

**PROBLEMS REGARDING EXEMPTION CLAUSES
IN CONSUMER CONTRACTS:
THE SEARCH FOR EQUITABLE JURISPRUDENCE
IN THE SOUTH AFRICAN CONSTITUTIONAL REALM**

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Submitted in the fulfilment of the requirements for the degree

LLD

In the Faculty of Law
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October 2017

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CHAPTER 1

THE INCORPORATION AND DEVELOPMENT OF EXEMPTION CLAUSES WITHIN STANDARD FORM CONTRACTS

1. Background

Most consumers in their day-to-day affairs find themselves entangled in the welter of provisions in standard form contracts and hard bargain situations attendant to them. Subsequent to the consumers' vulnerability is the inability to resist the terms contained in standard form and appreciation of their import. Most standard form contracts contain various limitations, exclusions and exemptions. Furthermore, the lack of comprehension and difficulties in interpreting these terms-exemption/exclusion clauses in particular exacerbate the problems. In this thesis, the term "exemption clause" and "exclusion clause" will be used interchangeably because of the interface between them.

The increasing debate provoked by the inclusion of onerous exemption clauses into standard form contracts (contracts of adhesion) manifests a prolonged turbulent upward trajectory in contract law. The impracticability for consumers' to always enlist the services of lawyers in their dealings for advice results in them signing standard form contracts unaware of their consequences. Few topics in commercial law have become as contentious as the issue of exemption clauses in contractual dealings and their ramifications for the contracting parties.

Although exemption clauses also apply to delictual action, however, most parties prefer to institute their cause of action under delict than in contract because the latter seems to be limiting than the former. Delictual actions may be superficially touched for clarity and comparison, however, the main thrust of this thesis is premised on contract law throughout the discourse. This thesis deals with the constitutionality of exemption clauses, as a way of tackling unfairness manifesting in the contractual setting and consumer law.

According to the Black's Law Dictionary, an 'exemption clause' is "a contractual provision providing that a party will not be liable for damages for which that party would otherwise have ordinarily been liable."¹ In standard form contracts, this contractual term is couched in a way that the consumer indemnifies the other contracting party of all or partial liability for

¹ Garner BA (Ed) *Black's Law Dictionary* 8th ed. (2004) 1724.

loss, damage, harm, omission or representation made before or during the operation of the contract. Thus, exemption or exclusion clauses are two sides of the same coin dependent on the degree of differentiation.

Viewed holistically, an exemption clause is a means of a defined allocation of risks between the parties through tacit admission. Entertaining such a clause that exempts suppliers or service providers from liability, or limits their liability, leads to a derogation of the common-law rights of redress for consumers involved in legal disputes in deference of the freedom of contract doctrine. The tendency of contracting parties to consent to this thorny issue without proper consideration warrants deep academic discourse and interrogation.

Examples of such provisions include: (a) a “no representations” clause, which excludes the right of a contracting party to rescind the contract or claim damages for a misrepresentation made by the other which induced him to enter into the contract; (b) a “no liability” or “limitation of liability” clause for failing to comply with statutory laws or *naturalia* of a specific contract, or for a breach of contract,² including for instance, an exemption from an implied term of the contract such as the seller’s warranty against latent defects of the merchandise; and (c) a “no liability to damage of property or personal injury” clause, for instance when parking a vehicle in a garage or certain premises at owner’s risk. Exemption clauses are often set out in fine print³ or obscured at the end of standard form contracts.

Normally, such a term comes into operation when a diversion from the agreed stipulation is actuated.⁴ One may ask whether it would be too far-fetched to say that it is a disguised anticipatory breach term, which is subject to interpretation to legitimize its effect. Commentators argue that exemption clauses which are framed widely and vague create no obligation, for instance, if a party can perform as he chooses and the undertaking will also

² Van der Merwe et al *Contract General Principles* (2007) 297.

³ Literal meaning of the word and in small font and is easy to miss; see also <http://www.meriam-webster.com/dictionary> (last accessed on 17 August 2012) that defines ‘fine print’ as something thoroughly and often deliberately obscure; especially: a part of an agreement or document spelling out restrictions and limitations often in small type or obscure language. In the same vein the Black’s Law Dictionary defines it as “the part of an agreement or document—usually in small, light print that is not easily noticeable—referring to disclaimers, restrictions, or limitations.

⁴ Van den Berg *Readable Consumer Contracts* (1985)1.

lack necessary certainty.⁵ It is mostly consumers' reaction to unfavourable interpretation that triggers dissatisfaction and review of these clauses.

The apparent failure of South African law to police the terms of standard form contracts demonstrates the deference to freedom of contract.⁶ In fact, it is law acquiescence to their putative function to honour freedom and sanctity of contract in the classical model. Despite the fine print, obscure legalese also compounds the problem of leaving the average consumer unable to evaluate the intricacy of the bargain offered to him. One may find a contractant bound to a term which he/she is unaware of when concluding the contract, or did not understand them. Thus, sanctity of contract is sometimes inevitably used to uphold harsh and oppressive standard form contracts.⁷ The question remains whether the legislative incursion enforced through plain language found in various statutory enactments would change the *status quo*.

Certainly, rigorous application of the traditional doctrines to contracts of adhesion lead to so many unjust results that it cannot longer be justified as the tolerable costs of applying a general system of rules.⁸ This describes the unenviable situations of consumer unconscionability that the Consumer Protection Act⁹ addresses in its provisions because most consumers are generally victims of such type of duress.¹⁰ Practically, contract of adhesion produces a new form of subservience or grovelling under the guise of contracting. The classical model of contract presented untrammelled powers to individuals and difficult adjudication.

⁵ Van Huyssteen LF, Lubbe GF & Reinecke MFB *Contract General Principles* 5th ed (2016)290.

⁶ Atiyah PS *The Rise and Fall of Freedom of Contract* (1979); JN Adams "Unconscionability and the standard form contract" in Brownsword R, Howells GG and Wilhelmsson T (Ed) *Welfarism in Contract Law* (1994) 230.

⁷ Hopkins K "Standard-form contracts and the evolving idea of private law justice: a case of democratic capitalist justice versus natural justice (2003) 1 *TSAR* 153.

⁸ Rakoff "Contracts of adhesion: an essay in reconstruction" 1983 (96) 6 *Harv LR* 1189.

⁹ 68 of 2008 ("the CPA").

¹⁰ Posner R *Economic Analysis of Law* 4th ed. (1992) enlist four types of duress:

- (a) In its original sense (where a contract was entered under a threat of violence);
- (b) A threat of non-performance to compel the other party to accept unfavourable terms;
- (c) As a synonym for fraud, for instance, where an illiterate person is tricked into signing a contract thinking it is something else; and finally
- (d) Abuse of monopoly ('the tug-boat cases' where, for example, if a ship is sinking and A refuses to bring his tug boat to rescue unless the master of the ship agrees to very unfavourable terms.

Since a man has to do some necessities, one might say that the consumer is compelled to contract upon particular terms and that, in a loose sense, he is the victim of compulsion.

For instance, in *Natal Motor Industries Ltd v Crickymay*,¹¹ Miller J, after considering the effect of an exemption clause in an agreement of sale,¹² said:

“I am of the opinion, therefore, that the plaintiff [seller] is protected by the said condition. To come to any other conclusion would be, to my mind, to revise or amend the condition rather than to construe it; and, although the condition is one which should be strictly construed, (it seems to me to give the plaintiff an extraordinary degree of protection) there is no warrant for construing it so strictly as to constrict it. The defendant, contracting on an equal footing with plaintiff, signed an agreement which derogated substantially from his common law rights and cannot be granted what would in effect be equitable relief.”¹³

A crisp examination of this view shows that the service provider’s protective interest was preferred by the court above that of the consumer for interpretative purposes because the court could not rely on equity alone deviate from the clause. This should be viewed in a retrospective light because that was before the CPA came into effect when South Africa relied on the common law for interpretation. The contract, when presented to the court, withstood judicial attack to legal support the seller’s position. The agreement to these provisions is not always an act of an improvident foolish contractant, but at most a result of necessity, which the courts overwhelmingly sustain on regular basis. This point would be further illustrated in the examination of case law in this study.

Furthermore, the dice is heavily loaded against the consumer in the onus of proof where for example a contract contains the words “at owner’s risk”.¹⁴ This concerns the burden of adducing evidence between the parties in dispute. Before the question can be adequately answered the contract as a whole should be considered to determine the responsibilities of the parties. It is, under those circumstances, that the risk of loss or destruction is the depositor’s, but the deposittee is liable if he willfully destroyed the thing,¹⁵ or its loss or destruction is a result of gross negligence on his part.

¹¹ 1962 (2) SA 93 (N).

¹² The clause provided: “I [the purchaser] agree that you [the seller] accept no responsibility for loss or damage arising from any cause whatsoever in respect of customers’ cars or goods taken in by you for storage or repair, whether such loss or damage occurs whilst the car or goods are in your premises or under your control at the time of the loss or damage or not, and whether such loss or damage is due to your negligence or not.”

¹³ At 98.

¹⁴ Kerr AJ *The Principles of the Law of Contract* 6th ed. (2002) 440-441, specifically regarding a typical exemption clause where the risk is placed on the owner of property such as a vehicle, brought onto the premises of the indemnified party.

¹⁵ *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 803A.

Economics necessarily play a pivotal role in the business world: in the planning and reduction of unexpected costs incurred by service providers. This contaminates drafters thinking who then exploit every lacuna to benefit their client to the detriment of the other contracting party, in this case, the consumer. The economics applied here to reduce the transaction costs for the sellers or service providers by incorporating into contracts a number of relatively simple and normal terms.¹⁶ To maximize profits, companies often incorporate these exclusion clauses in standard form contracts without pondering on their necessity and eventual impact.¹⁷ Naturally, they are used to hedge against calculated risks, but given a proper thought; their indiscriminate use in consumer contracts is unnecessary.

It is sensible to accept some of the cost of risk or liability and to insure against it, rather than risk the loss of goodwill and the cost of litigation, which could be the consequences when disputing the enforceability of a stringent exemption clause.¹⁸ However, positivists in the freedom of contract theory allow the parties to make choices, which best suit, their conditions and to live with the consequences of their bargain.¹⁹ To deal with the apparent tensions and contradictions in modern South African jurisprudence there is a need to reevaluate the incontrovertible validity of sanctity of contract against freedom of contract. The law cannot allow predatory and imprudent acts of business to the unwary consumers to go unchecked.

Furthermore, the lines in the classification of an exemption are blurred on whether a clause merely reflects an implied term of the specific type of contract, or whether it is a specific *incidental* or residual provision.²⁰ Kerr considers the “fuzziness” of these clauses as pigeonholing and prefers to characterize them as residual provisions. The latter are terms, which the law provides and imposes in the absence of express or implied agreement of the parties.²¹

¹⁶ See Cornelius S *Principles of the Interpretation of Contracts in South Africa* 2nd ed. (2007) 163 and Van der Merwe et al 283.

¹⁷ Christie & Bradfield *Christie's The Law of Contract in South Africa* (2016)216.

¹⁸ *Ibid.*

¹⁹ Taylor R *Contract Law Directions* 3rd ed. (1988) Chap 6 126.

²⁰ There is no consensus among scholars for this nomenclature categorization although Kerr 370;(1972) 89 *SALJ* 19; and (1974) 91 *SALJ* 121opts to call them residual provision, while Cornelius 163 refers to them as dispositive implied terms whereas the rest still adhere to the traditional usage, for instance Christie, Van der Merwe etc. Also see the dissenting judgment of Corbett AJA in *Alfred Mc Alpine v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531. “Terrain” is used to explain where service providers conduct business without the need of the consumer’s signature as in other formalities of the contract.

²¹ Kerr 370.

In the case of *Alfred McAlpine v Transvaal Provincial Administration*, the court declared that implied terms must not conflict with the express provisions included by the parties since they do not originate from the contractual consensus, but are imposed by law.²² In such a situation the intentions of the parties are not totally ignored. Christie and Bradfield argue that most of the terms implied by law originate from the idea that party entering into a particular type of contract would have included such a term.²³ Secondly, terms may be implied into the contract where it is unclear whether the parties would have agreed to incorporate them-implication from the facts. Thirdly, terms implied by law may derive from common law, trade usage or custom.

Terms implied by trade usage occupy an intermediate position between terms implied by law and tacit terms. As per the tradition of customary law, an implied term based on usage or custom, the evidence must be clear and consistent.²⁴ Probably, there is no need to imply a term by trade usage if the question is covered by an express term.²⁵ A trade usage known to both parties consist of surrounding circumstances must, therefore, be incorporated into their contract as a tacit term. Tacit terms are inferred from the express terms and the surrounding circumstances of a contract including the conduct of the parties after the conclusion of the contract.²⁶

In this thesis when *naturalia* is used for implied terms it would refer to the three categories discussed above: implied by operation of law, implied from the facts and implied from trade usage. This *naturalia* are terms, which apply generally to every contract of that particular class as identified by its *essentialia*.²⁷ For example in a contract of sale of goods that contains

²² Van der Merwe et al 278; Vorster JP *Implied Terms in the Law of England and South Africa* (1987) unpublished PhD thesis St John's College Cambridge 15 cited by Cornelius 162.

²³ Christie & Bradfield 189. See De Villiers J in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 374 where he says: "[t]he process of formulating new implied terms is in essence a process whereby the court is formulating a new rule of law. It is in essence new law based on policy consideration (Corbett "The role of policy in the evolution of our common law" (1987) 104 SALJ 66-67)"

²⁴ See Krause J in *Crook v Pedersen* 1927 WLD 62 at 71.

²⁵ *Tolgaz Southern Africa v Solgas (Pty) Ltd* 2009 (4) SA 37 (W) para [31].

²⁶ Per definition, a tacit term cannot be inferred if it would be irreconcilable with the express terms of the contract-see *First National Bank of South Africa Ltd v Rugby Union* 1997 (3) SA 851 (W) 864; *Kelvinator Group Services (Pty) Ltd v McCulloch* 1999 (4) SA 840 (W) 844; *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) 598-599.

²⁷ Van der Merwe et al 283. See also *Videtsky v Liberty Life Insurance Association of Africa Ltd* 1990 (1) SA 386 (W), *Schoeman v Constantia Insurance Co Ltd* 2003 (6) SA 313 (SCA) 321-323. According to Van Huyssteen et al 276: *essentialia* are terms, which are essential for the classification of a contract as belonging to a particular class of contract. They are not requirements for the validity of a contract, but are important because the *essentialia* determines the *naturalia* of a particular contract.

the required essential elements to qualify as a nominate contract, will contain the implied warranty against latent defects unless the parties expressly exclude it from their agreement by an incidental clause.

More importantly, the *naturalia* helps to determine the rights and duties of the contracting parties and the effects and consequences of their contracts where they omit to do so.²⁸ The probe into exemption clauses aims to address the extent that these *naturalia* vitiate consensus in the law of contract. *Naturalia* attempt to serve the purpose of justice, by levelling the playing field where there is unequal bargaining power, and furthermore reflect the changing norms of public policy to which contracts must adhere.²⁹ Interpretation of contracts recognizes the effect of unequal bargaining power on the terms of agreements.

A similar viewpoint is expressed in Jacobson's exposition on the abuse of this inequality that recognizes the need to protect the consumer party as follows:

“The individual who enters into a ...contract carelessly and without reading it may be considered somehow foolish. However, he may be excused to a certain extent for accepting something, which appears to be the normal and established practice. Furthermore, it is among the duties of the legislator in the modern world to protect people even against their own folly, not to permit exploitation, and to remove any manifest unfairness. The protection of consumers is gradually becoming a recognized feature in modern law and it inevitably involves limitations upon the doctrine of freedom of contract. It is all linked with a firm moral wish to do justice in so far as possible.”³⁰

Notwithstanding, this does not mean that the law requires individuals to be free to contract on equal footing before it will uphold the contract.³¹ However, generally agreement of the parties in a contract should be premised upon their subjective consensus, in accordance with the application of the will theory.³² The parties would, however, not only be bound by those obligations which accords with his or her intention at the end of the negotiations, but also by others imposed by law and policies. Factors which ignore shortages of services and unequal

²⁸ Van der Merwe 283.

²⁹ See Cornelius 163; and Van der Merwe 283 in general on the *naturalia* of a contract.

³⁰ Jacobson D “The Standard Contracts Law of Israel” (1968) 12 *Journal of Business Law* 325 326.

³¹ Lubbe GF and Murray CM *Farlam and Hathaway: Contract Cases, Materials and Commentary* 3rd ed. (1988) 2.

³² Kerr 3. In *Saambou-Nasionale Building Society v Friedman* 1979 (3) 978 AD 993A Jansen JA said “[o]ur sources, literature and decided cases are interlarded with terminology and statements indicating that by consensus is intended the concurrence of that which each party actually (psychologically) desires.” See also *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 435 and *Jonnes v Anglo-African Shipping Co* (1936) Ltd 1972 (2) SA 827 (A) 834D.

bargaining power that hamper individual negotiations and the reliance theory are totally irreconcilable with the concept of consensus *ad idem*.³³ Consequently, to this, the notions of freedom of contract and equality continue to pervade legal thinking about contracts.

2. Problem Statement

The party with superior bargaining power often determines the terms of the contract.³⁴ When this occurs it becomes apparent that the common law devices for controlling exemption clauses are of limited scope in hard cases-deference to the sanctity of contract. Commentators argue that unfairness in the making of a contract is related to the problem of inequality of bargaining power, an enduring problem to contract lawyers worldwide.³⁵ There is an enduring misconception that parties contract on equal footing hence the continuum of inequity. It seems unfair to enforce a contract where one of the parties is in a weak position that even the presence of consent is imposed and worst reluctantly conceded.³⁶

The law inevitably has to intervene to bring equality between the parties through statutory means. Friedman notes the unacceptable inadequacy of the law mechanism: “[n]either in the common law nor in any other developed system of law has there ever been absolute freedom of contract, or complete passivity in the face of patent inequality between the parties.”³⁷ For that reason, the common law developed remedial mechanisms to cushion the effect of inequality in bargaining power, which inter-alia includes limitations on the enforcement of exemption clauses, public policy, undue influence, duress, *caveat subscriptor* rule and construction *contra proferentem*.³⁸ Lately, the contested equality is promoted by the

³³ Fictions are relied upon to create a legal bond as is the case in the application of the reliance theory. As recognized in the *Saambou* case 995F from the well-known English judgment delivered in the case of *Smith v Hughes*: “[i]f, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

³⁴ *Minister of Home of Affairs & Another v American Ninja IV Partnership & Another* 1993 1 SA 257 (A) 269C-D. See also Turpin CC “Contract and imposed terms” (1956) 73 SALJ 145 154; Hahlo “Buying a new motor car-an object lesson in standard form contracts” (1956) 73 SALJ 443.

³⁵ Bradfield GB & Christie RH *Christie’s Law of Contract* 7th ed.(2016)14.

³⁶ *Ibid.*

³⁷ Friedmann W and Jur D *Law in Changing Society* 1st ed.(1959) 96 cited by Kerr 8.

³⁸ Bradfield & Christie 14.

constitutional values of equality, human dignity and freedom propagated in the South African Constitution.³⁹

In South Africa, equality and freedom of choice are taken for granted and the legal rules developed on the assumption that these values are in existence.⁴⁰ Rarely would one hear in a breach of contract case that the defence of the weaker party pleads unequal bargaining power and that the contract hardly reflects his or her own interest. This is an area where, *par excellence*, the tensions between consumer-welfare and market-individualism are apparent.⁴¹ However, courts' intervention in the interpretation of contracts is based on abstract contractual principles, which posits an even-handed treatment of the parties.⁴² There is a misconception of shared opportunities and privileges within the context of the market economy. It is presumed every party contracts in good faith without interrogating the purpose of the contract, which is the selfish need to improve a party's status.

Commentators have noticed that reconciling the different extreme paradigm within the law of contract straddles between the courts and legislator. Currently, in South Africa, the law of contract oscillates between the traditional classic contract, freedom-orientated approach, which manifests subordination of neo-liberalism and fairness-oriented approach, which its advocates consider as progressive.⁴³ Conversely, the mandatory consumer protection legislation introduces a fairness-based approach to a contract that looks into procedural and substantive fairness.

Part of this debate looks at how contractual language affects the parties; practitioners are faced with myriad theories of deconstruction, which are a fertile ground of misinterpretation. These disastrous consequences flow from the purposive construction of language and gripping complex jurisprudence arguments to facilitate interpretation. Thus, in many legal systems, the issue of hermeneutics in contracts remain a disquieting feature. It is no doubt that the linguistic factor has a tremendous influence on the public perception of exclusion

³⁹ Act 108 of 1996. See s 1(a); 7(1); 9(2); 36(1) and 39(1).

⁴⁰ Lubbe & Murray 2.

⁴¹ Consumer-welfare refers to modern contract where the State intervenes in a protective way to promote consumer's interest whereas market-individualism refers to the classic contract where a contractant is self-reliant and autonomous in the response to the demands of the market. In the latter there is a minimalist state supervision over individuals' contracts. The economic world of operations is defined as the market.

⁴² These are freedom of contract and sanctity of contract and their influence in classic contracts.

⁴³ Hawthorne "Public governance: unpacking the Consumer Protection Act 68 of 2008" 2012 (75) *THRHR* 345.

clauses. They are drafted by adept lawyers, whose interpretation might appear to the average consumer to be contradictory to their understanding.

An examination of standard form contracts will be devoid of the truth if one does not look into the interpretation of contracts and the nature and purpose of drafting. Thus, a consideration of the ambit of the whole contract gives the court adequate opportunity to construe the contract and reconcile those varying provisions.⁴⁴ This was authoritatively decided in the case of *Owsianick v African Consolidated Theatres (Pty) Ltd.*⁴⁵ Botha JA said that:

“[i]t is a sound principle that a written document should, if possible, be construed so as to give effect to every word in it. But that principle should not be employed to create variations in the meaning of the words that could never have been intended...and care should be exercised that, in an attempt to avoid the tautology, a distorted meaning is not assigned to either the specific or the general provisions.”

In a positive move from its previous detached stance, South Africa recently joined other jurisdictions across the globe by enacting general statutory consumer protection measures. Prior to the legislative work on consumer contracts courts’ relied on common law to interpret the classic contracts. From 2005 it promulgated the National Credit Act⁴⁶ (NCA), which became effective in June 2007 and the CPA, which became effective in April 2011. This legislation has an overarching effect on the protection of consumers.⁴⁷ Undoubtedly, the

⁴⁴ See Van der Merwe et al 429 and the following cases *Fraser & Chalmers (SA) (Pty) Ltd v Cape Town Municipality* 1964 (3) SA 303 (C) 307F; *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd* 1998 (4) SA 885 (SCA) 888A-C; *Botha v Minister van Lande* 1967 (1) SA 72 (A) 76G-77C.

⁴⁵ 1967 (3)SA 310 (A) 324 G-H; also see *Naicker v Pensil* 1967 (1)SA 198 (N)202H-203B; *Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation and another* 1995 (3)SA751 (A)757D-I.

⁴⁶ 34 of 2005.

⁴⁷ In its Preamble it states a law is to be enacted in order to-

- promote and protect the economic interests of consumers;
- improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs;
- develop effective means of redress for consumers; and
- promote and provide for consumer education, including education concerning the social and effects of consumer choices.”

CPA was enacted as a remedy to the pervasive problem of unfair contract terms and intervenes in a seemingly paternalistic way.⁴⁸

In the Preamble the CPA states that socio-economic inequalities necessitate innovative means to fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers, to protect all consumers against exploitation in the marketplace and to give effect to internationally recognized consumer rights.⁴⁹ Presumably, the statute closes most gaps that lead to the abuse of consumers. The begging question is now whether the professed democratic capitalist justice in private law will yield to the necessary social reality of a welfarist form of natural justice for consumer contracts.

This is because there is a historical legacy of our contract law dictated by abuse of monopoly borne from standard form contracts. Owing to the normal acceptance of certain terms by a class of consumers and their dogma service providers have developed the habit of embodying contracts of that nature in standardized documents normally referred to as standard-form contracts. Legislators have observed that the dice is heavily loaded against ordinary consumers hence the central theme of consumer protection is to strike a “balance between belief in the market economy while simultaneously preventing the excess of an unbridled market.”⁵⁰ Therefore, a market that is left unattended tends to favour the powerful.⁵¹

It is a calling of this thesis to contextualize and interrogate the depth of vulnerability caused by monopolistic traits and procedures to rectify them. It is argued that the invisible hand of the market has never protected the interest of the indigent consumers. For instance, there are examples where courts have denied consumers who contract with powerful institutions such as banks, micro financiers and hospitals protection.⁵² Consequently, markets require decisive rules, which allow all consumers free access to the market as well as providing protection to those consumers most vulnerable to exploitative practices.⁵³

⁴⁸ Paternalism is the principle or system of controlling in a parental way. See Hawthorne “The principle of equality in the law of contract” (1995) 58 *THRHR* 169 referring to Webster’s New Twentieth Century Dictionary of the English Language (1979).

⁴⁹ Preamble (a)-(c), however, these “internationally recognized consumer rights” are not specified.

⁵⁰ Hawthorne 369.

⁵¹ *Ibid*

⁵² Hawthorne 346. See *NBS Boland Bank Ltd V One Berg River Drive CC; Deeb v Absa Bank Ltd ; Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA); *Absa Bank v Lombard* 2012(6) SA 350 (SCA).

⁵³ Hawthorne 369.

Contrat d'adhesion or the term “adhesion contract” is used to describe those contracts whose conditions one of the parties to it fixes in advance and which are open to acceptance in that form alone.⁵⁴ The party with superior bargaining power unilaterally proffers the terms and the other contractant has no choice other than to accept it entirely or decline to contract at all.⁵⁵ It is designed to control the legal consequences of all or most contracts of that type entered into by the contractant who prescribes the standard form. Sachs J in *Barkhuizen v Napier*⁵⁶ crisply remarks that standard form contract eliminates an opportunity for arm’s length negotiations.⁵⁷

Standard form contracts comprise a vast number of general terms and conditions, which are indispensable in most legal transactions. In most cases, the adoption of standard form contract is derived from its advantageous and economic purposes.⁵⁸ As most commentators note these terms are usually incorporated without actual consensus being ever reached between the parties on their content between the parties.⁵⁹ What becomes of importance is the end result of efficiency. On the contrary, standard form contracts cease to represent the outcome of ad hoc bargaining between the parties. No account is taken of the actual facts surrounding the formulation and performance of each agreement or peculiar needs of the consumer.⁶⁰

⁵⁴ Aronstam 16.

⁵⁵ Van der Merwe et al 310; Applebey G *Contract Law* (2001) 259; Kerr 7; Aronstam P *Consumer Protection, Freedom of Contract and the Law* (1979) 17-19; Turpin “Contracts and imposed terms” (1956) 73 SALJ 145.

⁵⁶ 2007 (5) SA 323 (CC) 381 para[135]

⁵⁷ See Woolfrey “Consumer Protection-a new jurisprudence in South Africa” (1989-1990) 11 *Obiter* 119-120. Sachs J para [135] aptly describes the relationship between standard form contracts and exemption clauses: “...[T]hey contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer’s normal contractual rights and the supplier’s normal contractual obligations and liabilities. Not only is the consumer frequently unable to resist the terms in a standard form contract, but he or she is often unaware of their existence or appreciate their import. Onerous terms are often couched in obscure legalese and incorporated as part of the “fine print” of the contract.” Own emphasis

⁵⁸ See Adams JN “Unconscionability and the standard form contract” in Brownsword, Howells and Wilhelmsson 233.

⁵⁹ Hence the term contracts of adhesion is based on the take it or leave doctrine. See Kerr 7; Aronstam 16-25. For more detailed discussion on standard form contracts see also Rakoff TD “Contracts of adhesion: An essay in reconstruction” 1983 (96) 6 *Harvard LR* 1174-1284; Trebilcock “The doctrine of inequality of bargaining power: Post-Bentham economics in the House of Lords” 1976 (26) *University of Toronto LJ* 359-365 and Trebilcock & Dewees “Judicial control of standard form contracts” in Burrows P and Veljanovski CG *The Economic Approach to Law* (1981) 93-119; Kessler “Contracts of adhesion: some thoughts about freedom of contract” (1943) 43 *Columbia LR* 629-642; Brownsword Howells and Wilhelmsson (Ed) 230-247; and Hopkins K “Standard form contracts and the evolving idea of private law justice: a case of democratic capitalist justice v natural justice” 2003 (1) *TSAR* 150.

⁶⁰ Aronstam 16-25.

The contract is a block contract (with the pen used not for recording but for authentication), for one side (or both) to take or leave as is.⁶¹ This is a major handicap because contract law enables natural and legal persons the freedom to regulate their relations with each other by agreement in an unabridged party autonomy. It is observed that the author of the standard terms usually constructs them to reflect his or her own interests rather than those of all the parties and that eventually turns out to be one-sided and often unfair.⁶² Yet, especially when imposed on consumers, they have led to results, which can be regarded as unconscionable. Therefore, the quest to find and develop equitable jurisprudence lies with the courts in the current constitutional dispensation.

Nowadays, there is a general recognition that standard form contracts are the norm and essential in day to day trading. It facilitates transactions by enabling parties of equal bargaining power to conclude their negotiations efficiently and without unnecessary costs or by ensuring that consumers who conclude similar contracts receive similar treatment.⁶³ In *Afrox Healthcare Bpk v Strydom*⁶⁴ Brand JA pointed out that the exemption clause in standard form contracts is the rule rather than the exception. Conflicts with these clauses emanate from the difficulty of resolving the extent of the provision created by adept draftmanship. Exemption clauses are mostly framed in a language so wide that the clause, taken at its face value, often creates a patent ambiguity.

The inequality dynamic of the relationship itself is manifested by a charade of equal partners, not the law. Furthermore, this notion of equality is perpetuated by standard form contracts a mistake that most judicial decisions reflect when applying the substantive elements of contract law. One party who is in a superior bargaining position to be the creditor attempts to subdue the other party's interest under the contractual framework of obligations. Premised on this erroneous belief of equality contracts of adhesion are prima facie enforceable, as written like with negotiated contracts.⁶⁵ To impugn the disputed equality reference is made through the Constitution, which has the supremacy clause enshrined in it.

⁶¹ Hopkins 150.

⁶² See Eiselen S and Bergenthal K "The battle of forms: a comparative analysis" (2006) 39 *CILSA* 214, 215; Llewellyn K "The standardization of commercial contracts in English and commercial law" 1939 *Harv LR* 701 and Harker JR "Imposed terms in standard form contracts" 1981 *SALJ* 16.

⁶³ Posner R *Economic Analysis of Law* (1977) 127-128.

⁶⁴ 2002 (6) SA 21 (SCA) 42.

⁶⁵ Rakoff 1176.

In many civil and common law systems, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This principle is aptly conveyed by metaphoric colloquialisms such as “playing fair”, “coming clean” or “putting one’s cards face upwards on the table”.⁶⁶ Blind adherence to the reliance or declaration theories fail to take into consideration the notion of good faith in contract but gives credence to the need to curb economic or social power. South Africa inherited the Roman-Dutch common law of contract against the English common law and the contradiction and tension between these two legal systems are manifest under this doctrine.

More pertinent for practical purposes, the exposure of contracts to the impact of the Bill of Rights raises some fascinating issues. Commentators argue that the progressive development of the common law should acknowledge that the enforcement of an unconscionable contract can violate the constitutional right of the promisor,⁶⁷ or that the purported exercise of a contractual power can be invalidated if it violates the constitutional rights of the affected party⁶⁸ or is against public policy. In essence, courts have reaffirmed the concept of public policy as the prime instrument for dealing with contractual unfairness, which cannot be adequately addressed by existing rules.⁶⁹

In his minority judgment, Olivier JA in the case of *Eerste Nasionale Bank van Suidelike v Saayman NO*⁷⁰ reconsidered the role of public policy and bona fides in the law of contract. He remarked that the Appellate Division had since early years of the century taken the lead recognizing and applying the principle to establish new and equitable rules of law to find equitable solutions where strict applications of the rules of law would have resulted in

⁶⁶ *Interfoto Picture Library Ltd Stiletto Visual Programme Ltd* [1988] 1 All ER 352J.

⁶⁷ Strydom “Freedom of contract and the constitutional rights: A noteworthy decision by the German Constitutional Court” (1995) 58 *THRHR* 696; Christie RH *Law of Contract and the Bill of Rights’ in Bill of Rights Compendium* (1997) 3H-1.

⁶⁸ Cockrell A “Second-guessing the exercise of contractual power on rationality grounds” (1997) *Acta Juridica* 26. See also Brand “The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the constitution” (2009) *SALJ* 71-90.

⁶⁹ Christie & Bradfield 18. See also *ff Brisley v Drotzky* 2002 (12) BCLR 1229, 2002 (4) SA 1 (SCA) [91], citing *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347, 1989 (1) SA 1 (A); *De Beer v Keyser* [2002] 1 All SA 368, 2002 (1) SA 827 (SCA) [22].

⁷⁰ 1997 (4) 302 (SCA).

injustice. Public policy as a mechanism for nullifying “agreements offensive in themselves” has longevity in the South African law of contract supported by case law and academics.⁷¹

As the substance of the law evolves one could examine the position in the English law and countries like United States of America, Sweden, Denmark, Germany and New Zealand who have established consumer protection legislation to enlighten us on this jurisprudential journey. This is for reference purposes not for determination because South Africa inherited the Roman-Dutch common law and some of these countries are civil law. These countries legislatures have long passed general legislation to tackle the problem in different types of contracts,⁷² while others,⁷³ like South Africa, were lagging behind and are countering the problem in a piecemeal fashion. Such temptations to look abroad should not deprive South Africa of an opportunity to develop its fledgling jurisprudence. It is clear that our Constitution highlights the need to consider foreign and international law in its interpretation.⁷⁴

One hopes to show how England, United States of America and the European Union (EU) over the years have dealt with fairness in contract in order to proselytise and reconcile it with our current legislation. Many elements of EU consumer protection policy appear to be driven towards the desire to level the playing field amongst consumers to ensure that social rather than economic policy objectives are met.⁷⁵ Their successful and hands-on approach to new consumer laws gave meaning to fundamental principles and innovative jurisprudence. The EU has legislated to protect consumers and thus the United Kingdom’s (UK) legislation has been amended to incorporate the European legislation.

The amendments have been implemented sometimes in domestic law without resolving inconsistencies or overlaps. Foremost is England in its dealing with the promulgation of the

⁷¹ Innes CJ’s review of Roman and Roman-Dutch authorities in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 204-205 cited in Christie & Bradfield 18.

⁷² Christie and Bradfield 198 (n 188). The authors name Israel and Germany as examples and cites: Gottschalk “The Israeli Law of Standard Contracts, 1964” (1965)81 *LQR*; Spiro “Standard terms—a recent enactment of West Germany” (1977) 10 *CILSA* 315. Also see *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 (4) SA 865 (C).

⁷³ England is an example it has section 2 (1) of the English Unfair Contract Terms Act 1977. In New Zealand the Contractual Remedies Act 1979 s 4 regulates clauses intended to exclude liability for misrepresentation.

⁷⁴ S 39 of the Constitution of the Republic of South Africa Act, 1996.

⁷⁵ Winn & Webber “The impact of EU Unfair Contract Terms Law on U.S Business-to-Consumer internet merchants” (2006) 62(1) *TBL* 209-228

UCTA, the Misrepresentation Act⁷⁶ culminating with the Unfair Terms in Consumer Contracts Regulation 1999 (UTCCR), Unfair Terms in Consumer Contracts (Amendment) Regulations 2001. The UTCCR have been revoked by the new Consumer Rights Act 2015, therefore, the discussion around it would be in passing and not binding. Clearly, this shows that the law which protects consumers when they enter into contracts has developed in a piecemeal fashion over time. These pieces of legislation currently cover more than just consumer contracts, but a certain number of their provisions offer extra protection to consumers.

Our courts must not shy away from the mere fact that English contract law, for example, can influence the development of South African private law. Greater harmonization in European law might be helpful in shaping contract law for the EU that would also influence South African consumer law. Although Australia does have effective and progressive consumer protection laws, it was not chosen for comparative study because it does not have a Constitution, and thus there is no laws that deal with the constitutionality of exemption clauses which is the main focus of this thesis.

Secondly, judicial activism in our courts would help to accentuate these principles in hard cases and ameliorated the consumer's suffering. It is against this background that it is unclear why our courts remain cautious and are reluctant to infuse hard bargains with legal precepts of equity. This is particularly the stance taken on unequal bargaining power, a point which will be expanded upon later in the main chapter. Likewise, the task of a judge is to interpret law not imprecise and abstract notions such as good faith.⁷⁷ Ideas such as contractual freedom seem more real and problematic to judge than the unobservable (such as bona fides). A judge has to evaluate conflicting values like contractual freedom and equity and when necessary adapt and adopt them gradually and slowly.⁷⁸

According to Sutherland, “[t]he time is ripe to consider this principle against the backdrop of the Constitution, the importance of the state in the regulation of the economy and the need for consumer protection.”⁷⁹ Fairness, inequality of bargaining power, public policy, good faith

⁷⁶ 1967.

⁷⁷ Kroeze “Contract, constitution and confusion: the case of *Brisley v Drotsky* (47)” 1 Jan 2006 21.

⁷⁸ *Ibid.*

⁷⁹ Sutherland “Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC)” (2009) 126 *SALJ* 53.

and reasonableness should be the yardsticks by which exemption clauses are interpreted in consumer contracts.

It is interesting to note the prognosis of Lewis about the application of consumer legislation in South Africa. The tests of substantive fairness introduced by such legislation would have to be applied to standard form contracts and tests of reasonableness to exclusion and limitation clauses.⁸⁰ Since the inception of the CPA, the question remains how the law has crystallised the overriding principles governing contract law in South Africa.

What is going to be investigated in the present legal dispensation is the jurisprudential transposition of the freedom of contract and its twin concept of sanctity of contracts into our consumer laws to give effect to equitable jurisprudence in view of the South African constitutional realm. Responding to the challenge on the judicial discourse Moseneke says, "...the intractable question on the intersection between public law guarantees, as provided for in our Bill of Rights, and the private law regulation of contract between private parties is hard."⁸¹ One submits that the time has come to impugn the rigidity of the doctrine of *pacta sunt servanda* in the context of exclusion clauses; otherwise, poverty will remain a social construct.

Exclusion clauses may be a validation of the averments that there is an immense gulf dividing harsh bargains and equity in the law of contract. Whether the Constitution gives recourse to affected consumers is a matter of consideration in view of theory and existing practice. Prosperous economic activity is ostensibly tainted by unfairness, unreasonableness or oppressive contractual terms. A discussion of the merits of dignity and equality within contract law as required by the Constitution may help to retain confidence in the economic objectives of contracts.

The promotion of freedom and the wish for communitarian approach by statutory means creates conflict with strict principles of the law of contract. Principles of freedom of contract are individualistic and self-reliant yet the consumer legislation is interventionist and promotes communality. It is not necessarily an overstatement to say the democratic transition represents a constitutional revolution also in the context of the law of contract. Commentators

⁸⁰ Lewis "Fairness in South African contract law" (2003) 2 *SALJ* 330.

⁸¹ Moseneke D "Transformative constitutionalism: its implications for the law of contract" (2009) 20 *Stell LR* 3.

argue that these defined parameters, in fact, predate the birth of the Constitution in the common law principles of the law of contract. Apparently, the changes brought by the legislation represent misplaced expectations if we consider the contradictory remarks made by Ngcobo J in the case of *Barkhuizen v Napier*.⁸²

One must note the court's reluctance to infuse and engage the contract on the one hand with the open-ended norms of the Constitution on the other. Ngcobo CJ rejected the direct testing of the constitutionality of a contractual term against a provision of the Bill of Rights. The effect of direct horizontal application would entail the rights in the Bill of Rights not only respected by the state, but by all private persons. Consequently, the private law would be interpreted and if necessary corrected in order to realize the citizens' human rights to the largest possible extent.⁸³ The judge held that the proper approach to a constitutional challenge of contract terms by private parties is a determination on whether the term is contrary to public policy.

The learned judge enunciated his perception of public policy by adding:

“Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.”⁸⁴

This decision represents the court's aversion to the subjectivity of public policy according to individual's perceptions. This appears from the dissenting judgment of Moseneke DCJ and the minority judgment of Sachs J. More importantly, the court's vacillation concerns the influence and applicability of the Constitution in private law. The Constitution finds indirect or horizontal application in contract law as per the injunction.⁸⁵ All courts when applying a provision in the Bill of Rights are under the positive duty to develop or limit the common law in accordance with the values expressed in the Constitution.

⁸² Para [57]-[83].

⁸³ Hawthorne 350.

⁸⁴ Para [57].

⁸⁵ S 8(1) and s 39.

This means the fundamental principles of the Constitution are consolidated against the contemporary backdrop of uncertain interpretation. The tricky question remains on how to prevent the court from abdicating their constitutional responsibility which is to uphold equality, freedom and dignity. The interpretation of unfair terms within contracts exists in a dichotomous atmosphere, where the interpretation of the common law and constitutional directives have uncertain outcomes. This is the reasoning behind the title of this thesis, which places obligations in the search for equity within the South African constitutional realm.

3. Objectives

The aim of this thesis is to show that courts are circumspect in adopting transformative constitutionalism in contract law. The reverberating theme in this thesis is the interface between contract law and consumer law within the constitutional dispensation. It aims to analyse and interrogate the depth and mechanisms of contract law to assist consumers to achieve equality through the existing various consumer protection legislation. Although sometimes delict and contract law cross paths and converge in the discourse of exemption clauses and damages, for the purpose of this thesis it should be stated categorically that the main focus will be on the contract law.

There will be a content analysis of the CPA, as it permeates every aspect of the contract dynamic in South Africa. Furthermore the exact point of contract formation is of crucial importance in the discussion that follows because this delineates the boundaries between the first stage of pre-contractual regime of no liability (or possible liability based on delict) and the second stage (after the contract has come into being) in which the parties are subject to contractual liability.⁸⁶ For instance, a breach of contract in exemption clauses occur where the conduct of a contractant infringes a contractual obligation between the parties, whereas delict relates to other forms of wrongful and culpable conduct to another person with or without contractual relations.

The jurisprudential thrust of this thesis is to provide overarching propositions for reforming traditional contract law in light of the Constitution vis-à-vis empowering legislation. The starting point is to examine the central characteristics of the law of contract and the influence of the consumer law in the constitutional transformation agenda. Probably, from the

⁸⁶ Van der Merwe et al 55.

conclusion of the research and exposition of the problems that comes with current legislation for specific contracts, one will contribute to the development of an equitable jurisprudence in accordance with the constitutional imperatives.

The thesis aims to indicate the direction, which the drafters and the legislature should have taken in enacting such consumer legislation. This approach will come to light after a reflective evaluation of the consumer legislation vis-a-vis Anglo-American and European countries laws. It will show that to strike a harmonious balance between the protection of consumers against the business interest is as difficult as untying the Gordian knot. The conclusion is substantiated by the split and conflicting judgments given in our courts.

As a matter-of-fact, this thesis will determine how the inclusion of exemption clauses in standard form contracts by service providers or placing this exclusion provisions, impact on the freedom of contract for consumers. Some business people are eager to use these disclaimers without understanding their purpose. It must be investigated whether the overwhelming use of the clauses, as a necessary escape route for businesses against the all-win position that a consumer party wishes for on contracting justify their mushrooms in contract. It is not every business who has plugged or inserted the exemption clause in the contract that understands it.

The thesis furthermore intends to:

1. Examine all available policy documents, foreign and international law on how they have dealt with cases of unfair, unreasonable or oppressive terms in consumer contracts. Do courts provide adequate protective mechanisms promoting consumers' rights in these latter years?
2. To gauge whether the statutory changes in the jurisprudence relating to the conceptualisation of terms and language affect the whole theory of contracting.

This study will serve as a pointer to the magnitude of the inherent problems attributed to exclusion clauses in consumer contracts across the broad spectrum of human society with particularity to South Africa. Finally, it will suggest solutions to the development of our law of contract and delict because exemption clauses straddle between them depending on what the parties chose to base their litigation on. Invariably the conclusions reached in this thesis is

not conclusive but open to other researchers that may want to pursue the study further using another case study or other aspects of contract.

However, this thesis is limited to the exclusion or exemption clauses found in standard form contracts excluding insurance contracts. This is because insurance contracts are premised on a different theory from the one exercised in business interest. In an insurance contract, there must be insurable interest and full disclosure with the payment of premium upon the conclusion of the insurance contract. Issues that concern insurance are beyond the scope of this thesis.

4. Hypothesis

- Courts are faced with issues of particular importance in the evolving world of consumer contracts. A thorough consideration of this seminal transition would put the idea of private law justice to the test. It is becoming clearer that the protection afforded to consumers by the legislature may cross prevailing political ideologies. South Africa is a capitalist society whereas modern contract allows for a mixed economy advancing social democracy. The subtle theories born from analysing this jurisprudence are that freedom of contract and its twin concept of *pacta sunt servanda* are no longer inviolable like the “holy cow”.
- The issue as to whether the common law grounds of unfairness is sufficient enough grounds to save ordinary consumers is quite topical. This is because, despite the nuanced improvement to the procedural fairness of making a contract, the element of unequal bargaining power remains a sore thumb in contract law around the world. The begging question is how can the courts strike a right balance of building the constitutional directives of equality, freedom and dignity in private law in a social democracy without disturbing established classical contract jurisprudence?
- Consequently, it seems the more progress legislatures makes towards protecting consumers from the grips of private capital the more intricate the system of checks and legal methodology become, thus obviating the laissez-faire contracting. Fundamentally, the social and political factors of the party’s must be considered in interpreting these consumer contracts endorsing the substantive equality in law and where necessary formal equality of the Constitution.

- There is a paradigm shift from the classical model of contract globally with the infusion of this welfare and paternalism, South Africa, in particular, is on course, but there is much work to be done in this field. The redress should have been immediate in the legislation without the apprehension of litigation lurking for the vulnerable consumers because that is a dreaded road to take.

5. Methodology

- By studying literature review-books, articles, journals, specific contracts, reports of the Credit Regulator (NCR), Consumer Commission and drawing comparative analysis with foreign legislation;
- Case law-interpretation of court judgments, principles of contract law, common law and content analysis of applicable legislation and the Constitution; and
- Examine factors that influence the contract law and interpretative processes: draw the attention of consumers to unexpected provisions, unfair terms and the understanding of them. Moreover, it will highlight the inefficiency or failure of judicial recourse in some instances to help trapped consumers from the unconscionable terms of the contract dictated by the party with superior bargaining power.

6. Delimitations

This academic discourse does not address the consumer protection measures introduced into the insurance industry by virtue of the Financial Advisory and Intermediary Services Act (FAISA)⁸⁷ and the Terms and Conditions Framework, although reference is made to the *Barkhuizen* case several times. The target of this work is consumer protection within contract law. What may attract interest is that most insurance contracts contain waivers, which are sticky when interpreting exemption clauses. Does it mean consumers voluntarily waive their legally enforceable rights, as a concession? The law is not clear in terms of adjudicating waivers in a contract.

Contract law interpretation is subsumed within the multifaceted Bill of Rights. To deal accordingly with exemption clauses the theoretical foundations for the common law of contract needs to respond to the transformative agenda of the Constitution and the slow

⁸⁷ No.37 of 2000.

progress being made to protect and promote consumer rights. Bhana⁸⁸ puts the point differently emphasizing the need to move from the cumbersome classical liberal philosophy of contracts to “a substantively progressive and transformative conception. This fosters the foundational constitutional values of freedom, dignity and equality (i.e. the foundational triad),⁸⁹ as well as any applicable rights (as enumerated in the Constitution of the Republic of South Africa)⁹⁰ operating in the post-apartheid era.”⁹¹

7. Outline

- Chapter 1 - The Incorporation and Development of Exemption within Standard Form Contracts gives the foundation of the study, as a proposal. This serves as an introduction that lays bare the background of the research and its objectives. It examines the relationship between standard form contracts and exemption clauses. The research is done within a defined scope of exemption clauses within standard form contracts. The research proposal gives the motivation to examine the constitutionality of exemption clauses in contract law within the developing consumer legislation. It contains the hypothesis and the methodology employed to carry out the study, as well the delimitation of the study.

Without being exhaustive on the subject, the thesis furthermore intends to examine the following in:

- Chapter 2 - Pre-Welfare Dispensation and Contractual Principles of Interpretation. This chapter examines the role of contractual liability and the libertarian ideas of freedom of contract and how it eventual moulded judicial philosophy. Furthermore, it examines the common law remedies in South Africa and UK that monitor the

⁸⁸ D Bhana Chapter Four (“Development of a constitutionalised approach to a contractual autonomy and methodology”) of her PhD D thesis (2013) *Constitutionalising Contract Law: Ideology, Judicial Method and Contractual Autonomy*, Witwatersrand School of Law.

⁸⁹ The foundational constitutional triad comprises the foundational constitutional values of freedom, dignity and equality, which serves to articulate the concept of contractual autonomy operating in the post-apartheid constitutional context. Importantly, the triad contemplates a fluid *intra*-action of the different dimensions of each of the foundational values as well as a fluid *inter*-action between the values. For more information on the operation of the triad see also D Bhana *Constitutionalising Contract Law: Ideology, Judicial Method and Contractual Autonomy* (2013) unpublished PhD thesis, University of the Witwatersrand 90-115 (available at <http://wiredspace.wits.ac.za/handle/10539/12816>).

⁹⁰ See s 9-35 of the Constitution.

⁹¹ Barnard-Naudé (2008)1 *Constitutional Court Review* 155-208; Bhana&Pieterse (2005) *SALJ* 865-895; Hawthorne (2006) *THRHR* 48-63; Hawthorne (2010) *SA Public Law* 80-93; Lewis (2003) 104 *SALJ* 330.

operation of exemption clauses that seek to protect the weaker party such as the *exceptio doli generalis* and the doctrine of fundamental breach. There is a marked difference of the influences and points of departures in the interpretation of contracts between these two jurisdictions. It explores the evolution of the competing interest that emerges from the constitutional dispensation. It analyses enforceability and the struggle of transition towards the modern contract. Modern contract seeks to protect the weaker party.

3. Chapter 3 - Exposition from Case Law. This chapter engages vigorously with case law on how South African courts have interpreted exemption clauses on the issues mentioned in chapter 2. It gives a comprehensive outlook on the refining of exemption clauses. It also analyses the categorization of the terms and the different interpretative phases that the South African experience gives. It exposes language with its attendant rules of interpretation and the shift towards secondary and tertiary rules. The innovative means of interpretation such as good faith, public policy and other technicalities for interpretation are explored in depth.
4. Chapter 4 - Statutory Changes, Ramification and Content Analysis of the Consumer Protection Act 68 of 2008. This chapter critically examines the CPA from its objectives, interpretation and critique of the Act. All available policy documents, foreign and international law documents are studied on how they have dealt with cases of unfair, unreasonable or oppressive terms in consumer contracts. As a critical chapter of this thesis, its main objective enquires on whether courts provide adequate protective mechanisms in promoting consumers' rights? This is examined within the context of unequal bargaining and the impact it has on fairness and reasonableness. It analyses the criteria used to determine whether a term is unfair and unreasonable. The issue of strict liability with consumer contract containing exemption clauses as introduced by the CPA is covered at length in this main chapter. It assesses the new kind of contracting theory emerging from consumer jurisprudence and the interface between consumer law and the Constitution.
5. Chapter 5 - Comparison with Foreign Legal Regime and Deductions. This chapter outlines the purpose and importance of comparative analysis in the interpretation of exemption clauses. It examines the European Union law and substantive United Kingdom's law on the control of unfair terms. Furthermore, it analyses Germany and

United State of America consumer law with particular emphasis in the State of California. The issue of plain language as a major control mechanism on exemption clauses is also covered.

- Chapter 6 - Conclusion and Recommendations. This chapter decisively tallies the theoretical findings based on the hypothesis of the discourse. It seeks to give contract law a fresh perspective on the emerging consumer law jurisprudence in South Africa. Probably, the emerging in the interpretative mechanisms of consumer contracts is going to enhance the fresh perspective of judicial activism when trying to infuse the law with the constitutional value of equality. That is the main proposition made in the hosts of arguments. Findings are made on the shortcoming and grey areas of our consumer protection legislation and the proposed amendments to an ideal legislation they are more comprehensive in dealing with exemption clauses and other unfair terms in contract law.

Because of the dynamic nature of the study, there is a further need to research the impact of unfair terms incorporated into online transactions, which are not explored in this thesis. Contemporary consumers are living in digital age where they find themselves trapped in the need to hastily peruse wording, consent thereto or provide information under great time pressures.

CHAPTER 2

PRE-WELFARE DISPENSATION

IN CONTRACTUAL PRINCIPLES OF INTERPRETATION

AND THE STRUGGLE IN TRANSITION

2.1 Development of the rules of interpretation in contract law

It is quite axiomatic that courts are constantly saddled with the insurmountable pressures of interpreting terms in standard form contracts in the event of a dispute or uncertainty. This should not be the dominant perception that the law of contract is considered in terms of litigation but on clear obligations and duties of the parties involved. The main problem identified by commentators here is the inclination of business to use contracts of adhesion to ensure that standard terms are incorporated into transactions with consumers which they hardly understand and least can interpret. It is after a dispute arise that a consumer realizes the limitation of their rights in the contract.

Generally, the law of contract determines which agreements are enforceable and regulates these agreements, providing remedies if contractual obligations are broken.¹ Under a contract, the parties' voluntarily assume their obligations unless they are contrary to law and remain unenforceable. The point of departure in this discourse of exemption clause surrounds the dearth of contractual liability in standard form contracts. Seemingly, the existing theories of contractual liability: will, reliance and declaration are best suited for individual-negotiated contracts and incompatible with standard form contracts.

This emerges from the kaleidoscopic labyrinth of interpretations given by courts that are telling of the substantive issues of perceived unfairness in standard-form contracts.² It is based on the contradictions that perpetuate immeasurable scope of inequality and unclear rules of interpretation on liability emanating from exemption clauses. Commentators argue that the basis of contractual liability underwent a long period of development and only in

¹ Koffman L & MacDonald E *The Law of Contract* 6th ed(2007)1.

² Hopkins K "Standard-form contracts and the evolving idea of private law justice: a case of democratic capitalist justice versus natural justice" (2003) 1 *TSAR* 155.

recently that more clarity has been achieved.³ The basis of contractual liability remained the focal point of Roman law determining consensus and obligations.

Even in contemporary society the issue of contractual liability still remains a sticking point. Organically, the binding force of consensus came to be accepted as part of the philosophy of natural law and the doctrines of the Catholic Church.⁴ Historically, adherence to agreements consented to acquire a moral or religious connotation and was a sin to renege on one's word.⁵ This development of interpretation infused private law with public law scope of morality. Therefore, "contract law may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction."⁶

Cohen argues that the law of contract is a way of enforcing some kind of distributive justice within the legal system and the technical doctrines of contract serve as rules that will systematize decisions in this field.⁷ Subsequently, these doctrines serve as guidelines for lawyers and their clients to deal with problems they have not anticipated. A study of the interlocking principles of contract and public law presents an intriguing dilemma for legal academics in this respect. Thus, for instance, if the question arises as to who should suffer loss caused by the destruction of goods in transit, the technical doctrine of when title passes enable us to deal with the problem more definitely.

On the contrary, standard form contracting procedures deprive consumers do not have sufficient knowledge and skill to assess the quality of goods they intend to purchase depending on their level of literacy. Mostly, the retailers' function is reduced to handling what buyers have already been persuaded to buy by nationally advertised producers and the established balance between buyer and seller (if ever there was any) has been tampered with by the standard form contracts, necessary to deal with customers on a mass scale.⁸ Nevertheless, behind this discourse is a manifestation of how contractual liability is founded welding the theories to suit standard form contracts.

³ Van Huyssteen et al *Contract General Principles* 5th ed. (2016) 20

⁴ Ibid.

⁵ Ibid.

⁶ Cohen "The basis of contract" 1933 (46) *Harvard LR* 586.

⁷ Cohen 584.

⁸ Nebbia P *Unfair Contract Terms in European Law: A study in comparative and EC Law* (2007) 23.

The inadequacy of the common law rules to deal with standard form contracts have been witnessed in numerous decisions. At the centre of this problematic interpretation lies the exemption clauses.⁹ If an exemption clause is framed so widely that it amounts to an undertaking to perform if the party so chooses, there cannot be an obligation; the undertaking will lack the necessary certainty.¹⁰ The unpredictable and arbitrary manner in which courts often apply the rules of interpretation brings confusion.¹¹

Take for instance, the case of *L'Estrange v Graucob*¹² where, in holding the plaintiff bound by his signature on a standard form contract, Maugham LJ lamented:

“I regret the decision to which I have come, but I am bound by legal rules and cannot decide the case on other considerations... I could wish that the contract was in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such a small print.”¹³

This is typical of the positivist interpretation derived from the rules and rationality of classical contracts. Given this degree of detachment from principles of fairness and rationality modern law recognizes the need for a paradigm shift. Inevitably, this chapter aims to juxtapose the classical model of contract to the modern contract law in order to identify the principles of interpretation that engender the classical model and hampers welfare dispensation in South Africa. The modern tendency of contract discourse theorizes at a high level of abstraction, perpetuating the perception, that contract law is doing well in practice yet the reality is that it is in crisis.¹⁴

This chapter intends to examine the scope of common law remedies available in South African and English law and their inadequacies in protecting the weaker party. At the end of this chapter, one hopes that the different kinds of contracts: classical and modern can be merged in a seamless transition towards the objectives of modern contracts and consumer protection. Debunking the theory of classical contracts seems a Herculean task because its judicial philosophy is deeply-rooted. Classical law of contract represents one of the acmes of

⁹ Kerr AJ *The Principles of the Law of Contract* 6th ed. (2002) 427.

¹⁰ Van Huysteen et al 290.

¹¹ Wiechers M *Administrative Law* (1985) 38-41 cited by Cornelius S *Principles of the Interpretation of Contracts in South Africa* 2nd ed. (2007) 65.

¹² [1934] 2 KB 394.

¹³ At 405.

¹⁴ Pretorius C “The basis of contractual liability (1): ideologies and approaches” 2005 (68) *THRHR* 255.

legal formalist scholarship by virtue of its clear rules and their clusters of logical derivatives.¹⁵

On the contrary, commentators argue that modern law of contract appears so uncertain in its scope and mysterious in its moral vision.¹⁶ What is the purpose, for example, of awarding compensation to a person who has acted to his detriment in reliance upon another's words or conduct when the parties have not reached an agreement?¹⁷ Questions are asked on what basis does the modern law deprive parties of their freedom to choose the terms of their bargain? All the above questions are pertinent in the interpretation of exemption clauses. Giving a sobering narrative to the interpretation dilemma Megaw LJ states that:

“One of the important elements of the law is predictability. At any rate in commercial law there are obvious and substantial advantages in having, where possible, a firm and definite rule for a particular class of legal relationships...It is surely much better...when a contractual obligation of this nature is under consideration...”¹⁸

In order to grapple with the issue of certainty there is a need to identify the values and principles of market ideology as follows: (1) the security of transactions must be protected. When a party reasonably assumes that he has entered into a contract, the law should defend that assumption. (2) the ground rules of the contract must be clear to enable parties to plan their private transactions with the necessary circumspection. Thus certainty is of utmost importance.¹⁹

When there is uncertainty in the market the law of contract may fall out of place with commercial practice. The volatile interplay of the contracting parties' partisan interests is in fact manifestly power contestation, which mostly favour the drafting party in exemption clauses whereas the other party expects full performance of the obligations. The law of contract, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party.²⁰ Judicial activism is premised on

¹⁵ Collins in Twining (ed) *Legal Theory and Common Law* (1986) 136.

¹⁶ *Ibid.*

¹⁷ This effect is achieved through estoppel by representation, as enunciated in *Van Ryn Wine & Chandos Bar* 1928 TPD 417. See Fuller & Perdue "The reliance interest in contract damages" (1936) 46 *Yale Law Journal* 52 and 373; Atiyah PS *The Rise and Fall of Freedom of Contract* (1979)1-7 and 771-778.

¹⁸ [1971] 1 QB 205; [1970] 3 All ER 138.

¹⁹ Adams J & Brownsword R *Contract* (1987) 172-174.

²⁰ Cohen 586.

the belief that judges have a creative role to play in the interpretation and application of statute laws.²¹

The conservative type of adjudication in the modern contract is unwelcome for most consumers because it warrants judicial activism package. It is clear from the classical perspective of contracting that where freedom of contract is considered; harshness or oppressiveness of a term appears to be of little concern to the judges. More attention should be paid to the evaluation of exemption clauses because the parties modify the usual liabilities, for example, excluding the possibility of a claim, removing the payment of compensation or limiting the amount of compensation payable. These clauses qualify the legal rights expected in situations of breach and attempt to vitiate their impact.

In the latter part of this chapter, it is impelling to explore some of the intermittent strides made from classical contract theory towards the realization of the constitutional imperatives in South Africa. In constitutional democracies like South Africa, the judiciary has the significant task of safeguarding and protecting the Constitution and its values. More particularly, the overarching Bill of Rights warrants thorough consideration in application and interpretation.²² Therefore, since judges are suitably positioned when exercising their judicial power they are instrumental agents of change through judicial activism.

The various approaches and their interrelation are analysed below in order to determine the actual basis of contractual liability in current South African law. This is very significant in finding the moral authority for holding the parties liable in an environment where there is unequal bargaining in order to define a legitimate market order. Modern interpretation argues that the essential principles of classical contract should be vitiated not through choice, but because of harm to others or risk of causing harm to others.²³ This chapter is essential when considering reforms to classical contract interpretation and synchronizing it with modernity.

²¹ Du Plessis L *Re-Interpretation of Statutes* (2007) 97.

²² S 8(1)-(3) of the Constitution of the Republic of South Africa, 1996.

²³ Hugh Collins in Twining (Ed) *Legal Theory and Common Law* (1986) 140.

2.2 The nature of contractual liability

In theory, contractual liability in accordance with the classical theory is a result of the operation of the will of the parties or apparent conduct of the parties.²⁴ In terms of the will theory, the parties agree on the *essentialia* of the contract and accept those terms imposed upon them by law (*naturalia*). Negotiate, and agree to additional terms or obligations (*incidentalia*). In simple terms, the will or intention theory postulates that contractual liability is based on the concurrence of the subjective wills of the parties.²⁵ Arguments premised on the common law states that the will theory is the sole basis of contractual liability.²⁶

According to this theory, contracts are gauged within the precepts of *essentialia*, which cannot be excluded by agreement of the parties for the nominate contract. Nevertheless, parties can also agree to conclude a contract out of the *essentialia* and have their own, which is *sui generis* that is binding, but not nominate contract. From innumerable scholars, the subjective intention is advanced as the basis for contractual obligations. It is also regarded as the justification and foundation of the many doctrines and rules that comprise the general principles of the law of contract.

Under classic law contract the parties can modify the nature of their contractual liability (by subjective consensus), but problems ensue in implied agreements because liability emanates from a reasonable belief in the existence of consensus. This consensus induced by the other contracting party by application of the reliance theory. There is overwhelming case law that supports the notion that the intention of the parties should be the starting point to determine contractual liability.²⁷ As a matter-of-fact, the basis of any contract is either consensus (will theory) or the reasonable belief by one of the contractants that there is consensus (reliance theory).²⁸

²⁴ Hutchinson D & Du Bois F *Willie's Principles of South African Law* 9th ed. (2007) 737 says that an agreement is apparent when, despite the lack of subjective consensus between the parties, there is an objective appearance of agreement which the law will uphold as a binding contract.

²⁵ Pretorius C "The basis of contractual liability (2): Theories of contract (will and declaration)" 2005 (68) *THRHR* 442.

²⁶ Van Huyssteen 22.

²⁷ *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA); [2008] 1 All SA 529 (SCA) para [10]; *Loureiro and Others v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para [43]. Cf *Novartis SA (Pty) Ltd and Another v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA).

²⁸ Van der Merwe et al *Contract General Principles* 3rd ed.(2007) 19.

The will theory is rule-based because every contract is understood within the context of offer and acceptance implying that a contract entails the formation of common intention between the contractants through an exchange of declarations, which express their respective intentions.²⁹ Therefore, a theory that disregards the mental attitude of every contracting party lacks support.³⁰ This line of argument is logically correct because it can be argued that a contract reflects a contestation of power between the parties' expectations and the surrounding circumstances.³¹

Although there is a difference between the will theory and the reliance theory, for the present purpose of analysing exclusion clauses one may lump them together because it splits the subjective intention of an individual to determine the existence, or not, of a contract. Where actual consensus is prevented other factors, such as material mistake, the parties will not be contractually bound because a contract has not come into existence.³² Therefore, in a democratic society like that of South Africa, where the free expression of an individuals will and personal autonomy of a person are primary values, the will theory dovetails with the Constitutional values.

In addition, the will theory gives effect to fundamental values such as freedom of expression. It has the further advantage of strong historic roots in Roman-Dutch law, which is the foundation of South African contract law.³³ Moreover, the will theory functions satisfactorily because it is entrenched in the parties understanding each other correctly. However, the will theory also has its defects. The will theory forms the basis for contractual liability.³⁴ A consistent application of the will theory would clearly yield inequitable results in case of *dissensus* thus its wholesale application should be admitted with a pinch of salt.

Under the will theory, either party to the contract is at liberty to rely on the lack or absence of consensus to avoid liability. This mistake has to be known by both parties to be fair, but if one or both are unaware of the mistake, it may be unsatisfactory to allow a party to set up a mistake and the lack of consensus in order to avoid liability. Fagan CJ in *George v Fairmead*

²⁹ Van Huyssteen et al 22; Van der Merwe et al 48; Lubbe GF & Murray C *Contract Cases and Materials* 3rd ed.(1988) 28

³⁰ Kahn E, et al *Contract and Mercantile Law, A Source Book* 2nd ed. (1985) 17.

³¹ Lubbe & Murray 418.

³² Van der Merwe 22.

³³ Van Huyssteen et al 32.

³⁴ Van der Merwe 30.

(Pty) Ltd³⁵ held that the retailer must effectively demonstrate that his conduct did not confuse the other party to believe that he was binding himself.

“...If his mistake is due to misrepresentation, whether innocent or fraudulently, by the other party, then, of course, it is the second party who is to blame, and the first party is not bound.”³⁶

Factually speaking this position is not an inflexible one slavishly followed by the courts because each case depends on its own particular facts. According to the reliance theory, as it is applied in South African law context, *dissensus* cannot be assumed if one party to an agreement manifest outward appearance of consensus by creating a reasonable impression or reliance on his part that the other party had the same intention. For reasons outlined below, commentators argue that the reliance theory is regarded as only supplementary to the will theory: if the two parties do have coinciding intentions, there is consensus and there is no need to inquire further, what the parties’ impression of the other was.³⁷

Schreiner JA in the case of *National and Overseas Distribution*³⁸ held, where the other party has not made any misrepresentation and has not recognized that his assent was accepted under misapprehension, the scope for the defence of unilateral mistake is curtailed. The reseller must show his mistake (error) is both material and reasonable (and thus *iustus*), which must be expressly pleaded.³⁹ These factors carry weight in the evaluation in determining whether a justifiable error exists.

The *iustus error* approach and is not considered a theoretical explanation for holding someone to be bound by a contract-the role must be fulfilled by the will theory supplemented by the reliance theory: if a material mistake is reasonable, the mistaken party is allowed to rely on the *dissensus* to avoid liability since there is no contract.⁴⁰ Consequently, the reliance theory has suffered an avalanche of criticism. It is argued that this theory is based on abstract ideas and illusions, which endorses that words have a meaning that is independent of the person who uses them.

³⁵ 1958 (2) SA 465 (A)

³⁶ 471 B-D.

³⁷ Van der Merwe et al 38.

³⁸ 1958 (2) SA 473 (A).

³⁹ 479 G-H.

⁴⁰ See *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A).

Contrary to this, in modern contract law, liability is often imposed by law-in a welfarist society. In modern consumer contract law, the State furthermore intervenes through legislative means to protect consumers from risks or dangers posed by contracting rashly or while labouring under ignorance. It must be pointed out that analyses of agreements indicate that true *consensus ad idem* is an abstract fiction for legal purposes.

In South African law, the reliance theory is used in the context of *dissensus*, where one party relies on an apparent agreement and reasonable impression or reliance on his part that the other party had the same intention.⁴¹ As the will theory serves as the primary theory for consensus, the reliance theory can serve only as a secondary basis for consensus. In recognition of this possibility, the following was held in the South African *locus classicus* on this point:

“The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestations of their minds. Even, therefore, if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract.”⁴²

In this context, the agreement is not a mental state but an act deduced from conduct. An individual, whereby a person voluntarily opts to undertake an economic transaction, which he or she becomes legally bound to finish unvaryingly, bases this legal theory upon the exercise of choice. The choice paradigm follows the normal common law reasoning and resorts to an ‘extrovert’ approach.⁴³

There is a third theory that supplements the reliance theory, called the declaration theory. According to the declaration theory, parties are bound to the contract because of their objective coinciding declarations of will. Technically the declaration accepts that the will of the contractants is the basis of their agreement, however, the existence of a contract is determined without further recourse to their actual intention, but simply by interpreting their declared or expressed will. The conflation of the two latter theories: reliance and declaration

⁴¹ Van der Merwe et al 38.

⁴² *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 993H. See the *ratio decidendi* of Wessels JA in *South African Railways & Harbour v National Bank of South Africa Ltd* 1924 AD 704 715-716.

⁴³ Collins “Contract and legal theory” in Twining WL (Ed) *Legal Theory and Common Law* (1986)136-154 142.

theory paradox opens a Pandora box in the law of contract on the true meaning of consensus because it seems the law clutches any straw to found contract.

Substantively, the premise of quasi-mutual assent and inflexibility of contract terms under the umbrella of standard form contracts package to support this view.⁴⁴ This quasi-mutual assent is an apparent agreement giving recognition to the reliance theory and declaration theory. Here the outward manifestation of intent is a factor for the misled party to leverage upon for liability. Although there may be *dissensus* because a party's mind evidenced by his words and or actions manifest ambiguity or are misunderstood, they reasonable lead others to the belief that the party is assenting to the agreement that eventually binds himself or herself.⁴⁵ This is the rationale for recognising a contract.

According to Yates, "an exemption clause is generally defined as any term in a contract excluding, restricting or modifying a remedy or liability arising out of a breach of a contractual obligation."⁴⁶ Relatively speaking the problems relating to exclusion clauses are not a modern phenomenon, as Roman-Dutch law authorities have already written about them.⁴⁷ However, its rise was felt particularly during the *laissez-faire* economic era of the nineteenth century, when traders were "not bound to make their contracts according to any rule of law".⁴⁸ From then onwards they have become the common practice in every sphere of commercial activity.

As problematic as exemption clauses were, the question can be asked as to why they have been sustained for so long? In any case, the essential problem of the law of contract is the problem of the distribution of risks. Therefore, an attempt to manoeuvre between constraint and liberal values must be explained in terms of protection of reliance and liberalism. It is noteworthy that the gravitational force of liberal values exerts its influence at the core of

⁴⁴ In quasi-mutual assent for all intents and purposes it seems an agreement has been created by the parties, yet the opposite is true. For similar views see the case of *Smith v Hughes* (1871) LR 6 QB 597 607, adopted in *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417 423; *Benjamin v Gurewitz* 1973 (1) SA 418 (A) 425; *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) 198B-C; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234(A) 239H; *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) 61E; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co Ltd* 1995 (2) SA 795 (A) 800D .

⁴⁵ Kerr 9.

⁴⁶ Yates *Exclusion Clauses in Contracts* 2nd ed. (1982) 1.

⁴⁷ See Van der Merwe et al 297(n 309).

⁴⁸ Per Brett LJ in *Hanck v Muller* (1881) 7 QBD 103.

contract and justifies the enforcement of contracts.⁴⁹ This scenario illustrates the classical contract doctrine that places a high premium on freedom and individual autonomy.

2.2.1 Operational freedom of contract and its impact on judicial philosophy

The classical contract law is based on the freedom of contract that was derived by political philosophers to formulate a new political order; by sociologists as a means to free men from the toils of social status; and by economists who advocated the creation of a *laissez-faire* economic system. In addition, legal philosophers used it as a means of formulating a legal order in which the individual could exercise his rights without vexatious constraint, a legal system in which the sanctity of his bargains would be rigidly upheld.⁵⁰

Sir George Jessel MR crisply formulated the principle of freedom of contract in *Printing and Numerical Registering Co v Sampson*⁵¹ as follows:

“[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.⁵²

This premise forms the cornerstone of the sanctity of contract. According to Mill *On Liberty*, interference by the state should be kept to a minimum, which became a weapon to advance human freedoms.⁵³ In Mill’s view, it does not matter whether the party contracted from a position of economic inferiority or not. This attitude was consistent with the *laissez-faire* philosophy that was dominant at that time. It was thought to be consistent with the free market economy and the spirit of competition.⁵⁴ In retrospect, this notion became the source of troublesome and strenuous interpretation of modern contracts.

On a different point, equality was projected as subsidiary to the virtues of autonomy during that era, leading to an interface between political philosophy and the law of contract.⁵⁵ This

⁴⁹ Twining 137.

⁵⁰ The excerpt on the various views have been sourced from Aronstam preface page v.

⁵¹ (1875) LR 19 Eq 462.

⁵² At 465.

⁵³ JS Mill *Three Essays On Liberty* (1959) 15 cited by Aronstam 4.

⁵⁴ Koffman L & MacDonald E *The Law of Contract* 6th ed. (2007) 4.

⁵⁵ Collins 137.

crosscutting happens when lawyers and philosophers reappraise the moral significance of binding promises and the interpretation of the modern law of contract. Upon further examination, it appears that the objectives of judicial controls over the terms of contracts to ensure fairness and reasonableness carry philosophical traits.⁵⁶

In the case of *Pieters & Co v Salomon*⁵⁷ Innes J validates the sanctity of contract in this context:

“When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him bona fide in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware.”

This judgment remains generally true, even though it is subject to a number of important qualifications. This principle is regarded as the trite law of England by leading English textbooks, which were contemporaneous in South Africa.⁵⁸ The development of South African contract law must be understood within the historical backdrop of colonialism. After the subjugation of the Dutch in the Cape Colony by the British, South Africa by osmosis inherited the same English contract law based on the classical law of contract,⁵⁹ although South Africa initially practiced the Roman-Dutch law concepts pertaining to contract law. It should be pointed out here that English law, unlike Roman-Dutch law, enforces bargains and not promises.⁶⁰

Properly understood the freedom of contract entails three aspects: the freedom to choose whom to contract with; on what terms to contract; and whether or not to contract at all.⁶¹ However, it should be recognized that this freedom of contract is constrained by

⁵⁶ See Gordley J “Equality in exchange” (1981) 69 *California Law Review* 1587.

⁵⁷ 1911 AD 137.

⁵⁸ See *Halsbury Laws of England* 1st ed. (1909) 349-350 and *Anson Law of Contract* 11th ed. (1906)154 and 12th ed. (1910) 156.

⁵⁹ *The Bigge and Colebrooke Report* of 1826 recommended amongst other things, the gradually replacement of Roman-Dutch law with the English law in the Cape Colony. See Hahlo HR and Kahn E *The South African Legal System and Its Background* (1968) 575-596 for a detailed history of English law spread in South Africa.

⁶⁰ Christie RH & Bradfield GB *The Law of Contract in South Africa* 6th ed. (2011)8 (n 42).

⁶¹ Du Bois in *Willie’s Principles of South African Law* 737. See also Brownsword R *Contract Law: Themes for The Twenty-First Century* (2006) 48.

considerations of public policy and later by the Constitution.⁶² This principle cannot be divorced from its Siamese twin concept: the sanctity of contract. That means the parties are legally bound to their agreement once it has been properly reached — *pacta sunt servanda*.⁶³ Sanctity of contract is the heart of certainty in commercial dealings underpinned with considerations of morality, that agreement should be honoured.

Commentators have noticed that the principle of sanctity of contract emphasizes two aspects. First, if the parties are held to their bargain, then they must be treated as masters of their own destiny, and courts should not indulge in ad hoc adjustment of terms on the basis of substantive justice. Secondly, if contracts are strictly enforced, then the courts should not lightly relieve contractants from their obligation to perform. Thus, contracts should not be tampered with *ex-post facto* but enforced as agreed between the parties.⁶⁴ This notion of inviolability of sanctity of contract is strongly criticized. It is the principle of sanctity of contracts that chiefly account for individualistic ideology against paternalistic intervention in contracts.⁶⁵

At best, absolute freedom of contract and absolute contractual equality remain an ideal - if not merely an illusion. The bargaining process is trammelled by inequality and abuse by the more powerful party to the contract, a feature normally manifested by insertion of exclusion clauses in standard form contracts. Commentators note that the classical law *mistakenly assumed* in our modern law that all parties to contractual negotiations bargain freely, know their interests and would agree to terms on utilitarian grounds.⁶⁶ This fallacy has led to the unenviable and precarious plight of the consumer thereby motivating legislative inroads to curb widespread abuse.

An incontrovertible truth is that in many circumstances there is neither freedom nor equality when contracting. Take for instance, when people are forced to take out mandatory insurance cover for their motor vehicles for the protection of other road users; sign unfavourable employment contracts and sign hospital admission for operations. There are many other

⁶² See Cameron J pronouncement in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) 35.

paras 91-93; *Napier v Barkhuizen* [2005] ZASCA 119; [2006] 2 All SA 469 (SCA) paras 6-7.

⁶³ See *Wells v South African Alumenite Co* 1927 AD 73; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 893-4.

⁶⁴ Pretorius C "The basis of contractual liability (1): Ideologies and approaches" 2005 (68) *THRHR* 259.

⁶⁵ *Ibid.*

⁶⁶ Poole J *Textbook on Contract Law* 7th ed. (2001) 197.

instances where freedom of choice is minimal. The consumer in selecting his or her new car, for example, from a large number of retailers and dealers, finds little difference in many of the standard terms that they employ. Hence, within this environment of enduring unfair contracting facing consumers, legislation has acquired prominence.⁶⁷

2.2.2 *The odd juxtaposition of our contract law regime*

Amongst the poignant impulses of modern society, the South African judiciary is unwilling to constrain the abuse of the unconscionability doctrine in contract law, favouring the classical contract. Admittedly, courts are guided by the precepts of the classical law, individualism in contractual interventions, which does not holistically immerse itself in matters of fairness unless they concern procedural unfairness.⁶⁸ Compounding the situation is the phraseology adopted by the courts both to limit the operation of a contract and to value its component parts.⁶⁹ The distinction between the components of a contract is artificial and irrelevant for practical purposes.⁷⁰

In a common law system, judges have been conforming to the rule-bound rationality of contract law and a positivist type of interpretation. In such cases, the judge's role is tantamount to that of an administrator and the rules are simply applied to the facts at hand. This contract formalistic approach and interpretation does not encourage the jurists to infuse the law with value judgments. Such mechanical application of rules by the judges is the foundation of certainty earlier alluded to but does not do justice to consumers in the current modern era.⁷¹

⁶⁷ See Sharrock 297. The author submits that legislation is efficacious because it has administrative control mechanisms and authorize "general use challenges against suppliers (both forms of preventative control) and it can, if well drafted, achieve clarity on how the principle of substantive unfairness should be understood and applied, for example, by laying down guidelines and relevant considerations and by itemizing provisions that are absolutely or presumptively unfair. More generally on this discussion see, Aronstam PJ "Unconscionable contracts: The South African solution" (1979) 42 *THRHR* 27; Lewis J "Fairness in South African contract law" (2003) 120 *SALJ* 345-6; Naudé "The consumer's rights to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective" (2009) 126 *SALJ* 527 and Christie 5th ed. (2006) 15.

⁶⁸ Pretorius C "The basis of contractual liability (3): theories of contract (consideration, reliance and fairness) 2005 (68) *THRHR* 591.

⁶⁹ Furmston MP Cheshire, Fifoot and Furmston's *Law of Contract* 11th ed. (1986) 140.

⁷⁰ Both forms of fairness: substantive and procedural are relevant to the law of contract. See Smith "In defence of substantive fairness" 1996 *LQR* 138; Van der Merwe *et al Contract* 200-202, 292-296; Cockrell "Substance and form in the South African Law of Contract" 1992 *SALJ* 40.

⁷¹ Cockrell 42.

On the contrary, fairness theories or principles promote collectivist ideals within the contractual context and display an affinity for being found in standard-based form, inviting judicial activism when finding a just outcome.⁷² The murky ground that needs to be travelled in resolving unfairness of contract is the move away from common law remedies that were hardly enforceable to clearer ground. This is important in the exposition of the tension between equity and certainty in the contract law. It is apparent that foundational principles of contract law, such as certainty in agreements seriously undertaken, are slipping away to the periphery in court decisions and there remains confusion as to why courts are not eager to rescue a party who claims that the terms of a contract or their enforcement operate unfairly against them.⁷³

The imprecise terminology of existing statutory laws that protect consumer's interpretation of the text provides room for legal academics to innovate and debunk norms, which are inappropriate for emerging challenges and the development of society. In a solution-driven environment, the law remains a living, developing and transforming instrument and cannot be reduced to a set of axioms or precepts as if it were an exact natural science.⁷⁴ In science, one follows a formula to get a particular result. Therefore, statutory interpretation when applied must relate to existing concrete situations in life. These are questions such as the "true" nature of the law and the possibility of justice for the parties whom the statute is applicable.⁷⁵ The argument advanced here is against the rule bound methodology of interpretation.

Cockrell, however, concedes the impropriety of rigid application of rules may result in unfairness, unreasonableness or injustice, but for the sake of certainty of the law, it is the small price to pay.⁷⁶ It is the oscillation between certainty and uncertainty that has created problems in the interpretation of contracts. With the ever-changing powers of businesses in consumer contracts, the courts must apply and develop legal rules to address the issue. Courts should not even when required by legislation to determine what is "unfair" abandon its decision-making and respond to visceral instincts alone.

⁷² Pretorius (3) 591.

⁷³ Lewis "The uneven journey to uncertainty in contract" 2013 (76) *THRHR* 81.

⁷⁴ Koffman & MacDonald 6.

⁷⁵ Du Plessis 91.

⁷⁶ Cockrell 43.

This is because South African courts in the few opportunities they have been given to develop the common law of contract have failed to respond to the call adequately until their English counterparts gave them direction in the form of legislation. The crowning moment of the law's insensitivity in this context has been the various failures of the Supreme Court of Appeal in some important decisions⁷⁷ to give life to the values of freedom and equality. This triggered a raging debate on the trajectory that our contract jurisprudence is taking. It is submitted that the court has a tendency to reduce a contracting party to an object of economic gratification of the other.⁷⁸ The gap of unconscionability must be closed to attain equitable results.

Lessons could be drawn from the history of the "unfair prejudice" jurisprudence,⁷⁹ where ultimately the House of Lords (as then it was) noted that a balance had to be struck between "the breadth of the discretion given to the court and the principle of legal certainty"⁸⁰ and applied equitable principles. These well-established equitable principles may clearly support the imposition of obligations beyond those explicitly imposed by statute. The judiciary, with the supported by the common law, should intervene to remedy the lack of or defects in statutory law because legislative processes are often not suited to allow the consumer to deal with day-to-day deficiencies.

The suppression of the creative role of the judge was always historically challenged. As freedom of contract reached its pinnacle in post-French Revolution, for example, the drafters of the French Civil Code impugned it on grounds of justice, *boni mores* and public interest.⁸¹ In the pre-Constitutional South Africa's landscape for judicial activism was smothered.⁸²

⁷⁷ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁷⁸ Naudé T "Unfair contract terms legislation: The implications of why we need for its formulation and application" (2006) 17 *Stell LR* 452. A similar viewpoint is expressed by the decision in *Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd* 1991 (2) SA 754 (A) 759B, H-J: Because of lack of reciprocity between the lessee's duty to pay the rental and supplier's duties under the maintain and service agreement, there was no need to consider the appellant's contention that a clause purporting to exclude a reliance on the *exceptio non adimpleti contractus* was contrary to public policy.

⁷⁹ Petitions under Companies Act 2006, s994 in UK

⁸⁰ *O'Neill v Phillips* [1999] 1 WLR 1099.

⁸¹ *Projet de Code Civil an VIII (1800) Discours preliminaire LX* cited by Hawthorne L "Closing the open norms in the law of contract" (2004) 67 *THRHR* 295.

⁸² Judicial activism refers to a system where fair outcomes should be reached in decisions. Such justice is achieved by the application of standards to the facts at hand. Each case is decided with reference to public policy considerations and what is best for the community. Vettori S "The socialization of the law of contract" 2005 *De Jure* 81. See also Cockrell 55. This judicial activism is critiqued for its tendency to produce outcomes that is predetermined by the interpreting judges' pre-understanding of the law.

There was hardly any movement to detach the judiciary from the conservative approach of “wait and see” attitude to legislative reforms that would aid the citizens’ litigations. The judiciary deferred to parliamentary sovereignty especially when the command was issued in clear and unambiguous language.

For instance, there is a school of thought that recognizes the domino effect of good faith (*bona fides*) in contract law as the underlying factor, which imports other dimensions that never saw the light of the day. In the early case of *Meskin NO v Anglo American Corporation of SA Ltd*⁸³ the court was given an excellent opportunity to infuse our contract law with good faith in antecedent negotiations and performance but abdicated this responsibility. A few years later, the same court had another opportunity to revisit the issue of good faith. This obiter was the starting point for future development of this principle because Jansen J decision postulates that *bona fides* create new and equitable solutions.

