

*THE CONSUMER'S 'RIGHT TO FAIR,
REASONABLE AND JUST TERMS' UNDER THE
NEW CONSUMER PROTECTION ACT IN
COMPARATIVE PERSPECTIVE*

TJAKIE NAUDÉ*

Professor of Private Law, University of Cape Town

I INTRODUCTION

Legislation to protect consumers against unfair contract terms has long been overdue in South Africa.¹ The inclusion of provisions on unfair contract terms in the new Consumer Protection Act² should therefore be welcomed.³ However, as this contribution will show, the provisions on unfair contract terms in the Act are lacking in some respects. The problems faced by consumers which necessitate legislative protection have not been sufficiently addressed. Neither has international best practice in the field been properly

* BA LLB LLD (Stell). I am grateful to the Oxford Institute of European and Comparative Law, particularly its Director, Stefan Vogenauer, for hosting me as a visiting fellow in Oxford where most of this research was done. I also benefited from financial assistance by the National Research Foundation, the Harry Crossley Fund and the International Office of the University of Stellenbosch. Views expressed in this article should obviously not be attributed to any of these institutions.

¹ For a comprehensive discussion of the need for such legislation see Tjakie Naudé 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' (2006) 17 *Stell LR* 361. See also already C C Turpin 'Contract and imposed terms' (1956) 73 *SALJ* 144; Peter Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979); Hein Kötz 'Controlling unfair contract terms: Options for legislative reform' (1986) 103 *SALJ* 405; C F C van der Walt 'Die huidige posisie van die Suid-Afrikaanse reg met betrekking tot onbillike kontrakbedinge' (1986) 103 *SALJ* 647; G T S Eiselen 'Die standaardbedingprobleem: Ekonomiese magsmisbruik, verbruikersvraagstuk of probleem in eie reg?' (1988) 21 *De Jure* 251, (1989) 22 *De Jure* 44; C F C van der Walt 'Kontrakte en beheer oor kontrakvryheid in 'n nuwe Suid-Afrika' (1991) 54 *THRHR* 367; Jonathan Lewis 'Fairness in South African contract law' (2003) 120 *SALJ* 330.

² Act 68 of 2008.

³ See Naudé op cit note 1. However, separate detailed legislation geared specifically to the problem of unfair contract terms, and providing for differentiated levels of control for business-to-consumer ('B2C') and business-to-business ('B2B') contracts, would have been preferable. Note that the provisions on unfair contract terms will only come into force eighteen months after date of signature by the President, that is, on 24 October 2010 (s 122 read with item 2 of Schedule 2).

considered. The Act therefore requires amendment to ensure effective protection against unfair contract terms.

The provisions on unfair contract terms in the Act will be analysed here in terms of the three main categories into which legislative control mechanisms in respect of standard contract terms may typically be divided. The first category are rules on the incorporation of contract terms, that is, rules that set threshold requirements for terms to be considered part of the contract in the first place. Such rules have been termed ‘incorporation tests’ or ‘prerequisites’, but control on this basis could also be termed ‘incorporation control’.⁴ Once terms comply with such preliminary requirements for incorporation, unfair contract terms legislation typically also provide for overt control of their contents in the form of a power for courts to strike out unfair contract terms. This form of control is called ‘content control’ in German literature,⁵ but the term ‘substantive control’ has also been used elsewhere.⁶ Once contract terms pass this additional hurdle, rules on interpretation would cause terms to be interpreted against the party on whose behalf they were drafted, that is, typically in favour of the consumer and against the business in a business-to-consumer (‘B2C’) contract. This type of control could be termed ‘interpretation control.’ In addition, legislation may prescribe mandatory terms which are implied by law into consumer contracts, which may of course not be excluded or varied by contrary agreement.

The South African Consumer Protection Act makes use of all these techniques. Non-derogable rights are created for consumers and small businesses throughout the Act, for example, the consumer’s right to quality goods which are enforceable by remedies of repair, replacement or refund.⁷

In addition, s 4(4)(a) gives statutory authority to the *contra proferentem* rule of interpretation. Any contract or document must therefore be interpreted ‘to the benefit of the consumer so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer’. Confusingly, s 4 also provides that

‘[t]he [National Consumer] Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier . . . to the benefit of the consumer . . . (b) so that any restriction, limitation, exclusion or deprivation of a consumer’s legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to (i) the content of the document; (ii) the manner and form in which the document was prepared and presented; and (iii) the circumstances of the transaction or agreement.’⁸

⁴ See the separate discussion of ‘incorporation tests’ under the topic ‘Unfair Clauses’ in Hugh Beale et al *Cases, Materials and Texts on Contract Law* (2002) 496. See also Peter Ulmer ‘§ 305’ in Peter Ulmer *AGB-Recht — Kommentar zu den §§ 305-310 BGB und zum Unterlassungsklagengesetz* 10 ed (2006) 211 (Rn 123).

⁵ ‘Inhaltskontrolle.’ See, for example, Andreas Fuchs ‘Vorbemerkung zum Inhaltskontrolle’ in Ulmer et al op cit note 4 at 492.

⁶ Beale et al op cit note 4 at 509.

⁷ Sections 55 and 56.

⁸ Section 4(4)(b).

Although this form of control purports to be by interpretation, it effectively allows the Tribunal or court to deviate completely from a strict interpretation by simply ignoring plainly worded limitations on a consumer's rights where such limitations are not reasonably foreseeable in view of the surrounding circumstances. In other words, under s 4(4)(b) the Tribunal or court may give a meaning to a term which on normal or strict interpretation it cannot have. This provision is unnecessary as Chapter 2 Part G of the Act on unfair contract terms (ss 48 and 52) already allows a court to strike out unfair contract terms. When a court finds that a contract term restricts a consumer's rights more than a 'reasonable person would ordinarily expect', it should either hold that the term is surprising and should therefore have been specifically pointed out to the consumer before it binds her under the common law rules on mistake⁹ or should otherwise openly strike out or amend the term on the basis that it is unfair under s 48. A court should not pretend that it is merely interpreting the contract when it is simply ignoring or amending a term beyond what the words can possibly mean. Section 4(4)(b) should therefore be deleted.

Chapter 2 Part G of the Act provides for incorporation and content control under the heading 'Right to fair, just and reasonable terms and conditions'. However, the provisions are not structured logically along these lines as is the case with international examples of unfair contract terms legislation which do contain incorporation requirements.¹⁰ Section 48 contains the general prohibition against unfair terms, which therefore amounts to content control. However, s 49 then purports to set formal requirements for incorporation of certain types of terms, such as a requirement that certain types of terms must be signed or initialed or the consumer must have otherwise acted in a manner consistent with acknowledgment of such terms.¹¹ Thereafter s 50 provides for written contracts to be in plain language etc, after which s 51 returns to the theme of content control by providing a list of prohibited terms. Finally, s 52 bestows powers on courts in cases involving unfair contract terms. Confusingly, s 52 also grants powers to courts in respect of unconscionable conduct (prohibited in s 40, in the previous Part of Chapter 2) and misrepresentations (prohibited in s 41), and in respect of contravention of the incorporation requirements of s 49 as well.

The next part of this contribution will focus firstly on the incorporation control of s 49. Thereafter, s 50 will be discussed, as it blends elements of incorporation control and content control. Next, ss 48 and 51 which provide

⁹ If a term is surprising and was not pointed out to the consumer, there is no consensus on the term and no reasonable reliance on consensus on the part of the consumer. See, for example, *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).

¹⁰ For example, the German Civil Code's provisions on standard contract terms start off with requirements for the incorporation of standard terms (§§ 305-306 BGB) and thereafter provide for content control (§§ 307-309 BGB).

¹¹ Section 49(2).

for content control will be discussed. Finally, s 52 on the court's powers in respect of prohibited conduct will be considered.

II INCORPORATION PREREQUISITES: SECTION 49

Section 49 provides that certain types of terms or notices must be drawn to the attention of the consumer in a prescribed manner and form. This discussion will focus on contract terms, but the same applies *mutatis mutandis* to notices of similar effect.

The four types of terms in question are, first, exemption clauses (that is, clauses limiting in any way the risk or liability of the supplier or another person), secondly, clauses by which the consumer assumes a risk or liability, thirdly, indemnity clauses (requiring the consumer to indemnify the supplier or any other person for any cause), and finally, acknowledgments of any fact by the consumer.¹²

First, these types of terms must be written in plain language.¹³ Secondly, their existence, nature and effect must be drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer.¹⁴ This must be done before the earlier time at which the consumer enters into the transaction or engages in the activity or enters the facility to which the term relates, or is required or expected to offer 'consideration' (counter-performance) for the transaction.¹⁵ Thirdly, the consumer must be given an adequate opportunity to receive and comprehend the term.¹⁶

It is unclear what format would be regarded as sufficiently conspicuous to be 'likely to attract the attention of an ordinarily alert consumer.' It is submitted that it should generally not be sufficient for the exemption clauses etc to be printed on the reverse side of the contractual document, even if that is done in a contrasting color or font. Most consumers do not even turn over contract forms to glance at the standard terms on the reverse, given the time and effort it would take to read the terms, try to understand their implications, find someone in the organization with authority to negotiate about them or shop around for better standard terms.¹⁷ The high 'transaction costs' of doing all of this and the implicit understanding that the terms are invariable and presented on a take-it-or-leave-it basis put most consumers off from doing more than checking the primary terms as to price and definition of the main subject matter before signing the document.¹⁸ If the exemption clause etc is printed in contrasting typeface close to the primary terms of the

¹² Section 49(1).

¹³ Section 49(3) read with s 22.

¹⁴ Section 49(1) read with s 49(4).

¹⁵ Section 49(4).

¹⁶ Section 49(5).

¹⁷ See Naudé *op cit* note 1 at 366-7.

¹⁸ *Ibid.*

contract, and must therefore be noticed by any consumer who reads the primary terms, this may be sufficient.

What is clear from s 49 is that it is not sufficient to bring the four types of terms in question to the notice of the consumer after conclusion of the agreement, or after the consumer begins to engage in the activity, enters or gains access to the facility or is expected or required to offer counter-performance for the goods or services to be provided. This means, for example, that adventure sports companies can no longer book an adventure holiday for the consumer over the phone, receive payment in respect thereof, and only confront the consumer with the requirement to sign an exemption clause once the consumer arrives at the destination.

