

UNFAIR CONTRACT TERMS LEGISLATION: THE IMPLICATIONS OF WHY WE NEED IT FOR ITS FORMULATION AND APPLICATION*

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1 Introduction

Legislative control over unfair contract terms is regarded in many countries as an essential tool in the law's response to the abuses attendant upon the use of non-negotiated or standard contract terms.¹ Some countries go further and extend statutory fairness control to negotiated terms.² The need for unfair contract terms legislation has also repeatedly been pointed out in South Africa,³ including by a few judges⁴ and the

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¹ Such legislation has long been the norm in Europe. See, eg, the German Standard Contract Terms Act of 1978 (*AGBG*) now incorporated into the Civil Code (*BGB*) (§ 305 *et seq*) and the Swedish Consumer Contract Terms Act of 1994, which replaced an Act from 1971 of the same title. See also the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993 (the Unfair Terms Directive), and reports on its implementation collated in 1995 *European Review of Private Law*. Other countries with such legislation include Zimbabwe, many South American countries, Asian countries like Japan, Hong Kong and Thailand, Israel, and provinces in Australia and Canada (many of these are mentioned in the South African Law Commission's Report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts* Project 47 April 1998). By standard terms I mean previously formulated terms intended for repeated and general use. Non-negotiated terms, as the term is used in Europe, is a wider concept between standard terms and individually negotiated terms. It refers, in the words of the Directive, to a term drafted in advance, where the consumer has not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. Non-negotiated terms therefore includes terms pre-formulated for a specific contract, but the Directive excludes a review of the core terms as to price and subject matter insofar as these are transparent. See also, eg, Micklitz *German Unfair Contract Terms Act and the EC Directive 93/13* in Lonbay (ed) *Enhancing the Legal Position of the European Consumer* (1996) 173 180.

² The Nordic countries provide examples (see Wilhelmsson *Standard Form Conditions* in Hartkamp et al *Towards a European Civil Code* (2004) 431 441). See also the English Unfair Contract Terms Act 1977 which is not limited to standard terms, although its scope is more limited than the title suggests.

³ See, eg, Turpin "Contract and Imposed Terms" 1956 *SALJ* 144; Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979); Kötz "Controlling Unfair Contract Terms: Options for Legislative Reform" 1986 *SALJ* 405; Van der Walt "Die Huidige Posisie van die Suid-Afrikaanse Reg met betrekking tot Onbillike Kontraksbedinge" 1986 *SALJ* 647; Eiselen "Die Standaardbedingprobleem: Ekonomiese Magsmisbruik, Verbruikersvraagstuk of Probleem in Eie Reg?" 1988 *De Jure* 251, 1989 *De Jure* 44; Eiselen *Die Beheer oor Standaardbedinge: 'n Regsvergelykende Ondersoek* Unpublished LLD dissertation, University of Potchefstroom (1988); Van der Walt "Kontrakte en Beheer oor Kontrakvryheid in 'n Nuwe Suid-Afrika" 1991 *THRHR* 367; Van der Walt "Aangepaste Voorstelle vir 'n Stelsel van Voorkomende Beheer oor Kontraktevryheid in die Suid-Afrikaanse Reg" 1993 *THRHR* 65; Lewis "Fairness in South African Contract Law" 2003 *SALJ* 330; cf Kerr *The Principles of the Law of Contract* 6 ed (2002) 661.

⁴ *Western Bank Ltd v Sparta Construction Co* 1975 1 SA 839 (W) 840 and *Linstom v Venter* 1957 1 SA 125 (SWA), cited by Aronstam *Consumer Protection* 16 24.

Law Commission in their 1998 Report on *Unreasonable Stipulations of Contracts and the Rectification of Contracts*.⁵

Subsequent to that Report, some South African writers have still suggested that common law mechanisms for controlling one-sided terms (such as interpretation and the requirement of legality)⁶ may be flexible enough to deal sufficiently with the problem.⁷ In addition, some writers commenting on the Supreme Court of Appeal's subsequent failure to strike down a clearly unfair exemption clause in a private hospital admission form,⁸ have tended to plead only for a greater role for constitutional values and common law principles and control mechanisms, without calling for general unfair terms legislation.⁹ This may perhaps suggest some confidence in the common law and the Bill of Rights on their own.¹⁰

In my view, common law mechanisms and judicial control cannot sufficiently address the problems in this area, regardless of how wide judges would be prepared to interpret their powers under the Constitution or the common law.¹¹ Legislative control in the form of unfair contract terms legislation (which *inter alia* gives a general power to courts to strike out or amend unfair terms) is necessary. South Africa already has some sector-specific legislation that imposes a measure of control over the contents of certain contract types, such as the National Credit Act¹² and the Rental Housing Act,¹³ but these are insufficient to address the problem of unfair contract terms, which is more pervasive.¹⁴

The South African Department of Trade and Industry (DTI) has therefore taken a step in the right direction by including provisions on unfair terms control in their proposed Consumer Protection legislation (which has not yet been finalised).¹⁵ Thus South Africa will probably

⁵ See n 1 *supra*. This report was effectively shelved after publication.

⁶ The requirement of legality implies that contracts may not be enforced insofar as they are contrary to public policy. The most important case is *Sasfin v Beukes* 1989 1 SA 1 (A).

⁷ Hefer "Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie" 2000 *TSAR* 142; Hopkins "Standard-form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice Versus Natural Justice" 2003 *TSAR* 150; Hefer "Billikheid in die Kontraktereg" 2004 *Tydskrif vir Regswetenskap* 1. Cf Jamneck "Die Konsepswontwerp op die Beheer van Kontraksbedinge" 1997 *TSAR* 637.

⁸ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA). The clause excluding liability for bodily injury caused by negligence was held to be neither surprising nor contrary to public policy.

⁹ Eg, Tladi "Breathing Constitutional Values into the Law of Contract: Freedom of Contract and the Constitution" 2002 *De Jure* 306; Hawthorne "Closing of the Open Norms in the Law of Contract" 2004 *THRHR* 294; but cf Hawthorne "Distribution of Wealth, the Dependency Theory and the Law of Contract" 2006 *THRHR* 48. Cf Bhana & Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited" 2005 *SALJ* 865 who, in criticising the *Afrox* case, argue in depth for a greater role for constitutional values in applying common law rules such as those on illegality, but mention in a footnote that they do not wish to state a preference for legislative enactment or judicial reform to facilitate constitutional compliance of contract law.

¹⁰ Such writers may, however, have simply focused on common law and constitutional arguments because these are already available.

¹¹ As will be explained further below.

¹² 34 of 2005.

¹³ 50 of 1999.

¹⁴ Such legislation is bound to have *lacunae* in respect of unfair terms control (Kötz 1986 *SALJ* 405 409).

¹⁵ Draft Consumer Protection Bill, 2006, published for comment in GN 418 in GG 28629 of 2006-03-15.

soon have unfair terms legislation which allows the “striking out” of unfair terms across different types of contract.

A proper understanding of the reasons why legislative control are required, and thus the types of goals it should achieve, remains important, however, even when we accept that such legislation is now inevitable. Such reasons will be analysed below, an exercise which is certainly not aimed primarily at persuading sceptics that we cannot do without unfair contract terms legislation. More importantly, a clear understanding of the mischief which such legislation should address, and of the reasons for the insufficiency of judicial control, is a prerequisite for a proper evaluation of the content of such legislation, in other words, for arguments on the appropriateness and effectiveness of particular legislative choices or techniques.¹⁶ Such an understanding also has a bearing on the proper interpretation and application of whatever provisions will be included in the legislation in the end.

In my view, therefore, to properly assess legislative techniques and the scope of unfair terms legislation, it is not sufficient merely to proceed from a comparative overview of experiences elsewhere, and some practical arguments why one approach or choice may be more attractive than another, without a proper understanding of the problems which such legislation seeks to address and the resultant methodological choices which this points to.¹⁷

This article therefore focuses on the implications of the problems faced by consumers confronted with non-negotiated terms, including the inherent limitations of judicial control, for the *contents* of unfair contract terms legislation. The purpose of this article is not to investigate extensively once again all the possible arguments for and against the concept of unfair contract terms legislation. This has been done sufficiently before by others in South Africa, and seems unnecessary given the overwhelming international support for such legislation and the imminence of the South African legislation. The reason I focus on the mischief to be addressed and the limits of judicial control is rather that an understanding of the problems faced by consumers is essential for an attempt to address them as effectively as possible when drafting and applying the legislation.

