SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 65

PROJECT 47

UNREASONABLE STIPULATIONS IN CONTRACTS AND THE RECTIFICATION OF CONTRACTS

Closing date for comments 30 September 1996

ISBN: 0-621-17503-X

INTRODUCTION

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

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PREFACE

This discussion paper (which reflects information gathered up to the end of March 1996) was prepared to elicit responses, and with those responses, to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations in this paper should not, at this stage, be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

The Commission will assume that respondents agree to the Commission's quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations under the Constitution of the Republic of South Africa, Act 200 of 1993.

Respondents are requested to submit written comments, representations or requests to the Commission by 30 September 1996 at the address appearing on the previous page.

The project leader responsible for this project is the Honourable Mr Justice P J J Olivier and the researcher, who may be contacted for further information, is Mr P A van Wyk.

SUMMARY

1. Contracts are daily concluded in the expectation that they will satisfy the needs and aspirations of the contracting parties. It may only subsequently be realised that, in practical application, the contract or some of its terms are unjust or unconscionable. The question considered in this discussion paper is whether the courts should be able to grant relief in these circumstances by either setting aside the contract or modifying its terms. There is concern that any tampering with the binding force or sanctity of contracts will destroy legal and commercial certainty, because contracting parties will not know whether or not their agreements will be modified to the detriment of one or the other. It is alleged further that the consequences of giving such a power to the courts will be counter-productive as far as the weak, the uneducated and the economically disadvantaged are concerned, since nobody will be prepared to conclude contracts with them. It is also argued that such a power of review is unnecessary since such persons are sufficiently protected by the rules relating to justifiable mistake, duress, undue influence and fraudulent, negligent and innocent misrepresentations, and by the provisions of the laws relating to usury, credit agreements, etc.

2. With the rise of the movement for consumer protection in the early seventies, it became the generally accepted view in most first world countries that legislative action was required to deal with contractual unconscionability. The South African proponents of granting such a power of review to the courts support legislation that will introduce the doctrine of unconscionability and the concomitant review power of the courts. They consider it necessary to define the scope and extent of such a power, however. Furthermore, the question is being asked whether the "*unconscionability*" or the *"good faith*" approach should be followed. In the end, the two approaches may be thought to lead to the same result. When considering the historical background of the South African law, and taking into account the general use of the unconscionability approach by the legal systems close to our own, the unconscionability criterion is considered advisable.

3. Some argue that, whether one approaches the matter from the viewpoint of

unconscionability or good faith, the courts will need guidelines to limit their powers of intervention but also to indicate the ambit of the intended doctrine. **The Commission is opposed to the enactment of any guidelines. It believes that the laying down of guidelines by legislation may result in the courts considering themselves bound exclusively by those guidelines.** The next question is whether the review power of the courts should extend to all types of contracts, to non-consumer transactions, to international agreements or to standard term contracts only. **The Commission believes that no exceptions should be made to the provisions relating to good faith. It therefore proposes that the provisions of the Bill proposed in this paper should apply to all contracts concluded after the commencement of the Act and, furthermore, that the Act should be binding upon the State.** Finally, there is the problem of waiver of the benefits of the proposed Bill. The Commission is of the view that to allow the waiver of the provisions of the Bill would neutralise the efficacy of the Bill. It proposes that any agreement or contractual term purporting to exclude the provisions of the Bill or to limit its application should be void.

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DISCUSSION PAPER

UNREASONABLE STIPULATIONS IN CONTRACTS AND THE RECTIFICATION OF CONTRACTS

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

1.2 This Discussion Paper is published in order to inform the broad South African public of the **prima facie** views of the Commission and to request our readers to participate in the debate and eventual formulation of legislation, if it is deemed necessary, on this topic.

THE PROBLEM DEFINED

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

to latent defects in the goods sold; an illiterate and unemployed bricklayer agrees to act as subcontractor for a building contractor on the basis that he must at his own expense procure an assistant, and so on.

1.4 Should the courts be able to give relief to the unfortunate debtors in these circumstances by either setting aside the contract or modifying its terms?

