A CONSIDERATION OF CERTAIN ASPECTS OF STANDARD FORM CONTRACTS AND EXEMPTION CLAUSES:

BY

J L VAN DORSTEN BA LLB (CAPE TOWN)

A Dissertation Submitted to the Faculty of Law, University of Cape Town, for the Degree of Master of Laws.

Cape Town 1981

TO WENDY

TABLE OF CONTENTS

PART II THE NATURE OF A CONTRACT AND EXEMPTION CLAUSES

PART IV THE BURDEN OF PROOF AND EXEMPTION CLAUSES

ACKNOWLEDGEMENTS

I gratefully acknowledge the kind assistance and helpful comments given by both my supervisors: Professor J C DE WET (before his retirement) and Professor J T R GIBSON.

The financial assistance received from THE SOUTH AFRICAN ATTORNEYS NOTARIES AND CONVEYANCERS FIDELITY GUARANTEE FUND is also gratefully acknowledged.

SUMMARY

This dissertation, which is divided into four independent parts, deals with two aspects of standard form contracts: the general nature of standard form contracts and the credit receiver's title to sue ex delicto; and two aspects of exemption clauses: the nature of a contract and exemption clauses and the rules of incidence applicable to exemption clauses.

In the first part standard form contracts in general are discussed. A brief historical background shows that standard terms and standard form contracts have a long history but it is only in the last century that they have become predominant. Under the nature and categories of standard form contracts only the general characteristics are discussed; no definition is formulated because the widespread usage would necessitate too cumbersome a definition. Standard form contracts are generally documents in common form containing comprehensive pre-determined provisions designed to regulate all transactions of a particular type. Two classes of standard form contracts are distinguished: model contract forms (or agreed documents), which are specimen forms, incorporating settled practices, used at the discretion of the parties; and adhesion contracts which contain unilaterally fixed terms and are presented on a take-it-or-leave-it basis. Adhesion contracts arise from statutory intervention, regulations of associations or where individuals or business concerns have sufficiently strong bargaining powers.

A further classification based on the situation in which standard form contracts operate distinguishes between: horizontal or commercial standard contracts; vertical or commercial consumer standard contracts; end-consumer standard contracts; and personal service standard contracts. This classification is useful in that it provides a framework within which to deal with standard form contracts and to determine whether or not intervention is justified.

The advantages of standardisation include uniformity; a saving in time and expense; costing and planning is facilitated; the promotion of economic stability; and legal certainty.

The disadvantages include the shifting of the legal and economic equilibrium to the economically stronger party's advantage, the one-sided control of the contractual terms, the imposition of oppressive contracts, the limitation of the proferens' liability and the curtailment of the adhering party's rights and remedies.

In the last section, the proposals for reform, various forms of administrative control and judicial control are briefly examined. The drawbacks of administrative control include the cumbersomeness of the administrative machinery which limits the effectiveness of the control, and the fact that general administrative powers are not always used to deal with a specific problem. The advantages of administrative control are that general measures can be imposed by administrative bodies acting mero motu, if necessary, and, if efficiently run, the process may be speedier because the procedures are generally

more flexible. It is submitted that the Israeli and Swedish methods of providing for the submission of standard form contracts for approval prior to general use should be adopted.

The disadvantages of judicial control are that until a body of case law develops uncertainty may arise, and many judges are reluctant to become involved in the morality of contracts. The advantage of judicial control is that general powers provide flexible remedies applicable to a wide range of problems. It is submitted that the English requirement that contractual provisions be reasonable to be enforceable be adopted.

In conclusion it is recommended that administrative and judicial control be combined: a representative administrative body to provide prior approval and the courts to be given general powers to refuse to enforce unreasonable provisions.

The second part examines the credit receiver's title to sue ex delicto in instalment sale transactions. This important academic and practical problem, which was not clarified in the new Credit Agreements Act, is concerned with whether a non-owner who buys on credit has sufficient interest to sue for patrimonial damage to the goods. The approach adopted here is to ascertain who has title to sue under the Lex Aguilia; the legal status of the credit receiver/purchaser; and the various solutions adopted by the courts.

Title to sue ex delicto is granted to owners and to a limited number of non-owners; of these only the bona fide possessor is entitled to a claim for the full measure of the damage, the others are limited to their id quod interest. Parties without the title to sue must obtain cession of action from the owner.

The credit receiver/purchaser possesses the goods with the intention of becoming owner; he enjoys all the essential rights and duties of ownership; he bears the risk of damage or destruction whilst remaining liable for the full purchase price; and is obliged to compensate the owner for damage to the goods.

The case law is divided as to the credit receiver/purchaser's title to sue and where he has been allowed an action in his own right the juridical basis has varied. Actions have been allowed on the following grounds: (a) the contract itself which binds the purchaser to pay the full price after the risk has passed; (b) the contractual assumption of liability for loss; (c) the bona fide possessor analogy; and (d) as possessor being allowed to sue for the id quod interest which amounts to the risk borne, i.e. for the full amount of the damage. It is now clearly established in our law that the credit receiver/purchaser has title to sue because the second and the last ground has received the sanction of the Appellate Division.

A brief comparative study shows that it is a widely accepted principle of law that possession gives title to sue. It is recommended that possible comprehensive statutory remedies dealing with remaining problems be examined.

The third part examines the nature of a contract and exemption clauses: the relevance of this is that a clear understanding of each will assist in determining the effect of exemption clauses on contractual rights and duties; the exact content of the contractual obligation can then be established.

A contract is an obligation-creating agreement which gives rise to various rights and duties; these may be classified into primary and secondary rights and duties to facilitate an examination of the nature and effect of individual provisions. The primary duty is the duty to perform in the agreed manner. The corresponding primary right entitles the creditor to demand performance and may be enforced by the primary remedy, a claim for performance - specific performance or damages as surrogate for performance. The primary rights and duties are binding and effective ab initio. The secondary rights entitle the creditor or injured party to the remedies of rescission or consequential damages; the corresponding secondary duty binds the debtor to make reparation for foreseeable damage caused by the breach. The secondary rights and duties arise ab initio but may be enforced only after a breach occurs. Both primary and secondary rights and duties may arise expressly or by operation of law.

Exemption clauses restrict or exclude rights, liabilities, and remedies which, but for the exemption clauses, would form part of the relevant contracts. They have both a procedural and a substantive effect. A brief historical survey shows that in the Roman Law exemption clauses were either formal substantive stipulations or informal pacta adiecta which provided procedural defences. This substantive/procedural distinction was blurred in the Roman-Dutch law where added agreements have a substantive effect.
Exemption clauses have a procedural effect if they limit or exclude adjectival or procedural rights of enforcement. The view that they operate as shields to damages by qualifying or excluding existing liabilities under a contract cannot be supported. Exemption clauses have a substantive effect because they are merely provisions which reflect the actual or presumed intentions of the parties and the rigts and duties to which they pertain do not and are not intended to come into existence.

Exemption clauses may be classified according to how they operate and a distinction is here drawn between their excluding and limiting effects on primary, secondary, and procedural rights, as well as on special defences. Primary exemption clauses may be divided into primary exclusion clauses, which prevent naturalia or primary remedies from arising; and primary limiting clauses, which merely qualify without excluding the naturalia or primary remedies. Secondary exemption clauses may, similarly, be divided into secondary exclusion clauses, which exclude secondary remedies; and secondary limiting clauses, which limit the creditor's secondary rights. Procedural exemption clauses exclude or qualify procedural rights of enforcement. Special defence exemption clauses affect the right to rely on certain special defences based on factors such as defects in the formation of the contract or supervening impossibility. The latter two classes of exemption clauses have

a procedural effect whereas the former two are substantive in their effect.This analysis may assist in gaining a clearer understanding of the nature and effect of exemption clauses and thereby facilitating the drafting and interpretation of contracts.

The final part deals with the burden of proof and exemption clauses; it examines the meaning of the expression onus or burden of proof and the rules of incidence applicable to the law of contract and exemption clauses. This is clearly relevant because in all disputes concerning the contents of contracts some party must ultimately prove the presence or absence of particular provisions.

The meaning of the term onus, which must be distinguished from the evidential burden, is the duty borne by a litigant to ultimately satisfy the court that he is entitled to succeed in his claim or defence.

Some of the more important rules of incidence are: the onus rests upon the person who makes an assertion; or who affirms a fact; or against whom a rebuttable presumption of law operates. In the law of contract the general rule is that the existence and contents of a contract must be proved by the person relying on the contract. This may be done by tendering a signed contractual document. If the terms of the latter are then disputed the defendant must prove one of the following: that it does not represent the true or complete agreement; that it was not signed animo contrahendi; or iustus error.

Where exemption clauses are incorporated by implication or by reference the court's approach is as follows: the person is bound if he knows that the document contains writing relevant to the agreement; if he is unaware of the relevance of the writing but the other party did what was reasonably sufficient to bring the terms to his notice, he is also bound. The requirements of reasonable sufficiency and contemporaneousness of notice applies in all cases of incorporation by implication or by reference and the strictness of the requirements vary according to the circumstances of each case. A proper understanding of the incorporated provisions is not generally required; this it is submitted should be varied to require such understanding in circumstances that warrant it, to prevent disavadvantaged parties from being unfairly surprised by the provisions. Moreover, exemption clauses should be printed or suitably reproduced instead of merely referring to them.

Only terms which originate in the contractual concensus need to be proved; the naturalia, being normal incidents of a contract do not have to be proved. Persons disputing naturalia must establish special agreements to that effect. Persons relying on exemption clauses must prove their existence and that they cover the acts that caused the loss in question. If liability for negligence is excluded the party covered by the clause need not disprove such liability; if further grounds for liability are alleged they must be established. To avoid strict or absolute liability the defendant must prove that one of the acknowledged exceptions is applicable or that such liability was modified by special agreements.

The application of the general rules to purchase and sale, letting and hiring, special defences, unreasonable terms, and third parties is also briefly examined. A party who relies on a lawful contract need not prove that its terms are reasonable or conscionable. In the absence of fraudulent or criminal acts contractual terms are generally enforceable whether or not they are harsh or onerous. However, if gross injustice will result the courts will in some cases uphold the defence of exceptio doli. This tendency and the statutory power given in terms of the Conventional Penalties Act does not provide a general remedy. It is, therefore, recommended that a statutory remedy along the lines of the English Unfair Contract Terms Act be adopted. This would require that persons relying on exemption clauses must prove that they are reasonable to be enforced; this requirement should only be applicable where a marked inequality of bargaining power exists.

Third parties are protected by exemption clauses only if this is intended by the parties; the onus of establishing this is obviously borne by the third party.

This examination of the rules of incidence shows that the courts are aware of the injustices that could result if exemption clauses are imposed without restriction. Attempts to intervene are limited by poweful precedents and it is recommended that the legislature should provide a remedy which requires that exemption clauses be incorporated in a clear and conspicuous manner; that they be reasonable; and that the burden of proving this be borne by the party imposing the exemption clause.

PART I

STANDARD FORM CONTRACTS

STANDARD FORM CONTRACTS

INTRODUCTION

The standardisation of contracts is one of the most prevalent and pervasive of phenomena in the modern law of contract.[1] It started gaining predominance in the mass-producing industrial societies at the turn of the century and attracted the attention of Continental and Anglo-American legal writers, who realizing the far reaching legal-economic consequences of this development, formulated terms such as "adhesion contracts"[2] and "standard contracts"[3] to distinguish them from the traditional bargaining contracts.

There is, however, nothing new about their nature; the civil and the common law have long been familiar with contracts in standard form, but their usage was initially confined to a limited number of well-defined transactions such as insurance and maritime contracts. The vastly extended use of standard form contracts is a more recent development which, as will be seen, has had a significant impact on the modern law of contract.

The object of this article is to examine briefly the historical background to standard form contracts; the nature and categories of such contracts; the reasons for their widespread usage; the problems encountered and the various solutions adopted to deal with such problems.

HISTORICAL BACKGROUND

The history of standard form contracts is closely connected with the growth of economic and political institutions; they are most commonly resorted to where state interference, monopolies and mass-production exist, with the result that the phenomena of standardisation tends to be cyclic in nature.

The following is a brief, and by no means complete, survey to provide a background indicating some of the areas and periods in which standardisation occurred prior to the nineteenth century. Reference will first be made to isolated instances of standardisation; these are nevertheless relevant because they illustrate not only the extent and duration of standardisation in particular societies and historical periods, but also that the process is an ongoing and inevitable one; inevitable because legal and economic relationships and transactions are seldom unique and a natural consequence of repetition is standardisation. After this the development of maritime and insurance contracts will be examined in more detail.

The evolution of standardisation can be traced back to the isolated instances recorded in the Archaic or Ancient Orient Period. Surviving cuneiform and hieroglyphic texts recorded on clay tablets and papyrus reveal that many transactions were standardised; clay tablets that were in use in Mesopotamia, Babylon and Assyria, between the nineteenth and sixteenth centuries BC show that contracts and transactions such as the sale of houses and slaves, the making of loans, and marriages were standardised.[4] No doubt an important contributory factor (in this and subsequent periods) was that a very limited number of people could write and the professional scribes of the day had, of necessity, to standardise the transactions.

Interference by kings and the state was another major factor in the early standardisation of contracts. Attempts were made as early as the second millennium BC to protect the economically weaker from oppression and exploitation. Regulations were introduced to control working conditions and to fix wages, prices and rates of interest payable on loans.[5] As all parties to such transactions were bound by these terms the agreements, in fact, constituted standard adhesion contracts.[6]

During the eighteenth and seventeenth centuries BC Hammurabi's legal code made it compulsory for all transactions of sale and deposit to be recorded in writing, failure of which was punishable by death.[7] This particularly severe or ultimate form of statutory interference no doubt greatly increased the burden of the scribes and contributed significantly to the standardisation of contracts.

The Ptolemaic Egyptian state, in the third and second centuries BC, not only had a well established monopoly over the majority of goods marketed, but also regulated and controlled the production of goods. The most important of the monopoly goods were the papyrus writing materials of which Egypt had a world monopoly. The sale of such goods by firms not owned by the state was strictly regulated and permitted only by special concession at fixed prices in defined quantities.[8] Transactions involving monopoly goods were clearly regulated by standard contracts as parties dealing with the state had to accept the prescribed terms that regulated both the buying and the subsequent selling of such goods.

During the Roman era, especially from the Principate onwards,[9] the state increasingly regulated the exchange of mass-produced daily necessities; it also took over control of the marine trade and standardised banking transactions. Moreover, by the third century AD it was a common occurrence for public land to be granted on a long or perpetual lease by the Roman state and municipalities.[10]

The various ways in which this could be done merged under the name of emphyteusis[11] in the fourth and fifth centuries AD, during which period private landowners also adopted this practice. Emphyteusis was created by means of a contract[12] that contained a number of standard terms[13] to which the holder (emphyteuta) had to agree and abide by in order to obtain land. Emphyteusis is an example of a standard adhesion contract because the grant had to be accepted on unilaterally imposed terms.

During the Middle Ages standard agreements were to be found in the feudal, industrial commercial and maritime institutions of the day. The earliest feudal communities were bound by agreement and new associates were obtained by contracting with them. The relation between the lord and vassals was originally settled by "express engagement" and any person who wished to join a community (by commendation or infeudation) came to a clear understanding as to the set of standard terms on which he was to be admitted.[14] Although these relations originated in contract they later became customary and fixed with the result that various castes or statuses evolved.

In the Netherlands the woollen and cloth industries developed remarkably during the ninth and tenth centuries AD and were prosperous and vigorous enough to carry on an export trade. These industries were concentrated in the towns and by the thirteenth century AD the employees and their families represented more than half the population. These industrial workers must be regarded as mere wage-earners who were dependent on the merchants who supplied the raw material and sold the finished products. The merchants dominated the workers by their economic superiority and ruled them by their political authority. The employment terms imposed on the workers must have been oppressive examples of adhesion contracts because the workers eventually went out on strike and started uprisings that resulted in a general rebellion.[15]

The method of trade adopted by the merchants of the Middle Ages was that of associations, hansas or guilds that established rules for the conduct of commercial affairs.[16] All economic activities were carried on within the framework of the guilds which were established with the approval of the urban authorities for the purposes of regulating trade, protecting the interests of the merchants and eliminating competition. The guilds fixed the terms of employment, entrance into apprenticeships, regulated prices of manufactured goods and prescribed and guaranteed the quality of such products.[17] Examples of guilds that became powerful economic and political forces are the twelth century 'Hansa of London', which was a vast association in which all the Flemish groups that carried on trade in England were federated;[18] and the Hanseatic League which had a practical monopoly of the trade with Russia and the fisheries of northern Europe.[19] The guilds had as their objectives stability and orderliness and regulated in great detail the inter-group relations and their dealings with other associations and the general public.[20]

Under the Mercantilistic System that prevailed from the sixteenth to the early eighteenth centuries AD the rights and activities of individuals were regulated and limited in the interests of the national economy and political power. An important aspect of mercantilistic policies was the striving for a favourable balance of trade and payments and numerous measures were adopted to ensure that exports exceeded imports; these included: the granting of monopoly and patent rights to stimulate domestic manufacturing; the fixing of prices and wages to maintain low production costs; and promoting shipping for purposes of transport and defence.[21] During the seventeenth century the Dutch had a highly developed standardised shipbuilding industry, became the principal carriers of world trade and supplied ships to many foreign countries.[22]

Page 6/ .....

Examples of mercantilistic companies are the Merchants of the Staple and the Company of Merchant Venturers in Britain; and the Dutch East India Company in the Netherlands, which, inter alia, monopolised commerce with the Spice islands.[23] Such powerful economic units that had state backing and statutory monopolies no doubt made use of adhesion contracts to impose their terms on the public.

The eighteenth centure saw the advent of the Industrial Revolution which was marked by technological and mechanical inventions that transformed the economic and industrial face of Britain and Europe. Economic changes during the eighteenth and nineteenth centuries included the replacement of the home-industry system based on small firms of specialist craftsmen by the factory system based on mass production by machinery; a shift from small partnerships to large share companies; and from self-sufficiency to a dependence on the factories for daily necessities. The large scale output necessitated mass employment which resulted in the expansion of the market on which the people (or consumers), in turn, became dependant to satisfy their day to day needs. The various populations expanded and acquired a higher standard of living. In order to meet the increased demands for goods and services commerce had to adjust and did so by separating production and trade. Whereas before the same person produced and sold the manufactured goods, now wholesalers and retailers performed the distribution functions and it is with these middlemen that most standard consumer transactions are entered into.

The most significant change in the nineteenth and twentieth centuries has been the scale of the expansion of commercial activity; this to a large extent resulted from the availability of finance in the hands of wage earners and from the creation and availability of credit on a large scale.[24]

The foregoing was a general look at conditions and historical periods that imposed or favoured the use of standard form contracts or standard terms; the advantages and disadvantages accompanying this development will be discussed further on. To complete the historical section two specific areas where standard form contracts have, almost without change, been used for centuries, will be examined, they are maritime contracts and insurance contracts.

Maritime Contracts

One of the earliest examples of a maritime contract in standard form is the bottomry contract which was known to the Babylonian merchants in the fifth millenium BC, the Hindus in the seventh century BC, and the Greeks in the fourth century BC.[25]

In terms of a bottomry contract a vessel is pledged as security in return for a loan of money that is repayable only if the ship arrives safely at its destination.[26] Therefore, although it is actually a form of mortgage, bottomry also served the function of marine insurance.[27]

A standard maritime transaction that was common in Roman law and is in many respects similar to bottomry, is fenus nauticum or pecunia traiectitia. This is a contract for the loan of money for the purpose of buying cargo and transporting it by sea. Unlike in bottomry, the cargo was pledged as security for the loan which had to be repaid only if the ship safely reached its destination. As higher rates of interest were allowed the contract also served the purpose of marine insurance.[28]

The Romans adopted useful principles from other systems[29] and developed a body of law that effectively defined the rights and duties of parties to maritime contracts.[30]

Shipowner's guilds or associations were formed but they fell under the control of the state during the decline of the Empire and became in effect state services, which no doubt used standard terms in transactions with the public. By the third century AD standard written charter-parties were used to record most contracts of freight.[31]

During the Middle Ages shipping business was carried on mainly by syndicates and standard forms of engagement for sailors were common.[32] The mediaeval maritime law that governed the dealings of masters, mariners and merchants was an important source of standard terms and contracts. Numerous useful principles were embodied in a number of codes, such as the Catalan Consolato del Mar, which was adopted in the Mediterranean ports; and the laws of Wisby, the Laws of Lubeck and the Hanse Towns, and the Judgments of Laws of Oléron of 1194, which were adopted by the more northern ports and formed the foundation of the British and the north-European customary maritime law.[33]

The Laws of Oléron, for example, provided for standard terms and exemption clauses that regulated the various rights and duties relating to freightage, demurrage, jettison and average loss.[34] The standard terms provided, inter alia, for penalty clauses (double damages for breach) and, until the seventeenth century, that the ships had to be armed.[35] The Laws also provide for an unusual exemption clause, namely, that where a pilot lost or ran a ship into peril, the sailors or merchants would not be liable for any penalty if they decapitated him.[36]

The contract of affreightment, as expressed in charter-parties and bills of lading, was well known in the fourteenth century; it developed into a standard form that has changed little since the seventeenth century.[37]

The maritime codes, standard laws and customs had much in common as they all derived from established principles based on the Rhodian, Greek and Roman sea law and customs.[38]
They proved to be very beneficial to the international shipping industry as they introduced uniformity and certainty as regards shipping transactions.

Insurance

The earliest records of the ordinary insurance contract are to be found in the marine insurance policies of the fourteenth century Italian merchants,[39] who solved the problem of separating the risk (to be borne by the risk carrier) from the advance on the goods at sea. This practice was adopted by the other Mediterranean countries and spread, inter alia, to the Netherlands,[40] where the contract of insurance was regularly used as a means of guaranteeing indemnity against chance losses and guarding against risk.[41]

During the fourteenth and fifteenth centuries standard insurance policies were developed on the Continent; these were introduced into England in the sixteenth century and formed the foundation of English insurance law.[42] In 1601 English legislation provided for the establishment of a Chamber of Insurance which for two centuries accumulated and administered a body of insurance principles it produced a standard policy form which has to this day been used in all marine insurances effected at Lloyds.[43]

Insurance soon spread into other fields: fire insurance companies came into existence before the end of the seventeenth century; life assurance companies, in the second half of the eighteenth century; and accident insurance in the nineteenth century.[44] The twentieth century has seen a vast expansion of non-marine insurance.[45]

10/ .....

In each field the companies involved produced a standard form of insurance policy and where applicable based the wording upon the older policies because the meaning of the various expressions, phrases and words had by then been clearly defined by the courts.[46] The certainty that the sanction of the law brings, therefore, perpetuated and proliferated the use of standard insurance terms.

It can be seen from the historical survey that the process of standardisation was a regular phenomenon where favourable conditions existed. In some instances, particularly where the earlier examples are concerned, the standardisation was limited to specific areas or periods; the later examples, such as maritime and insurance contracts, have been used and developed continuously for centuries. What sets the present phenomenon aside is not its uniqueness but its scale; it is hoped that the survey provides a clearer picture of the differences of scale that resulted from our modern means of mass production and distribution.

What requires discussion next is the general nature and categories of standard form contracts; after this, the advantages and disadvantages of standardisation will be examined.

THE NATURE AND CATEGORIES OF STANDARD FORM CONTRACTS.

Although the phenomenon of contracts in standard form has, as indicated above, been known to lawyers for a number of centuries, it is only in the last few decades that the expression "standard form contract" or any of its variants,[47] has been used and discussed generally. The legal literature dealing with standard form contracts is now very large;[48] reference has also been made to the expression in the case law[49] and by members in Parliament.[50]

Despite the fact that the expression is frequently used and that the idea conveyed by it is familiar to lawyers, it has not acquired "any recognised and distinctive meaning"[51] which makes the formulation of a precise definition difficult. Moreover, because a great variety of standard form contracts are widely used, a comprehensive definition would be too cumbersome to be useful; consequently, no attempt will be made to formulate a definition. There are, however, a number of characteristic features of standard form contracts that may be described and although they are not all to be found in every case, they do assist in identifying them.

GENERAL CHARACTERISTICS

a) They are documents in a common or standard form that in most cases contain printed terms. Standard contracts may contain writing, for example, when blank spaces are left to be completed in writing, or they may be entirely in writing; the latter, is an infrequent occurrence because it would be too time consuming where large numbers of transactions are concerned. In theory, standard form contracts may also be partly or wholly oral, for example, where a representative or salesman memorises the wording of a contract;[52] however, this could give rise to problems of proof. The most common practice, therefore, is to make use of printed documents.

b) The terms contained in standard documents are formulated in advance either by bodies who represent both parties or by one party who then presents the standard document to all the parties with whom he deals who are in the same category, e.g. consumers.[53] The terms are designed to regulate all transactions of a particular type (e.g. dealing with the same service or product) without taking into consideration the peculiar circumstances of any individual transaction.[54]

An attempt is made to provide comprehensively for all eventualities regarding the particular type of transaction, so that the document can be presented to an indefinite number of persons with little, if any, variation.[55] All the necessary terms are printed on the document, or incorporated by reference to the relevant schedules, regulations or notices. Standard form contracts, therefore, are used in circumstances where the offer is general and continuing in nature.[56]

CLASSES OF STANDARD FORM CONTRACTS

Two classes of standard form contracts may be distinguished: model contract forms and adhesion contracts.[57]

a) Model Contract Forms or Agreed Documents

Model contract forms are specimen or convenient forms that contain the essential terms of certain types of contract or incorporate commercial practices which have become settled: they may commend themselves either generally or to a particular trade.[58]

Representative bodies are also a source of model form contracts; this occurs where conflicting interests must be balanced to arrive at an agreement acceptable to all the parties being represented.[59] The use of these forms are discretionary and the parties are free to modify the terms to suit individual transactions.

Provision is sometimes made for the insertion of written terms in blank spaces, or for appendices, without which the forms may well be incomplete.[60] Model contract forms are generally used between parties who have relatively equal bargaining positions. They are useful and unobjectionable instruments that facilitate the bargaining process and, because the terms are open to discussion and alteration by the negotiating parties, their interests are usually fairly balanced.

b) Adhesion Contracts

The term "contract d'adhesion" was coined by Saleilles,[61] a French civil lawyer, at the turn of the century. He defined adhesion contracts as "preformulated stipulations in which the offeror's will is predominant and the conditions are dictated to an undetermined number of acceptants and not to one individual party."[62]

Thus the terms in adhesion contracts are fixed unilaterally and in advance, by or on behalf of one of the parties - the offeror, stipulator or proferens. No negotiating takes place nor is opportunity to do so provided;[63] the terms must be accepted or rejected in their totality, without variation (except, possibly, in minor and inessential detail).[64] The acceptant or adhering party must submit to the imposed terms if he wishes to contract because they are presented on a take-it-or-leave-it basis.[65]

The exclusion of the bargaining process indicates that adhesion contract are backed by a force that is strong enough to ensure adherence to the settled terms in individual transactions;[66] this force may take various forms, which include legislation, agreements of associations, or a stronger economic and bargaining position.[67]

Legislation and the common law frequently prescribe the contents of contracts: individual standard terms may be imported or prescribed in certain cases[68] and proscribed or invalidated in others;[69] legislation may go further and prescribe all the essential terms of certain contracts.[70] The statutory terms then determine the respective rights and duties, leaving little to be decided or added to by the parties.

In such cases the contractual obligations consist largely of predetermined statutory rights and liabilities that the parties must accept in order to contract.[71] With this form of adhesion contract the autonomy of both parties is affected; regardless of their bargaining strengths, both parties are obliged to accept terms that are imposed ab extra. These transactions are nevertheless contracts despite the fact that the parties must either contract on the statutory terms or not at all (failure to do so will result in voidness), because the parties still have an election whether or not to contract and if they do contractual consequences flow therefrom.

Associations, into which firms of particular industries, business or trades have been orgainzed, frequently prescribe standard terms or formulate standard form contracts, which the association members are obliged to incorporate or adopt in their dealings with each other and with the public.[72] Once again, the settled terms must be adhered to, but here instead of being statutory, the backing force takes the form of contractually binding regulations.

Where monopolistic conditions exist, or the offeror has a sufficiently strong economic and, therefore, bargaining position, he may insist that the public or individual persons who deal with him do so either on his terms or not at all.[73] Here the autonomy of one party is affected by the inequality of bargaining power.

This occurs in the vast majority of transactions between private individuals and large organizations, government agencies or state monopolies, for the supply of goods and services that are essential (e.g. public utilities such as water and electricity) or for which there is a widespread demand (e.g. consumer goods).[74]

The characteristic features of adhesion contracts are, therefore, the unalterability of the terms, their imposition on the adhering or signing party, and the fact that the will of one or both of the parties is affected either by the law,associational regulations or the inequality of bargaining power.[75]

Having considered the nature of the two classes of standard form contracts it may be worthwhile to approach standard form contracts from a different angle and to categorize them according to the various situations in which they operate.

FURTHER CATEGORIES

Although any legal relationship or transaction can be regulated by way of standard form contracts, Silberberg[76] correctly points out that the expression is more commonly used to describe instruments designed to regulate transactions that involve the provision of goods and services on the economic market. On this basis he suggests a further classification, which is adopted here because it provides a useful framework within which contracts may be identified for the purposes of determining the approach to be adopted towards particular contracts. In some cases intervention, either statutory or judicial, may be justified to protect the weaker party, whereas in other cases parties with sufficient resources should be left to fend for themselves.

Categories that may be distinguished are the following:

a) Horizontal or Commercial Standard Contracts

These are used in transactions between parties who are engaged in commerce, trade or industry, and who are acting in the course of business. The parties are on the same level in the economic hierarchy, with the result that they have relatively equal bargaining powers. For example, a standard contract used in a transaction between two banks or between the two manufacturers.[77]

b) Vertical or Commercial Consumer Standard Contracts

Here the parties operate on different levels of the economic market and may or may not have relatively equal bargaining powers; in transactions between wholesalers and retailers or between large combines and small traders there may be a large disparity in bargaining power. However, the reverse may also be true, for example, between a small manufacturer and a large retail chain. The transactions are both commercial and consumer in nature as the goods acquired are used or consumed in the ordinary course of business, and any services procured are necessary for business purposes.[78] An example of the former is a transaction between a petroleum company and a retail outlet or petrol station; and of the latter, one between a manufacturer and a shipper for transport facilities.

c) End-Consumer Standard Contracts

These contractual documents are used in transactions between suppliers who act in the course of business and invididuals who require the services or goods for private use or consumption.[79] They include all the usual consumer transactions concerning, for example, the supply of household necessities, private vehicles, and public utilities and transport. The parties are on different levels of the economic hierarchy and generally do not have equal bargaining powers.

d) Personal Service Standard Contracts

These may be used, firstly, in agreements between associations of employers and individual employees or between individual employers and employees, in which case, there is usually an imbalance in the parties' bargaining powers; and secondly, in collective labour agreements between associations of employers and trade unions, in which case, the bargaining power on both sides is relatively equal.[80]

The benefit of this categorization is that it provides a framework within which to deal with standard form contracts. In certain categorie the use of such documents are very beneficial and no forms of intervention are justified, for example, where parties are on relatively equal terms (as in the case of horizontal or commercial transactions - (a) above; and collective personal service standard contracts - (d) above).
However, intervention may be justified where oppression could result from the imposition of standard terms on economically weaker parties (as in the case of end-consumer transactions and to a lesser extent vertical or commercial consumer transactions); this framework can therefore assist in pinpointing the problematic areas.

THE ADVANTAGES OF STANDARDIZATION

Standard form contracts introduce uniformity; this has many advantages.[8] It simplifies the task, and therefore reduces the cost, of internal administration, as everything, from the size, to the contents of the contract, is standard. Order can then be enforced effectively because filing is made easier and information can be supplied more readily and queries dealt with more promptly.