Therefore, in paragraph 2 below, I will first give an overview of the problems posed by the use of non-negotiated contract terms especially, as these problems and their methodological implications are sometimes not properly understood. From this analysis some conclusions will be drawn on the appropriate formulation and interpretation of unfair terms legislation. In this regard, I will point out some dangers to be avoided when formulating, interpreting and applying typical unfair terms provisions. Paragraph 3 will set out the reasons why judicial control

¹⁶ Cf also Eiselen 1988 *De Jure* 251.

¹⁷ Wilhelmsson *Standard Form Conditions* 432-433; cf Eiselen 1988 *De Jure* 251.

generally is insufficient to deal with the problem on its own. This analysis will be applied to reach conclusions on some other broad choices to be made in formulating and applying unfair terms legislation. I will illustrate the practical implications of these choices in respect of some particular legislative techniques.

A full consideration of all the major methodological choices raised by the prospect of unfair terms legislation can obviously not be attempted in one article. An analysis of the abuses attendant upon the use of unfair contract terms, and what such legislation generally seeks to achieve in this regard, is not the only determinant of good policy. For example, although one reason why control is justified over non-negotiated terms is also often present in business-to-business contracts (B2B contracts), the appropriate scope and form of control over B2B contracts is a complex issue, due to various other policy considerations at play. It therefore rather deserves a separate comprehensive study. Another controversy which will not be addressed here is the degree to which unfair terms legislation should also allow the striking out of negotiated terms. There are certainly some policy reasons for extending legislative control to negotiated terms in business-to-consumer contracts (B2C contracts),¹⁸ but this is a somewhat complex question which I cannot properly address here.¹⁹ I therefore do not, in this article, attempt to draw comprehensive conclusions on the correct methodological or theoretical paradigm(s) for unfair terms legislation in order to comment on these and all other fundamental choices on the scope of such statutory control. Nevertheless, I consider that the few choices that are commented upon are important to evaluate and improve the formulation and eventual application of unfair terms legislation. I also realise that more comprehensive, comparative research on some particular practical techniques mentioned by me will be beneficial to a more detailed proposal on their use, especially insofar as they were not considered fully by the South African Law Commission.²⁰

This article focuses primarily on “content control” in general unfair terms legislative provisions. Usually there are more steps than that involved in the control of unfair terms.²¹ The first step involves incorporation control. This entails, for example, the common law rule that surprising clauses should be pointed out before they could form part of the contract, as

¹⁸ I do not include business-to-small-business contracts where the small business deals within its normal contractual sphere of competence when I speak of consumer contracts. The DTI proposals make no differentiation between such contracts and consumer contracts in a more traditional sense. Small businesses are always regarded as consumers for purposes of the Act, except in the case of certain high-value transactions.

¹⁹ All the provisions in the SA Law Commission’s proposed Bill, as well as those of the DTI’s draft Bill apply without differentiation to negotiated and non-negotiated terms, with the obvious intention that courts may draw the necessary differentiation on the facts of a particular case.

²⁰ The DTI’s new proposals deviate from the Law Commission’s proposed Bill of 1998 in a number of respects. No explanatory memorandum or similar document was published to explain the choices made in the DTI draft Bill.

²¹ See also Bernitz *European Law in Sweden – Its Implementation and Role in Market and Consumer Law* (2002) 246.

well as formalities requirements, such as the new provisions proposed by the DTI which require express agreement on exemption and limitation of liability clauses, evidenced by signature next to such terms.²² I will only make some remarks on possible dangers of the last mentioned legislative technique. Secondly, rules of interpretation, especially the *contra proferentem* rule, play a role. Thirdly, other mandatory legislation must be kept in mind. This type of control may consist of “adding” mandatory implied terms to a contract type. If this is not relevant to a particular term, the content control of the unfair contract terms legislation comes into play. The first step in this part of the adjudication process would typically be considering any prohibited list of terms, and thereafter the general clause together with the provisions which seek to give guidance on its application.

There is some link between incorporation control and content control in general unfair terms legislation, however. The suspicion that there is typically not enough justification for incorporation of unfair non-negotiated terms other than core terms, justifies overt content control.²³ This is because an examination of what typically happens in the context of non-negotiated terms (attempted below), suggests that the average consumer often creates no reasonable reliance that he would agree to unfair terms in the fine print. Instead, the user of the terms more likely creates a reasonable reliance by the signals it sends out through marketing etcetera that contracting with it would be a pleasurable experience, that the customer will be treated fairly and that the business would not seek to avoid liability.²⁴

As the proposed Consumer Protection legislation is far from finalised at the time of writing (and hopefully will still be subject to thorough debate and improvement for some time), no overview of the proposals thus far will be provided, but some of the draft provisions will be referred to to illustrate certain arguments.

2 The justification for intervention, and the resultant need for “content control”, including “substantive unfairness control”

2 1 The reasons and justification for intervention

The non-negotiated or standard terms of a B2C contract can often not be regarded as “the proper expression of the self-determination of both parties”, which ultimately is the justification for enforcement of

²² S 50.

²³ The UK Law Commissions state in their Consultation Paper that one must accept that defects in the process of conclusion of such contracts are inevitable so that the substance of such contracts must be controlled overtly (Law Commission & Scottish Law Commission *Unfair Contract Terms – a Joint Consultation Paper* 7, Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119) (hereafter UK Law Commissions Consultation Paper).

²⁴ Willett *Good Faith and Consumer Contract Terms* in Brownsword, Hird & Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 67 76-77. Cf also Aronstam *Consumer Protection* 16; Eiselen 1988 *De Jure* 255.

agreements, under the banner of “party autonomy” and “freedom of contract”.²⁵ To use a phrase of Reinhard Zimmermann,²⁶ the reality is that, for whatever reason, a “proper evaluation and balancing of [all] the consequences of the transaction does not normally occur” on the side of one of the parties to a standard term contract. The typical absence of this basic justification for enforcement of contracts in itself demands the exercise of control over the contract’s contents in the interests of party autonomy and social responsibility.²⁷ These goals of contract law are furthermore bolstered by the fundamental constitutional values of freedom, equality and dignity.²⁸ Autonomy (and thus “freedom”) is in fact not guaranteed where one party effectively claims freedom of contract for it alone, whereas there is only freedom of contract for the other party in a very formalistic, hollow and practically meaningless sense.²⁹ It has therefore quite rightly been said that statutory intervention is necessary to protect freedom of contract.³⁰

A proper understanding of the reasons why the autonomy of the customer is impaired is important to ensure the effectiveness of any intervention.

It appears that the most important reason why the customer has no chance of influencing the non-negotiated terms is the “prohibitively high transaction costs involved, rather than the superiority of the entrepreneur”.³¹ Indeed, very often the main reason why consumers and

²⁵ The first quoted phrase is that of Zimmermann *The New German Law of Obligations* (2005) 206. See also Eiselen 1988 *De Jure* 257-258; Wilhelmsson *Standard Form Conditions* 432.

²⁶ *New German Law of Obligations* 206 208. See also Sandrock “The Standard Terms Act 1976 of West Germany” 1978 *American Journal of Comparative Law* 551; Maxeiner “Standard-Terms Contracting in the Global Electronic Age: European Alternatives” 2003 *Yale Journal of International Law* 109 174.

²⁷ See the authorities in the previous footnote and Turpin 1956 *SALJ* 144 145.

²⁸ Autonomy clearly equates with freedom and equality and dignity is endangered if the law allows the user of standard terms to pursue its own interests without a reasonable measure of concern for those of its contractual partner, especially where the latter’s apparent assent to unreasonably detrimental terms is not in fact an expression of his self-determination.

²⁹ Rakoff “Contracts of Adhesion: An Essay in Reconstruction” 1983 *Harvard Law Review* 1173 1236; Bassenge et al *Palandt Bürgerliches Gesetzbuch* 63 ed (2004) Überblick v § 305 Rdn 8; Zimmermann *New German Law of Obligations* 207-208, Howells & Weatherill *Consumer Protection Law* 2 ed (2005) 18; Van der Walt 1993 *THRHR* 65 67; Eiselen 1988 *De Jure* 256; cf BVerfGE 89, 214 et seq. Lord Reid’s recognition of a lack of real freedom of contract in *Suisse Atlantique v Rotterdamsche Kolen Centrale* 1966 2 All ER 69 76 is often cited: “In the ordinary way, the customer has no time to read [the standard terms], and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.”

³⁰ Hondius *Standaardvoorwaarden* (1978) 341; Maxeiner 2003 *Yale Journal of International Law* 109 174; Wilhelmsson *Standard Form Conditions* 432; Lewis 2003 *SALJ* 330 348; and the writers cited in n 29 supra.

