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Germany and South Africa: A Comparison**

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Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Policing Standard Form Contracts in Germany and South Africa: A Comparison

Introduction

Today an agreement between two parties is often embodied in a standardised document, which has been specially drafted.¹ Such standard form contracts probably account for more than 99 % of all contracts made today.²

You take your cell phone to repair and get a receipt for it. The receipt has your name, the price of service and probably a written number on its front side. On its reverse side it contains a list of written terms. You surf in the Internet and buy an airplane ticket for your next holidays. You pay for the ticket by entering your credit card number in the seller's form. On the bottom of the page is a request to accept the seller's standard terms and two buttons, one marked "I accept" and the other "I do not accept". You click the "I accept" button without reading the terms.

These transactions are ordinary and routine in our daily life and aim at purchasing a simple product or service. Other considerations, such as the specifications in the small print, are secondary.³ In typical situations, the party subject to the standard form contract terms (or submitting party⁴) has no option but to use the offered services. Such inferior bargaining position of the submitting party often results in an abuse of standard form contract terms by their users (hereinafter: the user). Therefore, special

¹ S Van der Merwe, L Van Huysteen, M Reinecke and G Lubbe *Contract, General Principles* 2ed (Landsdown: Juta Law, 2003) at 285.

² WD Slawson 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84 *Harvard LR* 529 at 529. Professor Slawson did not provide any support for this statement, but it has been repeatedly cited without question by scholars and courts.

³ J Burke 'Contract as Commodity: A Nonfiction Approach' (2000) 24 *Seton Hall Legislative J* 285 at 286.

⁴ The terms 'party subject to (standard form) contract terms' and 'submitting party' will be used interchangeably.

treatment of standard form contracts, which provides for protection from unfair contract terms, might be necessary.

The aim of this dissertation is to compare South African law on standard form contracts against the corresponding German law. Thus, the responses of both legal systems to the special situation occurring in cases of standard form contracts will be compared and evaluated. Thereby, the focus of this dissertation is to determine whether South African law on standard form contracts provides adequate protection for the submitting party. German law on standard form contracts provides the basis and outline against which South African law will be critically evaluated. German law was selected for this task, as it was one of the first legal systems, which enacted legislation, and addresses the issue systematically. It should be noted that this dissertation does not aim to evaluate German law on standard form contracts.

In the first part of this dissertation I will provide a brief definition of the notion of freedom of contract and consumer protection. I will then proceed to highlight the relevance of standard form contracts in modern society and outline the problems associated with such contracts. This will be followed by a discussion of whether standard form contracts can be considered as classical contracts. In the second part of this dissertation I will outline the law on standard form contracts in both jurisdictions. Concerning the German law, I will give a brief overview of what the relevant provisions state. Concerning South African law, I will briefly illustrate what the relevant common law appears to be without going into far too much depth. Such outlines of the applicable laws are necessary in order to acquaint the reader with some of the important themes that this dissertation will discuss in detail. In part three the actual comparison and evaluation will follow. The comparison will include a detailed illustration of the law on standard form contracts in both jurisdictions. Thereby, some repetition in regard to the applicable law cannot be avoided. Thereafter, the evaluation will more specifically investigate whether South African law

is effective in achieving its aims and whether South Africa should introduce legislation on standard form contract terms.

Part I

Outline of the Underlying Problems Associated with Standard Form Contracts

Chapter One

The Conflict between Freedom of Contract and Consumer Protection

Standard form contract law protects from oppressive contract terms. Such protection limits freedom of contract. Accordingly, writing about this topic requires one to illustrate the conflict that generally arises between the notion of freedom of contract and consumer protection.

A. Definition of Freedom of Contract

No aspect of private law is more important for the self-determination of an individual than freedom of contract. Contract, in general,

‘stands for the idea that co-ordination and co-operation for common purposes is best achieved in a given society by allowing individuals and legal entities to make, for their own accounts and on their own responsibility, significant decisions on the production and distribution of goods and services by entering into enforceable agreements based on freely given consent.’⁵

In this context, most of us rely on free contractual exchange and take contract for granted.⁶ As a flexible instrument, which constantly adapts itself, contract is moreover essential for a free economy: it is essential for private enterprise and for the construction of economic relationships.⁷

As a result, the notion of freedom of contract is one of the basic principles of both German and South African contract law. This notion entitles everybody to conclude a contract with a freely chosen person and

⁵ H Kötz ‘Controlling Unfair Contract Terms: Options for Legislative Reform’ (1986) 103 *SALJ* 405 at 405.

⁶ *Ibid.*

⁷ N Horn, H Kötz and HG Leser *German Private and Commercial Law: An Introduction* (Oxford: Clarendon Press, 1982) at 84.

allows one to freely determine the provisions of the contract without arbitrary or unreasonable legal restrictions. In other words, each person should be free to decide whether, with whom, and on what terms to conclude a contract.⁸

In Germany, there is a wider notion of freedom of contract, which contains a distinction between the freedom to enter into a contract (Abschlußfreiheit) and the freedom to shape the conditions of a contract (Gestaltungsfreiheit). Such a distinction is not evident in South African law. Moreover, some German commentators emphasise that freedom of contract is part of the general freedom of action as contained in Art 2(1) of the German Constitution (Grundgesetz, hereinafter referred to as GG) and therefore enjoys constitutional protection.⁹ Also in South African law, it was recently held that the notion of freedom of contract is enshrined in the Bill of Rights of the South African Constitution¹⁰ as it is part of the fundamental right to freedom.¹¹

B. Brief Notes about the History of Freedom of Contract

Freedom of contract is not a creation of modern contract law. Its roots can be found in the social, economic and political philosophies of the sixteenth and seventeenth centuries, in attempts to define basic human rights.¹² During that period Thomas Hobbes, *inter alia*, expressed freedom of contract as a fundamental human right.¹³ In his view liberty only existed where a person was free to act unrestricted by external legal or social impediments. He developed the idea that liberty could be expressed by means of fundamental rights with freedom of contract as one of them. John Stuart Mill, too, considered freedom of contract as being a part of the

⁸ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 10.

⁹ D Medicus *Allgemeiner Teil des BGB* 8ed (Heidelberg: Hüthig Fachverlage, 2002) at 172.

¹⁰ Constitution of the Republic of South Africa Act 108 of 1996.

¹¹ *Mort NO v Henry Shield-Chiat* 2001 (1) SA 464 (C).

¹² P Aronstam *Consumer Protection, Freedom of Contract and the Law* (Cape Town: Juta & Company Limited, 1979) at 1.

¹³ T Hobbes *Leviathan* (Oxford: Oxford University Press, 1998) at 145-146.

general freedom of action.¹⁴ In his opinion, the function of the law was to ensure that contractual intentions were carried out. Finally, the notion of freedom of contract and action became widespread in conjunction with the doctrine of *laissez faire* in the nineteenth century.¹⁵ In a *laissez-faire* marketplace, individuals interact freely and without governmental restrictions.¹⁶ In this system of natural liberty, freedom of contract was considered to be vital for the continuance of trade and industry.¹⁷

It was in this climate judges in English and American courts tried to formulate a judicial notion of freedom of contract.¹⁸ One of the most notable to this effect is that of Sir George Jessel MR, who said:

‘[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entering into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider – that you are not likely to interfere with this freedom of contract.’¹⁹

In the twentieth century, South African judges also adopted the notion of freedom of contract. South African writers and judges have used it in four different senses:²⁰ firstly, it has been used to give individuals the freedom to negotiate the terms of their contracts without legislative interference; secondly, it has been used to mean that where individuals have concluded a contract, the provisions of that contract should be given full legal effect; furthermore, freedom of contract has been used to give individuals the freedom to select the other contracting party; and finally it has been used to give the freedom not to contract.

¹⁴ JS Mill *On Liberty* (1859).

¹⁵ B Silverglade ‘Contract Terms in the United States and Sweden: A Comparative Analysis of Consumer Protection Law and Policy’ (1978-1979) 2 *Boston College International & Comparative LR* 477 at 478.

¹⁶ *Ibid.*

¹⁷ A Smith *Wealth of Nations* (1776).

¹⁸ Aronstam (note 12) at 6.

¹⁹ *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462.

²⁰ Aronstam (note 12) at 13.

C. Restrictions on Freedom of Contract

From the sixteenth to the beginning of the twentieth century, the notion of freedom of contract was almost unrestricted.²¹ However, economic growth in Europe and the aggregation of capital within fewer hands as well as the growing use of standard form contracts enabled powerful contracting parties to impose contractual terms upon weaker parties.²² Thus consumers²³ often became subjected to oppressive contract terms by trade and industry. Due to the superior position of most sellers, freedom of contract for the consumers existed only theoretically. In practice, the notion of freedom of contract became a fiction.

For these reasons, it had been recognised in Germany, that freedom of contract was not an end in itself.²⁴ The response to this new attitude was to limit freedom of contract in favour of the weaker party and in doing so to depart from the principles of liberal individualism and to move in favour of individual justice.²⁵

D. Definition of Consumer Protection (Law)

Freedom of contract nowadays remains the basic principle of contract law both in Germany and South Africa, but is subject to limitations. Many limitations in this context originate in the phenomenon of consumer protection. Before embarking into further details, one firstly has to question what this vague expression means. Despite the vast amount of publications dealing with consumer protection and its relevance in society,

²¹ According to Mill's understanding of freedom of contract, it did not matter that one contracting party had bargained from a position of economic inferiority. Nor did it matter that the superior party had imposed unconscionable provisions upon the inferior party. Furthermore, the fact that a contractual provision was harsh or oppressive was of little concern to the early twentieth century South African Judges, who upheld such on the basis that both contracting parties had freely and voluntarily accepted such. Similarly, in Germany the civil courts exercised the natural liberal approach to the doctrine of freedom of contract well until the twentieth century.

²² E McKendrick *Contract Law* 5ed (Hampshire and New York: Palgrave Macmillan, 2003) at 4.

²³ In this dissertation, the terms 'consumer' and 'individual' will be used interchangeably.

²⁴ M Habersack and R Zimmermann *Legal change in a codified system: Recent developments in German Suretyship Law* (1999) 3 *Edinburgh LR* 272 at 277.

²⁵ McKendrick (note 22) at 4.

it is difficult to find a clear definition. One such definition that I managed to find reads as follows:

‘Consumer protection is government regulation to protect the interests of consumers, for example by requiring businesses to disclose detailed information about products, particularly in areas where safety or public health is an issue, such as food. Consumer protection is linked to the idea of consumer rights (that consumers have various rights as consumers), and to consumer organisations, which help consumers to make better choices in the marketplace’²⁶

Another definition in the same source reads thus:

‘Consumer protection law or consumer law is considered as an area of public law that regulates private law relationships between individual consumers and the businesses that sell them goods and services. Consumer protection covers a wide range of topics including but not necessarily limited to product liability, privacy rights, unfair business practices, fraud, misrepresentation, and other consumer/business interactions.’²⁷

The roots of consumer protection can be found in the nineteenth century. The industrial revolution, which led to mass production and the increase of business transactions between sellers and consumers, as well as the development of *laissez-faire* philosophy, which relied on self-regulation of the market and sought to remove every restriction of trade or competition, gave rise to an abuse of the superior business positions by the sellers and oppressive contract terms for consumers. As a result, modern contract law had been developed in order to protect the weaker consumer by placing limitations on the notion of freedom of contract.

E. The Conflict between Freedom of Contract and Consumer Protection and Ways of Balancing these Notions

Freedom of contract and consumer protection illustrate differing policies present in the law of contract. Thereby the principle of social control over

²⁶ http://en.wikipedia.org/wiki/Consumer_protection (accessed on 11/05/05).

²⁷ *Ibid.*

private decisions opposes the notion of freedom of contract.²⁸ In this context, government activities have been directed at protecting the consumer's interests. In protecting the consumer, governments have remained careful in keeping the notion of freedom of contract intact.²⁹

Consumer protection has a manifold nature. This dissertation will concentrate on consumer protection in private law, particularly in contract law. As an example of consumer protection in the field of contract law this dissertation deals with the phenomenon of standard form contracts. Consumer protection in contract law generally includes an increased protection in the process of concluding the contract and increased control of the contract once the parties have entered into the agreement.

²⁸ Kötz (note 5) at 406.

²⁹ Silverglade (note 15) at 480.

Chapter Two

Definition: Standard Form Contracts and Contracts in their Classical Sense

A. Characteristics of Standard Form Contracts

A standard form contract generally has the following characteristics: It is an agreement between two parties that contains predrawn terms and is used by a business entity or firm in transactions with consumers.³⁰ The contract is used to supply mass demands for goods and services.³¹

Generally the will of the user of such contract terms dominates the transaction. The consumer is required to accept contractual terms without negotiations notwithstanding some particulars. Often the consumer accepts such terms without knowing or understanding such.³² Often this position exists as the user is in a stronger bargaining position, whereas the consumer has little choice other than to accept the terms contained in the standard form contract, or at least the consumer thinks so. Clearly an unequal situation exists.

B. History of Standard Form Contracts

Standard form contracts are not a new method of conducting business. In the fifteenth century, such contracts were already in use in parts of Europe, when standard insurance policies had been issued; as well as worldwide in the seventeenth century, when charter-parties and bills of lading were drafted in a standard form.³³ The general use of standard form contracts became widespread in the industrial revolution era of the nineteenth century.³⁴ Since then, the use of standard form contracts has become the main method of doing business wherever there is legal-

³⁰ Burke (note 3) at 288.

³¹ A Burgess 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion' (1986) 15 *Anglo-American LR* 255 at 257.

³² *Ibid.*

³³ WS Holdsworth *History of English Law* 7ed (London: Methuen, 1956) 255-256 and 290-295.

³⁴ Aronstam (note 12) at 17.

commercial activity.³⁵ Furthermore the development of Internet transactions has given standard term contracts an increased importance.³⁶

C. Importance of Standard Form Contracts and Relevance in Business Life

The extensive use of standard form contracts reflect today's underlying economic realities and are evidence of their economic necessity.³⁷

Standard form contracts are the consequence of mass production and play an integral part to it.³⁸ Although advantageous, disadvantages do exist in their usage.

On the one hand, standard form contracts fulfil an important efficiency role in society.³⁹ Standard form contracts facilitate the functioning of modern society, which is dependant on the mass production of goods. Generally, mass production can be characterised by high specialisation, division of labour and the production of large amounts of standardised products.⁴⁰ As a result it provides very inexpensive products. However the extreme specialisation of the functions of modern life require the formation of detailed contracts on an almost daily basis. In this context standard form contracts provide information about the transaction and enforce order by setting out the terms and conditions of the transaction in writing. They ensure low transaction costs, through being mass-produced like the goods and services, which they regulate.⁴¹

It is highly unlikely that a contract of that type will ever be "custom made".⁴² The consumer in a non-standard form transaction would have to pay for an attorney to negotiate it and for the extra costs of the seller in

³⁵ *Ibid.*

³⁶ JR Maxeiner 'Standard-terms Contracting in the Global Electronic Age: European Alternatives' (2003) 28 *Yale Journal of International L* 109 at 111.

³⁷ Slawson (note 2) at 530.

³⁸ *Ibid.*

³⁹ http://en.wikipedia.org/wiki/Standard_form_contract (accessed on 11/05/05).

⁴⁰ <http://www.britannica.com/eb/article-68157> (accessed on 10/08/05).

⁴¹ Slawson (note 2) at 530.

⁴² Slawson (note 2) at 531.

this regard.⁴³ Such increased transaction costs would lead to an increase in the price of the product, thus depriving many consumers the opportunity to enter into the transaction.⁴⁴ Therefore, standard form contracts ensure an efficient delivery of mass-produced products and benefit the consumer.⁴⁵ Additionally, they assure uniformity and quality of the transactions. Predrawn terms are often better adapted to the special needs of the particular bargain as sales persons and consumers are neither able and in some cases not permitted to set out their own terms and conditions.⁴⁶

For the aforementioned reasons it is clear that standard form contracts serve a useful purpose in enabling parties to conclude their negotiations efficiently and without unnecessary costs. However, the benefits received by the consumers in this regard are not without their disadvantages.

The use of standard form contracts often results in unjust terms to the detriment of the contracting parties. Standard form contract terms are unilaterally beneficial to their user as lawyers instructed to minimise liability usually draft them.⁴⁷ There exists a high potential for abusing standard form contract terms as the user is often in the stronger bargaining position and does not allow the consumer to negotiate. Often the consumer does not read the standard form contract terms. This may occur due to the small print and the complicated legal language in which the document is written in. Oppressive or unreasonable terms can therefore easily escape the notice of the consumer.⁴⁸ In this context terms governing warranty, damages, attorney's fees, refund and repair,

⁴³ *Ibid.*

⁴⁴ L Bates 'Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection' (2002) 16 *Emory International LR* 1 at 3.

⁴⁵ *Ibid.*

⁴⁶ EM Holmes and D Thurmann 'A new and old theory for adjudicating standardized contracts' (1987) 17 *Georgia Journal of International and Comparative Law* 323 at 334.

⁴⁷ http://en.wikipedia.org/wiki/Standard_form_contract (accessed on 11/05/05).

⁴⁸ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 286.

indemnification, risk of loss and waiver of rights have a particular potential for abuse.⁴⁹

By using standard form contracts an economic disparity arises whereby the user gains advantages and the consumer disadvantages. In effect, standard form contracts institutionalise the disparity.⁵⁰ An example of this disparity is that the risk-transaction-failure is allocated to the economically weaker consumer.⁵¹ Unequal standard form contract terms constitute a costless benefit for the user. Practically, if the user fails to take advantage of these benefits, his competitors will.⁵² These competitive pressures have been in existence for a substantial duration. This has resulted in a situation whereby consumers do not even notice the unfairness contained in the standard form contract terms anymore.⁵³ Despite this, some commentators argue that consumers still possess the ability to avoid the aforementioned injustices by shopping around for the user who offers the most favourable terms.⁵⁴ However as stated above, consumers, do not in the most part, read or necessarily understand the terms contained in the standard form contract. Moreover, it is argued that consumers are correct to believe that the standard form contracts of the other user are also unjust.

As a result of the importance of standard form contracts in modern business life and the potential for abuse, policing mechanisms are necessary to balance the advantages of standard form contracts and their negative 'side-effects'. In order to compare and evaluate the existing policing mechanisms of standard form contracts in German and South African law, the phenomenon of a standard form contract finally has to be analysed within a framework of the classical definition of a contract.

⁴⁹ New Jersey Law Revision Commission *Final Report and Recommendations Relating to Standard Form Contracts* (1998).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Slawson (note 2) at 531.

⁵³ *Ibid.*

⁵⁴ http://en.wikipedia.org/wiki/Standard_form_contract (accessed on 11/05/05).

D. Can a Standard Form Contract be considered as contract in the classical sense?

The enforcement of standard form contracts in general is justified by the assumption that both the user and the consumer have adopted the writing.⁵⁵ This fictional consent is consistent with the objective character of contract law in general.⁵⁶

Freedom of contract entitles everybody to conclude a contract with a freely chosen person and freely determine the provisions of the contract without arbitrary or unreasonable legal restrictions. In this regard, judicial enforcement of contracts derives from the notion of freedom of contract. Accordingly, all contracts generally are enforceable. This feature of the law of contract is expressed in the Latin maxim, *pacta sunt servanda*.⁵⁷ The effect of this maxim is existent in both German and South African contract law. It requires the enforcement of contractual obligations created in circumstances, which are consistent with freedom of contract.⁵⁸

To determine whether a contract exists under South African law, one has to look for an agreement by consent of two or more parties.⁵⁹ More specifically, this requires an actual meeting of the minds of the parties or the reasonable belief by one of them that there is consensus.⁶⁰ The objective manifestation of the parties' wills is of importance, due to the fact that a court decides from the external facts whether a contract has been validly concluded and therefore whether it is enforceable or not.⁶¹ Under South African law the existence of a contract is evidenced by the agreement of two or more parties. This existence is revealed by the external manifestations/objective proof of the parties' subjective agreement. To determine whether a true agreement exists, one has to

⁵⁵ Burke (note 3) at 287.

