

## Articles

# *LESSONS FROM AMERICA? A SOUTH AFRICAN PERSPECTIVE ON THE DRAFT RESTATEMENT OF THE LAW, CONSUMER CONTRACTS*

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### **Abstract**

The American Law Institute is drafting a *Restatement of the Law, Consumer Contracts*. It deals at a very broad level with various requirements for the formation, validity, and proof of consumer contracts and terms, and especially with how they are to be applied in modern commercial environments, characterised by the widespread use of standard terms in online contracting. At the heart of the *Draft Restatement* lies the notion that it reflects a ‘grand bargain’ or trade-off in American consumer contract law. While its rules follow a ‘permissive’ approach to assent, through granting businesses significant freedom to draft contract terms, the effect of these rules is balanced by greater *ex post* substantive control, through imposing mandatory restrictions on terms. The purpose of this paper is to view this central idea of the *Draft Restatement*, as well as some related features, from the perspective of South African consumer contract law. Aspects that enjoy attention include the treatment of standard contracts, rules on actual or deemed assent, various forms of substantive control, the relationship between common-law and statutory regulation of consumer contracts, restrictions on adducing evidence, and the most appropriate institutions for granting consumers effective relief.

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## I INTRODUCTION

An American *Restatement* is a peculiar creature. Like the Roman god Janus it has two faces: one face is turned to the mass of existing law, and tries to discern its common principles; the other face looks to the future, and to the possible directions the law could take.<sup>1</sup> A *Restatement* is also peculiar because it is aimed at promoting legal harmonisation, but has no real force: it is neither a code, nor a directive; it is not even the product of a state body aimed at law reform, such as a ministry or law commission. It emanates from a private body, the American Law Institute (ALI), founded almost a century ago by a distinguished group of legal academics, judges, and practitioners. Ultimately, the power and authority of a *Restatement* depends on the persuasive force of its analysis.

In the context of the law of contract, the *Restatement (Second) of the Law of Contracts*, which was completed in 1979, has exerted considerable influence. However, its ambit (which has been somewhat limited by Uniform Commercial Codes) is the general principles of the law of contract. It is only relatively recently, in 2012, that the ALI embarked on drafting a *Restatement of the Law, Consumer Contracts* ('the *Draft Restatement*'), a supplementary instrument that applies specifically to transactions by consumers.

The *Draft Restatement* is based on a considerable body of research on consumer contracts. The purpose here is to enquire whether this research contains any lessons for South African law. This form of learning would be nothing new, since use has been made of comparative American perspectives in drafting local consumer legislation. Moreover, South African courts and authors have drawn on American law and legal scholarship in developing the common law.<sup>2</sup> However, before embarking any further on this exercise, it is worth first gaining a better understanding of the current status of this ambitious project.

<sup>1</sup> See *Restatements (Excerpt of the Revised Style Manual approved by the ALI Council in January 2015)* (ALI 2017); Frank, 'The American Law Institute 1923–1998' (1997–1998) 26 *Hofstra L Rev* 615 at 617–618.

<sup>2</sup> See Barnard, 'The role of comparative law in consumer protection law: a South African perspective' (2017) 29 *SA Merc LJ* 353. South African cases on contract often refer to American authors such as Williston and Corbin (see, eg, *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A)).

## II THE BROADER CONTEXT: THE STATUS OF THE *DRAFT RESTATEMENT OF THE LAW, CONSUMER CONTRACTS*

Once the reporters had prepared various memoranda and Council Drafts,<sup>3</sup> the *Draft Restatement* (termed a ‘Discussion Draft’) was circulated for discussion during the May 2017 Annual Meeting of the ALI. However, strong criticism was expressed that the *Draft Restatement* does not sufficiently reflect the common law. For example, nine general counsel of non-insurance companies sent a letter to the ALI on the eve of the May 2017 Annual Meeting, accusing the ALI of taking an approach that ‘risks causing irreparable harm to the organisation’s reputation in the legal community’. To these lawyers, ‘the idea that the ALI is even considering this project as a Restatement is deeply troubling’, since, in their experience, they did not believe that ‘so called “consumer contracts” represents a separate body of law from the general law of contracts’.<sup>4</sup> In short, to the general counsel, the face of *Draft Restatement* leans too much in one direction — to what the common law should be — and not to the preferred direction of clarifying and simplifying prevailing common-law rules. The preferred route for the project to take, for some at least, is that it should rather assume the form of a ‘Principles’ project, where the proposed unification of laws does not have to conform so precisely to the existing law, but rather reflects, or perhaps even indulges, academic views on its future.

As an outsider, one is somewhat bemused by the vehemence of the criticism. When the current venerated *Restatement (Second) of the Law of Contracts* was adopted, it was hardly a mere clarification of the prevailing law; it also looked to the future. The general counsels’ criticism may also evoke some nostalgia on the side of South African observers who were present in Parliament when local corporate lawyers representing suppliers expressed alarm over the radical impact of the proposed Consumer Protection Act (‘CPA’).<sup>5</sup> Nonetheless, there is a kernel of truth in the general counsel’s objections: the general common law of contract traditionally does not recognise a well-defined subcategory of law relating to consumer contracts. Furthermore, the criticism that the *Draft*

<sup>3</sup> The latest is Council Draft 3 of 2016.

<sup>4</sup> Calve, ‘GCs to ALI: BackOff!’, available at <https://www.inhouseops.com/2017/08/gcs-ali-back-off/>, accessed on 12 October 2018. The general counsel further accuse the reporters of attempting to create ‘separate consumer contracts rules that are not grounded in the existing case law’, but rather in consumer legislation. The *Draft Restatement* is also said to be ‘proposing to give consumers broad new legal remedies to challenge virtually any contract involving consumers’, and appears ‘to empower judges to exert broad new authority to change contracts absent existing common law precedent.’

<sup>5</sup> Act 68 of 2008.

*Restatement's* scope is over-ambitious is not limited to practitioners. It has also been expressed in academic circles. For example, concern has been expressed that the empirical methods used to determine the position in the common law may not have been sound,<sup>6</sup> and that the process is premature, and may inhibit further regulation.<sup>7</sup>

The current status of the *Draft Restatement* is that reporters are to incorporate feedback from the May Annual Meeting 2017 discussion, and that a subsequent Draft will only appear on the agenda for the May 2019 Annual Meeting.<sup>8</sup> However, these developments are not particularly relevant in the context of the present enquiry. From a comparative perspective, it does not really matter to what extent the *Draft Restatement* faithfully reflects American state law. What is more relevant, are the lessons or ideas contained therein, especially when dealing with universally problematic fact-patterns such as the lengthy online contracts presented to consumers for supposed assent. The focus here will be on whether these ideas could assist in finding answers to a specific question: to what extent the South African law of contract must be developed to take greater account of the unequal relationships inherent in so many consumer contracts. In answering this question, consideration must be given to both our existing general, common-law rules of contract, and statutory consumer law. While some developments may be better suited to incremental judicial development, others may demand statutory reform.

### III THE MAIN LESSON: THE GRAND BARGAIN

The enquiry begins with the main lesson contained in the *Draft Restatement*. In essence, it reflects a 'grand bargain' or trade-off in American consumer contract law. On the one hand, its rules follow a 'permissive' approach to assent by granting businesses fairly unrestricted freedom to draft standard contract terms.<sup>9</sup> Therefore, when contracting online, consumers are not constantly required to provide indications of assent through clicking or ticking boxes. Browse-wrap and shrink-wrap agreements are permitted. On the other hand, the effect of these lenient rules on what qualifies as consent is balanced by

<sup>6</sup> See Klass, 'Empiricism and privacy policies in the Restatement of Consumer Contract Law' (forthcoming, (2019) 36 *Yale Journal on Regulation*).

<sup>7</sup> Klass, 'The *Restatement of Consumer Contracts* and quantitative caselaw studies <https://blogs.harvard.edu/nplblog/2017/07/27/the-restatement-of-consumer-contracts-and-quantitative-caselaw-studies-greg-klass/>, accessed on 12 October 2018.

<sup>8</sup> See *Restatement of the Law, Consumer Contracts Discussion Draft — Foreword* (ALI 2017) 1.