³¹ Zweigert & Kötz *Comparative Law* 335; Zimmermann *New German Law of Obligations* 176; Rebmann, Säcker & Rixecker *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 2a Schuldrecht Allgemeiner Teil* 4 ed (2003) Vorbemerkum zum § 305 Rn 5. See also the writers cited in the following footnotes. For an example of a recent contrary argument that it is primarily a lack of bargaining power that justifies intervention, see Hopkins 2003 *TSAR* 150 154-155 and cf Bhana & Pieterse 2005 *SALJ* 865 884. It has been pointed out in the UK that “inequality of bargaining power” is an ambiguous concept anyway, which decreases its helpfulness in this area (Beale “Inequality of Bargaining Power” 1986 *Oxford Journal of Legal Studies* 123 125; The Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts – Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Law Commission Consultation Paper No 292, Scottish Law Commission Discussion Paper No 199) 43; UK Law Commissions’ Consultation Paper par 4.102.

businesses resign themselves to accept standard terms is that it simply takes too much time and effort to read long, complex lists of standard terms every time one enters into a transaction, even for a relatively well-informed, sophisticated consumer in a competitive market.³² It takes even more time and effort to think through and find out the implications or meaning of the standard terms, as will finding someone in the counterparty-organisation who has the authority to negotiate an amendment, suggesting alternative terms and bargaining about them, or shopping around for more favourable standard terms.³³ The transaction costs of doing any of the above are out of proportion to the dangers apparent to the average customer at conclusion of the contract.³⁴ There is therefore no easy alternative for the reasonable person but to submit, even without reading, and to focus only on the core terms, that is, the terms of immediate concern.³⁵ Without more, this probably justifies control, as the transaction costs in itself understandably inhibits a proper evaluation of the consequences of the transaction, which contradicts the assumption that the agreement resulted from self-determination by both parties.³⁶

Even the customer who understands that it is important to read the fine print, will therefore often realise at the same time, or very soon thereafter, that it will require just too much effort to actually obtain standard terms which are fairer. Such a customer may therefore eventually stop his or her practice of reading all the fine print in every contract. Attempts to negotiate standard terms, even amongst businesses, are therefore said to be rare.³⁷ (It has been said that any bargaining done by businesses in this area is usually aimed at acceptance of the whole of

³² Rakoff 1983 *Harvard Law Review* 1173 1226; Zweigert & Kötz *Introduction to Comparative Law* 3 ed (translated by Weir) (1998) 334-335; Howells & Weatherill *Consumer Protection Law* 19; Griggs "The [I]rrational Consumer and Why We Need National Legislation Governing Unfair Contract Terms" 2005 *Competition and Consumer Law Journal* 1 16-17 27-28; Hillman "Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?" 2006 *Michigan Law Review* 837 839-841. Hillman mentions his empirical study involving contracts students which tends to show that only about 4% of American shoppers on the internet read standard terms available to them (as opposed to core terms as to price etc) (839 841-842). Cf Lewis 2003 *SALJ* 330 339; *Thornton v Shoe Land Parking Ltd* 1971 2 QB 163 169.

³³ See the authorities in n 32 *supra* and Zimmermann *New German Law of Obligations* 176.

³⁴ Rebmann et al *Münchener Kommentar* Vorbemerkung zum § 305 Rn 5; Coester, Coester-Waltjen & Schlosser in Martinek (ed) *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* AGBG 13 ed (1998) Einl zum AGBG § 3 ff Rn 4; Maxeiner 2003 *Yale Journal of International Law* 109 114; Hillman 2006 *Michigan Law Review* 837 840-841.

³⁵ Maxeiner 2003 *Yale Journal of International Law* 109 114; Rakoff 1983 *Harvard Law Review* 1173 1226. See Macneil "Bureaucracy and Contracts of Adhesion" 1984 *Osgoode Hall Law Journal* 5 6: "[N]o one can honestly say that consumers ought to read long documents of this kind. The many courts which over the years have casually or not so casually said that ignore the fact that if consumers actually did such a foolish thing the modern economy would come to a screeching halt." This may be overstating the case somewhat. Core terms would concern, for example, the price and any warranty period.

³⁶ See the quotations from Zimmermann *New German Law of Obligations* 206.

³⁷ Coester et al *Staudinger* Einl zum AGBG § 3 ff Rn 4.

the one or the other party's terms, which is a less costly alternative to studying and haggling over individual terms).³⁸

Additional psychological factors are likely to dissuade customers, particularly unsophisticated consumers, from bargaining.³⁹ The standard form may appear official and invariable, for example.⁴⁰ Companies also generally send out signals in advertising and the like that contracting with them would only be a positive experience, and a customer is therefore lulled into a sense of security that he will always be treated fairly.⁴¹ Even the sophisticated, more suspicious customer with time to read and bargain will often not wish to be seen as the one eccentric and difficult individual who haggles over terms which apparently only apply in exceptional circumstances and which all other customers are prepared to "accept" without more. This applies especially to consumer contracting which often takes place in a public space.

In addition, such an eccentric customer is unlikely to find better alternatives or a different attitude to the normal "take-it-or-leave-it" one elsewhere. Even a marketplace which is competitive on the core terms does not usually ensure that fair standard terms or "fine print" are also on offer.⁴² In fact, it may cause the eccentric consumer to have even less time to read and shop around for small print, given that more time has to be spent in comparing the core aspects of the many products on offer. The incentive for business to offer fair standard terms is therefore not increased at all. The increased need to remain competitive may perhaps even encourage businesses to shift more risks onto customers in the small print in an attempt to drive prices down.⁴³

Moreover, standard term contracts are often sprung on businesses and consumers at the very last moment when they have already decided to contract on the basis of the core terms which were disclosed to them from the start. Sometimes they have already made all sorts of arrangements which would be difficult to pull out from when confronted with the standard terms. This is an additional factor which would keep a consumer from bargaining about these terms. The situation in *Afrox Healthcare Ltd v Strydom*⁴⁴ provides an example. As has already been pointed out,⁴⁵ when a patient such as Strydom is confronted with the

³⁸ Coester et al *Staudinger* Einl zum *AGBG* § 3 ff Rn 4.

³⁹ Eiselen 1989 *De Jure* 44 49. Of course, many consumers in South Africa are very vulnerable and not well-informed about contractual matters at all.

⁴⁰ Eiselen 1989 *De Jure* 44 49. Consumers are intimidated from bargaining by all these realities (Howells & Weatherill *Consumer Protection Law* 20).

⁴¹ Willett *Good Faith and Consumer Contract Terms* 76-77.

⁴² Griggs 2005 *Competition and Consumer Law Journal* 1 23; UK Law Commissions Consultation Paper 8.

⁴³ Rakoff 1983 *Harvard Law Review* 1173 1227; UK Law Commissions Consultation Paper 9; Eiselen 1989 *De Jure* 44 50; Beale *Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts* in Beatson & Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 231; Beale "Inequality of Bargaining Power" 1986 *Oxford Journal of Legal Studies* 123 131; cf Howells *Good Faith in Consumer Contracting* in Brownsword et al (eds) *Good Faith in Contract* 91 95.

⁴⁴ 2002 6 SA 21 (SCA).

⁴⁵ Naudé & Lubbe "Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)" 2005 *SALJ* 441 461.

private hospital admission form containing the small print, he has already booked his bed for that day, and has often agreed to be operated upon or treated by a specific doctor who only works from that hospital, and made all the necessary arrangements for leave at work, and so forth. To pull out of all these arrangements at the last moment and to arrange alternative treatment elsewhere, due to a confrontation with an exemption clause is not a realistic option, and his “bargaining power” is definitely drastically decreased by his interest to have the treatment as planned.⁴⁶ The same applies, for example, when a consumer had already concluded a contract over the telephone with an adventure sports company to go river rafting, and when he or she finally arrives at the destination, perhaps hundreds of kilometres away from home, he or she is suddenly confronted with the requirement to sign a document first exempting the company from liability for bodily injury caused by negligence before he or she can continue with the holiday.

Often, the users of standard terms effectively “trade” or “speculate” on the customer’s typical lack of knowledge, experience, time, bargaining skill, choice and/or assertiveness to include onerous terms, which maximize only the interests of the user.⁴⁷ There is simply very little incentive to do otherwise.

It is therefore important to note that there is a problem of typical insufficient evaluation of the consequences of the transaction by one party, regardless of that party’s bargaining strength in the light of other sources of supply, his sophistication, and theoretical opportunities for shopping around and negotiation.⁴⁸ The realities of the marketplace for consumers and many businesses make it normal to enter into contracts without reading the standard terms, or at least, without bargaining about them.

Because of the resultant one-sided imposition of standard terms, the user of the standard terms acts more like a legislator than a contracting party.⁴⁹ Thus, just as controls in favour of the public are necessary over legislation emanating from government departments, control in favour of the public over this type of “private legislation” is justified.

