TOWARDS AUGMENTING THE LIST OF PROHIBITED CONTRACT TERMS IN THE SOUTH AFRICAN CONSUMER PROTECTION ACT 68 OF 2008

1 *Introduction*

The South African Consumer Protection Act 68 of 2008 (the act) currently has a rather short list of prohibited contract terms in section 51. Section 51 first confirms the obvious point that contract terms may not purport to limit or exclude consumers' rights under other parts of the act (s 51(1)(*a*) and (*b*)). Other significant terms which are prohibited by section 51 include exemption clauses or assumptions of risk relating to gross negligence, purported cessions of claims against the Guardian's Fund and false acknowledgements that no representations or warranties were made in connection with the agreement or that goods or any required document were received. Clauses which require the consumer to forfeit any money if the consumer exercises a right in the act or which the supplier is not entitled to under the act or other law are prohibited as well. In addition, what could be termed unfair enforcement clauses are prohibited, *eg* an undertaking to sign in advance any documentation relating to enforcement of the agreement or to consent to a predetermined value of costs relating to enforcement of the agreement. This list in section 51 applies to all the contract terms covered by the act, including the negotiated terms in the business-to-small business contracts governed by the act. In this regard it should be noted that all natural persons are consumers as well as juristic persons with an annual turnover or asset value below a threshold set by the minister of trade and industry (currently R2 million: see s 5(2)(*b*) read with GN 294 in *GG* 34181 (01-04-2011)).

In addition, regulation 44 of the Consumer Protection Act Regulations creates a list of terms that are presumed to be unfair (GN 293 in *GG* 34180 (01-04-2011)). This is commonly referred to as the grey list, a label often used in Europe (see *eg* Naudé "The use of black and grey lists in unfair contract terms legislation in comparative perspective" 2007 *SALJ* 128). This list contains 28 clauses. It is based largely on the EC Directive on Unfair Terms in Consumer Contracts of 1993 and the erstwhile Proposal for a Consumer Rights Directive of 2008, but some items are based on the German and Australian legislation (see for references Naudé "Enforcement procedures in respect of the consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective" 2010 *SALJ* 515 540). It should be noted that the list in regulation 44 applies only to "true" business-to-consumer transactions, namely in contracts between suppliers acting for purposes wholly or mainly for purposes of their business or profession and consumers who are natural persons and who are acting for purposes wholly or mainly unrelated to their business or profession (reg 44(1)). Thus the list does not apply to not-for-profit suppliers. However, it is not limited to non-negotiated or standard terms and so also applies to negotiated terms. This makes sense in the consumer context, where there is hardly any negotiation with suppliers anyway. If negotiated terms would be excluded from the list it may result in suppliers engaging in superficial sham attempts to negotiate non-core terms without actually being willing to change their terms, just in order to evade application of the list.

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It is widely recognised that lists of prohibited terms and lists of presumptively unfair terms improve the effectiveness of the control of unfair terms and that they lead to greater certainty about which terms are unfair (Naudé 2007 *SALJ* 131; Sharrock "Judicial control of unfair contract terms: the implications of the Consumer Protection Act" 2010 *SA Merc LJ* 295 317). As noted before, such lists have been described by leading international writers as "of crucial importance" (Hondius *Unfair Terms in Consumer Contracts* (1987) 183) and "the key element of any attempt to regulate unfair terms" (De Nova "Italian contract law and the European Directive on Unfair Terms in Consumer Contracts" 1995 *European Review of Private Law* 221 230).

Prohibiting certain clauses is obviously more effective in the fight against unfair terms than grey-listing clauses. Businesses are more likely to remove prohibited terms from their standard terms or to be willing to not rely on such terms in the face of a challenge by a consumer, regulator or consumer organisation (Naudé 2007 *SALJ* 131; Sharrock 317).

Regulation 44 largely follows the recommendation for a list of terms which are presumed to be unfair made by Naudé in 2010 *SALJ* 536-540, but the order of the items in the list was changed in order to group terms together thematically. This contribution will argue that, while such a list of presumptively unfair terms has many advantages, the proposal made by this author was too conservative for the reasons provided below.