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

* **The answer must be <u>no</u>.**
* **The answer must be an unqualified <u>yes</u>.**
* **The answer must be a qualified <u>yes</u>.**

A. <u>The "no" answer and its justifications</u>.

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

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

1.8 This approach is perhaps best illustrated by the sketch of the approach of our

common law by Prof H R Hahlo of Wits University in 1981.[1]

> Provided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress his contractual undertakings will be enforced to the letter. If, through inexperience, carelessness or weakness of character, he has allowed himself to be overreached it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature, is also the law of the market-place.

1.9 Whether this sketch truly reflects the spirit of the South African law as a whole is debatable, but from a positivist point of view, irrelevant, in the light of the decision of Appellate Division in 1988 in **Bank of Lisbon and South Africa (Ltd) v De Ornelas and Another[2].** In that case the respondents, in order to secure overdraft facilities, handed signed suretyships to the lender bank, passed mortgage bonds on their properties and delivered a negotiable deposit certificate. After the respondents had paid the full amount of the loan, they claimed from the bank the redelivery of all the aforesaid securities, which claim was resisted by the bank. It averred that it intended instituting a claim for damages against the respondents for breach of another contract between the parties and that it was entitled, in terms of the written contract of loan, to retain the aforesaid securities. The Appellate Division held that on a correct interpretation of the contract the bank was indeed entitled to retain the securities. But the respondents relied on a counter-argument, that the conduct of the bank was contrary to the view our society takes of what is right or wrong in the requirements of good faith. They relied on the common-law remedy of the **exceptio doli generalis**. In theory, this was a defence available to a defendant, who, though liable according to the letter of a contract and in strict law, could show that implementation of the contract would be unconscionable or inequitable. But even before this case was heard, this remedy was not rigorously applied by our courts. Yet one could have hoped that a doctrine of relief against unconscionable claims could be founded on this **exceptio**. It was not to be. In this case the majority of the Appellate Division Bench, per Joubert J A, decided "... once and

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

2 1988 (3) SA 580 (A).

for all, to bury the **exceptio doli generalis** as a superfluous, defunct anachronism. **Requiescat in pace**" (let it rest in peace). The learned judge also held that equity could not override a clear rule of law; neither could the application of good faith do so. The "clear rule of law", presumably, was the rule that contracts must be performed according to their terms.

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

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

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

(i) Clauses reversing the ordinary burden of proof and requiring a debtor to prove facts which according to the ordinary rules of evidence the creditor would have had to prove, e.g. usually the creditor (seller) has to prove delivery of the goods sold; a clause reversing this burden of proof makes it virtually impossible for the debtor (buyer) to prove the negative of non-delivery.

(ii) Under the existing parol evidence rule, facts extrinsic to the written documents may not be adduced in evidence to modify or contradict the

writing. A verbal assurance by a creditor may thus not be proved and relied on by the debtor if it contradicts the written contract.

(iii) Clauses excluding, waiving or limiting the protection afforded by consumer protection legislation or legislation aimed at the modification of unfair contract terms.

(iv) The research team proposed a review of, but not a witch-hunt against exemption clauses. These clauses do have a legitimate place but they should not be tolerated where, in the circumstances of a particular case, their implementation would lead to harsh and unjust results.

(v) Choice-of-law clauses, whereby parties agree that legislation, other than that of South Africa, should apply to a contract concluded and implemented here and adjudicated upon by a South African court, should be limited to contracts concluded between foreign contracting parties or between South Africans and foreigners contracting in the ordinary course of their profession or business.

(vi) Clauses by which rights and defences are lost in the case of cession or discounting of contracts. It appears that there is a standard practice by which a seller sells goods to a purchaser on condition that if the seller cedes or discounts the contract to a third party (e.g. a bank or financial institution) the purchaser will not be able to raise any defence (e.g. that the goods suffered from latent defects, that warranties were not honoured) against the third party.

(vii) Clauses under which the weaker party submits to the jurisdiction of a magistrates' court, but the stronger party (the seller, usually) does not agree that it may be sued in such court.

(viii) Clauses by which jurisdiction is conferred upon a court which would not otherwise have had jurisdiction in the matter, to the detriment of, usually,

the debtor, by the stratagem of a clause under which it is "acknowledged" that the contract had been concluded or executed or breached in the area of jurisdiction of the said court, etc.