The historical journey to its meaning is found in the judgment of Joubert JA in the context of insurance law in the case of *Mutual and Federal Insurance Co Ltd v Outdshoorn Municipality*.⁸⁴ He enunciated the law thus:

‘By our law all contracts are *bonae fidei*...Yet the duty of disclosure is not common to all types of contract. It is restricted to those contracts, such as contracts of insurance, where it is required *ex lege*. Moreover, there is no magic in the expression *uberrima fides*. There are no degrees of good faith. It is entirely inconceivable that there could be little, more or most (utmost) good faith. The distinction is between good faith or bad faith. There is no room for *uberrima fides* as a third category of faith in our law.

This judgment seems to have formed the foundation of Joubert JA’s dislike for equity principles, as three years down the line in 1988 in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas* he hammered the last nail in the coffin of *exceptio doli*.⁸⁵ Having positivist judges the question was whether the South African common law could deal with fairness, reasonableness and equity. The advent of a constitutional dispensation has resuscitated the role of fairness, reasonableness and good faith in contract: premised on the

⁸³ 1968 (4) 793 (W) 802.

⁸⁴ 1985 (1) SA 419 (A) 433B-F.

⁸⁵ See also *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 208 (4) SA 16 (CC); (2007 (5) BCLR 453); and *Bredenkamp and Others v Standard Bank of South Africa* 2010 (4) SA 468 (SCA).

values of dignity and equality entrenched in the Bill of Rights.⁸⁶ These factors are frequently considered when determining contractual enforceability.

The minority judgment in *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman NO*⁸⁷ dismissed the appeal on the ground of the bona fide principle. Olivier JA was lauded for being a pioneer for the application of the norm of good faith in contract law. He set out that good faith, which is based on equitable principle is significant in the law of contract and that an intimate bond between the concept of good faith, public interest, and *iusta causa* exists. According to the judge, the concept of good faith is part of the general principle of public interest. The requirement of *bona fides* is applied because public interest demands it.⁸⁸ Others criticised the introduction of such a requirement into our law. The concept of good faith is expanded on further in Chapter 4 of this dissertation.

It is perforce critical that one points to other factors that have shifted the ground to assist interpretations. In practice, the law of contract is clearly engaged in trying to balance the upholding of traditional market liberalism with the need to protect the vulnerable and weak in the market.⁸⁹ Commentators convincingly argue that initial the common law sanctity of contract rule once epitomised contractual justice is currently atavistic. Despite some efforts of market-individualist judges to obliterate doctrines infused with fairness,⁹⁰ or limit their purport,⁹¹ contractual fairness or justice is undoubtedly an integral part of the law of contract.

Commentators suggest that a correct approach the imbalance in the powers is by focussing on the general concepts that underlie the doctrines, rules and remedies intended to affect the fair operation of contracts. These include the concept of a reasonable balance between performance and counter-performance or the concept of “unconscionability”.⁹² Fairness and

⁸⁶ Lewis 81.

⁸⁷ 1997 (4) SA 302 (SCA).

⁸⁸ This *ratio decidendi* is found in 318G-322D-E.

⁸⁹ Koffman & MacDonald 4. The vulnerable groups susceptible to exploitation are consumers, employees and tenants.

⁹⁰ For example, the rejection of the *exceptio doli* in South African law by the court in *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A). See further Van der Merwe SJ, Van Huyssteen LF and Lubbe GF “The *exceptio doli generalis: Requiescat in pace-vivat aequitas*” 1989 SALJ 235; Van der Merwe et al 293.

⁹¹ For example, the limitations placed on the principle of good faith in South African law: see *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 12-19; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 40-41; *SA Forestry Co Ltd v York Timbers Ltd* [2004] 4 All SA 168 (SCA) 178-180. See further Pretorius C “Individualism, collectivism and the limits of good faith” 2003 THRHR 638; Van der Merwe et al 295.

⁹² Van der Merwe et al 317.

reasonableness, contractual justice and other norms are mechanisms of change although considered as vague terms serve as guidelines around specific applications.⁹³

Reforms came after unqualified literalism in the interpretation arena “[had] reached its apogee and is on the wane”.⁹⁴ There is criticism to the language vulnerabilities assumptions because language is not an infallible source of meaning.⁹⁵ The wane of literal interpretation began in the post-constitutional dispensation because courts have to expand the rights enshrined in the Bill of Rights.

Promotion of the freedom to contract and the sanctity of contract became the necessary catalysts of *laissez-faire* making it possible for the courts to foster one and to vindicate the other.⁹⁶ Informed by this intrinsic aspect of interpretation, it can be said the classical model suffers from inherent omissions, contradictions and disadvantages. Inequality between the parties has abundantly resulted in various limitations of the classical model of contract and their concomitant remedies to resolve contractual interpretations.⁹⁷ It is clear that the presumption of equality in contracting is fundamentally flawed.

The valuable tools to be used in this never-ending duel between freedom of contract and interventions are the open norms found in the common law of contract.⁹⁸ Commentators have noted that due to the domineering free market economic liberalism during the last two centuries, courts are indifferent to utilize the interpretation of these norms. Legal enforcement of contracts demands a careful justification, for legal sanctions inevitably fetter individual freedom.⁹⁹ A laxity on rigidly applying the rules and standards of contract law play an important role in satisfying justice.

It must now also be viewed through the constitutional values that inject the open norms to it organically. The Constitution¹⁰⁰ guarantees respect for equality and freedom. It cannot be

⁹³ Pretorius (3) 591.

⁹⁴ See Devenish GE *Interpretation of Statutes* (1992) 26. This means the change of contractual documents interpretation from being interpreted ‘purely’ on internal linguistic considerations. Rather, they are placed in their “context”: courts must have regard to the wider circumstances surrounding the conclusion of the contract including its commercial purpose.

⁹⁵ Du Plessis 94.

⁹⁶ Furmston 18.

⁹⁷ Lubbe GF & Murray C *Farlam and Hathaway Contract—Cases, Materials and Commentary* (1988) 237.

⁹⁸ Hawthorne “Public policy and micro lending—has the unruly horse died?” 2003(66) *THRHR* 117.

⁹⁹ Peel E *The Law of Contract* 13th ed. (2010) 1.

¹⁰⁰ S7 and 9.

right for it to leave individuals to pursue their own interest as they wish without state intervention. With statutory enactments¹⁰¹ advocating for state intervention between contracting parties, there may be present features, which encourage and entitle a court to apply equitable principles to intervene and grant rescission. This does not mean the relationship between the contracting parties is one of improper conduct, however, upholding and enforcement of a contract within the modern law has to be viewed within the context of the parties bargaining power.

2.2.3 The South African common law remedies

In the past, a more honest party was protected against his co-contractant by the Roman *exceptio doli generalis* defence and the bona fides doctrine. This exception allowed a contractant faced with a pending action to raise a defence on facts impermissible in civil law.¹⁰² Presumably, these defences might connect with the challenge posed against exemption clauses currently. The *exceptio doli generalis* was seen as a neutralizer to the strictness of the civil law by introducing equitable principles of redress to contracts through praetorian law.¹⁰³

In *Paddock Motors (Pty) Ltd v Igesund*,¹⁰⁴ the court held that the *exceptio* does not operate to change the substantive law or to alter unfair terms of an otherwise validly concluded contract. It only serves to preclude reliance on a contractual term in the circumstances that makes it unconscionable to do so, in view of subsequent events or conduct of a contractant.

The application of the *exceptio doli generalis* as an instrument of equity was harshly terminated by the judgment of Jansen JA in *Bank of Lisbon & South Africa Ltd v De Ornelas*.¹⁰⁵ He crisply laid it to rest in that it "...has never formed part of Roman-Dutch law, and, despite the fact that in a number of judgments this Court accepted the exception as part of our law, the time has now arrived, once and for all, to bury the exception as a superfluous, defunct anachronism. This conclusion holds equally for the replication *doli generalis*." By

¹⁰¹ Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005.

¹⁰² Van der Merwe *et al* make an example of a *pactum* which exempted the debtor from performing or which extended the stipulated time for performance.

¹⁰³ Van der Merwe, Lubbe & Van Huyssteen 237.

¹⁰⁴ 1976 (3) SA 16 (A); see also *Airprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A).

¹⁰⁵ 1988 (3) SA 580 (A).

providing, a brief historical background to these mechanisms of equity would assist in the legal lacunae to deal sufficiently with the risks posed by exemption clauses of late.

The South African law contains a raft of common law remedies to restrain an unlimited freedom of contract. It permits the setting aside of a contract on improperly obtained consensus, due to for example misrepresentation, duress, or undue influence.¹⁰⁶ The economically or mentally weaker party could rely, for example, on *laesio enormis* to protect himself or herself from rendering performance more than double the value of counter-performance. This doctrine is enunciated in the case of *Tjollo Ateljees (Edms) Bpk v Small*¹⁰⁷ and sustained thereafter until it was statutorily abolished.¹⁰⁸ Uncertainty still surrounds the issue of whether *laesio enormis* was based on consideration of justice between the contractants, or whether it was simply an economic mechanism to reduce inflation. This is not for us to discuss for present purposes, as it does not assist with our argument and the current narrative.

Performance of obligations during the operation of the contract is a mandatory voluntary responsibility of the parties. In this atmosphere, the liberal theory requires a justification explaining the state's dual role: an institution to protect individual freedom and through the courts to become an instrument of constraint.¹⁰⁹ The Constitution empowers the courts to develop the common law and further introduces purposive interpretation to seep into our contract law through judicial activism.¹¹⁰ In support of this and prescient in 1909 Innes J stated:

“There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.”¹¹¹

From the above, it is clear that the law cannot be reduced to a set of immutable axioms or precepts that are alienated to the changing dynamics of society. Thus, an attack on the rule-bound rationality is sometimes justified. The critical question that emerges from

¹⁰⁶ *Plaaslike Boeredienste (Edms) Bpk v Chemfos (Bpk)* 1986 (1) SA 819 (A).

¹⁰⁷ 1949 (1) SA 856.

¹⁰⁸ S 8 Act 8 of 1979 (Cape, s 6 Ordinance 5 of 1902 (OFS) and Act 32 of 1952).

¹⁰⁹ Collins 138.

¹¹⁰ S 173 and 39(1)-(2).

¹¹¹ *Bower v Van Noorden* 1909 TS 905.

commentators is, how the legal system can achieve the protection of dignity and equality (which must rest on good faith in contractual dealings) in contractual relations, while at the same time not undermining another value central value to contract-certainty.¹¹²

For instance, a contractant under a short-term insurance with time limitation clause would find that he has no legal remedy after prescription under the common law. The extinctive prescription effect shows the contractual supremacy, stamina, endurance and strength of the sanctity of contract rule in pre-Constitutional common law.¹¹³ According to commentators, the legal infrastructure of the institution of contract should generally enforce voluntary reciprocal agreements and not enforce involuntary or unreciprocated ones.¹¹⁴

It is noteworthy that attaining justice and fairness are universally accepted purposes vital to any system of law.¹¹⁵ Van der Merwe and Van Huyssteen argue that in the commitment to such an ideal of justice and fairness, the legitimacy of a legal system depends finally on the extent to which it is experienced as just and fair in its particular application.¹¹⁶ Contemporary societies have enacted legislative intervention, specifically for consumer protection, to control and guide the performance of contractual obligations.

2.2.4 Competing theories within the constitutional realm

The advent of the 1996 Constitution changed the contractual landscape. Commentators acknowledge the common law doctrines that dominate many of the rights that are provided in the Bill of Rights.¹¹⁷ Social policy considerations, public mores and bona fides are imbued by the Constitution. The Bill of Rights that enshrines the values of dignity and equality, amongst others that operate horizontally, implored the state to apply those rights directly, but they can also be directly invoked between private parties.¹¹⁸

¹¹² Lewis 83.

¹¹³ Hopkins K "The influence of the Bill of Rights on the enforcement of contracts" *De Rebus* August 2003 23. See also *Santam Insurance Ltd v Cave t/a The Entertainers and The Record Box* 1986 (2) SA 48 (A).

¹¹⁴ Gullifer L & Vogenauer S *English and European Perspective on Contract and Commercial Law* (2014) 119.

¹¹⁵ Van der Merwe and Van Huyssteen "The force of agreements: valid, void, voidable, unenforceable" 1995 *THRHR* 549.

¹¹⁶ *Ibid.*

¹¹⁷ Hopkins 22.

¹¹⁸ Lewis 82.

Every court that interprets legislation is bound to read a legislative provision through the prism of the Constitution.¹¹⁹ In *Fraser v ABSA Bank Limited*,¹²⁰ Van der Westhuizen J explained the role of section 39(2) in the following terms:

“When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation.

This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation becomes a new rule. This kind of interpretation transcends private law. If the provision under construction implicates or affects rights encompassed by the Bill of Rights, then the obligation imposed by section 39(2) is activated.¹²¹ Undoubtedly, there is a mandatory imperative to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

The indirect horizontal application of the Bill of Rights aims to fulfil the seminal role of introducing a transformative constitutional agenda to permeate public space. The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning the court adopts a less restrictive meaning to the Bill of Rights.¹²² Essentially, the transformation should protect and equip the marginalised and poorer consumers from exploitation by big businesses in the contractual sphere without compromising justice and fairness.

A critical reflection of the Supreme Court of Appeal judgments yielded questionable decisions that are in conflict with constitutional values, and that serve as support a riveting argument for this thesis. Cameron JA in *Brisley v Drotsky*, said that, although the common law is subject to the constitutional supremacy, the Constitution enshrines the fundamental values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism and requires a neutralizing power between this freedom and “securing a framework within which the ability to contract enhances than

¹¹⁹ *Investigating Directorate; Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others In re: Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* [2000] ZACC 12; 2000 (1) BCLR 1079 (CC); 2001 (1) SA 545 (CC) para [21].

¹²⁰ [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) para [43].

¹²¹ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC).

¹²² Makate’s case para [89].

diminishes our self-respect and dignity”. Yet the court went on to hold the non-variation clause in the contract against the lessee is valid in accordance with a strict application of *pacta sunt servanda*.

The Court’s decision above leaves a lot to be desired on the methodology for infusing constitutional norms and values into the law of contract and principles of interpretation. Commentators lamented the apathy to curtail this freedom on utilitarian grounds in contracts where its continued enforcement would result in harm to others. Since contract initiatives are to uplift the economic development of individuals it is disquieting when people remain prejudiced and discomforted when contracting. The extent of this paradox is entrenched by the limitation clause of the Constitution, which applies on a limitation by laws of general application, yet not contract law.¹²³ An overview of South Africa’s contractual landscape reflects this position.

Practitioners and academics alike are debating the disjuncture between the expository common law position and the need of constitutional impulse interpretation for contracts. More importantly, section 8(2) of the Constitution clarified the horizontal application of the Bill of Rights, and section 39 (2) now enjoins courts to interpret legislation and develop the common law and customary law incrementally to realize the spirit, purport and objects of the Bill of Rights.¹²⁴ The advent of democracy has placed the development of an equitable development of the law of contract on the forefront.

Critics point out that instead of relying on the common law principles like good faith,¹²⁵ practitioners are now inclined to react on the constitutional impetus. As the Constitution does not bar the use of alternative common law remedies, however, some conservative lawyers are unwilling to buy into this. The principle of good faith hardly features in the formation or conclusion of contracts and ever courts lightly consider it in the construction of contracts. Probably, interpretation of contracts needs content and development of good faith in order to

¹²³S 36 which enumerates the circumstances in which that freedom dignity and equality may be limited in an open and democratic society.

¹²⁴See Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[2004]ZACC 15; 2004 (7) BCLR 687 (CC) para 72.

¹²⁵See 2.6 below.

supplement or limit the operation of contracts.¹²⁶ The topic of good faith, which has manifold aspects, as a self-standing principle is subsequently discussed later in this thesis.

Because standard or policy considerations are somewhat vague and abstract, their application could result in some uncertainty in the law. This kills consumers' rights because whichever way the outcome evinces a tendency of substantive unfairness, that violates the very essence of public policy. On the other hand, this could result in a fairer, more equitable and just system, yet their use causes some discomfort.¹²⁷ Therefore, public policy can be considered a flywheel to balance the sanctity of contract and fairness.

Commentators note that the principles of fairness and reasonableness lie at the heart of the law's quest for justice. Thus, when courts interpret, supplement or limit contractual obligations according to the precepts of reasonableness and fairness, they are in fact adjudicating upon the existence or content of such obligations essentially from a normative perspective, and to the exclusion of party intention.¹²⁸ Judicial officers should use the open norms of the Constitution to adapt the common law so that it becomes constitutionally compliant.

2.3 Different English common law grounds for policing exemption clauses

In the past courts used substantive contract principles to curb the erosive powers of unfair and unconscionable terms of the contract. The courts both in South Africa and in England formulated their own distinctive principles to articulate these principles. A brief comparative discussion will serve to inform the reader of the principles available in the foreign jurisdiction.

Generally, it is accepted that in every contract there are certain fundamental obligations, which have to be fulfilled, and that a breach of it amounts to non-performance of the contract, which cannot be excused. Such breach constitutes a breach of a "fundamental term". In England, the most commonly used defence against such abuses was to declare the

¹²⁶ Hawthorne "Closing of the open norms in the law of contract" 2004 (67) *THRHR* 296.

¹²⁷ Vettori 86.

¹²⁸ Pretorius "The basis of contractual liability (3): (consideration, reliance and fairness" 2005 *THRHR* 593.

unreasonable exemption clause invalid by means of the “fundamental breach doctrine”.¹²⁹ The term “fundamental breach” is used in two distinct senses: First, it denotes a breach by one party to an agreement that is so serious as to permit the other party not only to claim damages for the breach but also to elect to regard himself as completely discharged from his duties under the agreement.¹³⁰

Secondly, the term denotes those breaches of a contract that are so destructive of the obligations of the promisor that the effect of such a breach cannot be limited or excluded by means of an exemption clause in an agreement.¹³¹ A party cannot be deprived of what he bargained for or be given something completely different from what he expected in terms of the obligations. The courts are reluctant to construe exemption clauses that then validate acts of deliberate disregard of the main purpose of the contract. It was well established by the courts that where a seller of goods did not deliver the goods or merchandise bargained for, no reliance could be placed on an exclusion clause where the contract benefitted the seller.¹³² This doctrine is rooted in the observation that when a breach is committed of an *essentialia* term it is seen as complete non-performance of the agreement.¹³³ The peremptory *naturalia* of any contract that cannot be affected by an exemption clause captures the quintessential character of this doctrine.

That is why in most cases parties have been held to their part of the bargain despite the insertion of exemption clauses. It can be argued that the imposition of an exemption clause of this nature is a limited escape route used to intimidate consumers. Lord Denning MR in *J Spurling Ltd v Bradshaw*¹³⁴ was rational in declaring that a person could claim protection under an exemption clause only “when [he or she] is carrying out his contract and not when he is deviating from it or breaking it in a radical respect”. The judge subsequently reiterated his viewpoint in *Karsales (Harrow) Ltd v Wallis*¹³⁵ thus:

¹²⁹ Described by Aronstam P “Exemption clauses in contracts: a new approach for South African courts”(1977) 94 *SALJ* 56 to be the most important attack made by the judiciary, without legislative or administrative authority on the imposition of unfair contractual terms in the 1950s and 60s.

¹³⁰ *Suisse Atlantique Societe D’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) 431A

¹³¹ Lord Devlin (1966) 24 *Cambridge LJ* 192.

¹³² *Nichol v Godts* (1854) 10 Exc.191; *Wieler v Schilizzi* (1859) 17 C.B. 619; 139 E.R.1219.

¹³³ *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co (No1)* [1953] 1 *WLR* 1470.

¹³⁴ [1956]2 ALL ER 121 (CA) 125G.

¹³⁵ [1956]2 ALL ER 866 (CA) 868-9.

“...it is now settled that exemption clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of breach which goes to the root of the contract. It is necessary to look at the contract apart from the exempting clauses and see what are the terms, expressed or implied, which impose an obligation on the party. If he has been guilty of a breach of these obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.”

Thus, under the doctrine of fundamental breach, the exempted party could not escape liability by the overzealous pursuit of self-interest. An exclusion clause that shrinks the core of the contract flies in the face of contracting. It is submitted that such clause should be read subject to and interpreted to give effect to the purpose of the contract. It is noteworthy that upon conclusion of the contract the doctrine of fundamental breach applies to every subsequent breach of the remaining content of the contract, which will be actionable.¹³⁶ Although considered an extremely important mechanism for the protection of private consumers it had its shortcomings and openings for abuse.¹³⁷

Aronstam’s article, for instance, makes an example of a unilateral variation of the terms of a party’s performance to which the doctrine could not apply.¹³⁸ With the enactment of the Unfair Contract Terms Act 1977 (UCTA), which provided a statutory base for invalidating unreasonable exemption clause in the United Kingdom it is no longer necessary to rely on that common law mechanism. In the absence of legislation, the mechanism could still inform the laws of other countries.

The English UCTA of 1977 provides that where one party deals as a consumer or on the other’s written standard terms of business, the other party cannot by reference to a contract term claim to be entitled to render contractual performance substantially different from that which was reasonably expected of him, or in respect of the whole or any part of his contractual obligation, to render no performance at all except insofar as the contract term

¹³⁶ Coote B *Exception Clauses* (1981)55 A.L.J 792. The counter-argument on fundamental breach shows no basis for its reliance. Exemption clauses qualify the promises to which they relate and take effect at the formation rather than as mere defences at the point of adjudication.

¹³⁷ It was not adopted unanimously by legal commentators. One of its disadvantages is that it was directly used by the courts to emasculate exemption clauses yet there were also clauses, which were unconscionable although they were not exemption clauses.

¹³⁸ Aronstam 57.

satisfies the requirements of reasonableness.¹³⁹ Interestingly, the same Act renders the exclusion of liability for the equivalent in English law of the breach of warranty against eviction ineffective.¹⁴⁰ For this, reason and comparable parties should be cautious of infusing their contracts with unreasonable terms that would be objectionable in court.

This mechanism embodied in this doctrine echoes, however, in South African law in that a contract may not be cancelled unless the breach is material. This applies where the breach is by default, positive malperformance or repudiation. Comparatively speaking the doctrine of fundamental breach does not form part of South Africa substantive law.¹⁴¹

Hoexter JA in *Elgin Brown & Hammer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd*,¹⁴² denigrated it, as “the outmoded English doctrine of the fundamental breach which, in the matter of interpreting exemption clauses, has never been part of our law...” Hoexter JA’s words are considered the authoritative statement of our law. Again, in *Goodman Brothers (Pty) Ltd v Rennies Group Ltd*,¹⁴³ Cloete J restated the law with the same strong conclusion thus clearly jettisoning it from our jurisprudential shores... “[T]he doctrine should be given its final quietus in our law as well”.¹⁴⁴ The Judge went on to sum Treitel’s¹⁴⁵ analysis for the rise and fall of this doctrine:

“This substantive doctrine of fundamental breach was developed by the courts as a device for protecting customers. But it was not restricted to consumer cases; and when applied to commercial transactions negotiated at arm’s length it was liable to upset perfectly fair bargains for the reasonable allocation of contractual risks. When in the *Suisse Atlantique* case in 1966, an attempt was made to apply the doctrine in such a context, the House of Lords rejected the view that the doctrine was one of substantive law and held it was one of construction only, so that liability for even a fundamental breach could be excluded so long as the words of the clause were sufficiently clear. In the following years the lower courts were reluctant to accept this position.... But the substantive doctrine was no longer needed for this purpose once the effectiveness of exemption clauses came to be restricted by the Unfair Contract Terms Act 1977; and where these restrictions did not apply it was desirable, in the interest of commercial certainty, to allow the

¹³⁹ S 3(2).

¹⁴⁰ S 6(1)(a).

¹⁴¹ *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) 834-35; *Witjenburg Holdings t/a Flamingo Dry Cleaners v Bobroff* 1970 (4) SA 197 (T); *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C); *Micor Shipping (Pty) Ltd v Tregor Golf and Sports (Pty) Ltd and Another* 1977 (2) SA 709 (W).

¹⁴² 1993 (3) SA 424 (A) 492F-G.

¹⁴³ 1997 (4) SA 91 (W) 103 I-J.

¹⁴⁴ 104 F.

¹⁴⁵ *The Law of Contract* 7th ed. (1987) 175.

parties to allocate risks between themselves by clearly drafted exemption clauses. In the Photo Production case (*Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827) in 1980 the House of Lords therefore reasserted the view that the doctrine of fundamental breach was a rule of construction only. That view was again affirmed by the House of Lords in George Mitchell case (*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds* [1983] 2 AC 803) in 1983 where Lord Bridge said that the Photo Production case had given “the final quietus to the doctrine that a ‘fundamental breach’ of contract deprived the party in breach of the benefits of clauses in the contract excluding or limiting his liability”.

It is unclear from Hoexter’s decision in the Elgin Brown case when jettisoning the fundamental breach whether an exemption clause may exempt a party from the consequences of non-performance or default, as opposed to malperformance.¹⁴⁶ What remains a sticking point is that in the absence of the fundamental breach doctrine, one may question whether our laws curtail the parties’ freedom to contract to render them scot-free from the consequences of breaches of the contract? Case law, however scant, does make a distinction between clauses of malperformance and intentional non-performance.

Commentators describe the exemption clause of the latter void for vagueness, as in the classical *sivolum* of Roman law.¹⁴⁷ The exemption clause in the case of *Agricultural Supply Association v Olivier*¹⁴⁸ was upheld. In this case, the seller sold different seeds from those intended by the customer. The court wrongly decided the case because this amounted to non-performance. It seems our law may enforce liability for intentional non-performance, but not for unintentional failure to perform properly.¹⁴⁹

2.4 Incorporation by Notice

2.4.1 Signed Documents

Mainly, the common law insofar as contracts were concerned, seeks to protect the weak against the strong by ensuring that unconscionable provisions in a contract are brought to the attention of the weaker party.¹⁵⁰ Under the doctrine of notice, the provision must be known at the formation of the contract and not be a subsequent insertion. The enquiry in interpreting

¹⁴⁶ Christie & Bradfield 194.

¹⁴⁷ It is voided for its unlimited power granted to the promisor to do as he pleases.

¹⁴⁸ 1952 (2) SA 661 (T). The clause read thus: “We give no warranty, express or implied, as to the description, name and /or character of any seeds or as to the germination, productiveness, quality or growth of any seeds or plants supplied by us and we will not be in any way responsible for the results.”

¹⁴⁹ Christie & Bradfield 195.

¹⁵⁰ Aronstam 26.

exclusion clauses starts from the point that those terms should form part of the contract.¹⁵¹ Secondly, a reasonable person in possession of such document should expect that term, in that it is not an ambush provision.

A fundamental and critical distinction has to be made between signed and unsigned documents in contractual interpretation. Because of the *caveat subscriptor* rule, a person who signs a contractual document is assumed to have assented to the contents of the document. This is also one of the most misused principles of the party with a superior bargaining power, as it has the potential to bind the weaker party. The basis of this rule is that where a document is the sole record of the contract, a person signing it will be bound even though he failed to read the contents, yet only in the absence of fraud, and /or misrepresentation of the other. The question of notice in this situation becomes irrelevant.

The rule is applied to curtail recklessness on the part of the signatory and extends to a party who fails to avail himself to study the provisions incorporated by reference. In *Burger v Central South African Railways*¹⁵² Innes CJ held:

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

In such circumstances, the court will look into the facts of the case to determine whether a signed document is to be treated as a contractual document as opposed to merely a receipt.¹⁵³ This classification will be of great assistance when devising strategies to the consequences of standard form contracts and the interpretation of attendant exemption clauses. Paton¹⁵⁴ states that the object of classification is:

“To create a logical structure that will enable the rules of law to be so interrelated and so effectively and concisely stated that they may be more easily grasped, applied and developed; secondly, in order to enable lawyers to find their law.”

A consumer will be justified in ignoring a document that does not appear to him or her as a reasonable person, to be contractual in nature. Nevertheless, a mere description of the

¹⁵¹Ibid. See Van de Merwe *et al* 8, where a contract is explained as a legal agreement between parties intended to create obligation capable of performance and complying with formalities.

¹⁵² 1903 TS 578.

¹⁵³ Cornelius 139 defines classification as the allocation of that document to its correct legal category to reveal the relevant rules for the interpretation of that document.

¹⁵⁴ Paton *GW A Text-Book of Jurisprudence* 3rd ed. (1967) 235.

document either as a “receipt” or “voucher” does not exclude it from imposing contractual obligations. If its nature is contractual and the person signs it as an offeror or offeree, he or she will be bound by its provisions.¹⁵⁵ It does not matter whether there are contractual provisions, which fetter the party’s autonomy in terms of exemption clause. The law interprets the description of the document in the circumstances more than the real form of it and author.

The sending of copies of a contract to a customer thereafter on a number of occasions would not change its status or his belief. This principle is recognized in *Frocks Ltd v Dent and Goodwin (Pty) Ltd*,¹⁵⁶ where the court held that no reasonable person could expect to find an exemption clause on a depositor’s invoice to a warehouse. The provision was not incorporated into the contract even though it had been printed on an invoice sent to the plaintiff for some years before the proceedings were initiated. Most suppliers are inclined to rely on this hidden exemption clause which falls foul of the law and the normative expectation of a contracting party. If tolerated, such travesty of justice would not bring recourse in matters of liability in health, death and personal injury circumstances. Slessor LJ and MacKinnon LJ express a similar viewpoint in *Chapelton v Barry Urban District Council*.¹⁵⁷

The *caveat subscriptor* rule is also a good defence for the consumer in standard form contracts because it does not apply in the following circumstances listed by Kerr.¹⁵⁸ These are: (1) if the person who signs does not understand the terms of the document and is neither careless nor reckless; (2) if there is disagreement about the nature of the legal relationship; (3) if the other party in the contract understood the words in the document in their ordinary meaning knew, or had reason to know, that the other party misapprehended the terms of the contract, but left him under such misapprehension,¹⁵⁹ or (4) if there is an unusual provision , or one that would not be expected in the context in which it was found,¹⁶⁰ or (5) if the person

¹⁵⁵ See the judgment of Denning LJ in *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 ALL ER 631 discussed in (1951) 67 LQR 153.

¹⁵⁶ 1950 (2) SA 717 (C).

¹⁵⁷ [1940] 1 ALL ER 356 (CA) 360. Interestingly, this was also followed in the South African case of *Frocks Ltd v Dent and Goodwin (Pty) Ltd* mentioned above.

¹⁵⁸ At 103-104.

¹⁵⁹ See *Prins v ABSA Bank Ltd* 1998(3) SA 904 (C).

¹⁶⁰ See *Phillips v Aida Real Estate (Pty) Ltd* 1975 (3) SA 198 (A) 206G-207C; *Aetiology Today CC t/a Somerset Schools v Van Aswegen and another* 1992 (1) SA 807 (W)810G; *Fourie NO v Hansen and another* 2001 (2) SA

“was misled as to the purport of the words to which he was thus signifying his assent”,¹⁶¹ or (6) where the circumstances are such that the courts when applying the provisions of section 39 of the Constitution. The Consumer Protection Act¹⁶² has been developed to bar reliance on an exclusionary clause in the contract, which has been signed without sufficient explanation of the presence and the effect of the clause.

It must be noted that the first two points listed above are irrelevant for practical purposes when interpreting exemption clauses.

2.4.2 *Unsigned Documents*

An unsigned document that embodies contractual terms cannot be primary evidence that a contractant has agreed to those terms.¹⁶³ Other evidence is required to prove the existence of the contract reflecting those terms. Typically of these scenarios are “ticket cases” used by railway companies, airline operators, bus companies, theatre owners, sports promoters, dry cleaners, repair people and many others. According to Christie and Bradfield “ticket cases” refers to all cases in which the supplier gives the customer a document which is not intended to be signed, but contains or refers to terms and conditions in which the supplier is prepared to do business upon regardless of the description.¹⁶⁴

If a thief steals the ticket from the recipient or an agent purchases a ticket airline for someone. Conversely, this principle of *caveat subscriptor* rule for unsigned documents is a rebuttable presumption, which falters at times under judicial scrutiny. Here, it is not easy to determine whether the party intended to be bound by the incorporation of the provisions. The practical question, however, is how the issuer of the ticket or receipt must prove the existence of the contract. The nature of the document remains material in deciding the applicable principles.

2.4.3 *Degree of notice*

Where there is an unexpected exemption clause the party with knowledge has to disclose it to the ignorant one for it to be incorporated into the contract. Drawing analogy from the case of

823 (W)832C/D-834C and *Paltex Dyehouse (Pty) Ltd and another v Union Spinning Mills (Pty) Ltd* 2000 (4) SA 837(BHC).

¹⁶¹ *George v Fairmead* 472A.

¹⁶² 68 of 2008. See section 49 of the Act and detailed discussion on the subject in Chapter 4 of this thesis.

¹⁶³ Van der Merwe et al 301.

¹⁶⁴ At 187.

*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*¹⁶⁵, the court held that where a condition in a contract was particularly onerous or unusual and would not be generally known to the other party, the party seeking to enforce that condition had to show that it had been fairly and reasonably brought to the other party's attention. Dillon LJ accentuated this position by citing Denning LJ obiter in *J Spurling Ltd v Bradshaw*¹⁶⁶:

“[s]ome clauses which I have seen would need to be printed in red ink on the face of the document with red hand pointing to it before notice could be held to be sufficient.”

Flowing from this argument, a ticket or receipt for money paid or voucher cannot *ipso facto* be regarded as a contractual document, but a post-contract proof, hence, no reasonable person could expect that it contain contractual terms. The supplier bears the onus of proof that the consumer received notice of the terms of the contract.

In *Primesite Outdoor Advertising (Pty) Ltd v Salviati and Santori (Pty) Ltd*¹⁶⁷, the court heard a matter on breach of cost and freight in a contract of carriage. The plaintiff alleged that the defendant released goods consisting of billboards to a consignee without the presentation of the bill of lading. The result was that the plaintiff never received payment for their services. The defendant relied on its quotation which contained printed terms and conditions. These terms were in fine print and did not clearly print when the document was faxed. Willis AJ held that the plaintiff could not be held liable because of terms and conditions of trading, which were not seen in the pre-printed quotation and for which no other copy was given.

Parties who propose exemption clauses are usually in strong bargaining positions and can indirectly use standard form contracts to surreptitiously impose extremely wide and unreasonable exclusion clauses, safe in the knowledge that the other party will not even read these clauses, let alone object to them. Exemption clauses are often in such small print, long and tedious that not even a conscientious lawyer reads them. This is customary, but typical of the insensitivity of the market and classical model of contract. The logical question to be asked is how far contracts have transformed from classical to modern if the classic model still prevails.

¹⁶⁵ [1988] 1 ALL ER 348.

¹⁶⁶ At 125; [1956] 1 WLR 466.

¹⁶⁷ 1999 (1) SA 868 (W).

It is assumed that the customer reads and understands the document and by his conduct in upholding the contract (for example by entering sports grounds, a cinema or boarding a train) he becomes bound to its terms. Consent is presumed not from the true form of the legal meaning of the word but based on quasi-mutual assent since the supplier is reasonably entitled to interpret this as a contract from the subjective conduct of the consumer. He or she cannot escape liability on the basis of the façade of the document from the very obligations emanating from the contract. Conversely, case law suggests that the consumer should be held liable if it can be proved that he or she actually read the document.¹⁶⁸ Here what is of essence is reading and comprehending the terms in the document. The consumer or contractant must understand the consequence that attaches to his contract undoubtedly.

Sometimes incorporation by reference does not cause the provisions to become part of a contract. This was confirmed by the judicial pronouncements in *Sanso Properties Joubert Street (Pty) Ltd v Kudsee*.¹⁶⁹ In *casu*, the lessor of certain premises claimed that a lease thereof contained a binding provision, which contained an escalation clause with reference to municipal rates and consumer price index. The court held that regarding all the cumulative circumstances, the lessor having omitted to send the standard lease form within a reasonable time could not now seek to interpret the interim agreement as incorporating by reference a clause in that form. The form contained an escalation clause, that but for such omission would have been a binding provision of the formal lease.

2.4.3.1 Steps to give notice

Conducting sufficient disclosure is a prerequisite to notify the consumer of the existence of an imposed term. The law recognizes that not every contractual document will be signed, therefore, allows terms to be incorporated by notice.¹⁷⁰ Essentially non-disclosure is similar to misrepresentation.¹⁷¹ A party may labour under a misapprehension for various reasons: (a) an incorrect statement has been made to him; or (b) relevant facts have been withheld from

¹⁶⁸ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A) 9911-992A per Scott JA; *Jacobs Imperial Group (Pty) Ltd* [2010]2 All SA 540 (SCA) 9.

¹⁶⁹ 1976 (4) SA 761.

¹⁷⁰ Simple put is showing the other party written set of terms, but not requiring him to sign them. Notice is bringing into attention of the existence of such terms not the cognitive contents of the exemption clause.

¹⁷¹ Kerr 266 recognises that the borderline between misrepresentation and non-disclosure is not clearly delineated.

him,¹⁷² or (c) there has been both an incorrect statement and withholding of relevant facts,¹⁷³ and (d) a statement correct in itself gives insufficient information and is misleading in the context. Sufficiency of the notice depends on the facts of each case. Nonetheless, certain general principles can be extracted from case law. King AJ in *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd*¹⁷⁴ summarised these principles as follows:

“It is so, as have said, that the nature of the document is relevant to the steps required of a party in order to bring the contractual provisions to the other party’s attention. The more contractually obscure or incidental the document, the less likely it is to expect it to contain contractual provisions and the more specific and positive must the steps be taken to bring this to the attention of the other party. Per contra in the case of carriage tickets and bills of lading, where long-established usage has created a situation where a contracting party, even an ordinary member of the public, will be taken to be aware of the existence of such provisions on the relevant document, or at least of a reference thereto, and to have knowledge thereof.”

2.4.3.2 Trade custom

All the principles considered above constitute some of the common law mechanisms to constrain the abuse of unequal bargaining power except the *contra proferentem* rule that will be discussed in chapter 3 of this thesis. The latter part of the judgment in the case mentioned above recognizes the custom and trade usages, which form part of the rules of construction. Courts at times have found it suitable that even where an unconscionable contract term is imposed, its oppressive impact can be blunted by the rules or principles of narrow interpretation.¹⁷⁵ The King’s Car Hire judgment is lauded as bringing our contract law into harmony with modern law.

¹⁷²*Dibley v Furter 1951 (4) SA 73 (C); and Mayes and another v Noordhof 1992 (4) SA 233 (C)*. In the latter case the defendant withheld information about the existence of a squatter camp next to the purchased property, which the court found in favour of the plaintiffs as constituting a fraudulent misrepresentation.

¹⁷³*Hulett & others v Hulett 1992 (4) SA 291 (A)*.

¹⁷⁴1982 (2) SA 565 (C) 569E-G. See also *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd 2002 (4) SA 408 (SCA) 410-411; D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd 2006 (3) SA 593 (SCA) para [14]-[19]*.

¹⁷⁵Aronstam 34.

2.4.3.3 Evidentiary burden of proof

It had been held that the supplier does not have to do extraordinary publicity if the document on its face presents an opportunity to bring its contents to the attention of a reasonable customer.¹⁷⁶ The interpretative development on notice is linked to the three major questions enunciated by the courts in assessing the binding nature of ticket clauses, articulated by the House of Lords in *Richardson Spence & Co v Rowntree*.¹⁷⁷

- (a) Did the plaintiff know there was writing or printing on the ticket?
- (b) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?
- (c) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?

The only problem with this kind of probing was that previously uncritical courts expected the first two questions to be answered in the affirmative, before asking the third. Therefore, it provided no redress for suppliers against neglectful consumers. It has been followed in a number of leading South African cases, although derived English rules and not Roman-Dutch law.¹⁷⁸ Schutz JA put the matter of probity more crisply on his *ratio decidendi* in *Cape Group (Pty) Ltd v Government of the United Kingdom*¹⁷⁹:

“The doctrine in the ‘ticket cases’ is designed to bind one who is indifferent to the extent of his commitment, not one who, although acting reasonably, is ignorant of what is sought to be imposed upon him.”

In the Cape Group’s case above, the respondent had contracted with the appellant for repairs and renovations to be done to the roof of its ambassador’s house. The applicant’s quotation was faxed to the respondent with a notice stating: “see terms and conditions overleaf”, but the back of the document was not also faxed. The applicant furthermore made no follow up to send it. During the course of the work, the roof caught fire, because of the appellant’s

¹⁷⁶ In *King’s Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N) 641 the court held that the defendant had done adequate means to notify the plaintiff that the contract was subject to the condition that the deposit of the car was at ‘owner’s risk’. The first factor was that above a ramp leading to the area where the car was left by the plaintiff there was displayed a notice to the effect that cars parked at owner’s risk. Secondly, in the verbal contract between the plaintiff and the parking attendant, a ticket was also issued containing similar information in print.

¹⁷⁷ [1894] AC 217.

¹⁷⁸ *Essa v Divaris* 1947 (1) SA 753 (AD); *King’s Car Hire*, to name but a few.

¹⁷⁹ 2003 (5) SA 180 (SCA) 188.

worker's negligence. Therefore, the respondent claimed damages resulting from the fire. The court dismissed the appeal on the basis that the non-attendant contractual terms had not been incorporated by quasi-mutual assent and did not form part of the contract. The reverse side of the fax could have been faxed or given prominence through the body of the contract, however, this was not done.

Probably, this decision indicates a positive development in our law, as previously the notice factor could become applicable even if the document never came into the hands of the customer. If sustained, this notion would have defeated the very purpose of incorporation by notice. It was an unconscionability perpetrated inadvertently. Following this, the case of *Slabbert, Verster & Malherbe (NoordVrystaat) (Edms) Bpk v Gellie Slaghuise (Edms) Bpk*¹⁸⁰ was wrongly decided and is parallel to the protection purposes as currently advanced. Clearly, the legal grounds of the contract served by notices are so tentative and fancy that a consumer can easily rebut them thus invalidating the contract. There are no cogent reasons to bind a contractant on an assumed assent.

In all sincerity, the law does not accept surprises to an innocent consumer presented by the intricacies of well-drafted exclusion clauses. Perhaps, this fact emphasizes the ascension of truly understanding the nature of interpretation.¹⁸¹ De Ville concedes that no understanding can take place without interpretation.¹⁸² In all these scenarios, the enduring argument that should withstand judicial scrutiny is that a consumer should not be bound by a provision, which he or she was not aware of or could not consent into consciously.

2.5 Public Policy

Contracts are defined within the realm of legality avoiding crevices of illegality. Agreements are described as illegal if they are contrary to good morals (*contra bonos mores* in the strict

¹⁸⁰ 1984 (1) SA 491 (O).

¹⁸¹ De Ville JR *Constitutional and Statutory Interpretation* (2000) 1.

¹⁸² Supra 3. As a rider, the author here by interpretation means both situations where we consciously reflect on the meaning of something and situations in which the meaning of something is interpreted or understood before reflection. See Feldman SM "The persistence of power and the struggle for dialogic standards in postmodern constitutional jurisprudence: Michelman, Habermas and Civic Republicanism" 1993 *Georgetown LJ* 2279. The contrary view is that understanding is at times possible without interpretation. Interpretation then is only necessary if the text in question is ambiguous or unclear; see Patterson D "The poverty of interpretive universalism: Towards the reconstruction of legal theory" 1993 *Texas LR* 1 54-55; de Waal and Erasmus "The constitutional jurisprudence of the South African courts on the application, interpretation and limitation of fundamental rights during the transition" 1996 *Stell LR* 180-181.

sense) or public interest or policy.¹⁸³ The *boni mores*, public interest and public policy provide the basis upon which a decision on the question of illegality is made in the law.¹⁸⁴ The notion that the legality of a contract is a requirement for enforcement of a contract expresses the interests or convictions of a society. Similarly, courts should be used to enforce agreements or contracts, which are not in conflict with the interests and convictions of a society.¹⁸⁵ Perhaps, this is the premise for unenforceability of agreements in conflict or incongruent with the Constitution. Thus, the parties' capacities to contract out of the *naturalia* of a contract are restricted by the tenets of public policy.¹⁸⁶

There has been a trend to interpret public policy in terms of the interest of society in general and the interest of the individual contractants. It seems sensible therefore to draw a distinction between public policy and public interest, the latter being the expression of the goals of a society on an abstract level whilst the former being the more concrete expression of the values and norms which are realized when the policy is implemented.¹⁸⁷ However, the distinction is not absolute because just as policy assists to determine and shape the interests which are regarded as worthy of recognition in the public will, the recognition of particular interests eventually influences and shapes policy. As such, it is justifiable to use the terms "public policy" and "public interest" interchangeable in the present case because of the theoretical nexus.¹⁸⁸

The issue of specific categorization between *boni mores* and public interest and public policy is insignificant for the practical purposes. However, it should be highlighted that agreements, which are to the detriment of the state and obstruct or defeat the administration of justice, which restrict someone's freedom to act or to be economically active, or which are contrary to constitutional values, or are unconscionable and manifestly unreasonable and unfair are said to be contrary to public policy and public interest.¹⁸⁹ In an article, Aquilus gives the following definition of a contract against public policy:

¹⁸³ Van Huyssteen et al *Contract General Principles* 5th ed. (2016) 188. See also *Absa Bank h/a Bankfin v Lou wen Andere* 1997 (3) SA 1085 (C) 1088; *De Jager en Andere v Absa Bank Bpk* 2001 (3) SA 537 (SCA) 543.

¹⁸⁴ Van Huyssteen et al 188.

¹⁸⁵ Van der Merwe et al 191.f

¹⁸⁶ *Rosenthal v Marks* 1944 TPD 172 at 180

¹⁸⁷ See Van Huyssteen et al 189 para 7.7. Cf for example, *Basson v Chilwan & Others* 1993 (3) SA 742 (A) 767C.

¹⁸⁸ See *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) 402H-J.

¹⁸⁹ Van Huyssteen et al 189.

“A contract against public policy is one stipulating a performance which is not per se illegal or immoral, but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interests of the community.”¹⁹⁰

As a matter-of-fact, on grounds of public policy clauses purporting to exclude liability for willful acts or omissions, whether in breach of a contract or delictual in nature are rendered ineffective. In addition to this, an exemption clause exempting a debtor from liability for fraud is against public policy and void.¹⁹¹

It should be clear that their ineffectiveness of exemption clauses are attacked on a number of fronts in the interpretation of the contract, as public policy does not preclude their operation *per se*. However, it should be pointed out that the precise nature and consequences of unconstitutionality of contracts have not been authoritatively decided in South African law except to argue that unenforceability¹⁹² is motivated by “strong public policy considerations” are involved¹⁹³ and invalidity.¹⁹⁴ Below one discusses the effect of the public under enforceability.¹⁹⁵

2.5.1 Certainty

Often difficulties regarding exemption clause emanate from the fact that the clause reflects conflict within itself because the language used is not clear. Vague language is a leading source of uncertainty in contracts. It is a general requirement for a contract that the agreement brings about certainty regarding its legal consequences and not leave a party in suspense or second-guessing its actual obligations.

Take for instance the clause in *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd*.¹⁹⁶ In this case, the depositor’s grain bags were stored for reward in the

¹⁹⁰ Aquilus 1941 SALJ 346.

¹⁹¹ *Wells v SA Alumenite Co* 1927 AD 72.

¹⁹² See Christie Contract 1st ed. (1981) 402 *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2005 (3) SA 205 (N) 208.

¹⁹³ See *Garden City Incorporated Association Not for Gain v Northpine Islamic Society* 1999 (2) SA 268 (C) 271.

¹⁹⁴ See *Coetzee v Comitis* 2001 (1) SA 1254 (C) 1273.

¹⁹⁵ See para 2.5.2

¹⁹⁶ 1978 (2) SA 794 at 800E. The clause reads thus “2 [I]n consideration of Messrs Fibre spinners and weavers arranging, and keeping in force, insurance as detailed I paragraph 3 hereunder, you are hereby absolved from all responsibility for loss or damage howsoever arising in respect of this Department’s stocks of raw jute and phormium and finished jute and phormium products whilst in the care of your company and in or upon any premises owned or used by your company and/or any of its associated or subsidiary companies, but 3 it shall

depositee's store. Thieves, one of which was the depositee's chief security, stole grain bags from the store. A contract between the parties, embodied in a letter from the depositor "absolved [the depositee] from all responsibility for loss of or damage howsoever arising in respect of the grain bags in consideration of [the depositee] from all responsibility for insuring in an all risks policy such grain bags. This clause tends to exclude liability for gross negligence, but there is the patent ambiguity in the wording. It was against public policy. To prevent these ambiguities clear words are needed. The court stated for liability of negligence the act must be a realistic possibility as opposed to a mere fanciful one the party can be held liable irrespective of negligence because the clause would be construed as not to cover liability for only negligence.

The special problems relating to negligence liability have been highlighted as follows:

"It may happen that, apart from the contract, [the person inserting the clause] may find himself in a situation where the law cast upon him not only a duty of care but also some form of strict liability. In such a case, unless the language of the contract manifestly covers both types of obligation he will be taken to have excluded only the latter."¹⁹⁷

The liability for negligence in delict is well illustrated by the case of *White v Warwick*.¹⁹⁸ For present purposes, the observation made by Lord Denning warrants attention that:

"[t]he liability for breach of contract is more strict than the liability for negligence. The owners may be liable in contract for supplying a defective machine, even though they were not negligent... In these circumstances, the exemption clause must, I think be construed as exempting the owners only from their liability in contract, and not from their liability in negligence.

Therefore, the reliance theory as explained above and adopted by the South African courts, as a supplementary basis for contractual liability means the legal consequences may be determined by the reasonable expectation of a party to a contract. Fault plays no role in contractual liability. Taking into account the effect of some contractual rules such as *caveat subscriptor* and the "ticket cases", it is apparent that courts are unwilling and incapable of relieving the parties from the consequences of their transactions designed by themselves.

be your company's responsibility to maintain with my Department's interest properly noted in the policies, insurance in the following forms..."

¹⁹⁷ See Cheshire, Fifoot & Furmston 157.

¹⁹⁸ [1953] 2 All ER 1021 at 1025.

Apart from the agreement of the parties and the reasonable reliance of one of them, the prevailing question is whether its consequences are enforceable. Answers can be found in the consideration of legal policy both as expressed by *naturalia* of the various specific contracts and from case law when interpreting contracts as subject to tacit terms based on an intention imputed to the parties.¹⁹⁹

2.5.2 Enforceability and the struggle for transition

The notion that legality is a requirement for constituting a contract and for rendering it enforceable expresses the interests or convictions of a society. Recognizing transactions between individuals and adhering to sanctity of contract constitutes *boni mores*. Societal institutions for enforcing agreements mostly uphold agreements, which are concomitant to the interests and convictions of that society. Public policy, thus represents the legal convictions of the community-those values held dear by society.

An agreement is illegal if “(i) the making of it, or (ii) the performance agreed upon or (iii) the ultimate purpose of both parties conflict with statutory law or common law, is contrary to public policy or is contra *boni mores*.”²⁰⁰ In most cases, a statute or common law may express in clear terms that certain agreements will be illegal. In practice, the courts have expressed cold animosity towards exclusion clauses for negligence and fraud.²⁰¹ Ringera J in the case of *Christ* recognises the problems with public policy for *All Nations v Apollo Insurance Co. Ltd*²⁰² stated:

“Public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years (Burrough J in *Richardson v Mellish* (1824) 2 Bing 252 quoted by L Bramwell in *Mogul Steamship Co v McGregor, Gow and Others*, L.T Rep. 6) used to say, it is an unruly horse and when you get astride of it you never know where it will carry you.”

An agreement is contrary to public policy if it is opposed to the interests of the state, or of justice, or of the public.²⁰³ Likewise, agreements, which are clearly inimical to the public

¹⁹⁹ Lubbe & Murray 425.

²⁰⁰ *Willie's Principles of South African Law* 760.

²⁰¹ Courts regard it as “inherently improbable that one party to a contract should intend to absolve the other party from the consequence of his own negligence”. See *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep 145 at 157.

²⁰² [2002] 2 EA 366 (CCK) 369.

²⁰³ *Edouard v Administrator, Natal* 1989 (2) SA 368 (D).

interest, whether they are contrary to law or morality, or counter social or economic expedience, will not be enforced.²⁰⁴ This is public policy's contribution to the development of common law in relation to the Constitution. It is argued that a contractual provision is not contrary to public policy merely because it offends one's individual sense of fairness or propriety; the harm to the public must be substantially incontestable.

It is the tendency of the proposed transaction, rather than its proved result, which determines whether it is contrary to public policy.²⁰⁵ Therefore, exemption clauses are not *per se* illegal, but their interpretation is scrutinized when they *prima facie* tend to: (a) defeat or obstruct the administration of justice or (b) interfere with the free exercise by persons of their rights. Exemption clauses tend to encroach on the validity of consumer's rights captured in the contract. Courts have to untie the Gordian knot, determine whether an agreement is contrary to public policy and whether it is valid or void. Public policy seems to be the litmus test for fairness in a contract.

Note that public policy is dynamic and varies with time, for instance, what is unacceptable in one generation may become acceptable in a later generation.²⁰⁶ Traditionally, principles such as public policy were vested in the sanctity of contract in the law of contract and were considered sacrosanct status. In a progressive manner, many of the older ideas of morality that are in disharmony with modern views and conditions are debunked. For instance, commentators argue strict enforcement of contracts in terms of the classical theory of contract allowed no room for judicial discretion.²⁰⁷

The symbolic values of the Constitution attempt to unravel the conundrum in contemporary society by providing the basic frame of reference.²⁰⁸ Hopkins lays the methodology adopted by the courts as follows: first, what the constitutional provision means and how broad its

²⁰⁴ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 782. In the latter case, Hoexter JA at 782I-783C said, "I proceed to consider whether the provisions of clause 7 are, in the language of the majority judgment in the Sasfin case (at8C-D). He went on to hastily add "... clearly inimical to the interest of the community, whether they are contrary to law or morality, or run counter to social or economic expedience..."

²⁰⁵ *Sasfin (Pty) Ltd v Beukes* 14; *Botha's case* 783; *Eastwood v Shepstone* 1902 TS 294 302. Hence, a provision, which merely is capable of implementation contrary to public policy, but has a neutral tenor, will be upheld. See also *Juglal & Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) para 12; *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) para 14.

²⁰⁶ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 891 and *AB Wall's Marriage Bureau v Pienaar* 1986 (2) SA 165 (T).

²⁰⁷ Vettori 93.

²⁰⁸ See Cameron J in *Brisley v Drotzky* 35D and *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) para 6-7.

sphere of influence is intended to be; secondly, whether enforcement of the contract would indeed amount to an infringement of the constitutional right; and, thirdly, whether, notwithstanding the infringement, there is nevertheless good reason for retaining the provision in the contract.²⁰⁹

The concepts of public policy and *bona fides* qualify as standards. As opposed to rules, they, therefore, do not have the same status in terms of applicability.²¹⁰ The two expressions are used interchangeably here. One should keep in mind that public policy is a question of fact, not law,²¹¹ and changes with “the general sense of justice of the community, the *boni mores* is manifested in public opinion.”²¹² Ideally, section 39(1) calls for the invocation of the *boni mores* or legal convictions of the community when interpreting the private law (contract law and delict).

The Constitutional Court in *Carmichele v Minister of Safety and Security*²¹³ expressed concerns about “over-hasty or unreflective importation into the field of contract law of the concept of *boni mores*” or “the legal convictions of the community”. This concept is “open to misinterpretation and misapplication” and could be alleviated by replacing it with “appropriate norms of the objective value system embodied in the Constitution”.

From case law, the following has transpired in relation to the application of the criterion of public policy:

“there must be borne in mind:(a) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man²¹⁴; and (b) that a court’s power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest.”²¹⁵

Without heeding to this admonishment, the court took an extreme view in *Afrox Healthcare v Strydom* and failed to apply its judicial discretion. This matter concerned a standard form

²⁰⁹ See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

²¹⁰ Vettori 93.

²¹¹ Van den Heever “Immorality and illegality in contract” 1941 (58) SALJ 337 346.

²¹² *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129(T) 1152H per Van Dijkhorst J, cited with approval in *Longman Distillers Ltd v Drop Inn Liquor Supermarkets (Pty) Ltd* 1990 2 SA 906 (A) 913G-H.

²¹³ See footnote 206 above.

²¹⁴ *Jajbay v Cassim* 1939 AD 544.

²¹⁵ *Botha’s* case repeating what is stated in *Sasfin’s* case.

contract exempting a hospital against its negligence in the performance of its obligations to patients. A consolation for this inimical judgment is the argument that this happened before the enactment of the Consumer Protection Act but reduced the constitutional values. The unequal bargaining power makes it easy for powerful private institutions like insurance companies to violate the fundamental human rights of one party.²¹⁶

As a result, this judgment stimulated a raging debate and opprobrium in legal and academic circles that the courts are still recovering from. Even though the Consumer Protection Act has in the meantime provided some relief in this regard, one should keep in mind that in contracts excluded from the scope of the Act, clauses are still interpreted according to our common and positive law. Brand JA quotes Smallberger JA in *Sasfin (Pty) Ltd v Beukes* before coming to a questionable conclusion:

“The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power... In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12... ‘the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds’... In grappling with this often difficult problem it must be borne on mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.”

It was stated it would be a failure to do justice if the exemption clause was upheld. This is a factor restricting the enforcement of freedom of contract. The judge found that the term of the contract was not contrary to public policy by attaching more weight to the principle of freedom of contract than the principle of equity. That is why earlier on one has argued that the freedom of contract principle contains contradictions, omissions and dichotomy. The court cites the incisive comments of Cameron JA in *Brisley v Drotzky*²¹⁷ that:

“Public policy...nullifies agreements offensive in themselves—a doctrine of considerable antiquity. In its modern guise ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines... The constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perspective

²¹⁶ See *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (2) BCLR 176 (SCA); 2001 (1) SA 853 (SCA), where the court held that constitutional rights (right to just administrative action) cannot be waived in a contract.

²¹⁷ At 133(B).

restraint...contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.”

Hopefully, judges in the future will be able to use their discretion imaginatively to create a body of precedent that will ensure fairness where there is an inherent imbalance of power between the parties. Noteworthy about this judgment is that it puts a patient’s life at the mercy of the hospital. It sought to obstruct the administration of justice in terms of section 34 of the Constitution by depriving a person of his right to seek redress in the courts of justice. Constitutionally, the right of access to court incorporated in the Bill of Rights normatively represent the values that society holds most dear. This is what constitutional supremacy is all about.²¹⁸

Hawthorne vigorously attacks this socialization of the law of contract to “socio-economic developments, for example, the concentration of power in business and industry, the increasing awareness of fundamental human rights and the expansion of the functions of state”.²¹⁹ Most of the inroads to standard form contracts lie at the fulcrum of unequal bargaining power and monopolistic tendencies of capital. To counter this it is necessary to argue on the proposition that the Bill of Rights represents the most reliable statement on public policy.

The reliability of the Constitution as a statement of public policy can and should be used by the courts in deciding on the applicability of a provision of the Bill of Rights under section 8(2) and developing the common law in order to give effect to a right in the Bill under section 8(3)(a). The application of the Bill of Rights to the common law represents a flexible continuum of exponential growth not necessarily polarizing the South African contract law. Advocates of this view acknowledge the overarching common law as the primary resource, which the Bill of Rights will have little practical effect in influencing extensively.

The common law, for instance, has developed a way of balancing competing rights through creative and abstract principles such as public policy and *boni mores*. Farlam J in *Ryland v Edros*²²⁰ showed remarkable judicial activism under the interim Constitution,²²¹ by developing the common law through the open norms of the Constitution. He held that

²¹⁸ Hopkins 23.

²¹⁹ 1992 SALJ 166.

²²⁰ 1997 (2) SA 690 (C); [1996] 4 All SA 557 (C); 1997 1 BCLR 77 (C).

²²¹ *Interim* Constitution of the Republic of South Africa Act 200 of 1993.

polygamous Muslim marriages, which all along had been held contrary to public policy, could no longer be held contrary to public policy. This case shows one of the advantages of applying public policy. The same approach application of public policy invalidated an exclusion clause in the *Durban Wonderland* case.

Thus, the sanctity of contract rule represents the pre-Constitutional era notion of public policy whilst the Bill of Rights ought to represent the post-Constitutional notion of public policy in the law of contract.²²² Under the Constitutional milieu, one is called to analyse the impact of exemption clauses within the matrix of indirect horizontal application of the Constitution to the classical law of contract.

The Bill of Rights being the guarantor to all South Africans that their fundamental rights will be protected against infringement imposed by the State and fellow contractants in exemption clauses triggers the horizontal application of the rights. Exemption clauses are not per se unlawful and unenforceable for being against public policy, but it is the circumstances in which they are invoked that muddy their purpose and probability of success in a contract. A landmark judgment in *Barkhuizen v Napier*²²³ is illustrative of the tension between contractual freedom and the Bill of Rights and the supposed influence of public policy in the indirect horizontal application.

The case concerns a short-term policy, concluded between the appellant (the insured) and Lloyds syndicate (the insurer) represented by the respondent. The insured suffered loss resulting from the crash of his motor vehicle. When the appellant instituted a claim against the respondent for the value of his car, the insurer repudiated the claim. The summons was met with a special plea alleging that the insurer had been released from liability because of a time-limitation clause in the policy. The question was whether the court could impugn the time-limitation clause. The insured conceded non-compliance with the clause but contended that the provision could not be enforced against him because it contravened the right of access to the courts afforded by the Constitution.²²⁴

²²² Hopkins 23.

²²³ 2007 (5) SA 323 (CC).

²²⁴ S 34 of the Constitution provides “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

No legislation applied to this situation, and the common law had to give effect to the contract. The law had to be developed in this instance to give effect to the Constitution in accordance with section 39(2).²²⁵ The court found that it could declare a contractual provision invalid if it contravened the Constitution on the basis that section 172(1) (a) obliged it to “declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its consistency”.

Ngcobo J writing for the majority rejected direct or vertical testing of the constitutionality of a contractual term against a provision in the Bill of Rights. He enunciates the law as follows:

“...What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable. In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, and at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.”²²⁶

Paradoxically, the judgment endorses two dichotomous principles, which are not mutual exclusive: freedom of contract and sanctity of contract. Furthermore, the court then reduced public policy to the question of whether the challenged term is fair and reasonable. The question of fairness and reasonableness is discussed in depth in Chapter 4 of this thesis. In addition, the court in obiter stated that public policy would preclude the enforcement of a contractual term if its enforcement would be unjust and fair,²²⁷ and that the hands of justice can never be tied under the constitutional order.²²⁸ All persons have a right to seek judicial redress.

²²⁵ “When interpreting any legislation and when developing the common law or customary law, every court or tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

²²⁶ Para [28]-[30].

²²⁷ Para [73]

²²⁸ Para [73].

Sutherland,²²⁹ mentions three grounds for this reasoning: (a) all law derives from the Constitution and is subject to constitutional control;²³⁰ (b) public policy is rooted in the Constitution, and therefore the Constitution should impact on contracts through public policy;²³¹ (c) the proposed approach would allow for a proper opportunity to balance the principle of freedom of contract against the values enshrined in the Constitution. Hopkins also holds a similar view that private law justice ought to be informed by the natural values enunciated in the bill of rights.²³²

Public policy has proven until now not to be an alternative to fairness and will remain so until its scope and content has accordingly been expanded. Its precise prescripts and how exactly they ought to be weighed in the balance in a given case are difficult for courts to grapple with.²³³ *The constitutional argument seems to be perched on expediency instead of real expansion and statutory prescripts advanced here are designed to deal with those particular situations or circumstances.*

Where there is clear text of the Constitution, it will easily assist the courts in determining public policy. Where, however, changes have to flow from the spirit, purport and objects of the Constitution, clarity is lacking. As per Cameron J in *Brisley v Drotzky* case:

“[p]ublic policy imports the notion of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair.

It is postulated that the manner of applying the Constitution depends on the nature of the constitutional right and the nature of the attack on existing contract law.²³⁴ For instance, the exemption clause in *Afrox* case offends against the principle of good faith as well as dignity of the patient.²³⁵ How far does an exemption clause go in diminishing the equality

²²⁹“Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC) Part 1” 2008 (3) *Stell LR* 390-414 394.

²³⁰*Afrox Healthcare Bpk v Strydom* para 27; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44; *S v Thebus* 2003 (6) SA 505 (CC) para 25; Woolman “Application” in Woolman, Roux & Bishop *Constitutional Law of South Africa* 2nd ed. (2006) 31-8, 31-49.

²³¹Para 27-30.

²³² *TSAR* (2003) 159.

²³³ Kohn ‘Escaping the “Shiffren shackle” through the application of public policy: an analysis of three recent cases shows Shiffren is not immutable after all’ 2014 *Speculum Juris* 75.

²³⁴Sutherland 404.

²³⁵ Naudé & Lubbe 2005 *SALJ* 457.

and dignity of the parties in a given case of contract? In *United Reformed Church, De Doorns v President of the Republic of South Africa & Others*²³⁶ Zondi J had this to say:

“...in determining the weight to be attached to the values of freedom and dignity and equality the extent to which the contract was freely and voluntarily concluded will be a vital factor...the role of the courts is not merely to enforce contracts but also *to ensure that a minimum degree of fairness which include consideration of the relative position of the contracting parties, is observed.*”²³⁷

Scholars should not make the mistake to treat the Constitution as the last word on public policy because it overlooks constituents of public policy like good faith and equity. Generally, adjudication based on the common law examines the role of good faith in advancing or promoting fairness and equity. As the role of good faith in advancing equity is highly contentious and topical it becomes necessary for practical purposes to examine it.

2.6 Good faith

South Africa’s legal system contains a blend of civil and common-law culture and doctrines that offer a curious context for the study of good faith.²³⁸ Its legal system contains a number of doctrinal resources that qualify contractual freedom-some designed to secure the reality of the parties’ agreement, others to protect the broader public interest. This generates a debate about the distinctive role of good faith in contract law.²³⁹ There has been considerable prevarication to give expression to the principle of good faith in South African courts.

In *South African Forestry Co Ltd v York Timbers Ltd*²⁴⁰ Brand JA said the following:

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

Obviously this approach is suitable for the fair operation of the contract, taking into account the doctrines, rules and remedies for breach of contract and in cases of performance and

²³⁶ 2013 BCLR 573 (WCC).

²³⁷ Paras [33]-[34] author’s own emphasis.

²³⁸ Brownsword R, Hird N.J and Howells GG (eds) *Good Faith in Contract: Concept and Context* (1999) 8.

²³⁹ Ibid.

²⁴⁰ 2005 (3) SA 323 (SCA) 340; also see *Meskin v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W). 802A; *VanAswegen v Volkskas Bpk* 1960 (3) SA 81 (T) 85A.

counter-performance or the concept of “conscionability”.²⁴¹ The principle of good faith is currently escalated to the economic landscape of consumer dealing with the Consumer Protection Act (CPA).²⁴² The application of constitutional values resulting in the acceptance of good faith as a requirement in contractual relations, as well as the developments in the context of illegality and public policy, may well advance the general acceptance on this principle.²⁴³

Generally, in contract, every party should show a minimum degree of respect for the interest of the other party, to the extent that he does not use the contract to protect his own interest unreasonably; good faith thus requires “ordinary business decency”.²⁴⁴ This view seems to be contrary to the power contestation in the field of contracting. More so is the undesirability of imposing exemption clauses in a consumer contract of individuals. Nevertheless, it is normal for good faith as a neutralizer for self-interest in contracting to be a cause of disagreement “between those who favour the law being informed by rugged individualistic ethic and those who prefer a more communitarian approach”.²⁴⁵

With the same token, a general duty to act in good faith can be imposed on all contractants, when performance is made and when rights under the contract are exercised.²⁴⁶ In the civil law countries, such a duty may be imposed by statute and developed by the courts, as the CPA directs. Even though the Australian law has not been chosen for comparative purposes due to the absence of a Constitution, a pragmatic approach such as that taken by Australia could be mentioned in passing. Although the requirement of good faith in contracts is diminished by their specific laws, a combination of elements in its jurisprudence such as unconscionability²⁴⁷ relating to unjust contracts²⁴⁸ has infused Australian contract law with

²⁴¹ Van der Merwe 317.

²⁴² 68 of 2008 s 48.

²⁴³ See *Uniting Reformed Church, De Doorns v President of the Republic of South Africa & Others* 2013 (5) SA 205 (WCC), where the court found that an inequality in bargaining power was a factor resulting in the contract being harmful to the public interest and thus unconstitutional and unenforceable.

²⁴⁴ See *Standard Bank of South Africa Ltd v Prinsloo (Prinsloo Intervening)* 2000 (3) SA 576 (C); and *ShopRite Checkers v Bumper Schwarmas CC* 2002 (6) SA 202 (C) 215. A similar viewpoint is expressed by Hutchinson that good faith is a “mediator”, connecting community standards of honesty, decency and fair dealing to a broader range of technical legal doctrines such as estoppels, waiver, equitable jurisdiction and the like.

²⁴⁵ Brownsword et al 8.

²⁴⁶ Van der Merwe 320.

²⁴⁷ See Trade Practices legislation and the landmark decision of Australian High Court in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

²⁴⁸ New South Wales Contracts Review Act 1980.

the principle of fair dealing. This equates to good faith in other legal systems and echoes the innovative terminology as introduced by the CPA.²⁴⁹

There is a difference between English law and some other common law systems, like the United States of America, which accepts the significant role of the adoption of good faith by the contracting parties in particular contexts, and the duty of good faith in the performance of contracts.²⁵⁰ The English law of contract does not recognise the general principle of good faith except in insurance law, which is beyond the scope of this thesis. Brownsword better sums up the reasons why one should refuse to recognize the validity of the doctrine of good faith²⁵¹ under these five negative themes:

- (a) it is objected that the doctrine of good faith by requiring the parties to take into account the legitimate interests or expectations of one another, cuts against the essentially individualistic ethics of English contract law;
- (b) it is said that good faith is a loose cannon in commercial contracts. Whilst everyone agrees that the doctrine of good faith represents some set of restrictions on the pursuit of self-interest, the objection is that it is not clear how far these restrictions go. In other words, good faith presupposes a set of moral standards against which contractors are to be measured or judged but is not clear whose (or which) morality this is. Without a clear moral reference point there is endless uncertainty about a number of critical questions²⁵²;
- (c) That a doctrine of good faith would call for difficult inquiries into contractor's state of mind. Often the literature on good faith emphasizes that the question of whether a contractor has acted in good faith hinges on

²⁴⁹ Brownsword et al 9.

²⁵⁰ Cartwright J *An Introduction to the English Law of Contract for the Civil Lawyer* (2007) 58 cites Farnsworth *EA Contracts* para 7.17 (implication of duty of good faith in performance); Uniform Commercial Code para 1-304.

²⁵¹ *Contract Law: Themes for the Twenty-First Century* 2nd ed. (2006) 114-120.

²⁵² For example, about whether good faith requires only a clear conscience (subjective good faith) or whether it imports a standard of fair dealing independent of personal conscience (objective good faith), whether good faith applies to all phases of contracting, including pre-contractual conduct; whether good faith only regulates conduct (namely, how the parties conduct themselves during the formation of a contract and subsequently how they purport to rely on the contractual terms for performance, termination, and enforcement) or also the content (substance) of contracts (in other words, whether good faith regulates matters of procedure and process or also matters of contractual substance); whether a requirement of good faith adds anything to the regulation of bad faith (that is, whether good faith simply comprises so many instances of bad faith); whether good faith imposes both negative and positive requirements (covering, say, non-exploitation, non-opportunism, non-shirking as well as positive co-operation, support, and assistance) and so on.

the contractor's reason for action. This should not be confused with matters of subjective honesty, but it does involve speculating about the contractor's reasons;

- (d) If good faith regulates matters of substance in a broad sense (including the remedial regime) (which it seems to do once we view it as a kind of an implied term for cooperation), then this impinges on the autonomy of the contracting parties. If we combine the thought that good faith imports an uncertain discretion with the thought that it restricts the autonomy of the parties there are cogent reasons to be sceptical about the wisdom of adopting such a doctrine; and
- (e) The general doctrine of good faith goes wrong in failing to recognize that contracting parties are not the same. It cannot apply the rule that one size fits all and if contract law is sensitive to context, it cannot be right to apply the doctrine of good faith irrespective of context.

In its rudimentary form, the South African legal system is portrayed as equitable,²⁵³ and contracts are repetitively called acts involving good faith - *judicia bona fidei*.²⁵⁴ Recently, Yacoob J in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*²⁵⁵ said, “a promise to negotiate in good faith occurs in a context of an arrangement which makes it clear that the promise is too illusory or too vague and uncertain to be enforceable is not enforceable”. Contrary to this, Christie²⁵⁶ argues, “the gap between law and justice is steadily closing as the Judges becomes more confident in applying the concepts of good faith and public policy”. At length, he pointed out that:

“There is every reason to hope that when the opportunity arises the Supreme Court of Appeal will apply Olivier JA's reasoning (*Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*)²⁵⁷, harnessed to the concept of public policy, in the context of the unfair enforcement of a contract. The foundation has long since been laid by

²⁵³ *Bank of Lisbon & South Africa Ltd v De Ornelas* 606 A; cf *First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council* 1995 (2) SA 853 B.

²⁵⁴ See *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 652; *Savage & Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) 198A; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 321; *Afrox Healthcare Bpk v Strydom* 4011-J; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) 469E-F.

²⁵⁵ 2012 (1) SA 256 (CC); see also *Coal Cliff Collieries (Pty) Ltd and Another v Sijehama (Pty) Ltd and Another* (1991) 24 NSWLR 1.

²⁵⁶ *The Law of Contract* 4th ed. preface

²⁵⁷ At 318H-326G.

the Appellate Division's recognition that in our law the concept of good faith is applicable to all contracts, and its acceptance of the principle that in deciding whether public policy forbids the enforcement of a contract the circumstances existing at the time of the enforcement is sought must be taken into account. Public policy is a question of fact not law and changes with 'the general sense of justice of the community, the *boni* mores, manifested in public opinion', public opinion being understood in the sense of seriously considered public opinion on the general sense of justice and good morals of the community. By limiting good faith in the enforcement of the contract to the requirement to show that degree of consideration to the legitimate interests of the other party that public policy demands, the Supreme Court of Appeal could tackle the unfair enforcement of contract with a flexible instrument free from rigidity inherent in an Act of Parliament."²⁵⁸

However, the English law from the late 1980s onwards beginning with the judgments of Mr. Justice Steyn in *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd*²⁵⁹ and of Sir Thomas Bingham in the *Interfoto Picture Library Ltd* case gave recognition to good faith. With added impetus from the EC Directives on Commercial Agents²⁶⁰ and on Unfair Terms in Consumer Contracts²⁶¹ and scholarly work the concept of good faith gained considerable ground. It is felt English lawyers accepted this idea of good faith begrudgingly.²⁶² In the same vein, the general law of contract in England had been slow to adjust into alignment with good practice in consumer and commercial contracting.²⁶³ Eventually, from the circumstances, the English law has adopted good faith as a requirement.

Different views expressed by various commentators would enlighten us on the critical role played by good faith in contract law. As alluded above, it does not perforce mean that contracts are just and fair because they accord with the existing rules and principles of the law, including the provisions of the Constitution more constraints should be at play to ensure

²⁵⁸ Christie 4th ed. 19-20.

²⁵⁹ [1987] 2 All ER 923; on appeal, see [1989] 2 All ER 952 (CA); [1990] 2 All ER 947 (HL).

²⁶⁰ Directive 86/653/EEC, implemented by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053). Regulations 3(1) and 4(1) lay down reciprocal duties on principal and agent to "act dutifully and in good faith" in relation to one another's interests.

²⁶¹ Directive 93/13/EEC, implemented by the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159). Article 3(1) of the Directive, implemented by Regulation 4(1), provides that a term is unfair if "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". For analysis of Article 3, see Brownsword, Howells & Wilhelmsson, "Between market and welfare: some reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts" in Willet C (ed) *Aspects of Fairness in Contract* (1996) 25; and for analysis of the Regulations, see Brownsword R and Howells GG "The implementation of the EC Directive on Unfair Terms in Consumer Contracts-some unresolved questions" (1995) *JBL* 243.

²⁶² Brownsword, Hird & Howells (eds) Chapter 14.

²⁶³ Brownsword R "The philosophy of welfarism and its emergence in the modern English law of contract" in Brownsword, Howells & Wilhelmsson (eds) *Welfarism in Contract Law* (1994) 21.

fairness.²⁶⁴ Hutchinson states that good faith functions not so much as an “excluder”, but as a “mediator”, connecting community standards of honesty, decency and fair dealing with a broad spectrum of technical legal doctrines such as estoppel, waiver, equitable construction and the like. The author also points out that good faith is a neutralizer in contracting between those who favour rugged individualistic ethic and those who prefer a communitarian approach (an approach that requires contractors to respect the legitimate interests of one another).²⁶⁵

Developed according to English influence and with ingrained judicial reluctance to create law,²⁶⁶ South African courts have manifestly overlooked the dynamic potential of good faith as a source of new *naturalia*. In few cases, the courts tried to rise to the challenge.²⁶⁷ It is startling that after democratization, the legal system embedded in constitutional values failed to give due recognition to the doctrine of good faith. Still, the stronger party is allowed to dictate the contents of the contract courts should use the omnipresent values of good faith to correct the ensuing imbalance.²⁶⁸ Matters of exemption clauses poke holes in the complex and uncertain scenario by elevating to another level the tug-of-war between the parties to give perceived socially acceptable interpretations and thus serve the purpose of good faith.

What stifles the development of good faith is that cases have been pleaded and decided on the assumption that the actual or presumed intention of the parties is the only basis for the implication of the terms yet there are other extra-curial matters that influence the outcome. The presumed view is attacked for creating uncertainty by entrusting the judges with too much discretion, therefore overriding the legislator on the *naturalia* of some contracts. Compounding the difficult task of interpretation is the courts’ reluctance to recognize good faith as a “free-floating” basis for judicial intervention and control in consensual contractual terms. As courts have pronounced, good faith is not an absolute concept, but a relative one to time, place and circumstances.

²⁶⁴ Van der Merwe *et al* 319.

²⁶⁵ Hutchinson D “Good faith in the South African law of contract” in Brownsword (ed) 213.

²⁶⁶ *Brisley v Drotzky; Afrox Healthcare Bpk v Strydom; Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman Olivier JA*, warning against static adherence to posited legal rules, allowed for the more general application of the “principle” of good faith to contracts and accepted that the principle enjoys a wide and undeniable role.

²⁶⁷ *Janse van Rensburg v Grieve Trust CC 2000 (1) SA 315 (C); Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman; Miller & another NNO v Dannecker 2001 (1) SA 928 (C).*

²⁶⁸ Brownsword *et al* 9.

To meet the contours of liability and for refining and adapting the law to meet the demands of changed circumstances, the existing *naturalia* may be modified, entirely new legal incidents identified, and the common law developed.²⁶⁹ In *Tucker's Land and Development Corporation (Pty) Ltd v Hovis Jansen J*, after sketching the role of bona fides in the Roman and Roman-Dutch law of contract, pointed out how in transactions based on good faith, the concept gave the courts “wide powers” of complementing or restricting the duties of parties and of implying terms. This was done in accordance with the requirements of justice, reasonableness and fairness.²⁷⁰ He held that courts, in principle, should have wide powers to read into contracts any term that justice required. This judgment makes a salutary reference to the indirect manner in which good faith is made to work in the law of contract.

Consequently, the courts have referred to good faith as an operative factor in respect of contracts in a clumsy way.²⁷¹ What precipitated this neglect is the court's slavish favour of certainty by considering nature, structure and content of concepts and rules that have crystallized.²⁷² Because of its seeming abstract values, courts prefer to use identifiable duties. It is gratifying that the courts in their functions and the legislature (in its development of the CPA) have recognized the development of contract law to express fairness in a contract, circumventing unconscionability terms although there has been actual consensus. Such inclusion-required elasticity in the development of the common law weighing competing interests to concretize the “objective normative value system” embodied in the Constitution.²⁷³

A final analysis of good faith, as a principle underlying the law of contract, shows that it has infused development of specific duties to protect consumers. Analysis show that the *raison d'être* for the voidability of a contract due to misrepresentation, duress and undue influence is not premised on whether the promisor has a will, but from the improper conduct of the promisee.²⁷⁴ Some recent cases create the distinct probability that good faith, with the concept of *ubuntu* will be accepted and applied directly as a principle of the law of contract

²⁶⁹ See *A Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A) 419G.

²⁷⁰ At 651E-F.

²⁷¹ *Schoeman v Constantia Insurance Co Ltd* 2003 (6) SA 313 (SCA).

²⁷² *Van der Merwe et al* 322.

²⁷³ *S v Thebus* 2003 (6) SA 505 (CC) 525B-E; *K v Minister of Safety & Security* 2005 (6) SA 419 (CC) 429-430.

²⁷⁴ See *Van der Merwe SJ & Van Huyssteen LF*, “Improperly obtained consensus” (1987) 50 *THRHR* 78.

and constitutional value, rather than being accepted as merely an underlying value with no direct practical implications.²⁷⁵

Despite the indirect horizontal application capable of subjugating freedom of contract and sanctity of contract to the values entrenched in the Constitution, under certain circumstance also the factors listed above relating to improperly obtained consensus, warrant a departure from the older strict legal consequences of a contract. The constitutional injunction warrants broadening of the scope when interpreting constitutional norms. Hence, it has been suggested the well-established doctrines were to be better understood if interpreted in the context of good faith: they are all instances of bad faith, which enforcement would be unjust in the promise to benefit.

Commentators point out that traditionally the law approached voidability based on misrepresentation and duress.²⁷⁶ This scene is aptly demonstrated in the context of non-disclosure, which falls under the category of misrepresentation. Essentially, our law still adheres to the principles that there is no general duty of disclosure among contractants of the facts and circumstances known to them, which might influence the decision of the other party to conclude the contract.²⁷⁷ Take for instance when a consumer takes his motor vehicle to a garage to be repaired. He is hardly told of any exemption clause or when a patient goes to see a doctor and he is just told to fill the consent form, not knowing that it contains exemption clause. Jansen JA, who buried the *exceptio doli generalis* in South Africa, pointed out in *Meskin* case how the law is resistant to allowing considerations of morality to intrude the field of commerce.²⁷⁸

For this reason, the anachronistic general rule on disclosure does not represent the modern position of the law. In light of the recent developments in contract law as infused by legislation, it becomes imperative to afford the abstract idea of good faith a base, as an

²⁷⁵ See *Potgieter & Another v Potgieter NO & Others* 2012 (1) SA 637 (SCA) para 32-34 to the effect that good faith as such does not provide an independent basis for striking down contractual terms or interfering in the enforcement of a contract. However, some recent cases indeed raise the probability that good faith can in certain instances be directly applied and developed as a principle and constitutional imperative. Cf also *Combined Developers v Arun Holdings & Others* 2015 (3) SA 215 (WCC).

²⁷⁶ For detailed analysis on improperly obtained consensus see Van der Merwe *et al* Chap 4.

²⁷⁷ See *Hoffman v Moni's Wineries Ltd* 1948 (2) SA 163 (C); *Speight v Glass* 1961 (1) SA 778 (D); *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) 433C; *Ozinsky NO v Lloyd* 1992 (3) SA 396 (C) 418F-G.

²⁷⁸ 807B.

independent general rule in South Africa. Imagine that if the courts moved along the line of good faith the *Afrox Healthcare Bpk* and *Brisley* cases would have been decided differently. These cases represent shortcoming or failure to address the harshness of sanctity of contracts because the common law is enduringly familiar with exclusion clauses and the interpretation of variation clauses. One may conclude that the influence of good faith in South Africa is a mixture of acknowledgment and denial-that is confusion.²⁷⁹

Some of these judgments represent the ability of courts to function within the classical contract theory, attempt to bring about equity. It is disturbing, however, that the legacy of Van den Heever JA (*Tjollo*) and Joubert JA (*Ornelas*) remain impervious towards reform despite the Constitutional impetus.²⁸⁰ Proponents of the good faith doctrine advance that its establishment goes beyond the remedies, but its potential lies in giving contracting parties greater security and greater flexibility about the feasibility of doing business.

Lastly, good faith may be considered as the underlying principle that is covering, unifying and filling the gaps in a range of specific doctrines designed to secure fair dealing.²⁸¹ It has a creative role that is used by judges to make innovative judgments capable of developing the common law in the constitutional era. Brownsword submits that in good faith finding its niche in law and the contractual environment becoming more congenial to trust and risk-taking, these reciprocal influences may precipitate more co-operative thinking in both legal doctrines and in contracting.

In the case of *Makate v Vodacom Ltd case*,²⁸² the applicant seeks to enforce an agreement to negotiate in good faith with him for the use of his idea on Vodacom “Call back services”. The parties had agreed to negotiate later for the compensation once the product was developed and tried for commercial sustainability and profitability. The court expounded on agreements to negotiate in good faith as a species of the *pacta de contrahendo* (agreements to agree). The court in obiter pointed out that the enforceability of an agreement to negotiate in good faith where there is a deadlock-breaking mechanism remains a grey area of our contract law. The

²⁷⁹ Hawthorne L “The end of bona fides” 2003 (2) *SA Merc LJ* 272.

²⁸⁰ Hawthorne 2004 (67) *THRHR* 302.

²⁸¹ Brownsword, Hird & Howells 31.

²⁸² Para [94].

court held that both parties must enter into negotiations with serious intent to reach consensus.²⁸³

This chapter exhaustively discusses the various theoretical alternatives of contractual liability and demonstrates that the final constitution of principles of liability is an interpretation of the law of contract, with descriptive and prescriptive elements.²⁸⁴ The core principles of contractual liability are a mixture extracted from the common law and civil law examples and presented in a composite theory of contract.²⁸⁵ It points out in depth the influence of English common law in the doctrines of contractual relations to the South African contract law.

