

The influence of Part G of the Consumer Protection Act 68 of 2008 on the general principles of contract

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Declaration of candidate

I, Carl de Veer, hereby declare that the contents of this dissertation represent my own unaided work and the dissertation has not previously been submitted for academic examination towards any qualification. Furthermore, it represents my own opinion and not necessarily those of the University of Pretoria.

Summary

This dissertation considers and evaluates how the implementation of the Consumer Protection Act 68 of 2008 (“CPA”) and more specifically Part G thereof influences the common law in relation to contract law and the consumer’s rights’ to fair just and reasonable contract terms, together with considering the pit falls of the CPA in its current form and the sections which require amendment.

It will be illustrated that the CPA has been drafted with the clear intention of protecting and benefiting the consumer by codifying the common law provisions in order to strengthen the consumer’s position within consumer markets.

Many terms and principles introduced by the CPA are foreign to the South African legal system. It can be expected with any entirely new piece of legislation implemented within an existing legal system that there will be conflicts and uncertainties in the application thereof.

Ultimately this dissertation has found two sets of conclusions. Firstly the general effect that Part G of the CPA has on consumer markets, namely strengthening consumer rights thereby enabling consumers, more particularly historically disadvantaged consumers to actively partake in consumer markets as a whole. Secondly this dissertation unfortunately has also found that the CPA has failed to use essential mechanisms as used in the United Kingdom and European Union unfair terms legislation to curb unfair unjust and unreasonable contract terms.

Opsomming

Hierdie verhandeling oorweeg en evalueer hoe die implementering van die Verbruikers Beskerming Wet No. 68 van 2008 (hierna " VBW ") en meer spesifiek Deel G daarvan wat die gemenerereg met betrekking tot kontraktereg beïnvloed en die verbruiker se regte tot billike, regverdige en redelike kontraktermen, tesame met die

oorweging oor die moontlike gevaar van die VBW in sy huidige vorm en die gedeeltes wat wysigings vereis.

Dit sal geïllustreer word dat die VBW opgestel is met die duidelike bedoeling om beskerming en voordeel van die verbruiker deur kodifisering van die Gemene Reg beginsels wat voorsiening maak daarvoor om die posisie van die verbruiker binne die verbruikersmarkte te versterk.

Heelwat van die bepalings en beginsels wat deur die VBW bekendgestel is, is vreemd tot die Suid-Afrikaanse regsisteem. Dus kan daar verwag word dat die implementering van 'n nuwe stuk wetgewing binne 'n bestaande regstelsel, konflik en onsekerheid in die toepassing daarvan ondervind sal word.

Gevolgtrek is daar twee stellingevolgtrekkinge wat uit hierdie verhandeling spruit. Eerstens; die algemene effek wat Deel G van die VBW op verbruikersmarkte gehad het, naamlik die bevordering van verbruikers se regte wat daardeur verbruikers, veral voorheen benadeelde verbruikers, in staat stel om aktief deel te neem in verbruikers markte in die geheel. Tweedens het die verhandeling ongelukkig ook gevind dat die VBW versuim het om essensiële meganismes toe te pas, soos wat dit gebruik word in die Verenigde Koninkryk en die Europese Unie naamlik, onregverdige kontrak bepalinge wetgewing wat onregverdige en onredelike kontrakvoorwaardes voorkom.

Acknowledgement

I dedicate this dissertation to my mother, Aletta Cathrina de Veer, who did not have the opportunity to study further, but impressed upon me the values of hard work and the importance of obtaining my degrees. Words will never be enough to express the appreciation I feel towards the love and patience you displayed in assisting me to finish this dissertation.

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1.1 Background and information

There has been a global shift towards the increase in protection of consumer rights due to the high levels of poverty, illiteracy and social and economic inequity.¹ The Consumer Protection Act² which was assented to on the 24 April 2009³ was implemented with the direct intention of providing consumers with fundamental statutory consumer rights.⁴

Prior to the implementation of the CPA the South African law of contract was governed by common law principles, more specifically the principle of freedom of contract which is founded on the notions of individual autonomy and sanctity of contract. This enables contracting parties to enter into agreements at liberty and consequently the parties are bound to such agreements.⁵

The CPA is South Africa's first attempt at "subject specific" legislation. Subject specific legislation is legislation primarily tasked with protecting consumers and regulating the manner in which consumers and suppliers engage with each other. The Legislature was tasked to prohibit unfair and unconscionable conduct in consumer markets with the aim of regulating market practices and contracts.⁶

The eight fundamental rights which the CPA introduced into our law are: the consumers' rights to equality in the consumer market;⁷ privacy;⁸ choice;⁹ disclosure and information;¹⁰ fair and responsible marketing;¹¹ fair and honest dealing;¹² fair, just and reasonable terms and conditions;¹³ fair value, good quality and safety.¹⁴

¹ Hopkins (2007) 22-25; Preamble of the Consumer Protection Act 68 of 2008.

² Act 68 of 2008. Hereinafter the "CPA" or the "Act".

³ GG 32186/29-4-2009 and became fully operational on the 1 April 2010.

⁴ Preamble read with s 3.

⁵ Hopkins (2007) 23. Apart from a few statutory regulations no comprehensive body of law existed governing consumer protection law, refer to chapter 2 for a full discussion herein.

⁶ Preamble read together with s 3 and s 40.

⁷ Ss 8, 9-10.

⁸ Ss 11-12.

⁹ Ss 13-21.

¹⁰ Ss 22-28.

¹¹ Ss 29-39.

1.2 Problem statement and research objective

The greatest criticism of the common law is that although it has been recognised that good faith serves as a foundation and justification for legal rules, it could not be accepted as an independent basis for setting aside or not enforcing contractual provisions.¹⁵ This has resulted in the use of blatantly one sided standard term contracts which originally started off as a means to improve operational efficiency. Such contracts have unfortunately also become a means of exploitation and abuse due to the inclusion of exemption clauses.¹⁶

Initially it seemed as if the courts were prepared to recognise the principles of good faith as a remedy enabling intervention into agreements, where it appeared that a party was subjected to undue hardship due to a party having not acted in good faith. In *Sasfin v Beukes*¹⁷ for example the court conceded that under the requirements for legality the common law principles were wide enough to include the ideology of public policy.¹⁸ The court referred to the decision of *Eastwood v Shepstone*,¹⁹ where it was found that any contract as a whole or any clause within a contract may be severed or treated as void, insofar as the purpose or provisions of the contract are against public policy.²⁰ For a number of years courts have followed this decision, until the decision of *Brisley v Drotsky*²¹ where it was held that the principles of public policy and that of good faith could not be directly relied upon to avoid the enforcement of undesirable contractual provisions.²²

In the recent decision of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,²³ the court once again opened the door for consumers to rely on the Constitution and the values established by the Bill of Rights. This was an attempt by

¹² Ss 40-47.

¹³ Ss 48-52.

¹⁴ Ss 53-61.

¹⁵ Christie (2011) 15-16. See also *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 21; *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 (3) SA 544 (SCA) 13; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹⁶ Christie (2011) 190.

¹⁷ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

¹⁸ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) paras 7-9.

¹⁹ *Eastwood v Shepstone* 1902 TS 294.

²⁰ *Eastwood v Shepstone* 1902 TS 302.

²¹ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

²² *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 27. This decision was confirmed and upheld *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) paras 12 and 21.

²³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

the court to develop the provisions of public policy, by holding that possibly the most important constitutional value underlying the principles of fairness and public policy in the value system of *ubuntu*, which calls for the increase of substantive equity. However these rights in contract law are not absolute and would still need to be applied and tested by the courts.

From the above it can be seen that consumers face a number of challenges in that there are no clear enforceable rights that can be relied on. Nor do our courts effectively or constantly apply the available common law mechanisms. Where a consumer wishes to dispute the provisions of an agreement, the consumer is forced to engage in expensive litigation which is not always a financial possibility for consumers.

The introduction of the CPA into South African law will potentially create a mechanism for statutory control of unfair contractual terms.²⁴ Part G of the Act, namely sections 48 to 52, read together with regulation 44, appears to provide consumers and suppliers alike with a form of statutory and administrative control in regulating contract terms. The research object of this dissertation is to determine what the influence of part G of the CPA is on the general principles of the South African law of contract.

1.3 Delineation and limitations

This dissertation will examine the common law position where the CPA does not find application. Thereafter, I will provide a general overview of the fundamental consumer rights provided for by the CPA, followed by considering the provisions relating to fair, just and reasonable contractual terms provided for under Part G and regulation 44 of the CPA.²⁵ A brief comparative study of international legislation in the European Union and United Kingdom will be considered, in as far as being applicable to unfair contract terms.

The enforcement of the CPA and recourse through alternative dispute resolution falls outside the ambit of this dissertation. The power of the courts to ensure fair and just conduct, terms and conditions will only be discussed insofar as being relevant.²⁶ The

²⁴ Van der Walt (2000) 33.

²⁵ Part G, ss 48-52 read together with reg 44.

²⁶ S 52.

requirements relating to franchise agreements, auctions, business names and industry codes of conduct will not be discussed and does not fall within the ambit of the research objective.

It is to be noted that this contribution reflects consumer legislation and relevant developments as at 1 October 2014.

1.4 Methodology

This study will involve a literature study of books, journals, articles, legislation and precedent. The study is primarily a critical analysis of the relevant South African legislation, literature and case law. A brief comparative study will be undertaken illustrating the extent of South Africa's conformity with international consumer rights.

1.5 Structure

This dissertation is structured in six parts to meet its objective. Chapter 2 contains the general common law position where the CPA does not find application and establishes the basis for the need of statutory protection for the consumer. Chapter 3 contains a general overview of the CPA. Chapter 4 provides a critical analysis of the principles established by Part G of the CPA together with regulation 44. Chapter 5 embarks on a comparative study of international consumer protection laws. Lastly, chapter 6 contains the general conclusion and recommendations.

The position where the Consumer Protection Act 68 of 2008 is not applicable

2.1 Introduction

Prior to the implementation of the CPA, the South African law of contract was predominantly governed by common law principles. Apart from a few statutory regulations such as the Consumer Affairs Act (Unfair Businesses Practice);²⁷ Price Control Act;²⁸ Trade Practices Act;²⁹ Alienation of Land Act;³⁰ National Credit Act³¹ and Rental Housing Act³² no comprehensive body of law existed, governing consumer protection law. None of the aforementioned legislation created a form of statutory “content control” regulating unfair contract terms. This legislation was insufficient in addressing the problems of unfair contract terms in consumer markets, and consequently the common law principles of contract law found application.³³

Some South African writers are of the view that the common law mechanisms for controlling unfair contract terms are sufficient and flexible enough to deal with such unfair terms.³⁴ This chapter addresses the situation where the CPA does not find application and consumers find themselves dependent upon the common law for controlling unfair contract terms.

2.2 The basis of contractual liability

The South African law of contract is based on the will theory, in terms of which all contracting parties are treated as equals.³⁵ The will theory includes the principles of freedom of contract³⁶ and sanctity of contract.³⁷ These principles which were founded in the 16th and 17th century’s social, economic and political philosophies

²⁷ Act 71 of 1988.

²⁸ Act 25 of 1964.

²⁹ Act 76 of 1976.

³⁰ Act 68 of 1981.

³¹ Act 34 of 2005.

³² Act 50 of 1999.

³³ Kötz (1986) 409.

³⁴ Hefer (2000) 142; Hopkins (2003) 150; Hefer (2004) 637.

³⁵ Hawthorne (2006) 48; Hawthorne (1995) 164.

³⁶ Kötz (1986) 6.

³⁷ Hawthorne (2006) 55; *Wells v SA Alumenite Co* 1927 AD 69; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) ALL SA 520 (A).

regulated the manner in which persons contracted with one another to create social contracts, which otherwise defined basic human rights.³⁸

The common law provided parties with freedom of autonomy, which enabled a party to freely engage and enter into agreements with whom they deemed fit and on the terms and conditions the parties agreed upon. This was however subject to compliance with the basic requirements set by the common law.³⁹ These principles further provided that the decision maker must accept responsibility for his actions. The principle of *pacta sunt servanda*, in return required exact enforcement of the contractual obligations created through the contract.⁴⁰

The following statement, made by Sir George Jessel in 1875 in *Printing and Numerical Registering Co v Sampson*,⁴¹ expressly reflects the intended application of the principles which prevailed in the 19th century common law jurisdictions:⁴²

“...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...”

Provided that an agreement is compliant with the basic requirements of contract law namely: where a party to the agreement is not a minor⁴³ or mentally ill⁴⁴ and consent⁴⁵ was not obtained by means of error, misrepresentation, fraud, undue influence or duress,⁴⁶ the contractual undertakings will be enforceable.⁴⁷

Our law requires that where a person enters into a contract which later transpires to be to his own detriment he would be bound to the consequences created. Our courts cannot out of sympathy for such persons amend the contract to be more favourable.⁴⁸ This view has been confirmed and followed by a number of judgments

³⁸ Aronstam (1979) 1.

³⁹ Van der Merwe *et al* (2012) 22 and 56.

⁴⁰ Christie (2011) 384.

⁴¹ *Printing and Numerical Registering Co v Sampson* 1875 LR 19 para 462.

⁴² Hahlo (1981) 70; Hawthorne (2006) 49; *Burger v Central South African Railways* 1903 TS 571-576; *Van Rensburg v Straughan* 1914 AD 317; *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

⁴³ Christie (2011) 240.

⁴³ Christie (2011) 24-25.

⁴⁴ Christie (2011) 255.

⁴⁵ Christie (2011) 24-25.

⁴⁶ Van der Merwe *et al* (2012) 38-43; Christie (2011) 291, 305, 313 and 321.

⁴⁷ Hahlo (1981) 70. Which reflects the view of *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

⁴⁸ *Grinaker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration* 1982 (1) SA 78 (A).

where a party raised the issue of substantive unfairness due to the use of unfair contract terms as expounded in *Brisley*,⁴⁹ *Afrox*,⁵⁰ *Napier*,⁵¹ *Bredenkamp*,⁵² *Maphango*⁵³ and *Potgieter*.⁵⁴

The above cases have made it clear that courts refuse to come to the assistance of persons who have willingly entered into a contract and have freely negotiated and settled on the terms thereof.⁵⁵ There is no general common law rule that entitles a court to strike down a contractual provision on the basis that the term or agreement is substantively unfair.⁵⁶

The central issue in the application of unfair contract terms stems from the courts strict adherence to the principles of freedom of contract, which does not require parties to act in good faith.⁵⁷ These principles prevent our courts from intervening and applying substantive fairness in situations where an agreement was clearly unjust and unreasonable.⁵⁸ The judiciary's application and acceptance of such principles has lead businesses to develop and take advantage of standard term contracts which in turn has resulted in the abuse of consumers, as consumers have found themselves at the mercy of suppliers.

2.3 The effect of standard term contracts

The development of consumer markets in society has lead businessmen to draft and introduce mass produced generic contracts, otherwise known as standard term contracts. Consumer markets around the world have benefited from standard term contracts which have become a norm.⁵⁹ The use of standard term contracts have developed out of necessity to enable organisations to speedily negotiate and enter into contracts with the public allowing for trouble-free negotiations. This in return reduces the costs associated in having a representative from the organisation

⁴⁹ *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

⁵⁰ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁵¹ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

⁵² *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA).

⁵³ *Maphango v Aengus Lifestyle Properties* 2011 (5) SA 19 (SCA).

⁵⁴ *Potgieter v Potgieter NO and Others* 2012 (1) SA 637 (SCA).

⁵⁵ Hopkins (2003) 152.

⁵⁶ Kötz (1986) 407. For example *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) and *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA).

⁵⁷ Christie (2011) 15-16; Hawthorne (2004) 297; *Burger v Central South African Railways* 1903 TS 576; *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 608.

⁵⁸ Hopkins (2003) 155; Hawthorne (2006) 50.

⁵⁹ Hopkins (2003) 153.

individually negotiate the terms of the agreement.⁶⁰ These standard term contracts are drafted in advance to specifically address the needs of the organisation and provide the consumer with very little to no rights at all.⁶¹

What originally started off as a means to improve operational efficiency has become a means of exploitation and abuse, due to the inclusion of exemption clauses.⁶² These clauses have become the norm as suppliers are able to impose such terms upon the consumer, with the content thereof having been unilaterally decided. This leaves the consumer with the option of either accepting the terms of the contract or looking elsewhere.⁶³ Once the consumer has signed the standard term contract, the law perceives it as if the agreement had been entered into freely and voluntarily by the consumer and thus the agreement must be adhered to.⁶⁴

2.4 The role of the Constitution in contract law

The final Constitution⁶⁵ came into effect on 4 February 1997 introducing values which can be described as socialistic in nature, as the Constitution attempts to achieve social justice.⁶⁶ The drafters of the Constitution chose not to entrench the principles of freedom of contract as a fundamental right in the Bill of Rights,⁶⁷ instead the drafters created the principles of fairness and greater substantive equity in contracts.

The principles of public policy and good faith were confirmed in the matter of *Napier v Barkhuizen*⁶⁸ where the court held that public policy is today greatly influenced by the South African Constitution.⁶⁹ Ngcobo J, writing for the majority of the court stated that:

“This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that

⁶⁰ Naudé (2006) 367.

⁶¹ Naudé (2006) 361; Hawthorne (2004) 299; Barnard (2005) 185-186.

⁶² Naudé (2006) 365.

⁶³ Sharrock (2010) 296. In *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 33. The court acknowledged the fact that exemption clauses in standardized contracts are the rule, rather than the exception.

⁶⁴ Hawthorne (2008) 92; Hawthorne (2004) 299.

⁶⁵ Constitution of the Republic of South Africa Act 108 of 1996.

⁶⁶ Preamble of the Constitution.

⁶⁷ Chapter 2 of the Constitution.

⁶⁸ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

⁶⁹ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) paras 80-82.

are in conflict with constitutional values even though the parties may have consented to them.”⁷⁰

The court confirmed that the principles of public policy forms part of underlying constitutional values and that where a term in a contract is contrary to public policy, such term is unenforceable.⁷¹ This decision has allowed for the further development of the role of good faith in our common law of contract. In return this has created a mechanism for the protection of consumers which is in line with the principles of fairness and substantive equity found in the Constitution.⁷²

In the recent decision of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,⁷³ it was found that possibly the most important constitutional value underlying the principles of fairness and public policy is the value system of *ubuntu* which calls for the increase of substantive equity in contracts.

Yacoob J, writing the minority judgment of the court, expressed the following views on good faith:⁷⁴

“Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.”

What makes the courts observation of good faith important is the express inter-relationship of good faith and the value system of *ubuntu*, which the court held as follows:⁷⁵

⁷⁰ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) paras 28-30.

⁷¹ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) paras 80-82.

⁷² Louw (2013) 62.

⁷³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

⁷⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 22.

⁷⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 23-24.

“The values embraced by an appropriate appreciation of *ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone. It may be said that a contract of lease between two business entities with limited liability does not implicate questions of *ubuntu*. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates *ubuntu*.”

The decision of *Everfresh Market Virginia* has opened the door further for consumers to rely on the Constitution and the values established by the Bill of Rights, namely the values of good faith and *ubuntu* in the plight against unfair contract terms predominantly found in standard term contracts.

The effect the Constitution has on exemption clauses was further tested in the recent decision of *Bredenkamp v Standard Bank of South Africa Ltd*.⁷⁶ The case concerned the legality of a contractual clause allowing a bank to unilaterally close a client's bank account for any reason it deemed sufficient. The facts are briefly as follows: the complainant was an extremely wealthy businessman whom had an account with the bank. The bank terminated the account after the complainant was blacklisted by the US Department of Treasury's Office of Foreign Asset Control.⁷⁷ The effect of such listing was that US financial institutions were prohibited from dealing with the

⁷⁶ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 75.

⁷⁷ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 75-76.

complainant and were obligated to freeze any accounts which the complainant held.⁷⁸

The SCA in coming to its finding considered the decision of *Barkhuizen v Napier*⁷⁹ as authority for the principle that an unfair contractual term can be struck down on constitutional grounds.⁸⁰ However, there were subtle differences in the facts of *Barkhuizen* and the current matter before the court. The court's interpretation of *Barkhuizen* might have resulted in a different finding should the court have considered the effect that standard term contracts have on the bargaining position of the parties as well as the unfairness of the terms in such contracts.⁸¹

Consequently the court in *Bredenkamp* held that *Barkhuizen* did not import a general criterion of fairness in the law of contract.⁸² The court held that the test of reasonableness only applied if a clause or its implementation concerned an identified constitutional value or other public policy consideration.⁸³ Both in the interim and final judgments constitutional arguments were forwarded namely; the inequality of the bargaining powers between the parties and the potential impairment of dignity by being deprived of banking facilities, however on appeal such arguments were abandoned and thus never argued before the court.⁸⁴

It is however important to note that the court held that only where an identified constitutional value or other public policy consideration would be affected could the unfair contractual term be struck down on constitutional grounds.⁸⁵

2.5 Existing protective measures within our law

Prior to the implementation of the CPA into our law courts were able to review contractual injustices with the principles underlying the common law, together with a limited number of statutory protective measures to assist the judiciary in reviewing contractual injustices.

⁷⁸ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 1-11; Nortje (2009) 518.

⁷⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁸⁰ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 41-43.

⁸¹ Nortje (2009) 520.

⁸² *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 50-53.

⁸³ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 50.

⁸⁴ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 30.

⁸⁵ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 25, 27-28.

The most prevalent issues affecting consumer rights are the manner in which exemption clauses are used in standard term contracts.⁸⁶ Consumers have a number of defences available to them to avoid contractual liability these, *inter alia* being error, misrepresentation, fraud, undue influence and duress. The courts are able to apply these principles to limit the onerous consequences of such exemption clauses.⁸⁷

2.5.1 Prior notice

When parties contract with each other, the contract must be drafted in such a manner that a reasonable person would expect the agreement to contain an exemption clause. A party wishing to rely on and enforce an exemption clause must have drawn such clause to the attention of the other party prior to the conclusion of the agreement.⁸⁸

In the matter of *Mercurius Motors v Lopez*⁸⁹ the respondent claimed damages for breach of contract arising from the theft of his motor vehicle from the appellant's premises. The appellant in defence stated that the liability for loss by theft was exempt by means of an exemption clause.⁹⁰ The clause was found on the reverse side of the contract which was signed by the respondent upon delivering his vehicle to the appellant. Navsa JA held that:

“A person delivering a motor vehicle to be serviced or repaired would ordinarily rightly expect that the depositary would take reasonable care in relation to the safekeeping of the vehicle entrusted by him or her. An exemption clause such as that contained in clause 5 of the conditions of contract, that undermines the very essence of the contract of deposit, should be clearly and pertinently brought to the attention of a customer who signs a standard instruction form,

⁸⁶ Naudé (2006) 365.

⁸⁷ Hawthorne (1995) 164; Naudé (2006) 361-385; Stoop 499-506.

⁸⁸ *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) paras 643G-644A ; *Fourie v Hansen* 2000 (1) All SA 510 (W) paras 516i-517f; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) paras 22-23; *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) para 33.

⁸⁹ *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).

⁹⁰ The clause read as follows: “I/we acknowledge that MERCURIUS shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire and/or burglary and/or unlawful acts (including gross negligence) of their representatives, agents or employees.”

and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question.”⁹¹

The above decision held that the essence of the contract and the obligations associated thereto needs to be established to determine whether an exemption clause is fair in the situation. Lopez was unaware of the exemption clause contained in the agreement as it was not drawn to his attention and furthermore contrary to the essence of the contract.

In *Fourie v Hansen*⁹² the plaintiffs’ attempt to escape liability on the basis of an exemption clause failed as the court found the clause to be valid and binding. The clause was specifically brought to the attention of the signatory and thus the court held that where an exemption clause is used it needs to have been printed in a different colour ink, or underlined or printed in another typesetting of a different size from the other clauses so as to draw the parties’ attention specifically thereto.⁹³

There appears to be some contradiction in our law as the court in *Afrox Healthcare Bpk v Strydom*⁹⁴ did not follow the same view as in *Fourie*⁹⁵ and *Mercurius Motors*.⁹⁶ In *Afrox Healthcare Bpk v Strydom*⁹⁷ the court found that exemption clauses in standardised contracts are the rule rather than the exception.⁹⁸

The facts of *Afrox Healthcare Bpk v Strydom* are briefly as follows; Afrox was the owner of a private hospital in which Strydom had been admitted for an operation. Upon being admitted a contract was concluded between the parties which contained an exemption of liability clause. Negligent conduct by the hospital nursing staff caused the respondent to suffer damages. When the respondent issued legal action against the hospital for such damage, the hospital relied on the exemption clauses contained in the signed contract.

The court found that the signatory’s subjective expectations of what the agreement between them would contain and what the agreement actually contained played no

⁹¹ *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) para 33.

⁹² *Fourie v Hansen* 2000 (1) All SA 510 (W).

⁹³ *Fourie v Hansen* 2000 (1) All SA 510 (W) para 833 E-G.

⁹⁴ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁹⁵ *Fourie v Hansen* 2000 (1) All SA 510 (W).

⁹⁶ *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).