(ix) Clauses by which jurisdiction is limited to the High Court, thereby making it more difficult for the weaker party to gain access to the courts, in the light of the higher costs of litigation in the High Court.

(x) Clauses by virtue of which the usual defences available to a debtor under a contract of suretyship (the benefit of prior exclusion, the benefit of division, the benefit of simultaneous citation and division of debt, the benefit of cession of actions) and to a debtor under a contract of loan (the exception of non-payment of the capital of the loan) are excluded.

(xi) Clauses by which certain rules of court are waived, e.g. that in provisional sentence cases the creditor must prove the legality of the document sued upon or the amount of the debt.

(xii) Clauses waiving

> "all exceptions, defences, benefits and rights, of whatever nature, the content and meaning thereof being known by me".

(xiii) Clauses by which certain statutory defences, e.g. by the Prescription Act 68 of 1969, the Agricultural Credit Act 28 of 1966 or the Moratorium Act 25 of 1963, are waived.

(xiv) Clauses by which a claim for damages for breach of contract is excluded, e.g. where an agricultural co-operative or a seed company sells infertile seed to a farmer.

1.13 The research team was of the view that legislation should deal specifically with

the aforesaid clauses, by giving the courts the power to set aside, depending on the relevant circumstances.

1.14 The research team considered that it would be easier and more effective if unenforceable terms were featured in the same way in all the legislation under consideration. Most of the terms recommended are already contained in certain Acts, but not on a uniform basis. The research team proposed that the following terms be prohibited in consonant terms in the Alienation of Land Act, the Share Block Control Act, the Property Time-sharing Control Act, the Sectional Titles Act and the Housing Development Schemes for Retired Persons Act:

* **A person who acted on behalf of the seller at the conclusion of the contract or in the negotiations preceding the conclusion of the contract is appointed or deemed to have been appointed as agent of the seller.**

* **The seller is exempt from any liability for any act, omission or representation by a person acting on his behalf.**

* **The liability of the seller to indemnify the purchaser against execution is limited or excluded.**

* **The purchaser binds himself in advance to consent to the seller assigning some of his duties under the contract to a third party.**

* **The seller is the sole agent to effect the resale of the property. (Although it may make sense in the case of sectional title units, share blocks and property time-sharing interests to make resale subject to the approval of the body corporate, trustees or the share block developer, as the case may be, it seems unfair to restrict resale to the seller as the sole agent, since such arrangements are made merely with a view to charging agent's commission.)**

* **The purchaser forfeits any claim for necessary expenditure which he has incurred with or without the consent of the seller for the purpose of preserving the thing purchased.**

* **The purchaser forfeits any claim for an improvement which increases the market value of the thing purchased and which he effected with the express or tacit consent of the seller or owner of the thing.**

* **The purchaser is obliged to accept a loan secured by a bond arranged on his behalf by the seller or his agent for the payment of all amounts owed by him under the contract.**

* **The purchaser may not claim that transfer of the thing purchased shall take place against payment of all amounts owing under the contract if he elects to advance the discharge of his obligations upon payment of all amounts owing under the contract.**

* **The date upon which risk, profit and loss of the thing purchased pass to the purchaser is earlier than the date upon which the purchaser obtains possession, use or physical control.**

* **A prohibition on the purchaser's refusal to perform if the seller fails to make performance.**

* **The exclusion of set-off by the purchaser.**

* **The exclusion of the requirement for a written demand if any party fails to perform, or the exclusion of a written notice if any party wishes to cancel the contract or wishes to enforce an acceleration**

clause.

* **Transfer of liability to another person/body in the event of defective performance.**

* **Exclusion of liability for additional costs in the event of defective performance.**

* **A condition that repairs will be undertaken in the event of defective performance only subsequent to full performance by the other party.**

* **Exclusion of liability in the case of explicit guarantees.**

1.15 If this recommendation is implemented, it could be argued, general legislation dealing with unconscionable clauses would be unnecessary.