This study tries to penetrate the interstices of inherent inviolable twin concepts of contractual principle: freedom of contract and sanctity of contract and recent court's interpretation of them of late informed by constitutional values. It is here where there is a struggle to embrace the transposition and synergy. What confuses people most is that contracts, which lie at the cogwheel of economic activities have some spurious terms, which renege on legitimate expectation. This is more predominant in issues concerning exemption clauses, which lies at the centre of this research. Any contradictions do not countenance the declared progressive and egalitarian ethos of constitutional dispensation in South African contract law infused with paternalism phenomenon of the 21st century.

From the early days of constitutional dispensation henceforth courts have manifested unconvincing reluctance to effectuate constitutional injunctions on the common law hence this contractual crossroad. Consequently, the problems of exemption clauses have been sustained over the years even with the changes. There was no iota of protection of consumers by the judiciary. This is critical for understanding the role of equity towards the modern contract.

This chapter also looked into the creative mechanism of interpretation derived from the common law and those derived from constitutional interest such as good faith, Ubuntu and public policy. Presumably, this chapter managed to point out the need for innovative interpretation, which juggles the transition from traditional classical contract to a modern

²⁸³ Para [102].

²⁸⁴ Pretorius C "The basis of contractual liability (1): Ideologies and approaches" 2005 (68) *THRHR* 254.

²⁸⁵ *Ibid.*

contract with Constitutional and statutory influences. The latter sphere of constitutional era introduces fairness and reasonableness of terms in the interpretation of public policy.

CHAPTER 3

EXPOSITION FROM CASE LAW

The emergence of consumerism in a contractual environment has made debilitating inroads to freedom of contract philosophy typical of classical contract.¹ Consequently, the traditional model of contract, as a means of exchange between business people underwent a paradigm-shift to accommodate the idea of exchange between a businessperson and a consumer in the modern contract regime. Balance in contractual relations had to be found for private parties through State's instruments to cushion ordinary consumers' from patent the inequality bargaining powers by providing protection against economic exploitation. This was done by promoting rights of this marginalized group in business power contestations.²

Traditionally, the paradigm of contracting presupposes *dealing* (manifesting the parties' free choice) as well as a *deal* (the product of that joint mutually enhancing creative process).³ Relations are built by commercial transactions where there is an exchange of goods or services. As a result, the conclusion of a contract creates an interrelationship or personal rights and obligations between the parties and imposes corresponding duties on one or more of the parties. Therefore, the primary rights and duties flowing from a contractual relationship are those attributable to that particular contract either expressly or tacitly agreed to by the parties as well as those, which are implied by law.⁴

This chapter aims to interrogate the issues of contractual relations and doctrinal matters raised concerning exemption clauses in case law. It analyses the core factors of interpretation of the doctrinal issues that are outlined in Chapter 2 and further explores the nature of standard form contracts interpretative practices. Apart from dealing with the proper categorization of exemption clauses, it investigates the purpose of exemption clauses. The theme of this chapter is to examine case law starting from the traditional common law classical contract and switches to modern contract hoisted by the constitutionalism banner.

¹ Koffman L & MacDonald E, *The Law of Contract* 6th ed. (2007) 5.

² A good example is the Unfair Contract Terms Act 1977, which went further in regulating and restricting the use of exclusion clauses than any previous control provided by the courts had gone. The public law regulation of consumer affairs through the imposition, inter alia, of fair trading standards also applies.

³ Gullifer L & Vogenauer S *English and European Perspectives on Contractual and Commercial Law* (2014) 107.

⁴ Hutchinson D & Du Bois F, *Wille's Principles of South African Law* 9th ed. (2007) 790.

This set the stage of the enquiry on whether there is a common denominator for convergence between the Constitution and the consumer legislation.

The above narrative is crucial for the understanding language as an interpretative source. Interpretation rules and canons of construction all serve the purpose of assisting courts to dissect and construe parties' intention (subjectively and objectively) and language used. This is manifestly immanent in this chapter, as a large portion of it is devoted to the primary rules of construction and the surrounding circumstances that help courts determine the parties' intentions. Even the parol evidence rule represents the common law evidentiary burdens to assist courts in interpretation. The importance of interpretation cannot be over-emphasized because it is the backbone of the search for equitable jurisprudence to deal with injustices.

The crux of the matter emanates from the uncontested use of words by the stronger party to achieve its interest in a contract.

“It is crudely supposed that words have a ‘true’, or ‘legal’ meaning described as ‘objective’, one that all persons of whatever race, origin, or education are bound to know, and in accordance with which the law requires them to perform and to accept performance....”⁵

In the latter part, it examines the interface between contract and delict. Although not clouding the issues of the thrust of this thesis it is intended to examine the impact of pre-contractual negotiations once an intention to contract has been made or when no disclosure is made for the enforcement of exemption clauses. It is quite evident that the South African law of delict finds application to behaviour during negotiations in particular circumstances.⁶ This will assist consumers who are uncertain on the type of action to institute for gross negligence on whether they should be considered on contract or delict.

Viewed objectively the formulation of exemption clause has insurance instinct flowing from its veins: service providers guarantee themselves protection against unforeseen circumstance that may occur in the range of business where they practice. As a matter-of-fact, these clauses are intended to shield them from claims in delict and contract. It is the tricky situation when there is gross negligence that the enquiry on the cause of action needs to be clarified.

⁵ *Saambou v Friedman* 1979 (3) SA 978 (A) 996E-F.

⁶ Van Huyssteen et al *Contract General Principles* 5thed (2016) 87.

Plaintiffs have sometimes erroneously brought their actions in delict rather than in contract because they lack clarity on the proper cause.

An obligation based on delict arises *ex lege* when a legal subject wrongfully and without adequate justification, intentionally or negligently, infringes a recognized interest of another to the detriment of that person.⁷ This is not cut clear in gross negligence where there is a contract binding a party to particular terms or legislation. Problems arise with exemption clauses because one party in the contract inserts terms that indemnify it against duties or liabilities, which would attach to it. Mostly, this is found in property and insurance contracts, as a protective measure by the exempted party against a consumer who ignorantly waives his or her rights.

Note that the right of an exempted party to enforce an unconscionable claim against a particular consumer where under special circumstances it would be inequitable dates back to Roman times and is embodied in the maxim *summum just ab aequitate dissidens just non est*.⁸ Thus, equity has often intervened to strike down unconscionable bargains. Thus to a certain extent, the problems associated with exclusion clauses have triggered the development of special rules for the protection of consumers against highly disproportionate contracts.⁹

This viewpoint is expressed by Jacobson lucid analysis on the abuse of this inequality that recognizes the need to protect the consumer party. He commented thus:

“The individual who enters into a ...contract carelessly and without reading it may be considered somehow foolish. However, he may be excused to a certain extent for accepting something which appears to be the normal and established practice. Furthermore, it is among the duties of the legislator in the modern world to protect people even against their own folly, not to permit exploitation, and to remove any manifest unfairness. The protection of consumers is gradually becoming a recognized feature in modern law and it inevitably involves limitations upon the doctrine of freedom of contract. It is all linked with a firm moral wish to do justice in so far as possible.”¹⁰

⁷ Lubbe & Murray 1.

⁸ See the *semble* in *Eerste Nasionale Bank van SA v Saayman NO 1997 (4) SA 302* for the minority judgment of Olivier JA 318G-332H.

⁹ Poole J *Textbook on Contract Law* 10th ed. (2010) 149.

¹⁰ Jacobson D “The Standard Contracts Law of Israel” (1968) 12 *Journal of Business Law* 325 326.

3.1 Nature of exemption clauses in standard form contracts

It has become a normal practice to include exemption clauses in standardized contracts. Brand JA best describes the dominance of this phenomenon in *Afrox Healthcare Bpk v Strydom*¹¹ that exemption clause in standard contracts is the rule rather than the exception. An exemption clause forms part of boilerplate clauses,¹² used for protection by one of the contracting parties. It is generally accepted that most exemption clauses found in standard form contracts are not freely negotiated, where the law must interfere.¹³

To mitigate the full rigours of exemption clauses one may, however, to some extent resort to divert from the normal canons of interpretation.¹⁴ This is because the ordinary canons and rules of construction have not been adequate in constraining the unfairness imported by exemption clauses.

Standard form contracts may be used to impose an exclusion or limitation of liability, which have not been negotiated, and the consumer whose contractual rights are diminished receives no reciprocal benefit. Inasmuch they serve a particular purpose the consumer could view their interpretation with suspicion. They enable contractants with superior bargaining power an excellent opportunity to exploit their weaker co-contractants. This is exemplified by the phrase in the clause that a party will carry “all responsibility for loss or damage howsoever arising”. In the *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd*,¹⁵ this wording was held to cover fraud and negligence. Instead of being expunged and declared invalid, courts cut down on them by restrictive interpretation.

Standard form contracts in consumer transactions like the one mentioned above are not presumed to be fair and reasonable. They are viewed as the flexing of muscles in the

¹¹ 2002 (6) SA 21 (SCA) 42.

¹² McKendrick 391 describes them as “standard terms often appended or incorporated into standard documentation sent out on behalf of the business whenever a transaction is concluded”. Christou R, *Boilerplate: Practical Clauses* 5thed. (2010)1 and 4-9 submits the term ‘boilerplate’ is most properly used in its widest sense to describe the clauses, “common to nearly all commercial contracts, which deal with the way in which the contract itself operates, as opposed to the rights of the parties under a particular transaction that they have agreed upon and embodied in the substantive clauses. Boilerplate clauses regulate, control, and in some cases modify, these substantive rights and their operation and enforcement. They are thus vital part of every contract, without which the substantive rights of the parties embodied in the agreement would have little meaning”.

¹³ Downes AT, *Textbook on Contract* 5th ed. (1999) 235.

¹⁴ Lubbe GF & Murray C, *Farlam & Hathaway Contract* 3rd ed. (1988) 428.

¹⁵ 1978 (2) SA 794 (A).

packaging of the one party with the superior bargaining position to the one with the lower bargaining position; hence described as “contract of adhesion”.¹⁶ The extent of standard form engenders the criticism levelled at them that their terms are abusive and oppressive against the weaker party. Control of them and their terms is desirable and may be achieved through statutory intervention or in terms of general principles those that relate to consensus, rescission, legality and interpretation.¹⁷

Typical of the institutions that abuse power, they subject the weak to the will of the strong. These enterprises are banks and insurances, weaker party is either forced to consent to the infringement of a fundamental right or elsewhere forced to waive a fundamental right altogether.¹⁸ Note in this contract matrix the waiver of a right conferred by the law does not require acceptance whereas a waiver conferred by the terms of the contract requires acceptance to be effective and should be regarded, as a donation.¹⁹ Consequently, to this, the law should be reluctant to impose affirmative duties on individuals unless they have been voluntarily consented to.

Lord Dunpark in *McCrone v Boots Farm Sales Ltd*²⁰ referred to a standard form contract as one where there are: “a number of fixed terms or conditions invariably incorporated in contracts of the kind in question.” In recent years, there has been an overwhelming increase in the global use of electronic commerce. In the UK, it generated more than 7 percent of national income, nearly as much as transactions in the financial services sector.²¹ In addition to the normal hard copy printed form, the following are also considered standard form contracts:

- “shrink-wrap” contracts (typically used in software contracts; they bind a party to terms contained therein even if these terms cannot be seen or agreed to until the product is bought and opened;

¹⁶ Koffman L & MacDonald E *The Law of Contract* (2007)163.

¹⁷ Van Huyssteen et al 305.

¹⁸ Hopkins in *TSAR* (2003) 158.

¹⁹ Christie RH & Bradfield G *The Law of Contract in South Africa* 6th ed.(2011) 453. See also Botha JA in *Traub v Barclays National Bank Ltd* 1983 (3) SA 619 (A) 634H:

“It is clear, in my opinion, that a creditor’s intention not to enforce a right has no legal effect unless and until there is some expression or manifestation of it which is communicated to the debtor or in some way brought to his knowledge.”

²⁰ 1981 SLT 105.

²¹ See Robinson J “UK’s Internet industry worth £100 billion: report”, *The Guardian* (London), 28 October 2010, available at www.theguardian.com/technology/2010/oct/28/net-worth-100bn-uk.

- “click wrap” (when parties are bound by clicking ‘I agree’ online; where reference may be made to dense text standard terms in a hyperlink, elsewhere on the site, offsite or even on a different website); and
- “browse wrap” (where the terms for use of a website or downloadable product are posted on the website, typically as a hyperlink at the bottom of the screen, and the site user is bound by simply using the product, such as by entering the website or downloading the software product).
- where contractual terms sent after a contract is concluded over the telephone (for example, in procuring insurance products);

Because one party is in a position of dictating terms, standard form contracts have caused significant interpretation problems in the law. It derogates the basic tenets of negotiating contract terms by the parties and introduces non-negotiated terms merely by incorporation. This detracts from the core of “bargain”, “negotiation” or “consent” in any meaningful sense. To put it bluntly, the non-negotiated paradigm is more akin to the imposition of the proffering party’s will than of a mutually agreed arrangement; hence, its description as “private legislation” and “contracts of adhesion”.²² Due to the bruising nature of exemption clauses and its effect on the weaker party courts are galvanized to attempt to avoid the negative consequences for the consumer of such clauses.

Gulliver and Vogenauer highlight the following difficulties in attempting to evade these consequences: (1) the complainant suffers from no mental incapacity or mistake, which are the recognized vitiating factors; (2) there is no opportunity and no unconscientious conduct by the proffering party in the recognized sense of misrepresentation, duress, undue influence, undue conduct; and (3) the concern with standard form contract pertains to the presence of terms that subvert the complainant’s reasonable expectation based on the price and main subject matter of the contract.²³

The third factor is paralyzing because it affects the other party’s liability for defects and breach. These terms deprive complainants of default rights, or render such rights and duties

²² Kessler F “Contracts of Adhesion: Some Thoughts about Freedom of Contract” (1943) 43 *Columbia Law Review* 629.

²³ Gullifer and Vogenauer 109.

subject to the other party's discretionary powers.²⁴ This situation has the potential to impoverish a hopeless consumer. Coupled with the inequality of bargaining power is the asymmetrical of knowledge²⁵ regarding the consumer's rights on the one hand and the characteristics and technical components of the goods or services on the other. Finally, the inequality of resources²⁶ between the two parties whether that pertains to consumer's liability in obtaining access to justice or in a supplier's ability to absorb the cost of a defective product is trouble imposed by exemption clauses.²⁷

Clearly, the non-negotiated paradigm generates different problems from those which were negotiated when contracting. Argumentatively, whatever protection against unfairness a process of negotiation might have, standard form contracting does not offer it.²⁸ Primarily, standard form contract promotes commercial interest and efficiency at the expense of consumer protection. Moreover, the consumer's predicament under the circumstances is often exacerbated by invisible fine print lurking in these contracts. Deprived of competitive market to compare consumers are reluctant to read them.²⁹

Thus, the question whether a contractual provision has operational content is fundamental to the question to the ambit of the obligations the parties undertake, which precedes the application of rules designed to establish the proper interpretation of their undertakings.³⁰ The well-known cases on sufficiency of notice are to be read in this context. At one level, they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other a notice and on the other, whether it would be reasonable (fair) in all the circumstances to hold a party bound by a particular condition of unusual and stringent nature.

In such circumstance [where one party was ignorant of its existence] the fairness of an exemption clause would be questioned more particularly where the contract is between a business and an individual consumer. To counter this problem the United Kingdom enacted

²⁴ Ibid.

²⁵ Howells GG & Weatherill S *Consumer Protection: Markets and the Law* 2nd ed. (2005) 6; Hadfield GK, Howse R & Trebilcock MJ "Information-based principles for rethinking consumer protection policy" (1998) 141.

²⁶ Caplovitz D "The poor pay more" (1977) 1 in Williams (ed) *Why the poor pay more*; Ramsay I *Consumer protection text and materials* (1989) 48 who elaborates on the concept of consumer detriment.

²⁷ Howells & Weatherill 6; Hadfield, Howse and Trebilcock 131 & 138 and Ramsay 33.

²⁸ Gullifer & Vogenauer 110.

²⁹ Lord Denning in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 169 (CA) remarks that 'no customer in a thousand ever read the conditions'; Lord Megaw anticipated the likely indignation of service providers if customers actually tried to read and understand the terms provided.

³⁰ Cameron JA in *Absa Bank Ltd v Swanepoel NO* 2004 (6) SA 178 (SCA) paras [6]-[7]

the Unfair Contract Terms Act 1977 (UCTA) and in South Africa thirty years later the Consumer Protection Act.³¹ It should be pointed out that the UCTA has been replaced by the Consumer Rights Act 2015.³² These are discussed below in Chapter 4, which deals with comparative analysis of legislation

3.1.1 Benefits of exemption clauses

On the other hand, it should not be always assumed that standard form contracts, with their exemption clauses, are always devices for the abuse of superior bargaining position. They have their advantages, for instance, speeding up the contracting process and reducing the costs of arriving at a concluded contract. Take the fact that most standard form contracts used in a particular trade, are arrived at by initial negotiations, on equal terms, between representatives of those using it on both sides (for example, both buyers and sellers of a particular commodity, or lessors and those to whom they lease a type of equipment.³³

This means that besides the drafting stage, the interpretative mechanisms provide a causal nexus between standard terms and exemption clauses, as elucidated above. Koffman and MacDonald expand the same view differently that whilst a set of terms ‘invariably’ incorporated into contracts of the appropriate type would clearly be standard terms, a set of terms may be ‘standard terms’ even though not used invariably. A conclusion on what constitutes standard terms should depend upon the pattern of dealing on the terms in question when the contract is of the type to which they are appropriate.

It is argued that their frequent use in a contract should be the determining factor for them to be regarded as that party’s standard terms, and the relevant party’s intention to use them should be factored in. Judge Stannard in *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd*³⁴ concludes that this is a matter of ‘*fact and degree*’ approach. In his *obiter dictum*, he says:

“...What are alleged to be standard terms may be used so infrequently in comparison with other terms that they cannot realistically be regarded as standard, or any particular occasion may be so added to or mutilated that they must be regarded as having lost their essential identity. What is required for terms to be

³¹ 68 of 2008.

³² In particular s 61 of the Consumer Rights Act 2015 spells out the scope and application of the Act.

³³ Koffman & MacDonald 164.

³⁴ (1991) 56 BLR 115 at 133.

standard is that they should be regarded as standard by the party which advances them as its standard terms and that it should habitually contract on those terms. If it contracts also on other terms, it must be determined in any given case, and as a matter of fact, whether this has occurred so frequently that the terms in question cannot be regarded as standard, and if on any occasion a party has substantially modified its prepared terms, it is a question of fact whether those terms have been so altered that they must be regarded as not having been employed on that occasion.”

On the converse of this relationship, exclusion clauses are usually, though not necessarily, contained in tacit standard form or so-called ticket contracts, for example, the exemption clauses found placed in walls and plaques in garages, hotels, malls and other public places. This kind of standard form is dictated by the party with superior bargaining power, either exercised alone or in conjunction with others providing similar goods or services. In essence, this can be used to demonstrate the problematic nature of exemption clauses and the onus of proof needed for them. The issue of pleadings for a claim to enforce such a clause is a vexed one.

It is quite curious that the courts on several occasions have held that such display is binding as to avoid liability by the exempted party.³⁵ A party who accepts a milder exemption clause unknowingly, in a ticket, or signed but the unread document, is advised against seeking protection from public policy rule, but to the defence that one could not reasonably expect to find such a clause in such a document.³⁶

It should be noted that the remedies for a breach of contract are aimed at performance or fulfilment of contractual obligations,³⁷ or at cancellation and withdrawal from a contract, or at damages for breach.³⁸ The odd juxtaposition of exemption clauses in the South African jurisprudence is evident and unsullied leaving most consumers befuddled as to the true position in recent years. The law is facing manifold hurdles to resolve in this respect despite tangible dynamism because the law seems to deny just claims or allows unjust claims.

³⁵ *Jacobs v Imperial Group (Pty) Ltd* [2010] 2 All SA 540 (SCA); *Klaasen v Blue Lagoon Hotel Conference Centre* [2014] ZAECGHC 117; [2015] 2 All SA 482 ECG.

³⁶ Bradfield GB & Christie RH *Christie's Law of Contract in South Africa* 7th ed.(2016) 218.

³⁷ This occurs through an order for specific performance; an interdict and the *exceptio non adimpleti contractus*. See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

³⁸ See Potgieter JM, Steynberg L and Floyd TB Visser & Potgieter *Law of Damages* 3rd ed. (2012) 351.

3.1.2 Implied terms or residual terms

Proper classification of exemption clauses straddles between these two possibilities. Note some terms may be included in contracts not because one of the party so wishes, but because it is decreed as an *ex lege* term of the contract. For an accurate exposition on this concept, a clear distinction is made between residual and implied terms of a contract. Generally, this distinction of terms does not derogate the necessity of consent and agreement in the standardized contract are and in the formation of contracts.³⁹ Furthermore, the lines in the classification of an exemption are blurred on whether a clause merely reflects implied terms of the specific type of contract, or whether it is a specific *incidental* or residual provision.⁴⁰

Kerr considers the ‘fuzziness’ of these clauses as pigeonholing and prefers to characterize them as residual provisions. The latter are terms, which the law provides and imposes in the absence of express or implied agreement of the parties.⁴¹ In the case of *Alfred McAlpine v Transvaal Provincial Administration*⁴² the court declared that implied terms must not conflict with the express provisions included by the parties since they do not originate from the contractual consensus, but are imposed by law.⁴³ Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* describes implied terms more as follows:

“In legal parlance the expression “implied terms” is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual *consensus*: it is imposed by the law from without. Indeed, terms are implied by the law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract.”

³⁹ Kerr AJ *The Principles of the Law of Contract* 6th ed. (2002) 8.

⁴⁰ There is no consensus among scholars for this nomenclature categorization although Kerr 370 ;(1972) 89 *SALJ* 19; and (1974) 91 *SALJ* 121opts to call them residual provision, while Cornelius S *Principles of the Interpretation of Contracts in South Africa* 2nd ed. (2007) 163 refers to them as dispositive implied terms whereas the rest still adhere to the traditional usage, for instance Christie, Van der Merwe etc. Also see the dissenting judgment of Corbett AJA in *Alfred Mc Alpine v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531. “Terrain” is used to explain where service providers conduct business without the need of the consumer’s signature as in other formalities of the contract.

⁴¹ Kerr 370.

⁴² 1974 (3) SA 506 (A) 531.

⁴³ Van der Merwe et al *Contract General Principles* 3rd ed.(2007) 278; Vorster JP *Implied Terms in the Law of England and South Africa* (1987) unpublished PhD thesis St John’s College Cambridge 15 cited by Cornelius 162.

The court identifies that these implied terms may derive from the common law, from trade usages or customs, or from statute. In this sense the judge perceives it to be that an ‘implied term’, in this context, is “a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is a *naturalia* of the contract in question.”

Christie and Bradfield criticize Corbett AJA’s observation of an “implied term” in this context that it is a misnomer and raises the vexed question of nomenclature. The above authors analyse the incorporation by the law of quasi-mutual assent or tacit terms. This overstretched incorporation of “an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties” requires a revisit of the appellation. Due to this, Kerr prefers to abandon the traditional labelling in favour of the term “residual provisions”.⁴⁴

The significance of this distinction is not merely an academic one. In fact, the appellation of ‘implied term’ as defined in Alfred McAlpine’s case is a standardized one, amounting to a rule of law, which the Court will apply unless validly excluded by the contract itself. The court emphasised that “[w]hile it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation.” The issue of implied terms in particular addresses the interpretation of exemption clauses, as it will be seen in the many cases discussed below.

Contrast this issue of residual terms with the *naturalia* of a contract. *Naturalia* are terms that apply generally to every contract of that particular class as identified by its *essentialia*. For example in a contract of sale of goods that contains the required essential elements to qualify as such a nominate contract, will contain the implied warranty against latent defects unless the parties expressly exclude it from their agreement by an incidental clause. More importantly, the *naturalia* help determine the rights and duties of the contracting parties and the effects and consequences of their contracts where they omit to do so.⁴⁵

The *naturalia* of a contract is an expression of legal policy that implies that it may develop over time in response to the demands of changed circumstances in society.⁴⁶ Therefore, before a court can imply a tacit term it must be satisfied that upon consideration in a

⁴⁴ Kerr AJ, (1972) 89 *SALJ* 19 and (1974) 91 *SALJ* 21.

⁴⁵ Van der Merwe 283.

⁴⁶ Lubbe & Murray 424.

reasonable and business-like manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication is necessary and that the parties intended to contract based on the suggested term.⁴⁷ Where the whole contract is implied, it is awkward to identify all the provisions as either implied or residual, a cause for concern for interpreting and identifying exclusion clauses. At least it is clear that the *ex-lege* provisions must be implied, otherwise, there would be no contract to which residual provision can be attached.⁴⁸

Our probing into exemption clauses aims to address the extent that these *naturalia* vitiate consensus in the law of contract. Deep affinity to *naturalia* derives from an economic point of view, that it reduces the cost of transactions by incorporating into contracts terms which the contractants do not need to negotiate themselves.⁴⁹ *Naturalia* attempt to serve the purpose of justice, by levelling the playing field where there is unequal bargaining power, and furthermore reflect the changing norms of public policy to which contracts must adhere.⁵⁰ Interpretation of contracts recognizes the effect of unequal bargaining power on the terms of agreements.

The case of *Cargo Africa CC v Gilbeys Distillers & Vintners (Pty) Ltd & Another*⁵¹ is illustrative of this analysis and application. In *casu* the question before the court was whether a loss arising from the interception of one of the respondent's vehicles by subterfuge without any violence, force, coercion or even threat of violence could be covered by use of the term 'hijacking' as used in the agreement between the parties. The court held that it appears that what the parties had in mind when the theft was excluded from the indemnity was petty pilfering of individual goods from the load. The theft indemnified was not the whole. The concept 'hijacking' could be wide enough to include theft of a load of goods in transit and the court held that the parties actually had this in mind. The court concluded that it would not have made any commercial sense to the parties that the indemnity would apply only when there was someone in attendance of the vehicle.

⁴⁷ *Alfred McAlpine* 533.

⁴⁸ *Kerr* 354.

⁴⁹ *Van Huyssteen et al* 276.

⁵⁰ See *Cornelius* 163; and *Van der Merwe* 283 in general on the *naturalia* of a contract.

⁵¹ 1998 (4) SA 355 (N).

In most cases, the exclusion clause may categorically state the exempted act or omission, but this does not derogate the power to imply other terms in express contracts.⁵² In *Consol Ltd v Twee Jonge Gezellen*⁵³, where the appellant sought to exclude warranties or guarantee of the quality of the product unless given in writing, Brand JA held that Consol's liability could not be excluded by a clause relating to implied warranties. Moreover, in terms of the supply agreement, the plaintiff was obliged to manufacture bottles according to plaintiff's standard manufacturing procedure and techniques using raw materials.

A term implied by law to a contract has the same effect as written terms and cannot be negated or varied by presenting parol evidence nor will it be excluded by a clause stating that the written contract constitutes the sole record of the agreement between the parties.⁵⁴ The basis for the implication of a term by law is envisioned on the desire to regulate certain types of contracts. It is done so that one party does not inveigle the other and adequate protection is given to both parties as in such contracts little time is spent on the detailed negotiation of the terms.⁵⁵ Thus, common contracts have taken on a standard content, by terms implied in law.

Salmond⁵⁶ then makes an advanced categorization of implied terms into two kinds. The first consists of those terms, which are read into the contract because of a general rule of law applicable to contracts of that class. The second consists of terms, which are read into the contract not by virtue of any such general rule, but by way of interpretation of the express terms of the individual contract. In respect of the latter, Salmond explains further that:

“[t]here will be read into every contract such implied terms as are derivable by necessary implication from the express terms of that contract, read in light of the subject-matter and purpose of the contract and the circumstances in which it is made. By necessary implication is meant such an implication is necessary to give efficacy to the contract by so supplementing express terms as to make it a workable and complete agreement in such a manner as the parties would presumably have themselves adopted had the question been brought to their minds and been made the subject of an express provision at the time when the contract was made. The law attributes to parties by this process of interpretation the intention which as reasonable men they must necessarily have formed and

⁵² For instance, a party may not exempt the other party for personal injury from negligence or death.

⁵³ [2004] 1 All SA 1 (SCA) 38

⁵⁴ *Stewart v Appleton Fund Managers* [2000] 3 All SA 545 (N) 549E; *Van Nieuwkerk v McCrae* 2007 (5) SA 21 (W) 28G-29A.

⁵⁵ Downes 224.

⁵⁶ Salmond *JWPrinciples of the Law of Contract* 2nd ed. (1945)37-38 cited by Cornelius 152.

expressed on the making of the contract if the matter had been called to their intention.”⁵⁷

For this cogent reason, Hoexter J in *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd*⁵⁸ laid out the ‘business efficacy test’ that entails an objective element. According to this, test ‘contracting parties should consciously have directed their minds to the incidental contingency which might later supervene, and the need to provide for it’. This test also imports the standard of a reasonable man. The contracting parties questioned by the officious bystander must be taken to be persons endowed with the degree of shrewdness, knowledge and prudence of persons ordinarily engaged in the conclusion of the relevant contract.

The question is whether it will give business efficacy to that specific contract or whether it will contravene express provisions made by the contracting parties. In the former, it may be imported when using the officious bystander test and custom and trade usage, however, in the latter it would not be incorporated. Some of the express terms may deliberately exclude the importing of tacit terms of a particular type despite the urge and need to do so by the law.⁵⁹ Eventually, this necessitates the restatement of the functionality of contract law as a mechanism to “reduce the complexity and hence the cost of transactions by supplying a set of normal terms that, in the absence of a law of contract, the parties would have to negotiate expressly.”⁶⁰

According to the article by Williams,⁶¹ which also assists in explaining the implied term principle in comparison to the English law, there are three kinds of unexpressed terms that may be found in a contract:

- (i) terms that the parties probably had in mind but did not trouble to express;
- (ii) terms that the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention; and

⁵⁷ Salmond 39-40.

⁵⁸ 1978 (4) SA 901 (N) 909.

⁵⁹ *Rouwkop Caterers (Pty) Ltd v Incorporated General Insurance Ltd* 1977 (3) SA 941 (C) 945G; *First National Bank of SA Ltd v Transvaal Rugby Union* 1997 (3) SA 851 (W) 864J-865A.

⁶⁰ Posner RA *Economic Analysis of Law* (1986) 69.

⁶¹ Williams G “Language and the Law” 61 *LQR* 7.

- (iii) terms that, whether or not the parties had them in mind or would have expressed them if they had foreseen the difficulty, are implied by a court because of that court's view of fairness or policy or in consequences of rules of law.

Commentators argue that implied terms occupy an intermediate position between terms implied by law and tacit terms. The above statement is manifest when taking a closer look at terms implied by trade usage.⁶² If both parties know the trade usage, then their knowledge will be one of surrounding circumstances indicating that the trade usage ought to be incorporated into their contract as a tacit term. However, if one party cannot prove that the other knew of the trade usage, it will nonetheless be incorporated as an implied term in the contract if it is so universal and notorious that the party's knowledge and intention to be bound by it can be presumed.⁶³

Residual rules may originate from any of the other rules of law namely⁶⁴ statute, precedent, custom or trade usage or they may be found in old authorities. The importance of trade usage is conspicuous in standard form contracts of a specific type. If within a trade or profession there is a uniform dominance of certain usage within that particular trade concerned, "long-established, notorious, reasonable and certain" without contradicting with positive law or with clear provisions of the contract,⁶⁵ then "that usage, when proved, must be considered as part of the agreement in contracts affected by it."⁶⁶

In *Barloworld Capital (Pty) Ltd v Napier*,⁶⁷ an insured refused to enter into a tripartite agreement with the owner of the property insured. The proof of a trade usage that insurers will pay owners directly in certain circumstances gave the owner no right to claim payment. The usage could not operate except in a contractual setting. In order to decide whether a tacit term is to be imported into the contract one must first examine the express terms of the

⁶² Christie & Bradfield 190. Tacit terms are terms, which are derived from the actual unexpressed intention of the parties. See the *obiter dictum* of Brand JA in *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494 (SCA).

⁶³ See in this regard specifically *Tolgas Southern Africa v Solgas (Pty) Ltd* 2009 (4) SA 37 (W) [32].

⁶⁴ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 531G-H.

⁶⁵ *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 (2) SA 642 (C) 645H per Corbett J. See also Kerr AJ "Trade Usage and Customs" (1970) 87 SALJ 403.

⁶⁶ See Hosten WJ & Schoeman E "Custom and Usage" (1994) *LAWSA Reissue* (5)2 paras 378-380.

⁶⁷ 2005 (1) SA 57 (W).

contract. Rumpff JA in *Pan American World Airways Inc v SA Fire and Insurance Co Ltd*⁶⁸ enunciates the law thus:

“When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term.”

In South African law, this need is satisfied by the so-called *naturalia* of the various specific contracts, that is supplementary rights and duties, which are imported by operation of law into an agreement upon its conclusion, at least in the absence of clauses excluding them.⁶⁹ The *naturalia* of the various specific contracts in South Africa are mostly based on romantic notions of reasonableness and fairness and such they constitute an objective determinant of the contractual content based on consideration of public policy and the dictates of good faith.⁷⁰ These factors play a critical role in contractual interpretation and consequences of the contractual performances due.

In *Van der Westhuizen v Arnold*⁷¹ in a case of a car sale Marais JA held the words ‘no warranty whatsoever has been or is given to me by the seller or his agent(s)’ were of the widest connotation, but of critical importance were the words ‘has been or is given to me by the seller or his agent(s)’. Their ordinary meaning was that the appellant (or his agent(s)) neither gave nor had given in any guarantees or warranties. They were certainly apt to have excluded all expressly given warranties whatever their content. Although the word ‘whatsoever’ would have covered both expressly given and tacitly given warranties, a warranty which arose *ex-lege* and owed nothing to the consensus of the parties. It was not a warranty, which was given (either expressly or tacitly) by the seller or his agent(s). It was held the chosen words were not apt to exclude such a warranty unless expressed in plainer language.

An analysis of this exemption clause indirectly shows an erosion of the implied terms of the contract bargained under the thrust of freedom of contract. An exemption clause is sometimes used in defence for non-performance or gross negligence, but its inconvenience is

⁶⁸ 1965 (3) SA 150 (A) 175C.

⁶⁹ See *Falch v Wessels* 1983(4) SA 172 (T), *A Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A), *Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphics Supplies (Pty) Ltd* 1983 (1) SA 295 (A) and *Louis Botha Motors v James & Slabbert Motors (Pty) Ltd* 1983 (3) SA 793 (A) on natural incidents of the contract of sale.

⁷⁰ Lubbe & Murray 423.

⁷¹ 2002 (6) SA 453 (SCA) para [43]; also 470A/B-D/E.

precipitated by the omission by one of the parties to read the term or by a lack of understanding. There is sufficient literature to demonstrate the above narrative showing that an adhering party would be “rationally ignorant” of such terms.⁷²

Typically, a passenger would receive a flight ticket stating the terms on which the airways are prepared to carry or take charge of his luggage without reading the conditions. Moreover, the traditional approach in adjudicating the validity of exclusionary clauses is executed against the backdrop of the common law of contract.⁷³ Even if he attempts to read them, his comprehension and assessment of them would be hampered by lack of legal and financial literacy at most times.

3.2 Case law

Compare and contrast the cases of *Jacobs and Klaasen* with *Faceira v Kempster Sedgwick*.⁷⁴ In *casu*, a car dealership was held liable for the hijacking of a vehicle returned for repairs of its air-conditioner despite the existence of exemption clauses against such loss published in various notices.⁷⁵ The vehicle was hijacked near the workshop whilst driven by one of the defendant’s drivers. There were disclaimer notices displayed around the dealership and a job card that a customer signed for repairs that also contained an indemnity clause exempting the defendant.⁷⁶ The court held that the delivery of the hijacked vehicle to the defendant for repairs of its air conditioner is analogous to the return of goods to a contractor for remedying a defect. Therefore, the acceptance of the hijacked vehicle by the defendant amounted to a contract of bailment. The plaintiff was not aware of incorporation of a term and conclusion of

⁷² Eisenberg MA “The Limits of Cognition and the Limits of Contract” (1995) 47 *Stanford LR* 211, 241 and 243; Alces P “Guerilla Terms” (2007) 56 *Emory Law Journal* 1529-30. ([T]he “search” cost of discovering the higher price and greater risk is too great given the benefit the buyer imagines she would derive from discovering the cost’) Bebchuk L & Posner R “One-sided contracts in competitive consumer markets” (2006) 104 *Michigan Law Review* 832 (arguing the cost imposed on consumers in gaining information may exceed the benefit, resulting in consumers’ rational ignorance).

⁷³ Lerm H “Exclusionary clauses in medical contracts revisited” an unpublished LLD thesis *submitted* to the University of Pretoria in 2008 49. Available on upetd.up.ac.za and accessed on the 18/10/2013.

⁷⁴ [2011] ZAGPPHC 4.

⁷⁵ The disclaimer notice read thus: “Please note that we are not liable in any way for loss, damage, theft or hijacking of vehicle or contents while vehicle are in our possession”.

⁷⁶ The conditions overleaf begin with the words: The following conditions apply to this dealing and a/l future dealings with Kempster Sedgwick (Pty) Ltd. (I) All vehicles are driven at licensed Owner’s Risk and Kempster Sedgwick (Pty) Ltd, is not responsible for any loss or damage, special, consequential or otherwise arising from any cause whatsoever in respect of any customer’s vehicle or goods taken in by it for reward or otherwise, and whether for storage, service, or repair, or any other purpose, whether or not such loss or damage occurs while the vehicle or goods are in the premises of or under its control at the time of the loss or damage, or due to its negligence or fault whatsoever.

a contract when she signed the job card of the defendant. It was held the disclaimer clause did not form part of the contractual arrangement for the repairs. Furthermore, it was held that to bind the plaintiff to the provisions of the disclaimer notices it would have been necessary to alert the plaintiff's agent about the disclaimer notices before the contract relating to the repair of the air conditioner was concluded. Moreover, there was nothing in the sale agreement to warn the new car buyer that the defendant invariably did business on the basis of these disclaimer clauses. Therefore, the defendant was liable to the owner of the vehicle for the reasons outlined above defeating the basis of the exemption clause.

Negligent conduct by the exempted party should not be interpreted favourably against the other party in the circumstance of unequal bargaining power if it amounts to unfairness. Thus Kessler⁷⁷ stated in his article on adhesion contracts that "in dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterprise's calling', and to what extent the stronger party disappointed reasonable expectations based on the typical life situation." A more reasonable approach is enunciated by Lord Birmingham in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*,⁷⁸ that:

"The courts should not ordinarily infer that a contracting party has given up rights which the law confers upon him to an extent greater than the contract terms indicate he has chosen to do; and if the contract terms can take legal and practical effect without denying him the rights he would ordinarily enjoy if the other party is negligent, they will be read as not denying him those rights unless they are so expressed as to make clear that they do."

3.2.1 Common law interpretative mechanisms

The different legal systems indicate that even before the enactment of legislation to control and regulate exclusion clauses, the common law grappled to develop doctrines of construction for equal and appropriate resolution of disputes in commercial or consumer transactions. Commentators argue that the very fact that an exclusion clause limits or ousts common-law rights should alert the courts to be careful when construing them, especially those of general application.⁷⁹ The reforms introduced by legislation from across the globe to

⁷⁷ Kessler 637.

⁷⁸ [2003] UKHL 6, [2003] 2 Lloyd's Rep 61 at [11], [61]-[63], [95] and [116]

⁷⁹ Harms LTC *Amler's Precedent of Pleadings* 7th ed. (2009) 112.

increase consumer protection are measures actuated by this failure of the common law. The complex account that follows from case law demonstrates this.

This is exemplified by the pronouncement of Coetzee J in *Western Bank Ltd v Sparta Construction Co*⁸⁰ who remarks:

“It is undesirable that this form of [contracting] should be developed without adequate safeguards in law to protect those members of the public who are in need of this type of finance. They should not find themselves in a position where they have to rely on honesty and sense of fair dealing of the financier. One can point to a number of undesirable features of these...agreements. If a [person] could read and understand them, he might very well not find the agreement, as a whole, acceptable to him/[her]. The time has arrived when a proper investigation into this form of [contracting] should be made and if found desirable and feasible, legal provisions which are fair to both parties should then be enacted to regulate their relationship.”

Exemption clauses were borne from the conception of a classical liberal laissez-faire and sanctity of contracts. In South Africa, their interpretation was within the traditional common law with major advances made by the Constitution, which courts have been sluggish to embrace in contract law. The continued investigation of exemption clauses is triggered by their incessant misapplication.⁸¹ In essence, when courts are seized with the enforceability of exemption clause, they look at consensus between the parties, public policy, interpretation of contracts and legislation.⁸²

See the insightful views of Naudé on the characteristics of the classical theory in South African law, with a particular emphasis on the freedom of contract.⁸³ This doctrine is in its nature individualistic, self-reliant, and necessary for personal liberty and freedom of contract.⁸⁴ Resultant to this is that courts honour the *pacta sunt servanda* principle. The premise of the form of a contract is a result of an interaction between logic and legal policy, dating back to Roman law.⁸⁵ The outcome of this development was the acceptance of the

⁸⁰ [1975] 1 All SA 224; 1975 (1) SA 839 (W) 840.

⁸¹ Stoop “The current status of enforceability of contractual exemption clause” (2008) 20 *THRHR* 496.

⁸² Stoop 497.

⁸³ Naudé T “Exemption clauses-A rethink occasioned by *Afrox Healthcare Bpk v Strydom*” (2005) *SALJ* 447.

⁸⁴ On the sanctity of contracts see Cockrell A “Substance and form in the South African Law of Contract” (1992) 109 *SALJ* 40 41 and 61.

⁸⁵ See in general Zimmermann R *The Law of Obligations* (1990); *Conradie v Rossouw* 1919 AD 279. For recent discussion of the issues involved here see Hogg & Lubbe in Zimmermann R, Visser D & Reid K (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 34.

maxim *pacta sunt servanda*, as one of the guiding principles of the law of contract, particularly in view of the reception of Roman law into the systems of law, which obtained in Western Europe.⁸⁶

Repetitively and contrary to consumers' expectations South African courts undisputedly have maintained the classical and capitalist form of contracting in substance. This encourages self-reliance, independence, individualistic, rigid, consent-based liability and certainty, whereas, the modern law of contract entails co-operative ideology and paternalism. It is worth noting that the imposition of the Thomistic scheme of a standard of commutative justice embodies the ethical view of the parties' contractual purpose and teleological interpretation of contracts.⁸⁷

There are two or three landmark cases, which have impugned the climate of South African contract law, and, most of them had not been favourable for consumers' rights and welfarist form of contracting.⁸⁸ There is a slow negative development of common law because practitioners too are still steeped in the conservative positivism rather than innovative legal reasoning and rules particularly within the sphere of the common law.⁸⁹ For instance, the court in *Brisley v Drotzky*,⁹⁰ felt that good faith is not a self-standing norm, but a factor to be considered when assessing reasonableness and fairness of the terms of the contract.

As a counter balance, paternalism has recently emerged that aims to protect the weaker party *vis-a-vis* freedom of contract. An intervention by the courts where the agreement seems to be unreasonable would be paternalistic and inconsistent with the parties' intentions and invariable contradictory.⁹¹ This study tries to penetrate the interstices of inherent inviolable twin concepts of contractual principle: freedom of contract and sanctity of contract and recent court's interpretation of them of late informed by constitutional values.

⁸⁶ Cf Visser 1984 *SALJ* 641 for a general discussion of the origin and meaning of the phrase *pacta sunt servanda*.

⁸⁷ Naudé 451.

⁸⁸ *Brisley v Drotzky*; *Afrox Healthcare Bpk v Strydom* 2002(6) SA 21 (SCA) and *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

⁸⁹ Moseneke "Transformative adjudication in post-apartheid South Africa—Taking stock after a decade" (2007) *Speculum Juris* 13.

⁹⁰ 2002 (4) SA 1 (SCA).

⁹¹ Stoop 507.

An exclusion clause can also be under attack if it infringes upon the essence of a contract by undermining the basic relationship of reciprocity of some obligation envisaged by the parties.⁹² Based on the earlier decision of *Sasfin (Pty) Ltd v Beukes*,⁹³ which recognizes that in South Africa the only limiting factor for exclusion clauses under common law is public policy should be regarded as legally problematic. Public policy is subjective, mercurial and uncertain hence sometimes described, as an unruly horse. Mason J in *Morrison v Angelo Deep Gold Mines Ltd*⁹⁴ emphasized this point thus:

“...It is a wide-reading and not well-defined principle, and the courts always recognize the difficulties and dangers of the doctrine. For this argument to succeed on the ground of public policy it must be shown that the arrangement necessarily contravenes or tends to induce contravention of some fundamental principles of justice or a general statutory law, or that it is necessarily to the prejudice of the interest of the public.)

The fact that an exemption clause may sometimes run counter to public policy was addressed in the case of *Johannesburg Country Club v Stott & another*⁹⁵. In its ratio, the Supreme Court of Appeal mentioned statutory provisions in England, Wales and Northern Ireland, which declared exemption clauses such as those found in the *Afrox* case to be unlawful.⁹⁶ Yet the court held that the clause remained enforceable in South African law. Thus, Naudé goes on to question the validity of continued retention of the substantive limitation on the principle of contractual freedom in contrast to the perceived anachronistic and incompatible classical model of contracting.⁹⁷

3.2.2 Constitutional transition

As described above, South African jurisprudence has competing contractual principles with no hierarchy and canons of construction, therefore, the need to break the mould and find harmony between the constitutional imperatives becomes a pressing invitation for judicious resolve to interpretation. These circumstances warrant a harmonious relationship between the development of contract jurisprudence. Courts must be aware that the weighing of conflicting

⁹² *Afrox Healthcare and Brisley* cases.

⁹³ 1989 (1) SA 1 (A).

⁹⁴ 1905 TS 784-85.

⁹⁵ 2004 (5) SA 511 (SCA).

⁹⁶ Unfair Contract Terms Act of 1977.

⁹⁷ Naudé 447.

claims of competing interests represents the high water mark of judicial power in the policymaking sphere.

Note that a judgment is an outcome of an intricate evaluation of the total legal material presented by the parties and it is trite that courts do not make cases for the parties, but adjudicate disputes brought by them. Although not expressly admitted the judiciary's adjudication of exclusion clauses remains uncertain and a theme for debate. This hurdle would be surmounted if practitioners and stakeholders were able to navigate skilful between the precepts of construction and securing a model jurisprudence encapsulating the values of the Constitution.

Commentators question the rationale on why the forefathers of the Constitution chose not to entrench freedom of contract as a fundamental right in the Bill of Rights, even though its importance as a constitutional value appears to have been recognized on occasion.⁹⁸ It is argued that contractual autonomy is the means in which a person engages in economic life. The interstitial adoption of contract law viz-a-vis its importance is surprising because it appears that the common law at first glance has significantly isolated the constitutional project to the higher courts through.

Argumentatively, the courts' decision regarding exemption clauses demonstrates jurisprudential inconsistency, which can never be explained within the present constitutional dispensation of contracting. The backlash rumblings are triggered by the cases of *Afrox Healthcare Bpk v Strydom*⁹⁹ and *Lopez v Mercurius Motors*.¹⁰⁰ In the former case, the Supreme Court of Appeal failed to protect the rights of the consumer against an unreasonable exemption clause in a standard contract in favour of the hospital. However, in the latter case, the same court held that an exemption clause that undermines the *naturalia* of a contract and

⁹⁸ Louw A "Yet another call for a greater role for good faith in the South African law of contract: can we banish the law of the jungle, while avoiding the elephant in the room" 2013 (16) *SPELJ* 48. See also Malan AJA in *Reddy v Siemens* 2006 (SCA)164; [2006] ZASCA 135; 2007 (2) SA 486 (SCA) para [15] and Rautenbach "Constitution and contract-exploring the possibility that certain rights may apply directly to contractual terms or the common law that underlies them" 2009 *TSAR* 624-631.

⁹⁹ 2002 (6) SA 21 (SCA).

¹⁰⁰ 2008 (3) SA 572 (SCA).

hidden should be clearly and pertinently brought to the attention of a consumer who signs a standard contract.¹⁰¹

The constitutional mantras of freedom, equality and human dignity find expression in the Bill of Rights, as the radar for South African policies and values in the current dispensation. It must inform the judicial interpretation of the private law. The Bill of Rights encourages economic activity and prosperity of the populace: through affirmative action and economic empowerment programmes.

Writing in the context of transformative constitutionalism¹⁰² Moseneke said:

“To achieve this broader purpose, the Constitution lays down fundamental norms. Foremost of these is that the Constitution itself oust rule by a sovereign parliament and declares itself as supreme law; it commands that any law inconsistent with it is invalid and that the obligation imposed by the Constitution must be fulfilled. Equally important is that the Constitution spells out its specific normative value system or the juridical ideology. In this way, it displaces subjective ethical or intellectual preferences with a transparent and justiciable set of values”.¹⁰³

Particularly, the interpretation of contracts in South Africa is now within the constitutional spectrum.¹⁰⁴ In the same vein, the judge goes on to accentuate the significance of the Bill of Rights:

“In order to buttress its transformative project, the Constitution does not leave the fundamental rights it seeks to entrench to chance. It prescribes, in remarkable detail, a Bill of Rights that it describes as a cornerstone of our democracy. It is said to affirm the democratic values of human equality and freedom. Our Bill of Rights applies to all law. It binds the legislature, executive, the judiciary and all organs of state and in appropriate circumstances; it applies to natural and juristic persons. In effect the Bill of Rights reinforces the supremacy of the Constitution and demands that all law and conduct must be consistent with its provisions.”¹⁰⁵

In the early days of the constitutional dispensation, our courts have manifested unconvincing reluctance to effect constitutional injunctions on the common law hence this contractual crossroad. In *S v Mhlungu*,¹⁰⁶ the court advised, “Where it is possible to decide any case, civil

¹⁰¹ Para 33.

¹⁰² A theoretical notion first developed in the seminal article by Klare “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 146-188.

¹⁰³ Moseneke 2 para 9.

¹⁰⁴ S8 (2)-(3) of Constitution of the Republic of South Africa, 1996.

¹⁰⁵ Moseneke para 13.

¹⁰⁶ 1995 (3) SA 867 (CC).

or criminal without reaching a constitutional issue that is the course that should be followed.” Consequently, the problems of exemption clauses have been sustained over the years even with the changes. There was no iota of protection of consumers by the judiciary. Further stimulation now comes with the recent raft of laws drafted to protect consumers’ rights: the NCA and the CPA.

The Constitution, a model of transformation of the political and socio-economic path somehow curbs the laissez-faire in contracting by infusing the constitutional values of freedom, equality and dignity when contracts are interpreted.

3.2.3 Post-constitutional interpretation

After enduring fierce jurisprudential contestation in our contract law South African courts, seem to be taking heed of the statutory injunction to protect ordinary consumers in recent edictal action.¹⁰⁷ The CPA provides that the consumer must not unfairly waive rights or liability of the supplier [service provider].¹⁰⁸ The landmark case of *Mercurius Motors v Lopez* is an odd juxtaposition to the decision given in *Afrox Healthcare Bpk v Strydom*. Here the court after the theft of a motor vehicle delivered for service to the appellant owing to the negligence of its staff denied liability basing it on the exemption clause in the job card. The court held the exemption clause was applicable to the value of the vehicle rather than the vehicle itself. Navsa JA enunciated the law as follows¹⁰⁹:

“A person delivering a motor vehicle to be serviced or repaired would ordinarily rightly expect that the depository would take reasonable care in relation to the safekeeping of the vehicle entrusted to him or her. An exemption clause such as that contained in clause 5¹¹⁰ 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 the customer who signs a standard instruction form, 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. Moreover, the caption immediately above the signature is misleading in that the customer is directed to that provision away from the more important provision in small print on the left-hand side of the document

¹⁰⁷*Drifter Adventures Tours v Hircock* [2007] 1 AllSA 133 (SCA).

¹⁰⁸S 48 (1) (c) of the CPA.

¹⁰⁹Para [33].

¹¹⁰“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.”

which refers to the conditions on the reverse side of the document which are themselves not easily accessible.”¹¹¹

Seemingly the court interpreted this contract with the precepts of good faith. Bhana and Pieterse argue that good faith has “infused the law of contract with an equitable spirit” and that this interpretation of good faith “thus obviates engagement with the equity and fairness of a contract and so defends the lack of substantive equitable defence in South African contract law”.¹¹² The previous stance to devalue good faith adopted by the Supreme Court of Appeal is no longer welcome. The above judgment engenders a slight level of optimism that our jurisprudence is developing concerning exemption clauses.

Hawthorne had this advice on the development of good faith in an environment clouded with legal positivism and judicial formalism.¹¹³ She highlights the fact that the Constitution demands a different approach by the courts which they were then sluggish to adopt. She surmises this as follows:

“In essence the Constitution calls for a reappraisal of traditional ideas of the judicial function and legal interpretation. It requires judges to engage in substantive legal reasoning, to articulate the values upon which their decisions are based and to engage with the social, historical and legislative context. Judges themselves are thus made subject to the demand for justification: rather than simply relying on a pre-existing rule or precedent, they are required to engage in value-based, contextual reasoning. Consequently, the new constitutional dispensation promises to initiate new developments in the law of contract. Despite rhetorical support for good faith, fairness and reasonableness, however, the post-constitutional pattern in our case law remains a succession of victories for the free marketeers. It would appear that the heritage of positivism and formalism has effectively jeopardised development of the law of contract by means of constitutional interpretation.”¹¹⁴

¹¹¹ See *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) 318C; *Kempston Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T) 467B-C and 468G-H; *Keens Group Co (Pty) Ltd v Lotter* 1989 (1) SA 585 (C) 590B-592C; *Ndlovu v Brian Porter Motors Ltd* 1994 (2) SA 518 (C) 526F; *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) 495I-496A; *Fourie NO v Hansen* 2001 (2) SA 823 (W) 833F-834C and *Faceira v Kempster Sedgwick (Pty) Ltd* 19-20. More elaborating is the article of Naudé T & Lubbe GF “Exemption clauses-A rethink occasioned by *Afrox Healthcare Bpk v Strydom* (2005) 122 SALJ 441.

¹¹² Bhana D & Pieterse M “Towards a reconciliation of contract law and constitutional values: Brisley & Afrox revisited” (2005) 122 SALJ 868 (footnote 12).

¹¹³ Hawthorne “Legal tradition and the transformation of orthodox contract theory: the movement from formalism to realism” 2006 *Fundamina* 75-79.

¹¹⁴ Hawthorne 84.

3.2.4 Convergence of the Constitution and the CPA

Under the statutory dispensation of consumer laws, one can deduce that quasi-mutual assent is vulnerable under judicial probity in modern contracts. Section 48(2) (d) (ii) of the CPA states that a term is unfair if the fact, nature, effect of that term or condition was not drawn to the attention of the consumer in a manner that satisfies section 49.¹¹⁵ Both these provisions cover well-established common law principles that have been applied and now find a place in legislation. Their application is likely to curtail the freedom of contract from the overarching effect of unequal bargaining power in consumer contracts. By implication, this is done by infusing the open-ended norms of the Constitution and contractual rules in the interpretation of contracts when taking into account improper conduct such as economic duress and illegality.

Furthermore, it is apparent from case law that ordinary consumers would not exempt service providers from personal or bodily injury either be a hospital or public places. Prior to the new constitutional dispensation exemption clauses for negligently causing bodily injury or death were generally more permissible but interpreted restrictively to protect human dignity. However, from the judgment in *Durban's Water Wonderland v Botha & Another*,¹¹⁶ the courts have been inclined to use caution in construing their validity to comply with the constitutional imperatives.

The case of *Naidoo v Birchwood Hotel*¹¹⁷ raises the question of exemption from a claim for damages for bodily injuries against a hotel owner under the new constitutional dispensation. The applicant pleaded that the defendant had been negligent by failing to take adequate steps to prevent the damaging incident from occurring, by not properly maintaining an access gate; for not ensuring that it was safe for public use and for failing to warn the public of a potential danger created by the state of repair of the gate. The defendant based its defence on a contractual provision in terms of which liability for negligence was excluded. The defendant bears the onus of establishing the terms of the contract and proving that it did everything

¹¹⁵“Any notice or provision which tends to limit the supplier’s liability or impose an obligation on the consumer to indemnify the supplier should be drawn to the attention of the supplier.”

¹¹⁶1999 (1) SA 982 (SCA).

¹¹⁷2012 (6) SA 170.

reasonably necessary to bring these terms to the attention of the applicant. Nicholls J in an *obiter dictum* said:

“[p]roperty-owners are liable to ensure that their property does not present undue hazards for the public who enter and use the premises. The duty is even greater in respect of property such as the hotel which is designed for use by the public. The hotel is obliged to take reasonable steps to ensure that the public is safe.”¹¹⁸

The court held that an exemption clause that excluded liability for bodily harm in hotels and other public places have the effect of denying a claimant access to judicial redress.¹¹⁹ Such clauses do not necessarily pass constitutional muster of section 34. It was further held that in this case, the applicant had discharged the onus of proving his delictual claim against the defendant and that neither the disclaimer notices nor the exemption clauses are a good defence to the claim.

In cases of disputes of exemption clause the evidentiary burden relates to three distinct questions: (a) who has the burden of proving whether or not the contract contains the clause in question; (b) what evidence is required to prove that the contract contains the clause in question; and (c) if the contract contains the clause and loss or destruction has occurred who has the burden of proving how it occurred?¹²⁰ The onus of proof in delictual actions towards the enforceability of exemption clauses rests on the party relying on the clause in question because the plaintiff bears the onus of establishing the contractual terms.¹²¹

Consequently, the pursuit of one’s own interest may be tempered with a concern for others, as our Constitution requires us to honour the human rights and human dignity of others.¹²² Thus constitutional dignity, which forms one of the cornerstones of our democracy takes

¹¹⁸ *Probst v Pick ‘n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W); *Chartaprops 16 (Pty) Ltd & Another v Silberman* 2009 (1) SA 265 (SCA).

¹¹⁹ See *Bafana Mabopane v Makwakwa & Another* 2006 (4) SA 581 (SCA) where it was held that: “If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking legal redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.”

¹²⁰ Kerr 435.

¹²¹ *Afrox Healthcare Bpk v Strydom* par [6]; In his judgment in *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 3 SA 754 (A) 762E-767C, Corbett JA said: “[o]rdinarily, the general rule is that a plaintiff who sues on a contract must prove his contract, even though this may involve proving a negative, viz that an additional term alleged by the defendant was not agreed to by the parties”. Also see *Yeats v Hoofwegmotors* 1990 (4) SA 289 (NC) 293F-H and *Randfontein Transitional Local Council v ABSA Bank Ltd* 2000 (2) SA 1040 (W) 105 B-G.

¹²² In its Preamble.

cognisance not only of the fact that law must respect agreements voluntarily entered into,¹²³ but also that the law of contract should secure a “framework within which the ability to contract enhances rather than diminishes our self-respect and dignity.”¹²⁴

A cue for our courts can be found in German constitutional law, which places a high premium on the protection of human dignity in relation to the free development of the human personality.¹²⁵ One may put the question to the courts: Should the civil law intervene where there is structural subjugation of a contractual party and the results of the contract cumbersome to promote human dignity and equality?

What is clear from this exposition is that no hard and fast rule exists that provides clarity on the full recognition of exemption clauses. There have been significant improvements in the three phase’s transition: common law era, Constitution era and the statutory era. Because the law is interlinked, the first part of interpretation strategy-common law had many failures, which depicts the deference of positivism and the classical theory. Therefore, the second part shows a convergence between the Constitution and legislation that is intent on realigning modern theory with equality to alleviate the impact of exemption clauses in consumer contracts. The CPA remains the watershed moment in all these eras.

By and large contract law does not favour normative reasoning (purposive adjudication) to accommodate the more modern (post-constitutional) paternalistic or welfarist leanings that embrace a fair measure of altruism to augment the conception of the “good life”.¹²⁶ For this reason, the South African contract jurisprudence reflects these conflicting decisions of courts.

3.2.5 *Constitutionality of a clause on language*

Cultural diversity and the issue of language are entrenched in the Constitution: section 29 in particular deals with the latter.¹²⁷ South Africa is a multiracial and democratic state with

¹²³ The reliance in the case of *Afrox Healthcare v Strydom* para [22] and [38D]; and Cameron JA’s remarks on this statement in *Brisley v Drotzky*.

¹²⁴ *Brisley v Drotzky* para [95] 36B; Lubbe GF “Taking fundamental rights seriously: The Bill of Rights and its implication for the development of the common law” (2004) 121 *SALJ* 395.

¹²⁵ S 1(1) and s 2(1) of the German Constitution cited by Strydom “Freedom of contract and constitutional rights: a noteworthy decision by the German constitutional court” 1995 (58) *THRHR* 696.

¹²⁶ Collins *The Law of Contract* 3rd ed. (1997)4-5; Bhana & Pieterse 868-69, and the Preamble of the Constitution.

¹²⁷ (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access

eleven official languages. Where such diversity exists it becomes a clear-cut case that the use of plain language to ensure all consumers and other contracting parties are aware of what they are contracting into. However, this constitutional directive has been taken for granted by many institutional bodies that are supposed to implement it.

Responding to the apparent apathy to effectuate the language clause in *Mpumalanga Department of Education v Hoerskool Ermelo*¹²⁸ MosenekeDCJ said:

“[in] an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by radical transformation of society as a whole.... This the Constitution does in a cluster of warranties...Section 1 (a) entrenches respect for human dignity, achievement of equality and freedom. Section 6 (1) read with section 6 (2) warrants and widens the span of our official languages from a partisan pair to include nine indigenous languages which for long have jostled for space and equal worth....”

Taking into consideration the constitutional court pronouncement it is very interesting to note the influence of the Bill of the Rights in contract law in South Africa. However, Cornelius¹²⁹ argues that the applicability of the Bill of Rights to a contract depends on the accessibility or inaccessibility of the nature of the transaction either public or private. The importance of credit agreements to communal development it is immutable and organic that the Bill of Rights applies more readily here. This means normative considerations influence the state to intervene and when necessary prevent impending harm to the contracting parties or to society.¹³⁰

What is of significance for the present discussion is the equality clause enshrined in section 9(1) of the Constitution.¹³¹ The onerous of plain and understandable language in credit and consumer contracts is an affirmation of the constitutional values of equality, freedom and equality. This is the mantra that has found traction throughout our Constitution that these laws seek to promote and safeguard. The present discussion is critical of classical libertarian

to, and implementation of, this right, the state must consider all reasonable educational alternatives, including a single medium institutions, taking into account –

(a) equity;

(b) the need to redress the results of past racially discriminatory laws and practices.

¹²⁸ [2009]ZACC 32 par 47.

¹²⁹ *Principles of Interpretation of Contracts in South Africa* (2007) 76.

¹³⁰ **Good Faith, Lender Liability**, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code. *Texas Law Review*, Vol. 68, No. 169, 1989-1990. 44 Pages

¹³¹ It provides “everyone is equal before the law and has the right of equal protection of the law.”

freedom of contract and the attendant sanctity of contract rule within a constitutional dispensation. Classical contract favoured survival of the fittest doctrine.

Since substantive equality recognizes the social and economic milieu of individuals: it would not be far-fetched to submit that the proper use of language and understanding of consumer in contractual matters is an initiative fitting the purpose of substantive equality. It is evident that substantive equality countenances the values espoused by the Constitution and is the source of transformation. It can be argued that the value of substantive equality dictates the curtailment of the freedom of contract to take into account of the real inequalities.

Subtly the National Credit Act¹³² (NCA) is responsive to the constitutional values of equality when reading in the context of the language clause. Apparently, the use of plain and understandable language for consumers' in credit contracts have been stimulated by international experience and the modern conception of contract law, which inclines towards a healthy measure of legal paternalism.¹³³ Therefore, in the legal environment, a focus on issues of interpretation dictates the preliminary adoption of plain language principles to close the widening gap. Application of the act is prescriptive on the extent to which turgid language is permitted in credit contracts.

Equality before the law is now a statutory touchstone present in every credit agreement executed in South Africa following the unequal bargaining power in contract transactions. The act enjoins credit providers to ensure that these contracts are written in plain and understandable language: “[a]ll the users of law have the right to be informed in a language which they can understand”.¹³⁴ Apparently, the salutary impact of plain language by legislation and the move to protect consumers has become an international phenomenon.

Section 22 of the CPA expressly stipulates that a consumer for any contractual dealing has a right to information in plain and understandable language. This is triggered by the mere fact that in contracts it has been observed that somewhere between the writer and the reader the meaning floats:¹³⁵ some issues are not adequately grasped by the recipient. Ultimately, this is the source of confusion and disagreements. Thus, standardized documents have raised special problems for interpretation.

¹³² 34 of 2005 in s 64.

¹³³ Lubbe and Murray 242; Bhana and Pieterse 868.

¹³⁴ Quote of Stewart 1995: 532 in Van der Walt and Nienaber *English for Law Students* (2009)136.

¹³⁵ Mc Gough “For the sake of argument” in Lewison *The Interpretation of Contracts* (2007) 145.

In the CPA, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom is the addressee of the document, with an average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the document without undue effort.¹³⁶ Of course, this begs the question as to the linguistic ability of the ordinary member of the public.¹³⁷

To determine if a term is in “plain intelligible language”, it must be asked to whom the language used in a term should be plain and intelligible. The determination should not be abstract from the circumstances, but the standard requires an objective approach.¹³⁸ Literacy level and the indigenous language of the consumer forms part of the context, which may assist the court’s interpretation particularly in view of the socio-economic imbalances stemming from apartheid in South Africa.

This is going to be difficult to achieve because most standard form contracts are used to exploit those in economically weaker position. Perpetuating the syndrome is the fact that most consumer contracts are born of necessity and are last-ditch efforts to deal with an unforeseen emergency or predicament-the issue of exemption clauses become a side by issue. A consumer in dire straits may be placed in an extreme disadvantage bargaining position including accepting unfair conditions to save the situation.¹³⁹

These consumers might be caught in grinding poverty, lacking in any fixed asset to use as collateral for the debt, and also with a very low standard of education.¹⁴⁰ Such people tend to be ignorant both of the credit market and the protection afforded to them by the law.¹⁴¹ They are also presented with unintelligible contracts and cut-throats usurious rates of interests.

Patterson¹⁴² explains the issue of language more articulately thus: “[u]nderstanding what it means for a linguistic sign to have meaning begins with the recognition that the ‘meaning’ of linguistic sign is a public affair meaning is not private mental phenomenon”. Based on this

¹³⁶ S22 (2).

¹³⁷ Koffman 292.

¹³⁸ Ibid.

¹³⁹ For instance, if a consumer is admitted to hospital or a consumer enters into a credit agreement.

¹⁴⁰ Aronstam P *Consumer Protection, Freedom of Contract and The Law* (1979) 65.

¹⁴¹ National Opinion Polls Market Research Ltd, *Consumer Credit Surveys*, Part 1 section1 para 21 (viii) cited in Rakoff TD “Contracts of adhesion: an essay in reconstruction” 1983 (96) 6 *Harvard LR* 1176. The surveyss were carried out on the instructions of the Committee on Consumer Credit in the US 137-145.

¹⁴² See above *Good Faith and Lender Liability* (1990) 68.

aspect, one agrees with the view that interpretation of contracts cannot only be adjudicated by the dextrous manipulation of ground rules around valuational-vacuum.¹⁴³ Hermeneutics should yield to the general understanding of adapted rules and principles of law not to distort facts. Interpretation of contract has to be relative to its commercial purpose and the languages used not the background circumstances in which a contract was concluded.¹⁴⁴ In that way, the gap between the lender and the consumer would be halved.

Closely connected with the issue of plain language is the question of whether or not a term is reasonable.¹⁴⁵ Acceptance of terms does not rest solely on plainness without the moral fiber of fairness. More importantly, is the fact that courts should be cognizant of the fact that a particular consumer does not speak English or that English is not his mother tongue. In such a situation this factor should be taken into account in assessing good faith and fairness.

Indiscriminate adoption of those terms not negotiated poses a danger of abuse in that random and unconscionable imposition of such terms might occur. More so when the great majority of form terms merely furnish alternatives or displace terms that the law normally provides for stated bargains.¹⁴⁶ Examples include disparate matters requiring suits to be brought within a brief period¹⁴⁷-thus displacing otherwise applicable statutes of limitations and due-on-sale clauses in mortgages (displacing background law permitting the sale of real estate subject to a mortgage).

There must be equal respect for each party without the fear of forfeiting the benefits he/she sought to acquire in the credit market. A further development was witnessed in *Ex parte Ford*,¹⁴⁸ where it was held that courts have a duty “to have proper regard to giving due effect to the public policy reflected in the NCA.”

¹⁴³ Cockrell A “Substance and Form in the South African Law of Contract’ (1992) 109 SALJ 40. 40-63.

¹⁴⁴ *Rearden Smith Line Ltd v Yngvar Hansen-Tangen* [1976]1WLR 989, HL;*Hyundai Shipbuilding and Heavy Industries Co. Ltd v Pournaras* [1978] 2 Lloyd’s Rep 502, CA; also see Marais JA in *First National Bank of SA Ltd v Rosenblum* and another 2001 (4) SA 189 in para 7.

¹⁴⁵ Atiyah *The Rise and Fall of Freedom of Contract* (1979) cited in Beatson J and Friedmann D *Good Faith and Fault in Contract Law* (1995) “From classical to modern contract law” 8. The concept of freedom of contract had twofold meaning namely: the creative power of the participants in the contractual process to act as private legislators: to legislate for rights and duties binding upon themselves; freedom from obligation unless consented to and embodied in valid contract.

¹⁴⁶ Rakoff 1183.

¹⁴⁷ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC); Napier’s case.

¹⁴⁸ 2009 (3) SA 376 (WCC) 383F-G par 20.

Certainly, rigorous application of the traditional doctrines to contracts of adhesion lead to so many unjust results that it can no longer be justified as the tolerable cost of applying a general system of rules.¹⁴⁹ The unconscionability issue raised by the adhesion contract is better explained as a species of duress. Practically, it produces a new form of subservience or grovelling under the guise of contracting. Consumers toe the line, which the law has invaded through equality and language fronts. There is a need to close this chapter of genuflection on the part of consumers to make contracting a legitimate process.

It should be clear from this analysis that an equal bargaining position per se is not vital to public policy, nor should it be used in isolation from other factors. It is but one factor that can potentially inform the court's judgments on the criterion of substantially incontestably harm to the public interest. The issue of plain language in the interpretation of contracts is also subsumed under the umbrella of public policy.

Apparently, and in contradistinction to South Africa's situation, in the UK fairness lies at the extreme of the spectrum trumping all other considerations, whereas in South Africa refuge is provided through statutory seepages protecting consumers. English law is more based on the equity in contrast to South African common law, which mitigates the situation.

Many clauses are being challenged on this ground of late hence there is a concerted effort from all quarters to use plain language in credit contracts; there is a strong emphasis throughout that "before they enter into any contract consumers must be able to read and understand all its written terms".¹⁵⁰ It is encouraging to note that from the beginning the Office of Fair Trading (OFT), which governs the implementation of UCTA (similar to the National Credit Regulator) has taken a purposive and positive approach to the issue of plain intelligible language.¹⁵¹

It is one's submission that South African courts should duplicate this approach when deliberating over the inequality of bargaining power in credit contracts. A brief consideration of case law is justified to elucidate these issues. In *Kidlance Ltd v Murphy*,¹⁵² a judge struck down an "early repayment penalty" clause in a loan agreement. One of the grounds for doing

¹⁴⁹ Rakoff 1189.

¹⁵⁰ Office of Fair Trading Bulletin 2 para 2.7.

¹⁵¹ Woodroffe GF & Lowe R *Woodroffe and Lowe's Consumer Law and Practice* (2007)166.

¹⁵² Unreported Northern Ireland High Court, Ch D.

so was that it was not expressed in plain, intelligible language. Pat Edwards¹⁵³ sounded a note of cautious optimism when she said:

“...It seems likely that the use of plain language, and the dropping of substantial unfairness, tend to go hand in hand. Doubtless, once terms are seen in the cold light of ordinary language, unfairness which [was] decently veiled by jargon and complexity [stood] out as the excrescences they are and the scales fall from the suppliers’ eye”.

3.3 Problems of language as a source of interpretation

The essence of contractual interpretation commences by probing into the intentions of the parties depicted by the language they used. Van den Bergh’s¹⁵⁴ description of what language is to the critical work of lawyers provides assistance to the present discourse. He says the language is a blunt instrument with which delicate works of art are created. Parties find themselves entangled in the adverse construction of terms full of ambiguities when attempting to unravel the sometimes-colourful strained language used to express exemption clauses.

Most cases for interpretation relate to (i) the total exclusion of liability for implied terms of quality; (ii) the limitations of liability to a particular sum; (iii) the imposition of short-time limits during which claims for breach of contract must be brought; or (iv) by imposing onerous conditions on obtaining the remedy (such as payment of costs of transport of defective goods to and from the supplier’s place of business).¹⁵⁵ Difficulty furthermore lies in interpreting exemption clauses, which purport to modify performance so that breach does not occur, than clauses that exempt liability for breach.¹⁵⁶

The latter clause is exemplified in *Compass Motors Industries (Pty) Ltd v Callguard (Pty)*¹⁵⁷ the written agreement between I Motors and the defendant provided that the sole function of defendant’s security service and personnel would be to *minimize*¹⁵⁸ the risk of loss or damage

¹⁵³ Then Director of Legal Affairs at the OFT in 1997, Bulletin 4 at 26.

¹⁵⁴ Van den Berg NJC “Die Gebruikswaarde van bepaalde Struktuurmalitiese Metodes vir Wetsuitleg” 1981 TSAR 136.

¹⁵⁵ Downes 237.

¹⁵⁶ Ibid.

¹⁵⁷ 1990(2) SA 520 (W).

¹⁵⁸ Author’s emphasis. The phraseology on its own is indicative of anticipated failure, and lack of liability by its timid assertion of the legal duty giving room for malperformance and other omissions. The defendant did not guarantee success, while it specifically limited its liability in terms of clause 3.1.3 and 3.1.4 of the agreement.

by theft etcetera, and that the defendant gave no guarantee that it would be able to minimize or prevent such loss or damage. Furthermore, that it would not be liable to I Motors or any third party for any loss or damage arising out of any act or omission by the defendant or any of its personnel, whether or not such act was negligent or grossly negligent. Two motor vehicles of a third party were stolen from the premises guarded by the defendant. The court held that the plaintiff failed to prove negligence of a legal duty of care and the claim was dismissed.

Interpretative problems have also been found to occur where (i) the exclusion clause applies to goods held in a different location from the one specified in the exemption clauses in a contract; (ii) the extent of the application if the injury results from the exempted party's fraud or gross negligence; (iii) the kind of loss and the extent of loss recoverable is limited and whether it only applies to permanent injury or death. Any interpretation of a contract in circumstances that involves an exemption clause of liability for loss and/or damages¹⁵⁹ is, in essence, a form of a fault-finding adjudication against the exempted party. In the *Compass Motor* case above the court accepted I Motors's restrictive interpretation of the word 'patrolling', as it appears in the schedule of the agreement.

Moreover, the formulation of the contract has been described as the "ultimate limiting device". Alfenus¹⁶⁰ provides an example encountered in the interpretation of exemption clauses as follows:

"A tenant received a house under the condition that he would return it uninjured, except so far as damage might result through violence or age. A slave of the tenant burnt the house, but not accidentally. The opinion was given that this kind of violence would not appear to have been excepted; and that it was not agreed that the tenant should not be responsible if a slave burnt it, but that both parties intended that violence exerted by strangers should be excepted."

¹⁵⁹ The clause in the *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 800E: "2. In consideration of Messrs Fibre Spinners and Weavers arranging, and keeping in force, insurance as detailed in para 3 hereunder, you are hereby absolved from all responsibility for loss of or damage howsoever arising in respect of this Department's stocks of raw jute and phormium and finished jute and phormium products whilst in the care of your company and in or upon any premises owned or used by your company and/ or any of its associated or subsidiary companies, but 3. it shall be your company's responsibility to maintain, with my Department's interest properly noted in the policies, insurance in the following forms..."

¹⁶⁰ D 19.2.30.4 cited in Kerr 428.

It transpires from this example that the delimitation of different interests by the exemption clause does not cover every contingent situation resulting in a dilemma for the contracting parties. In the aforementioned example “clear language’ is incongruous with the intention of the parties gathered from the wording used in and the purpose of the instrument has to be discerned. To determine this means courts must consider the contract, as a whole rather than sticking to those disparate provisions and considerations of public policy. Hence, one can agree with Yates who argues that in most cases exemption clauses should be read in the context of the whole agreement, rather than as a separate from the rest.¹⁶¹

3.3.1 Purposive interpretation

First, it seems unrealistic to engage in a process of interpretation that is divorced from the context in which the parties find themselves. Van Huyssteen¹⁶² argues that “the general purpose of interpretation of a contract is to ascertain the common intention of the contractants, as expressed by the words or conduct (which, in the context of written agreements and the parole evidence rule, would normally be their constructive intention in terms of the application of the reasonable reliance as a contractual basis), by ascertaining the meaning of the language used,¹⁶³ Simply put, what they intend their contract to mean?¹⁶⁴

¹⁶¹Yates *D Exclusion Clauses in Contracts* 2nd ed. (1982) 29.

¹⁶² *Contract General Principles* 5th ed.(2016) 296-97.

¹⁶³ Commentators warn that although the same terminology of ascertaining the parties’ intention is widely referred to, for instance, *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) paras 24-25, care should be taken not to understand the process of interpretation as an inquiry into the minds of contracting parties, rather than as an exercise to ascertain the meaning of the language used. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18 and 20 the court defines : “Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all these factors” (para 18) ; “the enquiry is restricted to ascertaining the meaning of the language of the provision itself” (para 20). See the also *Novartis SA (Pty) Ltd & Another v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) para 27: “I do not understand these judgments to mean that the interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties-what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it.”

¹⁶⁴ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* para 24.

Thirion J in the *Cargo Africa* case states that meaning given to an expression always depends upon the construction of a the particular contract in which it is used, viewed in light of the circumstances pertaining to it.¹⁶⁵ Subsequent to that courts' have expanded this meaning by holding that "a contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract to give it a commercially sensible meaning."¹⁶⁶

Ironically, Smallberger JA in *Public Carriers Association v Toll Road Concessionaires (Pty) Ltd*¹⁶⁷ states that "the notion of what is known as a 'purposive construction' is not entirely alien to our law", yet preferred the literal interpretation as the one firmly established in our law. This bizarre view should be contrasted with the argument that words cannot be cut out, pasted on a clean sheet of paper and then considered with a view to determining their meaning in abstract and out of context.¹⁶⁸

Decades ago Lord Steyn, a judge in the House of Lords in England once said '[t]he law must respect the reasonable expectations of the contracting parties'.¹⁶⁹ Indeed, in the interpretation of statutes there has been a paradigm shift from a literalist to a purposive approach.¹⁷⁰ The lacunae in South African law on the reluctance to apply purposive interpretation was subsequently filled by Grosskopf JA in *Venter v Credit Guarantee Insurance Corp of Africa Ltd*¹⁷¹ when he advocated that: "[i]nsofar as the words used in the undertaking are capable of bearing different meanings, a 'purposive construction' may be applied."

Therefore, purposive interpretation is apposite when the clear meaning of the words given effect would "nullify the essential purpose of the contract".¹⁷² By implication, the adoption of a purposive construction is consistent with the avoidance of absurdity, repugnance and inconsistency.¹⁷³ Founded on purposivism, which attributes meaning to a legislative provision in the light of the purpose that it seeks to achieve in the context of the instrument of which it

¹⁶⁵ 361 E-F.

¹⁶⁶ *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA).

¹⁶⁷ 1990 (1) SA 925 (A) 943C.

¹⁶⁸ *CTP Ltd and others v Argus Holdings Ltd and another* 1995 (4) SA 774 (A) 787E per Nienaber JA.

¹⁶⁹ Lord Steyn, "Contract Law and the reasonable expectations of honest men" (1997) 113 *L.Q.R.* 434.

¹⁷⁰ McKendrick 372.

¹⁷¹ 1996 (3) SA 966 (A) at 973D.

¹⁷² Christie &Bradfield 245.

¹⁷³ *Ibid*; see Lord Steyn 440-441.

forms a part.¹⁷⁴ It is directed at countering or ameliorating the effects of the mischief which was apparent to the legislature and which the legislation aims to regulate.

The classical version of purposive interpretation, the so-called “mischief rule” referred to in the *Heydon’s* case,¹⁷⁵ is a guiding principle in the exposition of this judicial mechanism. Likewise, the mischief rule implies that a provision must be construed in its historical context and the rest of the legislative instrument of which a provision forms part also constitutes such context.¹⁷⁶ McMeel also puts it differently in that there has been a shift from the strict objective approach to a so-called “purposive”, “commercial” or “modern” approach.¹⁷⁷

Note that the development of our contract law has been spurred on by the Constitution¹⁷⁸ together with consumer legislation.¹⁷⁹ This jurisprudential development ran parallel to a similar development spurred by the requirements of European Union legislation binding on the English courts, that it be interpreted purposively.¹⁸⁰ Currently, purposive interpretation is increasingly incorporated to our law by the courts, as manifested in *Lloyds of London Underwriting Syndicates 969, 48, 1183 & 2183 v Skibya Property Investments (Pty) Ltd*¹⁸¹, where Conradie JA said:

“Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by paragraph 1 of section IV. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by the incorporation of the provision. It is quite clear that without the incorporation of the exclusions from the hull policy, the war policy would have left the appellants which potential liabilities they could not have intended to assume and which the respondent could not have thought they were assuming.”¹

In *Antanios Compania Naviera S.A. v. Salen Rederierna A.B*¹⁸² Lord Diplock cites Lord Steyn in *Mannai*²⁸ that: "if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it

¹⁷⁴ Du Plessis L *Re-Interpretation of Statutes* (2007) 96.

¹⁷⁵ (1584) 3 Co Rep 7a-7b, [1584] EWHC Exch J36 76 ER 637, Pasch 26 Eliz.

¹⁷⁶ Du Plessis 97.

¹⁷⁷ Gerard McMeel, "The rise of commercial construction in contract law" [1998] *L.M.C.L.Q.* 382 at 383.

¹⁷⁸ Per Kroon and Froneman JJ in *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75(E).

¹⁷⁹ See the NCA; CPA and the Companies Act 71 of 2008.

¹⁸⁰ In *General Building & Maintenance plc v Greenwich Borough Council* (1993) 65 BLR 62-65 method of interpreting United Kingdom Regulations enacting the EEC Council Directive 71/305.

¹⁸¹ [2004] 1 All SA 386 (SCA) 391.

¹⁸² [1985]AC 191 at 201.

must be made to yield to business common sense". Business common sense is there to protect the reasonable expectations of honest business people. Lord Steyn continues: "[I]n determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction."

Schreiner JA in *List v Jungers*¹⁸³ is seen as a prominent advocate of purposive construction. He argues: "...the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene." In such circumstances, the primary rule is that the contract is to be interpreted in an ordinary way, considering it as a whole and discovering the parties' intention.¹⁸⁴ This intention is, however, to be gathered from the language used by the parties given its ordinary grammatical meaning.¹⁸⁵

On the other hand, considering the ambit of the contract as a whole allows one to reconcile provisions, which, if taken in isolation, would be irreconcilable with the rest of the document. Purposive interpretation is more relevant where there is ambiguity in provisions exempting negligence. In connection with exemption clauses, judges have often expressed ambivalence about such words as "wilful act",¹⁸⁶ "wilful misconduct", and "malicious or willful misconduct". In view of disputes, it is arguable that lawyers are good at coining phrases to describe conduct, which they disapprove.

The case of *Galloon v Modern Burglar Alarms (Pty) Ltd*¹⁸⁷ is illustrative that severance is sometimes irreconcilable with wholesale application. In this case, the defendant company let a burglar alarm system to the plaintiff, a jeweller, which the defendant installed and undertook to maintain in proper working order. In fact, the alarm was malfunctioning from the outset, but there was a clause in the contract, which read thus:

"The lessor shall not be liable for any damage whatsoever, whether by burglary or any other means, caused to the lessee by non-operation of the alarm for any reason, and whether the lessor was aware of such non-operation or not."¹⁸⁸

¹⁸³ 1979 (3) SA 106 (A).

¹⁸⁴ *Lawrence v Kondotel Inns (Pty) Ltd* 1989 (1) SA 44 (D) 54 D.

¹⁸⁵ See *Hansen Schrader & Co. v De Gasperi* 1903 T.H. 103.

¹⁸⁶ On this point the dictum of Innes CJ in *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 779.

¹⁸⁷ 1973 (3) SA 647 (C).

¹⁸⁸ See 648E-F.

When the plaintiff fell victim to a burglary on its premises and sued the defendant for the loss the defendant relied on the clause and accepted to the claim that it did not disclose a cause of action.¹⁸⁹ Baker AJ observed that the clause “taken in isolation” could “be construed as referring to all conceivable reasons for non-operation of the alarm” including the negligence of the workmen.¹⁹⁰ However, the judge pointed out later, the clause had to be read “in context of the whole contract.”¹⁹¹ He confirmed that:

[T]he crucial words are ‘for any reason’. A non-operation of the alarm could facilitate a variety of activities or happenings which could result in loss to the plaintiff, and this non-operation could be attributable to reasons (causes of a purely physical nature) not necessarily involving negligence on the part of the defendant. In my opinion ‘any reason’ means, in the context of the contract as a whole, the physical causes of a non-operation and not the legal consequences in the sense of negligence or wilfulness or non-negligent breach of the contract. One would not normally write into a contract a reference to the non-operation of an alarm by reason of the negligence/wilfulness/breach of contract of the instAll ER thereof: one should, however, do so in order to make certain of securing the exemption sought...In other words, it seems to me that ‘any reason’ in clause 23 really means ‘physical causes’... ‘

The judge perceived that ‘any reason’ seems to him a most inept expression to use when a contracting party wishes to refer to his own negligence, misconduct or breach of contract (as legal cause). Contextually, validating the defendant’s defence would have permitted positive malperformance legitimacy over *de jure* expectations of the applicant. Reviewing the guidelines or ‘rules’ that have been developed to assist an interpreter in ascertaining the intention of the contractants¹⁹² would help us understand why at times courts give different interpretation from the superficial overtones of the words.