In addition, s 49 provides that provisions or notices concerning activities or facilities that are subject to certain types of risks must also be drawn to the attention of the consumer in the same manner. The risks in question are defined as any risk:

- (a) of an unusual character or nature;
- (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or
- (c) that could result in serious injury or death.¹⁹

Provisions relating to such risks must also be signed or initialed by the consumer, unless the consumer had otherwise assented to that provision 'by acting in a manner consistent with acknowledgment of the notice, awareness of the risk and acceptance of the provision.'²⁰

Section 49 does not spell out the consequences of non-compliance with its requirements. For this one has to consider s 52 on the powers of a court to ensure fair terms. Section 52(4) provides that if a term or notice failed to satisfy the requirements of s 49, the court may make an order severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction. The court may also make any further order that is just and reasonable in the circumstances.²¹ It therefore seems that non-compliance with s 49 will have no extra-judicial effect such as rendering the terms in question voidable at the instance of the consumer, although this is not completely clear. To require that a court must pronounce the term as having no force or effect is to ignore the severe limitations of judicial control in the consumer context, particularly in view of the cost, risk and effort of litigation to consumers.²² Section 49 should rather have provided that a supplier who did not comply with s 49 may not rely on the contract term in question. In that case, the consumer would only need to approach a court in the event of a dispute as to whether the supplier did indeed comply with s 49.

¹⁹ Section 49(2)(a)–(c).

²⁰ Section 49(2).

²¹ Section 52(4)(b).

²² See Naudé op cit note 1 for a full discussion of these limitations.

Although aspects of s 49 are to be welcomed, incorporation prerequisites that specific types of terms be specifically drawn to the attention of the consumer and counter-signed or initialed can be a double-edged sword which may ultimately work against the consumer.²³ The apparent legislative condonation of such clauses, provided they are signed or initialed, may strengthen the hand of the supplier to argue that they are always fair.²⁴ This is particularly worrying in respect of clauses excluding or limiting liability for bodily injury or death caused negligently. Section 49(2) seems to provide legislative sanction for exemption clauses excluding or limiting liability for personal injury or death caused negligently, as long as they are signed or initialed by the consumer. For various reasons, such clauses would in fact mostly be unfair, regardless of whether the consumer knew about them at the time of conclusion of the contract and signed next to them. Ultimately, they involve the consumer's fundamental rights to bodily integrity and life.²⁵ Such exemption clauses may also have been sprung on the consumer at the very last minute, when the decision to contract had already been taken and all kinds of arrangements made in expectation of conclusion of the contract. The decision in *Afrox Healthcare v Strydom*²⁶ provides an example of a clause that is unfair for this reason (amongst others). As has already been pointed out, when the patient signs the admission form exempting the private hospital from liability for bodily injury or death caused by their employees' negligence, he has already made all sorts of arrangements for leave at work, is likely to have already arranged treatment by a specific doctor who only operates from that particular hospital, and may have a strong interest in immediately proceeding with the hospitalization as planned in view of his medical condition.²⁷ To pull out of all these arrangements at the very last moment when confronted with the exemption clause, in order to seek better contract terms elsewhere, is not a realistic option and the consumer will sign anyway.²⁸ In this sense the consumer's bargaining power is fatally impaired and the supplier takes unconscionable advantage of the situation by including the exemption clause. The structural inequality caused by this situation, the fact that the term is contrary to the main purpose of an agreement for the provision of medical care, and that it ultimately involves the patient's fundamental right to life and bodily integrity, means that the clause should usually be substantively unfair, regardless of whether the consumer knew

²³ As already pointed out by Naudé op cit note 1 at 378.

²⁴ Ewoud Hondius *Standaardvoorwaarden* (1978) 577; cf Robert A Hillman 'Online boilerplate: Would mandatory website disclosure of e-standard terms backfire?' (2006) 105 *Michigan LR* 837 at 840, 854; William C Whitford 'Contract law and the control of standardized terms in consumer contracts: An American report' (1995) 3 *European Review of Private Law* 193 at 206.

²⁵ Sections 11 and 12(2) of the Bill of Rights.

²⁶ 2002 (6) SA 21 (SCA).

²⁷ Tjakkie Naudé & Gerhard Lubbe 'Exemption clauses — A rethink occasioned by *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)' (2005) 122 *SALJ* 441 at 461.

²⁸ Naudé & Lubbe op cit note 27 at 461.

about it or could theoretically have found better standard terms elsewhere in the market.²⁹ In addition, consumers are not able to guard against the supplier's negligence and will often not be insured against bodily injury or death caused by the supplier's negligence.³⁰

Exemption clauses relating to bodily injury or death are therefore mostly held to be unfair per se in Europe. They are prohibited outright in some countries' legislation.³¹ The EC Directive on Unfair Terms in Consumer Contracts of 1993 (which does not have a so-called 'black list' of prohibited clauses) requires that, at the least, exemption clauses in respect of 'injury or death caused by an act or omission of the supplier' be greylisted throughout the European Union.³² This means that such terms must at the very least be included in an indicative list of clauses which may be regarded as unfair, whereas the supplier may still persuade a court otherwise.³³

Counter-signing requirements in the Italian unfair terms legislation have proved to be of dubious value to consumers for the above-mentioned reasons and because they just become another formality which does not necessarily ensure that the consumer even reads the terms that he initials.³⁴ Subsequent legislation in other countries has wisely tended to avoid this type of incorporation control. Instead, more general requirements that the consumer must have been given an opportunity to take note of the contract terms are used.³⁵ Some legislation also provides more generally that surprising or unusual terms do not form part of the contract unless they have been specifically assented to.³⁶ The South African common law already implicitly

²⁹ Cf Naudé & Lubbe op cit note 27 at 461.

³⁰ Ibid.

³¹ Prohibited in s 2(1) of the United Kingdom's Unfair Contract Terms Act, 1977, and also in s 1(1) of the Unfair Contract Terms Bill drafted by the Law Commissions of England, Wales and Scotland (Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a Reference Under s 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005) (hereafter *English and Scottish Law Commission Report*; § 309(7)(a) BGB (German Civil Code); § 6(1)(a) Austrian Consumer Protection Act (Konsumentenschutzgesetz); art 18(a) of the Portuguese Decree-Law No 446/85 of 25 October 1985 on unfair contract terms, as amended by Decree-Law No 220/95 of 31 January 1995.

³² EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993. As a minimum harmonization directive, it prescribes merely a minimum level of protection. See on the status of the Directive's indicative list of clauses that may be regarded as unfair, art 3(3) and the Recital as well as *Commission of the European Communities v Sweden* Case C-478/99; [2002] ECR I-4147 para 11. The EC's Proposal for a new Directive on Consumer Rights prohibits such clauses outright (Annexure II of Commission of the European Communities *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights* COM(2008) 614 final; 2008/0196 (COD)).

³³ Item (a) of Schedule 1 to the Directive.

³⁴ Hondius op cit note 24 at 577 with reference to art 1341 of the Italian Civil Code; cf also Hillman op cit note 24 at 840, 854; Whitford op cit note 24 at 206.

³⁵ See, for example, art 6:233(b) of the Dutch Civil Code and § 305 of the German Civil Code.

³⁶ For example, § 305c of the German Civil Code.

recognizes such a principle.³⁷ This type of rule on surprising terms is more preferable than express counter-signing requirements.

The counter-signing requirement of s 49 is particularly problematic if courts do not sufficiently grasp that substantive unfairness on its own should often be sufficient reason for setting aside a term, regardless of procedural aspects such as the particular individual consumer's knowledge of the term as evidenced by signature. As will be shown further below, in some respects the Act focuses more on procedural unfairness than on substantive unfairness and does not sufficiently take into account the typical problems faced by consumers when confronted with standard contract terms.

III SECTION 50 ON WRITTEN CONSUMER AGREEMENTS: A MIXTURE OF INCORPORATION AND CONTENT CONTROL

Section 50 provides, first, that the Minister may prescribe categories of consumer agreements that are required to be in writing.³⁸ Secondly, any written consumer agreement must comply with certain requirements. Most importantly, any written agreement must satisfy the requirements of s 22 as to plain and understandable language.³⁹ The consumer is given a right to a free copy of such agreement or free electronic access to a copy, which must furthermore set out an itemized breakdown of the consumer's financial obligations under the agreement.⁴⁰ In addition, s 50 provides that if a consumer agreement is in writing, it applies irrespective of whether the consumer has signed the agreement.⁴¹ Lastly, if a consumer agreement is not in writing, the supplier 'must keep a record of transactions entered into over the telephone or any other recordable form as prescribed'.⁴²

The Act does not spell out the consequences of non-compliance with s 50. The general point of departure under South African law is that non-compliance with statutory formalities results in the nullity of the transaction.⁴³ However, the legislation in question may provide otherwise. For example, the Credit Agreements Act 75 of 1980, which required credit agreements to be in writing, specifically provided that the mere fact that an agreement is not in writing and signed by the parties does not mean that it is invalid. The absence of a similar provision in the Consumer Protection Act may point to the conclusion that the general rule should apply, namely that

³⁷ *Constantia Insurance Co v Compusource* supra note 9 confirms that an adhering party would not be bound by a contract term to which it did not and could not reasonably have been thought to agree. The fact that the clause was unusual played a role in this decision.

³⁸ Section 50(1).

³⁹ Section 50(2)(b)(i).

⁴⁰ Section 50(2)(b)(ii).

⁴¹ Section 50(2)(a).

⁴² Section 50(2)(c).