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

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

1.18 In Germany consumer organisations, trade organisations and chambers of industry, business and commerce are able to avail themselves of a so-called **Verbandsprozess** in applying to a court for an order prohibiting anyone who uses or

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

proposes a standard clause from doing so in future.[4] The user of the clause is given notice that such an application is being made. This affords the user an opportunity of trying to settle the matter extra-judicially and of negotiating with the applicant. The user is required to give an undertaking not to use the clause in question or any clause to the same effect again, nor to invoke any such clause in existing contracts. In such an application the court is also requested to impose a penalty clause which takes effect if the user uses that standard clause again. The object of this is to keep the user bound to his undertaking.

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

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

* Judicial action cannot fulfil a preventative function, since a concrete dispute is a prerequisite for judicial action and parties must be sophisticated enough, must have enough money to have a case adjudicated and must have sufficient trust in the operation of the law to litigate.

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

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

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

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

* A prerequisite for judicial action is that the jurisdiction of courts should not be precluded by an arbitration clause.

* Preventative action is more flexible and does not depend on precedents.

* Self-imposed control by informed users is more effective under a system where there is provision for direct preventative action.

* Preventative action makes it possible for bodies established under private law to act on their own.

* Under a preventative system users of standard clauses and control bodies established under private law or public law are afforded the opportunity of negotiation through co-operation in formulating model contracts and model codes of conduct.

* Under a preventative system consumer organisations and employee organisations are afforded the opportunity of acting as watch-dogs and educating consumers.

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

1.21 The research team proposed that the proposed legislation should make it possible to test terms in standard contracts against the criterion of good faith. Such assessment should be carried out without a dispute concerning a standard term having arisen between individuals; it should therefore, be preventative in the sense that the use of such a term is precluded. The research team proposed that the task of preventative action concerning unfair clauses be undertaken by a subcommittee of the Business Practices Committee. To this end the research team proposed an amendment to the

Harmful Business Practices Act.[8] It initially proposed that this committee be known as the Committee on Unfair Contractual Terms, and later the title Subcommittee on Standard Terms was proposed. A further proposal was that the Subcommittee on Standard Terms should exercise control over clauses and that appropriate definitions be included in the Harmful Business Practices Act.

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

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

> The proposed Bill suggests changes to the Harmful Business Practices Act, yet it is intended to be introduced by the Minister of Justice, while the Harmful Business Practices Act resorts under the Minister of Trade and Industry.
>
> The proposed Bill underscores the need for effective consumer protection mechanisms. The necessary legal instrument to achieve this is already largely in place in the Harmful Business Practices Act. What is needed is not so much further legislation but a proper resourcing of the existing mechanisms.
>
> The proposed Bill purports to establish a subcommittee on Standard Terms which would be a Subcommittee in terms of the Harmful Business Practices Act.

8 Act 71 of 1988.

Although this 'Subcommittee' purports to be a subcommittee of the Business Practices Committee the proposed Bill invests it with the powers that are currently entrusted to the Business Practices Committee.

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

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

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

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

Enacting new substantive rules on the control of unfair contracts terms is an important step. What is equally important, however, is to consider whether there exist adequate mechanisms through which these rules are to be made effective. The mechanism normally available is private litigation in which an individual bases his claim or his defence on the invalidity of the contract term on which his opponent relies. For various reasons this mechanism, if taken alone, cannot be regarded as a satisfactory solution of the problem. If an unfair contract term is used throughout an industry it may affect the interests of many people at the same time, but the individual injury will often be so small that there is no point in seeking redress by way of bringing or defending the court action.

Sometimes the unfair contract term will typically harm people who are too poor to pay for the expenses of litigation but are too 'rich' to qualify for legal aid, if legal aid is available at all. Even where legal aid is available the persons affected may belong to population groups who lack the skills and sophistication required to make use of existing procedures. On the other hand, the interest at stake for the party who proposed the unfair term is typically much larger than the interest of

the other side. As a result, there is a strong incentive for the proponent of an unfair term to buy the other side off and thus keep the clause out of the courtroom. Even where a particular clause has been held invalid by a court there is nothing to stop the proponent of the clause to continue its use with impunity in the hope that other less aggressive or less sophisticated parties will fail to pursue their rights in the mistaken belief that the clause is effective. In sum, it is all very well to enact rules defining unfair contract terms and to give the courts a power to set them aside. This will not get you very far in an area where there are few plaintiffs around who are in a position to make an effective use of the available controls by way of private litigation.[9]

