

ARTICOLE

CONTRACT LAW- A DÉLUGE OF NORMS IN SEARCH OF PRINCIPLES: THE COMMON EUROPEAN SALES LAW AND THE SOUTH AFRICAN CONSUMER PROTECTION ACT

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Abstract: *It is trite law that legislation which protects the consumer causes a surge of new norms. This article proposes that from these new norms found in the mandatory rules of consumer legislation it is possible to extract principles. The European Commission's proposal for a regulation on a Common European Sales Law (CESL) and the South African Consumer Protection Act (CPA) are analysed in an attempt to establish and ascertain principles which are aimed at controlling adjudication in a fair and just manner as opposed to a regime where free discretionary adjudication reigns. From the new norms contained in the mandatory rules of the CESL and the South African CPA it is possible to extract an information principle and a principle of fair dealing. The Draft Common Frame of Reference has identified freedom of contract, justice security and efficiency as the underlying principles of contract law. It is suggested that the obligation of information and fair dealing are recognised as independent principles which may facilitate bridging the divide between classical and consumer contract law.*

Keywords: principles; information principle; principle of fairness and fair dealing; consumer law; Common European Sales Law; South African Consumer Protection Act

1. Introduction

Recognition of human rights and the concomitant social rights has led to development of pragmatic, politically correct solutions to socio-economic inequalities in the form of specific legislation. This has brought about a dichotomy between this promulgated legislation and the existing legal structures. An example of such a situation can be found in the current tension between the legislation introduced to protect consumers and the traditional theory of contract law.¹ This tension between protective interventionist legislation and traditional *laissez-faire* contract law has been the subject of debate since the inception of statutory protection of weaker contracting parties. Traditionally the fast developing body of special statutory contract law has been considered an exception to the general body of private law²

and it is argued that the basic principles of the law of contract remain unaffected by consumer legislation. However, the implicit awareness that the underlying principles of consumer law are not in harmony with the fundamental structure of classical contract law³ has led Ian Ramsay to question whether consumer law is a 'progressive' form of law or merely a subaltern in the onward march of neo-liberalism.⁴ This observation may be based on two factors: first, the high incidence of mandatory provisions, which at first glance infringe on freedom of contract, and secondly on the fact that consumer law's specific range of remedies moves away from the orthodox paradigm of private contract law.⁵ This process is now described by the terms "materialisation" and "differentiation"⁶ and as this body of exceptional law expands, the more problematic assimilation will become within the traditional system of law.⁷ Moreover, this begs the question whether the validity of the basic tenets of the "rump" contract law, namely freedom and sanctity of contract are still exclusive today.⁸ In order to answer this question and possible subsequent questions it is apposite to give a brief overview of the causes of consumer protection.

2. Reasons for consumer protection

The reasons for consumer protection are manifold and vary from the abstract to the concrete, from economics to ethics and from socio-economic policies to legal development. Thus market failure has been identified as a source for legislative intervention, while the occasions of market failure may be lack of competition, barriers preventing prospective consumers from entering the market, problems consequent to differentiation in quality of available products, possible liability to third parties and dissimilitude's of information between consumers and businesses.⁹ The ethical ideal of social justice is a strong motivation for consumer protection, while poverty alleviation and the social advancement of the marginalised groups in society have played a prominent role within social and economic policies. This has led to the development of the concept "social market" and the desire for standards in the market place and equal access to the market.

2 1. Inequality

The repercussions of the above in the law of contract have been Trebilcock's Doctrine Of Inequality Of Bargaining Power,¹⁰ Which Laid The Foundation For The Principle of equality in contract law. Today it is trite that inequality of bargaining power between the supplier of goods and services and the consumer who avails herself of them is one of the reasons for consumer protection legislation.¹¹ Closely linked to this inequality is the dissimilitude of knowledge¹² regarding the consumer's

rights on the one hand and the characteristics and technical components of the goods or services on the other hand. Another inequality is that of resources between the two parties, which affects the consumer's ability to obtain access to justice as well as the supplier's ability to absorb the cost of a defective product.¹³

2.2. Standard contracts

A final and major cause for legislative intervention has been the standard contract,¹⁴ which has become the norm within the contracting arena. A logical result of the mass production of goods and services and the quest for efficiency, the standard contract reduces transaction costs and streamlines the contractual obligations of providers of services and goods to mass markets.¹⁵

Drafted by specialist teams of lawyers the dominant position of their client is used to tailor contractual terms to the advantage of the supplier and existing default rules are superseded with terms limiting liability, shifting risk or reducing a period of prescription. Such contracts are also referred to as contracts of adhesion, which clearly indicates that the terms are non-negotiable. Standard contracts rule modern commerce¹⁶ and their use has been compared to the exercise of monopoly power.¹⁷ In spite of the last fact, contracts of adhesion are treated as any other contract, that is enforceable according to the terms of the contract unless other elements contained within recognised doctrines such as duress, misrepresentation, mistake, rescission, legality and interpretation¹⁸ are present to render the contract unenforceable. Standard contracts are in reality cast in stone as well as inherently one-sided. Attempts to balance contracting parties' interests and obligations has resulted in piecemeal protective legislation cabined within the newly developing paradigm of consumer protection.

Finally it should be mentioned that consumer protection has been an impetus to private law to reconsider values and norms such as honesty, fair dealing and risk-sharing and to further develop rules and principles in these areas.¹⁹

3. Consumer Protection Legislation

3.1. Introduction

This article analyses the South African Consumer Protection Act²⁰ (hereafter referred to as CPA) and the latest European Union initiative in this field, the proposal on a Common European Sales Law²¹ (hereafter referred to as CESL), in search of principles. The hypothesis is that one of the characteristics of the legislative protection of consumers has been a casuistic approach aimed at eliminating the worst excesses of exploitative behaviour within the consumer market. These recent instruments

represent a new dawn in which the *laissez faire* principles of classical contract are no longer socially justifiable. In consequence, this legislation has introduced a considerable number of new mandatory rules, new consumer rights and new principles. These new rules effect great changes within contracting and can cause confusion in the law.²² This paper undertakes to classify and analyse this *déluge* of norms with the intention to extract new principles of contract law from both documents. The attempt to distill from the multitude of rules a number of principles is inspired by the desire to retain coherence within the over-all law of contract. Application of recognised principles in consumer law will achieve predictable solutions and open the possibility of assimilation of these principles in general contract law and counter differentiation, materialisation and guarantee legal unity.

3.2. South African consumer protection initiatives

An important step in South African consumer protection legislation has been the promulgation of the National Credit Act²³. This Act aims to address the issues of market failure, the ethical goal of social justice, consumer entitlements, and community values.²⁴ The chosen route is one of mandatory rules and information obligations. In 2009 the Consumer Protection Act²⁵ was promulgated, which continued on this road introducing mandatory rules promoting transparency and fairness into contract law.²⁶ In this article attention will only be given to the CPA in view of the fact that the CESL excludes application to contracts involving credit.²⁷

3.3. The Common European Sales Law

In 2011²⁸ The European Parliament and the Council of the European Union proposed a regulation on a Common European Sales Law.²⁹ This proposal constitutes the most recent legislation dealing with the contract of sale and is a result of the Draft Common Frame of Reference.³⁰ The objective of the proposal is to facilitate cross-border trade in the European Union for traders and consumers. Differences in the contract law between the member states have been identified as an obstacle for such trade, not only for business-to-consumer, but also for business-to-business transactions. This proposal recognises the fact that in spite of the European efforts at harmonisation, particularly in the field of consumer protection law differences in mandatory consumer protection rules remain.³¹ Moreover, article 6 of Regulation no 593/2008 of the European Parliament³² deters enterprises from cross-border trading. The same applies to e-commerce³³ where the requirement that the business' website must be adapted to the legal requirements of each member state where business activities are directed, has resulted in refusals to sell to consumers of other member states.

Although no restrictions regarding applicable law in respect of traders and their cross-border transactions are current, the multiplicity of national contract laws poses problems. Thus, small and medium-sized enterprises (SME's) dealing with larger companies are generally forced to agree to the law of the big business partner.³⁴ Furthermore, for SME's to find the content of foreign law and the negotiations on the point of applicable law constitutes considerable additional transaction costs, and the smaller the company, the greater the proportion of the transaction costs. The Vienna Convention on International Sale of Goods regulates only certain aspects, but does not address important matters such as unfair contract terms.³⁵ Moreover, these rules only apply by default and several European Union members have not signed the convention.

In consequence, the CESL provides an optional uniform set of contract rules,³⁶ intended as a second contract regime within each national law for cross-border³⁷ business-to-business and business-to-consumer³⁸ contracts for the sale of goods, supply of digital content and related services.³⁹ However, the proposed regulation offers member states the option to make the CESL available for domestic trade and to include contracts between traders, both not qualifying as SME.⁴⁰ As the CESL does not cover every aspect of contracting, the existing national rules regulating matters outside the scope of the CESL will continue to apply.⁴¹

The CESL should also be available to facilitate trade between member states and third countries, which gives consumers from third countries the option to agree to use the CESL.⁴² Consent by a consumer to use the CESL must be an informed choice; the trader must draw attention to the intended use and provide information on the nature and salient features;⁴³ the agreement to apply the CESL is indispensable and subject to strict requirements; an explicit separate statement is required and inclusion of a term to this effect in the contract itself is not possible. The trader must provide confirmation of this agreement in durable medium;⁴⁴ the regulation provides a standard information notice. Where it was impossible or omitted to provide such notice, the agreement is not binding until both notice and confirmation have been delivered and agreed to by the consumer. Agreement to apply the CESL covers the entire regime and the United Nations Convention on Contracts for the International Sale of Goods is by implication excluded.⁴⁵

The CESL and the CPA both provide protection to consumers by means of mandatory rules.⁴⁶ Mandatory rules are the essence of consumer law, because the latter constitutes statutory-based protection which impacts on traditional contract law.⁴⁷ Both instruments address the whole contracting dynamic, extending their application to both pre- and post-contractual relations. The CESL's proposal includes the possible application in trade between European Union member states and third countries, which will give consumers from third countries the option to agree to use the CESL.