⁵⁶ *Ibid.*

⁵⁷ RH Christie *The Law of Contract in South Africa* 4ed (Durban: Butterworth, 2001) at 24.

⁵⁸ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 10.

⁵⁹ Christie (note 57) at 23.

⁶⁰ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 16.

⁶¹ Christie (note 57) at 24, 25.

look for an offer and an acceptance of that offer.⁶² If a standard form contract is used, the user of such contract will typically make the offer and the consumer or party subject to the standard form contract terms the acceptance.

In German law, a contract is an agreement between two or more parties who wish to bring about certain legal consequences.⁶³ In order to bring a contract into effect, two or more reciprocal corresponding declarations of will of the contracting parties, which subject each other to the contract, must be present.⁶⁴ The corresponding declarations of will are offer and acceptance. This position is the same in South African law. A further similarity that exists is the need for an objective proof of the subjective agreement.

In this context the question now arises, whether a standard form contract can be considered a contract in this classical sense. In order to ascertain this answer, a standard form contract has to be analysed within the framework of the above stated definition of a classical contract. As noted earlier, standard form contracts contain predrawn terms in favour of the user. Often consumers do not have the opportunity to negotiate or even read the terms. Extreme examples in this context are insurance policies. Purchasers of insurance often do not receive their policies before entering into the contract.⁶⁵ Therefore, standard form contracts above all lack the traditional element of negotiation and agreement in regard to their terms.⁶⁶

Since the consumer is ignorant of both the content and existence of the terms within a standard form contract, the terms cannot be considered

⁶² Christie (note 57) at 31.

⁶³ BS Markensinis, W Lorenz and G Dannemann *The German Law of Obligations, Volume I: The Law of Contracts and Restitution: A Comparative Introduction* (Oxford: Clarendon Press, 1997) at 47.

⁶⁴ *Ibid.*

⁶⁵ Slawson (note 2) at 540.

⁶⁶ Silverglade (note 15) at 478.

as a manifestation of the consumer's will and consent.⁶⁷ However, the objective character of the law of contract only places a small emphasis on the search for the subjective meeting of the minds of the contracting parties. Objective criteria, such as a signature or other manifestations, are of crucial importance. The signature or a click on the mouse button during an Internet transaction assumes the consumer's agreement on the terms.⁶⁸ Nevertheless, pretending that the consumer's signature or other manifestation amounts to consent ignores the fact that not much consent can be found in most standard form contracts.⁶⁹

As a result, the classification of a standard form contract as a contract in the general sense is questionable. The aim of this dissertation is to compare and contrast the German and South African approaches to standard form contracts. More specifically, the aim is to compare and evaluate the mechanisms for policing of standard form contracts in both jurisdictions. In undertaking this task, I will illustrate the law on standard form contracts in Germany and South Africa in the following part of this dissertation.

⁶⁷ Slawson (note 2) at 541.

⁶⁸ Burke (note 3) at 286-288.

⁶⁹ Burke (note 3) at 297

Part II

German and South African Law on Standard Form Contracts

Chapter Three

German Law on Standard Form Contracts

Germany is one of the few countries that have legislation concerning standard form contracts. Incorporated in the Bürgerliches Gesetzbuch (German Civil Code, hereinafter BGB), the German legal system deals with the phenomenon of standard form contracts and the problems that arise comparatively systematically.⁷⁰

In this chapter, I will first illustrate the German law on standard form contracts. The second section will outline the history of the German standard form contract law. This historical discussion is useful because in Germany, although it is a country of legislation, the law controlling standard form contract was initially judge-made.

A. Current German Law on Standard Form Contracts

The current German law on standard form contracts can be divided into 2 aspects: the substantive part and the procedural part. The substantive provisions deal with the validity of standard form contract terms and are incorporated in the BGB.

The relevant provisions can be found in §§ 305 – 310 of the BGB. The procedural provisions, which deal with the unenforceability of unlawful standard terms, are contained in the Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Law of Actions for Injunctions for Violations of Consumer and Other Law, hereinafter UklG).

⁷⁰ For the exact wording and content of the provisions of the German Law on Standard Form Contracts throughout the whole dissertation see Appendix.

I. Substantive Provisions of German Law on Standard Form Contracts

The substantive provisions of standard form contract law are comprised of four principal parts: firstly, a determination of its scope of application; secondly, an incorporation control of the standard form contract terms; followed by a content control; and finally a determination of the consequences of invalidity of contract terms.

Before discussing in greater depth, it should be noted that German standard form contract law only applies to terms, which provide for changes and additions to statutory provisions (§ 307(3) BGB). These changes and additions are only possible where the statutory provisions are non-mandatory and therefore can be replaced by terms agreed upon by the contractual parties.

1. Scope of Application of the German Law on Standard Form Contracts

§ 305(1) BGB states that the provisions of the German law on standard form contracts⁷¹ are exclusively applicable to standard form contract terms. Under § 305(1) BGB, standard form contract terms are defined as pre-formulated terms intended to be incorporated into numerous contracts. The intention to use the term as a standard term in numerous contracts, serves to make § 305(1) BGB applicable, even where the standard terms are incorporated into a contract for the first time.⁷² However, the intention to use the standard terms in at least three contracts is required.⁷³ Furthermore, § 305(1) BGB states that it is important that the standard terms have been introduced into the contract by one party, regardless of the person who drafted the terms or their appearance.

⁷¹ §§ 305 – 310 BGB and the provisions contained in the UKlaG.

⁷² Bundesgerichtshof (German Federal Supreme Court, hereinafter BGH) 1991 *Neue Juristische Wochenschrift* at 843.

⁷³ BGH 2002 *Neue Juristische Wochenschrift* at 139.

Exceptionally, if standard terms have been subject to bargaining and the non-drafting party has had a real chance to influence the content of the terms, traditional contract law instead of the standard form contract law applies, § 305(1) Sentence 3 BGB.

German standard form contract law does not apply to contracts in the field of the law of succession, family law and company law or to collective agreements and private-or public-sector works agreements, § 310(4) BGB. According to this provision, German standard form contract law applies to labour contracts with modifications.

The provisions concerning the scope of application of the German law on standard form contracts also provide for a special treatment of consumer and commercial contracts (§ 310 (1) and (3) BGB).⁷⁴

2. Incorporation Control of Standard Form Contract Terms

Besides defining standard form contract terms, § 305 BGB provides the general rule for when such terms become part of a contract as a whole. According to § 305(2) BGB, and in order to be valid and enforceable, standard form contract terms have to be incorporated into the contract. More specifically, this provision states three requirements for such incorporation: Firstly, the user of the terms has to give the other party notice of the application of such (§ 305(2) No 1 BGB). This notice has to be given during the conclusion of the contract and may be oral or in writing.⁷⁵ If, for certain types of contracts, an express notice creates disproportionate difficulties, a visible sign stating that the contract is subject to standard terms at the place where the contract is concluded is sufficient. Secondly, the user of the terms must give the other party an opportunity to review them (§ 305(2) No 2 BGB). Thirdly, the other party has to agree that the standard terms are to apply (§ 305(2) No 2 BGB).

⁷⁴ For further details see below chapter 5 A I.

⁷⁵ H Heinrichs 1998 *Neue Juristische Wochenschrift* at 1450.

According to § 305a BGB specific types of standard form contract terms such as terms of public transport and terms of contracts for telecommunications become a part of the contract even without notice or sign, as long as the other party agrees to their application.

Another exception to § 305(2) BGB provides § 305b BGB. According to this provision, individually negotiated terms take priority over standard form contract terms. This provision is applicable where a standard form contract term is inconsistent with an individually negotiated term of the same contract.

The most important exception to § 305(2) BGB can be seen in the provision of § 305c BGB. The first part of this provision states that surprising terms do not become part of the contract, even if the parties have complied with the requirements of § 305(2) BGB.⁷⁶ The second part of § 305c BGB contains the German version of the *contra proferentem* rule and provides that ambiguous terms are to be construed against the user. It is in the hands of the drafter to formulate clear terms, he therefore should not profit from his own poor drafting.⁷⁷

3. Content Control of Standard Form Contract Terms

The heart of the German law on standard form contracts is its control of the content of standard terms. At a glance, it consists of three parts: § 307 BGB as general clause prohibiting standard terms that are unreasonable and contrary to the requirements of good faith; § 308 BGB as a list of standard terms that may be prohibited subject to a default reasonableness test; and § 309 BGB as a list of terms that are prohibited and therefore invalid *per se*. These three provisions are to be applied in the following order: Firstly, one has to check if the challenged term is contained in the “black list” of § 309 BGB; then, if the challenged term is part of the “grey

⁷⁶ For further details see below chapter 5 A I.

⁷⁷ Holmes and Thurmann (note 46) at 350.

list” of § 308 BGB; finally if the term is unreasonable and contrary to the requirements of good faith according to § 307 BGB.⁷⁸

a. § 309 BGB

§ 309 BGB provides a list of prohibited standard form contract terms. More specifically, it lists thirteen types of prohibited terms. Prohibited in this context means that a term, which is contained in list of § 309 BGB, is invalid without undergoing an evaluation. There is no further need for the courts to review the content of the term.⁷⁹ § 309 BGB is considered to be an application of the general clause of § 307 BGB and addresses specific terms, which by experience are often included in standard form contracts.⁸⁰ § 309 BGB intends to increase legal certainty by providing such a specific list.⁸¹ The extent to which the provision has achieved this is debatable.

In detail, § 309 BGB addresses standard form contract terms about price increases at short notice; the right to refuse to perform; a prohibition of set-off; notices and periods for performance; lump-sum claims for damages; penalties; exclusions of liability for death, injury to body and health and for gross fault; exclusions of liability in the event of other breaches of duty; a period of recurring obligations; the change of a contract partner; the liability of an agent on the conclusion of the contract; the burden of proof; and the form of notices and declarations.

b. § 308 BGB

If a term does not fall under § 309 BGB, it has to be tested under § 308 BGB. This provision complements § 309 BGB and is also considered to be an application of the general clause of § 307 BGB. It also addresses specific terms, which by experience are often included in standard form

⁷⁸ For further reading on this procedure see for example O Jauernig *Bürgerliches Gesetzbuch, Kommentar* 10ed (München: C.H. Beck Verlag, 2003) § 307 at 312 para 1.

⁷⁹ See for example Maxeiner (note 36) at 153.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

contracts.⁸² Contrary to § 309 BGB, if a term falls under § 308 BGB, it is tested under specified measures. It is not invalid *per se*, but lists eight types of terms that are suspected to be invalid. It requires a value judgement of the particular standard term, i.e. an evaluation of its impact on the consumer party under the specific circumstances.⁸³

In detail, § 308 BGB lists standard form contract terms about the period for acceptance or performance; an additional period for performance; the right of termination of the contract; the right of amendment of the promised performance; fictitious declarations; fictional receipts; winding-up of contracts; and an unavailability of the object of performance.

c. § 307 BGB

Because it is never sufficient against the ingenuity of contract drafter who will find new ways to unfairly favour their own interests, § 307 BGB contains a general clause invalidating standard form contract terms, which violate the notion of good faith.⁸⁴ Accordingly, standard terms not caught by § 309 BGB or § 308 BGB are subject to an evaluation under the § 307 BGB standard.⁸⁵

§ 307 BGB operates to place limits on the extent to which the user of standard form contracts, mostly a businessperson, may take advantage of the notion of freedom of contract.⁸⁶ A provision in standard terms is thereby invalid if it places the contractual partner of the user at an unreasonable disadvantage and therefore is contrary to the requirement of good faith. By finding out if a term is contrary to good faith, the courts

⁸² *Ibid.*

⁸³ Bates (note 44) at 62.

⁸⁴ Holmes and Thurmann (note 46) at 359.

⁸⁵ For a detailed illustration of the evaluation under § 307 BGB see below chapter 5 A III

1.

⁸⁶ Bates (note 44) at 60.

determine whether the user of the term has one-sidedly exploited over drafting.⁸⁷

§ 307(2) BGB thereby provides guidelines for the courts to assume an unreasonable disadvantage under specific circumstances. § 307(2) No 1 BGB presumes an unreasonable disadvantage if a standard term makes a material departure from a fundamental principle of otherwise applicable law. § 307(2) No 2 BGB presumes an unreasonable disadvantage if the standard terms takes away or limits a material benefit that the contract is designed to provide.

4. General Rules of German Private Law Governing Standard Form Contracts

The above-mentioned specific provisions governing standard form contracts are not the exclusive source.⁸⁸ Additionally, other rules of private law, such as fraud, incapacity, illegality and mistake also apply.⁸⁹ The afore-stated rules will not be discussed as they are beyond the focus of this dissertation.

5. Legal Consequences of Non-Incorporation and Invalidity of Standard Form Contract Terms

If a standard form contract term falls under the list of prohibited terms of § 309 BGB, the term is invalid. Such a term is also invalid, if it is tested under § 308 BGB and valued to be prejudicial to the consumer. Finally, a standard form contract term is invalid if it is contrary to the requirement of good faith according to § 307 BGB. These consequences arises directly out of the provisions §§ 307-309 BGB.

⁸⁷ Maxeiner (note 36) at 147.

⁸⁸ Holmes and Thurmann (note 46) at 341-342

⁸⁹ *Ibid.*

§ 306 BGB provides for the destiny of the (remaining) contract: Where standard form contract terms have not become part of the contract according to §§ 305(2) – 305c BGB or are invalid according to §§ 307-309 BGB, the content of the contract is determined by the statutory rules (§ 306(2) BGB). In that case, the remainder of the contract continues to be valid (§ 306(1) BGB), unless one party would suffer unreasonable hardship bound by it (§ 306(3) BGB). In such case the whole contract is invalid.

II. Procedural Provisions of German Law on Standard Form Contracts

The German procedural provisions of standard term contract law govern procedures to be taken in case of invalid standard terms and complement the substantive provisions of the German standard form contract law. They are contained in the UklaG and, to give a brief outline, provide for a “positive enforcement”, i.e. measures designed to prevent the use of unfair standard terms.

More specifically, Germany operates with the procedural solution of institutional action (Verbandsklage). § 1 UklaG sets up a procedure for certain consumer organisations, commercial associations and trade associations to bring an action against those who use or recommend use of illegal standard terms for discontinuance or retraction. Individual consumers cannot initiate an action under § 1 UklaG; only qualified consumer organisations, trade associations or commercial groups are entitled to use § 1 UklaG against the user of illegal standard terms. In order to qualify as such a consumer organisation, the organisation must have legal capacity and exist for the purpose of providing consumers with information and advice (§ 3(1) UklaG). These requirements clearly limit the potential number of claimants and therefore to some extent reduce the general availability of the institutional action as means of consumer

protection.⁹⁰ This limitation illustrates that the institutional action procedure exists to protect the contracting public rather than individual consumers from an unfair use of standard terms. Nevertheless, individual consumers have the possibility to report the use of illegal standard terms to qualified organisations that are entitled to initiate an action according to § 1 UklG. Additionally, they still have the opportunity to bring an ordinary action against the user of illegal standard form contract terms.

However, most legal complaints about unfair standard form contract terms do not require judicial involvement.⁹¹ Besides the possibility of institutional action itself, the collective procedure of the UklG allows consumer organisations to pursue users of unfair contract terms in other ways.⁹² Although not established in the UklG itself, warning letters issued by the consumer organisations have proven very effective on achieving compliance with the UklG.⁹³ Such letters to the users of unfair contract terms demand the discontinuation of the use of such terms and threaten judicial action against the users unless they voluntarily agree to stop using the invalid term.⁹⁴ As a consequence, many users voluntarily agree to discontinue using the terms. Additionally, in order to provide adequate security against a relapse, the user gives a promise to stop doing something and to incur a penalty for non-compliance (strafbewährte Unterlassungserklärung).⁹⁵ This is a legally binding agreement stating that the use of the unfair term ceases.⁹⁶

Back to the UklG, § 6 UklG provides that one ordinarily must sue in the defendant's home jurisdiction. In order to make it easier for the consumer organisations, it further provides that, if the defendant is not located in Germany, the plaintiff may sue in any district where the invalid standard form contract term is used.

⁹⁰ Bates (note 44) at 63.

⁹¹ Maxeiner (note 36) at 156.

⁹² Bates (note 44) at 64-66.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Maxeiner (note 36) at 158.

As an additional sanction § 7 UklaG provides that a judgment decided in favour of the plaintiff, is to be published. Therefore the user of invalid terms risk more than just losing a trial. Namely, they risk having their name published in a list that everybody can have a look at. Accordingly, such users have their good reputation to lose, which creates an additional sanction.

§§ 9 and 11 UklaG give the institutional action its real threat. According to § 9 UklaG, a judgment against the user of unfair contract terms must recite the invalid term, identify the type of transaction in which its use by the defendant is prohibited, and prohibit the use of terms having the same content. Ordinarily, a judgment in Germany has effect only for the parties to the trial. Contrary to this, § 11 UklaG changes this rule and gives the judgment a broader effect. According to this provision, terms found invalid in an institutional action are invalid with respect to all of the users' customers. The users, should they fail to comply with the judgment and continue to use the invalid terms, are subject to fines or imprisonment under § 890 of the Zivilprozessordnung (Code of Civil Procedure, hereinafter ZPO).

B. History of the German Law on Standard Form Contracts

The German legal system has long provided some control over the use of standard form contract terms.⁹⁷ South African lawyers view contract law in South Africa as judge-made law, whilst perceiving Germany as a country of legislation. However, for three quarters of the twentieth century, German law on standard form contracts was also judge-made. Finally, Germany legislated this area of law in the 1970s. This final section of chapter 3 deals with the history of the German law on standard form contracts and its development from case law into codified law. The

⁹⁷ Maxeiner (note 36) at 142.

German history is useful in determining whether South Africa should introduce legislation to this judge-made area of law.

In Germany, standard form contracts achieved widespread use by the end of the nineteenth century.⁹⁸ Especially since the First World War insurance companies, banks, large firms, and associations started to rationalise their business.⁹⁹ They abandoned the practise of tailoring contracts to the individual consumer and started to adopt predrafted and standardised contract terms.¹⁰⁰

First, German courts refused to challenge such standard form contracts. They held that freedom of contract precludes them from intervening to control standard form contracts no matter how unfair the contained terms might be.¹⁰¹ However, when the German Civil Code (BGB) came into force in 1900, it provided a statutory basis for an intervention, especially with its provisions §§ 138 and 242 BGB. With these two general clauses, German courts started through the 1930s to challenge the validity of unfair standard form contract terms and formulated special rules to be applied in cases dealing with such terms.¹⁰² § 138(1) BGB states:

‘A transaction that offends good morals is void.’

Thereby “offend good morals” can be equated to “unconscionable”.¹⁰³ § 242 BGB states:

‘Obligations shall be performed in the manner required by good faith, with regard to commercial usage.’

⁹⁸ *Ibid.*

⁹⁹ Horn, Kötz and Leser (note 7) at 88.

¹⁰⁰ *Ibid.*

¹⁰¹ Maxeiner (note 36) at 142.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

In the beginning, German courts applied the good morals provision of § 138 BGB to police standard terms. Standard form contract terms were struck down in situations where one party took advantage of its monopoly position and the other party had no choice but to accept them.¹⁰⁴ That resulted in a situation *contra bonos mores* according to § 138 BGB. It was argued that in situations where the user of standard form contract terms could use his economic power to dictate one-sided and unfair terms to the inferior party, freedom of contract needed some supplementary protection.¹⁰⁵ In order to remedy this imbalance the courts intervened and held that unfair contract terms must be construed in favour of the weaker party, i.e. the consumer.¹⁰⁶

Later, the Bundesgerichtshof (German Federal Supreme Court, hereinafter BGH) shifted from relying on the good morals provision of § 138 BGB to applying the good faith provision of § 242 BGB.¹⁰⁷ This change permitted the judicial control to be made in detail, correcting only specific terms of a contract and leaving the rest of the contract valid as is.¹⁰⁸ This was not possible under § 138 BGB.