<sup>9</sup> See IV(b) below.

greater judicial control of consumer contracts. This control is contained in provisions on, for example, unconscionability,<sup>10</sup> deception,<sup>11</sup> and how promises and affirmations that were made to consumers and resulted in their concluding the contract, could be given effect by making them part of the substance of the contract — regardless of what the fine print may say.<sup>12</sup>

What underlies this grand bargain? According to the reporters, it has been the practice of American courts to relax assent rules, and as these rules ‘shift to the more permissive end of the continuum, common law courts are recognizing the greater need and justification for mandatory restrictions and ex-post scrutiny of unfair terms’.<sup>13</sup> But, to recognise the need for something is one thing, and to do something about it another. Apparently, the reporters’ dilemma is that the courts have not yet fully implemented the second part of the bargain. This may explain the outrage of corporate legal counsel and critique that the project is no longer one of drafting a Restatement.

However, these formal objections are not of concern in this discussion. What matters are the merits of the grand bargain, and the reporters make a strong argument in their favour. The willingness of American courts to relax assent rules is not the product of judicial whim. The grand bargain reflects a certain (universal) reality,<sup>14</sup> namely that even though courts (and the legislature) may try to improve the quality of assent by requiring increased disclosure of standard terms, consumers are simply not interested in that which is disclosed. They will blithely click, tick, and sign away, even if some terms are made more prominent than others by being formatted in boxes, large fonts, or screaming caps, or are expressed in crystal clear terms.

When faced with this reality, courts have a choice. One extreme possibility is simply to regard all these terms as non-binding because assent is lacking, leaving the contract to contain only those core terms of which the consumer actually was aware and to which he or she assented. But, as the reporters point out, (many) standard terms fulfil the economically justifiable function of reducing transaction costs to the benefit of both parties.<sup>15</sup> Similar sentiments have been expressed in the

<sup>10</sup> See IV(c) below.

<sup>11</sup> See IV(d) below.

<sup>12</sup> Section 7, briefly discussed in IV(e) below.

<sup>13</sup> *Restatement of the Law, Consumer Contracts Discussion Draft — Reporters’ Memorandum* (ALI 2017) 3.

<sup>14</sup> *Restatement of the Law, Consumer Contracts Rep Mem DD* (ALI 2017) 2; *Restatement of the Law, Consumer Contracts Discussion Draft — § 1 Definition and Scope* (ALI 2017) 8–9.

<sup>15</sup> *Restatement of the Law, Consumer Contracts Rep Mem DD* (ALI 2017) 2; *Restatement of the Law, Consumer Contracts § 1 DD* (ALI 2017) 8.

South African context. Thus, according to Sachs J in *Barkhuizen v Napier*:<sup>16</sup>

‘The use of standard forms responds to two economic pressures. They reduce the transaction costs of contracting by making available at no extra cost a suitable set of terms. In addition the printed forms permit senior management of a firm to control the contractual arrangement made by subordinate sales staff. For these reasons it makes sense to permit the use of standard forms, but to control the content of the terms of the contracts.’

Alternatives must therefore be considered. This brings us to the grand bargain: recognise more relaxed rules on assent that could bind consumers to terms they were unaware of, but exercise control, and protect them in exceptional cases. However, the devil is in the detail: how generous should these rules on assent be, and what should these exceptional cases be? To answer these questions it is necessary to examine the text of the *Draft Restatement* more closely.

#### IV THE DETAIL: GIVING EFFECT TO THE GRAND BARGAIN

##### (a) Introduction

The *Draft Restatement of The Law, Consumer Contracts*, despite its broad title, has a limited focus. It consists of only nine sections, which essentially deal with the formation of a binding consumer contract. It therefore does not cover issues such as the operation of these contracts, breach, and its consequences. Section 1 contains some definitions, whereas sections 2 and 3 respectively deal with the adoption and modification of standard terms, which form the core of the first, ‘asset’ part of the grand bargain. Section 4 regulates the exercise of discretions, and sections 5 and 6 focus on unconscionability and deception; this is clearly the domain of the second, ‘control’ part of the grand bargain. Section 7 further binds businesses to certain promises by making them terms, regardless of what the other terms may say, while section 8 deals with when agreements are to be regarded as ‘integrated’ (so triggering the parol evidence rule). Finally, section 9 sets out the effect of derogation from the mandatory rules.

For present purposes, it is only possible to engage in very general terms with these provisions. It should be apparent that, roughly speaking, the comparable South African rules on the ‘assent’ part of the

<sup>16</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 139; also see Van der Merwe et al, *Information and Communications Technology Law* 2 ed (LexisNexis 2016) 179.

grand bargain are to be found in our common law, whereas as the second ‘restrictive’ part is contained in both our common law and in consumer legislation (especially the CPA). Furthermore, it would have to be kept in mind throughout that the ambit of the *Draft Restatement* is narrower than that of the CPA.<sup>17</sup> For example, the *Draft Restatement* only applies to ‘consumer contracts’, ie, contracts between ‘consumers’ and ‘businesses’, where a consumer is defined (more strictly than in the CPA) as an individual acting primarily for personal, family, or household purposes, and a ‘business’ is an individual or entity other than a consumer that regularly participates in or solicits, directly or indirectly, transactions with consumers. Furthermore, a number of important provisions in the *Draft Restatement* — especially those relating to assent — apply only to standard terms in consumer contracts. These are defined as terms drafted in advance by a party other than the consumer for multiple use. This strong focus in the *Draft Restatement* on rules relating specifically to standard terms is not shared by the South African common law of contract, or indeed the CPA. Even a consumer who concludes a negotiated contract could resort to the CPA,<sup>18</sup> and the common law of contract applies to both negotiated and non-negotiated contracts.

However, it of course must also be appreciated that in practice some rules of our common law, such as those dealing with the ticket cases, or CPA provisions on the use of plain language, or notification of consumers of certain types of term, are particularly relevant where suppliers require consumers to assent to standard terms.<sup>19</sup> Therefore, ultimately South African law does regulate standard terms, although it does so in a more indirect manner. Moreover, the *Draft Restatement’s* focus on standard-term consumer contracts should also not be over-emphasised, as the reporters have acknowledged that there should be room for analogous application of its rules to other transactions ‘in which similar asymmetries in information, sophistication and stakes are present’.<sup>20</sup>

<sup>17</sup> See s 1, and the comment in *Restatement of the Law, Consumer Contracts § 1 DD* (ALI 2017) 1–6.

<sup>18</sup> Therefore, the CPA’s provisions on unfair terms apply to negotiated and pre-drafted standard terms (see Naudé, ‘Section 48’ in Naudé & Eiselen (managing eds), *Commentary on the Consumer Protection Act* (revision service 2017, original service, Juta 2013) 48–2 — 48–3.

<sup>19</sup> See s 22 of the CPA on plain language and compare s 49(5) of the CPA with the more broadly worded § 2(a) of the *Draft Restatement*; also see s 58 of the CPA. The CPA contains an isolated reference to standard terms in s 4(4), which essentially applies a statutory contra proferentem rule to the interpretation of ‘any standard form, contract or other document prepared or published by or on behalf of a supplier’. But the reference to standard form adds hardly anything. The CPA does not expressly address questions raised in the *Draft Restatement*, such as when standard terms form part of consumer contracts (see §§ 2, 3 and 7 of the *Draft Restatement*).

<sup>20</sup> *Restatement of the Law, Consumer Contracts § 1 DD* (ALI 2017) 3.



(b) *Rules on actual or deemed assent in the adoption and modification of standard terms*

(i) *The general approach to incorporating standard terms*

With these background observations in mind, significant specific provisions of the Restatement will now be considered, starting with the rules on assent.

