

# FACTORS RELEVANT TO THE ASSESSMENT OF THE UNFAIRNESS OR UNREASONABLENESS OF CONTRACT TERMS: SOME GUIDANCE FROM THE GERMAN LAW ON STANDARD CONTRACT TERMS\*

Tjakié Naudé  
BA LLB LLD  
Professor, University of Cape Town

Charlotte Koep  
BBusSci LLB  
Associate, Bowman Gilfillan Inc

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## 1 Introduction

Section 48 of the Consumer Protection Act 68 of 2008 (“CPA”) prohibits unfair, unreasonable and unjust terms in contracts governed by the Act.<sup>1</sup> But how is the fairness of a term to be assessed? Section 48(2) of the CPA attempts to give some guidance by providing that there is unfairness *inter alia* when the term is excessively one-sided against the consumer or when it is so adverse to the consumer to be inequitable.<sup>2</sup> In addition, section 48(2) provides that a term could be unfair if it was induced by a misrepresentation prohibited by section 41 or if the prominence requirements of section 49 were not met.<sup>3</sup> Section 52(2) then provides a list of factors which courts “must” consider when applying section 48. These are:

\* This article is partly based on an unpublished LLB research paper submitted by Charlotte Koep to the University of Cape Town in 2012, written under the supervision of Tjakié Naudé

<sup>1</sup> For the scope of the CPA and more on the provisions on unfair terms therein see RD Sharrock “Judicial Control of Unfair Contract Terms: The Implications of the Consumer Protection Act” (2010) 22 *SA Merc LJ* 295-325; PN Stoop *The Concept “Fairness” in the Regulation of Contracts Under the Consumer Protection Act 68 of 2008* LLD thesis University of South Africa (2012) 1-277; E de Stadler “Section 5” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (OS 2014) 5-1; T Naudé “The Consumer’s Right To Fair, Reasonable and Just Terms under the New Consumer Protection Act in Comparative Perspective” (2009) 126 *SALJ* 505-536; T Naudé “Enforcement Procedures in Respect of the Consumer’s Right to Fair, Reasonable and Just Terms under the New Consumer Protection Act in Comparative Perspective” (2010) 127 *SALJ* 515; T Naudé “Introduction to ss 48 to 52” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (OS 2014) 48-1; T Naudé “Section 48” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (OS 2014) 48-13; T Naudé “Section 52” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (OS 2014) 52-1

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

<sup>3</sup> S 49 essentially requires that four types of terms, namely exemption clauses, assumptions of risk, indemnity clauses and acknowledgments of fact, be set out in a conspicuous manner and form likely to attract the attention of an ordinarily alert consumer. If the term relates to certain risks the consumer must also sign next to it

- “(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;
- (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 [on plain and understandable language];
- (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.”

The majority of these factors relate to so-called procedural unfairness, and thus focus on the particular circumstances of the individual consumer involved in relation to the contracting process, such as their bargaining power or knowledge of the term. However, some of the factors are relevant to the substantive fairness of a term, most importantly the reference to the legitimate interests of the supplier contained in section 52(2)(f).

The aim of this paper is to consider some factors which German courts regard as relevant when they apply their general clause, § 307(1) of the German Civil Code, on the control of the content of standard contract terms. These factors are not currently listed as relevant in section 52(2) of the CPA, but do have an important bearing on the fairness of a term.

The German general clause essentially provides that “provisions in standard business terms are ineffective if contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user.”<sup>4</sup> The German Civil Code itself does not contain a list of factors, but some factors have crystallised in decades-old case law that are discussed in academic commentaries. The European Communities Council Directive on Unfair Terms in Consumer Contracts<sup>5</sup> (the “EC Directive”), to which Germany is subject, also mentions relevant factors which will be briefly set out below.<sup>6</sup> (It should be noted that the EC Directive merely lays down a minimum threshold

<sup>4</sup> § 307(1) of the German Civil Code. All translations of provisions in the German Civil Code in this contribution are by the German Ministry of Justice. See German Ministry of Justice “German Civil Code BGB” (2014) *Ministerium der Justiz und für Verbraucherschutz* <[http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/)> (accessed 30-01-2015). The “user” is the party who offers to contract on the standard terms. The other party who “agrees” to contract on the user’s standard terms will be called “the adhering party” or “the consumer” or “the client” in this contribution.

<sup>5</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

<sup>6</sup> These factors will be listed in part 6 below.

of consumer protection and that member states may exceed its standard of consumer protection).

How could the German experience possibly be relevant to South African law? The CPA provides that, when interpreting the CPA, regard may be had to appropriate foreign and international law.<sup>7</sup> Hopefully, comparative research may also persuade the legislature to improve the text of the CPA.

Obviously absolute certainty and predictability are impossible ideals when applying open norms like fairness and reasonableness, because so much depends on the facts of each case. It is still useful, however, to identify factors that would inform the application of these open norms, in the interest of providing more predictability. The goal of predictability is part of the fairness ideal. It would be unfair to potential litigants if they had no idea how a court would approach their dispute on the fairness of a term, and therefore no idea of the wisdom of spending lawyer's fees and time on the dispute.

In the next part of this article, the scope of content control under the German Civil Code (part 2) is considered. Thereafter, part 3 provides more context in relation to the general clause in § 307(1), for example how it relates to the grey and black lists of prohibited clauses in §308 and §309 of the German Civil Code. Part 4 considers the wording of § 307, after which application of this provision in practice is discussed in part 5. Part 5 is the heart of the paper and focuses on factors deemed relevant by German courts in the application of § 307(1). In part 6, further factors contained in the EC Directive are set out briefly, before conclusions are drawn in part 7.

## 2 Scope of content control under the German Civil Code

§§ 305 to 310 of the German Civil Code contain the provisions on standard terms. § 307, the general clause, applies to standard terms in business-to-consumer ("B2C") and business-to-business ("B2B") contracts. However, in B2C contracts, non-negotiated terms more generally (even if drafted for only one transaction) are also subject to review.<sup>8</sup> This extension to other non-negotiated terms apart from standard terms was required by the implementation of the EC Directive.<sup>9</sup>

Negotiated terms in both B2C and B2B contracts may yet be attacked for being contrary to public policy under § 138 of the German Civil Code, a higher threshold enquiry than unreasonableness under § 307. A discussion of the public policy standard of § 138 is beyond the scope of this article.<sup>10</sup>

By contrast, section 48 of the CPA applies the unfairness standard to all terms in contracts between suppliers and natural persons and also to all

<sup>7</sup> S 2(2) of the CPA

<sup>8</sup> § 310(3) of the German Civil Code

<sup>9</sup> The EC Directive applies to all non-negotiated terms, a wider category than standard terms as non-negotiated terms include terms drafted only for one use and not for general and repeated use

<sup>10</sup> See T Pfeiffer "§ 307" in M Wolf, WF Lindacher & T Pfeiffer *AGB-Recht Kommentar* 6 ed (2013) 267 276-278 See § 307 paras 15-26 for a comparison between § 138 and § 307

terms in the business-to-small-business contracts covered by the CPA.<sup>11</sup> The scope of control is therefore wider under section 48 than under § 307 as it includes negotiated terms and core terms, such as the price, which is specifically mentioned. However, a consideration of German law's narrower general clause is still relevant to sections 48 and 52 of the CPA, as most terms in consumer contracts are not negotiated anyway.

### 3 § 307(1) in context

#### 3.1 Relationship to the grey and black lists in §§ 308 and 309

To further explain the scope of § 307, its relationship to the grey and black lists in the German legislation should be briefly set out. The German grey and black lists of §§ 308 and 309 are both quite extensive lists of prohibited clauses. The only reason why the list in § 308 is called a grey list is because the items in it contain open-ended terms calling for an evaluation, such as “unreasonably long or insufficiently specific periods of time for acceptance or rejection of an offer or for rendering performance”<sup>12</sup> or “a provision by which the user may demand unreasonably high remuneration for enjoyment or use of a thing or a right or performance rendered” in the event that the contract is terminated.<sup>13</sup> Once the court decides, for example, that the time for performance is “unreasonably long” or the remuneration “unreasonably high”, the term is prohibited. Therefore, recourse cannot be had to the general clause in § 307(1) to argue that it is fair.<sup>14</sup> However, regard could be had to the basic standard in § 307 when applying the open-ended evaluative criteria in the grey list of § 308.<sup>15</sup>

By contrast, the items in the South African grey list in regulation 44 of the Consumer Protection Act Regulations<sup>16</sup> are only presumed to be unfair and are not prohibited outright.<sup>17</sup> A South African court must therefore still apply the general unfairness standard of section 48 read with the factors in section 52 to ascertain whether a grey-listed clause is fair in the particular circumstances of the case. It should also be noted that South Africa has a very short blacklist in section 51 of the CPA hence the general clause, section 48, has a potentially broader application than § 307(1) of the German Civil Code.

Of course, § 307 still plays a role in clauses that are not covered in the black and grey lists, such as clauses excluding liability for ordinary negligence, as

<sup>11</sup> Section 5 of the CPA excludes transactions in which “the consumer” is a juristic person with an asset value or annual turnover above a threshold determined by the Minister (currently R2 million) from the ambit of the CPA. However, section 61 on damage caused by goods applies in favour of all juristic persons (s 5(5)) and this product liability may thus not be excluded by agreement.

<sup>12</sup> § 308(1) of the German Civil Code.