§ 242 BGB, despite its unimpressive look, is one of the most astonishing phenomena of the BGB.¹⁰⁹ The general clause requiring that obligations shall be performed in a manner according to good faith is a super control norm for the entire BGB.¹¹⁰ It is entirely a product of judicial decisions, with the sprawl and disorder that can be found in case law and rapidly growing and changing.¹¹¹ The importance of the provision of good faith lies in its function on giving legal force to ethical values of society.¹¹² Concerning standard form contracts, § 242 BGB has been used to monitor

¹⁰⁴ This view was taken by the Reichsgericht (Supreme Court of the German Empire, hereinafter RG), for example 62 *RGZ* at 264; 103 *RGZ* at 82.

¹⁰⁵ Horn, Kötz and Leser (note 7) at 88.

¹⁰⁶ *Ibid.*

¹⁰⁷ BGH 22 *BGHZ* at 90.

¹⁰⁸ JP Dawson 'Unconscionable Coercion: The German Version' (1976) 89 *Harvard LR* 1041 at 1109.

¹⁰⁹ Horn, Kötz and Leser (note 7) at 135.

¹¹⁰ *Ibid.*

¹¹¹ Dawson (note 108) at 1110.

¹¹² Horn, Kötz and Leser (note 7) at 137.

the exercise of rights of the contracting parties.¹¹³ Thus, to be valid, standard form contract terms could not be contrary to the transactional expectations of the non-drafting party and could not unfairly advantage the user of the terms.¹¹⁴

In detail, it firstly was argued that the consumer is only bound to the standard form contract terms with which he should fairly and justly reckon.¹¹⁵ Accordingly, the consumers should be protected against unfair surprise by terms in a place where they would not be expected.¹¹⁶ This was explained as follows:¹¹⁷ Standard form contract terms replace non-mandatory provisions of the BGB. These provisions nevertheless represent a legislative value judgement as how normal transaction should work. The drafter and user of deviating standard form contract terms, in making “new law” concerning certain transactions, therefore has a special responsibility to ensure that any deviating consequences are both fully understood and not unfairly one-sided in favour of himself.

Another motive of policing standard form contracts was called the denaturing of the transaction.¹¹⁸ In altering the content of the contractual transaction by replacing the relevant non-mandatory provision of the BGB, often a provision on the burden of proof of damage or injury, by standard form contract terms the protection the transaction pretended to give is often made illusory.¹¹⁹ Since the consumer would seldom have the means to proof the relevant facts, it was considered unfair and against good faith (§ 242 BGB) to let them carry this burden.¹²⁰

¹¹³ Horn, Kötz and Leser (note 7) at 138.

¹¹⁴ For a discussion of early attempts by the German Courts to address standard form contract problems see also: Dawson (note 108).

¹¹⁵ Dawson (note 108) at 1110.

¹¹⁶ See for example BGH 60 *BGHZ* at 243.

¹¹⁷ BGH 1965 *Neue Juristische Wochenschrift* at 265.

¹¹⁸ See for example the decisions of the BGH 1971 *Neue Juristische Wochenschrift* at 1036; BGH 41 *BGHZ* at 151.

¹¹⁹ *Ibid.*

¹²⁰ BGH 41 *BGHZ* at 151.

The most remarkable feature of the BGH's approach to standard form contracts was that it did not make any inquiries into the degree to which the individual's consent had been impaired.¹²¹ Whether he or she was coerced, had read the form or not or lacked bargaining power was not relevant in the decision about the validity of standard form contract terms.¹²² The court's role was rather to evaluate the transaction in broader terms, so as to dispense elementary contractual justice for the large, undefined group of individuals who have to agree to the terms than to make justice in individual cases.¹²³ Accordingly, they were required to balance out the interests of the user of the standard form contract terms against those of numerous unknown but potential individuals, some of whom might be severely deprived; if there could be some the particular term was held invalid.¹²⁴

In addition to setting the standards of policing standard form contract terms, the above mentioned decisions of the BGH in the 1950s and 1960s set in motion broader changes in thinking that ended with the Gesetz zur Regelung von Allgemeinen Geschäftsbedingungen, 1976 (Standard Contract Terms Act, hereinafter AGBG).

As response to the consumer protection movement, in the early 1970s both sides of the German legislative aisle¹²⁵ agreed that it was time for legislation on standard form contracts.¹²⁶ Accordingly, the AGBG finally entered into force on April 1, 1977. This Act basically turned over twenty years of the judge-made law into a statute. Thus, the in the first part of this chapter illustrated provisions reflect the German case law prior to the enactment of AGBG.¹²⁷

¹²¹ Dawson (note 108) at 1113.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ For example BGH 52 *BGHZ* at 86.

¹²⁵ The German legislative organs are the Bundestag (parliament) and the Bundesrat (federal assembly). Typically these two sides of the legislative aisle do not easily reach an agreement on new legislation.

¹²⁶ Maxeiner (note 36) at 144.

¹²⁷ Bates (note 44) at 18.

The AGBG quickly assumed a central role in German contract law.¹²⁸ From 1977 to 1999 the BGH alone dealt with more than 1500 cases dealing with standard form contracts.¹²⁹ The AGBG remained a separate statute until January 1, 2002. Then, in the course of the Schuldrechtsreform (reform of the German Law of Obligations), the substantive provisions of the AGBG were incorporated in the BGB, and its procedural provisions became part of a new procedural statute, the UklaG. However, in their 27-year life, the provisions on standard form contracts experienced no major amendments. The law is widely regarded as a success.¹³⁰

¹²⁸ O Remien 'AGB-Gesetz und Richtlinie über mißbrauchliche Verbrauchervertragsklauseln in ihrem europäischen Umfeld' 1994 *Zeitschrift fuer Europaeisches Privatrecht* 34.

¹²⁹ Maxeiner (note 38) at 149.

¹³⁰ See Maxeiner (note 38) at 149 with further references to that statement.

Chapter Four

South African Law on Standard Form Contracts

Contrary to German law, in South African law one can find no general legislation on unfair contract terms; especially no legislation on standard form contracts. However, it cannot be said that the South African consumer is completely unprotected. Parliament has enacted protective legislation as, for example, the Price Control Act, 1964¹³¹, the Limitation and Disclosure of Finance Charges Act, 1968¹³², the Alienation of Land Act, 1981¹³³, the Rent Control Act, 1976¹³⁴, the Credit Agreement Act, 1980¹³⁵, the Gauteng Consumer Affairs (Unfair Business Practices) Act, 1996¹³⁶ and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000¹³⁷. But these statutes tackle the problem of unfair contract terms piecemeal and lack a unifying principle.¹³⁸ Therefore, they can only be seen as a supplement to a general solution of the problem of unconscionability.¹³⁹

Regarding the abuse of standard form contracts, the South African consumer protection is only provided by common law rules. These rules do not aim at standard form contracts as a specific type of contract; they are rather general rules which govern the conclusion and terms of all contracts. Nevertheless, in the context of standard form contracts they are of great importance.

Due to this lack in consumer protection there is the suggestion that general legislation on unfair contract terms should be introduced. The South African Law Commission's project 47 was set up to investigate

¹³¹ Act 25 of 1964.

¹³² Act 73 of 1968.

¹³³ Act 68 of 1981.

¹³⁴ Act 80 of 1976.

¹³⁵ Act 75 of 1980.

¹³⁶ Act 7 of 1996.

¹³⁷ Act 4 of 2000.

¹³⁸ TG Winkler *Consumer Law and Unfair Contract Terms, The Austrian Answer to a Worldwide Challenge* (LLM-Dissertation, University of Cape Town, 1986/87) at 62.

¹³⁹ *Ibid.*

whether legislation on this area of law is necessary.¹⁴⁰ As a result, the Law Commission's proposal, contained in its report of April 1998, is a comprehensive statute called the "Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act".¹⁴¹

In this chapter, I will first illustrate the current South African case law on standard form contracts / unfair contract terms. The second section will outline its history. This will be followed by an overview of the Law Commission's proposal, i.e. the "Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act".

A. Current South African Law on Standard Form Contracts / Unfair Contract Terms

The common law has developed many principles and rules to limit unfairness in the process of concluding a contract and as well as limiting unfairness within the contract terms itself.¹⁴² These rules can be divided into three different categories. The first category contains rules of construction of the contract. The second category contains rules of narrow interpretation of contract terms. Finally, the third group can be described as limiting the enforcement of unfair contract terms on the grounds of public policy.

I. Scope of Application of the South African Law on Standard Form Contracts / Unfair Contract Terms

Generally, the South African common law rules in standard form contracts / unfair contract terms apply to all contracts. Thus, they are not limited to consumer contracts only. They apply to consumer contracts, i.e. transactions between suppliers who act in the course of business and individuals who require the services or goods for private use or

¹⁴⁰ Christie (note 57) at 14.

¹⁴¹ Christie (note 57) at 15.

¹⁴² Christie (note 57) at 16.

consumption.¹⁴³ Furthermore, they apply to commercial contracts, i.e. to transactions between parties who are engaged in business, trade or industry and act in the course of the business.¹⁴⁴

II. Rules of Construction

Concerning the rules of construction one has to distinguish between signed und unsigned documents.

1. Signed documents

Generally, a person who signs a contractual document (e.g. a standard form contract) thereby signifies consent to the contents of the document.¹⁴⁵ This general principle of law is described as the *caveat subscriptor* rule and has been expressed in *Burger v Central* as follows:

‘It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he has to put his hand.’¹⁴⁶

These ‘grounds’ include fraud, undue influence, duress, misrepresentation and mistake. However, if such grounds do not exist and the terms included in the signed document then turn out to be disliked the signing person has no one to blame but him- or herself.

The basis of the *caveat subscriptor* rule is, however, not like it sometimes was expressed, a rebuttable presumption that a person who puts his signature to a document knows what the document contains.¹⁴⁷

¹⁴³ H Silberberg ‘The Meaning of Standard Form Contracts’ 1967 *Rhodes LJ* 158 at 172.

¹⁴⁴ JL Van Dorsten *A Consideration of Certain Aspects of Standard Form Contracts and Exemption Clauses* (LLM-Dissertation, University of Cape Town, 1981) Part I at 16.

¹⁴⁵ Christie (note 57) at 199.

¹⁴⁶ SAR 1903 TS 571 at 578.

¹⁴⁷ Christie (note 57) at 199. Cases see for example *Graff-Reinet Municipality v Jansen* 1917 CPD 604 at 610.

The true basis of this principle rather is the doctrine of *quasi*-mutual assent.¹⁴⁸

Nevertheless, the South African common law on contracts does seek to protect weak parties against stronger ones. Thus, in exceptional cases South African courts limit the *caveat subscriptor* rule to achieve such protection of the weaker party.¹⁴⁹

2. Unsigned Documents – The “Ticket Cases”

For some suppliers, obtaining of a signature from each customer is impracticable.¹⁵⁰ Contracts in the fields of public entertainment, sports promotion and passenger transport require such to be concluded without obtaining a signature.¹⁵¹

The common law has evolved a set of certain rules to make the obtaining of a signature in order to conclude a contract unnecessary. These rules apply to all cases where a supplier places before the customer a document which contains or refers to the terms the supplier requires to include in the contract and which is not intended to be signed – the “ticket cases”.¹⁵² These cases are especially relevant for the law on standard form contracts as they represent an important portion of them.

In an ideal case, the customer reads and understands the terms of the document. By going ahead with the contract (e.g. with boarding the train or entering the cinema), he binds himself to it, because he consents to them or because the supplier is reasonably entitled to assume the consent from the behaviour.¹⁵³ The customer is bound to the terms if it is

¹⁴⁸ Christie (note 57) at 200; approved in *Dlovo v Brian Porter Motors Ltd* 1994 (2) SA 518 (C) at 524 D-E.

¹⁴⁹ For a detailed illustration of such exceptions see chapter 5 A II 2.

¹⁵⁰ Christie (note 57) at 204.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

proved that he read them.¹⁵⁴ In this case it is not necessary to go further, an understanding of the terms in order to bind the customer is assumed.¹⁵⁵

If there is no proof that the customer read the document he will nevertheless be bound if the supplier did what was reasonable sufficient, necessary or possible, to draw the customer's attention to the terms contained in or referred to in the contractual document.¹⁵⁶ Thus, the supplier of standard form contract terms has to take reasonable steps to draw the customer's attention to the terms at the time of concluding the contract. What steps are reasonable is a question depending on the particular circumstances of each case.¹⁵⁷ However, some principles can be extracted from previous cases:

'The more contractually obscure or incidental the document, the less likely it is to expect it to contain contractual provisions and the more specific and positive must the steps be which are taken to bring to the attention of the other party. *Per contra* in the case of carriage tickets and bills of lading, where long established usage has created a situation where a contracting party, even an ordinary member of the public, will be taken to be aware of the existence of such provisions on the relevant document, or at least a reference thereto, and to have knowledge thereof.'¹⁵⁸

To be binding, the document does not necessarily have to come into the hands of the customer.¹⁵⁹ Generally, it is sufficient if the document with its terms is available for inspection.¹⁶⁰

III. Rules of Narrow Interpretation

¹⁵⁴ *Essa v Divaris* 1947 (1) SA 753 (A) at 763.

¹⁵⁵ *Ibid.*

¹⁵⁶ Christie (note 57) at 205.

¹⁵⁷ Christie (note 57) at 207.

¹⁵⁸ *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 (2) SA 565 (C) at 569 E-G.

¹⁵⁹ Christie (note 57) at 208.

¹⁶⁰ See for example *Davidson v Johannesburg Turf Club* 1904 TH 260 at 265; *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) Sa 982 (A) at 992 A-D.

Even where an unfair contractual term is imposed in accordance with the above-mentioned rules of construction, its oppressive effect can be mitigated to some extent by the rules or principles of restricted or narrow interpretation.¹⁶¹

In this course, South African courts generally construe a contract term narrowly, where it imposes an undue hardship upon a person or where it deprives the person of common-law rights.¹⁶² Doing this, the courts try to place a light burden upon the weaker contractant or try to confine the exclusion of his right to the narrowest possible field.¹⁶³

The *contra proferentem* rule is often used to provide relief to persons affected by oppressive contract terms. This rule is based on the principle that a person is responsible for ambiguities in his own expression and provides that the words of a contract may be construed against the party who uses them.¹⁶⁴ However, this rule should not be used unless all ordinary rules of interpretation to explore the true intention of the contracting parties have been exhausted.¹⁶⁵ In the context of standard form contracts and contained unfair terms the *contra proferentem* rule is of a special importance because the party drafting and using an unfair contract terms often seeks to cover his unfair intentions through ambiguity.¹⁶⁶

IV. Rules Limiting the Enforcement of Unfair Contract Terms on the Grounds of Public Policy

There are cases where a contract is concluded according to the above-mentioned rules of construction and rules of narrow interpretation, but still

¹⁶¹ Aronstam (note 12) at 34.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ Aronstam (note 12) at 35.

¹⁶⁵ *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (AD) at 123.

¹⁶⁶ Aronstam (note 12) at 36.

affect the public interest. In these cases, the South African courts may strike down contract terms that are contrary to public policy.¹⁶⁷

Writing about the role of public policy in policing standard form contracts requires firstly a definition of this vague expression. Generally, public policy expresses the interest of the community.¹⁶⁸ It is a general legal norm that dictates what society views as appropriate. Public policy is static and changes as society's views change. A legal embodiment of public policy is expressed in the bill of right in the Constitution and in well-established legal principles in case law.

In contract law, public policy expresses what society expects and tolerates concerning the conclusion of a contract, its content and enforcement. More specifically, public policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject matters.¹⁶⁹ Accordingly, South African's courts generally uphold the notion of freedom of contract and refuse to interfere with contractual terms, however harsh they are.¹⁷⁰ Nevertheless, nowadays there is a trend to interpret public policy not only in terms of the society's interest in upholding freedom of contract, but also in terms of the interests of the individual contractant.¹⁷¹

In their decisions, courts rely on the corrective function of the *iustus error* doctrine as well as on the possibility of a restrictive interpretation, whereby public policy emerges as a corrective doctrinal control mechanism.¹⁷² Considerations such as good faith and reasonableness are also taken into account. Thereby, good faith operates only

¹⁶⁷ For a detailed illustration of substantive control in South African law see below chapter 5 A III.

¹⁶⁸ *Law Union v Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598.

¹⁶⁹ *Ibid.*

¹⁷⁰ See for example *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) Sa 779 at 785.

¹⁷¹ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 275.

¹⁷² See for example *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 847 (A); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Brisley v Drotosky* 2002 (4) SA 1 SCA; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

indirectly.¹⁷³ Moreover, the determination whether a contract term is contrary to public policy or not has to be informed by values of the Constitution.¹⁷⁴

It can be noticed that generally South African courts are unwilling to lay down guidelines as to what is conscionable in a contract or economically and socially desirable. Whether a contract term is extremely unfair and therefore contrary to public policy, is a question of a value-judgement in each particular case. However, it is possible to extract a series of rules from the case law: One area in which courts exercise their power to restrict the freedom of contract relates to the use of restraint of trade clauses in contracts of employment and sales of goodwill.¹⁷⁵ Such clauses might be declared invalid because they deprive a person of his right to earn a living in the occupation of his choice.¹⁷⁶ Public policy is also the basis upon which the courts strike down clauses, which exclude liability for any criminal act done in connection with the performance of the contract¹⁷⁷ or any intentional breach of contract.¹⁷⁸ Moreover, an exemption clause excluding liability for gross negligence may also be against public policy.¹⁷⁹

In the analysis undertaken in the *Afrox* case concerning the issue of public policy, it was held that three grounds could lead to the invalidity of an exemption clause: firstly, the inequality of bargaining power of the parties at the time of conclusion of the contract (only in conjunction with other factors); secondly, the nature and scope of the exemption from liability which the clause afforded to the appellant rendered it objectionable; and thirdly the possibility that the clause infringes

¹⁷³ *Brisley v Drotsky* (note 172) at 15 E.

¹⁷⁴ *Afrox Healthcare Bpk v Strydom* (note 172) at 37 D-E.

¹⁷⁵ See for example the leading case *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* (note 172).

¹⁷⁶ See also *Van den Pol v Silbermann & another* 1952 (2) SA 561 (AD).

¹⁷⁷ *Wells v South African Alumenite Company* 1927 AD 69.

¹⁷⁸ See for example *East London Municipality v South African Railways & Harbours* 1951 (4) SA 466 (E); *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A).

¹⁷⁹ See *Afrox* case (note 172) generally.

constitutional rights which public policy by virtue of sec 39(2) of the Constitution requires to promote.¹⁸⁰ However, in the end the *Afrox* case upheld the traditional view that public policy generally as well as in that particular case favoured the sanctity of contract.¹⁸¹

V. General Rules of South African Contract Law Governing Standard Form Contracts

Besides the above mentioned common law rules governing standard form contracts, other rules of the South African contract law, such as fraud, incapacity and illegality also apply. However, these rules will not be discussed as they are beyond the aims of this paper.

VI. Unenforceability and Severability of Invalid Contract Terms

If an unfair contract term or the whole contract is found invalid on the grounds of public policy, it is unenforceable.¹⁸²

In this context the question appears what happens to the remainder if only one contract term is found invalid. The general rule is that the court may not make a contract for the parties.¹⁸³ However, to answer the above mentioned question, one firstly has to ask whether the term in question is severable from the remainder of the contract. In order to determine that, it has to be examined whether the elimination of the invalid part still leaves the substantial character of the contract unchanged.¹⁸⁴ Facts taken into consideration include the terms of the contract as well as its nature and surrounding circumstances¹⁸⁵, and the intention of the parties to remain bound¹⁸⁶. If the result is that the remainder of the contract still has the substantial character of the original contract and the parties intended so,

¹⁸⁰ *Afrox Healthcare Bpk v Strydom* (note 172) at 35 A.

¹⁸¹ *Afrox Healthcare Bpk v Strydom* (note 172).

¹⁸² Christie (note 57) at 452.

¹⁸³ *Laws v Rutherford* 1924 AD 261 at 264.

