



Chapter 10

Factors influencing the Law of Contract in general and impacting on medical contracts

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10.1 Introduction

The discussions in Chapters 8 and 9 reveal that the ethos of freedom of contract and the sanctity of contract is deeply entrenched in academic minds, the convictions of the legal community, especially judges, who have to adjudicate on issues of contract law as well as

other legal scholars. Such is the influence that, Sachs J, in *Barkhuizen v Napier*¹ remarks "the doctrine of sanctity of contract and the maxim *pacta sunt servanda* have through judicial and text-book repetition come to appeal axiomatic, indeed mesmeric, to many in the legal world."² What also emerged during the discourse in Chapter 9 is that the *caveat subscriptor* rule, a consequence which flows from the doctrine of freedom of contract, has and continues to play a cardinal role in the application of the law of contract, universally. The rationale for the continued recognition and implementation of the rule is said to give stability to written agreements or to enshrine an element of sacrosanct to writing. This position has taken centre stage especially since the adoption and recognition of standardized contracts, or, as they are sometimes referred to, contracts of adhesion. But, what has also emerged during these discussions is that during the post classical period and thereafter, the doctrine of freedom of contract is seen not to be unlimited. This position has been recognized, especially, 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. Certain factors have been identified as vitiating real consent and therefore, interfering with the doctrine of freedom of contract and sanctity of contract. These factors include *inter alia* fraud, undue influence, and the principle of fairness, unconscionable-ness and contracts, or provisions of contracts, which are found to be contrary to public policy.

Some of these factors were merely mentioned in the two last chapters. To flesh out the core subject matter and to do justice to the research undertaken in this thesis it is, therefore, of import that these factors be discussed in greater detail. The aim is to consider the nature and scope of each factor individually and to demonstrate how they impact upon contractual freedom. Consequently, having identified three of the mainstream factors important for the research undertaken, the principle of fairness, unconscionable-ness and public policy will be considered in this chapter. What will also be determined is how they impact on freedom of contract in countries such as South Africa, England and the United States of America.

The principle of fairness in the law of contract is said to have had a very rich heritage, anchored in the foundation of equity. It is sometimes referred to as the principle of good faith or *boni fides* and was received in the different jurisdictions from Roman³ or Roman

¹ 2007 (5) SA 323 (CC) Para 141.

² Per Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Para 141.

³ Many legal writers have written about the origin of principle of good faith or *boni fides* of which the most apt

Dutch Law.⁴

During the Roman law period, the iudex (judge as it is today), through the system of equity used by the courts, acquired an equitable discretion to decide a case before them based upon what they perceived to be fair and reasonable. Through the writings of Justinian, the inferior bargaining position of weaker contracting parties was recognized. To protect them from abuse of contractual power, the courts introduced the element of good faith in the interpretation and performance of contracts.

The *exceptio doli* also served as a powerful tool in bringing about a just solution especially, where the conduct of the contracting parties, or the provisions, were improper or in bad faith.⁵

The recognition of the principle of good faith received very mixed reactions in the South African jurisdiction. Whereas, the legal writers generally viewed, and continue to do so today, that the principle of good faith or fairness is a means of curtailing unlimited freedom of contract and the concept of *pactum sunt servanda*,⁶ the South African courts have

writings in South African legal writings is found in the writings of Grove "Kontraktuele gebondenheid, die vereistes van die goeie trou, redelikheid en billikheid" 1998 (61) *THRHR* 687 at 688-689. The writer holds the view that the principle of good faith originated in the distinction made in Roman law between *negotia stricti iuris* and *negotia bonae fidei*. See also Fletcher "The role of good faith in the South African law of contract" *Responsa Meridiana* (1997) 1ff wherein the writer states that the principle applicable in our law of contract today, namely, consensual contracts are "based upon the bona fides of both, or all parties" is derived from the Roman Law *negotia bonae fidei*. For that reason, our legal writers have asserted again and again that all contracts are *bonae fidei*.

⁴ For the reception of the Roman law principles in South Africa via Roman Dutch Law see the writings of other legal writers Zimmerman and Visser *Southern Cross* (1996) 240; Hutchinson et al *Principles of South African Law* 1991) 443; Kerr *Principles of the Law of Contract* (2002) 301, 646; Hahlo and Kahn *The South African legal system and its background* (1968) 137; Van Aswegen "The Future of South African Contract Law" 1994 (57) *THRHR* 456 137.

⁵ The writings of Zimmerman and Visser (1986) 218-219; Van der Merwe et al (2003) 231; Lubbe and Murray (1988) 389; Fletcher (1997) 11ff; Aronstam (1979) 168-184; Kerr (2002) 642; Hahlo (1981) 71; Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* (2003) 155; Hawthorne "Public policy and micro-lending - Has the unruly horse died?" *THRHR* (2003) 115-116.

⁶ Many motivational reasons have been advanced by the different academic writers. In this regard Van Aswegen (1994) 448 at 456 argue that freedom of contract and *pacta sunt servanda* brought with it inequalities which necessitated the introduction of mechanisms such as fairness, justice and good faith in contract to counter substantial injustices in the law of contract. Lotz "Die Billikheid in die Suid-Afrikaanse Kontraktereg" (Unpublished inaugural lecture Unisa 1979) 11-12 promotes the utilization of *bona fides* or good faith as a mechanism to advance "honesty in contract and the prohibition of unreasonable promotion of one's own interests". Support for this view is found in the writings of Fletcher (1997) 1 at 2. Christie (2001) 19-20 believes good faith as a mechanism will go a long way to create and enforce moral and ethical values in contract especially, where courts are confronted with "the unfair enforcement of a contract". Support for this view is espoused by Zimmerman

clearly shown a mixed reaction towards recognizing the principle. More recently, despite the mixed reactions from legal writers and the courts alike, the Supreme Court of Appeals, when confronted with a golden opportunity to bring about law reform in the South African law of contract, squandered the opportunity in the cases of *Brisley v Drostky*⁷ and *Afroxc Healthcare Bpk v Strydom*.⁸ In the case of *Brisley v Drostky*,⁹ the Supreme Court of Appeals refused to follow the Cape Provincial Division judgements of *Miller and Another NNO v Dannecker*,¹⁰ in which Ntsebeza AJ, followed the minority decision of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*,¹¹ wherein the learned Judge found that the principle of *bona fides* is very much part of the modern law of contract in South Africa, it being part and parcel of the moral and ethical values of justice, equity, and decency, as well as *Janse van Rensburg v Grieve Trust CC*,¹² wherein Van Zyl

(1996) 256. The writer also calls for legislative intervention whereby courts will openly be obliged to perform their duty of policing unfair contract terms. See further Van Aswegen (1994) 458 who finds for the courts to be given an equitable discretion to declare invalid or modify a contract or contractual clause which does not conform to the standard of good faith. The courts as early as 1881 in *Judd v Fourie* (1881) 2 EDC 41 (76) expressed the view that good faith is required in all contracts. The Appellate Division as far back as 1923 in the case of *Neugebauer and Co v Herman* 1923 AD 564 also endorsed the principle that *boni fides* is required from both parties to a contract of sale. It was especially, with the interpretation of contracts where the contracts were ambiguous and capable of more than one construction that the courts adopted a practice to consider good faith as means to seek an answer. This position was recognized in *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 (AD) 14, *Rand Rietfontein Estates Ltd v Cohen* 1937 (AD) 317 in which use was made of equitable construction. The South African courts, including the Appellate Division (as it was then) recognized the principle that all contracts are *bonae fidei*. See *Meskin NO v Anglo American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A). In the latter case the court specifically states the requirement of *bona fides* underlies our law of contract. The curtain was however, drawn on the recognition of *bona fides* as a criterion in contract law and more in particular, that *bona fides* had developed to fulfil the function of the *exceptio doli*. The court continues to make it clear an equitable discretion with our courts, is no part of our law. See however, the Jansen JA minority decision. But the recognition of good faith as a norm in the South African law of contract flared up in a number of cases *inter alia* the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (A). The learned Judge argues that there is a close connection between the doctrine of *bona fides* and that of public policy, public interest and suggests that *bona fides* becomes a open norm or free floating defence. Van Zyl J in the case of *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) pleaded for the development of good faith as a norm to control unconscionable and unfair contracts. A similar approach was taken by Ntsebeza AJ in *Miller and Another NNO v Dannecker* 2001 (1) SA 928 (C) when following the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA). The re-introduction was also pleaded for by Davis J in *Mort NO v Henry Shields-Cheat* 2001 (1) SA 404 (C).

⁷ 2002 (4) SA 1 (SCA).

⁸ 2002 (6) SA 27 (SCA).

⁹ 2002 (4) SA 1 (SCA).

¹⁰ 2001 (1) SA 928 (C).

¹¹ 1997 (4) SA 302 (SCA).

J found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights, and the *Mort NO v Henry Shields-Chiat*¹³ case, in which Davis J supported the reasoning of Van Zyl J in *Janse van Rensburg v Grieve Trust* (supra), that in performing their constitutional mandate the courts could use the concept *boni mores* to infuse our law of contract with the concept of 'good faith'.

One of the reasons advanced by the courts is this, to give judges, *carte blanche*, discretion to ignore contractual principles which they regard as unfair and unreasonable, would be in conflict with the rules of practise. Such practise, according to the Supreme Court of Appeals, would be in conflict with the principle of *pacta sunt servanda* and the pronouncements of the enforcement of contractual provisions will, ultimately, be determined by the presiding judge, who has to determine whether the circumstances of the case are fair and reasonable or not. The further argument is advanced that the criteria would no longer be the principles of law but the judge himself/herself.

In a subsequent judgement of *Afrox Healthcare Bpk v Strydom*,¹⁴ the court, per Brand AJ, expressed a strong opinion against the minority judgement of Oliver AJ in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*,¹⁵ and the Cape High Court decisions discussed *supra*. The court, consequently, supported the views expressed by Cameron AJ in *Brisley v Drotzky*,¹⁶ in which it was stated that good faith or *bona fides* has never been an independent, free-floating principle in South Africa as an aid to pronounce on the validity or invalidity of contractual provisions. This position was again supported by Ngcobo J delivering the majority judgement in *Barkhuizen v Napier*.¹⁷

But, following the decisions of *De Beer v Keyser and Others*¹⁸, *Afrox Healthcare Bpk v*

¹² 2000 (1) SA 315 (C).

¹³ 2001 (1) SA 464 (C).

¹⁴ 2002 (6) SA 27 (SCA).

¹⁵ 1997 (4) SA 302 (SCA).

¹⁶ 2002 (4) SA 1 (SCA).

¹⁷ 2007 (5) SA 323 (CC).

¹⁸ 2002 (1) SA 827 (SCA).

*Strydom*¹⁹, *Brisley v Drotsky*,²⁰ the writer *Hawthorne*²¹ was critical of the court for not considering properly the contention that the contractual provisions (indemnity clause in the *Afrox* case), were contrary to the principle of good faith. For that reason, the writer contends, the time is ripe that "*an imprecise notion of good faith should be given precision by our courts, that the sacrosanct freedom of contract should be tempered by this same good faith in order to end the abuse of the contractual terms.*"

This is supported by the writers *Lubbe and Murray*²² who regard the concept of *bona fides* as "*an informing principle in our law of contract*" which "*will show up the unconscionability aspect after the conclusion of the contract, having regard to it being contrary to the principle of bona fides.*" This, the author's state, would be a positive development in the South African law of contract and which aligns with the development in overseas jurisdictions.

There are also constitutional challenges by certain legal writers who suggest that the constitutional dispensation has the necessary potential to decide by equity, whether a contractual provision is unreasonable, unconscionable or oppressive.²³ *Hawthorne*²⁴ suggests that the open norms of the common law such as; *bona fides*, public policy, and *boni mores* should be developed in accordance with the constitutional mandate.

But, there is opposition to the suggestion that "*good faith*" be developed to form an open norm of the law of contract. It is fact that "*good faith*" is unlikely to provide justification for a paradigm shift.

The South African Law Commission, in its Report²⁵ and Draft Bill,²⁶ does however suggest

¹⁹ 2002 (6) SA 211 (SCA).

²⁰ 2002 (4) SA 1 (SCA).

²¹ "Closing of the open norms in the law of contract" (2004) *THRHR* 294 at 298-301.

²² (1988) 733-774.

²³ Cockrell "Second-guessing the exercise of contractual power on rationality grounds" 1997 *Acta Juridica* 26 41-43; Christie (1997) 3H-11; Glover "Good faith and procedural unfairness in contract" 1998 *THRHR* 328-325; Hutchinson (1991) 720.

²⁴ Hawthorne (2003) 115.

²⁵ South African Law Commission Report on *Unreasonable Stipulations in Contracts and the Rectification of Contract* (1998) 56.

that a paradigm shift is necessary as a corrective mechanism to the current position. Authority should be given to the courts to cope with unreasonableness, unconscionableness or oppressiveness in contract.

The principle of fairness is a concept which found favour with the English courts as far back as 1770. The Chancery during this period regularly set aside transactions which, they felt, were excessively harsh or unfair. In the eighteenth century, the adoption of the principle of fairness was based upon public interests, as the courts believed it was their duty to protect the weaker contracting parties from exploitation by the stronger parties to the contract. This situation, according to the writer *Atiyah*,²⁷ still seems to be the position today, in that the English courts still protect a contracting party where the contract, or provisions of the contract, is unfair or inequitable. But, despite the recognition which good faith has received in protecting weaker contractants against unfairness and inequity, good faith, according to the English writers *McKendrick* and *Beatson et al*,²⁸ has never featured as a separate defence such as public policy, fraud etc.

But, notwithstanding the difference of opinion expressed by the English legal writers, and the reluctance shown by English courts, sometimes, to make use of the principle of good faith, the legislature stepped in by introducing the *Unfair Contract Terms Act 1997* and the *Unfair Terms in Consumer Contracts Regulation 1999*. The legislative intervention had as its aim, the adoption and protection of good faith in contract in order to bring about fairness in contractual terms. It is especially where exemption clauses have been included in contracts, excluding liability for personal injuries caused by negligence, that the courts have used their discretion to declare these clauses ineffective on the ground of unfairness.²⁹

²⁶ Section 1(1) of the Draft Bill on the *Control of Unreasonable or Oppressiveness in Contracts or Terms* (1998) 56.

²⁷ *The Rise and Fall of Freedom of Contract* (1999) 337-340.

²⁸ *Contract Law Text, Cases and Materials* (2003) 533 respectively *Contra* Bronswood *Contract Law: Themes for the twenty first century* 2000 Paras 5.15-5.18 who suggests that the absence of good faith leaves the case of contract ill-equipped to achieve fair results, leaving judges unable to do justice at all. But English courts have not been averse to adopting the principle of good faith. The expectancies of contracting parties, by the courts, have metaphorically been expressed as "playing fair", "coming clean" etc. See *Inter Foto Library Ltd v Stilleto Visual Programme Ltd* (1989) 1 Q.B. 433, 439. In the leading English case of *Walford v Miles* (1992) 2 AC 128 the Court of Appeal emphasizes the need for negotiations to take force in good faith. But the court also does not support the protagonists who suggest that good faith should be a free-floating defence. But since this case certain English courts have come out in favour of good faith.

²⁹ *Beatson Good Faith and Fault in Contract Law* (1995) 14-15. It is especially, the writer Chitty *Chitty on Contracts* (1999) Para 1.024 who emphasizes fairness, or reasonableness, where provisions of a contract are interpreted. In this regard, he suggests, the more unreasonable the result, the more unlikely it is that the parties can have intended it. The interpretation of the good faith requirement in the *Unfair Terms in Consumer Contracts Regulations 1994* receive the attention of the House of Lords in the case of *Director General of Fair Trading v First*

The American law of contract was profoundly influenced by its English counterpart. From very early days the principles of equity governing contracts, *inter alia*, the various degrees of bargaining unfairness and the harsh results they bring with them, as well as the impact of unfair terms upon contracting parties, found their way into the American law of contract.

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A further principle received in American law of contract is that of good faith, which was viewed as a 'safety valve' adopted by Judges to ensure fairness in contracting. This was founded upon the philosophy that ethics and fairness, in law, form part of contract.³¹

Although judges, at the time, used public policy to develop fairness in contract, in order to protect the public welfare against unfair contracts and contractual terms leading to unreasonable hardship, it was considered, at the time that not enough was done by the courts. For that reason, American contract law extended its safety mechanism against contractual abuse by accepting the interventions that good faith, fair dealing and unconscionable-ness brought with them.³²

The philosophy behind including good faith as part of the intervention is said to be based on the reasonable expectations of the contracting parties, which in turn is premised upon community-based standards.

In this regard, a paradigm shift was caused in the American law of contract, in that, there was a movement away from the extreme individualism, of the nineteenth century and early part of the twentieth century, to societal norms and values which have become one of the trademarks of the twentieth century and beyond. Apart from the "reasonable expectation"

National Bank (2001) UKHL 52 in which the court gives recognition to the principle of good faith.

³⁰ For a discussion on the influence of the English law see Hillman *The Richness of Contract Law* (1997) 130-131. As far as case law is concerned, as far as 1926 in the case of *Cobb et al v Whitney* 124 Okla 188, 255, 566, 1013 (1926) the court in recognizing the principles of right and fair dealings state the aim thereof is to achieve "justice between man and man" but even before this case in 1873 the Supreme Court of the *United States in Railroad Company v Lockwood* 84 LS 357 (1873) reflected on the 'fairness and reasonableness in contracts'.

³¹ It is especially legal writers such as Summers "The general duty of good faith - its recognition and conceptualization" 69 *CORNELL L.REV* (1982) 143-144; Newman "The hidden equity: An analysis of the moral content of the principles of equity" 19 *Hastings L.J.* (1967) 129-130, 147 and Dematteo *Equitable law of contracts: Standards and Principles* (2001) 10-16 who devote their attention to the rationale for the reception of good faith in contract law in America.

³² Dematteo (2001) 153-155 emphasize that it was especially the increase in the use of standard form contracts which often lead to the exploitation of contractual parties which lead to an acute awareness that other intervening in the form of good faith etc was necessary.

motivation alluded to hereinbefore, other factors also included the demand for justice based upon the seeking, by the community, of what is fair and unfair.³³

The recognition of community interests and standards in contracts has had a significant influence on the law of contract in America.

Some of the issues identified as affecting community interests include, the concern about one-sided and often unfair contracts involving unsophisticated contractants, the unequal bargaining positions of some contracting parties, the imprudent judgements of, especially, the weaker and often, unsophisticated, contracting parties.³⁴

Besides the common law interventions by the courts, the legislature also stepped in, in promoting fair dealings in contracts.³⁵

The intervention and acceptance of the principle of good faith, as previously discussed, is said to have made inroads into the fundamental doctrine of freedom of contract, in that, the courts are, today, less reluctant to increase their focus on justice and fairness, instead of always promoting freedom of contract at the expense of justice and fairness.³⁶

Another factor universally recognised in different jurisdictions, more particularly, in the

³³ The legal writer Dematteo (2001) 153-155 views the shift from extreme individualism to community based norms and standards as an important shift in contractual philosophy.

³⁴ It is the issues affecting community interests which Dematteo (2001) 157 opines that poses a threat to public welfare. The writer at 160-161 suggests that with the acceptance of the equitable principles such as good faith or fairness when interpreting contractual terms or provisions the courts are given an opportunity of fulfilling a court's duty to administer justice and to ensure contracting parties act justly towards each other and to avoid the advancement of self-interest.

³⁵ The American Law Institute in 1979 promulgated Section 205 of the *Second Restatement of Contracts* setting forth an obligation of good faith in every contract as well as fair dealings between contracting parties.

³⁶ It is the legal writer Nassar *Sanctity of contracts revisited: A study in the theory and practice of long-term international commercial transactions* (1995) 180 who writes that although the principle of sanctity of contract remains strong, it has to a certain extent given way to equitable considerations. The adoption of these principles has caused the American courts in *Henningsen v Bloomfield Motors* 161 A. 2d 69 N.J. 1960 to state that "freedom of contract is not such an immutable doctrine so that courts cannot fail to be influenced by any equitable doctrines" In the case of *Kriegler v Roman* 58 N.J. 522, 279 A. 2d 640 (1971) the court recognizes that courts should not hesitate to declare as unconscionable the contracts that are contrary to good faith, honesty in fact, and observance of fair dealings. The special relationship between the contracting parties has also in the past been recognized as imposing a special duty of good faith and fair dealing. See the case of *Carnival Cruise Lines Inc v Shute* 499 U.S. 585 (1991); *Broemmer v Abortion Services of Phoenix* 840 P.2d 1012, 1015 Ariz (1992).

jurisdictions selected for the purpose of research in this thesis, is that of the principle or doctrine of unconscionable-ness. Although, as will be seen from what follows in this Chapter, in some jurisdictions the doctrine of unconscionable-ness is regarded as a free-floating defence, on the same level as public policy, fraud, etc. In other jurisdictions the doctrine is not regarded as a complete defence. Consequently, it is of import that the role of the doctrine of unconscionable-ness be discussed in this Chapter as it appears in the jurisdictions selected.

In South Africa, as will be seen from the contents of this Chapter that follows, the doctrine of unconscionable-ness has never become an independent defence, despite its roots emanating from Roman law.

South African legal writers have described the meaning and effect of unconscionable-ness in different terms.³⁷ But, notwithstanding the description given, there seems to be consensus amongst the writers that its application is very limited in South Africa, with its focus on the abuse of weak bargaining power contracting parties. From the discourse that follows, what will emerge is, apart from limited legislative intervention,³⁸ aimed at providing relief where unconscionable terms and conditions have been put into a contract leading to harsh results. It should however, be noted, the legislative intervention does not provide for general criterion of control, nor do they give the courts a control power to strike down unconscionable terms in a contract, irrespective of the nature, content or subject-matter or the unequal bargaining position in which one of the contracting parties may find himself/herself in.

The South African courts have, also, not assisted in developing the common law as means to put preventative measures in place, to prevent harm being done through the exploitation of persons having weak bargaining power.³⁹ Apart from the application of the rules of

³⁷ The most relevant description varies from unacceptable conduct in contracting or an unfair act in attempting to enforce a contract. See Lubbe and Murray (1988) 388, to the above or disproportionate or unequal bargaining power, see Aronstam (1979) 42.

³⁸ The *Hire-Purchase Act*, the *Rent Control Act*, the *Sale of Land on Instalments Act* etc.

³⁹ It is Aronstam (1979) 26-27 who is particularly critical of the South African courts' role in handling unconscionable contractual conduct. For the reluctance of the courts to interfere see the Appellate Division approach in *Wells v South African Alumenite Company* 1927 AD 69, 73. In *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 23, (W) 238 the Witwatersrand Division also cautioned against the 'shattering of the concept of sanctity of contract'. The Appellate Division again showed its reluctance to enquire into the unconscionable ness in *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 77 (A). More recently, the Supreme Court of Appeals in three more recent judgements of *Brisley v Drotzky* 2002 (4) SA 1 (SCA) 35 C.E.; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) 21 (A) demonstrated that the courts will not outright recognize

interpretation, *inter alia*, the *contra proferentem* rule; the courts have been particularly reluctant to extend the principles of the common law to curb unconscionable contractual conduct. It has been suggested therefore, that the legislature step in and bring about a paradigm shift in South Africa, by putting in place a doctrine of relief against unconscionable transactions.⁴⁰

The doctrine of unconscionable-ness, as far back as the second half of the 17th century, found its way into English law as part of the adoption of equitable relief to protect the weak, the foolish and the thoughtless from exploitation and oppressions. It was, especially, the court of Chancery which struck down unreasonable and unconscionable agreements. It was especially in transactions of unfair bargain, in which the equitable relief in this form was applied.⁴¹

The influence of the doctrine of unconscionable-ness began to be felt in its application, especially with the advent and the increase in the usage of standard form contracts. In this way, concern was placed on the substantive fairness of contract, i.e., the nature of the contract, rather than the events which lead to the formation, i.e., procedural fairness.

What is, however, significant to note, is that despite the widespread use of unconscionable-ness and the application thereof by the English courts,⁴² it has never become a fully fledged defence in English law. In fact, during the 20th century the English courts became more reluctant or less willing, to use the doctrine of unconscionable-ness to strike down contracts or contractual clauses, notwithstanding their unfairness. As will be seen from the discussions in this Chapter, a debate rages between the legal writers whether the doctrine

unconscionable-ness as an independent defence.

⁴⁰ Aronstam (1979) 42 and Hawthorne (2003) 116-118 are particularly in favour of legislature intervention to bring about the establishment of a doctrine of relief against unconscionable transactions. This was also mooted by the South African Law Commission in 1998.

⁴¹ The rationale for the recognition of unconscionable-ness to strike down unfair bargains is stated by the legal writers Peden, Chin Nyuk-Yin, McKendrick, Treital and Beatson as stamping out unfair, inequitable agreements entered into in an unconscientious manner, where advantage is often taken by the stronger contracting party over the foolish or the weaker contracting party.

⁴² The cases in which the courts were prepared to give relief where unconscionable bargains were present include *Earl of Aylesford v Morris* (1873) 8 CH App 484, *Fry v Lane* (1888) 30 CHD 312, *Knights Bridge Trust Estate v Byrne* 1933, *Cityland and Property Holdings Ltd v Dabrah* (1968); *Multi Service Bookbinding Ltd v Marden* (1979) CH 84; *Lloyds Bank Ltd v Bundy* (1975) QB 326; *Hart v O'Connor* (1985) AC 1000 PC; *Bovitany v Pegott* (1993) 69 PandCR 298; *Credit Lyonnais Bank v Burch* (1997) 1 ALL ER 144; *Contra Royal Bank of Scotland P/C v Etrider (No 2)* in which the court decline to apply the doctrine.

of unconscionable-ness ought to be retained.⁴³ There has been a suggestion by *Sayton*⁴⁴ that the doctrine of unconscionable-ness ought to be codified.

Unconscionable-ness is a concept which is widely accepted and known, in the United States of America, in contract law. The doctrine found its way into American law via English law, and similarly, its foundations are galvanised in equity, ethics and fairness in law.

The application of the doctrine was particularly enforced with the advent and usage of adhesion contracts or standardized contracts. The rationale for its application in respect of standardized contracts is founded by the American legal writers, on different grounds. But, generally, it concerns the harshness and unreasonableness which inequality of bargaining power brings.⁴⁵

The American courts, when adopting and enforcing the doctrine of unconscionable-ness, did so in individualized cases, so much so, that there was no blanket application in all cases, irrespective of the results often being oppressive and harsh. Moreover, this resulted in a lack of consistency shown by the American courts, so much so, that critics remarked that the application of the doctrine was regarded as highly unreliable and unpredictable.⁴⁶

Consequently, what followed was the advocacy of contractual reform by many American

⁴³ Beal "Unfair Contract Terms Act" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) and Collins *The law of contract* (1997) 251 express the view that where as in British law of contract, the system is geared predominantly on freedom of contract, there ought to be no interference. *Contra* Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39 (4) July (1976) 369 at 371 who suggests that despite the recognition of the criteria of unconscionable-ness, freedom of contract will be retained.

⁴⁴ "The unequal bargain doctrine" Lord Denning in *Lloyds Bank v Bundy* (1976) 22 *MCGILL LJ* 94 at 108.

⁴⁵ Deutsch *Unfair contracts - The doctrine of unconscionability* (1972) 1-4 and, Williston *A Treatise on the Law of Contracts* (1957) Para 1763A expresses the view that it is especially, standard contracts including disclaimers of warranties and limitation of remedies, which are often one-sided in favour of companies, which brings oppressive and harsh results that need to be curbed, with relief being given through unconscionability in contract.

⁴⁶ The first traces of the application of the doctrine of unconscionability goes back to 1811 in *Cutler v How* 8 Mass. 257 (1811) and *Baxter v Wales* 12 Mass. 365 (1815). The courts continued to motivate for the recognition of the doctrine in the latter part of the 19th century in *Scott v United States* 79 U.S. (12 Wall) 443, 445 (1870) and the Supreme Court decision of *Hume v United States* 132 U.S. 406 (1889). First attempts were made to find a general application of unconscionability in 1942 in the case of *United States v Bethlehem Steel Corp* 315 U.S. 284, 312 (1942) in which the court lay down a general rationale for the doctrine. The courts progressed in their attempts to generalize the application by embodying some principles eventually incorporated in the *Uniform Commercial Code* 1965. One such case was that of *Campbell Soup Co v Wentz* 172 F2d 80 (CA) 1948; See also *Henningsen v Bloomfield Motors Inc* 75 Alr 2d 1 (1960) 24.

writers. It was felt, at the time that, legislative intervention would lead to greater consistency in stamping out the unfairness and harshness of certain contracts, or contractual provisions.

What followed was the enactment of S2-302 (1) of the *Uniform Commercial Code*, 1965. The effect thereof was that the courts were encouraged to openly strike down provisions, harmful to a contracting party, and which were unconscionable at the time it was made. The Code also gave the judges greater power to police agreements, or clauses and to identify clauses which, due to their unconscionable-ness, should be struck down. The application of the Code found favour amongst the American legal writers and the courts alike, and has most certainly left its mark in the American law of contract, as a factor impacting on contractual freedom.⁴⁷

Public policy, apart from the other factors impacting on contractual freedom, as discussed infra, is possibly the most widely recognised and used defence, in the jurisdictions chosen for this thesis, which limits contractual freedom and the enforcement of contractual agreements once entered into, i.e., the *pacta sunt servanda*. This is particularly relevant in the South African law of contract.⁴⁸

The rationale for the existence of public policy as a defence, in modern times, is said to lie in the broader concept of paternalism, in which public interest demands that the courts protect the weaker party in the law of contract. The effect thereof is that public policy demands that a contract offending against the public interest, be struck down and declared invalid.⁴⁹

⁴⁷ The most prominent American legal writers Llewellyn *The common law tradition* (1960) 675 and who is regarded as the principal architect of the Code sets out the advantages which the Code brings with it. The writers Summers and Hillman, *Contract and related obligations - The doctrine and practice* (1987) 577, express the view that the Code reflects the moral sense of the community in curbing the harshness and oppressiveness which some contracts bring. The American courts in a number of landmark cases have expressed their approval with the enactment of the Code. The rationale for its enactment is discussed with approval in *Jones v Star Credit Group* 59 Misc 2d 189, 298 N.Y.S. 2d 264. It is especially in cases involving disclaimers in contract which has inspired the American courts to enforce S2-302 of the Code. See the judgement of the New York Supreme Court of Appeals in the case of *Industrialised Automated and Scientific Equipment Corp v R.M.E. Enterprises Inc* 58 A.D. 2d 482, 396 N.Y.S. 2d 427.

⁴⁸ In this regard the author Kahn *Contract and Mercantile law* (1988) 32, expresses the view that our common law has, in a sense, encroached on the freedom and sanctity of contract by its condemnation of contracts against public policy. Hutchinson et al (1991) 431 identifies the need for the freedom of contract in the form of public policy, when he states "*the necessity for doing simple justice between man and man*".

⁴⁹ It has long been established in South Africa, by the Appellate Division, in the cases of *Morrison v Anglo Deep Gold Mines Ltd* 1905 (AD) 775; *Jajbhay v Cassim* 1939 (AD) 577, *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A), that courts will not shrink from their duty of declaring

It is, however, a firmly entrenched principle, embedded by our legal writers and the courts alike, that the power to declare a contract, or a term in a contract, invalid as *contra bonos mores* ought to be exercised sparingly and only in the clearest of cases.⁵⁰ There are no numerous clauses as to precisely when the courts will come to the rescue of a contracting party who has been harmed. Many writers suggest numerous different criteria to be used as aids in determining when the courts should step in and assist.⁵¹ What is significant is the fact that judicial thinking is influenced by two main streams, namely; common law factors, *inter alia*, agreements injuring public service, unreasonable restraint of trade agreements, and agreements to escape liability for fraud as statutory enactments affecting public interests.

Strong voices have also been raised to include good faith, or *bona fides*, in determining whether public policy forbids the enforcement of the contract.⁵²

a contract contrary to public policy when the occasion so demands, even if it means restricting a person's liberty or freedom to act. There is also the stance taken by the Transvaal Division in *Eastwood v Shepstone* 1902 TS 294.

⁵⁰ It appears from the South African writings, that, where public harm will be caused, or public interests will be adversely affected, the courts should step in to protect the public. See Joubert (1997) 215 and Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 58 at 61. This was the clear message of our Supreme Court of Appeal in the more recent judgements of *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA), *Brisley v Drotzky* 2002 (2) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), in which the court, in all three matters, emphasized the fact that although the courts have the powers to invalidate bargains on the ground of public policy, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power. The Supreme Court of Appeal, in all these matters, place emphasis on the freedom of contract and sanctity of contract and point out that public policy, generally, favours the utmost freedom of contract. But, as will be seen, *infra* the dicta in the three well-known cases, did not escape severe criticism from our legal writers. In this regard Hawthorne *infra*, suggests that *pacta sunt servanda* should not be placed on a pedestal at the expense of unconscionable terms or contracts, thus 'effectively eliminating equality'. It is especially in the case of *Afrox Healthcare Bpk v Strydom, supra* that the court missed a golden opportunity to follow the mainstream of foreign jurisdictions, wherein disclaimer clauses against liability for medical negligence are viewed as an infringement of *boni mores* or against public policy. Instead, the court chose to keep the South African legal position in a swamp, in which morality has no place, but business considerations weigh more heavily than normative medical ethics.

⁵¹ The criteria used by the various writers include; the general sense of justice of the community which manifests itself in the form of public opinion. But, cautions Christie (2005) 400, 402, superficial public opinion does not suffice, as it swings like a weather cock. This approach, it is argued, causes stability to the law of contract as it is not left at the mercy of future public opinion.

⁵² It is especially Hefer "Billikheid in die kontraktereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2000-1142 at 153-154 and Van Aswegen (1994) 448 at 458-459, who believe, the process of contracting requires honesty and good faith, and prohibits the unreasonable promotion of one's own interests. There is a long history of South African case law preceding the *Bank of Lisbon South Africa Ltd v Ornelas* 1988 (3) SA 580 (A) which used the concept "good faith" to determine whether public policy had been violated or not. They include *Tuckers Land Development Corp (Pty) Ltd v Hoves* 1980 (1) SA 645 (A), *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A). The death knell to this practice was, however, given in the case of *Bank of Lisbon South Africa Ltd v Ornelas supra*. From time to time, as with support in legal writings, our courts do find

The principles of equity, fairness and reasonableness are also seen, by many South African writers, as a determining factor in invalidating a contract, or contractual provisions, which are harsh and oppressive.⁵³

Although some legal writers have grappled, over the years, with the question of whether morality and ethics influence public policy, which may lead to the invalidity of contracts; more recently greater calls have been made for their application in invalidating contracts.⁵⁴

More recently normative medical ethics and medical law principles have also been mooted, by academic legal writers, as factors which ought to be considered when deciding the unenforceability of contracts or contractual provisions due to public policy.⁵⁵

The main thrust of the argument in support of the recognition of normative ethics is this: normative medical ethics and medical principles bring about medical standards of behaviour against which the behaviour of practitioners and hospitals, as well as nurses, ought to be measured.⁵⁶

justification for an application of good faith. The cases of *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) and *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C) are however, not cases decided in the Supreme Court of Appeals.

⁵³ The legal writers, who have paid careful attention to this factor, include those mentioned in *infra*. This factor is also supported by the South African Law Commission, who recognized the need for legislation against unfairness, unreasonableness, unconscionability or oppressiveness, as it serves public interest. The South African courts, though not over-eager to stick their necks out to nullify agreements merely because they appear to be unreasonable or unfair, in the cases of *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Ingesund* 1975 (3) SA 294 (D); *Louw and Co (Pty) Ltd v Richter* 1987 (2) SA (W) have, especially in restraint clauses, decided not to enforce contracts that are unfair or unreasonable.

⁵⁴ Joubert (1997) 132-137 argues that good morals and public interests do not provide certainty as they differ, from society to society, both in place and in time. Hutchinson et al (1991) 435, however, argue that agreements are against good morals where they offend our conscience, or sense of what is right, or modesty'. Van der Merwe et al (2003) 231, argue that they impact on the ideals of individual autonomy and freedom of action. The influence of ethics, and how they impact on public policy, has been recognized in different ways by the South African legal writers. Zimmerman et al (1996) 246, see the role of ethics as being vital in curbing the exploitation, by the stronger party in a contract, of the weaker contracting party. Hawthorne (2004) *THRHR* 274, suggests that good faith should become an underlying ethical value. The South African courts have, from time to time, grappled with questions of morality and how these factors influence public policy in deciding whether an agreement is invalid or not. The cases of *Dodd v Hadley* 1905 T.S. 439, *Silke v Goode* 1911 (TPD) 989, *Ailas Organic Fertilizer (Pty) Ltd v Pikkewyn (Pty) Ltd and Others* 1981 (2) SA 173 (T); *Lorimar Productions Inc and Others v OK Hyperama Ltd and Others*; *Lorimar Productions Inc and Others v Dallas Restaurant*, demonstrate the court's willingness to consider the morals of the market place.

⁵⁵ The writers Carstens and Kok (2003) 449-452 persuasively argue, in deciding the enforceability of, especially, medical or hospital contracts, medical ethics and medical principles derived from the Hippocratic Oath, the Declaration of Geneva and other medical Codes and ethics, ought to be considered.

⁵⁶ The primary aim of normative medical ethics, according to Carstens and Kok (2003) 449-452, is set to

Whether medical standards of behaviour may be compromised by the usage of waivers, or disclaimers against medical negligence in hospital contracts forms an integral part of the research undertaken in this thesis. In many jurisdictions, as will be seen in Chapter 13, such attempts to exclude liability for negligent acts by the use of exculpatory clauses or disclaimers would be void as against public policy.⁵⁷

It can also be argued that in this regard, the legal convictions of the community dictate that a breach of an ethical duty, by causing harm to the patient and not to act in the patient's best interest, would also amount to a breach of legal duty.

Foreign law is sometimes also regarded as an influencing factor and as a means of balancing conflicting interests. It is also sometimes regarded as a persuasive authority in shaping the South African law.⁵⁸

Since the arrival of the Interim Constitution 1992 and the Final Constitution, and since South Africa became a Constitutional State, many writers have advocated that the effect of the Constitution and the values derived from the Constitution must be looked at in order to determine whether a contract, or contractual provision, is against public policy or not.⁵⁹

The doctrine of public policy has been part and parcel of the English law for many centuries.

concentrate on "to do no harm" to the patient and to act in the best interests of the patient.

⁵⁷ The writers Carstens and Kok (2003) 449-452, in this regard, opine "..... *disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm*".

⁵⁸ Some of the writers, including Neethling et al (2005) 19-20, 40-41, believe the balancing of conflicting interests involves the convictions of the South African community and not foreign countries. Dugard (1994) 25, on the other hand, believes, with the advent of our constitution, the courts should consider international law in shaping South African law. There are mixed reactions, by the South African courts, on whether foreign law should be followed or not. Kriegler J in *Bernstein v Bester* 1996 (4) BCLR 449 (CC) warns against "*alien concepts or inappropriate precedents*". Other courts, *inter alia*, the Ciskei High Court in *Matinkinca and another v Council of State, Ciskei and Another* 1994 (1) BCLR 17 (CC), talk about 'values emerging from the civilized international community'. In *S v Makwanyane* 1995 6 BCLR 665 (CC), Chaskalson P cautions that although we can derive assistance from foreign law, we are not bound to follow it. But in the case of *Carmichell v Minister of Safety and Security and Another (Centre for applied legal studies)* 2001 (4) SA 938 (CC), the Constitutional Court relied heavily on English law and the European Court of Human Rights to develop our common law. The court expressed the view that the South African Constitution encourages our courts to consider foreign law.

⁵⁹ Van der Merwe et al (2003) 14, 18 suggest that in determining the enforceability courts must look at whether the common law, as it stands, is not incongruent with the Constitution. Christie (1997) 3H-6 suggest, regard must be had whether the provisions of the Bill of Rights would regard the contract or provisions of the contract as against public policy. It is especially, Hopkins (2003) 155 who argues strenuously that the common law which regulate the enforcement of contracts must underline the Bill of Rights.

Owing to the imprecise nature in and inconsistency of, its application in declaring contracts or provisions of contracts against public good or `contra bonos mores', the doctrine was subjected to much criticism by judges and writers alike, especially during the 1800's. The term "public policy" was given all kinds of names, the most notable of which was that it was an `unruly horse to ride'.⁶⁰

For that reason, its application in English law has been sparing. Moreover, two fundamental reasons are advanced why some writers have even suggested that the categories of common law are closed, and the doctrine ought only to be applied to a type of contract to which it has not previously been applied. Firstly, there is a lack of certainty in its application. Secondly, parliament's role in passing legislation in an attempt to curb unfair and unreasonable contracts or contract terms⁶¹ has also curbed its development.

But, notwithstanding the aforementioned suggestion, the courts have not been reluctant to declare certain contracts, or contractual provisions, as against public policy where they affect morality, the administration of justice, restraint of trade etc.⁶²

American law does recognize public policy as one of the factors which impact upon the validity of contracts or contractual provisions, despite the great emphasis being placed by American legal writers and the courts, on the doctrine of freedom of contract and the sanctity of contract.⁶³

⁶⁰ It is precisely for that reason why Burroughs J, in the case of *Richardson v Mellish* (1824) 2 Bing 229, would call the maxim `a very unruly horse'. This dictum has been repeated in various dicta over many years, the most recent of which, is the case of *McFarlane v Tayside Health Board* 2000 2. A.C. 59 in which the court also stated that public policy is a term which `reasonable persons may disagree' on.

⁶¹ It was stated by Lord Halbury in *Janson v Driefontein Consolidated Mines Ltd* (1902) A.C. 484 that courts should guard against inventing new heads of public policy. The reason, judges can so easily change depending on their moods.

⁶² But there is sufficient authority that the English courts will defend economical, social and moral conditions; adapt to these changes and consider those factors as perhaps, contrary to public policy. For that reason Lord Denning in *Enderby Town Football Club Ltd v The Football Association Ltd* 1971 CH 591 comments: "With a good man in the saddle, the unruly horse can be kept in control". The court in *Johnson v Moreton* (1980) A.C. 37 refers to instances when the courts will interfere, namely, public interest. Likewise in *Cheal v Apex* (1980) 2 A.C. 180 the court comments with authority that public policy `move with the times'. This is echoed in *Ciles v Thompson* (1994) 1 A.C. 142 especially, where contractual terms are `injurious' to the public.

⁶³ It is especially the eminent writer Williston (1972) Para 1630, who regards the right of individuals to enter into contracts, and the prevention of unreasonably restricting them to make their own contracts, as a super-imposing factor in American law, quoting the dictum of *Printing and Numerical Registering Co v Sampson* 19 L.R. Eq. 462, 465 (1879) in which it was stated that "men of full age and competent understanding shall have the utmost liberty of contracting This being paramount public policy to consider"

The rationale for the recognition of the exception is said to be founded upon the protection of the general public against socially undesirable conduct and injury to public health, safety and welfare.⁶⁴

Although certain definitions have been given to public policy, there is no united description of the concept. It has also been stated that the nature and scope of public policy is to a great extent influenced by contemporary factors such as, social customs, economic needs, and moral aspirations. For that reason there is no absolute rule by which to determine what contracts are repugnant to the public policy.

The American courts throughout the years developed rules and practises in determining whether a contract is against public policy or not. They include looking at each case individually and considering the purpose of the contract and the situation of the parties. Language plays a major role in determining the intention of the contracting parties.⁶⁵

But, it is clear; that the American courts would rather enforce contracts than have contracting parties escape their obligations on the pretext of public policy. For that reason, it has been suggested that exercising their power to declare a contract void as contrary to public policy should be done rarely and with great caution.⁶⁶

⁶⁴ The rationale, as enumerated, is clearly stated by the American courts in the following cases, but not necessarily restricted thereto, namely: *Cohen Insurance Trust et al v Stern et al* 297 Ill.App 3d 220 696 N.E. 2d 743, 231 Ill Dec 447; *Schurman-Heinz v Folsom* 328 Ill 321, 330, 159 N.E. 2d 599 (1983); *Diamond Match Co v Rieber* 106 N.Y. 473, 13 N.E. 419 (1887); *Zeitv v Foley* 264 S.W. 2d 267 (1954); *Ingalls v Perkins* 763 P. 761 (1928); *Anderson et al v Blair* 80 So. 31 (1918); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill 2d 540, 687 N.E. 2d 968 227 Ill. Dec 486 (1997); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 671 (1942); *Trotter v Nelson* 684 N.E. 2d 1150 (1997); *Skyline Harvestone Systems v Centennial Insurance Co* 331 N.W. 2d at 109 quoted in *Walker v American Family Mutual Insurance Company* 340 N.W. 598 (1983).

⁶⁵ This was clearly the position considered and taken in the cases of: *Smith v Idaho Hospital Services Inc d/b/a Blue Cross of Idaho* 89 Idaho 499, 406 P. 2d 696 (1965); *Cohen Insurance Trust v Stern et al* 297 Ill App. 3d 220, 696 N.E. 2d 743, 231 Ill Dec 447 (1998); *Home Beneficial Association v White* 106 N.Y. 473, 13 N.E. 419 (1887); *Anderson et al Blair* 80 So. 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.W. 353, 51 S.Ct 476 (1931); *Eichelman v Nationwide Insurance Company* 551 Pa. 558, 711 A. 2d 1006 (1998); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill. 2d 540, 687 N.E. 2d 968, 227 Ill. Dec 486 (1997); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

⁶⁶ Williston (1972) Para 1630 opines that the power to declare a contract void as contrary to public policy is not open-ended. It should be so declared only in instances where it is clear and unmistakably so. The American courts have, throughout, adopted the same principles in their pronouncements. The principle was enunciated in the following cases, but not necessarily restricted to the mentioned cases, namely: *Hoyt v Hoyt* 213 Tenn. 177, 372 S.W. 2d 300 (1963); *Zeitv v Foley* 264 S.W. 2d 267 (1954); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Martin v Alianze Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Walker v America Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Diamond Match Co v Rieber* 106 N.Y. 473, 13 N.E. 419 (1887); *Ingalls v Perkins* 763 P. 761 (1928); *Eichelman v Nationwide Insurance Company* 551, Pa 558, 711

Despite the American courts' general reluctance to declare contracts against public policy, both the American writers and the courts recognize that in certain circumstances the courts cannot turn their backs and allow contractants to suffer prejudice because of their lack of understanding. Factors, including, public interest, good morals and the injurious results some contracts or contracting provisions bring,⁶⁷ influence public policy.

It is especially in contracts containing exculpatory or exclusionary clauses, in which attempts are made to exonerate contracting parties from liability, notwithstanding their negligent conduct, often with harsh results that the American courts have stepped in and have taken an active stance to protect, particularly, the weaker party.⁶⁸ A more in-depth discussion follows in Chapters 11, 12 and 14 *infra*.

10.2 Factors impacting on contractual freedom

10.2.1 The principle of fairness

10.2.1.1 SOUTH AFRICA

10.2.1.1.1 Legal Writings

The principle of fairness, otherwise referred to as good faith or *bona fides*, is a doctrine received into South Africa from Roman Dutch Law. It is said to have a rich heritage, anchored in the foundation of equity.⁶⁹

Equity, as it was known in Roman law, afforded a judge an equitable discretion to decide a case before him, in accordance with what he perceived to be fair and reasonable.⁷⁰ In this

A. 2d 1006 (1998); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 671 (1942); *Cornellier v American Casualty Company* 389 F.2d 641 (1968); *Trotter v Nelson* 684 N.E. 2d 1150 (1997). The American decision of *Organ R.R. and Navigation Co v Dumes* (CCA) 181 F781 (1917) clearly sets out the test, namely, the case must be free from doubt and the injury to the public must be substantial and not theoretical or problematical.

⁶⁷ The eminent author Williston (1975) 163, emphasizes the duty of the courts to come out in favour of contracting parties who feel hardship under these circumstances. Likewise, public interest plays a significant roll in the American courts' decision to declare a contract void as against public policy.

⁶⁸ As far as 1921 Mr Justice Cardozo in *Messersmith v American Fidelity Co* 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876 (1921) stated "*No one shall be permitted to take advantage of his own wrong.*"

⁶⁹ Grove 1998 (61) *THRHR* 687 at 688-689. The writer holds the view that the principle of good faith originated in the distinction made in Roman law between *negotia stricti iuris* and *negotia bonae fidei*. See also Fletcher *Responsa Meridiana* (1997) 1 at 2 wherein the writer states that the principle applicable in our law of contract today, namely, consensual contracts are "*based upon the bona fides of both, or all, parties*" is derived from the Roman Law *negotia bonae fidei*. For that reason, our legal writers have asserted, again and again, that all contracts are *bonae fidei*. For other legal writings see Zimmerman and Visser (1996) 240; Hutchinson et al (1991) 445; Kerr (2002) 301, 646; Hahlo and Kahn (1968) 137; Van Aswegen 1994 (57) *THRHR* 456.

⁷⁰ Zimmerman and Visser (1996) 218-219; Van der Merwe et al (2003) 231; Lubbe and Murray (1988) 389; Fletcher 1997 *Responsa Meridiana* 2.

regard, the *exceptio doli* served as a powerful tool in bringing about a just solution. The *exceptio doli* was available as a defence, where the institution of action by the plaintiff, in itself, was improper and in bad faith.⁷¹

During this period substantial weight began to be placed on the element of good faith in the interpretation and performance of contracts.⁷² One of the underlying reasons recognized, was that people in inferior bargaining positions required protection from an abuse of contractual power. For this reason Justinian incorporated a passage into the *Corpus Iuris Civilis*, introducing the need for the rule on *Laesio Enormis* to assist those in a weaker bargaining position.⁷³

The recognition in our law of the principle of good faith, or fairness, is viewed by some academic writers, as a means of curtailing unlimited freedom of contract and the concept *pactum sunt servanda*. There are academic writers who have claimed that freedom of contract is not absolute and that it ought to be limited by the principles of justice, *boni mores* and public interest.⁷⁴ In addition, other academic writers have also added good faith as a mechanism which impacts on contractual freedom, in that, it has a limiting affect on the contractual relationship of the parties. *Bona fides* or good faith requires from the contractants that they would have mutual respect for each other's, or one another's interests, notwithstanding the fact that they promote their own interests as well.⁷⁵

⁷¹ Zimmerman and Visser (1996) 219; Lubbe and Murray (1988) 389; Aronstam (1979) 168-184; Kerr (2002) 642ff; Van der Merwe et al (2003) 231.

⁷² Van der Merwe et al (2003) 231; Hahlo *SALJ* (1981) Vol. 98 71.

⁷³ Hopkins *TSAR* 2003-1 155; Hawthorne (2003) *THRHR* 114 at 115-116.

⁷⁴ Murray and Lubbe (1988) 37; Hawthorne 2004 (67) (2) *THRHR* 294 at 295; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 at 167; Kerr (1998) 8; Hawthorne 2003 *THRHR* 114 at 114-115.

⁷⁵ Grove (1998) (61) *THRHR* 687 at 689; Van der Walt "Aangepaste voorstelle vir 'n stelsel van volkome beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65 at 67; Van Aswegen 1994 (57) *THRHR* 448 at 456. The writer holds the views that it was especially the inequalities that freedom of contract and *pacta sunt servanda* brought, that necessitated Roman Dutch law to seek such mechanisms as fairness, justice and good faith to ensure that problems of substantial injustices are averted. This found favour in South Africa as well. See also Lubbe "*Bona fides* billikheid en die openbare belang in die Suid-Afrikaanse Reg" 1990 *Stell LR* 16 at 17-25; Lubbe and Murray (1988) 390; Van der Merwe et al (1993) 233-234; Cockrell "Substance and form in the South African Law of Contract" 1992 *SALJ* 56; Lotz (1979) 11-12. The author promotes the utilization of *bona fides* as a mechanism in that it promotes "*honesty and prohibits unreasonable promotion of one's own interests.*" See further Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 at 172; Neels "Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontrakereg" *TSAR* 1999-4 684 at 693; Fletcher *Responsa Meridiana* (1997) 1 at 2; Zimmerman and Visser (1996) 241.

What needs to be added however is that good faith, unlike *boni mores* and public interest, never became an independent, free floating basis for setting aside or not enforcing contractual principles, though, it became a relevant criterion in the interpretation of contracts.⁷⁶

There was a time in the South African contract law history when it was generally accepted that the *exceptio doli generalis* was an instrument of equity, generally used as a remedy by the South African Courts.⁷⁷

This remained the position until the death knell was given to the *exception doli generalis* and the principle of good faith in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas*⁷⁸ which shocked the legal fraternity, especially, the South African legal writers, who have been very critical of the decision. In the main, the court was criticised for its failure to engage in an in-depth discussion of general policy considerations, as well as its lack of insight and responsibility in bringing about justice for the contracting parties.⁷⁹

Not surprisingly, after the complete absence of the concept of good faith as a principle to be used to correct unreasonable, unconscionable or oppressive contractual provisions, since the majority judgement of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 616, many South African legal writers showed a renewed interest in reviving good faith. Many voices went up, calling for the recognition of an appropriate mechanism, aimed at limiting the unfair or unreasonable consequences of the *pacta sunt servanda*. Several academic writers advocated the use of the *bona fides* principle as an independent, free floating mechanism, alternatively, to be used as a component of public interest. The court's

⁷⁶ Zimmerman and Visser (1996) 241-243; Hawthorne "The End of *bona fides*" (2003) 15 *SA Merc.LJ* 271 at 275.

⁷⁷ Van der Merwe et al (1993) 231-232; Hefer *TSAR* 2000-1 142 at 145; the *exceptio doli generalis* is seen by Fletcher *Responsa Meridiana* (1997) 1 at 3 "as a contract remedies that can give practical application to good faith in contracts". For case law see *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W); *Artprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 254 (A).

⁷⁸ 1988 (3) SA 580 (A).

⁷⁹ Christie (2006) 15. See also Van der Merwe, Lubbe, Van Huyssteen "The *exceptio doli generalis: requiescat in pace - vivat aequitas*" (1989) 106 *SALJ* 235; Zimmerman "The law of obligations - character and influence of the civilian tradition" 1992 *Stell L.R.* 5 6-9, and see Lambiris "The *exceptio doli generalis* an obituary" (1988) 105 *SALJ* 644; Hawthorne 2004 67 (2) *THRHR* 294 at 295-296; Neels "Die Aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" *TSAR* 1999-4 684 at 689; Fletcher *Responsa Meridiana* (1997) 1 at 5; Zimmerman and Visser (1996) 256; Lubbe and Murray (1988) 391; Hawthorne (2003) 15 *SA Merc L.J.*

function was seen by the academics as to correct unreasonable contractual provisions.⁸⁰

More specifically, *Van der Merwe et al*⁸¹ advocate the need for "*substantive justice between contractants*". The authors argue that, despite it being frequently said that "*the South African legal system is equitable*" and contractual transactions involve "*acts of good faith*", it does not follow that contracts "*will be inherently just and fair*". What is needed is a mechanism "*to ensure contractual fairness*".⁸²

Moreover, the authors argue that good faith ought to be given concrete content in regulating the operation of a contract. It is suggested that the duty of good faith be placed on a par with the concept of public policy and public interest. Any conduct contrary to good faith may then be classified as illegal, resulting in the usual consequences of illegality.⁸³

Christie,⁸⁴ on the role of good faith in modern law, argues that its implementation will go a long way in creating and enforcing moral and ethical values, especially where the courts are confronted with "*the unfair enforcement of a contract*".

*Fletcher*⁸⁵ highlights the role good faith, as a mechanism, can play in the contractual law sphere, namely, the prevention of "*the unreasonable promotion of one party's own interests to the detriment of the other contracting party*"⁸⁶ Consequently, the writer advocates that good faith can play a vital role in bringing about procedural or substantive fairness in

⁸⁰ Van der Merwe et al (1993) 233; Lubbe and Murray (2003) 390; Zimmerman (1996) 217.

⁸¹ Contract - General Principles (2003) 232.

⁸² Van der Merwe et al (2003) 232.

⁸³ Van der Merwe et al (2003) 233-234. See also Hawthorne 1995 (58) *THRHR* 172 who also pleads for the principle of good faith "*been given concrete content in its application both to particular instances and to the operation of contracts*". He also suggests that good faith be developed in that "*it being imposed as a general duty*" which can be enforced "*ex lege*". See further Hawthorne 2004 67 (2) *THRHR* 294 at 296. He illustrates the importance of the principle of good faith and quotes with authority the writings of Du Plessis - "A History of Remissio Mercedis and Related Legal Institutions." A Doctoral thesis Erasmus Univ Rotterdam (2003) which sets out the functions of the principle of good faith, *inter alia*, "*it serves as a standard of honesty and fidelity in contractual obligations* in accordance with society's precepts of fairness" and "*governs consensual contracts by using as well, corrective functions of good faith.*"

See also the persuasive argument by Van der Walt 1993 (56) *THRHR* 65 at 66 in which the writer prefers good faith as a general criterion as "*good faith requires a strong ethical requirement which would lead to greater legal certainty.*" See also Christie (2001) 19; Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor Kontrakteervryheid in 'n nuwe Suid-Afrika" *THRHR* 1991 367 at 387.

⁸⁴ *The Law of Contract in South Africa* (2001) 19-20.

⁸⁵ *Responsa Meridiana* (1997) 1 at 2ff.

⁸⁶ Fletcher "The Role of Good Faith in the South African Law of Contract" *Responsa Meridiana* (1997) 1 at 2ff.

contracting. In this regard, the legal writer holds the view that "*if good faith is entrenched legislatively, powerful bargainers will be less able to rely on their access to legal resources as an advantage over consumers.*"⁸⁷ This he claims will result in greater protection, ultimately, to the consumer.

Zimmerman et al,⁸⁸ on the other hand, advance social responsibility and the return of the ethical foundations, as major factors for the reintroduction of the concept of good faith.

The author further calls for overall legislative intervention as means to "*enable the South African courts openly to perform their duty of policing unfair contract terms.*" In this way, Zimmerman argues: "*courts may either declare invalid or modify any contract in any clause within a contract which, in the light of all the circumstances, does not conform to the standard of good faith.*"⁸⁹

*Van Aswegen*⁹⁰ also supports the view of other academic discourse, namely, courts should be given a general equitable discretion based on *bona fides* "*to ensure substantive justice in the creation, contents and enforcement of contracts.*"⁹¹

There are also South African legal writers who view the new Constitutional dispensation as having the necessary potential to create a jurisdiction to decide, by equity, whether any contractual provisions are unreasonable, unconscionable or oppressive. In this regard, *Hawthorne*⁹² suggests that the obvious route to follow 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.*"⁹³

⁸⁷ Fletcher *Responsa Meridiana* (1997) 1 at 2ff.

⁸⁸ *Southern Cross Civil Law and Common Law in South Africa* (1996) 256.

⁸⁹ Zimmerman and Visser (1996) 257, The rationale for legislative intervention is expressed as follows by Aronstam (1979) 184: "*..... because the South African courts are extremely reluctant to extend the principles of the common law to vest themselves with a jurisdiction based on principles of equity to deal with problems caused by unconscionable contractual conduct, the legislature introduce or create such a general jurisdiction for them.*"

⁹⁰ 1994 (57) *THRHR* 458; See also Van der Walt 1993 (56) *THRHR* 65 who supports the proposed reform in favour of a general criterion in terms of good faith a good faith "*is locally and internationally acknowledged as the term in which ethical requirements and the collective experience of our legal culture*" is considered.

⁹¹ Van Aswegen 1994 (57) *THRHR* 458.

⁹² (2003) 15 *SA Merc.L.J.*

⁹³ Hawthorne "The end of *bona fides*" (2003) 15 *SA Merc.L.J.*



*Hawthorne*⁹⁴ is especially critical of the Supreme Court of Appeals in handling the cases of *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 SCA, *Brisley v Drotzky* 2002 (4) SA 1 (SCA). More especially, the writer is critical of the court for not considering properly the contention that the contractual provisions (indemnity clause in the Aprox case) were contrary to the principle of good faith. For that reason, the writer contends, that the time is ripe that *"an imprecise notion of good faith should be given precision by our courts, that the sacrosanct freedom of contract should be tempered by this same good faith in order to end the abuse of the contractual terms."*⁹⁵

The re-introduction of the concept of *bona fides* is also supported by Lubbe and Murray,⁹⁶ who regard the concept of *bona fides* as *"an informing principle in our law of contract"* which *"will show up the unconscionability aspect after the conclusion of the contract, having regard to it being contrary to the principle of bona fides."* This, the author's state, would be a positive development in the South African law of contract and which aligns with the development in overseas jurisdictions.

But, some resistance is given, by some writers, to the reintroduction of the concept of *bona fides*. *Cockrell*⁹⁷ reinforces this warning by emphasizing that a subjective concept of good faith is valueless, and an objective concept of good faith will be equally valueless if it is allowed to *"collapse into a malleable notion of reasonableness."* The author suggests that this danger could be avoided by limiting good faith to an obligation and to give some consideration to the legitimate interests of the other party.

*Christie*⁹⁸ endorses the suggestion by *Cockrell* but adds *"if by 'some consideration' one understands the degree of consideration required by public policy one is coming close to linking good faith and public policy into an instrument for developing the common law of contract in confirmatory with the Bill of Rights."*

⁹⁴ 2004 67 (2) *THRHR* 294 at 298-301.

⁹⁵ Hawthorne "Closing of the open norms of the Law of Contract 2004 67(2) *THRHR* 294 at 298-301.

⁹⁶ (1988) 733-734; Support but in a restrictive way can be found in the argument by Neels "Die Aanvullende en Beperkende werking van redelikheid en billikheid in die Kontraktereg" *TSAR* 1999-4 705.

⁹⁷ "Second-guessing the exercise of contractual power on rationality grounds" 1997 *ACTA JURIDICA* 26 41-43

⁹⁸ "The Law of Contract and the Bill of Rights" *Bill of Rights Compendium* (2002) 3H-11

*Glover*⁹⁹ warns that equitable notions like good faith and unconscionability "should be treated with the utmost caution" as "the dictates of good faith are unlikely to provide justification for a paradigm shift."

Other protagonists of good faith not becoming an underlying ethical value or controlling principle, is *Hutchinson*¹⁰⁰ who does not regard good faith as an independent, free-floating basis for setting aside, or not enforcing, contractual principles.

*The South African law commission*¹⁰¹ recognised the contractual doctrine of good faith in its *draft Bill*,¹⁰² when it suggested that the South African courts should be given a corrective mechanism in instances where, in a contractual context, "unreasonableness, unconscionable-ness or oppressiveness" is present.

The legal writer *Lewis*,¹⁰³ in particular, is very critical of the scanty weight given, by the courts, to consideration of fairness. He advocates that the introduction of fairness in contract will bring about greater certainty. Similar criticism is levied, by *Bhana and Pieterse*,¹⁰⁴ at the Supreme Court of Appeal as, in both the *Brisley* and *Afrox* cases, the court failed to take proper account of "the normative considerations of good faith, fairness and equality that were at play in the circumstances." The writers, consequently, call for a greater role which good faith ought to play in ensuring a just and equitable law of contract. The legal writers also quote from the work of *Hutchison*¹⁰⁵ who explains the role of good faith in contract law, when he states:

"Good faith may be regarded as an ethical value or controlling principle, based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines defines their form, consent and field of application and provides them with a moral

⁹⁹ "Good faith and procedural unfairness in contract" 1998 (61) *THRHR* 328-335.

¹⁰⁰ "Non-variation clauses in contract: Any escape from the Shifren straight jacket" (2001) 118 *SALJ* 720.

¹⁰¹ South African Law Commission Report on *Unreasonable Stipulations in Contracts and the Rectification of Contract* (1998) 56.

¹⁰² Section 1(1) of the draft Bill on the *Control of Unreasonableness, Unconscionable ness or Oppressiveness in Contracts or Terms* (1998).

¹⁰³ "Fairness in South African Contract Law" (2003) 120 *SALJ* 330, 331.

¹⁰⁴ "Towards the Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited" (2005) 122 *SALJ* 865 and articles quoted therein.

¹⁰⁵ "Non-variation clauses in contract: Any escape from the Shifren strait jacket?" (2001) 118 *SALJ* 720 at 744-745.

and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract, nor, perhaps, even the most important one. In the words of Lubbe and Murray: "It does not dominate contract law but operates in conjunction (and competition) with notions of individual autonomy and responsibility, the protection of reasonable reliance in commerce, and views of economic efficiency in determining the contours of contract doctrine. However, it will ensure just results only if judges are alert to their task of testing existing doctrines and the operation of particular transactions against the constantly changing mix of values and policies of which bona fides are an expression." On this view of things the influence of good faith in the law of contract is merely of an indirect nature, in that the concept is usually if not always mediated by some other, more technical doctrinal device. Thus for example, while good faith does not empower a court directly to supplement the terms of a contract, or to limit their operation, it might in appropriate cases enable the court to achieve these same results indirectly, through the use of devices such as implied terms and the public policy rule."

Consequently, the writers hold the view that " to condemn the indirect application of the value of good faith is to sacrifice good faith in its entirety; and amounts to a condemnation of a basic pillar of contract law." ¹⁰⁶

Support for the proposed legislative reform can be found amongst prominent academic writers and authors. ¹⁰⁷ The writer *Lewis*, ¹⁰⁸ in particular, calls for the introduction of legislation akin to the United Kingdom, which precludes contractual unfairness, unreasonableness, unconscionability or oppressiveness.

It is respectfully submitted that legislation is a preferred medium of legal reform and the optimal approach available in South Africa today. One of the most significant underlying reasons remains the Supreme Court of Appeal's reluctance to bring about fundamental changes in the law of contract, including, preventative action and policy changes. The court remains steadfast in clinging to precedent i.e., freedom of contract and *pactum sunt servanda*. It is also submitted, that the introduction of legislative enactment of good faith in contracting, will go a long way in overcoming procedural and substantive unfairness in contracts.

10.2.1.1.2 Case Law

The role of *bona fides* has featured quite prominently in South African contract law, until its

¹⁰⁶ Bhana and Pieterse "Towards Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited" (2005) 122 SALJ 865 and articles quoted therein.

¹⁰⁷ Van der Walt 1993 (56) THRHR 65 at 66; Van Aswegen 1994 (57) THRHR 448 at 458-459; Fletcher *Responsa Meridiana* 1997 1 at 11-14; Zimmerman and Visser (1996) 257; Hawthorne 2003 THRHR 114; *Contra* Christie (1996) 17; Grove 1998 (61) THRHR 687 at 696; Hefer TSAR 2000-1 142 at 153-154; Lewis (2003) 120 SALJ 330.

¹⁰⁸ "Fairness in South African Contract Law" 2003 120 SALJ 330, 349.

death knell in the Appellate Division Judgement of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

As early as 1881, Barry JP, in the case of *Judd v Fourie*,¹⁰⁹ justified the existence of good faith in contract, by declaring, that "*good faith is required in all contracts.*" In one of the earliest examples in which the court relied upon the concept good faith in determining the true intentions of the contracting parties, in leading to the conclusion of a contract, the Appellate Division *Neugebauer and Co v Herman*,¹¹⁰ per Innes CJ, emphasized the importance of the principle of *bona fides* when it stated:

*"The principle is fundamental that bona fides are required from both parties to a contract of sale"*¹¹¹

During this era, good faith was also viewed as a relevant criterion in the interpretation of contracts. Whilst the courts were not entitled and willing to depart from the clearly expressed intention of the parties, even though the courts considered the contract to be unfair, nevertheless, when the wording in a contract was ambiguous and capable of two constructions, then, it was regarded as appropriate that the court consider good faith as a criterion. Innes CJ stated this position, as long ago as 1916, in the case of *Trustee, Estate Cresswell and Durbach v Coetzee*¹¹² when he claimed "*it would be proper to avoid a manifestly inequitable result.*"

Some twenty years later, De Wet JA, in the Appellate Division case of *Rand Rietfontein Estates Ltd v Cohn*¹¹³ put the position as follows: "*The court will lean to that interpretation which will put an equitable construction upon the contract and will not, unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other.*"

The South African courts have also, prior in the Bank of Lisbon judgement, recognized that all contracts are *bonae fidei*. This was not confined to matters that arose after consensus had been reached; it applied to the very process of reaching consensus as well. The court,

¹⁰⁹ (1881) 2 EDC 41 (76).

¹¹⁰ 1923 AD 564 at 573.

¹¹¹ *Neugebauer and Co v Herman* 1923 AD 564 at 573.

¹¹² 1916 (AD) 14 at 19.

¹¹³ 1937 (AD) 317 at 330.

in *Meskin NO v Anglo American Corporation of SA Ltd and Another*,¹¹⁴ per Jansen J, categorically stated:

"It is now accepted that all contracts are bona fidei"

The learned Judge goes on to add *"there can be no doubt, that in contrahendo our law expressly requires bona fides, a concept of variable content in the light of changing mores and circumstances."*¹¹⁵

More specifically, Stegmann J in *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd*¹¹⁶ stated:

*"The proposition that by our law all contracts are bonae fidei is not confined to matters that arise after consensus has been reached; it applies to the very process of reaching consensus. A party who adopts an ambivalent posture, with a view to manipulating the situation to his own advantage, when he can see more clearly where his best advantage lies, has a state of mind that falls short of requirements of bona fides."*¹¹⁷

The fore stated position was repeated in the case of *Paddock Motors (Pty) Ltd v Igesund*,¹¹⁸ in which the court, as to the application of the principle of good faith in the South African law of contract, stated:

"An exceptio doli was declared to be available, wherever the raising of the action constituted objectively a breach of good faith. The insertion of the exceptio doli in the formula was considered to empower the Judge to take account of every single circumstance that would render the condemnation of the defendant substantially unjust"

And, referring to the judgement of Wessels JA in *Weinerlein v Goch Building Ltd* 1925 AD 282 at p292, in which it was held:

"It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law."

The court cautions:

¹¹⁴ 1968 (4) SA 793 (W) at 802.

¹¹⁵ *Meskin NO v Anglo American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) at 804.

¹¹⁶ 1987 (2) SA 149 (W).

¹¹⁷ *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W).

¹¹⁸ 1976 (3) SA 16 A at 27.

"As today all transactions are *bona fide*, the field of operation of the *exceptio doli generalis* is necessarily more restricted. If, however, a contract required to be in writing is considered to be analogous to a *negotium strictjuris*, then of course the *exceptio doli* may aptly be applied, as was done by Wessels JA in *Weinerleins' case supra*. I do not understand the learned Judge to have done more than this, and to have enunciated a general principle that equity should override the substantive law." ¹¹⁹

In the case of *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* ¹²⁰ the Appellate Division, again per Jansen JA, commented that the requirement of *bona fides* underlies and informs the South African law of contract when he stated:

"It would be consonant with the history of our law, and also legal principle, to construe this as an application of the wide jurisdiction to imply terms conferred upon a court by the Roman law in respect of the *judicia bonae fidei*. It should therefore be accepted that in our law an anticipatory breach is constituted by the violation of an obligation *ex lege*, flowing from the requirement of *bona fides* which underlies our law of contract." ¹²¹

Although the Appellate Division, in the case of *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*, ¹²² regarded "*uberima fides* as an alien, vague, useless expression without any particular meaning in law" the court nevertheless recognised that all contracts are *bona fidei*.

But, the curtain was certainly drawn, in 1988, for the utilization of the *exceptio doli generalis* as a defence, as well as, *bona fides* as a criterion. All fears, at the time, that *bona fides* would become a stronghold in South African Law, were squashed.

In the landmark judgement of *Bank of Lisbon and South Africa Ltd v De Ornelas* ¹²³ Joubert JA, for the majority of the court, jettisoned the *exceptio doli* which, until then, had largely been used as a substitute for *boni fides* in the South African common law of contract. The court held that it could not find any evidence of the existence of a general substantive defence based on equity. The facts of this matter were that the respondents, who were joint managing directors of Ornelas Fishing Company (Pty) Ltd, had asked the Bank, in 1981, for overdraft facilities and been given the facility in the amount of R75 000.00. This was subsequently increased to R125 000.00 and thereafter, in June 1984, to R146

¹¹⁹ *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 A at 27.

¹²⁰ 1980 (1) SA 645 (A) at 652.

¹²¹ *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 652.

¹²² 1985 (1) SA 419 (A) 433.

¹²³ 1988 (3) SA 580A.



000.00. On 26 September 1984 the company asked that the limit be raised to R200 000.00. The latter request was refused and the company discharged its entire indebtedness under the overdraft and closed its account with the Bank. When the overdraft facilities had been put in place, the respondents had passed certain mortgage bonds in favour of the Bank, given a negotiable certificate of deposit, and had entered into certain surety-ships. When the account was closed, the appellant company demanded, from the Bank, the return of the negotiable certificate of deposit and the cancellation of the deeds of surety-ship and the mortgage bonds.