⁹⁷ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁹⁸ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) paras 36-42.

role in the question whether there was a legal duty on the hospital to specifically point out the content of the exemption clause in the contract.⁹⁹

The outcomes of *Afrox* created a contradiction in our law, as *Mercurius Motors* came to the aid of consumers who found themselves faced with unexpected exemption clauses. The court in *Afrox* also re-affirmed the ruling in *Brisley v Drotsky*¹⁰⁰ that “abstract” considerations such as good faith were not legal rules which could be directly relied upon to curb the enforcement of contractual provisions.¹⁰¹

2.5.2 Interpretation

The effects of exemption clauses can also be limited in the manner and approach the courts interpret such clauses.¹⁰² Courts are able to apply restrictive means of interpretation where exemption clauses have been drafted excessively wide or vaguely and such terms do not specifically set out the legal grounds for liability from which such exemption is based upon.¹⁰³

Our courts follow the general rule, that where an exemption clause places a contracting party in an excessively onerous position without a reciprocal duty being placed upon the other party; or where a party is deprived from a common law right, the courts will interpret such exemption clauses as narrowly as possible to attempt to strike a balance between the individual rights of the contracting parties.¹⁰⁴

The above approach conforms to the *contra proferentem* rule found in our common law. This rule provides that the words of the contract may be construed more strictly against the drafter of the contract. This enables courts to provide relief to a person whose rights have been excessively oppressed.¹⁰⁵ This approach is based on the principle that a person cannot through his own ambiguity induce another person to

⁹⁹ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); Naudé & Lubbe 442-443.

¹⁰⁰ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

¹⁰¹ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) paras 31-32 at 40G-41B; Naudé & Lubbe 442.

¹⁰² *Stoop* 503; *Christie* (2011) 195; *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA.416 (A); *Cotton Marketing Board of Zimbabwe v Zimbabwe National Railways* 1990 (1) SA 582 (ZS).

¹⁰³ *Stoop* (2008) 503; *Christie* (2011) 216.

¹⁰⁴ *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA); *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C).

¹⁰⁵ *Christie* (2011) 190-195; *Kötz* (1986) 407.

contract with him, on the assumption that the words in the agreement mean one thing, while in reality the drafter has intended a different meaning for them.¹⁰⁶

This view is confirmed in *Drifters Adventure Tours CC v Hircock*¹⁰⁷ where the court followed the decision of Scott JA in the matter of *Durban's Water Wonderland (Pty) Ltd v Botha*¹⁰⁸ in which it was held:

“If the language of the disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens.”

Through the use of such restrictive interpretive rules courts are able to mitigate the impact of burdensome exemption clauses, by restricting the application of such clauses to the liability they expressly refer to and not the drafters extended interpretation thereof.¹⁰⁹ These interpretative rules are however of no assistance where well educated businessmen have drafted exemption clauses with precision ensuring such clauses are clear and unambiguous. Such clauses would be enforceable irrespective whether they are fair and reasonable.¹¹⁰

2.5.3 Public Policy

Public policy is a primary corner stone of society which regulates the social contract between persons. In *Morrison v Anglo Deep Gold Mines Ltd*¹¹¹ Innes CJ stated:

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

As far back as 1905 when Innes CJ made the above statement courts were not prepared to enforce contracts which were contrary to public policy and were consequently held to be invalid.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA).

¹⁰⁸ *Durban's Water Wonderland (Pty) Ltd v Botha* and Another 1999 (1) SA 982 (SCA) para 463.

¹⁰⁹ Naudé & Lubbe 443.

¹¹⁰ *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA).

¹¹¹ *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 paras 784-785.

Courts generally do not *ex mero motu* raise the issue of public policy as a means to limit the application of harsh contractual provisions. Public policy generally favours the utmost freedom of contract and requires transactions which have been freely entered into to be enforced.¹¹² Our courts will only in exceptional circumstances refuse to enforce a contract which is contrary to public policy or against good morals. Although public policy creates possible protection for consumers it has limited application.¹¹³

Public policy is interpreted in terms of the interests of society as a whole, together with the interests of the individual contractant.¹¹⁴ Our courts first recognised this as a tool to assist a distressed party in the matter of *Napier v Barkhuizen*,¹¹⁵ where the court held that public policy is greatly influenced by the South African Constitution.¹¹⁶

The notion of public policy and the values which underlie the Constitution was further developed and expanded upon in the recent decision of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.¹¹⁷ The court found that possibly the most important constitutional value underlying fairness and public policy is the value system of *ubuntu* which calls for the increase of substantive equity in contracts.

The facts of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*¹¹⁸ are briefly as follows; Everfresh challenged ejectment proceedings under a commercial lease agreement relating to premises in a shopping centre. Shoprite being the lessor had refused to negotiate the renewal of the lease in terms of a provision in the agreement. The provision provided for renewal of the lease on notice by the lessee upon a rental amount to be agreed between the parties.¹¹⁹ Everfresh limited its

¹¹² *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) paras 28-30.

¹¹³ Hopkins (2003) 153-154; Louw (2013) 62; Naudé & Lubbe 443.

¹¹⁴ Van der Merwe et al (2012) 298; Louw (2013) 62.

¹¹⁵ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

¹¹⁶ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) paras 28-30.

¹¹⁷ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

¹¹⁸ *Ibid.*

¹¹⁹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 3. Clause 3 of the lease agreement provided as follows: "Provided that the Lessee has faithfully and timeously fulfilled and performed all its obligations under and in terms of this Lease, the Lessee shall have the right to renew same for a further period of four years and eleven months commencing on 1st April 2009, such renewal to be upon the same terms and conditions as in this Lease contained save that there shall be no further right of renewal, and save that the rentals for the renewal period shall be agreed upon between the Lessor and the Lessee at the time. The said right of renewal is subject to the Lessee giving written notice to the Lessor of its intention so to renew, which notice shall reach the Lessor not less than six (6) calendar months prior to the date of termination of this Lease. In the event of no such notice being received by the Lessor, or in the event of notice being duly received but the Parties failing to reach

argument to Shoprite's claimed obligation to make a *bona fide* attempt to agree, contending that the terms of the agreement precluded Shoprite from frustrating Everfresh's qualified right to renew by refusing to negotiate in good faith and that its right to renewal would fall away only if the negotiations in good faith did not result in an agreement.¹²⁰

Yacoob J summarised the parties' respective contentions as follows:¹²¹

“Everfresh contends that the common law should be developed in terms of the Constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith. The contention of Shoprite is that a provision of this kind should not be enforceable because the concept of good faith is too vague.”

The court in coming to its findings expressed the following views on good faith and the role good faith has in the Constitution:¹²²

“Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.”

The courts views on the importance of good faith in contract law, together with the court taking cognisance of the importance of the spirit purpose and object of the Constitution in contract law is a step forward in developing the common law to be in line with the principles of good faith and the value system of *ubuntu*, which Yacoob J explained as follows:¹²³

agreement in regard to the rentals for the renewal period at least three (3) calendar months prior to the date of termination of this Lease, then in either event this right of renewal shall be null and void.”

¹²⁰ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 9.

¹²¹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 22.

¹²² *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 22.

¹²³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 23-24.

“The values embraced by an appropriate appreciation of *ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone. It may be said that a contract of lease between two business entities with limited liability does not implicate questions of *ubuntu*. This is, in my view, too narrow of an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates *ubuntu*.”

The above views were expressed *obiter dictum*, as the majority of the court ultimately held that *Everfresh's* argument that the common law of contract needs to be developed in accordance with section 39(2) of the Bill of Rights and should not have been raised for the first time in the Constitutional Court. The court therefore denied the request to appeal the Supreme Court of Appeal's¹²⁴ decision.

None the less, the court chose to vehemently express itself regarding the potential application of *ubuntu* and the role of good faith in contract law and its application within the current principles found within the common law. Where a court is to apply the principles of *ubuntu* together with good faith, which inspire much of the values found within the Constitution, such consideration may tilt the argument in the weaker contractants favour as such application is more in line with the spirit, purport and objects of the Bill of Rights.¹²⁵

¹²⁴ Hereinafter referred to as the “the SCA”.

¹²⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 36 and 73-74.
“The proposition that a common law contract principle that provides meaningful parameters to render an

The second opinion which the court expressed was that the current role of good faith within contract law needs to be revisited in favour of a more robust application to contract law.¹²⁶ I am of the view that this judgment will lead to numerous court rulings where specific emphasis is placed on the principles of *ubuntu* and public policy, in striking a balance between fairness and simple justice between the contracting parties.¹²⁷

2.5.4 Bargaining power of the parties

There is not a lot of case law which specifically deals with the individual bargaining power of the consumer. The court first raised the issue in *Afrox Healthcare Bpk v Strydom*¹²⁸ where it was pointed out that the unequal bargaining power between the parties is a factor which courts should consider along with other factors to assess public interest.

Sachs J, in *Barkhuizen v Napier*¹²⁹ expanded on this point and stated that:

“The genuine nature of the intentions of the parties to a contract, nowadays, is something that is in itself often fraught with uncertainty, and with the potential for significant inequity.”¹³⁰

The court specifically referred to the problematic aspects of standard term contracts, where the terms of such agreements are seldom negotiated and thereby creating situations of significant disparity in the bargaining power between the parties.¹³¹ Sachs J asked whether the considerations of public policy in our present constitutional era does not compel courts to refuse to give legal effect to an imposed, onerous and one-sided ancillary term buried in a standard term contract that

agreement to negotiate in good faith enforceable is decidedly more consistent with section 39(2) than a regime that does not. A common law principle that renders an obligation to negotiate enforceable cannot be said to be inconsistent with the sanctity of contract and the important moral denominator of good faith. Indeed, the enforceability of a principle of this kind accords with and is an important component of the process of the development of a new constitutional contractual order. It cannot be doubted that a requirement that allows a party to a contract to ignore detailed provisions of a contract as though they had never been written is less consistent with these contractual precepts: precepts that are in harmony with the spirit, purport and objects of the Constitution.”

¹²⁶ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 73-74.

¹²⁷ *Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs* 2010 (4) SA 261 (ECM); *Standard Bank of SA v Dlamini* 2013 (1) SA 219 (KZD); *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

¹²⁸ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹²⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28-30.

¹³⁰ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28-30.

¹³¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28-30.

unilaterally and without corresponding advantage, limits the enjoyment of a constitutionally protected right. Sachs argued that holding a person to one sided terms which was not expressly consented to cannot be said to be within the boundaries of public policy.¹³² There are many writers who are of the view that this is the approach that needs to be followed by our courts. Such an approach is in line with the constitutional values of equity and dignity.¹³³

The position of the individual persons bargaining power was further tested and expanded upon in the recent decision of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.¹³⁴ The court recognised the potential injustice that is caused by the inequality between the bargaining powers of the contracting parties and found that the principles of fairness and public policy together with the value system of *ubuntu* requires there to be an increase of substantive equity in contracts.¹³⁵

The court in *Jordan v Faber*¹³⁶ acknowledged the unequal bargaining power faced by many contractants referring to the decision of *Afrox Healthcare Bpk v Strydom*¹³⁷ and that the contract concluded between the parties created vast inequalities and was contrary to public policy and therefore void.¹³⁸

From the above case law it is evident there has been a shift in factors courts consider when determining whether an agreement is contrary to public policy.¹³⁹ The courts clearly view the bargaining power of the parties as a factor to consider when pronouncing on whether the agreement is contrary to good faith. Given the court's statement regarding the role of unequal bargaining powers between contracting parties, it would appear as if courts are prepared to accept the value system of *ubuntu* and its relationship with public policy to determine whether parties acted in good faith.¹⁴⁰

¹³² *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28-30.

¹³³ Naudé (2006) 367; Louw 2013 62; Naudé & Lubbe 460; Tladi (2002) 477.

¹³⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

¹³⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 36 and 73-74.

¹³⁶ *Jordan v Farber* 2010 JOL 24810 (NCB) para 12.

¹³⁷ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹³⁸ *Jordan v Farber* 2010 JOL 24810 (NCB) para 33. In this case the bargaining position was between an attorney and his client. The court took cognisance that the attorney was in a position of great power over his client who was dependent on the attorneys to handle their affairs in stressful situations.

¹³⁹ Refer to *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Jordan v Farber* 2010 JOL 24810 (NCB); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

¹⁴⁰ Barnard & Nagel (2010) 452-453; Naudé & Lubbe 460; Louw (2013) 62.

2.5.5 Misrepresentation

The common law allows a party to escape the consequences of an agreement where there is error namely that of *iustus* error and whether the reasonable man would have believed such misrepresentation.¹⁴¹ This implies that the contracting party must have actually been misled and that the misrepresentation relates to a material factor influencing the nature and purpose of the agreement.¹⁴²

In the matter of *George v Fairmead (Pty) Ltd*¹⁴³ Fagon CJ held that an error is said to be *iustus* if it was caused by the misrepresentation of the other party.¹⁴⁴

“When can an error be said to be *iustus* for the purpose of entitling a man to repudiate his apparent consent to a contractual term? As I read the decisions, our courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? If his mistake is due to a representation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound”

In the matter of *Allen v Sixteen Stirling Investments (Pty) Ltd*¹⁴⁵ the plaintiff had brought an action seeking an order declaring a written agreement of sale of an immovable property null and void, averring that he entered into the agreement in the *bona fide* belief that he was buying an immovable property pointed out to him by the defendant’s agents. The property pointed out was not the property described in the sale agreement. The plaintiff contended that he would not have entered into the sale agreement had he known that the erf pointed out to him was not the one for sale.¹⁴⁶

Howard J held that an error *in corpore* caused by a misrepresentation, and which vitiated the consent to the contract concerned, rendered that contract void *ab initio* and therefore the representor could not rely on an exemption clause.¹⁴⁷

¹⁴¹ Christie (2011) 282-284.

¹⁴² Christie (2011) 291-292.

¹⁴³ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

¹⁴⁴ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) para 471 a-d.

¹⁴⁵ *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D).

¹⁴⁶ *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) para 151.

¹⁴⁷ *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) para 171 B-F.

In the matter of *Du Toit v Atkinson's Motors Bpk*¹⁴⁸ the plaintiff entered into an agreement to purchase a 1979 Mercedes Benz 350. Du Toit at a later stage of the agreement had requested that the contract be reduced to writing to embody the terms of their oral agreement. The written agreement contained an exemption clause exempting *Atkinson's Motors* from liability for any misrepresentation. The written agreement described a car that was in fact a 1976 model and not that of a 1979 model. Du Toit instituted action for the cancellation of the contract and the return of the purchase price, consequently *Atkinson's Motors* in defence relied upon the exemption clauses contained in the written agreement.

The court held that Du Toit was not bound to such agreement as he had entered into the agreement in the erroneous belief thinking that he was in fact be purchasing a 1979 model vehicle, and not that of a 1976 model.

The court found that such misrepresentation was material in nature and consequently the contract was void.¹⁴⁹ The judgment in *Du Toit v Atkinson's Motors Bpk*¹⁵⁰ has been confirmed and followed by a number of judgments holding the view that where the misrepresentation results in a fundamental mistake, the contract is void *ab initio*.¹⁵¹ The courts have explained this approach as follows:¹⁵²

“In this way, the law gives effect to the sound principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his or her signature, while at the same time, protecting such a person if he or she is under a justifiable misapprehension, caused by the other party who requires such signature, as to the effect of the document.”

The above cases have reaffirmed the position in our law that where misrepresentation forms the basis of a fundamental mistake the prejudiced party may have the contract set aside due to the misrepresentation. The contract is thus voidable at the discretion of the prejudiced party.¹⁵³

¹⁴⁸ *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A).

¹⁴⁹ *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) para 36.

¹⁵⁰ *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A).

¹⁵¹ *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 2.

¹⁵² *Ibid.*

¹⁵³ *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A); *Janowski v Fourie* 1978 (3) SA 16 (O); *Moresky v Morkel* 1994 (1) SA 249 (C).

2.5.6 Negligence

In our law it has become the norm for standard term contracts to exclude ordinary negligence.¹⁵⁴ Some businessmen have even gone so far as to exclude gross negligence.¹⁵⁵ Public policy has however found that such exemption clauses are valid and binding where the clause is clear, unambiguous and that such negligent conduct amounted to being reasonable.¹⁵⁶

In the case of *Kruger v Coetzee*¹⁵⁷ the court formulated what is now known as the reasonableness test, in terms thereof liability will only arise where a reasonable person in the shoes of the defendant could have foreseen the possibility of his conduct injuring another person and would have taken steps to guard against such an occurrence.¹⁵⁸

In the recent decision of *Naidoo v Birchwood Hotel*¹⁵⁹ the court was tasked to consider whether an exemption clause was fair and reasonable and not against public policy. In October 2008, Naidoo, the plaintiff, wanted to exit the Birchwood Hotel premises but found that the gate to one of the entrances of the hotel was closed. Naidoo sat waiting inside his bus for a security guard to open the gate. After a considerable time had passed he realised that the gate was still not opening as the gate had jammed and the wheels had come off the rails. As Naidoo approached the entrance, the gate fell on top of Naidoo, causing him serious bodily injuries.¹⁶⁰

Naidoo argued that the hotel was negligent in that it failed to take adequate steps to prevent the incident from occurring by not properly maintaining the gate, by not ensuring that it was safe for public usage, and by failing to warn the public of the potential danger created by the state of repair of the gate.¹⁶¹

¹⁵⁴ *Rosenthal v Marks* 1944 TPD 172.

¹⁵⁵ *Government of the Republic of South Africa v Fibre Spinner's and Weavers (Pty) Ltd* 1978 (2) SA 794 (A); *First National Bank v Rosenblum and Another* 2001 (4) SA 189 (A).

¹⁵⁶ *Hopkins* (2001) 133; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982.

¹⁵⁷ *Kruger v Coetzee* 1966 (2) SA 428 (A).

¹⁵⁸ *Kruger v Coetzee* 1966 (2) SA 428 (A) 428-429.

¹⁵⁹ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

¹⁶⁰ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) paras 2, 10-14.

¹⁶¹ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 4.

In defence the Birchwood Hotel relied on the disclaimer and exemption clauses found on the back of the hotel register. Clause 5 of the registration card read as follows:

“The guest hereby agrees on behalf of himself and the members of his party that it is a condition of his/their occupation of the Hotel that the Hotel shall not be responsible for any injury to, or death of any person or the loss or destruction of or damage to any property on the premises, whether arising from fire, theft or any cause, and by whomsoever caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel.”¹⁶²

Naidoo did not contest the fact that he did not read the "terms and conditions" even after seeing the instruction on the front of the registrar to: "Please read terms and conditions on reverse!"¹⁶³ It was also not disputed that Naidoo was aware that standard term contracts contained such clauses and that he was bound by the terms contained therein.¹⁶⁴

The question before the court was whether such disclaimer or exemption clause was binding on Naidoo and if such exemption clause was against public policy.¹⁶⁵

With reference to whether the disclaimer found in the hotel registration card was binding, the court considered the circumstances, having regard to the reason for non-compliance with the clause.¹⁶⁶ The court having followed the *contra proferentem* rule¹⁶⁷ used this rule to reduce the effect of the exemption clause holding that Naidoo is not liable as the enforcement of the exemption clause would not have been fair and just, as such terms were not specifically drawn to his attention together with disclaimer signs not having been displayed in various locations on the hotel premises or at the entrance to the reception.¹⁶⁸

¹⁶² *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 37.

¹⁶³ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 36.

¹⁶⁴ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 38.

¹⁶⁵ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) paras 40-48.

¹⁶⁶ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) paras 42-53. Even if Naidoo did not read the disclaimer, he conceded that he ought reasonably to have expected that it would contain such conditions. That Naidoo was aware of the disclaimer and the contents thereof cannot be denied.

¹⁶⁷ The court however considered the case of *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA), where it was found that a party wishing to contract out of liability must do so in clear and unequivocal terms which are clearly visible.

¹⁶⁸ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 33.

The question as to whether the disclaimer clause was contrary to public policy was left open by the court.¹⁶⁹ The court acknowledged that prior to the new constitutional dispensation clauses contracting out of liability for negligently causing bodily injury or death were permissible.¹⁷⁰ This approach was affirmed by the Supreme Court of Appeal in *Durban's Water Wonderland v Botha and Another*¹⁷¹ as well as in *Afrox Healthcare Bpk v Strydom*.¹⁷² The court in Naidoo alluded to the fact that it is of the opinion that any exemption clause which attempts to limit or exclude liability for negligently causing bodily injuries or death will not pass constitutional scrutiny. Such exemption clauses are likely to be contrary to public policy, the court however failed to provide a definite answer herein.¹⁷³

Mupangavanhu is of the view followed by myself and others that there is a need within our society to develop the law regarding exemption clauses beyond precedent.¹⁷⁴ Our Legislature needs to balance the interests of legal continuity and social realities in enable parties to contract in good faith.¹⁷⁵ In reaching fairness and reasonable within contract law will result in legal and commercial uncertainty the Legislature needs to work around such faults to allow for a society that values fairness whilst ensuring legal certainty.¹⁷⁶ The court's decision in Naidoo has opened the door for the further development of exemption clauses and their application in the new constitutional regime, representing a major step towards the realisation of the principles of *ubuntu* and the creation of fairness and reasonableness in contracts.

2.6 Statutory protective measures

The Legislature had introduced a number of statutory protective measures, most predating 1994, in an attempt to provide consumers with some form of statutory protection, however as it will be seen most of the statutory protective measures are

¹⁶⁹ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 53.

¹⁷⁰ Mupangavanhu 2014 THRHR 1169; *Naidoo v Birchwood Hotel* para 37.

¹⁷¹ *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982.

¹⁷² *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹⁷³ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 53.

¹⁷⁴ Mupangavanhu (2014) 1188.

¹⁷⁵ *Ibid.*

¹⁷⁶ Mupangavanhu (2014) 1189.

outdated and find no application within our current consumer markets and have therefore been repealed.¹⁷⁷ These statutory protective measures are as follows:

The Sales and Services Matters Act.¹⁷⁸ This Act prohibited the sale of certain goods together with the manner in which goods were displayed and marketed;

The Trade Practices Act.¹⁷⁹ Protects consumers against false or misleading advertisements;¹⁸⁰

The Consumer Affairs (Unfair Business Practices) Act.¹⁸¹ This Act regulates the unfair business practices, such practices were defined as any direct or indirect practices which had the direct or indirect effect of harming relations between businesses and consumers, which resulted in conduct which unreasonably prejudices, deceives or unfairly affected a consumer;

The Price Control Act.¹⁸² Promoted and controlled competitive prices between suppliers;

The Business Names Act.¹⁸³ Regulates the control of business names and conduct incidental thereto.

The aforementioned legislation had no real effect in the protection of consumer rights, consequently a number of consumer protection bodies had been established to promote conduct within consumer markets these bodies included: The Office for the Investigation of Unfair business practices, this body's sole purpose was to investigate unfair business practices and to make recommendations to the Minister of Trade and Industry; the South African Bureau of Standards, which promotes quality and standardisation of goods; the Provincial Government Departments of Consumer Affairs was established to monitor credit and usury matters.

The above legislation and consumer protection bodies have failed to provide consumers with the necessary protection as skilled businessmen have been able to circumvent any obligations created through such Acts and regulatory bodies with the

¹⁷⁷ The general consumer protection provision have been repealed by the CPA see s 121(2))b)-(f).

¹⁷⁸ The Sales and Services Matters Act 25 of 1964.

¹⁷⁹ The Trade Practices Act 76 of 1976.

¹⁸⁰ The Consumer Affairs Act repealed large sections of this Act rendering it almost redundant.

¹⁸¹ The Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

¹⁸² The Price Control Act 25 of 1964.

¹⁸³ The Business Names Act 27 of 1960.

use of cleverly worded exemption clauses leaving consumers to rely on the common law when attempting to escape the consequences of unscrupulous practices.¹⁸⁴

2.7 Conclusion

There are a number of authors who advocate that the current common law provisions are sufficient and flexible enough to adequately deal with the inequalities faced by consumers.¹⁸⁵ There are also a number of authors,¹⁸⁶ judges¹⁸⁷ together with the Law Commission¹⁸⁸ whom are of the view that current consumer laws require reform to provide sufficient statutory protection for consumers.¹⁸⁹

It is argued that the current common law mechanisms and judicial control of unfair contract terms are not sufficient to deal with the abusive tendencies found in standard term contracts. Courts have failed to effectively and constantly apply such common law mechanisms, regardless of how wide courts are prepared to interpret the provisions of the common law or that of the Constitution. Consumers are often found bound to the harsh provisions of exemption clauses.¹⁹⁰

The need for legislative control is essential for the development of our consumer markets. A vast number of consumer transactions are concluded with the use of standard term contracts, generally being sprung upon a consumer and automatically placing the consumer in the weaker bargaining position. Such standard term contracts do not provide for a reciprocal opportunity for the consumer to re-negotiate the terms of the agreement or to consider the true implication of the exemption clauses contained in the agreement. It is this very situation that the CPA aims to eliminate by prescribing that the agreements themselves and the exemption clause contained therein must be fair, just and reasonable.¹⁹¹ This would create the situation that where any clause attempts to limit or exclude any rights of the consumer, or attempts to affect the nature of the agreement; such clauses must be

¹⁸⁴ Naudé (2006) 379; Aronstam 46.

¹⁸⁵ Hefer (2000) 142; Hopkins (2003) 150-156; Hefer (2004) 1-14; Jamneck (1997) 637-640.

¹⁸⁶ Hawthorne (2008) 77-83; Stoop (2012); Naudé & Lubbe 450; Naudé (2006) 368.

¹⁸⁷ *Western Bank Ltd v Sparta Construction Co* 1975 (1) SA 839 (W) 840; *Linstom v Venter* 1957 (1) SA 125 (SWA).

¹⁸⁸ The South African Law Commission's Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts Project 47 (April 1998).

¹⁸⁹ Naudé (2006) 361-385.

¹⁹⁰ Naudé (2006) 361-385.

¹⁹¹ Part G, s 48-51.

specifically drawn to the attention of the consumer¹⁹² and must be written in plain language.¹⁹³

The CPA will possibly eliminate situations as found in *Afrox Healthcare Bpk*,¹⁹⁴ *Naidoo*¹⁹⁵ and *Du Toit*¹⁹⁶ where the consumer was unaware of the existence or the extent of the exemption clause in the agreement. The CPA will ultimately create a consumer environment that requires parties to contract in a manner which is fair, just and reasonable creating certainty as to the content and the nature of the agreement. The provisions of the CPA will most likely act as a deterrent preventing the use of exemption clauses which are drafted with the sole intention of primarily exploiting the consumer. In my view, this will result in greater consumer confidence within existing consumer markets as negotiations between consumers and suppliers will be in line with the principles of *ubuntu*, and the constitutional values underlying the principles of fairness and public policy.

