THE IMPACT OF THE CONSUMER PROTECTION ACT 68 OF 2008 ON THE ENFORCEABILITY OF EXEMPTION CLAUSES

By

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SUMMARY

The purpose of this dissertation is to understand the impact of the Consumer Protection Act 68 of 2008 (CPA) on the enforceability of exemption clauses, if any, with specific reference to sections 22, 48, read with regulation 44(3), 49, 51, 52 and 58. An exemption clause is a term contained in an agreement (contract) which, in theory, eliminates, varies or restricts the legal responsibility of the parties to the contract.

Certain requirements as set out in the CPA must be met when the enforcement of exemption clauses is considered. The CPA does not specifically prohibit the use of exemption clauses; however, it attempts to regulate or limit their use in contracts.

The shift towards consumer alertness and fair-mindedness when entering into an agreement through the CPA is of great value. However, to ensure that the consumer is protected to the maximum, certain amendments to the CPA must be made to guarantee actual safeguard against unfair terms. Nevertheless, the protection offered to the consumer by the CPA remains limited.

What is important is that exemption clauses in their totality will not die away, as they would possibly play a significant part in assigning the risk between parties in instances where none of the parties were responsible. I therefore say that exemption clauses still remain legal, binding and enforceable if their wording is clear-cut. By this I mean that they must comply with section 22, read with section 49(3)–(5) of the CPA, and must not be the terms or conditions contained in regulation 44(3) or section 51 of the CPA.

Exemption clauses must therefore be formulated and conveyed in accordance with the CPA, and taking advantage of a consumer by making use of such clauses will consequently come to an end.

KEYWORDS

Exemption clause(s)

The Consumer Protection Act 68 of 2008

Consumer/Supplier

Common law

Public policy

Bargaining position(s)

Unfairness

Reasonableness

Standard-form contracts

Plain language

Constitution

Ubuntu

Grey list

Black list

Regulation 44(3) of the Consumer Protection Act 68 of 2008

Australian Consumer Law (ACL)

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contracts Regulation 1999

Consumer Rights Act 2015

ABBREVIATIONS

Australian Consumer Law — ACL

Constitutional Court — CC

Constitution of the Republic of South Africa 1996 — Constitution

Consumer Protection Act 68 of 2008 — CPA

Consumer Rights Act 2015 — CRA

National Credit Act 34 of 2005 — NCA

Unfair Contract Terms Act 1977 (UCTA)

Unfair Terms in Consumer Contracts Regulations 1994 — UTCCR 1994

Unfair Terms in Consumer Contracts Regulations 1999 — UTCCR 1999

DECLARATION

I declare that “The impact of the Consumer Protection Act on the enforceability of exemption clauses” is my own work and that all the sources that I have cited or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Daniel Ross Richards

(Original signed copy has been submitted to supervisor)

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CHAPTER 1: OVERVIEW AND INTRODUCTION

1.1 Introduction

An exemption clause (otherwise known as an exclusion clause or an exception clause) is a clause used in a contract which omits or limits the liability of a contracting party, in general the consumer, in instances of misrepresentation by the other contracting party, normally the supplier, for negligence, or in instances of breach of contract.[1] An exemption clause is typically drafted by the party who will benefit from such clause, and it usually protects the contracting party in the stronger bargaining position, that is, commonly the supplier.[2]

The South African courts have usually enforced exemption clauses, especially before the enactment of the Consumer Protection Act[3], mainly as a result of their reliance on freedom of contract, as well as the common-law principle of *pacta sunt servand*a.[4] This unfortunately allows suppliers to impose unreasonable exemption clauses on consumers.

An exemption clause is not the exception to the rule when it comes to standard-form contracts as exception clauses are ever so often incorporated in the standard-form contracts. It can therefore be said that the consumer is the party in the weaker bargaining position and in actual fact has no *real* freedom concerning the terms of the agreement as the majority of such terms are not open for negotiation.[5] In other words, the consumer is forced to come to an agreement pertaining to the provisions as set out in such a standard-form contract.[6] The actual consequence thereof is that even though the law of contract in South Africa affords a party the freedom to enter into a contract, it can be said that that such freedom is quite theoretical or formalistic when it comes to standard form-contracts.[7]

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[1] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 288.
[2] For purposes of this dissertation, the term “supplier” will be used. “Supplier” is defined in section 1 of the Consumer Protection Act 68 of 2008 as a person who markets any goods or services.
[3] The Consumer Protection Act 68 of 2008 (hereinafter the CPA).
[4] *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 804–806; *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 989; SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere 1964 (4) SA 760 (A) 767A and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 38.
[5] Sharrock 2010 (22) 3 *SA Merc LJ* 296. With the exception of negotiation regarding the price of the goods or services, the relevant payment terms, the delivery date and time, as well as any possible warranties.
[6] Naudé 2009 (126) 3 *SALJ* 529.
[7] See Naudé 2006 (3) *Stell LR* 366; Stoop 2008 (20) 4 *SA Merc LJ* 496–497; and Bhana and Pieterse 2005 (122) *SALJ* 885.

1.1 The legal framework

An exemption clause (and the enforceability of such a clause) is regulated, firstly, in terms of the common law, and secondly, in terms of legislation. Exemption clauses were familiar in the Roman-Dutch Law[8] and are frequently used in a modern society. They have also been the subject of litigation in modern times.[9] Our courts have usually, upheld exemption clauses but in recent years have been in the process of limiting the impact and consequence of exemption clauses.

In recent times, the CPA[10] was enacted with the aim, in broad terms, to protect and develop the social and economic welfare of consumers.[11] The CPA has reduced the application of the common law as it seeks to regulate exemption clauses and enforceability of such clauses.

In chapter 2 of the CPA, several fundamental consumer rights are created. These consumer rights include the right of equal opportunity in the consumer market,[12] namely, privacy,[13] the right to choose,[14] the right to information and the disclosure thereof,[15] the right to reasonable and responsible marketing,[16] the right to just and truthful dealing, the right to fair-minded, objective and reasonable contract terms and conditions,[17] and the right to fair value, good quality and safe goods.[18]

1.2 The aim of this dissertation

The main aim of this dissertation is to analyse the impact of the CPA on exemption clauses. However, I will also discuss the influence of the common law on the implementation of an

[8] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 290.
[9] *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 804–806; *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 989; and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).
[10] The CPA.
[11] Section 3 of the CPA.
[12] Section 8–10 of the CPA.
[13] Section 11–12 of the CPA.
[14] Section 13–21 of the CPA.
[15] Section 22–28 of the CPA.
[16] Section 29–39 of the CPA.
[17] Section 48–52 of the CPA.
[18] Section 53–61 of the CPA.

exemption clause, specifically the common-law principles and rules, and the judicial treatment of exemption clauses.

With the commencement of the CPA, certain consumer rights have been codified by the CPA and certain unfair business practices, which were formerly unregulated, are now governed by the CPA. In terms of section 2(2) of the CPA, the Consumer Tribunal, the National Consumer Commission, a court or a person is permitted to look to foreign law for direction. In this dissertation I will therefore also compare South African law related to the enforceability of exemption clauses with English and Australian law. In this regard, the English Consumer Rights Act 2015 and the Australian Consumer Law (contained in schedule 2 of the Competition and Consumer Act 2010) will be considered. Across the world, consumer rights and consumer protection law provide a way for consumers to *fight* back against abusive business practices, with specific reference to unfair contract terms (in this regard specific reference is made to exemption clauses).

The shift towards consumer alertness and fair-mindedness when entering into an agreement through the CPA is of great value. However, to ensure that the consumer is protected to the maximum, certain amendments, as indicated above, must be made to the CPA to guarantee actual safeguard against unfair terms. Considering all the relevant discussions to follow, I will determine whether exemption clauses in their totality can be expected to cease or not. Furthermore, I will discuss the formulation of exemption clauses in accordance with the CPA, with specific reference to section 22, read with section 49(3)–(5) of the CPA. Further regard will be given to the terms listed in regulation 44(3) and section 51 of the CPA.

1.3 Research methodology

The research will largely entail an amalgamation of literature on certain common-law principles and the synthesising of the relevant general principles of exemption clauses within the ambit of South African law of contract. The legal comparative research will outline certain comparisons between South African, English and Australian law.

1.4 Chapter division

As indicated above, the focus in this dissertation will be on the provisions of the CPA and their impact on the enforceability of exemption clauses. However, in order to do an extensive analysis

of the above-mentioned, the common law and the judicial control of exemption clauses will also be considered.

In chapter 2 I will discuss common-law principles, judicial limitation, interpretation and the enforceability of exemption clauses as a background to the main discussion of the CPA. Chapter 3 will contain an analysis of the influence of the Constitution[19] on the enforceability of exemption clauses. Chapter 4 will deal with the application field of the CPA. In this chapter I will define important concepts and analyse the effect of the CPA on the enforceability of exemption clauses. In chapter 5 I will compare the South African, English and Australian law. Finally, chapter 6 will contain a conclusion and recommendations.

[19] Constitution of the Republic of South Africa 1996 (hereinafter the Constitution).

CHAPTER 2: COMMON-LAW PRINCIPLES, JUDICIAL LIMITATION, INTERPRETATION AND THE ENFORCEABILITY OF EXEMPTION CLAUSES

2.1 Introduction

The notion of exclusionary clauses has been interpreted in different ways, and these clauses are also known as indemnity clauses, waivers, exculpatory clauses and, specifically, exemption clauses.[20]

An exemption clause is not a concept that was developed recently; it is firmly rooted in Roman law, and has traditionally been used in Roman-Dutch law.[21] Under Roman law, exemption clauses took the form of informal *pacta.* Of these, the *pacta ad minuendam obligationem* were deals (pacts) made in order to reduce the accountability of a debtor, whereas the *pacta ad augendam obligationem* were deals (pacts) made to increase the debtor's accountability.[22]

Contracting parties make use of exemption clauses to exclude liability (wholly or in part) which would have arose under normal circumstances. From Roman-Dutch law[23], exemption clauses initially found their way into Europe in the 15th century, and ultimately made their way into England by the 17th century.[24]

The essential principle, acknowledging exemption clauses, originated from the norm of *freedom of contract* which sequentially is founded on social, economic and political beliefs and was observed by *Grotius* as a man's right to contract.[25] With the institution of standard-form contracts in the law of contracts, exemption clauses found their way into standard-form contracts to such an extent that in recent times exemption clauses are still firmly rooted in standard-form contracts.[26]

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[20] Lerm *A critical analysis* 8; Stoop 2008 (20) 4 *SA Merc LJ* 496.
[21] See De Groot *Inl* 3.14.12; Voet 21.1.10 as referred to in Van der Merwe Van Huyssteen, Reinecke & Lubbe *Contract: general principles* (2012) 258.
[22] Van Dorsten 1986 (49) *THRHR* 195.
[23] Van Dorsten 1986 (49) *THRHR* 197. With reference to Lee *Commentary by Hugo Grotius* para 1.3.1, Van Dorsten holds the view that it was especially Grotius who advocated the position that agreement may be used to confirm or limit the normal incidents of a contract.
[24] Aronstam *Consumer protection* 16–17; Holdsworth *History of English law* 290–295.
[25] Aronstam *Consumer protection* 1.
[26] Aronstam *Consumer protection* 16–17 demonstrates the influence of exclusionary clauses in standard-form contracts by referring to their large-scale use in charter agreements, Bill of Lading agreements and the so-called "common carrier" cases in which skippers of carriers sought to absolve themselves from discharging their public functions and, more specifically, their duties. See also McClaren 1914–1915 *Harvard LR* 550.

The implementation of exemption clauses in accordance with the common law remained identical to what it was in the Roman-Dutch law.[27] In the event of the contracting parties having full contractual ability and the exemption clause having been drafted in a clear-cut way, the contracting parties must abide by the provisions of such a contract.[28]

The relevant aspects of exemption clauses will be discussed in the paragraphs below. These relate to the rules applicable to exemption clauses that pertain to the approach adopted and applied by our courts. They also relate to the rules that pertain to contractual form, consensus, sufficient notification, restrictive interpretation, public policy, negligence, fraud and *dolus*.

However, before discussing the above, I will embark on a short discussion on what exactly an exemption clause is and the reason why it is typically considered an unfair and punitive contract term.

2.2 What is an exemption or exclusion clause?

An exemption clause (otherwise known as an exclusion clause or an exception clause) is a clause used in a contract which omits or limits the liability of a contracting party, in general the consumer, in instances of misrepresentation by the other contracting party, normally the supplier, for negligence, or in instances of breach of contract.[29] An exclusion clause is ordinarily used in a standard form contract, excluding liability of the other contracting party.[30] An example is the elimination of liability for misrepresentation or the exclusion of liability for breach of contract[31]. As previously indicated, exemption clauses are, generally speaking, regarded as unreasonable contractual terms.[32] As stated by Van der Merwe *et al*,[33] exemption clauses exclude or restrict the

[27] Van Dorsten 1986 (49) *THRHR* 197. The author indicates that in classical Roman-Dutch law and formalistic Roman Law, all lawful agreements with *iusta causa* were enforceable.
[28] Hopkins 2007 (June) *De Rebus* 22 and Van Dorsten 1986 *THRHR* 189. See also, for example, *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 804–806, *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 989 and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), which dealt with the enforceability of exemption clauses.
[29] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 288.
[30] See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 42 Brand JA, remarked that, in South Africa exemption clauses in standard contracts are the rule rather than the exception.
[31] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* (2007) 289.
[32] Christie and Bradfield *The law of contract* 12 and Stoop 2008 (20) 4 *SA Merc LJ 496.*
[33] Van der Merwe *et al Contract: general principles* (2012) 297.

legal responsibility of a contracting party, which is typically enforced by the *naturalia* of a specific contract.

Exemption clauses appear in diverse forms and are usually used in standard-form contracts. Despite the fact that exemption clauses are considered a vibrant part of the immense majority of contracts, such clauses are also, in practice, the most problematic clauses. This is because they ordinarily eliminate the liability of the supplier, for example, for damages suffered by the consumer as a result of defective performance.[34] Exemption clauses may furthermore eliminate the legal responsibility of the supplier for the breach of a warranty or a specific term of a contract, for example, a warranty against hidden defects.

The following is a distinctive example of an exemption clause:

> "The amenities which we provide at our amusement park have been designed and constructed to the best of our ability for your enjoyment and safety. Nevertheless we regret that the management, its servants and agents, must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever whether arising from negligence or any other cause howsoever which is suffered by any person who enters the premises and/or uses the amenities provided."[35]

Further to the aforesaid, a typical illustration of the way in which an exemption clause is worded, is found in *First National Bank of South Africa Ltd v Rosenblum and Another*[36] (hereinafter *First National Bank v Rosenblum*). The clause had the following formulation:

> "The bank hereby notifies its clients that, although the bank will apply all possible reasonable care, it is not accountable (liable), at all, for any losses or damages suffered by its clients, which losses or damages have been caused by rain, wind, flow of storm water, lightning, fire, theft, explosion, hail, action of the elements or by means of any other reason as well as war or riot and whether the losses or damages are as a result of the bank's negligence or not."[37]

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[34] Mckendrick *Contract law* 101.
[35] *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 988. This clause was visible in a window panel which was readily available to all its customers of the amusement park and its facilities.
[36] *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) 194.
[37] *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) 194C–D.

Suppliers often use exemption clauses in a contract as a tool to enforce unreasonable obligations on consumers. However, the courts still enforce these clauses even though they may be punitive and one-sided in certain circumstances,[38] rendering such enforcement unfair.

An exemption clause has always been seen as the rule rather than the exception in standard-form contracts, and it can therefore be said that the other contracting party, that is, the one in the weaker bargaining position, actually has no *rea*l freedom concerning the contract terms. This is because the majority of such terms are not subject to negotiation.[39] In other words, the consumer is faced with a take-it-or-leave-it situation and is constrained to agree to the provisions set out in such a standard-form contract.[40] The actual implication of this is that no real freedom of contract exists and it can therefore be said that the freedom is quite theoretical or formalistic.[41] This factor must be taken into account by the courts where the supplier depends on disclaimer notices or exemption clauses to reduce or abolish its liability.

It is essential to understand that, once the courts have to decide on the enforceability of exemption clauses according to the common law, they generally consider certain common-law rules and principles such as freedom of contract, the doctrines of *pacta sunt servanda* and *exceptio doli*, the *caveat subscriptor* rule, the use and exploitation of standard-form contracts, the *contra proferentum*-rule[42], and judicial limitation. Although these rules and principles are interconnected, each one is separately pointed out below.

2.3 The issue of standard-form contracts

[38] Hopkins 2003 (1) *TSAR* 152–153, in particular, argues that this type of argument is based on an erroneous premise, especially because the harshness and oppressiveness that standard-form contracts bring are founded upon an unequal bargaining position between the contracting parties. This often results in the weaker contracting party being abused by the stronger contracting party; Hutchison and Pretorius *The law of contract* 271.
[39] Sharrock 2010 (22) 3 *SA Merc LJ* 296. With the exception of negotiation regarding the price of the goods or services, the relevant payment terms, the delivery date and time, and any possible warranties.
[40] Naudé 2009 (126) 3 *SALJ* 529.
[41] See Stoop 2008 (20) 4 *SA Merc LJ* 496–497; Naudé 2006 (3) *Stell LR* 366; Bhana and Pieterse 2005 (122) *SALJ* 885.
[42] See footnote 95.

Mass contracts have their foundation in the improvement of mass production and distribution, and are also known as standard-form contracts.[43] In nature, these contracts are typically one-sided, benefiting the supplier that uses the contract. In layman's terms a standard-form contract can be described as a standard template intended for wide-ranging and repetitive use by an organisation and its various clients.

Making use of standardised contracts has a number of advantages. One advantage is that the legal costs pertaining to the drafting of the agreement are much lower than in the case of exemption clauses. This is because the terms of the agreement are not negotiable, less legal assistance is required, and time and money are saved for the both the consumer and the supplier. Also, risks are limited for the supplier (only), while the relevant (initiating) party can control any and all contractual arrangements without effort.[44]

Notwithstanding these advantages, the vast majority of standard-form contracts contain unfair and punitive terms which are often abused by the suppliers to exploit consumers. As previously noted, in *Afrox Healthcare v Strydom*[45] (hereinafter *Afrox*) it was held that exemption clauses stand as the rule rather than the exception in standard-form contracts.

As explained above, contractual terms normally found in standard-form contracts are generally not open for negotiation and a consumer must either agree to the contract in totality or not at all. Because no real negotiations take place when concluding a standard-form contract, it cannot be held that there is freedom of contract when entering into such a contract.

It should be noted that even in a vastly competitive market, suppliers only compete on the terms commonly known to a non-expert consumer, such as price, premiums and interest rates, instead of on punitive and oppressive terms.[46] The reason for this is that consumers are commonly unaware of these terms or at least incapable of appreciating their significance, as lawyers tend to draft these terms in incomprehensible language and set them forth in fine print.[47] It can be said that this take-it-or-leave-it basis established by the supplier and endorsed by the law is hugely

[43] Furmston, Cheshire and Fifoot *Law of Contract* 20.
[44] Collins *The law of contract* 119; Wilson 1965 (14) 1 *ICLQ* 176.
[45] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).
[46] Hopkins 2003 (1) *TSAR* 155. See also the minority decision by Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) 121–185.
[47] Sutherland 2009 *Stell LR* 61. See also the minority decision by Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) 150–185.

harmful and inadequate to the well-being of South Africa's defenceless majority.[48] While standard-form contracts have drawn ample attention, our courts have managed to distance themselves from the substantive concerns relating to the inherent unfairness of standard-form contracts.[49]

2.4 The courts' approach to exemption clauses in accordance with the common law

As I indicated above, the courts reflect on the enforceability of exemption clauses with regard to the origin of consensus, public policy, lack of notification, negligence, restrictive interpretation, *dolus* and fraud.

The courts, after bearing in mind the enforceability of an exemption clause, have frequently been confronted with encounters founded on a claim of lack (i.e. absence) of consensus between the contracting parties, consensus that was wrongfully obtained or obtained in an improper manner, the operation of public policy, or the application of restrictive interpretation. I will therefore discuss the most relevant bases below.

2.4.1 Consensus or the lack thereof

The defence mostly relied on by contracting parties who are in the weaker bargaining position when it comes to the enforcement of exemption clauses is that a party did not consent to such an exemption clause.

By tradition it is recognised that the foundation of liability arising from a contract is either consensus, meaning that there was a genuine meeting of the minds of the contracting parties, or the equitable impression by one of the contracting parties that there is indeed consensus[50].

An exemption clause, or even the contract containing an exemption clause, could render the contract void as a result of the absence of consensus between the contracting parties.[51] Consensus should consequently be reached between the contracting parties to form a valid contract.

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[48] Hopkins 2003 (1) *TSAR* 154.
[49] Lewis 2003 (120) *SALJ* 330 and Hopkins 2003 (1) *TSAR* 154. See also the minority decision by Sachs J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) 121–185.
[50] Jethro *Reliance protection* 1.
[51] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 290.

One of the essential requirements for a binding contract is consensus, or else, an appropriate meeting of the minds, between the relevant contracting parties[52]. Consensus, however, can be influenced by a number of elements, which in some circumstances are so severe that they can have an impact on the legitimacy of the contract. Error or mistake is one such element[53].

Nevertheless, true consensus is practically never reached, mainly in standard-form contracts where such contracts are entered into on a take-it-or-leave-it basis.[54] On account of the aforesaid, the party in the weaker bargaining position will be subjected to the party in the stronger bargaining position.[55] It is unfortunate that in certain cases where no real (true) consensus has been reached, the courts have failed to afford the necessary protection to the contracting party who did not anticipate to be bound by the terms of the contract to which they appended their signature.

In *Allen v Sixteen Stirling Investments (Pty) Ltd*[56] (hereinafter *Allen v Sixteen Stirling Investments*), Allen approached the court seeking an order declaring a written agreement, namely, the sale of an immovable property, not binding. He claimed that he had concluded the agreement based on the *bona fide* belief that he was purchasing the immovable property brought to his attention by Sixteen Stirling Investments (Pty) Ltd's agents while, in reality, the property pointed out to Allen was not the immovable property referred to and described in the sale agreement entered into. It was held that an error is believed to be *iustus* if such error was initiated by the misrepresentation of the other contracting party, which was the case *in casu*. The court therefore found that Allen's mistake was *iustus.* The court held that no consensus was reached between the parties and that the sale agreement concluded by the parties was therefore *void ab initio*.

In the case of *Shepherd v Farrell's Estate Agency*, [57] the estate agency marketed that it controlled the sale of commerce and that its *motto* was no sale no charge. The appellant instructed the defendant to sell his business, and appended his signature to a mandate but failed to read the contents thereof. In terms of the mandate, the appellant bound himself to pay agency commission if and when a sale took place, whether or not it was brought about by the defendant's efforts. It was held that the appellant was not bound by this specific provision of the mandate. The appellant

[52] Van Der Merwe *et al Contract: general principles* (2012) 90 and *Bourbon Leftley v WPK (Landbou) Bpk* 1999 1 SA 902 (C).
[53] See *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 471A–D.
[54] See generally *Durban Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA).
[55] Stoop 2008 (20) 4 *SA Merc LJ* 497.
[56] *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (DCLD).
[57] *Shepherd v Farrell's Estate Agency* 1921 TPD.

erroneously thought that the sale of business agreement was extensively in accordance with the advertisement and the mistake was triggered by the advertisement itself and the defendant's failure to bring the conflict between the advertisement and mandate entered into to the attention of the appellant. The court held that the appellant had indeed appended his signature to the written agreement under a misapprehension as to its real consequence.[58] The court held that the appellant was entitled to rely on the mistake brought about by the advertisement.

Consequently, it is trite in law, and confirmed in case law, that a unilateral error or mistake does not serve to avoid a contract unless it is *iustus*.[59] This would have the effect that the affected party is not bound to such agreement, which means that the contract is valid but voidable.

As referred to above, an error is believed to be *iustus* in instances where such error was caused by the misrepresentation of the other contracting party. In *George v Fairmead (Pty) Ltd* (hereinafter *George v Fairmead*) the court held that "when someone is requested to append their signature to a document, they cannot fail to recognise that they are called upon to indicate that they confirm the content of the document and by appending their signature to the document, they agree to contents which appear above their signature". [60]

Further to the aforesaid, in *George v Fairmead*[61] Fagan CJ pronounced the subsequent *locus classicus dictum*:

> "When can an error be said to be *iustus* for the objective of permitting another person to renounce their obvious acceptance of a term to an agreement? As I read the judgments, our courts have taken into account the situation that there is an additional party involved and have reflected on the position. They have, in effect, said: Has the consumer been to blame in the sense that by his conduct he has directed the supplier, as a reasonable man, to accept as true, that he was binding himself? ... If his error is as a result of a misrepresentation, whether innocent or fraudulent, by the supplier, then evidently, it is the supplier who is at fault and the consumer is not bound to the agreement."

[58] *Shepherd v Farrell's Estate Agency* 1921 TPD 66, 68 and 70.
[59] See *Allen v Sixteen Stirling Investment (Pty) Ltd* 1974 (4) SA 164 (DCLD).
[60] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 472.
[61] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 471.

It was therefore held that if a party appends his[62] signature to a contract without familiarising himself with the contents of such contract, that party cannot renounce his acceptance of the contents thereof, based on the fact that his error was *iustus*. In such conditions, the party's (consumer's) error is unreasoning and is therefore bound by the contract.

More than three decades after the *Allen v Sixteen Stirling Investments* decision, the court held in *Perumal v Bayett and Another*[63] that Perumal was under a unilateral error which was the sole reason for entering into the agreement, but the error was *iustus*. The court accordingly held that no consensus *ad idem* was reached between the parties and that the sale agreement concluded by the parties was *void ab initio*.

In *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer*[64] it was held that, as there was no meeting of the minds (consensus *ad idem*) between the parties, no agreement came into existence. Jansen JA again addressed the question of the basis of liability arising from a contract. In a minority judgment, Jansen JA recognised that there was a lack of consensus between the parties. Consequently, based on the consensual theory, no contract came into existence on account of the absence of real consensus[65]. The court accepted that consensual theory (*die wilsteorie*) is the basis of liability arising from a contract in our law.[66]

In *Morgan Air Cargo v Sim Road Investments & Another*, Murphy J noted, with respect to the question whether an exemption clause is enforceable, that "… the importance thereof has moved from the 'nature of the fault-element' bringing about the misrepresentation to the nature and quality of the consensus caused by the misrepresentation."[67]

The *caveat subscriptor* rule, which is discussed in paragraph 2.5 below, also relates to consensus. The court confirmed the *caveat subscriptor* rule in *George v Fairmead*[68] and held that, although the contractual party in that case failed to read the contract, the contractual party was still bound

[62] The generic use of the male gender pronouns "he", "him" and "his" in this dissertation should be understood to include the female gender.
[63] *Perumal v Bayett and Another* (14337/2007) [2009] ZAKZDHC 40 [19] (31 August 2009).
[64] *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A) 78A.
[65] *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A) 78E– F.
[66] *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A) 78G– H.
[67] *Morgan Air Cargo v Sim Road Investments & Another* [2009] 4 All SA 249 (GNP) 83.
[68] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

to the terms of that contract. Nonetheless, the courts have recently followed a more tranquil and flexible attitude on the application of this principle.[69]

In *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands*[70] it was determined that in instances when a contracting party is in a position to indicate that he was talked into signing a contract whilst wrongly believing that the contents of the contract is true (but in fact is not, as a result of a false impression regarding its nature, meaning and implication or the contents of the document), the *caveat subscriptor* rule is not to be used to the advantage of the contracting party in the stronger bargaining position (i.e. the supplier), since the consumer would have performed under a *iustus error.*

In *Mercurius Motors v Lopez*[71] the decision was again based on a less than rigorous examination of the disputed document by the signatory, as the court held that the document was deceptive because the term in question was not given adequate prominence. In a welcome change of trend, the Supreme Court of Appeal held that an exemption clause eliminating the legal responsibility for negligence of a motor vehicle dealer entrusted with a motor vehicle for the purposes of maintenance work "ought to be plainly and appropriately drawn to the knowledge of a consumer, who appended his signature to a standard instruction form, and not by way of an inconspicuous and hardly readable term mentioning the terms and conditions on the back side of the sheet of paper in query."[72]

It can therefore be said in summary that when exemption clauses are used, there may often be a lack of consensus between the contractual parties. Depending on the facts of each case, the legal position is that the *caveat subscriptor* rule is applied (see para 2.5 below). However, a contract assertor may have a duty to notify a contract denier of the existence of an unexpected clause in the contract, where the term undermines the essence of the contract.