⁴⁶ Naudé & Lubbe 2005 *SALJ* 441 461. Theoretically, of course, the other options are open to him. This is implicit in the Supreme Court of Appeal’s argument that there was no evidence that the patient was in a weaker bargaining position (par 12). In fact, the Medi-Clinic private hospital group had no exemption clause relating to death or bodily injury in their admission forms at that stage. This illustrates the ambiguity of the concept of inequality of bargaining power and the problem of uncritically considering the existence of alternative offerings in the market without the particular term.

⁴⁷ Zweigert & Kötz *Comparative Law* 331 336; Kötz 1986 *SALJ* 405 410; Maxeiner 2003 *Yale Journal of International Law* 109 143. Cf Bassenge et al *Palandt Überblick* v § 305 Rdn 6.

⁴⁸ Cf also Eiselen 1988 *De Jure* 251.

⁴⁹ Kessler “Contracts of Adhesion – Some Thoughts about Freedom of Contract” 1943 *Columbia Law Review* 629 640; Rakoff 1983 *Harvard Law Review* 1173 1237; Maxeiner 2003 *Yale Journal of International Law* 109 119.

Perhaps it is not too surprising that it has been questioned whether there is any justification at all for enforcing such standard terms insofar as they conflict with the background or residual rules of contract law.⁵⁰

Clearly, however, the use of standard terms per se is an inevitable phenomenon in modern business life, particularly in this age of complex organisational structures and mass marketing.⁵¹ It is required, for example, by the efficient use of expensive managerial and legal talent so that more lowly-paid, less highly-trained personnel can contract with clients on a controlled basis.⁵² The background rules also do not always provide sufficiently detailed rules for the complexities of modern business transactions. It has therefore been suggested that it is only the public interest in economic efficiency created by the standard terms that justifies the enforcement of non-negotiated standard terms (and not consensus or reasonable reliance thereof).⁵³ By implication, only standard terms which are necessary in the public interest should be enforced, and clearly not unjustifiably onerous and one-sided terms.⁵⁴ Rakoff argues that “invisible terms” should not be presumptively enforceable. Instead, the user should prove justification of deviation from the background law on the basis that enforcement contributes significantly to the maintenance of civic freedom, as this is ultimately why a firm should be allowed to organise itself by means of standard terms.⁵⁵ Thus he is in favour of a more “positive” approach which requires a business to prove that its non-core non-negotiated terms are fair and reasonable (whenever they conflict with background law).⁵⁶

2.2 The resultant case for content control

The first conclusion to be drawn is that content control is justified, at the very least in negative form by striking out (or amending) unfair terms. This is unquestioningly true in respect of non-negotiated terms, due to the

⁵⁰ Wilhelmsson mentions (but does not advocate) the radical notion that businesses should only be allowed to supplement non-mandatory or residual rules, and not to change them in their favour in standard terms (*Standard Form Conditions* 443). Cf Rakoff 1983 *Harvard Law Review* 1173 1238.

⁵¹ Rakoff 1983 *Harvard Law Review* 1173 1220-1223. For other claims on the usefulness of standard terms see, eg, Eiselen 1988 *De Jure* 254; Hopkins 2003 TSAR 150 153-154; Zweigert & Kötz *Comparative Law* 333; Maxeiner 2003 *Yale Journal of International Law* 109 113; Howells & Weatherill *Consumer Protection Law* 19.

⁵² Rakoff 1983 *Harvard Law Review* 1173 1223; Beale *Legislative Control of Fairness* 231-232.

⁵³ Burgess “Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion” 1986 *Anglo-American Law Review* 255 271-274. Cf Pretorius “The Basis of Contractual Liability (4): Towards a Composite Theory of Contract” 2006 *THRHR* 97: “The reliance principle has much to do with ascription of contractual responsibility in circumstances where it is fair and reasonable to do so.”

⁵⁴ Burgess 1986 *Anglo-American Law Review* 255 271-274.

⁵⁵ Rakoff 1983 *Harvard Law Review* 1173 1240-1242. For a recent defence by Rakoff of his views, see Rakoff “The Law and Sociology of Boilerplate” 2006 *Michigan Law Review* 1235. See also Wilhelmsson *Standard Form Conditions* 443.

⁵⁶ The UK Law Commissions’ proposed Unfair Contract Terms Bill of 2005 also places the onus on the business contracting with a consumer (a natural person acting outside his trade or profession) to prove its non-core terms are reasonable when the issue is raised, whether by the consumer or *mero motu* by the court. In South Africa, by contrast, a negative striking-out approach is proposed.

inherent structural inequality caused by the use of such terms and the typical and understandable absence of proper evaluation of the consequences of submitting to such terms,⁵⁷ which inhibit the autonomy of normal people confronted with standard terms⁵⁸ and make them vulnerable to abuse.

This justifies control without more, but such control is furthermore also in the public interest in a more general sense. Ultimately, the costs incurred by society are higher if the risks and obligations involved are not shouldered by the party best able to prevent risks or to bear them most efficiently from an economic point of view.⁵⁹ To shift risks and obligations onto the structurally weaker party as a matter of course, without an offer of an alternative deal at a higher price, and mostly without his or her knowledge, is not necessarily efficient from an economic point of view.⁶⁰ More speculative, but perhaps true, are claims that the removal of unfair terms may increase consumer confidence and trust and therefore economic activity, and that grievance procedure costs will ultimately be reduced.⁶¹

23 The possibility of control on the basis of substantive unfairness alone

It should always be possible to impugn non-negotiated terms, which may be fair if specifically pointed out or agreed to, on the basis of the particular customer's lack of bargaining strength and other problems with the bargaining process itself, such as a lack of alternative terms in the marketplace and a lack of knowledge of the term. The converse is also true: a term which would appear to be excessively one-sided and unfair generally may be justified if the customer consciously decided to contract on that basis after having considered alternatives. Procedural factors to do with the manner in which the particular contract was concluded may indeed be relevant to the question of fairness.

However, the reality that the prohibitively high transaction costs involved understandably discourage contracting parties to read all the small print, and the fact that it would be an inefficient use of time and resources anyway,⁶² justifies the possibility of regarding terms as unfair *per se*, regardless of the circumstances surrounding the manner in which the agreement was reached ("the procedural factors").⁶³

⁵⁷ See n 26 *supra*.

⁵⁸ See par 2 1 *supra*; cf Vickers "Economics for Consumer Policy" 2004 125 *Proceedings of the British Academy* 287 302.

⁵⁹ Willett *Good Faith and Consumer Contract Terms* 67.

⁶⁰ Willett *Good Faith and Consumer Contract Terms* 67.

⁶¹ Griggs 2005 *Competition and Consumer Law Journal* 1 49-50 and authorities there cited.

⁶² Howells & Weatherill *Consumer Protection Law* 261-262; cf Burgess 1986 *Anglo-American Law Review* 255 270.

⁶³ Eiselen 1989 *De Jure* 44 45; UK Law Commissions Consultation Paper 7 15 40; Wilhelmsson *Standard Form Conditions* 432-433; Griggs 2005 *Competition and Consumer Law Journal* 1 21; Maxeiner 2003 *Yale Journal of International Law* 109 119; Atiyah *Essays on Contract* (1986) 346: "it is no longer possible to accept without serious qualification the idea that the law is today solely concerned with the bargaining process and not with the result".

Legislation should therefore make it possible, in appropriate cases, to strike out non-negotiated terms simply because they are unfair in content (“substantively unfair”), whether or not there were theoretical opportunities to become acquainted with the terms; whether or not the customer was theoretically free to explore the possibility of negotiation, but did not do so; whether or not the product could theoretically have been obtained elsewhere on better standard terms; and whether or not the consumer’s “bargaining position” (an ambiguous term) and “sophistication” was lower than that of the user of the standard terms.⁶⁴ That is, “substantive unfairness” control should be possible, particularly in the case of non-negotiated terms, which may make an investigation into the procedural unfairness of the specific case irrelevant.⁶⁵ For example, courts should be able to declare a term that unreasonably goes beyond protection of the legitimate interests of its user and that unreasonably prejudices the consumer, to be unfair, despite the fact that a competitor happened to include a fairer term on that point in its standard terms.