Where large scale production and marketing takes place the use of standard form contracts has proved to be essential because they not only speed up but also facilitate transactions. By dispensing with individual negotiations and the bargaining process, they eliminate much of the time, trouble and expense involved; less staff can then more easily cope with large numbers of transactions.

In this respect their use benefits all concerned as they help to reduce the costs of goods and services and to keep them at levels which are generally acceptable, for example, standardised assurance application forms and policies reduce administrative costs and policy fees.

Uniformity facilitates costing and planning, which is essentially aimed at the calculation of risks with a view to reducing them to a tolerable level[82] by allocating or limiting them. Risks which are difficult to calculate or anticipate can be excluded altogether. Thus, unforeseeable factors, such as strikes, which could affect performance can be taken care of.[83] An important purpose for which standard form contracts are designed, therefore, is to shift the burden of the contractual risk away from the party who would otherwise have borne it. This need not necessarily be unfair or oppressive as the party bearing the risk frequently receives a benefit, in some form or other, in return, for example reduced fares. The parties can then also determine in advance who is to bear the expense of insuring against such risk.[84a]

In the case of commercial transactions, standard form contracts are said to promote economic stability as businessmen will know that they are dealing with their suppliers on the same terms as their competitors.[84]
Kessler[85] argues that standard contracts have become an important means of avoiding "juridical risks". This is done by excluding or controlling the "irrational factor in litigation", namely, the danger that a court or jury may be swayed to decide against a powerful litigant;[85] Llewellyn also writes of legal risks as "reducible overhead".[86] The expense, delay and uncertainty of litigation may be avoided by inserting penalty stipulations, exemption clauses and in some cases, arbitration clauses, in the standard form contract.

Moreover, in areas where standard forms have been used for a considerable time (e.g. in marine insurance the policies have remained almost identical for over three centuries)[87] the meaning of the expressions and words used in the instrument have been defined and clarified by the courts in the course of numerous disputes.

The legal effect of the standard terminolgy becomes established and certain because past interpretations are re-applied and, in terms of the doctrine of stare decisis, become binding. In this way the law can be tailored to specific fields to cater for the special needs of particular organizations, or of the parties, and thereby introduces an obviously desirable certainty.[88] Standard terms with established meanings can then be incorporated into a variety of contracts.

Where practices, which have been thrashed out and settled by a particular trade or industry, are incorporated into a standard form contract it has the potential of being a fair set of rules for the regulation of internal and external relations.[89] The fact that all the necessary terms are contained in a standard contract clarifies the agreement; the parties have all the terms before them in black and white, and can ascertain the exact scope of the contract with the resultant benefits of consistency and certainty.

Standard form contracts have proved to be useful in international trade as well. The international business community has found them acceptable and their formulation has contributed substantially to the unification and harmonisation of international trade law.[90]

It can be seen, therefore, that the advantages of standard form contracts are legion, which accounts for their widespread usage. Moreover, their usefulness will ensure that the standardising of contracts will continue unabated in the future. This in itself is not to be decried; however, some of the attendant ills, which will be discussed next, need to be checked.

20/ .....

DEFECTS OR DISADVANTAGES

The widespread standardization of contracts has resulted in an objectionable trend which has shifted the legal and economic equilibrium to the advantage of the economically stronger party.[91] The courts continue to apply the traditional law of contract, despite the fact that the adhesion contracts lack the marketplace bargaining of the consensual contract model; in other words there is no give and take in the offer and acceptance, as traditionally envisaged,[92] to balance the interests of the parties.

Moreover, the combination of standardized mass-produced contracts, with the inevitable one-sided control of their terms has affected both the freedom and the equality of bargaining.[93] The freedom or voluntariness of bargaining is affected in that the adhering party has no real alternative to accepting the terms.[94] Adhesion contracts are usually drawn up by large business organizations, trade association and governmental monopolies, with the result that no matter where the individual chose to deal he would have little choice but to do so on the imposed terms.[95]

Standardized contracts can hardly be avoided by the ordinary man; they are to be found in everyday activities such as travelling, parking and consumer transactions. In most such cases the standard terms must be accepted in order to go about one's affairs; whereas the individual is increasingly becoming dependent upon the large organizations that supply the necessary goods and services, his ability to negotiate terms has decreased substantially.[96] It is clear, therefore, that the voluntary element, the freedom of bargaining has been affected. The lack of voluntariness becomes more apparent where a marked imbalance of economic bargaining power exists.[97] Standard form contracts easily lend themselves to abuse and are frequently used to exploit and abuse economic power.[98]

21/ .....

They are drafted by the offeror or proferens to give him rights and protection that often extends beyond what is reasonably required in the normal course of business, and conversely, deprive the adhering party of rights designed for his protection and which balance the interests of both parties.[99]

Problems arise when oppressive and onerous clauses that are unfair to the adhering party, are imposed upon him;[100] the gravamen of the complaint is that the person seeking the goods or services need them due to the compelling nature of the economic and social necessities,[101] and he will, in most cases, be unable to obtain them without subjecting himself to the burdensome terms.[102] Thus, not only is it necessary for the individual to contract, he, in addition, has no say over the terms of the contract,[103] because, as the weaker party, his will is confined to the choice of accepting or rejecting a contract that is entirely dictated by the stronger party.[104]

A further problem is that the adhering party is frequently unaware of the terms of the adhesion contract. There are a number of reasons for this, and despite the fact that laymen seldom read through standard form contracts, they are not always to blame. Where the terms are easily noticeable and drafted in clear and simple language the adhering party can with reasonable ease ascertain the extent of his rights and obligations. However, all too often, this is not possible due to the fact that the terms are difficult to read and to understand.[105] They are frequently obscured by the small size of the print and the prolixity of contractual documents containing detailed and involved legal terms and phrases,[106] often in Latin, which remain incomprehensible to all but legal experts. The standard contract may, in addition, incorporate terms by reference to other documents, schedules or regulations that are not always available for inspection at the time of contracting. It is too much to expect of consumers or other laymen to read prolix standard forms every time they contract, or to search for and wade through the rules and regulations of the organizations they deal with; for example, each commuter can hardly be expected to read all the relevant regulations of the railways administration.

The objectionable aspect of adhesion contracts is, therefore, their sheer one-sidedness[107] - the risk allocation, the exclusion or limitation of the proferens' liability and the curtailment of the adhering party's rights and remedies.[108] This has led numerous writers to doubt whether there is in fact an agreement,[109] or a true meeting of the minds.[110] The adhering party's contractual intention is nothing more than a subjection (in a way voluntary) to a collection of rules dictated by the economically stronger party. For this reason adhesion contracts have been referred to variously as codes, bodies of by-laws, private legislation and collective legal regulations.[111]

PROPOSALS FOR REFORM

It is clear from the above that some form of control as regards standard form contracts is necessary. However, before possible remedies can be explored it is important to delimit the exact nature of the problem to be solved. The constituent elements of the rights of contracting parties may be divided into (a) the power to co-determine the contractual terms, and (b) the freedom to choose whether or not to enter into the contract.[112] The problem created by the increasing standardisation of contracts is that one or both of these elements is or are restricted or excluded; the former by the nature of adhesion contracts and the latter by the widespread standardisation of transactions involving daily necessities. A satisfactory solution will have to be aimed at counter-balancing the abovementioned inequalities that result from the offeror's superior bargaining position. The first step is to recognize adhesion contracts as a separate category that requires special rules.

This has been done in numerous countries where legislation has been passed to control the use of standard form contracts or the use of unconscionable or unfair contractual provisions. Examples of such enactments are the British Unfair Contract Terms Act 1977, and the Israeli Standard Contracts Act 1964.[113] In South Africa no enactment has as yet been passed to deal exclusively with unfair contractual provisions or standard form contracts.

The general approach adopted by the legislature has, until recently, been a direct ad hoc[114] one to deal with particular types of provisions or contracts where abuses have become apparent, with the result that only in specific or limited areas have contracting parties enjoyed some protection. For example, the operation of the Conventional Penalties Act[115] is restricted to penalty stipulations and that of the Limitation and Disclosure of Finance Charges Act[116] to money lending and credit transactions.[117]

ADMINISTRATIVE CONTROL

The legislature adopted a new approach with the enactment of the Trade Practices Act 76 of 1976. The wording of the Act is wide enough to cover the problems created by adhesion contracts ("trade practices that may directly or indirectly injure .... the relations between businesses and consumers")[118] and provides the Minister of Economic affairs with the necessary power to prohibit, restrict or control such practices.[119] The Minister acts on the advice of an administrative body, the Trade Practices Advisory Committee, which is created by the Act and consists of seven members appointed by the Minister from names submitted by various representative commercial and consumer bodies,[120] together with two to eight persons who are able to advise the Minister on the application of consumer protection legislation. If the Minister is satisfied that a particular trade practice is injurious, inter alia, to the relations between consumers and businesses he may at his discretion prohibit, restrict or control the trade practice by notice in the Gazette.[121]

The Minister has thusfar invoked the powers under the Trade Practices Act in two instances: first, to prohibit and to make certain recommendations regarding a pyramid selling scheme[122] and secondly, to impose conditions in respect of the distribution of solicitation documents.[123] It is interesting to note that persons who distribute such documents are obliged to print a clear and conspicuous notification on the fact of each document;[124] the words "Pro forma" must also be printed diagonally across the front of the document in a large print size and in a colour other than the colour of the paper and the printing thereon.

This is an effective means of overcoming the problems created by inconspicuously printing exemption clauses in the fine print or incorporating them by reference. However, in the four years since the Act came into operation[125] no steps have been taken to introduce such a requirement in respect of exemption clauses.

The drawback of this form of administrative control is that elaborate machinery is required to administer the Act; this cumbersomeness limits the effectiveness of the control with the result that it is not readily available on a large scale where numerous and varying grievances arise.
Perhaps the biggest complaint is that the Act is not directed specifically at controlling unfair contractual provisions; this shortcoming is highlighted by the fact that the Act has, as yet, not been invoked to combat any of the problems created by the standardisation of contracts. In Britain it was found necessary to supplement the Fair Trading Act 1973, on which our Act was modelled, with the Unfair Contract Terms Act 1977. It is submitted that this too will prove necessary in South Africa.

The Israeli and Swedish legal systems have also created administrative tribunals to control the abuses arising from the use of standard form contracts. The Israeli Standard Contracts Act 1964 provides for the creation of a government appointed Board of Trade to which a proposer may submit a standard form contract for approval. If the contract is approved it cannot be impugned before a court of law. The Board may disapprove the standard contract as a whole, in which case it is void, or it may prohibit the use of specific provisions for a period of up to five years.[126]

The Swedish Act Prohibiting Improper Contract Terms 1971, empowers the Office of the Consumer Ombudsman to prohibit the use of standard terms that are unfair or improper and contrary to the public interest. Persons who make use of or intend to make use of standard form contracts or standard provisions may obtain a ruling from the Office as to whether or not their contracts are improper.[127]

A worth-while feature that is present in both systems and which may fruitfully be adopted is that the administrative bodies may be used to prevent the abuses of standardisation and thereby provide a more effective safeguard for consumer interests. The fact that standard contracts may be submitted for approval can provide businessmen making use of such contracts with the certainty that they will not become embroiled in litigation regarding the contents of their contracts consumers receive added protection because the process of submission and negotiation ensures that unfair or improper provisions are not put into commercial use.[128]

An efficient system of administrative control may provide adequate protection for consumers because administrative bodies are more flexible regarding procedure and can act more speedily than a court of law to provide a comprehensive remedy, (acting mero motu, if necessary) instead of awaiting litigation to deal piecemeal with the problem.

JUDICIAL CONTROL

An alternative solution is that of judicial control authorized by legislation, in terms of which the courts are empowered to apply principles of good faith, public policy, fairness or reasonableness to strike down or limit unfair or unconscionable provisions. For example, in France the courts have used article 1138 of the Code Civile, which requires that contracts be performed in good faith, to refuse to enforce oppressive provisions. Similar use has been made of the German Civil Code BGB article 138 (good morals) and articles 242 and 315 (good faith) to counter abuses of economic power, inequality of bargaining power and the settling of terms by one party.[129]

In the United States of America, the courts[130] are empowered by the Uniform Commercial Code paragraph 2-302 and the Uniform Consumer Credit Code paragraph 5-108, to refuse to enforce unconscionable contracts or provisions. The former Code is aimed at preventing commercial oppression whereas the latter relates only to consumer transactions.[131]

In England, the Unfair Contract Terms Act 1977 requires that contractual provisions used in consumer transactions or in standard form contracts must be reasonable to be enforceable.[132]

The disadvantages of judicial control authorized by legislation are that unless firm guidelines are laid down it may lead to confusion and uncertainty, especially if the remedy is applied inconsistently or limited to extreme cases. Until a body of case law has developed there will be a certain measure of insecurity because it is difficult to lay down specific criteria by which to determine the fairness or reasonableness of individual provisions. Moreover, many judges are reluctant to become involved in the morality of contractual provisions because of the difficulty involved in deciding for others.

Against the above must be weighed the benefits of a remedy that is generally and readily available; a flexible remedy applicable to a wide range of varying problems, which gives the courts a wide discretio to examine disputed provisions or contracts and to apply the appropriate remedy. General powers enable the courts to prevent injustices in respect of a wide range of transactions while avoiding the limitations and complications that arise from strict or rigid requirements of form.

Where unequal contracting parties are concerned, the weaker one may be afforded additional protection by shifting the burden of proof to the stronger party to prove that the contract or provision in question satisfied the requirement of reasonableness or that the opportunity for bargaining existed, in other words, that the power to co-determine the contractual terms was not excluded.[133] This will ensure that where the parties are not on an equal footing the stronger party will not impose unreasonable provisions.

It is submitted that the most effective means of controlling the abuses of standardisation without interfering too much with contractual freedom would be to combine administrative and judicial control.

This can be achieved by legislation that deals specifically with standard form contracts and unfair contractual provisions; it should provide, inter alia, for the creation of an administrative tribunal, comprised of legal members and members appointed from bodies representing the interested parties, which is empowered to adjudicate on the reasonableness or validity of contracts or individual provisions. As in the Israeli and Swedish systems, provision should be made for the submission and negotiation of standard form contracts to enable persons making use of such contracts to obtain prior approval.

To ensure that consumers and other economically weaker parties receive fair treatment in standard transactions the courts should be empowered to refuse to enforce provisionsthat do not meet the requirements of reasonableness. This may increase the workload of the courts but will not be foreign to them as they are already involved in the determination of reasonableness in respect of restraint of trade clauses. Moreover, guidance can, if necessary, be sought from the application of Section 3 of the English Unfair Contract Terms Act 1977, by the English courts.

This dual approach is preferable to an artificial extension of existing common law principles, such as those relating to the exceptio doli, 134 because a modern and comprehensive remedy is necessary to deal with the problems created by the large-scale standardisation of contracts. The dual approach allows for general preventative actions as well as ad hoc remedies in individual cases. This approach taken together with the suggested shifting of the burden of proof to the stronger party (to establish the required reasonableness of contractual provisions) will counter-balance the undesirable aspects of limiting or excluding the economically weaker party's power to co-determine the contractual terms. In this way the manifold advantages of standardisation may still be exploited as the controls will be limited to those cases where both an inequality of bargaining power and the imposition of unreasonable terms are present.

1. See, inter alia, E. Kahn, "Standard Form Contracts", 1971 BML 49; H.B. Sales, "Standard Form Contracts", 1953 MLR 318; CC Turpin, "Contract and Imposed Terms", (1956) 73 SALJ 144; W.D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power", (1971) 84 Harv LR 529 ; O. Lando, "Standard Contracts : A Proposal and a Perspective", (1966) 10 Scandinavian Studies in Law 129; H. Silberberg, "The Meaning of Standard Form Contracts",1967 Rho LJ 158; E. von Caemmerer,"Standard Contract Provisions and Standard Form Contracts in German Law", 1976 VUW Law Review 235; C.M. Schmitthoff, "The Unification and Harmonisation of Law by means of Standard Contracts and General Conditions", (1968) 17 ICLQ 551.

2. R. Saleilles, De La Déclaration de Volonté, (1901) cited by Silberberg, 1967 Rhod LJ 158 at 160

3. N. Isaacs, "The Standardizing of Contracts", (1917) 27 Yale LJ 34. See also Watkins v Rymil (1883) 10 QBD 178 at 188 (document in a common form) and New York Central RR v Lockwood 84 US (17 Wall) 357 (1873) at 379 (cited by N.S. Wilson, "Freedom of Contract and Adhesion Contracts" (1965) 14 ICLQ 172 at 182).

4. See W. Seagle, The History of Law (1946 Tudor Publishing Co. N.Y 259-260; F.M. Heichelheim, An Ancient Economic History, (1958 Sijthoff/ Leiden) translated by J. Stevens, vol 1, pp 98-9, 104-106, 110-113, and 116-117.

5. Heichelheim, op.cit, pp 114, 148 and 183-185.

6. The characteristics of standard adhesion contracts are discussed below.

7. Article 7 of the Code. See Heichelheim, op.cit, vol 1 p 131; See also pp 281-286 where Solan's laws in the sixth century Greece are discussed.

8. See Heichelheim, op.cit, vol 3, pp 66, 103 and 105. See also p 115 where banking monopolies are referred to.

9. During the period of the Principate (or limited monarchy) 27BC to 284AD commercial expansion took place. During the Dominate (or absolute empire) period, 284 AD to the fifth century AD, the industries were organized and large scale production occurred. See Heichelheim, op.cit, col 33 pp 235, 299 and 312; Seagle, op.cit, 160.

10. JAC Thomas, Textbook of Roman Law, (1976 North-Holland) 209; Sohm's Institutes of Roman Law, trans by JC Ledlie 3 ed (1907 Oxford) 348.

11. Emphyteusis is neither sale nor hire, it is a sui generis contract. See Sohm, supra, 349; C 4.66.1
It still survives in modern civil law, but in French law its duration is limited to one hundred years. It also closely resembles the leasehold estate of English law. Nicholas, An Introduction to Roman Law, (1962 Oxford) 148-149.

12. It can also be created by wills. Thomas, supra, 209.

13. Thus the land would be granted only if the holder (emphyteuta) agreed, inter alia,: (a) to pay the annual rent (vectigal, pensio, canon) whether or not he benefited by his emphyteusis - the right would be forfeited and the holder evicted if the rent was three years in arrear (C 4.66.1); (b) to use the land so that the value did not deteriorate (Nov 7.3.2.); and (c) to give notice of his intention to dispose of his rights as emphyteuta so that his landlord could exercise his right of pre-emption, if he chose to do so. (Nov 7.3.2.; C 4.66.3).
All holders were entitled to take both the fruit and the produce of the land, as well as change the mode of cultivation and make improvements. See T.C. Sandars , The Institutes of Justinia 7 ed (1917 Longmans Green and Co) 134-135; Sohm, supra, 349; Thomas, supra, 209-210; Inst. 3.24.3; C 4.66; C 11.63.1; C Th. 5.15; D 6.3; D 27.9.3.4.

14. H.Maine, Ancient Law, 10th ed (1912 Murray, London) 372-3; Seagle, op.cit., 254. In the Netherlands the reciprocal obligations were : protection and defence, owed by the lord; and homage and service, owed by the feudatories.
See Grotius, Inl. 2.41.1 and 35-50, and 3.6.8; Grotius, De Iure Belli ac Pacis, 1.3.23; Van der Keessel, Thes. Sel., 386, 394 and 395.
Grotius, Inl. 2.41.39 writes: ".... met onderlinge verbintenisse want den heer is schuldig aen den leenman schut einde scherm, den leenman aen den heer manschap ende heergewaden".

15. H Pirenne , "The Place of the Netherlands in the Economic History of Mediaeval Europe," (1929-39) 2 Economic History Review 20 at 22,35 and 36.
The Netherlands is here used in its geographical and not its political sense to include Holland,Belgium,and parts of France.

16. J.H. Merryman, The Civil Law Tradition, (1969 Stanford) 14

17. R.H. Soltau, An Outline of European Economic Development, (1935 Longmans, Green and Co.) 67.

18. Pirenne, op.cit, 26.

19. Soltau, op.cit, 55

20. R. Huebner, A History of Germanic Private Law, trans. F.S. Philbrick (1918 John Murray) 128 et seq.

21. Soltau, op.cit, 88-9 and 144-150.

22. R Barbour "Dutch and English Merchant Shipping in the Seventeenth Century", (1929-30) 2 Economic History Review 261 at 277.

23. Soltau, op.cit, 142 and M.L. Nash, "The Origins of Commercial Law and the EEC", (1973) 123 New LJ 548 at 549.

24. See generally, Soltau, op.cit, 164 et seq; W.F. Oakeshott, Commerce and Society, (1936 Oxford) 256-7, 293-311.

25. Heichelheim, op.cit, vol 2 pp 80, 90 and 150; H.E. Raynes, Insurance,(1960 OUP) 3-4; Encyclopaedia Britannica, Macropaedia, vol 9 p 657.

26. CJ Classen, Dictionary of Legal Words and Phrases, (1975-1977 Butterworths) vol 1 pp 188 and 196.

27. Although the standard bottomry contracts clearly formed part of the Roman-Dutch law, where it was regulated by statute (Grotius, Inl., 3.11 and Van der Keessel, Prael., 3.11 and Thes.Sel. 550-569) it is not clear whether bottomry, as such, was known to the Roman law. Schorer, Note 339, supports Reitz's claim that it did (Reitz's note 12 to Heineccius, Grondbeginselen van het Wisselrecht, 2 e druk (Bohemer 1774 Middelburg) pp 90-91); however, Reitz did not distinguish between bottomry and fenus nauticum or pecunia traiectitia. J.Crook, Law and Life of Rome (1970 Thames and Hudson) 223, writes that D 45.1.122.pr and 1 refers to bottomry but this is not clear either. WW Buckland A Text-Book of Roman Law from Augustus to Justinian, 3rd ed revised by P. Stein (1963 Cambridge) pp 466-7 n.19, states that in Roman law bottomry developed out of fenus nauticum. It is likely that a development took place in terms of which the pledge was shifted from the cargo to the vessel itself.

28. See generally C 4.33; D 22.2; Van der Keessel, Thes. Sel., 556-7.

29. See for example D 14.2 (lex Rhodia de iactu).

30. C.E. Fayle, A Short History of the World's Shipping Industry (1934 Allen and Unwin) 57.

31. Ibid 58-9.

32. Ibid 69-70.

33. Ibid 80-82; Nash, op.cit., 548;
H. Potter, Historical Introduction to English Law, 4 ed by A.K.R. Krialfy (1962 Sweet and Maxwell) 185;
A.A.F. Keeton, The Norman Conquest and The Common Law, (1966 Noble) 193

34. Potter , op.cit., 103

35. Fayle, op.cit., 80-82.

36. Ibid 96-7.

37. Scrutton on Charterparties, 15 ed by WL McNair and AA Mocatta (1948 Sweet and Maxwell) 1. The phrase "charte de freight ou endenture" was used as early as 1375. Ibid.
See WS Holdsworth , History of English Law, vol 8 p 256 (1922 Methuen).

38. Potter , op.cit., 185 and Crook, op.cit., 223.

39. Raynes, Insurance, 4-5
Insurance soon gave rise to the contract of reinsurance. Reinsurance was first mentioned in a Genoese enactment of the 12 July 1370. See M. Niemeijer, Beschouwingen Over Herversekering in het Algemeen en Levensherversekering in het Bijzonder, (Thesis Leiden. 1926 Roelants - Schiedam) 4.
Decker, however, notes that mention was made of insurance contracts by Roman writers such as Livy (lib. 23).
See Decker's Note 1 to Van Leeuwen 2.5.2.

40. Raynes, loc cit.

41. Grotius, De Iure Belli ac Pacis, 2.12.5;
Grotius, Inl. 3.24;
Van der Keessel, Thes Sel 711-769; Prael 3.24
Voet 22.2.3;
Bynkershoek, Q.J. Priv., 4.1.

42. Silberberg, 1967 Rhod. LJ 158;
Raynes, op.cit., 5;
Holdsworth, History of English Law, vol 8 p 293.

43. Raynes, supra, 10-11.

44. Ibid 19-20.

45. Ibid 25.

46. Ibid 52-53.

47. "Standardized mass contracts" (A Lenhoff, "Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law", (1962) 36 Tulane LR 481);
"block contracts" (E. Kahn, "Standard-Form Contracts", 1971 BML 79);
'blueprint" contracts (A. Harmathy, "Adhesion Contracts, Model Contracts", Eighth International Congress of Comparative Law (Reports 137-8);
"type contracts/less contracts types" (V Bolgar, "The Contract of Adhesion. A Comparison of Theory and Practice", (1972) 20 Am J Comp L 54);
"documents in common form" (Watkins v Rymil, supra);
"form contracts" (G. Gorla, "Standard Conditions and Form Contracts in Italian Law", (1962) 11 Am J Comp L 2);
"common form contracts" (B. Coote, Exception Clauses, (1964 Sweet and Maxwell) 45).

48. The Anglo-American literature is voluminous. By contrast the South African literature is small. See, inter alia:
C.C. Turpin, "Contract and Imposed Terms",(1956) 73 SALJ 144;
H.R. Hahlo, "Buying a New Motor Car - An Object Lesson in Standard Form Contracts", (1956) 73 SALJ 443
C.C. Turpin, "Another Glance at Grootenboer's Case", (1958) 75 SALJ 26; E. Kahn "Standard-Form Contracts" 1971 BML 49;
E. Kahn, "Freedom of Contract", 1971 BML 79; 1972 AS 73;
E. Kahn, "Restraint of Trade Clauses and Standard-Form Contracts", 1975 BML 194;
P. Aronstam, "Exception Clauses in Contracts: A New Approach for SA Courts", (1977) 94 SALJ 55;
Wille and Millin, Mercantile Law of South Africa, 17 ed by JF Coaker and WP Schutz (1975 Hortors) 16-19;
P. Aronstam, Consumer Protection, Freedom of Contract and the Law, (1977 Juta).

49. See Wire Industries Steel Products v Surtees and Heath 1953 (2) SA 531 (A) 536, 538;
Linstrom v Venter 1957 (1) SA 125 (SWA) 127 D
Blaikie - Johnstone v Holliman 1971 (4) SA 108 (D) 115 G, 116 E
Sanso Properties Joubert Street (Pty) Limited v Kudsee 1976 (4) SA 761 (A) 764 B, 768 E; Racec (Mooifontein) (Pty) Limited v Devonport Investment Holding Co. (Pty) Ltd 1976 (1) SA 299 (W) 302 E; Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd 1977 (2) SA 709 (W) 713.

50. House of Assembly Debates, 29 March 1971, vol 33 col 3826;
Senate Debates, 3 June 1971, cols 3436-7.

51. H.B. Sales, "Standard Form Contracts", (1953) 16 MLR 318;
Exemption Clauses ; Second Report. The Law Commission No 69 and the Scottish Law Commission No 39 HMSO London 1975, para 151.
The expression is not defined or referred to in any South African legal dictionary, nor in The Law of South Africa. The law commissioners of the Second Report did not attempt to formulate a statutory definition as "any attempt to lay down a precise definition of 'standard form contract' would leave open the possibility that terms that were clearly contained in a standard form might fall outside the definition". para 157.
However, attempts have been made to define standard form contracts. Thus s.1 of the Israeli Standard Contracts Law, 5724 - 1964, defines a 'standard contract' to mean - "a contract .... all or any of whose terms have been fixed in advance by, or on behalf of, the person supplying the commodity or service .... with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity .... " Second Report, para 151.

See also Turpin, (1956) 73 SALJ 144:
".... a contractual document embodying terms designed to control the legal results of a transaction and employed without variation in all transactions of a similar class".

See also JE Sheldon, "Consumer Protection and Standard Contracts The Swedish Experiment in Administrative Control", (1974) 22 Am J Comp L 17.

52. Second Report, para 154.

53. Schmitthof, (1968) 17 ICLQ 551; D. Jacobson, "The Standard Contract Law of Israel", 1968 JBL 325;
Second Report, para 152.

54. F. Kessler, "Contracts of Adhesion - Some thoughts about Freedom of Contract", (1943) 43 Columbia LR 629, 631; Silberberg, 1967 Rhod LJ 171; Second Report, para 152; Western Bank v Heunis 1972 (4) SA 703 (NC) 704.

55. HR Hahlo, "Buying a New Car. A Object Lesson in Standard Form Contracts", (1956) 73 SALJ 113; Lenhoff, (1962) 36 Tulane LR 481; AT Wright, "Opposition of Law to Business Usages", (1926) 26 Columbia LR 914, 929; Western Bank v Heunis, supra 704.

56. V. Bolgar, "The Contract of Adhesion. A Comparison of Theory and Practice", (1972) 20 Am J Comp L 53, 54.

57. Schmitthof, op.cit., 551; Silberberg, op.cit., 171-2
O. Lando, "Standard Contracts : A Proposal and a Perspective", (1966) 10 Scandinavian Studies in Law 129, where model contract forms are referred to as 'agreed documents'.

58. Schroeder Music Publishing Co Ltd v Macaulay (1974) 2 All ER 616 (HL) 624; Wright, op.cit., 929.

59. Second Report, para 152; Lando, op.cit., 129.

60. Schmitthof, op.cit., 551-2; Bolgar, op.cit., 54 footnote 2; the Kudsee case, supra, 764 C.

61. R. Saleilles, De la déclaration de volonté, 1901. Cited in Amos and Walton, Introduction to French Law, 3 ed (1967 OUP) 152.

62. The translated definition was taken from the opinion in Henningsen v Bloomfield Motors Inc 161 A 2d 69 (1960) and appears in Bolgar, op.cit., 54.

63. Second Report, paras 152 and 156.

64. Amos and Walton, op.cit., 153; A. Endrey, "Contract and Status", (1955) 29 ALJ 333, 334.

65. Linstrom v Venter, supra, 127 D;
Macaulay's case, supra, 624;
P.H. Clarke, "Unequal Bargaining Power in the Law of Contract" (1975) 49 ALJ 229, 233; Terry, op.cit., 200;
W.D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power", (1971) 84 Harv LR 529, 530;
W.A. Wright, "Arbitration Clauses in Adhesion Contracts", (1978) 33 Arbitration Journal 41.

66. Silberberg, 1967 Rhod. LJ 172.

67. Silberberg, ibid; Endrey, op.cit, 336

68. See inter alia, the Credit Agreements Act 75 of 1980; the Limitation and Disclosure of Finance Charges Act 73 of 1968 (as amended), the Sale of Land on Instalments Act 72 of 1971, and Tariff Book and the SAR and H Rules and Regulations; and Schmitthof's (op.cit., at 53) example of international conventions such as the Brussels Convention of 1924, relating to Bills of Lading, which are introduced into municipal legislations and give effect to the provisions that the contract of carriage by sea must contain certain terms which cannot be contracted out. See also Aronstam, op.cit., 166 et seq.

69. Legislation invalidates, inter alia,the following clauses:
(a) implied warranties in credit agreements (Credit Agreements Act).
(b) clauses which provide that leases shall be terminated or varied upon the sequestration of either party's estate (s. 37(5) of the Insolvency Act 24 of 1936).
(c) clauses that waive rights conferred in terms of the Sale of Land on Instalments Acts, (s.15 of the Act).
(d) various clauses that limit an insurers liability (the Insurance Act 27 of 1943) e.g. s.38 invalidates clauses that exclude liability for death whilst on military duty. See also the Limitationand Disclosure of Finance Charges Act, 73 of 1968.

70. For example, third party insurance in terms of the Compulsory Motor Vehicle Insurance Act 56 of 1972, and aspects of labour agreements, such as fixed minimum wages, in terms of industrial laws, such as the Wage Act 5 of 1957 and the Industrial Conciliation Act 28 of 1956.

