

**THE INTERNATIONAL INTERPRETATION  
OF UNCONSCIONABLE CONDUCT  
AND THE UNCONCIONABILITY FACTORS  
CONTAINED IN SECTION 40  
OF THE CONSUMER PROTECTION ACT 68 OF 2008**

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## **Abstract**

This dissertation interprets the meaning and application of the concept 'unconscionable conduct' as well as the factors that constitute unconscionability, contained in section 40(1) of the Consumer Protection Act 68 of 2008 (CPA), by comparing consumer laws and definitions from different countries with South Africa.

This dissertation illustrates that the generic term 'unconscionable conduct' is not well known in South Africa, despite the provision thereof in the CPA. There is consequently uncertainty regarding this concept and it is therefore necessary to include a more in depth definition and explanation.

The dissertation furthermore attempts to establish concrete definitions for the unconscionability factors such as, physical force against a consumer, coercion, undue influence, pressure, duress or harassment and unfair tactics. These factors are not defined anywhere in the CPA and well-constructed definitions will reduce uncertainty and interpretation problems

Two conclusions can be drawn from this dissertation:

Firstly, that the concept of 'unconscionable conduct' must be expanded, improved and explained. This will ensure that all suppliers know the consequences of unconscionability and that the consumer can have the peace of mind to know they will be protected under all circumstances.

Secondly, that the CPA must be improved with regards to the factors of unconscionability. By removing unnecessary factors and providing concrete definitions to the remaining factors will ensure that the entire concept is easier to understand and apply.

Keywords: *Unconscionable conduct; Consumer Protection Act (CPA); section 40(1).*

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## **A: ABBREVIATIONS USED**

1. **ACL:** Australian Consumer Law
2. **ACCC:** Australian Competition and Consumer Commission
3. **ADR:** Alternative Dispute Resolution
4. **ASIC:** Australian Securities and Investments Commission
5. **BPCP:** Business Practices and Consumer Protection Act
6. **CAFCOM:** Consumer Affairs Committee
7. **CISG:** United Nations Convention on Contracts for the International Sale of Goods
8. **CPA:** Consumer Protection Act
9. **DTI:** Department of Trade and Industry
10. **ECC:** European Consumer Centre
11. **EU:** The European Union
12. **FTC:** Federal Trade Commission
13. **FTCA:** Federal Trade Commission Act
14. **NCC:** National Consumer Commission
15. **NCT:** National Consumer Tribunal
16. **ODR:** Online Dispute Resolution
17. **OFT:** The Office of Fair Trading
18. **UCC:** Uniform Commercial Code
19. **UDTPA:** Uniform Deceptive Trade Practices Act
20. **UK:** The United Kingdom
21. **USA:** The United States of America

## **CHAPTER 1: INTRODUCTION**

### **1.1. Background**

Consumer protection has become a very important field of law in South Africa and internationally. It is needed to safeguard the economic interests of the consumer against a supplier or service provider's unfair trade practices, deceptive and false advertisements.

The primary legislation for the protection of consumers in South Africa in general is the Consumer Protection Act (hereinafter the 'CPA').<sup>1</sup> It came into effect incrementally with the final enactment on 1 April 2011. As a result all suppliers of goods and services after 1 April 2011 need to comply with the CPA, provided that the CPA is applicable to their transaction.<sup>2</sup> Before the implementation of the CPA, general consumer protection in South Africa was largely unregulated and resulted in a lack of basic rights to consumers and exploitation of consumers.<sup>3</sup> The CPA regulates the rights of the consumers and the responsibilities of the suppliers. With its enactment South Africa codified a common law for consumer rights by aligning itself with the United Nations and the European Union guidelines on consumer protection.<sup>4</sup>

The aim of the CPA is to promote a fair, accessible and sustainable marketplace for consumer products and services and this will in turn help to improve the relationship between consumers and businesses. Therefore it can be said that the main aim of the CPA is to level the playing field in the marketplace between consumers and suppliers.

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<sup>1</sup> Act 68 of 2008.

<sup>2</sup> The CPA is not applicable to all transactions. Section 5 of the CPA provides that "the CPA shall apply to every transaction, agreement, advertisement, production, distribution, promotion, sale or supply of goods or services". Therefore the CPA has a very wide application. Further, the CPA shall apply to "the promotion and marketing of any goods or services and to suppliers of goods and services". Certain transactions are exempt. For instance, where the goods or services could not reasonably be the subject of a transaction falling within the ambit of the CPA (s5(3)) or where the goods or services have been exempted from the application of the CPA (s5(4)).

<sup>3</sup> There are a few consumer protection statutes that were replaced by the CPA. This will further be discussed in Chap 2.

<sup>4</sup> The Banking Association of South Africa "Consumer Protection Act" available <http://www.banking.org-za/index.php/consumer-centre/consumer-protection-act> (accessed on 29 March 2014).

The purpose of the CPA is furthermore to promote and advance the social and economic welfare of consumers.<sup>5</sup>

Chapter 2 Part F of the CPA deals with the consumer's right to fair and honest dealing. In section 40 of the CPA the supplier or service provider's unconscionable conduct is specifically addressed. In section 40 'unconscionable conduct' is defined as:

- (1) "A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any-
  - (a) marketing of any goods or services;
  - (b) supply of goods or services to a consumer;
  - (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
  - (d) demand for, or collection of, payment for goods or services by a consumer; or
  - (e) recovery of goods from a consumer".<sup>6</sup>

Further, according to the CPA unconscionable conduct is defined as "any conduct unethical or improper to a degree that would shock the conscience of a reasonable person".<sup>7</sup> The term 'unconscionable conduct' is not well known in South African law and it may have been inspired by common-law consumer legislations<sup>8</sup> like in Australia, New Zealand and United States of America.

In section 40(1) the different factors which constitute unconscionable conduct are mentioned which includes factors like coercion, undue influence, pressure, duress or harassment and unfair tactics.<sup>9</sup> The problem that arises is that some of these are innovative factors in South African law (such as pressure, harassment and unfair tactics for example) that are not clearly defined in the Act, and that can lead to uncertainty and confusion on their exact meaning.

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<sup>5</sup> S 3(1) of the CPA.

<sup>6</sup> S 40 of the CPA.

<sup>7</sup> S 1 of the CPA.

<sup>8</sup> Du Plessis J "Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 86 of 2008" 2012 *THRHR* 26.

<sup>9</sup> S 40(1): "A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct".

## 1.2. Problem Statement and Research Objective

The generic term ‘unconscionable conduct’ is not well known in South African law and has not featured prominently in South African legislation. It is a novel concept that has not been the focus of interpretation in case law or by statute other than in the CPA. Due to its current relevance it is therefore necessary to ensure that this concept is defined and explored to understand what exactly is meant with it. Because it was introduced into the South African law by means of the CPA which was based on foreign consumer legislation, it is vital to examine its interpretation in these legislatives, and to determine how this concept is defined and applied in other countries, to obtain a better understanding of its impact.

A fundamental problem that emerges from this is an interpretive one. It is necessary to attempt to give the section as a whole, as well as the individual words used in the subsection, a sensible interpretive meaning. The general rule of interpretation is that the legislature must not use words unnecessarily and therefore each word must be given an independent meaning.<sup>10</sup> When examining section 40 it is clear that the legislators and drafters of the Act have taken some of these terms *directly* from foreign sources, without taking in consideration what these terms mean in South African law and to what extent they will be recognized by the consumer.<sup>11</sup>

The following paragraph shown specifically that the CPA stated that international law must be taken into consideration. According to section 2(2):

“When interpreting or applying this Act, a person, court or Tribunal or the Commission may consider-

- a. Appropriate foreign and international law;
- b. Appropriate international conventions, declarations or protocols relating to consumer protection; and

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<sup>10</sup> Du Plessis J 29.

See also Du Plessis LM *The (Re-) Interpretation of statutes* (2002) 214.

<sup>11</sup> See fn 9.

- c. Any decision of a consumer court, ombud or arbitrator in terms of this Act, to the extent that such a decision has not been set aside, reversed or overruled by the High Court, Supreme Court of Appeal or the Constitutional Court”.

Therefore the main aim of this dissertation was to determine the meaning of the concept of unconscionable conduct and further to try and establish a meaning for each of the factors contained in section 40(1). This will be done by examining the interpretation of unconscionable conduct in other jurisdictions and to deduce potential meanings from foreign sources. This dissertation focuses on a comparative review of the law in Australia, the United Kingdom, the United States of America, the European Union and Canada. A secondary aim of this dissertation is to use the comparative study to recommend definitions that can be applied to the unconscionability factors contained in section 40(1) and try to incorporate these definitions for the consumer act in South African law.

### **1.3. Methodology**

The following three phases of comparative legal research were followed in this dissertation:

- (1) Researching the different legal systems to obtain relevant information on the applicable foreign rules.
- (2) Analyzing the different elements against each country’s unique legal system and consumer protection framework.
- (3) Considering the similarities and differences between the chosen elements and incorporating them in the South Africa legal framework.<sup>12</sup>

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<sup>12</sup> S 40(1) of the CPA.

#### **1.4. Significance of the Study**

This study provides a comprehensive analysis of the meaning of the term ‘unconscionable conduct’ and the factors that it contains. It also attempts to interpret the international meanings of the different factors of unconscionable conduct to determine a possible definition for them that can be applied in the South African legal system. By understanding the meaning of this term it will enable South Africans to understand exactly what the legislators of the CPA meant therewith and apply it accordingly.

#### **1.5. Structure of the dissertation**

This dissertation is structured in seven chapters to meet its objectives. In Chapter 2 an overview of the development and history of the consumer protection legislation in South Africa is provided. Chapter 3 deals with the legislation that governs the consumer protection in certain countries and how these different legislations are applied in these countries. The countries examined and compared, in this chapter are Australia, The United Kingdom, The European Union, the United States of America and Canada. Chapter 4 deals with section 40 of the CPA and critically analyses the meaning of unconscionable conduct and compares it with its meaning and interpretation in foreign legislation. In Chapter 5 the meaning of the different factors as listed in the definition of ‘unconscionable conduct’ is established by determining the dictionary meanings and by comparing the definition of these factors in international legislations. This chapter will attempt to establish a meaning for these factors that can be applied in South African legislation. Furthermore this chapter also deals with the influence that these factors and their meanings have on the interpretation of contracts. In the final chapter a conclusion is drawn and recommendations for the South African context will be addressed.

## **1.6. Delimitations or Delineations**

This dissertation examines the international interpretation of the different factors of unconscionable conduct mentioned in Section 40 of the CPA. Even though some references will be made to other sections in the CPA where necessary, the main focus remains on section 40 (and not the CPA as a whole).

Any international legislation referred to herein is only with reference to unconscionability or a term which could be related to it. Therefore any reference to the foreign legislations is only to the parts thereof which are applicable and not the entire legislation.

It is to be noted that this dissertation reflects relevant developments in this area of the law as in November 2015.

## **CHAPTER 2: CONSUMER PROTECTION IN SOUTH AFRICA**

### **2. Introduction**

Consumer protection has become a very important aspect all over the world. Whenever consumers want to buy something or render the services of someone, it constitutes a contract between the parties. These contracts are an agreement where both parties promise to fulfil an obligation.<sup>13</sup> These agreements between the parties need to be fair and ensure that the consumers are not taken advantage of or abused. Consumers need protection, even more so in South Africa, due to the large number of uneducated citizens, who do not necessarily understand certain terms in a contract or conditions that can apply. It is therefore necessary that these citizens' interests are protected against the faulty or poor delivery of products and services.<sup>14</sup>

However, the protection of consumers in South Africa was not easily accomplished. In this chapter an overview of the development and history of consumer protection in South Africa will be given.

#### **2.1. Common Law**

Before any consumer legislation was in place in South Africa, the consumer had to rely on the general principles of common law, where any problems pertaining to the validity or enforcement of the contract was at issue.<sup>15</sup> The general principles of contract law were therefore applicable on all these agreements. The definition of a contract<sup>16</sup> is an agreement between two or more parties where there is a serious intention to create legally binding obligations.<sup>17</sup>

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<sup>13</sup> Lake R and Opperman I *Understanding the Consumer Protection Act* (2012) 1<sup>st</sup> ed. x (preface).

<sup>14</sup> Lake and Opperman xi.

<sup>15</sup> Woker T "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" (2012) 31 *Obiter* 223.

<sup>16</sup> Hutchison, Pretorius & others *The Law of Contract in South Africa* (2009) 1<sup>st</sup> ed. 6.

<sup>17</sup> Kerr AJ *The General Principles of the Law of Contract* (2002) 6<sup>th</sup> ed. 187

A party to a contract might act improperly towards the other when they negotiate in order to obtain consensus. This conduct can be, for example, where the one makes a misrepresentation to the other, or places him under duress, unduly influences him or bribes the latter's agent. These forms of conduct render the contract voidable as they are improper in the process of attaining consensus.<sup>18</sup>

Due to the fact that this dissertation deals with unconscionable conduct, the focus will only be on examining how the common law protected parties against improper conduct of one of the parties towards the other.

Unconscionable conduct (which will be described in more detail later) deals with improper conduct from one party that influences the other party to enter into a contract which he would not normally enter into. This applied in terms of common law only when a party entered into a contract due to a misrepresentation made to him, or due to duress or undue influence exercised upon him.<sup>19</sup> When this conduct is applicable the contract is still valid, but due to the fact that the consensus of one of the parties has been obtained improperly<sup>20</sup>, the contract will be voidable.<sup>21</sup>

According to the common law there are a few remedies available in the instance of improperly obtained consensus:

*i. Restitutio in integrum*

This remedy combines rescission and restitution and it has become the law to set aside a contract when it can be proven that the contract is voidable. When the ground for relief is based on misrepresentation, duress or undue influence, the innocent party has the option to uphold the contract or to rescind it.<sup>22</sup> When the contract is rescinded or set aside, both parties must restore any performance made in terms of the contract. The purpose of

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<sup>18</sup> Hutchison, Pretorius & others 113.

<sup>19</sup> Hutchison, Pretorius & others 114.

<sup>20</sup> Jacobs W, Stoop P & Van Niekerk R "Fundamental Consumer Rights under the Consumer Protection Act 60 Of 2008: A critical overview and analysis" (2012) 13 *PER* 347.

<sup>21</sup> See fn 18.

<sup>22</sup> Kerr 318.

restitution is to place the parties in the position they were before the contract was concluded.<sup>23</sup>

ii. Delictual Damages:

When the wrong-doing party's conduct constitutes a delict, the innocent party may recover damages of any financial loss suffered as a result of this improper conduct. The damages are recoverable irrespective of whether the innocent party sets the contract aside or not. The damages are calculated according to the position in which the innocent party would have been, had the delict not been committed.<sup>24</sup>

## **2.2. Consumer Protection Legislation**

The common law legislation had some flaws when it came to the protection of consumers and the need for more specific legislation arose. The following Acts were consecutively put in place to regulate the position of consumer protection:

### **2.2.1. Sales and Service Matters Act and Price Control Act**

The Price Control Act 25 of 1965 was an act to provide for the control of prices of services and goods. The Sales and Services Matters Act 25 of 1965 provided for the control of sale of goods and the rendering of services. This act was amended as Act 71 of 1993.<sup>25</sup>

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<sup>23</sup> Hutchinson, Pretorius & others 114.

<sup>24</sup> Hutchison, Pretorius & others 115.

<sup>25</sup> Price Control Amendment Act 71 of 1993.

### 2.2.2. Usury Act and Credit Agreements Act

Due to the fact that consumers could not always afford the products and services provided to them, the banks and companies started to lend money to the consumers. The Usury Act 73 of 1968 therefore came into effect to protect consumers by limiting and ensuring the disclosure of finance charges levied in money lending transactions.<sup>26</sup>

When money lending transactions became so popular, suppliers started to realise that they could provide their services and products to the consumers and reach an agreement to only receive payment therefore at a later stage. This is how credit agreements came into existence and in 1981 the Credit Agreements Act 75 of 1980 came into effect. This Act provided a broader scope of protection in transactions where movable goods were purchased or leased on credit or when services were rendered on credit.<sup>27</sup> Both these Acts were repealed by the National Credit Act 34 of 2005.<sup>28</sup>

### 2.2.3. Trade Practices Act

The Trade Practices Act 76 of 1976 as amended by Trade Practices Act 34 of 2001 was a bill that prohibited “ambush marketing” in respect of sponsored events and increased penalties for failure to comply with the Act.<sup>29</sup> “Ambush marketing” is a technique where a product is linked to a particular event to create the impression that the product is part of the sponsorships of the event when it is not.<sup>30</sup> This statute prohibited and dealt with practices that were in fact improper.

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<sup>26</sup> The Preamble of the Usury Act 73 of 1968.

<sup>27</sup> The Preamble of the Credit Agreements Act 75 of 1980.