¹⁹² S 48(2)(d) and s 49(4).

¹⁹³ S 49(3).

¹⁹⁴ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹⁹⁵ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

¹⁹⁶ *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A).

3.1 Introduction and background

South Africa has aligned itself with many international jurisdictions to protect consumers on a statutory level. As previously stated herein consumer protection legislation is not entirely new in our law, with the CPA merely being a culmination of several decades of legal development effectively replacing all previous legislation relating to consumer protection.¹⁹⁷

The CPA is a revolutionary piece of legislation for the South African consumer, with a direct effect on the common law contractual rules. It effects how business is done for both local and foreign companies who provide goods and services within the Republic. These businesses will need to ensure compliance with the provisions of the Act. The ambit of the Act is extremely comprehensive with the intention of including as many industries as possible to ensure that consumers are sufficiently protected.

3.2 Consumer protection within the South African context

The Legislature acknowledged the need for greater protection of vulnerable consumers in society with the implementation of the CPA.¹⁹⁸ The purpose of the CPA is to protect consumers who live in areas with high levels of poverty, illiteracy and other forms of social and economic inequality and also those that are living in remote or low-density population areas.¹⁹⁹ Whether they are minors, seniors or other similarly vulnerable consumers who have a limited ability to read and comprehend advertisements, agreements, instructions, and warnings as a result of their low literacy levels or visual impairment. It attempts to fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers.²⁰⁰

The preamble introduces the Act as follows:

¹⁹⁷ Lötzer (2009) 1.

¹⁹⁸ Preamble.

¹⁹⁹ *Ibid.*

²⁰⁰ Melville (2010) 6.

“To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the National Consumer Commission...”.²⁰¹

The CPA has been expressly promulgated with the intention to protect consumers, who are deemed to be vulnerable and historically disadvantaged. The CPA can almost be seen as the “Bill of Rights” for consumers as its direct intention is to promote and protect consumers in the marketplace. Section 1 of the Act ensures that every transaction occurring within the Republic is subject to the provisions of the Act, apart from the few exemptions provided under section 5.

The CPA incorporates internationally recognized consumer rights into the South African legal system, seeking to ensure transparent redress for consumers who are currently subjected to abuse and exploitation in the marketplace.²⁰² The common law, in relation to contract law, has been codified to a certain point as the Act sets out clear rights and duties which the consumer and supplier have towards each other. When the courts are called upon to interpret such rights they should not be interpreted to limit any existing common law rights as the courts have a duty to develop the common law in terms of the Constitution.²⁰³

3.3 Interpretation, purpose and policy of the CPA

The CPA contains its own interpretation clause under section 2 which provides that the Act must be read and interpreted in a manner that gives effect to the purposes as set out under section 3.²⁰⁴ Section 3 provides that the purpose of the Act is to establish a legal framework of rules within which consumers are protected, thereby

²⁰¹ Preamble.

²⁰² GN 1957 in GG 26774 of 9 September 2004.

²⁰³ S 2(10).

²⁰⁴ S 2(1).

developing the social and economic welfare of consumers in the marketplace, in particular consumers who are classified as vulnerable consumers.²⁰⁵

The CPA requires that cognisance must be taken of any applicable foreign law, international law, conventions, declarations or protocols or any decision of a consumer court, ombud or arbitrator when interpreting the Act. The aforementioned is subject to such a decision having not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court, as these courts have the power to create precedents should they interpret the provisions of the Act.²⁰⁶

Sections 2(8) and 2(9) provide guidelines where any conflict may arise due to inconsistencies between two distinct pieces of legislation. In situations where there are clear inconsistencies between provisions of the CPA and other legislation the provisions of both Acts will apply simultaneously. To the extent that the application of both pieces of legislation are no longer possible, the provision of whichever Act provides the consumer with the most protection will prevail.²⁰⁷

The intended purpose and interpretation is further expressed under section 3(2) which places additional responsibility on the National Consumer Commission²⁰⁸ to ensure all reasonable and practical steps are taken to promote the purpose of the Act through the release of proposed policies to the Minister,²⁰⁹ in an attempt to ensure the realisation and the purpose.

3.4 Key definitions within the CPA

Before being able to ascertain the application of the CPA, it is necessary to note the key definitions used within the Act. The Act applies to every transaction occurring within the Republic for the supply of goods and services or the promotion of goods or services or the goods or services themselves, unless the transaction is specifically exempted by the provisions of section 5.²¹⁰

²⁰⁵ S 3.

²⁰⁶ S 2.

²⁰⁷ An exemption to this is the provisions of Chapter 5 of the CPA, which deals with national consumer protection institutions and the Public Finance Management Act 1 of 1999 or the Public Service Act 103 of 1994 where the latter two Acts will prevail.

²⁰⁸ Hereinafter ("NCC").

²⁰⁹ S 1 "Minister" means the member of the cabinet responsible for consumer protection.

²¹⁰ S 5(2)(f)-(g).

3.4.1 Transactions

One of the most important definitions of the Act is that of “transaction”.²¹¹ A transaction refers to transactions in the ordinary course of business therefore once-off transactions are not deemed transactions for the purposes of the Act.²¹²

A transaction is defined as an agreement between two or more persons for the supply of goods or services for consideration,²¹³ the supply by the direction of a consumer for consideration,²¹⁴ or an interaction as contemplated in terms of section 5(6).²¹⁵ However, in terms of section 5(6), the supply for consideration is not always a requirement of a “transaction”. Certain arrangements must be considered or automatically deemed to be a “transaction” irrespective of whether a charge or economic contribution is a requirement.²¹⁶

The test to determine whether a transaction falls within the ordinary course of a supplier's business was considered in the case of *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander*.²¹⁷ The court held that a transaction will be deemed to fall within the scope of a particular business, where the ordinary businessman would have entered into such contract which embodies the terms and conditions associated with such business. The court further held that it is irrelevant whether such contract is concluded on a regular occurrence.²¹⁸

Agreements entered into between a franchisee and a franchiser, are also deemed to be a transaction.²¹⁹ Where any goods or services are supplied to the franchisee these dealings constitute a transaction between a supplier and a consumer in terms of the Act.²²⁰

²¹¹ S 1 “transaction”.

²¹² S 1 “transaction” read with s 5(1)(a).

²¹³ S 1 “transaction” (a)(i).

²¹⁴ S 1 “transaction” (a)(ii).

²¹⁵ S 1 “transaction” (b).

²¹⁶ S 5(6)(a).

²¹⁷ *Amalgamated Banks of South Africa Bpk v De Goede en 'n Ander* 1997 (4) SA 66 (SCA) paras 75-78.

²¹⁸ *Joosab v Ensor NO* 1966 (1) SA 319 (A) 326; *AA Mutual Insurance Association Ltd v Biddulph and Another* 1976 (1) SA 725 (A) 738; *Ensor NO v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A) 824; Van Eeden (2013) 49.

²¹⁹ S 5(6)(b).

²²⁰ S 5(6)(c)-(e).

3.4.2 Consumer

The second definition which plays a vital role in the application of the Act is that of a “consumer”.²²¹ A consumer is any person, who includes a juristic person, to whom goods and services are supplied or marketed to in the ordinary course of the supplier’s business.²²² A person is classified as a consumer where such person merely obtained the right to use a product, or was a recipient or beneficiary of a product or service.

A juristic person may be classified as a consumer under the Act, however protection may not always be afforded to a juristic person due to the Act not applying to juristic persons whose asset value or annual turnover is equal to or exceeds the threshold value currently determined by the Minister, to be equal to or exceed two million rand.²²³ Franchise agreements generally entered into with the use of juristic persons would also be subject to the Act as the franchisee in terms of a franchise agreement is also a consumer to the extend provided for under section 5(6).²²⁴

3.4.3 Goods and Services

The next definitions I consider are the words “goods”²²⁵ and “services”²²⁶ which are used simultaneously throughout the Act. Goods are defined by the Act to include anything marketed for human consumption, any tangible objects, literature, music, photographs, motion pictures, games, information, data, software, codes or other intangible products written on any medium, licences to use such intangible objects, legal interests in land or other immovable property; gas, water and electricity, bread, compact discs, electronic appliances and books, all qualify as goods. The Act contains the word “includes” which indicates that the above list provided by the Act is not a closed list and the definition of goods is not limited to the items listed in the definition.²²⁷

²²¹ S 1 “consumer”.

²²² S 1 “consumer”.

²²³ S 5(2)(b).

²²⁴ S 5(6).

²²⁵ S 1 “goods”.

²²⁶ S 1 “services”.

²²⁷ S 1 “goods”.

Services are defined as work performed by persons for the direct or indirect benefit of another, the provision of education, information, advice or consultation,²²⁸ banking or similar financial services, the transportation of goods or an individual, accommodation, entertainment or access to entertainment, access to electronic communication infrastructure, this being cellular or internet access, access or a right of access to an event, premises, activity or facility, or access to or use of property in terms of a rental agreement,²²⁹ right of occupancy of, or power or privilege over, land or immovable property, and under section 5(6), the rights of a franchisee in terms of a franchise agreement as provided for under this section.²³⁰

3.4.4 Suppliers

In order to determine when the Act applies, it is necessary to analyse who would qualify as a “supplier”.²³¹ A supplier is any person including a juristic person or organ of state, and even though section 5(2)(a) specifically excludes the State as a consumer, this does not disqualify the State from being classified as a supplier of goods and services who markets goods or services. To “market”²³² means to supply or promote.

The Act defines “supply”²³³ in connection with goods to sell, rent, exchange or hire in the ordinary course of business for consideration, as where a supplier “supplies” in relation to services, means to sell services, to perform or to cause services to be performed or provided, and to grant access to premises, events, activities or facilities in the ordinary course of business for consideration. As where “promote”²³⁴ means to advertise, display or offer to supply services or goods in the ordinary course of business for consideration.

²²⁸ S 1 “services”. Advice or intermediary services provided by financial institutions which are subject to the FAIS Act are excluded from the Act.

²²⁹ S 1 “rental” the Act defines rentals as an agreement for consideration in the ordinary course of business, in terms of which temporary possession of any premises or other property is delivered, at the direction of, or to the consumer, or the right to use any premises or other property is granted, at the direction of, or to the consumer, but does not include a lease within the meaning of the National Credit Act 35 of 2005.

²³⁰ S 5(6).

²³¹ S 1 “supplier”.

²³² S 1 “market”.

²³³ S 1 “supply”.

²³⁴ S 1 “Promote”. Stassen 42-43.

Promote includes the making of any representation in the ordinary course of business that could be inferred as expressing willingness to supply services or goods for consideration or engagement in any other conduct in the ordinary course of business that could reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction.

“Retailers”²³⁵ in terms of the Act refers to a person who, in the ordinary course of business, supplies goods to a consumer.

3.5 Application of the CPA and the realisation of rights

The long title the CPA throws a spotlight on the purpose of the Act, which is to promote a fair, accessible and sustainable marketplace for consumer products and services.²³⁶ This is an attempt by the Legislature to create a legislative framework to enable uniform rules in which consumers are able to actively engage in the marketplace.²³⁷

Section 5 of the CPA has been drafted in such a manner as to make the application of the Act as far reaching as possible. The Act applies to every transaction occurring within South Africa for the supply of goods and services, or the promotion of goods and services and the goods and services themselves; however an exemption to this is found under section 5(2) where a transaction is exempt from the application of the Act.²³⁸

A transaction is specifically excluded from the application of the CPA under the following conditions:²³⁹ Where there is a supply or promotion of goods and services

²³⁵ S 1 “Retailers”.

²³⁶ Act 68 of 2008 “long title”, and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the National Consumer Commission, to repeal sections 2 to 13 and sections 16 to 17 of the Merchandise Marks Act 17 of 1941; the Business Names Act 27 of 1960; the Price Control Act 25 of 1964; the Sales and Service Matters Act 25 of 1964; the Trade Practices Act 76 of 1976; the Consumer Affairs (Unfair Business Practices) Act 71 of 1988; and to make consequential amendments to various other Acts and to provide for related incidental matters.

²³⁷ GN 1957 in GG 26774 of 9 September 2004 para 13.

²³⁸ S 5(2) (a)-(g).

²³⁹ S 5(2) (a)-(g).

to the State;²⁴⁰ in situations where the consumer is a juristic person whose asset value and annual turnover at the time of the transaction, is more than or equal to two million rand;²⁴¹ if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);²⁴² if the transaction constitutes a credit agreement under the National Credit Act;²⁴³ any services in terms of a employment contract;²⁴⁴ or collective bargaining agreement within the meaning of section 23 of the Constitution²⁴⁵ and the Labour Relations Act;²⁴⁶ or giving effect to a collective agreement as defined in section 213 of the Labour Relations Act,²⁴⁷ are specifically excluded and the CPA does not apply in such situations.

Section 5(1) of the Act needs to be read in conjunction with section 5(5). Section 5(5) of the Act seems to be the overriding provision when it comes to the application thereof, as a transaction can only be exempted in so far as this section allows. If goods are supplied within South Africa in terms of a transaction that is exempt from the application of the Act, the importer, producer or distributor and the retailer of those goods will be subject to sections 60 and 61 which deal with unsafe goods, safety-monitoring, recall and damage caused by such goods.²⁴⁸

The effect of this section is that manufacturers are subject to section 61 of the Act regardless of the fact that the transaction may fall under transactions that are exempt from the application of the Act. As a result of this, the Act always applies and manufacturers are unable to escape liability for harm or damage caused by defective or hazardous products that they manufacture and which subsequently find their way into the market place. This section ensures that any goods and services supplied to

²⁴⁰ S 5(2)(a). The Act does not contain a definition of "State". The Act does however define "organ of state" which is defined in s 1 as an organ of state as defined in s 239 of the Constitution.

²⁴¹ S 5(2)(b). The Act does not provide the manner in which information pertaining to the juristic person's annual turnover or asset value should be obtained. Such asset value is set by the minister in terms of s 6.

²⁴² S 5(2)(c). In terms of s 5(3), only a regulatory authority may apply to the Minister for an industry wide exemption from one or more provisions of the Act on the basis that the provisions overlap or duplicate a regulatory scheme regulated by the authority under national legislation, treaty, international law, convention or protocol. Therefore, an individual supplier or a representative body may not apply for an exemption from the Act. However, in terms of s 5(4), the Minister may, by notice in the *Government Gazette*, grant an exemption to an industry, after receiving advice from the Commission subjected to conditions that the limitations are necessary to ensure the achievement of the purposes of the Act.

²⁴³ Act 35 of 2005. Hereinafter "the NCA". However, the goods and services that are the basis of the credit agreement are not excluded from the ambit of the Act.

²⁴⁴ S 5 (2)(e).

²⁴⁵ The Constitution of the Republic of South Africa 1996, s 23.

²⁴⁶ Labour Relations Act 66 of 1995.

²⁴⁷ S 5(2)(g).

²⁴⁸ Ss 60-61.

consumers are covered by the operation of the Act and further entrenches consumer's rights with regard to transactions they enter into with any of the parties mentioned under sub-section 5.

Section 61 of the Act came in to operation at the end of April 2010, even before the bulk of the Act came into operation on 31 March 2011. This provision strengthens and confirms the burden of strict liability imposed upon manufacturers by section 61 of the Act. This is in line with the purposes of the Act, as it reinforces the rights of the consumers and ensures that consumers have an improved bargaining position in the market.

From the above, it can be seen that the CPA will only apply to the supply of goods and services in the ordinary course of business. Once-off transactions are excluded from the application of the Act and the common law position will find application to such transactions.²⁴⁹ However, where goods are supplied within South Africa in terms of a transaction which is exempted from the application of the Act, the suppliers of such goods will still be subject to the provisions of sections 60 and 61 of the Act.

3.6 Composition of the CPA

The CPA consists of seven chapters, each dealing with a specific issue, followed by two schedules. Schedule 1 explains the extent to which the Act amends existing laws and schedule 2 contains transitional provisions for the implementation of Act. The Legislature's intention was for the CPA to be set out in a manner in which the average consumer would be able to understand and apply the intended purpose of the Act.

Chapter 1 of the CPA consists of two parts, part A which deals with the interpretation and definitions²⁵⁰ and part B which deals with the purpose, policy and application of CPA.²⁵¹

Chapter 2 is worded as "fundamental consumer rights" and consist of eight parts. Each part deals with a specific right the consumer has with the ninth part specifically

²⁴⁹ Melville (2010) 6.

²⁵⁰ Ss 1-2.

²⁵¹ Ss 3-7.

intended for suppliers of goods and services.²⁵² Chapter 3 consists of four parts dealing with the rights and procedures as to how consumers are to enforce the provisions of the Act.²⁵³ Chapter 4 deals with business names and industry codes of conduct and consist of two parts intended to regulate the manner in which suppliers operate their businesses.²⁵⁴

Chapter 5 deals with the powers of the national consumer protection institutions, which consists of three parts specifically dealing with the jurisdiction of the Act and the establishment of the National Consumer Commission.²⁵⁵ Chapter 6 provides for the enforcement procedure of the CPA and consists of four parts.²⁵⁶ Chapter 7 deals with the general provisions of the CPA,²⁵⁷ which is followed by two schedules dealing with the amendment of current laws as well as transitional provisions.

Chapter 2 the Act ascribes eight specific consumer rights which are worded in the positive and provide the consumer with the right to equality in the consumer market,²⁵⁸ privacy,²⁵⁹ choice,²⁶⁰ disclosure and information,²⁶¹ fair and responsible marketing,²⁶² fair and honest dealing,²⁶³ fair, just and reasonable terms and conditions,²⁶⁴ and fair value, good quality and safety.²⁶⁵

3.6.1 Part A: The right of equality in the consumer market

Part A of chapter 2 consists of sections 8 to 10.²⁶⁶ These sections state that suppliers may not exclude or unfairly discriminate against any person, or category of persons which must be read with section 9 of the Constitution²⁶⁷ and the Promotion of Equality and Prevention of Unfair Discrimination Act.²⁶⁸

²⁵² Ss 8-67.

²⁵³ Ss 68-78.

²⁵⁴ Ss 79-82.

²⁵⁵ Hereinafter ("the NCC"). Ss 83-98.

²⁵⁶ Ss 99-119.

²⁵⁷ Ss 120-121.

²⁵⁸ Ss 8-10.

²⁵⁹ Ss 11-12.

²⁶⁰ Ss 13-21.

²⁶¹ Ss 22-28.

²⁶² Ss 29-39.

²⁶³ Ss 40-47.

²⁶⁴ Ss 48-52.

²⁶⁵ Ss 53-61.

²⁶⁶ Chapter 2 part A, ss 8-10.

²⁶⁷ S 9 of the 1996 Constitution.

²⁶⁸ Promotion of Equality and prevention of Unfair Discrimination Act 4 2000.

Suppliers are prohibited from limiting access to goods and services or prioritizing certain groups of consumers over others, or from charging certain types or groups of persons more than others when marketing or distributing their goods and services. Suppliers are further prohibited from varying the quality of their goods in any discriminatory manner, irrespective of the consumer's age, gender, race, socio-economic status or the geographic location of the consumer.²⁶⁹

Section 9 provides suppliers with the right to justifiably differentiate the way in which they treat consumers provided that the requirements set out under sub-sections 9(1)-(4) have been complied with. In the aforementioned circumstances where there has been compliance with section 9 the supplier may differentiate the way they treat consumers, provided such differentiation is not in contravention with section 8.²⁷⁰ The grounds for differentiation predominantly involve minors or the elderly who do not have capacity to act or where it will be in accordance with any public regulation or as a reasonable precaution to protect the health, welfare or safety of consumers.²⁷¹

Section 10 deals with the jurisdiction of the Equality Court with reference to section 8 to 10.²⁷² The courts have an inherent power to assess the reasonableness of any contract or agreement before the court or to determine the fairness thereof. The consumer is entitled to institute proceedings before an equality court or file a complaint with the NCC, and should the complaint appear to be valid, the NCC must refer it to the Equality Court.²⁷³

3.6.2 Part B: The right to privacy

The consumers right to privacy stems from section 14 of the Constitution.²⁷⁴ Kirby²⁷⁵ is of the view that the rights which are provided by the CPA are necessary and needed as a set of rights in which careful thought has been given to the manner and nature in which consumers and suppliers engage with one another.

²⁶⁹ S 8(1)-(4).

²⁷⁰ S 9(1).

²⁷¹ S 9(1) (a)-(d).

²⁷² S 9(1)(a)(i)-(ii).

²⁷³ S 10 (1)(a).

²⁷⁴ Chapter 2, part B, ss 11-12.

²⁷⁵ Kirby (2009) 141.

The CPA provides the consumer with the right to protect their privacy and confidentiality from unwanted or unsolicited marketing, by restricting or refusing any unwanted direct marketing by blocking any form of communication be it via e-mail, telephone or SMS.²⁷⁶ The CPA allows for specific contact times in which suppliers are authorised to contact consumers, unless the consumer has consented to the contrary. The Minister may prescribe time periods by notice in the Government Gazette in which suppliers are entitled to contact consumers.²⁷⁷

The CPA enables the NCC to establish a registry in which consumers may register to automatically block any unwanted direct marketing.²⁷⁸ This would place a heavier burden on suppliers who use direct marketing strategies, as the obligation would be placed on the suppliers to ensure such consumers are not on the register.²⁷⁹

Consumers are further provided the right to unsubscribe or opt-out. Suppliers are then prohibited from sending any unwanted or unsolicited marketing to the consumer in the future, especially if they are deemed to be for “direct marketing” purposes.²⁸⁰ Consumers also have the right to a cooling-off period for agreements which were concluded as a result of direct marketing.²⁸¹

3.6.3 Part C: The right to choose

Section 13 provides the consumer with the right to choose the goods and services they require.²⁸² Suppliers are prohibited from locking consumers into agreements that force consumers to buy bundled or grouped goods, or forcing consumers to enter into agreements that require goods to be purchased from a particular supplier.²⁸³ The CPA does provide an exemption to suppliers, where a supplier is able to show that the benefit or convenience the consumer will receive with the

²⁷⁶ Ss 11(1).

²⁷⁷ S 12(1)-(2). "Direct marketing" means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, goods or services to that person in the ordinary course of business.

²⁷⁸ S 11(3).

²⁷⁹ S 11(2)-(5).

²⁸⁰ S 12(3).

²⁸¹ S 16(3).

²⁸² Chapter 2, part C, ss 13-21.

²⁸³ S 13(1)(a)-(b).

bundled goods is a justifiable limitation on the consumer's freedom of choice and that such goods are also available individually.²⁸⁴

Section 14²⁸⁵ deals with the consumer's right to renew any fixed-term agreement. The CPA provides that a fixed-term agreement may not exceed the maximum period prescribed.²⁸⁶ Consumers are entitled to cancel fixed-term agreements by giving such supplier 20 business days notice.²⁸⁷ Such notice must be given in writing or in any other recorded manner.²⁸⁸

Where a consumer terminates a fixed-term agreement the consumer will still be liable for any amounts owed in terms of the agreement up to date of cancellation.²⁸⁹ The Act provides that the consumer may cancel a fixed-term agreement upon the expiry of the fixed-term agreement without penalty or charge;²⁹⁰ however where the consumer prematurely cancels the fixed-term agreement the supplier is entitled to impose a reasonable cancellation penalty.²⁹¹

A supplier is required to provide the consumer with no less than forty days and no more than eighty days notice before the fixed-term agreement will expire.²⁹² Where a fixed-term agreement has lapsed, the CPA provides that the fixed-term agreement will automatically continue on a month to month basis.²⁹³ This is however subject to the requirement that the consumer has given a clear indication of his intention to renew the fixed-term agreement or to terminate the agreement upon the expiry date.²⁹⁴

Section 15 deals with the rights of consumers regarding pre-authorisation of repairs or maintenance services.²⁹⁵ This section applies to all work that requires the service

²⁸⁴ S 13(1)(i)-(iii).

²⁸⁵ It should be noted s 14 does not apply to transactions between juristic persons, regardless of their turn over or asset value.

²⁸⁶ S 14(a).

²⁸⁷ S 14(2)(b)(i)(bb).

²⁸⁸ It is uncertain whether notice which is recorded via a telephonic conversation is sufficient notice.

²⁸⁹ S 14(3)(a).

²⁹⁰ S 14(2)(b)(i)(aa).

²⁹¹ S 14(3)(a)-(b). The supplier must credit the consumer with any amount that remains the property of the consumer as of the date of cancellation. Also see s 14(4)(c) on the reasonableness of credits and charges which is to be prescribed by the Minister.

²⁹² S 14(2)(c).

²⁹³ S 14(2)(d).

²⁹⁴ S 14(2)(d)(i)-(ii).