It is at times somewhat challenging to square the text of the *Draft Restatement* with the reporters' comments, but the essence appears to be the following. According to § 2(a), read with the comments, a standard term can be 'adopted' as part of a consumer contract in two circumstances. The first is when the consumer has been given reasonable prior notice of the term. The consumer is bound if he or she either: i) expressly signifies assent to the terms in the course of assenting to the transaction; or ii) if the consumer has been given a reasonable opportunity to review the term, and then signifies assent to the transaction.<sup>21</sup>

From the examples, it appears that § 2(a) covers terrain which, in South African law, is in the domain of the caveat subscriptor rule (perhaps now better described as the caveat clickor rule), where there is an express indication of assent, as well as of the rules governing the 'ticket cases', where parties have not expressly assented to written terms (by signature), but were given reasonable notice of the terms, and their assent can be inferred. Both these sets of rules could be linked to the doctrine of quasi mutual assent,<sup>22</sup> which would hold one party liable for instilling in the other party the reasonable reliance of assent. When applying this doctrine, our courts readily hold that there is a reliance of assent. However, this can clearly only be some sort of general reliance on the consumer assenting to the terms, whatever they may be, as opposed to a genuine reliance on the consumer being aware of and assenting to specific terms. Only rarely do our courts protect a party by applying rules — such as those aimed against confusing format,<sup>23</sup> inadequate display,<sup>24</sup> or unexpected or surprising terms<sup>25</sup> — where the person

<sup>21</sup> *Restatement of the Law, Consumer Contracts* § 1 DD (ALI 2017) 2 para 3.

<sup>22</sup> See *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 2.

<sup>23</sup> If a standard form is misleading, a party could escape liability by arguing that the mistake as to the content of the agreement was reasonable (see, eg, *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C); also see *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W)). In the language of the *Draft Restatement*, this could be regarded as a situation where notice of the terms was not reasonable.

<sup>24</sup> See, eg, *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA) 991.

<sup>25</sup> See *Fourie NO v Hansen* 2001 (2) SA 823 (W) 832; *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) para 23; *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).



presenting the terms could not have expected that the other party's general indication of assent could ever have covered some or other specific unexpected term.<sup>26</sup> The CPA, in turn, provides only limited protection in these circumstances, and contains nothing like the general notification requirements of § 2(a) of the *Draft Restatement*.<sup>27</sup>

Although the *Draft Restatement* has been compared to South African law only in the broadest terms above, it does appear that the general rules of our common law of contract, which also cover standard terms in consumer contracts, are also generous in finding that where one party has taken only limited steps to bring terms to the attention of another party, the latter would be bound by those terms, even though it may be abundantly clear that he or she had no knowledge of most of their content. This provisionally suggests that there is room for adopting the grand bargain perspective in South African law.

(ii) *Terms presented after assent (PNTL and shrink-wrap)*

To enable a firmer conclusion, regard must also be had of other rules on assent in the *Draft Restatement*. What is the position if a standard term is only presented to a consumer *after* the consumer has signified assent to the transaction, or if the standard terms are modified? The *Draft Restatement* expressly provides for both circumstances.

As far as adding a term after conclusion is concerned, the *Draft Restatement* determines in § 2(b) that before signifying assent to the transaction, a consumer must have been given reasonable prior notice of the existence of such a term, must have been given a reasonable opportunity to terminate the contract after the term had been made available for review, and must then have failed to terminate. This covers the practice of 'Pay Now, Terms Later' (PNTL) contracts, or 'shrink-wrap' contracts of the digital world, where the consumer agrees to the core terms of the transactions, and more specifically to the price, but is

<sup>26</sup> See *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 (2) SA 518 (C) 524–525.

<sup>27</sup> Section 49 of the CPA requires that a consumer's attention should be drawn to certain types of term (including unusual or unexpected terms), but a failure to adhere to this provision does not automatically result in nullity of the term under the CPA; a court must make a finding to this effect. Some commentators have suggested that compliance with these notification requirements may deprive consumers of the protection of provisions that regulate unfair contract terms (see generally, Naudé, 'Section 49' in Naudé & Eiselen (eds), *Commentary on the Consumer Protection Act* revision 1 (Juta 2016), 49–5), but in cases of ambiguity an interpretation of the CPA which serves the purpose of protecting a consumer is to be preferred.

warned that terms will follow.<sup>28</sup> Assent is in effect inferred from inaction. This position is said to be supported by recent case law, but not by traditional scholarship.<sup>29</sup> Finally, some provision is made for the partial adoption of certain standard terms.<sup>30</sup>

This is a rather relaxed approach to inferring assent. Does South African law follow a similar approach? Various possibilities require consideration. First, if there is no prior indication that terms are to follow, the position is clear. A contract is only concluded on the terms agreed on, and any subsequent addition or amendment must be agreed to separately, according to the normal principles.<sup>31</sup> The position is presumably the same if there is an indication that terms are to follow, but these terms were not sufficiently brought to the consumer's attention. An indication that terms are to follow could, in any event, also be ineffective if it is contrary to legislation.<sup>32</sup>

The second possibility is that the consumer may have been sufficiently notified that further terms are to follow after conclusion of the 'core' contract. The consumer will then be bound to these further terms if he or she subsequently indicates assent to them. The difficulty, though, is to determine whether this happened. The offeror may prescribe a mode of acceptance of the terms that are to follow, but our courts are traditionally loathe to recognise that acceptance can be inferred from mere

<sup>28</sup> See *Restatement of the Law, Consumer Contracts Discussion Draft — § 2 Adoption of Standard Contract Terms* (ALI 2017) 13–15.

<sup>29</sup> *Restatement of the Law, Consumer Contracts § 2 DD* (ALI 2017) 14.

<sup>30</sup> § 2(c).

<sup>31</sup> See *WJ Lineveldt (Edms) Bpk v Immelman* 1980 (2) SA 964 (O). Days after the conclusion of an oral agreement of safekeeping, the one party sent the other an invoice, containing a standard form exemption clause. This clause was not binding (967). However, contrast the situation where an agent undertakes to process an order, and the supplier then dispatches terms to the prospective customer for assent (see *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 (4) SA 408 (SCA)).

<sup>32</sup> Section 43(1) of the Electronic Communications and Transactions Act 25 of 2002 ('the ECTA') determines that a supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make certain information available to consumers on the website where such goods or services are offered. This includes '(i) the full price of the goods or services, including transport costs, taxes and any other fees or costs; . . . (k) any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers'. Section 43(2) in turn determines that 'the supplier must provide a consumer with an opportunity (a) to review the entire electronic transaction; (b) to correct any mistakes; and (c) to withdraw from the transaction, before finally placing any order' (own emphasis). If the supplier fails to comply with these provisions, the consumer may under s 43(3) cancel the transaction within 14 days of receiving the goods or services under the transaction. The requirements of disclosure of applicable terms and of being provided an opportunity for prior review suggest that PNTL terms are impermissible when engaging in these transactions.

silence or inaction,<sup>33</sup> for example through not ‘terminating’ the contract after having been given the opportunity to do so. However, acceptance could be inferred from more positive conduct such as implementing the contract.<sup>34</sup> Presumably, if a consumer has been sufficiently notified that terms are to follow, and does not assent to these terms, the contract as a whole fails. Our common law does not reflect any clear indication that the contract would automatically continue on the (core) terms that have already been agreed on.<sup>35</sup>

Ultimately, although the details differ somewhat, it should be apparent that both legal systems could potentially hold a consumer liable for terms presented after conclusion of a core contract, provided that the consumer had been sufficiently notified that these terms follow. Whether the consumer actually was aware of the terms does not matter; there need only be some indication that the consumer did not object to them. Our common law may just be a bit more strict than the *Draft Restatement*, to the extent that it might not be sufficient for the supplier to indicate that the consumer who received the additional terms is bound because he failed to terminate after having the opportunity to do so.<sup>36</sup>

### (iii) *Modifications of standard terms*

The focus now shifts to the rules on modification of standard terms in § 3. In essence, the section requires that the consumer must have received reasonable notice of the proposed modification, and had a reasonable or ‘meaningful’ opportunity to reject the terms. The modification further must be made in ‘good faith’ to prevent opportunistic advantage being taken of ‘locked-in’ consumers.<sup>37</sup> The wording of § 3 is

<sup>33</sup> See Bradfield, *Christie’s Law of Contract in South Africa* 7 ed (LexisNexis 2016) 80–82; Van Huyssteen, Lubbe & Reinecke, *Contract — General Principles* 5 ed (Juta 2016) 62.