¹⁸⁴ *Cameron v Bray Gibb & Co (Pvt) Ltd* 1966 (3) SA 675 (R) at 676-677.

¹⁸⁵ *Bhengu v Alexander* 1947 (4) SA 341 (N) at 347.

¹⁸⁶ *Sasfin (Pty) Ltd v Beukes* (note 172) at 17 E-H.

the remainder may still be enforceable. However, public policy may even in these cases require that the entire contract is unenforceable.¹⁸⁷

VII. Procedural Rules of South African Law on Standard Form Contracts / Unfair Contract Terms

In South Africa, there exist no specific or written procedural rules concerning standard form contracts or unfair contract terms in general. Rather, the general litigation-based system of remedies applies. Any decision that declares an unfair contract term invalid has effect only for the specific parties to the trial. Persons who feel aggrieved by unfair contract terms have to institute an action in their own name against the user of the term in order to vindicate their rights.

B. History of the South African Law on Standard Form Contracts / Unfair Contract Terms

The starting point in the South African law on standard form contracts / unfair contract terms always was and still is the principle that public policy demands in general full freedom of contract.¹⁸⁸ Therefore, judges have been reluctant to use the common law as means to interfere with the process of the market place and stayed away from controlling contract terms.¹⁸⁹ As a result, courts did not interfere with contracts or contract terms on the grounds that they were unreasonable.

Nevertheless, it was generally assumed that the *exception doli generalis* provided a remedy against the enforcement of a contract in unfair circumstances.¹⁹⁰ This rule applied whenever in the circumstances of a case the enforcement of a remedy by the user of an unfair contract term would cause great inequity and would amount to unconscionable

¹⁸⁷ *Sasfin (Pty) Ltd v Beukes* (note 172) at 15 *et seq.*

¹⁸⁸ See for example *Law Union v Rock Insurance Co Ltd v Carmichael's Executor* (note 168) at 598.

¹⁸⁹ E Kahn *Contract and Mercantile Law: A Source Book* vol 1, 2ed (Cape Town: Juta, 1988) at 32.

¹⁹⁰ Christie (note 57) at 14-15.

conduct on the part of the user.¹⁹¹ However, the unexpected decision of *Bank of Lisbon and South Africa Ltd v De Ornelas*¹⁹² fully reviewed old and new authorities on the *exception doli generalis* and decided that this rule is not part of the South African contract law.

Decisions in the eighties then started recognising public policy as corrective instrument for policing unfair contract terms. The case *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*¹⁹³ dealt with an agreement in restraint of trade. That agreement brought into conflict freedom of trade and *pacta sunt servanda* as two considerations that were relevant to public policy and made it necessary to weigh these up against each other. Also the second case, *Sasfin (Pty) Ltd v Beukes*¹⁹⁴ gave due recognition to the treatment of public policy and that contract terms contrary to public policy are for that reason unenforceable.

Finally, the cases *Afrox*¹⁹⁵ and *Brisley v Drosky*¹⁹⁶ recently recognised the obligation of the higher courts to develop the common law in order to give effect to the Bill of Rights of the Constitution.

C. The Proposed “Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act”

After an extensive study of the law of other jurisdictions the South African Law Commission proposed in 1998 the so-called the “Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act”.¹⁹⁷ This proposed legislation has not been enacted yet.

¹⁹¹ See for example *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (AD) at 537.

¹⁹² 1988 (3) SA 580 (A).

¹⁹³ See note 172.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ South African Law Commission *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) Report (1998).

The proposed legislation provides a comprehensive judicial and executive branch regulation of unfair contract terms. It authorises courts to determine whether contractual terms are unreasonable, unconscionable or oppressive and to issue appropriate orders. Having determined that, the legislation furthermore authorises courts to void an entire contract or to limit its application (section 1(1) (d)). However, the “Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act” does not define the phrase “unreasonable, unconscionable or oppressive”. Nevertheless, in its section 2 it provides 26 factors that the courts may rely on to determine the legality of a contract term.

The scope of the proposed Act is broad. It applies to consumer as well as commercial contracts, except those contracts specifically exempted from the legislation (section 3). It covers the process of contract formation, the substance of the contract itself and post contract behaviour of the parties. Moreover, it applies to standard form contracts as well as to individually negotiated contracts.

Thirdly, according to section 1(4) the proposed legislation provides for injunctive relief. Thus, the High Court is empowered to issue orders preventing a party from using a contract likely to contain an unreasonable, unconscionable or oppressive term. Any organisations, body or person is entitled to bring an action for injunctive relief.

Finally, the proposed Act creates the office of an Ombudsperson in order to enforce the law (section 6). However, one must bear in mind that this Ombudsperson may consider any complaint on a non-negotiated contract term only (section 6(2) (a)). According to that section, a contract term is presumed to be non-negotiated where the contract has been drafted in advance and where the other party had no chance to influence the development of the questioned contract (term). The Ombudsperson has, under section 6(2), the following powers: (1) to require the user of the contract to provide all information necessary to assess the character of the contract; (2) to order a user to comply with the legislation; (3) to file an

action with the High Court against the user of an alleged unfair contract;
and (4) to draft codes of conduct for particular industries or persons
subject to approval of the Minister.

Part III

Comparison and Evaluation

Chapter Five

Comparison

A. Detailed Comparison

Generally, it can be noticed that both the German and the South African legal systems developed ways to protect the parties to a contract from unfair standard-form contract terms. Both systems, generally protecting and upholding the notion of freedom of contract, noticed the need for balancing out the competing interests between the notion of freedom of contract and restrictions to this freedom in order to prevent abuse in the form of unfair standard-form contract terms.

To give a very brief outline, both legal systems, different in their general contract law as it is statutory law in Germany and case law in South African, are similar in their results to the problems discussed in this dissertation. It can be noticed that both legal systems, in order to protect a contractual party from unfair contract terms, have developed similar rules for determining whether a contract term is enforceable. Both in Germany and South Africa, the contractual parties have to fulfil certain requirements in order for making the questionable contract term a valid and enforceable part of the contract. Secondly, even where an unfair contract term is imposed in accordance with the above-mentioned requirements, its oppressive effect can affect the public interest to such extent that both jurisdictions declare it unenforceable. However, it can also be noticed that contracting individuals in South Africa are less protected from unfair terms than in Germany.

This chapter of the dissertation compares the actual responses of the German and South African legal systems to the phenomenon of standard form contracts. The comparison has to be limited to the core

features of both legal systems, which are: (1) Scope of application of standard form contract law; (2) Incorporation / rules of construction; (3) Content control / rules limiting the enforcement of unfair contract terms; (4) Severability of invalid terms; (5) Procedural rules. After discussing the detailed comparison below, I will proceed to discuss specific consequences that follow forthwith.

I. Scope of Application of Standard Form Contract Law

1. Application to Standard Form Contract Terms only versus Application to Contract Terms in General

As a first difference one can recognise the differing scope of application of the German and South African laws, which aim to protect the parties to a standard form contract. In Germany the relevant provisions of the Civil Code (BGB) apply to standard terms only (§ 305(1) BGB). According to § 305(1) BGB, standard terms are all contractual terms pre-established for a multitude of contracts which one party to the contract (the user) presents to the other party upon the conclusion of the contract. Such terms do not constitute standard terms where they have been individually negotiated between the parties (§ 305(1) Sentence 3 BGB). In South African, there yet is no specific legislation governing the considered area of law. General common law rules covering all kinds of contracts apply. Such common law rules govern all areas of unfair contracts, i.e. unfairness in making the contract, unfair contracts and contract terms as well as unfair enforcement of a contract.¹⁹⁸ No difference is made between standard form contracts and individually negotiated ones. Relevant for standard form contracts are the first two areas. Thus, only these areas are discussed in this dissertation.

¹⁹⁸ For details see above chapter 4 A I.

2. Differentiating between Consumer Contracts and Commercial Contracts / Enhanced Review of Consumer Contracts

A further difference is that the German provisions concerning the scope of application, contrary to the general South African rules, distinguish between commercial contracts and consumer contracts. In Germany, standard form contract law protects mainly consumers. To fulfil this task, the German standard form contract law firstly restricts the scope of application of the standard form contract provisions for commercial contracts. Thus, § 305(2) and (3) BGB and §§ 308 and 309 BGB do not apply to standard terms which are proffered to a businessperson, a legal person governed by public law or a special fund governed by public law (§ 310(1) BGB). Accordingly, only contracts which are proffered to a consumer have to pass the incorporation control of § 305(2) and (3) BGB and the content control of §§ 308 and 309 BGB. Consumer is thereby defined as a natural person who enters into a contract for non-commercial purposes, § 14 BGB. Nevertheless, § 310(1) BGB in the end only eases the requirements of the incorporation control. According to § 310(1) Sentence 2 BGB, the value judgments of §§ 308 and 309 BGB have to be considered in the evaluation under the § 307 BGB standard.¹⁹⁹ Moreover, in this evaluation due regard must be paid to the customs and practices applying in business transactions (310(1) Sentence 2 BGB).

Secondly, the German law on standard form contracts provides in § 310(3) BGB an expanded protection that is available to consumers only. Thus, in consumer contracts standard terms are deemed to have been proffered by the businessperson (§ 310(3) No 1 BGB). That has the advantage for consumers that the standard form contract law applies even if third parties introduce standard terms to the contract, as long as the consumer could not influence their content.²⁰⁰ Insofar the protection for the consumer is extended, as § 305(1) BGB for the rest of the cases requires that one party to the contract (the user) presents the standard terms to the other party. Moreover, the standard form contract law

¹⁹⁹ Jauernig (note 78) § 310 at 330 para 2.

²⁰⁰ Jauernig (note 78) § 310 at 330 para 7.

provisions apply to pre-established conditions of consumer contracts even if they are intended for use only once, provided that the consumer could not influence their content (§ 310(3) No 2 BGB). Finally, the circumstances surrounding the conclusion of the particular contract are also to be taken into account when deciding whether there has been unreasonable detriment under § 307 BGB (§ 310(3) No 3 BGB). This constitutes a deviance to the circumstances taken into account in the examination under § 307 BGB. Courts usually are not supposed to concern themselves with the situation of individual parties, but focus on an abstract evaluation to determine if the standard terms are contrary to good faith. However, according to § 310(3) No 3 BGB courts concerned with a consumer contract additionally take the individual circumstances of the consumer into account.

The exceptions of § 310(1) and (3) BGB show that the German law on standard form contracts distinguishes between commercial contracts and consumer contracts and provides extended protection where consumers are involved. Such a distinction cannot be found in South Africa. As mentioned earlier, here general common law rules covering all kinds of contracts apply. Such rules apply to standard form contracts and individually negotiated ones as well as to consumer contracts and commercial contracts.²⁰¹ Therefore, extended protection for consumers is not provided, at least not explicitly. Although the relevant common law rules generally apply to all kinds of contracts, in the results there is not such a big difference between the German and South African scope of application of standard form contract law. As shown above, the South African courts evaluate in the individual case if an intervention is necessary in order to protect one contractual party from the oppressive behaviour of the other one. Many problems the South African rules aim to solve do not occur when the contract is individually negotiated or only businesspersons enter into it. The problem of unfairness in terms, resulting from a situation where one contractual party is superior and the

²⁰¹ For details see above chapter 4 A I.

other one inferior because of a lack in bargaining power just does not arise if the parties to a contract are in an equal position like for example contracting business people.²⁰² The situation where for example a customer has no option but to use the services of the post office, the railway or the electricity provider and therefore does not have the possibility of negotiation about the terms of the particular contract usually exists for consumers only. Moreover, these are typical situations where standard form contracts and not individually negotiated ones are used. Therefore, it is argued that South African courts usually see the necessity for action only in these situations. Accordingly, they restrict the enforceability of unfair contracts terms in situations only where also the German law on standard form contracts applies.

As a result one can say that although the South African scope of application of standard form contract law is formally wider than the German one, the end results practically do not differ. In Germany the scope of application is restricted to certain situations, while in South Africa the courts restrict the enforceability of a contract only in exactly these similar or similar ones.

II. Incorporation Control versus Rules of Construction

Also the German provisions about the incorporation control of standard form contract terms come to similar results as the South African rules of construction. Both countries have developed certain requirements for (standard) contract terms in order to become a valid and enforceable part of the contract.

In Germany, a standard term, in order to become valid and enforceable, has to fulfil certain requirements. Such requirements are laid down in § 305(2) BGB and followed by some exceptions stated in §§ 305a – 305c BGB. The South African rules of construction are similar. Just the

²⁰² For a detailed illustration of the potential of abuse of contractual terms see above chapter 2 C.

starting point is a different one. While Germany states three requirements, which the user of standard terms has to fulfil *ab initio* in order to enforce such terms, South Africa generally requires only a signature of the party subject to such terms. As long as a signature exists, the person signing the contractual document is, as a matter of principle, bound.²⁰³ From this general rule, South African courts make certain exceptions in order to protect weak parties against strong ones.²⁰⁴

1. The Role of Consent

In detail, the first similarity is that both jurisdictions require some form of consent of the submitting party to the application of the (standard form) contract terms. Background of this requirement in Germany is the principle of consent (Konsensualprinzip). According to this principle, standard terms should not be unilaterally imposed on the submitting party; both parties to the contract should rather actually agree on their application.²⁰⁵ For achieving such an agreement, § 305(2) BGB states three requirements with the consent of the submitting party as one of them. Thereby, a party²⁰⁶ has to expressly or impliedly agree to the application of the terms. A signature is not necessary; it is sufficient if the user of the standard term can reasonable assume the consent.²⁰⁷ German law states two further requirements for the standard terms to be incorporated in the contract. As illustrated above, such further requirements are a notice of the application of standard form contract terms and a review opportunity.²⁰⁸ These two further requirements should ensure that standard terms are brought to the attention to the submitting party in order for this party to agree to their application, what is required by the principle of consent.²⁰⁹

²⁰³ The *caveat subscriptor rule* has firstly been expressed in *Burger v Central SAR* 1903 TS 571.

²⁰⁴ See also above chapter 4 A II.

²⁰⁵ Jauernig (note 78) § 305 at 303 para 12.

²⁰⁶ The submitting party in this context will be a consumer, because § 310(1) BGB excludes the application of § 305(2) BGB for commercial contracts.

²⁰⁷ Jauernig (note 78) § 305 at 304 para 15.

²⁰⁸ See above chapter 3 A I 2.

²⁰⁹ Jauernig (note 78) § 305 at 303 para 12.

The three requirements of § 305(2) BGB have two effects: the party subject to the standard terms cannot avoid their application by simply not reading them; and the user of such terms cannot impose any terms without obtaining the other party's consent and without giving him the opportunity to read them.²¹⁰ These requirements thereby are contrary to the former German case law, that allowed, under certain circumstances, standard terms to become a part of the contract without notice or knowledge of the submitting party.²¹¹ This case law had been considered as dissatisfactory.²¹² Thus, the statutory provisions should ensure that the incorporation of standard terms in the contract happens in terms of general contractual provisions of the BGB.²¹³

Whereas as illustrated in Germany consent is only one of three requirements, it forms the starting point in South Africa. Generally, a contract in South Africa requires either an actual meeting of the minds of the parties or the reasonable belief by one of them that there is consensus.²¹⁴ According to the will theory, an actual meeting of the minds of the contractants, in other words consent, forms the basis of a contract.²¹⁵ However, in some cases, such as standard form contract cases, an alternative basis for a contract is required. In such cases, due to the fact that an actual meeting of the minds hardly exists because the submitting party mostly does not understand or read the contract terms, a contract needs to have some other basis. According to the doctrine of quasi-mutual assent, a contract then is based on the intention of one party (the user of the terms) to an agreement and the reasonable impression on his part that the other part (the submitting party) had the same intention

²¹⁰ Holmes and Thurmann (note 46) at 355.

²¹¹ See for example BGH 9 *BGHZ* at 1.

²¹² See BT (Bundestag)-Drucksache (Report of the German Law Commission) 7/3919 at 13.

²¹³ *Ibid.* In Germany, contract in general is an agreement between two parties consisting of two corresponding declaration of wills. Therefore, if one party does not know about some contract terms, they do not become part of the contract.

²¹⁴ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 16. For details about contract in general also see above chapter 2 D.

²¹⁵ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 19.

(reliance theory).²¹⁶ The requirements for proving of a contract on this alternative basis are: (1) the creation of reliance by one party to the agreement that they have reached consent, and (2) the reasonability of the reliance in the circumstances.²¹⁷

As illustrated, South Africa, contrary to Germany, generally only requires some form of consent. This consent generally has to be given in writing, i.e. a signature. Accordingly, it is a matter of common knowledge and a general principle that a person who signs a contractual document thereby signifies his consent to the contractual terms.²¹⁸ As illustrated above, this is expressed by the *caveat subscriptor* rule and sophisticated by the doctrine of quasi-mutual assent. According to the latter, a contractual party is reasonably entitled to assume that the other contractual party, the signatory, signifies his intention to be bound by signing the document, even after not reading it.²¹⁹ Thus, it was held that if somebody puts his signature to a document he cannot fail to realise that signing he is giving his consent to whatever words are contained in the document.²²⁰

However, from this general rule, South African courts make certain exceptions in order to protect weak parties against strong ones. In this course, they ensure that every contract term is brought to the attention of the weaker party. Thus, they set limits to the *caveat subscriptor* principle and the doctrine of quasi-mutual assent. They do so by applying the *iustus error* approach. According to this approach, a party who enters into a contract under a reasonable and material mistake is not bound.²²¹ Then the other contractual party is no longer reasonably entitled to assume that the signing party signifies the intention to be bound. As a result, South

²¹⁶ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 35.

²¹⁷ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 36.

²¹⁸ Christie (note 57) at 199.

²¹⁹ See for example: *Dlovo v Brian Porter Motors Ltd* (note 148) at 524 D-H; *Fourie v Hansen* [2000] 1 All SA 510 (W) at 516d-517a.

²²⁰ *George v Faimead (Pty) Ltd* 1958 (2) SA 465 (A) at 472 A; see also *Bhikhagee w Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E) at 110; *Mathole v Mothle* 1951 (1) SA 256 (T) at 259 D.

²²¹ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 39.

Africa ends up in having the same or similar requirements as the Germans.

2. The Requirements of the Principle of Consent versus Exceptions to the *Caveat Subscriptor* Rule

In particular, in South Africa the *caveat subscriptor* rule is for example not applicable where the contractual terms are not contained in a document of such nature, as the reasonable person would expect it to contain such terms.²²² Accordingly, a document that is merely a receipt for money paid or a voucher of that nature cannot be regarded as a contractual document.²²³ The document, rather, can be considered as evidence of a contract that has already taken place.²²⁴ German law achieves the same result with the aforementioned requirement that the user of standard terms has to give the other party notice of the application of such (§ 305(2) No 1 BGB). Such notice must be given at the time of contracting and is not effective if made only once the contract is concluded.²²⁵ The same requirement was stated in the South African case *Annie Peard v John T Rennie & Sons*.²²⁶

A further exception to the South African *caveat subscriptor* principle can be seen in the requirement of not presenting a contract inconsistent with a previous advertisement or previous representations during negotiations. Thus, in a case where a standard form contract contains a term allowing the user of the standard form contract to vary dates whereas a particular date was crucial in previous negotiations, it was held that the signatory should not be bound as a result of a *iustus error*.²²⁷ Similarly, a term does not become part of the contract if the form or the document

²²² *Central South African Railways v McLaren* 1903 TS 727 in general.

²²³ *Ibid.*

²²⁴ The exception was also applied in *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C).

²²⁵ Palandt *Bürgerliches Gesetzbuch* 62ed (München: C.H. Beck Verlag, 2003) § 305 at 106 para 30.

²²⁶ *Annie Peard v John T Rennie & Sons* (1895) 16 NLR 175.