Notwithstanding the aforesaid, an exemption clause, which is normally punitive, continues to function to the disadvantage of the other party to the contract.

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[69] In *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) the court held that an exemption clause that is hidden and which undermines the essence of the contract must be brought to the attention of the consumer who signs the contract.
[70] *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C) 524H-I.
[71] *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).
[72] *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) 578.

Even though the CPA deals extensively with consensus improperly obtained, such provision overlaps significantly with the common law. Hutchison and Pretorius[73] accurately contend that the substantive provisions contained in the CPA extend further than the prevailing common law.

2.4.2 Consensus improperly obtained

Instances where consensus has been improperly obtained refer to undue influence, duress or misrepresentation.

Our law comprises numerous common-law remedies to restrain indefinite freedom of contract. In *Plaaslike Boeredienste (Edms) Bpk v Chemfos (Bpk)*[74] it was apparent that our law allows for the setting aside of a contract on improperly obtained consensus due to, for example undue influence, duress or misrepresentation. Undue influence is a form of unjustifiable burden on a contracting party to persuade such contracting party to conclude a contract.

It can be said that duress or *metus* is an improper burden to constitute threats on the part of one party to the contract against the other party to the contract. It consists of force directed against the will of a contracting party in the sense that that the contracting party is forced to enter into an agreement to its disadvantage.

A misrepresentation is a variant of a dishonest, untruthful (i.e. false) statement. Where a contract is concluded between the parties based on the strength of a misrepresentation made to one of the parties to the contract by the other, or by way of undue influence or duress by the other contracting party, the contract is nonetheless valid because there is not a lack of consensus. Conversely, if the consensus was improperly attained, the contract is voidable at the request of the blameless contracting party.

[73] Hutchison and Pretorius *The law of contract* 114.
[74] *Plaaslike Boeredienste (Edms) Bpk v Chemfos (Bpk)* 1986 (1) SA 819 (A).

2.4.3 Public policy

It is established that exemption clauses which are in conflict with public policy[75] are null and void and unenforceable.[76]

A contract is defined as a legal commitment with the effect of closing the vent for any illegality[77]. Even though exemption clauses are permissible, the courts are regularly innovative in restraining or excluding the realm of the application thereof when construing such clauses in a contract.[78]

One of the foundations upon which the courts decide whether an exemption clause is permitted while construing a contract, is public policy.[79] Public policy introduces concepts of impartiality, integrity and reasonableness, and would preclude the execution of a term resulting in possible unfairness.

As early as 1902 the courts measured exemption clauses against public policy. In *Eastwood v Shepstone*[80], it was held that the courts have the power to treat a contract as null and void and to reject the recognition of contracts and transactions which are contrary to public policy or in contradiction with good morals. It is a power not to be hastily or impulsively implemented. However, once it is evident that a contract or a transaction is contrary to public policy, the court would be below par in its responsibility if it is hesitant to proclaim such a contract or transaction void.

In *Morrison v Angelo Deep Gold Mines Ltd*,[81] the court again held that it is a common principle that a person entering into a contract or transaction without intimidation, without fraud, and understanding the consequences of his action when entering into such a contract or transaction,

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[75] Public policy in the new constitutional dispensation will be further discussed in chapter 3.
[76] See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA*);* and *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[77]Tembe *Problems regarding exemption clauses* 66.
[78] See Turpin 1956 (73) *SALJ* 144.
[79] *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775 784–785 had this to say about the notion: "Now in our law it is a principle that agreements *contra bonos mores* will not be enforced, and that is in reality the same as the English maxim as to contracts against public policy. It is a wide-reading principle…. to succeed on the ground of public policy it must be shown that the arrangement necessarily contravenes or tends to induce contravention of some fundamental principle of justice or of general statutory law, or that it is necessarily to the prejudice of the interests of the public."
[80] *Eastwood v Shepstone* 1902 TS 294, 302.
[81] *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775.

would possibly at will abandon any and all of his rights. There are, however, definite exclusions to that rule, and surely the law will not acknowledge the existence of any contract or transaction contrary to public policy.[82]

On the other hand, and contrary to the aforesaid, the Supreme Court of Appeal in *Afrox*[83] held that an exemption clause was recognised and sustained, which clause released a private hospital from legal responsibility for impairment caused negligently to patients. The court was not persuaded by the respondent that the clause was in contradiction of public policy and that it caused offence to any constitutional provisions.[84]

In *Brisley v Drotsky* it was held that "public policy is now entrenched in the Constitution and the essential values it safeguards. It includes human dignity, the realisation of equality and the development of human rights and freedom, non-racialism and non-sexism".[85] This norm was confirmed in *Barkhuizen v Napier* by the CC.[86]

Further to the aforesaid, in *Barkhuizen v Napier* it was held by Ngcobo J that "public policy symbolises the legal principles of the public; it embodies those values which are treasured by the public[87]". Ngcobo J also considered the continuous worth of public policy in resolving differences arising from contractual agreements.[88] Even though Ngcobo J acknowledged that defining the content of public policy was once a complicated subject, public policy nowadays is significantly subjective to our Constitution and the values which it brings about.

The common law of contract has continuously denied the recognition of contracts which are believed to be in conflict with public policy. This was demonstrated in the matter of *Sasfin (Pty) Ltd v Beukes*[89] (hereinafter *Sasfin*) where the court held that no court should shrivel from the responsibility of proclaiming a contract in contradiction of public policy once the circumstances so demand. The court held that the power to sustain that a contract is in contradiction of public policy must, however, be applied vigilantly and only in the most distinctive circumstances, for the fear of

[82] *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 779.
[83] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 42.
[84] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 38.
[85] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 94.
[86] *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) 29.
[87] *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 72-73, 83-86.
[88] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 72-73.
[89] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

ambiguity regarding the legitimacy of contracts arises out of an illogical and haphazard use of the power.

Apart from the aforesaid, Harms JA in *Johannesburg Country Club v Stott and Another* held that it would be against public policy to allow the enforcement of an exclusion of legal responsibility for damages where the death of another was negligently caused, as it is unwarranted in view of the high value placed on the sanctity of life by the common law, along with the Constitution.[90]

Our law of contract has continuously considered the legitimacy of a contract or contractual provisions (i.e. exemption clauses) by applying the standard of legitimacy as well as contractual interpretation. In *Wells v South African Alumenite Co*[91] it was held that there is certainty that the situation (enforcement of exemption clauses) is tough and difficult, but if individuals append their signature to conditions, the consumer, should, in the absence of fraud, be bound to them. Public policy so demands.[92] Contractual principles and their accompanied values have triumphed over the requisite to realise fairness between the contracting parties.[93]

With particular reference to the prohibition of exclusion from legal responsibility for fraud, Innes CJ in *Wells v SA Alumenite Co*[94] held that, based on public policy, the law will not recognise an undertaking whereby one of the parties to the contract is bound by such contract to disregard and surrender to the fraudulent behaviour of the other party to the contract. The courts will not enforce such an undertaking because by doing so, they would appear to defend and encourage fraud. [95]

In *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd*[96], Wessels JA held that the defendant was not legally obliged to pay compensation to the plaintiff for any

[90] *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) 518–519.
[91] *Wells v South African Alumenite Co* 1927 AD 69.
[92] The interaction between public policy and *pacta servanda sunt* is not foreign to our courts: the Supreme Court of Appeal held in *Wells v South African Alumenite Company* 1927 AD 69 that "[i]f there is one thing which, more than another, public policy requires, it is that men of full age in competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."
[93] Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9B–F states that "[t]he power to declare contracts against public policy should … be exercised sparingly and only in the clearest of cases … it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom."
[94] *Wells v South African Alumenite Co* 1927 AD 72.
[95] *Wells v South African Alumenite Co* 1927 AD 72.
[96] *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A).

losses or damages suffered, caused to the immovable property in question by *vis major* or *casus fortuitous*. Notwithstanding the aforesaid, the court further held that the defendant would have been held liable to pay compensation to the plaintiff if such loss or damage was due to its own, wilful misconduct or negligent conduct, or probably by the wilful unlawful activity or negligent conduct on the part of the employees, acting within the course and scope of employment.[97]

Further to the aforesaid, it is clear that public policy plays a vital role concerning the interpretation of exemption clauses. With the aforesaid in mind, exemption clauses which endeavour to excuse a party of a contract from legal responsibility for fraud, or from legal responsibility for deliberate breach or wilful wrongdoing, will be considered to be against public policy and consequently set aside. [98]

In the case of *Bafana Finance Mabopane v Makwakwa and Another* [99] a micro-lender endeavoured to impose a clause in its loan agreement with Makwakwa, whereby Makwakwa waived his right to apply for an administration order and excluded his loan from any administration order Makwakwa may obtain. The court held that in instances where a clause has the likelihood to deprive or has the consequence of depriving a contracting party of the right to approach the courts for redress, such clause is against public policy. Therefore, the micro-lender's clause under dispute (the exception clause) was contrary to public policy and consequently not enforceable.

In 2011 the SCA again held in *Freddy Hirsch Group (Pty) Limited v Chickenland (Pty) Limited,*[100] that a supplier could not place confidence on an elimination of legal responsibility clause (exemption clause) in its standard terms and conditions, in situations where the product delivered was substantially different to the product purchased. The court determined that when someone is dealing with non-performance instead of failed performance, the exemption does not benefit the supplier. The supplier contended that the standard terms and conditions on the reverse side of the credit application form enclosed certain clauses that discharged the supplier from liability. The SCA, after reflecting on the aforesaid clauses, determined that such clauses did not benefit Hirsch in a situation such as this, where it had delivered something different to that bargained for and, in addition, what was basically an illegal disqualified substance. The SCA consequently confirmed

[97] *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A).
[98] Stoop 2008 (20) 4 *SA Merc LJ* 502. See also *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 803.
[99] *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA).
[100] *Freddy Hirsch Group (Pty) Limited v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA).

the judgment delivered by Blieden J.[101] Ponnan J was of the view that the clause was so unreasonably punitive and unjust that public policy could not endure it[102].

Further to the aforesaid, the SCA in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* (2011),[103] when considering the appropriate construction to be found on the exemption (i.e. non-liability) clause, mentioned the case of *Durban's Water Wonderland (Pty) Ltd v Botha and Another*[104], where Scott JA held that –

> "it is appropriate to think through the appropriate construction to be sited on the disclaimer. The right approach is well recognised. If the language of a disclaimer or exemption clause is such that it discharges the person who proposed the contract or transaction from liability in precise and explicit terms, effect ought to be given thereto. If there is uncertainty, the language ought to be interpreted against the person who proposed the contract or transaction."[105]

The most recent judgment delivered on exemption clauses and the enforceability thereof, when taking into account public policy, is *Koen v Pretoria Central Investments (Pty) Ltd t/a Pretoria Parkade*,[106] (hereinafter *Koen v Pretoria Central Investments*) Chesiwe AJ held that "disclaimer notices that are bad in law and not being able to be enforce(d) or allow an injured person to approach the courts for redress are bad in law and can therefore not pass the constitutional muster. Chesiwe AJ held further held that under these circumstances, to enforce any exemption clause as it appears on the disclaimer notice[107] would be unfair and unjust."

Theoretically, public policy necessitates courts to give effect to the objective of the contracting parties by imposing the exemption clause. However, if an exemption clause is against public policy or if it is rare and uncommon in such a contract, the clause is unenforceable.

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[101] *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 (GSJ).
[102] *Botha (now Griesel) & Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 782.
[103] *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276SCA.
[104] *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 989.
[105] See *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 804C.
[106] *Koen v Pretoria Central Investments (Pty) Ltd t/a Pretoria Parkade* (33737/13) [2018] ZAGPPHC 113 (2 March 2018).
[107] *Koen v Pretoria Central Investments (Pty) Ltd t/a Pretoria Parkade* (33737/13) [2018] ZAGPPHC 113 (2 March 2018) [54].

2.4.4 Restrictive interpretation

The impact of an exemption clause may well be restricted by way of restrictive interpretation but only within the limits of what the process of interpretation permits.[108] This approach was applied in *Johannesburg Country Club v Stott and Another*.[109]

In *Transport and Crane Hire Ltd v Hubert Davies & Co Ltd*[110] McNally JA defined the practice of restrictive interpretation as follows: "This weapon was called 'the accurate principles governing the interpretation of the contract (construction).' It was used with great ability and resourcefulness. It was used so as to deviate from the ordinary sense of the words of an exemption clause and to place on them an edgy and unusual construction…"[111]

In instances where the language used is vague, a court should construe a clause narrowly.[112] In *First National Bank v Rosenblum*[113] it was held that, in the instance where a contracting party desires to be exempted from a legal responsibility, which would normally confer upon such a contracting party in terms of the common law, such a contracting party has to evidently state his objective without any uncertainty. Marais JA held that –

> "[i]n matters of contract the contracting parties are taken to have anticipated their legal rights and responsibilities to be administered by the common law, except where the contracting parties have clearly and unequivocally shown the contrary. In the instance where one of the contracting parties desire to be released, either entirely or partly, from any legal responsibility which can ascend at common-law under a contract of the type which the contracting parties anticipate to enter into, it is for that contracting party to make sure that the magnitude to which such a contracting party is to be released is evidently explained."[114]

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[108] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 290.
[109] *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) 516D–I.
[110] *Transport and Crane Hire Ltd v Hubert Davies & Co Ltd* 1991 (4) SA 150 (ZS). Zimbabwean case law.
[111] At 160–162, cited from *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* 1983 QB 284 296–6.
[112] See *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd* 1957 (2) QB 233 (CA) 269.Denning LJ, reflecting the judiciary's attitude towards exemption clauses, stated that "[w]e have repeatedly refused to allow a party to a contract to escape from his just liability under it by reason of an exempting clause, unless he does so by words which are perfectly clear, effective and precise."
[113] *First National Bank of South Africa Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA).
[114] *First National Bank of South Africa Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) 195.

This practice could be used by the court only in instances where the language of the exemption clause is indistinct. If that is not the situation, the court should put such an exemption clause in force.

Furthermore, the courts every so often apply the *contra proferentum* rule[115], while interpreting restrictively.[116] In the matter of *Drifters Adventure Tours v Hircock*[117] the court believed that exemption clauses ought to be interpreted, altogether restrictively. In a case of uncertainty, an exemption clause that is rationally capable of having more than one meaning must be given the interpretation slightly less favourable and prejudiced against the drafter of such a clause that is in favour of the consumer. Further to the aforesaid and as already referred to above in paragraph 2.4.3, the court held in *Durban's Water Wonderland (Pty) Ltd v Botha and Another*[118] that, if the language of a disclaimer or exemption clause is clear to such extent that it discharges the person who proposed the contract or transaction from legal responsibility in precise and explicit terms, such disclaimer or exemption clause must be adhered to. When there is uncertainty, the language should be interpreted against the person who proposed the contract or transaction.[119]

In *Mercurius Motors v Lopez*[120] the court held that an exemption clause, in instances where such a clause diminishes the precise essence of the contract, should evidently and pertinently be drawn to the attention of the consumer who appends his signature to a standard form contract.[121] The SCA came to a corresponding decision in the matter of *Freddy Hirsch (Pty) Ltd v Chickenland (Pty) Ltd*,[122] where the court held that exclusion from legal responsibility for underlying defects was not applicable to circumstances where the product delivered was substantially different to the product purchased, for the reason that this resulted in non-performance.

Restrictive interpretation, however, did not satisfactorily provide a consumer with the necessary protection in instances where the exception clause was clear-cut (clear and unambiguous), as

[115] Also known as "interpretation against the draftsman", this is a doctrine of contractual interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.
[116] The rule means that the document is interpreted in favour of the party not represented for the drafting of the agreement.
[117] *Drifters Adventure Tours v Hircock* 2007 (2) SA 83 (SCA) 87E–G.
[118] *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA).
[119] See *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) 804C.
[120] *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) [33].
[121] *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) [33].
[122] *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) [23].

such a clause would have been enforced by the court regardless of its effect on the consumer. The CPA, nonetheless, aims to protect a consumer against exception clauses, where such clauses are seen as unfair terms in terms of the CPA.

2.5 Background to the enforcement of exemption clauses in terms of the common law

The first issue pertaining to exemption clauses (and standard-form contracts) in our law of contract emanates from the constant faithfulness to freedom of contract.[123] This principle prohibited the courts from applying reasonable solutions in circumstances where a contract or a term contained in such a contract is unfair, punitive and unjust and, as a result has led to unreasonable exemptions of liability being enforced against the consumer standing in the weaker bargaining position.[124] The aforesaid resulted in a second issue, identified as the use and misuse of standard-form contracts.[125] This gave rise to a third issue, namely, that the consumer, owing to his weaker bargaining position, remains caught in a take-it-or-leave-it situation, with no facility to discuss the terms and conditions contained in such a standard-form contract, known as contract of adhesion.[126]

Exemption clauses have continuously been operative to the detriment of most consumers, regardless of the courts' efforts to determine otherwise. If the language is adequately clear to be accorded clear meaning of such a term, the courts cannot prevent the application of such exemption clauses. Numerous causes exist for the constant governance of such exemption clauses.

The common-law principle of *pacta sunt servanda* means that courts have to enforce contracts because, directly translated, this principle means that every contract entered into must be honoured. This common-law principle is consistent with constitutional values, namely, dignity and autonomy, to be precise.[127] Our common law of contract is founded on this principle.

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[123] See Van Rensburg 1986 (49) *THRHR* 448, where the author discusses the traditional emphasis of the law of contract on party autonomy (freedom of contract).
[124] Hopkins *TSAR* 2003 (1) 155.
[125] See Stoop 2015 (27) 2 *SA Merc LJ* 191 193–194, where the author discusses issues related to standard-term contracts (exemption clauses).
[126] See Stoop 2015 (27) 2 *SA Merc LJ* 191 193–194 and Aronstam *Consumer protection* 16–17.
[127] *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323; *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D); *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM).

The principle of *pacta sunt servanda* has been the benchmark when executing a contractual term. It has also provided the concept that a contracting party is not obliged to notify the other contracting party of the meaning and consequences of the terms of the anticipated contract.

In *Afrox*[128] the court held that, once somebody signs a contract but nevertheless fails or neglects, to read such contract, such person does it at their own risk and such terms as contained in the contract will be binding on that person, as if that person had explicitly consented to them. It has at all times been trite in our law that contracts which have been concluded at liberty must not be obstructed.[129]

In the case of *Grinaker Construction v Transvaal Provincial Administration*[130] the court held that, in the event of the consumer having struck a bad bargain, the court is not in a position to adjust the contract in the consumer's favour purely out of compassion for such consumer.[131]

In *Mozart Ice Cream Classics Franchises (Pty) Ltd v Davidoff and Another*[132] the court held that without the common-law principle of *pacta sunt servanda*, the law of contract would be dependent on gross ambiguity, judicial notion and the absence of integrity between the parties to a contract.

The law of contract in South African provides for contracting parties to have the freedom to conclude a contract and to have the capability to choose with whom. The basis for recognising exemption clauses originated from the principle of freedom of contract.[133] One of the terms included in the aforesaid is the freedom to include exemption clauses in a contract. It is founded on the belief that nobody can be compelled to enter into a contract.[134] Freedom of contract also

[128] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [34 and 35].
[129] *Printing and Numerical Registering Co v Sampson (1875) 19 Eq* 462.
[130] *Grinaker Construction v Transvaal Provincial Administration* 1982 (1) SA 312 (A) 97A-B.
[131] Van Eeden *A guide to the Consumer Protection Act* 69. The courts will, with only limited exceptions, protect and hold inviolable that which is contained within the four corners of the signed contract as conclusive proof of the consensus of the parties.
[132] *Mozart Ice Cream Classics Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C).
[133] Lerm *A critical analysis of exemption clauses in medical contracts* 8. The freedom not to contract is sometimes referred to as "freedom from contract". See Willet *Fairness in consumer contracts* 18. See also Barnard *A critical legal argument* 72–73; Brownsword 1995 (22) 2 *JLS* 262–263; Hawthorne 2004 (67) *THRHR* 295; Hawthorne 1995 (58) *THRHR* 163; Pettit 1999 (79) *BULR* 263.
[134] Hawthorne 2004 (67) *THRHR* 295; and Van Rensburg 1986 (49) *THRHR* 448.

means that a court is unwilling to interfere in contracts entered into freely and of their own accord by contracting parties.[135]

In the case of *Burger v Central South African Railways* [136] the court held that the right of a court to discharge a party to a contract from the effects of the contract, properly concluded by the party, simply for the reason that the contract seems to be unreasonable, is not recognised by our law.[137]

Before the enforcement of the CPA and the delivery of the *Naidoo v Birchwood Hotel* (hereinafter *Naidoo*) judgment[138] the courts, on the odd occasion, held that a contract should not be enforced as a result of unfairness, and the courts did not contest freedom of contract on reasonable grounds.[139] It can therefore be said that the courts seem to be vigilant when determining whether to enforce contract terms based on the fact that the contract is unfair or unreasonable.[140] In these cases the courts anticipated that any judicial regulation of contracts was against the notion of freedom of contract.[141]

It can be interpreted that the aforesaid restriction by the courts that freedom of contract and the common-law principle of *pacta sunt servanda* are still favoured over and above the principle of fairness and reasonableness.[142] This appears to be the situation regardless of the fact that, in accordance with the current constitutional system, these doctrines ought to be put to practical use bearing in mind the spirit, purport and objects of the Bill of Rights[143], in agreement with section 39(2) of the Constitution.[144]

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[135] *Wells v SA Alumenite Co* 1927 AD 69; *Burger v Central SA Railways* 1903 TS 571; Bhana and Pieterse 2005 (122) SALJ 865 878–883.
[136] *Burger v Central South African Railways* 1903 TS 571.
[137] *Burger v Central South African Railways* 1903 TS 571 576.
[138] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ).
[139] See Bhana and Pieterse 2005 (122) *SALJ* 865–866 and 872–876. It was indicated that the Supreme Court of Appeal closed off existing legal avenues through which the harshness of the unfettered operation of a classical liberal model of contract could have been ameliorated. See also Van der Walt 2000 (33) *TSAR* 35–36, where it is indicated that the courts with their positivist attitude lost track of reality.
[140] Cameron JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) submitted that the Constitution did not give courts the power to invalidate contractual provisions because they happen not to coincide with the judges' own notions of fairness or good faith. See *Brisley v Drotsky* 2002 4 SA 1 (SCA) 93. In cases of negligence, this submission may be fraught with difficulties as it would be unfair to exclude liability.
[141] See Lewis 2003 (120) *SALJ* 330–338.
[142] See Hawthorne 2004 (67) *THRHR* 294. Hopkins correctly points out that there appears to be an obvious and apparent unwillingness on the part of the SCA to free the law of contract from the shackles of the sanctity of contract rule, which have for so long held back the progressive development of our law of contract. See Hopkins 2007 (June) *De Rebus* 23.
[143] Sections 7–39 of the Constitution, being Chapter 2 of the Constitution.
[144] *Carmichele v Minister of Safety and Security* 2001 4 SA 983 (CC) 43.

The *Naidoo*[145] case marked a noteworthy development in the direction of fairness and justice in contracts because the court in this case held that it would be unjust and unfair to enforce an exception clause and disclaimer notice notwithstanding the principle of freedom of contract. Freedom of contract and *pacta sunt servanda* have generally triumphed above fairness. However, one of the most recent cases decided regarding the common-law principle of *pacta sunt servanda*, is *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*[146]. The court again confirmed the principle that a party to a contract's right to freedom to contract is not merely considered to be a constitutional right, necessitating protection by the courts, but is, furthermore, a right that ought to be valued by both parties to the contract. This judgment supports the belief that, once a contract has been concluded freely and willingly, legal responsibilities deriving from such a contract need to be adhered to by the contracting parties.

A result of the term "freedom" is that, as soon as the contracting parties have entered into a contract, such parties must meet the terms of such a contract, better known as sanctity (sacredness) of contract.[147] This keystone judgment finds manifestation in the common-law principle of *pacta sunt servanda* and is established on individualism, autonomy, personal liberty, and freedom of contract.[148]

Sacredness of contract necessitates that contractual obligations willingly entered into between the parties be adhered to by the contracting parties and, when necessary, imposed by the courts.[149] It is trite in law that contracts willingly concluded between contracting parties must be imposed and the courts must not frustrate such an enforcement.[150] Additionally, courts should not casually release a contracting party of its duty to execute as desired in accordance with the contract.

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[145] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ).
[146] *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA).
[147] Pretorius 2003 (66) *THRHR* 640; Willet *Fairness in consumer contracts: the case of unfair terms* 19-20.
[148] Christie and McFarlane *The law of contract* 12; Cockrell 1992 (109) *SALJ* 41. See also a discussion of *pacta sunt servanda* in para 2.2.2 above.
[149] Hutchison *The law of contract* 21.
[150] See *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 582, in which Sir Gorge Jessel MR stated that "men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice".

Over and above the aforesaid, another common-law principle applicable is the *caveat subscriptor* rule, which plainly means *the signatory should be cautioned*.[151] This means that as soon as a contract is reduced to writing and signed by the contracting parties, the terms contained in the contract are binding on the parties of that contract, as the signatures of the parties are confirmation that they have agreed to such terms. This rule places the onus on the consumer to ensure that he understands the terms contained in the contract prior to signing it, as the consumer will be bound to it.

The court confirmed the *caveat subscriptor* rule in *George v Fairmead*[152] and found that, although the contractual party in that case had failed to read the contract, such terms were still binding on such party. However, the courts have lately followed a more relaxed and flexible approach to the application of this term:[153]

> "The *caveat subscriptor* rule is founded on the reliance theory which is every so often described by referring to Blackburn J's renowned *dictum* from the English case *Smith v Hughes:* "… whatever an individual's actual objective might be, by acting in such a manner that a reasonable person would consider his actions to be a reflection of him agreeing to the terms of a contract suggested by the other contracting party, and that such contracting party, upon the aforesaid notion, concludes the contract. Such a party therefore conducting himself would be similarly bound, as if he had anticipated to consent to the terms of the other contracting party"". [154]

It is essential to note that there are occurrences where one can avoid the application of the *caveat subscriptor* rule.[155] Such exceptions are *iustus error*, fraud, undue influence and duress.[156] The *exceptio doli generalis* was established in the Roman law and it functioned as a defence.[157] This defence enabled the consumer, taken to court, to raise situations which would make the implementation of the contract similar to that of fraud.[158]

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[151] Van der Merwe *et al Contract: general principles* (2012) 36; Christie *The law of contract* 174–176.
[152] *George v Fairmead (Pty) Ltd* 1958 (2) 465 SA 46F.
[153] In *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) 33, the court held that an exemption clause that is hidden and which undermines the essence of the contract must be brought to the attention of the consumer who signs the contract.
[154] *Smith v Hughes* 1871 LR 6 QB 597 and 607.
[155] Woker 2003 (15) 1 *SA Merc LJ* 110.
[156] Woker 2003 (15) 1 *SA Merc LJ* 110.
[157] *Bank of Lisbon and South Africa Ltd v De Ornelas and Others* 1988 (3) SA 580 (A) 605.
[158] In *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) 215 it was accepted that the *exceptio doli generalis* rule formed part of the South African law.

The *exceptio doli* had two functions. The first was that, in a case where the consumer assumed that the supplier was guilty of fraud, the *exceptio doli specialis* was raised prior to instituting a claim. The second was that, where the consumer suspected that the supplier was claiming something which such supplier was legally entitled to but, with reference to reasonableness and good faith, was ineligible to, the *exceptio doli generalis* was similarly raised.[159]

In the case of *Bank of Lisbon and South Africa v De Ornelas and Others*[160] (hereinafter *Bank of Lisbon*), the court pointed out its inclination for individualism and, in doing so, got rid of the *exceptio doli generalis* where a contract would possibly be affirmed unenforceable based on deliberations of unfairness. The majority held that the *exceptio doli generalis* did not form part of our law.[161] In addition, the court failed to point toward any other remedy in our law which would possibly attain an effect similar to the *exceptio doli generalis*.

In the case of *Brisley v Drotsky*,[162] the SCA criticised some, but not all, efforts to revive the *exceptio doli.* Nonetheless, it was shown in the minority judgment in this case that our law is currently in a developing stage where contractual fairness is progressively growing as a juristic and ethical standard.[163]

Taking all the above-mentioned into consideration, with specific reference to the application of common-law principles to exemption clauses, the legislature has intervened by passing the CPA, which act deals extensively with the drafting, application and enforceability of exemption clauses in contracts.

