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Title of thesis: **CONTRACTUAL DISCRETIONARY POWERS AND THE  
*ESSENTIALIA* OF PRICE AND RENTAL IN THE SOUTH AFRICAN  
LAW OF SALE AND LEASE – A JURISPRUDENTIAL AND  
COMPARATIVE ANALYSIS**

Supervisor: **Professor BSC Martin**

## ACKNOWLEDGEMENTS

My sincere thanks and gratitude to the following persons:

- My supervisor and friend, Professor BSC Martin, for his unstinting support and incisive commentary.
- My mentor and friend, Professor LF Van Huyssteen, whose knowledge, expertise, and example has guided me throughout my academic career.
- To the Dean, Professor Sloth-Nielsen, and all my colleagues for their support and encouragement.
- My late mother and siblings for their sacrifices over the years.
- My wonderful and loving children, Imraan, Ilhaam and Yasin, and their great partners for providing a state of tranquillity and serenity through what at times proved to be a rocky journey.
- Finally and most importantly my beloved wife, Lamese, for everything.

Mubarak Allie Sulaiman  
March 2013

## ABSTRACT:

This thesis concerns the tension that exists between the principles of certainty and freedom of contract (which includes the notion of contractual discretionary powers) and how this tension impacts on the requirement that agreement must be reached on the price and rental in contracts of sale and lease, respectively.

The matter at issue is whether South African law should recognise the validity of contracts of sale at a reasonable price and lease and rental respectively, and/or at a unilaterally determined price or rental as suggested in an *obiter dictum* of the Supreme Court of Appeal in *NBS Boland Bank v One Berg River Drive and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA) and in an *obiter dictum* of the then Appellate Division in *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (AD). Currently, the law requires that the price (in the case of sale) or the rental (in the case of lease) must be certain, in the sense that it is either ascertained or objectively ascertainable. The price is ascertainable if there is agreement between the contractants on an external standard in light of which the price may be ascertained objectively without further reference to the contractants: *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A).

The *obiter dicta* in the *One Berg River* and *Genac* cases suggest that an agreement to a reasonable price or rental or to unilaterally determined price or rental meets this requirement.

The basis for both *obiter dicta* can be found in the principles of freedom and sanctity of contract that form the cornerstones of the South African law of contract. The conceptual framework of public policy forms the outer limits of both freedom and sanctity of contract.

The thesis considers whether a development in South African law that recognises the validity of a contract of sale or lease at a price or rental determined unilaterally by a contractant or at a reasonable price or rental, respectively, is contrary to public policy as informed by the values embodied in the Constitution of the Republic of South Africa 1996

and whether it would promote consensus and certainty, which are foundational principles of South African law of contract. Consideration is also be given to the question whether such a development is defensible in law, and desirable as a matter of policy and practice.

## KEY WORDS

- Freedom of contract
- Public policy
- Contractual discretionary powers
- Constitution
- *Ubuntu*
- Dignity, equality and freedom
- Definition, role and function of *essentialia*
- Price
- Rental
- Role and function of courts of law



Submitted in fulfilment of the requirements for the degree of Doctor of Laws in the Faculty of Law, University of the Western Cape.

I declare that this thesis is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed:            Student - Mubarak Allie Sulaiman            .....

Supervisor – Professor BSC Martin            .....



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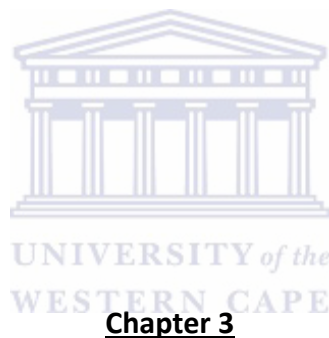
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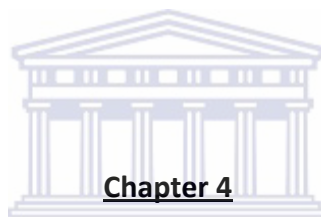


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## Chapter 1

### Overview and summary

#### 1.1 Introduction

The question dealt with in this thesis concerns the tension that exists between the principles of certainty<sup>1</sup>, and freedom of contract<sup>2</sup> (which includes the notion of contractual discretionary powers), and how this impacts on the requirement that agreement must be reached on the price and rental in contracts of sale and lease respectively.<sup>3</sup>

At issue, is whether South African law should recognise the granting of a discretionary power to one of the contracting parties to unilaterally determine the price, or the rental, as suggested in an *obiter dictum* of the Supreme Court of Appeal.<sup>4</sup> Currently, the law requires that the price and

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<sup>1</sup> Certainty is one of the general requirements for the validity of contracts in general. Van der Merwe, van Huyssteen, Reinecke and Lubbe *Contract: General Principles* (2012) 192, hereafter Van der Merwe *et al Contract*; Hutchison, Pretorius, Du Plessis, Eiselen, Floyd, Hawthorne, Kuschke, Maxwell, Naudé and De Stadler *The Law of Contract in South Africa* (2012) 210-216, hereafter Hutchison *et al Contract*. See further paras 1.3.2 and 1.3.3 below and in chapter 2 paras 2.2 and 2.7.

<sup>2</sup> Freedom of contract is discussed in paras 1.3.1 and 1.3.3 below and in chapter 2 paras 2.2-2.4 and 2.7. Freedom of contract and certainty underpin the South African law of contract: Hutchison *et al Contract* 21-24. Certainty and freedom are also principal attributes of the law in general: Hund & Van der Merwe *Legal Ideology and Politics in South Africa: a social science approach* (1986). Hence, the two concepts form the basis of the discussion throughout the thesis.

<sup>3</sup> The price and rental are *essentialia* (essential terms) in contracts of sale and lease respectively. *Essentialia* are terms required by law and typify a contract as being, for example, a contract of sale or lease or exchange etc.

<sup>4</sup> *NBS Boland Bank v One Berg River Drive and others Deeb and another v ABSA Bank Ltd Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA) para [32], hereafter *NBS Boland Bank* 1999 (4) SA 928 (SCA). The case dealt with a discretionary power granted to financial institutions to change, unilaterally, the interest rates on housing loans extended by them. The *obiter* flies in the face of a wealth of authority going back to Gaius that advocate against granting a contractant the power to unilaterally settle the price. See further para 1.2 below. In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A), hereafter *Westinghouse* 1986 (2) SA 555 (A), the Appellate Division said that “[t]here can be no valid contract of sale if the parties have agreed that the price is to be fixed by one of them” (547C-D). See also *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) 514G-H hereafter *Murray & Roberts* 1991 (1) SA 508 (A); *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 (4) SA 141 (SCA) 158F-H, hereafter *Lambons* 1997 (4) SA 141 (SCA). The position was left unchanged in the recent decision of the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), hereafter *Everfresh* 2012 (1) SA 256 (CC), without the court expressing an opinion on the matter. In *casu*, the court expressed the opinion that a duty of good faith exists in respect of pre-contractual negotiations. The case concerned a clause in a lease agreement that gave the Appellants the option to renew the lease on expiry on the same terms and conditions, subject to agreement being reached on the rental. The Respondents rejected

rental must be certain in the sense that it is either ascertained<sup>5</sup> or objectively ascertainable. The price is ascertainable if there is agreement between the contractants on an external standard<sup>6</sup> in light whereof the price may be ascertained objectively without further reference to the contractants.<sup>7</sup>

The *obiter dictum* in *NBS Boland Bank v One Berg River* suggests that a discretionary power to unilaterally settle the price and rental meets this requirement. Linked to the proposition contained in that *obiter dictum* is the question whether contracts of sale and lease at a reasonable price or rental, respectively, should be regarded as valid<sup>8</sup> as suggested in an *obiter dictum* of the then Appellate Division.<sup>9</sup> The basis for the *obiter dicta* may be found in the principles of freedom and sanctity of contract that form the cornerstones of the South African law of contract.<sup>10</sup> The conceptual framework of public policy forms the outer limits of both freedom and sanctity of contract.<sup>11</sup>



the offer of renewal and argued that the renewal clause did not constitute a legally binding and enforceable right and that it was hence not obliged to negotiate. The question before the Court was whether the common law should be developed in terms of section 39(2) so as to place a duty on the parties to negotiate in good faith. The minority judgment held that the issue had merit and that it should be referred back to the High Court for determination. Whilst the majority acknowledged the importance of infusing the common law with constitutional values, it left the question open by deciding that it was not in the interests of justice to entertain the appeal, the Appellants having raised the constitutional issues for the first time in the Constitutional Court.

<sup>5</sup> The price will be ascertained if an amount is fixed in the contract: Kerr *The Law of Sale and Lease* (2004) 33, hereafter Kerr *The Law of Sale and Lease*.

<sup>6</sup> For example, a formula. Currently, the following, *inter alia*, are regarded as valid formulae: usual price, implied price, market price, matching clauses (lowest price of a competitor). See further para 1.4.2 below.

<sup>7</sup> *Westinghouse* 1986 (2) SA 555 (A), 547 C-D. This will, hereafter be referred to as the *Westinghouse* principle; *Burroughs Machines Ltd v Chenille Corporation of South Africa (Pty) Ltd* 1964 1 SA 669 (W) 670C-D, hereafter *Burroughs Machines* 1964 1 SA 669 (W). The impact of the *obiter dicta* in *Everfresh* 2012 (1) SA 256 (CC) on the current legal position is dealt with in chapter 4 para 4.2.4.4.

<sup>8</sup> Currently, such contracts are void: *Adcorp Spares P.E. (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (3) SA 663 (T) 668, hereafter *Adcorp* 1972 (3) SA 663 (T).

<sup>9</sup> In *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (AD) 578 B-C, hereafter *Genac Properties* 1992 (1) SA 566 (AD). The case concerns a contract of lease and is briefly dealt with below in paras 1.2 and 1.4.2 below and also chapter 4. Currently, the Appellate Division is known as the Supreme Court of Appeal.

<sup>10</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras [57] and [87], hereafter *Barkhuizen* 2007 (5) SA 323 (CC). The case is discussed in para 1.3.3 below and in chapters 2, 3, 4, 5 and 6.

<sup>11</sup> *Barkhuizen* 2007 (5) SA 323 (CC) paras [29] and [30].

The thesis intends to determine whether a development in our law that recognises the validity of a contract of sale and lease at a price determined unilaterally by a contractant or at a reasonable price or rental, respectively, is contrary to public policy<sup>12</sup> as informed by the values embodied in the Constitution of the Republic of South Africa 1996<sup>13</sup> and whether it promotes consensus and certainty of the law which are foundational principles of South African law of contract. In the process, consideration will be given to the question whether such a development is defensible in law, and desirable as a matter of policy and practice. The following main themes will be explored:

1. The tension that exists in the law of contract between certainty and contractual freedom and the role and function of public policy.
2. The recognition of a duty of good faith and its role and function in relation to the *essentiale* of price.
3. A discussion of the policy considerations and relevant provisions of consumer-orientated legislation<sup>14</sup> and how these relate to the principles of freedom and certainty of contract. The aim is to determine the validity and desirability of a development as proposed in the *obiter dicta*<sup>15</sup> in the context of these policy considerations.
4. The constitutionality of a clause that leaves the determination of the price and rental to the sole discretion of one of the contractants as well the constitutionality of an agreement to pay a reasonable price or rental. The question will be considered whether the views expressed in the *obiter dicta* give expression to the constitutional values of dignity, equality and freedom.