<sup>13</sup> § 308(7).

<sup>14</sup> See also *Vorbem v § 307 para 9* in A Fuchs “Vorbemerkungen zur Inhaltskontrolle” in G Christensen, A Fuchs, M Habersack, C Schäfer, H Schmidt & A Witt *Ulmer Brandner Hensen AGB-Recht* 11 ed (2011) 501 506; § 307 para 23 in W Wurmnest “§ 307” in W Krüger (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 2 Schuldrecht Allgemeiner Teil* 6 ed (2012) 1197 1209.

<sup>15</sup> § 307 para 10 in M Coester “§ 307” in M Coester, D Coester-Waltjen, R Krause & P Schlosser *Staudinger Sonderedition AGB-Recht* (2014) 221 242; Pfeiffer “§ 307” in *AGB-Recht* 274.

<sup>16</sup> The Consumer Protection Act Regulations GN R 293 in GG 34180 of 01-04-2011.

<sup>17</sup> However, reg 44 recognises the possibility that such terms may be prohibited under other law.

well as to all standard terms in B2B contracts.<sup>18</sup> The black and grey lists of German law only apply to true B2C contracts.<sup>19</sup>

### 3.2 The role of the Constitution

Further context to be provided is that German courts also apply § 307 in the light of the German Constitution, as South African courts would do with the Constitution of the Republic of South Africa, 1996 (“Constitution”) when applying section 48 read with section 52.<sup>20</sup>

### 3.3 Case law and literature on certain types of clauses and types of contract

It should also be noted that a vast amount of case law on certain types of clauses and certain types of contracts has been systemised and categorised by academic commentators on § 307 and § 308, using the German *Fallgruppen* (“categories of cases”) approach, thereby elucidating the concept of “unreasonableness”. This falls outside the scope of this paper which will simply focus on the general factors taken into account when applying § 307.

### 3.4 Consequences of an unreasonable disadvantage under § 307

When clauses fall foul of §§ 307 to 309 they are ineffective, but the contract as a whole will normally remain intact.<sup>21</sup> Courts fill the resultant gaps with dispositive law or interpretation of the contract.<sup>22</sup> Modification of an ineffective clause to remove its offending aspects is not allowed by the German courts.<sup>23</sup> The European Court of Justice (“ECJ”) has also confirmed that allowing national courts to alter an unfair contract term to eliminate the unfairness, is incompatible with the EC Directive.<sup>24</sup> The ECJ therefore wants to prevent the inclusion of unfair terms by suppliers, free of the risk that these would be completely ineffective. The willingness of German courts to interpret a clause restrictively to render it effective<sup>25</sup> has been criticised as being contrary to the ECJ’s insistence that the offending term may not

<sup>18</sup> See also § 307 para 11 in Coester “§ 307” in *Staudinger* 242; *Vorbem v § 307* para 8 in Fuchs “Vorbemerkungen” in *Ulmer Brandner Hensen* 505

<sup>19</sup> § 310(1) of the German Civil Code Not to contracts with an entrepreneur, a legal person under public law or a special fund under public law However, these lists have a so-called reflective effect on B2B contracts as courts may informally take them into account when considering the reasonableness of terms in such contracts, particularly when the adhering party is a small business with little bargaining power See *Vorbem v § 307* paras 11, 163 in Fuchs “Vorbemerkungen” in *Ulmer Brandner Hensen* 507 665

<sup>20</sup> § 307 para 53 in Wurmnest “§ 307” in *Münchener Kommentar* 1220; § 307 para 176 in Pfeiffer “§ 307” in *AGB-Recht* 325 with examples

<sup>21</sup> § 307 para 344 in Pfeiffer “§ 307” in *AGB-Recht* 380

<sup>22</sup> § 307 para 54 in Coester “§ 307” in *Staudinger* 265; § 307 paras 344-346 in Pfeiffer “§ 307” in *AGB-Recht* 380-381

<sup>23</sup> § 307 para 55 in Coester “§ 307” in *Staudinger* 265

<sup>24</sup> *Banco Español de Crédito v Joaquín Calderón Camino* (2012) C-618/10; *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani* (2013) C-488/11

<sup>25</sup> See § 307 para 55 in Coester “§ 307” in *Staudinger* 265; § 307 paras 36, 345 in Pfeiffer “§ 307” in *AGB-Recht* 282 345; BGH NJW 2012, 1865

be rewritten and revised.<sup>26</sup> However, the same critics note that “where total nullity of the clause would work to the detriment of the consumer” a balanced interpretation of the clause may be upheld by referring to national law.<sup>27</sup>

By contrast, section 52 of the CPA expressly allows a court to alter the offending provision “to the extent required to render it lawful”.<sup>28</sup> This is problematic as it may encourage suppliers to cynically include unfair terms in their standard terms knowing that a court is still likely to uphold the term and merely alter it to the extent necessary.<sup>29</sup> Section 52 may also perhaps create the impression that only a court could declare a term unfair and therefore sever it from the agreement. This may create the impression that section 48 has no extra-judicial effect, so that consumers are forced to approach a court to challenge a term. However, an interpretation of section 52 in accordance with the purposes of the CPA as set out in section 3, should lead to the recognition of the extra-judicial effect of section 48, with section 52 only becoming relevant once a dispute reaches a court.

### 3.5 Exclusion of content control by agreement

It is not possible to exclude the operation of § 307 by standard term, but otherwise invalid unreasonable standard terms can be confirmed by individually negotiated agreement in terms of § 141 of the German Civil Code. § 141 provides that “[i]f a void legal transaction is confirmed by the person who undertook it, the confirmation is to be seen as a renewed undertaking.”<sup>30</sup> However, as noted above, no contract term may be contrary to public policy, the higher threshold of control in terms of § 138.<sup>31</sup>

## 4 The wording of § 307 itself

§ 307(1) of the German Civil Code provides that “a term is ineffective if contrary to the requirement of good faith; it unreasonably disadvantages the other party to the contract with the user” (the adhering party). In addition, it provides that “an unreasonable disadvantage may also arise from the provision not being clear and comprehensible.”<sup>32</sup>

§ 307(2) provides for two instances in which an unreasonable disadvantage is to be assumed, namely

- “if a provision is not compatible with essential principles of the statutory provision from which it deviates”; or

<sup>26</sup> HW Micklitz & N Reich “The Court and Sleeping Beauty: the Revival of the Unfair Contract Terms Directive (UCTD)” (2014) 51 *CML Rev* 771-793

<sup>27</sup> 793

<sup>28</sup> Section 52(4)(a) of the CPA

<sup>29</sup> See Micklitz & Reich (2014) *CML Rev* 792-793 on the motivation for the case law under the EC Directive

<sup>30</sup> § 307 para 58 in Coester “§ 307” in *Staudinger* 266; BGH NJW 1985, 57, 58; Official translation of section 141 by the German Ministry of Justice. The EC Directive has the effect that content control of non-negotiated terms in consumer contracts is mandatory

<sup>31</sup> For more on the relationship between § 307 and § 138 see § 307 paras 15-26 in Pfeiffer “§ 307” in *AGB-Recht* 276-278

<sup>32</sup> § 307(1) of the German Civil Code

- “limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised”.

The reference to statutory provisions in the first instance in which an unreasonable disadvantage is to be assumed, is intended to refer to the *ex lege* rules. These rules are laid down in the German Civil Code and other legislation (given that Germany has a codified legal system). These two presumptions in § 307(2) are helpful in the assessment of fairness, but they are not mentioned in the list of factors in section 52 of the CPA nor in section 48. Perhaps the first presumption could be reworded for inclusion in section 52(2) as “whether a term is not compatible with essential principles of the law that would apply in its absence.” There is some implicit support for the relevance of these factors to the unfairness assessment of section 48 in pre-CPA case law, particularly for the second criterion that refers to the nature of the contract.<sup>33</sup> It has been argued, on the basis of historical authority and implicit support, in *Vrystaat Motors v Henry Blynaut Motors*<sup>34</sup> and *Alpha Trust (Edms) Bpk v Van der Watt*<sup>35</sup> that a term may be contrary to public policy if it conflicts with the nature or essence of the contract so that the purpose of the contract is jeopardized, as this may show that the bargaining power of the adhering party was fatally impaired, with the user of the term taking unconscionable advantage of this situation.<sup>36</sup> The current contribution will not focus on how German courts have applied the two presumptions in § 307(2), but rather on some factors which the courts take into account when applying the general clause in § 307(1).<sup>37</sup>

## 5 The application of § 307(1) in practice, compared to relevant provisions in the CPA

### 5.1 A “disadvantage”

First, a German court would ascertain whether the term causes a disadvantage to the adhering party.<sup>38</sup> To do this, the standard term is compared to the legal position in the absence of the term.<sup>39</sup> The degree to which the term deviates from what the law would have been in its absence also remains a factor in the unreasonableness enquiry.<sup>40</sup> Courts align their

<sup>33</sup> T Naudé & G Lubbe “Exemption Clauses: A Rethink Occasioned By *Afrox Healthcare Bpk v Strydom*” (2005) 122 *SALJ* 441 441-463

<sup>34</sup> 1996 2 SA 448 (A)

<sup>35</sup> 1975 3 SA 734 (A)

