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SOUTH AFRICAN LAW COMMISSION

REPORT

PROJECT 47

**UNREASONABLE STIPULATIONS IN CONTRACTS
AND THE RECTIFICATION OF CONTRACTS**

APRIL 1998

(ii)

TO DR AM OMAR, MP, MINISTER OF JUSTICE

I am honoured to submit to you in terms of section 7(1) of the *South African Law Commission Act, 1973* (Act 19 of 1973), for your consideration the Commission's report on unconscionable stipulations in contracts and the rectification of contracts.

I MAHOMED

CHAIRPERSON: SA LAW COMMISSION

APRIL 1998

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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SUMMARY OF FINDINGS AND RECOMMENDATIONS

1.1 The Commission notes the concerns raised by a substantial number of respondents, particularly in respect of the possibility that foreign investors and contracting parties might be discouraged from concluding contracts in South Africa should the law enable courts to review contracts in order to determine whether they comply with principles of contractual fairness. The Commission notes that apart from there being local calls for the recognition of fairness in contracts, measures have lately been adopted and existing ones extended in foreign jurisdictions who have recognised the need to regulate unfair contracts. In view of this factual situation it seems to the Commission that the argument raised by some respondents that the introduction of measures against unfair or unconscionable terms would isolate South African contracting parties and inhibit foreign investment and trade, should be critically evaluated. It seems to the Commission that South Africa would rather become the exception and its law of contract would be deficient in comparison with those countries which recognise and require compliance with the principle of good faith in contracts. Furthermore, the Commission accepts on the question whether the proposed legislation will create unwarranted legal uncertainty, that any change effected by the proposed legislation, will produce a measure of legal uncertainty and consequent litigation, at least in the short term when many contracts are challenged. The Commission is, however, of the view that this is a price that must be paid if greater contractual justice is to be achieved, that certainty is not the only goal of contract law, or of any other law, and lastly in any event, that the fears provoked by the proposed Bill are exaggerated, in the light of the experience of countries that have already introduced such legislation. The Commission furthermore considers that the issue of unfair contracts or terms has to be addressed in a more fundamental and less fragmentary way than *ad hoc* reform to specific Acts, as some respondents proposed, would mean. The Commission is finally of the view that reform is called for and that legislation is the most viable and expedient method to effect legal reform. The Commission is of the view that there is a need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed and when its terms are enforced. The Commission consequently recommends the enactment of legislation addressing this issue. (See par 2.2.3.1 to 2.2.4.1.)

1.2 The Commission notes the respondents' arguments about the inaccessibility of the courts

and that the Commission's preliminary proposals will do little to alleviate the plight of ordinary consumers. The Commission is therefore of the view that it has to reconsider its Working Committee's preliminary Bill which contained no provisions on the establishment of preventative mechanisms. The Commission duly notes the proposals on establishing an Ombudsperson with powers to prevent the continued use of contractual terms which are unreasonable, unconscionable or oppressive. The Commission is of the view that the arguments raised for establishing such an office is persuasive and consequently recommends that the Office of an Ombudsperson be established. The Commission is of the view that the powers of the Ombudsperson should be limited to pre-formulated standard contracts. Judging from the comments raised by the respondents it seems as if the administrative control of the Ombudsperson seems to be necessary particularly in regard of standard form contracts. (See par 2.3.6.1.)

1.3 The Commission also notes the issue of the pre-validation of terms and its significance in other jurisdictions. The Commission is however of the view that the proposed powers of the Ombudsperson would provide adequate relief and that there is no need to consider conferring powers to an administrative body to enable it to perform the task of the pre-validation of contractual terms. The Commission further notes the arguments in favour of allowing industry and trade to self-regulate itself by adopting codes of conduct or codes of practice. The Commission has considered the advantages and limitations of codes of conduct and is of the view that these voluntary codes of conduct will not in itself be able to effect the redress which is needed in contracts. Although the Commission would concur that codes of conduct should be encouraged, it believes that codes of conduct could be established in addition to legislation establishing an office such as an Ombudsperson. The Commission therefore recommends that provision be made for setting out the powers of the proposed Ombudsperson in regard of codes of conduct. The Commission recommends further that the powers of the Ombudsperson should be aimed at preventing the continued use of contractual terms which are unreasonable, unconscionable or oppressive. The Commission proposes that the Ombudsperson should have the following powers and duties- (See par 2.3.6.1 and 2.3.7.1.)

- to negotiate with a person using or recommending the use of pre-formulated standard contracts in order to obtain an undertaking from him or her that he or

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she will act in accordance with the proposed Act, and if such a party fails to fulfil such an undertaking, that the Ombudsperson may issue such orders as may be deemed necessary for ensuring the fulfilment of such an undertaking;

- if having considered a complaint about any contract term that the Ombudsperson considers to be unreasonable, unconscionable or oppressive, that he or she may bring proceedings in the High Court for an interdict against any person appearing to him or her to be using or recommending use of such a term; provided that if he or she decides not to apply for an interdict, he or she shall furnish reasons to the complainant for such a decision;
- to prepare draft codes of conduct applying to particular persons or associated persons in a field of trade or commerce, in consultation with such persons, organisations, consumer organisations and other interested parties for the consideration and approval of the Minister;
- if it appears to the Ombudsperson that a person has acted in contravention of a prescribed code of practice applicable to that person, that the Ombudsperson may request the person to execute within a specified time a deed in terms approved by the Ombudsperson under which the person gives undertakings as to-
 - (i) discontinuance of the conduct;
 - (ii) future compliance with the code of practice; and
 - (iii) the action the person will take to rectify the consequences of the contravention,or any of them;
- to retain all deeds and to register the deeds in a Register of Undertakings kept by the Ombudsperson and containing the prescribed particulars;
- if a person fails to comply with the request by the Ombudsperson for the giving of an undertaking that the Ombudsperson may on application to the High Court, request that the person be ordered-
 - (i) to act in a manner that would have been required; or
 - (ii) to refrain from acting in a manner that would have been prohibited.

1.4 The Commission is of the view that it is understandable that considerable concern were raised that conferring wide-sweeping powers to the courts may lead to legal uncertainty. The

Commission is, however, of the view that there is a need to confer wide powers to the courts to effect justice to contracting parties, especially when considering the wide-sweeping powers conferred by legislation in other jurisdictions. The Commission is of the view that the wide powers it proposes to confer to the courts should and can be balanced by confining the proposed criterion of fairness to unreasonableness, unconscionability and oppressiveness. The Commission furthermore agrees with Professor Kerr that there is a need to redraft the clause governing the powers of the courts to set aside contracts along the lines he proposes, and also agrees with the Supreme Court Judges that any court sitting on appeal on that issue, shall be at liberty to approach the matter as if it were a court of first instance. (See par 2.4.4.1.)

1.5 The Commission furthermore believes that there is a need for a specific provision conferring on the High Court the jurisdiction where it is satisfied, on the application of any organisation, or any body or person, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of contracts or terms which are unreasonable, unconscionable or oppressive, that it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class. The Commission further is of the view that provision should be made for the High Court issuing orders on the application by the Ombudsperson that a person fails to comply with the request by the Ombudsperson for the giving of an undertaking and to order, in addition to granting any other relief, the omission of terms that are unreasonable, unconscionable or oppressive, or any term having in substance the same effect, from all pre-formulated standard contracts. (See par 2.4.4.2, 2.4.5.1 and 2.4.5.2.)

1.6 The Commission is of the view that its respondents did not raise valid arguments for the reconsideration of the Working Committee's proposed criteria for determining fairness in contracts. The Commission therefore considers that the fairness criterion to be included in the proposed legislation should be based on the determination of the question whether contracts or terms are unreasonable, unconscionable or oppressive. The Commission recommends that unreasonableness, unconscionability or oppressiveness should be the yardstick to be applied in determining fairness in contracts. (See par 2.5.4.1 and 2.5.5.1.)

1.7 The question whether there should be guidelines also led to diverging comments from the respondents: some are totally opposed to guidelines whereas others are strongly in favour of guidelines. The Commission is of the view, upon reflection, that there is a need to provide some definition to the concept of unreasonableness, unconscionability or oppressiveness by setting out guidelines in the proposed legislation. The Commission considers that legal certainty and predictability can be effected by including guidelines in the proposed legislation. The Commission is of the view that an open-ended list of guidelines will not have the effect of unduly limiting judicial discretion. Moreover, the Commission takes note once again of the numerous comments stating that courts are inaccessible, that providing for curial intervention only will not effect relief and that provision should therefore be made for preventative action. The Commission supports the view that no preventative action is possible without guidelines and that informed self-control by drafters of standard and model contracts, action by representative bodies, negotiations with a view to settling disputes, etc, are all heavily dependant upon there being a large measure of predictability regarding the question of what will be acceptable and what not in regard of contracts. The Commission therefore recommends that guidelines be included in the proposed legislation. (See par 2.6.4.1 and 2.6.5.1.)

1.8 The Commission has duly noted the mixed reaction of its respondents on the question of the scope of the proposed legislation. In the first instance the Commission considered the suggestion that only the High Court should have jurisdiction to entertain applications under the proposed legislation. The Commission notes the concerns which a number of respondents have raised on the question of the accessibility to justice and to the courts. The Commission considers that granting jurisdiction to the High Court only would mean that the proposed legislation would be available to an exclusive minority of the South African community and this would mainly defeat the purpose of the proposed legislation. The Commission therefore does not support the suggestion concerning the exclusive jurisdiction of the High Court. (See par 2.7.4.1.)

1.9 The Commission further considered the Unfair Contract Terms Committee's suggestion that certain contracts are already specifically regulated, and that they should therefore not be over-regulated by the application of the proposed legislation. The Commission notes that the UCTC argues along the same lines as the Ontario Commission when it considered whether it would or should be possible to limit the application of the proposed provisions so as to exempt

certain types of contract that are already subject to extensive regulation. The Commission notes the reasoning applied by the Ontario law Commission namely that their proposed doctrine of unconscionability should be statutorily recognised as a basic and pervasive contract norm, that their proposed legislation should apply to all contracts and that certainty and finality should yield to flexibility and avoidance of injustice. The Commission is, however, of the view that the UCTC's view is persuasive that the tendency to over-regulate, by imposing general control through the application of a general fairness clause to contracts which are created, structured and performed under specific legislation, tailor-made for the purpose, is uncalled for, and that the purpose should not be to codify the entire field of the law of contract in this respect, but rather to retain specialised, *ad hoc* legislation already in existence, and to make provision only for those matters which are still left uncatered for. The Commission concurs with the UCTC's suggestion that the proposed legislation should not apply to the following contracts-

- contracts which fall within the scope of the Labour Relations Act, Act 66 of 1995, or which arise out of the application of that Act;
- contracts falling within the scope of the Bills of Exchange Act, Act 34 of 1964;
- contracts to which the Companies Act, Act 61 of 1973, or the Close Corporations Act, Act 69 of 1984, apply or which arise out of the application of those Acts; and
- contractual terms in respect of which measures are provided under international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of this Act.

(See par 2.7.4.2 and 2.7.5.1.)

1.10 The Commission does not agree with excluding the application of the proposed legislation in respect of family law agreements in accordance with the *Divorce Act*, the *Matrimonial Affairs Act*, or the *Matrimonial Property Act*. It does not seem to the Commission that settlements reached under these Acts are in any way satisfactorily regulated and the possibility of judicial review under the proposed legislation seems to be called for. (See par 2.7.4.3.)

1.10 The Commission does not believe that the arguments raised by respondents for exempting

categories of contracting parties from the application of the proposed legislation are persuasive. The Commission supports Prof Hein Kötz's view that the distinction between consumers and other contracting parties are mostly arbitrary and difficult to maintain. The Commission concurs with Prof Hein Kötz that a court would apply more flexible criteria when a contract concluded by so-called business people is being considered than would be the case where other contracting parties are involved. (See par 2.7.4.4.)

1.11 The Commission considers that the arguments raised by Professors Van der Merwe and Lubbe and the Unfair Contract Terms Committee on the question of changed circumstances after concluding a contract, particularly in view of the position in other jurisdictions, are persuasive. One must agree with the Commission on European Contract Law that this is a vexed question. However, the Commission is of the view that the provision adopted by the Commission on European Contract Law seems to provide a fair solution to the issues involved in changed circumstances after conclusion of a contract. The Commission therefore recommends that the proposed legislation should provide that in the application of the legislation the circumstances which existed at the time of the conclusion of the contract should be taken into account, and that where there is a reasonably unforeseeable change of circumstances which makes performance under the contract excessively onerous, the parties to the contract should be bound to enter into negotiations with a view to adapting the contract or terminating it. (See par 2.8.4.1 and 2.8.5.1.)

1.12 The question whether the parole evidence rule should be retained or abolished leads to divergent answers not only in South Africa but also in other jurisdictions. The Commission is of the view that if evidence of what passed between the parties, or the background or surrounding circumstances, contains the best clue to understanding what the parties meant, and if the words the parties used are capable of some other meaning, as is almost invariably the case, such evidence should be admissible to prove the contract. The Commission further considers that where one party has induced another to believe that a document contains all the terms of their agreement, he or she shall be bound by the belief that he or she has induced - provided that the other party was bona fide and reasonable in entertaining that belief and that the inquiry should involve the ventilation of all relevant information, including anything that may have been said or written by the parties, before or after the execution of the document, that might have a material bearing on whether there had been consensus or the induction of that belief. The Commission

further considers that if a party leads evidence which the court feels has been nothing more than a waste of time it can make an appropriate order as to costs, and that when litigants realise that such orders both can be, and will be, made there should be no undue lengthening of the time taken in court on contractual cases. The Commission recommends that the following provision be included in the proposed Bill: (See par 2.9.4.4 and 2.9.5.1.)

Whether or not the words of the contract appear to be ambiguous evidence of what passed during negotiations between the parties during and after the execution of the contract and surrounding circumstances is admissible to assist in the interpretation of any contract.

CHAPTER 1

1.1 The object of Project 47 of the Commission is to consider whether the courts should be enabled to remedy contracts or contractual terms that are unjust or unconscionable and thus to modify the application to particular situations before the courts of such contracts or terms so as to avoid the injustices which would otherwise ensue.

1.2 The Commission published *Discussion Paper 65* for general information and comment during July 1996. It was explained that the Discussion Paper is published in order to inform the broad South African public of the **prima facie** views of the Commission and to request its readers to participate in the debate and eventual formulation of legislation, if it is deemed necessary, on this topic. **The problems concerned and the preliminary recommendations were set out as follows:**

THE PROBLEM DEFINED

1.3 It happens daily that individuals voluntarily enter into contracts with one another, or with banks, building societies, financial institutions, wholesalers or retailers, in the expectation that the contracts will satisfy their needs and aspirations, only to find subsequently that, in practical application, the contracts as a whole or some of their terms are unjust or unconscionable. Common examples of such situations abound, but a few examples will suffice: the head of a homeless family urgently in need of a roof over their heads signs a lease which gives the lessor the right to raise the rent unilaterally and at will, and the lessor doubles the rent within five months; an uneducated man signs a contract of loan in which he agrees to the jurisdiction of a High Court, to find out only later, when he is sued that a lower court also had jurisdiction over the matter and that the case could have been disposed of at a much lower cost to himself; a man from a rural area purchases furniture from a city store on standard, pre-prepared hire-purchase terms, later to find out that he has waived all his rights relating to latent defects in the goods sold; an illiterate and unemployed bricklayer agrees to act as subcontractor for a building contractor on the basis that he must at his own expense procure an assistant, and so on.

1.4 Should the courts be able to give relief to the unfortunate debtors in these circumstances

by either setting aside the contract or modifying its terms?

1.5 There seem to be the following approaches to this question:

- * **The answer must be no.**
- * **The answer must be an unqualified yes.**
- * **The answer must be a qualified yes.**

A. The "no" answer and its justifications.

1.6 The mainstay of this approach is that any tampering with the binding force or sanctity of contracts will destroy legal and commercial certainty, because contracting parties will not know whether or not the agreement will be modified to the detriment of one or the other. The courts will be saddled with thousands of "hard-luck" cases. The consequences of giving such power to the courts will be counter-productive in regard to the interests of those whom society wishes to protect, viz. the weak, the uneducated or the economically disadvantaged. Banks, building societies, financial institutions, landlords and employers and other individuals will simply not deal with them.

1.7 It is also argued that such a power is unnecessary: our law protects such persons sufficiently by the rules relating to justifiable mistake, duress, undue influence and fraudulent, negligent and innocent misrepresentations and by the provisions of the laws relating to usury, credit agreements, etc. If a further remedy is needed, it should be found in the domain of preventative administrative action.

1.8 This approach is perhaps best illustrated by the sketch of the approach of our common law by Prof H R Hahlo of Wits University in 1981.¹

Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress his contractual undertakings will be enforced to the letter. If, through

1 "Unfair Contract Terms in Civil-Law Systems" in vol 98 **SA Law Journal** 1981: 70.

inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place.

1.9 Whether this sketch truly reflects the spirit of the South African law as a whole is debatable, but from a positivist point of view, irrelevant, in the light of the decision of Appellate Division in 1988 in **Bank of Lisbon and South Africa (Ltd) v De Ornelas and Another**². In that case the respondents, in order to secure overdraft facilities, handed signed suretyships to the lender bank, passed mortgage bonds on their properties and delivered a negotiable deposit certificate. After the respondents had paid the full amount of the loan, they claimed from the bank the redelivery of all the aforesaid securities, which claim was resisted by the bank. It averred that it intended instituting a claim for damages against the respondents for breach of another contract between the parties and that it was entitled, in terms of the written contract of loan, to retain the aforesaid securities. The Appellate Division held that on a correct interpretation of the contract the bank was indeed entitled to retain the securities. But the respondents relied on a counter-argument, that the conduct of the bank was contrary to the view our society takes of what is right or wrong in the requirements of good faith. They relied on the common-law remedy of the **exceptio doli generalis**. In theory, this was a defence available to a defendant, who, though liable according to the letter of a contract and in strict law, could show that implementation of the contract would be unconscionable or inequitable. But even before this case was heard, this remedy was not rigorously applied by our courts. Yet one could have hoped that a doctrine of relief against unconscionable claims could be founded on this **exceptio**. It was not to be. In this case the majority of the Appellate Division Bench, per Joubert J A, decided "... once and for all, to bury the **exceptio doli generalis** as a superfluous, defunct anachronism. **Requiescat in pace**" (let it rest in peace). The learned judge also held that equity could not override a clear rule of law; neither could the application of good faith do so. The "clear rule of law", presumably, was the rule that contracts must be performed according to their terms.

2 1988 (3) SA 580 (A).

1.10 For those hoping that our courts would develop a doctrine of relief in cases of unconscionability, the judgment was a great disappointment. Only legislative intervention can now correct its implications, and it must be accepted that the sketch so vividly painted by Hahlo is still a correct portrayal of our law.

1.11 It is further argued that the correct way of protecting consumers against unconscionable contracts or clauses is to provide in consumer legislation for appropriate mechanisms, e.g. a cooling-off period, a prohibition against fine print in standard form contracts, an accessible Usury Act capable of being understood by the layman or provisions outlawing or limiting certain types of clauses, e.g. consent to jurisdiction, exemption and voetstoets clauses, waiver of defences clauses, etc. If this is done, so it is argued, the courts do not need a general review power.

1.12 The preliminary research into this project was done by a team of researchers under the guidance of Prof C F C van der Walt of the University of Potchefstroom. The team identified a number of common provisions which could and should receive the critical attention of the legislature:

- (i) Clauses reversing the ordinary burden of proof and requiring a debtor to prove facts which according to the ordinary rules of evidence the creditor would have had to prove, e.g. usually the creditor (seller) has to prove delivery of the goods sold; a clause reversing this burden of proof makes it virtually impossible for the debtor (buyer) to prove the negative of non-delivery.
- (ii) Under the existing parol evidence rule, facts extrinsic to the written documents may not be adduced in evidence to modify or contradict the writing. A verbal assurance by a creditor may thus not be proved and relied on by the debtor if it contradicts the written contract.
- (iii) Clauses excluding, waiving or limiting the protection afforded by consumer protection legislation or legislation aimed at the modification of unfair contract

terms.

- (iv) The research team proposed a review of, but not a witch-hunt against exemption clauses. These clauses do have a legitimate place but they should not be tolerated where, in the circumstances of a particular case, their implementation would lead to harsh and unjust results.
- (v) Choice-of-law clauses, whereby parties agree that legislation, other than that of South Africa, should apply to a contract concluded and implemented here and adjudicated upon by a South African court, should be limited to contracts concluded between foreign contracting parties or between South Africans and foreigners contracting in the ordinary course of their profession or business.
- (vi) Clauses by which rights and defences are lost in the case of cession or discounting of contracts. It appears that there is a standard practice by which a seller sells goods to a purchaser on condition that if the seller cedes or discounts the contract to a third party (e.g. a bank or financial institution) the purchaser will not be able to raise any defence (e.g. that the goods suffered from latent defects, that warranties were not honoured) against the third party.
- (vii) Clauses under which the weaker party submits to the jurisdiction of a magistrates' court, but the stronger party (the seller, usually) does not agree that it may be sued in such court.
- (viii) Clauses by which jurisdiction is conferred upon a court which would not otherwise have had jurisdiction in the matter, to the detriment of, usually, the debtor, by the stratagem of a clause under which it is "acknowledged" that the contract had been concluded or executed or breached in the area of jurisdiction of the said court, etc.
- (ix) Clauses by which jurisdiction is limited to the High Court, thereby making it more difficult for the weaker party to gain access to the courts, in the light of the

higher costs of litigation in the High Court.

- (x) Clauses by virtue of which the usual defences available to a debtor under a contract of suretyship (the benefit of prior exclusion, the benefit of division, the benefit of simultaneous citation and division of debt, the benefit of cession of actions) and to a debtor under a contract of loan (the exception of non-payment of the capital of the loan) are excluded.
- (xi) Clauses by which certain rules of court are waived, e.g. that in provisional sentence cases the creditor must prove the legality of the document sued upon or the amount of the debt.
- (xii) Clauses waiving

"all exceptions, defences, benefits and rights, of whatever nature, the content and meaning thereof being known by me".
- (xiii) Clauses by which certain statutory defences, e.g. by the Prescription Act 68 of 1969, the Agricultural Credit Act 28 of 1966 or the Moratorium Act 25 of 1963, are waived.
- (xiv) Clauses by which a claim for damages for breach of contract is excluded, e.g. where an agricultural co-operative or a seed company sells infertile seed to a farmer.

1.13 The research team was of the view that legislation should deal specifically with the aforesaid clauses, by giving the courts the power to set aside, depending on the relevant circumstances.

1.14 The research team considered that it would be easier and more effective if unenforceable terms were featured in the same way in all the legislation under consideration. Most of the terms recommended are already contained in certain Acts, but not on a uniform basis. The research

team proposed that the following terms be prohibited in consonant terms in the Alienation of Land Act, the Share Block Control Act, the Property Time-sharing Control Act, the Sectional Titles Act and the Housing Development Schemes for Retired Persons Act:

- * A person who acted on behalf of the seller at the conclusion of the contract or in the negotiations preceding the conclusion of the contract is appointed or deemed to have been appointed as agent of the seller.
- * The seller is exempt from any liability for any act, omission or representation by a person acting on his behalf.
- * The liability of the seller to indemnify the purchaser against execution is limited or excluded.
- * The purchaser binds himself in advance to consent to the seller assigning some of his duties under the contract to a third party.
- * The seller is the sole agent to effect the resale of the property. (Although it may make sense in the case of sectional title units, share blocks and property time-sharing interests to make resale subject to the approval of the body corporate, trustees or the share block developer, as the case may be, it seems unfair to restrict resale to the seller as the sole agent, since such arrangements are made merely with a view to charging agent's commission.)
- * The purchaser forfeits any claim for necessary expenditure which he has incurred with or without the consent of the seller for the purpose of preserving the thing purchased.
- * The purchaser forfeits any claim for an improvement which increases the market value of the thing purchased and which he effected with the express or tacit consent of the seller or owner of the thing.

- * The purchaser is obliged to accept a loan secured by a bond arranged on his behalf by the seller or his agent for the payment of all amounts owed by him under the contract.
- * The purchaser may not claim that transfer of the thing purchased shall take place against payment of all amounts owing under the contract if he elects to advance the discharge of his obligations upon payment of all amounts owing under the contract.
- * The date upon which risk, profit and loss of the thing purchased pass to the purchaser is earlier than the date upon which the purchaser obtains possession, use or physical control.
- * A prohibition on the purchaser's refusal to perform if the seller fails to make performance.
- * The exclusion of set-off by the purchaser.
- * The exclusion of the requirement for a written demand if any party fails to perform, or the exclusion of a written notice if any party wishes to cancel the contract or wishes to enforce an acceleration clause.
- * Transfer of liability to another person/body in the event of defective performance.
- * Exclusion of liability for additional costs in the event of defective performance.
- * A condition that repairs will be undertaken in the event of defective performance only subsequent to full performance by the other party.
- * Exclusion of liability in the case of explicit guarantees.

1.15 If this recommendation is implemented, it could be argued, general legislation dealing

with unconscionable clauses would be unnecessary.

1.16 The next argument against giving the courts a review power over contractual terms is that preventative administrative control is a better way of dealing with unfair and unconscionable terms. While this would not necessarily replace the review powers of the Courts, it should exist simultaneously with such review powers.

1.17 The research team found that courts in Germany, England, the USA, Sweden, Israel, the Netherlands and Denmark may take judicial action against unfair terms, **in addition to which preventative control may also be used against unfair terms.**³

1.18 In Germany consumer organisations, trade organisations and chambers of industry, business and commerce are able to avail themselves of a so-called **Verbandsprozess** in applying to a court for an order prohibiting anyone who uses or proposes a standard clause from doing so in future.⁴ The user of the clause is given notice that such an application is being made. This affords the user an opportunity of trying to settle the matter extra-judicially and of negotiating with the applicant. The user is required to give an undertaking not to use the clause in question or any clause to the same effect again, nor to invoke any such clause in existing contracts. In such an application the court is also requested to impose a penalty clause which takes effect if the user uses that standard clause again. The object of this is to keep the user bound to his undertaking.

1.19 Under the Swedish Improper Contract Terms Act the ombudsman has the power to apply to the Market Court for the prohibition of a business person from using an unfair standard clause again.⁵ In Israel a supplier may voluntarily submit to the Standard Contracts Tribunal a standard contract which he wishes to conclude or which he intends to use, in order that the tribunal may certify that it does not contain any unfair clauses.⁶ The attorney-general, his representative, the

3 Van der Walt C F C "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg" 1993 **THRHR** at 76 (hereinafter "Van der Walt 1993 **THRHR**").

4 **Ulmer Brandner Hensen AGB-Gesetz** § 3 Rdn 51.

5 Hellner J "Unfair Contract Terms" in Neal AC **Law and the Weaker Party. An Anglo-Swedish Comparative Study Vol 1 The Swedish Experience** Abingdon 1981 at 89.

6 Section 12(a) of the **Standard Contracts Law** 5743-1982.

commissioner of consumer protection, any consumer organisation or government body appointed by regulation may also make an application to the tribunal alleging that a clause is unfair.

1.20 The research team pointed out the following reasons why provision should also be made in South Africa for preventative action in addition to the powers of the courts to adjudicate individual disputes concerning contractual terms:⁷

- * Judicial action cannot fulfil a preventative function, since a concrete dispute is a prerequisite for judicial action and parties must be sophisticated enough, must have enough money to have a case adjudicated and must have sufficient trust in the operation of the law to litigate.
- * A prerequisite for judicial action is that the jurisdiction of courts should not be precluded by an arbitration clause.
- * Preventative action is more flexible and does not depend on precedents.
- * Self-imposed control by informed users is more effective under a system where there is provision for direct preventative action.
- * Preventative action makes it possible for bodies established under private law to act on their own.
- * Under a preventative system users of standard clauses and control bodies established under private law or public law are afforded the opportunity of negotiation through co-operation in formulating model contracts and model codes of conduct.
- * Under a preventative system consumer organisations and employee organisations are afforded the opportunity of acting as watch-dogs and educating consumers.

7 Van der Walt 1993 **THRHR** at 75.

- * Preventative action may prevent unfair standard clauses from gaining currency and giving rise to disputes that have to be subjected to judicial action again.

1.21 The research team proposed that the proposed legislation should make it possible to test terms in standard contracts against the criterion of good faith. Such assessment should be carried out without a dispute concerning a standard term having arisen between individuals; it should therefore, be preventative in the sense that the use of such a term is precluded. The research team proposed that the task of preventative action concerning unfair clauses be undertaken by a subcommittee of the Business Practices Committee. To this end the research team proposed an amendment to the Harmful Business Practices Act.⁸ It initially proposed that this committee be known as the Committee on Unfair Contractual Terms, and later the title Subcommittee on Standard Terms was proposed. A further proposal was that the Subcommittee on Standard Terms should exercise control over clauses and that appropriate definitions be included in the Harmful Business Practices Act.

1.22 The research team proposed that the Subcommittee on Standard Terms be appointed as a standing subcommittee by the Minister (of Trade and Industry) after consultation with the Business Practices Committee. It was proposed that the subcommittee be appointed by the Minister on the advice of the Business Practices Committee and that it should consist of at least two members of the Business Practices Committee and not more than three additional members. The research team proposed that the functions of the proposed subcommittee be set out clearly and not merely assigned to it by the Business Practices Committee under section 3(1)(b) as a directive. The research team considered that greater legal certainty could be achieved in this way, that the subcommittee would gain stature, without which it would not be able to act effectively as a negotiator, and that the aims of preventative control could best be achieved in this way.

1.23 But Prof Louise Tager has a further argument. She responded as follows to a previous Working Paper:

8 Act 71 of 1988.

The proposed Bill suggests changes to the Harmful Business Practices Act, yet it is intended to be introduced by the Minister of Justice, while the Harmful Business Practices Act resorts under the Minister of Trade and Industry.

The proposed Bill underscores the need for effective consumer protection mechanisms. The necessary legal instrument to achieve this is already largely in place in the Harmful Business Practices Act. What is needed is not so much further legislation but a proper resourcing of the existing mechanisms.

The proposed Bill purports to establish a subcommittee on Standard Terms which would be a Subcommittee in terms of the Harmful Business Practices Act. Although this 'Subcommittee' purports to be a subcommittee of the Business Practices Committee the proposed Bill invests it with the powers that are currently entrusted to the Business Practices Committee.

This has the effect of creating a dual headed Business Practices Committee, each with equivalent powers. This 'subcommittee' would consequently not be a subcommittee in the ordinary sense of the word, it would be a substantive Committee in its own right. This is unacceptable both from a legal and an organisational point of view. Moreover, this would not only be an unnecessary duplication of structures, but it would fragment consumer affairs by placing it under two different Ministries.

The functions which the proposed Bill contemplates investing in a so-called 'Subcommittee' of the Business Practices Committee can be achieved in a much simpler and effective way, namely by adding to the Harmful Business Practices Act those provisions contained in the proposed Bill relating to the necessary powers to deal with standard terms, without erecting an artificial 'Subcommittee' on top of the structure of the Business Practices Committee.

The regulatory regime is largely in place for dealing with consumer protection and contractual terms. The Business Practices Committee is establishing a liaison committee on Unfair Contract Terms in terms of section 3A of the Harmful Business Practices Act.

1.24 In a valuable contribution to the research project, the renowned jurist, Prof Hein Kötz of the Max Planck Institute at Hamburg, advised as follows regarding the question of private litigation as a remedy as opposed to administrative control.

Enacting new substantive rules on the control of unfair contracts terms is an important step. What is equally important, however, is to consider whether there exist adequate mechanisms through which these rules are to be made effective. The mechanism normally available is private litigation in which an individual bases his claim or his defence on the invalidity of the contract term on which his opponent relies. For various reasons this mechanism, if taken alone, cannot be regarded as a satisfactory solution of the problem. If an unfair contract term is used throughout an industry it may affect the

interests of many people at the same time, but the individual injury will often be so small that there is no point in seeking redress by way of bringing or defending the court action.

Sometimes the unfair contract term will typically harm people who are too poor to pay for the expenses of litigation but are too 'rich' to qualify for legal aid, if legal aid is available at all. Even where legal aid is available the persons affected may belong to population groups who lack the skills and sophistication required to make use of existing procedures. On the other hand, the interest at stake for the party who proposed the unfair term is typically much larger than the interest of the other side. As a result, there is a strong incentive for the proponent of an unfair term to buy the other side off and thus keep the clause out of the courtroom. Even where a particular clause has been held invalid by a court there is nothing to stop the proponent of the clause to continue its use with impunity in the hope that other less aggressive or less sophisticated parties will fail to pursue their rights in the mistaken belief that the clause is effective. In sum, it is all very well to enact rules defining unfair contract terms and to give the courts a power to set them aside. This will not get you very far in an area where there are few plaintiffs around who are in a position to make an effective use of the available controls by way of private litigation.⁹

This is why most European legal systems have not confined themselves to the enactment of substantive provisions on unfair contract terms. They have developed new control systems which do not, like traditional litigation, depend on the existence of an aggrieved individual willing and able to bring or defend a court action. Instead, public officials or consumers organisations have been given standing to institute control procedures before the ordinary courts or special tribunals which may lead to injunctions or cease-and-desist orders if contract terms used or recommended by the defendant are found invalid under the applicable substantive law.

In Scandinavia, it is a public official called the Consumer Ombudsman who, as the head of a fairly large administrative agency, has broad powers to control marketing practices including the use of standard form contracts. If the Consumer Ombudsman has reason to assume that contract terms, normally standardised terms, used by firms in their dealings with consumers are improper he will carry on negotiations with the suppliers or trade organisations concerned. In most cases these negotiations will lead to a settlement. If no agreement can be reached the Ombudsman has a power to ask a special tribunal, called the Market Court, for an injunction prohibiting the defendant supplier from using contract terms which the Court has found to be 'unreasonable towards the consumer'.

Similarly, the English Fair Trading Act of 1977 provides for the appointment of a Director-General of Fair Trading who has the task to keep under review the carrying on a commercial activities, including the use of standard form contracts, which relate to goods and services supplied to consumers. If a course of conduct is in the Director's view 'detrimental to the interest of consumers' and 'unfair' to them he must try to obtain an assurance that it will be discontinued. If such an assurance is not given, he can obtain a

9 For a comparative survey of the mechanisms that have been developed in various countries to stimulate private litigation in these areas, see **Kötz**, Public Interest Litigation, A Comparative Survey, in: **Access to Justice and the Welfare State** (Cappelletti ed., 1981) 85.

restraining order from a special court, called the Restrictive Practices Court. It would seem, however, that little or no use has been made so far of this procedure in order to combat unfair contract terms. What has been so much greater practical importance in this field is that the Director-General has succeeded in persuading, presumably by kicks as well as kisses, important trade associations, such as the Association of British Travel agencies, to adopt so-called 'Codes of Practice' which have led to standard contracts considerably more favourable to consumers than those previously in use.

In France, an Act of 1978, called the **Loi Scrivener**, has established a system that differs very much from the solutions of other European countries. Under art 35 of the Act the Government is authorised to issue decrees invalidating certain clauses provided that they confer an excessive advantage on one party and are imposed by that party on consumers by what the Act calls 'an abuse of economic power'. Recommendations regarding the clauses to be prohibited by a decree may be submitted to the Government by a 'Commission des clauses abusives' set up under art 36 of the Act. It is composed of 15 members including judges, civil servants and representatives of consumers' organisations and business interests. So far, only one decree forbidding four specific clauses has entered into force in March 1978, and it appears that the many recommendations submitted by the Commission during the last six years have been disregarded by the Government. Since the Commission, other than the Swedish Consumer Ombudsman, has no executive powers of its own it lacks the leverage in its negotiations with traders. Nor are its recommendations binding on the courts, and it is indeed remarkable that while there exist in France many special statutes mandating consumer protection for specific types of contract there is no general statutory rule that would permit the courts to invalidate unfair or unreasonable contract terms. This has been criticised by Professor Calais-Auloy, a member of the Commission, on the ground that judges, being directly confronted with contractual inequality in specific cases, are better qualified to assure consumer protection than the Government which, particularly in a period of economic crisis, always tend to treat business interests with great gentleness and moderation.

When the bill of the German Standard Terms Act was debated in the mid-seventies there were many who argued the case for the creation of an administrative agency whose tasks would have been to work out model terms for specific branches of the industry, to restrain the use of unfair terms and, if necessary, to institute litigation, and even to exercise a prevention control by a licensing procedure similar to the system used in the insurance industry. The legislature rejected these proposals mainly on two grounds. One was a lack of enthusiasm for the idea of creating a new class of consumer protection bureaucrats. The other was the fact that in 1965 a *locus standi* to seek injunctions restraining unfair business practices had been granted to consumers' associations. This experiment had been fairly successful, perhaps not so much because of a very large number of successful actions but because consumers' associations were enabled, like the Swedish Consumer Ombudsman, to wield the 'big stick' of a possible court action and were therefore in a much better position to obtain 'voluntary' compliance from potential defendants. This system was extended to the control of unfair contract terms. Accordingly, s. 13 of the German Act confers standing on consumers' associations to seek an injunction restraining the defendant from using or recommending standard terms found to be illegal under the Act. No special courts or tribunals have been installed for the purpose, but there are now so many cases in which the validity of a standard term is

at issue that even an ordinary German court will fairly quickly build up some expertise.

1.25 Finally, there is the argument that by giving a review power to the courts in respect of contractual terms the legislature will create uncertainty, swamp the courts with litigation, and inhibit trade and commerce.

1.26 After the publication of a working paper by the Law Commission in May 1994, which contained, *inter alia*, proposals for a legislative introduction of a review power for the courts based on fairness and good faith, 19 respondents raised the objection just mentioned, among them Mr Justice D H van Zyl of Cape Town, the Statutes and Administration Committee of the General Council of the Bar, the Natal Law Society, the Building Industries Federation of SA, the Department of Trade and Industry, the Financial Services Board, the Standing Committee on Legislation of the SA Council of South African Bankers, the Chamber of Mines, the Defence Force (Financial Section), the Association of Legal Advisers of South Africa, and Prof Louise Tager of the Business Practices Committee. Seven respondents, including the Consumer Council, supported the proposals made in the Working Paper, while eight voiced qualified support, among which were the Cape Town Legal Resources Centre, the National Manpower Commission and the Free State Law Society on behalf of the Association of Law Societies.

1.27 The main objection to the said proposal was based on the uncertainty argument. This argument is a straightforward one: the main aim of a contract is to regulate the future relationship between the parties as regards a specific transaction. The very foundation of contract is to create certainty, to protect the expectations of the parties, to secure to each the bargain made. That is why the idea of contract, based on autonomy of the will and freedom of contract, is the very basis of all commercial and financial dealings and practices, from the simple supermarket purchase to the most involved building contract. If a court is given a review power, it means in practical terms that the court can re-make the contract, relieve one party of his or her obligations, wholly or partly - and to that extent frustrate the legitimate expectations of the other party. One would not know, when concluding a contract, whether or not that contract was going to be rewritten by a court, using as its yardstick vague terms such as "good faith", "fairness", "unconscionability", etc.

1.28 What is more, judges will probably differ as regards the application of such amorphous terms from case to case, creating further chaos. It is predicted that the public, and especially employers, builders, entrepreneurs, financial institutions, etc., will lose confidence in contract as a legal institution, while nothing else can ever take its place. A typical response was that of the Council of SA Bankers:

From past experience we are aware that any further possible defences to action taken to enforce our rights and to recover outstanding debts will give rise to a plethora of litigation. Whilst some of the defences may be genuine, many are raised as a delaying tactic by persons who find themselves in financial difficulties. The resulting increased costs to the banking industry must ultimately lead to an increase in the cost of lending. This situation is exacerbated by the fact that, where we hold security, we could be met with defences of the same nature on both the main agreement and security contracts such as suretyships. This may give rise to extended litigation in respect of one transaction. The banks have, at great expense to their depositors, recently obtained confirmation from the courts that their standard cession, suretyship and other security documentation is in accordance with public policy. The proposed legislation would result in the same documents once again coming before the courts in order that they may decide on the validity thereof.

South Africa has recently been re-admitted as a member of the international community and is looking to the international community to fund its redevelopment programme. A large proportion of the funding is made by overseas corporations who provide funding to local development corporations and other bodies who then lend or contract with domestic companies. In order to attract such investment and to facilitate the transfer of funds to local companies, it is essential that lenders in terms of the existing law be able to enforce their rights and to recover the amount of loans made in the event of default. Should each contract be subject to scrutiny and confirmation by courts this will have the effect of discouraging the investor.

It is also necessary for a speedy remedy to be provided to the lender whereby the funds lent may be recovered or damage, removal or destruction of any property which is provided in security may be prevented. Should the lender's right of recovery be contested in each instance by the borrower, this will, in addition to increasing the cost of lending, also reduce the amount of money available for lending to new borrowers. Lenders will be unable to withdraw money from unsuccessful projects and reallocate same to successful projects, thereby stimulating the economy.

For the above reasons the banking industry cannot, in principle, support legislation of this nature. However, if such legislation is to be introduced it is important that this is directed specifically to those areas where it is required and is not framed so widely as to interfere with areas of banking which, we believe, it is not intended to affect.

B. The unqualified "yes" answer

1.29 **We must now turn to the second approach mentioned above, viz. that the answer to the question of whether a review power should be given to the courts, must be an unqualified yes.** What is the basis of this approach, and how are the objections raised above to be met?

1.30 In modern contract law, a balance has to be struck between the principle of freedom of contract, on the one hand, and the counter-principle of social control over private volition in the interest of public policy, on the other.

1.31 The background is sketched by Prof Kötz:

Most of us take contract for granted. It stands for the idea that the co-ordination and co-operation for common purposes is best achieved in a given society by allowing individuals and legal entities to make, for their own accounts and on their own responsibility, significant decisions on the production and distribution of goods and services by entering into enforceable agreements based on freely given consent. In this sense, contract seems to be a principle of order of universal usefulness. Even socialist economies, despite their insistence on governmental planning as the dominant method of social and economic ordering, are obviously unable to dispense with it.

Contract involves free choice of the individuals concerned and is therefore based on the idea of private autonomy. On the other hand, contract has also been justified in terms of economic purpose and social function. It has been explained as a mechanism by which scarce resources can be moved to what are considered the most valuable uses. Thus, contract enhances the mobility of the factors of production. It helps to maximise the net satisfactions realised in a given society. As a result, individuals by entering into contracts that serve their own interests are also serving the interest of society.

Both the idea of private autonomy and the reliance on free contractual exchange are rooted in a political and economic philosophy that reached its apogee in the nineteenth century. However, the principle of freedom of contract has never been without its limitations. When Sir George Jessel said in 1875 that it was a paramount principle of public policy to have the 'utmost liberty of contracting' he was careful to point out that this liberty was to be given only to 'men of full age and understanding', and when he said that contracts 'shall be held sacred' he added that this applied only to contracts that had been 'entered into freely and voluntarily'.¹⁰

1.32 The doctrine that courts will interfere to strike down unconscionable clauses was

¹⁰ **Printing and Numerical Registering Co. v Sampson**, (1875) L.R. 19 Eq 462, at p 465.

recognised as early as the 18th century, when the English court in *Evans v Llewellyn*, [1787] 29 ER 1191, said that-

if the party is in a situation in which he is not a free agent and is not equal to protecting himself, this Court will protect him.

1.33 A century later, again in England, the court set aside a purchase where two poor and ignorant men had not, prior to entering into a contract, received any legal advice. The court stated:

... a Court of Equity will inquire whether the parties really did meet on equal terms, and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress it will void the contract.¹¹

1.34 **However, it must not be thought that there is in the Anglo-American law of equity a general theory of unconscionability allowing a court to interfere with a contractual relationship merely on the grounds of unfairness, nor is a mere difference in the bargaining power of the parties sufficient to invoke the doctrine.** See the Australian case of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

1.35 The principle underlying the equitable doctrine of unconscionability in Anglo-American law can be invoked -

... whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis a vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. (*Commercial Bank of Australia Ltd v Amadio*, *supra* at 462)

1.36 Certain criteria have been developed for the application of the doctrine. In the Australian case of *Blomley v Ryan* ((1956) 99 CLR 362 at 415) the doctrine was outlined by Kitto J as follows:

It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial

11 **Frey v Lane** (1888) 40 Chancery Div 312.

need or other circumstances affected his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

1.37 One of the consequences of this point of view is that courts are reluctant to apply the doctrine to contracts between two commercial organisations. In 1989 the New South Wales Court (*Austoil Pty Ltd v Franklins Self Serve Pty Ltd* (1989) 16 NSW LR 582 at 585) warned against substituting "lawyerly conscience" and "the overly tender consciences of judges" for the hard-headed decisions of business people.

1.38 In contrast with the law of equity, the Anglo-American common law previously adopted a strict and uncompromising attitude to the law of contract: certainty is to govern, not the equities of an individual case. The common law does not recognise a doctrine of unconscionability. In 1981 Lord Bridge stated in *The Chikuma* :

This ideal [of certainty] may never be fully attainable, but we shall certainly never even approximate to it unless we strive to follow clear and consistent principles and steadfastly refuse to be blown off course by the supposed merits of individual cases.

1.39 And in 1983 Professor Goode (in *Legal Studies*) has written that -

... the strictness of English contract law [i.e. common law], its insistence that undertakings in commercial agreements must be fully and timeously performed, may be repellent to lawyers trained in the civil law tradition with its emphasis on good faith and fair dealing. Yet it is the very rigour of the common law of contract and its preference for certainty over equity that have made English law ... one of the most commonly selected systems in choice of law clauses in international contracts.

1.40 But there is a development in the English common law of contract which is moving in the direction of recognising a doctrine of unconscionability. In 1977 the *Unfair Contract Terms Act* was adopted. In spite of its optimistic title, however, it was limited to the policing of some exclusion clauses and did not address the general problem at all.

1.41 In 1974 the House of Lords in *Schroder v Macauley* recognised the principle of "protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable".

1.42 In *Davis v W E A Records* Lord Denning, in 1975, criticised the manager of a "pop group" who had taken the copyright of the group's music for a consideration of a few pennies for each work, and had not undertaken any obligation in return. He said that it was unconscionable that the group be held to such a contract, because they had acted in a situation of economic dependence and without legal advice.

1.43 Again, in *Lloyds Bank v Bundy* in 1975, the court refused to enforce a suretyship signed by an elderly customer of the bank where he had not had the benefit of legal advice. The effect of the judgment is that mere unfairness is not a sufficient ground for invoking the unconscionability rule; it is necessary to show exploitation or manipulation of another person's ignorance or inability to protect his own interest.

1.44 It is therefore clear that the argument of those in favour of giving the courts the power to strike down unconscionable clauses is based on the principle of social control over private volition in the interests of public policy. Public policy, in more modern times, is more sensitive to justice, fairness and equity than ever before. This is borne out by recent developments in the English common law of contract. But it is also borne out by developments in Western law. With the rise of the movement towards consumer protection in the early seventies, it became the generally accepted view in most Western countries that neither specific legislation dealing with certain types of contract nor the traditional techniques of control through "interpretation" of contractual terms were sufficient, and that legislative action was required to deal with contractual unconscionability on a more general level. Such laws have been enacted in Denmark, Sweden, Norway, France, the Federal Republic of Germany, the Netherlands, and in Australia as well. They are all based on the principle of good faith in the execution of contracts.

1.45 In the United States of America the Uniform Commercial Code, which has been adopted in nearly all of the different states, provides that contracts of sale are unenforceable if they are unconscionable. It also provides in section 1- 203 that

"... every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement".

1.46 Some Canadian provinces have enacted fair trading statutes. In Australia a Draft Uniform Consumer Credit Code was adopted in May 1993. In clause 71 the court is empowered to review a contract, mortgage or guarantee if it is satisfied that, in the circumstances in which it was entered into, the contract, mortgage or guarantee was unjust.

1.47 In April 1993 the European Community adopted a *Directive on Unfair Contract Terms*. It prohibits the use of unfair terms in consumer contracts which have been negotiated by individuals. Its operation is limited to contracts between consumers and sellers or suppliers of goods and services, building contracts involving a builder and a domestic purchaser concluded after 1 January 1995, and insurance contracts, but it is not applicable to employment contracts, contracts relating to succession to property, family law or the incorporation of companies or partnerships.

1.48 The proponents of the view under discussion (the unqualified "yes") hold that modern social philosophy requires curial control over unconscionable contracts.

C. The qualified "yes" answer

1.49 The third point of view agrees with the view just discussed, but emphasises the need for limiting curial control. The supporters of this view attempt to achieve a balance between the principle of certainty and the counter-principle of fairness and justice in individual cases. They are in favour of legislation for our country introducing the doctrine of unconscionability and the concomitant review power of the courts, but consider it necessary to define the scope and extent of such powers.

1.50 The first problem for the proponents of this view is how to define and describe the "good faith" requirement in legislation. Should it follow the "unconscionability" or the "good faith" approach? In the end, the two approaches lead to the same result. In view of the historical background to our law, the unconscionability approach would probably be advisable, also taking into account the general use of that approach by legal systems close to our own. But the good faith approach may well in the foreseeable future become the relevant criterion in British law, as a result of the UK's membership of the European Union.

1.51 With this in mind, the Working Committee of the Commission provisionally suggested the following provision for inclusion in an Act of Parliament to be entitled the Unfair Contractual Terms Act:

If a court, having regard to all relevant circumstances, including the relative bargaining positions which parties to a contract hold in relation to one another and the type of contract concerned, is of the opinion that the way in which the contract between the parties came into being or the form or content of the contract or any term thereof or the execution or enforcement thereof is unreasonable, unconscionable or oppressive, the court may rescind or amend the contract or any term thereof or make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties, notwithstanding the principle that effect shall be given to the contractual terms agreed upon by the parties.