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<sup>12</sup> As defined in *Barkhuizen* 2007 (5) SA 323 (CC) para [30]. See further para 1.3.3 below.

<sup>13</sup> Hereafter the Constitution.

<sup>14</sup> For example, the National Credit Act 34 of 2005, the Rental Housing Act 50 of 1999, and the Consumer Protection Act 68 of 2008. See the discussion in chapter 3.

<sup>15</sup> The *obiter dicta* propose the recognition of contracts of sale and lease at a reasonable price and rental respectively, or a unilaterally determined price or rental.

5. The role and function of *essentialia* will be investigated with a view to establishing the critical function and value of *essentialia*, and, hence, the importance for both parties to be involved in the formulation of the content of the obligations that will bind them.<sup>16</sup>
6. The desirability of courts of law functioning as contract-creating mechanisms which may be the ultimate, albeit unintended, consequence if the *obiter dicta* are accepted as law.
7. The approaches in other jurisdictions<sup>17</sup> that allow the price and rental to be determined unilaterally or by the standard of reasonableness. International instruments<sup>18</sup> will also be examined with a view to ascertaining the legal position in an international law context. The aim will be to determine what lessons may be learnt from the international experience.

## 1.2 Current legal position regarding the question of law

This part sets out, briefly, the current legal position regarding the question of law<sup>19</sup> as well as the views expressed in support of a reform of the law in this regard.

In *Westinghouse Brake & Equipment v Bilger Engineering*,<sup>20</sup> the Appellate Division explained that the price must either be ascertained or objectively ascertainable.<sup>21</sup> The price will be

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<sup>16</sup> See further para 1.4.2 below and chapter 4 and in particular para 4.2.4.

<sup>17</sup> The United States of America, England, Scotland, Germany, the Netherlands. The jurisdictions to be investigated are those referred to by the court in *NBS Boland Bank* 1999 (4) SA 928(SCA) case as examples of modern legal systems with which our own legal system is “sadly” out of touch (para [16]). See the discussion in chapter 5.

<sup>18</sup> The United Nations Conventions on Contracts for the International Sale of Goods (1980) (CISG); UNIDROIT Principles of International Commercial Contracts (2004) (UNIDROIT Principles (2004)); Principles of European Contract Law (2003) (PECL). See further chapter 5.

<sup>19</sup> The question of law being whether South African law should sanction a contract that allows the unilateral determination of a price or a rental, and whether contracts of sale and lease at a reasonable price or rental should be regarded as valid. See para 1.1 above.

<sup>20</sup> 1986 (2) SA 555 (A). See also *Murray & Roberts* 1991 (1) SA 508 (A) 514G-H; *Lambons* 1997 (4) SA 141 (SCA) 158F-H.

<sup>21</sup> There is a marked similarity between contracts of sale and contracts of lease. Cooper *Landlord and Tenant* (1994) 6-7, hereafter *Cooper Landlord and Tenant*, makes the following observation:

“Paradoxically, the fundamental difference between lease and sale emphasizes their affinity, for, as Pothier says:

‘...[L]ease, when analysed, is seen to be a species of sale for lease connotes, in a measure, not the

ascertainable if there is a formula in the contract in light whereof the price may be ascertained objectively without further reference to the contractants. Thus, it should be possible for an outsider to determine the price by employing the formula.<sup>22</sup> The court also held that “[t]here can be no valid contract of sale if the parties have agreed that the price is to be fixed by one of them.”<sup>23</sup> Further light was cast on the requirement that the price must be ascertainable in *Adcorp Spares P.E. (Pty) Ltd v Hydromulch (Pty) Ltd*<sup>24</sup> where the Court held that an agreement to pay a reasonable price is not valid because there is no objective standard in light of which it may be ascertained.

A similar position prevails in the law of lease. In *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*,<sup>25</sup> the Appellate Division acknowledged that a valid contract of lease exists where the contractants agreed to a formula whereby the rental could be determined. In *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*<sup>26</sup> the Appellate Division accepted that an agreement that one of the contractants has an unfettered discretion to settle the price is not permissible.




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sale of a thing itself which has been let, but the sale of the use and enjoyment of the thing for the period of the lease, and the amount fixed as rent is the price of the use and enjoyment.’

Since lease is akin to sale it is governed by similar rules. Hence the principles applicable to sale and lease are alike in matters relating to the formation of the contract, e.g. the fixing of the price or rent...If there is doubt regarding the law of lease, we may go to the law of sale for an analogy.”

Because of the similarity between the law relating to price and rental, I will henceforth, for the sake of convenience and brevity, refer mainly to the law relating to the price in contracts of sale. Differences between the two will be highlighted. For the law of sale see *Westinghouse* 1986 (2) SA 555 (A), 547 C-D; Kerr *The Law of Sale and Lease* 33 *et seq.*; Bradfield, Lehmann, Khan, Havenga, Havenga & Lotz *Principles of the Law of Sale and Lease* (2010), 18 *et seq.*, hereafter *Bradfield et al Principles*. For the law of lease see *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A) 746 G-H, hereafter *Proud Investments* 1991 (3) SA 738 (A); *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A), hereafter *Letaba* 1993 (1) SA 768 (A); Kerr *The Law of Sale and Lease* 257 *et seq.*; Bradfield *et al Principles* 74 *et seq.*; Cooper *Landlord and Tenant* 54-55. The requirement that the price must be ascertained or objectively ascertainable is dealt with in chapter 4.

<sup>22</sup> Examples of what are currently are regarded as valid formula are: usual price, implied price, market price, matching clauses (lowest price of a competitor). See further para 1.4.2.2(C)(ii) below.

<sup>23</sup> At 547C-D. See also *Murray & Roberts* 1991 (1) SA 508 (A) 514G-H; *Lambons* 1997 (4) SA 141 (SCA) 158F-H; *Burroughs Machines* 1964 1 SA 669 (W) 670C-D.

<sup>24</sup> 1972 (1) SA 663 (TPD) 668.

<sup>25</sup> 1993 (1) SA 768 (A) 775 B-G.

<sup>26</sup> 1993 (1) SA 179 (A) 184 I- 186D.

In light of, *inter alia*, the *Westinghouse* and *Adcorp Spares* cases<sup>27</sup> the current legal position may be summarised as follows:

- (i) An agreement to pay a reasonable price is not valid because one of the *essentialia*, the price, is lacking in the sense that it is neither ascertained nor objectively ascertainable; and
- (ii) The recognition of contractual discretionary power does not extend to agreements enabling a contractant to unilaterally settle the price.

Before discussing the case law that has called the current legal position into question, it is apposite to briefly summarise the history of the current state of law.

The Institutes of Justinian required that the contractants had to agree to a definite price to conclude a valid contract of sale.<sup>28</sup> The price had to be ascertainable from the contract and it was permissible for the price to be set by a third party.<sup>29</sup> The same rules applied in respect of rental in contracts of lease.<sup>30</sup> The concept of a reasonable price was not known to Roman law.<sup>31</sup> The rule against unilateral determination of the price may be traced to Gaius<sup>32</sup> who was of the view that the determination may not be made by the buyer.<sup>33</sup> The Codex extended this rule to

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<sup>27</sup> *Westinghouse* 1986 (2) SA 555 (A). *Adcorp* 1972 (3) SA 663 (T) 668.

<sup>28</sup> *Institutes* 3.23.1 in Moyle *Imperatoris Justiniani Institutiones* (1923) 433, hereafter *Moyle Imperatoris*. See also Sandaris *The Institutes of Justinian* (1934) 363, hereafter Sandaris *The Institutes*.

<sup>29</sup> *Institutes* 3.23.1 in Moyle *Imperatoris* 433. See also Sandaris *The Institutes* 363. Van der Bergh explains that Roman jurists argued in favour of third party determination because it brought objectivity and was indicative of the contractants' trust and belief that the price would be fair and just: Van der Bergh "The Roman tradition in the South African contract of sale" (2012) 1 *TSAR* 53, 60-67, hereafter Van der Bergh (2012) 1 *TSAR*.

<sup>30</sup> Kerr & Glover 'May Essential Provisions of a Contract be Determined by One of the Parties Alone' (2000) 117 *SALJ* 201, 203, hereafter Kerr & Glover (2000) 117 *SALJ*.

<sup>31</sup> Van der Bergh (2012) 1 *TSAR* 62.

<sup>32</sup> Mommsen, Krueger & Watson *The Digest of Justinian* 18.1.35.1 Volume 2 (1985) 518, hereafter Mommsen *et al The Digest of Justinian*.

<sup>33</sup> Mommsen *et al The Digest of Justinian* 18.1.35.1 Volume 2 (1985) 518. See also *Digest* 18.1.35.1 in Moyle *Imperatoris* 433. Du Plessis 'The Unilateral Determination of Price in Roman Law' (2012) 18 (1) 15-31 *Fundamina* provides an in-depth and insightful exposition of the debate surrounding the validity of unilateral price determination in Roman Law.

prohibit the unilateral determination of the price by either contractant.<sup>34</sup> The same holds true for rental in lease agreements.<sup>35</sup>

The Roman statements of law are not accompanied by any explanation and were stated as a self-evident rule.<sup>36</sup> The probable reason for the rule that the price must be ascertained or objectively ascertainable is that because contracts are based on consensus, there has to be agreement on the essentials.<sup>37</sup> Zimmermann postulates that the Romans regarded the rule as promoting certainty. The main reason against unilateral determination, according to Zimmermann, was the possibility of exploitation in that “the institutional check against gross and unreasonable contractual imbalance (namely negotiation about the price) had been removed.”<sup>38</sup> Kerr also postulates that the Roman texts on the topic suggest that the basis of the rule is the promotion of certainty.<sup>39</sup>

The Roman-Dutch writers accepted the Roman law principles in respect of price and rental with little comment.<sup>40</sup> There is also very little evidence of the concept of a reasonable price in Roman-Dutch law.<sup>41</sup> The Roman and Roman-Dutch texts have formed the basis for court decisions in South Africa to the effect that that the price or rental must be certain in that it is ascertained or objectively ascertainable.<sup>42</sup> The current state of law that does not recognise sales or leases at a reasonable price or rental or at a unilaterally determined price or rental was

<sup>34</sup> *Codex* 4.38.13 in Moyle *Imperatoris* 433.

<sup>35</sup> *Institutes* 3.24.1 in Moyle *Imperatoris* 438.

<sup>36</sup> Kerr *Sale and Lease* 65; Kerr and Glover ‘May Essential Provisions of a Contract be Determined by One of the Parties Alone’ (2000) 117 *SALJ* 201 203.

<sup>37</sup> Kerr *Sale and Lease* 65.