71. Endrey, supra, 336.

72. See for example Millner and Co v Liberman and Buirski 1920 CPD 139 (concerning the SA Grain Trade Association's rules and regulations) and Levin and Co v Berg River Flour Mills 1921 AD 78.

73. This obviously applies equally to individually negotiated contracts, see for example, Techni-Pak Sales (Pty) Ltd v Hall 1968 (3) SA 231 (W).

74. See Sales, supra, 342 fn 93 and SAR&H v Conradie 1922 AD 137 at 149.

75. Schmitthof, supra, 553.

76. H. Silberberg, "The Meaning of Standard Form Contracts", 1967 Rhod. LJ 158, 172.

77. Silberberg, ibid.; Sales supra, 319; Second Report, para 11 footnote 18.

78. Silberberg, supra, 173 and Sales, supra, 319.

79. Silberberg, ibid.; Second Report, paras 34 and 159 where it is recommended that contracts should be treated as consumer contract where -

" (i) one party was acting in the course of business; and
(ii) the other party neither made the contract in the course of business nor held himself out as doing so".

Where the contracts are for the supply of goods a third point is added, namely, "the goods are of a type ordinarily supplied for private use or consumption".
The term "consumer", therefore, applies both to persons who use or consume goods, and to persons who make use of services available to the public.
A similar definition of "consumer" is to be found in section 1 of the Trade Practices Act 76 of 1976.

80. Silberberg, ibid. 173.

81. See Kessler, op.cit., 632;
"Contract clauses in fine print" (1950) 63 Harvard Law Review 494, 497 (author not named);
E. Kahn, "Standard Form Contracts", supra, 49;
M. Wright, "Exclusion Clauses Rationale and Effect" (1972) 122 New LJ 490, 491;
J.E. Sheldon, "Consumer Protection and Standard Contracts: The Swedish Experi ment in Administrative Control", (1974) 22 Am J Comp L 17.

82 Wilson, "Freedom of Contract and Adhesion Contracts" (1965) 14 ICLQ 172;
H. Silberberg, "The Economics of Standard Contracts", 1968 Rhod LJ 89, 90.

83. See notes 81 and 82 above and Kessler, op.cit., at 631: "The standard clauses in insurance policies are the most striking illustrations of successful attempts on the part of business enterprises to select and control risks assumed under a contract".

84. KN Llewellyn, Review of Prausnitz, The Standardization of Commercial Contracts in English and Continental Law (1937), in (1939) 52 Harv LR 700, 702

84a See for example Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) SA 794 (A).

85. Kessler, op.cit., 631.

86. Llewellyn, Ibid., footnote 3.

87. Raynes, Insurance, 52.

88. E. von Caemmerer., "Standard Contract Provisions and Standard Form Contracts in German Law", 1976 VUW Law Review 235, 236; and, for example, S v Allied Steel (Pvt) Ltd 1976 (4) SA 164 (RAD).

89. Wilson, op.cit., 176;
A.L. Terry, "Freedom from Freedom of Contract", (1975) 9 NZLJ 197.

90. Schmitthof, supra, 570;
Sheldon, op.cit., 17 footnote 3.

91. Schmitthof, supra, 553. He argues that this is true of both standard model contracts and adhesion contracts. However, it is to a lesser extent true in respect of model form contracts because,as has been pointed out, they may be altered or rejected.

92. Sheldon, supra, 18.

93. Llewellyn, (1939) 52 Harv LR at 702.

94. Hahlo, (1956) 73 SALJ 443
Sales, supra, 318-319;
W.A. Wright, "Arbitration Clauses in Adhesion Contracts", (1978) 33 Arbitration Journal 41, and the comments in Linstrom v Venter 1957 1 SA 125 (SWA) 127.

95. Wilson, (1965) 14 ICLQ 172, 174.

96. Ibid.

97. LM Friedman, Law and Society: An Introduction, (1977 Prentice Hall) 131

98. E Von Hippel "The Control of Exemption Clauses: A Comparative Study", (1967) 16 ICLQ 573, 591.

99. Wilson, supra 176; Silberberg, 1967 Rhod LJ 158, 163; Linstrom v Venter,supra, 127.

100. Lando, supra, 130; Turpin, (1956) 73 SALJ 145
Kahn, 1971 BML 49 ; Linstrom v Venter, supra, 127; A. Endry, "Contract and Status", (1955) 29 ALJ 333, 335; See also D. Jacobsen, "The Standard Contract Law of Israel", 1968 JBL 325.

101. Friedman, op.cit., 131; GW Paton A Text-Book of Jurisprudence 4 ed (1972 OUP) 453.

102. CH Bright,"Contracts of Adhesion and Exemption Clauses", (1967) 41 ALJ 261, 262; Wright, (1978) 33 Arbitration Journal 41, 43.

103. Sales, supra, 334 and Wilson, supra, 181.

104. Paton, op.cit., 452-453.

105. See generally Sales, supra, 333-334;
Bolgar, supra, 54; Kahn, supra, 49; Sheldon, supra, 18;
Comment, "Contract Clauses in Fine Print", (1950) 63 Harv LR 494;
Terry, supra, 201;
E.R. Hardy Ivamy, "Exception Clauses - Small Print", (1967) 117 New LJ 563;
L.A. Kornhauser, "Unconscionability in Standard Forms", (1976) 64 Calif LR 1151.

106. See Western Bank Ltd v Heunis 1972(4) SA 703 (NC) 703H: "This contract .... contains about three folios of somewhat one-sided fine print".

107. Ibid and see 1972 Annual Survey at 73.

108. A good example of such an adhesion contract is to be found in Western Bank Ltd v Heunis, supra, 704. Discussing the 'Westhire Agreement', Van den Heever J said: "Plaintiff is protected against all concievable contingencies - including, for example, any claim for damages for late delivery or non-delivery of 'the goods'. The lessee accepts 'the goods' as they stand, and without warranties or guarantees of any kind, express or implied, every warranty implied by law being expressly excluded; and undertakes to keep in good order. All risk of damage to or loss of 'the goods' passes to him on delivery".

109. See Schmitthoff, supra, 552; Bolgar, supra, 55-6; Lando, supra, 132-3; and Silberberg, 1967 Rhod LJ 158 at 171 n.65

110. See Jacobson, supra, 325; and generally E.J. Cohn, Manual of German Law, 2 ed (1971 London) vol. 2 p 30; Slawson, supra, 540-1; Endry, supra, 335-6; Llewellyn supra, 403.

111. See, for example, Bolgar, supra, 54; Kessler, supra, 632 Encyclopaedia Britannica, Macropaedia, vol 5 p 125; S. Macaulay "The Standardized Contracts of United States Automobile Manufacturers", International Encyclopaedia of Comparative Law, vol. 7 ch. 3 p. 31.

112. This division is recognized in German legal theory: the power to co-determine the terms is the Gestaltungsfreiheit and the freedom to decide whether to contract the Abschlussfreiheit. See A. Lenhoff, "Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law", (1962) 36 Tulane LR 481 at 482.

113. See also the British Fair Trading Act 1973; the Swedish Lag om förbud mot otillbörliga avtalsvillkor SFS 1971 (Act Prohibiting Improper Contract Terms 1971); the Canadian provincial enactments: Unconscionable Transactions Act RSA 1970, Consumer Protection Act SBC 1967, The Unconscionable Transactions Relief Act RSM 1970 and the Unconscionable Transaction Relief Act SNB 1964; and the general provisions of: the American Uniform Commercial Code section 2.302; the Italian Civil Code articles 1341 and 1342; and the German Civil Code BGB articles 138 and 242.

114. See Aronstam, op.cit., 47-168.

115. Act 15 of 1962.

116. Act 73 of 1968.

117. See also the Credit Agreements Act 75 of 1980; Sale of Land on Instalments Act 72 of 1971 (as amended); the Price Control Act 25 of 1964; Insurance Act 27 of 1943 (as amended); Rent Control Act 80 of 1976.

118. Section 15. The definitions of 'business' and 'consumers' in section 1 are widely phrased, the latter also includes any person who make use of any service.

119. Section 15. The Secretary for Commerce is also given a similar but temporary power in terms of section 17.

120. Representing each of the categories of marketing, advertising, commerce, industry, consumer affairs and mail order firms.

121. Section 7 of the Act empowers inspectors to enter premises and to inspect and to seize documents and goods relating to a contravention of the Act. If found guilty a fine of R2 000 or two years imprisonment, or both, may be imposed. Persons may not be prosecuted after one year of the offence having been committed.

122. Government Notice No.'s R469 and R470 in Gazette No. 6880 pp 10 and 16, respectively, in volume 177, South African Government Gazette, March 1980.

123. Government Notice No. R40 in Gazette No 6801 p 7, volume 175, South African Government Gazette, January 1980.

124. The notification must read: "This is a solicitation for the order of (goods or services or goods and services, as the case may be) and not an invoice or statement of account due. You are under no obligation to make any payments on account of this offer unless you accept this offer".
The notification must be printed in boldface capital letters that are not less conspicuous than other printed words and not smaller than the largest of the other printed words. The notification must be surrounded by a clear space of at least one centimeter and must not be obscured by a colour contrast other than the rest of the document. The names of the proprietors or directors as well as the business address must be printed on the document.

125. The Act came into effect on the 1st of April 1977 by Proclamation 60 of 1977 in Government Gazette no. 5485 of 1 April 1977.

126. See for a discussion of this Act: A Bin-Nun, "Type Contracts and Adhesion Contracts ; the Israel Law on Standrad Contracts", 1970 Israeli Reports to the 8th International Congress of Comparative Law. No 17 Institute for Legislative and Comparative Law 107; and D. Jacobson, "The Standard Contracts Law of Israel", (1968) 12 JBL 325.

127. For a discussion of this Act see JE Sheldon, "Consumer Protectic and Standard Contracts ; The Swedish Experiment in Administrativ Control" (1974) 22 Am J Comp L 17.

128. See Sheldon, supra; Aronstam, op.cit., 54; and Bin-Nun supra.

129. See Wilson, supra, 179.

130. Except those in the state of Louisiana. See N.K. Duncan, "Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code" (1974) 34 Louisiana LR 1081.

131. See Duncan, supra, 1091-3.

132. In terms of section 3. For a discussion of the Act see J. Tillotson, "Exclusion Clauses, Consumer Protection and Business Reasonableness : The Unfair Contract Terms Act 1977", (1978) 12 The Law Teacher 11.

133. See Wilson, supra, 186 and Duncan, supra, 1098.

134. See Aronstam, op.cit., 168-184 ; F. Viljoen, "The Exceptio Doli Its Origin and Application in South African Law" (1981) 160 De Rebus 173.

PART II

THE CREDIT RECEIVER'S TITLE TO SUE EX DELICTO IN INSTALMENT SALE TRANSACTIONS

THE CREDIT RECEIVER'S TITLE TO SUE EX DELICTO IN INSTALMENT SALE TRANSACTIONS

INTRODUCTION

As instalment sale transactions (formerly hire-purchase transactions) constitute a major feature in the economic interaction in our society, one would expect all legal aspects of such transactions to be well defined; this is, however, not the case. Legislative provisions which regulate such transactions are concerned primarily with the respective rights of the contracting parties and are aimed at safeguarding the public against sharp dealers.[1] It has been left to the courts to deal with remaining substantive problems, particularly those relating to the position of third parties, by applying relevant or analogous principles of the common law.[2]

The object of this article is to examine how one such problem has been dealt with, namely the question of whether a credit receiver in instalment sale transactions (hereinafter referred to as credit receiver/purchaser), who is not an owner, can recover damages for patrimonial damage to the goods without cession of action from the credit grantor/owner. It is clear that this is not merely an academic question; with regard to litigation and settlements it is of considerable practical importance that the respective rights of the parties and the extent to which they may recover be clearly defined.[3]

Despite the fact that this problem has been the subject of some controversy in our law, the legislature has not provided statutory clarification in the new Credit Agreements Act. Consequently the authorities relating to the hire-purchaser's position remain equally valid as far as the credit receiver/purchaser is concerned.

Page 2/ ...

A clearer understanding of the problem will be gained by first ascertaining who has title to sue for patrimonial damages under the Lex Aquilia and then examining the legal status of the credit receiver/purchaser. After this an attempt will be made to identify the various solutions adopted by the courts.

THE AQUILIAN ACTION : TITLE TO SUE

Whenever the wrongful infringement of a person's rights gives rise to patrimonial loss it constitutes the delict damnum iniuria datum which entitles the injured person to an action under the Lex Aquilia to recover from the wrongdoer the amount of pecuniary loss sustained by him. In other words, the plaintiff may claim pecuniary redress only insofar as his right or id quod interest has been infringed or impaired.[4]

The question which now arises is what kind of right or interest must a person have in corporeal property to be entitled to sue under the Lex Aquilia; or put differently, which classes of persons may recover and to what extent may they do so? It is necessary to examine the capacity of owners as well as non-owners in this respect.

OWNERS

There is no doubt that the owner of property which has been damaged is entitled to sue ex delicto for the full measure of the damage.[5] This is true whether or not the risk has passed or the owner has parted with any of the rights of ownership.

Thus, where the defendant in Rondalia Finansieringskorporasie van Suid Afrika Beperk versus Hanekom[6] raised the argument that the plaintiff/ owner of the damaged motor car (that had been sold on hire-purchase) had suffered no loss because the risk in the car had passed to the hire-purchaser who was contractually responsible to the owner to make good the damage caused by the defendant's negligence, it was held, on appeal, that the owner's right to sue ex delicto could not be defeated by his contractual right to be indemnified by the buyer or an insurer. Colman J remarked[7] that the law would not deny the owner a remedy against the wrongdoer who he may "prefer to pursue rather than rest upon his right to seek redress from a person with whom he has contracted,"[7] because this may lead to an inequitable result "if the purchaser is unwilling or unable to sue the wrongdoer, and is financially unable to compensate the plaintiff or to discharge his other obligations under the hire-purchase agreement." In these circumstances the owner would not remain uncompensated nor would the wrongdoer escape liability "by reason merely of the existance of a contract".[7]

In instalment sale transactions the owner of the goods may, depending on the terms of the contract, be either the credit grantor or the credit receiver; in either case, the owner indisputably has the title to sue ex delicto.

NON-OWNERS

The remedy under the Lex Aquilia was initially restricted to the quiritary owner, but, in practice, this limitation was found to be unsatisfactory with the result that the right of action was extended by way of praetorian edict and juristic interpretation, in the form of actiones in factum or utiles, to other persons with proprietory or possessory interests in the property.[8] An examination of the Roman and classical Roman-Dutch law brings to light that the Aquilian action or its derivations was given to the following non-owners:

Page 4/...

the bona fide possessor,[9] the colonus partiarius,[10] and certain holders of limited real rights or iura in re aliena: the hypothecary creditor,[11] usufructuary,[12] usuary[13] and the holder of a servitus aquaeductus.[14]

Of these only the bona fide possessor is permitted to claim the full measure of the diminution in the value of the property. The others are restricted in their claim to their actual or id quod interest in the property, in other words, they can claim compensation for patrimonial damage only insofar as their personal or limited real rights are impaired.[15]

With a few exceptions[16] all remaining parties with a legal interest in the property must, to acquire the necessary locus standi, obtain cession of action from the owner.[17] The seller who is at the same time owner is obliged to cede all rights of action to the purchaser to whom the risk has passed.[18]

THE CREDIT RECEIVER/PURCHASER

Section 1 of the Credit Agreements Act[19] defines an instalment sale transaction as "a transaction in terms of which

(a) goods are sold by the seller to the purchaser against payment by the purchaser to the seller of a stated or determinable sum of money at a stated or determinable future date or in whole or in part or in instalments over a period in the future; and

(b) the purchaser does not become the owner of those goods merely by virtue of the delivery to or the use, possession or enjoyment by him thereof; or

(c) the seller is entitled to the return of those goods if the purchaser fails to comply with any term of that transaction."

One significant difference between this definition and the former statutory definition of a hire-purchase agreement,[20] is that, for the purposes of the new Act, ownership in the goods sold need not remain vested in the credit grantor/owner.[21]

However, this wide definition is unlikely to alter the nature of the transaction in practice as the people involved in the instalment sale business in South Africa prefer to retain ownership as a means of security and sales with reversion of ownership clauses do not find favour with them.

Consequently, attention will be focused on instalment sale transactions where ownership is retained by the credit grantor/owner; not only because such transactions are more prevalent but also because the problem relating to the title to sue applies only to such transactions. Thus as far as the credit receiver/purchaser's legal status is concerned one point is clear - in practically all cases he will not acquire ownership during the currency of the agreement; an express term to this effect is to be found in most standard form contracts.[22] This then precludes all possibility of the credit receiver/purchaser being a bona fide possessor.[23]

The credit receiver/purchaser has a right to possess the goods; this right, the ius possidendi,[24] flows from the instalment sale agreement.[25] He is, therefore, both a possessor and a purchaser which means that he possesses with the intention of becoming owner.

And although he does not, as yet, have the legal dominium he in fact enjoys all the essential rights and duties of ownership and acts towards all parties as if he were the owner.[26] Whilst the credit receiver/purchaser fulfils his obligations the legal owner parts with possession, enjoyment and the right of free disposition which constitute the essential elements of ownership.[27]

Concerning the risk, the common law rule that, in the absence of a contrary agreement, the risk is borne by the seller pendente condicione, is in most, if not all, cases modified by way of a risk clause in the standard form contract. Consequently the credit receiver/purchaser bears the risk of destruction or damage to the goods as soon as the agreement is signed.[28]

As purchaser the credit receiver remains liable for the full purchase price, whether or not the goods are damaged or destroyed unless the loss is caused by the seller's wrongful act or breach.

In addition, the credit receiver/purchaser is contractually bound to make good any damage to the goods (in terms of standard clauses requiring the goods to be kept "in proper repair and good working order.")[29]

To sum up then, the credit receiver/purchaser, although not an owner, has the right to possess, possession itself and the enjoyment of the goods; he is a purchaser and has the intention of becoming owner; he is liable for the full purchase price, bears the risk and is obliged to compensate the owner for damage.

The question which now arises is whether, bearing in mind his substantial interest,[29a] the credit receiver/purchaser is entitled to sue ex delicto, without cession of action from the owner, for the full diminution in the value of the goods?

Page 7/...

THE CASE LAW

The case law is sharply divided on this point. One approach, a stricter and limited one, is to hold that unless the credit receiver/purchaser obtains cession of action, he has no locus standi.[30] The other, recognizing the necessity of extending the scope of the Aquilian action, allows the credit receiver/purchaser an action in his own right; however, as regards the juridical basis on which the action is allowed there is little unanimity. The following are the grounds on which actions have been allowed:

(a) The contract itself which binds the purchaser to pay the full price after the risk has passed.

(b) Contractual assumption of liability for loss.

(c) The bona fide possessor analogy.

(d) As possessor being allowed to sue for the id quod interest which amounts to the risk borne.

(a) Where a contract of sale contains a condition which suspends the passing of ownership until full payment has been made, and the credit receiver/purchaser is bound to make full payment after the risk has passed, he is deemed to have sufficient interest.

This is the view held by Gardiner JP in the case of Sulaiman versus Armadien.[31]

Here the plaintiff, A, entered into a hire-purchase contract with B for the purchase of a car. A then hired the car to the defendant, who, after smashing the car, rendering it useless abandoned it. Although the car remained the property of B throughout, A sued for the return of the car, or its value. The following passage is cited in extenso to show the reasoning for allowing the action.

> "This contract, in my opinion, binds him (plaintiff) out and out to pay for the car, and, although he has not got the dominium he has sufficient interest to entitle him to sue. It matters not whether he is bound or not, if the car is destroyed, through no fault of his own, to return the car to Brink; I am not going to interpret the contract on that point because it seems unnecessary. Even if one assumes that the destruction of the car by inevitable accident would terminate his liability to Brink, I still think that he would have title to sue under the agreement. He has paid a considerable portion of the money for the car and if the car is lost the loss will be his and not Brinks. I am, therefore, of the opinion that he is the proper person to sue, in fact, I am by no means certain whether Brink would have any title to sue the defendant."[32]

The Judge-President gives no authorities on which he bases his opinion. When regard is had to the authorities, they do not bear him out; nowhere is it stated that a mere contract, binding the purchaser to pay the purchase price, gives the purchaser sufficient interest to entitle him to sue for patrimonial damage once he is in possession and part payment has been made.[33]

Furthermore, the view that the owner is not in this case entitled to sue is obviously incorrect. It is indisputable law that the owner who has not ceded his right of action has locus standi in all cases of patrimonial damage. He cannot automatically be deprived of this right once a hire-purchase contract is entered into.

However the recognition of the need for a remedy was a very timely one and the equitable consideration concerning loss after the passing of risk becomes an important and deciding factor in the later leading case of Smit versus Saipem.[34]

(b) The contractual assumption of liability for loss has been held to be sufficient basis for the Aquilian action.

Direct support for this view is not to be found in the Roman law nor in the works of the institutional writers. Its origin can be traced to an obiter dictum by De Villiers CJ, in the case of Melville versus Hooper[35] and to the ratio decidendi of Barry JP's judgment in Bower versus Divisional Council of Albany.[36]

This ground is an adaptation of the principles enunciated by the courts and is not based on the analogy of the bailee's "special property" in the English law. The latter was rejected as being foreign to Roman-Dutch law principles by the Appeal Court in Marcus versus Stamper and Zoutendijk[37] by De Villiers CJ[38] himself, and Innes JA.[39]

This extension of the right of action found support in numerous subsequent cases, where it was allowed not only to the bailee but also to the borrower, hirer and the purchaser in possession, in short, to those possessors responsible for damage whether or not they aspire to become owners in the future.[40]

This development has been the subject of criticism. Professor Boberg argues that it is difficult to see why the assumption of contractual liability, which relates only to the question of damage and not to the title to sue, should make any difference. The reason why such a possessor suffers loss is not due to the violation of his contractual right in regard to the damaged property but the "coming to fruition of his separate obligation to compensate someone else (the party actually injured or the owner of the property damaged) for the latter's loss"[41]

This argument, to which much weight can be attached, was judicially accepted in a number of provincial division decisions.[42] However, the Appellate Division, in Smit versus Saipem, put paid to it when Jansen JA, after referring to the Melville and Spolander cases stated that theirs was

> "'n benadering wat goed inpas by die ontwikkeling van ons reg vanaf Romeinse tye. Regshistories staan hierdie sake bo verdenking."[43]

Thus in the present law it must be accepted that a possessor responsible to the owner for damage (which includes the credit receiver/purchaser) is entitled to sue under the Lex Aquilia

:) The bona fide possessor analogy. The credit receiver/purchaser is entitled to sue under the Lex Aquilia on the grounds that his position in fact and in law is so close to that of a bona fide possessor that he must be accorded the same rights to sue.

Page 11/ ...

This basis was suggested as a legally more acceptable one by Professor Boberg[44] and found judicial support in the dicta of Hofmeyer J in Lean versus Van der Mescht[45] and Claasens AJ in the case of Vaal Transport Corporation versus Van Wyk Venter.[46]

Once again criticism was raised, this time by Rabie JA[47] who rejected this approach on the grounds that the hire-purchaser does not have a real right. In the same case Jansen JA[48] (for the majority) found it unnecessary to decide this point.

It is therefore uncertain whether the bona fide possessor analogy will in future be resorted to, to provide a basis for the credit receiver/purchaser's title to sue. This is not only unlikely but also unnecessary as other grounds have been established which provide clear authority for such title.

(d) The credit receiver/purchaser is entitled to sue for his id quod interest which in this case amounts to the risk borne by him, entitling him to sue for the full diminution in the value of the property.

This was decided in the Appellate Division decision of Smit versus Saipem.[49] The facts of the case were, briefly as follows: Smit, the appellant, had contracted to purchase three erven from a third party. It was agreed that Smit would immediately acquire possession and occupation of the erven by virtue of the deeds of sale and that the risk would pass at the same time. Ownership would be transferred by registration in Smit's favour once the purchase price was paid, which was to be done in instalments. Smit acquired possession but before becoming owner Saipem, the respondent, trespassed on the property and damaged it by driving heavy earthmoving vehicles over it. Smit sued for damages for trespass, the amount of R4 000 representing the diminution in the market value of the erven.

Page 12/...

The court a quo held that Smit was restricted in his claim to his id quod interest which amounted to the diminution in the value of his rights of use and occupation resulting from Saipem's conduct. It held, further, that the owner alone had an action for the diminution in the market value of the property itself. This decision was overruled by a majority of four to one on appeal.

What the Appeal Court was faced with was the question of whether the plaintiff, as lawful holder or occupier for his own benefit under a hire-purchase agreement,[50] was entitled to sue the defendant in his own right and whether this could be done in respect of the diminution in the market value of the property itself. Put differently, whether the plaintiff could sue for the actual or patrimonial damage to the erven. The court recognized the expediency of entitling the hire-purchaser to proceed directly against the delinquent for the diminution in value.[51] Jansen JA (who delivered the judgment of the majority) based the plaintiff's title to sue upon his possession of the property. The old authorities were exhaustively examined for direction because of the contradictory case law; the latter was avoided. The learned judge concluded[52] that according to legal history and on principle Grotius 3 37 5[53] could justifiably be applied to the present case. This passage entitles the possessor to claim "in-so-far he is injured". The court held:

> "Gesien dat die eiser die risiko dra, is die skade van waardevermindering ... in ekonomiese sin sy skade. Daar skyn geen rede te wees om dit nie ook regtens as sodanig te beskou nie - inteendeel, dit sou 'n logiese en geregverdige aanpassing van ons reg wees. Die eiser se positiewe interesse omvat, benewens die genot en gebruik van die saak, ook die reg op transport van die erwe.

Page 13/...

> Die reg, of selfs die erwe, sou hy kon verkoop, en die geldwaarde van daardie belang hou direk met die markwaarde van die erwe verband. Waardevermindering van die erwe raak die eiser dus regstreeks.
>
> "Op hierdie basis kom m.i.'n skadevergoedingsaksie aan die eiser toe, en hy kan die waardevermindering van die erwe verhaal."[54]

The court therefore, found it unnecessary to decide whether the plaintiff could be placed on an equal footing with a bona fide possessor,[55] or whether he could sue on any broader basis such as "interference with contractual relationships".[56]

As regards the possibility of duplication of actions, which on the principles is a real one and could complicate matters, Jansen JA agreed[57] that, as the actio legis Aquiliae had lost its penal element, there was in reality no danger of the offender being compelled to pay twice. If he were sued a second time he could raise the exceptio doli or maintain that once compensation for the damage had been paid, the owner's right of action lapsed on the analogy of the creditor's in solidum.

Professor van Warmelo submits that there are "certain risks attached to this development", in that anyone, more particulary the borrower, lessor and lessee, suffering patrimonial loss, might feel justified in bringing an action.[58] It is submitted by the present writer that this will present no real problem in practice as the courts will only entertain thoughts of extending the Aquilian action if this were proved to be both necessary and desirable.[59] In the case of the purchaser in possession, especially the hire-purchaser in possession, it proved to be both.

Page 14/ ...

The need for extending the action to the abovementioned categories has, therefore, not been felt and it is improbable that this will in the foreseeable future become necessary. They are not legally in the same position as the bona fide possessor or the purchaser in possession, both of whom have "proprietary" and possessory interests in the corporeal property.

Before concluding it might be of interest to compare this development to the position existing in other legal systems.

In the Anglo-American legal system it is a firmly established principle that the bailee, by virtue of his special property, is entitled to recover the value of the chattel in his possession, as though he were the owner.[60]

The bailee need not prove any personal loss, nor is he limited in his claim to his own interest in the chattel.[61]
Fleming submits that

> "... it may be taken as beyond argument that ... the hirer under a hire-purchase agreement occupies a position no different from that of any ordinary bailee."[62]

The Anglo-American common law, therefore, accords the hire-purchaser the right of action against a third party on the same basis as the owner for the recovery of patrimonial damage. It follows that the practical outcome, in both the Anglo-American and Roman-Dutch legal systems, is the same, the juridical bases merely differ.

In the German Law, article 823 of the BGB provides:

> "A person who, intentionally or negligently injures unlawfully the life, body, health, freedom, property or any other right of another person is bound to compensate him for any damage arising therefrom."[63]

Page 15/...

Included under "any other right of another person" are the real contingency rights, for instance, the expectation of acquiring ownership in an article purchased or acquired under a reservation of ownership.[64]

The French Code Civil provides for a delictual action of a general nature in Article 1382:

> "Any act by which a person causes damage to another makes the person by whose fault the damage has occurred liable to make reparation for it."

And Article 1383:

> "Everyone is liable for the damage he has caused not only by his acts but also by his negligence or imprudence."[65]

In passing, it may be noted that a similar position is theoretically to be found in the Russian Soviet Federative Socialist Republic. The Civil Code of 1964 makes provision for a general action for damages in Article 444.[66] In accordance with the socialist policy of disregarding or minimising the significance of individual ownership the Code provides in Article 157[67] that a bare possessor is accorded the same right as an owner, who is entitled, inter alia, by virtue of Article 156 to

> "... demand that any violation of his rights be remedied even if not connected with a deprivation of possession."

It can be seen, therefore, that it is a widely accepted principle of law that possession gives title to sue. This uniformity is also highly desirable in view of the numerous and divergent approaches adopted in the conflict law of delict in seeking to establish the most appropriate lex causae.

Page 16/...

The uniform approach ensures that in a conflict case, regardless of the lex causae indicated the purchaser in possession will have locus standi, in the countries mentioned, to recover patrimonial loss, whether or not the indicated law is applied. This is of considerable importance in view of the rapidly and ever-expanding international trade and travel between these countries.[68]

CONCLUSION

In this article an attempt was made to gather into a logical whole the authorities relevant to the abovementioned problem, and in so doing, to illustrate to some extent how, in the common law, the judicial process evolves a remedy. It was seen that the common law is flexible enough to allow the hire-purchaser (credit receiver/purchaser) a remedy and the remedy is to be welcomed as it is both expedient and in keeping with other developed legal systems. The process, however, was a slow, pragmatic and often contradictory one, which, it is submitted, is an unsatisfactory method of dealing with a problem this prevalent. It could effectively have been solved more speedily and thoroughly by legislation, with the concomitant benefit of consistency. Also, as it is, the possibility, although remote, of an offender being sued twice still exists. This and the remaining problems, for example, the question of contributory negligence,[69] could fruitfully be examined by the Law Reform Commission with a view to providing draft legislation for statutory remedies.

1 This is true of both the new Credit Agreements Act, 75 of 1980, and the repealed Hire-Purchase Act 36 of 1942. See for example the comments in Smit and Venter v Fourie and another 1946 WLD 13.

2. The position appears to be the same in English law. See J.G. Fleming, "Tort Liability for Damage to Hire-Purchase Goods," (1959) 32 ALJ 26F.

3. PQR Boberg 1969 Annual Survey 143 and 1972 Annual Survey 162.

4. Voet 9.2.12 and 47.10.18 ; Matthews v Young 1922 AD 504; Oslo Land Co. Ltd v Union Government 1938 AD 590 ; Trotman v Edwick 1951 (1) SA 443 (A) 449 ; TW Price, "Patrimonial Loss and Aquilian Liability" 1950 THRHR 87 at 98 (and the numerous authorities there cited); Wille's Principles of South African 7 ed by JTR Gibson (1977 Juta) 514; W de Vos "'n Bespreking van sekere Aspekte van die Reqsposisie van Besitters" 1959 Acta Juridica 184 at 188. E. Grueber, The Lex Aquilia, (1886 Oxford) 233.

5 D 9.2.11.6 ; Grotius 3.37.1 and 5 ; Voet 9.2.10; Union Government v Lee 1927 AD 206 and Smit v Saipem 1974 (4) SA 918 (A) 930. The action is also given to the owner's successors (D 9.2.13.23, D 9.2.14 , D 9.2.17.1 , D 9.2.23.8 and Grueber, op.cit, 235) and to the executor. Lockhat's Estate v North British and Mercantile Insurance Co. Ltd 1959 (3) SA 295 (A) 304.