4. Information obligations

4.1. Asymmetry of information

In classical contract law incentives for suppliers and traders to supply information are non-existent. Consumer legislation is making provision for mandatory information which is a response to the asymmetries of information between suppliers/traders and consumers.⁴⁸ Thus, one important facet of consumer protection has been the introduction of obligatory information, on the basis of the argument that consumers in possession of the necessary information will be in a position to protect their own interests, information being a condition for rational decision-making. When a consumer's expectations and reliance are based on reliable information, the supplier will benefit as well, since the consumer is more likely to fulfil her obligations. Information obligations⁴⁹ rely heavily on financial literacy⁵⁰ and play an important role in consumer protection,⁵¹ since they promote transparency and competition in the market.⁵² Correct information places the consumer in a position to participate in comparative shopping⁵³ and should stimulate competition in the market.

4.2. The South African Consumer Protection Act

The information obligations developed by the CPA have a distinct South African flavour and are representative of an *ad hoc* reaction against exploitative malpractices in the consumer market.

The CPA applies to⁵⁴ all transactions involving the supply of any goods or services in the ordinary course of business for fair value.⁵⁵ Provision is made for information obligations in the following instances: the Act requires suppliers to clearly inform a consumer with whom they contract,⁵⁶ what exactly is supplied⁵⁷ and at what price,⁵⁸ and any special information relating to direct marketing,⁵⁹ promotional offers,⁶⁰ loyalty programmes,⁶¹ promotional competitions,⁶² work, business or activity from home⁶³ or investment of money,⁶⁴ sales by auction.⁶⁵

Limitation of risk and liability involves robust information obligations. The CPA provides that any notice to consumers or any term of a consumer contract limiting the risk or liability of the supplier⁶⁶ or constituting an assumption of risk or liability by the consumer,⁶⁷ or obliging the consumer to indemnify the supplier⁶⁸ or acknowledging any fact by the consumer,⁶⁹ must be clearly,⁷⁰ timely⁷¹ and fairly drawn to the attention of the consumer.⁷² This applies also to notices and contractual terms relating to activities and facilities subject to risk of an unusual character, which a reasonable consumer could notice and that could result in serious injury or death.⁷³ It is prescribed that notices, documents and visual representations must be in a specified form or in plain language.⁷⁴

In South Africa all terms and notices which limit the supplier's risk or liability⁷⁵ or place the risk or liability on the consumer⁷⁶ or indemnify the supplier⁷⁷ or constitute an acknowledgement of any fact by the consumer⁷⁸ must be drawn to the consumer's attention.⁷⁹ This must be done in plain written language,⁸⁰ in a conspicuous manner⁸¹ prior to the consumer entering into the agreement, and commencing to engage in the activity by entering or gaining access to the facility⁸² or is required to begin payment.⁸³

These mandatory rules bolster the role of information obligations and can clearly be applied to common law agreements as well as consumer contracts for which they were created. In this manner mandatory rules can be transposed onto classical contract law and so create an information principle which transcends boundaries.

4 3. The Common European Sales Law

The CESL applies to cross-border⁸⁴ business-to-business and business-to-consumer⁸⁵ contracts for the sale of goods, supply of digital content and related services.⁸⁶ However, contracts involving the supply of foodstuffs, beverages or other consumables for household use frequently supplied by a trader on regular rounds to the consumer's home or workplace,⁸⁷ and contracts concluded by means of vending machines or automated commercial premises,⁸⁸ multiple contracts concluded with a total price not exceeding fifty Euro⁸⁹ are excluded.

Stringent information obligations are proposed by the CESL⁹⁰ for consumer contracts where the agreement is concluded at a distance or off-premises,⁹¹ and face to face.⁹² In all these instances a trader must provide in a clear and understandable manner all information regarding the main characteristics of goods or services,⁹³ the total price as well as any additional charges,⁹⁴ the identity of the trader, her name, the geographical address as well as the telephone number;⁹⁵ and the contract terms.⁹⁶ This information forms an integral part of the contract and may only be altered on the express agreement by the parties.⁹⁷ Provision is also made for rights of withdrawal.⁹⁸

Pre-contractual information obligations are dealt with in chapter 2. The chapter is divided into four sections thus making provision for trader-consumer contracts, at distance or off-premises or face-to-face⁹⁹ and trader-trader relations¹⁰⁰, while section four deals with the duty to ensure that the information is correct. This choice makes for repetition. In addition to the above the CESL specifies that for a distance contract information must be provided in a way that is appropriate to the means of distance communication,¹⁰¹ in plain understandable language¹⁰² and in a durable medium and be legible.¹⁰³ It also specifies that for an off-premises contract the information must be given on paper,¹⁰⁴ be legible and in plain language,¹⁰⁵ and that the trader is obliged to give the consumer a copy of the signed agreement.¹⁰⁶ Such an agreement will only be valid once the consumer has signed the offer and the trader has provided the consumer with confirmation of the agreement in a durable

medium.¹⁰⁷ In regard to face to face contracts the duration of the contract, the minimum duration of the consumer's obligations or in the event where the contract is indeterminate or is to be extended automatically the conditions for terminating the contract must be provided.¹⁰⁸

Regarding the information to be provided, the CESL sets out the factors to be taken into account in order to determine whether good faith and fair dealing require a contracting party to disclose particular information or not.¹⁰⁹ Regard should be given to all the circumstances including whether the party had expertise;¹¹⁰ the cost to the party of acquiring the information;¹¹¹ the ease with which the other party could have acquired the information;¹¹² the nature of the information;¹¹³ and the apparent importance of the information to the other party.¹¹⁴ Although the CESL does not require notification of exclusion of a suppliers liability, it considers these terms to qualify as not individually negotiated and consequently automatically unfair, void and unenforceable.¹¹⁵

5. Good faith and fair-dealing and the right to fair and honest dealing

Recognition of the principle of good faith and fair dealing as well as the right to fair and honest dealing is indicative of Wilhelmsson's¹¹⁶ person-oriented approach to contracts. Such an approach is concerned with how the physical, property, social and economic interests of consumers will be affected by the terms of their agreements¹¹⁷ and takes cognisance of a consumer's ability to protect her interests, which demands contextualisation.¹¹⁸ Designed to promote social justice and the economic welfare of consumers¹¹⁹ and described as a welfarist approach to contracts,¹²⁰ this approach represents consumer law and the quest for substantive fairness is reflected in the fair distribution of substantive rights and obligations in terms of the contract, often also referred to as the 'fairness' or 'unfairness' of the terms.¹²¹

5.1. The South African Consumer Protection Act: a right to fairness and fair dealing

The CPA does not explicitly mention a principle of good faith and fair dealing as such but introduces several rights deriving from such principle, namely the right to fair and responsible marketing,¹²² the right to fair and honest dealing,¹²³ the right to fair, just and reasonable terms and conditions,¹²⁴ and the right to fair value.¹²⁵

5.1.1 The right to fair and honest dealing

The Consumer Protection Act recognises inequality between contracting parties and proscribes a supplier's conduct of knowingly taking advantage of a consumer's inability to protect her own interest on account of illiteracy, ignorance,

inability to understand the language of the agreement or mental or physical disability.¹²⁶ This is not a *numerus clausus*¹²⁷ and other factors, which may be taken into account¹²⁸ are: income, remote, isolated or low density communities, minors, seniors or other vulnerable consumers or persons with low literacy, vision impairment, or limited language ability; as well as that a court must consider the nature of the parties, their relationship, their relative capacity, education, experience, sophistication and most importantly their bargaining position.¹²⁹

Furthermore the CPA combines the common law remedies with new statutory provisions. Thus, the act penalises¹³⁰ the use of physical force, coercion, undue influence, pressure, harassment, unfair tactics or any other similar conduct¹³¹ as well as false, misleading and deceptive representations,¹³² exaggerations, innuendos or ambiguities as to a material fact,¹³³ non-disclosure of¹³⁴ and failure to correct a misapprehension regarding a material fact,¹³⁵ with voidness. These provisions mirror the common law and do not constitute a superfluous repetition, but emphasise the fact that they form part of both the common law and the consumer protection regime.¹³⁶ If a consumer relied upon a false, misleading or deceptive representation, or a statement of opinion provided by or on behalf of the supplier to the detriment of the consumer¹³⁷ and the term was unfair, unreasonable, unjust or unconscionable,¹³⁸ or was not correctly drawn to the consumer's attention¹³⁹ it may be struck down as void.¹⁴⁰

The CPA introduces an important new rule namely that any unconscionable act¹⁴¹ directed at successfully concluding a contract will be void.¹⁴² Unconscionable conduct is defined widely, namely the use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any similar conduct.¹⁴³