The Bank declined, saying that it had a claim, against the company, for R624 197.00 damages for breach of a contract entered into on 7 September 1984, for the forward purchase of dollars, between December 1984 and March 1985, which contract, the Bank claimed, the company had repudiated. The Respondents, in the words of Joubert JA, in effect, by way of replication, alleged that the Bank's conduct amounted to *dolus generalis*.

Whilst the court, per Joubert JA, recognised that in modern law "*all contracts are bonae fidei*" it rejected the proposition that *bona fides* had developed to fulfil the function of the *exceptio doli*.

The court appears to say that whilst good faith was the fountainhead of the wide variety of rules of substantive law in Roman Law "*the exceptio doli generalis has never formed part of Roman-Dutch Law, and, despite the fact that in a number of judgements this court accepted the exceptio as part of our law, the time has now arrived, once and for all, to bury the exceptio as a superfluous, defunct anachronism requiescat in pace.*"

Joubert JA, for the majority, also found there was no evidence of "*a general substantive defence based on equity in Roman-Dutch Law*" and also that "*our courts have consistently refused to exercise an equitable discretion to release a party from an unconscionable but otherwise valid contract.*"

Jansen JA, in a minority judgement of the court, found that the *exceptio doli* is part of the South African law of contract. The learned Judge placed the *exceptio doli* within the confines of corrective reasonableness and equity when he remarked:

"Seen as a substantive defence the exceptio would imply that in appropriate circumstances a Court could grant relief where the strict law would have an effect contra naturalem acquitatem, and in so doing it would modify the law. Broadly speaking this is what happened in Rome and in the course of time new defences developed as a result (e.g. exceptio non numeratae pecuniae etc). Critics of the survival of the exceptio would have one believe that the defences so developed constituted a numerus clausus to this day. This would deny the possibility of the

law being adapted according to the exigencies of the times and in the light of the changing mores and concepts of fairness and proper conduct."

According to Jansen JA contractual freedom and the principles of *pacta servanda sunt* are not absolute values, in that, sometimes they have to succumb to other considerations namely "*the sense of justice of the community.*"

The learned Judge goes further and cites "*rampant inflation, monopolistic practises giving rise to unequal bargaining power and the large scale of standard-form contracts often couched in small print.*" ¹²⁴

The minority judgement, it is respectfully submitted, is the preferred view, especially in the light of our new constitutional dispensation, in which good faith is consonant with the spirit and values contained in the Bill of Rights. One such right would be the right to equality, which serves to militate against the unequal bargaining position in which the economically weaker contracting parties often find themselves. This will also contribute towards a paradigm shift in the law of contract, which has hitherto made it impossible for the court to shy away from upholding the sanctity of contract, towards engaging good faith as an underlying ethical value, or controlling principle, in protecting the weaker parties, based on the principle of equity.

Besides the academic criticism, as hereinbefore stated, against the majority judgement of the Bank of Lisbon, ¹²⁵ the South African courts (though sometimes minority judgements), have also, in a number of cases, reviewed the role of good faith in our modern law of contract. Nine years after the fall of the principle of good faith in the Bank of Lisbon case, the Appellate Division, was again confronted with a contractual issue, which Olivier JA in a minority of judgement of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman N.O.*, ¹²⁶ credited the use of honest dealings, in an attempt to steer a course which could be followed in the application of the norm of good faith in the law of contract.

Consequently, the judge declared the surety agreement and cession a nullity, ordered the share certificates to be returned to the respondent, and dismissed the Bank's counterclaim

¹²⁴ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 at 619 C-D Per the minority judgement of Jansen JA.

¹²⁵ See Zimmerman (1996) 256 who shortly after the judgement write: "*It is unlikely that Bank of Lisbon will remain the last word on the matter of good faith and contract law.*"

¹²⁶ 1997 (4) SA 302 (A).

(307A).

The Learned Judge criticized the way in which the contract had been concluded against the principles of *bona fides* (318I). Olivier JA consequently described the role of *bona fides* as "*eenvoudig om gemeenskapsomvattings ten aansien van behoorlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik.*"

Consequently, after analysing the historic development of the doctrine of good faith in the Appellate Division, the learned Judge concluded that the principles of *bona fides*, which are based on the legal convictions of the community, play a "*wye en onmiskenbare rol in the kontraktereg*" (321J-322A).

Secondly, the judge held that there is a close connection between the doctrine of *bona fides*, and those of public policy, public interest and *iusta causa* (322C). Olivier suggests the courts should apply the notion of good faith to all contracts because public policy demands that this should be so (322E).

Thirdly, Olivier JA felt constrained to touch on the thorny issue of the *exceptio doli generalis* as a defence, which the learned Judge regards as inextricably linked to the concept of *bona fides*. Turning to the majority judgement of *The Bank of Lisbon v De Ornelas*, and especially the perception that the Appellate Division had done away with the principle of good faith, he showed that the Appellate Division had continued, after that case, actively to employ the dictates of good faith in deciding contractual disputes, although often under the guise of public policy and the public interest (*Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *LTA Construction Bpk v Administrateur, Transvaal* 1992 1 SA 473 (A)).

Consequently he contended:

*"Ek hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrond op openbare beleid, steeds in ons kontraktereg 'n belangrike rol speel en moet speel, soos in enige regsstelsel wat gevoelig is vir die opvattinge van die gemeenskap wat die uiteindelijke skepper en gebruiker is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoorlikheid."*¹²⁷

Sometime later, in 2000, the Cape High Court, per Van Zyl J, in the case of *Janse van*

¹²⁷ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) at 326G.

Rensburg v Grieve Trust CC,¹²⁸ dealt with a trade-in agreement between buyer and seller involving their respective liabilities for latent defects and the *aedilician* actions available. In assessing the competency of our courts to pronounce on the reasonableness and fairness of contractual provisions in contract, in the absence of legislative regulation, Van Zyl J, found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights (326E). The learned Judge relied on Section 8(3) (a) as a means of developing the common law in so far as rights are concerned. Moreover, Van Zyl J believes that one such a right is the right to equality as provided for in Section 9(1) which reads: '*Everyone is equal before the law and has the right to equal protection and benefit of the law*'.

In dealing with the nature of the trade-in agreement, the court concluded that this was an opportunity for the development of good faith as a norm that governs contractual content and provides a foundation for a doctrine of substantive unconscionability that directly controls unfair contracts (318B).

Consequently, Van Zyl J, recognized equity as a principle of the South African law of contract. He held that in a trade-in agreement, it would be unjust, inequitable, and unreasonable for a seller to be liable for latent defects in a vehicle sold by him, and misrepresentations relating to it, if no similar liability were to attach to the purchaser, in respect of the vehicle traded-in by him (at 325H). He contended that a purchaser would, effectively, be able to deliver a defective trade-in vehicle knowing full well that the seller would not be able to raise the *aedilician* actions against him. If these actions were available only to the one and not to the other, the legal recognition of the principle of equality would be false (at 325I-J).

The development of the principle of good faith continued, especially, in the Cape High Court. In the case of *Miller and another NNO v Dannecker*,¹²⁹ Ntsebeza AJ, decided that a court can refuse to enforce an entrenchment clause where such enforcement would breach the principle of good faith. The learned Judge relied heavily on the minority judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at 318.

In this regard Ntsebeza AJ supported the two principles laid down by Olivier JA, namely:

¹²⁸ 2000 (1) SA 315 (C).

¹²⁹ 2001 (1) SA 928 (C).

"A Judge may deviate from the decisions of the High Court where their application would be contrary to the principle of *bona fides*, and *bona fides* constitute an independent basis for not giving effect to the principles of the law of contract." (938D-F) ¹³⁰

The use of the concept 'good faith' was also kindled in a Cape decision of *Mort NO v Henry Shields-Chiat*, ¹³¹ in which Davis J held that freedom of contract is part of the fundamental right to freedom, which right is enshrined in the Bill of Rights and informs the constitutional value of human dignity. Although he also recognized that, in performing their constitutional mandate, the courts could use the concept '*boni mores*' to infuse our law of contract with the concept good faith (at 325-376 and 326E-F). Regarding good faith, the court identifies the principle as a minimum level of respect for each party's interests, so that, an unreasonable and one-sided promotion of one party's interests at the expense of the other outweighs the sanctity of contract and empowers the court to refuse enforcement.

But, in the end, Davis J nonetheless upheld an agreement entered into by a father of a severely injured minor and an attorney who specializes in road-accident claims. Despite recognizing the concept *bona fides*, Davis J did not give the concept *bona fides* sufficient content to trump the sanctity of contract, which, disappointingly, endorses the perception that it is virtually impossible for a court to stay away from upholding sanctity of contract.

Subsequently, the Supreme Court of Appeals, when confronted with a golden opportunity to bring about law reform in the South African law of contract, squandered the opportunity in the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A). Instead of infusing the law of contract with equitable principles, founded upon constitutional values, the court continued to entrench the doctrines of freedom of contract and the *pactum sunt servanda*.

The first case of *Brisley v Drotsky*, ¹³² involved a non-variation clause in which the Appellant rented immovable property from the Respondent. Upon the failure of the Appellant to pay the first month's rental on time, the Respondent sought to terminate the lease and gave the Appellant two weeks to vacate the premises. On appeal, the Appellant

¹³⁰ *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C).

¹³¹ 2001 (1) SA 464 (C).

¹³² 2002 (4) SA 1 (SCA).

raised several arguments against the eviction order. It was argued, inter alia, on behalf of the Appellant, that the enforcement of the non-variation clause, in spite of a subsequent oral agreement, is contrary to the principle of good faith. Consequently, the court looked at the legal position in South Africa with regard to the principle of good faith as a defence.

The majority of the court (Harms, Streicher and Brand JJA) subsequently refused to follow the Cape Provincial Division judgements of *Miller and Another NNO v Donnecker* 2001 (1) SA 928 (C), (in which Ntsebeza AJ followed the minority decision of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) wherein the learned Judge found that the principle of *bona fides* is very much part of the modern law of contract in South Africa, it being part and parcel of the moral and ethical values of justice, equity, and decency), as well as *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) (wherein Van Zyl J found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights); and the *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) case (in which Davis J supported the reasoning of Van Zyl J in *Janse van Rensburg v Grieve Trust* (supra) that in performing their constitutional mandate the courts could use the concept 'boni mores' to infuse our law of contract with the concept of 'good faith').

The reasoning of the majority judgement in the Brisley case amount to this:

Firstly, the judgement of Olivier JA, in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (HHA), does not bind courts in other divisions as it was handed down by a single judge. The court continues to add that, notwithstanding how convincing such minority judgement, it will succumb to the principle of precedence (*stare decisis* rule).

Secondly, they also did not support Judge Olivier's view that *boni fides* ought to be given a more prominent place in the South African Law of Contract. To do so, according to the court, would be too far-reaching. Hence, the court stated, the judgement by a single judge must be approached with great circumspection, as Oliver's reasoning is based on shaky grounds.

The court agreed with the writer Hutchison, who is of the view that good faith was not "*an independent, free-floating basis for setting aside or not enforcing contractual principles*".

The court consequently weighed up different values, including contractual freedom, and concluded:



"[23] 'n Ander waarde onderliggend aan die kontraktereg is deur Rabie HR in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) op 893I-894A onderstreep toe hy daarop gewys het dat `dit in die openbare belang is dat persone hulle moet hou aan ooreenkomste wat hulle aangegaan het. In laasgenoemde verband het Steyn HR in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en H Andere* 1964 (4) SA 760 (A) op 767A, gewag gemaak van:

"die elementêre en grondliggende algemene beginsel dat kontrakte wat vrylik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word"."

When weighing up the different values, the court suggests the following approach:

"[24] Die taak van howe in die algemeen en van hierdie Hof in besonder is om hierdie grondliggende waardes wat soms met mekaar in botsing kom teen mekaar op te weeg en om by geleentheid, wanneer dit nodig blyk te wees, geleidelik en met verdrag aanpassings te maak. Of A soos Lord Simon of Glaisdale dit stel in *Miliangos v George Frank (Textiles) Ltd* SALJ15:

'Judicial advance should be gradual. One step is enough. It is, I concede, a less spectacular method of progression than somersaults and cartwheels, but it is the one best suited to the capacity and resources of a Judge. 'R"

But, cautions the court:

"Om eensklaps aan Regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van pacta sunt servanda grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalinge sal afhang van wat 'n bepaalde Regter in die omstandighede as redelik en billik beskou. Die maatstaf is dan nie meer die reg nie C maar die Regter."

Olivier AJ, in a minority judgement, again highlights the effectiveness of the principle *bona fides* as a corrective tool when he states:

"[76] Hoe moet die *bona fides* of te wel redelikheid en billikheid in die kontraktereg toegepas word? Vanweë die voortreflike formulering van die antwoord op gemelde vraag deur Neels ((1999) 4 TSAR op 700) haal ek hom woordeliks aan: H

"Die howe, so is reeds herhaaldelik betoog, behoort die bevoegdheid tot korreksie beginselmatig en terughoudend uit te oefen. Die beginsels van regsekerheid en outonomie vereis dat die wilsooreenstemming wat die partye tot die kontrak bereik het of the redelike vertroue wat geskep is, as uitgangspunt moet dien (voorlopige regsoordeel). Slegs in gevalle waar die onredelikheid of onbillikheid van die voorlopige regsoordeel duidelik, klaarblyklik, kennelik of onmiskenbaar is (marginale toetsing), moet dit in die finale regsoordeel gekorrigeer word op die grondslag van nuutverfynde reëls en beginsels'."

In so far as a court's approach in weighing up values, Olivier AJ suggests the following approach should be adopted, namely:



"[78] Dit mag so wees dat die voorgestelde benadering 'n mate van regs-en kommersiële onsekerheid sal invoer, maar dit is die prys wat 'n viriele regstelsel, wat billikheid net so belangrik as regsekerheid ag, moet betaal; 'n balans moet gevind word tussen kontinuiteit van die regsisteem en die aktualiteit van die sosiale werklikheid (Neels 1999 (2) TSAR op 266 ev; 1998 TSAR op 702, 716-17; (1999) 4 TSAR op 685-98). D" ¹³³

The Supreme Court of Appeal, in a subsequent judgement in the case of *Afrox Healthcare Bpk v Strydom*, ¹³⁴ further illustrated the court's slavish following of the sanctity of contracts. The facts briefly stated revealed that Aprox was the owner of a private hospital. The respondent had been admitted to this hospital for an operation and remained in the hospital for post-operative medical treatment. Upon admission a contract had been concluded between the parties. During the post-operative medical treatment, certain negligent conduct by one of the hospital's nursing staff caused the respondent to suffer damage. The respondent argued that this negligent conduct of the nurse had constituted a breach of contract by the appellant and instituted an action claiming for the damage suffered.

The respondent contended that the indemnity clause was contrary to the public interest, that it was in conflict with the principles of good faith and that, the admission clerk had had a legal duty to draw respondent's attention to the clause, which he had failed to do.

The court, per Brand AJ, emphasized the constitutional value of contractual autonomy in stating:

"[22] Hierbenewens is art 27(1) (a) nie die enigste konstitusionele waarde wat in onderhawige verband ter sprake kom nie. Soos Cameron AR dit in *Brisley v Drotzky* (supra Para [94]) stel:

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

And continues:

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

"die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word."

¹³³ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) 1-34.

¹³⁴ 2002 (6) SA 27 (A).

Insofar as the principle of *bona fides* in the South African Law of Contract is concerned, Brand AJ is unsupportive of the minority judgement of Olivier AJ in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (HHA) and the Cape Town decisions enunciated supra, but, supports the view, but without commenting further, of Cameron AJ in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) when the court stated:

"[31]As alternatiewe basis vir sy saak het die respondent aangevoer dat selfs al sou klousule 2.2 nie met die openbare belang in stryd wees nie, dit steeds onafdwingbaar is omrede dit onredelik, onbillik en strydig met die beginsel van *bona fides* of goeie trou is. Hierdie basis, wat die Hof a quo blyk te onderskryf het, vind sy oorsprong in die minderheidsuitspraak van Olivier AR in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (HHA) op 318 ev en die beslissings van die Kaapse Hooggeregshof wat in navolging daarvan gegee is.

[32]In *Brimley v Trotsky* (supra) het hierdie Hof egter, by wyse van 'n meerderheidsbeslissing, die uitspraak van Olivier AR in perspektief gestel. Aangaande die plek en rol van abstrakte idees soos goeie trou, redelikheid, billikheid en geregtigheid het die meerderheid in die *Brisly* saak beslis dat, ofskoon hierdie oorwegings onderliggend is tot ons kontraktereg, dit nie 'n onafhanklike, oftewel 'n `free-floating' grondslag vir die tersydestelling of die nie-afdwinging van kontraktuele bepalinge daarstel nie (para [22]); anders gestel, alhoewel hierdie abstrakte oorwegings die grondslag en bestaansreg van regsreëls verteenwoordig en ook tot die vorming en die verandering van regsreëls ken lei, hulle op sigself geen regsreëls is nie. Wanneer dit by die afdwinging van kontrakbepalinge kom, het die Hof geen diskresie en handel hy nie op die basis van abstrakte idees nie, maar juis op die basis van uitgekristalliseerde en neergelegde regsreëls. (Sien, byvoorbeeld, *Brummer v Gorfil Brothers Investments* (supra op 419F-420G).) Derhalwe bied die alternatiewe basis waarop die respondent steun, inderwaarheid geen onafhanklike basis vir sy saak nie." ¹³⁵

Most recently, in a Constitutional Court judgement in *Barkhuizen v Napier*, ¹³⁶ per Ngcobo J, held that good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. The court, in this regard, held "..... *Good faith is given effect to by the existing common law rule that contractual clauses are impossible to comply should not be enforced.*" But, cautions the court, good faith is not, however, the only value or principle that underlies the law of contracts. In a minority judgement, Sachs J emphasizes that in assessing the validity of standard form terms, a principled approach using objective criteria should be adopted. Moreover, courts should be sensitive to the economic power in public affairs, which ought to be regulated to ensure standards of fairness in an open and democratic society. Sachs J stresses legal convictions of the community, which seeks fair dealings in business/consumer relationships, in contemporary society. Sachs J finds support for his contention in the preamble to the new *Consumer Protection Bill*, published by the Department of Trade and Industry for public comment in the Government Gazette 2862 GN R489 on the 15th March 2006. In this regard the preamble states:

¹³⁵ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A) at 40.

¹³⁶ 2007 (5) SA 323 (CC).

"The people of South Africa recognise-

That is necessary to develop and employ innovative means to-

- (a) Fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;
- (b) Protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and
- (c) Give effect to the internationally recognised customer rights."

Section 3(1) goes on to provide that-

"The purpose of the Act is to promote and advance the social and economic welfare of consumers in South Africa by-

- (a) Establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible."

In Chapter 2, which deals with fundamental consumer rights, special attention is given to the question of notice to the consumer of clauses which provide for exemption from liability. Section 50(1) provides that any provision in an agreement in writing that purports to limit in any way liability of the supplier is of no force and effect unless:

- "(a) the fact, nature and effect of that provision are drawn to the attention of the consumer before the consumer enters into the agreement;
- (b) The provision is in plain language; and
- (c) If the provision is in a written agreement, the consumer has signed or initialled that provision indicating acceptance of it."

Sachs J also highlights the further provisions in the Bill, which require that the attention of the consumer be drawn to similar exemptions from liability at an early stage and in a conspicuous manner and in a form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances (section 50(2)(b)(i)). Sachs J continues to state: *"The section dealing with determination of whether a term of a contract is unfair or unreasonable provides that a court must have regard to all the circumstances of the case and in particular, the bargaining strength of the parties relative to each other, and whether the consumer knew or ought reasonably to have known of the existence and extent of the term, having regard to any custom of trade and any previous dealings between the parties (section 58(1)(a) and (c))."*

Sachs J, with regard to scholarly opinion on the need for fairness in contracts, states that their approach aligns with the theory that he is developing, which he suggests is *"manifestly in keeping with the Constitutional values of human dignity, equality and freedom."* In the concluding remarks of his minority judgement, Sachs J clearly pleads for legal regulation which *"ensures the basic equity in the daily dealings of the ordinary*

people." ¹³⁷

10.2.1.1.3 Legal Opinion

The recognition of the influence of the fairness or good faith in the South African Law of Contract has had mixed reactions ranging from acknowledgement to denial.

It must be noted that prior to the case of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) the role of *bona fides* featured quite prominently in the South African contract law. Both the courts and academic writers alike recognised the existence of the concept *bona fides* or good faith. The justification for the existence thereof, have taken many forms and have been expressed in many ways ranging from "*all contracts are bona fidei*" or "*good faith is required in all contracts*" ¹³⁸ to "*the absence of good faith as a criterion would lead to an inequitable result.*" ¹³⁹ As a value, good faith was never recognised without some form of resistance, especially, from those ardent followers of the sanctity of contract rule. They argue that "*the maxim pacta sunt servanda is still the cornerstone of the law of contract and there should be the utmost freedom of contract.*" ¹⁴⁰ So strong has the influence of the sanctity of contract been that the argument has often been advanced that the sanctity of contract rule has prevented our courts from "*applying equitable solutions in situations where the contract is clearly unfair,*

¹³⁷ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

¹³⁸ See *Judd v Fourie* (1881) 2 EDC 41 (76); *Nengebauer and Co v Herman* 1923 AD 564 at 573; *Meskin No v Anglo American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) at 802 (A); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 147 (W); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 A at 27; *Tuckers Land Development Corporation (Pty) Ltd v Hoves* 1980 (1) SA 645 (A) at 652; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 A. For the view of the legal writers see Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 240; Hutchinson et al *Wille's Principles of South African Law* (1991) 445; Kerr *The Principles of the Law of Contract* (2002) 301; 646.

¹³⁹ *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 (AD) 14 at 19; *Rand Rietfontein Estates Ltd v Cohn* 1937 (AD) 317 at 330.

¹⁴⁰ See Lotz "Die billikheid in die Suid-Afrikaanse Reg" unpublished inaugural lecture University of South Africa (1979) 1; Lubbe "Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 7 16, "Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreë" 1991 *TSAR* 1 13-14; Van der Walt "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367 368; Van Aswegen "The future of South African contract law" 1994 *THRHR* 448 456; Lubbe and Murray *Farlam and Hathaway Contract: Cases, materials and commentary* (1988) 20-21; Van der Merwe et al *Contracts - General Principles* (2003) 10; Pretorius "The basis of contractual liability in South African Law (1) 2004 *THRHR* 179 at 189; Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 240; Kahn *Contract and Mercantile Law* (1988) 32-33; Hawthorne "The End of *bona fides*" (2003) 75 *SA MERC L.J.* 271 at 274.

harsh and oppressive." ¹⁴¹ As countenance to the latter argument, there are academic writers who hold the view that freedom of contract is not an absolute value and ought to be limited by, *inter alia*, *boni mores*, public interest and good faith which have, hitherto, not become an independent, free floating value used as a basis, for setting aside contracts or contractual provisions). ¹⁴²

At one stage, until it's demise in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A), the *exceptio doli generalis*, was used as a contractual remedy that could give practical application to good faith in the South African Law of Contract. It served as an instrument of equity and was extensively used by the South African courts and recognised by some of the academic writers. ¹⁴³

But the position changed with the majority judgement in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas*, ¹⁴⁴ when the court, per Joubert JA, concluded: "*All things considered, the time has now arrived, in my judgement, once and for all, to bury the*

¹⁴¹ Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* (2003-1) 155; Hefer "Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* (2000-1) 144, 153.

¹⁴² Murray and Lubbe *Farlam and Hathaway Contract: cases, materials and commentary* (1988) 37 390; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 295; Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 157 at 167; Kerr *The principles of the law of contract* (1998) 8; Hawthorne "Public policy and Micro-lending: Has the unruly horse died?" 2003 *THRHR* 114 at 114-115; Grove "Kontraktuele gebondenheid, Die vereistes van die goede trou, redelikheid en billikheid" 1999 (61) *THRHR* 687 at 689; Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteeer vryheid in die Suid-Afrikaanse reg" 1993 (56) (SA) *THRHR* 65; Van Aswegen "The future of South African contract law" 1994 (57) *THRHR* 448 at 456. The latter writer holds the view that it was especially the inequalities that freedom of contract and *pacta sunt servanda* brought, that necessitated Roman Dutch Law to seek such mechanisms as fairness, justice and good faith to ensure that problems of substantive injustices are averted." This has now found favour in South Africa as well. See Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse reg" 1990 *Stell LR* 16 at 17-25; Van der Merwe et al *Contract: General Principles* (2003) 233-234; Cockrell "Substance and form in the South African Law of Contract" 1992 *SALJ* 56; Lotz "Die Billikheid in die Suid-Afrikaanse Kontraktereg" (Unpublished inaugural lecture Univ 1979) 11-12. The author promotes the utilization of *bona fides* as mechanism in that it promotes "*honesty and prohibits unreasonable promotion of one's own interests*". See further Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 157 at 172; Neels "Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" *TSAR* 1999-4 684 at 693; Fletcher "The role of good faith in the South African Law of Contract" *Responda Meridiana* (1997) 1 at 2; Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 241.

¹⁴³ Van der Merwe et al *Contracts - General Principles* (2003) 231-232; Hefer "Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2000-1 142; Fletcher "The Role of Good Faith in the South African Law of Contract" *Responda Meridiana* (1997) 1 at 3. For case law see *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 254 (A).

¹⁴⁴ 1988 (3) SA 580 (A).

exceptio doli generalis as a *superfluous, defunct anachronism Requiescat in pace*". Joubert JA also recognised that in modern law "*all contracts are bonae fidei*" but declined to acknowledge that *bona fides* had developed to fulfil the function of the *exceptio doli*. In fact, it appears that whilst the court recognised that good faith was the fountain head of a wide variety of rules of substantive law in Roman law, the court stated the *exceptio doli* had never formed part of the Roman Dutch Law, hence it was defunct in South African Law.

Moreover, the court found there was no evidence of a "*general substantive defence based on equity in Roman Dutch Law*" and also "*our courts have consistently refused to exercise an equitable discretion to release a party from an unconscionable but otherwise valid contract.*"

Jansen JA, in a minority judgement of the court, found, on the other hand, that the *exceptio doli* is part of the South African Law of Contract. The learned Judge placed the *exceptio doli* within the confines of "*corrective reasonableness and equity*". He advocates, in his judgement, that the principles of *pacta sunt servanda* are not absolute values and should therefore, sometimes, succumb to other considerations namely "*the sense of justice of the community*". The learned judge demonstrates that monopolistic practises, giving rise to unequal bargaining power and the evil of large scale standard form contracts, are *inter alia*, motivating factors why new corrective action ought to be put in place.

The majority judgement elicited a wide ranging response from, especially, the South African legal writers and eventually, the South African Law Commission.

The thrust of the arguments, in the main, varied and included:

- (1) The court failed to engage in an in-depth discussion of general policy considerations and lacked insight and the required responsibility in not bringing about justice for the contractants.¹⁴⁵

¹⁴⁵ Christie *The Law of Contract in South Africa* (2001) 15; Van der Merwe, Lubbe, Van Huyssteen "The *exceptio doli generalis requiescat in pace - vivat aequitas*" (1989) 106 *SALJ* 235; Zimmerman "The Law of Obligations - character and influence of the civilian tradition" 1992 *Stell L.R.* 5 6-9 and see Lambiris "The *exceptio doli generalis* an obituary" (1988) 105 *SALJ* 644. Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 295-296; Neels "Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" *TSAR* 1999-4 684 at 689; Fletcher "The Role of good faith in the South African Law of Contract" *Responsa Meridiana* (1993) 1 at 5; Zimmerman and Visser *Civil Law and Common Law in South Africa* (1996) 256; Lubbe and Murray *Farlam and Harthaway Contract: Cases, Materials and Commentary* (1988) 391; Hawthorne "The end of *boni fides*" (2003) 15 *SA MERC L.J.*.

- (2) A new mechanism aimed at limiting the unfair or unreasonable consequences of contractual freedom or contractual autonomy, ought to be recognised and applied. *Bona fides*, as an independent mechanism, alternatively, as a component of public interest, alternatively, equity *inter partes* in public interest, has, in this regard, been identified by a number of writers. They contend that the principle of *bona fides* will empower the courts to correct unreasonable contracts or contractual provisions.¹⁴⁶
- (3) The main characteristics of the principle of *bona fides* as a separate mechanism which, the legal writers espouse, ought to be given concrete content in regulating the operation of a contract, include:
- (3)(1) It would bring about certainty and economic efficiency, in that, the principle of good faith would provide technical rules, on a par with public policy and public interests. This would result in any contract, deemed to be contrary to good faith to be classified as illegal, resulting in the usual consequences of illegality.¹⁴⁷
- (3)(2) It would serve as a standard of honesty and fidelity in contractual obligations and help form a much needed ethical base in the law of contract.¹⁴⁸
- (3)(3) The principle of good faith will serve as a mechanism which will work

¹⁴⁶ Van der Merwe, Lubbe and Van Huyssteen "The exceptio doli generalis requiescat in pace - vivat aequus" (1984) *SALJ* 235; Van der Merwe *Contract: General Principle* (1993) 2, 233; Lubbe en Murray *Farlam and Hathaway Contract: cases, materials and commentary* (1988) 390; Zimmerman "Good faith and equity"; Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* 1996 256; Lambiris "The exceptio doli generalis" *SALJ* 644; Lewis "The Demise of the exceptio doli to contractual equity" 1990 *SALJ* 26; Hefer "Billikheid in die Kontrakereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2000-1 142.

¹⁴⁷ Van der Merwe et al *Contract - General principles* (2003) 232-234. See also Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 172. The writer pleads that the principle of good faith "*be given content in its application both to particular instances and to the operation of contract.*" He also suggests that, good faith be developed and imposed as a general duty" which can be enforced "*ex lege*". See also Van der Walt "Kontrakte en beheer oor kontrakteer vryheid in 'n nuwe Suid-Afrika" *THRHR* (1991) 367 at 387. See further Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 296.

¹⁴⁸ Du Plessis "A history of *remissio mercedis* and related legal institutions" A Doctoral Thesis Erasmus Univ. Rotterdam 2003. See also the persuasive argument by Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg" 1993 (56) *THRHR* 65 at 66. The writer prefers good faith as a general criterion in that good faith provides a strong ethical requirement, which would, lead to greater legal certainty. See also Zimmerman and Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 256.

against contracts which, in terms of their content, are unfairly prejudicial against one of the contracting parties, in that, good faith can play a vital role in bringing about procedural or substantial fairness in contracting.¹⁴⁹

- (3)(4) Good faith, if implemented, is also seen as an informing principle, which will show up the unconscionability aspect after the conclusion of the contract, having regard to it being contrary to the principle of fairness or *bona fides*.

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- (3)(5) Another characteristic identified by several South African legal writers, is the potential *bona fides* has in the Constitutional order. It would create a jurisdiction to decide by equity, whether any contractual provisions are unreasonable, unconscionable or oppressive. What has been suggested is the development of the open norms of the South African common law *inter alia*, *bona fides*, public policy and the *boni mores* in accordance with the Constitutional mandate.¹⁵¹

- (4) But there are legal writers who do not support the notion that the principle of good faith should become an independent, free-floating basis for setting aside contracts or contractual provisions, nor, an underlying ethical value or controlling principle.

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- (5) Perhaps then, in consequence of the difference of opinion between the South

¹⁴⁹ Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse Kontrakereg" 1990 *Stell. L.R.* 8-11. Van Aswegen "The future of South African Contract Law" 1994 (5) *THRHR* 458; See also Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65. The writer supports the proposed reform in favour of a general criterion of good faith "*is locally and internationally acknowledged as a term in which ethical requirements and the collective experience of our legal culture*" is considered.

¹⁵⁰ Lubbe and Murray *Farlam and Hathaway Contract: Cases, materials, commentary* (1988) 773-774.

¹⁵¹ Hawthorne "The end of *bona fides*" (2003) 15 *SA MERC L.J.*; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 295.

¹⁵² Hutchison "Non-variation clauses in contract: Any escape from the Shifren straight jacket" (2001) 118 *SALJ*. Support for this view are to be found in the *Acta Juridica* 26 41-43; writings of Cockrell "Second-guessing the exercise of contractual power on rationality grounds" 1997 Christie "The law of contract and the Bill of Rights" Bill of Rights Compendium (2002) 3H-11. See also Hefer "Billikheid in die kontrakereg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2000-1 142 at 154; Glover "Good faith and procedural unfairness in contract" 1998 (61) *THRHR* 328-325 See further Neels "Die aanvullende en beperkende werking van redelikheid en billikheid in die kontrakereg" *TSAR* 1999-4 705.

African legal writers and amid the confusion created by majority decision in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A), the South African law commission¹⁵³ stepped in, in an attempt to give direction to this impasse, which existed, and continues to exist today. The Commission firstly, recognized good faith as a defence. It was suggested secondly, that the South African legal system should use good faith as a corrective mechanism, especially in instances where, in a contractual context, unreasonableness, oppressiveness or unconscionable-ness is present. Sometime later, in a majority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A), Olivier JA recognized the principle of good faith, which he regards as based on the legal convictions of the community which play an undeniable role in the law of contract (321J-322A). The learned Judge held that there was a close connection between the doctrine of *bona fides* and public policy, public interests and *iusta cause* (322C). Consequently he suggested that as *bona fides* is a free-floating value, as is the case with public policy etc, public policy demands that good faith should apply to all contracts.

It was however, especially the Cape Provincial Division of the High Court which, sometime later, moved for the reintroduction and application of *bona fides* in the law of contract. Motivation therefore appears to be the absence of legislative regulations and the promotion of the spiritual values of the Bill of Rights enshrined in the Constitution (326E). Reference is particularly made to Sections 8(3) (a) and 9(1) in so far as they concern equality. See the cases of *Janse van Rensburg v Grieve Trust* CC 2000 (1) SA 315 (C); *Miller and another NNO v Donnecker* 2001 (1) SA 928 (C); *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C).

But the clarification of the possible reintroduction of the *bona fides* principle was short lived, in that, after the Supreme Court of Appeal had heard the cases of *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A), the Supreme Court of Appeal made it clear that the highest court of appeal was not ready for a paradigm shift. The court does not recognize the principle of good faith as an independent free-floating basis for setting aside or enforcing contractual provisions. Nor is the Supreme Court of Appeal prepared to recognize good faith as an independent defence. Instead, the court sought to entrench the

¹⁵³ South African Law Commission Report on *Unreasonable Stipulations in Contracts and the Rectification of Contract* (1998) 56.

sacrosanctity of the freedom of contract and the *pacta sunt servanda*.

Moreover, it was especially obvious in the *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A) case, in which Brand AJ flatly ignored the contention, that the contractual provisions (an indemnity clause in a hospital admission form) were contrary to the principle of good faith. Instead, the Supreme Court of Appeal seems to have decided to use the occasion to severely limit, if not eliminate, the application of good faith in the law of contract.¹⁵⁴

More recently the Constitutional Court, in a majority judgement, in the case of *Barkhuizen v Napier*¹⁵⁵ again chose not to recognize good faith as an independent, or what the court termed, a 'self-standing rule'. The court was, however, prepared to accept that good faith was an underlying value that is given expression through existing rules of law. One of the existing rules of law identified by the court is that contractual clauses that are impossible to comply with should not be enforced. As will be seen hereinafter, the court, in the majority judgement per Ngcobo J, singles out public policy as one of the few factors which courts may rely on in pronouncing the validity of contractual provisions, or contract as a whole. The Constitutional Court, save for recognizing the notion of fairness in a public policy context remarks: "*Public policy imports the notions of fairness, justice and reasonableness.*" The court, unlike Sachs J in the minority judgement, does not see fairness as a free-floating factor. The courts, per Ngcobo J, in the majority judgement, did however, find that 'justice, reasonableness and fairness constituted good faith' but declined to recognize good faith as a free-floating factor. In a dissenting judgement, Sachs J however, develops contract law jurisprudence in South Africa when he refers to 'the need for fairness in contracts' which Sachs J views to be "*..... manifestly in keeping with the Constitutional values of human dignity, equality and freedom.*" Sachs J further states that the legal convictions of the community call for 'reasonable and fair dealing' and 'the ensurance of standards of fairness,' which the learned Judge regards as intrinsic to appropriate business/consumer relationships in contemporary society. This approach needs to be welcomed in a changing society, where the ethos of consumer welfarism is encouraged. Sachs J finds support for the developing of his theory in the new *Consumer Protection Bill*.

¹⁵⁴ See in this regard the valid criticism of the Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 295; See also the criticism of Bhana and Pieterse "Towards Reconciliation of Contract Law and Constitutional Values: Brisley and Aprox Revisited" (2005) 122 *SALJ* 865 of the Supreme Court of Appeals reversion to 'Classical Libertarian' and hostility to the broader principles of equity and fairness; See also Lewis "Fairness in South African Contract Law" *SALJ* (2003) 330ff.

¹⁵⁵ 2007 (5) SA 323.

The Bill aims to protect the interests of consumers against abuse or exploitation in the market place and to promote consumer rights. In particular it also regulates the practise of exempting from liability to contractual provision and the criteria set to be met before these types of contractual provisions are deemed to be valid. The criteria include, *inter alia*, the bargaining strength of the contracting parties and knowledge of the existence and extent of the terms.

It is precisely for that reason, that urgent law reform is needed in the South African Law of Contract.

It is respectfully submitted that legislation is a preferred medium of legal reform and the optimal approach available in South Africa today. One of the most significant underlying reasons remains the Supreme Court of Appeal's reluctance to bring about fundamental changes in the law of contract, including preventative action and policy changes. Instead, it remains steadfast in clinging to precedent i.e. freedom of contract and *pactum sunt servanda*. It is also submitted that, the introduction of a legislative enactment of good faith in contracting, will go a long way in overcoming procedural unfairness in contracts.

It is also respectfully submitted that one of the most effective ways in dealing with the "sanctity of contract" rule, is by introducing good faith as an independent, free-floating mechanism on a par with public interest, the *boni mores* and equity. This will limit, or correct, the unfair, unreasonable and oppressive consequences of the *pactum sunt servande*, as observed in the most recent cases in the Supreme Court of Appeals.

10.2.1.2 ENGLAND

10.2.1.2.1 Legal Writings

The principle of fairness in the English Law of Contract is a concept which found favour with the Chancery as long ago as 1770. During this period it became clear policy of the Chancery that a contract must, basically, "*be fair*". For that reason, Chancellors, during this period, regularly set aside transactions which they felt were excessively harsh or unfair.¹⁵⁷

¹⁵⁶ The Bill contains broad proposals formulated by a Commission of Enquiry under the auspices of the Department of Trade and Industry Government Gazette under No 28629 GN R489 on the 15th March 2006.

¹⁵⁷ Atiyah *The Rise and fall of Freedom of Contract* (1979) 147.

Fairness in contracts began finding favour with the courts in the eighteenth century, during which period the courts assumed a more protective and regulative a role.¹⁵⁸ One of the primary reasons for the recognition of the principle of fairness, by the English courts during this period, was based upon public interest, wherein the courts protected the weaker contracting parties against the exploitation by the stronger contracting parties, especially capitalistic monopolies.¹⁵⁹

During more modern times, the principle of good faith and unconscionability, founded upon the principles of equity and fairness, emerged. The aim of these principles is for the courts to grant relief against anything that is unfair or inequitable in contract.¹⁶⁰

But, while English contract law is influenced by the principles of good faith, English law does not, to date, recognise the existence of a doctrine of good faith as a separate defence.¹⁶¹

Academic debate amongst English writers has revealed that they are divided on whether good faith ought to become a fully fledged defence, or not. This has sparked off fierce discourse amongst the legal writers and it is especially, *Brownsword*,¹⁶² who has identified the pros and cons of the validity of a doctrine of good faith. The principle reasons against the introduction of a doctrine of good faith have been summarized, by Professor Brownsword, in the following terms:

"5.4 *Firstly, it cuts against the essentially individualistic ethic of English contract law.*

5.5 *Secondly, it is said that good faith is a loose cannon in commercial contracts. It is also not clear whose (or which) morality or morality standards it is suggested to protect.*

5.6 *Closely related to the second concern, there is a third concern, namely that a doctrine of good faith would call for difficult inquiries into contractors states of mind. It would involve, speculating, about a contractor's reasons.*

5.7 *Good faith would impinge on the autonomy of the contracting parties and is inconsistent with the*

¹⁵⁸ Atiyah (1979) 168-169.

¹⁵⁹ Atiyah (1979) 220-221.

¹⁶⁰ Atiyah (1971) 339-340.

¹⁶¹ McKendrick *Contract Law Text, Cases and Materials* (2003) 533; Beatson and Friedman *Good faith and fault in Contract Law* (1995) 14-15.

¹⁶² "Good faith in Contracts" 'Revisited' (1997) *CLJ* 111; Brownsword *Contract Law: Themes for the Twenty First Century* (2000) Paras 5.3-5.9; See also Chitty *Chitty on Contracts* (1994) Para 1-024 for the doctrinal dispute over the notion of good faith in English Law.

fundamental philosophy of freedom of contract.

5.8 *The final thread of the sceptical negative view is that a general doctrine of good faith goes wrong in failing to recognise that contracting contexts are not all alike.*" ¹⁶³

Brownsword ¹⁶⁴ suggests that the following factors support the recognition of a general doctrine of good faith in English contract law:

"5.15 *as English law already tries to regulate bad faith dealings, it may be argued that it would be more rational to address the problem directly (rather than indirectly) and openly (rather than covertly) by adopting a general principle of good faith.*

5.16 *Secondly, in the absence of a doctrine of good faith, it may be argued that the law of contract is ill-equipped to achieve fair results, on occasion leaving judges 'unable to do justice at all'.*

5.17 *Thirdly, the general principle of good faith, it might be argued that, with such a principle, the courts are better equipped to respond to the varying expectations encountered in the many different contracting contexts, and, in particular, it might be argued that the courts are better able to detect co-operative dealing where it is taking place.*

5.18 *Finally, it is arguable that the beneficial effects of a good faith doctrine go beyond (reactive) dispute-settlement, for a good faith contractual environment has the potential to give contracting parties greater security and, thus, greater flexibility about the ways in which they are prepared to do business.*" ¹⁶⁵

But, notwithstanding the difference of opinion between the English legal writers and as will be seen, the reluctance of the courts to develop principles that will allow direct control over substantive unfairness, *inter alia*, good faith, legislative intervention in the form of the *Unfair Terms in Consumer Contracts Regulation*, ¹⁶⁶ has as its aim the adoption and protection of good faith in contract in order to bring about fairness in contractual terms.

In this regard Regulation 8(1) provides that any 'unfair term' in a consumer contract 'shall not be binding on the consumer'. The test of 'unfairness' is contained in reg 5(1) and covers:

"..... Any term, which contrary to the requirement of good faith, causes a significant imbalance in the party's rights and obligations under the contract to the detriment of the consumer."

¹⁶³ Brownsword (2000) Paras 5.3-5.8 quoted in McKendrick (2003) 544-545. The writer is also of the opinion that whilst the existing system works, there is no reason to adopt good faith as a general doctrine or principle.

¹⁶⁴ *Contract Law: Themes for the Twenty First Century* (2000) Paras 5.15-5.18.

¹⁶⁵ Brownsword *Contract Law: Themes for the Twenty First Century* (2000) Par 5.3-5.8.

¹⁶⁶ SI 1999/2083.

This definition, with its reference to 'good faith', reveals the European origins of the Regulations.

The 1994 regulations contained a schedule of factors which the court should take into consideration in assessing the issue of good faith. The factors included:

- (a) *the strength of the bargaining position of the parties;*
- (b) *whether the consumer had an inducement to agree to the term;*
- (c) *whether the goods or service were sold or supplied to the special order of the consumer; and*
- (d) *the extent to which the seller or supplier has dealt fairly and equitably with the consumer."* ¹⁶⁷

It is especially *Chitty*, ¹⁶⁸ with regard to the legislative intervention in the *Unfair Contract Terms Act 1977* and the *Unfair Terms in Consumer Contracts Regulations 1994*, who recognizes the obligations of good faith imposed by the regulations.

In this regard the *Unfair Contract Terms Act 1977* declares exemption clauses totally ineffective in certain situations, notably, where they attempt to exclude business liability for personal injuries caused by negligence and where they attempt to exclude, or limit, liability for breach of the terms as to quality and fitness for purpose implied by section 14 of the *Sale of Goods Act 1979* as against someone dealing as a consumer. ¹⁶⁹ According to *Chitty* it gives the courts a discretion, in a wide category of other cases, to deny effectiveness to an exemption clause, unless, it is proven to be "fair and reasonable" by the person who seeks to rely upon it. ¹⁷⁰ *Chitty* also holds the view that in 1994, when the *Unfair Terms in Consumer Contracts Regulations* were issued, it caused to implement into English law, the *European Community Directive on Unfair Terms in Consumer Contracts*. The ambit of the system of control on the ground of unfairness which these regulations impose, is not restricted to exemption, limitation and indemnity clauses, but extends, according to *Chitty*, to any term which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and

¹⁶⁷ *Unfair Terms in Consumer Contracts Regulations 1994* quoted in Stone *The Modern Law of Contract* (2002) 251. The writer holds the view that although the list has not been reproduced in the 1999 regulations, it is unlikely that a court will not consider them in assessing good faith when confronted with a similar problem. See also Stone *Principles of Contract Law* (1996) 168-170.

¹⁶⁸ *Chitty on Contracts* (1994) para 1-018 to 1-024.

¹⁶⁹ SS2 (1) and 6(2) of the *Unfair Contract Terms Act 1977*.

¹⁷⁰ *Chitty* (1994) Para 1-018 to 1-019.

obligations under the contract, to the detriment of the consumer. ¹⁷¹

Chitty, ¹⁷² advancing a case in favour of the doctrine of good faith emphasizes the principle of fairness in English law. More particularly the following factors are highlighted:

- (1) The importance of fairness or reasonableness in the interpretation or construction of contract, i.e. *"the more unreasonable the result the more unlikely it is that the parties can have intended it."*
- (2) The common law often resorts to the implication of a term in a contract in a case which could otherwise be considered to be a matter of "good faith in the performance of a contract", in, for example, employers contracts, the employer is obliged to inform an employee of his/her rights in certain instances, here the result, in the absence thereof, would lead to unfair results.
- (3) In instances where a person assumes a fiduciary duty, the fiduciary must act honestly and not allow his own interests to conflict with that of the principle, i.e. insurance law.
- (4) General considerations of fairness are relevant to the availability of certain equitable doctrines which are significant in the contractual context, for example, estoppels and specific performance.

10.2.1.2.2 Case Law

English law, as far back as 1766, per the dictum of Lord Mansfield C.J. in the case of *Carter v Boehm* ¹⁷³ has promoted the principle of good faith. In this regard, Lord Mansfield CJ stated that *"[T]he governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to ground open to both, to exercise their judgement upon."* ¹⁷⁴

¹⁷¹ *Chitty* (1994) Para 1-018.

¹⁷² *Chitty on Contracts* (1994) Para 1-020 to 1-023.

¹⁷³ (1766) 3 Burr 1905, 1910.

¹⁷⁴ *Carter v Boehm* 1766) 3 Burd 1905, 1910.

Nevertheless, the modern view in English law is that, in keeping with the doctrines of freedom of contract and the binding force of contracts, in English contract law, good faith definitely plays a subsidiary role and has never been regarded as a complete defence. But, that does not imply that good faith has no role to play in English law.

But, in the case of *Interfoto Picture Library Ltd v Stilleto Visual Programme Ltd*¹⁷⁵ Bingham L.J., delivering the judgement, talks about a piecemeal approach when he states:

*"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize. Its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair open dealing..... English law has characteristically committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."*¹⁷⁶

The leading English case on good faith is the decision of the House of Lords in *Watford v Miles*,¹⁷⁷ where it was held that an obligation to negotiate in good faith is not valid.

The facts stated briefly amounted to this: The appellants entered into negotiations, with the respondents, in March 1987, for the purchase of a company belonging to the respondents. A third party had offered \$1.9 million (1.9 million pounds) for the business and the premises. The respondents were prepared to warrant, *inter alia*, that, at the date of completion, the resources in the company's bank account would not be less than \$1 million. At one stage the parties reached agreement in principle for the sale of the business. A letter, to this effect, was sent to the appellants recording that an agreement had been reached between the parties. The letter also confirmed the appellants would provide a comfort letter, from their bank, guaranteeing the finances. In return the respondents agreed that, upon receipt of the letter they would terminate negotiations with the third party, with a view to concluding an agreement with the plaintiffs. The respondent responded by confirming a deal had been clinched, subject to contract. But, to the appellant's surprise, they received a letter, from the respondents, a few days later stating they had decided to sell the company to a third party. The appellants brought an action for damages against the respondents for, breach of contract for an amount of \$1 million. They relied upon an oral

¹⁷⁵ (1989) 1 Q.B. 433, 439.

¹⁷⁶ *Inter Foto Picture Library Ltd v Stilleto Visual Programme Ltd* (1989) 1 Q.B. 433, 439.

¹⁷⁷ (1992) 2 AC 128.

agreement, collateral to the negotiations which preceded the purchase of the company and the land it occupied `subject to contract'.

The consideration for this oral agreement was twofold, firstly, the Watfords agreeing to continue the negotiations and not to withdraw and, secondly, their providing the comfort letter from their bankers in the terms requested.

Furthermore, the justification for the implied term in paragraph 5 of the amended statement of claims was that, in order to give the collateral agreement `business efficacy', the respondents were obliged to `continue to negotiate in good faith'.

The law, as it stood then, is contained in a dictum of Lord Denning MR in the case of *Courtney and Fairbairn Ltd v Talaini Brothers (Hotels) Ltd* (1975) VLR 297, where Lord Denning MR said, at pp 301-302:

"If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law. I think we must apply the general principle that where there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract."

Consequently, the issues to be decided included: Whether an agreement to negotiate in good faith, if supported by consideration, is an enforceable contract? Lord Ackner held: *"While accepting that an agreement to agree is not an enforceable contract, the Court of Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like, an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty."*

The court sought to answer the legal question by begging the following question: How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations?

Lord Ackner replied by stating:

"The answer suggested depends upon whether the negotiations have been determined in good faith. However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations."

He goes on to state:

"A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgement, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper-reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content." ¹⁷⁸

Since *Walford v Miles* was decided there have been some signs of a more sympathetic judicial stance towards good faith (see *Timeload Ltd v British Telecommunications p/c* (1995) EMLR 459, *Philips Electronique Grand Publique SA v British Sky Broadcasting Ltd* (1995) EMLR 472, *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 Build LR 42, 67-68, and *Re Debtors* (Nos 4449 and 4450 of 1998) (1999) 1 ALL ER (Comm) 149, 157-158).

The interpretation of the good faith requirement in the *Unfair Terms in Consumer Contracts Regulations* 1994, received the attention of the House of Lords in the case of *Director General of Fair Trading v First National Bank*. ¹⁷⁹ This case concerned a term in a loan agreement issued by a bank. The term provided that if the consumer defaulted on an instalment, the full amount of the loan became payable. This is not unusual, but, the term to which exception was taken, and about which the Director General received complaints, was to the effect that interest on the outstanding debt would remain payable, even after a judgement of the court. Thus, a court might order the consumer to pay off the debt by specified instalments, but, the effect of the contract was that interest would continue to accrue, at the contractual rate, while the instalments were being paid.

On appeal the Court of Appeal concluded that the term created 'unfair surprise' and did not meet the requirement of 'good faith'. Subsequently the House of Lords disagreed. Lord Bingham viewed good faith, in this context, as follows:

"The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously take advantage of the consumer's necessity. Indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position, or any other

¹⁷⁸ *Walford v Miles* (1992) 2 AC 128 at 137-145. Although Lord Ackner did not state expressly that in no circumstances would an English court recognize the validity of a duty of good faith, he nevertheless, in robust language, suggested that he did not envisage any role for a doctrine of good faith in English law. McKendrick, however, suggests that, that does not mean that good faith has no impact at all on English contract law.

¹⁷⁹ (2001) UKHL 52; (2002) 1 A.C. 481, (12).

factors listed in or analogous to those listed in Schedule 2 of the Regulations."

Referring to Lord Mansfield's dictum in the eighteenth century and the traces of good faith thereafter, Lord Bingham claims that traces of good faith can still be found in English Law. Turning to the application of the doctrine of good faith in English Law, Lord Bingham remarked:

"..... it is important that the English courts proceed cautiously and only recognize the existence of a doctrine of good faith where they are convinced that the harm that it will do (in terms of the uncertainty that it will bring) is outweighed by the advantages that will be brought by the open articulation of a doctrine of good faith."

Lord Steyn, in the same case, while agreeing with Lord Bingham, took the view that 'good faith' was concerned with substance, as well as procedure and will, therefore, overlap with the test of 'significant imbalance'. He continues to state:

"The examples given in Sched 3 convincingly demonstrate that the argument of the bank that good faith is predominantly concerned with procedural defects in negotiating procedures cannot be sustained. Any purely procedural or even predominantly procedural interpretation of good faith must be rejected." ¹⁸⁰

10.2.1.2.3 Legal Opinion

The principle of fairness, in the English Law of Contract, has its roots in the policy of the Chancery, dating back to 1770. Transactions deemed to be excessively harsh or unfair were regularly set aside. ¹⁸¹

Fairness in contract found extensive application in the English courts during the eighteenth century, as the courts, more and more assumed a protective and regulative role. ¹⁸² The rationale for the adoption of this principle in the law of contract is said to stem from the protection of public interest, wherein the courts were out to protect the weaker contracting parties from exploitation by the stronger parties to the contract, often the monopolies. ¹⁸³

In more modern times, the principle of good faith and unconscionable-ness founded, upon

¹⁸⁰ *Director General of Fair Trading v First National Bank plc* (2001) UKHL52; (2002) 1 A.C. 481, (12). The author Stone (2002) 252 agrees with Lord Steyn's approach as it makes 'significant imbalance' an element within an overall test of 'good faith'.

¹⁸¹ Atiyah *The Rise and fall of Freedom of Contract* (1979) 147. See also the cases of *Carter v Boehm* (1766) 3 Burr. 1905, 1910.

¹⁸² Atiyah (1979) 220-221.

¹⁸³ Atiyah (1979) 339-340.

the principles of equity and fairness, emerged in English law of contract, where-upon the English courts may grant relief against anything that is unfair, or inequitable in contract. ¹⁸⁴

But, while English contract law is strongly influenced by the principles of good faith, English law, to date, does not recognise the existence of a doctrine of good faith as a separate defence. ¹⁸⁵

There is however, division amongst English legal writers on the question of whether good faith ought to become a fully fledged defence or not. ¹⁸⁶ The primary objection to the full scale introduction of good faith as an independent defence is based upon the reasoning that it "*cuts against the essentially individualistic ethic of English contract law*", in which "*freedom of contract is a fundamental philosophy*" that encourages contractual autonomy. ¹⁸⁷

The primary reason advanced for its introduction as a fully fledged defence is based on achieving fair results, leaving judges to do justice between contracting parties. ¹⁸⁸

The English courts have also, per the judges, had differences of opinion on whether good faith ought to be recognised as an independent, free floating defence. Certain courts advocate that English law has committed itself to no such overriding principle, but, may use good faith on a piecemeal basis. ¹⁸⁹

But, there have been some signs of a more sympathetic judicial stance towards good faith. ¹⁹⁰ However the situation has, more recently, been summed up by Lord Bingham, in the

¹⁸⁴ Atiyah (1979) 339-340.

¹⁸⁵ McKendrick *Contract Law Text, Cases and Materials* (2003) 533 Beatson and Friedman *Good Faith and Fault in Contract Law* (1995) 14-15.

¹⁸⁶ Beatson and Friedman "Good faith in Contracts" `Revisited' (1997) *CLR* 111; Brownsword *Contract Law: Themes for the Twenty First Century* (2000) Paras 5.3-5.9; See also Chitty *Chitty on Contracts* (1994) Para 1-024 for the doctrinal dispute over the notion of good faith in English Law.

¹⁸⁷ Brownsword "Good faith in Contracts" `Revisited' (1997) *CLR* 111.

¹⁸⁸ Brownsword *Contract Law: Themes for the Twenty First Century* (2000) Paras 5.3-5.9; See also Chitty *Chitty on Contracts* (1994) Para 1-023 who advocates the introduction of good faith as a defence based on the fairness it will bring in its application.

¹⁸⁹ *Interfoto Picture Library Ltd v Stiletto Visual Programme Ltd* (1989) 1 QB 437, 429. See also the approach of Lord Achnar in the case of *Walford v Miles* (1992) 2 AC 128 in which he found, due to the uncertainty which negotiations between contracting parties brings, good faith as a defence is not the answer.

¹⁹⁰ See *Timeload Ltd v British Telecommunications p/c* (1995) EMLR 459, *Philips Electronique Grand Publique SA v*

case of *Director General of Fair Trading v First National Bank*,¹⁹¹ in which the House of Lords per Lord Bingham stated the English judicial approach towards the use of the doctrine of good faith in English law as follows:

"..... it is important that the English courts proceed cautiously and only recognize the existence of a doctrine of good faith where they are convinced that the harm that it will do (in terms of the uncertainty that it will bring) is outweighed by the advantages that will be brought by the open articulation of a doctrine of good faith."

Notwithstanding the difference of opinion between the English legal writers and the reluctance of the court to develop principles that will allow direct control over unfair contracts, Legislative intervention, in the form of the *Unfair Terms in Consumer Contracts Regulation*,¹⁹² was introduced. In terms of the legislation, good faith is used as a basis to bring about fairness. Courts are, therefore, authorized to set aside terms contrary to the requirement of good faith, which cause "a significant imbalance in the party's rights and obligations under the contract to the detriment of the consumer."¹⁹³

10.2.1.3 UNITED STATES OF AMERICA

10.2.1.3.1 Legal Writings

The American law of contract, as was stated earlier, was profoundly influenced by its English counterpart. Spurred by the English influence, the United States of America inherited, from English law, the principles of equity governing contracts, especially in instances where a degree of bargaining unfairness was present, in addition to a finding of unfair terms. In this regard similar equity courts were established in the United States of America.¹⁹⁴

Good faith was seen as a "*safety valve*" employed by judges to ensure a minimum level of fairness in contracting.¹⁹⁵

British Sky Broadcasting Ltd (1995) EMLR 472; *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 Build LR 42, 67-68, and *Re Debtors* (Nos 4449 and 4450 of 1998) (1999) 1 ALL ER (Comm) 149, 157-158.

¹⁹¹ (2001) UKHL 52; (2002) 1 A.C. 481, (12).

¹⁹² S1 1999/2083.

¹⁹³ Regulation 5(1) and Regulation 8(1) of the *Unfair Terms in Consumer Contracts* 1999/2083.

¹⁹⁴ Hillman *The Richness of Contract Law* (1997) 130-131.

¹⁹⁵ Summers "The General Duty of Good Faith - Its Recognition and Conceptualization" 67 *Cornell.L.Rev.* 810, 812 (1982) quoted in Hillman (1997) 143-144.

The historical justification for recognizing good faith in contract stems from the fact that, it is generally accepted in all legal systems, that ethics and fairness in law form part of contract.¹⁹⁶ This stems from the fact that, historically, public policy was developed, by judges, on the basis of their perception that a great need existed to protect the public welfare against unfair contracts or contractual terms leading to unreasonable hardship.¹⁹⁷

But it was, especially, the advent and the increased use of standard forms, increasing the power of the promiser over the contractual relationship, and the lack of the promisee's understanding of the meaning of some of the terms or provisions of the written contract, that forced the courts and the legislature in the United States of America to step in and control abuse in the contracting process.¹⁹⁸

At the forefront of the intervention was the expansion of the concepts of good faith, fair dealing and unconscionable-ness.¹⁹⁹ The use of the doctrine of good faith was said to involve "*the determining of the reasonable expectations of the contracting parties*",²⁰⁰ by taking into account the effect of the performance decisions upon the expectations of the other contracting party.²⁰¹

Reasonable expectations, on the other hand, are premised upon community-based standards which have the affect that there is a shift from "*extreme individualism of the late nineteenth and early twentieth centuries to societal norms and values.*"²⁰² Equitification of modern contract has become the order of the day in America. This can be seen especially in private house sales, government contracts, which is said to add some certainty to these types of contracts.²⁰³ Apart from the reasonable expectations theory as a motivating factor for the expansion of the doctrine of good faith or the principles of fairness, other motivating

¹⁹⁶ Newman 19 *Hastings L.J.* 147 (1967) quoted in Hillman (1997) 129.

¹⁹⁷ Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 153-155; Hunter *Modern Law of Contracts* (1999-2000) 10-16ff.

¹⁹⁸ Dimatteo (2001) 153-155; Hunter (2001) 144.

¹⁹⁹ Dimatteo (2001) 153-155; Hunter (2001) 144.

²⁰⁰ Hillman "An Analysis of the Cessation of Contractual Relations", *Cornell Law Review* 68 (1983) 617, 645 quoted Dimatteo (2001) 153-155; Hunter (2001) 144.

²⁰¹ Dimatteo (2001) 153-155; Hunter (2001) 144.

²⁰² Dimatteo (2001) 153-155; Hunter (2001) 144.

²⁰³ Hunter (1999-2000) 10-18 to 10-24.

factors include, the demand for justice based upon the feeling of what is fair and unfair. ²⁰⁴

The fact that parties enter into one-sided and often unfair contracts due to their lack of sophistication, the use of standard form contracts drawn up by one of the contracting parties, the unequal bargaining positions of the parties and to imprudent judgement by, especially, the weaker party, has forced the courts to come to their rescue and protect them in the interest of public welfare. ²⁰⁵

The use of equitable principles such as good faith or fairness when interpreting and enforcing, or, sometimes, not enforcing, contractual terms or provisions, is seen to be a fulfilment of the court's duty to administer justice, and, in so doing, to ensure that both contracting parties act justly towards each other and avoid the advancement of self-interest. ²⁰⁶

On the other hand, the promotion of fairness and justice in contract, with contract law being part of the social institution, mirrors a reflection of the public conception of justice. For that reason, *Rawls* ²⁰⁷ wrote that the Western canon of fairness dictates that contracts must not only reflect the free will of the contracting parties, but, they must also satisfy the public conception of justice. ²⁰⁸

This entails that the contracting parties should deal in good faith. Furthermore, fair dealing should result in a fair deal or fair agreement. ²⁰⁹

In 1979, the American Law Institute promulgated Section 205 of the *Restatement (Second) of Contracts*, which set forth an obligation of good faith performance in every contract namely:

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its

²⁰⁴ Dimatteo (2001) 150.

²⁰⁵ Dimatteo (2001) 157.

²⁰⁶ Dimatteo (2001) 160-161.

²⁰⁷ "Fairness to Goodness", *Philosophical Review* 84 (1975), 536, 543.

²⁰⁸ Rawls *Philosophical Review* 84 (1975), 536, 543 quoted by Dimatteo (2001) 162.

²⁰⁹ Dimatteo (2001) 162-165.

enforcement." ²¹⁰

Although no definition is given for the term good faith as such, the commentary to Section 205 of the *Restatement (Second) of Contracts* provides, *inter alia*:

"Good faith performance or enforcement of a contract excludes a variety of type of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." ²¹¹

The legislative intervention, as discussed hereinbefore, is said to have heralded in a new spirit in the law of contract in the United States of America. ²¹²

It is general policy of the Code to utilize equitable principles in the furtherance of commercial standards and good faith. In turn, the courts should ascertain the legitimate business aims of the parties and take into consideration the customs and expectations of the business community. ²¹³ All contracts are expected to be equitably reformed to include the obligations of "good faith" and unconscionability. ²¹⁴

What has taken place as well, in the process, is that there has been *"a loosening of the grip of the formal requirements and the rejection of a purely formalist approach."* Good faith is generally implied into all contracts in the United States of America. According to *Dimatteo*, ²¹⁵ the introduction of good faith has had profound ramifications for the classical theory's fundamental premise of freedom of contract. ²¹⁶

The practical effect of the introduction of good faith in contract, in the United States, has been that the courts, on an ad hoc basis, pursue an inquiry into contract with an increased focus on justice and fairness. There has also, simultaneously, been a general shift in judicial attitude away from the sanctity of contract doctrine, with "conscience" becoming an

²¹⁰ S205 *Restatement (Second) of Contracts* (1979).

²¹¹ Commentary to S205 *Restatement (Second) of Contracts* (1979).

²¹² Dimatteo (2001) 166-167.

²¹³ Dimatteo (2001) 167.

²¹⁴ Dimatteo (2001) 167.

²¹⁵ Dimatteo (2001) 168.

²¹⁶ Dimatteo (2001) 172.

important influence in contract law.²¹⁷ One legal commentator has stated the position as follows:

*"Though the principle of sanctity of contract remains strong, relational elements are on the rise (resulting in) a major shift towards relationalism and a recognition of equitable considerations."*²¹⁸

Parties are generally expected to observe a higher standard of fairness in their dealings. Society requires from contracting parties a greater degree of justice, fairness and equity.²¹⁹ In this new era, good faith is seen as the legal reflection of the practises of honest and fair dealings.²²⁰

10.2.1.3.2 Case Law

The English contractual law influence, especially the principles of equity, which had its origin in the equity courts, under the auspices of the Lord Chancellor, in England in the sixteen hundreds, profoundly influenced the law of contract in American Law, so much so, that, still in 1926, in the matter of *Cobb et al v Whitney et al*,²²¹ the court referred to the Chancery jurisprudence of meting out "equal and exact justice". The court emphasized the jurisdiction of courts of equity, which rests upon the fundamental principles of right and fair dealing and which had as its aim "*justice between man and man*" and the protection of "*the innocent and blameless*."²²²

The fairness and reasonableness of contract within the notion of good faith, has formed the subject for decision-making in the American Courts over a lengthy period of time. The Supreme Court of the United States, as far back as 1873, in the case of *Railroad Company v Lockwood*,²²³ was asked to pronounce upon a contract involving a railroad company, which presented a standardized contract containing a waiver of all claims for damages or injuries arising from the loading, transporting and unloading of cattle. The court was, consequently, tasked to pronounce on the validity of such an exemption.

²¹⁷ Dimatteo (200) 172.

²¹⁸ Nassar (1995) 234 quoted in Dematteo (2001) 180.

²¹⁹ Dimatteo (2001) 181.

²²⁰ Dimatteo (2001) 182.

²²¹ 124 Okla 188, 255, 566, 1013 (1926).

²²² *Cobb et al v Whitney et al* 124 Okla 124 Okla 188, 255, 566, 1013 (1926).

²²³ 84 U.S. 357, (1873).

The court considered a host of cases involving common carriers, including, *inter alia*, *Dorr v The New Jersey Steam Navigation Company and Stanford*, 136 (1850); *Smith v New York Central Railroad Company* 29 Barbour, 132 (1859); *Express Company v Kountze Brothers* 8 ID 342, 353 (1851). Consequently, the court found that, depending on the status and relative position of the parties, the conditions of such an agreement would be rendered void. In this regard, the court held:

"Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness."

The court continues:

"The proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law." ²²⁴

Fairness and justice also played a crucial role in the case of *Wood v Lucy, Lady Duff-Gordon*, ²²⁵ in which Cardozo J utilized the equitable principles by imposing a duty of reasonable efforts in order to salvage the contract.

Following thereupon in using equitable principles to decide the fairness of contract, Cardozo J, in the case of *Jacob and Youngs Inc v Kent*, ²²⁶ used substantial performance as "*an instrument of justice*" based on the good faith of the contractor.

The transfiguration of the English Chancery Court's equitable principles to American Jurisprudence was made obvious in the previous mentioned case of *Cobb v Whitney*. ²²⁷

One of the salutary principles of chancery jurisdiction is that it has no immutable rules. It was the keeper of the king's conscience to do investigations, and regardless of the narrow and technical rules of law, mete out equal and exact justice. The Lord Chancellor became the head of these ecclesiastical or chancery courts, and thus the jurisdiction of courts of

²²⁴ *Railroad Company v Lockwood* 84 U.S. 357, (1873).

²²⁵ 222 N.Y. 88, 118 N.E. 214 (1917).

²²⁶ 230 N.Y. 239; 129 N.E. 889 (1921).

²²⁷ 124 Okla. 188 (1926).

equity rested upon the fundamental principles of right and fair dealing; its creed was justice between man and man.²²⁸

The fore stated heralded in methods of overcoming the formal requirements of contract and to strive for reasonableness and fairness in contract.

In the case of *Loblaw Inc v Warren Plaza Inc*,²²⁹ the court also held that, based on equitable principles, the policy of the courts is to construe covenants not too narrowly and to modify or void terms that they view as unfair.

In the case of *Henningsen v Bloomfield Motors Inc*,²³⁰ the court, relying upon *Corbin on Contracts* (1950) 5128 P.188, suggests that "courts cannot fail to be influenced by any equitable doctrines that are available". It is, especially, in instances involving unconscionable provisions in pre-printed, standardized contracts that principles of fairness and equity come into play. For that reason, the court held that:

"Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned."²³¹

The Supreme Court of the United States in the case of *International Ladies' Garment Workers' Union, AFL-Cio v National Labour Relations Board et al*,²³² recognized the need for fundamental fairness, based upon the good faith between the parties in collective bargaining agreements in a labour dispute.

The same principle was previously adopted in the case of *Lewis v Benedict Coal Corp*,²³³ in which the court held:

"There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with others affairs."²³⁴

²²⁸ *Cobb v Whitney* 124 OLa. 188 (1926).

²²⁹ 163 Ohio St. 581, 127 N.E. 2d 754 (1955).

²³⁰ 161 A. 2d 69 N.J. (1960).

²³¹ *Henningsen v Bloomfield Motors Inc* 161 2d 69 N.J. (1960).

²³² 366 U.S. 731, 81 S.Ct 1603 (1961).

²³³ 361 U.S. 459 498 (1960).

²³⁴ *Lewis v Benedict Coal Corp* 361 U.S. 459, 498 (1960). See also *Riley v National Federation of the Blind of North California* 487 U.S. 781 (1988) concerning fund raising contracts.

The courts, in applying the equitable principles, have also adopted and applied the reasonable expectations test. In this regard, the issue is not what the promisor willed, but rather, what the promisee reasonably expected. The test has been used extensively to the detriment of insurance companies. In *Gerhardt v Continental Insurance Company et al*,²³⁵ the court held that reasonable expectation is dependent upon the good faith of the company and its representatives and they, in turn, are under a correspondingly heavy responsibility to the employees.

With the advent of the *Uniform Commercial Code*, the rules of good faith and fair dealings have transformed the contractual relationship between the contracting parties. The notion of good faith has impacted upon contracts from the negotiation stage, to the formation stage and through to the performance and termination stage, where applicable. The Supreme Court of New Jersey, in *Krigler v Romain*,²³⁶ recognized that the standard of conduct contemplated by the provision of the *Uniform Commercial Code*, authorized courts to decline to enforce unconscionable contracts, contrary to good faith. Honesty in fact, and observance of fair dealing became important criteria.

The demand for good faith in the performance of an agreement, under the Uniform Commercial Code, was also recognized in *Feld v Henry S. Levy and Sons Inc.*²³⁷ The commercial rule embodied in this act, according to the court, is founded upon the principle that impliedly, even when not expressed, the contracting parties bind themselves to use reasonable diligence, as well as good faith, in their performance of the contract. Therefore, in terms of the *Uniform Commercial Code*,²³⁸ every contract of this type imposes an obligation of good faith in its performance.²³⁹

Good faith, as a requirement in a security agreement involving an acceleration clause, forms the basis of the court's reasoning in the case of *Brown et al v Avemco Investments Corporation*.²⁴⁰ In this case the court, in relying on the *Uniform Commercial Code*, held:
"Section 1-203 of the U.C.C. imposes an obligation of good faith on the performance or enforcement of every

²³⁵ 48 N.J. 291, 225 A.2d 328 (1966).

²³⁶ 58 N.J. 522, 279 A.2d 640 (1971).

²³⁷ 37 N.Y. 2d 466, 335 N.E. 2d 320, 373 N.Y.S. 2d 102 (1975).

²³⁸ S2-306 of the *Uniform Commercial Code*.

²³⁹ 603 F.2d 1367 (1979).