6 1972 (2) SA 114 (T)

7 At 117

8 See Kaser, Roman Private Law, 2 ed trans R Dannenbring (1968 Butterworths) 4.2.51.II.2 (p 214) ; RG McKerron, The Law of Delict, 7 ed (1971 Juta) 6 - 8 ; P Pauw, "Die bevoegdheid van die nie-eienaar van 'n saak om deliktueel te eis," 1977 TSAR 56 ; Smit v Saipem, supra, 929.

9 On the same basis as the owner. See D 9.2.11.8 ; D 9.2.17 ; Grotius 3.37.5 ; Voet 9.2.10 ; Van Breda v Hofmeyer 3 Menzies 461 ; Erasmus v Mitter and Reichman 1913 TPD 628-9 ; Union Government v Lee, supra, 206 ; Smit v Saipem, supra, 929 A.

10 D 9.2.27 ; Grueber, op.cit. 249 ; See also Louise Tager , "The Aquilian Action at Whose Instance?"(1970) 87 SALJ 6 at 10.

11 D 9.2.17 ; D 9.2.30.1 ; Voet 9.2.10 ; Grueber, op.cit. 243.

12 D 9.2.11.10 ; D 9.2.12 ; Voet 9.2.10

13 D 9.2.11.10 and Voet 9.2.10

14 D 9.2.27.32 and Grueber, op.cit., 243 . See P van Warmelo, "Limits to the Lex Aquilia", (1975) 92 SALJ 129 at 130 where it is stated that

> "... the praetor had full control of the matter. He could allow extensions of the principle of the Lex Aquilia when it was necessary or useful to do so. At the same time, he could refuse an extension, if it were advisable, or take other practical steps to avoid anomalous results."

The role of our Supreme Court judges appears to some extent to be similar to that of the Roman praetor in that they can extend or limit the scope of the Aquilian action when and if deemed necessary. See Ex parte Minister of Native Affairs In re Yako v Beyi 1948 (1) SA 388 (A) 399-400 ; Union Government v Ocean Accident and Guarantee Corp Ltd 1956 (1) SA 577 (A) 584H ; Smit v Saipem supra 931-932.

15 See Grotius 3.37.5: "... voor so veel hy door hem is verkort." See also Voet 9.2.30 ; Grueber , op.cit, 244, 265 and 278; Erasmus v Mittel and Reichman supra, 622; Maraisburg Divisional Council v Wagenaar 1923 CPD 94 at 96 ; Moodley v Bondcrete 1969 (2) SA 370 (N) 372 G-H; Kruger v Strydom 1969 (4) SA 304 (NC) 309; Rondalia v Hanekom 1972 (2) SA 114 (T) 117H-118A ; Smit v Saipem supra 931-2 and 945 ; McKerron op.cit 115-116 and 117.

16 (a) The bailee,as possessor,responsible to the owner for damage; (b) the credit receiver (hire-purchaser) and (c) the case of Krüger v King William's Town Municipality 1959(4)SA 547 (E) in which it was held, at 550, that the plaintiff had acquired certain rights, conferred by a Privincial Notice which, inter alia entitled her to erect monuments and the right to maintain them in situ. The plaintiff alleged that her right had been infringed through an act of negligence imputable to the Municipality (defendant) and that she thereby sustained patrimonial loss.

On the strength of the rights conferred by the regulations the court held, per O'Hagan J, at 550 that :

> "I consider that the plaintiff under the Lex Aquilia can recover such loss from the defendant subject to her being able to establish an unlawful infringement of her right."

Cf Gillespie v Toplis 1951 (1) SA 290 (C)
(d) The holder of a real right in the thing was also given an action in Smit and Shapiro v Van Heerden 1941 TPD 228 at 231.

17 Voet 18.6.2. and 9; D 18.1.35.4 ; D 47.2.14.pr; Shackell v Lippert 7 SC 75 at 77; De Kock v Finchham 19 SC 136 at 136, 142-3 and 145; Grobbelaar v Van Heerden 1906 EDC 229 at 233 and 234 (this case dealt with a purchaser, before delivery, who has neither dominium nor possession, but merely a contractual right); Mahemo v Mpefu 1912 TPD 724 at 728; Anzika v Jacobson 1918 CPD 193 at 195: Meintjies v Manley & Co 1922 CPD 151 at 153; Kruger v Fourie 1946 TPD 155 at 158; Gillespie v Toplis supra 296; Hudson's Transport (Pty) Ltd v Du Toit supra 731 G-H; Van Wyk v Herbst 1954 (2) SA 571 (T) 547; Kruger v Strydom, supra, 310 G-H and 313, where mere possession is considered insufficient basis; McKerron op.cit, 117; Smit v Saipem supra, 942H; Pottie v Kotze 1954 (3) SA 719 (A) 725 F-G; see Boberg 1969 Annual Survey 142-3. The actio ex lege Aquilia is freely assignable, even after litis contestatio. Kader v Frank and Warshaw 1926 AD 347; Walker v Matterson 1936 NPD 504; Goldberg v Tomaselli and Sons 1940 TPD 413.

18 Inst. 3.23.3 ; D 19.1.13.12 ; D 19.1.31.pr ; Sande, Commentary on Cession of Actions, (Ander translation 1906 African Book Co.) Ch.6 para 7 ; Van Wyk v Herbst, supra, 574 C ; Smit v Saipem, supra, 943 A. Cession of action must be actual and proved, it cannot occur tacitly or automatically. See Marcus v Stamper and Zoutendyk 1910 AD 75 and Smit v Saipem, supra, 946 B-C.

19 Act 75 of 1980

20 Hire-Purchase Act, 36 of 1942, section 1(1)

21 Section 5(e) and (f) prescribes that all agreements must state the conditions as to the reservation and subsequent passing of ownership or those relating to the credit grantor's right to the return of the goods.

22 This suspends one of the two elements of delivery, namely, the intention to pass ownership; the other element is the physical delivery. What is suspended is the passing of ownership only and not the whole contract. The Clause therefore amounts to a suspensive term and is not a suspensive condition. MA Diemont RM Marais P Aronstam, The Law of Hire-Purchase in South Africa, 4 ed (Juta 1978) p 17 n 44 : "A condition affects the operation of some exigible part, or all, of the contract. A term modifies its ordinary effect and adds different obligations." Aird v Hockly's Estate 1937 EDL 34 at 50.

23 A bona fide possessor is a person who possesses the property of another believing that he is owner; in other words, he has the animo domini, whereas he is in fact not the owner. See D 50.16.109 ; Grotius 2.2.10 and 11 ; Voet 41.3.6 ; Fletcher and Fletcher v Bulawayo Waterworks Co Ltd 1915 AD 636; Smit v Saipem, supra, 938 E.

24 As opposed to the right of possession, the ius possessionis, which is acquired by mere physical possession.

25 That he does not possess animo domini in no way detracts from his right as possessor as possession is widely interpreted by the courts in this respect. W. De Vos, Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg, 2e uitgawe 215 ; Herring v "Kimpton's" 1931 SR 89 ; Smit v Saipem, supra, 940.

26 See Vaal Transport Corporation v Van Wyk Venter 1974 (2) SA 575 (T) 577

27 Ibid .

28 See further Diemont Marais and Aronstam, op.cit, 94-5 and para 4 of the specimen agreement, Appendix C on p 290; and The South African Encyclopaedia of Forms and Precedents, vol. 9, p 300 para 9.

29 If called upon, the credit receiver/purchaser must be able to restore the goods in the same condition in which he received them, fair wear and tear excepted. Eensaam Syndicate v Moore 1920 AD 458 and SA Encyclopaedia, supra, 292 para 7, 298 para 8 and 308 para 7. To safeguard themselves the credit grantor/sellers usually insist the goods be insured and kept insured to the seller's satisfaction at the purchaser's expense.
Colman J's comments in Rondalia v Hanekom, supra, 115 H concerning the standard form contract which if scrutinized "by one possessed of a magnifying glass strong enough to render its small print legible" it will be seen that the above provisions are present.

29a Whether the credit receiver/purchaser has a real right or merely a personal right is a matter of controversy.

(a) Personal Right The reasoning behind this view is that as the possessory right flows from an agreement it does not diminish the owner's real right. In other words a ius in re aliena does not accrue because, where necessary, the possessory right in its totality must give way before the right of ownership. See for example Grueber, op.cit, 243 et seq ; De Vos, 1959 Acta Juridica at 197 ; HCJ Flemming, Huurkoopreg, 2e uitg. (1974 Butterworths) 246 ; Van Wyk v Herbst, supra, 574B ; and Rabie JA's dissenting judgment in Smit v Saipem, supra, 940 - 942.

(b) Real Right The reasoning adopted here is that it is justified to contend that the credit receiver/purchaser's right is stronger than a mere contractual/personal one and that it is a limited real right because of his substantial interest (as discussed above); bare dominium is retained merely to fulfil the function of real security; his possession is exclusively for his own benefit and is not temporary; and all he has to do to acquire ownership is to pay the price, in other words, ownership may be acquired independently and the owner may not prevent this happening. See DSP Cronje, "Die aard van die reg van 'n huurkoper van 'n roerende saak", 1980 TSAR 233; Diemont, Marais and Aronstam, op.cit, 226 (contingent real right); Van Niekerk 1974 THRHR at 321; Lean v Van der Mescht, supra, 110-111; cf. Sulaiman v Amardien 1931 CPD at 510-511; Boland Bank Bpk v Joseph and another 1977 (2) SA 82 (D) 88-9.
It is submitted that the latter argument is the more acceptable one. However, in view of the Appellate Division decision in Smit v Saipem (discussed below) it does not matter, for the purposes of his title to sue, whether he has a real or a personal right.

30 Grobbelaar v Van Heerden 1906 EDC 229 at 233; Hudson's Transport (Pty) Ltd v Du Toit 1952 (3) SA 726 (T) 731; Van Wyk v Herbst 1954 (2) SA 571 (T) 574; Pottie v Kotze 1954 (3) SA 719 (A) 725; Smith v Saipem 1973 (4) SA 335 (T) (overruled on appeal) and Rabie JA's dissenting judgment in Smit v Saipem, supra, 942 H.
See also Kruger v Strydom 1969 (4) SA 304 (NC) 311-313.

31 1931 CPD 509.

32 At 510-511.

33 See the pre- 1931 authorities in notes 8 - 17 above.

34 Supra 932 F.

35 3 J SC 261 at 262, where the Chief Justice stated that although the case was

> "in the nature of conductio furti ... it may be said that the present action is rather for the destruction of the bird. Then the Lex Aquilia would apply. And under this law, too, I find that not only the owner, but also a bailee responsible to the owner, could sue."

36 7 EDC 211 at 212 where it was held:

> "We come to the conclusion that there was a special contract by which the horse was not merely lent, but the bailee became responsible for any accident that might happen to it. Under these circumstances Bower, the bailee, is injured, and may sue for the full amount of damage done to the horse."

As the Melville v Hooper case was neither relied upon nor cited it could be argued that the court was influenced, as in the former case, by the English law. All the more so since respondent's counsel distinguished the position in Roman-Dutch law, as stated by Voet 9.2.10, from that of the English law, as stated by Stephen in his Commentaries.

37 Supra.

38 At 75:

> "I confess that I am unable to attach a definitive meaning to the words 'special property.' It is a phrase of the English law which has not, so far as I know, found general acceptance in our law."

39 At 81:

> "... an idea expressed in the terminology of the English law, and of doubtful efficacy, according to the Roman-Dutch practice, to supply a right of action if none were present without it."

The "special property" doctrine was further rejected by Searle J in Hofmeyr & Son v Luyt 1921 CPD 831 at 835 and subsequently as Judge-President in Maraisburg Divisional Council v Wagenaar 1923 CPD 94 at 96.

40 See De Villiers and Paul v Jansen 1912 CPD 354; Geldenhuys v Keller 1912 CPD 623 at 628 and 630 (where Searle J explains the above case in which he was also a judge); Hofmeyr & Son v Luyt, supra, 836; Maraisburg Divisional Council v Wagenaar, supra, 95-6; Wireless Telegraph Co v Dougall and Munro 1927 CPD 380 at 383; Caluza v Nyongwana 1930 NPD 157 at 161; Spolander v Ward 1940 CPD 24 at 32; Moosa v Mohamed 1940 NPD 435 at 440; Nienaber v Union Government 1947 (1) SA 392 (T) 397; Hudson's Transport v Du Toit, supra, 731-732; Van Deventer v De Villiers 1953 (4) SA 72 (C) 74; Moodley v Bondcrete (Pty) Ltd, supra, 372 G; Minister of Defence v Carlson 1971 (2) SA 231 (N) 232A; Craig v Collins 1972 (1) PH F12; Smit v Saipem, supra, 931H-932A.

41 1969 Annual Survey 143.
See also Rabie JA's dissenting judgment in Smit v Saipem, supra, 941.

42 Lean v Van Der Mescht, supra, 110-111; Vaal Transport Corporation v Van Wyk Venter, supra, 577; Nothnagel v Synodinos TPA No A 134/73 (mentioned by Van Niekerk 1974 THRHR at 321).

43 Supra 932 A.

44 1969 Annual Survey 144.

45 Supra 11 A. Cf. Kommissaris van Binnelandse Inkomste v Anglo-American (OFS) Housing Co Ltd 1960 (3) SA 642 (A).

46 Supra 578 A
This approach was also adopted in Nothnagel v Synodinos, supra, according to Van Niekerk (note 42 above).

47 In his dissenting judgment in Smit v Saipem, supra, 938-940. He stated that the correct position in our law is as set out in Laubscher v Paterson, supra.

48 Supra 932 H.

49 Supra. Van Blerk, Wessels and Hofmeyer JJA concurring with Jansen JA;and Rabie JA dissenting.

50 The court at 926D found that the deeds of sale could be regarded as hire-purchase agreements.

51 At 927 in agreement with Prof. Boberg's submissions in the 1972 Annual Survey 165.

52 At 932.

53 Grotius 3.37.1:
"Crimes against property are destruction and deprivation of, and damage to, property against the will of the party interested in the property."

Grotius 3.37.5:

> "We say the party interested in the property, for not only the owner in full or qualified ownership, but also he who has the use of, or a mortgage upon or merely the possession of the property, has a claim against the wrong-doer, in-so-far he is injured by him."

The Introduction to Dutch Jurisprudence of Hugo Grotius, translated by A.F.S. Maasdorp (Juta 1903).

4 At 932 F-H.

5 As was done in the Lean and Vaal Transport cases supra n 45 and 46.

6 See N J van der Merwe. Die Beskerming van Vorderingsregte uit Kontrak teen Aantasting deur Derdes, 119 et seq.

7 At 932D with Claassens AJ in the Vaal Transport case, supra, at 578 B-C.

8 (1975) 92 SALJ 130 at 134

9 See note 14 above.

0 This was firmly established by the Court of Appeal in the leading case of The Winkfield 1902 PD 42 (CA) by Collins MR at 54. This case is also "the current of modern American authority." See Prosser on Torts 2nd ed(West Publishing Co 1955) 68 n 38, and Fleming,(1959) 32 ALJ 268 n 6.

1 The Winkfield, supra, 61 ; Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt 1914 AC 197 (PC) 210. Similarly in the USA, Brewster v Warner 1883 135 Mass 57, and in Australia, Turner v Hardcastle (1862) 11 CB (NS) 683.

2 (1959) 32 ALJ at 267

3 EJ Cohn's translation, Manual of German Law, 2nd ed Vol 1 155 para 314.

54 O. Palandt, Bürgerliches Gesetzbuch Beck'sche Kurz Kommentare 1968 p 677:

> "Auch dingliche Anwartschaftsrechte (z b Anwartschaft auf Erwerb des Eigentums an einer unter Eigentumsvorbehalt veräusserten sache) gehören hierber (viz Art 823 "Wer ... ein sonstiges Recht ... verletzt") BGH LM (Ad) No 1."

(My thanks to Dr J E Schiller for his assistance in researching and translating the German texts.) Art 455 (BGB) provides for the possibility of a sale with the reservation of ownership.

55 Translated by Ryan op cit 111, where he makes the following comments:

> "By virtue of these provisions, a defendant will incur liability if his conduct is such that fault can be imputed to him; and the damage which is recognized, as subject-matter for compensation is any harm, material or moral, done to the plaintiff's person or property. We can thus assert that the Code Civil recognizes a fully generalized principle of tortious liability namely that one who injures another either intentionally or negligently must compensate him for his loss."

The above provisions were adopted in articles 1401 and 1402 of the Dutch Code. See Nederlandsche Wetboeken, issued by J A Fruin and compiled by N J Brink (Martinus Nijhoff, 's-Gravenhage 1947) 449.

56 "Harm caused to the person or property of a citizen and also harm caused to an organization must be made good in full measure by the person causing it. The person who caused the harm is not liable to make it good if he proves that it was not caused by his fault. Harm caused by lawful acts is liable to be made good only in the cases laid down by Statute."

Translated by A K R Kiralfy, Law in Eastern Europe no 11 (University of Leiden, A W Sijthoff 1966) 117.

57 "Protection of the right of a possessor who is not owner. The rights conferred by Sections 151-156 of this Code also belong to any person, even if not the owner, who is in possession of property by virtue of law or of contract."

58 Thus where instalment sale goods are damaged or destroyed locally or in another country by locals or foreigners, the credit receiver/purchaser will have title to sue whatever lex causae (the lex fori or the lex loci delicti commissi) is applied. Dispensing with the requirement of having to obtain cession of action from the owner will clearly facilitate matters in such cases.

59 Referred to in the cases of Union Government v Lee, supra, and Lean v Van der Mescht, supra; and by Boberg 1972 Annual Survey 165-6 and Van der Merwe 1972 THRHR 183-4.

PART III

THE NATURE OF A CONTRACT AND EXEMPTION CLAUSES

THE NATURE OF A CONTRACT AND EXEMPTION CLAUSES

INTRODUCTION

As a general rule, the parties to a contract may determine for themselves what the content of their contractual obligation (their rights and duties) shall be, provided they act within the law.[1] Because the basis of a contract is the agreement - whether real or presumed - between the parties, a contract need not have any particular content to be valid.[2]

There are, however, various well developed classes or specific types of contracts - for example, sale, lease and deposit - which are commonly found in day to day transactions and contracting parties who intend to enter into these contracts must comply with the requirements laid down by law for such contracts.[3] The contents and consequences of the recognized contracts become fairly well known and laymen, such as consumers, come to expect that when they enter into specific contracts the usual and expected rights and duties will arise and be protected or enforced in terms of the general law.

However, the normal scope of a particular type of contract or rights, duties and remedies under the general law, may be extended, restricted or excluded by special provisions in the contract or by additional or subsequent agreements. Such provisions may be introduced with the knowledge and consent of the contracting parties, but in today's mass markets they are frequently imposed unilaterally by the economically stronger party and are often contained in the fine print of prolix documents and couched in complex legal terminology so that the other party either remains unaware of them or cannot understand them. Because the use of standard form contracts and exemption clauses is widespread, it is important, for purposes of litigation and settlement, to have a clear understanding of the nature of a contract and the nature and effect of exemption clauses; this will assist in determining the effect of the clauses on the contractual rights and duties, and establishing the exact content of the contractual obligation.

THE NATURE OF A CONTRACT

Generally speaking, a contract is an agreement which is entered into with the intention of creating, and which in fact does create, a legal obligation. In other words, a contract is an obligation-creating agreement.[4]

As the essential element of an obligation is the legal bond or vinculum iuris,[5] the essence of a contract is that the duties which the parties seriously and deliberately undertake will be legally binding on them.[6] With the conclusion of a contract one party,[7] the obligor or debtor, assumes a duty, or duties, and is liable to perform them in the agreed manner, and the other party, the creditor or obligee, acquires the right to the proper performance of the duties or the obligation as a whole.[8]

The term "obligation" requires some clarification. It may be used to refer to the legal bond or vinculum iuris,[9] i.e. to signify the state or condition of being bound or answerable under the contract;[10] however, "obligation" is also commonly used to refer to the duty, debt or liability that results from the contract. This may lead to confusion because it can then be said that an obligation gives rise to an obligation. Therefore, for the purposes of clarity and consistency, the term "obligation" will be used to refer to the legal bond and the terms "duty" or "liability" will be used as the correlatives of the rights that are created by the contract. Thus seen from the debtor's side the contractual obligation is a duty or liability to perform and from the creditors side it is a right or a claim against the debtor for performance.[11]

In order to enforce his contractual rights the creditor is given a number of remedies which, along with the other rights and duties, arise at the time the contract is concluded and avail the creditor if the debtor commits breach of contract.[12] The remedies are generally aimed at proper performance but may also in special circumstances, be used to resile from the contract, or to claim compensation.

A claim for performance may take two forms: a claim for performance in forma specifica, that is, specific performance or "reele eksekusie"[13]; or a claim for a sum of money in lieu of the whole or incomplete part of the performance, in other words, damages as a surrogate for performances.[14] The injured party may choose which form the claim will take subject to the court's discretion.[15]

The remedies directed towards cancellation or rescission may be said to run counter to the initial purpose or intention of the parties[16] because the contract was concluded primarily with a view to performance. Although such remedies arise at the time the contract is concluded, they are not available to the creditor until breach of contract is committed by the debtor, and then only in special circumstances.[17]

A further remedy is the claim for damages in respect of foreseeable loss suffered as a result of a breach, that is, the right to consequential damages;[18] damages that flow from and arise out of the breach itself must be distinguished from the damages as surrogate for performance. Once again this remedy, which also arises at the time of contracting, obviously only avails the creditor after a breach has occurred.

Thus it can be seen that although all the remedies arise with the obligation, they are not all immediately available to the creditor and they are not all aimed at performance. The primary object of the contractual obligation is, nevertheless, to ensure that proper performance takes place. There is, however, also a secondary object, namely, to compel the debtor to compensate the creditor for any loss suffered as a result of a breach.[19]

To distinguish between the various rights and duties referred to above, it may be argued, in jurisprudential terms, that a contract gives rise, simultaneously, to primary and secondary rights and duties. This does not mean that a separate and distinct obligation or legal bond is created for each class, but merely that the contract gives rise to various types of rights and duties that may be distinguished and grouped.

According to this analysis, the primary duty is the duty to perform in the agreed or required manner,[20] and the corresponding primary right is the right that entitles the creditor to demand performance. The primary right may in the event of a breach be enforced by means of a remedy, namely, a claim for performance (either in forma specifica or the equivalent in money) which is enforceable by means of a court order.[21] This remedy may be termed a primary remedy or a sanctioning right. Where money debts are concerned there is, in effect, no difference between the right to demand performance and the remedy to claim performance. In other cases, however, the creditor's right to demand the performance due and the remedy to claim damages as a surrogate for performance may be distinguished because such damages may only be claimed after a breach occurs. The primary rights and duties are binding and effective ab initio and may be resorted to immediately the performance becomes due. The primary remedy gives effect to the initial purpose of the parties and is directed towards the intended outcome, namely, performance.

Turning now to what may be termed the secondary rights and duties, it will be seen that not only are there sufficient differences to justify this distinction but also that it provides a useful conceptual framework within which to discuss various kinds of contractual provisions.

The secondary rights are the rights of the creditor or injured party to the remedies that entitle him to claim consequential damages and rescission. The corresponding secondary duty is the duty of the debtor to make reparation for the foreseeable damage caused by a breach of contract.[22] The secondary rights or remedies may be resorted to and the secondary duty becomes enforceable only after a breach of contract occurs. Moreover, the secondary rights and duties do not merely give effect to the initial purpose of the parties and are not only aimed at performance, they are directed at both the money value of proper performance and the losses caused by the breach.[23]

Thus it can be seen that there is a clear difference between the primary rights and duties, which are effective immediately and are aimed at performance, and the secondary rights and duties, which lie dormant until activated by a breach and then to some extent run counter to the intended outcome.[24]

These differences may be illustrated by the following hypothetical case. A and B enter into a contract in terms of which A is to deliver a television set with an aerial to B for R800, performance is to take place immediately. As soon as the contract is concluded all the primary and secondary rights and duties arise. However, only the primary rights and duties may be enforced immediately. Thus A may demand the purchase price and B the delivery of the goods. Should either commit a breach, the injured party may resort to his primary remedy to sue for performance. The primary right and remedy of A, to claim the R800, amounts to the same thing, but not those of B. B's primary right entitles him to claim the television set and aerial. Should A fail to perform, B's remedy is to claim either delivery of the goods or the equivalent in money. In other words, the right entitles him to performance, and the remedy, to either specific performance or R800 in damages as surrogate for performance.

B's right to claim the R800 is in the alternative; unless a breach has been committed, he may not substitute the damages for the performance due and claim only the money.

Moreover, if the breach is serious enough to entitle B to cancel the contract[25] or if B suffers foreseeable loss, then only at this stage do the secondary rights and remedies of B come into operation and enable him to cancel the contract and/or sue for consequential damages.

Both primary and secondary rights and duties may arise expressly or be imported by operation of law. Primary rights and duties based on agreement are reflected in the essentialia and the incidentalia, and those imported by law in the naturalia.[26] Although secondary rights and duties are constituent elements of an obligation, they may also be provided for expressly, for example in cancellation clauses and penalty stipulations.[27]

The benefit of this analysis is that it facilitates an examination of the nature and effect of individual contractual provisions. Thus where exemption clauses are concerned the particular right, duty or remedy that the clause limits or excludes can be pin-pointed and,as will be seen,the effect of the provision on the contract as a whole can be determined. However, before looking at the effect of individual provisions on particular contracts, it is necessary to discuss the general nature and effect of exemption clauses.

THE NATURE AND EFFECT OF EXEMPTION CLAUSES

The expression "exemption clause"[28] is a generic term which encompasses a variety of provisions that in some way exclude or restrict the scope of legal rights and liabilities. The nature of a particular provision is determined by the real effect it has despite its apparent purpose. Some provisions are clearly designed to operate as exemption clauses and their wording expressly provides for the exclusion or restriction of rights, liabilities, or remedies. What is meant by "restriction" may be illustrated by the following examples: clauses that impose some liability on parties who exercise a right or enforce a remedy; that restrict the time within which rights and remedies may be enforced; or that alter the onus of proof or provide that certain matters are conclusive proof of others.[29]

There are, however, other provisions which, although intended for a different purpose, may be regarded as exemption clauses because they are capable of producing the same result as exemption clauses. Thus a clause which provides that disputed matters are to be decided by one of the parties and that such decision is to be final, clearly affects the other party's remedies.[29]

An exemption clause, in its ordinary or dictionary sense, is a clause which removes or omits something or grants relief from liability to which others are subject.[30] In its legal sense, an exemption clause, can therefore, have one of two functions. First, it can restrict or exclude rights, liabilities and remedies which, but for the exemption clause, would form part of the contract or be available to the parties: these are the naturalia of specific contracts, the inherent remedies (or secondary rights and duties), and the adjectival or procedural rights of enforcement; in the latter case the effect is procedural whereas in the former it is substantive.

The second function an exemption clause may have is to restrict or exclude the effect of earlier express provisions contained in contractual documents; this can be done by inserting later specific provisions that contradict earlier ones.[31] However, strictly speaking, it cannot be argued that rights and duties are created by the earlier provisions only to be restricted or excluded by later ones. The rights and duties reflected in the essentialia and the incidentalia are created by and based on agreement - whether real or presumed - and the contract as a whole must be construed to determine the limits of the contractual obligation or the scope of the substantive rights and duties.

PROCEDURAL OR SUBSTANTIVE EFFECT?

A clear distinction must be drawn between an exemption clause's procedural and substantive effects. In Roman law this was to a large extent determined by the nature of the provisions agreed upon. In general, the formal stipulations had a substantive effect whereas the informal pacta merely operated as procedural bars to litigation.

A pactum in Roman law was an agreement which fell outside the recognized categories of contracts and was consequently not actionable, though it might give rise to a defence, or exceptio, in litigation.[32] However, in the classical and later Roman law a number of pacts were recognized as being enforceable; of these only the pacta adiecta are relevant here.[32a]

Pacta adiecta were added to recognized contracts[33] and were in some cases allowed by the praetors to modify the normal rights and duties under such contracts. A distinction was drawn between pacts that were made at the time the original contract was entered into,

the pacta continua or pacta in continenti adiecta, and those that were made subsequently, the pacta ex intervallo. A further distinction was drawn between pacts made to diminish a debtor's liability, the pacta ad minuendam obligationem, and pacts made for the purpose of increasing the debtor's liability, the pacta ad augendam obligationem.[34] The effect of the pacta adiecta varied according to the nature of the contract to which they were added.

In an informal bonae fidei contract a pactum continuum, whether it increased or decreased the debtor's liability, was considered to be a term in the original or main contract; the pactum continuum was enforceable because good faith required that it be honoured.[35] However, pacta ex intervallo neither formed part of the main contract nor conferred a right of action: ".... si ex intervallo, non inerunt nec valebunt, si agat, ne ex pacto actio nascatur".[36] Although there is no evidence it has been argued that this general rule was to some extent qualified where pacta ad minuendam obligationem were subsequently added to consensual contracts; the reasoning being that as a consensual contract could be set aside by a consensus contrarius,[37] there was no reason why it could not be diminished by a pactum ex intervallo;[38] but for such an agreement to be construed as altering the main contract it had to affect essential terms because a pactum ex intervallo that altered incidental matters or increased the debtor's liability gave rise only to an exceptio.[39]

Where stricti iuris contracts were concerned all pacta adiecta were initially unenforceable in terms of the rule ex nudo pacto non oritur actio.[40] Later a few exceptions were allowed in the case of pacta in continenti. For example, in mutuum, where a loan of money was involved, an informal agreement that interest should be paid was eventually regarded as being enforceable;[41] such an agreement is a pactum ad augendam obligationem. It appears that pacta in continenti ad minuendam obligationem remained unenforceable and merely gave rise to the exceptio pacti.

10/ .....

It can be seen, therefore, that exemption clauses were well known to the Roman law where they took one of two forms: formal contractual stipulations, which had a substantive effect, and informal pacta adiecta known as pacta ad minuendam obligationem, which, with a few exceptions, merely had the procedural effect of providing a defence based on the agreement (known as the exceptio pacti conventi) which was available to the debtor if sued by the creditor on the original contract.[42] Exemption clauses could be agreed to at the time or after the conclusion of a contract to affect both the naturalia and the essentialia of specific contracts thereby limiting or excluding certain of the rights, duties and remedies of the contracting parties.[43]

However, the value of the Roman law regarding the nature and effect of exemption clauses is limited by the formalism that prevailed at the time; the relatively strict demarcation between the formal stipulations and the informal pacta no longer exists in our law, consequently guidance must be sought from more recent authorities.