⁴³ Schalk van der Merwe et al *Contract: General Principles* 3 ed (2007) 172 and cases there cited.

the transaction or a particular term is invalid if it does not comply with the writing, recording or plain-language requirements. However, two provisions in the Act seem to contradict or qualify this conclusion. First, as noted, s 50 itself provides that if a consumer agreement is in writing it applies irrespective of whether the consumer has signed the agreement. This means that writing may be an incorporation requirement, but not signature. Secondly, s 52 implies that non-compliance with the requirement of plain and understandable language does not render the agreement void per se. '[T]he extent to which any documents relating to the transaction or agreement satisfied the requirements of s 22 [on plain and understandable language]' is merely listed in s 52 as one of the factors which the court must consider to decide whether a contract term is unfair, unreasonable or unjust under s 48.⁴⁴

In European legislation on unfair contract terms, the fact that a provision is not clear and comprehensible is also usually not an absolute bar to its incorporation per se, but rather a factor to be taken into account when deciding whether it should be struck out of the contract as unfair. For example, the general clause of the German Civil Code provides that '[p]rovisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract'.⁴⁵ It then provides that 'an unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible'. The Unfair Contract Terms Bill proposed by the English and Scottish Law Commissions also provides that

'whether a contract term is fair and reasonable is to be determined by taking into account (a) the extent to which the term is transparent and (b) the substance and effect of the term and all the circumstances at the time it was agreed.'⁴⁶

'Transparent' is then defined as

'(a) expressed in reasonably plain language, (b) legible, (c) presented clearly, and (d) readily available to any person likely to be affected by the contract term or notice in question.'⁴⁷

Although the EC Unfair Terms Directive does not contain a similar explicit provision, it is implicit from art 4(1) that the language in which a term is couched is a relevant factor in assessing fairness. Article 4(1) excludes 'core terms' from review, but only in so far as these terms are in plain and

⁴⁴ Section 52(2)(g).

⁴⁵ § 307 BGB (translations throughout from the German Justice Ministry's website at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000G27 (last accessed 13 March 2009)).

⁴⁶ Section 14(1). See also s 14(2) which has a similar provision on notices.

⁴⁷ Section 14(3).

intelligible language. Therefore obscurity of language can lead to core terms being declared unfair.⁴⁸

However, under all these rules courts would probably easily strike out a term as unfair merely because it is not transparent.

It remains to comment on the provision in s 50(2)(a) that if the agreement is in writing it applies irrespective of whether or not the consumer has signed it. This must mean that the supplier wishing to rely on the contract would still have to prove that agreement was reached on all the provisions set out in writing. The consumer would still be able to dispute having agreed to all the terms where she did not sign the document. This paragraph should ideally be reworded to state that if the agreement is in writing the consumer may rely on it irrespective of whether or not the consumer has signed it. That would mean that the paragraph would only operate to the benefit of the consumer, and there would be no chance of the supplier relying on an unsigned document on the basis of this paragraph alone where the consumer disputes having actually agreed to all the terms in the written document.

IV CONTENT CONTROL: SECTIONS 48, 51 AND 52

Sections 48, 51 and 52 provide for control of the contents of terms which otherwise comply with requirements for incorporation into the contract.

Section 48 prohibits the use of unfair terms, whereas s 52 grants courts the power to strike out unfair terms, as well as certain additional powers. Section 51 contains a list of prohibited clauses which are void per se.

Section 48: The general prohibition against unfair terms

Section 48, headed 'unfair, unreasonable or unjust contract terms', sets out the general prohibition against unfair, unreasonable or unjust terms and also purports to provide definitions of the concepts 'unfair, unreasonable or unjust'.

Section 48 attempts to cover every possible base by not only prohibiting the inclusion of unfair terms in agreements, but also prohibits the supplier from offering to supply goods or services on terms that are unfair, unreasonable or unjust, or from requiring 'a consumer or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights, assume any obligations or waive any liability of the supplier on terms that are unfair, unreasonable or unjust.'⁴⁹

Section 48 therefore aims to provide for control of the content of contract terms, whether already incorporated into a specific transaction or merely put on offer for general use by the supplier. When read with s 4, this seems to

⁴⁸ Article 4(1) provides that '[a]ssessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.'

⁴⁹ Section 48(1)(a) and (c).

allow an institution with locus standi under s 4, such as a consumer organization, to seek relief against a mere offer of unfair terms to consumers generally, without having to involve an individual consumer in the litigation, as the mere 'offer' of unfair terms to consumers constitutes prohibited conduct under the Act.⁵⁰ However, as will be seen further below,⁵¹ s 52, which lists the orders that a court may make to ensure fair terms, is written with only the paradigm of a challenge to an existing agreement between the supplier and a particular individual consumer in mind, and is not sufficiently geared towards such 'abstract' or 'general use' challenges by consumer organizations. In addition, the list of relevant factors to which courts 'must' have regard to when assessing unfairness according to s 52 focuses largely on the circumstances under which an individual consumer concluded the particular contract (so-called procedural unfairness factors) and does not give much guidance as to relevant factors to assess the 'substantive fairness' of a term, which would be more important in such 'abstract' or 'general use challenges' by a consumer organization.⁵²

That s 48 is aimed at content control is supported by the heading of this section ('Unfair, unreasonable or unjust contract terms') and of Part G in which it is situated ('Right to fair, just and reasonable terms and conditions'). However, this conclusion is contradicted by s 48(1)(b), which provides that the supplier must also not *market, negotiate or administer* a transaction or agreement *in a manner* that is unfair, unreasonable or unjust.⁵³ This speaks to the *process* of marketing etc rather than to the actual *content* of terms proposed for an agreement or agreed to in fact. Other parts of the Act, such as Part F on the 'right to fair and honest dealing', already regulate the manner of 'unfair marketing' etc. Thus, s 40 on 'unconscionable conduct' is already a 'catch all clause' designed to cover any form of unfair conduct. It provides, amongst other things, that a supplier may not use unfair tactics or any other similar conduct in connection with any marketing or supply of goods or services, or in connection with any negotiation, conclusion, execution or enforcement of an agreement.⁵⁴ It is unnecessary and confusing to create a similar general provision on conduct in s 48 amongst the provisions on the content of contract terms.

Section 48(2) returns to the theme of content control by purporting to provide more guidance as to the meaning of 'unfair, unreasonable or unjust'

⁵⁰ Section 4(1) provides a list of persons who 'may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed. . .or that prohibited conduct has occurred or is occurring.' This list includes a 'a person acting as a member of, or in the interest of, a group or class of affected persons; a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and an association acting in the interest of its members'.

⁵¹ At note 110 to note 118 below.

⁵² See at note 127 below.

⁵³ My emphasis.

⁵⁴ See also s 4(5).

in four paragraphs.⁵⁵ In fact only the first two relate to control of the contents of terms. They provide that, without limiting the generality of the general prohibition against unfair terms, a term or notice is unfair if '(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied; or (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable.'⁵⁶ Whereas the first of these paragraphs is helpful to flesh out the concept of unfairness, paragraph (b) is not very useful as 'inequitable' is merely a synonym for 'unfair.'

It may be useful for courts to consider formulations of the concept of 'unfairness' in other legal systems. The Consumer Protection Act itself provides that courts etc may consider appropriate foreign and international law when interpreting or applying the Act.⁵⁷ The Unfair Terms Directive's test appears from its general clause which provides that a contractual term is unfair if, 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'⁵⁸ This test is similar to that in the German Civil Code, although the latter refers to an unreasonable disadvantage rather than a significant imbalance between the parties' rights and duties.⁵⁹ It has also inspired a comparable test in the European Draft Common Frame of Reference of February 2009 (which seeks to serve as a model for a possible harmonized European Law of Contract), although the standard of 'fair dealing' is added to the concept of 'good faith' in this instrument.⁶⁰ The Trade Practices Amendment (Australian Consumer Law) Bill of 2009 proposes that a term is unfair if '(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it.'⁶¹ This test is based on the Directive's test,⁶² but it should be noted that the reference to good faith has been omitted and the legitimate interests criterion has been added.

⁵⁵ Section 48(2)(a)-(d).

⁵⁶ Section 48(2)(a) and (b).

⁵⁷ Section 2(2)(a).

⁵⁸ This Directive has largely been copied out in the UK's Unfair Terms in Consumer Contracts Regulations, 1999 (the first version was promulgated in 1994).

⁵⁹ § 307 BGB, quoted at note 45 above. See also the Brazilian Consumer Protection Code: 'that place the consumer at an unreasonable disadvantage or that are incompatible with good faith or fair practices' (s 51.IV of the Código de Defesa do Consumidor Lei n° 8.078 de 11 de setembro de 1990, as translated by David B Jaffé & Robert G Vaughan *South American Consumer Protection Laws* (1996) 117).

⁶⁰ Article II — 9:403 refers to non-negotiated terms that 'significantly disadvantage the consumer, contrary to good faith and fair dealing.' The European Commission's Proposal for a Directive on Consumer Rights merely replicates the test of the Unfair Terms Directive, however (art 32(1)).

⁶¹ Section 3(1).

⁶² As used in s 32W the Fair Trading Act, 1990 of Victoria, Australia.

The general clause in the German Civil Code also lists two circumstances in which an unreasonable disadvantage is, in case of doubt, to be assumed. These are if a provision 'is not compatible with essential principles of the statutory provision from which it deviates' (that is, with the residual rule in the relevant part of the Code), or 'limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized'.⁶³

By contrast to such detailed formulations, the Dutch Civil Code simply provides that a term is voidable if it is 'unreasonably detrimental to the adhering party'.⁶⁴ Similarly, the general clauses in the United Kingdom's Unfair Contract Terms Act are content with simply referring to the 'requirement of reasonableness' and then listing a set of relevant factors elsewhere in the Act.⁶⁵ The Unfair Contract Terms Bill proposed by the English and Scottish Law Commissions in 2005 also refers only to 'fair and reasonable' and then lists a set of relevant factors.⁶⁶ They decided against a reference to good faith in their test. In this regard, they pointed out that the majority of the respondents to their Consultation Paper opposed a reference to good faith, mostly because it may be confusing and is likely to mislead and because it is a concept which is unfamiliar to UK lawyers in this field.⁶⁷

Whereas the more detailed formulations of the Directive, German law, Draft Common Frame of Reference and the proposed Australian legislation are useful, it is not absolutely essential in my view to provide anything more than that unfair and unreasonable terms may be struck out, as long as a good set of relevant factors is supplied (discussed below).⁶⁸ An explicit reference to 'good faith' in the test for unfairness, such as is found in the Directive and German law, may perhaps mislead South African lay readers of the Act such as consumer advisors into thinking that terms may only be struck out in extreme situations of 'bad faith'. That may lead to too narrow an interpretation of the prohibition against unfair terms, especially on the part of such lay readers.⁶⁹ However, courts should indeed consider the concepts of good faith and fair dealing in deciding whether a term is unfair, as well as the concept of

⁶³ § 307(2). On the relevance of the second criterion to the legality of a contract term, and historical and other authority for its use in South African law, see Naudé & Lubbe *op cit* note 27. This article was recently cited with approval in *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) in respect of surprising terms. Although the authors' argument focused on the relevance of the criterion of the essence or nature of the contract for common-law control mechanisms, this criterion would be similarly relevant to unfair contract terms legislation.