<sup>38</sup> Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* (1990) 254, hereafter Zimmermann *The Law of Obligations*.

<sup>39</sup> Kerr *Sale and Lease* 58.

<sup>40</sup> Van der Bergh (2012) 1 *TSAR* 62. The following Roman-Dutch writers are recorded as supporting this rule: Grotius, Voet, and Van Der Keesel: Kerr *Sale and Lease* 55 & 59; Kerr & Glover (2000) 117 *SALJ* 203. Van der Linden refers only to sale whilst Huber referred only the inability of the buyer to settle the price unilaterally. Pothier also opined against unilateral price determination: Kerr & Glover (2000) 117 *SALJ* 203. See also Van der Merwe *Contract* 201-202.

<sup>41</sup> Van der Bergh (2012) 1 *TSAR* 62–63.

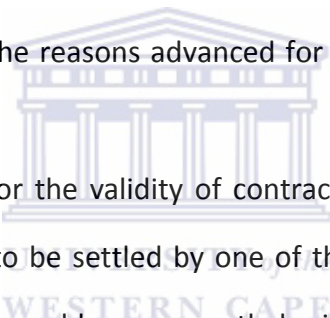
<sup>42</sup> Kerr *Sale and Lease* 66. Van der Bergh gives an insightful analysis of the historical development of the objective ascertainability rule from Roman times through to the present: Van der Bergh (2012) 1 *TSAR* 60-67. See also Van der Merwe *Contract* 202; Kerr & Glover (2000) 117 *SALJ* 202-205.



called into question by the *obiter dicta* in the *Genac Properties*<sup>43</sup> and in *NBS Boland Bank* cases.<sup>44</sup>

In 1992, in *Genac Properties*, a case that dealt with the terms of a contract of lease, the Court expressed the opinion that it was difficult to see on what principle a sale for a reasonable price or even a lease at a reasonable rental should be regarded as invalid. The court referred to the position in England and the United States of America in support.<sup>45</sup>

In 1999, in *NBS Boland Bank*, the Supreme Court of Appeal, after reviewing the position in England, Scotland, Germany, the Netherlands and the United States of America, expressed the view that our law of sale is “sadly out of step with modern legal systems”<sup>46</sup> in that it regards as invalid a contract of sale that gives to one of the contractants the power to unilaterally settle the price. The court summarised the reasons advanced for the current state of the law which resulted in the invalidity as follows:

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- (i) One of the requirements for the validity of contract of sale is that the price must be certain. If the price is left to be settled by one of the parties then the price would be uncertain and the contract would consequently be invalid. The contract would be void for vagueness.<sup>47</sup>
  - (ii) Such an agreement would lead to an unfettered exercise of discretion.<sup>48</sup>

In criticising the present position in respect of the first reason above, the Court noted that our law regards as valid a contract where the contractants agree that a third party may settle the price or rental on their behalf. The court reasoned that in such a case the price is as “uncertain”

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<sup>43</sup> 1992 (1) SA 566 (AD).

<sup>44</sup> 1999 (4) SA 928 (A).

<sup>45</sup> At 578B-C. The court also echoed the view of Zeffert ‘Sales at a Reasonable Price’ (1973) 90(2)*SALJ* 113, 113. Zeffert argued that a fair and reasonable price is not void for vagueness because “...that which can be reduced to certainty is certain and an agreement to pay a reasonable price may be capable of being reduced to certainty if the court is able to determine what is reasonable and fair in the circumstances of a particular agreement” (113).

<sup>46</sup> Para [16].

<sup>47</sup> Para [9].

<sup>48</sup> Para [21].



as it is when it is left to the discretion of one of the parties.<sup>49</sup> Regarding the second reason, the Court said that at common law any discretion given to a contractant is not unfettered; it has to be exercised *arbitrio bono* [sc: *boni*] *vir*.<sup>50</sup> Accordingly, the court was of the opinion that there is no reason why a contract that leaves the determination of the price or rental to the discretion of one of the contractants should be void for vagueness.<sup>51</sup>

Van der Merwe *et al*<sup>52</sup> agree with the criticism of the *NBS Boland Bank* court that the common law position in respect of contracts of sale was, as described by the court, “illogical” and “sadly out of step with modern legal systems.”<sup>53</sup> The authors argue against the blanket prohibition of a discretionary power<sup>54</sup> and state that the recognition of a discretionary power to settle the price does not mean that the exercise of power is unassailable. In this regard, they propose “that the risk of exploitation”<sup>55</sup> should be addressed by subjecting the exercise of such power “to judicial control with reference to considerations of objective reasonableness.”<sup>56</sup> In light of developments regarding public policy, they suggest that courts will be “sensitive to the need to protect a party against the possibility of exploitation” and that one approach might be “to regard a so-called unfettered discretion as valid unless shown to be unreasonable and against public policy” – each case to be decided on its own merits. The other approach, and one apparently not favoured by the authors, would be “to hold that, because an objective limitation on the exercise of contractual power is in itself a reflection of public policy, it is to that extent

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<sup>49</sup> Para [9].

<sup>50</sup> Para [25]. The term “*arbitrio bono* [sc: *boni*] *vir*” is explained as the decision of a reasonable person or simply a reasonable decision: Claassen *Dictionary of Legal Words and Phrases* vol. 1 (2011) 146-147. See also *Erasmus and Others v Senwes Ltd and Others* 2006 (3) SA 529 (T) 538. See further chapter 4 para 4.3.

<sup>51</sup> Para [32].

<sup>52</sup> *Contract* 209.

<sup>53</sup> Para [16].

<sup>54</sup> At 234–237.

<sup>55</sup> The risk of exploitation may be regarded as a major concern in this regard. See further chapters 2, 3 and 4.

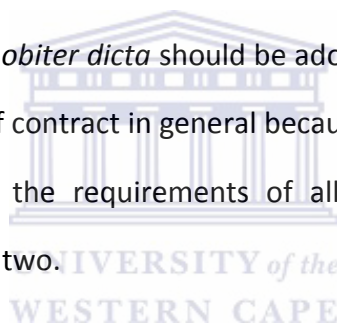
<sup>56</sup> At 238 and 234–243.

not a matter of dispositive law and that a stipulation to the effect that a power is unlimited is ineffective.”<sup>57</sup>

In the development of the thesis, the views formulated by the authors will, *inter alia*, be considered and explored as part of determining whether or not the approaches the *obiter dicta* suggest should be adopted.<sup>58</sup>

### **1.3 The tension that exists in the law of contract between contractual freedom and the requirement of certainty, and the role and function of public policy**

Brief expositions of freedom of contract, certainty, and public policy are given to establish the foundation for later chapters as well to found a basis for the thesis and hence for a determination of whether not the *obiter dicta* should be adopted in our law.<sup>59</sup> It is necessary to deal with the position in the law of contract in general because the general principles of the law of contract pervade and inform the requirements of all specific contracts, of which the contracts of sale and lease are but two.



#### **1.3.1 Freedom of contract**

In general, private law functions to facilitate arrangements by legal subjects in their personal and commercial relations with each other. It provides a forum and a framework whereby legal subjects may, for example, enter into a marriage, or acquire property, or conclude contracts, if

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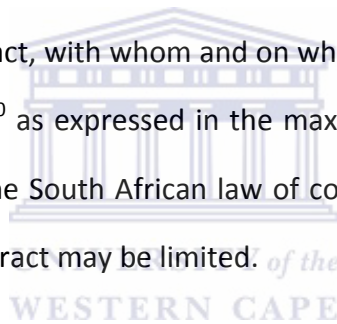
<sup>57</sup> At 242.

<sup>58</sup> The content of the issues raised by the authors are discussed in chapters 2, 3, 4, 5 and 6.

<sup>59</sup> Each of these fundamental principles of South African contract law has a bearing on the question of law, namely whether validity should be bestowed on contracts of sale at a reasonable price or at a unilaterally determined price as proposed in the *obiter dicta*. Freedom of contract theorists would support the *obiter dicta* on the basis that individual autonomy that forms an integral part of freedom of contract should be given effect to. See further on freedom of contract chapter 2 and in particular para 2.2.2 and chapters 3, 4, 5 and 6. Adherents of certainty may argue against the recognition of the *obiter dicta* on the basis that the standard of reasonableness in relation to price introduces uncertainty in a fundamental area of contract creation. See further on certainty chapter 2 para 2.6 and generally in chapters 3, 4, 5 and 6. It will be argued that public policy considerations as informed by the Constitution will ultimately be definitive in the determination of the question of law. See further chapter 4.

they so desire.<sup>60</sup> In particular, the law of contract provides an enabling framework within which parties can choose to establish and exchange rights and obligation.<sup>61</sup> A contract is an agreement that is recognised by the law and that gives rise to enforceable rights and duties.<sup>62</sup> The law of contract deals, therefore, mainly with the two questions of agreement and enforceability.<sup>63</sup> The *Digest*<sup>64</sup> specifies that the essence of an obligation is “that it binds another person to give, do, or perform something for us.”<sup>65</sup>

Contractual obligations, unlike other legally enforceable obligations,<sup>66</sup> arise because of a conscious and voluntary act on the part of each of the contractants.<sup>67</sup> It follows that the contractants must have the requisite intention to reach an agreement and thereby to create obligations.<sup>68</sup> Implicit in this is the principle of freedom of contract, meaning that an individual is free to decide whether to contract, with whom and on what terms.<sup>69</sup> This principle goes hand in hand with sanctity of contract<sup>70</sup> as expressed in the maxim *pacta sunt servanda*.<sup>71</sup> The two principles form cornerstones of the South African law of contract.<sup>72</sup> Hereunder follows a brief discussion of how freedom of contract may be limited.



<sup>60</sup> Cranston *Legal Foundations of the Welfare State* (1985) 51, hereafter *Cranston Legal Foundations*.

<sup>61</sup> Bowles *Law and the Economy* (1982) 128, hereafter *Bowles Law*; Pretorius ‘The basis of contractual liability (1) Ideologies and approaches’ (2005) 68 *THRHR* 253, 259, hereafter Pretorius (2005) 68 *THRHR*; Kessler ‘Contracts of Adhesion – Some Thoughts About Freedom Of Contract’ (1943) 43 *Columbia Law Review* 629, 629.

<sup>62</sup> Van der Merwe *et al Contract* 7-8; Pretorius (2005) 68 *THRHR* 259.

<sup>63</sup> Cranston *Legal Foundations* 91; Bowles *Law* 128.

<sup>64</sup> Mommsen *et al The Digest of Justinian* 44(7)3 Volume 4 641.

<sup>65</sup> For an introduction to the historical development of the South African law of contract see Christie & Bradfield *Christie’s The Law of Contract in South Africa* 6ed (2011) 1-12, hereafter Christie & Bradfield *Christie’s The Law of Contract*.

<sup>66</sup> For example, in delict the obligation arises *ex lege* as a result of, *inter alia*, a wrongful act, and in unjustified enrichment the obligation arises *ex lege* because an enrichment and a corresponding impoverishment occurred without a valid legal cause. See also Hutchison *et al Contract* 8-9.