In the classical Roman-Dutch law the formalism of Roman law was dispensed with and all lawful agreements with iusta causa or redelijke oorzaak were enforceable.[44] The established or specific contracts were still recognized and the parties could freely vary them by way of extending or exempting provisions in the form of agreements or express promises. This is clearly explained by Grotius in his Inleidinge:[45]

> "Toezegging welcke dient tot eenige andere handelinge geschied of tot verstercking van de ghewoonelicke rechten tot die handeling behoorende; of om iet daer buiten te bevoorwaerden: want met voorwaerden, ghelijckmen zeit, gaet een man uit sijn kleederen, dat is, sijn recht: ende mag daerom hem een ider verbinden tot iet dat nae ghewoonte in de handeling niet en is begregpen, ofte oock sijne mede-handelaer van iet dat nae gewoonte daar in zoude zijn begrepen te ontlasten, 't en waer de burgerlicke wet zodanighe verbintenisse ofte onlastinge verrietigde".[46]

Therefore, according to Grotius, added agreements may be used to confirm, enlarge or to limit the normal incidents of a contract. The term "toezegging" means an express verbal promise or agreement and includes both the stipulatio and the pactum of Roman law.[47]

In his commentary on D 2.14 Voet sheds further light on the nature and effect of added agreements. These, if seriously and deliberately entered into, are all valid and enforceable, whether or not they increase or diminish the normal scope of contracts, or were added at the time or after the contract was concluded.[48] This is true whether they are incidental to or varied other contracts; incidental provisions relate to matters that may be present in or absent from a contract without altering its nature.[49] Added provisions may also be essential if framed on matters that vary the usual nature of contracts.[50] Where special terms diverge from the normal nature of a contract they will have to be observed, but as far as the remainder of the contract is concerned, the general law still applies.[51] However, where special provisions are added so as to destroy the very essence of a contract there is no general rule that can be applied.[52] The provisions may, in some cases, invalidate the whole contract, for example, where they introduce impossibilities;[53] in others, the added agreement is void but the main transaction remains valid.[54] Finally, the added agreement, if contrary to the essence of a contract, may transform the nature of the main contract so that a different contract comes into being.[55]

The foregoing brief discussion of added provisions (including exemption clauses) illustrates the fact that in the classical Roman-Dutch law formal and specific rules gave way to informal and general principles that blurred the substantive/procedural distinction; also that the effect of serious and deliberate added agreements was clearly considered to be substantive in nature.

12/ .....

PROCEDURAL EFFECT

In the modern South African law one finds that the courts do not have a uniform approach as regards the effect of exemption clauses. In a number of cases it appears that the view is held that exemption clauses operate in a procedural way, as qualifications of liability or as shields to damages. The approach adopted in such cases is to ascertain the liability of the proferens under the contract without reference to the exemption clause, and then to determine whether or not the limitation or exclusion contained in the exemption clause is sufficient to exempt the proferens from that liability.[56] This is illustrated in Galloon v Modern Burglar Alarms (Pty) Ltd.[57] The facts are briefly that the plaintiff entered into a contract with the defendant for the leasing, installation and maintenance of a burglar alarm system. When the plaintiff's premises were burgled the system failed to operate due to the negligence of the defendant's employees. Although the contract contained a clause excluding liability "for any damage whatsoever, whether by burglary or any other means, caused to the lessee by non-operation of the alarm for any reason .....", the plaintiff sued the defendant for the loss suffered, alleging negligence in contract and delict. Baker AJ said: ".... the question before the court is whether the exemption clause in the contract serves to protects the defendant against liability for its own negligence."[58]

He then cited with approval a passage from Rutter v Palmer[59] where Scrutton LJ, inter alia, said:

> ".... the liability of the defendant apart from the exempting words must be ascertained."[60]

According to this view the function of exemption clauses is apparently to prevent the enforcement of substantive rights and duties by defeating actions for breach. The obligation created by the contract is not affected and any failure to perform amounts to a breach. The exemption clauses merely operate as defences by providing a bar to claims envisaged by the contract.[61]

The basic error in the reasoning here is that it fails to recognize that if the exemption clauses have the effect of excluding liability for non-performance the purported rights and duties to which they relate will not arise, or at best a unilaterally binding contract (i.e. a donation) will come into operation. Moreover, the parties cannot legally create contractual rights that they intend to be unenforceable; to have a right without a remedy is the same as having no right at all.[62]

There is however, a limited area where exemption clauses do have a procedural effect and this is where they operate to limit or exclude adjectival or procedural rights of enforcement. For example, certain arbitration clauses, clauses affecting the burden of proof, and clauses that limit the time within which an action may be brought. Outside these narrow confines it must be accepted that the effect of exemption clauses is substantive.

SUBSTANTIVE EFFECT

The traditional juristic view is that exemption clauses operate to modify substantive liability.[63] A fundamental principle of construction of a contract is that the contract as a whole must be interpreted and effect must be given to all its provisions.[64] Exemption clauses are treated as being nothing more than contractual provisions and their meaning is ascertained by determining what the parties' intentions were as regards individual provisions,[65] in other words, exemption clauses are taken to reflect the actual or presumed intentions of the parties.

The approach of the courts is, therefore, to establish the actual content of the contractual obligation (as intended by the parties and reflected in the terms of the contract as a whole); this differs from determining the extent to which the contractual obligation is affected by exemption clauses because that would imply that rights and duties come into existence before being affected.

This approach is clearly reflected in the dicta of Corbett JA in Stocks and Stocks (Pty) Ltd v TJ Daly and Sons (Pty) Ltd:[66]

> "I am unable to see how a party who, in the course of negotiating a contract, agrees to a term which will have the effect of varying what otherwise would have been one of the normal incidents of the contract, can be said to waive a right. After all, the only relevant rights are contractual ones and until the contract, incorporating the terms in question, has been concluded no contractual rights can arise. Contractual rights cannot exist in vacuo. And by the time that the contract is concluded, the so-called 'waiver' has already taken place."[67]

There can be no doubt then that exemption clauses are substantive in their effect and the rights and duties to which they pertain do not, and are not intended to come into existence. This is illustrated in the case of Agricultural Supply Association v Olivier,[68] which concerned the effect of a non-warranty clause. The plaintiff[69] had ordered Rutgers tomato seeds from the defendant who supplied seeds which, although similar in appearance, turned out, after germination, to be a different type known as Samazana; as a result the plaintiff suffered losses which he claimed from the defendant. The defendant raised the defence that both the catalogue, which was supplied by the defendant, and the invoice, which was handed to the plaintiff when the seeds were delivered, contained a non-warranty clause that had been brought to the plaintiff's notice.

To determine the effect of the lengthy clause the judges divided it into the recital/preamble and the operative part.[70] The recital/preamble was further divided into two parts; first, the statement that, "We take the utmost care to supply seeds, plants etc. true

> to name and character, of good germinating strength and genuine in every way ...."

and secondly, the reason for the clause, " .... but owing to the fact that certain seeds are indistinguishable in appearance from other seeds of different name and/or character and owing to changeable climatic conditions, different modes of cultivation and various causes over which we have no control ...."

The following was held to be the operative part, ".... we give no warranty, express or implied, as to the description, name and/or character of any seeds or as to the germination, productiveness, quality or growth of any seeds or plants supplied by us and we will not be in any way responsible for results. Goods not accepted on these conditions are to be returned at once."

The plaintiff contended that the words of the recital qualify both the exclusion of the warranty and the liability; however, both judges rejected this contention. De Wet J held that the operative part was unambiguous and, therefore, the recital was irrelevant and not open to construction.[71] Steyn J construed the clause as a whole but found nothing in the preamble that qualified the exclusion of the warranty and the seller's liability.[72] Consequently it was held by De Wet J that the plaintiff,

".... had no cause of action based on the implied warranty which he would otherwise have had namely that the seeds supplied to him were not the seeds ordered and that there was a breach of contract."[73]

The non-warranty clause performed a substantive function here by preventing the plaintiff from acquiring a right to demand that a particular type of seed be delivered to him; failure to supply the desired type, therefore, did not amount to breach. What the buyer actually bought was not the specified seeds, but a spes of obtaining the correct type.[74]

The incorporation of exemption clauses into specific contracts may have the effect of altering the nature of the contract. The case of Welgemoed en andere v Sauer[75] affords a good example of how the apparent nature of a contract can be affected by the inclusion of a special clause that contradicts an earlier express provision in a contractual document. In this case the appellants sold a farm to the respondent ; the agreed purchase price, stated in clause 1,was R40 per morgen. According to the figures listed in the contract, the various portions of the farm amounted to 1079,6935 morgen, making the purchase price R43 187,74. However, the actual size of the farm turned out to be 978,4982 morgen. The buyer paid the sellers R39 139,93, based on the actual size of the farm at R40 per morgen. The sellers sued for the balance, claiming that on a proper interpretation of the contract the purchase price had to be determined, not according to the actual size, but in accordance with the size as indicated in the contract. Reliance was placed on clause 5 which provided that the property was sold ".... soos dit tans lê in uitgestrekktheid, daar die verkooper nie begeer deur enige grotere uitgestrektheid voordeel te trek, of enige tekortkoming in die grootte van die eiendom goed te maak nie ...."

Jansen JA examined in detail the nature of sales by measure (ad quantitatem) and sales by the price (ad corpus) and the consequences of such sales. Of relevance is the fact that, if there is an excess or a shortfall in the property sold, a proportionate adjustment of the purchase price takes place. It was found that the contract under consideration had the characteristics of a sale ad quantitatem but that this was contradicted by the wording of clause 5 which excluded the normal consequences of such a sale.[76] Jansen JA held that the specific and express provision in clause 5 carried the greatest weight and this meant that the normal interpretation and legal consequences of stating the measurement and the fixing of the price per unit, were excluded.

Consequently the correct interpretation of the contract was that the purchase price was the number of morgen mentioned in the contract at R40 per morgen.[77]

Muller JA held that the only acceptable interpretation that could be placed on the clause is that if it should be found that there is an excess or a shortfall it would make no difference to the purchase price. The purchase price would always be calculated on the size of the farm as mentioned in the agreement.[78] The learned judge went on to criticize the approach adopted by the court a quo, in terms of which the contract was construed without reference to clause 5 after which an attempt was made to reconcile clause 5 with the conclusion reached; he stated that there was no justification for such an approach.

The substantive effect of this clause is clear: instead of the apparent (and expected) sale ad quantitatem, a contract with a different substantive content came into operation because the right to demand a reduction in the purchase price for any shortfall had been excluded. Consequently the buyer actually paid R43,73 per morgen, instead of R40, as was expressly provided for in clause 1.

To sum up, then, exemption clauses can have both a procedural and a substantive effect, the former being limited to adjectival or procedural rights, whereas the latter applies where substantive rights in general are concerned and, as was seen, the effect may be such as to alter the apparent nature of specific contracts.

Having examined both the nature of a contract and the nature and effect of exemption clauses it can be gathered that the usual primary and secondary rights and duties in contracts may be affected in various ways by individual exemption clauses. The effect of such provisions on specific contracts can more readily be established if exemption clauses are categorized according to the manner in which they affect particular rights and duties.

CATEGORIES OF EXEMPTION CLAUSES

Exemption clauses may be categorized according to whether they exclude or merely limit certain rights and duties that would otherwise have come into operation or would have been available to the parties. In the following analysis distinctions will be drawn between the exclusionary and limiting effects of exemption clauses on primary, secondary and procedural rights, after which, exemption clauses relating to special defences will be discussed.

1. Primary Exemption Clauses

These clauses exclude or limit the usual substantive primary rights or duties under specific contracts; they affect the normal consequences by excluding or limiting the naturalia or the primary remedies to claim either specific performance or damages as surrogate for performance.

a) Primary exclusion clauses: These provisions are intended to prevent specific naturalia or primary remedies (sanctioning rights) from arising. The effect of such provisions is to diminish the substantive content of individual contracts and may have one of the following as a consequence.
The first possibility is that no contract arises. This occurs where the provision excludes both the primary remedies. The legal position is no different from that of where a person apparently assumes a liability on condition that the performance or non-performance of the duty is made dependant upon his will; such acts are deemed to be acts without legal consequences or non-juristic acts.[80] An agreement without primary remedies is not a contract because no obligation or vinculum iuris is created.[81]

The second possibility is that a contract with a different nature or a unilateral contract is created. Thus in Welgemoed v Sauer[82] the clause in question excluded the normal right to adjust the price, thereby altering the nature of the apparent (and expected) sale ad quantitatem.

A unilateral contract would be created if the parties to what was initially a bilateral contract agree to exclude one party's primary duty (for example, where parties to a sale subsequently agree that the purchase price need not be paid) or his primary rights (for example, where they enter into a subsequent pactum de non petendo not to claim repayment of a loan); in both instances a unilateral contract-donation-is created. The third possibility, which occurs most frequently, is that, although the substantive content is diminished, the nature of the contract remains unaltered. The essentialia, which make it possible to identify the contract, arise, but some or all of the naturalia are excluded. Thus, if parties to a contract of purchase and sale agree to exclude the so-called implied terms relating to risk, latent defects and eviction, the resultant contract remains one of purchase and sale despite the fact that its substantive content is less than that of other such contracts.

b) Primary limiting clauses: These provisions limit or qualify the naturalia or primary remedies without excluding them. For example, in Olivier's case[83] the "non-warranty" clause qualified, without excluding, the right to demand performance by limiting it to the right to demand damages as surrogate for performance; the alternative right to claim specific performance (for the correct type of seed) was excluded by the clause. An example of a clause limiting a naturalium is a time limit or guarantee clause that guarantees sales goods for a shorter period than that allowed by the general law, thereby limiting the availability of the implied warranty against latent defects; the warranty is extinguished once the time limit expires.

2. Secondary Exemption Clauses

These clauses affect the substantive secondary rights and duties by excluding or limiting the constituent secondary remedies that entitle the creditor or injured party to claim consequential damages or rescission.

(a) Secondary exclusion clauses: The effect of secondary exclusion clauses is to exclude some or all of the secondary remedies that normally avail the creditor or obligee when a breach of contract occurs. Thus the parties may agree that in the event of breach neither may resile from the contract;[84] this excludes the right of rescission but does not affect the right to claim consequential damages. Conversely, they may agree that the debtor or obligor will not be liable to make reparation for any foreseeable damage caused by a breach. However, the exemption clause will only afford protection in respect of the risks which ordinarily arise out of the performance required by the contract in question. If the contract is breached in a way that increases the risk of loss or damage the exemption clause cannot be relied upon in respect of the loss that resulted from the increased risk.[85]

If both the secondary remedies are excluded, leaving the creditor or injured party no remedy for the infringement of his rights, then once again, no contract arises because the remedies are constituent elements of the obligation and provide the requisite vinculum iuris.[86] The difference between the exclusion of primary and secondary remedies is that in the former case the right to demand performance cannot be enforced whereas in the latter case the rights of rescission and to claim compensation (for damage sustained as a result of the infringement of a primary right) are nullified. The vinculum iuris consists of remedies to enforce both primary and secondary rights and if either group of remedies is entirely excluded the binding force is broken with the result that no contract arises.

(b) Secondary limiting clauses: These provisions limit, without excluding, the creditor's rights or remedies in the event of late, defective,or non-performance.

They are used, inter alia, to place a limit on the amount of damages that may be claimed,[87] or to limit the time within which the claim must be brought.[88] By merely qualifying the secondary rights and remedies they do not destroy the contract's binding force; the debtor remains liable, albeit in a limited way, to compensate the creditor for damage suffered. Secondary limiting clauses must be distinguished from penalty stipulations. With the former, damage must still be proved and if the damages are less than the amount provided for in the limiting clause then only the actual damages need be made good; the limitation in the clause comes into operation only if the proven damages exceed the agreed amount. With penalty stipulations the agreed amount, if not out of proportion to the prejudice suffered,[89] becomes payable when the breach occurs and damage need not be proved.[90]

Clauses that place a time limit on secondary rights have the effect of extinguishing the right to damages at the end of the limitation period. Similarly, once the stipulated damages have been claimed the right to compensation is extinguished by its fulfilment. These provisions are, therefore, directed at the limitation and extinction of the constituent secondary rights.

3. Procedural Exemption Clauses

Procedural exemption clauses exclude or qualify the procedural rights of enforcement. Although the rights that are affected do not form part of a contract the provisions may nevertheless be regarded as exemption clauses because they affect the rights that are normally available to contractors to enforce substantive rights. Here too, a distinction can be drawn between provisions that exclude and those that merely qualify procedural rights.

(a) Procedural exclusion clauses: Provisions that exclude procedural rights have the effect of extinguishing the rights of enforcement or ousting the jurisdiction of the courts; the latter are against public policy and therefore void.[91] The former prevent the enforcement of substantive rights with the result that no contract arises,or if agreed to subsequent to the formation of a contract, the vinculum iuris is broken and only a moral obligation remains. An example of such a provision is a pactum de non petendo in rem, an agreement that no action will be brought against anyone, which may be raised as a defence by all persons who may be liable in terms of the obligation in question.[91a] Such provisions do not affect the substantive content of contracts, they merely ensure that no actions may be brought.

(b) Procedural qualifying clauses: These provisions provide, inter alia, for alternative procedures to settle disputes without attempting to exclude procedural rights. Arbitration clauses afford a good example. The jurisdiction of the court is not ousted when a party to a contract wishes to rely on an arbitration clause when sued on that contract. Usually the matter must first be submitted to arbitration but the court has a discretion as to whether or not the proceedings should be stayed pending the outcome or whether it should itself settle the dispute,[92] this discretion "must be judicially exercised and a very strong case for this exercise must be made."[93] Moreover, the defendant may raise the defence that submission to arbitration is a condition precedent to a claim on the contract by virtue of the provisions of the contract itself.[94]

Procedural rights may also be qualified by means of clauses that restrict rules of evidence or procedure, or that impose a time limit within which claims must be made. If the stipulated time is shorter than the time allowed in terms of the general law then no claim may thereafter be brought if this provision is not complied with.[95]

In other words time limitation clauses have the effect of extinguishing not only primary and secondary rights but also procedural rights.

4. Special Defence Exemption Clauses

Contracting parties may agree to exclude the right of either party to rely on most of the special defences available to them. These special defences relate to surrounding factors such as defects in the formation of the contract or supervening impossibility. Examples of defects in the formation of contracts are misrepresentation, mistake and fraud. Clauses excluding the right to raise misrepresentation[96] and in certain minor cases mistake,[97] as a defence, will be upheld. However, the consequences of fraud may not be excluded as this is against public policy.[98]

The view of the present writer is that the right to raise these defences is a special category of the procedural rights which exists by virtue of the general law and operates as a bar to litigation. It does not form part of the contractual obligation and its effect does not diminish the latter's substantive content. When it is resorted to without the intention of resiling it amounts to a confession and avoidance; the contract is not disputed but the party setting up the special defence seeks to avoid some of its legal consequences. The effect of the exemption clause here is to exclude or limit the right to raise the special defence without affecting the contract. However, if the special defence (e.g. iustus error) is aimed at nullifying the contract then the exemption clause may not be relied upon because the contract as a whole, including the exemption clause, is void ab initio.[99]

CONCLUSION

In this article an attempt was made to analyse the nature of a contract and the nature, effect and various categories of exemption clauses with a view to providing a framework within which the effect of exemption clauses on contractual and other relevant rights can be determined. It can be seen from the foregoing that this is a complex area and unless matters are reduced to their essentials it is not possible to gain a full understanding of the effect of exemption clauses on particular rights or the contract as a whole. This analysis may, in addition, assist in the drafting of clauses because they can then be framed to limit or exclude only the desired rights or duties without extending their effect too far and could thereby prevent unnecessary litigation. Finally, it may also facilitate the interpretation of contracts because it can be used to establish the exact limits of the contractual obligation.

1. See Voet 2.14.16; Grotius, Inl. 3.1.10-12 and De Iure Belli ac Pacis 2.12.8-10; Wells v SA Alumenite Co. 1927 AD 69 at 73; Marlin v Durban Turf Club and others 1942 AD 112 at 113; SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere 1964 (4) SA 760 (A) 766-7; Stocks and Stocks (Pty) Ltd v T.J. Daly and Sons (Pty) Ltd 1979 (3) SA 754 (A) 764 C.

2. See LAWSA 5.111 (Joubert (general editor), The Law of South Africa (Butterworths) vol 5 para 111); De Wet en Yeats, Kontraktereg en Handelsreg, 4e uitg. J.C. de Wet en A. Van Wyk (Butterworths 1978) pp 5 and 7 For an example of a sui generis contract see Farmer's Co-operative Society v Berry 1912 AD 319 at 324.

3. For example, in sale, agreement must be reached as to the merx and the purchase price. Weiman v Malcomess Ltd 1950 (2) SA 115(E) 121

4. See De Wet en Yeats, 4 and 7 ('n verbintenisskeppende ooreenkoms); LAWSA 5.110; Lee and Honoré, The South African Law of Obligations, 2ed by E. Newman and D.J. McQuoid-Mason (1978 Butterworths) para 51.

5. Iust. Inst. 3.13. pr; D 44.7.3; Van Leeuwen, C.F. 1.4.1.2; De Wet en Yeats,1. See also Nicholas v Wigglesworth 1937 NPD 376 380 and Jones v Raad 1940 CPD 376 378 ("cause of action").

6. Wilken v Kohler 1913 AD 135, 140 Conradie v Rossouw 1919 AD 279, 320 Wille and Millin, Mercantile Law of South Africa, 17ed by J.F. Coaker and W.P. Schutz (1975 Hortors) 1.

7. As a contract is a bilateral juristic act there must be at least two parties to the contract. Any number of persons may, however, enter the agreement on either side, but, to simplify matters, reference will be made only to two parties.

8. Inst. 3.3. pr; D 44.7.3. pr; Voet 12.1.1 and 44.7.4; J.W. Wessels, The Law of Contract in South Africa, 2 ed by A.A. Roberts (1951 Butterworths) para 27.

9. See note 5 above.

10. See Fairlands Ltd v Inter-Continental Motors Ltd 1972 (2) SA 270 (A) 276 (where 'liability' is discussed).

11. De Wet en Yeats, 1;
Grotius, Inl. 3.1.24

12. LAWSA 5.200.

13. De Wet en Yeats, 188-190
LAWSA 5.235.

14. LAWSA 5. 233 and 236; De Wet en Yeats, 188.
This must not be confused with cancellation as the contract remains in force.

15. See generally Grotius, Inl. 3.15.6
Van der Keessel, Prael. 3.3.41 and 3.15.6 and Thes. Sel. 512; Farmer's Co-operative Society (Reg) v Berry 1912 AD 319, 324-5;
Woods v Walters 1921 AD 303, 309-310;
Shill v Milner 1937 AD 101, 106-7;
Radiotronics (Pty) Ltd v Scott, Lindberg and Co. Ltd 1951 (1) SA 312 (C) 330-1.
Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A) 378.
Gengan v Pathur 1977 (1) SA 826 (D) 830-1.

16. LAWSA 5.200; De Wet en Yeats, 176.

17. See the Radiotronic's case, supra, 300-301;
The special circumstances are listed in LAWSA 5.238.

18. LAWSA 5.233 and 243; Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1, 46-47; the Radiotronic's case, supra, 300-1.

19. I. Van Zijl Steyn, Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg, Annals of the University of Stellenbosch, Section B vol 7 (1929) p 3.

20. See Naylor v Munnik (1859) 3 Searle 187, 191 and Medallie and Schiff v Roux (1903) 20 SC 438, 440.
The primary duties based upon agreement are contained in the essentialia and incidentalia. The naturalia, i.e. terms which arise by operation of law, also impose legal duties which give rise to correlative rights (Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) 531); these duties may also be classified as primary ones.

21. LAWSA 5.236.

22. Unlike in the law of delict where the payment of damages is a primary duty.

23. A further significant factor lending support to this analysis is that prescription starts running only after a breach has occurred, in other words, from the time the secondary rights and duties come into operation.

24. See W. de Vos, Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg, 2e uitgawe (1971 Juta) 310.
The distinction between primary (or principal, original, antecedent) and secondary (or remedial, sanctioning, subsidiary) rights and duties is known to the English and Continental legal systems. For the position in English law see G.W. Paton A Text-Book of Jurisprudence, 4ed (OUP 1972) pp 276-7;
B. Coote, "Discharge for Breach and Exception Clauses since Harbutt's 'Plasticine'", (1977) 40 MLR 31;
C. Czarnikow v Koufos (1966) 1 Lloyd's Rep 595 (CA) 607;
LEP Air Services v Rolleswin 1973 AC 331 (HL) 350.

In the law of the Netherlands a distinction is drawn between "principale (primaire, oorspronkelijke) en secundaire (vervangende, subsidiaire, bijkomende) verbintenissen". These secondary obligations may arise by way of statutory provisions (BW articles 1272 and 1275) or by agreement (strafbeding). Sometimes they arise alongside the original duty (e.g. payment of interest) and in other cases instead of the original duty (article 1275). See generally, C. Asser Verbintenissenrecht, deel 1, De Verbintenis in Het Algemeen, 5e druk door L.E.H. Rutten (Willink-Zwolle 1978) vol. 4 pp 111 and 227.

Both the French Code Civile (article 1152) and the Louisiana Civil Code (article 2117) define a penal clause as a secondary obligation stipulated for the purpose of enforcing the performance of a primary obligation.

Pothier in his Traité des Obligationes, 2.1.5 (vol 1 paras 183-185) distinguishes between primary and secondary obligations: "The primary obligation is that, which is contracted principally in the first place, and on its own account.
The secondary obligation is that, which is contracted in case of the non-performance of a primary obligation". (Evan's translation).

Using the contract of sale to illustrate this distinction he writes that the seller's primary obligation is to deliver and warrant the thing sold, and his secondary obligation is that of paying the buyer damages if he is unable to deliver or warrant the thing.

Pothier further subdivides secondary obligations into two kinds:
Firstly, the secondary obligations which replace the primary ones, namely the obligation of damages, and secondly, the secondary obligations which "accede to the primary obligation without destroying it", for example, the obligation of interest when the debtor delays the payment of a money debt. (para 185).

Pothier's contention that the secondary obligation of damages is substituted for the first and entirely replaces or destroys the primary obligation cannot be accepted. The creditor retains the right to claim either specific performance or damages as surrogate for performance and his right to the latter in no way prejudices his right to the former despite the fact that his claim is subject to the courts discretion.
See the authorities cited in note 12 above.

25. For example, repudiation of the contract by A. Inrybelange (Edms) Bpk v Pretorius 1966 (2) SA 416 (A) 427 A.

26. See Grotius, Inl., 3.6.10.

27. See note 24 above and Pothier, Obl., 2.1.5 para 184.

28. Also exception clause, protective clause, restrictive term, non-liability clause, exoneration clause, exculpatory clause, disclaimer clause.

29. See paragraphs 161-164 of Exemption Clauses : Second Report, The Law Commission No.69 and The Scottish Law Commission No.39 (HMSO London 1975) where the meaning of "exemption clause" is discussed.

30. See, inter alia, CJ Classen, Dictionary of Legal Words and Phrases (Butterworths);
Jowitts and Walsh, Dictionary of English Law, 2ed (Sweet and Maxwell 1977) edited by J. Burke.
Suisse Atlantique Société D'Armament Maritime SA v NV Rotterdamsche Kolen Centrale (1967) 1 AC 361 (HL) 420 per Lord Upjohn.

31. See for example Hayne and Co v Kaffrarian Steam Mill Co Ltd 1914 AD 363 at 371.
See also Second Report para's 141 and 143.

32. D 2.14.7 pr, 1,4; C 2.3; C 4.65.27.

32a. The other enforceable pacts were the pacta vestita which were independent of other contracts and were enforceable by praetorian action (the pacta praetoria) or due to an imperial provision (the pacta legitima).
The pacta praetoria, enforceable by way of an actio in factum, included the receptum arbitrii (D 4.8.3.1; D 4.8.11.1, and C 2.(55)56.4.4), the receptum nautae argentarii (C 4.18.2. pr, 1 abolished by Justinian), the pactum de constituto (Inst 4.6.8,9; C 4.18.2.1; D 13.5.1.1,6-8; D 13.5.14.3) and the pactum de iureiurando (D 12.2.3 pr, 7,9 pr 1, 11.1; D 44.5.1.3; C 4.1.1)

The pacta legitima were enforceable by provisions of the emperors in the later empire and included the compromissum (D 4.8.11.1,3 and C 2.(55)56.5 pr) the pactum donationis (Inst. 2.7.2 and C 8.(53)54.35.5) and pactum dotis (C 5.11.6) See generally,W.W. Buckland A Text-Book of Roman Law from Augustus to Justinian, 3ed revised by P. Stein (1963 Cambridge) pp 527-531;J.C. Van Oven Leerboek van Romeinsch Privaatrecht, (Leiden - Brill 1948) para's 180-186; and P. Van Warmelo,An Introduction to the Principles of Roman Civil Law (1976 Juta) para's 515-531.

33. D 2.14.7.5,6.

34. Van Warmelo, op.cit., para 516.

35. D 2.14.7.5 and D 18.5.3.

36. D 2.14.7.5 See also D 18.1.72 pr.

37. D 18.5.3,5; D 46.4.8 pr, 23;
Inst. 3.29.1,4.

38. D 2.14.7.6 and D 2.14.27.2.

39. D 2.14.7.5,6; D 18.1.72 pr; D 18.5.2;
C 4.54.4. See also Buckland, Text-Book, 528 and Van Warmelo, op.cit., para's 517 and 619.
A subsequent pact to increase the debtor's liability could also have the effect of terminating the main contract. Thus where parties to a contract of sale entered into a pactum ex intervallo to increase the purchase price it was held that they had withdrawn from the original contract and had contracted anew. D 18.1.72 pr and Voet 2.14.8.

40. D 2.14.4.3; D 2.14.7.4,5; C 2.3.10;
C 4.65.27. See also Van Warmelo, op.cit., para's 515 and 518.

41. D 22.2.7 and C 4.32.
Limits were placed on interest rates and compound interest was forbidden. C 4.32.26.
It is stated in D 12.1.40 that a pactum in continenti to pay interest formed part of the stipulatio.
See also D 2.14.4.3.

42. D 2.14.7.4,5; D 12.1.40; D 18.1.72 pr
See also Voet 2.14.7; Van Warmelo, op.cit., para 518; and Buckland, Text-Book, 528.

43. See for example:
a) naturalia - the limitation or exclusion of the liability for eviction (D 19.1.11.18) and for latent defects (D 19.1.6.9 and D 21.1.14.9) in sale;
b) essentialia - the amount owed by a debtor could be reduced by agreement (D 2.14.27.5) and it could be agreed to deduct something from the property purchased after a sales contract had been concluded (D 18.1.72), the subsequent agreement was construed as a renewal of the first (D 2.14.7.6 and D 2.14.27.2).

Rights and remedies could also be qualified by pacta de non petendo (agreements not to sue) or by agreements not to rely on exceptions or defences available to the parties (C 2.3.29).
Were an exceptio to be raised in breach of the latter agreement it could be met by a replicatio pacti (Gai 4.126). A pactum de non petendo gave rise to a praetorian defence or exceptio pacti against any creditor who sued contrary to such an agreement. The pact could be general, personal, conditional or temporary; its effect could be limited, as a temporary procedural bar to litigation (D 12.1.40 and D 2.14.4.3); or complete, to extinguish the creditor's right of action (D 2.14.27.6, C 8.(13)14.23, Voet 2.14.3)
See generally D 2.14.2.1, D 2.14.7.8, D 2.14.17.2 and D 2.14.41.

The rights of a creditor could also be affected by arbitration provision. Two agreements were entered into, first the compromissum between the parties to abide by the arbiter's decision and not to take the dispute to court (D 4.8.11.1-3 and C 2.(55)56.5 pr); and secondly, the receptum arbitrii, between the parties and the arbiter agreeing to arbitrate (D 4.8.3.1). A penalty provision was usually incorporated into the arbitration agreement in terms of which a party who was dissatisfied with the outcome was bound to pay the agreed penalty if he appealled to another court. (D 4.8.3.2. and Nov 6.11). Such agreements clearly placed a restriction on the normal rights available to parties to a dispute.

The parties could not agree to exclude the remedies available to the injured party where fraud was concerned; the pactum ne dolus praestetur was invalid as being contra bonos mores and against good faith. See generally D 2.14.7.7, D 2.14.9.10, D 2.14.27.3, D 19.1.6.8, D 19.1.11.5 and 8, and C 4.54.6.

44. See Voet 2.14.3,9; Grotius, Inl. 3.1.53 Van der Keessel, Prael., 3.1. 51-3 and Thes.Sel. 484.

45. Inl. 3.3.1

46. See also Voet 2.14.5,9 and 20.1.21.

47. RW Lee, Commentary on 'The Jurisprudence of Holland' by Hugo Grotius, (1936 Oxford) 3.3.1

48. Voet 2.14.8,9. See also Van der Keessel, Prael., 3.3.1.

49. Voet 2.14.5.

50. Ibid.

51. Ibid.

52. Ibid.

53. Ibid.

54. Ibid. For example, in depositum, an added agreement which provides that the thing deposited may not be reclaimed within a specific time is void but does not affect the validity of the contract of deposit. D 16.3.1.45,46. This text indicates that the Roman law principles were largely adopted into Roman-Dutch law.