²²⁷ *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 318 C.

confuses or misleads the signatory.²²⁸ For example, in the case *Keens Group v Loetter*²²⁹ the signatory signed a document headed by the words: 'Confidential: Application for Credit Facilities' without reading the terms contained in it. It turned out that the terms of the document bound the signatory personally as a surety. This consequence did not appear from what was stated both at the beginning and immediately above the signature. In this case it was held that, because the attention of the signatory was not specifically attracted to the questionable terms and because these terms were not highlighted or made conspicuous in any way, the signatory could not reasonably expect to find such terms in the document.²³⁰ Therefore, the signatory successfully established *iustus error* and was not bound by his signature.²³¹ Similarly, in the case *Dlovo v Brian Porter Motors*²³² the signatory signed an agreement ('job card') authorizing certain car repairs. The document contained, printed in small print at the bottom of the job card and not brought to the attention of the signatory, an exemption clause. The court in this case held that there was no reason for doubt that the signatory signed under the impression that she was signing only a job card²³³. She did not expect and did not have to expect an exemption clause as nobody draw her attention to such clause.²³⁴ Therefore, the signatory's error in respect of the exemption clause was held *iustus* and she was held to be not bound by such clause.²³⁵ In the third case *Fourie v Hansen*²³⁶ the signatory signed a car hire agreement, which contained a term that excluded liability for damages for breach of the contract. The term was held to not be binding because of his surprising nature and because nobody drew the signatory's attention to it.²³⁷

²²⁸ See for example *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *Keens Group Co (Pty) Ltd v Loetter* 1989 (1) SA 585 (C) at 590 B-592 C; *Fourie v Hansen* (note 219) at 517a-f; *Dlovo v Brian Porter Motors Ltd* (note 148) at 524 C-527 D.

²²⁹ *Keens Group Co (Pty) Ltd v Loetter* (note 228).

²³⁰ *Keens Group Co (Pty) Ltd v Loetter* (note 228) at 591 B.

²³¹ *Keens Group Co (Pty) Ltd v Loetter* (note 171) at 590 B-592 C.

²³² *Dlovo v Brian Porter Motors Ltd* (note 148).

²³³ *Dlovo v Brian Porter Motors Ltd* (note 148) at 526 E-G.

²³⁴ *Dlovo v Brian Porter Motors Ltd* (note 148) at 526 I-J and 527 A-C.

²³⁵ *Dlovo v Brian Porter Motors Ltd* (note 148) at 527 A-C.

²³⁶ *Fourie v Hansen* (note 219).

²³⁷ *Fourie v Hansen* (note 219) at 516i-517f.

These exceptions of the South African law to the *caveat subscriptor* rule are similar to the German provision § 305c(1) BGB. According to this provision, terms do not become part of the contract if they are of a surprising nature, even if the parties have complied with the requirements of § 305(2) BGB, § 305c(1) BGB. Under § 305c(1) BGB it is the term's unusualness and not its unfairness that makes it void.²³⁸ Background of the provision is the assumption that the party subject to the standard form contract terms rarely reads the terms and should only be bound to the terms with which he should fairly and justly reckon.²³⁹ The factors taken into account in order to determine the term's unusualness are similar to the findings in the aforementioned South African cases. In particular, a term is surprising if, under the circumstances, it is so unusual, in particular in view of its appearance in the document, that the other party would not expect it.²⁴⁰ Also negotiations prior to the conclusion of the contract have to be taken into account.²⁴¹

Further similarity between the German and South African law exists in cases where the submitting party does not sign the standard form contract (in South Africa the so-called ticket cases). As illustrated above, a signature in such cases is hard to obtain because the user (usually an enterprise) attracts so many customers at the same time to the same place that the requirement of a signature would lead to a costly and impracticable delay. Here the South African law requires, instead of a signature, some other form of consent. In these cases, consent is given impliedly (like it is possible in Germany under § 305(2) BGB). Briefly, the party subject to the standard terms becomes reads and understands such terms and is bound by going ahead with the contract (entering sports ground or boarding a train).²⁴² If it cannot be proved that the party subject to the terms read them, this party will only be bound if the user did what

²³⁸ Jauernig (note 78) § 305c at 307 para 1.

²³⁹ See BT (Bundestag)-Drucksache (Report of the German Law Commission) 7/3919 at 19.

²⁴⁰ Jauernig (note 78) § 305c at 307 para 2.

²⁴¹ BGH 2001 *Der Betriebsberater* at 2019.

²⁴² *Pepler v Molteno School Board* 1912 CPD 519; *Smith v Carson* 1916 EDL 26.

was reasonable possible to draw the party's attention to the terms contained in or referred to in the document.²⁴³ This requirement is similar to the three requirement stated in the German provision § 305(2) BGB. This provision applies for signed as well as unsigned documents and requires the user generally to give the other party notice of the application of standard terms. Depending on the circumstances, an express notice contained in the document or a sign is necessary, § 305(2) No 1 BGB.

It can be followed that both jurisdictions try to make sure that (standard form) contract terms do not become part of the contract unless the party subject to the terms is aware of them and is provided with an opportunity to read them before the conclusion of the contract. Germany with its three requirements stated in § 305 (2) BGB that have to be fulfilled *ab initio* ends up in having the similar requirements as South Africa in order for the (standard form) contract terms to be part of the contract, which generally requires only consent but has developed certain exceptions and modifications.

It is argued that the reason for the different starting points (resulting in similar conclusions) is once again that the South African common law rules applying to standard form contracts are general contract law principles, whereas Germany has tailored provisions. These tailored provisions codify previous case law as standard form contract law in Germany started off as case law. The structured German provisions on the incorporation of standard form contract terms benefit from the previous case law, while South Africa still is one step behind.

III. Content Control versus Rules Limiting the Enforcement of Standard Form Contracts / Unfair Contract Terms

The third part of the comparison deals with the substantive control of (standard form) contract terms. It can be noticed that both the German and

²⁴³ *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* (note 158) at 569 E-G. For further details see above chapter 4 A II 2.

South African law on standard form contracts have found ways to limit the enforceability of contract terms that are successfully incorporated in the contract but unfairly disadvantage one contractual party. Thus, both jurisdictions accommodate the problems that typically occur in standard form contract cases and that are outlined above.²⁴⁴ Thereby both the German and South African law tried to keep the notion of freedom of contract intact. However, it can also be noticed that the approaches taken are different. Moreover, the extent of protection of the party subject to the standard form contract terms differs.

1. Means of Substantive Control

The first difference is the means to review the content of standard form contract terms in both jurisdictions. German law focuses only on the content control, which is contained in the provisions §§ 307 – 309 BGB. As demonstrated above, German law uses a matrix approach to review the content of standard form contract terms.²⁴⁵ According to this matrix, one firstly has to check if the challenged term is contained in the list of § 309 BGB. If yes, then it is invalid without a further review. Secondly, one has to check if the challenged term is part of the list of § 308 BGB. If yes, the term is not invalid *per se*, but suspected to be invalid and therefore subject to a value-judgement. Thirdly, the judges have to check if the term that is not contained in the lists of §§ 309 and 308 BGB is unreasonable and contrary to the requirements of good faith according to § 307 BGB.²⁴⁶

In this comparison the list of invalid and suspect terms contained in §§ 309 and 308 BGB shall be disregarded. These terms belong to the specific context of German law and society²⁴⁷; a discussion would go beyond the scope of this dissertation. South African law has to make its own decisions about which terms offend the South African notion of

²⁴⁴ For details see chapter 1 and 2 above.

²⁴⁵ Maxeiner (note 36) at 156.

²⁴⁶ For a detailed explanation of this three-step procedure see for example Jauernig (note 78) § 307 at 312 para 2.

²⁴⁷ Holmes and Thurmann (note 46) at 358.

fairness. What should be addressed, though, are the technique and standard § 307 BGB uses for the substantive control of standard form contract terms. However, the importance of content control of standard form contract terms in German law should be emphasised, as it is the only option whereby the court can review the content of such terms.²⁴⁸ The position is somewhat different in South Africa.

The South African law also reviews unfair contract terms and gives the judges the power to declare terms unenforceable if they are contrary to public policy.²⁴⁹ Additionally, and contrary to Germany, the second option by which the courts undertake a substantive control of unfair contract terms is confining such within reasonable bounds by interpreting them narrowly.²⁵⁰ In interpreting such unfair contract terms the court must first examine the nature of the contract in order to decide what legal positions concerning the questionable term would exist in the absence of the term (in the case of an exemption clause for example strict liability, negligence, gross negligence).²⁵¹ As a second step the courts will then give the term the minimum of effectiveness by being interpreted narrowly as to place as light a burden as possible upon the submitting party.²⁵²

Cases interpreting unfair contract terms narrowly are various. *Essa v Divaris*²⁵³ can be considered as one of the leading cases in this context. In this case, a lorry was stored in a garage at “owner’s risk”. A notice on the wall of the garage stated that all cars should be garaged at owner’s risk. The lorry was destroyed by fire. The “owner’s risk” term was in this case was interpreted as exempting the owner of the garage only from liability based on negligence as the minimum degree of blameworthiness. Also the judges in the decision *Elgin Brown & Hamer (Pty) Ltd v Industrial*

²⁴⁸ A detailed comparison of the technique taken by the both jurisdiction will follow under chapter 5 A III 4.

²⁴⁹ For details see above chapter 4 A IV and the following comparison.

²⁵⁰ Christie (note 57) at 214.

²⁵¹ Christie (note 57) at 215.

²⁵² Aronstam (note 12) at 34.

²⁵³ 1947 (1) SA 753 (A).

*Machinery Suppliers (Pty) Ltd*²⁵⁴ interpreted an exemption clause couched in the widest possible term narrowly. It was held that there is no rule against interpreting an exemption clause as excluding liability for damages resulting from fundamental breach.²⁵⁵ Finally, in *Van der Westhuizen v Arnold*²⁵⁶ an exemption clause saving the user from any liability that might arise by operation of law or by virtue of representations or warranties was interpreted as protecting the user against liability for defects only.²⁵⁷

In *Van der Westhuizen v Arnold*²⁵⁸ it was also held that although the *contra proferentem* rule was in strict theory inapplicable because the words had a clear meaning, it nevertheless applied.²⁵⁹ This was justified by a need for interpreting terms that seek to limit oust common law rights where the exclusion is very general in its application and concerned the most fundamental obligation of one contractual party.²⁶⁰ It was also held that

‘[i]n the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of a party whose rights have been limited, but also give effect that to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible.’

The aforementioned statement shows that narrow interpretation in South African, e.g. applying the *contra proferentem* rule, is used as the second means to review and restrict the content of unfair contract terms. Thus, interpreting contract terms is not only exercised for giving unclear words a precise meaning.

²⁵⁴ 1993 (3) SA 424 (A).

²⁵⁵ *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* (note 254) at 430-431.

²⁵⁶ 2002 (6) SA 453 (SCA).

²⁵⁷ *Van der Westhuizen v Arnold* (note 256) at 468 A.

²⁵⁸ (note 256).

²⁵⁹ *Van der Westhuizen v Arnold* (note 256) at 464 D and 469 E.

²⁶⁰ *Van der Westhuizen v Arnold* (note 256) at 464 D, 468 A and 469 E-G.

2. The Function of the *Contra Proferentem* Rule

It can be followed that the function of the *contra proferentem* rule, which is used in both jurisdictions, differs. As just illustrated, in South African law it is one of two means of reviewing the content of unfair contract terms. It is used as an option to restrict the scope of application of unfair contract terms and thus as a means of substantive control.

Contrary to the South African law, German law regards the *contra proferentem* rule contained in § 305c(2) BGB exclusively as a standard of interpreting terms that are ambiguous. Also in German law it is possible to secretly review the content of standard form contract terms by means of the *contra proferentem* rule. However, the systematical location of the rule in § 305c(2) BGB, the intention of the legislator and the view of the BGH prohibit any substantive control under § 305c(2) BGB.²⁶¹ § 305c(2) BGB must make it possible to determine whether a contract term valid or invalid.²⁶² It is argued that, in contrast, South African courts do exactly that when they carefully construct unfair contract terms to ensure the protection of a party whose rights have been limited. Although nowhere openly admitted, the result of such a “careful” interpretation in South African law is finding the original term invalid and replacing it by a term that is legally permissible.

A further difference concerning the *contract proferentem* rule is the circumstances taken into account in order to determine whether a contract term is ambiguous. In German law, the requirements in order to determine whether a term is ambiguous according to § 305c(2) BGB are controversial. This controversy involves using objective versus individual standards of construction to decide the issue of ambiguity.²⁶³ In this context, the BGH favours using objective criteria and therefore construes the terms without regard to individual circumstances.²⁶⁴ Factors to be taken into account are expectations, interests and the ability to understand

²⁶¹ Jauernig (note 78) § 305c at 308 para 7;

²⁶² BGH 1979 *Versicherungsrecht* 370 at 371.

²⁶³ Holmes and Thurmann (note 46) at 352.

²⁶⁴ See for example BGH 22 *BGHZ* at 90.

of an average contractual party.²⁶⁵ According to this universal and abstract approach, the *contra proferentem* rule of § 305c(2) BGB applies to consumer contracts and commercial contracts, as it is not excluded by § 310(1) BGB.²⁶⁶ Nevertheless, according to § 305b BGB it applies to non-negotiated contracts only (like the rest of the standard form contract law provisions as well). Contrary to this, in South African law individual circumstances are taken into account when determining if a clause has to be construed against its user.²⁶⁷

3. Importance of the Substantive Control of Standard Form Contract Terms by means of Good Faith / Public Policy

The means of substantive control in German and South African differ. This is illustrative of the fact that German law places a higher regard to content control of standard form contract terms than South African law does. Content control forms the heart of the German law.²⁶⁸ The provisions §§ 307 – 309 BGB aim to balance the submitting party's lack of influence regarding the content of the standard form contract terms. Whereas the importance of the incorporation control of standard form contract terms has substantially declined.²⁶⁹

This is contrary in South African law. There

[t]he power of the courts to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest cases, lest uncertainty to the validity of contracts result from an arbitrary and indiscriminate use of the power.²⁷⁰

The judges should be careful not to conclude that a contract is contrary to public policy because the contract terms offend one's individual sense of

²⁶⁵ See for example BGH 33 BGHZ at 216.

²⁶⁶ For details see above chapter 5 A I.

²⁶⁷ See for example *Cairns (Pty) Ltd v Playdon & Co Ltd* (note 165) at 122-125; *Durban's Water Wonderland (Pty) Ltd v Botha* (note 160) at 989-990; *Van der Westhuizen v Arnold* (note 256) at 469 G.

²⁶⁸ Jauernig (note 78) vor §§ 307 - 309 at 310 para 1.

²⁶⁹ Holmes and Thurmann (note 46) at 352.

²⁷⁰ *Sasfin (Pty) Ltd v Beukes* (note 172) at 9 A.

propriety and fairness.²⁷¹ In South African law, it generally is recognised that judges have the responsibility to weigh up underlying values such as good faith and *pacta sunt servanda* when these come into conflict.²⁷² However, this power has to be exercised sparingly because the enforceability of contract terms would otherwise depend on what individual judges consider reasonable and fair in the circumstances.²⁷³

4. Standards of Substantive Control of Standard Form Contract Terms and Factors Taken into Account

It can be noticed that German and South African law use different standards to determine the suitability of a term in a (standard form) contract. Whereas German law uses the notion of good faith for such determination (which underlies the content control contained in §§ 307 – 309 BGB), South African law challenges contract terms against the notion of public policy. However, this section of the comparison will show that the standards of the substantive control of (standard form) contract terms do not differ much.

In detail (and as briefly illustrated above), the German provision of § 307 BGB provides the general standard by which the fairness of standard form contract terms is to be judged. Thus, a standard form contract term is invalid if it places the submitting partner at an unreasonable disadvantage and is therefore contrary to the notion of good faith. The provision of § 307 BGB is thereby based on the general clause of good faith contained in § 242 BGB.

Under § 307 BGB, a standard form contract term does not comply with the notion of good faith if it is entirely one-sided and does not take into account the interests of the submitting party.²⁷⁴ It is required that obligations imposed by standard form contract terms are reasonable both

²⁷¹ *Ibid.*

²⁷² *Brisley v Drotsky* (note 172) at 15 E-16 E.

²⁷³ *Brisley v Drotsky* (note 172) at 16 B.

²⁷⁴ Maxeiner (note 36) at 154.

in relation to the user's interest and the burden imposed on the submitting party.²⁷⁵ In order to explore if the aforementioned requirements are fulfilled, German courts rely on fundamental principles of German law such as necessity (Erforderlichkeit) and proportionality (Verhältnismässigkeit).²⁷⁶ Thus, balancing out the different interests of the parties is required.

Also South African courts balance out competing interests when they determine the suitability of a contract term. Contrary to German law, they use the instrument of public policy.²⁷⁷

An agreement in South African law is defined as being contrary to public policy if

Translation: 'the upholding of the pertinent ... contractual provision would, either because of extreme unfairness or because of other policy considerations, be in conflict with the interest of the community'.²⁷⁸

Due to the fact that public policy generally upholds the notion of freedom of contract, but that its conception is variable over space and time, the courts have to balance out competing considerations of a normative nature.²⁷⁹ Thus, they have to weigh the competing interest of the public in the enforcement of seriously intended agreements on the one side against 'simple justice between man and man'.²⁸⁰

It follows that the way of balancing out competing interests in South African law differs from the German law concerning the interest that are taken into account. While German law weighs the interests of the

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ As illustrated earlier, this is only one option of substantive control of unfair contract terms in South Africa. The other option is applying the *contra proferentem* rule and interpreting the term narrowly.

²⁷⁸ *Afrox Healthcare Bpk v Strydom* (note 172) at 34 I.

²⁷⁹ *Sasfin (Pty) Ltd v Beukes* (note 172) at 8 I.

²⁸⁰ *Jajbhay v Cassim* 1939 AD 537 at 544.

contractual parties against one another, South Africa law weighs up full freedom of contract against restricting it in favour of individual justice.

It is argued that this difference can be explained by the role of the BGB in German law. The presence of a comprehensive code in Germany furthers the recognition of the fact that the parties exercise their freedom of contract against the backdrop and within the framework of the law.²⁸¹ Therefore, contracts in German law are understood as an interaction between law and individual autonomy.²⁸² Holistically, the BGB determines the extent of the permitted restrictions to the notion of freedom of contract. It weighs full freedom of contract against individual justice. Thus the notion of good faith as a provision of the BGB does not have to balance these competing interests again. On the other hand, South African law primarily seeks to enforce freely incurred contractual duties. However, if a situation occurs where the notion of freedom of contract is challenged, it is the role of public policy to determine whether such notion should be restricted at all.

Due to the fact that common law aims to give full effect to the notion of freedom of contract, courts very seldom strike down a contract term because it is contrary to public policy. Nevertheless, it is argued that freedom of contract is limited by narrowly interpreting contract terms. This is achieved by means of the *contra proferentem* rule employed by the courts as the second option for a substantive control.²⁸³

Also the factors taken into account in determining if the challenged (standard form) contract term violates the notion of good faith in German law / is contrary to public policy in South African law are different.

In German law, factors taken into account when balancing the interests of the contractual parties include 'the nature and subject matter

²⁸¹ Holmes and Thurmann (note 46) at 344.

²⁸² *Ibid.*

²⁸³ For details see above chapter 5 A III 2.

of the legal transaction, the requirements contracting parties must satisfy in terms of persons protected, and the economic reasons underlying the drafting of the standard form contract'.²⁸⁴ Where these factors provide no clear guidance, § 307(2) BGB instructs the courts to assume an unreasonable disadvantage under specific circumstances. The first presumption (§ 307(2) No 1 BGB) is the material departure from fundamental principles, which underlie the legal rules that would govern the contractual relationship without standard form contract terms. Such legal rules have the presumption of fairness in their favour.²⁸⁵ The second presumption (§ 307(2) No 2 BGB) concerns standard form contract terms that oppose the rights and duties inherent in the nature of the contract.²⁸⁶ This presumption for examples applies to situations where standard form contract terms eviscerate terms that are material to a contract.²⁸⁷

In German law courts are thereby generally not supposed to concern themselves with the situation of the individual parties.²⁸⁸ Inquiries into the degree to which the submitting party for example lacked bargaining power must be disregarded.