<sup>67</sup> Van der Merwe *et al Contract* 5; Vorster ‘The bases for the implication of contractual terms’ 1988 2 *TSAR* 161, 163.

<sup>68</sup> *Conradie v Roussouw* 1919 AD 279, 288 and 320.

<sup>69</sup> Van der Merwe *et al Contract* 9.

<sup>70</sup> Hutchison *et al Contract* 22.

<sup>71</sup> Agreements freely entered into must be honoured and enforced. Van der Merwe *et al Contract* gives a succinct and informative overview of the development of the principle 17-18.

<sup>72</sup> The jurisprudential value of these principles and limitations thereof are dealt with in chapter 2 and particularly in paras 2.2 and 2.4.

### 1.3.1.1 Limitations on freedom of contract

The freedom to enter into contracts is subject to various limitations, in terms of the common law, statute law, and, importantly, in terms of the Constitution and contractants may find that their agreement to create obligations has no legal effect or that it does not have the intended legal effect.<sup>73</sup> What follows is a brief exposition of some of the ways in which contractual freedom may be limited.

### 1.3.1.2 Common law

#### (A) *Contra bonos mores* and public policy

Contracts may be void for illegality if the subject matter of the contract, its object, or its conclusion is *contra bonos mores* or against public policy.<sup>74</sup> In *Sasfin v Beukes*<sup>75</sup> the court said that though the distinction between *contra bonos mores* and public policy may not be of importance in principle, in that there may be an overlap between the two, it is, nevertheless, convenient to make the distinction. The Court explained that “[a]greements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expediency, will...on the grounds of public policy not be enforced.”<sup>76</sup>

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<sup>73</sup> Van der Merwe *et al Contract* 9-16. A brief discussion of some of the reasons for a limitation on freedom of contract is given in Hutchison *et al Contract* 24-26 and a comprehensive discussion is given in Aronstam *Consumer Protection, Freedom of Contract and the Law* Juta (1979), hereafter Aronstam *Consumer Protection*.

<sup>74</sup> Hosten *Introduction to South African Law and Legal Theory* (1995) 715, hereafter Hosten *Introduction*; Eiselen & Pienaar *Unjustified Enrichment: A Casebook* (1999) 89–91.

<sup>75</sup> 1989 (1) SA 1 (A) 8.

<sup>76</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8, hereafter *Sasfin* 1989 (1) SA 1 (A). See further on illegality Kerr *The Principles of the Law of Contract* (2002), 187-204; Van der Merwe *et al Contract* 165-191; Lubbe & Murray *Farlam & Hathaway Contract Cases, Materials and Commentary* (1988) 236–296, hereafter Lubbe & Murray *Contract*; Hutchison *et al Contract* 174-177; Du Bois, Bradfield, Himonga, Hutchison, Lehmann, le Roux, Paleker, Pope, van der Merwe & Visser *Wille’s Principles of South African Law* (2007) 763-772, hereafter Du Bois *et al Wille’s Principles*. See further chapter 2 para 2.3.

## (B) Requirements

The requirements for contracts in general and specific contracts also have a bearing on contractual validity. An example of a general requirement is that a person must have contractual capacity.<sup>77</sup> An example of specific requirements is in contracts of sale where the requirements are that there must be an intention to buy and sell; there must be a *merx* (*res vendita*) and a price.<sup>78</sup> These requirements limit contractual freedom since they prescribe the circumstances under which the exercise of such freedom will be effective.

## (C) Rules of interpretation

Rules of interpretation also play a role in restricting the freedom to contract. It is a trite law that courts give effect to the real intention of the parties whatever the expressed intention may be.<sup>79</sup>



## (D) Implied terms

Implied terms<sup>80</sup> also have a bearing on the agreement between the contractants. In contracts of sale, the *ex lege* incorporation of *naturalia* such as the implied warranty against eviction and the implied warranty against latent defects, the existence whereof contractants are, in general,

<sup>77</sup> Hutchison *et al Contract*: for example, a person must be major and of sound mind to conclude a valid contract. has comprehensive discussion of contractual capacity (chapter 5).

<sup>78</sup> Kerr *Sale and Lease* 8-75.

<sup>79</sup> In *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A), the respondent in an attempt to recover machinery from the appellants relied on a simulated contract of sale and resale between himself and the person who sold the machinery to the appellant. The court held that the true intention of the parties (the respondent and the seller) was to create a contract of pledge and not one of sale and resale. See also *Maize Board v Jackson* 2005 (6) SA 592 (SCA) 596 A-F. See further chapter 2 para 2.4.5.

<sup>80</sup> The distinction between implied and tacit terms has been described as “trite” by the Supreme Court of Appeal in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* 2005 (5) SA 186 (SCA) para [33]. An implied term is one that is not expressly agreed upon between the contractants but which is imposed by operation of law (*ex lege*) and hence forms part of the contract unless validly excluded by the contractants. Tacit terms refer to the unarticulated intention of the contractants and are inferred from the express terms and the surrounding circumstances of the contract. Van der Merwe *et al Contract* 242; Hutchison *et al Contract* 244-245 and 247-248; Du Bois *et al Wille’s Principles* 798-800; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531-533. See also the discussion of tacit terms in chapter 4 para 4.3.4.2(C)(viii).

unaware, impose obligations which significantly affect the legal relationship between the parties.<sup>81</sup>

### 1.3.1.3 Self imposed limitations

The contractants may by agreement impose restrictions on their own freedom to contract by, for example, providing that a contract or any amendments to an existing contract will have the cloak of validity only if it is reduced to writing.<sup>82</sup>

### 1.3.1.4 Statute law

Statutory attempts at balancing the bargaining power of contractants have also had the effect of curtailing the freedom to contract. Recent examples of legislation are the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,<sup>83</sup> Consumer Protection Act,<sup>84</sup> the National Credit Act,<sup>85</sup> and the Rental Housing Act.<sup>86</sup> These statutes have a definite consumer-friendly orientation which is evidenced in their respective preambles and in their provisions generally.<sup>87</sup>

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<sup>81</sup> Scott, Baqwa, Eiselin, Humby, Kelly-Louw, Konyn, Kopel, Mukheiber, Schoeman, Smit, Sutherland and Van der Bijl *The Law of Commerce in South Africa: commercial law* (2009) 158-164, hereafter Scott *et al The Law of Commerce*.

<sup>82</sup> Van der Merwe *et al Contract General Principles* 129 *et seq.* See also chapter 2 para 2.3.2.2(A) below.

<sup>83</sup> Act 19 of 1998.

<sup>84</sup> Act 68 of 2008.

<sup>85</sup> Act 34 of 2005.

<sup>86</sup> Act 50 of 1999.

<sup>87</sup> For example, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 have the effect of nullifying a clause in a lease agreement entitling the lessor to forthwith evict a tenant on failure to pay rental (sections 4, 5, 6 and 8). The National Credit Act prohibits any agreement in a credit agreement that has the effect of excluding any common law rights that would otherwise be applicable (section 90(1)&(2)(c)). The Rental Housing Act, in criminalizing conduct such as locking out a tenant and disconnecting utilities (S16hA), effectively excludes terms in lease agreements giving discretionary powers to a lessor to do so. In imposing an implied warranty of quality, the Consumer Protection Act has effectively rendered meaningless a *voetstoots* clause in a contract of sale (section 56 read with section 55). See further chapter 3.

### 1.3.1.5 The Constitution of the Republic of South Africa 1996

All laws or forms of conduct which are inconsistent with the Constitution, as the supreme law of the land, are invalid.<sup>88</sup> Courts are required to declare invalid any law or conduct that is inconsistent with the Constitution<sup>89</sup> and every court, tribunal or forum is required to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation, developing the common law or customary law.<sup>90</sup> It follows that contractual relations as regulated by common law or statute law are subject to Constitutional control and scrutiny.<sup>91</sup>

### 1.3.1.6 Conclusion

The considerations mentioned above illustrate that the notion that contractual obligations are reflective of the agreement of the parties, is subject to qualification. Qualifications are necessary and expedient in that they serve to regulate and promote legal intervention in a key area of the law by allowing for a balancing of principles and policies “so as to satisfy prevailing perceptions of justice and fairness, as well as economic, commercial, and social expediency”<sup>92</sup>

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<sup>88</sup> Section 2.

<sup>89</sup> Section 172 (1)(a).

<sup>90</sup> Section 39(2).

<sup>91</sup> *Barkhuizen* 2007 (5) SA 323 (CC), para. [15]. In *Du Plessis v De Klerk and Another* 1996 (3) SA 850 (CC) the Constitutional Court decided that the interim Constitution does not, as a general rule, have direct horizontal application. Whilst the matter of horizontal application is not in dispute under the final Constitution, the debate is whether the application should be direct or indirect: *Van der Merwe et al Contract* 10-15; *Brisley v Drotosky* 2002 (4) SA 1 SCA, hereafter *Brisley* 2002 (4) SA 1 SCA discussed in chapter 2; Woolman ‘The Amazing Vanishing Bill of Rights’ (2007) 124 *SALJ* 762, hereafter Woolman (2007) 124 *SALJ* 762. Direct application in terms of section 8 of the Constitution means that a contractant contests the validity of a contract or its term(s) on the basis that it is inconsistent with a particular right expressed in the Constitution. In terms of this approach, the courts utilise the “rights and freedoms, and the general rules derived from them” as a “point of departure for determining whether the law or conduct is invalid.” Woolman (2007) 124 *SALJ* 769. Drawing on *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 CC para 54, and *S v Thebus* 2003 (6) SA 505 (CC), Woolman (2007) 124 *SALJ* argues that indirect application in terms of section 39(2) of the Constitution does not require of a court to pronounce on the validity of a right but rather “to bring *all* laws into line with the ‘spirit, purport and objects’ of the Bill of rights and the ‘objective, normative value system’ made manifest in the text of the Constitution as a whole (769 fn12). See also Currie & de Waal *The Bill of Rights Handbook* (2008) 32 and the discussion in para 1.3.3 below. In *Barkhuizen* 2007 (5) SA 323 (CC), the Constitutional Court preferred the indirect approach (paras [23]–[30]).

<sup>92</sup> *Van der Merwe et al Contract* 10.



as well as to reflect the values that underlie the Constitution.<sup>93</sup> Inasmuch as qualifications place limitations on contractual freedom, the limitations are necessary and desirable in that, *inter alia*, they promote legal certainty.<sup>94</sup>

### 1.3.2 Certainty

The principle of certainty is not limited to the law of contract. A few examples of the manifestation of certainty in the legal system in general will be discussed and thereafter certainty in the context of the law of contract will be dealt with briefly.

#### 1.3.2.1 *Stare decisis* (judicial precedent)

Certainty of the law is a characteristic of most legal systems and, in the South African context, finds expression, *inter alia*, in the *stare decisis*<sup>95</sup> doctrine which forms the foundation of the South African system of binding judicial precedent.<sup>96</sup> The practical effect of the doctrine is that the *ratio decidendi* of a superior court must be followed by all courts that are obliged to follow the decision of that court;<sup>97</sup> thereby certainty of the law is created and promoted.<sup>98</sup>

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<sup>93</sup> *Barkhuizen* 2007 (5) SA 323 (CC), para [30].