For this reason, to include practically only procedural factors in the five factors to which courts “*must*” have regard in particular in determining whether a term is unfair, as the DTI draft Bill does,⁶⁶ is problematic and not very helpful.⁶⁷ It may perhaps give the impression that mere substantive unfairness in itself is not sufficient. The reality is that consumers, regardless of how sophisticated they are, will often not read standard terms as a result of the high transaction costs involved and are effectively dissuaded from assessing whether there was in fact “an opportunity of acquiring the goods or services, or equivalent goods or services, from any source of supply under a contract that did not include that term”,⁶⁸ one of the few factors listed in the DTI’s draft Bill. A court which is not sufficiently conscious of the realities of standard form contracting may therefore consider the mere existence of other offerings in the marketplace which happen not to include the particular term, as unduly important in counting against the consumer. As I have shown, the reality that high transaction costs make even a reading of all the terms on offer unlikely, applies regardless of “the bargaining strength of the parties relative to each other, taking into account (i) the availability of equivalent goods or services and (ii) suitable alternative sources of supply” (thus economic inequality), one of the few factors which “*must*” be considered “in particular” according to the proposed legislation.

⁶⁴ Cf Eiselen 1989 *De Jure* 44 45 generally.

⁶⁵ I do not use “substantive fairness” control in the sense used by Collins “Good Faith in European Contract Law” 1994 *Oxford Journal of Legal Studies* 229 246 as an evaluation of whether the consumer received poor value for money. This article does not concern the legitimacy of price control, or “core terms” control.

⁶⁶ S 58 on “unfair contract terms”. I am counting s 58(1)(b) as encompassing two factors. The last factor is “in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer”. This is the only factor which can be described as substantive, but it is only relevant in a few cases.

⁶⁷ See also Maxeiner 2003 *Yale Journal of International Law* 109 119.

⁶⁸ S 58(1)(b).

It appears that the source of inspiration for this list of factors in the DTI's draft Bill was the United Kingdom's Unfair Contract Terms Act of 1977 (the UCTA)⁶⁹ and perhaps the Preamble⁷⁰ of the EC Unfair Terms Directive of 1993,⁷¹ which lists similar factors.

This being the case, it is important also to take note of the new list of relevant factors proposed by the Law Commissions of England, Wales and Scotland in their Unfair Contract Terms Bill of 2005, which they recommend should replace the UCTA and the Unfair Terms in Consumer Contracts Regulations of 1999.⁷²

In the UK Law Commissions' new list, the procedural factors are "balanced" by more factors relevant to substantive fairness, and some of the important procedural factors are explained in such a way as to invite sensitivity to the realities of standard form contracting. The substantive unfairness factors listed include "(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".⁷³ The United Kingdom allows publication of Explanatory Notes with a Bill, and the Law Commissions have used this technique to explain further what might be relevant when considering the procedural factors of a party's "knowledge and understanding" and the "strength of the parties' bargaining positions", two factors in their list. After having specifically warned that "inequality of bargaining power" is an ambiguous term which is often misunderstood,⁷⁴ the Law Commissions explain in the Notes to the Bill 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)".⁷⁵ 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

⁶⁹ Schedule 2.

⁷⁰ Or Recitals.

⁷¹ For the Directive's full title, see n 1 *supra*.

⁷² Law Commissions' Report 60 (s 14(4) of the Bill). The Regulations (UTCCR) were promulgated in response to the Unfair Terms Directive.

⁷³ S 14(4).

⁷⁴ 43.

⁷⁵ Par 45 of the Explanatory Notes.

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 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”.⁷⁶

The South African Law Commission also included some factors to do with substantive fairness in their list of guidelines, and it is not clear why the DTI left these out.⁷⁷ 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; (x) the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled”.

A list of factors is in any event more helpful to guide courts, businesses, consumers and enforcement agencies if it also includes factors relevant to substantive fairness, which clearly is relevant along with procedural factors. Factors to do with substantive unfairness will be especially important in “abstract proceedings” in which an injunction is sought against a particular business to stop using or to amend a particular term, mostly at the behest of the National Consumer Commission or a consumer organisation.⁷⁸

One therefore hopes that the South African consumer protection legislation will benefit from the UK Law Commissions’ and SA Law Commission’s example in this regard, instead of substantially reverting to the factors initially formulated in the UK in 1977. The UK Law

⁷⁶ Par 44 of the Explanatory Notes.

⁷⁷ S 2. As I will suggest later, some of the SA Law Commission’s “factors” are not so much open-ended factors likely to be relevant in many cases, but concern specific types of clauses, such as clauses on set-off, which should rather have been considered for inclusion in a “suspect list” or “grey list” of terms which would normally be unfair, unless the circumstances justify a contrary conclusion. It is understandable that the DTI did not include these in their list of factors, but neither did they make use of a “suspect list”. See further par 3 3 *infra*.

⁷⁸ Unfair terms legislation should always empower an administrative body and consumers’ organisations to take action against businesses using unfair terms, that is, without a particular consumer as plaintiff being involved. Such action will often centre on substantive fairness “in the abstract”, although the transparency of the term, which could be regarded as a procedural factor, should also be important. It should be possible for the court or tribunal to make an order with “procedural” components in such an action, such as ordering the business to introduce a certain practice, such as expressly pointing out a particular term or rewriting a term in clearer language or giving more information to consumers (*cf* s 55(1)(b) of the DTI’s draft Bill).

Commission's substantive fairness factors seem to be more succinct than the ones mentioned from the SA Law Commission's Bill, but nevertheless more attention should be given to at least both these sources of lists of factors.

Regardless of what the list of factors ultimately looks like, courts should remember that they should be able to find a term unfair in content without having to find anything unreasonable in the way in which the term was included.⁷⁹ Thus the sophistication of the consumer and the existence of a competitive market do not detract from the need to protect the consumer against unfair terms which are unduly onerous in the particular context taking into account factors such as insurability, reciprocity, and the interests of the business sought to be protected by the term. Even if other firms have a fairer standard term tucked away in its long list of terms, the normal consumer cannot realistically be expected to read and understand all the standard terms on offer and choose on this basis, and so the mere existence of alternatives on better standard terms should not penalise a consumer complaining about a substantively unfair term.⁸⁰ Instead, the fact that other firms do not include a clause should perhaps sometimes count in favour of the consumer: this fact may suggest that the term is not essential for profitability of businesses in that sector or that opinion in that business sector regards the term as unreasonable or unethical.⁸¹

Of course, procedural aspects may always still be relevant in a particular case, as I have said. Control over unfair terms would, however, be less effective if courts do not fully grasp that any reason which typically and understandably cause customers not to bargain justifies intervention in appropriate cases. One could perhaps go so far as to say that the mere fact that the user uses a long list of non-negotiated terms already causes some "procedural unfairness", because this habit prevents the typical consumer from reading and comparing terms.

If the DTI cannot be persuaded to change their list of factors in the way suggested, courts should recognise the legitimacy of finding in an appropriate case that "all the circumstances of the case" show that the clause in question is unfair in substance, despite "economic equality in bargaining power" and alternatives available to the consumer. They would also benefit from considering the UK Law Commissions' explanations on the "bargaining strength" and "knowledge" factors.

Such control on the basis of substantive unfairness alone should not only be used in more "abstract", "preventative" proceedings brought, for example, by a consumer association or the National Consumer Commission when they allege that a term or terms used by a particular

⁷⁹ UK Law Commissions Consultation Paper 15.

⁸⁰ Cf Griggs 2005 *Competition and Consumer Law Journal* 1 16-17; Vickers 2004 125 *Proceedings of the British Academy* 302.

⁸¹ Cf Rebmann et al *Münchener Kommentar* § 307 Rn 34 according to whom German law takes into account the opinions in the particular sector (*Anschaungen der Verkehrskreise*).

firm or firms is always unfair. Substantive unfairness control should also be a possibility where a particular plaintiff as a consumer lodges a complaint or sues a firm with reference to the particular contract he has made, or raises the issue of an unfair term when he is sued by the firm involved.

It is interesting to note that in Germany, particularly before implementation of the EC Unfair Terms Directive, courts have tended to use a generalising or abstract approach overtly focused on substantive fairness, which goes further than the approach advocated here.⁸² Under their so-called “supra-individual generalising approach”,⁸³ the courts generally focused on the substantive unfairness of clauses in the light of typical party interests and not on the particular circumstances of the particular consumer or business who complained. Writers who consider this approach of German law point out that there are some advantages to such overt “clause-oriented” control.⁸⁴ Some writers have pointed out that it “facilitates universal application of the resulting control”.⁸⁵ In other words, it creates a clearer precedent for other firms with respect to particular types of terms, as it is not primarily concerned with the particular circumstances of the particular consumer complaining about the term. Such a clause-oriented approach is said to lead more quickly to generalised *Fallgruppenbildung*, which is the emergence of categories of cases with reference to types of terms, often more closely defined with regards to particular types of sectors.⁸⁶ Bernitz⁸⁷ is of the opinion that, by contrast, the individualised approach followed thus far in Swedish courts (focusing on all the circumstances of the particular consumer in every case) has resulted in “inadequate foreseeability and probably a certain lack of efficacy” in this area.