<sup>28</sup> The Preamble of the National Credit Act 34 of 2005.

<sup>29</sup> Trade Practices Amendment Bill 34 of 2001. Available at: <http://www.gov.za/documents/downloads.php?f=67165> (last accessed on 15 July 2014).

<sup>30</sup> Definition found on the Business Dictionary. Available at <http://www.businessdictionary.com/definition/ambush-marketing.html#ixzz3itHTwbU8> (last accessed on 15 July 2014).

## 2.2.4. Harmful Business Practices Act and Consumer Affairs (Unfair Business Practices) Act

Targeted consumer protection in South Africa however, started with the Harmful Business Practices Act 71 OF 1988 as amended by Harmful Business Practices Amendment Act 43 of 1990. The purpose of this Bill: “is to harmonise the National and Provincial legislation and to change the object of the principal Act from prohibiting and controlling harmful business practices, to prohibiting and controlling unfair business practices”.<sup>31</sup>

According to this act a harmful business practice is “any way of doing business that would harm the relationship between the business and the consumer, mislead the consumer or be unreasonably unfair to the consumer”.<sup>32</sup>

In 2001 the Act was changed and renamed the Consumer Affairs (Unfair Business Practices) Act 21 Of 2001.<sup>33</sup> The Act was amended to provide for the questioning of a person at a preliminary investigation, to make provisions for measures pending the outcome of an unfair business practice investigation, to repeal obsolete provisions and to empower a curator to obtain legal assistance under certain circumstances.<sup>34</sup>

This Act was an enabling Act and did not prohibit anything itself. It authorised the Consumer Affairs Committee (CAFCOM), which is a statutory body of the Department of Trade and Industry (DTI), to investigate business practices and then report it to the Minister. The Minister can accept recommendations made by the Committee and then publish it in the Government Gazette to declare the business practice as unfair.<sup>35</sup>

Although many harmful and unfair business practices were stopped by this Act, consumers were still not protected enough. The lack of protection is due to the fact that CAFCOM is under-resourced and it has no power to order redress.<sup>36</sup> The Committee

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<sup>31</sup> As in the Memorandum on the objects of the Harmful Business Practices Amendment Bill, 1998.

<sup>32</sup> See above.

<sup>33</sup> Lake & Opperman ix.

<sup>34</sup> The Preamble of the Amendment Act 21 of 2001. Available at:  
[http://www.saflii.org/za/legis/num\\_act/cabpaa502.pdf](http://www.saflii.org/za/legis/num_act/cabpaa502.pdf) (last accessed on 15 July 2014).

<sup>35</sup> Woker T 219.

<sup>36</sup> Woker T 220.

can only advise the Minister, who in turn can declare certain practices illegal. But then, the matter goes over to the police and prosecuting authorities who deals with the Minister's orders. These entities are overloaded with criminal matters and the consumers' issues do not receive the necessary attention.<sup>37</sup>

Furthermore, due to the fact that technology keeps on developing and evolving, new products like cell phones and computers have created new ways of doing business. Issues like standard form contracts or automatically renewed contracts were not covered by this Act, which can cause problems.<sup>38</sup>

### **2.2.5. Consumer Protection Act**

It was clear that a new legislation was needed to deal with the shortcomings of the above mentioned consumer laws. The DTI constituted a national survey<sup>39</sup> in which the most common problems which consumers face were identified, and information about people's views and stands on consumer protection was researched.

The main problems identified were specifically the parties' consent to agreements obtained improperly by way of undue pressure, where consumers were misled during negotiation, the contract terms were unfair and the product or goods were defective.<sup>40</sup> The findings of the survey resulted in the Draft Green Paper on the Consumer Policy Framework to deal with these problems that consumers face.<sup>41</sup> An impact assessment of the policy was conducted by the DTI and in 2006 the first draft of the Consumer Protection Bill was published for public comment. The first and second drafts were amended which resulted in the final Consumer Protection Bill which was published in 2008.<sup>42</sup> On 31 March 2011 the Consumer Protection Act (CPA)<sup>43</sup> was implemented and

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<sup>37</sup> See fn 33.

<sup>38</sup> Lake & Opperman ix.

<sup>39</sup> Du Preez ML "The Consumer Protection Bill: A Few Preliminary Comments" (2009) *TSAR* 59.

<sup>40</sup> Woker T 223.

<sup>41</sup> The Draft Green Paper on Consumer Policy Framework. Available at:

<http://www.search.gov.za/info/search.jsp?q=consumer+policy+framework&s=1&st=b&ast=1&rps=20&xcb=1413303496169>. (Last accessed on 12 October 2014).

<sup>42</sup> Du Preez 60.

since then the relationship between suppliers and consumers has been controlled by the CPA.<sup>44</sup>

The CPA is a combination of international practices and sections which were adapted to deal specifically with consumer related problems unique to South Africa.<sup>45</sup> The Act is divided into 7 chapters and contains 122 sections, of which unconscionable conduct is addressed in section 40. This section falls under Chapter 2 Part F on the consumer's right to fair and honest dealing.<sup>46</sup> It is clear to see that the CPA not only mentions the consumer's fundamental rights, but it also deals with the consumer's participation in the market and the way in which suppliers and service providers treat consumers.<sup>47</sup>

The purpose of the CPA is to “promote and advance the social and economic welfare of consumers in South Africa”.<sup>48</sup> The aim of the act to achieve this purpose is “to promote a fair, accessible and sustainable marketplace for consumer products and services...” and “...to establish national norms and standards relating to consumer protection”.<sup>49</sup> The purpose of the CPA is a very important clause, because it helps to determine the legislature's intention behind the act and also helps to understand the scope of the legislation. This clause is also very significant when it comes to the interpretation of the Act. The CPA has its own interpretation clause in section 2, and there it states that when interpreting the CPA, it has to be interpreted “in a manner that gives effect to the purpose”<sup>50</sup> of the Act. Therefore will it be necessary to keep the purpose in mind when interpreting and to always give effect to it.<sup>51</sup>

In section 5 of the CPA it deals with the Application of the Act. There it declares that the CPA applies to every transaction in South Africa, unless it is specifically excluded from the Act,<sup>52</sup> and to the promotion of goods and services.<sup>53</sup> It is also applicable to

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<sup>43</sup> Consumer Protection Act 68 of 2008.

<sup>44</sup> Lake & Opperman ix.

<sup>45</sup> See fn 41.

<sup>46</sup> Preamble of the CPA under the heading “Arrangement of Sections”.

<sup>47</sup> Du Preez ML 64.

<sup>48</sup> S 3 of the CPA.

<sup>49</sup> Preamble of the CPA.

<sup>50</sup> S 2(1) of the CPA.

<sup>51</sup> Du Preez ML 65.

<sup>52</sup> S 5(1)(a).

transactions happening in South Africa even if the supplier is not in South Africa and transactions where the supplier does not make a profit.<sup>54</sup> There are transactions that are specifically excluded from the scope of the CPA. Transactions where goods or services are supplied or promoted to the State; where the consumer is a juristic person whose asset value or annual turnover exceeds the threshold value determined by the Minister; where it constitutes a credit agreement under the National Credit Act; where it deals with services supplied under an employment contract; where it gives effect to a collective bargaining agreement and where it falls within an exemption granted by the Minister.<sup>55</sup>

The enforcement of the Act is regulated by Chapter 3 and Chapter 6. There it states that a consumer has the right to have their rights enforced or to have a complaint resolved by referring it to the National Consumer Tribunal (NCT), an ombudsman with jurisdiction in the relevant industry and when the supplier is in an industry, which is not regulated by an ombudsman, to refer the complaint to the Provincial Consumer court, an alternative dispute resolution agent, or the National Consumer Commission (NCC). When all these options have been exhausted and the complaint has still not been resolved, a court with jurisdiction can be approached.<sup>56</sup> The NCT has the jurisdiction to adjudicate complaints and to deal with consumer protection matters in general. The NCC was established to enforce the provisions contained in the CPA. These different entities have been argued to be dependent on one another and therefore it clears up any confusion as to which entity must be used when referring your complaints.<sup>57</sup>

The sanctions applicable when convicted of an offence in terms of the CPA can be a fine or imprisonment for twelve months, and in the case of breach of confidence, imprisonment for ten years.<sup>58</sup> There is also provision made for administrative fines for prohibited or required conduct. This fine can be up to ten per cent of the supplier's

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<sup>53</sup> S 5(1)(b).

<sup>54</sup> S 5(1)(c) and 5(1)(d).

<sup>55</sup> S 5(2)(a)-(g).

<sup>56</sup> S 69 of the CPA.

<sup>57</sup> Du Preez ML 81.

<sup>58</sup> S 111 of the CPA.

annual turnover or R1 000 000 (one million), whichever is the highest.<sup>59</sup> These fines must be paid to the National Revenue Fund.

### **2.3. Conclusion**

It is therefore clear that consumer protection legislation in South Africa has come a long way since the initial attempts. The CPA tries to cover all possibilities where a consumer can be misled or taken advantage of, and tries to protect the consumer from it. It is a pivotal piece of legislation and must always be revered to in any transactions which occur on a daily basis in the normal course of business between consumers and suppliers or service providers.

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<sup>59</sup> S 112 of the CPA. This section also sets out what the Tribunal needs to consider when determining the fine.

## **CHAPTER 3: INTERNATIONAL CONSUMER PROTECTION**

### **LEGISLATION**

#### **3. Introduction**

To establish the meaning of unconscionability as a factor of improper conduct, it will be necessary to explore how it is interpreted internationally. As an introduction, it is necessary to establish the different consumer protection measures applicable in the countries chosen for the comparative study.

Before the different countries' laws are explored it is important to examine the United Nations and to determine whether any conventions can be applicable in this regard. In 1988 the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>60</sup> came into effect, which governs the sale of goods between parties and enterprises that are situated in different countries. It is a modern regime for international contracts and is considered to be the core international trade law convention.<sup>61</sup> When examining the CISG it prescribes separate obligations to the seller and to the buyer and furthermore provides for remedies when the seller breaches the contract.<sup>62</sup> These remedies protect the buyer from any wrongful conduct on behalf of the seller with regards to the contract. If there is any wrongfulness involved the CISG provides protection for the party that has been aggrieved and the party can claim damages, require performance from the seller, declare the contract *avoided* and so forth.<sup>63</sup> This protection of the buyer can be seen as a means to promote a fair, accessible and sustainable marketplace which is the aim of the South African CPA.<sup>64</sup> The CISG is therefore an international consumer protection regime which ensures that even if parties

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<sup>60</sup> United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, art. 5 (1981) (opened for signature Apr. 11, 1980).

<sup>61</sup> UNCITRAL "United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)" available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html) (last accessed on 24 September 2015).

<sup>62</sup> Chap II of the CISG Art 30 – 52.

<sup>63</sup> Art 45 – 52 of the CISG. The voiding of the contract is within the theme of this study.

<sup>64</sup> Preamble of the CPA.

contract internationally with each other they must still act in the best interest of the other party and ensure that everyone is treated fairly.

Finally it will be necessary to determine the different consumer protection legislation applicable in foreign countries. This chapter will therefore deal with the legislation that governs the consumer protection in certain countries and how these different legislations are applied. The countries chosen for this chapter are Australia, the United Kingdom, the European Union, Canada and the United States of America.

### **3.1. Australia**

On 1 January 2011 the Australian Consumer Law (ACL) came into effect in Australia. The ACL is a schedule to the Competition and Consumer Act 2010, which was previously named the Trade Practices Act 1974. The ACL replaced a wide range of existing consumer legislation and creates a better understanding of the law for not only the consumers, but the suppliers as well.<sup>65</sup>

The ACL is national law relating to consumer protection and fair trading, and provides Australian consumers the same protection and expectations regarding business conduct in all Australian state or territories.<sup>66</sup> The ACL came into effect to ensure that all Australian citizens have the same rights and protection, to simplify the law, to reduce business compliance burdens and to create a national enforcement scheme.<sup>67</sup>

The ACL implemented a few major changes into the consumer protection of Australia. Firstly it implemented a new national law on unfair contract terms<sup>68</sup> and set out provisions about unfair practices and fair trading. These provisions were amendments and additions to the existing consumer laws.<sup>69</sup> Secondly, unsolicited consumer

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<sup>65</sup> The Australian Government “The Australian Consumer Law: An Introduction” (2010) at 1. Available at [http://www.consumerlaw.gov.au/content/the\\_acl/downloads/ACL\\_an\\_introduction\\_november\\_2010.pdf](http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_november_2010.pdf) (last accessed 30 June 2015)

<sup>66</sup> See fn 65.

<sup>67</sup> As explored in the Australian Government “The Australian Consumer Law: An Introduction”.

<sup>68</sup> Chap 2 and Part 2-3 of the ACL

<sup>69</sup> See fn 68. The unfair practices and fair trading provisions are contained in Division 3 and Part 3-1 of the ACL.

agreements were better regulated and a new regime for these agreements was set out therein.<sup>70</sup> Another important change was new provisions on the standards of information which applies to all services and goods.<sup>71</sup>

Since the ACL came into effect in 2011 various consumer agencies in Australia work together to support the enforcement and education of the ACL. These agencies release annual reports about the implementation of the ACL and also include how to strengthen and improve the ACL.<sup>72</sup> The latest report was drafted in December 2014 and is a very thorough report about consumer policy and research, education and information, compliance and dispute resolution and product safety. It is very informative and will ensure that they are up to date with how the new act is implemented and how effective it is.

The ACL is enforced and administered by the Australian Competition and Consumer Commission (ACCC) and the consumer agencies. All the consumer protection agencies in Australia had to sign a Memorandum of Understanding which entails how they will work together to enforce the ACL.<sup>73</sup>

To assist consumers, businesses and legal practitioner's guides have been drafted to highlight the key elements of the ACL. These guides were prepared by the ACCC, the Australian Securities and Investments Commission (ASIC) and the State and Territory consumer protection agencies.<sup>74</sup> There are numerous guides to assist the Australians with the ACL, and the guides include "Avoiding unfair business practices guide", "Sales practice guide", "Unfair contract terms guide". I am of the opinion that these guides are a very good way of ensuring that all the parties know exactly what is expected and know how to apply their act.

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<sup>70</sup> Chap 3 and Part3-2 of the ACL.

<sup>71</sup> Chap 3 and Part 3-4 of the ACL.

<sup>72</sup> The Australian Government "The Australian Consumer Law". Available at [http://www.consumerlaw.gov.au/content/Content.aspx?doc=the\\_acl.htm](http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl.htm) (last accessed 30 June 2015)

<sup>73</sup> See above. Also take note that the Memorandum of Understanding can also be found on the same website and sets out exactly all the parties to the Memorandum and all the relevant terms.

<sup>74</sup> See fn 72.

### 3.2. United Kingdom

The first ever consumer protection legislation in the United Kingdom (UK) was the Sale of Goods Act,<sup>75</sup> which entailed the use of contract law to protect consumers who purchased defective goods, by empowering them to bring a claim for breach of the terms of the agreement.<sup>76</sup> This Act was merely a codification of common law principles and dealt with the breach of implied or expressed contract terms and the remedies thereof.<sup>77</sup> As the consumer activism grew, the UK Parliament introduced more consumer protection laws, which strengthened the consumer's contractual rights.<sup>78</sup> There are a number of acts applicable to consumer protection in the UK, and too comprehensive to set out each of them in this chapter in detail. Therefore only the main general laws are dealt with.

In 2003 the UK government administered a “comparative study of the consumer policy regimes” in the European Union and Organization for Economic Co-operative and Development countries.<sup>79</sup> This study indicated that the best practice for consumer protection is a duty on all the parties to trade fairly, however the UK did not have a provision for fair trading in its legislation. Therefore, in an effort to refine their consumer protection, the UK implemented a generic consumer law, to include a “general duty not to trade unfairly”<sup>80</sup> into their consumer protection.<sup>81</sup> This generic consumer law was the Consumer Protection from Unfair Trading Regulations.<sup>82</sup> These Regulations were amended in 2014 by the Consumer Protection (Amendment) Regulations.<sup>83</sup>

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<sup>75</sup> Sale of Goods Act 1989 c.54.

<sup>76</sup> Legislative Council Secretariat “Information Note: Consumer Protection in the United Kingdom and Singapore” IN11/10-11 1. Available at <http://www.legco.gov.hk/yr10-11/english/sec/library/1011in11-e.pdf>. (Last accessed 4 September 2015).

<sup>77</sup> See above.

<sup>78</sup> As explained in the information note of the Legislative Council Secretariat (fn 76).

<sup>79</sup> Legislative Council Secretariat's information note at par 3.

<sup>80</sup> Part 3 of the Act, S 8 of the Consumer Protection from Unfair Trading Regulations.

<sup>81</sup> See fn 76.