1.52 A second mechanism discussed is that of guidelines. It is argued that whether one approaches the matter from the unconscionability or the good faith viewpoint, the courts will need guidelines to limit their powers of intervention but also to indicate the ambit of the intended doctrine. Such guidelines will both stimulate and control curial review of contracts.

1.53 Our research team advocates the guideline approach. The research team is of the opinion that if specific guidelines are laid down to supplement a general provision as to fairness a higher degree of legal certainty can be achieved. The team believes that guidelines outline the application of a general provision, while general provisions are sometimes expressed more theoretically than specifically. According to the research team, guidelines that are the product of the development of the law in the legal systems investigated can be used to very good effect in South Africa, so that it will therefore not be necessary to place the proposed system of fairness on an unstable footing. It is also held that guidelines offer the advantage that they promote self-imposed control, negotiation to resolving problems, and the introduction of codes of conduct and model contracts.¹²

1.54 The research team proposes that the guidelines be embodied in an open-ended list, so that it can be adapted to changed circumstances and be extended. It is also proposed that the

12 Van der Walt 1993 **THRHR** at 79.

guidelines should be available to all participants in commerce. The research team believes that consumers should not be expected to have the same degree of experience and insight as business or professional people, that it should be possible to qualify the guidelines in respect of business and professional people. Initially the research team proposed that guidelines should also be enacted with regard to the formal aspect of concluding contracts. Later it was decided that guidelines containing a value judgement would suffice, i.e., guidelines on those aspects of a contract that relate to its substance or content.

1.55 The research team holds that guidelines are indispensable for legal certainty, but proposes that, should guidelines be unacceptable for the purposes of judicial control over all contractual terms, the proposed guidelines ought at least to apply to standard terms under a system of preventative control. In addition, it is proposed that for the sake of certainty it should be a requirement that courts consider the guidelines that are relevant to the dispute adjudicated.

1.56 The research team proposes the following provisions:

- 2(3) In the application of the general criterion in terms of section 1 the following guidelines laid down by the **Subcommittee on Standard Terms** shall be used: Provided that these guidelines shall be taken into account only in so far as they are relevant to the case in question: Provided further that no court shall be restricted to these guidelines in the application of this Act:
- (i) Whether the goods or services in question could have been obtained elsewhere without the term objected to, unless the contract is concluded in the course of the professional or business activities of both parties;
 - (ii) whether one-sided limitations are imposed on the right of recourse of an opponent in respect of compensation for consequential damage or for personal injury, unless the contract is concluded in the course of the professional or business activities of both parties;
 - (iii) whether Latin expressions are contained in the term and whether it is otherwise difficult to read or understand, unless the contract is concluded in the course of the professional or business activities of both parties;
 - (iv) whether the manner in which the term states the legal position that applies is one-sided or misleading, unless the contract is concluded in the course of the professional or business activities of both parties;
 - (v) whether the user is authorised to make a performance materially different

from that agreed upon, without the opponent in that event being able to cancel the contract by returning that which has already been performed, without incurring any additional obligation;

- (vi) whether prejudicial time limits are imposed on the opponent;
- (vii) whether the term will cause a prejudicial transfer of the normal trade risk to an opponent;
- (viii) whether the term is unduly difficult to fulfil, or will not reasonably be necessary to protect the user;
- (ix) whether there is a lack of reciprocity in an otherwise reciprocal contract;
- (x) whether the competence of an opponent to adduce evidence of any matter which may be necessary to the contract or the execution thereof is excluded or limited and whether the normal incidence of the burden of proof is altered to the detriment of the opponent;
- (xi) whether the term provides that an opponent shall be deemed to have made or not made a statement to his detriment if he does or fails to do something, unless -
 - (a) a suitable period of time is granted to him for the making of an express declaration thereon, and
 - (b) at the commencement of the period, the user undertakes to draw the attention of an opponent to the meaning that will be attached to his conduct;
- (xii) whether the term provides that a statement made by the user which is of particular interest to the opponent shall be deemed to have reached the opponent, unless such statement has been sent by prepaid registered post to the chosen address of the user;
- (xiii) whether the term provides that an opponent shall in any circumstances absolutely and unconditionally forfeit his competence to demand performance;
- (xiv) whether an opponent's right of denial is taken away or restricted;
- (xv) whether the user is made the judge of the soundness of his own performance, or whether an opponent is compelled to sue a third party first before he will be able to act against the user;
- (xvi) whether the term directly or indirectly amounts to a waiver or limitation of the competence of the opponent to apply set off;
- (xvii) whether, to the prejudice of an opponent, the user is otherwise placed in a

position substantially better than that in which the user would have been under the regulatory law, had it not been for the term in question.

1.57 The project committee did not consider the laying down of guidelines as a possible aid to the criterion of good faith. The Working Committee was completely opposed to the enactment of any guidelines. It believed that the laying down of guidelines by legislation may result in the courts considering themselves bound exclusively by those guidelines, notwithstanding the so-called open-ended list of unfairness factors that can be supplemented by the circumstances. The Working Committee foresaw that the danger of enacting guidelines may be that, if unfairness factors exist within a set of facts not covered by the guidelines, the term in question will not be found to be unfair.

1.58 A next question considered was whether the power of the courts should extend to all types of contract. The question was posed whether it should apply, for example, to non-consumer transactions and international agreements or to standard term contracts only.

1.59 Having considered the proposals made by our research team, the project committee proposed the following provision in the envisaged Act:

- 4(1) Subject to the provisions of other legislation which apply to a specific case, the provisions of this Act shall apply to all contracts concluded after the commencement of this Act, between all contracting parties, excluding -
- (a) contractual acts and relations which arise out of or in connection with circumstances which fall within the scope of the Labour Relations Act, Act 28 of 1956, or which arise out of the application of that Act;
 - (b) contractual acts falling within the scope of the Bills of Exchange Act, Act 34 of 1964;
 - (c) contractual acts to which the Companies Act, Act 61 of 1973, or the Close Corporations Act, Act 69 of 1984, apply or which arise out of the application of those Acts;

- (d) family law agreements in accordance with the Divorce Act, Act 70 of 1979, the Matrimonial Affairs Act, Act 37 of 1953, or the Matrimonial Property Act, Act 88 of 1984, as well as succession settlements;
- (e) contractual terms in respect of which measures are provided under international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of this Act;
- (f) a contract or a term in a contract merely on the ground of an alleged excessive price payable by the opponent.

1.61 The Working Committee of the SA Law Commission, however, held the opposite view.

1.62 The Working Committee failed to see the necessity of excluding from the provisions of the proposed Act contractual relations arising out of specific legislation, such as the Labour Relations Act, 1956, the Bills of Exchange Act, 1964, the Companies Act, 1973, the Divorce Act, 1979, and the Matrimonial Affairs Act, 1953. It considered that even if these Acts contain provisions aimed at preventing unfairness, this does not mean that contracts which are connected with such legislation or which govern relations arising out of such legislation may be contrary to good faith. It stated that the Working Committee believes that no exceptions should be made to the provision relating to good faith. The Working Committee proposed the following provision:

2(1) The provisions of this Act shall apply to all contracts concluded after the commencement of this Act.

2(2) This Act shall be binding upon the State.

1.63 Finally, there is the problem of waiver of the benefits of the proposed Act. The Working Committee was of the view that to allow waiver of the provisions of the Act would neutralise the efficacy of the Act. It therefore proposed a clause as follows:

"Any agreement or contractual term purporting to exclude the provisions of this Act or to limit the application thereof shall be void."

1.64 The Working Committee therefore provisionally proposed that the following Bill be presented to the Minister of Justice:

Court may rescind or amend unfair contractual terms

1.(1) If a court, having regard to all relevant circumstances, including the relative bargaining positions which parties to a contract hold in relation to one another and the type of contract concerned, is of the opinion that the way in which the contract between the parties came into being or the form or content of the contract or any term thereof or the execution or enforcement thereof is unreasonable, unconscionable or oppressive, the court may rescind or amend the contract or any term thereof or make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties, notwithstanding the principle that effect shall be given to the contractual terms agreed upon by the parties.

(2) In deciding whether the way in which a contract came into existence or the form or content of the contract or any term thereof is contrary to the principles set out above, those circumstances shall be taken into account which existed at the time of the conclusion of the contract.

Application of Act

2.(1) The provisions of this Act shall apply to all contracts concluded after the commencement of this Act.

(2) Any agreement or contractual term purporting to exclude the provisions of this Act or to limit the application thereof shall be void.

(3) This Act shall be binding upon the State.

Short title

The Act shall be called the Unfair Contractual Terms Act, 19... .

CHAPTER 2

EVALUATION

2.1 INTRODUCTION

2.1.1 *Discussion Paper 65* was published during July 1996. Copies of the discussion paper were widely distributed to organisations, institutions, government departments and individuals, such as the Lawyers for Human Rights, the Black Lawyers Association (BLA), the Legal Resources Centres, the Corporate Lawyers Association of South Africa (CLASA), the Council of South African Banks (COSAB), the Consumer Council, the South African National Consumer Union, the National Black Consumer Union, the Black Sash, Business South Africa, the South African Chamber of Business (SACOB), the South African Property Owners Association (SAPOA), the Organisation of Civic Rights, the Housing Consumer Protection Trust, the Association of Arbitrators, the Human Rights Trust, the Human Rights Commission, Law Societies, Bar Councils, Judges President of the High Court, the Chief Justice of the Supreme Court of Appeal, deans of law faculties in South Africa, Chief Magistrates, Senior Magistrates, State Attorneys, attorneys, advocates, Directors-General of Governmental Departments and foreign law reform bodies.

2.1.2 The closing date for comment was initially 30 September 1996, which was finally extended to 15 November 1996. A few respondents, however, favoured the Commission with comment as late as February 1997. A notice was published in the *Government Gazette* on 8 August 1996 which contained an overview of the discussion paper and its recommendations and a request for comments.¹³ The legal periodical *De Rebus*¹⁴ and the newspaper *The Star*¹⁵ also informed its readers of the availability of the discussion paper and its recommendations. The *Beeld*¹⁶ newspaper reported on SACOB's views regarding the proposals and the *Financial*

13 *Government Gazette No 17351* of 8 August 1996, Notice 1097 of 1996 at p 44 - 45.

14 "SA Law Commission seeks comments on unreasonable stipulations in contracts" *De Rebus* September 1996 at p 548.

15 "Law Body looks at bringing reason to contracts" *The Star* 8 August 1996 at p 6.

16 "Voorgestelde wet oor kontrakte kan ekonomie skade aandoen" *Sake-Beeld* 1 October 1996 at p 6 and "SABEK gekant teen wet oor kontrakte" 1 October 1996 *Sake-Beeld* at p 1.

*Mail*¹⁷ on SAPOA, Professors Louise Tager and Alfred Cockrel and the *Business Day* on Mr Peter Leon's¹⁸ comments.

2.1.3 A number of 45 respondents submitted comments to the Commission in respect of discussion paper 65 and the views of persons such as Professors Luise Tager and Alfred Cockrell and Mr Peter Leon were reflected in the media. A number of 18 respondents supported the "no approach" meaning that the existing mechanisms are adequate, that the proposed legislation should not be passed and that consumers should be protected more effectively by extending existing mechanisms and implementing effective preventative administrative mechanisms.¹⁹ Two of the 18 respondents indicated that their comments should be categorised as an "unqualified no" response to the proposed measures. Six respondents supported the "yes approach," meaning that legislation, empowering courts to review contracts, as proposed should be passed.²⁰ Twenty respondents supported the "qualified yes" approach, meaning that the proposed curial power should be limited.²¹ Furthermore, three respondents noted specific problems involved in the law of contract, without addressing the question which one of the three

17 "Towards fair agreements" 15 November 1996 *Financial Mail* at 77.

18 "Consumer Court's penal, judicial powers are frightening" 22 January 1997 *Business Day* at 41.

19 Mr J Hoffman, of the firm of attorneys Dyason; Prof RH Cristie; Prof AN Oelofse; Mr NG Jooste of the firm of attorneys Cliff, Bekker and Todd; the attorneys Jan S de Villiers & Son; Rashid Amod Sadeck of the firm of attorneys Rashid Patel & Co; Mr DJ Potgieter of the firm of attorneys Louw & Heyl; SACOB; Business South Africa (BSA); The Life Offices' Association of South Africa; SAPOA; a number of Judges of the Supreme Court of Appeal; Liberty Life; Advocate Harpur of the Durban Bar; Advocate Derek Mitchell of the Cape Bar; the Joint Legal and Technical Committee of the Institute of Retirement Funds; Murray and Roberts Holdings Ltd; and Mr ER Humphreys, a magistrate of Pretoria North.

20 Mrs Lillibeth Moolman, Chairperson, South African National Consumer Union; Mr MS Bham and Mrs M Ntsomele of the Northern Province Legal Services; the South African Institute of Chartered Secretaries and Administrators; the South African Refrigeration and Air Conditioning Contractors' Association (SARACCA); the office of Mr JM Damons of the Financial Services Board.

21 A number of Judges of the Supreme Court of Appeal; Mr Justice Basil Wunsch; Professor AJ Kerr, Professor Emeritus of Law and Honorary Research Fellow of the Rhodes University; Professors SWJ van der Merwe and LF van Huyssteen of the University of Stellenbosch and Western Cape respectively; Advocate Vujani Richmond Ngalwana, an associate member of the Pension Lawyers Association of South Africa; Professors DB Hutchison and BJ van Heerden, respectively head of, and associate professor at, the Department of Private Law, University of Cape Town; Mr M Motsapi, Chief Director, Legal Services and Policy Co-ordination of the Province of the North West; Mr Sibusiso Nkabinde, a legal adviser; the Unfair Contract Terms Committee (subcommittee of the Business Practices Committee); the Department of Finance; the Department of Agriculture; the Council of South African Banks; the Laws and administration Committee of the General Council of the Bar; Mr Kaya Zweni of Lawyers for Human Rights in Umata; Mr GC Cox of the firm of attorneys Cox Yeats; Mr PA Bracher of the firm of attorneys Deneys Reitz; Mr Peter Erasmus, the Executive Director of the Corporate Lawyers' Association of South Africa (CLASA); and Mr NS Rambouli, a registrar of Thohoyandou.

stated specific approaches should be adopted. One of these three respondents drew attention to unfair terms relating to the payment of cellphone accounts even where such accounts are incorrect, another noted unjust and ambiguous terms contained in agreements of sale governing the payment of levies and the creation of a maintenance fund reserve, and the third respondent drew attention to the likely effect of the envisaged legislation on first demand guarantees.

2.2 THE DESIRABILITY OF ENACTING LEGISLATION

2.2.1 Respondents' views

(a) Generally

2.2.1.1 As we saw above a substantial number of 18 respondents believe that the proposed general power of review is undesirable since the aim of the Bill can allegedly be achieved either through the existing common law remedies or through preventative administrative action, through the giving of real authority to existing consumer bodies or protection mechanisms which in the end-result would amount to a large degree of self-regulation, consumer awareness and pro-active competitor regulation. The second point of view, albeit of a small group of six respondents, states unreservedly that there is a need for the proposed legislation. The question whether it can be averred that the majority view is that there is indeed a need to introduce the proposed legislation, is determined by the third group of respondents supporting the "qualified yes approach". These respondents believe that there is a definite need for legislation but they suggest that the proposed legislation should be qualified concerning-

- * the fairness criterion to be applied;
- * the powers of the courts;
- * the introduction of an administrative tribunal;
- * guidelines guiding courts and administrative tribunals;
- * the introduction of an administrative tribunal excluding the introduction of powers to courts;
- * the particular contracting parties which should be subject to its application;
- * the possibility of contracting parties being entitled to exclude its operation; and

* the taking into account of changed circumstances after the conclusion of a contract.

(b) Unconscionability should be a matter for our common law

2.2.1.2 One respondent, Mr J Hoffman, states that the phenomenon of unconscionability should be a matter for our common law and not Parliament²² and he considers that McNally JA's view in *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pty)Ltd* 1991 4 SA 150 (ZS)²³ deserves credit. Mr Hoffman remarks that it is evident that our courts

22 Of the firm of attorneys Dyason.

23 "The Courts, primarily in England but followed in South Africa and Zimbabwe, were hostile to these exemption clauses. Their attitude is expressed, as only he can do it, by Lord Denning in a passage in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at 296-7 ([1983] 1 All ER 108 (CA) at 113). ...

'None of you nowadays will remember the trouble we had, when I was called to the Bar, with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or time-tables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract". But the freedom was all on the side of the big concern which had the use of the printing press. . . . It was a bleak winter for our law of contract. . . . Faced with this abuse of power, by the strong against the weak, by the use of the small print of the conditions, the Judges did what they could to put a curb on it. They still had before them the idol, "freedom of contract". They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract". They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put on them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to rely on the exemption clause. . . . But when the clause was itself reasonable and gave rise to a reasonable result, the Judges upheld, at any rate when the clause did not exclude liability entirely but only limited it to a reasonable amount.'

...

'In 1969 there was a change of climate. Out of winter into spring. It came with the first report of the Law Commission on Exemption Clauses in Contracts, which was implemented in the Supply of Goods (Implied Terms) Act 1973. In 1975 there was a further change. Out of spring into summer. It came with their second report on Exemption Clauses which was implemented by the Unfair Contract Terms Act 1977.'

These legislative interventions introduced the concept of reasonableness. The Courts were authorised to determine whether an exemption clause was reasonable or not. It was no longer necessary to put 'strained' interpretations on such clauses.

...

I do not think we should pretend that the Court's approach to the interpretation of exemption clauses is based on a search for the 'true meaning'. I think we must accept that we are dealing with what I would call 'policy-based interpretation'. The cases in England and South Africa and Zimbabwe show, to my mind quite clearly, that the Courts interpret exemption clauses in a way which can only be described as artificial. A great deal of ingenuity is expended in trying to show that these artificial interpretations are in fact true and natural interpretations. I do not think the effort is worth the candle. It is the old story of the Court claiming that they do not make law but only interpret it. That is not so. See *Blower v Van Noorden* 1909 TS 890 at

have made policy-based interpretations on numerous occasions, this being the result of the inability of the South African common law to adequately address the question of unconscionability in contracts. He believes that it is awkward that the judges are willing to consciously make use of artificial interpretations of unconscionable terms in contracts but when it comes to the adoption, or the opportunity to confirm the existence in our law of common law remedies able to effectively address the question of unconscionability, they refuse to do so. He considers that one of these opportunities presented itself in the form of the *exceptio doli generalis*; that the general approach by our courts to shy away from an attempt to formulate a general doctrine of contractual morality, can easily be ascertained; the courts have rather had recourse to Parliament to deal with the question of contractual morality; and this *ad hoc* approach to control often fails in its objectives because of poor draftsmanship of their provisions or because their whole approach to control is fundamentally unsound.

2.2.1.3 Mr Hoffman poses the question whether our common law has the ability, or in the alternative, the adaptability to give rise to the justifiable requirement of judicial control in the sense of the creation of a general and elastic criterion able to account swiftly and with clarity to limit or exclude unconscionable contracts? He considers that it is evident that a great need exists in our law to remedy our current position on the treatment of unconscionable terms in contracts but that it has to be conceded that no case for the common law coming to the rescue has been established on a preponderance of probabilities. He states although many plausible and noble contributions have been made by legal commentators and even judges, the fact of the matter is that the doctrine of fundamental breach will in all likelihood never surface in our courts, given its fate in its country of origin and the rejection thereof in our courts in the past. He considers that it was a noble and brave effort from Lord Denning, but commerce and practice prevailed in the end.

2.2.1.4 Mr Hoffman is of the view that the *exceptio doli generalis*, if viewed with an energetic imagination, can be regarded as more or less the South African equivalent of the English doctrine of fundamental breach, and just as uncertainty surrounded the doctrine for a number of years until the *Suisse Atlantique Societe d' Armament Maritime SA v NV*

905; *Liverpool City Council v Irwin and Another* [1976] QB 319; [1975] 3 All ER 658 (CA) at 332, and *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) I SA 825 (ZS) in fine. ..."

*Rotterdamsche Kolen Centrale*²⁴ case, likewise with the *exceptio doli generalis* until the *Bank of Lisbon v De Ornelas*²⁵ case. He notes that in both instances a conglomerate of credible criticism followed the judgments,²⁶ as happens after every "cast in stone" judgment, but in both cases the judgments persevered. Hence, he considers that the proponents for the resuscitation of the *exceptio doli generalis* face a mighty battle indeed and it might well have disappeared into the annals of legal history forever, however, if Professor AJ Kerr²⁷ is correct, the *exceptio doli generalis* might just answer all the questions.

2.2.1.5 Mr Hoffman believes that it seems inevitable that Parliament will pass legislation based on this investigation in the near future which will remedy the current situation, that it will be a very welcome supplement to our consumer protection legislation, but that it will also be a sad day for our legal system. He considers that it will be an admission of failure of our common law, a system ironically based on equity, to adequately come to the rescue of "victims" of unconscionable terms. He notes that the future resuscitation of possible common law remedies, like the *exceptio doli generalis*, will also be deprived of opportunities by a statutory replacement and that we are perhaps now back where we started in Roman days, a few months or

24 [1966] 2 All ER 61.

25 1988 3 SA 580 (A).

26 Mr Justice PJJ Olivier notes in *Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman NO* 1997 4 SA 302 (SCA) at 323B (hereinafter "*Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman*") the following authors who criticised the *De Ornelas* decision:

HJ Erasmus (1989) 106 *SALJ* at 676 et seq; Van der Merwe, Lubbe and Van Huyssteen (1989) 106 *SALJ* at 235 et seq; Kerr *The Principles of the Law of Contract* 4th edition at 483 et seq & 488 et seq; Lubbe & Murray in *Farlam and Hathaway Contract: Cases, Materials and Commentary* 3rd edition at 391 et seq; Carole Lewis (1991) *SALJ* at 262 et seq; Reinhard Zimmermann (1992) 3 *Stellenbosch Law Review* at 5 et seq; Zimmermann "Good Faith and Equity" in *Southern Cross - Civil Law and Common Law in South Africa* Zimmermann & Visser (editors) at 254 - 5.

Prof RH Christie remarks as follows in his submission to the Commission:

"Bank of Lisbon and South Africa Ltd v De Ornelas has been almost universally condemned for burying the *exceptio doli generalis*, but I do not share that view because, as I wrote in *The Law of Contract in South Africa* (2 ed) 18 'the half-life of the *exceptio* from 1925 to 1988 showed it to be so entangled with its history that it was not a satisfactory instrument for modern courts to use'. Having buried the *exceptio* the Appellate Division has replaced it by defining the courts' power to declare contracts contrary to public policy in *Sasfin v Beukes* 1989 1 SA 1 (A); *Botha (now Griessel) v Finanscredit (Pty)Ltd* 1989 3 SA 773 (A); *Ex Parte Minister of Justice: in re Nedbank Ltd v Barclays National Bank Ltd* 1995 3 SA 1 (A) and *Mufumadi v Dorbyl Finance (Pty) Ltd* 1996 1 SA 799 (A), together with *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 4 SA 874 (A) deciding the time at which enforceability is to be tested. This line of development has unlimited potential as the courts continue to harness the 'unruly horse' of public policy."

27 Kerr AJ "The replicatio doli reaffirmed. The *exceptio doli* available in our law" 1991 *SALJ* 583-586.

weeks away from the Praetor issuing legislation to secure simple justice between man and man.²⁸

2.2.1.6 Prof RH Christie remarks that the proposed legislation would interfere with the development of the common law by shackling the courts to the wording of the statute. He considers that once the Appellate Division had interpreted the statutory criteria its interpretation would be binding as a matter of law, but that public policy is a matter of fact not law. Prof RH Christie states that looking at the proposed Bill's three criteria of whether a contract is "unreasonable, unconscionable or oppressive," the common law, using its flexible instrument of public policy, is already prepared to declare unenforceable a contract or term that is "plainly improper and unconscionable" or "unduly harsh or oppressive"²⁹ but has wisely decided not to interfere with a contract or term that is merely unreasonable unless it is in restraint of trade or is contained in a document that is signed without being read or in an unsigned document such as a ticket. He is therefore of the view that there is no need for legislation.

2.2.1.7 Adam Fletcher however supports the introduction of legislation on the matter.³⁰ He indicates that he finds the most compelling indication in favour of legislative entrenchment of good faith in contracting to be the stance taken in other jurisdictions. He argues that the time is nigh for good faith to be elevated to a position from where it can operate against substantive, and if necessary, procedural unfairness in contracts. He believes the concept is not taken sufficiently seriously in South Africa, and that legislation is the most viable and expedient method of attaining this goal.

2.2.1.8 Prof Reinhard Zimmermann asks whether the formalistic and clinical conclusions of the majority in the *Bank of Lisbon v De Ornelas* case mean that the Roman-Dutch law should have lost the feature which enabled it to survive in the modern world, its flexibility to react to new challenges and to accommodate new problems, and its openness to considerations of policy.³¹ He also asks whether the description of Roman -Dutch law as a strong and vibrant legal system with a powerful inherent capacity for growth have become pure hypocrisy. Prof

28 Mr J Hoffman.

29 *Botha (now Griessel) v Finanscredit (Pty)Ltd* 1989 3 SA 773(A) at 783B-C.

30 Fletcher 1997 *Responsa Meridiana* at 12 - 14.

31 Zimmermann "Good Faith and Equity" at 255 - 257.

Zimmermann notes that freedom of contract and *pacta sunt servanda* have, in the course of this century, increasingly come under assault as a result of, *inter alia*, rampant inflation, monopolistic practices giving rise to unequal bargaining power, and the large-scale use of standard form contracts. He remarks that extreme individualism was short-lived and that there is today, all over the world, a transition from freedom of contract to social responsibility. He explains that this development can be described as a return to the ethical foundations of the earlier *ius commune*. Prof Zimmermann notes that many of the doctrines designed to accommodate the concern for substantive justice have been abandoned such as the *clausula rebus sic stantibus* and *laesio enormis* and the will theories replacing them have turned out to be in many ways deficient. He considers that the introduction of legislation such as the *Credit Agreements Act*, the *Usury Act*, the *Conventional Penalties Act* and the *Alienation of Land Act* are examples of the legislature attempting to readjust the balance. In referring to the investigation conducted by Prof CFC van der Walt as part of this investigation, Prof Zimmermann notes that the perception has been gaining ground that the issue of unfair contract terms has to be addressed in a more fundamental, less fragmentary manner.

2.2.1.9 Adam Fletcher notes a number of alternatives to legislative reform:³² He remarks that Carole Lewis advocates a modification of the literal approach to interpreting contracts in order that the real intention of the parties can be ascertained as opposed to being purported to be ascertained.³³ Prof R Zimmermann also considers³⁴ her proposal which has been suggested to counter the inequity arisen in cases such as *Bank of Lisbon* and *Rand Bank v Rubenstein*³⁵. He remarks that it would be naive to assume that this is the only remaining problem area for which another route to contractual equity has to be devised after the demise of the *exceptio doli*. Adam Fletcher further notes that Proff GF Lubbe, C Murray and A Cockrell speculate that the defences of undue influence and duress could be extended to cover situations of economic duress and undue influence and thereby provide relief from unfair contractual terms. Prof Zimmermann also considers this proposal that the doctrine of undue influence has paved

32 Fletcher 1997 *Responsa Meridiana* at 12 - 13.

33 Referring to her article "The demise of the *exceptio doli generalis*: is there another route to contractual equity?" 1990 *SALJ* 26 - 44 at 44 the Commission noted in its Working Paper 54 her proposal that the rules regarding the interpretation of contracts be released.

34 Zimmermann "Good Faith and Equity" at 257.

35 1981 (2) SA 207 (W).

the way for the recognition of *abuse of circumstances* as a general ground for the rescission of contracts. Prof Zimmermann is of the view that the proposal essentially accepts the parameters set by the will theories: the courts are merely concerned with the fairness of the bargaining process. He points out that the assumption here is if that the result of fair negotiations is likely also to be substantially fair. Prof Zimmermann notes that recognition of this ground would mean an extension of the existing list of defences consisting of fraud, misrepresentation, duress, and undue influence. He further points out that proposals were made By Professors LF van Huyssteen and SF van der Merwe that a change of circumstances may effectively render a contract unenforceable. Prof Zimmermann is however of the view that there is no signs of this kind of renaissance of the *clausula rebus sic stantibus* in South African case law.

2.2.1.10 Adam Fletcher further states that although these alternative suggestions to legislative reform considered by him are useful and valid, they ignore the fact that leaving the issue in the hands of the judiciary will prolong the process of reform indefinitely. He further considers that the legal record indicates the contrary. Adam Fletcher suggests that legislation is a preferable medium of legal reform in the current situations because of the following reasons which have, *inter alia*, been pointed out by the Commission,³⁶ namely that courts are slow, costly, incapable of abstract preventative action, ill-equipped for policy decisions and bound by precedent.

(c) Large scale uncertainty will result from the Bill

2.2.1.11 A number of respondents vehemently opposed the proposed legislation on the ground of the alleged large scale uncertainty which will result from the Bill: It is alleged that what is in issue is the sanctity of contract,³⁷ a subsequent challenge to this principle based on the provisions of the interim Constitution has failed,³⁸ the problems occasioned by continuing to

36 See *Working Paper 54* par 2.29 at 23 - 24.

37 Advocate G Harpur of the Durban Bar. (Advocate DA Gordon SC, Chairperson of the Society of Advocates of Natal notes that it is practice at their Bar to refer documents such as the Discussion Paper to a member of the Bar who is considered familiar with the relevant topic, that it is unusual for the Bar Council to endorse or pass any further comment on the member's efforts and that Advocate Harpur's comments do not necessarily represent the views of the Bar Council.)

38 *Knox v D'Arcy Ltd & Another v Shaw & Another* 1996 2 SA 651 (W) at 660C-E and 660I-661B: "The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as matter of policy, to protect them against their own foolhardy or rash decisions. As long as there is no overriding principle of public policy which is violated thereby, the freedom of the individual

apply the sanctity of contract approach are overstated and sanctity of contract is the cornerstone of the economy. Uncertainty would therefore be introduced by the proposed legislation.³⁹ A considerable period of uncertainty will be followed by expensive and non productive time consuming litigation. By giving a general review power to the courts the legislature will create uncertainty, swamp the courts with litigation and inhibit trade and commerce.⁴⁰ Any party which, as a result of second thoughts or intervening circumstances, is unhappy with the consequences of a contract freely entered into will without doubt attempt to use the provisions of the Bill to its own advantage. The phrase "sanctity of contract" is not an empty one and is recognised in most countries either judicially or by statute. The whole concept of law is to create order and certainty and where such order or certainty is absent, a profound effect on formal, everyday commerce can be expected and will result. Although not detailed in the discussion paper, this aspect has clearly been considered by the Working Committee, but consigned to a less important role for reasons (to the extent given) which are not compelling.⁴¹

2.2.1.12 Further comments pointing to the effect predicted by the previous respondents are as follows: The proposed legislation will become the first resort of the pleader in contract litigation; whatever criteria are laid down for adjudging the fairness or otherwise of a contract or contractual term, the door must be opened to the adducing of evidence to enable the court to adjudicate the issue; a non-exciptable defence could almost always be advanced, on however tenuous grounds, to delay the early resolution of even the most clear contractual claims; the

comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage. ...

It must be understood that there is a moral dimension to a promise which is seriously given and accepted. It is generally regarded as immoral and dishonourable for a promisor to breach his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand, the enforcement of a bargain (even one which was ill-considered) gives recognition to the important principle of the autonomy of the individual.

Where, however, the restraint is unreasonable so as to warrant the censure of the courts, then the common law protects the rights of the covenantor (notwithstanding his contract in restraint of trade) to engage in economic activity. The principles set out in *Basson v Chilwan (op cit)* are intended to protect the covenantor from the effects of an unduly harsh restraint of trade agreement."

39 SACOB, Advocate Derek Mitchell of the Cape Bar, Advocate Harpur of the Natal Bar, Murray and Roberts, Professor AN Oelofse, the attorneys JS de Villiers & Son, Rashid Amod Sadeck and Mr DJ Potgieter and the one group of Judges of the Supreme Court of Appeal who are opposed to the proposals.

40 Advocate Harpur and the Statutes and Administration Committee of the General Council of the Bar (see par 1.26 above).

41 Cliffe Bekker & Todd.

phrase litigation paradise⁴² is appropriate to describe what will follow the enactment of such legislation; the task of the lawyer advising his or her client would be rendered almost impossible; each case would have to be decided on its own merits and reliance on precedent may well prove hazardous, as a particular contractual term could be held to be fair in one case but unfair in another, due to differing circumstances pertaining at the time of the conclusion of the contract; commercial certainty in the drafting of contracts would be difficult, if not impossible, to achieve; and the common law relating to contracts has developed over a long period to strike a balance between contractual certainty and what can be described as equitable considerations.⁴³

2.2.1.13 Respondents remark also as follows: The present proposals of the Commission are just as or even more unacceptable than its earlier proposals.⁴⁴ Legislation such as proposed was not successful even in a highly developed country such as Germany and a lot of litigation was needed there to regain a measure of legal certainty after the *Allgemeine Geschäftsbedingungengesetz* commenced in 1977. Even today after two decades the legislation causes enormous uncertainty. Those who have not yet realised that legislation, such as is proposed, will be totally counterproductive, will probably never realise it. It is hoped that this form of "social engineering" will be abandoned. The only results to be attained by the proposed legislation are to further damage economic initiative and development in this country.⁴⁵

2.2.1.14 The following concerns were also raised: The extent to which the common law powers are to be modified or replaced by proposed legislation would be disputed, leading to uncertainty and expensive litigation. This has happened in Israel with the *Contracts (General Part) Law* 1973, sections 12 and 39 of which impose a criterion of good faith, and there is every reason to expect the same to happen in South Africa with a statute of a similar nature.⁴⁶ The common law of contract, based on the principles of freedom of contract and *pacta sunt servanda*, has been evolved primarily to meet the requirements of the business world, but it is a mistake to

42 Juanita Jamneck 1997 *TSAR* at 637 considers the proposals contained in *Working Paper 54*. She notes that the most important disadvantageous effect of the proposals which has also been pointed out by some project committee members, is the creation of a litigation paradise.

43 Advocate Mitchell.

44 Professor AN Oelofse of the Department of Mercantile Law at the University of South Africa.

45 *Ibid.*

46 Christie *The Law of Contract in SA* at p 16.

think of it as concerned only with the requirement of predictability.⁴⁷ It contains many principles and rules designed to produce a just legal outcome when the contract does not conform to the classical pattern of a well-considered bargain between well-informed parties. Misrepresentation, fraud, duress, undue influence, mistake and common law illegality and unenforceability spring to mind. One of the unintended consequences of the proposed Bill would be to create a "demarcation dispute" between the common law principles and rules and the new statutory criteria. This has happened in Israel with the Contracts Law of 1973. In South Africa there would be a similar demarcation dispute because our courts are poised to achieve the desired result by developing the common law without the aid of legislation.⁴⁸

2.2.1.15 The proposed legislation will encourage litigation, litigation lawyers will have a new source of work, it will create a massive risk for the lawyers in the commercial field, and lawyers will have to call for indemnity and extra insurance cost will be incurred.⁴⁹ The development of sanctity of contract, although mostly centred around the restraint of trade issue, indicates the need not to meddle therewith. Merely an assumption that there could be uncertainty or unfairness is insufficient grounds for change which would definitely have adverse effects, change common law and throw into disarray the current structure. This is so, even if existing statutes, or the common law, does not initially seem to be ad idem with the Constitution. The courts will lose their character of judicial courts and become equity courts with uncertainty reigning supreme.⁵⁰ The Labour Court functions as a court of equity and not a court of law therefore there has hardly been talk of certainty during the years. The legislation would be a waste of costs, interpretation would lack certainty and the Bill would lead to further unwarranted doubt.⁵¹

2.2.1.16 Respondents argue, furthermore, as follows: The concept of public policy in the common law has a restricted application, and the proposed legislation would presumably be interpreted to grant a greater licence to courts to interfere with contractual relations than is

47 Prof Christie commenting in his submission to the Commission.

48 Ibid.

49 The attorneys Jan S de Villiers and Son.

50 Mr DJ Potgieter of the firm of attorneys Louw and Heyl.

51 Mr Rashid Amod Sadeck of the firm of attorneys Rashid Patel and Co.

provided by the common law.⁵² The effect thereof would be that the validity of many contracts would be in doubt. Even if the proposed legislation is limited to contracts which are considered "unconscionable" the results would be unpredictable.⁵³ The wide discretion afforded a court will not only undermine legal certainty, but it will also destroy commercial certainty by interfering with the market place and, furthermore, it could inhibit trade and commerce and discourage local and foreign investment.⁵⁴ One would not know, when concluding a contract in respect of which South African law is the governing law, whether or not and how that contract might be re-written by a South African court. The fact that the provisions of the Bill may not be waived or limited will interfere with the right to choose the law which will govern contracts and it will, in turn, have a detrimental effect on business in those cases where the parties do not wish South African law to apply. The sanctity of contract is a sound and well-established principle which should prevail and not be tampered with.⁵⁵

2.2.1.17 Respondents also raise the following concerns: Enactment of the proposed legislation would be tantamount to re-introducing elements of the doctrine of *laesio enormis*, originally limited to land sales but later extended to many contracts, allowing rescission of a transaction where consideration was below half of true value. The "antediluvian fossil" was vilified by the case of *Tjollo Ateljees v Small* 1949 1 SA 856 (A), urging its repeal by legislation as being out of keeping in the modern world with its highly developed commercial and financial organisation and which was done by the passing of the *General Law Amendment Act, 1952*. A general law such as is proposed, could undermine legal certainty in the law of contract to the detriment of, and at great expense to, the business community as it would undoubtedly precipitate a deluge of vexatious actions. Legal certainty is an important element in economic decision-making, as a party to a contract must have reasonable assurance of the validity and enforceability of the rights and obligations flowing from the contract. Legislation of the nature envisaged often encourages parties to challenge or cast doubt on the validity of contracts on

52 The group of Judges of the Supreme Court of Appeal, opposing the proposed legislation whose main objection to the proposals is the uncertainty that would be introduced by the proposed Bill, point out that they agree with the objections to the proposed legislation set out by their colleagues who support the proposals with reservations.

53 Ibid.

54 BSA.

55 SACOB.

mainly spurious grounds, simply because they no longer wish to be bound thereby for whatever reason. This would in turn add to already congested court rolls and onerous case loads to be dealt with by a legal system, presently heavily overworked, and understaffed. The provisions of the Bill requiring a court to amend a contract is tantamount to calling upon it to make a new contract for the parties. This is in itself an unfair burden on the judiciary, many of whose members are known to regard the prospect thereof with disfavour. How is a court to arrive at a substitute formula in the case of a long term contract in terms of which the price is to be determined by a formula and the court is asked to conclude that the result of such formula is "unreasonably prejudicial".⁵⁶

2.2.1.18 Finally, respondents argue as follows: The very drive internationally towards electronic contracting and distribution mechanisms is founded upon the fact that the concept of sanctity of contract results in commercial and customer certainty.⁵⁷ This is a solid foundation, well established, well protected and well policed. It is upon this foundation that new methodologies of contracting are implemented. Should a court at some point in time be empowered beyond current legislation to rectify, vary or, even worse, try to interpret or establish the intention at the time of contracting, the solid foundation of contracting could be undermined.

2.2.1.19 Adam Fletcher however argues that good faith should be accorded more importance and influence in the South African law of contract in order that it can serve as a much needed tool of equity and fairness in a commercial era where these aims are increasingly prone to neglect and abuse.⁵⁸ He addresses the argument that allowing good faith to effect the substantive validity of contracts will detract from legal certainty:⁵⁹ He submits that this may be true and that one cannot deny that certainty in law is important. He however states that he feels that the concerns for certainty are somewhat misplaced. He argues that, on a simplistic level, if one considers good faith and public policy in contract law at present, a degree of uncertainty exists already, and in particular with the latter. He believes, furthermore, that carefully drafted legislation can combat uncertainty and may allow a degree of judicial discretion which would be

56 One of SACOB's respondents.

57 Liberty Life.

58 Fletcher 1997 *Responsa Meridiana* at 10.

59 Fletcher 1997 *Responsa Meridiana* at 11.

vital given the abstract nature of good faith. He also considers that in the end the general pursuit of justice between contracting parties must prevail over legal certainty. He notes that efforts to maintain certainty will result in a failure to do justice to contracting parties' expectations, which is a worse evil than legal uncertainty. His conclusion on the question of certainty is that while legal certainty is a valid concern, it is not so crucial as to be prohibitive of according good faith a more prominent position in contract law.

- (d) Existing legislation is sufficient - if in any particular field greater protection is required, it should be applied *ad hoc*

2.2.1.20 A recurring comment by respondents is that the existing legislation is sufficient and that if in any particular field greater protection is required, it should be applied *ad hoc* to the specific evil which is intended to be countered. The respondents who are of this view proffered the following arguments: Some of the malpractices referred to in the discussion paper are already protected by law, others can readily be protected by relatively minor legislation, or there are a number of Acts which are aimed at precisely all or some of the same problems at which the Bill is aimed.⁶⁰ The South African common law and statute law, together with the Constitution, provide adequate general protection to, and relief to parties who feel aggrieved by unreasonable, unjust or unfair contract stipulations.⁶¹ Greater consideration could have been given to specific amendments to the plethora of consumer protection laws, too many, on the statute book, aimed at preventing undesirable practices, eg the *Credit Agreements Act*, *Usury Act*, *Prescription Act*, *Conventional Penalties Act* and *Harmful Business Practices Act*, and a host of others,⁶² to the imposition of a general obligation of good faith such as that imposed in the American *Uniform Commercial Code*⁶³ and any further legislative intervention should be directed towards specific

60 Mr NG Jooste.

61 SACOB; Business South Africa (BSA); and the Life Offices' Association of SA. Jamneck 1997 *TSAR* at 647 is of the view that it seems as if the initial aim of the investigation into the control of unfair contract terms was to protect parties against unfair standard terms or standard form contracts particularly in cases where the parties concerned are in positions of weaker negotiating power. She considers that given the fact that this idea grew into proposals for wide ranging control over all contracts, it seems to be too drastic a measure, particularly in view of the existing measures which are able to provide relief in most instances.

62 Ibid.

63 SACOB.

areas of abuse without introducing provisions to cover all contracts generally.⁶⁴

2.2.1.21 Furthermore, these respondents argue as follows: Since there are a number of statutes which protect contracting parties against harsh or oppressive terms in specific circumstances, no legislation is necessary at present, save perhaps in specific types of contracts in which experience has shown that contractual freedom is being abused.⁶⁵ The Judges argue that in general, these provisions provide with greater or lesser clarity which provisions are regarded as objectionable, and, in addition, the courts have a common law power to set aside contracts on the grounds that they are contrary to public policy. In exercising this power, the court in terms of *Sasfin v Beukes* 1989 1 SA 1 (A) has regard to features such as that the contract is "unconscionable", "unduly prejudicial" or "grossly exploitive". Hence, these provisions are sufficient.⁶⁶

2.2.1.22 In addition it is argued that sufficient consumer protection mechanisms exist currently, such as the National Business Practices Committee, and the *Consumer Affairs (Harmful Business Practices) Act* of Gauteng and the bodies potentially protecting the consumer already in place should rather be empowered to take action.⁶⁷ The existing consumer protection legislation can be varied, as opposed to being replaced, and the same result or better result achieved.⁶⁸ Any limitations on the freedom to contract, intended to address the perceived unconscionable clauses, should be set down in: statute law such as national or provincial consumer protection legislation, the *Long-term Insurance Act*; self-regulatory codes governing the conduct of certain sectors; and more generalised codes of conduct and effective action by way of orders given substance by the *Harmful Business Practices Act*. As to the latter two forms, the consumer protection legislation could empower, or at least guide, the courts to strike down or rectify clauses which are found to be in breach of the relevant codes. The only means of

64 SACOB, BSA and a number of Judges of the Supreme Court of Appeal. The former Chief Justice, Mr Justice MM Corbett forwarded two comments to the Commission. He explained that the Discussion Paper has been considered by the Judges of that Division, that it has given rise to a difference of opinion and that each of the two opposing points of view has substantial support from among the Judges.

65 The group of Judges of the Supreme Court of Appeal who are opposed to the proposed legislation.

66 Ibid.

67 SAPOA and SACOB.

68 Mr NG Jooste.

public policy control over contract provisions by express prohibition or invalidation should be via some codification mechanism, which may be varied from time to time, without retrospective effect, thus preserving the integrity and certainty of contracts yet eliminating the worst manifestations of unconscionable terms.⁶⁹

2.2.1.23 Further costly structures are being proposed when enabling legislation should rather help existing structures to operate as effectively as possible.⁷⁰ Attractive as the proposals may seem, it would almost certainly fall victim to what neo-conservative thinkers call the law of unintended consequences and would do more harm than good.⁷¹ One unintended consequence would be to create a form of demarcation dispute between the courts' new statutory power and their existing common law powers to intervene in cases of misrepresentation, fraud, duress, undue influence, mistake and common law illegality and unenforceability.⁷²

2.2.2 Recognition for the introduction of notions of *fairness or good faith* into foreign legal systems

2.2.2.1 A number of South American countries have enacted legislation since 1990 providing for consumer protection against unfair contracts similar to the existing legislation in other so called first world countries.⁷³ Extensive consumer protection statutes were introduced which, among other things, provide a range of administrative and judicial remedies.⁷⁴ There were developments in Europe too, where the members of the European Union had to ensure that their national law conform with the principles contained in the *European Directive on Unfair Contract Terms*, and, furthermore, in Africa, such as the Zimbabwean Consumer Contracts Act 6 of 1994 and the *Model Law for Consumers in Africa*. We also note in this Chapter that good faith and fairness are part of international law too.

69 The Life Offices' Association.

70 Liberty Life.

71 Christie *The Law of Contract in SA* at 16.

72 Ibid.

73 See in this Chapter below.

74 Jaffe and Vaughn *South American Consumer Protection Laws* at ix. These statutes were heavily influenced by the Mexican *Consumer Protection Law* of 1975 and the Brazilian *Consumer Protection Code* of 1990, as well as Spanish and French consumer law.

2.2.2.2 The contractual doctrine of good faith inspired a sometimes critical and otherwise supportive reaction to a contractual doctrine of good faith in a number of foreign jurisdictions.⁷⁵

"In 1984, Professor Michael Bridge, then of McGill University, took aim in a major article at the doctrine of good faith performance as it had been developed south of the Canadian border. He speculated that, 'Far from involving the community ethic in the day-to-day task of law-making and decision-making ... good faith is more likely to produce idiosyncratic judgment'. It was Bridge's conclusion that 'Anglo-Canadian law does not need to legislate a standard of good faith because it has evolved sufficiently towards the protection of justified expectations' and that while 'a preoccupation with [good faith] is useful in articulating contract theory and in defining the goals that our contract law is harnessed to serve, good faith could well work practical mischief if ruthlessly implanted into our system of law'. Professor Roy Goode told an Italian audience that 'we in England find it difficult to adopt a general concept of good faith'. He seemed not at all overcome with regret and added that 'we do not know quite what [good faith] means'.

Other English jurists, however, have been more positive about a doctrine of good faith performance. As far back as 1956, Professor Raphael Powell observed that 'there are a number of individual cases in which the [English law of contracts] contains an element of ... good faith' and opined that '[f]or want of a rule of good faith the courts have upon occasions had to resort to contortions or subterfuges' or 'to fictitious implied promises.' In 1991 Steyn J, in a lecture on good faith at Oxford University, explained that, lacking a doctrine of good faith, 'English law has to resort to the implication of terms'. He urged rather that 'in using the high technique of common law the closest attention is paid to the purpose of the law of contract, ie, to promote good faith and fair dealing'. Even more support for a doctrine of good faith has come in other parts of the common-law world.

Australia is a leading example. In 1987, Professor HK Lücke admitting that 'the United States legal system has some special characteristics which make it necessary for lawyers to embrace broad principles and policies' nonetheless thought it not unreasonable to hope that good faith would ultimately make a significant and beneficial impact upon [Australian] private law'. He was supported by Professor Paul Finn, who noted in the same year that equity 'has no exclusive proprietorship of "good faith"' and, in 1989, that the 'doctrine of "good faith" in contract performance is now squarely upon contract's agenda'. It was also in 1989 that Priestley JA published an article in which he turned his attention to the doctrine of good faith as a 'feature ... of much United States contract law' and wondered whether "Australian law has reached the point where terms may readily be implied into contracts, having substantially the same effect as the good faith formulation in the United States.' In 1992 he elaborated this view in a case involving the power of a government agency to terminate a construction contract on default by the contractor if the contractor did not 'show cause to the satisfaction' of the agency why the contract should not be

75 Farnsworth in *Good Faith and Fault in Contract Law* at 156 - 158.

terminated. After reviewing US and other common law authorities on good faith, Priestley JA concluded 'that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance.

The doctrine of good faith has also stirred interest in Canada." ... "In 1987, in its report on Amendment of the Law of Contract, the [Ontario Law] Commission recommended that legislation recognize the doctrine of good faith in the performance of contracts generally, that this statutory obligation not be disclaimable, and that the provision should take the form of Restatement (2d) § 205."