However, what I am advocating for cases where a particular consumer is involved is not what German courts have been doing. Instead, I advocate an approach to such litigation which is concrete in the sense that it takes into account the particular interests of the parties and the particular circumstances of the case, but which is not overly obsessed

⁸² Maxeiner 2003 *Yale Journal of International Law* 109 160; Micklitz *German Unfair Contract Terms Act* 181-182; Howells & Wilhelmsson *EC Consumer Law* (1997) 100; Rebmann et al *Münchener Kommentar* § 310 Rn 20, 70-75, § 307 Rn 35; Niglia *The Transformation of Contract in Europe* (2003) 166 *et seq.* In response to the Directive, § 310(3) was inserted, which enjoins courts to take into account also the circumstances surrounding conclusion of the contract in the case of consumer contracts (that is, a contract with a natural person acting outside the scope of his business, trade or profession). In respect of unfair contract terms control over commercial contracts, the abstract, generalising approach is still used (Rebmann et al *Münchener Kommentar* § 307 Rn 35).

⁸³ *Überindividuell generalisierende Betrachtung* (Rebmann et al *Münchener Kommentar* § 310 Rn 20; BGH NJW 1992, 2626).

⁸⁴ The terminology is that of Bernitz *European Law in Sweden – Its Implementation and Role in Market and Consumer Law* (2002).

⁸⁵ Maxeiner 2003 *Yale Journal of International Law* 109 172.

⁸⁶ Bernitz *Swedish Standard Contracts Law and the EEC Directive on Contract Terms* in Lonbay (ed) *Enhancing the Legal Position of the European Consumer* (1996) 188. On *Fallgruppen* generally, see Beater “Generalklauseln und Fallgruppen” 1992 *Archiv des Civilistische Praxis* 82.

⁸⁷ *Swedish Standard Contracts Law* 188. Cf Whitford “Contract Law and the Control of Standardised Terms in Consumer Contracts: An American Report” 1995 *European Review of Private Law* 193 204.

with procedural factors and recognises that the control of substantive unfairness on its own is also legitimate in appropriate cases. In particular, it takes into account the realities of standard form contracting when considering procedural factors.

2.4 The role of procedural measures

“Procedural” measures aimed at improving the conduct of the “potential bargaining process”, such as ensuring greater transparency through requirements on legibility and simple, clear language,⁸⁸ are very important.⁸⁹ Consumers who do have the time to read standard terms, bargain and shop around would particularly be empowered by these measures, and more likely to bargain successfully to the ultimate advantage of less ideal consumers. Such measures may also drive businesses to use fairer terms, given that consumers (and the businesses themselves!) may be more likely to read and understand the standard terms than before. If terms are written in simple language instead of in incomprehensible, complex legalese, a small business may perhaps realise that the contract drafted by its lawyers or copied from elsewhere exceeds its requirements and that it does not wish to be associated with a particular term. Addressing the “information asymmetry” between business and consumer may sometimes also lead to a more effective allocation of risk: a consumer who knows of and understands an exemption clause well in advance may take out insurance against it or consciously decide to run a particular risk in order to obtain a product at a lower cost.⁹⁰ Such “procedural” measures will, however, be insufficient in the absence of effective, independent content control.⁹¹ Lack of available information is not the only problem, but rather the inability of many consumers to benefit from that information before contracting, whether because of lack of understanding of complex information (such as the likelihood of risks materialising and the probable costs involved if they do), lack of time or lack of bargaining skill and power generally.⁹² “[M]erely knowing of a term does not necessary lead to rational decision-making by a consumer.”⁹³

The reality that even clear and legible terms pointed out to the customer may be unfairly sprung upon him at the very last moment, also

⁸⁸ The DTI’s draft Bill contains a plain language requirement.

⁸⁹ Other techniques may concern a requirement that a copy always be given to the other party and be shown at the user’s place of business, and that incorporation by reference be prohibited (see, eg, Hondius *Standaardvoorwaarden* 577).

⁹⁰ Howells & Weatherill *Consumer Protection Law* 40.

⁹¹ Weatherill *EU Consumer Law and Policy* 2 ed (2005) 113; Aronstam *Consumer Protection* 46.

⁹² Griggs 2005 *Competition and Consumer Law Journal* 1 21; Aronstam *Consumer Protection* 46. See also Beale *Legislative Control of Fairness* 248 who gives the example of the consumer’s inability to assess risk (such as the chances of a fairground car leaving the tracks) as impacting upon her understanding of the exemption clause. See also Vickers 2004 125 *Proceedings of the British Academy* 125 287 302.

⁹³ Griggs 2005 *Competition and Consumer Law Journal* 1 51.

underlines the need for substantive control. It is probably not enough for unfair terms legislation to merely promote “informed consumers”.⁹⁴ Legislation in many countries, including South Africa, provides for mandatory terms in certain contracts, which therefore acknowledges that some terms (exemption clauses in conflict with these mandatory terms) are too dangerous even for consumers who know of a particular term.

In fact, legislative incorporation control such as requiring the existence of all exemption clauses to be drawn to the attention of the consumer and requiring that they be signed or initialled,⁹⁵ can be a double-edged sword, if the importance of controlling substantive unfairness as a problem in itself is not sufficiently realised. Such incorporation measures may strengthen the hand of the user of a term to argue that a term is fair, because the consumer has specifically assented to the term.⁹⁶ Particularly worrying in this regard is the provision in the DTI’s draft Bill that an exemption or similar clause in respect of any activity or facility that is subject to a hazard that could result in serious injury or death is of no effect unless the hazard has been drawn to the attention of the consumer and the consumer has signed or initialled that provision indicating acceptance of it, or otherwise acted in a manner consistent with acceptance of the provision.⁹⁷ In my view, any exemption clause which excludes or limits liability for death or personal injury caused by negligence should at the very least be presumed to be usually unfair (“suspect-listed” or “grey-listed”).⁹⁸ In any event, courts and administrative bodies should remember that, despite apparent express agreement to an exemption clause, a term can still be unfair because it may be inherently repugnant. This should be sufficient to show that the consumer suffered from lack of understanding and experience and/or lack of bargaining power.⁹⁹ In other words, gross substantive unfairness in standard terms most often indicates that there must have been procedural unfairness.

⁹⁴ See on the concept of the “informed consumer” and the “confident consumer”, Weatherill “Prospects for the Development of European Private Law through Europeanization in the European Court The Case of the Directive on Unfair Terms in Consumer Contracts” 1995 *European Review of Private Law* 307. See on the insufficiency of the “informed consumer” paradigm, Griggs 2005 *Competition and Consumer Law Journal* 1 21.

⁹⁵ See s 50 of the DTI’s proposal which requires this in the case of exemption and indemnification clauses.

⁹⁶ Hondius *Standaardvoorwaarden* 577; cf Hillman 2006 *Michigan Law Review* 837 840 854; Whitford 1995 *European Review of Private Law* 193 206.

⁹⁷ S 50.

⁹⁸ See par 3 3 *infra* on these legislative techniques.

⁹⁹ Cf Griggs 2005 *Competition and Consumer Law Journal* 1 21. The unsophisticated consumer may not realise that it is possible for the business to contract without the term, and may not know that this is what background law provides.

3 The limits of judicial control and their implications, particularly for the substantive provisions of unfair terms legislation

3.1 The insufficiency of common law grounds for intervention

It should now be accepted that the common law grounds for control of the phenomenon of unfair terms are clearly insufficient.¹⁰⁰ In other words, the combined common law rules on incorporation, interpretation, voidable contracts and legality (the latter being the most promising) are of too limited scope to address the problem adequately. I will not repeat the arguments of the writers or those of the Law Commission who hold this view here, except to say that it is probably quite understandable that judges would typically only intervene on the basis of illegality in the clearest of cases in the absence of explicit legislative sanction to do more. The Scottish writer, Hector MacQueen, writing after the *Afrox* case, has stated that he has sympathy with this attitude of South African judges as the control of exclusion clauses is “peculiarly apt for legislative rather than judicial innovation.”¹⁰¹ This has been the experience in other jurisdictions as well.¹⁰²

3.2 The inherent limits of judicial control

In any event, regardless of how radically a court may interpret its power to review unfair contract terms on a general basis, judicial control also has inherent limits. The reasons why judicial control is too limited not only points to the obvious truth that an administrative body should be empowered to deal with complaints from consumers, negotiate with and apply for injunctions against businesses (what I would call the enforcement parts of the legislation).¹⁰³ I will not deal any further with this, particularly as the Law Commission’s proposal on an Ombudsperson was very admirable, and the DTI’s new proposed powers for the National Consumer Commission and the National Consumer Tribunal do provide the possibility of preventive and reactive control by administrative bodies.