²⁹⁵ S 15.

provider to take possession of the property in order for a quote to be provided before the service is carried out.²⁹⁶

Section 16 deals with the consumers cooling-off rights.²⁹⁷ Section 16 enables the consumer to cancel any fixed-term agreement entered into by way of direct marketing, without reason or penalty. The consumer is required to give notice to the supplier in writing, or in any other recorded manner or form, within five business days after the conclusion of the agreement, or from the date on which the goods were delivered.²⁹⁸ A supplier is obligated to return any payments received by the consumer within 15 days unless permitted under section 20(6).²⁹⁹

Section 17 deals with the consumers' rights to cancel advance reservations, bookings or orders. Where the consumer is afforded the right to cancel, a supplier is entitled to charge a reasonable cancellation penalty.³⁰⁰

Section 18 provides the consumer with the right to choose or examine goods; this section must be read in unison with section 19.³⁰¹

The CPA clearly provides rights to the consumer in situations where the supplier does not act in accordance with the agreement.³⁰² Where a supplier delivers goods to the consumer, the consumer is entitled to examine those goods for the purpose of ascertaining whether he or she is satisfied that the goods are fit for the purpose required.³⁰³ Where the supplier delivers goods and services at a location other than a location agreed upon, the consumer may accept delivery or cancel the agreement or require delivery or performance at the agreed location, date and time.³⁰⁴ Where a supplier delivers only some of the goods to the consumer, or supplies a mixed supply of goods of a different description not contemplated in the agreement, the consumer is entitled to accept delivery of the goods or reject the goods.³⁰⁵

²⁹⁶ S 15(1)(b)(i)–(ii).

²⁹⁷ S 16. This section does not apply to a transaction if s 44 of the Electronic Communications and Transactions Act 25 of 2002 applies to that transaction.

²⁹⁸ S 16(1)–(3).

²⁹⁹ S 16(4).

³⁰⁰ S 17.

³⁰¹ Ss 18–19. S 19 does not apply to goods or services resulting from a franchise agreement, or in a case in which the performance of that transaction is governed by s 46 of the ECTA.

³⁰² S 19(5).

³⁰³ S 19(5)(a)–(b).

³⁰⁴ S 19(6)(a)–(c).

³⁰⁵ S 19(8)(a)–(b).

Section 20 provides the consumer with the right to return goods, this section does not replace the consumers' right to return unsafe or defective goods, nor does it substitute any other right that the consumer may have to return goods for a refund.³⁰⁶ The consumer is provided the right to return goods within ten business days from concluding the agreement.³⁰⁷

Section 20(3) refers to goods that may not be returned in a case in which, *inter alia*, public health or a public regulation prohibits the return of goods to a supplier once they have been supplied. This would include medication or other personal use items.³⁰⁸

In situations where the consumer has elected to return goods, the supplier must refund the consumer the price paid for the goods, less any amount that the CPA allows the supplier to charge.³⁰⁹ Should the goods still be in their original packaging and not have been opened, the consumer may not be charged an amount in respect of the goods.³¹⁰ Where the original goods were opened but repacked in their original packaging, the supplier is entitled to charge a reasonable amount. The amount charged will be for the actual use of the goods or any consumption or depletion of the goods.³¹¹ The exemption to this is where the consumer was required to open the packaging to determine whether the goods were fit for the intended purpose or if they conformed to the description of such goods.³¹²

Section 21 deals with unsolicited goods or services. The CPA places no obligation upon a consumer to pay for unsolicited goods or services and the consumer may lawfully retain such goods or services. In the event a supplier delivered unsolicited goods or services, the supplier is provided with ten business days to notify the consumer of any incorrect delivery. Any goods that have been incorrectly delivered to the wrong recipient and notice of this error has been brought to the attention of the supplier, such goods only become unsolicited should the supplier fail to recover the goods within twenty business days after being informed of the incorrect delivery.³¹³

³⁰⁶ S 20(1)(a)–(b).

³⁰⁷ S 20(4).

³⁰⁸ S 20(3).

³⁰⁹ See reg 44 herein.

³¹⁰ S 20(5) and s 20(6)(a).

³¹¹ S 20(6)(b)(i)–(ii).

³¹² S (20)(6)(c)(ii)(aa)–(bb).

³¹³ S 21(2)(a).

The CPA remains silent on the manner in which the consumer should notify the supplier of the unsolicited goods as well as to the time within which the consumer should bring the suppliers attention to such error.³¹⁴

3.6.4 Part D: The right to disclosure and information

Section 22 provides the consumer the right to receive information or agreements in plain and understandable language.³¹⁵ This first began with the implementation of the NCA.³¹⁶ The NCA requires that an agreement must be made available in one of the official languages as where the CPA does not. The CPA only requires that an agreement must be in a plain and understandable language which the ordinary consumer should be able to comprehend and make an informed decision regarding the nature and obligations that arise from an agreement.³¹⁷

The plain language requirement intends that where a notice, document or representation is aimed at a particular consumer, such consumer must be able to understand the content even with average literacy skills and minimal experience. Therefore the consumer must be able to understand the contents without undue effort.³¹⁸

Section 22 will require many suppliers to rethink the manner in which they have drafted their fixed term contracts in order to meet the plain language requirement set down by section 22. This section applies to all consumers whether dealing with educated consumers or consumers with no education. The Act lays down a clear test to determine whether a document or representation is in plain and understandable language and states that:

- (a) the context, comprehensiveness and consistency of the document or representation;³¹⁹
- (b) the manner in which the representation is done or the style of the document;³²⁰

³¹⁴ S 21(1)(a)-(e).

³¹⁵ S 22.

³¹⁶ S 64, Act 34 of 2005.

³¹⁷ S 22(2). Du Preez (2009) 76.

³¹⁸ S 22(2).

³¹⁹ S 22(2)(a).

³²⁰ S 22(2)(b).

- (c) the manner in which the sentences are structured and the types of words used in the document; and³²¹
- (d) the aids used to assist the consumer in the reading and understanding of the document or representation.³²²

The NCC will publish guidelines in the future for suppliers to assess whether a notice, document or visual representation satisfies the requirements of subsection (1)(b) which will lead to more user-friendly agreements in the consumer market.³²³

Section 23 regulates the manner in which suppliers disclose the price of goods and services.³²⁴ Suppliers are prohibited from displaying any goods for sale without displaying the price of the goods.³²⁵ Section 23(5) provides the manner in which suppliers are expected to adequately display such prices. However, the exemption to this rule is where goods are primarily displayed for advertising purposes.³²⁶

Where goods have two prices displayed the consumer will be entitled to pay the lower of the two prices for the goods, subject to the provisions of sections 23(6)-(11). Section 24 deals with product labelling and trade descriptions which prevent any misleading trade descriptions. The CPA prohibits any trade descriptions which will knowingly mislead a consumer.³²⁷

The CPA defines "trade description"³²⁸ as excluding trademarks, but including a statement as to the ingredients of which any goods consist. The Minister may prescribe categories of goods that must have a trade description applied to them, or rules as to be used in accordance with any international agreement for the purpose of determining the country of origin of the goods.³²⁹

Section 25 deals with the disclosure of grey-market or reconditioned goods bearing the original suppliers trade mark. Such goods being sold by suppliers are required to display a clear notice informing the consumers that such goods have been re-

³²¹ S 22(2)(c).

³²² S 22(2)(d).

³²³ S 22 (3). The guidelines published in terms of subsection (3) may be published for public comment.

³²⁴ S 23. This section does not apply where s 43 of the ECTA applies to a transaction.

³²⁵ S 23.

³²⁶ S 23(4).

³²⁷ S 24(2)(a)-(b).

³²⁸ S 1 "trade description".

³²⁹ S 24(4)(a)-(b).

conditioned or remade. Where grey-market goods are sold, such supplier must apply a conspicuous notice on these goods.³³⁰

Section 26 requires the supplier to provide the consumer with written record of each transaction the consumer has carried out with the particular supplier,³³¹ together with the supplier providing his full business information to the consumer on such written record.³³²

Section 27 deals with intermediaries and the duty placed on intermediaries to disclose prescribed information to such person to whom the intermediary solicits or agrees to represent in respect of the sale of goods and services.³³³

Section 28 creates the requirement that where a person is engaged in direct marketing at the consumers' premises, while performing services, be it delivering or installing goods, such supplier is required to visibly wear an identification device such as a badge to provide suitable identification to enable the consumer to identify such supplier if necessary.³³⁴

3.6.5 Part E: The rights to fair and responsible marketing

Section 29 applies to marketing;³³⁵ negative option marketing;³³⁶ direct marketing;³³⁷ catalogue marketing;³³⁸ trade coupons and similar promotions;³³⁹ customer loyalty programmes;³⁴⁰ promotional competitions;³⁴¹ alternative work schemes;³⁴² referral

³³⁰ S 25 (1)-(2).

³³¹ S 26.

³³² S 26(3). This section does not apply where s 43 of the ECTA applies to a transaction.

³³³ S 27(1).

³³⁴ S 28(a)-(b).

³³⁵ Chapter 2, part E, ss 29-39, s 30. Bait marketing entails where a supplier intentionally misleads a consumer that certain goods and services are available at a specific value and price where this is not the true situation.

³³⁶ S 31. Negative option marketing entails where a supplier induces a consumer to enter into an agreement through marketing goods to the consumer and the obligation is placed on the consumer to return such goods or services.

³³⁷ S 32. A person who is directly marketing any goods or services, and who concludes a transaction or agreement with a consumer, must inform the consumer, in the prescribed manner and form, of the right to rescind that agreement, as set out in s 16.

³³⁸ S 33. Where consumers are provided goods and services through catalogue marketing, a supplier must disclose to the consumer all the information as described under s 33(3)(a)-(h).

³³⁹ S 34. Catalogue marketing refers to an agreement for the supply of goods or services that is not entered into in person, and includes agreements concluded telephonically or by postal order or fax or in any similar manner in which, with respect to goods, a consumer does not have the opportunity to inspect the goods prior to conclusion of an agreement. See Jacobs *et al* (2010).

³⁴⁰ S 35. The Act defines a "loyalty programme" as any arrangement or scheme in the ordinary course of business in terms of which a supplier or an association of suppliers or any person on behalf of a supplier

selling,³⁴³ and agreements with persons lacking legal capacity.³⁴⁴ In an attempt to create the right to fair business practices in respect of the marketing of goods and services, the Legislature has attempted to create an atmosphere of truthful and honest advertising. This will promote fair business practices, which in turn will lead to fair competition between suppliers of goods and services, resulting in competitive prices and a more vibrant and active consumer market.³⁴⁵

Any credit agreements which are promoted in terms of the NCA are not expressly excluded from credit marketing. Therefore, any advertising and marketing of credit agreements would be subject to the CPA. However, this would create a duplication of regulatory schemes. The consumer would be provided the greatest possible protection between the CPA and NCA, only where it would not be possible to apply the two Acts concurrently would the Act which provides the consumer with the most protection apply.³⁴⁶

3.6.6 Part F: The right to fair and honest dealing

Sections 40 to 47 deal with the consumers rights to fair and honest dealings and provides the consumer with the right to protection against unconscionable conduct.³⁴⁷ The CPA attempts to regulate this by, *inter alia*, prohibiting unconscionable conduct;³⁴⁸ false misleading or deceptive representations,³⁴⁹ fraudulent schemes and offers;³⁵⁰ pyramid schemes;³⁵¹ auctions;³⁵² waivers; deferrals; substitution of goods;

or association of suppliers grants or offers loyalty awards or credit in connection with an agreement or transaction.

³⁴¹ S 36. "Promotional competition" are defined as any competition, game, scheme, arrangement, system, plan or device distributing a prize by lot or chance, that is conducted in the ordinary course of business.

³⁴² S 37. Prohibits any person from making false representations to the actual availability, or potential profitability, risk or any material aspect of work, business or an activity involved in any arrangement for gain.

³⁴³ S 38. Referral selling occurs where a consumer accepts an offer to buy goods or services on the representation that a benefit will be received where the consumer provides the supplier or assists the supplier in supplying the goods or services to other consumers.

³⁴⁴ S 39. Any agreement that is entered into for the supply of goods and service to a consumer, who is mentally unfit is void if the supply could have reasonably or ought to have known that the consumer does not have mental capacity.

³⁴⁵ GN 1957 in GG 26774 of 9 September 2004 para 25. See Jacobs *et al* (2010) 334.

³⁴⁶ Jacobs *et al* (2010) 334.

³⁴⁷ Chapter 2, part F, ss 40-47.

³⁴⁸ S 40.

³⁴⁹ S 41.

³⁵⁰ S 42.

³⁵¹ S 43.

³⁵² S 45.

³⁵³ and over-booking and over-selling.³⁵⁴ The CPA uses the word “unconscionable conduct” and Melville³⁵⁵ states;

“Given that the Act itself calls for “plain language” in all dealings with the consumer, this clause calls for positive conduct with the consumer, and does not allow a supplier to use undue influence, pressure, duress or harassment, unfair tactics or any similar conduct in getting payment due to the supplier, or goods returned.”

Suppliers may not directly or indirectly imply a benefit which the consumer would possibly receive from the goods or services that does not exist, or ignore any misunderstanding that the consumer may express towards the product or the service due to exaggerations, puffing or ambiguous sales techniques.³⁵⁶

The CPA has taken a firm stance on businesses that tend to over-book or over-sell goods and services, with the express knowledge that not all the consumers who had reservations for goods and services will make use of such reservation.³⁵⁷

The Act requires that where a supplier has made a commitment or reservation but fails to comply with such commitment due to insufficient stock or capacity to supply such goods or services, the supplier is required to supply the consumer with goods and services of a similar or comparable nature, or goods and services of better quality, class or nature.³⁵⁸ Where the situation arises that the supplier has the inability to honour the supply of goods and services, the supplier must refund the consumer any amounts paid, together with interest at the prescribed rate from the date on which the amount was paid until date of reimbursement.³⁵⁹ The Act further holds suppliers liable for any costs the consumer directly incurred due to the suppliers breach, except to the extent under subsection 5.³⁶⁰

³⁵³ S 46.

³⁵⁴ S 47.

³⁵⁵ Melville (2010) 44.

³⁵⁶ S 41(2).

³⁵⁷ S 47(1)(a)-(b) read with s 47(2). This section does not apply to franchise agreements or to the supply of any special order goods

³⁵⁸ S 47(3).

³⁵⁹ S 47(3)(a).

³⁶⁰ S.47(3)(b). Subsection (3)(b) does not apply where there is a shortage of stock or capacity is due to circumstances beyond the supplier's control, and the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do so in the circumstances.

3.6.7 Part G: The right to fair, just and reasonable terms and conditions

Arguably one of the most important and long overdue rights which have been provided to the consumer in our law is the right to fair, just and reasonable terms and conditions.³⁶¹ The CPA prohibits suppliers from requiring consumers to waive any rights, or assume any obligations, waive any liability of the suppliers on terms that are unfair, unreasonable or unjust in an attempt to circumvent the provisions of the Act.³⁶²

Section 48 provides that suppliers may not offer to supply, or enter into an agreement to supply goods or services at an unfair, unjust or unreasonable price or on terms that are unfair, unjust or unreasonable.³⁶³ Suppliers are further prohibited from marketing any goods or services in an unfair or unjust manner,³⁶⁴ or from requiring a consumer to waive any rights, or assume any obligations or limit the supplier's liability on terms that are unfair, unreasonable or unjust.³⁶⁵

The terms and conditions of an agreement will automatically be deemed to be unfair, unreasonable or unjust, if it is excessively one sided in favour of a person other than the consumer to whom the goods or services are supplied. Further, terms or conditions that are adverse to the consumer in that they are inequitable shall also be deemed to be unfair, unreasonable or unjust, so too will false, misleading or deceptive representations. Deceptive and misleading representations include words or conduct on the part of the supplier concerning a material fact; the usage of exaggeration, innuendo or ambiguity and the omission of a supplier to disclose a material fact if such omission amounts to deception. Suppliers are also obliged to correct any misapprehension that a consumer has concerning the goods or services.³⁶⁶

Section 49 provides that the supplier is required to provide the consumer with notice when any right of the consumer is to be limited in any way or amounts to an assumption of risk or liability or that could be unexpected. Should the consumer not be aware of its existence, such a limitation must be specifically pointed out and

³⁶¹ Chapter 2, part G, ss 48- 52.

³⁶² GN 294 in GG 35181 of 1 April 2011.

³⁶³ S 48(1)(a).

³⁶⁴ S 48(1)(b).

³⁶⁵ S 48(1)(c).

³⁶⁶ S 48(2)(a)-(d).

drawn to the consumers' attention. The fact, nature and potential effect that such an assumption or limitation of risk will possess must be disclosed. The supplier is required to make such notice in a manner and form that satisfies the requirements of subsections 3 to 5, and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of such provisions.³⁶⁷

In terms of section 50(1), the Minister may prescribe categories of agreements that are required to be in writing. Where there is an agreement between a supplier and a consumer and such agreement is reduced to writing, in terms of the Act or voluntarily, such agreement is valid irrespective of whether the parties to the agreement signed the agreement. This may however be to the detriment of the consumer.³⁶⁸ Any agreement which attempts to circumvent the terms or provisions of the CPA would be void in so far as such circumvention is in conflict with the Act.³⁶⁹

Section 50(2) deals with the powers of the courts to ensure fair and just conduct and terms and conditions. Where a consumer alleges that a supplier has acted in contravention of section 40, in that he acted with unconscionable conduct; or in contravention of section 41, in that such supplier acted in an unfair, unreasonable or unjust manner; or in contravention of section 48, where it is alleged that the agreement itself is riddled with unfair, unreasonable or unjust contractual terms, the CPA fails to address such issues as it does not provide a sufficient remedy to correct such contraventions. The courts would be required to consider the factors listed in section 52(2) as well as the provisions within the Act dealing with the purpose and application of the Act before a court is able to hand down an order.³⁷⁰

3.6.8 Part H: The right to fair value, good quality and safety

Sections 53 to 61 create the rights to expect fair value, good quality and safety from goods and services.³⁷¹ Effectively the CPA has created an inherent warranty that

³⁶⁷ S 49(1)-(5).

³⁶⁸ S 50(1). Also see chapter 4 hereunder.

³⁶⁹ S 51.

³⁷⁰ S 52(1)-(2).

³⁷¹ Chapter 2, part H, ss 53-61.

provides for suppliers to warrant that the goods offered will comply with the standards set out under part H.³⁷²

Under section 54, the consumer has the right to receive quality services, this means that the consumer is entitled to receive timely performance and the completion of the services rendered. The Act further provides that quality is the minimum requirement when service is delivered, and that quality is expected to be that of what the average consumer would expect of that particular good or service.³⁷³

Goods that are delivered or installed are expected to be preformed and completed in good time and free of any defects and without any unnecessary delay. The supplier is required to give the consumer sufficient and timely notice where performance will not be possible. The Legislature uses the word “unavoidable” which seems to give the impression that a delay may not be caused by the fault of the supplier.³⁷⁴

Suppliers are further required in terms of section 67 to return any goods removed during repair or maintenance work to the consumer in a reasonably clean container.³⁷⁵ Section 65³⁷⁶ provides that a supplier must hold and account for the consumer’s property and therefore must return to the consumer their property in good condition.³⁷⁷ Should the supplier fail to remedy any defect in the quality of services performed or in the goods supplied, the supplier may offer a refund to the consumer.³⁷⁸

Section 55 provides the consumer with the right to receive goods or services that are of good quality, and in good working order, free from any defects for the intended purpose for which the consumer wishes to use such goods. The goods must comply

³⁷² S 51. “Defect” is defined as any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.

³⁷³ S 54.

³⁷⁴ S 54(2).

³⁷⁵ S 7(1).

³⁷⁶ This section does not apply to a supplier which is classified as a bank or a financial institution.

³⁷⁷ S 65.

³⁷⁸ S 55(1)-(2).

with any applicable standards set for such goods under the Standards Act³⁷⁹ or any other public regulation.³⁸⁰

In determining whether the particular goods or services are reasonably suitable for the intended purpose of the consumer, all relevant circumstances must be considered. Such considerations include: the manner and purpose for which the goods were marketed for; the use of any trade descriptions; the instructions and warnings supplied with the goods; the things the product may reasonably be anticipated to perform and the time when the goods were produced and supplied.³⁸¹

The right to implied warranty of quality is provided by section 56 of the CPA. This right provides that any agreement pertaining to the supply of goods or services to the consumer has an implied warranty that the goods will be suitable for the purpose for which they are intended for. Each supplier in the supply-chain from the producer, importer, distributor to the retailer provides this implied warranty. This provision has confirmed that each supplier in the supply chain warrants that the goods and services will comply with the requirements and standards of being safe, of good quality and durability. Should a consumer discover that the goods are not compliant with the above requirements they will be entitled to return the goods to suppliers, without penalty.³⁸²

Section 57 provides for refunds, repairs and warranties. The CPA creates “implied warranties” which provide that suppliers are expected to supply goods and services that meet the standards of quality that the CPA envisions. This entails that any repairs or maintenance work, or the labour required for installation of the products are further warranted for a period of three months after the date of installation or a longer period if the supplier allows for it.³⁸³

Section 58 creates the right to receive warnings on the nature of the risk of any goods that are solicited to consumers by suppliers. This places an obligation upon a supplier to draw to the consumers attention, any risks of an unusual character or nature namely; risks of which consumers could not or would not reasonably be expected to foresee, or which the ordinarily alert consumer could not reasonably be

³⁷⁹ Standards Act 29 of 1993.

³⁸⁰ S 55(1)-(2) read with s 45.

³⁸¹ S 55(1). This section does not apply to goods bought at an auction, as contemplated in s 45, except to the extent contemplated in subsection 6.

³⁸² S 56.

³⁸³ S 57.

expected to consider, depending on the specific circumstances or nature of the risk that could result in injury or death. Suppliers are obliged to bring to the consumers attention notice and labelling of any hazardous or unsafe goods, and provide the consumer with adequate instructions for the safe handling and use of such goods.³⁸⁴

Under section 59 the consumer has the right to recovery and safe disposal of designated products or components. Any supplier in the supply chain will be responsible for accepting and disposing of waste deemed unsuitable for disposal in common waste systems. A particular product may be prohibited from being disposed of in common waste systems by national legislation.³⁸⁵

Section 60 provides that the consumer has the right to have products monitored for safety and if such products are required to be recalled.³⁸⁶ The NCC must promote the development, adoption and application of industry-wide codes of practice providing for an effective and efficient system of industry codes which will make provision for the return or recall of hazardous, unsafe or defective goods or components, and the monitoring of injury or damage resulting from the use of such goods.³⁸⁷ The NCC has the power to instruct any importer or producer to recall a product if the NCC on reasonable grounds believes that a product is unsafe, or if the supplier has not taken the necessary steps to ensure public safety.³⁸⁸

The regulations provided for in terms of section 60 with regards to safety monitoring applies to all transactions including transactions which are expressly exempt from application of the Act.³⁸⁹

Section 61 provides the consumer with the right to claim damages for injuries caused by unsafe or defective goods. The creation of strict liability by the Legislature makes it possible for the consumer to claim damages from any supplier of goods and services where it is found that the goods are unsafe, defect or hazardous as well as if damage was caused due to inadequate instructions or warnings.³⁹⁰

³⁸⁴ S 58.

³⁸⁵ S 59.

³⁸⁶ S 60.

³⁸⁷ Such promotion must be done within the structure of s 82.

³⁸⁸ S 60(2).

³⁸⁹ Jacobs *et al* (2010) 307.

³⁹⁰ S 61.

3.6.9 Part I: Supplier's accountability to consumers

Part I of Chapter 2 consists of sections 62 to 67 and deals with the suppliers' accountability when goods and services are sold to consumers by way of:³⁹¹ lay-bys;³⁹² prepaid certificates; credits and vouchers;³⁹³ prepaid services and access to service facilities.³⁹⁴ The suppliers' responsibility and accountability where the consumer's goods are left in the care of the supplier, the Act regulates the suppliers' accountability of the consumer's property,³⁹⁵ deposits in respect of containers, pallets or similar objects³⁹⁶ and the return of parts and materials.³⁹⁷

Under section 62(1), lay-by sales refer to an agreement where the supplier agrees to sell the goods to a consumer where payment of the full purchase price is deferred and the consumer makes periodic instalments. However, the supplier retains the goods until the full purchase price has been paid.³⁹⁸ Subject to the provisions of section 65 of the Act suppliers remain liable for such goods until the final instalment has been paid and the goods are delivered to the consumer.³⁹⁹

In situations where the supplier is no longer able to deliver the goods after the consumer has paid the full purchase price, the supplier is entitled to either; supply the consumer with a corresponding amount of goods that are similar or better,⁴⁰⁰ or refund the consumer all amounts paid with interest, should the supplier have been unable to supply the goods owing to circumstances beyond his or her or its control.⁴⁰¹

In situations where the consumer is unable to fulfil his obligation to the supplier and thereby cancels or defaults on the agreement before the full payment of the purchase price, the supplier is entitled to charge the consumer a termination penalty,

³⁹¹ Chapter 2, part I, ss 62-67.

³⁹² S 62.

³⁹³ S 63.

³⁹⁴ S 64.

³⁹⁵ S 65.

³⁹⁶ S 66.

³⁹⁷ S 67.

³⁹⁸ S 62(1).

³⁹⁹ S 62(1)(a).

⁴⁰⁰ S 62(a).

⁴⁰¹ S 62(2)(b)(i). Interest is to be paid in accordance with the Prescribed Rate of Interest Act 55 of 1975, namely the ruling interest rate for that period.

provided that the consumer is informed of the fact and the extent of the penalty before the consumer entered into the agreement.⁴⁰²

Section 63 deals with the consumers' right where prepaid certificates, credits and vouchers have been purchased.⁴⁰³ The CPA provides that where such prepaid certificates, credits vouchers, cards or similar devices have been purchased such devices will not expire until the full value has been redeemed or 3 years, after such devices have been purchased.⁴⁰⁴ Suppliers who issue these certificates or credit devices must hold the consideration received in trust for the benefit of the bearer of the device to the extent that the device has not yet been redeemed in exchange for goods, services or future access to services.⁴⁰⁵

Section 64 deals with goods and services which have been supplied to consumers in the form of prepaid services and access to service facilities.⁴⁰⁶ Where a consumer agrees to pay or is required to pay a one-time periodic membership fee, or any amount in respect of service or access to services to be provided, at a date more than twenty five business days after the payment is made, the amount remains the property of the consumer until the supplier makes a charge against it.⁴⁰⁷

Where a supplier is unable to deliver the service or intends to close the facility, written notice of such closure must be given to the consumer at least forty business days before the intended date of closure and no later than five business days after closing the facility, the supplier must refund the consumer the balance of any money belonging to the consumer.⁴⁰⁸

Section 66 deals with deposits in respect of containers, pallets or similar objects. This section applies where a person returns bottles, containers, reels or similar objects to any supplier of goods which is ordinarily sold in such bottles, containers, reels, pallets or similar objects. The supplier must pay that person the amount of the

⁴⁰² S 62(4) read with s 62(5)(a) and s 62(5)(b) makes provision that a supplier may not charge a penalty where the consumers default is due to the death or hospitalization of the consumer.