⁶⁴ Article 6:233 Burgerlijk Wetboek (Dutch Civil Code).

⁶⁵ See ss 2(2), 3(2) and 4(1) of the Unfair Contract Terms Act, 1977. The list of factors is set out in Schedule 2 to the Act.

⁶⁶ Section 14 (*op cit* note 31).

⁶⁷ English and Scottish Law Commissions *Report op cit* note 31 at 39.

⁶⁸ At note 132.

⁶⁹ See also English and Scottish Law Commissions *Report op cit* note 31 at 39. 'Good faith' is also omitted from the Australian proposals given the 'uncertain application of that principle in Australian law . . . [and] the potential for differing interpre-

a 'significant imbalance in the rights and obligations of the parties' which is 'not reasonably necessary to protect the legitimate interests of the supplier', as well as the further presumptions in the German Civil Code.⁷⁰ In this regard, good faith must be understood to encompass at least that the pursuit of the supplier's own interests 'must be tempered by a reasonable measure of concern' for those of the consumer.⁷¹ The consumer's fundamental right to dignity in the contractual context encompasses this same standard.⁷²

As stated above, the last two paragraphs of s 48(2), which purport to give guidance on what is 'unfair', do not relate to control of the content of a contract, but confuse and conflate other forms of control with content control. Section 48(2)(c) provides that a term is unfair 'if the consumer relied on a false, misleading or deceptive misrepresentation, as contemplated in s 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer.' Section 41 itself should rather have provided for the effect of a prohibited misrepresentation, such as that any material misrepresentation proscribed by that section would render the contract voidable per se, as under the common law. In addition, s 41 should provide that an individual term should be voidable if it is severable from the rest of the contract and consensus on it was improperly obtained because of a misrepresentation. Instead, the implication of s 48(2)(c) in its current form, read with s 52 on the powers of a court, may be that once a misrepresentation is proved, a court must first declare a contract or term unfair for the consumer to obtain any relief, which is a rather convoluted way to achieve protection against misrepresentations. In any event, at least the common-law rules on misrepresentation will still enable an extra-judicial avoidance of the contract or provision.⁷³

Similarly problematic is s 48(2)(d), which provides that the agreement or a term thereof is unfair if the agreement was subject to a term contemplated in s 49(1) (exemption clauses etc) and the fact, nature and effect of that term was not drawn to the attention of the consumer in a manner that satisfied the requirements of s 49. Again, it would have been preferable to provide in s 49 itself that if its requirements are not met, the term in question is voidable or not incorporated into the contract at all. Section 48(2)(d) read with s 52 may be interpreted to mean that this hurdle of incorporation control does not have automatic extra-judicial effect, as the result of non-compliance with s 49 seems to be merely that a court may declare a term unfair and sever it from the rest of the agreement under s 52. However, courts should preferably

tations of good faith and that other definitions of an unfair term may be equally apt' (*Australian Consumer Law Consultation Paper* op cit note 61 at 30).

⁷⁰ See at note 63 above.

⁷¹ This formulation is that of G F Lubbe 'Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg' (1990) 1 *Stell LR* 1 at 20.

⁷² Naudé op cit note 1 at 366.

⁷³ Section 2(10) provides that '[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law'.

interpret any prohibition in this part of the Act, including the prohibition of unfair terms in s 48, as causing such terms to be non-binding on the consumer per se, with s 52 just enumerating possible court orders that a court may make in a case where a dispute on the non-binding nature of a term has reached a court. There are better provisions in other legislation, such as in the EC Unfair Terms Directive which provides that an unfair term is not binding on the consumer, and that the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair terms.⁷⁴

Section 51: The list of prohibited terms

Section 51 sets out a list of absolutely prohibited terms under the heading 'Prohibited transactions, agreements, terms or conditions'. Such terms are void.⁷⁵ Such lists of prohibited terms are commonly called 'blacklists' in Europe, and this terminology will be used here for brevity's sake.

The blacklist of s 51 was largely inspired by s 90 of the National Credit Act on unlawful provisions.⁷⁶ Subsections (a) and (b) of s 51 of the Consumer Protection Act are unnecessarily verbose in my view. They aim to prohibit contractual exclusion or limitation of the consumer's rights and the supplier's obligations under the Act, and could simply have provided that 'any term or notice which directly or indirectly waives or restricts the consumer's rights under this Act or in any other way contravenes this Act shall be void'. One example of a mandatory implied term is the right of consumers to claim a repair, refund or replacement in respect of defective goods⁷⁷ as well as damages to the extent provided for in s 61.

Only a few other specific terms are blacklisted in s 5. These are:

- (1) exemption clauses in respect of gross negligence;⁷⁸
- (2) transfers of claims by the consumer against the Guardian's Fund;⁷⁹
- (3) false acknowledgments that no representations were made by the supplier or that goods or services or a required document were received by the consumer;⁸⁰
- (4) certain forfeiture clauses;⁸¹ and
- (5) certain unfair enforcement clauses, such as an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete

⁷⁴ Article 6.

⁷⁵ Section 51(3).

⁷⁶ Act 34 of 2005. Several of the paragraphs of s 51(1) are directly copied from s 90 of the National Credit Act.

⁷⁷ Sections 55 and 56.

⁷⁸ Section 51(1)(c)(i).

⁷⁹ Section 51(1)(f).

⁸⁰ Section 51(1)(g).

⁸¹ Section 51(1)(h).

at the time it is signed, or a requirement that the consumer hands over his or her bank card and PIN number to the supplier.⁸²

In principle, the decision to include clearer rules in the form of a blacklist of clauses which would always be unfair is wise. As argued in depth elsewhere, the limitations of judicial control in the consumer context mean that clearer rules in the form of black and grey lists of prohibited and presumptively unfair clauses respectively are essential to ensure fast, real and effective consumer protection.⁸³ As Stewart Macaulay has pointed out,

‘[c]lear rules here might cut the costs of consumers seeking remedies; consumers can seldom afford to battle about reasonableness and unconscionability when the product in issue cost only a few thousand dollars.’⁸⁴

To mention but a few advantages of black and grey lists again: they promote self-imposed control by suppliers themselves, who are far more likely to react to more specific provisions in a black and grey list as to which terms are prohibited and which terms must be treated with caution than if they are merely implored to remove ‘unfair terms’ from their contracts.⁸⁵ Expensive court action is therefore less likely to be necessary to challenge unfair terms. Leading writers on unfair terms control therefore regard lists as ‘of crucial importance’⁸⁶ and ‘the key element of any attempt to regulate unfair terms.’⁸⁷

Greylisting typically problematic clauses could have the added benefit that the burden of convincing a court that a listed term is fair rests on the business in respect of at least these clauses. This creates an incentive for the business to bring evidence on the business reasons which justify use of the term in its particular context, without which it is very difficult for a court properly to decide on the fairness of a term. The lack of evidence on the business reasons for the term considered in *Napier v Barkhuizen*⁸⁸ appeared to have contributed to the SCA’s reluctance to strike out the terms as being contrary to

⁸² Section 51(1)(i) and (j).

⁸³ Tjakie Naudé ‘The use of black and grey lists in unfair contract terms legislation in comparative perspective’ (2007) 124 *SALJ* 128.

⁸⁴ Stewart Macaulay ‘The real and the paper deal: Empirical pictures of relationships, complexity and the urge for transparent simple rules’ (2003) 66 *Mod LR* 44, also cited in Naudé op cit note 83 at 136.

⁸⁵ Geraint Howells ‘Good faith in consumer contracting’ in Roger Brownsword, Norma J Hird & Geraint Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 91 at 98; Karl-Heinz Neumayer ‘Contracting subject to standard terms and conditions’ in Arthur von Mehren (ed) *International Encyclopedia of Comparative Law* vol VII chap 12 (1999) 96–7 para 12–96, as also cited by Naudé op cit note 83 at 131–2. For a full exposition of the many other advantages of grey lists, see Naudé op cit note 83.

⁸⁶ Ewoud Hondius *Unfair Terms in Consumer Contracts* (1987) 183.

⁸⁷ Giorgio de Nova ‘Italian contract law and the European Directive on Unfair Terms in Consumer Contracts’ (1995) 3 *European Review of Private Law* 221 at 230.

⁸⁸ 2006 (4) SA 1 (SCA).

public policy.⁸⁹ Of course, the consumer is not able to bring such evidence — it is peculiarly within the knowledge of the business. Greylisting problematic clauses would place the burden of adducing such evidence where it belongs.

It is unfortunate that the drafters of the Act did not therefore take account of experience elsewhere in the world with lists to include a non-exhaustive, but comprehensive grey list of presumptively unfair clauses in the text of the legislation as well.⁹⁰ Many more terms can be greylisted than blacklisted, whilst this technique still carries the important advantages for proactive and effective reactive control of lists. Developing countries with not much experience of unfair contract terms control (such as South Africa) may justifiably be reluctant immediately to introduce the long lists of prohibited terms found in some European countries.

At least s 120(1)(d) was included in the final version of the Bill at the Parliamentary Portfolio Committee's insistence. This provision allows the Minister to 'make regulations relating to unfair, unreasonable or unjust contract terms.' This amendment was made in response to a submission to Parliament that a grey list of presumptively unfair clauses would be essential for proactive and effective reactive control of unfair contract terms.⁹¹ It remains to be seen whether the Department of Trade and Industry will keep their promise to the Portfolio Committee that a grey list be introduced by way of regulation.