5.1.2 The right to fair, just and reasonable terms and conditions

The CPA provides¹⁴⁴ that terms may be void on the basis of being unfair, unreasonable, unjust or unconscionable;¹⁴⁵ a price or term¹⁴⁶ that is unfair, unreasonable or unjust is considered to be void;¹⁴⁷ any unfair, unjust, or unreasonable exclusion of consumers rights, or exemption of suppliers' liability will also be struck down as being void.¹⁴⁸ The following indicators of unfairness are provided: ie terms which are excessively one-sided in favour of someone other than the consumer¹⁴⁹ or if the terms of the agreement are so adverse that they are considered to be inequitable to the consumer¹⁵⁰ or where there is detriment to the consumer¹⁵¹ may be struck down as void.¹⁵² The fact that a doctrine of a just price is introduced is indicative of the failure of the development of this doctrine by Canon law lawyers during the Middle Ages and its subsequent disappearance.¹⁵³ This disappearance can be ascribed to the decline of the authority of the church and the rise of secularisation and capitalism and the concomitant expansion of individualism.¹⁵⁴

5.1.3 Prohibited terms

Section 51 creates a blacklist of prohibited terms. The generic proscription is to void terms purporting to supersede the purposes and provisions of the CPA,¹⁵⁵ deceive or defraud a consumer¹⁵⁶ or divest the consumer of a right in terms of the Act, or impose risk or liability on the consumer, or to ignore a supplier's duty in terms of this Act.¹⁵⁷

The Act becomes more specific when it blacklists¹⁵⁸ limitations or exemptions of a supplier from liability for loss resulting from gross negligence;¹⁵⁹ assumption of risk or liability by the consumer arising from the above limitation or exemption;¹⁶⁰ imposition of an obligation to pay for damage to, or other assumption of risk of handling any goods displayed by the supplier¹⁶¹ unless the loss or damage is caused by gross negligence, recklessness, malicious behaviour or criminal conduct on the part of the consumer.¹⁶² Agreements culminating from negative option marketing;¹⁶³ agreements requiring a consumer to enter into supplementary agreements;¹⁶⁴ agreements ceding to another, charging, setting off against a debt, or alienating in any manner a consumer's right to claim against the Guardian's fund are also prohibited.¹⁶⁵ Clauses in which a consumer acknowledges that before contracting no representations or warranties were made¹⁶⁶ or that the consumer has received goods or services or documentation required in terms of this Act¹⁶⁷ as well as clauses in terms of which a consumer is to forfeit money to the supplier if she would exercise any of her rights in terms of the Act,¹⁶⁸ are also outlawed. The same applies to terms authorising entry into her premises to repossess,¹⁶⁹ terms undertaking to sign in advance any documentation relating to enforcement of the contract¹⁷⁰ or terms consenting to a predetermined value of costs relating to enforcement of the contract,¹⁷¹ and terms obliging a consumer to deposit an identity document, credit or debit card, bank account or automatic teller machine access card or any similar identity document or device¹⁷² or provide a personal identification code or number to be used to access an account.¹⁷³

Consumer contracts in contravention of section 51 will be void,¹⁷⁴ either entirely or the court may sever the term in question and declare this void or alter it.¹⁷⁵

Section 44 of the CPA regulations¹⁷⁶ provides a list¹⁷⁷ of contract terms presumed to be unfair and unreasonable, the so-called grey list.¹⁷⁸ This list is non-exhaustive¹⁷⁹ and establishes a presumption which means that the terms listed may be fair in view of the particular circumstances of the case.¹⁸⁰ However, the onus of proof has been shifted and the supplier will have to rebut the presumption. Section 44(3) lists 28 terms derived from standard contracts, which to an extent mirror the grey list of the CESL and run the gamut from limitation of the liability of the supplier, exclusion of remedies of the consumer, prescription, access to court, changing the applicable law and the distribution of risk, allowing unilateral amendment of the terms of the agreement, permitting extravagant damages or remuneration or costs and similar "standard" practices current in contracts of adhesion.

6. The Common European Sales Law; good faith and fair dealing

6.1. General principles

The CESL provides that each party has a duty of good faith and fair dealing, which may not be excluded, derogated from or varied.¹⁸¹ Good faith and fair dealing are defined as a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.¹⁸²

Good faith and fair dealing appear in chapter 5 of the CESL dealing with defects in consent,¹⁸³ purporting to harmonise the law on mistake,¹⁸⁴ fraud,¹⁸⁵ and unfair exploitation.¹⁸⁶ The requirements for voiding a contract concluded as the result of a mistake are that the other party caused the mistake, failed to comply with any of the pre-contractual information obligations, and omitted to point out the relevant information contrary to good faith and fair dealing.¹⁸⁷ Furthermore a party may void a contract if the contract was induced by fraudulent misrepresentation¹⁸⁸ whether by words, deeds or fraudulent non-disclosure¹⁸⁹ of any information which good faith and fair dealing, or any pre-contractual duty required that party to disclose.¹⁹⁰

The specific information which the requirement of good faith and fair dealing oblige a party to disclose, depends on all the circumstances, including whether the party had special expertise, the cost to the party of acquiring the relevant information, the ease with which the other party could have acquired the information by other means, the nature of the information, the apparent importance of the information to the other party and in contracts between traders good commercial practice.¹⁹¹ Unfair exploitation of another's dependency or distress resulting in excessive benefit or unfair advantage constitutes another ground for voiding a contract on account of a defect in consent.¹⁹²

Good faith and fair dealing may be contemplated in interpretation of a contract,¹⁹³ give cause to an implied term,¹⁹⁴ or make a contract term concerning the rate of interest for late payment unfair.¹⁹⁵

6.2. Unfair contract terms

However, the most consequential import of good faith and fair dealing is in respect of standard terms, which the CESL qualifies as those contract terms not individually negotiated.¹⁹⁶ Chapter 8 of the CESL is devoted to unfair contract terms. Article 83 lays down the principle approach of the CESL in respect of standard terms and conditions in consumer contracts¹⁹⁷ by providing that a contract term supplied by a trader and not individually negotiated is unfair if it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer, contrary to good faith and fair dealing.¹⁹⁸ The trader is obliged to make sure that these terms are

drafted and communicated in plain and intelligible language,¹⁹⁹ which will be one of the factors considered, the others being the circumstances during conclusion and the contract itself, in the decision on the unfairness of a standard term.²⁰⁰

To concretise the ambiguity of “unfair term” the CESL provides in article 84 a black list of terms which are always unfair, thus outlawing a standard variety of exclusions,²⁰¹ limitations²⁰² and assymetric rights and duties.²⁰³ A grey list of contract terms presumed to be unfair is found in article 85²⁰⁴ where the object or effect of a term is taken into consideration. Thus terms purporting to or resulting in restricting the consumer in respect of evidence,²⁰⁵ legal remedies,²⁰⁶ set-off,²⁰⁷ obtaining supplies or repairs from third parties,²⁰⁸ termination²⁰⁹ or terms requiring the consumer to pay excessive damages,²¹⁰ advances or provide excessive guarantees,²¹¹ or terms allowing the trader: to shift the burden of proof,²¹² to keep money paid for related services not yet supplied on termination,²¹³ to terminate without reasonable notice,²¹⁴ alter contract terms unilaterally,²¹⁵ to alter characteristics of the goods, digital content or related services unilaterally,²¹⁶ to determine the price at the time of delivery, or increase the price,²¹⁷ to unilaterally transfer its rights and obligations under the contract,²¹⁸ to supply an equivalent,²¹⁹ to reserve an unreasonable period of acceptance or performance,²²⁰ to require unreasonable formalities,²²¹ and to bundle the contract without justification.²²² Finally, asymmetry of rights and duties creates a presumption of unfairness; thus terms permitting the trader to keep money paid in the event of non-conclusion or non-performance, without providing compensation for the consumer in the reverse situation;²²³ allowing the trader discretionary termination without giving the same right to the consumer,²²⁴ oblige the consumer to perform fully where the trader fails to perform.²²⁵

The above black and grey list are derived from and aimed against the standard contract, and their inclusion in the CESL raises a question as to the tempering effect of good faith in the European jurisdictions and casts a shadow on the much praised freedom of contract. The rules of chapter 8 are mandatory so parties may not exclude application or derogate therefrom.²²⁶ The effect of unfair terms is that they are not binding on the other party, but where the contract can be maintained without it, the remainder remains binding.²²⁷

7. An academic in search of principles

In his 1950 rectorial address Walter Wilburg drew attention to the tension between the traditional system of private law and new legislation introduced to address societal changes.²²⁸ Wilburg held that disregarding the inherent contradictions between the two systems²²⁹ was a cause of confusion, which observation remains of

particular importance for contract law, which recognises several parallel systems alongside classical common law of contract in the form of the new statutory consumer law, labour law, rental housing law etc. As stated above, this paper addresses the first two of these systems and attempts to propose principles in order to effect coordination and harmonisation.

The fact that an asymmetry of information and an inequality of bargaining power are only dealt with in certain circumstances emphasises that equality in contract is not regarded as important. This raises the question whether equality is relevant only in cases between a “business and consumer” and why not also between “consumers and businesses” and “business to business” situations. Furthermore, consumer protection emphasises the failure of formal freedom of contract. Walter Wilburg offered as a solution to this dichotomy the “flexible system approach” to private law. According to this approach two fundamental issues are identified,²³⁰ namely that in specific areas of the law new values and consequent purposes have been introduced,²³¹ and secondly that this had led to free decision making²³² by which he understood adjudication disregarding principles leading to a casuistic jurisprudence.²³³ The flexible system recognises a plurality of principles, and applies these principles not individually but concomitantly. Each principle is weighted and graded when applied in a particular case.²³⁴ Thus the legal outcomes are determined by an interplay of each principle.²³⁵ It is submitted that this model may be applied to either consumer protection legislation or classical contract law.²³⁶

In 1999 Franz Bydlinski²³⁷ published his analysis of the flexible system approach to contract law and suggested the development of an information principle as a possible solution to the challenge of applying two parallel systems of contract law. Bydlinski argued that priority should be given to such principle which he defined as reflected in the rule that the party who is better informed or more easily capable of obtaining information is obligated, as far as is reasonable, ... to provide information to the other party concerning circumstances relevant to the latter.²³⁸ Bydlinski proposed the use of mandatory rules as a method of enforcing the rights resorting within the information principle. From both the mandatory rules contained in the CPA and the CESL it is clearly possible to derive an information principle and a principle of fair dealing.