55. Ibid. For example, if the parties to a contract of purchase and sale provide by a subsequent special or added agreement that the price need not be paid the former contract is altered and is then taken to be a donation.
However, if an agreement that appears to be a contract of purchase and sale contains a special provision that the price need not be paid, then only one contract, a donation, comes into being.

56. This is the traditional juristic view and approach in England. See Rutter v Palmer (1922) 2 KB 87,92;
Istros v Dahlstroem (1931) 1 KB 252-3; Karsales v Wallis (1965) 1 WLR 936 (CA) 940; the Suisse Atlantique case, supra, 420;
See also the discussion by B. Coote, Exception Clauses, (1964 Sweet and Maxwell) 1 et seq and M. Wright, "Exception Clauses Rationale and Effect", (1972) 12 New LJ 490.

57. 1973 (3) SA 647 (C).

58. At 650 B.

59. Supra, 92.

60. See also SAR&H v Lyle Shipping Co Ltd 1958 (3) SA 416 (A) 419 C ("the clause ..... is open to the interpretation that it bars actions arising from causes .....");
Hall-Thermotank Natal (Pty) Ltd v Hardman 1968 (4) SA 818 (D) 835 G
("The clause is ..... to be construed as affording limited protection .....)
Wijtenburg Holdings, trading as Flamingo Dry Cleaners v Bobroff 1970 (4) SA 197 (T) 209
("..... the exemption clause was intended to apply only if the risk eventuated while the defendant performed".)
Bristow v Lycett 1971 (4) SA 223 (R,AD) 226,235,237.
Government of the RSA (Department of Industries) v Fibre Spinners and Weavers 1977 (2) SA 324 (D) 332,336-337;
and the same case on appeal, 1978 (2) SA 794 (A) 806 B and G ("..... the protection of an exemption clause .....")
W.H. Hosten, "Insake: Cardboard Packing Utilities (Pty) Ltd v. Edblo Transvaal Ltd 1960(3) SA 178 (W)," (1960) 23 THRHR 292.

61. See Coote, op.cit., 3 and 12.

62. See Amod v Parsotham and others 1929 NPD 163 at 167; Minister of the Interior v Harris 1952 (4) SA 769 (A) 781;
Coote, op.cit., 7; and the discussion on secondary exclusion clauses below.

63. A statement that clearly illustrates the substantive effect of an owner's risk clause in a contract of depositum/ bailment is that of Murray J in Rosenthal v Marks 1944 TPD 172 at 178:

> ".... the whole method of approach of the discussion of the effect of this clause on ordinary bailment .... in a series of South African decisions starting in 1859 with Naylor v Munnik and ending in 1943 with Weinberg v Oliver shows that it is not a question of method of proof but of modification of substantive liability".

See further Naylor v Munnik (1859) 3 Searle 187 at 191-2;
CSAR v Adlington and Co. 1906 TS 964 at 974-5;
The Farm Implement Co. of Kroonstad v The Minister of Railways 1916 OPD 183 at 190-1;
Mahomed v Teubes 1918 CPD 398 at 400;
Weber and Pretorius v Pretoria Municipality 1921 TPD 19 at 24;
Nightingale and Adams v SAR&H 1921 EDL 91 at 100-101;
SAR&H v Conradie 1922 AD 137 at 156;
SAR&H v Williams 1930 TPD 514 at 521-2;
Weinberg v Oliver 1943 AD 181 at 188;
Essa v Divaris 1947 (1) SA 753 (A) 774;
Frocks Ltd v Dent and Goodwin (Pty) Ltd 1950 (2) SA 717 (C) 725-6;
Beinashowitz and Sons (Pty) Ltd v Night Watch Patrol (Pty) Ltd 1958 (3) SA 61 (W) 64-5;
King's Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N) 642-3.

64. Britz v Du Preez 1950 (2) SA 756 (T) 760.

65. Bristow v Lycett 1971 (4) SA 223 (RAD) 236.

66. 1979 (3) SA 754 (A).

67. At 763. Agreeing with what was stated by Flemming J in this connection in Havenga v De Lange 1978 (3) SA 873 (O).

68. 1952 (2) SA 661 (T).

69. The successful plaintiff in the court a quo and respondent on appeal; the judge continued referring to him as the plaintiff

70. At 664 and 665.

71. At 664 G.

72. At 666.

73. At 664 H.

74. See R.H. Christie, "Exemption Clauses and Misdescription", 1975 Rhod LJ 108.

75. 1974 (4) SA 1 (A).

76. At 20.

77. Ibid.

78. At 21F.

79. At 21-22.

80. Theron NO v Joynt 1951 (1) SA 498 (A) 506;
D 45.1.17; D 45.1.46.3, D 45.1.108.1;
Pothier, Oblig., 1.1.1.3.6 (No. 47) and 2.3.1.2 (No. 205)
Cf. Deetleefs v Wright 1977 (2) SA 560 (A).

81. By the very nature of legal rights there must be a remedy for the infringement of a right - ubi ius ibi remedium; to have a right without a remedy is the same as having no right at all.
Amod v Parsotham and others 1929 NPD 163 at 167.
See also Minister of the Interior v Harris 1952 (4) SA 769 (A) 781.
For example, if a person agrees to donate something but imposes a provision that the donee acquires no right to claim the gift, the agreement would not be a contract because there is no binding force; the "obligor" enters into the agreement without the intention to be bound.

82. Supra.

83. Supra.

84. See for example Wells v SA Alumenite Co., supra, 72 (although here the clause excluded the right to rely for cancellation upon misrepresentations).

85. Weinberg v Oliver, supra, 188-189. In direct breach of his obligation the defendant's servant removed the plaintiff's car from the garage premises, thereby exposing it to an additional risk of damage. As a result the owner's risk clause did not relieve the defendant from liability.
Cf. Beinashowitz and Sons (Pty) Ltd v Night Watch Patrol (Pty) Ltd 1958 (3) SA 61 (W).

86. See the authorities in notes 80 and 81 above.

87. For example, the Post Office limits its liability in respect of registered articles to R50; the South African Airways' liability in respect of lost baggage is limited to R18-14 per kilogram (Hague Protocol and Special Drawing Rights No.17) and $75000 in respect of loss of life or proven injuries. The Second Report para 141 gives the example of a clause in a building contract which provides that liability for failure to complete the work within the contractual period shall not exceed £x.

88. For example, a clause providing that a carrier is not liable for loss unless advised in writing within seven days from the date of delivery. Second Report para 141.
In Lawn v Rhodesian Eagle Insurance Co Ltd 1977 (3) SA 80 (R) the company unsuccessfully relied on a time limitation clause.

Liability may also be qualified by clauses requiring that specified notice be given before commencement of proceedings as a condition precedent to liability; if such notice is not given the applicant cannot succeed in a claim. See Gaza v Motor Insurer's Association 1964 (3) SA 273 (D) (concerning claims against the MIA).
The manner in which secondary rights or remedies are to be invoked may also be prescribed by agreement in which case they must be adhered to. Swart v Vosloo 1965 (1) SA 100 (A) 112.

89. Section 3 of the Conventional Penalties Act 15 of 1962.

90. See also as regards demurrage clauses the Suisse Atlantique case, supra, 395, 420 and 436.

91. Yenapergasam v Naidoo 1932 NPD 96; Wille and Millin, op.cit, 524.

91a. D 2.14.17.5.

92. Yorigami Maritime Construction Co Ltd v Nissho - Iwai Co Ltd 1977 (4) SA 682 (C) 692-4.

93. The Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 375.

94. Davies v South British Insurance 3 Juta SC 416;
Sherry v Stewart 1902 TH 252 at 257;
Glanfield v Asp Development Syndicate Ltd 1911 AD 374 at 383.

95. See for example, Dave Zick Timbers (Pty) Ltd v Progress Steamship Co Ltd 1974 (4) SA 381 (D).

96. See Trollip v Jordaan 1961 (1) SA 238 (A) 256 and Joubert en 'n andere v Faure en 'n andere 1978 (3) SA 1025 (C).

97. The mistake must not be induced by fraud or go to the root of the contract. Wells v SA Alumenite Co 1927 AD 69 at 72-3 (honest mistake) and Sisson v Lloyd 1960 (1) SA 367 (SR) 370 (mere mistake). Cf. Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA 164 (D) 171-2 and Papadopoulous v Trans-State Properties and Investments 1979 (1) SA 682 (W) 689.

98. D 50.17.23; Wells v SA Alumenite Co, supra, 72-3;
Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) SA 794 (A) 803A and 806C.

99. See as regards material iustus error Allen's case, supra, 171-2 and Papadopoulous'case, supra, 689.

PART IV

THE BURDEN OF PROOF AND EXEMPTION CLAUSES

THE BURDEN OF PROOF AND EXEMPTION CLAUSES

INTRODUCTION

In disputes concerning the contents of contracts, it is important to establish which party must ultimately prove the presence or absence of particular provisions. The incidence of this burden of proof, or onus probandi, is a matter of substantive law;[1] it being logical that rules which attach legal consequences to a fact, must stipulate which party is required to establish that fact.

A clear understanding of the rules of incidence is particularly relevant where exemption clauses are concerned because the use of such clauses (which limit or exclude rights that the parties would, but for the clauses, have been entitled to) is widespread; they are to be found, inter alia, in standard form consumer contracts, in notices on walls and signboards, in hotel registers, and in travelling agreements. Moreover, because the persons who make use of such provisions employ a variety of means of incorporating or imposing them on an often unwary public, special problems of incidence arise.

In this article it is proposed first to examine the meaning of the expression onus or burden of proof, and then to discuss briefly the general principles regulating its incidence and the application of these rules in the law of contract with particular reference to exemption clauses.

ONUS

The term onus has been used in various senses to denote, inter alia, two concepts which must be clearly distinguished: the burden of proof and the evidential burden. The original or true meaning of onus is the former, meaning ".... the

> duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be ...."[2]

The onus proper or "overall onus",[3] therefore, comes into operation and determines the outcome if the court, after examining the relevant evidence, is unable to reach a decision due to there being an inadequate balance of probabilities on either side.[4] This burden of proof is determined by the pleadings; it is fixed once the issues are established, and is not transferred in the course of the trial.[5]

The second meaning of onus is the duty borne by either litigant to furnish evidence in order to combat the opponents evidence.[6] In this sense it is merely a matter of introducing evidence and has more accurately been referred to as the "burden of adducing evidence in rebuttal."[6] It arises as soon as a prima facie case has been made and is borne by the litigant who risks failure if the case is not answered. The evidential burden may, therefore, shift during the course of the proceedings depending upon how the measure of proof furnished by each litigant shifts the risk of failure.[7]

Of the two concepts only the first one, the burden of proof, will be considered here.

GENERAL RULES RELATING TO INCIDENCE

Various rules, which are ultimately based upon "broad and undefined reasons of experience and fairness,"[8] have been developed to regulate the incidence of the burden of proof.[9]

A separate onus arises in respect of each issue which is raised in any particular case; individual burdens may be incident upon either party and these are not transferred in the course of the proceedings.[10]

The general rule is that the onus rests upon the person who makes an assertion: " .... semper, necessitas probandi incumbit illi qui agit."[11] Thus a person who seeks a remedy must establish the grounds thereof and satisfy the court that he is entitled to whatever he claims.[12] Normally the plaintiff bears this onus and if the balance of probabilities does not favour either side the court generally finds for the defendant.[13]

Where the plaintiff fails to give evidence, the defendant need not give any to be absolved. Consequently, in the absence of legal presumptions to the contrary, the defendant need not disprove anything if the plaintiff is unable to establish his assertions.[14] The defendant may, however, renounce this right and voluntarily shoulder the burden of proof. Thus if he is confident of the merits of his cause and wishes to terminate the legal proceedings without delay, he may offer to lead evidence first to prove that the plaintiff's claim is unfounded.[15]

Another basic rule states that the onus is on the party (either plaintiff or defendant) who affirms a fact, i.e. makes the positive assertion, and not on the party who denies it: "Ei incumbit probatio qui dicit, non qui negat."[16] However, this rule is not consistently applied. If the denial is one of law or one of fact, which is qualified or supported by references to place or time, then the party making it must prove the affirmative proposition contained in the denial.[17] Also, where a negative assertion constitutes an essential element of one party's claim or defence, the onus of proving it rests upon that party.[18]

It can be seen, therefore, that the burden of proof does not only rest on the plaintiff and may frequently be borne by the defendant. Another such instance is where the defendant confesses and avoids. This occurs when he does not deny the plaintiff's claim but sets up a special defence, which raises a fresh issue. He is then regarded as a claimant and consequently bears the onus of proof in respect of the defence, which will only be upheld once sufficient evidence is furnished.[19]

The burden of proof is also borne by any party against whom a rebuttable presumption of law operates. The presumption prevails until met by counter evidence or by a stronger presumption.[20]

From the above it is clear that no single rule can be applied without exception to all cases and that considerations of fairness and equity sometimes require a departure from the general rules.[21]

The foregoing was a brief look at some of the more important general rules of incidence which are relevant to the topic under discussion. What must now be considered is the application of the abovementioned rules to the law of contract and in particular to exempting provisions.

INCIDENCE IN THE LAW OF CONTRACT

The general rule in the law of contract is that the onus of proving the existence, and the contents of a contract, rests on the party who relies on the contract.[22] Similarly, where breach of contract is concerned, the plaintiff must prove that the defendant failed to perform or that he had committed the breach in question; and conversely, the defendant must prove that he had fulfilled his contractual obligations.[23]

Contractual provisions may be agreed to, incorporated or imposed in a large variety of ways; consequently, only those rules of incidence that relate to the most commonly used means - contractual documents and signs or notices with a contractual import - will be discussed here because they cover the areas where problems are most frequently encountered.

Contractual Documents

The plaintiff may discharge the onus of proving a contract by tendering a signed contractual document which reflects the agreement.[24] If the document is not obviously of a contractual nature the plaintiff must prove that the signatory signed animo contrahendi and that the document in fact embodies a contract.[25] In other words, if the document is not one in which a reasonable man would expect to find contractual terms the plaintiff must establish that the defendant knowingly put his signature to a document which embodies, in whole or in part, an obligation-creating agreement.[26]

Where one party alleges that the terms of a written contract differ from prior representations or verbal explanations concerning the contents of the document,he must convince the court that he was misled;[27] the party who subsequently relies on the contract then bears the onus of proving that the other party knew the actual terms of the contract and the extent to which they differ from the representations. In other words that the impression created by the misdescriptions or misrepresentations had been removed from the other party's mind at the time of contracting.[28]

If the defendant disputes the terms contained in a signed document he bears the onus of proving one of the following: that it does not represent the true or complete agreement;[29] that he did not sign with the intention of binding himself;[30] or that he reasonably did not appreciate the contractual nature of the document, i.e. iustus error.[31] Where mistake is raised the approach of the courts is to ask whether the party who is trying to resile has given the other party reasonable grounds to believe that he was binding himself; if he is to blame, in this sense, his defence fails.[32]

However, if the mistake is due to the other party's misrepresentation then the first party is not bound.[32] These principles were discussed and applied in the case of George v Fairmead (Pty) Ltd.[33] The appellant had entered into a verbal agreement with the respondent company, through the latter's receptionist, to stay at the hotel; a deposit was paid but no documents were signed. Later, when the appellant moved in, he was asked to sign the hotel register; he filled in certain parts of it and signed without reading the printed provisions or having his attention drawn to anything specific therein. Subsequently, personal effects of his were stolen from his hotel room and he sued the hotel for their value. The hotel disclaimed liability on the grounds that the hotel register incorporated a provision which excluded such liability. Absolution from the instance was granted in both the magistrate's court and the Cape Provincial Division. On appeal the court accepted the appellant's argument that the respondent bore the onus of proving that the initial verbal agreement had been varied with the appellant's concurrence, subject to the qualification that this onus was discharged "when the document was put in evidence and the appellant's signature was admitted"[34] unless some further fact was disclosed in the evidence that legally entitled the appellant to repudiate the document.[34]

The appellant also raised the point of iustus error by submitting that he was under the "reasonable misapprehension" that he was merely signing a register and not a contract, and by so doing, no new terms would be introduced into his contract; however, no allegation of misrepresentation was made. Fagan CJ held that under the circumstances the appellant's failure to acquaint himself with the terms to which he had signified his assent by his signature was not excusable; consequently, he could not be heard to say that his ignorance of the terms (including the exemption clause) was a iustus error.[35]

In English law the signatory's defence that he did not appreciate the document's contractual nature is known as the defence of non est factum.[36] However, a heavy burden of proof lies on the party who raises this plea as a defence.[37]

If the genuineness of a signature is disputed the party relying on it must prove that it is in fact the other party's signature and that it has not been forged.[38] In practice this onus is always borne by the party who produces the document.[39] And finally, if one party claims rectification[40] of the contractual document or that one or more of the provisions should be deleted[41] he must establish the grounds for having this done.

Incorporation and Notification

Where an attempt is made to incorporate exemption clauses, or any other provisions, by implication or by reference (for example, by way of documents or tickets referring to standard terms or regulations; or by way of a sign or notice-board) the approach of the courts is as follows: If it is established that the person who received the document knew that there was writing on it containing terms relative to the agreement, he is bound whether or not he reads them; if he knew that there was writing but did not know that it contained relevant terms, he is not bound, unless it can be shown that the other party has done what is reasonably sufficient to bring the terms to his notice.[42]

The courts, in addition, draw a distinction between documents which a person ought reasonably to suppose to contain terms (such as bills of lading and tickets for travelling) and documents which a person cannot reasonably be held to suppose to contain terms (such as cloakroom tickets and warehouse or other invoices).[43] Persons who rely on the latter type of documents bear a heavier onus with regard to the notice requirement.

This was illustrated in the Micor Shipping case.[44] The issue before the court was whether a note at the bottom of certain invoices and credit notes incorporated the plaintiff's "standard trading conditions", which included an exemption clause. This was denied by the defendant who claimed that he was unaware of the said endorsement and that he had not received a circular letter with a copy of the standard terms from the plaintiff, a fact the latter alleged but did not prove.[45] A significant fact was that other documents (the statements of account against which payment was made) did not contain a similar note or endorsement. Franklin J found that the note at the bottom of the abovementioned documents was "not so prominent as being calculated immediately to attract the attention of the recipient of such documents, who would be (and was, according to the evidence) only concerned with the facts and figures appearing in the body of the documents."[46]

Consequently having regard to the nature of the documents - not being contractual documents on which a person might reasonably suppose to see terms[47] - it could not be said, "objectively, that (the plaintiff) did all that was reasonably necessary to bring the conditions to the notice of the defendant."[48]

Where signs or notice-boards are used to impose or incorporate exemption clauses or other provisions they must also reasonably be brought to the other party's (or the public's) attention. In Essa v Divaris[49] it was sufficient to point out one of two "owner's risk" notices painted conspicuously on the walls; and in Bristow v Lycett[50] to have a "large notice prominently displayed" at the entrance to the wild animal farm.

What is reasonably sufficient will obviously vary according to the circumstances of each case. In King's Car Hire (Pty) Ltd v Wakeling[51] Harcourt J formulated an objective test which requires the party who bears the onus to take steps sufficient to notify "persons acting reasonably."[52] A restricted interpretation of the notification requirement is to be found where, in terms of the naturalia, the common law imposes a strict liability on certain classes of persons (such as hotel-keepers); express personal notice must be given, if this is practicable, and other forms of notification are then not regarded as reasonable.[53] However where the signs or notices are so conspicuous that a reasonable man could not help but see them, the courts will readily draw the inference that they were in fact seen by the customer or contracting party.[54]

Another significant factor relating to notification is the requirement of contemporaneousness. The contracting parties must be notified of or referred to all the relevant contractual provisions at the time the contract is concluded, and not subsequently; this prevents the unilateral imposition or alteration of terms without the necessary concurrence. For example a contractual document which embodies the agreement, in whole or in part, must be produced before or at the time of contracting. Thus in Peard's case[55] the court upheld the plaintiff's argument that an exemption clause in a 'freight ticket', which was issued after the contract to ship a box had been concluded (and after the ship had sailed), did not form part of the original agreement and, therefore, did not free the defendant from responsibility.[56]

The requirement of contemporaneousness is satisfied where the clause is printed in a hotel register which must be completed and signed by the customer,[57] but not if the same provision is only to be found in a notice displayed in the hotel bedrooms.[58]

It is not necessary for the party who bears the onus, to prove that, at the time of contracting, the other party correctly understood all the legal consequences that flow from the provisions incorporated by implication or by reference.[59] It is submitted that this principle should not be rigidly applied; in a plural society like South Africa's it would not always be reasonable or equitable to expect all persons to understand either or both of the official languages, especially when couched in legal phrases. The courts have in some cases gone further (than the objective requirement of reasonably sufficient notice) by holding that the party relying on the notice must prove that the other party not only saw but also understood that the notice had some legal significance - not necessarily its exact meaning - and agreed to it.[60] This is a step in the right direction but may not prove adequate in all cases; in addition to the possible injustice that could result from the enforcement of terms not properly understood by the relevant parties, it also offends against the consensual basis of contracts.

It is further submitted that in circumstances that warrant it, the approach adopted by De Wet AJ in Mzobe v Prince Service Station[61] should be adopted. In this case the garage owner sought to bind a black person with a limited knowledge of English to an "owner's risk" clause. The learned judge held that it must be proved that the other party ".... not only saw, but understood the notice"[62]; thereby requiring proof that the provision's actual meaning be understood.[63] This is a welcome extension of the rules and fits in well with the ultimate basis of the rules of incidence: fairness.

The requirement of reasonably sufficient notice is aimed at preventing contracting parties from being unfairly surprised by provisions that limit or exclude the rights and duties of the respective parties. This procedural check is more effective where the contents or wording of the provisions in question are readily available so that the parties can, if they are sufficiently aware or concerned, establish the ambit of their contractual obligation.

Page 11/ .....

It is submitted, therefore, that where exemption clauses are concerned the requirement of reasonably sufficient notice should be stricter and that where they are incorporated by reference it would be insufficient to meet the requirement. The public would be better protected if all exemption clauses were conspicuously printed in contractual documents[64] or reproduced in clear signs or notices at places where tickets incorporating such provisions are sold; mere reference to complex or prolix rules or regulations does little to inform the public of their rights or duties.

EXEMPTION CLAUSES

Not all the terms of a contract need to be proved specifically, only those which originate in the contractual consensus, namely, the essentialia and the incidentalia (or accidentalia). Terms which arise by operation of law, the naturalia, do not have to be proved, they are normal incidents of a contract and remain part of it until the parties agree otherwise.[65] Consequently, the party who relies on a particular naturalium need only prove the existence of the category of contract to which it applies.[66] If the other party puts the existence of a naturalium in issue he must plead and prove its absence. To do this he must establish that another agreement had specifically been entered into, which varied or excluded the naturalium.

Thus the burden of proof rests on the party who relies upon terms which vary the normal incidents of a contract.[67] However, once this has been done, the party relying on the naturalium bears the onus of proving its existence, even if this involves proving a negative, namely that the parties had not entered into an agreement which varied or excluded the naturalium.[68]

Exemption clauses that originate in the contractual consensus must obviously be proved by the parties who rely on them. What must usually be established is whether or not the clause covers the act that constitutes the breach or caused the loss in question. It is clear therefore, that the problem as to who bears the onus can significantly affect the outcome of the litigation.

Where an exempting provision is relied upon and raised as a defence it usually amounts to a confession and avoidance. The party relying on the provision admits the contract but seeks to avoid one or more of its legal consequences by setting up the exemption clause. The onus rests on such party to plead and prove that it was incorporated into the contract[69] and that its terms cover the situation in respect of which exemption is claimed.[70]

In De Wet's[71] case an insurance company undertook to make good any loss or damage caused by fire but excluded liability for loss caused by explosion. When the plaintiff brought a claim for loss by fire against the company, the latter denied liability alleging that an explosion had caused the fire. The court held that as the defence constituted an exception to the general liability, the onus of proving facts which would bring it into play (namely, that the fire had been caused by an explosion) rested on the defendant company.

Once the existence of an exempting provision has been established, the party who disputes it bears the onus of disproving the provision. This is clearly illustrated in Stock's case.[72] In terms of an oral agreement the respondent company (a transport and haulage contractor) had undertaken to convey the appellant company's crane from Johannesburg to Pretoria. The crane was damaged in the process of transportation; the appellant sued the respondent in the Transvaal Provincial Division where absolution from the instance was ordered. On appeal Corbett JA stated that the dispute related essentially to the terms of the contract of carriage; the appellant alleged a "simple, ungarnished contract",[73] whereas the respondent alleged an additional 'owner's risk' term which emanated from an earlier agreement (entered into in 1950). In terms of the latter agreement, which was not disputed or disproved, an owner's risk clause would be incorporated into all future contracts of carriage between the parties. Corbett JA held[74] that the court a quo had correctly placed the onus of disproving the owner's risk clause on the appellant and that he had failed to do so.

Page 13/ ....

Another significant question regarding exemption clauses is whether their effect is substantive or merely procedural in nature.[75] If the effect is substantive the liability excluded by the clause does not arise; if it is procedural the liability arises but may not be enforced because the clause provides a procedural defence. Concerning the former - substantive exemption clauses which define the contractual obligation - the party who claims damages for breach should, strictly speaking, prove that the act in issue fell within the obligation as qualified by the clause;[76] in other words, that the breach relates to liabilities not affected by the exemption clause. In practice, however, the onus in both cases is usually borne by the party relying on the exemption clause to prove that the clause covers the act in question.[77] This, it is submitted, is the more satisfactory approach and does not warrant any change; it ensures that the party who imposes or incorporates the clause bears the onus instead of the other party who, for example, as consumer, is usually the economically weaker one and, where standard form contracts are concerned, has had little say over the contents of the contract which is usually presented on a take-it-or-leave-it basis.[78]

Having considered some general rules it will now be necessary to examine various types of exemption clauses that are commonly resorted to in specific transactions and the application of the rules of incidence by the courts in such cases.

Negligence and Gross Negligence

Where an exemption provision that modifies or excludes liability on the grounds of negligence is established, the party protected by the provision need not disprove such liability.[79] If the other party alleges further grounds for liability, such as gross negligence or dolus, which are not covered by the exempting provision, he bears the onus of establishing them.

Page 14/ .....

The case of Essa v Divaris[80] affords a clear example. The appellant (a car owner) had entered into a contract with the respondent depositary in terms of which the latter undertook, for consideration, to take care of the former's car in his garage. An 'owner's risk' clause was incorporated into the contract by way of conspicuous notices painted on the walls. Tindall JA held[81] that the effect of the clause was to free the bailee from liability for ordinary negligence. The 'owner's risk' clause left open the question of the bailee's liability for gross negligence. The court held[82] that if, despite the clause, gross negligence rendered the bailee liable, the onus of proving gross negligence rested on the appellant, an onus he failed to discharge.[83]

Strict Liability

Where, in terms of the naturalia, strict or absolute liability is imposed on one of the parties, for example by operation of the praetorian edict de nautis cauponibus et stabulariis,[84] he must, to avoid liability, prove either that the loss of or damage to the goods given into his custody falls within one of the acknowledged exceptions,[85] or that the parties had entered into a specific contract which modified or excluded the absolute liability.[86]

Similarly, a depositary (or bailee for reward), who is under a duty to exercise reasonable care with regard to the goods entrusted to him, must prove either that the damage or destruction occurred without culpa or dolus on his part[87] or that his liability had been modified or excluded by agreement. This is usually done by incorporating an 'owner's risk' clause in the contract of bailment or depositum.[88] In Essa v Divaris[89] Tindall JA stated[90] that the onus which lies on the depositary (bailee) "arises as an inference from the nature of the contract" because he is placed under an obligation to return the deposited article or to establish the reason why this was not possible.

Page 15/ .....

However, this inference does not arise if an 'owner's risk' clause is incorporated because a "radically different contract" arises.[90] Thus where the nature of the contract determines which party bears the burden of proof, one sequela of changing the normal consequences of the contract by agreement is that the burden of proof is shifted; the plaintiff must then establish a ground for liability which is not excluded by the exempting provision.

Purchase and Sale

In contracts of purchase and sale the seller must plead and prove the existence of provisions which limit or exclude liability for latent defects (voetstoots clauses)[91] and for eviction (pacta de evictione non praestanda).[92] If a purchaser, in the absence of the latter provision, has been evicted he is entitled to recover the purchase price and damages after discharging the onus of proving both the contract of sale and the eviction.[93] Should the seller raise the pactum de evictione non praestanda as a defence to both claims he must prove that it in fact excluded liability on both counts as such a pact is usually construed to exclude only the buyer's right to claim damages, leaving intact the right to reclaim the purchase price.[94] The parties may, no doubt, agree to exclude both the right to claim the purchase price and the right to claim damages,[95] in which case the onus of proving such agreement is borne by the seller.[96]

Letting and Hiring

In contracts of lease the land-lord bears the onus of proving that an exemption clause relieves him of his common law duty to maintain the leased premises.[97] He must similarly prove that the lessee's common law right to remove improvements before the expiration of the lease had been excluded by agreement.[98]

Special Defences

Where a special defence, such as fraud, mistake, misrepresentation or a pactum de non petendo, is relied upon, without the intention of resiling from the contract, it amounts to a confession and avoidance. The party setting up the special defence does not dispute the contract but seeks to avoid some of its legal consequences and obviously bears the onus of proof.[99] Defences relating to non-fraudulent misrepresentation[100] and, in certain limited cases, mistake[101] may be met by proof that the right to rely on either had been excluded by agreement.

However, if the mistake is such that a valid contract did not come into existence the party relying on exemption clauses in the contract will not be assisted by them. Thus in Papadopoulos' case,[102] the fact that the sale was voetstoots and that the effects of representations had been excluded did not avail the applicant because the contract in question was void ab initio as a result of the mistake.[102]

The consequences of fraud may not be excluded.[103] The onus of proving the existence and scope of a pactum de non petendo rests on the defendant[104] and if this special defence is subsequently disputed, the onus of disproving the pact is borne by the plaintiff.[105]

Unconscionable or Unreasonable Terms

In South African law a contracting party who relies on a lawful contract is not required to prove that its provisions are reasonable or conscionable. In the absence of fraud the parties are bound by the terms of their contract, which are generally enforceable whether or not they are harsh or onerous.[106] A distinction must be drawn between provisions that are unconscionable, and the unconscionable reliance upon provisions, which may or may not be unconscionable in nature.

Prima facie it cannot be unconscionable for a party to rely on the terms of his contracts and the courts will not enquire into the conscionableness or unconscionableness thereof.[107] However, in the light of extrinsic circumstances such reliance may become unconscionable;[108] the onus is then on the party who alleges unconscionable or unreasonable conduct to prove it.[109] Certain guidelines as to what is regarded as unacceptable have been laid down by the courts.

In Morrison v Angelo Deep Gold Mine Limited[110] Innes CJ stated that "the law will not recognize any arrangement which is contrary to public policy"[111] and added further on that,

> "it must be shown that the arrangement necessarily contravenes or tends to induce contravention of some fundamental principle of justice .... or that it is necessarily to the prejudice of the interests of the public."[112]

Examples of conduct that the courts will refuse to sanction for being contrary to public policy include illegal acts, male fide acts, and fraudulent or intentionally wrongful acts related to the performance of contract.[113] The case of Rand Bank Limited v Rubenstein[114] provides a clear example of unconscionable conduct: the court held that the plaintiff had acted in bad faith by attempting to use a deed of suretyship for a purpose for which it was not intended; had it been enforced it would have resulted in "gross injustice or great inequity" towards the defendant.[115] In the Resisto Dairy case[116] Rosenow J gives another example: where an insurer accepts liability and clearly indicates this to the insured, the insurer will not be allowed to rely on a written waiver clause if it subsequently changes its mind to the insured's prejudice.