Ideally, the grey list should be included in the text of the legislation, if need be in a schedule. It would then have greater legitimacy and also be more prominent and accessible, particularly to lay readers of the Act, such as consumer advisers or journalists who are not lawyers. The argument that that would necessitate frequent amendments to the legislation as new unfair terms crop up does not hold water. The grey list of the EC Unfair Terms Directive of 1993 has withstood the test of time.⁹² The English and Scottish Law Commissions recommended only superficial changes to the Directive's List for their Unfair Contract Terms Bill of 2005.⁹³ The European Commission's Proposal for a new maximum harmonization Directive on consumer rights make some, but not extensive alterations to the EC Unfair Terms Directive's grey list, although it places five of the original items in the grey list in a blacklist. In addition, stricter lists in the legislation of other European countries like Germany and the Netherlands have remained unchanged for

⁸⁹ *Napier v Barkhuizen* supra note 88 para 10. Cf *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 9.

⁹⁰ For a full consideration of lists of prohibited and presumptively unfair clauses, including international experience with the use thereof, see Naudé op cit note 83.

⁹¹ Paragraph 1 of the author's submission to Parliament, available at www.pmg.org.za/files/docs/080826profjakiessub.doc (last accessed on 27 October 2008).

⁹² Set out in an Annexure to the Directive.

⁹³ Schedule 1 to their Unfair Contract Terms Bill.

years. A properly drafted grey list, which takes into account all this experience with the use of lists, need not be amended frequently at all.

In the interest of flexibility, the English and Scottish Law Commissions propose that the grey list be placed in a Schedule to the legislation and the Minister given the power to add terms by regulation, should this prove necessary.⁹⁴ The European Commission's draft Directive on Consumer Rights also sets out the black and grey lists in Annexures to the Directive and provides that the Commission may amend these Annexures in the light of notification by the Member States of terms found unfair by competent national authorities and which the Member States deem to be relevant for the purpose of amending the Annexures.⁹⁵ Similarly, the last item in the list of 'examples of unfair terms' in the proposed new Australian legislation refers to 'a term of a kind, or a term that has an effect of a kind, prescribed by the regulations'. It may be argued that a similar intermediate solution is impossible in South Africa in view of the decision in *Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & others*,⁹⁶ which held that Parliament may not in an Act authorize the President or a Minister to amend the Act itself. It is submitted that the Australian wording does not authorize the Minister to amend the Act itself, but merely expressly incorporates terms prescribed by regulations into the grey list as well.

In any event, if a grey list is included in the Regulations, the Regulations should state clearly and in no uncertain terms that other, unlisted terms may still be unfair under s 48; in other words, that the grey list is not intended to be exhaustive.

However, in respect of the business-to-business contracts covered in the Act,⁹⁷ the black and grey lists should not apply to anything more than a term that was originally put forward as one of the supplier's written standard terms of business and that has not subsequently been changed in favour of the small business. This is the position under the Unfair Contract Terms Bill proposed by the Law Commissions of England, Wales and Scotland.⁹⁸ In fact, in business-to-small business transactions, control merely on the basis of unfairness should always be restricted to such standard terms.⁹⁹ Common-law and constitutional control mechanisms are sufficient to deal with core terms and other negotiated terms in business-to-small business contracts.

It is submitted that even if no grey list is forthcoming, courts should have regard to the black and grey lists in foreign unfair contract terms legislation in

⁹⁴ Op cit note 31.

⁹⁵ Article 39.

⁹⁶ 1995 (10) BCLR 1289 (CC).

⁹⁷ See s 5 read with the definition of 'consumer' in s 1.

⁹⁸ S 14(6) read with s 11.

⁹⁹ Cf English and Scottish Law Commissions *Report* op cit note 31 at 83 et seq.

interpreting the concept of unfairness.¹⁰⁰ It should be relevant for courts, consumers and enforcement bodies to know which types of terms have commonly been held to be so unfair that legislatures in a number of countries were prepared to brand them as always or usually unfair.¹⁰¹

Three of the items in the current blacklist of s 51 deserve further comment. Section 51(1)(g)(i) merely prohibits a false acknowledgment by the consumer that 'before the contract was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier.' The more widely formulated item in the EC Directive's grey list, which refers to 'terms with the object or effect of limiting the business's liability for statements or promises made by its employees or agents, or making its liability for statements or promises subject to formalities', is preferable as it is better able to catch all sorts of terms aimed at achieving the same effect.¹⁰² This type of term should also rather be greylisted than prohibited outright in s 51, particularly as s 51 currently applies to negotiated terms in the business-to-business contracts covered by the Act (in particular where the 'consumer' is a small business or a franchisee). The current wording prevents two businesses from explicitly and expressly negotiating that a term be included that their written agreement will be the sole record of their transaction and that no party would be able to rely on alleged representations or warranties not recorded in the written agreement.

Secondly, the decision to prohibit exemption clauses in respect of gross negligence¹⁰³ is dangerous unless exemption clauses in respect of ordinary negligence are greylisted. The legislation in its current format may be interpreted as effectively sanctioning clauses that exempt liability for ordinary negligence, particularly where these are initialed or signed, whereas these are often unfair as well.¹⁰⁴ The burden of persuading the court that there are good reasons why the consumer should carry the risk of any harm caused by the supplier's negligence, should be on the business, which is what greylisting such clauses would achieve. Greylisting such clauses would also make it more likely that businesses would carefully consider whether it is really justifiable in their business environment to exclude liability for negligence, as opposed to, say, merely placing a reasonable cap on liability or to providing the consumer with a choice to contract at a higher price without the exemption clause.

However, it must be said that clauses exempting liability for ordinary negligence are not necessarily greylisted in all foreign jurisdictions with

¹⁰⁰ As noted above, s 2(2)(a) authorizes courts to consider relevant foreign and international law when interpreting and applying the Act. See Naudé op cit note 83 at 147-64 for a discussion of the contents of lists from other countries.

¹⁰¹ Naudé op cit note 83 at 129.

¹⁰² Naudé op cit note 83 at 160-1.

¹⁰³ Section 51(1)(c)(i).

¹⁰⁴ See also the discussion of s 49 above.

unfair terms legislation.¹⁰⁵ They are greylisted in, for example, the Netherlands and Portugal, whereas the UK's Unfair Contract Terms Act, 1977, subjects clauses excluding or limiting liability to a reasonableness standard,¹⁰⁶ and explicitly provides that 'it is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.' In addition, clauses excluding or limiting liability for breach of contract (which would often encompass contract terms limiting the supplier's liability for negligence) are greylisted in the European Unfair Terms Directive as well as in a developing country like Thailand.¹⁰⁷ However, in Germany only clauses excluding or limiting the supplier's liability for personal injury or death and/or for gross negligence are blacklisted, whereas other exemption clauses in respect of negligence are only subject to the general prohibition against unfair contract terms.¹⁰⁸

Whereas research on the practical impact of greylisting all exemption clauses in respect of negligence would have been very helpful to inform the decision of whether to take this course, at the very least clauses excluding or limiting the supplier's liability for bodily injury or death caused by the supplier's negligence should be greylisted.¹⁰⁹

Finally, s 51(1)(h) on forfeiture clauses may be ambiguous in that it refers to a requirement to forfeit any money to the supplier to which the supplier is not entitled in terms of this Act or any other law. This may mean that no forfeiture clause except in respect of forfeiture that is specifically allowed by a law is allowed. Alternatively, it could merely mean that clauses in respect of forfeiture prohibited by the Act or other laws are prohibited.

Section 52: 'Powers of court to ensure fair and just conduct, terms and conditions'

Although situated in Part G on the consumer's right to fair contract terms, s 52 applies not only to unfair contract terms, but also to contraventions of s 40 on 'unconscionable conduct' and s 41 on misrepresentations (both of

¹⁰⁵ For a fuller discussion see Naudé op cit note 83 at 155-8.

¹⁰⁶ Section 2(2).

¹⁰⁷ In addition, the UK's Unfair Contract Terms Act, 1977, which predates the Directive, subjects exemption clauses in respect of negligence to a reasonableness review.

¹⁰⁸ This would be explained by the fact that Germany's 'grey list' does not function like most grey lists which allow for the possibility of a listed item being fair in the particular circumstances of the case. The clauses in the German 'grey list' of § 308 are all prohibited, but the list is called 'grey' as each item therein contains a particular 'open' or 'evaluative' element in the definition of the listed term itself, such as 'an unreasonably long period', 'an objectively justified reason' or 'a declaration. . . of particular importance'. There are no items without such open-ended standards in the German grey list. See further Naudé op cit note 83 at 130.

¹⁰⁹ For full argument see Naudé op cit note 83 at 156-7. Such clauses are prohibited in s 2(1) Unfair Contract Terms Act (UK); § 309(7)(a) BGB (German Civil Code); § 6(1)(a) Austrian Consumer Protection Act (Konsumentenschutzgesetz); art 18(a) of the Portuguese legislation; and greylisted in item (a) Directive (injury or death caused by an act or omission of the supplier).

which appear in Part F). This peculiar situation is a remnant of the first two published drafts of the Bill, dating from before its introduction into Parliament, in which these provisions were all set out in one Part under the heading 'Right to honest dealing and fair agreements'.¹¹⁰

Essentially, s 52 grants courts the power to declare agreements, in whole or in part, unfair or unconscionable.¹¹¹ A court may also make any further order it considers just and reasonable, including, but not limited to, an order to restore money or property to the consumer, to compensate the consumer for losses or expenses and requiring the supplier to cease any practice or alter any practice, form or document, to avoid repetition of the supplier's conduct.¹¹²

However, all of these orders may only be made if the Act 'does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability'.¹¹³ It is unclear whether this means that the consumer must first approach the alternative dispute resolution agents mentioned in the Act (such as the ombud in a particular sector) or the provincial consumer courts before she may approach an ordinary court. This conclusion seems to be borne out by s 69(1)(d), which provides that the consumer may only approach a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted. This paragraph in s 69 appears after the reference to the consumer's right to use the other possible dispute resolution mechanisms of s 69(1)(a) to (c).