"Reasonable expectations of the parties", as described above includes "honesty", "reasonable results", "fair framework" are concepts that can be related to the doctrine of good faith. It is noteworthy that South Africa’s legal system contains a blend of civil and common law culture and doctrines, that offers a curious context for the study of good faith.¹⁹³ The matter of good faith is discussed in detail in chapter 2 of this thesis. Actually, the modern approach and purposive construction provide a mechanism to fulfill the reasonable expectation of the

¹⁸⁹ 649C-D.

¹⁹⁰ 652B.

¹⁹¹ 654C.

¹⁹² Van Warmelo 1960 SALJ 219; *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 38.

¹⁹³ Brownsword et al *Good faith in Contract: Concept and Context* (2000) 8.

contractual parties and to point out the real significance of the words. This is the outward manifestation of a particular determination.

Purposivism is a whittled-down teleological approach that helps realize the “scheme of values” on which the legal order is premised.¹⁹⁴ Commentators argue that this approach is a so-called “value-activating interpretation” that goes beyond the purpose of an individual provision, by the scheme of values informing the legal and constitutional orders in their totality.¹⁹⁵ It counters the positivist approach where contract law is construed in a mechanical reasoning process where courts apply the set of rules abstractly to socio-economic relationships, without adequately dealing with relevant extra-contractual policy concerns.¹⁹⁶ This statement postulates a predilection of constitutional interpretation in the application of the rules to the instrument.

The notion of purposive construction in contracts considered in this dissertation was firmly consolidated in our law by the Supreme Court of Appeal in *First National Bank of SA Ltd v Rosenblum and another*¹⁹⁷ Marais JA who again accentuated the literary interpretation. He goes on to say that “[t]he language of the clause [must be] read in the context of the agreement as a whole in its commercial setting and against the background of the common law and, now, with due regard to any possible constitutional implication.”

3.3.2 *Strategies of Interpretation*

The rules of interpretation can be divided into three classes: those which are applied as a matter of course (primary rules); those applied as and when the facts demand (secondary rules); and those which are applied as a last resort, without any pretence and attempting to find the real intention of the parties.¹⁹⁸ It is advised that one way to conceive the interpretative process one has to understand the sequential application of the hierarchical series of rules to resolve the contractual ambiguity.

¹⁹⁴ Du Plessis 119.

¹⁹⁵ Carpenter 1999 *THRHR* 633.

¹⁹⁶ Bhana D “The role of judicial method in the relinquishing of constitutional rights through contract” 2008 (24) *SAJHR* 304.

¹⁹⁷ 2001 (4) SA 189 (SCA).

¹⁹⁸ Reinecke & Van der Merwe *Insurance* para 218 cited in Van der Merwe et al 304.

3.3.3 Primary rules

Courts usually start by resorting to the primary rules, as they are referred. The first being to determine the intention of the parties sought from the words used by them to express what they want or expect from the contract. This is also called the golden rule of interpretation because it only accentuates the literalist approach which purposive construction seeks to cure its shortcomings. As a matter of course, the second rule requires that the words are given their ordinary grammatical meaning¹⁹⁹, as they appear from the rules of grammar,²⁰⁰ dictionaries²⁰¹ and even previous judicial decisions.²⁰²

The third step probably under this rule and the most important one is that courts consider the contextual setting to properly construe the contract in whole. There are a lot of cases, which emphasizes this point of context.²⁰³ Despite the words used in the contract, the courts have to place themselves in the same factual matrix the parties were at the time of contracting. Malan AJA in *Engelbrecht v Senwes Ltd*²⁰⁴ puts the matter more succinctly that: “[t]he intention of the parties is ascertained from the language used in a contextual setting in the light of admissible evidence...”

The first or golden rule is perfectly suitable for the conservative legal culture of adjudication in South Africa where the contract law’s foundations of the classical liberal theory have been naturalized in interpretation with the adjective of value-neutral. Jansen JA in *Sassoon*

¹⁹⁹*Lourens v Colonial Mutual Life Assurance Society* 1986 (3) SA 373 (A) 383; *Fedgen Insurance Ltd v Leyds; Johannesburg Country Club v Stott* 518D-G.

²⁰⁰*Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) 803; *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) 1188EH.

²⁰¹*Multotec Manufacturing (Pty) Ltd v Screenex Wire Weaving Manufactures (Pty) Ltd* 1983 (1) SA 709 (A) 719; *Snodgrass v Hart (SANTAM Ltd, Third Party)* 2002 (1) SA 851 (SE).

²⁰²*Airprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A) 261. In *Jonnes v Anglo-African Shipping* 1972 (2) SA 834 Potgieter JA quotes Fagan CJ decision in *Consolidated Diamond Mines of South West Africa v Administrator, S.W.A. & Another* 1958 (4) SA 572 (AD) 599B-E that:

“[l]egal systems lay down legal principles. Since words have to be read in their context and in their application to the subject-matter to which they relate, legal principles which affect the subject-matter may well affect the meaning of words used in relation to it. Decisions of our Courts are therefore useful precedents in the enunciation of legal principles and as guides in the application of those principles to particular facts and circumstances. Where we find in a judgment statements which attach meanings to particular words or phrases, we must remember that the Judge is dealing with those words or phrases in the context in which they occur and with reference to the subject-matter to which they relate. Beyond that, a statement as to the meaning of a word or phrase would merely be obiter dictum...”

²⁰³*Reardon Smith Line Ltd v Hansen-Tangen* [1976] 4 ALL ER 574C-575E.

²⁰⁴ 2007 (3) SA 29 (SCA) para [7].

*Confirming & Acceptance Co (Pty) Ltd v Barclays National Bank Ltd*²⁰⁵ warns that the first step in construing the agreement is to determine the ordinary grammatical meaning of the word, but bearing in mind, that few words have a single meaning only. He cautions that the meaning that a particular word bears in a particular contract must be made to appear from the contract as a whole, its interaction with the other words and provisions in the contract and circumstances of the contract's setting.

In *Aisla Craig Fishing Co Ltd v Malvern Fishing Co Ltd*²⁰⁶ Lord Wilberforce remarked on limitation clauses that "one must not strive to create ambiguities by strained construction...The relevant words must be given, if possible, their natural plain meaning."²⁰⁷ However, this is not clear in exemption clause where the language used is not plain, prolix and sometimes ambiguous qualifying the need for interpretation and all canons of construction.

Diemont JA in the *List* case discounts the unrewarding and misleading exercise of the reductionist theory of this primary rule. That is to first determine the more usual and ordinary meaning of a word, and then to seek to interpret the document in which the word occurs in the light of the meaning so ascribed to the word. This becomes clear from his statement that "[a]part from the fact that to decide on the more usual or ordinary meaning of a word may be a delicate task...it is clear that the context in which the word is used is of prime importance."²⁰⁸

The importance of contextual interpretation cannot be overemphasized because in the absence of it a contract would be considered in a vacuum, thus leading to inequitable results. It would be an emphasis of the text against the substance, which reflects the common intention of the parties-deficiency of the literal approach. Sometimes the linguistic treatment of contracts may expose a party to injustice. Take, for instance, *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*.²⁰⁹ In *casu* a contractual disclaimer exempted a party from supplying defective goods but had to move away from the text to mete justice to the parties. To hold Hirsch liable the court resorted to purposive interpretation to get to the common

²⁰⁵ 1974 (1) SA 641 (A) 646.

²⁰⁶ [1983] 1 All ER 101.

²⁰⁷ At 104.

²⁰⁸ Applied in *Ridon v van der Spuy & Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) 136-138.

²⁰⁹ 2011 (4) SA 276 (SCA).

intention of the parties. Therefore, the words of Lord Wilberforce in *Prenn v Simmonds*²¹⁰ remain insightful on this part. He said that the time has passed where words could be isolated from the matrix of facts in which they were set when there was a need for interpretation or interpreted on purely internal linguistic considerations. There is no need to appeal here to any modern, anti-literalist tendencies.

“... [W]e must inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (*Macdonald v Longbottom* 1E&E 977) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.”

Of late, the rules of construction and presumptions premised on this theory of golden rule of interpretation have been shaken to the core. There has been a slow departure from the slavish adherence to the literal meaning of words if the ordinary meaning would be contrary to the actual intention of the parties.²¹¹ The rudiments of the literal approach are based on *five assumptions*: (a) the written contract is a means of communication between the parties; (b) communication by language is possible; (c) the parties wish to communicate certain ideas by means of their contract; (d) they are familiar with the ordinary rules of language; and (e) they use language competently.²¹²

Critics of the subjective theory, as applied by the courts, point out that this is no more than a literalist theory under the guise of *intentionalism*.²¹³ The subjective theory fails to explain why wrong or inappropriate words can be used to express ideas. It is untenable when the wrong or inappropriate words, which are so used do not correctly represent the true ideas albeit having a different meaning.²¹⁴ The art of language use creates exponential problems more particularly in the case of a latent ambiguity.²¹⁵ In *Lehmbecker's Earthmoving and*

²¹⁰ [1971] 1 WLR 1381-1384.

²¹¹ See *Sassoon Confirming & Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* (footnote 116 above) 646, where a literal construction would run contrary to “sound commercial principles and good business sense” and would ‘produce an unrealistic and generally unanticipated result’, for example, by absolving an insurer from liability in respect of the principal risk intended to be covered by the policy (*Grand Central Airport (Pty) Ltd v AIG South Africa Ltd* 2004 (5) SA 284 (W) 288H-I .

²¹² Cote PA *The Interpretation of Legislation in Canada* (1984)193 cited in Cornelius 31.

²¹³ Devenish GE *Interpretation of Statutes* (1992)35; Du Plessis LM *Re-Interpretation of Statutes* (2002)100.

²¹⁴ Du Plessis 35, *Re-Interpretation* 94.

²¹⁵ Cornelius 197 says latent ambiguity occurs when a written contract on the face of it seems to be perfectly clear, yet may be found to be ambiguous when the apparent meaning of the terms is applied to the facts of the specific case.

*Excavators (Pty) Ltd v Incorporated General Insurance Ltd*²¹⁶ Miller JA explains that a latent ambiguity exists when:

“the parties use simple words, in themselves unambiguous, but which cannot readily or reasonably be applied in their literal sense to all the situations to which their agreement was directed. In such cases an element of ambiguity arises from the fact that ‘an absolutely literal interpretation’ may be wholly or substantially impracticable, or productive of startling results which could hardly have been intended.”

When a court is called to interpret a contract, the objective of each of the parties is to place the court in the milieu of the facts with the hope that it may be “as near as may be in the situation of the parties to the instrument” at the time the contract was entered into.²¹⁷ This position is unattainable unless the court appreciates the context in which the words were used to determine their subjective intentions. In short, interpretation is the legal process by which courts seized with the matter endeavour to determine the subtle meaning of the *express terms* of the contract.²¹⁸

This occurs for instance, where an insurer who sends an insured a disclaimer form in variation with the intent of authorizing repairs. In fact, the form makes a compromise of all amounts due in repairs for the insured as follows: “should the repair costs for any reason whatsoever exceed the settlement figure as determined in the report prepared by SIAS Accident Assessing Services; you will be liable for these additional costs.”²¹⁹ To the uninitiated consumer this is not clear that there is anticipatory breach of contract by the insurer. In such a case, interpretation should abandon the literal meaning to clarify this inconsistency for the purpose of insurance when examined against the background circumstances. The contract flies in the face of the purpose of an insurance contract. In order to have a just interpretation, the situation requires interrogation of the nature and purpose of the contract to interpret the document.²²⁰

²¹⁶ 1984 (3) SA 513 (A) 520H-521A.

²¹⁷ *Consolidated Diamond Mines of South West Africa Ltd v Administrator SWA & Another* 1958 (4) SA 572 (A) 609F-G.

²¹⁸ Van der Merwe 303. The author points out that a tacit term requires that ‘new’ words be read into the contract, whereas interpretation of an express term requires that existing words be clarified.

²¹⁹ Disclaimer form sourced from the documents of the South African Outsurance Insurance Company.

²²⁰ Van der Merwe 306.

Kotze JA in *West Rand Estates Ltd v New Zealand Insurance Co Ltd*²²¹ offers the following guidance:

“[I]t is the duty of the court to construe [the parties’] language in keeping with the purpose and object which they had in view, and so render that language effectual... Thus Pothier (*Obligations*, para 91) citing the *lex* 219 de *Verborum signif*, observes: ‘In agreements we should examine what is the common intention of the contracting parties, rather than the grammatical sense of the terms. Moreover, we must construe the words in that sense which is most agreeable to the nature of the agreement.’”

Olivier JA puts this differently in *Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation and Another*²²², in relying on Thayer’s admonition he remarked “there is no ‘lawyer’s paradise’ in which all words have a fixed and precisely ascertained meaning” and the concept of a “plain meaning” is just an illusion.²²³

In fact, the doctrine of quasi-mutual assent is criticized for its tendency to call for aid in the interpretation of contracts thus promoting uncertainty. Davis J in *Irvin and Johnson (SA) Ltd v Kaplan* enunciated this position²²⁴ after quoting the well-worn phrase on the reliance theory from *Smith v Hughes*²²⁵ and *SAR & H v National Bank of SA Ltd*²²⁶ thus:

“If this were not so, it is difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would become relevant and no party to any contract would be safe: the door would be opened wide to uncertainty and even to fraud.”²²⁷

In *Concord Insurance Co Ltd v Oelofsen NO*²²⁸ the phrase “independently of any other cause” in its context did not refer to a possible pre-existing disease which in fact was a *conditio sine qua non*. Consequently, the fact that a word has a technical legal meaning does not salvage the court from considering it in context.²²⁹ It is argued unless a different intention is manifested, (a) where language has a general prevailing meaning, it is interpreted in

²²¹ 1925 AD 245.

²²² 1995 (3) SA 751 (A).

²²³ *Evidence* 428-429; EL Jansen ‘Uitleg van kontrakte en die bedoeling van die partye’ 1981 *TSAR* 97 102-3.

²²⁴ 1940 CPD 647 651.

²²⁵ (1871) LR 6 QB 597.

²²⁶ 1924 AD 704.

²²⁷ See *Garden Cities Inc v Northpine Islamic Society* 1999 2 SA 268 (C) 270H-I, 272H.

²²⁸ 1992 4 SA 669 (A) 673B-675 followed in *Aegis Assuransie Maatskappy Bpk v Van der Merwe* [2000] 1 All SA 420 (T).

²²⁹ Kerr 394.

accordance with that meaning and (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.²³⁰

3.3.4 Secondary rules

The resort to secondary rules is used when an uncertainty or ambiguity remains after the *intentionalism* principles in the primary rules have failed to resolve the dispute on the meaning of the terms of the contract. More importantly, the resort to context is taken after internal aids have failed to clarify the problem, and the court must resort to other aids and presumptions.²³¹ To make a pronouncement whether or not writing is ambiguous is a question of law to be resolved by the courts. The second method is more applicable to clauses, which do not specifically delineate the legal grounds for liability from which exemption is granted vis-a-viz the golden rule.

3.3.4.1 *Eiusdem generis* rule

This is what Pothier and Van der Linden's classify as the eighth rule and it does not emphasize the general expressions of an agreement, but what is important is that it should concern the matters what the parties intended to contract on and not what they never contemplated.²³² In effect, this method is invoked by the courts in an attempt to confine exemption clauses within reasonable bounds by interpreting them narrow if they are ambiguous.²³³

However, it should be noted that the application of this rule bears its own challenges. It is not possible to prescribe clear guidelines as to when the wide general language is to be given full independent application and when it is going to be given a narrow scope of associated words.²³⁴ Words with a general meaning are restricted when used in association with words relating to a species of a particular class (the *eiusdem generis noscitur a sociis* rule).²³⁵

²³⁰ Ayres I & Spiedel RE, *Studies in Contract Law* 7th ed. (2008) 697.

²³¹ Cornelius 31. See the case of *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 368-69, where the court relied on written words in a printed form to prevail.

²³² Cited by Christie & Bradfield 259.

²³³ Christie & Bradfield 259.

²³⁴ See *Grobbelaar v Van de Vyver* [1954] 1 All SA 316; 1954 (1) SA 248 (A) 254D.

²³⁵ See *Reinecke & Van der Merwe Insurance* (2002)231; *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 (3) SA 403 (A) 415; *Shooter's Fisheries v Incorporated General Insurance Ltd* 1984 (4) SA 269 (D) 277-278.

Therefore, the correct application of this rule implies a proper approach to interpretation is of attributing meaning to words used in context.²³⁶

Therefore, general words such as “all other property”, “of any description”, “in any other manner” would be interpreted restrictively than they would if interpreted in isolation. Furthermore, this rule is the premise for the introduction of background circumstances in the interpretation of a contract.²³⁷ The application of this rule is not simple straight forward, as it might look and is more complicated. In *First National Bank of SA Ltd v Rosenblum*, the court observed that there was no genus established for the words “or as a result of any cause whatsoever” and it could not be given restricted meaning. Marais JA remarks: “[t]he assemblage of causes of loss or damage consists of an unrelated collection of phenomena”.²³⁸

Although there are complexities in the application of this rule, what is important is that the provision of a contract or statute must not be allowed to substitute an artificial intention from the provenance of the real one.²³⁹ This rule should be used together with the one that a special reference to a particular subject is assumed to exclude even those subjects which would otherwise have been implied in the circumstances (the *expressio unius* rule) will find application, as well the rule that a contract should rather be interpreted as to be valid and not invalid.

3.3.4.2 *Expressio unius et exclusio alterius* rule

By definition, this maxim means the inclusion of one term may imply an exclusion of the other when an express term already covers the ground.²⁴⁰ Argumentatively, *expressio contrario* points to the conclusion that the express mention of one item indicates an intention to treat differently items of a similar nature, which have not been mentioned, and such an argument may or may not be correct.²⁴¹ Thus, commentators warn that this general aid of interpretation of contracts this rule must be applied with caution.²⁴²

²³⁶ Christie & Bradfield 259.

²³⁷ *Lanfear v Du Toit* 1943 AD 59.

²³⁸ At 197

²³⁹ *Grobbelaar v Van de Vyver* 1954 (1) SA 248 (A) Schreiner JA at 255A.

²⁴⁰ *Zeederberg Ltd v Fromburg* 1922 SR 80

²⁴¹ Christie & Bradfield 261.

²⁴² *Dettmann v Goldfain* 1975 (3) SA 385 (A) 398F

The case of *Weinberg v Oliver*²⁴³ is illustrative on the application of the latter expression *unius* rule. The plaintiff had arranged with the defendant to leave his car at the latter's garage each day at a monthly fee. Inside the garage there was the exemption clause "[c]ar garaged at owner's risk". An employee of the garage drove the car to his home and it was severely damaged in a collision with a building. The plaintiff claimed damages from the defendant for breach of his obligation to keep the car safe in the garage. Watermeyer JA said the clause is a contractual modification of the common law rule as to risk, which in the absence of special agreement would apply to the contract between the parties. He went on to say: "[i]n my opinion it means that the plaintiff took upon himself certain risks of damage occurring to the car while, it was in the garage." Therefore, it was held the only risks, which the plaintiff undertook to bear, were risks attendant on the garaging of the car in the garage and not risks to which the car might be exposed if, in breach of the contract between the parties, it was taken out of the garage into the public streets. The defendant was liable in damages unless the condition, as to owner's risk modified the position. In the above case, the clause was construed to afford limited protection to the defendant against faults or imperfections of its employee that is substantial consonant with the contract.

3.3.4.3 *Ut res magis valet quam pereat* rule

As part of the secondary rules, this in essence means a contract or an agreement should be interpreted in all possible ways to be effective or valid.²⁴⁴ This rule is very much alive in modern contract not done by straining the language of the contract. This is necessary to both oral as well as written contracts and has been applied to save contracts as a whole or in part from legal ineffectiveness²⁴⁵ and from illegality.²⁴⁶

3.3.4.4 *Contra proferentem* rule

Essentially, the *contra proferentem* rule is a tertiary rule. Largely, this rule is supposed to be used as a last resort when all the ordinary rules of interpretation have been exhausted in an

²⁴³1943 AD 181.

²⁴⁴ *Interpretatio chartarum benigne facienda est ut res magis valeat quam pereat*. See *Kotze v Frenkel & Co* 1929 AD 418; *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) 670G-H; *Incorporated General Insurances Ltd v Shooter t/a Shooter Fisheries* 1987 (1) SA 842 (A) 858G; *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) 640-642.

²⁴⁵ *Credit Guarantee Insurance Corp'n of South Africa Ltd v Schreiber* 1987 (3) SA 523 (W) 526D-E; *Kriel v Le Roux* [2000] 3 All SA 65 (A) para [5].

²⁴⁶ In *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) 429.

attempt to arrive at the true expressed intention of the parties. Practically, it is not concerned with ascertaining the parties' common intentions, but to penalize the party who failed to draft a contract with sufficient clarity. In essence, this means courts would apply the *contra proferentem* principle with particular venom to exclusion clauses.²⁴⁷ Courts are however inclined to apply the rule directly without trudging through the list of secondary rules when interpreting consumer contracts.

Section 4(4)(a) of the CPA endorses this hard-line stance by stipulating that a court or Tribunal interpreting any standard form contract or another document which is ambiguous or has more than one reasonable interpretation must be resolved to the benefit of the consumer. Further, the CPA states any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect to have regard to the content of the document. The latter part speaks about expectations or reasonableness of the terms in the context.

Where a client instructs a lawyer to draft an exclusion clause that will exclude the client's liability for negligence in the performance of any contract it concludes requires the lawyer to spend considerable time drafting the clause. In designing and wording the exemption, the lawyer has to factor in the principles applied by the courts to the interpretation of contracts.²⁴⁸

Within the context of secondary rules, an ambiguously drafted exclusion clause is rendered ineffective to exclude the liability of the exempted party where it is not clear whether the clause covers the loss suffered. It would exempt the party concerned from the ground of liability for which he was supposed to be liable, but only include where there is a degree of blameworthiness.²⁴⁹ The *contra proferentem* cuts the Gordian knot and arbitrarily determines against the stipulator.²⁵⁰ It is a maxim recognized by most civil and common-law countries and used when the ambiguity of the language is such that its true meaning cannot be satisfactorily determined.

²⁴⁷ *Contra proferentem* is a principle of general application in contract law and is not confined to exclusion clauses. It is a tertiary rule for interpretation that provides that, in the event of there being an ambiguity in a contract term, the ambiguity is to be resolved against the party relying upon the term.

²⁴⁸ McKendrick *E Contract Law Text, Cases and Materials* 5th ed. (2012)371.

²⁴⁹ Christie&Bradfield 221.

²⁵⁰ See Davis AJA in *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (AD); Innes CJ in *Bon Accord Irrigation Board v Braine* 1923 AD 468.

According to case law, this principle must not be overstretched to absurd lengths and fanciful or remote grounds of liability against which the *proferens* cannot be supposed to have intended protection from.²⁵¹ The object is not to give the clause a strained interpretation, but to ascertain what the parties intended to cover bearing in mind that in case of doubt it must be construed against the *proferens*.²⁵² Scott JA gives the proper approach to the interpretation of indemnity clauses by application of this rule in *Durban's Water Wonderland (Pty) Ltd v Botha*²⁵³:

“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 the meaning. If there is ambiguity the language must be construed against the *proferens*...But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be the one which the language is fairly susceptible; it must not be “fanciful” or “remote”²⁵⁴

A party who shies away from expressing himself clearly in his exclusion clause runs the risk that his exclusion will be held to be ineffective. This construction constitutes the old baggage of interpretation requiring a party to spell out the extent of absolution from liability as required by our contract law.²⁵⁵

3.3.4.5 Exclusion of Negligence

The principle applied whether or not a party has effectively excluded liability for his own negligence is a vexatious one. Lord Morton authoritatively decided the case of negligence of employees in *Canada Steamship Lines v The King*²⁵⁶ in the following terms:

²⁵¹ *Cardboard Packing Utilities (Pty) Ltd v Edblo Tvl Ltd* 1960 (3) SA 178 (W).

²⁵² *Lawrence v Kondotel inns (Pty) Ltd* 1989 (1) SA 44 (D) 53D-54F; *Zietsman v Van Tonder* 1989 (2) SA 484 (T).

²⁵³ At 989

²⁵⁴ See also *Van der Westhuizen* case 468-469; *Lenaerts v JSN Motors (Pty) Ltd* 2001 (4) SA 1100. The application of these principles to insurance policies is illustrated by *Fedgen Insurance Ltd v Leyds* 38; *Barnard v Protea Assurance Co Ltd* 1998 (3) SA 1063 (C); *Van Zyl v KILN Non-MarineSyndicate No510 of Lloyds of London* 2003 (2) SA 440 (SCA) 445-446; *Springgold investments (Pty) Ltd v Guardian National Insurance Co Ltd* 2009 (3) SA 235 (D) paras [22]-[23]; *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) para [13].

²⁵⁵ In *First National Bank of SA Ltd v Rosenblum* Marais JA at 195 said: “In matters of contract the parties are taken to have intended that their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intended to conclude, it is for that party to ensure that the extent to which he, she is absolved is plainly spelt out.”

²⁵⁶ [1952] AC 208.

- (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereinafter called ‘the *proferens*’) from the consequence of the negligence of his own servant, the effect must be given to that provision...
- (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If doubt arises at this point, it must be resolved against the *proferens*,
- (3) If the words used are wide enough for the above purpose, the court must then consider whether “the head of damage may be based on some ground other than that of negligence.” The “other ground” must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene’s words in *Alderslade* case [1945] KB 189, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are prima facie wide enough to cover negligence on the part of his servants.

The third rule according to the *contra proferentem* terms as set out in the *Canadian Steamship Lines* case fails to recognize that contracting parties are reluctant to use general words of exclusion to cover both negligently inflicted loss and non-negligently inflicted loss.²⁵⁷ This assumption, considered a mutated form of a rule of law is very tricky to be cast on a stone. This notion is further supported by the views of Salmon J in *Hollier*²⁵⁸ that “rules of construction are merely our guides and not our masters”. An interpretation depends upon a court’s determination whether a clause is effective to exclude liability for negligence under the third limb of *Canadian Steamship* notwithstanding that it was possible to contemplate other sources of liability to which the clause might apply.²⁵⁹

Taking a cue from the precedent set out in England, the Supreme Court of Appeal in *Drifters Adventure Tours v Hircock* applied these principles. In *casu*, a passenger in a bus tour had signed an indemnity form exempting operator’s liability for driving. The question before the court was whether the contract exempted the appellant from liability to the respondent arising out of injuries sustained by her caused by the appellant’s employees’ negligence, and if so,

²⁵⁷ Poole 447.

²⁵⁸ *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, Court of Appeal.

²⁵⁹ See *The Raphael* [1982] 2 Lloyd’s Rep 42.

whether the indemnity is enforceable to exempt the appellant's liability arising out of its employee's recklessness or gross negligence in relation to the accident. The court held that the appellant bears the onus of establishing on a balance of probabilities, that the indemnity clause is enforceable against the respondent.

Wherefore, commentators argue that an interpretation which "strains the wording of the indemnity cannot be adopted."²⁶⁰ The Appellate Division in *Coopers & Lybrand v Bryant*,²⁶¹ developed an aid to assist the court beyond the literal expression. The court says the next phase is that the wording of the contract must be interpreted in the context of the other provisions in the document, read as a whole. This is what Hutchinson & Pretorius call textual text.²⁶² If this intra-textual treatment does not assist in determining the parties' intentions, the interpreter must look at extra-textual elements in order to draw useful inferences to the intended meaning from the nature of the contract, its purpose and the background against in which it was concluded-extended context.²⁶³

The narrow interpretation method to confine exemption clauses within reasonable bounds also considers the clause against the surrounding circumstances in order to determine the parties' intentions that the clause should only protect the *proferens* from liability while performing his part of the bargain. Otherwise, the tests laid out in the *Canadian Steamship Lines* case will fail if its use causes tension. This is particular so in relation to a clause that excludes liability for damage 'howsoever caused'.

The above analysis may assist the court to determine the legal grounds of liability that subsist in the absence of a clause stipulating strict liability, negligence, gross negligence, and the clause will then be given minimum effectiveness by being restrictive. Probably, this rule examines the true intention of the parties by considering the claims the exempted party seeks

²⁶⁰ Christie & Bradfield 222.

²⁶¹ 1995 (3) SA 761 (A).

²⁶² Hutchinson D & Pretorius CJ *The Law of Contract of South Africa* (2009)254-255.

²⁶³ *Ibid.*

to diminish or exclude.²⁶⁴ This means, for instance, that a clause, which seeks to limit liability, will be construed less strictly than one, which purports to exclude it altogether.²⁶⁵

3.3.4.6 Parol evidence rule

Where the parties dispute the meaning of the word, in particular, the complexity or technicality of the words or phrase in their contract or the claim of consensus is in issue evidence of the circumstances²⁶⁶ in which the contract originated, including what passed between the parties is admissible and that all relevant evidence is admissible at the same time. The rule regarding the admission of evidence on matters outside the contract that throws light on how it is to be interpreted is of fundamental importance. This is called the parol evidence rule or integration rule.²⁶⁷

Commentators argue the parol evidence rule is an intervention adopted to deal with certainty and prevention of litigation in written contracts. The parol evidence rule declares that where the parties intended their agreement to be fully and finally embodied in writing, evidence to contradict, vary, add to or subtract from the terms of the writing is inadmissible.²⁶⁸ A distinction must be drawn between evidence of the parties, which shows what the common intention was, and that, which shows that one of the parties had “unexpressed reservation”, “a condition which he omitted to mention, and of which the other party was unaware”. The latter does not form part of the contract, but that evidence is admissible in the interpretation of the contract.²⁶⁹

This has been accepted by the courts in connection to words, which are used in a special or technical sense,²⁷⁰ and words, which identify persons or objects mentioned in the

²⁶⁴See *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314; [2009] 1 Lloyd’s Rep. 225 at [25] where, in the context of an insurance warranty, there was said to be an ambiguity in the seemingly unambiguously phrase “at all times”.

²⁶⁵In *Aisla Craig Fishing Co v Malvern Fishing Co* 970 the court in an *obiter dictum* conceded that it is “inherently improbable” that an injured party will agree to a total exclusion of the other party’s liability, in that “there is no such high degree of improbability that he would agree to a limitation of...liability.” See also Palmer 45 M.L.R.327; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803 at 814; *BHP Petroleum Ltd v British Steel Plc.* [2000] 2 All ER (Comm) 133 at 149.

²⁶⁶Irrespective of whether they have been previously described as “background circumstances” or “surrounding circumstances”.

²⁶⁷*Venter v Birchholtz* 1972 (1) SA 276 (A) 282; *Johnston v Leal* 1980 (3) SA 927 (A) 939.

²⁶⁸*Hutchinson & Pretorius* 255. See *Union Government v Vianini Pipes (Pty) Ltd* 1941; *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA).

²⁶⁹Per Innes JA in *I Pieters & Co v Salomon* 1911 AD 137.

²⁷⁰See *Richter v Bloemfontein Town Council* 1922 AD 70

document.²⁷¹ In the *Delmas Milling* case the appellate division was of the view that only in case of “ambiguity” or “uncertainty” should extrinsic evidence be admitted and should be used as conservatively as possible. Without any derogation the court accentuated the linguistic treatment before evidence of surrounding circumstances and where “true ambiguity” remains-evidence of “what passed between the parties would be allowed.²⁷² However, in later years, the rigid stance was softened and extrinsic evidence of surrounding circumstances could be admitted even for non-technical words.

Whether a provision forms an operational part of a contract, or it is merely informational, historical or evidentiary, depends on what it says within its context in the contract against the background in which the parties concluded it. In *Absa Bank Ltd v Swanepoel NO* the court had to determine whether a borrower in a mortgage bond has chosen to accept a life cover from the bank. The court examined evidence of both parties against the background circumstances to interpret the ambiguity of the words.²⁷³ The court held that in the context, the disputed provision is incapable of containing an undertaking for the cover. The ambiguity on which counsel relied was created by the fact that the words ‘in terms of this loan’ appear before, and not after, the words ‘the amount owed’.

A similar viewpoint is reiterated by Lewis²⁷⁴ when advocating for context in the role of equity that contracts should be interpreted through ascertaining the common intention of the parties, having regard to “surrounding circumstances” that prevailed when the contract was entered.²⁷⁵ This approach should be taken where a contractual term was *ex facie* ambiguous, but also wherever there was any dispute as to the meaning of the term.²⁷⁶ It has been observed that the more technical a word is, the higher the probability that its meaning is limited.

In *the Commercial Union* case, the words in issue in an insurance matter were the phrase “this section is extended to cover loss or damage directly occasioned by or through or in

²⁷¹ Identificatory evidence has been in fact said to “apply the contract to the facts” and not so much to interpret the words- *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447(A) 454F.

²⁷² At 454-455.

²⁷³ “I hereby declare that the advantages of life insurance that in terms of this loan covers the amount owed, have been fully explained to me, and that I have chosen to accept/not to accept this cover”.

²⁷⁴ “The demise of the *exceptio doli*: Is there another route to contractual equity?” 1990 SALJ 26.

²⁷⁵ Surrounding circumstances are matters that were probably present to the minds of the parties when they contracted (but not actual negotiations and similar statements. Kerr argues that there is no significant difference between “background circumstances” and “surrounding circumstances” (405). For a reaffirmation of the need to consider “any admissible surrounding circumstances” see *Atteridgeville Town Council* case 306.

²⁷⁶ Lewis “The uneven journey to uncertainty in contract” 2013 (76) THRHR 81.

consequence of the deliberate or wilful or wanton act of any person committed with the intention of causing such loss or damage but excluding loss or damage caused by or arising from theft or any attempt thereat”. The appellant argued that the phrase “committed with the intention of causing such loss or damage” could be designated a “qualification phrase” and the phrase “...but excluding loss or damage caused by or arising from theft or any attempt thereat”, an exception phrase. It was further submitted that the insured bore the onus of proving that he fell within the qualification phrase. If he succeeded in doing that, the onus was then on the insurer to prove that it was exempt from liability by virtue of the exception clause.

The court held that it was now accepted in our law that a contract of this nature where ambiguity reared its head, ought to be interpreted against the background of the factual context or ‘matrix of facts’ in which it was concluded. Further held, that the context or matrix of facts included interpreting the non-operative parts of the contract together with the operative part. It means the court is not constrained to the terms, but may also read the Preamble to get the background. Therefore, the loss or damage suffered by the respondents was not excluded by the exception clause.

3.4 Background and surrounding circumstances-interpretation of parol evidence rule

The passage from *Reardon Smith Line v Hansen-Tangent*²⁷⁷ that is also quoted in *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd*²⁷⁸ lays the foundation for the recognition of background circumstances in contractual interpretation. It says:

“No contracts are made in a vacuum, there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as “the surrounding circumstances” but this phrase is imprecise, it can be illustrated but hardly defined. In a commercial contract, it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.”

Insofar as interpretation is concerned, the ‘surrounding circumstances’ referred to are what we understand as background facts. It is said a party intending to rely on background

²⁷⁷ [1976] 3 All ER 570 (HL).

²⁷⁸ 1980 (1) SA 796 (A) at 805B.

circumstances or facts has to plead them.²⁷⁹ Joubert JA in *Coopers & Lybrand v Bryant*²⁸⁰ recognises them as probably present to the minds of the parties when they contracted. However, courts on several occasions have been ambivalent to express a distinction between “background circumstances” and “surrounding circumstances”.²⁸¹

In the landmark case of *Investor Compensation Scheme v West Bromwich Building Society*,²⁸² adopted in many contractual interpretations, Lord Hoffman laid down the following five canons of construction:

(1) Interpretation is the ascertainment of the meaning, which the document would only convey to a reasonable person having all the background knowledge, which would reasonably have been available to the parties, in the specific situation they were in at the time of conclusion of the contract.

(2) The “background” was famously referred to by Lord Wilberforce as the “matrix of fact,” but this simple phrase is, if anything, an understated description of what the “background” may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

In this analysis of the process, courts sometimes take the subjective route of interpretation,²⁸³ but at some point often embark on an objective interpretation. Objective interpretation places the conduct of the parties within the context of the legal policy which prevails within a

²⁷⁹ *Streek v East London Daily Despatch (Pty) Ltd* 1980 (1) SA 156H.

²⁸⁰ 1995 (3) SA 761 (A) 768.

²⁸¹ See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) 464E: “It is not apparent to me quite where to draw the line between background and surrounding circumstances. Perhaps it is a distinction without difference. But it is clear that in construing the ambit of the exemption clause between the parties in this matter regard should be had at least to the “matters probably present to the minds of the parties when they contracted”-the background circumstances,

²⁸² [1998] 1 WLR 912-913.

²⁸³ Here the interpretation is dominated by the underlying intention of the parties, and is in essence psychological in its approach that stays close to the actual expressions of intent such as expressed by the text of the document.

particular society and includes *inter alia*, good faith between the parties and the principles of public policy.²⁸⁴

(3) The law excludes from the admissible background the previous negotiations of the parties and their declaration of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. Yet this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars, whereas the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous, but even (as occasionally happens in ordinary life), to conclude that the parties must, for whatever reason, have used the wrong words or syntax.²⁸⁵

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from that background that something must have gone wrong with language, the law does not require judges to attribute to the parties an intention which they could not have had.

Investors Compensation Scheme v West Bromwich Building Society is a case concerned with the construction of a claim form. Investors submitted a claim to the Investors Compensation Scheme Ltd (ICS) for compensation in respect of negligent advice given to them by brokers who had sold them home plans in contravention of the provisions of the Financial Services Act 1986. Furthermore, the investors claimed for misrepresentation and the rescission of their mortgages. The plans rendered the investors’ home vulnerable to repossession by the building societies to whom the investors had mortgaged their homes as part of their home income

²⁸⁴ Van der Merwe 303.

²⁸⁵ See *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945.

plan. The claim form drafted by ICS required the investors to assign to ICS all their rights arising out of a sale of the home income plans. The issue of interpretation that arose between the parties related to the construction of the claim form, in particular the scope of the provisions relating to the assignment of investors' rights against the building society.

In applying his principles to the facts of the case, Lord Hoffman concluded that all claims for damages and compensation had been validly assigned to ICS (so that ICS and not the investors could bring a claim for damages), yet that the investors had retained the right to claim rescission of the mortgages. Thus he concluded that the phrase '[a]ny claim (whether sounding in rescission for undue influence or otherwise)' was actually used by the parties to mean "[a]ny claim sounding in rescission (whether for undue influence or otherwise)" is [not] a reason for giving effect to what they appear to have meant. He highlighted that the claim form governing the relationship between the parties was intended to be read by lawyers and the explanatory note by laymen.

Lord Hoffman's phrase that "almost all the old intellectual baggage of legal interpretation has been discarded" is significant. This baggage referred to by the Lord includes the "artificial rules" relating to the construction of exemption or exclusion clauses. In a subsequent case, Lord Hoffman in his evolutionary judicial activism concluded that:

"The disappearance of artificial rules for the construction of exemption clauses seems to me in accordance with the general trend in matters of construction, which has been to try to assimilate judicial techniques of construction to those which would be used by a reasonable speaker of the language in the interpretation of any serious utterance in ordinary life."²⁸⁶

In a number of international cases, the principles laid out by Lord Hoffman have been followed and applied in the interpretation of specifically exemption clauses. This can be welcomed as it resulted in a degree of certainty being formed on admissible evidence. Although this did not overrule the restrictive approach in the interpretation of exemption clauses in older cases, the likelihood of their long-term survival clearly was delicate.²⁸⁷

The above analysis shows that the distinction between (admissible) background circumstances and (inadmissible) surrounding circumstances, as laid out in earlier cases

²⁸⁶ *Bank of Credit & Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 para [62].

²⁸⁷ McKendrick 377.

posed some difficulty that it is fortunately no longer relevant in contemporary contract law. Harms DP, in *KPMG Chartered Accountants (SA) v Securefin Ltd*²⁸⁸ laid the forced distinction between the two forms of circumstances to rest and said:

“The time has arrived for us to accept that there is no merit in trying to distinguish between ‘background circumstances’ and ‘surrounding circumstances’. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The term ‘context’ or ‘factual matrix’ ought to suffice.”²⁸⁹

3.5 Interpretation to prevent repudiation

In various jurisdictions including South African law of contract, liability for breach by a contractant is not for all the consequences, but limited for those aspects of a contract, which are critical. The courts in South Africa systematically rely on English law for guidance on the way in which liability for damage due to the breach of contract may be limited.²⁹⁰ English law applies a strict interpretation of exclusion clauses in trying to prevent anticipatory breach of contract. The exempted party has underlying propensity to use those clauses as their defence when an obligation to perform their part of the bargain or when there has been negligent in their obligation.

Scrutton LJ in *Gordon Alison & Co Ltd v Wallsend Slipway & Engineering*²⁹¹ confirmed that a person, who wishes to evade a legal liability, can only do so by using clear words”.²⁹² This is further accentuated by the decision in *Internet Broadcasting Corp Ltd and (t/a NETTV) v MARIL LC*.²⁹³ In deciding that an exclusion clause does not apply to acts of deliberate repudiation, the court enunciated the following principles:

- (1) There is no express rule of law applicable and the question is one of construction.

²⁸⁸ 2009 (4) SA 399 (SCA) para [39].

²⁸⁹ *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) paras [13], [33]; *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2011] 2 All SA 295 (SCA).

²⁹⁰ Van der Merwe et al 426 citing the case of *Lavery & Co Ltd v Jungheinrich* 1931 AD 156.

²⁹¹ (1927) 43 T.L.R. 323.

²⁹² At 324. See also *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 850 per Lord Diplock’s approach, that was accepted as correct by HH Judge Coulson in *Decoma UK Ltd v Haden Drysys International Ltd* [2005] EWHC B12 (TCC). In *Stoznia Gdynia SA v Gearbulk Holdings Ltd* [2008] EWHC 944 (Comm), it was argued that the enactment of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulation 1999 (SI 1999/2083) rendered the “clear words” principle inapplicable to exclusion clauses since it is less necessary for the courts to find a strained interpretation in order to seek to do justice between the parties.

²⁹³ [2009] EWHC 844 (Ch). See also *Red River UK Ltd v Sheikh* [2010] EWHC 961 (Ch).

- (2) There is a presumption, which appears to be a strong presumption, against the exemption clause being construed so as to cover deliberate, repudiatory breach.
- (3) The words needed to cover deliberate, repudiatory breach need to be very “clear” in the sense of using “strong language” such as “under no circumstances...”
- (4) There is a particular need to use “clear”, in the sense of “strong”, language where an exemption clause is intended to cover deliberate wrongdoing by a party in respect of a breach which cannot, or is likely to be, covered by insurance. Language such as “including deliberate repudiatory acts by [the parties to the contract] themselves...” should be used in such a case.
- (5) Words which, in a literal sense, cover a deliberate repudiatory breach will not be construed as such if that would defeat the “main object” of the contract.
- (6) The proper function of an exemption clause in a contract between commercial parties concluded at arm’s length and with equal bargaining power is to allocate insurable risk. An exemption clause should not normally be construed in such cases so as to cover an uninsurable risk or one very unlikely to be capable of being insured, in particular deliberate wrongdoing by a party to the contract itself (as opposed to vicarious liability for the conduct of others).
- (7) Words which in a literal sense cover deliberate repudiatory breach cannot be relied upon if they are “repugnant”. Exemption clauses should not normally be construed in such cases so as to cover an uninsurable risk or one very unlikely to be capable of being insured, in particular deliberate wrongdoing by a party to the contract itself (as opposed to vicarious liability for the conduct of others).

3.6 Other factors for interpretation

Insofar as one cascades through the canons of construction, the level of generality and abstraction of the sources increases: first comes the specific transaction, followed by the totality of transactions made between the same parties, then trade usages, legal rules applicable to similar contracts, general rules of contract law, and finally, the general standard of reasonableness. In such a scenario, “a term which is considered *reasonable* in the circumstances is supplied by the court”.

When viewing this from an international perspective, one identifies the following trend: The American Restatement puts emphasis on the normative character of this task: “where there is

in fact no agreement [respecting an essential issue], the court, should supply a term which comports with community standards of fairness and policy rather than analyse a hypothetical model of the bargaining process.” Similarly, the Unfair Contract Terms Act 1977 (UCTA) in the United Kingdom has made major changes to the law relating to exclusion clauses that it declared certain exclusion clauses ineffective and subjected others to a reasonableness test.

Part 2 of the Consumer Rights Act 2015 amends the UCTA (in relation to business to consumer contracts) and revokes the Unfair Terms in Consumer Contracts Regulations 1999. It applies to consumer contracts other than for employment or apprenticeship. The Act covers a notice to the extent that it relates to rights or obligations between a trader and a consumer or purports to exclude or limit a trader’s liability to a consumer. So the reasonableness test remains under the UCTA.

The reasonableness test is an ancient phenomenon dating back to 1877. In *Parker v South Eastern Railway*,²⁹⁴ courts were enjoined to ignore and void exclusion clauses, which were unreasonable. Bramwell L.J asked himself: “what if there was some unreasonable condition, for instance, to forfeit £1000 if the goods were not removed within 24 hours?” These clauses are normal in insurance contracts. The Lord Justice argued against the clause being binding if the particular individual was told that the conditions were to be, but did not in fact read them. Indirectly, he introduced the implied term against unreasonableness.

Lord Denning, the protagonist of this approach long before the UCTA prescription in *John Lee & Son (Grantham) Ltd v Railway Executive*,²⁹⁵ expressed an opinion that an unreasonably onerous term in a standard form contract would not be enforced by the courts. “There is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused”.²⁹⁶ Furthermore, in *Thornton v Shoe Lane Parking Ltd*²⁹⁷ he said that courts, when judging a particular clause, did not pause to enquire whether the exempting condition is void for unreasonableness,²⁹⁸ although believing there were circumstances where this could be so. These dicta have not been contradicted on many occasions.

²⁹⁴ (1877) L.R. 2 C.P.D 416.

²⁹⁵ [1949] 2 All ER 581.

²⁹⁶ At 584.

²⁹⁷ [1971] 1 All ER 686.

²⁹⁸ At 690.

This can be an explanation why in the rules of construction there is a move away from the parties' individual will towards social values. The "community standards of fairness and policy," according to which the court should supply the omitted term, connote moral and social values of fairness, equity, decency, trust, taking the other party's interests into consideration, mutual cooperation and good faith.²⁹⁹ Perhaps the position might be different on an equitable interpretation based on good faith.³⁰⁰ Now the South African legal system is not in unison on the exact role of good faith in the current constitutional dispensation, specifically for purposes of the interpretation of contracts in our law.³⁰¹

3.7 Technicalities to constrain unconscionability in contracts

3.7.1 *The role of public policy*

In the English common law countries, there are few cases of authority likely to nullify an agreement stigmatized as harsh and unconscionable or declared unenforceable.³⁰² To tackle unconscionability in contracts the court in *Alec Lobb (Garages) Ltd & Others v Total Oil Great Britain Ltd*³⁰³ said that:

"There must be some impropriety, both in the conduct of the stronger party and in terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) which in the traditional phrase 'shocks the conscience of the court' and makes it against equity and good conscience for the stronger party to retain the benefit of a transaction he has unfairly obtained"

The court goes on to lay the criteria that would warrant court interference to relieve a party from a bargain considered unconscionable. From the common law perspective the principles are as follows: (i) that one party was at a serious disadvantage to the other, "whether through poverty or ignorance or lack of advice or otherwise", so that circumstances existed of which unfair advantage could be taken; (ii) that the weakness of the one party had been exploited by the other in some morally culpable manner; and (iii)

²⁹⁹ Ayres & Spiedel 689.

³⁰⁰ See Van der Merwe 317.

³⁰¹ In *Brisley v Drotsky* the court concluded that while good faith has a creative and controlling and legitimating or explanatory function' it does not exclude consideration of other important contractual values or principles such as the sanctity of the contract.

³⁰² Lawson (2008) 102.

³⁰³ [1983] 1 W.L.R 87.

that the resulting transaction has been, not merely hard and improvident, but overreaching and oppressive.

As a matter-of-fact, courts in South Africa have, through judicial notice, struck down unconscionable and unduly harsh or oppressive contractual provisions for being in conflict with public policy.³⁰⁴ Most exemption clauses are attacked based on point (ii) and (iii) above. The issue of public policy to control contracts would constitute a dissertation on its own because it spills over to many other aspects of contractual interpretation. More importantly, in South Africa the interpretation of contracts have been avowed to be consonant with the directives in the Bill of Rights.³⁰⁵

However, this does not necessarily discount the need to accentuate fairness ideal on the assumption that contracts, which are consonant with the provisions of the Constitution, will be inherently just and fair. The need for clear guidelines for applying the Constitution to the relationship between private parties cannot be over-emphasized in the development of equitable jurisprudence. Public policy imports the notion of fairness, justice and reasonableness and would preclude the enforcement of a contractual term if its enforcement would result in injustice. The case of *Barkhuizen v Napier*³⁰⁶ is instructive of this argument.

It is upon this *ratio* that one seeks to evaluate the impact of exemption clauses in the post-constitutional democracy and explore the lacuna for the sway against enforcement of unreasonable contracts. By giving diametrically opposed judgments, our courts have been tardy in or perhaps reticent to imbue the fundamental rights or values of our Constitution to

³⁰⁴Van der Merwe et al 218-220. Similar views are also expressed in the following case law: *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 782-783; *Brisley v Drotzky* para [32] where the court referred to “*buitengewone onbillikheid*” (translated as ‘extraordinary unfairness’); *Diners Club SA (Pty) Ltd v Singh* 2004 (3) SA 630 (D) 658; *National Bank of SA Ltd v Bophuthatswana Consumer Affairs Council* 1995 (2) SA 853 (BG) 871; *Price Waterhouse Coopers Inc. v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) para 24; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 14. In *First National Bank of SA v Sphinx Fashions CC* 1993 (2) SA 721 (W) 725 the court relied on the *Sasfin* decision and stressed that the inequity of the situation was apparent and that it was grossly exploitative; in *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D) 575-576 the court spoke of “unconscionability” and a complete ‘lack of elementary justice’; the minority judgment in *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (2) SA 389 (SCA) 420; in *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) para 21 the court found that a provision was offensive to one’s sense of justice.

³⁰⁵ S 8(2) of the Constitution.

³⁰⁶ 2007 (5) SA 323 (CC).

influence the civil law through direct or indirect horizontality.³⁰⁷ Commentators begrudgingly accept that different and conflicting interpretations are welcome and serve a certain purpose in the letter of the Constitution. Nevertheless, inconsistent judgments on the indirect application of the Bill of Rights are untenable and create confusion to scholars.³⁰⁸

Eventually, the common law needs to be developed specifically regarding contracts that contain exclusion clauses, such as the one in the *Afrox* case, to ensure fairness or compliance with public policy because the protection afforded to the individual consumer seems inadequate. In *S v Thebus* Moseneke J pointed out pertaining to section 39 that “[t]his section does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified.” The South African Constitution is expressly value-based and demands that the judiciary take cognisance of substantive values.³⁰⁹

The dithering and uncertainty of South African courts is also manifest in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.³¹⁰ Here the court was called to determine whether a lease contract imposed a duty of good faith to negotiate a renewal. The question was whether the common law of contract had to be refashioned by the importation of a requirement of good faith. The court recognized that good faith held considerable importance in our contract law, as well considerable public and constitutional importance. The minority held that the proposition of a common law principle of good faith could provide meaningful parameters to render an agreement to negotiate in good faith enforceable, and consistent with section 39(2) of the Constitution. Further, it was held that this common law principle to negotiate in good faith is consistent with the sanctity of contract. The enforceability of this principle accords with and is an important component of the process of the development of a new constitutional contractual order. Lastly, it was held that a requirement that allows a party to a contract to ignore detailed provisions of a contract is inconsistent with the Constitution.

Although in the above case the leave to appeal failed, it is apparent that the Constitutional Court missed the opportunity to develop the common law duty of good faith beyond existing

³⁰⁷ Moseneke D “Transformative constitutionalism: its implications for the law of contract” 2009 (20) *Stell LR* 10.

³⁰⁸ Sutherland PJ “Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC)-Part 1” *Stell LR* 396.

³⁰⁹ S1, 7 and 39 (1)-(2).

³¹⁰ 2012 (1) SA 256 (CC) 268.

precedent. This means the threats posed by unconscionability and unreasonableness should be countered by the presence of good faith within the context of contract principles. Developing the common law pertaining to reasonableness in this context will ensure fairness and protection of the weaker party.

3.7.2 Exploring the constitutional methodology

The need to develop the common law to protect the individual consumer who is faced with exemption clauses in the era of consumerism (in accordance with a welfarist approach) must reflect the critical role of public policy seen through the prism of the Constitution. It is summed up as follows:

“The need to develop the common law under section 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted and developed to create harmony with the ‘objective normative value system’ found in the Constitution”.³¹¹

Unequal bargaining power is a relevant factor in determining whether a contract or a contractual clause is against public policy. Therefore, the contractual interpretation that “where the words of a contract are ambiguous, a court will lean towards an interpretation which is equitable and does not give one party an unreasonable advantage over the other,³¹² but will avoid doing so if such interpretation goes against clear and unambiguous meaning of the words used” seems premised on policy grounds.

It is on the similar account that the High Court in *Naidoo v Birchwood* declined to enforce an exemption clause and disclaimer notices on the basis that doing so would be unjust and unfair. Nicholls J concluded that exemption clauses, which exempted liability for bodily injuries in hotels and other public places, have the effect of denying a claimant a right to judicial redress. The methodology to reach this decision was based on the development of the common law in the Constitution instead of the existing CPA of 2008. Section 51 of

³¹¹Ngcobo J para [28]. See also Currie & De Waal *Bill of Rights Handbook* (2005)67; Lubbe GF 2004 *SALJ* 402-403.

³¹²*Van Aswegen v Volkskas Bpk* 1960 (3) SA 81 (T).

the Consumer Protection Act prohibits certain terms in a consumer contract in a general language. This will be addressed in detail in the next chapter of this discourse.

3.8 Which route for the courts on exemptions claims based on breach of contract or delict?

A breach of contract is a conduct that contravenes contractual norm, which protects the contractual interest of one contractant against particular conduct of the other contractant.³¹³ In totality, this does not mean that the enforcement of an exemption clause represents a breach of contract, although it contains some indicia of repudiation.

In South African law, the failure to disclose information pertinent to a transaction is regulated by settled principles that balance the interest of the parties and proclaims delictual liability for culpable misrepresentations.³¹⁴ The interface between these laws seems to be a revival of the principle of good faith, which is discussed in detail in chapter 2. The reluctance of the courts to apply the underlying principle of good faith, as a counterweight to improper behaviour in the pre-contractual phase³¹⁵ militates against the imposition of additional duties on any extensive scale in the context of bargaining within the commercial arena.³¹⁶

Some commentators believe that since breach of contract entails wrongful conduct, therefore, it is a particular form of delict. A breach of contract claim has its own requirements, and a delictual damages claim has its own requirements. Proving the existence of a breach of contract claim by its nature does not by implication mean it is a delictual claim.³¹⁷ This argument has been laid to rest in *ABSA Bank v Fouche*,³¹⁸ where the court held that the two could be concurrent actions.

³¹³ Van der Merwe et al 329. See Poole 244 who submits that a breach will occur where without lawful excuse, a party either fails or refuses to perform a performance obligation imposed upon it under the terms of the contract, or a party may perform its contractual obligations, but may do so defectively, in the sense of failing to meet the required standard of performance that was agreed upon.

³¹⁴ Ibid.

³¹⁵ Cf *Indwe Aviation (Pty) Ltd v Petroleum Oil & Gas Corporation of South Africa (Pty) Ltd (No1)* 2012 (6) SA 96 (WCC) on the general application of the norm of good faith, both in *contrahendo* and *stante contractu*.

³¹⁶ Van Huyssteen et al 87.

³¹⁷ Van der Merwe 1978 *SALJ* 317.

³¹⁸ 2003 (1) SA 176 (SCA).

In relation to the law of delict, which is also a ground for claim, contract law has occupied a privileged position. With the contract-delict interface, a primary concern is that the contract should not be circumvented by a delictual claim. The basic argument is that parties, by the exercise of their autonomy, are able to isolate and allocate general risks of their bargain and accordingly plan their affairs within the contractual law paradigm.³¹⁹ With the contractual arrangement in hand, there is a reasonable expectation that the law of delict should not be allowed to frustrate this.

In general terms, the non-breaching party is entitled to be compensated for the loss they suffered as a result of a breach of contract. Failure to perform a primary obligation under a contract gives rise to a secondary obligation to pay damages or to pray for payment of the contract price. However, the secondary obligation may be excluded by an exemption clause; hence its availability will arise only as proof of the primary breach.

For an example, the incorporation of an exemption for fraudulent misrepresentation in a contract as a term does not only restrict the innocent party's remedy to breach of contract but may also restrict his other remedies such as delict or enrichment claims. A party may exercise his options as the redress differs, of course depending on whether the requirements for the remedy are complied with.³²⁰ There is a need to keep flexibility in these matters because rigidity may sometimes result in injustices.

According to commentators, "[T]he same conduct may constitute both a breach of contract and delict. This is the case where the conduct of the defendant constitutes both an infringement of the plaintiff's rights *ex contractu* and a right which he had independently of the contract."³²¹ This was enforced by the judgment of *ABSA Bank v Fouche*.

This kind of analysis raises the question whether the requirements of damage and fault should also be set for breach of contract. The requirement of damages does not stick because there is no authority stipulating that it forms an integral part, but what remains is fault. It is argued that nothing prevents a contractant from excluding fault as a

³¹⁹ Bhana (2008) 306.

³²⁰ *Holtzhausen v ABSA Bank* 2008 (5) SA 630 (SCA) para [7] In this case the appellant counsel nailed his colours to the mast by disavowing any claim based on contract, and advancing a claim based on delict for pure economic loss suffered due to negligent misstatements.

³²¹ See Van der Walt in *LAWSA* (8) para 5 cited in *Lillicrap, Wasenaar & Partners v Pilkington Brothers (Pty) Ltd* 1985 (1) SA 475.

requirement for breach.³²² Fault and culpability normally form components of negligence, which arise out of the contract. On closer examination, it is possible that specific rules will apply to specific situations on whether to exclude or include fault.

In earlier times, the liability of ship owners, innkeepers and stable-keepers was based on strict liability.³²³ The debate on fault in these situations remains unsettled in the minds of many scholars and lawyers.³²⁴ For example, further confusion is planted by the decision in *Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd*³²⁵, where the court held that the *Edictum de nautis, cauponibus et stabulariis* is not applicable to a public carrier by land and that his liability for damages to the goods transported is accordingly based on fault. Thus, an inclination exists to base contractual liability for damage to a thing on fault.

Most commentators who believe that breach of contract is but a form of delict argue either that fault is a necessary requirement for breach of contract,³²⁶ or that it should be a general requirement precisely because of the close relationship between breach of contract and delict.³²⁷ However, their view is irreconcilable with a suitably worded representation clause which may bar both remedies for a *voetstoots* clause. Consequently, the protagonist of the fault approach should admit the onus of proving that fault does not rest on the person who seeks to rely on a breach of contract, but the defendant will have to prove the absence of fault if he wants to be excluded from liability for breach of contract.³²⁸

In *Administrator, Natal v Edouard*³²⁹, the appeal court remarked that liability in delict is not based on fault for damages. Fault is an issue where the claim is based on breach of contract. Therefore, if fault is not a general requirement for breach of contract, it is

³²² See Nienaber 1989 *TSAR* 6.

³²³ See *OK Bazaars (1929) Ltd v Stern & Ekermans* 1976 (2) SA 521 (C) 529B-D. Furthermore, no fault is required for breach of a warranty.

³²⁴ Stoop 1998 *THRHR* 1 recognises that this problem is also experienced in other foreign jurisdictions. Thus in German law fault is indeed required for breach of contract while English law does not insist on fault. (Cf Treitel *GH Remedies for breach of contract: a comparative account* (1988) Chaps 2 and 4.

³²⁵ 1995 (3) SA 42 (A) 50.

³²⁶ Hosten 1960 *THRHR* 254; NJ Van der Merwe 1978 *SALJ* 324; Neethling, Potgieter & Visser *Delict passim*; Stoop 1998 *THRHR* 1.

³²⁷ Cf the discussions by Nienaber 6; Van der Merwe NJ 1978 *SALJ* 324.

³²⁸ See *Scoin Trading (Pty) Ltd v Bernstein, Gillies Martin NO* [2010] ZASCA 160, where the court in *obiter* says contractual damages do not depend on fault. All that the creditor is required to prove is that the debtor is in mora. It is not necessary to prove fault on the part of the debtor. Also see *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 (1) SA 584 (T) 587F.

³²⁹ 1990 (3) SA 581 (A) 597F.

sufficient to conclude that liability for breach of contract is not a just form of delictual liability. Accentuating this point on policy grounds, the Appellate Division in *Lillicrap, Wassenaar & Partners v Pilkington Brothers*³³⁰ held that it was not desirable to extend the delictual action to a contractual duty to perform professional work with due diligence, when the contract has caused pure economic loss.

The point of convergence would be where the breach has caused physical injury to a person or property; the affected party may sue on delict and not on contract, as demonstrated in a number of case law canvassed in this chapter.³³¹ This happens if the injury infringes a legally recognized interest, which exists independently of the contract. Negligent design or construction of a building under a building contract therefore gives the employer no right of action in delict if there was an exclusion clause against the engineer or contractor.³³² That would confine the claim by the employer to the contract only. Where there is a contract, it enables the parties to regulate their relationship including the respective remedies that are included or excluded.

In *White v Warwick*³³³, the claimant hired a bicycle from the defendants with an exclusion clause that “nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired”. When the saddle tipped over and the claimant got hurt, he brought an action for breach of contract or in tort for negligence. Liability could be grounded either in negligence or strict liability for breach of contract, the Court of Appeal held that the exclusion clause extended to strict liability for breach of contract. However, in the House of Lords the defendants were held liable for negligence. Denning L.J accentuated this position through his remark that:

“[T]he liability for breach of contract is more strict than the liability for negligence. The owners may be liable in contract for supplying defective machine, even though they were not negligent...In these circumstances, the exemption clause must, I think, be construed as exempting the owners only from their liability in contract, and not from their liability in negligence.”³³⁴

³³⁰ Footnote 323 above.

³³¹ *Cathkin Park Hotel v JD Makesch Architects* 1993 (2) SA 98 (W) 102 (C); *Visagie v Transsun (Pty) Ltd* [1996] 4 All SA 702 (TK); *Niemand v Old Mutual Property Investment Group (Pty) Ltd* [2012] ZAGPPHC 87.

³³² *Kohler Flexible Packaging (Pinetown) (Pty) Ltd v Marianhill Mission Institute* 2000(1) SA 141 (D) 145F-G.

³³³ [1953] 2 All ER 1021.

³³⁴ At 1025.

Despite the connection between breach of contract and delict, the two causes of action differ significantly in degrees such that there should be no attempts to treat them as the same aspect. Their respective distinctions should be sustained and not conflated to the extent that a party who, while performing his contractual duty injures a third party (who has no contractual relationship with him, whether or not he has a contractual relationship with the other party to the contract) cannot rely on any contractual restriction of his liability.³³⁵ Each has its own requirements and each is governed by its own rules and consideration of policy, for remedies and limitation of liability, as broached in this discourse above.

The question hinges in interpretation of the exemption clause. Does it aim to exempt a party from all claims, contractual and delictual, or is the aim so narrow as to include only one of them? Lewis AJA sums up the tentative position eight years before the promulgation of the Consumer Protection Act in the case of *Van der Westhuizen v Arnold*³³⁶ thus:

“...The very fact, however, that an exemption clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very generally in its application.”

In practice, this construction is more prevalently applied in exemption clauses because they seek to diminish or exclude a party's obligation and it will have to be inserted for the benefit of the party seeking to rely on it.³³⁷ To a certain extent, this interpretation dovetails with the English principle of fundamental breach, which does not form part of our law, as discussed in the previous chapter of this dissertation. It should be pointed out that avoidance of the contract is done with a wilful intent.

In *Goodman Brothers (Pty) Ltd v Rennie's Group Ltd*,³³⁸ the appellant instituted an action against the respondent for damages suffered as a result of the theft of its watches, stolen by employees of respondent, a carriage company. A clause in the contract stipulated that respondent would not accept liability for the handling of any of the series of goods, including ‘bullion coins, precious stones, jewellery (and) valuables’ unless ‘special arrangements’ were made beforehand. The clause went on to state that if a customer nevertheless delivered any such goods to respondent or caused respondent to deal with them “otherwise than under

³³⁵ *Viv's Tippers (Edms) v PHA Phama Staff Services (Edms) Bpk* 2010 (4) SA 455 (SCA).

³³⁶ Para 19.

³³⁷ Peel E *The Law of Contract* 13th ed. (2011) 243.

³³⁸ 1997 (4) SA 91 (W).

(such) special arrangements”, respondent would bear “no liability whatsoever for...any loss or damage to the goods”. The principal issue was whether clause 9 absolved respondent from liability for the loss.

Cloete J in *obiter* said, “a bailee can in no circumstances rely upon an exemption clause purporting to afford him protection against liability for loss of or damage in respect of the bailor’s property caused by his (the bailee’s) wilful misconduct...it would not be enforceable in a court of law.”

In *S Pearson & Son Ltd v Dublin Corp*³³⁹, a case dealing with exclusion of responsibility for fraudulent misrepresentation, Lord Loreburn alleviated the effect of this by stating that different considerations apply in agency on construction of the contract. He stated:

“I will not say that a man himself innocent may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that in my opinion the clauses before us do not admit of such construction.”

The full impact of a principal’s liability for the conduct of his agent was expressed in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank*.³⁴⁰ The case involved allegations that various statements made prior to a contract of insurance involved fraudulent misrepresentations and non-disclosure by an agent of the assured. The House of Lords held that the duty of disclosure in insurance contract is such an absolute duty that it is infringed even if the non-disclosure was entirely inadvertent. The same token is true of the duty not to misrepresent material facts. The court added that, even if the clause in question was specifically directed at the consequences of non-disclosure or misrepresentation the final task is to discern what the parties intended by the wording that they had agreed in the context of the particular type of contract under consideration.

It crystallizes from the above case that liability of the agent is strict in the *making* of the contract vis-à-vis its *performance*.³⁴¹ Therefore, a principal is liable for his agent’s fraud even if the principal did not himself act fraudulently; in this peculiar “inherited” fraud situation there are less policy objections against allowing a party to exclude his liability for (his

³³⁹ [1907] A.C. 351 353, 362. See *Dormell Properties 658 (Pty) Ltd v Rowmoor Investments 513 (Pty) Ltd & Another* [2013] ZAWCHC 152.

³⁴⁰ [2001] 1 Lloyd’s Rep 30; [2003] UKHL 6; [2003] 2 Lloyd’s Rep 61.

³⁴¹ Peel 261.

agent's) fraud. It is unclear whether such exclusion is practically possible or in theory, but Lord Bingham said such liability "must be expressed in clear and unmistakable terms on the face of the contract" general words will not suffice.³⁴²

Here in particular, the concern tackles the interpretation of "no liability to property and personal injury" emanating from gross negligence. Gross negligence "connotes recklessness, an entire failure to give consideration to the consequences of his actions, a total disregard of duty".³⁴³ The term "gross negligence" never formed part of English civil law. It is considered distinct from "mere" negligence and embraces "not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk".³⁴⁴ For this reason, the State is conscientious guarding against supplier of goods exempting itself from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or agent of the supplier.³⁴⁵

Section 65(1) of the Consumer Rights Act 2015 (CRA), a party cannot by any contract term or notice exclude or restrict his liability for death or personal injury resulting from negligence to any person or another party. In the United Kingdom the full-blown effects of the UCTA and Unfair Terms in Consumer Contracts Regulations,³⁴⁶ that alleviated the position of giving strained construction to exclusion and limitation clauses have been superseded by the new legislation. Previously, there was underlying trait to rely on the common law kind of interpretation, but the legislation changed the *modus operandi*.

Personal injury includes any disease and any impairment of physical or mental condition.³⁴⁷ It has been observed that the reluctance to expand is most common in exempting juristic persons from liability *viz-a-vis* individual persons. However, the Act proceeds to define negligence including the common law expectation. The party would be liable for any negligence arising from failure to take reasonable care or skill in the performance of an express or implied term of the contract. It is this section that is significant for hampering the

³⁴² Para [16].

³⁴³ Murray J in *Rosenthal v Marks* 1944 TPD 180. This case was followed in *Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) 770D-E.

³⁴⁴ *Camarata Property Incorporated v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm) [161].

³⁴⁵ S 51 (1) (c) of CPA 68 of 2008. See also the case of *Halstead-Cleak v Eskom Holdings* [2015] ZAGPPHC

³⁴⁶ 1999.

³⁴⁷ S65(3) of the CRA.

effects that are likely to emanate or ensue from exemption clauses. It also states the breach of the enlisted legislation reasonable care constitute negligence.³⁴⁸

Prior to the new constitutional dispensation in South Africa liability for personal injuries and death could be excluded, but with the right to life and right to bodily integrity entrenched there is a paradigm-shift.³⁴⁹ The case of *Essa v Divaris*³⁵⁰ is illustrative of the influence English common law has had on our law of contract. The plaintiff attempted to persuade the court to encompass garage owners within the scope of strict liability for damages. Strict liability as an alternative to negligence is intended to rescue consumers' plight against the big business, as seen in *Katzeff v Canal Walk & Others*.³⁵¹

The case of *Masstores (Pty) Ltd Murray Roberts Construction*³⁵² demonstrates a clear case of gross negligence between companies. Employees of the respondent while working on a roof of the appellant with a grinder, which caused huge fire, destroyed the store and its contents of the appellants. The appellant then sued the respondent for breach of contract. The alleged breaches by the respondent *inter-alia* include: failure to comply with all laws and regulations, failure to carry out the work in a proper and workmanlike manner; failure to ensure that subcontractors appointed by the appellant complied with safety levels and failure to ensure that the work was executed safely and in such a way as not to endanger the lives and property of people in the vicinity of the work. These failures are alleged to have been negligent or grossly negligent. The respondent excepted to the particulars of claim on the basis that clause 9.2.7³⁵³ of the building contract precluded an action against it-exempted it from liability for causing damage to Masstores' existing structure. Lewis JA in *obiter* pronounced on trite law that "exemption clauses are to be narrowly construed, particularly when a party seeks to escape liability for negligence."³⁵⁴ The court held that on the interpretation of the clause and the contract as a whole the clause did preclude an action by the employer against the contractor for destruction of the warehouse and its contents.

³⁴⁸ S 65(4) (a)-(d).

³⁴⁹ S 11 and 12 of the Constitution.

³⁵⁰ 1947 (1) SA 753 (A).

³⁵¹ [2005] ZAWCHC 58.

³⁵² [2008] ZASCA.

³⁵³ It reads thus: "[P]hysical loss or damage to an existing structure and the contents thereof in respect of which this agreement is for alteration or addition to the existing structure."

³⁵⁴ Para [18].

3.9 Distinction between exclusion clauses and limitation clauses

Sometimes the common law makes a distinction between clauses, which exclude or restricts liability and those, which prevent it from arising.³⁵⁵ Where a clause provides for a precise sum of money to be recovered by way of damages in the event of a breach, that clause will be enforceable if it is a genuine pre-estimate of the likely loss; but will be ineffective if it is a penalty clause that was inserted in *terrorem*, as an intended punishment in the event of breach.³⁵⁶

For instance, a clause which places an upper limit on the damages recoverable (such as £1000 or 20 times the contract price) will be construed *contra proferentem*, but less restrictive than an exclusion properly so-called.³⁵⁷ The reasons propounded for such differentiation are not convincing because, for instance, a limitation clause of R1 is very similar to a total exclusion of liability. Therefore, it is safe to conclude that much depends on the extent of the limitation clause. Initially Lord Wilberforce in *Aisla Craig Fishing* case explained this more succinctly as follows:

“Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other party to insure.”³⁵⁸

Expanding on the rationality for the difference in assessment of limitation clauses from exclusion clauses is the commiserate explanation given by Lord Fraser in the same case. The contract clause made it clear that the potential losses, which could derive from negligence, were greater than the sum that could be charged by the *proferens* for its services. He argued that cases expounding principle of strict construction:

“...are not applicable when considering the effects of clauses merely limiting liability. Such clauses will of course be read *contra proferentem* and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. The reason for imposing such standards on these clauses is the inherent improbability that the other party to a contract including such a clause intended to release the *proferens* from a liability that would otherwise fall upon him. But there is no such high degree of improbability that he would

³⁵⁵ Peel 267.

³⁵⁶ See *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motors Co Ltd* [1915] A.C.79. See also Lawson 10th ed. (2011) 77-78 on the subject.

³⁵⁷ Lawson (2011) 78.

³⁵⁸ [1982] S.L.T. 377 at 380. Lord Wilberforce's dictum was approved in *South West Wales Services Ltd v International Computers Ltd* [1999] B.L.R. 420, *BHP Petroleum v British Steel Plc* April 7, 2000 CA and in *Frank Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm).

agree to a limitation of the liability of the *proferens*, especially when...the potential losses that might be caused by the negligence of the *proferens* or its servants are so great in proportion to the sums that can be reasonably be charged for the services contracted for. It is enough in the present case that the clause must be clear and unambiguous”³⁵⁹

However, the distinction between the two types of clauses and this approach by the courts is now out-dated, as exemplified by *Whitecap Leisure Ltd v John H. Rundle*.³⁶⁰ Moore-Bick L.J laid this matter to rest by arguing that “the modern approach to construction, which applies much to exclusion and limitation clauses as to other contractual terms is to ascertain the objective intention of the parties from the words used in the context in which they are found, including the document as a whole and the background to it...”

It is argued that where the clause excludes any right to damages, the tendency is to restrict its application, if possible, to minor matters; or to limiting its effects to forbidding rejection; or to confining a buyer to claiming a return of the purchase price and nothing beyond.³⁶¹ However, it seems that if the clause clearly applies to a contractual duty it will be effective to deny a party any claim for damages. In *Van Immerzeel & Pohl & Others v Samancor Limited*,³⁶² the court placed a limit on the amount, which the respondent could recover from the applicants. The construction contract also allowed the employer another remedy, namely the right to claim from the firm the cost of re-executing the work if the firm did not comply with the contract.

3.9.1 General and special damages

In the case law, a distinction is drawn between general (or intrinsic) and special (or extrinsic) damages.³⁶³ General damages are those damages that flow generally or naturally from the kind of breach of the contract in question, which the law presumes the parties contemplated as probable result of the breach, whereas, special damages are those damages that, although caused by breach of the contract, are ordinarily in law regarded as too remote to be

³⁵⁹ [1982] S.L.T.382.

³⁶⁰ [2008] EWCA Civ 429.

³⁶¹ Lawson 79.

³⁶² [2000] ZASCA 79; 2001(2) SA 90 (SCA); [2001] 2 All SA 30.

³⁶³ See *Lavery & Co Ltd v Jungheinrich* 1931 AD 156, 165, 171, 174 and *Shatz Investments (Pty) Ltd v Kalovrymas* 1976 (2) SA 545 (A).

recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that it would result from its breach.³⁶⁴

A party is liable for general damages, as he is deemed to have impliedly assumed liability therefor. Liability is derived from implied terms of the contract in the former case whereas in the latter (special damages) a party is liable if it is proved that he has assumed liability therefor. Strictly speaking, this means in the latter category liability ensues from evidentiary proof. Note that in cases of breach of contract, damages are not intended to recompense the innocent party for their loss, but to put them in the position in which they would have been if the contract had been properly performed.³⁶⁵

3.9.2 Consequential loss

Where a contract excludes liability for “consequential” loss or damage, the courts have held that it embraces only loss or damage not resulting directly or naturally from the breach of contract.³⁶⁶ Probably the phrase is used to exclude liability for consequential loss to ensure that damages claims remain within acceptable bounds. In the *Transport & Crane Hire*³⁶⁷ case the contract contained an exclusion clause, which recited, “[I]iability for direct or consequential loss of whatsoever nature or howsoever arising is expressly excluded.” This meant that during the period covered by the guarantee of the goods, any loss suffered by the appellant as a result of any defective part through the use of bad material or workmanship, of which the appellant could not with due diligence have been aware of, the *proferens* was not liable.

Specific guidance has been provided in *British Sugar Plc. v NEI Power Projects Ltd*³⁶⁸ where the clause stipulated that:

“The seller will be liable for any loss damage cost or expense incurred by the purchaser arising from the supply of any such faulty goods or materials or any goods or materials

³⁶⁴ *Hadley v Baxendale* 156 ER 145. See also *Eduard v Administrator, Natal* 1989 (2) SA 368(D); *Wroth v Tyler* [1973] 1 All ER 897 (Ch) 922. Cf *Botes v Van Deventer* 1966 (3) SA 182 (A) and *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 768 D.

³⁶⁵ Christie RH *The Law of Contract in South Africa* 5th ed.(2006) 544.

³⁶⁶ *Transport & Crane Hire (Pty) Ltd v Hubert Davies & Co (Pvt) Ltd* [1991] 4 All SA 644 (ZS). See also *Civil and Marine Slag Cement Ltd v Cambrian Stone Ltd* Unreported June 8, 2000 QBD.

³⁶⁷ Footnote 335 above.

³⁶⁸ [1997] C.L.C.622.

not being suitable for the purpose for which they are required save that the seller's liability for consequential loss is limited to the value of the contract."

The plaintiff contracted for the delivery and installation of equipment by the defendant. After some delays and defects, the claimants sought damages. The value of the contract was £106,000, while the damages claimed for breach topped £5 million. The court referred to earlier cases and accepted them as holding that "consequential loss" must be taken to mean, "such loss as the claimants may prove over and above that which arose as a direct result of such breaches". In this case, "the parties had agreed to limit the defendant's liability for loss and damages not directly and naturally arising from the defendant's breach of the contract to an amount equal to the value of the contract. The Court of Appeal upheld the decision."³⁶⁹

Furthermore, interpretation of the extent of "consequential loss" was given broad approval by the court in *Hotel Services Ltd v Hilton International Hotels (UK) Ltd*.³⁷⁰ The exclusion clause in question was: "[t]he Company will not in any circumstances be liable for any indirect or consequential loss damage or liability arising from any defect in or failure of the System or any part thereof or the performance of this Agreement or any breach thereof by the Company or its employees". The contract was for the supply of hotel minibars, and intended to reduce theft in the hotel minibars. The equipment eventually had to be removed because the leaking ammonia corroded the equipment and created a risk of injury or fatality to guests. The issue before the Court of Appeal was whether this clause was effective to exclude losses claimed by the claimants. The court held that it was not.

The court noted that the use of "consequential" here was a synonym of "indirect" since all recoverable loss is literally consequential. The important distinction that must be made in this context is between a "direct" loss (which is outside the scope of exclusion clause) and an 'indirect' loss, which is within the scope. The court relied on the two rules laid in *Hadley v Baxendale* to determine direct and indirect consequential losses. If the loss is naturally arising from the breach of contract, it is direct, but if it was in contemplation of the parties when they contracted, it is an indirect or consequential loss.

³⁶⁹ [1997] EWCA Civ 2438.

³⁷⁰ [2000] 1 All ER (Comm) 750; [2000]BLR 235.

In South Africa, case law on this issue is scant.³⁷¹ Therefore, a clause which excludes liability for ‘indirect or consequential losses’ will provide little protection for a defendant because many sizeable loss of profit claims will fall within the category of “direct” rather than “indirect” losses. It is advisable that express reference to loss of profit through an exclusion clause will be of assistance than reliance on the vague phrase of “indirect or consequential loss”. The courts differentiate between conditions, which are direct consequences and innominate terms to give appropriate interpretation.

In this section, one analyses the different aspects of common law contract doctrine and how the courts have manoeuvred their interpretation factoring in exemption clauses. This chapter is interlinked with chapter 2, which advances the motive for a more creative way of interpretation. When courts proceed to interpret the terms of a contract they are generally merely seeking to discover the actual past meanings, but deciding on the “equities”, the rights and obligations of the parties.³⁷² Therefore, the legal relations are determined by the courts and the jural system and not by the will of the contesting parties, which seems to be the basis of contractual liability.

It was discovered that despite the philosophical underpinnings, the essence of interpretation is that it should be interpreted in the ordinary way, considered as a whole and discovering the parties’ intention, applies whether a contract contains an exemption clause or not. In interpretation, the task of a judge is creative-to evaluate conflicting values (contractual freedom and equity) and when necessary to adopt them gradually and slowly.

Having considered all the hurdles brought by interpretation of exemption clauses it is clear that our courts are not supine to the brute and cold letter of craftily drafted clauses that seek to encroach on the *naturalia* of contracts. Courts aim to aid consumers from unscrupulous big business. It has done so in the case of *Mercurius Motors v Lopez*. This is a landmark decision because the Supreme Court of Appeal moved away from rigid positivist and formalism and developed the common law, as required of them by the Constitution.

³⁷¹The Supreme Court of Appeal in *Holmedene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 affirmed the manufacturer’s liability for supplying defective goods, however, did not endorse the damages for consequential loss because there was no exclusion to that effect.

³⁷² Cohen M “The basis of contract” 1933 (46) *Harvard LR* 577.

In the past the courts have, in their endeavours to curtail the multifaceted effects of indemnity clauses, been using these common law devices, which sometimes proved to be ineffectual. It's high time that South Africa, propelled by constitutional values that find expression in judicial pronouncements, emerges from the dark chapters of consumer exploitation. Our contract law is now infused with fairness values, good faith and *ubuntu* to assist it in hard cases of bargain in interpretation.

In this chapter, one also grappled with the legal measures to facilitate the implementation of the plain language in credit and consumer markets to achieve comprehensive protection of consumers. It reflects the dominant judicial attitudes on interpretation and how the predominant common law theories change in the space of economic expediency. Again, a measured clarity between delictual and contractual action was provided. Delictual action exist if the negligence that occurred is independent of the contract altogether except for injury to person and property.

It would be interesting to note how the courts respond on the issue of negligence within the statutory definition. There are no hard bargain cases in this matter. However, it can be argued that the common law principles of individual autonomy and equity became mutually exclusive to rescue consumers from predatory behaviour of business. The deficiency was meant to advance the need of creative interpretation to be realigned with emerging consumer legislation. In the following chapter, one considers the impact of the statutory measures introduced to supplement contractual remedies in specifically focussed consumer legislation.

CHAPTER 4

CRITICAL DISSECTION OF THE CONSUMER PROTECTION ACT 68 OF 2008

The complementary and conflicting interests of producers and consumers aided by the court's interpretative riddles are a real concern for many economies in the contractual sphere. In effect, these circumstances heralded profound proliferation of consumer protection legislation worldwide.¹ Of note is that the formal rules embedded in contract law have not been flexible enough to deal with the complexities of modern societies² hence their passivity is antiquated. Premised on this background, consumer law development is attributed to legislative reaction to fight opaque business operations: disclaimers to accountability for negative consequences attendant to their dealings with ordinary consumers.

The development of consumer legislation largely by-passed South Africa and the little that was there on protection was fragmented by ineffective laws in credit agreements, usury price control, insurance agreements, promotional competitions and unfair business practices.³ Action for consumer protection started with the enactment of raft of laws such as the Electronic Communications and Transactions Act,⁴ which provided for protection in the online or electronic transacting environment. This was followed by the more comprehensive National Credit Act (NCA),⁵ which replaced the fragmented and ineffective consumer credit measures with far-reaching protection measures.⁶

Recently, the South African contract regime is springing into action on the ability to constrain the bane of exemption clauses from the legal tradition that promotes and upholds party autonomy.⁷ Amidst the scope of consumer law is a raft of measures to protect the consumer from dangerous products, unfair contract terms, lack of information and abusive sales

¹ Van Eeden E *Consumer Protection Law in South Africa* (2013) 1.

² Hawthorne "The 'new learning' and transformation of contract law: reconciling the rule of law with the constitutional imperative to social transformation" 2008 *SAPR/PL* 82.

³ Cited by Naudé T & Eiselen S *Commentary on the Consumer Protection Act* (2014 original service and updated 2017) see Woker "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act (2010) *Obiter* 217-231; Van Eeden 2; Du Preez "The Consumer Protection Bill: A few preliminary comments" 2009 *TSAR* 58.

⁴ Act 25 of 2002.

⁵ Act 34 of 2005.

⁶ Eiselen & Naudé [Original Service, 2014] Introduction 1.

⁷ Hawthorne 85.

tactics.⁸ Monti concedes the interface between competition law and consumer law are both designed to remedy market failures.⁹ Competition law aims to safeguard economic freedom so that consumer sovereignty can be exercised.

Without amplifying problems emanating from indemnity clauses as critically discussed in the preceding chapter, one is compelled to assess the impact of statutory advances made and the shape it seeks to give to our consumer jurisprudence development. This cannot be done in isolation by merely hypothesizing on abstract principles, but interpreting contextually and making content analysis of practical contractual situations involving local consumers. The consumer legislation is a turning point heralding an era of changes and ramifications for consumer and contract law regime.

In this analysis, there is a need to strike a balance between unacceptable excesses of contractual freedom and permissible legislative framework. This can be properly done by analysing situations of similar class terms worldwide. Therefore, in making the content analysis, cues will be drawn from some countries' with fully-fledged consumer protection legislation and how they navigate to cover the grey areas.