2.2.2.3 In 1994 Mr Peter Quinton, the Director of the Law Reform Unit of the Australian Capital Territory Community Law Reform Committee, commented as follows on the question of legal uncertainty in reaction to the Commission's *Working Paper 54*:

"The issue under consideration in your paper has recently been the subject of specific consideration in the ACT. As a result, the ACT Legislative Assembly has recently enacted a coherent body of law regulating competition within the ACT. The *Fair Trading Act 1992*, came into effect on 1 January 1993. The law applies to the supply of goods and services.

These provisions complement Commonwealth anti-trust provisions in the *Trade Practices Act*, which itself has recently been the subject of review by the ALRC in compliance with the *Trade Practices Act 1974*, Report No 68, Australian Law Reform Commission, June 1994. While noting the desirability of a national scheme of consumer protection, in this report the ALRC has gone on to suggest a series of changes to the *Trade Practices Act 1974* to promote the objectives of the Act. The report proposes a new right to replacement. It also considers measures to minimise the effect of and preventing further contraventions.

The passage of the *Fair Trading Act 1992* did not bring about the end of civilisation as we knew it. Indeed, as far as I can ascertain, people have not been crowding the courts seeking remedies under the Act. While, no doubt, there will remain contractual provisions which are unfair, the mere passage of legislation has not precipitated change in the marketplace. On the basis of this experience, I believe that change in the commercial practice will occur slowly in this area."

2.2.2.4 Brenda Marshall remarks that in recent times, concerns have been raised that the provisions of the Australian *Trade Practices Act* of 1974 are causing widespread uncertainty

among business persons, resulting in much complex and costly litigation.⁷⁶ She states that commentators are presumably basing their concerns on section 52 of the Act's notoriety as the most litigated provision in the *Trade Practices Act*. Ms Marshall comments that in Australia, the courts and the legislature have declined to place paramount importance on the absolute certainty of contract, accepting that there are notions of justice and fairness of equal or higher value.⁷⁷ She remarks that while certainty and predictability are valuable attributes of a legal system, Australian law takes the view that they should not be used as an excuse for unscrupulous behaviour. She indicates that the case law reflects a growing concern by judges with moral issues in evaluating the behaviour of parties, whether they be involved in consumer or commercial transactions. She notes that, from a legislative perspective, it can be argued that provisions such as section 52 of the *Trade Practices Act* establish minimum absolute standards of commercial probity. Ms Marshall is of the view that while commercial morality is a desirable judicial and legislative goal, it inevitably conflicts with certainty of contract. She indicates that insofar enactment and interpretation of the provisions of the *Trade Practices Act* reflect notions of commercial morality, they may well create a degree of uncertainty in the business community, but that this is simply part and parcel of the principle that unconscionable and misleading conduct is to be condemned. Ms Marshall notes that one commentator explained this matter as follows:⁷⁸

"It is little wonder that the growing importance of the [Trade Practices] Act, as a whole, is creating commercial uncertainty along with a commensurate level of judicial activity, when the entire focus of the law is directed more towards enforcing different set of norms of conduct or *moral* constraints vis-a-vis the consumer and parties in an inferior bargaining position, as opposed to the familiar 'hands-off' approach of the general law to notions of justice and fairness in arm's length commercial relationships."

2.2.2.5 Dr Malcolm Clarke notes a number of objections raised against a general doctrine of good faith, some of which were also raised by the respondents to the Commission's discussion paper, namely -⁷⁹

76 Marshall 1995 *Bond Law Review* at 42.

77 Marshall 1995 *Bond Law Review* at 56.

78 Ibid.

79 Clark "Will there be a General Doctrine of Good Faith?" at 25 - 28.

- * the very notion of good faith is too vague;
- * it means different things to different people in different moods at different times and in different places;
- * eliminating rules to the highest point of abstraction may well produce contemplative gains, but if this process occurs in a practical world, these gains are more than offset by the losses introduced by uncertainty and vagueness;
- * does not the triumph of an ethical standard without overt legal recognition show the absence of such recognition?;
- * in the form in which good faith and fair dealing is cast in section 205 of the Restatement (2nd), good faith is an invitation to judges to abandon the duty of legally reasoned decisions and to produce an unanalytical incantation of personal values;
- * in Germany, the good faith provision contained in § 242 of the *BGB*, has generated an enormous case law and an equally enormous literature, it can therefore be a dangerous weapon in the hands of the wrong judge, as Germany's past has shown, for it allows him or her to apply his or her own notions of social policy, and even among the 'right' judges the notion of good faith may change under the influence of relative values.

2.2.2.6 Dr Clarke gives, inter alia, the following answers to the concerns raised above:⁸⁰ He believes that the fear of uncertainty is not justified by the track record of the doctrine of good faith in Germany. He considers that the fear is based on a misunderstanding of good faith and that it is not a rule but a standard, which is not applied without more but which requires concretisation through the judicial creation of certain rules.

2.2.2.7 It is believed that in answering the question whether there is a case for adopting reform in South Africa, valuable insights can be gained by noting the arguments adopted by the Ontario Law Reform Commission and the Law Reform Commission of Hong Kong when they considered that the case is made out for reform there. The Ontario Law Commission argues as follows:

80 Clark "Will there be a General Doctrine of Good Faith?" at 28 - 33.

"In our view, statutory affirmation of the doctrine [of unconscionability] would stress its pervasive importance and encourage the courts to evaluate realistically the significance of standard form terms and manifestly unfair bargains. It ought also to encourage the courts to abandon such anachronistic tools as the doctrine of fundamental breach and adverse construction. Fictitious techniques of this kind do harm to the law, because they conceal the reasons for judicial decisions and prevent the development of clear principles. Statutory recognition of a generalized doctrine of unconscionability would fill the gaps in legislative intervention, and enable judges to direct their minds to the truly relevant criteria for decisions.

Accordingly, we recommend that legislation should be enacted expressly conferring on the courts power to grant relief from unconscionable contracts and unconscionable terms in a contract and spelling out the remedies available where unconscionability is found. However, as we emphasized in our *Report on Sale of Goods*, legislative recognition of the doctrine of unconscionability should not be construed as a life jacket for persons who have entered into a bad bargain; nor should it interfere with the right for parties to bargain freely with respect to the terms of their contract. The thrust of the legislative doctrine that we support is to redress the imbalance where parties are *not* bargaining from equal positions and where the stronger party has taken advantage of its superior power to impose harsh and oppressive conditions on the weaker party.

We recognize the concerns of some critics of the doctrine of unconscionability that its statutory adoption may lead to uncertainty and that it will enable judges to impose their view of public policy on the market place. In our view, both these concerns can be satisfactorily answered. The numerous jurisdictions that have now adopted some form of statutory unconscionability doctrine have not found it giving rise to a flood of uncertainty. In fact, the volume of litigation has been extremely modest. So far as the exercise of the judicial power is concerned, this would be subject to the usual rights of appeal that are open to an aggrieved litigant."⁸¹

2.2.2.8 The Hong Kong Law Commission states its point of view as follows:

"The main argument in favour of an unconscionability provision appears to be that judges need to be given a clear power to strike down unfair terms or contracts so that they would not have to resort to artificial interpretation or distinction in order to avoid injustice."⁸²

A major argument against such legislation is that legislation of this kind may create uncertainty as to whether an apparently binding contract may be enforceable. ...

We however do not feel that the objection that an unconscionability provision introduces uncertainty into the law carries weight. If certainty were the sole aim of law, it would

81 OLRC *Report on Amendment of the Law of Contract* at 127.

82 LRCHK *Report on Sale of Goods and Supply of Services* at 36.

justify passing a statute, or adopting a principle of interpretation, that the consumer or weaker party was always wrong (or, indeed, right). There is another aim of law which is fairness. As Lord Atkin put it 'finality is a good thing but justice is a better'. Certainty is a pragmatic rather than a principled consideration craved by lawyers so that they can advise their clients upon their rights. We do not belittle certainty, but we do not feel it is paramount. Certainty in this context is sometimes sought to be justified by the principle of sanctity of contract, that a party must abide by his agreement. This assumes of course that a piece of paper signed by that party is truly his agreement. But in reality that party has not genuinely consented to the terms on that paper, which are in standard form and have not been read (or been expected to be read) by him, let alone been the subject of negotiation. The principle of sanctity of contract carries conviction only if there is a contract in the sense of a full-hearted agreement which is the result of free and equal bargaining. Unfortunately, in modern life, there is rarely the time or the opportunity for such bargaining; it has been replaced by the convenient form and the standard clause.

Professor Cranston points out in 'Consumers and the law' (2nd ed, 1988) that the objection that an unconscionability provision could introduce uncertainty ignores the ways courts have historically narrowed discretion. Although the counter-argument is that it is questionable whether the judiciary possess the necessary breadth of vision for such a discretion to be entrusted to them, in his view it is possible to meet some of these criticisms by fleshing out an unconscionability provision on the basis of legislative and judicial experience in the area of unjust contracts.

The Alberta Institute of Law Research and Reform also felt that the development of a doctrine of unconscionability would not result in uncertainty if the doctrine is laid down within clear statutory guidelines.⁸³

...

Our initial reaction was that if the court should be given powers to review harsh or unconscionable provisions in sale of goods and supply of services contracts, that would lead to uncertainty in the law and would amount to interference with freedom of contract. We had thought that the introduction of legislation on the control of exemption clauses would be sufficient.

On consultation, there was much support for introducing legislation in Hong Kong to control harsh or unconscionable terms. It was suggested to us, we think with justification that, in focussing on the contents of the clause itself, we were taking too narrow a view and that unconscionability also depended on the circumstances of how the contract was entered into. We are now of the view that this is an important area and that it could help to protect the consumer."⁸⁴

2.2.2.9 The Japanese Consumer Policy Committee which is a subcommittee of the

83 LRCHK *Report on Sale of Goods and Supply of Services* at 37 - 38.

84 LRCHK *Report on Sale of Goods and Supply of Services* at 40.

Social Policy Council noted in December 1996 that the Council has considered the rectification of consumer transactions several times in the past.⁸⁵ The Committee remarks that transactions between consumers and businesses are becoming more diverse and complex because of changes in the socioeconomic structure (the move towards service industries, globalisation, the ageing of the population, and the move towards information/technology) and also because of the growing diversity and complexity of products and services themselves. The Committee considers in addition, that as deregulation progresses a wider range of goods and services are being provided to consumers more cheaply, and while this is widening the range of consumer choice, it also requires that consumers act according to choices that they themselves have made in an independent, pro-active manner. The Committee notes that there are, however, differences between consumers and businesses in terms of access to information and negotiating power, and it is often the case that contracts are entered into for transactions that are neither efficient nor rational, consumers having been unable to make appropriate choices. The Committee considers that it is difficult to conclude that businesses always, in the process of negotiating contracts, provide consumers with the information they require to make appropriate choices in a speedy and accurate manner, and often there is a strong drive from the business to induce the consumer to enter into a contract. The Committee notes that consumers quite often are insufficiently informed of the content of contracts because of the enormous number and complexity of contractual clauses and terms. The Committee remarks that in cases in which businesses have unilaterally created standard contracts in advance, contracts are often signed with, for all intents and purposes, no room for the consumer to fully understand and negotiate the content.

2.2.2.10 The Japanese Consumer Policy Committee remarks that these trends have led to a sharp rise in the number of contractual disputes between consumers and businesses in recent years. In 1995, more than half-54.7%-of the consultations given by such organisations as the Japan Consumer Information Centre and the Local Information Centre concerned contracts and contract cancellation. The Committee considers that this has therefore created the need to create a framework that will assure the free choice of consumers and enable them to select appropriately from among a wide variety of goods and services. The Committee states that it has noted the need for specific and comprehensive civil law rules to be made for both the procedural (contracting process) and content (contract terms) aspects of consumer transactions. They

85 <http://www.epa.go.jp/e-e/doc/e1996ca2.html> accessed on 10/12/1997.

suggest that these rules must be suitable, without exception, to all industries and transactional forms in consumer transactions, and must improve predictability for both consumers and businesses. They suggest that it is necessary to eliminate improper contract terms in a direct manner.

2.2.2.11 The Consumer Policy Committee suggests that as a policy for the rectification of the contracting process, they must consider the formation of civil rules that, focussing on consumer transactions, specifically and comprehensively impose a requirement on businesses to in good faith provide consumers with information and explanations of important matters, with the stipulation that a contract can be cancelled if this obligation is not discharged. They consider in doing this and in drafting specific rules, they should consult Germany's laws on negligence in the contracting process, France's obligations to provide information, and the United States' laws on unconscionability and misrepresentation. The Committee notes that as a policy for the rectification of contract terms, they must consider specific and comprehensive civil rules that concretise and provide standards of interpretation for the content of the general "good-faith" civil rules. They note in doing this and in drafting specific rules, they should consult the European Union's *Directive on Unfair Terms in Consumer Contracts*.

2.2.2.12 The Consumer Policy Committee suggests that the proposed measures will provide behavioural guidelines for both consumers and businesses that will restrain improper actions and prevent disputes from occurring, should there be disputes, they will also provide concrete guidelines for their resolution and therefore facilitate retroactive relief. The Committee considers that for businesses in particular, the existence of rules can be expected to lead to reductions in the cost of dispute settlement, and in relation to deregulation, the formation of these rules will provide a clear articulation of rules for areas on which the current legal system is not clear, thereby improving the stability of transactions. They predict that the rules will not represent the imposition of new regulations on transactions; if anything, they will make it easier for consumers to make appropriate choices while at the same time making it easier for businesses to be innovative in their activities. The Committee further states that in addition to drafting the specific and comprehensive civil rules they must also take measures to supplement these rules and improve their effectiveness such as the enhancement of individual forums and methods for settling disputes and the promotion of information supply and consumer education regarding

contracts.

2.2.3 Evaluation

2.2.3.1 The Commission notes the concerns raised by a substantial number of respondents, particularly in respect of the possibility that foreign investors and contracting parties might be discouraged from concluding contracts in South Africa should the law enable courts to review contracts in order to determine whether they comply with principles of contractual fairness. The Commission however duly noted local and foreign developments concerning the law of contract. Apart from there being local calls for the recognition of fairness in contracts,⁸⁶ measures have lately been adopted and existing ones extended in foreign jurisdictions clearly recognising the need to regulate unfair contracts. One respondent suggested that since South Africa's competition is not first world countries, but countries such as China, India, Malaysia and the South American countries, research on these countries would be more appropriate.⁸⁷ The Commission appreciates these constructive comments. We noted in this paper that there are South American countries which have adopted legislation providing for consumer protection against unfair contracts similar to the existing legislation in Europe, North America and Australia and that there are calls in India presently for legislation which would make it compulsory for traders to obtain approval to include specified exclusionary clauses in standard form of contracts. The Commission furthermore noted developments in Europe regarding the *European Directive on Unfair Contract Terms*, and, furthermore, in Japan and also in Africa, such as the *Zimbabwean Consumer Contracts Act 6 of 1994* and the *Model Law for Consumers in Africa*. The Commission further noted the reaction the doctrine of good faith inspired in a number of countries.

2.2.3.2 We noted above that some respondents argue that the introduction of measures against unfair or unconscionable terms would isolate South African contracting parties and inhibit foreign investment and trade. The Commission is of the view that the developments noted above require that this argument should be critically considered. It seems to the

86 Fletcher 1997 *Responsa Meridiana* at 14.

87 Murray and Roberts Holdings Ltd.

Commission that South Africa would rather become the exception and its law of contract would be deficient in comparison with those countries recognising and requiring contractual fairness. Furthermore, the Commission regards the views of Adam Fletcher and Professors Hutchison and Van Heerden as persuasive on the question whether the proposed legislation will create unwarranted legal uncertainty. The Commission accepts, as they suggest, that any change effected by the proposed legislation, will produce a measure of legal uncertainty and consequent litigation, at least in the short term when many contracts are challenged, that this is, however, a price that must be paid if greater contractual justice is to be achieved, that certainty is not the only goal of contract law, or of any other law, and lastly in any event, that the fears provoked by the proposed Bill are exaggerated, in the light of the experience of countries that have already introduced such legislation. The Commission further agrees with them that the developments taking place in other jurisdictions, and particularly on the African continent, indicates that this matter cannot be ignored. The Commission furthermore concurs with Prof Zimmermann's observation that the issue of unfair contracts has to be addressed in a more fundamental and less fragmentary way. The Commission is finally of the view that reform is called for and that Adam Fletcher's suggestion that legislation is the most viable and expedient method to effect legal reform, is persuasive.

2.2.3.4 The Commission further shares Mr Justice Olivier's view that the principles of good faith, based on public policy still plays and should play an important part in the South African law of contract as in any legal system which is sensitive to the views of the community who is ultimately the creators and users of the law in regard to the moral and ethical values of justice, fairness and decency.⁸⁸ The Commission also shares his view that the judgment in the case of *Sasfin v Beukes*⁸⁹ should or may not be regarded "as a free pardon for recalcitrant and otherwise defenceless debtors".⁹⁰ The Commission also notes Mr Justice Olivier's argument that the reticence of the Local and Provincial Divisions of the former Supreme Court to give full effect to bona fides is contrasted by the more accommodating view of the Supreme Court of Appeal as is clear, inter alia, in *Ex Parte Minister of Justice: In re Nedbank v Abstein*

88 See *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) at 326F-J.

89 1989 1 SA 1 (A).

90 See *Donnelly v Barclays National Bank Ltd* 1990 1 SA 375 (W).

*Distributors (Pty) Ltd and Others and Donnelly v Barclays National Bank Ltd.*⁹¹

2.2.4 **Recommendation**

2.2.4.1 The Commission is of the view that there is a need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressiveness in all contractual phases, namely at the stages when a contract comes into being, when it is executed or when its terms are enforced.⁹² The Commission consequently recommends the enactment of legislation addressing this issue.

2.3 SHOULD COURTS AND OR TRIBUNALS BE EMPOWERED TO ACT AGAINST UNFAIR OR UNCONSCIONABLE CONTRACTS?

2.3.1 A mixed reaction from respondents on the provisional recommendation to exclude provision for preventative administrative mechanisms from the Bill

2.3.1.1 The Working Committee's provisional recommendation excluded provision for the introduction of preventative administrative mechanisms. One respondent suggests that the High Court already has an inherent jurisdiction to effectively deal with any situation the proposed Bill seeks to address.⁹³ Another suggests that the powers of the courts will become more consumer orientated through a process of evolution and *stare decisis* rather than by imposed legislation which upsets too many aspects of current understanding and legal certainty for it to really balance itself.⁹⁴ Three respondents who support the "no approach" state that they are of the view that the proposed legislation will not improve or ameliorate the lot of ordinary consumers nor assist or protect them, since they have neither the means nor the knowledge to access the court system,⁹⁵ and furthermore, that it would be inadvisable for parties to bring an

91 1995 3 SA 1 (A) at 8H et seq.

92 Procedural and substantive fairness in contracts are addressed below.

93 SACOB.

94 Liberty Life.

95 The Joint Legal and Technical Committee of the Institute of Retirement Funds; Mr NG Jooste of Cliff, Bekker & Todd; and the attorneys Jan S de Villiers who remarked that the poor, lame and halt are not equipped financially to take advantage of a measure such as proposed.

action where there is no clear right but a judge's discretion.⁹⁶ The point was, however, also made that it is not realistic to believe that consumers are more effective watchdogs and will complain about very transgression, as in many instances they would not be informed enough to know whether or not a transgression has taken place, and that in the insurance industry it has been found that contracts or agreements are effectively watch-dogged by competitors.⁹⁷ The argument was further raised on the heavy case load of the courts and the expected increase in cases, should the provisional recommendation empowering courts to review contracts, be implemented.

2.3.1.2 It is also argued that the setting of industry norms, the drawing up of codes of conduct and the appointment of an Ombudsman to control marketing practices has appeal and would serve the man in the street far better than the passing of the proposed legislation.⁹⁸ It is further said that if the true victims are the poor and uninformed, then they will not seek recourse to the courts and hence the proposed legislation will not help them. The view is also held that more appropriate would be the adjudication of disputes by an existing body such as the Business Practices Committee, which would have the authority to declare contracts void if they are found to contravene any of this consumer legislation.⁹⁹ It is also argued that the vulnerable consumer looks to the law for protection, but since litigation is generally too cumbersome and expensive to provide that protection,¹⁰⁰ it is the machinery rather than the law that needs attention.¹⁰¹ A substantial number of respondents supporting the "no" approach are of the view that the existing bodies are either sufficient or should be empowered to take direct action.¹⁰²

2.3.1.3 It is proposed that legislation should be adopted which creates a mechanism of

96 The Joint Legal and Technical Committee of the Institute of Retirement Funds.

97 Liberty Life.

98 SAPOA and Prof RH Christie.

99 The Joint Legal and Technical Committee of the Institute of Retirement Funds.

100 Prof RH Christie in his submission to the Commission on Discussion Paper 65.

101 Christie *The Law of Contract in South Africa* at 17.

102 SACOB remarks that the Commission must seriously question the advisability of continuing with the project, which has to date, been unable to produce practicable and acceptable proposals, and that the mechanism established by the Unfair Contract Terms Committee of the Business Practices Committee should be given sufficient opportunity to deal with contractual practices, without further legislation being enacted to the detriment of business as the prime generator of economic wealth and employment.

the nature of an administrative tribunal which would then consider particular standard wording or clauses and after evidence and due consideration determine whether such wording or clauses would in future be unacceptable and therefore illegal.¹⁰³ Murray and Roberts suggests that such an approach has the advantage of fostering legal certainty and also limiting the potential, and therefore the cost, of litigation. Murray and Roberts further notes that such legislation and any code or guidelines promulgated thereunder could be amended from time to time in the light of experience. Murray and Roberts remark it supports the German, Swedish or Israeli mechanisms described in par 1.18 and 1.19 above, stating that such mechanisms provide for reasonable legal certainty. Mr Sibusiso Nkabinde suggests that in addition to the passing of the proposed Bill, preventative measures such as proposed or equivalent steps be implemented, such as -

- * clauses of the kind identified in par 1.12 and 1.14 above be legislatively prohibited from standard form contracts as being unconscionable;
- * contrary to the view expressed in par 1.15 above, despite legislative prohibition of such clauses, courts be conferred residual powers to adjudicate on any contract which possibly may not contain any of the clauses identified in par 1.12 and 1.14, but may through other means be unconscionable or oppressive;
- * a body or mechanism be established charged with investigating the use of unconscionable clauses in contracts in standard form contracts and that such committee have powers to investigate and prevent the use of unfair terms in standard contracts, by negotiating extra-judicially the resolution of any dispute arising out of a proposed use of unfair terms, and by prohibiting the use of any terms which in its view are unfair or unconscionable;
- * no matter how such committee, proposed above is appointed, that such committee should be accessible to the public, in the sense that members of the public through consumer organisations or as individuals should be legally empowered to petition the committee to carry out an investigation into the use of unconscionable or unfair standard form contracts and that the committee's investigations and recommendations should be adequately publicised.

2.3.1.4 An insightful remark by the Joint Legal and Technical Committee of the Institute of Retirement Funds who falls into the "no" approach category and who supports preventative mechanisms is that the preliminary proposals focus on a remedy and not on prevention which would be far more effective for the group that needs protection. Cliffe Dekker and Todd Incorporated suggests that our courts are already hopelessly overburdened with an excessive caseload, that our courts are inaccessible to the ordinary citizen, and if the courts were, in addition to their current functions, also to be required to adjudicate on whether contracts

103 Murray and Roberts Holdings Limited.

contain any unreasonable, unconscionable or oppressive terms, the court system will break down completely. This firm of attorneys is of the view that the efforts currently being made to make the courts more accessible have not been effective, even for the current work load of the courts. Cliffe Dekker and Todd Inc believes that any assumption that a vast number of contracts will not be referred to the courts, would be naive, and that it is impossible to foresee what will happen if the work-load is doubled, trebled or quadrupled but considers that it will undoubtedly result in chaos. Murray and Roberts suggests that the real issue is that of appropriate consumer protection rather than one of empowering courts to rescind or amend contracts.

2.3.1.5 One respondent supporting the "unqualified yes" approach believes that the existing Business Practices Committee does not represent consumers and should not be used for preventative purposes.¹⁰⁴ Six respondents falling in the "qualified yes" category support preventative mechanisms,¹⁰⁵ two of which support the English preventative system existing under the Office of the Director-General of Fair Trading¹⁰⁶ whereas one respondent in this category is totally opposed to preventative control. It is suggested that the financial implications and constraints on an ordinary consumer may necessitate the appointment of an Ombudsman charged with the task of regulating marketing practices including unconscionable contracts along the lines of the Scandinavian consumer protection system.¹⁰⁷ Mr Justice B Wunsch and Mr PA Bracher suggest that the preventative approach adopted in the United Kingdom through the powers and duties of the Director-General of Fair Trading is a more practical one than the envisaged legislation.¹⁰⁸ Professor Alfred Cockrell is sympathetic to the argument for certainty but sees the protection of consumers against unfair clauses in sale and lease documents as timely and necessary. He argues as follows:¹⁰⁹

"It is not enough to have legislation and leave it to the courts. The process will be

104 Lilibeth Moolman.

105 The Laws and Administration Committee of the General Council of the Bar; Mr Kaya Zweni of Lawyers for Human Rights.

106 Mr Justice B Wunsch and the attorney, Mr PA Bracher. The latter suggests that that should be the furthest the Commission should go.

107 The Director-General of the Department of Agriculture.

108 These powers are set out below.

109 "Towards fair agreements" 15 November 1996 *Financial Mail* at 77.

cumbersome, and as experienced in England, with lots of little cases, it will take a long time to get any rigorous principles established. We need to establish guidelines for the courts. The proposed Bill is too short and cryptic."

2.3.1.6 Professor Cockrell's views corresponds with those of Professor Hein Kötz of the Max Planck Institute in Hamburg who says that the experience of Europe is that those who need the protection of the courts cannot afford the costs or are not sophisticated enough to know that the clauses would be considered unfair.¹¹⁰ This is why most European systems have not confined themselves to the enactment of substantive provisions on unfair contract terms and why they have developed new control systems in which public officials or consumer organisations have been given standing to act in ordinary courts or special tribunals. SAPOA opts for self-regulation and after vigorous lobbying to Prof Tager's committee from "an unrepresentative group acting for small traders", SAPOA is bringing its guideline lease document up to date "to keep pace with current thinking". Furthermore, a property Ombudsman is also being introduced.¹¹¹ The GCB is also of the opinion that there should, in addition to power of *review* as contemplated in the draft Bill, be an effective system of preventative administrative control on the lines pointed out by the research team.

2.3.1.7 COSAB believes that the judicial system is the best way of ensuring that our law develops in an open and accessible manner and that all parties are given an opportunity to be heard. COSAB is opposed to an administrative body being given any power to decide on the permissibility of contract terms, and believes that the courts are generally in a better position to develop legal principles of this nature.

2.3.2 The establishment of administrative tribunals in the form of the Unfair Contracts Terms Committee and the Consumer Affairs Courts

2.3.2.1 The question arises whether provision should be made for the existence of a preventative body acting against unfair or unconscionable contracts. An administrative body, namely the Unfair Contracts Term Committee was established as a subcommittee of the

110 Ibid.

111 Ibid.

Business Practices Committee during 1995. Another noteworthy development was the introduction of the Province of Gauteng's *Consumer Affairs (Unfair Business Practices) Act* of 1996 which came into operation on 27 September 1996. This legislation creates a tribunal which is, amongst other things, empowered to consider the fairness of contracts. (It should be noted that in terms of Schedule 4 of the *Constitution* of 1996 consumer protection falls within the functional area of concurrent National and Provincial legislative competence.)

2.3.2.2 The definition of "unfair business practice" contained in the Act states that it means any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer. Business practice includes, inter alia, any agreement, accord or undertaking in connection with business, whether legally enforceable or not, between two or more persons. The Act establishes the Office for the Investigation of Unfair Business Practices and provides for the appointment of a Consumer Protector. One of the powers of the Consumer Affairs Court is that it may, pursuant to proceedings instituted, if it is satisfied that any particular business practice which was the subject of proceedings in question should be declared to be unlawful, declare any agreement, accord or undertaking, or terms thereof to be void. The media notes the establishment and role of the Consumer Courts as follows:

- * "Head of Gauteng Consumer Affairs Office Collette Caine says: 'Consumer courts, which are a "first" for South Africa, will have the power to deal with serious consumer problems we know exist, but which are not being addressed through the current justice system, probably because it doesn't have the capacity to do so.

This is not a law court, but a tribunal structure, similar to the Industrial Court, which can handle consumer complaints quickly, efficiently and affordably, instead of resorting to the small claims or magistrate's courts, which can be an expensive process.'

Examples of cases to be heard include those involving companies which take deposits without supplying goods or insurance companies which sell policies with unfair contracts.

The idea for the court was conceived by the Consumer Affairs Interprovincial Working Group of the nine provinces and the Trade and Industry Department. It was welcomed by the umbrella body of all consumer organisations, the National Consumer Forum (NCF), which feels its expectations are being met.

NCF chief Diane Terblanche says: 'The creation of this kind of structure is long overdue. Consumers are finally getting protection and the Government is playing

its role, therefore we are very positive about the move."¹¹²

- * "A flood of complaints has started pouring in ahead of the opening of South Africa's first consumer court, which will protect the public from unfair business practices, next month.

The court ... will be the first of several that will open countrywide and is a huge step forward for the consumer who cannot afford to make a civil action in the civil courts.

A panel of three members well versed in consumer affairs, including attorneys, will sit in court to hear complaints. Legal representation is allowed and consumers will be called as witnesses. All services and costs are free of charge.

'When a complaint is received, we try to sort the matter out amicably between the parties. If this does not work, we take the matter to the Consumer Protector who will decide whether the case should be heard in court. If the protector deems it should go further, a court date is set.

Sometimes, when there are several complaints about one company, we can save time by bringing a class action against the business,' said Collette Caine, the Director of Consumer Affairs and Business Regulation in Gauteng.

...

Courts will be opened in all nine provinces within the next six months and offices where complaints can be made are open countrywide and not just at the main centres. Among the 20 offices already set up are those in Soshanguve, Soweto and even Springbok."¹¹³

2.3.2.3 Regulations governing, inter alia, the practice and procedure of the Consumer Affairs Court, are presently being drafted. It remains to be seen whether and to what extent the Consumer Affairs Court will be able to provide redress in respect of unfair contracts or terms. It seems, however, that the Court will, in principle and by definition, be able to provide curative - ie after an dispute arose - and not preventative relief over contracts.

2.3.2.4 Another matter to be considered in this regard is the proposed amendments to

112 "Court takes up cudgels for the aggrieved" *Saturday Star* 15 March 1997 at 1.

113 "New court: flood of complaints: Good deal for the consumer who can't afford civil claims" 11 July 1997 *Pretoria News* at 4.

the *Harmful Business Practices Act*¹¹⁴ to be effected by the *Consumer Affairs (Unfair Business Practices) Bill*.¹¹⁵ The memorandum on the objects of this Bill indicates that the purpose thereof is, inter alia, to harmonise the national and provincial legislation; to replace the Business Practices Committee with a Consumer Affairs Committee; and to reconstitute the Special Court to which appeals in terms of the *Harmful Business Practices Act* lie, as a permanent court. The Bill further provides that the decision of the Special Court shall be one of equity and fact on the basis of fairness. Finally, if any person seeks to enforce or rely on an alleged unfair business practise in any proceedings before any civil court, the Bill provides that that court may, on application of any party to those proceedings, stay those proceedings in the interests of justice until such time as the Minister of Trade and Industry or the Special Court has come to a decision in terms of the Bill. The proposed definition of "business practice" includes, among other things, any agreement, accord, arrangement, understanding or undertaking, whether legally enforceable or not, between two or more persons.

2.3.3 The limitations of a Business Practices Committee effecting fairness in contracts

2.3.3.1 The Unfair Contract Terms Committee notes that the research team's endeavour in making their proposals for the establishment of a subcommittee of the Business Practices Committee was to follow a minimalist line, in that no unnecessary new structures or bureaucracies would be proposed. They consider that whereas there already was in place the Harmful Business Practices Act and its Business Practices Committee, with powers that could, with some amendments, be used also to effect preventive control over unfair contract terms to some extent, it seemed logical to the research team to go along that route. They consider that it was incidentally at all times the second best option and that the risk it carried - and still carries - with it was that, because of the very specialised expertise needed in order to perform preventative control over unfair contract terms, this might not be a priority in a more generally constituted Business Practices Committee, operating under a rather restrictive definition of a business practice, nor would they be able to gain the necessary expertise and experience to do the task as well as it should be done. They are of the view that some of the problems encountered by

114 Act 71 of 1988.

115 Published for comment in the *Government Gazette* No 18124 on 11 July 1997 Notice 1023 of 1997.

the Business Practices Committee since its establishment, leading to the need for that act to be currently under review, support this argument. The UCTC note that this leads back to the original idea of the research team, namely that preventative control can, also judging from experience elsewhere, best be undertaken by an independent Ombudsman-like office. The UCTC says it remains of the opinion that a dual system of control is needed for contracts, namely judicial and preventative control.

2.3.3.2 Mr Sibusiso Nkabinde states that the current Business Practices Committee's investigations and recommendations are not sufficiently publicised - even lawyers are not familiar with its works - and the Harmful Business Practices Act does not provide for the petitioning of the Committee or the filing of complaints by members of the public with the Committee to carry out investigations into such complaints or petitions. He considers that as a result of the lack of the Business Practices Committee's stature - as a result of inadequate publicity of its work - and lack of sufficient interaction with members of the public - through the lack of a mechanism to allow public petitions or complaints - it would be insufficient to merely appoint a sub-committee or liaison committee to investigate the use of unconscionable terms in standard form contracts without addressing the Business Practices Committee's lack of public stature, accessibility and transparency. He suggests that the *Harmful Business Practices Act* should be amended so as to allow the public to petition or file complaints with the Committee on grounds set out clearly in the Act, and, in addition, people with stature as a result of their expertise and preferably a demonstrable history of attempting to improve consumer protection, should be appointed to such committee. Mr Nkabinde proposes that consumer courts should be established nationally to resolve disputes arising from consumer contracts and means should be devised to make such courts easily accessible by consumers, from a cost point of view, and to make such courts less procedurally formal than ordinary courts. He considers that the biggest barrier to effective consumer protection is the cost of litigation which the ordinary consumer cannot afford, especially against companies who have the resources to delay or prolong proceedings so as to discourage consumers from litigating. Mr Nkabinde therefore suggests that such courts should have powers to review unconscionable contracts.

2.3.3.3 It is clear that considered from the perspective of creating an institution to effect pre-emptive contractual fairness, the concerns raised above are not sufficiently addressed by either

conferring the powers to the newly established Consumer Affairs Court, or by amending the Harmful Businesses Practices Act as proposed. It is also clear that the Consumer Affairs Court lacks the powers of a body such as the English Director-General of Fair Trading has (see below).

2.3.4 Shortcomings involved in providing measures solely enabling individuals to seek redress in courts

(a) Respondents' views

2.3.4.1 A number of respondents state that the position of consumers are hardly improved by provisions which only entitle aggrieved parties to contracts to seek redress in court. (See paragraphs 2.3.1.1 to 2.3.1.7 above.) This issue raises the question of access to justice.

(b) The view on access to justice in contractual disputes in foreign jurisdictions

2.3.4.2 The Australian view on access to justice in contractual disputes is put as follows:¹¹⁶

"Provisions of the substantive law ... are obviously very important in providing a means of achieving justice for individuals, particularly consumers, trying to enforce their contractual rights. This, however, may have limited effect in providing control in the interests of consumers generally. This is partly because of cost and other factors, increasingly discussed recently in public debate in Australia on 'access to justice' problems, making resort to the courts to resolve their disputes quite beyond the reach of most individuals. Moreover, even in those relatively rare cases which are brought to court, the decision in any individual case directly binds only the parties to the contract being sued on. The mere fact that a provision is likely to be held to be ineffective if litigation does arise does not necessarily deter enterprises from continuing to use such provisions in their contracts. Accordingly, many jurisdictions have experimented with a variety of techniques designed to provide a more generalised or 'abstract' control of unfair contracts. This can take various forms, but typically a public authority or an organisation of consumers or traders will be empowered to seek an injunction or similar order prohibiting the continued use by a trader of a contract term that is unfair to consumers.

Abstract control of unfair contracts almost of necessity concentrates on the substantive terms of contracts against which complaint is made. Many reform statutes in Europe follow a pattern of combining a general prohibition on unfair contracts with the setting out

116 Carter and Harland *Contract Law in Australia* at 514 - 516.

of certain types of clauses which are to be regarded as unfair. For example, ... in contracts with consumers, certain specified types of clause are presumed to be invalid unless the business party can show they are reasonably justified in the circumstances (the 'grey' list) and others are always invalid (the 'black' list). ...

Certainly a case can be made that somewhat greater certainty would be created if, following the European example, the existing 'shopping lists' of relevant factors appearing in State and federal legislation were to be supplemented by lists of types of clauses which are to be (absolutely or presumptively) ineffective, at least in consumer transactions."

2.3.4.3 The following arguments are raised in the United Kingdom in support of public control over contracts:¹¹⁷

Legislative adjustment of what might be termed the common law of consumer protection improves the position of the consumer and, in perhaps a rather imprecise way, helps to make more effective the market mechanism based on consumer/supplier dialogue. ...

The case for public controls becomes all the stronger when account is taken of practical difficulties which confront consumers seeking to enforce legal rights, however generous those rights may seem on paper. ... an effective consumer protection programme cannot be constructed from the operation of the private law alone.

Most fundamental of all is consumer ignorance of the law. Attractive though rights may look on paper, they will play a major role in the consumer/supplier relationship only where a sufficient number of consumers are aware of them. ... In fact, paradoxically, the more sophisticated and nuanced consumer protection law is on paper, the greater the risk that consumers will be confused by it and alienated from it in practice. Legal rights should be easy to grasp and to use. Lack of understanding of the law among consumers plainly defeats much of the purpose of the law. It should not be left out of account that ignorance of and/or disinterest in the nuances of consumer law among practising lawyers, perhaps even combined with antipathy to consumer disputes as trivial complaints, are yet a further impediment to its practical impact.

In part this leads to the charge that consumer protection law is, or has become, law for the middle class, at least (or especially) in its private law manifestations. The middle class complains about purchases, whereas poorer sections of society worry about being able to make purchases in the first place. It hardly matters whether a product is of satisfactory quality if you cannot afford it. The middle class understands the law and can either use it or threaten to use it; poorer sections of society are doubtful about its relevance to their needs. The allegation that consumer law is middle class law is not without foundation. If it is true that adjustment of the private law is of disproportionate assistance to already affluent members of society, then a stronger commitment to public law regulation may be

117 Howells and Weatherill *Consumer Protection Law* at 39 - 43.

appropriate.

Even where the consumer is aware, however dimly, that a legal point has arisen, it is a practical truth that literally the last thing that the typical disgruntled consumer will do is to initiate litigation against a trader. Court proceedings take time and cost money, even if they are ultimately successful. Naturally, if they are lost the consumer may be greatly out of pocket and obliged to pay his or her own costs and those of the other (winning) side. In practice, the cost of formal resort to law typically excludes the middle class as much as poorer members of society. Moreover, courts are intimidating to the average citizen. Consequently there will be a strong consumer preference to avoid legal proceedings. Frequently consumers write off loss to experience, occasionally perhaps after attempting to complain. The majority of consumers do nothing which will immediately affect the supplier's pocket. This is particularly likely to be the case in the event of small scale loss incurred as a result of a disappointing purchase. The rational consumer will not invoke the law. ...

Where action is actively pursued by the consumer, informal settlement will be preferred, where feasible. This preference will to some extent be shared by the trader. The small trader, especially, will be almost as reluctant as the consumer to embark on the perilous seas of litigation from which it is notorious that lawyers normally emerge the real and (sometimes) only winners. Nonetheless the risk remains that traders, typically with more resources at their disposal than consumers, will be able to use consumer reluctance to litigate as a method for fobbing off the vindication of consumer rights. ...

It is not difficult to construct a powerful argument that a legal system based on individual action by 'consumer' against 'trader' bears no useful relation to an economy of mass production and extended distribution and marketing chains. The pursuit of such distinct goals as the correction of market failure and fairness within a market order cannot be fully achieved under a system based purely on private law.

...

Contract and tort are also limited in their capacity to deliver fair outcomes. Contract, classically is in any event concerned with no such thing. It has latterly moved more in the direction of controls reflecting notions of fairness, but this aspect remains relatively unsophisticated and is in any event not undisputed. Tort law is more allied with ideas of social fairness. However, as judge-made law, it remains erratic and unpredictable in its scope.

Such qualifications to the role of tort and contract in securing an efficient and fair market are greatly deepened by the practical problems of securing access to justice. The reluctance of consumers to go to court and the absence of effective recourse to representative actions together shelter producers from the consequences of their failure to fulfil consumer demand and expectation, while also denying consumers the practical enjoyment of legal rights.

The perception that private law rights are often hazily understood by consumers and that their pursuit is frequently neglected sharpens the policy perception that an effective

programme of consumer protection in the modern market must embrace public law too. For the benefit of consumers, for the benefit of fair and honest traders who find themselves exposed to dishonest competition, and in the public interest generally in an efficient market system, action to improve the operation of the market can be justified."

2.3.4.4 The same authors suggest that the traditional methods of dispute resolution in the UK should be re-examined:¹¹⁸

"However, the most damning criticisms of private law as a method of consumer protection relate to the inability of legal institutions to deal with consumer complaints. Critics claim that, even if the substantive law were framed in the most pro-consumer terms, the rights granted to consumers would not be effective because the amounts of money involved are generally too small to be worth litigating; because the legal system and lawyers appear alien to the average consumer and only the more educated consumers are aware of and can articulate their complaints in terms which allow them to take advantage of the law. These criticisms have been well made and have encouraged responses seeking to question the way legal services are delivered to consumers and to re-examine dispute resolution procedures. ...

Many reforms have still been based on a paradigm which involves an individual consumer in dispute with an individual business. Attempts have been made to even up this relationship by providing or subsidising the advice costs of the consumer or making legal action less expensive, less intimidating, less risky and more convenient. However, legal reforms which continue to view consumer problems as individual problems are going to lead to a continuation of many of the present difficulties. Consumer law will continue to be viewed as 'middle class' law, for it will only be worth litigating disputes involving high-cost goods and services (although many middle-class consumers will themselves be excluded by the high cost of lawyers). Equally consumers will not be allowed to claim the organisational advantages which are automatically available to all but the smallest businesses. One response is to recognise the collective dimension by increasing the public law protection of consumers. Alternatively, consumers can be permitted to aggregate individual claims in group or class actions, or consumer organisations can be allowed to invoke private law rights on behalf of consumers generally."

2.3.4.5 Whilst it is acknowledged that civil and criminal sanctions do a great deal to protect the consumer, it is argued that they are not sufficient for the following reasons and that a

118 Howells and Weatherill *Consumer Protection Law* at 527 - 528.

third measure of consumer protection, namely administrative control by a public body is needed.¹¹⁹

- "Industry is never static for long and the enterprising trader is likely to come up with new business practices. Some of these, while within the law, may be harmful to consumers and swift action may be needed to curtail them.
- C There may be a number of dishonest or inefficient traders who may make large profits, *e.g.* by the delivery of shoddy goods or by practices which infringe the Trade Descriptions Act 1968. They may not be deterred by the occasional fine or award of compensation. What the consumer really needs is a system whereby such traders can be restrained from trading altogether unless they mend their ways.
- C The standards set by the law are minimum standards and the consumer can benefit if traders are persuaded to undertake additional voluntary obligations.
- C Neither the civil nor the criminal law achieve one of the most important aims of consumer protection - making the consumer aware of his rights."

2.3.4.6 The following views support the argument that curial invalidation of unfair terms will hardly ameliorate the position of consumers:

"We should not expect the invalidation of unfair terms in consumer contracts to provide more than a marginal improvement in the standard of living for consumers. The prospects of expensive litigation are likely to deter all but the most determined consumers from seeking a judicial declaration on the invalidity of an unfair contract term. The best protection for consumers is always likely to come from public administrative measures, which can tackle abuses in a whole sector of trade and can insist upon preventative measures which remove the offending terms from standard contracts."¹²⁰

"It is unrealistic to expect individual consumers to challenge the alleged use of unfair terms by sellers and suppliers in all but the most exceptional circumstances. It has long been established that well founded fears of expensive litigation and ignorance in relation to rules of law, legal procedures and so forth will deter consumers from enforcing their rights in court. It has equally been recognised that a more effective system for protecting consumers' right is to provide some type of administrative agency charged with the task of safeguarding and promoting rights on behalf of consumers."¹²¹

119 Lowe and Woodroffe *Consumer Law and Practice* at 299.

120 Collins 1994 *Oxford Journal of Legal Studies* at 243.

121 Collins 1995 *Web Journal of Current Legal Issues*; Beale in *Good Faith and Fault in Contract* at 256 - 258 notes that individual actions, even the "invisible hand" comprising the aggregate of individual consumers' decisions, cannot be relied on to achieve all the results which are necessary, and since individual challenges to unfair terms will always remain few because of the many obstacles to effective

2.3.4.7 The New Zealand Law Commission also considers that, far from the problem being limited to unfair contracts, an underlying problem exists of practical access to justice.¹²² They are of the view that it may not be enough that the courts can do justice in cases that come before them since many who are vulnerable cannot or do not pursue their rights in the courts for various reasons, and that the availability of legal aid is only one reason. They remark that empirical evidence suggests that members of groups most likely to be the victims of exploitation or unconscionable conduct are least likely to take the matter to court.

2.3.4.8 The Hong Kong Commission also remarks that litigation is unpopular with consumers.¹²³ They note that the rights given to a buyer under their Sale of Goods Ordinance are enforced by taking proceedings in the court and if the goods supplied are unmerchantable or unfit for the buyer's purpose, the buyer can take the seller to court and sue him for breach of his obligations under the Ordinance. They indicate that the question whether the matter will be dealt with in the District Court or the Small Claims Tribunal depends on the amount of money involved. (The jurisdiction of the District Court was shortly before increased to \$ 120 000 and that of the Small Claims Tribunal to \$ 15 000.) They remark that the result thereof will be that more consumer cases will go to the Small Claims Tribunal. The Hong Kong Commission considers that rules introduced to protect consumers would only be effective if they could be readily and easily enforced, and that legislation giving a right to sue in court may not be adequate as a consumer protection measure. They are of the opinion that even if their recommendations proposing the amendment of the Sale of Goods Ordinance, this would only go a short way towards what other jurisdictions have done. They note the following reasons why litigation is unpopular with consumers:

- * Legal fees have to be paid if a lawyer is employed;

legal action by individual consumers, supplementation of individual private remedies by public action or collective action has to be considered. Hugh Beale notes in respect of England that despite both consumer education and the *Unfair Contract Terms Act*, the level of complaints about unfair terms and conditions is still quite high. He notes that the Trading Standards Authorities and Citizen's Advice Bureaux received 16 200 complaints in 1989, 43% thereof related to defective goods or substandard services and 25% to selling techniques. He considers that 16 200 complaints is not a negligible number, and that the real dissatisfaction is probably much higher, even if not all grumbles are justified.

122 NZLC *Unfair Contracts* at 26 - 27.

123 LRCHK *Report on Sale of Goods and Supply of Services* at 46 - 47.

- * Where the amount of money involved is small, litigation is hardly justified as the costs may exceed the amount of money claimed.
- * Litigation tends to be long-winded and it causes the consumer anxiety to have the matter hanging over him for a long time;
- * It may be thought that it is to the advantage of the consumer to have the matter dealt with in the Small Claims Tribunal where the proceedings are informal and legal presentation is disallowed. This assumption may be incorrect as it may be difficult for the consumer to present and argue his case before the adjudicator;
- * The fact that most people brought their cases to the Consumer Council or the Hong Kong Tourist Association rather than going to court, shows that consumers would only go to court as a last resort.

2.3.4.9 It is noted that in India the legislature has not given any attention to problems of consumers arising out of exemption clauses.¹²⁴ Attention is drawn to the fact that it is not unusual for a trader to display a notice at a prominent place in his establishment stating that goods sold will not be accepted back even though these are defective, and that these directions are accepted by most consumers without a murmur. It is said that consumers in India are so exposed to exclusion clauses that hardly any of them find them burdensome in comparison with the amount of harassment to be faced if such cases are taken to court. It is noted that in so far as consumers are concerned exclusion clauses continue to be enforced by private traders and the state owned public utility services. It is stated that in view of poverty, ignorance and lack of powerful consumer organisations, it would be futile to expect that consumers will resort to court action to vindicate their rights, and that most consumers depend exclusively on state monopolistic services or undertakings for their basic needs. It is suggested that in the Indian conditions the best way to deal with the menace of such contracts or terms of contract would be to have all standardised contracts containing exclusion clauses approved by a designated authority.

2.3.4.10 We noted above that the Japanese Consumer Policy Committee suggests that specific and comprehensive provisions should be adopted and that measures be taken to enhance the settlement of disputes.¹²⁵ The Committee states that individual forums and methods for settling disputes include mutual negotiation, mediation and intervention, and arbitration, and partly because these forums and methods are not sufficiently well-known, consumers do not

124 Saraf *Law of Consumer Protection in India* at 102.

125 <http://www.epa.go.jp/e-e/doc/e1996ca2.html> accessed on 10/12/1997.

necessarily resort to these means for settling disputes. They consider that should consumers be unable to reach an agreement in these forums and disputes, the next step is to seek resolution in a lawsuit, but they note that this involves large expenses and a considerable amount of time before final resolution. The Committee notes that additionally, consumers tend to bring dissatisfaction and complaints to Local Information Centre consultations, with the result that other dispute settlement institutions are not fully utilized. The Committee therefore states that this makes it necessary to enhance dispute settlement procedures, and specifically, this will involve on the one hand enhancements in arbitration institutions, and on the other, active efforts to explain dispute settlement systems to consumers and the referral of consumers by the Local Information Centres to appropriate forums and methods. The Committee considers that doing this will enable the disputes settlement process to rectify transactions that are disadvantageous to consumers, and by having consumers themselves involved in the settlement of disputes will improve the awareness of consumer issues among all parties involved while at the same time contributing to greater independence by establishing the practice of individuals making their case and taking responsibility for the case they make.