<sup>82</sup> Consumer Protection from Unfair Trading Regulations 2008 No. 1277.

<sup>83</sup> Consumer Protection (Amendment) Regulations 2014.

As mentioned in Fisher Meredith Solicitors “Consumer Protection (Amendment) Regulations 2014” available at <http://www.fishermeredith.co.uk/site/blog/fm-blog/consumer-protection-amendment-regulations-2014> (last accessed on 9 November 2015).

Any issues pertaining to consumer protection was enforced by the Office of Fair Trading (OFT).<sup>84</sup> The OFT investigated the issue at hand and then either imposed an injunction or settled the matter by means of litigation.<sup>85</sup> However, due to the continuous development of the market, new acts and regulations must be implemented to ensure that the law is relevant. Due to the development of technology and the internet, a need was identified for the protection of consumers specifically with regards to electronic contracts and transactions. Therefore the Consumer Contracts Regulations<sup>86</sup> were amended to afford protection to consumers when they purchase goods or services through the internet or in a location which is not the store of the trader.<sup>87</sup> This Act tried to clear up all the uncertainties which traders and consumers face when contracting on these grounds, like placing an order, cancellation rights, refunds, return of goods, delivery and risks.<sup>88</sup>

The latest consumer protection legislation in the UK was first introduced to the House of Commons on 23 January 2014<sup>89</sup> by ways of the Consumer Rights Act.<sup>90</sup> This Act codifies the current consumer protection, which consists of eight separate legislations, into one comprehensive consumer protection act.<sup>91</sup> The Act comes into effect on 1 October 2015 and it will make the consumer law easier for consumers and traders. This Act is fundamentally updated to the existing consumer law, but there are two new areas of law which is introduced by it.<sup>92</sup> For the first time the UK will set out legislation with regard to your rights on digital content such as online films and series, music downloads and electronic books.<sup>93</sup> Further, it also introduces rules relating to the

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<sup>84</sup> OFT is set up in terms of the Fair Trading Act 1973.

<sup>85</sup> See fn 79 at 4.

<sup>86</sup> Consumer Contracts Regulations 2013 No. 3134.

<sup>87</sup> Giles G & Reeve F "Upcoming Changes to Consumer Rights Legislation" (2014) *Bird&Bird*. Available at <http://www.twobirds.com/en/news/article/2014/uk/upcoming-changes-to-consumer-tig> (last accessed on 5 September 2015).

<sup>88</sup> See above.

<sup>89</sup> As described in Giles G & Reeve F "Upcoming Changes in Consumer Rights Legislation".

<sup>90</sup> The Consumer Rights Act 2015 c.15.

<sup>91</sup> As described in Giles G & Reeve F "Upcoming Changes in Consumer Rights Legislation".

<sup>92</sup> Citizens Advice "The Consumer Rights Act 2015" available at <http://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/citizens-advice-consumer-work/the-consumer-rights-act-2015/> (last accessed on 5 September 2015).

<sup>93</sup> See above.

remedies available to the consumer when services are not provided with reasonable care or as agreed between both parties.<sup>94</sup>

It is clear that the UK is very attentive to the demands of the modern world and how quickly matters develop and improve. The UK conducts numerous studies to ensure that their laws are up to date and to ensure that consumers are protected in all possible aspects.

### **3.3. European Union**

As early as 1957 the European Union (EU) signed the Treaty Establishing the European Economic Community<sup>95</sup>, or more commonly known as the Treaty of Rome.<sup>96</sup> This Treaty entailed the first elements of consumer protection on which the EU's consumer protection legislation was developed.<sup>97</sup> It is seen as one of the primary laws for consumer protection in the EU and it stated that the Union must contribute to the protection of consumers as well as the promotion of their rights.<sup>98</sup> Further, the Treaty mentioned that a high level of protection should be afforded to consumers and that the consumer protection requirements must be considered when implementing other Union policies and activities.<sup>99</sup>

Following the Treaty was the 1975 Council Resolution<sup>100</sup> which set out the five basic rights of consumers. This resolution marked the formal beginning of consumer protection policies in the EU<sup>101</sup> and it was also the first special programme that the EU adopted with regards to consumer protection.<sup>102</sup> The EU will adopt these policies to

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<sup>94</sup> See the Citizen's Advice on the Consumer Rights Act 2015 at fn 92.

<sup>95</sup> Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S 11.

<sup>96</sup> Treaty Establishing the European Economic Community (TEC) was amended by the Treaty of Lisbon and on 1 December 2009 the Treaty on the Functioning of the European Union (TFEU) came into effect, replacing the TEC.

<sup>97</sup> Horvath A & Villafranco J "Consumer Protection Law Developments" (2009) 1 716.

<sup>98</sup> Art 169 of the TFEU.

<sup>99</sup> Art 4(2)(f) and 12.

<sup>100</sup> Council Resolution of 14 April 1975, O.J. (C92) 1.

<sup>101</sup> Valant J "Consumer Protection in the EU: Policy Overview" (2015) European Parliamentary Research Services 1 available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS\\_IDA\(2015\)565904\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf) (last accessed on 5 September 2015).

<sup>102</sup> Valant J 4.

ensure that the consumer protection policy corresponds with the changes in the society and economy. Another way to ensure that the consumer protection policy is up to date is by means of directives that are transposed into each EU Member State's national laws.<sup>103</sup> At present the EU has approximately 90 directives relating to consumer protection issues, and when invoking one of the directives against a trader or supplier the necessary national legislation's rules must also be considered.<sup>104</sup>

The EU legislation with regard to consumer protection only deals with specific issues, it is therefore necessary for these directives to be in place to create a more general scope and application.<sup>105</sup> The most effective directives with regard to consumer protection are the Directive on unfair terms in consumer contracts,<sup>106</sup> the Directive on injunctions for the protection of consumers' interests,<sup>107</sup> the Directive on consumer rights<sup>108</sup> and the Directive on alternative dispute resolution for consumer disputes.<sup>109</sup> These directives set out how to deal with different situations and it also prescribes how to apply them.

The Charter of Fundamental Rights of the European Union<sup>110</sup> is also a primary law of consumer protection and it confirms the high level of consumer protection which Union policies must ensure.<sup>111</sup> The Charter is a single document containing the fundamental rights which are protected in the EU. It was proclaimed at the Nice European Council on 7 December 2000 but it did not have any legal effect.<sup>112</sup> Only on 1 December 2009 did it become legally binding on the EU institutions and the national government.<sup>113</sup>

To ensure that a consumer is always protected there are remedies available to the consumer to resolve his disputes. European Consumer Centres (ECC) was established

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<sup>103</sup> Valant J 5.

<sup>104</sup> See fn 97.

<sup>105</sup> Valant J 8.

<sup>106</sup> Directive 93/13/ECC.

<sup>107</sup> Directive 2009/22/ECC.

<sup>108</sup> Directive 2011/83/EU.

<sup>109</sup> Directive 2013/11/EU.

<sup>110</sup> Charter of Fundamental Rights of the European Union 2000/C 364/01

<sup>111</sup> Art 38 of the Charter of Fundamental Rights of the European Union.

Also as discussed in Valant J "Consumer Protection in the EU: Policy Overview" (2015) at fn 101.

<sup>112</sup> European Commission "EU Charter of Fundamental Rights" available at [http://www.ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://www.ec.europa.eu/justice/fundamental-rights/charter/index_en.htm) (last accessed on 5 September 2015).

<sup>113</sup> See above.

to help consumers deal with their consumer disputes. These centres inform the consumer of his rights and give them advice on how to deal with the complaint; they provide assistance to resolve these disputes with the traders. They have implemented a free mobile application to ensure that even if consumers are abroad, they can still get the necessary assistance for consumer problems.<sup>114</sup>

Another way of dealing with any consumer disputes is by means of Alternative Dispute Resolution (ADR) or Online Dispute Resolution (ODR).<sup>115</sup> On 18 June 2013 a new directive was published on Alternative Dispute Resolution and Online Dispute Resolution.<sup>116</sup> This directive ensures that consumers can resolve all types of disputes by means of alternative dispute resolutions. It does not matter what product they purchase or whether they purchased it online or in a store.<sup>117</sup> In order to give effect to the operation of this directive, an Expert Group has been established which consists of ADR experts, who can assist the consumer with this process.<sup>118</sup> In January 2016 the EU plans to bring ODR platform to life which will deal with disputes that arise from online transactions.<sup>119</sup>

The EU therefore has a good system in place with these various directives that can be implemented. It ensures that whenever a new, relevant issue comes to life, it can be incorporated into the national legislation and ensure that all aspects of the law are covered. Due to the fact that unconscionable conduct is a new and unfamiliar issue, this system can help to shed light on this term. By creating a directive applicable to unconscionable conduct, which provides protection to the consumer against this type of conduct, will ensure that the supplier be more attentive to his behaviour and ensure that the consumer do not get taken advantage of. South Africa can explore the possibility of

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<sup>114</sup> European Commission “European Consumer Centres” available at [http://www.ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/ecc-net/index\\_en.htm](http://www.ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm) (last accessed on 5 September 2015).

<sup>115</sup> European Commission “Alternative and Online Dispute Resolution (ADR/ODR) available at [http://www.ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/adr-odr/index\\_en.htm](http://www.ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm) (last accessed on 5 September 2015).

<sup>116</sup> Directive 2013/11/EU.

<sup>117</sup> See fn 115.

<sup>118</sup> As examined in the European Commission “Alternative and Online Dispute Resolution”.

<sup>119</sup> See above.

adding directives into our legislation to see to it that all relevant parties are protected in all circumstances, and that no area of law is omitted in our legislation.

### **3.4. Canada**

PW Hogg<sup>120</sup> noted that there are numerous references to Canadian authorities in the South African Constitutional Court and other South African case law. Upon comparison it appeared that the Canadian Charter of Rights is the closest of all foreign legislation to the South African Bill of Rights in its language and structure and that judges of the South African Constitutional Court tended to seek out the law of other jurisdictions, especially the jurisdiction of Canada.<sup>121</sup> It is for this reason that it is important to keep a close eye on the Canadian law due to its similarities to the South African law.

Consumer protection was first introduced in Canada in 1967 when the Canadian Government introduced<sup>122</sup> the Department of Consumer and Corporate Affairs Act.<sup>123</sup> In terms of this Act a Department of Consumer and Corporate Affairs was established and it administers all policies relating to the marketplace and the relationships between the consumer and the supplier.<sup>124</sup> Within this department there were various Bureau's who regulated different aspects of the consumer protection to ensure that the consumer is protected and to regulate the way which the businesses operate.<sup>125</sup> However, in 1993 the government disassembled this department and its responsibilities were delegated to other departments.<sup>126</sup>

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<sup>120</sup> Hogg PW "Canadian Law in the Constitutional Court of South Africa" (1998) 13 *SAPR/PL* 1.

<sup>121</sup> Hogg PW 2.

<sup>122</sup> Axworthy CA "Consumer Law in Canada" (1980) 29 *International and Comparative Law Quarterly* 346.

<sup>123</sup> The Department of Consumer and Corporate Affairs Act S.C. 1967-68, c. 16.

<sup>124</sup> The Canadian Encyclopedia "Consumer and Corporate Affairs" available at <http://www.thecanadianencyclopedia.ca/en/article/consumer-and-corporate-affairs/> (last accessed on 24 September 2015).

<sup>125</sup> See above.

<sup>126</sup> See fn 124. Take note that the Canadian Encyclopedia describes the department of Consumer and Corporate Affairs in detail and provides a summary of all the important aspects thereof.

Like most of the other countries, numerous consumer protection legislation followed, each pertaining to a different aspect of the law and each providing a different type of protection to the consumer.

While exploring all the different consumer protection legislation, the one which stood out is the Business Practices and Consumer Protection Act (BPCP).<sup>127</sup> This Act prescribes requirements for certain consumer contracts, as well as requirements for businesses. It consolidates various consumer legislation or statutes and provides better understanding to all consumers about their rights.<sup>128</sup> The Act furthermore addresses the new aspects of consumer law in the modern era (like internet sales) and therefore ensures that the protection is up to date.<sup>129</sup> This Act explains that when any section in the BPCP is contravened, it constitutes an offence<sup>130</sup> and the person committing the offence will be liable to a fine or imprisonment.<sup>131</sup> It also provides the court with the power to order that the defendant must pay compensation towards the consumer for any damages occurred as a result of the offence. The consumer can request this order or any other person may apply for the order on the consumer's behalf.<sup>132</sup> This ensures that if the party did not institute legal proceedings to recover damages suffered, he is still protected and will still be reimbursed for these damages.

It will be necessary to explore the different states of Canada to ensure which legislation is applicable, but most of them are very similar and will determine the same with regards to consumer protection. The Canadian Government has a very user friendly website which indicates all the different states and their applicable law and helps one to lodge complaints. This is a good means of ensuring that the consumer understand his rights and know how to enforce it if he feels that it has been infringed.<sup>133</sup>

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<sup>127</sup> Business Practices and Consumer Protection Act SBC [2004].

<sup>128</sup> Consumer Protection BC "BPCP Act" available at <http://www.consumerprotectionbc.ca/consumer-alias/help-for-consumer-rights/bpcp-act> (last accessed on 24 September 2015).

<sup>129</sup> See fn 127.

<sup>130</sup> S 189 of the BPCP.

<sup>131</sup> S 190 of the BPCP.

<sup>132</sup> S 192(1) and (2) of the BPCP.

<sup>133</sup> This "user friendly" website is the Canadian Consumer Information Gateway and is available at <http://www.consumerinformation.ca/>.

### 3.5. United States of America

The history of consumer protection in the United States of America (USA) developed by way of legal responses to crises and emergencies which arose, and required response from the public and government. These situations lead to the creation of governing bodies that had jurisdiction over products and practices concerning consumers.<sup>134</sup> An example of a crisis, was the outrage created due to the shameful conditions in the American meat packing industry<sup>135</sup> which caused the creation of the Food & Drug Administrations, and led to the inspection and regulation of food safety in the USA.<sup>136</sup>

The modern movement of consumer protection began in the 1960's when President Kennedy promoted the Consumer Bill of Rights and other consumer advocates highlighted the existence of unsafe products and the need for protection and regulation thereof. The result was the protection of consumers in public and private matters.<sup>137</sup>

When analysing the law that regulates consumer affairs in the USA there are a variety of laws at both the federal and state level. At the federal level there are Fair Debt Collection Practices Act, Fair Credit Reporting Act, Truth in Lending Act, Fair Credit Billing Act and the Gramm-Leach-Bliley Act. These acts are enforced by the Federal Trade Commission, the Consumer Financial Protection Bureau and the U.S Department of Justice.<sup>138</sup> At the state level some of the states have adopted the Uniform Deceptive Trade Practices Act. This Act prohibits conduct involving unfair or fraudulent business practice and untrue or misleading advertising. There is also a regulating body applicable here, which majority of the states has called the Department of Consumer Affairs, and

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<sup>134</sup> Waller SW, Brady JG, Acosta RJ & Fair J "Consumer Protection in the United States: An Overview" (2011) *European Journal of Consumer Law* 1. Available at: <http://www.ssm.com/abstract=1000226> . (Last accessed on 13 August 2014).

<sup>135</sup> In 1906 Upton Sinclair published a novel *The Jungle* which dealt with the conditions of the meat packing industry and where he exposed that the meat packing plants in the USA had very poor working conditions and that it was very unsanitary. This expose shocked the public.

<sup>136</sup> See Waller SW, Brady JG, Acosta RJ & Fair J in their Overview of Consumer Protection in the United States of America (fn 134).

<sup>137</sup> See above.

<sup>138</sup> Consumer Protection – United States of America. Available at: [http://www.en.wikipedia.org/wiki/Consumer\\_protection#United\\_States](http://www.en.wikipedia.org/wiki/Consumer_protection#United_States) (last accessed on 13 August 2014)

they regulate certain industries and protect consumers who use goods and services from these industries.<sup>139</sup>

Due to the fact that there are a number of acts applicable in the USA and because the different states decide which of these they want to adopt, it can become very broad. Therefore this study will focus on the application of the federal and state level and not on every state individually.

### 3.5.1. Federal Level of Consumer Protection

At the federal level the main agency responsible for consumer protection is the Federal Trade Commission (FTC).<sup>140</sup> The FCT's was created in 1914 and a Federal Trade Commission Act (FTCA) was also incorporated to regulate this agency.

The FTC has two main goals, firstly to protect consumers by “stopping fraud, deception and unfair business practices in the marketplace”<sup>141</sup> and secondly to promote competition and innovation in the US economy.<sup>142</sup> The FTC has a Bureau of Consumer Protection who is responsible for the first goal, namely protecting the consumer.