Currently, the snowball of exemption clauses in South Africa is, to some extent, buoyed by dithering in enforcement of the legislative enactment. The described narrative of unfairness emanating from case law, contract principles and canons of construction are catalytic to mechanisms for substantive justice and paradigm-shift more compelling.¹⁰ Consequently, the Consumer Protection Act¹¹ (CPA or "the Act") is seen as an advanced instrument by both scholars and practitioners transcending the scope of current problems and the legal framework it replaces applicable to consumer contracts.¹²

It should be pointed out that the CPA is a culmination of several debates and legal development in the field of consumer protection in South Africa. It is a product of the South

⁸ Van Eeden 4.

⁹ Monti G, *EC Competition Law* (2007) 100-101.

¹⁰ *Ibid.*

¹¹ 68 of 2008.

¹² Van Eeden 2.

African Law Commission Project 47,¹³ proposal to have a comprehensive statute for the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act. The proposed Act would establish a criterion of unreasonableness, unconscionableness or oppressiveness to be applied by the courts to all contracts (with certain exceptions already covered by other legislation).

The CPA applies to most consumer markets and agreements not governed by the NCA¹⁴ or the Financial Service Board Legislation.¹⁵ Therefore, the CPA is the appropriate substitute of that model Act described in the proposal. Commentators describe the CPA as an ambitious and comprehensive piece of legislation aimed to regulate the consumer market as widely as possible including consumer's privacy.¹⁶

As mentioned, the chapter analyses the CPA within the interpretative perspective of the changes it introduces and its interface with existing doctrines of contract law. In order to properly dissect the Act in search of the said "equitable jurisprudence within South African constitutional realm," an assessment has to be made of its provisions that affect or improve the achievement of its objectives. The Act minces no words that it is intended to promote and protect the economic interests of consumers, improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs and protect consumers from hazards to their well-being and safety.¹⁷

This is because socio-economic responsibility of both suppliers and consumers has implications for both the economy and society.¹⁸ It is argued that the only way to achieve responsibility is by introducing procedural fairness whose main exponent is transparency.¹⁹ Therefore in the following section, the author shows how the CPA fulfils its objectives and

¹³ The South African Law Commission Project 47 was set up to investigate unfair making, unfair terms of a contract or the enforcement of unfair contracts. The Report of the South African Law Commission (SALC) released in April 1998 related to Unreasonable Stipulations in Contracts and the Rectifications of Contracts.

¹⁴ For more detailed discussion see Scholtz et al *Guide to the National Credit Act* (2008); Otto & Otto *The National Credit Act Explained* 3rd ed.(2013); Kelly-Louw *Consumer Credit Regulation in South Africa* (2012).

¹⁵ The exclusion clause created by s 66 of the Financial Services Laws General Amendment Act 45 of 2013, came into effect on 28 February 2014; cf s 28 of the Financial Services Board Act 97 of 1990.

¹⁶ Eiselen & Naudé, Introduction 2.

¹⁷ Preamble of the CPA.

¹⁸ Hawthorne L "Public governance: unpacking the Consumer Protection Act 68 of 2008" 2012 (75) *THRHR* 369.

¹⁹ *Ibid.*

the doctrinal principles to change the perception through content analysis and examining sections that relate to exemption clauses.

4.1 Objectives of the Act

The CPA in its preamble seeks to emphasize the comprehensive protection of all consumers' interests, ensuring accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace in general; and to give effect to international recognized customer rights. As an instrument to protect the illiterate, poor, ignorant and vulnerable people, it purports to fulfil their rights and promote their full participation as consumers. Commentators argue that the Act endeavours to achieve a balance between relevant principles and policies in order to satisfy prevailing perceptions of justice and fairness, as well as economic, commercial and social expediency.²⁰

According to Hawthorne, consumer law has caused the disintegration of traditional orthodox contract law as an autonomous system of law, since it is an implicit acknowledgement of the reality of inequality that undermines one of the unwritten cornerstones of classical contract.²¹ Within the context of this discourse, the Act will be critically analysed to check whether it provides guidance in the search of constitutional values of equality and dignity,²² which translates to equitable jurisprudence. It is more apposite that consumer protection be catapulted where there are inequalities between the bargaining powers of the supplier and consumer.²³

Undoubtedly, the fragmented mechanism through the common law and the Constitution to deal with consumer is prejudiced and the impact of unfair clauses undoubtedly gives rationality of the CPA in the contract sphere in South Africa. Although, the Act is directed to the consumer-business relationship, its ripple effect is expected to go beyond the business community, but will also make a mark between business-business commercial practices and

²⁰ Van der Merwe et al *Contract General Principles* (2012)10.

²¹ Hawthorne 85.

Mupingavhanu Y "Fairness a slippery concept: the common law of contract and the Consumer Protection Act 68 of 2008" 2015 *De Jure* 129.

²³ Van der Merwe et al 12.

relationships, as the suppliers who interact with consumers begin seeking refuge against their own upstream suppliers and insurers.²⁴

The Act furthermore intends to protect consumers from unconscionable, unfair unreasonable, unjust and improper practices.²⁵ This encompasses deceptive, misleading, unfair or fraudulent conduct. It is within this purview that this chapter traces the upward trajectory of statutory regulation resulting from the problems of courts' interpretation of exemption clause in South Africa. The protection provided by this Act overlaps extensively with the pre-contractual protection afforded by the common law.²⁶ The Act, however, attempts to provide more clarity and certainty of the evaluation criteria.

The Act imposes requirements of both procedural and substantive fairness.²⁷ Procedural fairness is critical at the formative stage of the agreement whereas substantive fairness pertains to fairness in the distribution of substantive rights and obligations under the contract.²⁸ The latter affects the illusory notion of freedom of contract propagated by protagonists of classic contract to subsist between parties in standard form contracts. Naudé welcomed the inclusion of provisions against unfair contract terms provisions in the CPA.²⁹

Lord in his treatise on law of contract explains that substantive unconscionability is concerned with the substantive terms themselves and asks, "whether they are unreasonably favourable to the more powerful party." These terms impair the integrity of the bargaining process or contravene the public interest or public policy. They include terms (usually of an adhesion or boilerplate nature) that attempt to alter, in an impermissible manner, fundamental duties otherwise imposed by the law, fine print terms or procedures that seek to negate the reasonable expectations of the non-drafting party, or unreasonably or unexpectedly harsh terms having to do with the price or other central aspects of the transaction.³⁰

²⁴ Van Eeden 2.

²⁵ S 3 (1) (d) (i).

²⁶ Potgieter JM, Steynberg L & Floyd TB *Law of Damages* 3rd ed. (2012)398.

²⁷ See the discussions in Willet C, *Fairness in Consumer Contracts: The Case of Unfair Contracts* (2007) 2, 37-46; Bigwood R *Exploitative Contracts* (2003) 175-182; Lord RA, *A Treatise on the Law of Contracts* 4th ed. (1998) (8) 57-68.

²⁸ Willet 2.

²⁹ Naudé "The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 126 (2009) *SALJ* 505.

³⁰ Lord 57-58 cited by van Eeden 237.

Noteworthy, is that the Act controls and penalises certain forms of behaviour in the commercial sphere: it strives to control the exercise of commercial power in relation to consumers with which individuals are agents by virtue of employment by companies. It makes marked distinction between consumer transactions, as individuals and commercial transactions-business to business and the extent of applicability to indemnity clauses. This is a palliative measure designed to alleviate the unfortunate situation against a party with superior bargaining position who has covered himself against the risks of non-performance or defective performance to the other party.

Practically, it probes issues relating to the “proper roles and functions of the judicial, legislative and administrative branches of government; the validity and role of the doctrine of freedom of contract (one of the central jurisprudential pillars of private law); the implications of the phenomenon of standard form contracts for legal doctrine; the nature and role of markets; forms and techniques of governmental intervention in the commercial markets and their respective advantages and disadvantages, and the tension between economic freedom (sometimes seen as unregulated markets and non-intervention in contracts) and regulation (sometimes characterised as the excessive exercise of governmental power).”³¹

Theoretically, the question that begs an answer from the analysis of the CPA is how it infuses fairness and equity in the contract regime.³² Quite clearly, the legislature prohibited some conditions outright and rendered them void if they are inconsistent with the objectives of the CPA. Out of the 122 sections of the Act, section 51 lists the forms of agreements, transactions, conditions and terms, which are strictly prohibited. Where contractual terms are not prohibited, they are subjected to the requirement of fairness and reasonableness.

Particularly, section 48 sets out the general prohibition against unfair, unreasonable or unjust terms and also purports to provide some guidelines to establish whether a term is unfair, unreasonable or unjust.³³ This test is a foreign transplant imported directly from the Unfair Contract Terms Act 1977(UCTA) pertaining to exemption clauses.³⁴

³¹ Van Eeden 3.

³² Mupangavanhu 130.

³³ Naudé [Original Service 2014] 48-14.

³⁴ S 3(2) (a) and s 11(2) of the UCTA. The UCTA is amended by the Consumer Rights Act 2015 concerning fairness of terms.

4.2 Provisions dealing with warranties in sale contracts

In the CPA for instance, section 56 (1)-(2) of the CPA ordain implied warranty of quality in a contract of sale. The consumer is given six months after delivery to return the goods to the supplier if they fall short of the required standards at the risk and expense of the supplier. Section 55 and section 56 of the CPA impose reasonable expectation of suitability of the goods from a retailer in terms of quality and standards. It gives credence to the fact that the Standards Act³⁵ should be factored in when interpreting quality and fairness in a sale contract involving durable goods.

Quality means the prescribed standard and good working order free from any defects.³⁶ This is because when consumers encounter quality-related problems their claims are neutralised by reference to fine print and lack of co-operation on the part of the seller, which may turn a simple defective goods complaint into a marathon of frustration for the consumer.³⁷ Therefore, to emphasize the supply of fully functional goods and ensure fairness, the provisions of section 55(2) (b) and (6) must be read with the provisions of section 51(1) (a) and (b), 48(1) (a) (i), 29(b) (iii) and 41(3) (f).

Section 48(1) (a) may sound very critical for the furtherance of this discussion. It attempts to cover every possible situation of contracting by not prohibiting these synonymous terms in agreements, but also prohibiting the supplier from offering to supply goods or services on unfair terms.³⁸ The provision is prescriptive on the price and terms that are unfair, unreasonable or unjust. Marketing of goods or services, negotiating to enter into or administering a transaction or agreement for the supply of any goods or services is covered by this section.

Under this section, contract terms or conduct of contractants has to be measured against the notions of unconscionability, unfairness, unreasonableness and injustice, none of which is has proper definition within the Act.³⁹ Naudé further argues that this section must be interpreted so as to provide control of the content of contract terms which are either incorporated into a specific transaction or put on offer for general use by the supplier. This could be referred to

³⁵ No. 8 of 2008.

³⁶ S 55(2) (b).

³⁷ Van Eeden 350.

³⁸ Naudé [Original Service 2014] 48-14.

³⁹ Christie RH & Bradfield GB *The Law of Contract in South Africa* 7th ed. (2016)25

as “general use” challenges because they challenge terms proposed by the supplier for general use in its agreement with consumers.⁴⁰

The courts are admonished to be cautious of interfering with a price agreed between the supplier and consumer. This notion is advanced in the public interest. Despite that most consumers do not read the standard terms of agreement, the least of what can be expected of them is to know about the core aspects of the transaction such as the upfront price before entering into an agreement and to shop around for them hence the circumspection. Thus, it is considered generally fair to keep the consumer to the upfront price they have agreed to, provided that the terms relating to the price are transparent and prominent, and that the price payable in the circumstances is reasonable, expected and not contained in a subsidiary term.⁴¹

In most European countries, upfront price terms are not subject to review; control takes place over price-related terms such as price escalation clauses and terms concerning default interest.⁴² This control is guided and judicious because the price of escalation clauses may reach ceiling and collapse business. It is advisable for courts to allow escape route for consumer from excessive price on the basis that the agreement was induced by misrepresentation or other unconscionable conduct as regulated in sections 40 and 41 of the CPA and by the common law rules on voidable contracts induced by improper means.⁴³

Commentators advancing the public interest notion against interference in the pricing argue that “the essential functioning of the economy, and to a large extent the availability of goods and services at affordable prices, require a pricing system with the least possible interference by the state”.⁴⁴ This argument is more valid where courts lack capacity to determine what is fair and lack expertise, knowledge and services. Eventually, the UN Guidelines for Consumer Protection avoid recommending price control, but instead provide that “governments should

⁴⁰ See Bright S “Winning the battle against unfair contract terms” (2000) (20 *Legal Studies* 331).

⁴¹ Cf s 4(3) of the Unfair Contract Terms Bill proposed by the Law Commissions of England, Wales and Scotland, which provide for control of the price in only these situations (Law Commission of England and Wales and the Scottish Law Commission Unfair Terms in Contracts- Report on a reference under s 3(1)(e) of the Law Com No 292, Scot Law Com No 199)(2005). For example how service providers sometimes ensnare consumers with unfair pricing in cell phone content contracts see the website of the Wireless Application Service Providers ‘ Association at <http://www.waspa.org.za/code/complaints.php>, accessed 18 February 2013.

⁴² See Micklitz, Stuyck & Terryn 293-295.

⁴³ Naudé 48-16-17.

⁴⁴ Van Eeden *A Guide to the Consumer Protection Act* 185.

encourage fair and effective competition in order to provide consumers with the greatest range of choice amongst products and services at the lowest cost”⁴⁵.

4.2.1 Critique of the Act

In the midst of legal hype surrounding the CPA Naudé, however, opines that it is quite deficient in a number of respects in protecting consumer’s rights and does not conform to international best practice.⁴⁶ First, criticism is directed to the failure of the legislature to give comprehensive meaning and interpretation of the key concepts such as “unfair”, “unreasonable” and “unjust” is problematic.⁴⁷ With such shoddy draftmanship, this means the criticisms levelled against contract law are addressed partially. For this reason, the Act requires amendment to ensure effective protection against unfair contract terms.⁴⁸ Consequently, this would allow the court to raise the issue of unfairness *mero motu*.⁴⁹

Her analysis of the Act to fairness and reasonableness concerns the following identified categories: (a) incorporation contract terms; (b) content control; and (c) interpretation control. In fact, she observes that the South African CPA makes use of all these techniques listed above. It is argued judicial creativity bordering on judicial legislation, which marks the development of these rules has been a desperate remedy invoked to remedy widespread injustice.⁵⁰ For this reason, emphasis will be placed on content control that gives courts overt powers to control the contents and actively strike out unfair contract terms to ensure substantive unfairness.

4.2.2 Interpretation of the CPA

Section 4 (2) of the CPA enjoins a tribunal or a court attending to any consumer dispute to develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally. This section implores adjudicators to promote the spirit and purpose of the Act in protecting the consumer. These goals are further substantiated by provisions such as

⁴⁵ Paragraph 19 of the United Nations Guidelines for Consumer Protection, 1999 as expanded in 2003, available at http://www.un.org/esa/sustdev/publications/consumption_en.pdf (accessed 10 January 2016). This point is also made by Van Eeden *A Guide to the Consumer Protection* 185, *Consumer Protection* 261.

⁴⁶ International best practice are the practices of consumer dealings followed in the most developed countries like the European Union, United States of America and Asian countries.

⁴⁷ Christie & Bradfield 25; Hawthorne 2011 *SAPL* 439; Naudé 516.

⁴⁸ Naudé 505.

⁴⁹ *Idem* 536.

⁵⁰ *B.C.C.I. S.A v Ali* [2001] 2 W.L.R 735 per Lord Hoffman 756.

section 4(4) (a)-(b) which give statutory authority to the application of the *contra proferentem* rule of interpretation. This rule and the contents of the section are discussed in chapter 3 of this thesis. It states that a court or tribunal must interpret a standard form to the benefit of the consumer for the following reasons:

“(a) 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; and

(b) so that any restriction, limitation, exclusion or deprivation of a consumer’s legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect having regard to (i) the content of the document; (ii) the manner and form which the document was prepared and presented; (iii) the circumstances of the transaction or agreement.”

Perhaps, this provision suffers criticism because of its probability to allow the tribunal or court to deviate completely from primary rule of interpretation by ignoring plainly worded limitations on consumer’s rights where such limitations are not reasonably foreseeable in the surrounding circumstances. The tribunal’s unrestricted discretion to protect consumers might imply that it can be so innovative to give a meaning to a provision, which is not intended. This statement is countered by the infusion of reasonableness, as a guideline of interpretation.

Admittedly, by implication this provision introduces the subjective attributes of the consumer in that transaction rather than the group perspective perpetuated by a standard form or adhesion contract. According to Naudé, this subsection is superfluous and unnecessary because Chapter 2 Part G of the Act deals with unfair contract terms and allows a court to strike out unfair contract terms.⁵¹ The viewpoint is that it should be deleted because it is in fact redundant.⁵² It may happen that the legislature wanted to protect the consumer even when the contract was attacked not only on unfairness, but also on other legal grounds.

It is further argued the provisions of section 4(3) are susceptible to both broad and conflicting interpretation because when searching for a meaning, which promotes the spirit and purpose of the Act, social or economic welfare may be emphasized to substitute the overarching tensions between fairness and efficiency. Fairness is a subjective factor pleaded by the affected party whereas reasonableness is an objective factor to be determined by the court in

⁵¹ S 48 and 52.

⁵² Naudé 507.

its decision. The essential function of the courts in these circumstances is to ascertain the benefit it offers to the consumer.

Thus, when read broadly, the provisions of section 4(3) are not substitutes for existing rules and presumptions of interpretation. This section should be read in conjunction with, as well as subject to existing rules of interpretation,⁵³ thoroughly discussed in the preceding chapter, which serves as a base for understanding the intricacy of statutory changes. Furthermore, commentators argue that the CPA is described as ‘remedial law’ and may be interpreted in a manner that “extends the remedy as far as the words will admit”.⁵⁴ This argument substantiates the historical and philosophical underpinnings entrusted by the CPA.

Consequently, this requires a balancing of rights and remedies that will be fair not only to suppliers and to consumers, but also efficient. It is argued that the court or National Consumer Tribunal (NCT), as the case may be must also consider, within this broader context, the rule that where the meaning of burdensome or onerous statutory provisions is not clear, a more equitable interpretation should be favoured to lessen the burden.⁵⁵ Finally, regard should be had to the assumption that the legislature does not intend to encroach on the rights of, or confiscate the property of, persons.⁵⁶

4.2.3 Control of unfairness and unreasonableness:

The following words in the CPA form the category of mischief the legislature intended to curb and deal with substantive fairness in contracts: terms or conduct that is “unconscionable”, “unfair”, unreasonable” and “unjust”. From the provisions of section 40(1) on the consumer’s “right to fair and honest dealing”, the CPA prohibits “unconscionable conduct” in general. The unconscionable conduct covers *inter alia*, “negotiating, concluding, executing on and enforcing an agreement to sell goods; demanding or collecting payments for goods; or recovering goods from consumer” and extends to making and enforcement of contracts.

⁵³ Van Eeden 39.

⁵⁴ *Turtle v Hartwell*, 6 T.R 426 at 429, as cited by Schreiner JA in *Looyen v Simmer & Jack Mines* [1952] 4 All SA 347 (A) 352. See also Kellaway EA *Principles of Legal Interpretation* (1995)105.

⁵⁵ Kellaway 340.

⁵⁶ *Ibid.*

The making and enforcement of contracts is relevant for this purposive inquiry. On the substance, unconscionable conduct includes the use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct.⁵⁷ Indirectly, this brings the common law of duress that is used to vitiate a contract. Progressively, these principles appear to encapsulate interpretation of undue influence within public policy realm with the infusion of the Bill of Rights imperatives through the open-ended norms of the Constitution. The CPA restates the biased conduct towards the consumer in section 48.

According to various precepts of the Act, procedural fairness requires the following:

- (a) suppliers must make specific information available to consumers;
- (b) suppliers must not make false or deceptive representations;
- (c) provisions or notices with identified implications or consequences should be in writing or be written in certain standard manner of transparency;
- (d) certain provisions, notices or risks should be brought to the attention of the consumer in a prescribed way.

By factoring in economic expediency, literacy level and individual consumer's background the unconscionability doctrine has acquired a deserved primary focus. Furthermore, it is unconscionable where a supplier knowingly takes advantage of the fact that the consumer was unable to protect his or her own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.⁵⁸ These relatively new statutory concepts warrant interpretation and demarcation.

The right to fair, just and reasonable conduct contained in the CPA is aimed at ensuring that contract terms are not unfair, unreasonable or unjust for the consumer.⁵⁹ For instance, a contract would be considered unfair, unreasonable or unjust if they require a consumer to waive rights; assume obligations or waive liability on unfair terms or imposing such terms as prerequisite for entering into such transactions.⁶⁰ It is clear that many statutory rules in

⁵⁷ S 1 "unconscionable conduct" read with s 40(1). This conduct is improper to a degree that would shock the conscience of a reasonable person.

⁵⁸ S 40(2).

⁵⁹ Christie & Bradfield 24..

⁶⁰ S 48 (1).

consumer law seek to regulate the content and form of agreements owing to the common law innate inability to curb the undesirable consequences and implications of the modern industrial and post-industrial state.

In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,⁶¹ the Constitutional Court recognized in obiter that contracting parties need to relate to each other in good faith. In *casu*, the Constitutional Court had to decide on the rule of the common law rendering a clause in a lease agreement unenforceable should be re-examined in the light of constitutional values. The court held that “where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiations must be done reasonably, with a view to reaching and in good faith”.⁶²

Although the CPA does not refer to the concept of good faith, this concept is central to Chapter 2, Parts F and G, which deals with unconscionable conduct and the right to fair, just and reasonable terms and conditions.⁶³ These terms are closely associated with the concept of good faith. Good faith can be linked to the fundamental right to dignity. Dignity and good faith in consumer contracts mean that the supplier must show reasonable measure of concern for the interests of the consumer and not merely further its own interests in a one-sided manner.⁶⁴

An agreement or provision of a contract is considered to reflect the harshness of the bargain if it is, *inter alia*, “excessively one-sided in favour of any person other than the consumer”; its terms are “so adverse to the consumer as to be inequitable”; or if it is subject to a term or condition, or notice that is unfair, unreasonable, unjust or unconscionable.⁶⁵ Arguably, there is an overlap between the regulation of contracts and market practices that is reflected by the legislature’s use of the term “unconscionable” and “unconscionability” in the CPA, by referring to the regulation of market practices.

⁶¹ 2012 (1) SA 256 (CC).

⁶² Para [72].

⁶³ Eiselen & Naudé [Original Service, 2014] Introduction-3.

⁶⁴ See for example, the recital to the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993 (good faith may be satisfied “by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account”). See also Naudé 2006 *Stell LR* 366; Naudé 2009 *SALJ* 518.

⁶⁵ S 48 (2) read with s 49 (1) for the notice requirements.

Furthermore, “unfairness” refers to the regulation of contracts.⁶⁶ According to Van Eeden this is the same terminology used in the United States Fair Terms in Contracts (FTC) that is clothed with an “unfairness jurisdiction” in regard to trade (market) practice where the Uniform Commercial Code employs “unconscionability” to determine unfairness. He also submits that sections 41 and 51 (save for section 48(1) (b)) read with section 52, regulate contractual terms and introduce processes of both administrative and judicial control of fairness, reasonableness and justness of contractual terms (including price terms).⁶⁷

There is a need to restate that section 48(1) (a) and (c) deals with the general standard of fairness.⁶⁸ The Act prohibits the requirement by a supplier that a consumer must waive any rights, assume any obligation, or waive any liability of the supplier on terms that are unfair, unreasonable or unjust;⁶⁹ and the imposition by a supplier the precondition of entering into a transaction, of terms that are unfair, unreasonable or unjust and by which the consumer waives any rights, assumes any obligation, or waives any liability of the supplier.⁷⁰ Holistically, this section invokes the doctrine of good faith

The two basic unfairness standards expressed in section 48(2) (a) and (b) concern one-sidedness, and adverseness to consumer become apparent. On proper interpretation, commentators assume that contracts, which have terms that satisfy these two basic standards, will be considered unfair, unreasonable or unjust irrespective of meaning of these concepts as defined in section 48(1).⁷¹ By implication, the Act encourages value judgment because the basic unfairness standards of section 48(2) (a) and (b) are open to subjective interpretation. It fulfils a policy directive of the Act. Note that in terms of this provision a single term or the agreement as a whole may be declared to be unfair.⁷²

To explore the determination of these terms, courts are given sufficient space to be innovative and realign their interpretation with the objectives of the Act. For instance, it is not a defence open to the supplier that it never relies on a term that is “excessively one-sided” or “so adverse to the consumer as to be inequitable” in an unfair manner in practice, but intends to

⁶⁶ Van Eeden 238.

⁶⁷ Van Eeden 251.

⁶⁸ S 48 (1) (a) (i) and (ii).

⁶⁹ S 48 (1) (c) (i), (ii) and (iii) of the CPA.

⁷⁰ S 48 (1) (c).

⁷¹ Van Eeden 252.

⁷² S48(2).

use it in a fair manner. The term is adjudicated on the potential of its unfairness or tendency.⁷³

In this regard, predictability and certainty can be advanced if a court would consider whether it is prepared to declare the term unfair *per se* in a particular trade sector or, more generally, based on the “tendency of the clause”, regardless of the idiosyncrasies of the particular consumer who contracted.⁷⁴ If a court is prepared to make an “objective finding” based on the substantive repugnancy of the clause itself and the interests of typical suppliers in that sector, this will advance predictability, to the benefit of suppliers and consumers alike.⁷⁵ If the court is unwilling to engage on the objective finding, it is appropriate that it considers the fairness of the term in regard of all the circumstances of the parties involved including their special attributes.⁷⁶

4.2.4 Content control of one-sidedness

When addressing the issue of one-sidedness and adverseness, the court will be entitled to take judicial notice of relevant trade usages and customs prevalent in that trade or industry.⁷⁷ The mere fact that certain terms are customary in the trade does not discount their criticism, because they may be terms, which perpetuate inequity, by being one-sided or adverse to the consumer. They should be proscribed and are not exempt based on wide use.⁷⁸ This will be considered on a case-by-case basis, and is not a sweeping assumption. It has been observed that section 51 provides a list of the kinds of terms that are considered unfair, unreasonable or unjust whilst section 48 provides a flexible mechanism for dealing terms not listed in section 51.

As alluded earlier on, the patent failure to expressly define the three concepts in the Act: unfair, unreasonable or unjust is a source of confusion for interpretative purposes. It will be useful for courts to consider formulations of the concept of “unfairness” in the legislation of

⁷³ Naudé [Original Service 2014] 48-19. The approach taken here is similar to the common law when considering whether a term is contrary to public policy.

⁷⁴ Moseneke D then CJ cautioned in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) that if public policy could be determined “at the behest of the idiosyncrasies of individuals contracting parties”, “the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties” para [98].

⁷⁵ Naudé 48-21.

⁷⁶ *Ibid.*

⁷⁷ *Totalgaz Southern Africa v Solgas (Pty) Ltd & Another* [2008] ZAGPHC 170.

⁷⁸ *Van Eeden* 252.

other legal system.⁷⁹ What it entails to be properly understood is that contractual fairness is not an easy task even for the legislature, as manifested in this Act. The greatest error that has been made so far when interpreting the CPA is to assume that the meaning of the concept “fairness” can be determined, or may be restricted, by reference to the right to fair, just and reasonable terms and conditions.⁸⁰ Fairness is much broader than these nominal concepts and includes context and interpretative methodology.

On the latter part, despite the policy objectives the Act, in sections 2(1)-(2) permit the court, person, the National Consumer Tribunal (NCT) or the National Consumer Commission (NCC), when interpreting the Act to consider appropriate foreign and international law, as well as appropriate international conventions, declarations or protocols relating to consumer protection. The urge to benchmark on international law warrants reference to the unfairness or deception standards prevailing in countries such as the United States of America (USA), the European Union (EU), the United Kingdom (UK) and Australia to mention a few, where a substantial body of jurisprudence relating to “unfairness” and “unconscionability” exists.⁸¹

The salient sections 48(2) (a) and (b) evidently recognize the general unfairness standard of section 48(1). The entire purpose of section 48(2) seeks to broaden the scope of navigation than pivoting on it,⁸² but incorporates the deception standards captured in section 48(2) (c), read with section 41. It incorporates the procedural standard embodied in section 48(2) (d) (ii).⁸³ The standard prescribed by section 48(2) (b) enables a court to determine whether a term or an entire agreement is adverse to the consumer. It moves away from the balancing context implied by the standard of one-sidedness employed in section 48(2) (a). The grey list of Regulation 44(3) lists a number of terms which are normally unfair because they are typically excessively one-sided.

Section 41 prohibits direct or indirect false, misleading or deceptive representations to a consumer, the use of exaggeration, innuendo or ambiguity as to a material fact, failure to

⁷⁹ Naudé 48-22.

⁸⁰ Stoop P “The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts” (18)4 (2015) *PER* 1092.

⁸¹ Van Eeden 253.

⁸² S48(2) provides that without limiting the provisions of ss 1, a term or condition is purportedly unfair, unreasonable or unjust if (a) it is excessively one-sided in favour of any person other than the consumer; and (b) in terms of the transaction are so adverse to the consumer as to be inequitable.

⁸³ *Ibid.*

disclose material facts that will amount to deception and failure to correct misapprehension that will amount to false, misleading or deceptive representation. While a supplier has, a duty to disclose material facts, failure to do so may be regarded as false, misleading or deceptive representation.

It is argued that section 41 itself should have provided for the effect of a prohibited misrepresentation, such that any material misrepresentation proscribed by that section would render the contract voidable per se, as under the common law.⁸⁴ In addition, section 41 should have provided that an individual term should be voidable if it is severable from the rest of the contract and consensus on it was improperly obtained because of misrepresentation.

4.2.5 Reliance on representations or statements of opinion

Section 48(2)(c) provides that a contractual provision is unfair if the consumer, to his detriment, relied upon a false, misleading or deceptive representation as contemplated in section 41, or on a statement of opinion provided by or on behalf of the supplier.⁸⁵ The concept of unfairness as used in section 48(2)(c) is measured against the scope on whether the consumer has relied on representation or statement of opinion, and thus lacks reference to a contractual provision, unlike the standards encapsulated in section 48(2)(a) and (b).

The case of the *Office of Fair Trading v Ashbourne Management Services Ltd and Others*⁸⁶ is instructive. In *casu*, members of a gym signed a standard form contract for membership to a gym, health and fitness clubs staggered from 12, 24, and 36 months. The court accepted the notion of an average consumer's inclination to over-estimate his or her attendance to the gym upon acquiring membership. No attention is paid to unforeseen circumstances that might hinder regular attendance or use of the facilities impractical or unaffordable. The contract was so one-sided that it failed to be pragmatic in its approach to the circumstances. The court held that the supplier's business model was designed and calculated to take advantage of the naivety and inexperience of the average consumer using gym clubs at the lower end of the market. The court recognised that the supplier's standard form contracts contained a trap for

⁸⁴ Naudé 48-19.

⁸⁵ See also s 14 of the CPA, read with s 18 of the Ontario Consumer Protection Act S.O.2002, Chap 30 Schedule A.

⁸⁶ [2011] EWHC 1237 (Ch) (27 May 2011). See section 14 of the CPA with regard to fixed term agreements.

average consumers, which they fall into.⁸⁷ Clearly, the circumstances of this case demonstrate a misleading or deceptive representation or statement of opinion, as contemplated in section 48(2) (c). Thus, section 48(2) (c) substantially broadens the concept of unfairness.

Conduct in conflict with the provisions of sections 41 and 48 is not only prohibited, but also those covered by section 52(1) (a) if it is pleaded or the court so determines. In furtherance of the wide ambit, the court *inter alia* is empowered to order payment of compensation to the consumer for losses or expenses relating to the transaction, agreement, or legal proceedings if it concludes that a transaction or agreement is unconscionable, unjust, unreasonable or unfair.⁸⁸ This compensation provision in the CPA is welcome in consumer circles in view of the welfares kind of society, which the State currently aims for. The court may also order the supplier to cease any practice that violates the above provisions.

Section 52(2) contains a list of factors which courts “must consider” when a person alleges that the supplier contravened the prohibitions against the unfair terms in section 48. Most of these factors are procedural as they refer to defects in the bargaining process, such as the consumer lack of knowledge of a term and lack of bargaining power and therefore relates to “procedural fairness”. However, control on the premise of “substantive unfairness” alone would be justified in some circumstances, given that the mere use of standard contract terms creates procedural fairness, as a result of the lack of incentive for the consumer to read and bargain about such terms.⁸⁹

Section 52 (4) provides that in any litigation concerning a transaction or agreement between a supplier and consumer an aggrieved party may void a term or condition in the CPA for failure to conform with the requirements of section 49.⁹⁰ These characteristics constitute procedural fairness, which requires that consumers be aware of terms that are to their detriment so that they can protect themselves against.⁹¹ The doctrine of notice, which has been covered by

⁸⁷ Para 173.

⁸⁸ S 52(3) (b) (i)-(iii).

⁸⁹ Naudé 48-20.

⁹⁰ This section deals with notice or provision of an agreement limiting in any way the risk or liability of the supplier or any other person; constitutes assumption of risk or liability by the consumer; impose an obligation on the consumer to indemnify the supplier or any other person for any cause or be an acknowledgement of fact should be drawn to the attention of the consumer in a manner that is understandable to the consumer written in plain language.

⁹¹ Stoop 1102.

common law, is elevated to a statutory provision in section 49(2). Disclosures of detrimental terms and other important information increases transparency on these clauses.

What forms the basis of this interpretation is the interplay between substantive and procedural fairness which cannot be holistically separated. Some elements of procedural unfairness and some element of substantive unfairness will coincide. These factors are not mutually exclusive of each other. It is advisable that procedural factors such as the prominence of the term should be considered in conjunction with the “substance” or content of the term itself when its fairness is assessed.⁹² Thus, a court will look into “an overall evaluation of the interests involved⁹³ and this includes consideration of “public interest”.⁹⁴

However, Stoop is of the view that sometimes compliance with the transparency criteria may not increase overall fairness because consumers are reluctant or apathetic to read detailed contract terms.⁹⁵ To overcome this hurdle of procedural fairness, it is suggested that strong emphasis should be placed on standardization in the presentation of terms. This should not serve as a panacea against the reluctance to read standardized clauses, it cushions the impact and increases understanding with few complications. Thus, section 49 serves the above purposes and may assist a consumer to make comparison between suppliers, products and quotations for his merchandise.⁹⁶ Alternatively, the party may sever any part of the agreement or alter it to become lawful if it is reasonable to do so in the circumstances or declare it void in its entirety *ab initio*.

Interpreting these provisions gauges the impact of exemption clauses on the contract as a whole within the meaning of the CPA. The classic case of *Hanson v Liberty Group Limited*⁹⁷ captures the issue of consumer rights against the impact of exemption clauses. In *casu*, the plaintiff was a passenger in a motor vehicle that entered a shopping complex. She tripped on

⁹² It is recognized in the UK that the general clause of the Directive “lays down a composite test, covering both the making and the substance of a contract” (Lord Bingham in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481 para 17).

⁹³ See the recital of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993.

⁹⁴ As argued by Whittaker 1040.

⁹⁵ Stoop 1102.

⁹⁶ Any notice to consumers or provision of a consumer agreement that purports to (a) limit in any way the risk or liability of the supplier or any other person; (b) constitutes an assumption of risk of liability by the consumer; (c) impose an obligation on the consumer to indemnify the supplier or any person for any cause; or (d) be an acknowledgement of any fact by the consumer must be drawn to the attention of the consumer that satisfies the requirements of subsections (3)-(5).

⁹⁷ Case Number: 2009/4633.

the elevated expansion in the complex and sustained injuries. She claimed damages for such injuries and the owners of the complex defended the action based on an exemption clause,⁹⁸ which has been placed on a slab on the entrance on the driver's side of the entrance near the machine where the driver collects the entry ticket. The clause was written in red against a white background. The court held that the notice is directed towards parkers only. Any person who was not a parker or owner of a motor vehicle would not realize it and would have been entitled to ignore it. It was also held that the defendant did not do what was reasonably sufficient to give plaintiff notice of the terms of the disclaimer.

4.3 Incorporation wrangle

It transpires from section 49 that sufficient notice to the consumer before conclusion of the agreement is a prerequisite and inadequate after performance. To get proper clarity, this section should be read simultaneously with section 48(2) (d). This provision accentuates the common law doctrine of notice. It states that an agreement or a term is unfair if the term was subject to a term contemplated in section 49(1) (exemption clauses, assumption of risk clauses, indemnity clauses and acknowledgments of fact) and the fact, nature and effect of the term was not drawn into the attention of the consumer in a manner that satisfies the requirements of section 49.⁹⁹

This is particularly so when a contractant enters or gains access to the facility or is expected to offer counter-performance for the goods or services to be provided. Impliedly, this means adventure sports companies must now deal directly with the consumer because making bookings over the phone and receiving payment thereof would create problems.¹⁰⁰ This is because consumers mostly find themselves faced with the requirement to sign an exemption clause only upon their arrival at their destinations or when leaving their properties with the bailee. Another dimension of this hurdle is captured by section 49(2), which states that the

⁹⁸ Conditions of Parking and Parkers/Owner's Risk reads as follows "The owner or its officers or its servants or its agents or the independent contractors of any of them or the employees of any of them (hereinafter collectively referred to as "The Employer") do not accept or take any responsibility or liability for the safe custody of any vehicles or articles therein nor for any damage to vehicles or articles therein nor for any injuries or loss to any persons whether as a result of the negligence of the employer or any cause whatsoever including but without limiting the generality, collision, fires, theft, rain or hail. All vehicles are parked or driven in all respects at the risk of the parker, driver, owner thereof and all persons entering the car park do so at their own risk. The employer has the right to move or drive any vehicle left for parking."

⁹⁹ Naudé 518-19.

¹⁰⁰ Naudé 509. See the case of *Drifters Adventure Tours v Hircock* 2007 (2) SA 83 (SCA).

following risks require more diligence to bring them to the attention of the consumer because the risk is:

- (a) of an unusual character or nature;
- (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstance;¹⁰¹ or
- (c) that could result in serious injury or death.

The consumer must be given adequate opportunity in the circumstances to receive and comprehend the provision or notice.¹⁰² In addition to that, the consumer must be able to make an informed decision. More importantly, the consumer must be made aware of decisions that are likely to affect his life or result in death, as statutory expressed above. No matter what, the statute protects life and bodily integrity of a consumer in ordinary business dealings. Section 49(1) (a)-(d) in particular, places prerequisite of notification for certain terms and agreements in order for the notice requirement to be honoured. It appears preferable that the Act should have stated that if the requirements of section 49¹⁰³ are not met, the term in question is voidable or not incorporated to the contract at all.

The four types of terms as tabulated in the CPA are, first, exemption clauses (that is, clauses limiting in any way the risk or liability of the supplier or any other person); secondly, clauses by which the consumer assumes a risk or liability; thirdly, indemnity clauses (requiring the consumer to indemnify the supplier or any other person for any cause); and finally, acknowledgments of any fact by the consumer. Furthermore, the consumer is required to sign or initial the provisions unless the consumer acts in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

Nevertheless, commentators have noted the vagueness of the Act on what would be regarded as “sufficiently conspicuous” to attract the attention of an ordinary alert consumer. Such deficiencies in the Act present challenges. Even educated consumers hardly turn the reverse

¹⁰¹ See also *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) para [33] where the court held that a clause that undermines the essence of a contract and a hidden clause should be clearly and pertinently brought to the attention of a client who signs a standard form contract.

¹⁰² S 49(5). See also Jacobs, Stoop and Van Niekerk 2010 *PELJ* 357-358.

¹⁰³ Naudé 48-20.

side of a contractual document, even if that is done in a contrasting colour or font because they hate to be bored by the minute details of the transaction or contract. The time factor contrasted with market difficulties in finding someone, specifically in a larger organization, to negotiate about them or shop around for better standards¹⁰⁴ underscores the strenuous advantages of this section.

Naudé, however, argues that it may be sufficient to print in a contrasting typeface to the primary terms of the contract in particular exemption clauses.¹⁰⁵ This includes terms that purport to exclude liability “as much is allowed by law” or which state that the exclusion of liability mentioned in the clause “does not affect your statutory rights” or “does not affect your rights under the CPA” or something similar if not drawn to the attention of the consumer. More importantly, consumers who are not consumer law experts are unable to understand the meaning and effect of such statements that it’s a contravention of section 49.¹⁰⁶ In addition, these types of clauses are not in plain and understandable language, as required by section 50 read with section 22.¹⁰⁷

Commentators note that these provisions enjoin courts when exercising their discretion to factor in the following: (a) nature of the parties to the transaction or agreement; (b) their relationship to each other and their relative capacity; (c) education, experience, sophistication and bargaining positions; (d) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time the conduct or transaction occurred or agreement was made; (e) the conduct of the parties; whether there was negotiation between the parties, and if so, the extent of that negotiation; whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the supplier’s legitimate interests; whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement alleged to have been unfair, unreasonable or unjust, having regard to any custom of trade; and (f) any previous dealing between the parties; the amount for which, and circumstances under which,

¹⁰⁴ Naudé “Unfair contract terms legislation: The implications of why we need it for its formulation and application” (2006) 17 *Stell LR* 366-67.

¹⁰⁵ Naudé 508-09.

¹⁰⁶ Naudé 49-3.

¹⁰⁷ The UK Office on Fair Trading does not allow terms stating that a term or contract “does not affect your statutory rights” for similar reasons (Office of Fair Trading *Unfair Contract Terms Guidance* (2008) para 2.8.4 at 35-36). Similarly, such clauses are regarded as too unclear under the transparency requirement of the German law on standard terms. (Basedow “§ 305” in Sacker, Rixecker & Oetker (eds) *Munchener Kommentar zum Bürgerliches Gesetzbuch-Schuldrecht Allgemeiner Teil* 6th ed.(2012) §305 para 75).

the consumer could have acquired identical or equivalent goods from a different supplier; and (g) whether the goods were manufactured, processed or adapted to the consumer specifications.¹⁰⁸

Naudé differently argues that no direct consequences attach to a failure to conform to the provisions of section 49, which is a critical element in the protection of consumer's rights.¹⁰⁹ Indeed, there are consequences and various consumer remedies for a term or notice that fails to conform to section 49, as spelled out in detail in section 52(4).¹¹⁰ Resort to such partial redress seems to overlook the costs of litigation, risks and efforts consumers have to undergo. A well-considered view would be that a supplier or service provider who fails to comply with the requirements of section 49 might not rely on the contract terms in question, thus limiting his enforcement options. In such a case, the consumer would only approach a court in the event of a dispute to answer on the legal question whether the supplier did indeed comply in full with the relevant section.¹¹¹

Despite the positives of section 49, not all is rosy as this section can also act as a double-edged sword against the consumer. The fact that a consumer is obliged to counter-sign and initial the agreement countenances the supplier's argument that the term is fair although it is overall unfair.¹¹² This legislative prescription indirectly gives legitimacy to exemption clauses limiting liability for personal injury or death caused negligently, as long as they are signalled or initialled by the consumer. There is a nuanced contradiction between the provisions of section 51 and 49, as far as the caveat, *subscriptor* and *iustus* error defence are concerned.

Insofar as these signings are concerned, lessons could be drawn from the European Directive on Unfair Terms in Consumer Contracts of 1993 that make them unfair *per se* regardless of whether the consumer knew about them at the time of the conclusion of the contract or not. It

¹⁰⁸ Christie & Bradfield 25.

¹⁰⁹ Naudé 509

¹¹⁰ A court may make an order severing any part of the relevant agreement, provision or notice or alter it to an extent that makes it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole and in the case of a provision or notice that fails to satisfy any provision of section 49, severing the provision as a whole declaring it void and of no force or effect with respect to the transaction. In addition to that, the Court may make an order that is just and reasonable in the circumstances with respect to the agreement, provision or notice, as the case might be.

¹¹¹ Naudé 509.

¹¹² Naudé 510-511.

avoids the sweeping assumption that every consumer understands his or her implication. However, this is not in accordance with for example the German Civil Code¹¹³ because the Directives are not binding in law and not all countries have implemented them. Bearing in mind the provisions of Article 3(3) it is more useful to take note of the list of objectionable terms in consumer contracts from other jurisdictions.

Section 49 is criticized for its prevarication to ban the supplier who did not comply with its statutory requirements from relying on it.¹¹⁴ In such a scenario, the term would have been contested on compliance in a court of law. This is critically because section 49 sets preliminary incorporation requirements because a term may remain unfair despite its prominence in the agreement, even if the consumer knew about it when entering into the contract. Arguably, such a term may be unfair on substance ground, for example, being excessively one-sided in favour of the supplier.¹¹⁵

Thus, a term of a consumer agreement is presumed to be unfair if it has the effect of imposing a limitation period that is shorter than otherwise applicable under common law or legislation¹¹⁶ for the institutions of legal proceedings or making a written demand.¹¹⁷ For this reason, the interpretation of contractual terms imports these notions of fairness and reasonableness. As pointed out above some of the procedural defects of the Act, for instance, the counter-signing requirement discounts the import of substantive unfairness in the term as a whole.

Substantive fairness denotes requirements that contractual terms and their enforcement must satisfy prescribed standards of fairness whether on the basis of *per se* rules, or in terms of discretionary judicial or administrative powers, or both.¹¹⁸ The Act is commendable for its intended objectives to ensure consumers are aware of the risks attendant upon entering into agreements containing exemption clauses, but not when viewed from the perspective of a contractual mistake. The issue of mistake is jettisoned by the underlying tones derived from this section.

¹¹³ See Art 1341 of the Italian Civil Code for exposition.

¹¹⁴ Naudé 49-4.

¹¹⁵ Ibid.

¹¹⁶ See for instance, s 113(1) of the Defence Act 44 of 1957, under consideration in *Mohlomi v Minister of Defence* 1996 (12) BCLR 1559 (CC).

¹¹⁷ Reg 44(3) (z) of the CPA. Compare item 1(b) of Sch 2 to UCTR 1999.

¹¹⁸ Van Eeden 238.

On the contrary, the Act may prove less efficacious because service providers are lax in pointing exclusion clauses buried in the bulk of terms in standard form contracts. The pros and cons are that service providers are compelled by legislation to point out exemption clauses and the providers will take precautions to comply and thereby neutralise a useful tool that can be used by the courts as ammunition to wield for the benefit of the unwitting consumer. The prospects of finding service providers who are prepared to ensure compliance rather than self-interest are very scarce.

4.3.1 Reasonable foreseeable circumstances at the time the contract is made

A logical question to ask in determining fairness of exemption clauses is whether the circumstances, which happen thereafter, were reasonably foreseeable to the party with less bargaining power. It is said that the reasonableness of a contract term is not affected by the gravity of the loss or damage sustained, but rather by that which was contemplated by the parties at the time of contracting. Surely, the Act does not outlaw exemption clauses within legally permissible parameters,¹¹⁹ but aims to maintain their validity and enforceability. A court interpreting these provisions must evaluate the impact of exemption clauses to a contract as a whole and within the parameters of the CPA.

Questions arise as to what stands and what falls to satisfy the reasonableness dimension of the clause where some parts of it display dearth of reasonableness. Collins argues that there must be conformity to reasonable expectations, which suggests that the ancillary terms should not deviate from a reasonable package of terms for transactions of that particular type; unless, if the parties have expressly negotiated the point.¹²⁰ This scenario depicts the divisibility of a contract. Since the CPA fails to define unreasonableness, refuge on the meaning of the term can be sought from the Unfair Contract Terms Act 1977 (UCTA) as amended by the Consumer Rights Act 2015 (CRA).

Section 11 (1) states: “[i]n relation to a contract term, the requirement of reasonableness...is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.”

¹¹⁹ The Act prohibits an exemption clause from liability for gross negligence-s 51(c) (i).

¹²⁰ *The Law of Contract* 3rd ed. (1997) 253.

The reasonableness of the clause is to be assessed on the basis of the circumstances known to or contemplated by, or which should have been known to or contemplated by the parties at the time of contracting. The particular breach is not directly relevant.¹²¹ It can be relevant only if it falls within the scope of possibilities that the parties contemplated or should have contemplated, at the time of contracting. Assessing the reasonableness of the clause in relation to the circumstances at the time of contracting should assist contract planning.¹²² The importance of reasonableness is emphasized differently in section 49 of the CPA such that it should be drawn to the attention of the consumer so that he decides correctly before entering into a contract.

Guidance on the concept of unfairness and unreasonableness can be gleaned from case law. Sachs J in the landmark case of *Barkhuizen v Napier*¹²³ cited Collins with approval that “the idea of balance suggests that an advantage obtained in ancillary terms, such as an exclusion of liability or a fixed measure of damages for breach, should be matched by corresponding benefits to the other party”.¹²⁴

Brown and Chandler,¹²⁵ having observed the growing jurisprudence on reasonableness, suggest a reductionist theory as a response to exemption clauses. This requires the breakdown of the contract into separate composite and distinct parts, so that the unreasonableness of a single part does not render the rest of the parts ineffective, which on their own would not have been regarded as unreasonable.

The case of *Goodman Brothers (Pty) Ltd v Rennie's Group Ltd*¹²⁶ is illustrative of the complex situation of composite contracts in respect of theft committed by an employee. The court held that where an employee, acting within the scope of his authority, made a fraudulent misrepresentation inducing another party to contract with his employer, the employer was liable. This had to be distinguished from a case in which an employee stole goods that had been entrusted to his employer. Like fraud, the theft by the employee was not theft by the employer. Yet unlike the fraudulent misrepresentation, the theft benefited only the employee, so that to allow the employer in that case to rely on a clause excluding liability.

¹²¹ Koffman L & Macdonald E *The Law of Contract* 6th ed.(2007)235.

¹²² *Ibid.*

¹²³ 2007(5) SA 323 (CC) para 165.

¹²⁴ Collins 253.

¹²⁵ 1993 (109) *LQR* 41.

¹²⁶ 1997 (4) SA 91 (W).

Accordingly, this would not have the effect of encouraging theft. An employer who agreed to deliver goods to another person was entitled to contract out of liability for the dishonesty of his servants entrusted by him with the performance of his contractual duty.

Similarly, a court construing the contract against a consumer may first attempt to put the blue pencil down, that is to excise the provision and allow an escape route by checking conformity with the plain language to the consumer. If it was reasonably foreseeable that such a breach would occur, the court may hold that the term was unreasonable at the time of contracting to exclude liability for such consequences. Excluding liability for foreseeable incidences is untenable and against public policy.

Courts have held in several cases that public policy is now anchored in the constitutional values.¹²⁷ If a term offends against a constitutional value, it will be unfair under the CPA as well. Courts are warned to be circumspect of interpreting public policy against value-judgements of the individual judge's concern. The case of *Nyandeni Local Municipality v Hlazo*¹²⁸ is very clear in enunciating this ideology of interpretation:

“The concept of “fairness” runs like a golden thread through our Bill of Rights. However, even a superficial glance will reveal that...it is not an independent or substantive constitutional right. Therefore, and subject to what follows, a contract does not necessarily offend public policy merely because it may operate unfairly. Like the concept of good faith (bona fide), fairness may be regarded as an ethical value..., but is not an independent constitutional or contractual principle in terms of which a contracting parties may escape their obligations including obligations arising from the Shifren principle...It follows that a party does not have a general discretion to decide what is fair and equitable and then to determine public policy with reference to his or her views on fairness...”

On a dissenting judgment Sachs J in the case of *Barkhuizen v Napier* stated that-

“[t]he potential of unreasonableness in the eyes of the community, leading to a possible finding on a violation of public policy, lies in holding a person to one-sided terms of a bargain to which he or she apparently did not actually agree, in respect of which there is nothing to indicate that his or her attention was drawn and the legal import of which a reasonable person in his or her position could not be expected to be aware.”¹²⁹

¹²⁷ See *Barkhuizen v Napier; Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D); *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM).

¹²⁸ Para [92].

¹²⁹ Para [148].

In the case of *Swinburne v Newbee Investments (Pty) Ltd*,¹³⁰ the court adopted the notion of reasonableness according to South African circumstances. In *casu*, the plaintiff, a tenant in the defendant's building, sustained injuries when he slipped and fell down a flight of stairs to his flat. The plaintiff instituted a claim for damages contending that the defendant was negligent by failing to erect a handrail on the stairs. The defendant denied negligence and in the alternative relied on two clauses in their lease agreement that excluded liability for any damages arising from its alleged negligence. Particular reliance was placed on a portion of clause 26 of the lease agreement, which read as follows: "[T]he lessor shall not be responsible or liable to the lessee... for any damage suffered as a result of any negligent act or omission on the part of the lessor". The plaintiff countered that should the disclaimers operate to bar his otherwise valid claim, they would be unenforceable for being contrary to public policy. The court held that the question of whether the defendant owed the plaintiff a legal duty was anterior to the question of the defendant's negligence. In the case of liability for an omission, the test for the existence of a legal duty depended on the reasonableness of a plaintiff's expectation that a defendant should have taken positive measures preventing the harm from occurring. The reasonableness or lack thereof of such an expectation was a conclusion of law based on the court's perception, the prevailing legal convictions of a community, and on considerations of public policy.¹³¹ The court further held that the defendant had a legal duty. A reasonable person in the position of the defendant would therefore have foreseen the possibility of someone slipping on the stairs, losing the balance and falling. The provision of a handrail was the obvious step in guarding against such injury and failing to do so would have constituted negligence on the part of the defendant.¹³² Furthermore, the two clauses of the lease relied upon by the defendant as a disclaimer, read in context, clearly only excluded its liability for negligence to omissions or acts relating to obligations for repair and maintenance, and did not extend to the provision of basic safety features such as handrails for the stairs.¹³³

4.3.2 Control and degree of negligence

In terms of section 54(1) (b) of the CPA the consumer has the right to performance of service in a manner and quality that persons are generally entitled to expect. A standard, which falls

¹³⁰ 2010 (5) SA 296 (KZD).

¹³¹ Para [10] and [12] 302D-F and 303A-D.

¹³² Para [15] and [19] 304G-H and 306C-E.

¹³³ Para [22] 307E-F.

short of legitimate expectation or positive malperformance, is wrong and can be impugned because it is considered unfair.¹³⁴ Furthermore, section 58 creates an obligation on the supplier with regard to any activity or facility that may entail either an uncommon risk or a risk that the consumer cannot reasonably be expected to foresee and or a risk that may lead to serious injury or death, to specifically forewarn the consumer of the fact, nature and potential effect of the risk.

On the contrary, exemptions of liability for loss or damage due to gross negligence will thus no longer be permitted in the South African law of contract as such terms are void and unenforceable.¹³⁵ From this, it transpires that the effect of a term on the supplier or the credit provider often depends on the subject matter of the term and the technique used by the draftsman.

A term that excludes the supplier's liability for representations by its representatives may be an indirect admission or acknowledgement by the consumer that, before the agreement was concluded, the supplier or its agents made no representations or warranties in connection with the agreement.¹³⁶ These terms are important as they may also be used under the following headings: (a) a term that affects evidence;¹³⁷ and (b) a term that restricts the supplier's liabilities.¹³⁸ The latter term is transversal because it has the effect of trammelling the consumer's right of access to justice and redress.¹³⁹

In a medical context, the interpretation of the term "gross negligence" is controversial because the Act does not define this phrase. It becomes fuzzy when conduct will be regarded as grossly negligent or when such conduct falls within the normal negligence.¹⁴⁰ Commentators argue that the problematic nature regarding this phrase is more apparent in delictual or criminal liability because it does not make any difference.¹⁴¹ These difficulties are further manifest where the exemption clause is in a composite form relating to several

¹³⁴ See Article 3(3) (b) of the European Directive on non-performance.

¹³⁵ S51 (3).

¹³⁶ See for example, s 90(2) (g) (i) and (2) (h) (i) of the National Credit Act 34 of 2005 (NCA).

¹³⁷ See terms subject to Reg 44(3) (y) of the CPA.

¹³⁸ Reg 44(3) (c).

¹³⁹ See section 3(1) (h).

¹⁴⁰ Pat van den Heever (March 2012) *De Rebus* 24.

¹⁴¹ Nothing Slabbert M 'Medical Law South Africa' in R Blanpain *International Encyclopaedia of Laws* (109) 2011 para 168.

different possible breaches of the contract in question or purporting to exclude or restrict liability, remedies, or procedural rights in more than one way.

4.3.3 *The gauge of effectiveness, reasonableness and fairness*

4.3.3.1 *The test for reasonableness*

Similarly, the UCTA confers wide-ranging discretionary powers on the courts to invalidate contractual exclusion clauses by reference to a reasonableness test. The English courts evaluate a term against the control of the UCTA for effectiveness¹⁴² and reasonableness.¹⁴³ Similarly, these criteria are used to control exclusion clauses falling within section 3 of the Misrepresentation Act 1967 in the sale of goods.¹⁴⁴ Because of the advanced nature of English consumer legislation, a comparative analysis may assist in determining whether South Africa is moving in the proper direction in this specific regard. The jurisprudence, which has evolved around such legislation, may provide a ready-made source of assistance for the determination of unfair contracts under the South African Act-CPA.

Section 11(1) of UCTA lists the test for determining reasonableness. It tests whether the term is a fair and reasonable one to have been included in the light of the circumstances known (or which ought to have been known) to the parties at the time of contracting.¹⁴⁵ For instance, contravention of the reasonable requirement in the UCTA is drafted in such a way that no reliance may be placed on it to exclude or restrict liability, which would otherwise exist under the contract.¹⁴⁶

Furthermore, under the UCTA, a wide range of exclusionary provisions are either blacklisted (that is, they cannot be relied upon)¹⁴⁷ or placed on a grey-list (that is, declared to be valid only if they satisfy a test of reasonableness). This is the highly paternalistic measure of the

¹⁴² S 2 (1), 5, 6 (1), (2), 7(2).

¹⁴³ S 2 (2), 3, 4, 6(3), 7(3), (4).

¹⁴⁴ Andrews N *Contract Laws* (2011) 431.

¹⁴⁵ Poole J, *Textbook on contract Law* 7th ed. (2001)220. See also Beatson J *Anson's Law of Contract* 28th ed. (2002) 194.

¹⁴⁶ Poole 226.

¹⁴⁷ Typical examples are that, clauses which purports to exclude or restrict liability for death or personal injury resulting from negligence (section 2(1), clauses which purport to exclude the implied obligations as to title under section 12 of the Sale of Goods Act (section 6(1), and clauses in consumer contracts that purport to exclude or restrict liability for breach of the implied obligations under sections 13, 14 and 15 of the Sale of Goods Act 1979 (section 6(2).

Act in place for the UK consumer. Noteworthy from this observation is that similar developments have taken place in the United States of America. The Uniform Commercial Code¹⁴⁸ contains a similar provision against unconscionable contracts.

Furthermore, most European legislation contends that the existence of an unintelligible provision is a factor to be taken into account when deciding whether a term should be struck out for being unfair.¹⁴⁹ The German Civil Code stipulates that “provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract,”¹⁵⁰ It also provides that an unreasonable disadvantage may also result from the fact that the provision is not clear and incomprehensible.

Section 11(5) of the UCTA provides that the burden of proving reasonableness lies on the party seeking to rely on the exemption clause. In South Africa, this argument of unenforceability of an exemption clause imports the notion of public policy and is mostly applicable in negligence cases. Comparatively, the English had gone further to lay down some guidelines to assist the Court in determining whether a term satisfies the requirement of reasonableness in the UCTA.¹⁵¹ These are:

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer’s requirements could have been met;
- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
- (c) whether the customer knew or ought to have known of the existence and extent of the term (having regard, among other things, to any custom of trade and any previous course dealings between the parties);

¹⁴⁸ Uniform Commercial Code par 2.302.

¹⁴⁹ Naudé 513.

¹⁵⁰ §307 BGB cited in Naudé’s article.

¹⁵¹ Sch 2 provides factors for the court to consider in applying the reasonableness test when looking at non-consumer sales in relation to s 6 and 7 of the UCTA.

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

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

An analysis of these guidelines on reasonableness could open Pandora's Box; for instance, having to determine the market position at the time the contract was made.¹⁵² All in all reasonableness is a factual matter and is easily confused with fairness, which is subjective. In particular, the first criteria pertaining to the unequal bargaining power in consumer contracts is manifestly patent in commercial contracts. A clause that has been imposed on one side is less likely to be reasonable than one that has been the product of co-operative negotiations between representative bodies, or had evolved over extensive time because of trade practice.¹⁵³

4.3.3.2 *Bargaining position of the parties*

The aim of this discourse from the onset is to pivot debate where the consumer is an individual and not a juristic person, because in the latter circumstance the scales of bargaining power are in parity.¹⁵⁴ In the commercial context the most important factors in determining reasonableness of a clause seems to be equality of bargaining position, whether the clause is generally accepted in the industry in question, and whether, on this basis, it is essentially a clause allocating a particular risk between two commercial parties thereby avoiding the risk of duplicate insurance.¹⁵⁵ A weak bargaining position and limited choice militates against a finding of fairness in a normal contractual setting because these factors imply that the consumer could not have done anything to mitigate or protect his or her own interests.¹⁵⁶

¹⁵² Beatson 195.

¹⁵³ *Howard Marine and Dredging Co. Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] Q.B. 578, per Lord Denning M.R 594. See also *Schemers v Overland Shoes* [1998] 1 Lloyd's Rep 498 at 507. Trade practice without negotiation is not a weighty factor.

¹⁵⁴ S 6(1) of the CPA stipulates that the Minister at intervals of not more than five years, by notice in the Government Gazette, must determine the monetary threshold applicable to the size of the juristic person for the purpose of s 5(2)(b). S 5(2)(b) stipulates that in case of a juristic person the annual turnover at the time of the transaction, equals or exceeds as the threshold.

¹⁵⁵ Poole 223.

¹⁵⁶ Willet C *Fairness in Consumer Contracts: The case of Unfair Terms* (2007) 22-25.

Tucker LJ (with whose judgment Potter LJ and Hart concurred) in *Granville Oil & Chemicals Ltd v Davies Turner & Co Ltd*,¹⁵⁷ put this matter succinctly that:

“...The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But, I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms.”

This dictum is an indirect recognition that most suppliers would be in a stronger bargaining position than individuals simply because a single consumer cannot provide the leverage derived from a group or certain class of consumers. However, Stoop argues that mere inequality of bargaining position cannot be the only determinant of unfairness, but consist of a host of factors influencing the outcome of unfairness.¹⁵⁸ These include unconscionable conduct of the supplier and consumer respectively, whether there was negotiation between the supplier and consumer, the inclusion of exemption clauses, individual circumstances of a consumer and others contributing towards his or her prejudicial predicament.¹⁵⁹

In addition, section 52(2) of the CPA sets the criteria for the courts to determine whether a contract is unfair and its power to ensure fair and just conduct, terms and conditions. These are not only the fair value of the goods or services in question, but specifically the nature of the parties to the contract (such as the size of the supplier), their relationship to each other, and their relative capacity, education, experience, sophistication and bargaining position.¹⁶⁰ Also included are those circumstances of the transaction that existed or were reasonably foreseeable at the time the transaction or conduct occurred. Therefore, when applying the reasonableness test, courts are advised not to grasp at straws by focusing on remote possibilities to conclude that a clause fails the reference check.

The case of *Standard Bank of South Africa Ltd v Dlamini*¹⁶¹ is instructive on the court’s engagement with the inequality of bargaining power and consumer protection. The respondent is a functionally illiterate Zulu speaker, who bought a defective car from a second-hand car dealer and eventually returned it. The dealer did not refund the respondent’s

¹⁵⁷ [2003] EWCA Civ 570, [2003] 1 All ER (Comm) 819 at [31].

¹⁵⁸ Page 1105.

¹⁵⁹ S 52 (2) (d)-(f).

¹⁶⁰ S 52(2)(b).

¹⁶¹ 2013 (1) SA 219 (KZD).

deposit. The bank ended up issuing summons against Mr Dlamini for failure to comply with a procedural way of terminating the contract, and called this voluntary surrender. The bank contended that it could sell the car and claim the shortfall due by him under the agreement. The court held that the bank or its agents caused Mr Dlamini to enter into a credit agreement without reading, interpreting and explaining the material terms to him, which he did not know or understand. Furthermore, when a credit agreement was terminated in terms of section 121 of the National Credit Act ¹⁶²(NCA), the consumer had the right to a refund from the credit provider, which the clause in the bank's agreement studiously excluded. It was further held that a non-disclosure of the provisions of section 121 (3) (a) violated the right of a consumer to education and information as required in terms of section 3 of the NCA. The bank's selection of what parts of section 121 of the NCA it recorded in the agreement, and what it excluded, was deliberate and deceptive. Such deception conflicted with the letter and spirit of the NCA. It was held further that the bank could not absolve the dealer of its duty to act in good faith to notify it in the ordinary course of commercial practice that the vehicle had been returned. It was further held, that for lawyers and laypersons alike, the form of the bank's standard agreement was an unappetising, formidable read. For a labourer like Mr Dlamini who did not read, write or understand English there might just as well have been no written agreement at all. His failure to comply with procedural obligations had not been due to an unwillingness to comply, but rather an unawareness of such an obligation. Held further, that the bank could not hold Mr Dlamini bound to the agreement by applying the common-law principles of *caveat subscriptor* and mutual consent. Due to his illiteracy, the unpalatable form and set-up of the agreement would have been immaterial to Mr Dlamini, and this was even more reason why the bank should have ensured that its agents explained the material terms to him. Since Mr Dlamini was ignorant of the prescribed notice requirements of the agreement, there was no mutual consent as regards this term. Finally, it was held, that the agreement had been skewed in favour of the bank by: (a) the selective disclosure; (b) the failure to inform Mr Dlamini of the contents of the agreement; and (c) the breach of his rights to information in an official language that he understood and to information in plain and understandable language. Distorting the balance created in the NCA in this way was unlawful, defeated the purpose of the NCA, and rendered the entire agreement unlawful. The entire agreement had to be set aside.

¹⁶² 34 of 2005.

A vigorous analysis of the above case to pursue the balance of scales in commercial contracts and manifestation of consumer protection gives two narratives. One extreme interpretation is that circumstances and people are never identical and there will always be differences.¹⁶³ Since the agreement was not drafted in plain and understandable language, but in befuddling legalese; the agent owed Mr Dlamini an explanation as to those skewed provisions so that he was clear of the effects of the contract. Secondly, the court's interpretation of the whole contract takes a holistic view of Mr Dlamini's background and seeks to spearhead the protection of consumer rights. The main issue of language is well articulated in legislation¹⁶⁴ and has an over-dominating effect on the court's interpretative process. Moreover, in this particular case the illusion of equal bargaining power under the freedom of contract becomes more conspicuous.

Thus, the urge for evolving substantive equality is perforce to invigorate consumer protection. It becomes clear that consumer protection legislation grew out of the failure of the free market and common-law systems to protect the consumer's interests.¹⁶⁵ This fact, coupled with manipulative marketing techniques used by many entrepreneurs, becomes apparent in other analyses below. The lesson learnt from the above case of *Standard Bank of South Africa v Dlamini* is that contracts cannot detract from the consumer's rights in terms of the CPA, as any clause that does so is void.¹⁶⁶ Moreover, suppliers must not mislead the consumers;¹⁶⁷ because consumers have a right to contracts, which are fair, reasonable and just¹⁶⁸-not excessively one sided.

Objectively speaking, a mere inequality of bargaining position cannot lead a court to conclude that a contract is unfair, and vice versa. The facts of the matter count; hence it is always argued each case is decided on its own material facts. However, when a supplier exploits a consumer's lack of education, experience and sophistication, the inequality of the bargaining position may lead the court to the conclusion that the contract is unfair.¹⁶⁹

¹⁶³ Hawthorne 158.

¹⁶⁴ S 22 of the CPA and s 63-64 of the NCA.

¹⁶⁵ *Obiter* (1989-1990) 111.

¹⁶⁶ S 51.

¹⁶⁷ S 41.

¹⁶⁸ S 48.

¹⁶⁹ See Sharrock 2010 SA *Merc LJ* 310-311. It is pointed out that it is conscionable for suppliers to knowingly take advantage of a consumer because a consumer was unable to protect his/her own interests on account of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any

As a matter-of-fact, several broad and individualised elements play a role when adjudicating bargaining positions of the parties.

Ramsey J in *Mylcris Builders v Buck*¹⁷⁰ summarized the relevant principles as follows:

- “(1) A term is unfair if it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith.
- (2) There is ‘significant imbalance’ if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour.
- (3) The element of ‘detriment to the consumer’ makes clear that the Regulations are aimed at significant imbalance against the consumer, rather than the seller or supplier.
- (4) The requirement of good faith is one of fair and open dealing in which:
 - (a) Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms, which might operate disadvantageously to the customer.
 - (b) Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the 1994 Regulations (an inducement to the consumer to agree to the term, whether goods or services were sold or supplied at the special order of the consumer or whether the seller or supplier dealt fairly and equitably with the consumer.
- (5) Schedule 2 to the Regulations is best regarded as a checklist of terms which must be regarded as potentially vulnerable to being unfair.

similar factor. Section 3(1)(b) furthermore provides that the CPA aims at reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by vulnerable consumers.

¹⁷⁰ [2008]BLR 611, [2008] CILL 2624 [2009] 2 All ER (Comm) 259, [2008] EWHC 2171(TCC). Available in <http://www.bailii.org/ew/cases/EWHC/TCC/2172.html>. See also the judgment of Ramsey J in *Harrison & Others v Shepherd Homes Ltd & Others* [2011] EWHC1811 (TCC), (2011)27 Const LJ 709; (<http://www.bailii.org/ew/cases/EWHC/TCC/2011/1811.html>) at para 78. Lastly accessed on 24/10/2017.

- (6) Useful approaches include:
- (a) assessing the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it.
 - (b) considering the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether a term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between the parties acting on level terms and at "arms" length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion.
- (7) Where the consumer has imposed the term either by their own choice or a choice made by their professional agent then it is unlikely that there would be any lack of good faith or fair dealing with regard to the incorporation of the term into the contract."¹⁷¹

Clearly, courts adjudicating on unfairness - at most - would need to look at situations where a consumer finds himself overreached by a supplier's predatory practices because of his vulnerability, ignorance or inexperience, and inability to obtain redress from available defences.¹⁷² For instance, the Canadian statute also list, inter alia, consumer's inability to protect his interest to a reasonable extent because of physical infirmity, ignorance, illiteracy or inability to understand the language of an agreement.¹⁷³ Canadian's courts also consider the following when adjudicating unconscionable conduct: the exertion of undue pressure; grossly excessive price; terms which are very harsh or adverse as to be inequitable and probability of the consumer's inability to pay the price.

Some of the criticism levelled against common law remedies is that a consumer, who is often unaware of his rights and unable to identify abuses, must invoke them normally.¹⁷⁴ Therefore,

¹⁷¹ Para [51].

¹⁷² Ramsey *Obiter* 112.

¹⁷³ Enman SR "Doctrine of unconscionability in Canadian, English and Commonwealth Contract Law" (1987) 3 *Anglo-American Law Review* 215.

¹⁷⁴ Ramsey *Obiter* 112.

the CPA directs the court *mero motu* to infuse some of the protection borne of the Act. In addition to the constraints of litigation a consumer may be hamstrung by time constraints or financial resources to pursue his rights in appropriate forums particularly where the harm suffered is petty or the costs of pursuing the claim outweighs the anticipated benefits of successful redress.¹⁷⁵

Similarly, these factors have been considered in a number of English cases.¹⁷⁶ Lord Chadwick's dictum in the Court of Appeal in the case of *Watford Electronics Ltd v Sanderson CFL Ltd*¹⁷⁷ is more lucid. The Court of Appeal stressed the need to consider reasonableness in the light of the contract terms as a whole, including the entire agreement clause whereby the claimant had agreed that it had not relied on any pre-contractual statement or representation. It was held the clause was reasonable because the contract had been negotiated between experienced businesspersons of equal bargaining power and skill. Both should have appreciated the party who was to bear the risk of loss and would anticipate that the price would reflect the risk. In explaining the ramifications of this, his Lordship said:

“In circumstances in which the parties of equal bargaining negotiate a price for the supply of product under an agreement which provides for the person on whom the risk of loss will fall, it seems to me that the court should be very cautious before reaching the conclusion that the agreement which they have reached is not fair and reasonable one.”

He goes on to state that:

“... experienced businessmen representing substantial companies of equal bargaining power...should... be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement...Unless satisfied that one party has, in effect, taken an unfair advantage of the other—or that a term is so unreasonable that it cannot properly have been understood or considered—the court should not interfere.”

Substantiating this view Gibson LJ stated in his judgment that these circumstances will provide “little scope for the court to unmake the bargain made by commercial men”. This is not different from indirectly endorsing the concept of sanctity of contract as a sacred cow- a

¹⁷⁵ Reiter B “The control of contract power” (1981) *Oxford Journal of Legal Studies* 354.

¹⁷⁶ See *Monarch Airlines Ltd v London Luton Airport Ltd* [1997] CLC 698 in finding that a clause, excluding the liability of the airport for unintentional damage to aircraft was considered reasonable.

¹⁷⁷ [2001]EWCA Civ 317, [2001] 1 All ER (Comm) 696 noted Peel (2001) 117 *LQR* 392 at [54].

point disapproved by Ngcobo J in *Barkhuizen v Napier*.¹⁷⁸ In recent years, the courts have considered the nature of the contract and the extent of the commercial risks involved when concluding whether the exemption clause at issue is reasonable or not. In South Africa, this is encompassed by the principle of good faith and constitutional values and norms to be delved into later below.

4.3.4 The role of good faith in equality

A lot has been written about the theme and the role of good faith in contractual principles, requirements and interpretation. On the vacillating journey of contract law from the classical contract theory to modern contract, the question often asked is how equity can be achieved within this legal matrix. Put differently, the search is on for a rationale for interfering with agreements made by consumers to counter the inequality in bargaining. Mostly, it seems easier to see contractual justice in interfering with the formal terms which the seller or supplier has proposed and the consumer has accepted.

Questions that remain unanswered in such situations are what the interests of each of the parties are, and how the law should balance these interests. This could be classified as a question of micro-contractual justice.¹⁷⁹ For instance, in a contract involving risk and liability the seller has a higher probability than the consumer to appreciate the risks that may be attendant to the supply of goods or services. This example typifies the explicit diverse views that exist, leading to most suppliers willing to distribute the risks and liability unequally.

By reducing the supplier's ability and scope for transferring the risk to the consumer and rendering the supplier his own insurer, the true costs of the risk will be more effectively factored into the price of the product.¹⁸⁰ Each party in a contract tries to protect and promote its side of the deal without considering the broader concept of contractual justice, hence the need to intervene through contractual norms and values. According to Hawthorne, it is in the application of open norms of the common law of good faith that equitability can be attained.¹⁸¹

¹⁷⁸ 2007 (5) SA 323 (CC).

¹⁷⁹ As in the term used by Brownsword R, Hird NJ & Howells GG *Good Faith in Contract: Concept and Context* (1999) 75.

¹⁸⁰ Van Eeden 282.

¹⁸¹ Hawthorne 2003 (2) SA Merc LJ 271.

A topical issue for micro-contractual justice is going on the offensive by the consumer, as the weaker party. In many instances presented above, it has been outlined that the welfarist agenda is to protect the weak consumer from lack of choice and from obscure and substantively unfair terms.¹⁸² That can be accomplished by factoring the position of the seller/supplier into the micro-contractual justice as part of the reforms to the comprehensive view. However, in South Africa the role played by good faith in the interpretation of contracts vacillates between recognition and denial exemplified by case law.¹⁸³ This has been exhaustively canvassed in Chapter 2 of this thesis.

For purposes of equality, the role of good faith is elaborated on by the judgment of Van Zyl J in *Janse van Rensburg v Grieve trust CC*.¹⁸⁴ In *casu*, the nature of a trade-in agreement presented an opportunity for the development of good faith as a norm that governs equality in contractual content, and provides a foundation for a doctrine of substantive unconscionability that can directly control unfair contracts.¹⁸⁵ The court held that, in trade-in agreements, it would be unjust, inequitable, and unreasonable for a seller to be liable for latent defects in a vehicle sold by him, and misrepresentations relating to it if no similar liability attached to the purchaser in respect of the vehicle traded by him. If these actions were available to one and not the other, the legal recognition of the principles of equality would be false.¹⁸⁶ Van Zyl's attitude of judicial activism is lauded for discarding the rule¹⁸⁷ laid down by Kotze JA in *Weinerlein v Goch Buildings*¹⁸⁸ and confirmed by Joubert JA in the *Bank of Lisbon v Ornelas*.¹⁸⁹

This development of good faith gained momentum the following year in the case of *Miller & Another v Dannecker*¹⁹⁰ from the decision of Ntsebeza AJ. In *casu* the court refused to enforce an entrenchment clause where such enforcement would breach the principles of good faith. His authority for the *ratio* is the judgment of Olivier JA in *Eerste Nasionale Bank van*

¹⁸² Brownsword et al 75.

¹⁸³ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) and *Meskin NO v Anglo-American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W).

¹⁸⁴ 2000 (1) SA 315 (C).

¹⁸⁵ At 318B.

¹⁸⁶ 325I-J.

¹⁸⁷ This is the rule on equitable defence of *exceptio doli*. Under this rule a plaintiff cannot benefit on his own *summum* if he knows his claim is based on fraud or mistake error.

¹⁸⁸ 1925 AD 295.

¹⁸⁹ *Bank of Lisbon* 580.

¹⁹⁰ 2001 (1) SA 928 (C).

*Suidelike Afrika Bpk v Saayman NO*¹⁹¹ laying down two principles: that a judge may deviate from the decisions of the High Court where their application would be contrary to the principles of *bona fides*, and that *bona fides* constitutes an independent basis for not giving effect to the principles of the law of contract.¹⁹² The judge recognized that good faith plays an important role in the law of contract.

However, Lubbe¹⁹³ submits that the principle of good faith is uncertain in content except for requiring honesty in commercial dealings. It connotes a minimum level of respect for each party's interests, so that an unreasonable and one-sided promotion of one party's interests at the expense of the other outweighs the sanctity of contract and empowers the court to refuse empowerment.¹⁹⁴ All the above case law lays foundation or is a fusion of section 40 of the CPA prohibiting unconscionable conduct, being conduct that is so improper or unethical to a degree that it would shock the conscience of a reasonable person.¹⁹⁵

Du Plessis¹⁹⁶ sums up the functions of *bona fides* as follows: "(a) it serves as a standard of honesty and fidelity in contractual obligations as determined by the *iudex* in accordance with society's precepts of fairness"; and "(b) [s]ince bona fides governed consensual contracts, the judge could interfere with the rights and duties arising from the agreements by using the expansive and corrective functions of good faith". These positive attributes of good faith are functional and have to be fulfilled by judges without shying away from it during their interpretative process. Tacitly, judges are expected to infuse contracts with good faith in their narrow or broad interpretation of the existing contract or agreement to bring equality between the parties.

An instructive guide on the principle of good faith when dealing with equality in exemption clauses is found in the case of *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others*,¹⁹⁷ where Davis J says the following:

¹⁹¹ 1997 (4) SA 302 (SCA) 318.

¹⁹² 938D-F.

¹⁹³ „Bona fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg“ (1990) 1 *Stellenbosch LR* 17.

¹⁹⁴ See also *Mort NO v Chiat* [2000] 2 All SA 515 (C).

¹⁹⁵ See the definition of "unconscionable" in s 1 of the CPA.

¹⁹⁶ Unpublished doctoral thesis 2003 from the Erasmus University Rotterdam titled "A history of *remissio mercedes* and related legal institutions"33.

¹⁹⁷ 2002 (6) SA 202 (C) 215H-I.

“Whatever the uncertainty, the principle of good faith must require that the parties act honestly in their commercial dealings. Where one party promotes its own interest at the expense of the another in so unreasonable a manner as to destroy the very basis of consensus between the two parties, the principle of good faith can be employed to trump the public interest inherent in the principle of the enforcement of a contract.”

Against this pronouncement, however, in 2002 in *Brisley v Drotsky*¹⁹⁸ and *Afrox Healthcare Bpk v Strydom*¹⁹⁹ the law surprisingly took two steps backwards against the concept of good faith. This trend was also followed by Brand JA in *South African Forestry Co Ltd v York Timbers Ltd*²⁰⁰ pronouncing that:

“...In these cases it was held by this Court that, although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder. In addition, it was held in *Brisley* and *Afrox Healthcare* that-within the protective limits of public policy that the courts have carefully developed, and consequently judicial control of contractual performance and enforcement-constitutional values such as dignity, equality and freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint.”

Some of the factors considered in the determining “reasonableness” under the 1977 Act are also used in determining “good faith” and ‘fairness’, under the European Union Unfair Consumer Terms Directive although not expressly referred to in the 1999 Regulations.²⁰¹ According to Article 3 of the Directive, a contract term is unfair if: (a) it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer; and (b) it is contrary to the requirements of good faith. This underlines the fact that good faith doctrine has ascended the hierarchy of construction under the Directive.

¹⁹⁸ 2002 (4) 1 (SCA).

¹⁹⁹ 2002 (6) SA 21 (SCA).

²⁰⁰ 2005 (3) SA 323 (SCA); [2004] 4 All SA 168 at paras 26-29. At para 27.

²⁰¹ Factors listed in Recital 16 to Directive 93/13, which may be referred to in interpreting the Regulations, are strikingly similar to those in Schedule 2 to the 1977 Act. According to Recital 16 good faith must be appreciated by reference to an “overall evaluation of the interests involved”, including “the strength of the bargaining position of the parties... whether the consumer has received inducement” and whether “the seller or supplier...deals fairly and equitably with the other party whose legitimate interests he has to take into account”.

The Consumer Rights Act 2015,²⁰² provides that a “term is unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties rights and obligations arising under the contract to the detriment of the consumer”. Lord Bingham of Cornhill in the House of Lords, when responding to the application of these requirements in *Director General of Fair Trading v First National Bank plc*²⁰³ says:

“The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty...the requirement of good faith in this context is one of fair and open dealing. Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageous to the consumer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, and unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations.”

Good faith in this context is not an artificial or technical concept, but a valuable guide of interpretation. Since Lord Mansfield was its champion, the significance of good faith has gradually grown and is no longer a concept wholly unfamiliar to British lawyers. It looks to good standards of commerciality and practice. Furthermore, the Principles of European Contract Law (PECL) introduced the good faith concept.²⁰⁴ However, the same argument cannot be valid for the United Kingdom after it left the European Union. Her laws have to be judged individually per jurisdiction and not according to the community law. Nevertheless, its law on good faith with the exit from the European Union has not changed much.

A moment of reflection shows that the common law does not make good faith a free-floating principle, but a factor, which vitiates the contractual validity like duress and undue influence. In this regard good faith must be understood at least to encompass the pursuit of the supplier’s own interests and “must be tempered by a reasonable measure of

²⁰² S62 (4) which revokes the Unfair Terms in Consumer Contracts Regulation 1999.

²⁰³ [2001]UKHL 52 para[17]

²⁰⁴ Article 4:110. The PECL were prepared by the Commission on European Contract Law (“the Lando Commission”) to serve as a possible model for a unified European Contract Law and are set out in Lando O & Beale H *Principles of European Contract Law Parts I and II* (2000). The standard of good faith has been retained in the Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law COM (2011) 635 final-2011/0284 (COD).

concern” for those of the consumer.²⁰⁵ In the same context, the consumer’s fundamental right to dignity in the contractual context may be argued to encompass the same standard.²⁰⁶

The potential for good faith to influence change and reform in the development of contract law can be seen in German law, where it has been said that the “doctrine of good faith has been used to create new causes of action where no cause of action existed in statutory law”.²⁰⁷ Contrary to most of his compatriots, Brownsword, as the chief protagonist of good faith, argues that it is an integral component of the law of contract in other jurisdictions and is a mandatory part of international restatement of contract law.²⁰⁸

Jacob J’s obiter in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*²⁰⁹ concerning good faith in infusing fairness is important in this context:

“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 insist that good faith requirements are enforceable should be determined sooner 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.”

Note, “the law of contract is not concerned with partisan protection of individual’s interest, but recognizes interests for both their individual and social context. The general principle of good faith dictates that the signs that parties send to other parties should be considered in determining their responsibilities.”²¹⁰ The signs theorem examines the moral position of the party sending the signal because it has been observed that most suppliers consciously send paradoxical statements. Suppliers would project a positive image whilst simultaneously

²⁰⁵ This formulation is that of Lubbe 1990 *Stell LR* 20.

²⁰⁶ Naudé 2006 *Stell LR* 366.

²⁰⁷ Ebke W & Steinhauer B “The doctrine of good faith in German Contract Law” in Beatson J & Friedmann D (eds) *Good Faith and Fault in Contract Law* (1995) 171

²⁰⁸ Mckendrick E *Contract Law, Text, Cases and Materials* 5th ed. (2012) 511. Also, see Article 7(1) of the Vienna Convention on Contract for the International Sale of Goods.

²⁰⁹ 2012 (1) SA 256 (CC) para [22].

²¹⁰ Brownsword et al 78.

communicating dichotomous incompatible formal terms.²¹¹ Therefore, this principle is a broad justification for rules, which regulate unfair terms in contracts between suppliers and consumers.

4.4 Strict liability

4.4.1 The introduction of a new strict liability regime

Argumentatively, if producers were not held liable for the costs of design, manufacturing or distribution errors that harm consumers, there would be apathy to avoid such errors and implant an enduring culture of competitiveness.²¹² Therefore, the need for accountability in the private sphere then permeates the market order. Policy considerations indicate economic and moral justifications for imposing strict liability for defective products, to cushion the loss from an individual consumer, for whom the concentration of the loss can prove catastrophic, to the “deep-pocket” manufacturer, for whom the loss can be less disruptive.²¹³

The CPA introduced a framework for strict liability to enable consumers to obtain redress from the producer, importer, distributor or retailer where the supply of unsafe goods or product failure, defect or hazard, or inadequate instructions or warnings for the use of goods has caused death, injury, illness or property loss or damage.²¹⁴ In this perspective, South African consumer law has been brought into line with many jurisdictions in the developed or developing world. There is a clear departure from the common law position on liability for product defects, which required the consumer to prove fault.