²⁴⁰ *Brown et al v Avemco Investments Corporation* 603 F.2d 1367 (1979).

contract or duty within the Code. Section 1.208 further defines and applies the good faith obligation to options to accelerate at will and requires that the accelerating party "in good faith believes that the prospect of payment or performance is impaired." ²⁴¹

An implied covenant of good faith and fair dealing was also recognized in *K.M.C. Co, Inc v Irvine Trust Company*, ²⁴² which concerned a financial agreement in which it was alleged that one of the contractants was in breach of the said agreement. The court, when considering the affect of the *Uniform Commercial Code on Contract*, concluded:

"The application of principles of good faith and sound commercial practice normally calls for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement." ²⁴³

In *Darner Motor Sales Inc v Universal Underwriting Insurance Company* ²⁴⁴ the court also enunciated the reasonable expectations test as formulated by the Second Restatement. ²⁴⁵

But the court held:

"Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectations." ²⁴⁶

Reasonable expectation, so the court held, is founded upon the trust and good faith the parties have for each other.

The Supreme Court of the United States in *Carnival Cruise Lines Inc v Shute*, ²⁴⁷ also recognized the need for a "fundamental fairness" inquiry when courts are tasked to review clauses in standard form contracts offered, on a 'take-or-leave' basis, by a party with stronger bargaining power to a party with weaker power. In *White et al v Continental Insurance Company*, ²⁴⁸ following the dictum in *McCullough v Golden Rule Ins Co* 789 P.2d 855 WYO (1990), the court concluded that:

²⁴¹ S1-203 of the *Uniform Commercial Code*.

²⁴² 757 F. 2d 752 (1985).

²⁴³ *K.M.C. Co, Inc v Irvine Trust Company* 757 F. 2d 752 (1985).

²⁴⁴ 140 Ariz. 383, 682 F.2d 388 (1984).

²⁴⁵ S211 of the *Second Restatement*.

²⁴⁶ *Darner Motor Sales Inc v Universal Underwritings Insurance Company* 140 Ariz. 383, 682 P.2d 388 (1984).

²⁴⁷ 499 U.S. 585 (1991); See also *Brommer v Abortion Services of Phoenix* 840 P.2d 1013, 1015 Ariz. (1992).

²⁴⁸ 831 F.Supp 1545 (1993).

"..... The duty of good faith and fair dealing was an implied term of all insurance contracts because of the special relationship between the parties to this type of contract."

More recently, in the case of *Cantrell-Waind and Associates Inc v Guillaume Motorsports Inc*,²⁴⁹ the court, with regard to implied duty of good faith and fair dealing, held:

"A party has an implied obligation not to do anything that would prevent, hinder, or delay performance We hold that the circuit court erred in failing to recognize that a duty of good faith and fair dealing was included in the contract."²⁵⁰

10.2.1.3.3 Legal Opinion

The United States of America, by adopting principles of equity in contract, has been deeply influenced by the English legal system, commencing with the role of the Chancellor in the Equity Courts.²⁵¹

The degree of bargaining power, often resulting in an imbalance between the contracting parties, had as a consequence unreasonable and unfair results. For that reason, the American legal writers and the courts alike identified equitable principles as means to address unfairness and unreasonableness in contract. One way of dealing with this aspect was to seek a solution beyond the common law defence of, inter alia, fraud, misrepresentation, public policy etc. In so doing, unconscionability and good faith were identified as interventions to stem the tide against the increase of unfair contracts or contractual terms, leading to unreasonable hardship.²⁵² Good faith, in itself, was seen as a "safety valve", employed by the judges to ensure a minimum level of fairness in contract.²⁵³

²⁴⁹ *White et al v Continental General Insurance Company* 831 F.Supp 1545 (1993).

²⁵⁰ *Cantrell-Wained and Associates Inc v Guillaume Motorsports Inc* 62 Ark App 66, 968 S.W. 2d 72 (1998).

²⁵¹ Hillman *The Richness of Contract Law* (1997) 130-131. For the recognition of the role of the Chancellor see *Cobb et al v Whitney et al* 124 Okla. 188, 255 P.566, 1013 (1926).

²⁵² Dimatteo *Equitable law of Contracts: Standards and Principles* (2001) 153-155; Hunter *Modern Law of Contracts* (1999-2000) 10-16ff; For case law see *Railroad Company v Lockwood* 84 U.S. 327 (1873) who as far back as 1873 strived to attain fairness and reasonableness in contract. See also *Wood v Lucy, Lady Duff-Gordon* 222 N.Y. 88, 118 N.R. 214 (1917); *Jacob and Youngs Inc v Kent* 230 N.T. 239, 129 N.E. 889 (1921).

²⁵³ Summers "The General duty of Good Faith - Its recognition and conceptualization" 67 *Cornell L. Rev* 810, 812 (1982) quoted in Hillman (1997) 143, 144. For case law see *Henningsen v Bloomfield Motors Inc* 161 A. 2d 69 N.J. (1960); *International Ladies' Garment Workers' Union AFL-Cio v National Labour Relations Board et al* 366 U.S. 731, 81, S.Ct. 1603 (1961); *Lewis v Benedict Coal Corp* 361 U.S. 459, 498 (1960).

The doctrine of good faith was said to include the following namely: "*The determining of the reasonable expectations of the contracting parties in affecting their performance decisions*"²⁵⁴ and "*the demand for justice based upon the feelings of what is fair and unfair.*"²⁵⁵ The motivating factors for the latter include the lack of sophistication, the negative influence of the contracting parties and the imprudent judgement, usually, by the weaker party. It has often been suggested that public welfare demands that courts come to the rescue of the weaker party.²⁵⁶

In order to satisfy the public conception of justice in contract, legislative intervention was introduced in 1979, when the American Law Institute promulgated Section 205 of the *Restatement (Second) of Contracts*, which set forth an obligation of good faith performance in every contract.²⁵⁷ The type of conduct expected during good faith performance, is measured against community standards of fairness or reasonableness.²⁵⁸

The legislative intervention has been widely welcomed by the legal writers, as well as the judiciary.²⁵⁹

The *Uniform Commercial Code* also previously intervened, by guiding the courts to decline to enforce unconscionable contracts and observe good faith, honesty and fair dealing.²⁶⁰

With legislative intervention, it is believed that there has been a loosening of the grip which formalism has always enjoyed. Courts can thus interfere with contracts and contractual provisions which are unfair, unreasonable or unconscionable. The classical theory's fundamental principles of freedom of contract and the sanctity of contract have been

²⁵⁴ Dimatteo *Equitable law of Contracts: Standards and Principles* (2001) 153-155; Hunter *Modern Law of Contracts* (1999-2000) 10-16ff; For case law see *Gerhardt v Continental Insurance Company et al* 48 N.J. 291, 225 A.2d 328 (1966); *Darner Motor Sales Inc v Universal Underwriters Insurance Company* 140 Ariz. 383, 682 P.2d 388 (1984).

²⁵⁵ Dimatteo *Equitable law of Contracts: Standards and Principles* (2001) 153-155; Hunter *Modern Law of Contracts* (1999-2000) 10-16ff; for case law see *Kiegler v Romain* 58 N.J. 522, 279 A, 2d 640 (1971).

²⁵⁶ Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 161.

²⁵⁷ S205 *Restatement (Second) of Contracts* (1979).

²⁵⁸ Dimatteo *Equitable Law of Contracts: Standards and Principles* (2001) 164.

²⁵⁹ S2-306 of the *Uniform Commercial Code*.

²⁶⁰ Commentary to S.205 *Restatement (Second) of Contracts* (1979).

substantially inhibited with the introduction of good faith. ²⁶¹

The effect of the introduction of good faith in contractual dealings has further resulted in a greater standard of fairness being observed in the dealings between contracting parties, which satisfies societal demands for greater justice, fairness and equity. ²⁶²

10.2.2 The Doctrine of Unconscionable-ness

10.2.2.1 SOUTH AFRICA

10.2.2.2.1 Legal Writings

The doctrine of unconscionable-ness, despite having its roots in Roman law, and, despite South African contractual law being greatly influenced by Roman law, has never become an independent defence in the South African law of contract. ²⁶³

Unconscionable-ness is, however, a concept used by the South African writers, in a number of ways. In this regard *Van der Merwe et al* ²⁶⁴ described it as a concept relative, mainly, to the conduct of one of the contracting parties. *Lubbe and Murray*, ²⁶⁵ on the other hand, describe it as 'unacceptable conduct in contracting' or an 'unfair act in attempting to enforce a contract', and the like. Aronstam described it as the abuse of disproportionate, or unequal, bargaining power. ²⁶⁶ But, whatever description is given by the legal writers, its application has been very limited in South Africa. What is certain, however, is its application focuses on the abuse of weaker bargaining power contracting parties, who are poor and ill educated who are in need of the goods and services, but, upon who, unfair terms and conditions are imposed. ²⁶⁷

²⁶¹ Dimatteo *Equitable law of Contracts: Standards and Principles* (2001) 168. For case law see *Brown et al v Avwemco Investments Corporation* 603 F.2d 1367 (1979).

²⁶² Section 1-2-3 of the *Uniform Commercial Code*. For case law acknowledging the criteria see *Brown et al v Avemco Investments Corporation* 603 F.2d 1367 (1979); *Feld v Henry S. Levy and Sons Inc* 37 N.Y. 2d 466 335 N.E. 2d 320, 373 N.Y.S. 2D 102 (1975); *K.M.C. Co Inc v Irving Trust Company* 757 F. 2d 752 (1985).

²⁶³ Aronstam "Unconscionable Contracts: The South African Solution?" (1979) (42) *THRHR* 26, Lubbe and Murray *Farlam and Hathaway Contract, Cases, Materials Commentary* (1988) 388.

²⁶⁴ *Contract: General Principles* (2003) 1117; Lubbe and Murray *Farlam and Hathaway Contract: Cases Materials Commentary* (1988).

²⁶⁵ *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 388.

²⁶⁶ Aronstam (1979) (42) *THRHR* 22.

²⁶⁷ Aronstam (1979) (42) *THRHR* 22.

Legislative intervention ²⁶⁸ has in the past assisted in providing relief where unconscionable terms and conditions have been put into a contract leading to harsh results. ²⁶⁹ Despite the protective attempts by parliament, the results have not been overwhelmingly positive, in that, the legislation passed did not provide for a general criterion of control. Furthermore, parliament did not give the courts a controlling power to strike down an unconscionable term in a contract, entered into in respect of any transaction, irrespective of its nature, content or subject-matter. ²⁷⁰

In so far as the common law is concerned, *Aronstam* ²⁷¹ holds the view that limited preventative measures have been instituted to prevent harm being done, through the exploitation of persons having weak bargaining power. Restrictive practises have been adopted by the courts inter alia, by applying certain rules of interpretation of contracts, to prevent such exploitation. Where a harsh term in a contract is ambiguous, the courts have applied the *contra proferentem* rule to relieve the weak party from its oppressive provisions. ²⁷²

Aronstam ²⁷³ is particularly critical of what he terms "*a haphazard, random, fragmented approach which he believes will provide no solution to the present problem.*"

Aronstam advocated then, that, because the South African courts are extremely reluctant to extend the principles of the common law to satisfy those who advocate a jurisdiction based on principles of equity, to deal with problems caused by unconscionable contractual conduct, the legislature should step in to create such jurisdiction for the courts. ²⁷⁴

The *South African Law Commission*, ²⁷⁵ in 1998, recognised that there are contracts, in

²⁶⁸ *Hire-Purchase Act 1942, The Limitation and Disclosure of Finance Charges Act 1968, The Sale of Land on Instalments Act 1971, Regulations under the Price Control Act 1964, The Rent Control Act 1976, The Conventional Penalties Act 1962.*

²⁶⁹ Aronstam (1979) (42) *THRHR* 26.

²⁷⁰ Aronstam (1979) (42) *THRHR* 26.

²⁷¹ Aronstam (1979) (42) *THRHR* 26.

²⁷² Aronstam (1979) (42) *THRHR* 26-27.

²⁷³ Aronstam (1979) (42) *THRHR* 27.

²⁷⁴ Aronstam (1979) (42) *THRHR* 42.

²⁷⁵ The South African Law Commission's report on *Unreasonable Stipulations in Contracts and the Modification of Contracts* 47 (1998) 58.

South Africa, which are unfair, unreasonable, unconscionable or oppressive and which may arise when the agreement is executed or when its terms are enforced. Consequently, the commission recommended that South Africa needed to enact legislation against contracts of unfairness, unreasonableness, unconscionable-ness or oppression.

Despite the commissions' recommendation, the position has not changed much in the South African Law of Contract. In fact, as recently as 2003, *Hawthorne*²⁷⁶ pleads for the introduction of a doctrine of relief against unconscionable transactions.

10.2.2.2.2 Case Law

The South African courts, throughout the years, have generally adopted the view that the courts will not enquire into the conscionable-ness, or unconscionable-ness, of contractual terms, however harsh they may be. In fact, the courts have, on many occasions, refused to apply considerations of equity to deal with harsh and unconscionable contracts. The reasons thereof are enunciated in various dicta.

In one of the first South African decisions in which the court referred to it, the court neither was in favour, nor prepared to interfere with the fairness or unconscionable-ness of contractual terms. Innes CJ in *Wells v South African Alumenite Company*²⁷⁷ commented as follows:

*"No doubt the condition is hard and onerous, but if people sign such conditions they must, in the absence of fraud, be held to them "*²⁷⁸

In a later judgement, in the case of *Techni-Pak Sales (Pty) Ltd v Hall*,²⁷⁹ Colman J viewed the principle with great scepticism when he stated:

*"If the courts are to interfere (with contracts) on grounds of equity alone in contractual bargains, where does the process end? Some of the dicta seem to suggest that we have here the thin end of a wedge whose exact shape and full dimensions remain undefined. A few more taps, maybe, and the granite concept of sanctity of contract will be shattered."*²⁸⁰

²⁷⁶ "Public Policy and Micro Lending - Has the unruly horse died? 2003 (66) *THRHR* 116 118.

²⁷⁷ 1927 AD 69, 73.

²⁷⁸ *Wells v South African Alumenite Company* 1927 AD 69, 73.

²⁷⁹ 1968 (3) SA 231 (W) 238.

²⁸⁰ *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 238.

The freedom and sanctity of contract, at the expense of unconscionable-ness in contract, continued to roll from the lips of our judges, more particularly in the case *Oatorian Properties (Pty) Ltd v Maroun*,²⁸¹ in which Potgieter JA stated: *Once there is such a breach, the materiality of the breach is irrelevant and the court will not enquire into the conscionable-ness or unconscionable-ness thereof. (See Human v Rieseberg 1922 TPD 157 at P163).*"²⁸²

Sometime later, Jansen JA, in the case of *Paddock Motors (Pty) Ltd v Igesund*,²⁸³ supported the principle enunciated in *Rashid v Durban City Council* 1975 (3) SA 920 (D) at 927 B-D, in which Fanwin J, stated the position to be: *"Mr Mendelow was able to refer me to no case in which it has been held that the exception doli can successful be pleaded merely because one part to a contract has exercised, as against the other party, a right conferred upon him by that contract. To do that would, in my opinion, be to exercise a jurisdiction to regulate contractual relationships merely on the ground that the court considered that one party has driven a hard, harsh bargain, and I do not think that our law confines any such jurisdiction upon our courts, whatever may be the position in other countries whose law is, in whole or in part, derived from the civil law."*²⁸⁴

The Appellate Division, in 1982, in the case of *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd*,²⁸⁵ relied on the dictum of *McCullough and Whitehead and Co* 1914 AD 599 which provides: *"Now that the document was one-sided and harsh admits of no doubt; but I am not aware of an principle of our law by which, on that ground alone, an undertaking deliberately and knowingly entered into could be repudiated."*²⁸⁶

Although the courts showed tendencies, at times, to protect contracting parties against unconscionable terms or agreements as a whole, particularly, in contracts containing restraint of trade clauses (*Basson v Chilwan* 1993 (3) SA 742 (A) 762I-J 763A-B) and

²⁸¹ 1973 (3) SA 779 (A).

²⁸² *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A).

²⁸³ 1976 (3) SA 16 (A) 28.

²⁸⁴ *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 28.

²⁸⁵ 1982 (1) SA 398 (A) 439.

²⁸⁶ *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 435.

unemployment contracts (*New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75 83; *Van de Pol v Silberman* 1952 SA 561 (A) 571E-572A; *Wahlman v Baron* 1970 (2) SA 760 (C) 764; *Malan v Van Jaarsveld* 1972 (2) SA 243 (C) 246A-247F) in which the courts favoured the position of the inferior party, the courts have, however, never given outright recognition to unconscionable-ness as an independent defence, alternatively, as an open norm of public policy and *boni mores*.

This seems to have been the message given by Cameron JA, in a more recent judgement of the Supreme Court of Appeal, in the case of *Brisley v Drotsky*,²⁸⁷ in which Cameron JA remarked:

*"I share the misgivings the joint judgement expresses about over-hasty or ineffective importation into the field of contract law of the concept of boni mores. What is evident is that neither the Constitution nor the value system it embodies give the courts a general justification to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith."*²⁸⁸

It is further respectfully submitted that, not only did the Supreme Court of Appeal lose the opportunity to bring about much needed law reform in the *Brisley case*, the micro-lending case of *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) and the hospital exclusionary clause case of *Afrox Health Care Bpk v Strydom* 2002 (6) 21 (A) met with the same fate. It is respectfully submitted that the Supreme Court of Appeal had the opportunity to apply, *inter alia*, our Constitutional values, to the law of contract, and authoritatively decide the debate on the issue of whether the courts should be, empowered with the necessary jurisdiction, based on principles of equity, to deal with problems caused by unconscionable contractual conduct, leading to undue hardship; instead the court squandered the opportunity.

Likewise, the Constitutional Court, in the most recent judgement in the case of *Barkhuizen v Napier*²⁸⁹ and the Supreme Court of Appeal in the case of *Napier v Barkhuizen*,²⁹⁰ also

²⁸⁷ 2002 (4) SA 1 (SCA) 35 C-E.

²⁸⁸ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35 C-E; See however, the criticism launched by Hawthorne "Public Policy and Micro-Lending - Has the unruly horse died?" 2003 (66) *THRHR* 116 188 to the Cameron J remarks in *Brisley v Drotsky* that "*the Constitution does not give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.*" The author is particularly critical that the Supreme Court of Appeals still clings to the hands-off approach by the courts to the doctrine of freedom of contract and sanctity of contract in 2003.

²⁸⁹ 2007 (5) SA 323 (CC).

²⁹⁰ 2006 (4) SA 1 (SCA); 2006 (9) *BCLR* 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

lost the opportunity to pronounce on the acceptability of unconscionable-ness as a fully-fledged defence, in the law of contract in South Africa. Instead, the only reference made thereto is in the dissenting and minority judgement of Sachs J, when he states:

"A strong case can be made out for the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom."

10.2.2.2.3 Legal Opinion

The doctrine of unconscionable-ness, despite its rich Roman law connection, has never become an independent defence in the South African law of contract.²⁹¹

The concept unconscionable-ness is, however, not foreign in the South African contractual sphere. The description of the concept often differs amongst the legal writers. Nonetheless, the meaning attached to unconscionable-ness generally centres on the unacceptable and unfair abuse of disproportionate or unequal bargaining power, especially of the poor and illiterate, who are often in need of goods and services but, upon who, unfair terms and conditions are imposed. This often has harsh or oppressive consequences for the weak.²⁹²

In the past, legislative intervention was introduced, albeit in individual pieces of legislation,²⁹³ in an attempt to provide relief where unconscionable terms and conditions had been included in contracts, pertaining to the subject matter regulated by that specific act. But, despite the attempt by Parliament to protect the poor and vulnerable, in the absence of a general criterion of control, the South African courts were left without the necessary jurisdiction to strike down an unconscionable term in a contract.²⁹⁴

In so far as the common law is concerned, the courts have also not shown great prowess in preventing harm being done through the exploitation of persons having weak bargaining

²⁹¹ Aronstam "Unconscionable contracts" The South African Solution? (1979) (42) *THRHR* 26; Lubbe and Murray *Farlam Hathaway Contract: Cases, Materials and Commentary* (1988) 388.

²⁹² Van der Merwe *Contract: General Principles* (2003) 117; Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988); Aronstam "Unconscionable Contracts: The South African Solution" (1979) (42) *THRHR* 26.

²⁹³ *Hire-Purchase Act 1942, The Limitation and Disclosure of Finance Charges Act 1968, The Sale of Land on Instalments Act 1971, Regulations under the Price Control Act 1964, The Rent Control Act 1976, And The Conventional Penalties Act 1962.*

²⁹⁴ Aronstam "Unconscionable contracts" The South African Solution? (1979) (42) *THRHR* 26.

power. The restrictive practises applied by the South African courts *inter alia* applying certain rules of interpretation of contractual terms against harsh results, i.e., the *contra proferentem* rule, has also not helped to impose the situation.²⁹⁵

In fact, the South African Courts throughout the years have, generally, adopted the view that the courts will not enquire into the conscionable-ness or unconscionable-ness of contractual terms, however harsh they may be. The courts have on occasions refused to apply considerations of equity to deal with harsh and unconscionable contracts.²⁹⁶

There have, however, been occasions when the South African courts showed tendencies to protect contracting parties against unconscionable terms or agreements as a whole, more particularly, in contracts containing restraint of trade clauses²⁹⁷ and employment contracts.²⁹⁸

The South African court in *Brisley v Drotsky*,²⁹⁹ referring to the South African Constitutional influence on the law of contract, reconfirmed the court's general approach to conscionable-ness or unconscionable-ness of contractual terms, namely; courts do not have a general jurisdiction to invalidate contracts because of inequity or unjustness.

The cases of *De Beer v Keyser and Others*,³⁰⁰ *Afrox Health Care Bpk v Strydom*,³⁰¹ *Napier v Barkhuizen*;³⁰² *Barkhuizen v Napier*,³⁰³ caused the same fate for any chance of bringing about law reform in South Africa. What is needed, it is submitted, is the revival of the

²⁹⁵ Aronstam "Unconscionable contracts" The South African Solution? (1979) (42) *THRHR* 26-27, 42.

²⁹⁶ *Wells v South African Alumenite Company* 1927 (AD) 69, 73; *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 238; *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (a); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 28; *Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 439.

²⁹⁷ *Basson v Chilwan* 1993 (3) SA 742 (A) 762I-J, 763A-B.

²⁹⁸ *Van der Pol v Silberman* 1952 SA 561 (A) 571E-572A; *Wahlman v Baron* 1970 (2) SA 760 (C) 764; *Malan v Van Jaarsveld* 1972 (2) SA 243 (C) 246A-247F.

²⁹⁹ 2002 (4) SA 1 SCA 35 C-E.

³⁰⁰ 2002 (1) SA 827 (SCA).

³⁰¹ 2002 (6) SA 21 (A).

³⁰² 2006 (4) SA 1 (SCA); 2006 (9) BCLR 101 (SCA).

³⁰³ 2007 (5) SA 323 (CC).

South African Law Commission's recommendations³⁰⁴ that legislation should be enacted against contractual unfairness, unreasonableness, unconscionable-ness or oppressiveness.

10.2.2.2 ENGLAND

10.2.2.2.1 Legal Writings

The origin of the common law doctrine of unconscionable-ness is found in both the Greek and Roman concepts of justice.³⁰⁵

The common law doctrine of unconscionable-ness is based upon certain elements of justice, such as fair dealings and not taking advantage of a weaker party.³⁰⁶ The history of unconscionable contracts is also said to provide a useful focus for tracing the general development of contract theory, and, in particular, the ongoing conflict between freedom of contract and the desire for fairness.³⁰⁷

The doctrine of unconscionable-ness found its way into English law in the second half of the seventeenth century. It appears to be closely related to policing transactions which offended against the usury laws, i.e., the Bill against Usury Hen VIII C9 (1545) and to the Action of Family Estates.³⁰⁸

The court of Chancery was often approached to grant equitable relief. In so doing, the court made use of a balancing technique which involved a balance between competing sets of values. *Waddams*³⁰⁹ suggests that on the one end of the scale:

*"Freedom of contract emphasises the need for stability, certainty, and predictability. But, important as these values are, they are not absolute, and there comes a point where they "face a serious challenge". On the other end of the scale against them must be set the value of protecting the weak, the foolish, and the thoughtless from imposition and oppression. Naturally, at a particular time, one set of values tends to be emphasised at the expense of the other."*³¹⁰

³⁰⁴ Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts*, Project 47 (1998) 58.

³⁰⁵ Peden *The Law of Unjust Contracts including the Contracts Review Act 1980* (NSW) (1982) 3.

³⁰⁶ Peden 1980 (NSW) (1982) 3.

³⁰⁷ Peden 1980 (NSW) (1982) 9.

³⁰⁸ Peden 1980 (NSW) (1982) 18.

³⁰⁹ "Unconscionability in Contracts" *The Modern Law Review* Vol. 38(4) July (1976) 369.

³¹⁰ Waddams (July 1976) 369. See also Peden 1980 (NSW) (1982) 9; Standing Committee - Unfair Contract Terms Working Party Unfair Contract Terms (January 2004).

The earliest example of equitable relief granted by the Court of Chancery was against forfeitures of various kinds *inter alia* attempts of mortgagees to draft their documents in such a way as to achieve the result they wanted namely, forfeiture of the land on the mortgagor's default.³¹¹

In other cases the agreements struck down were described as "unreasonable" and "unconscionable". The early principle that certain transactions ought to be struck down because of unconscionable-ness was applied *inter alia* in transactions of "unfair bargain". Areas in which the principle was applied included forfeiture clauses in mortgage transactions, as well as rental agreements involving penalty clauses.³¹²

It also included relief for equitable fraud, namely; unconscientiously using of power in making a hard bargain or misrepresentation.³¹³ Besides heirs and expectants, general relief was also granted, during this period, to others, where they had entered into provident bargaining. The onus would then be upon the aggrieved party to prove that there was an inequality between the parties, of which the stronger party was aware and from which, he gained an unfair advantage.³¹⁴

One of the underlying reasons advanced for justifying judicial control was that in a civilised system of law one could not accept the implied terms of absolute sanctity of contractual obligations.³¹⁵

The nature of these types of clauses is said to be founded on the premise that the transaction is so unfair that it is unconscionable without there being an overbearing of the will by duress, nor any presumption of undue influence raised by a recognised relationship between the parties. Whereas the other defences such as mistake, duress or undue influence are based upon the absence of genuine consent, an unconscionable contract is one arising from the willing but foolish acceptance of oppressive terms, or where the stronger party has exercised his rights under the contract in a harsh, unfair, inequitable or

³¹¹ Waddams July (1976) 369 at 370. See also Peden 1980 (NSW) (1982) 20.

³¹² Waddams (1976) 369 at 370-375. See also Peden 1980 (NSW) (1982) 20.

³¹³ Peden 1980 (NSW) (1982) 18.

³¹⁴ Peden 1980 (NSW) (1982) 20.

³¹⁵ Waddams (1976) 369 at 370.

unconscientious manner.³¹⁶

The key ingredients for the doctrine of unconscionable-ness, according to *Poole*,³¹⁷ are the concept of inequality of bargaining power and taking advantage of that position. The author also suggests that inequality of bargaining on its own is not sufficient; there must also be an element of abuse.

Unconscionable-ness is, therefore, a principle aimed at seeking relief from the courts on behalf of a contracting party, in instances where the contracting party feels aggrieved by the abuse of the unequal bargaining power of the other contracting party resulting in unfair advantage being gained by the latter often resulting in the former suffering prejudice.³¹⁸

A corollary of this important conceptual distinction is found in the form of relief. In the case of defence based upon absence of consent, the appropriate remedy is to void the contract altogether; however, an unconscionable contract may be set aside or kept alive for the benefit of the weaker party but valid so as to avoid the unconscionable elements.³¹⁹

Unconscionable-ness has been encouraged, especially, by the widespread use of exception clauses and standard form contracts.³²⁰ Unlike with duress and undue influence, wherein, English law is primarily more concerned with procedural fairness rather than substantive fairness, with unconscionability, the focus is more on substantive fairness, in that it is the nature of the contract itself, rather than the events which led to it being formed, which is being investigated.³²¹

Although the doctrine of unconscionable-ness has been widely applied, by the English courts, throughout the centuries and is still sometimes referred to in the modern days, it was never become a fully fledged defence in English Law. The application of the doctrine

³¹⁶ Peden 1980 (NSW) (1982) 17-18; Chin Nyuk-Yin *Excluding liability in contracts* (1985) 134; McKendrick *Contract Law Text, Cases and Materials* (2003) 755-757; Treitel (2003) 420-421; Beatson (2002) 296-297.

³¹⁷ *Textbook on Contract Law* (2004) 375.

³¹⁸ Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 132-133; Stone (1998) 225; Stone (2002) 338-339; Treitel (2003) 420-422; Beatson (2002) 296-299; McKendrick (2003) 755-757.

³¹⁹ Peden 1980 (NSW) (1982) 17-18.

³²⁰ Chin Nyuk-Yin (1985) 136.

³²¹ Stone (1998) 225; Beatson (2002) 297; Treitel (2003) 421.

has also not escaped criticism. It has been stated before that the rules pertaining to the application of the rules in relation to these areas of the law became too rigid during the end of the nineteenth century, often, resulting in unjust results. An example of this can be found in the rule against a mortgagee stipulating for any collateral advantage enabled a borrower to avoid liability "*although the transaction was a fair bargain between men and business without any trace or suspicion of oppression, surprise or circumvention.*" ³²²

For that reason, it is said that the English courts in the twentieth century were less willing to grant relief in this type of case. ³²³

Against the background must be seen however, the substantial legislative developments and other common law restrictions which have made considerable inroads upon freedom of contract especially, in consumer and employment contracts, which academic writers believe have reached the need for relief against unconscionable bargains. ³²⁴

Waddams, ³²⁵ a proponent of the doctrine of unconscionable-ness, has, however, suggested that an open recognition of the court's power to interfere with unconscionable contracts would strengthen the principle of freedom of contract. He suggests in the long term and when the criteria of unconscionable-ness become reasonably clear, the contracting parties will retain their freedom to contract, provided, they reason within the guidelines of fairness.

Support for a codification technique, as means to reform the doctrine of unconscionable-ness, is also advocated by *Sayton* ³²⁶ who advocates that the development of a modern doctrine of unconscionable-ness is a necessity.

The development of the doctrine of unconscionable-ness has also resulted in a clear

³²² Peden 1980 (NSW) (1982) 17-18.

³²³ Peden 1980 (NSW) (1982) 20; *Waddams* (1976) 369 at 371; *Treitel* (2003) 421; *Chin Nyuk-Yin* (1985) 133; *Stone* (1998) 225-226; *Stone* (2002) 338; *McKendrick* (2003) 759; *Beatson* (2002) 297; *Beale* "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) remarks that although the American courts have struck down quite frequently contracts that are unconscionable under the *Uniform Commercial Code* S.2-302 on the ground of substantive unfairness, English courts however, have been loath to follow suit as they may not feel the same freedom. See also the comments of *Collins* *The Law of Contract* 3rd ed (1997) 251 who stated that: "*A system of contract law committed to freedom of contract must reject controls over the fairness of contracts.*"

³²⁴ Peden 1980 (NSW) (1982) 21.

³²⁵ *Waddams The Law of Contracts* (1977) 316.

³²⁶ "The Unequal Bargain Doctrine: Lord Denning in *Lloyds Bank v Bundy*" (1976) 22 McGill LJ 94 at 108.

distinction being drawn between procedural unconscionable-ness and substantive unconscionable-ness.

Procedural unconscionable-ness means unfairness in the bargaining process and the method of making the contract. It includes factors such as, absence of meaningful choice, superiority of bargaining power, the contract being an adhesion contract, unfair surprise, sharp practices or deception. Substantive unconscionable-ness, on the other hand, refers to unfair substantive terms of the contract and the overall unjust results of the transaction.³²⁷

Factors which could influence substantive unconscionable-ness include relationship between price and consideration received, whether onerous terms bear a reasonable relationship to business risks, and the relative fiscal positions of the parties.³²⁸

10.2.2.2.2 Case Law

The origin of the doctrine of unconscionable-ness in case law can be traced back to the English courts, as far back as 1663 and 1705 respectively. In two English decisions, namely *James v Morgan*³²⁹ and *Thornborough v Whitacre*,³³⁰ though the courts did not actually mention the term unconscionable-ness, the two cases, nevertheless, served as the forerunner of the doctrine itself, because the courts dealt directly with the unfairness element in the transactions. Both cases involved the exploitation of fairness arising from an unequal bargaining situation.

The first traces of the Courts of Chancery interfering with the general principle of freedom of contract, and granting equitable relief in mortgage cases, can be found as far back as the 1680's. In some of the cases the relief granted was founded upon equitable jurisdiction.³³¹

In the case of *Howard v Harris*³³² the court stated:

"The law itself will control that express agreement of the party; and by the same reason equity will let a man loose

³²⁷ Peden 1980 (NSW) (1982) 23.

³²⁸ Peden 1980 (NSW) (1982) 23.

³²⁹ 1 LEV. 111, 83 E.R. 323 (1663).

³³⁰ 2 LD. RAYM. 1164, 92 E.R. 270 (K.B. 1705).

³³¹ (1683) 1 Vern 191, 192; See also *Pawlett v Pleydell* (1679) 79 Seldon Society 737; *Baity v Lloyd* (1682) 1 Vern 141; 23 ER 374. In these cases relief was often granted due to the unconscientious use of power in making a hard bargain. But courts would not relieve a contracting party against "voluntary foolish bargains".

³³² (1683) 1 Vern. 191.

from his agreement, and will against his agreement permit him to redeem a mortgage." ³³³

In a further English decision during this period, the court in the case of *Earl of Chesterfield v Janssen*, ³³⁴ placed a definition to an unconscionable contract as a transaction "*such as no man in his senses and not under delusion could make on the one hand, and no honest and fair man would accept on the other, which are inequitable and unconscientious bargains; and of such even the common law has taken notice.*" ³³⁵

The reason for this interference was also suggested in *Vernon v Bethell*: ³³⁶

"The court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases." ³³⁷

In other cases agreements were struck down and the relief granted was founded upon "unreasonableness" ³³⁸ and "unconscionability". ³³⁹

One of the first cases in which the English courts stressed the ills that 'restraining the exercises of a legal right' can bring, occurred in the case of *Sanders v Pope* ³⁴⁰ in which Lord Erskine expressed the following view:

"There is no branch of the jurisdiction of this court more delicate than that, which goes to restrain the exercise of a legal right. That jurisdiction rests only upon this principle; that one party is taking advantage of a forfeiture; and as a rigid exercise of the legal right would produce a hardship, a great loss and injury on the one hand arising from going to the full extent of the right, while on the other the party may have the full benefit of the contract as originally framed, the court will interfere; where a clear mode of compensation can be discovered. In that case

³³³ *Howard v Harris* (1683) 1 Vern 191, 192.

³³⁴ 2 Ves Sen. 125, 28 E.R. 82 (1750).

³³⁵ *Earl of Chesterfield v Janssen* 2 Ves. Sen 125, 28 E.R. 82 (1790).

³³⁶ (1762) 2 EDEN 110, 113.

³³⁷ *Vernon v Bethell* (1762) 2 EDEN 110 113.

³³⁸ *Talpot v Braddill* (1683) 1 Vern 183 and 394. It was held in this matter that to allow a person to sit with excessive profits obtained by a special bargain in the agreement between the parties would be unreasonable.

³³⁹ *Jennings v Ward* (1705) 2 Vern 520. The court in this case ruled that a man shall not have interest for his money on a mortgage and a collateral advantage besides for the loan on it; or clog the redemption with any by-agreement. If he does it would be unconscionable.

³⁴⁰ (1806) 12 Ves 282.

equity is in the constant course of relieving the tenant" ³⁴¹

Moreover, the court's jurisdiction to give relief was also founded in cases of 'unconscionable bargains'. In this regard, the courts of equity had long been willing to intervene to protect expectant heirs, who sold away their future rights to receive an inheritance, in exchange for a derisory sum. Lord Selbourne LC justified this principle in the case of *Earl of Aylesford v Morris*, ³⁴² in wonderfully graphic terms when he explained the need for protection based upon equity as follows:

"He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him, the ordinary effect of all the circumstances by which these considerations are introduced, is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness, and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it." ³⁴³

He continues to look at the nature of unconscionable transactions and refers to the well-known dictum of Lord Hardwicke in *Earl of Chesterfield v Janssen* ³⁴⁴ when Lord Selborne states:

"Those cases, which, according to the language of Lord Hardwicke, 'raise from the circumstances or conditions of the parties contracting - weakness on one side, usury on the other, or extortion, or advantage taken of that weakness', a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientiously use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable." ³⁴⁵

The same considerations were found in *Fry v Lane*. ³⁴⁶ In this case two brothers, both manual workers, had reversionary interests in a deceased's estate (meaning that they would inherit their shares when someone else's life interest had run out). Both sold their rights for significant under-value, receiving unsatisfactory legal advice before doing so from an inexperienced solicitor who was also acting for the purchaser. Kay J reviewed the expectant heir cases and other analogous decisions, concluding that they represent a

³⁴¹ *Sanders v Pope* (1806) Ves 282.

³⁴² (1873) LR 8 CH APP 484 at 490.

³⁴³ *Earl of Aylesford v Morris* (1873) LR 8 CH APP 484 at 490.

³⁴⁴ (1751) 2 Ves Sen 125 at 157; 28 E.R. 82 at 101.

³⁴⁵ *Earl of Aylesford v Morris* (1873) LR 8 CH 484 at 490-1.

³⁴⁶ (1888) 40 CHD 312.

general principle:

"that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, the Court of Equity will set aside the transaction." ³⁴⁷

Both cases, it is submitted, set the tone of the modern case law, with their emphasis on the weak position of one of the parties, the unfair advantage taken by the other party of that weakness, and the disadvantageous terms of the resulting transaction.

At the beginning of the twentieth century, similar concerns were raised, and are evident, in a well established line of cases in which the court considered equitable principles in exercising its authority to interfere in, for example, mortgage transactions. So in *Knights Bridge Trust Estate v Byrne*, ³⁴⁸ although the Court of Appeal declined the exercise its equitable jurisdiction in relation to a disputed mortgage, it nevertheless held that *"equity does not reform mortgage transactions because they are unreasonable, but only if the essential requirements of a mortgage are not observed and where there are oppressive or unconscionable terms."* ³⁴⁹

This principle was adopted by Goff J in *Cityland and Property Holdings Ltd v Dabrah* ³⁵⁰ in that *"wholly disproportionate, draconian provisions in a mortgage were unconscionable and consequently unenforceable."* ³⁵¹

What is clear from these cases is that the jurisdiction of the court is not concerned with the unreasonableness of the terms of the mortgage, but, from the facts it must be evident that provisions of the contract must be unconscionable.

This was demonstrated in the case of *Multiservice Bookbinding Ltd v Marden*, ³⁵² in which the court held that the intervention is not justified because the terms are unreasonable, but only where the conduct of the mortgagee in imposing such terms, was 'morally reprehensible'. Nevertheless, the court, per Browne-Wilkinson J, was prepared to lay down

³⁴⁷ *Fry v Lane* (1888) 40 CHD 312.

³⁴⁸ (1933).

³⁴⁹ *Knights Bridge Trust Estate v Byrne* (1933).

³⁵⁰ (1968).

³⁵¹ *Cityland and Property Holdings Ltd v Dabrah* (1968).

³⁵² (1979) CH 84.

certain guidelines as to when the courts are more likely to interfere, more particularly: "*The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted. But I do not think the categories of unconscionable bargains are limited: the court can and should intervene where a bargain has been procured by unfair means.*" ³⁵³

Whether it is desirable for the courts to develop a general doctrine of unconscionable-ness and how they should proceed, has been a contentious issue in English Law for a considerable period. Commencing with the case of *Fry v Lane* ³⁵⁴ the English courts, in a string of *dicta*, were prepared to recognise the principle of unconscionable-ness.

In *Fry v Lane* ³⁵⁵ as more fully discussed *supra*, the doctrine derives from a right of equity to set aside transactions at a considerable undervalue and without independent advice, against the 'poor and ignorant'.

Many years later, in the important dictum of Lord Denning in *Lloyds Bank Ltd v Bundy*, ³⁵⁶ when the learned Judge suggests that it is possible to deduce a common theme which unifies the cases, he stated:

"Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."

Lord Denning continues: "*One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself.*" ³⁵⁷

This principle has gradually been extended in its scope. In *Cresswell v Potter* ³⁵⁸ the court held that 'poor and ignorant' is a matter of negative perspective and old age appears to come within its ambit.

³⁵³ Multiservice Bookbinding Ltd v Marden (1979) CH84.

³⁵⁴ (1988) 40 CHD 312.

³⁵⁵ (1888) 40 CHD 312.

³⁵⁶ (1975) QB 326.

³⁵⁷ *Lloyds Bank Ltd v Bundy* (1975) QB 326 at 339.

³⁵⁸ (1978) 1 WLR 255.

In this case, the plaintiff (a telephonist) and her husband were divorcing. As part of a financial settlement, the plaintiff conveyed her share in the matrimonial home to the husband and, in return, he indemnified her against any liability on the mortgage, but gave no other consideration. This was a very bad deal for her, because the house was worth considerably more than the outstanding mortgage debt and so she lost the surplus value of her share. Megarry J granted the plaintiff's application to set the transaction aside, but struggled to fit the facts into the *Fry v Lane* straitjacket when he stated:

"I think that the plaintiff may fairly be described as falling within whatever is the modern equivalent of "poor and ignorant". ³⁵⁹

The court found that the word "poor" is not necessarily concentrated on the lower income group nor is the word "ignorant" concentrated on the less highly educated. The court found that, although the work of a telephonist requires considerable alertness and skill, a telephonist can properly be described as 'ignorant' in the context of property transactions.

³⁶⁰

Although the court refused to set the transaction aside and ruled against the plaintiff, the Privy Council, in the case of *Hart v O'Connor* ³⁶¹ considered the following facts: The vendor, an elderly farmer, held farm land as sole trustee under a testamentary trust for the benefit of himself and his siblings, and had, for many years, farmed the land in partnership with two of his brothers. When the brothers were too old to continue farming successfully, the vendor (without consulting his brothers) sold the land to the defendant (on terms that the vendor and his two brothers had the right to continue residing in their houses on the farm land during their lifetime). One of the vendor's brothers sought to set the transaction aside on the basis that it was an unconscionable bargain (he also argued that the vendor was of unsound mind and lacked contractual capacity at the time of the sale). He conceded that the defendant had acted with complete innocence throughout; attempting to argue that relief should be available for objectively unfair transactions without the need for proof of unconscionable conduct by the stronger party.

The Privy Council disagreed and refused to set the transaction aside, because the defendant had not acted unconscionably. As Lord Brightman explained:

³⁵⁹ *Cresswell v Potter* (1978) 1 WLR 255.

³⁶⁰ *Cresswell v Potter* (1978) 1 WLR 255.

³⁶¹ (1985) AC 1000 PC.

"There was no equitable fraud, no victimisation, no taking advantage, and no overreaching or other description of unconscionable doings which might have justified the intervention of equity" ³⁶²

In the same year, in the case of *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*, ³⁶³ there were limited signs that the courts might be prepared to recognise a general right of intervention to prevent a weaker party from being exploited by a stronger party. The court however stressed that there must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself.

The question of whether a transaction involving the renewal of a lease agreement was unconscionable or not, also formed the subject matter for decision in the case of *Boustany v Pigott*. ³⁶⁴ The facts in this case briefly stated were:

Miss Pigott was an elderly lady who leased one of her properties for five years, in 1976, to Mrs Boustany and her husband. Miss Pigott was becoming 'quite slow' because of senile dementia and so, in 1977, her cousin, George Pigott, took over responsibility for the management of her properties. In 1980, while George Pigott was away on business, Mrs Boustany invited Miss Pigott to tea to meet a bishop and generally lavished attention and flattery on her. Mrs Boustany then took Miss Pigott to the office of Mrs Boustany's solicitor, where she produced a new draft, 10 year lease of the property to replace the existing lease (which still had over a year to run). The terms of the new lease were extremely favourable to Mrs Boustany and the solicitor 'forcibly' pointed this out, while Mr and Mrs Boustany said nothing, but Miss Pigott insisted on signing. Later George Pigott (acting on behalf of Miss Pigott) sought to have the lease set aside. The Privy Council agreed that the lease should be set aside, concluding that:

"Mrs Boustany must have taken advantage of Miss Pigott before, during and after the interview with [the solicitor] and with full knowledge before the 1980 lease was settled that her conduct was unconscionable." ³⁶⁵

In this case the Privy Council's opinion (delivered by Lord Templeman) expressed general agreement with five submissions, together with supporting authorities, which had been put

³⁶² *Hart v O'Connor* (1985) AC 1000 PC.

³⁶³ (1985) 1 WLR 173.

³⁶⁴ (1993) 69 P and CR 298.

³⁶⁵ *Boustany v Pigott* (1993) 69 PandCR 298.

forward by Mrs Boustany's counsel purporting to summarise the unconscionable bargain jurisdiction, as follows:

1. It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that, is to say, in a way which affects his conscience: *Multiservice Bookbinding v Marden*.
2. "Unconscionable" relates not merely to the terms of the bargain, but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety. *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*.
3. Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, "*it was not right that the strong should be allowed to push the weak to the wall*". *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*. (??)
4. A contract cannot be set aside in equity as "an unconscionable bargain" against a party innocent of actual or constructive fraud. Even if the terms of the contract are "unfair" in the sense that they are more favourable to one party than the other ("contractual imbalance"), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct. *Hart v O'Connor*.
5. In situations of this kind, it is necessary for the plaintiff, who seeks relief, to establish unconscionable conduct, namely, that unconscientious advantage has been taken of his disabling condition or circumstances. Per Mason J in *Commercial Bank of Australia Ltd v Amadia*.

In *Credit Lyonnais Bank v Burch*³⁶⁶ per Millet LJ recognised the doctrine of unconscionable-ness but laid down certain requirements before it could be accepted that the terms of a transaction, or the conduct of the parties in concluding the transaction, manifest unconscionability, in that, "*some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself*" has to be present

³⁶⁶ (1997) 1 ALL ER 144.

In an unreported decision in the case of *Kalsep Ltd v X-Flow*,³⁶⁷ it was stressed that a party seeking to set aside an agreement, as an unconscionable bargain, had to show more than just improvidence. Pumfrey J stated that although it would be difficult, “[I]t is necessary to prove impropriety, and that is to say not merely harshness but impropriety, both in the terms of the agreement and in the manner in which the agreement was arrived at. On the facts there was no evidence of any coercion or other improper pressure, although the judge accepted that it was an ‘exceptionally improvident agreement, ignorantly and foolishly entered into’. It seems therefore, that to succeed in a claim based on unconscionable-ness, there must be procedural and substantive ‘impropriety’ which extends beyond mere unfairness.

In *Portman Building Society v Dusangh*³⁶⁸ the Court of Appeal also refused to grant relief, based on an argument of unconscionable-ness of the bargain, where the defendant was aged seventy-two. He was illiterate in English and spoke the language poorly. The claimant building society granted him a mortgage, guaranteed by his son, covering 75 per cent of the value of his property, over twenty-five years, in order to release the equity in the property. The money was given to the defendant's son to enable him to purchase a supermarket. The son was later declared bankrupt so the guarantee was worthless. The building society sought to enforce their security, but the defendant claimed that, because of the nature of the agreement, it could be set aside as an unconscionable bargain, both in respect of unconscionable conduct by the son exploiting his father's weakness which affected the building society, and in respect of unconscionable conduct by the building society itself, based on the principle in *Fry v Lane*.

The Court of Appeal rejected the argument based on the son's unconscionable conduct, (distinguishing *Credit Lyonnais Bank*) because the building society had not exploited the situation and had not acted in a ‘morally reprehensible manner’ (per Simon Brown LJ). The father had merely sought to assist his son in what he hoped would be a profitable venture. Ward LJ stated that ‘it may be that the son gained all the advantage and the father took all the risk, but this cannot be stigmatized as impropriety. There was no exploitation of father by son such as would prick the conscience and tell the son that in all honour it was morally wrong and reprehensible’.

³⁶⁷ *The Times* 3 May 2001.

³⁶⁸ (2000) 2 ALL ER 221.

More recently, in the case of *Royal Bank of Scotland P/C v Etrider (No 2)*,³⁶⁹ the House of Lords, as per Simon Brown LJ, also refused to declare a transaction unconscionable and stated that building societies were not required to police transactions to ensure the wisdom of parents' actions in seeking to assist their children.

Whether the courts should develop a general doctrine of unconscionable-ness, did not find favour in the case of *Bridge v Campbell Discount Co Ltd*³⁷⁰ in which Lord Radcliffe expressed some reservations when he stated:

*"`Unconscionable' must not be taken to be a panacea for adjusting any contract between competent persons. Since the courts of equity never undertook to serve as a general adjuster of men's bargains, it was inevitable that they should in course of time evolve definite rules as to the circumstances in which, and the conditions under which, relief would be given, and I do not think that it would be at all an easy task, and I am not certain that it would be a desirable achievement to try to reconcile all the rules under some simple general formula."*³⁷¹

10.2.2.2.3 Legal Opinion

The Common Law doctrine of unconscionable-ness has, as its foundation, both the Greek and Roman concepts of justice. The elements of justice comprise fair dealings and not taking advantage of a weaker party.³⁷²

Since the introduction of the doctrine of unconscionable-ness there has been an ongoing conflict between freedom of contract and the desire for fairness.³⁷³ This is evident in the judgements delivered by the Court of Chancery, which was introduced with the specific aim of policing transactions which offended against, especially, the Usury Laws or mortgage agreements.³⁷⁴ One of the other particular aims and objectives of the doctrine of unconscionable-ness, during this period, was to protect the weak, the foolish and the

³⁶⁹ (2002) UKHL 44 (2002) 2 AC 773.

³⁷⁰ (1962) AC 600 at 626.

³⁷¹ *Bridge v Campbell Discount Co Ltd* (1962) AC 600 at 626.

³⁷² Peden *The Law of Unjust Contracts including the Contracts Review Act 1980* (NSW) (1982) 3.

³⁷³ Peden *The Law of Unjust Contracts including the Contracts Review Act 1980* (NSW) (1982) 9.

³⁷⁴ Peden *The Law of Unjust Contracts including the Contracts Review Act 1980* (NSW) (1982) 9, 18. For the first traces of the courts utilizing their equitable jurisdictions see *Pawlett v Pleytell* (1679) 79 Seldon Society 737; *Baity v Lloyd* (1682) 1 Vern 141; 23 ER 374. *Howard v Harris* (1683) 1 Vern. 191, 192; *Vernon v Bethell* (1762) 2 Eden 110, 113. In these cases relief was often granted due to the unconscientious use of power in making a hard bargain. In other cases agreements was struck down and relief granted due to unreasonableness and unconscionable-ness. See *Talpot v Braddill* (1683) 1 Vern. 183; *Jennings v Ward* (1705) 2 Vern. 820.

thoughtless from harsh results and oppression.³⁷⁵

During this period the onus was upon the aggrieved party to prove that there was an inequality between the parties and that the stronger party was aware, but notwithstanding, the stronger party was prepared to take unfair advantage.³⁷⁶

Although the common law had available defences, inter alia, mistake, duress, undue influence etc, the said defences were available where there was an absence of genuine consent.

The doctrine of unconscionable-ness on the other hand, was available where the transaction was so unfair that the result was inequitable. The unconscionable-ness of the contract arises from the willing but foolish acceptance of oppressive terms or the abuse of the stronger party in a harsh, unfair, inequitable or unconscientious manner without duress or undue influence being present.³⁷⁷

Therefore, the key ingredients in modern day practise to show the presence of unconscionable-ness, is to show that there has been an inequality of bargaining power and the stronger party has abused the position of strength he occupied.³⁷⁸

But, despite the continued recognition by the English courts and legal writers of the concept of unconscionable-ness, it remains a very contentious issue in England whether it would be desirable to develop a general doctrine of unconscionable-ness. There are two streams amongst the legal writers and the courts. On the one end, it is argued that the introduction of unconscionable-ness as a fully fledged defence if too rigidly applied, would lead to unjust

³⁷⁵ Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39(4) (July 1976) 369; See also Peden *The Law of Unjust Contracts including the Contracts Review Act 1980* (NSW) (1982) 9; Standing Committee - *Unfair Contract Terms Working Party Unfair Contract Terms* (January 2004).

³⁷⁶ Peden *The Law of Unjust Contracts including the Contracts Review Act 1980* (NSW) (1982) 3.

³⁷⁷ Peden *The Law of Unjust Contracts including the Contracts Review Act 1980* (NSW) (1982) 17-18; Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 134; Treitel *The Law of Contract* 11th ed (2003) 755-757; Beatson *Anson's Law of Contract* 18th ed (2002) 296-297; McKendrick *Contract Law Text, Cases and Materials* (2003) 755-757. For the first traces of cases in English law see *Sanders v Pope* (1896) Ves 282; *Earl of Ayleford v Morewa* (1873) LR 8 CA App 484 at 490; *Fry v Lyne* (1888); *City Land and Property Holdings Ltd v Dabrah* (1968).

³⁷⁸ Pool *Textbook on Contract Law* (2004) 375; for case law see *Multiservice Bookbinding Ltd v Maroun* (1979) CH 84 (Concerning young, inexperienced or ignorant people in respect of whom unconscionable bargains have been procured by unfair means).

results as it would unduly interfere with contractual freedom.³⁷⁹

On the other hand, *Waddams*,³⁸⁰ a proponent of the doctrine of unconscionable-ness advocates that the open recognition of the court's power to interfere with unconscionable contracts would rather strengthen the principle of freedom of contract provided the contracting parties reason within the guidelines of freedom.

10.2.2.3 UNITED STATES OF AMERICA

10.2.2.3.1 Legal Writings

Unconscionable-ness is a concept widely known in the United States of America Contract Law. The concept, as was discussed earlier, can be traced to the Chancery Court of England and has its foundations in equity, ethics and fairness in law.³⁸¹ The concept was recognised in American law as early as the 1912's when Chief Justice Stone remarked that the concept of unconscionability underlie "*practically the whole content of the law of equity.*"³⁸²

It was especially with the introduction of standard and the so-called adhesion contracts in the 1930's, that legal writers recognized the unfairness inherent in some standardized contracts.³⁸³ Some of the main criticism lodged against standard and adhesion contracts included the fact that generically, they facilitated commerce, but, tended to be unfair because they were drafted by the party with the stronger bargaining power, often to the detriment of the weaker party, who is forced to assent to often unfair terms. One of the

³⁷⁹ Peden *The Law of Unjust Contracts including the Contracts Review Act 1980* (NSW) (1982) 21, 44 For English case law see *Royal Bank of Scotland P/C v Etridge (No 2)* (2002) UKHL 44 (2002) 2 AC 771; *Bridge v Campbell Discount Co Ltd* (1962) AC 600 at 626; *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (1985) WLR 173.

³⁸⁰ Atiyah *The Law of Contracts* (1977) 316. See also Sayton "The Unequal Bargaining Doctrine": Lord Denning in *Lloyds Bank v Bundy* (1976) 22 *MCGILL LJ* 94 at 108 who supports a codified technique involving the doctrine of unconscionable-ness. For case law in support of the development of unconscionable-ness see *Fry v Lane* (1988) 40 *CHD* 312. For the most prolific support for the doctrine see the important dictum of Lord Denning in *Lloyds Bank Ltd v Bundy* (1975) QB 326 supported in its scope in *Creswell v Potter* (1978) 1 *WLR* 255; *Hart v O'Conner* (1985) AC 1000; *PC Boustany v Pigott* (1993) 69 *PandCOR* 298; *Credit Lyonnais Bank v Burch* (1997) 1 *ALL ER* 144; *Kalsep Ltd v X-Flow* *The Times* 3 May 2001 (Unreported).

³⁸¹ Hillman *The Richness of Contract Law* (1997) 129-130; Calamari and Perillo *Contracts* (1987) 399-400; Williston *Williston on Contracts* (1957) Par 1632; Summers and Hillman *Contract and Related Obligation. The Doctrine and Practice* (1987) 565; Deutsch *Unfair Contracts - The Doctrine of Unconscionability* (1977) 43.

³⁸² Calamari and Perillo (1987) 399.

³⁸³ Prausnitz, The Standardization of Commercial Contracts in *English and Continental Law* (1937) discussed in the Harvard Book Review, 52 *Harv. L. Rev.* 700 (1938-39); Williston *A Treatise on the Law of Contract* (1957) Para 1763A.

most common abuses also identified in standardized contracts, was the unfair use of disclaimers of warranties and limitation of remedies.³⁸⁴ The terms of those contracts have often been viewed by the American legal writers as harsh and grossly one-sided in favour of the company, alternatively, the weaker party has to adhere to unfair and unreasonable terms.³⁸⁵ Consequently, the American legal writers encouraged contractual reform to counter the deficiencies of standardized contracts.

Subsequently, in the pre-*Uniform Commercial Code* (to which we shall return infra) era, despite no well-defined doctrines being present, the traditional doctrines *inter alia* the common law and equity doctrines, nevertheless served as protective measures to counter deficiencies of standardized contracts. The traditional doctrines, according to *Deutsch*,³⁸⁶ included, concepts such as lack of mutual assent (fine print), lack of mutuality, failure of consideration, defects in formation of the contract, public policy, fraud, duress, interpretation and constriction, etc.

Before the recognition of the doctrine of unconscionable-ness, it was especially public policy which was used to invalidate unfair clauses in standard and adhesion contracts.³⁸⁷ But in time, the doctrine of unconscionable-ness was founded as a means of directly attacking unfair contracts. Its use was, however, limited and it dealt predominantly with non-standardized contracts.³⁸⁸

The origin of the doctrine of unconscionable-ness is encapsulated in the definition of an unconscionable contract as a transaction "*such as no man in his senses and not under delusion could make on the one hand, and no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice.*"³⁸⁹

Although the doctrine aimed to prevent the enforcement of unfair contracts, or contractual

³⁸⁴ Deutsch (1977) 1-4; Williston (1957) Para 1763A.

³⁸⁵ Deutsch (1977) 10; Williston (1957) Para 1763A.

³⁸⁶ Deutsch (1977) 11.

³⁸⁷ Deutsch (1977) 13.

³⁸⁸ Deutsch (1977) 43.

³⁸⁹ The definition founded in common law and equity has been cited by several legal writers including Deutsch (1977) 43; Bolgar "The Contract of Adhesion: A Comparison of Theory and Practice" 20 *AM J. COMP. L.* 53, 58 (1972).

provisions, on grounds of unconscionable-ness, because the application thereof was restricted to individual cases, this resulted in a lack of consistency shown by the courts. The application of the doctrine by the courts was highly unreliable and unpredictable.³⁹⁰

This eventually resulted in the legislature stepping in, enacting section 2-302(1) of the *Uniform Commercial Code* to prevent, *inter alia*, the abuse of the weaker party to the contract by the stronger.³⁹¹

*Llewellyn*³⁹² the principal architect of the *Uniform Commercial Code* highlights that the code provision on unconscionable-ness is designed to do two things namely:

- "(1) encourage courts to openly strike down provisions of the type which had previously been denied enforcement at law largely through covert means;
- (2) achieve a substantive merger of equity doctrine into law."³⁹³

In this regard section 2-302 of the *Uniform Commercial Code* reads as follows:

- (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."*³⁹⁴

The legislative intervention of Section 2-302 of the *Uniform Commercial Code* is said to reflect the moral sense of the community into the law of commercial transactions.³⁹⁵ The effect thereof is that section 2-302 of the code authorizes the court to find, as a matter of law, that a contract or a clause of a contract was "*unconscionable at the time it was*

³⁹⁰ Calamari and Perillo (1987) 401; Deutsch (1977) 49.

³⁹¹ Hillman (1997) 131-132; Calamari and Perillo (1987) 402; Williston (1957) Para 1632 A; Summers and Hillman (1987) 565; Deutsch (1977) 41.

³⁹² *The Common Law Tradition* (1960) 675.

³⁹³ Llewellyn *The Common Law Tradition* (1960) 675.

³⁹⁴ The Code came into operation in the District of Columbia on January 1, 1965.

³⁹⁵ Summers and Hillman (1987) 577.

made", and upon so finding the court may refuse to enforce the contract, excise the objectionable clause or limit the application of the clause to avoid an unconscionable result.

It also permits a court to accomplish directly what before the legislative intervention would have been accomplished by constriction of language, manipulations of fluid rules of contract law and the application of public policy.³⁹⁶ In other words, the unconscionable-ness provision of the Code affords Judges great power to police agreements or clauses and to identify those contracts or clauses which they find to be unconscionable and to strike down the offensive agreement or provision.³⁹⁷

Although the Code does not define the term "unconscionable", several factors have been identified which influence the courts in deciding whether contracts, or provisions of the contract, are unconscionable. They include the gross disparity in the values exchanged, which includes defects in the bargaining process. Gross inequality of bargaining power; together with terms unreasonably favourable to the stronger party often influence the courts.³⁹⁸ The aforementioned contain both procedural and substantive unconscionable-ness.³⁹⁹

The legislative intervention has, however, not escaped some form of criticism, in that, especially, *Deutsch*⁴⁰⁰ has expressed the opinion that Section 2-302 has failed to establish clear guidelines for applying the actual doctrine of unconscionable-ness. The uncertainty which the writer identified has raised concern amongst other writers as well. In this regard the wish has been expressed that "*..... The doctrine would be clarified under die case law and that the courts would establish the necessary rules and procedures for application.*"

10.2.2.3.2 Case Law

The American courts, with regard to the doctrine of unconscionable-ness, were deeply influenced by English law. It was especially the dictum of Lord Hardoniche in *Earl of Chesterfield v Janssen* 2 VES SEN. 125, 28 E.R. 82 (1750) which influenced the two early American cases involving the doctrine of unconscionable-ness. Both cases involved reduced

³⁹⁶ Summers and Hillman (1987) 577; Hillman (1997) 132-134.

³⁹⁷ Hillman (1997) 132-135; Summers and Hillman (1987) 506; Calamari and Perillo (1987) 398; Williston (1957) Par 1578A.

³⁹⁸ Fuller and Eisenberg *Basic Contract Law* (1981) 61; Deutsch (1977) 126-129.

³⁹⁹ Summers and Hillman (1987) 572; Deutsch (1977) 122-140.

⁴⁰⁰ *Unfair Contracts - The Doctrine of Unconscionability* (1977) 111.

payments resultant from duress. The Massachusetts court, in the cases of *Cutler v How*⁴⁰¹ and *Baxter v Wales*⁴⁰² used the doctrine of unconscionable-ness to invalidate the agreements. Subsequently the doctrine of unconscionable-ness received further momentum when the Supreme Court of Utah, in the case of *Carlson v Hamilton*,⁴⁰³ enunciated the equitable principle that courts do not have to enforce some agreements when, in its sound discretion, the agreements are deemed to be unconscionable:

*"People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability."*⁴⁰⁴

Further progress was made in recognizing the common law doctrine of unconscionable-ness with two decisions handed down by the Supreme Court in the latter part of the nineteenth century. In the first case of *Scott v United States*⁴⁰⁵ the court strongly motivated for the existence of unconscionable-ness as a defence when it stated:

*"If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."*⁴⁰⁶

In a subsequent decision, the Supreme Court in the case of *Hume v United States*⁴⁰⁷ again dealt with the issue of unconscionable-ness. This case involved a United States official ordering a quantity of shucks and mistakenly promising to pay 60 cents per pound, although the market value was only 1 3/4 cents per pound. It was clear that there had been an enormous error in the price, an error which did not, however, qualify as a legal mistake.

⁴⁰¹ 8 MASS.257 (1811).

⁴⁰² 12 MASS. 365 (1815).

⁴⁰³ 8 UTAH 2d 272, 332 P2d 989.

⁴⁰⁴ *Carlson v Hamilton* 8 UTAH 2d 272, 332 P8 2d 989. Leading cases in which this view was affirmed included *Mississippi R. Co v Cromwell*, 91 US 643, 23 L Ed 367; *Hume v United States*, 137 US 406, 33 L Ed 393, 10 S Ct 134; *Randolph's Ex'r v Quidnick Co* 135 US 457, 34 L Ed 200, 10 S Ct 655; *Dalzell v Dueber Watch Case Mfg. Co* 149 US 315, 37 L Ed 749, 13 S Ct 886; *Deweese v Reinhard* 165 US 385, 41 L Ed 757, 17 S Ct 340.

⁴⁰⁵ 79 U.S. (12 WALL) 443, 445 (1870).

⁴⁰⁶ *Scott v United States* 79 U.S. (12 WALL) 443, 445 (1870).

⁴⁰⁷ 132 U.S. 406 (1889).

Chief Justice Fuller, relying on the case of *Earl of Chesterfield v Janssen* 2 VES SR 125, 28 ENG.REP 82, decided to give the plaintiff only the market price value because the price promised was unconscionable. The court subsequently held that:

"If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter but only what he is equitably entitled to." ⁴⁰⁸

The cases cited above dealt basically with one type of unfairness, namely, gross inadequacy of consideration. In most of these cases the dicta focused on the unfairness of enforcing the contracts rather than the unfair process of contracting.

One of the first cases in which an attempt was made in breaking through the very limited recognition of unconscionable-ness in Common Law was that of *United States v Bethlehem Steel Corp.* ⁴⁰⁹ In this case, the attorney for the United States claimed that excessive profits were promised to the appellee due to the inequality of bargaining power between the parties. At the time of the contract (World War I, in 1917) the United States was at war with Germany, and Bethlehem was then the largest shipbuilding company in the world. Mr Justice Frankfurter, dissenting, attempted to lay down a general rationale for the doctrine of unconscionable-ness when he stated:

"These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other."

After citing a number of dicta Frankfurter J added:

*"Strikingly analogous to the case at bar are the decisions that a salvor who takes advantage of the helplessness of the ship in distress to drive an unconscionable bargain will not be aided by the courts in his attempts to enforce the bargain. In *Post v Jones* it was said that the courts 'will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit.' These cases are not unlike the familiar example of the drowning man who agrees to pay an exorbitant sum to a rescuer who would, otherwise permit him to drown. No court would enforce a contract made under such circumstances."* ⁴¹⁰

The views of Frankfurter J are similar to those expressed in *Frederick L Morehead v New*

⁴⁰⁸ *Hume v United States* 132 U.W. 406 (1889).

⁴⁰⁹ 315 U.W. 289, 312 (1942).

⁴¹⁰ *United States v Bethlehem Steel Corp* 315 U.S. 289, 312 (1942).

York ex re Joseph Tipaldo,⁴¹¹ by Hughes CJ, who stated:

"We have on frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.

*We have repeatedly said that liberty of contract is a qualified and not an absolute right. 'There is no absolute freedom to do as one wills or to contract as one chooses Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community'."*⁴¹²

The principle enunciated in the dissenting judgement amounted to this: When an unfair contract has been achieved through oppression resulting from the superiority of the bargaining power of one party and the lack of choice of the other, the contract should be declared unconscionable and therefore unenforceable.

Just prior to the *Uniform Commercial Code* coming into effect, certain cases adopted the principle of unconscionable-ness embodied in the Code. The first of these significant cases was that of *Campbell Soup Co v Wentz*.⁴¹³ This case involved a farmer who had undertaken to sell his carrot crop to the plaintiff soup company. The contract price ranged from \$23 to \$30 per ton depending on the time of delivery. When the market price rose to \$90 per ton, the farmer notified the soup company that he would not deliver the carrots at the agreed price. The contract was in the form of an adhesion contract which made provision for liquidated damages.

The court noted that the contract was characterized as *"being too hard a bargain and too one-sided an agreement"* to entitle the plaintiff soup company the required relief sought. In this regard the court stated that *"..... The sum total of its provisions drives too hard a bargain for a court of conscience to assist."*⁴¹⁴ Thus the court found that a court was empowered to find that a contract is unconscionable, it being sufficient to set aside the contract.

In the case of *Henningsen v Bloomfield Motors, Inc*⁴¹⁵ the plaintiff brought an action for

⁴¹¹ 298 US 587 (1935).

⁴¹² *Frederick L. Morehead v New York ex rel Joseph Tipaldo* 298 U.S. 587 at 627-628 (1939).

⁴¹³ 172 F 2d 80 (CA3) 1948.

⁴¹⁴ *Campbell Soup Co v Wentz* 172 F 2d 80 (CA3) 1948.

⁴¹⁵ 75 ALR 2d 1 (1960) 24.

breach of warranty for personal injuries sustained when an automobile's steering mechanism failed and the car veered off the highway. The court, holding that the manufacturer's disclaimer of warranties was invalid as against public policy, cited the unconscionable-ness as an important factor.

Francis J, who delivered the judgement of the court, recognized the fact that, although the "traditional contract" resulted from the free bargaining of persons who met with one another on an equal footing, in present-day commercial life, the use of the standardized mass contract had almost completely destroyed any semblance of bargaining equality. He went on to say:

"The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among car makers in the area of the express warranty. Where can the buyer go to negotiate for better protection? Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common-law principles of freedom of contract. Because there is no competition among the motor vehicle manufacturers with respect to the scope of protection guaranteed to the buyer, there is no incentive on their part to stimulate good will in that field of public relations. Thus, there is lacking a factor existing in more competitive fields, one which tends to guarantee the safe construction of the article sold. Since all competitors operate in the same way, the urge to be careful is not so pressing."

Francis J continued that it was the task of the judiciary to administer the spirit, as well as the letter of the law, and that in cases such as the one before the court; it was the court's duty to protect the ordinary man against the loss of important rights caused by the unilateral acts of another. He concluded:

*"The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising there from is so inimical to the public good as to compel an adjudication of its invalidity."*⁴¹⁶

Relying on the *Henningsen v Bloomfield Motors, Inc* dictum, the court in a later decision of *Ellsworth Dobbs, Inc v Johnson*:⁴¹⁷

"Courts and legislatures have grown increasingly sensitive to imposition, conscious or otherwise, on members of the public by persons with whom they deal, who through experience, specialization, licensure, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such

⁴¹⁶ *Henningsen v Bloomfield Motors, Inc* 75 ALR 2d 1 (1960) 31-32.

⁴¹⁷ 50 NJ 528, 553-554, 236 A. 2d 856-857 (1967).

expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage. Henningsen v Bloomfield Motors, Inc 32 N.J. 358 pp 388-391, 161 A. 2d 69 (1960)."

The court continued to state:

*"Grossly unfair contractual obligations resulting from the use of such expertise or control by the one possessing it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable. The perimeter of public policy is an ever increasing one. Although courts continue to recognise that persons should not be unnecessarily restricted in their freedom to contract, there is an increasing willingness to invalidate unconscionable contractual provisions which clearly tend to injure the public in some way. (Citing cases)"*⁴¹⁸

The court in the case of *Williams v Walker - Thomas Furniture Co*⁴¹⁹ also decided that there was no substantive law in the District of Columbia which would object to the rule that a court of law would not enforce an unconscionable bargain.

The meaning of unconscionable-ness is described by the court as:

"..... has generally been recognized to include 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. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration.

Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?"

Consequently the court suggested the following approach ought to be adopted namely:

"Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain.

*But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld."*⁴²⁰

⁴¹⁸ *Ellsworth Dobbs, Inc v Johnson* 50 N.J. 528, 553-554, 236A 2d 843, 856-857 (1967).

⁴¹⁹ 121 APP DC 315, 35 F 2d 445, 18 ALR 3d 1.

⁴²⁰ *Williams v Walker - Thomas Furniture Co* 121 APP DC 315, 350 F 2d 445, 18 ALR 3d 1.

The application of Section 2-302 of the *Uniform Commercial Code* has formed the subject matter of a number of cases during the post-incorporation era. Often, the question the courts need to decide upon is whether the transaction and the resulting contract could be considered unconscionable within the meaning of Section 2-302 of the *Uniform Commercial Code*?

This, in fact, formed the basis for decision-making in the case of *Jones v Star Credit Group*⁴²¹ in which the Supreme Court of New York considered the rationale of the Code. The court first looked at the traditional common law position and remarked:

"There was a time when the shield of "caveat exemptor" would protect the most unscrupulous in the marketplace - a time when the law, in granting parties unbridled latitude to make their own contracts, allowed exploitive and callous practices which shocked the conscience of both legislative bodies and the courts."

The court then continued to rationalize the shift in the American contract law thinking when it stated:

"The effort to eliminate these practises has continued to pose a difficult problem. On the one hand it is necessary to recognise the importance of preserving the integrity of agreements and the fundamental right of parties to deal, trade, bargain, and contract. On the other hand there is the concern for the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest members of the community."

But, remarked the court:

"The law is beginning to fight back against those who once took advantage of the poor and illiterate without risk of either exposure or interference. From the common law doctrine of intrinsic fraud we have, over the years, developed common and statutory law which tells not only the buyer but also the seller to beware. This body of laws recognizes the importance of a free enterprise system but at the same time will provide the legal armour to protect and safeguard the prospective victim from the harshness of an unconscionable contract."