2 *Potentially problematic terminology?*

Firstly there is the question of terminology. The act itself and the act's regulations do not use the labels black and grey lists, which are commonly used by European scholars in particular, but also in South Africa (apart from Naudé, see *eg Vodacom Service Provider Company (Pty) Ltd v National Consumer Commission* (NCT/2793/2011/101 (1)(P)) 2012 ZANCT 9 (8 Jun 2012) par 59; Sharrock 316-321; Jacobs, Stoop and Van Niekerk "Fundamental consumer rights under the Consumer Protection Act 68 of 2008" 2010 *PER* 302 362). It is possible that there may be sensitivity in South Africa about the pejorative use of the word "black" to indicate clauses that are so "bad" that they should not be allowed at all. Although many South Africans may not take offence at this usage, it may be safer to rather use the label of a "red list" in this context, which also indicates that the terms may not be used. Another way around the problem which assists with finding shorthand labels for lists is to only ever describe a list like that in section 51 as a "list of prohibited terms" and a list of presumptively unfair terms as a "list of suspect terms". The term "grey list" to refer to a list of presumptively unfair terms is not as potentially problematic as the term "black list", and may be related more to the common usage of the terminology of "a grey area" to denote some uncertainty about what is allowed. However, if the convenient shorthand label of a red list is to be used, it perhaps makes more sense to speak of an orange list to indicate terms that are problematic and should normally not be used. The terminology that will be used in this note is that of red and orange lists, also in order to elicit readers' views on this usage.

3 *No guidance from courts and other enforcers on which terms are always unfair*

A more substantive issue with Naudé's previous proposals on lists is that she proposed wording for an orange list in her article (2010 *SALJ* 515), instead of arguing more strongly for lengthening the red list in section 51. This tentative approach of concentrating on wording for an orange list may have been influenced by the fact that the EC Directive on Unfair Terms in Consumer Contracts only has an indicative list of terms that may be regarded as unfair and not a red list. This tentative approach may also have been justified by the fact that South Africa had very little experience of control over unfair terms and it may have been hoped that courts and other enforcement bodies would provide guidance on which terms should always be unfair before these were to be prohibited outright by legislation (*cf* Naudé 2007 *SALJ* 137).

Any hope that the courts and enforcement bodies would have given guidance by now on which terms on the orange list would always be unfair and so should always be avoided has been dashed. In the five years since the act came into effect, the courts, national consumer tribunal (tribunal), national consumer commission and accredited ombuds have not given guidance on whether clauses on the orange list could sometimes be fair or rather never be fair. There are apparently no reported cases in the ordinary courts on the fairness of a clause listed in regulation 44. The high courts, whose decisions are reported, are out of reach of most consumers anyway. The tribunal did set aside a few compliance notices issued by the national consumer commission in 2011 in which it was alleged that terms in regulation 44 were included in the supplier's standard terms and were accordingly unfair (the *Vodacom* case; *Mobile Telephone Networks (Pty) Ltd v National Consumer Commission* NCT/2738/2011/101(1)(P)) 2012 ZANCT 20 (17 Sep 2012) par 4; *CJ Digital SMS Marketing CC v National Consumer Commission* (NCT/3584/2011/101(1)) 2012 ZANCT 22 (1 Oct 2012) par 19). However, the compliance notices were set aside on procedural grounds and the tribunal did not consider the allegations that the contract terms in question were unfair. For example in the *Vodacom* case the compliance notice was set aside on the basis that the national consumer commission did not give a "balanced and well-reasoned decision" and did not conduct a "detailed analysis of the circumstances in which the clause is being used" (par 60-62). In other words, the correct procedure was not followed by the national consumer commission and therefore the tribunal did not want to engage with whether the listed terms were unfair. In the same case, the tribunal left open the question whether only a court of law has jurisdiction over unfair contract terms (par 62). The tribunal has also said in another context that it is "not mandated to adjudicate on contractual disputes [and] [t]his is reserved for civil courts" (*Primi World (Pty) Ltd v National Consumer Commission* (NCT/4740/2012/101(1)(PCPA) 2013 ZANCT 42 (23 Oct 2013) par 57). However, the courts, apart from the small claims courts, are out of reach of most consumers. There are apparently no indications in later decisions by the tribunal that the national consumer commission issued compliance notices in respect of the use of orange-listed clauses which were then challenged by suppliers before the tribunal. Unlike, for example, the competition and markets authority of the United Kingdom, the national consumer commission does not publish information on its website setting out its experience with the control of unfair contract terms (Competition and Markets Authority *Unfair Contract Terms Guidance* (2015)). Therefore it is difficult to obtain guidance on which terms on the orange list should always be unfair according to the national consumer commission, as well as