2.6 Conclusion

It is clear-cut that our courts, under the common law, have dealt with the question of the enforcement of exemption clauses on the foundation of freedom of contract. The courts' method has been affected by the customary interpretation that contracts freely concluded between the contracting parties ought to be enforced and that the courts should not interfere with the

[159] See Joubert *General principles* 279.
[160] *Bank of Lisbon and South Africa v De Ornelas and Others* 1988 (3) SA 580 (A).
[161] *Bank of Lisbon and South Africa v De Ornelas and Others* 607B. Cf *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A). See also Van der Merwe, Lubbe and Van Huyssteen 1989 (106) *SALJ* 236.
[162] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [14 and 29].
[163] See Van der Walt 2000 (33) *TSAR* 38.

enforceability thereof. Nonetheless, the application of the common-law principles by the courts has been so arbitrary that it cannot be predicted with confidence, whether the courts would be of assistance to the distressed contracting party.[164]

The Constitution[165] has had particular repercussions for common-law principles. With the commencement of the Constitution, the notions of public policy and ubuntu began to play a very significant part when the courts wish to enforce exemption clauses.[166]

The CPA and the *Naidoo*[167] judgment mark a vital defining moment in our law of contract regarding the usage and enforcement of exemption clauses displayed by way of a disclaimer notice. The CPA presents all-embracing modifications, and acts as an all-purpose legislation prohibiting a range of terms (including exemption clauses) which would have been enforced in accordance with the common law. The CPA produces a notion of fairness by the citation of a range of terms which are prohibited and terms which are assumed to be unfair.[168]

[164] Naudé 2006 (3) *Stell LR* 379.
[165] Constitution of the Republic of South Africa 1996.
[166] Discussion in this regard will follow in chapter 3.
[167] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ).
[168] Discussion in this regard will follow in chapter 4.

CHAPTER 3: THE EFFECT OF THE CONSTITUTION, PUBLIC POLICY AND UBUNTU ON THE USE OF EXEMPTION CLAUSES

3.1 Introduction

South African private law, specifically the contract law, is essentially uncodified. The role of abstract values, for example good faith and fairness, in our contract law needs to be measured against the extensive background of our legal system.

Both the Constitutional Court[169] and the Supreme Court of Appeal[170] have established that our common-law principles of contract law are dependent on the Constitution. Nevertheless, in so doing, continuous importance is placed on the classical liberalist notions of freedom and dignity. At the same time, the courts have given a lower profile to the prospective role of substantive equality, to a considerable extent, within a constitutionalised contract law.

An exemption clause is, in effect, an agreement between the contracting parties, and as such, in general, enforceable. However, exemption clauses which are against public policy, are invalid and unenforceable. Public policy renders contracts that are in themselves invasive, null and void. Public policy is now entrenched in the Constitution, as well as in the essential values it protects. Such values include human dignity, the advancement of human rights, the achievement of equality, freedoms (including freedom of contract), non-sexism and non-racialism.[171]

3.2 The Constitution

3.2.1 Introduction

The Constitution is the supreme law of South Africa. The Constitution provides the legal foundation for the existence of the Republic, setting out the rights and duties of its nation, and defining the structure of the government.

[169] Hereinafter the CC.
[170] Hereinafter the SCA.
[171] Cameron JA in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [91].

All laws enforced and applied in our country, inclusive of the common law of contract, now derive their force from the Constitution. It can therefore be said that the Bill of Rights[172], enclosed in Chapter 2 of the Constitution, has had a considerable influence on the law of contract, and continues to have such an impact.

The Bill of Rights is the basis of the democracy in our country. The Constitution treasures the rights of each and every citizen and upholds the democratic values of human dignity, equality and freedom.[173]

The rights contained in the Bill of Rights can be restricted simply in accordance with the law of general application, to the degree that such restriction is reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom, and by considering all relevant factors.[174]

The Bill of Rights contains all human rights that safeguard the civil, political and socio-economic rights of each and every citizen in our country. The rights contained therein are applicable to all law, inclusive of the common law, and bind all divisions of government.[175] It can therefore be said that the Constitution, specifically Chapter 2 of the Bill of Rights, is a real expression of principles, policies and values which triumph in a South African society.[176]

As stated in the previous chapter, the introduction of the Constitution has particular implications for common-law principles, with specific reference to *pacta sunt servanda* and the notion of autonomy.[177]

In the context of specifically contractual claims, both the CC and the SCA have laid down that the obligation of the courts to advance the common law in terms of the Constitution and its fundamental values extends directly to the principles and concepts of the positive law.[178] The effect of the Constitution on the enforceability and application of exemption clauses has received

[172] Chapter 2 of the Constitution.
[173] Section 7 of the Constitution.
[174] Section 36 of the Constitution.
[175] Including the national executive, Parliament, the judiciary, provincial governments and municipal councils.
[176] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 11.
[177] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 11.
[178] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 13.

some consideration in the past number of years. Both the CC and the SCA have accepted that the Constitution has horizontal application, however there is still significant ambiguity regarding the exact degree and way of such horizontal application, especially when it comes to the issue of substantive fairness in contracts.[179]

A number of sections of the Constitution are relevant when the enforcement of an exemption clause is considered. Bearing in mind all the applicable sections, it is my view that the rights to dignity, equality and freedom of the contracting party in the weaker bargaining position should be taken into account.[180] It must be determined whether the Constitution binds all courts and all persons, whether the exemption clause deprives a contracting party of a fundamental right, and whether a contracting party's fundamental rights may be limited. In the paragraphs that follow, the relevant and applicable sections of the Constitution and their influence on the interpretation and enforcement of exemption clauses will be discussed.

3.2.2 Sections 7 and 39 of the Constitution

Section 7 of the Constitution[181] preserve all the rights of all people in South Africa. Section 39 of the Constitution, [182] in its turn, sets out the manner in which the Bill of Rights should be interpreted.

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[179] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [22, 24 and 93]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [32]; *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) [12 and 14–17]; *South African Forestry Co Ltd v York Timbers* 2005 (3) SA 323 (SCA) [30]; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) [7]; *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) [27–8 and 50–4]; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) [23–5]; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [51–2, 56–8, 70–3, 104 and 124]; and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA256 (CC) [71]. See Bhana and Meerkotter 2015 (132) 3 *SALJ* 494.

[180] Bauling and Nagtegaal 2015 *De Jure* 149; Barnard AJ *A critical legal argument* 229; *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA); and *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

[181] Section 7 of the Constitution reads as follows:
"(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill".

[182] Section 39 of the Constitution enshrines the interpretation of Bill of Rights, which section reads as follows:
"*(1) When interpreting the Bill of Rights, a court, tribunal or forum—*
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Ngcobo J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) repeated the constitutional prominence of (contractual) self-sufficiency (i.e. autonomy) and established that contracting parties are permitted to enter into a contract, even if it is to a party's disadvantage.[183]

The leading CC case to date to speak expressly of the foundational value of freedom remains that of *Ferreira v Levin no and others; Vryenhoek and others v Powell NO and others* [184] (hereinafter the *Ferreira* case). The contradictory considerations of the constitutional value of freedom by the respective judges in the *Ferreira* case highlighted the multi-faceted nature of freedom and, therefore, also of autonomy.[185] In this regard, specific reference is made to Ackermann J, who submitted that –

> "[h]uman dignity has little significance without freedom; for without freedom personal growth and fulfilment is impossible. Without freedom, human dignity is little more than a mere concept. Freedom and dignity are linked without option of being separated. To refute individuals their freedom is to refute them from their dignity. So, a person's right to freedom ought to be defined as extensively as probable, in agreement with a similar extent of freedom for others."[186]

Contrary to Ackermann J, Sachs J's attitude towards freedom involves the multi-dimensional constitutional values of freedom, dignity and equality, both individually and jointly. However, subsequent case law has not followed through with Sachs J's approach. The SCA has adopted an approach to freedom of contract that rather echoes Ackermann J's understanding of freedom.[187]

Section 39(2) of the Constitution provides that when a court, tribunal or forum is developing the common law, such development should encourage the essence, purpose and objects of the Bill

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(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".

[183] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [58]: "Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity".

[184] *Ferreira v Levin no and others; Vryenhoek and others v Powell NO and others 1996 (1) SA 984 (CC)*. This is in the context of the interim Constitution and with reference to the right to freedom and security of the person.

[185] Bhana *Constitutionalising contract law* 92–95.

[186] *Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC);1996 1 BCLR 1 (CC) [49 - 51].

[187] Bhana *Constitutionalising contract law* 97.

of Rights. In *Brisley v Drotsky,*[188] the court, per Cameron JA positioned South African common law of contract within the Bill of Rights. Cameron JA explained that the common law of contract is currently conditioned on the Constitution,[189] meaning that "public policy", as applied to contracts, is nowadays recognised in the Constitution together with its foundational values of human dignity, freedom and equality.[190] Public policy signifies the legal principles of the public, and under the constitutional system the Constitution is the most trustworthy declaration of public policy.

In terms of the extensive constitutional framework, the values of freedom and human dignity contain the fundamental principle of freedom of contract, save for any obscene excesses.[191] In other words, the SCA held that the constitutional values of freedom and dignity re-legitimate the classical liberal notion of the autonomy of individuals, to administer their own lives by contract as long as their self-respect and dignity are not debilitated. Further to the aforesaid, in the case of *Afrox*,[192] the SCA held that the common-law principle of freedom of contract, in itself, is a constitutional value.[193]

The SCA has successively started to recognise the impact of the constitutional value of equality (and dignity) on contractual validity, at least insofar as it concedes that a court must take cognisance of imbalances in the bargaining power to ensure that the parties are not compelled to enter into a contract on terms which invade their dignity and equality.[194]

The common law principles pertaining to contracts, particularly contractual autonomy, must find a legal home in the Bill of Rights. Without a definite right to freedom of contract, both the CC and the SCA have purported to place freedom of contract within the foundational triage, namely, the essential constitutional values of freedom, dignity and equality.[195] However, the extent thereof must be determined on each individual case. When the Constitution was drafted, it was chosen not to insert freedom of contract as an essential right, although its significance as a constitutional

[188] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[189] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [88].
[190] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [91].
[191] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [94].
[192] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).
[193] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [17–24], especially [23] where freedom of contract was referred to as "[d]ie grontwetlike waarde van kontrakteersvryheid..."; and Bhana *Constitutionalising contract law* 97–98.
[194] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [12]; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) 14 and 16; and Bhana *Constitutionalising contract law* 98.
[195] Bhana *Constitutionalising contract law* 90.

value seems to have been acknowledged from time to time.[196] It can therefore be said that freedom of contract should indeed be considered when interpreting a contract, specifically an exemption clause.

3.2.3 Section 8 of the Constitution

The courts have held that, considering the provisions of section 8 of the Constitution[197], the Constitution binds all courts and, in principle, all persons, in view of the positive duty imposed on all courts to advance the common law in agreement with the values expressed in the Constitution. It is held that the provisions of the Constitution must every so often also find direct application between individuals, that is, consumers.[198]

The majority judgment in *Barkhuizen v Napier*, delivered by Ngcobo J, is authority for the affirmation that the CC is more favourable towards an interpretation of section 8(2) in the direction of indirect application of the Bill of Rights in instances where the constitutionality of a contract term is challenged. According to the majority judgment, direct application of the Constitution is fraught with problems.[199]

In light of the aforesaid it can be said that an interpretation of section 8(2) proposes that not every fundamental right binds private persons, and such right will be binding only to the degree to which it is relevant.

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[196] See Malan AJA in *Reddy v Siemens* 2006 SCA 164 (SA) [15]; see also Brand JA in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) [23].

[197] Section 8 of the Constitution, enshrining the application of the Bill of Rights, reads as follows:
"(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court —
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

[198] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 12–13.

[199] See Ngcobo J's judgment in *Barkhuizen v Napie*r 2007 (5) SA 323 (CC) [23–30].

It is clear from section 8(3) that if a right contained in the Bill of Rights is applicable in the private domain, it will, rather than directly, be given effect through the improvement of the common law.[200] The majority in *Barkhuizen v Napier* conveyed that assessing the constitutionality of a contractual term directly against a right contained in the Bill of Rights would be problematic.[201]

Even though, for the time being, courts would possibly be more satisfied with indirect horizontal application of the Bill of Rights to a dispute arising from a contract that implicates constitutional rights, the possibility still exists for courts to get directly involved if a contracting party has implemented a contractual power in a way that fails to have regard to the constitutional rights of the other contracting party.

3.2.4 Section 34 of the Constitution

With regard to the distinctive examples of exception clauses in chapter 2[202], it is evident that an exemption clause deprives a party to a contract from instituting legal action, which in turn deprives such party from having access to a court or the relevant forum.

Section 34 of the Constitution**[203]** provides expression to one of the foundational values, namely, assuring that every person has the right to seek legal redress of a court, and it moreover provides assurances for fair and orderly resolutions of disputes by courts or independent and unprejudiced tribunals. [204]

The aforesaid was confirmed by the CC in *Barkhuizen v Napier*. This confirms that the aforesaid is essential to the steadiness of a well-ordered civilisation. It is definitely important to a society that such society is established on the rule of law.

In the majority judgment of *Barkhuizen v Napier*, the court found that section 34 does not merely mirror the foundational values that bring about our constitutional order; it also establishes public

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[200] See Woolman 2007 *SALJ* 762 and Rautenbach 2009 (3) *TSAR* 624 - 631 in which the authors promote the probability of a direct application of the Bill of Rights to private contract terms.
[201] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [23–30].
[202] Para 2.2 above.
[203] Section 34 of the Constitution reads as follows: *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".*
[204] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [31].

policy.[205] The court held that an unreasonable or unfair time limitation clause would be conflicting with public policy as public policy considered the essence of doing unpretentious justice between persons, to be cognisant of the notion of ubuntu.[206] However, the court found that the clause was not unfair or unreasonable, and it further found that section 34 did not exclude time limitation clauses. Furthermore, it held that there was no proof that the plaintiff did not freely and willingly conclude the relevant contract. It further decided that the time limitation clause did not consequently infringe on any of the applicant's constitutional rights.

Over and above the aforesaid, Sachs J [207] concluded, in a minority judgment, that public policy, nowadays brought alive by section 34 of the Constitution, gives a person a right to access to the courts.

Taking all of the aforesaid in consideration, it is clear that in terms of section 34 of the Constitution, everyone has a guaranteed right to access to the courts, and consequently exemption clauses, with specific reference to time-bar clauses, would possibly infringe this right. In order to determine whether such clause can invade the right enclosed in section 34 of the Constitution, section 36 of the Constitution comes into play.

3.2.5 Section 36 of the Constitution

It should be noted that the rights and freedoms as enshrined in the Constitution are not fixed; therefore, the limitation of such rights (and freedoms) is enshrined in section 36 of the Constitution,[208] also known as the general limitation clause. Such limitations must be reasonable

[205] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [33].
[206] See paras 3.3 and 3.4 below in respect of public policy and ubuntu.
[207] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[208] Section 36 of the Constitution reads as follows:
"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

and can only be done with good cause.[209] It can therefore be said that not all contraventions of an individual's fundamental rights are unconstitutional.

Notwithstanding the aforesaid, it is clearly provided for in the Constitution that individuals who limit (or attempt to limit) rights ought to meet with the requirements contained in the Constitution.[210] Incidentally, not all requirements will be discussed, as they do not fall within the scope of this dissertation; however, what is important is the element of proportionality.[211]

3.2.6 Relevant case law

Our courts have shown that in a constitutionalised contract law, equality plays a substantial role, insofar as contracting parties can establish the presence of unequal bargaining power.

Public policy furthermore requires some degree of fairness in contracts.[212] The law desires to embrace normative and constitutional values so as to become accustomed to the shifting requirements of the community, particularly where the need arises to defend the party to a contract that is in the weaker bargaining position. In this regard it was held in the minority judgment by Olivier JA in *Brisley v Drotsky*, that there was a need to bring about a balance between the well-being of legal stability and social realities.[213]

A discussion of the post-constitution judgments of *Brisley v Drotsky, Afrox Health Care Bpk v Strydom, Napier v Barkhuizen,* and *Barkhuizen v Napier* will follow.

3.2.6.1 Brisley v Drotsky

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[209] Section 36(1) of the Constitution.
[210] Section 36(2) of the Constitution provides as follows: *"Except as provided in subsection (1) of the Constitution, no law may limit any right entrenched in the Bill of Rights."*
[211] In this regard, see *Bernstein v Bester* 1996 2 SA 751 (CC) [145]; *De Lange v Smuts* 1998 3 SA 785 (CC) [23]; *Malachi v Cape Dance Academy International (Pty) Ltd* 2010 6 SA 1 (CC) [15]. See also Currie and De Waal *Bill of Rights Handbook* 272. From the aforesaid case law, it can be concluded that the Constitutional Court also works with proportionality during the first stage of the enquiry to determine if a deprivation of freedom was undertaken "arbitrarily and without just cause" in applying section 12(1)(a) of the Constitution, but nevertheless endeavours to consider the matters referred to in section 36(1)(a) to (e) after it has concluded that there was an arbitrary deprival without just cause.
[212] Bhana and Pieterse 2005 (122) *SALJ* 868 correctly submit that a contract does not operate in isolation but in a social context. Society should thus exercise some control over a contract, so as to ensure that there is justice and equity.
[213] *Brisley v Drotsky* 2002 4 SA 1 (SCA) 63, 69–70, 72, 75–76 and 78.

This SCA case emphasises the point that even a straightforward lease agreement which consumers enter into on a daily basis shows how hazardous, unilateral and unfair an exemption clause (i.e. the non-variation clause exempting the landlord from legal responsibility under an oral alteration to the contract) can be if put into operation to the detriment of a party in a weaker bargaining position, being the tenant. [214]

Cameron JA positioned contract law within our constitutional dispensation, where he relied on section 39(2) of the Constitution, for all intents and purposes, to infuse contract law with the founding values of our Bill of Rights.[215]

Subsequent cases, in particular *Afrox Health Care Bpk v Strydom, Napier v Barkhuizen* and *Barkhuizen v Napier*, have thus supported the horizontal application of the Bill of Rights, essentially *via* the portal of public policy.

3.2.6.2 Afrox Health Care Bpk v Strydom

A public policy encounter again came before the SCA in this case. The SCA held that, insofar as exemption clauses were involved, in accordance with the common-law approach, such exemption clauses would possibly be affirmed to be against public policy and as such be regarded unenforceable.[216] Regardless of such acknowledgment, the court held that there was no evidence showing that the respondent was in an imbalanced or weaker bargaining position with regard to *Afrox* at the conclusion of the admission agreement.[217] The court found that, in contemplation of whether a term contained in a contract was against public interests, the values contained in the Constitution had to be considered.[218] Public interest upholds the notion that when a contract is freely and voluntarily entered into between contracting parties, having the necessary capacity, such contract terms are necessary to be sustained and imposed by the courts.[219]

[214] Bhana *Constitutionalising contract law* 275-278. Furthermore see *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [12]; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) [8 – 9] and *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [59].
[215] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [91–94].
[216] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [34].
[217] *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 1 (SCA) [35].
[218] *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 1 (SCA) [37].
[219] *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 1 (SCA) [38].

What the court in this case had to determine was whether the exemption clause was unanticipated to bring about the obligation to have such exemption clause directed to the consumer's attention.[220]

In *Afrox* the respondent disputed the legitimacy of the exemption clause enclosed in an admission form. The form released the hospital from legal responsibility for medical negligence. The respondent argued that the exemption clause was against public policy and that if such a clause were to be enforced, it would be unreasonable, unfair and against the notion of good faith. In this regard, the respondent depended on Olivier J's minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*.[221] The respondent further held that the clause violated his fundamental right to have right to use health care services. The SCA affirmed its previous decision in *Brisley v Drotsky*, on the part of good faith, reasonableness and fairness in private contractual relationships.[222]

The SCA held that the exemption clause was, objectively viewed, not unforeseen, and therefore there was no legal duty upon the admission clerk to draw the respondent's attention to the clause. Consequently, it was held that the exemption clause was binding on the respondent.[223]

Brisley v Drotsky and *Afrox* have set the stage for the broader constitutionalisation of South African contract law. Indeed, this has become the foundation of further SCA judgments,[224] as well as the first CC judgment dealing with the constitutionalisation of contract law.[225]

3.2.6.3 Napier v Barkhuizen

The issue at heart in *Napier v Barkhuizen*[226] and finally in *Barkhuizen v Napier*[227] was the degree of the influence that the Constitution has on the contractual relationship between individuals and

[220] *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 1 (SCA) [42].
[221] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 322-324.
[222] *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 1 (SCA) [32].
[223] *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 1 (SCA) [42].
[224] *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) [12]; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) [12]; *Napier* [11–14].
[225] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [57]. Discussion to follow.
[226] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).
[227] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

the constitutionality of contractual provisions which limit an individual's right of access to the courts.[228]

In the case of *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) (hereinafter *Napier v Barkhuizen*) the insurance policy determined that in instances where the insured was unsuccessful in timeously serving summons on the insurer (within 90 days of being notified of the insurer's rejection of the claim), such a claim against the insurer by the insured would lapse. The respondent, Mr Barkhuizen, argued that this clause infringed on his constitutional right of access to the courts set out in section 34 of the Constitution. In the Pretoria High Court, De Villiers J held that time-limitation clauses are indeed unconstitutional. Mr Napier took the matter on appeal to the SCA.

Cameron JA acknowledged the approach taken in both *Brisley v Drotsky* and *Afrox* in acknowledging that the common law is nowadays conditioned on the Constitution and that courts must take into account the fundamental constitutional values of equality, dignity and freedom when developing the common law of contract in harmony with the spirit, importance and objects of the Constitution.[229] The SCA, however, cautioned that this did not mean that judges now have the power to set aside contracts or to pronounce them unenforceable founded on their individual views of fairness, justice or good faith. However, a judge must pronounce contracts in their totality, or the terms contained therein, to be unenforceable in instances where such contracts or terms are in conflict with public policy as cognisant of the values which are brought about by the Constitution.[230]

The judges held that the respondent concluded the contract out of free will whilst exercising his constitutional rights to dignity, equality and freedom. No circumstances existed to undermine the deal he concluded, and consequently he must be bound to the contract.[231]

3.2.6.4 Barkhuizen v Napier

After the above judgment was handed down, Mr Barkhuizen petitioned to the CC, where after the CC essentially held that, as between private contracting parties, the Constitution can apply

[228] Kuschke 2008 *De Jure* 463.
[229] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) [6].
[230] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) [7].
[231] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) [28] and Kuschke 2008 De Jure 465.

indirectly to a contract, by way of an invocation of the common law of contract's standard of public policy.[232]

The CC further established the public policy assessment, which assessment is held to be two-staged, providing that a contract ought to be objectively as well as subjectively reasonable in the specific conditions, to be enforceable. Ngcobo J, in the majority judgment, held that, as soon as it is recognised that the exemption clause is not against public policy, it is a prerequisite for the consumer to demonstrate that, in the relevant circumstances of the situation, there was a noble reason why there was a failure to act in accordance with public policy. Ngcobo J further held that the Constitution necessitates contracting parties to fulfil their contractual responsibilities which were entered into willingly and without restrictions, and that, while it is essential to recognise the principle of *pacta sunt servanda*, courts should be allowed to reject the enforcement of a clause if the effect thereof would be unfairness or unreasonable.

The CC was further presented with an opportunity to pronounce on the constitutionalisation of our common law of contract, in particular, to adjudicate on the constitutionality of a contractual time-limitation clause. The primary focus was on public policy, as the external constitutional corrective for South African common law of contract.[233] Still, in examining the external reach dimension of contractual autonomy, the CC needed first to reposition the common law of contract, as a whole, within the ambit of the Bill of Rights.[234] It stands to reason therefore that Ncgobo J, in delivering the majority judgment, took as his starting point the classic doctrine of *pacta sunt servanda*, it being the embodiment of freedom of contract and contractual autonomy. At the same time, however, the CC endorsed the approach to freedom of contract as adopted by the SCA.[235] So, whilst the CC expressly recognised that *pacta sunt servanda* is not to be held above criticism, it conditioned on constitutional control, applying its mind only to the external reach dimension of autonomy. Moreover, like the SCA, it did so only in the classical liberal image of the values of freedom, dignity and equality.[236]

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[232] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [23 and 28–30].
[233] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [28–30].
[234] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [23 and 28–30].
[235] The CC did, however, disagree with the SCA insofar as the SCA had refused to give weight to the mere fact that "a term is unfair or may operate harshly…" (*Napier v Barkhuizen* 2006 (4) SA 1 (SCA) [12] note 64 and *Barkhuizen v Napier* 2007 5 SA 323 (CC) [72] note 17).
[236] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [15, 30, 55 and 57] and Bhana *Constitutionalising contract law* 100.

As stated elsewhere in this dissertation,[237] *Barkhuizen v Napier* is authority for the affirmation that the CC is more favourable towards an interpretation of section 8(2) of the Constitution in the direction of indirect application of the Bill of Rights in instances where the constitutionality of a contractual term is challenged.[238]

3.2.6.5 Johannesburg Country Club v Stott and Another [239]

This case law was discussed in the previous chapter, relating to public policy and restrictive interpretation.[240]

What is of importance in this matter, is that the SCA dealt with the implication for contracts, of the constitutional right to life, enclosed in section 11 of the Constitution. Incidentally, the SCA was more forthcoming where it introduced the probability of an exclusion clause that purports to exclude liability for causing another's death through negligence, as being contrary to public policy, as this would be contrary, not only to the common law's great respect for the sacredness of life, but also to the spirit of section 11 of the Constitution.

3.2.6.6 Conclusion

The eventual decision of the court in *Barkhuizen v Napier* seems to accept that the question was not primarily whether such clause (a time-bar clause) was contrary to the Constitution, but whether it was against public policy as demonstrated by the constitutional values particularly the values established in the Bill of Rights.[241] It was held that the clause was indeed sanctioned by a law of general application, namely, the doctrine of *pacta sunt servanda*, and that it will possibly only be against public policy if, in the specific circumstances, it were unreasonable.

Further to the aforesaid, in the *Naidoo*[242] case, Nicholls J referred to *Barkhuizen v Napier*, with specific reference to public policy, and held that the limits of contractual sacredness lie at the

[237] See para 3.2.3 above.
[238] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [23–30].
[239] *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) [12] (per Harms J, for the majority); cf [14–16] (per Marais J, for the minority).
[240] See para 2.4.4 above.
[241] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 17.
[242] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) [47].

edges of public policy which would receive greater force and precision, taking into account the Constitution specifically as contained in the Bill of Rights.[243]

Considering the aforesaid, it is clear that exemption clauses against public policy are void and unenforceable. Public policy must be decided on by referring to the values which inspire our constitutional democracy as given expression by the provisions of the Bill of Rights.

3.3 Public policy

The concept of public policy was discussed in length in the previous chapter.[244] A discussion of the application, or the influence, of public policy on the enforcement of exemption clauses, will follow.

As stated in the previous chapter, public policy has introduced notions of fairness, justice and reasonableness, and would preclude the enforcement of a term which would, in theory, result in unfairness.

The concept of public policy can therefore be understood to refer to the courts' reflections of what is in the interests of the community or society when contracts are interpreted. Cameron AR stated in *Brisley v Drotsky* that "[p]ublic policy ... invalidates contracts, which are in itself offensive - a doctrine of significant antiquity. In its current facade 'public policy' is now entrenched in our Constitution as well as the fundamental values it cherishes". [245]

Both the SCA and the CC have established that the constitutional values of freedom, dignity and equality inform public policy and that a contractual provision inclusive of exemption clauses, which violates a constitutional value, may be set aside or affirmed to be unenforceable regarding the common law, for being against public policy.

Public policy must be decided on with regard to the values which brings about our constitutional democracy as identified in the provisions of the Constitution. Subsequently, a contractual term, which is contrary to the values cherished in the Constitution, is against public policy and therefore

[243] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) [46].
[244] See para 2.4.3 above.
[245] *Brisley v Drotsky* 2002 4 SA 1 (SCA) [4].

unenforceable.[246] Therefore, a contract, in its totality or a contractual term, including an exemption clause, which infringes on any constitutional values, such as dignity, equality, and freedom, will be against public policy and consequently unenforceable.

One of the leading cases on contracts and more specifically public policy, is *Sasfin.*[247] This case is also measured to be the point of departure of the modern law of the unlawfulness or unenforceability of contracts through the common law, due to the fact that this case was decided before the commencement of the Constitution. Since the rejection of good faith in favour of public policy by the courts in *Brisley v Drotsky*[248] and *Afrox*, *Sasfin* remains the foremost authority for assessing the enforceability of contracts which, in other jurisdictions, would raise queries of good faith.[249] Smalberger JA in his judgment held that our common law does not acknowledge agreements which are against public policy. Smalberger further held that, with regard to the question of what is intended by public policy and the instance when it can be said that agreements are against public policy, the interests of the community or public are of overriding significance. Agreements which are evidently contrary to the interests of the community, whether such agreements are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, be unenforceable.