I will rather concentrate on the implications of the limits of judicial control for the substantive parts of ideal unfair terms legislation, namely those which describe or flesh out the concept of unfairness.

The reasons why judicial control is too limited are the following:¹⁰⁴

¹⁰⁰ See already Aronstam *Consumer Protection* as well as the South African Law Commission’s Report.

¹⁰¹ MacQueen *Good Faith* in MacQueen & Zimmermann (eds) *European Contract Law: Scots and South African Perspectives* (2006) 43–64.

¹⁰² See, eg, Maxeiner 2003 *Yale Journal of International Law* 109–144.

¹⁰³ This is what Van der Walt 1993 *THRHR* 65–70 calls second generation control mechanisms.

¹⁰⁴ See especially Hondius *Standaardvoorwaarden* 488.

- Access to courts is limited.¹⁰⁵ The effort, costs and risks of litigation, especially when compared with the small sums typically involved in consumer transactions, promotes an attitude of rather writing off the episode as a learning experience, with the business continuing its practice with impunity.¹⁰⁶ Lack of knowledge about the law, particularly in a country with many vulnerable consumers, will also decrease the likelihood of cases on unfair terms coming to the courts.¹⁰⁷ Perhaps consumers, who may not have heard about the consumer protection legislation, may not even always complain to consumer organisations or the National Consumer Commission. If judicial control is the only control paradigm, a business who suspects its terms may be declared unfair may rather prefer to settle an individual case with a particularly difficult consumer on the basis of waiver of its term, leaving the business free to use that term in all other contracts.
- Court decisions have a limited effect.¹⁰⁸ They only bind the particular business(es) involved, and may be limited to the particular circumstances of the case. Because many cases in respect of B2C contracts will only reach the lower courts, whose decisions are unreported, other businesses are unlikely to take note in any event, even with legal advice.¹⁰⁹
- Judicial control is reactive and comes too late, after the abuse has already taken place, often for years.¹¹⁰
- For some of these reasons combined, it will often be very difficult to predict with any certainty whether or not a court will provide relief in a particular case.¹¹¹ German judge-made law before promulgation of the Standard Terms Act was criticised for an “absence of concrete provisions and for uneven application by lower courts”.¹¹²

¹⁰⁵ Hondius *Standaardvoorwaarden* 488.

¹⁰⁶ Hondius *Standaardvoorwaarden* 488; Aronstam *Consumer Protection* 46; Griggs 2005 *Competition and Consumer Law Journal* 1 23; Maxeiner 2003 *Yale Journal of International Law* 109 144; Rebmann et al *Münchener Kommentar* Vorbemerkung zum § 305 Rn 10-11; Van der Walt 1993 *THRHR* 65 75.

¹⁰⁷ Rebmann et al *Münchener Kommentar* Vorbemerkung zum § 305 Rn 10.

¹⁰⁸ Hondius *Standaardvoorwaarden* 488; Maxeiner 2003 *Yale Journal of International Law* 109 144; Rebmann et al *Münchener Kommentar* Vorbemerkung zum § 305 Rn 11; Van der Walt 1993 *THRHR* 65 75.

¹⁰⁹ S 109 of the DTI's draft Bill provides that the National Consumer Commission is responsible for promoting public awareness of consumer protection matters, including publishing any orders and findings of the Tribunal or a court in respect of a breach of the Act. It is, however, rather unlikely that the National Consumer Commission will be able to publish every decision by every lower court in the country involving every breach of every provision of the entire Act. However, they should at least publish cases on unfair terms in which they themselves were involved, and cases before the Tribunal as well as details on undertakings given by businesses as a result of negotiations which did not eventually go to court (as the Law Commission provided for in its Bill).

¹¹⁰ Hondius *Standaardvoorwaarden* 488.

¹¹¹ Cf Aronstam *Consumer Protection* 46 and generally chapter 2.

¹¹² Maxeiner 2003 *Yale Journal of International Law* 109 144. Judicial control in Germany dates back to the first half of the 20th century and was based on s 138 of the Civil Code (*BGB*) which rendered contracts violating good morals void, and on the requirement of good faith in s 242.

3 3 The implications for the substantive portions of unfair terms legislation

The first, obvious conclusion to be drawn from this analysis is that statutory intervention is required. As I have said, this has been accepted worldwide, including in South Africa.

It is important to note that legislation is more proactive, could lead to greater predictability if properly structured and has wider effect.¹¹³ Thus the shortcomings of judicial control also emphasise the desirable outcomes of legislation.

There is clearly a need for a legislative paradigm of preventive or proactive and not only reactive control. Ideally, this should also permeate the substantive portions of the legislation, even more so as some of these limitations apply to action taken by administrative bodies as well, as I have already suggested. For example, action by the National Consumer Commission against a particular business would not automatically bind all other businesses that use similar terms (that may be unfair towards businesses which had no chance to make representations at the hearing or negotiations).

One practical way in which the effectiveness of legislative control can be increased is to formulate the description of what is unfair in as detailed a manner as possible (without sacrificing the necessary flexibility supplied by broad provisions at all).¹¹⁴ Lists of prohibited and suspect terms hold particular promise in this regard. (These are commonly referred to as “black” and “grey” lists elsewhere). Whereas a list of prohibited terms is a self-explanatory concept, the term “grey list” has been used in different ways. It refers mostly to a list of terms which would usually be unfair, but may be justified by the particular circumstances (they are therefore “suspect”). Such a grey list is usually clearly described as non-exhaustive and indicative only, so that application of the general clause could certainly allow other clauses to be unfair and the listed clauses to be fair in appropriate circumstances.¹¹⁵

Such detailed provisions increase the likelihood of unfair contract terms control having a fast, real and proactive effect. They decrease the need to wait upon courts and administrative authorities to take action. Businesses would more likely react spontaneously and without court action to more specific prohibitions in the legislation itself, such as a list of suspect terms which would usually be unfair, than to a very general criterion of unfairness which may take a long while to be worked out in detail on its own.¹¹⁶ In other words, greater particularity in the substantive provisions increases the chance of self-control.¹¹⁷

¹¹³ Maxeiner 2003 *Yale Journal of International Law* 109 146; Van der Walt 1993 *THRHR* 65 75.

¹¹⁴ Such as a general clause providing for an open standard such as “fairness” or “good faith”.

¹¹⁵ Simpler language than this cryptic description (“non-exhaustive and indicative”) should be used.

¹¹⁶ Howells *Good Faith* 98.

¹¹⁷ Van der Walt 1993 *THRHR* 65 74 79.

Moreover, it strengthens the hands of the administrative authority appointed to police unfair contract terms when negotiating with less conscientious businesses to stop using unfair terms.¹¹⁸ This is likely to decrease the need for the National Consumer Commission and consumer organisations to resort to court action.

Another view in support of particularity (that is, a detailed dealing with issues) is that the clearer the rules, the greater the likelihood of action being taken against a business, and the more legal actions, the greater the likelihood of even clearer rules emerging as a result of litigation.¹¹⁹

Greater particularity also gives greater guidance to lower courts where cases on unfair terms may be heard, whereas their decisions are not reported.¹²⁰

With good reason, lists of terms have therefore been described by leading international writers in this field as “of crucial importance”¹²¹ and “the key element of any attempt to regulate unfair terms”.¹²² It has also been argued that one of the reasons why unfair terms control has been more effective in Germany than in the USA, is that the US judges struggled with applying a single general clause, whereas German law “provided additional authoritative points for application of unfair terms control [such as lists of prohibited terms], while maintaining a general clause to respond to the need for flexibility”.¹²³

Of course, increased particularity in the legislation itself increases predictability, which is also fair to businesses. This also benefits consumers and consumer organisations in acting against businesses. It goes a little way towards addressing the typical complaint that unfair contract terms legislation creates ambiguity and uncertainty and triggers wasteful litigation.¹²⁴ Unfair terms legislation should strike a balance between the interests of consumers and that of businesses, and this implies an optimum balance between fairness or flexibility and legal certainty.¹²⁵

Accordingly, the South African Law Commission correctly rejected the Working Committee’s very general, short and non-detailed Bill in 1998. The latter simply proposed a wide power for courts to strike out unfair contract terms, with practically no guidance as to when a term would be

¹¹⁸ Cf Van der Walt 1993 *THRHR* 65 74 79 in respect of “guidelines”.

¹¹⁹ Hondius *Standaardvoorwaarden* 489.

¹²⁰ See, however, n 109 *supra*.

¹²¹ Hondius *Unfair Terms in Consumer Contracts* (1987) 183.

¹²² De Nova “Italian Contract Law and the European Directive on Unfair Terms in Consumer Contracts” 1995 *European Review of Private Law* 221 230.