information on the national consumer commission's negotiations with suppliers in that regard. It may be that the national consumer commission has decided by now that it would only issue compliance notices in respect of prohibited terms. If this is the case, the benefit of the grey list is severely reduced, as effective unfair contract terms control depends largely on proactive enforcement by regulators or consumer organisations. This suggests that terms which are always unfair should rather be prohibited outright in a red list. The consumer goods and services ombud has also not thus far had occasion to consider whether a term listed in regulation 44 should always be unfair either. This ombud has published one assessment on an orange-listed term thus far (Reg 44 fairness (201606-0007707) 2016 ZACGSO 12 (29 Aug 2016)). In this assessment, the ombud simply allowed the consumer to cancel an open-ended contract due to unilateral variation of its terms by the supplier as item (i) of the orange list read with regulation 44(4)(*c*)(iv) also allows. South Africa also does not have well-resourced consumer organisations taking up the fight against unfair contract terms.

In fact, many of the terms on the orange list should have been prohibited outright. Some examples will be given below. But first some experience in other jurisdictions and comments on the scope of the red list will be set out in the next two parts.

4 *Brief comparative perspective*

The Brazilian Consumer Protection Code prohibits all exemption clauses for defects in goods or services in consumer contracts, clauses allowing the transfer of responsibilities to third parties, onus reversal clauses, compulsory arbitration clauses, unilateral price variation clauses, unilateral contract modification clauses, unilateral cancellation clauses and unilateral legal costs clauses (a 51 of the *Codigo de Defesa do Consumidor Lei No 8.078, de 11 de Setembro de 1990*). Closer to home, the Seychelles Consumer Protection Act, 2010, has a red list which is based primarily on the list in the EC Unfair Terms Directive (s 15(4) read with the schedule). The Model Law for Consumer Protection in Africa of 1996, by contrast, only has an orange list (*Consumer Protection for Africa – Report of the Africa Conference on Consumer Protection*, Harare, Zimbabwe, 28 April-2 May 1996, United Nations document ST/ESA/254 (1997)). The orange list is set out in the schedule to the unfair contract terms rules, an annex to the Model Law. (See s 4(3)(*b*) of these rules on the status of the list.) The Zimbabwean Consumer Contracts Act Cap 8:03 also has an orange list (s 4(3) read with the schedule). It is submitted that developing countries with high levels of inequality like South Africa should actually be very protective of consumers and have red lists.

Many European countries have red lists. These are Austria, Belgium, Bulgaria, the Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxemburg, Malta, the Netherlands, Portugal, Slovakia, Spain, Germany and the Netherlands (European Commission "Staff Working Document Impact Assessment accompanying the document Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods" (2015) 274 final of 09-12-2015). It should be noted that these countries therefore have a stricter approach than the EC Directive on Unfair Terms in Consumer Contracts, which sets minimum standards for consumer protection in this area in Europe, and which only has an "indicative list of terms that may be regarded as unfair", which is not a red list. In some European countries, all the terms on the EC Directive's list are prohibited outright (*eg* Belgium: see Schulte

Nölke, Twigg-Flesner and Ebers *EC Consumer Law Compendium: the Consumer Acquis and its Transposition in the Member States* (2008) 233 and further).

Similar to the directive, however, the United Kingdom has an "indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair" in the Consumer Rights Act, 2015 (sch 2 read with s 63(1)). This list is similar to the list in the predecessor of this act, the Unfair Terms in Consumer Contracts Regulations, 1999. However, in practice the United Kingdom's list has been functioning virtually like a red list. The Office of Fair Trading's *Unfair Contract Terms Guidance* of 2001 sets out its strict approach to the listed clauses in the Unfair Terms in Consumer Contracts Regulations. This guidance has largely been duplicated by the new regulator, the competition and markets authority, which therefore takes a similar strict approach to the list (*Unfair Contract Terms Guidance* (2015)). These regulators have been very successful in negotiating with suppliers to remove listed terms from their contracts (see *eg* Bright "Winning the battle against unfair contract terms" 2000 *Legal Studies* 331).