Consequently, the court assessed the value of Section 2-302 of the Code when it discerned:

"Section 2-302 of the Uniform Commercial Code enacts the moral sense of the community into the law of commercial transactions. It authorizes the court to find, as a matter of law, that a contract or a clause of a contract was "unconscionable at the time it was made", and upon so finding the court may refuse to enforce the contract, excise the objectionable clause or limit the application of the clause to avoid an unconscionable result. "The principle", states the Official Comment to this section "is one of the prevention of oppression and unfair

⁴²¹ 59 MISC. 2d 189, 298 N.Y.S. 2d 264.

surprise". It permits a court to accomplish directly what heretofore was often accomplished by construction of language, manipulations of fluid rules of contract law and determinations based upon a presumed public policy."

Moreover, the court then pronounced on the effect of the provision, in that:

"..... the statutory language itself makes it clear that not only a clause of the contract, but the contract in toto, may be found unconscionable as a matter of law." ⁴²²

The effect of Section 2-302 of the Code on disclaimers of express and implied warranties in the lease of industrial equipment, also received the attention of the New York Supreme Court of Appeals in the case of *Industrialised Automated and Scientific Equipment Corp v R.M.E. Enterprises, Inc.* ⁴²³ The court, in holding that the disclaimer of warranties was unconscionable, looked at the official comment to Section 2-302 which states that it:

"..... is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability", and that "[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."

The court then restated the test laid down by the American Courts in determining unconscionable-ness, namely:

"to include 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", and characterized "by a gross inequality of bargaining power" (Williams v Walker-Thomas Furniture Co 121 U.S. App D.C. 315, 350 F.2d 445, 449)"

Although, the court recognized that *"parties to a contract are given broad latitude within which to fashion their own remedies for breach of contract"*, the court nevertheless, identified that under the *Uniform Commercial Code "the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed."*

Applying the facts of the case the court concluded:

"In this case, the evidence plainly establishes that the equipment did not work at all, that it achieved none of the

⁴²² *Jones v Star Credit Corp* 59 MISC. 2d 189, 298 N.Y.S. 2d 164 (1969); See also the cases of *Lefkowitz v ITM, Inc.* 52 Misc 2d 39, 275 N.Y.S. 2d 303; *Frostifresh Corp v Reynoso*, 52 Misc 2d 26, 274 N.Y.S. 2d 757, revd. 54 Misc 2d 119, 281 N.Y.S. 2d 964; *American Home Improvement, Inc. v MacIver*, 105 N.H. 435, 201 A.2d 886, 14 A.L.R. 3d 324.

⁴²³ 58 A.D. 2d 482, 396 N.Y.S. 2d 427.

purposes of the parties. This is a result so "one-sided", in the words of the authors of the Official Comment to the UCC, that the disclaimer in good conscience should not be enforced. In effect, the equipment was worthiness."

Consequently the court held:

"We therefore hold that the disclaimer of warranties is unconscionable under the circumstances and may not be enforced." ⁴²⁴

But, the American Courts have also cautioned that the statutory provision in terms of the *Uniform Commercial Code* should not be exploited by contracting parties. In the case of *Token v Westerman* ⁴²⁵ the court stated:

"It is apparent that the court should not allow the statutory provision in question to be used as a manipulative tool to allow a purchaser to avoid the consequences of a bargain which he later finds to be unfavourable. Suffice it to say that in the instant case the court finds as shocking, and therefore unconscionable, the sale of goods for approximately 2 1/2 times their reasonable retail value. This is particularly so where, as here, the sale was made by a door-to-door salesman for a dealer who therefore would have less overhead expense than a dealer maintaining a store or showroom. In addition, it appeared that defendants during the course of the payments they made to plaintiff were obliged to seek welfare assistance." ⁴²⁶

10.2.2.3.3 Legal Opinion

The concept unconscionable-ness in the American Law of Contract, was received into the United States of America from English Law, and was first recognised as early as the 1800's. Following the dictum of Lord Hardwicke in *Earl of Chesterfield v Janssen* 2 Ver. Sen 127 28 E.R. 82 (1750) the Massachusetts court in *Cutler v Hon* ⁴²⁷ and *Baxter v Wales* ⁴²⁸ used the doctrine of unconscionable-ness to invalidate the agreements. After that the Supreme Court of Utah, in the case of *Carlson v Hamilton*, ⁴²⁹ also enunciated the

⁴²⁴ *Industrialease Automated and Scientific Equipment Corp v R.M.E. Enterprises, Inc* 58 A.D. 2d 482, 396 N.Y.S. 2d 427 (1977).

⁴²⁵ 113 N.J. Super 452, 274 A. 2d 78 (1970).

⁴²⁶ *Token v Westerman* 113 N.J. Super 452, 274 A. 2d 78 (1970).

⁴²⁷ 8 MASS. 257 (1811).

⁴²⁸ 12 MASS 365 (1815).

⁴²⁹ 8 Utah 2d 272, 332 P.2d 989. Other leading cases in which this view was affirmed include *Mississippi R. Co v Cromwell* 91 US 643, 23 L Ed 367; *Hume v United States* 132, US 406, 33 L Ed 393, 10 S Ct 134; *Randolph's Ex'r v Quidnick Co* 135 US 457, 34 L Ed 200, 10 S Ct 655; *Dalzell v Dueber Watch Case Mfg. Co* 149 US 315, 37 L Ed 749, 13 S Ct 886; *Deweese v Reinhard* 165 US 385, 41 L Ed 757, 17 S Ct 340; *Scott v United States* 79 U.S. (12 WALL) 443, 445 (1870).

equitable principle that courts do not have to enforce some agreements which, upon the court's discretion, are deemed to be unconscionable.

Apart from the courts pronouncing on the recognition of the concept of unconscionable-ness, as early as the 1912's the Chief Justice of the United States of America, Stone CJ remarked that the concept of unconscionable-ness underlie "*practically the whole content of the law of equity.*" ⁴³⁰

It was especially with the introduction and the enormous expansion of standardized contracts in the 1930's, that writers began to sense the unfairness and inequity inherent in some of the standardized contracts. The underlying reason for the unfairness, it was thought, started with the fact that the standardized contracts were drafted by the party with the stronger bargaining power, often to the detriment of the weaker party. The latter is often forced to accept unfair and unreasonable terms. The weaker contracting party has no choice but to accept harsh and often one-sided contracts, to their prejudice. ⁴³¹

Sensing the unreasonable and unfair results these types of contracts bring with them, the American courts and legal writers started advocating contractual reform. It was felt, at the time, that the traditional common law doctrines, including, lack of mutual assent, lack of mutuality, public policy, fraud, and duress, as well as the equity doctrines, was not sufficient protective measures to curb the deficiencies of standardized contracts. ⁴³²

What was sought was the uniform application by the courts of unconscionable-ness as means to attack unfair contracts. The definition of the doctrine of unconscionable-ness namely:

"such as no man in his senses and not under delusion could make on the one hand, and no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice"

⁴³⁰ His Honourable Chief Justice Stone Book Review, 12 Colum L. Rev 756 (1912); the concept has subsequently been recognized by other legal writers as well. See Hillman *The Riches of Contract Law* (1997) 129-130; Calamari and Perillo *Contracts* (1987) 399-400; Williston *Williston on Contracts* (1957) Par 1632; Summers and Hillman *Contract and Related Obligation. The Doctrine and Practice* (1987) 565; Deutsch *Unfair Contracts - The Doctrine of Unconscionability* (1977) 43.

⁴³¹ Prausnitz *The Standardization of Commercial Contracts in English and Continental Law* (1937) discussed in the Harvard Book Review 52 *Harv. L. Rev* 700 (1938-39); Williston *A Treatise on the Law of Contract* (1957) Para 1763A; Deutsch *Unfair Contracts - The Doctrine of Unconscionability* (1977) 1-4.

⁴³² The definition founded in common law and equity has been cited by several legal writers including Deutsch (1977) 43; Bolgar "The Contract of Adhesion: A Comparison of Theory and Practise" 20 *AM J. COMP L* 53 (1972).

has found the attention by many legal writers.

But what was felt to be lacking was the restrictive approach by the courts, which restricted the application of unconscionable-ness to individual cases. This resulted in a lack of consistency shown by the courts, resulting in an unreliable and unprotected application of the doctrine.⁴³³

One of the leading cases, however, in which the court attempted to break through the limited recognition of unconscionable-ness in common law, was that of *United States v Bethlehem Steel Corp.*⁴³⁴ In this case Mr Justice Frankfurter with regard to the common law defences *inter alia* fraud and physical duress, stated they were not the only grounds and added that courts generally refuse to enforce bargains unjustly obtained through taking advantage of the weak, as it would be unconscionable. The principle enunciated at the time amounted to this:

*When an unfair contract has been achieved through oppression resulting from the superiority of the bargaining power of one party and the lack of choice of the other, the contract should be declared unconscionable and therefore unenforceable.*⁴³⁵

The efforts by the legal writers and the courts alike in their efforts to bring about contractual reform, was assisted greatly with the legislative intervention in enacting Section 2-302(1) of the *Uniform Commercial Code*. It is especially; in the case of *Campbell Soup Co v Wentz*⁴³⁶ that the court was prepared to set aside the contract as a result of unconscionable-ness. In the case of *Henningsen v Bloomfield Motors Inc.*⁴³⁷ the court also invokes unconscionable-ness as an important factor in setting aside a manufacturer's disclaimer of warranties. Francis J picked upon the gross inequality of bargaining power, public welfare, and lack of competition among the motor vehicle manufacturers and the

⁴³³ Calamari and Perillo *Contracts* (1987) 401; Deutsch *Unfair Contracts - The Doctrine of Unconscionability* (1977) 49.

⁴³⁴ 315 U.W. 289, 312 (1942); See also *Frederick and Morehead v New York Ex Rec Joseph Tiplado* 288 US 587 (1935) in which similar views were expressed per Hughes CJ.

⁴³⁵ *United States v Bethlehem Steel Corp* 315 U.W. 289, 312 (1942); *Frederick L. Morhead v New York ex rec Joseph Tiplado* 288 US 587 (1935).

⁴³⁶ 172 F.2d 86 (CA3) 1948.

⁴³⁷ 75 A.L.R. 2d 1 (1960) 24; See also *Ellsworth Dobbs Inc v Johnson* 50 N.J. 528, 553-554, 236A 2d 856-857 (1967).

protection of the ordinary man against the loss of important rights, as factors to the public good in compelling an adjudication of its invalidity.

A similar approach was adopted in the case of *Williams v Walker-Thomas Furniture Co*,⁴³⁸ in which the court relied upon the following factors, namely; absence of meaningful choice, unreasonably favourable contract terms to one of the contracting parties, lack of education, the one-sided bargain of one of the contracting parties, to determine that a court of law would not enforce an unconscionable bargain.

The efforts by the legal writers and the courts alike, in bringing about legal reform, by having unconscionable-ness elevated to a fully fledged defence, paid dividends when, in 1969, Section 2-302 of the *Uniform Commercial Code*⁴³⁹ was promulgated. In the main, Sec 2-302 of the Code provides that a court, as a matter of law, may refuse to enforce a contract should the court find that the contract, or a clause of the contract, was unconscionable at the time it was made.

The legislative intervention is said to reflect the moral sense of the community to avoid an unconscionable result.⁴⁴⁰ It also affords judges greater power to police agreements or clauses which they find to be unconscionable and to strike down the offensive agreement or provision.⁴⁴¹

Although the Code does not define the term "unconscionable", several factors have been identified which influence the courts in deciding whether contracts, or provisions of the contract, are unconscionable. They include the gross disparity in the values exchanged, gross inequality of bargaining power, terms unreasonably favourable to the stronger contracting party.⁴⁴²

The value of Section 2-302 of the *Uniform Commercial Code* has also received the attention of the American Courts.

⁴³⁸ 121 App. A.C. 305, 35 F.2d 445, 18 ACR 3d 1.

⁴³⁹ The Section of the Code came into operation in the District of Columbia on January 1, 1965.

⁴⁴⁰ Summers and Hillman *Contract and related obligations. The doctrine and practise* (1987) 577.

⁴⁴¹ Hillman *The Richness of Contract Law* (1997) 132-135; Summers and Hillman *Contract and related obligations. The doctrine and practise* (1987) 506; Calamari and Perillo *Contracts* (1987) 398.

⁴⁴² Fuhler and Eisenberg *Basic Contract Law* (1981) 61; Deutsch *Unfair contracts - The doctrine of unconscionability* (1977) 126-129.

Commencing with *Jones v Star Credit Group*,⁴⁴³ the court held that the value of Section 2-302 of the Code is founded in the fact that it reflects the moral sense of the community and it aims, to avoid an unconscionable result in contract. It also curbs oppression and unfair surprise in contracts.

In a subsequent case, *Industria Lease Automated and Scientific Equipment Corp v R.M.E. Enterprises Inc*,⁴⁴⁴ the New York Supreme Court of Appeals identified that, under the Code, the obligations of good faith, diligence, reasonableness and care prescribed by the Act, may not be disclaimed. Consequently, the court held that a disclaimer of warranties is unconscionable under the circumstances and may not be enforced.

But, the American courts have also contended that such statutory provisions as contained in the Code should not be abused by contractants. In *Toker v Westerman*,⁴⁴⁵ it was stated by the court, that the statutory provision should not be used as a manipulative tool to allow a purchaser to avoid the consequences of a bargain which he later finds to be unfavourable.

10.2.3 Agreements contrary to public policy

10.2.3.1 SOUTH AFRICA

10.2.3.1.1 Legal Writers

Owing to the great influence Roman law⁴⁴⁶ had on the South African Law of Contract, it is

⁴⁴³ 59 Misc 2d 189, 278 N.Y.S. 2d 264.

⁴⁴⁴ 58 AD 2d 4812, 396 N.Y.S. 2d 427 (1977).

⁴⁴⁵ 113 N.J. Super 452, 274, A.2d 78 (1970).

⁴⁴⁶ See Wessels (1951) Volume I 148 ff. The author refers to the wealth of Roman law authorities which influenced the South African Law of Contract. It was especially the rules governing estates regulated by the edicts of the emperors which made provision for certain clauses to be declared invalid. Any condition in a will which was immoral was regarded as *pro non scripto*, although the rest of the will was considered to be valid with the heir taking the inheritance or legatee as if the condition did not exist. Where however, a contract depended upon an illegal or immoral condition, the whole of the contract was considered void and unenforceable. Not only did Roman law provide governing conditions or contracts which were against public policy, Roman law also concerned itself with unconscionable agreements. It was Papinian who wrote about unconscionable agreements when he remarked "*Nam quae facta laedunt pietatem, existimationem, vere cundim nostram et ut generaliter dixerim contra bonos mores sunt se facere nos posse credendum est*" (D.28.7.15)

Translated:

For those acts which offend against our sense of what is right (conscience), our honour (good name), our modesty and which generally speaking are contra bonos mores and regarded as incapable of performance cf. 582 and see also Otto: 2442, and D 28.7.14 "Conditions in a will contrary to the edicts of or the laws or what has the force of law, or which are contra bonos mores or ridiculous (derisoriae), or such as the parties have disapproved of, are regarded as pro non scripto. Roman law writers defined contracts against public policy as "acts which are contrary to the interest of the community are said to be acts contrary to public policy." See Wessels (1951) 157.

today widely recognised, by our legal writers, that agreements contrary to law, morality or public policy are unenforceable or void.⁴⁴⁷

Public policy has been identified by the legal writers as a doctrine which places a limitation on contractual freedom, also known as contractual autonomy, as well as the enforcement of contractual agreements once entered into, namely; the doctrine of *pacta sunt servanda*.

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The rationale for the existence of public policy, in modern times, lies in the broader concept of paternalism, in which the courts protect the weaker party in the law of contract and, by the same token, determine what is or is not a matter of public interest and whether public policy demands that a contract offending against the public interest be struck down and declared invalid.⁴⁴⁹

But, caution the legal writers, the power to declare a contract, or a term in a contract, contrary to public policy and therefore unenforceable, should be exercised sparingly and only in the clearest of cases.⁴⁵⁰ No exhaustive list exists of all contracts that would be either immoral or against public policy.⁴⁵¹

⁴⁴⁷ See Wessels (1951) Par 463-480ff; Van der Merwe et al (2003) 176-178; Joubert (1987) 132-151; De Wet and van Wyk (1978) 89-92; Kerr (1998) 177-189; Christie *Bill of Rights Compendium* (2002) 3H-9-3H-12; 3H-20-3H-21; Hutchinson et al (1991) 431; Joubert et al *LAWSA* Volume 5 Part 1 (1994) 214-216; Kahn (1988) 32; Christie (2001) 398ff; Hawthorne (2003) 15 *SA Merc LJ* 277; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 59ff; Hopkins *TSAR* 2003-1 159; Hawthorne 2004 67 (2) *THRHR* 295 ff; Hawthorne 1995 (58) *THRHR* 173; Van Aswegen 1994 (59) *THRHR* 453.

⁴⁴⁸ See Wessels (1951) Par 463-480 ff; See also Jordaan (2004) *De Jure* 59-60; Christie *Bill of Rights Compendium* (2002) 3H-20; Van der Merwe et al (2003) 15; See also Kahn (1988) 32. The author expresses the view that: "Our common law has in a sense encroached on the freedom and sanctity of contract by its condemnation of contracts against public policy." See further Hutchinson et al (1991) 431 who identifies the need for the exception to the general rule of freedom of contract in the form of public policy as "the necessity for doing simple justice between man and man." Joubert *LAWSA* Volume 5 Part 2 (1994) 215.

⁴⁴⁹ See Hawthorne 1995 (58) *THRHR* 167 173; Christie *Bill of Rights Compendium* (2002) 3H-20-3H-21 suggests that it is especially in cases of inequality of bargaining power that public policy play a satisfactory role; See further Joubert (1987) 133; Hawthorne 2004 67 (2) *THRHR* 294 at 298.

⁴⁵⁰ See Hawthorne 2004 67 (2) *THRHR* 299; See also Christie *Bill of Rights Compendium* (2002) 3H-10; Hutchinson et al (1991) 431; Joubert *LAWSA* Volume 5 Part I (1994) 215. The author endorses the principle that the power to declare a contract contrary to public policy should be exercised sparingly "..... only when the impropriety of the contract and the element of public harm are manifest"; Jordaan 2004 *De Jure* 61 identifies the criterion to prove that a contractual provision is *contra* public policy namely when "substantially incontestable harm to the interests of the public will be caused"; See further Pretorius 2004 69 (2) *THRHR* 298-299.

⁴⁵¹ See Joubert *LAWSA* Volume 5 Part I (1994) 215; De Wet and Van Wyk (1992) 89; Hawthorne 1995 (58) *THRHR* 173-174 is of the view that not many criteria to guide a court in its function of weighing conflicting issues of public interests have been identified. In this regard no serious examination of issues of conflicting values and

Due to the ever-changing context and texture of society,⁴⁵² what has, however, emerged are various factors influencing judicial thinking in considering whether a contract, or a term in a contract, is contrary to public policy and therefore unenforceable.⁴⁵³

As public policy is a question of fact and not a question of law, public policy, holistically assessed, is influenced by the general sense of justice of the community, the *boni mores* manifested in public policy opinion.⁴⁵⁴

But, cautions *Christie*,⁴⁵⁵ regard must not be had to superficial public opinion, which can swing like a weathercock, but, rather, the seriously considered public opinion on the general sense of justice and good morals of the community.

The reason advanced there-for is that it causes the maintenance of stability in the law of contract by ensuring that contracts are not at the mercy of future public opinion.

Although there are no numerous clauses, the factors alluded to above which have influenced judicial thinking include: (1) Agreements with alien enemies; (2) Agreements tending to injure the public service; (3) Agreements impeding or obstructing or preventing the administration of justice; (4) Agreements for the future separation of husband and wife; (5) Contracts which unreasonably restrain trade; (6) wagering contracts etc.⁴⁵⁶

Other factors include: (6) Agreements in which the vital interests of minor children are traded by a parent for money; (7) Agreements in breach of statutory provisions; (8) Agreements to escape liability for fraud; (9) Agreements to deprive a person of his right to defend himself in legal proceedings brought against him etc.⁴⁵⁷

customs inherent in any society, composed of people of various beliefs, identities or cultures have been made, of which, a court may take judicial notice. Nor are there guidelines as to what type of evidence must be lead relevant to an assessment of the requirements of public interests; See also *Christie Bill of Rights Compendium* (2002) 3H-10-3H-11; Hawthorne (2003) 15 *SA MERC LJ* 277.

⁴⁵² Christie (2001) 400, 403; See also Joubert (1987) 133; Christie *Bill of Rights Compendium* (2002) 3H-11.

⁴⁵³ Christie (2001) 400, 403; Wessels (1951) 157.

⁴⁵⁴ Christie (2001) 400, 403.

⁴⁵⁵ Christie *The Law of Contract in South Africa* (2001) 400, 403.

⁴⁵⁶ Wessels (1951) 157; Van Heerden Aquilius "Immorality and Illegality to Contract" 1941 (58) *SALJ* 346.

⁴⁵⁷ See also Kerr (1998) 177-196ff. The author apart from repeating several factors mentioned by Wessels includes

*Joubert*⁴⁵⁸ holds the view that in the case of statutory enactments, the courts may consider the policy of the legislature in enacting the statute in order to determine the validity of the statutory provision or provisions.

Good faith has, in the past, been considered by our courts in determining whether public policy forbids the enforcement of the contract.⁴⁵⁹ *Hefer*⁴⁶⁰ advocates that the courts' hands ought to be strengthened to attain, in public interest, a greater degree of fairness in contract. *Van Aswegen*,⁴⁶¹ with regard to overcoming the problems which the inequalities between contracting parties brings, suggests that the *bona fides* of the contracting parties, which requires honesty and which prohibits the unreasonable promotion of one's own interests, ought to be used to determine whether public policy dictates that a contract should be invalidated. Another factor which has featured very prominently in determining whether an agreement, or the provisions of an agreement, is contrary to public policy, it has been suggested, that one commences from the premises that public policy favours the utmost freedom of contract. Contracts or provisions of a contract will, therefore, only be declared contrary to law or morality, or runs counter to social or economic experience, or are plainly improper and unconscionable, or unduly harsh or oppressive⁴⁶² if against public policy.

the afore stated.

⁴⁵⁸ (1987) 153.

⁴⁵⁹ Christie (2001) 19.

⁴⁶⁰ "Billikheid in the Kontrakte Reg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2001-1 142 at 153-154; See also Hawthorne 1995 (58) *THRHR* 157 at 171-172, Hawthorne 2004 67 (2) *THRHR* 294.

⁴⁶¹ "The Future of South African Contract Law" 1994 (57) *THRHR* 448 at 456ff; See also Van der Walt 1993 (56) *THRHR* 157 at 66 who believes good faith would fit the ethical requirement set by public policy in the contractual field; *Contra* Neels 1999 *TSAR* 684; Glover "Good faith and procedural unfairness in contract" 1998 (61) *THRHR* 328.

⁴⁶² As this was discussed at great length *supra* a further in depth discussion is unwarranted. See however the legal writings of Christie (2001) 17 400; Van der Merwe et al (2003) 10-11; Christie *Bill of Rights Compendium* (2002) 3H-6-3H-12; Kerr (1998) 8-9; Wessels (1951) 572; Hutchinson et al (1991) 431ff; Joubert Volume 5 Part 1 (1994) Par 165; Kahn (1988) 32ff; Christie (2001) 17-18 400ff; Van der Walt *THRHR* (1991) 367ff; Hahlo (1981); *SALJ* 70ff; De Wet and Van Wyk (1992) 6ff; Pretorius 2004 (67) *THRHR* 179 183 185; Lotz (1979) 1; Eiselen 1989 *THRHR* 518-519 532-533; Lubbe 1990 *Stell LR* 7 16; Van der Walt 1991 *THRHR* 367 368; Van Aswegen 1994 *THRHR* 448 456; Lubbe and Murray (1988) 20-21; Van der Merwe et al (2003) 10; Hawthorne (2003) 15 *SA MERC LJ* 271 274; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 58 59-60; Hefer *TSAR* 2000 1 142ff; Grove 2003 *De Jure* 134ff; Hopkins *TSAR* 2003 1 150 152 155; Hawthorne 2004 67 (2) *THRHR* 294ff; Hawthorne 1995 (62) *THRHR* 596-597; Hawthorne 1995 (58) *THRHR* 157 162-63; 166-162; SA Law Commission Report (1998) 17ff.

The principles of equity, fairness and reasonableness are seen, by many of the South African legal writers, as a determining factor in deciding whether an agreement, or the terms of an agreement, should be upheld or denounced because of their unfairness, unreasonableness, harshness or oppressiveness.

This arises, especially, from the detrimental results that the harsh and oppressive provisions, often contained in standard-form contracts, bring with them.⁴⁶³ It is especially with the adoption of the constitutional dispensation in South Africa, that legal writers hold the view that the natural law values in the form of fairness and reasonableness, should impact on the judicial decision-making process. It is suggested that instead of judges merely following judicial precedent and so embrace the freedom of contract or sanctity of contract, they ought to use public policy dictates to influence them. To this end, freedom of contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights.⁴⁶⁴

Although unconscionable-ness is a concept known to the South African law of contract, it is a term which has not been accepted by the South African legal writers as an independent, free floating defence. It is a concept, as seen previously, which relates mainly to the conduct of one of the parties and which encompasses unfair terms, unfairness in attempting to enforce a contract, and the like.⁴⁶⁵

The aim for some form of intervention is seen as serving the interests of the public, especially, the weak and vulnerable who stands in an unequal bargaining position with the stronger party in standard term contracts, which ultimately has harsh and oppressive results for the former. For that reason, the *South African Law Commission*,⁴⁶⁶ in 1998 recommended that South Africa needed to enact legislation against unfairness, unreasonableness, unconscionable-ness or oppressiveness as it serves the public interests.

⁴⁶³ Van der Merwe et al (2003) 200-201; Lubbe and Murray (1988) 386; Lubbe (1999) *Stell. L.R.* 22; Kerr (1998) 8-9; Christie (2001) 14 16-17; Christie *Bill of Rights Compendium* (2001) 3H-1-0; 3H-20 to 3H22; Jordaan 2004 *De Jure* 58 at 63; Hefer *TSAR* 2001-1 142 at 154; Hopkins *TSAR* 2003 1 150 at 154ff.

⁴⁶⁴ Hopkins *TSAR* (2003) 1 150 at 154ff; Hawthorne 1995 (58) *THRHR* 157 at 174; Van Aswegen 1994 (57) *THRHR* 448 at 450; Grove 1998 (61) *THRHR* 687 695; Neels *TSAR* (1999) 4 684 705.

⁴⁶⁵ Van der Merwe et al (2003) 117; Lubbe and Murray (1988) 386ff; Kahn (1998) 35ff; Hawthorne 1995 (58) *THRHR* 157 167.

⁴⁶⁶ The South African Law Commission's Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts*, Project 47 (1998) 58.

The South African legal writers have, over decades, grappled with the issues of morality and ethics in contract. More particularly, uncertainty still exists when to apply these concepts in determining whether public policy dictates that their presence should lead to the enforcement of agreements, or certain terms of agreements, or not. In this regard, *Joubert*⁴⁶⁷ suggests the basis for deciding when contracts or provisions of an agreement are against good morals and public interests is not filled with certainty and that opinions on matters of good morals and public interest can differ from society to society, both in place and in time.

It has, however, been suggested by *Mr Justice van den Heever*,⁴⁶⁸ as far back as 1941:

*"The legal rules relating to contracts do not actively enforce morality, but merely discourage immorality. This must not be taken to mean that legal rules do not sometimes positively promote proper conduct, e.g. by requiring good faith between contractants."*⁴⁶⁹

But *Hutchinson et al*⁴⁷⁰ suggest that agreements are said to be against good morals if *"this offend our conscience, or sense of what is right, or modesty."*⁴⁷¹

Van der Merwe et al,⁴⁷² on the other hand, in a very balanced opinion, suggest:

*"the principle of morality (an extension of the values of society) or socio-economic expediency will in many circumstances support a policy favouring the exact enforcement of contracts freely entered into by consenting parties, but may, in particular circumstances, require that less weight be attached to the ideals of individual autonomy and freedom of action."*⁴⁷³

But, caution *Van der Merwe et al*:⁴⁷⁴ *"Agreements will only be said to be contrary to good morals if the illegality is founded in law. In this regard the law does not enforce morals*

⁴⁶⁷ *The Law of South Africa* Volume 8 (1987) 132-133.

⁴⁶⁸ Aquillius "Immorality and Illegality in Contract" (1941) (58) *SALJ* 337-354 at 346.

⁴⁶⁹ Aquillius "Immorality and Illegality in Contract" (1941) (58) *SALJ* 337-354 at 346.

⁴⁷⁰ *Wille's Principles of South African Law* (1991) 435; See also Wessels (1951) 421, 582.

⁴⁷¹ *Hutchinson et al* (1991) 435.

⁴⁷² *Contract: General Principles* (2003) 11.

⁴⁷³ *Van der Merwe Contract: General Principles* (2003) 11.

⁴⁷⁴ *Van der Merwe Contract: General Principles* (2003) 11.

simply because they are morals, but only when the moral content has been transformed into legal doctrine and specific rules."

In so far as ethical considerations are concerned and their influence on public policy, the South African legal writers have most certainly found a place for ethics in contracts. To this end, Zimmerman⁴⁷⁵ highlights the impact Christian teachings, as well as Stoic moral philosophy have had on the formation of the law of contract in general, in that, "... they demand the infusion of ethics and of humanities into the law". The rationale there-for according to Zimmerman is to render aid to the weak, from exploitation by the so-called "urban capitalists".⁴⁷⁶

Hawthorne⁴⁷⁷ recognises the value of ethical consideration in the law of contract, especially in promoting the principle of good faith in contract, has suggested "*good faith should become an underlying ethical value*".⁴⁷⁸

More recently, it is especially, the writers Carstens and Kok⁴⁷⁹ who opine that under the influence of a value-driven Constitution, the influence of normative medical ethics and medical law principles should not be ignored in deciding the unenforceability of contracts or contractual provisions. The authors justify their argument in favour of the influence of normative medical ethics by using, as their basis, the power which medical ethics and other instruments *inter alia* the Hippocratic Oath, the Declaration of Geneva (1968), International Code of Medical Ethics; the Declaration of Helsinki (as revised in 2000) have exerted over the medical profession for decades.

The writers persuasively argue that; as ethical codes and other instruments have as their foundation, a human rights culture, the ethical practise of medicine has, as its primary aim, the protection of human rights within a medical context. In this regard Carstens and Kok express the view that a medical practitioner "*by accepting and treating a patient, the practitioner is first and foremost required 'to do no harm' and to act in the best interest of*

⁴⁷⁵ *The Law of Obligations* (1992) 265ff.

⁴⁷⁶ Zimmerman *The Law of Obligations* (1992) 246ff.

⁴⁷⁷ "The End of *bona fides*" (2003) 15 *SA Merc LJ* 271, 274.

⁴⁷⁸ Hawthorne "The end of *bona fides*" (2003) 15 *SA Merc LJ* 271, 274; See also Van der Walt (1993) (56) *THRHR* 65, 69; Neethling et al (2001) 400.

⁴⁷⁹ "An Assessment of the use of Disclaimers in South African hospitals in view of Constitutional demands, foreign law and medico-legal considerations (2003) 18 *SAPR/SAPL* 430 at 449-452.

the patient."

For that reason, they argue, although patients, to a certain extent, determine their own destiny, bearing in mind the doctrine of informed consent, nevertheless, in certain instances, patients ought to be protected against conduct which may result in harm. In this regard the writers persuasively argue " *disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury/death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm.*" The writers continue "... *this obvious contradiction is possibly the reason why certain jurisdictions have rules that disclaimers against medical negligence are against public policy, thereby giving legal effect to existing medical ethical rules.*" ⁴⁸⁰

One, it is submitted, has to associate oneself with the views expressed by *Carstens and Kok*. Not only does it follow international trends, the ethical codes record standards of behaviour against which practitioners conduct can be measured. It is submitted that the purpose of codes of ethical conduct is to ensure the maintenance of a sound system of medicine and medical standards and the patient's welfare.

In addition, it is submitted, they also create duties in respect of the medical profession and the public at large. Since ethical and legal duties overlap to a large extent, it is submitted that the legal convictions of the community dictate that a breach of an ethical duty, for example, causing harm to the patient and not to act in the best interest of the patient, would amount to the failure to exercise care towards the patient. Hence it would amount to a breach of a legal duty.

Although foreign law is not automatically considered as an influencing factor as means of balancing conflicting interests, nonetheless, it is persuasive authority at times in which legal thinking is influenced. *Neethling et al* ⁴⁸¹ hold the view that the balancing of conflicting interests in South Africa does involve the convictions of the South African community and not that of foreign countries for example the United States of America, Europe and England.

⁴⁸⁰ Carstens and Kok (2003) 18 *SAPR/SAPL* 430 at 449-452. For a discussion of ethical and legal duties albeit in a legal context see Midgley "Ethics and Legal Duties" *De Rebus*, August 1990 525-528. See also Dada and McQuoid-Mason *Introduction to Medico-legal Practices* (2001) 35-45.

⁴⁸¹ *The Law of Delict* (2001) 19-20, 40-41.

Nonetheless, the authors do also hold the view that this principle does not preclude the investigation of foreign legal systems for comparative purposes. After all, it is submitted, Section 39 of Chapter 2 of the Bill of Rights of the Constitution Act 108 of 1996 provides that courts have discretion to consider comparable foreign decisions. *Dugard*⁴⁸² describes the South African legal position with regard to foreign law as follows: "*South Africa's new constitutional order, which requires courts to interpret all legislation and particularly the Bill of Rights to accord with international law, and the nations commitment to the rule of law and human rights, sets the scene of renaissance of international law both in South Africa's foreign policy and in the jurisprudence of its courts.*"⁴⁸³

Since South Africa became a Constitutional state, with the introduction of the Interim Constitution in 1992 and the Final Constitution in 1996, legal writers, in numbers, have begun to attach greater significance to the effects of the Constitution and the values derived there-from. Many legal writers have, since, written extensively on the effects of the Constitution and the values derived there-from.⁴⁸⁴

*Van der Merwe et al*⁴⁸⁵ state that when considering the enforceability of certain contracts or provisions of a contract, the courts, in interpreting the contract or terms of the agreement, must ensure the common law is not incongruent with the Constitution. The authors opine that when a court balances the interests of parties in determining the illegality of a specific agreement, it must consider the Constitution of the Republic of South Africa and the values which it possesses.

As to the value of Constitution to public policy *Christie* states:⁴⁸⁶

"By accepting the Constitution as a reliable statement of public policy, a court would have no difficulty in declaring a contract which infringed a provision of the Bill of Rights to be contrary to public policy and therefore

⁴⁸² *International Law* (2000)25.

⁴⁸³ Dugard *International Law* (2000) 25; See also Van der Merwe et al (2003) 121-76; Christie *Bill of Rights Compendium* (2002) 3H-7 to 3H-8; Hawthorne (2003) 15 *SA Merc LJ* 271; Grove (2003) *De Jure* 134 141; Hopkins *TSAR* 2003 1 150 157; The South African Law Commission in their report Project 47 (1998) relied heavily on foreign law in order to come to their findings and recommendations.

⁴⁸⁴ Dugard (2000) 25; See also Van der Merwe et al (2003) 121-76; Christie *Bill of Rights Compendium* (2002) 3H-7 to 3H-8; Hawthorne (2003) 15 *SA Merc LJ* 271; Grove (2003) *De Jure* 134 141; Hopkins *TSAR* 2003 1 150 157.

⁴⁸⁵ *Contract: General Principles* (2003) 14, 82.

⁴⁸⁶ Christie *Bill of Rights Compendium* (2002) 3H-6J; See also Hawthorne (2003) 15 *SA Merc LJ* 271 who suggests the courts are encouraged to give a purposive interpretation to contracts which must be consonant with the spirit and values contained in the Bill of Rights.

unenforceable." ⁴⁸⁷

Hopkins, ⁴⁸⁸ in assessing the value of the New Constitution, suggests the New Constitutional dispensation with regard to contract include: "*All law in South Africa (including the common law that regulates the enforcement of contracts - and standard-form contract by implication) must promote the values that underlie the Bill of Rights.*" These values according to Hopkins include openness, dignity, equality, and freedom. The writer describe the influence of the Constitution as: "*The Constitution instructs lawyers to develop the common law where it is non-compliant with these values because of the duty to 'promote the spirit, purport and objects of the Bill of Rights' (s39 (2) of the Constitution.*"

He goes on to caution that: "*The old (pre-constitutional) idea of private law justice cannot stand aloof from these developments. It is my submission that whereas the common law sanctity of contract rule once epitomised contractual justice, it must now also be constitutionally scrutinised against the values that animate the Constitution.*" ⁴⁸⁹

In weighing up the doctrine of human rights and natural justice with the sanctity of contract, Hopkins highlights the potential abuse of power by the strong over the weak. In this way the latter is either forced to consent to the infringement of a fundamental right or else forced to waive a fundamental right altogether.

Strydom ⁴⁹⁰ in this regard hold the view that:

"No matter how highly we value the sanctity of contract rule, the freedom to contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights." ⁴⁹¹

Finally, *Christie*, ⁴⁹² with regard to the Constitutional values as aid for shaping public policy,

⁴⁸⁷ Christie *Bill of Rights Compendium* (2002) 3H-6J.

⁴⁸⁸ "Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice v natural justice" (2003) 1 *TSAR* 150, 157.

⁴⁸⁹ Hopkins "Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice v natural justice" (2003) 1 *TSAR* 150, 157.

⁴⁹⁰ "The Private domain and the Bill of Rights (1995) *SA Public Law* 52.

⁴⁹¹ Strydom "The Private domain and the Bill of Rights (1995) *SA Public Law* 52; See also the writings of Hawthorne 2004 67 (2) *THRHR* 294ff; Van Aswegen 1994 (57) *THRHR* 448, 450-451.

⁴⁹² *The Bill of Rights Compendium* (2001) 3h-8 to 3H-12. For support see Grove (2003) *De Jure* 134, 140.

suggests that it is especially in the law of contract and specifically where a contract is considered to be unenforceable and against public policy, that a court may have regard to Section 8(3) (a) and 8(3) (b) to limit a right.

10.2.3.1.2 Case Law

It has long been recognised ever since the dictum of Innes CJ in *Eastwood v Shepstone*⁴⁹³ that the South African courts will not enforce a contract that is against public policy or *contra bonos mores* even if it means restricting a person's liberty, or freedom to act. In this regard, Innes CJ held:

*"Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised but once it is clear that any arrangement is against public policy the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is the tendency of the proposed transaction, not its actually proved result."*⁴⁹⁴

The Appellate Division, in *Morrison v Anglo Deep Gold Mines Ltd*,⁴⁹⁵ recognised that it was against public policy to allow a man to contract out of liability for injury done to persons by those in his employment, when the court stated per Mason J:

*"It may be fairly argued that it is against public policy to allow a man to contract out of liability for injury done to persons by those in his employment and that argument, so far as I understand it, raises two grounds: first, that the permission to contract out may make employers careless of the safety of their servants so that such permission is against public interest, and the second is the ground given in the American decision quoted during the argument that it would fill the land with disabled and impoverished workmen. The latter argument is expressed in theoretical language, but appears to me in substance to be embraced within the first ground. Now in our law it is a principle that agreements contra bonos mores will not be enforced, and that is in reality the same as the English maxim as to contracts against public policy."*⁴⁹⁶

In *Jajbhay v Cassim*⁴⁹⁷ the Appellate Division, recognising the principle of public policy, held: *"..... [P]ublic policy should properly take into account the doing of simple justice between man and man....."*⁴⁹⁸

⁴⁹³ 1902 TS 294.

⁴⁹⁴ *Eastwood v Shepstone* 1902 TS 294.

⁴⁹⁵ 1905 (AD) 775.

⁴⁹⁶ *Morrison v Anglo Deep Goldmines Ltd* 1905 (AD) 775 at 784.

⁴⁹⁷ 1939 AD 537.

⁴⁹⁸ *Jajbhay v Cassim* 1939 (AD) 537.

In what may be regarded as the commencement of modern law of illegality or unenforceability of contracts due to public policy and those *contra bonos mores*, Smalberger JA in *Sasfin (Pty) Ltd v Beukes*⁴⁹⁹ set the tone by declaring:

"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The powers to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."

The court then quotes with approval the words of Lord Atkin in *Fender v St John-Mildway* 1938 AC 1 (HL) at 12:

"The doctrine should only be invoked in clear cases in which the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds."

The court then cautions against relaxing the doctrine *pacta sunt servanda* when stating:

*"In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract and requires that commercial transactions should not be unduly cancelled by restrictions on that freedom."*⁵⁰⁰

A few months later the Appellate Division, in the case of *Botha (now Griessel) v Finanscredit (Pty) Ltd*,⁵⁰¹ was again confronted with what Smalberger in *Sasfin* has called *"this often difficult problems"* in having to decide when a contract or provisions of an agreement run counter to public policy or is said to be *contra bonos mores*. Hoexter JA after considering the principles laid down in the *Sasfin* case, adopted the principles laid down in *Sasfin* and restated further principles from *Sasfin* when he stated:

"I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgement to the Sasfin case (at 8C-D0.

' clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience 'And accordingly, unenforceable on the grounds of public policy. In such an investigation (see the remarks of Smalberger JA at 9A-G of the Sasfin case) there must be borne in mind: (a) that while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transactions and the element of public harm are manifest. So approaching the inquiry in the instant matter I am

⁴⁹⁹ 1989 (1) SA 1 (A).

⁵⁰⁰ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 9ff.

⁵⁰¹ 1989 (3) SA 773 (A).

not persuaded that the provisions of clause 7 of the suretyships are plainly improper and unconscionable. While at first blush the provisions of clause 7 may seem somewhat rigorous they cannot, I think, having regard to the particular circumstances of the present case, fittingly be described as unduly harsh or oppressive. The enquiry is directed to `..... The tendency of the proposed transaction, not it's actually proved result. (Per Innes CJ in Eastwood v Shepstone 1902 TS 294 at 302, the Sasfin case supra at 81-9A:14f)." ⁵⁰²

In more recent times, during the post-constitutional era, our Supreme Court of Appeal was again confronted with the often difficult problem of deciding when to exercise its power to declare a provision in a contract against public policy. In the case of *De Beer v Keyser and Others*, ⁵⁰³ the court was asked to pronounce upon the validity of a franchise agreement and more particularly, whether the franchise agreement was contrary to public policy. The franchise agreement, itself, was a micro-lending agreement, stipulating that the lender surrender his cash card and disclose his personal identification number to the lender (franchisee). On appeal, the Appellants, in addition to the vagueness of the agreement, also argued that the agreements were unenforceable because the technique used to recover the debt was contrary to public policy. According to the Respondents, the form of technique used was a *parate executie* i.e. an agreement granting a creditor the right to sell the debtor's property in satisfaction of the debt. The Supreme Court of Appeal consequently upheld the appeal.

The court, per Nugent AJA, recognised that there are instances when agreements are to be regarded as contrary to public policy when he stated:

"[22] There might well be circumstances in which an agreement unobjectionable in itself will not be enforced because the object it seeks to achieve is contrary to public policy." ⁵⁰⁴

But, relying on the *Sasfin* case, the court concluded:

"Nevertheless a court should be cautious when it performs its role as arbiter of public policy. In Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 9B-E Smalberger JA said:

"No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Midmay 1938 AC 1 (HL) at 12 ([1937] 3 ALL ER 402 at 407B-C);

"The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable,

⁵⁰² *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782I-783C.

⁵⁰³ 2002 (1) SA 827 (SCA).

⁵⁰⁴ *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837.

and does not depend upon the idiosyncratic inferences of a few judicial minds."

(See also *Olsen v Standaloft* 1983 (2) SA 668 (ZS) at 673G), *Williston on Contracts* 3rd Ed Para 1630 expresses the position thus:

"Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power." ⁵⁰⁵

The court consequently held that *"..... The use of the technique is in any event not contrary to public policy."* The court continues *" ... once it is accepted that the borrower is obliged to repay the debt, in my view it is not objectionable for the borrower to furnish a ready means for its collection."* ⁵⁰⁶

The dicta in the De Beer case have not escaped criticism. *Hawthorne*, ⁵⁰⁷ in particular, is of the view that, although public policy has been recognised as one of the open norms that determine the character of contract law, ⁵⁰⁸ nonetheless, the limited interpretation, by the Supreme Court of Appeal, in the application of this norm to the micro-lending industry *"begs the question whether public policy is still available to inject equitable principles into unconscionable contracts by way of interpretation."*

I respectfully associate myself with the additional comments by *Hawthorne*, when he suggests that the *"obvious route is to develop the open norm of the South African Common Law, such as bona fides, public policy, and boni mores in accordance with the constitutional mandate."* ⁵⁰⁹

If the above principles, it is submitted, are adopted and applied by the courts, the result will

⁵⁰⁵ *De Beer v Keyser and Others* 2002 (1) SA 823 (SCA) at 837.

⁵⁰⁶ *De Beer v Keyser and Others* 2002 (1) SA 823 (SCA) at 839.

⁵⁰⁷ "The end of bona fides" (2003) 15 SA MERC LJ 271 at 276-278.

⁵⁰⁸ See also the following cases in which the courts in restraint of trade matters as well as employment contracts have emphasized the doctrine of public policy: *Basson v Chilwan* 1993 (3) SA 742 (A) at 762I-J and 763A-B; *New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75 at 83; *Van de Pol v Silberman and Another* 1952 (2) SA 561 (A) at 571-572; *Wohlman v Buron* 1970 (2) SA 760 (C) at 764; *Malan en andere v Van Jaarsveld en 'n ander* 1972 (2) SA 243 (C) at 246-247.

⁵⁰⁹ Hawthorne "The end of bona fides" (2003) 15 SA MERC LJ 271 at 276-278.

ensure, as suggested by *Hawthorne*,⁵¹⁰ that "*pacta sunt servanda will not be placed on a pedestal at the expense of unconscionable terms or contracts thus effectively eliminating equality.*"

In a case concerning the eviction of a lessee, the Supreme Court of Appeal, in the case of *Brisley v Drotsky*,⁵¹¹ was tasked to decide whether the enforcement of a non-variation clause in a lease agreement would be fair and enforceable, alternatively, whether such a clause would be unenforceable. The facts of this case may briefly be stated as follows:

The appellant (the lessee) concluded a lease with the respondent (the lessor). The rent was payable in advance on the first of each month. The contract provided that if the rent was not paid on time, the lessor could cancel the agreement immediately. The contract also contained a 'Shifren clause' - no alteration, variation, or cancellation of any of the terms or conditions of the lease would be of any force or effect unless it was recorded in writing and signed by the parties. The appellant failed to pay the first month's rent on time. The respondent terminated the lease and gave the appellant two weeks to vacate the premises. On appeal, the lessee raised several arguments against the eviction order.

The court considered, *inter alia*, the principles governing the application of public policy when enforcing agreements between contractants. In this regard, the court, in the majority judgement of Harms JA, Streicher JA and Brand JA, emphasized that it is in public interests that agreements entered into between consenting adults be enforced. The court relied upon the case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A), in which it was held:

"..... dit in die openbare belang is dat persone hulle moet hou aan ooreenkomste wat hulle aangegaan het. In laasgenoemde verband het Steyn HR in SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964(4) SA 760(A) op 767A, gewag gemaak van:

*"die elementêre en grondliggende algemene beginsel dat kontrakte wat vrylik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word."*⁵¹²

The court recognises that, in certain circumstances, restrictions may be placed on contractual freedom and relied, in this regard on the dictum of Botha J, in the case of

⁵¹⁰ "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294; See also Hawthorne "Public policy and micro-lending - Has the unruly horse died?" 2003 *THRHR* 116.

⁵¹¹ 2002 (2) SA 1 (SCA).

⁵¹² *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15.

National Chemsearch SA (Pty) Ltd v Borrowman and Another 1979 (3) SA 1092 (T) at 1107C-H, in which it was stated:

"At first sight it might be thought strange that a contract can be void at one point of time and valid at another. But that, I believe, is not the right way of looking at a situation where the decisive question is whether the court should decline to enforce a contract in restraint of trade because of considerations of public policy. In an article in 1941 SALJ 335 at 346 Aquillus gives the following definition of a contract against public policy."

*'A contract against public policy is one stipulating a performance which is not per se illegal or immoral, but which the courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interests of the community.'*⁵¹³

The court then formulates certain ground rules which ought to be applied with regard to agreements in restraint of trade namely:

*"(My italics). With regard to agreements in restraint of trade, it seems to me that the court's concern is to assess the effect of an order enforcing the agreement in the light of the dictates of public policy, and that the proper time for making that assessment is the time when the court is asked to make the order, taking into account the relevant circumstances existing at that time. Public policy does not require the court to penalise the party seeking to enforce the agreement, by declining to do so, because at the time when it was entered into it was so worded that it would not be accurately forecast whether it would be reasonable or not to enforce it when the occasion for its enforcement should arise."*⁵¹⁴

Commenting on the ever-present dicta of Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9B-E:

*"The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* (1938) AC 1 (HL) at 12:*

'..... The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.'

The court held:

*"In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires the commercial transactions should not be unduly trammelled by the restrictions on that freedom."*⁵¹⁵

⁵¹³ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15.

⁵¹⁴ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 17.

⁵¹⁵ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 18.

Cameron JA, in the same judgement, concentrates, *inter alia*, on the effect of the constitution on public policy. He remarks then as follows:

"[91] The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. 30 Public policy in any event nullifies agreements offensive in them - a doctrine of very considerable antiquity. 31 in its modern guise, 'public policy' are now rooted in our Constitution and the fundamental values it enshrines.

There include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. 32

[92] It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity are at the borders of public policy will therefore receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights." ⁵¹⁶

Cameron JA, however, warns against over-hasty or unreflective importation of the concept of 'boni mores' when he remarks:

"[93] I share the misgivings the joint judgement expresses about over-hasty or unreflective importation into the field of contract law of the concept of 'boni mores'. The 'legal convictions of the community' - a concept open to misinterpretation and misapplication - is better replaced, as the Constitutional Court itself has suggested, by the 'appropriate norms of the objective value system embodied in the Constitution'. 33 What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith. 34" ⁵¹⁷

[94] The court adds, on the contrary, the Constitution's value of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. 35 One of the reasons, as Davis J has pointed out, 36 is that contractual autonomy is part of freedom. Shorn of its obscene excesses, 37 contractual autonomy informs also the constitutional value of dignity." ⁵¹⁸

Cameron JA then concludes:

"[95] The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity. The issues in the present appeal do not imperil that balance." ⁵¹⁹

⁵¹⁶ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 34.

⁵¹⁷ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35.

⁵¹⁸ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35.

⁵¹⁹ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 36.

The case of *Brisley* was also not spared the rod by our writers. It is especially *Hawthorne*,⁵²⁰ who is very critical of Cameron JA's comments in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35ff, where the learned judge explains that "*although the common law of contract is subject to the Supreme Law of the Constitution (35G-H) the Constitution enshrines the fundamental values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism (37A) and requires a balance between contractual freedom and "securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity."*"⁵²¹

Hawthorne, in dealing with the issue at hand, has the following comment to make, namely:

*"Although Cameron JA held in Brisley 35B that it is not difficult to envisage situations in which contracts which offend the fundamentals of our new social compact, will be struck down as being offensive to public policy, it will be argued that this is a myth. Cameron JA admits so much by holding, virtually in the same breath (35D-E), that neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of unjustness or to determine their enforceability on the basis of imprecise notions of good faith."*⁵²²

It is submitted that *Hawthorne* correctly points out that:

*"The obvious reason for the above restraint and the underlying interpretation of the effect of the constitutional values in the law of contract is the much vaunted freedom of contract."*⁵²³

But, points out *Hawthorne* "*..... open norms like public policy, boni fides, boni mores, etc create the possibility to curb excesses, so sparing our courts the shame of complete passivity in respect of patent inequality between the parties."*⁵²⁴

Whether an admission document, signed by the respondent during his admission to the hospital which included an exemption clause, absolving the respondent the hospital and/or its employees and/or agents from all liability and indemnifying them from "*any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature*" formed the subject matter for adjudication in a medical negligence

⁵²⁰ "Closing of the open norms in the Law of Contract" 2004 69 (2) *THRHR* 294.

⁵²¹ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35-36.

⁵²² Hawthorne "Closing of the open norms in the Law of Contract" 2004 67 (2) *THRHR* 294.

⁵²³ Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294.

⁵²⁴ Hawthorne "Closing of the open norms in the Law of Contract" 2004 67 (2) *THRHR* 294.

case of *Afrox Healthcare Bpk v Strydom*.⁵²⁵ The facts of the case and a more comprehensive discussion of the dictum will be covered in Chapter 13 of this thesis. Save for briefly discussing the relevant facts in so far as they relate to public policy or public interest, a more comprehensive discussion at this stage would be superfluous. The respondent advanced several reasons why the provisions of the exclusion clause could not operate against him.

The respondent contended, *inter alia*, that the relevant clause was contrary to the public interest, etc. The grounds upon which the respondent based his reliance on the public interest were the alleged unequal bargaining positions of the parties at the conclusion of the contract, as well as the nature and ambit of the conduct of the hospital personnel for which liability on the part of the appellant was excluded and the fact that the appellant was the provider of medical services. The respondent alleged that, while it was the appellant's duty as a hospital to provide medical treatment in a professional and caring manner, the relevant clause went so far as to protect the appellant from even gross negligence on the part of its nursing staff. This was contrary to the public interest.

The court, in assessing the validity or invalidity of exclusionary clauses in the South African Law of Contract, considered, *inter alia*, the doctrine of public policy and sets out the legal position as follows:

"[8] 'n Kontraksbepaling wat dermate onbillik is dat dit met die openbare belang, in stryd is, is regters onafdwingbaar. Hierdie beginsel is onder meer deur hierdie Hof in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) en Botha (now Griessel) and another v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A) erken en toegepas. In die Sasfin saak (op 9B-F) rig Smalberger AR egter die volgende woorde van waarskuwing:

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

One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St-John Mildmay 1938 AC 1 (HL) at 12:

" The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds..... "

*In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom."*⁵²⁶

⁵²⁵ 2002 (6) SA 21 (SCA).

⁵²⁶ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (AD) 33-34.

Brand JA, delivering the judgement, held that, although, as a general rule, exclusionary clauses in contract are enforceable. It does not however, necessarily follow that in certain circumstances certain exclusionary clauses contrary to public policy may be regarded by our courts that such clauses are void and unenforceable. In this regard Brand JA stated:

*"[10] Die feit dat uitsluitingsklousules as 'n spesie in beginsel afgedwing word, beteken uiteraard nie dat 'n bepaalde uitsluitingsklousule nie deur die Hof as strydig met die openbare belang en derhalwe as onafdwingbaar verklaar kan word nie. Die bekendste voorbeeld van 'n geval waar dit wel gebeur het, is waarskynlik die beslissing in Wells v South African Alumenite Company 1927 AD 69 op 72 waarvolgens 'n kontrakbeding wat aanspreeklikheid vir bedrog uitsluit, as strydig met die openbare belang en derhalwe ongeldig verklaar is."*⁵²⁷

The court consequently held that the yardstick used in measuring whether exclusionary clauses are unenforceable as against public policy are exactly the same as measuring contractual provisions which are, as a result of public policy, unenforceable. The question always remains whether the enforcement of the particular exclusionary clause or other contractual provision would, as result of extreme unfairness or as a result of other policy convictions, be contrary to the interests of the community.

The Supreme Court of Appeal, after considering the three grounds relied upon by the respondent to prove that the disclaimer offended public policy, namely:

- (1) The unequal bargaining position between the parties;
- (2) The nature and extent of the acts of the hospital staff against which the appellant was indemnified;
- (3) The fact that the appellant is the provider of healthcare services rejected all of these grounds.

As to the unequal bargaining power, the court held that, on its own, it is not enough to conclude that the impugned clause offends public policy. The court, consequently, held that unequal bargaining power is a factor to be considered together with all other factors in deciding whether public policy was offended. But, the court held that, in this case, the respondent provided no evidence whatsoever that indicated a weaker bargaining position.

As to the second ground, it was argued on behalf of the respondent that the disclaimer excluded even gross negligence and that this is against public policy. The court however, rejected this argument, *inter alia* because the respondent relied on negligence *per se* in his

⁵²⁷ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (AD) 33-34.

pleadings and not on gross negligence.

The court also held that contractual autonomy, as encapsulated in the common law maxim of *pacta sunt servanda*, forms part of the value of freedom and is thus protected in the Constitution.

It is respectfully submitted that, for the dicta in the *Afrox case*, Mr Justice Brandt deserves no accolades whatsoever. I believe here was a golden opportunity for the court to embrace morality rather than capitalistic business principles. Instead, the Supreme Court of Appeal chose to ignore normative medical ethics and values, which *Carstens and Kok*⁵²⁸ define as 'to do no harm' and 'to act in the best interest of the patient.'

Instead of going with the mainstream of foreign jurisdictions, *inter alia*, the United Kingdom, United States of America and the Federal Republic of Germany, in which disclaimer clauses against liability for medical negligence are viewed as an infringement of the *boni mores* or against public policy, Brandt JA, with his reasoning, kept the South African legal position in a swamp in which morality has no place, but business considerations, such as savings in regard to insurance premiums and competition remains the order of the day (34E-F of the dicta)⁵²⁹

More recently the Supreme Court of Appeals, in two dicta, discussed the role of public policy in the South African law of contract. In the case of *Napier v Barkhuizen*,⁵³⁰ the court, in an appeal, dealt with the decision of the Pretoria High Court which upheld a challenge that a clause in an insurance contract barring Barkhuizen from claiming because he had not instituted legal action within 90 days as required by the contract. The court consequently held that the clause relied on by the insurance company was violative of Section 34 of the Bill of Rights, which guarantee the right to approach a court for redress, as well as public policy which also protected this right.

On appeal to the Supreme Court of Appeal, the Supreme Court of Appeal reversed the decision of the High Court. It held that Section 34 does not prohibit time limitation clauses. In addition, the Supreme Court of Appeal held that there was no evidence that Barkhuizen

⁵²⁸ "An Assessment of the use of Disclaimers by South African Hospitals in view of Constitutional demands, Foreign Law and Medico-legal considerations" (2003) 18 *SAPR/PL* at 430 .

⁵²⁹ See further Hawthorne 2004 67 (2) *THRHR* 294 at 301-302.

⁵³⁰ 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA).

did not freely and voluntarily conclude the insurance contract. The court, as a general rule, accepted that contractual claims are subject to the constitution. It also accepted that a contractual term that is contrary to public policy is unenforceable. Save for the established common law factors influencing public policy, the court held that public policy now derives *"from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism."*

The Supreme Court of Appeal, relying heavily on the *pacta sunt servanda* rule, cautioned that the fact that a term in a contract is unfair or may operate harshly, does not, by itself, lead to the conclusion that it offends the values of the Constitution. Here, the court emphasized the principles of dignity and autonomy which, according to the court, *"finds expression in the liberty to regulate one's life by freely engaging in contractual arrangements."* The court then suggests that the Constitution requires of the courts that they *"employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives."*⁵³¹

The court however warns: *"that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."*

The court consequently held that the evidence placed before it by way of a stated case was 'extremely slim' for it to determine whether these constitutional values have been impeached. In the case of *Bafana Finance Mabopane v Makwekwa and Another*⁵³² a matter concerned a clause in a money lending contract whereby the debtor purports to undertake not to apply for an order placing his/her estate under administration in terms of S74 (1) of the Magistrate's Court Act 32 of 1944 and to agree that the loan debt will not form part of an administration order for which he/she might apply was held to be unenforceable as being inimical to public policy.

The Supreme Court of Appeal, per Cachalia AJA, relying on public interests, set out the common law position as follows:

"An agreement whereby a party purports to waive the benefits conferred upon him or her by statute will be contra bonos mores and therefore not enforced if it can be shown that such agreement would deprive the party of protection which the legislature considered should as a matter of policy be afforded by law. An agreement is contrary to public policy according to Wells 'if it is opposed to the interests of the State or of justice of the

⁵³¹ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) Paras 12 and 13.

⁵³² 2006 (4) SA 581 (SCA).

public'."

Besides the chief classes of agreements regarded as contrary to public policy as quoted in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) which included: " *those which tend to (i) injure the State or the public service (ii) defeat or obstruct the administration of justice; or (iii) interfere with the free exercise by persons of their rights*" the court found that public policy is "*anchored in founding Constitutional values which include human dignity, the achievement in equality and the advancement of human rights and freedoms.*"

Consequently, the court considered the law applicable to the restriction or prevention of rights. The court, with reference to the dictum of Kotze JA in *Schierhout v Minister of Justice*,⁵³³ in which it was held:

"If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him there would be good ground for holding that such an undertaking is against the public law of the land."

And *Standard Bank of SA Ltd v Essop*⁵³⁴ in which it was decided:

"In my opinion, the applicant's conduct in having purported to stipulate for these rights was, and remains, unconscionable. It has purported to empower itself, in the event of any relevant default by the respondent to deprive him of his status as a solvent person, and inevitably to subject him to all the onerous obligations and extensive restrictions which bind an insolvent in terms of the Act without his being in any event able to defend himself. This conduct offends my, and in my opinion would offend any reasonable person's sense of justice."

Held that:

"To deprive or restrict anyone's right to seek redress in court, as the cases cited above make clear, is offensive to one's sense of justice and is inimical to the public interest. When this is done to a poor person in the circumstances of the respondent, as the appellant attempted to do in the present matter, it is even more so."

The Constitutional Court have also, subsequent to the Supreme Court of Appeals *dicta* discussed hereinbefore, in the case of *Barkhuizen v Napier*⁵³⁵ discussed the nature and effect of public policy in contract. The majority judgement, per Ngcobo J, held that public policy represents the legal convictions of the community which represents those values that

⁵³³ 1925 AD 417.

⁵³⁴ 1997 (4) SA 569 (A).

⁵³⁵ 2007 (5) SA 323 (CC).

are held most dear by society. The court expressed the view that determining the content of public policy was once fraught with difficulties. The court states that since the introduction of the Constitution, in this new legal order, this is no longer the position, as public policy is now rooted in our Constitution and the values which underlie it. The values, according to the court, include the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law.

Therefore, what public policy is and whether a term in a contract is contrary to public policy, the court suggested, must now be determined by reference *"..... to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*

The court held that courts are entitled to decline to enforce contractual terms that are in conflict with the Constitutional values, even though the parties may have consented to them. The court consequently considered public policy and the right of access to court in the light of Sec 34 of the Constitution. Turning to Section 34 the Constitutional Court held that: *"..... Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."*

And further:

"..... Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."

Turning to the common law approach Ncgobo J held:

"Courts have long held that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy."

The court cites as an example the case of *Schierhout v Minister of Justice*,⁵³⁶ in which the Appellate Division, as the Supreme Court of Appeal was then known, held that:

*"If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land."*⁵³⁷

⁵³⁶ 1925 AD 417.

⁵³⁷ *Schierhout v Minister of Justice* 1925 AD 417 at 424. See also *Nino Bonino v De Lange* 1906 TS 120 at 123-4.

The court cites a host of cases⁵³⁸ in which the South African courts have considered terms in a contract, denying a contracting party the right to seek the assistance of a court, to be contrary to public policy and therefore contrary to common law.

As to the new legal order, the court held *"all law derives its force from the Constitution and is thus subject to Constitutional control."* The court continues to hold that, no law is immune from Constitutional control, nor is the common law of contract. Consequently, the court held that our courts have a constitutional obligation to develop common law, including the principles of the law of contract, so as to bring it in line with the values underlying our Constitution.

The court then formulates the proper approach to determine whether a claim is inimical to the values that underlie our constitutional democracy, namely: whether the term limitation clause is contrary to public policy as evidenced by constitutional values regard must be had to factors such as reasonableness and fairness and doing simple justice between individuals. The court states that public policy is founded upon the concept of Ubuntu.

Consequently the court held:

"It would be contrary to public policy to enforce a time limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress."

The court also held that the first inquiry in these types of matters would be directed at the objective terms of the contract. Consequently, the court suggests:

"If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties."

The court consequently accept that the unequal bargaining power between the contracting party together with other factors with reference to the case of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA) at Para 18, plays a role in the consideration of public policy. The rationale for the acceptance of this factor is founded according to the court on *"..... the potential injustice that may be caused by inequality*

⁵³⁸ *Administration, Transvaal and Others v Traub and Others* 1989 (4) SA 729 (A) at 764E; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 AD at 621F-G; *Stokes v Fish Hoek Municipality* 1966 (4) SA 421 (C) at 423H-424C; *Gibbons v Cape Divisional Council* 1928 CPD 198 at 200; *Benning v Union Government (Minister of Finance)* 1914 AD 29 at 31.

of bargaining power." The court found as well is important in a society "unequal as ours". The court also found that:

"..... Many people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness"

But, holds the court in the case *in casu*, there is no admissible evidence that the contract was not freely concluded and that there was unequal bargaining power between the parties.

Recognizing that public policy imports the notions of fairness, justice and reasonableness and those agreements which are immoral and violative of public policy, the court however, found that the 90 days allowed to him to sue was not inadequate or unfair.

In a dissenting judgement, Sachs J found that terms contained in small print in standard form contracts, which bear harshly on contracting parties and which do not form part of the actual terms on which reliance was placed by the parties when the agreement was reached, do not comply with the standards of contractual freedom required by public policy in South Africa. Sachs J, relying on the guidance of international practise and the official proposals for statutory reform in South Africa on consumer protection, found that what public policy seeks to achieve *"..... Is a reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition."* Sachs J, with regard to the legal convictions of the community in relation to consumer protection generally and the status of one-sided terms in standard form contracts, found that considerations of public policy, as animated by the Constitution, dictated that the time-bar clause, which limited access to courts, should not be enforced as it offends to comply with standards of notice and fairness, which the contemporary notion of consumer protection required in open and democratic societies.

A number of factors have over several decades been identified by the South African courts as means to determine whether in a contractual setting, a contractants conduct has violated public policy or put differently, is *contra bones mores*. One of the factor's which have received extensive judicial attention, albeit with much controversy, is that of good faith. Prior to the Appellate Division's case of *Bank of Lisbon South African Ltd v Ornelas*⁵³⁹ which seem to have sealed the fate of good faith, as an independent defence, the

⁵³⁹ 1988 (3) SA 580 (A).

Appellate Division in *Tuckers Land and Development Corp (Pty) Ltd v Hoves*⁵⁴⁰ and *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*⁵⁴¹ did recognise that the concept good faith does assist in determining whether public policy forbids the enforcement of a contract or not. Although the Supreme Court of Appeals (previously the Appellate Division), in the cases of *Brisley v Drotsky*⁵⁴² and *Afrox Healthcare Bpk v Strydom*,⁵⁴³ does appear to continue to support the non revival of good faith in South African law, our courts do from time to time show the worth of good faith, if not a revival of the concept. The recognition of the concept is viewed by some courts as a principle which requires ordinary business decency.⁵⁴⁴

Van Zyl J in the case of *Janse van Rensburg v Grieve Trust CC*⁵⁴⁵ found justification for an application of good faith in the fact that such an interpretation was consonant with the spirit and values contained in the Bill of Rights.

The court emphasizes, especially, the right to equality in contract. In this case, Van Zyl J held that, in a trade-in agreement, it would be unjust, inequitable, and unreasonable for a seller to be liable for latent defects in a vehicle sold by him, and misrepresentations relating to it, if no similar liability were to attach to the purchaser in respect of the vehicle traded-in by him (at 325H). A purchaser would effectively be able to deliver a defective trade-in vehicle knowing full well that the seller would not be able to raise the aedilician actions against him.

In a subsequent judgement, also in the Cape Provincial Division, per Ntsebeza AJ, in the case of *Miller and Another NNO v Dannecker*,⁵⁴⁶ the court, relying on the minority decision of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO 1997 (4) SA 302 SCA at 318*, held that a court can refuse to enforce an entrenchment clause where such enforcement would breach the principle of good faith.

⁵⁴⁰ 1980 (1) SA 645 (A) 561 C 562 6.

⁵⁴¹ 1985 (1) SA 419 (A).

⁵⁴² 2002 (4) SA 1 (SCA) 1.

⁵⁴³ 2002 (6) SA 21 (SCA).

⁵⁴⁴ *Standard Bank of South Africa Ltd v Prinsloo (Prinsloo Intervening)* 2000 3 SA 576 (C) 585; *Shoprite Checkers v Bumpers Schwarmas CC* (2002) 2 ALL SA 588 (C) 600.

⁵⁴⁵ 2000 (1) SA 315 (C) 326.

⁵⁴⁶ 2001 (1) SA 928 (C).

The concept of contractual freedom and sanctity of contract has also, through decades, been recognized by the South African courts as an aid to determine whether public policy demands that a contract or contractual provision should be denounced as unreasonable or unfair.⁵⁴⁷

The principles of equity, fairness and unreasonableness have also received the attention of the South African courts over many decades. Although the courts have been reluctant, on occasions, to release a contracting party from the consequences of an agreement merely because that agreement appears to be unreasonable or unfair,⁵⁴⁸ there have been a number of judgements wherein the South African courts have decided not to enforce contracts that are unreasonable or unfair for a number of reasons.⁵⁴⁹

Although the South African courts have, on occasions, protected contracting parties against unconscionable terms or agreements as a whole, more particularly, in contracts containing restraint of trade clauses and employment contracts,⁵⁵⁰ in which the courts have favoured the position of the inferior contracting party, nevertheless, the courts have never, outright,

⁵⁴⁷ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Brisley v Drotsky* 2002 (4) SA 1; *Eastwood v Shepstone* 1902 RS 294; *Osry v Hirsch Loubser and CO Ltd* 1922 CPD 531; *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775; *South African Railways and Harbours v Constable* (2) (AD) 132; *Conradie v Rossouw* 1919 AD 279; *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600; *Wells v South African Alumenite Company* 192 AD 69; *George v Fairmead* 1958 (2) SA 465 (A); *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren* 1904 (4) SA 760 (A); *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W); *New United Yeast Distributors (Pty) Limited v Brooks* 1935 W.L.D. 75; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Olsen v Standaloft* 1983 (2) SA 668 (ZS); *Oatorean Properties (Pty) Ltd v Maroun* 1983 (2) SA 668 AD; *Tamarillo (Pty) Ltd v BN Atken (Pty) Ltd* 1982 (1) SA 398 (AD); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD); *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 1989 (SCA) 420; *De Beer v Keyser and Others* 2002 (1) SA 829 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁵⁴⁸ *Burger v Central South African Railways* 1903 TS 531 576; *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 238; *Weinerlein v Goch Buildings Ltd* 1925 (AD) 282.

⁵⁴⁹ *Zurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Ingesund* 1975 (3) SA 294 (D); *Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (W). Didcott J in this case delivered the following dictum: "From the judgements that were delivered one learns the following, all of which is now clear. Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenanter's freedom to trade or to work." See also *Sunshine Records (Pty) Ltd v Frohling* 1990 (4) SA 782 (A) 794 B-F; *Basson v Chilwan* 1993 SA 742 (A) 767 E-Z; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD).

⁵⁵⁰ For restraint of trade see *Basson v Chilwan* 1993 3 SA 742 (A) 762-J 763-B and for employment contracts see *New United Yeast Distributors (Pty) Ltd v Brooks* 1935 WLD 75 83. *Van de Pol v Silberman* 1952 SA 561 (A) 571E-572A; *Wahlman v Baron* 1970 2 SA 760 (C) 764; *Malan v Van Jaarsveld* 1972 2 SA 243 (C) 246A-247F.

declared unconscionable-ness as an independent defence, alternatively, an open norm of public policy and *boni mores*.⁵⁵¹

The question of morality and ethical considerations has received the attention of our courts from time to time. In so far as the aspect of morality is concerned, as early as 1905, the case of *Dodd v Hadley*⁵⁵² recognised that an illegal contract may be declared unenforceable. In the case of *Silke v Goode*,⁵⁵³ Wessels J stated the law as follows:

*"I take our law to be this: That a contract cannot be enforced by our courts of law to be this: That a contract cannot be enforced by our courts of law if the object of the contract is illegal, or if it is for an immoral purpose."*⁵⁵⁴

Morality and ethics continued to be factors which weighed heavily with the courts in the eighties and nineties and continues to be the position today. This was the position adopted in *Ailas Organic Fertilizers (Pty) Ltd v Pikkewyn (Pty) Ltd and Others* 1981 (2) SA 173 T at 188 and quoted with authority in the case of *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant*.⁵⁵⁵

In weighing up the interests of the competing parties, besides bearing in mind also the interests of society, the court will also consider *"... the business ethics of the section of the community where the norm is to be applied."* In the *Lorimar* case, Van Dijkhorst J, turning to the present case stated:

*"In applying the norm of public policy in the present case, the following factors seem to me to be relevant; the protection already afforded by statutes and by established remedies, like passing off, under the common law, the morals of the market place, thereby I mean the ethics of the business community concerned; an inherent sense of fairplay and honesty, the importance of a free market and strong competition in our economic system; the question whether the parties concerned are competitors; conventions with other countries, like the Convention of Paris."*⁵⁵⁶

⁵⁵¹ *Wells v South African Alumenite Company* 1827 (AD) 69, 73; *Oatorian Properties (Pty) Ltd v Maroun* 1976 (3) SA 16 (A) 28; *Brisley v Drotzky* 2002 (4) SA 1 SCA 35 C-E.