7.1. An information principle

Both the CESLA and the CPA emphasise the importance of information obligations which are rudimentary in classical contract law.

It has been argued on an earlier occasion that the objection that the imposition of information obligations would be a threat to party autonomy, can be countered with the argument that information obligations in reality promote party

autonomy by placing the recipient of the information in a position to make an informed choice, which will benefit her own interests.²³⁹ However, the question to be addressed is whether developments in consumer law validate the conclusion that the time is ripe for recognition of an information principle in consumer law. If the answer to this should be affirmative the subsequent question is whether such principle would be suited for application in contract law in general. In respect of the first question it is submitted that information obligations rather promote free and informed consent as the foundation of contract thus enhancing freedom of contract.²⁴⁰ Moreover, information duties level the playing field, thus promoting equality.

The CESL states clearly in the preamble to the proposal for a regulation²⁴¹ and in article 1²⁴² that freedom of contract is a fundamental guiding principle and that party autonomy should only be limited if indispensable for consumer protection. However, the provisions regarding information obligations in the CESL and CPA are many and mandatory, which clearly indicates that these duties represent more than a transitory phase. The fact that the CESL has extended the ambit of the information obligations outside consumer protection is a first step in recognising that information is a fundamental principle, derived from and supported by true party autonomy, which encompasses informed consent and equality. South African consumer law does not contain an explicit provision upholding freedom of contract, but both case law and legal theory concur in the original and fundamental position of this principle, and the recognition and reinforcement thereof by the constitution.²⁴³ INSERT FN

7.2. A principle of fair dealing

The CPA has introduced the right to fair dealing. In a narrow sense this may be viewed as a reversal of the stunted development of good faith during the 20th century in South African law of contract. The CESL explicitly mentions the principle of good faith and fair dealing. Although this may *prima facie* appear a pleonasm, the reality that good faith has a different content in different European jurisdictions may explain the tautology. However, the elevation of fair dealing to an underlying principle of contract is not a *novum* introduced by consumer law, but can be found in the dawn of common law.

Another argument in favour of recognition of such a principle may be found in the fact that both the CESL and the CPA contain a number of provisions regarding defects of agreement such as the prohibition of false, misleading or deceptive representations,²⁴⁴ exaggeration, innuendo or ambiguity as to a material fact,²⁴⁵ or failure to disclose²⁴⁶ such fact, or the failure to correct an apparent misapprehension by the consumer regarding a material fact,²⁴⁷ which mirror the various European codifications and the South African common law on these topics. This repetition may

partly be explained by the desire for harmonisation and the wish to clarify that these essential elements of the general law of contract form part of both contractual system, namely the consumer protection regime²⁴⁸ as well as the non-consumer law of contract. On the other hand, these parallels emphasise that the prohibiting fraud and the refusal to validate transactions concluded as the result of a mistake or threats, represents the principle of fair dealing and also originate in the foundations of the respective legal traditions. Although it may be argued that recognition of fair dealing as a independent principle of the law of contract is an unnecessary complication, since fair dealing has been an underlying value, a component of an open norm such as good faith, fairness and reasonableness, or public policy, or even an indispensable component of the over-riding principle of justice, the fact that today it has been necessary to legislate the CPA, and propose the CESL undermines this argument. The stunted development of the most important of the mentioned principles, namely justice in real practical law, is collaborated by the present demand for social justice, which indicates that this aspect has been neglected. The arrested development of the other norms, values or principles is corroborated by the black and grey lists, which provide ample examples of the failure of the existing legal structures to prevent exploitation. It is, therefore, submitted that the principle of fair dealing be added to the law of contract in *toto*, as a logical consequence of our legal tradition, introduction of consumer legislation introducing new stimulus and last but not least the argument that to deny recognition of a principle of fair dealing is reverting to the law of the jungle.

8. Conclusion

From the surge of new rules it is possible to extract and identify an information principle and a principle of fair-dealing. These new principles are derived from the fundamental principles of freedom of contract and justice. Their identification as aspects of these fundamental principles also aid contextualisation of freedom of contract and justice. Recognition of these principles will not only aid adjudication in consumer law, but in the law of contract as such.

The Draft Common Frame of Reference (DCFR)²⁴⁹ which is at present the most comprehensive guide on private law have identified the overriding principles of private law as protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare and finally promotion of the internal market.²⁵⁰ In regard to the law of contract the DCFR has reduced them to four underlying principles viz: freedom, security, justice and efficiency.²⁵¹ In this article it has been shown that from the

mandatory rules promulgated in the South African CPA and the proposed regulation of the CESL it is possible to identify an information principle and a principle of fair dealing, respectively aspects of freedom of contract and justice in the DCFR.

Although the principles of information and fair dealing both stem from legislation it is argued that they can be transposed onto classical common law contracts and will achieve the same result within the sphere of private contract law as in consumer contracts. The way to this event is being paved in the CESL, which provides an option for application to cross-border business-to-business contracts for the sale of goods, supply of digital content and related services. Moreover, the proposed regulation offers member states the option to make the CESL available for domestic trade and to include contracts between traders, both not SME.

Another important extension is that both instruments apply to all stages of the contracting-dynamic,²⁵² thus effectively eliminating the boundaries between contractual, pre-contractual and post-contractual,²⁵³ important in the classical model.²⁵⁴ The consequence is that the new principles rule the whole gamut of the contracting dynamic.

Introduction of these new rules and principles was necessitated by the fact that under the existing contractual regimes it had been proven impossible to prevent exploitation of the weaker party. The traditional model is and remains based on equality of the contracting parties and ignores the excesses committed during contracting, for example the more subtle forms of duress and fraud. The reason for the lacklustre development of safety mechanisms such as good faith equity *etc*, has been the dominant position of the principle of legal certainty, which in tandem with party autonomy has ruled supreme. It is a sad reflection on the human condition that it has taken the holocaust to force decisive steps in the effective development of human rights. The resulting awareness of the plight of the under-privileged, the uneducated and powerless, who have been marginalised by the legal systems since the dawn of mankind has given new impetus and stimulus in both public and private law and it is to be hoped that these attempts to humanise the legal systems will be met with more success than earlier efforts by the church.

Both CPA and CESL represent two faces of the same coin. On the one side there is a logical development of ageless roots in the form of transparency and fairness within the doctrines of the law of contract. On the other side a clear break with legal doctrine and tradition is also present in the form of the sacrifice made by existing legal theory and the business-friendly priority of legal certainty to a realistic acknowledgement of the short-comings of the law. The well-known excesses of the privileged, legalised by the standard contract are addressed, by an ad hoc approach, which legal theory has not succeeded in accommodating within the system. This

paper has attempted to show that our legal arsenal does contain the possibilities of integrating these tentative steps towards social justice and it is submitted that it is the task of academia to aid and abet this process.

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¹ Traditional contract law refers to the so-called classical contract law. Built upon freedom of contract, classical contract law departs from the premise that both contracting parties are equal and the legal system impartially enforces the sanctions of the law of contract, irrespective of the circumstances of the parties. The equality adhered to is equality before the law and in this paradigm the law is not concerned with social and economic equality and/or any resulting inequality. For further reference see J N Adams and R Brownsword *Understanding Contract Law* 4th ed (2004) 41f; P S Atiyah *The Rise and Fall of Freedom of Contract* (1979) 226ff and 341ff; H Collins *The Law of Contract* 4th ed (2003) 5 and 35f; L Hawthorne "The principle of equality in the law of contract" (1995) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 157 164ff; D Bhana and M Pieterse "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited" (2005) *South African Law Journal* 865 and 883ff; L Hawthorne "Distribution of wealth, the dependency theory and the law of contract" 2006 *Tydskrif vir Hedendaagse Romeins Hollandse-Reg* 48 at 53ff; P Aronstam *Consumer protection, freedom of contract and the law* (1979) 14; J Wightman *Contract: A critical commentary* (1996) 85ff; J N Adams and R Brownsword *Key issues in contract* (1995) 59; W Friedmann *Law in a changing society* (1959) 131; G Lubbe and C Murray *Farlam and Hathaway Contract cases, materials and commentary* (1988) 18–26; *Barkhuizen v Napier* 2007 5 SA 323 (CC) 341C–D.

² L Antonioli "Consumer Protection, fair dealing in marketing contracts and European contract law – a uniform law?" in H Collins (ed) *The forthcoming EC directive on unfair commercial practices – contract consumer and competition law implications* (2004) 288ff.

³ I Ramsay "'Productive disintegration' and the law of contract" (2004) *Wisconsin Law Review* 495ff; L Antonioli (*supra* n3) 286.

⁴ *Consumer law and policy* (2007) 1.

⁵ L Antonioli (*supra* n3) 286.

⁶ Both terms were introduced by I Ramsay (*supra* n 3) at 495 where he defines materialisation as the breakdown of the formal system of classical contract law; differentiation of contract norms is used for describing the process which identifies contract law as different spheres of commercial, consumer and labour law with different norms ruling each sphere. See also K Riesenhuber *Europäisches Vertragsrecht* (2003) par 889; C-W Canaris "Wandlungen des Schuldvertragsrecht – Tendenzen zu seiner 'Materialisierung'" *AcP* 200 (2000) 273, 276-292; A Schwartz and R Scott "Contract theory and the limits of contract law" 2003 *Yale Law Journal* 541.