<sup>34</sup> See *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA) on acceptance being inferred from conduct such as performance.

<sup>35</sup> In this regard it is not quite clear how § 2(c) of the *Draft Restatement* provides for a contract to exist with only some of the proposed terms being adopted. Presumably a consumer cannot simply unilaterally determine which of the additional terms are accepted. If the consumer only wishes to be bound by some of the additional terms, the supplier would in turn have to indicate that the contract could indeed continue with only these additional terms.

<sup>36</sup> South African consumer legislation could further protect a consumer even if there was assent to the additional terms by providing statutory rights to withdraw from these contracts in prescribed time periods. Section 44 of the ECTA provides a seven-day cooling-off period, and s 16 of the CPA provides a 5-day cooling-off period in the event of direct marketing (on the value of these exit rights see *Restatement of the Law, Consumer Contracts* § 2 DD (ALI 2017) 10–11).

<sup>37</sup> § 3 (b) *Draft Restatement*. Although the boundaries are rather indistinct (to an outsider at least), § 3 does not cover express terms in contracts that grant a party a discretion to specify

somewhat challenging, with cross-referencing to rules on adoption in § 2, but the comments suggest that the idea is that if a business takes these steps, the consumer's assent can be inferred from his or her further continuation with the contract.

Is the South African common law also as generous to the party presenting a modification? In principle, a deal is a deal; a party cannot unilaterally modify terms. A party can, of course, propose a change, but the other party could reject it, and that would be the end of the matter. However, where contracts require continuous performance, matters can be more complex. These contracts are often terminable on notice by either party. One party could, therefore, propose a modification and indicate that if it is not assented to, notice will be given to terminate the contract.<sup>38</sup> But the question as to how acceptance of the proposed modification is to be inferred remains. The position, as indicated earlier in the context of terms being presented after the core contract has been concluded, is that acceptance cannot be automatically inferred from inaction. Something more is required — eg, continued use of a service or adjusted performance.<sup>39</sup> Unfortunately, the South African common law is rather vague on the detail. Perhaps there is something to learn from the *Draft Restatement's* express requirement in § 3 that reasonable notice must be given, that the consumer must have a reasonable opportunity to

or modify the contractual content (see *Restatement of the Law, Consumer Contracts Discussion Draft* — § 3 Modification of Standard Contract Terms (ALI 2017) 6). These discretions are dealt with separately in § 4 of the *Draft Restatement*, which requires that they be exercised in good faith — a requirement which to some extent is reflected in rules in South African law that require certain discretions to be exercised in a reasonable manner. This issue is becoming increasingly important under South African law, and potentially is one in which good faith will play an important role. According to the South African common law, a party must exercise a contractual power to determine or to modify another party's obligations reasonably (see *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb & another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA)). The same qualification could apply to a discretion relating to a party's own performance (see *Erasmus v Senwes Ltd* 2006 (3) SA 529 (T) 538). In terms of the common law, discretions to determine the price in a sale agreement, or rental under a lease are invalid. Regulations issued under the CPA (GN 293, GG 34180 of 1–4–2011) determine that terms that contain some discretions as presumed to be unfair or are greylisted. See, eg, reg 44(3)(h) on terms that allow a supplier to increase a price without a right to terminate, subject to certain qualifications. It has been argued that according to s 23 of the CPA a seller must fix a price prior to a sale being concluded, and hence that the seller cannot enjoy a discretion to fix a price, unless a consumer has waived this right (see Du Plessis, 'Price discretions and consumers' right to disclosure in terms of the Consumer Protection Act 68 of 2008' (2013) 76 *THRHR* 225 at 235).

<sup>38</sup> In South African law such an intimation of a desired change does not amount to economic duress. See generally, *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) para 18. The position is different if the threats are used to induce parties to act to their detriment in relation to accrued rights — see *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP) para 24.

<sup>39</sup> This appears to be the implication of *Seeff*.

reject the modification, and that the modification must be made in good faith. This could, for example, prevent consumers from being compelled to accept modifications because they cannot explore opportunities to find alternative suppliers.

Ultimately, it should be apparent from the overview above that both American and South African law can be regarded as generous in finding assent. It will be recalled that in terms of the grand bargain, this generosity must be balanced by some form of control. This brings the enquiry to various ways in which such control can be exercised. It will commence with the provisions on unconscionability.

### *(c) Unconscionability*

When used colloquially, the term ‘unconscionability’ can loosely be equated to ‘unfairness’ or to ‘unreasonableness’.<sup>40</sup> However, a consumer cannot simply appeal to unfairness or unreasonableness to enjoy protection under § 5 of the *Draft Restatement*. This crucial counterweight to the loose assent requirements under the grand bargain, normally requires two forms of unconscionability to be present before a contract or term will be unenforceable. The contract or term must be substantively unconscionable in the (extreme) sense of being ‘fundamentally unfair or unreasonably one-sided’ (§ 5(b)(1)), and it must be procedurally unconscionable, ‘amounting to unfair surprise or depriving the consumer of meaningful choice’ (§ 5(b)(2)). Crucially, the *Draft Restatement* further works with a sliding scale in applying these two elements: the more one element is present, the less is required of the other.<sup>41</sup> But, before their interaction is considered, the two forms of unconscionability require closer attention.

#### *(i) Substantive unconscionability*

The definition of substantive unconscionability in § 5(b)(1) as ‘fundamentally unfair or unreasonably one-sided’ is clearly broad, but the grand bargain is not overly generous. A term must not be viewed in isolation, but in the context of the contract as a whole; what may seem harsh in isolation may be justifiable given other benefits.<sup>42</sup> The *Draft Restatement* further contains some presumptions making it easier for consumers to prove substantive unconscionability. These presumptions

<sup>40</sup> For a comparative analysis of the concept see Glover, ‘Section 40 of the Consumer Protection Act in comparative perspective’ 2013 TSAR 689.

<sup>41</sup> Section 5(c); *Restatement of the Law, Consumer Contracts Discussion Draft — § 5 Unconscionability* (ALI 2017) 1.

<sup>42</sup> *Restatement of the Law, Consumer Contracts § 5 DD* (ALI 2017) 2, 9–10.

are contained in grey lists<sup>43</sup> that have been inspired in part by American consumer legislation, rather than by the common law. However, the reporters expressly state that a higher degree of unfairness may be required when applying the *Draft Restatement* as opposed to the legislation.<sup>44</sup> The choice not to make use of detailed lists and rather use general standards was deliberate, to allow courts freedom to apply these standards in particular cases.

It is not possible here to engage in a detailed comparison of the way in which the *Draft Restatement* and South African law protect consumers in cases of substantive unconscionability. However, it can be observed, in general, that the protection provided in the *Draft Restatement* does not appear to be particularly generous, which reflects a position closer to the South African common law than to the CPA. The South African common law knows no separate doctrine of substantive unconscionability, but a term may not be so unfair as to be contrary to public policy.<sup>45</sup> While this ‘public policy rule’ may in theory be used to combat serious cases of substantive unfairness, the test is applied strictly and success is rare.

Section 48 of the CPA, in turn, generally bans unfair terms and prices, and indicates that unfairness may be present if a term or condition is excessively one-sided, or if the terms are so adverse to the consumer as to be inequitable.<sup>46</sup> But the CPA goes further and blacklists a number of terms.<sup>47</sup> Some correlation exists between the *Draft Restatement’s* grey lists and those promulgated under the CPA.<sup>48</sup> This correlation is found in terms that exclude or limit liability or the consumer’s remedies that

<sup>43</sup> See *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 9. According to § 9 of the *Draft Restatement*, courts may not only sever, but also limit derogating terms, or replace them with appropriate alternative provisions. The CPA effectively invalidates terms that seek to defeat its purposes or to deprive a consumer of its protection (see sub-ss (1) and (3) of s 51; also see s 4(5)(a)). Courts further have the power, in a manner redolent of § 9 of the *Draft Restatement*, to order that agreements or terms that are void in terms of the CPA and notices that are non-compliant may be declared void, or be severed or altered (s 52(4)(a)).