In section 5 of the FCTA it concedes that the FTC can prevent unfair methods of unlawful competition. This section furthermore defines the unlawful behaviour as “unfair methods of competition in, or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”.<sup>143</sup> Together with this section 5, the FCT furthermore has enforcement and administrative abilities under forty six other statutes, including the statutes mentioned above.

The FTC investigates situations to uncover if there is any deception, unfair activities or any violation of statutes. When the possibility of violations occurs, the Bureau of Consumer Protection can intervene by issuing “civil investigative demands”. These

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<sup>139</sup> See fn 134.

<sup>140</sup> The website for the Federal Trade Commission. Available at: <http://www.ftc.gov> (last accessed on 13 August 2014).

<sup>141</sup> See fn 138 under the heading “What we do”.

<sup>142</sup> Waller SW, Brady JG, Acosta RJ & Fair J 2.

<sup>143</sup> § 45(a)(1) [s 5] of the FCTA available at website referred to in fn 138.

demands serve as a subpoena to compel a person to produce documents or testify orally about the possible violations.<sup>144</sup> After the investigation is completed and the FTC believes that a violation exists, a complaint may be issued to the violating party. A hearing will then be held in front of an Administrative Law Judge, and if the Judge concludes that a violation occurred, he may recommend a cease and desist order.<sup>145</sup> This order is one of the FTC's methods to stop anti-consumer practices and if these orders are violated, civil penalties or restitution can be ordered for the consumers who were harmed.<sup>146</sup> The order may be appealed, but when neither party appeals, the order will become a final order within sixty days after issue. Once the order is final and a party violates it, there will be a civil penalty brought of up to \$10 000 (ten thousand) per violation.<sup>147</sup> Furthermore the FTC has authority to make trade regulation rules that focusses on defining unfair or deceptive trade practices, and any violation of these regulations will also result in a civil penalty.<sup>148</sup>

The FTC has remedies to try and place the victimised consumers in the position they were before the violation, and they are, by way of restitution or disgorgement.<sup>149</sup> These remedies are however only applied when the FTC can prove that a clear violation has occurred and when they can calculate the damages suffered by the consumer. When the FTC concludes that private actions or criminal proceedings can lead to complete relief for the consumer, they will probably choose not to enforce these remedies. The FTC does not have the authority to bring criminal charges and when there are federal cases present in the consumer protection area, it has to be brought to federal courts by the US Department of Justice. The burden of proof to be convicted of a criminal offense is to proof the violation beyond a reasonable doubt.<sup>150</sup>

The FTC's mandate to protect consumers is carried out by the Bureau of Consumer Protection by way of seven divisions. These divisions are Advertising Practices,

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<sup>144</sup> § 57b 1(c)(1) [s 19].

<sup>145</sup> Waller SW, Brady JG, Acosta RJ & Fair J 4.

<sup>146</sup> See fn 145.

<sup>147</sup> § 45(1) [s 5].

<sup>148</sup> Waller SW, Brady JG, Acosta RJ & Fair J 4.

<sup>149</sup> § 53(b) [s 13]. The disgorgement remedy is a remedy to force the wrongdoer to disgorge his gain over the consumer.

<sup>150</sup> Waller SW, Brady JG, Acosta RJ & Fair J 5.

Financial Practices, Marketing Practices, Privacy and Identity Protection, Planning and Information, Consumer and Business Education and lastly Enforcement.<sup>151</sup> It is clear that each of these divisions has a very specific purpose and each of them work to prevent a different type of violation. This leads to a very broad protection and ensures that the consumers are covered in all possible situations.

### 3.5.2. State Level of Consumer Protection

At the state level, most of the states use the Uniform Deceptive Trade Practices Act (UDTPA). In this Act certain conduct, which comes down to deceptive trade practices, are prohibited and it includes unfair or fraudulent business practices and misleading advertising.<sup>152</sup> Like the federal level, the state government also acts as both consumer law enforcement agencies and consumer advocates. This system causes the enforcement to be decentralised and ensures that no consumer protection department or agency is overarching.<sup>153</sup>

The majority of the states have a Department of Consumer Affairs, who regulate certain professions and who protects the consumers trading in that profession by way of regulatory entities. Furthermore, in most of the states the consumers are encouraged to act as State Attorney Generals to enforce the state consumer protection laws.<sup>154</sup> These Attorney Generals are consumer advocates of their state and they may file lawsuits on the consumer's behalf, investigate any violations, issue injunctions to end any illegal activity which is taking place, procure restitution on the consumer's behalf and make rules to govern certain trade practices.<sup>155</sup> To enhance consumer protection, multi-state consumer protection activity and litigation can occur and the different states can work together to ensure the best possible protection. One of the most successful joint state-federal consumer protection initiatives was the 2012 National Mortgage Settlement. In

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<sup>151</sup> As discussed in Waller SW, Brady JG, Acosta RJ & Fair J article "Consumer Protection in the United States: An Overview" (2011).

<sup>152</sup> See fn 151.

<sup>153</sup> Waller SW, Brady JG, Acosta RJ & Fair J 17.

<sup>154</sup> See fn 140 pertaining to FTC Investigation and Enforcement Authority.

<sup>155</sup> Waller SW, Brady JG, Acosta RJ & Fair J 18.

this matter, forty nine State Attorney Generals and the Federal Government reached a settlement agreement with the five largest mortgage servicing entities in the USA. The settlement dealt with improper mortgage foreclosure practices by the Respondents and granted relief to a number of mortgage borrowers.<sup>156</sup>

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<sup>156</sup> See above pertaining to the Prevention and Enforcement.

## **CHAPTER 4: UNCONSCIONABLE CONDUCT**

### **4. Introduction**

Unconscionable conduct was defined for the first time in South Africa in 2010 when the Consumer Protection Act<sup>157</sup> came into effect. Before this the term did not feature prominently in South African law, and uncertainty with regards to the meaning and effect of this concept prevailed. The concept is thus new and needs to be examined to determine its interpretation and application.

This chapter will deal with the development of unconscionable conduct in the South African law of contract, and explore its meaning. Furthermore, this chapter will establish its meaning in international legislation and attempt to establish its application in the jurisdictions selected for the comparative study. These jurisdictions are Australia, the United Kingdom, the European Union, Canada and the United States of America.

### **4.1. Unconscionable Conduct in South Africa**

#### **4.1.1. The development of unconscionable conduct**

For a long time, no South African legislation was in force that dealt with unconscionable conduct. There was, however, a need for legislative intervention to safeguard the interests of the South Africa citizens when entering into contracts and business transactions.<sup>158</sup> Due to fact that South Africa has a lot of disadvantaged people with little or no education and who are unfamiliar with the legal system, such a doctrine was necessary to ensure that their rights are protected.<sup>159</sup>

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<sup>157</sup> Consumer Protection Act 68 of 2008.

<sup>158</sup> Berat L “South African Contract Law: The Need for a Concept of Unconscionability” 1992 (14) *Loy. LA Int & Comp Law Review* 507. Available at Available at: <http://digitalcommons.lmu.edu/ilr/vol14/iss3/4> (last accessed 9 March 2015).

See also Fleming A “The Rise and Fall of Unconscionability as the ‘Law of the Poor’” 2014 (102) *Georgetown Law Journal* 1.

<sup>159</sup> See Berat L (fn 158).

The term “unconscionable” was first mentioned in South African law in 1983 in the court case *Botha v Van Niekerk*.<sup>160</sup> In this case it was decided that personal liability would become justifiable only once it was clear that a third party suffered an “unconscionable injustice” due to a third parties unjust actions.<sup>161</sup> However, after this case the concept “unconscionability” still did not receive much attention in South Africa.<sup>162</sup>

In 1998 the issue resurfaced<sup>163</sup> when the South African Law Commission had to determine whether any relief could be granted to unfortunate contractual parties.<sup>164</sup> The Commission acknowledged that people contract with one another with particular expectations and then in reality the resulting contracts are “unjust or unconscionable”.<sup>165</sup> The Commission furthermore recommended that a court should be able to intervene in a contract when it seems that the contract or certain terms thereof was “unreasonable, unconscionable or oppressive”.<sup>166</sup> Appropriate protection mechanisms were proposed and the necessity for interventions identified as no protection was available for a party prejudiced by an unfair or unconscionable contract.<sup>167</sup> This report reflected that the term unconscionability were preferred to the established common law term good faith.<sup>168</sup>

Subsequently the courts continued to address the issue of gross unfairness in contract law even though the universal concept of unconscionable conduct concept was not known in South Africa.<sup>169</sup> In *Cape Pacific v Lubner Controlling Investments*<sup>170</sup> the court used a test of “policy considerations” to deal with unfairness in contracts. These considerations were for example fraud, dishonesty and improper conduct.

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<sup>160</sup> *Botha v Van Niekerk* 1983 (3) SA 513 (W).

<sup>161</sup> *Botha v Van Niekerk* at 514.

<sup>162</sup> Nel E “An Interpretative Account of Unconscionability in Trust Law” 2014 (1) *Obiter* 82.

<sup>163</sup> Glover G “Section 40 of the Consumer Protection Act in Comparative Perspective” (2013) 4 *TSAR* 690.

<sup>164</sup> Nel E 86.

<sup>165</sup> South African Law Commission Report: Project 47: Unreasonable Stipulations in Contracts and the Rectification of Contracts April 1998 at par 1.3.

<sup>166</sup> South African Law Commission Final Report on Project 47: Unreasonable Stipulations in Contracts and the Rectification of Contracts 1998 213-218.

<sup>167</sup> Law Commission Report par 1.34.

<sup>168</sup> Glover G (2013) 690 and also see Jacobs W, Stoop P & Van Niekerk R 346 – 347.

<sup>169</sup> Nel E 87.

<sup>170</sup> 1995 (4) SA 790 (A).

In *Barkhuizen v Napier*<sup>171</sup> the matter dealt with a time bar clause in an insurance contract, and it was relevant in this purpose due to the examining of unfair contract terms. In this case the *court a quo* decided that as a matter of public policy, courts can refuse the implementation of unreasonable and unfair contractual provisions.<sup>172</sup> The matter was taken on appeal where the Supreme Court Appeal reversed the *court a quo*'s decision in deciding that the fundamental constitutional values must be considered when applying and developing contract law.<sup>173</sup> The matter eventually came before the Constitutional Court where the majority judgment concluded that contractual provisions can be disputed if its provisions are contrary to public policy.<sup>174</sup> However, the correct approach according to this judgment is to determine whether the contract clause is detrimental to the underlying values of the constitution, and if it is then it will be contrary to public policy.<sup>175</sup>

In 2012 in *Potgieter v Potgieter*<sup>176</sup> the Judge criticized the ruling in *Barkhuizen* and it was submitted that “reasonableness and fairness are not freestanding requirements for the exercise of a contractual right”.<sup>177</sup> The court came to the conclusion that values like good faith, reasonableness and fairness are grounds on which “substantive rules” of contracts are based. These values however are not independent grounds on which contracts can be declared invalid.<sup>178</sup>

Although these cases assisted with the interpretation and application of unfair contract terms, the need for legislation to protect consumers was clear.

In 2011, nearly a decade after the Law Commission's recommendations, the full CPA came into effect. The main aim of the CPA is to create a “fair, accessible and sustainable marketplace for consumer products and services” and to furthermore

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<sup>171</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>172</sup> See fn 163.

<sup>173</sup> Kuschke B “Barkhuizen v Napier: Case CCT 72/05 [2007] ZACC 5 delivered on 4 April 2008: Constitutionality of a time bar clause in an insurance contract” (2008) 2 *De Jure* 463.

<sup>174</sup> Kuschke B 465.

<sup>175</sup> *Barkhuizen v Napier* supra par 36.

<sup>176</sup> *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA).

<sup>177</sup> *Potgieter v Potgieter* supra par 32.

<sup>178</sup> See fn 163 pertaining to *Potgieter v Potgieter*.

“establish national norms and standards relating to consumer protection”.<sup>179</sup> In the CPA the term “unconscionable conduct” was defined for the first time.

#### 4.1.2. The meaning of unconscionable conduct under the CPA

In Chapter 1 of the CPA “unconscionable” is defined as conduct that is “unethical or improper to a degree that would shock the conscience of a reasonable person”.<sup>180</sup> It also elaborates that it is conduct “having character as contemplated in Section 40” of the CPA.<sup>181</sup>

Section 40 of the CPA deals with unconscionable conduct and it falls under a consumer’s right to fair and honest dealings.<sup>182</sup> This section prescribes the following:

“40 (1) A supplier or an agent of the supplier must not use physical force against the consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any –

- a. marketing of any goods or services;
- b. supply of goods or services to a consumer;
- c. negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
- d. demand for, or collection of, payment for goods or services by a consumer; or
- e. recovery of goods from a consumer.

(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any similar factor”.<sup>183</sup>

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<sup>179</sup> According to the Preamble of the CPA.

<sup>180</sup> According to the definitions contained in S 1(a) of Chap 1 of the CPA.

<sup>181</sup> S 1(b) of Chapter 1 of the CPA.

<sup>182</sup> Part F of the CPA: Right to fair and honest dealing 74.

<sup>183</sup> S 40 of the CPA 74.

When examining the provision of section 40(1) it is apparent that unconscionable conduct under the statute consists of seven factors, namely physical force, coercion, undue influence, pressure, duress or harassment and unfair tactics. These factors indicate that unconscionability can be found in the extreme methods used by the supplier against the consumer and the effect of these methods on the will of the consumer.<sup>184</sup> When examining the provision of section 40(2) it establishes that unconscionable conduct is present when a consumer is being disadvantaged because he is illiterate, disabled, ignorant or does not understand the proceedings.<sup>185</sup> Furthermore, like mentioned in this section the consumer will not be able to protect his or her own interests and therefore it will lead to an unequal bargaining power between the supplier and the consumer.<sup>186</sup> This section therefore makes provision for the instances where the supplier acts with intent due to the fact that he realises that his behaviour is unconscionable and unfair, but he still proceeds to see what advantages he can gain. This section 40(2) will consequently influence section 40(1) by creating another aspect of unconscionability. In terms of section 40(1) it can be difficult to establish unconscionable conduct because suppliers can act unconscionably without knowing it, but in terms of section 40(2) the supplier's unconscionable conduct is intentional. When the intent of the supplier is to disadvantage the consumer, it will be easier to establish unconscionability.

When examining the definition of unconscionable conduct contained in Chapter 1, it provides a comprehensive description. However, when examining the second part of this definition it can lead to a broader context for the interpretation of the different instances of unconscionability listed in section 40.<sup>187</sup> This definition indicates the need of a higher degree of impropriety and not conduct that is generally unfair.

According to Du Plessis<sup>188</sup> to interpret section 40 and to define the meaning of unconscionable conduct it is necessary to give effect to the general purposes<sup>189</sup> of the

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<sup>184</sup> Du Plessis J "Protecting Consumers against Unconscionable Conduct: Section 40 of the Consumer Protection Act 68 of 2008" 2012 (75) 25.

<sup>185</sup> S 40(2) of the CPA.

<sup>186</sup> More on this unequal bargaining power/position hereunder on page 37.

<sup>187</sup> Du Plessis J 25.

<sup>188</sup> See above.

CPA. Due to the fact that section 40 prohibits unconscionable conduct in the form of pressure and taking advantage of consumers it can serve two purposes of the CPA. These purposes served are “to promote and advance the social and economic welfare of consumers”<sup>190</sup> and “protecting consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices.”<sup>191</sup>

Earlier, unconscionability in terms of the common law was discussed and it was evident that misrepresentations, duress or undue influence constituted unconscionable conduct.<sup>192</sup> However, when the CPA came into effect, misrepresentation was not included in the factors of unconscionability in terms of section 40, but provision was made for misrepresentation in its own section of the CPA.<sup>193</sup> Section 41 prohibits any false, misleading or deceptive representations in relation to the marketing of goods or services.<sup>194</sup> This factor can therefore fall under the ambit of the unconscionability factor unfair tactics, because by misleading or misrepresenting material information of the product or service to the consumer can lead to the situation where advantage is taken of the consumer and therefore be unacceptable.<sup>195</sup> It can consequently be seen that section 41 is a supplementary section to unconscionability and the explanation thereof.

When analysing the synonyms for the word ‘unconscionable’ one encounters words like “immoral, unprincipled, unreasonable, unfair, outrageous, dishonest”<sup>196</sup> to name but a few. It is clear from these that this sort of conduct cannot be tolerated because it will lead to unfair situations that can lead to problematic business and personal relationships.

It can be said that the underlying aim of unconscionability is to protect the basic human rights of any person who is in a weaker bargaining position.<sup>197</sup> Suppliers or vendors

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<sup>189</sup> Contained in S 3 of the CPA.

<sup>190</sup> S 3(1)(b) of the CPA.

<sup>191</sup> S 3(1)(d)(ii) of the CPA.