<sup>94</sup> The conclusion is supported by the conclusions reached in respect of the consumer protection legislation discussed in chapter 3 and in the discussion of public policy and the constitutional values of dignity, equality and freedom in chapters 4.

<sup>95</sup> The Latin *maxim stare decisis non quita movere* means to let decisions stand and do not disturb settled law. Whilst the doctrine does not have much currency in France and other laws of the Romano-Germanic legal tradition, in England “the rules set by decided cases must be followed or else the certainty of the Common Law will be destroyed and its very existence compromised”: David & Brierley *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (1985) 376-378.

<sup>96</sup> Du Bois *et al Wille's Principles* give brief exposition of the operation of doctrine in South African law (86-92). See also Havenga & Havenga *General Principles of Commercial Law* (2010) 11-12.

<sup>97</sup> *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 28, hereafter *Camps Bay Ratepayers* 2011 (4) SA 42 (CC); Hosten *Introduction* 386-388.

<sup>98</sup> Hahlo & Kahn *The South African Legal System and its Background* (1968), hereafter Hahlo & Kahn *The South African Legal System*, summarises the nature and function of the *stare decisis* principle as follows: “The advantages of a principle of *stare decisis* are many. It enables the citizen, if necessary with the aid of practising lawyers to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along the right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing



In *Daniels v Campbell NO and Others*,<sup>99</sup> the Constitutional Court described the doctrine of judicial precedent as an incident of the rule of law that is designed to promote legal certainty and in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*<sup>100</sup> the Constitutional Court elaborated that “[i]t is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution [s1(c)].” The Constitutional Court in *Ex parte Minister of Safety and Security, In re S v Walters*<sup>101</sup> confirmed the validity of the doctrine in respect of post-constitutional decisions.

The interrelationship between the *stare decisis* doctrine and the section 39(2)<sup>102</sup> of the Constitution was explained in *Afrox Healthcare Bpk v Strydom*.<sup>103</sup> Whilst confirming the sanctity of the *stare decisis* doctrine, the court held that the reach of section 39(2) to override pre-constitutional decisions of the court, be limited to two instances. The first would be where the High Court is convinced that the rule in question is inimical with a constitutional provision. This applies even if the rule in question had been laid down by the Supreme Court of Appeal.<sup>104</sup> The second would be where the High Court, with due regard for the values of the Constitution, was of the view that a pre-constitutional decision, based on considerations such as *boni mores* or public interest, no longer reflected the *boni mores* or public interest. In both these instances

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justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike .... Certainty, predictability, reliability, equality, uniformity, convenience: these are the principle advantages to be gained by a legal system from the principle of *stare decisis*” (214-215). The views expressed by the authors were quoted with approval in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para [30], hereafter *Afrox Healthcare* 2002 (6) SA 21 (SCA) and in *Camps Bay Ratepayers* 2011 (4) SA 42 (CC) para [28]. The authors explain that “[t]he maintenance of the certainty of the law and equality before it, the satisfaction of legitimate legal expectations, entails a general duty of judges to follow the legal rulings in previous judicial decisions” and that litigants would feel “unjustly treated if a past ruling to his applicable case were not followed where the material facts were the same” (214).

<sup>99</sup> 2004 (5) SA 331 (CC) para [94].

<sup>100</sup> 2011 (4) SA 42 (CC) para 28.

<sup>101</sup> 2002 (4) SA 613 (CC) paras [57]-[61]. See also *Camps Bay Ratepayers* 2011 (4) SA 42 (CC) para [29] quoting with approval from *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) at paras [60]-[61].

<sup>102</sup> Section 39(2) enjoins all courts to promote the “spirit, purpose and objects” of the Bill of Rights when developing the common law or customary law.

<sup>103</sup> 2002 (6) SA 21 (SCA) paras [25]–[30].

<sup>104</sup> The reason being that the Constitution is the highest law of the law and thus supersedes the common law (para [27]).

the High Court would be obliged to depart from such pre-constitutional decision and such departure would not be viewed as being in conflict with the *stare decisis* doctrine.<sup>105</sup>

### 1.3.2.2 The law of succession

The devolution of a deceased estate is regulated by the provisions of the common law and the Wills Act<sup>106</sup> in the event of testate succession.<sup>107</sup> Though freedom of testation is the cornerstone of our law of succession, it is subject to limitations imposed by the common law<sup>108</sup> and by statute.<sup>109</sup> In addition, the Wills Act prescribes formalities that must be complied with.<sup>110</sup> These requirements and formalities are necessary because of the significant legal effect of a will which is to confer rights on the beneficiaries named therein. This necessitates certainty regarding the form and content of a will and this is provided by the law of succession.



### 1.3.2.3 The law of marriage

In addition to the common law requirements which the parties must comply with, the Marriage Act<sup>111</sup> imposes certain formalities<sup>112</sup> for a marriage to be valid. A valid marriage holds important

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<sup>105</sup> Paras [27]–[28].

<sup>106</sup> Act 7 of 1953

<sup>107</sup> The Intestate Succession Act 81 of 1987 applies where the deceased did not leave behind a valid will.

<sup>108</sup> A condition in a will that purports to cause the break-up of a marriage by divorce or separation is invalid as being contrary to public policy and will be treated as *pro non scripto*. See further Corbett, Hofmeyr & Kahn *The Law of Succession in South Africa* (2001) 129-138, hereafter Corbett *et al The Law of Succession*.

<sup>109</sup> For example, the Subdivision of Agricultural Land Act 70 of 1970 restricts a testator's power to subdivide agricultural land. See further Corbett *et al The Law of Succession* 40.

<sup>110</sup> For example, sections 1 and 2 require that the will must be in writing and signed by the testator and at least two witnesses, all in the presence of one another.

<sup>111</sup> Act 25 of 1961. This Act regulates civil marriages. Customary marriages are regulated by the Recognition of Customary Marriages Act 120 of 1998 and marriages between same-sex partners are regulated by the Civil Union Act 17 of 2006. See further Du Bois *et al Wille's Principles* 236-253.

<sup>112</sup> For example, the marriage ceremony must be performed by a duly appointed marriage officer and the marriage must be solemnized in the presence of the parties to the marriage and at least two competent witnesses. The marriage officer, both parties to the marriage and at least two witnesses must sign the marriage register and two copies of the register. The original register and one of the copies must be sent by the Marriage Officer to the Director-General of Home Affairs: Du Bois *et al Wille's Principles* 250-252.

(invariable) consequences<sup>113</sup> for the parties to the marriage; hence, there must be certainty as to its conclusion and its existence. The requirements and the formalities promote such certainty.

#### 1.3.2.4 The law of contract

“It is a general requirement for a contract that the agreement must bring about certainty regarding its legal consequences.”<sup>114</sup> A contract would be void for vagueness where it is incomplete because an essential or material aspect has not been agreed upon.<sup>115</sup> Though it may be possible for the parties to supplement their agreement to facilitate its implementation, this may not always be possible because the parties may no longer be available to provide the requisite explanation or the rights under the contract may have been ceded. Since it is not the function of the court to create obligations,<sup>116</sup> the notion of certainty of contract assumes critical importance.<sup>117</sup> The law of contract promotes certainty, *inter alia*, by providing general<sup>118</sup> and specific requirements<sup>119</sup> and in some instances formalities<sup>120</sup> that that must be met in order for a contract to be valid.

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<sup>113</sup> For example, the status of the parties change in that a relationship by affinity is created between each spouse and the blood relatives of the other; a spouse who was a minor prior to the marriage attains majority status on marriage. See further Hahlo *The South African Law of Husband and Wife* (1985) 127-130; Cronje and Heaton *South African Family Law* (2010) 43-63; Cronje and Heaton *Casebook on South African Family Law* (2010) 67-98; Visser and Potgieter *Introduction to Family Law* (1998) 72-81.

<sup>114</sup> Van der Merwe *et al Contract* 192.

<sup>115</sup> Van der Merwe *et al Contract* 194.

<sup>116</sup> *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd & Another* 1994 (3) SA 449 (C) 453I-455G, hereafter *Hurwitz* 1994 (3) SA 449 (C).

<sup>117</sup> *Hutchison et al Contract* 210.

<sup>118</sup> For example, only major persons who are of sound mind may conclude a valid contract; a contract must not promote illegality.

<sup>119</sup> For example, in contracts of sale it is required that (i) the contractants must agree to buy and sell, (ii) there is agreement on the property sold, and (iii) there is agreement on the price.

<sup>120</sup> Section 2(1) of the Alienation of Land Act 68 of 1981 requires that contracts for the alienation of land must be reduced to writing and signed by the parties thereto or their representatives. The purpose “is to promote legal certainty regarding the authenticity and contents of contracts, thereby limiting litigation and preventing malpractice and fraud”: *Hutchison et al Contract* 161-162.

### 1.3.2.5 Conclusion

Certainty as a feature of the law is important in that, in the words of Hahlo and Kahn, “[i]t enables the citizen ... to plan his private and professional activities with some degree of assurance as to their legal effect” and “it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule.”<sup>121</sup>

### 1.3.3 The role of public policy in the tension between contractual freedom and certainty

Having discussed the requirement of certainty and the notion of freedom of contract, it is necessary to explore the role played by public policy in attempting to attain a balance between the two.

Whilst it is trite law that, at common law, agreements which are contrary to public policy are void for illegality,<sup>122</sup> the definition of what constitutes public policy has always been considered to be fraught with difficulty.<sup>123</sup> The Appellate Division has cautioned that there cannot be a closed list of agreements that may be regarded as contrary to public policy because of the difficulty in reaching consensus about what constitutes public policy or what effect it should

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<sup>121</sup> Hahlo & Kahn *The South African Legal System* 215. Though the authors expressed these views with reference to the *stare decisis* doctrine, it aptly also encapsulates the role of certainty as a characteristic of our legal system. See also Carter & Hartland *Contract Law in Australia* (2002) para [113].

<sup>122</sup> *Sasfin* 1989 (1) SA 1 (A) 71 and 18F-G; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 891G, hereafter *Magna Alloys* 1984 (4) SA 874 (A). In the *Sasfin* case, the Appellate Division recognised the interests of the community as a paramount consideration in determining, not only, the content of public policy, but also, in deciding whether an agreement is contrary to public policy. Accordingly, the Court explained that agreements which are contrary to public policy are those “which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, [such agreements] will ... on the grounds of public policy, not be enforced” (8C-D). Though the Court, at 9B-F, was wary of declaring a contract contrary to public policy “merely because its terms (or some of them) offend one’s individual sense of propriety or fairness,” Van der Merwe *et al Contract* offer a qualification. The authors explain that public interest is not limited to the wider interests of society in general “but may include the individual interests of the parties to a particular agreement” (168). As an example, they cite that a restraint of trade agreement “may seem acceptable when only the general interest of society is considered, but may be so unreasonable when the relative interests of the contractants are taken into account that it is against the public interests after all” (168). See further the discussion of public policy in chapters 2, 3, 4, 5 and 6.