<sup>44</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 5.

<sup>45</sup> In American law, the doctrine of unconscionability is distinct from the doctrine of illegality or unenforceability on grounds of public policy (see *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 8). South African courts may not use the standard of good faith to refuse to recognise or to enforce a term; good faith is only an underlying value, which can inform the development of new rules or standards.

<sup>46</sup> Section 48(2)(a) of the CPA. Also see s 52 of the CPA on the factors a court must consider when applying s 48. These include procedural and substantive considerations (see Naudé & Koep, ‘Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: Some guidance from the German law on standard contract terms’ (2015) 26 *Stell LR* 85.

<sup>47</sup> See s 51 of the CPA, which, inter alia, blacklists terms excluding liability for gross negligence; these terms are only greylisted in § 5(d)(1)(B) of the *Draft Restatement*.

<sup>48</sup> Regulation 44(3). See Naudé, ‘Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008’ 2017 *TSAR* 138 for a proposal that some greylisted terms should be blacklisted.

would otherwise apply to negligently and innocently caused personal injury;<sup>49</sup> terms (such as penalty clauses) that expand the consumer's liability for breach;<sup>50</sup> and terms that limit the consumer's ability to pursue a complaint and to seek reasonable redress for violation of legal right — eg, arbitration clauses and time bar clauses.<sup>51</sup> However, South African law also greylists quite a number of terms that are not (expressly) provided for in the *Draft Restatement*.<sup>52</sup> Conversely, there are relatively few terms that the *Draft Restatement* covers which are not (expressly) provided for in the CPA's grey lists.<sup>53</sup> Ultimately, the CPA's black list and grey list, in theory at least, serve the purpose of providing consumers with the type of protection that they require under the grand bargain to justify generous rules of assent.

### (ii) *Procedural unconscionability*

As indicated earlier, a consumer seeking to escape enforcement of a substantively unconscionable contract or term would generally be expected to prove that there was also a problem with the way in which the contract was concluded. Section 5(b)(2) of the *Draft Restatement* states that this must have been 'procedurally unconscionable, amounting to unfair surprise or depriving the consumer of meaningful choice'.

An objective test is used to determine procedural unconscionability. It asks what the effect of a contract or term was on a substantial number of consumers or on the 'ordinary consumer'. The question is not whether a particular consumer was unfairly surprised, but whether this

<sup>49</sup> Compare § 5(d)(1)(A) of the *Draft Restatement* with reg 44(3)(a); further see *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 10.

<sup>50</sup> Section 5(d)(2) of the *Draft Restatement* greylists provisions on expanding consumer's liability, remedies of business, and business's enforcement powers. The comments indicate that this covers liability for breach, most notably penalty clauses (see *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 10). The CPA greylists penalty clauses (see reg 44(3)(r), as well as (q) and (s)). In terms of § 5(d)(2) of the *Draft Restatement*, penalties for early termination or early exit penalties are greylisted. Compare s 14 of the CPA, which regulates the costs of early termination of fixed-term contracts.

<sup>51</sup> Compare § 5(d)(3) with reg 44(3)(x)–(aa) of the CPA. See *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 10–11.

<sup>52</sup> South African law greylists various exclusions for liability in reg 44(3)(c)–(g) (these are not expressly covered in § 5(d)(1)(B)), unilateral power terms in reg 44(3)(h)–(q), terms on cession/transfers in reg 44(3)(t),(u), and terms on law other than South African law in reg 44(3)(bb).

<sup>53</sup> Section 5(d)(3) of the *Draft Restatement*, eg, covers anti-disparagement clauses (see *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 5). These clauses are not clearly covered by reg 44(3)(x). And § 5(d)(1)(B) greylists terms excluding ordinary negligence, which is not expressly dealt with in the CPA. However, the CPA does greylist terms limiting liability for breach by the supplier (see reg 44(3)(b)), and breach could potentially amount to negligence.



is its general effect.<sup>54</sup> The more a term is ‘expected’, the more it would influence the decisions of consumers, and the less chance there is of finding procedural unconscionability. This renders it difficult to escape from core terms, most notably those relating to price, and renders it more promising to escape from non-core fine print that consumers do not bother to read, even when it is disclosed more conspicuously.<sup>55</sup>

To aid consumers, the *Draft Restatement* even contains a presumption that non-core standard terms do not affect the contracting decisions of a substantial number of consumers or are not ‘salient’ — to use term favoured by the reporters.<sup>56</sup> The value of the test of ‘salience’ is supposedly that it describes a term that can be policed by competition, and hence would be procedurally acceptable. The ‘salience’ test is contrasted to ‘formalistic’ tests, such as requiring conspicuousness; according to the reporters, consumers could still be overwhelmed by standard terms even though these tests have been met. Note, however, that there is merely a presumption of procedural unconscionability.<sup>57</sup> Nothing stops a business from drawing a consumer’s attention to specific terms.<sup>58</sup> Ultimately, the *Draft Restatement* does not go so far as to state that the use of standard terms automatically amounts to procedural unconscionability.<sup>59</sup>

It is not entirely clear, however, why an objective approach should be followed in determining whether a procedural problem exists under § 5(b)(2). An objective test presumably serves to prevent businesses or suppliers who deal with the public in general, from having to bear the consequences of an individual consumer being particularly weak or susceptible to a procedural flaw, such as being highly naive about what terms to expect. However, the implication of an objective test is also, conversely, that a term which consumers generally are unaware of, could be procedurally unfair even though the particular consumer seeking relief was actually astute enough to read it and be aware of its contents. Apparently, the justification for regarding this as a case of procedural unconscionability is that a market failure still exists.<sup>60</sup> But then the preferred approach may perhaps rather be to protect the public against

<sup>54</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 6.

<sup>55</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 5–8, 13.

<sup>56</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 13–14.

<sup>57</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 6, 8.

<sup>58</sup> See Naudé, ‘Section 52’ in Naudé & Eiselen (eds), *Commentary on the Consumer Protection Act* revision 2 (Juta 2017) 52–13.

<sup>59</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 13.

<sup>60</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 5).

such a market failure through a general-use challenge by entities such as consumer bodies.

The question still remains as to what is to be understood by procedural unconscionability. Unfortunately, at least from an outsider's perspective, the drafting is rather unclear, and this complicates comparison. Do the terms 'unfair surprise' or 'deprivation of meaningful choice' define procedural unconscionability exhaustively, or are they merely examples of it?<sup>61</sup> Moreover, if they are mere examples, what other defects are included? The comments are somewhat vague on all of this, save for indicating that general contract law already provides for doctrines like mistake, misrepresentation, and duress.<sup>62</sup>

From a South African perspective, our common law has well-established doctrines of mistake (which could cover surprising terms giving rise to a material and reasonable mistake, irrespective of whether there was any substantive unfairness),<sup>63</sup> misrepresentation (including fraud), and duress.<sup>64</sup> Some of these serious procedural flaws can be dealt with under section 40 of the CPA, which prohibits various forms of what it terms 'unconscionable conduct'. However, this provision goes much further than procedural unconscionability in American law.<sup>65</sup> Section 40 covers various procedurally improper ways of influencing a consumer's consent, including 'harassment', 'unfair tactics', and the supplier knowingly taking advantage of various forms of weakness on the side of the consumer, such as disability, illiteracy, and ignorance.

It is less clear, however, where South African law stands on the elusive procedural problem referred to as 'inequality of bargaining power'.<sup>66</sup> This is sometimes referred to as a factor to be taken into account when

<sup>61</sup> The comments refer to defects 'like surprising and unexpected terms or lack of meaningful choice' (own emphasis), which suggests they are merely illustrations (*Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 5). The comments contain examples of withholding information (such as whether information could be obtained from a public official), the use of high-pressure, door-to-door sales techniques, and marketing primarily to 'less educated and financially unsophisticated individuals' — see *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 7–8, examples 15–18. But are these all cases of depriving a consumer of a meaningful choice?

<sup>62</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 9 (indicating that when these doctrines apply, substantive unconscionability is not required), 13.

<sup>63</sup> In the event of mistake relating to a particular term, the courts may invalidate the term without necessarily invalidating the contract as a whole — see, eg, *Constantia* (above).