This is different in South African law. The position in South African law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy.²⁸⁹ In the case *Afrox Healthcare Bpk v Strydom* inequality of bargaining power between the parties when the contract was concluded was one factor for which the contract term was challenged.²⁹⁰ However, the concrete and individual approach of the South African law is not as different from the abstract and universal

²⁸⁴ N Reich and H-W Micklitz *Consumer Legislation in the Federal Republic of Germany* (Wiley, John & Sons, Inc: New York, Cincinnati, Toronto, London, Melbourne, 1981) at 271.

²⁸⁵ BGH 1965 *Neue Juristische Wochenschrift* at 246.

²⁸⁶ See for example BGH 41 *BGHZ* 151.

²⁸⁷ Holmes and Thurmann (note 46) at 359.

²⁸⁸ See for example Maxeiner (note 36) at 154.

²⁸⁹ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* (note 172) at 875; *Sasfin (Pty) Ltd v Beukes* (note 172) in general.

²⁹⁰ (note 172) at 35 A.

approach of the German law as it seems to be. With the incorporation of the AGBG in the BGB, the wording of the provision § 310(3) BGB has been changed. According to § 310(3) No 3 BGB, in the case of a consumer contract the circumstances surrounding the conclusion of the particular contract are also to be taken into account. Thus, in the case of a consumer contract the factors taken into account in both the German and South African law are the same. Thus the courts in both jurisdictions consider individual factors.

A further difference between both jurisdictions can be pointed out by examining the technique used by German law in §§ 307 – 309 BGB. In §§ 308 and 309 BGB the German law provides guidelines for terms contrary to the notion of good faith. Such guidelines are drawn from previous case law and serve to create predictability and least uncertainty.²⁹¹ Contrary to this feature in German law, South African law, as illustrated above, generally refuse to give guidelines as to what is conscionable in a contract or economically and socially desirable. This leads to a value-judgement in each particular case and creates flexibility.

However, in German law the general provision of § 307 BGB serves to create flexibility. And least uncertainty in South African law is ensured by only sparingly exercising the power to declare unfair contract terms contrary to public policy.²⁹²

5. Limits and Extent of Substantial Control of Standard Form Contract Terms

It can be noticed that the submitting party under German law enjoys a greater extent of protection than under South African law. As illustrated above, § 307(2) No 2 BGB presumes that standard form contract terms that oppose the rights and duties inherent in the nature of the contract

²⁹¹ Holmes and Thurmann (note 46) at 358.

²⁹² See for example *Sasfin (Pty) Ltd v Beukes* (note 172) at 9 B.

violate the notion of good faith.²⁹³ Such a presumption applies to situations where standard form contract terms disembody terms that are material to a contract.²⁹⁴ Thereby, the provision of § 307(2) No 2 BGB is complemented by § 307(2) No 1 BGB. A clear distinction between these two provisions is not easy to draw.²⁹⁵ As a result, in German law it is not possible to undermine the fundamental characteristics of a contract. For example a security clause in a sales contract providing that, as long as any item purchased from the store was not completely paid, all items bought from the store serve as security for the open balance and could be repossessed upon default of any payment would be held invalid under § 307(2) No 2 BGB. Such extended possibility of repossession makes it difficult to obtain unrestricted possession of the purchased goods as right inherent to contract.

Contrary to German law, in South African law it is generally possible to undermine the fundamental characteristics of a contract. Thus, it was held in the case *Afrox Healthcare Bpk v Strydom* that a contract term contained in a hospital's admission form, which exempted the hospital from liability for the negligence of its staff, was enforceable.²⁹⁶

It is argued that this resulted in a modification of the consequences of the contract in a manner opposed to the nature of the contract itself. An exemption clause in the medical context effectively allows the hospital to provide a service, which is substantially different from the essential obligation normally imported by the contract.²⁹⁷ Typically, a contract to obtain medical care imports the provision of professionally acceptable medical care.²⁹⁸ The approach of the Court in *Afrox Healthcare Bpk v Strydom* ignored the foundations on which the medical professions are built – that of a caring relationship between healthcare worker and

²⁹³ See for example BGH 41 *BGHZ* at 151.

²⁹⁴ Holmes and Thurmann (note 46) at 359.

²⁹⁵ Maxeiner (note 36) at 153.

²⁹⁶ See *Afrox Healthcare Bpk v Strydom* (note 172) in general.

²⁹⁷ T Naudé and G Lubbe 'Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*' (2005) 122 *SALJ* 441 at 459.

²⁹⁸ *Ibid.*

patient.²⁹⁹ In a contract to obtain medical care the interest in the patient's bodily inviolability is at stake.³⁰⁰ Such an interest is affected by an exemption clause that excludes the essence of the contract designed to protect it.³⁰¹

Generally, the decision of *Afrox Healthcare Bpk v Strydom* acknowledged that a court has the power to strike down contract terms contrary to public policy. However, the decision can be considered as departure from the brief turn towards justice made by the case *Sasfin (Pty) Ltd v Beukes*³⁰². Whereas public policy was a useful tool in *Sasfin (Pty) Ltd v Beukes*³⁰³ which superseded the notion of freedom of contract, such notion was upheld above all other values in the decisions *Brisley v Drotsky*³⁰⁴ and *Afrox Healthcare Bpk v Strydom*³⁰⁵. In both the latter cases the courts returned to the traditional view that public policy favors the notion of freedom of contract.

Despite the differing extent of protection of the submitting party in both jurisdictions, it can be noticed that both the German and South African law set limits for the substantial control of (standard form) contract terms. In South African law, this is achieved by the practise to declare contracts contrary to public policy sparingly and only in the clearest of cases.

In German law, a limitation is achieved by means of § 307(3) BGB. Literally, the provision of § 307(3) BGB limits the content control of standard form contract terms that provide changes and additions to non-compulsory provisions of the BGB. However, it is unanimously agreed that fundamental terms of the contract, namely performance and price, are

²⁹⁹ Naudé and Lubbe (note 297) at 460.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² (note 172).

³⁰³ *Ibid.*

³⁰⁴ See *Brisley v Drotsky* (note 172) in general.

³⁰⁵ See *Afrox Healthcare Bpk v Strydom* (note 172) in general.

also excluded from a content control.³⁰⁶ The exclusion of the *essentialia negotii* of a contract thereby serves to protect the notion of freedom of contract.³⁰⁷ The fundamental terms of the contract belong to the core of the notion of freedom of contract, which must not be restricted. Moreover, it is submitted that contractual parties do not need to be protected in respect of such terms. The underlying notion of the German standard form contract law is that the submitting party needs to be protected for certain reasons. One of these reasons is that such party is often unaware of the standard form contract terms or does not understand such. This is different concerning the performance and price of the contract. As fundamental terms, it can be presumed that both parties know about them and do want to include them into the contract. Therefore protection is not necessary.

6. Dogmatic Differences

In order to determine the enforceability both jurisdictions use general principles for making / doing individual justice. However, it can be noticed that such general principles underlies a different dogmatic.

A contract against public policy in South African law is defined as

'one stipulating performance which is not *per se* illegal or immoral but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community'.³⁰⁸

It is argued that public policy is similar to the English doctrine of equity. The body of law referred to as equity in English law is supposed to be a supplement to the common law, in order to alleviate the rigidity and harshness of its rules.³⁰⁹ The aforementioned definition of public policy

³⁰⁶ See for example BGH 1998 *Neue Juristische Wochenschrift* at 383; Jauernig (note 78) § 307 at 316 para 14.

³⁰⁷ Jauernig (note 78) § 307 at 316 para 14.

³⁰⁸ Aquilius 'Immorality and Illegality in Contract' 1941 *SALJ* 346.

³⁰⁹ A Mason 'The impact of equitable doctrine on the law of contract' (1998) 26 *Anglo-Am. L. Review* 1 at 1.

illustrates that also public policy serves as a supplementary control mechanism.

Contrary to this role of public policy in South African law, good faith in German law is incorporated in the BGB (in § 242 BGB and § 307 BGB). Therefore it can be considered as a part of the BGB and not a supplement.

IV. Severability

As illustrated above, in German law the remainder of a contract generally continues to be valid if some of its terms are found invalid, § 306(1) BGB. Standard form contract terms that have not become part of the contract or that are invalid are substituted by the relevant statutory rules of the BGB, § 306(2) BGB.

Contrary to the presumption of validity of the remainder of a contract in German law, the South African law on this matter has not been stated authoritatively.³¹⁰ Even if an objectionable part of the contract can be severed according to the aforementioned test³¹¹ public policy may require that the contract should be enforced at all.³¹² However, there is also support for the view that severance from the illegal part will be allowed and the remainder of the contract will be upheld and enforced.³¹³

Noticeably different is that in South Africa the contract terms that have not become part of the contract or that are invalid are not substituted (e.g. by statutory rules as there are no statutory rules in this area of law). This difference interacts with the different means for substantive control of (standard form) contract terms in both jurisdictions. As illustrated above, a content control in German law is only possible by means of §§ 307 – 309 BGB. In South African law substantive control is possible by using public

³¹⁰ Van der Merwe, Van Huysteen, Reinecke, and Lubbe (note 1) at 186.

³¹¹ For details see chapter 4 A VI.

³¹² *Sasfin (Pty) Ltd v Beukes* (note 172) at 15 *et seq.*

³¹³ See for example *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* (note 172) at 896.

policy and by using the *contra proferentem* rule. The latter possibility may sound dogmatically unsound, as the *contra proferentem* rule is a rule for interpreting ambiguous contract terms.

However, it is argued that the use of the *contra proferentem* rule in South African law is understandable and makes sense in the particular circumstances. South African law does not provide for statutory rules of law that can substitute contract terms that are held unenforceable. Additionally, a general rule is that the court may not make a contract for the parties.³¹⁴ Therefore the question arises what happens to the “gap” in the contract that arises due to the enforceability of a particular contract term. Besides providing the guidelines that I illustrated earlier in this section, South African courts avoid giving an answer to this question by using the *contra proferentem rule* as illustrated above. It is argued that by narrowly interpreting a contract term nothing else is done but substituting such unfair term by giving it its minimum of effectiveness. The end result then is the same as in German law where invalid unfair standard form contract terms are substituted by statutory provisions.

V. Institutional Action versus Individual Litigation

Finally, one main difference between the German and the South African law on standard form contracts lies in the procedural provisions. As illustrated above, German law provides in its Unterlassungsklagengesetz (Law of Actions for Injunctions for Violations of Consumer and Other Law, UklG) specific provisions for measures designed to prevent the use of unfair standard terms. Thus, German law operates with the so-called institutional action (Verbandsklage).³¹⁵ As described above, this institutional action can be stated more succinctly as follows: A consumer organisation brings an action against the user of unfair contract terms (§ 1UklG). If these terms are found to be invalid in the judgment, they are invalid in respect of all standard form contracts containing this invalid

³¹⁴ *Laws v Rutherford* (note 183) at 264.

³¹⁵ For details see above chapter 3 A II.

terms (§ 11 UklG). This consumer organisation also exercises a monitoring function. Thus the user of the unfair contract term is subject to a fine if that user continues to use the term, which was previously declared invalid. This institutional action must not be confused with class actions. The institutional action operates as an independent watchdog. Additionally, consumers still have the opportunity to bring an ordinary action against the user of illegal standard form contract terms. In contrast, this institutional action does not exist under South African law.³¹⁶

³¹⁶ Advantages and disadvantage of this situation will be discussed in the evaluation contained in chapter 6 E.

B. Comparison in a Broader Context: Further Thoughts

The German and South African law on standard form contracts reflect the difference in approach taken by those jurisdictions when the tension between freedom of contract and individual justice is balanced. The jurisdictional approaches demonstrate that although different, they come to the same or to a similar result. However, it can also be noticed that the German law of contract in general is illustrative of a tendency towards individual justice, whereas the South African law of contract leans towards upholding the notion of freedom of contract. German and South African law on standard form contracts also serve to illustrate the influence of the Bill of Rights in German and South African contract law.

I. Classification of Standard Form Contract Terms

Generally, it can be noticed that German law seems to be one step ahead of South Africa in dealing with standard form contracts. German law provides special provisions that deal with standard form contracts. Thus, German law has recognised that standard form contract terms are different from “classical” contract terms. The German approach is cognisant of the problems that occur when parties enter into a standard form contract.³¹⁷ The provisions of the BGB on standard form contracts reflect this awareness.

Although German standard form contract terms are unanimously considered as a special species of contractual terms, some commentators have even proposed that such terms have the quality of regulatory (administrative) law.³¹⁸ This view can be rejected because the law on standard form contracts treats such terms as contractual provisions and not regulatory provisions.³¹⁹ The drafter or user of standard form contract terms has no authority to impose regulatory law on the other party.³²⁰ Such power would be necessary in order to qualify standard form contract

³¹⁷ Such problems are outlined in chapter two.

³¹⁸ Holmes and Thurmann (note 46) at 344.

³¹⁹ See for example RG 179 *RGZ* at 223; BGH 83 *BGHZ* at 86.

³²⁰ Holmes and Thurmann (note 46) at 344.

terms as regulatory law. Standard form contract terms rather become a part of the contract by agreement of both parties.

However, the idea that standard form contract terms can be characterised as regulatory law is not without reason.³²¹ Such a characterisation furthers an understanding that such terms are different from individually negotiated terms.³²² It also illustrates that the consent of the party subject to standard form contract terms is defective.³²³ The characterisation of standard form contract terms as regulatory terms illustrates that the consent to such terms is defective because of two reasons: Firstly, it is not based on a true choice of the party subject to the terms and secondly, such party usually does not even know or understand what he or she has assented to.³²⁴ However, the recognition by German law that such terms are distinct from classical contract terms is important.³²⁵

Such recognition helped the German law on standard form contracts to make a basic distinction between standard form contract terms and individually negotiated ones.³²⁶ It is argued that such distinction is one of the most important achievements of modern contract law. German standard form contract law can be considered a success in this regard.³²⁷

Contrary to German law, the current South African law does not differentiate between standard form contract terms and individually negotiated ones. Thus, special provisions cannot be found. However, South African contract law also recognises the need for special treatment of unfair (standard form) contract terms. In order to satisfy this need,

³²¹ Holmes and Thurmann (note 46) at 345.

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ Holmes and Thurmann (note 46) at 345 - 346. For details of the question if standard form contracts can be considered as classical contracts see above chapter 2 D.

³²⁵ Holmes and Thurmann (note 46) at 346.

³²⁶ Holmes and Thurmann (note 46) at 347.

³²⁷ See Maxeiner (note 36) at 149 with further references to that statement.

South African law has established certain exceptional rules to the classical rules of its contract law. In this spirit, exceptions to the *caveat subscriptor* rule and to an absolute upholding of the notion of freedom of contract can be found.³²⁸ Such rules and their exceptions form current South African law dealing with standard form contracts. It is submitted that such system is confusing for a neutral observer and not systematically sound.

However, Germany's law on standard form contracts also started off as judge-made law that established exceptions to rules and principles of classic German contract law. Moreover, the South African legislator has drafted a proposed Act on unfair contract terms. Thus, the need for changes and clearance in this area of law has been recognised. Pending these changes, South African contract law remains highly controversial in this regard.

II. Ways of Balancing out the Competing Interests of the Notion of Freedom of Contract and Consumer Protection

Both jurisdictions recognise that the control of standard form contract terms challenges the notion of freedom of contract. German consumer protection legislation that deals with standard form contracts has taken the notion of freedom of contract into account. South African courts also took this notion into account in regard to common law rules that apply to standard form contracts. Therefore both the German and South African law aim to control standard form contract terms without aborting the notion of freedom of contract. In this context, it can be noticed, that both jurisdictions balance the competing interests of freedom of contract and consumer protection by using different means.

German law uses a so-called contract model.³²⁹ In German theory, the contract model does not limit the notion of freedom of contract.³³⁰ In

³²⁸ For details see above chapter 5 A III.

³²⁹ Maxeiner (note 36) at 146.

prohibiting the user of standard form contract terms from taking inappropriate advantage of the party subject to such terms, German law claims that it does not limit the core of the notion of freedom of contract. It considers the freedom to enter into a contract (Abschlussfreiheit) as such core.³³¹ Standard form contract law, in preventing the use of certain standard form contract terms, limits only the freedom to shape the conditions of a contract (Gestaltungsfreiheit). Therefore German law argues that the core of the notion of freedom of contract is untouched.³³²

The German contract model has its name because it applies to all standard form contracts without limitation as to personal characteristics of the contractual parties.³³³ The content control it imposes is considered to be abstract and universal. Thereby the contract model does not ask whether the standard form contract term is fair in regard to the particular parties of the contract. As illustrated earlier, the circumstances of the individual parties to the particular contract are not taken into account. Thus it is not necessary for courts to find that the party subject to standard form contract terms is a weak party in order for the contractual terms to be declared invalid. German standard form contract law applies to both consumer contracts and commercial contracts. The only concession German law makes is to take into account specific experience and capability of a party subject to standard form contract terms when deciding on the ambiguity of a term under § 305c(2) BGB. The focus of review of German standard form contract terms is thereby the control of their content.³³⁴

Contrary to German law, South African law uses the so-called consumer model. As opposed to the contract model, the South African

³³⁰ See BT (Bundestag)-Drucksache (Report of the German Law Commission) 14/6040 at 149.

³³¹ As illustrated above, also shaping the fundamental terms of the contract belongs to the core of the German notion of freedom of contract.

³³² Maxeiner (note 36) at 148.

³³³ Maxeiner (note 36) at 160.

³³⁴ Maxeiner (note 36) at 146; Holmes and Thurmann (note 46) at 352.

consumer model is limited to consumer contracts.³³⁵ This does not mean that the common law rules developed to protect the party subject to the standard form contract terms are only applicable to consumer contracts. Such rules apply, like in Germany, to commercial contracts and consumer contracts. However, due to the fact that South African law takes individual circumstances into account when reviewing the content of standard form contract terms, the protecting rules apply hardly to commercial contracts. A finding of weakness in the party subject to standard form contract terms is not likely if contracting business people are concerned. The typical lack of bargaining power will rather be found if a consumer is involved.

Using the consumer model, South African law balances out the competing interests between the notion of freedom of contract and consumer protection different from German law. While generally favouring the consumer, South African law focuses its review of (standard form) contract terms on incorporation and interpretation of such terms. As illustrated above, the power to declare a contract term unenforceable because its content is contrary to public policy and thus limiting the parties' freedom of contracts is exercised very sparingly and only in the clearest cases.

III. The Role of Good Faith in German and South African Contract Law

The approaches of German and South African law on standard form contracts are good examples of the role of good faith in both jurisdictions' contract law. The role of good faith differs considerably in both jurisdictions. Whereas under German law, the notion of good faith declares contract terms that violate such notion invalid (§ 242 BGB), South African law only acknowledges good faith as underlying principle of the contract law.³³⁶ However, the notion of good faith in both jurisdictions, despite the differences, is regarded as an ethical value or controlling

³³⁵ See Maxheimer (note 38) at 160 who considers US-American contracts.

³³⁶ *Brisley v Drotsky* (note 172) at 15 E.

principle, which is based on community services and standards of fairness, that underlies and informs the law of contract.³³⁷ In both German and South African law, the notion of good faith, finds expression in various legal rules and doctrines, Furthermore, the notion of good faith defines the form, content and field of application of these legal rules and doctrines.³³⁸

As mentioned above, the general clause of the content control of standard term contract terms in Germany, § 307 BGB, copies the general clause of the BGB concerning good faith: § 242 BGB. Thus, § 307 BGB expresses the relevance of the notion of good faith in the German standard form contract law.

Generally, the notion of good faith plays a huge role in German contract law. It can be noticed that the wording of § 242 BGB³³⁹ is a general and bland statement. However, it is precisely this generality that makes the provision so important.³⁴⁰ Thus, § 242 BGB functions as a means of German private law to keep the BGB up to date.³⁴¹ Its generality allowed it to become the hook on which numerous value judgments of German courts could be attached.³⁴² For example and as illustrated above, the content control of standard form contract terms originates from § 242 BGB.