<sup>192</sup> See Chap 2 above, par 2.1 on p 8 – 9 and also see Jacobs W, Stoop P & Van Niekerk R 348.

<sup>193</sup> S 41 of the CPA dealing with “false, misleading or deceptive representations”.

<sup>194</sup> S 41(1)(a) of the CPA.

<sup>195</sup> See Chap 5 below, par 5.6 on p 65 where unfair tactics are described and interpreted.

<sup>196</sup> Available at [www.webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=unconscionable](http://www.webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=unconscionable) (last accessed on 21 February 2015).

<sup>197</sup> Nel E 83.

tend to take advantage of uneducated or uninformed consumers to promote their own interests. When a party is in a weaker bargaining power it can lead to a contract which is one-sided in favour of the stronger party. One of the fundamental rights of a consumer is the “right to equality in the consumer market”<sup>198</sup> and when a contract is one-sided in favour of one of the parties it creates an unequal position in the consumer-supplier relationship. Any one-sided, exploitative or overreaching contract term can constitute unconscionable conduct.<sup>199</sup> However, it must be kept in mind that the right to contract freely must not be affected by the application of unconscionable conduct.<sup>200</sup> Each contracting party must be able to exercise this right freely, and a means to achieve this is that the stronger party must believe that the contract will be fulfilled and the weaker party must believe that there will be no unconscionable prejudice against him.<sup>201</sup>

When courts describe conduct as being unconscionable, it means that the conduct is not in line with our conscience. When a court comes to the conclusion that something is unconscionable, it will refuse to allow any benefit to the conducting party.<sup>202</sup> However, when the prejudiced party is aware of the unconscionability and a contract is still concluded, there will have to be determined whether duress or unfair tactics were involved to conclude the contract. The unconscionability factors will then be used to determine whether the negotiation process was conscionable or not.<sup>203</sup>

#### **4.1.3. The enforcement of an unconscionable contract**

After it has been established that there is an unconscionable term in a contract, it is necessary to discuss what this unconscionability means for the validity and enforcement of the contract.

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<sup>198</sup> Part A of the CPA – s 8, 9 and 10.

<sup>199</sup> Nel E 84.

<sup>200</sup> As described in the definition of the word unconscionable in fn 32.

<sup>201</sup> See above.

<sup>202</sup> According to the Free Dictionary available at <http://www.legal-dictionary.thefreedictionary.com/unconscionable> (last accessed on 21 February 2015).

<sup>203</sup> See fn 199.

Initially the South African Law Commission decided that it was necessary to give powers to the courts in case of unconscionability.<sup>204</sup> In a report on Project 47 it proposed a few provisions which set out the powers of the courts. The proposal was that if the court is of the opinion that:

- “(a) the way in which a contract between the parties or a term thereof came into being; or
- (b) the form or the content of a contract; or
- (c) the execution of a contract; or
- (d) the enforcement of a contract, is unreasonable, unconscionable or oppressive, the court may declare that the alleged contract
  - (aa) did not come into existence; or
  - (bb) came into existence, existed for a period, and then, before action was brought, came to an end; or
  - (cc) is in existence at the time action is brought, and it may then-
    - (i) limit the sphere of operation and/or the period of operation of the contract; and/or
    - (ii) suspend the operation of the contract for a specified period or until specified circumstances are present; or
    - (iii) make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonable, unconscionable or oppressive to any of the parties.”<sup>205</sup>

The CPA that eventually came into effect provides for remedies regarding any unconscionable or unjust contract terms. According to the CPA the parties are allowed to approach the court if one of the parties alleges that a term of the contract is unfair,

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<sup>204</sup> Napier GA “One sided contracts are a bad deal for all parties (or getting greedy will get ya’)” 2008 *Bluegrass Business Law*. Available at <https://troutmanhays.wordpress.com/2008/03/23/one-sided-contracts-are-a-bad-deal-for-all-parties-or-getting-greedy-will-get-ya> (last accessed on 20 April 2015).

<sup>205</sup> Law Commission of South Africa: Unreasonable Stipulations in Contracts and the Rectification of contracts (Project 47).

unjust or unconscionable. The court then has the discretion to make an order after considering certain principles and provisions of the CPA.<sup>206</sup>

In section 48 of the CPA, unfair, unjust and unreasonable terms are prohibited. Therefore, in terms of this section the inclusion of unfair terms in agreements are prohibited. Furthermore, offering goods or services which are based on unfair, unreasonable or unjust terms and influencing the consumer with regards to the agreement with terms that are unfair.<sup>207</sup> This section is therefore a provision to control the content of contract terms before they are incorporated into a contract.<sup>208</sup>

The statutory remedies for unconscionable and unfair contract terms in terms of the CPA can be found in section 52 and it ensures that contract terms, conditions and conduct is fair and just.

Before a court can make an order with regards to a condition it needs to adjudicate whether a term or condition of the contract is unconscionable and unfair. When adjudicating there are a few factors that the courts need to consider according to section 52(2) of the CPA. These factors are:

- a) “the fair value of the goods or services;
- b) the nature of the parties to the transaction or agreement, their relationship, education, experience, sophistication and bargaining position;
- c) the circumstances of the transaction or agreement that existed or were foreseeable at the time that the conduct occurred;
- d) the conduct of the supplier and the consumer;
- e) whether there was any negotiations between the supplier and the consumer and the extent of that negotiations;
- f) whether consumer was required to do anything that was not reasonably necessary for the legitimate interest of the supplier;
- g) extent to which any documents satisfied the requirements of section 22;

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<sup>206</sup> S 52 of the CPA.

<sup>207</sup> S 48 (1)(a) – (c) of the CPA.

<sup>208</sup> Naude T “The Consumer’s Right to Fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective” 2009 SALJ 514.

- h) whether the consumer knew or ought to have known of the existence of any provision that is alleged to have been unfair, unreasonable or unjust taking in consideration the custom of trade and any previous dealing between the parties;
- i) the amount and circumstances under which the consumer could have acquired similar goods or services from a different supplier; and
- j) whether the goods were manufactured, processed or adapted to the special order of the consumer.”<sup>209</sup>

These factors, which the courts can take into account's, main focus is on the circumstances present when the consumer concluded the contract.<sup>210</sup> Further, the factors are only applicable to a specific individual consumer which complaint arose from terms already included in the contract or agreement. There is therefore numerous criticisms on these factors due to the fact that they limit the courts actions in these circumstances.<sup>211</sup> Another criticism is that the factors relate to procedural unfairness which makes it difficult to apply it in instances of substantive unfairness, and therefore factors relevant to the substantive fairness of terms should also be included.<sup>212</sup>

If any of these factors are present in a contract it can lead to a certain term or condition in the contract being unconscionable or unreasonable. When the court establishes that a transaction or contract is unconscionable, unjust or unreasonable the court may, in terms of section 52(3), make a declaration to that effect.<sup>213</sup> The court may then make any order which it considers just and it can include an order to restore money to the consumer, an order to compensate the consumer for any loss or expenses incurred or an order stating a supplier to cease any practice or alter any document or form to ensure that the same conduct does not happen again.<sup>214</sup>

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<sup>209</sup> S 52(2)(a)-(j) of the CPA.

<sup>210</sup> Naude T 515.

<sup>211</sup> Naude T 529.

<sup>212</sup> See above.

<sup>213</sup> S 53(3)(a) of the CPA.

<sup>214</sup> S 53(3)(b)(i)-(iii) of the CPA.

## 4.2. The Meaning of Unconscionable Conduct in International Legislation

### 4.2.1. Australia

The current legislation in Australia for consumer protection is the Australian Consumer Law (ACL) which is Schedule 2 of the Competition and Consumer Act 2010.<sup>215</sup> Chapter 2 of the ACL deals with unconscionable conduct and it provides for three types of unconscionability. These types of unconscionability are unconscionable conduct within the meaning of the unwritten law,<sup>216</sup> unconscionable conduct in connection with goods or services<sup>217</sup> and unconscionable conduct affecting small businesses.<sup>218</sup>

Section 20 of the ACL states that a “person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time”.<sup>219</sup> This section does not define the meaning of unconscionable conduct but merely prohibits it<sup>220</sup> and it provides for a pecuniary penalty if unconscionable conduct occurs.<sup>221</sup>

Section 21 of the ACL declares that a “person must not, in trade or commerce, in connection with: the supply or possible supply of goods or services to a person (other than a listed company); or the acquisition of goods or services from a person; engage in conduct that is, in all the circumstances, unconscionable”.<sup>222</sup> This provision protects a person from this type of unconscionability, but only with regards to goods or services that are “of a kind ordinarily acquired for personal, domestic or household use or consumption”.<sup>223</sup> Furthermore in the subsections of section 21, guidance and considerations are provided as to what amounts to unconscionable conduct.<sup>224</sup> These

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<sup>215</sup> Competition and Consumer Act No. 51 of 1974 as amended.

<sup>216</sup> S 20 of the ACL.

<sup>217</sup> S 21 of the ACL.

<sup>218</sup> S 22 of the ACL.

<sup>219</sup> S 20(1) of the ACL.

<sup>220</sup> Hobart Community Legal Services Inc. “Unconscionable Conduct under ACL” available at <http://www.hobartlegal.org.au/tasmanian-law-handbook/consumers-money-and-debts/australian-consumer-law/unconscionable-conduct> (last accessed on 10 September 2015).

<sup>221</sup> Note in S 20(1) of the ACL.

<sup>222</sup> S 21(1) of the ACL.

<sup>223</sup> S 21(5) of the ACL.

<sup>224</sup> S 21(2), 21(3) and 21(4)(c) of the ACL.

considerations include the bargaining power of the parties, whether the consumer understood the transaction, whether undue influence or unfair tactics were exercised against the consumer,<sup>225</sup> whether unreasonable conditions were imposed on the consumer to protect the interests of the supplier, the requirements of applicable industry codes and whether the supplier was willing to negotiate the terms of the agreement.<sup>226</sup> This list of considerations is not exhaustive and the courts are allowed to consider any other relevant factors. This section therefore provides more guidance as to what is unconscionable conduct and the meaning thereof is not left to general law, like it is done in section 20.<sup>227</sup>

According to the Australian Competition and Consumer Commission (ACCC), unconscionable conduct is any conduct that is so harsh that it goes against good conscience. Although this concept does not have a precise legal definition it is developed by the Australian courts on a case-by-case basis.<sup>228</sup> In Australian courts the most dealings or transactions are considered unconscionable when it is deliberate and when it involves serious misconduct or conduct which is very unfair and unreasonable.<sup>229</sup>

Due to the fact that the cases must develop the meaning of unconscionable conduct it is important to examine case law. One of the first cases which influenced the meaning and interpretation of unconscionable conduct was the case of *Commercial Bank of Australia v Amadio*.<sup>230</sup> In this case the respondents were migrants from Italy and therefore had unlimited English skills and limited formal education, who executed a guarantee in favour of the appellant bank. The majority of the court held that relief on ground of unconscionable conduct is usually granted when one party makes “unconscientious use of his superior position” to the disadvantage of the weaker

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<sup>225</sup> See fn 220.

<sup>226</sup> Australian Competition and Consumer Commission “Unconscionable conduct” available at <http://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct> (last accessed on 10 September 2015).

<sup>227</sup> See fn 220 pertaining to unconscionable conduct under the written law.

<sup>228</sup> Discussed in the Australian Competition and Consumer Commission “Unconscionable conduct” (fn 205).

<sup>229</sup> See above.

<sup>230</sup> *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

party.<sup>231</sup> A party will unconscientiously use his superior power if he has knowledge of the fact that the consumer has a disadvantage in relation to the transaction and he still proceeds with the transaction, and therefore this behaviour will come down to unconscionable behaviour.<sup>232</sup> The court furthermore dealt with the jurisdiction of courts to grant relieve against unconscionable conduct and it held that it includes circumstances where a party is under a special disability and there is no reasonable degree of equality between the parties and this disability was noticeable to the stronger party.<sup>233</sup> The fact that the disability was noticeable makes it *prima facie* unfair for the stronger party to accept the weaker party's consent to the contract.<sup>234</sup>

In 2013 the ACCC appealed against the High Court decision in the case of *Australian Competition and Consumer Commission v Lux Distributors (Lux case)*.<sup>235</sup> After this case many Australians were of the opinion that the judgment of the appeal clarified a new approach to applying the ACL's unconscionable conduct provisions.<sup>236</sup> In this case Lux Distributors entered the homes of consumers with the pretence of offering a free maintenance check where instead they tried to sell new vacuum cleaners. The court found that gaining entry into someone's house on these pretences creates a "deceptive ruse" and therefore the norms and standards of today must be taken into account to determine unconscionability, instead of moral judgment.<sup>237</sup> The court further stated that today's norms and standards requires businesses to exhibit honesty and openness when they want to gain access to the homes of consumers for extended selling opportunities.<sup>238</sup> Another aspect with which the court had to deal with was the fact that a "cooling-off period" was included into the contracts as required by law and therefore Lux

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<sup>231</sup> *Commercial Bank of Australia* 461.

<sup>232</sup> *Commercial Bank of Australia* 467.

<sup>233</sup> *Commercial Bank of Australia* 474.

<sup>234</sup> See above.

<sup>235</sup> *Australian Competition and Consumer Commission v Lux Distributors (Pty) Ltd* [2013] FCAFC 90.

<sup>236</sup> Utz C "A new approach to defining unconscionable conduct? ACCC wins Lux case appeal" (2013) available at [http://www.claytonutz.com/publications/news/201308/19/a\\_new\\_approach\\_to\\_defining\\_unconscionable\\_conduct\\_acc\\_wins\\_lux\\_case\\_on\\_appeal.page](http://www.claytonutz.com/publications/news/201308/19/a_new_approach_to_defining_unconscionable_conduct_acc_wins_lux_case_on_appeal.page) (last accessed on 10 September 2015).

<sup>237</sup> Orr R "Trade Practices Case Update: ACCC v Lux Distributors (Pty) Ltd" (2013) *ListGbarriers* available at <http://www.listgbarriers.com.au/latest-news/publications/trade-practices-case-update-acc-v-lux-distributors-pty-ltd/> (last accessed 15 September 2015).

<sup>238</sup> See fn 233.

Distributors argued that they complied with statutory provisions.<sup>239</sup> The court found that there was no proof that Lux told the consumers about their right to withdraw from the contract and therefore it was held that businesses cannot rely on the “cooling-off period” to overcome unfair and unconscionable conduct.<sup>240</sup> This case therefore provides greater clarity on the concept of unconscionable conduct and how it is applied in direct selling businesses and how these businesses must also ensure they are honest for the reason of their visit at the consumers home, that they are not allowed to stay for too long and must ensure that the contracts are easy to understand and not too lengthy.

After exploring the literature on unconscionability in Australia, it is clear that the term ‘unconscionable conduct’ is well known in Australia and they are aware of the effects thereof. The ACL makes provision for three types of unconscionability and each one is discussed in detail with guidelines and considerations as to what amounts to unconscionable conduct. By doing this the Australian government ensures that all consumer and suppliers know exactly what is meant with the term in different circumstances and ensures that consumers are protected against this kind of conduct. In conclusion it can be said that it is better dealt with and discussed in the ACL than the South African CPA and creates a better understanding of the term: unconscionability.

#### 4.2.2. The United Kingdom

The term unconscionable conduct was initially introduced in English law by way of equity. Equity can be described as a portion of natural justice<sup>241</sup> and its main focus is more on justice and fairness in cases where it seems like one party would be unfairly affected by another who is depending on the defects of the English common law as a means to defend himself.<sup>242</sup> The true nature of equity is that it would not allow that any

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<sup>239</sup> Sendall C & Huang M “ACCC v Lux: the federal court provides clarity on unconscionable conduct provisions under the ACL” (2014) available at <http://www.lexology.com/library/detail.aspx?g=fdc950-ab1-448d-a455-0db519862738> (last accessed on 15 September 2015).

<sup>240</sup> As discussed in Orr R “Trade Practices Case Update: ACCC v Lux Distributors (Pty) Ltd” (fn 237).

<sup>241</sup> Gustaffson P 6.