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

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

Similarly, the English Fair Trading Act of 1973 provides for the appointment of a Director General of Fair Trading who has the task to keep under review the carrying on a commercial activities, including the use of standard form contracts, which relate to goods and services supplied to consumers. If a course of conduct is in the Director's view 'detrimental to the interest of consumers' and 'unfair' to them he must try to obtain an assurance that it will be discontinued. If such and assurance is not given, he can obtain a restraining order from a special court, called the Restrictive Practices Court. It would seem, however, that little or no use has been made so far of this procedure in order to combat unfair contract terms. What has been so much greater practical importance in this field is that

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

the Director-General has succeeded in persuading, presumably by kicks as well as kisses, important trade associations, such as the Association of British Travel agencies, to adopt so-called 'Codes of Practice' which have led to standard contracts considerably more favourable to consumers than those previously in use.

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

When the bill of the German Standard Terms Act was debated in the mid-seventies there were many who argued the case for the creation of an administrative agency whose tasks would have been to work out model terms for specific branches of the industry, to restrain the use of unfair terms and, if necessary, to institute litigation, and even to exercise a prevention control by a licensing procedure similar to the system used in the insurance industry. The legislature rejected these proposals mainly on two grounds. One was a lack of enthusiasm for the idea of creating a new class of consumer protection bureaucrats. The other was the fact that in 1965 a **locus standi** to seek injunctions restraining unfair business practices had been granted to consumers' associations. This experiment had been fairly successful, perhaps not so much because of a very large number of successful actions but because consumers' associations were enabled, like the Swedish Consumer Ombudsman, to wield the 'big stick' of a possible court action and were therefore in a much better position to obtain 'voluntary' compliance from potential defendants. This system was extended to the control of unfair contract terms. Accordingly, s. 13 of the German Act confers standing on consumers' associations to seek an injunction

restraining the defendant from using or recommending standard terms found to be illegal under the Act. No special courts or tribunals have been installed for the purpose, but there are now so many cases in which the validity of a standard term is at issue that even an ordinary German court will fairly quickly build up some expertise.

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

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

1.27 The main objection to the said proposal was based on the uncertainty argument. This argument is a straightforward one: the main aim of a contract is to regulate the future relationship between the parties as regards a specific transaction. The very foundation of contract is to create certainty, to protect the expectations of the parties, to secure to each the bargain made. That is why the idea of contract, based on autonomy of the will and freedom of contract, is the very basis of all commercial and financial dealings and practices, from the simple supermarket purchase to the most involved building contract. If a court is given a review power, it means in practical terms that the

court can re-make the contract, relieve one party of his or her obligations, wholly or partly - and to that extent frustrate the legitimate expectations of the other party. One would not know, when concluding a contract, whether or not that contract was going to be rewritten by a court, using as its yardstick vague terms such as “good faith”, “fairness”, “unconscionability”, etc.

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

> **From past experience we are aware that any further possible defences to action taken to enforce our rights and to recover outstanding debts will give rise to a plethora of litigation. Whilst some of the defences may be genuine, many are raised as a delaying tactic by persons who find themselves in financial difficulties. The resulting increased costs to the banking industry must ultimately lead to an increase in the cost of lending. This situation is exacerbated by the fact that, where we hold security, we could be met with defences of the same nature on both the main agreement and security contracts such as suretyships. This may give rise to extended litigation in respect of one transaction. The banks have, at great expense to their depositors, recently obtained confirmation from the courts that their standard cession, suretyship and other security documentation is in accordance with public policy. The proposed legislation would result in the same documents once again coming before the courts in order that they may decide on the validity thereof.**
>
> **South Africa has recently been re-admitted as a member of the international community and is looking to the international community to fund its redevelopment programme. A large proportion of the funding is made by overseas corporations who provide funding to local development corporations and other bodies who then lend or contract with domestic companies. In order to attract such investment and to facilitate the transfer of funds to local companies, it is essential that lenders in terms of the existing law be able to enforce their rights and to recover the amount of loans made in the event of default. Should each contract be subject to scrutiny and confirmation by courts this will have the effect of discouraging the investor.**
>
> **It is also necessary for a speedy remedy to be provided to the lender**