Aquilian liability for harm caused by defective products requires proof of both wrongfulness and fault, together with proof of conduct, causation and harm.²¹⁵ There are key difficulties in product liability statutes in other jurisdictions to determine the standard of defectiveness, i.e. if strict liability is to apply, how unsafe must the goods be before liability attaches irrespective of consideration of fault? The United States *Restatement Second* and the European Product Liability Directive attempted to set out a unitary standard for defectiveness

²¹¹ For instance, business may boost their image via advertising and other forms of promotion. The advertising and promotion used comes in the form of statements or promises, which would give rise to liability in contract, but it is too vague and non-specific for such liability to arise.

²¹² Van Eeden 368.

²¹³ Stapleton J *Product Liability* (1994) 93-94.

²¹⁴ S61.

²¹⁵ Loubser M & Reid E *Product Liability in South Africa* (2012) 56.

in products “unreasonably dangerous” in the case of the Restatement, and falling below “the safety which a person is entitled to expect” in the case of the Directive.²¹⁶

In South Africa, the common law provided a delictual remedy for harm caused by defective product. The South African statute changed and adopted a very different approach. In response, section 61 of the CPA introduces a modified form of strict liability although not completely different from the previously fault-based and encompassed by the common law in delict. It sets out a fixed set of interconnecting rules to determine what constitutes defectiveness.

Under this section, producers, importers, distributors or retailers are liable, irrespective of fault, in respect of harm caused by, or as a result of, the supply of any unsafe goods, product failures, defects or hazards in any goods, or inadequate instructions or warnings provided to the consumer, and pertaining to any hazard arising from or associated with the use of any goods. This form of strict liability applies irrespective of whether the harm is resulting from any negligence on the part of the producer, importer, distributor or retailer.

Product liability and product safety laws are significant because they give substance to the provisions of sections 55 and 56 of the CPA.²¹⁷ As already alluded to, these provisions are critical also when dealing with matters involving exemption clauses. Product safety laws here focus on: (i) unacceptable risk of death, injury and damage; (ii) preventing the realisation of those risks; and (iii) assuring compensation when the risks do realise.²¹⁸ For improving efficiency and competitiveness, Van Eeden identifies that fault-based and strict liability-based product liability regimes impact differently on production costs.²¹⁹

It must be noted that an action in delict against the manufacturer or producer was intended to avoid the need for successive actions for breach of contract by the consumer against the retailer, the retailer against the wholesaler, and so on to the manufacturer.²²⁰ It is a stop-gap measure to deal with the matter of product defectiveness in a comprehensive way. The action

²¹⁶ Loubser & Reid 57.

²¹⁷ S 55 speaks about consumer’s rights to safe, good quality goods and s 56 provides for an implied warranty of quality.

²¹⁸ Hondius EH & Rijken GJ, *Handboek Consumentrecht* 262 cited by Van Eeden 369.

²¹⁹ At 369.

²²⁰ Loubser & Reid 39.

in delict also obviates the need for a plaintiff to have acquired an interest in the product or to show reliance on a product warranty provided by the manufacturer.²²¹

Strict liability seems to be a more efficient standard for minimizing the social costs of product-related injuries, given the fact that manufacturers and designers know the special dangers associated with their products and can convey these to consumers.²²² For this reason, the law should apply to them with more strictures than to the intermediaries in the value chain. Consequently, complex matters arising from product safety law are now encompassed by statutory intervention-establishing regulation to be administered by means of bureaucratic and criminal law measures, whereas the arrangement of the distribution, scope and probability of liability lies in the ambit of the common law.²²³

The Act condemns the following harm for which a person may be held liable: first, physical harm that results in death, illness and injury to a natural person,²²⁴ and any loss of, or physical damage to, any property irrespective of whether is movable or immovable resulting from the above mentioned.²²⁵ Secondly, it refers to economic harm, which is any economic loss resulting from the physical harm.²²⁶ Contractual indemnity or waiver cannot circumvent liability in terms of this section.²²⁷ Interestingly, this section broadens the scope if more than one person is liable and holds them jointly and severally liable.²²⁸

The case of *Wagner v Pharmacare Ltd; Cuttings v Pharmacare Ltd*²²⁹ exemplifies the failure of the common law to hold manufacturers liable for unsafe products. In *casu*, the appellants had undergone surgery and became paralysed because of an anaesthetic manufactured by the respondent. The appellants pleaded that, contrary to the respondent's legal duty as a manufacturer, the anaesthetic administered was unsafe for use because it caused bodily harm sustained by both appellants. Alternatively, the appellants pleaded that the product was defective as a result of negligent manufacture by the respondent. The main issue before the Court was whether the respondent was strictly liable for defects in the

²²¹ Ibid.

²²² Cooter R & Ulen T *Law and Economics* 5th ed. (2007) 403.

²²³ Van Eeden 369.

²²⁴ S 61 (5) (b).

²²⁵ S 61 (5) (c).

²²⁶ S 61 (5) (d).

²²⁷ S 51.

²²⁸ S 61 (3).

²²⁹ [2003] 2 All SA 167 (SCA).

product (that is, whether the respondent was liable even if fault in the form of negligence in the manufacture of the product had not been proven). It was held that the right, which the appellants sought to enforce, was enshrined in the Constitution.²³⁰ However, if the common-law were inadequate to protect and enforce the right, it would be incumbent on the Court to develop the common-law in accordance with the spirit, objects and purport of the Constitution. The Court held that the Aquilian action for a damages claim was sufficient for the protection of the right to bodily integrity. Furthermore, that the legislature was in a far better position to create a more definitive form of product liability. Attempting to alter the law judicially on this point would raise more questions than answers.

In the Wagener's case liability was not imposed in the absence of fault. The evidentiary burden requires that the consumer must establish that the harm was caused wrongfully and that the producer was negligent in causing the said harm.²³¹ However, the court accepted that the manufacturer had wrongfully caused harm to patients by selling products not conforming to its own specifications. In the context of product liability fault essentially means negligence.

Clearly, the common law on product liability is not stringent enough on manufacturers and suppliers, as both here escaped apportioned share of liability. In this case, the considerations pertaining to the possibility of policy practice and fairness between the parties to place the onus on the manufacturer to disprove negligence was untenable. The court protected the business from the defect by arguing on economic policy grounds that strict liability on delict could only be relied on if there was legislation to that effect.

A priori, this means under the CPA the manufacturer would have been found liable. Conversely, to the strictness of the legislation against manufacturers and suppliers, Van Eden cautions this might result in extremely unwarranted high prices pushed to the consumer in the name of excessive care.²³² It is argued this might drive producers out of the market or inhibit innovation. A proper balance must be struck between the competing objectives of product safety and the legitimate interests of business affected by the legislation if that is enacted in South Africa.

²³⁰ S 12 deals with freedom and security of the person

²³¹ Loubser & Reid 39.

²³² At 372.

What does the Wagener case teach us? First, the current crop of lawyers may be indifferent to engaging with the common law principles, but rashly rely on constitutional provisions. For instance, the right of bodily integrity had been protected at common-law by means of the Aquilian action before the enactment of the Constitution. It enjoyed the same protection, under the Constitution, as it had been the case before its promulgation. The applicability of *res ipsa loquitur* in cases where a plaintiff could prove that the product had been defective at the material times, and the possibility of a reversed onus of proof, militated against the conclusion that the Aquilian remedy was insufficient to protect the right to bodily integrity in cases such as the present one. Thus, the CPA is bound to stimulate and be part of a continuum in the legal evolution in this regard.²³³

The subsequent case of *Eskom Holdings (Pty) Ltd v Halstead-Cleak*²³⁴ became the landmark decision in the protection of consumerism and application of section 61 of the CPA that imposes strict liability. In the high court and a decision which was overturned at the Supreme Court of Appeal the respondent was held liable for supplying “unsafe” goods, which presented an extreme risk of personal injury to the consumer (applicant). The applicant was electrocuted by a dangling low-lying line of electricity and suffered severe burns, and challenged the respondent under the abovementioned provision of the CPA instead of the delictual action. The respondent’s claim is based on (a) Eskom’s role as the sole supplier or producer of electricity on the national grid and its control of all power lines not falling under the control of any local authority or municipality; (b) the strict liability of Eskom as the producer or supplier of electricity provided for in terms of section 61 of the Act; and in the alternative (c) delict, in that Eskom negligently and wrongfully caused the respondent’s damages. The Supreme Court of Appeal held that the defendant was not a consumer in the contractual sense as assumed by the legislation. Secondly, the electricity in the context of the case did not suffer from a material imperfection in the manufacture of the goods. Likewise, the electricity did not have characteristic that rendered it less useful or safe than a person would generally expect in the circumstances. The same applies to the electricity not possessing a characteristic that presented a significant risk of injury to any person when the foods are utilised.²³⁵ The court in obiter highlighted that there must be a transaction to which

²³³ Van Eeden 2.

²³⁴ [2016]ZASCA 150; 2017 (1) SA 333 (SCA).

²³⁵ Para [24].

the consumer is party, or the goods are used by another person consequent on that transaction.

A “consumer” was given a restrictive or constrained meaning. There is no supplier and no consumer in the ordinary course of business as those covered by the Act. For liability to arise the act has to happen in the ordinary course of business, which is specified in the Act although not defined. A consumer is a person who buys goods and services, as well as persons who act on their behalf or use products that have been bought by consumers.²³⁶ The court made it clear that there are categories of persons who fall outside this definition, but they are deemed to be consumers in terms of the provisions of section 5(6). In the Act, a “consumer” is categorised into four and three of those categories are premised on a contractual relationship hence the case was overturned on appeal.

In *casu*, the plaintiff was not a user, recipient or beneficiary of that product under the circumstances for the claim to succeed. The court held that the harm envisaged in section 61 must be caused to a natural person mentioned in section 61(5) (a), in his capacity as a consumer. This is the only business-like interpretation possible. The Supreme Court of Appeal held that the High Court was wrong to rely solely on the wording of section 61(5) of “consumers”. In that context the Plaintiff need not be a consumer in the contractual sense as defined in order for the defendant to be liable to him. This loses sight of the fact that there should be a supplier and consumer relationship for Eskom to be strictly liable for the harm, as the Act’s purpose is to protect consumers.²³⁷

Although, there is no need to prove fault, a key feature that is distinct from section 61 is that the consumer will have to prove not only that the product caused the alleged harm, but also that the product was defective in terms of the statutory definitions.²³⁸ Van Eeden is of the opinion that “defect” for the purposes of this section, requires proof of imperfection in the manufacture that would render the goods less acceptable than persons generally would have reasonable expected.²³⁹ Proof also needs to be given of what people would be reasonably entitled to expect in the circumstances.

²³⁶ Para [16].

²³⁷ Para [23].

²³⁸ Loubser & Reid 57.

²³⁹ At 375.

In their comment on the initial Consumer Protection Bill, Loubser and Reid noted that the wording referring to what the consumer is “entitled” to expect, in contrast to actual consumer expectations, shows the propensity of reverting to a standard of reasonableness.²⁴⁰ They suggest that the consumer expectations test should be done away with, in favour of a general standard of reasonableness, assessed with hindsight.²⁴¹ Though Van Eeden acknowledges the merit and soundness of his counterparts’ point, he is comfortable in supporting the current test because it incorporates the standard and language used in international instruments for the determination of negligence.²⁴²

Actually, the Act contains its own interpretation clause, which requires adherence to give substance to the aims and purposes set out in section 3. When interpreting the Act, applicable foreign law, international law, conventions, declarations or protocols may be considered.²⁴³ This method of interpretation may lead to a different result than to the one that is expected when traditional rules of interpretation are applied to ascertain the intention of the legislature, which is the main intention of interpretation.

Van Eeden further argues that the CPA introduces what may be termed as a “modified negligence” liability regime, which is based on the European model adopted in the European Union.²⁴⁴ Section 61 provides essential delictual: it discards fault and gives its own content to the concept of defect, but it nevertheless, incorporates established elements of an action in delict, such as causation, harm, damages and defences such as prescription and consent.²⁴⁵ It is safe to conclude that a strict form of product liability is conducive to a fair apportionment of risks inherent in the mass production of goods in the modern economy.²⁴⁶

Commentators admit that prior to the introduction of the strict liability model South Africa was lagging behind internationally, and welcomed the change.²⁴⁷ The “modified negligence”

²⁴⁰ Loubser MM & Reid E “Liability for Products in the Consumer Protection Bill 2006: A comparative critique” *Stell LR* 2006 427.

²⁴¹ At 428. See also Gowar C “Product Liability: a changing playing field” *Obiter* (2011) 532; and Slabber MN, Maister B, Botes M & Pepper MS “The Application of the Consumer Protection Act in the South African Healthcare Context: concerns and recommendations” *XLIV CILSA* (2011) 168.

²⁴² At 376. See also s 3 of the UK Consumer Protection Act 1987 and Article 6 of the EU Product Liability Directive 85/374/EEC: L210/29.

²⁴³ S 2 (2).

²⁴⁴ At 376. See also Deakin et al *Tort Law* (1994) 723.

²⁴⁵ Loubser & Reid 39.

²⁴⁶ Loubser & Reid 21.

²⁴⁷ Van Eeden 242 and Loubser & Reid 413.

liability is a regime that attempts to strike a balance between fault and no fault liability. As Barnard opines the wording in section 53(1) (a) (i)-(ii) “than persons generally would be reasonably entitled to expect” seems to superficially impose the abortive legitimate expectation approach.²⁴⁸ Botha and Joubert argued the contrary that this is excluded in the CPA.²⁴⁹

One of the arguments against the legitimate (consumer) expectations test is that it relates to design defects, and that is difficult for an ordinary consumer to define of what he expects of such technical characteristics of a product.²⁵⁰ This argument concurs with the criticism propounded by Loubser and Reid above. Jacobs, Stoop and Van Niekerk; however, are of the view that the test for defective goods or services will have to be determined by the courts according to each individual case by considering all the relevant circumstances.²⁵¹ A holistic analysis of this section means that exemption clauses must be formulated in a manner compliant with the Act. Any exploitation of consumers by means of these clauses will cease, as their use will become impractical and serve no purpose.

4.4.2 Defences

Section 61(4) sets out the various defences available against the strict liability the Act seeks to impose. It is a defence if the harm mentioned in this section is wholly attributable to compliance with any public regulation, or if the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time, it was supplied by that person, or arose from complying with the instruction provided to the supplier by that person. Also if it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristics in the goods, taking into consideration the person’s role in marketing those goods to consumers.²⁵²

²⁴⁸ Barnard (2012) *De Jure* 466.

²⁴⁹ Does the Consumer Protection Act 68 of 2008 provide for strict liability?-a comparative analysis” 2011 *THRHR* 216.

²⁵⁰ *Ibid.*

²⁵¹ Jacobs, Stoop & Van Niekerk “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: a critical overview and analysis” 2010 *PER* 363.

²⁵² S 61(4) (a)-(c).

Of particular importance is the defence set out in section 61(4) (c).²⁵³ It provides an escape route if manufacturers and importers, distributors and retailers can prove that “it is unreasonable to expect the distributor or retailer to have discovered the fault”. In their article Botha and Joubert, submit:

“...liability of these parties is still fault based where reference is made to reasonableness. A distributor of the product does not incur delictual liability at common law unless there was a legal duty on him to inspect a product and he failed to do so...The CPA will make no difference to the present position of most South African consumers especially when taking into account the lack of education regarding consumer rights and that most consumers are found in the rural areas. These consumers might in most instances not even be aware of the protection provided by the CPA. It seems by opening the backdoor for distributors and retailers, effective redress is not provided for ordinary consumers. This provision is therefore defeating of the idea behind true strict liability because only the manufacture and importer will be strictly liable and not the distributor and retailers”.²⁵⁴

Clearly, the requirements established in terms of our positive law²⁵⁵ for the liability of merchant sellers (liability on a contractual basis) and manufacturers (liability on a delictual basis) for latent defects remain intact where the CPA is not applicable. Barnard²⁵⁶ is critical of the view expressed by Loubser and Reid²⁵⁷ that section 61 only creates contractual rights between consumer and suppliers other than a general rule of strict liability outside the contractual relationship. Jacobs, Stoop and Van Niekerk aver that a purposive interpretation of section 61(3) does not require the said contractual nexus to find liability discount this view.²⁵⁸

Commentators argue that section 61(2)²⁵⁹ attempts to impose strict product liability on, for example, an electrician who installs a defective geyser or a surgeon who implants a defective pacemaker into a patient’s heart or a defective prosthetic. According to Jacobs, Stoop and Van Niekerk, the purpose of this section is to protect customers against defective and inferior

²⁵³ Liability of a particular person in terms of this section does not arise if it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers.

²⁵⁴ At 318.

²⁵⁵ *Ciba-Geigy (Pty) Ltd v Lusho Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) 456.

²⁵⁶ At 480.

²⁵⁷ At 424.

²⁵⁸ At 370.

²⁵⁹ A supplier of services who in conjunction with the performances of those services, applies, supplies, installs or provides access to any goods must be regarded as a supplier of those goods to the consumer, for the purpose of this section.

goods installed by suppliers, as they do not have a choice amongst the goods, but solely rely on the supplier's choice. More importantly, the authors note that because of that lacuna the Act needs an amendment because of the omission of the word "supplier" on section 61(1). Such an amendment is also needed for strict product liability contemplated in section 61(2) so that it may be imposed on service providers too.²⁶⁰

The liability in terms of section 61 of the CPA has its own interpretational problems and the true effect of this section remains to be seen, as time will tell on its jurisprudential development. It is hoped that the interpretations by the courts will shed some light on the questions and doubts raised. It is questioned whether the Act, which is directed at improving commerce in general, will advance a mutually beneficial relationship between healthcare practitioners/establishment and the patient, where the patient's medical interest should be paramount without the impediments of strict rigours that unduly restrict or sacrifice the healthcare practitioner.²⁶¹

In addition to this, Van den Heever²⁶² submits the following criticism levelled against the CPA:

- (a) the existing measures before enactment offered sufficient protection to consumers;
- (b) uncertainty will result from the Act;
- (c) it will lead to a flood of litigation;
- (d) it will lead to a situation where business is reluctant to contract with consumers; and
- (e) that the principle of strict liability is too wide.²⁶³

4.5 The constitutional imperatives and contractual relations

The South African Bill of Rights is imbued with the mantra of equality, freedom and human dignity. It is the cornerstone of democracy, enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom.²⁶⁴ These overarching values enshrined in the Constitution also occupy the centre stage of a contract regime milieu,

²⁶⁰ At 384.

²⁶¹ P Van den Heever "Impact of the Consumer Protection Act in the healthcare context" March 2012 *De Rebus* 25.

²⁶² *Ibid.*

²⁶³ Kok C "The effect of the Consumer Protection Act on exemption clauses in standardised contracts", unpublished LLM dissertation, University of Pretoria (2010) 55-61.

²⁶⁴ S 7(1).

galvanizing construction that motivates the growing need to assert consumer protection in the interpretation of exemption clauses. The main thrust of this thesis is to search for equitable jurisprudence in the South African constitutional realm relative to the problems ensuing from exemption clauses.

Rautenbach, in his article,²⁶⁵ specifies three levels where the Constitution may be applied to the law of contract and contractual relations. These are: (a) the common, customary and statutory rules of the law of contract; (b) the contractual clauses concluded in terms of constitutionally valid legal rules; and (c) the action the parties execute in terms of constitutionally valid contractual clauses, as in *Bredenkamp* case.²⁶⁶ Clearly, the Constitution is unambiguous in accentuating the need to infuse the Bill of Rights in all aspects of law.²⁶⁷ However, these concepts: equality, freedom and dignity cannot be comprehensively analysed in silo fashion without factoring in the country's economic market posture in promoting the constitutional values in contract law.

The importance of the Bill of Rights is also masterly accentuated in the interpretation clause of the Constitution.²⁶⁸ Because of the indirect application of the Bill of Rights to the private law, the importance of the context existing in South African society hardly features in the interpretative stage of the fundamental rights analysis. Indirect or horizontal application is the deference to the normative value system established by the Constitution whenever the common law or legislation is interpreted, developed or applied.²⁶⁹ This means that when the

²⁶⁵ "Constitution and contract: the application of the bill of rights to contractual clauses and enforcement" 2011 (74) *THRHR* 515.

²⁶⁶ *Bredenkamp v Standard Bank of SA Ltd* 2010 (9) BCLR 892 (SCA).

²⁶⁷ S 8(1) states that the "[b]ill of rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state."

²⁶⁸ S 39(1) provides that when interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

²⁶⁹ Currie I & de Waal J *The Bill of Rights Handbook* 6th ed. (2013)31. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [56]; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) [48].

law of contract fails to generate its own remedies, deference must be given to the values espoused by the Constitution and mediated through the operation of the law.²⁷⁰

Direct or vertical application of the Bill of Rights means that in legal disputes the Constitution overrides the common law and any conduct that is inconsistent with it. Put bluntly, where a deficiency in available legal remedies exists, the Bill of Rights generates its own remedies.²⁷¹ In practice the Bill of Rights applies directly to a legal dispute when: (a) a right of a beneficiary of the Bill of Rights has been infringed by (b) a person or entity on whom the Bill of Rights has imposed the duty not to infringe the right; (c) during the operation of the Bill of Rights and (d) in the national territory.

In *obiter* the court states:

“Proportionality is consistent with the Bill of Rights, but that exercise must now be carried on in accordance with the “spirit, purports and objects of the Bill of Rights” and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.”²⁷²

These values are in fact enduring constitutional rights that are enshrined by the supreme law of our country. The court shows the difficulty in striking a balance between the interests of parties and conflicting interest of the parties, where liability would depend on the interplay of various factors. Rautenbach attempts to provide clarity to the confusion emanating from this narrative when he questions the rationale why the court in *Bredenkamp* refer to “constitutional values” rather than to “constitutional rights” when its examples of values are clearly constitutional rights that may be limited by law in terms of the limitation clause in the Constitution.²⁷³

He believes the court was constrained from drastic deviation in its interpretation. The Constitutional Court in *Barkhuizen* enunciated that the proper approach to constitutional challenges to contractual terms is by means of indirect application that is by infusion of

²⁷⁰ *Barkhuizen v Napier* para [29].

²⁷¹ Currie & de Waal 31.

²⁷² Para [43].

²⁷³ S 36. See Rautenbach 517.

constitutional values through public policy instead of direct reference to the guaranteed rights and the general limitation clause.²⁷⁴

4.5.1 Equality

The right to equality is a critical ingredient to the common law principles aimed at equity and consequently affecting in the development of the law of contract. Many legal commentators are at odds on the true exposition of the controversial and socially ideal concept of equality in contract and employment law.²⁷⁵ The private law's endorsement of inequality is illustrated in contractual transactions discussed in detail above, where one of the parties transacts from an overwhelming superior position and its agreement is regularly upheld by the courts under the sanctity of contract rule.

It is premised on the assumption that parties in commercial contracts participate on equal footing and therefore should be able to look after their own interest, a characteristic feature of the classic contract. Christie and Bradfield also express similar view that unfairness in the making of a contract is overwhelming related to the problem of inequality of bargaining power, which is derogatory towards the enforcement and consent of the weaker party.²⁷⁶ There is a subdued consent where there is unequal bargaining power. The deficiency of the common law remedies in this aspect is further elaborated by Reiter thus:

“Courts have limited remedial arsenal they can assert against a losing defendant: their judgment can serve to stop the defendant only in respect of the instant harm, and judgment for the plaintiff will not help other similar circumstanced plaintiffs who may have fallen prey to the same sort of victimisation. Judicial pronouncements suffer from low visibility that limits the possibility of consumers' rights being publicized widely. Indeed, judgment against a particular defendant may fail to demonstrate even to other or potential customers of that the defendant has conducted himself in an unacceptable manner.”²⁷⁷

The principle of equality as explained attempts to answer the question of similarities and variables: those in respect of which people and cases are equal or those in respect of

²⁷⁴ Barkhuizen paras [23]-[30]. For critical analyses of the court's arguments against direct application see Woolman “The amazing vanishing bill of rights” 2007 *SALJ* 762 and Rautenbach “Constitution and contract-exploring the possibility that certain rights may apply directly to contractual terms or the common law that underlies them” 2009 *TSAR* 616-623.

²⁷⁵ See *Solidarity Union v Department of Correctional Services Case CCT 78/15*.

²⁷⁶ *The Law of Contract in South Africa* 7th ed. (2016) 14.

²⁷⁷ B Reiter 354.

which they differ.²⁷⁸ Therefore, the right to equality is primarily interpreted negatively to prohibit discrimination. Liberal philosophers primarily emphasized equal opportunities of development for each individual,²⁷⁹ and in commercial contracting this relates to redistribution of economic wealth from monopoly. As a moral victory this might mean, for example, balancing the bargaining powers evenly in employment. Consequently, the law began to recognise the social realities and attempts to correct factual social inequalities.

Therefore, the interpretation of equality in the Universal Declaration of Human Rights does not aim to eliminate all social inequality, but aims at equality on a fundamental level to provide an equivalent life for all.²⁸⁰ This interpretation allows for a differentiation among people, but deprecates differentiation that leads to inequality about human dignity.²⁸¹ Thus, the Constitution commits the state towards achieving the goal of equality.²⁸² This comprises a guarantee that the law will protect and benefit people equally and prohibit unfair discrimination.²⁸³

Admittedly, the constitutional right to equality must be interpreted contextually, taking into consideration South Africa's painful chequered history and the emerging consumer protection law to concretise this right. Therefore, the constitutional commitment to equality also entails recognizing the shifting patterns of equality.²⁸⁴ When that is done, recognition must be given to the individuals and the circumstances especially between contracting parties to apply the appropriate form of equality.

Scholars have gone to the extent of formulating two distinct types of equality: namely formal equality and substantive equality. Formal equality advocates for the same treatment: the law must treat individuals in like circumstances alike; whereas substantive equality requires the law to ensure equality in outcomes and is prepared to tolerate disparity of treatment to

²⁷⁸ Hawthorne 1995 (58) *THRHR* 158.

²⁷⁹ *Ibid.*

²⁸⁰ Article 1, 2 and 7 of the Universal Declaration of Human Rights.

²⁸¹ Hawthorne 159.

²⁸² S 1(a) read with s 9.

²⁸³ Currie & de Waal 211 on the interpretation of section 9 (2) of the Constitution.

²⁸⁴ Currie & de Waal 212.

achieve this goal.²⁸⁵ Formal equality stipulates that all persons are equal bearers of rights in accordance with the same ‘neutral’ norm or standard of measurement.²⁸⁶

Looking at circumstances, formal equality seems unsuitable for consumer’s rights because of its uniform treatment without taking the actual social and economic disparities between groups and individuals into account. It has blanket application and cannot be a life jacket for those previously disadvantaged consumers. Failure to consider disparities that exist among the classes leads to a precarious approach. Some appropriate remedies for consumers are gradually filled through some provisions in the CPA²⁸⁷ and other laws that promote and uphold substantive equality.

The nature of inequality in the existing South African society and the one propounded by the Constitution cannot be achieved by a mere commitment to formal equality. Substantive equality is the more suitable form, because it requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld. Commentators argue that this theory highlights the importance of the rule rather than the form.²⁸⁸ An enquiry into these two approaches will reveal that the principles and purposes of the Constitution are defeated by a conservative attitude that is strictly positivist. Formal positivism is discouraged in the constitutional dispensation because its notion of equality risks neglecting the constitutional injunction. Conversely, it is the substantive conception of equality that supports the fundamental values of the Constitution.²⁸⁹

It proffers that in the process of transformation the government welfarist approach of intervention in contracts and unequal treatment has to be tolerated:

“...transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield to favour of achieving the goal we fashioned for ourselves in the Constitution. What is

²⁸⁵ See Loenen T “The equality clause in the South African Constitution: Some Remarks from a Comparative Perspective” (1997) 13 *SAJHR* 405.

²⁸⁶ Currie & de Waal 213.

²⁸⁷ S22 provides for the use of plain language.

²⁸⁸ Currie & de Waal 213.

²⁸⁹ Currie & de Waal 214.

required though is that the process of transformation must be carried in accordance with the Constitution.”²⁹⁰

Therefore, it seems more appropriate that the concept of substantive equality should be approached under the guise of transformative constitutionalism.²⁹¹ This concept requires understanding of the constitutional value of equality as a process towards the goal of an equal society not only in business transactions or commercial contracts, but also in all spheres of the life of South Africans. It is truism that before the constitutional dispensation and immediately thereafter the courts unabatedly continued to pursue capitalist justice without taking consideration of the individual’s backgrounds. Then later organically, a new kind of equality jurisprudence evolved.

Wherefore, Mr Dullar Omar when advocating for the transformation of the judiciary stated thus:

“...transformation means more than creating representative institutions. It requires developing and understanding the new constitutional order, sensitivity to the structure and ethos of the constitution and its Bill of Rights, developing a culture of service, which is people oriented and friendly to those they serve”.²⁹²

The current crop of jurists inevitably inherited a monolithically structured legal formalism system of contract law that makes it more difficult to prevent unequal bargaining power. It assisted powerful institutions like banks and insurance companies to infringe upon the fundamental human rights of the weakest and most ignorant members of our society.²⁹³ To remedy the malady of apartheid capitalism, a democratic justice transformation seems to be the panacea towards equality. The incisive remark of Collins on the evolution of private law in response to governmental intervention that brings collective consideration to the private sphere is worth noting. He observed as follows:

“The private law of tort, contract, and property rights that emerged in the nineteenth century provides a fortress of protection for individual rights, but the consequences for collective welfare were quickly found wanting. These consequences were addressed by the welfare state, regulation, and the separation of new spheres of private law such as consumer law and labour law from the mainstream doctrine...however, these regulatory

²⁹⁰ *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) [74].

²⁹¹ See the seminal treatment of the concept of “transformative constitutionalism” by Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146.

²⁹² During his Budget Vote Speech on 19 May 1998 cited in a Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South Africa State (2012) 6.

²⁹³ Hopkins (2003) *TSAR* 153.

measures had triggered a marked shift in private law reasoning as a whole, which became more instrumental or policy oriented. It evolved into a hybrid of the old private interest reasoning and modern policy oriented regulatory reasoning.”²⁹⁴

Although consumer protection laws usually employ various methods to enhance protection of the consumer, like testing and advisory facilities and educational programmes,²⁹⁵ the predominant method is to provide protective legislation as correctly captured by the CPA and the Harmful Business Practices Act.²⁹⁶ The increase in legislation protecting consumers has given birth to a new and independent legal discipline; consumer law.²⁹⁷ It is important for one to highlight some striking features of consumer law that are consistent with the concept of equality. These are:

- (a) A distinct social orientation:²⁹⁸ Parties to a consumer transaction are not viewed in *abstracto*; rather account is taken of wider social criteria,²⁹⁹ in particular, the social and economic status of the contracting parties. This seems to have been the position in the case of *Standard Bank v Dlamini* discussed above and the prevailing government policy of transformative constitutionalism. Hence, concepts such as “inequality of bargaining power”, “adverse circumstances”, “disabling conditions”, “disproportionate need” and so forth are the stock-in-trade of consumer law discourse.
- (b) Predominance of legislation: Since the common law has proved largely inadequate in protecting consumer interests, legislation has had to play a major corrective and decisive role. Thus, consumer law, unlike other areas of private law, is marked by a preponderance of legislation that defines the limits of acceptable commercial practice.
- (c) Interdisciplinary nature: Consumer law is the product of a number of traditional areas of the law.³⁰⁰ Its basic principles are derived from the law of contract, while it draws heavily on other areas of the law, for example, property law, delict, administrative law and criminal law. It has also been observed that to a lesser extent it relies on the

²⁹⁴ Collins H “Utility and rights in common law reasoning: rebalancing private law through constitutionalization” (2007)30 *Dalhousie Law Journal* 13.

²⁹⁵ Swann D *Competition and Consumer Protection* (1979) 288.

²⁹⁶ Act 71 of 1988.

²⁹⁷ *Obiter* 115.

²⁹⁸ Bernitz U “Consumer Protection and Standard Contracts” (1973) 20 *Scandinavian Studies in Law* 13 15 cited in the *Obiter* 116.

²⁹⁹ Madsen P “The impact of Consumer Law on the Law of Contracts in Denmark” (1984) 28 *Scandinavian Studies in Law* 96.

³⁰⁰ Rothschild D P & Carroll D W *Consumer Protection: Text & Materials* (1973) 8.

principles of certain non-legal disciplines, for instance economics, psychology and sociology.

- (d) Extensive use of “omnibus clauses” (legal standards):³⁰¹ Typically, courts or public tribunals are given broad, discretionary powers to apply general standards, such as “unfair”, “unreasonable”, “unconscionable”, “contrary to public policy” and “contrary to good faith”. This allows for maximum flexibility and “dynamic justice”.³⁰²
- (e) Recognition of collective (class) interests: This characteristic is not always present; yet where it is, class actions and aggregate damages awards are permitted, while the doctrines of privity of contract and *locus standi* are relaxed.

4.5.2 Application of freedom of contract vis-a-viz constitutional freedom

Contract is the vehicle through which individual autonomy and rational planning could be simultaneously promoted, the former achieved by respecting the parties’ free choices, and the latter by channelling the parties towards performance by holding those in breach responsible for letting down their fellow contractors.³⁰³ According to Van der Merwe, this premise influences the doctrines, structure and content on the law of contract.³⁰⁴ It is noteworthy that freedom of contract is a distinctive idea within the institution of contract law. The idea about freedom of contract is deeply embedded in the modern legal consciousness, as it explains the essence of a contract.³⁰⁵

This cornerstone of the theory of the law of contract forms part of the principle of liberty and is one of the basic human rights.³⁰⁶ Economic liberalism as an ideology of the eighteenth century promoted classic contract that is in conflict with modern contract. The nub of this political economy was its aversion to legislation interfering with freedom of contract espoused by classic contract theory. More importantly, South African law still reflects overflowing streaks of classical theory³⁰⁷ in particular on the freedom of contract front.

³⁰¹ Madsen cited in the *Obiter* 117.

³⁰² Madsen 90.

³⁰³ Brownsword R *Contract Law: Themes for the Twenty-First Century* 2nd ed. (2006) 49.

³⁰⁴ Van der Merwe et al *Contract—General Principles* 3rd ed. (2007) 11.

³⁰⁵ Brownsword 64.

³⁰⁶ Aronstam P *Consumer Protection, Freedom of Contract and the Law* (1979)1.

³⁰⁷ Lubbe & Murray 20.

It seems that, regardless of the emerging paradigm in the analysis, the theoretical influences of human rights on the private law can be found in the particular role and importance of freedoms and human rights values in a constitutional democracy.³⁰⁸ It is further argued that in the direction in which the influences flows much of the interplay between private law and human rights focuses on achieving a balance between individual interests and the public good. Freedom of contract can be circumscribed by *boni mores* of the community. Although these two concepts operate to some degree in sync, but they also remain independent of each other, that none can entirely be subsumed by the other.³⁰⁹

Reduced to its bare minimum, freedom of contract is associated with three key principles while other commentators categorizes it as four each of which seeks to influence the specific design of the contract.³¹⁰ These principles are: (a) the law should respect the freedom of contracting parties to pursue their own purposes and to set their own terms-“term freedom”; (b) that the law should respect the freedom of eligible contractors to choose their own partners-“party or partner freedom”; and (c) that where agreements have been freely made, the parties should be held to their bargain-“sanctity of contract.”³¹¹ In addition to this, it is said a person should be free not to contract.³¹²

According to Bhana and Pieterse³¹³ the interpretation of the *Brisley* and *Afrox* case as heard by the Supreme Court of Appeal indicates the court’s propensity to return to classical libertarian roots and shows an aversion to constitutional values that would seek to promote broader concepts of equity and fairness which had gradually infiltrated it in the application of its rules. The authors discredit the court’s reluctance to recognize the elevation of contract law to revamp itself in a constitutional dispensation founded on the values of dignity, equality and freedom. Although discussion on general policy and factors indicating unfairness were barely touched, they never yielded the desired results of the court’s duty to ensure justice and fairness.

³⁰⁸ Flaherty M “Private Law and its Normative Influence on Human Rights” in Barker K & Jensen D (eds) *Private Law: Key Encounters with Public Law* (2012) 214

³⁰⁹ Above 215.

³¹⁰ Aronstam 13; *Guest Anson’s Law of Contract* (1984) 4

³¹¹ Compare Von Hippel *The Control of Exemption Clauses* 443.

³¹² Aronstam 14.

³¹³ “Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited” 2005 (4) *SALJ* 865.

Freedom of contract is a concept that can be given a broader or narrow interpretation. The Constitution focuses on the term freedom with its philosophical underpinnings circumscribed by the limitation clause in the Bill of Rights. From a utilitarian perspective, there is considerable sense in the idea that welfare would be achieved if the law permits individuals to transact according to their own preferences; and, from a rights perspective, respecting the choices of an autonomous individual.³¹⁴ However, this freedom is limited in terms of a choice in which one protects and promotes one's interests because a contractual duty implies that one must conduct oneself in a particular way.³¹⁵ For instance, a debtor owes the duty of performance to his creditor that is delivering a specific service, paying a certain amount, delivering a particular thing or by refraining from doing something.

One of the factors placing freedom on a pedestal in contractual relationship is the manner in which the value interacts with the other values of equality and dignity.³¹⁶ Rautenbach, who argues that it has a definitive dual role, either as a capacity that is factually limited, or in defence of challenges to the enforceability of a contract, on the basis that the contract has limited constitutional effect, lays the constitutional importance of contractual freedom bare.³¹⁷ This has to be understood within the context of indirect application provided in section 8(3) of the Constitution.

Therefore, the principle of freedom of contract as gauged against the 1996 Constitution appears more relevant to contractual autonomy. It finds that contractual freedom dovetails with rights typically associated with the general right to freedom, such as freedom of the person, freedom of association and freedom of economic activity.³¹⁸ However, currently in the global arena there is a move to recognize and secure trade-related economic rights such as freedom of contract, freedom of trade and intellectual property rights and entrench fundamental human rights, not only in the body of international economic law, but also of international human rights instruments.³¹⁹ Human rights lawyers are displeased with the

³¹⁴ Brownsword 66.

³¹⁵ Van der Merwe et al 2-3.

³¹⁶ At 878. See also the case of *Ferreira v Levin* 1996 (1) SA 984 (CC).

³¹⁷ At 521. See also Christie RH *Human Rights Compendium* (1996) para 3H6.

³¹⁸ See Davis J in *Mort NO v Henry Shields-Chiat* 2001(1) SA 464 (C) 475A-B.

³¹⁹ See the arguments advanced by Booyesen H "The dilemma of international economic human rights: Their improvements through an integrated system approach" (1998) 23 *South African Yearbook of International Law* 104, 114-5; Petersmann E "Time for a United Nations "global compact" for integrating human rights into the law of worldwide organizations: Lessons from European integration" (2002) *European Journal of International Law* 629-30, 639-40 and 644.

current international human rights framework that remains hostile to the reception and entrenchment of economic liberties.³²⁰

Although the debate still rages on, it is apparent that South African contract law permits various limitations on individual autonomy and contractual freedom.³²¹ For example, contractual autonomy is often limited in the context of rules of incorporation and interpretation of terms in a contract. Whilst the rules require a court to ascertain and give effect to intention of the parties, the reality shows that the rules are formalistic and merely heed to the actual intention of the parties in form only.³²² Other instances of a limitation of contractual autonomy include the effect of objective impossibility of specific performance on a contract and the discretion, which the courts retain in relation to certain remedies such as specific performance.

These limitations must be contrasted with the economic liberty interest right found in section 22 of the Constitution.³²³ Depending on the construction, it is difficult to determine how far this right of contractual liberty is protected in the classical theory format. It is clear, however, that the value of freedom does not equate to complete individual liberty and is not an independent right to unlimited contractual liberty.³²⁴ With the same token, it transpires that the meaning of the value of freedom in the Constitution is substantially emasculated from its strict classical liberal theory.³²⁵ Strydom concedes the value of freedom is significantly curtailed by its interaction with the constitutional values of equality and dignity discussed here too.³²⁶

³²⁰ See Alston P “Resisting the merger and acquisition of human rights by trade law: A reply to Petersmann” (2002) 13 *European Journal of International Law* 826, 841-844; Howse R ‘Human rights in the WTO: Whose rights, what humanity? Comment on Petersmann’ (2002) 13 *European Journal of International Law* 651 654-5 and 658.

³²¹ Contractual terms are typically upheld only if this is allowed for by the requirement of legality. (See Lubbe & Murray 238)

³²² See Lewis C “The demise of the *exceptio doli*: Is there a route to contractual equality?” (1990) 107 *SALJ* 26 34.

³²³ It provides “every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

³²⁴ Bhana & Pieterse 879.

³²⁵ Van der Walt AJ “Justice Kriegler’s disconcerting judgment in *Du Plessis v De Klerk*: Much ado about direct horizontal application (read nothing)” (1996) *TSAR* 735.

³²⁶ Strydom H “The private domain and the bill of rights” (1995) 10 *SA Public Law* 52 62; Woolman S & Davis D “The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and the final Constitutions” (1996)12 *SAJHR* 361 399 and Chaskalson “The third Bram Fischer lecture: Human dignity as a foundational value of our constitutional order” (2000) 16 *SAJHR* 202.

As practised in the United States of America and in Germany, Rautenbach submits that contractual freedom should be viewed as an indispensable instrument for the exercise of other guaranteed rights. These rights *inter alia* are the right to property, the right to professional and occupational freedom, the right to freedom of association, the right of workers, employers and trade unions, and to right of freedom of association.³²⁷ In principle, this is the foundation predicated on democracy and the rule of law. Exemption clauses precedes these democratic rights, however, they have to be interpreted within the context of the tabulated rights.

4.5.3 Dignity

Functionally, the purpose of contract law and its general framework should be to enhance human dignity. This position is buttressed by section 10 of the Constitution that “everyone has inherent dignity and the right to have their dignity respected and protected”. It is argued in private law that the notion of dignity is fundamental connected to the value of individual autonomy.³²⁸ Brownsword explicitly links human dignity and the right to autonomy in those individuals, who are bereft of the right to make contracts, dispose of property and to arrange their affairs according to their own will be hamstrung. Eventually, they cannot fulfil their potential, assert self-determination or realize a full level of self-worth.³²⁹

Consequently, the private law conception of dignity requires not only protection from interference by state actors, but also includes the ability to exercise one’s will in one’s own private dealings.³³⁰ Cameron JA in *Brisley v Drotzky*³³¹ is of the view that the value of human dignity finds expression in the autonomy of individuals to govern their lives by deciding for themselves who and on what terms to contract. The judge then admonishes against any “obscene excesses” of autonomy, and advises that it must be rejected as counter-intuitive to individual dignity and self-respect. Moreover, the content of human dignity as a value is contested when it is invoked in relation to the value of freedom.³³²

³²⁷ At 521.

³²⁸ Flaherty M 216.

³²⁹ Brownsword R, “Freedom of contract, human rights and human dignity” in Friedmann D & Barak D (ed) *Human Rights in Private Law* (2001) 189.

³³⁰ Flaherty 216.

³³¹ Para [88]-[95].

³³² Bhana & Pieterse 880.

Commentators whilst grappling with the concept of dignity and proper classification have divided the concept into two categories: an “empowerment-based” conception of dignity and a “constraint on liberty”. The former enhances individual liberty by locating dignity in “capacity for autonomous action” giving individuals protection for their choices, whereas the latter implies that society should not tolerate excesses of autonomy that affront human dignity. Apparently, these two “rival concepts” of dignity are at odds in the contract field: classical understanding of contractual freedom complements an empowerment-based view of dignity whilst constraint on liberty is an opposite understanding of dignity.³³³ The attack on exclusion clauses by the CPA is an effort to advance the constraint on liberty in a pragmatic way. Therefore, the proliferation and wide use of exemption clauses in modern contractual dealings leaves a consumer bereft of dignity protection.

It is argued that human dignity is the paramount tenet of the “objective, normative value system” espoused by the constitutional state. Commentators have found it apt to rank the human dignity right equally to the other two values of freedom and equality, as the basis of constitutionalism jurisprudence.³³⁴ The trio mantra of freedom, equality and human dignity recanted in several provisions of the text of the Constitution³³⁵ requires a conception of a constitutional order, which purports to advance and protect individual liberty against state power.

Similarly, the effectiveness of exemption clauses is a result of unrestrained and minimalist approach towards equality, freedom and dignity of consumers. Subsequently, absolute equivalence could not be guaranteed in a free enterprise, profit-driven economic system. Perhaps, this construction carries a historical symbolism of the transition from classical contract to modern contract, a contrast manifesting in the South African contract regime. Chaskalson³³⁶ persuasively sums the goals of dignity and equality up as follows:

³³³ Bhana & Pieterse 881. See also Friedman D & Barak-Ezekiel (eds) 183-184; Lubbe GF “Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law” (2004) 121 *SALJ* 421-2.

³³⁴ Currie & de Waal 250.

³³⁵ See sec 7(1): The Bill of Rights is an instrument which ‘enshrines the rights of all the people in our country and affirms the democratic values of human dignity, equality and freedom’; section 39 (all rights in the Bill of Rights must be interpreted so as to promote the Constitution’s ambition of creating an ‘open and democratic society based on human dignity, equality and freedom’); section 36 (rights can only be limited to the extent justifiable in such a society).

³³⁶ Chaskalson (fn 326 above) 204.

“As an abstract value, common to the core value of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in the respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance? But social and economic policies are pre-eminently policy matters that are the only concern of government. In formulating such policies the government has to consider not only the rights of individuals to live with dignity, but also the general interests of the community concerning the application of resources. Individualised justice may have to give way here to the general interest of the community.”

Perhaps, this analysis is also appropriate in the interpretation of contracts where the *boni mores* has a domineering influence in the constitutional context. Contract law is part of business law that individuals or consumers utilize to improve their economic well-being and other social relations within the human society. Therefore, the social contract existing between the State and its citizens extends to consumers to claim contractual damages from the State for faulty houses built by it, and in the same way, the State can claim from the contractors, within the constraints of the contents and exemption clauses of the contract. Faulty workmanship although committed in terms of the contract between the State and the contractor does not empower the occupant of the house with dignity.

It was no surprise that the United Kingdom through the Molony Committee Report formulated some guidelines to advance human dignity.³³⁷ These guides formed the basis for the UCTA 1977 in the UK and locally in the CPA. This is done to show the importance of dignity. Undermining it affects the procedural fairness part of a contract. For practical purposes, the guidelines will be mentioned briefly:

“(i) the provision of information annexed to the goods which will assist the consumer to judge for himself whether or not they will satisfy his particular requirements (‘informative labelling’);

(ii) the assessment of the merits of the goods on offer by independent agencies (‘seals of approval’ and ‘comparative testing’);

³³⁷ The Report of the Molony Committee on Consumer Protection, published in July 1962.

(iii) the availability of adequate means whereby the justifiably aggrieved shopper may obtain fair redress;

(iv) the restraint of misdescription of the significant characteristics of the goods on offer;

(v) the restraint of objectionable sales promotion methods whether in the form of advertisements or otherwise, which are calculated to divert the shopper from a proper judgment of his best interest.”³³⁸

Thus in the context of consumer law, human dignity means the right to safety, the right to be informed, the right to choose and the right to be heard.³³⁹ The list of consumer rights were expanded in the Council of the European Communities on 14 April 1975 to five rights as mentioned below: (a) the right to the protection of health and safety; (b) the right to the protection of economic interests; (c) the right to compensation for damage suffered; (d) the right to information and education; and (e) the right to representation (the right to be heard).³⁴⁰ Eventually, these rights were adopted and enshrined in the Guidelines for Consumer Protection adopted by the General Assembly of the United Nations,³⁴¹ and are now used as the yardstick of comprehensive consumer protection policies.

The above summary is important as it encapsulates the right to the protection of consumers and their economic interests. Undoubtedly, consumers’ goods should meet reasonable demands of durability, utility and reliability. Furthermore, consumers should be protected against deceptive advertising and unfair marketing practices, and from contractual abuses such as exclusion of essential rights and the imposition of onerous and one-sided contract

³³⁸ Par [48] of the report cited by Harvey BW *Consumer Protection and Fair Trading* (1982) 21. U Bernitz “Consumer Protection: Aims, Methods and Trends in Swedish Consumer Law” (1976) 20 *Scandinavian Studies in Law* 26 argues the following as central subject areas for consumer protection: protection against risks of physical injury (life and health) and against obviously unserviceable products; protection against improper marketing measures and deficient information; “protection against one-sided contract terms and risks of economic damage; and the provision of effective and easily used possibilities for the consumer to safeguard his rights in the case of dispute”.

³³⁹ Harland D “The United Nations Guideline for Consumer Protection” 1987 (10) *Journal of Consumer Policy* 249.

³⁴⁰ Cited in *Obiter* 1989-1990 114 Reich N and Micklitz HW *Consumer Legislation in the EEC Countries: A Comparative Analysis* (1980) 2.

³⁴¹ Harland 249. The Guidelines were unanimously adopted by the General Assembly of the United Nations on 9 April 1985. According to Harland at 245, “they represent an internationally recognized set of minimum objectives, potentially being of particular assistance to developing countries”.

terms.³⁴² Currie and de Waal poignantly argue for the protection of human dignity right and respect because it is a value that informs the interpretation of all fundamental rights and in the limitation of rights enquiry.³⁴³

In a matter-involving contract and consumer law, it is postulated that the appropriate methodology for an adjudicator is to enquire how the constitutional value of dignity is affected. An exclusion clause, which limits a party's access to justice, is not empowering, but degrading to the consumer and thus unconstitutional in terms of section 34 of the Constitution. It has the potential to validate harm to others which is constitutional protected. In contract law, the right to human dignity thrives on the background of equity and justice yet is eclipsed by deference to "sanctity of contract" rule. According to the *pacta sunt servanda* rule, parties will have to abide with the obligations of their agreements and court will not release a contracting party because it may be unfair or harsh.

There is a pressing argument that if a contractual provision is inconsistent with a provision in the Bill of Rights the contract ought to be unenforced. The public policy inquiry under the constitutional dispensation cognitively follows a similar approach to the ordinary constitutional analysis of rights. It is apparent the sanctity of contract rule represents the pre-constitutional dispensation of public policy whereas the enforcement of human dignity espoused by the Bill of Rights ought to represent the new notion of public policy in the law of contract.³⁴⁴ Public policy is indirectly infused to contract law by adjudicators to protect the consumer where there is apparent substantial exploitation.

According to the principle of subsidiarity, norms of greater specificity should be applied to the resolution of disputes before resorting to norms of greater abstraction. In the case of the right to dignity, this translates into a rule that specific rights giving effect to a particular aspect or application should be firstly invoked rather than relying on a rule of general application.³⁴⁵ Cowen³⁴⁶ conclusively argues that the court, in construing human dignity ascribe to a collectivist notion of dignity. This notion is premised on equal moral worth of all humans. It encompasses the material preconditions for a dignified existence through an

³⁴² Harland 253.

³⁴³ Currie and de Waal 253.

³⁴⁴ Hopkins K "The influence of the bill of rights on the enforcement of contracts" (August 2003) *De Rebus* 22.

³⁴⁵ Currie & de Waal 253.

³⁴⁶ "Can 'dignity' guide South Africa's equality jurisprudence?" (2001) 17 *SAJHR* 44 and 49-55.

explicit acknowledgement of the link between intrinsic individual worth and the material context within which an individual finds herself in society.

An analogy can also be drawn from a well-known German 1993 constitutional court case.³⁴⁷ The German constitutional court had to apply the protection of human dignity as the *Grundnorm* of the relationship between state and citizen. In Germany the *Grundnorm* is a fundamental constitutional principle central to the German legal order and in terms of this, all law should reflect due respect for the protection of the dignity of the person. This is contained in section 1(1) of the German constitution. Section 2(1) enshrines the protection to the right to free development of human personality. The two concepts are interrelated, but section 2 (1) gives meaning and expression to the concept of dignity as contained in section 1(1). The case concerned a civil court's obligation to scrutinize contracts that cause undue burdens to rest upon the party contracting from an inherent position of weakness, in particular when providing suretyship. In *casu*, a twenty-one year old woman contracted as a surety on behalf of her father so that he could secure a loan from the bank. At the time of signing the contract the applicant, who had no professional education, was often unemployed and had to rely on meagre income to sustain her. A few years later the bank terminated her father's credit facility, at which time the amount due by the father stood at 2, 4 million DM. The bank then informed the applicant that they would hold her liable as surety under the agreement she had signed in 1982. The court *a quo* upheld the validity of the contract and an application to appeal to the Constitutional Court was allowed. The applicant claimed that the respondent's conduct infringed the *Grundnorm* in that the economic hardship attendant to the contract violated her dignity, because her living conditions had been reduced to such an extent that she could not maintain a dignified existence.³⁴⁸ Her argument, that freedom of contract should not be able to obscure a misuse of power by market-controlling enterprises against subordinate contractual parties, was upheld by the court. The constitutional court goes on to say that all civil courts had a duty to interfere, correctively, in such situations. For them not to do so would indeed violate the *Grundnorm*. It seems as though the inequality of the parties' contractual power is what contributed most to the court's decision to invoke the *Grundnorm*.

³⁴⁷ The case is narrated by Strydom "Freedom of contract and constitutional rights: A noteworthy decision by the German constitutional court" 1995 *THRHR* 696.

³⁴⁸ Compare *Sasfin v Beukes* [1989] 1 All SA 347 (A) the debt was humiliating to the debtor and the method of repayment made the applicant perpetual dependant on the respondent without maintaining a dignified life by himself.

In this way, the German Constitution has indirect application into the horizontal relationships between its citizens.

A similar constitutional injunction is imposed upon courts when interpreting contracts. Strydom holds a view that not every distortion of equality in contract should engage the remedial action of the courts, because that would affect legal certainty and put a restraint on overzealous contractual relationship intervention.³⁴⁹ The author was writing within the context of freedom of contract and constitutional right not interpreting the cold impact of exemption clauses in contracts which warrants otherwise. He states that intervention ought to be permissible only where “the structural subjugation of a contractual party is discernible and the results of the contract excessively burdensome.”

The tricky question is under which circumstances would Germany law would be too eager to intervene in contract with an adverse exemption clause. Clearly, the case discussed above exemplifies the heartland of contract law showing that dignity is important simultaneous with liberty. Freedom is the prime political virtue, and that coercion *prima facie* negates consent among parties. The wanton use of exemption clauses in standard form contracts demonstrates the keen contestation to subjugate the consumer with an unequal bargaining power when contracting.

4.5.4 *The sanctity of contract - pacta sunt servanda*

Sanctity of contract overwhelmingly emphasizes that parties are to be held bound by the agreement they have freely made.³⁵⁰ Perhaps, this is an oppressive theory to emerge from legal jurists of the nineteen-century manifesting inadequate legal reasoning about contractual relationships. The effect of sanctity of contract principle is discussed above with its twin principle of freedom of contract that is mutually inclusive.³⁵¹ For instance, in a legal system that fully subscribes to the principles of *pacta sunt servanda*, there will be no remedial action to grant paternalistic relief to a party who is simply trying to escape the consequences of a hard bargain that was inadvertently or ignorantly entered into by the consumer.

³⁴⁹ At 698.

³⁵⁰ See Parry DH *The Sanctity of Contracts in English Law* (1965); Baker “From Sanctity of Contract to Reasonable Expectation?” (1979) 32 *CLP* 17.

³⁵¹ See para 4.5.2.1 above on freedom of contract and the constitution.

Nassar³⁵² writing about long-term international commercial transactions punches holes on the anachronistic impropriety of the classic ideals to contractors in relational dealing. It follows that an appeal to sanctity of contract, whether in the context of interpretation or the enforcement is no longer relevant. The seminal view expressed below casts a negative light on the impact of classical contract theory:

“[t]he goal of contract law is not limited to ensuring enforceability, certainty and delimiting rights and duties. Rather...[c]ontract law is there to provide for the continuity of relationships through resolution of conflicts and correcting for market changes and failures may arise during the course of performance. Solutions adopted under contract law primarily should be concerned with furthering all the different interests involved. This is usually attainable through the articulation of legal standards which, contrary to technical rules, are inherently flexible. Fairness and good faith, defined in reference to best efforts, become the backbone of contract law through which mutual trust between the contracting parties is promoted...The aim of contract law should be the protection of contractual relationship and the balancing of the involved interests, not the protection of individually acquired positions.”

4.5.5 Systemic Context and Interpretation

A contract of whatever nature exists within a systemic context, which relates to the legal system in which the text exists and functions.³⁵³ Thus, the objective interpretation tends to place the conduct of the parties within the context of the legal policy framework, which prevails within a particular society.³⁵⁴ This narrative explains the relationship of contract law interface with the other branches of law. Therefore, the systemic context means the drafter of the document must, for practical considerations, relate the document under consideration to other documents of similar type. For instance, standard form contracts that contain exemption clauses such as insurance contract documents must be different from a contract of the sale of cell phones to avoid interpretative hurdles that might be created by overlaps.

Contract law discussed herein straddles between the substantive elements of contract, consumer law and constitutional law categories. One should not concentrate on one field to understand the dynamics that affects consumer contracting. A drafter of indemnities would find himself walking the tight rope when delineating the appropriate category of obligations or rights if he overlooks either of these categories. The law of contract supports obligations

³⁵² Nassar N *Sanctity of Contracts Revisited* (1995)24-25.

³⁵³ Mac Cormick DN & Summers RS (Eds) *Interpreting Statutes: A Comparative Survey* (1991) 264.

³⁵⁴ Van der Merwe et al 303.

by making them legally enforceable, but also legitimizes the conduct of the parties and the terms on which transactions may be agreed upon between the parties. Consumer law is mostly concerned with protection and social advancement of consumer rights.

The teleological approach of interpretation accords with the systemic context because it aspires to a realisation of the “scheme of values” on which a legal order is premised.³⁵⁵ It is described as “value-activating interpretation”³⁵⁶ disposed to transcend the purpose or design that lies behind an individual provision, but by the scheme of values informing the legal and constitutional orders in their totality.³⁵⁷ Therefore, an interpretation of an exemption clause within the constitutional realm must fuse and transverse contract law, consumer law and constitutional law because this is the system which it is situated in.

A simple juridical analysis breaks this up as follows: According to its substantive elements contract law is a the collection of legal rules which govern contracts and forms part of the law of obligations,³⁵⁸ whereas the protections afforded by consumer law inexorable tend to promote and intervene on behalf of consumers’ interest in a capitalist economy fraught with monopolies. Constitutional law promotes and upholds the constitutional values enshrined in the Bill of Rights and other structures of government in the Constitution.

The wide spectrum of obligations imposed by law to the parties in a contract must equip the contractants with knowledge of the variables within the whole law that affects the system. This is important for pleadings and proper interpretation of the contract. For instance, draconian exemption clauses may be examined to counter consensus of the parties, and the bargaining power that existed during the process of negotiating consensus. If there was no consensus to it than the court or tribunal must look into the consumer legislation for rights affected for remedies. If the right affected is in the Bill of Rights then the court should develop the common law to the realisation of that right.

The assumption promoted by the dynamics of legislation is that adjudicators of contract law should move away from the conservative shibboleth of enforcing rigid rules without ameliorating the situation of consumers. Judicial activism is premised on the notion that the

³⁵⁵ Mureinik 1986 *SALJ* 623-624.

³⁵⁶ Du Plessis L *Re-interpretation of Statutes* (2007) 119.

³⁵⁷ Carpenter 1999 *THRHR* 633.

³⁵⁸ Van der Merwe et al 1.

judiciary should be creative in the interpretation and application of statutory law.³⁵⁹ The correct approach for defiling freedom of contract is to question whether its exercise does not contravene the background regime of individual rights as established by legislation. Nowadays courts might release parties from hard bargains although it viewed in a serious light by libertarian scholars because such well-meaning paternalism betrays a lack of respect for a person's autonomy.³⁶⁰

The motivation for legislative and judicial intervention is to redress an imbalance of power engendered by freedom of contract. As promoted by the Constitution and legal system that advances rights-led morality, the right of freedom of contract will be abridged only where rights that are more important are at stake.³⁶¹ This limitation on the full application of contractual rights operates within the confines of section 36 of the Constitution when construing this freedom of contract within the evolving constitutional jurisprudence. Within this analysis, certainly exemption clauses like any other contractual clauses are subject to the broad principle of legality in the law of contract.³⁶² Increasing developments suggest a holistic co-ordination of contractual agreements to the positive law of South Africa.

4.6 Emerging consumer jurisprudence

Although some progress has been made, some commentators feel that the courts are reluctant to declare contracts that tend to limit constitutional rights, unenforceable.³⁶³ The courts in the constitutional dispensation have continued to uphold exemption clauses because they are premised on that freedom of contract and the notion that courts cannot rewrite a contract for the parties. It has been enduringly argued that for the sake of jurisprudential methodology the courts should be slow to interfere with the kinds of terms that the parties have agreed on within the scope of their contract,³⁶⁴ but only those that contravene reasonableness and

³⁵⁹ Du Plessis 97.

³⁶⁰ Brownsword 51.

³⁶¹ See Trebilcock MJ *The Limits of Freedom of Contract* (1993) and Collins H *The Law of Contract* 3rd ed. (1997) 96-101.

³⁶² This means that a contractual provision will be unenforceable if it is illegal, and it will be illegal if, *inter alia*, it violates public policy.

³⁶³ Hopkins K "Exemption clauses in contracts" (June 2007) *De Rebus* 24.

³⁶⁴ Brownsword 51. See Aronstam 13 where he makes the following statement about the classic theory of contract in South Africa: "[T]he fact that a contractual provision is harsh and oppressive is often of little concern to the judges".

conscionability. To counter these measures, legislation becomes the yardstick to determine the boundaries of legally permissible operations.

Prior to the enactment of consumer legislation, freedom of contract perpetually enjoined that the parties' freely made agreements should be enforced by the courts, but this is no longer a holy cow in modern contract. The calculus of interpretation is whether parties with unequal bargaining power concluded a term of a contract. If it is so, it becomes necessary to ascertain whether the contract exploits the party with weaker bargaining power. The need of state intervention then becomes inevitable to protect the weaker party and restore the parity in the bargaining power.³⁶⁵ To determine whether a contract is contrary to public policy the factors of inequality and exploitation have to be present.³⁶⁶

Therefore, merely contending that there was unequal bargaining power by one of the contractant is insufficient to found a claim that the term is or contract is contrary to public policy and thus unenforceable.³⁶⁷ The courts have several times reaffirmed the concept of public policy as the appropriate instrument for dealing with contractual unfairness that cannot be adequately constrained by existing rules.³⁶⁸ It is the vehicle to change the rules of interpretation despite the good faith concept.

It is argued that section 40(2) of the CPA attempts to deal with these inadequacies. The expressions "to take advantage of" and "unable to protect their own interest" are used to describe the second element of public policy that is exploitation.³⁶⁹ Hawthorne concedes that acceptance of this analysis buttresses the argument that the CPA provides content to public policy. The indirect patchwork to elevate public policy through statutory means should lead to the conclusion that the inclusion of the same "agreements" in a non-consumer contract is bad and wrong because such agreements constitute exploitation, whether the contractant is a consumer or a private individual.³⁷⁰

³⁶⁵ Roulhette "The obligatory force of contract in French law" in Harris & Tallon (Eds) *Contract Law Today* (1989) 38.

³⁶⁶ Hawthorne 2014 (77) *THRHR* 419.

³⁶⁷ *Ibid.*

³⁶⁸ See *Brisley v Drotsky* 2002 [91] citing *Sasfin (Pty) Ltd v Beukes*; *De Beer v Keyser* 2002 (1) SA 827 (SCA) [22].

³⁶⁹ Hawthorne (n304 above) 420.

³⁷⁰ 2014 (77) *THRHR* 421.

In addition to that, the CPA provides further safeguards against exploitation,³⁷¹ consisting of the grey list of provisions. It is argued this list is non-exhaustive³⁷² and encompasses contract terms, which are *prima facie* presumed to be unfair and unreasonable. In section 44(3) of Regulation 293, twenty-eight standard clauses common in contracts of adhesion are enumerated. These clauses limit the liability of the supplier, remedies of the consumer, prescription, access to court, changing the applicable law and the distribution of risk, allowing the unilateral amendment of the terms of the agreement, permitting extravagant damages or remuneration or costs and many other legal “niceties” found in such contracts. In all probability, these examples given manifest a fertile ground for exploitation.

4.7 Concluding remarks

Fundamentally, contract construction exists within the wide tentacles of the law embedded in the Constitution. Of note, is that the constitutional impetus to infiltrate the drafting and interpretation of contracts. Indeed many courts have endorsed Justice Kennedy’s words that “persons in every generation can invoke [constitutional] principles in their own search for greater freedom.”³⁷³ It is evident from the discussion that in individual contracts the parties interface with business to uplift the economy. Therefore, they exist and function within the societal realm, its values and interests, “of which the Constitution is but an expression.”³⁷⁴

Attendant to this narrative is that a contract lawyer or consumer specialist needs to have a working knowledge of the Bill of Rights the way it has been cultivated in the jurisprudential methodology.³⁷⁵ The impact of the constitutional realm has been explicated above and has been the scope of this research relatively speaking to contract law. The superior courts in interpreting the constitutional texts and in ensuring that there is progressive development of rights have ensured the constitutional values of freedom, equality and human dignity are realised and tackled from different angles of the contract law.

³⁷¹ S120 (1) (e) of the CPA entitles the Minister to make regulations relating to unfair, unreasonable, or unjust contract terms. Regulations in terms of the CPA were promulgated during 2011.

³⁷² S44 (2) (b). S 44(3) provides a non-exhaustive list so that other terms may also be unfair for purposes of section 48.

³⁷³ *Lawrence v Texas* 539 U.S 558 (2003).

³⁷⁴ Van der Merwe et al 15.

³⁷⁵ Monahan *Politics and the Constitution* (1987) 6 explains, “[w]hen the Court rules legislation to be unconstitutional, its judgment is supposedly not based on any disagreement with the underlying policy of the law; it simply reflects an assessment of the law in light of the objective and manageable standards contained in the constitution itself”.

The Supreme Court of Appeal in *Napier v Barkhuizen*³⁷⁶ in *obiter* stated that the constitutional values of dignity, equality and the advancement of human rights and freedoms do not provide “general embracing standards’ for purposes of invalidating a contractual term. It has been argued vigorously that a constitutional approach to liberty must reverberate with the value of substantive equality within the reality of peoples’ daily lives. The content of this constitutional value of freedom must dilute from the one enunciated in classical liberal theory because of the importance in attaching it to the constitutional values.

Bhana and Pieterse³⁷⁷ argue that the value of substantive equality, being an important vehicle to facilitate transformation in South Africa, would demand limitation of freedoms, including the freedom of contract where necessary. Klare views this concept differently, as he recognises transformative constitutionalism as:

“[a] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction.”³⁷⁸

Clearly, the constitutional injunction to interpret and determine these values within the realities of South Africa’s social, economic and political circumstances and the specific context under consideration cannot be over-emphasized. Furthermore, the importance of the development of constitutional principles in the manner in which cases should be decided is acknowledged. In order to give substance to this imperative superior courts in most cases have gravitated towards a purposive and generous interpretation of the Constitution. To interpret the Constitution purposively is not always tantamount to construing it generously or broadly, the converse is also true, meaning a purposive interpretation can also be restrictive because it is purely purposive.³⁷⁹

³⁷⁶ 2006 (4) SA 1 (SCA) para [11].

³⁷⁷ At 880.

³⁷⁸ “Legal culture and transformative constitutionalism” 1998 (147) *SAJHR* 178-179. See also Friedman J in *Baloro v University of Bophuthatswana* 1995 (4) SA 197(B) 241B where the court stated: “This Constitution has a dynamic tension because its aims and purpose are to metamorphose South African society in accordance with the aims and objects of the Constitution. In this regard it cannot be viewed as an inert and stagnant document. It has its own inner dynamism, and the Courts are charged with effecting and generating changes.”

³⁷⁹ *Soobramay v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC) para [17]; *SA National Defence Union v Minister of Defence* 1999 6 BCLR 615 (CC) para [28].

In pre-constitutional South Africa high premium was given to harsh statutory provisions gratuitously curtailing fundamental rights on the precepts of purposive interpretation.³⁸⁰ South African consumers had it tough under the Usury Act³⁸¹ and Credit Agreements Act.³⁸² The constitutional era can be hailed for its paradigm-shift in disputes involving private law.

The case of *Goldberg & Another v Carstens*³⁸³ illustrates the protectionist kind of intervention espoused by the Constitution.³⁸⁴ In *casu*, the appellant relied on clause 22, which was an exclusion clause containing warranty to repudiate the claim of the respondent. The court held that there was a clear authority spelling out that if the other party misled one party by its silence and the latter's mistake in respect of the content and nature of the contract was in *iustus* error, an exemption clause could not come to the former's assistance. The question for decision was whether the respondent had entered into the contract because of *iustus* error.³⁸⁵ The *ratio* of Davis AJ deals with the interface of the Constitution and contract law doctrines.

The court held section 35(3) of the Interim Constitution, (which enjoined the courts in the interpretation of any law and the application and development of the common law and customary law to have due regard to the spirit, objects and purport of the Constitution, viz the promotion of an open and democratic society based on freedom and equality) served to reinforce the principles of common law in which individual autonomy and consensus are compatible with the value of good faith in human relations. There was congruence between the reliance theory of contract and the constitutional injunction to the courts in section 35(3) of the Interim Constitution.³⁸⁶

Curiously, this interpretation happened 14 years before the advent of consumer legislation. Probably, this set a good precedent for recent contract law interpretations that currently reflect a legal system balance of principles and policies reflecting reigning awareness about justice and fairness as well as economic, commercial and social appropriateness.³⁸⁷ Forays to

³⁸⁰ See *Rossouw v Sachs* 1964 (2) SA 551 (A) discussed by McCreath "The 'purposive approach' to constitutional interpretation" in *Constitution and Law II* 65-68.

³⁸¹ 73 of 1968.

³⁸² 75 of 1980.

³⁸³ 1997 (2) SA 854 (C).

³⁸⁴ Constitution of the Republic of South Africa 200 of 1993.

³⁸⁵ 858G-I.

³⁸⁶ At 860A/B-E.

³⁸⁷ Van der Merwe et al 10.

this kind of interpretation must be made without resorting to constitutional norms and values particular where express terms of the contract are freely bargained for so that an appeal to the ideal of sanctity of contract is relatively straightforward.

This modern contract theory countervails the customary application of the principles of the classical theory of contract, which tends to promote certain stratification. Typically, of the classical theory is that the resourced-rich become richer and those on the periphery remain marginalised, as the mechanism by which wealth in society is distributed favours a stronger party to the contract. Contract law analysts have pointed out that an interpretation of the law of contract apparently constitutes an interpretation of the distributive scheme within a particular legal system.³⁸⁸ This is the way, which governs the allocation of rights and duties in the market.³⁸⁹ After all is said and done, the Constitution in essence endeavours to introduce a wider share to the economic wealth of the country and other benefits to the consumer.

Therefore, in a legal system guided by individual rights-led morality, the right to freedom of contract will be abridged only where most important rights are at stake,³⁹⁰ the same way the Constitution evaluates the importance of rights³⁹¹ and the CPA intervenes in the protection of consumer rights. Even a system which values individuals above collectivism must accept that if a contractant asserts the right to use material and formal resources society may in turn require that the agreements should respect its broader values.³⁹² The ripple effect of this symbiotic relationship is that it pays deference to public policy, fairness and good faith, which dovetail in the interpretation of a contract.

The English common law had been modified to include common law equity, which gives relief from unconscionable bargains to countenance the shortcomings of the two in a free market. In South Africa, the influence of the Constitution on the enforceability of contracts remains controversial in both literature and jurisprudence. Case law demonstrates that the South African legal tradition, known for its deference to open norms and support of party

³⁸⁸ Collins *Contract* 14.

³⁸⁹ Collins *supra* 18.

³⁹⁰ See Trebilcock (1993) and Collins 96-101.

³⁹¹ S36 of the Constitution.

³⁹² Van Huyssteen and Van der Merwe "Good faith in contract: proper behaviour amidst changing circumstances" 1990 *Stell LR* 244.

autonomy,³⁹³ tardily adopted the transition from the formal logic of the common law method to the purposive public interest orientated reasoning.

In most instances, the sticking point for the court analysis concerns the broad overview of freedom of contract whereas in a narrow sense freedom of contract focuses on term freedom and advocates that the law should recognize the importance of respecting the parties' own choices and preferences as expressed in the kinds of transactions they enter upon and the particular terms to which they agree.³⁹⁴ In principle, this assertion is credible, but in practice under modern contract, it is fundamental flawed. It fails to consider economic duress and dire need that neutralises a consumer's independence for the bargain. Take for instance, the contract of moving companies, which gives power to the moving company to destroy consumer items that are dangerous and may cause infestation with pest.

While the freedom of contract in the narrow sense argues for a minimalist approach, that is a light regulatory approach, both to the categories of transaction that are treated as illegal and to the kinds of terms that are both listed as void and unenforceable.³⁹⁵ This raises the question whether an argument in favour of substantive limitation, for instance, exemption clauses, which limit contractual freedom on the terms, can prima facie be extended to apply to a system incongruent to the precepts of individual will and private autonomy.

Consequently, a contract or term, which contravenes or tends to induce contravention of fundamental principle of justice or a statute is prejudicial to the interest of public and is contrary to public policy,³⁹⁶ which is now contained in the Constitution. It is necessary to understand good faith as a guiding principle to promote dialogue between businesses and consumers and to steer discussion towards developing a fair and ethical contractual regime.³⁹⁷ Watching the complexity of the legal aspects relating to exemption clauses as in statutes and case law closely reveals all the twists unfolding in contemporary contracts on the subject matter.

³⁹³ Lubbe GF "Contractual derogation and specific performance" in Glover (ed) *Essays in honour of AJ Kerr* (2006) 77; Hutchinson "'Traps for the unwary: When careless errors are excusable'" in Glover (ed) *Essays in honour of AJ Kerr* 39.

³⁹⁴ Brownsword 50.

³⁹⁵ Brownsword R "Remedy-Stipulation" in the English Law of Contract—Freedom or Paternalism?' (1977) 9 *Ottawa LR* 96-9.

³⁹⁶ Per Mason J in *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 778.

³⁹⁷ Geraint Howells "Good faith in consumer contracting" 91 in Brownsword et al (1999).

In a contemporary welfare state imbued with consumer protection legislation the sanctity of contract becomes the battlefield for the rights-orientated consumers against the exploitative and stronger bargaining party. It does not preclude a party waiving the right to hold a fellow contractant bound to the agreed terms of the bargain, but gives allowance to courts to examine these renegotiated agreements that are one-sided in terms of contractual principles.³⁹⁸ Such contractants need an agreement that allows for on-going adjustment, revision and flexibility, rather than one that has performance, obligations and allocations of risk cast on a stone.³⁹⁹

It is suggested that a focus on freedom of contract should shy away from term freedom, but garner support on the parties' freedom to engage a particular governance regime for their dealing (that is, to choose their preferred governing law). Term freedom as explained earlier on allows the parties autonomy to pursue their own purpose and set their own terms. Then in that perspective, there is a renewed role for freedom of contract in the twenty-first century.⁴⁰⁰ As South Africa, stands on the threshold of a new and evolving consumer law one cannot stop wondering on how this law (CPA) would be perceived after sometime in application.

The CPA decisively calls for the protection of consumers by reinforcing the need to incorporate the societal values such as fairness, justice and equality. Although the Act has got its flaws, but it is a step in the right direction that consumer rights are respected in the execution of contracts. It is subject to necessary amendments that would sufficiently address unfair contractual terms that have claw back clauses within them. There is a perpetual need to develop the common law with constitutional values to ameliorate the plight of consumers by infusing it with the concepts such as good faith and *ubuntu*, which have been discussed above.

The following chapter will contain a comparative study on foreign legal regimes and conclusions will be drawn to assess whether the South African laws and regulation pass the international muster of market transactions in an attempt to re-establish new consumerism, and to determine where our laws are lacking

³⁹⁸ Brownsword R, *Contract Law Themes for the Twenty-First Century* 2nd ed. (2006) 54.

³⁹⁹ The debt review and assessment of the debtor over-indebtedness in s 79 and reckless credit in s 80 of the NCA are part of the exemplary mechanisms to alleviate the plight of the sanctity of contract.

⁴⁰⁰ Brownsword 65.

CHAPTER 5

COMPARISONS WITH FOREIGN LEGAL REGIMES AND DEDUCTIONS

5.1. Application of foreign law in South Africa

In South Africa, the prevailing law in consumer and contract laws is a mixture of miscellaneous rules and norms, which have local and foreign provenance. In order to achieve the objective of aligning our laws with other countries this chapter seeks to dissect some transversal issues cutting across most consumer contracts to find equality, untangle the afflictions of exemption clauses and retain personal rights. South Africa is keeping pace with the changing structures of commercial markets and business practices hence the comparison.

The CPA is aligned to the Constitution because of the supremacy clause contained therein.¹ The provisions of section 2 of the Consumer Protection Act (CPA)² empower the court to resort to appropriate foreign and international law when interpreted and applied. Application of this section together with section 39 of the Constitution forms the legal basis for a comparison of the different legal regimes. It also nourishes the intellectual debate that the development of law is an organic process with a cosmopolitan outlook. Perhaps the legislature recognized the need for foreign legal transplant and international cross-pollination in the field of consumer protection for our law to survive and stability to remain in the volatile marketplace.

This is made clear by the CPA's permissive approach that when interpretation is done court may consider appropriate international conventions, declarations or protocols relating to consumer protection. Therefore, the development of consumer protection legislation is a true reflection of globalization. Many scholarly articles have been written giving insights and critique on the CPA, some intending to harness provisions from international legislation to reform consumer protection. A broader scope of this discussion considers the individual and public interests, confluence in the application of the law, and similarities and differences.

¹ S39(2) provides that a court or tribunal when interpreting g the Bill of Rights must consider international law and foreign law to promote the values that underlie a democratic society based on human dignity, equality and freedom..

² 68 of 2008.

However, the use of foreign law in interpretation should be carried out with circumspection because they may be misleading, as foreign instruments are shaped by different legal traditions and legislative contexts. Commentators note that the consideration of foreign law may have an influence not only on how the CPA is interpreted, but also on how it is applied.

In this respect, this chapter will traverse the contours and features of the emerging European legal tradition *vis-à-vis* South African consumer law to assess the impact and ably identify “grey areas” for future consideration and omissions in the recognition and enforcement of exemption clauses. To achieve the objectives of this chapter requires a reflective evaluation of consumer legislation in common law Anglo-American and European civil law countries.

The underlying question in this short discourse is how the law from the selected countries reacts to contract terms which appear one-sided, unbalanced, or unfair both in general contract law and in consumer contract law. Some crucial strides have been made on the regulation of unfair terms in for example European contract law.³

This discussion will briefly address the laws of the EU, the United Kingdom (UK), Germany and the United States of America. These countries are major trading partners of South Africa and play an important leading role in the development of consumer protection legislation.⁴ In order to have a broad understanding an inclusion of passing references to the consumer legislation of many other jurisdictions would be made where necessary.⁵ For this purpose, a choice has been made to concentrate on the English and Italian legal system since the two systems operate diametrical opposite in terms of legal techniques and methods, but also in their divergence on the role of the law and methods of adjudication.⁶

This thesis, with its narrow focus on the jurisprudence in the constitutional realm, does not aim to provide a comprehensive and in-depth discussion of the laws pertaining to exclusion clauses that exist in other jurisdictions. Yet a brief exposition on the application of, for

³ Wilhemsson T “Various approaches to unfair terms and their background philosophies” *Juridica International Law Review XIV* (2008) 51.

⁴ Germany has many companies with subsidiaries, branch offices or businesses in South Africa under the patronage of Germany Federation of Chamber of Commerce, and the United Kingdom spawns a relationship of kinship and parallel development of some laws occurs in the respective legal systems and traditions of these two countries.

⁵ Van Eeden E *Consumer Protection Law in South Africa* (2013)111. See also Consumer Law Benchmarks Study DTI May 2004 in this regard.

⁶ Nebbia P *Unfair Contract Terms in European Law: A Study in Comparative and EC Law* (2007) 22.

example the fairness criteria, can prove to be informative. From this discussion explored herein, it would crystallize that the issue of fairness is certainly more complex and diverse than is often appreciated.

It is important to understand the salutary dynamics of contract and consumer law intersecting with constitutional rights, to tackle unfairness in consumer contracts by putting them under global microscopic lens. Moreover, the rules found in these areas of law have many possible purposes that reflect different forms of justice. Thus, assessing the problems regarding exemption clauses in consumer contracts and the search of equitable jurisprudence in the South African constitutional realm would benefit future development.

The English laws, for example, subject exemption clauses to a statutory test of reasonableness⁷ whilst on the other hand the United States courts set guidelines in which courts may strike down or modify contracts, which are unconscionable. In US, the American Law Institute (ALI) drafted the Restatement. A more elaborate legislative guidance to consumer contracts is provided in European legislatures.⁸ Others are also dealt with in the UNIDROIT Principles of International Commercial Contracts. Some of these changes are dealt in both the Principles of European Contract Law (PECL)⁹ and the Draft Common Frame of Reference (DCFR).¹⁰

Thirdly, the comparative aspect postulated here acts as an epistemological tool by which the shortcomings, characteristics, rationales and values of each system reveal themselves with more clarity and vividness by means of comparison.¹¹ It becomes clear that only through comparison, can one unveil and explain the degree of divergence or convergence of legal systems; broader inferences can then be drawn on the viability and consequences of further measures of harmonisation.

⁷ See s 7 of the Railways and Canals Traffic 1854 and section 4, Sched 2 of the Unfair Contract Terms Act 1977 and s 68A of the Trade Practices Act 1974.

⁸ Contracts Review Act 1980.

⁹ Lando O & Beale H (Eds) *Principles of European Contract Law: Parts 1 and II* (2000) as well as Lando O, Clive E, Prum A & Zimmerman R (eds) *Principles of European Contract Law Part III* (2003).

¹⁰ Draft Common Frame of Reference (DCFR) published by Sellier (2007). Australian and New South Wales consumer laws are not discussed and beyond the scope of this thesis and are mentioned superficial.

¹¹ Minor J (Ed) *Works III* (1907) 45 cited in Zweigert K and Kotz H *An Introduction to Comparative Law* (1998) (Vol1) v).

Fourthly, comparative analysis is based on the idea that the fate of any change, which is made to any law, results from incorporation of the new into existing traditions and traditional methods of interpretation.¹² According to Krygier “even radical legislation enters a continuing tradition which probably affected the way in which it was drafted and certainly will affect the way in which it is read and applied.”¹³ In the dynamics of this milieu, it becomes clear that tradition is ineluctable in the drafting and interpretation of the law.

Depending on the legal regime, some jurisdictions compare the bargaining power in contracts with State power and the result of interactions across the broad spectrum of public sphere. Previously, bargaining power of the contracting parties hogged the limelight for private purposes without State intervention.

The issue of unfairness in contract terms form the core of consumer law and affects human dignity. Fairness rules in contract law may be used to support other societal policies.¹⁴ The Consumer Rights Act 2015 (CRA) amends the UCTA test on whether a term is a fair and reasonable one to be included in the contract, given the parties’ actual or reasonable knowledge or contemplation of the surrounding circumstances.¹⁵ Consumers’ rights in relation to the sale of goods and unfair terms remain broadly the same as under those statutes, but are clarified and enhanced in some places. Our new CPA is not lacking in that aspect, therefore, it is in tandem with international practice.

In particular, Part G of Chapter 2 of the CPA seeks to protect a consumer’s right to fair, reasonable and just terms and conditions. Section 52 provides for enforcement measures and factors to be considered when determining whether a term or a contract is unfair. Fairness being a wide and subjective concept gives the judicial officers and interpreters a hard time when applying section 40 of the CPA. Contrast this with the Directive, which provides those terms, which do not comply with the requirements of fairness, are not enforceable against the

¹² Nebbia P *Unfair Contract Terms in European Law: A study in comparative and EC Law* (2007) 1.

¹³ “Law as Tradition” (1986) *Law and Philosophy* 251.

¹⁴ Wilhemsson 52.

¹⁵ The CRA serves as a consolidating Act, but also introduces some significant changes to consumer law. As part of the consolidation, many statutory provisions familiar to practitioners will either disappear or cease to apply in the business-to-consumer context. Amongst others, the Act replaces the Unfair Terms in Consumer Contracts Regulations 1999 (“the UTCCRs”), the Unfair Contract Terms Act 1977 (“UCTA”) (in relation to consumer contracts), most of the Sale of Goods Act 1979 (“the SGA”), and the Supply of Goods and Services Act 1982 (“the SGSA”) (in relation to consumer contracts). Significant changes have been made to consumer remedies in respect of faulty goods and the exclusion of price terms from scrutiny for fairness.

consumer. The Directive's requirement to what is unfair is based solely on two main criteria: (a) that the term is not "contrary to the requirements of good faith" and (b) that it does not cause "a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".¹⁶

It is clear that the Directive draws a distinction between individually negotiated and non-negotiated contracts. From a layman's point of view, determining of the distinction looks cast on a stone and uses a simple formula. However, the Directive provides guide by defining meaning for a term that has not been individually negotiated in particular where it has been drafted in advance in particular where it forms part of standard form contracts. From this definitive parts it crystallizes that elements of fairness permeates the law although it is questionable whether these elements are coherently put together as a prerequisite to contracting.¹⁷

The exclusion of core terms from review means that terms relating to the price and definition of the main subject matter of the contract are excluded from review, provided they are "transparent", which is, expressed in clear and intelligible language. This position is demonstrated under the Unfair Terms Directive (implemented almost unchanged in the UK), the PECL and the European Draft Common Frame of Reference, all which apply to non-negotiated terms.¹⁸ On a different platform, Naudé notes the British experience with preventative control over unfair contract terms has been praised by the European Commission as a success story in the fight against unfair terms.¹⁹

5.2 European Union law

5.2.1 Evolution of consumer laws

Commentators note that at European level the situation is compounded by the adoption of consumer laws in response to specific problems leading to a piecemeal evolution instead of comprehensive consumer law.²⁰ In addition to the complexity of the field, there is furthermore an intertwined development of domestic national consumer laws and European

¹⁶ Article 3.