<sup>242</sup> Law Teacher “Concept of Unfairness Unconscionability” available at <http://www.lawteacher.net/free-law-essays/equity-law/concept-of-unfairness-unconscionability-equity-law-essay.php> (last accessed on 15 September 2015).

person against whom any wrong incurred is left without a remedy. Equity was therefore introduced into English law to supplement the common law by acknowledging the defects which it contains and by providing a remedy for the defect.<sup>243</sup>

In interpreting equity the concept of unfairness is relevant, and has been referred to as unconscionable conduct that includes unconscionable bargains, undue influence and duress.<sup>244</sup> By bringing together various doctrines to create one unified concept of unconscionability provides a single principle for equity to intervene in situations where a vulnerable party is being exploited.<sup>245</sup> Unconscionable bargains can be set aside when the vulnerable party is poor and ignorant and did not have the benefit of legal advice.<sup>246</sup> This results in the protection of the weaker party to ensure that no one is being taken advantage of. The emphasis with regards to unconscionable conduct is on the exploitation of the consumers weaknesses and therefore on the wrongful conduct of the supplier.<sup>247</sup>

The current consumer protection legislation in the UK is found in The Consumer Protection (Amendment) Regulations,<sup>248</sup> however when reading the Regulations there are no mention of unconscionable conduct. Section 3 of the Unfair Trading Regulation deals with the prohibition of unfair commercial practices,<sup>249</sup> and provides that a commercial practice is unfair if it infringes on professional diligence and if it distorts the economic behaviour of a consumer with regards to the product.<sup>250</sup> Furthermore it states that misleading actions, misleading omission and aggressive practices can also result in unfair commercial practices.<sup>251</sup>

Schedule 1 of the Unfair Trading Regulation provides a list of when commercial practices are considered to be unfair and it includes, *inter alia*, behaviour like lying to

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<sup>243</sup> See above.

<sup>244</sup> Pawlowski M “Unconscionability as a Unifying Concept in Equity” (2001-2003) 16 *Denning Law Journal* 80.

<sup>245</sup> See above.

<sup>246</sup> See fn 242.

<sup>247</sup> Pawlowski M 82.

<sup>248</sup> The Consumer Protection (Amendment) Regulations 2014 No. 870 which amended The Consumer Protection from Unfair Trading Regulation 2008 No. 1277.

<sup>249</sup> S 3(1) of the Unfair Trading Regulations 2008 (as amended).

<sup>250</sup> S 3(3) of the Unfair Trading Regulations 2008 (as amended).

<sup>251</sup> S 3(4) of the Unfair Trading Regulations 2008 (as amended).

the consumer, prejudicing the consumer or trying to exploit the consumer.<sup>252</sup> These types of behaviour by the supplier, will result in a weaker bargaining position for the consumer because it will influence him to conclude a contract which he would not normally conclude. Therefore although it never concedes that these practices result in unconscionable conduct, I am of the opinion that it is the same as unequal bargaining and therefore can be seen as the UK's equivalent to South Africa's unconscionable conduct.

Although the abovementioned provides an idea of unconscionability it does not provide a conclusive definition and it is therefore necessary to examine case law to explore how the judges use their discretion with regards to unconscionability.

In *Fry v Lane*<sup>253</sup> the court granted equitable relief for unconscionable conduct and it was decided that transactions can be set aside if it pressures a weaker party to enter into a contract due to their poverty and ignorance.<sup>254</sup> This case was seen as the most significant English decision in this regard.

In *Lloyds Bank v Bundy*<sup>255</sup> the court elaborated on when relief will be granted to a party and it held that relief will be granted to “one who enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance of infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other”.<sup>256</sup> In this case the court listed five categories of relief and these categories of unconscionability include unconscionable transactions, undue influence, undue pressure, duress of goods and salvage agreements. This is the first foreign country where it is clear that unconscionability also consists of different factors like in the South African context. Although the court called the concept “inequality of bargaining power” in this case, it can be seen as the equivalent doctrine which was dealt with in an American case mentioned

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<sup>252</sup> Schedule 1 (1 – 31) of the Unfair Trading Regulations 2008 (as amended).

<sup>253</sup> *Fry v Lane* [1888] 40 Ch.D. 312.

<sup>254</sup> *Fry v Lane* 321 – 322.

<sup>255</sup> *Lloyd's Bank Ltd v Bundy* [1975] Q.B. 326.

<sup>256</sup> *Lloyd's Bank v Bundy* 339 C – D.

in the previous paragraph (*Williams v Walker-Thomas Furniture*) and there the concept was defined as “unconscionability”.<sup>257</sup> Therefore this case comes down to two aspects which need to be present to establish unequal bargaining power, firstly there needs to be the vulnerability of one of the parties and secondly the contract must be unfair. If it can be proved that these two are present then the contract can be seen as being unconscionable and therefore be set aside.

Another case where that courts had to determine whether “inequality of bargaining power” justifies relief in situations where the bargain is not fair, just and reasonable, was *Alec Lobb v Total Oil*.<sup>258</sup> In this case the court held that unfair, unjust and unreasonable bargains are not enough to invoke the “inequality of bargaining power”, and for it to be enough it should include “extortion, or undue advantage taken of weakness, an unconscientious use of power”.<sup>259</sup> It is clear from this case that the court meant to include a more serious type of bargain and tried to broaden the scope of the context to include more than merely unfair and unjust behaviour.

It is therefore clear that unconscionable bargaining means that the Court has the power to set aside any transaction or contract when it is clear that a weaker party was pressured into entering into the contract due to his poverty.<sup>260</sup> However this concept is not very clear in the English law and although it has been applied in certain case law it can create a lot of confusion in this regard

It is therefore necessary to include the term into modern day legislation or regulations to ensure that it is dealt with and that all citizens know exactly what the concept entails and how it will be applied. In this regard, I am of the opinion that the English law, like South African law, is at a disadvantaged position and should consider expanding on this concept to try and establish a more certain definition for it. In their case law the concept

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<sup>257</sup> Wikipedia “Unconscionability in English law” available at [http://www.en.m.wikipedia.org/wiki/Unconscionability\\_in\\_English-law](http://www.en.m.wikipedia.org/wiki/Unconscionability_in_English-law) (last accessed on 15 September 2015).

<sup>258</sup> *Alec Lobb (Garages) v Total Oil Gr. Brit. Ltd* [1983] 1 W.L.R. 173.

<sup>259</sup> *Alec Lobb v Total Oil* 181 E-F – 182 G-H.

<sup>260</sup> Timofeeva V “The doctrine of unconscionable bargains is too uncertain and undermines the classical theory of contracts” available at [http://www.academia.edu/6381990/\\_The\\_doctrine\\_of\\_unconscionable\\_bargains\\_is\\_too\\_uncertain\\_and\\_undermines\\_the\\_classical\\_theory\\_of\\_contract.\\_](http://www.academia.edu/6381990/_The_doctrine_of_unconscionable_bargains_is_too_uncertain_and_undermines_the_classical_theory_of_contract._) (last accessed on 15 September 2015).

is dealt with and discussed but it should be incorporated into legislation to ensure that it is protected. In our South African CPA we mention the term ‘unconscionable conduct’ where in the English law it is merely referred to as unfair behaviour or unequal bargaining power. Although it all comes down to the same thing it will be better to have one universal concept for this conduct, and in this regard our CPA at least recognises the concept and this is another aspect where the English law can be improved.

### 4.2.3. The European Union

In the previous chapter it was established that one of the primary laws for consumer protection in the EU is governed by the Treaty of Rome.<sup>261</sup> In this Treaty there is a provision that states that when certain behaviour is exercised in undertaking transactions that places one of the trading parties at a competitive disadvantage, then that agreement will be automatically void.<sup>262</sup> When interpreting this section it is clear that this is yet another case of unequal bargaining power with regards to transactions and in this Treaty this sort of behaviour is prohibited.

In 2013 the EU adopted the Unfair Contract Terms Directive<sup>263</sup> that provides that a term to a contract is unfair if it “causes a significant imbalance in the parties’ rights and obligations”.<sup>264</sup> When there is an imbalance on the rights and obligations of the parties it causes a violation of the good faith principle as required by the Directive.<sup>265</sup> The Directive furthermore declares that these unfair terms are only applicable on non-negotiated terms.<sup>266</sup> ‘Non-negotiated terms’ means terms that are drafted in advance and it also includes the circumstances where a consumer is able to influence certain terms of the contract.<sup>267</sup> Another important aspect to remember is that this Directive only

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<sup>261</sup>Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S 11.

<sup>262</sup> Art 85 of the Treaty of Rome.

<sup>263</sup> Unfair Contract Terms Directive 93/13/ECC.

<sup>264</sup> Art 3 of the Unfair Contract Terms Directive.

<sup>265</sup> Gazquez MH “Unfair Contract Terms Directive and the Unconscionability Doctrine: Europe and United States, Two Different Approaches” (2004) available at [http://www.merch.tripod.com/id7.html#\\_ftnref5](http://www.merch.tripod.com/id7.html#_ftnref5) (last accessed on 15 September 2015).

<sup>266</sup> Art 3(2) of the Unfair Contract Terms Directive.

<sup>267</sup> See fn 265.

applies to natural individuals and therefore corporations are excluded from the Directive's protection.<sup>268</sup>

The Directive furthermore provides a list of possible unfair terms<sup>269</sup> and although it contains a number of circumstances when terms can be considered to be unfair, this list is not an exhaustive list.<sup>270</sup> Also, this list does not have to be adopted verbatim by all the Member States as was confirmed in the case of *Commission v Kingdom of Sweden*<sup>271</sup>. In this case the Commission brought an action against Sweden because they failed to adopt the Annex of the Directive *verbatim*. The court found that the Annex is merely exemplary and therefore the full effect of the Directive can still be ensured without the list contained in the Annex.<sup>272</sup>

In Article 6 of the Directive it declares that once a term has been established to be unfair then the specific term will not be binding on the consumer. It furthermore states that the rest of the contract can still be enforced but only if the contract can still exist without the certain unfair term.<sup>273</sup>

Again in this instance the EU merely refers to 'unfair contract terms', where the South African CPA acknowledges the concept 'unconscionable conduct'. Here it is important to note that the South African CPA also makes provision for 'unfair contract terms' in section 48 and it states that "unfair, unreasonable or unjust contract terms" are prohibited.<sup>274</sup> In terms of this section a contract term is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than the consumer,<sup>275</sup> or if the consumer relied on a false, misleading or deceptive representation.<sup>276</sup> When a contract is excessively one-sided in favour of one party, it creates an unequal bargaining power and consequently results in a broader context of unconscionability. Therefore the EU unfair contract term is very similar to the South African provisions on unfair contract

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<sup>268</sup> Art 2(b) of the Unfair Contract Terms Directive.

<sup>269</sup> Art 3(3) of the Unfair Contract Terms Directive and Annex to the Unfair Contract Terms Directive.

<sup>270</sup> See fn 265.

<sup>271</sup> *Commission of the Europe Communities v Kingdom of Sweden* C-478/99 21.

<sup>272</sup> *Commission v Kingdom of Sweden* at ground 21.

<sup>273</sup> Art 6(1) of the Unfair Contract Terms Directive.

<sup>274</sup> S 48 of the CPA.

<sup>275</sup> S 48(2)(a) of the CPA.

<sup>276</sup> S 48(2)(c) of the CPA.

terms and unconscionability, but the EU does not have a separate provision dealing with only unconscionable conduct. The directives should be improved to include an unconscionability concept to create a universal concept which will ensure that the concept is treated with the importance it deserves. Despite this shortcoming, the fact that directives are put in place to ensure that new issues are dealt with and incorporated into the legislative ensures that the issues are dealt with better and that better protection with regards thereto are afforded. In this instance the EU has a better explanation of the unfair contract terms and provides better guidance to the consumers and the suppliers than in South Africa.

#### 4.2.4. Canada

Canadian law does not include a precise statute like the United States of America's Uniform Commercial Code but it has a number of statutes which aim to provide relief against any unfair contractual provisions.<sup>277</sup> In the Business Practices and Consumer Protection Act<sup>278</sup> a "deceptive act or practice" is described as any representation by a supplier that deceives or misleads the consumer.<sup>279</sup> The Act furthermore provides a list of when a supplier's acts can be deceptive and it therefore ensures that all parties know exactly what constitutes deceptive practices and what to avoid when entering into a consumer transaction.<sup>280</sup> These deceptive practices can be seen as unfair practices and therefore result in unfair behaviour which is basically what unconscionability comes down to.

The concept unconscionability is a well-established concept in Canadian common law and it is generally defined as "taking undue advantage of an inequality in bargaining power".<sup>281</sup> When applying this concept in Canadian case law and the courts have set aside contracts due to unconscionability which resulted from duress, economic duress

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<sup>277</sup> Waddams SM "Unconscionability in Canadian Contract Law" (1992) 14 *Loyola of Los Angeles International and Comparative Law Review* 541.

<sup>278</sup> Business Practices and Consumer Protection Act SBC [2004].

<sup>279</sup> S 4(1) of the Business Practices Act

<sup>280</sup> S 4(3)(a)-(c) of the Business Practises Act.

<sup>281</sup> Waddams SM 542.

and undue influence.<sup>282</sup> The broadest concept of unconscionability was introduced by Waddams which includes at least twelve items which could result in unconscionability.<sup>283</sup> These items include penalties, duress, inequality of bargaining power, forfeitures, deposits, exemption clauses, documents and consent, deposits and incorporation of documents.<sup>284</sup> In this broad context of unconscionability the main purpose is to ensure the protection of the weaker party.<sup>285</sup>

The first Canadian case with regards to unconscionability was the case of *Waters v Donnelly*<sup>286</sup> which dealt with a weaker party being taken advantage of in an exchange of property transaction. In this case the court held that Waters made the exchange without any information or advice and due to his ignorance and “imbecility of intellect” the court had to protect him from the disadvantages of the transaction.<sup>287</sup> The bottom line of this case was that the court found that Waters would not have entered into the agreement if he was properly advised and protected, and therefore he had to be protected against the unconscionable behaviour.<sup>288</sup>

After this case, there were numerous other cases relating to this matter, but the next major authority was in 1965 in the case of *Morrison v Coast Finances*.<sup>289</sup> In this case the requirements for an unconscionable contract in Canadian law were stated as “the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger”.<sup>290</sup> Furthermore, the court held that the weaker party must establish a *prima facie* case of unconscionable conduct and then after it has been established, the onus of proof will shift to the stronger party to show that the conduct was “fair, just and reasonable”.<sup>291</sup>

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<sup>282</sup> See fn 281.

<sup>283</sup> Enman SR “Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law” (1987) 16 *Anglo-American Law Review* 191.

<sup>284</sup> Waddams SM “Unconscionability in Contracts” (1976) 39 *The Modern Law Review* 370 – 382.

<sup>285</sup> See fn 283.

<sup>286</sup> *Waters v Donnelly* (1884), 9 OR 391 (Ch.).

<sup>287</sup> *Waters v Donnelly* 406.

<sup>288</sup> See Enman SR (fn 283) pertaining to *Waters v Donnelly*.

<sup>289</sup> *Morrison v Coast Finances Ltd.* (1965), 55 DLR (2d) 710 (BCCA).

<sup>290</sup> *Morrison v Coast Finances* 713.

<sup>291</sup> See fn 290.

The all-important English case of *Fry v Lane*<sup>292</sup> was cited in this case, but the principle in *Morrison* goes further because it introduces an idea of inequality which emerges from certain circumstances.<sup>293</sup>

The final case which will be regarded is the Canadian Supreme Court case of *Hunter Engineering v Syncrude Canada*.<sup>294</sup> In this case it was decided that the court has the power to set aside an unconscionable contract clause or a provision which should not be enforced in the particular circumstances of the case.<sup>295</sup> This case established a general power of courts to set aside contractual provisions if these provisions are unfair.<sup>296</sup> However there is a fear that a general power to set aside contracts on grounds of unfairness can be too broad, and therefore in a number of Canadian cases it was determined that two elements are needed to ensure unfairness.<sup>297</sup> These two elements are, firstly an inequality of bargaining power must be present and secondly this power must be unduly taken advantage of.<sup>298</sup>

The Canadian law on unconscionable conduct is much more advanced than South Africa's. It is clear that the term is well established and that authors write more articles about this concept explaining the application and meaning thereof. Unlike the South African CPA which defines it as "conduct which would shock the conscience of a reasonable person", the Canadian law defines unconscionability as "taking undue advantage of an inequality in bargaining power". The latter is defined better because it actually mentions what this conduct entails and one can immediately understand what is meant with the concept.

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<sup>292</sup> *Fry v Lane* [1888] 40 Ch.D. 312.

<sup>293</sup> Enman SR 197.

<sup>294</sup> *Hunter Engineering Inc. v Syncrude Canada Ltd.* 57 D.L.R. 4<sup>th</sup> 321 (1989).

<sup>295</sup> *Hunter Engineering v Syncrude* 378.

<sup>296</sup> Waddams SM (1992) 542.

<sup>297</sup> Waddams SM "Abusive or Unconscionable Clauses from a Common Law Perspective" (2010) 49 *Canadian Business Law Journal* 385.

<sup>298</sup> See fn 293.