Briefly, § 242 BGB has three functions in German law. Firstly, the provision of good faith has the function to flesh out the contractual relationship of the parties where provisions in the BGB are missing (Ergänzungsfunktion).³⁴³ Secondly, it has the function of re-construction

³³⁷ For South Africa: D Hutchinson 'Good Faith in the South African Law of Contract' in R Brownword, NJ Hird and G Howells (eds) *Good faith in Contract, Concept and Context* (Ashgate Dartmouth: Aldershot, 1999) 213 at 230.

³³⁸ *Ibid.*

³³⁹ 'Obligations shall be performed in the manner required by good faith, with regard to commercial usage.'

³⁴⁰ Hutchinson (note 337) at 230.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ Markesinis, Lorenz and Dannemann (note 66) at 513.

of contractual obligations (Korrekturfunktion).³⁴⁴ Thirdly, and particularly relevant for standard form contracts, the notion of good faith has the function to limit the power of all rights bearers to exercise such rights.³⁴⁵ In the context of the last function, the rights bearer must not take unfair advantage of another rights bearer, probably his or her contractual partner.

The importance of these functions is highlighted by the consequences for violating the notion of good faith. In the case of a contract term violating the notion of good faith, such term is invalid and thus unenforceable.³⁴⁶

The role of good faith in South African law is contrary to the strong notions of good faith in German law. In many regards, good faith is a nebulous and ill-conceived aspect of South African contract law.³⁴⁷ For a long time, a remarkable aspect of the South African contract law was the complete absence of the notion of good faith.³⁴⁸ Nowadays, the notion of good faith exists in South African contract law, and its role is clearly defined. The next chapter will be concerned with assessing whether the current role and definition are sufficient and whether such role and definition should be supported,

After its absence in the South African contract law, the elimination of the *exceptio doli* set the scene for a dramatic entrance of the notion of good faith.³⁴⁹ Thus, in the case of *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman NO*³⁵⁰ it was held that if good faith so required, a court could refuse to enforce an otherwise valid contract. Although this decision was welcomed, such brief turn towards fairness in the South

³⁴⁴ Markesinis, Lorenz and Dannemann (note 66) at 514.

³⁴⁵ Jauernig (note 78) § 242 at 167 para 7.

³⁴⁶ Jauernig (note 78) § 242 at 174 para 36.

³⁴⁷ A Fletcher 'The Role of Good Faith in the South African Law of Contract' 1996 *Responsa Meridiana* 1 at 1.

³⁴⁸ L Hawthorne 'Closing the Open Norms in the Law of Contract' (2004) 67 *THRHR* 294 at 295.

³⁴⁹ Hawthorne (note 348) at 296.

³⁵⁰ 1997(4) SA 302 (SCA).

African law of contract was effectively ended in *Brisley v Drotsky*.³⁵¹ The Court in *Brisley* clearly defined the role of the notion of good faith. The Court practically dismissed such notion and held, that it operates indirectly, i.e. not as

Translation: 'an independent, or "free-floating" basis for the setting aside or non-enforcement of contractual provisions... Good faith is a foundational principle that underlies contract law and finds expression in the specific rules and principles of the latter'.³⁵²

This departure from fairness in South African contract law was approved in the case *Afrox*³⁵³ and more recently in *South African Forestry Co Ltd v York Timbers*³⁵⁴. Due to such recent case law, a refusal of a direct use of the notion of freedom of contract can be noticed.

The notion of good faith in South African law is regarded as

'an ethical value or controlling principle, based on community standards of decency and fairness, that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation'.³⁵⁵

Thus, it can be noticed that courts in South African law, contrary to German law, do not have power to declare contract terms invalid because they violate the notion of good faith. The South African notion of good faith is not an uncodified version to § 242 BGB.³⁵⁶ However, in both jurisdictions the notion of good faith, although not regarded as legal rule in South African law, reflect a basis of the doctrinal substance of the law and influences its formation and adaptation.³⁵⁷ In German law, one example

³⁵¹ (note 172).

³⁵² *Brisley v Drotsky* (note 172) at 15 E.

³⁵³ *Afrox Healthcare Bpk v Strydom* (note 172).

³⁵⁴ 2005 (3) SA 323 (SCA).

³⁵⁵ Hutchinson (note 337) at 230.

³⁵⁶ G Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law (2004) 121 SALJ 395 at 397.

³⁵⁷ For South African law see *Afrox Healthcare Bpk v Strydom* (note 172) at 41B.

for such formation and adaptation of the law is the development of the law on standard form contracts.

In South African law, the notion of good faith is an aspect of the wider notion of public policy: the courts invoke and apply such notion whenever the public interest so demands.³⁵⁸ That leads to the question of whether public policy in South African law has become the equivalent to the notion of good faith in German law? The use of the notion of good faith in German law to strike down unfair standard form contract terms and the use of the notion of public policy in South African law to do so could lead to such an assumption.

However, it is argued that the notion of public policy in South African law, although having reached similar results in some cases, cannot be considered to be the equivalent of the notion of good faith in German law. Whereas the notion of good faith in German contract law reviews the behaviour of the parties in respect of contractual fairness, public policy in South African law balances out the notion of freedom of contract on the one hand with the need for individual justice on the other hand.³⁵⁹ Public policy can be seen as the mantle under which such competing factors operate.³⁶⁰

The notion of good faith in German law provides the courts with the power to grant individual justice and therefore establishes a certain degree of fairness in the German civil law. As illustrated above, public policy generally favours the notion of freedom of contract and declares unfair contract terms contrary to good faith very sparingly and only in the clearest of cases. Thus, it is submitted that individual justice and fairness have a greater significance in German contract law than they do in South African contract law.

³⁵⁸ *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman NO* (note 393) at 406 h-i.

³⁵⁹ For details see above chapter 5 A III 3 and 4.

³⁶⁰ Fletcher (note 347) at 6.

IV. The Influence of the Bill of Rights in German and South African Contract Law

The approaches of German and South African law on standard form contracts also illustrate the influence of the Bill of Rights in German and South African contract law. In both jurisdictions, the Bill of Rights operates horizontally.

German law, in this respect, shows a very sophisticated a rational approach of how to balance the basic right of individual autonomy from state intervention against the right of other individuals.³⁶¹ Although the German Constitution (GG) does not discuss the horizontal effect of human rights, such an effect is acknowledged in modern German law.

Thereby, German law opened up the possibility to subject private law to the regime of the Constitution rather early in its history.³⁶² In the so-called *Lüth* decision the Federal Constitutional Court (Bundesverfassungsgericht, hereinafter BVerfG) 'held that the Bill of Rights not only provides the individual citizen with protection against the state, but also constitutes a system of basic values permeating the legal system as a whole' (horizontal effect of human rights).³⁶³ Since then, the German Bill of Rights is considered to constitute a comprehensive value system.³⁶⁴ Thereby, the entire body of private law has to be interpreted in the spirit of the Bill of Rights (so-called concept of indirect effect of the Bill of Rights).³⁶⁵ Major ports of entry for the constitutional value system are the general clauses contained in the BGB, especially §§ 138 (good morals) and 242 (good faith) BGB.³⁶⁶

³⁶¹ B Marquesinis 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons From Germany' (1999) 115 *The Law Quarterly Review* 47 at 47-48.

³⁶² Habersack and Zimmermann (note 24) at 274.

³⁶³ 7 *BVerfGE* at 198; and Habersack and Zimmermann (note 24) at 274.

³⁶⁴ In this context see the *Elfes* decision of the BVerfG 6 *BVerfGE* at 32.

³⁶⁵ Habersack and Zimmermann (note 24) at 275.

³⁶⁶ *Ibid.*

Accordingly, the BGH soon started to distance itself from purely formalistic approaches, which upheld the notion of freedom of contract.³⁶⁷ The Bill of Rights in the law of contract applied horizontally by using §§ 138 and 242 BGB as means for policing the substantive fairness of standard form contracts.³⁶⁸

The underlying basis of this policing is the guarantee of the autonomy of private individuals (Art 2(1) GG). Such autonomy is not properly safeguarded by a regime of an unrestricted notion of freedom of contract.³⁶⁹ The BverfG deems that parties who are engaged in private transactions are fundamentally equal in regards to their protection by the Bill of Rights.³⁷⁰ It has been held that, this fundamental equality would be disregarded only if the rights of the more powerful party were to prevail.³⁷¹ Where one party dominated to such extent that it alone could determine the content of the contract, the behaviour of the other party is characterised by heteronomy rather than by self-determination.³⁷² Thus, in typical situations such as the situation where one party is inferior and the other superior³⁷³ the legal system has to provide a rescue in order to maintain private autonomy and to comply with the requirements of the Sozialstaat³⁷⁴ principle.³⁷⁵ As a result one can say that the German law on standard form contracts is a product of the influence of the Bill of Rights in German contract law.

Contrary to the German Constitution, the South African Constitution has expressly stated the horizontal application of the Bill of Rights in its section 8. Thereby, section 8 lays down a two-stages process of the horizontal application. Firstly, section 8(2) requires an examination of the

³⁶⁷ Habersack and Zimmermann (note 24) at 279.

³⁶⁸ For details see above chapter 3 B.

³⁶⁹ Habersack and Zimmermann (note 24) at 277.

³⁷⁰ See for example 89 *BVerfGE* at 214.

³⁷¹ Habersack and Zimmermann (note 24) at 277.

³⁷² *Ibid.*

³⁷³ An example for a contract in such a situation is, as illustrated in chapter 2, a standard form contract.

³⁷⁴ Literally translated: principle of social welfare state.

³⁷⁵ Habersack and Zimmermann (note 24) at 275.

right in question and its correlative duty in order to see if they are applicable.³⁷⁶ Secondly, if such right and duty are applicable, section 8(3)(a) requires the court to give effect to them by applying or developing the common law “to the extent of that right.”

Section 8 of the South African Constitution becomes relevant in relation to the law of contract if a term contained within a contract is suspected of violating a constitutional right. When deciding, in accordance with section 8, whether and to what extent a constitutional right is applicable and whether the right should be limited, the principle *pacta sunt servanda* must always be taken into account.³⁷⁷ In other words, the horizontal effect of human rights in South African contract law requires weighing the right to enforcement of a contract (together with its corollary the notion of freedom of contract) against a constitutional right.³⁷⁸ In the case of standard form contracts, such constitutional right could be section 9: equality in the sense of contractual equality. Similar to German law, the right to contractual equality would be disregarded if the right of the more powerful party (i.e. freedom of contract) would succeed. It is argued that freedom of contract, when abused by the party with the greater bargaining power to achieve unfair contracts, undermines the values of equality and dignity that are supposed to permeate the South African constitutional dispensation.³⁷⁹

Taking the aforementioned basis into consideration, the judges in the South African case of *Brisley v Drotzky* stated that public policy in its modern guise is rooted in the Constitution and the fundamental values it enshrines.³⁸⁰ Accepting this *dictum*, it was expressly held in *Afrox* that the higher courts are obliged to develop the common law in order to give

³⁷⁶ RH Christie ‘The law of contract and the Bill of Rights’ *Bill of Rights Compendium* (looseleaf 1998-) para 3H1 at para 3H3.

³⁷⁷ Christie (note 376) at para 3H5.

³⁷⁸ *Ibid.*

³⁷⁹ D Tladi ‘One Step Forward, Two Steps Back for Constitutionalising the Common Law: *Afrox Health Care v Strydom*’ (2002) 17 *SA Public Law* 473 at 477.

³⁸⁰ *Brisley v Drotzky* (note 172) at 34 G-H.

effect to the Bill of Rights.³⁸¹ Accordingly, there is a further similarity to German law, as public policy as a general rule can serve as a vehicle for the realisation of human rights.

As a result, one might think that human rights play the same role in German and South African law of contract. However, this is not the case. Although both jurisdictions have the same starting point concerning a horizontal effect of human rights, as well as general rules that serve as ports of entry, it is argued that only German law consequently applies human rights when reviewing unfair contracts. In South Africa, the recognition of the courts to take human rights into consideration when reviewing a contract did not yield any practical results yet.³⁸² In both cases, *Brisley v Drotsky* and *Afrox*, the questionable contract terms were held enforceable.

³⁸¹ *Afrox Healthcare Bpk v Strydom* (note 172) at 37 D-E.

³⁸² Lubbe (note 356) at 410.

Chapter Six

Should South Africa Adopt Legislation on Standard Form Contracts?

In light of the questions raised within the first 5 chapters of this dissertation, this final chapter aims to discuss whether South Africa should introduce legislation on standard form contracts. However this chapter will preclude a detailed discussion of the form this legislation should exhibit. In this regard, the German law on standard form contracts will provide an example of a jurisdiction where such legislation has been introduced and whether such legislation has been successful.

Introducing legislation governing standard form contracts in South Africa will require the common law to be developed. This development is necessary in order to give effect to the Bill of Rights and allow the notion of good faith to play a more significant role. Thus, the discussion will also contain arguments on these issues.

A. Should the Notion of Good Faith Have a More Significant Role in South African Contract Law?

As illustrated above, good faith operates indirectly in South African law. It is only one factor that is taken into account when deciding whether a contract term is contrary to public policy. As illustrated above, South African public policy generally favours the competing notion of freedom of contract. Accordingly, it should be determined whether the notion of good faith should have a more significant role in South African contract law than its present status allows? It is argued that the answer to the afore-stated question is that good faith should play a more significant role.

In finding an answer, one must determine the needs of South African society. One must also consider that the economic climate in South Africa is dynamic. Thus this dynamism must be translated into South African contract law in order for the law to remain a useful

institution.³⁸³ South Africa has reached the stage of economic development described above, where individuals have no choice but to contract with vast and powerful corporations on an almost daily basis.³⁸⁴ The power disparity inherent in such a bargaining situation needs no further explanation. Accordingly, there is a need for a more significant role of the notion of good faith. This need exists in order to protect the weaker party in the bargaining process.

Another issue in favour of a stronger notion of good faith concerns the linguistic diversity of South Africa. Many people do not understand English or Afrikaans as the two major languages of South Africa's economy. Thus, they are predisposed to being victims of unfair contract terms via the widespread use of standard form contracts.³⁸⁵

This language disadvantage adds to the problems experienced by people subject to standard form contract terms. Typically the subjecting party does not read or understand the content of such term due to the complicated language in which such term is written. Furthermore, the spirit of the South African Bill of Rights leans towards a stronger notion of good faith in contracting.

B. Should South African Courts Develop the Common Law in order to Protect the Weaker Party of a Contract to a Greater Extent?

Presently, although all law inconsistent with the Constitution is invalid, and although courts should promote the spirit, purport and objects of the Bill of Rights, South African courts upheld the notion of freedom of contract above all other values.³⁸⁶ This is possible as a result of the fact that the Constitution contains a variety of human rights that in certain cases conflict.³⁸⁷ In the law of contract such rights include human dignity and

³⁸³ Fletcher (note 347) at 8.

³⁸⁴ Fletcher (note 347) at 9.

³⁸⁵ Fletcher (note 347) at 10.

³⁸⁶ Tladi (note 379) at 477; Hawthorne (note 348) at 294.

³⁸⁷ Hawthorne (note 348) at 294.

equality on the one hand and the notion of freedom of contract in the other hand. In the case of *Afrox*, where the notion of freedom of contract was upheld, it was stated that freedom of contract promotes constitutional values.³⁸⁸

It is argued that such view does not sufficiently address the inequality of bargaining power. Thus, the notion of freedom of contract is based on the false assumption that all contracting parties are equal.³⁸⁹ Certainly, in cases where the contracting parties are equal concerning their bargaining power, the notion of freedom of contract is unobjectionable.³⁹⁰ However, if they are not, upholding such notion can result in 'obscene excesses', which are unfair to the party with less bargaining power.³⁹¹ Therefore, the abuse of freedom of contract by the stronger party undermines the values of equality and dignity of the weaker party with less bargaining power.³⁹²

In order to exist, the notion of freedom of contract presupposes equality between the contracting parties.³⁹³ If such equality does not exist, the task of the Constitution should be to protect the weak and exploited party. As argued above, although the need has been recognised, such protection has not been developed sufficiently at present. Therefore, the common law must be developed in favour of the weaker party. And the weaker party in the case of standard form contracts is the party who is subject to the terms of such contracts.

C. Should South Africa Introduce Legislation Even if the Answer to the Above Questions is Affirmative?

If the aforementioned questions are answered affirmatively, and the notion of good faith is allowed to play a more significant role as well as

³⁸⁸ See *Afrox Healthcare Bpk v Strydom* (note 172) in general.

³⁸⁹ Tladi (note 379) at 477.

³⁹⁰ *Ibid.*

³⁹¹ *Brisley v Drotsky* (note 172) at 35D.

³⁹² Tladi (note 379) at 477.

³⁹³ Hawthorne (note 348) at 301.

developing the common law in favour of the weaker contractual party, this would give the courts a greater power to declare unfair (standard form) contract terms contrary to public policy (or even good faith). One must be aware that the problems which occur in cases of standard form contracts will not be solved. It is argued that such a solution is not sufficient and that the need for legislation is evident.

As was expressly held in separate concurring judgment of Cameron J, in *Brisley v Drotzky*

‘neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.’³⁹⁴

The aforementioned *dicta* illustrates that South African courts perceive judicial supervision of contracts to be contrary to the fundamental principle of freedom of contract.³⁹⁵ The Constitution might bestow courts with a greater power to declare contractual terms contrary to public policy, but this does not permit the courts to ignore precedents.³⁹⁶

Accordingly, in order to provide for a proper protection of the party subject to unfair (standard form) contract terms, a statutory framework in which courts are given the power to scrutinise the fairness of contractual terms is necessary.³⁹⁷

An argument against the introduction of legislation is that such legislation would denigrate two fundamental principles in contract law: certainty and the notion of freedom of contract.³⁹⁸ Certainty in contract law allows contractual parties to plan their future safely.³⁹⁹ It is also

³⁹⁴ *Brisley v Drotzky* (note 172) at 35C-E.

³⁹⁵ J Lewis ‘Fairness in South African Contract Law’ (2003) 120 *SALJ* 330 at 330.

³⁹⁶ Lewis (note 395) at 338.

³⁹⁷ Lewis (note 395) at 330.

³⁹⁸ Fletcher (note 347) at 10; Lewis (note 395) at 344.

³⁹⁹ Lewis (note 395) at 344.

important for South Africa's economy as it attracts investors. It cannot be denied that such certainty in law is very important.⁴⁰⁰ Giving good faith in contract law a more significant role might detract from legal certainty. However, it is submitted that such concerns are misplaced. Legislation governing standard form contracts could provide detailed guidelines as to what is considered fair. Such guidelines are provided by the German law in relation to §§ 308 and 309 BGB and by section 2 of the proposal of the South African Law Commission. Furthermore, the use of such guidelines serves to enhance legal certainty regarding standard form contracts.⁴⁰¹ The adherence to these guidelines would allow contractual parties to tailor their actions accordingly. Furthermore, statutory guidelines also exhibit a preventative effect. If users of standard form contracts terms are aware in advance of the permissible and enforceable limits, it is argued that the use of unfair contract terms would be prevented.

Another fear is that legislation would lead to a flood of litigation and that courts would be burdened with hundreds of cases.⁴⁰² Businesses would be disinclined to contract with consumers who might make use of the legislation to escape the contract.⁴⁰³ It is submitted that such arguments are convincing in deterring the implementation of legislation. Individuals must not be denied contractual justice and fairness due to the fear that such legislation would result in extra work for the courts.⁴⁰⁴

Much has been canvassed earlier in this chapter concerning the fears that legislation would degrade the notion of freedom of contract. Thus, restricting the notion of freedom of contract to promote contractual fairness is not only justifiable, but also advisable. However, the view taken by South African judges, that the notion of freedom of contract has

⁴⁰⁰ Fletcher (note 347) at 11.

⁴⁰¹ Lewis (note 395) at 346.

⁴⁰² Lewis (note 395) at 344.