⁷ *Ibid.*

⁸ Study group on social justice in European private law "Social justice in European contract law: a manifesto" (2004) *European Law Journal* 654; M Furmston *The law of contract* (2003) 37.

⁹ I Ramsay *Rationales for intervention in the consumer market place* (1984) 16. The collapse of the American subprime market followed by the banking and housing sectors of the global economy is a textbook example of market failure.

¹⁰ "The doctrine of inequality of bargaining power: Post Benthamite economics in the House of Lords 26 (1976) *University of Toronto Law Journal* 359ff.

- ¹¹ G Howells and S Weatherill *Consumer Protection Law* (2005) 6; G Howells “The Potential and limits of consumer empowerment by information” (2005) 32 *Journal of law and Society* 349 at 351f; G Hadfield, R Howse and M Trebilcock :Information based principles for re-thinking consumer protection policy” (1998) *Journal of consumer policy* 138ff.
- ¹² G Howells and S Weatherill *Consumer protection law* (2005) 6; G Hadfield, R Howse and M Trebilcock (1998) *Journal of consumer policy* 141ff.
- ¹³ G Howells and S Weatherill *Consumer protection law* (2005) 6; G Hadfield R Howse and M Trebilcock (1998) *Journal of consumer policy* 131 and 138ff; I Ramsay *Consumer law and policy Text and Materials* (2007) 33f.
- ¹⁴ A distinction must be made between standard contracts also referred to as contracts of adhesion and standard form contracts as found in Butterworth’s Forms and precedents. The first type of contract controls both the legal consequences of the particular contract without allowing true negotiation about the terms as well as the consequences of all or most contracts of that type entered into by the contractant who prescribes the standard form. The standard forms found in Forms and precedents are open for negotiation. This article refers to standard contracts or contracts of adhesion which fall into the first category.
- ¹⁵ H Collins *Contract* (2003) 3, 245.
- ¹⁶ S Van der Merwe L F Van Huyssteen *Contract general principles* (2007) 310; T D Rakoff (1983) “Contracts of adhesion: an essay in reconstruction” *Harvard LR* 1174, 1176
- ¹⁷ Rakof 1983 *Harvard LR* 1177 1178; Kessler “Contracts of adhesion – some thoughts about freedom of contract 1943 *Columbia LR* 629 632.
- ¹⁸ S Van der Merwe *et al* 298 311; T D Rakof 1983 *Harvard LR* 1191. The following characteristics have been identified: a standard form is printed in large quantities; the terms ave been drafted by the supplier and are clearly in the drafting party’s favour;¹⁸ the particular commercial community to which the supplier belongs uses this contract or a similar contract; the contract is presented to the co-contractant, usually a consumer, who is left no option to negotiate the terms of the contract; the contract is signed by the adhering party who seldom concludes the particular type of contract whose main obligation is the payment of money.
- ¹⁹ I Ramsay *Text and materials* 54 acknowledges consumer protection as the origin of the norms of trust, confidence, and solidarity.
- ²⁰ 68 of 2008
- ²¹ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) published during 2011.
- ²² F Bydlinski “A “Flexible System” approach to contract law” in H Hausmaninger, H Kozioli, A Rabello and I Gilead (eds) *Developments in Austrian and Israeli Private Law* (1999) 9.
- ²³ Act 34 of 2005.
- ²⁴ Preamble.
- ²⁵ 68 of 2008.
- ²⁶ C Willet *Fairness* 12. L Hawthorne “Public governance: Unpacking the Consumer Protection Act 68 of 2008” (2012) *Tydskrif vir Heedendagse Romeins Hollandsereg* 1.
- ²⁷ Art 6(2).
- ²⁸ On 11 October 2011.
- ²⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF> (last consulted 1 November 2012).

³⁰ The Draft Common Frame of Reference is the culmination of the research undertaken by two study groups viz the Study Group on a European Civil Code and the Research group on existing European Community private law, known as the “Acquis Group” all as part of the project to create the “Common Frame of Reference”.

³¹ CESL page 2.

³² *Ibid.*

³³ E-commerce Directive 2000/31/

³⁴ CESL page 3.

³⁵ CESL page 5.

³⁶ Art 3.

³⁷ Art 4.

³⁸ Art 7.

³⁹ Art 5 and Preamble 19.

⁴⁰ Art 13,

⁴¹ These include legal personality, invalidity due to lack of capacity, immorality, language, non-discrimination, representation, plurality of debtors and creditors, change of parties, assignment, sett-off, merger, transfer of ownership, intellectual property, torts, concurrence of contractual and non-contractual liability.

⁴² Preamble 14.

⁴³ Preamble 23.

⁴⁴ Preamble 22.

⁴⁵ CESL page 5.

⁴⁶ CESL page 6f ; and CPA Introduction and Preamble. The CESL has an overriding rule that a contract between a trader and a consumer will only be valid if the consumer consented to the application of the CESL explicitly in a separate statement to that in which the consumer agrees to the substantive contract (Art 8(2)). The trader must also provide the consumer with confirmation of agreement to application of the CESL on a durable medium.

⁴⁷ G Howells and S Weatherill *Consumer Protection Law* (2005) 31f, 34f.

⁴⁸ G Howells “The potential and limits of consumer empowerment by information” 2005 *Journal of Law and Society* 354; J Wightman *Contract a critical commentary* (1996) 31 lists asymmetric information as one of the most recognized forms of market failure.

⁴⁹ This approach to consumer protection was introduced by the National Credit Act 34 of 2005.

⁵⁰ Cf Consumer Financial Literacy Education; European Coalition for Responsible Credit – Principles for responsible credit.

⁵¹ This constitutes recognition of the fact that there is an underlying substantive information asymmetry in consumer contracts. Thus consumer protection entails the development of an information strategy.

⁵² G Howells and S Weatherill *Consumer protection law* (2005) 63ff; S Weatherill “The role of the informed consumer in European community law and policy” (1994) *Consumer LJ* 49; G Hadfield, R Howse and M Trebilcock “Information based principles for rethinking consumer protection policy (1998) *Journal of consumer Policy* 132; I Ramsay “From truth in lending to responsible lending” (hereafter referred to as “Truth in lending”) in G Howells, A Janssen and R Schulze (eds) *Information rights and obligations: A challenge for party autonomy and transactional fairness* (2005) 46; C Willet *Fairness* 4ff; 33.

⁵³ J Wightman “Beyond custom: contract, contexts, and the recognition of implicit understandings” in *Implicit dimensions* (2003) 144; I Ramsay “Truth in Lending” 48.

⁵⁴ Sections 40(1)(c), 52(3)(b)(i) and (ii)

⁵⁵ Sec 5(1) read together with section 5(6).

⁵⁶ S 26(2) and (3). Suppliers of goods and services must provide the consumer with a written record of the transaction, which clearly identifies them, their address, the goods or services, price, taxes. S 27 (1) and (3) provides that the minister may prescribe that intermediaries may have to disclose information. Excepted are executors and liquidators, s 27(2). S 28 provides that marketers, deliverers and installers at the premises of a consumer must display or provide identification. S 33(2) and (3) provide that where a contract is concluded *inter absentes* the supplier must provide the consumer with identity, address, the goods or services, price, taxes, currency, delivery arrangements, return, refund and complaints policy and any other prescribed information. For exceptions see s 33(1). S 37((2)(b)(i) and (ii) provide that advertisements of work, business or activity from home or investment of money must the identity and address of the promoter.

⁵⁷ S 25(1) and (2). Reconditioned and gray market goods bearing trademarks must be indicated as such. Gray goods are goods with a trademark, imported without approval or license of the trademark holder. It is not clear what the conspicuous notice to those goods is supposed to state.

⁵⁸ S 23(3) requires to display the price of goods offered for sale. Adequate display is defined in s 23(5). Exceptions in ss 23(1) and (4). S 23(11) for reduced prices. S 23(6) provides that a higher price than that displayed cannot be charged. Exceptions in ss 23(7)-(10).

⁵⁹ S 32(1). The consumer must be informed at the conclusion of the contract of her right of rescission.

⁶⁰ S 34(4)(a) provides that the nature of the prize, reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing being offered, must be clearly stated. The same applies to the related goods or services, the steps required by the consumer and the person, place, date and time, from, on or at which the consumer may receive the prize. S 34(4).

⁶¹ S 35(3)(a). The nature of the programme, credit or award being offered. The related goods or services, the steps required by the consumer and the person, place, date and time, from, on or at which the consumer may gain access to the programme must also be clearly stated. S 35(3).

⁶² S 36(5). The competition, the steps required by the consumer, closing date, basis of determination of results, how results will be made public and the person, place, date and time, from, on or at which the consumer may obtain a copy of the rules and/or receive a prize must clearly be stated.

⁶³ S 37(1)(a) and (b); S 37(2)(a)(i) and (ii); S 37((2)(b)(i) and (ii). A cautionary statement disclosing the uncertainty of the activity and the income and the nature of the work, business, activity or investment must be included in the advertisement.

⁶⁴ S 37(1)(c) invites, solicits or requires other persons to perform any work, business or activity, invest money, or perform any work, business or activity in association with the investment of money. S 37(2)(a)(i) and (ii); S 37((2)(b)(i) and (ii). Again a cautionary statement disclosing the uncertainty of the activity and the income as well as the nature of the work, business, activity or investment must be included in the advertisement.

⁶⁵ S 45(4). If such sale is subject to a reserve price or a right to bid by or on behalf of the owner or auctioneer, notice thereof must be given in advance

⁶⁶ S 49(1)(a).

⁶⁷ S 49(1)(b).

⁶⁸ S 49(1)(c).