Notwithstanding the aforesaid, in 1988 the *exceptio doli* was successfully removed from our law. In *Bank of Lisbon,* Joubert JA held that it was time to lay the *exceptio doli* to rest as an unnecessary redundant anachronism.[250]

It was not long after *Bank of Lisbon* that public policy was raised as a fairness defence. Smalberger JA held as follows:

> No court must shrivel from the responsibility of pronouncing a contract against public policy when the circumstance so requires. The power to affirm contracts to be against public policy must, nonetheless, be applied cautiously and merely in the most distinctive of cases, lest uncertainty as to the validity of contracts arising from an arbitrary and indiscriminate usage of the power. One ought to be vigilant not to enter into a contract which is against public policy simply as a result of its

[246] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [9].
[247] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).
[248] *Brisley v Drotsky* 2002 4 SA 1 (SCA).
[249] Mupangavanhu 2013 (1) *SPECJU* 115.
[250] *Bank of Lisbon and South Africa v De Ornelas and Others* 1988 (3) SA 580 (A) 607B.

> terms offending one's individual sense of decency and fairness... In the words of Lord Atkin in *Fender v St John-Mildmay* "the code should only be raised in distinct cases in which the impairment to the public is significantly undeniable, and is not dependent on the idiosyncratic interpretations of a small number of judicial minds.[251]

In recent times, in the matter of *Bredenkamp and Others v Standard Bank SA Ltd*[252] (hereinafter *Bredenkamp*), the SCA was again confronted with an encounter against a contract on the grounds of inconsistency with the Constitution. The court restated that "fairness is not an independent prerequisite for the implementation of a contractual right". [253] Nevertheless, the court also reiterated the *Sasfin*-principle, in that our common law fails to recognise contracts which are against public policy.[254] The difference, apparently, is that public policy is now embedded as constitutional values.

In *Bredenkamp* it was found that public policy and the *boni mores* are nowadays profoundly entrenched in the Constitution and its fundamental values.[255]

Ngcobo J held in *Barkhuizen v Napier*[256] that, even though public policy was a point in law raised the first time on appeal, the court was capable of using its discretion to contemplate this argument. [257] Public policy necessitates contracting parties to abide by the contractual responsibilities that have been freely and voluntarily accepted by the parties.[258] As previously stated, the Constitution makes provision for the fact that certain situations would possibly arise where the limitation of a right is allowed by a "law of general application" and whether such limitation would be reasonable and permissible. In this matter, it was the right to seek judicial redress. The limitation must, however, imitate public policy.[259] A person should, nevertheless, be given an adequate, reasonable and fair chance to seek judicial redress.[260]

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[251] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9B–G.
[252] *Bredenkamp and Others v Standard Bank SA Ltd* 2010 (4) SA 468 (SCA).
[253] *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) [53].
[254] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7I–9H.
[255] *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) [39].
[256] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [51].
[257] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [39].
[258] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [57].
[259] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [48].
[260] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [51].

Notwithstanding the aforesaid, public policy is informed by the notion of ubuntu. Ngcobo J accordingly held that "public policy takes into consideration the requirement to do 'simple justice' amongst individuals and that it is informed by the notion of *ubuntu.*"[261] It seemed as if the concepts of good faith in contractual relations and ubuntu are to be applicable to law of contract.[262]

3.4 Ubuntu

The concept of ubuntu[263] was first introduced as a constitutional concept in *S v Makwanyane*[264] which case was followed by several academic discussions on the subject.

Regrettably ubuntu was not specifically incorporated in the values contained in the provisions of the Constitution. Even so, regardless of the exclusion, the constitutional standing of ubuntu as a value has been reiterated by the CC,[265] SCA[266] and High Court.[267]

Nevertheless, some recent cases constructed the prospect that good faith, with the notion of ubuntu*,* will be accepted and applied directly as a law-of-contract principle and constitutional

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[261] *Barkhuizen v Napier* 2007 5 SA 323 (CC) [51].
[262] See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).
[263] Mokgoro 1998 (1) 1 *PER/PELJ* 2. Ubuntu can be defined as follows:
"Ubuntu is a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that motho ke motho ba batho babangwe/umuntu ngumuntu ngabantu which, literally translated, means a person can only be a person through others. In other words, the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is a basically humanistic orientation towards fellow beings".
[264] *S v Makwanyane* 1995 (3) SA 391 (CC).
[265] In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) [37], Sachs J (as he then was) held that the spirit of ubuntu "suffuses the whole of our constitutional order"; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) [38] where Van der Westhuizen J held that "[t]his court has also recognised the concept of *ubuntu* as underlying the Constitution"; *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) [46], where Skweyiya J held that "[i]t seems to me that Batho Pele gives practical expression to the constitutional value of *ubuntu*, which embraces the relational nature of rights".
[266] *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO* 2005 (6) BCLR 576 (SCA)*; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) [39]; See also *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA), where Harms JA held at [22] as follows: "I believe that the application of the basic principles of *ubuntu* placed an ethical duty on him to respond to her queries", and in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) the issue at the centre of the appeal concerned the question whether the common law maxim of *pacta sunt servanda* should be developed to infuse the law of contract with the Constitutional values of ubuntu, fairness and good faith.
[267] In *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C) [31] Davis J held as follows: "… a point reinforced by the value of *ubuntu* which seeks to assert that individual values are reflected from community".

value, rather than being recognised merely as an underlying value with no direct practical implications.[268]

Moseneke J, in delivering the majority judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[269] (hereinafter *Everfresh*), also elected to express himself rather strongly on the topic of the probable application of ubuntu and the role of good faith according to the common law:

> "Certainly, it is extremely anticipated and actually essential to infuse the contract law with constitutional values, together with values of *ubuntu*, which encourage much of our constitutional compact. On many occasions in the past, has this court had regard to the importance and content of the notion of *ubuntu.* It emphasises the collective nature of society and conveys in it the notions of humaneness, social justice and fairness, and covers the important values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity. Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may lean towards the argument in its favour. Contracting parties undoubtedly need to relate to one another in good faith. In instances where there is a contractual responsibility to negotiate, it would be barely imaginable that our constitutional values would not necessitate that the negotiation ought to be done reasonably, with the view of reaching an agreement, in good faith; it is nevertheless concluded that it is unnecessary to decide on the merits of any of these difficult questions." [270]

In relation to *Everfresh*, one of the most important constitutional values providing a basis for such development is the value scheme of ubuntu, and the Constitution has brought with it amplified pleas for more substantive fairness in contracts generally.

Subsequent to the judgments of the Constitutional Court in *S v Makwanyane* and *Everfresh* under the interim Constitution, as well as *Port Elizabeth Municipality v Various Occupiers*[271] under the

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[268] See *Potgieter & Another v Potgieter NO & Others* 2012 (1) SA 637 (SCA) [32–34] to the effect that good faith as such does not provide an independent basis for striking down contractual terms or interfering in the enforcement of a contract. However, some recent cases indeed raise the probability that good faith can in certain instances be directly applied and developed as a principle and constitutional imperative. See also *Combined Developers v Arun Holdings & Others* 2015 (3) SA 215 (WCC).
[269] *Everfresh Market Virginia* 2012 1 SA 256 (CC).
[270] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) [73–74].
[271] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

final Constitution, ubuntu was confidently recognised as a fundamental constitutional value that should be used in evolving the common law to uphold constitutional values as required by section 39(2) of the Constitution.[272]

In the past the courts have, in their endeavours to curtail the multifaceted effects of indemnity clauses, been using these common law devices, which sometimes proved to be ineffectual. It is high time that South Africa, driven by constitutional values which find manifestation in judicial pronouncements, emerges from consumer manipulation. Our contract law is now infused with fairness values, good faith and ubuntu to assist it in hard cases of bargain in interpretation.[273]

3.5 Conclusion

The Constitution marks a critical defining moment in our law of contract on the usage and implementation of exemption clauses. That is because exemption clauses would possibly be set aside if such clauses are contrary to public policy. Public policy, in turn, is entrenched in the Constitution and referred to, together with the concepts of good faith and ubuntu, as constitutional interest.

The effect of the Constitution on the usage of exemption clauses has been significant. It can therefore be said that the notions of freedom of contract and sacredness of contract are not the only considerations anymore. With the enactment of the Constitution the notions of fairness, reasonableness and good faith have arisen and when the courts decide on the validity of exemption clauses, these principles have to be considered.

Public policy furthermore requires some degree of fairness in contracts. The law has to grip normative and constitutional values so as to become accustomed to the altering needs of the community, specifically in instances where it is required to protect the weaker bargaining party to a contract.

The legislature has stepped in to fill the opening in circumstances where the contracting party in the weaker bargaining position has been ill-treated by their stronger counterparts through the CPA. It is nowadays evident that exemption clauses are no longer an entitlement of the parties to

[272] Du Plessis *The harmonisation* 390.
[273] Tembe *Problems regarding exemption clauses* (LLD thesis University of Pretoria, 2017) 163.

the contract. However, public policy is now rooted in legislation to circumvent punitive effects ordinarily caused by exemption clauses.

The CPA specifies important consumer rights, namely, the right to equality, the right to privacy, the right to choose, the right to fair disclosure and information, the right to fair and responsible marketing, the right to fair and honest dealing, the right to fair, just and reasonable terms and conditions and the right to fair value, good quality and safety.

Even with the commencement of the CPA there remains a need to develop the law concerning exemption clauses further than precedent. In the next chapter I will therefore discuss the impact of the CPA on exemption clauses within the ambit of consumer protection, which includes the application of the CPA by the courts.

CHAPTER 4: THE IMPACT OF THE CONSUMER PROTECTION ACT ON EXEMPTION CLAUSES WITHIN THE FRAMEWORK OF CONSUMER PROTECTION

4.1 The Consumer Protection Act (CPA)

The CPA was signed into law on 24 April 2009 by the President of South Africa. The CPA, however, came into full effect only on 31 March 2011. It is essential to note that the CPA sets out the minimum requirements to guarantee sufficient consumer protection in our country.

As evident from the discussion below, the CPA strives to protect defenceless consumers, and currently the CPA is applicable to consumers, including juristic persons, with a yearly revenue of not more than R2 000 000,00 (two million rand), subject to additional exclusions which may apply from time to time.[274] It should also be noted that the CPA does not apply to transactions concluded between two juristic persons with a yearly revenue of more than R2 000 000,00 (two million rand).

4.2 Introduction

With the commencement of the CPA, the common law, to a certain extent, as referred to in the previous chapters of this dissertation, as well as various consumer rights, was codified by the CPA, and various unfair business practices, formerly unregulated, are now regulated by the CPA.

As clearly stated in section 2 of the CPA, it is clear that the CPA ought to be construed in such a manner as to carry out its purposes as contained in section 3 of the CPA.[275] In addition, when the CPA is interpreted, applicable foreign law, international law, conventions, declarations or protocols can be taken into consideration.[276] What is of further importance is that in terms of section 2(10), it is stated that no provision contained in the CPA is to be interpreted to prevent a consumer from exercising any rights provided to the consumer in terms of the common law.

The purposes of the CPA, contained in section 3 thereof, are, among other things, to progress and uphold the economic and social well-being of consumers in our country by introducing a legal structure intended for the achievement and upkeep of a consumer market that is fair, accessible,

[274] Sections 5(2), (3) and (4), read with the threshold published in GN 294 in *Government Gazette* 34181 of 1 April 2011.
[275] Section 2(1) of the CPA.
[276] Section 2(2) of the CPA. A comparison between the CPA and foreign law or international law will be discussed in chapter 5 of this dissertation.

well-organised, maintainable and accountable to the advantage of consumers generally,[277] by promoting fair business practices, [278] protecting consumers from "unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and … deceptive, misleading, unfair or fraudulent conduct".[279]

A consumer is generally defined in the CPA.[280] The definition of a supplier is also of importance in that a supplier is defined as a person (natural or juristic) who markets any goods or services[281].

In terms of section 5(1) of the CPA, the CPA is applicable to all transactions which occur within the Republic of South Africa, unless it is excluded by sections 5(2), 5(3) or 5(4). It is also applicable to the promotion of goods or services, or of the supplier of goods or services, in the Republic, with two exceptions. The first exception is that such goods or services are not possibly reasonably the subject of a transaction to which the CPA is applicable with reference to section 5(1)(a). The second is that the promotion of such goods or services has been exempt in accordance with sections 5(3) and 5(4). The CPA, furthermore, applies to goods or services which are supplied or performed in accordance with a transaction to which the CPA is applicable, regardless of whether any of those goods or services are offered or supplied together with any other goods or services, or separate from any other goods or services. The CPA also applies to goods which are supplied in accordance with a transaction that is excluded from the application of the CPA but only to the degree provided for in section 5(5).

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[277] Section 3(1)(a) of the CPA.
[278] Section 3(1)(c) of the CPA.
[279] Section 3(1)(d)(i)–(ii) of the CPA. The subsections referred to, have been selected on the basis that they relate directly to the discussion in this chapter.
[280] Section 1(a)–(e) of the CPA. A consumer is defined as –
"*(a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;*
(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this CPA by section 5(2) or in terms of section 5(3);
(c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)".
Furthermore, with regard to the definition of "consumer", see *Eskom Holdings Limited v Halstead-Cleak* 2017 (1) SA 333 (SCA). The SCA held that Mr Halstead-Cleak, at the time of the incident, was not utilising the electricity nor was there any relationship between Eskom, as the supplier or producer, and Mr Halstead-Cleak. Therefore, Mr Halstead-Cleak was not a consumer for the purposes of the Act. Accordingly, Eskom was not liable to Mr Halstead-Cleak for the harm caused in terms of section 61(1) of the Act.
[281] Section 1 of the CPA.

In brief, it can be said that section 5 of the CPA provides that the provisions of the CPA will be applicable to every "transaction",[282] "agreement",[283] advertisement, production, distribution, "promotion" (promote)"[284], sale or "supply"[285] of "goods"[286] or "services",[287] unless exempted.

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[282] In terms section 1 of the CPA, ''transaction'' means—
"*(a) in respect of a person acting in the ordinary course of business—*
(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
(ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
(iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or
(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a)".

[283] In terms of section 1 of the CPA, "agreement" means –
"*an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them*".

[284] In terms of section 1 of the CPA, ''promote'' means to—
"*(a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration;*
(b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or
(c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction".

[285] In terms of section 1 of the CPA, ''supply'', when used as a verb, means—
"*(a) in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or*
(b) in relation to services, means to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration".

[286] In terms section 1 of the CPA, ''goods'' includes—
"*(a) anything marketed for human consumption;*
(b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
(c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
(d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section; and
(e) gas, water and electricity".

[287] In terms of section 1 of the CPA, ''service'' includes, but is not limited to—
"*(a) any work or undertaking performed by one person for the direct or indirect benefit of another;*
(b) the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);
(c) any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service—
(i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or
(ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998);
(d) the transportation of an individual or any goods;
(e) the provision of—

With regard to consumer agreements, Chapter 2, part G, under the right to fair, just and reasonable terms and conditions (sections 48 to 52 of the CPA) deals with unfair, unreasonable and unjust contract terms. Furthermore, the CPA prescribes that notice to a consumer is a necessity, pertaining to certain contractual, with specific reference to terms where the supplier anticipates to limit its liability (i.e. exemption clauses).[288]

The CPA, by the provisions of section 48, outlines when terms and conditions as set out in a contract are deemed to be unfair. It can therefore be said that the broad fairness benchmark for consumer contracts is set out in this section. Further to the aforesaid, the factors rendering a contract, in its totality or merely a specific contract term, unfair, unreasonable or unjust are set out in section 48(2). This section must be read with regulation 44(3), which regulation contains the so-called grey list. Section 48 of the CPA and the application thereof on exemption clauses will be fully discussed below.[289]

All terms contained in a contract or a notice which attempts to limit the supplier's accountability must be unambiguously brought to the consumer's attention and needs to be in "plain (simple) language".[290] Section 49 of the CPA and the application thereof on exemption clauses will be fully discussed below.[291]

Section 51 contains a list of prohibited transactions, agreements, terms and conditions that will be discussed in more detail below.

(i) any accommodation or sustenance;
(ii) any entertainment or similar intangible product or access to any such entertainment or intangible product;
(iii) access to any electronic communication infrastructure;
(iv) access, or of a right of access, to an event or to any premises, activity or facility; or
(v) access to or use of any premises or other property in terms of a rental;
(f) a right of occupancy of, or power or privilege over or in connection with, any land or other immovable property, other than in terms of a rental; and
(g) rights of a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e), irrespective of whether the person promoting, offering or providing the services participates in, supervises or engages directly or indirectly in the service".

[288] Section 49 of the CPA.
[289] See para 4.4.2 below.
[290] Section 22 of the CPA makes provision for a right to information in plain and understandable language.
[291] See para 4.5.3 below.

The CPA further in section 52 gives certain powers to the court to ensure fair and just conduct terms and conditions. [292] In addition, section 58 obliges a supplier to draw the fact, nature and possible consequence of potentially harmful activities and facilities to the attention of the consumer.[293]

The CPA therefore sets definite consumer rights, including the right to fair, just and reasonable contract terms which is contained in sections 48 to 52 of the CPA. These sections may expressively influence the validity and enforceability of exemption clauses and it should be noted that if such an exemption clause is not in accordance with the provisions as set out in the CPA, it possibly will be asserted to be unlawful and set aside by courts.

The CPA comprehensively deals with exemption clauses. The applicable sections of the CPA will be discussed herein below as the applicable sections, and the interpretation thereof will have an influence on the manner in which our courts approach the enforceability of exemption clauses.

4.3 Preceding the commencement of the CPA

Preceding the commencement of the CPA, defences raised against the enforcement of an exemption clause derived from the common law, the Constitution and ubuntu as public policy.[294]

In addition to the aforesaid, the courts have already, in some instances, achieved rejection of the enforcement of exemption clauses. The relevant decisions were based on the fact that the suppliers failed, alternatively, neglected to bring the specific clause to the knowledge of the consumer. By this is meant that there was a failure of reasonable reliance on the side of the supplier.[295]

The *Naidoo*[296] case paved the way with reference to exemption clauses, without the application of the CPA. In *Naidoo* the court had a different interpretation pertaining to the execution of an

[292] Section 52 of the CPA.
[293] Section 58 of the CPA.
[294] The case law referred to in chapter 3. See also *Potgieter & Another v Potgieter NO & Others* 2012 (1) SA 637 (SCA) [32–34].
[295] *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA); *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 4 SA 518 (C).
[296] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ).

exemption clause compared to previous case law, and marks a noteworthy development towards fairness and justice in a contract.

Although the judgment in *Naidoo* was delivered in 2012, after the general effective date of the CPA, the CPA does not have retrospective effect and was therefore not applied in *Naidoo*, as the accident occurred in 2008. The court therefore relied on previous case law, the Constitution and public policy.

Further to the aforesaid, the court in *Naidoo* did not uphold the exemption clause. The decision was made on the basis that the enforcement of the exemption clause would have been unfair (unreasonable) and unjust to a consumer who had suffered bodily injuries in the course of his stay at the hotel.

On 15 October 2008, Naidoo (the plaintiff) desired to leave the premises of the hotel but realised that one of the entrance gates of the hotel was closed. He waited in anticipation for a security guard to come and open the gate. At that moment the plaintiff was inside his bus. After realising that the gate was still closed, the plaintiff approached the gate. It became apparent that the gate had jammed and that the wheels of the gate had come off its rails. The gate then fell on the plaintiff as he approached the entrance, which resulted in severe bodily injuries.[297]

The hotel depended on its disclaimers and the relevant exemption clauses which were printed on the rear side of its register. The court had to determine whether the disclaimer relied upon was indeed on display, and whether such disclaimer or exemption clause excused the defendant from liability for the damages suffered by the plaintiff.[298]

The plaintiff did not contest the fact that he had not read the defendant's terms and conditions, even after noticing the instruction which read "Please read terms and conditions on reverse!"[299] It

[297] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) [10–14].
[298] Clause 5 of the registration card stated as follows:
"The guest hereby agrees on behalf of himself and the members of his party that it is a condition of his/their occupation of the Hotel that the Hotel shall not be responsible for any injury to, or death of any person or the loss or destruction of or damage to any property on the premises, whether arising from fire, theft or any cause, and by whomsoever caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel".
[299] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) [36].

was, furthermore, not contested that the plaintiff was aware of the fact that such clauses were included in a standard-form contract and the fact that such terms were binding on the plaintiff.[300] The court held that, although it was confident that the exemption clause in the *Naidoo* case would fall short of the constitutional requirements, it was not obliged to pursue this subject any further. This was this was due to the fact that the court had made the inference, subsequent to the judgment of *Barkhuizen v Napier,* that in the state of affairs of the *Naidoo* case, it would be unfair and unjust to impose the exemption clause in question. Supporting its decision, the court referred to the following statement of Ngcobo J in *Barkhuizen v Napier*: "A court will take into consideration the requisite to identify 'freedom of contract', but the court will not merely rely on the principle of freedom of contract if it supersedes the necessity to warrant that the parties to a contract have access to courts." [301]

As previously stated, the court held that it would have been unfair and unjust to enforce the exemption clause. The court further held that the plaintiff had discharged the onus of proving his delictual claim and that neither the disclaimer notice nor the exemption clause relied upon by the defendant would have constituted a worthy defence.[302]

The decision in *Naidoo* is ground-breaking in the history of exemption clauses as it demonstrates a significant step in the direction of recognising fairness and reasonableness in contracts.[303]

Before discussing all the relevant clauses of the CPA relating to exemption clauses, it would be appropriate to submit that, if the CPA were to apply in the *Naidoo* case, the court would have held that the disclaimer notice on the back of the registration card did not constitute sufficient notice in line with section 49[304] of the CPA. In other words, a term, condition or notice and its nature and consequence of was not brought to the knowledge of the consumer in such a way that it achieved the relevant requirements as set out in section 49. Furthermore, section 22[305] of the CPA also would have been applied. If the court were to apply section 48[306](2)(d)(i)-(ii), it would have easily

[300] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) [38].
[301] *Barkhuizen v Napier* 2007 (5) SA 323.
[302] *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ) [54].
[303] Mupangavanhu 2014 (17) 3 *PER/PELJ* 1187–1188.
[304] Section 49 of the CPA: "Notice required for certain terms and conditions".
[305] Section 22 of the CPA: "Right to information in plain and understandable language".
[306] Section 48 of the CPA: "Unfair, unreasonable, unjust or unconscionable contract terms".

reached the same conclusion in that the disclaimer notice was unfair, unreasonable, unjust or unconscionable. Last but not least, section 51[307] of the CPA would have also been applied.

As previously stated, the *Naidoo* decision is a ground-breaking decision in our law on the topic of exemption clauses, and the *Naidoo* decision has been referred to as authority in matters relating to such clauses and the fact that it will be unfair and unjust to enforce them.[308]

In light of the aforesaid, the relevant sections of the CPA will be discussed in depth below.

4.4 Analyses of the relevant sections of the CPA

It can be said that the position under the common law of contract regarding the enforcement of exemption clauses has been amended by the CPA. The CPA provides for rules restricting the freedom of contract of a consumer and supplier: both the formation and contents of contracts are regulated under the CPA. Part G of Chapter 2 of the CPA regulates consumer agreements entered into between a consumer and a supplier under the heading *Right to fair, just and reasonable terms and conditions*. The application of Part G should be read with section 22, contained in Part D of Chapter 2 of the CPA (Right to information in plain and understandable language).

A discussion of each relevant section of the CPA, specifically pertaining to exemption clauses, will follow below. For the sake of completeness, the relevant sections will be quoted in the footnotes.

4.4.1 Section 22 of the CPA

Section 22[309] of the CPA introduces and regulates the right of a consumer to receive information in plain (simple) and understandable language. Prior to discussing section 22, it should be noted

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[307] Section 51 of the CPA: "Prohibited transactions, agreements, terms or conditions".
[308] *Koen v Pretoria Central Investments (Pty) Ltd t/a Pretoria Parkade* (33737/13) [2018] ZAGPPHC 113 (2 March 2018) and *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO* [2018] ZASCA 124 (26 September 2018). These cases will be discussed throughout this chapter.
[309] Section 22 of the CPA provides as follows:
"(1) The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation—
(a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or
(b) in plain language, if no form has been prescribed for that notice, document or visual representation.

that it is a requirement, in terms of section 2(1) of the CPA, that every provision of the CPA must be construed to give effect to the purposes of the CPA as set out in section 3 thereof. Therefore, the consumer's right to plain language should also be executed in view of section 3.

Preceding the enactment of the CPA, the courts applied the notion of plain language in accordance with the common law. This meant that in instances where there was ambiguity in the language, it ought to be interpreted against the party who put forward a contract or term in a contract containing such ambiguity.[310] The National Credit Act[311] was the first piece of legislation enacted in South Africa that required agreements to be drafted in plain language.[312]

The term "plain language" can be elusive because it is often misunderstood to mean that the contents of an agreement, specially, exemption clauses, must be dumbed down or simplified,[313] which is not the case.

Section 22 stipulates that the relevant documentation referred to in this section should be in the form set by the CPA. Should there be no such form, the relevant documentation ought to be in

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(2) For the purposes of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to—
(a) the context, comprehensiveness and consistency of the notice, document or visual representation;
(b) the organisation, form and style of the notice, document or visual representation;
(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
(d) the use of any illustrations, examples, headings or other aids to reading and understanding.
(3) The Commission may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of subsection (1)(b).
(4) Guidelines published in terms of subsection (3) may be published for public comment".

[310] See in this regard *Durban's Water Wonderland (Pty) Ltd v Botha & Another* 1999 (1) SA 982 (SCA); *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA); and *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A).

[311] The National Credit Act 34 of 2005.

[312] The CPA, section 64. *(1) The producer of a document that is required to be delivered to a consumer in 30 terms of this Act must provide that document- (a) in the prescribed form, if any, for that document; or (b) in plain language, if no form has been prescribed for that document. (2) For the purposes of this Act, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is 35 intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort, having regard to- (a) the context, comprehensiveness and consistency of the document; (b) the organisation, form and style of the document; 40 (c) the vocabulary, usage and sentence structure of the text; and (d) the use of any illustrations, examples, headings, or other aids to reading and understanding.* See Stoop "Section 22" in Naudé and Eiselen *Commentary* (2019) 22-16.

[313] De Stadler and Van Zyl 2017 (29) 1 *SA Merc LJ* 98.

plain (simple) language.[314] Section 22 is consequently only applicable to notices (required by legislation), visual representations (disclaimer boards at shopping centres, venues, etc) and written agreements (exemption clauses written on the back of access cards, etc). Section 22 does not apply to oral agreements.[315]

Even though no clear description of plain language is given in the CPA, section 22(2) contains the right of a consumer to receive information in plain and clear language. This section, from time to time referred to as the right to plain language is possibly the most significant pro-active measure for procedural fairness enclosed in the CPA.[316]

In section 22(2) of the CPA, plain language is referred to as language which allows an everyday consumer with average literacy skills and a nominal understanding as a consumer of the relevant goods or services, to comprehend the content, importance and consequence of a document, notice or visual representation, without excessive effort.

In terms of section 22(2)[317] of the CPA, the following should be considered when determining whether a notice, term, documentation or representation is indeed in plain language: the context, completeness and uniformity, as well as the organisation, form and style thereof. Furthermore, the vocabulary, sentence structure and usage must be considered. Last but not least, what must also be borne in mind is the usage of any illustrations, examples, headings or other utilities to reading and understanding such notice, term, documentation or representation.

Gouws[318] states that certain conspicuous parts recorded in section 22(2)(a)-(d) are purely guiding principles and the failure to comply therewith will not *per se* render the contract not simple (i.e. basic).[319]

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[314] The CPA, section 22(1)(b).
[315] Du Preez 2009 (1) *TSAR* 75 - 76.
[316] Stoop http://uir.unisa.ac.za/bitstream/handle/10500/23191/Stoop-Inaugural%20lecture-31%20Aug%202017.pdf? sequence=1&isAllowed=y (accessed on 7 October 2018).
[317] having regard to—
(a) the context, comprehensiveness and consistency of the notice, document or visual representation;
(b) the organisation, form and style of the notice, document or visual representation;
(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
(d) the use of any illustrations, examples, headings or other aids to reading and understanding.
[318] Gouws 2010 (22) 1 *SA Merc LJ* 89.
[319] For further discussion, see Newman 2010 (31) 3 *Obiter* 735.