2.3.5 Administrative procedures in foreign jurisdictions

(a) A proposed consumer Ombudsman for New Zealand

2.3.5.1 The New Zealand Commission argues that some machinery for public action may be unavoidable if there is to be a truly effective remedy for unfair contractual practices. They believe that one possibility is to introduce a consumer ombudsman who might have powers not merely to investigate unfair contractual practices (on complaint, and perhaps on his or her own initiative) but also to hear parties and to make recommendations. The New Zealand Commission is of the opinion that, probably by analogy with the Ombudsmen under the *Ombudsmen Act 1977*, a consumer Ombudsman should not be able to make binding orders.¹²⁶ They remark that in Sweden, quite apart from the consumer ombudsman, an independent agency, namely the Board for Consumer Policies, has jurisdiction to settle consumer disputes, including

126 NZLC *Unfair Contracts* at 26 - 27.

allegations of unfair contractual terms.¹²⁷ They note, however, that the decisions of this Board, although usually accepted, are not legally binding. They consider that it may well be that a similar institution should be set up in New Zealand. They further propose that the ordinary courts should have sole jurisdiction to decide claims and grant relief, but that the Commerce Commission, which seemed the only suitable existing agency, should be given express standing to bring proceedings either on an individual contract or a class of contracts. They further propose that such contracts need not be proffered in business by one person, but, for instance, they might be contracts drawn up by a trade association and proffered by its members. They explain that the Commerce Commission would not simply be acting as a complainant's representative but in the public interest and when the Commerce Commission were to bring proceedings, the court may enjoin an unfair contract term generally. Hein Kötz remarks that the effectiveness of consumer bodies are substantially limited by the fact that they have limited financial resources.¹²⁸ He notes that this is the reason why it has been proposed often that governmental administrative bodies with comprehensive powers to examine market relations of businesses be established. He points out that such a measure was implemented in Sweden first.

(b) The Danish Consumer Ombudsman and the National Consumer Agency of Denmark

2.3.5.2 The following provisions of the Danish *Marketing Practices Act* governs the appointment and some of the powers of the Danish Consumer Ombudsman:¹²⁹

15.-(1) It shall be the duty of the Consumer Ombudsman to see that the provisions of this Act are not contravened, especially considering the interests of the consumers.

(2) The Consumer Ombudsman may require all such information as he considers necessary for the performance of his functions including information considered necessary to decide whether a matter falls within the scope of this Act.

(3) The Consumer Ombudsman shall possess the qualifications and fulfil the general conditions necessary for appointment as a judge.

(4) Decisions made by the Consumer Ombudsman under this Act cannot be made the subject of an appeal to any other administrative authority.

(5) The Minister of Industry and Coordination shall be empowered to make regulations

127 NZLC *Unfair Contracts* at 46.

128 Kötz *Europäisches Vertragsrecht* at 232.

129 Danish *Marketing Practices Act*.

specifying the functions of the Consumer Ombudsman.

16.-(1) The Consumer Ombudsman shall by negotiation endeavour to induce persons carrying on a trade or business to act in accordance with the principles of good marketing practices and with the provisions of this Act in general.

(2) If a person carrying on a trade or business fails to fulfil a commitment given to the Consumer Ombudsman after negotiations conducted pursuant to subsection (1) hereof, the Consumer Ombudsman may issue such orders to the person concerned as may be deemed necessary for ensuring the fulfilment of such commitment.

17. After conducting negotiations with the relevant trade and consumer organizations, the Consumer Ombudsman shall endeavor to influence the conduct of the persons carrying on a trade and business by drawing up and publishing marketing guidelines within specified areas considered important, especially to the interests of the consumers.

18.-(1) The Consumer Ombudsman shall, upon request, give his opinion on the legality of contemplated marketing initiatives unless such opinion gives rise to any particular doubt or special circumstances exist. An advance statement shall not imply that an actual decision has been taken with respect to the legality of the initiative concerned.

(2) Where the Consumer Ombudsman has given an advance statement to a person carrying on a trade or business to the effect that a contemplated initiative will be legal in the opinion of the Consumer Ombudsman, the Consumer Ombudsman may not on his own initiative intervene with respect to an initiative covered by the advance statement and implemented within a reasonable time after the issue of such advance statement.

(3) The Minister of Industry and Coordination may lay down specified rules governing fees for the issue of advance statements.

19.-(1) Any person with a legal interest herein may institute legal proceedings with respect to injunctions, orders or liability for damages pursuant to section 13 of this Act. The Consumer Ombudsman may institute legal proceedings with respect to injunctions and orders pursuant to section 13 (1) of this Act.

(2) If a charge is brought against a person for contravention of this Act, the execution of such charge shall be left to the Consumer Ombudsman if he so requests.

20. If, in connection with a contravention of the provisions of this Act, a plurality of consumers has uniform claims for damages, the Consumer Ombudsman may, upon request, recover the claims collectively.

21.-(1) The Consumer Ombudsman may issue an interlocutory injunction where there is a reasonable possibility that the object of an injunction referred to in section 13 (1) of this Act may not be achieved if the decision of the court has to be awaited. An action to confirm the injunction shall be brought not later than the next following weekday. The provisions of paragraph (1) of section 648 (1), sections 648 (2), 649, 650 and 651 of the Danish Administration of Justice Act shall apply correspondingly and the provisions of sections 628 (1), 629, 633, 634 (2) and (5), 636 (1), 639 and 640 (1) shall apply with the necessary modifications.

(2) Where judgment in a case to confirm an injunction under the provisions of subsection (1) hereof cannot be given before the expiration of five weekdays after the institution of proceedings, the court may, in the course of the preparatory stages of the case before the expiry of the said period, order that the injunction shall continue. Before such a decision is made, the court shall, as far as possible, give the parties an opportunity to make representations. If the injunction is not confirmed before the expiry of the said period, it shall lapse.

22.-(1) Any person guilty of breach of an injunction or non-compliance with an order issued by the court or by the Consumer Ombudsman pursuant to section 16 (2) hereof shall be liable to a fine or to mitigated imprisonment. However, non-compliance

with an order to repay money received shall not be subject to penalty.

(2) Any person who fails to give such information as is required of him under section 15 (2) of this Act or, in matters falling within the scope of this Act, gives false or misleading information to the Consumer Ombudsman shall be liable to a fine, unless the offence carries a more severe penalty under any other enactment.

(3) Any person who is guilty of an offence under sections 2 (1)-(3) or 6-9 of this Act or who wilfully contravenes the provisions of section 5 of this Act shall be liable to a fine, unless the offence carries a more severe penalty under any other enactment. Offences under subsections (2) and (3) of section 2 of this Act consisting in injurious statements made in respect of a person carrying on a trade or business or in respect of any other matters particularly relating to such person shall be a cause for private prosecution.

2.3.5.3 The Danish Consumer Ombudsman Mr Hagen Jørgensen states that the Consumer Ombudsman - who is appointed by the Government - has the task to make sure that private and public business activities are conducted in accordance with good marketing practices.¹³⁰ He notes that the Parliamentary Ombudsman and the Consumer Ombudsman are independent but they lack the powers to make decisions with binding effect. He says in their jobs they must try to convince, to persuade or to put pressure on the subject of their investigations. Mr Jørgensen notes that if a company does not comply with the statements of the Consumer Ombudsman the Ombudsman can ask the courts to issue injunction on acts that infringe the law and if a specific prohibition in the law is violated - for instance the prohibition of misleading advertising - the Consumer Ombudsman can act as public prosecutor at the courts. He states that proper marketing practices are a basic normative standard and it is the Ombudsman's duty to supplement and further develop the content of the term "good marketing practice" also in relation to unfair contract terms. He notes that the Consumer Ombudsman gives special attention to consumer interests on basis of an average norm and attempts to balance those interests with business and society interests. He remarks that the Ombudsman informs the public of cases of common interest, whether they are handled by him or by the courts. He notes that the Consumer Ombudsman may intervene in civil law suits in order to support the individual consumer - for instance if the case is of fundamental character and he can claim restitution for the individual consumer by means of a trial on an illegal marketing practice. Further, if a number of consumers have equal claims of compensation, connected to an infringement of the law, the Consumer Ombudsman can claim their compensation collectively.

130 Hagen Jørgensen "Company and Consumer Dialogue in Europe".

2.3.5.4 Mr Jørgensen considers that the most important tool of the Danish Consumer Ombudsman is negotiation. He explains that negotiations may be carried out individually with each company, but often the problems in question are common to a trade or they may be of importance to the market in general. He states that over the years his predecessors and he have issued several guidelines for instance on price advertising, on comparative advertising and on the contents of guarantees. He considers that mainly all these guidelines are respected because they have been acknowledged by the trade organisations and the Danish Consumer Council. He explains that the work of the Consumer Ombudsman is not in any way meant to hinder self-control in the business world and that he respects very much the work carried out within the International Chamber of Commerce and the different codes that the ICC has issued. Mr Jørgensen considers that self-control exercised by individual companies is in his mind the most important mechanism and therefore he wants to inspire companies to look at ethics as a tool in value based management.

2.3.5.5 Mr Jørgensen states that through the last 5 years the Danish Consumer Ombudsman has brought the banks to the courts in a number of cases, because it has been impossible to obtain negotiation results on different consumer problems, including contract clauses authorising banks to alter at their discretion the economic conditions for regular customers. He says it is his experience that other lines of business - including industry - are more open-minded and more open for dialogue, than the banks. In general he feels that business and trade are well aware of the mutual interest between companies and consumers in a fair trading environment. He states that the Danish Ombudsman system finds itself committed to a line of dialogue and negotiation and only when that fails and the need is apparent the Consumer Ombudsman goes to the courts which is a time-consuming and expensive way to solve daily problems.

2.3.5.6 The Danish National Consumer Agency (Forbrugerstyrelsen) is an agency of the Danish Ministry of Business and Industry (Erhvervsministeriet), and is secretariat of the Consumer Complaints Board (Forbrugerklagenævnet), the Consumer Ombudsman (Forbrugerombudsmanden) and the Danish Government Home Economics Council (Statens

Husholdningsråd).¹³¹ The Consumer Complaints Board deals with consumers' complaints concerning consumer goods, goods and services, meaning that the Complaints Board settles most complaints concerning textiles, furniture and carpets, radio and television sets, kitchen hardware, and second hand cars. By using mediation and negotiation the Agency contributes to creating and maintaining a high level of consumer protection, especially as far as quality, safety, health, and economic and juridical rights are concerned. The Agency's powers of settling consumer complaints is an administrative and less expensive alternative to judicial proceedings in court. It is considered that the settlement of complaints have a generally reconstructive effect on the commercial market, due to the fact that trade organisations encourage their members to adjust their procedures according to decisions made. If the decision is made by the Board or if it establishes an agreement between a complainant and a trader, and the decision or agreement of the Board is not complied with, the secretariat is empowered to bring the case before the courts at the request of and on behalf of the complainant.

(c) The Swedish Consumer Ombudsman

2.3.5.7 The central government agency in charge of consumer affairs in Sweden is the National Board for Consumer Policies (*Konsumentverket*).¹³² The Board for Consumer Policies is headed by a Director General who is also the Consumer Ombudsman *Konsumentombudsmannen*. He represents consumer interests in relation to businesses, and pursues legal action on behalf of consumers. He is also the chairman of the Governing Council of the Board who can make decisions in certain policy matters. One important task of the National Board for Consumer Policies and the Consumer Ombudsman is to ensure that companies abide by the laws and ground rules which are applicable in the consumer field, and that consumer rights are respected. It is the task of the Board and the Ombudsman to take action if companies violate the following laws, namely the *Marketing Act*, the *Price Information Act*, the *Consumer Contract Terms Act*,¹³³ the *Product Safety Act*, the *Consumer Sales Act*, the

131 <http://www.forbrugerstyrelsen.dk/uk/fsuk.htm> accessed on 10/12/1997.

132 "Swedish Consumer Policy" [http://www.lysator.liu.se/\(ns\)/nordic/morror/SI/consumer.html](http://www.lysator.liu.se/(ns)/nordic/morror/SI/consumer.html) accessed on 10/12/1997.

133 It is illegal to employ contract conditions which exclusively benefit the seller at the expense of the consumer. This can apply to the terms of a contract of sale, a rental agreement, warranties, order forms, etc.

Consumer Services Act, the Consumer Credit Act, the Consumer Insurance Act and the Door-to-Door Sales Act.

2.3.5.8 The Board states that an intervention by them or the Consumer Ombudsman often starts when a consumer makes a complaint. The Board usually receives about 3,500 complaints per year, but it can also pursue cases on its own initiative. In most cases, companies agree to put matters right voluntarily. If they fail to do so, the Ombudsman may bring legal proceedings, which may lead to the court issuing one of the following orders-

- * a prohibition order, meaning that the company is prohibited from using a particular kind of marketing, imposing inequitable contract conditions, or selling a dangerous product;
- * an information order, which means that the company is ordered to provide important information in its marketing to the consumer;
- * an order to recall a product, compelling the company to repair, replace or take back hazardous goods that have already been sold.

2.3.5.9 The Board remarks that these orders are combined with a conditional fine, and it is a substantial penalty which the company can be made to pay, if it violates the court order. The Ombudsman may furthermore issue an injunction himself in some cases but this must be approved by the company if it is to be valid. The Board explains that to a large extent the Consumer Board concludes agreements with individual companies or various parts of the business sector, often with a whole industry, on marketing activities or contract terms, and most conditions used in standard contracts today are the result of such agreements. The Board also encourages self-regulation in various parts of the business community.

2.3.5.10 Prof Ewoud Hondius notes that five situations can be distinguished in the negotiating process conducted by the Swedish Consumer Ombudsman, namely-¹³⁴

- the trades person (user of the standard form term) convinces the Consumer

134 Hondius *Standaardvoorwaarden* at 775.

Ombudsman that the standard form clause is fair and the Ombudsman will under these circumstances decide not to request the market court to prohibit the use of the term concerned;

- the Ombudsman convinces the trader that the terms concerned are unfair and that there is a strong possibility that the market court will decide likewise, resulting in the trader amending the terms and the solution of the dispute concerned;
- the Ombudsman imposes a prohibition against the trader using the terms concerned in future and the trader accepts the prohibition within the period set by the Ombudsman (which is only possible in regard of less important issues) and the legal effect of such an acceptance equals that of a prohibition issued by the market court;
- the Ombudsman does not succeed in convincing the trader of the unfairness of the terms concerned, the Ombudsman institutes a case in the market court with the request to issue a prohibition and the effect of a case being instituted or the threat of a case being instituted may result in the trader realising the unfairness of the terms concerned;
- the trader refuses to negotiate or to furnish information to the Ombudsman which entitles the Ombudsman to impose a fine.

2.3.5.11 Prof Hondius states that if negotiations are not successful on the question of the fairness of terms the Ombudsman may submit the issue to the market court and that this power vests firstly in the Ombudsman meaning that consumer associations, traders and employees can act likewise only if the Ombudsman refuses to institute action in the market court. Prof Hondius remarks that the first terms the Ombudsman considered when he was appointed, were those terms which were void under the then existing civil law.¹³⁵ He considers that traders are as slow in amending their standard term contracts to comply with new legislation as the legislature is tardy in reacting to new social developments. Prof Hondius states that the Swedish system of control cannot be described as anything but successful.¹³⁶ He notes that the Swedish legislature realised that effective administrative or judicial control over contractual terms must lead to prior informal discussions and that is the reason way it created the Consumer Ombudsman. He

135 Hondius *Standaardvoorwaarden* at 779.

136 Hondius *Standaardvoorwaarden* at 783.

considers that since the threat of action being instituted in the market court is so effective the market court has little work to perform. He states that a disadvantage of this result is that the market court was largely unable to perform the task of taking charge of legal developments in this field which was originally allocated to it. He nevertheless considers that his criticism should not detract from the admiration one should have for the new approach the Swedish legislature adopted when establishing the Ombudsman.

(d) The English *Unfair Terms in Consumer Contracts Regulations* of 1994 and the administrative powers of the Director-General of Fair Trading in England

2.3.5.12 The Director-General of Fair Trading in England and has the following powers in taking preventative steps against the use of unfair terms ¹³⁷ -

- C To consider any complaint made to him that any contract term drawn up for general use is unfair, unless the complaint appears to him to be frivolous or vexatious.
- C If having considered a complaint about any contract term he considers unfair he may, if considering it appropriate to do so, bring proceedings for an injunction (in which proceedings he may also apply for an interlocutory injunction) against any person appearing to him to be using or recommending the use of such a term in contracts concluded with consumers.
- C He may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.
- C He must give reasons for his decision to apply or not to apply, as the case may be, for an injunction in relation to any complaint which the Regulations require him to consider.¹³⁸
- C He may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of the Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by the

137 In terms of regulation 8 of the *Unfair Terms in Consumer Contracts Regulations* of 1994, see Lockett and Egan *Unfair Terms in Consumer Agreements*.

138 The court on an application by the Director may grant an injunction on such terms as it thinks fit and an injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or term having like effect, used or recommended for use by any party to the proceedings.

Regulations.

2.3.5.13 Article 7(2) of the *European Community Directive on Unfair Contract Terms in Consumer Contracts*, (the *EC Directive*) provides that Member States are to take steps to ensure that adequate and effective means exist to prevent the continued use of unfair contract terms. It further provides that provisions must be adopted whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.¹³⁹ Article 7 further provides that its legal remedies may be directed either separately or jointly against a number of sellers or suppliers from the same economic sector or their associations. The English Department of Trade and Industry initially argued that no action was necessary in the United Kingdom to implement the provisions of Article 7 of the *Directive*. The business sector welcomed this approach whereas it raised strong opposition from consumers and independent lawyers also noted that some form of implementation was required. The strong response led to the introduction of Regulation 8 noted above. A commentator notes that the advantage of this regulation lies in the fact that it would appear to offer a relatively simple, rapid, effective and inexpensive method for the consumer to take action against unfair terms in consumer contracts, bypassing the need to take direct legal action against the seller or supplier involved.¹⁴⁰

2.3.5.14 It is stated that the English Regulations introduced a considerable degree of flexibility into the process to be adopted for the prevention of the continued use of unfair terms.¹⁴¹ It is considered that should the Director give a clear indication that he considers a term in question to be unfair, it is probable that in the majority of cases the offending sellers, suppliers or association thereof will concede the future use of such terms by way of undertaking rather than face costly litigation. It is noted that the vast majority of consumers are deterred from taking legal action by the high cost of litigation and that a complaint lodged with the Office of Fair Trading who may take legal action removes the issue of costs and also the strong deterrent

139 Lockett and Egan *Unfair Terms in Consumer Agreements* at 57.

140 Lockett and Egan *Unfair Terms in Consumer Agreements* at 59 and 61.

141 Lockett and Egan *Unfair Terms in Consumer Agreements* at 59.

in the effective enforcement of consumer legislation. It is said that a disadvantage of the Regulations is that there is no specific right of appeal from a decision of the Director of Fair Trading. It is further noted that although it would appear that if the Director does not take action in respect of a particular term or type of term, the complainant consumer would not be in a position to take further action, it is probable that the decision by the Director will be susceptible to judicial review.¹⁴²

2.3.5.15 Hugh Beale notes, in considering the powers of the English Director-General of Fair Trading under the Regulations and article 7(2) of the *Directive* that an opportunity was lost to make an improvement in the English law to ensure adequate and effective means to prevent the continued use of unfair terms.¹⁴³ Beale believes it is worth considering the following conditions under which the type of procedure envisaged by article 7 would likely to be really adequate and effective:¹⁴⁴

- "1. The mechanisms for obtaining an order prohibiting continued use of the unfair term must be speedy.
2. There must be an effective way of publicising decisions that particular clauses are unfair. Relying on percolation of information from the law reports is probably not enough. Under the Regulations the Director-General may arrange for dissemination of information about the operation of the Regulations to the public. A public register would help, or a provision to enable clauses declared unfair to be added to the grey list which I hope will form part of the Regulations to be made under the Directive.
3. Orders made that terms are unfair should be effective not only against the individual seller or supplier but also any trade association which recommends use of the term and, preferably, other individual sellers or suppliers using it. This is envisaged by Article 7.3. Regulation 8(6) permits injunctions against 'any similar term ... used or recommended for use by any party to the proceedings.
4. The order should not relate just to the use of the exact same clause in the specific circumstances of the case. The fact that the Directive is dealing with 'grey' clauses

142 Lockett and Egan *Unfair Terms in Consumer Agreements* at 60.

143 Lowe and Woodroffe *Consumer Law and Practice* at 150 are of the view that it is strongly arguable that this provision does not meet the requirements of section 7 and they consider that consumer organisations may well litigate this issue, noting that the Consumer Association is seeking judicial review of the Department of Trade and Industry's decision in this regard, or that consumer organisations may persuade the EC Commission to take the UK Government to the European Court.

144 Beale in *Good Faith and Fault in Contract* at 256 - 259.

which may or may not be unfair, according to the circumstances, causes a significant difficulty in this respect. A power to enjoin the further use of an unfair term would be of little use if it could be evaded by the use of slightly different words, a different presentation or very slightly more generous terms so as to take it outside the ban without any real change to the merits. Orders would have to be made in quite general terms, with guidance as to what is and is not acceptable.

5. The decision and the order will have to take into account the circumstances in which the clause was used and might be used in the future, since a clause might not be unfair in all situations. To some extent this is a question of the degree of information given to the consumer, and guidance on that should not be hard to formulate. It gets harder when the court has to take into account other factors. ...
6. It will not be easy to formulate the guidance businesses will need. The laws of other countries permit similar challenges to 'grey listed' terms, ...
7. The decision must be made by an appropriate body. In the light of the difficulties mentioned in (4) and (5), I wonder whether the questions are not more complex and less precise than whether an advertisement is misleading, and whether it really is appropriate for the High Court or County Court to decide them. Decisions under UCTA [the Unfair Contract Terms Act] have not produced very clear guidance as to what is or is not reasonable. The range of information for a full consideration would be large. There seems to be a case for a single, specialised tribunal which can build up experience - in Victoria there is now a Market Court consisting of a County Judge as president and two advisers. Or would it be better to give the decision to the Director-General of Fair Trading himself, perhaps with the possibility of an appeal to a court? The power to initiate action could then be given to other bodies such as the National Consumer Council or perhaps Trading Standard authorities.
8. It is desirable to decentralize initiative. If the procedure is to be effective there must be a realistic prospect of action against unfair terms. I do not mean any criticism of the Office of Fair Trading when I say that its initiatives in this regard will necessarily be constrained by the resources available to it - it may not, for example, be able to follow the example of the Israeli Ministry of Justice which reportedly has a group dedicated to reviewing contracts. Under the Regulations, the Director-General has a duty to consider any complaint that a term is unfair, unless the complaint appears frivolous or vexatious; but he only has a power to bring proceedings 'if he considers it appropriate to do so'. He must give reasons if he does not act, but he might legitimately give such proceedings a low priority, eg if the term is not widely used.
9. Other bodies which may have different priorities and maybe a different view should be permitted to act; in other words we should follow the lead of several other Member States and give consumer organizations the power to initiate action. In France some 20 consumer organizations have been recognized for this purpose.
10. If organizations other than the Office of Fair Trading are to be permitted to take

action, the cost of seeking a declaration must be low, or the threat of high bills for costs if they lose will deter them. The Victorian Market Court permits legal presentation but does not award costs."

- (e) The powers and duties of the Director-General of the Department of Consumer Affairs in New South Wales

2.3.5.16 The Director-General of the Department of Consumer Affairs in New South Wales who is the Commissioner in terms of the *Fair Trading Act*, has the following powers and duties:

* The Commissioner may-

- (a) advise persons in relation to the provisions of the Act, and of any other legislation administered by the Minister, and take action for remedying infringements of, or for securing compliance with, those provisions, whether on complaint or otherwise,
- (b) make available to consumers, and persons dealing with consumers, general information with respect to:
 - (i) the Act and other legislation administered by the Minister, and
 - (ii) matters affecting the interests of consumers,
- (c) receive complaints from persons on matters (including fraudulent or unfair practices) relating to the supply of goods or services, or the acquisition of interests in land, and deal with any such complaint (whether or not under paragraph (d)) in such manner as the Commissioner considers to be appropriate,
- (d) investigate the matter the subject of a complaint received under paragraph (c) or refer the complaint to a public authority, or any other body, that the Commissioner considers to be best able to take action, or provide advice, in relation to the complaint, and
- (e) make known, for the guidance of consumers and persons dealing with consumers, the rights and obligations arising under laws relating to the interests of consumers.

* The Commissioner must-

- (a) keep under critical examination, and from time to time report to the Minister on, the laws in force, and other matters, relating to the interests of consumers, and
- (b) report to the Minister on matters relating to the interests of consumers that are referred to the Commissioner by the Minister,

and, for those purposes, may conduct research and make investigations.

* Where a complaint is received the Commissioner may-

- (a) investigate the complaint even if it has been referred to a public authority or to another body, or
- (b) refer the complaint to a public authority, or any other body, even if an investigation of the matter has been commenced or completed by the Commissioner.
- (f) Argentinian administrative measures

2.3.5.17 Argentinian legislation prohibits certain contract clauses contained in adhesion or similar contracts which are detrimental to the consumer.¹⁴⁵ The Secretary of Industry and Commerce is the national enforcing agency whilst the City of Buenos Aires and the provinces are the local enforcement agencies. The provincial government may also delegate functions to municipal governments or other bodies within the jurisdiction of the province. The Secretary of Industry and Commerce has the following powers, namely to - propose regulations implementing the law; develop enforcement policies and to intervene as necessary to implement such policies; maintain a national register of consumer organisations; receive and act upon consumer complaints; conduct inspections necessary to ensure compliance with the law; and to arrange hearings to resolve complaints or violations. These enforcement mechanisms can be used following consumer complaints or action by the Secretary.

2.3.5.18 The Argentinian administrative complaint procedure established by the statute assumes that the formal determination of an complaint regarding a contractual clause will be preceded by an attempt at settlement of the complaint. If an agreement is reached during the settlement or conciliation process which is subsequently breached, the breach is treated as a violation of the law and subject to sanctions. In the case where conciliation is unsuccessful, a written statement and factual material has to be submitted to the alleged violator, who has five days to respond. The Secretary has the power to order the alleged violator in the statement of facts or at any time during the proceedings to cease particular conduct or action pending the outcome of the proceedings. The statute grants a very wide discretion to the Secretary for preparing technical material, admitting evidence and controlling the proceedings. The Secretary may impose the following sanctions, namely a warning, a fine ranging from 500 to 500 000

145 Article 38 of Law 24-240, see Jaffe and Vaughn *South American Consumer Protection Laws* at 21 - 23 & 43.

pesos (constituting triple the illegal gain or benefit of the violation), prohibiting the sale of the goods or the products or merchandise involved in the infraction, the closure of the business for a period of up to 30 days, debarment from contracting with the State for a period up to five years, and loss of concessions, privileges, tax benefits, or special benefits that the violator enjoys. The sanction has to be published in the newspaper of greatest circulation in the jurisdiction where the infraction has occurred and the violator has to pay for the publication.

(g) Administrative measures under the Brazilian Consumer Protection Code

2.3.5.19 The Brazilian Consumer Protection Code¹⁴⁶ (the Brazilian Code) provides that the Federal government, the States, the Federal District and the municipalities must monitor and control the production, manufacture, distribution and advertising of products and services, the consumer market in order to safeguard the consumer's life, health, safety, information, and well-being, and issue any guidelines¹⁴⁷ that may be necessary therefor.¹⁴⁸ The Brazilian Code also provides that the Federal government, the States, the Federal District and the municipal agencies in charge of monitoring and controlling the consumer market shall have permanent committees to draft, review and update the guidelines. It states, furthermore, that the participation in this process by consumers and suppliers is obligatory.

2.3.5.20 The Brazilian Code makes provision for the following administrative sanctions, without prejudice to civil and criminal sanctions or any other sanctions defined by specific legislation, in the case of infractions of the guidelines protecting the consumer, namely- fines; product seizure; destruction of the product; cancellation of product registration at the competent authorities; prohibition of product manufacture; suspension of product or service supply; temporary suspension of the activity; revocation of concession or permission for use; cancellation of the permit for the establishment or activity; total or partial closing down of the establishment, work or activity; administrative intervention; and imposition of counter-

146 Law No 8078 of 11 September 1990.

147 The guidelines are considered below.

148 Article 55 of the Brazilian Code, see Jaffe and Vaughn *South American Consumer Protection Laws* at 81 & 121 - 122.

advertising.¹⁴⁹ The fine may be graduated in accordance with the severity of the infraction ranging from 300 to 3 000 000 times the National Treasury Bond. The sanctions of product seizure, product destruction, prohibition of manufacturing a product, suspension of a product or service, cancellation of a product registration or revocation of a concession applies when the defect reflects inadequacy in the control of the product.¹⁵⁰ The other serious sanctions, such as cancellation of a license, the closing down or temporarily suspending of an activity, and administrative intervention apply to suppliers who repeat only the more serious violations of the guidelines or of consumer protection legislation. The cancellation of a concession is a possible sanction where the supplier performing a public function has violated a contractual or legal obligation. An order of counter-advertising may be made in cases where the supplier engages in misleading or unfair advertising.¹⁵¹ Furthermore, the counter-advertising must take place in the same manner, frequency, and visibility, and in the same vehicle, space and time as the original misleading advertising, the supplier having to bear the cost of the counter-advertising.

(h) Assurances, undertakings and pre-validation of terms

2.3.5.21 Measures whereby assurances and undertakings are obtained from parties to refrain from using unfair contract terms and the submitting of contracts for approval, so-called pre-validation of contracts, are further mechanisms used to effect fairness in contracts. Hugh Beale notes that, under the *Fair Trading Act* of 1973, the English Director-General first has to attempt to get an assurance from the trader as to its future conduct, and under the Regulations, the Director-General may have regard to any undertakings given to him.¹⁵² He further notes that Germany has a similar procedure, but that the German consumer organisations are empowered to act under their Law on Standard Contracts. These organisations can, therefore, obtain written assurance from the businesses and take proceedings if the assurance is broken. He notes that this has proved extremely important and effective, had a significant influence where markets are

149 Article 57 of the Brazilian Code.

150 Jaffe and Vaughn *South American Consumer Protection Laws* at 82.

151 Paragraph 1 of article 37 of the Brazilian Code provides that advertising is unfair, inter alia, when it is discriminatory, incites violence, exploits fear or superstition, takes advantage of a child's lack of judgment and experience, fails to respect environmental values, or is capable of inducing the consumer to behave in a manner that is harmful or hasardous to his or her health or safety.

152 Beale in *Good Faith and Fault in Contract* at 259.

dominated by a small number of large firms using broadly similar conditions, and that the impact on more fragmented markets has, not surprisingly, been less.

2.3.5.22 Hein Kötz further notes that in a number of countries contracts are used throughout a specific trade negotiated by and agreed to by consumer organisations and trade associations.¹⁵³ He considers that often there is a shortage of consumer organisations which energetically represent the interests of consumers during such negotiations. He believes that there is therefore ample justification to empower a governmental body with the mandate for negotiating such contracts. He states that in the Netherlands they went the other way: Section 6.214 of the *NBW* provides for the appointment of a governmental commission which may draft standard form contracts for particular sections of the business community. If such a standard form contract is approved by government and publicly published, it is valid, similarly like an Act, for all individually concluded contracts, in so far as the parties do not conclude deviating terms.

2.3.5.23 Hugh Beale asks whether, if the tribunal or administrative authority empowered to act is to set out the conditions under which terms are fair or unfair, it is not tantamount to pre-validation. He doubts that any subsequent court faced with the same clause in an individual case would readily dissent from the tribunal's view. He considers that it is arguable that it should be prevented from doing so except in a case in which the circumstances were radically different from those contemplated by the tribunal. He considers, furthermore, if one is coming this close to pre-validation, why not permit the seller or supplier to initiate action? Hugh Beale notes that the innovative pre-validation procedure of the Israeli *Standard Contracts Act* of 1964 did not produce many applications, and that one commentator suggested that firms feared retroactive invalidation. He states that Hondius reported, however, in 1987 much greater success with the 1982 *Standard Contracts Law* and that in four years some eighty contracts were submitted for approval. Hugh Beale notes that the part of the reason is perhaps that the new law contains not just the carrot but also the stick, since there are procedures for the Attorney General, the Commissioner of Consumer Protection and any approved customer's organisation to seek annulment of disadvantageous conditions. He remarks that there was no equivalent in the 1964 law and the court may also be taking a more severe attitude.

153 Kötz *Europäisches Vertragsrecht* at 234.

2.3.5.24 Hugh Beale draws attention to the fact that the English Law Commission considered pre-validation in its pre-Unfair Contracts Terms Report, and that it rejected the idea, partly because of the difficulties of pre-validating terms which may or may not be reasonable according to the circumstances. Beale accepts those difficulties but thinks that they will have to be faced anyway under the procedures required by the European *Directive*. He considers that it may be necessary to validate terms under prescribed conditions of use, just as he thinks it will be necessary to proscribe terms under certain conditions. He states that he agrees with the suggestion made by the House of Lords Select Committee during 1991 - 1992 that pre-validation should be reconsidered. Brian St J Collins notes on this issue that the Director General of Fair Trading has been very active to agree to codes of practice with trade associations in the past and he believes that the Director General could initiate a similar procedure in respect of unfair terms by virtue of the Regulations.¹⁵⁴ He considers that it is likely that informed traders and trade associations will be concerned about the implications of the 1994 Regulations and that the business world would therefore welcome an indication of what terms they could use in their standard form contracts which would satisfy the fairness requirements. St J Collins notes that there is potential here for the Director General to agree to sets of fair terms with various business sectors which would almost amount to a system of pre-validation of standard form contract terms.

2.3.5.25 In 1975 the English and Scottish Law Commissions considered the issue of the pre-validation of contracts.¹⁵⁵ They consider that any control over exemption clauses which falls short of an outright avoidance is capable of leading to uncertainty in particular cases, and that there will, therefore, be a great advantage to businessmen if it were possible, before entering into contracts in a standard form incorporating an exemption clause and before having the standard form printed, to have the individual form scrutinised on behalf of a public authority and approved so that it is not thereafter possible to argue that it is unreasonable to rely on the clause. The English and Scottish Law Commissions state that in their first Report they pointed out that the Restrictive Practices Court would be an inappropriate tribunal for the scrutiny of any

154 Collins 1995 *Web JCLI* at 11.

155 ELC and SLC *Exemption Clauses* 101 - 106.

contracts other than standard contracts, and nothing in their consultations in connection with the report has led them to change this view. They say they are quite clear that no machinery needs to be considered for the prior scrutiny of individually negotiated contracts and that the discussion must therefore relate only to provisions in standard contracts. The English and Scottish Law Commissions note that various possibilities present themselves, such as that reference to the Court might be voluntary, at the option of the business or a trade association using the standard form or it might be compulsory, either under a general provision or under a power of selection given to the Director General of Fair Trading, whether exercised on his own initiative or after complaint. They state that the effect could be that provisions in the relevant contracts might be void unless approved or valid unless disapproved and the decisions of the Restrictive Practices Court might or might not be binding on the ordinary courts.

2.3.5.26 The English and Scottish Law Commissions envisaged that a system of prior validation may work as follows: Standard form contracts containing exemption clauses would be subject to registration. Registration would take the form of supplying particulars, including a complete print in proof form of the proposed standard form, to the Director General of Fair Trading and it would be for the Director General to refer registered forms of contract to the Court for adjudication. They note that if registration were compulsory it would be appropriate to provide that exemption clauses in unregistered standard form contracts should be void and this would be a valuable sanction to enforce the registration requirement. Registration would then permit the use of the exemption clause, subject to a reasonableness test in the ordinary courts, until approved or disapproved in the Restrictive Practices Court. They argue that the Court would consider the exemption clause in the context of the whole of the standard form and approval would have the effect in relation to contracts adopting the whole of the approved form in such circumstances, and subject to such conditions, as the Restrictive Practices Court might prescribe in its decision. The English and Scottish Law Commissions consider that whether or not the scheme would be significantly slower or more expensive than proceedings in the ordinary courts, it might be possible to reduce time and expense by utilising the expertise of the Director General of Fair Trading. The Registrar of Restrictive Trading Agreements had wide experience of standard form contracts and had been able to influence their terms where they fell within his jurisdiction under the Restrictive Trade Practices Act. The two Commissions consider that the Director General could be given the power to approve standard form contracts without the need to refer them to the Restrictive Practices Court and that it might well be appropriate for decisions

of the Director General in pursuance of this power to be referred to the Consumer Protection Advisory Committee.¹⁵⁶ Approval by the Director General in accordance with this power would dispense with the need for a hearing by the Court. They think, nevertheless that it would be necessary that his decision should be binding on the ordinary courts.

2.3.5.27 The English and Scottish Law Commissions note the following advantages of the pre-validation of standard form contracts:¹⁵⁷

- * It would create certainty, as from the point of view of the party contemplating incorporating the exemption clause in a standard form contract there would be no risk that a court might subsequently hold that it was unreasonable, so he could make his arrangements with other traders or with insurers on that basis.
- * If the Restrictive Practices Court were to disapprove of an exemption clause in a standard form contract it is unlikely that the provisions in question would continue to be used. The Court would, therefore, exercise a preventative function which would reduce the need for the Director General to propose Ministerial orders.
- * It is possible that a system of validation by the Director General of Fair Trading and the Restrictive Practices Court would lend itself to a more thorough investigation of the background and consequences of the exemption clause than proceedings in litigation relating to particular disputes.

2.3.5.28 The two Commissions further note the following disadvantages of a system of prior validation:¹⁵⁸

- * In the First Report the widely held view was mentioned that to invoke the jurisdiction of the Restrictive Practices Court would be cumbersome, slow and expensive. It is a matter of balancing merits and demerits whether the thoroughness of the investigation of a problem which had been a feature of the work of the Restrictive Practices Court and which has been said to be a possible advantage that would flow from the use of the Court in the present context outweighs the time and expense involved in the preparation of a case for the Court.
- * It is only to be expected that trade associations in particular would take as a very serious matter indeed the scrutiny of their standard form of contracts by the Court and they would rightly not wish to take unnecessary risks in the interests of speed and economy. Moreover, although trade associations might have the resources to prepare adequately for a hearing by the Restrictive Practices Court, it must not be forgotten that many individual traders use standard form contracts; they would regard the prospect of being brought before the Court with less favour than a trade

156 For a report along the lines envisaged by section 14(3) of the *Fair Trading Act 1973*.

157 ELC and SLC *Exemption Clauses* at 105.

158 ELC and SLC *Exemption Clauses* at 105 - 107.

association.

- * There is, too, a major difficulty of procedure involved in the whole concept of prior validation. It was suggested that registration would involve the supply to the Director General of Fair Trading of a complete print in proof form of the proposed standard form contract. But contracts do not consist only of forms, and many contracts involving standard terms are partly oral and partly in writing. Moreover, even where a contract is wholly in writing, not all of the writing is necessarily to be found in the printed form; not only do printed forms contain blank spaces for the insertion of matters relevant to the particular transaction, but it is not uncommon for contracts comprised in correspondence to incorporate standard terms by reference. How could the Restrictive Practices Court consider the effect of printed terms without knowing what the individually prepared written or oral terms of the particular contracts are going to be? Terms which appear unobjectionable in one context might become wholly unreasonable in another. The addition of fresh clauses might radically change the effect of the standard terms.
- * Another problem is the effect of amendments to a standard form. In commerce conditions of trade change rapidly, and terms in a standard form may call for equally rapid change. It might well be necessary to provide for any variation in the terms of a standard form, or any addition to them, would take the resulting contract outside the scope of the original approval.
- * If the approval of an exemption clause by the Restrictive Practices Court were to exclude any control by the ordinary courts by way of the reasonableness test, as is thought necessary, that approval must afford an adequate substitute for the reasonableness test. A court applying the reasonableness test in a dispute between the parties to litigation would be in a position to consider the surrounding circumstances of the case that might bear on the question of reasonableness. These would include the strength of the bargaining positions of the contracting parties relative to each other, the amount of the consideration or price, whether the party adversely affected by the term had received any inducement to agree to the term, whether he had an opportunity of entering into a similar contract without the term, whether he had his attention drawn to the term and been advised as to the need for adequate insurance, and whether there were any unusual circumstances present at the time of contracting that might affect the court's view of what was reasonable. Yet none of these could be taken into consideration, except perhaps in abstract terms, by the Restrictive Practices Court. They arise from the particular circumstances of a particular contract between the contracting parties, whereas the Restrictive Practices Court would have to consider the terms of the standard form more or less in a vacuum.

2.3.5.29 The English and Scottish Law Commissions' conclusion on prior validation of contracts is that having reviewed the advantages and disadvantages, and having considered how the reasonableness test to be applied by the ordinary courts might operate in practice, it would be unwise to introduce a new scheme for prior validation of standard form contracts at that stage.¹⁵⁹

159 ELC and SLC *Exemption Clauses* at 107 - 108.

They remark that there was indeed little enthusiasm for such a scheme on the part of either traders or consumers. They believe that the reasonableness test as they envisage it, would work well without any material increase in the uncertainty always inherent in the application of principles of law to the actual facts as they emerge in litigation. For the reasons mentioned above they do not think that approval by the Restrictive Practices Court can afford an adequate substitute for control by the ordinary courts.

2.3.5.30 The two Commissions consider, nevertheless, that they should draw attention to one problem that may emerge in the future if their proposals are implemented, noting particularly that their study of this matter has arisen out of the need to deal with exemption clauses and that the exemption clause is a particular type of contractual provision that has become familiar to lawyers over the years. They remark that it has been said that many effects produced by exemption clauses might equally well be produced by drafting other provisions in the contract differently. The result of applying the test of reasonableness to exemption clauses in accordance with their recommendations might be that the draftsmen of a standard form contract will seek to produce the result he or she wishes by provisions that are not exemption clauses. They point out that they say 'might' rather than 'will' because the incentive to do this already exists in consequence of the attitude of the courts to exemption clauses, including the doctrine of fundamental breach, but there is no evidence that draftsmen have given up the use of exemption clauses in favour of other types of provision. Despite this, they recognise that attempts to avoid legislative control over exemption clauses might occur and that the courts might find it easy to influence the consequences of different drafting techniques.

2.3.5.31 It was noted above that a proposal is also presently made that legislation be enacted in India which would make it compulsory for traders to obtain the approval by a designated authority of specified exclusionary clauses in standard forms of contract and whereby consumers and consumer organisations are given the right to challenge such clauses before the authority.¹⁶⁰ It is further proposed that consumer organisations should take the initiative in drawing up model standard form of contracts.

160 Saraf *Law of Consumer Protection in India* at 102 - 103.

(i) Model contracts and codes of practice

2.3.5.32 Two respondents commenting on *Discussion Paper 65* consider that the setting of industry norms, the drawing up of codes of conduct or practice and the appointment of an Ombudsman to control marketing practices has appeal and would serve the man in the street far better than the passing of the proposed legislation.¹⁶¹ As was noted above, some respondents argue that if the true victims are the poor and uninformed, then they will not seek recourse to the courts and the proposed legislation will not avail them.

2.3.5.33 The English *Fair Trading Act* imposes a duty on the Director General of Fair Trading to encourage trade associations to prepare codes of practice for guidance in safeguarding and promoting the interests of the consumers. Hugh Beale notes that some of these Codes of Practice negotiated by the Office of Fair Trading refer to terms and conditions at least in general terms.¹⁶² He considers that suppliers may be encouraged to submit terms for vetting or pre-validation, as in Israel since the Standard Contracts Act of 1964 came into operation. He is, however, of the view that there are significant problems with these approaches. He explains that neither Codes of Practice nor model contracts are compulsory and they are, in particular, unlikely to be used by firms which are not members of the relevant trade association. He suspects that it is precisely these firms which cause a lot of the problems. He also notes that negotiating model terms and conditions is very time-consuming and difficult yet states that it should be noted that codes of practice, which are typically a particular industry's commitments have the potential of playing a significant role in consumer protection.

2.3.5.34 The Canadian Office of Consumer Affairs states that as part of the Voluntary Codes Project, the Consumers Council of Canada surveyed 375 knowledgeable consumers to solicit their views on the use of voluntary codes of conduct.¹⁶³ It is considered that the results suggest, firstly, that the respondents were favorably disposed toward industry assuming responsibility for its own behavior. Secondly, that respondents said that they tended to favour the use of voluntary

161 SAPOA and Prof RH Christie.

162 Beale in *Good Faith and Fault in Contract Law* at 251.

163 "A consumer perspective on voluntary codes" October 1996 *Consumer Quarterly* at <http://strategis.ic.gc.ca/SSG/ca0020e.html> accessed on 10/12/1997.

codes, provided that consumers are equal stakeholders with business in the process; that the codes are well-publicized; that they cover an entire industry; and that the sanctions included in the codes have real teeth. Finally, that the survey respondents clearly indicated that they would be more comfortable with codes that had been developed with some government involvement. The Office of Consumer Affairs considers that Government support for voluntary codes can take many different forms such as catalyst, facilitator, broker, rule-maker, participant or endorser depending on the circumstances.

2.3.5.35 The Office of Consumer Affairs notes that research conducted for the project suggests that voluntary codes clearly have potential benefits for consumers. The Office suggests that in contrast to command-and-control regulation, voluntary codes can be easier to develop and understand, cheaper and faster to implement, and more quickly adapted to changing circumstances. The Office further notes that they can also support innovation and increased competitiveness in industry, and, in a competitive marketplace, the resulting cost savings and related benefits are passed on to consumers. The Office of Consumer Affairs states that compared to redress using traditional legal mechanisms, which can be costly, time-consuming and forbidding to consumers, consumer redress under voluntary codes can be faster, more accessible, more effective and less expensive. The Office suggests that because they are voluntary industry arrangements, voluntary codes can side-step federal-provincial jurisdictional concerns and national boundaries.

2.3.5.36 The Office of Consumer Affairs states that while there is no one formula for developing a good code, the Voluntary Codes Project suggests that effective codes share common features, including the following-¹⁶⁴

- * the explicit commitment of the industry's leaders;
- * a clear statement of objectives, expectations and obligations to establish the ground rules;
- * early, regular, and meaningful participation of all affected stakeholders to help ensure credible standards. In addition to industry participants, stakeholders might include consumer organisations, environmental groups, government and labour;

164 "What drives voluntary codes?" October 1996 *Consumer Quarterly* at <http://strategis.ic.gc.ca/SSG/ca00219e.html> accessed on 10/12/1997.

- * an open and transparent development and implementation process to legitimise the code. This includes consultations on the proposed elements of the code, reporting and monitoring requirements, publication of compliance data and provision for revisions and adjustments;
- * a built-in commitment to review the terms of the code and its operation regularly to help "raise the bar" and ensure the code remains current with changing marketplace practices and standards;
- * a well-understood set of inducements for compliance, as well as sanctions for non-compliance, to increase the likelihood that a code will be followed; and
- * an effective complaint-handling and redress system to assure that problems will be treated seriously. Fair and consistent application of the code over time is a measure of its success.

2.3.5.37 The Office of Consumer Affairs notes that codes tend to work best when there is-

- * a mature, stable industry;
- * comparatively few players, each of which is of similar size and market power;
- * leadership from key industry players and a strong industry association;
- * a positive inducement for firms to participate, as well as sanctions for non-compliance;
- * a credible threat of government or legal action; and
- * public pressure.

2.3.5.38 However, the Office of Consumer Affairs note that voluntary codes also have their limitations. The Office states that adopting voluntary agreements can block or delay the development of needed laws and regulations to protect the consumer and public interest. The Office argues that such arrangements can also be anti-competitive when firms use the cover of a code to engage in collusive behavior. The office considers when there is not widespread agreement to adhere to a code, there is potential for non-participating firms to take a free ride on a voluntary agreement, giving consumers a false sense of security and penalizing firms that conform to it. The Office of Consumer Affairs notes that if codes are to work, there should also be effective inducements for firms to join, sanctions for non-compliance, and quick and equitable redress mechanisms. The Office of Consumer Affairs suggests that when these conditions are

not met. it is unlikely that codes will work.

2.3.5.39 The following provisions of the New South Wales *Fair Trading Act* of 1987 regulate codes of practice comprehensively and should be considered in this context:

74(1) The Commissioner may with the approval of the Minister, and shall if the Minister so directs, prepare for consideration by the Minister a draft code of practice for fair dealing:

- (a) between a particular class of suppliers and consumers, or
- (b) by a particular class of persons in relation to consumers.

(2) For the purpose of preparing a draft code of practice, the Commissioner shall arrange for consultation with, and invite submissions from, such persons and organisations as, in the opinion of the Commissioner, would have an interest in the terms of the proposed draft code of practice.

(3) If the Commissioner is satisfied that associated persons in a field of trade or commerce have, in consultation with organisations representing consumers and other interested persons, agreed to abide by a particular code of practice in their dealings with or in relation to consumers, the Commissioner may submit the code to the Minister for consideration together with any recommendations by the Commissioner with respect to amendments to the code.