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

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

B. <u>The unqualified "yes" answer</u>

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

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

1.31 The background is sketched by Prof Kötz:

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

> justified in terms of economic purpose and social function. It has been explained as a mechanism by which scarce resources can be moved to what are considered the most valuable uses. Thus, contract enhances the mobility of the factors of production. It helps to maximise the net satisfactions realised in a given society. As a result, individuals by entering into contracts that serve their own interests are also serving the interest of society.
>
> Both the idea of private autonomy and the reliance on free contractual exchange are rooted in a political and economic philosophy that reached its apogee in the nineteenth century. However, the principle of freedom of contract has never been without its limitations. When **Sir George Jessel** said in 1875 that it was a paramount principle of public policy to have the 'utmost liberty of contracting' he was careful to point out that this liberty was to be given only to 'men of full age and understanding', and when he said that contracts 'shall be held sacred' he added that this applied only to contracts that had been 'entered into freely and voluntarily'.[10]

1.32 The doctrine that courts will interfere to strike down unconscionable clauses was recognised as early as the 18th century, when the English court in **Evans v Llewellyn,** (1787) 29 ER 1191, said that-

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

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

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

1.34 **However, it must not be thought that there is in the Anglo-American law of equity a general theory of unconscionability allowing a court to interfere with a contractual relationship merely on the grounds of unfairness, nor is a mere**

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

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

difference in the bargaining power of the parties sufficient to invoke the doctrine. See the Australian case of **Commercial bank of Australia Ltd v Amadio** (1983) 151 CLR 447.

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

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

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

> It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affected his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

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

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

> This ideal [of certainty] may never be fully attainable, but we shall certainly never even approximate to it unless we strive to follow clear and consistent principles

and steadfastly refuse to be blown off course by the supposed merits of individual cases.

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

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

1.40 But there is a development in the English common law of contract which is moving in the direction of recognising a doctrine of unconscionability. In 1975 the Unfair Contract Terms Act was adopted. In spite of its optimistic title, however, it was limited to the policing of some exclusion clauses and did not address the general problem at all.

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

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

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

1.44 It is therefore clear that the argument of those in favour of giving the courts the

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

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

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

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

1.47 In April 1993 the European Community adopted a **Directive on Unfair Contract Terms.** It prohibits the use of unfair terms in consumer contracts which have been negotiated by individuals. Its operation is limited to contracts between consumers and sellers or suppliers of goods and services, building contracts involving a builder and a domestic purchaser concluded after 1 January 1995, and insurance contracts, but it is

not applicable to employment contracts, contracts relating to succession to property, family law or the incorporation of companies or partnerships.

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

C. The qualified "yes" answer

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

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

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

> **If a court, having regard to all relevant circumstances, including the relative bargaining positions which parties to a contract hold in relation to one another and the type of contract concerned, is of the opinion that the way in which the contract between the parties came into being or the form or content of the contract or any term thereof or the execution or**

enforcement thereof is unreasonable, unconscionable or oppressive, the court may rescind or amend the contract or any term thereof or make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties, notwithstanding the principle that effect shall be given to the contractual terms agreed upon by the parties.

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

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

1.54 The research team proposes that the guidelines be embodied in an open-ended list, so that it can be adapted to changed circumstances and be extended. It is also proposed that the guidelines should be available to all participants in commerce. The research team believes that consumers should not be expected to have the same degree of experience and insight as business or professional

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

people, that it should be possible to qualify the guidelines in respect of business and professional people. Initially the research team proposed that guidelines should also be enacted with regard to the formal aspect of concluding contracts. Later it was decided that guidelines containing a value judgement would suffice, i.e., guidelines on those aspects of a contract that relate to its substance or content.