In one of the most recent cases in which the CPA was applied, namely, *Four Wheel Drive CC v Leshni Rattan NO* (hereinafter the *Four Wheel Drive* case),[320] Pillay J held that –

> "in accordance with section 22(1)(b) of the CPA the "producer" of B2 was obligated to abide by the requirement that it be "in plain language, if no form has been prescribed by the CPA." B2 fails to comply with the definition of "clearly" since the quality of its writing does not satisfy the requirements of section 22. Subsequently B2 itself denies a consumer of his legal rights in terms of section 22. It follows that when the plaintiff failed to "satisfy the requirements of section 22" it also failed to provide the deceased with an agreement in terms of section 50(2)(b)(i)."[321]

The concept "clearly" is not specifically referred to in section 22. However, such concept is defined in section 1 of the CPA.[322] The court therefore, according to Stoop,[323] referred to the requirements of section 22 with its reference to the concept clearly.

It can therefore be said that the aforementioned has the effect that a contracting party will not be allowed to word terms so broadly that they can be interpreted in various manners. The CPA states that if there is any uncertainty regarding the meaning of certain words or terms and conditions, the benefit will go to the consumer.[324]

In terms of the CPA, the usage of plain and understandable language is an unavoidable requirement relating to consumer contracts and documents anticipated for consumers.[325]

The use of a specific language undoubtedly has an influence on whether a document is comprehensible. Consequently, this is a persuasive reason to ensure that the relevant document

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[320] *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO* 2018 JDR 2203 (SCA).
[321] *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO* 2018 JDR 2203 (SCA) 62–63.
[322] The word "clearly", in relation to the quality of any text, notice or visual representation to be produced, published or displayed to a consumer, means in a form that satisfies the requirements of section 22.
[323] Stoop "Section 22" in Naudé and Eiselen *Commentary* (2019) para 22–16.
[324] Section 4(4) of the CPA.
[325] Stoop and Chürr 2013 (16) 3 *PER/PELJ* (also available at http://www.saflii.org/za/journals/PER/2013/73.html#_ftnref24) (accessed on 6 October 2018). See also *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD). This case has to do with the National Credit Act, 2008 (NCA). However, the NCA and the CPA have identical plain language provisions and many of their principles can therefore be applied to other consumer agreements. Therefore, this judgment is also of importance when applying the sections of the CPA.

is accessible and, more specifically, that the relevant terms are accessible in more than one official language.[326] For example, when a consumer understands only Afrikaans, and the exemption clause in drafted in English, this will undoubtedly have an influence on whether the document is understandable.

It is submitted that where there is no standard form to which an agreement must conform, and the concept of plain language must be adhered to, this will have a considerable, and not always positive, effect. The reason for this is that the understanding of plain language differs from consumer to consumer. Therefore, a definition of plain language should be introduced in the CPA in order to exclude any misconception regarding the exact meaning of the term. The alternative would be extensive and expensive litigation in order to decide whether an exemption clause is indeed written in plain language.

One of the factors to be considered when determining whether a specific term, or the contract in its totality, is unfair under section 48 is the degree to which such term or contract in its totality fulfils the requirement of plain language.[327] Non-fulfilment of this requirement may add to a conclusion of unfairness in accordance with section 52 of the CPA.[328]

4.4.2 Section 48 of the CPA, read with regulation 44(3)

Section 48[329] encloses a list of factors to be considered when deciding whether a specific term or the agreement in totality is unfair.

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[326] De Stadler and Van Zyl 2017 (29) 1 *SA Merc LJ* 108.
[327] Section 52(2)(g) of the CPA.
[328]Stoop and Chürr 2013 (16) 5 *PER/PELJ* 546.
(also available at http://www.saflii.org/za/journals/PER/2013/73.html# ftnref24) (accessed on 6 October 2018).
[329] Section 48 of the CPA provides as follows:
"(1) A supplier must not—
(a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
(i) …. or
(ii) on terms that are unfair, unreasonable or unjust;
(b) …
(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
(i) to waive any rights;
(ii) assume any obligation; or
(iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

As identified in chapter 2 of this dissertation, exemption clauses are in general considered to be unreasonable contract terms as they eliminate or limit liability of a consumer. This is typically brought about by the *naturalia* of a contract.

Section 48(1) makes provision not only for the control of the contents of agreements but also for the control of offers, supply, negotiation, administration and associated matters. Section 48(1)(a) controls the contents of agreements and notices and therefore prohibits the insertion of unfair terms or an unfair price or offers to supply. It can consequently be said that the prohibition contained in section 48(1) is embedded in wide terms and endeavours to cover all circumstances.

Notwithstanding the aforesaid, section 48(1)(c) is more particular than section 48(1)(a) and is, amongst other things, directly targeted at barring the waiving of rights or assumption of risks or liability on terms that are unfair.[330] The prohibition contained in this section consequently, amongst other things, prohibits unfair exemption clauses. Section 48(1)(c) specifically emphasises the fact that any contract or term is prohibited in instances where such a contract or term necessitates a consumer to give up any right, to undertake any obligations or relinquish any liability of the supplier on terms that are unfair, unreasonable or unjust. Exemption clauses, by definition, represent a waiver of rights of the consumer. The elimination of liability by the supplier tend to be unfair or unreasonable towards the consumer.

Section 48(2) sets out guiding principles to determine which term or condition is ostensibly unfair. Section 48(2)(d) is of specific importance when one has to consider an exemption clause. This section provides that a contract or term of such a contract is unfair if the contract or term was subject to a term contained in section 49(1) and the fact, nature and consequence of that contract

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(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—
(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
(c) …
(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
(ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49".

[330] See Naudé "Section 48" in Naudé and Eiselen *Commentary* (2019) para 48-18 where she argues that section 48(1)(c) could have been omitted in light of the wide probation against unfairness in section 48(1)(a).

or term was not brought to the knowledge of the consumer in a way that fulfils the requirements set out in section 49(1). Section 49(1) provides that contractual clauses which limit the risk or indemnify a supplier must be drawn to the attention of the consumer.[331]

Therefore, in summary, the general standard in terms of section 48 to determine ostensible unfairness is that an offer to supply, the supply, marketing, entering into a contract, negotiation, administration, the waiver of rights, the assumption of the supplier's risk, the waiver of the supplier's liability, a term or a price that is unfair is prohibited.

There is, however, no closed list of factors, or requirements, regarding unfair contract (agreement) terms in the CPA. Consequently, what is indeed considered to be unfair is open to subjective interpretation by the courts.

Certain terms are assumed to be unfair if they comprise one or more of the purposes or consequences set out in regulation 44(3) of the CPA Regulations.[332] For that reason regulation 44(3) is branded the so-called grey list.[333] It is said that the grey list holds a list of terms which possibly will be unfair.[334] The ultimate judgment of a court on whether a term is unfair depends on the state of affairs of each specific situation.[335] A grey list is therefore not exhaustive but it gives

[331] See the discussion in this regard in Naudé 2009 (126) 3 *SALJ* 505 518–519. See also a discussion of section 49 of the CPA in para 4.5.3 below.
[332] These regulations were published in GN R293 in GG 34180 of 1 April 2011. See also Stoop *The concept "fairness"* 102.
[333] Ideally, the grey list should have been included in the text of the Act, in the same part as the black list. It would then have had greater legitimacy and would have been more prominent and accessible to consumers. See Naudé 2009 (126) 3 *SALJ* 521.
[334] Stoop *The concept "fairness"* 102. The terms listed in regulation 44(3) may still be fair in the particular circumstances of the case.
[335] Naudé 2007 (124) 1 *SALJ* 130.

a good indication of what constitutes fairness.[336] A grey list restricts the free interpretation of fairness in legislation and assist courts in making fair decisions.[337]

What is of importance is that the grey list contained in regulation 44(3) provides a number of terms that are ordinarily unfair for the reason that they are mostly excessively one-sided.[338] It is evident from the terms listed in regulation 44(3) that a term in an agreement that necessitates a consumer to waive their rights may perhaps be regarded as a presumed unfair term.

In the *Four Wheel Drive* case,[339] it was recommended that the alleged obligations of the consumer to insure a courtesy vehicle after 72 hours or return it before then, where these obligations were not included in the written agreement, ultimately concluded with the consumer:

> [Such obligations] are inconsistent with the prohibitions in section 48(1) against entering into or administering a transaction for the supply of the Discovery in a way which was unfair, unreasonable or unjust, by calling for the deceased to undertake responsibilities on such terms, and by imposing them as a condition of entering into the transaction.[340]

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[336] Listed below are some exclusion clauses paraphrased from Regulation 44(3) that are presumed to be unfair, namely, terms that have the effect or purpose of –

(i) excluding or limiting the liability of a supplier for death or personal injury caused to the consumer through an act or omission of a supplier for damage caused by goods in terms of section 61(1);
(ii) excluding or limiting the legal rights or remedies of the consumer in the event of partial or total breach of contract;
(iii) limiting the supplier's obligation to respect commitments undertaking by the supplier's agents making the commitments subject to compliance;
(iv) limiting or having the effect of limiting the supplier's vicarious liability for its agents;
(v) forcing the consumer to indemnify the supplier against liability incurred by it to third parties;
(vi) excluding or limiting the consumer's right to rely on statutory defence of prescription;
(vii) modifying the normal rules regarding the distribution of risk to the detriment of the consumer;
(viii) to exclude or deterring the consumer's right to take legal action or exercise any other legal remedy not covered by the CPA or any other legislation;
(ix) restricting the evidence available to the consumer or imposing on the consumer the burden of proof which should lie with the supplier in accordance with the applicable law;
(x) imposing a limitation period that is shorter than the applicable common law or legislation for legal steps to be taken by the consumer;
(xi) entitling the supplier to calm legal costs on a higher scale than usual where there is not a term entitling the consumer to claim such costs on the same scale as the supplier;
(xii) providing that the law other than that of the Republic applies to a consumer agreement concluded and implemented in the Republic at the place where the consumer was residing in the Republic at the time when the agreement was concluded.

[337] Stoop The concept "fairness" 102–103.
[338] Naudé "Section 48" in Naudé and Eiselen *Commentary* (2019) para 48-19.
[339] *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO* 2018 JDR 2203 (SCA).
[340] *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO* 2018 JDR 2203 (SCA) 67.

The court also held that –

> … claiming that such obligations existed when they were not included into the transaction and that the deceased is not capable of accepting or refuting such a claim is unfair, unreasonable and unjust as expatiated … in section 48(2).[341]

After reading the provisions of section 48 of the CPA, it can be said that the overall fairness benchmark for consumer contracts is contained in this section. In order to decide whether the term is actually unfair, a number of substantive and procedural factors play a part and need to be considered.

In section 48(2)(a) and (b) of the CPA, two basic criteria of unfairness are expressed concerning extreme partiality. The one is described as one-sidedness, and the other as adverseness to the consumer. *Van Eeden*[342] makes the assumption that if a contract contains a term that fulfils the aforesaid basic criteria, such a term will be deemed to be "unfair, unreasonable or unjust", regardless of its meaning as set out in section 48(1) of the CPA. In terms of the first part of section 48(2)(c), if a consumer, when entering into a contract, relied upon false, misleading or deceptive representation as to a material fact, such reliance renders the contract or contractual term unfair. The second part of section 48(2)(c) deals with a statement of opinion by a supplier to the impairment of a consumer. In terms of this part, if a consumer, to their detriment, relied on a statement of opinion by a supplier, the contract or contractual term would be unfair.

In light of the above, I state that the CPA accounts for value judgment because the criteria of basic unfairness given in section 48(2)(a) and (b) are exposed to subjective interpretation. What is important is that, in accordance with section 48, a particular term or the contract in its totality would possibly be affirmed to be unfair.

Notwithstanding the aforesaid, the CPA provides, in accordance with section 48(2)(d)(ii), that a term of a consumer contract or the consumer contract in its totality is unfair, unreasonable or unjust in instances where the fact, nature and consequence of that term or contract, or of a condition or notice, was not brought to the knowledge of the consumer in such a way that it fulfils the relevant requirements of section 49.[343]

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[341] *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO* 2018 JDR 2203 (SCA) [66].
[342] Van Eeden *A guide to the Consumer Protection Act* 169–182.
[343] See a discussion of section 49 in para 4.4.3 below.

It is therefore my view that section 49 of the CPA strikes unswervingly at exemption clauses and that this section is intended to ensure that the consumer is given adequate opportunity to interpret the meaning of exemption clauses contained in consumer contracts. This would give the consumer the chance to understand such provisions and give the required prominence to exemption clauses.[344]

There is no separate definition in the CPA for the words "unfair", "unreasonable" and "unjust", as all three words are mere alternative expressions of one another. Selection of a single term with an accompanying definition would have made the application of these provisions easier. The bar contained in section 48(1) refers to the unfairness of terms in general and not terms in standard-form contracts or any non-negotiated terms. As a result, even terms explicitly decided upon after hard bargaining are, theoretically, subject to the unfairness standard.[345]

As stated above, regulation 44(3) contains the so-called grey list of terms that would possibly be unfair, and determination of such unfairness depends on the state of affairs of each situation. The burden of proof is on the supplier, and the supplier must prove that the relevant term contained in regulation 44(3) is without a doubt fair. However, this would have been more obvious if such grey list had been integrated into the text of the CPA, as it would be easier to access the Act itself than to try to find and interpret the relevant regulations. Furthermore, no reference is made in section 48 that it must be read with regulation 44(3), and therefore the so-called grey list of terms is not ordinarily known to a supplier to support in the drafting of its terms in accordance with the CPA.

4.4.3 Section 49 of the CPA

Section 49[346] provides that certain types of terms (notably exemption clauses) need to be brought to the knowledge of the consumer in a conspicuous manner and form which will, in all probability,

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[344] See a discussion of section 49 in para 4.4.3 below.
[345] Sharrock 2010 (22) 3 *SA Merc LJ* 307.
[346] Section 49 of the CPA provides as follows:
"(1) Any notice to consumers or provision of a consumer agreement that purports to—
(a) limit in any way the risk or liability of the supplier or any other person;
(b) constitute an assumption of risk or liability by the consumer;
(c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
(d) be an acknowledgement of any fact by the consumer,
must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).
(2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk—

draw the attention of the ordinarily alert consumer. Furthermore, the section provides that certain terms regarding certain types of risks should be signed, or signed and initialled, by the consumer entering into the relevant consumer agreement.[347]

As stated elsewhere in this dissertation, exemption clauses are contractual terms that, in theory, eliminate, vary or limit the accountability of a contracting party or contracting parties.[348]

It appears from section 49 that adequate notice to the consumer prior to concluding the contract is a criterion, and inadequate after performance. To get proper clarity, this section should be read simultaneously with section 48(2)(d).

Section 49 states that certain categories of terms or notices contained in a consumer contract must meet certain requirements.[349] This is directed at making it more probable that the consumer would, in fact, be aware of such terms or notices when concluding a contract. Examples are the commencement of participation in an activity (i.e. riding on a roller coaster at an amusement park, using gymnasium equipment, etc) or gaining access to a facility (i.e. entering a shopping centre, parking area, etc) to which such terms and notices relate.[350]

(a) of an unusual character or nature;
(b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
(c) that could result in serious injury or death,
the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision".
(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.
(4) The fact, nature and effect of the provision or notice contemplated in subsection
(1) must be drawn to the attention of the consumer—
(a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
(b) before the earlier of the time at which the consumer—
(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
(ii) is required or expected to offer consideration for the transaction or agreement.
(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1)."
[347] Naudé 2009 (126) 3 *SALJ* 516.
[348] See para 2.2 above.
[349] The formal requirements are set out in section 49(3)–(5) of the CPA.
[350] "Section 42" in Naudé and Eiselen *Commentary* (2014) para 42-2.

Section 49(1) specifically lists four types of terms which must be brought to the knowledge of the consumer. Specific to the topic of this dissertation is section 49(1)(a), which deals with exemption clauses which limit the risk or liability of the supplier or a third party.

Further to the aforesaid, section 49 sets out three requirements in relation to the four types of terms listed in subsection 1 thereof. The requirements are, firstly, that these types of terms should be in plain, simple language[351], secondly, that their presence, nature and consequence must be brought to the consideration of the consumer in a way and form that is noticeable and is expected to attract the attention of a consumer[352] and, thirdly, that the consumer must be provided with reasonable opportunity to accept and understand such terms.[353] Each of the aforesaid requirements will be discussed below.

4.4.3.1 Discussion of the first requirement under section 49(3)

Section 22 has already been discussed.[354] However, I would like to reiterate that this section provides for the right to be given information in plain and understandable language. It is evident from section 49(3) that plain language is one of the influential factors when deciding on the fairness of a term of a consumer contract or a notice.

The use of plain language promotes transparency, honesty and the degree of disclosure, and enhances procedural fairness.[355] The objective of measures aimed at procedural fairness is to allow consumers to take care of their own interests when trading with suppliers.[356]

4.4.3.2 Discussion of the second requirement under section 49(4)

[351] Section 49(3) of the CPA.
[352] Section 49(4)(a) of the CPA. See also Section 49(4)(b)(i)–(ii) of the CPA. This must be done "*before the earlier of the time at which the consumer … enters into the transaction or agreement, begins to engage in the activities, or enters or gains access to the facility* … [or] *is required or expected to offer consideration for the transaction or agreement.*".
[353] Section 49(5) of the CPA.
[354] See paragraph 4.4.1 above.
[355] Stoop and Chürr 2013 (16) 5 *PER/PELJ*.
(also available at http://www.saflii.org/za/journals/PER/2013/73.html#_ftnref24) (accessed on 6 October 2018).
[356] Stoop *The concept "fairness"* 131.

It is clear from this requirement that the existence, nature and consequence of the term must be brought to the knowledge of a consumer in an eye-catching (i.e. conspicuous or obvious) fashion and form that would to ensure the attention of the ordinarily alert consumer.

Naudé[357] is of the opinion that it is inexact as to what format would be deemed adequately eye-catching. The term "conspicuous" is not defined in the CPA and its interpretation is therefore open for discussion.

According to Naudé, it ought to not be adequate for an exemption clause to appear in print on the back of the relevant document. She goes on to state that not even distinct colour fonts justify such printing on the reverse side of a document.[358]

After scrutinising various meanings of "conspicuous", it is my view that the term can be defined as clearly visible. One can therefore say that the fact, nature and effect of the content of an exemption clause must be brought to the knowledge of the consumer in such a way that its meaning or extent is clearly visible as the consumer reads the document containing the clause. This implies that it may be sufficient when an exemption clause is printed in a different font near the key terms of the document. This should enable any consumer who reads the key terms of such document to observe the exemption clause.[359]

In *Mercurius Motors v Lopez*[360] it was held that an exemption clause which compromises an actual feature of the contract should evidently and significantly be brought to the knowledge of the consumer whose signature is appended to such a standard-form contract. It should not be merely an inconspicuous and hardly readable clause which makes reference to the conditions on the back of the contract.

It has been discussed that *Afrox* possibly would have had a different outcome, had the CPA been enacted at the time, because the CPA would have placed a legal responsibility on the hospital to draw the fact, nature and consequence of the exemption clause to Mr Strydom's attention, prior to entering into the contract.[361]

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[357] Naudé 2009 (126) 3 *SALJ* 508.
[358] Naudé 2009 (126) 3 *SALJ* 508. See also *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).
[359] Naudé 2009 (126) 3 *SALJ* 508–509.
[360] *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).
[361] Naudé 2006 (3) *Stell LR* 378 and Naudé 2009 (126) 3 *SALJ* 510.

Section 49(4)(b) states that, when the fact, nature and effect of notice contemplated in section 49(1) (which includes exemption clauses) should be drawn to the attention of the consumer. What is clear from this provision is that it is not adequate to draw the relevant terms to the consumer's attention subsequent to entering into the contract, or subsequent to the commencement of the consumer's participation in the activity, or subsequent to entry or gaining of access to the facility. This provision requires that the existence, effect and nature of the provision or notice be drawn to the attention of the consumer, firstly, when the consumer enters into the transaction or agreement, begins to engage in the activity or enters or gains access to the facility or, secondly, when the consumer is required to offer consideration, whichever is the earlier. Therefore, when the transaction is entered into over the telephone (e.g. when accommodation or a holiday is booked), the supplier would have brought any exemption clauses to the consumer's attention before finalising the booking.[362]

4.4.3.3 Discussion of the third requirement under section 49(5)

Section 49(5) provides that the consumer has to be given an adequate opportunity (in the circumstances) to receive and comprehend the notice or provision contemplated in section 49(1) (which includes exemption clauses). The purpose of this subsection is to support consumers by compelling suppliers to provide consumers with adequate information to allow the consumer to make an educated (i.e. informed) decision. An informed decision can be described as a decision that is based on knowledge of a subject or situation; in other words, making a decision based on knowing (all) the facts.[363]

One of the fundamental characteristics of the CPA is that it obliges suppliers to make information available, which information must be complete, given in good conscience and presented in an understandable layout in order to assist consumers to make informed decisions. As long as the suppliers have done what they are supposed to do, consumers will usually be bound by the agreement entered into with the suppliers.[364]

It can therefore be said that a consumer challenged with an exemption provision needs to be offered adequate opportunity to read, reflect on and query any features of the terms prior to

[362] Tait and Newman 2014 (35) 3 *Obiter* 635.
[363] Based on a combination of the definitions of "decision" and informed as defined in the South African Pocket Oxford Dictionary.
[364] "Advisory Note 9" http://www.cgso.org.za/your-obligations/ (accessed on 19 October 2018).

determining whether or not to agree to it. What this subsection attempts to avoid is a consumer being pressured into agreeing to the exemption clause.[365]

This evidently places some responsibility on any party concluding an agreement with a consumer to draw to the consumer's attention to any provision that seeks to limit the liability of the supplier or to enforce any legal responsibility on the consumer.

4.4.4 Section 49(2) of the CPA

Over and above the three requirements contained in section 49(3)–(5), section 49(2) provides that the consumer should also append his signature or initials to all the provisions relating to the risks as listed in this section.

Naudé[366] is of the opinion that the requirement of section 49 that a consumer sign the agreement after it has been signed by the other party is predominantly challenging if courts do not adequately comprehend that substantive unfairness alone ought to be enough to set aside a term. This should be the case irrespective of the procedural aspects of the relevant term, for instance, the specific consumer's awareness and understanding of the term as demonstrated by his signature.

Sections 48 and 51 of the CPA should be read together, as both sections deal with a list of terms which may be prohibited and which are prohibited when it comes to the drafting of an exemption clause and subsequently enforcement thereof. Section 51 provides a list of the varieties of terms which are deemed to be unfair, unreasonable or unjust and therefore prohibited (i.e. banned).

4.4.5 Section 51 of the CPA

The CPA encourages the general prohibition of unfair terms by also reckoning certain terms to be completely banned. These include exemption clauses in respect of gross negligence, and false acknowledgments by the consumer that no representations were made by or on behalf of the supplier.[367]

[365] Tait and Newman 2014 (35) 3 *Obiter* 635.
[366] Naudé 2009 (126) 3 *SALJ* 516.
[367] Naudé (126) 3 2009 *SALJ* 515.

Section 51[368] provides a list of the varieties of terms which are deemed to be unfair, unreasonable or unjust and therefore prohibited. These terms are commonly known as the presumed black list of terms. To complement this list, section 48, as discussed above, provides a flexible mechanism for dealing with terms not listed in section 51 (the grey-list terms). Even though section 51 contains the so-called black list, it does not enclose a substantial list of terms but rather contains a list of factors or recommendations of what may not form part of a term.

Naudé[369] is of the understanding that subsections (a) and (b) of section 51 of the CPA are expansive without need. Furthermore, Stoop[370] believes that the initial part of the list is ambiguous and lengthy. The list could have been more precise, as it is related to the purpose and policy of the CPA. I am inclined to agree with Stoop that the subsections are overstated. In my view they simply should have read that a supplier may not make or enter into any transaction or agreement subject to any term, notice or condition if it directly or indirectly causes the consumer to relinquish any rights, or limits the consumer's rights in the CPA, or in any additional manner disregards the CPA.[371]

[368] Section 51 of the CPA provides as follows:
"*(1) A supplier must not make a transaction or agreement subject to any term or condition if—*
(a) its general purpose or effect is to—
(i) defeat the purposes and policy of this Act;
(ii) mislead or deceive the consumer; or
(iii) subject the consumer to fraudulent conduct;
(b) it directly or indirectly purports to—
(i) waive or deprive a consumer of a right in terms of this Act;
(ii) avoid a supplier's obligation or duty in terms of this Act;
(iii) set aside or override the effect of any provision of this Act; or
(iv) authorise the supplier to—
(aa) do anything that is unlawful in terms of this Act; or
(bb) fail to do anything that is required in terms of this Act;
(c) it purports to—
(i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier;
(ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or
(iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 18(1)".
[369] Naudé 2009 (126) 3 *SALJ* 519.
[370] Stoop *The concept "fairness"* 218.
[371] In support of such view, see Stoop *The concept "fairness"* 218.

It is furthermore essential to highlight that subsections 51(1)(c)(i)-(ii) prohibit exemption clauses with reference to gross negligence.[372]

It is clear from this provision that a supplier who wishes to limit or exempt its liability for any direct or indirect loss due to gross negligence of the supplier will not be permitted to do so. However, liability for any direct or indirect loss due to negligence leading to personal injury or death has been omitted from section 51. As correctly pointed out by Sharrock,[373] this was an unfortunate oversight.[374] In other legal systems[375] such clauses are indeed blacklisted and, in my opinion, should have been included in the CPA.[376] In *Johannesburg Country Club v Stott & Another*, the court left the question open as to whether liability for death caused by negligence could be excluded by agreement. Nonetheless, the court acknowledged that it was arguable that such an exemption was contrary to public policy, for the reason that it runs against the high value the common law and, nowadays also the Constitution, places on the sacredness of life. [377]

It is clear from the above, that sections 48, 49 and 51 of the CPA appear to contain conflicting provisions. Sections 48 and 51 prohibit a supplier from demanding from a consumer to waive any rights granted to them by the CPA, to undertake any obligation, or to waive any liability of the supplier. According to these sections, such terms must be brought to the consumer's attention. Yet section 49 states that any provisions which amount to a waiver of the consumer's rights must be drawn to consumer's attention. It can be interpreted that as long as a waiver is drawn to a consumer's attention, and as long as liability for gross negligence is not waived (in terms of section 51(c)(i)), a waiver of liability is permissible provided that it is drawn to a consumer's attention, be it through a signature point or by otherwise drawing such a provision in an agreement to a consumer's attention. Unfortunately, this is one of the examples of the conflicting provisions contained in the CPA and we will simply have to be patient and see how the courts will construe this provision.

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[372] See the case of *Government of the Republic of South Africa v Fibre Spinners and Weavers* (Pty) Ltd 1977 (2) SA 324 (D) (2) SA 794 (A), where the courts found that a carrier could not exempt itself from gross negligence. See also gross negligence as discussed by Naudé (2017) 1 *SALJ*.
[373] Sharrock 2010 (22) 3 *SA Merc LJ* 320.
[374] Section 49(2) of the CPA effectively allows a supplier to contract out of liability for serious injury or death by stipulating notice requirements which the supplier must follow to do this.
[375] See, for instance, the Unfair Contract Terms Act 1977 (UK) section 2(1); section 6(1)(a) of the Australian Consumer Protection Act. These pieces of legislation will be discussed in chapter 5.
[376] See Naudé 2009 (126) 3 *SALJ* 510. Naudé considers that section 49(2) of the CPA, by laying down specific incorporation requirements for such clauses, impliedly sanctions them.
[377] *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) [12].

Even though the black list of terms provided in section 51 of the CPA is not exclusive, the CPA should nonetheless arrange for the National Consumer Commission to review the black list on a regular basis and to make the necessary recommendations, if any, to the Department of Trade and Industry. The reason for this is that conditions and situations change and therefore provision should be made, or should be amended, to ensure that all prohibited, unfair terms are listed.

4.4.6 Section 52 of the CPA

Section 52 controls the powers of court to guarantee fair, reasonable and just terms and conditions. It consequently provides what orders a court may make in this regard and what features need to be considered when determining whether a term or a consumer agreement is unfair[378].