Page 18/ .....

Provisions that are against public policy include those which exclude liability for criminal or fraudulent acts.[117] Public policy, however, does not prevent contracting parties from excluding liability for loss caused by negligence or gross negligence.[118]

In the Fibre Spinners and Weavers case[119] Wessels ACJ refused to restrict the construction of the following widely phrased exemption clause: ".... you are hereby absolved from all responsibility for loss or damage however arising ...."[120]; stating that: ".... there is no justification for so restricting the plain meaning of the words of the exemption clause, nor is there any reason founded on public policy, why it should be held that, in so far as the clause refers to loss or damage caused by defendant's gross negligence, it is not enforceable."[121]

Therefore, the position in our law, at present, is that contracting parties may limit or exclude any liability that arises from an unintentional act or wrongdoing, provided they act within the law. This makes the burden of proof a difficult one to discharge, outside the narrow confines of fraud and illegality. However, if it can be established that gross injustice will result, despite the absence of fraud, the courts, at least in the Transvaal, will uphold the defence of exceptio doli because fraud is not a necessary element in such cases.[121a]

A person who wishes to establish that a contractual provision contravenes a fundamental principle of justice faces the problem that the ground to be established is so general; a grossly inequitable provision does not lend itself to succinct definition. However, characteristics that are commonly encountered are unfair surprise and oppression.[122]

The former has been dealt with under the heading of reasonably sufficient notice; it was seen that the courts readily intervene to assist parties where they are reasonably unaware of provisions.

The problem therefore, centres around oppressive contractual provisions. As mentioned above, the tendency of the courts is not to intervene where the parties act within the law, regardless of how harsh the terms are. It is submitted that this tendency fails to take cognizance of the economic realities where inequality of bargaining power is to be found in the majority of consumer transactions taking place daily.[123] A statutory step to redress the balance is the power given to the courts, in terms of Section 3 of the Conventional Penalties Act,[124] to reduce to an equitable amount a penalty that is out of proportion to the prejudice the creditor suffered as a result of the breach or contingency taking place for which the penalty was stipulated.[125] This is a welcome step, but because it is limited to penalty stipulations its operation is greatly restricted and cannot serve as a general remedy.

Faced with the reluctance of the courts to get involved in the question of contractual fairness[126] it must be left to the legislature to provide a solution. In this respect the English Unfair Contract Terms Act 1977 may provide guidance. Section 3 of the Act applies where exemption clauses are incorporated into consumer transactions or standard form contracts, and requires the provision to satisfy "the requirement of reasonableness" to be enforceable. The Act furthermore provides for the onus to be placed upon the party who claims that the other does not deal as a consumer to establish this;[127] and where misrepresentation is concerned, upon the party who claims that a clause, which limits or excludes liability for misrepresentation, satisfies the reasonableness requirement to show that it does.[128]

If provisions similar to the above were to be adopted it would not constitute a radical departure from our law in view of the fact that restraint of trade clauses must be shown to be reasonable to be enforced.[129]

Page 20/ .....

What is suggested is that the reasonableness requirement be extended only to cases, such as consumer transaction, where there is a marked inequality of bargaining power, and that in such cases the onus be shifted to the economically stronger party to prove either that the exemption clause is reasonable or that the transaction is not a consumer one or one marked by inequality. Between relatively equal contracting parties no interference is warranted.[130]

Third Parties

A person who is not a party to a contract and who contends that the protection of an exemption clause extends to him must establish this fact.
What must be established is whether on general principles there is authority for vicarious immunity. Moreover, as contractual liability arises only between parties to a contract a third party cannot be liable contractually; liability in this respect must therefore be based on delict. The question which arises is whether two contracting parties can agree to contractually exclude a third party's delictual liability? It is trite law that an employer or master can by agreement exclude his own contractual and delictual liability. Can he also exclude his employee's or servant's delictual liability, although there is no contract between the employee/servant and the other party?

Possible ways in which this can be done are: (a) agency - the principal, who is protected by an exemption clause, may ratify the delictual act of his agent to become personally "liable;" this however is an artificial and highly unlikely way;
(b) stipulatio alteri - one party enters into an agreement with another not to sue a third party; two problems arise here, firstly the third party does not acquire a benefit (which usually takes the form of positive performance) unless the immunity is considered to be a benefit; and secondly, as the third party must accede to the contract in some way, to accept the benefit, it is not clear whether reliance upon the exemption clause will be construed as acceptance, and very doubtful whether such acceptance may take place after the commission of the delict.

To avoid the above problems it seems the most logical to argue that if the intention of the contracting parties is clear then the third party is protected. Thus in Pan American World Airlines Incorporated v SA Fire and Accident Insurance Company Ltd[131] Steyn CJ found that the agreement in question did not extend immunity to the airline (a third party) and that if this was intended it would have been provided for specifically.

Where a contractual document contains a clause that clearly binds the parties to a third party then all the signatories to such document are so bound, whether or not they have read the document.[132] Another instance where a third party may be protected is where a pactum de non petendo in rem is entered into; this is an agreement that no action will be brought against anyone and, therefore, provides a defence for all who may be liable on the obligation in question.[133] For example, such an agreement between a creditor and the principal debtor will avail the surety.[134]

However, despite a clear intention, a pactum de non petendo between a breadwinner and another party may not be raised as a defence against the dependants of the breadwinner if such party wrongfully caused the death of the breadwinner. The reason for this is that the breadwinner's action (to claim compensation for loss of support) is independently conferred upon the dependants and enables them to enforce their claim directly against the wrongdoer in their own name.[135] The action is not derived from the deceased or through the deceased's estate and cannot, therefore, be affected by the deceased's contractual relations with the wrongdoer.[136]

It may be concluded that, apart from the above exception, a third party who is delictually liable may rely on an exemption clause in a contract to which he is not a party if the intention of the contracting parties to this effect is clear; the onus of establishing this is obviously borne by the third party.

Page 22/ .....

CONCLUSION

The complexity and the divergence of the rules of incidence relating to exemption clauses is an indication of the difficulties and uncertainties that sometimes arise when it is left to the courts to extend existing principles to counter undesireable aspects of new economic phenomena, such as the widespread usage of standard form contracts and exemption clauses. It can be seen from the foregoing that the courts are aware of the possible injustices that could result if exemption clauses are imposed without restriction and that they are prepared, in some cases, to intervene to check the excesses of contractual freedom; they are limited, however, by powerful precedents and the doctrine of stare decisis. It is submitted, therefore, that the legislature should intervene, as suggested, to provide a remedy (restricted to cases where a marked inequality of bargaining power exists) that requires exemption clauses to be reasonable and that they be incorporated in a clear and conspicuous manner; also, that the burden of proof be borne by the party who imposes the exemption clause to establish its reasonableness.

1 Tregea and another v Godart and another 1939 AD 16, 32; Pillay v Krishna and another 1946 AD 946, 951; Chetty v Naidoo 1974 (3) SA 13 (A) 20.

2 Pillay's case, supra, 952-3. See also Huber, Heed, Recht., 5.25.2-6; Mobil Oil Southern Africa (Pty) Limited v Mechin 1965 (2) SA 706 (A) 710 F; Southern Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited 1977 (3) SA 534 (A) 548 B.

3 Brand v Minister of Justice and another 1959 (4) SA 712 (A) 715; Vasco Dry Cleaners v Twycross 1979 (1) SA 603 (A) 615 G.

4 Van Aswegen v De Clercq 1960 (4) SA 875 (A) 882 E. See also Vengatsamy v Scheepers 1946 NPD 84, 85; Twigger v Starweave (Pty) Limited 1969 (4) SA 369 (N) 372 B-C; Stocks and Stocks (Pty) Limited v T.J. Daly and Sons (Pty) Limited 1979 (3) SA 754 (A) 766 C-D; LAWSA 9.566.

5 Mans v Union Meat Company 1919 AD 268, 271; Smith's Trustee v Smith 1927 AD 482, 487; Pillay's case, supra, 953; Klaassen v Benjamin 1941 TPD 85; and the Southern Cape Corporation case, supra, 548 B. See generally, Schmidt, Bewysreg, (1972 Butterworths) 36-40 and LAWSA 9.566-570. The burden of proof must be distinguished from the right or duty to lead evidence first. See H.A. Millard and Son (Pty) Limited v Enzenhofer 1968 (1) SA 330 (T) 333 and Supreme Court Rules Rule 39 (11).

6 By Corbett JA in the South Cape Corporation case, supra, 548. Also the "weerleggingslas." Ibid. Here it is a matter of "introducing evidence" as opposed to "establishing a case". See Tregea's case, supra,28.

7 Ibid. and Pillay's case, supra, 953. See generally the discussions on onus in Frenkel v Ohlsson's Cape Breweries Ltd. 1909 TS 957,961-964; Coch v Lichtenstein NO 1910 AD 178,192; Klaassen's case, supra, 85-89; Friedlander v Hodes Brothers 1944 CPD 169 172-3; Mechin's case, supra, 710-713; Schmidt, Bewysreg, 27-44; LAWSA 9.566-570.

8 Wigmore on Evidence par 2486 quoted in Pillay's case, supra, 954 and Nydoo en andere v Vengtas 1965 (1) SA 1 (A) 21 H. See also Stock's case, supra, 765 F-G.

9 For a detailed discussion see Schmidt, Bewysreg, 27-44.

10 Heneke v Royal Insurance Company Limited 1954 (4) SA 606 (A) 611A.

11 Inst. 2.20.4.
See also D 22.3.21; C 4.30.10; C 8.43.25; Voet 22.3.9,10; Smith's Trustee v Smith, supra, 485; Smit v Bester 1977 (4) SA 937 (A) 942 F; Stock's case, supra 765.

12 Mechin's case, supra, 711 D; Pillay's case, supra, 951; Naik v Panday 1952 (1) PH A3 (A); Cotler v Variety Travel Goods (Pty) Limited and others 1974 (3) SA 621 (A) 629; Pothier, Obligations, 3.6.1 (Section 620) and part 4 (Section 694).

13 See D 50.17.125; Wessels, Law of Contract in SA, vol 1 para 1963 Schmidt, Bewysreg, 27; and B Van Zutphen, Practycke der Nederlantsche Rechten, Van de Dagelijcksche so Civile als Crimineele Quaestien, (Gronigen 1680) 'Bewijs' 5: "Als het bewijs van den eischer ende den ghedaeghde gelijck is, so moet tot voordeel van den ghedaeghde ghepronuncieert worden."

14 C 2.1.4; C 4.19.2 and 23; C 8.(35)36.9; Voet 22.3.9; Van Leeuwen, 5.20. pr; Kunz v Swart and others 1924 AD 618,662.

15 D 22.3.14 (middle) and Voet 22.3.9 (end).

16 D 22.3.2. The reasoning behind this rule is that in the nature of things a person who denies a fact cannot prove it. See C 4.19.23; C 4.30.10 ; and Voet 22.3.10 See further D 22.3.12; C 4.19.1; Matthaeus, de Prob., 8.1 (Affirmanti, ut vulga dicitur, incumbit probatio .... qui dicit se solvisse .... necesse est, ut id probet); Pillay's case, supra, 952 and 956 (and authorities there cited).

17 Inst. 3.19.12; C 8.(37)38.14; Huber, Heed.Recht, 5.25.7; Voet 22.3.10. See also R v Nhlanhla 1960 (3) SA 568 (T) 570 F.

18 This is illustrated in Havenga v De Lange 1978 (3) SA 873 (0). The appellant had allowed the respondent to leave a platform, which could be fitted to a truck, in a passage-way on his premises; the appellant accepted no responsibility for the platform and when it disappeared he relied on a notice with an "owner's risk" clause, the wording of which clearly covered the situation in question (at 884).

The respondent, who in the court a quo successfully sued the appellant for the value of the platform, argued that he was not aware of the notice board. The court accepted the appellant's version and held that the respondent had failed to discharge the onus of proving that the parties had not entered into a consensual risk arrangement. (At 883-4).
See further
LAWSA 9.570; Schmidt, Bewysreg, 29-30; Dave v Birrel 1936 TPD 192 at 196; Kriegler v Minitzer and another 1949 (4) SA 821 (A) 828; Wessels v Wessels 1950 (3) SA 852 (O) 857 C-D; Eagle Star Insurance Company Limited v Willey 1956 (1) SA 330 (A) 335-336; Topaz Kitchens (Pty) Limited v Naboom Spa (Edms) Beperk 1976 (3) SA 470 (A) 474. Kunz's case, supra, 663; Stock's case, supra, 762 H and 767 B-C; Electra Home Appliances (Pty) Limited v Five Star Transport (Pty) Limited 1972 (3) SA 583 (W) 585 A; Nel v Nelspruit Motors (Edms) Beperk 1961 (1) SA 582 (A) 584 B-C.

19 D 22.3.19; D 44.1.1; C 8.(35) 36.9; Voet 22.3.9. and 10; Van Leeuwen, 5.20. pr; Pothier, Obl. 3.6.1 (Sec. 620); Pillay's case, supra, 952; Kunz's case, supra, 662-664; Avis v Verseput 1943 AD 331 at 345, 363 and 377; Pan American World Airways Incorporated v SA Fire and Accident Insurance Company Limited 1965 (3) SA 150 (A) 167; M.B. Investments Limited v Oliver and Partners 1974 (3) SA 269 (R,A) 272-3; Cotler's case, supra, 629 C;
Confession and avoidance must be distinguished from cases where the dispute revolves around terms which the defendant alleges should form part of the contract which the plaintiff is suing on. The plaintiff must still prove the terms of his contract as the defendant does not confess the contract as a whole. Stock's case, supra, 766 F. See also De Wet v Habig Brothers 1912 OPD 67 at 68.

20 Voet 22.3.15; Huber, Heed.Recht, 5.28.6; Shepherd v Farrell's Estate Agency 1921 TPD 62 at 66; Rex v Jolly and others 1923 AD 176 at 188-189; Kunz's case, supra, 663; Nelson v Marich 1952 (3) SA 140 (A) 145-146; Schmidt, Bewysreg, 36-40. See also the discussion in Tregea's case, supra, 28 et seq. The law is undecided as to whether a legal presumption determines the incidence of the onus of proof. See LAWSA 9.570 footnote 6.
Presumptions of fact are not relevant here as they merely affect the evidential burden. LAWSA 9.570 footnote 7. An example of a rebuttable presumption of law is that a contract of sale does not include a voetstoots clause. See Boere Handelshuis (Edms) Beperk v Pelser 1969 (3) SA 171 (O) 173 B; Schwarzer v John Roderick Motors (Pty) Limited 1940 OPD 170; and D. Rosenthal, "Voetstoots and the Onus of Proof", (1968) 85 SALJ 240 at 242.

21 See note 8 above; Schmidt, Bewysreg, 44; and the Electra Home Appliances case, supra, 584.

22 See generally Mabentsela v Booth (1908) 18 CTR 810 at 811; Faber v Schneider 1925 GWL 54 at 57-58; Blaker v Freedman 1930 TPD 230 at 232; Dave v Birrel 1936 TPD 192 at 196-197; Kriegler's case, supra, 827-828; Myers v Lesch 1954 (2) SA 487 (C) 490; Stewart v Zagreb Properties (Pvt) Limited 1970 (4) SA 542 (R) 546 A; Stock's case, supra, 762 H, 765 A and 766 H.
Express or implied terms may be proved from the contract itself or from the surrounding circumstances. Van der Merwe v Viljoen 1953 (1) SA 60 (A) 65 D. George Municipality v Freysen NO 1976 (2) SA 945 (A) 955.

23 See Kriegler v Mintzer, supra, 827; Pillay v Krishna, supra, 951; Sarkin v Koren 1949 (3) SA 545 (C) 556; Resisto Dairy v Auto Protection Insurance Company 1963 (1) SA 632 (A) 645; Rouwkoop Caterers (Pty) Limited v Incorporated General Insurance Limited 1977 (3) SA 941 (C) 947.

24 Mans v Union Meat Company 1919 AD 268,271; Patel v Le Clus (Pty) Limited 1946 TPD 30; George v Fairmead (Pty) Limited 1958 (2) SA 465 (A) 470; PMA Hunt, "Caveat Subscriptor", (1963) 80 SALJ 457,461.

25 Gordon Wilson (Pty) Limited v Barkhuizen 1947 (2) SA 244 (O) 248 and 251; CC Turpin, "Contract and Imposed Terms," (1956) 73 SALJ 144 at 150.

26 Frocks, Limited v Dent and Goodwin (Pty) Limited 1950 (2) SA 717 (C) 725 (warehouse invoice); Micor Shipping (Pty) Limited v Treger Golf and Sports (Pty) Limited and another 1977 (2) SA 709 (W) 717 (invoices and credit notes); Mondorp Eiendomsagentskap (Edms) Beperk v Kemp en De Beer 1979 (4) SA 74 (A) 90. This point is illustrated in Mans v Union Meat Company, supra, where it was held that the plaintiff failed to discharge the onus of proving that a memorandum written on the counterfoil of a cheque constituted a contract between the parties; the defendant alleged that he was under the impression that he was merely signing a receipt, instead of guaranteeing the weight of the sheep being bought, as was alleged by the plaintiff.

27 George v Fairmead (Pty) Limited, supra, 471-2.

28 Shepherd v Farrells Estate Agency 1921 TPD 62,68 (misleading advertisement); Rosettenville Motor Exchange v Grootenboer 1956 (2) SA 624 (T) 630 C.

29 Cunningham v Holcroft 1907 TS 251; Regal Mineral Waters (Pty) Limited v Lichter (TPD 1937 April 2) Digest of Cases in (1937) 54 SALJ 381; Patel's case, supra, 32; Andrianatos v Carados' Estate and another 1946 CPD 455, 458; Schmidt v Dwyer 1959 (3) SA 899 (C).

30 See Beaton v Baldachin Brothers 1920 AD 312 at 315; Turpin,. op cit, 150; P. Aronstam, Consumer Protection, Freedom of Contract and the Law, (1979 Juta and Co) 37-8.

31 Lindberg v Deetlefs 1926 CPD 123,128; Bhikagee v Southern Aviation (Pty) Limited 1949 (4) SA 105 (E) 109; George v Fairmead (Pty) Limited, supra, 470-472; Van Wyk v Otten 1963 (1) SA 415 (o) 419; Papadopoulous v Trans-State Properties and Investments 1979 (1) SA 682 (W) 689.

32 George v Fairmead (Pty) Limited, supra, 471.

33 Supra

34 At 470

35 At 471-3

36 See Muskham Finance Limited v Howard and another (1963) 2 WLR 871 (CA) and United Dominions Trust Limited v Western (1975) 3 ALL ER 1017 (CA).
The defence appears to have been accepted as part of South African law by Wille and Millin, Mercantile Law of South Africa, 17th ed JF Coaker and WP Schutz (1975) 91, and by AJ Kerr, The Principles of the Law of Contract, 3rd ed. (1980 Butterworths) 23-4. See also Musgrove and Watson (Rhod) (Pvt) Limited v Rotta 1978 (2) SA and 918 (R) ; Novick and another v Comair Holdings Limited and others 1979 (2) SA 116 (W) 123. CF. OK Bazaars (1929) Limited v Universal Stores Limited 1973 (2) SA 281 (C) 287.

Although the Latin expression was not used a similar plea was raised in Preuss and Seligmann v Prins (1864) 1 Roscoe 198.
Non est factum was equated with iustus error in National and Grindlays Bank Limited v Yelverton 1972 (4) SA 114 (R) 116.

37 Saunders v Anglia Building Society (1971) AC 1004 (HL) 1016 B.

38 Bright and others v Durwood's Executors (1894) 11 SC 357; African Banking Corporation v Sahib (1910) 31 NPD 320; Standard Bank v Kaplan 1922 CPD 214, 217-218.

39 Naidoo v Amacunoo (1910) 2 Leader LR 147 (Innes CJ and Mason J).

40 Bardopoulous and Macrides v Miltiadous 1947 (4) SA 860 (W) 864. See also Spiller and others v Lawrence 1976 (1) SA 307 (N).

41 The position being analogous to the deletion of restrictive conditions from title deeds. See Ex parte Cliffside Flats (Pty) Limited 1941 CPD 449, 453, and Swiss Hotels (Pty) Limited v Pedersen and others 1966 (1) SA 197 (C) 202-203.
See generally concerning rectification: W. de Vos, "Mistake in Contract", 1976 Acta Juridica 177 (Festschrift in honour of Prof. B. Beinart) 186-8; Aronstam, op.cit., 39; Mouton v Hanekom 1959 (3) SA 35 (A); Otto en 'n andere v Heymans 1971 (4) SA 148 (T). What must be established is that the parties had a common continuing intention which they intended to express in a written document but as a result of a mistake their intention was not correctly expressed. If the mistake resulted from one party's fraudulent action rectification will also be allowed. Grootenboer's case, supra.

42 See CSAR v McLaren 1903 TS 727 at 733; Frocks Limited v Dent and Goodwin, supra, 725; Kings Car Hire (Pty) Limited v Wakeling 1970 (4) SA 640 (N) 643-644; Kemsley's case, supra,; Meyer v Kirner 1974 (4) SA 90 (N) 96-7; Micor Shipping (Pty) Limited v Treger Golf and Sports (Pty) Limited and another 1977 (2) SA 709 (W) 714 and 717-718; Havenga v De Lange, supra.

43 McLaren's case, supra, 734; the Frocks Limited case, supra, 725; the Micor Shipping case, supra, 714 and Meyer v Kirner supra, 96-7 (words on the back of a cheque).

44 Supra.

45 At 715 D.

46 At 717 F.

47 At 716 A.

48 At 717 G.

49 Supra.

50 1971 (4) SA 223 (RAD).

51 Supra.

52 At 644A:
"In judging what is reasonably sufficient, the party bearing the onus of establishing the incorporation of the condition in question should bear in mind the degree or magnitude of the risk that the steps he has taken may not prove sufficient to convey the necessary notice to persons acting reasonably. He must (as in cases of negligence) bear in mind the extent of the risk of non-observation by the other party in relation to the steps which he has taken and the degree of probability that such steps will bring to the notice of such other party, if acting reasonably, the existence of the condition sought to be implied in the contract."
This formulation was cited with approval by Franklin J in Micor Shipping (Pty) Limited v Treger Golf and Sports (Pty) Limited and another, supra, 714.

53 Davis v Lockstone 1921 AD 153 at 162 and 167; Weiner v Calderbank 1929 TPD 654; Turpin, op.cit, 155

54 Ibid.

55 Peard v Rennie and Sons (1895) 16 NLR 175

56 At 183

57 George v Fairmead (Pty) Limited, supra.

58 Olley v Marlborough Court Limited (1949) 1 ALL ER 127; Turpin, op.cit, 146; see also Meyer v Kirner, supra.

59 See Essa v Divaris, supra, 763 (owner's risk clause) and Sampson v Union and Rhodesia Wholesale Limited 1929 AD 468 at 480.

60 See Weiner v Calderbank 1929 TPD 654 at 662 (must be aware of the notice and its contents); Davis v Lockstone, supra, 162 and 167; Kemsley's case, supra, 123-125.

61 1946 NPD 138

62 At 163

63 This may be compared with the position which formerly prevailed when a person, who alleged renunciation of beneficia by a woman, had to prove that the renunciation was made with knowledge of the nature of the beneficia. See Knocker v Standard Bank of SA Limited 1933 AD 128 at 131.

64 See Coetzee J's comments in Western Bank Limited v Sparta Construction Company 1975 (1) SA 839 (W) at 840.

65 This applies to naturalia that are directory; peremptory ones may not be excluded. LAWSA 5.169. See A.McAlpine and Son (Pty) Limited v Transvaal Provincial Administration 1974 (3) SA 506 (A) 531 F-H. Cf. Stock's case, supra, 763 G-H.

66 See Stock's case, supra, 766 A ; and Essa v Divaris, supra, 769.

67 Stock's case, supra, 762 et seq.; Rosenthal v Marks 1944 TPD 172 at 176; Essa v Divaris, 1947 1 SA 753 (A) 769; Government of the RSA v Fibre Spinners and Weavers 1978 (2) SA 794 (A) 802.

68 Stock's case, supra, 767 B-C; Havenga v De Lange 1978 (3) SA 873 (O) 883-4.

69 See Davis v Lockstone 1921 AD 153 at 162 and 167; Wakeling's case, supra, 643-644; Mzobe v Prince Service Station 1946 NPD 138 at 140; George v Fairmead (Pty) Limited, supra, 470 A; if more than one contract is involved the onus arises in respect of each contract. See Kemsley v Car Spray Centre (Pty) Limited 1976 (1) SA 121 (SE).

70 See for the onus of: (a) Carriers - Oxford v Donald Currie and Company (1881) 2 NLR 227, 229-230; Union Steamship Company Limited v James Brickhill (1888) 9 NLR 225, 228-229; Clan Line of Steamers v Alcock and Company (1898) 13 SC 104, 112-113 and LAWSA 2.177;

(b) depositories or bailees - Government of the RSA v Fibre Spinners and Weavers (Pty) Limited 1978 (2) SA 794 (A) 803 D-E, 806 G, 807 B;

(c) Insurance Contractors - Law Union and Rock Insurance Company Limited v De Wet 1918 AD 663, 667-668; Nathan NO v Ocean Accident and Guarantee Corporation Limited 1959 (1) SA 65 (N) 68 C; Madzibanane v Santam Insurance Company Limited 1974 (4) SA 839 (W) 840-841; Nel v Incorporated General Insurance Limited 1976 (3) SA 776 (W) 779 D.

71 Supra (Note 70).

72 Supra .

73 At 762 G .

74 At 767 B.

75 See B. Coote, Exception Clauses ,(1964) pp 1-18.

76 Coote, op.cit, 15.

77 See Note 70 above .

78 See Turpin, op.cit, and E. Kahn, "Standard Form Contracts", 1971 BML 49 .

79 Wakeling's case, supra, 643 A.

80 Supra.

81 At 767. Schreiner JA concurring and Greenberg JA dissenting at 774.

82 At 769.

83 At 773.
See also Rosenthal v Marks, supra, 180; Wakeling's case, supra, 643; Stock's case, supra, 760 E-F (obiter); and generally A.J. Kerr "Owner's Risk Clauses in Contract: The Onus of Proof and Sufficiency of Notice," (1979) 96 SALJ 177.

84 See D 4.9.1, D 4.9.3.1, Inst. 4.5.3, Voet 4.4.9.1, Voet 4.9.2 and 7, Grotius, Inl. 3.38.9, LAWSA 2.170 Tregidga and Company v Sivewright (1897) 14 SC 76.

85 Viz.
Casus fortuitous, damnum fatale or vis maior, latent defect or inherent vice in the goods, negligence of the consignor. See LAWSA 2.170, 174-6, Stock's case, supra, 761-2 and Hall - Thermotank Africa Limited v Prinsloo 1979 (4) SA 91 (T) 94.

86 See generally, Voet 4.9.7; Naylor v Munnik (1859) 3 Searle 187, 191; Davis v Lockstone 1921 AD 153; LAWSA 2.177 (carriers).
Statutory limitations may also affect a party's strict liability. In Walker v Carlton Hotels (SA) Limited 1946 AD 321 at 327, reference is made to the limitations placed on the inkeeper's liability by the provisions of Sec 112 of Act 30 of 1928.

87 Prinsloo v Venter 1964 (3) SA 626 (O)

88 See Rosenthal v Marks 1944 TPD 172, 176-7; Essa v Divaris, supra, 762 and 767; Kemsley's case, supra, 123 F; Stock's case, supra, 762

89 Supra

90 At 769

91 Bynkershoek, Observationes Tumultuariae, I obs. 749; Wessels, op.cit, para 7431; D. Rosenthal, "Voetstoots and the Onus of Proof" (1968) 85 SALJ 240; 1968 Annual Survey 125; Schwarzer v John Rodericks Motors (Pty) Limited 1940 OPD 170; Boere Handelshuis (Edms) Beperk v Pelser 1969 (3) SA 171 (O) 173 A.
Cf. Pretorius v Van der Merwe 1968 (2) SA 259 (N).
The existence of the voetstoots provision (or venditio simplaria - D 21.1.48.8) may be established from the terms of the agreement (Greyling v Fick 1966 (3) SA 579 (T)); the conduct of the parties and the circumstances surrounding the sale (Stevens v Benningfield 5 NLR 282; Bosman Brothers v Van Niekerk 1928 CPD 67; Van Wyk v Otten 1963 (1) SA 415 (O); and Pelser's case, supra); but not necessarily from the fact that the purchaser had the opportunity to examine the sales goods. (Nelson v Townsend 35 NLR 267; Wilcken and Ackerman v Klomfass 1904 TH 91).

92 This clause is valid only if the seller acted in good faith Kleynhans Brothers v Wessels Trustees 1927 AD at 290. If fraud is alleged by the buyer, it must be proved by him.

93 D 19.1.45.1; Voet 21.2.25 and 26; Grotius, Inl., 3.14.6 and 3.15.4; Lammers and Lammers v Giovannoni 1955 (3) SA 385 (A).

94 D 19.1.11.8, Voet 21.2.31, Van der Keessel, Prael., 3.15.4 De Wet en Yeats, 293;and D.F. Mostert, "Uitwinning by die Koopkontrak in die Suid-Afrikaanse Reg," 1968 Acta Juridica 5 at 52.

95 Mostert, ibid.

96 It would then amount to the sale of a hope. Voet 18.1.13. See also Gengan v Pathur 1977 (1) SA 826 (D & C) (the purchaser must prove that the passing of risk has been delayed by agreement).

97 Poynton v Cran 1910 AD 205, 214
Sarkin v Koren 1949 (3) SA 545 (C) 552.

98 De Beers Consolidated Mines v London and South African Exploration Company (1893) SC, 359, 374; (1895) 12 SC 107, 111, cited with approval in Poynton's case, supra, 214-215.

99 See for example Karoo and Eastern Board of Executors and Trust Company v Farr and others 1921 AD 413, 415. Rosettenvile Motor Exchange v Grootenboer 1956 (2) SA 624 (T) (fraud); The Trust Bank of Africa Limited v Frysch 1977 (3) SA 562 (A) 588 (misrepresentation); Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa, 2 ed (1973 Juta) by L. De V. Van Winsen, J.D. Thomas and A.C. Cilliers, pp 304-305

100 See Trollip v Jordaan 1961 (1) SA 238 (A) 256; Joubert en 'n andere NNO v Faure en 'n andere 1978 (3) SA 1025 (C).

101 The mistake must not be induced by fraud or go to the root of the contract. Wells v SA Alumenite Company 1927 AD 69 at 72-3 (honest mistake) (obiter); Sisson v Lloyd 1960 (1) SA 367 (SR) 370 (mere mistake).
In Allen v Sixteen Stirling Investments (Pty) Limited 1974 (4) SA 164 (D) 171-2, it was stressed that if the mistake is an essential or mutual one and the contract is void ab initio then the exemption clause is also inoperative with the result that the party sought to be bound by the exemption clause may ignore it and set up the mistake as a defence.

102 Supra, at 688. See also Maritz v Pratley 11 SC 345 and Allen's case, supra.

103 D 50.17.23; Wells v SA Alumenite Company. 1927 AD 69, 72-73; the Fibre Spinners and Weavers case, supra, 803 A and 806 C.

104 Standard Bank of SA Limited v Kerbel 1957 (1) PH A 29 (W) 89-90; Union Free State Mining v Union Free State Gold 1960 (4) SA 547 (W).