75(1) Except as provided by subsection (2), the regulations may prescribe a code of practice that:

- (a) has been submitted to the Minister in accordance with section 74, and
- (b) has been approved by the Minister with or without amendments.

(2) A code of practice may be prescribed as an interim code of practice to remain in force for a specified period not exceeding 6 months.

(3) An interim code of practice has effect while it remains in force even if no action in relation to the code has been, or is, taken or concluded in accordance with section 74.

75A (1) A code of practice prescribed under section 75 may be amended by the regulations, in accordance with this section.

(2) An amendment to a code of practice may be made only with the approval of the Minister.

(3) A code of practice which is not an interim code of practice is not to be amended unless:

- (a) the amendment has been submitted to the Minister in accordance with section

- 74 as if it were a draft code of practice, or
- (b) the Commissioner has certified in writing that the amendment is of a minor or inconsequential nature and that compliance with section 74 is not required.

(4) An amendment may be approved by the Minister with or without alteration.

76. If it appears to the Commissioner that a person has carried on business in contravention of a prescribed code of practice applicable to the person, the Commissioner may request the person to execute within a specified time a deed in terms approved by the Commissioner under which the person gives undertakings as to:

- (a) discontinuance of the conduct,
- (b) future compliance with the code of practice, and
- (c) the action the person will take to rectify the consequences of the contravention,

or any of them.

77(1) Where a person executes a deed under section 76, the Commissioner shall:

- (a) lodge a copy of the deed with the Registrar of the Commercial Tribunal, and
- (b) give a copy of the deed to the person who executed it.

(2) The Commissioner shall retain all deeds and shall register the deeds in a Register of Undertakings kept by the Commissioner and containing the prescribed particulars.

(3) The Register of Undertakings may, at any reasonable time, be inspected by any person free of charge.

78(1) If a person fails to comply with a request by the Commissioner for the giving by the person of an undertaking under section 76, the Commercial Tribunal may, on the application of the Commissioner and on being satisfied that there were grounds for requesting the undertaking, order the person:

- (a) to act in a manner that would have been required, or
- (b) to refrain from acting in a manner that would have been prohibited,

by the undertaking if it had been given.

(2) If, on the application of the Commissioner, the Commercial Tribunal is satisfied that a person has failed to observe an undertaking given by the person under section 76, the Commercial Tribunal may make an order under subsection (3).

(3) The Commercial Tribunal may order the person:

- (a) to observe the undertaking, and
- (b) in the case of an undertaking to rectify the consequence of a contravention of a code of practice to observe the undertaking within a time specified by the Commercial Tribunal in the order.

- (4) If:
- (a) the failure on which an application under subsection (1) or (2) is based is a failure by a body corporate, and
 - (b) the Commercial Tribunal is satisfied that the failure occurred with the consent or connivance of a person who, at the time of the failure, was a director of the body corporate or a person concerned in its management,

the Commercial Tribunal may, in addition to any other order, make an order under subsection (5).

- (5) The Commercial Tribunal may make an order prohibiting the person from:
- (a) continuing to consent to, or connive at, the failure, or
 - (b) consenting to, or conniving at, a like failure by any other body corporate of which the person is a director or in the management of which the person is concerned.
- (6) An order under this section may be made subject to such conditions (whether as to the duration of the order or otherwise) as the Commercial Tribunal thinks fit including:
- (a) conditions as to the future conduct of the person affected, and
 - (b) conditions specifying the action to be taken by the person to rectify the consequences of the failure the subject of the application under this section.

79 The Commercial Tribunal may, on the application of the Commissioner, vary or discharge an order made under section 78.

2.3.6 Evaluation

2.3.6.1 The Commission notes the respondents' argument about the inaccessibility of the courts and that the Commission's preliminary proposals will do little to alleviate the plight of ordinary consumers. The Commission is therefore of the view that it has to reconsider its preliminary Bill which contained no provisions on the establishment of preventative mechanisms. The Commission duly notes the proposals on establishing an Ombudsperson to ensure that pre-formulated standard contract terms are not unreasonable, unconscionable or oppressive. The Commission is of the view that the arguments raised for establishing such an office is persuasive and consequently recommends that the Office of an Ombudsperson be established. The Commission is further of the view that the powers of the Ombudsperson should be limited to pre-formulated standard contracts. Judging from the comments raised by the respondents it seems as if the administrative control of the Ombudsperson seems to be necessary

particularly in regard of standard form contracts.

2.3.6.2 The Commission also notes the issue of the pre-validation of terms and its significance in other jurisdictions. The Commission is however of the view that the proposed powers of the Ombudsperson would provide adequate relief and that there is no need to consider conferring powers to an administrative body to enable it to perform the task of the pre-validation of contractual terms. The Commission further notes the arguments in favour of allowing industry and trade to self-regulate itself by adopting codes of conduct or codes of practice. The Commission has considered the advantages and limitations of codes of conduct and is of the view that these voluntary codes of conduct will not in itself be able to effect the redress which is needed in contracts. Although the Commission would concur that codes of conduct should be encouraged, it believes that codes of conduct could be established in addition to legislation establishing an office such as an Ombudsperson. The Commission therefore recommends that provision be made for setting out the powers of the proposed Ombudsperson in regard of codes of conduct.

2.3.7 Recommendation

2.3.7.1 The Commission recommends that the office of an Ombudsperson should be established and that his or her powers should be aimed at preventing the continued use of contractual terms which are unreasonable, unconscionable or oppressive. The Commission proposes that the Ombudsperson should have the following powers and duties-

- to negotiate with a person using or recommending the use of pre-formulated standard contracts in order to obtain an undertaking from him or her that he or she will act in accordance with the proposed Act, and if such a party fails to fulfil such an undertaking, the Ombudsperson may issue such orders as may be deemed necessary for ensuring the fulfilment of such an undertaking;
- if having considered a complaint about any contract term that he or she considers to be unreasonable, unconscionable or oppressive, that the Ombudsperson may bring proceedings in the High Court for an interdict against any person appearing to him or her to be using or recommending use of such a term; provided that if he or she

decides not to apply for an interdict, he or she shall furnish reasons to the complainant for such a decision;

- to prepare draft codes of conduct applying to particular persons or associated persons in a field of trade or commerce, in consultation with such persons, organisations, consumer organisations and other interested parties for the consideration and approval of the Minister;
- if it appears to him or her that a person has acted in contravention of a prescribed code of practice applicable to that person, that the Ombudsperson may request the person to execute within a specified time a deed in terms approved by the Ombudsperson under which the person gives undertakings as to-
 - (i) discontinuance of the conduct;
 - (ii) future compliance with the code of practice; and
 - (iii) the action the person will take to rectify the consequences of the contravention,
 or any of them;
- to retain all deeds and to register the deeds in a Register of Undertakings kept by the Ombudsperson and containing the prescribed particulars;
- if a person fails to comply with the request by him or her for the giving of an undertaking, that the Ombudsperson may on application to the High Court, request that the person be ordered-
 - (i) to act in a manner that would have been required; or
 - (ii) to refrain from acting in a manner that would have been prohibited.

2.4 POWERS TO BE GRANTED TO THE COURTS

2.4.1 The Working Committee's proposal

2.4.1.1 The Working Committee proposed that courts should be empowered to rescind or amend a contract or any term thereof or to make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties.

2.4.2 Powers of courts in other jurisdictions

(a) Zimbabwe

2.4.2.1 In terms of the Zimbabwean Consumer Contracts Act, a court may make an order granting any one or more of the following forms of relief, namely -

- * cancelling the whole or any part of the consumer contract; or
 - * varying the consumer contract; or
 - * enforcing part only of the consumer contract; or
 - * declaring the consumer contract to be enforceable for a particular purpose only; or
 - * ordering restitution or awarding compensation to a party or reducing any amount payable under the consumer contract; or
 - * annulling the exercise of any power, right or discretion under the consumer contract or directing that any such power, right or discretion should be exercised in a particular way;
- and any such order may be made subject to such conditions as the court may fix.

(b) Germany

2.4.2.2 The powers of the German courts are limited under the German Standard Contract Terms Act to orders for discontinuance and retraction, and there are no provisions for adjusting a particular contract or awarding compensation. These restrictions are consistent with the inability of individuals to bring actions under the Act but consumer groups and trade associations may. The Act therefore has the flavour of public law rather than a private law remedy.¹⁶⁵ The principal thrust of the Act is to list specific terms that, if used in standard consumer contracts, are declared void in terms of section 11 under all circumstances, or, dependent on judicial evaluation of the factors set out in section 10, such as the reasonableness of the time limit, the reasonableness of compensation or reimbursement, or the adequate definition of an obligation to be performed by the other party.¹⁶⁶ The courts are, furthermore, not permitted to establish a general principle of fairness or equity, and therefore a court may not replace the effects of a contract or of a statutory provision by an outcome which it believes to be

165 See Hondius *Standaardvoorwaarden* at 788; and NZLC "*Unfair Contracts*" *Preliminary Paper No 11* 1990 at 102.

166 NZLC "*Unfair Contracts*" *Preliminary Paper No 11* 1990 at 101.

more fair and equitable.¹⁶⁷ Under the Dutch *Burgerlijke Wetboek* good faith not only supplements obligations arising from contracts but may also modify and extinguish them. Under exceptional circumstances courts in the Netherlands are empowered to replace the effects of a contract or a statutory provision by an outcome which it believes to be more fair and equitable. In Belgium the courts have used good faith extensively to supplement contractual obligations but have used it to limit obligations only in cases of disproportion and abuse of rights.

(c) The European Union *Directive*

2.4.2.3 Article 6 of the *European Directive on Unfair Contract Terms (EU Directive)* provides that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. Regulation 5 of the United Kingdom *Unfair Terms in Consumer Contracts Regulations* provides as follows:¹⁶⁸

- (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.
- (2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

(d) Sweden

2.4.2.4 The Swedish Contract Act provides that a contract term or condition is unconscionable having regard to - the contents of the agreement, the circumstances prevailing at the time the contract was entered into, subsequent circumstances, and circumstances in general.¹⁶⁹ Where a term is of such significance for the agreement that it would be unreasonable to demand the continued enforceability of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety. Particular attention is paid to the need to protect those parties who, in their capacity as

167 Lando and Beale *Principles of European Contract Law* at 56.

168 Lockett and Egan *Unfair Terms in Consumer Agreements* at 57.

169 Pointed out by CLASA in its comments on *Discussion Paper 65* to the Commission.

consumers or otherwise, hold an inferior bargaining position in the contractual relationship. As was noted above, the market court is approached by either the Consumer Ombudsman, trade associations, consumer associations, or employee associations to consider standard contract terms, and if a contract term is found unfair, the court prohibits the use of the term.¹⁷⁰ No right of appeal exists against the finding of the market court but there are two exceptions to this rule: The market court may review one of its prior decisions in the light of new circumstances or other special reasons at the request of the trader concerned, which case intervention by the Ombudsperson is not required. Secondly a prohibition imposed by the market court may be considered by a criminal court judge. If a trader contravenes a prohibition imposed by the market court, the Ombudsperson is entitled to request that the trader be prosecuted. The criminal court judge then has to consider whether the market court or Ombudsperson acted within their powers but he or she is not empowered to consider the appropriateness or fairness of the order issued by the market court.

(e) The USA

2.4.2.5 Section 2-302 of the American Uniform Commercial Code provides that if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

2.4.2.6 The meaning and effect of this section is explained as follows in the Official Comment to § 2-302:¹⁷¹

- "1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial

170 Hondius *Standaardvoorwaarden* at 776.

171 <http://www.law.cornell.edu/ucc/2/C2-302.html> (accessed on 01/12/97).

background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis;

Hardy v. General Motors Acceptance Corporation, 38 Ga.App. 463, 144 S.E. 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty;

Andrews Bros. v. Singer & Co. (1934 CA) 1 K.B. 17, holding that where a car with substantial mileage was delivered instead of a "new" car, a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description, even though the Sale of Goods Act called such an implied warranty;

New Prague Flouring Mill Co. v. G. A. Spears, 194 Iowa 417, 189 N.W. 815 (1922), holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage; and *Kansas Flour Mills Co. v. Dirks*, 100 Kan. 376, 164 P. 273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30 day postponement;

Green v. Arcos, Ltd. (1931 CA) 47 T.L.R. 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations;

Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck;

Austin Co. v. J. H. Tillman Co., 104 Or. 541, 209 P. 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description;

Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller;

Robert A. Munroe & Co. v. Meyer (1930) 2 K.B. 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.
3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts."

(f) New South Wales

2.4.2.7 Under the *Contracts Review Act* of 1980 of New South Wales the Supreme Court, the District Court and a Local Court have the following powers:

7. (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:

- (a) it may decide to refuse to enforce any or all of the provisions of the contract;
- (b) it may make an order declaring the contract void, in whole or in part;
 - (c) it may make an order varying, in whole or in part, any provision of the contract;
- (d) it may, in relation to a land instrument, make an order for or with respect to requiring the execution of an instrument that:
 - (i) varies, or has the effect of varying, the provisions of the land instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the land instrument.

(2) Where the Court makes an order under subsection (1) (b) or (c), the declaration or variation shall have effect as from the time when the contract was made or (as to the whole or any part or parts of the contract) from some other time or times as specified in the order.

(3) The operation of this section is subject to the provisions of section 19.¹⁷²

...

172 19. (1) An order made under section 7 (1) (b) or (c) has no effect in relation to a contract so far as the contract is constituted by a land instrument that is registered under the Real Property Act 1900.

(2) Where an order is made under section 7 (1) (b) or (c) in relation to a contract constituted (in whole or in part) by a land instrument, not being a land instrument registered under the Real Property Act 1900, the regulations made under this Act may make provision for or with respect to prescribing the things that must be done before the order, so far as it relates to the land instrument, takes effect.

(3) The Registrar-General and any other person are hereby authorised to do any things respectively required of them pursuant to subsection (2).

10. Where the Supreme Court is satisfied, on the application of the Minister or the Attorney General, or both, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.

2.4.2.8 The New South Wales Courts are furthermore empowered to grant the following ancillary relief under the same Act:¹⁷³

1. Where the Court makes a decision or order under section 7, it may also make such orders as may be just in the circumstances for or with respect to any consequential or related matter, including orders for or with respect to:

- (a) the making of any disposition of property;
- (b) the payment of money (whether or not by way of compensation) to a party to the contract;
- (c) the compensation of a person who is not a party to the contract and whose interest might otherwise be prejudiced by a decision or order under this Act;
- (d) the supply or repair of goods;
- (e) the supply of services;
- (f) the sale or other realisation of property;
- (g) the disposal of the proceeds of sale or other realisation of property;
- (h) the creation of a charge on property in favour of any person;
 - (i) the enforcement of a charge so created;
 - (j) the appointment and regulation of the proceedings of a receiver of property; and
 - (k) the rescission or variation of any order of the Court under this clause, and such orders in connection with the proceedings as may be just in the circumstances.

2. The Court may make orders under this Schedule on such terms and conditions (if any) as the Court thinks fit.

(g) New Zealand

2.4.2.9 The New Zealand Law Commission proposes that courts be granted the following powers:¹⁷⁴

173 Section 1 & 2 of Schedule 1 of the *Contracts Review Act*.

174 NZLC *Unfair Contracts* at 46 - 47.

- 12(1) A court on reviewing under this scheme any contract, or any term of a contract, or the exercise of a power of discretion or the refusal to waive any right under a contract, may grant such relief as it thinks just.
- (2) Without limiting the power of the court to grant relief, it may do one or more of the following things:
- (a) declare the contract to be valid and enforceable in whole or in part or for any particular purpose;
 - (b) cancel the contract;
 - (c) declare that a term of the contract is of no effect;
 - (d) vary the contract;
 - (e) award restitution or compensation to any party to the contract;
 - (f) annul the exercise of a power, discretion or right under the contract, or direct that it be exercised in a particular way;
 - (g) vest any property in any party to the proceedings, or direct any party to transfer or assign any property to any other party to the proceedings;
 - (h) order that an account be taken, and reopen any account already taken, in respect of any transaction between the parties to the contract.

13 If the Commerce Commission brings proceedings under clause 11 and it appears to the Court that a form of contract proffered by a person in the course of business and relating to a particular type of transaction, or transactions with persons generally or a particular class of persons, contains an unfair term, or a term that is invalid under clause 7, the Court may, as well as the granting of any other relief, order the omission of the term, or any other term having in substance the same effect, from all contracts subsequently proffered by that person.

14 Any order may be made on such conditions as the Court thinks fit.

(h) Ontario

2.4.2.10 The Ontario Law Commission considered in 1979 that the remedies provided by section 2-302 of the Uniform Commercial Code were insufficient.¹⁷⁵ The Commission was of the opinion, given the range of circumstances in which the courts may be called upon to intervene, including not only the type of contract and unconscionability involved but also the timing of the intervention, it seemed desirable that the courts be given flexible remedial alternatives. The Commission found the American court's inability to allow rescission of the agreement or to order repayment of part of the price where the court finds the price to be excessive particularly noteworthy, in view of the fact that both these powers are contained in their *Business Practices Act* and similar legislation in other jurisdictions. The Ontario Law Commission believed that the following provision in their proposed *Sale of Goods Act* would

175 OLRC Report on Sale of Goods at 159.

enable the courts to do justice as the circumstances require:

"5.2-(1) If, with respect to a contract of sale, the court finds the contract or a part thereof to have been unconscionable at the time it was made, the court may

- (a) refuse to enforce the contract or rescind it on such terms as may be just;
- (b) enforce the remainder of the contract without the unconscionable part; or
- (c) so limit the application of any unconscionable part or revise or alter the contract as to avoid any unconscionable result."

2.4.2.11 The Ontario Law Commission considers that the position taken in their *Report on Sale of Goods* in connection with contracts for the sale of goods applies with equal force to contracts of all types. They accordingly recommend that a provision similar to section 5.2(1) of the *Sale of Goods Act* should be incorporated into the legislation dealing with unconscionability. The Commission further notes the availability of injunctive relief under the *New South Wales Contracts Review Act* at the behest of a Minister with respect to contracts of a specified class. The Ontario Law Commission considers the question whether a form of public law relief should be included in a general statute governing the law of contracts and is of the view that injunctive relief might well be useful in cases where a person or corporation has demonstrated a pattern of contractual unconscionability. The Commission accordingly recommends that the courts should be empowered, at the behest of the Attorney-General or other prescribed Minister, to issue injunctions against conduct leading to unconscionability, either in the formation or in the execution of contracts. The Commission also emphasises that it is not its intention that the availability of this kind of injunctive power should, in any way, restrict the right of a party to injunctive relief with respect to a particular contract.

- (i) Hong Kong

2.4.2.12 The Hong Kong Commission proposes that courts should be empowered to strike down harsh or unconscionable terms. The Commission however acknowledges that such a power will rarely help the little man, particularly as he would still need to go to court if he wanted to attack the contract. The Commission considers that such a statutory provision would have a restraining effect on large corporations in that their lawyers would be more even handed when drafting their contracts because the court could strike down what terms it considered to be

harsh and unconscionable. The Commission remarks that it is conscious that large organisations, and perhaps in particular those offering financial services, may decide that such restraining legislation will mean that their risk of doing business has increased and would therefore increase their price which will of course have to be borne by the consumer. The Commission states, on the other hand, that consumers may be less hesitant to enter into contracts because they know they will be better protected which could increase the overall business of the seller of goods and services. The Commission notes the objection that such provisions would be too vague could be met by the argument that it is intended to apply to extreme cases which would be quite rare. The Commission considers if it trusts its courts to decide fairly and impartially, it should trust that its courts will also exercise a new power to strike down harsh and unconscionable terms and rewrite the terms appropriately. The Hong Kong Commission further suggests that specific matters which would assist the court in determining whether a contractual provision is in the circumstances harsh and unconscionable, could be set out in the proposed legislation. Section 5(1) of the *Unconscionable Contracts Ordinance* which was adopted as a result of the Hong Kong Commission's report provides as follows on the powers of courts:

"If, with respect to a contract for the sale of goods or supply of services in which one of the parties deals as consumer, the court finds the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may-

- (a) refuse to enforce the contract;
- (b) enforce the remainder of the contract without the unconscionable part;
- (c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result."

- (j) India

2.4.2.13 The Indian Supreme Court has held that corporations controlled by the State fall within the definition of State as contained in the Constitution and that such corporations can not be arbitrary in their dealings with consumers. Furthermore, the provisions of the Indian Contract Act are often invoked to strike down unfair terms of contract. Although consumers are protected against misrepresentation, coercion, undue influence and mistake, these provisions do not apply merely because of the oppressiveness or unconscionability of a term as such. Under section 23

of the Indian Contract Act contracts opposed to public policy are void and may be struck down by the courts.

(k) Argentine

2.4.2.14 Argentinian legislation provides that a consumer has the right to demand nullification of a contract or one or more of its clauses in the case where the offeror violates the duty of good faith in a stage prior to the conclusion of the contract or its implementation.

2.4.3 Proposals by respondents

2.4.3.1 Professor AJ Kerr notes that his proposal made in September 1994 on the proposals contained in *Working Paper 54* has not been accepted that the word "rescind" should be avoided when drafting the proposals contained in *Discussion Paper 65*.¹⁷⁶ He proposes the inclusion of a definition in the Bill setting out in what sense the word is to be understood. He believes there is a big difference between setting aside a contract *ab initio* and terminating a contract with effect from the date of the order. He considers that it should not be left to impecunious litigants to bring a case before a court to resolve the difficulties, quite likely without any knowledge of what the courts are doing. He considers that with the present jurisdiction of magistrates' courts many of them will have to apply the Bill and their decisions are not reported so very few people will know what such courts decide.

176 He proposed the following clause at the time:
 If a Court, having regard to all relevant circumstances, is of the opinion that the way in which the contract came into being or the form or the content of the contract or any provision thereof or the execution or enforcement thereof is contrary to the principle of good faith

- (a) the court may declare that the alleged contract
 - (i) did not come into existence; or
 - (ii) came into existence, existed for a period, and then, before action was brought, came to an end; or
 - (iii) is in existence at the time action is brought; and
- (b) in the case of contracts in existence the court may
 - (i) limit the sphere of operation and/or the period of operation of the contract; and/or
 - (ii) suspend the operation of the contract for a specified period or until specified circumstances are present; or
 - (iii) make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties.
- (c) whether a contract is governed by South African or any other law the court may decline to enforce it in whole or in part.

2.4.3.2 Prof Kerr further notes that his suggestion was also not accepted that the courts should not be empowered to "amend" contracts, ie to alter them, but should instead be empowered to limit contracts made by the parties. He remarks that if a court "amends" a contract, the contract continues in force as amended. He asks what happens if a court hears a case concerning the same contract, or concerning another example of the same standard contract, and has no knowledge of the earlier decision amending it? He notes that it may easily happen that the future court has no knowledge if the first case was in the magistrate's court, or in a High Court but the case is not reported. Prof Kerr suggests that it should be remembered that in the case of standard form contracts many other parties will have copies of their own contracts and will be regulating their lives, or part of their lives, in conformity with what they believe their contracts to be, whereas if the standard form has been amended by a court their contract may be subject to amendment also and so in effect be subject to being declared to be quite different from what they think it is. He suggests that if the Commission continues with its proposal to allow courts to *amend* contracts, the following clause should be added to the Bill:

"If a court amends a contract and either of the parties has other similar contracts that party, is obliged to inform the parties to such contracts at the earliest opportunity of the terms of the amendment. If a case is brought before a court the party who knows of the amendment is obliged in its pleadings to draw attention to the amendment. Failure to fulfil this obligation will render the party in breach liable for wasted costs, and damages, if any."

2.4.3.3 Prof Kerr also notes that the powers of the courts are, in terms of the proposed Bill that the court may rescind or amend the contract or make such other order the court considers necessary. He suggests that if, contrary the recommendation in the second preceding paragraph, the word "amend" is retained, the words "or limit the sphere of operation and/or the operation of the contract or suspend the operation of the contract for a specified period or until specified circumstances are present" should be inserted before the phrase "or make such other order ...". He considers that it is not satisfactory to emphasise only rescission and amendment and to leave everything else to the court. Prof Kerr states that unless the main intention is to leave the matter in the court's hands, in which case the phrase "rescind or amend the contract or any term thereof or" and the word "offer" should be omitted so that the Bill reads " ... the Court may make such order as may ...". He proposes that if rescission and amendment are specified, limitation and suspension should also be specified. He notes that suspension was the classic method of operation of the *exceptio doli generalis* and it is part of the object of the discussion

paper proposals to counter the decision of the *Bank of Lisbon v De Ornelas* case.

2.4.3.4 Furthermore, the widely phrased powers of courts is criticised by a substantial number of respondents: COSAB suggests that the powers of the court under the Bill should be limited to rescinding or refraining from enforcing those contracts or contractual terms which fall foul of the Bill. COSAB notes that in terms of the Bill, the court is entitled to rescind or amend the contract or any terms thereof or to make such order as may be necessary to prevent the contract being unreasonably prejudicial or oppressive to any of the parties thereto. COSAB considers that in the case of corporations concluding contracts in the course of their business and with the benefit of their respective legal advisers, it is difficult to understand how a court, not being privy to the intention of either of the parties at the time of the concluding of the contract and not necessarily having the business knowledge or expertise of either the parties, is able to have regard to circumstances at the time the contract was concluded and impose upon the parties a term not agreed upon by the parties but which the court in its discretion deems reasonable.

2.4.3.5 Advocate Derek Mitchell is of the view that the proposed powers given to the courts to amend a consensual contract enables a court to re-write a contract, the resultant "contract" not being consensual but imposed upon the parties. He asks whether it would be open to a party to say, "Had I known that this was to be my contract, I would not have concluded it, or would have concluded a contract with someone else?" He presumes presumably not. Advocate Mitchell considers that by way of example, a contract put out to tender and a party to such a contract, subsequently amended by a court, may well have preferred to contract with another tenderer in the light of the imposed amendments to the tender document. He states that unless a court were to refuse to use its powers under the proposed Bill in such circumstances, the result may well be unsatisfactory. SAPOA considers that clause 1(1) of the proposed Bill is so widely phrased that it does little to define the scope and extent of the court's review powers, it fails to achieve the necessary balance between the principle of certainty and the counter principle of fairness. SAPOA is of the view that the courts will be empowered to re-write contracts, and the effect of the provision could be to empower the courts to ride a coach and horses through the common intention of the parties to the contract. The General Council of the Bar suggests that the powers of courts should be limited to declining to enforce agreements and suggests the following Bill:

Enforceability of unconscionable and oppressive contractual terms

1. (1) Notwithstanding anything to the contrary contained in any law or the common law, a court of law may, upon application made to it, whether by way of a substantial application or by means of the pleadings in any proceedings, decline to enforce any agreement, whether entered before or after the commencement of this Act, or term of such agreement which is the subject matter of such application or proceedings, if, having regard to -
 - (a) the relative bargaining positions which the parties to such agreement hold in relation to one another;
 - (b) the type of agreement concerned;
 - (c) the way in which such agreement came into being between the parties;
 - (d) the form or content of such agreement;

it has on the evidence adduced reason to believe that such agreement or any term thereof or the execution or enforcement thereof is unconscionable or oppressive and that such agreement or term will, if enforced, have in the circumstances an unacceptable prejudicial effect to any of the parties to the agreement.

(2) Any agreement purporting to exclude the provisions of subsection (1) shall be null and void.

Act binding on State

2. This Act shall be binding upon the State.

Short title

3. This Act shall be called the Enforceability of Unconscionable and Oppressive Agreements Act, 199....

2.4.3.6 BSA considers that the wide discretion afforded a court will not only undermine legal certainty, but it will also destroy commercial certainty by interfering with the market place and, furthermore, it could inhibit trade and commerce and discourage local and foreign investment. BSA remarks that one would not know, when concluding a contract in respect of which South African law is the governing law, whether or not and how that contract might be re-written by a South African court. The fact that the provisions of the Bill may not be waived or limited will interfere with the right to choose the law which will govern contracts and it will, in turn, have a detrimental effect on business in those cases where the parties do not wish South African law to apply. SACOB has the following views: the vague and inconsistent terminology contained in the draft Bill creates more uncertainty and would further facilitate

undesirable and unnecessary litigation, as it would take many years for the courts to develop legal rules to define the scope of the new law, given the very wide powers proposed to be conferred on the judiciary; the provisions of the Bill requiring a court to amend a contract is tantamount to calling upon it to make a new contract for the parties - this is in itself an unfair burden on the judiciary, many of whose members are known to regard the prospect thereof with disfavour; how is a court to arrive at a substitute formula in the case of a long term contract in terms of which the price is to be determined by a formula and the court is asked to conclude that the result of such formula is "unreasonably prejudicial".

2.4.3.7 The group of Supreme Court of Appeal Judges who reservedly support the Working Committee's proposed Bill state that it is done with some hesitation, and in the interests of greater flexibility. They remark that the central proposition of the discussion paper is that courts be vested with the overriding power to set aside any agreement, or to modify its terms, if its conclusion or its content or its execution is 'unreasonable, unconscionable or oppressive'. They consider whether such power, as a matter of policy is desirable, may well depend on whether the matter is viewed from the perspective of creditors or of debtors. The Judges note if the power is viewed from the perspective of creditors who are anxious to exact or enforce performance, the implementation of the proposals would not be desirable, for the following reasons: Generally speaking, it would impair the principle, which is the basic tenet of the law of contract, that agreements duly concluded are to be honoured and enforced; it would introduce uncertainty and instability into the law of contract, undermine commercial confidence which is based on the expectation that agreements will be fulfilled or enforced, and thus hamper trade and commerce, if every commercial transaction is to be subject to the possibility of judicial scrutiny, dissection and review; such uncertainty would stem not only from the exigency of judicial review but also from the inexactitude of the proposed criteria, which would allow a court the licence of imposing on the parties its own predilections and social sensitivities; because of such uncertainties it would become difficult for parties to plan ahead; and for practitioners to advise parties as to their legal positions or to predict the course of any litigation concerning contracts; it would provide debtors with the means to extricate themselves from bad bargains, or at the very least to delay the enforcement of legitimate claims, and as such it would encourage litigation and in effect eliminate procedures such as summary judgments and exceptions designed to effect a speedy resolution of bogus defence. The Judges further suggest that the Bill should provide that

any court sitting on appeal on that issue, shall be at liberty to approach the matter as if it were a court of first instance.

2.4.4 Evaluation

2.4.4.1 The Commission is of the view that it is understandable that considerable concern was raised that conferring wide-sweeping powers to the courts may lead to legal uncertainty. The Commission is, however, of the view that there is a need to confer wide powers to the courts to effect justice to contracting parties, especially when considering the wide-sweeping powers conferred by legislation in other jurisdictions. The Commission is of the view that the wide powers it proposes to confer to the courts should and can be balanced by confining the proposed criterion of fairness to unreasonableness, unconscionability and oppressiveness. The Commission furthermore agrees with Professor Kerr that there is a need to redraft the clause governing the powers of the courts to set aside contracts along the lines he proposes, and also agrees with the Supreme Court Judges that any court sitting on appeal on that issue, shall be at liberty to approach the matter as if it were a court of first instance.

2.4.4.2 The Commission furthermore believes that there is a need for a specific provision conferring on the High Court the jurisdiction where the High Court is satisfied, on the application of any organisation, or any body or person, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of contracts or terms which are unreasonable, unconscionable or oppressive, that it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class. The Commission further is of the view that provision should be made for the High Court issuing orders on the application by the Ombudsperson that a person fails to comply with the request by the Ombudsperson for the giving of an undertaking and to order, in addition to granting any other relief, the omission of terms that are unreasonable, unconscionable or oppressive, or any term having in substance the same effect, from all pre-formulated standard contracts.

2.4.5 Recommendation

2.4.5.1 The Commission proposes the following provisions setting out the powers of

courts, namely -

1.(1) If a court is of the opinion that

- (a) the way in which a contract between the parties or a term thereof came into being; or
- (b) the form of a contract; or
- (c) the content of a contract; or
- (d) the execution of a contract; or
- (e) the enforcement of a contract

is unreasonable, unconscionable or oppressive, the court may declare that the alleged contract-

- (aa) did not come into existence; or
- (bb) came into existence, existed for a period, and then, before action was brought, came to an end; or
- (cc) is in existence at the time action is brought, and it may-
 - (i) limit the sphere of operation and/or the period of operation of the contract; and/or
 - (ii) suspend the operation of the contract for a specified period or until specified circumstances are present; or
 - (iii) make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unjust to any of the parties.

1(2) Any court hearing an appeal against an order made in terms of section 1, may hear the matter as if it were a court of first instance.

2.4.5.2 The Commission further proposes the following provisions on injunctive powers:

- Where the High Court is satisfied, on the application of any organisation, or any body or person, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of contracts or terms which are unreasonable,

unconscionable or oppressive, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.

- Where the High Court is satisfied, on the application by the Ombudsperson contemplated in section 6-
 - (a) that a person fails to comply with the request by the Ombudsperson for the giving of an undertaking under sections 6(2)(c) and 6(2)(f), the Court may order such person-
 - (i) to act in a manner that would have been required; or
 - (ii) to refrain from acting in a manner that would have been prohibite
 - (b) that a pre-formulated standard contract proffered by a person or which he or she recommends for use, contains a term which is unreasonable, unconscionable or oppressive, the Court may, as well as granting any other relief, order the omission of that term, or any term having in substance the same effect, from all contracts subsequently proffered or recommended by that person or any other person.

2.5 THE FAIRNESS CRITERION

2.5.1 The Working Committee's proposal

2.5.1.1 The Working Committee proposed that if a court is of the opinion that the execution or enforcement of a contract is unreasonable, unconscionable or oppressive, it may rescind or amend a contract to prevent the effect of the contract being unreasonably prejudicial.

2.5.2 Provisions in foreign jurisdictions

- (a) New South Wales

2.5.2.1 The long title of the *New South Wales Contract Review Act* states as follows:

"An Act with respect to the judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts."

2.5.2.2 This Act provides in section 7(1) that where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, make a number of orders. Section 9(1) of the same Act provides for the court considering a number of guidelines when determining whether a contract or a provision of a contract is unjust. It provides that the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of a number of set circumstances.

(b) Ontario

2.5.2.3 The Ontario Law Commission recommended in 1979 that a doctrine of unconscionability should be incorporated into their revised *Sale of Goods Act*, and argued that the doctrine is rapidly becoming, if it has not already become, a thoroughly respectable landmark in the modern law of sales.¹⁷⁷ The Commission subsequently stated in 1987 that judicial intervention in contracts on the ground of unconscionability may be explicit, as when statute law allows judicial intervention on the specific basis that the bargain between the parties or some aspect of it is harsh and unconscionable.¹⁷⁸ They remark that the concept of unconscionability may serve to explain and unify a number of discrete parts of the law of excuse for non-performance of a contract that do not overtly refer to unconscionability but that do allow certain harsh consequences of particular contracts to be avoided. They are of the opinion that the emergence of a modern doctrine of unconscionability does not signal a radical break with the past.¹⁷⁹

2.5.2.4 The Ontario Commission considers in their *Report on Sale of Goods* whether

177 OLRC *Report on Sale of Goods* at 156.

178 OLRC *Report on the Law of Contract* at p 119.

179 Ibid.

the unconscionability doctrine should be restricted to cases of procedural unconscionability.¹⁸⁰ They note that the distinction between substantive and procedural unconscionability is one that has been heavily emphasised by some American scholars and that some have argued that the court's power to interfere should be restricted to cases of procedural unconscionability. They state that according to this line of reasoning, the mere existence of a harsh clause, or of a bargain that is improvident in its entirety, should not attract the operation of the doctrine unless the transaction is accompanied by elements of procedural unconscionability, that is, some form of exploitation of the weakness, ignorance or gullibility of the other party. The Ontario Law Commission remarks while they are not questioning the importance of procedural factors, the distinction between substantive and procedural unconscionability is, in their view, too rigid and they do not recommend its adoption. They are of the view that the question what is *procedural* and what is *substantive*, will frequently result in a sterile debate, considering that these are not terms of art.¹⁸¹

2.5.2.5 The Ontario Law Commission notes in their *Report on the Law of Contract* that procedural unconscionability would appear to refer to unconscionability in the process of making the contract, whereas substantive unconscionability would seem to refer to an unacceptable one-sidedness in the terms of the contract.¹⁸² They recognise that it might be argued that to allow an attack on the basis of substantive unconscionability alone would be to negate the concept of freedom of contract, and that it may be further argued that certain avenues of inquiry should be closed to the courts because the issues may be too complex, or inappropriate for handling by regular adjudicative methods. They note that an example of this is provided by the prohibition in the *Uniform Land Transactions Act* on the use of inadequacy of consideration alone as a ground for giving relief on the basis of unconscionability. They however also note that the *Business Practices Act*, the *Consumer Protection Act* and the *Unconscionable Transactions Relief Act* do not draw distinctions between procedural and substantive unconscionability. They state that they favour an approach which would allow the courts to

180 OLCRC *Report on Sale of Goods* at 157.

181 Ibid.

182 The Law Reform Commissioner of Tasmania explains in his *Report on Harsh and Unconscionable Contracts: Report No 71* of 1994 at 10 that procedural unconscionability relates to the bargaining process of the transaction and the particular conduct of the parties, whereas substantive unconscionability focuses on the content of the contract.

consider all aspects of a bargain, without having to categorise particular aspects as either procedural or substantive, and that this becomes particularly important with respect to cases where one of the parties has no contractual alternatives. They considered that there is little danger of the courts jumping to hasty conclusions solely because of a disparity in bargaining power or a significant differential in value.¹⁸³

2.5.2.6 The Ontario Law Commission considers in its *Report on Sale of Goods* that the doctrine of good faith is a logical complement to the doctrine of unconscionability. The Commission explains the difference between the two as follows: the doctrine of unconscionability is concerned with fairness in the terms of the bargain, whereas good faith focuses on decent behaviour in the exercise of rights or duties imposed under the terms of the agreement. The Commission remarks that the similarities of the concepts are that both concepts derive their source from a common ethical sense and from the need to protect a contracting party from an abusive exercise of power, and furthermore, that like unconscionability, the flexibility inherent in the concept of good faith is also its weakness - its imprecision makes for uncertainty and, in the eyes of some critics, subordinates the interests of the individual to the whims of the court.

2.5.2.7 The Ontario Law Commission considers that a legislated requirement of good faith would be conducive to greater certainty in the law and would encourage more straightforward judicial reasoning.¹⁸⁴ The Commission recognises the concern of some critics that the adoption of an explicit doctrine of good faith might lead judges "to abandon the duty of legally reasoned decisions and to produce an unanalytical incantation of personal values" but considers that the considerable American experience with the doctrines does not support these fears. The Ontario Law Commission argues that a legislated requirement would not conflict with the then existing contract law principles, but that statutory recognition of such a doctrine of good faith would rather serve to synthesise the various strands of good faith analysis in the case law, and that the literature reveals that a generalised doctrine of good faith would conform to commercial realities. The Commission therefore recommends that legislation give recognition to

183 Ibid.

184 OLRC *Report on the Law of Contract* at 173 - 175.

the doctrine of good faith. A question the Commission considers is whether the proposed obligation of good faith should apply to contract negotiation and formation. The Commission notes that it is evident that good faith in pre-contractual dealings can play an important role, and that this fact was acknowledged in its *Report on Sale of Goods*. The Commission notes that the relevant provisions in the European Civil Codes and the American Uniform Commercial Code, as well as section 205 of the American Restatement, similarly limit the scope of good faith scrutiny to exclude contract negotiation and formation. The Ontario Law Commission favours in its *Report on Sale of Goods* a definition of good faith that encompasses reasonableness and fair dealing, in addition to subjective honesty in fact. The Commission recommends that the good faith obligation should apply to contract performance and enforcement. The Commission concludes, in light of the review of the then current law, that this approach is as appropriate to the general law of contract as it is to sale of goods law.¹⁸⁵

(c) New Zealand

2.5.2.8 The New Zealand Law Commission notes that the law, and particularly equity, has always been willing to intervene in what the courts see as unconscionable transactions. The Commission states that many recent cases can usefully be explained under some general head such as taking undue advantage of inequality of bargaining power, or a more general doctrine of unjust enrichment and even notions of an underlying "fair dealing" principle.¹⁸⁶ The New Zealand Commission notes that it may be asked whether the true basis of unconscionability is the principle of fair dealing and state that inequality of bargaining power simply sets up a situation where the need for fair dealing is more apparent. The Commission considers that by no means all contracts where the parties are in an unequal bargaining position are at risk for judicial intervention and that the courts have consistently stated that outside very narrow areas, such as minors' contracts, the cloak of unfairness or unconscionability does not cover the merely foolish, naive or imprudent and note the following three cases:

"Unconscionable' must not be taken as a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other ..." (*Bridge v*

185 OLRC *Report on the Law of Contract* at 175.

186 NZLC *Unfair Contracts* at 13 - 18.

Campbell Discount Co Ltd [1962] AC 600 at 626.)

"... it is not the function of the courts to protect adults from improvident bargains."
(*Griessenheimer v Ungerer* (1958) 14 DLR 2d 599 at 604.)

"The equitable jurisdiction to set aside unconscionable bargains is not a paternal jurisdiction protecting or assisting those who repent of foolish undertakings." (*Nichols v Jessup* [1986] 1 NZLR 226 at 235.)

2.5.2.9 The New Zealand Commission considers that simple inequality in bargaining position is not enough, since innumerable transactions take place where one side takes advantage of the needs of the other but which no one in their senses would challenge. The Commission notes that only serious types of inequality are recognised as needing redress, some sort of "special disability" is required, the bargain must be tainted with unfairness attributable in some way to the strongest party, and the exploiting party need not actually have to know of the other's disability, it is enough if he ought to have known thereof.

2.5.2.10 The New Zealand Law Commission considers that any legislation that tries to deal generally with abuses of inequality of bargaining must almost inevitably be expressed in terms of standards that have some subjective element.¹⁸⁷ The Commission states that the alternative seems to be to specify particular terms that may be considered unfair, and particular circumstances under which the courts may intervene on this ground. The Commission notes that the German legislation has gone some way towards specifying what terms in standard contracts are objectionable and the UK *Unfair Contract Terms Act* comprehensively regulates exemption clauses. The Commission notes, however, that this sort of legislation too is often expressed in terms of a standard. The Commission notes that what is "unreasonable", "unfair" or "oppressive" is not capable of precise definition in advance and that the introduction of such standards, whether by judges through case law or by legislation, has therefore been criticised as diluting the policies of certainty and predictability in contract.

2.5.2.11 The New Zealand Law Commission is of the view that the answer to an assertion that a contract or a term is unfair or unconscionable must depend in part on the response of a

187 NZLC *Unfair Contracts* at 28.

particular judge in a particular court. The Commission considers that the truth is that there is already some degree of uncertainty in the law of contract, both as developed by the courts and as modified by statute. The Commission is therefore of the view that the question is not whether more legislation about unfair contracts and unfair terms would introduce uncertainty into the law of contract, but rather whether or not it would increase uncertainty, and if it would, whether this is acceptable. The New Zealand Commission notes that what is desirable is that uncertainty should be reduced to the lowest practicable level by defining limits (what things are not to be regarded as unfair), setting down of criteria (what things are to be taken or not taken into account) and leaving scope for people to take risks where they wish to. The Commission considers that in this area of the law, reform must be cautious lest the baby goes out with the bath water, and therefore remark that freedom of contract and predictability ought not to be limited without good reasons. The Commission indicates that for a contract to be unfair under their proposals three elements are generally required, namely a serious imbalance of power between the parties, one party taking undue advantage of that imbalance, and a substantial disparity of result. The New Zealand Commission states that its proposed scheme draws on the common law doctrine of unconscionability as developed in their case law¹⁸⁸, and related doctrines such as undue influence and duress, and that it aim is to extend the focus beyond the actual making of the contract, to recognise that some contractual terms may not be unfair in themselves but can be applied in an unfair or harsh manner. Moreover, the New Zealand Commission sets out a number of factors or guidelines for determining unfairness.¹⁸⁹

(d) Hong Kong

2.5.2.12 We noted above that the Hong Kong Commission addressed the question of uncertainty involved in this issue. The Hong Kong Commission takes the view that there is already uncertainty in some well-accepted concepts, such as reasonableness, the statutory test for control of exemption clauses. The Commission notes that the concept of unconscionability has at least two advantages over the concept of reasonableness. Firstly, the court can look at the particular circumstances of the consumer who may not be a 'reasonable man' in the objective test

188 *Hart v O'Connor* [1985] 1 NZLR 159; [1985] AC 1000 and *Nichols v Jessup* [1986] 1 NZLR 226.

189 "A contract or a term of a contract, may be unfair if a party to that contract is seriously disadvantaged in relation to another party to the contract because he or she: ..." See the discussion below on guidelines.

of reasonableness. Secondly, the court is able to consider the conduct of both parties, not just that of the complainant.¹⁹⁰ The Hong Kong Commission remarks that unconscionability is neither new nor unknown, but nevertheless a vague notion.¹⁹¹ The Commission indicates that it is not the same as fraud, nor is it the same as unfairness or unreasonableness, although it shares elements with all of them, and similarly a contract or a clause which is unconscionable is not the same as one which is improvident. It considers that unconscionability focuses on the conscience of a party who is using a power which he holds over another, and where those persons have an agreement, that power stems from the agreement. The Commission notes that the question for the court is whether, in the circumstances, the exercise of that power is one which a court of conscience ought to permit.

2.5.2.13 The Hong Kong Commission is of the view that although it is impossible to pin unconscionability down, there are identifiable elements to it which may be present in a particular case. The Commission considers that inequality of bargaining power is one such element, and that it involves other sub-elements such as the identity, status and education of the parties, whether the party in the inferior position had an opportunity to take independent advice and whether he or she was able to make an informed judgment when signing the agreement, and associated with this, whether that party had adequate time to deliberate over his or her decision to sign and whether he or she was signing under pressure. The Commission notes that such pressure could come from the other party's sales techniques or position of influence or could stem from the financial or personal situation of the first party, and that sometimes the conduct of the other party amounts to more than pressure and constitutes sharp practice, coercion or even fraud.

2.5.2.14 The Hong Kong Commission considers that the type of transaction has an obvious bearing on conscionableness, the courts being more willing to intervene where the contract is a consumer one rather than a thoroughgoing commercial one in which risks are more readily accepted. It further notes that the consequences of the bargain for the party in the inferior position is also an important element. The Commission indicates that if the benefits received are

190 LRCHK *Sale of Goods and Supply of Services* at 37 - 38.

191 LRCHK *Sale of Goods and Supply of Services* at 34 - 35.

obviously inadequate in relation to the detriment suffered so that it can be said that no reasonable person who was properly advised would have entered into the contract, there will be a strong impetus for the court to intervene, especially if the inadequacy of the consideration can be explained by a factor (such as the age, health or education of the first party) which points towards unconscionability. The Hong Kong Commission considers that the unusualness or otherwise of the clause under attack and its prominence or otherwise in the contract are also relevant. The Commission argues that a party confronted by a wall of small print can be forgiven for not reading it, especially if it is presented on a take-it-or-leave-it basis by a man in a hurry, and some clauses may be so detrimental to the party's interests (despite being common in the trade) that they should be picked out in bold print and may be even boxed and pointed out by a red hand.

2.5.2.15 The Hong Kong Commission's report resulted in the *Control of Exemption Clauses Ordinance*.¹⁹² Section 3 of the *Ordinance* provides that the requirement of reasonableness is satisfied only if the court or arbitrator determines that the term was a fair and reasonable one to be included having regard to the circumstances which were, or which ought reasonably to have been, known to or in contemplation of the parties when the contract was made. It is suggested that the way in which the test is defined provides fertile ground for litigation. The *Ordinance* further provides that in relation to a term excluding liability, the reasonableness requirement is satisfied only if the court or arbitrator determines that it would be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the term) would have arisen.

(e) The European Union *Directive*

2.5.2.16 Article 3(1) of the *European Union Directive on Unfair Terms in Consumer Contracts* (the "*Directive*") contains the following criteria for determining the fairness of contracts:

A contract term which has not been individually negotiated shall be regarded as unfair if,

192 *Baker & McKenzie* "Asia Pacific Legal Developments Bulletin" February 1996 Vol 11 No 1 at http://www.netdoor.com/com/bakernet/publicat/asiapac/book9/bk9_4b4.htm accessed on 17/11/1997.

contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.¹⁹³

2.5.2.17 The *Directive's* purpose is set out as follows:

Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services, which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.

2.5.2.18 Hugh Beale notes in respect of article 3(1) of the *Directive* that the word "imbalance" has connotations of exploitation of the old-fashioned kind.¹⁹⁴ He considers if the arguments used earlier are correct, this would open to the seller or supplier the defence that the harsh clause resulted in a cheaper deal for the consumer, with the result that there was no overall imbalance. He notes that it was just on this ground that the French legislature rejected the test when considering what was to become the *Loi Scrivener* of 1978. He states that it seems that the *Directive* restricts relief to cases where there has not been good faith. He considers that to English lawyers this may have connotations of conscious misleading, or at least reckless attitude as to whether the other party has been misled by the standard form. It does not seem to him to apply readily to a case where the consumer has simply not read the standard form, although the form is not misleading, still less to cases where the supplier simply indicates that it is not willing to alter the form in the consumer's favour. He is of the view that, in this respect, the earlier drafts of the *Directive* seemed more satisfactory, and that, for instance, in the 1990 version, "significant imbalance" and "incompatibility with good faith" were alternatives, rather than cumulative. He also indicates that there were also two other grounds for unfairness, namely that the term caused performance of the contract to be unduly detrimental to the consumer, or that it caused the performance to be significantly different to what the consumer could legitimately expect.