It should be noted from the outset that section 52 is relevant only in instances where the CPA does not otherwise make available a remedy adequate to correct the applicable prohibited, unfair and biased conduct of the supplier.[379]

Section 52(2) also contains a list of unambiguous aspects (i.e. factors) which a court is obliged to reflect on in any proceedings before it, where it is apparent that the supplier conducted business unconscionably[380] or used misleading, incorrect or ambiguous representations,[381] or that an agreement or term is unfair.[382] The word "must" show that the court has to contemplate all these aspects in each instance, at all times.[383]

The majority of the factors contained in section 52(2)[384] relate to so-called procedural unfairness, and consequently emphasise the particular situations and all relevant factors, regarding the

[378] Naudé 2009 (126) 3 *SALJ* 515.
[379] Section 52(1)(a). Also see "Section 52" in Naudé and Eiselen *Commentary* (2018) para 52-4.
[380] Section 40 of the CPA.
[381] Section 41 of the CPA.
[382] Section 48 of the CPA.
[383] Stoop *PER/PELJ* 2015 (18) 4 1099.
[384] Section 52(2) of the CPA:
"*In any matter contemplated in subsection (1), the court must consider—*
(a) the fair value of the goods or services in question;
(b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
(c) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether this Act was in force at that time;
(d) the conduct of the supplier and the consumer, respectively;

individual consumer involved in relation to the contracting process, such as their bargaining power or understanding of the relevant term. However, some of the factors are applicable to the substantive fairness of a term, most importantly the reference to the legitimate interests of the supplier contained in section 52(2)(f).[385] Prior to discussing the listed factors, I will briefly discuss the procedural and substantive fairness of a term.

As stated, most of these factors are procedural as they refer to defects in the bargaining process, such as the consumer's lack of knowledge of a term and lack of bargaining power, and therefore relate to procedural fairness. However, control on the premise of substantive unfairness alone would be justified in some circumstances, given that the mere use of standard contract terms creates procedural fairness, as a result of the lack of incentive for the consumer to read and bargain about such terms.[386]

The CPA does not adequately provide for factors that relate to substantive fairness, namely, where there is unfairness in the substance or content of the specific term itself. This makes it difficult for drafters of contracts to predict whether contract terms or, more specifically, exemption clauses will pass the fairness test set by the CPA. According to Naudé,[387] it is clear that the realities surrounding standard-form contracts sometimes justify control on the basis of substantive unfairness alone, notwithstanding a particular consumer's sophistication or bargaining power in the economic sense, or the accessibility of another possibility in the marketplace.[388]

(e) whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation;
(f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
(g) the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22;
(h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any–
(i) custom of trade; and
(ii) any previous dealings between the parties;
(i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
(j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer."

[385] Naudé and Koep 2015 *Stell LR* 86.
[386] Tembe *Problems regarding exemption clauses"* 163.
[387] See "Section 52" in Naudé and Eiselen *Commentary* (2016) para 52-7.
[388] It is also correctly recognised by Sachs J in his minority judgment in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [149].

The majority of the factors listed in section 52 that must be taken into consideration by the court are addressed by measures or factors directed to achieve procedural fairness in accordance with the CPA. This means that the factors in section 52 mostly focus on procedural unfairness, which is unfairness in the way in which the contract was concluded by the parties.[389]

Stoop further acknowledges that it can be said that substantive fairness is considerate of the consequence of the contracting process, while procedural fairness is considerate of the contracting process itself. If it is determined that a contract is substantively unfair, then there is something offensive regarding the terms, or the contract terms are unfair as between the contracting parties. Procedures directed at procedural fairness address behaviour in the course of the bargaining process and are normally aimed at guaranteeing transparency. [390]

Transparency has two elements, namely, transparency regarding the terms of a contract and transparency in the sense of not being deceived prior to entering into the contract or during the performance of a contract, as to characteristics of the price, goods, terms and service. Transparency regarding the terms of a contract relates to the question of whether the terms of the contract are readily available, in clear (plain) language, of good structure, and cross-referenced, with distinction being given to terms that are unfavourable to the consumer or because they grant significant rights to the consumer. [391]

According to the CPA, procedural fairness necessitates a supplier to make available detailed information to a consumer.[392] Procedural fairness further necessitates that a consumer must be attentive of terms which are to their disadvantage, so that they can guard themselves from terms with that effect.[393] The factors listed in section 52, relevant in this dissertation, will be discussed under either procedural or substantial unfairness.

The nature of the parties to a transaction or an agreement, their relationship to each other and their comparative capacity, education, experience, sophistication and bargaining positions[394] are associated with procedural unfairness, that is, to the surrounding circumstances of the consumer,

[389] For a full discussion see Naudé 2006 (3) *Stell LR* 361–385.
[390] Stoop 2015 (18) 4 *PER/PELJ* 1093.
[391] Stoop 2015 (18) 4 *PER/PELJ* 1093.
[392] Section 22 of the CPA.
[393] Stoop *The concept "fairness"* 214.
[394] Section 52(2)(b) of the CPA.

which will differ from consumer to consumer. Even well-educated, sophisticated and experienced consumers do not read and bargain the standard terms of an agreement because the transaction costs are simply too high and it is therefore often regarded as reasonable by consumers to sign an agreement without reading it.

The circumstances of a transaction or an agreement which existed or were reasonably predictable at the moment that it was concluded, regardless of whether the CPA was effective at that time,[395] are related to procedural unfairness. The circumstances which a court is required to deliberate on are not well-defined, but most probably only the circumstances which both of the contracting parties were aware of or should have been reasonably foreseen by the contracting parties, would be applicable.[396] This applies even to circumstances ascending after the conclusion of a contract which was concluded prior to the enforcement of the CPA.[397] The words "reasonably foreseeable" refer to circumstances ascending subsequent to the conclusion of the contract. This indicates that, when deciding on the fairness of enforcement of a contract or a contractual term, the time at which it was challenged is relevant and not the time the contract is entered into.[398] In this regard, the CPA is consequently applied retrospectively.

The conduct of the supplier and the consumer, separately,[399] is related to procedural unfairness. An illustration of conduct by the supplier which a court may perhaps consider is the use of pressure on the consumer to conclude the agreement in haste and without proper contemplation of its repercussions or significance.[400]

The extent of any negotiation between the supplier and the consumer[401] is related to procedural unfairness. Even though the extent of the negotiations must be considered, this does not imply that terms not negotiated on are unfair. However, it has to be substantively unfair to warrant interference by the courts.[402] Notwithstanding this factor, the courts ought to be cautious not to

[395] Section 52(2)(c) of the CPA.
[396] Sharrock 2010 (22) 3 *SA Merc* LJ 311.
[397] Section 52(2)(c) of the CPA. In this regard, the CPA is therefore applied retrospectively.
[398] Sharrock 2010 (22) 3 *SA Merc LJ* 311.
[399] Section 52(2)(d) of the CPA.
[400] Sharrock 2010 (22) 3 *SA Merc LJ* 311.
[401] Section 52(2)(e) of the CPA.
[402] "Section 52" in Naudé and Eiselen *Commentary* (2016) para 52-15.

interfere with bespoke terms which were openly negotiated between the supplier and the consumer, specifically business-to-business contracts, even if such terms are tedious.[403]

Whether, through the behaviour of the supplier, the consumer was obliged to do something that was not reasonably required to protect the reasonable interests of the supplier[404] relates to substantive unfairness. Not only must it be made known that a term (or conduct) safeguards the authentic interests of the supplier; it must similarly be decided whether such a term is reasonably essential to safeguard the supplier's sincere (reasonable) interests. The proportionality of a term is consequently reflected.[405]

The degree to which some documents relating to a transaction or a contract fulfil the requirements as set out in section 22[406] is a particular factor which a court must study with reference to a transaction or a contract between a consumer and supplier where unfairness is alleged.[407] As discussed elsewhere in this dissertation, section 22 requires that a contract, notice or term be drafted in the prescribed form (if any) or in plain language.

Whether a consumer is acquainted with or ought to have reasonably known of the presence and scope of a specific provision of the contract which provision is alleged unfair, relating to any custom of trade and any preceding transactions between the contracting parties,[408] is related to substantive unfairness. Implementation of a term that is not in itself unfair may well be considered unfair if a consumer did not know, and could not reasonably have known, of the presence of the term and, accordingly, failed to safeguard his interests.[409] It can consequently be said that satisfactory opportunity must be given to the consumer to familiarise themselves with the terms of the contract. Further factors to be considered are the relationship between the contracting parties and the presence of an ongoing, co-operative relationship which will possibly show that the bargaining positions of the contracting parties were one and the same or that imbalances in bargaining positions have not been ill-used. Previous dealings between the contracting parties

[403] "Section 52" in Naudé and Eiselen *Commentary* (2016) para 52-15.
[404] Section 52(2)(f) of the CPA.
[405] Stoop *The concept "fairness" in the regulation of contracts under the Consumer Protection Act 68 of 2008* 226.
[406] Section 52(2)(g) of the CPA.
[407] Stoop 2015 (18) *PER/PELJ* 4 at 1104.
[408] Section 52(2)(h) of the CPA.
[409] Sharrock 2010 (22) 3 *SA Merc LJ* 313.

possibly will also be a consideration.[410] The presence of previous dealings between contracting parties will possibly be an indication that the consumer has the necessary knowledge of a term, which, in turn, points toward fairness of such a term.[411]

Section 52(2) does not specifically indicate whether the list of specific matters is an exhaustive one. I submit that the list is not exhaustive: the court must have regard to the matters expressly mentioned (to the extent that they are applicable), but it is not precluded from considering other factors that have a bearing on substantive unfairness.[412]

Section 52(1)(a), read with section 52(3), makes provision that, if a provision or notice fails to comply with the requirements of section 48, the court would possibly declare such provision or notice to be unfair, unreasonable or unjust and may make such other order as is deemed reasonable in the circumstances.[413]

Section 52(3) sets out a list of potential orders[414] that a court may deliver if it concludes that a contract, notice or term was wholly or partly unconscionable, unfair, unjust or unreasonable.

Unlike section 52(4), which deals with prohibited terms,[415] section 52(3) does not specifically give the court power to affirm an unfair provision null and void, or separate it from the contract, or alter

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[410] Section 52(2)(h)(ii) of the CPA.
[411] In terms of section 52(2)(h) of the CPA, regard must be had to any custom of trade and any previous dealings between the parties under this factor when a consumer's knowledge of a specific term is considered.
[412] Sharrock 2010 (22) 3 *SA Merc LJ* 314.
[413] Tait & Newman 2014 (35) 3 *Obiter* 641.
[414] In terms of section 52(3) of the CPA, such orders include the following:
"*an order that any money or property be restored to the consumer;*
an order that the consumer is compensated for losses or expenses relating to the transaction or the proceedings of the court;
an order that the supplier ceases any practice, or alters any practice, form or document so as to avoid repetition of the supplier's conduct."
[415] Section 52(4) of the CPA provides as follows:
"*If, in any proceedings before a court concerning a transaction or agreement between a supplier and a consumer, a person alleges that an agreement, a term or condition of an agreement, or a notice to which a transaction or agreement is purportedly subject, is void in terms of this Act or failed to satisfy any applicable requirements set out in section 49, the court may—*
(a) make an order—
(i) in the case of a provision or notice that is void in terms of any provision of this Act—
(aa) severing any part of the relevant agreement, provision or notice, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the transaction, agreement, provision or notice as a whole; or

it so as to make it fair. Section 52(4) provides that in litigation regarding a transaction or contract between a supplier and a consumer, an aggrieved party may void a term or condition in the CPA for failure to conform to the requirements of section 49.

Section 52(4)(a)(ii) of the CPA makes provision that in court proceedings where it is specifically purported that any contract, term or condition of a contract, or notice fails to conform with the appropriate requirements of section 49 of the CPA, a court would possibly separate such contract terms or such notice from the contract, or state that such term or notice is of no force or effect.[416]

Although section 52 of the CPA fails to mention that courts have the power to deliver orders on unfair terms, the courts would possibly still make use of the lists of significant factors and possible court orders provided for in this section to provide the necessary guidance when exercising their wide-ranging powers in accordance with provincial legislation.[417]

Section 52 does not stipulate which party bears the onus of proving that a term is unfair. Courts will consequently have to construct such a test by taking into consideration the factors contained in section 52(2) of the CPA. These factors include the reasonable value of the goods or services, the behaviour of the contracting parties individually, and whether there was negotiation of some sort between the contracting parties. If there was indeed negotiation, the courts must consider the degree of such negotiation, along with the degree to which a document regarding the transaction fulfils the plain language requirement.[418]

Naudé[419] states that section 52 is written based only on the example of court action relating to a single contract, with a single consumer in mind, which is challenging. Subsections (1) and (3) confer power on the courts regarding only transactions or contracts between a supplier and a consumer. Subsection (2) provides a list of factors applicable in instances where the fairness of a

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(bb) declaring the entire agreement, provision or notice void as from the date that it purportedly took effect; or

(ii) in the case of a provision or notice that fails to satisfy any provision of section 49, severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction; and

(b) make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be."

[416] Tait and Newman 2014 (35) 3 *Obiter* 642.
[417] Naudé 2010 (127) *SALJ* 526.
[418] Mupangavanhu 2015 (48) 1 *De Jure* 131.
[419] Naudé 2009 (126) 3 *SALJ* 526–527.

transaction or contract is assessed. This example of judicial control over a single consumer contract is extremely challenging in the consumer context, given the intrinsic restrictions of court action.[420]

4.4.7 Section 58 of the CPA

Section 58[421] places a legal responsibility on a supplier to explicitly warn the consumer of the fact, nature and likely consequence of a risk. Such responsibility pertains to any action or facility that could involve either an unusual risk or a risk that the consumer cannot realistically be expected to anticipate, or a risk that may result in severe bodily injury or death.

Section 58 ought to be read alongside section 49 as it necessitates a supplier of certain inherently risky facilities or activities to draw the fact, nature and likely consequence of the risk to the consumer's attention in such a way that it conforms to the criteria contained in section 49.[422] As evident from section 58, the fashion and form of the notice should also conform to the criteria contained in section 49.[423]

Van Eeden[424] argues that the phrase *fact, nature and potential effect*, in its totality, visibly shows that the supplier is obliged to guarantee that a consumer sufficiently consider and understand such risk and has the necessary appreciation of the risk instead of a superficial alertness to the risk.

From the aforesaid, it is obvious that a supplier of dangerous and risky facilities and activities must exclusively notify a consumer of the risk of any probable injury or death and must do so in a visible and noticeable way that is expected to attract the attention of a typical consumer. If a clause in a

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[420] Naudé 2009 (126) 3 *SALJ* 526–527.
[421] Section 58 of the CPA provides as follows:
"*(1) The supplier of any activity or facility that is subject to any—*
(a) risk of an unusual character or nature;
(b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
(c) risk that could result in serious injury or death, must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.
(2) …"
[422] Mupangavanhu 2014 (17) *PER/PELJ* 3 at 1179.
[423] Jacobs, Stoop and Van Niekerk 2010 (13) *PER/PELJ* 378. For a full discussion of section 49, see para 4.4.3 above.
[424] Van Eeden *A guide to the Consumer Protection Act* 178–179.

contract or a notice is connected to an activity or facility which constitutes a risk of an uncommon character or nature, or a risk with which a consumer is not familiar, or a risk that may result in severe bodily injury or death, the supplier must unambiguously bring the fact, nature and possible consequence of that risk to the consumer's attention.

In addition, any notice or clause contained in a consumer contract which restricts the risk or legal responsibility of a supplier or any third party ought to be drawn to the attention of a consumer for their consideration.

4.4.8 Section 61 of the CPA

Section 61(1)[425] pertains to absolute[426] legal responsibility ascending from hazardous and unsafe goods, product failure, hazard or defect,[427] and inadequate warnings or instructions.

In *Koen v Pretoria Central Investments*[428] it was found that section 61(1) of the CPA makes provision for strict liability for harm caused as a result of insufficient information or forewarning provided to a consumer. This applies to harm in relation to danger ascending from or associated with the use of goods, regardless of whether the harm was brought about by negligence on the part of the producer, importer, distributor or retailer. In this instance it is the negligence of the defendant as a service provider for parking as, according to the plaintiff, the warning instructions were inadequate.

[425] Section 61 of the CPA provides that –
"*the producer, importer, distributor or retailer of any goods is liable for any harm caused wholly or partially as a consequence of –*
(a) supplying unsafe goods;
(b) product failure or defect in any goods; and
(c) inadequate instructions or warnings provided with regard to any hazard arising from the use of any goods,
irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer."
[426] Strict liability.
[427] As defined in section 53 of the CPA.
[428] *Koen v Pretoria Central Investments (Pty) Ltd t/a Pretoria Parkade Investments* (33737/13) [2018] ZAGPPHC 113 (2 March 2018) [52].

4.5 Conclusion

From the aforesaid it is evident that the CPA has provided considerably better protection for a consumer in the framework of the use and exploitation of an exemption clause.[429] One of the objectives of the CPA is to exclude the position where a consumer is uninformed about and unfamiliar with the presence of an exemption clause in a contract entered into. However, the drafters of the CPA in some instances failed; alternatively, they neglected to put their thoughts to paper.

Section 22 of the CPA regulates a consumer's right to information in plain and understandable language. Even though it is required to make use of plain and understandable language when drafting contracts or documents which are intended for consumers,[430] simplifying the language and structure may not be a complete solution but it would certainly assist many consumers in understanding their rights and obligations in terms of a contract.[431] The term "plain language" can be deceptive as it is often misconstrued to mean that the contents of an agreement, specifically exemption clauses, have to be dumbed down or simplified,[432] which is not the case.

The CPA sets out certain essential consumer rights, including the right to fair, just and reasonable contract terms, which is regulated by sections 48 to 52. These rights could possibly have a considerable influence on the validity and implementation of exemption clauses, since terms which do not conform to the requirements as set out in the CPA could be affirmed to be improper and therefore set aside by the courts. Section 48 contains the general prohibition against unfair terms, with the effect of controlling the content of the exemption clause. Nonetheless, section 49 sets out strict requirements when incorporating certain kinds of terms. For example, terms may be required to be in plain language, and such terms must be signed or initialled by the consumer. Alternatively, the consumer must have acted in a way that is consistent with acknowledgment of such terms. Section 51 returns to the subject of content control by providing a list of banned terms

[429] Tait and Newman 2014 (35) 3 *Obiter* 643.
[430] See the discussion in Stoop and Chürr 2013 (16) 5 *PER/PELJ* (also available at http://www.saflii.org/za/journals/PER/2013/73.html#_ftnref24) (accessed on 6 October 2018). Also see *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD). This case has to do with the National Credit Act, 2008 (NCA). However, the NCA and the CPA have identical plain language provisions and many of their principles can therefore be applied to other consumer agreements. Therefore, this judgment is also of importance when applying the sections of the CPA.
[431] Newman 2010 (31) 3 *Obiter* 745.
[432] De Stadler and Van Zyl 2017 (29) 1 *SA Merc LJ* 98.

(the black list, in comparison to the grey list in regulation 44(3)). Finally, section 52 confers powers on courts in matters concerning unfair terms contained in a consumer contract.

The protection offered by the CPA to the consumer is of great value; however, the protection offered to the consumer remains limited. It should be noted that exemption clauses still remain lawful, binding and enforceable if their wording is unambiguous;[433] in other words, if it complies with section 22, read with section 49(3)–(5) of the CPA, and excludes terms listed in regulation 44(3) and section 51 of the CPA.

Even though it is important for a supplier to ensure that a consumer makes an informed choice, it must further be noted that once the exemption clause is brought to the consumer's attention in terms of the CPA, the terms of that contract are binding on the consumer. The CPA, in its current form, affords only limited protection to consumers, as service providers are still capable of using exemption clauses. The difference is only that they are now directed as to how to word the clauses and bring them to the consumer's knowledge in the manner and form prescribed in the CPA; alternatively, in plain language.

It should, however, be noted that it is not adequate for a supplier to merely draw the unfair term to the attention of the consumer with the intention of achieving an informed decision.[434] Therefore, in cases where a term which is unfair, unreasonable or unjust was not brought to the consumer's attention in the recommended manner and form, the court could refuse to impose such an exemption clause based on the fact that it is unfair.[435]

The move in the direction of consumer awareness and fairness when entering into a contract is of great value. However, to ensure that the consumer is protected to the maximum, certain amendments to the CPA must be made to guarantee actual protection against unfair contract terms.

In the following chapter I will compare the relevant sections of the CPA, aimed at protecting the consumer, with specific reference to the enforcement of exemption clauses, with foreign law. I will

[433] Hutchison and Pretorius *The law of contract* 271. See also Marx and Govindjee 2007 28(3) *Obiter* 622–635; Stoop 2008 *SA Merc LJ* 496–509; and Brand and Brodie *Good faith in contract law* 108.
[434] Naudé 2006 (3) *Stell LR* 385.
[435] Sections 48(2)(b) and 52(3) of the CPA.

do this comparison based on the fact that the courts may consider foreign law when interpreting the CPA.

CHAPTER 5: A COMPARISON BETWEEN THE AUSTRALIAN CONSUMER LAW, THE CONSUMER RIGHTS ACT OF THE UNITED KINGDOM AND THE CONSUMER PROTECTION ACT

5.1 Introduction

As pointed out in chapter 4 of this dissertation and in accordance with section 2(2) of the CPA, it is permitted to look at foreign law for direction. In this chapter, specific reference will be made to the consumer protection laws of Australia[436] and the United Kingdom[437] in comparison to the CPA. The reason for this is that both the Australian Consumer Law (or Laws) and the CRA are moderately recently enacted laws aimed at protecting the rights of ordinary consumers.

For the purposes of this dissertation, specific reference will be made to the transparency of terms (plain language), determining the unfairness of a term, and the so-called grey-list and black-list terms. Prior to comparing the applicable sections, a short background of the relevant legislation will be provided.

5.2 Australian Consumer Law (ACL)

The Australian Consumer Law (hereinafter the ACL) came into operation on 1 January 2011. The ACL, set out in Schedule 2 of the Competition and Consumer Act 2010 (hereinafter the CCA),[438] is legislation offering security to consumers, applied as a law of the Commonwealth of Australia. It is integrated into the law of each of Australia's states and territories and operates nationally. On commencement of this law, it replaced 20 different consumer laws throughout the Commonwealth and the states and territories[439], even though certain other acts remained in force.[440]

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[436] The Australian Consumer Law (hereinafter the ACL).

[437] The Unfair Contracts Terms Act 1977 (hereinafter the UCTA), the Unfair Terms in Consumer Contracts Regulations 1999 (hereinafter the UTCCR 1999) and the Consumer Rights Act 2015. The CRA changed and combined the UCTA and the UTCCR. Specifically, it amended the UCTA in respect of business and consumer contracts and repealed the UTCCR.

[438] Competition and Consumer Act 2010 Act No. 51 of 1974 as amended. The Competition and Consumer Act 2010 (hereinafter the CCA) covers most areas of the market: the relationships between suppliers, wholesalers, retailers and consumers. Its purpose is to enhance the welfare of Australians by promoting fair trading and competition, and through the provision of consumer protections.

[439] "The ACL" http://consumerlaw.gov.au/sites/consumer/files/2015/06/ACL_framework_overview.docx (accessed on 6 November 2018).

[440] "Exceptions under commonwealth, state & territory legislation" Australian Competition and Consumer Commission https://www.accc.gov.au/about-us/australian-competition-consumer-commission/legislation/exceptions-under-commonwealth-state-territory-legislation (accessed on 6 November 2018).

Like the CPA, the ACL's objective is to protect consumers and guarantee reasonable trading throughout Australia.[441] The ACL (Schedule 2 of the CCA) deals with disingenuous or deceptive behaviour, unacceptable conduct, unfair practices, conditions and warranties, product safety and information, the legal responsibility of manufacturers of merchandise with safety defects, offences and country of origin representations.

Part 2-3 of the ACL regulates unfair contract provisions. Broadly speaking, the provisions can be used to declare a term in a standard-form consumer contract invalid, in the event that such a term is unfair.[442]

The contract under discussion needs to be a consumer contract[443] over and above the fact that such a contract must be a standard-form contract. The application of the provisions of the ACL is restricted only to consumer contracts where the recipient (i.e. consumer) is a natural person. In deciding if a contract is indeed a consumer contract, the reason for the transaction must be ascertained. This could produce technical hitches for a supplier in some cases where the goods or services could be utilised for both personal and domestic or household use.

In terms of the ACL, a term must be transparent. With specific reference to section 24(3) of the ACL, a term is considered to be transparent in instances where the term is conveyed in reasonably plain language, when it is readable, and when it is presented clearly to and is freely obtainable by any party affected by such a term.[444]

Section 25 of the ACL provides for certain types of terms which will possibly be reflected to be unfair. For purposes of this dissertation, specific reference is made to only the following terms:

- A term which limits, or has the consequence of limiting, a contracting party's vicarious liability for the aforementioned party's agents;[445]

[441] Stoop and Chürr 2013 (16) 5 *PER/PELJ* 522.
[442] Section 23(1) of the ACL.
[443] Section 23(3) of the ACL states that a "consumer contract" is "a contract for (a) a supply of goods or services; or (b) a sale or grant of an interest in land to an individual whose acquisition of the goods, services, or interest is wholly or predominantly for personal, domestic or household use or consumption."
[444] In comparison to section 22 of the CPA, regulation 6 of the UTCCR and sections 64(2) and 68 of the CRA.
[445] Section 25(i) of the ACL.

- A term which limits, or has the consequence of limiting, a contracting party's right to take legal action against another party.[446]

Notwithstanding the aforesaid, as from 12 November 2016, the protection granted in terms of the ACL was extended to business-to-business transactions[447] for small business, which makes it similar to the position under the South African CPA. These additions allow for unfair contract terms in small business contracts to be affirmed to be invalid.[448]

Consequently, the aforesaid is applicable to standard-form small business contracts in instances where the contract was concluded or renewed on or subsequent to 12 November 2016. The standard-form small business contracts must, however, be used for the supply of goods or a service, or for a sale or a grant of an interest in land. Furthermore, at the time the contract was concluded, one of the contracting parties must be a business with fewer than 20 employees in its employ.[449]

Terms attempting to exclude any and all legal responsibility of one contracting party are to be expected to be unfair under the ACL.[450]

5.3 English law

By way of court judgments, an immense quantity of legislative enactments over the past few years and the institution of certain legislation in the English law, our law was further developed and advanced.[451]

Preceding the enactment of the CRA, there were two contractual fairness-oriented regulators in the United Kingdom specifically, namely, the UCTA and the Unfair Terms in Consumer Contracts Regulations 1999 (hereinafter the UTCCR 1999). The UTCA dealt mainly with exemption and

[446] Section 25(k) of the ACL.
[447] Also known and referred to as "B2B" (Small business contracts).
[448] Creighton https://www.b2bmagazine.com.au/b2b-contracts-unfair-contract-terms/ (accessed on 22 September 2018).
[449] Gates and Gates https://www.lexology.com/library/detail.aspx?g=b5464f93-d8ad-4ccc-922b-94b1fb46b7e0 (accessed on 22 September 2018).
[450] The so-called grey-list terms, more fully discussed later in this chapter.
[451] Nagel *Commercial law* [2.02].

limitation clauses, while the dealt mainly with non-negotiated consumer contracts or so-called standard-term contracts. Each of the aforesaid pieces of legislation will be discussed shortly.

5.3.1 Unfair Contracts Terms Act 1977 (UCTA)

The UCTA has been in force since 1 February 1978.[452] The introduction of the UCTA in 1977 indicated that it is an Act imposing further limitations on the degree to which civil legal responsibility for breach of contract, or for negligence or other breach of duty, may be circumvented through contract terms in countries such as Wales, England, Northern Ireland and Scotland.

The UCTA directly regulated exemption and limitation clauses in sections 2 to 7 thereof, with specific reference to clauses which excluded or limited certain responsibilities of suppliers to consumers. It furthermore dealt with non-contractual notices (i.e. disclaimer notices), excluding or restricting delictual liability on the part of the supplier.

Section 2(1) of the UCTA provided that an exemption clause was not allowed to be inserted in a contract if the purpose of such a clause was to exclude or restrict business liability of the supplier for the death of the consumer, or to exclude or restrict business liability for personal injury as a result of negligence.[453] In terms of section 2(2) of the UCTA, if it were the intention of the supplier to exclude liability of such supplier for loss or damage by means of negligence, for example, financial loss, other than personal injury, the clause was subject to the reasonableness test.[454] In terms of section 2(3) of the UCTA, where a contract term or notice intends to exclude or restrict liability for negligence, a person's agreement to such term or notice or their attentiveness to such term or notice is not indicative of such party's intentional acceptance of any risk. What is important to note is that section 2 of the UCTA, in terms of section 2(4) thereof, was not applicable to consumer contracts and consumer notices.