¹⁷ Nebbia 28

¹⁸ Gullifer & Vogenauer 81.

¹⁹ Naudé 518.

²⁰ Gullifer & Vogenauer S 67.

Union (EU) consumer law.²¹ Apparently, it has transpired within the EU legislators there is a high probability to believe that market failures are more likely to occur in consumer markets than do their counterparts in United States (US).²² The EU approach to the role of the State in managing risk in consumer markets is closer to the approaches taken for example in Canada,²³ Australia,²⁴ New Zealand,²⁵ Japan,²⁶ and other developed economies.²⁷

Despite the risks it appears EU regulators and their counterparts in other developed countries are confident of the benefits of having regulations to dictate what is legally permissible outweighs the costs.²⁸ In response, several European countries have enacted legislation regulating “unfair” terms in standard form contract used in consumer transactions. When assessed many elements of the EU consumer protection policy appear to be motivated by a desire to level the playing field among consumers to ensure that social rather than economic policy objectives are met.²⁹

An initial assessment of the overview of European trends shows that States adopted measures aimed at, *inter alia*, ensuring that purchasers of goods are protected “against the abuse of power by the seller from one-sided standard contracts, the unfair exclusion of essential rights in contracts, harsh conditions of credit, demands for payment for unsolicited goods and against unscrupulous selling methods.”³⁰ These are primary concerns that informed the usefulness of the Directive discussed in detail in this chapter, which also affected the consumer reforms here in South Africa.

As a result of marked differences in the development of law there have been attempts to fully harmonise and reform the law of contract amongst Member States of the EU because there is

²¹ Livermore 95.

²² Winn & Bix “Diverging perspective on electronic contracting in the US and EU” (45) 2006 *Cleveland State University* 183.

²³ See Canada, Industry Canada, and Internet Sales Contract Harmonization Template (Ottawa: Industry Canada (2001), available at <http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01642e.html>.

²⁴ See Australia Trade Practices Act 1974, available at <http://scaleplus.law.gov.au/html/pasteact/0/115/top.htm>.

²⁵ New Zealand, Model Code for consumer Protection in Electronic Commerce (New Zealand, Ministry of Consumer Affairs, 2000) available at <http://www.consumeraffairs.govt.nz/policyandlaw/discussionpapers/model-code.html>

²⁶ See, for example, Consumer Contract Act 2001, available at http://www.lrz-muenchen.de/_Lorenz/material/ccactjp.htm

²⁷ See, for example, Singapore Unfair Contracts Terms Act 1994 Cap.396 available at <http://statutes.agc.gov.za>

²⁸ Winn & Bix 184.

²⁹ Howells G & Wetherill S *Consumer Protection Law* 2nd ed. (2005)3.

³⁰ Council Resolution of 14 April 1975 para [19] contained in Recital 8 and 9 of the EC Directive 93/13.

not general European law of contract at present especially in relation to consumer law.³¹ Several important pieces of consumer protection legislation were passed as part of the move to a single market, including the Directive regulating doorstep selling,³² consumer credit,³³ and packages travel.³⁴

The Single European Act of 1986 and the push to complete the internal market by 1992 were strongly oriented towards liberalization and the strengthening of market mechanisms.³⁵ To fulfil these objectives there have been successive EC Directives exerted to domestic laws to influence development in the direction of a universal consumer law instead of fragmented approaches. However, this approach has limitations and the coexistence of separate, national laws lead to application problems in internal national markets.³⁶

The first process of reforms the EU followed was the so-called “minimum harmonisation” approach, which left member States free to introduce or maintain laws in the field covered by a Directive, which granted consumers a higher level of protection. To lessen the dichotomy between member states, however, recent Directives of European Commission policy shifted towards “full” or “maximum” harmonisation, thus removing the discretion of member States to have more protective domestic laws in the area.³⁷

In European countries, exemption clauses are governed by Directive 93/13,³⁸ EC Consumer Law and Policy and by election, the UNIDROIT Principles of International Commercial Contracts.³⁹ The basis of these laws and codes illustrate the complex philosophies behind the

³¹ Koffman L & MacDonald E *The Law of Contract* 6th ed. (2007) 6.

³² Council Directive 85/577/EC of 20 December 1985 to protect consumers in respect of contracts negotiated away from business premises.

³³ Council Directive 87/102/EEC of 22 December 1985 for the approximation of the laws regulations and administrative provisions of the Member States concerning consumer credit.

³⁴ Council Directive 90/314/EEC of 12 June 1990 on package travel, package holidays and package tours.

³⁵ Winn & Bix 184.

³⁶ *Ibid.*

³⁷ European Commission, *EU Consumer Policy Strategy 2007-2013*, COM (2007) 99 final p 7.

³⁸ Council Directive 93/13 of 5 April 1993 on Unfair Terms in Consumer Contracts OJ L95/29. The Directive is formally based on article 100(a) (now article 95) of the Rome Treaty and is aimed at reinforcing the internal market. It also pursues the objectives of ensuring protection of consumers against unfair terms throughout Europe. Historically, it arose as a result of Resolutions of the European Council, which led to the creation of two preliminary programmes for “consumer protection and information policy”. These programmes had the objective of harmonising the legislation within the European Community which was designed to protect the health, safety and economic interest of the consumer, as first recognized in the 1972 Paris Summit.

³⁹ Article 7.1.6 of the 2010 UNIDROIT Principles reads as follows:

approaches to contractual fairness rules. Thus, in order to achieve the requisite levels of coherence and consistency, as well as simplification, it could be more appropriate to consolidate separate pieces of legislation in one single new measure to ensure that all matters, which should be, treated the same are subject to one set of legal rules.

Consequently, this approach to global justice may facilitate the correction of the oppression many consumers face in the world. This, however, seems an unattainable goal in view of the disparity between countries, the UK withdrawal from the EU and that lack of cooperation. It remains but a dream. Commentators note that pre-existing different controlling measures for unfair contract terms amongst Member States justified Community intervention for the establishment of internal market.⁴⁰ It has been observed that the attempt to create harmony amongst the various countries have magnified the ambiguities and inconsistencies. At the centre of this divergence is the need to conform to the Directive.

To improve on the apparent inconsistencies from various national jurisdictions the European Union formulated the Treaty of Lisbon, which amends the Treaty on European Union and the Treaty establishing the European Community.⁴¹ The Lisbon Treaty started as a constitutional project at the end of 2001⁴² and was followed by the European Convention, which drafted the Treaty establishing a Constitution for Europe. It is part of a harmonization project in the European Union after two negative results on the Constitutional Treaty. The Treaty was signed at the European Council of Lisbon and has been ratified by all Member States.⁴³

The Treaty of Lisbon is lauded for its role to clarify the powers of the Union. It distinguishes three type of competences: exclusive competence, where the Union alone can legislate, and Member States only implement; shared competence, where the Member States can legislate and adopt legally binding measures if the Union has not done so; and supporting competence, where the EU adopts measures to support and complement Member States policies. Union

“Exemption clauses—a clause which limits or excludes one’s party liability for non-performance or which permits one party to render performance substantially different from what the party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.”

⁴⁰ In 1976, the Federal Republic of Germany adopted a statute on unfair contract terms; in 1977, the UK endorsed the Unfair Contract Terms Act (UCTA) 1977 and France followed with legislation in 1978. The dates are important to show the marked difference in years in which South Africa responded to effect consumer legislation.

⁴¹ OJC 306, 17.12.2007 which became effective on 1 December 2009.

⁴² European Council Declaration on the future of the European Union, or Laeken Declaration.

⁴³ Signed on 13 December 2007. The Treaty does not contain articles enshrining the supremacy of Union law over national legislation, but a declaration was attached to the Treaty (Declaration No.17).

competencies can now be handed back to the Member States in the course of a treaty revision.

The Treaty of Lisbon subordinates every Member States to its jurisdiction and provides procedure to be followed by members wishing to withdraw from the European Union in accordance with their constitutional requirements.⁴⁴ Article 50 of The Functioning of the Union (TEU) was invoked for Britain exit (Brexit). The negotiation to exit the Union by Member States is concluded in accordance with Article 218 (3) of TEU. The Treaty of Lisbon ceases to apply immediately to the Member States from the entry of negotiations to exit and failure which it can be considered after two years notice to the European Council.

The Lisbon Treaty formally recognizes the European Council as an EU institution, responsible for providing the Union with the “impetus necessary for its development” and for defining its “general political directions and priorities”. With the Treaty of Lisbon in force, the European Parliament is able to propose amendments to the Treaties, as Member State government or the Commission. Much significant changes brought by the Treaty of Lisbon are encapsulated in Article 6 TEU⁴⁵ which reads:

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competencies of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

⁴⁴ See Article 50. Under this Article Member States would notify the European Council of its intention to exit the Union and a withdrawal agreement would be negotiated between the Member States and the Union.

⁴⁵ The Treaty of European Union, signed at Maastricht, 7 February 1992 (Consolidated version in Official Journal C 115, 9.5.2008, 13)

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

It is argued the recent developments to enhance the application of the Charter can be discerned in light of the criticism that has been raised against the EU for an inconsistent and incoherent approach to fundamental rights protection.⁴⁶ The Charter does not differentiate which of its provisions are rights, which are freedoms and which are principles. Commentators decried the fact that the language used and Explanation in this regard was unhelpful and that the distinctions between the three different categories were not clear. For instance, “freedoms” whilst expressed separately in the preamble, in practice they fall under either “rights” or “principles”.

It transpires from the construction of this Article that while the EU has not metamorphosed into a proper “human rights organisation” steps have been taken in the Treaty to highlight the EU's commitment to fundamental rights protection.⁴⁷ This exemplified by the obligation of the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR/the Convention). Article 6 TEU brings about changes for the Member States. The ECHR, for example, covers both “human rights and fundamental freedoms” and lists a number of essentially rights which can be enforced before the European Court of Human Rights in Strasbourg.

By turning the Charter of Fundamental Rights⁴⁸ into a legally binding instrument, Article 6 TEU obliges also the Member States to respect the provisions of the Charter.⁴⁹ It is enforced through various references to it by the European courts.⁵⁰ In a 2006 judgment, the European

⁴⁶ For the general criticism of the system of human rights protection in the EC, see Turner “Human rights protection in the European Community: Resolving conflict and overlap between the European Court of Justice and the European Court of Human Rights” *European Public Law* 5 (3) (1999).

⁴⁷ Mathisen K “The impact of the Lisbon Treaty, in particular Article 6 TEU, on Member States' obligations with respect to the protection of fundamental rights” Working Paper Series (2010) 5.

⁴⁸ Charter of Fundamental rights of the European Union proclaimed on 7 December 2000 (Official Journal C 364, 18.12.2000, 1).

⁴⁹ Article 51(1) of the Charter.

⁵⁰ See, for example, the judgment of the Court of Justice of 3 May 2007 in Case C-303/305 *Advocate voor de Wereld VZW v Leden van de Ministerraad*; opinion of the Advocate General of 14 December 2006 in Case C-305/05 *Ordre des barreaux francophones et germanophones and others v Conseil des Ministres* (in particular para [48]).

Court of Justice (ECJ) referred to the Charter along with other sources of international law as authorities to ascertain the extent of the right to family life, emphasizing the Community legislature (in this case, the Council and the Parliament) had acknowledged the importance of the Charter by referring to it in the recitals of the Directive in question.⁵¹

5.2.2 The Directive on Unfair Terms in Consumer Contracts

The European Union adopted the Directive 93/13/EEC on Unfair Terms in Consumer Contracts⁵² on 5 April 1993. As the Directive 93/13 carries significant weight in the interpretation of contracts in Europe at continental level it is also viewed as a necessary element in the creation of the internal market through the “1992” programme.⁵³ This is the master framework document to protect consumers within the European Union against unfair contractual terms.

Practically, the Directive is the legislative form adopted to implement the Union’s control of unfair terms in consumer contract. It is the first major European intervention into the heartland of domestic contract law.⁵⁴ It sought to close the disparities between Member State laws in relation to the regulation of contractual terms between sellers of goods or suppliers of services and the consumers of such goods and services.

It applies to all terms contained in contract with consumers, which have not been ‘individually negotiated’, and introduces a requirement of fairness against which such terms are to be tested. Consider its application in contrast to section 52(2) (e) of the CPA, that almost places them on the same level for the scrutiny test.⁵⁵

To its advantage, the Directive recognizes that most consumers know their own national laws governing consumer contracts vis-a-viz their neighbours or Member States. Its deficiency is that Member States implement a Directive’s provisions through their own national legislative or administrative procedures. Therefore, the harmonization process was welcome to

⁵¹ See the judgment of the Court of Justice in Case C-540/03 *Parliament v Council* [2006] ECR I-5769 para [38].

⁵² (OJ 1993 L95/29).

⁵³ Under that programme, Member States’ internal frontiers relating to goods, persons, services and capital have been removed with the purpose of stimulating and increasing trade between these countries.

⁵⁴ Mc Kendrick *E Contract Law, Text, Cases and Materials* 5th ed. (2012) 461.

⁵⁵ The court in instances concerning a transaction or agreement between a supplier and consumer must consider whether there was negotiation between the parties, and if so, the extent of that negotiation.

encourage intra-Member States trade or transactions to deter phobia of foreign legislation. After its inception for a period of over 20-years, the EU adopted a number of Directives on aspects of consumer law, particularly consumer contract law.

One of the rationale behind the “European law of contract” for various reasons is to eliminate competitive advantages derived from differing legal systems and thus to level the playing field from different Member States to compete on a more equal footing.⁵⁶ Another one is to establish bonds between the various States by emphasizing what their legal system have in common.⁵⁷ Many lawyers in the European continent had aimed at harmonisation or unification of the private law of Member States. Furthermore, parties may decide to incorporate the Principles into their agreements.⁵⁸

In its preamble, the Directive states that for the purpose of effective consumer protection, the Directive’s rules on unfair terms should apply to all contracts concluded between sellers or suppliers and consumers.⁵⁹ The Directive provides an important element of consumer protection on an EU-wide basis; stimulates inter-Member State consumer transactions by increasing consumer confidence; assist sellers and suppliers in their task of selling goods and supplying services throughout the EU; and finally increases competition, thereby increasing choice for the European Union’s consumers.⁶⁰

The Directive established a universal test for fairness and also created a disincentive to prevent terms that were not individually negotiated, but came from standard terms and which operated as oppressive and unfair to the consumer. The enquiry in deciding whether a contractual term is fair or unfair first determines whether it has been individually negotiated or not. The Directive covers only contractual terms, which have not been individually negotiated based on the presupposition that non-negotiated terms are impervious to the consumer influence.

An Annexure to the Directive contains a list of 17 clauses, which may be regarded as unfair in accordance with Article 3(3). These clauses can be classified according to the following four criteria:

⁵⁶ Beale H “The Europeanization of Contract Law” in Halson R *Contract Law* (2001)23.

⁵⁷ Ibid.

⁵⁸ Article 1.101(3) (b).

⁵⁹ Art 3 and 4 of the EC Directive.

⁶⁰ Lockett N & Egan M *Unfair Terms in Consumer Agreements: New Rules Explained* (1995) 20.

- (i) terms giving a party the control of the terms of the contract or of the performance of the contract (for example terms which allow the seller or supplier to alter the terms of the contract unilaterally without a valid reason, which is specified in the contract);
- (ii) terms determining the duration of the contract (for example, terms enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice);
- (iii) terms restraining a party to have the same rights as the other (for example, terms making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone);
- (iv) exemption and limitation clauses (for instance, terms excluding or limiting 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).

In sorting out the problems associated with the above contract terms, the Directive formulated its own determinant test. In particular, unfairness, which is canvassed in many provisions of the CPA and the Directive, must be assessed in relation to the time of conclusion of the contract and to all circumstances surrounding the conclusion, including the nature of the goods or the services provided.⁶¹ However, fairness in this aspect does not appertain to the price or remuneration for services offered, but speaks to the substantive terms of the contract as long they are written in plain intelligible language.⁶²

5.2.3 Interpretation and plain language

The judiciary has to apply the law without constraints from the option to make comparisons with international customary law. In some jurisdictions, for instance, a trader who uses an exclusion clause, which is automatically void without pointing out the invalidity of such a clause, is held to be omitting material information. In UK the trader who fails to warn that a

⁶¹ Article 4(1).

⁶² Article 4(2).

clause can be challenged under the Act or the Regulations can too be considered to have omitted material information.⁶³

Naudé concedes it is necessary to qualify any provision on strict interpretation in order to manifest general use challenges.⁶⁴ Strict interpretation must be understood within the context of rigid literal interpretation of terms in a contract. The European Union community recognizes that applying strict interpretation is not favourable to the consumer in general, and opted to endorse interpretation, which is favourable to the consumer where there is doubt.⁶⁵ To the contrary, the provisions of the CPA in section 4(4)⁶⁶ are criticized for their failure to realise the need of wider interpretation in general use challenge does not demonstrate that the legislation is modelled on less litigation.

Probably, this research highlights the need to elevate and cement the emerging interpretation theories, as a balancing matter. Hawthorne further argues, the response of the classical model in the guise of formal equality is a failure and illusory hence the “new learning” is developing models attempting to address the imbalance in order to restore party autonomy, evaporated consensus, and mutual beneficence, in her quest to end the exploitation of the weaker in society.⁶⁷

This method forms part of the new paradigm called “new learning” according to Ramsay.⁶⁸ He describes “new learning” as the growth of decentralised regulation associated with the use of instruments of regulation that harness market factors and incentive to the market project.⁶⁹ Thus, Sachs nexus of the heterogeneous new, which ranges from relational contract theory to the various nuances of consumer protection, acknowledges the inequality of bargaining positions between the contracting parties.

⁶³ Lawson R *Exclusion Clauses and Unfair Contractual Terms* 9th ed. (2008) 116.

⁶⁴ Naudé T “The consumer’s right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective” (2009) 126 *SALJ* 525.

⁶⁵ Article 5.

⁶⁶ “To the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer so that any ambiguity that allows for more than one reasonable interpretation of a part of such document is resolved to the benefit of the consumer.”

⁶⁷ Hawthorne L “The ‘new learning’ and transformation of contract law: Reconciling the rule of law with the constitutional imperatives to social transformation” (2008) 23 *SAPR/PL* 90.

⁶⁸ Ramsay I “Consumer law, regulatory capitalism and the ‘new learning’ in regulation” (2006) *Sydney LR* 9.

⁶⁹ *Ibid.*

Furthermore, the Directive requires Member States to introduce “adequate and effective means” to prevent the use of unfair terms.⁷⁰ It requires no explanation that indemnity clauses for consumers fall under this specific category of terms. In pursuance of this, member states are encouraged to enact provisions to ensure that persons or organizations advocating for the protection of consumer rights can institute action on behalf of consumers that contracts by sellers, suppliers or their associations are unfair. Allowing the introduction of such provisions has revealed the tenuous link between the internal markets and the European Commission (EC) consumer protection policy.⁷¹

Therefore, member States have taken control of some aspects of market transactions in an attempt to re-establish parity in the bargaining powers of the parties by compensatory mechanisms like imposing warranties or prohibiting the inclusion of exemption clauses. They have also conferred “basic rights” to consumers by granting them rights such as health and safety, protection of economic interests, access to justice. Furthermore, they have revised classic principles such as *caveat emptor* and freedom of contract to favour the vulnerable or ignorant party to a transaction.⁷² With the brief summary given of the Directive it is not difficult to see the similarities between it and the CPA.

The Directive also introduces the plain language principle in Article 5, as part of the transparency requirements for consumers. “Plain and intelligible” are not tautological in that a term is in “plain” language when its unsurprising, it cannot be misunderstood and it does not give rise to any doubts whereas “intelligibility” encompasses both the style used and how a contract term is actually printed on paper.⁷³ The transparency principle is internalized and rooted in Community Law, both in secondary legislation and in the case law of the ECJ.⁷⁴

Language is a constitutional and human rights issue considering its applicability in criminal and civil trials in South Africa and worldwide. Similarly, to the Directive section 22 of the CPA have incorporated this requirement, as part of the transparency requirements.⁷⁵ It means that those rare consumers who do pay particular attention to the detail of the terms of the

⁷⁰ Article 7.

⁷¹ *Nebbia* 12.

⁷² Reich N “Diverse approaches to consumer protection philosophy” (1992) *Journal of Consumer Policy* 261.

⁷³ See Herrington M & Brothers S “Unfair Terms and Consumer Contract Regulations” (1995) *International Insurance Law Review* 263.

⁷⁴ *Nebbia* 136.

⁷⁵ S 22 read with s 49(3), 50 and 52 (2) (g). See also reg 7 (1) of the UK Unfair Terms Regulation.

contract would be empowered to bargain more effectively against the less careful consumers.⁷⁶

5.2.4 Enforcement of the Unfair Terms in Consumer Contracts Directive

The Directive is aimed at contracts of adhesion, *viz* “take it or leave it” contracts. It treats consumers as presumptively weaker parties and therefore fit for protection from abuses by stronger contracting parties. This is an objective, which must throughout guide the interpretation of the Directive as well as the implementing regulations. If contracting parties were able to avoid the application of the Directive and regulations by exclusionary stipulations, the regulatory scheme would be ineffective. The conclusion that the Directive and regulations are mandatory is inescapable.

According to Article 3(1), application of the Directive is limited to terms, which have not been individually negotiated. This means that the control of the Directive is triggered whenever one party has drafted a contract or some of its terms unilateral. The Directive states that although part of a term or an entire term may be individually negotiated this does not preclude the coverage of the Directive; what matters most is an overall assessment of the contract if it appears to be a standard form contract.

The Directive made provision for a dual system of *ex casu* challenges and pre-emptive or collective challenges by appropriate bodies: see Article 7. In many jurisdictions case law the question of identification of the *essentialia* of the contract had acquired fundamental importance, as the technique through which the courts controlled the effects of potentially unfair terms.⁷⁷ Since liability from the breach of such terms could not be excluded discretionary, it actuated the courts to define those terms so that consumers were adequately protected. Therefore, the divergent and contradictory views proved to be an unstable ground for the interpretation of the Regulations.⁷⁸

⁷⁶ Naudé T “Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective” 127(2010) *SALJ* 541.

⁷⁷ *Nebbia* 125

⁷⁸ See Brownsword R & Howells GG “The Implementation of the EC Directive on Unfair Terms in Consumer Contracts: Some Unresolved Questions” (1995) *JBL* 246.

English and Scottish Law Commissions in their Reports⁷⁹ used a reasonable expectation criterion as the nub for exclusion of core terms from review. The Law Commission proposed to determine the “subject matter” from the influence of section 3(2) (b) (i) UCTA.⁸⁰ Under this provision, terms, which allow business to render a performance, which is substantially different from the one that was reasonably expected, are subject to the reasonableness test. The “reasonable expectation” of the customer refers to what is not written in the contract, but to the other party’s reasonable expectation derived from all the circumstances, including the way in which the contract was presented to him.⁸¹

It means the definition of the performance must be substantially be the same as what the consumer reasonably expected in accordance with the definition. Probably, this is also the premise that supports the doctrine against fundamental breach. Note also, that the prices payable in the circumstances are substantially the same as those the consumer expected and calculated in a way that the consumer reasonably expected.⁸² Drawing analogy from these countries would have been advantageous for the South African courts to take into account the difference between negotiated, non-negotiated and core terms in considering the fairness of a term.

The “core terms” exclusion is contained in article 34(2) of the Italian Consumer Code and in Regulation 6(2) of the repealed 1999 Regulations. There is scant authority for implementation from Italy law. In many jurisdictions including Italian law once parties have agreed upon what type of contract they intend to conclude, the law automatically attaches to it many primary and ancillary obligations and liabilities. Commentators noted that it is difficult to justify a distinction between principal and subsidiary liabilities, as all of them form an integral part of the bargain.⁸³

Taking a cue from the Directive, the CPA also allows the consumer to challenge specifically negotiated terms, including core terms relating to the contract price or description of performance of the main subject matter. This applies to contracts with individual consumers

⁷⁹ Law Commission and Scottish Law Commission, *Unfair Terms in Contracts Law Com Report* no 292 Cm 6464 (2005) para 4.53

⁸⁰ Law Commission Report no.292, Cm 6464.

⁸¹ *Nebbia* 130.

⁸² S4 (2)-(3).

⁸³ De Moor “Common and civil law conceptions of contract and a European Law of Contract: the case of the Directive on unfair terms in consumer contracts” (1995) *European Review of Private Law* 267.

who are natural persons acting for purposes wholly or partially unrelated to their business profession, but to the Business to Consumer (B2C) contracts covered by the Act.⁸⁴ Naudé notes that some countries, which copied the EC Unfair Terms Directive, also limit protection in B2C contracts to non-negotiated, non-core terms, which are not, moreover, identical to the residual rules, which would apply in the absence of agreement on a matter.⁸⁵

By contrast, the similarities of the CPA and the Directive become tangible in the review of agreements for unfairness. Regulation 44 of the CPA contains a list of contract terms, which are deemed reasonable, and fair, which the Directive has in the Annexure to Article 3(3). Interestingly, a tricky situation may arise from this strict categorization where a contract contains both terms, which have been individually negotiated, and those, which are not.

Sometimes even with the particular provisions difficulties remain in interpreting the Directive where the seller or supplier offers an alternative form from a pool of standard terms.⁸⁶ That can be a ploy by unscrupulous supplier or seller aimed at exploiting the consumer. For instance, the Directive shifts the evidentiary burden from the supplier or seller to the consumer, in that he who alleges that a term has not been individually negotiated must prove this on a balance of probabilities. Commentators point out that this is an opposite of the traditional practice in EU Member States where a party making an assertion is required to discharge the burden of proof.

The thrust of the Directive on non-negotiated terms is: (a) whether it is contrary to good faith; (b) causes a significant imbalance in the parties' rights and obligations arising out of the contract, and (c) where that imbalance is to the detriment of the consumer.⁸⁷ Apparently, these factors are carefully crafted to develop a more personal subjective relationship between the individual contractant against business-to-business contracts. In the latter, there is detachment, indifference and objectivity element because they can protect themselves

⁸⁴ S 5(2) of the CPA explains that B2B contracts are agreements for the supply of goods and services to small juristic persons, defined with reference to a maximum turnover or asset value to be prescribed by the Minister, or to any business which is a non-juristic person (partnerships, trusts and corporate bodies are regarded as juristic persons for the purpose of the Act.)

⁸⁵ Naudé "The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 *SALJ* 531.

⁸⁶ Lockett & Egan 22.

⁸⁷ See also s 5(1) Unfair Terms in Consumer Contracts Regulations 1999.

contrary to the spirit of the CPA that seeks to protect the marginalized individual consumer.⁸⁸ In UK, this section lies at the heart of the Regulations.⁸⁹

On the first point (a) above, critics of the Directive point out that the meaning of “good faith” as defined here is quite different from the normal one attached in Member States.⁹⁰ It must be interpreted from a European perspective. Any attempt to rely on national legislation to define good faith for the purpose of unfairness is improper and fluctuates amongst the Member States. For instance in the United Kingdom, an act is considered to have been done in good faith if done honestly whether it is done negligently or not.⁹¹ This is quite different from the extensive definition provided in the preamble of the Directive and expected to be applicable to Member States as provided:

“Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular the sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; *whereas this constitute the requirement of good faith*; whereas in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; *whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interest he has taken into account.*”

Despite the minute detail provided above the Directive manifests a lack of coherence because several potential unfair terms indicated in the Annex could not be affected by the question on whether the seller or supplier acted honestly or dishonestly.⁹² Owing to these observed differences the matters identified do not constitute an exhaustive list of considerations in determining whether the requirement of good faith has been satisfied and that other factors may be considered where appropriate.

Mainly, the transposition of the Directive evoked a series of problems amongst member States partly attributable to unfamiliar rules and concepts, such as “good faith”, that are alien

⁸⁸ S40 (2).

⁸⁹ McKendrick 461.

⁹⁰ Lockett & Egan 22.

⁹¹ S 61 (3) of Sale of Goods Act 1979 and s 90 of the Bills of Exchange Act 1882.

⁹² Lockett & Egan 23.

to the common law system and therefore causing uncertainty as to its meaning, and also due to an inconsistent legislative technique in its transposition.

Secondly, amongst the test of unfairness in the Directive is (b) a consideration of whether the contractual term in issue causes a significant imbalance in the parties' rights and obligations. Although the term "significant imbalance" is not defined in the Directive, circumstance would indicate that cases involving minor detriment to the consumer would not be construed as unfair. It transpires that the precise meaning of "significant imbalance" is elusive. On the other hand, the Regulations state that there must have been a "significant imbalance" in the rights and obligations of the parties of the contract, and that imbalance must be to the detriment of the consumer.⁹³

Nebbia describing the fairness test submits that "significant imbalance" involves a lack of symmetry in parties' rights and obligations or that the seller's or supplier's rights or remedies are excessive and disproportionate. On the contrary, "balance" means that each risk placed on the consumer should be weighed against one placed on the supplier/seller.⁹⁴ Thus, it could be suggested that a term causes a "significant imbalance" when it involves a risk that not only one customer would be reluctant to take, but so would be many customers who are in the same situation.

Kitchin J in *Office of Fair Trading v Ashbourne Management Services*⁹⁵ attempted to define it purposively on a broader scale. He found that notice provisions in certain versions of the Ashbourne standard contract, which required members to notify Ashbourne of cancellations instead of notifying the gym, were unfair. An average consumer who wished to cancel was likely to give notice directly to their gym and therefore end up with an ineffective cancellation, remaining liable to pay membership fees. He found on the facts of the present case that the minimum terms in 10 of the 13 agreements (regardless of length) and a minimum of more than 12 months' notice in any of the agreements created a significant imbalance in the parties' respective rights and were contrary to good faith.

⁹³ Reg 5(1). The Unfair Terms in Consumer Contracts Regulations 1999 implement an EC Directive on Unfair Terms in Consumer Contracts into English law. The aim of the Regulations is to regulate unfair terms than unfair contracts.

⁹⁴ Nebbia 150.

⁹⁵ [2011] EWHC 1237 (Ch), [2011] All ER (D) 276 May [174].

Evidently, the doctrines deployed to counter enforcement of unfair transactions rarely refer to fairness as a serious consideration, but are “used instrumentally to achieve the outcome of invalidating the contract or noxious term”.⁹⁶ Fairness in this context appears, as a subsidiary element of the main issue thrust to the fore, which is the contract and gains application through indirect means. *Nebbia* argues that courts will stress any elements of procedural impropriety that it can discover such as deception, manipulation or unfair surprise rather than latching straight to substantive unfairness.⁹⁷

The Directive is not altogether a harmonious text. It reflects the pragmatic compromises, which were necessary to arrive at particular solutions between Member States with divergent legal systems. However, despite some inelegance and untidiness in the text, the general principle that the construction must be adopted which promotes the effectiveness and practical value of the system ought to overcome difficulties. In addition, the concepts of the Directive must be given autonomous meanings so that there will be uniform application of the Directive so far as is possible.

5.2.5 Circumvention of unfair terms

Largely the Regulations use the copy out technique or virtually use the same language as the Directive itself. This approach justifies the argument that exonerates Member States from full liability for failure to implement the Directive properly.⁹⁸ It is hard for the jury to delineate the lines when the Regulations seem to be an item with the Directive. The Directive provides that “adequate and effective” means to prevent the continued use of unfair terms concluded with consumers include:

“provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms”.⁹⁹

This Article forms the backbone of consumer organization activism, as it leaves the choice to implement it on the member States. Community law aims to accommodate the existing

⁹⁶ Collins H *The Law of Contract* (1997) 254.

⁹⁷ *Nebbia* 28.

⁹⁸ *Ibid.*

⁹⁹ Article 7(2) of the EC Directive on Unfair Terms in Consumer Contracts.

systems already developed prior to the Directive becoming law in January 1995. In compliance to the Directive, all member States were required to provide for collective court procedures, by which the use or recommendation of unfair terms in legal agreements shall be prohibited. In a number of member States, the emphasis is on administrative proceedings,¹⁰⁰ and in almost all member States, it is possible to pursue collective court action against unfair clauses.

Directive 98/27 supplements this rule on injunctions for the protection of consumer interests.¹⁰¹ The European Union uses the Injunctions Directive of 1998 and the Regulation on Consumer Protection Co-operation of 2004¹⁰² to harmonise injunction procedures, because they allow qualified bodies from one country to seek an injunction in another country where an infringement occurred. The Commission publishes a list of qualified bodies, which may seek injunctions under the Directive, provided by the various member States.¹⁰³ The Directive tasks these bodies to seek consultation with the business/supplier to seek an end of the activity.

If that fails, qualified bodies may also seek measures aimed at elimination the effects of such infringements or deterring a repetition or continuation such as publication of the court decision.¹⁰⁴ All Member States provide for collective court procedures, by which the use or recommendation of unfair terms in legal matters shall be prohibited. For instance, France and Slovakia enacted additional provisions for criminal proceedings in order to prohibit unfair terms. Apparently, such kind of proceedings practical play a subordinate role, so it does not require detailed examination.

This approach has not been free of the hurdles associated with criminal trials; hence, there has been a suggestion of a re-evaluation and substitution of a more effective regime. Initiation of criminal proceedings is time-consuming and the burden of proof is that of criminal cases-beyond reasonable doubt despite being a private law transaction.

¹⁰⁰ See Consumer Law Compendium 422 accessed at www.eu-consumerlaw.org/consumerstudy-part2c-en-pdf on 15 September 2016.

¹⁰¹ The purpose of this Directive is to approximate the laws, regulations and administrative provisions of member States relating to injunction actions referred to in Article 2 aimed at protection of collective interests of consumers included in the Directive listed in the Annex, with a view of ensuring smooth functioning of the internal market

¹⁰² EC 2006/2004.

¹⁰³ As required by Article 3 and 4 of the Injunction directive.

¹⁰⁴ Article 2(1) (b).

Administrative fines are recommended rather than criminal proceedings that are protracted and where the standard of proof cumbersome- proving beyond reasonable doubt.¹⁰⁵

The issue of consumer activism in Europe has taken significant stride forward by the changes brought about by the Regulation on Consumer Protection Co-operation in addition to the Directive. It obliges each member States to enforce the EU law in its state on behalf of all European consumers, and requires these member States to designate a public enforcement authority, which would be entitled to alert its counterparts for assistance in investigating possible breaches of European Consumer Law.¹⁰⁶ In addition, the Regulation provides that any requested body may tackle the issues by using all necessary enforcement measures.¹⁰⁷

Questions may arise in South Africa, as to which of the agencies of State may undertake hearing such complaints without the involvement of the consumer, as is the case with the Directive. Naudé puts this differently by asking which of the adjudicatory bodies recognized in the CPA (that is the National Consumer Tribunal, provincial consumer courts and ordinary courts) have the powers to declare contract terms unfair and to make orders against suppliers.¹⁰⁸ This question is triggered by the fact that many legal systems in Europe recognize the need for an effective preventative or proactive control paradigm in respect of unfair terms in consumer contracts.¹⁰⁹

Commentators have noted that it is unlikely that the CPA will generate as much litigation as its sister Act, the National Credit Act¹¹⁰ (NCA), as that litigation has mostly been driven by deep-pocket credit providers enforcing their credit agreements against consumers. The trammelled litigation in the CPA is because it's mostly consumers trying to enforce their rights against suppliers and that is unlikely. Their first option is section 69(d) which provides that a consumer may only approach an ordinary court if he or she has exhausted all other remedies available under national legislation.

¹⁰⁵ *Consumer Compendium Law* 422-423.

¹⁰⁶ Article 4.

¹⁰⁷ Article 8(3) read with Article 4(2).

¹⁰⁸ Naudé 516.

¹⁰⁹ Naudé above cites Sarah Andrews Organization for Economic Cooperation and Development Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, 19-20 April 2005, Washington DC—Background Report available at <http://www.oecd.org/dataoecd/59/21/34699496.pdf>. Accessed 23 August 2016.

¹¹⁰ 34 of 2005. There are already well over 100 reported cases and as many academic articles on the NCA in its short history.

Essentially, the prohibitive legal cost to consumers in developing countries becomes the motivation for such a preventative control paradigm. With a large number of poor, vulnerable consumers who cannot afford to seek redress from the courts at all and who are less likely to be aware of their right, more affordable processes before special tribunals must be created.¹¹¹ Even so, they might remain beyond the poor consumer's reach. According to Naudé, this measure gives credence to the procedural enforcement mechanisms in unfair contract legislation that warrants such a preventative control, which is not dependant on judicial control over a particular individual contract.¹¹²

Most consumers, in general, are averse to litigate as a formal legal process of redress and prefer to resolve their matters informal. The necessity of litigation by consumers will also signify a failure of the regulatory and extra-judicial enforcement measures contained in the CPA.¹¹³ Despite the problems experienced by National Consumer Commission at the embryonic stage of its development surrounding its first Commissioner there have been indications too that the resourcing of the National Consumer Commission has been under pressure.¹¹⁴

In some of the member States, deals on contractual conditions have been struck through negotiations and guidelines, as part of the administrative control of unfair terms. This procedure is characteristic of Denmark, Finland, Sweden and the United Kingdom.¹¹⁵ Of these countries, only the UK position is discussed in detail below. In the Nordic States,¹¹⁶ the Consumer Ombudsman shall endeavour by negotiation to induce persons carrying on trade or business to act in accordance with the principles of good practices. This may be done through issuing of business guidelines within specified areas based on negotiations within the relevant business and consumer organizations.

¹¹¹ Naudé (2010) 516-517.

¹¹² Ibid.

¹¹³ Naudé T & Eiselen S *Commentary on the Consumer Protection Act 2014* Introduction-20.

¹¹⁴ See the various reports by the National Consumer Commission to the Parliamentary Portfolio Committee on Trade and Industry, which highlights the problems with resourcing of the Commission, such as *National Consumer Commission progress on the work done since inception in April 2011, minutes of a meeting of the Parliamentary Portfolio Committee of 6.09.2011*, pmg .org.za/print/28332 (accessed 2 November 2012). See further Naudé 2012 2012 *Journal of European Consumer and Market Law* 243 who cites a number of these reports.

¹¹⁵ *Consumer Law Compendium* 425.

¹¹⁶ Denmark, Finland, Sweden.

In South Africa, such practices would have to be dealt primarily by the National Consumer Commission (NCC). Challenges would be there with capacity in the human resource and measures of efficiency on its part. According to its website, the NCC is the chief regulator of consumer-business interaction in South Africa, and was created to ensure economic welfare of consumers. The NCC is established by section 85 of the CPA and it has jurisdiction throughout the Republic. In short, it is tasked with establishing credible institutions for enforcement and implementation of the relevant regulatory framework in the country.

When the NCC does this it would be honouring the objectives of the CPA. Amongst its objectives is to promote a fair, accessible and sustainable marketplace for consumer products and services, establish norms and standards relating to consumer protection, to provide for improved standards of consumer information, prohibit unfair marketing and business practices, promote responsible consumer behaviour, and to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements.

The NCC is legal bound to register and assess complaints; investigates alleged misconduct by businesses; refers individual complaints to Alternate Dispute Resolution (ADR) agencies (i.e., Provincial Consumer Affairs Authorities and relevant ombudsman schemes) for resolution, and represents consumers in the Consumer Tribunal amongst other things. For effectiveness the NCC is advised to take a cue from the English system, for instance, when the OFT receives a complaint about a particular term in a contract it then takes a holistic review of every term in the contract that has the potential to be unfair.¹¹⁷ This helps cut down the work of bringing cases one by one.

However, at some stage of its enforcement actions the Commission overstepped its powers in issuing compliance notices not provided for in the CPA prematurely.¹¹⁸ Commentators hope that these teething problems in the Commission would disappear over time with more resources being made available and better training for the staff of the Commission. According

¹¹⁷ Naudé 2010 8.5-8.8.

¹¹⁸ See, for example, *Mobile Telephone Networks (Pty) Ltd v The National Consumer Commission*, NCT/2738/2011/101(1) (P) of 19 March 2012; *Multichoice Africa (Pty) Ltd v The National Consumer Commission*, NCT /3220/2011/101(1) (a) (P) of 23 March 2012.

to Ramsay the success of consumer protection laws is greatly enhanced by effective enforcement by regulatory authorities.¹¹⁹

Beside the individual complaints, the Office of Fair Trading (OFT) investigates contract terms across whole sectors industry, negotiating fairer terms within these sectors, as well as issuing guidance notices on unfair terms in particular sectors.¹²⁰ According to Bright, discussions with trade associations are not always a suitable response to complaints, yet may be pro-active when addressed by the OFT.¹²¹ It is better than litigation and cost-effective means to deal with business in ameliorating consumers' plight concerning unfair terms.

It is argued that such sectoral action promotes the effective removal of unfair terms and is beneficial to these businesses in those sectors.¹²² Actually, the OFT's main task is to undertake reforms to standard form contracts, as developed across the different sectors, to conform to fairness in terms of the Regulations. It means that all similar unfair terms are removed across the board so that no individual company can gain an unfair competitive advantage through the continued use of an unfair term. Therefore, in this approach a business is then less likely to face repeated challenges to its terms.¹²³

Hence in those countries that prior to the transposition of Directive 93/13 did not have a comparable system for monitoring contract terms,¹²⁴ now assumed that their traders have incurred additional burdens and costs as the result of the implementation of the Directive. Their business dealings may have to be cancelled because of imposing a term that is considered unfair under the current legislation, but which was not regulated under the previous legal system.¹²⁵ However, for other countries it is stated that traders do not incur additional burdens because of the historical lack of awareness among the business community of the applicable provisions and a lack of pro-active enforcement.

¹¹⁹Ramsay I *Consumer Law and Policy 3rd ed.* (2012) 125-128.

¹²⁰Naudé 2010 8.5-8.8. For example, the OFT approached all seven of the major mobile phone companies who thereupon agreed major improvements in their contracts in 1977, which included reductions in notice periods to a maximum period of one month (Vickers 175). Other sectors, which have been focused upon, include the home improvement industry, vehicle rental, and package holidays and, most recently, the Director General of Fair Trading has announced that he is investigating conditions of airline use.

¹²¹Bright "Winning the battle against unfair contract terms" (2000) 20 *Legal Studies* 333.

¹²²Ibid.

¹²³Ibid.

¹²⁴Especially in the new member States.

¹²⁵*Consumer Law Compendium* 435.

In some of the “old” member States, and more so in the Nordic States and in Austria, Germany and Portugal, it has been stressed that the Directive has not led to any noticeable increase in the level of consumer protection. In these countries, far reaching legislation was already in place prior to transposition of the Directive. The (minimal) changes brought about by the Directives primarily consisted of inserting provisions where required in order to avoid possible gaps.¹²⁶

In order to overcome barriers to the integration of European markets and to promote fair and vigorous competition in national consumer markets EU consumers’ protection has grown exponential.¹²⁷ Despite promoting the goal of harmonization of the laws across Europe, EU consumer protection law also strives to provide legal certainty to help drive forward the development of ecommerce.¹²⁸ Negatively, the EU online consumer contracts forces all merchants to internalize high compliance costs and constrains the range of possible innovation.

5.3 English law

5.3.1 Structure of English consumer laws

In order to appreciate the complexity of UK consumer law, it is important to provide an overview of its various components. Now UK consumer law displays a strange amalgam of domestic law and European Union law.¹²⁹ The European Union has adopted a string of Directives dealing directly or indirectly with consumer law, which even the United Kingdom was not immune to. These Directives took effect through national legislation adopted for that purpose amongst Member States, as discussed above. In addition to these, there is a small body of case law by the European Court of Justice (CJEU) on the interpretation of these Directives that must also be taken into consideration.¹³⁰ Some of these Regulations are directly applicable to these areas of private law.

¹²⁶ *Consumer Law Compendium* 433.

¹²⁷ Winn & Webber “The impact of EU Unfair Contract Terms Law on U.S Business to Consumer internet merchants” (62) 2006 *The Business Lawyer* 6.

¹²⁸ See Recital to EC Directive 00/31, 2000 OJL 178 available at http://europa.eu-lex/pri/en/oj/dat/2000/l_17820000717en00010016.pdf

¹²⁹ Gullifer & Vogenauer 71.

¹³⁰ *Ibid.*

For practical purposes, in private law, such as contract and consumer law there are cases and legislation applicable to all the circumstances. This can be classified as “general private law” law because it is not confined to specific circumstances such as consumer transactions.¹³¹ Take, for instance, in the field of tort law or delict general principles of negligence liability can be relied on by consumers in certain circumstances to seek redress, if they have suffered an injury.¹³² As contract law governs the formation performance and discharge of all contracts, there is no distinction between consumer and non-consumer contracts in the case law. Later legislation (CRA) is particular in their provisions to specify about consumer contracts.

On the contrary the UK government’s official policy tries to embrace both protection and innovation.¹³³ The UK first implemented the general UCTA 1977. It applies to Business-to-business (B2B) contracts, and in limited circumstances, to Person-to-Person (P2P) contracts. It covers a narrow range of terms because it is designed to control exclusion clauses for negligence or breach of contract and to limit or prevent the exclusion of liability for death or personal injury.

The laws that were enacted in the field of goods ensured that the goods were in “conformity with the contract”. More importantly, the Sale and Supply of Goods to Consumer Regulations 2002, which implement the Consumer Sales Directive,¹³⁴ amended existing legislation in this area and most notably the Sale of Goods Act 1979.¹³⁵ It also introduced the performance-focused remedies in Article 3 of the Directive. Instead of limiting consumer remedies to those in Part 5A of the Act, it was decided then to retain the existing right to reject goods and terminate the contract, which meant that contract remedies became incredibly complex.¹³⁶ This was noted by the Law Commission in its review to reform consumer law.¹³⁷

¹³¹ Gullifer & Vogenauer 71.

¹³² *Donoghue v Stevenson* [1932] AC 562.

¹³³ “[The government] want(s) a consumer regime that is fit for purpose for the 21st Century. A regime that will empower and protect consumers, support open competitive and innovative markets that is as fair to business as it is to consumers and that has the minimum regulation necessary to achieve these goals”. See <http://www.dti.gov.uk/consumers/policy/index.html>.

¹³⁴ 99/44/EC.

¹³⁵ See Bradgate R & Twigg-Flesner C *Blackstone’s Guide to Consumer Sales and Associated Guarantees* (2003) (Oxford University Press)

¹³⁶ Gullifer & Vogenauer 72.

¹³⁷ Law Commission, *Consumer Remedies for Faulty Goods* (Law Com No 317, 2009).

The process of contract formation for door-step and distance selling contracts is regulated by two separate statutory instruments¹³⁸ implementing the corresponding EU Directives, although both of them are replaced in the new regulations which took effect in June 2014. The Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013(Regulations) cover on-premises, off-premises and distance trader to consumer contracts subject to certain exceptions.¹³⁹ The superseded legislation will still be relevant in respect of any contract concluded prior to the Regulations coming into force.

In *Robertson v Swift*¹⁴⁰ the Supreme Court had to deal with the Cancellation of Contracts made in Consumer's Home or Place of Work etc Regulations 2008 (the Regulations) which in turn implemented the Council Directive (85/577/EEC). It is important for the understanding and evaluation on how courts approach statutory interpretation which implements European Directive. *In casu*, the trader frustrated right to cancel of the consumer at any time prior to the cancellation period. The trader did not give the notice to the consumer after they agreed on the price with the appellant in a contract for furniture removal. The appellant had cancelled after paying deposit and refused to pay the cancellation charges relying on the Regulations and further claimed his deposit. The court found that the Regulations applied in these circumstances and Respondent could enforce the contract. Further held the appellant had not been entitled to cancel the contract because he had not been given the required notice of his right to cancel. The contract remained alive and he did not recover his deposit. Member States are required to ensure that, where the notice is not given appropriate measures are put in place to protect consumers. The Court of Appeal had been incorrect to find that the appellant was not entitled to cancel the contract until he had been given appropriate notice of right to cancel. Article 4(1) requires traders to give consumers written notice of their right to cancel the contract within a period stipulated in the notice. It was further held, a national court must interpret domestic legislation, so far as possible, in the light of the wording and purpose of the Directive which it seeks to implement.

¹³⁸ Cancellation of Contracts Made in a Consumer's Home or Place of Work Regulations 2008, SI 2008/1816 and Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, respectively.

¹³⁹ This includes auctions (although there are no cancellation rights in relation to public auctions) and contracts for social services and healthcare (which are not covered by the Consumer Rights Directive (CRD)). They implement the bulk of the CRD and will supersede the Consumer Protection (Distance Selling) Regulations 2000 and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc., Regulations 2008.

¹⁴⁰ [2014]UKSC14.

In the area of tort law, Part 1 of the Consumer Protection Act 1985 implements the EU Directive on Product Liability¹⁴¹ and introduces strict liability systems for circumstances where defective products cause personal injury or damage. Similarly, in the new CRA this provision has been retained in somewhat modified form. There is no exclusion or limitation for death or personal injury arising from negligence that will be valid. It is the same form of strict liability for defective products contained in the CPA, an indication of harmonization of consumer law. This supplements the common law's negligence liability scheme.

In addition to the legislation discussed above and case law in the private law for consumers there also important administrative law or regulatory provisions derived partly from domestic law and partly from EU law, as it will be shown below. Substantiating the above narrative is The Trade Description Act 1968 which has been replaced by the Consumer Protection from Unfair Trading Regulations 2008¹⁴² that in turn implement the Directive on Unfair Commercial Practices.¹⁴³ This Regulation is supplemented by criminal law provisions, which allow for their enforcement not only through administrative sanctions such as injunctions, but also through the prosecution of persistent infringement of it.¹⁴⁴

In effect the Consumer Protection from the Unfair Trading Practices Regulations 2008 makes it an offence to make an oral undertaking and misrepresenting the effects of a term and other practices. Overriding or misrepresenting an exclusion or limitation clause could easily be regarded as an unfair practice because it contravenes the requirement of professional diligence and induces a consumer to enter into a contract he would otherwise have made.¹⁴⁵ Again such practices could be misleading actions, and hence unfair under the Regulations.

5.3.2 The Unfair Contract Terms Act 1977 and the amending legislation

The UCTA prefers to deal with exemption clauses on a fairly general basis rather than merely dealing with specific types of contract (although certain types of contracts are expressly excluded from its operation).¹⁴⁶ It targets "terms and notices which exclude or restrict the

¹⁴¹ 85/374/EEC.

¹⁴² SI 2008/1277.

¹⁴³ Directive 2005/29/EC (UCPD).

¹⁴⁴ See Part 3 of these Regulations.

¹⁴⁵ Lawson 98.

¹⁴⁶ Sched 1 lists certain types of contract, which are excluded wholly, or in part, from the operation of the contract. They include contracts of insurance, or any contract in so far as it relates to the creation or transfer

relevant obligations or duty” in respect of liability in tort or breach of statutory or implied terms, and stipulates that an adhering party’s agreement to or awareness of a term purporting to exempt liability for negligence “is not of itself to be taken as indicating his voluntary acceptance of any risk”.¹⁴⁷ It also targets terms that allow business to “render a contractual performance substantially different from that which was reasonably expected of him” or “render no performance at all” in respect of the whole or any part of his contractual obligations.

According to Koffman and MacDonald analysis, the most striking aim of the UCTA 1977 has been to strike down “objectionable” exemption clauses.¹⁴⁸ UCTA remained unaffected in transposing the Directive and remains in force. In some circumstances UCTA 1977 will strike down an exemption clause because it does not “satisfy the requirement of reasonableness”, but in others the clause is struck down without any reference to its reasonableness. It also subjects most other contractual terms to the reasonableness requirement, which often requires judicial interpretation.

The UCTA is the most significant legislation governing contract on unfair terms enacted in the UK, which though amended still plays a major role in contract interpretation forty years down the line. In 2015, the CRA was passed as explained above. The Act clarifies and consolidates existing consumer legislation on unfair terms. It was enacted following the 2005 consultation by the Law Commission which investigated the complexity of the law on unfair contract terms.¹⁴⁹ Then the law was contained in two distinct sources which overlapped and was inconsistent, application of the law was confusing. There was the UCTA and Unfair Terms in Consumer Contracts Regulation, 1994,¹⁵⁰ which was later revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999(UTCCR).¹⁵¹

of an interest in land or intellectual property (patents, trade mark etc.), the formation or dissolution of a company or its constitution, and the creation or transfer of securities (para.1), charter parties and carriage of goods by ship or hovercraft (para 2 and 3) and contracts of employment (para 4.) S 26, 27 and 29 set boundaries for the Act in relation to contracts with an international element.

¹⁴⁷ UCTA, s2 (3).

¹⁴⁸ At 210. The Act does not apply to all exemption clauses and it does not subject all of those clauses to which it does apply to the requirement of reasonableness.

¹⁴⁹ It is contained in two pieces of separate legislation-the UCTA and the Unfair Terms in Consumer Contracts Regulations (UTCCRs) - that have inconsistent and overlapping provisions.

¹⁵⁰ Introduced in July 1995 through (SI No 1994/3159).

¹⁵¹ SI No 1999/2083, which came into effect on 1 October 1999.

One of the criticisms levelled against the rash “copy-out” approach in the Regulations is the tardiness of national Parliaments from effecting quality drafting of the provisions of the Directive into their laws, or to clarify any obscurities.¹⁵² The Regulations operate in relation to individual disputes, but they also provide policing at a preventative level.

It was observed that the relationship between the UCTA and the Regulations has been a rugged road marked by sporadic clashes warranting the Law Commission to recommend that they be replaced by a unified regime.¹⁵³ This salutary recommendation comes from the untenable position where existed two parallel regimes all designed to control over contract terms, but using different tests proving to be irreconcilable and problematic. The overall purpose of the reforms for a unified law regime was to simplify the law and make it easier for both consumers and traders to understand.

In a dramatic turn, the CRA 2015 amends and replaces various pieces of legislation.¹⁵⁴ This is a very important piece of legislation with overarching influence because it examines contract terms that are exempted from an assessment of fairness by the courts because they concern the essential bargain of the contract—the subject matter and the adequacy of the price (exemption); and an indicative and non-exhaustive schedule of types of terms that may be considered unfair (“the grey list”). Practitioners will recognize much of Part 2 of the Act, which deals with unfairness to be a combination of the UCTA and the UTCCRs.¹⁵⁵

The “grey list” of potentially unfair terms is imported in its entirety from the UTCCRs and three new terms have been added to the list according to Schedule 2 of the CRA.¹⁵⁶ The

¹⁵² McKendrick 461. Also see Hartley “Five forms of uncertainty in European Community Law” [1996] *Columbia Law Journal* 265.

¹⁵³ Law Commission Consultation No 292 and Scottish Law Commission No 199. In February 2005, the Law Commission recommended that the two pieces of legislation be replaced by a unified regime.

¹⁵⁴ In relation to Part 1 of the Act (Schedule 1) amends and replaces: *Supply of Goods (Implied Terms Act 1973* (c.13); *Sale of Goods Act 1979* (c.54) replaced in toto; *Supply of Goods and Services Act 1982* (c.29); *Sale and Supply of Goods to Consumers Regulation 2002* (SI 2002/3045) are revoked; *Regulatory Enforcement and Sanctions Act 2008* (c.13). In relation to Part 2 of the Act (Schedule 4): *Misrepresentation Act 1967* (c.67); *Unfair Contract Terms Act 1977* (c.50); *Companies Act 1985* (c.6); *Merchant Shipping Act 1995* (c.21); *Arbitration Act 1996* (c.23); *Unfair Terms in Consumer Contracts Regulations 1999*; *Enterprise Act 2002* (c.40) and the *Companies Act 2006* (c.46). In consequences of the amendment made by Schedule 2 (a) omit paragraph 19(b) of Schedule 2 to the *Sale of Goods Act 1979*.

¹⁵⁵ Kingham “The Consumer Rights Act 2015: A summary of key changes” Gough Square Chambers.

¹⁵⁶ It sets out an “indicative and non-exhaustive “list of terms in consumer contracts. The new “grey list” terms are: (1) disproportionately high charges where the consumer decides not to conclude or perform the contract or for services which have not been supplied, even where the consumer cancels the contract; (2) terms

“blacklisted” terms relating to exclusions of liability for death or personal injury resulting from negligence are also imported from the UCTA. Therefore, an extensive discussion of the UCTA application remains authoritative where it has not been amended in the CRA. However, a number of changes to the law have been introduced that increase the court’s ability to intervene in consumer contracts.

Critics of the Consumer Rights Bill in 2014 argued that it falls away short of providing a full consolidation of the main pieces of legislation, which relate to consumer legislation it sought to replace.¹⁵⁷ Whilst it does provide some simplification of the law with regard to quality requirements of goods supplied to a consumer and the corresponding remedies there are many aspects which were not included in the Bill. Despite this, there are new provisions dealing with digital control which has not been subjected to specific domestic rules.¹⁵⁸ This section mirrors the provisions relating to goods as much as possible which are appropriate for maintaining necessary level of coherence.

One important change is that, unlike the UTCCR, the new Act applies to all business to consumer contracts, whether or not those contracts were individually negotiated with the consumer.¹⁵⁹ A contract to which Part 2 applies is called a “consumer contract” because it flows from the trader to the consumer. A trader cannot escape his obligations easily with this kind of intervention. Section 61(4) states in unequivocal terms that it intends to deal with exemption clauses, where it purports to exclude or limit trader’s liability to a consumer.

Like the implied terms that existed under the Sales of Goods Act, goods must be of a certain standard. Under the CRA, all goods supplied under consumer contract should: (a) be of satisfactory quality; (b) be fit for purpose; (c) match the description, sample or model; and (d) be installed correctly (if part of the contract). This consolidates the implied terms regarding the quality and fitness of goods previously found in three separate laws into one piece. This consolidation is criticized for being too simplistic and hardly revolutionary. For instance, the

allowing the trader to determine the characteristics or subject matter after the consumer is bound; and (3) terms allowing the trader to determine the price after the consumer is bound.

¹⁵⁷ Gullifer & Vogenauer 75.

¹⁵⁸ Ibid. These are contained in chapter 4 of Part 1 of the CRA.

¹⁵⁹ S61 of the CRA.

Act would apply similar provisions on remedies to all supply transactions with appropriate modification.¹⁶⁰

In the Bill, which produced the Act the following observation has not changed much, the right to reject the goods has been conflated with the right to terminate the contract for a refund, which leaves the law in a more complex and less coherent state than what would have been desirable.¹⁶¹ In section 19(4) the Act provides the consumer with a right of repair and price reduction. Interestingly in subsection 6 the Act provides the consumer with the right of rejection of the goods. In subsequent provisions of this section the Act gives the consumer the right for damages, specific performance and specific implement.

Whilst Part 2 concerns contracts, it also concerns consumer notices-both contractual and non-contractual consumer notices. A consumer notice includes an announcement or other communication which it is reasonable to assume is intended to be read by the consumer. The broadening of the scope to cover any communication intended for the consumer may solve the situation where the consumer is not in the literal sense a consumer or becomes a victim of a hazard subject. This means the case of *Eskom (Pty) Ltd v Halstead Cleak*¹⁶², would have been decided differently in UK under this provision.

Non-contractual consumer notices, for example, a sign in a car park do not include an exchange of something in return for something else of value, as a contract does.¹⁶³ A notice does not need to be in writing, but includes any communication or announcement intended to be read by or heard by the consumer. This Part covers terms in End user Licence Agreements to the extent that they are either consumer contracts or consumer notices.¹⁶⁴ Consumer contracts as outlined are subject to the provisions of Part 2 if they contain terms listed in Schedule 2 those terms are assessable for fairness.

¹⁶⁰ Gullifer & Vogenauer 75.

¹⁶¹ Gullifer & Vogenauer 76. See s19 of the CRA.

¹⁶² ZASCA 150; 2017 (1) SA 333 (SCA).

¹⁶³ See para 295 of the Explanatory Notes.

¹⁶⁴ Research suggest that that some End User Licence Agreements, for example those known as “click-wrap licences”, which the consumer must explicitly agree before they are able to digital download the content, may have contractual status. Other types of End User Licence Agreements, such as those known as “shrink-wrap” or “browse-wrap” licences, may not have contractual status but may alternatively be consumer notices, and therefore also be be subject to the provisions in Part 2.

Section 62(4) states that a term is unfair if “contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer”. An unfair term of a consumer contract is not binding on the consumer, but may be binding on the traders. What stands out from the application of this section is that the provision of unfair terms or notice does not override the legal requirements in other legislation nor the provisions or principles of convention in which the UK or the EU is a party.¹⁶⁵ This section acknowledges the impact of other pieces of legislation, such as those related to intellectual property and Article 6 of the Treaty of Lisbon for End User Licence Agreements.

A contract term or notice is not binding on the consumer unless the consumer chooses to rely on it.¹⁶⁶ The effect of this section when viewed objectively is that terms used in contracts and notices will be binding only when they are fair. Whether a term is fair or unfair is to be determined by subjecting the term into “fairness test”. It takes into account:

- (a) the nature of the subject matter of the contract- the circumstances of the contract;
- (b) reference to all the circumstances existing when the term was agreed; and
- (c) to all the other terms of the contract or any other contract that it depends.

However, in respect of terms relating to contract price and or subject matter they are excluded from being subjected to the fairness test. These terms can be interrogated only if they do not comply with the transparency and prominence criteria. Transparency in this regards means the terms must be written in plain and intelligible language and legible if they are written, whereas prominence for the purpose of this section would mean it has been brought to the attention of an average consumer and are aware of it.¹⁶⁷ Indirectly, this section attacks the fine print of the contract where exemption clauses may be hidden. This will ensure that the CRA is not a tool for challenging the price or the essence of a contract.

The case of the Supreme Court in *Office of Fair Trading v Abbey National Plc*¹⁶⁸, illustrates the problems of “ancillary charges” that are often included in businesses’ terms and conditions. In *casu*, the court held that charges for unauthorised overdraft were exempt from

¹⁶⁵ S73 (1) (a)-(b).

¹⁶⁶ S61 (1)-(3).

¹⁶⁷ S62 (1)-(4).

¹⁶⁸ [2009] UKSC 6; [2008] EWHC875; [2008] EWHC 2325.

assessment for fairness because they were price terms (pursuant to Regulation 6 of the UTCCRs). However, the Law Commissions have expressed displeasure with the conclusion of price terms. In particular, they pointed out that price comparison websites encourage traders to advertise unrealistically low prices to attract consumers and then make a profit from ancillary charges that are included in traders' "small print".¹⁶⁹ It was seen as particularly unfair that such charges are usually not brought to the attention of consumers at the point of sale. In order to combat these practices, the Commission recommended that:

- (i) The exclusion should only apply to aspects of terms that specify the main subject matter or price of the contract, but not to other aspects of those terms, and
- (ii) In order to qualify for the exclusion, all terms (including those dealing with the main subject matter or price) should be transparent and prominent.

It is argued that terms which are void will still be void regardless of the fairness test explained in this section. Terms which are void may still be subject to the fairness test and be found to be unfair, however, if they are found to be fair that does not prevent them from being held void. It suffices that this section brings together section 4 and 11 of the UCTA (for England, Wales and Northern Ireland), section 17 and 18 of the UCTA (for Scotland), and Regulations 5 and 6 of the UTCCRs.¹⁷⁰ This section also implements Article 3, 4 and 6 of the Unfair Terms on Consumer Contract Directive.

A term of a consumer contract must be regarded as unfair, if it has the effect that the consumer bears the burden of proof with respect to compliance by a distance supplier or an intermediary with an obligation under any enactment or rule implementing the Distance Marketing Directive.¹⁷¹ Some of the requirements for compliance may not be known by a consumer hence the burden of proof should shift. For this reason Regulations spells out the requirements of compliance.¹⁷²

Although the CRA is not intended to prevent business from limiting liability in their entirety, the context of liability adversely changes. Business looking to include in their terms and

¹⁶⁹ "Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills", the Law Commission and Scottish Law Commission (March 2013) S12.

¹⁷⁰ See para 302 of the Explanatory Notes.

¹⁷¹ S63 (6).

¹⁷² See Reg 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

conditions limitations should be aware it is not possible to exclude or limit the application of the remedies for faulty goods and digital content (such as the right to repair and replacement) that are implied into all consumer contracts under the Act. Despite the fact that traders are allowed to limit liability for supply of services in respect of price and time for performance any other limitations in respect of services performance would be subjected to a fairness test.

Part 1 of the CRA provides consumers with minimum rights in contracts for goods, services, and digital content. For example, the Act includes broadly similar requirements that goods to be of satisfactory quality, fit for particular purposes, and correspond with samples. Section 9 of the CRA provides for the goods to be of satisfactory quality. The quality of goods is satisfactory if they meet the standard that a reasonable person would expect factoring: description of the goods, price of the goods and all other relevant circumstance. Argumentatively, it can be said that section 56 of the CPA that creates an implied warranty of quality draws heavily from it.¹⁷³

Curiously, the UCTA 1977 used to strike down an exemption clause that failed to satisfy the requirements of reasonableness, but in other cases, the clause would be struck down without reference to its reasonableness at all. To assess the effects it would have on any given exemption clause requires careful consideration of its specific provisions and the specific situation that it governs.¹⁷⁴ In particular, section 3 of the UCTA prevents the use of an exclusion clause under certain circumstances.¹⁷⁵

In the UCTA there was a provision for fair and reasonable term. The sound of the terms seems tautological in definition, but for interpretation they have to be done separately. The

¹⁷³ Implied warrant of quality. Ss 4 of s 56 can be used to deal with the provisions in exemption clauses that no warrant has been provided.

¹⁷⁴ Koffman & MacDonald 209. The five guidelines to interpreting “reasonableness” laid down in Sched 2 to UCTA are, in summary:

- the relative strengths of the parties’ bargaining positions;
- whether the customer received any inducement to accept the term;
- whether the customer knew or should have known that the term was included;
- in the case of a term excluding liability if a condition is not complied with, the likelihood of compliance with that condition at the time the contract was made; and
- whether the goods were a special order.

The same applies to any term of a contract which attempts to exclude or restrict liability for pre-contractual misrepresentation or which tries to limit remedies available for misrepresentation.

¹⁷⁵ That is, where the clause (a) excludes liability for breach of contract; or (b) claims to permit a contractual performance substantially different from what is expected; or (c) in respect of the whole or any part of a contractual obligation, claims to allow no performance at all (for example, if a condition precedent is not satisfied); unless in each case the clause satisfies the reasonableness test.

CRA does not contain a similar provision where the principles of unfairness interface with reasonableness in the Act. Section 63 deals with contract, which may or must be regarded as unfair. This section introduces Schedule 2, which lists examples of terms which may be regarded as unfair-the “grey list”. It is explained that the “grey list” accounts, for example, for the specific nature of financial services contracts where fluctuations in the market may influence the price.¹⁷⁶

Schedule 2 is an indicative and non-exhaustive of terms that may assist the court when deciding on the fairness of the term, as prescribed by section 62. In addition to the existing grey list terms, the CRA adds three additional terms to the list:

- (a) a term which has the object of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high compensation or for services which have not been supplied (including a “ termination fee” for cancellation of a contract);¹⁷⁷
- (b) a term which has the object of or effect of permitting the trader to determine the characterisation of the subject matter of the contract after the consumer has become bound;¹⁷⁸ and
- (c) a term which has the object or effect of giving the trader the discretion to decide price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.

The latest term superlatively speaking is very unreasonable because it has the potential to encourage fraud and prevent the defence of estoppel. Limitation clauses might be regarded more favourably by the courts. It is argued special consideration should be given to acknowledgment of examination or non-reliance clauses. Consideration should be given to the application of the reasonableness test to clauses seeking to exclude liability for

¹⁷⁶ See Para 302 of the Explanatory Notes.

¹⁷⁷ Para 5 of the Schedule 2. This is penal in nature and the clause is automatically unfair because it defies the cooling-off period after the conclusion of the contract.

¹⁷⁸ Para 12 of the Schedule 2 and this does not apply to indefinite contracts and extensively affects the concept of consensus as the basis of liability. It becomes a unilateral contract instead of syllargmatic contract and defeats the concept of good faith.

misrepresentation.¹⁷⁹ In appropriate cases, the court can sever an offending clause from the contract because it is unreasonable and continue with the rest of the contract.

Pertaining to term (a) listed above Chitty supports the “indirect horizontal effect” of the Human Rights Act 1998¹⁸⁰ in relation to the tests of validity of terms under the UTCCR¹⁸¹ and the UCTA. That is, courts should legitimately take into account consistency with Convention rights (including that of the right to redress) when applying the reasonableness or unfairness tests.¹⁸² This would merely reinforce the policy embodied in the statutory instruments to protect the adhering party’s right to meaningful redress.

EU rights to effective judicial protection against unfair terms transcend the English interpretation of Article 6(1) of the European Commission on Human Rights (ECHR).¹⁸³ Commentators argue that this should encourage English courts to adopt a very robust and substantive (rather than purely formal) approach to evaluating terms that have the object or effect of depriving the adhering party of redress.¹⁸⁴

Comparative research is not done in order to answer non-comparative questions, but that comparison itself constitutes the purpose of an investigation. Perhaps, this becomes applicable if one wants to know the meaning of “good faith” within the terms of the contract. Chitty concludes that the difference of reasonableness and fairness, as a contravention of the good faith duty that causes significant imbalance between the parties is a result of the

¹⁷⁹ Lawson R *Exclusion Clauses and Unfair Contract Terms* 10th ed. (2011).231.

¹⁸⁰ Beale H (Ed) *Chitty on Contracts* (2012) para 1.079. See Craig P *Administrative Law* 6th ed. (2008) (London, Sweet & Maxwell) paras 18.027-18.028; Hunt M “The horizontal effect of the Human Rights Act” (1998) *Public Law* 423.

¹⁸¹ Beale para 1.083.The Preamble to Directive 93/13/EC suggest at recital 16 that the function of the requirement of good faith is to ensure that a court makes “an overall evaluation of the different interests involved”, and it then refers to matters which appear to relate to the public interest.

¹⁸² However, not when interpreting contracts or implying terms since courts would be open to the charge of remaking the contract. See Beale 1.080-1.081.

¹⁸³ See, for example, C240/98 *Oceano Grupo Editorial SA v Rocio Murciano Quintero* 27 June 2000(E CJ) and C-243/08 *Pannon GSM Zrt v Erzsebet Sustikne Gy rfi* [2009] ECR 1-4713, where the CJEU held that it is not necessary for the consumer to contest the validity of an unfair term. Courts of the Member States have the power to evaluate whether a specific contract term is unfair of their own motion and a clause in a consumer contract conferring jurisdiction to the seller’s seat may be considered unfair. And see C-473/00 *Cofidis SA v Jean-Louis Freedom* [2002] ECR I-10875, where it was held that a provision in the law of Member states which prevents a national court from finding a contractual term in a consumer contract to be unfair after the expiry of a limitation period, is not compatible with the Unfair Terms directive [Directive 93/13/EC].

¹⁸⁴ Gullifer & Vogenauer 123.

difference in scope of the two pieces of legislation that existed then: the parties affected and type of terms tested.¹⁸⁵

English contract law gives to the courts (and, in particular, to the Director General of the OFT broad powers to regulate unfair terms in standard form consumer contracts. In the UK, any complaint about unfair contract terms is usually resolved through negotiations with the trader concerned initiated by the Office of Fair Trading (OFT). It regularly publishes an “Unfair Contract Terms” Bulletin in which it provides details of the terms it has dealt with in this way to create precedence and inform consumers and consumer bodies.¹⁸⁶

The case of *Director General of Fair Trading v First National Bank*¹⁸⁷ is instructive. In *casu*, the applicant applied for an injunction to restrain the defendant from relying upon a sentence in their standard form contract that it was an “unfair term” within the meaning of regulation 4(1)¹⁸⁸ of the UTCCR of 1994. Clause 8 of the respondent’s standard term of business stated that, should the customer default on repayment to it, it was to be entitled to recover from the customer the whole of the balance on the customer’s loan account together with outstanding interest and the cost of seeking judgment. In such a case, payment pursuant to the instalment scheme did not have the effect of discharging the debt because interest continued to accrue on the unpaid balance of the debt by virtue of clause 8. The trial judge Evans-Lombe J, held that the term was not unfair. The Court of Appeal allowed the Director General’s appeal and concluded that the term unfair. However, the House of Lords in turn allowed First National Bank’s appeal and held that the term was not unfair.

What is important from the judgment for our purposes is the *ratio* of Lord Steyn, which summarizes the purpose of the UCTA and its Regulations, and the construction of good faith and significant imbalance to the consumer. Lord Steyn remarked thus:

“This is the first occasion on which the House has had the opportunity to examine an important branch of consumer law. It is therefore appropriate to consider the framework in which the questions before the House must be considered.

¹⁸⁵ Beale para 15-100.

¹⁸⁶ See <http://www.offt.gov.uk/News/Publications/Leaflet-Ordering.htm>.

¹⁸⁷ [2001] UKHL 52, [2002] 1 AC 481 (HL).

¹⁸⁸ Reg 5(1) of the 1999 Regulations.

The purpose of the Directive is twofold, namely: the promotion of fair standard contract terms to improve the functioning of the European market place, and the protection of consumers throughout European Community. However, the UCTA did not provide preventative control through the empowerment of an administrative regulator or consumer organization to bring abstract, general use challenges to standard terms-that is, applications for injunctions (interdicts) against businesses ordering them to stop using a term or terms-without involving any individual consumer in the litigation.¹⁸⁹

The system of pre-emptive challenges is a more effective way of preventing the continuing use of unfair terms and changing contracting practice than *ex casu* actions.¹⁹⁰ It is, however, to be noted that in a pre-emptive challenge there is not a direct links between the consumer and the other contracting party. Inevitably, the primary focus of such a pre-emptive challenge is on issues of substantive unfairness....”¹⁹¹

The omnipotent obligations of the OFT is to consider all consumer complaints, except those which are frivolous or vexatious, or where a qualifying body has notified the OFT that it consents to the hearing of the complaint by the OFT.¹⁹² The administrative model explored by this legal framework has changed the contracting practices. Besides the proclaimed enforcement measures, the OFT may then apply for an injunction against any person using or recommending the use of an unfair term drawn for general use in consumer contracts.¹⁹³ It thus has wide-ranging powers. Failure by the OFT to act against the villain of an infringement requires cogent reasons for its decision,¹⁹⁴ and in addition to this an undertaking that the continued use of the term is acceptable and that its inclusion is relevant.¹⁹⁵

Section 65 of the CRA prohibits a trader from excluding or limiting liability for death or personal injury arising from negligence. With regard to other loss or damage not as a result of death or personal injury the trader can only limit its liability if the clause is fair. This section is similar to section 2(1) of the UCTA that excludes or restrict liability for death or personal

¹⁸⁹ Naudé 519-520.

¹⁹⁰ See Bright 333-338.

¹⁹¹ Paras [30]-[35].

¹⁹² Reg 10(1). These qualifying bodies include the Financial Services Authority, as well as water, gas and railway authorities.

¹⁹³ Reg 12(1).

¹⁹⁴ Reg 10(2).

¹⁹⁵ Reg 10(3).

injury resulting from negligence and could even apply to employees. The only difference is that the latter is couched in broad terms of a person not particularly to consumer contracts.

This bar does not apply to discharge or indemnity given as part of a compensation settlement. More importantly, this section expands on meaning of personal injury as to include those which emanate from statutory breaches. In particular those from Scotland.¹⁹⁶ Section 4(2) (a) of the Damages (Scotland) Act 2011 deals with compensation because not all agreements to discharge liability will include compensation. Before the CRA came into effect in *Bennett v Pontins*¹⁹⁷, a widow could not claim damages for the death of her husband even though negligence was proved because the matter was covered by an appropriate exclusion.

In determining whether there has been a breach of duty or obligations, no account is to be taken of whether the breach was inadvertently or intentionally. Thus, in terms of this section which concerns negligence, the knowledge of the person about the term is insignificant and does not amount to voluntary assumption of the risk. This is because in some cases, under the common law, if an individual is aware of a risk, but ignores it he or she may be deemed to have taken on that risk.

It prohibits the defence of contributory negligence. The bar of the negligence against the trader is not unlimited, For instance, it does not apply to instances where the consumer enters premises for recreational purposes and suffers injury because of a bad state of the premises or was beyond the trade, profession, business or craft of the trader.¹⁹⁸ This section reflects Regulation 691) of the UTCCD, which is implemented by Article 8(2) of the UTCCRs.

Under the current consumer regime if traders do use or propose to use or recommend the use of unfair, void and or non-transparent terms in consumer contracts or notices, there are enforcement measures in place for this Part. Section 70 introduces Schedule 3 which sets out how this Part can be enforced. Schedule 3 explains that the Competition and Market Authority (“CMA”) and other Regulators (co-ordinated by the CMA) can investigate and apply for the injunctions to prevent the use of certain terms.¹⁹⁹ From its

¹⁹⁶ S65 (3).

¹⁹⁷ Unreported 1973.

¹⁹⁸ S65 (4) (a)-(b).

¹⁹⁹ See para 334-335 of the Explanatory Notes.

functions the CMA seems to have been the perfect replacement of the OFT in terms of the Regulations.

The terms which the CMA or other Regulator may investigate are those considered unfair, not transparent or void (for example, if they purport to exclude liability for death or personal injury through negligence). The Act stipulates that no exclusion or limitation for liability for death or personal injury arising from injury will be valid. The CMA or other Regulators are empowered to act if it thinks a term or notice fall into one or more of those three categories. It should be highlighted that Schedule 3 includes provisions for the CMA to collate and publicize information about actions taken against certain terms or notices. The Act also empowers the CMA to issue guidance if it deems appropriate to do so.²⁰⁰

Finally, section 71 of the CRA imposes an obligation on courts to *mero motu* consider the fairness of terms in consumer contracts even if it is not raised by the parties. When doing so the court must be satisfied that it has sufficient legal and factual material to do so. Clearly, this shows courts that overall the Act represents a substantial increase in the rights of consumers and in the powers of the court for intervention. This section represents an express recognition of existing European case law.²⁰¹

In the European Union Court of Justice in Case *C-168/05 Mostaza Claro*²⁰² the court outlined the process clearer. It says “the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair”. In fulfilling its duty the court would not have to look at the fairness of the term if they do not have adequate information to do so, as was emphasized by the Court of Justice in Case *C-243/08 Pannon*.²⁰³ In addition, the courts would only have to look at the term or terms in question, not the entire contract; this reflects the principle in Case *C-137/08 VB Penzugyi v Schneider*.²⁰⁴

Significantly, the Act does to a certain degree provide simplification, greater coherence and partial consolidation of consumer law and will improve the consumer landscape in

²⁰⁰ See para 333 of Explanatory Notes.

²⁰¹ See paras 340-341 of the Explanatory Notes.

²⁰² (2006) ECR I-10421 para [38].

²⁰³ (2009) ECR I-4713 para [35]

²⁰⁴ 2010.

UK.²⁰⁵ As they say there is no final document it becomes quite strange that despite the thoroughness of the Law Commission the Act omitted to include product liability in its reforms, as part of the consolidation exercise. This means despite the advancement of the UK consumer legislation they can still draw a lesson or take a cue from the CPA, which caters for product liability.

In the Consumer Protection Act 1987, Part 1 dealt with product liability. This part contains key consumer rights, with a body of domestic and EU case law now to be taken into account. It is argued UK consumer protection legislation would continue to be fragmented in its approach because the Commission became constrained to the brief without innovation to other obvious predicaments faced by consumers. The Product Liability Directive was not included in the review of the consumer acquis.

5.4 Germany

5.4.1 *The German approach*

The underlying philosophy to the Directive 93/13 is a combination of the French and German approaches to unfair terms control hence it was easy for these two countries to transpose and implement the Directive without complications and with only few amendments.²⁰⁶ The French and the German systems of control provide typical examples of two approaches reflecting two schools of thought that can be implemented towards unfair terms control.²⁰⁷ The German legal regime is more liberal towards limitation and exclusion agreements, hence such clauses are valid in commercial contracts, save in cases where the obligor has intentionally breached the contract.²⁰⁸

²⁰⁵ Gullifer & Vogenauer 76.

²⁰⁶ Nebbia 40-41.

²⁰⁷ Nebbia 35.

²⁰⁸ S276, BGB of the Responsibility of the obligor: "(1) The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk. The provisions of s 827 and 828 apply with necessary modifications.

(2) A person acts negligently if he fails to exercise reasonable care.

(3) The obligor may not be released in advance from liability for intention."

However, exemption and limitation of liability for damages caused by third parties, even in the event of a grossly negligent conduct, may be valid under a combination of Article 276 and 278 of the BGB.

With the German approach, the rationale for intervention against unfair terms lies in the use of standardised contract terms in market transactions. In standard terms and adhesion contracts, the non-performing party deems exemption and limitation of liability clauses invalid in circumstances such as where the breach of contract results from gross fault, assuming gross negligence.²⁰⁹ In addition to that, in the Federal Republic of Germany exemption clauses were subject to judicial review with a test akin to the criterion of reasonableness, which produced uncertainty and unnecessary litigation.²¹⁰ According to commentators, the subsequent German Act on General Conditions from 1976²¹¹ represents a national regulation focusing on standard-form conditions.

It deals both with the problem of incorporation and interpretation of such clauses and the fairness problem is only applied to standard-form provisions. This Act did not relate specifically to consumer protection, but recognized market failure attendant to standard terms. It controlled standard terms in both consumer and commercial contracts.²¹² These provisions were later included in the restatement of the law of obligations in the German Civil Code, the *Bürgerliches Gesetzbuch* (the BGB).²¹³ Likewise, in the Netherlands, provisions on general conditions (*algemene voorwaarden*) have been included in a specific part of the modern Dutch Civil Code.²¹⁴

Contrary to the German school of thought, the French school is biased in favour of the consumer on the potentially weaker side of the transaction, exploited by the superior economic power of the “professional” side. On a proper analysis, the South African CPA seems to contain attributes of both schools of thought. Furthermore, it seeks to counter the stronger market power in the form of superior negotiation and information power that leads to one-sided abuse of both freedom of contract and freedom of choice that works against the

²⁰⁹ See, for example, section 305-310 of the German Civil Code (BGB), which govern standard contract terms. Those provisions have replaced the Standard Contract Terms Act (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, AGB-Gesetz). For an English translation, see: <http://www.iuscomp.org/gla/statutes/BGB.htm#b2s2> (accessed on August 25, 2016). For more information on the German law of standard terms, see: Zerres, Thomas *Principles of the German Law on Standard Terms of Contract*, available at: [http://www.jurawelt.com/sunrise/media/media/mediafiles/14586/German Standard Terms of Contract Thomas Zerres.pdf](http://www.jurawelt.com/sunrise/media/media/mediafiles/14586/German%20Standard%20Terms%20of%20Contract%20Thomas%20Zerres.pdf) (access on 5 Sept 2016).

²¹⁰ Livermore 96.

²¹¹ *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*.

²¹² See Zimmerman R *Consumer contract Law and General Contract Law: The German Experience—Current Legal Problems* (2005) 415—489.

²¹³ *Gesetz zur Modernisierung des Schuldrechts*, BGB, Articles 305-310.

²¹⁴ See Dutch Civil Code, Article 6:231-247.

consumer in a liberal market theory. Commentators highlight the predominant narrative that the need for market control is actuated by the notion of abuse of economic power.²¹⁵

The French *loi Scrivener*²¹⁶ demonstrates that the main purpose of intervention is to prevent the abuse of power to the detriment of the more vulnerable party, the consumer.²¹⁷ However, it has been observed that the *loi Scrivener* has been drafted to be in tandem with the Directive because it does not aim to regulate the core of the contractual relationship, as long this is expressed in clear and comprehensible language. Similarly, the German *Allgemeine Geschäftsbedingungen Bürgerliches Gesetzbuch* (AGB)²¹⁸ in §307(3) BGB also provides expressly that the content of the main obligations under the contract is not subject to judicial control.²¹⁹

5.5.2 Statutory regulation

This §307 of the AGB also includes the principle of good faith in the general criteria for control of unfair terms. The German AGB provided two lists of unfair terms, each of them having a different effects, complemented by a general clause referring to the concept of good faith (*Treu und Glauben*) and unreasonable or immeasurable disadvantage (*unangemessene Benachteiligung*).²²⁰ The two criteria appear to run parallel: what matters in both cases is the objective imbalance, which needs to be out of proportion, or “significant”; this equals the criteria set out in the EU Directive.

Chapter 2, §307 BGB expressly states that, in order to assess whether there is “unreasonable disadvantage”, one must take into account whether the provision at issue can be reconciled with the essential basic principles contained in the statutory rule from which it deviates. Commentators note that this criterion has the advantage of ensuring a reasonable degree of predictability in the outcome of judicial decisions. However, this approach has a limited use in other jurisdictions especially in countries where contract law and general terms are not

²¹⁵ Kramer L *La CEE et la protection du consommateur* (1988) 168.

²¹⁶ The French law against unfair terms dates back to 1978 when the so-called *Loi Scrivener* no 78-23 of 10 January 1978 was enacted. This is contained in chapter 4, the rules on unfair terms and was consolidated, together with other provisions in the *Code de la consommation* in 1993. Provisions on unfair terms now constitute articles L 132.1 to L132.5 of that Code. The provisions only apply to contracts concluded between professionals and consumers or non-professionals.

²¹⁷ Nebbia 34.

²¹⁸ Of 9 December 1976.

²¹⁹ Nebbia 124.