On the other hand, if this was the intention, it does not make sense for s 52 to grant only the ordinary courts powers to make orders on unfair terms, and not to grant such powers to the provincial consumer courts as well.¹¹⁴ The result would be that the consumer is sent from pillar to post by requiring her to first approach the provincial consumer courts, whereas they will have no power to decide a dispute, but will merely be able to encourage the voluntary settlement of the dispute. The consumer dealing with an intractable supplier must therefore first go through the motions of discussing the matter before a provincial consumer court, only to have to refer the matter to the ordinary courts thereafter in order to obtain any relief where the supplier refuses to stop relying on the term.

That only the ordinary courts would have jurisdiction in respect of unfair contract terms, is not stated unequivocally, but is implicit in the absence of any reference to the National Consumer Tribunal or provincial consumer

¹¹⁰ See Chapter 2 Part F of the first published Draft Consumer Protection Bill, General Notice 418 GG 28629 of 15 March 2006 and the Second Discussion Draft dated 8 September 2006, available at http://www.dti.gov.za/ccrdlawreview/CPBillSept21_06.pdf (last accessed on 30 October 2008).

¹¹¹ Section 52(3)(a).

¹¹² Section 52(3)(b).

¹¹³ Section 52(1)(b).

¹¹⁴ '[C]ourt' is defined in s 1 as not including a consumer court.

courts in s 52. It should be noted that ‘court’ is defined in s 1 as not including a consumer court.

In their initial briefing to Parliament on the Consumer Protection Bill, the Department of Trade and Industry (‘the DTI’) explained that the Bill gives exclusive jurisdiction to the courts over ‘contractual disputes’ due to a compromise reached with the Department of Justice, which was concerned that the courts’ jurisdiction was eroded by the creation of various tribunals.¹¹⁵ The minutes of this briefing, although not reflecting what was said orally on the compromise with the Department of Justice, state that

‘[i]t was decided that the National Consumer Tribunal would be able to deal with most consumer issues, *but would refer contractual disputes to the courts*. The problem was however that courts were difficult for consumers to access. Thus the Tribunal had the power to order compensation for the consumer. Where the consumer approached the Ombudsman, the latter could enter a consent order, which can be taken to the Tribunal or court to be entered as an order (which could include damages). This shortened the process considerably, since a Tribunal order enjoyed the same status as an order of the court.’

Although this is not entirely clear, the implication of the italicized words seems to be that the DTI intended that consumers may either directly approach the court for a declaration that a term is unfair, or may approach the relevant ombud (if there is one for that sector), who could then enter a consent order, which could be taken to court or the Tribunal to be made an order of court. If such consensus was reached and reflected in a consent order, there would therefore not be a dispute which had to be decided by an ordinary court. However, the Tribunal and consumer courts would not have jurisdiction over contractual disputes; otherwise s 52 would have bestowed powers on these institutions as well.¹¹⁶

Whereas the existence of the small claims courts would provide some relief to consumers who cannot afford litigation in the Magistrates’ or High Courts, many cases would fall outside the jurisdiction of these courts. It is a well known fact that the costs, risks and effort of court action are just too high for ordinary consumers, including middle class consumers. For this and other reasons set out below it is therefore unlikely that this legislation in its current form will have a real impact on the eradication of unfair contract terms.

The problem is exacerbated by the fact that s 52 is written only with the paradigm of court action involving an individual agreement with a particular individual consumer in mind. Thus subsecs (1) and (3) only bestow power on courts in respect of ‘a transaction or agreement between a supplier and

¹¹⁵ Minutes of this briefing are available at <http://www.pmg.org.za/report/20080507-consumer-protection-bill-workshop-day-2> (last accessed on 10 March 2009).

¹¹⁶ The uncertainty caused by the failure to mention the Tribunal and consumer courts in s 52 was pointed out in submissions to Parliament, but this was not specifically responded to by either the DTI or the parliamentary portfolio committee, perhaps because an explanation was already given upon earlier introduction of the Bill that only the ordinary courts should have jurisdiction over contractual issues as a result of a compromise with the Department of Justice.

consumer'. Subsection (2) sets out a list of factors relevant to the assessment of fairness, but all of these refer to the agreement that *was* concluded and is considered by the court. This exclusive paradigm of judicial control over individual consumer agreements is highly problematic in the consumer context, given the inherent limitations of court action. These have been fully set out before¹¹⁷ and do not only relate to the cost, risk and effort of court action for individual consumers. Ignorance of the law would also deter many consumers, particularly vulnerable consumers, from bringing cases to court or other bodies. Businesses faced with a challenge by an individual 'difficult' consumer may prefer to settle the matter out of court with that individual by ceasing to rely on the term, whilst continuing to use it in all other transactions. Court decisions also only bind the individual business concerned and the message that a particular term has been declared unfair may never reach other businesses or even their legal advisers, particularly as many consumer cases would be heard in the lower courts, whose decisions are not reported. Judicial control over agreements concluded in the past is also only reactive, and always comes too late, after the abuse had already taken place.¹¹⁸ Fast, proactive control is more desirable and is unlikely to occur through court action over an individual transaction for the abovementioned reasons.

It may be acceptable to grant courts the exclusive, final say over whether a particular term is unfair, provided that other mechanisms aimed at preventative control which aim to address the limitations of reactive judicial control are fully utilized. Such mechanisms include black and grey lists and gearing the provisions on unfair terms towards the paradigm of 'abstract' 'general use challenges' as well. 'General use' court challenges refer to interdict proceedings brought by regulators such as the National Consumer Commission ('NCC') or accredited consumer organizations in respect of terms drawn up for general use. No transaction actually concluded with an individual consumer is involved in such challenges, so that no individual consumer need even give evidence on the terms 'agreed' with the supplier. Instead, legislation should clearly authorize such bodies, and in the case of the NCC, ideally oblige it, to consider complaints, negotiate undertakings with businesses to stop using particular terms and institute interdict proceedings against recalcitrant businesses which offer to contract on terms that are unfair, unless there are good reasons not to. Section 52 should be amended to cater for these types of challenges as well as individual challenges.

Experience in other countries has shown that only once such general use challenges have been used has any success been achieved in the eradication of unfair contract terms. For example, in the UK only the courts have the final say about whether a term is unfair. However, under the legislation which implemented the Unfair Terms Directive, the Office of Fair Trading ('OFT')

¹¹⁷ Naudé op cit note 1 at 379–80 and authorities there cited.

¹¹⁸ For all these arguments, see Naudé op cit note 1 at 379–80 and authorities there cited.

is obliged to consider complaints unless they are frivolous or vexatious, and may negotiate undertakings with businesses to stop using unfair terms, and bring injunction proceedings against recalcitrant businesses.¹¹⁹ They have to give reasons for any decision not to bring such injunction proceedings, which in particular could include a voluntary undertaking by the business to amend its terms.¹²⁰ Although the Unfair Contract Terms Act of 1977 already allowed for individual court challenges against certain unfair terms, the OFT, when starting its work in the 1990s, found that many consumer contracts contained unfair terms, even terms which were prohibited outright in the 1977 legislation.¹²¹ It was only once the OFT commenced its system of negotiations against the backdrop of general use challenges in the form of injunction proceedings that any real progress was made in the fight against unfair terms.¹²² In Germany, it is the abstract challenges by consumer organizations which have played the greatest role in the eradication of unfair terms in consumer contracts.¹²³ These challenges are sufficiently funded by the German government.¹²⁴

It is true that our Consumer Protection Act gives the NCC wide, general powers elsewhere in the Act.¹²⁵ These powers are wide enough to allow it to bring such general use challenges, although it would seem that the intention is that the NCC will first have to refer a complaint to the provincial and other enforcement agencies.¹²⁶ However, it would have been preferable to place more specific obligations on the NCC to consider all complaints unless they are frivolous or vexatious, negotiate undertakings with business to stop prohibited conduct, keep a record of all such undertakings and provide

¹¹⁹ Regulations 10 and 12, Unfair Terms in Consumer Contracts Regulations, 1999.

¹²⁰ Regulation 10, Unfair Terms in Consumer Contracts Regulations, 1999.

¹²¹ OFT Bulletin 2 page 5. See also Robert Bradgate 'Experience in the UK' in European Commission *The 'Unfair Terms' Directive, Five Years on: Evaluation and Future Perspectives, Brussels Conference 1-3.7.1999* (1999) 35 at 50; Standing Committee of Officials on Consumer Affairs — Unfair Contract Terms Working Party *Unfair Contract Terms — A Discussion Paper* (2004) 44.

¹²² See Bradgate in European Commission *Brussels Conference* *ibid* at 35 for statistics up to the end of 1998. See generally, Susan Bright 'Winning the battle against unfair contract terms' 2000 (20) *Legal Studies* 331.

¹²³ See Hans-W Micklitz 'Report on the practical implementation of Directive 93/13/EEC in the Federal Republic of Germany' in European Commission *Brussels Conference* *ibid* 221 at 222. They are given the power to bring injunction proceedings under the *Unterlassungsklagegesetz* (§§ 1-3). See also the Background Report to the OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace of 19-25 April 2005 at page 30 available at <http://www.oecd.org/dataoecd/59/21/34699496.pdf> (last accessed 18 February 2009).

¹²⁴ Micklitz *op cit* note 123 at 222. Similarly, Jaffe & Vaughn *op cit* note 59 report that '[t]he Venezuelan state provides a mechanism by which an agency representing consumers can examine and challenge contracts of adhesion. This provision for some oversight of these contracts seems to be a useful enforcement technique' (at 9).

¹²⁵ Chapters 3, 5 and 6.

¹²⁶ Section 72 *et seq.*

consumers with extracts from this register on request about the status of a particular term, and if the business fails to agree to or comply with such undertaking, bring general use challenges, unless there are good reasons not to. Ideally, separate unfair terms legislation, which provides specifically for these powers and other detailed rules to ensure more effective control, should have been passed. In any event, now that the rules on unfair contract terms form part of the Consumer Protection Act, s 52 should be rewritten with such challenges in mind.