There are also other indications of a move from orange lists to red lists. France initially had only an orange list (Schulte Nölke, Twigg-Flesner and Ebers 233 referring to a L132-1(3) *Code de la Consommation*), but thereafter put various terms on a red list (BEUC *Unfair Contract Terms in Business-to-Consumer Contracts in the Proposed Common European Sales Law BEUC's Viewpoint* (2012) http://www.beuc.eu/publications/2012-00480-01-e.pdf (01-09-2016) 12). Although the Proposal for a Common European Sales Law has been shelved, it may be significant that the drafters of the Common European Sales Law decided to place eleven terms on a red list, and retain the remainder of the EC Directive's listed terms on an orange list (a 84 and 85 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (11-10-2011) COM (2011) 635 final). The earlier Proposal for a Consumer Rights Directive also recommended that some terms be prohibited outright and the remainder presumed to be unfair (a 34 and 35 read with annexes II and III of the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (8-10-2008) COM (2008) 614 final). The Common European Sales Law and the Proposal for a Consumer Rights Directive were criticised on the basis that their red list would have been shorter than that of many individual member states – thereby decreasing consumer protection (see *eg* BEUC *Unfair Contract Terms in Business-to-Consumer Contracts in the Proposed Common European Sales Law BEUC's viewpoint* (2012) http://www.beuc.eu/publications/2012-00480-01-e.pdf (01-09-2016) 12). This criticism may have played a role in the scrapping of these proposals.

5 *Scope of a possible red list*

Before considering some terms which should be moved to a red list, and others which should arguably stay on the orange list, the scope of application of the proposed red list will be considered. As stated before, the current list in section 51 applies to negotiated terms in the business-to-small business contracts covered by the act. This is problematic. Two businesses with relatively equal bargaining power that negotiated an extensive contract should be allowed to genuinely negotiate an entire agreement clause genuinely stating that no representations outside the written contract may be relied upon. But if such representations were in fact made, section 51 would cause the entire agreement clause or no-representations clause to be prohibited. This is an unsatisfactory outcome. As the balance of power and equities in business-to-business contracts are more complex

than in business-to-consumer contracts, the red list should not apply to negotiated terms in the business-to-business contracts covered by the act. In Europe there are different approaches to whether the lists of prohibited terms should also apply to business-to-business contracts. Some countries' lists do not apply to business-to-business contracts, but the business-to-consumer lists may have a reflective effect on the non-negotiated terms in business-to-small business contracts (such as §§ 308 and 309 *BGB* (German Civil Code) and a 6:236 and 6:237 *BW* (Dutch Civil Code); see *eg* Busch *et al* (eds) *The Principles of European Contract Law and Dutch Law* (2002) 216). Portugal, by contrast, has separate lists applicable to business-to-business and business-to-consumer contracts (a 18 and 19, and 21 and 22 of Decree-Law No 446/85 of 25 October 1985 on unfair contract terms (*Decreto-Lei nº 446/85, de 25 de outubro 1985*)).

If the red list should apply in favour of the small businesses protected in the act, this should at most relate to non-negotiated terms or the narrower category of standard terms.

However, in business-to-consumer contracts, the list should apply to negotiated terms as well, but not against suppliers that are not businesses.

6 *Examples of terms that should be on the list of prohibited terms*

It would be impossible to discuss all 28 terms in regulation 44(3) in one article to motivate whether they should be on the red or orange list. The commentary on regulation 44 in Naudé and Eiselen (*Commentary on the Consumer Protection Act* (Revision Service 1, 2016) reg 44-1-reg 44-64) already runs to 64 pages.

The discussion of the orange-listed terms in the aforesaid *Commentary* indicates that most of them might as well be prohibited and that the strict treatment of a similar list of terms by the United Kingdom regulator is justified. That discussion in the *Commentary on the Consumer Protection Act* cannot be repeated here, of course. Only six examples of terms which should be placed on the red list will be highlighted, to elicit debate about which terms should be red-listed. Thereafter six items in regulation 44 which should perhaps not be prohibited outright in their current form will be discussed, again to elicit debate on this matter. It is contended that any other clauses on the orange list of regulation 44(3) not discussed here should be red-listed.