⁵⁵² 1905 T.S. 439, 442. See also *Blackett v South African Turf Club* 1909, 26 SC 45; *South African Tattersalls v Meyer Bros* 1905 TS 722.

⁵⁵³ 1911 (TPD) 989, 994.

⁵⁵⁴ *Silke v Goode* 1911 (TPD) 989, 994. See also *Estate Wege v Strauss* 1932 (AD) 76; *Joseph v Hein* (3) SA 175 (W).

⁵⁵⁵ 1981 (3) SA 1139 (T).

⁵⁵⁶ *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1139

In the case of *Ismail v Ismail*⁵⁵⁷ the Appellate Division (as it was known then) quoted, with approval, the dicta that crystallized from *Hurwitz v Taylor* 1926 TPD at 86, 91, which dealt with the criteria which are to be considered when determining whether a contract is against public policy. The dictum reads:

"A contract is against public policy if it is prejudicial to the public welfare; in deciding whether a contract should be enforced or not, the Courts have the power to look not only at the contract itself but also to the consequences which might flow from such contract or class of contracts. " the determination of what is contrary to the so-called 'policy of law' necessarily varies from time to time. Many transactions are upheld now by our courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion." 558

the liability of contracts contrary to public policy is that of *Sasfin (Pty) Ltd v Beukes* The *locus classicus* on,⁵⁵⁹ in which Smalberger JA sets out the position enunciated by our academic writers, namely with regard to illegal or immoral contracts:

"Writers generally seem to classify illegal or unenforceable contracts (apart from those contrary to statute) into contracts that are contra bonos mores and those contrary to public policy (see e.g. De Wet and Yeats Kontraktereg en Handelsreg 4th Ed at 80; Wille (op cit at 321); Joubert (Ed) Law of South Africa vol. 5 Para 151). Some, like Wessels (op cit), include an additional classification, viz. those contrary to the common law. These classifications are interchangeable, for as 'Aquilius' in 1941 SALJ at 344 puts the matter, 'in a sense all illegalities may be said to be immoral and all immorality and illegality contrary to public policy.' That the principles underlying contracts contrary to public policy and contra bonos mores may overlap also appears from the judgement of this Court in Ismail v Ismail 1983 (1) SA 1006 (A) at 1025G."

Smalberger JA then sets out the courts view namely:

"Now this court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised, but when once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not it's actually proved result." 560

In so far as ethical considerations are concerned, save for cases decided in a medical

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⁵⁵⁷ 1983 (1) SA 1006 (A) 1006.

⁵⁵⁸ *Ismail v Ismail* 1983 (1) SA 1006 (A) 1006.

⁵⁵⁹ 1989 (1) SA 1 (A) 8-9.

⁵⁶⁰ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8-9; See also *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C) 837.

context,⁵⁶¹ in which the best interest of the patient reigns supreme, there are no other cases which turn on ethics being fundamental to determining public policy.

Until the case of *Carmichell v Minister of Safety and Security and another (Centre for applied legal studies intervening)*,⁵⁶² the South African courts treated foreign law with mixed reactions in determining public policy.

It has generally been stated, by the South African courts, that foreign law should be followed with great circumspection, as our courts are not obliged to have regard to comparable foreign case law.⁵⁶³

The Constitutional Court, per Kriegler J, in *Bernstein v Bester*,⁵⁶⁴ took a robust approach in discouraging the reception of foreign authorities in our dicta when he stated:

*"I wish to discourage the frequent and, I suspect, often facile, resort to foreign 'authorities'. Far too often one sees citation by counsel of, for instance, an American judgement in support of a proposition.... The prescripts of section 35(1) of the (interim) Constitution are also clear; where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents."*⁵⁶⁵

But, there are cases in which the courts have shown a more progressive approach in being more receptive in considering foreign law. In the Ciskei High Court decision of *Matinkinca and Another v Council of State, Ciskei and Another*⁵⁶⁶ the court encouraged a "fundamental humanistic constitutional philosophy" interpretation which accords inter alia with ".... the values emerging in the 'civilized international community'."⁵⁶⁷

⁵⁶¹ *Stoffberg v Elliott* 1923 (CPD) 148; *Ex parte Dixie* 1950 (4) SA 748; *Esterhuizen v Administrator, Transvaal* 1953 (C) 837.

⁵⁶² 2001 (4) SA 938 (CC).

⁵⁶³ *Qozeleni v Minister of Law and Order and Another* 1994 (2) SALR 340 (E); *Berg v Prokureur-Generaal van Gauteng* 1995 (11) BCLR 1441 1446; *Potgieter en 'n Ander v Killian* 1995 (11) BCLR 1498 (N); *Park-Ross and Another v The Director of the Office of Serious Economic Offences* 1995 (2) BCLR 198 (C) 208-209; *Nortje and Another v Attorney-General of the Cape and Another* 1995 (2) BCLR 236(c) 247; *Shabalala v Attorney-General of Transvaal* 1995 (1) SA 608 (TPD) 640-41.

⁵⁶⁴ 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) Par 133.

⁵⁶⁵ *Bernstein v Bester* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 CC Par 133; See also *Ferreira v Leven*; *Vryenhoek v Powell* 1996 (1) BCLR 1 (CC), 1996 (1) SA 984 (CC) Par 190.

⁵⁶⁶ 1994 (1) BCLR 17 (CK).

⁵⁶⁷ *Matinkinca and another v Council of State, Ciskei and Another* 1994 (1) BCLR 17 (CK).

The following guidelines were laid down by Chaskalson P in *S v Makwanyane*,⁵⁶⁸ with regard to the following of international and foreign law: *"In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign law case law, but we are in no way bound to follow it."*⁵⁶⁹

The Constitutional Court also laid down certain guidelines in the case of *S v Mamabolo*⁵⁷⁰ wherein the court remarked as follows with regard to the use of foreign precedents namely:

*"(B)efore one could subscribe to a wholesale importation of a foreign product one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and in the society it has been developed to serve. More pertinently, it would have to be established that (the importation) was consonant with our South African Constitutional value system."*⁵⁷¹

The winds of change are, however, observed in the case of *Carmichell v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*,⁵⁷² in which the Constitutional Court relied heavily on English law and, noteworthy, on the decision of *Osman v United Kingdom* 29 EHHR 245 and two judgements of the European Court of Human Rights, in deciding *"a public interest immunity excusing the respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our constitution and its values."* In coming to its finding the court also relied on *"the constitution being the supreme law"*, the effect whereof is that *"Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary, as well as on the legislature and executive"* whereas *"Section 39(1) of the Constitution encourages courts to consider international law and foreign law."* Section 39(2) of the Constitution on the other hand provides that *"when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights"*. Consequently, the court held, *"where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts*

⁵⁶⁸ 1995 6 BCLR 665 (CC) 1995 (3) SA 391 (CC) Par 37 2001 5 BCLR 449 (CC) 2001 (3) SA 409 (CC) Par 32.

⁵⁶⁹ *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 (3) SA 391 (CC).

⁵⁷⁰ 2001 5 BCLR 449 (CC); 2001 (3) SA 409 (CC) Par 43.

⁵⁷¹ *S v Mamabolo* 2001 5 BCLR 449 (CC); 2001 (3) SA 409 (CC) Par 32.

⁵⁷² 2001 (4) SA 938 (CC).

have an obligation to develop it by removing that deviation."⁵⁷³

Another factor which, since the adoption of the South African interim Constitution and the final Constitution, has played a vital role in influencing public policy is that of the values underlying the Constitution and the Bill of Rights.⁵⁷⁴

Most recently the Constitutional Court, per Ngcobo J, in the case of *Barkhuizen v Napier*,⁵⁷⁵ again emphasized that "*public policy is now deeply rooted in our Constitution and the value which underlie it.*" The court adds "*..... Our Constitutional democracy is founded on, amongst other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law.*"

And further:

"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."

10.2.3.1.3 Legal Opinion

Public policy, as with misrepresentation, duress, undue influence etc is a defence fully recognized in the South African law of contract. It is a concept which was firmly entrenched in Roman law, which ultimately, greatly influenced South African contract law, in that, agreements contrary to law, morality or public policy are unenforceable or void.⁵⁷⁶

The rationale for the existence of public policy, in modern times, lies in the broader concept of paternalism in which the courts protect the weaker party in the law of contract. In addition, whether public policy demands that a contract offending against public interest

⁵⁷³ *Carmichell v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001(4) SA 938 (CC); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁵⁷⁴ *Carmichell v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at Paras 54-6; *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA); 2004 (9) BCLR 930 (SCA) at Para 24; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); (2002) 4 ALL SA 125 (SCA) at Para 18; *Brisley v Drotzky* 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at Para 91; and *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA); (2006) 4 ALL SA 1 (SCA) at Para 11.

⁵⁷⁵ 2007 (5) SA 323 (CC).

⁵⁷⁶ Wessels *The Law of Contract in South Africa* (1951) Volume 1 148ff.

may be struck down and declared invalid.⁵⁷⁷ In this regard, public policy has been identified as a doctrine which places a limitation on contractual freedom or contractual autonomy, as well as, the enforcement of contractual agreements with the aid of the doctrine of *pacta sunt servanda*.⁵⁷⁸

In order to assess whether or not an agreement or the terms of an agreement are contrary to public policy or *contra bonos mores*, various factors have been identified by the South African legal writers and the courts alike without an exhausting list been identified.⁵⁷⁹

The various factors influencing judicial thinking in this regard are very much affected by the ever changing context and texture of society.⁵⁸⁰

As public policy is a question of fact and not a question of law public policy, holistically assessed, is influenced by the general sense of justice of the community, the *boni mores*

⁵⁷⁷ See Wessels *The Law of Contract in South Africa* (1951) Par 463-480ff; Van der Merwe et al *Contracts: General Principles* (2003) 176-178; Joubert *General Principles of the Law of Contract* (1987) 132-151; De Wet and Van Wyk *Kontraktereg and Handelsreg* 5ed Volume 1 (1998) 89-92; Kerr *The Principles of the Law of Contract* (1998) 177-189; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-9-3H-12; 3H-2-3H-21; Hutchinson et al *Wille's Principles of South African Law* (1991) 431; Joubert et al *LAWSA Volume 5 Part 1* (1994) 214-216; Kahn *Contract and Mercantile Law* (1988) 32; Christie *The Law of Contract in South Africa* (2001) 398ff; Hawthorne "The End of bona fides" (2003) 15 *SA Merc LJ* 277; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 59ff; Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003-1 159; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 295ff; Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 173; Van Aswegen "The future of South African contract law" 1994 (59) *THRHR* 453. For the earlier cases see *Eastwood v Shepstone* 1902 (TS) 294; *Morrison v Angelo Deep Gold Mines Ltd* 1905 (AD) 775, 784; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A). For the more recent cases see *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) 837; *Brisley v Drotsky* 2002 (2) SA 1 (SCA) 15; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 373.

⁵⁷⁸ See Hawthorne "The Principles of Equality in the Law of Contract" 1995 (58) *THRHR* 167 173; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-20-3H-21. See further Joubert *General Principles of the Law of Contract* (1987) 133; Hawthorne "Closing the open norms in the law of contract" 2004 67 (2) *THRHR* 294 at 298.

⁵⁷⁹ See Wessels *The Law of Contract in South Africa* (1951) Par 463-480ff; See also Jordaan "The Constitution's impact on the law of contract in perspective" (2004 *De Jure* 59-60; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-2-; Van der Merwe et al *Contracts: General Principles* (2003) 15; See also Kahn *Contract and Mercantile Law* (1988) 32; Hutchinson et al *Wille's Principles of South African Law* (1991) 431; Joubert *LAWSA Volume 5 Part 2* (1994) 215.

⁵⁸⁰ See Joubert *LAWSA Volume 5 Part 1* (1994) 215; De Wet and Van Wyk *Kontraktereg en Handelsreg* (1992) 89; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 173-174; Christie "The Law of Contract and the Bill of Rights" *Bill of Rights Compendium* (2003) 3H-10-3H-11; Hawthorne "The End of Bona Fides" (2003) 15 *SA Merc LJ* 277".

manifested in public opinion.⁵⁸¹

Although various factors have crystallized throughout the years to determine whether a contract or a term of a contract is contrary to public policy and therefore unenforceable, that notwithstanding, the South African writers and the courts have on numerous occasions cautioned that the power to declare a contract or a term in a contract to be contrary to public policy and therefore, should be exercised sparingly and only in the clearest of cases.

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It is especially, *Christie*⁵⁸³ who cautions that regard must not be had to superficial public opinion, which can swing like a weathercock, but, rather the seriously considered public opinion on the general sense of justice and good morals of the community.

The reason advanced there-for is that it causes the maintenance of stability in the law of contract by ensuring that contracts are not at the mercy of future public opinion.⁵⁸⁴

Several factors have throughout the years crystallized, be that through legal writers, be that through judicial dicta. The factors which most prominently featured throughout the years include the following, namely:

- (1) In the case of statutory enactments, the courts may consider the policy of the legislature in enacting the statute in order to determine the validity of the statutory provision or provisions.⁵⁸⁵
- (2) Good faith has in the past been considered by our legal writers and courts in

⁵⁸¹ Christie *The Law of Contract in South Africa* (2001) 400, 403; Wessels *The Law of Contract in South Africa* (1951) 157.

⁵⁸² See Hawthorne "Closing of the open norms in the Law of Contract" 2004 67 (2) *THRHR* 299; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-10; Hutchinson et al *Wille's Principles of South African Law* (1991) 431; Joubert *LAWSA* Volume 5 Part 1 (1994) 215. Jordaan "The Constitution's impact on the Law of Contract in Perspective" 2004 *De Jure* 61; Pretorius "The Basis of Contractual Liability in South African Law (1)" 2004 69 (2) *THRHR* 298-299. For relevant case law in which the South African courts have advocated a cautious approach see *Eastwood v Shepstone* 1902 (TS) 294; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (now Griesel v Finanscredit (Pty) Ltd* 1984 (3) SA 773 (A); *Olsen v Standaloft* 1983 (2) SA 668 (ZS) 673E; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Brisley v Drotsky* 2002 (2) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Bafana Finance Mabepane v Makwakwa and Another* 2006 (4) SA 58.

⁵⁸³ Christie *The Law of Contract in South Africa* (2001) 400, 403.

⁵⁸⁴ Christie *The Law of Contract in South Africa* (2001) 400, 403.

⁵⁸⁵ Joubert *LAWSA* (1987) 153.

determining whether public policy forbids the enforcement of the contract.⁵⁸⁶

- (3) Freedom of Contract in itself has been viewed by the South African legal writers and the courts as a factor in considering whether an agreement is contrary to public policy. It has then been premised that public policy favours the utmost freedom to contract.⁵⁸⁷

⁵⁸⁶ Hefer "Billikheid in die Kontraktreg volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2001-1 142 at 153-154 advocates that the court's hands ought to be strengthened to attain in public interest a greater degree of fairness in contract. See also Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 at 171-172; Hawthorne "Closing of the norms in the Law of Contract" 2004 67 (2) *THRHR* 234; Van Aswegen "The Future of South African Law" 1994 (57) *THRHR* 448 at 456ff with regard to overcoming the problems which the inequalities between contracting parties brings suggests that the *bona fides* of the contracting parties, which requires honesty and which prohibits the unreasonable promotion of one's own interests, ought to be used to determine whether public policy dictates that a contract should be invalidated. See also Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65 at 66 who believes good faith would fit the ethical requirement set by public policy in the contractual field; *Contra* however Neels "Die Aanvullende en Beperkende werking van Redelikheid en Billikheid in die Kontraktereg" 1998 (61) *THRHR*. For case law on our court's "*topsy turvy*" approach in recognizing good faith as a defence see the cases of *Judd v Fourie* (1881) 2 EDC 41 (76); *Nengebvauer and Co v Herman* 1923 AD 564 at 573; *Meskin No v Anglo American Corporation of SA Ltd and Another* 1968(4) SA 793 (W) at 802 (A); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 147 (W); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 A at 27; *Tuckers Land Development Corporation (Pty) Ltd v Hoves* 1980 (1) SA 645 (A) at 652; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 A; *Trustee, Estate Cresswell and Durbach v Coetzee* 1916 (AD) 14 at 19; *Rand Rietfontein Estates Ltd v Cohn* 1937 (AD) 317 at 330 in which good faith was required in all contracts failing which it would lead to an inequitable result. The latter principle was followed in especially *Weinerlein v Gooch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 254 (A). But things changed with the decision of *Bank of Lisbon South African Ltd v Ornelas* 1988 (3) SA 580 (A) in which the Appellate Division (as it was then) gave the death knell to good faith as a defence by acknowledging "*requiescat in pace*". But, notwithstanding, the South African courts commencing with the minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) per Olivier JA came out fighting for the re-instatement of good faith as a defence. It was especially, the Cape Provincial Division of the High Court in *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C); *Miller and another NNO v Donnecker* 2001 (1) SA 928 (C) *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) which seem to rekindle some of a re-introduction. But this was short lived as the Supreme Court of Appeal denounced the re-introduction in the cases of *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 27 (A); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁵⁸⁷ As this was discussed at great length *supra* a further in depth discussion is unwarranted. See however the legal writings of Christie *The Law of Contract in South Africa* (2001) 17 400; Van der Merwe et al *Contract: General Principles* (2003) 10-11; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-6-3H-12; Kerr *The Principles of the Law of Contract* (1998) 8-9; Wessels *The Law of Contract in South Africa* (1951) 572; Hutchinson et al *Wille's Principles of South African Law* (1991) 431ff; Joubert *LAWSA Volume 5 Part 1* (1994) Par 165; Kahn *Contract and Mercantile Law* (1988) 32ff; Christie *The Law of Contract in South Africa* (2001) 17-18 400ff; Hahlo "Unfair contract terms in civil law systems" (1981) *SALJ* 70ff; De Wet and Van Wyk *Kontraktereg en Handelsreg* (1992) 6ff; Pretorius "The Basis of Contractual Liability in South African Law (1)" 2004 (67) *THRHR* 179 183 185; Lotz "Die billikheid in die Suid-Afrikaanse reg" Unpublished inaugural lecture University of South Africa (1979) 1; Lubbe "Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 7 16, "Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" 1991 *TSAR* 1 13-14; Van der Walt "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367 368; Van Aswegen "The future of South African contract law" 1994 *THRHR* 448 456;

- (4) Equity, fairness and reasonableness, especially, as a result of the inclusion of harsh and oppressive provisions in standard-form contracts which, in modern day, including South Africa, have become the order of the day in the international economic arena, are factors which the legal writers, as well as the courts, recognise as influencing public policy. Often these factors are used to determine whether a contract, or the provisions of a contract, ought to be upheld or denounced because of their unfairness, unreasonableness, harshness or oppressiveness.⁵⁸⁸

Kleyn 1995 THRHR 16; Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 20-21; Van der Merwe et al *Contract: General Principles* 10; Hawthorne "The end of bona fides" (2003) 15 SA *MERC LJ* 271 274; Jordaan "The Constitution's impact on the law of contract in perspective" 2004 *De Jure* 58 59-60; Hefer "Billikheid en die kontraktereg volgens die Suid-Afrikaanse regs kommissie" *TSAR* 2000 1 142ff; Grove "Die kontraktereg, altriïsme, keusevryheid en die Grondwet" 2003 *De Jure* 134ff; Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 1 150 152 155; Hawthorne "Closing of the open norms in the law of contract" 2004 67 (2) *THRHR* 294ff; Hawthorne "The principle equality impacts on the classical law of contract" 1999 (62) *THRHR* 596-597; Hawthorne "The principle of equality in the law of contract" 1995 (58) *THRHR* 157 162-63; 166-162; SA Law Commission Report (1998) 17ff. For case law see *Eastwood v Shepstone* 1902 TS 294, 302; *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775; *South African Railways and Harbours v Conradie* 1921 (AD) 132 147-148; *Conradie v Rossouw* 1919 AD 279, 288, 320; *Osry v Hirsch* 1922 CPD 531 546; *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600; *Wells v South African Alumenite Company* 1927 AD 69; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren* 1964 (2) SA 343 (O) 346; *Filmer and Another v Van Straaten* 1965 (2) SA 575 (W); *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 892-893; *Olsen v Standaloft* 1983 SA 668 (2) 673; *Tamarello (Pty) Ltd v B.N. Aitken (Pty) Ltd* 1982 (1) SA 398 (AD) 439. Cases in which courts were prepared to interfere with freedom of contract but only when expressed sparingly see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 AD 9 b-f; *Brisley v Drotsky* 2002 (4) SA 1 SCA; *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) at 420 F; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 837 C-E; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 33 I-J, 34 A-B; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Bafana Finance Mabepane v Makwakwa and Another* 2006 (4) SA 58.

⁵⁸⁸ Van der Merwe et al *Contract: General Principles* (2003) 200-201; Lubbe and Murray *Farlam and Hathaway: Cases, Materials and Commentary* (1988) 386; Lubbe "Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" (1990) *Stell. L.R.* 22; Kerr *The Principles of the Law of Contract* (1998) 8; Christie *The Principles of the Law of Contract* (2001) 14 16-17; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2001) 3H-10; 3H-20 to 3H-22; Jordaan "The Constitution's impact on the Law of Contract in Perspective" 2004 *De Jure* 58 at 63; Hefer "Billikheid en die Kontraktuele volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2001-1 142 at 154; Hopkins "Standard-form contract and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 1 150 at 154ff. For case law see the general remark by Innes CJ in *Burger v Central South African Railways* 1903 TS 571, 576 in which Innes CJ stated: "our law does not recognize the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable." See also *Rashid v Durban City Council* 1975 3 SA 920 (D) 927B-D; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Neuhoff v York Timbers Ltd* 1981 4 SA 666 (T) 673D-E; *Artprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A) 263; But the above approach seem to have been whittled away by the common law especially in restraint of trade cases in which the courts have indicated they will not enforce a contract that is unreasonable. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N) 243B-D in which Didcott J stated: "It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenant's freedom to trade or to work." See the comments by Sachs J in the minority judgement of *Barkhuizen v Napier* 2007 (5) SA 323.

Our newly acquired constitutional dispensation, in the 1990's in South Africa, also influenced academic thinking in that it is advocated that the natural law values, in the form of fairness and reasonableness, should impact on the judicial- making process, so much so, that, instead of judges merely following judicial precedent which strongly emphasized contractual freedom and the sanctity of contract, they ought to consider the principles of fairness, equity and reasonableness first.

But it is persuasively argued that, in terms of the new Constitution, public policy dictates that freedom of contract can never serve as a justification for enforcing a private agreement that has the purpose and effect of limiting the other party's fundamental rights.⁵⁸⁹

(5) Although the concept unconscionable-ness is known to the South African legal writers and the courts, it has never been accepted as an independent free floating defence. It has, however, been used, mainly, to assess the conduct of one of the parties or in establishing unfair terms, unfairness in attempting to enforce a contract.⁵⁹⁰ It is seen as a much-needed intervention in public interests to protect

⁵⁸⁹ Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* (2003) 1 150 at 154ff; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 at 174; Van Aswegen "The Future of South African Law" 1994 (57) *THRHR* 448 at 456; Neels "Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg" *TSAR* (1999) 4 684 705; *Ismail v Ismail* 1983 (1) SA 1006. The court saw the interim 1993 Constitution as a repository of modern public policy. See also *Amod v Multilateral Motor Vehicle Accidents Fund* 199 (4) SA 1319 (A). In *Qozoleni v Minister of Law and Order* 1994 1 BCLR 75 (C) 80 Kroon and Froneman JJ put the position "because the Constitution is the supreme law of the land against which all law and conduct is to be tested, it must be exercised with a view to extracting from it those principles or values against which such law or conduct can be measured." In *Brisley v Drotzky* 2002 (12) BCLR 1229 (A) (94) the court also relied on the Constitutional values in assessing whether to strike down a contract when Cameron JA stated: "The Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.... The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom", and securing a framework within which the ability to contract enhances rather than diminishes our self-respect." See also *Afrox Healthcare Bpk v Strydom* (2002) 4 ALL SA 125 (A) 133; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323; *Bafana Finance Mabepane v Makwakwa and Another* 2006 (4) SA 58.

⁵⁹⁰ Van der Merwe et al *Contract: General Principles* (2003) 200-201; Lubbe and Murray *Farlam and Hathaway: Cases, Materials and Commentary* (1988) 386; Lubbe "Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" (1990) *Stell. L.R.* 22; Kerr *The Principles of the Law of Contract* (1998) 8; Christie *The Principles of the Law of Contract* (2001) 14 16-17; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2001) 3H-10; 3H-20 to 3H-22; Jordaan "The Constitution's impact on the Law of Contract in Perspective" 2004 *De Jure* 58 at 63; Hefer "Billikheid en die Kontraktuele volgens die Suid-Afrikaanse Regskommissie" *TSAR* 2001-1 142 at 154; Hopkins "Standard-form contract and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 1 150 at 154ff. For case law see the general remark by Innes CJ in *Burger v Central South African Railways* 1903 TS 571, 576 in which Innes CJ stated: "our law does not recognize the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable." See also

the weak and vulnerable contracting party, who stands in an unequal bargaining position to the stronger party, which ultimately leads to harsh and oppressive results for the former.⁵⁹¹

- (6) Both the legal writers and the courts do recognise that morality and ethics in contract, do play a role in determining when public policy dictates that agreements or terms of agreements are enforceable or not.⁵⁹²

In this regard, *Van der Merwe et al*⁵⁹³ state that agreements will only be said to be contrary to good morals if the illegality is founded in law. In this regard the law does not enforce morals simply because they are morals, but only when the moral content has been transformed into legal doctrine and specific rules.

In so far as ethical considerations are concerned and their influence on public policy, the

Rashid v Durban City Council 1975 3 SA 920 (D) 927B-D; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Neuhoff v York Timbers Ltd* 1981 4 SA 666 (T) 673D-E; *Artprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A) 263; But the above approach seem to have been whittled away by the common law especially in restraint of trade cases in which the courts have indicated they will not enforce a contract that is unreasonable. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N) 243B-D in which Didcott J stated: "It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenant's freedom to trade or to work." See the comments by Sachs J in the minority judgement of *Barkhuizen v Napier* 2007 (5) SA 323.

⁵⁹¹ The South African Law Commissioner's Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts*, Project 47 (1998) 58; See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁵⁹² Joubert *The Law of South Africa Volume 8* (1987) 132-133; Mr Justice van den Heever Aquilius "Immorality and Illegality in Contract" (1941) (58) SALJ 337-354 at 346; Hutchinson et al *Wille's Principles of South African Law* (1991) 435 suggests that agreements are said to be against good morals if "this offend our conscience or sense of what is right, or modesty." See also Wessels *The Law of Contract in South Africa* (1951) 451, 582; Van der Merwe et al *Contract: General Principles* (2003) 11 a very balanced opinion suggests "the principles of morality (an extension of the values of society) or socio-economic expediency will in many circumstances support a policy favouring the exact enforcement of contracts freely entered into by consenting parties, but may, in particular circumstances, require that less weight be attached to the ideals of individual autonomy and freedom of action." In so far as case law is concerned, the South African courts have before dealt with the issue of morality in a number of cases. See *Dodd v Hadley* 1905 TS439, 442 recognizing the illegality of contract as early as 190. See also *Silke v Goode* 1911 (TPD) 989, 994 in which it was decided "that a contract cannot be enforced by our courts of law if the object of the contract is illegal, or if it is for an immoral purpose." In *Ailas Organic Fertilizers (Pty) Ltd v Pikkewyn (Pty) Ltd and Others* 1981 (2) SA 173 T at 188 and quoted with authority in the case of *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T). The court considered the business ethics and the morals of the market place as well as an inherent sense of fair-play and honesty when considering the enforceability of a certain contract.

⁵⁹³ *Contract: General Principles* (2003) 200ff.

South African legal writers have most certainly found a place for ethics in contracts.⁵⁹⁴

- (7) Foreign law, as influencing factor in balancing conflicting interests, is acknowledged by both the legal writers as well as the courts. Foreign law, although not automatically considered as persuasive authority, nonetheless, influences legal thinking, as well as judicial thinking, at times.⁵⁹⁵
- (8) Since South Africa became a Constitutional State in 1996, the Constitution itself and the values derived there-from represent a reliable statement of public policy.

⁵⁹⁴ Zimmerman *The Law of Obligations* (1992) 26ff highlights the impact which Christianity as well as stoic moral philosophy had on the formation of the law of contract in general. To this end he remarked: "... they demanded the infusion of ethics and of humanities into the law". The rationale therefore according to Zimmerman is to render aid to the weak from exploitation by the so-called "urban capitalists". Hawthorne "The end of *bona fides*" (2003) 15 SA Merc LJ 271, 274 emphasizing the roll of good faith in contract suggests "*good faith should become an underlying ethical value*". But, it is especially, the legal writers Carstens and Kok "An Assessment of Disclaimers in South African Hospitals in view of Constitutional demands, Foreign Law and Medico-Legal Considerations" (2003) 18 SAPR/PL 430, 441,450, 449-452, 455 who critically and persuasively argue that under the influence of a value-driven Constitution the influence of medical ethics and medical law principles should not be ignored in deciding the unenforceability of contracts or contractual provisions. To this end the authors argues: " disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm (in the form of personal injury /death resulting from medical malpractice) by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm." The writers continue: "..... this obvious contradiction is possibly the reason why certain jurisdictions have rules that disclaimers against medical negligence are against public policy, thereby giving legal effect to existing medical ethical rules."

⁵⁹⁵ Neethling et al *The Law of Delict* (2001) 19-20, 40-41, 67; Dugard *International Law* (2000). The writer states the South African position as follows: "*South Africa's new constitutional order, that requires courts to interpret all legislation and particularly the Bill of Rights to accord with international law, and the nations commitment to the rule of law and human rights, sets the scene of renaissance of international law both in South Africa's foreign policy and in the jurisprudence of its courts.*" See also Van der Merwe et al (2003) 121-76; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-7 to 3H-8; Hawthorne "The end of *bona fides*" (2003) 15 SA Merc L.J. 271; Grove "Die Kontraktereg, Altruisme, Keusevryheid en die Grondwet" (2003) *De Jure* 134 141; Hopkins "Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice" *TSAR* 2003 1 150 157. The *South African Law Commission* in their report Project 47 (1998) relied heavily on foreign law in order to come to their findings and recommendations. For case law see the mixed reaction by the South African courts ranging from the courts stating foreign law should be followed with great circumspection as courts are not obliged to have regard to comparable foreign law. See *Oozeleni v Minister of Law and Order and Another* 1994 (2) SALR; *Berg v Prokureur-Generaal van Gauteng* 1995 (11) BCLR 1441 1446; *Potgieter en 'n Ander v Killian* 1995 (11) BCLR 1498 (N); *Park-Ross and Another v The Director of the Office of Serious Economic Offences* 1995 (2) BCLR 198 (C) 208-209; *Nortje and Another v Attorney-General of the Cape and Another* 1995 (2) BCLR 236 (C) 247; *Shabalala v Attorney-General of Transvaal* 1995 (1) SA 608 (TPD) 640-41. In *Bernstein v Bester* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) Par 133 Kriegler J warns against the too frequent reception of foreign law. But the courts have shown encouraging signs in adopting foreign law. See *Matinkinca and Another v Council of State, Ciskei and Another* 1994 (1) BCLR (CK); *S v Makwanyane* 199 (6) BCLR 66 (CC) 1995 (3) SA 381 (CC) Par 37; *S v Mambolo* 2001 (%) BCLR 449 (CC); *Carmichell v Minister of Safety and Security and another (Centre for applied legal studies intervening)* 2001 (4) SA 938 (CC). In this case the court stated that foreign law should be adopted in appropriate circumstances in terms of Section 39(1) of the Constitution.

⁵⁹⁶ When considering the enforceability of certain contracts or provisions of a contract, the courts must ensure that the common law is not incongruent with the Constitution. Where the contract, or provisions of the contract, infringes a provision of the Bill of Rights it will be contrary to public policy and therefore unenforceable. ⁵⁹⁷

10.2.3.2 ENGLAND

10.2.3.2.1 Legal Writings

The doctrine of public policy commenced its development as long ago as the Elizabethan times, ⁵⁹⁸ but its foundations were not cemented until the eighteenth century. ⁵⁹⁹

During this period, judges were at great pains to emphasize that they would not tolerate any contract that, in their view, was injurious to society. For that reason no contract would be enforced that was 'contrary to the general policy of the law' or against public good' or 'contra bonos mores' or which had arisen *ex turpi causa*. ⁶⁰⁰ Because of the imprecise nature of its application ⁶⁰¹ judicial views differed as to when the doctrine would be applied i.e. when a contract would be immoral or subversive of the common good or against public good. ⁶⁰² Because of the flexibility of its application and the likelihood that judges may misuse the doctrine by invalidating any contract which he may dislike, some judges and writers, in the early 1800's, criticised the public policy maxim. It has even been described

⁵⁹⁶ Van der Merwe *Contract: General Principles* (2003) 14, 82; Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3H-7 to 3H-8; See also Hawthorne "The end of bona fides" 155 *SA Merc. L.J.* 271 who suggests the courts are encouraged to give a purposive interpretation to contracts which must be consonant with the spirit and values contained in the Bill of Rights.

⁵⁹⁷ Christie *The Law of Contract and the Bill of Rights Bill of Rights Compendium* (2002) 3h-7 to 3H-8; Hopkins "Standard form contracts and the Revolving idea of principles in Justice. A case of democratic capitalist justice v natural justice (2001) 1 *TSAR* 150, 157. For case law see *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Bafana Finance Mabepane v Makwakwa and Another* 2006 (4) SA 58.

⁵⁹⁸ Pollock *The Principles of Contract* (1950) 317ff; Furmston *Law of Contract* (1986) 341.

⁵⁹⁹ Furmston (1986) 341.

⁶⁰⁰ Furmston (1986) 342.

⁶⁰¹ Furmston (1986) 342; Treitel *The Law of Contract* (2003) 477 describes public policy as a "variable notion, depending on changing manners, morals and economic conditions"; See also O'Sullivan and Hilliard *The Law of Contract* (2004) 413-414; Stone *The Modern Law of Contract* (2003) 349.

⁶⁰² Furmston (1986) 342; Treitel (2003) 478; O'Sullivan and Hilliard (2004) 413.

as the so-called 'unruly horse' in some quarters.⁶⁰³ It is for that reason, why public policy in English law, is said to, possibly, be applied sparingly. Some writers argue that the categories of common law public policy have been stated to be closed, so that the courts will not apply this approach to a type of contract to which it has not been applied previously.⁶⁰⁴ Two fundamental reasons are advanced for this thinking, namely; the need for certainty and because parliament and its delegates have become more active in this field.⁶⁰⁵

There is, however, academic opinion which promotes the notion that in exceptional circumstances, judicial intervention in invalidating contracts as a result of public policy, even though these contracts are of a kind to which the public policy has not been applied before should be denounced. Examples thereof, include, money lending contracts where they impose quasi-service obligations on the borrower; an attempt to contract out of certain statutory provisions etc or certain exclusion clauses.⁶⁰⁶

Although notions of public policy and its substance change over time, the principles as seen in the categories of related cases, have, according to the legal writers, remained remarkably consistent. They include immorality, the administration of justice and restraint of trade.⁶⁰⁷ As this represents a whole field of study, I shall restrict my writing to the salient issues only.

In so far as morality is concerned, English courts have, over the years, invalidated certain types of contracts inter alia those contracts which are regarded as threatening to the institution of marriage; others include, contracts promoting sexual immorality; contracts to oust the jurisdiction of the courts; wagering contracts and contracts in restraint of trade. They have all being invalidated even most recently.⁶⁰⁸ Other contracts which have also been declared illegal as it affect public interests, or, public policy, include, contracts promoting the commission of a crime or a civil wrong. This is discussed more

⁶⁰³ Treitel (2003) 478; Von Hippel "The Control of Exemption Clauses: A Comparative Study" *International and Comparative Law Quarterly* Vol. 16 (July 1967) 597; O'Sullivan and Hilliard (2004) 413.

⁶⁰⁴ Stone (2003) 359; O'Sullivan and Hilliard (2004) 414; Treitel (2003) 478.

⁶⁰⁵ Treitel (2003) 478; Stone (2003) 359.

⁶⁰⁶ Treitel (2003) 478-480.

⁶⁰⁷ O'Sullivan and Hilliard (2004) 416ff.

⁶⁰⁸ Stone (2003) 360-368ff; O'Sullivan and Hilliard (2004) 416-430ff.

comprehensively, under the head illegality.⁶⁰⁹

10.2.3.2.2 Case Law

The English courts have, for more than two centuries, recognised the fact that public policy impacts on the law of contract and depending upon the circumstances of the case, such a contract could be declared wholly unenforceable. The policy of the law in England was summed up in 1775, by Lord Mansfield, in the case of *Holman v Johnson*,⁶¹⁰ as follows:

*"No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon this ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."*⁶¹¹

But, it is important to note that the doctrine of public policy was not applied in all cases. In fact, the courts became rather inflexible in applying the doctrine to invalidate some contracts, to such an extent that certain judges criticised the application of the doctrine. A noteworthy judgement in this regard is that of Burroughs J, in the case of *Richardson v Mellish*,⁶¹² in which he described the maxim as:

*"A very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law."*⁶¹³

The dictum has been repeated in numerous dicta over many years. In fact, as recently as 2000 in *McFarlane v Tayside Health Board*,⁶¹⁴ Lord Clyde, after quoting the long recognized passage of Burrough J in *Richardson v Mellish* (1824) 2 BING 225, highlighted the fact that it was not always easy to decide on matters of public policy, quoting Pearson *JIN Publick Health Trust v Brown* (1980) 388 So 2d 1048 at 1086 stated:

"I am confident that the majority recognises that any decision based upon notions of public policy is one about which reasonable persons may disagree".

⁶⁰⁹ O'Sullivan and Hilliard (2004) 414-415; Furmston (1986) 342.

⁶¹⁰ (1775) 1 COWP. 341.

⁶¹¹ *Holman v Johnson* (1775) 1 CONP 341 at 343.

⁶¹² (1824) 2 BING 229.

⁶¹³ *Richardson v Mellish* (1824) 2 BING 229 at 252.

⁶¹⁴ (2000) 2 A.C. 59 at 100-101.

And Cave J, in *In re Mirams* (1891) 1 QB 594 at P595, observed that judges should be trusted (more) as interpreters of the law than as expounders of what is called public policy."

Lord Clyde however, laid down certain criteria for determining considerations of public policy when he stated:

"What are referred to as policy considerations, include, elements of what may be seen as ethical or moral considerations." ⁶¹⁵

The restrictive application of the maxim was also emphasized in *Janson v Driefontein Consolidated Mines Ltd* ⁶¹⁶ in which Lord Halbury denied that any court could *"invent a new head of public policy."* His reasoning for such a view is encapsulated when he states:

"A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force."

To allow otherwise would result in, for example: *"..... a judge would be in full liberty to depart tomorrow from the precedent he has himself established today, or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate."* ⁶¹⁷

On the other hand, there is sufficient authority in English case law that law does adapt itself to changes in economical, social and moral conditions. This is especially imputed from the development of the rules as to contracts in restraint of trade.

Judicial expression per Lord Haldane in *Rodriquez v Speyer Bros* ⁶¹⁸ entailed the following:

"What the law recognises as contrary to public policy turns out to vary greatly from time to time." ⁶¹⁹

⁶¹⁵ *McFarlane v Tayside Health Board* (2000) 2 A.C. 59 at 100-101.

⁶¹⁶ (1902) A.C. 484 Cf. *Texaco Ltd v Mulberry Filling Station Ltd* (1972) 1 WLR 814 at 827; *Geismar v Sun Alliance and London Insurance* (1978) Q.B. 383 at 389; *Nickerson v Barraclough* (1981) Ch. 426; *Deutsch Schachybau- and Tiefbokgesellschaft mbH v Ras AL Khaima National Oil Co* (1990) 1 A.C. 295 at 316 (reversed on other grounds *ibid* at 329 et seq.).

⁶¹⁷ *Jansen v Driefontein Consolidated Mines Ltd* (1902) A.C. 484 at 491.

⁶¹⁸ (1919) A.C. 59.

⁶¹⁹ *Rodriquez v Speyer Bros* (1919) A.C. 59 at 79.

More recently, and in a similar view, Lord Denning in *Enderby Town Football Club Ltd v The Football Association Ltd*,⁶²⁰ in regard to an unruly horse and public policy expressed himself as follows:

"..... With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice." ⁶²¹

But weighing the attitude of the English courts, it appears that the judiciary strikes a balance between the flexibility inherent in the notion of public policy, on the one hand and the need for certainty in commercial affairs, on the other. The courts will therefore, in the interests of certainty, in general refuse to apply the doctrine of public policy to contracts of a kind to which the doctrine has never been applied before.

Commencing with the case of *Printing and Numerical Registering Co v Sampson*⁶²² for instance, an inventor assigned a patent to a company and also agreed to assign to the company any patent of a like nature thereafter to be acquired by him. He argued that this agreement was contrary to public policy as it tended to discourage inventors. In rejecting the argument, Jessel M.R. stated:

"You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy." ⁶²³

English courts have also expressed the view that as parliament and its delegates have become more active in the field of contract, courts are less ready to apply the doctrine of public policy to new classes of contract. This found favour in the dicta pronounced in the cases of:

In *D. Respondent v National Society for the Prevention of Cruelty to Children Appellants*⁶²⁴ the court suggested the practise of self-restraint when a court was approached to rule on public policy issues, when it stated:

⁶²⁰ (1971) CH 591.

⁶²¹ *Enderby Town Football Club Ltd v The Football Association* (1971) Ch 491 at 606.

⁶²² (1875) L.R. 19 EQ 462.

⁶²³ *Printing and Numerical Registering Co v Sampson* (1875) C.R. 19 Eq. 462 at 465.

⁶²⁴ (1978) A.C. 171.

"Their duty is to expound, and not to expand, such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy." ⁶²⁵

In *Johnson v Moreton* ⁶²⁶ the court considered whether a duty not to renounce a privilege may fall under a recognised head of public policy. Consequently the court first considered the policy and presumption of English and other systems of law that there should be freedom of contract, and endorsed the principle that contracts freely entered into should be enforceable. The Latin phrase *'pactum sunt servanda'*, according to the court, has been embellished with authority, inter alia, the maxim exemplifies Maine's famous observation, expressed in (Ancient Law (1861) 1st ed (Chapter 5)) namely, the progression in societies towards contractual freedom and the observance of peculiar rights and obligations which the law prescribes.

The court further stated that the dominant ideology of freedom and sanctity of contract have tended to be considered as pre-eminent legal values. Consequently the court quoted, as authority, the famous dictum of Jessel M.R.'s representative pronouncement in *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462, 465:

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

But, cautions the court, courts should not be oblivious to the challenges the ideology had been besotted with, and commented as follows on the attack supporters of welfarism had brought with them, namely:

"Even the ideology of Maine and Jessel "which lay behind their juristic views, was questioned. By some it was directly attacked; society's objective should be not wealth but welfare (with the implication that the pursuit and achievement of wealth were destructive of welfare), which was best promoted by the direct intervention of the organs of the state and could not be left to the bargain of the marketplace." The intervention advocated is stated by the court *"to counteract rigging of the market by monopolies or oligopolies and to redress inequalities of bargaining power, and consonantly, even in the 19th century, the law began to back-pedal."*

Turning to the authorities outlawing waiver of rights in instances where public interests are affected (*Graham v Ingleby* (1848) 1 Exch. 651, per Pollock C.B. at p. 655 per Parke B. at

⁶²⁵ *D. Respondent v National Society for the Prevention of Cruelty to Children Appellants* (1978) A.C. 171 at 235.

⁶²⁶ (1980) A.C. 37.

pp 656-657, per Alderson B. at p 657:

"An individual cannot waive a matter in which the public have an interest," Platt B. concurring: and see also Halesowen Presswork and Assemblies Ltd v National Westminster Bank Ltd (1972) A.C. 785, 808): it was apparently no longer accepted by the law that freedom and sanctity of contract were conclusive of the public interest."

Paying attention to the introduction of legislation and its influence on unfair contractual terms, the court commented as follows:

"The movement from status to contract was largely a creature of the common law. The reverse movement has been largely a creature of legislation. As a result lawyers sometimes tend to regard freedom and sanctity of contract as still of special and supervening juristic value. But freedom of contract and its consequences are quite likely to be "mischiefs" as that word is used in statutory construction." ⁶²⁷

Then, in *Cheall v Apex*, ⁶²⁸ Donaldson L.J. accepted the principle laid down in the case of *Blathwayt v Baron Cawley* (1976) A.C. 397, in which Lord Wilberforce stated at P. 426 that: *"conceptions of public policy should move with the times and that widely accepted treaties and statutes may point the direction in which such conceptions, as applied by the courts, ought to move."*

But, cautions the Judge, in following the view of Lord Atkin in *Fender v St John-Mildmay* (1938) A.C. 1, 12, that the doctrine of public policy *"should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds."*

In weighing up statutory interventions with the ability of judges to create public policy the court states:

"Whether judges are better or less able than others to assess the merits and demerits of political policies is beside the point, because that is not their function. On the other hand, "public policy" in the true sense is a part of the law and it is wholly within the province and capacity of the judges to declare it."

But the court renders the following advice:

"However, they must be satisfied that any reasonable person would agree that the enforcement of the provision under consideration would be "a harmful thing" to use Lord Atkin's homely phrase in Fender v St John-Mildmay

⁶²⁷ *Johnson v Moreton* (1980) A.C. 37 at 67.

⁶²⁸ (1980) 2 A.C. 180.

(1938) A.C. 1, 12." ⁶²⁹

In *Johnstone v Bloomsbury Health Authority*, ⁶³⁰ the court was tasked to decide whether a provision in the contract of employment regulating the number of working hours including overtime, was contrary to public policy. Stuart-Smith L.J. handing down judgement commented as follows:

"I have no doubt that it is a matter of grave public concern that junior doctors should be required to work such long hours without proper rest that not only their own health may be put at risk but that of their patients as well. That is the allegation in this case and it seems to me that for the purpose of a striking out application it must be assumed to be true."

Declining to find on that fact alone that clause 4(b) of this contract is contrary to public policy, the court also cautioned:

*"The courts should be wary of extending the scope of the doctrine beyond the well recognized categories: See Fender v St John-Mildmay (1938) A.C. 1, 11-12, per Lord Atkin. They should be even more reluctant to embark upon a *347 wide-ranging inquiry into matters of public debate where it is plain that there are two views bona fide and firmly held, and where complex considerations of capacity of the National Health Service and public funding are involved." ⁶³¹*

In *Lancashire County Council v Municipal Mutual Insurance Ltd* ⁶³² the Court of Appeal considered whether indemnity against exemplary damages was contrary to public policy and unenforceable. Considering the rules relating to the application of public policy, the court again cautioned against the danger of a limitless application of public policy when he stated:

"In my judgement there is nothing either in the authorities or in logic to justify extending this principle of public policy so as to deny insurance cover to those whose sole liability is one which arises vicariously, whether as employers or, as here, under an equivalent statutory provision."

The court continued:

"Contracts should only be held unenforceable on public policy grounds in very plain cases. The courts should be

⁶²⁹ *Cheall v Appex* (1980) A.C. 180 at 191.

⁶³⁰ (1992) QB 333.

⁶³¹ *Johnstone v Bloomsbury Health Authorities* (1992) QB 333 at 347, 349.

⁶³² (1997) QB 897.

wary of minting new rules of public policy when the legislature has not done so." ⁶³³

On the other hand, there are some cases where judicial intervention, as a last resort, is regarded as desirable. This formed the subject matter in *Monkland v Jack Barclay Ltd.* ⁶³⁴ In this case the court acknowledged that there are classes of contracts which are contrary to public policy, when it stated:

"Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion - for example, marriage brokerage contracts, contracts for the sale of honours, contracts in unreasonable restraint of trade and so on. But cautions the court: "The courts have again and again said that, where a contract does not fit into one or other of these pigeon holes, but lies outside this charmed circle, the courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest: see, for example, the language of the House of Lords in Fender v St. John-Mildmay (FN14)."

In *D. Respondent v National Society for the Prevention of Cruelty to Children Appellants* ⁶³⁵ Lord Edmund-Davies, whilst agreeing in part with Lord Hailsham of St Mary Le Bon, acknowledges, as well, that judicial intervention is sometimes indicated where there would be a breach of some ethical or social value and a failure to use public policy, would result in serious injustice.

There are also cases where judicial intervention is possible, notwithstanding the fact that the case in question, is not a kind to which the doctrine of public policy has applied before. These novel applications of the doctrine of public policy include the following decisions namely:

In *Horwood v Millar's Timber and Trading Co* ⁶³⁶ the court was confronted with the principle issue whether a contract may be illegal if it so severely restricts the liberty of an individual as to reduce him to a quasi-service condition. The facts briefly stated include: A clerk borrowed money from a moneylender and agreed that he would not, without the lender's written consent, leave his job, borrow money, dispose of his property or move house. The

⁶³³ *Lancashire County Council v Municipal Mutual Insurance Ltd* (1997) QB 897 at 909. See also *Multiservice Bookbinding Ltd v Marden* (1979) 84 (Swiss franc uplift clause in mortgage); *Nationwide BS v Registry of Friendly Societies* (1983) 1 W.I.R. 1226 (index linked mortgage).

⁶³⁴ (1951) 2 KB 252.

⁶³⁵ (1978) A.C. 171.

⁶³⁶ (1917) 3 K.B. 305.

contract was held to be illegal by the court as if unduly restricted the liberty of the borrower.

In this regard the court held that:

"The contract was entire and indivisible, and was bas as being contrary to public policy in as much as it unduly and improperly fettered the mortgagor's liberty of action and the free disposal of his property." ⁶³⁷

There are also instances in which the courts have held that an attempt to contract out of certain statutory provisions is contrary to public policy. In *British Eagle International Airlines Ltd v Ciecorpagnie National Air France* ⁶³⁸ the court held that: Contracting out of the provisions of Section 302 of the *Companies Act* 1948 was contrary to public policy.

In *Giles v Thompson* ⁶³⁹ though the court recognised the principle that courts may in appropriate circumstances invalidate a contract even though it is of a kind to which the doctrine of public policy has not been applied before in formulating a new kind of public policy, it nevertheless, refused to invalidate the agreement in question "*as it did not in fact have any injurious tendency.*"

10.2.3.2.3 Legal Opinion

The doctrine of public policy has a long history in the English law of contract, commencing with the Elizabethan times, but really cementing its foundation in the eighteenth century. ⁶⁴⁰

Judges, during this period, were at great pains not to enforce contracts which in their view were injurious to society, against public good, *contra bonos mores* or had arisen *ex turpi causa*. ⁶⁴¹ But, because of the imprecise nature of the application of the doctrine of public policy, judicial views differed as to exactly when the doctrine would be applied. It was also felt that some of the judges misused the doctrine by invalidating any contract which he may dislike. ⁶⁴²

⁶³⁷ *Horwood v Millar's* (1917) 3 K.B. 305.

⁶³⁸ (1975) 1 W.L.R. 758.

⁶³⁹ (1994) 1 A.C. 142.

⁶⁴⁰ Pollock *Principles of Contract* (1950) 312ff; Furmston *Law of Contract* (1986) 341.

⁶⁴¹ Furmston *Law of Contract* (1986) 342.

⁶⁴² Furmston *Law of Contract* (1986) 342; Treitel *The Law of Contract* (2003) 478 describes public policy as a "variable notion, depending on changing manners, morals and economic conditions"; See also O'Sullivan and

For that reason, legal writers in particular, started looking at the doctrine very critically. In some quarters the doctrine of public policy was viewed as an '*unruly horse*'.⁶⁴³

Two schools of thought emerged, namely:

Besides advocating that the application of public policy should be applied sparingly, this school of thought believed that the doctrine ought not to be applied to contracts to which the doctrine had not been previously applied. The fundamental reason advanced there-for was the need for certainty. It was also felt that the legislature had taken a keen interest in these issues hence no dominant involvement of the judiciary was indicated.⁶⁴⁴

The other school of thought promoted the notion that, in exceptional circumstances, judicial intervention in invalidating contracts was necessary as a result of public policy, notwithstanding, the fact that the contract or contracts were not from a class to which public policy had not been applied before. Examples given involve *inter alia* money lending contracts, an attempt to contract out of certain statutory provisions etc or certain exclusion clauses.⁶⁴⁵

What has emerged in applying public policy in certain types of contracts is the fact that uniformity in the application of the doctrine in invalidating certain types of contracts has emerged. Take for example, wagering contracts; contracts in restraint of trade; contracts promoting the commission of a crime or civil wrong, in England.⁶⁴⁶

In so far as judicial thinking was concerned, the courts, during the 1700's, were particularly severe on contracts which were immoral or illegal and which appeared to arise *ex turpi*

Hilliard *The Law of Contract* (2004) 413-414; Stone *The Modern Law of Contract* (2003) 349.

⁶⁴³ Furmston *Law of Contract* (1986) 342; Treitel *The Law of Contract* (2003) 478; O'Sullivan and Hilliard *The Law of Contract* (2004) 413; Von Hippel "The Control of Exemption Clauses: A Comparative Study" *International and Comparative Law Quarterly* Vol. 16 (July 1967) 597.

⁶⁴⁴ Stone *The Modern Law of Contract* (2003) 359; O'Sullivan and Hilliard *The Law of Contract* (2004) 414, 416; Treitel *The Law of Contract* (2003) 478. In the case of *D (Respondent) v National Society for the Prevention of Cruelty to Children (Appellant)* the court stated with parliamentary involvement courts are less likely to apply the doctrine of public policy.

⁶⁴⁵ Stone *The Modern Law of Contract* (2003) 360-368ff; O'Sullivan and Hilliard *The Law of Contract* (2004) 414-430ff.

⁶⁴⁶ Stone *Modern Law of Contract* (2003) 360-368ff; O'Sullivan and Killian *The Law of Contract* (2004) 414-230; Furmston *Law of Contract* (1986) 342.

causa. In this regard the courts would not come to the rescue of a party involved in such an agreement.⁶⁴⁷

The doctrine of public policy was not applied in all the cases. In fact, some judges criticised the application of the doctrine, in particular Burroughs J, in *Richardson v Mellogh*⁶⁴⁸ described the doctrine as:

"A very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law."⁶⁴⁹

The English judiciary, in general, was not keen to expand the influence of public policy. In this regard Cave J, in 1891, in the case of *In re Miranis*⁶⁵⁰ stated:

"Judges should be trusted (more) as interpreters of the law than as expounders of what is called public policy."⁶⁵¹

This restrictive approach was also emphasized in *Janson v Driefontein Consolidated Mines Ltd*⁶⁵² in which Lord Halbury sets out the rationale for not inventing, too frequently, a new head of public policy, which amounted to this, a rule of law, once established, ought to remain unchanged and can only be annulled by the legislature. To allow judges the full liberty to expound public policy at will, will lead to inconsistency which ultimately would lead to uncertainty.

But, the English courts have recognized that due to the changes in economical, social and moral conditions the courts are sometimes obliged to consider public policy in certain

⁶⁴⁷ *Holman v Johnson* (1775) 1 Comp. 341, 343.

⁶⁴⁸ (1824) 2 Big 229; See also *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462, 465 wherein the court stated that courts ought not extend arbitrarily rules which say that a given contract is void as against public policy.

⁶⁴⁹ *Richardson v Mellish* (1824) 2 Big 229. This dictum was repeated extensively in a number of cases more recently - *McFarlane v Tayside Health Board* (2000) 2 A.C. 59 at 100-101.

⁶⁵⁰ (1851) 1 QB 594.

⁶⁵¹ *In re Miranis* (1981) 1 QB 594.

⁶⁵² 1902 A.C. 484. The principles laid down in this case were followed in a number of other cases. *Texaco Ltd v Mulberry Filling Station Ltd* (1972) 1 W.L.R. 814 at 827; *Geismar v Sun Alliance and London Insurance* (1978) Q.B. 383 at 389; *Nickerson v Barresclough* (1981) Ch. 426; *Deutsch Schachybauand Tiefbokgesellschaft mbH v Ras AL Khaima National Oil Co* (1990) 1 A.C. 295 at 316 (reversed on other grounds *ibid* at 329 et seq).

matters.⁶⁵³

Lord Denning in *Enderby Town Football Club Ltd v The Football Association Ltd*,⁶⁵⁴ in overcoming previously expressed judicial constraints, expressed himself as follows with regard to the unruly horse concept, namely:

" *With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice.*"⁶⁵⁵

Although public policy is said to vary greatly from time to time, English courts have laid down certain criteria for determining considerations of public policy which include, *inter alia*, ethical and moral considerations.⁶⁵⁶ Freedom of contract has also been endorsed by the courts as a consideration in determining what influenced public policy in a contractual context. For that reason contractual freedom and the sanctity of contract have been considered as pre-eminent legal values.⁶⁵⁷

Although the English courts, have accepted the principle that the conceptions of public policy, should move with the times,⁶⁵⁸ nonetheless, English courts have applied this principle with the utmost caution. In the leading case of *Fender v St. John-Mildmay*,⁶⁵⁹ Lord Atkin, with regard to the application of the doctrine of public policy, stated the position as follows:

" *The doctrine of public policy should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds.*"

The court continued to lay down the following test when the doctrine should be applied by the judiciary, namely:

⁶⁵³ *Rodriguez v Spyer BNS* (1919) A.C. 59; *McFarlane v Tayside Health Board* (2000) 2 A.C. 59, 100-101.

⁶⁵⁴ (1971) CH 491 1606.

⁶⁵⁵ *Enderby Town Football Club Ltd v The Football Association Ltd* (1971) CH 491, 606.

⁶⁵⁶ *McFarlane v Tayside Health Board* (2000) 2 A.L. 59, 100-101.

⁶⁵⁷ *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462, 465. The dictum in this case with regard to this consideration has been quoted extensively in numerous English cases. *Inter alia Johnson v Moreton* (1980) A.C. 37. But cautions the court that freedom of contract and sanctity of contract cannot apply unrestrictedly because of the principle of welfare-ism and public interests.

⁶⁵⁸ *Blathways v Barencauley* (1976) A.L. 397; *Cheall v Apex* (1980) 2 A.C. 180.

⁶⁵⁹ (1938) A.C. 1, 12.

"They must be satisfied that any reasonable person would agree that the enforcement of the provision under consideration would be "a harmful thing". " ⁶⁶⁰

English courts have, over the years, applied public policy in not enforcing contracts or contractual provisions. ⁶⁶¹

10.2.3.3 UNITED STATES OF AMERICA

10.2.3.3.1 Legal Writings

From previous discussions herein it was observed that the American legal writers and the courts, place great emphasis to the doctrines of freedom of contract and the sanctity of contract. The legal writers, as well as the courts, as previously stated, do recognise that there are exceptions to these doctrines, one of which is contracts contrary to public policy do not necessarily have to be enforced.

Generally then, contracts contrary to public policy, that is, those which tend to be injurious to the public or against the public good, and are illegal and void, even though actual injury does not result there-from. ⁶⁶²

The rationale for recognizing public policy limitations is based on the philosophy that even fully voluntary and informed agreements between competent adults might, nonetheless, be socially undesirable because they might create negative externalities, the most important of which includes the threat to the reduction of total social welfare. Others include the prohibition of harm to others, be that public health, public safety, public welfare and the like. ⁶⁶³

Although the term "public policy" is said to be defined with great difficulty, and is comprehended by some, as a term of vague and uncertain meaning, nonetheless, attempts

⁶⁶⁰ *Fender v St. John-Midmay* 1938 A.C. 1, 11-12 followed with approval in *Cheall v Apex* (1980) A.C. 180 at 191.

⁶⁶¹ *Lancashire Council v Municipal Mutual Insurance Ltd* (1987) QB 897 (Indemnity clause in an insurance contract); *Monkland v Jack Barclay Ltd* (1951) 2 KB 252 (Contract in Restraint of Trade); *D (Respondent) v National Society for the Prevention of Cruelty to Children (Appellants)* (1978) A.C. 171; *Horwood v Millar's Timber and Trading Co* (1917) 3 K.B. 305 (Restrictions of Mortgagor's Liberty of Action); *British Eagle International Airlines Ltd v Compagnie National Air France* (1975) 1 W.L.R. 758 (Contracting out of statutory provision).

⁶⁶² Corpus Juris Secundum Volume (17A) (1999) 165; Williston *A Treatise on the Law of Contracts* (Vol. 18) (1978) Para 1629; Scott and Krauss *Contract Law and Theory* (2002) 517.

⁶⁶³ Scott and Krause (2002) 519; Jaeger (1953) 502; American College of Legal Medicine *Legal Medicine* (1991) 50; Corpus Juris Secundum Volume (17A) (1999) 165; Williston (Vol. 18) (1978) Para 1629.

have been made to put meaning to it in substance namely:

*Jaeger*⁶⁶⁴ defines public policy as "the common condition sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of such particular relation and situation." ⁶⁶⁵

On the other hand in the *Corpus Juris Secundum*⁶⁶⁶ public policy is defined as "that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law."⁶⁶⁷

The nature and scope of public policy in America is greatly influenced by contemporary factors. In time it is the present that counts. The social customs, economic needs and moral aspirations of the people are, in turn, influenced by changing habits, opinions and wants of the people, as well as, the local conditions in the state wherein the case arises.⁶⁶⁸

In America, public policy, in the case of a particular state, must be viewed in the light of the legislative acts and judicial pronouncements of that state.⁶⁶⁹ For that reason, courts will often view negative externalities, including illegal and immoral activities, against the legislative acts and judicial pronouncements.⁶⁷⁰

There is no magic formula in American law to determine whether a contract is contrary to public policy. Hence, it is said, there is no absolute rule by which to determine what

⁶⁶⁴ Jaeger (1953) 502.

⁶⁶⁵ Jaeger (1953) 502.

⁶⁶⁶ Corpus Juris Secundum Volume (17A) (1999) 165.

⁶⁶⁷ Corpus Juris Secundum Volume (17A) (1999) 165.

⁶⁶⁸ Corpus Juris Secundum Volume (17A) (1999) 168; Williston (Vol 18) (1978) Para 1629.

⁶⁶⁹ Corpus Juris Secundum Volume (17A) (1999) 168.

⁶⁷⁰ Scott and Krause (2002) 519. The Corpus Juris Secundum Volume (17A) (1999) 166-167 while acknowledging the other two sources of information for determining public policy, they include constitutional provisions as well.

contracts are repugnant to the public policy of the state.⁶⁷¹

In determining whether a contract is against public policy, the courts will look at all the facts and circumstances of each case. In addition, the courts may consider the purposes of the contract and the situation of the parties when the contract was concluded, as well as, the language of the contract itself.⁶⁷²

The courts also start from the premise that courts are there to enforce and to maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy. For that reason the courts have been loathe to extend the rules which hold a contract void as against public policy.⁶⁷³

The misgivings in the judicial adoption of non-public policy are often echoed when legal writers quote the well-known dictum of *Richardson v Mellish* 2 Bing (England) 229:

*"It is a very unruly horse, and when you once get astride it you never know where it will carry you."*⁶⁷⁴

Nonetheless, with or without the misgivings, legal writers are shared in their view that the courts have tended to heed the axiom that *"whatever is injurious to the interests of the public is void, on the grounds of public policy."* On this basis, a wide variety of agreements have been found illegal and unenforceable, wholly on grounds of "public policy".⁶⁷⁵

A superimposing factor in American law, influencing the courts in deciding whether a contract is against public policy, is the right of individuals to enter into contracts, i.e. private autonomy and that persons should not be unreasonably restricted in their freedom to make their own contracts, i.e. freedom to contract.⁶⁷⁶

The power to declare a contract void as contrary to public policy is not open ended. It has

⁶⁷¹ Corpus Juris Secundum Volume (17A) (1999) 169.

⁶⁷² Corpus Juris Secundum Volume (17A) (1999) 169.

⁶⁷³ Corpus Juris Secundum Volume (17A) (1999) 169.

⁶⁷⁴ Williston (Vol. 18) (1978) Para 1629; Corpus Juris Secundum Volume (17A) (1999) 169-170.

⁶⁷⁵ Williston (Vol. 18) (1978) Para 1629; Corpus Juris Secundum Volume (17A) (1999) 171.

⁶⁷⁶ Corpus Juris Secundum Volume (17A) (1999) 169; Williston (Vol. 18) (1978) Para 1630.

been stated that courts should do so rarely and with great caution. It has also been suggested that contracts should only be held to be void as being contrary to public policy, in instances where it is clearly and unmistakably so.⁶⁷⁷

Further requirements for contracts to be declared void as against public policy include, firstly, the contract must be invalid on the basis of recognized legal principles, secondly, the enforcement of the contract will be followed by injurious results which are against the public good, or contravene some established interest of society, or are inconsistent with sound policy and good morals, or tend to undermine the security of individual rights.⁶⁷⁸

Although the mere harshness of terms to one of the parties will not render the contract void as against public policy, the courts should, however, not hesitate to declare void as against public policy contractual provisions which clearly tend to injure the public in some way.⁶⁷⁹

The following illustrations have been identified in America as injurious to the public interests, hence, void as against public policy namely:

The contravention of established interests of society, or as against good morals, or tend to interfere with public welfare, health and safety, or tend to cause an injustice or oppression, restraint of liberty, or restraint of legal right, require an illegal act or lead to corrupt results.⁶⁸⁰

Insofar as contracts limiting or relieving a party from liability are concerned, the position in America may be stated as follows: while contracts relieving a party from liability are not favoured, and exculpatory clauses are strictly construed against those seeking their benefits, there is however, no public policy in favour of denying parties to a contract the right to limit their liability under American law.⁶⁸¹

But, it is especially with regard to contracts containing exculpatory or indemnity clauses which aim is to exempt one of the contracting parties from liability for negligence and

⁶⁷⁷ Corpus Juris Secundum Volume (17A) (1999) 169; Williston (Vol. 18) (1978) Para 1630.

⁶⁷⁸ Corpus Juris Secundum Volume (17A) (1999) 170-171; Williston Vol. 18 (1978) Para 1630A.

⁶⁷⁹ Corpus Juris Secundum Volume (17A) (1999) 170-171; Williston Vol. 18 (1978) Para 1630A.

⁶⁸⁰ Corpus Juris Secundum Volume (17A) (1999) 170-171; Williston Vol. 18 (1978) Para 1630A.

⁶⁸¹ Corpus Juris Secundum Volume (17A) (1999) 172; Williston Vol. 18 (1978) Para 1630.

which is violative of law or contrary to some rule of public policy, that legal writers, have been critical of their validity. Otherwise, generally, contracts releasing parties from liability for injuries caused by negligent acts are enforceable.⁶⁸² But notwithstanding, these type of contracts are not favoured and are subject to close judicial scrutiny. Often they are strictly construed against the party relying on them.⁶⁸³

Moreover, an exemption provision is void where it is prohibited by statute or governmental regulation.⁶⁸⁴ The rationale for the rule against the enforcement of release from negligence is said to be that, wrongdoers should not escape liability for their negligent acts which cause damages in the process. This is especially applicable, in instances where those contracting parties drive hard bargains.⁶⁸⁵

Whether or not such a contract is enforceable depends on the following factors, namely; the nature and subject matter of the agreement, the relations of the parties, the presence or absence of equality of bargaining power, and other circumstances, *inter alia*, the presence or absence of some statutory prohibition, where a public duty is owed or where public interest requires the performance thereof.⁶⁸⁶

It is especially in contracts where one of the parties enjoys a bargaining power superior to that of the other party to the contract, and where the effect of the contract is to put the other party at the mercy of such party's negligence, that it is felt that these types of contractual provisions should not be sustained.⁶⁸⁷

As will be seen *infra*, it is particularly exculpatory provisions in medical agreements, which have come under a lot of criticism, in American law, over a number of years.

10.2.3.3.2 Case Law

Even though public policy has been recognized by the American Courts as a means to

⁶⁸² Corpus Juris Secundum Volume (17A) (1999) 268; Williston Vol. 18 (1978) Para 1630.

⁶⁸³ Corpus Juris Secundum Volume (17A) (1999) 269; Williston Vol. 18 (1978) Para 1630.

⁶⁸⁴ Corpus Juris Secundum Volume (17A) (1999) 269; Williston Vol. 18 (1978) Para 1630.

⁶⁸⁵ Corpus Juris Secundum Volume (17A) (1999) 270.

⁶⁸⁶ Corpus Juris Secundum Volume (17A) (1999) 271; Williston Vol. 18 (1978) Para 1751.

⁶⁸⁷ Corpus Juris. Secundum Volume (17A) (1999) 271; Williston Vol. 18 (1978) Para 1751.

interfere, only in appropriate cases, with the freedom of contract and the sanctity of contracts, ever since the judgement of *Printing and Numerical Registering Co v Sampson*,⁶⁸⁸ in which the court laid down the following strict, dichotomous guideline, namely:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."⁶⁸⁹

The American courts have been loath to declare contracts void as against public policy.⁶⁹⁰

For that reason, it has been stated before, by the American courts, that the principle that contracts contravening public policy are unenforceable "*should be applied with caution and only in cases plainly within persons on which doctrine rests.*"⁶⁹¹

What the courts have also warned against is that, before courts pronounce contracts to be contravening public policy " *it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.*"⁶⁹²

⁶⁸⁸ 19 LR Eq. 462, 465 (1879).

⁶⁸⁹ *Printing and Numerical Registering Co v Sampson* 19 L.R. Eq. 462, 465 (1875).

⁶⁹⁰ *Cohen Insurance Trust et al v Stern et al* 297 Ill.App 3d 220 696 N.E. 2d 743, 231 Ill Dec 447; *Hoyt v Hoyt* 213 Tenn. 157, 372 S.W. 2d 300 (1963); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Smit v Simon et al* 224 So. 2d 565 (1969); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Martin v Alianze Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Walker v America Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1887) quoting *Printing Co v Sampson* L.R. 19 Eq. 462; *Smith v Simon et al* 224 So. 2d 565 (1969); *Oregon and Navigation Co v Duras* (C.C.A.) 181 F. 781 quoted in *Ingalls v Perkins* 763 P. 761 (1928); *Anderson et al v Blair* 80 So. 31 (1918); *Mitchell v Jones* 104 Colo 62, 88 P. 2d 557 (1939); *Wilson v Builders Transport Inc et al* 330 S.C. 287, 498 S.E. 2d 674 (1998); *Eichelman v Nationwide Insurance Company* 551, Pa 558, 711 A. 2d 1006 (1998); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill 2d 540, 687 N.E. 2d 968 227 Ill. Dec 486 (1997); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 671 (1942); *Heaton Distribution Co, Inc v Union Tank CAR Company* 387 F.2d 477 (1967); *Cornelleir v American Casualty Company* 389 F.2d 641 (1968); *Evans v General Insurance Company of America* 390 S.W. 2d 818 (1965); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

⁶⁹¹ *Hoyt v Hoyt* 213 Tenn. 177, 372 S.W. 2d 300 (1963); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Martin v Alianze Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Walker v America Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Diamond Match Co v Rieber* 106 N.Y. 473, 13 N.E. 419 (1887); *Ingalls v Perkins* 763 P. 761 (1928); *Eichelman v Nationwide Insurance Company* 551, Pa 558, 711 A. 2d 1006 (1998); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 671 (1942); *Cornelleir v American Casualty Company* 389 F.2d 641 (1968); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

⁶⁹² *Kellogg v Larkin* 3 Penn. Wis. 123, 56 A.M. Dec. 164 quoted with approval in *Mitchell v Jones* 104 Colo 62, 88 P.