⁴⁰³ S 63.

⁴⁰⁴ S 63(2)(a) and (b).

⁴⁰⁵ S 63(3).

⁴⁰⁶ S 64.

⁴⁰⁷ S 64(1)(a) and (b).

⁴⁰⁸ S 64(3).

deposit that the supplier charged for that object, irrespective of whether the person returning the object paid a deposit for that object to the supplier.⁴⁰⁹

Section 67 deals with the return of parts and materials by the supplier. Any parts or components removed from any goods or property in the course of repair or maintenance work must be kept separately from parts removed from other goods or property. Such goods or components must be returned to the consumer in a reasonably clean container unless the consumer declined the return of such goods.⁴¹⁰

3.7 Conclusion

There can be no question that the CPA has far reaching implications for both consumers and suppliers alike, with the Act clearly being drafted in favour of the consumer. The eight fundamental rights provided for under the CPA make inroads into the common law position of the consumer *vis-à-vis* the supplier. The Act clearly intends to regulate the interactions and relationship between suppliers and consumers, by removing unethical and unfair conduct from the marketplace. Undoubtedly, most suppliers who supply goods and services in South Africa will be affected by the CPA and have the onerous task of ensuring compliance with the Act, as the consequences for non-compliance are severe.

The increased costs of goods and services in achieving compliance with the reviewing of current agreements and practices together with the additional cost of training staff will in most probabilities be passed on to the consumer. Consumers will however welcome the provisions provided by the Act as unfair practices in the marketplace will eventually be eradicated.

⁴⁰⁹ S 66(2)(a) and (b). The Legislature has used the wider term "person" instead of "consumer" this would possibly be for the reason that the person returning the object would not necessarily have needed to be the "consumer" thereof.

⁴¹⁰ S 67(1) and (2).

The consumer's 'right to fair, just and reasonable contractual terms' under Part G of the Consumer Protection Act 68 of 2008

4.1 Introduction

The South African contract law is founded on the common law principles of freedom of contract. A disgruntled contractant may rely upon the common law principles of legality, or even go as far as to rely on the rules of interpretation in an attempt to find relief. These principles however cannot provide the substantive control needed in current consumer markets.⁴¹¹

Courts are generally reluctant to interfere and place limitations on agreements where the parties have freely entered into such agreements. This is due to the fact that the parties have negotiated and reached consensus on the terms of the agreement. The parties are bound by the principles of freedom of contract and that of *pacta sunt servanda*, which requires agreements to be honoured when entered into freely.⁴¹² Courts have constantly upheld agreements due to these principles, even where a complainant alleges that the provisions of the agreement are unfair or unreasonable.⁴¹³

Suppliers and service providers have been taking advantage of this loophole in our law for decades with the use and implementation of “standard term contracts” or business-to-business contracts which places these suppliers in a far more superior bargaining position, which leaves the consumer with none or very little rights.⁴¹⁴ Where consumers attempt to negotiate better terms for themselves, and the representative of the supplier dealing with the consumer generally does not have the authority to renegotiate the agreement which usually leaves the consumer with only two options to take-it or leave-it.⁴¹⁵

⁴¹¹ Christie (2011) 8; Jacobs *et al* (2010) 353.

⁴¹² *Burger v Central South African Railways* 1903 TS 571; *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); Christie (2011) 13-15; Van Eeden (2013) 235.

⁴¹³ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

⁴¹⁴ Christie (2011) 13-15.

⁴¹⁵ Naudé (2006) 515-517 and Stoop 503-506.

In the recent decisions of *Bredenkamp*,⁴¹⁶ *Everfresh Market Virginia*⁴¹⁷ and *Naidoo*⁴¹⁸ our courts have confirmed their willingness and acceptance that the common law is wide enough to include the ideology of public policy and *ubuntu* with the courts having the power to refuse the enforcement of certain provisions of a contract which are against public policy. However, only in exceptional and severe circumstances would a contractant be successful when approaching the court for relief. In most situations such legal expenditure would not be practical for the average consumer, as the legal costs would end up being more than the transaction value itself, making such litigation arbitrary for the consumer.⁴¹⁹

The Law Commission in a Draft Green paper⁴²⁰ raised the issue for the need for protective measures for unfair contract legislation with the attempt to discourage unfair, unreasonable, and unconscionable conduct in consumer agreements. The Commission proposed that instead of legislating separate unfair contractual legislation, general provisions regarding unfair consumer agreements, should rather be inserted into existing consumer laws.⁴²¹ What the Commission envisaged can now be found in the CPA, more specifically Part G of chapter 2, which deals with unfair, unreasonable or unjust contract terms.⁴²² It should however be noted that Part G of the CPA does not apply to agreements which were concluded before the general effective date.⁴²³

4.2 Application and definitions under Part G

As more fully discussed in chapter 3 hereof, the CPA only finds application to transactions occurring within the Republic for the supply of goods and services, or the promotion of goods or services and to the goods or services themselves, unless

⁴¹⁶ *Bredenkamp v Standard Bank* (599/09) [2010] ZASCA 75.

⁴¹⁷ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

⁴¹⁸ *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

⁴¹⁹ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) paras 39-46. Also see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 847 (A), where the court refused to enforce a contract where it was found to be contrary to public policy. For an in-depth discussion see Louw (2013).

⁴²⁰ GN 1957 in GG 26774 of 9 September 2004 paras 30-31. See also Naudé (2006) for a discussion on an earlier set of factors contained in the draft Bills.

⁴²¹ GN 1957 in GG 26774 of 9 September 2004 paras 30-31.

⁴²² Ss 48-51.

⁴²³ The CPA came into effect on the 24 April 2010, which included franchise agreements, as well as the "no fault" liability provisions under section 61. The remainder of the Act came into effect on the general effective date which was postponed by notice published on 23 September 2010 to 31 March 2011. See para 3 of Schedule 2, Van Eeden (2013) 5.

the transaction is specifically exempted by the provisions of section 5.⁴²⁴ The CPA however only applies where goods and services are supplied or marketed in the ordinary course of the suppliers business.⁴²⁵ Should a transaction be a once-off transaction then the transaction will not be subject to the provisions of the CPA and the common law contract law provisions will apply.⁴²⁶

Once it has been determined that the Act finds application, the definitions of the words “unfair”, “unreasonable”, “unjust” and “unconscionable” would need to be considered in order to establish the intended scope and extent of Part G. The Legislature had for some reason chosen not to individually define “unfair”, “unreasonable” and “unjust” and these terms would therefore need to be considered by the courts when called upon to interpret and consider whether the provisions of an agreement are “unfair”, “unreasonable” and “unjust” taking into account the purpose of the Act.⁴²⁷

The CPA does however define the word “unconscionable”.⁴²⁸ “Unconscionable”, when used with reference to any conduct, means to have a character as contemplated in section 40, or any otherwise unethical or improper conduct to a degree that would shock the conscience of a reasonable person.⁴²⁹ Section 40 prohibits the use of physical force against consumers; coercion; undue influence; pressure; duress or harassment; unfair tactics; or any similar conduct in connection with the marketing and supply of goods or services, negotiations, conclusion, execution or enforcement of a contract, for the supply of goods or services to consumers, or demand of or collection of payment for goods or services, or recovery of goods from consumers.⁴³⁰ Section 40 therefore has codified the common law, reinforcing the notion that contracting parties need to contract in good faith, and that their conduct should not be improper, unconscionable and against the *boni mores*.⁴³¹

When the courts are given the opportunity to interpret and consider the Legislatures intention with the use of the words “unfair”, “unreasonable” or “unjust” and their relation to “unconscionable”, the courts will be required to take into account the

⁴²⁴ S 5(2)(f)-(g). Refer to chapter 3 of this contribution.

⁴²⁵ S 1 “transaction”. S 5(1)(a)-(d).

⁴²⁶ *Jacobs et al* (2010) 309-311.

⁴²⁷ Sharrock 307 and *Jacobs et al* (2010) 356.

⁴²⁸ S 1 “unconscionable”.

⁴²⁹ Van Eeden (2013) 115.

⁴³⁰ S 40(1) read with s 51.

⁴³¹ *Jacobs et al* (2010) 347.

provisions of section 2 and 3 respectively. These sections provide that the CPA must be read and interpreted in a manner that gives effect to the purposes that are set out under section 2 and that consumers must be protected to enable the development of social and economic welfare of consumers, more particularly consumers which are classified as vulnerable consumers.⁴³²

Another definition of importance is “consumer court”. The CPA defines a “consumer court” as a body with that name or a consumer tribunal that has been established in terms of applicable provincial consumer legislation.⁴³³ The important qualification herein is that a “consumer court” is not regarded as a court of law in the ordinary sense and therefore it only has powers and jurisdiction as specifically provided for in the Act.⁴³⁴

4.3 Part G and the right to fair, just and reasonable terms and conditions

Chapter 2, Part G of the CPA is contained in sections 48 to 51 and is centred towards content, incorporation and interpretation control. Naudé is of the view, which I agree with, that these sections have not been rationally drafted and structured as is the case with many international unfair contract terms legislation.⁴³⁵ The Act makes use of all three control methods namely content, incorporation and interpretation. The problem which arises is that the Legislature has placed all three of these control mechanisms under Part G which will in most probabilities require judicial interpretation, or amendments to effectively operate within existing consumer markets.

Under this heading, I will critically discuss and highlight the legislative control mechanisms within Part G and whether or not these mechanisms are in fact sufficient. This part of the contribution will be discussed as follows:

Firstly by considering the provisions for content control under sections 48 and 51, which introduce general provisions for the prevention of unfair contract terms. This is followed by the provisions relating to incorporation control under section 49, which establishes a set of formal requirements for the use of certain types of terms.

⁴³² For an in-depth discussion herein see Naudé (2006); Carstens and Kok; Louw (2013).

⁴³³ S 1 “consumer court”.

⁴³⁴ S 1 “consumer court” read with section s 69 and s 70.

⁴³⁵ For example, the United Kingdom’s Unfair Contract Terms Act provides firstly for the general requirements for the incorporation of standard contract terms, and thereafter provides for content control which the South African CPA does not. For a full discussion herein in see Naudé 2009 (Part 1).

Thereafter provisions relating to both incorporation and content control under section 50, which stipulates that written contracts must be in plain language. Lastly, the rules relating to legislative control mechanisms will be discussed as sections 52 relates to the courts interpretive powers in respect of prohibited conduct.

4.3.1 Content control (sections 48, 51 and regulation 44)

Section 48 which is titled “unfair, unreasonable or unjust contract terms” is aimed at content control which prohibits the use of unfair contract terms and effectively creates a general standard of unfairness for consumer agreements.⁴³⁶ Section 51 provides for a list of strictly prohibited terms which are *prima facie* void should an agreement contain such provisions. Sections 48 and 51 respectively can be seen as the Legislatures attempt at a grey list and black list as seen in many foreign jurisdictions.⁴³⁷ A black list sets out terms that are deemed to be unfair in all circumstances. A grey list sets out terms that are *prima facie* unfair, however if suppliers are able to show cause as to why such terms are to be deemed fair in the circumstances, such classification may still provide guidance for our judiciary to determine whether an agreement contains unfair, unreasonable or unjust contract terms.⁴³⁸

Section 48 commences with section 48(1)(a) which provides that a supplier must not supply, offer to supply or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust.⁴³⁹ The prohibition under the aforementioned section relates to unfairness in general and not to “standard term contract/s” or non-negotiated terms.⁴⁴⁰ Thus, the unfairness test will apply even where prior negotiation took place between the parties.

Section 48(1)(b) then proceeds to provide that a supplier is prohibited from marketing any goods or services, or negotiating, or entering into a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable.⁴⁴¹ This is somewhat contrasting to the intended purpose of content control, as this provision deals with marketing of goods and services and would have

⁴³⁶ Sharrock 306.

⁴³⁷ S 48 and s 51. Van Eeden (2013) 251.

⁴³⁸ Naudé (2007) 128-164.

⁴³⁹ S 48(1)(a). A further question which may arise is whether the Legislature had intended to revive the abolished *laesio enormis* doctrine. For a full discussion herein see Barnard (2013).

⁴⁴⁰ Sharrock 307.

⁴⁴¹ S 48(1)(b).

found better application and understanding under Part F, where section 40 makes provision for any unfair conduct which would be included in the provision of unconscionable conduct.⁴⁴²

The CPA continues with section 48(1)(c) which makes provision that a supplier must not require a consumer or a person to whom goods or services are supplied to, at the consumer's direction, to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction. These provisions are somewhat out of place under Part G as the provisions created under Part F, and more specifically section 41 have been drafted wide enough to incorporate these provisions.⁴⁴³

Section 48(2) the CPA then continues with the theme of content control and provides for situations that would render a transaction or agreement, or a notice or terms or conditions of an agreement unfair, unreasonable or unjust, if such term or notice is excessively one-sided in favour of any person other than a consumer';⁴⁴⁴ or in the situation where such term of the agreement or transaction is so adverse to the consumer that it is inequitable';⁴⁴⁵ or should a consumer have relied to his detriment on a false, misleading or deceptive representation⁴⁴⁶ or a statement of opinion⁴⁴⁷ provided by or on behalf of a supplier';⁴⁴⁸ or should the transaction or agreement have been subject to a term or condition or a notice for which a notice is required.⁴⁴⁹

As stated above the Legislature had for some reason chosen not to individually define "unfair", "unreasonable" and "unjust" thereby leaving such determination of the meaning of these words to judicial interpretation. The first two provisions under section 48(2)(a) and (b) may be seen as guidelines for the interpretation of unfairness. However these guidelines have been drafted in such a manner as to include as many unfair provisions as possible, which has left this section far too

⁴⁴² S 40(1)-(3).

⁴⁴³ S 48(1)(c) and s 41(1)-(5). Naudé (2007) 128.

⁴⁴⁴ S 48(2)(a).

⁴⁴⁵ S 48(2)(b).

⁴⁴⁶ S 41.

⁴⁴⁷ A "statement of opinion" includes any opinion, and not only false, misleading or deceptive opinions.

⁴⁴⁸ S 48(2)(c).

⁴⁴⁹ S 48(2)(d). If a notice in terms of s 49(1) is required, and no such notice has been give and the term, condition or notice is unfair, unreasonable, unjust or unconscionable, or the fact, nature and effect of the terms, conditions or notice was not drawn to the consumer's attention as required by s 49(1). Sharrock 308; Van Eeden (2013) 184.

imprecise to provide a real definition or guideline. Section 48(2)(a) provides that an agreement or term is not unfair merely because it is one-sided or favours a supplier. Such benefit to the supplier needs to be of an excessive nature.⁴⁵⁰ Section 48(2)(b) provides that any adverseness to the consumer may qualify as unfairness; however such adverseness needs to be adequately severe to be deemed inequitable.⁴⁵¹

It would appear the Legislature had seen the shortfall of section 48 which does not provide for a specified grey list of suspect terms, which would automatically be deemed unfair. Under section 120(1)(d) the Minister is authorised to make regulations relating to unreasonable, unjust or unfair terms. Subsequently the Minister has made such regulation.⁴⁵² Regulation 44 came into effect on the 1 April 2011 which incorporated a list of terms which would be deemed to be unfair should such terms be incorporated into an agreement.⁴⁵³ Regulation 44 applies to all terms of a consumer agreement between; a supplier operating on a for-profit basis; and acting wholly or mainly for purposes related to his or her business or profession; and an individual consumer or consumers who enter into the agreement for purposes wholly or mainly unrelated to the consumer's business or profession.⁴⁵⁴

Regulation 44(3) provides for a non-exhaustive list of terms which would automatically be presumed to be unfair.⁴⁵⁵ The regulation has given the consumer an advantage, as in the past the onus to prove that a particular term is unfair, unjust or unreasonable, would be placed upon the consumer.⁴⁵⁶ The presumption created by regulation 44 has changed this position in relation to the terms listed under regulation 44(3).⁴⁵⁷ Where a supplier uses any of the terms listed under regulation 44 in any agreement, the onus is automatically shifted onto the supplier to show good cause as to why the particular term is necessary in the situation. It is thus important to note that the terms listed under regulation 44 create a grey list, in that a supplier may still show cause as to why a specific term ought to be found fair under

⁴⁵⁰ Naudé (2006) 518; Van Eeden (2013) 251.

⁴⁵¹ S 48(2)(b); Sharrock 316.

⁴⁵² GG No 34180, RG 951, GN No R293.

⁴⁵³ Reg 44.

⁴⁵⁴ Reg 44(1).

⁴⁵⁵ Reg 44(3)(a)-(bb).

⁴⁵⁶ S 48.

⁴⁵⁷ Reg 44(3)(a)-(bb).

the circumstances.⁴⁵⁸ Should a term not form part of regulation 44, such term will still be subject to the provisions of section 48-52 of the Act.⁴⁵⁹

Sub-regulation 44(4) however provides exceptions to the limitations set by regulation 44 and states that the limitations set in paragraph (a) to (k) of sub regulation (3) will not apply to a term or provision where a particular supplier is a financial service provider.⁴⁶⁰

Regulation 44 has clearly eased the burden on consumers in needing to approach the court to determine and prove whether a provision is indeed unfair, unreasonable or unconscionable. Should a supplier however choose to proceed to court to test the fairness of a provision the supplier faces an uphill battle, as section 4 provides that the tribunal or court must interpret any standard form contract or other document prepared or published by or on behalf of a supplier, to the benefit of the consumer.⁴⁶¹

The CPA itself provides that when the courts are called upon to interpret the provisions of the Act, the judiciary may consider appropriate foreign and international law, however it is important for the courts to keep in mind that the South African consumer markets are unique and a transportation of foreign law must be done taking the individual autonomy of the South African consumer markets into account.⁴⁶²

Taking into account the provisions of regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999,⁴⁶³ this regulation provides that where a standard term contracts have been used the terms within the agreement will automatically be deemed unfair if, contrary to the requirements of good faith. Such terms will be deemed to be contrary to good faith where such provisions cause a significant imbalance in the rights and obligations arising from the agreement. Should our courts consider a strict interpretation of this provision the majority of the

⁴⁵⁸ Reg 44(2)(a).

⁴⁵⁹ Reg 44(2)(d) specifically provides that regulation 44 does not derogate from provisions in the Act. Van Eeden (2013) 251.

⁴⁶⁰ Reg 44(4)(a)-(c).

⁴⁶¹ S 4.

⁴⁶² S 2(2)(a). Van Eeden (2013) 251.

⁴⁶³ UTCCR Regulations 1999.

consumer contracts entered into in our consumer markets will be considered unfair.⁴⁶⁴

Section 51 adds to the theme of content control, and although also situated in Part G of the Act, applies to prohibited transactions, agreements, terms or conditions providing a list of absolutely prohibited terms generally found within standard term contracts.⁴⁶⁵

Section 51(a) specifically prohibits agreements that have been drafted with the clear intention of circumventing or defeating the purpose of the CPA, misleading or deceiving a consumer, or terms that subject the consumer to fraudulent conduct resulting from an offer, are prohibited under section 51.⁴⁶⁶ This provision is followed by Section 51(1)(b), a term is *void ab initio* where a term voids a supplier's duties in terms of the CPA, or authorises a supplier to do something that is unlawful or fails to do something that is required in terms of the CPA.⁴⁶⁷

Section 51(1)(c) specifically prohibits a supplier from using exemption clauses or indemnity clauses or terms that limit or exempt a supplier from liability for any loss attributable to the gross negligence by the supplier or someone related to the supplier.⁴⁶⁸ Further, agreements which require consumers to enter into supplementary contracts;⁴⁶⁹ agreements purporting to cede or set off a consumer's right to claim against the Guardian Fund;⁴⁷⁰ agreements which falsely express an acknowledgement by a consumer that no representations or warranties were made before an agreement was concluded, or that a consumer has received goods, services or a required document before the consumer has in fact received such goods;⁴⁷¹ agreements which require a consumer to forfeit money to a supplier, should the consumer exercise any rights in terms of the CPA;⁴⁷² where the suppliers expressed an authority to supply on someone's behalf or the right to enter into any premises for the purpose of obtaining possession of goods, undertaking to sign in

⁴⁶⁴ A term which has not been individually negotiated, are terms which have been formulated and settled prior to the negotiations with the consumer and the consumer is unable to influence the substance of the term.

⁴⁶⁵ S 51. Also see Naudé (2007) 128.

⁴⁶⁶ S 51(1)(a) and s 51(1)(d).

⁴⁶⁷ S 51(1)(b). Van Eeden (2013) 268.

⁴⁶⁸ S 51(1)(c).

⁴⁶⁹ S 51(1)(e).

⁴⁷⁰ S 51(1)(f).

⁴⁷¹ S 51(1)(g). Such terms may still be used however they must not be false.

⁴⁷² S 51(1)(h).

advance documents relating to enforcement, or a consent to a predetermined value of costs relating to enforcement;⁴⁷³ expressing an agreement by the consumer to deposit a bank card or identity document or provide a pin code number to be used to access the consumers account.⁴⁷⁴

Section 51 can be seen as a “black list” within the CPA by providing a list of absolutely prohibited transactions, agreements, terms or conditions.⁴⁷⁵ Section 51 creates numerous benefits to consumers and suppliers alike as certainty is created as to terms which will automatically be deemed unfair, thus suppliers will have to conduct their business proactively to revise their contracts to ensure compliance with section 51. Section 51 further acts like an administrative watchdog for bodies such as the NCC, as such bodies will know what terms they may challenge and compliance will be required without the NCC having to first issue a compliance notice to such supplier.⁴⁷⁶

Consumers are now able to rely on basic consumer rights when entering into consumer agreements, with the implementation of regulation 44 read with sections 49 and 51. Agreements need to adhere to the basic standards of fairness which will prevent situations arising as in *Sasfin* where the Court was prepared to accept the consumer had been placed in an unfair contracting position, yet the claimant still had to prove that such unfairness amounted to being exceptionally unfair.⁴⁷⁷ Only time will enable courts to interpret and extend the application of sections 49 and 51 taking into account the application of the CPA and the effect it will have on consumer agreements.⁴⁷⁸

4.3.2 Incorporation control (sections 49 and 50)

Section 49, requires suppliers to provide notice to the consumer in the prescribed manner and form where certain terms and conditions are used, this provision, is aimed at the theme of incorporation control.

The Legislature with the implementation of section 49(1) has attempted to protect the consumer against four types of terms predominantly found in fixed term agreements

⁴⁷³ S 51(1)(i).

⁴⁷⁴ S 51(1)(i).

⁴⁷⁵ S 51. Naudé (2007) 128.

⁴⁷⁶ Sharrock 317.

⁴⁷⁷ *Sasfin (Pty) Ltd v Beukes* 1989 (1) ALL SA 347 (A) 351.

⁴⁷⁸ Refer to chapter 5 for a full discussion on the effect of international law on the CPA.

namely; exemption clauses which limit a supplier or third parties risk or liability; secondly clauses which transfer the risk and liability onto the consumer; thirdly indemnity clauses which require the consumer to indemnify the supplier or third party; lastly any terms which requires the consumer to make an acknowledgment of any fact.⁴⁷⁹

Section 49(1) provides that notice is required where the supplier attempts to limit in any way the liability or risk of the supplier or someone else; or incorporate a provision that constitutes an assumption of risk or liability by the consumer;’ or impose an obligation on a consumer to indemnify the supplier or someone else for any cause; or where a consumer acknowledges any fact by the consumer.⁴⁸⁰

In addition, to the above section 49(2) requires that notice concerning any activity which is associated with any form of risk of an unusual character or nature, must be specifically drawn to the consumers’ attention, where the ordinarily alert consumer could not reasonably be expected to notice or contemplate such risk in the circumstances.⁴⁸¹

Sections 49(1) and subsection (2) both conclude with a qualifying provision which requires suppliers to comply with the provisions of sections 49(3) to 49(5) which requires any provision or notice to draw to the attention of the consumer any fact, nature and potential effect of such risk and acceptance, which requires that the consumer must have assented to the provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with the acknowledgement of the notice, awareness of the risk and acceptance of the provision.⁴⁸² According to Naudé and Lubbe,⁴⁸³ a clause will be deemed to be unexpected or surprising where it purports to vary the consequences of the contract in a manner which is contrary to the essence of the contract by undermining the reciprocity between the essential obligations envisaged by the parties.⁴⁸⁴ The supplier is further required to draw the consumers’ attention to such terms and conditions at the earliest time before the

⁴⁷⁹ S 49(1)-(2). S 49(1)(a)-(d). Sharrock 295-325; Stoop 496-509 for a full discussing on exemption clauses. Naudé 2009 (Part 2) 508.

⁴⁸⁰ S 49(1)(a)-(d). Sharrock 357, also see Stoop for a full discussing on exemption clauses.

⁴⁸¹ S 49(2)(a)-(c).

⁴⁸² S 49(4)(1)(a).

⁴⁸³ Naudé & Lubbe 450.