6.1 Exemption clauses relating to bodily injury or death

Exemption clauses relating to bodily injury or death should be prohibited (see also Sharrock 320). The act in section 49 might give the impression that these clauses are acceptable provided the consumer has initialled next to them or otherwise acted "in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision" (s 49(2)(*c*)). There have been some indications that these clauses are always contrary to public policy in cases applying the common law and Constitution of the Republic of South Africa, 1996 (before the act came into effect). The supreme court of appeal stated *obiter* in *Johannesburg Country Club v Stott* (2004 5 SA 511 (SCA) par 12) that an exemption clause relating to death caused negligently would arguably be contrary to the constitutional right to life. There are *obiter dicta* in *Naidoo v Birchwood Hotel* (2012 6 SA 170 (GSJ) par 45) and *Swinburne v Newbee Investments (Pty) Ltd* (2010 5 SA 296 (KZD) par 35-37) that exemption clauses relating to injury caused negligently would not pass constitutional muster. However, the suggestion

that such exemption clauses may be unconstitutional and contrary to public policy has not been followed in all high court cases. In *Reyneke v Intercape Ferreira Mainliner (Pty) Ltd* (108/2012) 2013 ZAECGHC 47 (23 May 2013), the court did not strike down a standard term exempting a bus company from liability for injury negligently caused as contrary to public policy. (Apparently the consumer did not argue that the clause itself was contrary to public policy but only that its enforcement was contrary to public policy, which the court denied.) There is thus still a need to make clear by way of red-listing that these clauses are not acceptable in business-to-consumer contracts.

Many countries prohibit such clauses outright. Examples are the United Kingdom, Austria, Portugal, Spain, Italy, Germany, Greece, Hungary, Czech Republic, Estonia, Latvia, Lithuania, Slovenia, Belgium, and France (see Schulte Nölke, Twigg-Flesner and Ebers 234; article 53 of the Contract Law of the People's Republic of China, 1999).

Is there a persuasive counter-argument that small suppliers in a developing country like South Africa may be less likely to afford insurance cover than businesses in developed countries, and may be unable to trade profitably if they have to obtain such insurance cover or be subject to claims without insurance (*cf* Naudé and Eiselen reg 44-15)? As argued before, "this in itself is no justification for shifting the risk onto consumers as a matter of course in the non-negotiated terms, as consumers are even less likely to be able to bear the loss involved and cannot guard against the negligence of the business" (Naudé 2007 *SALJ* 156). Businesses offering dangerous activities to South Africans and foreign tourists (who may have potentially large claims for loss of income and medical expenses) should rather include the cost of insurance in the price quoted to customers (Naudé and Eiselen reg 44-15). Warnings about hazardous activities may be used, which puts the consumer on guard to take precautions, but they should still not exclude or restrict liability for bodily injury or death caused negligently. This is also the approach of the United Kingdom regulator (Competition and Market Authority *Unfair Contract Terms Guidance* (2015) par 5.3.3 at 70; Naudé and Eiselen reg 44-15)).

6.2 Terms limiting the supplier's vicarious liability for its agents

Such terms, listed in regulation 44(3)(*d*), apply to the residual common law liability of the supplier, *eg* for pure economic loss caused by defective goods, and should be prohibited. (S 113 of the act already provides that "if an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person".) The competition and market authority in the United Kingdom takes the view that "no term should shield a business where its employees fail to provide as good a standard of service as they are reasonably able" (Competition and Market Authority *Unfair Contract Terms Guidance* (2015) par 5.5.9 at 74; see also Naudé and Eiselen reg 44-29 for more reasons why such terms should be prohibited outright).

6.3 Clauses restricting the consumer's right to rely on the defence of prescription

Authors who have considered the issue agree that such clauses (item f) should be regarded as contrary to public policy and invalid under the common law (*eg* Van der Merwe *et al Contract: General Principles* (2012) 488-489; Hutchison "Contracts in general" in Du Bois (ed) *Wille's Principles of South African Law* (2007) 852). They should therefore be red-listed (see also Naudé and Eiselen reg 44-30).

6.4 Terms giving the supplier a final decision on whether the goods conform to the contract, or on interpretation of the contract

It should be noted that this item (in reg 44(3)(*j*)) has limited application due to mandatory rights to quality of the goods and that the goods comply with description provided by sections 18(3), 55 and 56, read with section 51. The Competition and Market Authority in the United Kingdom gives the following example of a term, which may fall within this orange-listed category whereas it is arguably not prohibited outright by the aforesaid sections in the act:

> "a term allowing the supplier or its agent, if the consumer complains that goods are faulty or work has not been properly carried out, to undertake their own test or inspection to determine whether the complaint is well-founded. Such a term is more likely to be fair if it provides for independent inspection or testing – provided that consumers are not required to meet the costs of this where it turns out that their complaint is well-founded" (CMA *Unfair Contract Terms Guidance* (2015) par 5.24.3 at 107-108, as also cited by Naudé and Eiselen reg 44-39).