Section 3 of the UCTA precludes the use of an exemption clause if it attempts to exclude legal responsibility for breach of contract, or if it tolerates contractual performance that is significantly diverse from the performance expected by the consumer, or if it allows no performance

[452] Section 31(1) of the UCTA.
[453] Section 1(1)(a) of the UCTA defines negligence as the breach of an obligation or duty "to take reasonable care or exercise reasonable skill".
[454] Section 1(2) of the UCTA.

whatsoever regarding the entire contractual obligation or any fragment thereof (e.g. if it fails to satisfy a condition precedent). The exception would be if the clause fulfils the reasonableness test.

The reasonableness test[455] as referred to in section 2(1) and section 3 of the UCTA is contained in section 11 of the UCTA. The UCTA sets course of action which is important when deciding whether a contract term fulfils the requirement of reasonableness, and takes account of the strength of the relevant parties' bargaining positions and whether the consumer knew or should have reasonably known of the presence or extent of such term. The requirement of reasonableness, in terms of section 11 of the UCTA, is that a term would be deemed to be a fair and reasonable term with due observation of the circumstances which were or ought reasonably to have been identified to the party or in the cogitation of the parties when the contract was entered into.[456]

In the matter of *St Albans City and DC v International Computers Ltd*[457] the issue at hand was whether damages could be restricted by a damage-limitation clause as contained in the contract, or whether the clause was an unfair contract term within the ambit of the UTCA. Scott Baker J held that, because the city council was operative on International Computers Ltd's written standard terms of business, section 3 of the UCTA applied. It was furthermore held that sections 6 or 7 of the UCTA correspondingly applied and that the contract term under section 11 of the UCTA was found to be unreasonable. In terms of section 11(4) of the UCTA, Scott Baker J emphasised that International Computers Ltd had sufficient resources and had £50m worldwide product liability insurance. Considering Schedule 2 of the UCTA, Scott Baker J held that the

[455] Section 52(2) of the CPA grants the courts authority to decide on fair and just conduct, as well as terms and conditions that can be regarded as being unfair to the consumer. The reasonableness test, as contained in section 11 of the UCTA, is consistent with the factors listed in section 52(2) of the CPA, being the factors that a court must take into consideration when determining whether or not an exception clause is reasonable. Therefore, the courts observe the application of section 11 of the UCTA when considering the reasonableness of an exception clause.

[456] In Schedule 2 of the UCTA, five guidelines to interpreting "reasonableness" are laid down. These are, in summary –

- the relative strengths of the parties' bargaining positions;
- whether the consumer received any inducement to accept the term;
- whether the consumer knew or should have known that the term was included;
- in the case of a term excluding liability if a condition is not complied with, the likelihood of compliance with that condition at the time the contract was made; and
- whether the goods were made or adapted to the special order of the consumer.

It should be noted that these guidelines are not exhaustive.

[457] *St Albans City and DC v International Computers Ltd* [1996] EWCA Civ 1296.

council was in a weaker bargaining position because it had financial limitations and was not in the commercial field. The council had no prospects of other contracts without the term. The council had knowledge of the term and made representations about it. Scott Baker J noted that Schedule 2 of the UCTA ought to be considered just as was the case with section 6 or 7 of the UCTA. The Court of Appeal upheld Scott Baker J's rationale but concluded that the damages were less than those determined by Scott Baker J.

In the matter of *Hirtenstein v Hill Dickinson LLP*[458] the contract under dispute was a commercial contract concerning the purchase of a yacht. The clause headed *Limitation of liability* in Hill Dickinson's standard terms stated that the defendant's legal responsibility for any claim would not exceed £3 million. The defendant wanted to depend on the aforesaid clause when the plaintiff sued it for professional negligence.

The court found that the limitation clause was unfair and unreasoning since the clause was wide enough to constitute an attempt to limit the defendant's liability for negligence. The defendant did not specifically draw the contents of the limitation clause to the knowledge of the plaintiff, nor was the clause referred to in correspondence or in any telephonic discussions between the parties.

5.3.2 Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999)

The UTCCR 1999 found application only to contracts entered into by a supplier (or a seller) and a consumer.[459]

Schedule 2 of the UTCCR 1999 encloses a so-called grey list, containing certain terms which might possibly be seen as unfair. The so-called grey-list terms were not by their mere design considered to be unfair; however, it was probable that in most situations such terms would be regarded as unfair.[460]

The Law Commission and the Scottish Law Commission in 2005 compiled a report on unfair contract terms, recommending that provisions in the UCTA and the UTCCR 1999 affecting the

[458] *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711.
[459] Regulation 4(1) of the UTCCR.
[460] Section 48 of the CPA contains a so-called grey-list of terms.

consumer in this regard ought to be replaced by a single Act of Parliament. In 2013, these recommendations were studied and restructured to form part of the Consumer Rights Act.[461]

5.3.3 Consumer Rights Act 2015 (CRA)

The Consumer Rights Act 2015 (hereinafter the CRA) came into effect on 1 October 2015, changing the rules pertaining to the supply of goods, services and digital content of contracts concluded after 1 October 2015. As from 1 October 2015 only one Act applies to all contracts, including contracts initially falling outside the scope of the UCTA or the UTCCR 1999.[462] The CRA strives to substitute and expand the current rules regarding unfair terms in consumer contracts under the UCTA and UTCCR. Nevertheless, just as the CPA does not find retrospective application to a consumer contract, the CRA does not find such retrospective application. If a contract was concluded prior to 1 October 2015, such contract will be administered by the UCTA or the UTCCR.

The CRA furthermore widened the definition of a consumer, providing further protection. In addition, the onus is on the "trader" (hereinafter "the supplier") to prove that the consumer relying on the provisions of the CRA, is not a consumer. The CRA also finds application to consumer notices (whether such notices are contractual/non-contractual, verbal or in writing), along with consumer contracts, in the classic form.[463]

Chapter 2 of the CRA applies to a contract of a supplier to supply goods to a consumer.[464] It finds application only if the contract is a sales agreement,[465] a contract for the rental of merchandise,[466] a hire-purchase contract[467] or a contract for the transfer of goods.[468]

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[461]"Exclusion clauses" http://www.open.edu/openlearn/people-politics-law/the-law/exclusion-clauses/content-section-0? (accessed on 19 September 2017).

[462] The Consumer Rights Act 2015 (hereinafter the CRA) also regulates clauses in contracts where goods are supplied, including sale, hire, hire-purchase and work-and-materials contracts. "The sale & supply of goods" https://www.businesscompanion.info/en/quick-guides/goods/the-sale-and-supply-of-goods (accessed on 19 September 2017).

[463] "Summary guide to the Consumer Rights Act 2015" https://www.wrighthassall.co.uk/knowledge/legal-guides/2015/10/01/summary-guide-consumer-rights-act-2015/ (accessed on 28 October 2018).

[464] Section 3 of the CRA.

[465] Section 5 of the CRA.

[466] Section 6 of the CRA.

[467] Section 7 of the CRA.

[468] Section 8 of the CRA.

Section 31 of the CRA contains a list of circumstances in which a supplier's liability to a consumer can be neither excluded nor restricted. The cause of section 31 is to preclude suppliers from contracting out of the consumer's statutory rights in terms of sections 9 to 16 of the CRA, such as satisfactory quality, fitness for purpose and matching the description. It is furthermore applicable to sections 28 and 29 of the CRA on time of delivery, the passing of risk and, for contracts other than hire, the requirement of right to title contained in section 17 of the CRA. In addition, section 31 has the effect that any contract term which strives to prevent the consumer from having access to statutory rights and remedies or to make exercising these rights and remedies less attractive to the consumer by either making it more challenging and burdensome to do so, or by placing the consumer at a disadvantage after doing so, will also be void. [469]

Further to the aforesaid, Part 2 of Chapter 5 of the CRA, dealing with unfair terms, is applicable to a contract between a supplier and a consumer.[470] Section 62 of the CRA deals with the fairness requirement pertaining to consumer contract terms and notices (and sets fairness criteria similar to section 48 of the CPA). Over and above the reasonableness test brought about by the UCTA, the CRA went a step further and brought about a fairness test, which is contained in section 62 of the CRA. In accordance with the fairness test, it is determined whether there is a substantial disproportion in the parties' respective positions, whether the obligation imposed by such a term is to the disadvantage of the consumer and whether such a term is in conflict with the demands of good faith.[471] In such instance, such a term will be considered unfair and therefore not enforceable. An equivalent test exists to determine the fairness of notices.[472]

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[469] "*A term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions— (a) section 9 (goods to be of satisfactory quality); (b) section 10 (goods to be fit for particular purpose); (c) section 11 (goods to be as described); (d) section 12 (other pre-contract information included in contract); (e) section 13 (goods to match a sample); (f) section 14 (goods to match a model seen or examined); (g) section 15 (installation as part of conformity of the goods with the contract); (h) section 16 (goods not conforming to contract if digital content does not conform); (i) section 17 (trader to have right to supply the goods etc); (j) section 28 (delivery of goods); (k) section 29 (passing of risk). (2) That also means that a term of a contract to supply goods is not binding on the consumer to the extent that it would— (a) exclude or restrict a right or remedy in respect of a liability under a provision listed in subsection (1), (b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition, (c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or (d) exclude or restrict rules of evidence or procedure. (3) The reference in subsection (1) to excluding or restricting a liability also includes preventing an obligation or duty arising or limiting its extent.*"

[470] Section 61(1) of the CRA.

[471] Section 62(4) of the CRA: "A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."

[472] Section 62(6) and (7) of the CRA.

Section 63 of the CRA brought about Schedule 2. Schedule 2, specifically part 1 thereof, lists illustrations of terms which would possibly be considered unfair (known as the so-called grey list), which schedule is an indicative and non-exhaustive list.[473] The terms listed are not by unfair design, but may of assistance to a court when the application of the fairness test in section 62 is considered in each particular case. Since the so-called grey list is non-exhaustive, terms not found in the list in the schedule could be found by a court to be unfair by the application of the fairness test contained in section 62 of the CRA.

Terms in the grey list are measurable for fairness even in instances where such terms would otherwise meet the requirements for being exempt under section 64 of the CRA. Terms in the so-called grey list are therefore assessable even if such terms are transparent and prominent as defined in section 64 of the CRA.

There are, however, certain contract terms which are excluded from the test as set out in section 62 of the CPA; such limited terms are contained in section 64 of the CRA. Section 64(1) of the CRA provides that terms on the main subject matter of the contract (i.e. a term describing the goods sold) or the correctness of the price are excused from an assessment of fairness in accordance with section 62 of the CRA. Furthermore, in terms of section 64(2) of the CRA, a contract term, as referred to in subsection (1), is not subject to the fairness test in instances where the contract or notice term is clear and conspicuous.[474] A term is transparent (clear) if it is

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[473] Some of the terms relevant in this dissertation are as follows:

> "*A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.*"
>
> "*A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.*"
>
> "*A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—*
> *(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,*
> *(b) unduly restricting the evidence available to the consumer, or*
> *(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.*"

[474] Reference in section 62 of the CRA is made to the words "transparent" and "prominent". Further to the aforesaid, section 64 also provides as follows:

"(1) A term of a consumer contract may not be assessed for fairness … to the extent that–
(a) it specifies the main subject matter of the contract, or
(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it."

conveyed in plain and understandable language and is readable in instances where the term is in writing.[475] A term is conspicuous (prominent) in instances where it is drawn to the attention of the consumer in such a manner that an ordinary consumer would have knowledge of such a term.[476] Section 64(5) of the CRA provides a clear definition of what is meant by the concept of an average consumer. Furthermore, section 64(6) of the CRA provides that section 64 is not applicable to terms contained in part 1 of Schedule 2, being the so-called grey-list terms as discussed above.

Section 65 of the CRA contains the so-called black-list terms which set a bar on the use of contract or notice terms that exclude or restrict liability caused by negligence.

In accordance with section 68 of the CRA, a supplier is required to make sure that a term contained in a written consumer contract, or in a consumer notice, is transparent. A consumer notice is transparent in instances where it is conveyed in plain and understandable language and is readable.

Another section of importance is section 69 of the CRA[477], which stipulates that, when contract terms are vague and have the ability of being construed in contrasting ways, especially if they are not in writing or in an accessible format, this section ensures that the interpretation that is most beneficial to the consumer, rather than the supplier, is the interpretation that is used. This section confirms the *contra proferentem* rule.[478]

In light of the aforesaid laws and the relevant sections thereof, a comparison will be made in order to establish whether sufficient protection is offered to the ordinary consumer when it comes to the exemption clauses.

5.4 A comparison between the CPA and the consumer protection laws of Australia and the UK

A comparison between Australian, British and South African legislation will be made, with specific focus on protection against exemption clauses.

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[475] Section 64(3) of the CRA.
[476] Section 64(4) of the CRA. It can be said that section 64(4) of the CRA is better worded that section 22 of the CPA due to the fact that section 64(4) is clear and easily understandable.
[477] Section 69(1) of the CPA reads that, if a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.
[478] Such a section is not included in the CPA; therefore, the common law is still applicable in South Africa.

	ACL	CRA	CPA
Who qualifies as a consumer?[479]	**An individual acting for purposes that are solely or primarily free standing from that individual's trade, business, craft or occupation.** **However, unfair contract terms in small business contracts are regulated by the ACL.**	**An individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.**	**Individuals and small juristic persons. See chapter 4 above.**
Transparency	**Section 24(3)**	**Section 68 and Section 64 in respect of certain terms**	**Section 22**
Determining the unfairness of a term	**Section 24(1) & (2)**	**Section 62**	**Section 48(2)**
So-called grey list	**Section 25**	**Section 63, read with Schedule 2**	**Section 48, read with Regulation 4(3)**
So-called black list		**Section 65, read with Schedule 2**	**Section 51**

[479] Due to the limitation of the length of this dissertation, an in-depth discussion regarding a consumer will not follow.

5.4.1 Plain language (transparency)

It is evident that the principle of plain language plays an important part when deciding if a contractual term is indeed unfair. Section 24 of the ACL moved towards providing requirements that should be met (elements) when it is to be determined if a contractual term is truly transparent. Section 68 of the CRA states that terms and notices that are in writing, ought to be transparent. As stated above, a term or notice is transparent in instances where it is stated in plain and understandable language and is readable.

5.4.1.1 Section 24 of the ACL

Section 24[480] of the ACL describes the meaning of fairness. The aim of the requirements set forth in section 24 of the ACL is to make certain that a consumer is completely conscious of a term and the meaning thereof.

In the ACL, transparency is clearly defined and not dependent on any circumstantial factors. The ACL also does not distinguish between different levels of transparency. Transparency is clearly described in the ACL, which is different from the position under the CPA. It is said that a term is transparent only when it satisfies all four requirements recorded in section 24(3) of the ACL.[481] In terms of section 24(3), a term is transparent (a) if it is expressed in reasonably plain language; and (b) legible; and (c) presented clearly; and (d) readily available to any affected party. Section 23(3)(a) provides that, in deciding whether a contract or term is unfair under sections 23 and 24(1), the extent to which a term is transparent must be considered.

When it is being determined whether a term is clearly presented, the font used by the supplier to showcase the term is one of the relevant factors that must be taken into consideration, and of course the size of the font.[482]

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[480] Section 24(3) of the ACL sets the requirements for transparency as follows:
"*For the purposes of subsection (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise."*
[481] Sise 2017 (17) 1 *QUT Law Review* 161.
[482] Own insertion. See Bender http://barristers.com.au/wp-content/uploads/2012/07/Australian-Consumer-Law-UnfairContracts-by-Dr-Philip-Bender.pdf (accessed on 29 October 2018).

Paterson[483] correctly submits that the elements as expressed in section 24 of the ACL are in accordance with the international principles of the "plain-language English movement" which endeavours to provide the average consumer with an easy understanding of legal documents. Paterson further contends that a contract would be transparent if the consumer finds it easy to read and realise (grasp) their contractual rights and obligations therein.[484]

When it is to be determined whether a contractual term is unfair, under the ACL, one cannot merely look at the contractual term separately from the remainder of the contract. It must be considered in view of the contract in its totality.[485] It is consequently evident that a court would be able to decide on the unfairness of a term, provided that the transparency factor together with the contract-as-a-whole factor are considered.[486]

Only the courts have the power to decide whether a term is indeed transparent or not. What should be noted is that, even if it is determined by a court that the term is not transparent, this does not automatically mean that the term is unfair. The unfairness in a contract term should still be considered.[487] The wording of the equivalent provision in the UTCCR (section 7) on the subject of unfair contract terms was, to some extent, different from the Australian provisions regarding unfair contract terms, as the UTCCR referred to plain and understandable language while the Australian laws refer to transparency.[488] However, the CRA included the phrase "plain and intelligible language" in the meaning of transparency.[489]

5.4.1.2 Section 68 of the CRA

[483] Paterson *Unfair contract terms* 86.
[484] Paterson *Unfair contract terms* 86. In this regard, the argument of Stoop (in Stoop and Chürr 2013 (16) 5 *PER/PELJ* 523) regarding the first element of the definition in section 24 of the CRA being unclear and subject to scrutiny, should be noted.
[527] Stoop and Chürr 2013 (16) 5 *PER/PELJ* 524 – 525.
(also available at http://www.saflii.org/za/journals/PER/2013/73.html# ftnref24) (accessed on 6 October 2018).
[486] Section 24(2) of the ACL.
"ACL 2010b http://www.consumerlaw.gov.au 12–13 (accessed on 28 October 2018).
[487] "Commonwealth of Australia 2010" https://www.accc.gov.au/media-release/a-guide-to-the-unfair-contract-terms-law (accessed on 29 October 2018).
[488] Stoop and Chürr 2013 (16) 5 *PER/PELJ* 524.
(also available at http://www.saflii.org/za/journals/PER/2013/73.html# ftnref24) (accessed on 6 October 2018).
[489] See section 64(3) of the CRA in this regard.

The most important requirement of transparency, in terms of the CRA, is that a term ought to be understandable (plain) to consumers. The transparency test is found in section 68 of the CRA.

Preceding the enforcement of the CRA, in the matter of *Director General of Fair Trading v First National Bank*,[490] some guidance was provided pertaining to the term "transparency" in that transparency necessitates that the terms be conveyed completely and clearly, be readable, and contain no hidden consequences or traps. Suitable importance ought to be provided to terms which may function detrimentally to the consumer.

Section 68 of the CRA provides that a supplier be required to make sure that a term contained in a written consumer contract, or a written consumer notice, is transparent. Such a term or notice is deemed to be transparent when it is in plain and intelligible language. In instances where the term or notice is in writing, it must furthermore to legible. As in the CPA, it is clear that the requirement of plain and intelligible language is also fundamental in the CRA.

It is evident from the foregoing discussion that the transparency of a term is of utmost importance when it is to be determined whether the term is fair. In terms of the CRA a term must not only be in simple (plain) and comprehensible (intelligible) language; it must also be clear enough to read (legible). The obligation to ensure that a term is indeed transparent rests on the supplier (the person responsible for drafting the contract or notice).

Notwithstanding section 68 of the CRA, specific reference to transparency is made in section 64, in that a term dealing with subject-matter and terms regarding the price must be transparent and prominent. In the instance when it is determined that such a term is indeed transparent and prominent, the term is exempt from being assessed in terms of section 62 of the CRA.[491]

As mentioned in the previous chapter, even though there is no clear description of plain language in the CPA, section 22(2) contains the right of a consumer to receive information in plain and clear

[490] *Director General of Fair Trading v First National Bank (2002) 1 AC 482; [2001] UKHL 52 (hereinafter Director General of Fair Trading).*
[491] Waller http://www.simplificationcentre.org.uk/2015/10/the-consumer-rights-act-2015-the-end-of-small-print/ (accessed on 29 October 2018).

language. This section, from time to time referred to as the right to plain language, is possibly the most significant pro-active measure of procedural fairness enclosed in the CPA.[492]

Transparency, alternatively referred to as plain language, is merely one of the requirements when determining whether a term is fair. In this regard, what qualifies as a fair term will be discussed in the paragraph below.

5.4.2 Determining the unfairness of a term

5.4.2.1 Section 24(1) and (2) of the ACL

Sections 23 and 24 of the ACL [493] are of great significance, as these sections lay down what constitutes an unfair term in a consumer contract, and evidently describe the meaning of unfair. It is essential to bear in mind that the ACL does not explicitly provide for a term to be in plain language, but rather provides that a contract term be transparent in instances where the term is expressed in reasonably plain language.[494] Section 23 provides that terms of a small business contract[495] or consumer contract[496] are void if the terms are unfair and the contract is a standard-form contract.

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[492] Stoop http://uir.unisa.ac.za/bitstream/handle/10500/23191/Stoop-Inaugural%20lecture-31%20Aug%202017.pdf? sequence=1&isAllowed=y (accessed on 7 October 2018).

[493] Section 24(1) and (2) of the ACL provides as follows:

"1. A term of a consumer contract or small business contract is unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

2. In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;

(b) the contract as a whole."

[494] Stoop and Chürr 2013 (16) 3 *PER/PELJ* 523.
(also available at http://www.saflii.org/za/journals/PER/2013/73.html# ftnref24) (accessed on 6 October 2018).

[495] Section 23(4) provides that a contract is a small business contract if the contract is for the supply of goods or services, or a sale or grant of an interest in land, and if at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons and either the upfront price payable under the contract does not exceed $300 000 or the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1 000 000.

[496] Section 23(3) defines a consumer contract as a contract for the supply of goods or services or a sale or grant of an interest in land.

The test used to determine whether a term is unfair is expressed outright.[497] It provides that a contract term is deemed to be unfair only when it satisfies all three requirements contained in section 24(1). Therefore, in the instance where such term would occasion a substantial disproportion in the parties' rights and obligations ascending under the contract, and is not reasonably required in order to safeguard the real interests of the contracting party who would be advantaged by it,[498] and would cause detriment to a contracting party if it were to be applied or depended on, such term would be deemed to be unfair.

The aforesaid test is not open for a wide interpretation. A contract term will therefore be unfair only if it fulfils all the aforesaid requirements as set out in section 24(1)(a)–(c).[499]

In terms of section 24(2), a court can consider such matters as it deems appropriate when deciding if a contract term is indeed unfair. However, the court is required to consider the degree of transparency of the terms and the contract in its totality.

It is, however, important to note that section 24(1) does not mandate transparency as a consideration when determining whether a contract term is unfair. Section 24(2)(a), however, necessitates the transparency of the purportedly unfair term to be taken into account, but not the transparency of an additional contract term which is not purportedly unfair.[500]

What is critical to take notice of is that reference to good faith is not used in section 24, but rather the appropriate interest measure has been inserted.[501]

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[497] Section 24(1).

[498] It should be noted that section 24(4) provides that, for the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

[499] Sise 2017 (1) *QUT Law Review* 163 - 169 (also available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjF9rX3npLgAhU5VBUIHXj2DOEQFjAAegQICRAC&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F686%2F621%2F&usg=AOvVaw3ckh76mbN-u_ZR8Eo2acdQ) (accessed on 29 October 2018).

[500] Sise 2017 (17)1 *QUT Law Review* 167 (also available at ISSN: Online- 2201–7275 160–173 DOI:10.5204/qutlr.v17i1.686. https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjF9rX3npLgAhU5VBUIHXj2DOEQFjAAegQICRAC&url=https%3A%2F%2Flr.law.qut.edu.au%2Farticle%2Fdownload%2F686%2F621%2F&usg=AOvVaw3ckh76mbN-u ZR8Eo2acdQ) (accessed on 29 October 2018.).

[501] Section 24(1)(b) of the ACL. For a discussion of "good faith", see "Section 48" in Naudé and Eiselen *Commentary* (2016) para 48-24.

5.4.2.2 Section 62 of the CRA

Section 62[502] of the CRA contains the requirement for contract terms and notices to be fair. Section 62(4) of the CRA stipulates that a term is unfair in instances where such a term brings about a substantial disproportion in the contracting parties' rights and responsibilities ascending from the contract, which disproportion (imbalance) is to the disadvantage of the consumer, which is in conflict with the requirement of good faith. The fairness test consequently includes substantial disproportion in the contracting parties' rights and responsibilities ascending from the contract, which disproportion (imbalance) is to the disadvantage of the consumer[503] and good faith.[504] In conjunction with section 62(4), the criteria to be considered to determine whether a contract term is fair, are set out in section 62(6). These include the essence of the subject matter of the contract, as well as all the circumstances prevailing when the contract term was agreed upon between the parties, and all the other contract terms, or the terms of any additional contract, by which such term is influenced.

Like section 62(4), which is applicable to contract terms, section 62(5) of the CRA stipulates that a notice is unfair in instances where such a notice brings about a substantial disproportion in the parties' rights and responsibilities ascending from the notice, which disproportion (imbalance) is to the disadvantage of the consumer, which is in conflict with the requirement of good faith. In conjunction with section 62(5), the criteria to be considered to determine whether a contract term

[502] Section 62 of the ACL provides as follows:
"1. An unfair term of a consumer contract is not binding on the consumer.
2. An unfair consumer notice is not binding on the consumer.
3. This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
4. A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
5. Whether a term is fair is to be determined—
a. taking into account the nature of the subject matter of the contract, and
b. by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.
6. A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.
7. Whether a notice is fair is to be determined—
c. taking into account the nature of the subject matter of the notice,
d. by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends."
[503] "A significant imbalance to the detriment of the consumer": direct quotation from section 62(4) of the ACL.
[504] CMA https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment data/file/450440/Unfair Terms Main Guidance.pdf (accessed on 29 October 2018).

is fair, are set out in section 62(7). These include the essence of the subject matter of the notice, as well as all the circumstances prevailing when the rights or obligations to which it relates arose, and to any additional contract by which such term is influenced.

In the matter of *Director General of Fair Trading* it was held that a contract term providing a substantial benefit to the supplier, without providing a similar advantage to the consumer, would possibly fail to fulfil the requirement for a term to be fair. Even though the term significant imbalance is not defined in the UTCCR, it was held in *Director General of Fair Trading*, that "this requirement is met when a contract term is so one-sided to the advantage of the supplier as to tip the rights and responsibilities under the contract considerably to his benefit".

From the foregoing section it appears that the common requirement is that there is an imbalance between contracting parties.

It should be noted that nowhere in the CPA any reference is made specifically to the substantial imbalance in the parties' rights and obligations as clearly as referred to in the other legislation. However, Stoop is of the opinion that substantial disproportion in the contracting parties' rights and responsibilities arising from the contract can be compared to excessively one-sided under section 48(2)(a) of the CPA. [505]

As referred to in chapter 4 of this dissertation, it is stated, according to section 48(2)(a) of the CPA, that a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if it is disproportionately unfair in favour of any person other than the consumer or other person to whom goods or services must be supplied. In addition to the above, I submit that significant imbalance can also be equated to the (unequal)[506] bargaining position of the contracting parties.

In terms of the CPA, when the fairness of a term or condition is considered by the courts, the courts must take into consideration the circumstances and conditions listed in section 52(2)(b), being the nature of the parties to the contract, their relationship to one another and their

[505] Stoop: *The concept "fairness" in the regulation of contracts under the Consumer Protection Act 68 of 2008* 115.
[506] Own insertion.

comparative capacity, education, capability, sophistication and (unequal) bargaining position, when determining the fair and just conduct, terms and conditions of a consumer contract.

5.4.3 The use of grey-list and black-list terms

Naudé states that the grey list and black list[507] contained in the relevant consumer legislation improve the efficiency of the control of unfair contract terms and this leads to certainty.[508] Naudé further defines grey-list and black-list terms.[509] The relevant grey-list and black-list terms contained in the ACL and CRA will be briefly discussed below.

5.4.3.1 Grey-list terms

According to Naudé, a grey list assists the bodies authorised to take precautionary action when negotiating with less diligent businesses to eliminate the use of unfair terms and decrease the use of costly and time-consuming litigation.[510]

Section 25 of the ACL[511]

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[507] For an in-depth discussion of grey-list and black-list terms, see CMA https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment data/file/450440/Unfair Terms Main Guidance.pdf (accessed on 29 October 2018).

[508] Naudé 2007 (124) 1 *SALJ* 131.

[509] See Naudé 2007 (124) 1 *SALJ* 130. A black list is a list of prohibited terms which are invalid under all circumstances, whereas a grey list is a list of terms which may be unfair, but the final decision depends on the circumstances of the particular case.

[510] Naudé 2007 (124) 1 *SALJ* 132.