⁴⁰³ *Ibid.*

⁴⁰⁴ Lewis (note 395) at 345.

to be upheld above other values, seems out of sorts in a developing country, in which illiteracy, poverty, disease are widespread.⁴⁰⁵

It is suggested that the notion of freedom of contract must rather be placed in the context of society, its values and the economy⁴⁰⁶, instead of judges slavishly adhering to this notion. German law on standard form contract shows⁴⁰⁷ that fairness in the law of contract and the parties' freedom of contract are not mutually exclusive.

D. Should the Legislation Apply to Contractual Terms in General or to Standard Form Contract Terms Only?

Taking all these thought into consideration, one has to determine whether the necessary legislation should be applicable to contractual terms in general or to standard form contract terms only. It is argued that only in cases where the contract is contained in a standard form is there sufficient reason to limit the notion of freedom of contract.⁴⁰⁸ There is no convincing reason to interfere with the notion of freedom of contract if the questioned term is the result of a give-and-take process of bargaining.⁴⁰⁹ Only where the party subject to the contract terms accepts such without having a chance to bargain, the argument that the notion of freedom of contract may not have worked properly applies.⁴¹⁰ Therefore, legislation should be introduced only in respect of standard form contract terms.

⁴⁰⁵ Hawthorne (note 348) at 301.

⁴⁰⁶ Hawthorne (note 348) at 295.

⁴⁰⁷ The German law on standard form contract uses its contract model, which aims to leave the core of freedom of contract intact.

⁴⁰⁸ Lubbe (note 356) at 409.

⁴⁰⁹ Lubbe (note 356) at 410

⁴¹⁰ *Ibid.*

E. Which Mechanism Should be Introduced in order to Make the Legislation Effective?

Introducing legislation on standard form contract terms in South Africa is necessary. However, equally important is to provide for a mechanism through which the legislation is to be made effective.

The mechanism normally available is private litigation. Thereby, the party subject to standard form contract terms bases the claim or defence on the invalidity of the term on which the user of such term relies.⁴¹¹ It is argued that such mechanism is not a satisfactory solution to the problems, which occur in standard form contract cases.

A litigation-based remedy places the entire burden of redress on the party subject to the standard form contract terms. This has the disadvantage that the costs of litigation preclude many of such parties from bringing the matter to court to obtain redress.⁴¹² Thus, protection of the party subject to the standard form contract exists in theory only, if such party has to resort the court by him- or herself.⁴¹³

More effective in this context is a mechanism that provides for a kind of administrative regulation. A watchdog, which brings questionable contract terms to court in order for review, is necessary. A good example of such a mechanism is the institutional action of the German law on standard form contracts as outlined above. Such or similar mechanisms allow courts to hold standard form contract terms invalid and unenforceable in respect of every person that ever concluded the same standard form contract. Control by administrative regulation or institutional action provides preventive protection that litigation-based mechanisms are not able to provide.⁴¹⁴

⁴¹¹ Lubbe (note 356) at 415.

⁴¹² Bates (note 44) at 6.

⁴¹³ *Ibid.*

⁴¹⁴ Bates (note 44) at 9.

Thus, South African legislation on standard form contracts must include a mechanism through which such legislation is to be made effective. One example in this regard is the Ombudsperson, which the South African Law Commission proposes (section 6 of the proposed “Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act”).

Conclusion

Holistically, the German and South African laws on standard form contract terms differ substantially. Both jurisdictions have opted to employ seemingly different systems to deal with the same problems. However, it can be noted that although the approaches differ, the results are similar. Nevertheless, the German law grants greater protection to the submitting party. South African law possesses the means to afford greater protection to such party, as it is acknowledged that contract terms contrary to public policy are unenforceable and that the Bill of Rights influences contract law. However, South African courts are still conservative in their approach and favour the notion of freedom of contract.

In comparing the German and the South African legal systems on standard form contract law it is argued that South Africa should follow a similar system to the German one. German law offers a wide range of protection to the party subject to the standard form contract terms. Such protection occurs predominantly through legislation, whereas South African law relies heavily on the general rules and principles contained within the common law. A strong case can be made for South Africa adopting legislation. At present, the values contained within the Constitution, are not given proper effect to. As a constitutional state and a developing nation, it makes sense to codify constitutional values, so that each person has access to the law. The common law system is at times unclear, compromising and whimsical. More guidance needs to be given to judges, so that the established competing interests may be balanced fairly. As canvassed above, the German law began much like the South African system, but has evolved into something more coherent.

South African courts have taken a conservative view in administering justice in cases of unfair contract terms. By in large, the courts have favoured the notion of freedom of contract ahead of individual justice. Courts in South Africa are restrained in that the vast majority of precedents favour the notion of freedom of contract. In order to break free

from this restraint, guidance must be provided by legislation. It should not be forgotten that South Africa is very weary of maintaining the divisions created by the separation of powers. It has been emphasised time and again that it is not the duty of a court to make law but rather it is the duty to apply law. The enactment of legislation would serve to uphold the traditional distinctions of the judiciary and legislature, and at the same time provide a greater sense of individual justice.

However, it should be emphasised that the proposed legislation would only apply to standard form contracts and not to all unfair contracts. In this regard, it is argued that Germany has taken the correct approach and created a distinction in the law whereby standard form contracts are treated differently from the contracts in classical sense. One must always tread carefully when legislating for the private law sector. Legislation in the private law sector always limits the notion of freedom of contract, and therefore a justification for this individual justice must be evident. Such justification is evident in standard form contract cases for the reasons, which have been illustrated earlier.

It is argued that South African law should also follow German law by instituting a watchdog organisation. Taking into consideration South Africa's political and socio-economic climate, this watchdog organisation would be beneficial as it grants greater access to the law.

However, one should be careful when transplanting legislative ideas into another legal system, as the form and substance of a legal system are determined by the culture behind such system.⁴¹⁵ Such cultural factors are, *inter alia*, the extent by which the members of a society are comfortable with uncertainty and the measures taken to minimise existing uncertainty.⁴¹⁶

⁴¹⁵ D Visser 'Cultural Forces in the Making of Mixed Legal Systems' (2003) 78 *Tulane LR* 41 at 42.

⁴¹⁶ GH Hofstede *Cultures and Organizations: Software of the Mind* (London: McGraw-Hill, 1991) at 13 –15.

It is submitted that German society is less comfortable with uncertainty than South Africa's society seems to be. A certain grade of uncertainty is established in South African contract law due to the centrality of the role of the judge and lack of legislation.⁴¹⁷ These cultural differences should not, however, serve to prevent South Africa from introducing legislation on standard form contracts. The South African legislator is required to develop a codified approach to the problems that exist in standard form contractual relationships.

South African courts attempt to protect the submitting party by employing the concept of public policy. This concept, although static, diverse and ever changing, seems to perpetually favour the notion of freedom of contract above other equally important and competing interests of the submitting party. In effect, the courts favour commercial expediency above the rights of the individual. This position is contrary to the rights contained within the Constitution and justice delayed is justice denied.

As argued above, the comparison and subsequent evaluation of the German legal system provide a strong case for South Africa adopting legislation. The South African Law Commission has proposed with its "Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act" that legislation should be adopted. It is uncertain whether the delay in enacting such legislation is the result of an overworked national assembly or a manifestation of the general apprehension against legislation in the contractual law arena as a whole.

⁴¹⁷ See Visser (note 415) for such uncertainty in English law.

Appendix

Standard Form Contract Law of the German Civil Code, Effective January 1, 2002 (as translated by Geoffrey Thomas and Gerhard Dannemann).

Section 2: Shaping contractual obligations by means of standard terms

§ 305 Incorporation of standard terms into the contract

(1) Standard terms are all contractual terms pre-established for a multitude of contracts which one party to the contract (the user) presents to the other party upon the conclusion of the contract. It is irrelevant whether the provisions appear as a separate part of a contract or are included in the contractual document itself, how extensive they are, what script is used for them, or what form the contract takes. Contractual terms do not constitute standard terms where they have been individually negotiated between the parties.

(2) Standard terms are incorporated into the contract only if, during the conclusion of the contract, the user

1. expressly draws the other party's attention to them, or if, on account of the way in which the contract is concluded, an express reference to them is unreasonably difficult, he draws his attention to them by means of a clearly visible sign at the place where the contract is concluded and
2. gives the other party, in a reasonable manner that also appropriately takes account of any physical handicap of the other party discernible by the user, the possibility of gaining knowledge of their content, and if the other party agrees that they are to apply.

(3) Subject to observance of the requirements set out in subsection (2) above, the parties may agree in advance that particular standard terms will apply to a particular type of legal transaction.

§ 305a Incorporation in special cases

Even if the requirements set out in § 305(2) Nos 1 and 2 are not observed, if the other party agrees to their application:

1. railway tariffs and regulations adopted with the approval of the competent transport authority or on the basis of international conventions and terms of transport, authorised in accordance with the Passenger Transport Act, of trams, trolley buses and motor vehicles in scheduled services are incorporated into the transport contract;
2. standard terms published in the official journal of the regulatory authority for Post and Telecommunications and kept available in the user's business premises are incorporated
 - (a) into contracts of carriage concluded away from business premises by the posting of items in post boxes,
 - (b) into contracts for telecommunications, information and other services that are provided directly and in one go by means of remote communication and during the provision of a telecommunications service, if it is unreasonably difficult to make the standard terms available to the other party before conclusion of the contract.

§ 305b Precedence of individually negotiated terms

Individually negotiated terms take precedence over standard terms.

§ 305c Surprising and ambiguous clauses

(1) Provisions in standard terms which in the circumstances, in particular

in view of the outward appearance of the contract, are so unusual that the contractual partner of the user could not be expected to have reckoned with them, do not form part of the contract.

(2) In case of doubt, standard terms are interpreted against the user.

§ 306 Legal consequences of non-incorporation and invalidity

(1) If all or some standard terms have not become part of the contract or are invalid, the remainder of the contract continues to be valid.

(2) Where provisions have not become part of the contract or are invalid, the content of the contract is determined by the statutory rules.

(3) The contract is invalid if one party would suffer unreasonable hardship if he were bound by the contract even after the amendment provided for in subsection (2) above.

§ 306a No circumvention

The rules in this section apply even if they are circumvented by other arrangements.

§ 307 Content Control

(1) Provisions in standard terms are invalid if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage. An unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible.

(2) In case of doubt, an unreasonable disadvantage is assumed if a provision

1. can not be reconciled with essential basic principles of the statutory rule from which it deviates, or
2. restricts essential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved.

(3) Subsections (1) and (2) above, and §§ 308 and 309 apply only to provisions in standard terms by means of which provisions derogating from legal rules or provisions supplementing those rules are agreed. Other provisions may be invalid under subsection (1), sentence 2, above, in conjunction with subsection (1), sentence 1, above.

§ 308 Clauses whose validity depends on an evaluation

In standard terms the following terms, in particular, are invalid:

1. (period for acceptance or performance)
a provision by which the user reserves the right to an unreasonably long or inadequately specified period for acceptance or rejection of an offer or for performance; this does not include reservation of the right to perform only after expiry of the period for revocation or return under §§ 355(1) and (2) and 356;
2. (additional period for performance)
a provision by which the user, in derogation from legislative provisions, reserves the right to an unreasonably long or inadequately specified additional period within which to perform;
3. (right of termination)
the stipulation of a right for the user to free himself, without an objectively justified reason specified in the contract, of his duty to perform; this does not apply to a contract for the performance of a recurring obligation;
4. (right of amendment)
the stipulation of the user's right to alter or depart from the promised

performance, unless, taking into account the user's interests, the stipulation to alter or depart from performance is reasonable for the other party;

5. (fictitious declarations)

a provision whereby a declaration of the user's contractual partner is deemed or not deemed to have been made by him if he does or fails to do a particular act, unless

a) he is allowed a reasonable period within which to make an express declaration and

b) the user undertakes to draw to his attention at the beginning of the period the particular significance of his conduct; this does not apply to contracts in which the whole of Part B of the contracting rules for award of public works contracts is incorporated;

6. (fictional receipt)

a provision which provides that a declaration by the user of particular importance is deemed to have been received by the other party;

7. (winding-up of contracts)

a provision by which, in the event that one of the parties to the contract terminates the contract or gives notice to terminate it, the user can demand

a) unreasonably high remuneration for the utilisation or use of a thing or a right or for performance made, or

b) unreasonably high reimbursement of expenditure;

8. (unavailability of the object of performance)

a stipulation permitted under 3. above of the user's right to free himself of his obligation to perform the contract if the object of the performance is not available, unless the user agrees

a) to inform the other party immediately of the unavailability, and

b) immediately to refund counter-performance by that party.

§ 309 Clauses whose invalidity is not subject to any evaluation

Even where derogation from the statutory provisions is permissible, the following are invalid in standard terms:

1. (price increases at short notice)

a provision which provides for an increase in the remuneration for goods or services that are to be supplied within four months of the conclusion of the contract; this does not apply to goods or services supplied in the course of a recurring obligation;

2. (right to refuse to perform)

a provision by which

a) the right under § 320 of the contractual partner of the user to refuse to perform is excluded or restricted, or

b) a right of retention of the contractual partner of the user, in so far as it arises from the same contractual relationship, is excluded or restricted, in particular by making it subject to recognition by the user of the existence of defects;

3. (prohibition of set-off)

a provision by which the contractual partner of the user is deprived of the right to set off a claim which is undisputed or has been declared final and absolute;

4. (notice, period for performance)

a provision by which the user is relieved of the statutory requirement to give notice to the other party to perform or to fix a period for performance or supplementary performance by him;

5. (lump-sum claims for damages)

stipulation of a lump-sum claim by the user for damages or for compensation for reduction in value, if

a) the lump sum in the cases in question exceeds the damage expected in the normal course of events or the reduction in value which normally occurs, or

b) the other party is not given the express right to prove that damage or reduction in value has not occurred or is materially lower than the lump sum agreed;

6. (penalty)

a provision by which the user is entitled to receive payment of a penalty in the event of non-acceptance or late acceptance of performance, delay in payment or in the event that the other party withdraws from the contract;

7. (exclusion of liability for death, injury to body and health and for gross fault)

a) (death and injury to body and health)

exclusion or limitation of liability for losses arising out of death, injury to body or health caused by negligent breach of duty by the user or a deliberate or negligent breach of duty by his statutory agent or a person employed by him to perform the contract;

b) (gross fault)

exclusion or limitation of liability for other losses caused by a grossly negligent breach of duty by the user or a deliberate or grossly negligent breach of duty by a statutory agent of the user or by a person employed by him to perform the contract;

a) and b) above do not apply to restrictions of liability in the terms of transport, authorised in accordance with the Passenger Transport Act, of trams, trolley buses and motor vehicles in scheduled services, in so far as they do not derogate, to the detriment of passengers, from the Regulation concerning the terms of transport by tram and trolley bus and by motor vehicles in scheduled services of 27 February 1970; b) above does not apply to restrictions of liability for State-approved lottery or raffle contracts.

8. (other exclusions of liability in the event of breach of duty)

a) (exclusion of the right to withdraw from the contract)

a provision which, upon a breach of duty for which the user is responsible and which does not consist in a defect of the thing sold or the work, excludes or restricts the other party's right to withdraw from the contract; this does not apply to the terms of contract and tariff rules referred to in No. 7 on the conditions set

out therein;

b) (defects)

a provision by which, in contracts for the supply of new, manufactured things or of work,

aa) (exclusion and reference of claims to third parties)

claims against the user on account of a defect as a whole or with regard to individual elements of it are excluded entirely, restricted to the assignment of claims against third parties, or which make the pursuit of legal proceedings against third parties a condition precedent;

bb) (restriction to supplementary performance)

claims against the user are restricted, entirely or with regard to individual elements, to a right to supplementary performance, unless the other party is given an express right to claim a price reduction if supplementary performance is unsuccessful or, except where the defects liability is in respect of building work, to choose to terminate the contract;

cc) (expenditure incurred in the course of supplementary performance)

the user's obligation to bear the expenditure necessary for supplementary performance, in particular the costs of carriage, transport, labour and materials, is excluded or restricted;

dd) (withholding of supplementary performance)

the user makes supplementary performance conditional on the prior payment of the entire price or, having regard to the defect, an unreasonably high proportion thereof;

ee) (time-limit for notice of defects)

the user fixes a period within which the other party must give notice of non-obvious defects which is shorter than the period permitted under ff) below;

ff) (facilitation of limitation)

facilitates the limitation of claims on account of defects in the cases set out in § 438(1), No. 2 and § 634a(1), No. 2, or, in

other cases, results in a limitation period of less than one year from the date on which the statutory period of limitation begins; this does not apply to contracts in which the whole of Part B of the contracting rules for award of public works contracts is incorporated;

9. (period of recurring obligations)

in a contractual relationship concerning the periodic delivery of goods or the periodic supply of services or work by the user,

a) a contract duration which binds the other party for more than two years,

b) a tacit extension of the contractual relationship which binds the other party for a period of more than one year in each particular case, or

c) to the detriment of the other party, a period of notice to terminate the contract which is more than three months prior to the expiration of the initial or tacitly extended period of the contract;

this does not apply to contracts for the supply of things sold as a unit, to insurance contracts or contracts between the owners of copyrights and of claims and copyright collecting societies within the meaning of the Protection of Copyrights and Related Rights Act;

10. (change of contract partner)

a provision whereby in sales contracts, contracts for the supply of services or contracts for work a third party assumes or may assume the rights and obligations of the user under the contract, unless the provision

a) specifies the third party by name, or

b) gives the other party the right to withdraw from the contract;

11. (liability of an agent on conclusion of the contract)

a provision by which the user imposes on an agent who concludes the contract for the other party,

a) the agent's own liability or duty to perform the contractual obligation without having made an express and separate

declaration in that regard, or

b) where the agent lacks authority, liability which exceeds that under § 179;

12. (burden of proof)

a provision by which the user alters the burden of proof to the detriment of the other party in particular by

a) imposing the burden in respect of circumstances which fall within the scope of the user's responsibility, or

b) requiring the other party to acknowledge particular facts;

Subsection b) above does not apply to acknowledgments of receipt which are separately signed or bear a separate, qualified electronic signature;

13. (Form of notices and declarations)

a provision by which notices or declarations to be given to the user or third parties are subject to a stricter requirement than the need for writing or to special requirements with regard to receipt.

§ 310 Scope of application

(1) § 305(2) and (3) and §§ 308 and 309 do not apply to standard terms which are proffered to a businessperson, a legal person governed by public law or a special fund governed by public law. In those cases § 307(1) and (2) nevertheless applies to the extent that this results in the invalidity of the contractual provisions referred to in §§ 308 and 309; due regard must be had to the customs and practices applying in business transactions.

(2) §§ 308 and 309 do not apply to contracts of electricity, gas, district heating or water supply undertakings for the supply to special customers of electricity, gas, district heating or water from the supply grid unless the conditions of supply derogate, to the detriment of the customer, from Regulations on general conditions for the supply of tariff customers with electricity, gas, district heating or water. The first sentence applies mutatis

mutandis to contracts for the disposal of sewage.

(3) In the case of contracts between a businessperson and a consumer (consumer contracts) the rules in this section apply subject to the following provisions:

1. Standard terms are deemed to have been proffered by the businessperson, unless the consumer introduced them into the contract;
2. §§ 305c(2) and §§ 306, 307 to 309 of the present Act and Article 29a of the Introductory Act to the Civil Code apply to pre-established conditions of contract even if they are intended for use only once and in so far as, because they are pre-established, the consumer could not influence their content.
3. When deciding whether there has been unreasonable detriment under § 307(1) and (2) the circumstances surrounding the conclusion of the contract must also be taken into account.

(4) This section does not apply to contracts in the field of the law of succession, family law and company law or to collective agreements and private-or public-sector works agreements. When it is applied to labour contracts, appropriate regard must be had to the special features of labour law; § 305 (2) and (3) is not to be applied. Collective agreements and public and private sector works agreements are equivalent to legal rules within the meaning of § 307(3).

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