The rationale there-for is founded in the courts attitude namely “..... *It is to the interests of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts.....* ”⁶⁹³ Or, as it has always been stated:” *the freedom of individuals to contract is not taken lightly* ”⁶⁹⁴

Public policy is also a term not clearly defined by the courts and it has often been suggested by the courts that, in order to determine whether a contract violates public policy depends upon “*the peculiar facts and circumstances of each case*”, as well as, “*the language of the contract itself.*”⁶⁹⁵ It has also been suggested, by the courts, that courts should have regard to “.....*the situation of the parties at the time the contract was made and the purposes of the contract.*”⁶⁹⁶

But, it has been frequently held by the American courts, in following the decision of the case of *Oregon R.R. and Navigation Co v Dumas*:

“A Court should declare a contract void as against public policy only when the case is clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical.”⁶⁹⁷

But, notwithstanding, the American courts have, throughout the years, identified several

2d 557 (1939).

⁶⁹³ *Cohen Insurance Trust et al v Stern et al* 297 Ill. App. 3d 220, 696 N.E. 2d 743, 231 Ill. Dec 447 (1998); *Schuman-Heinz v Folsom* 328 Ill. 321, 330, 159 N.E. 2d 599 (1983); *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1887); *Zeitv v Foley* 264 S.W. 267 (1954); *Ingalls v Perkins* 263 P. 761 (1928); *Anderson et al v Blair* 80 So. 31 (1918); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill 2d 540, 687 N.E. 2d 968, 227 Ill. Dec. 486 (1997); *Perkins v Hegg* 212 Minn 377, 3 N.W. 2d 671 (1942); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

⁶⁹⁴ *Skyline Harvestone Systems v Centennial Insurance Co* 331, N.W. 2d at 109 quoted in *Walker v American Family Mutual Insurance Company* 340 N.W. 599 (1983).

⁶⁹⁵ *Hoyt v Hoyt* 213 Tenn. 117, 372 S.W. 2d 300 (1963). In the case of *Styles v Lyon* 86 A. 564 (1913) the court emphasized legal consideration and reasonableness to be the criteria. See also *Cook v Johnson* 47 Conn. 175, 36 AM Rep 64; *Cornellier v American Casualty Company* 389 F. 2d 641 (1968); *Himrich et al v Carpenter et al* 569 N.W. 2d 568, 1997 SA 116 (1997).

⁶⁹⁶ *Smith v Idaho Hospital Services Inc d/b/a Blue Cross of Idaho* 89 Idaho 499, 406 P. 2d 696 (1965); *Cohen Insurance Trust v Stern et al* 297 Ill App. 3d 220, 696 N.E. 2d 743, 231 Ill Dec 447 (1998); *Home Beneficial Association v White* 106 N.Y. 473, 13 N.E. 419 (1887); *Anderson et al Blair* 80 So. 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.W. 353, 51 S.Ct 476 (1931); *Eichelman v Nationwide Insurance Company* 551 Pa. 558, 711 A. 2d 1006 (1998); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill. 2d 540, 687 N.E. 2d 968, 227 Ill. Dec 486 (1997); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

⁶⁹⁷ *Oregon R.R. and Navigation Co v Dumas* (C.C.A.) 181 F. 781 followed in *Ingalls v Perkins* 263 P. 761 (1928); *Mitchell v Jones* 104 Colo. 62, 88 P. 2d 557 (1939).

factors which the courts ought to consider in declaring a contract void as against public policy. Although there are no *numerus clausus*, the courts have identified the following factors in the main, as being void against public policy. Public interest, have been identified as one of the uttermost factors that plays a significant role in deciding when to declare a contract void as against public policy. The courts have made it abundantly clear that this arises when agreements are contrary "to what the constitution, the statutes or the decisions of the courts have declared" or "they are manifestly injurious to the public welfare or public good or violative to public interest." ⁶⁹⁸

It has also been held that before contracts may be held to be void and unenforceable against public policy, the contract must be "inimical to the public interest" ⁶⁹⁹ or "tend injuriously to affect the public service."

It is especially in contracts containing exculpatory or exclusionary clauses, in which attempts are made to exonerate contractants from liability, notwithstanding their negligent conduct and the serious consequences that flow there-from, that the courts have stepped in to protect the innocent by invoking public policy.

The rationale for the afforded protection was formulated, as far back as 1921, when Mr Justice Cardozo, in *Messersmith v American Fidelity Co*, ⁷⁰⁰ held that "no one shall be permitted to take advantage of his own wrong." ^{701 702}

⁶⁹⁸ *Cohen Insurance Trust et al v Stern et al* 297 Ill.App 39 220 696 N.E. 2d 743, 231 Ill Dec 447; *Hoyt v Hoyt* 213 Tenn. 177, 372 S.W. 2d 300 (1963); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Smith v Simon et al* 224 So. 2d 565 (1969); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Martin v Allianz Life Insurance Company of North America* 593 N.W. 2d 823 (1998); *Walker v America Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Diamond Match Co v Rieber* 106 N.Y. 473, 13 N.E. 419 (1887) quoting *Printing Co v Sampson* L.R. 19 Eq 462; *Smith v Simon et al* 224 So. 2d 565 (1969); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Ingalls v Perkins* 263 P. 761 (1928); *Anderson et al v Blair* 80 So. 31 (1918); *Styles v Lyon* 86 A. 564 (1913); *Lazenby v Universal Underwriters Insurance Company* 214 Tenn. 639, 383 S.W. 2d 1 (1964); *Eichelman v Nationwide Insurance Company* 551, Pa 558, 711 A. 2d 1066 (1998); *Perkins v Hegg* 212 Minn. 377, 3 N.W. 2d 571 (1942); *Canal Insurance Company v Ashmore* 126 F. 3d 1083 (1997); *Trotter v Nelson* 684 N.E. 2d 1150 (1997); *Owens v Henderson Brewnig Co et al* 215 S.W. 90 (1919); *Neiman v Galloway* 704 So. 2d 1131 (1998).

⁶⁹⁹ *Ingalls v Perkins* 263 P. 761 (1928); *Styles v Lyon* 86 A. 564 (1913); *Mitchell v Jones* 104 Colo. 62, 88 P. 2d 557; *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944).

⁷⁰⁰ *Anderson et al v Blair* 80 So. 31 (1918); *Home Beneficial Association v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Himrich et al v Carpenter* 569 N.W. 2d 568, 1997 So 116 (1997).

⁷⁰¹ 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876 (1921).

⁷⁰² *Messersmith v American Fidelity Co* 232 N.Y. 161, 133 N.E. 432, 19 A.L.R. 876; *Sproul v Cuddy and Williams* 131 Cal. App. 2d 85, 280 P. 2d 158 (1955); *Neiman v Galloway* 704 So. 2d A 31 (1998).

For a more in depth discussion see Chapter 13.

10.2.3.3.3 Legal Opinion

Public policy is generally regarded as an antipode to the emphasis which maxims such as freedom of contract and the sanctity of contract, have received in the United States of America. Although contracts or provisions of contracts are not easily interfered with, nonetheless, contracts or provisions of contracts which tend to be injurious to the public or against the public good will be declared against public policy and unenforceable.⁷⁰³

The rationale for the recognition of public policy is based on social welfarism as well as the prohibition of harm to others, be that, public health, be that, public safety, be that, public welfare and the like.⁷⁰⁴

Despite its recognition, the meaning of public policy is still vague and uncertain and its definition not uniform. What is certain, however, is that the following elements have received common recognition; it concerns the community, common sense and common conscience with regard to matters of public morals, public health, public safety, public welfare and the like.⁷⁰⁵

It has also been generally accepted that the nature and scope of public policy in the United States of America is influenced by contemporary factors, including, social custom, economic needs and moral aspirations of society. In turn, the contemporary factors are influenced by changing habits, opinions, wants and the needs of the people.⁷⁰⁶

What further influenced the determination of public policy were illegal and immoral activities often prohibited by legislative acts and judicial pronouncements.⁷⁰⁷

⁷⁰³ Corpus Juris Secundum Volume (17A) (1999) 165; Williston *A Treatise on the Law of Contracts* (Vol 18) (1978) Para 1629; Scott and Krauss *Contract Law and Theory* (2002) 517.

⁷⁰⁴ Scott and Krause *Contract Law and Theory* (2002) 519; Jaeger *Law of Contracts* (1953) 502; American College of Legal Medicine *Legal Medicine* (1991) 50; Corpus Juris Secundum Volume (17A) (1999) 165; Williston *A Treatise on the Law of Contracts* (Vol. 18) (1978) Para 1629.

⁷⁰⁵ Jaeger *the Law of Contracts* (1953) 502; Corpus Juris Secundum Volume (17A) (1999) 165.

⁷⁰⁶ Corpus Juris Secundum Volume (17A) (1999) 168; Williston *A Treatise on the Law of Contracts* (Vol. 18) (1978) Para 1629.

⁷⁰⁷ Scott and Krause *Contract Law and Theory* (2002) 519; Corpus Juris Secundum Volume (17A) (1999) 166-167 while acknowledging the other two sources of information for determining public policy, they include constitutional

Despite its recognition, there is no magic formula in American law to determine whether a contract is contrary to public policy or not. It has, then, also been acknowledged that there is no absolute rule by which to determine what contracts are repugnant to public policy. In this regard the courts will look at all the facts and circumstances of each case. In addition the courts may consider the purpose of the contract and the situation of the parties.⁷⁰⁸

10.2.4 Summary and Conclusions

It is evident from the scope of this Chapter that the impact of the doctrines of freedom of contract and the sanctity of contract, despite some factors such as the principle of fairness, the doctrine of unconscionable-ness and agreements contrary to public policy impacting on the said doctrines, contractual autonomy and *pacta sunt servanda* remains far-reaching and profound. What emerged from the discussion in this Chapter is that contractual freedom and the sanctity of contract are not without limits. In some instances the interference by the courts in contractual autonomy is warranted. The rationale for empowering the courts to interfere with the enforcement of contracts, or contractual provisions, rests on many principles: The most general motivating reasons, which have emerged throughout the years, include; courts will not turn a blind eye to the fraudulent conduct of one of the parties to the contract nor would courts ignore the influence which one of the contracting parties brings to bear upon the other contracting party, through undue influence or duress, often to the detriment of the other contracting party. Besides misrepresentation, fraud, duress and undue influence, the traditional defence to contractual freedom also includes mistake and illegality. Besides the traditional factors, what have also been recognized as factors influencing the validity and enforceability of contracts or contractual provisions, include: the harshness or unreasonableness which flow from the unequal bargaining position of contracting parties, the fairness of contract, unconscionability of certain contracts or contractual provisions as well as public policy and its effect on invalidating contracts and contractual provisions.

provisions as well.

⁷⁰⁸ Corpus Juris Secundum Volume (17A) (1999) 169; Hoyt v Hoyt 213 Tenn. 177, 372 S.W. 2d 300 (1963); In the case of *Styles v Lyon* 86 A. 564 (1913) the court emphasized legal consideration and reasonableness to be the criteria. See also *Cook v Johnson* 47 Conn. 175, 36 AM Rep 64; *Cornellier v American Casualty Company* 389 F.2d 641 (1968); *Himrich et al v Carpenter et al* 569 N.W. 2d 568, 1997 SA 116 (1997); *Smith v Idaho Hospital Services Inc d/b/a Blue Cross of Idaho* 89 Idaho 499, 406 P. 2d 696 (1965); *Cohen Insurance Trust v Stern et al* 297 Ill App. 3d 220, 696 N.E. 2d 743, 231 Ill Dec 447 (1998); *Home Beneficial Association v White* 106 N.Y. 473, 13 N.E. 419 (1887); *Anderson et al Blair* 80 So. 31 (1918); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.W. 353, 51 S.Ct 476 (1931); *Eichelman v Nationwide Insurance Company* 551 Pa. 558, 711 A. 2d 1006 (1998); *Liccardi et al v Stolt Terminals Inc et al* 178 Ill. 2d 540, 687 N.E. 2d 968, 227 Ill. Dec 486 (1997); *Trotter v Nelson* 684 N.E. 2d 1150 (1997).

The question of the recognition and the nature and scope of the principles of fairness, the doctrine of unconscionable-ness and the doctrine of public policy, as they impact on contractual freedom, was explored in some depth in this Chapter. Whilst it is clear that the principle of fairness, or good faith, is recognized and given effect to in the jurisdictions of English contract law and American law, the same cannot be said to the position in South Africa. The recognition afforded the principle of fairness in both England and the United States of America is founded upon public interests and public welfare, wherein the weaker contracting party is protected against exploitation by the stronger party to the contract. The philosophical principles of ethics and fairness have influenced the American judges, in deciding to declare contracts contrary to public policy. The philosophy, in turn, is founded upon community-based standards, derived from societal norms and values. The principle of fairness serves as a safety valve for the protection of, especially, the unsophisticated contracting parties against such exploitation. In so doing, it caused a paradigm shift in America, from extreme individualism to fairness and reasonableness in contract. English law introduced legislation, the aim of which was to bring about fairness in contract. This became particularly the practise which involved exemption clauses excluding liability. To this end, the courts exercise their discretion in declaring these clauses ineffective on the grounds of unfairness in contrast. Although some South African legal writers and the courts, in the minor divisions, have favoured the return of the application of the principle of good faith in the South African Law of Contract, the Supreme Court of Appeals resisted all attempts to re-introduce this principle. Despite the resistance put up against the re-introduction, the South African Law Commission introduced concept legislation to adopt the principle of fairness in South African Law, to deal with unreasonable and oppressive contracts.

Considerations of the doctrine of unconscionable-ness reveal that the concept is not foreign to the South African, English and American jurisdictions. It is a method of providing equitable relief to protect the weak, the foolish and the thoughtless, especially in transactions of unfair bargain. The doctrine of unconscionable-ness was particularly enforced with the usage of standardized contracts, where the contract itself, or the contract provisions, result in harsh or unreasonable consequences in South Africa. Its application is very limited where the weak is exploited resulting in oppressive consequences. But, in both South Africa and in England, the doctrine of unconscionable-ness) has never become a free- floating, independent defence. The American law of contract, prior to the legislative intervention in the form of *Uniform Commercial Code* in 1965, recognized the doctrine, but, the American courts did not consistently apply the

doctrine. This led to the enactment of S2-302(1) of the *Uniform Commercial Code*. The effect thereof was that the American courts were encouraged to openly strike down provisions harmful to a contracting party and which were unconscionable when the contract was concluded. Judges were thus, since the enactment, given greater power to police agreements and strike down unconscionable agreements.

Public policy, as seen by the discourse in this Chapter, is seen as possibly the factor which impacts most heavily on contractual freedom. In all three jurisdictions, South Africa, England and the United States of America, no other factor impacting on contractual freedom is given as much prominence, by the legal writers and the courts, as public policy in addressing the invalidity of contracts. It follows, therefore, that in the jurisdictions in question the courts are frequently asked to pronounce on the validity of contracts against the background of public policy. The rationale for the recognition of public policy as a defence lies in the fact that public interests regard that the courts protect the weaker contracting party and, in so doing, the courts are empowered to strike down and declare invalid contracts which are against public policy or *contra bonos mores*. There is, however, no hard and fast rule as to exactly when this head may successfully be used to invalidate contracts or contractual provisions. It has been suggested, in all three jurisdictions, however, that the power of the courts to declare contracts or contractual provisions to be invalid should be used sparingly and only in the clearest of cases. It has been suggested that although courts are empowered with this competency, public policy often dictates that contracts, once entered into, should be enforced because of the principles of freedom and contract and *pacta sunt servanda*.

The South African courts, as was seen in this Chapter, have demonstrated their conservatism in not sticking out their necks to nullify agreements merely because they appear to be unreasonable or unfair. This appeared to be the position even where a hospital contract containing an exclusionary clause, excluding the hospital and staff from liability, was not nullified by the Supreme Court of Appeal, despite normative ethics and medical standards being compromised. This will form the core discussion in Chapter 13.

It needs to be said however, at this stage, the Supreme Court of Appeal have, unlike other jurisdictions, including England and the United States of America, refused to follow the paradigm shift experienced in other jurisdictions in this regard.

English law, although more progressive in their handling of contracts against public policy, have also created much uncertainty as to when to nullify contracts or contractual provisions based on public policy. But then, English law have allowed legislative intervention to stem

the effect of standardized contracts, especially where they are injurious to public interests of the public welfare.

Despite the United State of America's ardent following of the principles of freedom of contract and the sanctity of contract, the American courts appear to be less likely to turn their backs and to allow contracting parties to suffer hardship and prejudice where public interests, good morals and public welfare are adversely affected. It is especially in the sphere of exclusionary, or indemnity contracts, exonerating contracting parties from liability, notwithstanding their often negligent conduct that the courts have played a greater protecting role.

All in all, one gains the impression that the South African courts play a less paternalistic role in protecting contracting parties, even in circumstances where contractual provisions are in conflict with public interests, public welfare and good morals. The South African courts' attitude even finds prominence in exclusionary, or indemnity clauses, wherein a contracting party exonerates himself from liability to the detriment of the other contracting party. Consequently, in the Chapter that follows, the status and effect of exclusionary clauses, or exculpatory clauses, in general will be considered. This will give one a greater insight into the acceptability of these types of clauses in the commercial sphere. It will also direct one into getting a better understanding as to when the courts will step in and interfere with contractual freedom, despite contracts, containing these types of clauses, being entered into.

Finally, a greater understanding of the recognition of exclusionary clauses in general and the protection of the public against the abuses which some of these type of clauses bring with them, will lay a sound foundation for the research to be pursued in Chapter 14, which forms the focal point of this thesis.

Chapter 11

The influence of exclusionary clauses on the Law of Contract in general

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11.1 Introduction

Exclusionary clauses in contract are not a new concept. It has its roots firmly embedded in the Roman law period. There were informal *pacta*, which operated as phenomenal bars to litigation. Other *pacta* also provided a defence to a debtor if sued by a creditor. In all, it had an affect on contract during this period, as exclusionary clauses limited, excluded certain rights, duties and rights of the contravening contracting parties. ¹

Exclusionary clauses were incorporated in standard form contracts, in English law, as early as the seventeenth century. In the so-called 'common carrier' cases, attempts were made to exonerate the skipper from his duties.

The foundation upon which exclusionary clauses are built is said to be the principle of the freedom to contract i.e., as Grotius argued, 'man's right to contract'. With its explosive use during the industrial revolution it became to be known as standard form contracts and were very much influenced by the philosophy of *laissez-faire*, which meant that the law should interfere with people as little as possible. Influenced then by this ethos, judges were very reluctant during this time to interfere with contractual agreements. ²

¹ Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189 at 196 highlights from the *Digest* the exemption clauses which in Roman times effected the naturally of agreements *inter alia* the limitations or exclusion of liability for evictions and latent defects. Likewise, the *pacta de non pretend* was an agreement not to sue.

² According to Alidah *An Introduction to the Law of Contract* (1995) 15ff the judges saw their main task as that of an umpire who assisted contracting parties where the rules of the game had been broken. For the non-interference

During the twentieth century the use of standard contracts reached gigantic proportions. The usage of standardized contracts found its way into the commercial field, most noticeably in transport, insurance, banking etc. Its use was then also extended to medical agreements involving especially, hospitals.

It is significant to note that these types of contracts found universal favour, including the jurisdictions of South Africa, England and the United States of America. What is of further significance is the fact that as competition became fiercer amongst especially, the industrial giants, exclusionary clauses became a mighty tool for the exploitation of economic power. What emerged as well is the fact that the weaker contracting party who stood in an unequal bargaining position was often exploited by the stronger contracting party, especially, bigger business enterprises and often, monopolies. The prevailing situation at the time led to the forming of consumer bodies, the aim of which was to protect consumers who were being exploited. The era of consumerism brought about new thinking and legal jurisprudence.³ The ethos that contracts were there to honour and enforce was being challenged by the moral principle that one should not take advantage of an unfair contract. Despite efforts being made to prevent the abuse of consumers, standardized contracts remained and continue to remain the order of the day.

Exemption clauses in South Africa have found their way into virtually every conceivable contract.⁴ Their effectiveness is said to be twofold. In the first instance, it is contended that it controls the consequences of most contracts. Secondly, these types of agreements it is contended, assist in reducing the uncertainties management faces in controlling the consequences that flow from the concluding of contracts. It brings about better planning and risk management as well as costing.

But, the application of exclusionary clauses in contract in South Africa has not been without criticism.⁵ Moreover, because of the undesirable and unreasonable affect

of the courts in the law of contract see the much quoted dictum of Sir George Jesse in *Printing and Numerical Registering Co v Sampson* (1875) L.R. E.Q at 465.

³ The legal jurisprudence according to Alidah (1995) 11 was founded on morality in that 'man must respect man and not take advantage of his weakness'.

⁴ The use of exemption clauses in contract is identified by both academic writers and the courts alike.

⁵ It is especially the writers Van der Merwe et al *Contract - General Principles* (2003) 214-216; Deport "Exemption Clauses: The English Solution" *De Rebus* December (1979) 641ff; Van Loggerenberg "Unfair Exclusion Clauses in Contracts: A Plea for Law Reform" *Inaugural Address University of Port Elizabeth* (1987) 1-5 who are very critical of the use of exemption clauses in certain forms and in certain contracts. The use of standard contracts with exclusionary clauses aimed at exploiting traps for the weak or the general exploitation by the stronger contracting

exemption clauses have in certain instances over contracting parties, especially, the weak, the legislature have stepped in controlling certain exemption clauses in contracts.⁶ The South African legal writers and the courts at common law have also identified several factors that impact upon the free use of exemption clauses in contract.⁷ Although some factors are mentioned in this Chapter, the factors impacting on exclusionary clauses in their application will be discussed comprehensively in Chapter 14. The South African courts have also adopted certain methods in curbing or curtailing exemption clauses deemed to be undesirable and unreasonable often with harsh and oppressive results. The two mainstream methods include, denouncing these clauses when warranted to be contrary to public policy, public interests or the public welfare. Most recently, the Constitutional Court, albeit the dissenting and minority judgement of *Barkhuizen v Napier*,⁸ held that considerations of public policy, as animated by the Constitution, dictated that a time-bar clause, which limited access to courts, should not be enforced. The court in a refreshing judgement viewed adversely the effects of small print contained in standard-form documents that often did not form part of the actual terms on which the parties placed reliance when the agreement was reached. This the court held failed to comply with standards of notice and fairness which contemporary notions of consumer protection required in open and democratic societies. Moseneke DCJ in another dissenting judgement held that the stipulation in the time-bar clause clashed with public norms and is so unreasonable as to offend public policy.

Prior to this judgement, the Supreme Court of Appeals in the case of *Bafana Finance*

parties, over the weaker contracting parties have lead to much criticism. See also Kahn "Standard-form contracts" *Businessman's Law* (1971) 50ff; Turpin "Contract and Imposed Terms" *SALJ* (1956) 144ff.

⁶ The legislature in South Africa has provided consumer protection with the enactment of the *Credit Agreement Act* 75 of 1980, the *Alienation of Land Act of South Africa* 66 of 1981 and the *Insurance Act* 27 of 1943. In the past the *South African Law Commission* under Project 47 has also made recommendations to regulate unfair contractual provisions, which, if implemented through an enactment of the Draft Bill would have had far reaching consequences. See the *Draft Legislation*, the *Unfair Contractual Terms Bill* 1998. More recently a commission of enquiry under the auspices of the Department of Trade and Industry, published for comment the *Consumer Protection Bill*. (Government Gazette 28629 GN R489, 15 March 2006). As will be seen from the preamble and the contents of the Bill, it is a clear attempt to promote the ethos of consumer welfarism. As will be seen further its primary aim is to promote and protect the rights of historically disadvantaged consumers; to find adequate redress for consumers who have been abused or exploited in the market place and to give effect to the internationally recognized consumer rights. Special attention is also given to exemption from liability clauses and their unfair or unreasonable, often harsh and oppressive results. The Bill further aims to curb such conduct.

⁷ The factors identified by our legal writers include *inter alia* the lack of consensus between the contracting parties often been influenced by fraud, the status and bargaining power of the contracting parties; those clauses which violates public interests and statutory duty and those which are contrary to public policy.

⁸ 2007 (5) SA 323 (CC) Para 183.

*Mabopane v Makwakwa and Another*⁹ also held that a micro-lending agreement whereby the debtor purports to undertake not to apply for an order placing his/her estate under administration, in terms of S74 (1) of the *Magistrate's Court Act* 32 of 1944, and to agree that the loan debt will not form part of an administration order for which he/she might apply, is unenforceable as being inimical to public policy. In this case, the court relied heavily on public interest to denounce these types of clauses. The court also emphasized the fact that, especially where a contracting party is of poor standing, the court in public interest needs to afford protection.

The other method involves the interpreting exemption clauses narrowly. This method is especially used in instances where clauses do not set out legal grounds from which contracting parties are exempted for liability owing to them signing an agreement incorporating the exemption clause.¹⁰ So strong was the movement against the troublesome feature of standard form contracts, namely, the presence of exclusionary clauses with all its accompanying unreasonable and unfair results that various pressure groups lobbied enough support which resulted ultimately in commissions of enquiries being appointed to investigate the legal effect of these types of clauses. Extensive investigations were carried out in jurisdictions *inter alia* South Africa, the United Kingdom and the United States of America as means to find answers to growing criticism expressed against the use of exclusionary clauses. Moreover, despite the entrenched use of exclusionary clauses in, especially, the commercial field, recommendations from law commissions and other institutions in the jurisdictions aforementioned, halted, to a certain extent, the unlimited and unrestricted use of exclusionary clauses in contracts. In this regard the South African Law Commission in 1998 published their findings in the *Unreasonable Stipulations in Contracts and the Rectification of Contracts* as well as draft legislation in the form of the *Unfair Contractual Terms Bill*. This was a significant attempt to regulate unfair contractual provisions that are unfair, unreasonable or unconscionable.

Exclusionary clauses, from the early days, have very much been part of the English Law of Contract as these types of clauses were widely used in contracts involving the carriage of goods and in other commercial contracts. In these contracts for example, the carrier would restrict its liability for damages to the goods while they were being carried. Because of their frequent usage, these type of clauses strongly favoured in the commercial world in England.

⁹ 2006 (4) SA 581.

¹⁰ Christie *The Law of Contract in South Africa* (2003) 209ff; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340ff.

But, the use of exemption clauses in England, has not escaped criticism. One of the reasons most fervently advanced is that although there is generally an assumption that contracting parties, when concluding a contract, stand on equal footing; this is not always the case. In standard form contracts in which the individual is not found to negotiate contractual terms, the position of the individual is merely one of adherence. The accepting party has very little choice in the matter, especially, with the inclusion of exemption clauses excluding liability that often lead to hardship. In the so-called 'ticket cases' the consumer often has very little time to read the content. They are often clothed with clauses that are unfair or unnecessarily one-sided to the weaker party's detriment. This intolerant position caused pressure to be brought and groups to be formed who were out to curb exploitative practises.

The growth of consumer protection heralded in a new era in the law of contract; the ethos of individualism was displaced and a consumer-welfare ethos was driven, in which, the interests of consumers were taken more seriously.¹²

In view of the aforementioned the English courts adopted certain measures to alleviate the position of the weaker contracting parties. The English courts developed a number of rules, *inter alia*, firstly, the rule of incorporation in which the courts regarded a clause excluding liability, to be ineffective if it is not part of the contract.¹³ Reasonable notice of the exclusionary clauses is therefore required.¹⁴ Secondly, once it is established that the clause

¹¹ *The Standing Committee of Consumer Affairs* in Britain on unfair contract terms in a discussion paper (January 2004) at page 16 of the report describes the advantages to include *inter alia* good contractual planning, the reduction of transaction costs; cutting down on the preparation time in finalizing contracts etc. Judicial recognition of exclusion clauses has also been wide. It is especially cases such as *Parker v South Eastern Railway* (1877) 2 CPD 416, *Swisse Atlantique Societe D'Armenetmaritime SAN v Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361, *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827, 848 which demonstrated the acceptance of exclusionary clauses.

¹² It is especially Adams and Brownsword *Understanding of Contract Law* (2004) 39 who advocate that the tenets of consumer-welfarism are founded upon reasonableness and fairness. It is based upon good faith between the contracting parties in which no one should be misled nor should the stronger party exploit the weaker party because of their unequal bargaining position. Further no contracting party should profit from their own wrong and no one should be able to dodge their responsibilities through the use of exclusionary clauses.

¹³ Nowhere in judicial thinking than in the cases of *Lloyds Bank Ltd v Bundy* 1975 QB 326 (CA); *Karsales (Harron) Ltd v Wallis* (1956) 2 ALL E.R. 866; *A Schroeder Music Publishing Co Ltd v Macaulay* (1974) 1 W.L.R. 1308 has it been more effectively demonstrated that exclusionary clauses are not always desirable often leading to unfair or unreasonable consequences.

¹⁴ The principle of "actual knowledge" was stressed by Lord Devlin in the case of *McCutcheon v Davis MacBayne Ltd*

has been incorporated, the rule of construction or otherwise, the rule of interpretation is applied. In this regard, the *contra proferentem* principle is applied. The application of the principle operates as follows: if there is any ambiguity in a contract term, the ambiguity is to be resolved against the party relying upon the term.¹⁵ The courts have also approached the situation that where there is doubt, it is inherently improbable that the innocent party would have agreed to the exclusion of negligence.

The legislature also stepped in by enacting both the *Unfair Contract Terms Act 1977* as well as the *Unfair Terms in Consumer Contracts Regulations 1994*, as a measure to direct the courts to declare exclusionary clauses as void in certain circumstances.

One of the primary reasons why legislative intervention was deemed to be necessary in Britain was said to be the artificial construction given by the courts to exemption clauses, often leading to great hardship. A further factor included the inconsistency of the courts in denouncing these types of clauses and to declare them to be contrary to public policy.

This resulted in the English Law Commission and the Scottish Law Commission both investigating this issue and making recommendations based on their findings. Some of the findings made include:

- "(1) *notwithstanding the entrenched ethos of the freedom of contract, unlimited or unrestricted freedom is likely to operate unreasonably and in many instances operate against public interest;*
- (2) *The ignorant often suffer at the hands of those who abuse their bargaining strength;*
- (3) *The notion that there should be complete freedom to contract is not acceptable as contracting parties often do not bargain from a position of equal strength. Contracts containing excluding clauses are often abused and misused;*
- (4) *Social policy dictates that exemption clauses should not take away rights or restricts rights;*
- (5) *Judicial inconsistencies in handling exclusionary clauses are unacceptable;*
- (6) *The right to contract out of liability for negligence is not desirable."*¹⁶

(1969) 1 ALL ER.

¹⁵ The acceptance of the *contra proferentem* rule, is clearly demonstrated in the English cases of *Lee (John) and Son (Grantham) Ltd v Railway Executive* (1949) 2 ALL E.R. 581, *Houghton v Trafalgar Insurance Co Ltd* (1954) 1 QB 247; *Morley v United Friendly Insurance PLC* (1993) 1 W.L.R. 996.

¹⁶ See The Law Commission and the Scottish Law Commission report on *Exemption Clauses: Second Report* (1975)

The effect of the recommendations resulted in legislative interventions taking place with the passing of the *Unfair Contract Terms Act* 1977. Responding thereto, the English legal writers¹⁷ found that the intervention gave the courts in England a general and direct means of controlling the use of exemption clauses. In this regard, the *Unfair Contract Terms Act* 1977 may render an exemption clause depending on the circumstances, either totally unenforceable or unenforceable, unless, reasonable. The enactment of the *Unfair Contract Terms Act* 1977 has also been widely accepted by the English courts.¹⁸

The use of standardized contracts in America, akin to the other jurisdictions, including, England and South Africa, has also been on a large scale. They are found there in all walks of life and are widely recognized in the commercial world. But, despite their general acceptance,¹⁹ these types of contracts, especially, those containing exclusionary clauses have often been the subject of much criticism by the legal writers and the courts alike.²⁰

One of the main strands of criticism against the use of exclusionary clauses incorporated in standardized contract is the fact that exclusionary clauses often exclude liability for negligence leaving the innocent without remedy.²¹

Prior to the enactment of the *Uniform Commercial Code* 1952, the American courts relied heavily on the traditional common law defences, including, the lack of mutual assent, and

4ff. Their terms of reference included to investigate the effect of the bargaining position of the contracting parties especially, where the weaker party often lacks knowledge of the contract and understanding of the terms and the abuse that flow there from; to investigate further the abuse of power of the stronger party over the weaker party and the effect of the stronger party often adopting the 'take it or leave it' approach; thirdly the commission was advised on the lack of restrictions by common law or statute on the overthrowing of the exercise of reasonable care and the general maintenance of high standard of performance.

¹⁷ See especially the writings of Poole *Textbook on Contract Law* (1986) 209ff.

¹⁸ For the courts' general acceptance see the remarks of Lord Denning Mr in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) QB 284.

¹⁹ The advantages in the use of these type of contracts according to Summers and Hillman *Contract and Related Obligations: Theory, Doctrine and Practice* (1987) 584 and Deutsch *Unfair Contracts* (1977) 1-2 include controlling the risks in insurance contracts, providing consistency in contract, and saving in the drafting of individual contracts.

²⁰ The main strands of criticism highlighted by Summers and Hillman (1987) 584 and Deutsch (1977) 1-5 include parties are not always on equal footing when concluding the contracts, often one of the parties is in a stronger bargaining position; the terms or provisions in the contracts do not form the subject of negotiations or bargaining; often unfair terms are imposed on the weaker contracting party over which the latter has no control; the unsophisticated and ignorant are often expected to sift through the maize of fine print often with obscure clauses which work to their detriment.

²¹ The writer Deutsch (1977) 9 is particularly sceptical of the exclusion of liability involving, personal injury.

lack of mutuality, fraud, duress and public policy to invalidate unfair standardized contracts. As was the case in England, the courts also adopted methods of interpretation and construction in contracts to invalidate or restrict unfair disclaimers. The lack of clear rules in when to apply public policy as well as other traditional defences, the inconsistency shown by the courts to overcome unfairness in these types of contracts, gave rise to greater impetus being placed on the evolution of the doctrine of unconscionable-ness.²² This in turn, led to the enactment of the *Uniform Commercial Code* 1952 and the *Restatement of the Law of Contracts* 1981. Primarily, the legislative intervention was seen to exercise control over exemption clauses and empowering the courts to strike down unconscionable clauses.

Besides unconscionable-ness, other factors also influence the American courts in declaring contracts containing exclusionary clauses unenforceable. They include public policy,²³ public interest,²⁴ statutory provisions encompassing a public duty of care,²⁵ the inequality

²² The inconsistency of the American courts' approach to exclusionary clauses and often conflicting judgements is highlighted, by the Supreme Court of Washington in the case of *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P.2d 1093 (1971). The same sentiments are expressed in the cases of *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A 2d 768 (1960), *Levine et al v Shell Oil Company* 28 N.Y. 2d 205, 269 N.E. 2d 799 321 N.Y.S. 2d 81 (1971). This must be seen against the background of the courts' general acceptance of exclusionary clauses in commercial and business transactions as expressed in *Kuzmiak v Brookchester Inc* 33 N.J. Super 495 111A 2d 425 (1955); *Chazen v Trail Mobile* 215 Tenn 87, 384 S.W. 2d 1 (1964); *Chicago and North Western Railway Company v Rissler and McMurray Construction Co and Truck Insurance Exchange* 184 F. Supp 98 (1960); *Crawford v Buckner* 839 S.W. 2d 784 (1992). But some courts have also expressed their reservations of the enforcement of exclusionary clauses in a landlord-tenant relationship; See *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982) concentrated on the Health Spa consumer relationship.

²³ There are a number of cases in which the American courts expressed their willingness to declare contracts or provisions of contracts void as against public policy but only where they are 'clear and free from doubt and where the injury to the public is substantial or inimical to the public interests'. See *inter alia* the cases of *Twin Pipe Line Co et al v Harding Glass Co* 233 U.S. 353, 51, S.Ct 476; *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 49, 293 N.W. 2d 843 (1980); *Banfield v Louis Cat Sports Inc* 589 So 2d 441 (1991); *Olson v Molzen* 558 S.W. 2d 429 Tenn (1977).

²⁴ Public interests include "inequitable harsh and oppressive terms, the loss of important rights; the transgression of public regulations or public service". Included in this are hospital contracts containing exculpatory provisions in respect of which the courts have frequently held they will not stand as they violate public interest. See in this regard the cases of *Belshaw v Feinstein and Levin* 258 Cal.App.2d 711, 65 Cal Rptr 788 (1968); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990); *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory Univ v Porubiansky* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Tunkl v Regents of University of California* 60 Cal. 2d, 98-101, 32 Cal. Rptr 33, 37-38, 383 P. 2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, 381 A.2d 164 (1977).

²⁵ The duty of care highlights that it is especially, hospital contracts containing exculpatory provisions, which are included in this category. The rationale for this is based on the philosophy that professional standards cannot be compromised as it violates statutory provisions. See the cases of *Belshaw v Feinstein and Levin* 258 Cal.App.2d 711, 65 Cal Rptr 788 (1968); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308

of bargaining power, etc.²⁶

11.2 Historical overview of the development of exclusionary clauses

In order to have a greater understanding of the effect of exclusionary clauses in hospital contracts, which is the focal point of this thesis, it is of import to give consideration to the origin and development of exclusionary clauses in general.

The first traces of exclusionary clauses can be found in early Roman law during which period informal *pacta* operated as procedural bars to litigation.²⁷

During the classical and later Roman law period a number of *pacta*, including, the *pacta adiecta* were recognised which had the procedural effect of providing a defence available to a debtor, if sued by the creditor on the original contract known as the *exceptio pacti conventi*.²⁸ Exemption clauses were also known to Roman law and they took the form of formal contractual stipulations. They also, had a substantial effect on contracts.²⁹

During this period, exemption clauses could be agreed to at the time of concluding the agreement or after the conclusion of a contract. This had an affect on both the *naturalia* and the *essentialia* of specific contracts, thereby, limiting or excluding certain of the rights, duties and remedies of the contravening parties.³⁰

(1990); *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory Univ v Porubiansky* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Tunkl v Regents of University of California* 60 Cal. 2d, 98-101, 32 Cal. Rptr 33, 37-38, 383 P. 2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, 381 A.2d 164 (1977).

²⁶ The inequality of bargaining power is a factor that in the modern era in America, are today frequently used to invalidate contracts or contractual provisions, incorporating exclusionary clauses, resulting in harsh or oppressive results. For case law see *Williams v Walker-Thomas Furniture Co* 350 F. 2d 445 D.C. Cir (1965); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Horner v Boston Edison Company* 45 Mass. App Ct 139, 695 N.E. 2d 1093 (1998); *Central Alarm of Tucson v Ganam* 116 Ariz 74, 567 P.2d 1203 (1977); *Allan v Snow Summit Inc* 51 Cal App 4th 1358, 59 Cal Rptr. 2d 813 (1996); *Weaver v American Oil Co* 257 Ind 458, 276 N.E. 2D 144 (1971); *Henningsen v Bloomfield Motors Co* N.J. 358 161 A.2d 69 (1960); *Mayfair Fabrics v Hanley* 48 N.J. 483, 26 A.2d 602 (1968); *Leidy v Desert Enterprises Inc o/b/a Body Health Spa* 252 P.A. Super 162, 381 A.2d 164 (1977).

²⁷ Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189 at 195.

²⁸ Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 1986 (49) 189 at 195, Van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) Par 515-531.

²⁹ Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189 at 195; Van Warmelo (1976) Par 518.

³⁰ Van Dorsten "The Nature of a Contract and Exemption Clauses" 1986 (49) *THRHR* 189 at 196; The *Digesta* recognised that in the following instances exemption clauses effected the *naturalia* of an agreement - "The

Roman Dutch law was less formalistic than Roman law. The informal *pacta* made way for a less strict approach in that all lawful agreements with *iusta causa* or 'redelike oorsaak' were enforceable.³¹ Roman Dutch Law also to a certain extent recognised exemption clauses more especially, when contracting parties wanted to vary contractual agreements by way of extending or exempting provisions of agreements.³²

It can be argued that historically exclusionary clauses have its roots embedded in the freedom of contract. The concept of freedom of contract, on the other hand, is founded in the social, economical and political philosophies of the sixteenth and seventeenth centuries, which centred on basic human rights. Because of man's ability to reason, a belief evolved, that man possessed certain fundamental rights, including as Grotius argued, "man's right to contract".³³

Inspired by the age of individualism and freedom to contract, the so-called 'standard form contracts' first emerged as early as the fifteenth century, when these types of contracts were used in Europe in the form of standard insurance policies and introduced into England in the seventeenth century.³⁴

It was during the seventeenth century when, especially in England, standard form contracts were already used on a large scale in charter agreements and Bill of Lading agreements.³⁵ It was during this period that first attempts were made in the so-called 'common carrier' cases to exonerate the skipper from discharging his public functions and, more particularly,

limitation or exclusion of the liability for eviction" (D19 1 11 18) and for "latent defects" (D 19 1 6 9) and (D21 1 14 9) in sale; In the following instances exemption clauses effected the essentialia of an agreement - rights and remedies could be qualified by *pacta de non petendo* (agreement not to sue) or by agreements not to rely on exceptions or defences available to the parties (C2 3 29). A *pactum de non petendo* gave rise to a praetorian defence or *excepti pacti* against any contracting party who sued contrary to such an agreement. But it is important to note that the parties could not agree to exclude the remedies available to the injured party where fraud was concerned; the *pactum non dolus praestetur* was invalid as being *contra bonos mores* and against good faith. See generally the Digesta D2 14 7 7; D2 14 9 10; D2 14 2 7 3; D19 1 6 8; D19 1 11 5 8.

³¹ Van Dorsten "The Nature of a Contract and Exemption Clauses" (1986) (49) *THRHR* 189 at 197.

³² Van Dorsten "The Nature of a Contract and Exemption Clauses" (1986) (49) *THRHR* 189 at 197; The writer with reference to the work of Lee *Commentary on the Jurisprudence of Holland* by Hugo Grotius (1936) 1.3.1 holds the view that it was especially Grotius who advocated that agreement may be used to confirm or limit the normal incidents of a contract.

³³ Aronstam *Consumer Protection, Freedom of Contract and The Law* (1979) 1.

³⁴ Holdsworth *History of English Law* (1923) 290-295; Aronstam (1979) 16-17.

³⁵ Aronstam (1979) 16-17.

his extraordinary duties. There was a rule in place at the time in relation to the carriage of goods, that the public carrier is absolutely liable for all loss not due to an act of God or the public enemy. ³⁶

But it was not until, in particular, during, the *laissez-faire* era of the early nineteenth century that exclusionary clauses came to the fore. The incorporation of exclusionary clauses in contract was encouraged under the doctrine of freedom of contract. ³⁷

The demands of the industrial revolution, during the middle years of the nineteenth century, within an atmosphere of mass production of limitless numbers of standard articles and the expanding use of mass transportation, encouraged standardised mass-produced contracts in which mass-produced exclusionary clauses were incorporated. They were then often referred to as "standard form contracts" or "contracts of adhesion". ³⁸

The rationale for the utilization of standard form contracts amount to this, once the business had formulated its contents; it was likely to be used in every contract concerning the same product or service with every new client or customer. ³⁹

The judges, who were largely responsible for the creation of the law of contract during this period, were, greatly influenced by the philosophy of *laissez-faire*, which meant that the law should interfere with people as little as possible. The judges were very reluctant, at the time, to interfere with contractual arrangements and to limit the contractual powers of contracting parties. They saw their task as an umpire and, merely, to assist one of the contracting parties where the other party to the contract had broken the rules of the game. ⁴⁰

The position was then, accordingly, summed up by Sir George Jessel, an eminent judge at

³⁶ McClarin "Contractual Limitation of Liability for Negligence" *Harvard Law Review* (1914-1915) 550.

³⁷ Atiyah (1995) 15-16; Aronstam (1979) 16-17; Yates *Exclusion Clauses in Contracts* (1982) 1' Jaeger *Law of Contracts* (1953) Par 1-010; Von Hippel "The Control of Exemption Clauses - A Comparative Study *International and Comparative Law Quarterly* (1967) 592-593.

³⁸ Deutsch (1977) 2; Atiyah (1995) 15-16; Lenhoff "Contracts of Adhesion and the Freedom of Contract: A Comparative study in the light of American and Foreign Law" *Tulane Law Review* (1962) Vol. XXXVI 482; Yates (1982) 1-2.

³⁹ Yates (1982) 1-2; Lenhoff (1962) Vol. XXXVI 481; Deutsch (1977) 1.

⁴⁰ Atiyah (1995) 3.

the time, in the case of *Printing and Numerical Registering Co v Sampson*:⁴¹ as follows :

*"(I)f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."*⁴²

It was particularly in the twentieth century, that the use of standardized mass contracts reached gigantic proportions. Moreover, standardized contracts were most notably used in commercial agreements concerning transport; insurance and banking, large scale business such as national and international trade, consumer sales and credit agreements.⁴³ Its usage has subsequently extended to medical agreements involving especially hospitals.⁴⁴

In time, since standard contracts were first introduced, and notwithstanding the advantages gained by business people *inter se*, market factors dictated that businesses become more consumer orientated. The introduction of fierce competition amongst the industrial giants also resulted in exclusionary clauses in business contracts becoming a mighty tool for the exploitation of economic power.⁴⁵

Part of the reasoning why standardized contracts or contracts of adhesion have received adverse publicity and come under scrutiny is from its very name namely "contract of adhesion". It is indicated that the legal transaction is not formulated as a result of the give-and-take of bargaining where the desires of one party are balanced by those desires of the other. When entering into the legal transaction, it is the customer who has to "adhere" to the terms prescribed by the business enterprise in which the customer has no bargaining power⁴⁶ alternatively unequal bargaining power⁴⁷ in which the customer is often abused by

⁴¹ (1875), L.R. 19 EQ at 465.

⁴² *Printing and Numerical Registering Co v Sampson* (1875), L.R. 19 EQ at 465.

⁴³ Yates (1982) 2; Slawson "Standard form contracts and Democratic Control of Lawmaking power" *Harvard Law Review* 84 (1971) 529 believes that in modern day, ninety-nine percent of all contracts appear in the form of standard contracts. See also Lenhoff Vol. XXVI (1962) 481; Turpin "Contracts and Imposed Terms" *SALJ* (1956) 144.

⁴⁴ Swarthout "Validity and Construction of Contract exempting hospital or doctor from liability for negligence to patient" *Annotations* 6 ALR 3d 704-707; Robinson "Rethinking the allegation of medical malpractice risks between patients and practitioners" *Law and Contemporary Problems* Vol. 49: No 2 (1986) 173 at 184-188.

⁴⁵ Yates (1982) 4.

⁴⁶ Lenhoff (1982) 482; Aronstam (1979) 18 refers to these type of contracts as the "take it or leave it" contracts. See also Yates (1982) 2.

the stronger, namely the business enterprise.⁴⁸

One extremely common and often troublesome feature of standard form contracts was the presence of "exemption clauses", which often provided that the business enterprise was not to be liable in virtually any circumstances whatsoever.⁴⁹ What followed however was the emergence of the era of consumerism, which, in turn, led to major changes in the law of contract, as well as, legal jurisprudence.⁵⁰

In the first place there was a virtual eclipse of the doctrine of *laissez-faire* as a political force. People's attitude that contracts were there merely to honour and enforce no longer held sway. The moral principle that one should abide by one's agreement and fulfil one's promises was being met with another moral principle, namely; that one should not take advantage of an unfair contract.⁵¹

Although, especially during the twentieth century, consumer organisations engaged in an attempt to prevent the abuse of consumers, particularly where standard contracts with exclusionary clauses were used by enterprises with strong bargaining power, nevertheless, all this was not to say that standard form contracts were necessarily evil. These types of contracts, with exemption clauses embodied in them, remained a force to contend with and were used internationally in, especially, the fields of transport, insurance, banking, national and international trade, consumer sales and credit agreements. That seems to be the position in the modern business world. These types of contracts, besides their usage in the commercial field, also found their way into other fields, including the medical field. These types of contracts have been adopted in medical contracts, the validity whereof, forms the focal point of this thesis.

Their value in the commercial field is said to centre on commercial conscience and commercial certainty, in that, enterprises who deal with many customers, or supplies or

⁴⁷ Aronstam "Unconscionable contracts: The South African Solution?" (1979) 42 *THRHR* 18-19; Aronstam (1979) 23; Kötz "Controlling Unfair Contract Terms: Opinions for Legislative Reform" *SALJ* (1986) 405 at 413; Yates (1982) 2; Deutch (1977) 3.

⁴⁸ Aronstam (1979) 18-19; Atiyah (1995) 12.

⁴⁹ Atiyah (1995) 12; Borrie "Legislative and Administrative Controls over Standard Forms of Contract in England" (1995) 317 at 321; Deutch (1977) 4.

⁵⁰ Atiyah (1995) 11; Yeates (1982) 4-5.

⁵¹ Atiyah (1995) 11.

clients, are absolved from negotiating and formulating contracts individually.⁵² In addition, they also have the advantage that a legal decision in one case will very likely provide a guide to other cases where similar disputed problems arise.⁵³

In the light of the fore stated and the important and valuable role exclusionary clauses played in regulating and containing risk, it became difficult into determining when they perform a legitimate function and when they do not. For that reason, a movement started in the jurisdictions of England, the United States of America and South Africa, to regulate and not outlaw these types of contracts.⁵⁴

The nature of this regulation, as will be seen from more comprehensive discussions that follow, has differed from jurisdiction to jurisdiction and has changed over time.

Two distinct mainstream regulatory measures were founded in an attempt to regulate exclusionary clauses, namely, legislation⁵⁵ on the one hand, and the courts⁵⁶ on the other.

Having given a short résumé of the origin and development of exclusionary clauses as they frequently appear in standardized contracts today, I shall consequently investigate the status exclusionary clauses occupy in these types of contracts today.

11.3 Recognition of exclusionary clauses in different jurisdictions

⁵² Yates (1982) 2-3; Atiyah (1995) 13.

⁵³ Atiyah (1995) 13.

⁵⁴ McKendrick *Contract Law Text, Cases and Materials* (2003) 438; Yates and Hawkins *Standard Business Contracts: Exclusion and Related Devices* (1986) 4; Deutsch *Unfair Contracts* (1977) 8-9; Kötz "Controlling Unfair Contract Terms: Opinions for Legislative Reform" *SALJ* (1986) 405 at 413-415; Von Hippel "The Control of Exemption Clauses - A Comparative Study" *International and Comparative Law Quarterly* (1967) 591 at 592-593; Van Loggenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 6; Yates (1982) 4-5; Tallon "Damages, Exemption clauses and Penalties" *The American Journal of Comparative Law* (1992) 675 at 680; Lenhoff (1962) 481 at 483.

⁵⁵ McKendrick (2003) 438; *Unfair Contracts Terms Act 1977* Yates and Hawken (1986) 4; *Uniform Commercial Code* (1954); Kötz (1986) 405 at 407; Von Hippel (1967) 591 at 594; Van Loggenberg (1987) 6-9; Yates (1982) 7-11, 73-81; Tallon (1992) 675 at 680; Lenhoff (1962) 481 at 485; Borrie (1995) 317-321; Aronstam (1979) 9.

⁵⁶ McKendrick (2003) 438; Deutsch (1977) 4-5 11-15; Pitt "Contractual Limitation of Liability for Negligence" *Harvard Law Review* (1914-1915) 550 at 554-555; Kötz (1986) 405 at 408-411; Von Hippel (1967) 591 at 595-600; Van Loggenberg (1987) 6-8; Yates (1982) 5-7, 269; Tallon (1992) 675 at 680; Lenhoff (1963) 481 at 483-484.

11.3.1 SOUTH AFRICA

11.3.1.1 Legal Writings

Exemption clauses, also known as exception clauses in South African Law, have, despite the scathing judicial indignation they received from legal writers from time to time, never lost their application in, especially, standard form contracts.⁵⁷

Exemption clauses in modern times, have found favour in almost all economic activities, ranging from mortgage bonds, insurance policies, bills of lading, credit sales agreements, surety-ships, sales and leases of motor vehicles, dry-cleaning contracts, building contracts and the so-called "ticket cases".⁵⁸

Their major advantages in the business world are said to control not only the legal consequences of the particular contract, but also the consequences of all or most contracts of that type entered into by the contracts. These types of agreements also assist in reducing the uncertainties management faces and the extent of risk with regard to the company's legal liability to customers.⁵⁹

Our legal writers have defined an exemption clause in a number of ways. *Claassen* defines it as "*is one inserted expressly or by implication in a contract with the object of exempting a party from liability in certain circumstances*".⁶⁰

Van der Merwe et al give the following definition to exemption clauses, namely: "*..... are terms which exclude or limit the liability of a contractant, such as liability for misrepresentation, liability to apose by the naturalia of a specific contract, or liability for*

⁵⁷ Van der Merwe et al (2003) 214-216, 225-226; Kerr (1998) 400; Christie (1996) 204-205; Delpont "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn (1988) 33-34; Lubbe and Murray (1988) 34; O'Brien "The Legality of Contractual terms exempting a contracting party from liability arising from his own or his servant's gross negligence or dolus" *TSAR* (2001) 3 597; Turpin "Contract and Imposed Terms" *SALJ* (1956) 144; Ramsden "The Meaning of Mutual Mistake and Exemption Clauses" *SALJ* (1975) 139; Lotz "Caveat Subscriptor: Striking down exemption clauses" *SALJ* (1974) 421-424; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 1-5; Kahn "Standard-form Contracts" *Businessman's Law* (November 1971) 49-50; Wille and Millen *Mercantile Law of South Africa* (1984) 34; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36.

⁵⁸ Kahn (1988) 33-34; Kahn "Imposed terms in tickets and notices" *Businessman's Law* (May 1974) 159; Boberg "A Chapter of Accidents" *Businessman's Law* (June 1976) 183-184; O'Brien *TSAR* (2001) 3 597; Kahn "Standard form Contracts" *Businessman's Law* (November 1971) 49; Van Dorsten (1984) (47) *THRHR* 36.

⁵⁹ Van der Merwe et al (2003) 225; Christie (2006) 204; Delpont (1979) 641; Kahn (1988) 34; Van Loggerenberg (1987) 2-3; Van Dorsten 1984 (47) *THRHR* 36.

⁶⁰ *Claassen Dictionary of Legal Words and Phrases* Vol. 2 D-I (2003).

breach of contract."⁶¹

Delport attaches the following definition to an exemption clause, namely: "*an exemption clause in a contract is a clause whereby the contractual and/or delictual liability of one party is either totally excluded or partially restricted.*"⁶²

The use of exemption clauses in standard form contracts in which the one contracting party is virtually capable of exempting himself/herself/itself, unilaterally, from liability to the detriment of the other contracting party, has often been the subject of much criticism by our legal writers.⁶³

It is especially due to the circumstances which have so often been created, in which, enterprises with stronger bargaining power exploited the weaker party by making use of standard contracts with exclusionary clauses contained therein, that legal writers came out in force, voicing their opinion against the allowance of such traps to be operated unchecked. In turn the legal writers also sought protection for the public against the abuses of exemption clauses by advocating limits for their operations and by interpreting exemption clauses narrowly.⁶⁴

The South African Common Law has recognized various factors and scenario when exemption clauses in standard form contracts are generally regarded as undesirable and unreasonable. The courts and the legislature have also developed a number of methods of limiting its effect or even striking it down.⁶⁵

The factors include lack of consensus between the parties to the contract; where consensus have been obtained in an improper manner; the exemption clause is framed so widely that the undertaking lacks the necessary certainty; the exemption clause is contrary

⁶¹ Van der Merwe et al (2003) 214.

⁶² Delport *De Rebus* (1979) 641.

⁶³ Delport *De Rebus* (1979) 641; Van der Merwe et al (2003) 214; Kerr (1998) 400; Christie (1996) 204; Kahn (1988) 34; Lubbe and Murray (1988) 340; Van Loggerenberg (1987) 30-4.

⁶⁴ Christie (1996) 204; Van der Merwe et al (2003) 214; Kerr (1998) 404-406; Delport (1979) 641; Kahn (1988) 34; Lubbe and Murray (1988) 340; Aronstam (1979) 33-36; Turpin (1956) 73 SALJ 144; Van Loggerenberg (1987) 4-5.

⁶⁵ Van der Merwe et al (2003) 214-216; Christie (1996) 204-211; Delport (1979) 641; Kahn (1988) 34; Farlam and Hathaway (1988) 340; Turpin (1956) 145; Van Loggerenberg (1987) 6-7; Kahn "Standard form contracts" *Businessman's Law* (1971) 50; Kahn "Imposed terms in tickets and notices" (1974) 159.

to public policy, etc.⁶⁶ These factors and other factors identified will be discussed comprehensively in the succeeding Chapter.

The first method by which the courts endeavour to confine exemption clauses within reasonable bounds is public policy.⁶⁷

The second method by which the courts endeavour to confine exemption clauses within reasonable bounds is by interpreting them narrowly. This method is particularly applicable to clauses that do not specifically set out the legal grounds for liability, from which the exemption is granted. In interpreting such a clause, the court first considers the nature of the contract, in order to decide what legal grounds of liability would exist in the absence of the clause (for example strict liability, negligence, gross negligence) and the clause will then be given the minimum of effectiveness by being interpreted to exempt the party concerned only from the ground of liability for which he would otherwise be liable which involves the least degree of blameworthiness.⁶⁸

In South Africa, legislative control over exemption clauses is restricted to consumer protection legislation, which includes the *Credit Agreement Act*, the *Alienation of Land Act*, and the *Insurance Act*.⁶⁹

More recently the *Consumer Protection Bill*⁷⁰ published by the Department of Trade and Industry in a progressive piece of legislation, highlights the need to protect the historically disadvantaged persons and to protect the interest of consumers. The Bill focuses especially, on the curtailment of clauses exempting contracting parties from liability. The Bill lays down criteria for the courts to consider before pronouncing that a term or the contract is unfair or unreasonable. The criteria include the bargaining strength of the parties relative to each other and whether sufficient notice was given to the contracting party who signs to his/her detriment.

⁶⁶ Van der Merwe et al (2003) 214-215.

⁶⁷ Van der Merwe et al (2003) 204-205; Lubbe and Murray (1988) 340.

⁶⁸ Christie (2003) 209; Lubbe and Murray (1988) 340.

⁶⁹ S 6 (1)(c) and (d) of Act 75 of 1980 (which prohibits the inclusion in a credit agreement terms, exempting a grantor of credit from liability for acts, omissions or representations; S 15(1)(b) and (c) of Act 66 of 1981, S63 of Act 27 of 1943.

⁷⁰ Government Gazette 28629 GN R489, 15 March 2006.

11.3.1.2 Case Law

The spirit of the South African contractual jurisprudence has very much been influenced by English Law in that, South African judges, have throughout the centuries often resorted to the doctrine of freedom of contract as a starting point. English Law principles have then often been relied upon and subsequently adopted by the South African Courts.⁷¹

There can be no doubt, in receiving standard form contracts with exclusionary clauses built in it, English Law rules and principles have been further entrenched in the South African Law of Contract.⁷²

Today, in all spheres of life, including insurance contracts, contracts involving travelling, commercial contracts, especially, in the so-called "ticket cases" or "owners risk" cases involving motor vehicles, it is a common feature of written contracts or notices that the person drafting the document or placing stencilled warnings on the walls, will seek to absolve himself/herself/itself wholly, or in part, from liability under the contract or from liability for a delict connected with the contract.⁷³

The rationale for such exemption clauses is they are said to reduce the uncertainties for which management will have to make allowances in its operations, planning and costing, by seeking to define, as closely as possible, the extent of the company's legal liability to customers.

Quite recently there appears to be some signs of change in South Africa when both, the Supreme Court of Appeal⁷⁴ and the Constitutional Court,⁷⁵ considered a micro-lending

⁷¹ *Henderson v Hanekom* (1903) 20 SC 513 at 519; *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 53; *Wells v South African Allumenite Company* 1927 AD 69.

⁷² *Burger v Central South African Railways* 1903 TS 571; *Mathole v Mothle* 1951 (1) SA 456 (T).

⁷³ In the so-called "owners risk" cases and "ticket" cases see *Weinberg v Olivier* 1943 AD 181; *Rosenthal v Marks* 1944 TPD 172; *Essa v Divaris* 1947 (1) SA 753 (AD); *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N); *Kemsley v Car Spray Centre (Pty) Ltd* 1976 (1) SA 121 (SEC); *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Central South African Railways v McLaren* 1903 TS 727; *Bristow v Lycett* 1971 (4) SA 223 RA; *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA); *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA); *Mzobe v Prince Service Station* 1946 NPD 138; *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C); *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A); *Wijtenburg Holdings, trading as Flaming Dry Cleaners v Bobr* 1970 (4) SA 197; *Glenburn Hotels (POT) Ltd v England* 1972 (2) SA 660 (RA); *Booyesen v Sun International (Bophutswana) Ltd Case 96/3261 WLD* (Unreported).

⁷⁴ *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA).

⁷⁵ See the minority judgement of Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

agreement and a time-bar limitation clause as means to establish whether, in nature and effect, these types of clauses are unenforceable as against public interests or public policy. In the *Bafana case* the Supreme Court of Appeal concluded that a clause in a money lending contract (in the present case a micro-lending agreement) whereby the debtor purports to undertake not to apply for an order placing his/her estate under administration, in terms of s74 (1) of the Magistrate's Courts Act 32 of 1944, and to agree that the loan debt will not form part of an administration order for which he/she might apply, is unenforceable as being inimical to public policy.⁷⁶ In this case the court relied upon public interest in deciding whether a micro-lending agreement was *contra bonos mores*. Consequently the court held that an agreement whereby a party purports to waive the benefits conferred upon him or her by statute and which deprives the party of such protection in conflict with the statutory provisions to be contrary to public policy.

In the *Barkhuizen case* the court dealt with the constitutionality of a time limitation clause in a standard form contract. The issues to be decided were firstly whether clause 5.2.5 in this standard form contract was contrary to public policy because it violates the right of the appellant to seek judicial redress and secondly, whether clause 5.2.5 limits the rights guaranteed in section 34 which guarantees a person a constitutional right of access to court and whether such limitation is reasonable and justifiable under section 36(1) of the Constitution. Clause 5.2.5 of the insurance policy provides *inter alia* that the insurance company, once they rejected liability for any claim, they would be released from liability unless summons was served on them within 90 days of repudiation. In arriving at its decision that clause 5.2.5 did not constitute an unreasonable and unjustified limitation of the constitutional right of access to court, the majority of the court per Ngcobo J laid down foundational principles for the proper approach to constitutional challenges to contractual terms. The court found that as a starting point the question needs to be answered whether the disputed provision is contrary to public policy? The court reasons that public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. The values in turn are the values that underlie the Constitution which include the values of human dignity, the acknowledgement of equality and the advancement of human rights and freedoms and the rule of law. What public policy is and whether a term in a contract is contrary to public policy, must now be determined by reference to the values that underlie our constitutional democracy by referring to the provisions of the Bill of Rights. A term in a contract which is immoral to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

⁷⁶ Para 21 at 588Z-589B.

The court consequently weighed up whether the time bar clause 5.2.5 was inimical to the values enshrined in our Constitution and contrary to public policy. More in particular, the court considered the value espoused by the rule of law in terms of section 34 of the Constitution that guarantees the right to seek the assistance of the courts. This the court found to be fundamental to the stability of an orderly society. Consequently, the court found that section 34 not only reflects one of the fundamental values that underlie our constitutional order, it also constitutes public policy. The court found support for this principle in the South African Common Law. Moreover, in the cases of *Schierhout v Minister of Justice* 1925 AD 417 and *Nino Binino v De Lange* 1906 TS 120 at 123-124 the courts have held that a term in a contract which deprives a party of the right to seek judicial redress is contrary to public policy. The question to be asked was therefore, whether clause 5.2.5 was inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy? The court consequently found that despite the argument that the clause limits the applicant's right to judicial redress in court and thus offends public policy, that the clause as such does not deny the applicant the right to seek judicial redress. Although the clause limits the right of the applicant to seek judicial redress, it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is redressed from liability.

In order to answer the question whether public policy tolerates time limitation clauses in contracts, the court held that time limitations are a common feature both in our statutory and contractual terrain. The court consequently found that neither in logic, nor in principle, can it be conceived why public policy would not tolerate time limitation clauses in contracts, subject to considerations of reasonableness and fairness. It was found by the court that, in general, the enforcement of unreasonable or unfair time limitation clauses will be contrary to public policy. Consequently the court looked at the notions of fairness and justice and the concept of ubuntu, the principle of freedom of contract and the maxim of *pacta sunt servanda*. The court also recognizes the unequal bargaining positions which contractual parties often find themselves in. The court found that while it is necessary to recognise the doctrine of *pacta sunt servanda*, equally, courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable. The court consequently relied on the objective facts in concluding that the enforcement of clause 5.2.5 would not be unjust. The court found, *inter alia*, that Mr Barkhuizen had all the information that was necessary for him to sue the insurance company and there was no evidence that the contract was not freely concluded between persons with equal bargaining power, or that Mr Barkhuizen was not aware of the clause, and consequently, in the circumstances, the clause was not unfair or unreasonable as

against public policy.

Sachs J dissenting, however, took an opposite view in holding that considerations of public policy, as animated by the Constitution, dictated that the time-bar clause, which limited access to courts, should not be enforced. Sachs J relied on the small print, often obscurely buried in standard form documents, the lack of consensus between the contracting parties, standing in unequal bargaining positions, as failing to comply with standards of notice and fairness which contemporary notions of consumer protection required in open and democratic societies as factors invalidating agreements.⁷⁷

11.3.1.3 Legal Opinion

Exclusionary clauses have found wide application in the law of contract in South Africa today, especially in the usage of standard form contracts.⁷⁸

The advantages in the usage of exemption clauses are said to lie in the control in the legal consequences of the particular contract as well as the consequences of all or most types of contracts in that class. It also reduces uncertainties for management in regard to the company's legal liability to customers.⁷⁹

The rationale for the recognition of exclusionary clauses in the South African Law of Contract is founded upon the influence of English law principles on the South African law of contract, more particularly, the doctrine of freedom of contract.⁸⁰

⁷⁷ Para 181 at 91-96.

⁷⁸ Van der Merwe et al *Contract: General Principles* (2003) 214-216, 225-226; Kerr *The Principles of the Law of Contract* (1998) 400; Christie *The Law of Contract in South Africa* (1996) 204-205; Delpont "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 33-34; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 34; O'Brien "The Legality of Contractual terms exempting a contractant from liability arising from his own or his servant's gross negligence or dolus" *TSAR* (2001) 3 597; Turpin "Contract and Imposed Terms" *SALJ* (1956) 144; Ramsden "The Meaning of Mutual Mistake and Exemption Clauses" *SALJ* (1975) 139; Lotz "Caveat Subscriptor: Striking down exemption clauses" *SALJ* (1974) 421 424; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 1-5; Kahn "Standard-form Contracts" *Businessman's Law* (November 1971) 49-50; Wille and Millen *Mercantile Law of South Africa* (1984) 34; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36.

⁷⁹ Van der Merwe et al *Contract: General Principles* (2003) 225; Christie *The Law of Contract in South Africa* (1996) 204; Delpont "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 34; Van Loggerenberg *Unfair Exclusion Clauses in Contracts A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 2-3; Van Dorsten "The Burden of Proof and Exemption Clauses" 1984 (47) *THRHR* 36.

⁸⁰ For case law see *Henderson v Hanekom* (1903) 20 SC 513 at 519; *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 53; *Wells v South African Allumenite Company* 1927 AD 69.

From the definitions given to exemption clauses, it is clear that the main aim and objective of exemption clauses, in general, is to exclude or limit a contracting party from contractual and/or delictual liability.⁸¹

Today, in all spheres of life, including insurance contracts, contracts involving travelling, commercial contracts, especially, in the so-called "ticket cases" or "owners risk" cases involving motor vehicles, it is a common feature of written contracts or notices that the person drafting the document or placing stencilled warnings on the walls, will seek to absolve himself/herself/itself wholly or in part from liability under the contract or from liability for a delict connected with the contract.⁸²

The inclusion of exemption clauses in standard-form contracts has however not escaped criticism.⁸³ One of the primary levels of criticism is aimed at the exploitation of the

⁸¹ Claassen *Dictionary of legal words and phrases* Vol. 1 D-2 (2003); Van der Merwe et al *Contract: General Principles* (2003) 214-216; Delpont "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641.

⁸² Kahn *Contract and Mercantile Law* (1988) 33-34; Kahn "Imposed terms in tickets and notices" *Businessman's Law* (May 1974) 159; Boberg "A Chapter of Accidents" *Businessman's Law* (June 1976) 183-184; O'Brien "The Burden of Proof and Exemption Clauses" *TSAR* (2001) 3 597; Kahn "Standard form Contracts" *Businessman's Law* (November 1971) 49; Van Dorsten "The Liability of Contractual terms exempting a contract from liability arising from his own servant's gross negligence or dolus" (1984) (47) *THRHR* 36. In the so-called "owners risk" cases and "ticket" cases see *Weinberg v Olivier* 1943 AD 181; *Rosenthal v Marks* 1944 TPD 172; *Essa v Divaris* 1947 (1) SA 753 (AD); *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N); *Kemsley v Car Spray Centre (Pty) Ltd* 1976 (1) SA 121 (SEC); *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Central South African Railways v McLaren* 1903 TS 727; *Bristow v Lycett* 1971 (4) SA 223 RA, *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA); *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA); *Mzobe v Prince Service Station* 1946 NPD 138; *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C); *Citrus Board v South African Railways and Harbours* 1957 (1) SA 198 (A); *Wijtenburg Holdings, trading as Flaming Dry Cleaners v Bobo* 1970 (4) SA 197; *Glenburn Hotels (POT) Ltd v England* 1972 (2) SA 660 (RA); *Booyesen v Sun International (Bophuthswana) Ltd* Case 96/3261 WLD (Unreported). In other type of cases in which exclusionary clauses are contained in written contracts see *Stocks and Stocks (Pty) Ltd v T.J. Daly and Sons (Pty) Ltd* 1979 (3) SA 754 (A); *Wells v South African Alumenite Co* 1927 D 69; *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A); *Essa v Devaris* 1947 (1) SA 795 (A); *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A); *First National Bank of South Africa Ltd v Rosenberg* Case no 392/99 1 June 2001 (SCA) (Unreported); *East London Municipality v South African Railways and Harbours* 1951 (4) SA 466 (E); *Huges v SA Fumigation Co (Pty) Limited* 1961 (4) SA 799 (C); *Micor Shipping (Pty) Ltd v Treger Gold and Sports (Pty) Ltd and Another* 1977 (1) SA 709 (W); *Bok Clothing Manufacturers (Pty) Ltd and Another v Ladylands (Pty) Ltd* 1982 (2) SA 565 (C); *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA); *African Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 691 (SCA); *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C); *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 779; *Melfort Morts (PVT) Ltd v Finance Corp of Rhodesia Ltd* 1975 (3) SA 267 (RA); *Ornalas v Andrews Cafe* 1980 (1) SA 378 (W); *Booyesen v Sun International (Bophuthatswana) Ltd* Case no 96/3261 WLD (Unreported); *Newman v East London Town Council* 1895 EC 61; *Agricultural Supply Association v Olivier* 1952 (2) SA 661 (T); *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA); *Afrox Bpk v Strydom* 2002 (6) SA 21 (A).

⁸³ Delpont "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Van der Merwe et al *Contract: General Principles* (2003) 214; Kerr *The Principles of the Law of Contract* (1998) 400; Christie *The Law of Contract in South Africa* (2003) 204; Kahn "Standard-form Contracts" *Businessman's Law* (1988) 34; Lubbe

enterprises with strong bargaining power of the weaker party. More especially, the allowance, of such traps, to be operated, unchecked.⁸⁴

In this regard the South African legal writers have sought protection for the public against the abuses of exemption clauses by advocating limits for their operations. The said limits include, *inter alia*, interpreting exemption clauses narrowly and endorsing the South African common law position, namely, in instances where exemption clauses in standard form contracts are undesirable and unreasonable, to limit its effect or even striking it down in the interest of public policy.⁸⁵

Although the legislature has also assisted in limiting the operations of exemption clauses in standard form contracts by creating consumer protection legislation including the *Credit Agreement Act*,⁸⁶ the *Alienation Land Act*,⁸⁷ and the *Insurance Act*,⁸⁸ it was generally been felt by South African consumers and academic writers that not enough had been done to protect the general public against abuse of enterprises with superior bargaining power. For that reason legislative reform is widely advocated wherein specific legislation is directed at specific abuses *inter alia* unreasonable and unconscionable contractual provisions.⁸⁹

and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 30-4.