<sup>36</sup> Naudé & Lubbe (2005) *SALJ* 441 This article was cited with approval by the SCA in *Mercurius Motors v Lopez* 2008 3 SA 572 (SCA) para 33, in which the court held that an exemption clause “that undermines the very essence of the contract of deposit, should be clearly and pertinently brought to the attention of a consumer who signs a standard instruction form” and not just be tucked away in the fine print A court had not yet considered the further argument in this article, namely that even if such a surprising term is pointed out, it may still be contrary to public policy for the reason set out in the text above

<sup>37</sup> For more on the application of § 307(2) see, for example, § 307 paras 63-74 in Wurmnest “§ 307” in *Münchener Kommentar* 1225-1230; § 307 paras 96-156 in Pfeiffer “§ 307” in *AGB-Recht* 301-319

<sup>38</sup> § 307 para 90 in Coester “§ 307” in *Staudinger* 282; § 307 para 98 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 564 625

<sup>39</sup> § 307 para 90 in Coester “§ 307” in *Staudinger* 282; § 307 para 98 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 564 625

<sup>40</sup> § 307 para 98 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 625

findings on the unreasonableness of terms with principles underlying the *ex lege*, background rules in order to prevent a “borderless casuistry.”<sup>41</sup> If a deviation from material principles of the dispositive law is not justified by special circumstances, the term in question would be contrary to good faith.<sup>42</sup>

The ECJ has also recently emphasised the importance of the residual rules of national contract law in the assessment of the fairness of non-negotiated terms under the EC Directive.<sup>43</sup>

Unfortunately, section 52(2) of the CPA does not refer to the degree to which the term in question deviates from what would have been the law in its absence as a relevant factor. One finds support for such a factor in the South African Law Commission’s proposed Bill on unreasonableness in contract of 1998.<sup>44</sup> It should be added to the list in section 52, and until then, courts should nevertheless consider it as an important factor.

## 5.2 An unreasonable disadvantage, contrary to good faith

Once a disadvantage is established, German courts will consider whether the disadvantage is unreasonable and contrary to good faith.<sup>45</sup> Unreasonableness and good faith are not regarded as two separate criteria.<sup>46</sup> Good faith rather acts as a further clarification of the unreasonableness criterion.<sup>47</sup>

German law has long understood good faith in this context to mean primarily that the user of standard terms should not merely further his or her own interests in a one-sided, inconsiderate manner, but should also give due regard to the legitimate interests of the other party in an appropriate manner.<sup>48</sup>

In addition, good faith requires the user to consider the conceptual clarity of the standard terms.<sup>49</sup> Any avoidable uncertainty is likely to render a clause contrary to good faith and unreasonable.<sup>50</sup> The ECJ has also stated that national courts may base their decision that a term is unfair on the fact that the term fails to inform the consumer of his rights in plain and understandable language.<sup>51</sup>

<sup>41</sup> § 307 paras 98-99 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 625

<sup>42</sup> § 307 para 75 in Pfeiffer “§ 307” in *AGB-Recht* 294 See in this regard § 307(2)

<sup>43</sup> *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (2013) C-415/11 [2013] 3 CMLR 5 para 68; *Constructora Principado v José Ignacio Menéndez Álvarez* (2014) C-226/12 S 2(x) of the Bill proposed in the South African Law Commission’s Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts* Project 47 April 1998

<sup>45</sup> As required by § 307(1) See also § 307 para 101 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 626-627

<sup>46</sup> § 307 para 97 in Coester “§ 307” in *Staudinger* 285; § 307 para 97 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 624 Wurmnest regards the relationship between the two criteria as unclear, but thinks that this is not an issue of practical importance See § 307 para 32 in Wurmnest “§ 307” in *Münchener Kommentar* 1213

<sup>47</sup> § 307 para 97 in Coester “§ 307” in *Staudinger* 285; § 307 para 97 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 624

<sup>48</sup> § 307 para 97 in Coester “§ 307” in *Staudinger* 285; § 307 para 96 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 623; § 307 paras 75, 158, 177 in Pfeiffer “§ 307” in *AGB-Recht* 294, 319-320, 326; BGH NJW 1982 178, 179; BGH NJW 1990 3197, 3198; BGH NJW 1997, 3022, 3023

<sup>49</sup> § 307 para 97 in Coester “§ 307” in *Staudinger* 285; § 307 paras 74, 158, 234 in Pfeiffer “§ 307” in *AGB-Recht* 294, 320, 343

<sup>50</sup> § 307 para 97 in Coester “§ 307” in *Staudinger* 285; § 307 paras 74, 158, 234 in Pfeiffer “§ 307” in *AGB-Recht* 294, 320, 343

<sup>51</sup> *RWE Vertrieb v Verbraucherzentrale Nordrhein-Westfalen* (2013) C-92/11 See also the judgment of the ECJ in *Kásler & Káslerné Rábai v OTP Jelzálogbank Zrt* (2014) C-26/13

Because good faith places emphasis on the interests of the parties, a thorough analysis and weighing of interests must be undertaken.<sup>52</sup> This long-standing understanding of good faith is also reflected in the preamble (recitals) of the EC Directive, when read with its general clause that also refers to good faith. The preamble states *inter alia* that:

“Whereas the assessment, according to the general criteria chosen, of the unfair character of terms ... must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; ... whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account ...”<sup>53</sup>

The ECJ has recently stated that, to ascertain whether an imbalance in the parties’ rights and duties is “contrary to the requirement of good faith” under the EC Directive

“the national court must assess ... whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations”.<sup>54</sup>

This also implies that the supplier cannot only further his own interests without having regard to the legitimate expectations of the consumer.

There is also support for the understanding of good faith along the lines of German law and the EC Directive in South African law, as well as increasing signs that our courts would be prepared to afford good faith a greater role.<sup>55</sup> This is certainly justified in consumer contracts, where there is already a statutory injunction to strike out unfair contract terms. The Constitutional Court in *Botha v Rich NO*<sup>56</sup> comes close to the formulation of good faith in the German law on standard terms when it stated that “[h]onouring [a bilateral contract] cannot be a matter of each side pursuing his or her own self-interest without regard to the other party’s interests”.<sup>57</sup> An earlier comparable statement on good faith by the influential German academic, Reinhard Zimmermann, has also been quoted with approval in South Africa before the decision in *Botha v Rich NO*, as well as in *Mort NO v Henry Shields-Chait*<sup>58</sup> and by Olivier JA in his minority judgement in *Brisley v*

<sup>52</sup> § 307 para 93 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 622; § 307 para 33 in Wurmnest “§ 307” in *Münchener Kommentar* 1213; § 307 paras 157, 181 in Pfeiffer “§ 307” in *AGB-Recht* 319, 307 The analysis and weighing of interests will be considered in more depth in the next part of this article

<sup>53</sup> The general clause is Article 3 which provides that “[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”

<sup>54</sup> *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (2013) C-415/11 [2013] 3 CMLR 5 para 69 Note that the ECJ has indicated “the [European] Court [of Justice] may interpret general criteria used by the European Union legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question...” (which is the task of the domestic court) See *Photovost’ sro v Iveta Korčkovská* (2010) Case C-76/10 [2010] ECR I-11557 para 60

<sup>55</sup> See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 72

<sup>56</sup> 2014 4 SA 124 (CC)

<sup>57</sup> Para 46

<sup>58</sup> 2001 1 SA 464 (C) 475C

*Drotsky*.<sup>59</sup> Consistent with the understanding of good faith in German law, Zimmermann stated that:

“Parties must adhere to a minimum threshold of mutual respect in which the unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts.”<sup>60</sup>

It is arguable that the constitutional obligation to treat others with respect for their dignity requires the same.<sup>61</sup>

Although the CPA neither refers to the criterion of good faith, nor to a balancing of interests, at least section 52(2) of the CPA lists as a relevant factor “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”.<sup>62</sup> In addition, section 48 refers to excessive one-sidedness as an indication of unfairness.<sup>63</sup> It should also be noted that section 50 read with section 22 requires written agreements to be in plain and understandable language and section 52 lists as a relevant factor to the unfairness enquiry whether the term or agreement complied with the plain language requirement.<sup>64</sup>

The next part of this paper will consider the analysis and weighing of the interests of the parties, which is central to the application of the good faith criterion.