<sup>123</sup> In *Law Union and Rock Insurance Co Ltd v Carmichele’s Executor* 1917 AD 593, the Appellate Division described public policy as an expression of “vague import” (598).

have.<sup>124</sup> Views about its content are not always the same and may change from time to time.<sup>125</sup> Compounding the problem of public policy being, in the words of Glover,<sup>126</sup> a “slippery and vexed concept,”<sup>127</sup> is the reality that in the South African context, the concept of public policy has to be understood and enforced within the reality of a heterogeneous society as opposed to a homogeneous one. Van der Merwe *et al* propose that the guiding principle should be that sectional interests must be evaluated within the context of the wider interests of society as a whole. The mutually beneficial result would be that sections of society would have an interest in upholding the general interests of society whilst the society at large would have an interest in maintaining sectional interests.<sup>128</sup>

The perception that public policy is a “slippery and vexed concept” underwent a seismic change in *Barkhuizen v Napier*.<sup>129</sup> The Constitutional Court, on the one hand, reflected, with approval, on the interrelationship between sanctity of contract and the core constitutional values of freedom and dignity,<sup>130</sup> but, on the other hand, cautioned that sanctity of contract must be tempered by considerations of morality and public policy as discerned from the values

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<sup>124</sup> *Magna Alloys* 1984 (4) SA 874 (A). Examples of agreements regarded as being against public policy are those that offends or injures the state, such as agreements which defeat, obstruct or pervert the administration of justice (*Lekeur v SANTAM Insurance Co Ltd* 1969 (3) SA (C)), and agreements which unduly restrict a person’s liberty or freedom to act (*Filmer and Another v Van Straaten* 1965 2 SA 575 (W)). For example, an agreement that the parties should never contract with one another in the future would be not be binding in that it would be contrary to public policy because it amounts to a substantial limitation of contractual freedom: *Shifren & Others v SA Sentrale Ko-op Grannatmaatskappy Bpk* 1964 (2) SA 343 (O).

<sup>125</sup> *Magna Alloys* 1984 (4) SA 874 (A), 891H; Van der Merwe *et al Contract* 165-170; Lubbe & Murray *Contract* 238-269.

<sup>126</sup> Glover (2007) 124 *SALJ* 449, 455.

<sup>127</sup> In *Sasfin* 1989 (1) SA 1 (A), the Appellate Division described public policy as being “an expression of ‘vague import’” and said that the requirements of public policy are “must needs often be a difficult and contentious matter” (71).

<sup>128</sup> Van der Merwe *et al Contract* 168.

<sup>129</sup> 2007 (5) SA 323 (CC). The Court upheld the validity of a clause that required an insured to institute legal proceedings within 90 days of the rejection by the insurer of a claim. In arriving at its conclusion, the court considered the question whether the time-limitation clause was contrary to public policy.

<sup>130</sup> Paras [57] and [87].

embodied in the Constitution, and especially the Bill of Rights.<sup>131</sup> The judgment, may therefore, be said to confirm that:

- (i) the basic values of dignity, equality and freedom<sup>132</sup> and the rule of law<sup>133</sup> that underpin the Constitution and the Bill of Rights<sup>134</sup> find expression in the principles of freedom and sanctity of contract that form the bedrock of the law of contract; and
- (ii) the common law checks and balances, public policy included, used to attempt to attain a balance between certainty and flexibility are constitutionally sound.

The Constitutional Court explained that the test to determine the constitutionality of a contractual clause is whether it is contrary to public policy and that the content of public policy is to be found in “the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights.”<sup>135</sup> The court concluded that a term that is inimical to the values enshrined in the Constitution is contrary to public policy and hence unenforceable.<sup>136</sup> The judgment, in acknowledging the moral profundity of *pacta sunt servanda* as a legal principle that has attained universal legal recognition, cautions that the rule cannot apply to immoral agreements which violate public policy.<sup>137</sup> The court makes it clear that constitutional provisions and values inform and underpin the content of public policy.<sup>138</sup> Public policy is also no longer viewed as being difficult to define as it is deeply rooted in the Constitution and its foundational values.<sup>139</sup> Public policy is defined as being informed by the concept of *ubuntu*<sup>140</sup>

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<sup>131</sup> Para [30].

<sup>132</sup> Section 1(a).

<sup>133</sup> Section 1(c).

<sup>134</sup> Chapter 2 of the Constitution.

<sup>135</sup> Paras [29] and [30].

<sup>136</sup> Para [29].

<sup>137</sup> Para [87].

<sup>138</sup> This theme forms the basis of the discussion in chapter 4 below.

<sup>139</sup> Para [28]. However, Glover (2007) 124 *SALJ* disagrees with the court, saying that public policy will continue to be “a slippery and vexed concept” (455).

<sup>140</sup> Para [51].

and as being a repository of “those values that the society hold most dear”<sup>141</sup> and of “the general sense of justice of the community, the *boni mores*, manifested in public opinion”<sup>142</sup> and incorporates:

- (i) the notions of fairness, justice and equity, and reasonableness;<sup>143</sup> and
- (ii) the necessity to do simple justice between individuals.<sup>144</sup>

The definition includes the competing values which are used, at common law, to evaluate the enforceability of agreements reached pursuant to the twin<sup>145</sup> notions of freedom of contract and sanctity of contract, but importantly, it heralds the incorporation of *ubuntu* in the definition.

In *S v Makwanyane*,<sup>146</sup> the court, in dealing with the constitutionality of the death penalty, commented that an outstanding feature of *ubuntu* in a community sense is the value it places on life and human dignity. The dominant theme of the culture of *ubuntu* is that the life of another person is at least as valuable as one’s own. Respect for the dignity of every person is integral to this concept.<sup>147</sup> It emphasises the communal nature of society and “carries in it the idea of humanness, social justice and fairness.”<sup>148</sup> Mokgoro J described *ubuntu* as humaneness. “In its most fundamental sense, it translates as *personhood* and *morality*.”<sup>149</sup> It refers to an interconnectedness between the individual and society and society and the individual.

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<sup>141</sup> Para [28].

<sup>142</sup> Para [73].

<sup>143</sup> Paras [51] and [73]. The Court added that unequal bargaining power is another factor that plays a role in the consideration of public policy (para [59]).

<sup>144</sup> Para [51].

<sup>145</sup> I regard the notions as twins because the one reinforces the other: because people are free to contract, therefore they are bound by their contract, the contract being an expression of their free will. See also *Hutchison et al Contract* 23; *Hutchison ‘Non-variation Clauses in Contract: Any Escape from the Shifren Straitjacket?’* (2001) 118 *SALJ* 720, 743; *Van der Merwe et al Contract* 11.

<sup>146</sup> 1995 (3) SA 391 (CC).

<sup>147</sup> Para [225]. See further chapter 4 and in particular para 4.2.4.2(A)(i).

<sup>148</sup> Para [237].

<sup>149</sup> Para [308]. The learned judge explains that it envelopes “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity” (para [308]).



Roederer and Moellendorf describe *ubuntu* as simultaneously individual and universal.<sup>150</sup> The philosophical notion of *ubuntu* is deeply rooted in the individual psyche but with a concomitant expectation that all conduct, whether by an individual or by society should promote the welfare of both the individual and of society.<sup>151</sup> From the foregoing, it may be concluded that the content of *ubuntu* is fluid in that it is based in all that is good and healthy and which promotes the goodwill of the individual and society – the individual and society being mirror images of one another.

Hutchison *et al*<sup>152</sup> observe that the *Barkhuizen* decision moderates and tempers the approach adopted by the Supreme Court of Appeal in *Brisley v Drotsky*.<sup>153</sup> The *Brisley* court, in reasoning that giving judges a discretion to disregard contractual provisions that offended their personal sense of what is fair and reasonable would give rise to legal and commercial uncertainty,<sup>154</sup> held<sup>155</sup> that good faith does not constitute an independent or “free floating” basis for the setting aside or non-enforcement of contractual terms.<sup>156</sup> The recognition of *ubuntu* as an expression of public policy will favour a further moderation of the approach of the *Brisley* court. The concept has both objective and subjective features, and since it does not lend itself to accurate definition as is evident from the different formulations of the content of *ubuntu* in the *Makwanyane* case,<sup>157</sup> it is conceivable that subjective features may, on occasion, come more strongly to the fore in relation to contracts.<sup>158</sup> A development in that direction has already

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<sup>150</sup> *Jurisprudence* (2002) 445, hereafter Roederer & Moellendorf *Jurisprudence*.

<sup>151</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC), paras [224]–[225].

<sup>152</sup> *Contract* 29-32.

<sup>153</sup> 2002 (4) SA 202 1 (SCA). In this case, the tenant wished to preclude the enforcement of a non-variation clause because to do so would be “onredelik, onbillik en in stryd met beginsels van *bona fides*” (para [12]).

<sup>154</sup> Para [24].

<sup>155</sup> Para [22].

<sup>156</sup> To paraphrase Hutchison *et al Contract* 29, good faith, reasonableness and fairness were said (by the court) to be merely abstract values rather than independent substantive rules of intervention in contractual relationships, and that the notions of *boni mores* and the legal convictions of the community were too vague to be used to judge the enforceability of contractual obligations.

<sup>157</sup> See also Roederer & Moellendorf *Jurisprudence* 445-446.

<sup>158</sup> See chapter 4.



occurred. In *Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd*,<sup>159</sup> the Constitutional Court expressed itself in favour of the importance of good faith in contract law<sup>160</sup> and of infusing contract law with constitutional values, including ubuntu.<sup>161</sup> Glover<sup>162</sup> and Kerr<sup>163</sup> are of the view that the *Barkhuizen* court has in a sense restored the *exceptio doli generalis*<sup>164</sup> which had been dealt a death blow by the Appellate Division in *Bank of Lisbon and South Africa Ltd v De Ornelas*.<sup>165</sup> Woolman<sup>166</sup> is critical of the Constitutional Court's "persistent refusal to engage in the direct application of the Bill of Rights," and its preference of an indirect approach in terms of 39(2) of the Constitution. The writer accuses the court of "[f]laccid analysis in terms of three vaguely defined values – dignity, equality and freedom..." In doing so, he postulates that the Constitutional Court "may assert constitutional jurisdiction ... whenever it believes that the common law ... does not conform to its understanding of our basic constitutional norms ... its authority [being] *unconstrained* by determinative standards." Woolman characterizes this approach as "the linguistic trick that causes the specific substantive provisions of the Bill of Rights – ss 9-35 of the Constitution – to disappear, and then to reappear in the rather amorphous form of an 'objective normative value system'."<sup>167</sup>

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<sup>159</sup> 2012 (1) SA 256 (CC).

<sup>160</sup> See, for example, para [22] (minority judgment) and para [72] (majority judgment).

<sup>161</sup> See, for example, para [23] (minority judgment) and para [72] (majority judgment).