⁶⁹ S 49(1)(d).

⁷⁰ S 49(3) requires such notices to be drawn to the attention of the consumer in 'plain language', as described in section 22. S 49(4)(a) requires provisions or notices to be drawn to the consumer's

attention in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances.

⁷¹ S 49(4)(b) before the earlier of the time at which the consumer- (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or (ii) is required or expected to offer consideration for the transaction or agreement.

⁷² S 49(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice

⁷³ S 49(2).

⁷⁴ S 22. (1). S 22(2) defines plain language: if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to-(a) the context, comprehensiveness and consistency of the notice, document or visual representation; (b) the organisation, form and style of the notice, document or visual representation; (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and (d) the use of any illustrations, examples, headings or other aids to reading and understanding.

⁷⁵ S 49(1)(a).

⁷⁶ S 49(1)(b).

⁷⁷ S 49(1)(c).

⁷⁸ S 49(1)(d).

⁷⁹ S 49(1).

⁸⁰ S 49(3) as described in s 22.

⁸¹ S 49(4)(a).

⁸² S 49(4)(b)(i).

⁸³ S 49(4)(b)(ii).

⁸⁴ Art 4.

⁸⁵ Art 7.

⁸⁶ Art 5 and Preamble 19.

⁸⁷ Art 13(5)(a).

⁸⁸ Art 13(5)(b).

⁸⁹ Art 13(5)(c).

⁹⁰ Part II Ch 2 Section 1 deals specifically with pre-contractual information to be given by a trader to a consumer.

⁹¹ Art 13.

⁹² Art 20(1)(a).

⁹³ Art 13(1)(a); Art 20(1)(a).

⁹⁴ Art 13(1)(b); Art 20(1)(b). Art 14(1)(a) includes taxes or if the price cannot be calculated in advance the manner in which the price is to be calculated; Art 14(1)(b) also includes any additional freight, delivery or postal charges as well as any other costs and where they cannot be calculated in advance the fact that such additional charges and costs may be payable.

⁹⁵ Art 13(1)(c). Art 15 elaborates on the information to be provided about the trader's identity and addresses eg the trading name (art 15(a)); the trader's geographical address (art 15(b)); the telephone and fax number, and email address (at15(c)); as well as the identity and geographical address of any other trader trading on the first trader's behalf (art 15(d) and (e)); Art 20(1)(c).

⁹⁶ Art 20(d); Art 13(1)(d); Art 16(a) provides that information to be provided in terms of art 13(1)(d) must include: arrangements for payment, delivery and supply of goods and the time when delivery or performance of the service will take place; the duration of the contract, the minimum duration of the consumer's obligations or in the event where the contract is indeterminate or is to be extended automatically the conditions for terminating the contract (art 16(b)); where applicable the information concerning deposits or other financial guarantees to be paid by the consumer (art 16(c)); if relevant codes of conduct and how copies of them may be obtained (art16(d)).

⁹⁷ Art 13(2).

⁹⁸ Art 17 (1) and (2) specify the time limits, procedures as well as the model withdrawal form as set out in Appendix 2. Provision is also made for informing the consumer of costs involved in returning goods in the event of withdrawal and technical information relating to the Model instructions as well as the position where a consumer does not have a right of withdrawal (art 17 (4) and (5) respectively. Art 13(f) provides for information regarding after sales customer assistance, services, commercial guarantees and complaints handling policy; Art 13(g) provides for the possibility of recourse to Alternative Dispute Resolution mechanisms; Art 13(h) provides for information regarding the functionality and technical protection of digital content; Art 13(i) provides for information regarding the possibility of any inoperability of digital content with hard and software which the trader is aware of or can be expected to have been aware of.

⁹⁹ Part II Ch 2 Sections 1 and 2.

¹⁰⁰ Part II Ch 2 Section 3.

¹⁰¹ Art 13(3)(a).

¹⁰² Art 13(3)(b).

¹⁰³ Art 13(3)(c).

¹⁰⁴ Art 13(4)(a).

¹⁰⁵ Art 13(4)(b).

¹⁰⁶ Art 18(1). If the consumer asks for related services to commence during the withdrawal period provided for in Art 42(2) the consumer must express the request in a durable medium. Art 19(1) provides that if a trader makes a telephone call to a consumer to conclude a distance contract the trader is obliged to divulge its identity and where applicable the identity of the person on whose behalf the call is made as well as the commercial purpose of the call.

¹⁰⁷ Art 19(2).

¹⁰⁸ Art 16(b). Art 20(1)(e) furthermore states that there is also an obligation to provide the consumer with information regarding the existence and conditions of the trader's after-sale services, commercial guarantees and complaints policy while Art 20(1)(f) provides for provision of information regarding the functionality of technical protection measures; and Art 20(1)(g) provides for information regarding any inoperability of digital content of which the trader is aware or could be expected to be aware.

¹⁰⁹ Ch 5 art 49(3).

¹¹⁰ Ch 5 art 49(3)(a).

¹¹¹ Ch 5 art 49(3)(b).

¹¹² Ch 5 art 49(3)(c).

¹¹³ Ch 5 art 49(3)(d).

¹¹⁴ Ch 5 art 49(3)(e).

¹¹⁵ Ch 1 section 2 art 7(1). The CESL in art 7(2) also regards a term as not having been individually negotiated if one party supplies a selection of terms to the other party and the former must choose from the selection provided. Art 7(3) furthermore places the burden on the party who claims that a

term has subsequent to being supplied been individually negotiated to prove that it has been. The CESL does however regard the exclusion or limitation of the trader's liability for death or personal injury caused to a consumer by the trader or someone acting on his behalf as an unfair term and consequently void and unenforceable see Ch 8 section 2 art 84(a).

¹¹⁶ *Social contract law and European integration* (1995) 29ff; T Wilhelmsson "The philosophy of welfarism and its emergence in the modern Scandinavian contract law" in R Brownsword, G Howells and T Wilhelmsson *Welfarism in contract law* (1994) 63ff.

¹¹⁷ C Willet *Fairness* 33.

¹¹⁸ C Willet *Fairness* 34.

¹¹⁹ This is the case in South Africa as well as the rest of the civilized world. Cf Consumer Protection Act 68 of 2008, S 3 "Purpose and Policy" of the Act. The concept "welfarist" is used in the sense of protecting the interests of the weaker party and is in keeping with the values of the welfare state. In this regard see R Brownsword, G Howells and T Wilhelmsson *Welfarism in Contract law* (1994); H Collins *Contract* (2004) at 9; J Adams and R Brownsword *Understanding Contract law* (2004) Ch 8; C Willet *Fairness* 33.

¹²⁰ T Wilhelmsson *Social contract law and European integration* (1995) 29ff; C Willet *Fairness* 33.

¹²¹ On substantive fairness in general see R Brownsword, G Howells and T Wilhelmsson *Welfarism in contract law* 1994; A Smith *Atiyah's introduction to the law of contract* (2006) ch 12; J Beatson and D Friedman "From classical to modern contract law" in J Beatson and D Friedman (1995); J Wightman *Contract: A critical commentary* (1996); H Collins *Contract* (2004); C Willet *Aspects* (1996); R Brownsword, NJ Hird and G Howells (eds) *Good faith in contract: concept and context* (1999); ADM Forte (ed) *Good faith in contract and property* 1999; RPJL Tjittes "Unfair clauses" in H Beale and D Tallon (eds) *Principles of European contract law* (2002).

¹²² S 29-40.

¹²³ S 40 – 47.

¹²⁴ S 48-52.

¹²⁵ S 53-61.

¹²⁶ S 40(2).

¹²⁷ S 40(2).

¹²⁸ S 3(1)(b)(i)-(iv).

¹²⁹ S 52(2)(b) exhorts a court to consider the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position in any proceedings concerning a transaction where the consumer alleges that the supplier contravened Ss 40, 41 and 48. (S 52(1) and (a)).

¹³⁰ S 41(5) and 51(3).

¹³¹ S 40(1).

¹³² S 41(1)(a).

¹³³ S 41(1)(a), (b) and (c).

¹³⁴ S 41(1)(b).

¹³⁵ S 41(1)(c).

¹³⁶ T Naudé "The use of black and grey lists in unfair contract terms legislation in comparative perspective" (2007) *South African Law Journal* 144 where she is of the opinion that to include all common law rules in legislature might hinder the development of such rules.

¹³⁷ As contemplated in s 41.

¹³⁸ S 48(2)(c)(i).

¹³⁹ S 48(2)(c)(ii) read together with s 49.

¹⁴⁰ S 48(2)(d)(ii) read together with s 51(3).

¹⁴¹ S 40(1)(a)-(e) provides that any unconscionable act relating to marketing, supply of goods and services, negotiation, conclusion, execution or enforcement of an agreement to supply goods and services, including the demand for or collection of payment for goods or services or any recovery of goods from a consumer qualify as such action.

¹⁴² S 40(3) read together with s 51(3).

¹⁴³ S 40(1).

¹⁴⁴ S 48.

¹⁴⁵ S 48(2)(d).

¹⁴⁶ S 48(1)(a)(i) and (ii).

¹⁴⁷ In terms of s 51(1)(a) if the general purpose or effect of any term or condition is to defeat the purpose or policy of this Act it is void in terms of s 51(3). Furthermore in terms of s 115(1) where an agreement, provision of an agreement has been declared by a provision of this Act to be void, that agreement or provision must be regarded as having been of no force or effect at any time.

¹⁴⁸ S 48(1) read together with s 51(3).

¹⁴⁹ S 48(2)(a).

¹⁵⁰ S 48(2)(b).