### 5.3 A thorough analysis and weighing of the interests of the parties

It is assumed in German law that a contract should, in essence, represent a balance of interests between the parties.<sup>65</sup> Individual, autonomous negotiations should normally result in such a balance of interests and are likely

<sup>59</sup> 2002 4 SA 1 (SCA) 29C-D

<sup>60</sup> R Zimmermann “Good faith and equity” in R Zimmerman & D Visser (eds) *Southern Cross: Civil and Common Law in South Africa* (1996) 240, 259-260 Also quoted, for example, by AM Louw “Yet Another Call for a Greater Role for Good Faith in the South African Law of Contract: Can We Banish the Law of the Jungle, While Avoiding the Elephant in the Room?” (2013) 16 *PE* 43 77; L Hawthorne “The End of Bona Fides” (2013) 15 *SA Merc LJ* 271 274; D Hutchison “Non-variation Clauses in Contract: Any Escape From the Shifren Straitjacket” (2001) 118 *SALJ* 720 742 See also already GF Lubbe “Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg” (1990) 1 *Stell LR* 7 19 who stated that good faith requires a party to give due regard to the legitimate interests of the other party, and not just selfishly further his own interests Lubbe relied on Dutch writers for this formulation as well as on implicit authority in one South African case on relationships subject to good faith Later writers also quoted Lubbe’s statement, including some of those mentioned above who quoted Zimmermann’s formulation See also GF Lubbe “Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law” (2004) 121 *SALJ* 395 421-422

<sup>61</sup> Naudé (2006) *Stell LR* 366

<sup>62</sup> S 52(2)(f) of the CPA

<sup>63</sup> S 48(2)

<sup>64</sup> S 52(2)(g) In respect of the balancing of interests of the parties it may be noted that a balancing of interests, including public interests, is undertaken to determine the illegality of an agreement See SWJ van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 4 ed (2012) 172 It may also be noted in passing that our courts have emphasised the need to balance the interests of both parties to a credit agreement when interpreting the National Credit Act 34 of 2005 See *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) para 2; *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC)

<sup>65</sup> § 307 para 95 in Coester “§ 307” in *Staudinger* 283 95; § 307 para 96 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 623

to guarantee contractual fairness.<sup>66</sup> However, in the case of standard terms, this guarantee may often be absent due to the typical lack of negotiation in this context. Insofar as no actual negotiations took place, the user of the terms cannot argue that the adhering party should have safeguarded his or her own interests.<sup>67</sup> It is widely acknowledged that typically a market failure occurs in respect of the use of standard terms, with adhering parties only rarely checking the standard terms of the other party when contracting.<sup>68</sup> It is rather up to the prohibition of an unreasonable disadvantage in § 307 and the lists of prohibited clauses in § 308 and § 309 to prevent an unreasonable imbalance of interests.<sup>69</sup>

It should be emphasised that the focus in the assessment of standard terms is not to arrive at a fair balancing of interests, but rather on the prevention of an unreasonable disadvantage contrary to good faith. Because the enquiry in German law is phrased in the negative, namely whether a term is unreasonable, and contrary to good faith, as opposed to having a requirement that a term must be fair or reasonable, a term would not be ineffective under § 307(1) simply because an alternative, less detrimental, and thus fairer, formulation is conceivable.<sup>70</sup> German law recognises that legal certainty and private autonomy require that the user of the terms have some leeway to formulate terms in different ways, as long as he does not do so unreasonably, contrary to good faith.<sup>71</sup> It is therefore not assumed that there is only one ideal reasonable formulation of terms and therefore only one way to fairly balance the parties' interests.<sup>72</sup>

The idea that the parties' interests must be fairly balanced has also been confirmed by the ECJ.<sup>73</sup>

The first step in the assessment of the term is to identify the parties' interests.<sup>74</sup>

<sup>66</sup> § 307 para 95 in Coester "§ 307" in *Staudinger* 283 95; § 307 para 96 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 623

<sup>67</sup> § 307 para 96 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 624

<sup>68</sup> § 307 para 96 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 624; P Hellwege *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgelehrte* (2010) 543; N Jansen "Klauselkontrolle" in H Eidenmüller, F Faust, HC Grigoleit, N Jansen, G Wagner & R Zimmermann *Revision des Verbraucher-acquis* (2011) 53 76-80

<sup>69</sup> Cf § 307 para 95 in Coester "§ 307" in *Staudinger* 284

<sup>70</sup> § 307 para 105 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 629

<sup>71</sup> § 307 para 107 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 631

<sup>72</sup> 631

<sup>73</sup> See *RWE Vertrieb v Verbraucherzentrale NRW* (2013) C-92/11 in which a price increase clause in contracts for the supply of gas was considered. The court held that the parties' interests should be fairly balanced, namely the "supplier's interest in guarding against a change of circumstances" and "the consumer's equally legitimate interest, first, in knowing and thus being able to foresee the consequences which such a change might in future have for him and, secondly, in having the data available in such a case to allow him to react most appropriately to his new situation" (para 53). Accordingly the court held that the supplier had to notify the consumer and give him information about the right to terminate upon a price increase well in advance of the price increase taking effect. See further Micklitz & Reich (2014) *CML Rev* 787

<sup>74</sup> § 307 para 174 in Pfeiffer "§ 307" in *AGB-Recht* 325

### 5 3 1 *Interests of the user of the term*

A German court will have to analyse the interests of the user of the term comprehensively.<sup>75</sup> The very important principles of necessity and proportionality dictate that the standard term should not go further in disadvantaging the consumer than is necessary for its purpose of protecting the user's legitimate interest.<sup>76</sup> In other words, overkill is not allowed.<sup>77</sup>

As noted above, at least section 52(2)(f) of the CPA enjoins courts to have regard to the supplier's legitimate interests and a similar concept of necessity.

Typical interests of all users of standard terms are the benefits of standardisation and rationalisation of contracting.<sup>78</sup> Standard terms simplify the contracting process, which saves the user time and money, which savings could be passed on to clients.<sup>79</sup> However, the user's rationalisation interest must be weighed against the disadvantage to the consumer in the light of proportionality.<sup>80</sup> For example, a German court has held that the benefit of ease of calculation does not justify a standard term forcing insurance clients to insure their used goods at a premium calculated with reference to replacement value whereas only the value at the time of the incident is payable.<sup>81</sup> In addition, the interests of the contract user in "using up" pre-printed standard form contracts cannot in itself justify an unreasonable disadvantage to the consumer.<sup>82</sup> In addition, merely arguing that higher prices would have to be charged in the absence of the term does not save an unreasonably detrimental term.<sup>83</sup>

Commercial interests of the user may serve to legitimise standard terms.<sup>84</sup> For example, holding the lessee bound to a long-term lease may be justified by the user/lessor's need to recover input costs.<sup>85</sup> Similarly, the ability of the user to obtain financing may justify a term allowing the user to cede its rights against clients to a third party.<sup>86</sup>

<sup>75</sup> § 307 para 103 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 628; § 307 para 33 in Wurmnest "§ 307" in *Münchener Kommentar* 1213

<sup>76</sup> BGH NJW 2004 2586 2587; § 307 para 162 in Coester "§ 307" in *Staudinger* 316; § 307 para 105 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 629; § 307 para 158 in Pfeiffer "§ 307" in *AGB-Recht* 320

<sup>77</sup> § 307 para 105 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 630

<sup>78</sup> § 307 para 161 in Pfeiffer "§ 307" in *AGB-Recht* 321; § 307 para 156 in Coester "§ 307" in *Staudinger* 313; § 307 para 121 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 639

<sup>79</sup> § 307 para 161 in Pfeiffer "§ 307" in *AGB-Recht* 321; § 307 para 156 in Coester "§ 307" in *Staudinger* 313; § 307 para 121 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 639

<sup>80</sup> BGH NJW 1996, 988, 989 (in the context of a clause permitting a debit order); § 307 para 156 in Coester "§ 307" in *Staudinger* 314; § 307 para 161 in Pfeiffer "§ 307" in *AGB-Recht* 321

<sup>81</sup> BGH NJW 1993, 2442, 2444; § 307 para 156 in Coester "§ 307" in *Staudinger* 314; § 307 para 123 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 640; § 307 paras 163, 218 in Pfeiffer "§ 307" in *AGB-Recht* 321, 338

<sup>82</sup> BGH NJW 1983, 1322, 1326; § 307 para 156 in Coester "§ 307" in *Staudinger* 314; § 307 para 123 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 640

<sup>83</sup> § 307 para 156 in Coester "§ 307" in *Staudinger* 314

<sup>84</sup> See generally § 307 para 164 in Pfeiffer "§ 307" in *AGB-Recht* 322

<sup>85</sup> § 307 para 125 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 641

<sup>86</sup> 641

Other relevant interests of the user may include pedagogical interests such as those related to a teaching contract<sup>87</sup> or the user's scientific interests in a contract for medical services.<sup>88</sup>

Obviously, the type and object of the user's business and the business sector within which the user operates are relevant considerations when considering the user's interests.<sup>89</sup>

### 5.3.2 Typical consumer interests

German writers have identified various types of interests of adhering parties. For example, the German writer Fuchs, writing in a leading commentary on the German law on standard terms, identifies four types of interests of the adhering party.<sup>90</sup> The first is the performance interest, which requires that the adhering party be allowed such rights as are necessary to realise the purpose of the contract and the reciprocal performance of promised obligations.<sup>91</sup> This echoes § 370(2) which refers to terms as unreasonably detrimental when they so limit essential rights and duties inherent in the nature of the contract that the attainment of the contractual purpose is jeopardised. Secondly, Fuchs argues that adhering parties typically have an integrity interest, such as their right to life and bodily integrity (but it should be noted that exemption clauses regarding death or injury are prohibited in § 309(7)).<sup>92</sup> Thirdly, adhering parties have an interest in their freedom to dispose of their property and freedom to trade, which are impaired by an overly long contract period, a prohibition of cession of the adhering party's rights and powers of attorney and assignment of wages in credit contracts.<sup>93</sup> Fourthly, Fuchs identifies "ideal interests" such as the pedagogical quality of a teaching obligation on the user.<sup>94</sup>

Coester (writing in another leading commentary) also points to the protection of property or wealth as another interest for example where liabilities or risks, which cannot be transferred or passed on, are taken on under a standard term.<sup>95</sup> In addition, Coester states that typically consumers have an interest in some basic contractual rights, such as the right to set-off

<sup>87</sup> BGH NJW 1985, 2585, 2586; § 307 para 158 in Coester "§ 307" in *Staudinger* 315; § 307 para 126 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 642; § 307 para 164 in Pfeiffer "§ 307" in *AGB-Recht* 322