<sup>64</sup> See, eg, *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 BK 1999* (1) SA 780 (T) 795–796 on duress and inequality of bargaining power.

<sup>65</sup> See Glover, 2013 TSAR 689 at 695–697. See further, Du Plessis, 'Section 40' in Naudé & Eiselen (eds), (Juta 2017); Du Plessis, 'Protecting consumers against unconscionable conduct: Section 40 of the Consumer Protection Act 68 of 2008' (2012) 77 THRHR 24.

<sup>66</sup> See Lewis, 'The uneven journey to uncertainty in contract' (2013) 76 THRHR 80 at 92 (writing in the context of determining when parties negotiate in good faith); also see *Roazar CC v The Falls Supermarket CC 2018* (3) SA 76 (SCA) para 20.

determining whether a contract or term is contrary to public policy (a matter that will be considered presently), but ‘inequality of bargaining power’ is not expressly listed in section 40. Presumably it could overlap with, or be accommodated under, some of the examples listed there. It is also not quite clear how ‘inequality of bargaining power’ is accommodated in the *Draft Restatement*, with its ‘surprising terms’, ‘deprivation of choice’ and ‘salience’ tests. But again, there could be an overlap, inasmuch as ‘inequality of bargaining power’ could cover various situations where use has been made of standard terms that a consumer may not have expected, or could not negotiate.

(iii) *The relationship between substantive and procedural unconscionability*

With these broad overviews of the two forms of unconscionability behind us, the enquiry returns to the observation that in exercising its control function, American law makes use of a sliding scale; in other words, the more one form of unconscionability is present, the less is required of the other. And here it must be acknowledged that the sliding-scale approach has a certain intuitive appeal: the clearer it is that consent has been obtained freely, the stronger the inference that it is not warranted for the law to interfere in the substance of what has been agreed upon. However, it must be added that American law recognises that pure substantive unconscionability may be sufficient in extreme cases.<sup>67</sup> Moreover, as indicated, severe procedural problems (eg, duress or misrepresentation) could be dealt with through other common-law doctrines,<sup>68</sup> without the need to prove substantive unconscionability.

Given that the control arm of the grand bargain may benefit from adopting a sliding scale, what is the comparable position in South African law? The enquiry starts with the position under the CPA before turning to the common law.

As far as the CPA is concerned, it recognises a spectrum of control of terms, albeit that it does so in a rather oblique manner. At one end of the spectrum there are cases where pure substantive unfairness is sufficient for relief. The blacklisted terms could be regarded as crystallised cases of such unfairness.<sup>69</sup> Secondly, as indicated earlier, terms or prices are subject to substantive-fairness control under section 48. When exercising this form of control, courts must, in terms of section 52(2), consider

<sup>67</sup> Section 5(c); *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 1.

<sup>68</sup> *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 2.

<sup>69</sup> And also some instances where s 48(1) of the CPA is applied; see Naudé, ‘Section 52’ in Naudé & Eiselen (eds), (Juta 2016) 52–7.

a variety of procedural circumstances.<sup>70</sup> While the language is not the same, the general impression is that in exercising fairness control under the CPA, South African courts must take account of some considerations comparable to those required when determining procedural unconscionability in terms of the *Draft Restatement*. These include the relationship between the parties and their relative bargaining position, whether there was negotiation, and whether terms were unexpected or surprising. And finally, there are more serious cases of procedural unfairness covered by section 40, where substantive unfairness is not required.

Ultimately, there is no express recognition in the CPA of the sliding-scale approach of the *Draft Restatement*, and this may be something that requires further attention. Such a scale may, for example, assist in applying section 52(2), which currently only lists certain procedural issues that are relevant in finding a term to be unfair, but does not spell out their relative importance.<sup>71</sup>

Consumer legislation can, therefore, aid in upholding the ‘control’ side of the grand bargain in a variety of permutations of substantive and procedural unfairness. But where does the South African common law stand? Unsurprisingly, the position is not quite as generous. As indicated, the common law may in rare instances provide relief in cases of substantive unconscionability through the general rule that terms or enforcement may not be contrary to legislation or public interest. In exercising this substantive control, courts may take into account the procedural problem of inequality of bargaining power, although it is not clear when and how. However, it has been shown above that the sliding scale of the *Draft Restatement* may be helpful in making these determinations. It is readily conceded that South African courts do not at present overtly recognise such a scale in determining whether a term itself or its enforcement is contrary to public policy. A case like *Barkhuizen* at least

<sup>70</sup> These include the nature of the parties, their relationship, and ‘their relative capacity, education, experience, sophistication and bargaining position’ (s 52(2)(b)); the parties’ conduct, which presumably includes presenting terms for immediate assent on a take-it-or-leave-it basis (s 52(2)(d)); whether they negotiated and the extent of such negotiations, which may require distinguishing between core and non-core standard terms (s 52(2)(e)); whether documents relating to the transaction are in plain language (s 52(2)(g)); and whether the consumer knew or reasonably ought to have known of the existence and extent of the allegedly unfair term, having regard to any custom and trade or any previous dealings between the parties — a category which covers surprising or unexpected terms (s 52(2)(h)) — for comment see Naudé, ‘Section 52’ in Naudé & Eiselen (eds), (Juta 2016) 52–17).

<sup>71</sup> For some support of such a scale see Stoop, ‘The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts’ (2015) 18/4 *PELJ* 1091 at 1093–1094 (to the extent that it is suggested that the higher the substantive unfairness, the easier it should be for the consumer to establish procedural unfairness).

establishes the basic point of departure that, in extreme cases, substantive unfairness may in itself lead to unenforceability and that, in other cases, proof of a procedural problem (inequality of bargaining power) may be a relevant factor in making such a determination.<sup>72</sup>

But theory is one thing and practice another. Even if the law were to develop further to recognise such a sliding scale, meaningful relief requires judicial sensitivity to problems within the procedural dimension. Thus, in *Barkhuizen*, the exclusion clause was contained in a standard term contract, yet this hardly featured prominently as a procedural concern in the majority judgment.<sup>73</sup>

#### (d) *Deception*

It will be recalled that procedural unconscionability in the *Draft Restatement* does not cover traditional common-law rules on mistake and misrepresentation (including fraud). These rules are already dealt with in the *Restatement Second, Contracts*. However, the reporters felt that in the context of consumer contracts, specific provision should be made for ‘deception’, which is dealt with in § 6. According to their comments, ‘deception’ does not only encompass outright fraud, but any act or practice that is likely to mislead the reasonable consumer.<sup>74</sup> A victim of deception may further avoid a specific term, as opposed to the whole contract.<sup>75</sup> Provision is also made for presumptions of deception when affirmations or promises are made to the consumer prior to concluding a consumer contract, but are undermined by its standard terms — for example, when an advertisement suggests that a service is free, but the terms indicate that a fee is payable.<sup>76</sup>

<sup>72</sup> See *Barkhuizen* (above) para 59: ‘If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties. In *Afrox* the Supreme Court of Appeal recognised that unequal bargaining power is indeed a factor that together with other factors plays a role in the consideration of public policy. This is a recognition of the potential injustice that may be caused by inequality of bargaining power’. Also see *Maphango & others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 124; *Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) para 30: ‘The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party’s relative power is an issue’ (own emphasis).

<sup>73</sup> *Barkhuizen* paras 65–67; contrast the minority judgment of Sachs J.

<sup>74</sup> *Restatement of the Law, Consumer Contracts Discussion Draft*—§ 6 *Deception* (ALI 2017) 3–4. The test is again objective; it is not enquired whether the specific consumer was actually misled.

<sup>75</sup> *Restatement of the Law, Consumer Contracts* § 6 DD (ALI 2017) 3.

<sup>76</sup> Section 6(b); *Restatement of the Law, Consumer Contracts* § 6 DD (ALI 2017) 1–2, 4.