⁸⁴ Christie *The Law of Contract in South Africa* (1996) 204; Van der Merwe et al *Contract: General Principles* (2003) 214; Kerr *The Principles of the Law of Contract* (1998) 404-406; Delpont "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 34; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340; Aronstam *Consumer Protection: Freedom of Contract and The Law* (1979) 33-36; Turpin "Contract and Imposed Terms" *SALJ* (1956) 144; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 4-5.

⁸⁵ Van der Merwe et al *Contract: General Principles* (2003) 204-205, 209, 214-216; Christie *The Law of Contract in South Africa* (2003) 204-211; Delpont "Exemption Clauses: The English Solution" *De Rebus* (December 1979) 641; Kahn *Contract and Mercantile Law* (1988) 34; Lubbe and Murray *Farlam and Hathaway Contract Cases, Materials and Commentary* (1988) 340; Turpin "Contract and Imposed Terms" *SALJ* (1956) 145; Van Loggerenberg *Unfair Exclusion Clauses in Contracts: A Plea for Law Reform Inaugural Lecture University of Port Elizabeth* (1987) 6-7; Kahn "Standard form contracts" *Businessman's Law* (1971) 50; Kahn "Imposed terms in tickets and notices" *Businessman's Law* (May 1974) 159; Fletcher "The Role of Good Faith in the South African Law of Contract" *Responsa Meridiana* (1997) 10.

⁸⁶ S6 (1) (c) and (d) of Act 75 of 1980.

⁸⁷ S15 (1) (b) and (c) of Act 66 of 1981.

⁸⁸ S63 of Act 27 of 1943.

⁸⁹ Hahlo "Unfair Contract Terms in Civil Law Systems" *SALJ*; Van der Merwe et al *Contract: General Principles* (2003) 216; Christie *The Law of Contract in South Africa* (2003) 15-17; Carstens and Kok "An Assessment of the

The most significant attempt was made by the *South African Law Reform Commission* in drafting draft legislation in an endeavour to regulate unfair contractual provisions which are unfair, unreasonable or unconscionable.⁹⁰ The said attempt it is submitted was in response to the reluctance shown by the South African courts to create new and equitable rules and to find just solutions to problems experienced in respect of fairness, unreasonableness, unconscionable-ness and oppressiveness.⁹¹ More recently, the legislature also introduced the *Consumer Protection Bill*⁹² in an attempt to promote the ethos of consumer welfarism. The Bill of Legislation, it is submitted, is specifically aimed at curtailing the negative effects of exemption clauses which are often detrimental to the poor or previously disadvantaged consumers.

More recently, the South African courts have also shown a tendency to look more critically at limitation and/or exemption clauses. The Supreme Court of Appeal in the case of *Bafana Finance Mabopane v Makwakwa and Another*⁹³ relied heavily on public interest in denouncing a micro-lending agreement as being inimical to public policy where a provision in a contract aimed to violate a statute.

Although the Constitutional court, in the majority judgement per Ngcobo J, in the case of *Barkhuizen v Napier*,⁹⁴ seemed to follow the old trend of the Supreme Court of Appeal,⁹⁵ in which great emphasis is placed on contractual freedom and the doctrine of *pacta sunt*

use of disclaimers by South African Hospitals in view of constitutional demand, foreign law and medico-legal considerations" (2003) 18 *SAPR/PL* 430 at 455; Van den Heever "Exemption of liability of private hospitals in South Africa" *De Rebus* (April 2003) 47 at 48; Strauss (1991) Doctor patient and the law: A selection of practical issues 305 Aronstam; "Unconscionable Contracts: The South African Solution?" *THRHR* (1979) 2 at 42; Fletcher "The Rule of Good Faith in the South African Law" *Responsa Meridiana* (1997) 1 at 12-13; Van der Walt "Aangepaste Voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse Reg" 1993 (56) *THRHR* 65 at 66; Van Aswegen "The Future of South African Contract Law" (1994) 67 *THRHR* 458-459; Hawthorne "The Principle of Equality in the Law of Contract" 1995 (58) *THRHR* 157 176.

⁹⁰ See The South African Law Commission Project 47 on *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1998) 57-58. See also the draft legislation *Unfair Contractual Terms Bill*.

⁹¹ See especially the cases of *Brisley v Drotzky* 2002 (4) SA 1 (A); *De Beer v Keyser and Others* 2002 (1) SA 877 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (A).

⁹² Government Gazette 28629 GN T489, 15 March 2006.

⁹³ 2006 (4) SA 581.

⁹⁴ 2007 (5) SA 323 (CC).

⁹⁵ See especially the cases of *Brisley v Drotzky* 2002 (4) SA 1 (A); *De Beer v Keyser and Others* 2002 (1) SA 877 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (A).

servanda, Sachs J and Moseneke DCJ in two separate dissenting judgements appear to place greater emphasis on reasonableness and fairness in contract.

The attempt to provide legislation, it is further submitted, is the correct approach. For as long as the South African courts religiously cling to contractual autonomy at the expense of reasonableness and equity and show inconsistencies, the South African Law of Contract will remain in this cauldron of uncertainty. What is further indicated, it is submitted, is a paradigm shift in which fairness and equity becomes the underlying ethical value or controlling principle.

11.3.2 ENGLAND

11.3.2.1 Legal Writings

English legal commentators have throughout the years, repeatedly held the view that generally, exclusionary clauses, are very much part of the English Law of Contract.⁹⁶

Exemption clauses first began to appear with some frequency, in the 19th century, in especially commercial contracts pertaining to, *inter alia*, the carriage of goods, bills of lading, insurance policies of insurance etc.⁹⁷

With the discovery of standard form contracts, exemption clauses eventually weaved themselves into the said standard form contracts.⁹⁸ The rationale for absorbing exemption clauses in standard form contracts during the classical period was said to be founded upon the doctrine of freedom of contract, namely: that every person was free to enter into a contract with any person they chose and to contract on any terms they wanted, as it was generally accepted that parties were able to negotiate on an equal footing, contracting parties having legal bargaining power. They were equally expected to look after their own interests as they had a full understanding of the consequences of their actions and the

⁹⁶ Stone *Principles of Contract Law* (1998) 145; Stone *The Modern Law of Contract* (2003) 163; Beatson *Anson's Law of Contract* (2002) 436-437; Poole *Textbook on Contract Law* (2004) 195; O'Sullivan and Hilliard *The Law of Contract* (2004) 243; Furmston et al *Furmston's Law of Contract* (1986) 149; Treitel *The Law of Contract* (2003) 216; Yates and Hawkins *Standard Business Contracts: Exclusions and Related Devices* (1986) 4-6; Coote *Exception Clauses* (1964) 137-138; Atiyah *An Introduction to the Law of Contract* (1995) 310ff; Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 125ff; Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39 (July 1976) No 4 378-379; *The Law Commission and the Scottish Law Exemption Clauses* Second Report (1976).

⁹⁷ Cheshire et al *Law of Contract* (1986) 22; Stone (2003) 220; Stone (1998) 143; Treitel (2003) 215.

⁹⁸ Stone (2003) 29-220; McKendrick (2003) 163ff; Stone (1998) 145.

terms of the contract.⁹⁹

Consequently, during the classical period, the contracting parties were empowered to modify, as they saw fit, the nature of the liability created. The more common means of modifying the usual liability were, to exclude any obligation to pay compensation or to limit the amount of compensation payable.¹⁰⁰ What followed was not only the exclusion or limit of the amount of compensation payable, but also, the incorporation of exclusionary clauses by which the contracting parties sought to avoid the consequences of their failure to perform their contractual obligation.¹⁰¹

An area in which it became customary to exclude liability, or to have very restricted liability for damages, was that of contracts involving the carriage of goods, for example, it may have been argued that the owner should be responsible for insuring the goods while in transit. In so doing, the carrier would have very restrictive liability for damages to the goods while they were being carried.¹⁰²

Although these types of contracts found favour in the commercial world in that they were viewed *inter alia* as the product of good contractual planning,¹⁰³ nevertheless, they did not escape academic and judicial criticism. Much of the censure is founded upon the classical law assumption that contracting parties moved on a terrain of equal bargaining position whilst, in reality, it was not so. Upon closer scrutiny it has been identified that the idea of an agreement freely negotiated between the parties has given way to one of adherence in that, with the broadening of the usage of standard forms of contract,¹⁰⁴ the individual is

⁹⁹ Stone (2003) 219-224; McKendrick (2003) 163; Stone (1998) 146; Poole (2004) 197; Beatson and Friedmann *Good Faith and Fault in Contract Law* (1997) 7-8; Cheshire et al (1986) 21-22; Standing Committee of Officials of Consumer Affairs Unfair Contract Terms - *A Discussion paper* (January 2004) 15-16; O'Sullivan and Hilliard (2004) 3-5.

¹⁰⁰ Poole (2004) 197.

¹⁰¹ Beatson (2002) 436.

¹⁰² Stone (2003) 218; Stone (1998) 145.

¹⁰³ Standing Committee of Officials of Consumer Affairs Unfair Contract Terms - *A discussion paper* (January 2004) 16. Other advantages include the reduction of transaction costs; allowing for lengthy and detailed contracts to be finalized with the minimum of time and by lay persons who are only required to negotiate the specifics such as price, description of goods and services and delivery times; they also bring a certain amount of understanding of trading practice. See also McKendrick (2003) 163-164; Stone (1998) 145; Poole (2004) 197; Treitel (2003) 215.

¹⁰⁴ Each time an individual travels by air, bus or train, buys a motor vehicle, takes clothes to the dry cleaners, buys household goods, takes the lease of a house or flat, a standard form contract devised by the supplier, will be provided which the individual is either expected to accept in toto or, theoretically, go without, should the individual

found not to negotiate, but merely adheres to the standard form contract containing standard terms and conditions, including exclusionary clauses.¹⁰⁵

Often the accepting party has therefore little choice as to whether to accept or not which may give the party relying on them a very broad exemption from liability, both in tort and in contract.¹⁰⁶ This practise has often lead to hardship in that the imposition of such exemption clauses may be particularly harmful in consumer contract, where the disequilibrium between the bargaining positions of the parties may be substantial. The consumer is thus left with no alternative but to accept the standard form of contract often to his/her/its detriment.¹⁰⁷

Moreover, standard form contracts with especially consumers, are often contained in some printed ticket or notice or receipt, which is brought to the attention of the consumer at the time the agreement is made, leaving the consumer, very little time, nor, the energy to read the contract. Besides, even if the consumer did make the effort to read the said agreement, it would be of little assistance for the consumer as he/she could not vary the terms in any way. It so happens that it is not until some dispute arises between the parties to the contract that the weaker of the parties often realise that the standard form contract, agreed to, contain clauses which are unfair or unnecessarily one-sided to his/her detriment.¹⁰⁸

A commercial practise also developed during the classical period that the weaker contracting party was often exploited by a stronger or more powerful contracting party who could exempt itself from any liability towards the weaker contracting party. The so-called 'bargaining at arm's length', although generally recognised as an acceptable commercial practise, did not escape criticism, especially, in those instances where the object of the use of standard items with exclusionary clauses contained therein, had been the exploitation or

choose not to sign the standard form of contract. See McKendrick (2003) 163.

¹⁰⁵ McKendrick (2003) 163; Poole (2004) 198.

¹⁰⁶ Stone (2003) 219-220; Often the document may seek unfair exemption from certain common law liability, and may, seek to deprive the other party of the compensation which that person may reasonably expect to receive for any loss or injury or damage arising out of the transaction. See McKendrick (2003) 164; or as Poole (2004) 198 puts it: "..... *Standard form contracts may be used to impose an exclusion or limitation of liability which has not been negotiated, and for which the person whose normal contractual rights are diminished has received no alternative benefit.*

¹⁰⁷ Poole (2004) 198; McKendrick (2003) 164; Stone (1998) 145.

¹⁰⁸ McKendrick (2003) 164; Standing Committee of Officials of Consumer Affairs Unfair Contract Terms - *A discussion paper* (January 2004) 16; Stone (1998) 145; Treitel (2003) 25; Poole (2004) 198; Cheshire et al (1986) 21-22.

abuse of the superior bargaining power of commercial suppliers when contracting with such consumers. Often the weaker party is obliged to accept the standard printed terms offered by the superior contracting party on a 'take it or leave it basis'.¹⁰⁹

The advent and growth of monopolies and restrictive practises saw the introduction of protective measures designed to counter the operations of monopolies and restrictive practises as well as matters of inequality of bargaining powers.¹¹⁰

The rationale for the introduction of protective measures aimed at curbing exploitative practises is described by *Tillotson*:¹¹¹

*"..... Where there is, as is frequently the case a significant degree of imbalance between the bargaining strengths of the parties freedom of contract becomes freedom to exploit or oppress. Equal treatment of unequals by the law results in injustice"*¹¹²

The growth of consumer protection, fanned by pressure groups and parliament, especially during the 20th century, heralded in a new era in the law of contract, in that they were responsible for the shift in the so-called 'individualism ethos', in which the individualist ethic was that contracting parties were expected to look after their own interests and to allow the best possible bargain to be executed, towards a consumer-welfare ethos in which the interests of consumers are taken more seriously.¹¹³ Consequently, to counter the unfair or unnecessarily one-sided and detrimentally prejudicial standard-form contracts (often containing exemption clauses), judicial and legislative measures were introduced.

In so far as judicial measures are concerned, besides developing the common law principles of illegality, incapacity, duress, undue influence, mistake, misrepresentation and deceit, the

¹⁰⁹ Treitel (2003) 215; Beatson (2002) 165; Atiyah (1995) 16-17; Beale "Unfair Contract terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (1978) 114 at 115.

¹¹⁰ Atiyah (1995) 19; *Tillotson Contract Law in Perspective* (1995) 40.

¹¹¹ *Contract Law in Perspective* (1995) 40.

¹¹² *Tillotson Contract Law in Perspective* (1995) 40.

¹¹³ O'Sullivan and Hilliard (2004) 4-6; *Tillotson* (1995) 7, 44 put the change "to moral, political and economic forces and a change from a 'market-individualist' philosophy to 'consumer-welfarism'." Adams and Brownsword (2004) 39 advocate that the tenets of consumer-welfarism are found upon reasonableness and fairness. Consumer-welfarism also represent that contracting parties should not mislead one another. They should act in good faith; a stronger [party should not exploit the weakness of another's bargaining position. In addition thereto no party should profit from his own wrong or be unjustly enriched and contracting parties who are at fault should not be able to dodge their responsibilities. See also Atiyah (1995) 26; Cheshire et al (1986) 23.

English courts endeavoured to alleviate the position of the recipient of the standard form contract, by requiring certain standards of notice in respect of ordinary terms and by construing the document wherever possible in that person's favour.¹¹⁴

The aforementioned is a subject of its own, which under discussion, can result into voluminous discourse. For the purpose of this research, I shall constrain myself to a general discussion of the judicial and legislative measures introduced.

Before introducing the first measure, it is of import to note that, traditionally, the approach of the English courts, with regard to exclusion clauses, was not to assess them on their merits. In other words, the courts would not look at the contract and say 'we think this clause is unreasonable in its scope or unfair in its operation and therefore we will not give effect to it'. The reason for this approach was not to run counter to the general terms of 'freedom of contract' which doctrine was of particular importance to the courts of the 19th century.¹¹⁵

The courts, however, developed and adopted formal rules relating to the determination of the contents of the contract and the scope of the clauses contained in it, which were used to limit the scope of exclusion clauses.¹¹⁶

The main rules designed by the English courts are 'incorporation' and 'construction'.

In so far as incorporation is concerned, the rule is that a clause cannot be effective to exclude liability if it is not part of the contract. The first task of the courts is often therefore to determine whether that written term can be regarded as part of the contract. In order to protect consumers and to limit the effect of exclusion clauses, the courts adopted strict rules as to the incorporation of terms. One such rule is that a party must have had reasonable notice of the exclusion clause at the time of the contract in order for it to be effective.¹¹⁷ To determine whether reasonable notice was given the courts distinguished

¹¹⁴ McKendrick (2003) 164; Stone (2003) 220ff; Treitel (2003) 215ff; Stone (1998) 145ff; Beatson (2002) 438ff; Poole (2004) 198; O'Sullivan and Hilliard (2004) 243ff; Atiyah (1995) 20ff.

¹¹⁵ Stone (2003) 220; Stone (1998) 145; Poole (2004) 199; Beale 1977; *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114 at 115-116; Coote (1964) 137.

¹¹⁶ Stone (2003) 220; Stone (1998) 145-146; Treitel (2003) 216; O'Sullivan and Hilliard (2004) 243; Poole (2004) 198-199.

¹¹⁷ Stone (2003) 221; Stone (1998) 145-146; O'Sullivan and Hilliard (2004) 243; Poole (2004) 200.

between written signed contracts and written unsigned contracts. In the first instance, the basic rule is that, subject to exceptions, the *caveat subscriptor* rule applies, namely, the contracting party who signs is straightforwardly bound by the terms contained in that document.

In the latter instance, the terms will only be incorporated if the party relying on this, has taken reasonable steps to bring the terms to the other party's notice. ¹¹⁸

In order to determine whether reasonable steps had been taken, an objective test is necessary. Factors such as prior dealings between the parties to the contract, the timing when notice is given, the type of document, how onerous is the terms etc will indicate whether reasonable notice had been given. ¹¹⁹

Once it has been established by the courts that a clause had been incorporated into the contract, the next issue to be determined is whether the clauses incorporated in the contract is effective to exclude or limit the liability of one of the contracting parties. In this regard English law has adopted and developed measures used by the courts namely, the Rule of Construction or otherwise known as the Rule of Interpretation. ¹²⁰

The rationale for introducing the Rule of Construction is said to counter the disparity between the bargaining power of consumers and large enterprises, especially those in which terms have been imposed upon consumers which are unfair in their application, and which exempt the enterprises putting forward the standard form document, either wholly or in part, from its just liability under the contract. ¹²¹

In the past the courts applied extremely restriction rules to the interpretation of exclusion and limitation clauses.

What the courts did was to apply the *contra proferentem* principle with particular venom to exclusion clauses. The *contra proferentem* principle is viewed by academic writers not to be

¹¹⁸ O'Sullivan and Hilliard (2004) 243-246; Poole (2004) 200; Stone (2003) 221; Stone (1998) 146ff; Treitel (2003) 164ff; McKendrick (2003) 164ff.

¹¹⁹ Stone (2003) 226; Stone (1998) 169; Treitel (2003) 221; McKendrick (2003) 169; Beatson (2002) 439; Poole (2004) 200.

¹²⁰ Stone (2003) 226; Stone (1998) 169; Treitel (2003) 221; McKendrick (2003) 169; Beatson (2002) 439; Poole (2004) 200.

¹²¹ McKendrick (2003) 169; Stone (2003) 226; Stone (1998) 169; Treitel (2003) 221; Beatson (2002) 439; Poole (2004) 200.

unreasonable.¹²²

The *contra proferentem* principle provides that, in the event of there being ambiguity in a contract term, the ambiguity is to be resolved against the party relying upon the term.

The effect thereof is that an ambiguously drafted exclusion clause is ineffective to exclude liability, at least in the case where it is not clear whether the clause covers the loss that has been suffered.¹²³

The courts also approached clauses which are said to exclude such liability on the assumption that it is 'inherently improbable' that the innocent party would have agreed to the exclusion of the contract-breakers negligence. To have any effect, the contractual term in question, must exclude liability for negligence clearly and unambiguously. Where it does, and a contracting party is so protected from the consequences of its negligence, it is not permissible for the other party to disregard the contract and to allege a wider liability in tort.¹²⁴

The position as regards exclusion of liability for negligence was significantly affected by the *Unfair Contract Terms Act 1977*¹²⁵ as well as the *Unfair Terms in Consumer Contracts Regulations 1994*.¹²⁶ This, it is suggested, may mean that at least as far as consumers are concerned, the afore-discussed rules will be of less significance. The effect of the introduction of the said legislative measures is said to influence the courts in this way namely, unless a clause purporting to exclude negligence comply with the requirements of reasonableness, the courts are obliged to declare clauses to the contrary, void.¹²⁷

Although the English legal writers suggest that in the commercial sphere, the courts will still give effect to a clause containing language which expressly exempts the person, in whose

¹²² Beatson (2002) 439; McKendrick (2003) 169.

¹²³ Beatson (2002) 439; Stone (2003) 226; McKendrick (2003) 169; Treitel (2003) 22; Stone (1998) 150; Poole (2004) 200-201.

¹²⁴ McKendrick (2003) 171; Beatson (2002) 444; Stone (2003) 227; Stone (2003) 227; Treitel (2003) 222; Beatson (2002) 444; O'Sullivan and Hilliard (2004) 267ff; Poole (2004) 203.

¹²⁵ *Unfair Contract Terms Act 1977*, 52.

¹²⁶ *Unfair Terms in Consumer Contracts Regulations 1994* (S1 1994/159).

¹²⁷ Stone (2003) 229; McKendrick (2003) 185-186; Stone (1998) 151-152; Beatson (2002) 441-442; Poole (2004) 208; Beale "Unfair Contract Terms Act" 1977; *British Journal of Law and Society* Vol 5, No 1 (Summer 1978) 114, 117-119; O'Sullivan and Hilliard (2004) 270; Treitel (2003) 222.

favour it was made, from the consequence of the negligence of his own servants, and equally, to the situation where the defendant is potentially directly liable for negligence. Nevertheless, in the consumer context, the courts, it is suggested, may be reluctant to find that attempts to exclude liability for failing to take reasonable care in the performance of a contract are reasonable, even where the negligence is the fault of the defendant's employee rather than the defendant personally.¹²⁸

The effect thereof was the rules of incorporation and construction discussed earlier did not have any necessary effect on such a clause.¹²⁹

A further measure introduced by the English courts concerning exclusionary clauses was that of the principle of fundamental breach. The doctrine of fundamental breach entailed that some breaches were so serious that no exclusionary clauses can cover them.¹³⁰ The rationale for the existence of the doctrine is said to lie in the fact that there are certain terms within the contract, which are so fundamental that there cannot be exclusion for breach of them, i.e., the one party to the contract, in such a case, has departed so far from the basic contractual obligation, that some courts felt that it could not be justifiable to allow him to exclude liability.

The doctrine of fundamental breach did not survive without criticism and the last vestiges of the fundamental breach rule of law were demolished in 1980 with the case of *Photo Production Ltd v Securio Transport Ltd*¹³¹ in which, as will be seen during a later discussion, the court, referring to the *Unfair Contract Terms Act 1977*, drew a distinction between commercial matters when parties are not of unequal bargaining power and when risks are borne by insurance and that of the consumer, who bargains in an unequal

¹²⁸ Stone (2003) 229; Stone (1998) 152 emphasizes the fact that in commercial contracts involving businesses, parties to the contract "negotiating at arms length should be expected to look after themselves" as "if they enter into contracts containing exclusion clauses they must be prepared to know what they are doing." See further Beale "Unfair Contract Terms Act" 1977 *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114, 117-119; O'Sullivan and Hilliard *The Law of Contract* (2004) 272ff.

¹²⁹ Stone (2003) 230-231; Stone (1998) 152-153; McKendrick (2003) 174-175 opines that at the heart of this doctrine is the principle that "a party could only claim the protection of an exemption clause where he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it." See also O'Sullivan and Hilliard (2004) 267; Poole (2004) 206; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114, 116.

¹³⁰ Stone (2003) 230-231; Stone (1998) 152-153; Tritely (2003) 225ff; McKendrick (2003) 174; O'Sullivan and Hilliard (2004) 265; Beatson (2002) 449-450; Poole (2004) 206; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114, 116.

¹³¹ (1980) AC 827.

bargaining position. In the former instance, legislative intervention dictates that the courts will not interfere and parties will be free to apportion the risks as they feel free, whereas, in the latter instance, the contracting party in an unequal bargaining position will receive the protection of the courts.¹³²

The legislative measures introduced included the enactment of the *Unfair Contract Terms Act* (UCTA) 1977, which proved to be a major addition to the mechanisms for controlling exemption clauses.¹³³ The background to the enactment of the said legislation is of particular significance for this field of study and especially, to find answers to the focal point of this thesis, one of which is to establish whether legislative intervention is not perhaps indicated in controlling exemption clauses, more especially, exclusionary clauses in hospital contracts exonerating the hospital and/or its staff from liability, notwithstanding their negligent acts.

Despite the common law measures introduced to curb the unfair consequences which exclusionary clauses brought sometimes in the law of contract, the courts were not always consistent in applying, especially, the rules of construction. Hence, the courts were sometimes criticised for “.....adopting, artificial constructions or to stray beyond merely seeking the ordinary meaning of the words used.”¹³⁴ Consequently, the British Government appointed the Law Commission to investigate the unfair consequences of exclusionary clauses.

Other factors which motivated the British Government to appoint the *Law Commission and the Scottish Law Commission*, in 1969, to investigate the possible control of exemption clauses in contract, included:

Firstly, to investigate the gap between the classical theory of contract law, in which the notion of freedom of contract is advocated, which influences the belief in individually negotiated agreements as a starting point and reality, which includes the ills modern standard-form contracts bring, i.e. a signature on a pre-printed document, drawn up in

¹³² Poole (2004) 207-208; Stone (1998) 155-156. See also Treitel (2003) 225.

¹³³ Poole (2004).

¹³⁴ Poole (2004) 208; O'Sullivan and Hilliard (2004) 264; Beale "Unfair Contract Terms Act" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115 opines that "because of their adherence to the notion of freedom of contract the courts were sometimes obliged to uphold unfair clauses provided they have been incorporated in the contract" Stone (1998) 151-152; Stone (2003) 229; *The Law Commission and The Scottish Law Commission Exemption Clause Second Report* (Report No 69 1976) 16.

advance by the other party, does not necessarily indicate knowledge of the contracts, let alone understanding of them. Often this form of contract can be abused as the party drawing up the contract may insert clauses especially restricting the others' rights, without the other contracting party realising, because he does not have the time to read or the skill to understand the document. ¹³⁵

Secondly, even if the standard form had been read and understood, some of the standard form contracts fits ill with the inequality of bargaining power, in that, the individual consumer or small businessman may well find that he is given no opportunity to negotiate the one-sided set of terms on which the other will contract, but that he must *"take it or leave it"*. This often leads to the stronger party choosing to dictate to the weaker, often resulting in the abuse of bargaining power. It is, then, often the case involving non-negotiable standard form contracts containing clauses limiting or excluding the liability of the party who has drawn up the form. ¹³⁶

Thirdly, there were, save for a number of statutory provisions dealing with special cases, no restriction, either by statute or at common law, on the freedom of a person to exclude or restrict a duty or obligation which he would otherwise owe to another to take reasonable care or to exercise reasonable skill. Such a lack of restriction and the resultant consequence, impacts negatively on the maintenance of high standards of performance. ¹³⁷

The commission, after hearing submissions from a wide range of academics, members of the legal profession, the judiciary and other interested parties considered whether to recommend that a stricter form of control be instituted and, if so, what form should such measures take? The commission subsequently resolved that:

"44. The comments we have received leave us in no doubt that clauses or notices exempting from liability for negligence are in many cases a serious social evil and our review of the powers at present at the disposal of the court for dealing with such clauses shows that they are far from adequate. The case for some stricter form of control seems to us to be unanswerable." ¹³⁸

¹³⁵ Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115; *the Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4.

¹³⁶ Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115; *the Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4.

¹³⁷ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4, 15.

¹³⁸ *The Law Commission and The Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 19.

Some of the salient factors impacting upon the resolution taken by the law commissions include:

- (1) Although the doctrine of freedom to contract has entrenched itself, in common commercial practise in England and Scotland, in which no restriction, either by statute or at common law, is placed on a contracting party to exclude or restrict a duty or obligation which he would otherwise owe to another to take reasonable care, or exercise reasonable skill, an unlimited or unrestricted freedom is likely to operate unreasonably and in many instances they operate against the public interest. ¹³⁹
- (2) The unreasonableness which exclusionary clauses bring, stem from the fact that, all too often, they are introduced in ways which result in the party affected by them remaining ignorant of their presence or import until it is too late. But, notwithstanding the fact that, even if he knows of the exemption clause, he will often be unable to appreciate what he may lose by accepting it. Moreover, he may not have sufficient bargaining strength to accept it. ¹⁴⁰
- (3) The notion that there should be complete freedom to contract is not an acceptable principle, as, in reality and especially in commercial contracts; parties are not negotiating from positions of mentally equal strength and not advised as to the legal consequences of the contract. Moreover, often one of the contracting parties may not have sufficient bargaining strength to refuse to accept it. In contracts containing exclusion clauses, the position is often abused and the misuse of these clauses is objectionable and sometimes unjustified. ¹⁴¹
- (4) Exemption clauses may both take away rights, which social policy requires that a party should have, and mislead him into thinking he has more rights than is actually the case, by restricting rights apparently conferred by other parts of the agreement. ¹⁴²

¹³⁹ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4, 15.

¹⁴⁰ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1979) 4.

¹⁴¹ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) 4, 15, 20.

¹⁴² *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975)

- (5) Although the courts have long recognized that exemption clauses may have unreasonable consequences, yet, because of the doctrine of freedom of contract, felt constrained to accept the parties' rights to agree to such provisions, the courts nevertheless developed a number of rules of construction which have had the affect of claimants recovering damages for negligence despite the presence of exemption clauses. At the time, in a long series of cases, the courts have recognized that exemption clauses will be effective to exclude liability for negligence where the meaning is clear and unambiguous. Where the clause is capable of more than one meaning, the courts have often applied the general rule of construction, *contra proferentem* and resolved against the party relying on the clause, which will, thus, be held not to exclude liability for negligence.

Despite the rules of construction being put in place, the difference of judicial opinion have led to inconsistencies which, in turn, showed up the lack of power possessed by the courts in dealing with exemption clauses which, at times, proved to be a serious social evil.¹⁴³

- (6) While the law recognises a general right to contract out of liability for negligence, the courts in England frequently refuses to give effect to an exemption clause where there has been a breach of the contract of which the clause forms part, if the breach is sufficiently serious to justify the application of the doctrine of "fundamental breach".¹⁴⁴

The existence of the doctrine of "fundamental breach", as previously stated, did not escape criticism from the courts, academic writers and the Law Commission alike. The Law Commission found its application to be most unsatisfactory, in that, it was found to be an unacceptable paradox that a contractual clause, freely negotiated and commercially reasonable, which was clearly intended to cover an event, is to be deprived of effect when the event does happen.¹⁴⁵

Paris 143-146; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115.

¹⁴³ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Paras 38-39.

¹⁴⁴ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Paras 38-39.

¹⁴⁵ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975)



Having considered what form of control was desirable, the Commission concluded that a general scheme of control was needed and that it ought to take the form of a reasonableness test that would apply to exemptions from liability, in both consumer and commercial contracts.

The following circumstances are said to be fair and reasonable whilst the converse circumstances might perhaps indicate that it is not:

- "(a) *that the bargaining position of the person against whom the clause is invoked was stronger than that of the person invoking it;*
- (b) *that it was reasonable in the circumstances to expect the person against whom the clause is invoked rather than the person invoking it to have insured against the loss that has occurred;*
- (c) *that the person seeking to rely on the exemption clause had offered the other party an alternative contract without the exemption clause, at a fair, increased rate;*
- (d) *where the exemption clause operates in the event of breach of contract, that the breach was due to a cause over which the party relying on the clause had no control;*
- (e) *where the exemption clause operates in the event of negligence, that the party against whom it is invoked could be expected to be aware of the activities of the other which might give rise to a risk of negligence and of the possible consequences of such negligence;*
- (f) *where the exemption clause takes the form of requiring the party again whom this invoked to comply with a time limit, that such a time limit is necessary to safeguard the position of the person seeking to rely on the clause;*
- (g) *that the clause did not exclude liability but only imposed an upper limit.*" ¹⁴⁶

The Law Commission also resolved that, in some special cases however, there should be control in the form of a complete ban on such exemptions. ¹⁴⁷

In so far as commercial contracts are concerned, the commission resolved that there should be selective control over commercial contracts instead of outright control. The underlying reasons for the commissions were summarised by the commission as follows:

- "(i) *It encroaches upon the important principle of freedom of contract only in those areas where there is*

paraes 41-43, 66 found that its application is "..... Uncertain and in some respects unsatisfactory in its operation".

¹⁴⁶ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 of 1975) Para 188.

¹⁴⁷ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 of 1975) Para 45-46.



evidence of abuse of that freedom. Any interference with such a fundamental principle must be justified by cogent evidence of existing injustice or unfairness;

- (ii) *It has the advantage that it allows all kinds of unfair contractual provisions, and not only exemption clauses, to be dealt with;*
- (iii) *It is more effective than a ban on exemption clauses since that could be evaded by skilfully drawn provisions which so define and delineate the rights and obligations of the parties to the contract as to achieve the same result as an exemption clause;*
- (iv) *there is already legislative control in certain areas where its practicability and efficiency have already been demonstrated.*" ¹⁴⁸

With regard to consumer contracts, the commission resolved that a total ban is also not indicated, despite the argument that a private consumer is at a serious disadvantage in the matter of bargaining power and he has no alternative but to accept the terms and conditions of a standard form contract imposed on him by a monopolistic industry. The commission found that suppliers are not all monopolists and customers are sometimes given a choice between accepting the risk and leaving the risk with the supplier. ¹⁴⁹

The commission, consequently, proposed that general control for commercial and consumer contracts should be governed by the reasonableness test as it would allow for flexibility, enabling account to be taken of the great variety of situations. ¹⁵⁰

The commission also found that there are, however, certain situations where the reasonableness test would be inadequate and where a complete ban on exemption clauses is indicated. These situations included an outright ban on clauses totally excluding liability for death or personal injury due to negligence. The commission reached its conclusion by contending that *"a civilised society should attach greater importance to human person than to property."* ¹⁵¹

The commission also concluded:

¹⁴⁸ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 of 1975) Paras 48-50.

¹⁴⁹ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Par 58-59.

¹⁵⁰ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Paras 64-68.

¹⁵¹ *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Par 72.

"..... that to permit a person who owes such a duty to contract out of liability for the breach of it is tantamount to giving him a licence to behave carelessly. This, it may be said, is both unjust and socially inexpedient: unjust because it deprives the person to whom the duty is owed of a right he is legally and morally entitled to: socially inexpedient because it tends to reduce standards of care and competence." ¹⁵²

Subsequent to the commission's recommendations in 1975, the *Unfair Contract Terms Act* (UCTA) ¹⁵³ was enacted in 1977.

For the purpose of the research undertaken and the restricted space available, it is impossible to do more than describe in very broad outline the salient features of the Act. The Act itself falls into the class of legislation which *Beadle* ¹⁵⁴ describes as "..... *Increasing the private rights of parties by making some inalienable and by permitting exclusion of others only if reasonable It also abolishes the unsatisfactory substantive doctrine of fundamental breach.*" ¹⁵⁵

The significance of the Act is that it was the first general regime giving judges the power to interfere with the terms of a contract because they are substantially unreasonable. ¹⁵⁶

It has also been said that, for the first time, the courts had a general and direct means of control of the use of exemption clauses, in that the application of the *Unfair Contract Terms Act 1977* may render an exemption clause either totally unenforceable or unenforceable unless shown to be reasonable. ¹⁵⁷ The *Unfair Contract Terms Act 1977* does not provide a general power to strike out a term which the court considers to be unreasonable or unfair. The aim of the *Unfair Contract Terms Act 1977* is to target exemption clauses. ¹⁵⁸

¹⁵² *The Law Commission and the Scottish Law Commission Exemption Clauses Second Report* (Report No 69 1975) Par 54.

¹⁵³ Unfair Contract Terms Act 1977.

¹⁵⁴ "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 117.

¹⁵⁵ Beadle "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 117.

¹⁵⁶ O'Sullivan and Hilliard (2004) 270; Poole (2004) 208; McKendrick (2003) 185; Beatson (2002) 453; Chitty (1999) Par 1-018.

¹⁵⁷ Poole (2004) 209.

¹⁵⁸ Chitty (1999) Par 1 018.

For the purpose of this research, I shall highlight the salient provisions of the Act, only in so far as they are relevant to the research undertaken.

It is important to note, in terms of the Act, the legislature has introduced the reasonableness test. In applying the reasonableness test, the question to be decided by the court is whether the term is a fair and reasonable one to have been 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'.¹⁵⁹

In order to assist the court in determining whether a term satisfies the requirements of reasonableness, the Act sets out certain 'guidelines' of circumstances to be taken into account.¹⁶⁰ These include *inter alia*:

- (1) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
- (2) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
- (3) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

With regard to the exclusion of liability for negligent acts resulting in death or personal injury, the Act provides:

"S2(1)A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence"¹⁶¹

¹⁵⁹ S11 (1) of the *Unfair Contract Terms Act 1977*; McKendrick (2003) 194.

¹⁶⁰ The *Unfair Contract Terms Act 1977* S11 (2) Sched. 2. For the guidelines under the *Unfair Terms in Consumer Contracts Regulations 1999* (S.I. No 2083), see post, p.200.

¹⁶¹ Section 2(1) of the *Unfair Contract Terms Act* (1977).

The effect of the provisions are where the obligation to take care arose in the course of a business, or from the occupation of premises used for business purposes, any term or notice excluding or restricting liability is invalid. It also applies to claims in either contract or tort.¹⁶²

It is important to note that 'business' referred to in S1 (3), referred to above, is given a broad definition by the Act (UCTA) 1977 S14 which provides that:

*"S14 'Business' includes a profession and the activities of any government department or local or public authority;"*¹⁶³

More recently, the United Kingdom also received into their domestic law the *Human Rights Act* 1998, which widely impacts on its civil and criminal law. The *Human Rights Act*, 1998, received royal assent on November 9, 1998 and mostly came into force on October 2, 2000. The aim of the act was said to give effect, in the United Kingdom, to the rights contained in the European Convention on Human Rights.¹⁶⁴ The act makes available, in the United Kingdom courts, a remedy for breach of conventional right, without the need to go to the European Court of Human Rights in Strasbourg.

The *Human Rights Act* 1998 is also said to reflect very closely, good practises adopted in the field of medical law and ethics in Britain. Any decisions taken by doctors on the basis of current ethical standards must be compliant with the *Human Rights Act*, in which the best interest of the patient is pivotal.¹⁶⁵

When someone believes their rights have been violated the person so affected has recourse to the courts and tribunals in the United Kingdom. The courts and tribunals, in turn, are required to interpret the issue against the *Human Rights Act*, to ensure that the development of the common law in the United Kingdom is compatible with the *European*

¹⁶² Section 2(1) of the *Unfair Contract Terms Act* (1977).

¹⁶³ Sec 14 of the *Unfair Contract Terms Act* 1977; See also Beatson (2002) 157; Stone (1998) 162; Stone (2003) 236.

¹⁶⁴ See the discussion of Murray Hunt "The horizontal effect of the Human Rights Act retrieved from "http://ea.wikipedia.org/wiki/human_rights_act_1998".

¹⁶⁵ See the discussion of the Committee on Medical Ethics: British Medical Association. The impact of the *Human Rights Act* 1998 on medical decision making. London: British Medical Association 2000.

Convention Rights. It has also been suggested that the *Human Rights Act*, 1998, akin to the European Convention, is a 'living instrument' and the issue to be interpreted must be interpreted in the light of present day conditions reflecting the changing social attitudes. In this regard, where a patient's interests are affected, it is suggested that the interpretation of the issue must take the patient's expectations and ethical standards into consideration.

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The general approach, when decisions are taken by public authorities affecting the public, amounts to this, besides the range of questions considered traditionally, the following questions need to be asked namely:

- (1) Are someone's human rights affected by the decision? And if so
- (2) Is it legitimate to interfere with them? ¹⁶⁷

When an answer is sought from a medical perspective, it has been suggested that, when balancing conflicting rights, a careful assessment of the best interests of the patients need to be considered. ¹⁶⁸

Put differently, in assessing whether an interference of a right is legitimate, the competing interests must be carefully balanced.

11.3.2.2 Case Law

Judicial recognition of exclusion clauses in, especially, the infamous ticket cases, dates back to the late nineteenth and the early part of the twentieth century. The court, in the *Parker v South Eastern Railway*, ¹⁶⁹ recognized the willingness of business enterprises to make use of sweeping exemption clauses in their dealing with consumers, which the court regarded as an acceptable practise. In this matter, a railway company sought to rely on an exclusionary clause after issuing a cloakroom ticket, at a railway station, containing conditions *inter alia* an exemption of liability. Deciding the matter on a question of law, the court of appeal found for the railway company.

¹⁶⁶ Committee on Medical Ethics Discussion on the *Human Rights Act* 1998 London: British Medical Association 2000.

¹⁶⁷ See the discussion of Murray Hunt "The horizontal effect of the Human Rights Act retrieved from "http://ea.wikipedia.org/wiki/human_rights_act_1998".

¹⁶⁸ See the impact of the *Human Rights Act* 1998 on medical decision making as discussed on the internet <<http://www.hm90.gov.uk/acts/acts1998/19980042.htmhgopfs>> .

¹⁶⁹ (1877) 2 CPD 416.

During this period, the doctrine of freedom of contract played a major role in legal philosophy which, in turn, heavily influenced judicial thinking. This thinking, from a judicial view point, was influenced, especially, by the most celebrated dictum of Jessel M.R. in the case of *Printing and Numerical Registering Co v Sampson*,¹⁷⁰ in which the court held:

*"If there is one thing which more than another public policy requires it is that man of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."*¹⁷¹

Lord Bramwell, in the case of *Manchester, Sheffield and Lincolnshire Railway Company v HW Brown*¹⁷² was just as adamant when he stated:

*" that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by them is the strongest possible proof that it is a reasonable agreement, and that I should require the strongest possible evidence, or something more even than a possibility, to show me that that was an unreasonable agreement."*¹⁷³

Nowhere can the attitude of the courts be seen more clearly in upholding clauses which attempted to limit or exclude liability in damages, not merely for breach of contract but also in tort, as far back as 1804 in the case of *Nicholson v William*,¹⁷⁴ in which Lord Ellenborough C.J. at 513, rejected the plaintiff's argument that the attempt of the defendant, a common carrier, to exclude his liability for the loss of goods carried beyond the value of \$5 was "contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent for losses not occasioned by Act of God (or) the King's enemies."¹⁷⁵

The legal philosophy, ranking the general principles of freedom of contract and the sanctity of contract as uppermost, still received considerable support in the modern judiciary in

¹⁷⁰ (1875), .R. 19 EQ 462 at 465.

¹⁷¹ *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 EQ 462 at 465; See also Lord Bramwill's dicta in *Manchester, Sheffield and Lincolnshire Ry v Brown* (1883) 8 APP CAS 703, 716-720; *Salt v Marquis of Northampton* (1892) A.C. 1, 18-19.

¹⁷² (1883) 8 App Cas 703.

¹⁷³ *Manchester, Sheffield and Lincolnshire Railway Company v HW Brown* (1883) 8 App CAS 703 at 716; See also *Ranger v G.W. Ry Co* (1854) H.L.C. 72, 94-95, 118-119 in which the court showed its reluctance to deviate from upholding the doctrine of freedom to contract.

¹⁷⁴ (1804) 5 East 507.

¹⁷⁵ *Nicolson v Williams* (1804) 5 East 507.

England.

This was prevalent in the case of *Swisse Atlantique Societe D'armement Maritime SA v N.V. Rotterdamsche Kolen Centrale*¹⁷⁶ in which Lord Reid rejected the dicta that the doctrine of fundamental breach was a substantial rule of law, negative any agreement to the contrary (and capable of being used to strike down an exemption clause) on the ground, inter alia, that this would restrict "*the general principle of English law that parties are free to contract as they may think fit.*"¹⁷⁷

In 1980, in the same context, the court per Lord Diplock, in the case of *Photo Production Ltd v Securicor Transport Ltd*,¹⁷⁸ observed that:

"(a) *basic principle of the common law of contract is that parties to a contract are free to determine for themselves what primary obligations they will accept.*"¹⁷⁹

But, it was the problems presented by big businesses, who systematically introduced exclusionary clauses in which they excluded liability towards consumers, which necessitated the courts to view exclusionary clauses in a different light and, where necessary, to introduce rules devised to limit the effectiveness where the said clauses would bring about unfair or unreasonable consequences.¹⁸⁰

Nowhere was this more prominent in the United Kingdom in which the courts sought to formulate a general criteria or standard according to which the fairness of a contract or one of its terms may be judged than the case of *Lloyds Bank Ltd v Bundy*.¹⁸¹ Lord Denning MR delivering the judgement commented:

"*Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are unfair or transfers property for a consideration which is*

¹⁷⁶ (1967) 1 A.C. 361.

¹⁷⁷ *Swisse Atlantique Societe D'armement Maritime SA v Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361 at 399.

¹⁷⁸ (1980) A.C. 827, 848.

¹⁷⁹ *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827, 848.

¹⁸⁰ *McCutcheon v David Macbrayne, Ltd* (1964) 1 ALL E.R. 437; *Thorton v Sherlane Parking Ltd* (1971) 1 ALL ER 686.

¹⁸¹ 1975 QB 326 (CA).

grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends upon proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bring to the other. I have also avoided any inference to the will of one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the restraints in which he finds himself." ¹⁸²

In this way Lord Denning expressed late-twentieth century legal ideology.

Lord Denning, in *Karsales (Harron) Ltd v Wallis*, ¹⁸³ also curbed the doctrine of freedom to contract and, more especially, in the usage of exemption clauses when he stated:

"Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract." ¹⁸⁴

In *A Schroeder Music Publishing Co Ltd v Macaulay*, ¹⁸⁵ the House of Lords clearly recognised the distinction between freely negotiated contracts and those negotiated on a "take it or leave it" basis and suggested that the latter calls for vigilance on the part of the courts, when Lord Diplock adopted the following test namely: "Was the bargain fair?" and continued:

" The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration." ¹⁸⁶

The measures put in place by the courts included two main rules namely; 'incorporation' and 'construction'.

¹⁸² *Lloyds Bank Ltd v Bundy* 1975 QB 326 (CA) at 339; See also the remark made by Lord Reid in *A Schroeder Music Publishing Co Ltd v Macaulay* 1874 (3) ALL ER 616 116 723 and Lord Denning in *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* 1975 (1) QB 303 (CA).

¹⁸³ (1956) 2 ALL E.R. 866.

¹⁸⁴ *Karsales (Harron) Ltd v Wallis* (1956) 2 ALL ER 866.

¹⁸⁵ (1974) 1 W.L.R. 1308.

¹⁸⁶ *A Schroeder Music Publishing Co Ltd v Macaulay* (1974) 1 W.L.R. 1308 at 1315-1316.

In so far as 'incorporation' is concerned, the first aspect to be determined is whether a written term, *inter alia*, an exclusionary clause, can be regarded as part of the contract. The courts have generally been concerned to limit the effect of exclusionary clauses, especially in regard to consumers and have applied fairly strict rules as to the incorporation of terms. Moreover, the rules are based on the general principle that a party must have had reasonable notice of the exclusion clause, at the time of the contract, in order for it to be effective. If, however, the content containing the clause has been signed by the plaintiff, there will be little that the courts can do.

The test for reasonable notice was stated in the case of *Parker v South Eastern Railway*¹⁸⁷ in which Mellish CJ formulated the test as follows:

*"I am of the opinion, therefore, that the proper direction to leave to the jury in these cases is that if the person receiving the ticket did not see or know there was any writing on the ticket, he is not bound by the conditions, that if he knew there was writing, and knew or believed that the writing contained conditions, then is he bound by the conditions, that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was in the opinion of the jury reasonable notice that the writing contained conditions."*¹⁸⁸

In this case the proprietor of a cafe bought an automatic cigarette vending machine. She signed, but did not read, a sales agreement which contained an exemption clause "in regrettably small print". It was held that she was bound by the clause, so that she could not rely on defects in the machine, either as a defence to a claim for part of the price, or as entitling her to damages.

This forced the subject matter in *L'Estrange v Graucob*,¹⁸⁹ a case involving a clause which was in small print and very difficult to read, but, because the contract had been signed, the clause was held to have been incorporated. Scrutton LJ made it clear that in such cases, questions of 'notice' were irrelevant:

"In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is

¹⁸⁷ (1877) 2 CPD.

¹⁸⁸ *Parker v South Eastern Railway* (1877) 2 CPD.

¹⁸⁹ (1934) 2 KB 394.

wholly immaterial whether he has read the document or not " 190

The principle of reasonable notice of exclusionary clauses came under discussion in the case of *McChutheon v David MacBayne Ltd*,¹⁹¹ a case involving a contract of carriage of goods which did not contain an express term absolving carriers from liability for negligence. The court found that the contract of carriage was an oral contract. The court also found that it was necessary to bring the terms of the conditions to the attention of the other contracting party. But, stresses the court, actual, as opposed to constructive, knowledge is necessary. Lord Devlin stated the position as follows:

"..... but at least by proving knowledge the essential bargaining is made. Without knowledge there is nothing." 192

In a similar case concerning the incorporation of an exception clause in an automatic car park notice, at an entrance to a car park, the court was asked to decide whether the exception clause had been incorporated in a contract. Subsequently, after hearing arguments in an appeal matter in the case of *Thorton v Sheelane Parking Ltd*,¹⁹³ the court held that the defendants were not able to avoid liability by relying on the exempting condition because, in order to show that the plaintiff was bound by the condition, it was necessary to show either, that he knew of it or that, the defendants had done what was reasonably necessary to draw it to his attention.

The court continued to state that where the condition was exceptionally wide and destructive of the plaintiff's rights, or was one which was not shown to be usual in that class of contract, it was not sufficient to show that the plaintiff had been given notice that the ticket was issued subject into conditions, it must be shown that adequate steps had been taken to draw his attention, in the most explicit way, to the particular exempting condition relied on. Upholding the appeal, the court held that the defendants had failed to show that the plaintiff knew of the condition or that they had taken sufficient steps to draw his attention to it.

Other factors influencing the courts' decisions in establishing whether an exclusion clause

¹⁹⁰ *L'Estrange v Graucob* (1934) 2 KB 394.

¹⁹¹ (1964) 1 ALL E.R.

¹⁹² *McChutheon v David MacBrayne Ltd* (1964) 1 ALL E.R.

¹⁹³ (1971) 1 ALL E.R. 686.

had been incorporated include:

The clause must be put forward at the time the contract is signed. If it is not put forward until after the contract has been made, then it clearly cannot be incorporated.¹⁹⁴ This issue came up for decision in the case of *Olley v Marlborough Court Hotel*.¹⁹⁵ The facts, briefly stated, amounted to: the claimant booked a room in the defendant's hotel. She later saw a notice in her bedroom exempting the defendants from liability for articles lost or stolen unless handed to the management for safe custody. It was held that, as the contract had been made at the reception desk when the defendants agreed to accept the claimant as a guest and as the notice in the room was only afterwards seen, this came too late to be incorporated into the contract.¹⁹⁶

Incorporation by a 'course of dealings' was considered in the case of *Kendell (Henry) and Sons v Lillico (Williams) and Sons Ltd*,¹⁹⁷ which dealt with a contract between buyers and sellers of animal feed. They had regularly contracted with each other, on three or four occasions each month, over a period of years. On each occasion a 'sold note' had been issued by the seller, which put responsibility for latent defects in the feed on the buyer. The buyer tried to argue that it did not know of the clause in the sold note. The House of Lords subsequently held that it was bound, as a reasonable seller would assume that the buyer, having received more than 100 of these notes containing the clause, and having raised no objection to it, was agreeing to contract on the basis that it was part of the contract.

This position was, however, distinguished in the case of *Hollier v Rambler Motors*¹⁹⁸ where there had only been three or four contracts over a period of five years. It was held that an exclusion clause contained in an invoice, given to the plaintiff after the conclusion of an oral contract for car repairs, was not incorporated into the contract.

A similar approach was adopted by the House of Lords in the case of *McCutcheon v MacBrayne*,¹⁹⁹ in which the plaintiff's agent had regularly shipped goods on the

¹⁹⁴ *Roscorla v Thomas* (1842) 3 QB 234.

¹⁹⁵ (1949) 1 KB 532.

¹⁹⁶ (1969) 2 AC 31.

¹⁹⁷ (1992) 2 QB 71; (1972) 1 ALL ER 399.

¹⁹⁸ (1964) 1 WLR 125.

¹⁹⁹ (1964) 1 ALL E.R. 437.

defendant's ship. On some occasions he was required to sign a 'risk note' containing an exclusive clause, on other occasions the contract was purely oral. The agent arranged for the carriage of the plaintiff's car, which was lost as a result of the negligent navigation of the ship. No risk note had been signed and the House of Lords refused to accept that the exclusion clause could be incorporated from the agent's previous dealings. There was no consistent course of conduct sufficient to allow such an argument to succeed.

Another factor previously considered by the English courts when determining whether an exclusionary clause had been incorporated is where the clause is unusual. In this regard the courts have adopted an approach which requires an assessment of the nature of the usage, alongside the amount of notice given, therefore, the more unusual or more onerous the exclusion clause, the greater the notice that will be expected to be given. This principle was adopted in the case of *Spurling v Bradshaw*²⁰⁰ in which Lord Denning commented that:

*"The more unreasonable the clause, the greater the notice, which must be given of it. Some exclusion clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."*²⁰¹

The aforementioned approach was applied in the case of *Thornton v Sherlane Parking Ltd*²⁰² so that a clause displayed on a notice inside a car park, containing extensive exclusions, was held not to be incorporated into a contract which was made by the purchase of a ticket from a machine.

The exclusion clause, in this case, was very widely drawn and purported to cover negligently caused personal injuries (which the plaintiff had in fact suffered). As a result the court felt that the defendant needed to take more specific action to bring it to the attention of customers.

In the view of Megaw L.J.:

"Before it can be said that a condition of that sort, restrictive of statutory rights (under the Occupier's Liability Act 1957) has been fairly excluded there must be some clear indication which would lead an ordinary sensible person to realise, at or before the time of making the contract, that a term of that sort, relating to personal injury was

²⁰⁰ (1956) 2 ALL ER 121.

²⁰¹ *Spurling v Bradshaw* (1956) 2 ALL ER 121 at 125.

²⁰² (1971) 2 QB 163; (1971) 1 ALL ER 686.

sought to be included." ²⁰³

In order to be effectively incorporated, the exclusion clause must also, generally, be contained or referred to, in something which can be regarded as a contractual document. This formed the subject of decision-making in the case of *Chapelton v Barry UDC*, ²⁰⁴ in which the court of appeal was tasked to decide whether a ticket could be regarded as a contractual document. The facts which came under the spotlight included: The plaintiff wished to hire a deck chair. He took a chair from a pile near a notice indicating the price and duration of time and requesting hirers to obtain a ticket from the attendant. The plaintiff did so, but when he used the chair it collapsed, causing him injury. It was accepted that the collapse of the chair was due to the negligence of the defendant (Barry UDC), but the council argued that it was protected by a statement on the ticket that: "*The council will not be liable for any accident or damage arising from hire of chair*". It was held by the Court of Appeal however, that the ticket was a mere receipt. It was not a document on which the consumer would expect to find contractual terms and the exclusion clause printed on it was therefore not incorporated. The purpose of the ticket was simply to provide evidence for the hirer that he had discharged his obligations to pay for the chair. It was, the court felt, distinguishable from, for example, a railway ticket which contains upon it the terms upon which a railway company agrees to carry the passenger.

More recently in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, ²⁰⁵ Interfoto Library hired 47 transparencies to Stiletto. The transparencies were despatched to Stiletto in a bag containing a delivery note, containing conditions, printed in small but visible lettering on the face of the document, including condition 2, which stated that a holding fee of \$5 plus VAT per day will be charged for each transparency retained longer than 14 days. The daily rate per transparency was many times greater than was usual but nothing whatever was done by Interfoto to draw Stiletto's attention, particularly, to condition 2. Stiletto returned the transparencies 4 weeks later and Interfoto claimed \$3,783.50.

The Court of Appeal held that the contract was made when, after the receipt of the transparencies, Stiletto accepted them by telephone. Although, to the extent the conditions were common form or usual terms, they were incorporated into the contract, it was held that condition 2 had not been incorporated. Bingham L.J. stated:

²⁰³ *Thorton v Shoe Lane Parking Ltd* (1971) 2 QB 163; (1971) 1 ALL ER 686.

²⁰⁴ (1940) 1 KB 532; (1940) 1 ALL ER 356.

²⁰⁵ 1989 QB 433.

"(Stiletto) are not to be relieved of liability because they did not read the condition although doubtless they did not, but in my judgement they are to be relieved because (Interfoto) did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention." ²⁰⁶

The English courts developed a second rule as a means of judicial control over exclusionary clauses, namely, the rule of 'construction' or sometimes referred to as the rule of 'interpretation'. The rule operates as follows: Once it has been established that a clause has been incorporated into the contract, the wording of the clause is examined to establish whether the terms imposed upon the consumers are unfair in their application. As an aid at common law, the courts evolved certain canons of constructions which normally work against the party seeking to claim the benefit of the exemption. In the first instance, the courts usually apply a strict interpretation when examining a clause. For that reason, it has been suggested before the words of the exemption clause must exactly cover the liability which it is sought to exclude. For example, a clause excluding liability for breach of warranty will not exclude liability for breach of condition. ²⁰⁷

This formed the subject matter for decision in the leading case of *Wallis, Son and Wells v Pratt and Haynes*, ²⁰⁸ in which the appellant bought seed described as 'common English Sainfoin', subject to an exemption clause that the sellers give no warranty, express or implied, as to growth, description, or any other matters. The seed turned out to be Giant Sainfoin, indistinguishable in seed, but inferior in quality and of less value. The appellant was forced to compensate those to whom it had subsequently sold the seed and sued to recover the money lost. The respondent pleaded the exemption clause.

It was held by the House of Lords that, even though the appellant had accepted the goods and could therefore only sue for breach of warranty *ex post facto*, there was nevertheless, originally a breach of the condition implied by the section 13 of the *Sale of Goods Act* and this had not been successfully excluded.

In the second instance, the courts frequently applied the '*contra proferentem*' rule, which has the effect that the words in written documents are construed more forcibly against the party putting forward the document to be considered. In the case of exemption clauses this

²⁰⁶ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* 1989 QB 433 at 445.

²⁰⁷ *Baldry v Marshall* (1925) 1 K.B. 260.

²⁰⁸ (1911) A.C. 394.

would be applicable to the party seeking to impose the exemption and there is doubt or ambiguity in the terms or conditions included in the clause.

In *Beck and Co v Szymanowski and Co*,²⁰⁹ the contract provided that, goods delivered were, deemed to be in satisfactory condition unless complaint was made within fourteen days of receiving them. The clause was ineffective to exclude liability for short delivery (i.e. for goods not delivered) even though complaint was made more than fourteen days after receiving the goods.

In *Lee (John) and Son (Grantham) Ltd v Railway Executive*,²¹⁰ the lease of a railway warehouse contained a clause exempting the lessors from liability, 'loss damage costs and expenses however caused (whether by act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created would not have arisen'. Goods in the warehouse were damaged by fire, owing to the alleged negligence of the lessors in allowing a spark to escape from their railway engines. The lessors claimed that the clause exempted them from liability.

The Court of Appeal held that, applying the *contra proferentem* rule, the operation of the clause was confined by the words 'but for the tenancy hereby created' to liabilities which arose only by reason of the relationship of landlord and tenant created by the lease. The clause was capable of a wider meaning, but, it had to be construed against the grantor and the defendants were not protected.

Although this rule rests on the existence of ambiguity in the meaning of the exemption clause, the courts have been resourceful in finding such ambiguity when it has suited them to be able to cut down the impact of a clause.

In *Houghton v Trafalgar Insurance Co Ltd*,²¹¹ a car insurance policy did not give protection to cover damage occurring when the car was conveying 'any load in excess of that for which it was constructed'. An accident occurred when the car, designed to carry five people, was carrying six. The Court of Appeal considered that 'load' was ambiguous, and construed it against the insurers to limit it to excess weight, rather than excess passengers.

²⁰⁹ (1924) AC 43.

²¹⁰ (1949) 2 ALL ER 581. See also *Adams v Richardson and Starling Ltd* (1969) 1 WLR; *Tor Line A.R. v Allmans Group of Canada Ltd* (1984).

²¹¹ (1954) 1 QB 247.

A more recent example of this approach may be found in *Morley v United Friendly Insurance plc*.²¹² An insurance policy excluded claims resulting from 'wilful exposure to needless peril'. The Court of Appeal held that an intentional and risky act did not fall within the scope of the clause where the risk was modest and the party affected did not have time to assess the peril involved.

The *contra proferentem* rule is now expressly incorporated in the *Unfair Terms in Consumer Contracts Regulations* (1999).²¹³ It provides that:

"If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail."

However, this principle is excluded from operation in respect of pre-emptive challenges to clauses in standard forms.

In certain instances, when applying the *contra proferentem* rule, the courts have also adopted a policy to limit the scope of exclusion clauses by restricting the scope of the exclusion. In this regard, the courts have shown a reluctance to extend the scope of an exclusion clause to other liabilities. A person wishing to void liability has been required to be very precise in the use of language to achieve that aim. When applying the *contra proferentem* rule in these circumstances, the courts interpret an exclusion clause against the person putting it forward.²¹⁴

In circumstances where the defendant seeks to exclude liability for negligence in the performance of a contract the courts have followed the approach by construing the exemption clause as extending to the ground alone, even if the words used are, *prima facie*, wide enough to cover negligence.²¹⁵

The principles to be applied were set out by the Privy Council in *Canada Steamship Lines*

²¹² (1993) 1 WLR 996.

²¹³ Reg 7 (2) Si 1999/2083.

²¹⁴ See *Andrews v Singer* (1934) 1 KB 17; *Wallis, Son and Wells v Pratt* (1910) 2 KB 1003.

²¹⁵ *Alderslade v Hendon Laundry Ltd* (1945) KB 189 at 192; *Canada Steamship Lines Ltd v The King* (1952) A.C. 292 at 304; *Sonat Offshore S.A. v Amerada Hess Development Ltd* (1988) 1 Lloyd Rep 145, 157; *Shell Chemicals UK Ltd v PandO Roadtanks Ltd* (1995) 1 Lloyd's Rep 297, 301; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* (1983) 1 W.L.R. 964 at 970.

Ltd v The King.²¹⁶ The facts, briefly stated, included: This case involved a lease of a freight shed, provided that the lessee should 'not have any claim against the lessor for damage to goods' in the shed. Owing to the negligence of the lessor's employees, a fire broke out and the lessee's goods in the shed were destroyed. The Judicial Committee of the Privy Council held that a strict liability was imposed upon the lessor by the Civil Code of Lower Canada and the exemption clause should be confined to that head of liability. The lessor was accordingly liable for the negligent destruction of the goods.

In this case Lord Morton included the following test:

- (1) *if the clause contains language which expressly exempts the person in whose favour it is made (hereinafter called the preference) from the consequence of the negligence of his own servants, effect must be given to that provision;*
- (2) *If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the preferens;*
- (3) *If the words used are wide enough for the above purpose, the court must then consider whether the head of damage may be based on some ground other than negligence. The 'other' ground must not be so forceful or remote that the preference cannot be supposed to have desired protection against it, but subject to this qualification the evidence of a possible head of damage other than negligence is fatal to the preference: even if the words used are prima facie wide enough to cover negligence on the part of his servants."*²¹⁷

The introduction of the *Unfair Contractual Terms Act 1977* and the existence of stricter statutory controls over exclusion clauses have indicated to the courts that there is no need for the rule of construction to be used in an artificial way. When businesses negotiate at arm's length to conclude commercial agreements containing exclusion clauses, they are pressured to know what they are doing and expected to look after themselves.

In *Photo Production Ltd v Securicor Transport Ltd*,²¹⁸ Lord Wilberforce commented that, in the light of parliamentary intervention to protect consumers (by means of the UCTA 1977):

"In commercial matters generally when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

²¹⁶ (1952) AC 192.

²¹⁷ *Canada Steamship Lines Ltd v The King* (1952) A.C. 292.

²¹⁸ 1980 AC 827; (1980) 1 ALL ER 556.

Lord Diplock, agreeing with Lord Wilberforce, commented that:

"In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction on words in an exclusion clause which are clear and fairly susceptible of one meaning only." ²¹⁹

In *Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co*, ²²⁰ the House of Lords held that the question whether an exemption clause operated to limit a party's liability was one of construction of the contract, read as a whole. Towards this end, Lord Wilberforce suggested that a distinction should be drawn between two different types of exemption clause, viz.:

- (i) an exclusion clause, whereby the parties alter the primary obligations which would otherwise arise under the contract, i.e., the parties agree not to undertake particular primary obligations and are therefore not liable for their non-performance;
- (ii) a limitation clause, whereby the parties alter their secondary obligation to pay damages in the event of a breach of particular primary obligations of the contract, i.e., the parties agree to limit the damages otherwise payable as a result of a breach of the contract.

Lord Wilberforce considered that an exclusion clause should be "*rigidly and strictly*" construed, while a limitation clause should be given its "*natural*" meaning.

Lord Fraser agreed that limitation clauses need not:

"..... be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. It is enough that the clause must be clear and unambiguous." ²²¹

A vivid account of the history of the rule of construction was given by Lord Denning MR in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*: ²²²

²¹⁹ *Photo Production Ltd v Securicor Transport Ltd* 1980 AC 827 (1980) 1 ALL ER 556 at 568.

²²⁰ (1983) 1 ALL E.R. 101 at 104.

²²¹ *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co* (1983) 1 ALL E.R. 101 at 102-103; 105-106.

²²² (1983) QB 284.



"None of you nowadays will remember the trouble we had when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract". But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order forms and invoices. The big concern said, "Take it or leave it". The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, "You must put it in clear words", the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.

Faced with this abuse of power - by the strong against the weak -by the use of the small print of the conditions - the judges did what they could to put a curb upon it. They still had before them the idol, "freedom of contract". They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract". They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put upon them a strained and unnatural construction. In case after case, they said that the words were strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to rely on the exemption clause. If a ship deviates from the contractual voyage, the owner could not rely on the exemption clause. If a warehouseman stored the goods in the wrong warehouse, he could not pray in aid of the limitation clause. If the seller supplied goods different in kind from those contracted for, he could not rely on any exemption from liability. If a ship-owner delivered goods to a person without production of the bill of lading, he could not escape responsibility by reference to an exemption clause. In short, whenever the wide words - in their natural meaning - would give rise to an unreasonable result, the judges either rejected them as repugnant to the main purpose of the contract, or else cut them down to size in order to produce a reasonable result." ²²³

Lord Denning then continued to explain the position of exclusion clauses since the passing of the *Unfair Contract Terms Act 1977* when he stated:

"We should no longer have to go through all kinds of gymnastic contortions to get round them."

Citing further some leading English cases he continued:

"A few years earlier, in Photo Production Ltd v Securicor Transport Ltd (1980) AC 827, 843 Lord Wilberforce had said much the same thing:

There were a large number of problems productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate. Lord Reid referred to these in Swisse Atlantique Societe d'Armement SA v Rotterdamsche Kolen Centrale NV 1 AC 361, 406, pointing out at the same time that the doctrine of fundamental breach was a dubious specific. But since then Parliament has taken a hand. It has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their

²²³ *George Mitchell (Chesterhall) Ltd v Finney Look Seeds Ltd (1983) QB 284 at 296-297.*

decisions."

Lord Denning then commented as follows:

"The lesson which I would draw from the development of the rules construing exemption clauses is that the judicial creativity, bordering on judicial legislation, which the application of that doctrine involved is a desperate remedy, to be invoked only if it is necessary to remedy a widespread injustice. Otherwise there is much to be said for giving effect to what on ordinary principles of construction the parties agreed." ²²⁴

The doctrine of fundamental breach was also a means adopted by the English courts to curtail the unlimited usage of exclusionary clauses, in that some breaches of contract are so serious that no exclusion clause can cover them. The doctrine found its origin in shipping law, where there is strong authority that if a ship `deviates' from its agreed route, there can be no exclusion of liability in relation to events which occur after the deviation. ²²⁵

The courts, as far back as 1838, also prevented a contracting party from relying on an exclusionary clause where the contract stipulated for the supply of peas and beans were provided instead. ²²⁶ The supplier, in such a case, had departed so far from the basic contractual obligation that the court felt that it could not be justifiable to allow him to exclude liability. Besides this form of the doctrine of fundamental breach which is concentrated at a particular term, a second form saw in its existence in the 1950's and beyond. The second form of the doctrine of fundamental breach does not look at a particular term which had been broken, but, at the overall effects of the breach which had occurred. Two cases illustrate the aspect of the doctrine:

In *Karsales v Wallis* ²²⁷ the contract was for the supply of a Buick car, which the plaintiff had inspected and found to be in good condition. When delivered (late at night), however, it had to be towed, because it was incapable of self propulsion. Amongst other things, the cylinder head had been removed, the valves had been burnt out and two of the pistons had been broken. The defendant purported to rely on a clause of the agreement which stated:

"No condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for purpose is given by the owner or implied herein."

²²⁴ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* 1983 QB 284 at 298-299.

²²⁵ *Joseph Thorley Ltd v Orchis SS Co Ltd* (1907).

²²⁶ *Chanter v Hopkins* (1838).

²²⁷ (1956) 1 WLR 936.

The court a quo held for the defendant, but the Court of Appeal reversed this. The majority of the court (Lord Denning reached the same conclusion, but on slightly different grounds) held that what had been delivered was not, in effect, a `car'. The defendant's `performance' was totally different from that which had been contemplated by the contract (that is, the supply of a motor vehicle in working order). There was, therefore, a breach of a fundamental term of the agreement and the exclusion clause had no application.

In the case of *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*,²²⁸ the contract involved the supply of pipe work in the plaintiff's factory. The type of piping used was unsuitable and resulted in a fire which destroyed the whole of the plaintiff's factory. The obligation to supply piping that was fit for its purpose could clearly have been broken in various ways, not all of which would have led to serious damage to the plaintiff's premises. In this case, however, the consequences of the defendant's failure to meet its obligation in this respect were so serious, that the Court of Appeal regarded it as a `fundamental breach' of the contract, precluding any reliance on an exclusion clause.

In arriving at its decision the Court of Appeal had to deal with the views expressed by the House of Lords in *Swisse Atlantique Societe d'Armement SA v Rotterdamsche Kolen Centrale NV*.²²⁹ The case concerned a charter which included provisions whereby, if there were delays the charterer's liability was limited to paying \$1,000 per day `demurrage'. The owners attempted to argue that the charterer's breach was so serious that the demurrage clause should not apply and that they should be able to receive their full losses. The House of Lords rejected this and in so doing, expressed strong disapproval of the argument that there was a substantive rule of law which meant that certain types of breach automatically prevented reliance on an exclusion claim.

Lord Denning, the architect of this doctrine, however remarked:

"When one party has been guilty of a fundamental breach of the contract, that by a breach which goes to the very root of it, and the other side accepts it, so that the contract comes to an end, or if it comes to an end anyway by reason of the breach, then the guilty party cannot rely on an exemption or limitation clause to escape from his liability for the breach."

²²⁸ (1970) 1 QB 447 at 467.

²²⁹ (1967) 1 AC 361; (1966) 2 ALL E.R. 61.

The *Harbutt's 'Plasticine'*²³⁰ judgement did not survive long as the House of Lords, when given a further opportunity to clarify the law in *Photo Production Ltd v Securicor Transport Ltd*,²³¹ demolished, by a careful analysis, the last vestiges of the fundamental breach rule of law. The facts briefly stated included: The plaintiffs owned a factory and engaged the defendants to provide security services, including a night patrol. Unfortunately, one of the guards, employed by the defendants to carry out these duties, started a fire, on the premises, which got out of control and destroyed the entire factory. Thus, rather than protecting the plaintiff's property, as they had been contracted to do, the defendants could be said to have achieved the exact opposite. The contract, however, contained a very broadly worded exclusion clause, which, on its face, seemed to cover even the very serious breach of the agreement which had occurred. The Court of Appeal took the view that this could not protect the defendants. There had been a fundamental breach and the exclusion clause was ineffective. The House of Lords, however, took the opportunity to state its position. Lord Wilberforce acknowledged (at p.843) that the doctrine of "fundamental breach" in spite of its imperfections and doubtful parentage [had] served a useful purpose' but went on, in the passage quoted by Lord Hoffman in *BCCI v Ali*, to state that there was no longer any need for the doctrine in the light of the enactment of the *Unfair Contract Terms Act*.

The final demise of the doctrine of fundamental breach was recognised in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*,²³² when Lord Bridge stated that Photo Production "gave the final quietus to the doctrine that a final breach of contract deprived the party in breach of the benefit of clauses in the contract excluding or limiting his liability."