<sup>88</sup> See BGH NJW 1990, 2313, 2315 with regard to consent to an autopsy upon admission to a hospital; § 307 para 158 Coester "§ 307" in *Staudinger* 315; § 307 para 138 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 648

<sup>89</sup> See § 307 para 112 in Coester "§ 307" in *Staudinger* 291 See also § 307 para 164 in Pfeiffer "§ 307" in *AGB-Recht* 322 for identification of interests in different types of contracts

<sup>90</sup> § 307 para 127 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 642-643

<sup>91</sup> 642-643

<sup>92</sup> § 307 para 127 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 642-643 See also § 307 para 160 in Pfeiffer "§ 307" in *AGB-Recht* 320

<sup>93</sup> § 307 para 127 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 642-643; § 307 para 160 in Pfeiffer "§ 307" in *AGB-Recht* 320 See also § 307 para 159 in Coester "§ 307" in *Staudinger* 315; BGH NJW 1989, 2382, 2384; § 307 para 160 in Pfeiffer "§ 307" in *AGB-Recht* 320

<sup>94</sup> § 307 para 127 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 643 See also § 307 para 160 in Pfeiffer "§ 307" in *AGB-Recht* 321

<sup>95</sup> § 307 para 160 in Coester "§ 307" in *Staudinger* 315

or to retain a performance.<sup>96</sup> Of increasing importance are the interests of the consumer in his or her personal data.<sup>97</sup>

Suppliers should also be mindful of differences in interests between different groups of clients and should thus not apply terms indiscriminately.<sup>98</sup> Similarly, a court could also indicate that a term that would have been unfair vis-à-vis one group of clients may be fair towards another group. For example, courts could differentiate between the interests of consumers who are acting outside of the normal sphere of their business or profession, small businesses acting within the sphere of their core purposes, independent professionals, or large businesses.<sup>99</sup> So a court could indicate that a term that would have been unfair only if it is used vis-à-vis a natural person acting outside the scope of his or her business, is not unfair towards a business customer acting within the core sphere of its business.<sup>100</sup> Conversely, a prohibition of cession may be more detrimental to a small business in need of credit than to an individual consumer involved in a once-off transaction.

Note that the majority view amongst German authors is that courts should in individual challenges to standard terms brought by an individual consumer or business, follow the so-called generalising supra-individual approach which takes into account the interests of the typical client in the particular sector in relation to the particular contract type.<sup>101</sup> If the term survives the enquiry into its reasonableness in the light of such typical interests, the court should, in respect of B2C contracts, thereafter consider the reasonableness of the clause in the light of the particular circumstances of the individual consumer challenging the term. This is because the EC Directive requires that the individual circumstances of the individual consumer challenging the term should also be considered.<sup>102</sup> This issue is somewhat controversial amongst German writers and a full consideration thereof is beyond the scope of this article.<sup>103</sup>

### 5 3 3 *Weighing of interests*

When identifying and weighing interests of the parties, German law recognises that courts should indicate whether an interest is specifically protected by law, particularly by the Constitution, or whether it is rather an economic interest, which the law recognises in general terms.<sup>104</sup> Only very

<sup>96</sup> 315

<sup>97</sup> § 307 para 161 in Coester “§ 307” in *Staudinger* 316; BGH NJW 1986, 46

<sup>98</sup> § 307 para 157 in Coester “§ 307” in *Staudinger* 314

<sup>99</sup> § 307 paras 111-112 in Coester “§ 307” in *Staudinger* 291; § 307 paras 184, 197 in Pfeiffer “§ 307” in *AGB-Recht* 328 332

<sup>100</sup> § 307 para 38 in Wurmnest “§ 307” in *Münchener Kommentar* 1214; § 307 para 113 in Coester “§ 307” in *Staudinger* 292

<sup>101</sup> § 307 paras 109-117 in Coester “§ 307” in *Staudinger* 289-294; § 307 paras 110-113 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 632-634

<sup>102</sup> Art 4(1) of the EC Directive

<sup>103</sup> See § 310 paras 77-78 in J Basedow “§ 310” in W Krüger (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 2 Schuldrecht Allgemeiner Teil* 6 ed (2012) 1492 1522; Hellwege *Allgemeine Geschäftsbedingungen* 579-580; cf Jansen “Klauselkontrolle” in *Revision des Verbraucher-acquis* 103

<sup>104</sup> § 307 para 104 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 628; § 307 para 176 in Pfeiffer “§ 307” in *AGB-Recht* 325 Cf also § 307 para 53 in Wurmnest “§ 307” in *Münchener Kommentar* 1220

important interests of the user can justify the limitation of the adhering party's constitutional rights or other legal rights.<sup>105</sup>

As already stated, the weighing of interests in determining unreasonableness links to the generally accepted principle of proportionality.<sup>106</sup> Courts will therefore distinguish proportionate and necessary limitations of clients' interests based on legitimate user interests (that is, rational limitations) from unnecessary and disproportionate limitations (that is, irrational ones).

Proportionality also requires that the user's rights should not be formulated in vague or broad language, but must be set out in such a way that the consumer's interests are protected as far as possible.<sup>107</sup>

Proportionality in a more narrow sense is also important in the assessment of unreasonableness, for example where a standard term provides for serious sanctions for a relatively minor breach of contract by the adhering party.<sup>108</sup>

As noted above, the *ex lege* position (already considered to establish a disadvantage) remains a relevant factor. This is because in the weighing of interests, the judge should not simply follow his or her own views on justice in the particular case, but should align the judgment as far as possible with the statutory guidelines or rules of contract law, thereby preventing a "borderless casuistry" and "simple fairness jurisprudence" or "palm tree justice".<sup>109</sup> The more the term deviates from the statutory model, the weightier the user's interest must be.<sup>110</sup>

If the user's interests in the contract term and the other party's interest affected by the term are of equal value, no unreasonable disadvantage exists.<sup>111</sup>

It is to be hoped that South African courts will use the concepts of unreasonableness and good faith to engage in a proportionality analysis focused on the legitimate interests of the parties, as that is what was intended by the legislature. Preferably, the following factor should be added to section 52(2): "the legitimate interests of both parties to the contract".

### 5 3 4 *The relevance of broader societal interests?*

The German writer, Coester, is of the opinion that when courts take into account broader societal interests engaged by the contract in the assessment of unreasonableness, this does not mean that content control of standard terms under § 307 should aim at society's interest and that broader societal

<sup>105</sup> § 307 para 104 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 628; § 307 para 176 Pfeiffer "§ 307" in *AGB-Recht* 325 Cf also § 307 para 53 in Wurmnest "§ 307" in *Münchener Kommentar* 1220 See also § 307(2) of the German Civil Code, quoted in part 4 above (text after n 32)

<sup>106</sup> § 307 para 105 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 629; § 307 para 98 in Coester "§ 307" in *Staudinger* 285; § 307 para 158 in Pfeiffer "§ 307" in *AGB-Recht* 320

<sup>107</sup> BGH NJW 1980, 2518, 2519; § 307 para 162 in Coester "§ 307" in *Staudinger* 317

<sup>108</sup> BGH NJW 1990, 767, 768; § 307 para 98 in Coester "§ 307" in *Staudinger* 285; § 307 para 177 in Pfeiffer "§ 307" in *AGB-Recht* 326

<sup>109</sup> § 307 paras 98-99 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 625

<sup>110</sup> § 307 para 104 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 629

<sup>111</sup> § 307 para 158 in Pfeiffer "§ 307" in *AGB-Recht* 320

interests should always form part of the interest analysis required by § 307.<sup>112</sup> Instead, in Coester's view, content control of standard terms should aim at the protection of contractual fairness, as parties are not obliged to contract for the benefit of society.<sup>113</sup> However, he recognises that judges should always consider the economic and societal effect of their decisions, which is not a principle specific to standard terms, but a general methodological obligation.<sup>114</sup> In addition, when a party relies on broader rights, like press freedom or freedom to trade, when challenging a standard term, the question according to Coester is rather one of the horizontal effect of constitutional rights, rather than societal interests that have to be weighed against those of the parties under § 307.<sup>115</sup>

As noted earlier, a separate provision in the German Civil Code contains the principle that contracts may not be contrary to public policy, which does not only apply to standard terms.<sup>116</sup>

#### 5 4 Some additional factors relevant to the assessment of an "unreasonable disadvantage" contrary to good faith

A § 307(1) assessment involves consideration of all normative and factual criteria. However, decades-old jurisprudence has led to the crystallisation of some relevant factors.<sup>117</sup> These are not exhaustive or conclusive.<sup>118</sup> It is a pity that section 52 of the CPA does not make it clear that its list of factors is not exhaustive either.