Where the term does not provide for independent testing, it cannot be fair. Thus such terms should be prohibited outright.

6.5 One-sided termination rights

Terms "allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer" are listed in item (k). Such terms are "excessively one-sided" in terms of section 48(2)(*a*). There is clearly no justification for treating the parties differently in this way and such terms should be prohibited outright.

6.6 Clauses excluding or hindering the consumer's right to take legal action including compulsory arbitration clauses

Another example of an item in regulation 44 which should be on the red list is a term "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, including by requiring the consumer to take disputes exclusively to arbitration not covered by the Act or other legislation" (item (x)). Usually consumers do not know about "private arbitration" clauses tucked away in standard terms and even if they know about the clause, they would not appreciate that private arbitration implies greater costs than litigation. These costs, when compared to the typically low value of consumer goods and services, will typically dissuade consumers from exercising their rights at all. Such terms may also mislead consumers about their rights to approach the enforcement agencies mentioned in section 69 of the act, such as accredited ombuds, provincial consumer protection authorities, the national consumer commission and tribunal. Compulsory arbitration clauses in consumer contracts are also prohibited outright in other countries, including Austria and Brazil (§ 6(2)(7) Austrian Consumer Protection Act (*Konsumentenschutzgesetz*); a 51 Brazilian Consumer Protection Code (*Codigo de Defesa do Consumidor*); see further Naudé and Eiselen reg 44-55 for the treatment of compulsory arbitration clauses in the United Kingdom). If the parties specifically agree to arbitration after the dispute arose though proper negotiation, a reference to arbitration should be allowed. This may make it necessary to qualify this item in the red list by adding the following words at the end of the current formulation: "provided that the parties may agree to submit a dispute to arbitration after the dispute between them arose".

7 *Examples of terms which could perhaps sometimes be fair so as to stay on the orange list*

The following items in regulation 44 could arguably stay on an orange list:

7.1 Exemption clauses in respect of breach

Item (b) of regulation 44 orange-lists terms "excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier". Due to mandatory rights to cancel, claim damages and proportional reductions in price elsewhere in the act, this item has limited application (see *eg* s 56 and 61). However, it may apply to damages claims for defective services, which are not mandatory under the act, except where the loss occurred while the goods were in the supplier's possession (s 54 read with s 65). A situation in which a limitation clause could arguably be fair is where the consumer is better able to assess the risk than the supplier and is in the best position to insure against it. An example may be a limitation clause in a security firm's contract which points out that the supplier does not know the value of the contents of the consumer's premises, whereas the consumer does and can insure against it (MacDonald *Exemption Clauses and Unfair Terms* (2006) 259 with reference to Office of Fair Trading Bulletin 4 (*Chubb Alarms Ltd*); Naudé and Eiselen reg 44-23 – reg 44-24). Another possible example is an exemption clause in a parking garage, given the low contract price and the fact that the consumer is able to insure against the harm to her car more easily than the supplier. However, it is arguable that the consumer's insurer should still be able to recoup the payment made to its client if the parking garage was really negligent and so the exemption clause may yet be unfair.

7.2 Clauses modifying residual rules regarding risk

It is arguable that such clauses listed in item (g) should not be prohibited outright, as a term stating that the risk of goods being damaged by supervening impossibility after the consumer was in breach of his/her obligation to take delivery of the goods could arguably be fair. Such a term would change the residual rule on the passing of risk under section 19(2)(*c*) of the act which provides that "[u]nless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with this section." (See also Naudé and Eiselen reg 44-31.)

7.3 Terms binding consumers where the supplier does not perform

Whereas these terms, listed in item (m), will usually be unfair, the United Kingdom competition and market authority has stated that a term allowing the supplier to suspend services may be fair if the contract period is extended "without additional cost to ensure that the consumer receives all the services and benefits contracted for" (Competition and Market Authority *Unfair Contract Terms Guidance* (2015) par 5.27.4 at 112; see also Naudé and Eiselen reg 44-45). It is arguable, however, that such a term falls outside of the orange-listed item.