<sup>162</sup> Glover 'Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?' (2007) 124 SALJ 449, 455-456, hereafter Glover (2007) 124 SALJ.

<sup>163</sup> Kerr (2008) 125 SALJ 241. The writer concludes that "those who thought that the *Bank of Lisbon* ... was correct are now obliged to note that it cannot any longer be so considered" (246).

<sup>164</sup> In Roman law, the *exceptio doli generalis* gave the judge an equitable discretion to make a decision on what appeared to be fair and reasonable. In the absence of fraud, an unconscionable claim would not be entertained even though the claim might be sound in law. Its reception into Roman-Dutch Law and hence into our common law was always uncertain with our courts at times prepared to recognise it: Hutchison *et al Contract* 26-29; Glover (2007) 124 SALJ 449-450. See also chapter 2 para 2.8.

<sup>165</sup> 1988 (3) SA 580 (A).

<sup>166</sup> Woolman (2007) 124 SALJ 763.

<sup>167</sup> At 769-770, fn12. The result of this is that "the court obviates the need to give the specific substantive rights in chapter 2 the content to determine the actual validity of the rule being challenged in the instant matter and of similar rules challenged in subsequent matters" ... in the process producing "the unintended consequence of undermining the rule of law" (763).

Regardless of the validity of Woolman's criticism, the considerations raised above, individually and cumulatively, suggest that a trend has emerged where, under the influence of the Constitution and the values of dignity, equality and freedom, equitable considerations of good faith,<sup>168</sup> fairness and reasonableness are beginning to play a more prominent role in decisions on the validity of contractual terms.<sup>169</sup>

As indicated before, tentative signs of the acceptance of a general principle of good faith as a constitutional value may be seen in the *Everfresh* case where the Constitutional Court pronounced that the question whether the Constitution requires good faith in contractual relations is one that should be determined sooner rather than later.<sup>170</sup> Further evidence of this trend may be found in cases such as *Breedenkamp and Others v Standard Bank of South Africa Ltd*<sup>171</sup> and in *Hoffmann v South African Airways*.<sup>172</sup>

In the *Breedenkamp* case,<sup>173</sup> the Court, *per* Jajbhay J, intervened to curtail the exercise of contractual power by granting an urgent interim interdict restraining the respondent from doing so. In answering the question whether it is fair in the circumstances to allow the

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<sup>168</sup> Notwithstanding the *Barkhuizen* court's acceptance in para [82], that good faith is not an independent rule of law determinative of the validity of a contractual term. The duty of good faith is discussed in chapter 2 para 2.8 and in chapter 4 para 4.2.4.4.

<sup>169</sup> In this regard, Woolman (2007) 124 *SALJ* 763 makes the observation that the *Barkhuizen* court speaks to a jurisprudence of restorative justice. "Such jurisprudence demonstrates far less concern with coherence and far more with compassion. It is unencumbered by rules and doctrine" (788).

<sup>170</sup> 2012 (1) SA 256 (CC) para [22] (minority judgment). The court continued to say that every contract has the potential of not being performed in good faith. See also para [71] (majority judgment) to same effect.

<sup>171</sup> 2009 (5) SA 304 (GSJ). The case concerned an application before Jajbhay J for an urgent interim interdict in respect of a clause that conferred a discretionary power on the bank to terminate the contract between the bank and the applicant for any reason. On the return date the matter was heard by Lamont J and the case was reported as *Breedenkamp v Standard Bank of SA Ltd* 2009 (6) SA 277 (GSJ). An appeal to the Supreme Court of Appeal was reported as *Bredenkamp and others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA). It should be noted that the first syllable of the applicant's name in the citations of the courts *a quo* is spelt with a double "e" whereas in the Supreme Court of Appeal citation it is spelt with one "e". The respective spellings will be retained and to avoid any confusion between the cases, the cases will hereafter be referred to as follows: *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ); *Breedenkamp* (return date) 2009 (6) SA 277 (GSJ); and *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA).

<sup>172</sup> 2001 (1) SA 1 (CC), hereafter *Hoffmann* 2001 (1) SA 1 (CC).

<sup>173</sup> *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ)

respondent to terminate the contract,<sup>174</sup> the Court said that a clause that purports to give a powerful bank the right to close a bank account (and in the process destroy the party's prospects of participating in the modern commercial world) without either showing that there is good cause for doing so, or giving the party a hearing, might operate in a way that is unfair, unjust and oppressive.<sup>175</sup> However, in rejecting Bredenkamp's appeal against the setting aside of the interim order,<sup>176</sup> the Supreme Court of Appeal,<sup>177</sup> opined that the *Barkhuizen* court<sup>178</sup> did not propose that fairness is a "core value of the Bill of Rights and that it is, therefore, a broad requirement of our law generally" and that, accordingly, any unfair conduct is void because it conflicts with the Constitution. The Supreme Court of Appeal dismissed as "novel" any suggestion that the Constitutional Court implied that there is a general underlying, all pervasive requirement of fairness, which if found to be breached, would render an impugned term unconstitutional, and, hence void.<sup>179</sup> The court re-affirmed its earlier decisions<sup>180</sup> and concluded that "fairness is not a free-standing requirement for the exercise of a contractual right..."<sup>181</sup> This interpretation of the *Barkhuizen* judgment was recently confirmed by the Supreme Court of Appeal in *Potgieter and Another v Potgieter NO and Others*.<sup>182</sup>

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<sup>174</sup> Para [59].

<sup>175</sup> Para [68].

<sup>176</sup> The interim interdict granted by Jajbhay J was set aside on the return date by Lamont J. See *Bredenkamp* (return date) 2009 (6) SA 277 (GSJ).

<sup>177</sup> *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) paras [27]–[28].

<sup>178</sup> *Barkhuizen* 2007 (5) SA 323 (CC).

<sup>179</sup> At para [27].

<sup>180</sup> For example, *Brisley* 2002 (4) SA 202 1 (SCA). See further chapter 2 paras 2.3 and 2.8.

<sup>181</sup> Para [53]. The merits of the *dicta* are considered in chapter 2. In this context it is apposite to acknowledge that the gloss that the Supreme Court of Appeal put on the Constitutional Court's decision in *Barkhuizen* 2007 (5) SA 323 (CC) constitutes a reality check on the belief, as expressed by Glover and Kerr (earlier in this paragraph) that the *exceptio doli generalis* has in a sense been restored by *Barkhuizen* decision, and puts a damper on the hope that the *Barkhuizen* decision may lead to a resurrection thereof. See further chapter 2.

<sup>182</sup> 2012 (1) SA 651 paras [32]–[34] and [36]. The Court upheld the Appellants' challenge to the variation of a trust deed by the founder and trustees of the trust, likening the deed to a *stipulatio alteri* which may be altered only with the consent of the beneficiaries.

In the *Hoffmann* case, the applicant challenged the respondent's refusal to employ him as a cabin attendant because of his HIV-positive status,<sup>183</sup> on the basis that the refusal constituted unfair discrimination, and violated his constitutional right to equality, human dignity, and fair labour practices.<sup>184</sup> The Constitutional Court, in ordering the respondent to offer Hoffmann a contract of employment as a cabin attendant, decided that the respondent's refusal impaired the applicant's dignity and amounted to unfair discrimination.<sup>185</sup> The court concluded that the refusal to employ Hoffmann because he was HIV impaired violated his right to equality, guaranteed in Section 9 of the Constitution.<sup>186</sup>

Though the Supreme Court of Appeal *dicta* in the *Bredenkamp* case<sup>187</sup> mirror the reasoning in *Brisley v Drotsky*,<sup>188</sup> the High Court decision in the *Bredenkamp* case<sup>189</sup> per Jajbhay J, the decision in the *Hoffmann* case,<sup>190</sup> and, especially the decision in the *Barkhuizen* case,<sup>191</sup> are indicative of the ascendancy of the considerations of reasonableness and fairness in determining the validity of clauses that grant discretionary powers and the exercise of such powers. Hence, it would not be inapposite to conclude that the above discussion, "illustrates a willingness [by the courts] to intervene if a party exercises a contractual power in a manner that fails to respect the constitutional rights of another party and may even, in appropriate circumstances, be prepared to compel one party to contract with another on constitutional grounds."<sup>192</sup> The regulatory role of constitutional values in the contract law arena received

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<sup>183</sup> The respondent sought to justify its decision on the basis of, *inter alia*, the inherent operational requirements of the work. The court rejected this argument on the basis of the respondent's own medical evidence and policy that only persons with a CD+ count of less than 350 were regarded as being unfit for who employment as a cabin attendant. The applicant did not fall into that category at the time when the respondent made its decision.

<sup>184</sup> Para [6].

<sup>185</sup> Para [40].

<sup>186</sup> Para [41].

<sup>187</sup> *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA).

<sup>188</sup> *Brisley* 2002 (4) SA 202 1 (SCA).

<sup>189</sup> *Bredenkamp* (interim interdict) 2009 (5) SA 304 (GSJ).

<sup>190</sup> *Hoffmann* 2001 (1) SA 1 (CC).

<sup>191</sup> *Barkhuizen* 2007 (5) SA 323 (CC).

<sup>192</sup> *Hutchison et al Contract* 41.

express recognition in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*<sup>193</sup> where the Constitutional Court pronounced that it is “necessary to infuse the contract law with constitutional values, including values of *ubuntu*.”<sup>194</sup>

### 1.3.4 Conclusion

The law of contract provides a legal framework that aims: (i) to ensure that agreements are kept by providing mechanisms for their enforcement and remedies for non-compliance; and (ii) to promote legal and commercial certainty and to promote good faith, fairness, and reasonableness in contractual relations.<sup>195</sup> In doing so, the law of contract has to balance the tension that exists between certainty and flexibility.<sup>196</sup> Rigid adherence to rules would compromise individual and judicial discretion, with good faith, fairness, and reasonableness amongst the casualties, whilst (excessive) flexibility would dilute certainty,<sup>197</sup> with the rule of law and respect of the law as possible casualties. Public policy, as informed by the provisions and values of the Constitution, appears to be the mechanism favoured by the Constitutional Court to achieve this balance.<sup>198</sup>

Having sketched the role of certainty and flexibility in relation to contracts in general, it is now apposite to briefly explore the position in the contract of sale.

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<sup>193</sup> 2012 (1) SA 256 (CC) para [71].

<sup>194</sup> The regulatory role of the constitutional values such as dignity, equality and freedom is explored in chapter 4.

<sup>195</sup> *Hutchison et al Contract* 22-23. The considerations of good faith, fairness and reasonableness are dealt with in chapters 2, 3, 4, 5 and 6.

<sup>196</sup> *Van der Merwe et al Contract* 10; *Hutchison et al Contract* 23.

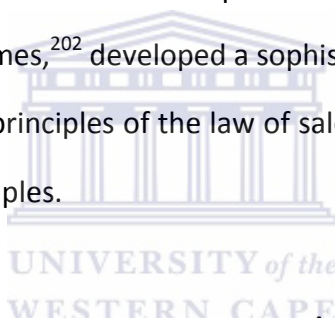
<sup>197</sup> *Hutchison et al Contract* 23.