#### 4.2.5. The United States of America

The concept of unconscionability initially entered the United States of America (USA) through the adoption of English law.<sup>299</sup> However, the concept was first formally introduced by the promulgation of the Uniform Commercial Code (UCC)<sup>300</sup> in 1952 to harmonise the law of sales and other commercial transactions. Section 2-302 of the UCC deals with unconscionable contracts or clauses.<sup>301</sup> If a clause of the contract is found to be unconscionable at the time that the contract was made, the court can refuse to enforce the contract.<sup>302</sup> According to this section evidence may be presented in the case of unconscionable clauses to aid the court with their decision. The evidence that can be provided must relate to the commercial settings, purpose and effect of the clause.<sup>303</sup>

Although the UCC deals with unconscionable conduct it does not contain a clear definition of the concept. But it was declared<sup>304</sup> that the purpose of section 2-302 is to prevent “oppression and unfair surprise”.<sup>305</sup> The concept of “unfair surprise” means that consent to the terms contained in the contract<sup>306</sup> was absent, and it occurs when an inexperienced party is being exploited because he did not understand what the terms means which he was consenting to. Where “oppression” indicates that even though consent was reached the agreement and surrounding facts indicates that over-reaching on the part of either party is present. Therefore the economic position of the parties involved is of such an extent that one of them becomes vulnerable, and it is usually the person in the weaker bargaining position.<sup>307</sup>

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<sup>299</sup> Thesis written by Gustafsson P “The Unconscionability Doctrine in U.S Contract Law” (2010) Faculty of Law Lund University 3.

<sup>300</sup> Uniform Commercial Code.

<sup>301</sup> See fn 299.

<sup>302</sup> §2-302(1) of the UCC.

<sup>303</sup> §2-302(2) of the UCC.

<sup>304</sup> In the Uniform Commercial Code §2-302, comment (Tentative Draft 1949).

<sup>305</sup> Van Loon JHA “Unconscionable Contracts under the Uniform Commercial Code” (1961) 109 *University of Pennsylvania Law Review* 403.

<sup>306</sup> Stuntebeck CA “The Doctrine of Unconscionability” (1967) 19 *Maine Law Review* 82.

<sup>307</sup> Stuntebeck CA 83.

When interpreting this section it is clear that it provides for procedural and substantive unconscionability. The “oppression” comes down to substantive factors and it deals with the contract clauses per se, where “unfair surprise” comes down to a procedural factor and it deals with how the contract came into existence.<sup>308</sup> Procedural unconscionability will exist because of inadequacy in how the contract came into being, and will include behaviour like exploiting a weaker party of the contract, deceptive language or terms in the contract and unfair bargaining tactics.<sup>309</sup> To determine procedural unconscionability the court will examine the bargaining process and assess whether one party went too far to ensure a favourable deal for himself.

Substantial unconscionability means the contract itself and it will entail that the contract must be viewed in isolation.<sup>310</sup> In this circumstance the court will have to determine whether the contract is excessively one-sided or if it contains a notable offensive term.<sup>311</sup> When section 2-302 was first introduced it received numerous positive comments due to the fact that it provided an explicit rule on unconscionability that allow courts to enforce unfair and oppressive situations without having to provide reasons, because the section already justified it.<sup>312</sup>

In 1979 the Second Restatement of Contracts<sup>313</sup> came into effect and it also influenced the concept of unconscionable conduct.<sup>314</sup> In terms of section 153, a contract is voidable when a material mistake was made at the time that the contract was concluded and if the mistake will cause that the enforcement of the contract is unconscionable.<sup>315</sup> Furthermore in section 208 it deals with unconscionable contracts or terms and in this section it allows the court to limit the application of unconscionability to avoid an unconscionable result.<sup>316</sup> Therefore in terms of these sections it is clear that the test for unconscionability of contracts in the US will be to determine whether the one-sided and

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<sup>308</sup> Gustafsson P 11.

<sup>309</sup> Gustafsson P 14.

<sup>310</sup> Gustafsson P 17.

<sup>311</sup> See fn 308.

<sup>312</sup> Gustafsson 9.

<sup>313</sup> Restatement (second) of Contracts (1981).

<sup>314</sup> Wikipedia “Unconscionability” available at [https://en.wikipedia.org/wiki/Unconscionability#United\\_States](https://en.wikipedia.org/wiki/Unconscionability#United_States) (last accessed 12 September 2015).

<sup>315</sup> §153(a) of the Restatement of Contracts.

<sup>316</sup> §208 of the Restatement of Contracts.

oppressive clauses of a contract or the contract clauses that create an unfair surprise were present at the time the contract was made. If they existed at the time when the contract was concluded then it will result in unconscionability and then that clause can be excluded from the contract. Any event that occurred after the contract was concluded will be irrelevant and therefore will not affect the unconscionability.<sup>317</sup>

It is clear from both the UCC and the Restatement of Contracts that there is no definite definition for unconscionability as both merely describe it as an unconscionable term.<sup>318</sup> However the fact that there is no definition can create the effect that the doctrine cannot be avoided by drafting a contract in a certain way or by deliberately leaving certain words out.<sup>319</sup> In the end it is necessary to examine case law to determine how the courts interpreted this concept and in that way determine what exactly is meant with unconscionable conduct.

The leading case on unconscionability in the US is *Williams v Walker-Thomas Furniture Co*<sup>320</sup> where the court interpreted section 2-302 and concluded that unconscionability means “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party”.<sup>321</sup> The court furthermore explained that to determine whether a “meaningful choice” is present one has to explore all the surrounding circumstances of the transaction and then a “meaningful choice” can be made if gross inequality with regards to a party’s bargaining power is present.<sup>322</sup> If the terms of the contract are unreasonably in favour of one of the parties it will constitute a prerequisite to a finding of unconscionability.<sup>323</sup> It was furthermore necessary to examine what constitutes unreasonable terms in a contract.

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<sup>317</sup> Gustaffson 13.

<sup>318</sup> Gustaffson 11.

<sup>319</sup> Stuntebeck CA 85.

<sup>320</sup> *William v Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

<sup>321</sup> *William v Walker-Thomas Furniture* 449.

<sup>322</sup> *William v Walker-Thomas Furniture* 449. Also see Gustaffson P 22.

<sup>323</sup> Stuntebeck CA 84.

In the case of *In re Elkins-Dell Mfg. Co.*<sup>324</sup> the court interpreted section 2-302 again and provided guidelines to determine unreasonable contract terms.<sup>325</sup> The court found that reasonableness must be determined by examining the commercial setting, purpose and effect of the contract. Furthermore the parties must be afforded the opportunity to lead evidence with regards to the commercial setting, purpose and effect before a term can be determined as unconscionable.<sup>326</sup>

It is clear from this definition created by the court that unequal bargaining power in contract negotiations is the main cause of unconscionable terms and in this instance it is very similar to the South African law. The court will therefore always focus on the position of both of the parties and how each of them was treated during the time when the contract was concluded. The difference with the USA is that the concept is not defined like in the CPA, but in the UCC and Restatement of Contracts unconscionable terms are described in detail and it is explained what it entails. I am of the opinion that it is better to rather explain an unknown concept better than adding a definition that does not add any value to the concept. Therefore the USA is better at explaining unconscionability and providing guidance for the application thereof.

### **4.3. Conclusion**

After this analysis of international interpretations of unconscionable conduct it is clear that the Australian law has the best legislation on unconscionable conduct. The ACL provides for a description of unconscionable conduct and deals with the concept directly. It sets out exactly how it is applied and what it means and it is therefore clear that his concept is an established term in Australia.

In the USA, the Commercial Code mentioned in this chapter also deals with unconscionable contracts and clauses directly and it sets out this concept properly by stating that is behaviour which prevents oppression and unfair surprise. Although

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<sup>324</sup> *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1996).

<sup>325</sup> See fn 323.

<sup>326</sup> See discussion in Stuntebeck CA 84, pertaining to determining unconscionability.

neither of these acts defined unconscionability per se, it deals with the factors or elements thereof and provides the application of this concept.

On the other hand legislation of the UK, the EU and Canada do not deal with “unconscionable conduct” as a separate defined concept. There is no mention of unconscionable conduct, but provisions against unfair commercial practices, unfair contract terms and deceptive practices are included. When examining unconscionable conduct in SA it is described as conduct that is so unfair and unreasonable that it shocks the conscience of the reasonable person. Any term, conduct or practice which comes down to gross unfairness, can then be described as unconscionable. Therefore, although these legislative do not deal with unconscionable conduct as a concept it has other provisions which entails the same concept. This furthermore proves that a universal “definition” of unconscionable conduct can therefore be any conduct which can be set aside due to ground of unfairness.

When examining all these different legislation of unconscionability, the term that is present whenever unconscionability is determined is the ‘inequality of bargaining power’. It is therefore abundantly clear that the common denominator for unconscionability is an unequal bargaining position. If a party is being placed in a weaker bargaining position due to his ignorance, education or financial status and therefore being disadvantaged the other party will have a stronger bargaining power which will lead to unconscionable conduct.

Therefore it can be concluded that the primary test for any unconscionability throughout the world appears to be whether both parties are in the same position with regards to the contract or the transaction. If there is no equal bargaining position and the party in the stronger position is aware thereof and exploits the weaker party then the behaviour will be unconscionable.

It is clear from the legislation mentioned in this chapter that the rights of the person who falls within a weaker position must be protected. Each of these legislations therefore contains provisions dealing with the situation where the party is being disadvantaged or exploited. When there is unconscionable conduct or unfair conduct present the contract

can be set aside and the weaker party can also claim damages for any loss due to the unconscionable conduct.

Although it is deemed that unconscionable conduct is not a universally well established term in legislation, it is clear from this chapter that that is not always the case. In each of the countries explored in this chapter it is clear that this concept has a place in the laws and is being developed on a daily basis by means of application in case law. The application of the concept will depend on the specific circumstances present in the certain case. At least there is bench mark applicable when applying this concept and that is to determine whether any unfairness is present in the contract terms and whether the unfairness creates an unequal bargaining position.

## **CHAPTER 5: THE UNCONSCIONABILITY FACTORS AND THE INTERPRETATION THEREOF IN SOUTH AFRICAN LAW**

### **5. Introduction**

It has been established that section 40 of the CPA deals with unconscionable conduct and the meaning of the concept as a whole. However, section 40(1) contains a list of different factors of unacceptable behaviour which comes down to unconscionable conduct. These factors are “physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct”. Some of these are known to us from common law, such as duress and undue influence.

These factors are not defined in the CPA and therefore it is difficult to establish what exactly was meant by the drafter of the Act with the new previously unknown factors. Because our CPA has been largely drafted by use of international legislation some of these words were borrowed from foreign sources and used in our legislation without any regard to the extent in which they overlap in the South African context. These unknown and undefined factors can lead to disputes and legal uncertainty.

In this chapter each factor will be dealt with individually to try and determine a definite meaning for each factor by exploring South African as well as foreign law, it will interpret the meaning of the factors by examining more than the mere literal meaning of the word and try to establish how these factors can be applied. The main aim of this chapter is to establish definitions for these factors which could be adopted into our CPA to ensure that unconscionable conduct and its factors have more certainty and clarity in our law.

## 5.1. Physical Force against a Consumer

The general definition of physical force is “power, violence or pressure directed against an individual consisting on a physical act”.<sup>327</sup> This can mean that one exercises physical force to such an extent that it is not possible for the consumer to express or exercise his will. It could also include any threat of physical force.<sup>328</sup>

When interpreting “physical force” it can come down to two possible interpretations.<sup>329</sup> The first interpretation is one of “absolute” physical force (*vis absoluta*) which comes down to the direct application of force affecting the party’s contractual capacity. In this instance there is no voluntary will control over the person being forced to do something. Another possible interpretation is one of a threat of physical force (*vis compulsiva*) and this is an indirect application of force. In this case the person being forced can still exercise his free will but it is manipulated by the person forcing him to act in a certain way.<sup>330</sup> It is clear that these two interpretations can create different outcomes and therefore it is necessary to establish which sort of physical force is applicable in the different situations. Threats of physical force can also amount to coercion or duress.

The term duress is a well-known term in South African law and it covers actual harm or threats of harm to force a person to enter into a contract.<sup>331</sup> This term will however be discussed in more detail hereunder.<sup>332</sup>

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<sup>327</sup> The legal definition available at: <http://www.duhaime.org/LegalDictionary/P/PhysicalForce.aspx> (last accessed on 25 September 2015).

<sup>328</sup> Du Plessis JE “Protecting the consumer against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008” (2012) *THRHR* 29.

<sup>329</sup> Du Plessis (2012) 29.

<sup>330</sup> Snyman CR “Die geweldsbegrip by die misdaad aanranding” (2004) 3 *TSAR* 458.

<sup>331</sup> Du Plessis JE “Notice 556 Department of Trade and Industry: Representations regarding the Consumer Protection Bill” available at <http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/080826profJEduPlessi.doc> (last accessed on 25 September 2015).

<sup>332</sup> See par 5.7.

## 5.2. Coercion

Coercion can generally be defined as “the practice of forcing another party to act in an involuntary manner by use of intimidation or threats or some form of pressure or force”. It includes actions like “extortion, blackmail, torture and threats” and “these actions are used as leverage to force a victim to act in a way contrary to his own interests”.<sup>333</sup> When exploring international law the concept of coercion is also rarely mentioned and not much attention is drawn to it.<sup>334</sup> Another general definition for coercion can be the application of force to control the actions of a voluntary agent.<sup>335</sup>

When interpreting coercion it still comes down to pressure or force a person to do something.<sup>336</sup> This term however does not have an established meaning in South African law, but has merely been used as a generic term for any pressure (yet see also par 5.5 below) exercised on contracting parties which entail legal sanctions.<sup>337</sup> Due to the fact that this term is not established in South African law it is clear that this is one of the terms which were borrowed from foreign legislature. The legislator did not take into account the possibility that this term could overlap with one of the terms already recognized in South African law namely duress, deals with the application of threat.<sup>338</sup> Even though these terms seem to overlap they both still appear in the CPA and therefore making the word coercion superfluous.<sup>339</sup>

## 5.3. Harassment

Harassment simply comes down to offensive behaviour and can be defined as “behaviour intended to disturb or upset and it is characteristically repetitive”.<sup>340</sup> In South

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<sup>333</sup> Wikipedia definition available at: <http://www.en.wikipedia.org/wiki/Coercion> (last accessed on 1 October 2014).

<sup>334</sup> Kanwar V “The Concept of Coercion in International Law” (2011) *Jindal Global Law School* 1.

<sup>335</sup> Kanwar V 3.

<sup>336</sup> Glover (2013) 694

<sup>337</sup> Du Plessis (2012) 29-30.

<sup>338</sup> Du Plessis (2012) 30.

<sup>339</sup> See fn 336.

<sup>340</sup> Wikipedia available at: <http://www.en.wikipedia.org/wiki/Harassment> (last accessed on 1 October 2014).

Africa the Protection from Harassment Act<sup>341</sup> defines it as engaging direct or indirect in conduct which the respondent knows “causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably following, watching, pursuing or accosting the complainant; engaging in verbal, electronic or any other communication aimed at the complainant; or sending, delivering or causing the delivering of letters, telegrams, packages, electronic mail or other objects to the complainant”.<sup>342</sup>

When considering this definition and then interpreting harassment in the Consumer Protection context it is clear that the definition is very wide. Harassment in the broad sense means to trouble or distress a person, but it can also mean so much more. In today’s modern and technology age, “harassment” can include certain forms of marketing in the instances where the supplier makes persistent and unwanted phone calls, send emails, messages, faxes or even make unwanted personal visits to the consumer’s home.<sup>343</sup> Furthermore consumers can be protected against direct marketing which could also come down to harassment. In this regard the CPA provides the consumer to “opt out” of direct marketing and exercising the right to cancel the transaction resulting from direct marketing with a cooling-off period of five days.<sup>344</sup>

#### **5.4. Undue Influence**

This can be defined as “any act of persuasion that overcomes the free will and judgment of another”<sup>345</sup> and it is usually imposed on weaker and vulnerable persons. It is the situation where one uses his influence over another which weakens the latter person’s power of resistance and causes that he does not follow his will, and the influence is then used in an unconscionable manner which leads to the agreement to a transaction that

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<sup>341</sup> Protection from Harassment Act No 17 of 2011.

<sup>342</sup> Section 1 of the Harassment Act under “harassment”.

<sup>343</sup> Du Plessis (2012) 33.

<sup>344</sup> S16 of the CPA.