⁴⁸⁴ Naudé & Lubbe 450. Also see *Mercurius Motors v Lopez* 2008 (3) 572 (SCA) para 33, where the Supreme Court of Appeal held that clauses which undermines the essence of a contract or are hidden within the agreement should be clearly and pertinently brought to the attention of a client who signs a standard contract.

consumer enters into the agreement or transaction, or begins to engage in the activity or enters or gains access to a facility, or before the consumer is required to offer consideration for the agreement or transaction.⁴⁸⁵ In providing such notice, suppliers are expected to use plain language as envisaged under section 22.⁴⁸⁶

Section 49 creates clear rules for suppliers who wish to engage with consumers and may no longer surprise consumers with terms and conditions only once the consumer has engaged in the activity or starts to use the facilities. The CPA does not provide sufficient guidance as to what is deemed conspicuous enough to likely attract the attention of an ordinary alert consumer to such terms and conditions, however it can be assumed that terms and conditions printed on the back of standard term contracts will not pass this requirement as most consumers do not have the patience or the time and effort to read and understand such terms.⁴⁸⁷

Section 49, has received a barrage of criticism from various authors in that, section 49 does not provide for the consequences for non-compliance.⁴⁸⁸ The only option available to the consumer would be to approach the court in terms of section 52(4) which provides the court jurisdiction to hear matters in situations where there is non-compliance of section 49. In such situations the court may make an order severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction. The court may also make any further order that is just and reasonable in the circumstances.⁴⁸⁹

In considering an extension of the current section 49 the Legislature needs to consider a provision that will render a term which is in violation of section 49, voidable at the instance of the consumer. Section 49 in its current form is neither practical nor viable for consumers. It is impractical for the average consumer to approach the court in terms of section 52(4) to interpret and sever the provision, taking into account the cost and risk in proceeding with litigation.

Further criticism can be drawn to section 49(c) which requires specific types of terms to be drawn to the consumers' attention and counter-signed or initialled. Such a requirement may be dubious to the consumers' interest, as the suppliers' position is

⁴⁸⁵ S 49(4)(1)(b).

⁴⁸⁶ For a full discussion on the plain language requirement of the CPA refer to Stoop and Chürr.

⁴⁸⁷ As was in the case of *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

⁴⁸⁸ Naudé 2009 (Part 2) 529; Sharrock 316-317.

⁴⁸⁹ S 52(4)(b).

strengthened and it may be argued that the consumer had understood the terms of the agreement and therefore attended to signature thereof. Generally exemption clauses which relate to the exclusion or limiting of the suppliers liability together with exempting the supplier from any personal injury or death caused negligently would almost in all circumstances be unfair in terms of the Constitution.⁴⁹⁰ Situations such as in *Afrox Healthcare Bpk*⁴⁹¹ will still arise as consumers are confronted with standard term agreements after having made all the necessary arrangements at work, the doctor and the hospital. The consumers' rights are still impaired and the section should be amended accordingly to prevent further abuse of the supplier's superior bargaining position.

Section 50, which is titled "written consumer agreements", contains elements of both content control and interpretation control. Section 50(1) empowers the Minister to prescribe certain categories of agreements that are required to be in writing. In addition to this, section 50(2) provides that where an agreement between a supplier and consumer is reduced to writing, should it be a requirement of the Act or not, the agreement is valid and binding irrespective of whether the parties signed the agreement.⁴⁹² Under section 50, suppliers are further required to provide consumers with a free copy of the agreement or free electronic access to a copy of the terms and conditions of that agreement, which must satisfy the requirements of section 22, as well as set out an itemised break-down of the consumer's financial obligations under such agreement.⁴⁹³

Lastly section 50(3) provides that where a consumer agreement is not in writing, a supplier must keep a record of transactions entered into over the telephone or any other recordable form as prescribed.⁴⁹⁴

In my view section 50 as a whole should be amended as it does more harm to consumers than good, as it can be seen from the above, this provision works against the intended rights the CPA attempts to create, by holding consumers captive to agreements that have been drafted yet not signed by the consumer.⁴⁹⁵ This provision

⁴⁹⁰ Ss 11 and 12(2) of the Bill of Rights.

⁴⁹¹ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁴⁹² S 52(a).

⁴⁹³ S 50(2)(b)(i)-(ii).

⁴⁹⁴ S 50 (3).

⁴⁹⁵ See herein *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA); *Maphango v Aengus Lifestyle Properties* 2011 (5) SA 19 (SCA); *Potgieter v Potgieter* 2011 ZASCA 181.

may be abused and exploited by fraudulent suppliers who falsify agreements or unilaterally perform with promises of correcting the written agreement at a later stage, which never materialises, and only to later force the consumer to perform where the consumer had in fact not agreed to the terms of the agreement. The CPA does not provide for the consequences of non-compliance to the provisions of section 50 and more specifically section 22 dealing with the plain language requirement. However it can safely be assumed that should a supplier not comply with the CPA, such non-compliance will result in the void ability of the agreement to the consumers benefit.⁴⁹⁶

4.3.3 Interpretive control (section 52)

Section 52(1) deals with any proceeding before a court where a consumer alleges that the supplier has contravened sections 40, 41 or 48⁴⁹⁷ and where the CPA does not provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability. The court may after considering the principles, purpose and provisions of the CPA make an order contemplated in terms of section 52(3).⁴⁹⁸ It will however be noted that section 52 is limited to the proceedings which relate to an existing transaction between a supplier and a consumer, and consequently this section finds no application to general-use challenges.⁴⁹⁹

When the court is called upon to interpret the agreement in terms of section 52 the court is required to consider the following; the fair value of the goods or services in question;⁵⁰⁰ the nature of the parties to the transaction, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;⁵⁰¹ those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether the CPA was in force at that time;⁵⁰² the conduct of the supplier and the consumer.⁵⁰³

⁴⁹⁶ Van der Merwe *et al* (2012) 172.

⁴⁹⁷ S 52(1)(a)-(c). Ss 41 and 48 falls under part F, which deals with the right to fair honest dealing.

⁴⁹⁸ S 52(1). Refer to Naudé 2009 (Part 1) 531-532.

⁴⁹⁹ Sharrock 315.

⁵⁰⁰ S 52(2)(a).

⁵⁰¹ S 52(2)(b).

⁵⁰² S 52(2)(c).

⁵⁰³ S 52(2)(d).

The factors listed under section 52 does not provided much guidance apart from the first factor relating to a particular transaction between a consumer and supplier, the remainder of the provisions are far too imprecise to create any real assistance.⁵⁰⁴ Further section 52 remains silent on whom the burden rests upon, to prove that a term is unfair. Some authors are of the view that the supplier should bear the onus of proving the fairness of non-negotiated terms.⁵⁰⁵

Sections 52(3) states that where a transaction or agreement is in whole or in any part unconscionable, unjust, unreasonable or unfair, the CPA empowers the court to make a declaration to that effect⁵⁰⁶ and to make any further order that the court considers to be just and reasonable in the circumstances. This includes an order to restore money or property to the consumer, or to compensate the consumer for losses or expenses.⁵⁰⁷ Such loss or expense needs to be related to the transaction, agreement or the proceedings of the court which requires the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.⁵⁰⁸

Section 52(4) provides for any proceedings before a court concerning a transaction or agreement between a supplier and a consumer.⁵⁰⁹ A person whom alleges that an agreement, a term, a notice or condition of an agreement to which a transaction or agreement is purportedly subject, is void in terms of the CPA or failed to satisfy any applicable requirements set out in section 49.

The court may make an order in the case of a provision or notice that is void in terms of any provision.⁵¹⁰ The court is empowered to sever any part of the relevant agreement, provision or notice, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole;⁵¹¹ or declaring the entire agreement, provision or notice void as from the date that it purportedly took effect;⁵¹² or in the case of a provision or notice that fails to satisfy any provision of section 49, severing the provision or notice from

⁵⁰⁴ Sharrock 315.

⁵⁰⁵ Naudé 2009 (Part 1) 535.

⁵⁰⁶ S 52(3)(a).

⁵⁰⁷ S 52(3)(b).

⁵⁰⁸ S 52(3)(b)(i-iii).

⁵⁰⁹ S 52(4).

⁵¹⁰ S 52(4)(a)(i).

⁵¹¹ S 52(4)(a)(i)(aa).

⁵¹² S 52(4)(a)(i)(bb).

the agreement, or declaring it to have no force or effect with respect to the transaction,⁵¹³ and make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.⁵¹⁴

The problem faced by the CPA is that where a court is called upon to intervene, it may only do so under section 52(1) if the Act itself does not provide a remedy sufficient to address the relevant unfairness. It remains unclear as to what the “remedies” the Legislature had in mind or when they are to be regarded as being “sufficient”.⁵¹⁵ The remedies the Legislature appears to have in mind are to first lay a complaint with the NCC as per section 71, alternatively to refer the dispute to an alternative dispute resolution agent, in terms of section 70.⁵¹⁶

It would appear as if the Legislature has made it virtually impossible for the consumer to rely on these remedies during the course of legal proceedings based on issues of unfairness. A further issue is created where a consumer attempts to rely on section 52(3) which does not expressly provide the courts powers to declare an unfair provision void, or to sever it from the agreement in an attempt to ensure fairness. This creates the question as to whether the Legislature intended that courts are not to have such powers, alternatively that the courts should have such general powers as contained under section 52(3)(b), which provides the court with general powers to make any further order that the court considers just and reasonable in the circumstance, this in all likelihood would seem to be more in line with the purpose of the Act.⁵¹⁷

4.4 The effect of Part G on the common law

The CPA has attempted to create a safer consumer market, within which consumers can actively engage. The Legislature has effectively codified a number of common

⁵¹³ S 52(4)(a)(ii).

⁵¹⁴ S 52(4)(b).

⁵¹⁵ Sharrock 316.

⁵¹⁶ The alternative dispute resolution agent must be the applicable ombud having jurisdiction over the supplier:

s 69(b) or, if the supplier is not subject to the jurisdiction of such an ombud, either an accredited industry ombud with jurisdiction over the supplier, or a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, or the consumer court of the province with jurisdiction over the matter, if there is such a court under s 69(c).

⁵¹⁷ S 52(3). Sharrock 316.

law principles. However it would appear that the consumer has been left more vulnerable as the certainty created by the common law has been undermined.⁵¹⁸

4.4.1 The doctrine of *laesio enormis*

Section 48 regulates unfair, unreasonable and unjust contract terms. Section 48(1)(a) raises the question as to whether the CPA has reintroduced the common law doctrine of *laesio enormis*.⁵¹⁹ The doctrine pertains to the value of the goods bought in relation to the purchased price paid, where the purchaser will have a remedy to cancel the contract and recover payment where the purchase price paid was twice as much as the value of the goods received.⁵²⁰ The doctrine was originally to some extent banished by the courts in the case of *Tjollo Ateljees v Small*.⁵²¹ The Court held that the doctrine formed part of our law, however the doctrine was out of place in the modern world with its highly complicated commercial organisations and its ingenious selling devices including the hire-purchase system designed to achieve the safe granting of credit, the Court recommended that the Legislature abolish the doctrine from our law⁵²² and later any doubt of its removal was confirmed by the General Law Amendment Act.⁵²³

Section 48(1)(a) of the CPA provides that a supplier must not enter into an agreement to supply, any goods or services at a price that is unfair, unreasonable or unjust.⁵²⁴ In interpreting the intended application of section 48 the provisions of part G as a whole need to be considered together with regulation 44. In terms of regulation 44(3)(h) a consumer agreement is presumed to be unfair if it has the function or effect of allowing the supplier to increase the price agreed upon unilaterally at a later date after the agreement had been concluded without giving the consumer the right to cancel the agreement.⁵²⁵

⁵¹⁸ See herein Meiring 2010; Du Preez 2009; Sharrock and Naudé 2009 (Part 1).

⁵¹⁹ For a full discussion herein see Barnard 2013.

⁵²⁰ *Cotas v Williams & another* 1947 (2) SA 1154 (T) 1159-1160, where the court confirmed that the doctrine applies in situation where movables are sold.

⁵²¹ *Tjollo Ateljees (Edms) Bpk v Small* 1949 (1) SA 856 (A) 855-857.

⁵²² *Ibid* at 857.

⁵²³ General Law Amendment Act 32 of 1952.

⁵²⁴ S 48(1)(a)(i).

⁵²⁵ Reg 44(3)h.

It is however argued by various writers such as Barnard,⁵²⁶ Van Eeden⁵²⁷ and Sharrock⁵²⁸ that the provisions of section 48(1)(a) are not applicable to the fairness of price per say as section 48(2) provides for factors, as discussed above, which sets out a test for unfairness which is intended to prevent situations where suppliers act in a deceptive, unfair or unconscionable manner and not that of a price control mechanism. As pointed out by Barnard the CPA contains many provisions which are relevant for the concept of price be it under Part A⁵²⁹ which relates to the prevention of price discrimination, or in terms of Part E⁵³⁰ which deals with the right to fair and responsible marketing.⁵³¹ Due to the fact that that the CPA does not contain a test applicable to prices directly, the Act creates sufficient remedies regarding prices that are unfair, unreasonable and unjust. Where the court is called upon to determine whether the Legislature had intended to revive a rule similar to the doctrine of *laesio enormis*, a disgruntled consumer would need to prove that such price is manifestly unjust in terms of the common law.⁵³²

Barnard is of the opinion, which I agree with, that it would be arbitrary for the Legislature to include a price control mechanism in the Act, as the control and regulation of prices would fall within the ambit of the fiscal and monetary authorities.⁵³³ It is further viewed that should section 48(1)(a) be raised in relation to fair prices, our courts are likely to use the reasonable market value of such goods as the yardstick in determining fairness.⁵³⁴

4.4.2 The parol evidence rule

As discussed earlier,⁵³⁵ the parol evidence rule encompasses rules that regulate the admissibility of extrinsic evidence where a court is called upon to interpret a written contract.⁵³⁶ Where a party to a contract disputes the contract in whole or a clause thereto, in that the contract or clause does not reflect the common intention between

⁵²⁶ Barnard (2013) 528-531.

⁵²⁷ Van Eeden (2013) 184.

⁵²⁸ Sharrock 308.

⁵²⁹ Part A, ss 8-10.

⁵³⁰ Part E, ss 29-39.

⁵³¹ Barnard (2013) 522.

⁵³² See Naudé 2009 (Part 2) and Barnard (2013), who holds the view that s 51(1)(a) is aimed towards situations where a particular market practice by a supplier effects a consumer.

⁵³³ Barnard (2013) 531.

⁵³⁴ *Ibid.*

⁵³⁵ For a full discussion herein refer to chapter 2 of this contribution.

⁵³⁶ Christie (2011) 192-194.

the parties; the courts must then follow the rules of interpretation, including the common law principles of the parol evidence rule. According to this rule, once a contract is signed between contracting parties, the contract is binding upon the parties as per the terms of the contract and no extrinsic evidence may be used to prove or dispute the terms of the contract.⁵³⁷

It should however be noted that the parol evidence rule itself is subject to certain limitations, for instance a party would be allowed to lead evidence to illustrate that the written document does not reflect the whole agreement between the parties and in such instances the negotiations between the parties should be considered by a court.⁵³⁸ Furthermore, evidence may be led where the words of a contract do not create sufficient certainty as to the meaning of the terms.⁵³⁹

However, section 48 of the CPA as discussed above, provides that a supplier may not enter into an agreement to supply goods or services if the terms are unfair, unjust or unreasonable, whilst regulation 44(3) specifically provides for such instances, the supplier may prove otherwise in view of the particular circumstances of the case. This section is therefore in conflict with the parol evidence rule, as it essentially provides that a matter within the NCT or relevant court hearing the matter may consider other factors surrounding the conclusion of the agreement. This enables the NCT or the particular court to determine whether the terms of the agreement are in fact fair, just or reasonable and are therefore not limited to only the written agreement and can consider extrinsic evidence in this regard.⁵⁴⁰

The CPA has accordingly adapted the common law parol evidence rule and although this principle remains intact, sections 48 read with sections 52(2) of the CPA allows for extrinsic evidence to be presented to a court or NCT to establish if the contractual terms are unfair, unjust or unreasonable. In conclusion it would appear as if the CPA is merely confirming the current approach followed by our courts.⁵⁴¹

⁵³⁷ Kerr (2002) 152; *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47.

⁵³⁸ Van der Merwe *et al* (2012) 174-175; *Johnston v Leal* 1980 (3) SA 927 (A) 944-945; *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 327; *Tesven CC v SA Bank of Athens* 2000 (1) SA 268 (SCA) 274

⁵³⁹ Christie (2011) 192-194; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) ALL SA 520 (A).

⁵⁴⁰ S 48 read with s 52(2).

⁵⁴¹ *Van der Westhuizen v Arnold* 2002 (4) ALL SA 331 (SCA) 335; *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (2) ALL SA 523 (SCA) 533; *Johnston v Leal* 1980 (3) SA 927 (A) 943; Christie (2011) 194; *Jacobs et al* (2010) 353-354; *Tesven CC v SA Bank of Athens* 2000 (1) SA 268 (SCA) 274.

4.4.3 The *contra proferentem* rule

It further appears as if the CPA has codified the *contra proferentem* rule of interpretation to the benefit of the consumer.⁵⁴²

Section 4 provides for the realisation of consumer rights. More specifically under section 4(4)(a)-(b) any contract or document must be interpreted to the benefit of the consumer so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer. This effectively means that a tribunal or court may give a meaning to a term where upon a normal or strict interpretation thereof such meaning cannot be found. This would raise the question of certainty as a court should not go beyond the reasonable interpretation of a contract, when in fact a court is overlooking or amending a term beyond what such term may possibly mean.⁵⁴³

The above provision is however unnecessary as sections 48 and 52 empowers a court, upon a proper interpretation of the contract to strike out any provisions which are in conflict with the provisions of the CPA as the courts would be in the position to determine the reciprocal relationship between the parties where such agreement complies with the Act.⁵⁴⁴

4.4.4 The *caveat subscriptor* rule

The CPA has created further uncertainty as to the application of the *caveat subscriptor* rule. The general rule is that there is no duty on a contracting party to inform the opposite party of the content of their agreement and the person signing the agreement does so at his own risk.⁵⁴⁵ The CPA has blurred the manner in which the *caveat subscriptor* rule operates by creating situations where consumers could be bound by agreements where the agreement has not been specifically signed. Section 50 deals with written consumer agreements. Section 50(2) provides that where an agreement between a supplier and consumer is reduced to writing, should it be a requirement of the Act or not, the agreement is valid and binding, irrespective

⁵⁴² For a full discussion herein refer to chapter 2.

⁵⁴³ Van Eeden (2013) 88.

⁵⁴⁴ Naudé 2009 (Part 2) 529.

⁵⁴⁵ See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). This general rule has however been extended in the case of *Mercurius Motors v Lopez* 2008 (3) (SA) 572 (SCA), where the court held that an exemption clause which undermines the very nature of the agreement must be brought to the attention of the opposite contracting party. Refer to chapter 2 herein for a full discussion.

of whether the parties signed the agreement.⁵⁴⁶ This can be seen to have extended the application of the rule, as section 50(2) has created the view that where a supplier and consumer have negotiated but not signed the agreement the parties would be bound by the provisions of the agreement even where consensus may not have been reached.

Conversely, section 49(c) has strengthened the provisions of the *caveat subscriptor* rule as this section requires specific types of terms to be specifically drawn to the attention of the consumer and countersigned or initialled before such terms will be deemed part of the agreement. Consumers are therefore no longer required to only initial the page which contains menacing provisions, as consumers are now also required to specifically sign next to such provision before they would be bound by such agreement.

4.4.5 The *exceptio doli generalis*

The CPA has further revived the common law defence of the *exceptio doli generalis*. Part F read together with part G would appear to re-introduce the common law defence of the *exceptio doli generalis*.⁵⁴⁷ The principles of the *exceptio doli generalis* provides a contracting party with an exception or *exception*, where a defendant is called upon to perform, the defendant may raise the defence that the plaintiff has not acted in good faith or with *mala fide* intention and where such party is able to prove that the contract provisions would lead to unconscionable conduct and unfairness, such agreement would voidable.⁵⁴⁸ Courts are now empowered to test the provisions of an agreement as to whether such provisions would amount to being unfair, unreasonable or unjust; this could to some extent be seen as the revival of the defence or a defence similar to the *exceptio doli generalis*.⁵⁴⁹

Originally it appeared as if the courts were prepared to accept the common law defence of the *exceptio doli generalis*.⁵⁵⁰ In the case of *Bank of Lisbon and South Africa Ltd v De Ornelas*,⁵⁵¹ it was found that the *exceptio doli generalis* ceased to function as a praetorian procedural remedy in post-classical Roman law as all

⁵⁴⁶ S 52(a).

⁵⁴⁷ Ss 22(2)(a)-(d); 49(1)-(5) and s 50(2)(i)-(ii.)

⁵⁴⁸ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 597; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) 478.

⁵⁴⁹ Kerr (2004) 583; Van der Merwe *et al* (2012) 318.

⁵⁵⁰ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 597.

⁵⁵¹ *Ibid.*

contracts were considered to be founded on *bona fides*.⁵⁵² The court found that the *exceptio doli generalis* did not form part of the Roman-Dutch law and consequently was never received in the South African common law. Only once the courts are in a position to test the above principles will it be determined whether the CPA has in fact revived a defence similar to that of the *exceptio doli generalis*.

4.5 Conclusion

The provisions created by the CPA as a whole are to be welcomed as the Act and the rights associated thereto are a first for our legal system. However, in the Department of Trade and Industry's briefing of the CPA it was stated that their intention was to establish the CPA in line with international best practice; this however was not achieved in all aspects. The provisions created which relate to unfair contract terms fails to incorporate some of the essential mechanisms used in most international jurisdictions.

The provisions of the CPA need to be reconsidered taking greater cognisance of international legislation and rights consumers have to fair, just and reasonable contract terms. The Legislature needs to consider protective provisions which incorporate terms that are sector specific, which are unique to that industry and could be controlled under general codes of practice.

The Legislature has created a broad general grey list with the implementation of regulation 44 aligning the CPA with many foreign jurisdictions. It would appear that the Act in its current form will certainly lead to protracted litigation, which the average consumer will not be able to engage in. The consumers' right to directly approach a court should not be taken away with the ultimate decision left with the consumer wishing to seek redress. At present section 69, which conflicts with section 4 forces the consumer to approach the NCC and thereafter the NCT. Only where there is no ombud is the consumer entitled to approach a court. I assume as the provisions of the CPA are tested and brought before the relevant bodies the Legislature will take note of the short coming of the Act and address these flaws. It is however important to note that the South African consumer markets are unique and should the Legislature transpose foreign law into our legal system it would need to be tailor made for our unique consumer markets.

⁵⁵² See herein Cod.4.10.4 "*Bonam fidem in contractibus consideri aequum est*". Also see *Bredenkamp & Others v Standard Bank of South Africa Ltd* where the Supreme Court of Appeal confirmed the majority judgment in the *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

The protection of consumers against unfair terms in the European Union and the United Kingdom

5.1 Introduction

In the introductory briefing of the CPA by the Department of Trade and Industry, it was indicated that their intention behind the implementation of the CPA was to harmonise the South African consumer protection laws with international best practice.⁵⁵³

Consumers are able to directly rely on basic consumer rights provided by the CPA when entering into consumer agreements with the implementation of regulation 44 read together with sections 49 and 51. Consumer agreements are required to adhere to basic standards of fairness which will prevent situations arising as in the matter of *Sasfin*,⁵⁵⁴ where the court accepted that the consumer had been placed in an unfair contracting position yet the onus was still on the consumer to prove that such unfairness amounted to being exceptionally unfair. It would appear as if the Legislature had failed to incorporate many of the content control mechanisms as implemented in most of the international best practice models.⁵⁵⁵ The Act itself provides that when courts are called upon to interpret the purpose and provisions of the Act courts must consider section 3 and may consider both foreign and international law.⁵⁵⁶

In the case of legislative governance in relation to control mechanisms of unfair contract terms, the position of the European Union⁵⁵⁷ and the United Kingdom⁵⁵⁸ in as far as such terms relate to unfair contract terms will be discussed.

5.2 Interpretation of the Consumer Protection Act

In terms of the CPA where any challenge is brought before the relevant forum⁵⁵⁹ for the purpose of determining the fairness of an agreement, section 2 provides that the

⁵⁵³ Department of Trade and Industry “consumer protection bill workshop day 2” (05 July 2008) <http://www.pmg.org.za/report/2008050> (Accessed 10 July 2014).

⁵⁵⁴ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) para 13.

⁵⁵⁵ Para 5 hereunder.

⁵⁵⁶ S 2(2)(a) and (b).

⁵⁵⁷ Hereinafter “EU”.

⁵⁵⁸ Hereinafter “UK”.

Act must be interpreted in a manner which gives effect to the purposes as set out in section 3.⁵⁶⁰ When interpreting or applying the Act a person, court, tribunal or the commission may consider appropriate foreign and international law;⁵⁶¹ appropriate international conventions, declarations or protocols relating to consumer protection;⁵⁶² and any decision of a consumer court, ombud or arbitrator in terms of the Act, to the extent that such a decision has not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court.⁵⁶³

The above provisions empower the relevant forum to consider, when pronouncing on the fairness of a contract term, the opportunity to consult appropriate foreign and international laws such as the consumer laws implemented by the EU and UK.

5.3 Unfair terms legislation within the European Union

The EU first implemented guidelines for consumer protection with the intention of introducing a standard of best practice in consumer protection laws with the aim of promoting the interests of consumers and to ensure a high level of consumer protection. In 1985 the first consumer protection directive on product liability and doorstep selling was enacted and introduced in the Maastricht Treaty.⁵⁶⁴

The EU has implemented a number of directives in an attempt to curb unfair contract practices in consumer markets. The following directives and regulations will be discussed: the Directive on Consumer Rights,⁵⁶⁵ Unfair Terms in Consumer Contracts Directive,⁵⁶⁶ Common European Sales Law Regulation⁵⁶⁷ and the European Communities Unfair Terms in Consumer Contracts Regulations.⁵⁶⁸

⁵⁵⁹ S 69 read with s 70. Dependent on the circumstances the correct forum may be the NCT, NCC or a Court of Law.