7.4 Terms allowing a transfer of the supplier's obligations

Such terms are listed in item (t). The Dutch Civil Code's provisions on standard terms indicate that a term allowing transfer of the supplier's obligations may be

fair if the consumer may cancel upon such transfer, or the transfer accompanies the transfer of a business of which all the rights and obligations are transferred (a 6:236(e) *BW*; as noted by Naudé and Eiselen reg 44-50). These exceptions may perhaps justify merely orange-listing this type of term.

7.5 Terms restricting evidence and reversing burden of proof

Terms "restricting evidence available to a consumer or imposing on him or her a burden of proof which, according to the applicable law, should lie with the supplier" are listed in item (y). They will usually be unfair. However, there is one incidence where the act itself seems to sanction reversal of the burden of proof. Section 65 makes the supplier who took possession of the consumer's goods (*eg* to repair them) liable for negligent harm to or loss of the goods. But this section appears to put the burden of proving negligence on the consumer. By contrast, the common law rules on *depositum* or safe-keeping (on which consumers may still rely according to s 2(10) of the act), places the burden of proof on the supplier to prove the absence of negligence where the goods were lost or damaged. The effect of item (y) is that a term placing the onus on the consumer to prove negligence is presumed to be unfair. However, the fact that the act itself is apparently content to place the burden of proof on the consumer may indicate that the reversal of the burden of proof under the common law may yet be fair (see also Naudé and Eiselen reg 44-57).

7.6 Limitation periods / time-bar clauses

Item (z) in regulation 44 concerns terms "imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer (including for the making of a written demand and the institution of legal proceedings)." The general prescription period for claims arising from a consumer contract is three years (s 11 of the Prescription Act 68 of 1969). *Barkhuizen v Napier* (2007 5 SA 323 (CC)) left open the possibility that a time bar clause of less than three years may give the consumer a fair opportunity to exercise the right. Generally German and Dutch law prohibit standard terms setting a limitation period of less than one year after the start of the statutory limitation period (§ 309(8) *BGB* (German Civil Code); a 6:236(g) *BW* (Dutch Civil Code); see also Naudé and Eiselen reg 44-61). It is therefore possible that some time bar clauses may be acceptable.

8 *The red list should preferably be in the act*

The items from regulation 44 that are always unfair should be moved to section 51, the red list in the act. Including the red list in the act itself will prevent any argument that the minister acted *ultra vires* in prohibiting so many terms in the regulations. It is true that section 120(1)(*c*) gives the minister authority to make regulations on unfair terms and arguably section 48 gives the minister enough guidance as to what should be regarded as unfair. Red-listing by way of regulation has the benefit that the list may be updated more easily. However, it does not make sense to have two red lists – one in section 51 and one in the regulations. An intermediate approach may be to augment section 51 as argued for here, and also give the minister the power to prohibit further terms by regulation.

9 *Deletion of regulation 44(2)(a)*

If the department of trade and industry and parliament cannot be persuaded to amend the act to include a longer red list, at least regulation 44(2)(*a*) should be deleted. This sub-regulation states that the list of terms in sub-regulation 3 "is indicative only so that a term listed therein may be fair in view of the particular circumstances of the case". This may suggest that there may always be circumstances in which a particular term is fair, whereas it should be up to enforcers, courts etc to take the view that some of the orange-listed terms are never fair.

Deleting these words may make it more likely that enforcers like the national consumer commission might take the same strict approach to the current orange list as the United Kingdom competition and markets authority. Then effectively the whole orange list turns into somewhat of a red list. There is something to be said for the United Kingdom's approach, as then it remains clear that all the terms on the list are typically unfair and not just the specifically prohibited clauses. However, such an approach is predicated on a very active enforcement body which proactively negotiates with suppliers and industry bodies and also gives guidance on its website about its approach to the terms on the list. This may be beyond the resources of our national consumer commission. At least regulation 44(2)(*d*) states that this regulation does not derogate from provisions in the act or other law in terms of or in respect of which a term or an agreement is prohibited. This therefore recognises that courts may consider some orange-listed terms always to be contrary to public policy.

10 *The national consumer commission must publish its experiences with enforcement*

A final recommendation is that the national consumer commission must publish its experiences with the enforcement of the prohibition of unfair contract terms on its website, if necessary by anonymising references to the supplier involved. In this way it can give guidance on the circumstances in which orange-listed terms would be regarded as fair or unfair and on how terms should be redrafted to make them fair. This would contribute to legal certainty, effective enforcement and the likelihood of suppliers proactively changing their terms in accordance with the guidance given by the national consumer commission.

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