##### 5 4 1 *Insurability and distribution of risk*

In respect of contract terms, that govern risk allocation, the central questions asked are in whose sphere is the risk most likely to arise and which party is in a better position to prevent the risk materialising and to insure against it.<sup>119</sup>

If risks arise solely in the user's sphere, it is normally unreasonable to transfer these to the client.<sup>120</sup> Examples of such risks would be non-adherence to delivery deadlines<sup>121</sup> or damage to a client's car by a car washing business.<sup>122</sup>

<sup>112</sup> § 307 para 151 in Coester "§ 307" in *Staudinger* 311; see also § 307 para 50 in Wurmnest "§ 307" in *Münchener Kommentar* 1219; cf § 307 para 136 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 647

<sup>113</sup> § 307 para 151 in Coester "§ 307" in *Staudinger* 311; § 307 para 50 in Wurmnest "§ 307" in *Münchener Kommentar* 1219

<sup>114</sup> § 307 para 151 in Coester "§ 307" in *Staudinger* 311; § 307 para 50 in Wurmnest "§ 307" in *Münchener Kommentar* 1219

<sup>115</sup> § 307 para 151 in Coester "§ 307" in *Staudinger* 311; § 307 para 50 in Wurmnest "§ 307" in *Münchener Kommentar* 1219

<sup>116</sup> § 138 of the German Civil Code

<sup>117</sup> § 307 para 152 in Coester "§ 307" in *Staudinger* 311

<sup>118</sup> § 307 para 152 in Coester "§ 307" in *Staudinger* 311; § 307 para 169 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 669

<sup>119</sup> § 307 para 167 in Coester "§ 307" in *Staudinger* 320; § 307 para 156 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 659-660; § 307 paras 33, 45, 49 in Wurmnest "§ 307" in *Münchener Kommentar* 1213, 1216-1217, 1218-1219

<sup>120</sup> § 307 para 157 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 660

<sup>121</sup> BGH NJW 1983, 1320; § 307 para 168 in Coester "§ 307" in *Staudinger* 320; § 307 para 157 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 660

<sup>122</sup> § 307 para 49 in Wurmnest "§ 307" in *Münchener Kommentar* 1218

Insurability is normally decisive in respect of exemption clauses not prohibited by the black list.<sup>123</sup>

If insurance by the user is normal in the business sector, this is a strong indication against placing the risk on the client.<sup>124</sup> However, where insurance by both parties is possible, the decisive question is which party is better able to insure against the loss. For example in the case of a wardrobe at a theatre, it is not possible for the client to insure against the risk of the business giving garments to the wrong client, whereas it is not difficult for the business to insure against that risk.<sup>125</sup> By contrast, in the case of parking garages, it is more sensible for the client to insure against the risk of theft of the car, than for the parking garage owner, as the latter will result in a great increase in the fairly low price for parking.<sup>126</sup> A company guarding a ship was able to validly exclude its liability, thereby lowering the contract price, given that it is customary for ship owners to insure against the risk of loss or damage to their ships<sup>127</sup> and given that the client knows the value of the ship better and so should insure, rather than the guarding company.<sup>128</sup>

A number of other cases based their decisions on the reasonableness of exemption clauses on the most appropriate risk distribution.<sup>129</sup> For example, it was held that the issuer of a credit card (rather than the client) can better guard against the risk of fraudulent use of the credit card in a mail order transaction by a person other than the credit card holder, for example by an increase in the risk premium payable by all card holders, and so this risk should not be placed on the client to whom the card was issued.<sup>130</sup>

Section 52(2) of the CPA should also have included as a relevant factor the possibility and probability of insurance, as well as which of the parties is better able to guard against or carry any risks involved.

#### 5 4 2 *Conformity with established standards*

If a clause breaches established norms and standards, such as commercial usages, professional guidelines or custom, this usually indicates that the clause is unreasonable in terms of § 307 of the German Civil Code.<sup>131</sup>

<sup>123</sup> § 307 para 169 in Coester “§ 307” in *Staudinger* 321; § 307 para 156 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 660. However, note that Wurmnest points out that the mere fact that the client could insure and normally does is not decisive: the question is rather which party is better able to cover the risk through insurance. See § 307 para 45 in Wurmnest “§ 307” in *Münchener Kommentar* 1217.

<sup>124</sup> § 307 para 159 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 662; § 307 para 45 in Wurmnest “§ 307” in *Münchener Kommentar* 1216-1217.

<sup>125</sup> § 307 para 159 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 662; § 307 para 46 in Wurmnest “§ 307” in *Münchener Kommentar* 1217 who also points out that the risk for the client that his or her clothing would be given to the wrong client is so small that it is not worth taking out insurance against that risk, whereas it is easy for the business to insure.

<sup>126</sup> § 307 para 159 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 662.

<sup>127</sup> BGH NJW 1961, 212; § 307 para 45 in Wurmnest “§ 307” in *Münchener Kommentar* 1216.

<sup>128</sup> § 307 para 46 in Wurmnest “§ 307” in *Münchener Kommentar* 1217. Cf § 307 para 159 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 662.

<sup>129</sup> See the discussion of cases in § 307 para 48 in Wurmnest “§ 307” in *Münchener Kommentar* 1218.

<sup>130</sup> BGH NJW 2002, 2234, 2237; § 307 para 48 in Wurmnest “§ 307” in *Münchener Kommentar* 1218.

<sup>131</sup> § 307 para 140 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 649; § 307 para 153 in Coester “§ 307” in *Staudinger* 312; § 307 para 38 in Wurmnest “§ 307” in *Münchener Kommentar* 1214; § 307 paras 193-195, 207 in Pfeiffer “§ 307” in *AGB-Recht* 331-332, 209-210; OLG Hamburg NJW 1986, 302, 303.

However, the mere fact that a term is common in the trade sector or consistent with a usage does not make it reasonable, as it may conflict with the German Constitution or the requirement of good faith.<sup>132</sup> However, if a term is regularly used in a particular sphere, this is one factor that may indicate reasonableness.<sup>133</sup>

It should be remembered that consumers do not always participate in the formulation of professional guidelines, which are therefore regarded as merely setting minimum standards of consumer protection.<sup>134</sup>

The CPA refers to custom in section 52(2)(h) in a more limited sense. It states that it is relevant whether the consumer knew or ought reasonably to have known of the existence and extent of a clause having regard to both custom of trade and previous dealings between the parties. However, this factor is in danger of ignoring the realities surrounding standard form contracting by consumers. Consumers are typically not repeat customers who are likely to know the customs in a sector.

Section 52 should rather refer more generally to conformity with established standards in the sector as a relevant factor.

#### 5 4 3 Overall scheme of the contract

German law recognises that the term should be understood in the context of the contract as a whole, including the purpose of the contract.<sup>135</sup> The parties' interests are also established in the context of the contract as a whole.<sup>136</sup> The EC Directive also provides that "the unfairness of a contractual term shall be assessed ... by referring [*inter alia*] to all the other terms of the contract or of another contract on which it is dependent".<sup>137</sup>

Section 52(2) of the CPA refers to the relevance of other terms of the contract in an oblique way, and it may have been better to refer to them directly as relevant factors. Firstly section 52(2)(a) provides that the court must consider the fair value of the goods or services in question.<sup>138</sup> In addition, section 52(2) (c) refers more generally to the circumstances of the transaction or agreement, but should have referred rather to all the other terms of the contract or of another contract on which it is dependent.

<sup>132</sup> § 307 para 140 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 650; § 307 para 153 in Coester "§ 307" in *Staudinger* 312-313; § 307 paras 207-211 in Pfeiffer "§ 307" in *AGB-Recht* 335-336

<sup>133</sup> § 307 para 153 in Coester "§ 307" in *Staudinger* 312; § 307 para 140 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 650

<sup>134</sup> § 307 para 207 in Pfeiffer "§ 307" in *AGB-Recht* 335; § 307 para 155 in Coester "§ 307" in *Staudinger* 313; § 307 para 142 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 651

<sup>135</sup> BGH NJW 1990, 767, 768; § 307 para 34 in Wurmnest "§ 307" in *Münchener Kommentar* 1213; § 307 para 116 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 636; § 307 para 124 in Coester "§ 307" in *Staudinger* 298; § 307 para 212 in Pfeiffer "§ 307" in *AGB-Recht* 336

<sup>136</sup> § 307 para 34 in Wurmnest "§ 307" in *Münchener Kommentar* 1213; § 307 para 116 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 636; § 307 para 124 in Coester "§ 307" in *Staudinger* 298; § 307 para 212 in Pfeiffer "§ 307" in *AGB-Recht* 336

<sup>137</sup> Article 4(1) of the EC Directive

<sup>138</sup> Stoop *The Concept "Fairness"* 224 argues that this factor should not be considered when determining whether a term is unfair under s 48

Some more specific principles have emerged in German law on the possibility of other terms in the contract either lessening or strengthening the misgivings about the term assessed.