[511] Section 25 of the ACL provides as follows:

"Without limiting section 24, the following are examples of the kinds of terms of a consumer contract or small business contract that may be unfair:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

Section 25 of the ACL provides a list of terms that would possibly be deemed to be unfair. The foregoing list is better known as the so-called grey-list terms. The list of terms provided for in section 25 of the ACL is not exhaustive. It should, however, be noted that the mere fact that a contract term would possibly fall within the realm of the terms listed in section 25 does not automatically render such a term unfair. Such terms are still subject to the fairness test contained in section 24 of the ACL.

Forms of exemption clauses deemed to be unfair that are contained in the so-called grey list include terms that inflict a penalty, or have the consequence of inflicting a penalty, on only one of the contracting parties for breach of contract.[512] These may be, for example, exemption clauses that restrict the liability of the supplier for breach of contract, terms that limit the vicarious liability of a supplier for its agents,[513] and terms that restrict or have the consequence of restricting a consumer's right to take legal action against a supplier.[514]

Schedule 2 of the CRA[515]

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
(k) a term that limits, or has the effect of limiting, one party's right to sue another party;
(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations."

[512] Section 25(c) of the ACL.
[513] Section 25(i) of the ACL.
[514] Section 25(k) of the ACL.
[515] For the purposes of this dissertation, reference will be made only to the following terms set out in Part 1 of Schedule 2:

- *"A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader. This does not include a term which is of no effect by virtue of section 65 (exclusion for negligence liability).*
- *A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.*
- *A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.*

The grey list of potentially unfair contract terms that is contained in the CRA has been imported in its totality from the list in the UTCCR, with the addition of three new terms.

Section 63(1) and (2) of the CRA provides that Part 1 of Schedule 2 encloses an indicative and non-exclusive list of terms that would possibly be regarded as unfair contract terms for the purposes of Part 1. Part 2 of Schedule 2 contains the scope of Part 1, although Part 1 is conditional on Part 2 of Schedule 2. However, a contractual term itemised in Part 2 would possibly still be evaluated for fairness under section 62 of the CRA, except in instances where sections 64[516] or 73[517] are applicable.

A contractual term enclosed in the so-called grey list is still measurable for fairness even in instances where such a term is transparent or prominent or both.[518]

5.4.3.2 Black-list terms

The ACL does not contain a so-called black list of terms which are unenforceable, however, such a list is contained in the CRA.[519]

Schedule 2 of the CRA

As contained in section 51 of the CPA, there are various terms which are automatically deemed to be unfair and exempt from the fairness test. If a blacklisted term is contained in a consumer

- *A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—*
  - *(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,*
  - *(b) unduly restricting the evidence available to the consumer, or*
  - *(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract."*

[516] In this regard, see section 64(1) of the CRA as discussed above at 5.3.3.
[517] Section 73 of the CRA provides for an exemption from both the fairness and the transparency tests in Part 2, for contract terms and notice provisions that reflect mandatory, statutory or regulatory provisions, for instance, in legislation and the provisions or principles of international conventions.
[518] A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term. In this regard, see section 49 of the CPA. See also "Summary Guide to the Consumer Rights Act 2015" https://www.wrighthassall.co.uk/knowledge/legal-guides/2015/10/01/summary-guide-consumer-rights-act-2015/ (accessed on 28 October 2018).
[519] An example is provided in section 65(1), in terms of which a supplier is entitled to use a consumer contract term or notice to disregard or limit liability for death or personal injury as a result of negligence.

contract, such a term will automatically be unenforceable.[520] Examples of the black-list terms relevant in this dissertation are as follows:

- A term or notice may not exclude or restrict legal responsibility for death or personal injury due to negligence.[521]

- A term or notice excluding, or attempting to limit liability where the supplier wishes to exclude or limit its obligations and liabilities under the contract or by attempting to depreciate the consumer's legal rights under the contract.[522]

- A term restricting or excluding a consumer's right to seek legal redress.[523]

Before the CRA came into effect in *Bennett v Pontins*,[524] a damages claim for the death of Mrs Bennett's husband, where negligence was proved, was rejected because the circumstances were excluded by an exemption clause. Section 65 of the CRA now prohibits a supplier from excluding or restricting its liability for death or personal injury due to negligence.

With reference to any other loss or damage not resulting in death or personal injury, the supplier is able to limit its liability only if the term is fair.[525] Despite the fact that liability for death or personal injury resulting from negligence is not specifically included in the black list contained in the CPA, the decision in *Johannesburg Country Club v Stott and Another*[526] is a step in the right direction and I am of the opinion that the decision would have remained the same even if such terms were indeed included in section 51.

The CPA similarly contains both grey-list and black-list terms which are, or may be deemed to be, unfair.[527] Regulation 44(3) of the CPA contains the so-called grey list of terms that may be unfair,

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[520] Naeme https://www.michelmores.com/news-views/news/guide-consumer-rights-act-2015-part-1-unfair-terms (accessed on 29 October 2018).
[521] This provision has been imported from the UCTA. Item 1, listed in Part 1 of Schedule 2 of the CRA, as well as section 65(1) of the CRA.
[522] Item 2 listed in Part 1 of Schedule 2 of the CRA.
[523] Item 20 listed in Part 1 of Schedule 2 of the CRA.
[524] *Bennett v Pontins* unreported 1973.
[525] See, in comparison, section 51 of the CPA which provides a list of the types of terms that are considered unfair, unreasonable or unjust and are therefore prohibited. However, liability for death or personal injury caused by negligence is not expressly included. See a full discussion at para 4.5.5 below.
[526] *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) [12].
[527] See in this regard section 48, read with regulation 44(3) of the CPA, as well as section 51.

and the determination of such unfairness is dependent on the circumstances of each and every case. The onus to prove that the term listed in regulation 44(3) is indeed fair, is on the supplier. In contrast with the aforesaid applicable laws, the grey list in regulation 44(3) is not contained in an Act.

5.5 Conclusion

Consumer rights and legislation protecting the consumer worldwide afford the consumers the opportunity to fight back against offensive business practices with regard to unfair contract terms, specifically exemption clauses.

Section 22(2) of the CPA provides that the relevant documentation[528], specifically referred to in this section, is considered to be in plain language if an average consumer for whom the documentation is anticipated[529] can understand the meaning, consequence and significance of the documentation without unnecessary effort. As a result of the diversity of our country relating to the education level of South Africans, it is extremely difficult to interpret this provision, as an ordinary consumer, in my view, differs from an ordinary consumer who has obtained only the minimum required education. Therefore, characteristics such as the context, organisation, form and style of the documentation will be considered, along with the terminology, language usage and sentence structure in such documentation.[530]

The significance of, and the part played by plain language in consumer contracts have been emphasised. Pronounced attempts are being made in countries such as South Africa, Australia and the United Kingdom to draft consumer contracts in the clearest possible language so that ordinary consumers can understand all the relevant terms and their effect, in such a contract. It is important to note that consumers are, in their own right, entitled to a contract drafted in simple language, and to a transparent contract clearly stating the rights and responsibilities of the relevant contracting parties. It can be said that the most vital objective of the requirement of plain language is to enable the consumer to realise the contract being entered into. Consequently, it would serve no purpose to permit terms in consumer contracts which are clearly misleading and

[528] Notice, document or visual representation.
[529] With average literacy skills and minimal experience of the relevant goods or services.
[530] Section 22(2) of the CPA.

ambiguous, even in instances where such terms are inserted in simple words and expressions that are easy to understand.[531]

South Africa can learn some lessons from the CRA, which states that a person is not assumed to have willingly agreed to a risk that arises from a notice simply because the consumer has accepted the notice or is familiar with it.[532] In terms of the CRA, a consumer will be bound by the terms only in instances where such terms are fair. Where a clause is not binding because it is unfair, the rest of the contract will take effect to the extent that this is possible.[533]

What should be noted is that, unless a challenged term is contained in the self-styled grey list in regulation 44(3) of the CPA, the onus of persuasion that such a term is indeed unfair will squarely fall on the consumer, to prove such unfairness. The consumer will consequently bear the risk of non-persuasion with reference to terms not listed in regulation 44(3).[534] Contrary to the aforesaid, in respect of the ACL, the onus rests on the contracting party who would have the upper hand if the standard term is enforced, to submit evidence that such a term is reasonably required with the intention of protecting the valid or real interest of such a contracting party.[535]

Unfortunately, foreign law, with specific reference to the explicit listing of grey-list and black-list terms, was not properly considered and incorporated at the time when the CPA was drafted. It is argued, which argument I substantiate, that section 48 of the CPA could have been drafted in such a way as to give more guidance on the meaning of "unfair, unjust or unreasonable", in accordance with the models from other legal systems, and regulation 44(3) should have been incorporated in section 48 of the CPA.[536]

Further to the aforesaid, section 51 of the CPA, containing the so-called black-list, contains a relatively limited list of contract terms which are prohibited. The consequence of the current wording of sections 48 and 51 of the CPA is that many of the problematic terms commonly

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[531] In this regard, see Stoop and Chürr 2013 (16) 3 *PER/PELJ* 545. (also available at http://www.saflii.org/za/journals/PER/2013/73.html# ftnref24) (accessed on 6 October 2018).
[532] Stoop *"Plain language and the assessment of plain language"* 2011 (4) *International Journal of Private Law* 329 at 332.
[533] Section 62 of the CRA.
[534] "Section 48" in Naudé and Eiselen *Commentary* (2016) para 48-26.
[535] Section 24(4) of the ACL.
[536] "Section 48" in Naudé and Eiselen *Commentary* (2018) para 48-30.

blacklisted or grey listed in other countries' corresponding legislation are not titled in the CPA.[537] However, section 2(2) of the CPA permits courts to look at international and foreign law for guidance, as it is essential to consider similar provisions of legislation enacted in foreign countries due to the gaps in the current wording of the CPA.

[537] Naudé 2009 (126) 3 *SALJ* 537.

CHAPTER 6: CONCLUSION

6.1 Background

As consumers we have entered or had to enter into a contract of some sort at least once in our lives. In the majority of such contract conclusions the consumer is on the short end of the bargaining position. This happens, for example, when a consumer enters into a cell phone contract with a service provider or into a lease agreement, or merely enters the parking area of a shopping centre. The supplier in all the listed circumstances will include some sort of exemption clause; in the vast majority of cases, such clauses are intended to exclude the liability of the supplier.

South African private law (with specific reference to the common law of contract) is in fact uncodified. Our law of contract was recognised and founded on the principle of freedom of contract, which was subsequently founded on the concept of individual objectivity and sanctity of contracts.[538] Based on the principle of freedom of contract, if a contract was concluded and such a contract contained an exemption clause, the parties agreeing to the terms set out in such a contract would be bound to the terms thereof, irrespective of the fairness of the exemption clause.[539]

Exemption clauses ascend in different forms and practices and are stereotypically used in standard-form contracts.[540] An example of an exemption clause is the exclusion liability for a damages claim against a supplier due to any default or breach of the contract by the supplier. Such clauses have customarily had a bad reputation since they are often unreasonable and being abused by the contracting party in the stronger bargaining position.[541]

An exemption clause has always been seen as the rule rather than the exception in standard-form contracts, and it can therefore be said that the other contracting party, namely, the one in the

[538] Hopkins 2007 *De Rebus* 23.
[539] *Burger v Central South African Railways* 1903 TS 571 578; *Natal Motor Industries Ltd v Crickmay* 1962 2 SA 93 (N) 96; *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991; *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA).
[540] Stoop 2008 (20) 4 *SA Merc LJ* 496; Van der Merwe *et al Contract: general principles* (2016) 297. For a detailed definition of the concept of standard-form contracts, see Kanamugire 2013 (4) *MJSS* 339–340.
[541] Stoop 2008 (20) 4 *SA Merc LJ* 496.

weaker bargaining position, in fact has no *real* freedom concerning the contract terms. This is because the majority of such terms are not subject to negotiation.[542] For this reason one can say that a consumer is confronted with a take-it-or-leave-it situation and is inhibited to agree to the provisions set forth in such a standard-form contract. In fact, the consequence of the aforesaid is that no actual freedom of contract exists, and it can therefore be said that the freedom is quite theoretical or formalistic.[543] This factor must be considered by the courts where the supplier depends on a disclaimer notice or exemption clause to reduce, alternatively, to abolish its liability.

Preceding the enactment of the CPA, in the instance where the fairness of exemption clauses was to be determined, the common law, public policy, ubuntu and the rights of each consumer rooted in the Constitution were considered and weighed against the possible effect of such an exemption clause. In accordance with the common law, the enforceability of exemption clauses was considered on the basis of consensus, lack of the necessary notification, public policy, restrictive interpretation, negligence, *dolus* and fraud.

One of the most important requirements for a binding contract is consensus, or a proper meeting of the minds, between the relevant parties to the contract.[544] Consensus can, however, be influenced by a number of elements, which in certain circumstances are so severe that they affect the validity of the contract. Misrepresentation is one such element.[545]

However, in most agreements, with specific reference to the so-called ticket cases, true consensus is hardly ever reached where the agreement is entered into on a take-it-or-leave-it basis.[546] Consequently, the party in the weaker bargaining position will be burdened by the party in the stronger bargaining position.[547] It is unfortunate that in the majority of such circumstances, where no true consensus has been reached between the contracting parties, the courts have been unsuccessful in protecting the contracting party to an agreement or contract who did not

[542] Sharrock 2010 (22) 3 *SA Merc LJ* 296. With the exception of negotiation regarding the price of the goods or services, the relevant payment terms, the delivery date and time, as well as any possible warranties.
[543] See Stoop 2008 4 *SA Merc LJ* 496–497; Naudé 2006 (3) *Stell LR* 366; Bhana and Pieterse 2005 (122) *SALJ* 885.
[544] Van Der Merwe *et al Contract: general principles* (2016) 90; *Bourbon Leftley v WPK (Landbou) Bpk* 1999 1 SA 902 (C).
[545] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A)4471; *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) 906.
[546] See generally *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (A).
[547] Stoop 2008 (20) 4 *SA Merc LJ* 497.

expect that the terms of such an agreement or contract, to which they appended their signature, would be bound to them.

Public policy plays an important role when the courts determine whether an exemption clause is recognised when interpreting the contract.[548] Public policy imported concepts of justice, reasonableness and fairness, and the application thereof, will prohibit the implementation of a term which would probably result in injustice. As long ago as 1902, the courts measured exemption clauses against public policy.[549] In *Brisley v Drotsky*,[550] it was held that public policy is now entrenched in our Constitution and the essential values, associated with it, is safeguarded. It includes human dignity, the realisation of equality and the development of human rights and freedom, non-racialism and non-sexism.[551] This norm was confirmed by the CC in *Barkhuizen v Napier*.[552]

Preceding the enactment of the CPA, the purpose of an exemption clause was to enforce imbalanced and unwarranted conditions on a consumer. The SCA, as well as the CC, have established that our common-law principles of law of contract are subject to the Constitution.

The Constitution marks a turning point in the South African contract law, with specific reference to the use and enforcement of, specifically, exemption clauses. As a result, exemption clauses can be declared invalid if they are in conflict with public policy. Public policy, in turn, is rooted in the Constitution and is accompanied by the concepts of good faith and ubuntu, as constitutional interests.

The effect of the Constitution on the implementation of an exemption clause has been noteworthy. It can consequently be said that the principles of freedom of contract and holiness of contract are no longer the only concerns. With the enactment of the Constitution, the values of

[548] *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775 784–785 had this to say about the notion of public policy: "Now in our law it is a principle that agreements *contra bonos mores* will not be enforced, and that is in reality the same as the English maxim as to contracts against public policy. It is a wide-reading principle … to succeed on the ground of public policy it must be shown that the arrangement necessarily contravenes or tends to induce contravention of some fundamental principle of justice or of general statutory law, or that it is necessarily to the prejudice of the interests of the public."
[549] *Eastwood v Shepstone* 1902 TS [294, 302]; *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775.
[550] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[551] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[552] *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) [29].

reasonableness, fairness and good faith have materialised, and when the courts have to determine the validity of exemption clauses, these values have to be taken into consideration.

Consumer rights and legislation protecting the consumer throughout the world are designed to afford consumers the opportunity to fight back against offensive business practices with reference to unfair contract terms, specifically exemption clauses. Considering the relevant provisions in the ACL and the CRA, it is clear that the drafters of the CPA unfortunately neglected to insert clear and precise corresponding provisions.

Consumer rights and legislation protecting the consumer worldwide afford the consumers the opportunity to "fight back" against offensive business practices with regard to unfair contract terms, specifically exemption clauses.

6.2 The CPA and its shortcomings

The CPA specifies essential consumer rights that include the right to equality, to privacy, the right to choose, the right to fair disclosure of information, to fair and responsible marketing, to fair and truthful dealing, to fair, just and reasonable terms and the right to fair value, good quality and safety.[553]

With the enactment of the CPA, minimum requirements were set out to guarantee satisfactory consumer protection in our country. Even though the CPA is a step in the right direction, in some instances this legislation has failed; alternatively, it has neglected to put proper thoughts to paper.

When drafting an exemption clause, the drafter should bear in mind that the exact wording of such a clause, the manner in which it is drafted, and its purpose will ultimately determine whether the it is unfair, unjust or unreasonable.

Section 22 stipulates that the relevant documentation referred to in this section should be in the form set by the CPA. Should there be no such form, the relevant documentation ought to be in plain (simple) language.[554] Section 22 is consequently applicable only to notices (required by legislation), visual representations (i.e. disclaimer boards at shopping centres, venues, etc) and

[553] Van Huyssteen, Lubbe and Reynecke *Contract: general principles* 18.
[554] Section 22(1)(b) of the CPA.

written agreements (exemption clauses written on the back of access cards, etc). Section 22 does not apply to oral agreements.[555]

As correctly stated by Stoop[556], the prerequisite of plain language is procedural as it is focused on the drafting of terms, rather than the effect thereof. It was held in the *Four Wheel Drive* case[557] that the right at stake in the agreement *in casu* is the right to information in plain and understandable language provided in section 22 of the CPA. The agreement *in casu* was not "in plain language" as Mr Murton was unable to interpret, understand and explain the contents thereof, regardless of it being his job to do so. The court further held that in terms of section 22(1)(b), the producer of the agreement *in casu* was required to comply with the requirement that it must be in plain language, if no form has been prescribed. The agreement *in casu* failed to satisfy the definition of *clearly* in that the quality of its text did not meet the requirements of section 22. It is interesting to note that, as stated by Pillay J in the *Four Wheel Drive* case, enquiries reveal that the National Consumer Commission had not published the guidelines anticipated in section 22 of the CPA.[558]

I am of the opinion that, in the absence of guidelines set by the Commission in terms of section 22, a definition of plain language should be inserted in the CPA to eliminate any confusion, alternatively, to eliminate extensive and expensive litigation, in order to decide whether an exemption clause is indeed in plain language. The mere definition of "clearly" is not adequate when deciding whether an exemption clause complies with the requirements set out in section 22.

Over and above the aforesaid section of the CPA, it should be noted that section 48 of the CPA provides that every consumer has the right to fair, just and reasonable terms and conditions. This section furthermore sets out the circumstances under which terms and conditions will be unfair. Further to the aforesaid, section 48 of the CPA sets out the circumstances under which notice for certain terms and conditions is mandatory. Section 50 of the CPA provides details as to when consumer contracts should be reduced to writing. Section 51 of the CPA sets out the so-called

[555] Du Preez 2009 (1) *TSAR* 58 75.
[556] Stoop *The concept "fairness" in the regulation of contracts under the Consumer Protection Act 68 of 2008* 206.
[557] *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO* 2018 JDR 2203 (SCA) [61–62].
[558]Section 22(3) and (4) of the CPA. See also footnote 70 of the *Four Wheel Drive case.*

black-list terms (i.e. the prohibited terms). Section 52 refers to the powers of the court to guarantee fair conduct, terms and conditions.[559]

Certain terms are assumed to be unfair if they comprise one or more of the purposes or consequences set out in regulation 44(3).[560] For that reason regulation 44(3) is branded the so-called grey list.[561] It is said that the grey list holds a list of terms which would possibly be unfair.[562] [563] The ultimate judgment of a court on whether a term is unfair, is predisposed to the state of affairs of each specific situation.[564] A grey list is therefore not exhaustive but it gives a good indication of what constitutes fairness. It should be borne in mind that, unless a challenged term is contained in the so-called grey list, as set out in regulation 44(3) of the CPA, the onus to prove the unfairness of such term will directly fall on the consumer. The consumer therefore bears the "risk of non-persuasion" with reference to terms not contained in regulation 44(3).[565] I am of the view that the onus should be on the supplier, in all circumstances, where the fairness of an exemption clause is in dispute.

Section 49, in turn, sets out three requirements in relation to the four types of terms listed in subsection 1 thereof. The first requirement is that they should be in plain and simple language;[566] the second, that their presence, nature and effect should be conveyed to the consumer in a noticeable and conspicuous form;[567] and the third, that the consumer must be given reasonable opportunity to accept and understand these terms.[568]

In addition to the three requirements set out in section 49(3)–(5), section 49(2) states that the consumer must also sign or initial provisions relating to the risks as listed in this section. Even though the possible risks that, for example, an amusement park attempts to exclude, can qualify

[559] See chapter 4 for an in-depth discussion of each of these sections.
[560] Stoop *The concept "fairness"* 102.
[561] Ideally, the grey list should have been included in the text of the Act, in the same part as the black list. It would then have had greater legitimacy and would have been more prominent and accessible to consumers. See Naudé 2009 (126) 3 *SALJ* 521.
[562] Stoop *The concept "fairness"* 102.
[563] The terms listed in regulation 44(3) may still be fair in the particular circumstances of the case.
[564] Naudé 2007 (124) 1 *SALJ* 130.
[565] "Section 48" in Naudé and Eiselen *Commentary* (2016) para 48-26.
[566] Section 49(3) of the CPA.
[567] Section 49(4)(a) of the CPA. This must be done "*before the earlier of the time at which the consumer … enters into the transaction or agreement, begins to engage in the activities, or enters or gains access to the facility, or … is required or expected to offer consideration for the transaction or agreement.*" See section 49(4)(b)(i)–(ii).
[568] Section 49(5) of the CPA.

under section 49(2), such clauses merely reflect either on the reverse side of the entrance ticket or are presented on a disclaimer board at the entrance of the amusement park, making it impossible to adhere to the provisions of section 49(2).

Naudé[569] states that the counter-signing prerequisite set out in section 49 of the CPA is particularly challenging, and substantive unfairness alone ought to be sufficient reason for setting aside a term, irrespective of procedural traits such as the consumer's familiarity and understanding of the term, as verified by his signature. This requirement should be abolished, as most consumers, whether the consumer is a layperson or someone with the necessary knowledge, sign agreements without reading the entire agreement. Notwithstanding the aforesaid, most suppliers do not always grant consumers the opportunity to read all the terms and conditions. They merely direct them to sign at the designated spots. For example, when you as a consumer are admitted to hospital, you may not be given the opportunity to read the terms and conditions before you sign the admission documents.

Bearing in mind the grey list contained in regulation 44(3), section 51 of the CPA, which contains the so-called black list, provides a relatively limited list of contract terms that are prohibited. Notwithstanding regulation 44(3), there is no grey list in the text of the CPA. This means that many of the problematic terms, ordinarily blacklisted or grey listed in other countries' legislation, are not referred to in the CPA.[570] It is clear from this section that a supplier who wishes to limit or exempt its liability for any direct or indirect loss due to gross negligence of the supplier is not allowed. However, liability for any direct or indirect loss due to negligence causing personal injury or death is not contained in section 51, clearly being an oversight as legal systems,[571] did indeed included such clauses in their blacklisted terms, and I therefore submit that such terms should have indeed been included in the CPA.[572]

Section 52 of the CPA provides the courts with wide authority to safeguard fair and just conduct if it finds that a transaction is unconscionable, unjust, unreasonable or unfair. These powers would include making appropriate cost orders. This section was correctly applied in the *Four Wheel Drive*

[569] Naudé 2009 (126) 3 *SALJ* 512.
[570] Naudé 2009 (126) 3 *SALJ* 521.
[571] See, for example, Unfair Contract Terms Act 1977 (UK), section 2(1); section 6(1)(a) of the Australian Consumer Protection Act. These pieces of legislation will be discussed in chapter 5.
[572] See Naudé 2009 (126) 3 *SALJ* 510. Naudé considers that section 49(2) of the CPA, by laying down specific incorporation requirements for such clauses, impliedly sanctions them.

case.[573] Naudé submits that section 52 is written merely with the paradigm of court action relating to an individual agreement with a particular individual consumer in mind, which is questionable.[574] Subsections (1) and (3) confer power on the courts regarding only transactions or agreements between a supplier and a consumer. Subsection (2) provides a list of factors applicable to the assessment of fairness. This exclusive paradigm of judicial control over individual consumer agreements is extremely challenging in the consumer context, given the inherent limitations of court action.[575]

Considering the drafting of the provisions of the CPA and the necessary recommendations, another issue that should be addressed with regard to the CPA relates to section 69.[576] This section is of significance even though it has not been discussed in this dissertation because section 69 regulates the enforcement of rights by the consumer. The intention of the legislature by implementing section 69 was clearly to ensure that the consumer has a less expensive resort by relying on the CPA. However, this is not always the case as the relevant ombud does not in all cases have the necessary jurisdiction to adjudicate., This would, in any event, force the consumer to approach the civil court, which the consumer could have done from the outset. Based on personal experience with the National Consumer Commission, I lodged a query pertaining to the aforesaid, and received the following response from the legal advisor of the National Consumer Commission:

> Dear Consumer
>
> The National Consumer Commission acknowledges receipt of your request for advice dated 13th December 2017. Yours [sic] cautions [sic] approached [sic] [your cautious approach] of exhausting sector specific remedial action in terms of Section 69 of the Consumer Protection Act 68 of 2008 as confirmed by the Joroy case is a safer one. The National Consumer Tribunal (NCT), however, recently ruled in NCC v Western Cars Sales NCT/81554/2017/73/(2)(b) that adjudication of Section 48 read with 52 remains exclusive reserve of the courts.
>
> ...
>
> Depending on your prayers, if you are seeking the agreement either to be declared partially, wholly invalid or remedied you will have to rely on section 52, and if the NCT approach is correct you do not need to observe section 69. [If,] however, in your prayers you [are] seeking to declare non-compliance with section 7 read with regulation 2 and 3 as a prohibited conduct then you would

[573] *Drive CC v Leshni Rattan NO* (1048/17) [2018] ZASCA 124 (26 September 2018) [68–69].
[574] Naudé 2009 (126) 3 *SALJ* 526–527.
[575] Naudé 2009 (126) 3 *SALJ* 526–527.
[576] A mere reference is made to this section, as the application of the relevant section of the CPA pertaining to exemption clauses is affected by this clause.

probably have to demonstrate that you have exhausted sector specific remedial action by starting with lodging a complaint with the NCC.

From the aforesaid it appears that the adjudication of section 48, read with section 52, of the CPA falls squarely into the jurisdiction of the civil court. However, with regard to the remaining relevant sections of the CPA, and the enforceability thereof, the consumer should be entitled to elect the necessary forum in which he intends to proceed with the application of the CPA.

6.3 Final conclusion

Notwithstanding the aforesaid, the shift towards consumer alertness and fair-mindedness when entering into an agreement through the CPA is of great value. However, to ensure that the consumer is protected to the maximum, certain amendments, as indicated above, to the CPA must be made to guarantee actual safeguard against unfair terms. However, the protection offered to the consumer remains limited. It should be noted that exemption clauses still remain lawful, binding and enforceable if their wording is unambiguous,[577] in other words, if they comply with section 22, read with section 49(3)–(5), of the CPA and exclude terms listed in regulation 44(3) and section 51 of the CPA.

The CRA, alternatively, the ACL has clear and precise definitions regarding transparency (plain language), unfair terms and a clearer indication as to which terms are automatically unfair and which terms are deemed to be unfair. Until such time as the National Consumer Commission and the Minister[578] deem it fit to amend the current wording of the CPA to ensure utmost protection to consumers, the courts must have more regard to international and foreign law regarding the enforcement of an exemption clause.

Taking all the aforesaid into account, it is important to note that exemption clauses in their totality will not die away as they would possibly play a significant part in assigning the risk between parties in instances where none of the parties were responsible. Exemption clauses must be formulated and conveyed in accordance with the CPA, and taking advantage of a consumer by making use of such clauses will subsequently come to an end.

[577] Hutchison and Pretorius *The law of contract* 271. See also Marx and Govindjee 2007 28(3) *Obiter* 629, 631; Stoop 2008 4 *SA Merc LJ* 496–509; and Brand and Brodie *Good faith in contract law* 108.
[578] As defined in section 1 of the CPA.

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