How does this fit in the grand bargain? We are not dealing with situations that should enable a party to avoid liability under the rules on assent. In cases of deception, there is assent; how it has been secured renders the contract voidable, and not void. So we are essentially dealing with a procedural problem on the ‘control’ side of the grand bargain. This somewhat subtle distinction must also be borne in mind when seeking to locate the comparable rules in South African common law. In some cases of misrepresentation, there could be no assent. A prominent case dealt with an advertisement of sale for a motor vehicle. The advertisement incorrectly indicated a more recent year of manufacture.<sup>77</sup> A standard term in the sale agreement excluded liability for such a representation, but the purchaser was unaware of the term and the seller did not seek to draw it to the purchaser’s attention. The court regarded this as a case where there is no assent at all to the term, due to the purchaser’s reasonable and material mistake.

However, normally a party would not find it easy under South African common law to escape liability if a ‘no-representations’ clause is at hand. It is in this context that the CPA performs better in exercising the controlling function in cases of what the *Draft Restatement* terms deception. Using terminology apparently adopted from foreign consumer legislation, section 41 of the CPA generally prohibits ‘false, misleading or deceptive representations’, which to some extent overlaps with the law of misrepresentation under the general law of contract.<sup>78</sup> Crucially, the CPA bans ‘no-representation’ clauses which exclude a supplier’s liability for representations, and also protect consumers who are deceived into concluding ‘negative option’ contracts with automatic renewal mechanisms, by providing them a right of termination.<sup>79</sup>

(e) *Proof of the terms of an agreement: Protecting an integration and the parol evidence rule*

So far the emphasis has been on how the grand bargain could protect parties in cases of substantive or procedural unconscionability or deception. The focus now shifts to the complex problem of proof of agreements, and more specifically, to how to deal with conflicting assertions of what constitutes the subject matter of a contract. This is the

<sup>77</sup> See *Du Toit v Atkinsons Motors Bpk* 1985 (2) SA 893 (A).

<sup>78</sup> On the use of these terms in Canadian law, see Du Plessis, ‘Section 41’ in Naudé & Eiselen (eds), (Juta 2017) 41–5. Unlike the common law, the CPA does not require proof of fault on the side of the supplier to claim damages, and, like § 6 of the *Draft Restatement*, it allows courts to adapt the contract by invalidating only a particular clause.

<sup>79</sup> See ss 51(1)(g) and 14 respectively.

terrain of the parol evidence rule, one of the most controversial and complex constructs of the common law of contract. The version of this rule adopted in § 8 of the *Draft Restatement* aims at protecting the integrity of standard terms by making it more difficult (but certainly not impossible) for the party seeking to contradict standard contract terms to prove his or her case. It does so by presuming in § 8(a) that standard terms constitute an integrated agreement with respect to those terms, and by presuming in § 8(b) that an express complete integration clause constitutes a completely integrated agreement with respect to the transaction.

The parol evidence rule could fulfil the purpose of preventing the wasteful hearing of irrelevant and misleading evidence when dealing with documents that purport to be the end-product of the parties' deliberations.<sup>80</sup> The difficulty with standard form consumer contracts is, however, that there generally is no such deliberation, and that the consumer actually has no idea what most of these terms are. Furthermore, a consumer may have been induced into concluding the contract by prior conduct that is not reflected in, or is even at variance with, these terms. This reality is accommodated to some extent in other provisions of the *Draft Restatement*. Therefore, according to § 6, a consumer is aided by a presumption of deception if a material affirmation of fact or promise is made which is contradicted by or is unreasonably limited in the standard terms.<sup>81</sup> Furthermore, according to § 7, affirmations or promises that are made 'part of the basis of the contract' (for example, warranties or statements relating to the price or features of the goods) could become part of the contract.<sup>82</sup>

South African law has adopted its version of the parol evidence rule from English law, and has also been influenced by American academic perspectives.<sup>83</sup> In terms of the South African rule, extrinsic evidence is excluded where a document is an integration. This in turn depends on whether the parties intended the document to be a complete or exclusive

<sup>80</sup> See Van Huyssteen, Lubbe & Reinecke, (Juta 2016) 168.

<sup>81</sup> *Restatement of the Law, Consumer Contracts* § 6 DD (ALI 2017) 4; *Restatement of the Law, Consumer Contracts Discussion Draft — § 7 Affirmations and Promises not Part of the Standard Contract Terms* (ALI 2017) 2.

<sup>82</sup> *Restatement of the Law, Consumer Contracts* § 7 DD (ALI 2017) 2. The test is objective, ie, it is not based on the actual or reasonable reliance of a particular consumer. The provision could apply even if the affirmations or promises were made after the contract had been concluded, or where they were made by a third party (*Restatement of the Law, Consumer Contracts* § 7 DD (ALI 2017) 2–4). In South African law an affirmation could potentially be the basis for an express or tacit term that could form part of the contract, but that would require actual or deemed consensus between the parties.

<sup>83</sup> See Van Huyssteen, Lubbe & Reinecke, (Juta 2016) 167–169 and references there to the works of Wigmore, Corbin, and Williston.



memorial of their agreement.<sup>84</sup> General expositions of the parol evidence rule in the South African common law do not expressly consider its application in the context of standard-term consumer contracts. Nonetheless, where a contract that contains standard terms looks like an integration, it may well be presumed that there is an intention to integrate.<sup>85</sup> The case law also does not expressly differentiate between the operation of merger clauses in negotiated and non-negotiated or standard-term contracts. These clauses are generally automatically regarded as reflecting an intention to integrate.<sup>86</sup> Unlike the *Draft Restatement*, a party cannot escape their operation in the context of standard contracts by rebutting a presumption that such an intention exists.

In South Africa the parol evidence rule has been heavily criticised. The name is said to be misleading,<sup>87</sup> and the rule is often ignored by practitioners and lower courts.<sup>88</sup> It is also subject to many exceptions and qualifications. Some are obvious: a party may not hide behind this rule or behind a merger clause to prevent evidence relating to the validity of a transaction;<sup>89</sup> and where the written document mistakenly does not reflect a common prior understanding, it can be corrected or rectified to reflect such an intention.<sup>90</sup> However, ultimately there can be no doubt that our local version of the rule, like § 8, generally makes life more difficult for a consumer who seeks to rely on terms that are not in line with those contained in a document that the consumer generally knows nothing about. The rule has even been called a ‘formidable obstacle’ in such a party’s way.<sup>91</sup>

<sup>84</sup> See, eg, *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39; *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) para 14; *Johnson v Leal* 1980 (3) SA 927 (A) 938–940, 943.

<sup>85</sup> See Van Huyssteen, Lubbe & Reinecke, (Juta 2016) 168. The case law cited there is not as clear as could be wished. *Avis v Verseput* 1943 AD 331, 363 seems to suggest that if there is a subsequent written agreement that purports to define the terms of the transaction, the burden of proof is on the party relying on an earlier oral agreement. However, what this burden and concomitant presumption entail is hardly clear. See Zeffertt & Paizes, *The South African Law of Evidence* 2 ed (Juta 2009) 345.

<sup>86</sup> See Van Huyssteen, Lubbe & Reinecke, (Juta 2016) 168–169 n 163.

<sup>87</sup> Zeffertt & Paizes, (Juta 2009) 345; Bradfield, (LexisNexis 2016) 226.

<sup>88</sup> See KPMG para 39.

<sup>89</sup> See *Philmtatt (Pty) Ltd v Mossel Bank Developments CC* 1996 (2) SA 15 (A) 22–23; and see generally Bradfield, (LexisNexis 2016) 228.

<sup>90</sup> See *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA).