#### 5 4 3 1 Compensation by another beneficial term or terms?

German law recognises that the detrimental effect of one term can be balanced out by another agreed benefit if two requirements are met.<sup>139</sup> Firstly, the beneficial clause and the term which ostensibly disadvantages the consumer must “be factually connected” as part of a unified arrangement in relation to the same subject matter.<sup>140</sup> Secondly, the benefit must be weighty enough to equal out the detrimental provision.<sup>141</sup> It is not weighty enough when it merely confirms the *ex lege* position, nor if there is only a theoretical possibility of a benefit that will not normally arise in practice, whereas the disadvantage does arise in the normal course of events.<sup>142</sup>

For example, it has been held that there is a sufficient connection between an exclusion of the lessor’s liability for quality in a leasing contract and a cession by the lessor to the lessee of all the lessor’s claims against the supplier who sold the goods to the lessor.<sup>143</sup> An exemption clause in a hospital admission form in relation to the loss of the patient’s property left behind in the hospital may also be acceptable when coupled with information and warnings to patients and a special dispensation for valuable goods.<sup>144</sup> Another example is where a right for the user of the terms to increase the price is balanced out by the consumer’s right to cancel the contract (provided the consumer is notified of this right well in advance of the price increase taking effect).<sup>145</sup> Exclusion of liability for negligence could be saved by a guarantee that the supplier has insurance against the risk of negligence.<sup>146</sup>

There is no sufficient connection when the user merely relies on the general economic benefit of the contract as a whole for the adhering party.<sup>147</sup>

<sup>139</sup> § 307 para 125 in Coester “§ 307” in *Staudinger* 298; Para 151 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 656; § 307 para 36 in Wurmnest “§ 307” in *Münchener Kommentar* 1213-1214; § 307 para 212 in Pfeiffer “§ 307” in *AGB-Recht* 336

<sup>140</sup> § 307 para 125 in Coester “§ 307” in *Staudinger* 298; Para 151 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 656; § 307 para 36 in Wurmnest “§ 307” in *Münchener Kommentar* 1213-1214; § 307 para 212 in Pfeiffer “§ 307” in *AGB-Recht* 336 Pfeiffer states that the terms must not only operate together by way of exception, but normally apply together. See § 307 para 212 in Pfeiffer “§ 307” in *AGB-Recht* 336

<sup>141</sup> § 307 para 125 in Coester “§ 307” in *Staudinger* 298; para 151 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 656; § 307 para 36 in Wurmnest “§ 307” in *Münchener Kommentar* 1213-1214; § 307 para 212 in Pfeiffer “§ 307” in *AGB-Recht* 336

<sup>142</sup> § 307 para 127 in Coester “§ 307” in *Staudinger* 300

<sup>143</sup> BGH NJW 1985, 105; § 307 para 126 in Coester “§ 307” in *Staudinger* 299

<sup>144</sup> BGH NJW 1990, 761, 764; § 307 para 214 in Pfeiffer “§ 307” in *AGB-Recht* 337

<sup>145</sup> § 307 para 152 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 656 with reference to BGHZ 90, 78. But see the decision of the ECJ in *RWE Vertrieb v Verbraucherzentrale NRW* (2013) C-92/11 in which the court noted that the mere right to cancel for the consumer does not save the unilateral price increase clause. Instead, the supplier had to notify the consumer and give him information about the right to terminate upon a price increase well in advance of the price increase taking effect

<sup>146</sup> § 307 para 217 in Pfeiffer “§ 307” in *AGB-Recht* 338

<sup>147</sup> § 307 par 126 in Coester “§ 307” in *Staudinger* 299

Generally, German courts and writers reject the notion that a detrimental non-negotiated term may be balanced out by a low price to customers, although there are exceptions to this principle.<sup>148</sup>

The reasons for rejection of the “price argument” are as follows. Firstly, it is difficult to show that a standard term on an ancillary matter actually affects the price, in that any saving is in fact passed onto clients.<sup>149</sup> In addition, it is not regarded as possible for a court to establish a reasonable price as this concept is left to the market to determine under modern German law.<sup>150</sup> In addition, the recognition of the price argument is said to have “undesirable economic and legal-political consequences”.<sup>151</sup> Content control would be jeopardised if the user can always rely on the argument that it would otherwise have charged a higher price.<sup>152</sup> This would lead to a “race to the bottom” as far as the quality of standard terms are concerned, given the absence of a competitive market in relation to the quality of such terms.<sup>153</sup> In addition, the great cost to an individual consumer if the risk materialises does not equal out the benefit of a slightly lower price.<sup>154</sup> It is more beneficial to consumers if the cost of insurance to the user is spread to all consumers through a slight increase to the price.<sup>155</sup>

The exceptions, when the price argument is relevant according to German law are, firstly, if it is not the risk of damage that is passed onto the consumer, but instead what is passed on are calculable costs that arise as a matter of course.<sup>156</sup> In this case, there is no danger of disproportionality between risk and benefit for the client, as otherwise the costs would simply be included in the price.

Secondly, the price argument may be entertained in some instances where the main performance and price are small anyway coupled with a risk of high loss, provided that insurance by the user is not an economic solution and it is open to the client to protect himself or herself against the risk, eg through insurance, and provided the user in fact advises clients to do so.<sup>157</sup> An example would be parking facilities stipulating an exemption clause.<sup>158</sup>

<sup>148</sup> § 307 par 145 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 652; § 307 par 129 in Coester “§ 307” in *Staudinger* 301; § 307 para 44 in Wurmnest “§ 307” in *Münchener Kommentar* 1216; § 307 para 224 in Pfeiffer “§ 307” in *AGB-Recht* 340

<sup>149</sup> § 307 para 130 in Coester “§ 307” in *Staudinger* 301; § 307 para 224 in Pfeiffer “§ 307” in *AGB-Recht* 340

<sup>150</sup> § 307 para 145 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 145; § 307 para 131 in Coester “§ 307” in *Staudinger* 302; § 307 para 44 in Wurmnest “§ 307” in *Münchener Kommentar* 1216

<sup>151</sup> § 307 para 132 in Coester “§ 307” in *Staudinger* 302

<sup>152</sup> 302

<sup>153</sup> 302

<sup>154</sup> § 307 para 133 in Coester “§ 307” in *Staudinger* 302; § 307 para 145 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 653

<sup>155</sup> § 307 para 224 in Pfeiffer “§ 307” in *AGB-Recht* 340; § 307 para 133 in Coester “§ 307” in *Staudinger* 302

<sup>156</sup> § 307 para 147 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 654; § 307 para 135 in Coester “§ 307” in *Staudinger* 303

<sup>157</sup> § 307 para 227 in Pfeiffer “§ 307” in *AGB-Recht* 341; § 307 para 146 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 653; § 307 para 136 in Coester “§ 307” in *Staudinger* 303

<sup>158</sup> BGH NJW 1968, 1718, 1720; § 307 para 44 in Wurmnest “§ 307” in *Münchener Kommentar* 1216; § 307 para 227 in Pfeiffer “§ 307” in *AGB-Recht* 341; § 307 para 146 in Fuchs “§ 307” in *Ulmer Brandner Hensen* 653; § 307 para 136 in Coester “§ 307” in *Staudinger* 303

Thirdly, a term passing a risk onto the client may be reasonable if the user gives the client a genuine choice of tariff (between lower risk at a higher price vis-a-vis higher risk at a lower price).<sup>159</sup> But this is acceptable only provided the difference in price is reasonable and provided that the higher tariff is correctly calculated in relation to actual risk (eg the price difference directly correlates to higher insurance costs).<sup>160</sup> Pfeiffer requires further that in the case of an exemption clause it should be possible for the customer to obtain cover such as insurance for the risk of loss.<sup>161</sup> One view is that such an arrangement would mean that the term is actually negotiated so that it is removed from control under § 307 anyway.<sup>162</sup>

#### 5 4 3 2 The combined detrimental effect of otherwise acceptable individual clauses

Individual clauses, which are not unreasonable on their own, can jointly be unreasonably detrimental to the consumer.<sup>163</sup> An example is a term that the lessee must pay the rental in advance at the beginning of the month, combined with a term limiting the possibility of set-off by the lessee. The joint effect of these clauses has been held to be an unreasonable limitation of the lessee's right to reduce the rent upon breach by the lessor.<sup>164</sup>

#### 5 4 4 Equal treatment of the contracting parties?

The question arises whether the prohibition of an "unreasonable disadvantage" implies that the user of the non-negotiated terms and the adhering party should generally be treated equally, for example, in respect of limitation of rights, time periods or sanctions for breach of contract. The general clause in the EC Directive also refers to a non-negotiated term causing a "significant imbalance in the parties' rights and obligations arising under the contract"<sup>165</sup> which raises the same question.

It is recognised in German law that a duty of equal treatment does not necessarily flow from the prohibition of an unreasonable disadvantage, especially as the parties' legal and commercial situations may differ and their interests with regard to matters such as cancellation or retention clauses are often in opposition to one another.<sup>166</sup>

<sup>159</sup> § 307 para 138 in Coester "§ 307" in *Staudinger* 304; § 307 para 226 in Pfeiffer "§ 307" in *AGB-Recht* 341  
Note that exclusion of liability for ordinary negligence is not blacklisted in § 309 (which applies to B2C contracts)

<sup>160</sup> § 307 para 138 in Coester "§ 307" in *Staudinger* 304; § 307 para 226 in Pfeiffer "§ 307" in *AGB-Recht* 341; § 307 para 148 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 654; § 307 para 160 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 663; § 307 para 47 in Wurmnest "§ 307" in *Münchener Kommentar* 1218

<sup>161</sup> § 307 para 226 in Pfeiffer "§ 307" in *AGB-Recht* 341

<sup>162</sup> § 307 para 138 in Coester "§ 307" in *Staudinger* 304, but see § 307 para 148 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 654

<sup>163</sup> § 307 para 139 in Coester "§ 307" in *Staudinger* 304; § 307 para 155 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 658; § 307 para 35 in Wurmnest "§ 307" in *Münchener Kommentar* 1213; § 307 para 213 in Pfeiffer "§ 307" in *AGB-Recht* 336; BGH NJW 2006, 2116, 2117

<sup>164</sup> BGH NJW 1995, 254; § 307 para 155 in Fuchs "§ 307" in *Ulmer Brandner Hensen* 659

<sup>165</sup> Article 3(1) of the EC Directive

<sup>166</sup> § 307 para 164 in Coester "§ 307" in *Staudinger* 318

The mere fact that the user and client are not treated equally eg in terms of remedies available, does not mean that a term disadvantaging the consumer is unreasonable.<sup>167</sup> Sometimes it is not possible or sensible to have equal treatment. For example, if a non-negotiated term gives the seller the right to amend the price, it does not make sense to treat the buyer “equally” by allowing the buyer to change the object of sale (*merx*), but the buyer could rather be given the right to cancel the contract upon a price variation, in order to equal out the seller’s discretion.