193 Article 3(1).

194 Beale in *Good Faith and Fault in Contract Law* at 242.

2.5.2.19 Meryll Dean is of the view that the phrase "significant imbalance" used in the *Directive* is vague and lacking in the sort of precision an English lawyer might expect.¹⁹⁵ She considers that it could well be argued that a large number of contracts quite naturally contain an imbalance between the parties' rights and obligations but which are not detrimental. She notes that the addition of the word "significant" does add a useful qualification, but argues that it is still conceivable that a contract may contain a "significant imbalance" and yet be reasonable. Dean notes that the absence of a test of reasonableness is a matter of concern to English lawyers and that the European Parliament recommended its introduction in an amendment to the original draft *Directive*. She further states that the report of the House of Lords Select Committee on the original draft *Directive* supported the addition of the concept of reasonableness, whilst noting that it would be helpful to lawyers and businesses in the UK, but may give rise to difficulty of interpretation in other member States.¹⁹⁶

2.5.2.20 Hugh Beale also notes that there were proposals for the addition of a further criterion, namely the "non-transparency of a contract term" besides the test of reasonableness.¹⁹⁷ It, however, seems probable to Hugh Beale that concerns over the test of imbalance and absence of good faith may be premised on interpretations of those phrases that are too narrow. He suggests that imbalance should be thought of not just in a narrow deviation from the market price sense, but in terms of balancing overall interests. He remarks that there may thus be imbalance if, by using a term, the supplier reduces the price slightly, and thereby gains a few extra sales, but at the price of placing a very large potential loss on the small number of consumers for whom the risk will materialise. He states that the test adopted by the *Directive* is close in its wording to the German Act on Standard Contract Terms, that the German general clause has been interpreted as requiring the courts to look at the overall balance of advantage in the general run of cases, and that it has been noted that the courts have frequently rejected the argument that a harsh clause is acceptable because it leads to a lower price being charged to the consumer. Hugh Beale notes that good faith has been developed very much beyond what might immediately be thought of and refers to the *Interfoto* case¹⁹⁸ where the court held as follows:

195 Meryll Dean "Unfair Contract Terms: The European Approach" 1993 *The Modern Law Review* 581 at 585.

196 Dean 1993 *Modern Law Review* at 585.

197 Beale in *Good Faith and Fault in Contract Law* at 245.

198 *Interfoto Picture Library Ltd v Stiletto Visual Programmes LTD* [1989] QB 433 at 439 as quoted by Beale

"In many civil law systems ... [t]his does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair and open dealing."

2.5.2.21 Hugh Beale notes that other legal systems have gone beyond the kind of disclosure requirement suggested in the *Interfoto* case, such as the Netherlands' *Civil Code* which uses the test whether the contract is unreasonably onerous and Germany, which also uses the good faith test extensively, both under their *BGB* § 242 and the Law of Standard Contracts. He states that commentators have noted that German courts tend to judge the clause by whether there was any real choice open to the customer and have discussed the balance of interests in general terms, rather than in relation to the particular position of the individual consumer. Beale considers that the preamble to the *Directive* suggests a broad interpretation of the imbalance and good faith tests. He notes that the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods and services were sold or supplied to the special order of the consumer are apparently taken directly from the guidelines on reasonableness in the English *Unfair Contract Terms Act*.

2.5.2.22 Hugh Beale remarks that the consultation paper on the *Directive* suggested that the tests of unfairness and reasonableness are likely to produce similar results in most cases, but that there is no guarantee that this will always be the case. Meryll Dean notes that article 4(1) expands the test of unfairness further by providing that the unfairness of a contractual term shall be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the contract and to all other terms of the contract or of another contract on which it is dependent. She states that the emphasis is once more placed upon the interaction of terms both in the contract at issue and any related contract. She considers that by allowing reference to the surrounding circumstances in order to test the unfairness of a term, it is clear that the issue is to be determined in the broader context of the bargain. She further notes that article 4(2) makes it

in *Good Faith and Fault in Contract Law* at 244").

clear that unfairness is not to be determined by reference to the subject matter of the contract, nor to the adequacy of the price and remuneration, and this avoids the danger of saying that the contract term is unfair simply because the goods or services are overpriced.

(f) England

2.5.2.23 Lord Johan Steyn¹⁹⁹ observes that whereas the principle of good faith is gaining ground in the rest of the world, English lawyers remain hostile to the idea of the incorporation of good faith principles into English law.²⁰⁰ He considers since English law serves the international market place it cannot remain impervious to ideas of good faith, or of fair dealing. He states that his impression is that the basis of the hostility is suspicion about the meaning of good faith. He is of the view if good faith were a wholly subjective notion, one could understand the scepticism and if it were an impractical and open-ended way of fastening contractual liability onto parties, it would not deserve a place in international trade. Lord Steyn remarks that this is however not the case. He considers that good faith has a subjective requirement entailing basically that the party must act honestly and an objective requirement entailing the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned. He considers that it is surprising that the House of Lords held in the case of *Walford v Miles*²⁰¹ that an express agreement that parties must negotiate in good faith is unenforceable. Lord Steyn notes that it was held that the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial process of the parties when involved in negotiations. He notes that the court did not consider in *Walford v Miles* that where a party negotiates in bad faith not intending to reach an agreement with the other party he is liable for losses caused to the other party. Lord Steyn states that he hopes that the concept of good faith would not be rejected out of hand if it were to arise again with the benefit of fuller argument. He considers that since the concept of good faith is practical and workable there is no need for hostility to the concept.

2.5.2.24 Lord Steyn further draws attention to the fact that the *Unfair Terms in Consumer Contracts Regulations* treats consumer transactions within its scope as unfair when they are

199 A Lord of Appeal in Ordinary.

200 Steyn 1997 *The Law Quarterly Review* at 438 - 439.

201 [1992] 2 AC 128 at 138E.

contrary to good faith and that it is likely to influence domestic English law. He considers that given the needs of the international market place, and the primacy of European Union law, English lawyers cannot avoid grappling with the concept of good faith. Lord Steyn explains that he has no heroic suggestion for the introduction of a general duty of good faith in the English contract law since it is unnecessary. He suggests that as long as the English courts always respect the reasonable expectations of parties the English contract law can satisfactorily be left to develop in accordance with its pragmatic traditions and where in specific contexts good faith are imposed on parties the English law system can readily accommodate such a well-tried notion.

(g) International law

2.5.2.25 It was mentioned above when considering the desirability of enacting legislation that good faith and fairness are part of international law. Nagla Nassar explains these concepts as follows:

"International practice regards reasonableness as the yardstick against which the duties of good faith are tested. This renders the issue of good faith one of discretion and understanding, rather than one of formalistic principles. What is reasonable depends on the circumstances of the case and the normative inquiry of how one should conduct himself. The process is not a mechanical one of interpreting the parties' intentions in light of formalistic principles. Rather, it is more an attempt to determine what is deemed to be proper conduct. Acknowledging a duty to cooperate, in situations where it is thought to best serve the contractual relationship and its goals, moves the contractual model away from a classical conceptualization - where individuals are free to conduct their business as they please, their agreements being the only self-imposed limitation - towards a relational one. Under the latter conceptualization, one is expected to conduct his affairs in conformity with an existing set of values, or what one may call a code of conduct. As is the case with the general standard of good faith, reasonableness, as opposed to honesty, requires sincere efforts to further the contractual relationship and achieve its goals. By falling short of the behavioural standards required under the circumstances, one can wind up in breach of his contractual obligations, regardless of whether one has acted in bad faith - that is, dishonestly.

The criterion used to test the reasonableness of questioned activity is whether the conduct conforms to reasonable business judgement. A party's motivations for his conduct do not affect the determination of the standard of good faith performance. In this regard, unlike the practice of some national legal jurisdictions, the duty of good faith is defined in terms of best efforts. The standards for good faith and best efforts are not distinct and do not require different tests of liability. To perform in good faith is to exercise one's best efforts to fulfill a contractual obligation. If one does so, he will not incur the liability which otherwise would ensue. This definition of the good faith standard of performance has been endorsed by arbitral awards in a variety of factual contexts. In fact, the same

standard has been used in cases where the equitable adjustments are made based upon the parties' duty to negotiate in good faith. It is when the parties' best efforts are not sufficient to negotiate a new agreement that the courts impose equitable solutions."²⁰²

"In this chapter, it will be demonstrated how 'fairness' constitute a principle of current international practice. This task will be carried out through a study of the 'extent' to which 'fairness' is regarded as an underlying principle of international commitments and arbitral awards. If fairness is an underlying principle of contractual obligations, then 'gaps' in the contract's provisions, whether minor or major, should be filled in accordance with this principle. This is the approach used in revision cases, where equitable standards are applied to correct for failed negotiations.

There are other examples of international practice where considerations of justice and fairness reflect themselves in contract rules. The *rebus sic stantibus* is one of these instances. ... Also, the *contra proferentem* rule is an example of an interpretation technique used to ensure fair implementation of deals. Public policy is another notion frequently used to deny or admit liability for equitable purposes. Although the *contra proferentem rule* and the public policy argument both further the notions of justice and fairness, they generally apply to all kinds of contracts."²⁰³

(h) Sweden

2.5.2.26 The Corporate Lawyers Association of SA (CLASA) draws attention section 36 of the Swedish *Contract Act* which provides that a contract term or condition may be modified or set aside if such term or condition is unconscionable. CLSA notes that this section is most frequently referred to by parties claiming to be in an inferior bargaining position, but it can also apply to contractual terms and conditions agreed between parties with equal bargaining power, and it may even apply to the disadvantage of the weaker party. It further notes that the following factors contained in the draft of section 36 may serve as guidelines for determining unconscionability, namely -

- * an uneven balance of the rights and duties of the parties;
- * the circumstances prevailing at the time of the formation of the contract, eg abuse of negotiating powers that do not qualify as coercion, duress or fraud, etc, which are regulated separately;
- * the parties' previous practice in similar situations;

202 Nassar *Sanctity of Contracts Revisited* at 167 - 168.

203 Nassar *Sanctity of Contracts Revisited* at 170.

- * unforeseen changes in circumstances, if the risk for such circumstances occurring has not been allocated;
- * deviation from, or attempts to, circumvent mandatory law;
- * deviation from good business practice.

2.5.3 Respondents' proposals

2.5.3.1 The group of Judges of the Supreme Court of Appeal who are opposed to the proposed Bill point out that they agree with the objections to the proposed legislation set out in their colleagues' memorandum in which the latter support the proposals with reservations. Their main objection to the proposals are the uncertainty that would be introduced by the Bill. They state that the concept of public policy in the common law has a restricted application, and the proposed legislation would presumably be interpreted to grant a greater licence to courts to interfere with contractual relations than is provided by the common law. The Judges consider that the effect would be that the validity of many contracts would be in doubt and even if the proposed legislation is limited to contracts which are considered "unconscionable" the results would be unpredictable. They note that the word "unconscionable" is capable of a wide interpretation and that it has the following meaning according to the Shorter Oxford Dictionary:

"1. Having no conscience; unscrupulous; monstrously extortionate, harsh etc.; ... 2. Of actions, etc.: Showing no regard for conscience; irreconcilable with what is right or reasonable ...".

2.5.3.2 SACOB is of the view that the vague and inconsistent terminology contained in the draft Bill creates more uncertainty and would further facilitate undesirable and unnecessary litigation, as it would take many years for the courts to develop legal rules to define the scope of the new law, given the very wide powers proposed to be conferred on the judiciary. They consider that the provisions of the Bill requiring a court to amend a contract is tantamount to calling upon it to make a new contract for the parties. They submit it is in itself an unfair burden on the judiciary, many of whose members are known to regard the prospect thereof with disfavour. They note that one of their respondents cites an example of a long term contract in terms of which the price is to be determined by a formula and they ask if a court concludes that the result is "unreasonably prejudicial", how is it to arrive at a substitute formula.

2.5.3.3 It was noted above that the one group of Judges of the Supreme Court of Appeal reservedly support the Working Committee's proposed Bill and that they state that it is with some hesitation, and in the interests of greater flexibility, that they support the approach adopted in the Discussion Paper. They remark that it is done with one crucial reservation and that is that the proposed criteria of "unreasonable, unconscionable or oppressive" be restricted to the single criterion of "unconscionability". They support the notion of "unconscionability" as the sole appropriate criterion inasmuch as it connotes conduct of a kind that would jar the sense of justice of any right-thinking person, conduct which is immoral or overreaching or which smacks chicanery or sharp practice. They consider that such a criterion is capable of being contained within workable and practical limits, it would not be offensive to the considerations of certainty and stability²⁰⁴ and that unconscionability thus interpreted would comprehend the concept of oppressiveness. They state that the word "oppressiveness" adds nothing to that criterion and is bound, if it is to remain, to create confusion when it is sought to contrast it with the concept of unconscionability. They oppose the introduction of the broad concept of unreasonableness as one of the criteria firmly, stating that it runs counter to the thinking contained in the discussion paper itself and unreasonableness widens the scope of interference to such an extent that courts will be enjoined to either endorse or rewrite contracts or even to manage them as circumstances change. They consider all the objections mentioned above apply in full force. They consider that it is not believed that the case is overstated if it is predicted that commercial chaos may well ensue and that an unmanageable proliferation of litigation will follow if every contract made may be subjected to an *ex post facto* corrective of reasonableness. They note that such a test would not discourage parties from entering into bad bargains, it might even encourage them to do so deliberately in line with the adage "tender low, claim high", confident that the courts are there to correct their mistakes and that, on that basis, a bargain will only be bad if it cannot be salvaged by a court. They urge the Commission strongly to jettison unreasonableness as a relevant criterion. They believe it will do more harm than good.

2.5.3.4 The deletion of the test of reasonableness is suggested by Professors Hutchison and Van Heerden of UCT too. They argue that to add to the tests of unconscionability

204 See their comments on the powers of the courts above.

and oppressiveness will lead to problems of interpretation, the courts will probably interpret it as requiring something less than the latter two tests, and it goes too far. They consider that the enforceability of a contract should not depend upon an individual judge's sense of reasonableness and that the contract or clause should be more than just unreasonable before it is struck down, there should be an element of unconscionability and oppressiveness. They argue that this is also in line with how the *exceptio doli generalis* was understood before its recent demise.

2.5.3.5 The group of Supreme Court Judges reservedly supporting the proposals consider that unconscionability, while less open-ended than unreasonableness, is still not a concept which lends itself to precise definition and any court invited to apply it will of necessity be invested with a considerable degree of latitude. They state that if that latitude should be construed as the exercise of a discretion in the wider sense,²⁰⁵ it would in effect emasculate any appeal which a disgruntled party may wish to pursue. They propose to make assurance doubly sure that a provision be included in the Bill to the effect that any court sitting on appeal on that issue, be at liberty to approach the matter as if it were a court of first instance.

2.5.3.6 Mrs Moolman of the SA National Consumer Union notes that the First European Congress on Unfair Contract Terms held in Coimbra, Portugal during 1988 came to the conclusion that there is a problem due to the various interpretations given to the terminology used in various countries, such as "unconscionability" in the USA, "unfair contract terms" in the United Kingdom, "clause abusive" in France and "oneerlijkheid" in the Netherlands. She is therefore not in agreement with the suggestions in the Bill that the unconscionability criterion is advisable and suggests that the terminology "unfair contract term" is preferable.

2.5.3.7 Professors SWJ van der Merwe and LF van Huyssteen note the proposed replacement of "good faith" with "unconscionability" as the basic standard for evaluating the "fairness" of contractual terms and point out that they experience a number of difficulties with the substitution proposed in the discussion paper. They state that the concept of good faith entails, by definition, an objective standard capable of application to all phases of contract and this is said on the basis that good faith is not without more the antithesis of "bad faith", which is

205 See *Media Workers Of South Africa and Others v Press Corporation of South Africa Ltd ("Perskor")* 1992 4 SA 791 (A) at 800C-801A.

generally understood in a more subjective fashion and that the absence of good faith is not automatically equal to bad faith. They consider that as such, good faith holds the potential of being developed into a general standard for equity in contract such as the *Generalklausel* of the German *BGB*, capable of interpretation and application by the courts. They are of the view that one should consider in this respect the existing body of jurisprudence in South Africa, including the present development regarding "unfair contract terms" and illegality. They remark that the concept of "unreasonableness" may certainly also be given an objective content, however, used in conjunction with "unconscionable" and "oppressive", it is difficult to interpret "unreasonable" as a completely objective standard. The Professors consider that it is not clear to what extent a more subjective standard may create difficulty for the courts when asked to develop the applicable norm and especially when required to relate it to existing norms which apply value judgments to the various phases of contract, such as the grounds for rescission and illegality. Mr Kaya Zweni also supports the use of the good faith approach.

2.5.3.8 The Unfair Contract Term Committee (UCTC) notes that the Working Committee proposes the terms "unreasonable, unconscionable or oppressive" and that the Working Committee find them to be more precise than the criterion of good faith proposed by the research team and project committee. The UCTC considers that the triad criteria proposed by the Working Committee, seems to be meant to give some more concrete meaning to a concept such as good faith. The UCTC is of the view that this sentiment is understandable, but find it doubtful whether this is the right way of going about with the matter. The UCTC considers that what it amounts to, is a triad of criteria, which over-lap in some respects, but not in others which will complicate the practical working of the system and increase legal uncertainty. The UCTC notes, as other respondent also do, that the nature of the three criteria proposed differ, in that reasonableness is usually regarded as something that can be established objectively, whereas fairness is usually criticised for being too subjective to be useful, and oppressiveness may, perhaps, be something which can be viewed both objectively and subjectively. The UCTC considers that a criterion such as good faith, being a so-called "open norm", cannot and should not be made more concrete in itself. The UCTC notes that if it were concretised, it would lose its capability to act as a corrective norm of general application in the law and practice of contracting and that this is why the research team opted for the criterion of good faith, as the general criterion providing the driving force and setting the tone for its proposed control system. The UCTC notes

that the general criterion of good faith, or any other general criterion for that matter, will obviously have to be applied in a way which will be conducive of greater certainty than all users of contracts currently enjoy. The UCTC considers that this can, however, not be attained by replacing good faith with three terms, which differ from each other, and over-lap with each other in ways hitherto unclear. The UCTC states that it is precisely with this in mind that the research team proposed an open list of guidelines for the concrete application of the general criterion.

2.5.3.9 The UCTC poses the question whether the proposed triad implies that those terms are to be understood, in line with normal hermeneutic principles, to fall under the *eiusdem generis*-rule? The UCTC notes that if that were the intention, how could those terms be understood in that way, where reasonability is notoriously objective, while unconscionability is notoriously subjective? The UCTC states if the above is not the intention, then one has to guess why the three terms are being used in one breath, without explaining how they are to be understood. The UCTC asks, furthermore, whether the reference to "unreasonably prejudicial or oppressive" as the requirements which should prompt the court to take avoiding steps, means that the above triad of criteria should be read subject to the qualification that they will only be found to be satisfied if prejudice is imminent to any party? The UCTC notes that whereas "unreasonably" and "oppressive" are used in connection with prejudice, one is in doubt why nothing is said about "unconscionability", which is the other member of the threesome. They ask whether the silence implies that a term can be acted upon by the court if it is seen to be unconscionable, without any "unreasonable prejudice or oppression" being required, and, furthermore, whether the proposed terms mean that there are three separate avenues that could lead to steps being taken by the court (and that we have then three separate criteria as well, one objective, one subjective and one which most probably be viewed as mixed) while the court will not take action unless, in the case of unreasonability and oppressiveness, the further qualification of prejudice is also satisfied, whereas, if the term complained about were found to be unconscionable, no prejudice is required before the court will act? The UCTC states that it remains convinced that the general criterion of good faith should be used, and that it should simply be made easier and more certain to apply in concrete instances, by providing an open list of guidelines.

2.5.3.10 COSAB is concerned about the fact that the preamble of the proposed Bill sets out

that a court may rescind or amend contracts which are contrary to good faith, but that the reference to good faith is not employed in the text of the Bill. COSAB considers that if the courts are empowered to rescind or amend certain contracts or the terms thereof, the courts should only be entitled to do so where the contract was concluded contrary to good faith. COSAB remarks that although it is possible for a court to determine whether or not any terms of a contract is unconscionable, the ability of a court to determine the reasonableness of a term of the contract is questioned, particularly where the court was not a party to the contract at the time of its conclusion and could not be certain as to what the intention of the parties was at that time. COSAB considers that the courts' powers under the Bill should be confined to contracts or terms thereof which are unconscionable and contrary to good faith.

2.5.3.11 The General Council of the Bar (the GCB) is also of the view that the criteria contained in the draft Bill are subject to some criticism. The GCB also suggests that the criterion of unreasonableness as one of the criteria on which the court should be empowered to rescind or amend a contract or any term thereof, should not be introduced in the proposed Bill. The GCB considers that both the expressions "unconscionable" and "oppressive" used in the Bill, contain elements of, if not dishonesty, at least unscrupulous, immoral or unprincipled behaviour. The GCB states that before conduct can be described as "oppressive" one would expect there to be a discernible inequality between the relative power of the parties. The GCB remarks that "oppressive" implies conduct whereby one more powerful party exploits this relative weakness of another and subjugates the weaker party forcefully, cruelly or harshly, and that the word "unreasonable" does not necessarily imply unconscionable or oppressive conduct. The GCB considers that conduct can be described as unreasonable if it is irrational or contrary to reason and it could also bear the connotation of excessiveness in a phrase such as "unreasonable demands". The GCB notes that unconscionable and oppressive contracts, terms or conduct can be identified objectively which would, in turn, preserve sufficient certainty in this branch of the law despite the proposed powers of curial intervention. The GCB doubts the advisability of the introduction of reasonableness as a criteria against which to measure the contracts, terms or conduct of the parties.

2.5.3.12 The GCB considers that the introduction of reasonableness as a requirement for the validity of a contract would undermine any remaining vestiges of certainty in this branch of the

law. The GCB remarks that parties sometimes contract to a variety of often hidden motives on terms which would seem unreasonable to others and that it is not uncommon to find situations where a party may even propose terms which would operate unreasonably against him or her with the view to obtaining a benefit which that party perceives could bring rich financial reward. The GCB considers that to allow such a party to escape the consequences of that bargain if that financial award does not materialise would not make for an environment in which business can be conducted with efficacy. The GCB is of the view that the draft Bill seems to confer in subjective terms a discretion in the court to determine whether a contract or any term thereof is unreasonable, unconscionable or oppressive. The GCB considers that there is authority for the view that should a statute make reference to the opinion of the court, then that court is vested with a discretion and a court of appeal will not interfere with the court *a quo*'s exercise of that discretion, unless the court of appeal finds that the discretion has not been properly exercised. The GCB notes that it is undesirable to vest a subjective discretion in the court - which could be a magistrate's court depending on the forum chosen by a litigant - which can only be interfered with on appeal if the Court of Appeal is satisfied that the finding could not reasonably be supported by the evidence. The GCB suggests, where, for reasons of public policy, serious inroads are made into a fundamental tenet of the common law principle of enforcement of consensual agreements on grounds which, at best, can be described as relative and capable of varied application, parties should be provided with the full benefit of an untrammelled right of appeal which would amount to a proper reconsideration of the findings of a court a quo.

2.5.3.13 Mr Justice B Wunsch and the attorney, Mr PA Bracher consider that the *Unfair Terms in Consumer Contract Regulations*, would be a more effective solution to the matter. As seen above, the criterion used in the Regulations is that of good faith.²⁰⁶

2.5.4 Evaluation

2.5.4.1 The Commission is of the view that its respondents did not raise valid

206 The Regulations provide in Schedule 2 that, in making an assessment of good faith, regard shall be had, in particular to - the strength of the bargaining positions of the parties; whether the consumer had an inducement to agree with the term; whether the goods or services were sold or supplied to the special order of the consumer; and the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

arguments for the reconsideration of the Working Committee's proposed criteria for determining fairness in contracts. The Commission therefore considers that the fairness criterion to be included in the proposed legislation should be based on the determination of the question whether contracts or terms are unreasonable, unconscionable or oppressive.

2.5.5 Recommendation

2.5.5.1 The Commission recommends that unreasonableness, unconscionability or oppressiveness should be the yardstick to be applied in determining fairness in contracts.

2.6 GUIDELINES

2.6.1 The Working Committee's proposal

2.6.1.1 The Working Committee was opposed to the enactment of any guidelines, believing that guidelines may result in courts considering themselves bound exclusively by those guidelines, and that if unfairness factors exist within a set of facts not covered by the guidelines, the term in question will not be found to be unfair.

2.6.2 Provisions in foreign jurisdictions

(a) New South Wales

2.6.2.1 The New South Wales Contracts Review Act contains the following guidelines-

9(1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:

- (a) compliance with any or all of the provisions of the contract; or
- (b) non-compliance with, or contravention of, any or all of the provisions of the contract.

(2) Without in any way affecting the generality of subsection (1), the matters to which

the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:

- (a) whether or not there was any material inequality in bargaining power between the parties to the contract;
- (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;
- (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract;
- (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract;
- (e) whether or not:
 - (i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests; or
 - (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented, because of his or her age or the state of his or her physical or mental capacity;
- (f) the relative economic circumstances, educational background and literacy of:
 - (i) the parties to the contract (other than a corporation); and
 - (ii) any person who represented any of the parties to the contract;
 - (g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed;
- (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act;
- (i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect;
- (j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:
 - (i) by any other party to the contract;
 - (ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract; or
 - (iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract;
- (k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party; and
- (l) the commercial or other setting, purpose and effect of the contract. (3)

For the purposes of subsection (2), a person shall be deemed to have represented a party to a contract if the person represented the party, or assisted the party to a significant degree, in negotiations prior to or at the time the contract was made.

- (4) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.
- (5) In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

2.6.2.2 The question of how the Supreme Court of North South Wales has to determine unconscionable conduct is set out as follows in their *Fair Trading Act*:

43.(1) A supplier shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a customer, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without limiting the matters to which the Supreme Court may have regard for the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or possible supply of goods or services, the Court may have regard to:

- (a) the relative strengths of the bargaining positions of the supplier and the customer,
- (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier,
- (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services,
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer (or a person acting on behalf of the customer) by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services, and
- (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier.

(3) A supplier shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a customer only because the supplier institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or possible supply of goods or services to a customer:

- (a) the Supreme Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention, and
- (b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this Act.

(b) Hong Kong

2.6.2.3 The Hong Kong Commission also favoured guidelines and suggested that specific matters which would assist the court in determining whether the contractual provision is harsh or unconscionable could be spelt out in legislation. They noted that the factors courts in other jurisdictions are directed to take into account, include the following-

- C the price charged by the seller and that charged by other suppliers;
 - C the relative bargaining strength of the seller and the consumer;
 - C the degree of understanding of the relevant contract document;
 - C the degree to which one party has taken advantage of the inability of the other party to protect his interests because of his physical or mental infirmity, illiteracy, inability to understand the language of the agreement and lack of education, lack of business knowledge or experience, financial distress or similar factors; and
 - C whether undue influence or pressure was exerted during negotiation.
- (c) Zimbabwe

2.6.2.4 The Zimbabwean Consumer Contracts Act contain the following guidelines for determining fairness:

- 5.(1) A court may find a consumer contract to be unfair for the purposes of this Act -
- (a) if the consumer contract as a whole results in an unreasonably unequal exchange of values and benefits; or
 - (b) if the consumer contract is unreasonably oppressive in all the circumstances; or
 - (c) if the consumer contract imposes obligations or liabilities on a party which are not reasonably necessary to protect the interests of the other party; or
 - (d) if the consumer contract excludes or limits the obligations or liabilities of a party to an extent that is not reasonably necessary to protect his interests; or
 - (e) if the consumer contract is contrary to commonly accepted standards of fair dealing; or
 - (f) in the case of a written consumer contract, if the contract is expressed in language not readily understood by a party.
- (2) A court shall not find a consumer contract to be unfair for the purposes of this Act solely because-
- (a) it imposes onerous obligations on a party; or
 - (b) it does not result in substantial or real benefit to a party; or

- (c) a party may have been able to conclude a similar contract with another person on more favourable terms or conditions.

(3) In determining whether or not a consumer contract is unfair for the purposes of this Act, a court shall have regard to the interests of both parties and in particular, shall take into account where appropriate, any prices, charges, costs or other expenses that might reasonably be expected to have been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded.

6.(1) A court may find the actual or anticipated exercise or non-exercise of a power, right or discretion under a consumer contract to be unfair for the purposes of this Act if -

- (a) in all the circumstances of such exercise or non-exercise is or would be unreasonably oppressive to the party affected by it; or
- (b) such exercise or non-exercise is not or would not be reasonably necessary to protect the interests of any party; or
- (c) such exercise or non-exercise is or would be contrary to commonly accepted standards of fair dealing.

(2) A court shall not find the actual or anticipated exercise or non-exercise of a power, right or discretion under a consumer contract is unfair for the purposes of this Act solely because a party affected thereby suffers or may suffer a penalty or forfeiture or a loss or diminution of any right or benefit under the contract.

(3) In determining whether or not the actual or anticipated exercise or non-exercise of a power, right or discretion under a consumer contract is unfair for the purposes of this Act, a court shall have regard to the interests of both parties and, in particular, shall take into account, where appropriate, any precautions that might reasonably be expected to have been taken to protect the interests of the parties if the contract had been concluded on terms and conditions other than those on which it was concluded.

2.6.2.5 The aim and purpose of section 5 of the Zimbabwean Act was explained as follows in the explanatory memorandum to the Consumer Contracts Bill:

"A court will not upset every contract where one of the parties discovers that he has made a bad bargain or where he is faced with hard or difficult terms. Only if there is an unreasonably unequal exchange of values or the terms are unreasonably oppressive, or if the terms go beyond anything that will reasonably protect the interests of the seller or supplier or if the terms go beyond accepted standards of fair dealing, will the contract be held to be unfair. The interests of both parties to the contract will have to be taken into account in any such determination.

2.6.2.6 The Zimbabwean Act further schedules the following provisions, which, if they are contained in consumer contracts, entitle the courts to grant relief unless satisfied that the

contracts are fair (the onus of satisfying a court that a contract containing a scheduled provision is fair rests with the seller or supplier):

- * Any provision (commonly known as a "*voetstoots provision*") whereby the seller or supplier of goods, other than used goods, excludes or limits his liability for latent defects in the goods.
- * Any provision whereby the seller or supplier of goods or services excludes or limits the liability which he would otherwise incur under any law for loss or damage caused by his negligence.
- * Any provision whereby the seller or supplier of goods or services excludes or limits his liability unless a claim is brought against him within a period which is shorter than would otherwise be permitted under any law regulating such claims.
- * Any provision whereby the seller or supplier of goods excludes or limits his liability in the event that the goods do not conform with any description or sample given in respect of the goods.
- * Any provision which denies or limits the right of the purchaser of any goods to require the seller or supplier-
 - (a) to reimburse the purchaser for the whole of the price or amount paid in respect of the goods; or
 - (b) to replace the goods; or
 - (c) to repair the goods at the expense of the seller or supplier; or
 - (d) to reduce the amount payable in respect of the goods;

in the event that the goods are not supplied in conformity with the consumer contract or are not fit for the purpose for which they are sold or supplied.
- * Any provision imposing a burden of proof of any matter on the purchaser or user of any goods or services, where the burden would otherwise lie on another party to the contract.

(d) New Zealand

2.6.2.7 The New Zealand Law Commission proposes the following guidelines for determining contractual fairness:

2. A general test of unfairness

A contract or a term of a contract, may be unfair if a party to that contract is seriously disadvantaged in relation to another party to the contract because he or she:²⁰⁷

- (a) is unable to appreciate adequately the provisions or the implications of the contract by reason of age, sickness, mental, educational or linguistic disability, emotional distress²⁰⁸, or ignorance of business affairs;²⁰⁹ or
- (b) is in need of the benefits for which he or she has contracted to such a degree as to have no real choice whether or not to enter into the contract;²¹⁰ or
- (c) is legally or in fact dependent upon, or subject to the influence of, the other party or persons connected with the other party in deciding whether to enter into the contract;
- (d) reasonably relies on the skill, care or advice of the other party or a person connected with the other party in entering into the contract;²¹¹
- (e) has been induced to enter into the contract by oppressive means, including threats, harassment or improper pressure; or
- (f) is for any other reason in the opinion of the court at a serious disadvantage;²¹² and that other party knows or ought to know of the facts constituting that advantage,²¹³ or of the facts from which that disadvantage can reasonably be inferred.

3. Professional advice

In considering whether a contract, or a term of a contract, is unfair the court shall have regard, among other things, to whether the disadvantaged party received appropriate legal or other professional advice.

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- 207 Clauses 2 to 4 set out the basic criteria for establishing whether contracts or contractual terms are unfair in the circumstances and are based on the concept of unjustly exploiting the other party's inferior position. The criteria for procedural unfairness corresponds roughly to those in the Australian *Trade Practices Act*, particularly the general reference there to inequality of bargaining power. The detailed drafting of the clause is an attempt to pin down the elements of unconscionability to avoid unnecessary uncertainty.
 - 208 Disadvantage caused by emotional distress is also recognised in the case law.
 - 209 Ignorance of business affairs has been an element of a number of decisions under the common law, particularly in guarantee cases and that lender are well advised to inform prospective guarantors as to the nature and extent of their obligations, unless the guarantor is adequately advised by a third party or has sufficient business acumen.
 - 210 Cases of pure economic need are included in the category of bargaining weakness, and consequently, for instance, suppliers of essential commodities, or at least things which are essential in the circumstances of those who seek to have them, may find their standard terms the subject of scrutiny.
 - 211 Par (c) & (d) overlap the common law of undue influence, breach of fiduciary duty, negligence and estoppel. Obvious cases of reliance and dependence under (c) & (d) would be an agent or solicitor of the other party, but because it would be almost impossible to pin down all the variations, the provision is left open.
 - 212 This residual provision is designed to give the courts a continued flexibility in the myriad variety of circumstances that can arise and avoids setting up closed categories.
 - 213 There is in New Zealand an objective test of knowledge based on what the stronger party knew or ought to have known, and constructive knowledge of a part's weakness may be sufficient.

4. Result must be unfair
 - (1) notwithstanding clause 2, a contract is not unfair unless in the context of the contract as a whole:²¹⁴
 - (a) it results in a substantially unequal exchange of values;²¹⁵ or
 - (b) the benefits received by a disadvantaged party are manifestly inappropriate to his or her circumstances;²¹⁶ or
 - (c) the disadvantaged party was in a fiduciary relationship with the other party.²¹⁷
 - (2) A grossly unequal exchange of values may create a presumption that the contract is unfair.²¹⁸
5. Harsh and oppressive terms²¹⁹
 - (1) A term of a contract is also unfair if, in the context of the contract as a whole, it is oppressive.
 - (2) A term of a contract is oppressive if it:²²⁰
 - (a) imposes a burdensome obligation or liability which is not reasonably necessary to protect the interests of the other party; and
 - (b) is contrary to commonly accepted standards of fair dealing.
 - (3) A transaction that consists of two or more contracts is to be treated as a single contract if it is in substance and effect a single transaction.

214 Par (a) & (b) require that the contract be substantively as well as procedurally fair, and this approach accords with the American approach to section 2-302 of the UCC. Substantive unfairness is broadly defined to include not only cases where the values exchanged under the contract are objectively disproportionate, but also the more difficult case of a contract which may appear objectively to provide a reasonable exchange but which, given all the circumstances of one party as known to the other, does not.

215 "Substantially unequal exchange of values" would allow a court to take direct account of excessive price. "Circumstances of the contract as a whole" will be important since these allow account to be taken, amongst other things, of the market price, evidence of market conditions is particularly relevant in determining whether a price is in fact excessive and the price difference would have to be substantial, even gross, to fall within the clause.

216 The term "manifestly" makes clear that questions of unfairness are to be approached robustly. Furthermore, as for procedural unconscionability, there should be at least constructive knowledge attributable to the other party.

217 Intended to reflect the New Zealand law whereby in a fiduciary relationship it is not necessary to show that there was a disparity of result, and where there has been a fair exchange of values, the presence of a strong influence should not matter.

218 This provision is in line with statements in New Zealand and elsewhere, that, if the terms of a contract on their face are hopelessly unbalanced, a presumption of unconscionability may arise.

219 The clause corresponds to overseas legislation that requires good faith and basic standards of fair dealing in the formation and performance of contracts.

220 Having regard to the general nature of the clause, the threshold of oppressiveness should be high, more than merely unreasonable or burdensome.

6. Context of the contract

- (1) In considering the context of the contract as a whole, the Court may, among other things, take into account the identity of the parties and their relative bargaining position, the circumstances in which it was made, the existence and course of any negotiations between the parties, and any usual provisions in contracts of the same kind.
- (2) In relation to commercial contracts the court shall take into account reasonable standards of commercial practice.

2.6.2.8 The New Zealand Commission considers that more work needs to be done to identify those kind of terms that might be regarded as unfair, either unconditionally or in consumer transactions. The Commission suggests that among terms that possibly justify intervention are the following-

- * those taking manifestly excessive security for the performance of obligations;
- * penalty clauses, those which impose arbitrary or excessive consequences for breach;
- * exclusion clauses which unreasonably exclude or restrict liability for one party's misrepresentations, negligence, or breach of contract;
- * at least in consumer and hire contracts, clauses which exclude or limit the terms of title and freedom from encumbrance implied by law;
- * in goods and services contracts, clauses negating a duty of reasonable care or skill;
- * clauses which make goods at buyer's or owner's risk while in possession of the seller or repairer;
- * compulsory arbitration clauses, at least in consumer contracts;
- * clauses which fix unreasonably brief limitation periods for claims;
- * clauses which unreasonably deny or penalise the early repayment of a debt;
- * clauses in leases which automatically raise the rent or provide that rent reviews can raise the rent but never lower it (ratchet clauses);
- * clauses which give a party a right to terminate the contract without good reason and without payment of compensation.

(e) England and Scotland

2.6.2.9 The English Law Commission and the Scottish Law Commission considered in 1969 that if exemption clauses in business sales were to be controlled by a test of reasonableness, the degree of uncertainty inherent in such a test could be reduced by the courts following certain guiding principles.²²¹ They stated they envisage that the courts would have regard in applying the test to any of the following elements of or surrounding the transaction, insofar as they are relevant in the instant case-

- (a) the bargaining position of the buyer, relative to the seller and to other sources of supply at the time of the contract;
- (b) whether the provision excluding or limiting liability is clear in its wording and scope of operation;
- (c) whether the steps taken to bring the provision to the attention of the buyer were reasonable in all the circumstances, including any customs of the trade and previous course of dealing;
- (d) whether the buyer was offered and accepted a material benefit in consideration of agreeing to the provision;
- (e) where the provision excludes or restricts liability unless certain conditions are complied with (for example, claiming within a prescribed time), whether it was, in the events that occurred, reasonably practicable to comply with those conditions;
- (f) whether the goods are manufactured, processed or adapted to the special order of the buyer;
- (g) the ultimate incidence of risk and liability arising by reason of defects in the goods.

2.6.2.10 The English Law Commission and the Scottish Law Commission explained²²² in 1975 that, when they set out their list of guidelines in 1969, they contemplated that the courts should be enabled to take account of their report and their recommendations, but they did not contemplate that the list, or anything like it, should be incorporated in an Act of Parliament.²²³ The English Law Commission stated in 1975 that they recognise that there is a widespread view that legislation enacting a reasonableness test should give some guidance to the courts as to the sort of matters that should be taken into account, and that the only objection the proponents of the opinion see to a statutory list of matters to which regard shall be had in particular, is that no such list can ever be complete. The English Commission considers that the omission of a matter which may well be relevant in a particular case may carry the implication that it should be

221 ELC and SLC *Exemption Clauses in Contracts First Report* at 43 - 44.

222 ELC and SLC *Exemption clauses Second Report* at 71.

223 Five paragraphs based on the matters they listed were set out in the new section 55(5) of the *Sale of Goods Act 1893* and section 12(4) of the *Supply of Goods (Implied Terms) Act 1973*

disregarded, and the inclusion of particular matters may mean that they receive more importance than they merit.²²⁴ However, the Commission thinks if the matters listed were introduced by words indicating that regard is to be had to all the circumstances of the case, the risk that other relevant matters will be disregarded, is slight.

2.6.2.11 The Scottish Commission considers that the ultimate question is one of confidence in the courts and states that they have confidence in the ability of the judiciary to apply the reasonableness test appropriately in the absence of guidelines and that they regret their inclusion in the *Sale of Goods Act* 1893. The Scottish Commission notes the following evidence which was submitted to the Committee on the Preparation of Legislation:

"It is probably the case that legislation in detail is resorted to because Parliamentarians harbour the suspicion that judges cannot be trusted to give proper effect to clear statements of principle. This, with respect to them (the Parliamentarians), is wholly unfounded."

2.6.2.12 The English Commission further considers that the hire of goods and contracts for work and materials, are very similar to contracts or the sale of goods and, therefore, that exemption clauses affecting the relevant terms should be treated as far as possible in the same way as in contracts for the sale of goods, and that legislation applying the reasonableness test to these contracts should, with the necessary slight adaptations, follow the model of section 55(5) of the *Sale of Goods Act*.²²⁵ The English Commission is of the view that there might well be a similar list of matters to be taken into account in any legislation implementing their proposals concerning provisions excluding or limiting liability for negligence and provisions which have the effect of excluding or restricting liability for breach of contractual obligations, as well as those provisions which are not exemption clauses in the ordinary sense of the word but have the effect of depriving persons against whom they are invoked of contractual rights which those persons reasonably expected to enjoy. The English Commission is opposed to such a list in regard of

224 The Scottish Commission was of the view that no such list could ever be complete and that the inclusion of particular matters might lead to excessive emphasis being placed upon the matters which is relevant to consider in deciding what is reasonable in the circumstances of the case.

225 The Scottish Commission did not share this view, explaining partly that sections 55(4) & 55(5) are arguably ambiguous in relation to the question whether circumstances emerging after the time of contracting are relevant to the assessment of the reasonableness of an exemption clause and partly because of their objection in principle to the qualification by statutory guidelines of the reasonableness test.

these provisions, arguing that these situations are very much more varied than those which arise in connection with the sale of goods alone. It notes that if such an exemption clause was to be found in a contract of sale, then some or all the matters listed in section 55(5) may be relevant, but the exemption clause may be in a totally different type of contract, or may be found in a notice, and the application of the reasonableness test may involve reference to very different considerations. The English Commission considers that this will become apparent if a list is given of the sort of matters it thinks the court could be expected to take into consideration when it would be fair or reasonable to permit reliance on provisions excluding or limiting liability or negligence or one of the other provisions discussed. The English Commission believes some parties would expect courts to regard the following circumstances as indicating that reliance on an exemption clause is likely to be fair and reasonable, while the converse circumstances might perhaps indicate that it is not²²⁶

- (a) that the bargaining position of the person against whom the clause is invoked was stronger than that of the person invoking it;
- (b) that it was reasonable in the circumstances to expect the person against whom the clause is invoked rather than the person invoking it to have insured against the loss that has occurred;
- (c) that the person seeking to rely on the exemption clause had offered the other party an alternative contract without the exemption clause, at a fair, increased rate;
- (d) where the exemption clause operates in the event of breach of contract, that the breach was due to a cause over which the party relying on the clause had no control;
- (e) where the exemption clause operates in the event of negligence, that the party against whom it is invoked could be expected to be aware of the activities of the other which might give rise to a risk of negligence and of the possible consequences of such negligence;
- (f) where the exemption clause takes the form of requiring the party against whom it is invoked to comply with a time limit, that such a time limit is necessary to safeguard the position of the person seeking to rely on the clause;
- (g) that the clause did not exclude liability but only imposed an upper limit.

2.6.2.13 The English Commission considers that in assessing the relative strength of the bargaining position of the parties, the following circumstances might be regarded as strengthening the bargaining position of the party against whom the exemption clause is invoked:²²⁷

226 ELC and SLC *Exemption clauses 2nd Report* at 72 - 73.

227 *Ibid* at 73.

- (i) that he knew or should have known that he could enter into a similar contract with another party without having to agree to the exemption clause;
- (ii) that he was experienced in transactions of the type in question;
- (iii) that he had not relied on the advice of the other party.

2.6.2.14 The English Law Commission remarks that circumstances the converse of those indicated above might perhaps be treated as indicating that the position of the person relying on the exemption clause was stronger than that of the person against whom it is invoked. The Commission states that it is very conscious of the fact that these lists of matters that the court may take into account are not, and cannot be, comprehensive. The Commission considers that the object of the reasonableness test is that the court should have regard not merely to the terms of the exemption clause or of the relevant contract but that it should take account of the commercial and social realities of the situation. Its conclusion is that the Commission should not recommend that matters of this sort be listed in legislation.²²⁸ The English Commission however notes that one of the consequences of listing certain matters in section 55(5) of the *Sale of Goods Act* is that it was clear that Parliament did not intend the courts to approach the question of unreasonableness in a narrow way and to exclude evidence of matters that might arguably not be relevant to mere questions of construction. The Commission remarks that it is apparent that the phrase "all the circumstances of the case" is to be interpreted widely, and it doubts if each new enactment of a reasonableness test needs to drive this point home.

2.6.2.15 Section 11(2) of the English *Unfair Contract Terms Act* of 1977 provides, nevertheless, that in considering the requirement of reasonableness, the court is to have regard to the matters specified in Schedule 2. The court is adjured to consider these guidelines in particular, so it is clear that even if they apply they are not the only factors to be considered-

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) relative means by which the customer's requirements have been met;
- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

228 The Scottish Commission were opposed to the use of guidelines to illustrate the application of the reasonableness test for the reasons adduced above, but also agree with the English Commission that these situations are so varied that, even if in principle guidelines were thought to be appropriate, it would not be practicable to devise an adequate list.

- (c) whether the customer knew or ought to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealings between the parties);
 - (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
 - (e) whether the goods were manufactured, processed or adapted to the special order of the customer.
- (f) Ontario

2.6.2.16 The Ontario Law Commission notes that the general unconscionability provision of the American *Uniform Commercial Code* provides only minimal guidance to the courts, and, since courts have not, consequently, formulated clear criteria by which unconscionability may be judged, seemingly inconsistent results have been reached.²²⁹ The Ontario Commission considers that the American experience suggests the wisdom of including decisional criteria in legislation dealing with unconscionability and that statutory criteria would encourage the courts to be explicit about the bases of decisions. The Ontario Commission is of the view that such elaboration should provide some definition to the concept of unconscionability, without unduly limiting judicial flexibility. The Ontario Commission therefore recommends that their formulation of the doctrine unconscionability of should include a non-exclusive list of decisional criteria to guide the courts in determining questions of unconscionability. The Ontario Commission recommends the following guidelines:

"In determining whether a contract or part thereof is unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard, among other factors to evidence of:

- (a) the degree to which one party has taken advantage of the inability of the other party reasonably to protect his or her interests because of his or her physical or mental infirmity, illiteracy, inability to understand the language of an agreement, lack of education, lack of business knowledge or experience, financial distress, or because of the existence of a relationship of trust or dependence or similar factors;²³⁰
- (b) the existence of terms in the contract that are not reasonably necessary for the

229 OLC *Report on the Law of Contract* at 128 - 129.

230 They explain this factor covers the traditional area of equity unconscionability and although the existence of a relationship of trust or dependence was not included in the proposals in the *Report on Sale of Goods*, the case law indicates that such a relationship can be a factor that contributes to unconscionability.

- protection of the interests of any party to the contract;²³¹
- (c) the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled;
 - (d) gross disparity between the considerations given by the parties to the contract and the considerations that would normally be given by parties to a similar contract in similar circumstances;
 - (e) knowledge by one party, when entering into the contract, that the other party will be substantially deprived of the benefit or benefits reasonably anticipated by that other party under the contract;
 - (f) the degree to which the natural effect of the transaction, or any party's conduct prior to, or at the time of, the transaction, is to cause or aid in causing another party to misunderstand the true nature of the transaction and his or her rights and duties thereunder;
 - (g) whether the complaining party had independent advice before or at the time of the transaction or should reasonably have acted to secure such advice for the protection of the party's interest;
 - (h) the bargaining strength of the parties relative to each other, taking into account the availability of reasonable alternative sources of supply and demand;
 - (i) whether the party seeking relief knew or ought reasonably to have known of the existence and extent of the term or terms alleged to be unconscionable;
 - (j) in the case of a provision that purports to exclude or limit a liability that would otherwise attach to the party seeking to rely on it, which party is better able to guard against loss or damages;
 - (k) the setting, purpose and effect of the contract, and the manner in which it was formed, including whether the contract is on written standard terms of business;²³² and
 - (l) the contract of the parties in relation to similar contracts or courses of dealing to which any of them has been a party.²³³
- (g) The European Union *Directive*

2.6.2.17 We noted above that article 3(1) of the EU *Directive* provides that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the

231 This circumstance has been recognised as bearing on unconscionability in the New South Wales *Contracts Review Act* and Canadian Case law and is but one kind of lack of equivalence that may arise in a contract, analogous to excessive waiver of rights by one party, and gross disparity in considerations exchanged.

232 They proposed this wording because of problems posed by the pervasive use of standard form contracts, particularly relating to failure on the part of a party to read or understand all the terms, noting Lord Devlin's comment on certain standard form contracts: "This sort of document is not meant to be read, still less to be understood".