The position was also reconfirmed in *Edmund Murray Ltd v BSP International Foundations Ltd*²³³ (1993) Con LR when Neil LJ stated:

*"It is always necessary when considering an exemption clause to decide whether as a matter of construction it extends to exclude or restrict the liability in question, but, if it does, it is not permissible at common law to reject or circumvent the clause by treating it as inapplicable fundamental breach."*²³⁴

²³⁰ *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* (1970) 1 QB 447 at 467.

²³¹ (1970) 1 QB 447.

²³² (1983) 2 AC 803.

²³³ (1993) 33 Con LR 1, 16.

²³⁴ *Edmund Murray Ltd v BSP International Foundations Ltd* (1993) 33 Con LR 1, 16.

11.3.2.3 Legal Opinion

Exclusionary clauses have, through the years, been recognized as playing a role in the English Law of Contract.²³⁵

With the invention of standard form contracts, the doctrine of contractual freedom and the sanctity of contract lived to its full potential as contracting parties were expected to look after their own interests, as they were free to enter into a contract and they had a full understanding of the consequences of their actions and the terms of the contract.²³⁶

A feature of exclusionary clauses which crept into standard form contracts was, besides attempting to exclude any obligation to pay compensation or to limit the amount of compensation, contracting parties sought to avoid the consequences of their failure to

²³⁵ For recognition by the English legal writers see Stone *Principles of Contract Law* (1998); Stone *The Modern Law of Contract* (2003) 163; Beatson *Anson's Law of Contract* (2002) 436-437; Poole *Textbook on Contract Law* (2004) 195; O'Sullivan and Hilliard *The Law of Contract* (2004) 243; Furmston Cheshire Fifoot *Furmston's Law of Contract* (1986) 149; Treitel *The Law of Contract* (2003) 216; Yates and Hawkins *Standard Business Contracts: Exclusions and Related Devices* (1986) 4-6; Coote *Exception Clauses* (1964) 137-138; Atiyah *An Introduction to the Law of Contract* (1995) 310ff; Chin Nyuk-Yin *Excluding Liability in Contracts* (1985) 125ff; Waddams "Unconscionability in Contracts" *The Modern Law Review* Vol. 39 (July 1976) No 4 378-379; *The Law Commission and the Scottish Law Exemption Clauses Second Report* (1976). For English case law see *Parker v South Eastern Railway* (1877) 2 CPD 416. This was one of the first cases in which the court held in the absence of fraud, exemption clauses are recognized. See also *Cholzen v William* (1804) 5 East 507; *Karsales (Harron) Ltd v Wallis* (1956) 2 ALL E.R. 866; *McCutcheon v David MacBryne Ltd* (1964) 1 ALL E.R.; *Thorton v Sherlane Parking Ltd* (1971) 1 ALL E.R. 686; *Olley v Marlborough Court Hotel* (1949) 1 KB 532; *Spurling v Bradshaw* (1956) 2 ALL E.R. 121; *Chapilton v Barry UDC* (1946) 1 KB 32; (1940) 1 ALL E.R. 356; *Baldey v Marshall* (1925) 1 K.B. 260; *Wallison and Wells v Pratt and Haynes* (1911) A.C. 394; *Beck and Co v Szymanowski and Co* (1924) A.C. 43; *Lee (John) and Son (Cratham) Ltd v Railway Executives* (1949) 2 ALL E.R. 581; *Adams v Richardson and Starling Ltd* (1969) 1 WLR; *Tor Line A.R. v Allmans Group of Canada Ltd* (1984); *Houghton v Trafalgar Insurance Co Ltd* (1954) 1 QB 247; *Morley v United Foreindly Insurance P/C* (1993) 1 WLR 996; *Andrews v Singer* (1934) 1 KB 17; *Aldersade v Hendon Laundry Ltd* (1945) K.B. 189 at 192; *Canada Steamship Lines Ltd v The King* (1952) AC 292 at 304; *Sonat Offshore SA v Amerada Hess Development Co* (1988) 1 Lloyd Rep 145, 157; *Shell Chemicals Oil Ltd v Leo Roadtanks Ltd* (1995) 1 Lloyd's Rep 3297, 301; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co* (1983) 1 ALL E.R. 101.

²³⁶ Stone *The Modern Law of Contract* (2003) 219-224; McKendrick *Text, Cases and Materials* (2003) 163; Stone *Principles of Contract Law* (1998) 146; Poole *Textbook on Contract Law* (2004) 197; Beatson and Friedmann *Good Faith and Fault in Contract Law* (1997) 7-8; Cheshire et al *Law of Contract* (1986) 21-22; Standing Committee of Officials of Consumer Affairs *Unfair Contract Terms - A Discussion paper* (January 2004) 15-16; O'Sullivan and Hilliard *The Law of Contract* (2004) 3-5. This was very much the position in the early dicta of *Parker v South Eastern Railway* (1877) 2 CPD 416; *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 EQ 462 at 465 in which the much quoted dictum of Jessel M.R. was conceived namely: *"If there is one thing which more than another public policy requires it is that man of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."* See also Lord Bramwill's dicta in *Manchester, Sheffield and Lincolnshire Ry. v Brown* (1883) 8 App. Cas. 702, 716-720; *Salt v Marquis of Northampton* (1892) A.C. 1, 18-19. In more recent times in the cases of *Swisse Atlantique Societe D'armiwent Maritime SA v N.V. Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* (1980) A.C. 827, 848 in which exclusionary clauses were recognized because of the principle of freedom of contract.

perform their contractual obligations.²³⁷

Although these types of contracts found favour in the commercial world,²³⁸ nonetheless, they did not escape academic and judicial criticism. The primary focus of the attack was concentrated on the fact that classical law assured that contracting parties moved on a terrain of equal bargaining, whereas, in reality it was not so. Often the stronger exploited the weaker. The contracting parties no longer negotiated the terms of the contract.²³⁹

They often merely adhered to the standard form contract, containing standard terms and conditions, including exclusionary clauses. The weaker party often accepted the terms of the agreement on a "take it or leave it" basis.²⁴⁰ These could prove to be extremely harmful to, especially, the weaker party.

A commercial practise developed in which the weaker contracting party was often exploited by a stronger or more powerful contracting party, who would exempt himself (itself) from any liability towards the weaker contracting party. This, together with the advent and growth of monopolies and restrictive practises, saw the introduction of protective measures to counter the operations of monopolies, as well as matters concerning inequality of bargaining power.²⁴¹

The protective measures comprised both judicial and legislative measures. The judicial measures introduced, comprised the expectation of certain standards of notice, in respect

²³⁷ Beatson *Anson's Law of Contract* (2002) 436.

²³⁸ Standing Committee of Officials of Consumer Affairs *Unfair Contract Terms - A discussion paper* January (2004) 16. The advantages include the reduction of transaction costs; allowing for lengthy and detailed contracts to be finalized with the minimum of time and by lay persons who are only required to negotiate the specifics such as price, description of goods and services and delivery times. They also bring a certain amount of understanding of trading practice. See also McKendrick *Text, Cases and Materials* (2003) 163-164; Stone *Principles of Contract Law* (1998) 145; Poole *Textbook on Contract Law* (2004) 197; Treitel *The Law of Contract* (2003) 215.

²³⁹ McKendrick *Text, Cases and Materials* (2003) 163-164; Poole *Textbook on Contract Law* (2004) 198; Stone *The Modern Law of Contract* (2003) 164, 219-220. This inequality of bargaining power and the unfair advantage gained by one of the contracts was aptly explained by Lord Denning in *Lloyds Bank Ltd v Bundy* (1975) QB 326 (CA). See also the remark made by Lord Reid in *A Schroeder Music Publishing Co Ltd v Macaulay* 1974 (3) ALL ER 616 723 and Lord Denning in *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* 1975 (1) QB 303 (CA).

²⁴⁰ Poole *Textbook on Contract Law* (2004) 198; McKendrick *Text, Cases and Materials* (2003) 164; Stone *Principles of Contract Law* (1998) 145.

²⁴¹ Treitel *The Law of Contract* (2003) 215; Beatson *Anson's Law of Contract* (2002) 165; Atiyah *An Introduction to the Law of Contract* (1995) 16-17; 19; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (1978) 114 at 115; Tillotson *Contract Law in Perspective* (1995) 40.

of ordinary terms. In addition, the courts introduced rules of construction in interpreting the provisions of a contract most favourably for the weaker contracting party.²⁴²

The courts also approached clauses which are said to exclude such liability on the assumption that is 'inherently improbable' that the innocent party would have agreed to the exclusion of the contract-breakers negligence. To have any effect, however, the contractual term in question, must exclude liability for negligence clearly and unambiguously.²⁴³

A further measure introduced by the English courts concerning exclusionary clauses was the principle of fundamental breach. The doctrine entailed that some breaches were so serious that no exclusionary clauses could cover them.²⁴⁴

²⁴² Tritely *the Law of Contract* (2003) 215; Beatson *Anson's Law of Contract* (2002) 165; Atiyah *An Introduction to the Law of Contract* (1995) 16-17; 19; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (1978) 114 at 115; Tillotson *Contract Law in Perspective* (1995) 40.

²⁴³ McKendrick *Text, Cases and Materials* (2003) 164; Stone *The Modern Law of Contract* (2003) 220ff; Treitel *The Law of Contract* (2003) 215ff; Stone *Principles of Contract Law* (1998) 145ff; Beatson *Anson's Law of Contract* (2002) 438ff; Poole *Textbook on Contract Law* (2004) 198-200; O'Sullivan and Hilliard *The Law of Contract* (2004) 243ff; Atiyah *An Introduction to the Law of Contract* (1995) 20ff. The court in *McChutcheon v David Macbrayne Ltd* (1964) 1 ALL E.R. made it clear that in certain instances it would be necessary to bring terms and conditions to the notice of the other contracting party. See also *Thorton v Sheelane Parking Ltd* (1971) 1 ALL E.R. 686. In *Spurling v Bradshaw* (1956) 2 ALL E.R. 121 it was also held that the more unreasonable the clause, the greater the expectation to bring this to a contracting party's notice. See also *Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd* 1985 QB 433. The English courts in *Wallisson and Wells v Pratt and Haynes* (1911) A.C. 394; *Beck and Co v Szymanowski and Co* (1924) A.C. 43; *Lee (John) and Son (Cratham) Ltd v Railway Executives* (1949) 2 ALL E.R. 581; *Adams v Richardson and Starling Ltd* (1969) 1 WLR; *Tor Line A.R. v Allmans Group of Canada Ltd* (1984); *Houghton v Trafalgar Insurance Co Ltd* (1954) 1 QB 247; *Morley v United Friendly Insurance P/C* (1993) 1 WLR 996 applied the *contra proferentem* rule in controlling exclusion clauses. The courts interpreted exclusion clauses against the person putting it forward. See *Andrews v Singer* (1934) 1 KB 17; *Wallis, Son and Wells v Pratt* (1910) 2 KB 1003; See also the all important judgement of *Canada Steamship Lines Ltd v The King* (1952) AC 192 in which the court laid down a valuable test for interpreting ambiguous terms including exclusionary clauses. In *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co* (1983) 1 ALL E.R. 101 the court also considered the rules of construction to determine if an exclusionary clause was invalid. See further *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) QB 284.

²⁴⁴ Stone *The Modern Law of Contract* (2003) 230-231; Stone *Principles of Contract Law* (1998) 152-153; Treitel *The Law of Contract* (2003) 225ff; McKendrick *Text, Cases and Materials* (2003) 174; O'Sullivan and Hilliard *The Law of Contract* (2004) 265; Beatson *Anson's Law of Contract* (2002) 449-450; Poole *Textbook on Contract Law* (2004) 206; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5, No 1 (Summer 1978) 114, 116. Cases in which the English court recognized the principle of fundamental breach include *Karsales v Wallis* (1956) 1 WLR 936; *Harbutt's Plasticene Ltd v Wayne Tank and Pump Co Ltd*. See however *Photo Production Ltd v Securicor Transport Ltd* (1970) 1 QB 447 in which the principle of fundamental breach was given the death knell. This was confirmed in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* (1983) 2 A.C. 803 and reconfirmed in *Edmund Murray Ltd v BSP International Foundations Ltd* (1983) 33 Con L.R.1.

In this regard the English courts felt that it could not be justifiable to allow him to exclude liability. The doctrine did not have a particularly long life-span, in that the last vestiges of the doctrine were demolished in 1980.²⁴⁵

Despite the common law measures introduced to curb the unfair consequences which exclusionary clauses brought into the law of contract, the courts were not always consistent in applying, especially, the rules of construction. The courts were then frequently criticised for adopting artificial constructions or to stray beyond merely seeking the ordinary meaning of the words used.²⁴⁶

Consequently, the British Government appointed the Law Commission to investigate the unfair consequences of exclusionary clauses. The terms of reference given to the English Law Commission and the Scottish Law Commission in 1969, in the main, comprised the following:

- (1) To investigate the gap between the classical theories of contract law in which the notion of freedom of contract is advocated and the ills modern, standard-form contracts incorporating exclusionary clauses, had brought with them.
- (2) To investigate the abuse of the bargaining power and, in particular, the inequality of bargaining power between the stronger and weaker contracting parties, often using clauses limiting or excluding liability in favour of the stronger party, often monopolies.
- (3) To investigate the possibility of placing a restriction on the freedom of a person to exclude or restrict a duty or obligation which he would otherwise owe to another to take reasonable care of to exercise reasonable skill.²⁴⁷

²⁴⁵ Poole *Textbook on Contract Law* (2004) 208; O'Sullivan and Hilliard *The Law of Contract* (2004) 264; Beale "Unfair Contract Terms Act" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115 opines that "because of their adherence to the notion of freedom of contract the courts were sometimes obliged to uphold unfair clauses provided they have been incorporated in the contract." Stone *Principle of Contract Law* (1998) 151-152; Stone *The Modern Law of Contract* (2003) 229; the Law Commission and the Scottish Law Commission *Exemption Clause Second Report* (Report No 69 1976) 16.

²⁴⁶ Poole *Textbook on Contract Law* (2004) 208; O'Sullivan and Hilliard *The Law of Contract* (2004) 264; Beale "Unfair Contract Terms Act" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 115 opines that "because of their adherence to the notion of freedom of contract the courts were sometimes obliged to uphold unfair clauses provided they have been incorporated in the contract." Stone *Principle of Contract Law* (1998) 151-152; Stone *The Modern Law of Contract* (2003) 229; The Law Commission and The Scottish Law Commission *Exemption Clause Second Report* (Report No 69 1976) 16.

²⁴⁷ The Law Commission and The Scottish Law Commission *Exemption Clauses Second Report* (Report No 69 1975) 19.

The commission consequently resolved:

- (1) Exemption clauses, exempting contracting parties from liability for negligence, are, in many cases, a social evil.
- (2) The powers at the disposal of the courts for dealing with such clauses showed that they were far from adequate.
- (3) The case for some stricter form of control was indicated.

The salient factors impacting upon the resolution can briefly be stated as follows:

- (1) Although the doctrine of freedom to contract has entrenched itself in common commercial practise in England and Scotland, an unlimited or unrestricted freedom is likely to operate unreasonably and, in many instances, they operate against the public interest.
- (2) The unreasonableness which exclusionary clauses bring, stem from contracting parties remaining ignorant until it is too late. Moreover, he may not have sufficient bargaining strength.
- (3) Parties, especially in standard form contracts, often bargain from a position of inequality or insufficient bargaining strength. This is often abused by the stronger contracting party.
- (4) Exemption clauses may take away rights where social policy requires that a party should be given those rights.
- (5) Despite the courts applying common law practises, rules of construction to override the harshness of exemption clauses, the differences of judicial opinion have led to inconsistencies which, in time, showed up the lack of power possessed by the courts in dealing with exemption clauses.²⁴⁸

The Commission concluded that a general scheme of control was needed and that it ought

²⁴⁸ The Law Commission and the Scottish Law Commission *Exemption Clauses Second Report* (Report No 69 1975) Paras 38-39.

to take the form of a reasonableness test.²⁴⁹

The Commission also concluded that, in some instances, there ought to be control in the form of a complete ban on such exemptions, whilst, in commercial contracts there should be selective control instead of outright control.

Instances in which the commission recommended that there be an outright ban on clauses totally excluding liability, include, excluding liability for death or personal injury due to negligence. The primary reasons advanced there-for by the commission are that: "*A civil society should attach greater importance to human person than to property*" and "*to permit a person who owes such a duty to contract out of liability for the breach of it, is tantamount to giving him a license to behave carelessly. This, it may be said, is unjust and socially inexpedient; unjust because it deprives the person to whom the duty is owed of a right he is legally and morally entitled to; socially inexpedient because it tends to reduce standards of care and competence.*"²⁵⁰

Consequently, the British parliament stepped in and legislated the *Unfair Contract Terms Act 1977*, as well as the *Unfair Terms in Consumer Contract Regulations 1994*. This legislation significantly affected exclusionary clauses in England, especially exclusion of liability for negligence. The effect of the introduction of the said legislative measures is said to influence the courts in this way, namely, unless a clause purporting to exclude negligence complies with the requirements of reasonableness, the courts are obliged to declare clauses to the contrary, void.²⁵¹

In so far as the exclusion of liability for negligent acts resulting in death or personal injury is concerned, the Act places a prohibition on the exclusion or restriction of liability for death or personal injury resulting from negligence, ensuring that a claim for damages under these circumstances remains an inalienable right.²⁵²

²⁴⁹ The Law Commission and the Scottish Law Commission *Exemption Clauses Second Report* (Report No 69 of 1975) Para 188.

²⁵⁰ The Law Commission and the Scottish Law Commission *Exemption Clauses Second Report* (Report No 69 1975) Par 54.

²⁵¹ *The Unfair Contract Terms Act 1977* S11(1); Stone *The Modern Law of Contract* (2003) 229; McKendrick *Text, Cases and Materials* (2003) 185-186; Stone *Principles of Contract Law* (1998) 151-152; Beatson *Anson's Law of Contract* (2002) 441-442; Poole *Textbook on Contract Law* (2004) 208; Beale "Unfair Contract Terms Act 1977" *British Journal of Law and Society* Vol. 5 No 1 (Summer 1978) 114, 117-119; O'Sullivan and Hilliard *The Law of Contract* (2004) 270; Treitel *The Law of Contract* (2003) 222.

²⁵² Sec 2(1) of the *Unfair Contract Terms Act* (1977).

Besides the *Unfair Contract Terms Act* 1977, as well as the *Unfair Terms in Consumer Contract Regulations* 1994, which give guidance to the English Courts in deciding the validity of exclusionary clauses in medical contracts, should such a situation ever arise, the English *Human Rights Act* 1998, it is submitted, will also influence judicial thinking. The *Human Rights Act* 1998, besides its protection of individual human rights in the United Kingdom in general, has been designed to develop the common law in a way which is compatible with the European convention.²⁵³ Any conduct by a public authority in contravention of the convention, will be unlawful in terms of the *Human Rights Act* 1998.

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In so far as the practise of medicine is concerned, decisions taken by public authorities, including doctors and hospitals, must be made on the basis of current ethical standards and in compliance with the provisions of the *Human Rights Act*.²⁵⁵

The effect of the adoption of the *Human Rights Act* 1998 amounts to this, namely, the United Kingdom courts and tribunals are required to take account of the *Human Rights Act* and ensure that the development of the common law is compatible with the European Convention Rights. As the convention is described as a "living instrument" any legal issue must be interpreted in the light of the present day limitations, reflecting the changing social attitudes, which include patient expectations and ethical standards.²⁵⁶

11.3.3 UNITED STATES OF AMERICA

11.3.3.1 Legal Writings

In America, as was the position in Great Britain, standard form contracts, especially, since the era of industrialization and the expanding use of mass transportation, became the order

²⁵³ See the discussion of Murray Hunt "The horizontal effect of the Human Rights Act retrieved from "http://ea.wikipedia.org/wiki/human_rights_act_1998". See also the discussion of the Committee on Medical Ethics: British Medical Association. The impact of the Human Rights Act 1998 on medical decision making. London: British Medical Association 2000.

²⁵⁴ Section 6(1) of the *Human Rights Act* 1998. Public authority include any institution or person "*whose functions are functions of public nature*". Section 6(3) (b).

²⁵⁵ See the Committee on Medical Ethics, British Medical Association. The impact of the *Human Rights Act* 1998 on medical decision making. London: British Medical Association 2000.

²⁵⁶ See the Committee on Medical Ethics: British Medical Association. The impact of the Human Rights Act 1998 on medical decision making. London: British Medical Association 2000.

of the day.²⁵⁷

Consequently, standard form contracts or as it is also known, contracts of adhesion, are to be found in all walks of life in America today, ranging from commerce, insurance, transport, communications, public services for example warehousing, garage-keeping, parking etc.²⁵⁸

Although these types of contracts have brought with them distinct advantages, *inter alia*, controlling risks in insurance contracts, providing consistency in respect of contracts generally, saving on expense in drafting individual contracts etc,²⁵⁹ nonetheless, they have not escaped criticism from the legal writers and the courts alike. Some of the main strands of criticism include, they are drafted by the party with the stronger bargaining power, most of the terms are not subject to negotiation or bargaining, unfair terms are imposed in adhesion contracts over which the weaker contracting party has no control; often harsh and unfair terms are included in these type of contracts which are then hidden in a maze of fine print of which the unsophisticated, poor customer is expected to make himself aware.²⁶⁰

One of the most common abuses in standardized or adhesive contracts is the unfair use of exclusionary clauses or disclaimers of warranties and limitation of remedies.²⁶¹

Exclusionary clauses or disclaimers are widely recognised and used in America. Not only do they have a long history, exculpatory clauses or exclusionary clauses continue to be used in the automobile industry, consumers' credit transactions, the insurance industry etc.²⁶²

A striking characteristic of these types of clauses is that they are utilized to exclude unforeseen risks, exclude one of the contracting parties against liabilities and even to exempt sellers from essential obligations of such transactions.²⁶³

²⁵⁷ Deutsch *Unfair Contracts* (1977) 2; Kessler "Contracts of Adhesion - Some thoughts about freedom of contract" 43 *Colum.L.Rev* 629, 631-33; 640-41 (1943); Summers and Hillman *Contract and Related Obligations: Theory, Doctrine and Practise* (1987) 583.

²⁵⁸ Williston *Contracts* (1936 with 1865 cumulative supplement) Vol. 6 Para 1751C quoted in Von Hippel. "The control of exemption clauses - A Comparative Study" *International and Comparative Law Quarterly* (Vol. 16) July 1967 591 at 599; Summers and Hillman (1987) 584.

²⁵⁹ Summers and Hillman (1987) 584; Deutsch (1977) 1-2.

²⁶⁰ Deutsch (1977) 1-5; Summers and Hillman (1987) 584.

²⁶¹ Deutsch (1977) 8.

²⁶² Deutsch (1977) 8-9.

²⁶³ Deutsch (1977) 8-9.

It is especially in a variety of consumer and commercial transactions and personal injury cases where liabilities and risks are exempted, that these types of contracts have received their greatest criticism.²⁶⁴

During the pre-code era there was no actual doctrine designed to deal specifically with the deficiencies and unfairness which standardized contracts, incorporating exclusionary clauses or indemnity clauses, bring. Traditional defences, such as lack of mutual assent (due to fine print), lack of mutuality, failure of consideration, defects in formation of the contract, public policy, fraud, duress, interpretation and construction would be invoked to invalidate unfair standardized contracts.²⁶⁵

It was especially public policy which was often used to invalidate clauses of waiver or exclusionary clauses. Its use was, however, severely restricted due to the lack of clear rules of application, matched by the process that "*[public police] is a very unruly horse; and when once you let astride it you never know where it will carry you.*"²⁶⁶

Although methods of interpretation and construction were adopted to invalidate or restrict unfair disclaimers, they were also applied inconsistently.²⁶⁷

It is suggested by *Deutsch*²⁶⁸ that the means used to overcome unfairness in these types of contracts, suffered from several defects and were insufficient to protect the weaker party in these types of contracts.

Other problems encountered, included, the use of these tools resulted in the undermining of the stability and certainty of the defences employed. The interpretation and construction tools were so manipulated, that they would distort the failure of traditional contract doctrines, so much so that, they were almost endangered.²⁶⁹

²⁶⁴ Deutsch (1977) 9.

²⁶⁵ Deutsch (1977) 11.

²⁶⁶ Deutsch (1977) 13.

²⁶⁷ Deutsch (1977) 14-15; Summers and Hillman (1987) 585; Kessler (1943) 629 at 631-633, 640-641.

²⁶⁸ *Unfair Contracts* (1977) 15.

²⁶⁹ Deutsch (1977) 16; Summers and Hillman (1987) 585; Kessler (1943) 629 at 631-633, 640-641.

Llewellyn²⁷⁰ in this regard wrote:

*"The difficulty with these techniques of ours is threefold. First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draughtsman to recur (sic) to the attack. Give him time and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction; that of making out for any type of transaction what the minimum decency are which a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type. Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts of true construction, later efforts to get at the truth of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools."*²⁷¹

The inadequacy of the traditional defences to provide a solution to the deficiencies of these types of contracts gave impetus to the evolution of the doctrine of unconscionable-ness in the code.²⁷²

Before the code was introduced however, the traditional thinking had been that disclaimers in adhesion contracts were enforced upon the contracting parties merely on the basis of freedom of contracts, notwithstanding the fact that, upon closer examination, it might have revealed their unfair nature.²⁷³ Generally then, exemption clauses were accepted and enforced, save for those clauses adopted in contracts where a public service is rendered or a human safety requirement is violated.²⁷⁴

Put differently, where the type of disclaimer or exculpatory clause did not adversely affect the public interest, they were generally accepted. But, despite this, lip service had been paid to the doctrine of freedom of contract, contracting parties; especially the weaker parties, were protected against unfair exemption clauses. The courts, during the pre-code era, often adopted covert techniques in exercising judicial control over these types of

²⁷⁰ Llewellyn, Book Review, 52 *Harv.L.Rev* 700, 703 (1938-39).

²⁷¹ Llewellyn, Book Review, 52 *Harv.L.Rev* 700, 703 (1938-39).

²⁷² Deutsch (1977) 18-19.

²⁷³ Deutsch (1977) 20; Sales "Standard form contracts", 16 *Mod.L.Rev* 318, 320 (1953); Lenkoff "Contracts of Adhesion and the Freedom of Contract: A Comparative study in the light of American and Foreign Law", 36 *TUL.L.Rev* 481 (1960).

²⁷⁴ Annotation (1938) 117 ALR Paras 42, 45, 48, Williston (1936) with cumulative supplement Vol 6 Para 239; P4968-4969.

clauses.²⁷⁵

Besides protecting contracting parties against agreements arising from contracts which contain exclusionary clauses, which violate public duties as aforementioned, similarly, where there was an unequal bargaining power, public interest called for the rejection of an exculpatory clause exacted by the dominant party.

In time, unconscionable-ness, often influenced by a prodigious amount of bargaining power on behalf of the stronger party, became a factor often considered by the courts to declare unjust contract provisions unenforceable.²⁷⁶

In determining the validity of an exculpatory agreement or disclaimer, which is made part of a contract, much, therefore, depends upon the positions of the contracting parties. If they do not stand on a footing of equality, this may very well influence the courts in declaring these types of clauses invalid.²⁷⁷

In so far as certain type of clauses are concerned, it is especially Furrow et al,²⁷⁸ who, with reference to the case of *Tunkle v Regents of the University of California*,²⁷⁹ denounce waivers of liability and other attempts at exculpating health care providers from liability. Reasons advanced by the authors for such a standpoint include; the vulnerability of patients, the anxious state they are often in when entering the hospital and the unfairness in trading-off the patient's common law right to sue in exchange for health care. For a more comprehensive discussion on the American academic approach, as well as the courts attitudes towards waivers in medical contracts, see Chapter 14.

The trend to exercise judicial control of exemption clauses continued and is favoured by the *Uniform Commercial Code*, which expressly empowers the courts to strike down "unconscionable" clauses.

²⁷⁵ Von Hippel (1967) 600; Deutsch (1977) 20-21.

²⁷⁶ Williston (1938) with cumulative supplement (1966) Para 1741; Von Hippel (1967) 699; Deutsch 20-21.

²⁷⁷ Williston (1938) with cumulative supplement (1966) Paras 1715C, 1851B stated:
"A promise not to sue for the future damage caused by simple negligence may be valid. Such bargains are not favoured, however, and, if possible, bargains are construed not to confer this immunity".

²⁷⁸ *Health Law* (1995) 256.

²⁷⁹ 32 Cal. RPTR. 33, 383 P.2d 441 (Cal. 1963).

The *Uniform Commercial Code* (UCC) of the United States of America, was approved of in 1952, amended and adopted since then, by all of the United States, except Louisiana. S2-30 serves as one of the earliest legislative attempts to give courts a general discretionary standard by which to judge the fairness of a contract or its terms. Section 2-302(1) provides:

"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 an unconscionable result."

Other attempts made to protect the public against unfair terms in exculpatory or indemnity clauses includes the intervention in the *Restatement of the Law of Contracts*,²⁸⁰ Section 575, *inter alia*, provides as follows:

- "(1) A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal and a bargain for exemption from liability for the consequences of negligence is illegal if:
- (a) The parties are employer and employee and the bargain relates to negligent injury of the employer in the course of the employment, or
 - (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.
- (2) A bargain by a common carrier or other person charged with a duty of public service limiting to a reasonable agreed valuation the amount of damages recoverable for injury to property by a non-wilful breach of duty is lawful."²⁸¹

From the aforementioned it is clear that an employer is not allowed to exonerate himself from liability for negligence to an employee. The rationale for this prohibition is said to be based on the inequality of the bargaining strength of the employer and employee.²⁸²

Likewise, in the so-called carrier cases, owners of carriers cannot relieve themselves from loss resulting from the negligence of themselves or their agents. This is based on public service considerations, human safety requirements and the relative inequality of bargaining power.²⁸³

11.3.3.2 Case Law

²⁸⁰ *Restatement (Second) of Contracts* (1981).

²⁸¹ *Restatement (Second) of Contracts* (1981).

²⁸² Von Hippel (1967) 599.

²⁸³ Von Hippel (1967) 599.

In so far as the status of exclusionary is concerned, there is no unanimity in the courts functioning in the different states of America. The position is very aptly described, in a number of cases, in different states. In *McCutcheon v United Homes Corp.*²⁸⁴ the Supreme Court of Washington after considering, *inter alia*, the importance of "freedom of contract" and the recognition exculpatory clauses had received from legal writers, including, the eminent writer, Williston, 6 Williston - *A Treatise on the Law of Contract* 1951 C P.4968 (Rev ed 1938) and the courts alike, as early as 1936 and 1947, in the cases of *Broderson v Rainier Nat'l Park Co* 187 Wash. 399, 60 P.2d 234 (1936) and *Griffiths v Broderick, Inc* 27 Wash 2d 901, 182 P.2d 18 (1947), respectively, as well as the negative influence of the unequal bargaining position of the contracting parties, especially, the weaker and further, the danger exclusionary clauses may hold in causing standards established by law to be lowered, nonetheless, with reference to the so-called "majority rule" in cases, stated: "It is safe to say, however, that there is no true majority rule. There are only numerous conflicting decisions, decisions concerned with contracts of indemnity, cases relating to property damage under business leases, and a disposition of the courts to emasculate such exculpatory clauses by means of strict construction."

And further: "From this one can reasonably infer that even though such clauses are recognized by some courts, a great number have regarded them with disfavour."²⁸⁵

The unanimity of the status of exculpatory clauses, albeit in the form of a warranty in an automobile manufacturing contract, was also dealt with in *Henningsen v Bloomfield Motors Inc*,²⁸⁶ in which the Supreme Court of New Jersey stated:

"Although the courts, with few exceptions, have been most sensitive to problems presented by contracts resulting from gross disparity in buyer-seller bargaining positions, they have not articulated a general principle condemning, as opposed to public policy, the imposition on the buyer of a skeleton warranty as a means of limiting the responsibility of the manufacturer. They have endeavoured thus far to avoid a drastic departure from age-old tenets of freedom of contract by adopting doctrines of strict construction, and notice and knowledgeable assent by the buyer to the attempted exculpation of the seller. 1 *Corbin, supra*, 337; 2 *Harper and James supra*, 1590; *Prosser, "Warranty of Merchantable Quality"*, 27 *Minn.L. Rev* 117, 159 (1932). Accordingly to be found in the cases are statements that disclaimers and the consequent limitation of liability will not be given effect if "unfairly procured", if not brought to the buyer's attention and he was not made understandingly aware of it; or if not clear and explicit"²⁸⁷

²⁸⁴ 79 Wash. 2d 443, 486 P.2d 1093 (1971).

²⁸⁵ *McCutcheon v United Homes Corp* 79 Wash 2d 443, 486 P.2d 1093 (1971).

²⁸⁶ 32 N.J. 358, 161 A. 2d 769 (1960).

²⁸⁷ *Henningsen v Bloomfield Motors, Inc* 32 N.J. 358, 161 A.2d 69 (1960).

The position is also expressed as follows in *Le Vine et al v Shell Oil Company*:²⁸⁸

*"Indemnification clauses have traditionally plagued both drafters and courts alike. Since one who is actively negligent has no right to indemnification unless he can point to a contractual provision granting him that right, a rule has evolved under which courts have carefully scrutinized these agreements for an expression of an intent to indemnify and for some indication of the scope of that indemnification."*²⁸⁹

The influence and recognition of exculpatory clauses in, especially, commercial and business transactions is expressed in *Kuzmiak v Brookchester Inc*²⁹⁰ when it is stated:

*"The use of exculpatory clauses in commercial and business transactions as a device for release from liability is widespread, and the validity of a particular contract depends upon many factors."*²⁹¹

Consequently the court identified "public interest" as a prominent factor influencing the validity and enforceability of exclusionary contracts.

In *Chazen v Trail Mobile*,²⁹² the Supreme Court of Tennessee identified the freedom of contract as rationale for the recognition of exculpatory clauses when holding:

*"There is no disagreement within the various courts and jurisdictions over the fact that parties may contract to absolve themselves from liability, and this rule is applicable, and has been applied to the field of landlord and tenant. It has often been held that public policy is best served by freedom of contract and this freedom is prompted by allowing the parties to limit their liability for fire damage under lease agreements. Hartford Fire Ins Co v Chicago M and St P.R. Co 175 U.S. 91, 20 S.Ct 33, 44 L.Ed 84; Sears Roebuck and Co Poling, 248 Iowa 582, 81 N.W. 2d 462."*²⁹³

The sanctity of contracts and the enforcement of contracts entered into freely and voluntarily, were recognized in *Chicago and North Western Railway Company v Rissler and McMurray Construction Co and Truck Insurance Exchange*,²⁹⁴ wherein it was held:

"Turning now to the question of the Railway Company indemnifying itself against its own negligence, an agreement to place another person at the mercy of one's own negligence is not ipso facto against public policy."

²⁸⁸ 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971).

²⁸⁹ *Levine et al v Shell Oil Company* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971).

²⁹⁰ 33 N.J. Super 575 111 A 2d 425 (1955).

²⁹¹ *Kuzmiak v Brookchester Inc* 33 N.J. Super 575 111 A. 2d 425 (1959).

²⁹² 215 Tenn. 87, 384, S.W. 2d 1 (1964).

²⁹³ *Chazen v Trail Mobile* 215 Tenn. 87, 384 S.W. 2d 1 (1964).

²⁹⁴ 184 F. Supp 98 (1960).

12 Am.Jur. Sec 181 page 282. Courts are cautious in voiding a contract on the ground that it violates public policy. The judicial function is to 'maintain and enforce contracts rather than to enable parties thereto to escape from their obligations on the pretext of public policy unless it clearly appears that they contravene public right or the public welfare'. Courts will not extend the public policy rule arbitrarily. Here the parties have entered into their own agreement freely and voluntarily." ²⁹⁵

The rationale underlying the argument for enforceability of exclusionary clauses based upon the doctrine of freedom of contract also received the attention of the Supreme Court of Tennessee in the case of *Crawford v Buckner*, ²⁹⁶ in which an exculpatory clause in the context of a landlord-tenant relationship received the courts scrutiny.

Referring to exculpatory clauses in general, the Supreme Court of Tennessee stated:

"The rationale underlying the argument for enforceability of such clauses has often been based upon the doctrine of freedom of contract. Courts employing that reasoning have said: that the public policy in apparent conflict with the freedom of contract argument in real-estate lease exculpatory clause cases, namely, that a landlord should be liable for the negligent breach of a duty which is owed to his tenant, is subservient to the doctrine that a person has the right to freely contract about his affairs. Some cases, especially the older ones, have reasoned that the relationship of landlord and tenant is in no event a matter of public interest, but is purely a private affair, so that such clauses cannot be held void on purely public policy grounds. John D Perovich, Annotation, Validity of Exculpatory Clause in Lease Exempting Lessor from Liability, 49 A.L.R. 3d 321, 325 (1973)"

But, cautions the court: "*However, because of the burden-shifting effect of such clauses which grant immunity from the law, it is not surprising that their validity has been challenged and that courts have reached different conclusions as to their enforceability. As early as 1938, Williston recognized that while such exculpatory clauses were recognized as "legal", many courts had shown a reluctance to enforce them. Even then, courts were disposed to interpret them strictly so they would not be effective to discharge liability for the consequences of negligence in making or failing to make repairs. Williston, A Treatise on the Law of Contracts <section> 1751 p. 4968 (Rev Ed 1938)).*

McCutcheon v United Homes Corp. 79 Was. 2d 443, 486 P.2d 1093, 1095 (1971)" ²⁹⁷

The recognition of the validity of exculpatory clauses and indemnity contracts is expressed

²⁹⁵ *Chicago and North Western Railway Company v Rissler and McMurray Construction Co and Truck Insurance Exchange* 184 F. Supp 98 (1960); See also *Occidental Savings and Loan Association v Venco Partnership* 206 N.E.B. 469, 293 N.W. 2d 843 (1980); *Equitable Loan and Security Co et al v Waring et al* 62 L.R.A. 931 117 Ga 599, 44, S.E. 320, 97 AM ST 173.

²⁹⁶ 839 S.W. 2d 754 (1992).

²⁹⁷ *Crawford v Buckner* 893 S.W. 2d 754 (1992).

by the Supreme Court of Minnesota in the case of *Schlobohm et al v Spa Petite Inc*,²⁹⁸ in which the court stated:

"When considering exculpatory clauses contained in construction contracts and commercial leases, we have held that parties to a contract may, without violation of public policy, protect themselves against liability resulting from their own negligence. (FN4) In so doing, we have noted that the public interest in freedom of contract is preserved by recognizing such clauses as valid. Northern Pacific Railway Co v Thornton Brothers Co 206 Minn 193, 196, 288 N.W. 226, 227 (1939)"

But, warns the court: *"Even though we have recognized the validity of exculpatory clauses in certain circumstances, they are not favoured in the law. A clause exonerating a party from liability will be strictly construed against the benefited party. If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, wilful or wanton acts, it will not be enforced. Thus, we held in Farmington Plumbing and Heating Co v Fischer Sand and Aggregate Inc 281 N.W. 2d 838, 842 (Minn. 1979), that the indemnity clauses were to be strictly construed against the purported indemnitee, and that indemnity will not be created by implication. We extended that rule of strict construction to exculpatory clauses in Solidification Inc v Minter 305 N.W. 2d 871, 873 (Minn. 1981)"*

Referring to the position of exculpatory clauses in Health Spa contracts in other jurisdictions, the court held:

"Though we have not heretofore addressed the issue, courts of other jurisdictions have held such clauses invalid if they purport to exonerate a party from wilful or wanton recklessness or intentional torts. See e.g. Jones v Dressel, Colo. 623 P.2d 370, 376 (1981); Winterstein v Wilcom 16 Md.App. 130, 136, 293 A.2d 821, 824-25 (1972)."
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The status and effect of exclusionary clauses, besides the freedom of contract is also influenced by other factors including public policy, public interests, as well as the equality of bargaining power.

In the first instance the American courts have stated, unreservedly, that they will only declare contracts in general to be void as against public policy, where the contract or certain provisions of the contract, are *"clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical,"*³⁰⁰ or *"in their tendency, are so*

²⁹⁸ 326 N.W. 2d 920 (1982).

²⁹⁹ *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982).

³⁰⁰ *Oregon R.R. and Navigation Co v Dumas* (C.C.A.) 181 F, 781; *North Cutt et ux v Highfeld et al* 9 S.W. 2d 209, 225, 456, 9 S.W. 2d 209 (1928); *Styles v Lyon* 87 Conn. 23, 86 A. 564 (1913); *Twin Pipe Line Co et al v*

inimical to the public interest " 301

It is, especially, in hospital contracts containing exculpatory provisions that the American courts have frequently held that as the exculpatory provisions involve the public interest they will not stand. ³⁰²

In the second instance, as previously indicated, "public interest" is an influencing factor in determining the validity and enforceability of exclusionary clauses. But, in order to qualify as an improper transaction, it has been stated before that "the public interest is not well served by indulging baseless suspicions of wrongdoings", there must be a "clear and manifest injury to the interests of the state" or "injurious to the public interests or the

Harding Glass Co 283 U.S. 353, 51, S.Ct 476; *Smith v Simon* 224 So. 2d 565 (1969); *Martin v Allianz Insurance Company of North America* 573 N.W. 2d 823 (1998); *Wunchel Law Firm, P.C. v Clabaugh* 291 N.W. 2d *In re Estate of Barnes*, 256 ICWA at 1052, 128 N.W.2d at 192; *Walker v American Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Sup. 444 (1976); *Sunny Isles Marina Inc v Adulami et al* 706 So. 2d 920 (1998); *Foster v Matthews* 714 So. 2d 1215 (1998); *Swift v Chick et al* 242 A.D. 2d 188 674 N.Y.S. 2d 17 (1998); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Smit v Seaboard Coast Line Railroad Company* 639 F. 2D 1235 (1981); *United States v United States Cartridge Co* 198 F. ed 456 (1952); *Messersmith v American Fidelity Co* 232 N.Y. 161, 33 N.E. 432 (1921); *Shell Oil Company v Viscontto* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321; *Krohnert Yacht System Hawaii Inc* 4 Haw.App. 190, 664 P.2d 738 (1983); *Chicago and North Western Railway Company v Rissler and McMurray* 184 F. Supp. 98 (1960); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980); *Equitable Loan and Security Co et al v Waking et al* 44 S.E. 320 (1903); *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Banfield v Louis Cat Sports, Inc* 589 So. 2d 441 (1991); *Olson v Molzen* 558 S.W. 2d 429 Tenn (1977); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982).

³⁰¹ *North Cutt et ux v Highfill et al* 8 S.W. 2d 209 225 456 (1928); *Anderson v Blair* 202 ALA 209, 80, So. 31 (1918); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177, S.W. 2d 545 (1944); *Bay Tucker and Sons Inc v GTE Directors Sales Corporation* 253 Neb 458, 571 N.W. 2d 64 (1997); *Allan v Snow Summit Inc* 51 Cal.App 4th 1358; 59 Cal Rptr 2d 813 (1956); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093; *Henningsen v Bloomfield Motors, Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Kuzmiak v Brookchester Inc* 33 N.I. Super 575 A.2d 425, 575, 111 (1955); *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Globe Home Improvements Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc* 116 N.J.L. 168, 182 A; *Banfield v Louis Cat Sports Inc* 589, So. 2d 441 (1991); *Olson v Molzen* 558, S.W. 2d 429 Tenn (1977); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A.2d 164 (1977).

³⁰² *Belshaw v Feinstein and Levin* 258 Cal. App. 2d 711, 65 Cal Rptr 788 (1968); *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990); *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory Univ v Porubiansky* 248 Ga. 391, 282 S.E. 2d 903 (1981); *Tunkl v Regents of University of California* 60 Cal. 2d 92, 98-101, 32 Cal. RPTR. 33, 37-38, 383 P. 2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891; *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, 381 A.2d 164 (1977).

welfare of the general public." ³⁰³

Factors influencing public interests include, "inequitable harsh and oppressive terms; ³⁰⁴ "the loss of important rights"; ³⁰⁵ the activity complained of concerns business of a type generally suitable for public regulations or the party seeking exculpation is engaged in performing service of great public performance and of practical necessity for some members of public. ³⁰⁶ The contract, transaction or course of dealing, is prohibited under a constitutional provision, statutory provision, or prior judicial decision. ³⁰⁷ The statutory provision referred to encompasses a public duty of care owed to members of the community. It is especially in the so-called hospital contracts containing exculpatory

³⁰³ *Ingalls v Perkins* 263 P. 761 (1928); *Martin v Allianz Life Insurance Company* 573 N.W. 2d P23 (1998); *Styles v Lyon* 86 A. 564 (1913); *Anderson v Blair* 80 So. 31 (1918); *Twin City Pipe Line Co v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Banfield v Louis Cat Sports Inc et al* 589 So. 2d 441 (1991); *Walker v American Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 57 N.W. 2d 64 (1997); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Dessert Seed Co In v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970); *Occidental Savings and Loans Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980).

³⁰⁴ *Styles v Lyon* 86 A.564 (1913); *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1987); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Williams v Walker-Tomas Furniture Co* 32 N.J. 97 404, 161 A.2d at 95.

³⁰⁵ *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958).

³⁰⁶ *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F.Supp 914 (1979); *Tunkl v Regents University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

³⁰⁷ *Banfield v Louis Cat Sports Inc* 589 So.2d 441 (1991); *Stack v State Farm Mutual Automobile Insurance Company* 507 So. 2d 617 (1987); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353; 51 S.Ct 476 (1931); *Smith v Simon* 224 So. 2d 565 (1969); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Singer v Bulk Petroleum Corp* 9 F.Supp 2d 916 (1998); *Hunter v American Rentals Inc* 189 Kan. 615, 371, P.2d 131 (1962); *Dessert Seed Co Inc v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970); *Batson-Cook Co v Georgia Marble Setting Co* 112 Ga. App. 226, 229-30, 144 S.E. 2d 547 (1965); *Smith v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Continental Corporation v Gowdy et al* 283 Mass. 204, 186 N.E. 244 (1933); *United State v United States Cartridge Co* 198 F. 2d 456 (1952); *Mayford Fabrics v Henly* 48 N.J. 483; 226 A.2d 602 (1967); *McCutcheon v United Homes Corp* 75 Wash. 2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161, A.2d 69; *Levine v Shell Oil Company and Visconte* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); *Krohnert v Yacht Systems Hawaii Inc* 4 Haw. App 190, 664 P.2d 738 (1983); *Chicago and North Western Railway Company v Rissler* 184 F. Supp 98 (1960); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc* 252 Pa, Super 162, 381 A.2d 164 (1977); *Tatham v Hoke* 469 F. Supp 914 (1979); *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 60 Cal 2d 92 32 Cal. RPTR 33, 383 P. 2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

provisions that it has, frequently, been held that professional standards cannot be compromised, as they negatively impact on public interests. Instead, what is required is to provide health care in a safe and professional manner.³⁰⁸

Thirdly, the equality of bargaining power has become a very prominent factor, in especially the more modern era in America, which greatly influences the status of exculpatory provisions in contracts. Factors which play a major role in determining whether exculpatory provisions, included in contracts, are invalid and unenforceable due to the inequality of bargaining power, include, the unconscionable-ness of certain agreements;³⁰⁹ the type of adhesion agreements;³¹⁰ the monopolous position, especially, the stronger contracting party occupies in the contractual relationship.³¹¹

Other factors influencing the status of exculpatory clauses or exculpatory contracts in general, include, illegal or immoral contracts;³¹² contracts tainted with fraud;³¹³ cases

³⁰⁸ *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory University v Porubiansky* 248 Ga 351, 282, S.E. 2d 903; *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tunkle v Regents of the University of California* 60 Cal 2d 92, 32 Cal. Rptr 33, 383 P.2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

³⁰⁹ *Williams v Walker-Thomas Furniture Co* 350 F.,2d 445 D.C. Cir (1965); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Horner v Boston Edison Company* 45 Mass. App Ct 139, 695 N.E. 2d 1093 (1998); *Central Alarm of Tucson v Ganem* 116 Aliz 74, 567 P.2d 1203 (1977); *Allan v Snow Summit Inc* 51 Cal App 4th 1358, 59 Cal Rptr. 2d 813 (1996); *Weaver v American Oil Co* 257 Ind 458, 276 N.E. 2d 144 (1971); *Henningsen v Bloomfield Motors Co* N.J. 358, 161 A.2d 69 (1960); *Mayfair Fabrics v Henley* 48 N.J. 483, 26 A.2d 602 (1968); *Leidy v Desert Enterprises Inc d/b/a Body Health Spa* 252 P.A. Super 162, 381 A.2d 164 (1977).

³¹⁰ *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Allan v Snow Summit Inc* 51 Cal App 4th 1358, 59 Cal Rptr 2d 813 (1996); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486 P.2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A 2d 69 (1960); *Levine v Shell Oil Company and Visconte* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Cudnik v William Beaumont Hospital* 207 Mich Ap 378, 525 N.W. 2d 891; *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tatham v Hoke* 469 F. Supp 914 (1979); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

³¹¹ *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161, A.2d 69 (1960); *Graham v Chicago Rock Island and Pacific Railroad Company* 431 F.Supp 444 (1976); *Kuzmiak v Brookchester Inc* 33 N.J. Super 575, 111 A. 2d 425 (1955); *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Olson v Molzen* 558 S.W. 2d 429 (1977); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308 (1990).

³¹² *Ingalls v Perkins* 263 P. 761 (1928); *Anderson v Blair* 80 So. 31 (1918); *Smith v Simon* 224 So 2d 565 (1969); *Zeitv v Foley* 264 S.W. 2d 267 (1954); *Ryan v Griffen* 199 Va. 891, 103 S.E. 2d 240 (1958); *United States v United States Cartridge Co* 198 F.2d 45 6 (1932).

³¹³ *Zeitv v Foley* 264 S.W. 2d 267 (1954); *Continental Corporation v Gowdy et al* 283 Mass 204, 186 N.E. 244

involving private transactions, provided, they are not opposed to public interests. ³¹⁴

The effect of exculpatory provisions which are found to be contrary to public policy or public interests is that they are regarded as invalid and unenforceable, due to the fact that they are void. ³¹⁵

11.3.3.3 Legal Opinion

Standard form contracts are phenomena that have dominated the American contractual sphere over several decades. They are, today, still found in all walks of life, ranging from commerce, insurance, transport, public services, for example, warehousing, garage-keeping, parking etc. ³¹⁶

Although it is recognized that these types of contracts have brought with them distinct advantages, nonetheless, they have not escaped criticism from the legal writers and the courts alike. The main strands of criticism include, these types of contracts are drafted by the contracting party with the stronger bargaining power, terms are not frequently negotiated, and often unfair terms are imposed upon weaker contracting parties, over which they have no control, often leading to harsh and oppressive consequences. ³¹⁷

The standardized contracts which have, perhaps, received the greatest attention by the American courts is that of exclusionary clauses or disclaimers, be that in consumer

(1933); *United States v United States Cartridge Co* 198 F.2d 456 (1952); *Levine v Shell Oil Company et al and Visconti* 28 N.Y. 2d 205, 269 N.W. 2d 799, 321 N.Y.S. 2d 81 (1971); *Equitable Loan and Security Co et al v Waring et al* 44 S.E. 320 (1903); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Tunkl v Regents of University of California* 383 P.2d 441 (1963).

³¹⁴ *Dixilyn Drilling Corp v Crescent Towing and Salvage Co* 372 U.S. 697, 83 S.Ct. 967, 10 L.E. 2d 78 (1963); *Bisso v Inland Waterways Corp* 349 84, 75 S.Ct 625, 99 L.E.D 911 (1955); *Kansas City Power and Nemark Morning Ledger Co* 111 N.J. Super 104, 267 A.2d 557 (1970) (such clause although not favoured depends on the position of the parties, i.e. special legal relationship and public interest *Ciofalo v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *McCutcheon v United Homes Corp* 79 Wash. 2d 443, 486, P.2d 1093 (1971).

³¹⁵ *Smith v Simon et al* 224 So 2d 565 (1969) (where the principal purpose of the contract is to provide protection to an illegal enterprise); *Zeitv v Foley* 264 S.W. 2d 267 (1954) (the direct object of the contract is to violate the constitution or state statute or some ordinance); *Ryan v Griffin* 199 Va 891, 103 S.E. 2d 240 (1958) (where the contract promotes something immoral like divorce).

³¹⁶ Deutsch *Unfair Contracts* (1977) 2; Kessler "Contracts of Adhesion - Some thoughts about freedom of contract" 43 *Coolum Lire* 629, 631-33; 640-41 (1943); Summers and Hillman *Contract and Related Obligations: Theory, Doctrine and Practice* (1987) 583-584; Williston *Contracts* (1936 with 1865 cumulative supplement) Vol. 6 Para 1751C quoted in Von Hipper "The control of exemption clauses - A Comparative Study" *International and Comparative Law Quarterly* (Vol. 16) July 1967 591 at 599.

³¹⁷ Deutsch (1977) 1-5; Summers and Hillman (1987) 584.

transactions, commercial transactions, be that personal injury cases where liabilities and risks are exempted. Moreover, these types of transactions have often been criticised by the courts.³¹⁸

The position with regard to exclusionary clauses in contract and the different opinions expressed by the American courts are dealt with in a number of cases. Exclusionary clauses had first received recognition as early as 1936 in the case of *Broderson v Rainier National Park Co*³¹⁹ and followed thereafter in the case of *Griffiths v Broderick Inc.*³²⁰

In *Chazen v Trail Mobile*,³²¹ the court, with regard to landlord and tenant contracts, recognised that parties may contract to absolve themselves from liability prior to the Chazen case. The court, in *Kuzmiak v Brookchester Inc.*,³²² recognized the influence of exculpatory clauses in especially, commercial and business transactions. But the court did declare: "..... the validity of a particular contract depends upon many factors" including "public interest" as a prominent factor influencing the validity and enforceability of exclusionary contracts.

There are however, cases in which the courts were very critical of the incorporation of exclusionary contracts in contracts, especially warranties in the manufacturing of automobiles. This formed the subject matter in the case of *Henningsen v Bloomfield Motors Inc.*,³²³ in which the court recognized the inherent danger of the gross disparity in the bargaining position of contractual parties. Accordingly, the court found that disclaimers and the consequent limitation of liability will not be given effect to if unfairly precluded and not brought to the notice of the other contracting party.

This position was followed in the case of *Levine et al v Shell Oil Company*³²⁴ in which the court emphasized that courts should carefully scrutinize these types of agreements.

³¹⁸ Deutsch (1977) 9.

³¹⁹ 187 Wash. 399, 60 P.2d 234 (1936).

³²⁰ 27 Wash. 2d 901, 182 P. 2d 18 (1947).

³²¹ 215 Tenn. 87, 384, S.W. 2d 1 (1964).

³²² 33 N.J. Super 575 111 A 2d 425 (1955).

³²³ 32 N.J. 358, 161 A. 2d 769 (1960).

³²⁴ 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971).



But, there were courts, in this period that used the doctrine of freedom of contract as underlying rationale for recognizing the enforceability of exclusionary clauses.³²⁵

In the case of *Scholobohm et al v Spa Petite Inc*,³²⁶ the court stated that, although exclusionary clauses are widely favoured, nonetheless, where exclusionary clauses violate public policy to protect themselves against liability resulting from their own negligence, they will be invalid.

But the courts have stated, unreservedly, that they will only declare contracts, in general, void against public policy where the contract or certain provisions of the contract are "*clear and free from doubt, and the injury to the public is substantial and not theoretical or problematical*"³²⁷ or "*in their tendency, are so inimical to the public interest*". As there was no other independent doctrine to deal with the deficiencies and unfairness which these type of contracts bring, prior to the inception of the *Uniform Commercial Code*, the traditional defences, such as lack of mutual assent, fraud, duress and especially public policy, were used to invalidate unfair standardized contracts or clauses of waiver or exclusionary

³²⁵ *Chicago and North Western Railway Company v Rissle and McMurray Construction Co and Truck Insurance Exchange* 184 F. Supp 98 (1960); See also *Occidental Savings and Loan Association v Venco Partnership* 206 N.E.B. 469, 293 N.W. 2d 843 (1980); *Equitable Loan and Security Co et al v Waring et al* 62 L.R.A. 931 117 Ga 599, 44, S.E. 320, 97 AM ST 173; *Crawford and Buckner* 839 S.W. 2d 754 (1992).

³²⁶ 326 N.W. 2d 920 (1982).

³²⁷ *Oregon R.R. and Navigation Co v Dumas* (C.C.A.) 181 F, 781; *North Cutt et ux v Highfeld et al* 9 S.W. 2d 209, 225, 456, 9 S.W. 2d 209 (1928); *Styles v Lyon* 87 Conn. 23, 86 A. 564 (1913); *Twin Pipe Line Co et al v Harding Glass Co* 283 U.S. 353, 51, S.Ct 476; *Smith v Simon* 224 So. 2d 565 (1969); *Martin v Allianz Insurance Company of North America* 573 N.W. 2d 823 (1998); *Wunchel Law Firm, P.C. v Clabaugh* 291 N.W. 2d *In re Estate of Barnes*, 256 ICWA at 1052, 128 N.W.2d at 192; *Walker v American Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Graham d/b/a The Graham Seed Company v Chicago, Rock Island and Pacific Railroad Company* 431 F. Sup. 444 (1976); *Sunny Isles Marina Inc v Adulami et al* 706 So. 2d 920 (1998); *Foster v Matthews* 714 So. 2d 1215 (1998); *Swift v Chick et al* 242 A.D. 2d 188 674 N.Y.S. 2d 17 (1998); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Smit v Seaboard Coast Line Railroad Company* 639 F. 2D 1235 (1981); *United States v United States Cartridge Co* 198 F. ed 456 (1952); *Messersmith v American Fidelity Co* 232 N.Y. 161, 33 N.E. 432 (1921); *Shell Oil Company v Viscontto* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321; *Krohnert Yacht System Hawaii Inc* 4 Haw.App. 190, 664 P.2d 738 (1983); *Chicago and North Western Railway Company v Rissler and McMurray* 184 F. Supp. 98 (1960); *Occidental Savings and Loan Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980); *Equitable Loan and Security Co et al v Waking et al* 44 S.E. 320 (1903); *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Banfield v Louis Cat Sports, Inc* 589 So. 2d 441 (1991); *Olson v Molzen* 558 S.W. 2d 429 Tenn (1977); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Kuzmiak v Brookchester* 33 N.J. Super 575, 11, A. 2d 425 (1955); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982).

clauses.³²⁸

The use of public policy was, however, severely restricted, in that there were no clear rules of application, often referred to as were as "*a very unruly horse!*." ³²⁹

Although the courts developed methods of interpretation and construction to invalidate or restrict unfair disclaimers, the inconsistency thereof led legal writers to argue that the measures introduced were insufficient to protect the weaker party in these types of contracts.³³⁰

Though the courts favoured exculpatory clauses in certain circumstances, the courts have been robust in their recognition, in other circumstances, by openly declaring that these types of clauses are not favoured in law.³³¹

The rules of interpretation or construction have been used by the courts to assess whether an exculpatory clause is unfair and against public policy or public interests. Consequently, the courts have held that a clause exonerating a party from liability will be strictly construed against the benefited party. Therefore, if the clause is either ambiguous in scope or purported to release the benefited party for intentional, wilful or wanton acts, it will not be enforced.³³²

But, in time, the courts, during the pre-code era, often adopted techniques in exercising judicial control over these types of clauses. The techniques included the evolution of the doctrine of unconscionable-ness, public duties, the unequal bargaining power of the parties, public interests.³³³

³²⁸ Deutsch (1977) 11.

³²⁹ Deutsch (1977) 13.

³³⁰ Deutsch (1977) 14-15; Summers and Hillman (1987) 585; Kessler (1943) 629, 631-633.

³³¹ *Scholobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982).

³³² *Farmington Plumbing and Heating Co v Fischer Sand and Aggregate Inc* 281 N.W. 2D 838, 842 Minn. 1979; *Solification Inc v Minter* 305 N.W. 2d 871, 873 Minn. 1981; *Scholobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Jones v Dressel, Colo* 623 P.2d 370, 376 (1981); *Winterteem v Wiilcom* 16 MD. App 130, 136, 793 A. 2d 821, 824.

³³³ Deutsch (1977) 18-19; Von Hippel (1967) 600; Williston (1938) with cumulative supplement (1966) Paras 1715C, 1851B provides that where parties do not stand in a footing of equality, this may influence the court in declaring these type of clauses invalid.

The United States of America eventually adopted the *Uniform Commercial Code*³³⁴ which expressly empowers the courts to strike down "unconscionable" clauses. The Act serves as a legislative attempt to give the courts a general discretionary standard by which to judge the fairness of a contract or its terms.³³⁵

Another legislative measure put in place was the restriction of the law of contracts,³³⁶ which also had as its purpose the protection of the public against unfair terms in exculpatory or indemnity clauses.³³⁷

It is especially in hospital contracts containing exculpatory provisions that the American courts have frequently held that, as the exculpatory provisions involve the public interest they will not stand. But, cautions the courts, "public interest" will only be regarded as a defence where "*there is a clear and manifest injury to the interests of the state*" or "injurious to the public interests or the welfare of the general public."³³⁸

There are various factors which influence public interests including the following namely:

³³⁴ Approved in 1952 and amended since on occasions and adopted by most states in the United States of America.

³³⁵ See S2-302(1) which provides that if a 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 the remainder of the contract.

³³⁶ S579 of the *Restatement (Second) of Contracts* (1981) provides for the denoucement of exemption clauses as illegal where there is a wilful breach of duty or a bargain for exemption from liability for negligence in an employer-employee relationship or one of the parties is charged with a duty of public service and the exemption relates to negligence in the performance of the duty or part thereof exempting him/her from compensation or part thereof.

³³⁷ *North Cutt et ux v Highfill et al* 8 S.W. 2d 209 225 456 (1928); *Anderson v Blair* 202 ALA 209, 80, So. 31 (1918); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177, S.W. 2d 545 (1944); *Bay Tucker and Sons Inc v GTE Directors Sales Corporation* 253 Neb 458, 571 N.W. 2d 64 (1997); *Allan v Snow Summit Inc* 51 Cal.App 4th 1358; 59 Cal Rptr 2d 813 (1956); *McCutheon v United Homes Corp* 79 Wash. 2d 443, 486 P. 2d 1093; *Henningsen v Bloomfield Motors, Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Kuzmiak v Brookchester Inc* 33 N.I. Super 575 A.2d 425, 575, 111 (1955); *Ciofalo et al v Vic Tanney Gyms Inc* 10 N.Y. 2d 294, 177 N.E. 2d 925, 220 N.Y.S. 2d 962 (1961); *Globe Home Improvements Co v Perth Amboy Chamber of Commerce Credit Rating Bureau Inc* 116 N.J.L. 168, 182 A; *Banfield v Louis Cat Sports Inc* 589, So. 2d 441 (1991); *Olson v Molzen* 558, S.W. 2d 429 Tenn (1977); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc d/b/a Body Shop Health Spa* 252 Pa. Super 162, 381 A.2d 164 (1977).

³³⁸ *Ingalls v Perkins* 263 P. 761 (1928); *Martin v Allianz Life Insurance Company* 573 N.W. 2d P23 (1998); *Styles v Lyon* 86 A. 564 (1913); *Anderson v Blair* 80 So. 31 (1918); *Twin City Pipe Line Co v Harding Glass Co* 283 U.S. 353, 51 S.Ct 476 (1931); *Banfield v Louis Cat Sports Inc et al* 589 So. 2d 441 (1991); *Walker v American Family Mutual Insurance Company* 340 N.W. 2d 599 (1983); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Tucker and Sons Inc v GTE Directories Sales Corporation* 253 NEB 458, 57 N.W. 2d 64 (1997); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Dessert Seed Co In v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970); *Occidental Savings and Loans Association v Venco Partnership* 206 NEB 469, 293 N.W. 2d 843 (1980).

"inequitable harsh and oppressive terms";³³⁹ "the loss of important rights";³⁴⁰ "the activity complained of concerns business of a type generally suitable for public regulation or the party seeking exculpation performs a service of public interests";³⁴¹ "the contract or transaction is prohibited under a constitutional provision, statutory provision or prior judicial decision."³⁴² The statutory provision referred to, encompasses a public duty owed to members of the community. In this regard the courts have held that professional standards, in especially medical care, cannot be compromised as they impact on public interests.³⁴³

11.4 Summary and Conclusions

Ever since their first application in Roman law, exclusionary clauses have, throughout the ages, had a major impact on the Law of Contract. With the advent of commerce and the

³³⁹ *Styles v Lyon* 86 A.564 (1913); *Diamond Match Co v Roeber* 106 N.Y. 473, 13 N.E. 419 (1987); *Martin v Allianz Life Insurance Company of North America* 573 N.W. 2d 823 (1998); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Williams v Walker-Thomas Furniture Co* 32 N.J. 97 404, 161 A.2d at 95.

³⁴⁰ *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161 A.2d 69 (1960); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958).

³⁴¹ *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F.Supp 532 (1958); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F.Supp 914 (1979); *Tunkl v Regents University of California* 383 P.2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

³⁴² *Banfield v Louis Cat Sports Inc* 589 So.2d 441 (1991); *Stack v State Farm Mutual Automobile Insurance Company* 507 So. 2d 617 (1987); *Twin City Pipe Line Co et al v Harding Glass Co* 283 U.S. 353; 51 S.Ct 476 (1931); *Smith v Simon* 224 So. 2d 565 (1969); *Zeitz v Foley* 264 S.W. 2d 267 (1954); *Home Beneficial Ass'n v White* 180 Tenn. 585, 177 S.W. 2d 545 (1944); *Powell v American Health Fitness Centre of Fort Wayne Inc* 694 N.E. 2d 757 (1998); *Singer v Bulk Petroleum Corp* 9 F.Supp 2d 916 (1998); *Hunter v American Rentals Inc* 189 Kan. 615, 371, P.2d 131 (1962); *Dessert Seed Co Inc v Drew Farmers Supply Inc* 248 Ark. 858, 454 S.W. 2d 307 (1970); *Batson-Cook Co v Georgia Marble Setting Co* 112 Ga. App. 226, 229-30, 144 S.E. 2d 547 (1965); *Smith v Seaboard Coast Line Railroad Company* 639 F.2d 1235 (1981); *Continental Corporation v Gowdy et al* 283 Mass. 204, 186 N.E. 244 (1933); *United State v United States Cartridge Co* 198 F. 2d 456 (1952); *Mayford Fabrics v Henly* 48 N.J. 483; 226 A.2d 602 (1967); *McCutcheon v United Homes Corp* 75 Wash. 2d 1093 (1971); *Henningsen v Bloomfield Motors Inc* 32 N.J. 358, 161, A.2d 69; *Levine v Shell Oil Company and Visconte* 28 N.Y. 2d 205, 269 N.E. 2d 799, 321 N.Y.S. 2d 81 (1971); *Krohnert v Yacht Systems Hawai Inc* 4 Haw. App 190, 664 P.2d 738 (1983); *Chicago and North Western Railway Company v Rissler* 184 F. Supp 98 (1960); *Crawford v Buckner* 839 S.W. 2d 754 (1992); *Schlobohm et al v Spa Petite Inc* 326 N.W. 2d 920 (1982); *Leidy v Deseret Enterprises Inc* 252 Pa. Super 162, 381 A.2d 164 (1977); *Tatham v Hoke* 469 F. Supp 914 (1979); *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tunkl v Regents of University of California* 60 Cal 2d 92 32 Cal. Rptr 33, 383 P. 2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

³⁴³ *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 469 F. Supp 914 (1979); *Emory University v Porubiansky* 248 Ga 351, 282, S.E. 2d 903; *Olson v Molzen* 558 S.W. 2d 429 (1977); *Tunkl v Regents of the University of California* 60 Cal 2d 92, 32 Cal. Rptr 33, 383 P.2d 441 (1963); *Cudnik v William Beaumont Hospital* 207 Mich. App. 378, 525 N.W. 2d 891 (1995).

arrival of the industrial revolution, the use of standardized contracts, often incorporating exclusionary clauses, became the order of the day. Exclusionary clauses have, as their foundation, the principle of the freedom to contract. To draw from the philosophy of Grotius, "*man's right to contract*". A further underlying philosophy which influenced the recognition of exclusionary clauses during the early period is that of *laissez-faire*, which meant that the law should interfere with people as little possible. This resulted in Judges being reluctant, during this time, to interfere with contractual arrangements. Beyond this period, especially during the twentieth century, the universal use of standardized contracts incorporating exclusionary clauses reached gigantic proportions. The usage of these types of contracts in the commercial sphere included insurance, banking, transport and every other conceivable business, including, hospital contracts.

In time, with the formation of consumer affairs bodies, whose aim was to protect consumers against exploitation and exploitative practises, the ills that standardized contracts and exclusionary clauses had brought with them were recognised. One of the major discoveries made by the consumer affairs movement was that exclusionary clauses became a mighty tool for the exploitation of the weaker contracting party, by the stronger party. This arose from the unequal bargaining position in which the contracting parties found themselves.

The era of consumerism brought about new thinking and legal jurisprudence. A new ethos emerged, switching from 'to honour and enforce a contract' to the moral principle that one ought not to take advantage of an unfair contract.

But, despite the efforts made by the consumer bodies to curb the use of exclusionary clauses, these types of clauses, universally, remain a major force in the commercial sphere.

Different jurisdictions have, however, engaged different authoritative bodies, including the courts and the legislature, in curbing exploitative practises by the use of exclusionary clauses in contract. The South African courts, for example, have used the doctrine of public policy to denounce exclusionary clauses which have been shown to be harsh and oppressive. Other factors used by our courts include, public interest and the violation of public welfare. Other methods used by the courts include the application of the *contra proferentem* rule. But, the courts have not been consistent in their approach. No wonder the South African Law Commission stepped in by investigating the means of controlling unfair exclusionary clauses. Unfortunately, despite making positive findings for law reform in South Africa and compelling draft legislation to regulate unfair contracting provisions

which are unfair, unreasonable and unconscionable, this was not carried further. More recently, an attempt has also been made by the legislature in introducing the Consumer Protection Bill.

This, as has been seen in this Chapter, has resulted in South Africa lagging behind in its efforts to strive for fairness in contract.

In contrast, English Law, besides engaging the courts to adopt certain measures to alleviate the position of the weaker contracting parties, also engaged the legislature to affect legislation. The purpose of the legislation was to control unfair contractual clauses. The measures adopted by the courts include the application of the incorporation rule, the notice of the exclusionary clause rule, and the rule of construction or otherwise, the rule of interpretation, alias *contra proferentem* rule.

Because of the inconsistency shown by the courts in denouncing unfair exclusionary clauses, the British Government appointed the English Law Commission and Scottish Law Commission in a joint effort to investigate the possibility of transforming the English Law of Contract, as means of bringing about reform to the controlling of exemption clauses. This resulted in the eventual enactment of legislation in England in the form of the *Unfair Contract Terms Act 1977*. This was widely accepted by the English courts and greater control of unfair contractual terms resulted. More recently, the *Human Rights Act 1998*, also dictates that any decision made by a public authority, including, hospitals and doctors, concerning medical practise, must be made on the basis of current medical ethical standards and in compliance with the provisions of the *Human Rights Act*.

The United States pursued a similar path to England. The American courts, first of all armed themselves with the traditional common law defences, including public policy, public interests, fraud, undue influence, lack of mutuality in curbing unfair contractual terms. Other methods adopted by the courts also included the rule of incorporation and the rule of construction, also known as the *contra proferentem* rule.

But, as in England, the American courts were very inconsistent in denouncing unfair exclusionary clauses, however harsh or oppressive they may have been. It may have had as a consequence, a contracting party losing a remedy against the other based on liability arising from a negligent act.

This resulted in the American legislature eventually stepping in and enacting legislation in

the form of the *Uniform Commercial Code* 1952 and the *Restatement of the Law of Contracts* 1981. This move, it is said, was to exercise judicial control over exemption clauses, empowering the courts to strike down these types of clauses where they are unconscionable, harsh and oppressive. There are many other factors which also move the courts to declare certain exclusionary clauses void.

In this Chapter brief mention is made of the factors, including public policy, public interest, statutory provisions, the inequality of bargaining power and the criteria required to successfully rely on these factors.

In this Chapter the history of exclusionary clauses was explored. Part of the discourse included the recognition of exclusionary clauses generally. Part of the discourse also included what factors impact adversely on the recognition of exclusionary clauses. The latter merely served as an introduction.

A more comprehensive discussion on the factors impacting on exclusionary clauses generally will be covered in the next Chapter.