As already stated, the list of relevant factors in s 52(2) which a court 'must' consider is also problematic for being written only with the paradigm of a complaint by a particular, individual consumer over terms already included in his agreement in mind. The list of factors is deficient even for that paradigm. Almost all the factors relate to 'procedural unfairness' whereas more factors relevant to the 'substantive fairness' of a term should also have been included.¹²⁷ With 'procedural unfairness factors' I mean factors relating to the process under which an individual agreement was concluded and the peculiar attributes of the individual consumer involved, such as the individual consumer's bargaining position and sophistication, and whether she knew about the term. As I have shown in detail elsewhere, even sophisticated consumers operating in a competitive market, who therefore have 'bargaining power' if this is understood in the economic sense, need protection against substantively unfair terms, regardless of whether they somehow sensed that they should really be reading the standard terms before adhering to the contract but did not do so.¹²⁸ The reality is that consumers, regardless of their sophistication or the theoretical possibility of obtaining better standard terms in the marketplace, will mostly not read long lists of standard terms every time they enter into a transaction.¹²⁹ As Reinhard Zimmermann has noted, the most prudent decision for the reasonable person will often be not to read the standard terms, even if he or she has the 'bargaining power' to have them renegotiated.¹³⁰ As noted above, the transaction costs of reading the terms, trying to understand what they mean and finding someone with authority to bargain about them, are just too high, regardless of the economic 'bargaining position' of the parties, taking into account the availability of equivalent goods or services on better standard terms.¹³¹ All consumers confronted with standard terms deserve protection against substantively unfair terms, as the use of long lists of standard terms and the typical take-it-or-leave-it attitude of suppliers create an inherent, structural inequality between the business and the consumer. Suppliers typically abuse the consumer's lack of time, knowledge or bargaining power by tucking away unfair terms in the standard terms. For this reason, mere substantive

¹²⁷ See also Naudé op cit note 1 in respect of an earlier set of factors in the draft Bills.

¹²⁸ Naudé op cit note 1 at 365-9.

¹²⁹ Naudé op cit note 1 at 365-9.

¹³⁰ Reinhard Zimmermann *The New German Law of Obligations* (2005) 176.

¹³¹ See at note 18 above.

unfairness of the term, regardless of the particular consumer's bargaining power etc, should sometimes be sufficient. A court which is not sufficiently aware of the realities surrounding standard-form contracting, upon seeing the prominence given to bargaining power and alternatives in the marketplace in s 52, may consider the consumer's sophistication or the availability of alternatives in the marketplace as unduly important in counting against the consumer. In addition, in general use challenges, the focus is likely to be more on substantive fairness, given that no individual consumer is involved in the litigation. More factors to do with substantive fairness should therefore have been included in the list. In addition, 'must' should be changed to 'may' to give the court the discretion to discuss only the factors which it considers relevant. It should also be made clear that the list of factors in s 52(2) is not a closed one, so that other factors may be relevant.

The best international model of relevant factors is to be found in the Unfair Contract Terms Bill proposed by the English and Scottish Law Commissions in 2005.¹³² Some of the substantive fairness factors in the Bill are '(c) the balance of the parties' interests, (d) the risks to the party adversely affected by the term, (e) the possibility and probability of insurance' and '(g) the extent to which the term (whether alone or with others) differs from what would have been the case in its absence.' In addition, the Explanatory Notes to the Bill heavily qualify the procedural factors of bargaining position and knowledge of the consumer in a manner that will invite sensitivity to the realities surrounding standard-term contracting.¹³³ Thus, after having specifically warned that 'inequality of bargaining power' is an ambiguous term which is often misunderstood, the Notes explain that:

'the strength of the parties' bargaining positions may involve questions such as (a) whether the transaction was unusual for either or both of them, (b) whether the complaining party was offered a choice over a particular term, (c) whether that party had a reasonable opportunity to seek a more favourable term, (d) whether that party had a realistic opportunity to enter into a similar contract with other persons, but without that term, (e) whether that party's requirements could have been met in other ways, (f) whether it was reasonable, given that party's abilities, for him or her to have taken advantage of any choice offered under (b) or available under (e)'.¹³⁴

In considering the 'knowledge and understanding of a party' it may be relevant:

'(c) whether the party understood [the term's] meaning and implications, (d) what a person other than the party, but in a similar position, would usually expect in the case of a similar transaction, (e) the complexity of the transaction, (f) the information given to the party about the transaction before or when the contract was made, (g) whether the contract was transparent, (h) how the contract was explained to the party, (i) whether the party had a reasonable

¹³² Op cit note 31 s 14(4).

¹³³ Paragraphs 44 and 45 of the Explanatory Notes to the Bill, op cit note 31.

¹³⁴ Ibid.

opportunity to absorb any information given, (j) whether the party took professional advice or it was reasonable to expect the party to have done so, and (k) whether the party had a realistic opportunity to cancel the contract without charge.¹³⁵

As already pointed out elsewhere, the South African Law Commission (as it then was) also included factors to do with substantive fairness in its Bill,¹³⁶ and it is a pity that all the good parts of its proposed Bill have not been replicated in the Consumer Protection Act.¹³⁷ Such factors include:

'(m) whether a term is unduly difficult to fulfil, or imposes obligations or liabilities on a party which are not reasonably necessary to protect the other party; (n) whether the contract or term excludes or limits the obligations or liabilities of a party to an extent that is not reasonably necessary to protect his or her interests; (o) whether there is a lack of reciprocity in an otherwise reciprocal contract; . . . (w) whether, to the prejudice of the party against whom the term is proffered, the party proffering the term is otherwise placed in a position substantially better than that in which the party proffering the term would have been under the regulatory law, had it not been for the term in question; [and] (x) the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled'.¹³⁸

In any event, even if the wording of s 52(2) is not changed in the manner suggested, courts should consider the aforementioned substantive fairness factors and qualifications placed on the procedural fairness factors, and refuse to be bound to consider only the factors currently listed in the Act.

V SCOPE OF THE CONTENT CONTROL PROVIDED FOR IN THE ACT

All terms in all the agreements covered by the Act are subject to review for unfairness. This means that specifically negotiated terms, including core terms relating to the contract price or definition of the main subject matter, may also be challenged under the Act. This applies not only to contracts with individual consumers who are natural persons acting for purposes wholly or partially unrelated to their business or profession (what I would call 'true B2C contracts'). It applies also to the B2B contracts covered by the Act. These are, first, agreements for the supply of goods and services to small juristic persons, defined with reference to a maximum turnover or asset value to be prescribed by the Minister, or to any business which is a non-juristic person.¹³⁹ (Partnerships, trusts and bodies corporate are regarded as juristic

¹³⁵ Ibid.

¹³⁶ Naudé op cit note 1 at 374.

¹³⁷ In particular, the powers and duties of the Ombudsperson provided for in the Bill, which are well-g geared towards preventative control.

¹³⁸ The argument that more factors to do with substantive fairness should have been included was also made to Parliament but not acted upon. See Naudé op cit note 22 at 4-5.

¹³⁹ Section 5(2).

persons for the purpose of the Act.)¹⁴⁰ It is possible that the Minister will set the maximum turnover or asset value at one million rand as under the National Credit Act.¹⁴¹ In addition, all terms in all franchise agreements may be challenged by the franchisee for their unfairness, regardless of the size of the franchisee.¹⁴²

In its original form as initially introduced into Parliament, the Bill differentiated between the price, which could only be set aside if it was manifestly unjust, and other terms, which could be set aside simply because they were unfair, unreasonable or unjust.¹⁴³ This distinction was removed in the final version.

By contrast to the position in the Consumer Protection Act, other jurisdictions often limit content control in respect of B2B contracts to standard terms.¹⁴⁴ Examples are the German, Dutch and Portuguese legislation.¹⁴⁵ One exception is the UK Unfair Contract Terms Act, 1977, but only certain types of negotiated clauses are subject to control on the basis of unreasonableness alone.¹⁴⁶ The countries which copied the EC Unfair Terms Directive limit protection in B2C contracts to non-negotiated, non-core terms which are not, moreover, identical to the residual rules which would apply in the absence of agreement on a matter.¹⁴⁷ 'Non-negotiated term' is a wider concept than 'standard term' as the term does not have to be intended for general and repeated use, as long as it was drafted in advance and the consumer has therefore not been able to influence the substance of the term.¹⁴⁸ The typical exclusion of core terms from review means that terms as to the price and definition of the main subject matter of the contract are

¹⁴⁰ See the definition of 'juristic person' in s 1.

¹⁴¹ Section 7(1)(a) of Act 34 of 2005 read with item 2 in the Schedule to General Notice 713 GG 28893 of 1 June 2006.

¹⁴² Section 5(6) and (7).

¹⁴³ Consumer Protection Bill 19 of 2008.

¹⁴⁴ This is what the Law Commissions of England, Wales and Scotland have recommended for small business contracts, whereas in B2C contracts all terms except transparent core terms are subject to review.

¹⁴⁵ §§ 305-310 BGB (German Civil Code), arts 6:231-237 BW (Dutch Civil Code); the Portuguese Decree-Law No 446/85 of 25 October 1985 on unfair contract terms, as amended by Decree-Law No 220/95 of 31 January 1995.

¹⁴⁶ So, for example, any clause limiting liability for death or personal injury caused by negligence is prohibited, and all other exemption clauses relating to negligence must be fair and reasonable (s 2). Exemption clauses relating to breach of contract are only subject to review if they form part of standard business terms, or the other party deals as a consumer (s 3). However, when a company purchases goods of a type in which it does not ordinarily deal and which are not for a purpose integral to the business, it may 'deal as a consumer' under the Unfair Contract Terms Act (see for example *R & B Customs Brokers Ltd v United Dominions Trust Ltd* [1988] 1 All ER 847).

¹⁴⁷ So, for example, apart from the limited category of negotiated terms covered by the UK Unfair Contract Terms Act, 1977, only non-negotiated, non-core terms are subject to review under the UK Unfair Terms in Consumer Contracts Regulations, 1999, which largely copied the EC Unfair Terms Directive.