²²⁰ According to Weil & Puis (1994) 1 cited by Nebbia 144.

codified or anyway and not regulated in such detail (as the OFT experience in the UK well demonstrates).²²¹ In view of the difference between the South African Constitution and laws, and the German acts, little value can be drawn from their approach.

The only point of convergence seems to be article 138(2) of the German BGB, which is comparable to section 40 of the CPA. It states that “a transaction wherein someone exploits the necessity, lack of experience, lack of discernment or lack of willpower of another, obtains monetary advantage or a promise to be granted monetary out of proportion to his own performance” is void.²²² Commentators argue that the reach of article 138(2) is wider since it explicitly includes the necessity to contract whereas in the South African context is left open. It has to find basis in the provision of “any other such factors”.²²³

In a case concerning the requirement that payment for a holiday package must be made in advance, the BGB held that such a term would be fair, only if adequate guarantees of performance are provided to the holidaymaker (such as the handing over of the document entitling him to the holiday).²²⁴ In its holding, the court drew a parallel with the statutory provision of the BGB concerning the contract of supply, which prohibits any advance payment to the supplier. To avoid the strict control on exclusion clauses in their standard terms, which apply under German law, some German companies notoriously choose foreign laws, notably Swiss law, to govern their international contracts.²²⁵

5.5.3 *Enforcement measures*

The German Federal Office of Consumer Protection and Food Safety have adopted central tasks in economic consumer protection, committing itself to the enforcement of consumer protection laws within the EU as part of a network of European authorities.²²⁶ This is another important mechanism to correct market failures, where harm caused by defendant’s action is more than the sum of the individual losses involved. German has more than seventy

²²¹ Nebbia 155.

²²² S 138(2) of the BGB cited by Hawthorne “Public governance: unpacking the Consumer Protection Act 68 of 2008” 2012(75) *THRHR* 358.

²²³ *Ibid.*

²²⁴ BGH 12 March 1987 in NJW c 1931.

²²⁵ Vogenauer S, *Commentary on the UNIDROIT Principles of International Commercial Contracts* 2nd ed. (2015) 26.

²²⁶ See http://www.bvl.bund.de/cln_027/nn_495478/EN/Home/homepage_node.html_nnn=true, accessed on 19th August 2016.

consumer organizations accredited to bringing class action and or to interdict in respect of unfair terms.²²⁷

This approach is similar to the other Member States where accredited consumer organizations are at the forefront of the fight against unfair terms in consumer contracts.²²⁸ Such actions are taken to vindicate the general consumer interest without the requirement to show actual harm to individual consumers. This right accrues to qualifying trade or professional associations, as well as chambers of commerce or industry, to bring interdict proceedings in respect of consumer contracts.²²⁹ Of particular interest is that the German government assists with funding of the litigation against unfair terms, and inherits the risks associated with it.²³⁰

This mechanism is available to consumer organisations in the following EU countries, and may be used in a broad range of cases relating to general breaches of consumer protection laws: Austria (specifically for cases relating to unlawful or unconscionable terms in standard form contracts and business terms and conditions); Belgium; France (specifically for cases relating to illegal clauses in standard form non-negotiable consumer contracts); Germany (for cases relating to unfair competition or to prevent a breach of certain consumer protection laws); Hungary; Ireland (for cases relating to unfair contract terms); Italy; the Netherlands; Norway; Poland; Switzerland and Turkey (specifically for cases relating to unfair and deceptive commercial practices).²³¹

5.5 United States of America (US)

5.5.1 Structure of laws

A wide variety of American businesses ranging from local health clubs to Fortune 500 companies attempt to limit their potential liability with the inclusion of express contractual

²²⁷ Naudé cites §3(1)(1) of the *Unterlassungsklagegesetz*, read with the list of institutions provided in the European Commission's 'Communication concerning Article 4(3) of the Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Article 2 of this Directive.

²²⁸ See Hans-W-Micklitz "Report on the practical implementation of Directive 93/13/EEC in the Federal Republic of Germany" in European Commission Brussels Conference (1999)220. They are given power to bring injunction proceedings under the *Unterlassungsklagegesetz* (§§ 1-3). See also the Background Report to the OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, 19-25 April 2005 at 30 available at <http://www.oecd.org/dataoecd/59/21/34699496.pdf>, accessed on 20 August 2016.

²²⁹ §§3(1) (2) and (3) *Unterlassungsklagegesetz*.

²³⁰ Micklitz 222.

²³¹ *Ibid.*

provisions in their agreements.²³² Although American contract law is largely based on common law, it is interesting to note that the US has the Uniform Commercial Code (UCC) pertaining to the enforceability of exemption clauses that applies in all states. The UCC recognizes that in the US, each State has different consumer law, yet it is not possible to discuss the individual refinements under each of the state laws, and will cover only the primary federal law.²³³

5.5.2 Doctrine of unconscionability

More relevant for exemption clauses, however, is the doctrine of unconscionability. Section 2-302 governs contracts that were “unconscionable” at the time they were made. Unconscionability and equity is discussed below.²³⁴ It is important to point out that UCC contains valuable official comments produced by the Permanent Editorial Board to aid in its interpretation and ensure a uniform approach. Both in its text and official comments the Code indicates a considerable awareness of the problems involved in standard form contracting.²³⁵ The Code contains nine articles, but of particular importance is Article 2 on the sale of goods that has the largest impact on general principles of US contract law. Specific provisions on exemption and limitation of liability clauses are found in section 2-719 of the Code.²³⁶

²³² Jeremy Reynolds *Los Angeles Daily Journal*, August 25, 2005 accessed on 12 September 2016.

²³³ For useful discussion on the concept of unconscionability in United States law, see J Calamari & J.Perillo *Contracts* 3rd ed. (1977) 397-409.

²³⁴ Para 5.6.2.

²³⁵ Livermore 121.

²³⁶ “§2-719. Contractual Modifications or Limitation of Remedy.

- (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages’
 - (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
 - (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”

5.5.3 Federal law

The US courts predominantly consult Article 2 for guidance beyond the sale of goods transactions.²³⁷ More importantly, section 2-307 and section 2-311(1) regulate the incorporation of standardised terms with little reference to agreement, real or assumed, Section 2-311(1) links the incorporation of terms to the existence of a specific agreement or specified contract (presumably subject to negotiation), and with the incorporation of specified terms dependent on commercial reasonableness and good faith. Under the UCC section 2-207 (2), such incorporation depends primarily on the concept of material alteration. It looks on the variation from the standardized terms of that contract.

Expanding on the concept of good faith, Nehf argues that American consumer law is in a dilemma regarding the resolution of bad faith conduct in consumer transactions, and the interpretation thereof.²³⁸ That intractable experience is also shared by South African courts in resolving the issue of unfair contract terms such as exemption clauses. American law places a clear emphasis on the duty of good faith. Generally, the presence of bad faith disturbs the reasonable expectations of the contracting parties. In the commercial context, the fundamental question whether there is a duty of good faith implied in every contract regardless of the context remains unsettled.

The reasonableness test applied in other jurisdictions is often criticized for hindering innovation of judicial practice.²³⁹ Consequently, courts are faced with a substantive problem in this context of determining what type of behaviour constitutes bad faith behaviour and how to interpret it. Commentators note the competing arguments regarding the general principles of unconscionability in contract, namely unpredictability and uncertainty. They also perceive that the recognition of a general principle might lead to a greater rationality in the law and the support the development of criteria that would offer a useful guide for future transactions.²⁴⁰

²³⁷ Koffman & MacDonald 463.

²³⁸ James Nehf 'Bad faith breach in consumer transaction' in Brownsword et al *Good Faith in Contract: Concept and Context* (1999)115.

²³⁹ Livermore 113.

²⁴⁰ Koffman & MacDonald 463.

5.5.4 Equity and unconscionability

Probably, the most seminal section is the provision on unconscionability of the UCC that is section 2-302, which states:

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

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

This section encompasses the core of procedural and substantive fairness that is similar in to the powers of the courts created by section 52 of the South African CPA. It was enacted to allow the courts to take action against unconscionable contracts or clauses. According to Calamari, the purpose of the regulation is to widen the court’s scope by looking any adverse construction of language and by checking whether the contract or clause is contrary to public policy or to the dominant purpose of the contract.²⁴¹ Commentators argue that the underlying principle to this provision is one of prevention of oppression and unfair surprise. Furthermore, not to disturb the allocation of risks because of one party’s superior bargaining power.

In many countries, the same result has been accomplished by the manipulation of technical doctrines, such as adverse construction covered by the *contra proferentem* rule. According to commentators section 2-302 bluntly enables the court to go directly to the issue of unconscionability and to “make a conclusion of law” on this ground without pussyfooting about.²⁴² This section should not be considered in isolation, but in conjunction with the obligation of good faith that the UCC imposes in other sections.²⁴³ Critics of the Code point

²⁴¹ At 365.

²⁴² Koffman & MacDonald 464.

²⁴³ Section 1-203. See also Calamari 375.

out that the chief weakness of section 2-302 is that it lacks adequate and specific guidelines.²⁴⁴

The test for the approach involves an inquiry on whether the terms are so one-sided as to be unconscionable in the light of the general commercial background to the contract. Considerable divergence and inconsistencies between the cases have been manifested. As a result, *Deutch* proposed standards to assist the courts by recommending elements of unconscionability instead of defining them. These are terms disclaiming a warranty, limiting damages or granting procedural advantages and those in small print or unintelligible language.

“The elements will serve as guidelines and illustrations, not as rigorous definitions. But since the courts did not establish a general formula for this doctrine, it is the legislature’s duty to formulate and enumerate the essential elements of unconscionability,”²⁴⁵

The impact of section 2-302 of the Code is beyond the scope of immediate statutory context (i.e. sale of goods) to a broader context and has been incorporated into the general law of contract.²⁴⁶ This section when invoked confers an unusually wide discretion to the courts, in particular, where a contract is in whole or any clause of the agreement is unconscionable. This section is in direct conflict with the English statutory approach, which has concentrated on unfair contract terms rather than on whole agreements. Reduced to its elementary form it means the English approach is parochially concerned with the marginal terms instead of with the broader picture like in the US, which examines the whole contract.

Be the case as it may be the courts in US have some flexibility in dealing with the unconscionability in question.²⁴⁷ As detailed in section 2-302, either it may refuse to enforce the contract or it may enforce the contract without the unconscionable clause. The latter

²⁴⁴ See A.A. Leff “Unconscionability and the Code: The Emperor’s New Clause” (1967) 115 *University of Pennsylvania Law Review* 485; J.C. Fort, “Understanding unconscionability: defining the principle” 9 *Loyola Law Journal*. (1978) 766; D Yates *Exemption Clauses in Contracts* 2nd ed. (1982)271. California dropped its s.2-302 from its Commercial Code due to s 2-302’s impreciseness and ambiguity. For a defence of the broad drafting of s. 2-302 see M Ellinghaus “In Defence of Unconscionability” (1969) 78 *Yale Law Journal* 757; for a comparison with the provision of the 1976 West Germany on Standard Contract Terms see Angelo & Ellinger “Unconscionable contracts—A comparative study” (1979) 4 *Otago Law Review* 328.

²⁴⁵ *Deutch S Unfair Contracts* (1977) 276-277. This recommendation is of considerable interest in Australia in that the Contracts Review Act 1980 (N.S.W.) in s.9 (2) lays down a list of 12 factors that require consideration by the courts in determining the issue of unconscionability. ADD them as commented on above

²⁴⁶ *Ibid.*

²⁴⁷ *Supra.*

option is almost the same as the blue-pencil rule, which allows severing the remainder of the contract from the irreconcilable parts to fulfil the purpose of the contract. Another alternative is for the courts to restrict or reduce the scope of such a clause to avoid an unfair result. Although subtle, such a purposive interpretation means the court can rewrite an agreement for the parties, even though such power is not expressly conferred by the enactment.²⁴⁸

In the state of Ohio, the court explained this approach in its judgment in *Raimonde v Van Vlera*.²⁴⁹ This is a case involving two employment contracts and restraint of trade. The judge says that:

“ [m]any courts have abandoned the “blue-pencil” test in favour of a rule of “reasonableness” which permits courts to determine, on the basis of all available evidence, what restrictions would be reasonable between the parties. Essentially, this test differs from the “blue-pencil” test only in the manner of modification allowed. It permits court to fashion a contract reasonable between the parties, in accord with their intention at the time of contracting, and enables them to evaluate all the factors comprising “reasonableness” in the context of employee’s covenants.”

A particular distinction between the USA and English laws is marked by the use of the word “unconscionability” as opposed to the reference to “reasonableness” in English law. Thus, the critical distinction between the reasonableness test and the concept of unconscionability outlines the fact of a subjective analysis followed in the USA. The “reasonableness” term applied in UK describes a model of contract law, which takes an objective view of agreement, determined by the conduct and attitudes expected from an ordinary person.²⁵⁰

Yates remarks in this respect:

“A test of unconscionability can cater for the susceptibilities of the particular parties to the agreement in a way that the more objective criterion of reasonableness does not...Also, by having regard to a test of conscience, the court can have regard to the conduct of both parties, not just the party against whom relief is sought. Conduct after the making of the agreement does not seem to play any part in the test of reasonableness.”²⁵¹

What is good about these tests is that the strength of the unconscionability criteria permits the court to focus on the subjective questions, namely the particular inadequacies or

²⁴⁸ Koffman & MacDonald 464.

²⁴⁹ 42 Ohio St.2d 21(1975).

²⁵⁰ Livermore 123.

²⁵¹ Yates 277. Although the comment cited is made based on applying section 2-302 of the Uniform Commercial Code to consumer agreements in English contract law, the distinction between the two criteria are adopted for this argument.

susceptibilities of the weaker party. This lenient or subjective approach propagated in the US seems to be the more realistic approach.²⁵² Koffman and MacDonald suggest that if contracting parties were rational and experienced bargainers such a term would not be objectionable because it reflects a certain level.²⁵³ To neutralise the impact of such terms requires minimum state intervention. Unfortunately many contracting parties are not ‘reasonable’ and may need assistance, in which case the law must engage and intervene.

The link between the EU Directive 93/13 and the UCC is manifests in the concept of good faith, which in many contract situations and should not be viewed as a simple iteration of honourable intentions.²⁵⁴ In addition to that, the warranty disclaimers in sections 2-314 and 2-315 of the UCC may function as a species of limitation or exclusion clauses, given that their purpose of limiting the seller’s obligation concerning the product’s merchantability²⁵⁵ or its fitness for a particular purpose.²⁵⁶

Section 2-316 of the UCC requires that the exclusion or modification of implied warranties in sales contracts (a) must be in writing; (b) must use language mentioning “merchantability” and (c) must show the exclusion or modification of the warranty conspicuously. In *Norfolk Southern Railway Company v Power Source Supply*,²⁵⁷ the defendant has alleged that the plaintiff breached both express and implied warranties of fitness for a particular purpose and merchantability. The Court applied both Alberta and Pennsylvania laws to consider the following elements of the disclaimer: “(1) the placement of the clause in the document; (2) the size of the disclaimer’s print, and (3) whether the disclaimer was highlighted or called to the reader’s attention by being in all caps...” Expressions such as “as is” or “with all faults” are approved by statutes as language of exclusion. The Court found the disclaimer to be valid in the US and not unconscionable.

²⁵² Ibid.

²⁵³ At 464-465.

²⁵⁴ Rohwer CD & Skrocki *Contracts* 5th ed. (2000) 14 cited by Berglund A in “The validity of exemption clauses in commercial contracts—A comparison with Anglo-American Law” (2004) 37 published LLM dissertation from the University of Lund.

²⁵⁵ §2-314 of the UCC Implied Warranty: Merchantability; Usage of Trade reads—

“Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”

²⁵⁶ S 2-315.

²⁵⁷ US 25 July 2008 Federal District Court (Pennsylvania).

5.5.5 Position in California

One state that can be singled out is California, as its approach is similar to the one followed in South Africa. Reynolds confirms that the enormity of threats of civil liability is always a major concern for business in California, specifically pertaining to the high risks and potential costs associated with litigation.²⁵⁸ A party cannot limit its liability for intentional wrongdoing or wilful misconduct according to California Civil Code.²⁵⁹

Basically, the Americans are known as a suing nation. The US approach relies heavily on litigation as an enforcement mechanism, and the most frequently litigated issue has been whether the merchants has the right to reduce its own dispute its own dispute resolution costs by limiting the consumer's access to courts.²⁶⁰ In contrast to this, in Europe consumer faces fewer obstacles to bringing a lawsuit in a local forum against a remote vendor because standard form contracts terms that impede consumers' rights of redress are invalidated as unfair.²⁶¹

Therefore, the question on whether a court will enforce a contractual limitation depends upon two factors: (a) Does it violate any California law or public policy. (b) Has the contractual limitation been drafted in such a way that it will be enforced? Reynolds submits that Californian courts will uphold contractual provisions limiting liability for breach of contract or ordinary negligence so long as the provision does not affect the "public interest" and no other statute expressly prohibits.²⁶² This is the same approach used in the South African context in the common law requirement of public policy, which is similar to the US public interest argument.

In making a determination courts attempt to answer the following questions: whether the party attempting to limit liability possesses superior bargaining power, whether the service is of great public importance and whether the party attempting to limit liability has control over the person or property of the other. This criteria or guidelines are derived from the judgment

²⁵⁸ Ibid.

²⁵⁹ S 1668 provides that "all contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law , whether wilful or negligent, are against the policy of the law."

²⁶⁰ See generally Horwitz MJ *The Transformation of American Law* (1977) 1760-1860.

²⁶¹ See generally Drahozal CR & Friel RJ *Consumer Arbitration in the European Union and the United States*, 28 N.C.J International Law & Comparative Reg (2002) 357.

²⁶² *Los Angeles Daily Journal*, 23 August 2005.

of *Tunkl v Regents of University of California*.²⁶³ In addition to the previous conditions on when contractual limitations on liability affect the public interest the following issues were also raised, namely whether:

- The provision concerns a business generally thought suitable for public regulation.
- The party will perform the service for any member of the public.
- The party seeking exculpation possesses a decisive advantage of bargaining strength against any member of the public.
- The party uses a standardized adhesion contracts to limit its liability.

These factors have the same tone to those listed in Article 3 of the Directive 93/13. In *Henriouille v Marin Ventures Inc.*²⁶⁴ an exemption clause in the lease agreement could not release the property owner from personal injuries sustained in the apartment. It was held that the comprehensive housing code affirms that under contemporary conditions, public policy compels property owners to maintain safe, clean, habitable housing conditions.

However, when the limitation of liability provision relates to recreational activities that do not have broad public importance-particular those which involved obvious and assumed risks-courts are much more likely to give the clause full effect. In *Benedek v PLC Santa Monica LLC*²⁶⁵ the court found that a provision releasing health club from liability for injuries to members was, however, enforceable. This is the same judicial policy adopted by South African courts. It is noteworthy that Californian law has some similarities with local contract law concerning consumer law at health clubs and courts follow the principle of *volenti non fit iniuria*.²⁶⁶ Our concepts clearly correlate with universal norms.

On the drafting methods, US commentators advise that a well-drafted contractual limitation of liability clauses can make the difference between business incurring millions of dollars in liability or facing no liability at all.²⁶⁷ Treitel gives an example of a contract term where

²⁶³ 60 Cal.2d 92 (1963).

²⁶⁴ 20 Cal.3d 512 (1978).

²⁶⁵ 104 Cal.App.4th 1351 (2002).

²⁶⁶ This is a common law doctrine meaning a person who voluntary participates in a dangerous sport cannot subsequently raise the claim of being injured. For instance, a boxer waives his personal rights in a boxing ring to claim for personal injuries.

²⁶⁷ *Los Angeles Journals*.

someone exempts oneself from liabilities for deliberate breach of his fiduciary duty, and which is ineffective.²⁶⁸ Courts have shown to be averse to a situation in which the merchant may draft the contract terms in bad faith without suffering the consequences of his action.

5.5.6 Conclusion

Through the common law and civil law countries, one can distinguish several models of fairness regulations as practised in the different countries. These models are connected with various combinations of different concepts of justice. It is worth noting that the approaches are not only related to different understandings of justice. This discussion shows how the different legal regimes affect human behaviour (that of the consumer), how the economy functions, how one should trust and what one could expect from fellow members of society when contracting, and how much interest courts should show in concrete justice.

One must always consider the fact that cultures and jurisprudence differ, for example, European cultures are very different²⁶⁹ from the American. Through the development of unfair contract terms law, EU regulators have been expanding their oversight of consumer markets and expanding the role of administrative agencies in enforcement when simultaneous the US contract law is shying away from public regulatory models. The chasm in contract law doctrines with regard to unfair contract terms demonstrates diverging long-term trends in political culture and economic regulation on either side of the Atlantic.²⁷⁰

Likewise, opinions may differ on the normative conclusions regarding fairness regulation that one may legitimately draw from such varying views. Thus, the regulation of unfair contract terms is clearly an issue on which deep cultural cleavages come to the fore. It is difficult to ensure a legal-technical harmonisation of some contract law issues across the board in the European Union. The basic idea of Europe “united in its diversity”²⁷¹ may be useful to the

²⁶⁸ *The Law of Contract* 9th ed. (1995) 223.

²⁶⁹ See Wilhemsson T, Paunio E & Pohjolainen A (Eds) *Private Law and the Many Cultures of Europe* (2007).

²⁷⁰ See Lofstedt RE & Vogel D “The changing character of regulation: A comparison of Europe and the United States” (21) *Risk Analysis* (2001)399.

²⁷¹ Draft Treaty Establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003, Preamble.

adoption of a cautious approach in sensitive areas such as the regulation of unfair terms in consumer contracts.²⁷²

Greater harmonization in Europe might be helpful in maintaining certain standards of civility for consumers. It prevented countries like Germany from establishing too low standard of competence for consumers and, as a result, significantly raising the compliance burdens of merchants.²⁷³ For instance, when trade associations representing established merchants allege unfair competition law violations by upstart competitors, a common ploy has been to ask courts to require all merchants to treat consumers as simpletons. With the expansion of the harmonization against unfair contract terms the safety of consumers' transactions is obtaining transnational recognition on the same level dictated by the Treaty of Lisbon.

Many discussions have been canvassed in this thesis on problems regarding exemption clauses and the search for equitable jurisprudence in the South African constitutional realm by elaborating on the hypothesis. Therefore, in the final chapter of this scholarly work the author will be drawing conclusion and making recommendations on the consumer laws, which affect a large section of the world population and their rights in the commercial market.

²⁷² The Unfair Contract Terms Directive was not extended to individual contract terms precisely because there was no agreement on the issue. See Wilhemsson T *Social Contract Law and European Integration* (1995) 137.

²⁷³ Winn & Webber 7.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

“Research and writing are lonely occupations. It is easy to become disturbed in solitary confinement.”—Oliver Wendell Holmes Jr

To sum up this rigorous academic exercise one gravitates towards Cockrell’s¹ summation that “the law of contract” is in the manner of George Orwell’s *Animal Farm*: some animals, the pigs, are more equal than others are. In this discourse, the hegemony of contract law occupies a privileged position within the South African law structure, where its supremacy serves to counter the expansionist ambitions of rival compartments of law. The theme of the title of this dissertation as outlined herein adds flavour to an enlightening academic journey on contract law. It gives insight into the rivalry of voices on the topic that carries intrinsic importance for consumers and contract law alike.

It is well established that contract law as part of the capitalist machinery is regarded as a positive driving force and a necessary tool for social and economic progress. Note that from the bowels of democratic capitalism contract law cemented its evolution in South African private law by creating rigid rules—such rules generally remaining constant regardless of how harsh or oppressive the contract might be.² Thus, emerging consumer legislation in modern contracts and judicial activism represents the plethora of reforms to interpretation theories of contract law. Contract law is meant to be value-neutral set of muscular, but predictable rules to curb uncertainty whilst inspiring confidence in the market place.³

6.1 The Arguments of this thesis

What transpires from this study is that the current body of rules governing contract law, spearheaded by the sanctity of contract rule, serves to lock the weakest consumers into a cycle of oppression—a cycle that is not interrupted merely by the promise of equal protection offered under the Constitution that is capable of liberating them from undue harm.⁴ It is in

¹ “The hegemony of contract” 115(1998) *SALJ* 286.

² Hopkins K “Standard-form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice” (2003) *TSAR* 152.

³ Moseneke D “Transformative Constitutionalism Its Implications for the Law of Contract” (2009) 20 *Stell LR* 4.

⁴ Hopkins 152.

this scenario of examining the freedom of contract within the parameters of the rule of law from common law to legislative interventions that the challenges and answers to find equitable jurisprudence part of the hypothesis is revealed.

This research traverses the monopolistic traits of individual autonomy against the principle of equity in consumer transactions in a constitutional democracy. There is a persuasive argument from commentators that liberation can only come with a change of perception of what private law is *vis-à-vis* natural justice within the common law. It manifests the difficulty of balancing private law interests and State functions in the South African milieu and expands to other international jurisdictions to demonstrate the impact of exemption clauses in contracts.

One can say that that the court's adjudication supplements the original contract as a method of distributing gains and losses. From this point of view, we may look at the law of contract as a number of rules according to which courts distributes gains and losses according to the equities of such cases. Just as the process of interpreting a statute is viewed as a process of subsidiary legislation, so is the interpretation of a contract really a method of supplementing the original agreement by such provisions as are necessary to determine the point at issue.⁵ This research highlights the need to elevate and cement the emerging theories of interpretation, as a balancing act.

Thus, the theme of this contribution is the narrative of correcting private law justice from a democratic capitalist system (driven by profit incentive) to a natural law system (driven by the promotion of human rights and dignity). The scholarly work immerses itself in the pathology of consumer rights and the fight against unfairness of exemption clauses that limit these rights. It tries to harness and interpret national legislation that protects and promotes consumer matters such as the CPA, NCA and the UCCTA.

Largely, it exposes the impervious superior bargaining power inherent in standard form contracts that is used, as ammunition by business or suppliers to ambush vulnerable consumers by the inclusion of exemption clauses. In most instances, suppliers abuse the consumer's ignorance or inferior bargaining power and exercise pressure by tucking away these exemption clauses in various disguises. However, contemporary consumer awareness

⁵ Cohen "The basis of contract" 46 (1933) *Harv LR* 584.

and protection laws have tremendously changed so that the argument to allow for their inclusion no longer holds water. By this little contribution, it may add to consumers' education and better understanding of unfair terms. This may serve as a school of enlightenment.

The overwhelming effect of exemption clauses guarded in statutes deal with four overlapping types of terms.⁶ First, terms that reduce or delete remedial rights that the adhering party (the consumer) would otherwise have, leaving the consumer with no or inadequate redress and allowing the proffering party (the supplier or service provider) to evade substantive legal oversight of the contract. Second, terms that reduces the proffering party's obligations against the baseline of the main subject matter term. Third, terms that inflates the adhering party's obligations against the price term. Fourth are terms that maximize protection of the proffering party's interests by imposing disproportionate or otherwise unfair burdens or liabilities on the adhering party.

6.2 Common Law

Empirical evidence proves paucity of common law devices and texts to curtail the mounting effect of exemption clauses in the current era of modern contract theory. Exemption clauses have been the albatross of contracting for many consumers that remains painfully enforced. Much of contract law is concerned with filling any gaps on what the parties should have agreed upon-residual terms. As put in one American publication: "the ordinary function of an exception is to take out of the contract that which otherwise would have been in it or to guard against misinterpretation". This means in the process of progression the law should develop internal logic and avoid inconsistency and contradictions.

Functionally, exemption clauses exist to provide a party with a defence to a breach of an obligation, as each party in a contract is considered self-reliant and not always worthy of statutory protection. The basic argument is that parties have, by an exercise of their autonomy, isolated and allocated the general risks of their bargain and accordingly planned their affairs within the contract law paradigm, which is fully functional within the constitutional realm. Despite the observed adverse effects of exemption clause texts to

⁶ See Gullifer L & Vogenauer S *English and European Perspective on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 111.

consumers there is nothing illegal about them.⁷ Some of the vexed questions around them give insight into the interface between contract law and constitutional law, as practitioners, judiciary and academics attempt to sift through the cold letter of the law to dispense justice for consumers.

In terms of the common law of contract, the legal methodology employed by the courts in solving a particular contractual dispute plays a pivotal role in defining the reach of contractual autonomy in relation to the exclusion of a particular right.⁸ Nowadays, it becomes a question of information: how each of the parties gets to know of its existence and ambit? However, it has been discovered that exemption clauses in contracts will always amount to a limitation of the constitutional right of access to courts as enshrined in section 34 of the Constitution.⁹

The enforceability of an exemption clause that is based on sanctity of contract and the backdrop of common law of contract has undergone a Damaskan change. The constitutional muster that must be passed when adjudicating exemption clauses is that a party seeking to enforce them must justify to the court why, in that particular case, there is a reasonable and justifiable basis for having the exemption clause in the contract. Some of the older case law relating to exemption clauses must now be treated with caution. With recent statutory developments, it means the common law devices that was used to protect consumers may now be used by the courts only sparingly.

The underlying principle of contractual autonomy and sanctity of contract have been sacrilegiously affected when grappling with the value of equality in private sphere of consumer transactions. Precipitating this, State intervention has been the private law recognition of inequality in bargaining power manifesting in standard form contracts, where although advantageous to one party the other party finds himself bound to an agreement that he had no meaningful part in negotiating its terms. Therefore, within the Constitutional values of equality, freedom and dignity the logic of many standard form contracts defeats both equality and freedom.

⁷ Van der Merwe et al *Contract General Principles* 3rd ed. (2007) 427.

⁸ Bhana "The role of judicial method in the constitutional rights through contract" (2008) 24 *SAJHR* 308.

⁹ "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Therefore, a radical and inflexible application of sanctity of contract and freedom of contract in whatever sense, where the parties are in a long-term, evolving and dynamic relationship is out of place.¹⁰ More particularly, exemptions clauses have proved to be one of the most interesting areas of contract law in recent years. It is an area, which has provoked raging debate, litigation and legislation, and often involves a balancing of the competing interests of consumer protection and freedom of contract. When parties litigate it's the State intervening in private matters-the convergence of private-public law.

Therefore, the first port of entry to attack exemption clauses in the South African context is embedded on the *Grundnorm* of this democratic dispensation-the Constitution of the Republic of South Africa.

6.3 Modern South Africa law of contract

The overarching influence of modern contract is observed when freedom of contract is challenged head-on, where the law provides that even though the parties have freely agreed that the term is invalid if it offends the *boni mores* of society free dealing. Free dealing is an idea that occupies no fixed point and so to speak, the spectrum of voluntariness is manifest in fact. Nevertheless, if the existing freedom of contract is to be a coherent idea it has to be decisive to subdue the pressure afflicted to the consumer and enhance the level of disclosure when contracting. To explain this seemingly abstract concept Kennedy reverts to the concept of voluntariness:

“[W]ithout doing violence to the notion of voluntariness as it has been worked out in law; [we] could adopt a hard-nosed self-reliant, individualist posture that shrinks the defences of fraud and duress almost to nothing. At the other extreme, [we] could require the slightly stronger or slightly better-informed party to give away all his advantage...If we cut back the rules far enough, we would arrive at something like the state of nature—legalized theft. If we extended them far enough, we would jeopardize the enforceability of the whole range of bargains that define a mixed capitalist economy...In either extreme case, we would have departed from freedom of contract—the concept has some meaning and imposes some loose limits.¹¹

According to Kennedy's analysis the matter of freedom of contract excludes the extremes but allows itself room to manoeuvre in between the outer limits of the circumference. From this,

¹⁰ Brownsword 68.

¹¹ Kennedy “Distributive and paternalist motives in contract and tort Law, with special reference to compulsory terms and unequal bargaining power” (1982) 41 *Maryland LR* 582.

clearly there is no problem in reconciling the raft of modern protective interventions within the scope of the freedom of contract, provided that it is actuated within that radius. One may conclude by submitting that the twin principles of freedom of contract and sanctity of contract are contested concepts and rarely helpful in resolving the obtaining situation of exemption clauses. The interpretation turns on the particular ethical base from which the interpreter begins his analysis.¹²

An appropriate dissection of the topic recognizes that consumer law has caused the disintegration of traditional orthodox contract law, as an autonomous system of law,¹³ to a new phenomenon that acknowledges the reality of inequality in bargaining, which is an antithesis of the cornerstone of classical contract law. Admittedly, this has led to increasing awareness¹⁴ of the materialisation¹⁵ and differentiation¹⁶ of the law of contract. It is argued that both materialisation and differentiation do imply the displacement of the classical contract law theory, which opens the door to questioning the validity of the freedom of contract.¹⁷ Thus, the impact of the welfare state has been robust in the law of contract.

The overarching effect of the Constitution is also criticized for encouraging lawyers' tardiness to effectively research common law mechanisms of redress instead of quick reliance on constitutional provisions. Previously, consumer rights to protection against the harsh realities of exemption clauses were reclaimed through the portals of common law rules and good faith in the law of contract. One of the challenges is that good faith is not seen as a self-standing doctrine to dilute contract inequality. In order to cure this deficiency of the common law the Constitution in the Bill of Rights infuses values and norms to dispense justice in the course of State intervention to regulate consumer contracting.

Through the constitutional prism the application of a right undergoes the following three-stage enquiry: firstly, what the constitutional provision means and how broad its sphere of

¹² See Fletcher GP *Basic Concepts of Legal Thought* (1996) 112.

¹³ Howells G & Weatherill S *Consumer Protection (Markets and the Law)* (2005) 31, 34.

¹⁴ Ian Ramsay "Productive disintegration" and the law of contract" (2004) *Wisconsin Law Review* 495.

¹⁵ Materialisation may be defined as the breakdown of the formal system of classic contract law; A Schwartz & R Scott, "Contract theory and the limits of contract law" (2003) *Yale Law Journal* 541.

¹⁶ Differentiation of contract norms is described as the process in terms of which contract law is identified as different sphere of commercial, consumer and labour law with different reigning within each sphere, Shwartz & Scott (541).

¹⁷ Study group on social justice in European private law "Social justice in European contract law: A manifesto" (2004) *European Law Journal* 654; Furmston M *The Law of Contract* (2003) 37.

influence is intended to be; thereafter, whether the enforcement of the contract would indeed amount to an infringement of the constitutional right; and, finally, whether, notwithstanding the infringement, there is nevertheless a good reason for retaining the provision in the contract. Section 36 of the Constitution applies to contract law where it is law of general application limits rights.

However, the intersection of the fields of law has not been an easy one leaving glaring inconsistencies warranting a tailor-made social dispensation. This point of departure warranted urgent attention in South Africa's political context because of its chequered history and the large number of disadvantaged and indigent consumers', as well as the fact that the consumer's right to protection constitutes an important factor in the political redistribution of wealth and power.¹⁸

Moreover, what has transpired is that South African courts have been slow to grant relief in cases of alleged unfairness under the common law. Therefore, paternalism in this context is an apparent admission to the fallibilities of consumers making rational choices. Government's realisation of the potential harm to the economy by such consumer behaviour justifies intervention purporting to overrule a consumer's short-term interest in favour of public, long-term interests.¹⁹ Consequently, consumer protection in the modern state is lauded for its regulatory mechanism where individuals were able to operate freely and are now limited by mandatory legislative obligations directing all their consumer activities.

The application of the constitutional mantra of equality, freedom and human dignity and other rights contained in the Bill of Rights introduces new-enlightened human rights approach to the treatment of private law disputes emanating from contracts. Summarily, it introduces landmarks into the South African contract jurisprudence: (a) it curbs judge's reliance on judicial precedence when deciding a case because of the novel rules to be followed in deciding a case involving the CPA; (b) the procedural requirements of a contract means parties can no longer limit their enquiry to the basic general requirements such as the contractual capacity of the parties and the legality of the transaction, but instead engage with

¹⁸ Hawthorne "The 'new learning' and transformation of contract law: Reconciling the rule of law with the constitutional imperatives to social transformation" (2008) 23 *SAPR/PL* 84.

¹⁹ Ramsay I *Consumer Protection Text and Materials* (1989) 54.

issues of fairness and reasonableness, as they will need to justify hard cases through normative reasoning.²⁰

Explaining such situations and the role of the court Judge Oliver Wendell Holmes Jr made the following observation: “[t]his is a court of law...not a court of justice”.²¹ He goes on to say that success is not the direction in which you are standing, but the direction in which you are going. These statements highlight the advantages of realism as the most logical methodology of adjudicating contract, consumer and constitutional matters. The most outstanding pronouncement comes from Holmes’s father that “[t]he life of the law has not been logic, it has been experience”.²² Therefore, the enquiry concerns the practical experience on how courts have dealt with the interpretation of exemption clauses.

Courts have struggled because the notion of equal bargaining powers for contracting parties is based on a false premise. Lerm argues that to balance the situation, freedom, as a constitutional value ought to be balanced with other constitutional values in our interpretations of for example fairness, dignity and equality.²³ To allow some exclusion clauses and businesses to operate with impunity would be to legitimize some form of contractually sanctioned theft. It is for this reason that the constitutional era contends that no matter how one values the sanctity of contract rule, the freedom of contract cannot be a licence for enforcing agreements that aim to affect or limit another party’s constitutional rights.

6.4 Are the objectives of the legislation attainable within the South African context?

The cases of *Mercurius Motors v Lopez*²⁴ and *Afrox Healthcare Bpk v Strydom*,²⁵ which both involve exemption clauses typifies the contradictions of South African courts’ jurisprudence. In the former case, the court concluded that the indemnity clause had to be drawn to the attention of the consumer so that he knows what he is contracting himself to;

²⁰ Hopkin (2003) TSAR 160.

²¹ Quoted by Walters F *Justice is God’s idea: Man has destroyed and corrupted it!* (2012) 24.

²² Justice Holmes *The Common Law* (1881): “The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories; intentions of public policy avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do that the syllogism in determining the rules by which men should be governed.”

²³ Lerm “Exclusionary clauses in medical contracts revisited” (2011) 74 *THRHR* 47-64.

²⁴ 2008 (3) SA 572 (SCA).

²⁵ 2002 (6) SA 21 (SCA) para [36].

whereas in the latter case the court held that a clause which reasonably may be expected to be part of a contract does not need to be pointed out. This is confusing and off tangent to the current regulatory framework. Thus, the matter can be taken on review from a constitutional perspective to clarify some of the issues raised in the matter.

The judgment in *Afrox* has been observed as in line with a strict application of the *caveat subscriptor* rule that was especially evident in earlier case law.²⁶ If the case were decided after the enactment of the CPA the clause at issue would have been null and void *ab initio*. It is also submitted that it was wrongly decided because the respondent counsel argued on delict instead of contract to found a claim for damages.

A breach of contract is easier to prove, because the question is based on whether there was performance or malperformance in terms of the contract, whereas proving delict requires an assessment of the standard of performance according to the category of that group or profession and is more difficult to prove. No much value was placed on the details of the contract, as applied herein. On the other hand, one has to consider the value of making a judgment call between these two causes of action as the scope of damages claimed by each is distinctly different. For breach of contract, the scope is narrower as it only covers direct patrimonial losses, whereas a claim for delictual damages offers a far broader scope of damages including patrimonial and non-patrimonial losses.

On the other hand, the decision in *Mercurius Motors* is a reminder of the discrepancies, which have crept into the law contract and the mistake defence.²⁷ Pretorius states this idea that judgment in *Mercurius Motors* reflects a cautious approach to the enforcement of such provisions and rightly so.²⁸ Cases such as *Mercurius Motors* demonstrates the judiciary's willingness to monitor exemption clauses more closely, especially where consumers are involved, which accords with the general direction in which legal policy is moving. That is the inventive approach of the courts and in particular, compliance with section 49 of the CPA, which stipulates the express, notice required terms and conditions.

²⁶ Pretorius "Exemption clauses and mistake" 73(2010) *THRHR* 497. See *Burger v Central South African Railways* 1903 TS 571; *Bhikagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E); *Mathole v Mothle* 1951 (1) SA 256 (T).

²⁷ Pretorius 501.

²⁸ 2010 (73) *THRHR* 502.

Concomitant with this premise the judiciary is expected to apply abstract legal norms, and are encouraged to eschew policy considerations or consider the relative justice of individual claims.²⁹ These are the norms of modern contract law aided by the values of a constitutional democracy. As general norms are open-ended and vague³⁰ requiring value judgments in their interpretation, our courts will continue to pronounce varying decisions. Finding the balance between the twin concepts of freedom of contract and sanctity of contract and consideration of fairness present a legal conundrum for modern contracts.

Argumentatively, through the CPA the legislature has attempted to curtail the abuse of exemption clauses in consumer contracts by requiring them to be pointed out to consumers. Courts' scope has been reduced when adjudicating cases of justifiable mistake, because if the consumer's attention has been drawn to it his defences are restricted.³¹ This means that with the enactment of the CPA the doctrinal dogma to contract law must be revisited by the jurists and scholars alike. The clash between sanctity of contract and fairness manifests the uneasy route for courts to sustain legal certainty in commercial setting interpretations. As a result, our courts have tended to enforce even unfair contracts, as long they were freely entered into.

The CPA's objective is to, *inter alia* "... protect consumers from hazards to their well-being and safety; develop effective means of redress for consumers..." Victor J stated in *Afriforum v Minister of Trade and Industry and Others*³² that the "extensive reach of consumer protection is embedded in the CPA itself" and "the reach of parliament into consumer matters was defined, and any deviation from its implementation must bear close scrutiny." Having made some relevant analyses of the problems caused to consumers by exemption clauses, and recent legislative amendments, consumers are cautioned from assuming that the law has reached perfection. This research is by far means not comprehensive, and thus not a bar on a further engagement on the subject, as only some issues could be raised within its scope.

For instance, the previous chapters have revealed the strengths and inadequacies of the present consumer law regime and the necessity of further development. Subsequently, some potential developments in these areas have been identified. Before making the final

²⁹ Hawthorne "Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism" 2006 *Fundamina* 76.

³⁰ Willet "General clauses and the competing ethics of European consumer law in the UK" 2012 *Cambridge LJ* 412.

³¹ Petoriosis 502.

³² 2013 (4) SA 63 GNP [11]-[13].

pronouncement on this topic, one is compelled to answer the question on whether the CPA and other legislation are assisting the obtaining situation of consumer's plight.

The National Credit Act (NCA), which became effective prior to the CPA, tries by explicitly excluding the applicability of exemption clauses.³³ The Act lists a variety of these unlawful provisions and for our purposes, the following are more relevant:

- (a) A provision is unlawful if it has a general purpose or effect that seeks to defeat the purposes or policies of this Act; deceive the consumer; or subject the consumer to a fraudulent conduct;³⁴
- (b) It directly or indirectly purports to-waive or deprive a consumer of a right set out in this Act; avoid a credit provider's obligation or duty in terms of this Act; set aside or override the effect of any provision of this Act; authorise the credit provider to (aa) do anything that is unlawful in terms of the Act; or (bb) fail to do anything that is required in terms of this Act;³⁵
- (c) It purports to waive any common law rights that may be applicable to the credit agreement.³⁶

In addition to the above listed provisions, the NCA invalidates the following exemption clauses: if it purports to exempt the credit provider from liability, or limit such liability for-

- (i) any act, omission or representation by a person acting on behalf of the credit provider; or
- (ii) any guarantee or warranty that would, in the absence of such a provision, be implied in a credit agreement;³⁷
- (iii) it expresses an acknowledgement by the consumer that- before the agreement was made, no representations or warranties were made in connection with the agreements by the credit provider or a person on behalf of the credit provider; or
- (iv) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer, which have or has not in fact been delivered or rendered to the consumer;

³³ 34 of 2005. See Sharrock RD *Business Transactions Law* (2011) 586. According to s 90 of the NCA, a credit agreement must not contain an unlawful provision.

³⁴ S90 (2) (a) (i)-(iii).

³⁵ S90 (2) (b) (i)-(iv).

³⁶ S90 (2) (c).

³⁷ S90 (2) (g).

- (v) it expresses an agreement by the consumer to forfeit any money to the credit provider.³⁸

Commentators have observed that this is major shift from the common law, which relied on signature as the basis for enforceability.³⁹ The NCA is a welcome relief for many consumers who were at the mercy of credit providers.

Besides the NCA, the Alienation of Land Act⁴⁰ also has an impact on the use of exemption clauses in land purchases. Section 15(1)(b)-(c) of the Land Alienation Act states that “an agreement whereby a purchaser forfeits any claim in respect of necessary expenditure he has incurred with or without the authority of the owner or seller of the land concerned, in regard to the preservation of the land or any improvement thereon, any improvement that enhances the market value of the land and that was effected by him on the land with express or implied consent of the owner or seller or the liability of the seller to indemnify the purchaser against eviction is restricted or excluded and shall be of no force and effect.”⁴¹ The purpose of such provision is to prevent unjust enrichment.

6.5 Final Conclusion

The undiminished and prolonged loyalty by the judiciary and scholars to the classic contract has the following negative effect: (a) it perpetuates the colonial exploitation of the periphery by closing the space for an equitable jurisdiction because the mechanisms of equality to the law of contract are obliterated.⁴² A number of controversial decisions issued by the Supreme Court when there is a need to develop the common law of fairness through good faith and *ubuntu*, which are the open norms of the Constitution, have frustrated the transformative agenda.

Contracts are a mechanism by which individuals exercise many of their fundamental rights. Commentators have advised that “the invitation to adhere to the contractual shibboleths of the past should be declined if we are concerned with inequality and its clear companion in South

³⁸ S90 (2) (h)-(i).

³⁹ Kanumugire & Chimuka “The current status of exemption clauses in South African contract law” (2014) *Mediterranean Journal of Social Sciences* 164.

⁴⁰ 68 of 1981.

⁴¹ Stoop “The current status of enforceability of contractual exemption clauses for the exclusion of liability in the South African contract law” (2008) 20 *SA Merc LJ* 506.

⁴² Hawthorne 2004 *THRHR* 294.

Africa-poverty”.⁴³ Remember that South Africa is one of the most unequal societies, therefore, a progressive and equitable contract law can play an integral part not only in addressing the private abuse of economic powers but also close the gap between the haves and the have-nots. This would be achieved through judicial activism not rigid formalism of conservative ideology underpinnings.

It becomes apparent that the developing post-colonial jurisprudence sometimes denies equity-based defences against unconscionable contracts, which the CPA adamantly intends to infuse. Therefore, it is the author’s assertion that the issue of indemnity clauses manifest the quandary of the South African’s state search for equitable jurisdiction in the constitutional realm. A persistent refusal by our higher courts to entertain the scope for the development of substantive equality would serve to perpetuate a situation where most consumers are cannon fodder for those with economic power, who can proceed with impunity to personify unscrupulousness in their dealings with others under a “philosophy of winner takes all”.⁴⁴

For instance, the classical model of contract is premised on a fallacious consensus of the parties operating at arm’s length. Negotiation between unequal parties stultifies the classical contract displaying ignorance of the disparities in resources. Therefore, the sanctity of contract is defeated when it yields to outcomes inconsistent with the constitutional standards of fairness, equality and human dignity. Commentators submit that the role of consensus and sanctity of contract “assumed” when contracting must be weighed against the constitutional pronouncement of fairness, equality and human dignity.⁴⁵

Noteworthy is that the country’s democratisation process espouses state intervention in many aspects of society’s life-housing, water, healthy and social grants and so forth. The developing welfarist state policy’s highlights fundamental dichotomy between the liberal economic doctrine in terms of which society consists of free and equal individuals and the reality of vast economic and social inequalities.⁴⁶ The CPA constitutes the legislature’s first strong general intervention concerning unfairness of terms, parties’ respective bargaining

⁴³ Rautenbach “Constitution and contract: The application of the Bill of Rights to contractual clauses and their enforcement-*Bredenkamp v Standard Bank of SA Ltd* 2010 9 BCLR (892) (SCA)” 2011 *THRHR* 521.

⁴⁴ Louw (16) 5 2013 *PELJ* 109 citing Hawthorne “Abuse of a right to dismiss not contrary to good faith” 2005 *SAMLJ* 221. 214-221.

⁴⁵ Bhana & Pieterse “Towards a reconciliation of constitutional values: *Brisley and Afrox* revisited” (2005)122 *SALJ* 884.

⁴⁶ Hawthorne 2006 *THRHR* 57.

powers,⁴⁷ and their status. It involves restoration of human dignity in its setting because it is located in the intersection of “law”, “economics” and “social welfare”.⁴⁸

Undoubtedly, the legislature has provided a legal framework for consumer protection by indirectly inviting courts to participate in extending and developing this structure in the scope of their decisions. The Act introduces a comprehensive mechanism to fight the unfairness matrix for explicit judicial evaluation of consumer choices to business contracts.⁴⁹ In the CPA Parliament has boldly addressed the legal framework encompassing consumers and suppliers’ interaction. According to commentators, the Act shifts from a freedom-oriented approach on the consumer contracts to a fairness-oriented approach.

As they say the taste of the pudding is in its eating, therefore, its potential success will be attributable to its enforcement mechanism. The South African judiciary is enjoined to take heed that the source of unfairness in contract is unequal bargaining power together with other factors.⁵⁰ This is done by considering the concept of procedural fairness and by so doing provides a structure within which to create a better balancing of interests in consumer contract paradigm. This includes the transparency criterion on information prescribed. Identification of this and other factors could not be done in isolation without the comparative and extra-judicial analysis encompassed by Chapter 5 of this dissertation.

In essence, this represents a rebirth and growth of South African case law on the subject other than the few rulings currently delivered. This does not mean contract law is static, as case law jurisprudence shows its unstoppable development. For instance, the case of *Business Zone v Engen Petroleum (Pty) Ltd*⁵¹ might change the way in which courts deal with exemption clause. In *casu*, the court had to adjudicate over unfair lease contract between the parties and the unequal bargaining power in the petroleum industry. Mhlantla J held that there is

⁴⁷ In *Gerolomou Constructions v Van Wyk* 2011 (4) SA 500 (GNP) 507, Claasen J held that to use threat of breaching a contract to induce an economically weak contractual counterpart to act to his disadvantage in relation to an accrued contractual right, the enforcement of which is not contrary to public policy, is subversive of freedom and human dignity.

⁴⁸ Van Eeden E *Consumer Protection Law in South Africa* (2013) 2.

⁴⁹ Van Eeden 236.

⁵⁰ In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [59], Ngcobo J stated: “In *Afrox* the Supreme Court of Appeal recognized that unequal bargaining power is indeed a factor that together with other factors plays a role in the consideration of public policy. This is recognition of the potential injustice that may be caused by inequality of bargaining power”. In addition, his Lordship went on to add: “[T]he relative situation of the contracting parties is relevant consideration in determining whether a contractual term is contrary to public policy. I endorse this principle. This is an important principle in a society as unequal as ours.”

⁵¹ [2017]ZACC 2.

sufficient context and justification to accept that “the equitable standard of fairness and reasonableness prevails in all petroleum contracts regardless of whether they are subject to statutory arbitration or ordinary court litigation.”⁵² Interpreted this way means “the purpose of introducing a fairness standard in petroleum contracts is better given effect to, without shielding the common law from statutory development.”⁵³

From the above Constitutional Court judgment, it shows and is unimaginable and difficult for courts to decide consumer disputes without infusing the fairness standards developed under the CPA, as if they are non-existent. Although the changes reflect a drastic paradigm shift for contract law to bring balance between sanctity of contract and the interest of the weaker party in bargaining, the balance still remains the Holy Grail and refuge from this deficiency has to be sought somewhere else for it. The tricky situation is perpetuated by the contrast between miscellaneous ideologies and the changing legal framework.

Despite some of the negatives perceived or real the legislature has to be applauded for the bold move to demand substantive fairness in consumer transactions as illustrated in the above case. Proponents of the consumer legislation hope that it will become part of contract law and not remain isolated island in the classical system. This follows the recognition in Europe that consumer rights have become part of human rights to restore human dignity. Increasingly, there is growing international influence on consumer rights spread in the United Nations and South Africa can take a cue from these institutions of stature to establish the culture of consumerism. All persons are consumers at some point in time so these rights are universal.

Botha⁵⁴ argues that the law in a welfare state only concerns itself with the promotion of the public interest rather than elaboration of private rights and individual duties. The interest moves from the individual to society at large-communitarian approach. Time will tell whether this has caused a decline in the proliferation of interests in private law, matched by the introduction of consumer law, which seek to regulate the private sphere of individuals or social life rather than to adjudicate between individuals. There is a serious presumption that this carries implications for traditional contract law because it does not delve into situation

⁵² Para [52].

⁵³ Para [56].

⁵⁴ Botha “The legitimacy of legal orders (3): rethinking the rule of law” (2001) *THRHR* 527.

analysis on what precipitated the conclusion of the contract.⁵⁵ However, it is going to affect the way in which contracts are concluded and lead to more transparency during contractual processes.

In most countries where consumer protection regulation has been established as a legal discipline, the various stakeholders have played significant and varying roles.⁵⁶ Judges have considered a wide range of factors in their judicial enquiry and legal interpretation to give a purposive approach rather than relying on pre-existing rules or precedents. This includes giving context to the language, history and social factors. For instance, in South Africa in the *Afrox* case the supreme court upheld some arguments on exclusion clauses on their limitation that are determined by business considerations such as saving costs for insurance premiums, competition and the possibility of deterring possible clients.⁵⁷

Interestingly, time has changed because now it is acknowledged that the CPA and the Constitution are exerting immense impact on the contract law in South Africa.⁵⁸ Yeukai further submits that the provisions of the CPA are likely to force courts to reshape the established principles and doctrines of contract law to be in conformity herewith.⁵⁹ The objectives of the CPA are attainable considering the developing jurisprudential philosophy of private law. In South Africa, the concepts of justice and fairness have been propelled into a new juridical space by the constitutional imperative to introduce substantive justice and bring about social transformation.⁶⁰

The constitutional approach has revamped a revision of contract law's frontiers and its governance at the helm of judicial activism. The import of consumer rights is now associated with the fundamental rights. Therefore, the right of equality in consumer market, the consumer's right to privacy, the consumer's right to choose and the right to disclosure of

⁵⁵ Hawthorne 84.

⁵⁶ See Reich N & Micklitz H-W *Consumer Legislation in the Federal Republic of Germany* (1981)1, where the author states: "...in the Federal Republic of Germany during the past decade the issue of consumer protection has increasingly been taken by the legislator, the courts and the jurists. As a result of legislation, but also as a result of court practice, the traditional legal system of the Federal Republic as it manifests itself in the traditional distinction between civil and public law is superimposed by a new field of law, consumer law."

⁵⁷ 34E-F

⁵⁸ Yeukai Mapungavanhu 2015 *De Jure* 133.

⁵⁹ *Ibid.*

⁶⁰ Hawthorne "Concretising the open norm of public policy: inequality of bargaining power and exploitation" 2014 (77) *THRHR* 408. See also Botha 535; Hawthorne "The 'new learning' and transformation of contract law: Reconciling the rule of law with the constitutional imperative to social transformation" 2008 *SAPR/PL* 78.

information appear cloaked in the fundamental rights enshrined in the Bill of Rights, now concretised and applicable in the private law by the legislator. Nevertheless, it seems that exemption clauses in standard form contracts will forever return to haunt many contractants who have consciously or unconsciously acceded to them.

From the introduction of interventionist consumer protection legal regime, it becomes apparent that the legitimacy of the formalistic rule of law has become questionable. With the apparent mellowing of constitutionalism and rule of law, all law in South Africa will accord the values that underlie the Bill of Rights. Development of consumer law has been hard owing to the chasm, resistance and conflicted interest between business and consumers.⁶¹

Of late, attention is given to the “new learning” and the contribution made by consumer law to the transformative thesis of contract law,⁶² as it has been alluded to earlier on that consumer law in South Africa is at its infancy. Therefore, state regulation of private domain is an essential aspect of the social contract. It has been discovered that the fundamental reason for consumer protection relates to the inequality of bargaining power⁶³ between the supplier of goods and services and the consumer who avails himself of them. On the same token exclusion, clauses are used, as defences of service providers.

Therefore, a laissez-faire approach by the state in such scenario is a breach of the social contract where democratic values warrants intervention to end exploitative economic practices like those facilitated by upholding the sanctity of contract rule in the enforcement of standard-form contracts.⁶⁴ Thus, the past two decades have witnessed a transformation in thinking about the role of the state in regulating the economy and in the role of the market as an institution and an ideology,⁶⁵ a transformation that has accompanied state actions such as large-scale privatisation and deregulation of markets and trends towards global economic integration.

⁶¹ See the case of *Tallman v MV Shark Team* [2014] ZAWCHC 202.

⁶² Hawthorne “The ‘new learning’ and transformation of contract law: Reconciling the rule of law with the constitutional imperative to social transformation” (2008) 23 *SAPR/PL* 82.

⁶³ Howell & Weatherill 6. See also Trebilcock “The doctrine of inequality of bargaining power: Post Benthamite economics in the House of Lords 26(1976) *University of Toronto Law Journal* 359; Howells GG “The potential and limits of consumer empowerment by information” (2005) 32 *Journal of Law and Society* 351; Hadfield, Howse R and Trebilcock MJ “Information-based principles for rethinking consumer protection policy” 21 (1998) *Journal of Consumer Policy* 141.

⁶⁴ Hopkins 157.

⁶⁵ For the position in the United Kingdom see, Moran M *The British Regulatory State: High Modernism and Hyper-Innovation* (2003).

The EU should be commended for its harmonization project in consumer law because it has given birth to a number of approaches that represent influential models of consumer protection in areas such as product safety standard setting,⁶⁶ product liability,⁶⁷ and the control on unfair contract terms which have now become a global phenomenon. This forms the basis of the CPA provisions of section 61 although it is not solely European creation.

Product and service standards are established at the regional and international level in areas such as consumer safety, food and financial services through private standards setting bodies with a public mandate. These areas lie at the core of consumer social and economically survival. Recent research in developing policy advice on food safety concludes that groups with superior knowledge such as regulators and business interests determine the agenda and outcome.⁶⁸ At the international level, Consumer International complains that business interests dominate standard setting within bodies such as the World trade Organization (WTO) and the Codex Alimentarius.⁶⁹

6.6 Existing theories

The rules and canons of construction still generally apply to contract terms and nothing has changed under the new consumer law dispensation. A badly drafted clause might be illegal and unenforceable. Protection means that exclusion clauses are construed in favour of the victim of the breach, and are generally construed very strictly. This has been the prevalent common law rule. Of particular importance are the rules of interpretation developed in relation to certain categories of clauses pertaining to negligence. Notably, the construction of expressions such as “consequential” or “indirect” loss can be categorized as hard cases. It

⁶⁶ See discussion of European Product Liability Safety Law in Howells & Weatherill (n63 above) 462-468; Howells “The relationship between product liability and product safety-Understanding a necessary element in European liability through a comparison with the US position” (2000) 39 *Washburn LJ* 305.

⁶⁷ See David Harland “Some reflections on the Influence of outside Europe of the EC Directive on products liability” in Kramer L, Micklitz H & Tonner K (eds) *Law and Diffuse Interests in the European Legal Order : Liber Amicorum Norbert Reich* (1997) 681. Although the EU directive on product liability has been a remarkable transplant in terms of its adoption throughout the world, it seems to have had little influence in practice with indigenous systems continuing to be used by litigants. See also Reimann M “Product liability in a global context: The hollow victory of the European model” (2003) 11 *Eur Rev Private L* 128.

⁶⁸ Ramsay 17. See also Rothstein H “Precautionary bans of sacrificial lambs? Participative risk regulations and the reforms of the UK food safety regime” (2004) 82 *Public Administration* 857. Rothstein concludes that “representations of policy processes and decisions as open, independent, and consumer-focused may have rhetorical purchase, but meeting such objectives in practice is more difficult” 878.

⁶⁹ The Food and Agriculture Organization (FAO) and the World Health Organization (WHO) establish the Codex Alimentarius Commission. It establishes international food standards that are used by the WTO in determining whether national standard is justified and not a technical barrier to trade.

mixes both common law and statute and exclusion clauses cannot be applicable to those not party to the contract, as it happened in the case of *Johannesburg Country Club v Stott*.⁷⁰

The situation that emerged in the Scott's reflects the tricky situation noted in matters of exemption clauses that require resolution involving parties who are not part to a contract. In fact, this matter was decided on public policy grounds, which is sometimes described as unruly horse with heightened straddle. If the court had denied the widow's claim for loss of support that would have legitimized undervalue given to human's life. Constitutional law in the protection of the right to life subsumes contract law.

The basic rule is that the notion of privity of contract prevents non-parties from receiving any benefits or burdens, which might be terms of an agreement made between others. The case of *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security*⁷¹ is very instructive in this regard. The court dismissed the *Aquilian* action of the truck owner based on vicarious liability finding that both wrongfulness and negligence were absent. However, the court in obiter was of the view that there should be relief granted to a third party who is a victim of a contract entered by two parties. Lewis JA cites Van Zyl J in *Compass Motors v Callguard (Pty) Ltd*⁷² that:

"...The contractual restriction or limitation of liability is, in my view, totally irrelevant for purposes of establishing the delictual liability of one or both contracting parties in respect of a third person who suffers injury arising from an act or omission pursuant to the contract in question. The community sense of justice, equity and reasonableness will undoubtedly be offended by strictures placed on delictual liability towards third persons, simply because the contract limits the contractual liability of the parties inter se."

Therefore, it would be helpful to determine to what extent a third person defrauded by a legal system may get redress from injuries incurred. Rather than prohibitively excluding a claim of a third party to an exemption clause solely because he was not part to the contract is unjust and unfair. The terms of the contract together with purposive interpretation by jurist must play a role in assessing what the convictions of society would be in relation to affording a claim for compensation to a non-contractual party.

⁷⁰ 2004 (5) SA 511 (SCA).

⁷¹ 2010 (4) SA 455 (SCA).

⁷² 1990 (2) 520 (W).

The shortcoming of this thesis is that it has no influence on the issue of public policy. It is perhaps necessary to emphasize that the task of interpretation of the particular clause and that caveats regarding the approach to the task are only points of departure. One should reiterate the court's holding in the above matter that "[i]n the end the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common-law and, now, with due regard to any possible constitutional implication."⁷³ The jurisprudence is clear that this is subject to the requirement that statutory provisions must be interpreted purposively and be properly contextualised.⁷⁴

On the contrary, Scotland and England still maintains the primary conservative approach that only a party to a contract can sue under it. There is an exception to this rule in the law of Scotland where it can be shown that the object of the contract is to benefit a third party.⁷⁵ This is the *ius quaesitum tertio*-a contract cannot confer a right to third party only a party can sue. This rule is now subject to an exception, principally those created by the Contracts (Rights to Third Parties) Act of 1999.⁷⁶

6.7 New Theories

Nowadays all the rules and canons of construction are tested before the courts to give concrete meaning to the objectives of the Legislature with regard to exemption clauses through the prism of the Constitution in South Africa. The unfairness of the market to produce sensible and judicious results was recognised and remedied by the legislature. The interpretation ensuing from here stands in sharp contrast between formalist judicial approach and realist judges, who are considered as of consumer welfarist persuasion.⁷⁷ Undoubtedly,

⁷³ Para [17].

⁷⁴ *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para [28] and *Natal Joint Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

⁷⁵ Lawson R *Exclusion Clauses and Unfair Contract Terms* 9th ed. (2008) 86.

⁷⁶ See Smith TB A *Short Commentary on the Law of Scotland* (2008) 177.

⁷⁷ Welfarist philosophy stands for policy of consumer protection and for principles of fairness and reasonableness in contract. See also the following contributions in Brownsword, Howells & Wilhelmsson (eds) *Welfarism in Contract Law* (1994): Brownsword "The philosophy of welfarism and its emergence in the English law of contract" 21, Wilhelmsson "The philosophy of welfarism and its emergence in the modern Scandinavian contract law" 63, Collins "Disclosure of information and welfarism" 97. See also Adams J N & Brownsword R *Understanding Contract Law* (2004)36-44 for a detailed explanation of the tension which runs between formalist, market-individualist-realist and consumer-welfarist-realist judicial approach to adjudication; Vettori "The socialisation of the law of contract" 2005 *De Jure* 81.

the notion of welfarism⁷⁸ is particularly reflected in legislative intervention and many legal narratives.

In addition to the steps that have been made in case law and regulatory framework in the last ten years, it has been observed that alternative contract theories have been developed. For instance, Brownsword⁷⁹ effectively describes how in England and elsewhere, welfarist protection have gone beyond legislation to develop concepts such as equitable estoppel, the doctrine of economic duress, the right to withdraw for breach of contract, and the recognition of consumer disappointment as a loss fit to be compensated by awards of damages as examples of judicial activism.⁸⁰ This interventionism promotes fairness and reasonableness, adjudication based on facts than on the rules.

In the past, there have been many hurdles to the development of realism kind of approach in some jurisdictions. However, one is drawn to concur with some commentators who argue that the Eurocentric nature of the South African common law cast some doubts over its survival prospects in the constitutional dispensation.⁸¹ Sachs J puts it differently that these Eurocentric rules have become Africanized. He sums it thus:

“Shorn of their associations with domination, there is no reason why these institutions should not be taken over and infused with a new spirit so as to serve the people as whole rather than just a minority.”⁸²

The question that begs an answer is whether contract law adjudication has upheld these sentiments. It remains debatable because the analysis of Cameron AJA in *Brisley v Drotsky*⁸³-where the judge chooses freedom in the eternal tension between freedom and equality. Taken in the context of Schauer's observation that the nature of appellate adjudication influences the entire legal system, the answer may be negative. In view of the force of our legal tradition, however, credit should be given to the small steps given in a realist direction.

⁷⁸ Brownsword “The philosophy of welfarism” 21.

⁷⁹ Adams JN & Brownsword R *Understanding Contract Law* 5th ed. (2007) 178.

⁸⁰ Brownsword 22.

⁸¹ Hawthorne 86.

⁸² Sachs A *The Future of Roman-Dutch Law in a Non-Racial Democratic South Africa: Some Preliminary Observations* (1992) 3.

⁸³ 2002 (4) SA 1 (SCA).

According to commentators, new theories adopt “the values of discretion and understanding than the formalistic principles of classic contract law”.⁸⁴ These theories were sufficiently discussed by Justice Sachs in the landmark case of *Barkhuizen v Napier*⁸⁵ and include inter alia, relational contract theory.⁸⁶ This theory is not in the mechanical interpretation of the parties’ intention, but with the determination of what is deemed to be proper conduct in the circumstances.⁸⁷ Implicit in this approach is a different dimension from the traditional form of interpretation and behaviour. Traditional contract doctrines failed to recognize a general obligation of the parties to cooperate and to assist each other, as it also does not recognize an independent duty to negotiate in good faith.

In *Barkhuizen v Napier*⁸⁸ Ngcobo J remarks that: “[a]s the law currently stands good faith is not self-standing rule, but an underlying value that is given expression through existing rules of law”. Therefore, the relational theory takes cognizance of these external factors, such as cooperation and common interest that are important in a relationship rather than the individual short-term gains of profit. The over-juridification of every aspect of the contract disturbs the value chain of contracting. Courts could not bring extraneous factors to dilute the impact of unfair terms on interpretation.

Further emphasis came from Justice Sachs when he held that the amelioration of unfair terms standard terms requires a principled approach, using objective criteria consistent both with contract law principles and with sensitivity to the manner in which economic power in public affairs should be regulated to ensure standard of fairness in an open and democratic society.⁸⁹

It is important to highlight that this theory of “new learning” originates from different paradigms and show different methods of legal reasoning,⁹⁰ but the factor that binds all “new

⁸⁴ Hawthorne L “Relational contract theory: Is the antagonism directed at discrete exchanges and presentation justified?” in Glover G, *Essays in honour of AJ Kerr* (2006) 138; JM Feinman “Relational contract theory in context” (2000) 94 *Northwestern Univ LR* 739; Adams J & Brownsword R *Key Issues in Contract* (1995) 354; Pretorius “Individualism, collectivism and the limits of good faith” (2003) 66 *THRHR* 638.

⁸⁵ 2007 (5) SA 323 (CC).

⁸⁶ Hawthorne L “Justice Albie Sachs’ contribution to the law of contract: Recognition of relational contract theory” (2010) 25 *SAPL* 82. She further elaborates that relational contract theory emphasizes the independence of individuals in social and economic relationships and focuses on the requirements of trust, mutual responsibility, solidarity and co-operation because the ambit of the agreement is extended relationship.

⁸⁷ 374A-B.

⁸⁸ 347G-H.

⁸⁹ 365F-G.

⁹⁰ Collins H *The Law of Contract* 3rd ed. (2003)20.

learning” together is the transformation of the law of contract⁹¹ based on a questioning of the freedom and sanctity of contract. More importantly, lying at the core of this analysis is the tension between contractual fairness and standard contracts.

It should be reiterated that Justice Sachs minority judgment in *Barkhuizen* gives licence to the “new learning”. He succinctly defines the rules thus: “seek[s] to achieve [a] reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition”.⁹²

6.8 Recommendations

As with other regulatory fields, the development of consumer law depends, in part, on prevailing ideas on institutional capacities and legitimate roles of the State and the market. The market must be steered in a certain direction in order to distribute wealth, to establish acceptable power relations and to provide meaningful opportunities to every consumer. To sum up the discussions in this thesis, it would not help to condemn the deficiencies of our legal system only without providing solutions to the problems.

Thus, one may suggest that the introduction of the duties of solidarity and cooperation, which form an essential part of relational contract theory. This must be concretised and encouraged, as part of the obligations of disclosure and transparency requirements. This requires an interpretative practice that goes beyond the rules and applies what is deemed fit in the circumstances of a particular case than for the courts to be bound to rigid formalism. We need a discriminating evaluation of what exist and what is humanly possible under reasonable circumstances-judicial activism. Clearly, the results of the legal relations are determined by the courts and the judicial system and not by the will of the contesting parties.

Parties to contracts must build strong relationships *in lieu* of state enforcement of contractual obligations, which is adversarial and counterproductive in nature. Social conditions such as reliable reputation and trustworthiness⁹³ are considered more powerful than state-enforced norms and the sanctions of contract law, and constitute the impetus of cooperation.⁹⁴ Parties

⁹¹ Ibid.

⁹² 375B-376C.

⁹³ Wightman J “Beyond custom: Contract, contexts, and the recognition of implicit understandings” in Campbell D, Collins H & Wightman J (eds) *Implicit Dimensions of The New Contextualism* (2003) 111.

⁹⁴ Gordon 574.

to a contract are obliged to cooperate from initial negotiations to the final performance and termination of a contract without any iota of threat of breach and chance of litigation.

Cooperation signifies working together with a contracting party to promote the common objective of fulfilling contractual obligations in order to bring a contract to fruition and consequently to maximise the individual's utility.⁹⁵ Thus, the incentive to cooperate is to be found in the economic self-interest, which motivated the parties to contract in the first place to improve their lives and gain human dignity. The undercurrent of this aura is that it negates the partisan and exploitative relations when dealing. In competitive markets, the parties know that the other party has a choice and could have entered into a similar agreement with a rival, usually strengthens the incentive to cooperate.

On another front, the CPA requires further amendment to ensure effective protection against unfair contract terms such as exemption clauses. Due to the failure to provide sufficient express provisions in the Act one could feel obliged to revisit the legislation and make the following observations. In some instances, it validates exemption clauses especially concerning notice (section 49) by implying that a consumer should initial next to an unusual term. South Africa can learn a lesson from the UK Consumer Right Act 2015, which states that a person is not assumed to have voluntarily agreed to the risk because he agreed to or knew about the notice.

As the EC Unfair Terms Directive is silent on the issue (unfairness)⁹⁶ the European Court of Justice held that national courts might raise the issue of unfairness on their own initiative. That prevents expensive litigation; the costs incurred by a consumer could have been avoided if there was an explicit provision on this point from the onset.⁹⁷

An advice and meaningful contribution in this regard warrants that the South African legislature should make explicit provision in the CPA for the courts, tribunals or provincial consumer courts to be given powers to raise the matter of unfairness in consumer contracts *mero motu* without the weaker party pleading it in court. Every principle, rule and doctrine of

⁹⁵ Hawthorne 88.

⁹⁶ Naudé T "The consumer's right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 536.

⁹⁷ *Oceano Grupo Editorial SA v Rocio Murciano Quintero: Salvat Editores SA v Jose M Sanchez Alcon Parades, Jose Luis Copano Badillo, Mohammed Berroane and Emilio Vinas Feliu*, ECJ judgment of 27/6/2000, Joined Cases C-240/98 to C-244/98, [2000] ECR I-4941.

contract law invested contagiously with aspects relating to exemption clauses is subject to consumer protection scrutiny within applicable legislation.

Research evidence suggests that most consumers will attempt to resolve any problems informally and many will do so without necessarily seeking advice. In the drive to reform consumer law, it is crucial that sight is not lost of the fact that consumers largely resolve disputes on an informal, self-help basis and if their rights are to be utilised effectively, reform should facilitate this informal approach.

In addition to the factors influencing law reform outlined above, the nature of consumer disputes requires the addition of a further objective. For instance, the law reform should ensure that an otherwise complex area of law is accessible as possible to both users (consumers and business) and advisers, to ensure that consumer rights are not just there on paper, but have some bite and are utilized.

Resultant to the consumer movement and need to promote consumer's rights South Africa is now at liberty to join Consumer International (CI), which is the largest and best-known international group. It has promoted ethical trading practices and sustainable consumption and acted as a forum that has brought together the interests of developing countries' consumers and those of developed countries.

The jurisprudence that has been fashioned around consumer legislation from foreign jurisdictions together with our own legal framework should help the country to establish solid bedrock for South Africa consumer policies and provide a starting point for that development. Even though the country has enacted legislation to protect consumers; much is left unsaid about the consumer education and consumer awareness of their rights and of service providers' exploitative practices as have been exposed to date.⁹⁸ A lot of work needs to be done by government and consumer organizations to effectively educate consumers about their legal rights. This attainable goal requires urgent attention and allocation of resources.

Giving a more cogent voice to the attainability of the recommendation above are the wise words of English scholars⁹⁹ that could also apply to the South African position:

⁹⁸ See *Speak Out*, which is a consumer programme on SABC 2 that commences at 21:30 every Thursday

⁹⁹ Borrie G & Diamond *A The Consumer, Society and the Law* (1976) 12.

“Convinced as we are of the need and value of legislating for improvements in the law, we have to admit that ‘you cannot legislate for fools’. No legislation is going to change us overnight into a nation of knowledgeable, prudent and discriminating shoppers. Law reform has to be accompanied by consumer education. We would like to see the work of the consumer organizations in this field supplemented not only by greater press and television but also by the schools giving consumer matters a prominent place in their curricula”.

Since the Constitution does not support the traditional classical contract law, but recognizes substantive moral values and the existence of different socio-economic conditions.¹⁰⁰ Botha¹⁰¹ puts this matter differently that although legal reasoning and the image of justice traditional associated with the rule of law are formalistic and resistant to any social contextualisation, the rule of law can be realigned to accommodate more substantive forms of legal reasoning and context-sensitive modes of inquiry.

This is patently clear in the crafting of the CPA and the methodology of its interpretation without any contradiction. The contextualisation of matters is restated in *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government*¹⁰², where Froneman J in obiter states that the rule of law is not synonymous with rigid formalism, and that it requires social and historical contextualisation to establish personal security for the indigent underclasses.

In the United Kingdom, following the enactment of the Consumer Protection from Unfair Trading Practices Regulations 2008¹⁰³ ordains that the matters relating to false oral undertakings and misrepresentations of effects of a term and other similar practices can now give rise to a criminal offence. What would prevent the South African legislator from transposing such a provision into its CPA? It is a good recommendation that its adoption should be seriously considered. This is because overriding or misrepresenting an exclusion or limitation clause could easily be regarded as an unfair and unconscionable practice since it contravenes the requirements of professional diligence and induces the consumer to enter into a contract he would not otherwise have made.¹⁰⁴

¹⁰⁰ Hawthorne L “Constitution and contract: Human dignity, the theory of capabilities and existenzgrundlage in South Africa” 2011 *Studia Universitatis Babeş-Bolyai. Serie: Jurisprudentia* (studia.law.ubbcluj.ro 2011-Numeral 2).

¹⁰¹ Botha (2001) 539.

¹⁰² 2000 (12) BCLR 1322 (E) 1331 (D).

¹⁰³ SI 2008/1277.

¹⁰⁴ Lawson (2008) 98.

Criminalising contravention could provide a strong deterrent against such conduct and indirectly prevent unacceptable practices and detriment to the consumer. There are, however, no equivalent provisions in the Business Protection from Misleading Marketing Regulation 2008 in the UK,¹⁰⁵ so similar offences could not arise in the context of business-to-business contracts.

Currently, South Africa recognises the concept of *ubuntu*¹⁰⁶ that may be used par excellence to concretise solidarity.¹⁰⁷ Louw¹⁰⁸ holds that the Cartesian concept of individuality now transforms from solitary to solidarity and from independence to interdependence, from individuality *vis-à-vis* community, to individuality *a la* community. Justice Sachs in *Port Elizabeth Municipality v Various Occupiers*¹⁰⁹, held that the South African Constitution and Bill of Rights have been acknowledged as having “a unifying motif... which is nothing if not structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern’ and that “*ubuntu*” suffuses the whole constitutional order and combines individual rights with a communitarian philosophy”.¹¹⁰

The duty to provide information on exclusion clauses, stricter requirements and control can be motivated for the South African scene that at this time refers to the provision of material information “in a manner which is unclear, unintelligible, unambiguous or untimely”.¹¹¹ An untimely clause could be presented when the consumer for example is already committed to a transaction and has no real chance of withdrawing from the

¹⁰⁵ SI 2008/1276.

¹⁰⁶ The concept of Ubuntu was first mooted as a constitutional concept in *S v Makwanyane* 1995 (3) SA 391 (CC) which case was followed by several academic discussions on the subject. See in general Mchunu “The need for traditional African jurisprudence in South African legal system” (1996) *The Magistrate* 55; Mqoke “Customary law and human rights” (1996) *SALJ* 304; Mokgoro “Ubuntu and the law in South Africa” (1998) *Potchefstroom Elektroniese Regstydskrif* (PER) ([http://www.pok.ac.za/lawper/1998 vol1](http://www.pok.ac.za/lawper/1998%20vol1%201)); Van Niekerk “A common law for Southern Africa: Roman law or indigenous African Law” (1998) *CILSA* 158; De Kock & Labuschagne “Ubuntu as a conceptual directive in realizing a culture of effective human rights” (1999) *THRHR* 114; Bohler-Muller “What the equality courts can learn from Gilligan’s ethic of care: A novel approach” (2000) *SAJHR* 623; Cornell “A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation” (2004) *SAPR/PL* 666; Hoctor “Dignity, criminal law and the Bill of Rights” (2004) *SALJ* 304; Bekker “The re-differentiation of contract law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention?” (2008) *THRHR* 445.

¹⁰⁷ Contextualization in this regard will help bring about responsabilisation of indigent consumers.

¹⁰⁸ Louw “Ubuntu: An African assessment of the religious other” (1998) [un.ac.za; http://www.bu.edu/wcp/Papers/Afri/AfriLouw.htm](http://www.bu.edu/wcp/Papers/Afri/AfriLouw.htm).

¹⁰⁹ 2004 (12) BCLR 1268 (CC).

¹¹⁰ 1288D-E.

¹¹¹ Reg 6(c).

contract. , as when a ticket from a parking barrier is revealed when the barrier is activated¹¹² or when a consumer needs to consent to terms and conditions of a website

For the European Union, as the volume of case law from European Union Court of Justice (CJEU) continues to increase, the need to monitor and, if necessary, review consumer legislation it complies with EU law is an ever-pressing issue. There is a need to take into account to take into account the occasional rulings from higher court if these affect the interpretation of domestic law affect domestic law in a significant way. In South Africa, the courts are encouraged to infuse consumer contracts with the spirit of the Constitution and the tenor of the consumer protection legislation in their interpretation.

Behavioural economics show that contracting parties are fraught with limited information and limited information processing. These insights should not diminish measures aimed at ensuring that consumers are better informed about the terms of standard form contracts. Measures that are more vigorous designed to provide information to consumers about terms in their standard form contracts must be enhanced for versatility. The use of technology to assist consumers on the text of the legislation with hyperlinks to related legislation and commentaries may be useful in the process of consumer education.

Through enlightenment, some terms may change from an incidental factor in the decision-making process of consumers to a salient factor. Measures designed to improve the information available to consumers about the terms of their contracts are valuable safeguards for consumers during the existence of their contractual relationships to prevent later disputes between the parties.¹¹³

6.9 Suggestions for further research

There is a need to adjust the methodology employed by contract law in a manner that would best suit constitutional determination of contractual autonomy. Failing that, refuge can still be found by adjusting the common law rules. The major issue is to balance the various interests from an ideological perspective to rights-based ones. Notwithstanding methodological hindrances, the country is swiftly trying to catch up with the universal increase of consumer

¹¹² See *Thornton v Shoe Lane Parking* [1971] 2 Q.B. 163 at p 15.

¹¹³ Paterson J "The Australian Unfair Contract Terms Law: The rise of substantive unfairness as a ground for review of standard form consumer contracts" (2009) *Melbourne University LR* 953.

rights promotion and protection. A comprehensive Act has been enacted instead of a fragmented legislative approach fraught with statutory uncertainty in resolving cases involving the enforcement of exemption clauses.

To sum up the completely academic exercise penned down in this thesis, one must reiterate that the focal point of this study has been to engage in a discussion on the need to smoothen a transition of the interface between the private law of contract, consumer law and constitutional law - specifically regarding the acceptance and validity of exemption clauses. Its progression shows the dichotomy of contract law with the current consumer legislation, and streamlining it into an existing legal regime. The content of the legislation is analysed in depth, which shows that there are still some open portals to enable us to continue to develop the common law. Clearly, the transition has to happen within the constitutionalization of our common contract law and not only in isolated cases under private law.

Without a fully developed theory of special contracts, many remains uncertain about the scope of obligations to be implied into the various nominate contracts. South Africa needs a legislation dealing with general terms like the General Contract Terms Act. This Act should be aligned with the Constitution and industry-specific terms. Therefore, South Africa's position might change and the plight of consumers ameliorated despite the relief coming from the CPA.

Lawyers must improve their drafting skills to make the contract "judge-proof": to anticipate and provide for possible conflicts in advance.¹¹⁴ Consumers faced with a dispute are more likely to be able to assess and assert their rights where the terms of their contracts are readily available and clearly expressed. Any consumer must be knowledgeable of the likely impact of exemption clauses and be ready and able to interrogate them in any transaction or service. The issue of compliance should be elevated to sanctions for the lack thereof by parties to any contract.

The fact that an obligation is recognized by and receives its effect through the agencies of the state implies that contracting parties, when exercising their private autonomy, remain subject to the values of our society and most importantly, must operate within the confines of the law. The rules of the law of contract manifest the attempts in the legal system to achieve a

¹¹⁴ In the words of Cartwright J *An Introduction to the English Law of Contract* (2007) 58.

balance between relevant principles and policies to satisfy prevailing perceptions of justice and fairness, as well as for purposes of economic, commercial and social expediency.¹¹⁵ It is apparent from this discourse that the law of contract continues to possess a dynamic and evolving nature.¹¹⁶

Other scholars may be privileged to answer or question the whole conversation raised here in this academic exercise. Despite the findings made here, the purpose is to stimulate an intellectual debate and improve our consumer and contract laws rather than explore fault-finding with its conclusions. The author may have offered an engaging picture of South African contract law and global perspective on exemption clauses and equality, but their tenets do not possess universal validity and inevitably would not thrive in an alien soil that is not receptive of the findings

¹¹⁵ Van der Merwe et al 11.

¹¹⁶ See remarks of Van Zyl J in *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C) 323-324.

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7. ABBREVIATIONS & ACRONYMS

ABBREVIATION/ACRONYM	FULL TEXT
Anglo-American LR	Anglo-American Law Review
ALJ	Administrative Law Journal
ASSAL	Annual Survey of South Africa
California LR	California Law Review
Camb LJ	Cambridge Law Journal
Can Bus LJ	Canadian Business Law Journal
CILSA	Comparative International Law Journal of Southern Africa
Colum LR	Columbia Law Review
Constitutional CR	Constitutional Court Review
Dalhousie LJ	Dalhousie Law Journal
De Jure	De Jure Law Journal
De Rebus	De Rebus Attorneys Journal
European JIL	European Journal of International Law
Emory LJ	Emory Law Journal
European Review PL	European Review of Private Law
Georgetown LJ	Georgetown Law Journal
Harvard LR	Harvard Law Review
International Encyclopedia L	International Encyclopaedia of Laws
International Insurance LR	International Insurance Law Review
ICQR	International Comparative Quarterly Review
JBL	Journal of Business Law
JCL	Journal of Consumer Law
Juridica International LR	Juridica International Law Review
LQR	Law Quarterly Review
LAWSA	The Law of South Africa
Lloyd Maritime CLQ	Lloyd Maritime Comparative Law Quarterly
Maryland LR	Maryland Law Review

Mediterranean Journal SS	Mediterranean Journal of Social Science
Melbourne University LR	Melbourne University Law Review
Merc LJ	Mercantile Law Journal
Michigan LR	Michigan Law Review
Northwestern University LR	Northwestern University Law Review
Obiter	Obiter Legal Journal
Otago LR	Otago Law Review
Ottawa LR	Ottawa Law Review
Oxford Journal LS	Oxford Journal of Legal studies
PELJ	Potchefstroom Electronic Law Journal
Public Admin	Public Administration
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL/PR	South African Public Law
South African YIL	South African Yearbook of International Law
Spec J	Speculum Juris
StanLJ	Stanford Law Journal
Stell LR	Stellenbosch Law Review
Sydney LR	Sydney Law Review
Texas LR	Texas Law Review
TBL	The Business Lawyer
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Washburn LJ	Washburn Law Journal
Wisconsin LR	Wisconsin Law Review
Yale LJ	Yale Law Journal