¹⁵¹ S 48 (2)(c) states that “The consumer relied upon any false, misleading or deceptive representation regarding a material fact or a statement of opinion to the detriment of the consumer”. See also S 41(1)(a). This also applies to any exaggeration, innuendo or ambiguity regarding a material fact or any failure to disclose a material fact which could qualify as a deception (S 41(1)(b). It will also be considered to be unfair if a supplier fails to correct an apparent misconception on the part of the consumer, which amounts to a false, misleading or deceptive representation (S 41(1)(c)).

¹⁵² S 48 read together with s 51(3).

¹⁵³ C Becker Die Lehre von der laesio enormis in der Sicht der heutigen Wucherproblematik (1990) 27-40; R Zimmermann The law of obligations (1990) 255-270.

¹⁵⁴ *Ibid.*

¹⁵⁵ S 51(1) A supplier must not make a transaction or agreement subject to any term or condition if—
(a) its general purpose or effect is to—

(i) defeat the purposes and policy of this Act; .. (b) it directly or indirectly purports to—

(iii) set aside or override the effect of any provision of this Act.

¹⁵⁶ S 51(1)(a)(ii) and (iii) “ ... mislead or deceive consumers or subject a consumer to fraudulent conduct.”

¹⁵⁷ S 51(1)(b)(ii) and (iv) “ ... to do anything unlawful in terms of the Act, or fail to do anything that is required in terms of this Act”.

¹⁵⁸ These are referred to as a black list of terms which are prohibited. Cf T Naudé (2007) *South African Law Journal* 128ff for an excellent explanation of the role of black and grey lists; see also RD Sharrock’s contribution to the role of blacklists (2010) “Judicial control of unfair contract terms: the implications of Consumer Protection Act’ *South African Mercantile Law Journal* 295 at 316ff.

¹⁵⁹ S 51(1)(c)(i).

¹⁶⁰ S 51(1)(c)(ii).

¹⁶¹ S 51(1)(c)(iii).

¹⁶² S 18(1).

¹⁶³ S 51(1)(d) read together with S 31.

¹⁶⁴ S 51(1)(e); S 51(2)(a).

¹⁶⁵ S 51(1)(f).

¹⁶⁶ S 51(1)(g)(i). The Act refers to “*falsely expresses*”. RD Sharrock (2010) “Judicial control of unfair contract terms: the implications of Consumer Protection Act’ *South African Mercantile Law Journal* at 319 points out that the adjective *falsely* is out of place and what the section aims to prohibit is any acknowledgement by the consumer that no warranties were made prior to conclusion of the contract.

¹⁶⁷ S 51(1)(g)(ii).

¹⁶⁸ S 51(1)(h)(i) and (ii). Sharrock 2010 “Judicial control of unfair contract terms: the implications of Consumer Protection Act’ *South African Mercantile Law Journal* at 319 points out that if the forfeiture is allowed in terms of the Conventional Penalties Act 15 of 1962 the prohibition will obviously not apply.

¹⁶⁹ S 51(1)(i)(i).

¹⁷⁰ S 51(1)(i)(ii).

¹⁷¹ S 51 (1)(i)(iii). This prohibition would appear to impact on attorney-client cost clauses.

¹⁷² S 51(1)(j)(i); 51(2)(b)(i).

¹⁷³ S 51(1)(j)(ii); 51(2)(b)(ii). *De Beer v Keyser De Beer v Keyser* 2002 1 SA 827 (SCA); L Hawthorne “Public policy and micro lending: has the unruly horse died” (2003) *Tydskrif vir Hedendagse Romeins Hollandse Reg* 116; RD Sharrock (2010) “Judicial control of unfair contract terms: the implications of Consumer Protection Act’ *South African Mercantile Law Journal* 320.

¹⁷⁴ S 51(3).

¹⁷⁵ S 52(4)(a)(i)(aa) and (bb).

¹⁷⁶ Regulation No 293 GG No 34180 of 1 April 2011. Section 120(1)(e) of the CPA entitles the minister to make regulations relating to unfair, unreasonable, or unjust contract terms.

¹⁷⁷ S 44(3) provides a non-exhaustive list so that other terms may also be unfair for purposes of S 48 of the Act. S 44(3) provides A term of a consumer agreement subject to the provisions of sub-regulation (1) is presumed to be unfair if it has the purpose or effect of-

- (a) excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier subject to section 61 (1) of the Act;
- (b) excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a debt owed to the supplier against any claim which the consumer may have against the supplier;
- (c) limiting the supplier's obligation to respect commitments undertaken by his or her agents or making his or her commitments subject to compliance with a particular condition which depends exclusively on the supplier;
- (d) limiting, or having the effect of limiting, the supplier's vicarious liability for its agents;
- (e) forcing the consumer to indemnify the supplier against liability incurred by it to third parties;
- (f) excluding or restricting the consumer's right to rely on the statutory defence of prescription;
- (g) modifying the normal rules regarding the distribution of risk to the detriment of the consumer;
- (h) allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement;
- (i) enabling the supplier to unilaterally alter the terms of the agreement including the characteristics of the product or service;
- (j) giving the supplier the right to determine whether the goods or services supplied are in conformity with the agreement or giving the supplier the exclusive right to interpret any term of the agreement;
- (k) allowing the supplier to terminate the agreement at will where the same right is not granted to the consumer.

- (l) enabling the supplier to terminate an open-ended agreement without reasonable notice except where the consumer has committed a material breach of contract;
- (m) obliging the consumer to fulfil all his or her obligations where the supplier has failed to fulfil all his or her obligations;
- (n) permitting the supplier, but not the consumer, to avoid or limit performance of the agreement;
- (o) permitting the supplier, but not the consumer, to renew or not renew the agreement;
- (p) allowing the supplier an unreasonably long time to perform;
- (q) allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the agreement, without giving the consumer the right to be compensated in the same amount if the supplier fails to conclude or perform the agreement (without depriving the consumer of the right to claim damages as an alternative);
- (r) requiring any consumer who fails to fulfil his or her obligation to pay damages which significantly exceed the harm suffered by the supplier;
- (s) permitting the supplier, upon termination of the agreement by either party, to demand unreasonably high remuneration for the use of a thing or right, or for performance made, or to demand unreasonably high reimbursement of expenditure;
- (t) giving the supplier the possibility of transferring his or her obligations under the agreement to the detriment of the consumer, without the consumer's agreement;
- (u) restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the supplier;
- (v) providing that the consumer must be deemed to have made or not made a statement or acknowledgment to his or her detriment, unless -
 - (i) a suitable period of time is granted to him or her for the making of an express declaration in respect thereof; and
 - (ii) at the commencement of the period the supplier draws the attention of the consumer to the meaning that will be attached to his or her conduct;
- (w) providing that a statement made by the supplier which is of particular interest to the consumer is deemed to have reached the consumer, unless such statement has been sent by prepaid registered post to the chosen address of the consumer;
- (x) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, including by requiring the consumer to take disputes exclusively to arbitration not covered by the Act or other legislation;
- (y) restricting the evidence available to the consumer or imposing on him or her a burden of proof which, according to the applicable law, should lie with the supplier;
- (z) imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer (including for the making of a written demand and the institution of legal proceedings);
- (aa) entitling the supplier to claim legal or other costs on a higher scale than usual, where there is not also a term entitling the consumer to claim such costs on the same scale;
- (bb) providing that a law other than that of the Republic applies to a consumer agreement concluded and implemented in the Republic, where the consumer was residing in the Republic at the time when the agreement was concluded.

¹⁷⁸ S 44(2)(a). See in general Naudé 2006 *Stell LR* 361.

¹⁷⁹ S 44(2)(b).

¹⁸⁰ S 43(2)(a).

¹⁸¹ CESL Article 2 Good faith and fair dealing:

1. Each party has a duty to act in accordance with good faith and fair dealing.
2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

¹⁸² Proposal for a regulation of the European Parliament and of the Council on a common European Sales Law Article 2 Definitions (b).

¹⁸³ The CESL in art 52(1) makes specific provision for effecting avoidance by notice to the other party. Art 52(2) states that a notice of avoidance must be given within the following period after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely: 6 months in a case of mistake (art 52(2)(a)) and 1 year in case of fraud, threats and unfair exploitation (art 52(2)(b)). The effects of avoidance are dealt with in art 54 and ch 17.

¹⁸⁴ Ch 5 art 48.

¹⁸⁵ Ch 5 art 49.

¹⁸⁶ Ch 5 art 51.

¹⁸⁷ Ch 5 Defects in consent Article 48 Mistake

1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and
 - (b) the other party:
 - (i) caused the mistake;
 - (ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;
 - (iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or (iv) made the same mistake.

¹⁸⁸ In terms of Ch 5 art 49(2) misrepresentation is fraudulent if it is made with knowledge or belief that the misrepresentation is false, or recklessly made as to whether it is true or false and is intended to induce the recipient to make a mistake.

¹⁸⁷ In terms of Ch 5 art 49(2) non disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.

¹⁹⁰ Ch 5 art 49(1).

¹⁹¹ Art 49 (3) In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:

- (a) whether the party had special expertise;
- (b) the cost to the party of acquiring the relevant information;
- (c) the ease with which the other party could have acquired the information by other means;
- (d) the nature of the information;
- (e) the apparent importance of the information to the other party; and
- (f) in contracts between traders good commercial practice in the situation concerned

¹⁹² Article 51

Unfair exploitation

A party may avoid a contract if, at the time of the conclusion of the contract:

- (a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and
- (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.