105 Roux v Executors of Roos (1847) 1 Menzies 89,90.

106 Colonial Government v D. Mills and Sons (1907) 24 SC at 91 (no right to complain if unreasonable); Wells v SA Alumenite Company, supra, 73; North Vaal Mineral Company Limited v Lovasz 1961 (3) SA 604 (T) 607-8; Venter v Venter 1949 (1) SA 768 (A) 771 (no equitable jurisdiction to override a clear provision) Cf. Baines v Piek 1955 (1) SA 534 (A) 545.

107 Human v Rieseberg 1922 TPD 157 at 163, 165 and 166; Resisto Dairy (Pty) Limited v Auto Protection Insurance Company Limited 1962 (3) SA 565 (C) 571 H; Oatorian Properties (Pty) Limited v Maroun 1973 (3) SA 779 (A) 785 C.

108 Weinerlein v Goch Buildings Limited 1925 AD 282 at 292-3; Zuurbekom Limited v Union Corporation Limited 1947 (1) SA 514 (A) 536-7; Rand Bank Limited v Rubenstein 1979 (2) SA 849 (W).

109 South British Insurance Company Limited v Patel and Company 1959 (4) SA 500 (SR) 505 F; North Vaal Mineral Company Limited v Lovasz, supra, 612-3; Paddock Motors (Pty) Limited v Igesund 1975 (3) SA 294 (D).

110 1905 TS 775.

111 At 779.

112 At 785.

113 See the Patel and Company case, supra, 505 E; Wells v SA Alumenite Company, supra; and Sisson v Lloyd, supra.

114 Supra.

115 At 849; The court upheld the defendant's reliance on the exceptio doli see also F. Viljoen, "The Exceptio Doli Its Origin and Application in South African Law" (1981) 160 De Rebus 173.

116 Supra, at 571.

117 See the Fibre Spinners and Weavers case, supra, 806 and Aronstam, op.cit, 42-3.

118 Essa v Divaris, supra, 769 and the Fibre Spinners and Weavers case, supra, 807.

119 Supra.

120 At 806 F-G.

121 At 807 D

121a See the full-bench decision in Otto v Heyman 1971 (4) SA 148 (T); Rand Bank Limited v Rubenstein, supra, and Viljoen, (1981) 160 De Rebus 173.

122 See E. Von Hippel, "The Control of Exemption Clauses A Comparative Study" (1967) 16 ICLQ 591 and Aronstam, op.cit, 192-3, both citing the comment to section 2-302 of the Uniform Commercial Code in the American Law Institute "Uniform Laws Annotated." See also Viljoen, (1981) 160 De Rebus 173.

123 There are a few exceptions though, see for example, Linstrom v Venter 1957 (1) SA 125 (SWA) 127 and Western Credit Bank Limited v Kajee 1967 (4) SA 386 (N) 390; and the cases dealing with the exceptio doli - note 121a above.

124 Act 15 of 1962.

125 See LAWSA 5.244. In Maiden v David Jones (Pty) Limited 1969 (1) SA 59 (N) it was held that where the monetary loss incurred as a result of the breach cannot accurately be ascertained the debtor bears the onus of establishing that "the amount fixed on by agreement between the parties was unfair to the debtor." At 63-4. See further Cous v Henn 1969 (1) SA 569 (GWLD); Van Staden v Central South African Lands and Mines 1969 (4) SA 349 (W).

126 See with regard to the now abolished equitable doctrine of laesio enormis; Botha v Assad 1945 TPD 1 at 4 and Tjollo Ateljees (Eins) Bpk v Small 1949 (1) SA 856 (A) Cf. Otto v Heymans, supra, and Rand Bank Limited v Rubenstein, supra.

127 s.12 (3).

128 s.8 (1) which is substituted for section 3 of the Misrepresentation Act 1967.

129 Van der Pol v Silberman 1952 (2) SA 561 (A).
The case law dealing with the burden of proof is not entirely harmonious. The established view is that as these agreements are prima facie unenforceable the party relying on the agreement bears the onus of proving that it is reasonable. (See for example Nachthseim v Overath 1968 (2) SA 270 (C) 271). However, once this is established the other party must prove that it is against the public interest. Brend Hairstyles (Pty) Limited v Marshall 1968 (2) SA 277 (O) 280.

See also Highlands Park Football Club Limited v Viljoen and another 1978 (3) SA 191 (W) and the full-bench decision in National Chemsearch SA (Pty) Limited v Borrowman and another 1979 (3) SA 1092 (T) 1101 (but cf. the dictum at 1099 H). However, there is a new trend in favour of the view that public policy does not generally condemn restraint of trade agreements and that only covenants which unreasonably restrict trade are unenforceable. The onus is then on the party who contests the validity of the agreement to prove that it is unreasonable. See SA Wire (Pty) Limited v Durban Wire Plastics (Pty) Limited 1968 (2) SA 777 (D) 787 (obiter); Roffey v Cotterall, Edwards and Goudré (Pty) Limited 1977 (4) SA 494 (N); Poolquip Industries (Pty) Limited v Griffin and another 1978 (4) SA 353 (W) 359-360 (obiter); Madoo (Pty) Limited v Wallace 1979 (2) SA 957 (T); and Stewart Wrightson (Pty) Limited and another v Minnitt 1979 (3) SA 399 (C). See also African Theatres Limited v D'Oliviera and others 1927 WLD 122 at 129.

130 Which is in keeping with the court's approach where restraint agreements are entered into between equal contracting parties. See Van de Pol's case, supra, and Spa Food Products Limited v Sarif 1952 (1) SA 713 (SR).

131 1965 (3) SA 150 (A) 160 E.

132 Phillips v Aida Real Estate (Pty) Limited 1975 (3) SA 198 (A).

133 D 2.14.17.5.

134 D 2.14.21.5 and D 2.14.32
See also D 2.14.17.5 (buyer and seller);
D 2.14.14 and D 2.14.25 pr (partners); and African Banking Corporation v Blauwklip Garden Company Limited (1908) 25 SC 946 at 949-50 (cessionaries of debtor).
For as long as and to the extent that a temporary or limited agreement not to sue a principal debtor operates, the surety is also protected. Grotius, Inleidinge, 3.41.9 and Van der Linde's note to Voet 2.14.13. However, the agreement may be worded so as not to benefit the surety. Voet 2.14.14.

135 Jameson's Minors v CSAR 1908 TS 575 at 584-5.

136 Ibid. and at 588.
See further Voet 9.2.11; Grotius, Inl., 3.32.16, 3.33.2 and 5, and 3.35.4; Schorer, Note 467; Van der Keessel, Prael., 3.33.2; and Ex parte Oliphant 1940 CPD 537 at 542-4.

TABLE OF CASES

Deetleefs v Wright 1977 (2) SA 560 (A)
De Kock v Fincham 19 SC 136
De Villiers and Paul v Jansen 1912 CPD 354
De Wet v Habig Brothers 1912 OPD 67

Eagle Star Insurance Co Ltd v Willey 1956 (1) SA 330 (A)
Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt 1914 AC 197 (PC)
Eensaam Syndicate v Moore 1920 AD 458
Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd 1972 (3) SA 583 (W)
Erasmus v Mitter and Reichman 1913 TPD 628
Essa v Divaris 1947 (1) SA 753 (A)
Ex parte Cliffside Flats (Pty) Ltd 1941 CPD 449
Ex parte Oliphant 1940 CPD 537
Ex parte Minister of Native Affairs In re Yako v Beyi 1948 (1) SA 388 (A)

Faber v Schneider 1925 GWL 54
Fairlands Ltd v Inter-Continental Motors Ltd 1972 (2) SA 270 (A)
Farmer's Co-operative Society v Berry 1912 AD 319
Fletcher and Fletcher v Bulawayo Watercorks Co Ltd 1915 AD 636
Frenkel v Ohlsson's Cape Breweries Ltd 1909 TS 957
Friedlander v Hodes Brothers 1944 CPD 169
Frocks Limited v Dent and Goodwin (Pty) Limited 1950 (2) SA 717 (C)

Gaza v Motor Insurer's Association 1964 (3) SA 273 (D)
Geldenhuys v Keller 1912 CPD 623
Gengan v Pathur 1977 (1) SA 826 (D)
George v Fairmead (Pty) Limited 1958 (2) SA 465 (A)
George Municipality v Freysen NO 1976 (2) SA 945 (A)
Gillespie v Toplis 1951 (1) 290 (C)
Glanfield v Asp Development Syndicate Ltd 1911 AD 374
Goldberg v Tomaselli and Sons 1940 TPD 413
Gordon Wilson (Pty) Limited v Barkhuizen 1947 (2) SA 244 (O)
Government of the RSA (Department of Industries) v Fibre Spinners and Weavers 1977 (2) SA 324 (D)
Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd 1978 (2) 794 (A)
Greyling v Fick 1966 (3) SA 579 (T)
Grobbelaar v Van Heerden 1906 EDC 229

Hall-Thermotank Africa Ltd v Prinsloo 1979 (4) SA 91 (T)
Hall-Thermotank Natal (Pty) Ltd v Hardman 1968 (4) SA 818 (D)
Havenga v De Lange 1978 (3) SA 873 (O)
Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A)
Haynes and Co v Kaffrarian Steam Mill Co Ltd 1914 AD 363
Heneke v Royal Insurance Co Ltd 1954 (4) SA 606 (A)
Henningsen v Bloomfield Motors Inc 161 A 2d 69

Herring v "Kimpton's" 1931 SR 89
Highlands Park Football Club Ltd v Viljoen and another 1978 (3) SA 191 (W)
Hofmeyr and Son v Luyt 1921 CPD 831
Hudson's Transport (Pty) Ltd v Du Toit 1952 (3) SA 726 (T)
Human v Rieseberg 1922 TPD 157

Inrybelange (Edms) Bpk v Pretorius 1966 (2) SA 416 (A)
Istros v Dahlstroem [1931] 1 KB 252

Jameson's Minors v CSAR 1908 TS 575
Jones v Raad 1940 CPD 376
Joubert en 'n andere NNO v Faure en 'n andere 1978 (3) SA 1025 (C)

Kader v Frank and Warshaw 1926 AD 347
Karoo and Eastern Board of Executors and Trust Company v Farr and others 1921 AD 413
Karsales v Wallis [1965] 1 WLR 936 (CA)
Kemsley v Car Spray Centre (Pty) Ltd 1976 (1) SA 121 (SE)
King's Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N)
Klaassen v Benjamin 1941 TPD 85
Kleynhans Brothers v Wessels Trustees 1927 AD 290
Knocker v Standard Bank of SA Ltd 1933 AD 128
Kommissaris van Binnelandse Inkomste v Anglo-American (OFS) Housing Co Ltd 1960 (3) SA 642 (A)
Kriegler v Minitzer and another 1949 (4) SA 821 (A)
Kruger v Strydom 1969 (4) SA 304 (NC)
Kruger v King William's Town Municipality 1959 (4) SA 547 (E)
Kruger v Fourie 1946 TPD 155
Kunz v Swart and others 1924 AD 618

Lammers and Lammers v Giovannoni 1955 (3) SA 385 (A)
Law Union and Rock Insurance Co Ltd v De Wet 1918 AD 663
Lawn v Rhodesian Eagle Insurance Co Ltd 1977 (3) SA 80 (R)
LEP Air Services v Rolleswin 1973 AC 331 (HL)
Levin and Co v Berg River Flour Mills 1921 AD 78
Lindberg v Deetlefs 1926 CPD 123
Linstrom v Venter 1957 (1) SA 125 (SWA)
Lockhat's Estate v North British and Mercantile Insurance Co Ltd 1959 (3) SA 295 (A)

Mabentsela v Booth (1908) 18 CTR 810
Madoo (Pty) Ltd v Wallace 1979 (2) SA 957 (T)
Madzibanane v Santam Insurance Co Ltd 1974 (4) SA 839 (W)
Mahemo v Mpefu 1912 TPD 724
Mahomed v Teubes 1918 CPD 398
Maiden v David Jones (Pty) Ltd 1969 (1) SA 59 (N)
Mans v Union Meat Company 1919 AD 268
Maraisburg Divisional Council v Wagenaar 1923 CPD 94
Marcus v Stamper and Zoutendyk 1910 AD 75
Maritz v Pratley 11 SC 345

Marlin v Durban Turf Club and others 1942 AD 112
Matthews v Young 1922 AD 504
M.B. Investments Ltd v Oliver and Partners 1974 (3) SA 269 (RAD)
Medallie and Schiff v Roux (1903) 20 SC 438
Meintjies v Manley and Co 1922 CPD 151
Meyer v Kirner 1974 (4) SA 90 (N)
Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd 1977 (2) SA 709 (W)
Millard HA and Son (Pty) Ltd v Enzenhofer 1968 (1) SA 330 (T)
Millner and Co v Liberman and Buirski 1920 CPD 139
Minister of Defence v Carlson 1971 (2) SA 231 (N)
Minister of the Interior v Harris 1952 (4) SA 769 (A)
Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706 (A)
Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer 1979 (4) SA 74 (A)
Moodley v Bondcrete 1969 (2) SA 370 (N)
Moosa v Mohamed 1940 NPD 435
Morris v Angelo Deep Gold Mine Ltd 1905 TS 775
Mouton v Hanekom 1959 (3) SA 35 (A)
Musgrove and Watson (Rhod) (Pvt) Ltd v Rotta 1978 (2) SA 918 (R)
Muskham Finance Ltd v Howard and another [1963] 2 WLR 871 (CA)
Myers v Lesch 1954 (2) SA 487 (C)
Mzobe v Prince Service Station 1946 NPD 138

Nachthseim v Overath 1968 (2) SA 270 (C)
Naidoo v Amacunoo (1910) 2 Leader LR 147
Naik v Panday 1952 (1) PH A3 (A)
Nathan NO v Ocean Accident and Guarantee Corporation Ltd 1959 (1) SA 65 (N)
National Chemsearch SA (Pty) Ltd v Borrowman and another 1979 (3) SA 1092 (T)
Naylor v Munnik (1859) 3 Searle 187
Nel v Incorporated General Insurance Ltd 1976 (3) SA 776 (W)
Nel v Nelspruit Motors (Edms) Bpk 1961 (1) SA 582 (A)
Nelson v Marich 1952 (3) SA 140 (A)
Nelson v Townsend 35 NLR 267
New York Central RR v Lockwood 84 US (17 Wall) 357 (1873)
Nicholas v Wigglesworth 1937 NPD 376
Nienaber v Union Government 1947 (1) SA 392 (T)
Nightingale and Adams v SAR&H 1921 EDL 91
North Vaal Mineral Co Ltd v Lovasz 1961 (3) SA 604 (T)
Nothnagel v Synodinos TPA No A 134/73

Novick and another v Comair Holdings Ltd and others 1979 (2) SA 116 (W)
Nydoo en andere v Vengtas 1965 (1) SA 1 (A)

Oatorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A)
OK Bazaars (1929) Ltd v Universal Stores Ltd 1973 (2) SA 281 (C)
Olley v Marlborough Court Ltd [1949] 1 All ER 127
Oslo Land Co Ltd v Union Govrnment 1938 AD 590
Otto en 'n andere v Heyman 1971 (4) SA 148 (T)
Oxford v Donald Currie and Company (1881) 2 NLR 227

Paddock Motors (Pty) Ltd v Igesund 1975 (3) SA 294 (D)
Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A)
Papadopoulous v Trans-State Properties and Investments 1979 (1) SA 682 (W)
Patel v Le Clus (Pty) Ltd v 1946 TPD 30
Peard v Rennie and Sons (1895) 16 NLR 175
Phillips v Aida Real Estate (Pty) Ltd 1975 (3) SA 198 (A)
Pillay v Krishna and another 1946 AD 946
Pottie v Kotze 1954 (3) SA 719 (A)
Poyton v Cran 1910 AD 205
Preuss and Seligman v Prins (1864) 1 Roscoe 198
Pretorius v Van der Merwe 1968 (2) SA 259 (N)
Prinsloo v Venter 1964 (3) SA 626 (O)

R v Nhlanhla 1960 (3) SA 568 (T)
Radiotronics (Pty) Ltd v Scott, Lindberg and Co Ltd 1951 (1) SA 312 (C)
Rand Bank Ltd v Rubenstein 1979 (2) SA 849 (W)
Rasec (Mooifontein) (Pty) Ltd v Devonport Investment Holding Co (Pty) Ltd 1976 (1) SA 299 (W)
Regal Mineral Waters (Pty) Ltd v Lichter (TPD 1937 April 2)
Resisto Dairy v Auto Protection Insurance Co 1962 (3) SA 565 (C)
Rex v Jolly and others 1923 AD 176
Rhodesian Railways Ltd v Mackintosh 1932 AD 359
Roffey v Cotterall, Edwards and Goudre (Pty) Ltd 1977 (4) SA 494
Rondalia v Hanekom 1972 (2) SA 114 (T)
Rosenthal v Marks 1944 TPD 172
Rosettenville Motor Exchange v Grootenboer 1956 (2) SA 624 (T)
Rouwkoop Caterers (Pty) Ltd v Incorporated General Insurance Ltd 1977 (3) SA 941 (C)
Roux v Executors of Roos (1847) 1 Menzies 89
Rutter v Palmer [1922] 2 KB 87

S v Allied Steel (Pvt) Ltd 1976 (4) SA 164 (RAD)
SAR&H v Conradie 1922 AD 137
SAR&H v Lyle Shipping Co Ltd 1958 (3) SA 416 (A)

SAR&H v Williams 1930 TPD 514
SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere 1964 (4) SA 760 (A)
SA Wire (Pty) Ltd v Durban Wire Plastics (Pty) Ltd 1968 (2) SA 777 (D)
Sampson v Union and Rhodesia Wholesale Ltd 1929 AD 468
Sanso Properties Joubert Street (Pty) Ltd v Kudsee 1976 (4) SA 761 (A)
Sarkin v Koren 1949 (3) SA 545 (C)
Saunders v Anglia Building Society [1971] AC 1004 (HL)
Schmidt v Dwyer 1959 (3) SA 899 (C)
Schroeder Music Publishing Co Ltd v Macaulay [1974] 2 All ER 616 (HL)
Schwarzer v John Roderick Motors (Pty) Ltd 1940 OPD 170
Shackell v Lippert 7 SC 75
Shepherd v Farrell's Estate Agency 1921 TPD 62
Sherry v Stewart 1902 TH 252
Shill v Milner 1937 AD 101
Sisson v Lloyd 1960 (1) SA 367 (SR)
Smit v Bester 1977 (4) SA 937 (A)
Smit v Saipem 1974 (4) SA 918 (A)
Smit and Shapiro v Van Heerden 1941 TPD 228
Smit and Venter v Fourie and another 1946 WLD 13
Smith v Saipem 1973 (4) SA 335 (T)
Smith's Trustee v Smith 1927 AD 482
South British Insurance Co Ltd v Patel and Co 1959 (4) SA 500 (SR)
Southern Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)
Spa Food Products Ltd v Sarif 1952 (1) SA 713 (SR)
Spiller and others v Lawrence 1976 (1) SA 307 (N)
Spolander v Ward 1940 CPD 24
Standard Bank v Kaplan 1922 CPD 214
Standard Bank of SA Ltd v Kerbel 1957 (1) PH A29 (W)
Stevens v Benningsfield 5 NLR 282
Stewart v Zagreb Properties (Pvt) Ltd 1970 (4) SA 542 (R)
Stewart Wrightson (Pty) Ltd and another v Minnitt 1979 (3) SA 399 (C)
Stocks and Stocks (Pty) Ltd v T.J. Daly and Sons (Pty) Ltd 1979 (3) SA 754 (A)
Sulaiman v Armadien 1931 CPD 510
Suisse Atlantique Societe D'Armament Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361 (HL)
Swart v Vosloo 1965 (1) SA 100 (A)
Swiss Hotels (Pty) Ltd v Pedersen and others 1966 (1) SA 197 (C)

Techni-Pak Sales (Pty) Ltd v Hall 1968 (3) SA 231 (W)
The Farm Implement Co of Kroonstad v The Minister of Railways 1916 OPD 183
The Trust Bank of Africa Ltd v Frysch 1977 (3) SA 562 (A)
The Winkfield 1902 PD 42 (CA)

Theron NO v Joynt 1951 (1)SA 498 (A)
Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk 1976 (3) SA 470 (A)
Tregea and another v Godart and another 1939 AD 16
Tregidga and Co v Sivewright (1897) 14 SC 76
Trollip v Jordaan 1961 (1) SA 238 (A)
Trotman v Edwick 1951 (1) SA 443 (A)
Turner v Hardcastle (1862) 11 CB (NS)683
Twigger v Starweave (Pty) Ltd 1969 (4) SA 369 (N)

Union Free State Mining v Union Free State Gold 1960 (4) SA 547 (W)
Union Government v Lee 1927 AD 206
Union Government v Ocean Accident and Guarantee Corp Ltd 1956 (1) SA 577 (A)
Union Steamship Co Ltd v James Brickhill (1888) 9 NLR 225
United Dominions Trust Ltd v Western [1975] 3 All ER 1017 (CA)

Vaal Transport Corporation v Van Wyk Venter 1974 (2) SA 757 (T)
Van Aswegen v De Clercq 1960 (4) SA 875 (A)
Van Breda v Hofmeyer 3 Menzies 461
Van der Merwe v Viljoen 1953 (1) SA 60 (A)
Van der Pol v Silberman 1952 (2) SA 561 (A)
Van Deventer v De Villiers 1953 (4) SA 72 (C)
Van Staden v Central South African Lands and Mines 1969 (4) SA 349 (W)
Van Wyk v Herbst 1954 (2) SA 571 (T)
Van Wyk v Otten 1963 (1) SA 415 (O)
Vasco Dry Cleaners v Twycross 1979 (1) SA 603 (A)
Vengatsamy v Scheepers 1946 NPD 84
Venter v Venter 1949 (1) SA 768 (A)
Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1

Walker v Matterson 1936 NPD 504
Watkins v Rymil [1883] 10 QBD 178
Western Bank Ltd v Heunis 1972 (4) SA 703 (NC)
Wire Industries Steel Products v Surtees and Heath 1953 (2) SA 531 (A)
Wireless Telegraph Co v Dougall and Munro 1927 CPD 380

Walker v Carlton Hotels (SA) Ltd 1946 AD 321
Weber and Pretorius v Pretoria Municipality 1921 TPD 19
Weinberg v Oliver 1943 AD 181
Weiner v Calderbank 1929 TPD 654
Weinerlein v Goch Buildings Ltd 1925 AD 282
Welgemoed en andere v Sauer 1974 (4) SA 1 (A)
Wells v SA Alumenite Co 1927 AD 69
Wessels v Wessels 1950 (3) SA 852 (O)
Western Bank Ltd v Sparta Construction Co 1975 (1) SA 839 (W)

Western Credit Bank Ltd v Kajee 1967 (4) SA 386 (N)
Wilken v Kohler 1913 AD 135
Wijtenburg Holdings, trading as Flamingo Dry Cleaners v Bobroff 1970 (4) SA 197 (T)
Wilcken and Ackerman v Klomfaas 1904 TH 91
Woods v Walters 1921 AD 303

Yenaspergasam v Naidoo 1932 NPD 96
Yorigami Maritime Construction Co Ltd v Nissho- Iwai Co Ltd 1977 (4) SA 682 (C)

Zuurbekom Ltd v Union Corporation Ltd 1947 (1) SA 514 (A)

PRINCIPAL AUTHORITIES QUOTED
WITH MODE OF CITATION

JOURNALS

ALJ	Australian Law Journal
Am J Comp L	American Journal of Comparative Law
Annual Survey	Annual Survey of South African Law
BML	Businessman's Law
Calif LR	California Law Review
Columbia LR	Columbia Law Review
De Rebus	De Rebus, Die Suid-Afrikaanse Prokureurstydskrif
Harv LR	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
JBL	Journal of Business Law
Louisiana LR	Louisiana Law Review
MLR	Modern Law Review
New LJ	New Law Journal
NZLJ	New Zealand Law Journal
Rhod LJ	Rhodesian Law Journal
SALJ	South African Law Journal
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tulane LR	Tulane Law Review
VUW Law Review	Victoria University of Wellington Law Review
Yale LJ	Yale Law Journal

OLD AUTHORITIES

ROMAN

The four parts of the Corpus Juris Civilis Justiniani:

D	Digest or Pandects
C	Codex
Nov	Novels
Inst.	Institutes
Gai	Institutes of Gaius
C Th	Codex Theodosianus

INSTITUTIONAL WRITERS

Bynkershoek, Obs. Tum.	C. van Bynkershoek, Observationes tumultuariae, ed E.M. Meijers et al (Haarlem, 1926 - 62).
Bynkershoek, Q.J. Priv	C. van Bynkershoek, Quaestiones juris privati, (Leyden 1744)
Decker	See Van Leeuwen
Grotius or Grotius, Inl.	H. Grotius (De Groot), Inleiding tot de Hollandsche Rechtsgeleertheyt (1631) ed with notes by S. Groenewegen and W. Schorer (Amsterdam, 1767)
Grotius, De iure belli ac pacis	H. Grotius (De Groot), De jure belli ac pacis (1625)
Huber, Heed. Recht.	U. Huber, Hedendaegse Rechtsgeleerdheyt, (1686) 5 ed., by Z. Huber (1768). Trans. P. Gane sub nom. Jurisprudence of my Time 2 vols., (1939 Durban)
Pothier, Obl.	M. Pothier, Traité des Obligationes. Trans. W.D. Evans (1802).
Schorer	W. Schorer, Aanteekeningen over de Inleiding tot die Hollandsche Rechtgeleertheyt van Hugo de Groot (1767)
Van der Keessel, Prael.	D.G. van der Keessel, Praelectiones iuris hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam, edited and translated by professors of the University of Pretoria, sub tit. Voorlesinge oor die Hedendaagse Reg na Aanleiding van De Groot se 'Inleiding tot de Hollandse Rechtsgeleerdheyd' (Amsterdam and Cape Town, 1961 - 7).
Van der Keessel, Thes. Sel.	D.G. van der Keessel, Theses selectae juris Hollandici et Zelandici, ad supplendam Hugonis Grotii Introductionem (Leyden 1800)
Van Leeuwen	S. van Leeuwen, Het Roomsch Hollandsch Recht (1664) 12 ed, op nieuws overgezien en met aanteekeningen uitgebreid door C.W. Decker (Amsterdam 1780 - 3).
Van Leeuwen, C.F.	S. van Leeuwen, Censura Forensis (1662) ed Leyden 1741, G. de Haas recensuit et observationes suas adjecit.
Voet	J. Voet, Commentarius ad Pandectas (The Hague 1698 - 1704)

MODERN AUTHORITIES

Amos and Walton	M.S. Amos and F.P. Walton, Introduction to French Law, 3 ed (1967 OUP)
Aronstam	P. Aronstam, Consumer Protection, Freedom of Contract and the Law, (1979 Juta and Co)
Buckland	W.W. Buckland, A Text-Book of Roman Law from Augustus to Justinian, 3 ed revised by P. Stein (1963 Cambridge)
Classen	C.J. Classen, Dictionary of Legal Words and Phrases, (1975 - 1977 Butterworths)
Cohn	E.J. Cohn, Manual of German Law, 2 ed (1971 London)
Coote, Exception Clauses	B. Coote, Exception Clauses (1964 Sweet and Maxwell)
Crook	J.A. Crook, Law and Life of Rome (1970 Thames and Hudson)
De Vos	W. de Vos, Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg, 2e uitgawe (1971 Juta)
De Wet en Yeats	J.C. de Wet en J.P. Yeats, Kontraktereg en Handelsreg, 4de uitgawe. J.C. de Wet en A. van Wyk (1978 Butterworths)
Diemont, Marais, Aronstam	M.A. Diemont, R.F. Marais and P.J. Aronstam, The Law of Hire-Purchase in South Africa, 4 ed (1978 Juta)
Fayle	C.E. Fayle, A Short History of the World's Shipping Industry (1934 Allen and Unwin)
Friedman	L.M. Friedman, Law and Society : An Introduction, (1977 Prentice Hall)
Grueber	E. Grueber, The Lex Aquilia (1886 Oxford)
Heichelheim	F.M. Heichelheim, An Ancient Economic History, translated by J. Stevens, (1958 Sijthoff/Leiden)
Holdsworth	W.S. Holdsworth, History of English Law, (1922 Methuen)
Huebner	R. Huebner, A History of Germanic Private Law, translated by F.S. Philbrick (1918 John Murray)
Kaser	M. Kaser, Römisches Privatrecht, translated by R. Dannenbring, Roman Private Law, 2 ed (1965 Butterworths)

Keeton	A.A.F. Keeton, The Norman Conquest and the Common Law, (1966 Noble)
Kerr	A.J. Kerr, The Principles of the Law of Contract, 3rd ed (1980 Butterworths)
Kiralfy	A.K.R. Kiralfy, Law in Eastern Europe no 11 (1966 University of Leiden, A.W. Sijthoff)
LAWSA	The Law of South Africa (Butterworths) W.A. Joubert Editor-in-Chief. Method of citation: LAWSA (volume number). (paragraph number) e.g. LAWSA 5.112.
Lee, Commentary	R.W. Lee, Commentary on 'The Jurisprudence of Holland' by Hugo Grotius (1936 Oxford)
Lee and Honoré	R.W. Lee and A.M. Honoré, The South African Law of Obligations, 2 ed by E. Newman and D.J. McQuoid-Mason (1978 Butterworths)
Maine	H. Maine, Ancient Law, 10th ed (1912 Murray, London)
McKerron	R.G. McKerron, The Law of Delict, 7 ed (1971 Juta)
Merryman	J.H. Merryman, The Civil Law Tradition, (1969 Stanford)
Nicholas	B. Nicholas, An Introduction to Roman Law, (1962 Oxford)
Oakeshott	W.F. Oakeshott, Commerce and Society, (1936 Oxford)
Paton	G.W. Paton, A Text-Book of Jurisprudence 4 ed (1927 OUP)
Potter	H. Potter, Historical Introduction to English Law, 4th ed by A.K.R. Kiralfy (1962 Sweet and Maxwell)
Raynes, Insurance	H.E. Raynes, Insurance, (1960 OUP)
Ryan	K.W. Ryan, An Introduction to the Civil Law (1962 Law Book Co Brisbane)
Sandars	The Institutes of Justinian, Corpus Juris Civilis, translated by T.C. Sandars 7 ed (1917 Longmans)
Sande	J. van den Sande, Commentary on Cession of Actions, translated by P.C. Ander (1906 African Book Co)

Schmidt, Bewysreg	C.W.H. Schmidt, Bewysreg, (1972 Butterworths)
Scrutton on Charterparties	T.E. Scrutton on Charterparties, 15th ed by W.L. McNair and A.A. Mocatta (1948 Sweet and Maxwell)
Second Report	Exemption Clauses ; Second Report. The Law Commission No 69 and the Scottish Law Commission No 39 (HMSO London 1975)
Seagle	W. Seagle, The History of Law (1946 Tudor Publishing Co. N.Y.)
Sohm's Institutes	R. Sohm's Institutes of Roman Law, translated by J.C. Ledlie 3 ed (1907 Oxford)
Soltau	R.H. Soltau, An Outline of European Economic Development, (1935 Longmans, Green and Co.)
Thomas	J.A.C. Thomas, Textbook of Roman Law, (1976 North-Holland)
Van Oven	J.C. van Oven, Leerboek van Romeinsch Privaatrecht, (Leiden - Brill 1948)
Van Warmelo	P. van Warmelo, An Introduction to the Principles of Roman Civil Law, (1976 Juta)
Van Zijl Steyn	I. van Zijl Steyn, Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg, Annals of the University of Stellenbosch (1929)
Wessels	J.W. Wessels, The Law of Contract in South Africa, 2 ed by A.A. Roberts (1951 Butterworths)
Wille's Principles	G. Wille's Principles of South Africa 7 ed by J.T.R. Gibson (1977 Juta)
Wille and Millin	G. Wille and P. Millin, Mercantile Law of South Africa, 17 ed by J.F. Coaker and W.P. Schutz (1975 Hortors)