Thus, unreasonableness and “imbalance of reciprocal rights and duties” should not hastily be equated if both parties’ interests are to be treated fairly.

On the other hand, there are situations where the unequal division of the rights of contracting parties is unreasonable. The idea has evolved that contractual time periods, such as notice periods, should in principle be the same for both parties as opposed to having a different more detrimental time period for the client.<sup>168</sup> In addition, sanctions and limitations of rights, which only affect the client, have been held to be unreasonable for that reason.<sup>169</sup>

Thus, material equality and not formal equality should be accorded primacy.<sup>170</sup> However, the implications of the principle of “equality of arms” in respect of remedies are not always clear. Authors suggest that this issue is worthy of consideration at European level by the ECJ.<sup>171</sup> Examples of such questions are whether a penalty for breach of contract should be applied equally to both sides or whether the penalty should be significantly higher against the user so that an economically comparative pressure can be achieved.<sup>172</sup>

Whereas section 52(2) of the CPA does not list as a factor whether the parties are treated equally by the contract, section 48 states that there is unfairness if a term is excessively one-sided. In addition, the grey list in regulation 44 of the Consumer Protection Act Regulations<sup>173</sup> contains several items that indicate that unequal treatment would be presumed to be unfair.<sup>174</sup> An example is item (q) which greylists a term with the effect of “allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the agreement, without giving the consumer the right to be compensated in the same amount if the supplier fails to conclude or perform the agreement.”<sup>175</sup>

In addition, the South African Law Commission included the following factor in section 2(o) of its proposed Bill: “whether there is a lack of reciprocity in an otherwise reciprocal contract.”<sup>176</sup>

<sup>167</sup> 318

<sup>168</sup> § 307 para 164 318; § 307 para 222 in Pfeiffer “§ 307” in *AGB-Recht* 339

<sup>169</sup> § 307 para 164 in Coester “§ 307” in *Staudinger* 318; § 307 para 222 in Pfeiffer “§ 307” in *AGB-Recht* 339

<sup>170</sup> § 307 para 165 in Coester “§ 307” in *Staudinger* 319

<sup>171</sup> § 307 para 165 319 The principle of equality of arms has been applied by the ECJ in, for example, *Juan Carlos Sánchez Morcillo, María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* (2014) C-169/14

<sup>172</sup> § 307 para 165 in Coester “§ 307” in *Staudinger* 319

<sup>173</sup> GN R 293 in *GG* 34180 of 01-04- 2011

<sup>174</sup> Items (k), (m), (n), (o) and (q) of the Consumer Protection Act Regulations

<sup>175</sup> Reg 44(3)(q) of the Consumer Protection Act Regulations

<sup>176</sup> S 2(0) of the Bill proposed in the South African Law Commission’s Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts* Project 47 April 1998

Courts would have to develop guidance on when equal treatment would be required, being sensitive to the reality recognised in German law that formal equality is not always required or sufficient in the application of the reasonableness standard.

### 5.5 Assessment at conclusion of the contract

According to German law as well as the EC Directive, unreasonableness of a standard or other non-negotiated term is considered at the time of conclusion of the contract in the case of an individual consumer challenging a term.<sup>177</sup> In general use challenges by a consumer organisation or watchdog authority, the relevant time is the last oral negotiation, that is, the last time at which the term was offered in the market.<sup>178</sup>

However, a term could lose effect later through a subsequent abuse of rights contrary to good faith under § 242 of the Civil Code or because of a change of circumstances which interferes with the basis of the transaction under § 313 of the Civil Code.

By contrast, section 48 of the CPA is broadly worded and provides that not only the offer to supply goods or the agreement to supply goods must not contain unfair terms, but also that the supply of the goods themselves (which could take place subsequent to conclusion of the agreement) must not be on unfair terms. In addition, section 52(2)(c) provides that a court, when considering the fairness of a contract or term, must consider “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”.<sup>179</sup>

## 6 List of relevant factors in the EC Directive on Unfair Terms in Consumer Contracts

In the case of business-to-consumer contracts, German courts are obliged by the EC Directive to also take into account the individual circumstances of the individual consumer such as his or her bargaining power.<sup>180</sup>

The preamble to the EC Directive lists several relevant factors, and quite a few of them hark back to factors already considered in German law before promulgation of the directive. Full considerations of those factors in the EC Directive that have not already been discussed above are beyond the scope of this contribution, and they will merely be quoted here. The relevant part of the preamble provides that:

“Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take

<sup>177</sup> See § 307 para 93 in Pfeiffer “§ 307” in *AGB-Recht* 299

<sup>178</sup> § 307 paras 93, 299 For more on general use challenges see Naudé (2010) *SALJ* 515

<sup>179</sup> A doctrine similar to that of abuse of rights has of course started to develop too, under cases like *Barkhuizen v Napier* 2007 5 SA 323 (CC), which holds that the enforcement of a contractual right must also not be unfair. South African law still has some way to go to develop a sophisticated doctrine of change of circumstances

<sup>180</sup> As recognised in § 310(3) of the EC Directive

account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;

Whereas the nature of goods or services should have an influence on assessing the unfairness of contractual terms;

Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, *inter alia*, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer;

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail; ...”

In addition, Article 4(1) of the EC Directive provides that “the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.”

The ECJ has also deemed violations of other consumer law directives relevant to the fairness of a contract term. For example, the ECJ has held that a competent court may rely on a violation of the Unfair Commercial Practices Directive<sup>181</sup> (*in casu* in the form of the supplier misleading the consumer about the effective interest rate) as one basis for its assessment of the unfairness of a contract term under the EC Directive.<sup>182</sup>

## 7 Conclusion

It is to be hoped that the traditional balancing of *pacta sunt servanda* against notions of fairness by South African courts when considering the legality of standard contract terms will rather yield to a more thorough weighing of the typical and actual interests of contracting parties when section 48 of the CPA is applied. This should be done in light of the realities surrounding standard form contracting and the principles of good faith, proportionality and necessity.

Sections 48 and 52 of the CPA should not be considered as exhaustive regarding the criteria relevant to the unfairness enquiry, and more criteria such as those drawn from German law on the control of standard terms and other non-negotiated terms would be useful additions.

<sup>181</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”)

<sup>182</sup> *Pereničova and Perenič v SOS* (2012) C-453/10

Preferably, section 52 should be amended, either by deleting the list of relevant factors and leaving this to the courts to develop, as has been the experience in Germany, or by adding to the text of section 52(2) factors such as those identified above, including reference to both parties' interests. In addition, it has already been pointed out elsewhere that some of the factors in the current section 52 do not adequately reflect the realities surrounding standard form contracting and would need to be qualified.<sup>183</sup> An example is section 52(2)(i) of the CPA which refers to "the amount for which, and circumstances under which the consumer could have acquired identical or equivalent goods or services from a different supplier". This could be interpreted to mean that it should count against the consumer if fairer standard terms could have been obtained elsewhere. However, it is recognised, also in German law, that there is a market failure in respect of standard terms, as competition on standard terms simply does not take place, so that the fact that the adhering party could have obtained better standard terms elsewhere should not count against the consumer.<sup>184</sup>

The CPA should also be amended to make it clear that the list of factors in section 52(2) is not exhaustive.

## SUMMARY

Section 52(2) of the Consumer Protection Act, 68 of 2008 ("CPA") lists factors that courts "must" consider when applying section 48, the prohibition of unfair contract terms. Section 52(2) could be improved, *inter alia* as it does not contain sufficient guidance about the substantive fairness of contract terms. Several other factors, not currently listed in section 52(2), have crystallised in German case law and academic commentaries on § 307(1) of the German Civil Code, which essentially provides that "provisions in standard business terms are ineffective if contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user." Although the scope of application of § 307(1) is different from that of section 48, the German case law and academic commentary are useful as most terms in consumer contracts are not negotiated anyway. German courts identify and weigh the interests of both parties in the light of the principles of proportionality and necessity. The degree to which the term differs from what the law would be in its absence is an important factor. In relation to contract terms governing risk allocation, the main questions asked are in whose sphere the risk is likely to arise and which party is in a better position to avoid the risk and to insure against it. Conformity with established standards in the sector is also a relevant factor, although its application is qualified. The other terms of the contract or of another contract on which it is dependent are also relevant. Principles that are more specific have developed in German law in respect of the possibility that other terms may increase or decrease the suspicion against a clause. Material inequality between the parties is also a relevant factor, which the South African Law Commission has formulated as whether there is a lack of reciprocity in an otherwise reciprocal contract. The article also lists further factors set out in the EC Directive.

<sup>183</sup> Naudé (2006) *Stell LR* 372-375

<sup>184</sup> Cf Stoop *The Concept "Fairness"* 224 who argue that the words "if the consumer had an opportunity of entering into a similar contract with another supplier" should be added to s 52(2)(i) of the CPA. Stoop also argues for a few further amendments of s 52(2) 227-234