⁵⁶⁰ Refer to chapter 3 of this contribution for a full discussion herein.

⁵⁶¹ S 2(a) CPA.

⁵⁶² S 2(b) CPA.

⁵⁶³ S 2(c) CPA.

⁵⁶⁴ Formally, the *Treaty* on European Union or TEU of 7 February 1992.

⁵⁶⁵ Directive 2011/83/EC. Hereinafter the "DCR".

⁵⁶⁶ Directive 93/13/EEC. Hereinafter the "UTD".

⁵⁶⁷ Published in the Green paper 2011/0284. The Directive as of date has not yet been implemented, however it has been eluded by the EU that the CESLR will be brought into effect in 2015. Hereinafter "CESLR".

⁵⁶⁸ Reg S.I. No 27/1995. Hereinafter the "ECUTCCR".

5.3.1 The Directive on Consumer Rights

The DCR applies to all Member states and was implemented with the intention of strengthening consumer rights within the EU, while striking a balance between consumer protection and business competitiveness, with the objective of aligning and balancing national consumer rules to ensure consumers are treated fairly in consumer markets when entering into transactions.⁵⁶⁹

The DCR consists of twelve regulations each of which deals with a specific aspect. The introductory chapter under regulation 1 states that the purpose of the directive is to achieve a high level of consumer protection across the EU and to contribute to the proper functioning of the internal markets by implementing regulations and administrative provisions concerning contracts concluded between consumers and traders.⁵⁷⁰

The predecessors of the DCR only provided for a basic level of consumer protection, whilst the DCR is in principle a full harmonization directive as it provides for a single set of core consumer rules. It strengthens consumer protection, by introducing stricter pre-contractual information requirements and a uniform withdrawal period. The directive further attempts to reduce the cost of cross-border traders, for whom the uniform rules will lead to lower compliance costs.⁵⁷¹

The new directive introduces a number of important changes to consumer rights in the EU namely:

- (a) The limitation of hidden charges and costs on the internet. Consumers will be protected against what may be referred to as "cost traps" on the internet, where consumers are now required to expressly confirm that they understand that they have to pay a specific price for goods or services;⁵⁷² and
- (b) An increase in price transparency as traders are required to disclose the total transaction cost of the product or service, as well as any extra fees. Online shoppers will not have to pay charges or other costs if they were not properly informed before they place an order.⁵⁷³

⁵⁶⁹ Refer to chapter 1 DCR.

⁵⁷⁰ Reg 1.

⁵⁷¹ Reg 1.

⁵⁷² Regs 4 and 11.

⁵⁷³ Regs 4 and 5.

- (c) Suppliers are further prohibited from using pre-ticked boxes when consumers engage in online shopping. Prior to the implementation of the directive consumers were required to un-tick boxes of services they do not require often not seeing such boxes and only finding out later that such services have been purchased.⁵⁷⁴
- (d) Consumers are entitled to a fourteen day cooling-off period⁵⁷⁵ from date of the transaction, whereby the consumer is entitled to withdraw from the sale agreement and return the goods for whatever reason, should they no longer require such goods. The directive extends the cooling-off period where the seller had failed to clearly inform the consumer of the cooling-off period.⁵⁷⁶
- (e) Traders must refund consumers for the product within fourteen days after the withdrawal. This includes the costs of delivery.⁵⁷⁷ The directive has also introduced an EU-wide model of withdrawal form, which provides the consumers with the form on which to withdraw from a supplier which may be used throughout the EU.⁵⁷⁸ Consumers will be provided with a standard withdrawal form, which can be used should a consumer wish to withdraw from a contract concluded at a distance or at the doorstep. This will make it easier and faster to withdraw, wherever consumers have concluded a contract in the EU.⁵⁷⁹
- (f) Suppliers may no longer charge consumers inflated prices for paying by credit card or debit card than what it actually costs the trader to offer such means of payment. Traders who operate telephone hotlines allowing the consumer to contact them in relation to goods and services will not be able charge more than the basic telephone rate for the telephoneone calls.⁵⁸⁰
- (g) Suppliers have to clearly inform the consumer who shall bear the cost of returning goods after the consumer has withdrawn from the agreement; otherwise the supplier will be compelled to pay for the return themselves. Traders must clearly give an estimate of the maximum costs of returning bulky

⁵⁷⁴ Reg 4.

⁵⁷⁵ Previously consumer where limited to a 7-day cooling-off period.

⁵⁷⁶ Regs 4 and 6.

⁵⁷⁷ Reg 6.

⁵⁷⁸ Reg 6.

⁵⁷⁹ Regs 6 and 8.

⁵⁸⁰ Reg 9.

goods bought over the internet, before the consumer concludes the agreement to enable the consumer to make an informed decision.⁵⁸¹

- (h) The regulation has further afforded protection to consumers in relation to digital products. Information on such products needs to be unambiguous and clear, stating the compatibility with hardware and software and the application of any technical protection measures.⁵⁸²

The DCR can be seen to directly regulate the manner in which consumers and suppliers engage with each other setting clear rules that both consumers and suppliers need to adhere to. The DCR works together with the UTD in regulating unfair terms and deceptive, misleading or aggressive practices in consumer markets.

5.3.2 The Unfair Terms in Consumer Contract Directive

The UTD attempts to regulate unfair terms in consumer contracts and it is the intention of the Legislature that the UTD complement the DCR, in the manner in which unfair terms are regulated. The UTD consists of eleven articles which attempt to facilitate the establishment of internal markets and to safeguard consumers acquiring goods and services through suppliers whom attempt to mislead or take advantage of consumers.⁵⁸³

Article 1 deals with the purpose of the UTD and provides that it is the intention of the Legislature to regulate the use of unfair terms in the Member state and to create mandatory regulatory provisions and principles of international conventions to address the issue of unfair terms.⁵⁸⁴

Article 2 contains a list of definitions which provides that a “consumer” means any natural person who is acting outside the scope of his trade, business or profession. It is interesting to note that the directive does not relate to juristic persons or to persons whom may be in the particular trade of which he is obtaining such service.⁵⁸⁵ A “seller” or “supplier” is any natural or legal person, who acts for the

⁵⁸¹ Regs 4,5 and 6.

⁵⁸² Reg 12.

⁵⁸³ Preamble UTD.

⁵⁸⁴ Art 1(1) and (2) UTD.

⁵⁸⁵ Art 2(b) UTD.

purpose of his trade, business or profession irrespective if such business is publicly owned or privately owned.⁵⁸⁶

Article 3 provides for the definition of “unfair terms” and states that a contractual term which has not been individually negotiated and which is contrary to good faith will be regarded as being unfair, where it causes a significant imbalance in the parties’ right and obligations under the contract.⁵⁸⁷

Where a contract has been drafted in advance and the consumer is unable to influence the contents or substance of the agreement such terms will always be regarded as not being individually negotiated.⁵⁸⁸

In situations where certain aspects of the agreement are negotiable, this alone will not exclude the application of this article, where a seller or supplier is of the view that the agreement as a whole has been individually negotiated; the onus still rests upon the supplier to prove the contrary. The directive contains a non-exhaustive list of terms which may be deemed unfair.⁵⁸⁹

Article 4 relates to factors courts are required to consider when pronouncing on the fairness of an agreement, taking into account the nature of the goods and services together with all the circumstances pertaining to the conclusion of the contract and to all the other terms of the contract or any another contract on which the agreement is dependant.⁵⁹⁰

Article 5 requires agreements to be drafted in plain, intelligible language, should any ambiguity arise as to the meaning of the terms of the contract, where any interpretation may favour the consumer such interpretation must prevail.⁵⁹¹

Article 6 provides that Member states must enact provision under their national laws which provide that where a contract is concluded between a consumer and supplier and such contract contains unfair terms that such terms will not be binding on the

⁵⁸⁶ Art 2(c) UTD.

⁵⁸⁷ Art 3(1) UTD.

⁵⁸⁸ Art 3(2) UTD.

⁵⁸⁹ Art 3 UTD.

⁵⁹⁰ Art 4(1) UTD.

⁵⁹¹ Art 5 UTD.

consumer and that the contract shall continue to bind the parties in as far as the contract can exist without the unfair terms.⁵⁹²

Article 7 provides that Member states must ensure that the interests of the consumer are capable of being enforced, through persons or organizations, having a legitimate interest in protecting consumer interests.⁵⁹³

Article 8 creates direction for Member states and provides that should their laws provide for more stringent provisions which are compatible with the UTD then such laws should be applied.⁵⁹⁴

Articles 9, 10 and 11 provides for the manner and time within which the directive needs to be implemented within the Member states, as this directive is already in operation these provisions will not be discussed.⁵⁹⁵

The directive contains an annex which contains a closed list of terms which may be regarded as being unfair. These terms have been copied over into schedule 2 of the UTCCR and will be fully discussed hereunder.⁵⁹⁶

The UTD has been criticised for its limited scope of application in “business to consumer” transactions in that the UTD only provides for natural persons, who are not acting in a particular trade, therefore in situations that the consumer is a juristic person or a natural person in a particular trade in which goods are sought the directive does not provide protection to such consumers, this short coming has been addressed in the CESLR which will provide for greater regulation of unfair contract terms.

5.3.3 Common European Sales Law Regulation

The EU recognizes the need for greater consumer protection against unfair contract terms. Contract terms define the rights and duties of the parties, whom in turn are bound to such terms. Suppliers generally make use of and enter into standard term agreements which place suppliers in the superior position by defining the terms in advance which are not capable of being individually negotiated. At present the EU

⁵⁹² Arts 6(1) and (2) UTD.

⁵⁹³ Arts 7(1), (2) and (3) UTD.

⁵⁹⁴ Art 8 UTD.

⁵⁹⁵ Arts 9, 10 and 11 UTD.

⁵⁹⁶ Refer to para 5.4.2.2 herein for a full discussion on the list of terms which may be regarded as being unfair.

has passed a green paper draft of the CESLR with the direct intention of addressing unfair terms in consumer agreements as well as business transactions by introducing the notion of “good faith” which will form part of standard term contracts.⁵⁹⁷

The directive as of date has not yet been implemented, however it has been eluded by the EU that the CESLR will be brought into operation in the second quarter of 2015.

The importance herein is that chapter 8 of the CESLR contains what would be the newest development in unfair contract term prevention, which stems from the UTD,⁵⁹⁸ which in effect would ensure a balance between the bargaining position of the consumer and that of the supplier. Many Member states have implemented unfair contract term legislation, however they have failed to address the direct issue of “unfair terms” as no real form of recourse is available to consumers against unfair contract terms.⁵⁹⁹ The UTD has been criticised for its limited scope of application towards unfair contract terms in relation to terms used in business-to-consumer agreements.⁶⁰⁰ The UTD provides Member states with the option on whether to provide consumers with a higher level of consumer protection than what is provided by the directive.⁶⁰¹ The CESLR intends to change this with the incorporation of article 8 of the UTD, with the intention of increasing legal certainty.

Chapter 8 of the CESLR is centered towards unfair contract terms consisting of three sections containing eight articles in total. The importance herein is that the regulation contains general provisions which will automatically deem a prohibited clause either void or unfair when used in business-to-business agreements⁶⁰² or business-to-consumer agreements.⁶⁰³ Section 1 is contained in articles 79-81 and applies to all contracts which are governed by the CESLR. Section 2 is contained in articles 82-85 and applies only to contracts between traders and consumers. Lastly, section 3

⁵⁹⁷ Art 3 CESLR.

⁵⁹⁸ Art 2 UTD.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Art 1 UTD.

⁶⁰¹ Art 8 UTD.

⁶⁰² Hereinafter the “B2B agreements”.

⁶⁰³ Hereinafter the “B2C agreements”.

which is found in article 86 applies only to contracts where both parties are considered to be traders.⁶⁰⁴

The unfairness test is found in articles 83 and 86 of the CESLR which contains a grey list of terms that provides guidance when purported unfair terms are used in either B2B or B2C agreements. Where a clause or term is considered to be unfair article 79(1) states that such a clause or term “*is not binding on the other party*”.⁶⁰⁵ This means that a supplier may not rely on such terms when attempting to enforce an agreement and that the court may on its own accord treat such term as if it did not form part of the agreement.⁶⁰⁶

The unfairness test in terms of the CESLR does not find application where agreements contain terms which provide for statutory requirements or provisions.⁶⁰⁷ The second exclusion to the unfairness test concerns terms defining the main subject matter of the contract and the price to be paid, as long as the trader has complied with the duty of transparency set out in article 82 such provisions are exempt from the application of the unfairness test.⁶⁰⁸ The exclusion is based on the idea that, even though the parties may not have negotiated about the standard terms of agreement, the parties would have at least negotiated about the core terms of the agreement which the consumer would have deemed reasonable. Therefore article 80(2) provides that the core terms of an agreement may not be tested by the courts and are binding on consumers, as long as terms are stated in plain and intelligible language, this appears to be in line with the principles of freedom of contract, which is a fundamental principles underlying the CESLR.⁶⁰⁹

The CESLR can be seen to have shifted the focus from purely consumer protection to the more generic protection of the weak contracting party in an attempt to achieve a safer consumer market and simultaneously making the EU more competitive on an international level.

⁶⁰⁴ Ss 1-3 CESLR.

⁶⁰⁵ Art 79(1) CESLR.

⁶⁰⁶ This principle was confirmed in *Océano Grupo Editorial SA v Roció Murciano Quintero* (2000) ECR I-04941 para 25.

⁶⁰⁷ Para 1 of art 80 CESLR. This exception follows a similar exception in the UTD, of which art 1(2) provides that the directive does not apply to contractual terms that reflect mandatory or regulatory provisions and provisions of international conventions.

⁶⁰⁸ Art 80 read with art 82.

⁶⁰⁹ *Ibid.*

5.3.4 European Communities (Unfair Terms in Consumer Contracts) Regulation

The ECUTCCR was first promulgated in 1995 to give effect to the UTD with the direct intention to curb unfair terms in consumer contracts.⁶¹⁰ The regulation has been amended to bring about the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations of 2013.⁶¹¹ The ECUTCCR consists of fifteen regulations and 2 schedules.

Regulation 1 and 2 provides for the general introduction.⁶¹² Regulation 3 contains a list of definitions which is applicable to the regulation. For the purpose of this dissertation it is important to note that the regulation defines “consumer” as any natural person who is acting or conducts business outside his primary business.⁶¹³ As where a “seller” is a person who is acting or conducting business in relation to the business, supplies or services he ordinarily renders.⁶¹⁴

Regulation 4 provides for the application of the regulation which applies to unfair terms in contracts concluded between a seller or a supplier and a consumer.⁶¹⁵

Regulation 5 of the ECUTCCR provides for what may be seen as the definition of unfairness and states that a contractual term will be regarded as being unfair where such term is contrary to the requirements of good faith and causes a significant imbalance in the parties’ rights and obligations under the contract which is ultimately detrimental to the consumer.⁶¹⁶ In determining whether a term is unfair, cognisance of schedule 2 must be taken into account.⁶¹⁷ Schedule 2 contains a non-exhaustive list of terms which may be regarded as being unfair when used in an agreement.⁶¹⁸ In determining the unfairness of a term all the circumstances attending the conclusion of the contract must be considered.⁶¹⁹ However, the assessment is not to

⁶¹⁰ SI 27/1995. Which has subsequently been replaced with the European Communities (Unfair Terms in Consumer Contracts) Regulations SI 160/2013.

⁶¹¹ SI 160/2013. Hereinafter the “ECUTCCR”.

⁶¹² Reg 1 ECUTCCR.

⁶¹³ Reg 3 “consumer” ECUTCCR.

⁶¹⁴ Reg 3 “seller” ECUTCCR.

⁶¹⁵ Reg 4. The regulation however does not apply to (a) mandatory statutory or regulatory provisions (including such provisions under the law of any Member State or in Community legislation having effect in the United Kingdom without further enactment); (b) the provisions or principles of international conventions to which the Member States or the Community are party.

⁶¹⁶ Reg 5(1) ECUTCCR.

⁶¹⁷ Reg 5(4) ECUTCCR.

⁶¹⁸ Reg 5 read with schedule 2.

⁶¹⁹ Reg 5(3) ECUTCCR.

relate to the definition of the main subject matter of the contract or the adequacy of the price or remuneration as against the goods or services supplied in exchange as long as the terms concerned are in plain and intelligible language.⁶²⁰ Where it is found that a contract term is found to be unfair such unfair contract term is not binding on the consumer in as far as the contract is capable of continuing to exist without such unfair term.⁶²¹

The regulation further requires that all terms which are offered to the consumer in writing must be drafted in plain and intelligible language.⁶²² Where any doubt arises as to the meaning or interpretation of such term, the interpretation most favourable to the consumer must prevail.⁶²³

Regulations 9 to 15 provides for and empowers the authorized body to approach the Director General of Fair Trading to have an order made prohibiting the use or as may be appropriate, the continued use of any term that is to be regarded as unfair in contracts concluded between sellers or suppliers.⁶²⁴ Such powers allow such authorised body to approach the court for an order prohibiting specific unfair terms which arises in specific consumer sectors.⁶²⁵

The regulation further contains 2 schedules. Schedule 1 relates to qualifying bodies to which the regulation applies. Schedule 2 provides for a non-exhaustive list of terms which may be regarded as being unfair.

In effect the ECUTCCR is a consumer protection measure which regulates the relationship between the consumer and the seller or supplier. It protects the consumer by providing for a statutory content control mechanism for the control of unfair contract terms in agreements where a consumer may be required to contract with such terms. The regulation recognises the fact that consumers are generally in the weaker contracting position.

⁶²⁰ Reg 6 ECUTCCR.

⁶²¹ Reg 8 ECUTCCR.

⁶²² Reg 7 ECUTCCR.

⁶²³ Reg 7(2) ECUTCCR.

⁶²⁴ Reg 8 (1)-(6) ECUTCCR. The authorized body means the National Consumer Agency, the Central Bank of Ireland or a consumer organization.

⁶²⁵ Reg 13(6).

5.4 Consumer protection legislation within the United Kingdom

The UK being a Member of the EU is required to transpose and align itself with the directives established by the EU.⁶²⁶ The UK as far back as 1893 had implemented consumer protection laws with the Sale of Goods Act,⁶²⁷ which provided for the inclusion of implied terms of quality and fitness. In response to the need for greater consumer protection in the 1980's the UK Legislature enacted a number of Acts specifically aimed at enhancing consumer protection.⁶²⁸ This brought about the Consumer Protection Act of 1987⁶²⁹ which enabled consumers to hold manufacturers liable for any injury, loss or damage suffered as a result of defective products, whether caused through the negligence of the supplier or not.

The UK in an attempt to align itself with the directives established by the EU, has implemented a number of Acts and regulations to prevent unfair contract terms and deceptive, misleading or aggressive practices in consumer agreements. The following Acts and regulations will be discussed; the Consumer Protection Act,⁶³⁰ Unfair Contract Terms Act,⁶³¹ Unfair Terms in Consumer Contract Regulation.⁶³²

5.4.1 The United Kingdom Consumer Protection Act

The UK Consumer Protection Act⁶³³ aims to safeguard consumers from products that do not comply with a reasonable level of safety.

Part 1⁶³⁴ of the Act introduces the provisions of the Product Liability Directive⁶³⁵ which came into effect on the 1 May 1988. The provisions of part 1 were only first applicable and enforceable in Greater Britain, and only later were the same rights and duties extended to Northern Ireland. The original purpose of UK CPA was to prevent and safeguard consumers from products that do not reach a reasonable level of safety.⁶³⁶ It can be seen from part 1 of the UK CPA that the Legislature's

⁶²⁶ Art 3 and 4 EEC Treaty.

⁶²⁷ Sale of Goods Act 1893.

⁶²⁸ Consumer Credit Act 1974, the Unfair Contract Terms Act 1977, the Sale of Goods Act 1979, Supply of Goods and Services Act 1982.

⁶²⁹ Consumer Protection Act 1987.

⁶³⁰ *ibid.*

⁶³¹ Unfair Contract Terms Act 1977.

⁶³² Unfair Terms in Consumer Contracts Regulations of 1999 (SI 1999/2083). Hereinafter the "UTCCR".

⁶³³ Consumer Protection Act of 1987. Hereinafter the "UK CPA".

⁶³⁴ Part 1, ss 1-9 of the UK CPA.

⁶³⁵ Product Liability Directive 85/374/EEC.

⁶³⁶ Preamble of the Consumer Protection Act of 1987.

intention is to clearly protect consumers from defective products that do not meet the relevant level of safety.⁶³⁷ This is further corroborated by section 2 of part 1 which pertains to the liability of any of the parties to a transaction where any damages may have been caused by a defective product.⁶³⁸

Part 2⁶³⁹ of the Act deals with consumer safety which came into effect on the 1st of October 1987. This provision is aimed at creating a civil law right of redress for any death, or injury, caused by using defective consumer goods. The consumer is entitled to enforce such right against any supplier, manufacturer, or importer rather than the dealer from whom the goods were purchased from.⁶⁴⁰ The Legislature has established a general safety requirement in that all goods for domestic use must be reasonably safe. Part 2 of the Act has allowed the relevant authority to suspend suspected goods from sale for up to six months, to enable tests to be conducted on the products safety.⁶⁴¹

Part 3⁶⁴² of the Act regulates price, more specifically the price indicated for goods, services and accommodation, or facilities. The Act makes it a criminal offence to mislead consumers regarding the actual price for goods, services, accommodation or facilities.

Part 4 deals with the process and procedural elements of the Act and pertains to the enforcement of the Act.⁶⁴³

The last part of the Act is part 5 and is headed miscellaneous and supplemental and deals with the interpretation together with other factors such as civil proceedings before court.⁶⁴⁴

The UK CPA as it stands deals more with the procedural aspect of consumer rights, in that it relates to what suppliers and consumers may and may not do, the Act fails to address the substantive aspects of consumer rights. To resolve this, the UK Legislature had promulgated subject specific legislation which specifically addresses

⁶³⁷ S 3 of the UK CPA.

⁶³⁸ S 2, part I of the UK CPA.

⁶³⁹ Part 2, ss 10-19 of the UK CPA.

⁶⁴⁰ S 2(2) of the UK CPA.

⁶⁴¹ Refer to the General Product Safety Regulation s 2(3)(a)-(c) and s 2(5) of the UK CPA.

⁶⁴² Part 3, ss 20-26 of the UK CPA.

⁶⁴³ Part 4 of the UK CPA.

⁶⁴⁴ Part 5 of the UK CPA.

the issues of unfair contract terms namely; the Unfair Contract Terms Act⁶⁴⁵ and the Unfair Terms in Consumer Contracts Regulations.⁶⁴⁶

5.4.2 Unfair contract term legislation within the United Kingdom

The UK being a Member of the EU is required to provide for a minimum level of statutory consumer protection. The UK has however opted to provide for greater consumer protection with the promulgation of subject specific legislation with the implementation of the UCTA, together with the UTCCR which gives effect to the UTD established by the EU.⁶⁴⁷

5.4.2.1 The Unfair Contract Terms Act

The UCTA was first promulgated in 1977 with the direct intention of regulating unfair terms. The UCTA attempts to regulate unfair contract terms which are used in the course of business. Firstly by regulating situations where there is an absolute prohibition of unlawful terms and secondly by providing a form of guidance to courts when called upon to interpret the fairness of specific terms.⁶⁴⁸

The UCTA has 8 areas of specific application namely; the exclusion of liability for negligence,⁶⁴⁹ the exclusion of liability for breach of contract,⁶⁵⁰ where suppliers exclude personal liability and such liability is placed on the consumer,⁶⁵¹ the exclusion of liability in contracts for the sale of goods,⁶⁵² the exclusion of liability in hire contracts⁶⁵³ and the exclusion of liability arising from misrepresentation.⁶⁵⁴ The UCTA creates what may be deemed the reasonableness test,⁶⁵⁵ and is supplemented by schedule 2 of the Act which provides guidance to courts on factors that need to be considered when applying the reasonableness test.

⁶⁴⁵ Unfair Contract Terms Act 1977, (“UCTA”).

⁶⁴⁶ Unfair Terms in Consumer Contracts Regulations 1999, (“UTCCR”).

⁶⁴⁷ Art 3 and 4 of the EEC Treaty.

⁶⁴⁸ Refer to the preamble read together with ss 2 and 3 UCTA.

⁶⁴⁹ S 2.

⁶⁵⁰ S 3.

⁶⁵¹ S 4.

⁶⁵² S 6.

⁶⁵³ S 7.

⁶⁵⁴ S 8.

⁶⁵⁵ S 11.