233 They believe that, in appropriate cases the way in which a party has behaved towards other contracting parties may be relevant to the determination of unconscionability, as, for example, where there is a pattern of contracting that demonstrates a situational monopoly, that is, circumstances giving one contracting party abnormal market power over the other) or market-wide control.

requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Furthermore, article 3(3) of the *Directive* makes provision for an annexure containing an indicative and non-exhaustive list of the terms which may be regarded as unfair provides as follows:²³⁴

- "1. Terms which have the object or effect of:
- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;²³⁵
 - (b) inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;²³⁶
 - (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
 - (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
 - (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionate high sum in compensation;²³⁷

234 See Lockett and Egan *Unfair Terms in Consumer Agreements* at 95 - 102. Hugh Collins 1994 *Oxford Journal of Legal Studies* at 251 notes that legislation such as this provision is known as "grey law", aiming at reducing the potential divergences in the interpretation of the Directive by courts of Member States. He considers that although most of these examples conform to a simple criterion of substantive fairness in the terms of the contract, the social market ambitions contained in the good faith idea are revealed in some illustrations.

235 Lockett and Egan *Unfair Terms in Consumer Agreements* at 34 note that most Member States already have some form of legislation prohibiting terms which attempt to exclude or limit liability in the event of the consumer suffering death or injury and that section 2 of the *Unfair Contract Terms Act* invalidates any term excluding or restricting liability death or personal injury resulting from negligence. They note that the *Directive* seem to place a higher standard of care upon the seller or supplier than the test of negligence.

236 Lockett and Egan *Unfair Terms in Consumer Agreements* at 35 state that this provision was included as a catch-all provision, and as with a number of the indicative provisions in the *Directive*, it does not seek a blanket prohibition of the terms, it rather suggests that such terms be deemed unfair where they are *inappropriate*. Since *inappropriate* is not defined they consider that it may give rise to litigation as parties seek to determine what is included within the definition. They further note that the harmonising effect of the *Directive* may be undermined by the possibility that different States may vary in their approach to this provision. They are of the view that this provision amounts to an inappropriate limitation of the consumer's legal rights to be able to contract out setting off debts owed by the seller or supplier against any claim that the consumer may have against that party.

237 Lockett and Egan *Unfair Terms in Consumer Agreements* at 37 note that *disproportionate* is not defined, that variation in the regulation of compensation clauses may continue between Member States and suggest

- (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;²³⁸
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;²³⁹
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;²⁴⁰
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;²⁴¹
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;²⁴²

that a formula for calculating a maximum sum for compensation would perhaps have been of assistance.

- 238 Lockett and Egan *Unfair Terms in Consumer Agreements* at 38 point out that the Annex does not define what a reasonable notice period is nor what circumstances would amount to grounds serious enough to justify termination without notice. They consider that it is possible that Member States will continue to vary in their approach to the regulation of termination without notice clauses. They state that section 2 of the Annex limits the prohibition of *termination without notice* terms in respect of financial services. Lockett and Egan note that a supplier of financial services is required to inform the other contracting party or parties immediately of terminating a contract of indeterminate duration. They suggest it is unclear whether a supplier terminating a financial services contract without notice merely has to inform the other party or parties of the fact of termination or of the reason for termination as well. They consider if a valid reason has to be given it will require fundamental alterations in the policies of many financial institutions.
- 239 Lockett and Egan *Unfair Terms in Consumer Agreements* at 40 consider that this provision will act as an incentive upon the supplier to remind the consumer of his or her right to opt for non-renewal of the fixed term and of extending the period during which the consumer can decide whether or not to renew the contract until very close to the renewal date, and thus the *Directive* will introduce a test of fairness into the renewal period of contracts.
- 240 Lockett and Egan *Unfair Terms in Consumer Agreements* at 40 - 41 consider that this is the most important type of term that the Annex indicates should be construed as unfair. They note that merely showing the consumer the terms of the contract will not necessarily suffice and that the terminology indicates that the consumer must have a realistic chance of understanding the implications of what he is binding himself into. They indicate that the requirements of this paragraph should act as an incentive upon sellers and suppliers to ensure that the terms of their agreements are intelligible and easily understandable, and, further, that it should act to deter sellers and suppliers from using pressure tactics to persuade consumers to enter into contracts. They also consider that this provision will indirectly place a requirement upon the seller or supplier to assess the ability of the consumer to understand the contract that he or she is entering into.
- 241 Lockett and Egan *Unfair Terms in Consumer Agreements* at 42 -43 note that the *Directive* seeks to prevent the terms of a contract being changed without a valid reason and that it fails to provide guidelines as to what constitutes valid reasons. They consider that this provision will place a considerable burden on sellers and suppliers in the drafting of their contracts to identify in advance any reasons for unilateral alteration that they may rely upon.
- 242 Lockett and Egan *Unfair Terms in Consumer Agreements* at 44 note that unlike paragraph (j) potential valid reasons do not have to be specified in the contract.

- (l) providing for a price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;²⁴³
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;²⁴⁴
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;²⁴⁵
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;²⁴⁶
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;²⁴⁷
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.²⁴⁸

243 Lockett and Egan *Unfair Terms in Consumer Agreements* at 45 state that the prohibition on determining the price of goods at the time of delivery will have profound consequences for many of the commercial operations dealing with consumers. They note that standard terms allow, in many cases, orders to be taken when goods are not in stock for a future delivery date and for any factory gate price increases to be passed on to the consumer. They point out that this paragraph does not apply to the provision of services since it is often impossible to determine in advance the amount of work involved in providing services ranging from accountancy to plumbing. They consider that the fact that *too high* is not defined will lead to uncertainty and that the different national courts will vary in the percentage price rise that is acceptable before the consumer has the right to cancel the contract.

244 Lockett and Egan *Unfair Terms in Consumer Agreements* at 46 note that the terms sought to prohibit are particularly prevalent in contracts relied upon by builders and property developers and, in the past, such terms enabled commercial undertakings to escape liability where the goods or services varied to a moderate degree from original specifications. They consider that this provision is likely to have a serious impact on those organisations accustomed to using such terms.

245 Lockett and Egan *Unfair Terms in Consumer Agreements* at 47 state that this provision will be of particular interest to insurance companies and other financial institutions since it will bind them to their agents' undertakings as to how the policy will operate.

246 Lockett and Egan *Unfair Terms in Consumer Agreements* at 48 consider that contractual terms which enable sellers and suppliers to avoid their obligations, whilst not providing a similar right to contracting consumers, are obviously unfair and are unlikely to withstand judicial scrutiny whether considered under the *Directive* or other European Union or national laws.

247 Lockett and Egan *Unfair Terms in Consumer Agreements* at 48 note that the provision does not seek to prohibit assignment clauses, but that it indicates that such clauses are unfair if the assignment to a third party reduces the guarantees enjoyed by the contracting consumer and only if the contracting consumer does not agree to the course of action taken.

248 Lockett and Egan *Unfair Terms in Consumer Agreements* at 48 - 49 note that the provision is directed at

2. Scope of subparagraphs (g), (j) and (l):

- (a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
- (b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.
Subparagraph (j) is also without hindrance to terms which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
- (c) Subparagraphs (g), (j) and (l) do not apply to:
 - transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
 - contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
- (d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

(h) Brazil

2.6.2.18 The Brazilian Consumer Protection Code contains the following guidelines:

Any contractual clause becomes null and void by operation of law when relating, inter alia, to the supply of products and services that:

clauses that seek to limit a consumer's legal rights in the event of that party seeking to commence or having commenced litigation against the seller or supplier. They state that the provision is not a blanket prohibition against arbitration clauses but that it affects terms where the arbitration body is not covered by legal provisions. They note that it is unclear whether the *Directive* intends to prohibit arbitration clauses in the event that the arbitration body concerned is completely unregulated or only partially so. They further point out that in most Member States the *Directive* creates a new burden of proof which favours the consumer. They consider that sellers and suppliers will therefore not be able to contract out of the burden of proof placed upon them by Article 3 of the *Directive* should they wish to argue that the contract in question had been individually negotiated.

- (i) prevent, exonerate or reduce the supplier's liability for defects of any kind whatsoever in the products and services, or that entail a waiver or disposal of rights. Indemnification may be limited in justifiable circumstances in a consumer relationship between the supplier and a corporate consumer.
- (ii) deprive the consumer of the option of receiving a refund of what was already paid, in the events provided for herein;
- (iii) transfer liability to third parties;
- (iv) establish obligations considered inequitable or abusive that place the consumer at an unreasonable disadvantage, or that are incompatible with good faith or equitable practices;
- (v) (vetoed);
- (vi) reverse the burden of proof to the detriment of the consumer;
- (vii) provide for compulsory use of arbitration;
- (viii) require a representative to conclude or realise another legal transaction by the consumer;
- (ix) leave the supplier with the option of whether to conclude the contract, while obligating the consumer;
- (x) permit the supplier to directly or indirectly vary the price in an unilateral manner;
- (xi) allow the supplier to cancel the contract unilaterally without conferring the same right on the consumer;
- (xii) obligate the consumer to reimburse any charges for collection of what is owed, without the same obligation for the supplier;
- (xiii) Authorise the supplier to unilaterally modify the contents or quality of the contract, after conclusion thereof;
- (xiv) infringe or allow for violation of environmental regulations;
- (xv) contravene the consumer protection system;
- (xvi) allow waiver of rights to indemnify for necessary improvements.

2.6.3 Proposals by respondents

2.6.3.1 Two respondents supporting the "no approach" commented particularly on this aspect, namely SAPOA and Liberty Life. SAPOA considers that without the limitation by specific guidelines, the legislation cannot be supported. Liberty Life states that the Bill seems so all-embracing especially in view of the Commission opposing guidelines which could in any event limit the court's powers of intervention. Liberty Life considers that it is questionable whether guidelines would serve the purpose of clearly indicating the ambit of the doctrine of good faith or unconscionability. Liberty Life further notes that the Working Committee considers that the courts will not possess the necessary ability to determine that they are not bound exclusively by such guidelines, yet inexplicably ascribes to the courts the ability to determine the ambit of the intended doctrine and the limits of their powers from a Bill which not only lacks clarity, but also consistency in terminology.

2.6.3.2 The Judges of the Supreme Court supporting the "qualified yes" approach is of the view that it would be undesirable to incorporate the guidelines into the proposed legislation, since it is difficult to envisage the exact status thereof, and if flexibility is the aim it should be left to the courts to develop the concept of unconscionability case by case.

2.6.3.3 There is, however, also support from ranks of the "qualified yes" approach supporters for guidelines,²⁴⁹ arguing that - there is a need for guidelines; the laying down of guidelines will not inhibit the courts to such an extent that they will decline to strike down a clause simply because the facts are not covered by the guidelines;²⁵⁰ the powers of the courts should be limited by clear guidelines to define the scope and extent of the powers of the courts;²⁵¹ and guidelines will reduce rather than increase uncertainty because both parties to the contract, particularly the more advanced party who is normally the culprit in consumer abuses, would be aware of the guidelines and so steer clear of inequitable and unconscionable terms.²⁵²

2.6.3.4 The Unfair Contract Terms Committee notes that the Working Committee indicates its unwillingness to propose any guidelines to assist a court in handling its task and that the Working Committee motivates its decision by expressing its doubt as to the judges' ability to understand that guidelines are precisely that, and that they should be proactive in their application of the law, within the wording and scope of the envisaged Bill. The UCTC states that it does not share this doubt. The UCTC further notes that the Working Committee points out that some of our courts have in the past shown reticence when they were called upon to use guidelines provided in connection with, amongst others, the grounds for divorce. The UCTC considers that one should not react over-hastily, and try to give an evaluation after such a short period of time, nor from one legal culture (operating under legislative and executive supremacy) to another legal culture (operating under a supreme constitution). The UCTC suggests that one should not lose sight of the fact that we talk of a system applied by "a court", as is proposed, we must be mindful

249 Professors A Cockrell, DB Hutchison and BJ van Heerden, Mr M Motsapi, Mr VR Ngalwana, the Unfair Contract Terms Committee, and probably Mr K Zweni.

250 Professors DB Hutchison and BJ van Heerden.

251 Mr Motsapi of the Legal Services and policy Coordination Division of the Province of North West.

252 Mr VR Ngalwana.

of the fact that provincial, regional, district and small claims courts are included in that proposal, and concurs that all the civil courts should be included. The UCTC however foresees that without guidelines for the handling of contract terms in these disputes, confusion and disparity will be caused if the exclusion of guidelines were to be accepted.

2.6.3.5 The UCTC notes that, in contradistinction to the Working Committee's view of the courts' ability to handle guidelines constructively, the guidelines proposed by the research team, are those which have been in application in many other, comparable jurisdictions, both from the civil and common law countries, including codified and un-codified systems, social and economic systems and legal cultures of a great variety, some more and some less developed than South Africa. The UCTC considers that obviously in none of those systems did insurmountable problems arise through the courts' alleged "inability" to handle guidelines correctly, nor was there any greater uncertainty caused than already existed under the previously unregulated contractual regime. The UCTC observes that on the contrary, it fails to see the matter as negatively as the Working Committee and some of the exponents of the "no-answer" obviously do.

2.6.3.6 The UCTC remarks that no preventative action is possible without guidelines and that informed self-control by drafters of standard and model contracts, action by representative bodies, negotiations with a view to settling disputes, etc, are all heavily dependant upon there being a large measure of predictability regarding the question of what will be acceptable and what not. The UCTC considers that the best way in which the current uncertainty that exists in the field of contracts can be alleviated, is through a set of guidelines. The UCTC observes that the Working Committee clearly lost sight of the fact that their proposal is not free from guidelines either. It notes that the Working Committee's proposed clause 1(1) contains in fact the following guidelines, namely-

- * parties' relative bargaining position;
- * the type of contract concerned;
- * the way in which the contract came into being;
- * the form of the contract;
- * the content of the contract;
- * the way or the effect of the execution or enforcement of the contract;
- * the principle that effect shall be given to the contractual terms agreed upon by the parties.

2.6.3.7 The UCTC states that one therefore cannot help to wonder why the Working Committee seems to have set its mind against the mere idea of guidelines as such. The UCTC considers that it seems to be borne from some prejudice as a result of experience gathered in another legal culture. The UCTC believes that the guidelines contained in the Working Committee's proposal are not only acceptable, but are also to be found in the guidelines applied elsewhere, and are proposed by the research team. The UCTC notes further that the guidelines proposed by the research team are being used extensively by the drafters of standard contract terms, in reviewing their own contracts. The UCTC states that this has been happening ever since those guidelines were initially proposed, is borne out by the statement on the behalf of the Council of SA Bankers, contained in par 1.28 above.²⁵³ The UCTC believes this goes to show the importance of having preventative control and guidelines, because it, more than anything else, can assist the drafters of standard documents to establish beforehand whether their documents will be of a border-line nature or not. The UCTC considers that the mere fact that the type of contracts and the cases chosen as test cases, referred to by COSAB were decided as they were, says nothing about the application or effect such terms may have under different circumstances. The UCTC observes if COSAB's statement in respect of those decisions were thus to be understood to mean that such contracts and the effect of their enforcement will of necessity now always be in accordance with public policy, it would definitely imply that more than those courts ever considered, decided or stated. The UCTC observes that this fact, namely that court decisions can only be regarded as precedent with regard to the specific matter the court decided on, really goes to emphasise the need for preventative control very clearly.

2.6.3.8 The UCTC remarks that, as far as the guidelines and the use thereof and as initially proposed by the research team and defined and propagated by the UCTC, are concerned, after many views had been heard and many inputs were received, it believes that the case can rest. It notes that the approach proposed by the research team and refined, is in fact already being applied with great effect in practice, although as yet informally, by the committee. The UCTC states that it is in other words, albeit not ideally, already applying such guidelines when it investigates, negotiates and settles complaints brought to its attention. It notes that in that process, valuable experience and expertise is being built up, regarding the application of a system

253 "The banks have, at great expense to their depositors, recently obtained confirmation from the courts that their standard cession, suretyship and other security documentation is in accordance with public policy."

of preventative control, employing guidelines such as those that have been proposed in the performance of its task. The UCTC observes that there is, of course, nothing sacrosanct about the guidelines the research team proposed, that they can be scrutinised and refined even more, if necessary, but that they should not be ignored by the Commission. The UCTC remarks that it still remains its opinion that a dual control system is needed, combining the best of both judicial and preventative control, and operating in tandem with each other. The UCTC considers that the existence of an open list of guidelines is of paramount importance for this purpose.

2.6.3.9 The UCTC notes the question posed in par 1.54 of the discussion paper, whether business and professional persons contracting in that capacity and in their field of expertise, should be allowed to make equal use of all the guidelines proposed. The UCTC states that the suggestion from the research team, which is in line with the position elsewhere, is that certain of those guidelines could be qualified, in the sense that they should not be available to such persons. The UCTC believes it gives some expression to the need felt that only parties in need of regulation or protection should be availed thereof. The UCTC considers that, in principle, however, any party making use of the contract as instrument should be able to make use of the guidelines.

2.6.3.10 In remarking that the guidelines taken into consideration should be relevant to the case, it seems that Kaya Zweni of the LHR in Umtata supports the setting of guidelines in the Bill. Without indicating whether he supports the principle of including guidelines into the proposed legislation, Mr Cox of Cox Yeats remarks that in attempting to protect people who are uninformed regard has to be had to the fact that sophisticated individuals who are fully informed as to their rights not infrequently enter into contracts which contravene some of the guidelines proposed.

2.6.4 Evaluation

2.6.4.1 The Commission is of the view, upon reflection, that there is a need to provide some definition to the concepts of unreasonableness, unconscionability and oppressiveness by setting out guidelines in the proposed legislation. The Commission wishes to make it clear that it trusts the South African judiciary to be able to effectively apply the envisaged legislation. It nevertheless believes that legal certainty and predictability can be effected by including

guidelines in the proposed legislation. The Commission is of the view that an open-ended list of guidelines will not have the effect of unduly limiting judicial discretion. Moreover, the Commission takes note once again of the numerous comments stating that courts are inaccessible, that providing for curial intervention only will not effect relief and that provision should therefore be made for preventative action. The Commission supports the view that no preventative action is possible without guidelines and that informed self-control by drafters of standard and model contracts, action by representative bodies, negotiations with a view to settling disputes, etc, are all heavily dependant upon there being a large measure of predictability regarding the question of what will be acceptable and what not in regard of contracts. The Commission believes that the guidelines recommended by the research team (see Chapter 1 par 1.56 above) should be included into the proposed legislation, although the references to "unless the contract is concluded in the course of the professional or business activities of both parties" should be deleted and that the guidelines should be supplemented by the following guidelines-

- * the bargaining strength of the parties to the contract relative to each other;
- * any prices, costs, or other expenses that might reasonably be expected to have been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded: provided that a court shall not find a contract or term unreasonable, unconscionable or oppressive for the purposes of this Act solely because it imposes onerous obligations on a party; or the term or contract does not result in substantial or real benefit to a party; or a party may have been able to conclude a similar contract with another person on more favourable terms or conditions;²⁵⁴
- * in relation to commercial contracts, reasonable standards of fair dealing and in relation to consumer contracts, commonly accepted standards of fair dealing;
- * whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;
- * whether or not it was reasonably practicable for the party seeking relief under this

254 This provision is aimed at the argument raised by Juanita Jamneck 1997 *TSAR* at 647 that a party to a contract may very well subsequently to concluding a contract allege that it was unfair because of the price paid having been too low. She considers that this argument could be applied to each area of the law of contract and thus the thought of the legal uncertainty which could be caused by the proposed legislation (contained in *Working Paper 54*) seems to become the more monstrously.

Act to negotiate for the alteration of the contract or to reject any of the provisions thereof;

- * 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;
- * 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;
- * the degree to which the contract requires a party to waive rights to which he or she would otherwise be entitled; and
- * the context of the contract as a whole, in which case the court may take into account the identity of the parties and their relative bargaining position, the circumstances in which the contract was made, the existence and course of any negotiations between the parties, any usual provisions in contracts of the kind or any other factor which in the opinion of the court should be taken into account.

2.6.5 Recommendation

2.6.5.1 The Commission recommends that guidelines be included in the proposed legislation.

2.7 SCOPE OF THE PROPOSED LEGISLATION

2.7.1 The Working Committee's proposal

2.7.1.1 The Working Committee was of the opinion that no exceptions should be made to the application of the provisions relating to good faith and proposed that the provisions of the proposed legislation should apply to all contracts concluded after the commencement thereof and, furthermore, that the legislation should be binding on the State.

2.7.2 Provisions in foreign jurisdictions

- (a) New South Wales

2.7.2.1 The Contract Review Act of New South Wales contains the following provisions on the scope of the Act:

6.(1) The Crown, a public or local authority or a corporation may not be granted relief under this Act.

(2) A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession carried on by the person or proposed to be carried on by the person, other than a farming undertaking (including, but not limited to, an agricultural, pastoral, horticultural, orcharding or viticultural undertaking) carried on by the person or proposed to be carried on by the person wholly or principally in New South Wales.

16 An application for relief under this Act in relation to a contract may be made only during any of the following periods:

- (a) the period of 2 years after the date on which the contract was made;
- (b) the period of 3 months before or 2 years after the time for the exercise or performance of any power or obligation under, or the occurrence of any activity contemplated by, the contract; and
- (c) the period of the pendency of maintainable proceedings arising out of or in relation to the contract, being proceedings (including cross-claims, whether in the nature of set-off, cross-action or otherwise) that are pending against the party seeking relief under this Act.

21.(1) This Act does not apply to a contract of service to the extent that it includes provisions that are in conformity with an award that is applicable in the circumstances.

(2) In subsection (1), "award" means an award or industrial agreement filed under the Industrial Arbitration Act 1940, an award made under the Apprentices Act 1969, or an award or industrial agreement made under the Conciliation and Arbitration Act 1904 of the Commonwealth.

(3) Schedule 2 has effect.²⁵⁵

22. Nothing in this Act limits or restricts the operation of any other law providing for relief against unjust contracts, but the operation of any other such law in relation to a contract shall not be taken to limit or restrict the application of this Act to the contract.

(b) England

2.7.2.2 The provisions of the English *Unfair Contracts Terms Act* governing the

255 Schedule 2 provides as follows in regard of existing contracts:

1. Subject to clause 2, this Act does not apply in respect of a contract made before the commencement of this Schedule.

2. Where the provisions of a contract made before the commencement of this Schedule are varied after that commencement, this Act applies in respect of the contract, but:

- (a) no order shall be made under this Act affecting the operation of the contract before the date of the variation; and
- (b) the Court shall have regard only to injustice attributable to the variation.

purview of the Act are complex.²⁵⁶ It deals only with unfair exemption clauses, and sections 2 to 7 apply only to business liability. Business liability is defined as-

liability for breach of obligations or duties arising-

- (a) from things done or to be done by a person in the course of a business (whether his own business or another's); or
- (b) from the occupation of premises used for business purposes by the occupier.

2.7.2.3 Business is not defined in the English *Unfair Contract Term Act*. However, section 14 of the Act provides that a business includes a profession and the activities of any Government Department or local or public authority. It is noted that this still leaves a number of unclear areas, since clearly, amongst other things, polytechnics and state schools are included, whereas universities and public schools may not be, but it is thought that a purposive interpretation would include them.²⁵⁷ Furthermore, under Schedule 1 a list of contracts are in part or wholly excluded from sections of the Act, namely:

- (a) contracts of insurance (including contracts of annuity);²⁵⁸
- (b) contracts relating to the creation, transfer or termination of interests in land;
- (c) contracts relating to the creation, transfer or termination of rights or interests in intellectual property such as patents, trade marks, copyrights etc;
- (d) contracts relating to the formation or dissolution of a company or the constitution or rights or obligations of its members;
- (e) contracts relating to the creation or transfer of securities or of any right or interest therein;

256 *Cheshire, Fifoot and Furmston's Law of Contract* at 172.

257 *Cheshire, Fifoot and Furmston's Law of Contract* at 172.

258 Collins 1994 *Oxford Journal of Legal Studies* at 242 243 remarks as follows on the lack of control over contracts of insurance:

"Under English law, consumer insurance contracts represent the abyss of exploitation permitted by free markets. Not only are they excluded from controls under the UCTA, but the extraordinary duties of disclosure imposed on consumers by the doctrine of *uberrimae fidei* must render nearly every contract of insurance potentially avoidable at the discretion of the insurer. It is true that the insurance industry has a code of practice which disapproves of strict insistence upon its legal rights, and offers informal redress for breaches of the code through an Ombudsman, but the point remains that there are no legal restrictions on the form or content of standard form insurance contracts. No doubt there is some substance in the argument that the small print of insurance contracts is necessary in order to define the risk with precision and thus determine the price, but for most consumers insurance contracts the risks are standard and can be averaged across customers, and the small print containing terms such as a requirement of prompt notification of claims only serves to take the unwary consumer by surprise.

- (f) contracts of marine salvage or towage; or charterparty of ships or hovercraft or of carriage of goods by sea, by ship or hovercraft (except in relation to section 2(1) or in favour of a person dealing as consumer).

2.7.2.4 International supply contracts are outside the scope of the English *Unfair Contract Terms Act*. The following requirements are set for international contracts-

- (a) the contract is one for the sale of goods or under which either of the ownership or possession of goods will pass;
- (b) the places of business (or if none, habitual residences) of the parties are in the territories of different states (the Channel Islands and the Isle of Man being treated for this purpose as different states from the United Kingdom); and
- (c) Either-
 - (i) at the time the contract is concluded the goods are in the course of carriage or will be carried from the territory of one state to the territory of another; or
 - (ii) the acts constituting the offer and acceptance have been done in the territories of different states; or
 - (iii) the contract provides for the goods to be delivered to the territory of a state other than that within which the acts of the offer and acceptance were done.

2.7.2.5 The English *Unfair Contract Term Act* introduces a threefold test in regard of a person dealing as a consumer, namely that neither makes the contract in the course of a business nor holds himself out as doing so; the other party makes the contract in the course of a business; and the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.²⁵⁹

- (c) Ontario

2.7.2.6 The Ontario Law Commission argues as follows on the scope of their proposed legislation on contracts:²⁶⁰

"It would be possible to limit the application of the proposed provisions so as to exempt certain types of contract - for example, insurance and consumer contracts - that are already subject to extensive regulation. However, while it might be argued that contracts that are already highly regulated need not and should not be subject to the proposed unconscionability provisions, a limitation of this kind could lead to considerable

259 *Cheshire, Fifoot and Furmston's Law of Contract* at 176.

260 *OLC Report on the Law of Contract* at 132.

complexity. It might also be argued that the proposed provisions should not apply to executed contracts, on the ground that reopening of such contracts on the basis of unconscionability would lead to uncertainty and lack of finality. We have concluded, however, that certainty and finality should yield to flexibility and the avoidance of injustice. In our view, the doctrine of unconscionability should be statutorily recognised as a basic and pervasive contract norm. We therefore recommend that the proposed provisions on unconscionability should apply to all contracts."

(d) The European Union *Directive*

2.7.2.7 The EU *Directive* applies to all contracts between sellers of goods or suppliers of services and consumers which have not been individually negotiated. A term shall be regarded as not individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated does not exclude the application of the Act to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated contract.²⁶¹

A "consumer" is defined as any natural person who is acting for purposes which are outside his trade, business or profession, and a "seller or supplier" as any natural or legal person who is acting for purposes relating to his trade, business or profession, whether publicly or privately owned.²⁶² The provisions of the Directive applies to all contracts between sellers or suppliers and consumers, except contracts relating to employment, succession rights, rights under family law and the incorporation and organisation of companies or partnerships agreements. Furthermore, where the terms of an insurance contract clearly define or circumscribe the insured risk and the insurer's liability, they are not subject to an assessment since these restrictions are taken into account in calculating the premium paid by the consumer.²⁶³

2.7.2.8 Hugh Collins welcomes the inclusion of insurance contracts into the ambit of the EU *Directive*, but remarks that the control over these contracts are weakened by the exclusion of assessments of fairness. He considers that the exclusion threatens to exempt insurance contracts from control by the back door, since it might be argued that all the small print in an

261 Article 3 of the EU Directive.

262 Article 2.

263 Recital 19 of the Preamble of the EU Directive.

insurance contract shapes the risk undertaken by the insurer. He proposes that, at the very least, a distinction should be drawn between the substance of the insured risk and the process by which claims may be brought, in order to permit the courts to control the fairness of the procedural obstacles to claims. The *Directive* provides, in addition, that the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, are not subject to the provisions of the Directive.

(e) Hong Kong

2.7.2.9 The Hong Kong Commission believes that their proposed legislation should be confined to consumer contracts of sale of goods and supply of services. The Hong Kong Commission considers that since unconscionability is a question of fact to be determined having regard to all the circumstances of the case, it is impossible to give it a precise definition, and therefore suggest that each case must be decided on its own facts using the guidelines mentioned above. It further indicates that as commercial contracts are generally the result of arm's length negotiations between parties who have better knowledge about their business and want to continue commercial relations, they do not propose that their recommendations should apply to them.

(f) Zimbabwe

2.7.2.10 The Zimbabwean *Consumer Contracts Act* applies to consumer contracts which is defined as contracts for the sale or supply of goods and services or both, in which the seller or supplier is dealing in the course of business and the purchaser or user is not. Contracts for the sale, letting or hire of immovable property and contracts for employment are excluded. The Act further applies to consumer contracts whether concluded before, on or after the date of commencement of the Act. It does, however, not apply in relation to a contract concluded before the commencement of the Act, where performance under the contract has been completed in accordance with the contract by all parties thereto. Nor shall a court grant relief solely on the ground that a consumer contract contains a scheduled provision if the contract was concluded before the provision concerned became a scheduled provision.

(g) Proposals made by Prof Hein Kötz

2.7.2.11 Prof Hein Kötz considers the scope of the protection sought to be granted by legislation which aims at fair contracts.²⁶⁴ Firstly, he considers whether such legislation should be directed only at consumers and whether or not businesses should be included. He notes that it is inadvisable to restrict judicial control of contract terms where the affected party contracts as a consumer. He suggests that one would apply more flexible criteria in the event of the contracting parties being business people and would to a higher extent take into account the circumstances of the particular case than if it were a consumer transaction. Prof Hein Kötz is of the view that there are no persuasive reasons which could justify totally exempting from any control the contracts concluded by business people in the course of their businesses. He is of the view that those who consider that the jurisprudential reason for justifying control of the validity of contractual terms is based on the protection of the *weaker* contracting party, have to admit that, in the commercial dealings of business people, often there is disparity in the commercial power of the contracting parties. He considers that he who assumes that parties do not negotiate on the content of standard form terms for the reason of the high costs involved in such transactions will also come to the latter conclusion. Prof Kötz remarks therefore that the principle applies in respect of each rationally acting person that no one does anything which is of no benefit to him irrespective whether he or she is a consumer or business person. He states one has to consider finally that the distinction between consumer transactions and other transactions and likewise the distinction between consumers - which one sometimes want to equate with the *small* business people - and other contracting parties are arbitrary and difficult to maintain. Prof Kötz remarks that these distinctions acquire even more importance in practice where different legal regimes are being applied to different types of transactions.

2.7.2.12 Prof Kötz states that a further question is whether judicial control should apply in respect of all contractual terms or whether it should be limited to terms which have been introduced into the contract by one party in a pre-formulated standard form. He notes that such a limitation is foreign to the French, Belgium and Nordic law although no one would doubt that the

264 Kötz *Europäisches Vertragsrecht* at 218 - 220.

terms in question are usually standard form contractual terms in practice. He notes that the opposite is the case in Germany. He remarks that when judicial review was proposed in respect of all contractual terms in the 1990 draft of the European Union *Directive*, it led to vehement opposition and to the argument that the death of the free market economy was signalled.²⁶⁵ Prof Kötz considers that these sentiments would have been understandable if the proposed powers provided for the determination of the question whether performance in accordance with individually negotiated contractual terms were adequate. He is further of the view that legislation providing that only standard form contractual terms are subject to judicial review leads to considerable legal uncertainty. He argues it is often doubtful whether a client had the required degree of influence in determining the outcome of terms during contractual negotiations.

2.7.3 Proposals by respondents

2.7.3.1 The issue of the application of the proposed legislation caused a mixed reaction from respondents. Some respondents are of the opinion that the legislation should apply to all types of contracts whereas others propagate that the application of the proposed legislation be limited or qualified so as to apply to consumers only.

2.7.3.2 SAPOA states that the opinions espoused by the proponents of the "yes" and a qualified "yes" were, albeit to differing degrees, influenced by considerations of social control and argue that, as a consequence, these recommendations are flawed by a basic inequity, namely, that the courts, in the determination of unfairness, should take into account the relative bargaining positions of the parties concerned. SAPOA considers that an approach which seeks to differentiate between parties and thus the measure of justice to which they are entitled, will result in a number of inequities, eg a contract, riddled with harsh provisions, may be judged fair as between two sophisticated, educated parties but on the basis that they could or should have known that they were getting into, but judged unfair as between one educated and one uneducated party.

2.7.3.3 Liberty Life believes that to cite a few examples of what were disadvantaged

265 Kötz *Europäisches Vertragsrecht* at 221: "Als im Jahre 1990 ein Entwurf der EG-Richtlinie vorgelegt wurde, der sämtliche Vertragsbedingungen richterliche Prüfung unterwerfen wollte, erhob sich flammender Protest: Man glaubte geradezu, dass damit der Marktwirtschaft das Todesglöcken geläutet werde."

communities is tantamount to saying that some form of affirmative consumer protection Bill should be passed in order that certain consumers can reach the level of contractual capacity that exists as regards previously advantaged groups. Liberty Life argues that this view is dangerous in the sense that it is the economy of this country which ultimately must benefit the people of this country. Liberty Life considers that the concept of contract is not part and parcel of a basket of issues which needs to be redressed in order to educate or descend to a level which would allow the uneducated consumer to develop to the state of the sophisticated consumer. Liberty Life remarks that this is simply untenable since this country operates internationally on standard term contracts with foreign entities who will not deal with countries where contractual uncertainty exists. Liberty Life comments that the ability not to exclude the operation of the Bill from the contract only in respect of a class of persons is discriminatory, since the very class of persons excluded are the ones that in the first place formulate the content of the contract. Liberty Life considers that those whom are allegedly favoured by the terms of the proposed Bill would never become "educated" as regards their purported rights. Liberty Life states that the Bill is highly patronising in that it anticipates or rather suggests contractual inability among the population and a general body of consumers and presupposes contractual bullying by institutions operating within the community or the country as a whole. Liberty Life argues that no recommendations have been made as to how to educate the public or how to get the customers or the consumer aware of his or her rights in terms of contracting.

2.7.3.4 Cliffe Bekker & Todd notes that an aspect which causes them serious concern is the apparent ease with which the Working Committee has concluded that the protection afforded by the Bill should be extended to all contracts. Although they wholeheartedly support a greater level of consumer protection, they believe there does not appear to be any compelling reason to extend the scope of the proposed legislation to commerce clearly and undisputedly dealing as equals at arms length. They consider it is inconceivable that an agreement between, for example, two internationally recognised mining houses, banks or insurance companies should, as a matter of public policy, be subject to scrutiny by the courts to determine whether there are unreasonable, unconscionable or oppressive terms. They argue that the relevant agreement will invariably have been carefully and deliberately negotiated by the parties with the assistance of numerous experienced and skilled attorneys on both sides, who will have drafted the agreement and advised on every conceivable aspect thereof. Mr Justice B Wunsch argues along

the same lines in saying that he cannot see why relief from what is alleged to be an unfair or unconscionable term is called for when, for example, two industrial or commercial organisations negotiate and conclude a contract, usually with the advice of professionals. Cliff Bekker & Todd however believes that it is important to differentiate agreements entered into between unequal parties (such as consumers) and agreements entered into between equal parties. This firm of attorneys state that it fully supports and applauds any attempt to protect the consumer against not only the unscrupulous exploiter but also against the consumer's own inexperience, lack of knowledge and lack of means. The firm however does not agree with the direction in which this attempt has been taken and believes that the Bill will have consequences that are undesirable in numerous respects. The firm suggests, as was noted above, that the existing consumer law can be varied, as opposed to being replaced, the Bill will not improve or ameliorate the lot of the ordinary consumer and that it appears not only unnecessary but unwise to extend the scope of the proposed legislation to areas where it is neither necessary nor advisable to interfere with normal day-to-day commerce.

2.7.3.5 SAPOA would be opposed to the exclusion of certain contracts as suggested by the research team and the project committee. SAPOA proposes that should the Bill become law, only the High Court should have jurisdiction. Mr MS Bham and Mrs N Ntosomele of the Northern Province Legal Services however support the proposal that any court should have jurisdiction under the legislation. SACOB however questions the advisability of applying the provisions of the propose legislation to all contracts concluded after the commencement thereof. SACOB considers that this would include international agreements, and one of their respondents has expressed the view, with which they concur, that it would be unthinkable to have the proposed legislation apply to contracts with foreign business entities, eg international loan agreements. SACOB believes legislation creating so much legal uncertainty would hardly be conducive to promoting business between South African and foreign undertakings. SACOB remarks, furthermore, that the draft Bill effectively extinguishes any vestiges of legal contractual certainty that any business or professional person would hope to have by nullifying any agreement or contractual term purporting to exclude the provisions of the proposed legislation or limiting its application.

2.7.3.6 Professors Hutchison and Van den Heerden consider that the review power of

the courts should extend to all types of contracts. They state that flexible standards of fairness or conscionability will vary in their application from one context to the next. They suggest that waiver by a contracting party of the protection afforded by the proposed legislation should not be allowed and waiver by a contracting party of the protection afforded by the Bill should be null and void.

2.7.3.7 The General Council of the Bar considers that there is a need to afford some protection where persons in weaker bargaining positions are exploited through unconscionable and oppressive terms. The GCB suggests that there seems to be no good reason why the provisions should apply to agreements entered into after the commencement of the proposed legislation, and having regard to the reprehensibility of clauses in question, why it cannot apply to all agreements entered into before or after such commencement. Mr Kaya Zweni is also of the view that the review power of the courts should apply to all forms of contract whether non-consumer and international transactions, the reason being that whether consumer or non-consumer contracts, their requirements are all the same.

2.7.3.8 The UCTC notes that the research team proposed that contracts made in terms of certain specific legislation be excluded from the envisaged control system, whether it be the dual system proposed by them, or the one-step judicial system proposed by the working committee, and that the project committee supported the research team's proposal. The UCTC considers that the reason for those proposed exclusions, which are also excluded in other legal systems, is that the tendency to want to over-regulate must be counteracted. The UCTC argues that once a court, for instance, has considered the agreements entered into between the parties to a divorce suit, and has confirmed such agreement by making it an order of court, such contract terms should not be susceptible to further attack under the proposed Bill. The UCTC suggests that if it were otherwise, unnecessary embarrassment could be caused to such court and much the same can be said about contractual agreements reached in the sphere of the administration of estates and labour disputes. The UCTC considers that in both cases there are existing structures and mechanisms through which the relevant contractual arrangements have to pass already. The same would also apply, though for different reasons, to agreements such as cheques, made under the relevant legislation. The UCTC remarks that one should not lose sight of the fact that a cheque is but a specific type of written contract, where the terms of the contract and its further

ramifications must appear on the document itself, whether on the front or the back of it, and that this type of contract is very specifically regulated in the relevant legislation, making it superfluous and dangerously disruptive if those contracts were also to be susceptible to attack under the proposed Bill.

2.7.3.9 The UCTC considers that the control system should apply to contracts between all classes of contracting parties, and for all types of contracts concluded after the commencement of the legislation, with the reservation as expressed above, concerning contracts coming into being under specific legislation or curial pronouncement. The UCTC considers that the tendency to over-regulate, by imposing general control through the application of a general fairness clause to contracts which are created, structured and performed under specific legislation, tailor-made for the purpose, is uncalled for. The UCTC suggests that the purpose should not be to codify the entire field of the law of contract in this respect, but rather to retain specialised, *ad hoc* legislation already in existence, and to make provision only for those matters which are still left uncatered for. The UCTC further proposes that where parties contract under an international treaty to which South Africa is a signatory, or for which contract another, specific legislation contains regulatory measures and procedures, it is unnecessary to super-impose control under the envisaged legislation on top of such specific legislation and dedicated procedures. The UCTC supports the clauses governing exclusion and binding the State.

2.7.3.10 COSAB considers that the draft Bill should apply to consumers only, focussing on the supply of goods and services for private and domestic use and the following guidelines should apply for determining whether the transactions considered are consumer transactions -

- * by reference to transactions wherein at least one of the parties is a natural person (the transaction should not be of a type which the natural persons who are parties to them ordinarily enter into);
- * no transactions which are not effected in the ordinary course of business (the reference to the ordinary course of business must for purposes of clarity be construed as a reference to the ordinary course of business of the consumer. Deeds of suretyship, for example, are entered into by banks in the ordinary course of their business but are not normally part of the ordinary course of business of the sureties, who do not necessarily even conduct any

business. What is intended is that the transactions should not be of a type which the natural persons who are parties to them ordinarily enter into. Regarding corporations concluding contracts in the course of their business it is difficult to understand how the court not being privy to the intention of the parties at the time of concluding the contract is able to have regard to the circumstances at the time the contract was concluded and impose terms on the parties they did not agreed on).

2.7.3.11 COSAB initially proposed that contracts involving the maximum amount of R50000 should be subject to the Bill and subsequently proposed that the amount concerned should be R30000. COSAB suggests that by entitling courts to have regard to "all relevant circumstances", businesses concluding large numbers of contracts each day would need to maintain a record of the circumstances surrounding each contract for production to the court in the event of the contract being considered in terms of the Bill. COSAB considers that in view of the large number of lending transactions which banks enter into each day, and insofar as it is not unusual for certain transactions, say letters of suretyship, to be relied upon some 10 to 15 years subsequent to their conclusion, the records which the banks would be required to maintain would be substantial and would inevitably result in increase in the operating costs of banks. COSAB proposes that courts should therefore only be entitled to consider the circumstances surrounding a contract within a period of say, three years, commencing from the date the parties entered into that contract. COSAB's initial recommendation was that the court should only be thus entitled during the duration of the contract and within one year after the contract was terminated for whatever reason.

2.7.3.12 COSAB suggests that it may be necessary to give the Minister the power to exclude certain transactions from the ambit of the proposed legislation. COSAB considers that this will enable areas where it is found that the legislation is inappropriate, eg documentary credits or payments systems to be excluded on an *ad hoc* basis, so ensuring that the legislation does not result in unintended problems in South Africa's international business dealings. COSAB proposes that the following types of contract should be excluded from the application of the Bill, without it being intended to be a comprehensive list-

* contracts relating to the international system of documentary credits which are generally

dealt with under the UCP rules and which include not only letters of credit and similar undertakings given by banks but also the instructions to issue the documentary credit given by a client to the bank;

- * contracts arising from international payment systems, such as SWIFT, and local payment systems which take place on the same basis to allow for local reimbursement and back to back payments;
 - * any facility or loan contract by an American or European bank to a South African bank which is subject to an opinion from legal counsel for the local bank confirming, *inter alia*, that the contract will be enforceable in this country and unless such opinion is obtained, no funding is available; and
- C contracts concluded by foreign contracting parties or contracts concluded by South Africans with foreign contracting parties.

2.7.3.13 COSAB remarks that in many instances such as in the case of payment systems and documentary credits, related local contracts are entered into in connection with the same transaction and these are often based on the international contracts. COSAB is of the view that it is not necessary or practical to permit the legislation to interfere in any area of commerce where established international rules are applicable. Advocate Derek Mitchell recommends that the envisaged protection should be limited to natural persons acquiring goods and services intended for personal or domestic use and the Bill should make it clear that the whole of a contract containing a term purporting to exclude the provisions of the Bill is not void, but only the offending term.

2.7.3.14 Murray and Roberts Holdings is also opposed to the proposed legislation applying to international dealings. Murray and Roberts suggests that *Discussion Paper 65* does not adequately recognise and acknowledge harsh realities, namely that there are stronger and weaker parties. Murray and Roberts note that certain parties are more powerful and they will insist in parties submitting to their legal systems or to foreign arbitration whether it is liked or not. Murray and Roberts consider that commercial contracts can often be construed to be unreasonable, unconscionable or oppressive, especially in retrospect, and the proposed legislation will impair businesses' ability to conduct business within a relatively certain framework. Murray and Roberts note that in international dealings parties will refuse to have contracts governed by

South African law which will involve considerable extra cost and inconvenience. Murray and Roberts suggest that it can always be provided that legislation overrides such terms as contained in the research team's proposals in par 1.12(iii) above concerning terms that regulate waiver, limitation or modification. Murray and Roberts consider that in many instances it would not be possible to raise monies were the terms mentioned in par 1.12(x) and (xi) (excluding defences and waiving rules of court) not available.

2.7.3.15 CLASA notes that the proposed measures are clearly not designed to affect organisations who operate from "a level playing field". CLASA considers that the certainty and sanctity of contract is absolutely vital for on-going, efficient operations in the commercial world and chaos would ensue in the commercial world if contracting parties could ignore their contractual obligations. CLASA states that it is appreciated that the draft Bill goes a certain way towards accommodating its views by virtue of the provisions of clause 1(2). CLASA nevertheless considers that the clause falls well short of providing for the principles that are fundamental. CLASA suggests that an unintended effect of the proposed legislation would be to provide a loophole for commercial entities, who contract on an equal footing, whereby they are able to threaten the other party after the conclusion of the contract, with the delays inherent in the legislation. CLASA believes that this is particularly applicable to contracts where time is of the essence. CLASA notes, furthermore, that the legislation would preclude parties from resorting to arbitration. CLASA suggests that the proposed legislation be amended to the extent that it does not apply to contracts between corporate entities, or alternatively that corporate entities may contract out of these provisions. CLASA proposes, in addition, that clause 1(1) should provide for proceedings initiated in terms of the Arbitration Act.

2.7.3.16 The group of Judges of the Supreme Court of Appeal who support the enactment of legislation reservedly, are of the view that there are two approaches, namely, one approach would be to attempt to identify those instances where common law relief is inadequate and to legislate specifically in respect thereof, such as consumer protection and exemption clauses and perhaps suretyships for future but as yet unidentified debts. The other approach they suggest is to legislate generally even though the proposed measures would in large measure overlap with relief obtainable under the common law.

2.7.4 Evaluation

2.7.4.1 The Commission has duly noted the mixed reaction of its respondents. In the first instance it considered the suggestion that only the High Court should have jurisdiction to entertain applications under the proposed legislation. The Commission notes the concerns which a number of respondents have raised on the question of the accessibility to justice and to the courts. Granting jurisdiction to the High Court only would mean that the proposed legislation would be available to an exclusive minority of the South African community and would mainly defeat its purpose. The Commission therefore does not support the suggestion concerning the exclusive jurisdiction of the High Court.

2.7.4.2 The Commission further considered the Unfair Contract Terms Committee's suggestion that certain contracts are already specifically regulated, and that they should therefore not be over-regulated by the application of the proposed legislation. The Commission notes that the UCTC argues along the same lines as the Ontario Commission when it considered whether it would or should be possible to limit the application of the proposed provisions so as to exempt certain types of contract that are already subject to extensive regulation. The Commission notes the reasoning applied by the Ontario law Commission namely that their proposed doctrine of unconscionability should be statutorily recognised as a basic and pervasive contract norm, that their proposed legislation should apply to all contracts and that certainty and finality should yield to flexibility and avoidance of injustice. The Commission is, however, of the view that the UCTC's view is persuasive that the tendency to over-regulate, by imposing general control through the application of a general fairness clause to contracts which are created, structured and performed under specific legislation, tailor-made for the purpose, is uncalled for, and that the purpose should not be to codify the entire field of the law of contract in this respect, but rather to retain specialised, *ad hoc* legislation already in existence, and to make provision only for those matters which are still left uncatered for. The Commission concurs with the UCTC's suggestion that the proposed legislation should not apply to the following contracts-

- contracts which fall within the scope of the Labour Relations Act, Act 66 of 1995, or which arise out of the application of that Act;
- contracts falling within the scope of the Bills of Exchange Act, Act 34 of 1964;

- contracts to which the Companies Act, Act 61 of 1973, or the Close Corporations Act, Act 69 of 1984, apply or which arise out of the application of those Acts; and
- contractual terms in respect of which measures are provided under international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of this Act.

2.7.4.3 The Commission does not agree with excluding the application of the proposed legislation in respect of family law agreements in accordance with the *Divorce Act*, the *Matrimonial Affairs Act*, or the *Matrimonial Property Act*. It does not seem to the Commission that settlements reached under these Acts are in any way satisfactorily regulated and the possibility of judicial review under the proposed legislation seems to be called for. The Commission is further of the view that instead of including the research team's proposed subsection (f) "*a contract or a term in a contract merely on the ground of an alleged excessive price payable by the opponent*" into the provision dealing with the scope of the Bill that a suitable guideline should rather be included into the proposed legislation such as is proposed above on the question of whether a party may have been able to conclude a similar contract with another person on more favourable terms or conditions. (See par 2.6.4.1 above.)

2.7.4.4 The Commission does not believe the arguments are persuasive for exempting categories of contracting parties from the application of the proposed legislation. The Commission supports Prof Hein Kötz's view that the distinction between consumers and other contracting parties are mostly arbitrary and difficult to maintain. The Commission concurs with Prof Kötz that a court would apply more flexible criteria when a contract concluded by so-called business people is being considered than would be the case where other contracting parties are involved.