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

1.56 The research team proposes the following provisions:

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

(iv) whether the manner in which the term states the legal position that applies is one-sided or misleading, unless the contract is concluded in the course of the professional or business activities of both parties;

(v) whether the user is authorised to make a performance materially different from that agreed upon, without the opponent in that event being able to cancel the contract by returning that which has already been performed, without incurring any additional obligation;

(vi) whether prejudicial time limits are imposed on the opponent;

(vii) whether the term will cause a prejudicial transfer of the normal trade risk to an opponent;

(viii) whether the term is unduly difficult to fulfil, or will not reasonably be necessary to protect the user;

(ix) whether there is a lack of reciprocity in an otherwise reciprocal contract;

(x) whether the competence of an opponent to adduce evidence of any matter which may be necessary to the contract or the execution thereof is excluded or limited and whether the normal incidence of the burden of proof is altered to the detriment of the opponent;

(xi) whether the term provides that an opponent shall be deemed to have made or not made a statement to his detriment if he does or fails to do something, unless -

(a) a suitable period of time is granted to him for the making of an express declaration thereon, and

(b) at the commencement of the period, the user undertakes to draw the attention of an opponent to the meaning that will be attached to his conduct;

(xii) whether the term provides that a statement made by the user which is of particular interest to the opponent shall be deemed to have reached the opponent, unless such statement has been sent by prepaid registered post to the chosen address of the user;

(xiii) whether the term provides that an opponent shall in any circumstances absolutely and unconditionally forfeit his competence to demand performance;

(xiv) whether an opponent's right of denial is taken away or restricted;

(xv) whether the user is made the judge of the soundness of his own performance, or whether an opponent is compelled to sue a third party first before he will be able to act against the user;

(xvi) whether the term directly or indirectly amounts to a waiver or limitation of the competence of the opponent to apply set off;

(xvii) whether, to the prejudice of an opponent, the user is otherwise placed in a position substantially better than that in which the user would have been under the regulatory law, had it not been for the term in question.

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

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

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

1.60 The project committee proposed the following provision:

4(1) Subject to the provisions of other legislation which apply to a specific case, the provisions of this Act shall apply to all contracts concluded after the commencement of this Act, between all contracting parties, excluding -

(a) contractual acts and relations which arise out of or in connection with circumstances which fall within the scope of the Labour Relations Act, Act 28 of 1956, or which arise out of the application of that Act;

(b) contractual acts falling within the scope of the Bills of Exchange Act, Act 34 of 1964;

(c) contractual acts to which the Companies Act, Act 61 of 1973, or the Close Corporations Act, Act 69 of 1984, apply or which arise out of the application of those Acts;

(d) family law agreements in accordance with the Divorce Act, Act 70 of 1979, the Matrimonial Affairs Act, Act 37 of 1953, or the Matrimonial Property Act, Act 88 of 1984, as well as succession settlements;

(e) contractual terms in respect of which measures are provided under international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of this Act;

(f) a contract or a term in a contract merely on the ground of an alleged excessive price payable by the opponent.

1.61 The Working Committee of the S.A Law Commission, however, holds the opposite view.

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

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

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

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

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

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

Court may rescind or amend unfair contractual terms

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

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

Application of Act

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

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

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

Short title

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

1.65 Your response to these proposals is sincerely requested. Submissions should be addressed to the Secretary of the SA Law Commission, Private Bag X668, Pretoria 0001. Should you consider that there is a need to debate the issues raised in this paper and if you can assist us in organising such a debate in your area, please inform the Secretary as soon as possible.

ANNEXURE A

THE WORKING COMMITTEE'S PROPOSED UNFAIR CONTRACTUAL TERMS BILL

BILL

To provide that a court may rescind or amend contracts which are contrary to good faith.

To be introduced by the Minister of Justice

BE IT ENACTED by the President and the Parliament of the Republic of South Africa, as follows:

Court may rescind or amend unfair contractual terms

1.(1) If a court, having regard to all relevant circumstances, including the relative bargaining positions which parties to a contract hold in relation to one another and the type of contract concerned, is of the opinion that the way in which the contract between the parties came into being or the form or content of the contract or any term thereof or the execution or enforcement thereof is unreasonable, unconscionable or oppressive, the court may rescind or amend the contract or any term thereof or make such

other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties, notwithstanding the principle that effect shall be given to the contractual terms agreed upon by the parties.

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

Application of Act

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

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

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