¹⁴⁸ See, for example, the definition in art 3(2) of the Unfair Terms Directive.

excluded from review, provided they are 'transparent', that is, expressed in clear and intelligible language. This is, for example, the position under the Unfair Terms Directive (implemented almost unchanged in the UK),¹⁴⁹ the Principles of European Contract Law (PECL) and the European Draft Common Frame of Reference, all of which apply only to non-negotiated terms.¹⁵⁰ The English and Scottish Law Commissions wisely place further qualifications on the exclusion of core terms from review, namely that the definition of the main subject matter must be substantially the same as the definition the consumer reasonably expected, and the price must be payable in circumstances substantially the same as those the consumer expected and calculated in a way substantially the same as the consumer reasonably expected.¹⁵¹

It is to be hoped that courts applying the more generous provisions of the South African legislation will intuitively take into account the difference between negotiated, non-negotiated and core terms when considering the fairness of a term. Hopefully they will not easily pronounce on the adequacy of the price, at least not unless it is manifestly unjust or there is 'gross disparity'.¹⁵² Similarly, the definition of the main subject matter of the contract should normally be left untouched, provided it complies with the above-mentioned qualifications set by the Law Commissions in the UK. The consumer definitely knows about the core terms and could be expected to shop around for better core terms or otherwise bargain about them. It would also create uncertainty if courts are willing to set aside a contract simply on the basis that the price exceeds what is ultimately found to be the market value and is therefore 'unfair'.

In my view core terms should rather have been explicitly excluded from review on the basis of their fairness, provided the aforesaid qualifications are

¹⁴⁹ See note 146 above.

¹⁵⁰ Article 3, EC Unfair Terms Directive (op cit note 32); art 4:110 PECL, art II — 1:110 DCFR. See generally on PECL and its status, Ole Lando & Hugh Beale (eds) *Principles of European Contract Law — Parts I and II Combined and Revised Edition* (2000) xxi-xxvii and on the Draft Common Frame of Reference Study Group on a European Civil Code & Research Group on EC Private Law (Acquis Group) *Principles, Definitions and Model Rules on European Private Law — Draft Common Frame of Reference — Outline Edition* (2009) 1-5.

¹⁵¹ Section 4(2) and (3).

¹⁵² The concept of a 'manifestly unjust price' is found in the common-law rule that a court may set aside a price set by a third party appointed by the parties for that purpose as long as it was manifestly unjust. See, for example, *Hurwitz & others NNO v Table Bay Engineering (Pty) Ltd & another* 1994 (3) SA 449 (C); *Van Heerden v Basson* 1998 (1) SA 715 (T). The reasoning in the latter case shows that this situation is distinguishable from one where the parties specifically agreed on the manifestly unjust price, as the court suggested that the reason why the third party's price might be challenged is the absence of consensus or reasonable reliance of consensus that a manifestly unjust price set by the third party would bind them (at 718I — 719B). On the concept of 'gross disparity' see for example, art 3.10 of the Unidroit Principles of International Commercial Contracts, 2004.

met. Of course, the stricter common-law and constitutional control mechanisms¹⁵³ and s 40 of the Act on unconscionability would still provide control over unjust core terms.

Certainly terms which merely reflect what the law would have been in their absence should not be set aside merely because the court considers them 'unfair'. Rather, the normal route for developing the common-law residual rule (or 'term implied by law') must be followed if the court considers it unfair. Again, ideally international best practice of explicitly excluding such terms from review on the basis of unfairness should have been followed.¹⁵⁴

In addition, courts should be wary of upholding challenges to any negotiated terms in B2B contracts merely on the basis that they are 'unfair'. The legislation should have provided for differentiation between the B2B and B2C contracts covered by the Act. In respect of the B2B contracts covered by the Act, only standard terms should have been subject to challenge simply on the basis that they are unfair. In this regard the Act should have allowed challenge to a term that was originally put forward as one of the supplier's written standard terms of business and that has not subsequently been changed in favour of the small business.¹⁵⁵ This would allow the small business to challenge a particular standard term which was not negotiated, even if some of the other standard terms were negotiated. The stricter common-law control mechanisms such as the requirement that contracts must not be contrary to public policy are sufficient for the negotiated terms in business-to-business contracts.¹⁵⁶ The Act does not purport to have codified all of these common-law rules.

Finally, it should be noted that Part G of the Consumer Protection Act does not apply to contracts concluded before the general effective date.¹⁵⁷

¹⁵³ Such as the requirement of legality, and the rules on undue influence and misrepresentation.

¹⁵⁴ See, for example, § 307(3) of the German Civil Code; s 4(4)(b) of the English and Scottish Law Commissions' Bill.

¹⁵⁵ This is the position under the Unfair Contract Terms Bill proposed by the Law Commissions of England, Wales and Scotland. See s 14(6) read with s 11.

¹⁵⁶ The Law Commissions of England, Wales and Scotland aptly recommended that in B2C contracts, all terms, including negotiated terms, are subject to a fairness review. They considered that in B2C contracts, there is hardly ever any real negotiation about terms except for core terms anyway. The Office of Fair Trading gave evidence that firms were exploiting the fact that the Unfair Terms in Consumer Contract Regulations, 1999 do not apply to individually negotiated terms. In addition, a consumer may not realize the implications of negotiating. They stated further that the proposal would also make the legislation simpler, while affecting very few cases where non-core terms are actually negotiated. The fact that a term was explained to the consumer or that the consumer took advice on it, would of course be relevant to whether or not the term is unfair (op cit note 31 at 30-1). Their reasons for providing for more limited control in business-to-small business contracts (defined with reference to employee numbers) is set out at 86 et seq of their Report (op cit note 31). A consideration of the delimitation of which businesses deserve statutory protection against unfair standard terms is beyond the scope of this article.

¹⁵⁷ Paragraph 3 of Schedule 2.

VI OTHER PROPOSALS FOR IMPROVEMENT OF THIS PART OF THE ACT

Burden of proof in respect of unfairness

I have argued elsewhere that where an individual ('true') consumer is involved in the litigation, the burden of proving the fairness of a term should ideally be on the business once the issue is raised by the consumer or the court on its own initiative, even if the particular term is not greylisted.¹⁵⁸ This is what is proposed by the English and Scottish Law Commissions for true consumer contracts, that is, contracts with an individual (natural person) acting wholly or mainly for a purpose unconnected with her business or profession.¹⁵⁹ This would prevent the supposed danger that a grey list would cause courts to limit control to the listed clauses (coupled with clear emphasis in the legislation and explanatory memorandum that unlisted terms may also be unfair).¹⁶⁰ However, in general use challenges where no individual consumer is involved, but a consumer organization, regulator or the NCC applies for an interdict to stop a supplier from using a term in future, or where a compliance notice by the NCC in this regard is challenged by a supplier, the burden of proof in respect of unlisted clauses should remain on these institutions.¹⁶¹ They are in a stronger position than individual consumers to argue their case, will be familiar with the Act and will vigorously argue that an unlisted clause may still be unfair under the general clause prohibiting unfair terms. However, a greylisted term should always be rebuttably presumed to be unfair, including in general use challenges.¹⁶²

In all the B2B transactions covered by the Act the burden of proof should remain on the complainant.¹⁶³

However, it may be argued that it would be too drastic to place the risk of non-persuasion on the business in cases involving individual consumers and non-greylisted clauses. On this view, the burden of proof or risk of non-persuasion should in these cases also depend on whether a term is greylisted or not. This is the position in, for example, the Netherlands.¹⁶⁴ On reflection, a country with not much experience with unfair contract terms

¹⁵⁸ Naudé op cit note 83 at 142–4, who also sets out different views on this issue encountered in other jurisdictions.

¹⁵⁹ Section 16(1) of the English and Scottish Law Commissions' Bill.

¹⁶⁰ See also Naudé op cit note 1 especially at 361–70 for the argument that typically the standard terms of a consumer contract cannot be regarded as the product of the autonomy of the consumer. Other policy reasons demand that businesses are allowed to organize themselves by way of standard contract terms. As argued there, some commentators therefore argue that the burden should be on the business to prove that a term should be enforced in so far as it conflicts with the residual rules of contract law which would have applied in its absence.

¹⁶¹ See also s 16(2) of the English and Scottish Law Commissions' Bill.

¹⁶² Naudé op cit note 83 at 142–4, contrary to what is proposed by the English and Scottish Law Commissions.

¹⁶³ See also s 17 of the English and Scottish Law Commissions' Bill.

¹⁶⁴ Article 6:237 Burgerlijk Wetboek (Dutch Civil Code).

control, like South Africa, might justifiably follow this more cautious option than always placing the risk of non-persuasion on the business in cases involving individual consumers.

Power of court to raise issue of unfairness of its own initiative

It is likely that South African courts would be prepared to raise the issue of the unfairness of a term on their own initiative, given the well-established principle that courts may decide issues overlooked by the parties where this is required in the interest of justice.¹⁶⁵ Nevertheless, it may be advisable to include an explicit provision in the Act that courts (or the Tribunal or provincial consumer courts if they should be given jurisdiction) may raise the issue of unfairness on their own initiative. This issue was disputed in the European Court of Justice in view of the silence of the EC Unfair Terms Directive on the matter. Although, not surprisingly, the Court held that national courts may raise the issue of unfairness on their own initiative, the expensive litigation could have been avoided if there was an explicit provision on this point.¹⁶⁶

VII CONCLUSION

Whereas the DTI and Parliament should be commended for introducing unfair contract terms legislation at last, more cognizance should have been taken of international best practice in this area in drafting this legislation. The problems faced by consumers which necessitate legislative protection could have been far better addressed through a number of strategies employed elsewhere. The DTI and Parliament are therefore urged to make the amendments to the Consumer Protection Act proposed in this contribution on the basis of comparative research. Courts are also urged to follow the recommendations made in this article for the interpretation of the provisions.

¹⁶⁵ See recently *Southern Africa Enterprise Development Fund Inc v Industrial Credit Corporation Africa Ltd* 2008 (6) SA 468 (W).

¹⁶⁶ *Océano Grupo Editorial SA v Roció Murciano Quintero; Salvat Editores SA v José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Beroane and Emilio Viñas Feliú*, ECJ judgment of 27/6/2000, Joined Cases C-240/98 to C-244/98, [2000] ECR I-4941.