2.7.5 Recommendation

2.7.5.1 The Commission recommends that the provisions of the proposed legislation apply to all contracts concluded after the commencement of the proposed legislation but excluding contracts with which fall within the scope of the Labour Relations Act, Act 66 of 1995, or which arise out of the application of that Act; contracts falling within the scope of the Bills of Exchange Act, Act 34 of 1964; contracts to which the Companies Act, Act 61 of 1973, or the Close Corporations Act, Act 69 of 1984, apply or which arise out of the application of those Acts; and contractual terms in respect of which measures are provided under international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of this Act.

2.8 CHANGED CIRCUMSTANCES AFTER THE CONCLUSION OF THE CONTRACT

2.8.1 The Working Committee's provisional proposal

2.8.1.1 The Working Committee recommended that in deciding whether the way in which a contract came into existence or the form or content of the contract or any term thereof is contrary to the principles set out in its proposed clause 1(1), those circumstances shall be taken into account which existed at the time of the conclusion of the contract.

2.8.2 Proposals by respondents

2.8.2.1 Professors SWJ van der Merwe and LF van Huyssteen state that it remains unclear as to whether the proposed clause 1(2) is worded clearly enough so as to express the fact that in the phases of contract not expressly mentioned in the subsection, a court may and should, in principle, have regard to circumstances after the conclusion of the contract, particularly circumstances which have in fact occurred by the time the court is approached for assistance. They consider that no party should be able to gain one-sided benefits from reasonably unforeseeable changes of circumstances after the conclusion of a contract. The Unfair Contract

Term Committee points out that the research team proposed that developments intervening after the conclusion of the contract, which was not foreseen and were not reasonably foreseeable at the time of concluding the contract, should also be taken into account in judging the fairness or otherwise of enforcing the contract according to the letter thereof. The UCTC considers that the Working Committee's proposal in this respect is not very clear and notes that the Working Committee does not give any explanation for their decision to stick to the moment of concluding the contract, and taking into account only circumstances that existed at that moment, if the question is about the "coming into existence, form or content" of the contract. The UCTC asks whether it could have been intended that unforeseeable intervening events may be taken into consideration if the question is about the "effect" of the performance or enforcement of a contract, but not when it is about the "creation, form or content" thereof. The UCTC also asks whether it is tenable to distinguish between "content" and "effect" in such a manner. The UCTC considers that if this is indeed the case, one feels that it is expressed in an unnecessary subtle way and asks whether it would not be better to express the intention more clearly then.

2.8.2.2 The UCTC is further of the view that if the Working Committee intended to propose that no circumstances, whether reasonably foreseeable or not, developing or taking effect after the conclusion of a contract can be taken into consideration when evaluating the fairness of a contract, surely it should be said directly. The UCTC states that it would then be superfluous to specify things like "the way in which it came into existence, form or content" of the contract. The UCTC proposes that clause 1(2) of the Bill be reconsidered since there are good reasons to provide for the taking into consideration of developments after the conclusion of the contract when the effect of the performance or enforcement of a contract has to be evaluated. The UCTC further proposes that where the conclusion of the contract is in question, circumstances in existence at the time of its conclusion only should be taken into consideration.

2.8.2.3 Advocate Derek Mitchell however proposes that the Bill should make it clear that only circumstances which existed at the conclusion of the contract may be taken into account. SACOB asks, whether, in deciding a matter regarding the way a contract came into existence, or its form or contents, is the court restricted to only looking at the circumstances which existed at the time of the conclusion of the contract, bearing in mind that there is no express exclusion in the draft Bill, of subsequent changed circumstances being a factor? SACOB

further asks whether a contract negotiated in good faith, the execution or enforcement of which was reasonable at the time of the conclusion of the contract, but which has subsequently become unreasonable due to changed circumstances, can be rescinded or amended by the court and, would such changed circumstances if applicable, include, for example, changes in the financial situations of the parties, or changes in exchange, inflation or income tax rates. SACOB notes that if changed circumstances are in any way a factor which courts may take into account in deciding to amend or rescind contracts, how can parties to a contract be able to determine that a contract or term, negotiated in good faith and with circumspection, will still be enforceable, in the sense of being reasonable, at the time or times that performance becomes due.

2.8.3 Provisions in foreign jurisdictions

2.8.3.1 The Commission on European Contract Law note that one of the most vexed questions of modern contract law is the effect on parties' obligations to perform if there is a change of circumstances for which neither party is responsible.²⁶⁶ They remark that in these circumstances contract law has to resolve a tension between two conflicting principles, namely *pacta sunt servanda* (meaning that agreements must be observed) and *rebus sic stantibus* (meaning that undertakings are based on the premise that circumstances remain as they are). The Commission on European Contract Law drafted the following article to govern this matter:

"Article 2.117: Change of Circumstances

- (1) A party is bound to fulfil his obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance he receives has diminished.
- (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:
 - (a) the change of circumstances occurred after the time of conclusion of the contract, or had already occurred at that time but was not and could not reasonably have been known to the parties; and
 - (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract; and
 - (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

266 Lando and Beale *Principles of European Contract Law* at xxv.

- (3) If the parties fail to reach agreement within a reasonable period, the court may:
- (a) terminate the contract at a date and on terms to be determined by the court; or
 - (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances; and
 - (c) in either case, award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith.

2.8.3.2 The Commission on European Contract Law note the majority of countries in the European Community have introduced into their law some mechanism intended to correct any injustice which results from an imbalance in the contract caused by supervening events which the parties could not reasonably have foreseen when they made the contract.²⁶⁷ The Commission notes that contracting parties often adopt the same idea when they include so-called hardship clauses in their contracts and the contractual justice approach underlying these mechanisms under consideration is the prevention of cost caused by some unforeseen event from falling wholly on one of the parties. They point out that the mechanism of judicial intervention reflects the modern trend towards giving the court some power to moderate the rigours of freedom and sanctity of contract. They remark that a strict application of the sanctity of contract and the rejection of the idea of a court being able to grant relief would be no incentive to parties to include appropriate clauses in their contracts. The reasons therefor are that parties are frequently not sufficiently sophisticated or are too careless of their own interests, and the clauses included in their contracts do not cover every eventuality or the operation of the clauses create unforeseen problems.

2.8.3.3 The rules permitting renegotiation will only operate in exceptional circumstances and do not provide a means for a party who has entered into a contract which has turned out badly to revise it.²⁶⁸ The contract must have become excessively burdensome. There is a fine line between a performance which is only possible by totally unreasonable efforts, and a performance which is only very difficult to execute, however, it is up to the court to decide which situation it is dealing with. The court's decision to terminate or modify the contract is largely a last resort, the whole procedure being devised to encourage the parties to reach an amicable

267 Lando and Beale *Principles of European Contract Law* at 113.

268 Lando and Beale *Principles of European Contract Law* at 114.

settlement. The change in circumstances must bring about a major imbalance in the contract and the court should not interfere merely because of some dis-equilibrium. Although the powers given to the courts are very wide, they must be used in moderation to avoid any reduction in the vital stability of contractual relations as is shown by the experience in countries which have similar rules.²⁶⁹

2.8.3.4 The German law admits that a contract may be ended or modified if the result of maintaining the original contract would be to produce intolerable results incompatible with law and justice.²⁷⁰ However, according to German case law, a contract will not be terminated unless it is impossible to adapt it. Just as the German law is based on good faith on this issue, the Dutch law similarly applies the good faith principle to provide for an ending or modification of the contract in the case of changed circumstances. The Italian Civil Code provides that the obligator may demand that the contract for continued or periodic performance or for deferred performance be ended if extraordinary and unforeseeable events make them excessively onerous to perform. The ending of the contract may be avoided by an equitable offer to modify the terms of the contract. The Greek Civil Code also grants courts wide powers to adapt the contract to new circumstances or to end it.²⁷¹

2.8.4 Evaluation

2.8.4.1 The Commission considers that the arguments raised by Professors Van der Merwe and Lubbe and the Unfair Contract Terms Committee are persuasive, particularly in view of the position in other jurisdictions. One must agree with the Commission on European Contract Law that this is a vexed question. However, the Commission is of the view that the provision adopted by the Commission on European Contract Law seems to provide a fair solution to the issues involved in changed circumstances after the conclusion of a contract. The Commission is therefore of the view that the inclusion into the Commission's proposed legislation of the provision drafted by the Commission on European Contract Law is warranted.

269 Lando and Beale *Principles of European Contract Law* at 118.

270 Lando and Beale *Principles of European Contract Law* at 118.

271 Lando and Beale *Principles of European Contract Law* at 118.

2.8.5 Recommendation

2.8.5.1 The Commission recommends that the proposed legislation should provide that in the application of the legislation the circumstances which existed at the time of the conclusion of the contract should be taken into account, and that where there is a reasonably unforeseeable change of circumstances which makes performance under the contract excessively onerous, the parties to the contract should be bound to enter into negotiations with a view to adapting the contract or terminating it. The Commission proposes the following clause:

- 4.(1) In the application of this Act the circumstances which existed at the time of the conclusion of the contract shall be taken into account and a party is bound to fulfil his or her obligations under the contract even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance he or she receives has diminished.
- 4.(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:
 - (a) the change of circumstances occurred after the time of conclusion of the contract, or had already occurred at that time but was not and could not reasonably have been known to the parties; and
 - (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract; and
 - (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.
- 4.(3) If the parties fail to reach agreement within a reasonable period, the court may:
 - (a) terminate the contract at a date and on terms to be determined by the court; or
 - (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances; and
 - (c) in either case, award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith.

2.9 THE PAROL EVIDENCE RULE

2.9.1 The Working Committee's proposal

2.9.1.1 The Working Committee did not deal with this issue particularly in *Discussion Paper 65*. However, the question was dealt with in the Commission's *Working Paper 54*. The research team remarked there that in terms of the parol evidence rule or integration rule a written contract provides conclusive proof of all the terms of the contract, the oral statements of the contracting parties which preceded the conclusion of the contract are irrelevant, have no legal effect and may not be adduced to prove the terms of the contract.²⁷² The research team noted that proposals were made that the parol evidence rule be abolished and that all relevant evidence be admissible to prove a fact which is disputed.²⁷³ They further noted that it should be made possible to waive the exclusion of the parol evidence rule. The research team supported these proposals in principle but considered that they may have the effect that the abolition of the parol evidence rule would be rendered null and void by an appropriate standard term.

2.9.1.2 The research team was of the opinion that parol evidence or integration terms should not simply be labelled as being contrary to good faith. The research team considered that the continued existence of the parol evidence rule may on the one hand lead to an inequity being committed against a contracting party where only the terms of a written contract are taken into account, but that on the other hand it may be argued that the evidential value of contracts which are not contrary to good faith should be upheld for the sake of legal certainty. The research team proposed that the general criterion and guidelines be used to challenge parole evidence terms in appropriate circumstances. The research team emphasised that standard contracts often contain

272 SALC *Working Paper 54* par 2.53 at 35.

273 DT Zeffert and A Paizes *Parol Evidence with particular reference to contract* Johannesburg: Centre for Banking Law 1986. See also C Lewis "The demise of the *exceptio doli*: is there another route to contractual equity?" 1990 *SALJ* 26 - 44 who remarks as follows:

"... I believe that we must recognize that the literal approach to interpretation needs to be modified, at least to allow evidence of surrounding circumstances where the words in issue are apparently clear and unambiguous. This change would not only avoid the inequity that has arisen in cases like *Bank of Lisbon*, but would be consonant with trends in England and America. We can do without the *exceptio doli* - but only if we adopt a more enlightened approach to the construction of contracts."

terms which have evidential implications and which may be unfair in their effect, and in particular the burden of proof is often manipulated to the detriment of the parties who are in a weaker bargaining position. The research team suggested that by expressly enacting the guidelines only with a view to preventative control over standard terms, any objections are met regarding possible undesirable consequences of the imposition of a burden of proof if a certain term appears in a contract.

2.9.1.3 The Working Committee considered it unnecessary to propose the enactment of a provision regarding the incidence of the burden of proof.²⁷⁴ The Committee was of the view that the general rule will in any event apply that the party who wishes to challenge the contract on the ground of the absence of good faith will carry the burden of proof concerning the lack of good faith.

2.9.2 Provisions in foreign jurisdictions

2.9.2.1 Nagla Nassar notes that the parol evidence rule is a well-established rule of interpretation in the common law jurisdictions of both England and the United States.²⁷⁵ Nassar points out that the rule provides that if there is a contract which has been reduced to writing, verbal evidence is not allowed to be given so as to add to or subtract from, or in any other manner to vary or qualify the written contract. Nassar further notes that the rule has been interpreted to exclude all forms of extrinsic evidence, whether oral or not and preliminary agreements or drafts, prior negotiations and the parties' conduct after the conclusion of a contract are excluded from admissible evidence. Nassar remarks that prior negotiations are not admissible because they are superseded by the parties' agreement, while admission of subsequent conduct would inevitably result in an alteration of the agreement in the course of its implementation. Nassar considers that decisions to this effect are but direct applications of the sanctity of contract principle in its most stringent form, where the content of the contractual relationship is thought to better serve certainty and finality as well as to eliminate the inconveniences of troublesome litigation.²⁷⁶ She notes that the stringency of the parol evidence rule and the rigidity of the sanctity principle do not

274 SALC *Working Paper 54* par 2.55 at 36.

275 Nassar *Sanctity of Contracts Revisited* at 37.

276 Nassar *Sanctity of Contracts Revisited* at 38.

in practice meet the demands of ever complicated and extended relationships which are in need of flexibility as well as certainty, and therefore, since strict adherence to the parol evidence rule was difficult, if not impossible to maintain, exceptions began to appear as soon as the rule was established, to soften its apparent rigidity.

2.9.2.2 Section 2-202 of the Uniform Commercial Code of the USA provides as follows:²⁷⁷

§ 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement .

2.9.2.3 The *Official Comment* on § 2-202 explains this section as follows:²⁷⁸

1. This section definitely rejects:
 - (a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;
 - (b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and
 - (c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.
2. Paragraph (a) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have

277 <http://www.law.cornell.edu/ucc/2/2-202.html> (accessed on 01/12/1997).

278 <http://www.law.cornell.edu/ucc/2/C2-202.html> (accessed on 01/12/1997).

become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

2.9.2.4 Section 1-205 of the American Uniform Commercial Code provides as follows on course of dealing and usage of trade:

- (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
- (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
- (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
- (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.
- (5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.
- (6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

2.9.2.5 The Official Comment to § 1-205 sets out the meaning and effect of this provision as follows:²⁷⁹

279 <http://www.law.cornell.edu/ucc/1/C1-205.html> (accessed on 01/12/1997).

- "This section makes it clear that:
 1. This Act rejects both the 'lay-dictionary' and the 'conveyancer's reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.
 2. Course of dealing under subsection (1) is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the Act on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning. (Section 2-208.)
 3. 'Course of dealing' may enter the agreement either by explicit provisions of the agreement or by tacit recognition.
 4. This Act deals with 'usage of trade' as a factor in reaching the commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. By adopting in this context the term 'usage of trade' this Act expresses its intent to reject those cases which see evidence of 'custom' as representing an effort to displace or negate 'established rules of law'. A distinction is to be drawn between mandatory rules of law such as the Statute of Frauds provisions of Article 2 on Sales whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade, and those rules of law (such as those in Part 3 of Article 2 on Sales) which fill in points which the parties have not considered and in fact agreed upon. The latter rules hold 'unless otherwise agreed' but yield to the contrary agreement of the parties. Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.
 5. A usage of trade under subsection (2) must have the 'regularity of observance' specified. The ancient English tests for 'custom' are abandoned in this connection. Therefore, it is not required that a usage of trade be 'ancient or immemorial', 'universal' or the like. Under the requirement of subsection (2) full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.
 6. The policy of this Act controlling explicit unconscionable contracts and clauses (Sections 1-203, 2-302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be 'reasonable'. However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should

- become standard.
7. Subsection (3), giving the prescribed effect to usages of which the parties 'are or should be aware', reinforces the provision of subsection (2) requiring not universality but only the described 'regularity of observance' of the practice or method. This subsection also reinforces the point of subsection (2) that such usages may be either general to trade or particular to a special branch of trade.
 8. Although the terms in which this Act defines 'agreement' include the elements of course of dealing and usage of trade, the fact that express reference is made in some sections to those elements is not to be construed as carrying a contrary intent or implication elsewhere. Compare Section 1-102(4).
 9. In cases of a well established line of usage varying from the general rules of this Act where the precise amount of the variation has not been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern has been fairly evidenced, the party relying on the usage is entitled under this section to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement.
 10. Subsection (6) is intended to insure that this Act's liberal recognition of the needs of commerce in regard to usage of trade shall not be made into an instrument of abuse."

2.9.2.6 The Ontario Law Commission remarks in respect of section 2-202 of the *Uniform Commercial Code* that force is attributed to a seeming contractual document only to the extent that the parties so intended and such documents are to be regarded as complete and exhaustive only if the parties so intended. The Ontario Commission notes that while this suggests a very liberal view of the admissibility of extrinsic evidence, in practice the American courts have often shown themselves quite conservative.²⁸⁰

2.9.2.7 The English Law Commission provisionally recommended in 1976 that the parol evidence rule be abolished. The English Law Commission was of the view that the rule no longer serves any useful purpose, it is a technical rule of uncertain ambit, which, at best, adds to the complications of litigation without affecting the outcome and, at worst, prevents the courts from getting at the truth.²⁸¹ In 1986 the English Law Commission pointed out that in its working paper they considered what they saw as the many exceptions which permitted the court to receive evidence otherwise inadmissible under the terms of the assumed rule, and that it concluded that the exceptions were so numerous and extensive that it might be wondered whether the rule itself

280 OLRC *Report on the Amendment of the Law of Contract* at 159.

281 ELC *The Parol Evidence Rule Working Paper* 70 at 25.

had not been largely destroyed.²⁸²

2.9.2.8 The English Law Commission notes that for the purpose of deciding whether the parol evidence rule should be abolished or amended by statute, it has been necessary to analyse the rule in detail.²⁸³ The English Commission states that they have concluded that although a proposition of law can be stated which can be described as the "parol evidence rule" it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. They consider that it is rather a proposition of law which is no more than a circular statement: *when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.* The Commission states that they have considerable doubts whether such a proposition should properly be characterised as a "rule" at all, but several leading textbook writers and judges have referred to it as a "rule" and they are content to adopt their terminology for the purposes of the report. The English Commission remarks that the two principal reasons which have led them to their conclusion on the nature of the parol evidence rule are, in substance, two aspects of the same process of reasoning. They note that the first relates to the circumstances in which the rule is to be applied and the second is exemplified by the concept of the contract which is made partly orally and partly in writing.

2.9.2.9 The English Commission considers that in their view, some statements of the rule may have given rise to misunderstandings because they have concentrated on the *effect* of the rule rather than *when it is to be applied*.²⁸⁴ They state that the effect of the rule is to exclude evidence or to cause the judge to ignore the evidence if given and that the 1897 case of *Bank of Australasia* refers to the inadmissibility of parol evidence to contradict, vary, add to, or subtract from the terms of a *written contract*. The English Commission notes that when the parties have set down all the terms of their contract in writing, extrinsic evidence of other terms must be ignored, and if the contract is not entirely in writing, it is not a written contract. The Commission

282 ELC *The Parol Evidence Rule* Report 154 at 3.

283 ELC *The Parol Evidence Rule* Report 154 at 8.

284 ELC *The Parol Evidence Rule* Report 154 at 10.

further notes that because a contract can be made partly orally and partly in writing, the mere production of a contractual document, however complete it may look, cannot as a matter of fact exclude evidence of oral terms if the other party asserts that such terms were agreed. They consider that if that assertion is proved, evidence of the oral terms cannot be excluded because the court will, by definition, have found that the contractual terms are partly to be found in what was orally agreed as well as in the document in question and no parol evidence rule could apply. They however state that if the assertion is not proved, there can be no place for a parol evidence rule because the court will have found that all the terms of the contract were set out in the document in question and, by implication, will thereby have excluded evidence of terms being found elsewhere. The English Commission considers that the pleadings in the action should normally reveal whether there is an issue as to where the contractual terms are to be found and what those terms are. They remark that if there is an issue, it will be an issue of fact for resolution on the balance of probabilities, and if there is no issue, neither party will be permitted to adduce evidence of the contractual terms being found elsewhere than as admitted in the pleadings.

2.9.2.10 The English Commission concludes that the parol evidence rule, in so far as any such rule of law can be said to have an independent existence, does not have the effect of excluding evidence which ought to be admitted if justice is to be done between the parties.²⁸⁵ They note that those authorities which, it may be argued, support the existence of a rule which would have that effect would, in their view, be distinguished by a court today and not followed, and evidence will only be excluded when its reception would be inconsistent with the intention of the parties. They are of the view that while a wider parol evidence rule seems to have existed at one time, no such wider rule could, in their view, properly be said to exist in English law today.

2.9.2.11 The English Commission notes that at first sight it may seem, in the light of their conclusion on the nature of the parol evidence rule, that to recommend the enactment of legislation in this field would be wholly inappropriate.²⁸⁶ They state that the practical difference between their understanding of the rule and that of their predecessors seems virtually non-

285 ELC *The Parol Evidence Rule* Report 154 at 27.

286 ELC *The Parol Evidence Rule* Report 154 at 28.

existent. The English Commission remarks that on the predecessors' understanding of the rule, evidence relevant for doing justice would not be excluded in any case likely to occur since it could always be admitted under one of the exceptions, however, on their understanding of the rule, it simply does not apply to such evidence. They consider that essentially, the difference between the two approaches is one of analysis, the improvement of legal analysis is not normally one of the purposes of legislation and, moreover, an Act of Parliament is not a suitable vehicle to achieve such a purpose. The English Commission states that in particular, exposition of analysis generally requires explanation, but the legislative techniques available are inapt for the purposes of explaining a preferred legal analysis of a problem.

2.9.2.12 The English Commission notes that it might be suggested that although legislation may at first sight seem inappropriate, nevertheless a different understanding of the rule is so prevalent that clarification by statute should be recommended. They note that they doubt whether such misunderstanding is common and decided that legislation in this field would be more confusing than clarifying. They further state that it became apparent as they considered the nature of such legislation that the task involved fundamental difficulties. They consider that if they approached it by abolishing the rule, or declaring it not to exist, it would be necessary either to refer to the rule by name or to describe it, and naming the rule would not be possible because the same name is used for more than one rule of law. They remark that describing the rule might seem more scope for the production of a plausible provision but that they could not avoid the conclusion that any description consistent with their analysis of the rule would be circular, so that any purported abolition would plainly appear to be beating the air.

2.9.2.13 The Ontario Law Reform Commission considered in 1979 whether the parol evidence rule should be abolished or relaxed in connection with the law of sale of goods. They concluded that the rule caused greater harm than it was designed to avoid, should be abolished and that merger or integration clauses should have no conclusive effect. They proposed the following provision:

The parol evidence rule does not apply to contracts for the sale of goods and a provision in writing purporting to state that the writing represents the exclusive expression of the parties' agreement has no conclusive effect.

2.9.2.14 The Ontario Commission noted in 1987 that the Uniform Law Conference of Canada adopted this clause in principle in adopting the following section:²⁸⁷

No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing prevents or limits the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation or evidence as to the true identity of the parties.

2.9.2.15 The Ontario Commission states that the question is whether they should extend their recommendation on the parol evidence rule beyond the sales context. They are of the view that the reasons they gave in 1979 favouring abolition of the rule are as cogent as they were then, and apply as forcefully to the law of contracts generally as to the law of sale of goods. They note that from Ontario decisions the parol evidence rule continues to have force in Ontario, therefore they cannot conclude, as could the English Law Commission, that the common law has arrived at a satisfactory state. They further agree that written documents should not be set aside lightly in favour of evidence of oral representations, but at the same time do not believe that the parol evidence rule is necessary to ensure continued judicial respect for written documents. They state that they would rather endorse the approach taken by the English Court of Appeal in *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 ALL ER 1078 which held that the court is best able to gauge the real agreement between the parties by reviewing all the relevant evidence. The Ontario Commission considers that the rule is at odds with the principle that contracts should be enforceable and to exclude evidence of the terms of a contract is to contradict that principle.

2.9.2.16 The Ontario Commission remarks that particularly in light of the prevalence of standard form contracts, they worry about a rule that reinforces the position of the party in a stronger position and enables that party, if the rule is rigorously applied, to walk away from prior or contemporaneous statements with impunity. They consider that given the lack of clarity in the case law as to the proper interpretation and application of the rule, and the many exceptions to the rule, they are not convinced that it conduces to certainty in the law. The Ontario Commission state that they believe, on the contrary, that the rule often has the effect of obscuring the real reasons for decisions, and the rule invites judicial recourse to technical exceptions to it, and fictitious devices to avoid it. The Ontario Commission therefore recommends as follows:

287 OLRC *Amendment of the Law of Contract* at 162.

- * Evidence of oral agreements or terms not included in, or inconsistent with, a written document should be admissible to prove the real bargain between the parties;
- * Conclusive effect should be attached to merger and integration clauses;
- * A provision similar to section 17 of the *Uniform Sale of Goods Act*, but applicable to all types of contracts, should be enacted.

2.9.2.17 Nagla Nasser notes the following provisions contained in the German, French and Swiss Codes on the interpretation of contracts:²⁸⁸

§ 133 of the German Civil Code: In interpreting a declaration of intention the true intention shall be sought without regard to the declaration's literal meaning.

Art 1156 of the French Civil Code: The common intention of the contracting parties must be sought in agreements rather than to stop at the literal sense of the terms.

Art 18 of the Swiss Civil Code: When interpreting the form and contents of a contract, the mutually agreed real intention of the parties must be considered and not incorrect terms or expressions used by the parties by mistake or in order to conceal the true nature of the contract.

2.9.2.18 Nagla Nasser considers that, on closer inspection, these provisions reveal an ability to reconcile a contextual and a relational approach in interpreting contracts, it is the approach favoured by jurists and evidenced in practice. Nasser notes that it is argued that paragraph 133 of the German Civil Code encompasses all contractual circumstances, including prior negotiations and subsequent manifestations and that the interpretation of contracts should be determined in light of the contractual economic purposes. Nasser further notes the following findings made by two arbitral tribunals respectively concerning the Swiss law:²⁸⁹

- * According to this provision, interpretation means trying to find the real intention of the parties, beyond the words used in their agreement. Circumstances prior and contemporary to the agreement as well as posterior to the agreement - especially the way parties have fulfilled their obligations - have to be taken into consideration.
- * Under Swiss law, the wording of the contracts forms the basis of their construction, but Swiss judges also look at all the circumstances which seem appropriate to

288 Nasser *Sanctity of Contracts Revisited* at 44.

289 Nasser *Sanctity of Contracts Revisited* at 45.

establish the common intention of the parties. If the real intention of the parties cannot be proven, the judge will look at the objective meaning of the contract, defined in accordance with the general experience of life and the principle of good faith.

2.9.2.19 Nagla Nassar states that the above-mentioned understanding of the Swiss law affirms beyond doubt its contextual approach since it admits prior negotiations and subsequent conduct as extrinsic evidence. Nassar considers from a continental approach, the contractual content is not solely derived from the parties' agreements, but also ensues from their relationship as a whole. Nassar remarks that it is affected by both what has taken place before, and what has taken place after, the conclusion of a contract, meaning that contracts are primarily viewed not as discrete transactions, but as relationships.

2.9.3 Comments by respondents

2.9.3.1 Prof AJ Kerr commented as follows on *Working Paper 54*:

"The principle that contractual obligations are to be complied with ... is strongest when there was actual agreement on the obligations sought to be enforced; it has some force when the conduct of one of the parties leads the other to rely on a particular interpretation of the words used (ie when there is apparent agreement); it has no force (apart from a generalised sense in which all legal institutions should be respected) when the contract is a construction of a person or body other than the parties, such as a court. This means that it is a necessary prerequisite for the primary application of the maxim that what the parties' understanding of the contract is, what they actually intended, be discovered, and that evidence of this be admissible. At present courts often say that rules of the law of evidence require them to treat as inadmissible evidence of what the parties' actual intention was if that evidence relates to what passed between the parties during the negotiation of the contract or to surrounding or background circumstances. ... In my opinion, now that a new statute emphasising good faith is being prepared, it is essential that it include a separate section stating that

"Whether or not the words of the contract appear to be ambiguous evidence of what passed between the parties and surrounding circumstances is admissible to assist in the interpretation of any contract.

Without such a provision there will be numerous cases in which a court will say that good faith requires that contractual obligations must be complied with but will adopt an interpretation that is not in conformity with what the parties intended. In other words, the court will enforce something which is its own construction, something on which the parties did not agree, which they did not intend, and to which the principle that contractual obligations must be complied with can only apply, if it applies at all, in its weakest, most

attenuated form. ... Such a position makes a mockery of the principles of good faith and should be avoided. For example, the Working Committee's proposed provision for the new Act ... concludes with a reference to 'the principle that effect shall be given to the contractual terms agreed upon by the parties.' If, as not infrequently happens, what passed between the parties, or the background or surrounding circumstances, contains the best clue to understanding what the parties meant, and if the words the parties used are capable of some other meaning, as is almost invariably the case, the statements on the admissibility of evidence often found in decisions make nonsense of any reference in such cases to what the parties 'agreed upon.'

As I have said elsewhere (Contract 313) the point made above is concerned with admissibility, not weight. If a party leads evidence which the court feels has been nothing more than a waste of time it can make an appropriate order as to costs. When litigants realise that such orders both can be, and will be, made there should be no undue lengthening of the time taken in court on contractual cases.

2.9.3.2 Liberty Life however expresses surprise and confusion at what it argues seems to be an attempt to sweep aside certain legal norms, inter alia the parol evidence rule. Liberty Life and SACOB consider that the problems of legal uncertainty are further compounded by the fact that the draft Bill seeks to override the parol evidence rule, which is to the effect that a written document is, as between the parties thereto, the exclusive memorial to the transaction, and evidence will be admitted to add to, vary, modify or contradict the terms so set out. SACOB further suggests that should the Bill become law, a signed contract would have to be evaluated, inter alia, in the light of the negotiations leading to its signature, the Court having to take into account *the way in which the contract came into being*. Murray and Roberts considers that the parol evidence rule offers appropriate certainty and guards against those who dishonestly seek to invent reasons for not being bound by an agreed contract and it maintains reasonable commercial certainty in commercial dealings.

2.9.4 Evaluation

2.9.4.1 Prof RH Christie remarks that despite the difficulties attendant upon it, the parol evidence rule must exist because it serves the vitally important purpose of ensuring that where the parties have decided that a contract should be recorded in writing, their decision will be respected, and the resulting document or documents will be accepted as the sole evidence of

the terms of the contract. He further remarks, inter alia, as follows:

"One does not need a very fertile imagination to see how, necessary as the rule is, it can lead to injustice if rigorously applied, by excluding evidence of what the parties really agreed. It has therefore been the constant endeavour of the courts to prevent the rule being used as an engine of fraud by a party who knows full well that the written contract does not represent the true agreement. In the nature of things this endeavour to achieve a fair result without destroying the advantages inherent in written contracts has led to some decisions which are difficult to reconcile with each other. Perhaps the best way to look at the rule is to see it as a backstop which comes into operation only in the absence of some more dominant rule. Thus, ..., it gives way to the rules concerning misrepresentation, fraud, duress, undue influence, illegality or failure to comply with the terms of a statute and mistake. If it did not do so none of these rules would apply to written contracts, which would be absurd. In all such cases, of course, the burden is on a party who has signed a written contract to displace the maxim *caveat subscriptor* by providing lack of the necessary *animus*.

It cannot be too often stressed that the mere existence of a written contract containing contractual terms does not automatically bring the rule into operation. It is first necessary to decide whether the document is in truth a reduction to writing or integration of the contract, and for this purpose evidence may well be necessary because the true nature of the document may not appear from the document itself. Such evidence may be oral or documentary and may canvass the negotiations and oral agreements preceding or accompanying the document, provided it is directed to establishing the true nature of the document.

...

Evidence may thus be given to show that a document appears on the face of it to be a written contract is not a contract at all, having been executed without *animus contrahendibut* for some other purpose such as misleading creditors. In *Beaton v Baldachin Bros* 1920 AD 312 315 Innes CJ said:

'Now the general rule is clear: a party to a written instrument cannot vary its terms by parol evidence. But a party to such a writing, which it is sought to use against him, may lead evidence to show that the document in question is not a contract at all, that it was not intended by the signatories to operate as such, but was given for another purpose. And when he has thus got rid of the writing, he may, if he can, establish another verbal contract as the true agreement. The law upon this point was clearly stated in *Roberts v Currie* (1911 TPD p36). Such a case is always difficult to establish; but it may be attempted, provided the pleadings are so framed as to raise it.'

The attempt has been made in a number of cases, not always successfully, and in *Weiner v The Master* (1) 1976 2 SA 830 (T) 841D Botha J remarked on the

'formidable obstacle which normally faces a party who seeks to negative the effect of what appears *prima facie* to be the record of an agreement.'

The obstacle, as pointed out by Botha J, is by no means so formidable if the document is signed by only one party. On the face of it a unilateral document of this sort is not a reduction of the whole contract to writing, so it would be inappropriate to apply the parol evidence rule and extrinsic evidence of the terms of the contract may be given. But ... a

reduction of a whole contract to writing either because it so appears on its face, as in the case of negotiable instruments, mortgage bonds, letters granting an option and other documents of a similar nature, or because evidence of the surrounding circumstances will show it to be so, in which case this fact must be pleaded and proved."

2.9.4.2 Professors Zeffertt and Paizes consider that South African law does not require the parole evidence rule and suggest as follows that the purposes served by it can be met by the adoption of an alternative approach:²⁹⁰

"It is more in accord with our current theory [regarding the basis of contractual liability] to say that, where the parties are ad idem that they are to be confined to the contents of a document, they will necessarily be confined to it; but, when there is dissensus, then, if one party has induced another to believe that a document contains all the terms of their agreement, he shall be bound by the belief that he has induced - provided that the other party was bona fide and reasonable in entertaining that belief. Both inquiries ... should involve the ventilation of all relevant information, including anything that may have been said or written by the parties, before or after the execution of the document, that might have a material bearing on whether there had been consensus or the induction of that belief."

2.9.4.3 It is further pointed out that it was suggested that the *Civil Proceedings Act* be amended to provide as follows:

"Save as to the contrary in [this or] any other law provided, and save as to the contrary expressly provided in any document embodying, or purporting to embody, the terms of any contract entered into by the parties to any civil proceedings, no evidence shall be excluded in any such proceedings on the sole ground that -

- (a) it alters, adds to, varies or contradicts such a document; or because
- (b) such document appears on the face of it to be clear and unambiguous."

2.9.4.4 It is clear from the discussion above that the question whether the parole evidence rule should be retained or abolished leads to divergent answers not only in South Africa but also in other jurisdictions. The Commission is of the view that the arguments advanced by Professors Kerr, Zeffertt and Paizes as well as those by the Ontario Law Commission is persuasive. The Commission is therefore of the view that if evidence of what passed between the parties, or the background or surrounding circumstances, contains the best clue to understanding

290 As quoted by *Farlam and Hathaway Contract: Cases, Materials and Commentary* 3rd edition by GF Lubbe and CM Murray at 220 - 221.

what the parties meant, and if the words the parties used are capable of some other meaning, as is almost invariably the case, such evidence should be admissible to prove the contract. The Commission also agrees with Professors Paizes and Zeffert that where one party has induced another to believe that a document contains all the terms of their agreement, he or she shall be bound by the belief that he or she has induced - provided that the other party was bona fide and reasonable in entertaining that belief and that the inquiry should involve the ventilation of all relevant information, including anything that may have been said or written by the parties, before or after the execution of the document, that might have a material bearing on whether there had been consensus or the induction of that belief. The Commission further agrees with Professor Kerr's reasoning that if a party leads evidence which the court feels has been nothing more than a waste of time it can make an appropriate order as to costs, and that when litigants realise that such orders both can be, and will be, made there should be no undue lengthening of the time taken in court on contractual cases.

2.9.5 Recommendation

2.9.5.1 The Commission recommends that the following provision be included into the proposed Bill:

"Whether or not the words of the contract appear to be ambiguous evidence of what passed during negotiations between the parties during and after the execution of the contract and surrounding circumstances is admissible to assist in the interpretation of any contract."

The Commission's proposed Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms

To provide that a court may determine whether contractual terms are unreasonable, unconscionable or oppressive and to issue appropriate orders if contracts are unreasonable, unconscionable or oppressive; to set down the powers of the High Court in regard with terms which are unreasonable, unconscionable or oppressive; to establish the office of the Ombudsperson; to set down the powers of the Ombudsperson; to provide for the appointment of officers and staff to the Office of the Ombudsperson; and for matters connected therewith.

To be introduced by the Minister of Justice

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

Court may determine whether contractual terms are unreasonable, unconscionable or oppressive and issue appropriate orders

1.(1) If a court is of the opinion that

- (a) the way in which a contract between the parties or a term thereof came into being; or
- (b) the form or the content of a contract; or
- (c) the execution of a contract; or
- (d) the enforcement of a contract,

is unreasonable, unconscionable or oppressive, the court may declare that the alleged contract-

- (aa) did not come into existence; or
- (bb) came into existence, existed for a period, and then, before action was brought, came to an end; or
- (cc) is in existence at the time action is brought, and it may then-
 - (i) limit the sphere of operation and/or the period of operation of the contract; and/or
 - (ii) suspend the operation of the contract for a specified period or until specified circumstances are present; or
 - (iii) make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonable, unconscionable or oppressive to any of the parties.

1.(2) Any court hearing an appeal against an order made in terms of section 1, may hear the matter as if it were a court of first instance.

1.(3) Where the High Court is satisfied, on the application of any organisation, or any body or person, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of contracts or terms which are unreasonable, unconscionable or oppressive, it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.

1.(4) Where the High Court is satisfied, on the application by the Ombudsperson contemplated in section 6-

- (a) that a person fails to comply with the request by the Ombudsperson for the giving of an undertaking under sections 6(2)(c) and 6(2)(f), the Court may order such person-
 - (i) to act in a manner that would have been required; or
 - (ii) to refrain from acting in a manner that would have been prohibited.
- (b) that a pre-formulated standard contract proffered by a person or which he or she recommends for use, contains a term which is unreasonable,

unconscionable or oppressive, the Court may, as well as granting any other relief, order the omission of that term, or any term having in substance the same effect, from all contracts subsequently proffered or recommended by that person or any other person.

A court may take guidelines into account for determining unreasonableness, unconscionableness or oppressiveness in contracts or terms

2. In determining whether a contract or a term thereof is unreasonable, unconscionable or oppressive, as contemplated in section 1 of this Act, the court may, where applicable, take into account the following factors, namely-

- (a) the bargaining strength of the parties to the contract relative to each other;
- (b) whether the goods or services in question could have been obtained elsewhere without the term objected to;
- (c) any prices, costs, or other expenses that might reasonably be expected to have been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded: provided that a court shall not find a contract or term unreasonable, unconscionable or oppressive for the purposes of this Act solely because it imposes onerous obligations on a party; or the term or contract does not result in substantial or real benefit to a party; or a party may have been able to conclude a similar contract with another person on more favourable terms or conditions;
- (d) in relation to commercial contracts, reasonable standards of fair dealing or in relation to consumer contracts, commonly accepted standards of fair dealing;
- (e) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;

- (f) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of the contract or to reject any of the provisions thereof;
- (g) whether one-sided limitations are imposed on the right of recourse of the party against whom the term is proffered;
- (h) whether Latin expressions are contained in a term or whether the terms of a contract is otherwise difficult to read or understand;
- (i) whether the manner in which a term states the legal position that applies is one-sided or misleading;
- (j) whether the party proffering the term is authorised to make a performance materially different from that agreed upon, without the party against whom the term is proffered in that event being able to cancel the contract by returning that which has already been performed, without incurring any additional obligation;
- (k) whether prejudicial time limits are imposed on the other party;
- (l) whether the term will cause a prejudicial transfer of the normal trade risk to the party against whom the term is proffered;
- (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;

- (p) whether the competence of the party against whom the term is proffered to adduce evidence of any matter which may be necessary to the contract or the execution thereof is excluded or limited and whether the normal incidence of the burden of proof is altered to the detriment of the party against whom the term is proffered;
- (q) whether the term provides that a party against whom the term is proffered shall be deemed to have made or not made a statement to his detriment if he or she does or fails to do something, unless -
 - (i) a suitable period of time is granted to him or her for the making of an express declaration thereon, and
 - (ii) at the commencement of the period, the party proffering the term undertakes to draw the attention of the party against whom the term is proffered to the meaning that will be attached to his or her conduct;
- (r) whether a term provides that a statement made by the party proffering the term which is of particular interest to the party against whom the term is proffered shall be deemed to have reached the party against whom the term is proffered, unless such statement has been sent by prepaid registered post to the chosen address of the party against whom the term is proffered;
- (s) 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;
- (t) whether a party's right of denial is taken away or restricted;
- (u) 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;

- (v) whether the term directly or indirectly amounts to a waiver or limitation of the competence of the party against whom the term is proffered to apply set off;
- (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;
- (y) the context of the contract as a whole, in which case the court may take into account the identity of the parties and their relative bargaining position, the circumstances in which the contract was made, the existence and course of any negotiations between the parties, any usual provisions in contracts of the kind or any other factor which in the opinion of the court should be taken into account;
- (z) any other factor which in the opinion of the court should be taken into account.

Application of Act

3.(1) Subject to subsection (2) the provisions of this Act shall apply to all contracts concluded after the commencement of this Act and between all contracting parties.

3.(2) The provisions of this Act shall not apply in respect of-

- (a) contractual acts and relations which arise out of or in connection with the Labour Relations Act, Act 66 of 1995, or which arise out of the application of that Act;

- (b) contractual acts which arise out of or in connection with or out of the application of the Bills of Exchange Act, Act 34 of 1964;
- (c) contractual acts to which the Companies Act, Act 61 of 1973, or the Close Corporations Act, Act 69 of 1984, apply or which arise out of the application of these Acts;
- (d) contractual terms in respect of which measures are provided under international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of this Act;

3.(3) Any provision or contractual term purporting to exclude the provisions of this Act or to limit the application thereof shall be void.

3.(4) This Act shall be binding upon the State.

Taking into account circumstances which existed at the time of the conclusion of the contract and the effect of a subsequent change of circumstances

4.(1) In the application of this Act the circumstances which existed at the time of the conclusion of the contract shall be taken into account and a party is bound to fulfil his or her obligations under the contract even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance he or she receives has diminished.

4.(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that-

- (a) the change of circumstances occurred after the time of conclusion of the contract, or had already occurred at that time but was not and could not reasonably have been known to the parties; and

- (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract; and
- (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

4.(3) If the parties fail to reach agreement within a reasonable period, the court may-

- (a) terminate the contract at a date and on terms to be determined by the court; or
- (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances; and
- (c) in either case, award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith.

Admissible evidence to assist in the interpretation of a contract

5. Whether or not the words of the contract appear to be ambiguous evidence of what passed during negotiations between the parties during and after the execution of the contract and surrounding circumstances is admissible to assist in the interpretation of any contract.

Ombudsperson

6.(1) The Minister shall appoint a person as the Ombudsperson who appears to him or her to be fit for appointment on account of the tenure of a judicial office or on account of experience as an advocate or as an attorney or as a professor of law at any university, for a period of five years and such appointment may be revoked at any time by the Minister if in

his or her opinion good reasons exist therefor.

6.(2) The Ombudsperson shall have the power-

- (a) to consider any complaint made to him or her on any contract term which has not been individually negotiated: provided that a term shall be regarded as not individually negotiated where it has been drafted in advance and the party against whom the term is proffered, has not able to influence the substance of the term, and provided further that the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this subsection to the contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract;
- (b) to require all such information as he or she considers necessary for the performance of his or her functions, including information considered necessary to decide whether a matter falls within the scope of this Act;
- (c) to negotiate with a person using or recommending the use of pre-formulated standard contracts in order to obtain an undertaking from him or her that he or she will act in accordance with this Act, and if such a party fails to fulfil such an undertaking, the Ombudsperson may issue such orders as may be deemed necessary for ensuring the fulfilment of such an undertaking;
- (d) if having considered a complaint about a pre-formulated standard contract term that he or she considers to be unfair, the Ombudsperson may bring proceedings in the High Court for an interdict against any person appearing to him or her to be using or recommending use of such a term; provided that if he or she decides not to apply for an injunction, he or she shall furnish reasons to the complainant for such a decision;
- (e) to prepare draft codes of conduct applying to particular persons or associated persons in a field of trade or commerce, in consultation with such persons,

organisations, consumer organisations and other interested parties for the consideration and approval of the Minister;

(f) if it appears to him or her that a person has acted in contravention of a prescribed code of practice applicable to that person, to request the person to execute within a specified time a deed in terms approved by the Ombudsperson under which the person gives undertakings as to-

- (i) discontinuance of the conduct;
- (ii) future compliance with the code of practice; and
- (iii) the action the person will take to rectify the consequences of the contravention,

or any of them;

(g) if a person fails to comply with the request by him or her for the giving of an undertaking under subparagraphs (c) and (f), the Ombudsperson may on application to the High Court, request that the person be ordered-

- (i) to act in a manner that would have been required; or
- (ii) to refrain from acting in a manner that would have been prohibited.

6.(3) The Ombudsperson shall retain all deeds contemplated in subsection (2)(f) and shall register the deeds in a Register of Undertakings kept by him or her containing the prescribed particulars.

6.(3) Such other officers and employees as are required for the proper performance of the Ombudsperson's functions, shall be appointed in terms of the Public Service Act, 1994 (Proclamation 103 of 1994).

Short title

6. The Act shall be called the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act, 19.. .

**THE WORKING COMMITTEE'S PROPOSED UNFAIR CONTRACTUAL TERMS
BILL AS CONTAINED IN *DISCUSSION PAPER 65***

BILL

To provide that a court may rescind or amend contracts which are contrary to good faith.

To be introduced by the Minister of Justice

BE IT ENACTED by the President and the Parliament of the Republic of South Africa, as follows:

Court may rescind or amend unfair contractual terms

1.(1) If a court, having regard to all relevant circumstances, including the relative bargaining positions which parties to a contract hold in relation to one another and the type of contract concerned, is of the opinion that the way in which the contract between the parties came into being or the form or content of the contract or any term thereof or the execution or enforcement thereof is unreasonable, unconscionable or oppressive, the court may rescind or amend the contract or any term thereof or make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties, notwithstanding the principle that effect shall be given to the contractual terms agreed upon by the parties.

(2) In deciding whether the way in which a contract came into existence or the form or

content of the contract or any term thereof is contrary to the principles set out above, those circumstances shall be taken into account which existed at the time of the conclusion of the contract.

Application of Act

2.(1) The provisions of this Act shall apply to all contracts concluded after the commencement of this Act.

(2) Any agreement or contractual term purporting to exclude the provisions of this Act or to limit the application thereof shall be void.

(3) This Act shall be binding upon the State.

Short title

The Act shall be called the Unfair Contractual Terms Act, 19.. .

LIST OF RESPONDENTS**Annexure C****Judiciary**

1. Judges of the Supreme Court of Appeal
2. Mr Justice B Wunsch of the Witwatersrand Local Division of the High Court

Bar Societies

3. The Laws and Administration Committee of the General Council of the Bar
4. Derek Mitchell on behalf of the Cape Bar

Advocacy

5. Mr G Harpur of Durban

Attorneys

6. Rashid and Patel and Company
7. Peter Horwitz Mendelsohn & Associates
8. Louw & Heyl
9. Cliffe Dekker & Todd Inc
10. Jan S de Villiers & Son
11. Mr GC Cox of Cox Yeats
12. Mr PA Bracher of Deneys Reitz
13. Mr J Hoffman of Dyason

Magistracy

14. Mr ER Humphreys: Magistrate Pretoria North

Other law associations

16. The Corporate Lawyers Association of South Africa (CLASA)

Professors of Law

17. Prof AJ Kerr Professor Emeritus of Law and Honorary Research Fellow at Rhodes University

18. Prof AN Oelofse of the University of South Africa
19. Prof DB Hutchison of the University of Cape Town
20. Prof BJ van Heerden of the University of Cape Town
21. Prof SWJ van der Merwe of the University of Stellenbosch
22. Prof LF van Huyssteen of the University of the Western Cape
23. Prof RH Christie

The Insurance Industry

24. Life Office's Association of South Africa
25. Liberty Life
26. The Joint Legal and Technical Committee of the Institute of Retirement Funds

Governmental Departments

27. The Department of Finance
28. The Department of Sport and Recreation
29. The Department of Agriculture

Parastatal organisations

30. Mr JM Damons of the Financial Services Board

Statutory bodies

31. The Unfair Contract Terms Committee (Subcommittee of the Business Practices Committee)

Provincial bodies

32. Mr M Motsapi: Chief Director Legal Services and Policy Co-ordination of the Province of the North West
33. Mrs M Ntosomele and Mr MS Bham of the Northern Province Legal Services

Business Sector

34. The South African Property Owners Association

35. Business South Africa
36. The South African Chamber of Business
37. Murray and Roberts Holdings
38. The South African Institute of Chartered Secretaries and Administrators
39. The SA Refrigeration and Air Conditioning Contractors' Association

Banking Industry

40. Council of South African Banks

Individuals

41. Mr and Mrs RH Sealy
42. Mr GF Kent
43. Lilibeth Moolman: South African National Consumer Union
44. Sibusiso Nkabinde: Legal Adviser
45. Mr Vuyani Richmond Ngalwana
46. Kaya Zweni: Lawyers for Human Rights
47. Mr NS Rambauli: registrar Thohoyandou