In terms of section 2 a business cannot exclude or restrict liability for death or personal injury arising from the negligence of the supplier. This provision is absolute and is not subject to the requirement of the reasonableness test.⁶⁵⁶ The only instance a business may exclude or restrict liability for any other type of loss is if such exclusion is reasonable in the circumstance.⁶⁵⁷ A supplier is further prohibited from unilaterally accepting the consumers' voluntary acceptance of risk, where an exclusionary clause is included in an agreement.⁶⁵⁸

Section 3 applies to the exclusion of liability in circumstances where the supplier breaches an agreement.⁶⁵⁹ Section 3 specifically prohibits the exclusion or restriction of liability for breach of contract, where exclusionary clauses are used that require a substantially different performance to that what was agreed upon or may be reasonably expected, alternatively to allow the supplier not to perform at all.⁶⁶⁰

Section 4 which is titled "unreasonable indemnity clauses", provides that a person contracting as a consumer cannot be made to pay an unreasonable indemnity arising from liability incurred as a result of breach of contract or negligence.⁶⁶¹

Section 5 provides for goods which are supplied to consumers for private use or consumption, where loss or damage arises from the goods which become defective whilst in the consumer's use.⁶⁶² It is a requirement that such defectiveness needs to result from the negligence of a person in the manufacture or distribution process of the goods.⁶⁶³ Liability for such loss or damage cannot be excluded or restricted by any contract term or notice contained in the agreement.⁶⁶⁴

Section 6 deals with the exclusion of liability in contracts for the sale of goods together with hire purchase agreements.⁶⁶⁵ The provisions are created and relate to the liability which arises through implied terms created under the Sale of Goods Act⁶⁶⁶ and the Supply of Goods Act.⁶⁶⁷ Under section 6 any party to any agreement

⁶⁵⁶ S 2(1).

⁶⁵⁷ S 2(2) read with s 11.

⁶⁵⁸ S 2(3).

⁶⁵⁹ S 3 read with s 11.

⁶⁶⁰ S 3.

⁶⁶¹ S 4 read with s 11.

⁶⁶² S 5(1)(a).

⁶⁶³ S 5(1)(b).

⁶⁶⁴ S 5.

⁶⁶⁵ S 6.

⁶⁶⁶ Sale of Goods Act 1979.

⁶⁶⁷ Supply of Goods Act 1973, in relation to implied terms.

may never under any circumstance exclude liability relating to the correctness of title of the object, liability relating to the description, quality, and fitness of use of the goods.⁶⁶⁸

In situations of non-consumer sales⁶⁶⁹ the parties to the agreement are able to exclude liability for the quality, description and fitness of the goods in as far as it is reasonable to do so subject to the provisions of section 11.⁶⁷⁰

Section 7 relates to hire contracts and is set out in the same theme of section 6, in that a supplier is prohibited from excluding the correctness of the description, sample, quality, fitness and purpose of the goods. The supplier is only entitled to exclude such liability in situations where the agreement relates to a non-consumer agreement.⁶⁷¹ Section 7 specifically prohibits any exemption clauses relating to the title of goods.⁶⁷²

Section 8 of the Act pertains to liability arising from misrepresentation and provides that such misrepresentation may be excluded only if it amounts to being reasonable. The Act requires terms to be fair and reasonable taking into account all circumstances which were known, or ought to have reasonably been known by the parties at the time of contracting.⁶⁷³ This places the onus on the party seeking to enforce the term to show that it was fair and reasonable.⁶⁷⁴

In determining whether a contract term or notice satisfies the requirement of the reasonableness test, courts are required to take into consideration the terms contained in schedule 2 which contains a non-exhaustive list of factors. Schedule 2 does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any prohibited exclusion of liability that such term does not form part of the contract.⁶⁷⁵

In relation to a term or notice, the requirements of reasonableness under the Act requires that such term or notice must be fair and reasonable before such supplier is

⁶⁶⁸ S 6.

⁶⁶⁹ A non-consumer sale would occur where both parties are deemed suppliers or traders in the ordinary course of business.

⁶⁷⁰ Ss 6, 11 and schedule 2.

⁶⁷¹ Ss 7, 11 and schedule 2.

⁶⁷² S 7.

⁶⁷³ S 8 read with s 11.

⁶⁷⁴ It is however important to note that s 8 of the UCTA amends s 3 of the Misrepresentation Act 1967.

⁶⁷⁵ S 11(2).

able to rely thereon, together with considering all the circumstances which gave rise to the liability.⁶⁷⁶ Where reference is made to a contract term or notice and a person attempts to restrict liability to a specified sum of money, whether the term or notice satisfies the requirement of reasonableness or not, cognisance must be taken into account of the resources which the supplier has available to him for the purpose of meeting the liability.⁶⁷⁷

Section 24 forms the basis of the reasonableness test found in section 11. Section 24 provides for factors that courts are required to consider in the circumstances which were or ought to have been reasonably known to the parties.⁶⁷⁸ The Act further provides that in determining if it is fair and reasonable in the circumstance the court must consider the terms specified in schedule 2.⁶⁷⁹

When a court is called upon to consider fairness under the Act cognisance must be taken of schedule 2 which contains a list of factors courts are required to consider namely;

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account alternative means by which the customer's requirements could have been met;⁶⁸⁰
- (b) whether the customer received an inducement to agree to the terms, or in accepting it had an opportunity of entering into a similar contract with a third party, but without having a similar term;⁶⁸¹
- (c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term;⁶⁸²
- (d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;⁶⁸³

⁶⁷⁶ S 11(3).

⁶⁷⁷ S 11(4)(a) and s 11(4)(b).

⁶⁷⁸ S 24.

⁶⁷⁹ S 24(2).

⁶⁸⁰ Schedule 2(a).

⁶⁸¹ Schedule 2(b).

⁶⁸² Schedule 2(c).

⁶⁸³ Schedule 2(d).

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.⁶⁸⁴

The UCTA can be seen as tailored legislation in that it is subject specific legislation with the sole purpose of regulating unfair contract terms. The shortfall of the UCTA is that the Legislature failed to make provision for preventative control mechanisms in which an ombudsman or regulator can bring a general use challenges against terms used in a particular industry without the need to involve a consumer in such review.⁶⁸⁵ This is in contrast to the UTD which requires the Office of the Fair Trade to consider all complaints which relate to unfair contract conditions.⁶⁸⁶ The UCTA is further supplemented by the UTCCR.

5.4.2.2 The Unfair Terms in Consumer Contracts Regulations

The UTCCR finds application in that it only applies to contracts entered into between businesses and consumers and where such agreements are based on non-negotiable terms. The UTCCR attempts to create compliance through the implementation of frame work to provide an adequate and effective means to prevent the use of unfair terms in contracts concluded with consumers.⁶⁸⁷

The regulation creates a process where any person or organisation who holds a legitimate interest in protecting consumer interests, may institute the necessary proceedings at court or with the relevant body to hear the grievance for a decision as to whether such terms are deemed to be unfair.⁶⁸⁸

Regulation 4 of the UTCCR provides for the substantive application of unfair terms in agreements concluded between a seller or supplier and a consumer. A term will be regarded as being unfair if such term has not been individually negotiated and contrary to the requirements of good faith, if such term creates a significant imbalance in the parties' rights and obligations arising under the contract, or to the detriment of the consumer.⁶⁸⁹ A term will always be regarded as not having been

⁶⁸⁴ Schedule 2(e).

⁶⁸⁵ The Office of Fair Trade "Guidance for the Unfair Terms in Consumer Contracts Regulations 1999", *September 2008* < [https:// www.offt. gov.uk /shared_ oft/ business_ leaflets/ 530162/ oft 1008.pdf](https://www.offt.gov.uk/shared_offt/business_leaflets/530162/oft1008.pdf) (Accessed 27/12/2014) 8-9.

⁶⁸⁶ Reg 10(1). These powers and duties are set out in the amended UTCCR.

⁶⁸⁷ Naudé 2009 (Part 1) 378.

⁶⁸⁸ Art 7 of the UTD.

⁶⁸⁹ Reg 4 of the UTCCR.

individually negotiated where it has been drafted in advance and the consumer is unable to negotiate or influence the substance of the term.⁶⁹⁰ Notwithstanding the situation where a specific term or aspect of the agreement has been individually negotiated, the regulation will apply to the rest of the agreement where it *prima facie* appears to be a pre-formulated standard term contract. The burden rests on the seller or supplier to prove that the terms of the agreement were individually negotiated.⁶⁹¹

Regulation 4 creates the “unfairness test” which provides for the testing of unfair terms in all standard term contracts used by businesses in terms of schedule 2. Schedule 2 to the regulation contains a non-exhaustive list of the terms which will regard terms as being unfair.⁶⁹²

Schedule 2 provides that the following terms will be regarded as being unfair where the object or effect of the term is to:

- (a) exclude or limit the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;⁶⁹³
- (b) inappropriately excluding or limiting the legal rights of the consumer in relation to the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him,⁶⁹⁴
- (c) making an agreement binding on the consumer, where performance of such an agreement is solely dependent on the seller or suppliers own will;⁶⁹⁵
- (d) permitting the seller or supplier to retain money paid by the consumer where the consumer latter decides not to conclude or perform the contract, without providing for the consumer with a refund;⁶⁹⁶

⁶⁹⁰ Reg 4 of the UTCCR.

⁶⁹¹ *Ibid.*

⁶⁹² Reg 4 read with schedule 2 of the UTCCR.

⁶⁹³ Schedule 2(a).

⁶⁹⁴ Schedule 2(b).

⁶⁹⁵ Schedule 2(c).

- (e) requiring a consumer who fails to fulfil a contractual obligation to pay a disproportionately high sum in compensation;⁶⁹⁷
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same option is not available to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;⁶⁹⁸
- (g) enabling the seller or supplier to terminate a contract of an indeterminate duration without reasonable notice except where there are serious grounds for doing so;⁶⁹⁹
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;⁷⁰⁰
- (i) irrevocably binding the consumer to terms where the consumer has not been given an opportunity to acquaint himself with such terms;⁷⁰¹
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;⁷⁰²
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;⁷⁰³
- (l) providing for the price of goods to be determined at the time of delivery or allowing the seller or supplier to increase their price without giving the consumer a corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;⁷⁰⁴

⁶⁹⁶ Schedule 2(d).

⁶⁹⁷ Schedule 2(e).

⁶⁹⁸ Schedule 2(f).

⁶⁹⁹ Schedule 2(g).

⁷⁰⁰ Schedule 2(h).

⁷⁰¹ Schedule 2(i).

⁷⁰² Schedule 2(j).

⁷⁰³ Schedule 2(k).

⁷⁰⁴ Schedule 2(l).

- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving such seller or supplier the exclusive right to interpret any term of the contract;⁷⁰⁵
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;⁷⁰⁶
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform;⁷⁰⁷
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;⁷⁰⁸
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.⁷⁰⁹

The terms listed under schedule 2 can be seen as a non-exhaustive grey list of terms and therefore are not void if they are used, but merely voidable. Should a supplier wish to rely on such term the onus to prove that such term is *prima facie* fair in the instance is upon the supplier.

Regulation 8 which is titled "effect of unfair terms" deals with the situation where a term listed under schedule 2 is used and provides that when an unfair term is used within a contract which is concluded with a consumer such term will not be binding on the consumer, however the contract will continue to bind the parties subject to the contract being capable of continuing to operate without the unfair term.⁷¹⁰

⁷⁰⁵ Schedule 2(m).

⁷⁰⁶ Schedule 2(n).

⁷⁰⁷ Schedule 2(o).

⁷⁰⁸ Schedule 2(p).

⁷⁰⁹ Schedule 2(q).

⁷¹⁰ Reg 8 UTCCR.

The fairness test is found in regulation 6, which takes into account a number of factors such as; the nature of the goods and services,⁷¹¹ all circumstances surrounding the conclusion of the contract ⁷¹² and where the term is clear and understandable the question of fairness of the term cannot relate to the definition of the subject matter of the contract or the adequacy of the price or remuneration.⁷¹³

It can be seen from the above that the aim of the UTCCR is to regulate terms that have not been individually negotiated together with terms that are contrary to the requirements of good faith. The Legislature does not allow a consumer to escape liability from the conclusion of the contract as a whole. This is however subject to the provision that the contract is still capable of operating without such terms, thereby confirming that the non-exhaustive list of terms listed under schedule 2 forms a grey list of terms which are intended to be used as an indicating factor as to what is deemed unfair, this gives the courts broad powers to review contracts and to order contracts to be amended.⁷¹⁴

5.5 Comparative analysis

The EU promotes consumer protection and requires a minimum level of consumer protection within the Member states. The UK being a Member state transposes and implements a greater level of consumer protection than what is required in compliance to the directives established by the EU, thereby constantly updating and implementing regulations and directives to curb unfair contract terms.

Currently there are no mechanisms in place which requires the South African legislator to provide for a minimum level of statutory protection or to implement or update existing legislation to conform to international best practice standards. The preamble of the CPA recognises the need to give effect to internationally recognised consumer rights, however the manner in which the Legislature wishes to recognise and implement such international consumer rights must be considered. The underlying purpose of the CPA is to protect and promote historically disadvantaged

⁷¹¹ Reg 6(1) UTCCR.

⁷¹² Reg 6(2) UTCCR.

⁷¹³ Reg 6(3) UTCCR.

⁷¹⁴ For a full discussion herein refer to The Office of Fair Trade "Guidance for the Unfair Terms in Consumer Contracts Regulations 1999", *September 2008* < [https:// www.offt. gov.uk /shared_ oft/ business_ leaflets/ 530162/ oft1008.pdf](https://www.offt.gov.uk/shared_offt/business_leaflets/530162/oft1008.pdf)(Accessed 27/12/2014).

consumers in the market place and thus advanced consumer rights may not assist such historically disadvantaged consumers.⁷¹⁵

The UK has implemented sector specific legislation which is predominantly found in the UCTA and UTCCR. The UCTA provides for what is known as the “reasonable test” which enables courts to test contractual provisions objectively taking into account specific circumstances of the agreement together with the information the parties had available to them at the time of contracting in considering whether such provisions are unfair.⁷¹⁶ The UTCCR contains the “unfairness test” which deems certain terms voidable and places the burden on the party relying on such terms to prove the validity thereof.⁷¹⁷

International consumer protection has been developed further with the soon to be implemented CESLR which introduces the notion of “good faith” in standard term contracts which will have far reaching implications in consumer markets as courts are able to develop the notion of good faith within current market trends.⁷¹⁸

The unfair terms legislation implemented by the EU and UK have a number of similarities to that of the CPA with regards to content control, incorporation control and interpretation control. The CPA has been formulated in such a manner as to provide for a “cover all” situation providing consumers with a broad basis of consumer protection. Sections 48 and 51 read together with regulation 44, deals with content control and attempts to regulate unfair contract terms. It will be quickly seen from the onset that the South African unfair terms legislation is in its infancy compared to that of the EU and UK. The South African unfair terms legislation is only dealt with in Part G of the CPA, as where the EU and UK have implemented a number of sector specific acts, regulations and directives each addressing specific aspects of unfair contract terms.

The CPA fails to provide the necessary content control required, as Part G together with regulation 44 provides for a general grey list of terms which are found across a variety of sectors. The legislation implemented within the UK and EU provides for sector specific unfair terms legislation which is incorporated into a number of acts

⁷¹⁵ Preamble (3).

⁷¹⁶ S 11 UCTA.

⁷¹⁷ Regs 4 and 6 UTCCR.

⁷¹⁸ Art 3 CESLR.

and regulations.⁷¹⁹ The South African consumer protection legislation falls behind where it comes to the regulation of such unfair terms as courts are required to consider all the factors listed under section 52(2)(c) in determining whether such provisions are fair, however this is not practical because if a contract term is substantively unfair a court should be entitled to make a general finding in that particular case without the need to consider all the factors, such as the individuals “bargaining power”, “knowledge” and “sophistication” as this may lead to decisions based on procedural factors and not the true circumstances surrounding the particular transaction.⁷²⁰

Legislation within the EU and UK specifically provides for a fairness and reasonable test which enables courts to test fairness and reasonableness based on the principles of good faith.⁷²¹ The CPA in its current form fails to expressly provide for such test. Section 52(2) of the CPA enables courts to consider all surrounding circumstances of an agreement when considering fairness, thus courts are able to access the principles of fairness. Further section 2(10) of the CPA needs to be applied as it enables the courts to test the principles of good faith. Section 2(10) provides that no provision of the CPA must be interpreted to exclude a consumer from exercising any rights afforded in terms of the common law, therefore it is implied through such wording that the courts are able to access the principles of good faith by virtue of this provision. To attempt to access the law through such implied means is always open for interpretation which will ultimately lead to litigation which consumers are not always able to afford.

5.6 Conclusion

The international position governing unfair terms in consumer contracts as discussed above are products of the nineteenth and twentieth century and are consequently at a far more advanced stage than that of our South African consumer legislation. This chapter identifies two important conclusions.

Firstly, it is clear that consumer protection laws within the EU and UK have been extensively developed with the implementation of subject and sector specific

⁷¹⁹ The newest thereof being the Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013, which specifically address the consumer’s right to cancel and withdraw from an agreement.

⁷²⁰ Naudé (2009) 518- 519.

⁷²¹ Art 83 and 86 CESLR, reg 6 UTCCR and reg 3 ECUTCCR.

legislation, which are actively being developed and improved due to the unique relationship between the EU and UK which requires Member states to transpose EU legislation into national law.

Secondly it can be argued that the laws implemented by both the EU and UK have attempted to balance the rights between consumers and suppliers rather than providing a direct contractual advantage to either the consumer or supplier. This can be seen by the fairness and reasonableness tests contained within the UK consumer protection legislation.⁷²² The use of such tests enables courts to access the principles of good faith by considering a number of factors associated with the conclusion of the agreement which results in courts making independent subjective findings as to whether the agreement amounts to being fair, just and reasonable.

As consumer laws develop so will the consumer markets in which they find application, however the question arises; Is it possible for consumer laws to out develop or be too advanced for the consumers for which such legislation is primarily intended to be protecting? This is the position South Africa currently finds itself in, as the CPA together with certain South African consumer markets require conformation with international best practice, however the manner in which such legislation needs to be implemented into our laws need to be considered.⁷²³

The purpose of the CPA is to protect the interest of the consumer, but more specifically to fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers. Section 3(1)(b) specifically provides for consumers who are low-income persons or persons comprising low-income communities who live in remote, isolated or low-density population areas or communities, thus advanced consumer laws regulating on-line transactions would be of no help to such consumers.⁷²⁴ It is suggested in overcoming this dilemma sector specific legislation must be implemented which will enable the Legislature to regulate specific sectors which requires advanced consumer legislation which will in effect improve consumer confidence by creating the necessary level of consumer protection.

⁷²² Reg 4 read with schedule 2 UTCCR and ss 11 and 24 read with schedule 2 UTCA.

⁷²³ The Preamble of the CPA recognises the need to incorporate international best practice “(c) to give effect to internationally recognised customer rights”.

⁷²⁴ S 3(1)(b)(i)-(ii).

6.1 Introduction

This dissertation considered and evaluated how the implementation of the CPA and more specifically Part G thereof influenced the common law and the consumer's rights' to fair just and reasonable contract terms, together with considering the pitfalls of the CPA in its current form as well as the sections which require amendments.

The CPA is required to operate within an existing legal system and within the parameters set by the common law, therefore it was necessary to provide a background of the common law and the position where the CPA does not find application and then proceed to critically discuss the application of Part G to agreements which fall within the ambit and scope of the CPA.

This dissertation clearly illustrates that the CPA has been drafted with the clear intention of protecting and benefiting the consumer by codifying the common law provisions in relation to consumer contract law in order to strengthen the consumer's position within consumer markets.

A question that may arise is whether the CPA may at any point become too advance for the particular consumer, the Act intends to protect?

Section 3 read with the Preamble of the Act provides that the CPA must protect consumers but more particularly historically disadvantaged persons to enable their full participation as consumers.⁷²⁵ This clearly illustrates that the purpose of the Act is to protect historically disadvantaged persons, however if this provision was to be read in isolation then it can be argued that the CPA has effectively carried out its intended purpose by providing a minimum level of consumer protection within the South African consumer market. The CPA needs to be read as a whole. The preamble further states that the purpose of the CPA is to protect the interests of all consumers by ensuring accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the market place.⁷²⁶ Thus ultimately the

⁷²⁵ Preamble (a) read with s 3(1)-(2).

⁷²⁶ Preamble (b) read with s 3(1)-(2).

CPA's primary purpose is to protect all consumers across the variety of socio and economical backgrounds found within consumer markets.

In light of the above it would not be possible for the CPA to become too advanced as ultimately the Act is tasked in protecting consumers from a variety of different socio and economical backgrounds. The Act would need to create provisions that enable it to operate within the various segments of the consumer market to protect consumers across the board.

This dissertation has found two sets of conclusions. Firstly the general effect that Part G of the CPA has had on consumer markets, namely strengthening consumer rights thereby enabling consumers, more particularly historically disadvantaged consumers to actively partake in consumer markets as a whole. Secondly this dissertation unfortunately has also found that the CPA has failed to use essential mechanisms as used in the UK and EU unfair terms legislation to protect consumers from different socio and economic backgrounds against unfair contract terms.

6.2 Summary of findings

Prior to the implementation of the CPA courts were rigid in their application of the common law in that they did not ordinarily allow a contracting party to escape liability where an agreement contained unfair, unjust or unreasonable contract terms.⁷²⁷ This allowed businesses to draft cleverly worded standard term contracts which once signed by the consumer left the consumer with little to no right of recourse. Only in exceptional circumstances were the courts prepared to refuse the enforcement of contractual provisions due to such provisions overstepping the boundaries of public policy.⁷²⁸ This is evident by the abundance of case law where agreements have been strongly contested by businesses that constantly rely on the principles of the common law to enforce agreements, namely the principles of freedom of contract and that of *pacta servanda sunt*.⁷²⁹

With the implementation of the CPA into our law, our common law with regards to contract law has been codified and extended to empower courts to specifically test

⁷²⁷ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) paras 605- 607B. Joubert JA held "that our courts do not have an equitable jurisdiction." *Burger v Central South African Railways* 1903 TS 571 -576.

⁷²⁸ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) paras 80-82.

⁷²⁹ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) paras 7-9; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 480-482.

standard term contracts against the criteria of good faith, fairness and unconscionability.⁷³⁰

The purpose of the CPA is clearly set out and defined in section 3, which provides that the Act has been implemented to protect and develop the social and economic welfare of consumers, in particular, vulnerable consumers together with protecting all consumers against unconscionable, unfair, unreasonable, unjust or improper practices. Such conduct is regulated under Part G together with regulation 44 of the Act.⁷³¹ The CPA has imposed the notion that all agreements must be subject to the condition that terms of an agreement must be fair, just and reasonable and that any term which purports to restrict or limit any of the consumer's rights must be specifically drawn to the consumer's attention.⁷³² Businesses are no longer able to rely solely on the provisions of the common law to hold consumer captive to agreements which are excessively one sided or unfair.

It is argued that the CPA in its current form will promote litigation as businesses wishing to enforce agreements which are in conflict with Part G and regulation 44 will attempt to prove that such terms are fair or in accordance with the Act in an attempt to avoid monetary loss.⁷³³ If the society we live in and past circumstances has any say as to the manner in which the CPA will be applied, it is certain that well educated businessmen will use the loopholes created by the CPA to attempt to escape liability or go as far as to use the short comings of the Act to enforce agreements against consumers.

6.3 Conclusion

It has been argued by many that the principles contained in the common law and that of public policy is more than sufficient to achieve the desired results of consumer protection.⁷³⁴ Courts have constantly found that the underlying values of public policy to be somewhat abstract as these principles do not create binding rules of law.⁷³⁵ It can be expected as with any entirely new piece of legislation implemented within an

⁷³⁰ Ss 40, 48, 49, 50, 51 and 52.

⁷³¹ Refer to chapter 4 herein.

⁷³² S 49(1).

⁷³³ As evident by *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ); *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

⁷³⁴ Hefer (2000); Hopkins (2003); Hefer (2004); Jamneck (1997) and Naudé (2006) 362;

⁷³⁵ See herein *South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 (SCA) 260; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) where this view was confirmed.

existing legal system that there will be conflicts and uncertainties in the application thereof, however the Legislature will need to set out guidelines for courts in the manner in which certain sections are to be applied keeping in mind the ultimate purpose of the Act is to ensure fairness in consumer markets taking into account the socio and economic background of the consumer.

The Act fails to make use of some of the essential international mechanisms to curb unfair unjust and unreasonable contract terms. Regulation 44 has cured many of the defects originally found in the Act however the Act is still defective for a number of reasons namely:

The list of factors courts are required to consider whether a term is unfair should be amended as it is not practical for courts to consider all the factors listed under section 52(2), the Legislature should rather provide a definition of what it deems unfair and list sector specific terms which it deems unfair.⁷³⁶ With the use of such mechanisms sellers and suppliers will be placed in the position to ensure compliance with the Act and that agreements entered into with consumers are fair, just and reasonable.

It would almost be impossible for the Legislature to list all possible unfair terms or variations thereof that would amount to a term being unfair. The Act should make provision that where the issue of fairness is raised by the consumer the burden of proving that such term is fair in the instance is automatically placed on the business. In an attempt to achieve the purpose of the CPA the Legislature should include sector codes of conduct which contain a list of unfair terms which would regulate a specific sector. With the use of such sector codes the Legislature would be in the position to enact sector specific unfair terms with the use of grey and black lists similar to that which is currently contained in sections 48, 52 and regulation 44 of the CPA. These sector codes of conduct would in effect create tailor made legislation, which would be applicable to a specific industry, whereby undesirable conduct within a specific industry can be controlled through the use of such sector codes of practice.

Lastly section 49 of the Act which requires exemption clauses to be specifically brought to the attention of the consumer needs to be removed as businesses will have consumer's initial or sign next to such exemption clauses as proof that such clause was brought to the attention of the consumer, where in fact the consumer is blissfully unaware of the implications of such exemption clause. This will eventually

⁷³⁶ S 52(2).

work against the consumer as businesses would argue that the consumer had knowledge of the term and considered such term acceptable when entering into the agreement. Such amendments will be consistent with the purpose of the CPA, which is to protect and advance the social and economic welfare of consumers in South Africa.

There can be no doubt that South African consumers require unfair contract term legislation, for the most part due to the inherent limits of the common law and judicial control. The CPA will create greater predictability and a shift in awareness and fairness in consumer agreements which will bring with it various advantages to all role players in consumer markets as a whole.

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