<sup>345</sup> The Free Dictionary available at: <http://legal-dictionary.thefreedictionary.com/undue+influence> (last accessed on 1 October 2014).

would not have been agreed upon voluntarily. It is normally applicable in situations where there is a relationship between the parties or a strong emotional link.<sup>346</sup>

This can be interpreted as a subtle manipulation of someone's will to the point where the person agrees to something that they ordinarily would not have agreed to. The pressure<sup>347</sup> in this case is a subtle pressure and it involves an erosion of the victim's ability to exercise a free and independent judgment in the situation.<sup>348</sup>

In the case *Gerolomou Construction v Van Wyk*<sup>349</sup> it dealt with undue influence as a way to rescind the contract and it was a good example of how this concept is interpreted by the courts. The learned judge noted that a party who relied on undue influence must establish what the plaintiff pleaded.<sup>350</sup> The court concluded in this case that the defendant most definitely gained an influence over the plaintiff for the following reasons. Firstly the defendant knew the plaintiff's financial situation and secondly, the defendant took advantage of the plaintiff by persuading him to enter into the transaction which was to his disadvantage. Finally, with regards to unconscionability, the court noted that there is a difference between exploiting a person's economic weakness in the situation of genuine settlement, and when a powerful party withholds something that he owes to the weaker party just to gain a commercial advantage.<sup>351</sup> The court found that the latter resulted in undue influence and therefore it is established as a means to gain a commercial advantage.

This is therefore one of the most important factors of unconscionability, because like established in the previous chapter unconscionable conduct's main characteristic is an unequal bargaining power. This factor therefore establishes unequal bargaining power by influencing the weaker party to enter into the contract.

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<sup>346</sup> Du Plessis (2012) 30.

<sup>347</sup> See factors of physical force in par 5.1 and pressure in par 5.5.

<sup>348</sup> Hutchison & Pretorius *The Law of Contracts in South Africa* (2012) 2<sup>nd</sup> ed 141.

<sup>349</sup> *Gerolomou Construction (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP).

<sup>350</sup> See *Gerolomou Construction* par 19.

<sup>351</sup> See *Gerolomou Construction* par 20,21 & 23.

## 5.5. Pressure

According to the Free Dictionary<sup>352</sup> it can be “the application of continuous force by one person on another” or “a compelling or constraining influence, such as a moral force, on the persons will”. Therefore it can come down to the applying of pressure on a consumer to convince them to act in a certain way which one wants them to act. This pressure can be applied by appealing to a person’s fears, ambitions, insecurities and so forth.<sup>353</sup>

When interpreting this term it is clear that one is trying to convince another to act in a certain way. The problem that arises is to determine when the application of pressure results in unconscionability. It is common practice that commercial pressure will be present when negotiating a contract<sup>354</sup> due to the fact that each party will still want their point to be taken into account. The pressure will be exercised to ensure that own rights are protected and incorporated into a contract. Therefore not all pressure can be recognised as unconscionable conduct. According to Du Plessis the CPA section 40(1) could not have possibility meant that it should apply to the entire general and innocuous attempt to influence the consumer.<sup>355</sup> There are situations where the consumer can feel under pressure, but it is only part of the suppliers marketing plan, in which case the pressure will be conscionable.<sup>356</sup>

To establish whether the pressuring of someone is unconscionable regard has to be given to the other factors listed in section 40(1). If the pressure arises in the form of unlawful threats it can be seen as coercion and duress<sup>357</sup>, but when it comes down to the exploitation of one’s influence over another person it is undue influence.<sup>358</sup> Therefore pressure can in a way be seen as an element within the unconscionability

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<sup>352</sup> The Free Dictionary available at: <http://thefreedictionary.com/pressure> (last accessed on 1 October 2014).

<sup>353</sup> Du Plessis (2012) 31.

<sup>354</sup> LawTeacher “Distinguish Between Legitimate Commercial Pressure” available at <http://www.lawteacher.net/free-law-essays/contract-law/distinguish-between-legitimate-commercial-pressure-and-conduct-law-essay.php> (last accessed on 25 September 2015).

<sup>355</sup> See fn 353 pertaining to pressure.

<sup>356</sup> See above.

<sup>357</sup> As discussed in par 5.2 and par 5.7 hereunder.

<sup>358</sup> As discussed in par 5.3. Also see Du Plessis (2012) 31.

factors, because depending on the type of pressure applied a different factor of unconscionability can be applicable.

Thus pressure can come down to duress<sup>359</sup>, more specifically economic duress, in the circumstances where a party agrees to certain terms of the contract because he had no other choice due to the excessive pressure he was put under.<sup>360</sup> For pressure to result in economic duress it must be proven that the pressure is illegitimate. In an English case, *Universe Tankship v International Transport Workers Federation*,<sup>361</sup> the illegitimate pressure was explained as “pressure amounting to the compulsion of the will of the victim” and this pressure must be illegitimate.<sup>362</sup>

## 5.6. Unfair tactics

When defining this factor each word must be examined individually. “Unfair” means something is “marked by injustice, partiality or deception” or it is something that is “not equitable in business dealings”.<sup>363</sup> Whereas “tactics” comes down to “the art or skill of employing available means to accomplish an end”.<sup>364</sup> Unfair tactics can therefore mean that the use of the means is unacceptable.<sup>365</sup> However it is still not clear what exactly is meant with this provision. Because threats and different forms of taking advantage of someone are already covered by section 40, the only meaning which could be added is to refer to “high pressure tactics”.<sup>366</sup> High pressure tactics includes physical intimidation, coercion, use of threats or aggressive, persistent tactics used to conclude a sale or

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<sup>359</sup> See duress discussed in more detail in par 5.7.

<sup>360</sup> See above.

<sup>361</sup> *Universe Tankships Inc of Monrovia v International Transport Workers’ Federation* [1982] 2 All ER 67.

<sup>362</sup> See above.

<sup>363</sup> Merriam-webster Dictionary available at: <http://www.merriam-webster.com/dictionary/unfair> (last accessed on 25 September 2015).

<sup>364</sup> Merriam-webster Dictionary available at: <http://www.merriam-webster.com/dictionary/tactics> (last accessed on 25 September 2015).

<sup>365</sup> Du Plessis (2008) at 2.3.5.

<sup>366</sup> See above.

agreement.<sup>367</sup> Again, this type of behaviour in turn results in pressure, threats and coercion.

## 5.7. Duress

Duress is consequently an important factor which needs to be examined very carefully due to the fact that physical force, coercion and pressure all entail some sort of duress. Duress is one of the grounds on which a contract can be rescinded in South African law and the traditional common law can determine and influence its meaning.<sup>368</sup>

Duress can be defined as “making someone do something against his will, or making someone perform an illegal act, by using threats, coercion or other illicit means”.<sup>369</sup> In this situation it is accepted that the victim exercised his will and that the focus is on the means used to instil fear and to obtain the consent. Consequently it means that unlawful threats had to be used to obtain consent and conclude a contract.<sup>370</sup>

In *Broodryk v Smuts*<sup>371</sup> the case dealt with duress and here it was established that the focus is on the means to instil fear and the means to obtain consent. In this case the test for duress was set out which contains five elements.<sup>372</sup> When interpreting “duress” regard will have to be given to these elements, and they are: “actual violence or reasonable fear, fear must be caused by the threat of some considerable evil to the party or his family, it must be a threat of imminent or inevitable evil, the threat or fear must be *contra bonos mores*,<sup>373</sup> and the moral pressure used must have caused damage”.<sup>374</sup>

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<sup>367</sup> Beasley Allen “High Pressure Tactics” available at <http://www.beasleyallen.com/practice/fraud/deceptive-trade-practices/high-pressure-tactics/> (last accessed on 25 September 2015).

<sup>368</sup> See par 5.1 dealing with *vis absoluta* and *vis compulsive* because threats of physical force can result in duress or coercion.

Also see Du Plessis (2012) 31.

<sup>369</sup> Your Dictionary available at: <http://www.yourdictionary.com/duress> (last accessed on 1 October 2014).

<sup>370</sup> Du Plessis (2012) 31.

<sup>371</sup> *Broodryk v Smuts* NO 1942 TPD 47.

<sup>372</sup> *Broodryk v Smuts* 51-52.

<sup>373</sup> It means the threat had to be unlawful.

<sup>374</sup> Glover G “Test for duress in South African law of contract” (2006) 123 *SALJ* 99.

However Glover was of the opinion that this test and the elements were outdated and that it was in need of an overhaul. He proposes the new Two-Pronged test for duress.<sup>375</sup> This test is logically ordered because it starts with the assessment of the aggressors conduct, and thereafter the assessment of the victims conduct. The conduct of both parties is assessed and evaluated before a court may find that duress has been established. This test minimizes confusion by not adding so many elements like the first test and to ensure that there is a balance of the interest of both of the parties to the contract.<sup>376</sup> Another aspect of this test is that it does not limit the doctrine of duress to a specific threat or distinguish between different forms of harmful occurrence thus causing no differentiation between threat to persons and threats to property, which makes it applicable to all situations.<sup>377</sup> This test facilitates the interpretation and application of duress in a beneficial way.

It is also a broad concept as various types of duress are recognised that include for example physical force<sup>378</sup>, threats to ensure physical harm, threats to disgrace, threats of legal action and threats of economic loss.<sup>379</sup> The most important form of duress in modern consumer law is unlawful threats of economic loss or harm. This threat of economic harm includes threats to breach a contract, to discontinue services or to lose your property.<sup>380</sup> Section 40(1) must therefore also be interpreted to include that any reference in this section also includes economic harm.

The doctrine of economic duress is a relatively new area used by the law to establish commercial bargaining and it is established from the doctrine of consideration.<sup>381</sup> The case which opened the way for this doctrine is *North Ocean Shipping Co v Hyundai*<sup>382</sup> where it dealt with a fixed price for services delivered and when the dollar devalued the defendant insisted that the further instalments be increased. The court found that the

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<sup>375</sup> Glover G (2006) 108.

<sup>376</sup> Glover G (2006) 124.

<sup>377</sup> Glover G (2006) 125.

<sup>378</sup> See par 5.1 and 5.2.

<sup>379</sup> Dugger A "Duress and Undue Influence in Contract Enforcement" available at <http://www.study.com/academy/lesson/duress-and-undue-influence-in-contract-enforcement-krysa-v-paine.html> (last accessed on 25 September 2015).

<sup>380</sup> See fn 377.

<sup>381</sup> See fn 354.

<sup>382</sup> *North Ocean Shipping Co. Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705.

defendant's actions constituted consideration for the increased contract price and therefore the agreement is voidable on the basis of economic duress.<sup>383</sup> Economic duress was present because the plaintiff avoided to agree to additional or increased payments but did not propose any alternative - the increased amount was therefore paid under duress. The court held that duress can take a form of economic duress where a threat to breach the contract is present.<sup>384</sup>

## 5.8. Conclusion

The golden rule of interpretation<sup>385</sup> is that the legislature should not use words unnecessarily and that each word must be given an independent meaning.<sup>386</sup> The legislator of the CPA should have looked at this golden rule more carefully. It is possible that legislatures sometimes use words which have the same meaning because they neglect to examine the foreign words in South African context.<sup>387</sup> Yet that should be avoided to avoid confusion and to make interpretation easier.<sup>388</sup>

After defining and interpreting these factors it is clear to see that some are an unnecessary repetition of another and the necessity for many synonyms or similar factors that basically entail the same thing may be questioned.

One may argue that there should actually only be two broad factors of unconscionability.

Firstly, duress is an important factor of unconscionability and should be emphasised. When exploring the meaning of "physical force, coercion, pressure and duress" it is very clear that they all are very alike and comes down to forcing the consumer to act in a

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<sup>383</sup> All England Law Reports "North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd and another The Atlantic Baron" available at [http://www.icab.org.bd/images/stories/icab/campus/study\\_materials/knowledge\\_level/The%20Atlantic%20Baron%20Case.pdf](http://www.icab.org.bd/images/stories/icab/campus/study_materials/knowledge_level/The%20Atlantic%20Baron%20Case.pdf) (last accessed on 25 September 2015).

<sup>384</sup> See fn 383.

<sup>385</sup> Kerr AJ 360, 368.

<sup>386</sup> Du Plessis J *Re-interpretation of statutes* (2002) 214.

<sup>387</sup> Glover (2013) 696.

<sup>388</sup> Naude T 536.

certain manner or agree to something that he would not normally agree to. A better option would have been to create one single and comprehensive duress factor with its own sub-section under section 40. In this sub-section duress must be defined and mention all the different circumstances of duress such as physical force, coercion, unfair tactic and pressure. In this way there will be more clarity about the term and the supplier will understand exactly what type of behaviour will result in duress.

Secondly, undue influence should also have its own sub-section in section 40 and be considered the second factor of unconscionability. As determined above,<sup>389</sup> undue influence establishes an unequal bargaining power because it creates the position where a weaker party is influenced to act in a certain way. This is the basis of unconscionable conduct and therefore if this factor is defined and explained exactly how it can be applicable it will ensure that all unconscionable conduct is dealt with on a more efficient and effective manner.

If only the legislator took the time to define these factors and conclude that their meanings are similar then the CPA would not contain so many factors of unconscionability that are redundant.

The multitude of factors can fall under the broader classification proposed above to prevent confusion and lead to certainty. Because unconscionability as a specific legal concept is a new area of law special attention should have been applied to these factors and their meaning. It can be recommended that section 40 of the CPA be amended to refer only to two factors of unconscionability, yet define and explain each of them in greater detail, improving its regulation and application in South Africa.

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<sup>389</sup> Par 5.4 above.

## **CHAPTER 6: GENERAL CONCLUSION AND RECOMMENDATIONS**

The protection of the consumer and recognition of consumer rights is a universal concept. In South Africa the largely overdue protection measures were introduced by the Consumer Protection Act which was implemented on 31 March 2011. The establishment of the Act was welcomed in South Africa especially due to the fact that the country has such a large portion of uneducated and illiterate citizens. When consumers do not understand the terms of the contract or what exactly it is that they are contracting into, it can create situations where advantage is taken of them and they are exploited.

This dissertation was conducted to compare the legislation and definitions regarding some concepts in consumer law, specifically ‘unconscionable’ conduct, between the laws of different countries. Furthermore, it investigated the meaning and interpretation of certain factors in section 40(1) of the CPA that define unconscionable conduct and finally contributed to a better understanding of this section.

It appeared from the literature that Australian law has the most comprehensive legislation on unconscionable conduct. It sets out exactly how it is applied and what it means and it can be concluded that the concept of unconscionable conduct is therefore an established term in Australia. Although other countries do not define unconscionable conduct as such, most made provision for unfair practices in contract and always include or refer to the “inequality of bargaining power”. Therefore the main test for any unconscionability throughout the world will be whether both parties are in the same position with regards to the contract or the transaction. If there is no equal bargaining position and the party in the stronger position is aware thereof and exploits the weaker party, then the behaviour will be unconscionable.

This concept is vital to ensure that the illiterate and uneducated consumer is protected and to ensure that all transactions and contracts concluded are done on a fair and reasonable basis. Due to the fact that South Africa has a large population of

uneducated citizens the protection with regards to this type of conduct must therefore especially be enforced. The concept must therefore be expanded and improved to ensure that all suppliers know that this conduct will not be tolerated and that consumer can have the peace of mind to know they will be protected in these types of situations.

South Africa has come a long way with the implementation of the CPA in 2011 and it has definitely improved the position of the consumer in South Africa. In the foreign countries the modern technology is being used to help improve the manner in which consumers are protected. In Australia there are websites which deals with unconscionable conduct and a consumer can lodge his or her complaint directly on these websites. Once a complaint has been lodged there are forums that deal with it and try to settle the dispute. If South Africa could implement the same type of system, it will aid the consumers to ensure that they will be protected of this sort of behaviour. A consumer is not always in the position to seek legal advice, nor do they have the financial means to pay for it. Therefore if they can lodge their dispute electronically and there are people in place to settle this dispute, it will ensure a better protection.

After an in-depth analysis of the different factors in section 40 (1) namely physical force against a consumer, coercion, harassment, undue influence, pressure, unfair tactics and duress, it can be concluded that they are mostly a repetition of each other and can lead to confusion. It is recommended that the CPA be improved by grouping them together as the following:

Firstly, duress is an important factor of unconscionability and should be emphasised. When exploring the meaning of “physical force, coercion, pressure and duress” it is very clear that they are all similar and results in forcing the consumer to act in a certain manner, or agree to something that he would not normally agree to. A better option would have been to create one single and comprehensive duress factor with its own sub-section under section 40. In this sub-section duress must then be defined and provision made for all the different variables of duress, like physical force, coercion, unfair tactic and pressure.

Secondly, undue influence also deserves to have its own sub-section in section 40 and be considered the second factor of unconscionability. Undue influence establishes an unequal bargaining power, because it creates the position where a weaker party is influenced to act in a certain way. Thus is the basis of unconscionable conduct and if defined and explained correctly, it will ensure that all unconscionable conduct is dealt with on an efficient and effective manner.

This, in final conclusion: It is recommended that the CPA can be improved by reducing section 40(1) to only refer to duress and undue influence as the two main factors of unconscionability. By doing this, it will make the entire concept easier to understand and ensure that the factors has a definite meaning. Consumer and suppliers will then know exactly what type of behaviour constitutes unconscionability without eight similar factors confusing them.

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