¹²³ Maxeiner 2003 *Yale Journal of International Law* 109 172. See also Whitford 1995 *European Review of Private Law* 193 200-201. Cf also Hondius *Unfair Terms in Consumer Contracts* 173 178 in respect of practical experience in Denmark and France, both of which had no list at the time of writing (1987).

¹²⁴ Kötz 1986 *SALJ* 405 406.

¹²⁵ UK Law Commissions Consultation Paper 15.

regarded as unfair.¹²⁶ The Law Commission's reaction was to include, inter alia, a very good and detailed chapter on preventive powers for an ombudsperson as well as a list of 26 guidelines to be taken into account when assessing "unreasonableness, oppressiveness or unconscionability". However, they included neither a prohibited list nor a suspect list as the latter is commonly understood.¹²⁷ The DTI's proposed legislation contains a prohibited list, but no suspect list of any kind, and the prohibited list could probably have been used more effectively.¹²⁸

It should thus be clear that the limitations of judicial control in the light of obvious goals that the legislation should seek to attain, has a bearing on the choice of particularity of the substantive provisions.

No prohibited or suspect list in the initial legislation will, however, be able to exhaustively capture the terms which are likely to be unfair. Extra-legislative strategies should also be used to provide more detailed guidance to businesses and consumers as to which terms would likely be unfair. The National Consumer Commission is therefore urged to follow the example of the UK Office of Fair Trading (OFT) to publish (non-binding) guidelines on terms which it considers to be unfair, on the basis of its experience with negotiation and enforcement.¹²⁹ The OFT guidelines draw on the individual case reports published by the OFT in its regular unfair contract terms bulletins. Apart from its general guidelines on unfair terms, which includes examples, the OFT publishes guidelines on unfair terms in specific sectors, such as the package holiday, health and fitness club and consumer entertainment sectors. These are available on the OFT website. Such "extra-legislative" particularity is also important for effective preventive and reactive control and predictability. It appears, however, that the existence of a suspect list in the UK legislation itself¹³⁰ is an important justification relied upon by the

¹²⁶ Full argument on the reasons for the Working Committee's aversion to any guidelines is beyond the scope of this article and was in any event sufficiently addressed in the Law Commission's final report. The main problem with the Committee's arguments is that they focused exclusively on a paradigm of judicial control, eg, by arguing that courts may restrict control to the situations envisaged in the guidelines. As argued above, self-control and preventive control which is more proactive and effective than *ex post facto* judicial control benefits from the use of guidelines and lists. See, eg, Van der Walt 1993 *THRHR* 65 74. The Working Committee was opposed to any system of preventive control by an administrative body.

¹²⁷ The non-exhaustive list of 26 guidelines contains rather detailed "factors", reminiscent of a suspect list, mixed with more general "factors" or "guidelines" such as the relative bargaining positions of the parties, commonly accepted standards of fair dealing, the alternatives available to the party prejudiced by the term, reciprocity and whether negotiation took place. The guidelines towards the latter part of s 2 which remind one of a suspect list include, eg, the consideration "whether a term provides that a party against whom the term is proffered shall in any circumstances absolutely and unconditionally forfeit his or her competence to demand performance" and "whether the party proffering the term is made the judge of the soundness of his or her own performance, or whether the party against whom the term is proffered is compelled to sue a third party first before he will be able to act against the party proffering the term". Although the Law Commission listed some examples of prohibited and suspect lists in its comparative overview, it never discussed this technique in its evaluative comments.

¹²⁸ Full argument on this matter cannot be attempted here.

¹²⁹ Only the courts can give a final ruling on what is definitely unfair.

¹³⁰ The Unfair Terms in Consumer Contracts Regulations 1999. The UK Law Commissions propose a revision of this grey list in their Draft Bill.

OFT in this regard. The listing of particular terms as probably unfair in a set of guidelines is often justified as non-binding interpretations of the suspect list, insofar as a court had not specifically decided on a term mentioned in the guidelines.¹³¹

4 Conclusion

There can be no doubt that South Africa needs unfair contract terms legislation, particularly in the light of the inherent limits of judicial control.

In formulating and applying unfair terms legislation, one should realise that the main reason why the customer has no real chance of influencing preformulated, non-negotiated terms, is the “prohibitively high transaction costs involved [in reading, bargaining over and shopping around for non-negotiated terms], rather than the superiority of the entrepreneur”.¹³² This reality in itself justifies intervention, as it causes reasonable people confronted with non-negotiated terms to typically refrain from properly evaluating all the consequences of the transaction, with the result that the transaction cannot be regarded as the outcome of the self-determination of both parties.¹³³ Thus party autonomy does not provide a justification for the enforcement of all such terms.

One conclusion to be drawn from this analysis of the problem is that content control on the basis of substantive unfairness alone is justified in some cases. The proposed South African consumer protection legislation should reconsider the list of factors to be considered in applying the “unfairness” standard. It should include factors to do with substantive fairness as well and should formulate the procedural factors to do with the manner in which agreement was reached in a manner more sensitive to the realities of standard form contracting. The UK Law Commission’s proposed Unfair Contract Terms Bill is particularly helpful in this regard. One reason why it should be considered is that the DTI’s list of factors was ultimately inspired by the 1977 UK Unfair Contract Terms Act, which the UK Law Commission considered could be improved in this regard.

In any event, courts should be aware of the justification for overt content control on the basis of substantive unfairness alone, and be willing to downplay such procedural factors in an appropriate case.

Incorporation control over exemption clauses such as the proposed countersigning of exemption clauses in the draft Bill is helpful to limit abuse, but can be a double-edged sword which may ultimately work against consumers if it is not coupled with an understanding of the typical realities surrounding the conclusion of a consumer contract. It is

¹³¹ See, eg, the *Unfair Contract Terms Guidance* of February 2001 par A, and the *Guidance on Unfair Terms in Consumer Entertainment Contracts* (2003) 15.

¹³² Zweigert & Kötz *Comparative Law* 335.

¹³³ See the quotations from Zimmermann to this effect at n 36 *supra*.

particularly dangerous to specifically mention counter-signing of exemption clauses in connection with death and personal injury in this regard, given that the proposed legislation does not prohibit or suspect-list exclusion or limitation of liability for negligence causing death or personal injury.

An appreciation of the reasons why judicial control is inherently limited leads to a better understanding of the desirable outcomes of unfair terms legislation. The desirability of a preventive, and not only a reactive, approach has implications not only for the procedural or enforcement parts of such legislation, but also for the substantive provisions which attempt to flesh out the concept of “unfairness”. In particular, particularity supplied by the use of non-exhaustive lists of prohibited and suspect terms, has an important role to play to promote fast and effective preventive and reactive control. The greater predictability which they bring is also advantageous for everyone involved. These mechanisms are not sufficiently utilised in the DTI’s current proposals and an in-depth comparative study thereof is justified.

OPSOMMING

’n Behoorlike begrip van die redes waarom statutêre beheer oor onbillike kontraksterme noodsaaklik is het etlike implikasies vir die wenslike inhoud en toepassing van sulke wetgewing. Die belangrikste rede waarom die verbruiker gewoonlik geen invloed op die inhoud van standaardkontraksterme het nie, is die hoë transaksiekoste verbonde aan die lees en onderhandeling van sodanige terme. Dit lei dikwels daartoe dat die standaardterme van ’n verbruikerskontrak nie as die selfbeskikking van een van die partye tot die kontrak beskou kan word nie (en dus van sy outonomie of kontrakteervryheid nie). Een gevolgtrekking is dat inhoudelike kontrole geregverdigd is, ook op grond van substantiewe onbillikheid alleen in gepaste gevalle. Dit is dus problematies dat die Suid-Afrikaanse Departement van Handel en Nywerheid in hul konsep-verbruikerswetgewing slegs prosedurele faktore in die lys van faktore noem wat in besonder in ag geneem moet word by beoordeling van kontraksterme vir onbillikheid, behalwe vir die vraag of die goedere gemaak is op spesiale aanvraag van die koper (wat nie dikwels relevant sal wees nie). Voorstelle vir verbetering van hierdie lys word dus gemaak. Daar word ook gepleit vir ’n genuanseerde begrip en toepassing van prosedurele faktore wat die realiteite van standaardvorm-kontraktering in ag neem. Die redes waarom regterlike kontrole te beperk is, lei tot ’n beter begrip van die wenslike uitkomst van onbillike kontraksterme-wetgewing. Die belangrikheid van voorkomende beheer het ook implikasies vir die substantiewe bepalings van sodanige wetgewing. Gedetailleerdheid voorsien deur lyste van verbode en verdagte terme (“swart” en “grys” lyste) kan veral in vinnige, effektiewe voorkomende en reaktiewe beheer ’n belangrike rol speel.