<sup>91</sup> See *Weiner v The Master (1)* 1976 (2) SA 830 (T) 841; Bradfield, (LexisNexis 2016) 229. When only one party signs a document, it would generally not appear to be an integration, but the context is decisive. In *Weintraub v Oxford Brick Works (Pty) Ltd* 1948 (1) SA 1090 (T), the document in question purported to be a unilateral recollection of a prior oral agreement, signed by only one party. If a standard form consumer contract only provides for signature by

Is this a good thing? More specifically, can it be justified in the context of the grand bargain? This topic cannot be explored in any further detail here, but it is difficult to avoid the conclusion that the time is more than ripe for a fundamental reconsideration of the tenability of the parol evidence rule, at least in the context of standard-term consumer contracts. Perhaps, the parol evidence rule may have some broad value in limiting wasteful contractual disputes. However, even this is hardly self-evident, given that many jurisdictions and some model instruments do not even recognise it in the context of negotiated contracts, let alone standard-term contracts.<sup>92</sup>

Ultimately it is difficult to see why a party who unilaterally presents standard terms for ‘assent’ in situations where it is obvious that the addressee has no knowledge of the terms, should enjoy the benefit of potentially being saved from such disputes. In these cases the rationale that the document can be regarded as the culmination of the parties’ negotiations is a fiction. This suggests that consumers should be able to adduce evidence of prior terms that are not accounted for in the written contract.<sup>93</sup> And in this regard it may be added that consumers, in any event, rarely litigate, which renders the prospects of their adducing masses of wasteful evidence rather remote. However, this whole issue is passed over in almost complete silence in local consumer-protection debates.<sup>94</sup>

the consumer, this could suggest that an integration was intended, but this issue is not clearly addressed in the literature.

<sup>92</sup> See Vogenauer, ‘Article 4.3’ in Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 2 ed (OUP 2015) 597–598.

<sup>93</sup> See generally Klass, ‘Parol evidence rules and the mechanics of choice’ (forthcoming in *20 Theoretical Ing L*, available at <https://scholarship.law.georgetown.edu/facpub/2048> at 23, accessed on 12 October 2018) on the merits of holding businesses to these ‘business-sided communications’. Klass further argues that the rules should protect business against prior consumer-sided communications that may get lost ‘in the shuffle of corporate bureaucracy’, and then be unwittingly accepted through performing the contract (24). This rationale would not apply to smaller businesses, eg, when a consumer sends an email to a small bookshop owner who deals with these messages personally. Ultimately, it may still be asked why it is necessary to exclude evidence entirely, as opposed to merely according it less weight. Consider the facts in *Baker v Afrikaanse Nasionale Afslaaers en Agentskap Maatskappy (Edms) Bpk* 1951 (3) SA 371 (A). The client of the estate agent alleged that a prior oral agreement qualified the agent’s entitlement to commission. This qualification was in conflict with the express terms. On the facts, the client alleged that he had orally stated the qualification to the agent who, according to the client, ‘probably understood it’, but drove off without reacting to the statement (377). The preferred approach is to permit the client’s evidence, but simply accord it limited evidentiary value.

<sup>94</sup> Perhaps reg 44(3)(y), which greylists terms that restrict evidence, could apply to merger clauses, inasmuch as they prevent a consumer from adducing evidence on the terms?

## V CONCLUSION

The first lesson is that the *Draft Restatement's* grand bargain must be taken seriously. South African law also recognises relatively generous assent rules, such as caveat subscriptor and the rules on the ticket cases, which bind consumers to standard terms that they could only be regarded as having assented to 'freely' in a very vague, abstract sense. The prospects of remedying this problem by much stricter rules on the assent side of the grand bargain are limited. It may be possible to tighten up some provisions of the CPA, such as section 49,<sup>95</sup> or to introduce new rules that deal more directly with problems relating to online contracting, for example, by expressly acknowledging that privacy policies could be intended to be binding terms, or by limiting the use of shrink-wrap or PNTL terms.<sup>96</sup> However, ultimately the problems arising from deficient assent will not really be remedied by going doggedly down the road of requiring greater disclosure or more plain language in documents that will never be read. Furthermore, it seems neither practical nor economically sensible to bind parties only to the few core terms to which they have actually assented.<sup>97</sup>

This brings us to the second part of the grand bargain: to focus far more energy on its control side. Here a number of lessons could be learned. As indicated earlier, the CPA already provides fairly significant control over the substance of contract, both at a general level and in regulating specific terms that are either banned (blacklisted), or presumed to be unfair (greylisted). However, is this enough? It is generally accepted that consumers do not go to court — it is too expensive and the amounts involved are often too low. This calls into question the value of grey lists, which require judicial confirmation that the presumption of unfairness is justified. Calls for greater use of black lists to effect substantive control<sup>98</sup> therefore deserve serious attention to ensure that the control side of the grand bargain functions properly in practice — especially if black lists were to induce suppliers to remove these terms

<sup>95</sup> See n27 above on s 49 of the CPA, which only applies to certain terms and requires courts to declare nullity.

<sup>96</sup> The *Draft Restatement* reflects the dominant view that privacy policies on websites can constitute consumer contracts if the necessary elements of contract formation are present, and are not to be regarded as non-binding statements of policy (*Restatement of the Law, Consumer Contracts* § 1 DD (ALI 2017) 5).

<sup>97</sup> See Sharrock & Steyn, 'The problem of the illiterate signatory: *Standard Bank of South Africa v Dlamini*' (2014) 26 SA Merc LJ 150 at 161.

<sup>98</sup> Naudé, 'Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008' 2017 TSAR 138. However, blacklisting is a rather blunt instrument, so any move of terms from grey lists to black lists would require individual justification.

from their standard terms altogether. There is no reason in principle, though, why the courts should not also be more pro-active in generally developing the common-law rule by striking down or refusing to enforce terms that violate public policy, even though this is an avenue consumers would rarely follow.

A further lesson on the control side relates to the relevance of procedural considerations when policing the substance of consumer contracts. Our courts already recognise that procedural considerations, such as inequality of bargaining power, are relevant in performing this type of control.<sup>99</sup> However, for a grand bargain to function properly in our common law, greater sophistication is required to determine which procedural problems associated with consumer contracts are relevant, and to what extent they could influence relief. In this regard it is suggested that South African law may benefit from the ‘sliding scale’ approach of American law, which seeks to address these problems. Furthermore, given the difficulty of proving procedural problems, effective control may also require greater use of presumptions — for example, that non-core standard terms do not affect consumer’s decisions, and hence are procedurally unconscionable,<sup>100</sup> or that certain fact patterns warrant a presumption of deception.<sup>101</sup> It may be added that the use of presumptions to aid with the proof of defects in the formation of a contract — procedural grey lists in effect — is a practice with an ancient, but sadly neglected pedigree in our common law.<sup>102</sup>

Finally, and still on the topic of proof and the consumer, the *Draft Restatement* compels us to reflect fully on why suppliers should be able to rely on the parole evidence rule to make it more difficult for consumers to hold them to their prior representations.

However, all of these potential reforms may be of limited use if one final problem is not addressed. For the grand bargain to work, consumers need to be accorded more direct access to effective relief mechanisms.<sup>103</sup> In this regard it simply beggars belief that the CPA continues to make the courts, and the Small Claims Court in particular, a last resort after other institutions have been approached.<sup>104</sup> As far as these other institutions are concerned, the industry ombuds, in particu-

<sup>99</sup> See IV(c)(iii) above.

<sup>100</sup> See *Restatement of the Law, Consumer Contracts* § 5 DD (ALI 2017) 8.

<sup>101</sup> See *Restatement of the Law, Consumer Contracts* § 6 DD (ALI 2017) 1–2, 4.

<sup>102</sup> See Du Plessis and Zimmermann, ‘The relevance of reverence: undue influence civilian style’ (2003) 10 *Maastricht Journal of European and Comparative Law* 345.

<sup>103</sup> On these exemptions see De Stadler, ‘Section 5’ in Naudé & Eiselen (eds), (Juta 2013, 2016) 5-28–5-29 n 4.

<sup>104</sup> See s 69 of the CPA. For detailed comment on the various routes and divergent interpretations of when they should be followed, see Van Heerden, ‘Section 69’ in Naudé & Eiselen (eds),

lar, must be commended, but there is a real need for the National Consumer Commissioner to play a more active role in resolving disputes directly referred to it.<sup>105</sup> Failing this, any local grand bargain will exist more in theory than in practice.

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*Commentary on the Consumer Protection Act* revision services 2 and 3 (Juta 2017, 2018) 69–14—69–25. For criticism see Naudé, ‘Section 52’ in Naudé & Eiselen (eds), (Juta 2016) 52–31.

<sup>105</sup> See Woker, ‘Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress’ (2017) 29 *SA Merc LJ* 1.