¹⁹³ Article 59

Relevant matters In interpreting a contract, regard may be had, in particular, to:

- (a) the circumstances in which it was concluded, including the preliminary negotiations;
- (b) the conduct of the parties, even subsequent to the conclusion of the contract;
- (c) the interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract;
- (d) usages which would be considered generally applicable by parties in the same situation;
- (e) practices which the parties have established between themselves;
- (f) the meaning commonly given to expressions in the branch of activity concerned;
- (g) the nature and purpose of the contract; and
- (h) good faith and fair dealing.

¹⁹⁴ Article 68

Contract terms which may be implied

1. Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:
 - (a) the nature and purpose of the contract;
 - (b) the circumstances in which the contract was concluded; and
 - (c) good faith and fair dealing.

¹⁹⁵ Article 170

Unfair contract terms relating to interest for late payment

1. A contract term relating to the date or the period for payment, the rate of interest for late payment or the compensation for recovery costs is not binding to the extent that the term is unfair. A term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service.

¹⁹⁶ Article 7

Not individually negotiated contract terms

1. A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.
2. Where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.
3. A party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been.
4. In a contract between a trader and a consumer, the trader bears the burden of proving that a contract term supplied by the trader has been individually negotiated.
5. In a contract between a trader and a consumer, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract.

¹⁹⁷ For the standard terms and conditions in contracts between traders of which one is a SME Article 86
Meaning of “unfair” in contracts between traders

1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:
 - (a) it forms part of not individually negotiated terms within the meaning of Article 7; and
 - (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
 - (a) the nature of what is to be provided under the contract;
 - (b) the circumstances prevailing during the conclusion of the contract;
 - (c) the other contract terms; and
 - (d) the terms of any other contract on which the contract depends.

¹⁹⁸ Ch 8 Section 2 Art 83.

¹⁹⁹ Article 82

Duty of transparency in contract terms not individually negotiated Where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to ensure that they are drafted and communicated in plain, intelligible language.

- ²⁰⁰ Art 83 2. When assessing the unfairness of a contract term for the purposes of this section, regard is to be had to: (a) whether the trader complied with the duty of transparency set out in Article 82;
- (b) the nature of what is to be provided under the contract;
 - (c) the circumstances prevailing during the conclusion of the contract;
 - (d) to the other contract terms; and
 - (e) to the terms of any other contract on which the contract depends.

²⁰¹ Art 84 (a) exclude ... the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or of someone acting on behalf of the trader; (b) exclude the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence;

(d) exclude the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer.

²⁰² Art 84 (a) (l)imit the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or of someone acting on behalf of the trader; (b) (l)imit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence; (c) limit the trader's obligation to be bound by commitments undertaken by its authorised agents

²⁰³ Art 84 (c) (m)ake its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the trader;

(d) hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer;

(e) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;

(f) give the trader the exclusive right to determine whether the goods, digital content or related services supplied are in conformity with the contract or gives the trader the exclusive right to interpret any contract term;

(g) provide that the consumer is bound by the contract when the trader is not;

- (h) require the consumer to use a more formal method for terminating the contract within the meaning of article 8 than was used for conclusion of the contract;
- (i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;
- (j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;
- (k) determine that non-individually negotiated contract terms within the meaning of article 7 prevail or have preference over contract terms which have been individually negotiated.

²⁰⁴ Article 85

Contract terms which are presumed to be unfair

A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:

- (a) - (w).
- ²⁰⁵ Art 85 A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to: (a) restrict the evidence available to the consumer "
- ²⁰⁶ Art 85 A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to: (b) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;
- ²⁰⁷ Art 85 (c) inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader;
- ²⁰⁸ Art 85 (t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;
- ²⁰⁹ Art 85 (v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;
- ²¹⁰ Art 85(e) require a consumer who fails to perform obligations under the contract to pay a disproportionately high amount by way of damages or a stipulated payment for nonperformance;
- ²¹¹ Art 85 (s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;
- ²¹² Art 85 (a) or impose on the consumer a burden of proof which should legally lie with the trader;
- ²¹³ Art 85 (f) or entitle a trader to keep money paid for related services not yet supplied in the case where the trader withdraws from or terminates the contract;
- ²¹⁴ Art 85 (g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;
- ²¹⁵ Art 85 (i) enable a trader to alter contract terms unilaterally without a valid reason which is specified in the contract; this does not affect contract terms under which a trader reserves the right to alter unilaterally the terms of a contract of indeterminate duration, provided that the trader is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract at no cost to the consumer;
- ²¹⁶ Art 85 (j) enable a trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or related services to be provided or any other features of performance;
- ²¹⁷ Art 85 (k) provide that the price of goods, digital content or related services is to be determined at the time of delivery or supply, or allow a trader to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;

- ²¹⁸ Art 85(m) allow a trader to transfer its rights and obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the trader, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;
- ²¹⁹ Art 85 (n) allow a trader, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance;
- ²²⁰ Art 85(o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer; Art 85(p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;
- ²²¹ Art 85(r) subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;
- ²²² Art 85(u) unjustifiably bundle the contract with another one with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer;
- ²²³ Art 85(d) permit a trader to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the trader in the reverse situation;
- ²²⁴ Art 85(f) entitle a trader to withdraw from or terminate the contract within the meaning of Article 8 on a discretionary basis without giving the same right to the consumer, or entitle a trader to keep money paid for related services not yet supplied in the case where the trader withdraws from or terminates the contract;
- ²²⁵ Art 85(l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own.
- ²²⁶ Ch 8 Section 1 Art 81.
- ²²⁷ Article 79 Effects of unfair contract terms
1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.
 2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.
- ²²⁸ W Wilburg *Entwicklung eines beweglichen systems im Bürgerlichen Recht* (1950) 3; F Bydlinski 9.
- ²²⁹ W Wilburg 4.
- ²³⁰ W Wilburg 4; F Bydlinski 10.
- ²³¹ W Wilburg 5 and 17; F Bydlinski 10.
- ²³² W Wilburg 4.
- ²³³ W Wilburg 3f; F Bydlinski 10.
- ²³⁴ W Wilburg (*supra* n9)12; F Bydlinski (*supra* n2) 11.
- ²³⁵ W Wilburg (*supra* n9) 17.
- ²³⁶ L Hawthorne (*supra* n10) forthcoming.
- ²³⁷ F Bydlinski (*supra* n2) 18. Franz Bydlinski was a scholar of Walter Wilburg.
- ²³⁸ F Bydlinski (*supra* n2) 18.
- ²³⁹ Furmston 37; Willet "Autonomy and fairness: The case of public statements" in Howells, Janssen and Schulze (eds) *Information rights and obligations-A challenge for party autonomy and transactional fairness* (2004) 1ff. Cf Howells who is of the opinion that their are limitations to information as a consumer protection strategy, in Howells "The potential and limits of consumer empowerment by

- information” 2005 *Journal of Law and Society* 356ff; Weatherill “The role of the informed consumer in European community law and policy” 1994 *Consum LJ* 49.
- ²⁴⁰ L Hawthorne ‘Materialisation and differentiation in contract law: may solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention’ (2008) *Tydskrif vir Hedendagse Romeins Hollandse Reg* 451.
- ²⁴¹ CESL Preamble paragraph (30) Freedom of contract should be the guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated.
- ²⁴² Art 1. Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules. Art 2. Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.
- ²⁴³ S 1(a) Constitution of the Republic of South Africa 108 of 1996; PS Atiyah *The rise and fall of freedom of contract* (1979) 25, 29ff; R Zimmerman *The law of obligations* (1990) 256.
- ²⁴⁴ S 41(1)(a) of the CPA; ch 5 art 48 of CESL.
- ²⁴⁵ S 41(1)(a), (b) and (c).
- ²⁴⁶ S 41(1)(b); ch 5 art 49(2) of the CESL.
- ²⁴⁷ S 41(1)(c); Ch 5 art 49(1) of the CESL.
- ²⁴⁸ T Naudé “The use of black and grey lists in unfair contract terms legislation in comparative perspective” (2007) *South African Law Journal* 144 where she is of the opinion that to include all common law rules in legislature might hinder the development of such rules.
- ²⁴⁹ The Draft Common Frame of Reference is the culmination of the research undertaken by two study groups viz the Study Group on a European Civil Code and the Research group on existing European Community private law, known as the “Acquis Group” all as part of the project to create the “Common Frame of Reference”.
- ²⁵⁰ C Von Bar, E Clive, H Schulte-Nolke, H Beale, J Herre, J Huet, M Storme, S Swann, P Varul, A Veneziano and F Zoll (eds) *Draft Common Frame of Reference Principles, definitions and model rules of European private law* (hereafter referred to as DCFR) (2009) 14ff.
- ²⁵¹ DCFR 60ff.
- ²⁵² R Sefton-Green “General Introduction” in *Mistake, fraud and duties to inform in European contract law* (ed) R Sefton-Green (2005) 29; C Willet *Fairness* 2ff.
- ²⁵³ Cf the seminal work by N Cohen “Pre-contractual duties: two freedoms and the contract to negotiate” in J Beatson and D Friedman (1995) at 25; J Carter and M Furmston “Good faith and fairness in the negotiation of contracts (1995) *Journal of contract law* 1-15; H McQueen “Good faith in the Scots law of contract” in ADM Forte (ed) *Good faith in contract and property law* (1999) at 20ff; D Hutchison “Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?” (2011) *South African Law Journal* 273ff.
- ²⁵⁴ The exact point of contract formation is of crucial importance as this marks the boundary between the pre-contractual regime of no liability (or possible liability based on delict) and the second stage (after a contract has come into being) in which the parties are subject to contractual liability. N Cohen “Pre-contractual duties: two freedoms and the contract to negotiate” in J Beatson and D Friedman (1995) 25ff; Van der Merwe *et al* 55 n5 also 93ff and 316ff.