<sup>198</sup> See *Barkhuizen* 2007 (5) SA 323 (CC) paras [87] and [28]. Chapter 4 deals with the role of public policy in answering the question of law, viz., whether our law should recognise the validity of contracts of sale and lease at a reasonable price or rental or at a unilaterally determined price.

## 1.4. Contracts of sale

### 1.4.1 Introduction

Contracts of sale are “the most common and typical of contracts”<sup>199</sup> and are entered into, consciously and unconsciously, on a daily basis. By entering into a contract, each contractant voluntarily<sup>200</sup> assumes one or more obligations. The contractant often does so oblivious of the consequences or blindly accepting consequences without appreciating the implications thereof.<sup>201</sup> Litigation or the threat or fear thereof also exacts its toll on many different levels. For example, litigation could possibly have an adverse effect on the structure and activities (legal, economic, educational, social etc) of the family. In order to regulate this daily activity and to clothe the parties to the contract with the protection of the law, our legal system has over the centuries, from Roman times,<sup>202</sup> developed a sophisticated set of legal principles which today comprise our common law principles of the law of sale. The discussion that follows deals briefly with the common law principles.



### 1.4.2 The protection afforded to contractants at common law

It is imperative for contractants to know what they are contracting for and what rights and obligations flow from their actions. Such understanding is promoted, and the contractants protected, by the law of sale requiring that the contract contains certain *essentialia*.<sup>203</sup>

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<sup>199</sup> Du Bois *et al Wille's Principles* 740.

<sup>200</sup> The voluntariness of the assumption of the obligation is debatable when viewed in the light of, for example, standard form contracts, discussed chapter 2 para 2.4.2. See further Aronstam *Consumer Protection* 14 *et seq.*

<sup>201</sup> Aronstam *Consumer Protection* quotes the following from the speech of the Minister of Economic Affairs to the House of Assembly on 29 March 1971: “In many cases the purchaser does not read the contents of the contract and, even if he does read them, he does not for the most part understand the implications of certain clauses appearing in the contract. If in fact the purchases does have objections to any term or condition included in the contract, he will often be swayed by the assurance of the seller that the danger he envisages is not a real one” (23).

<sup>202</sup> For more on the historical development see Kerr *Sale and Lease* 3–7.

<sup>203</sup> Zulman & Kairinos *Norman's Law of Purchase and Sale in South Africa* (2005) 1-3, hereafter Zulman & Kairinos *Norman's Law of Purchase and Sale* for a list of definitions of a contract of sale going back to Gaius (*Institutionem*) 3.1.39. At this juncture, it is appropriate to repeat that *naturalia* are imposed, *ex lege*, in contracts, mainly for the protection of the buyer and may, if the law so allows, be excluded by agreement

#### 1.4.2.1 *Essentialia*

The common law identifies specific contracts by means of their *essentialia*.<sup>204</sup> The *essentialia*, aside from serving as a tool for identifying a contract as belonging to a specific class or category,<sup>205</sup> also serve to identify for the parties the most important obligations that flow from that contract.<sup>206</sup> Christie<sup>207</sup> interprets Pothier as describing *essentialia* as the essence of a contract in the absence whereof there is either no contract or a contract of a different kind.<sup>208</sup>

#### 1.4.2.2 The price as an *essentiale* of a contract of sale

##### (A) Introduction

It is an *essentiale* of contract of sale that there must be agreement on the price. The requirement that the contractants must have stipulated a price, and the notion that it be certain, in the sense that it must be agreed upon between the parties,<sup>209</sup> appear consistently in definitions of the contract of sale from the time of Gaius to the present.<sup>210</sup> This requirement, therefore, constitutes one of the protective mechanisms devised and refined by our common law and serves, *inter alia*, to prevent disputes regarding the counter-performance expected of the buyer.<sup>211</sup> The price must be ascertained or objectively ascertainable in that the contract contains some objective standard by the application whereof it will be possible to determine

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between the contractants. In this regard, it is important to note that the Cape Provincial Division has extended the protection of the implied warranty against latent defects (one of the *naturalia*) to the seller as well. See *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C) and *Janse Van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C). The Durban and Coast Local Division and the Orange Free State Provincial Division rejected the reasoning of the Cape Provincial Division. See *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D) and *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 (2) SA 208 (O).

<sup>204</sup> The role and function of *essentialia* are dealt with in chapter 4.

<sup>205</sup> See Hosten *Introduction* 720.

<sup>206</sup> Van der Merwe *et al Contract* 245; Hosten *Introduction* 770.

<sup>207</sup> Christie & Bradfield *Christie's The Law of Contract* 164-165.

<sup>208</sup> The theme of *essentialia* as the essence of the contract is developed in chapter 4 para 4.3.3.3(D).

<sup>209</sup> At common law, the parties may agree on any price. There is no rule of law that states that the price agreed upon must be the market price or that it must be close to that price. Kerr *Sale and Lease* 30; Bradfield *et al Principles* 21-22.

<sup>210</sup> Kerr *Sale and Lease* 3-5 and 30-31. The history of the law in this regard is briefly set out in para 1.2 above.

<sup>211</sup> Kerr *Sale and Lease* 66; Zimmermann *The Law of Obligations* 254-255.



the price without reference to contractants.”<sup>212</sup> This seemingly simple requirement that there must be agreement on the price is beset with problems of definition - what are and what ought to be the accepted routes of arriving at such agreement?<sup>213</sup>

As a starting point, it may be said that the requirement that the parties must have agreed on a price is to show that there must be a serious intention to pay. More relevant to the matter at hand is the further requirement that the price must be certain in the sense that it is either ascertained or objectively ascertainable.

#### (B) Price must be ascertained

The requirement that the price must be ascertained presents no problem. It is ascertained in the sense that it is fixed in the contract or it is arrived at, for example, by virtue of a simple arithmetical calculation. For example, X buys a motor vehicle for 50 000 ZAR (fixed price) or X buys a 10 000 loaves of bread at 10 ZAR (simple arithmetical calculation).<sup>214</sup> In these examples, the price is clear. It is known. It is certain. There is no doubt about what the price is. The problem lies with the interpretation to be given to the requirement that the price must be ascertainable.

#### (C) Price must be ascertainable

In the *Westinghouse* case,<sup>215</sup> the court required the contractants to either fix the amount of that price in their contract or to agree upon some external standard by the application whereof

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<sup>212</sup> *Westinghouse* 1986 (2) SA 555 (A) 547C-D; *Burroughs* 1964 (1) SA 669 (W) 670C-D; *Murray & Roberts* 1991 (1) SA 508 (A) 14G-H; *Lambons* 1997 (4) SA 141 (SCA) 1997 (4) SA 158F-H. Payment must take the form of money. *Kerr Sale and Lease* 30; Van den Bergh ‘The Roman tradition in the South African contract of sale’ (2012) 1 *TSAR* 2012 53, 55, hereafter Van den Bergh (2012) 1 *TSAR* 2012. The rental requirement in contracts of lease is similarly formulated in *Proud Investments* 1991 (3) SA 738 (A) 746G-H. The *essentialia* of price and rental is explored more fully in chapter 4.

<sup>213</sup> This theme is explored in chapters 4 and 5.

<sup>214</sup> *Kerr Sale and Lease* at 33; Zulman & Kairinos *Norman’s Law of Purchase and Sale* 43.

<sup>215</sup> 1986 (2) SA 555 (A) 574 C-D.



it would be possible to determine the price without reference to them.<sup>216</sup> The *Westinghouse* principle means that it should be possible for even a total stranger to ascertain the price by employing the external standard, the contractants then playing no role in this process, other than to pay and to receive the price. From this, it is clear that the price must be objectively capable of ascertainment. Our law recognises that this may happen in one of two ways, either by nomination or by a formula.

#### (i) Nomination

Nomination<sup>217</sup> is the process whereby the seller and the buyer jointly designate an identified or identifiable third party to settle the price on their behalf.<sup>218</sup> A valid contract comes into existence as soon as the contractants have agreed on a nominee provided, of course, that the other *essentialia* have been met.



<sup>216</sup> This is henceforth referred to as the *Westinghouse* principle.

<sup>217</sup> Kerr *Sale and Lease* 36-55; Bradfield *et al Principles* 19–20. *Gillig v Sonnenberg* 1953 4 SA 675 (T), hereafter *Gillig* 1953 4 SA 675 (T) and *Dublin v Diner* 1964 1 SA 799 (D), discussed in chapter 4 para 4.4.2 illustrate this method. Both contractants must be in agreement as to the identity of the nominee and it cannot be left to one of the contractants to unilaterally appoint the nominee. It appears to be possible for the parties to agree that the price would be settled by one of the contractants and a nominee. In an *obiter dictum* in *Murray & Roberts* 1991 (1) SA 508 (A) the court reasoned that the validity of such an agreement would depend on the facts of the case, in particular the relationship between the contractants, and the independence and competence of the nominee (515B-E). It is submitted that such an agreement does not compromise the *Westinghouse* principle provided that the independence and competence of the nominee is beyond reproach. Conceivably such an arrangement would be apposite in situations such as where only one of the contractants is of the view that he/she does not have the necessary skill and/or expertise to negotiate a price of a particular commodity. The nominee would then, in a manner of speaking, stand in for the contractant in a manner that approximates that of an agent. Kerr's suggestion that a deadlock-breaking clause be included in such an agreement is, with respect, a sound one: *Sale and Lease* 37. In the absence of the recognition of a duty to negotiate in good faith, a situation could very well arise where the contractant (the one with whom the nominee must settle the price) frustrates the agreement by ensuring that no agreement is reached with the nominee. A deadlock-breaking clause could provide, for example, that in the event of no agreement being reached, the price is to be settled by third party. The role of a deadlock-breaking mechanism is discussed again in chapter 4 para 4.2.4.4.

<sup>218</sup> Examples: "We appoint Joan Smith to settle the price on our behalf." The nominee's identity is ascertained. It is ascertainable: "We appoint the current Dean of the Faculty of Law at the University of the Western Cape to fix the price on our behalf".

## (ii) Formula

The contractants may agree on a formula, the employment of which would settle the price to be paid and received.<sup>219</sup> Whilst there is no closed list of formulae, the *sine qua non* is that the formula must, in terms of the *Westinghouse* principle, be sufficiently clear so as to enable an outsider to calculate the price without further involvement of the contractants.<sup>220</sup> The objective method of price determination may be contained in the contract itself, or it may arise from commercial practice or other custom or usage. Some of the formulae are briefly discussed below.

### (a) Usual or current price

The contractants may agree to a sale at the usual or current price.<sup>221</sup> Such an agreement is valid only in respect of commodities in free supply (“over-the-counter” goods), for example, milk, coal, and bricks. The price would then be the usual price of the particular seller.<sup>222</sup> A sale at the usual price will not be valid in the case of expensive, rare, or unique commodities, for example, gold jewellery or jewellery made of precious stones, a painting etc.<sup>223</sup> These commodities are expensive, rare or unique, consequently there is no usual price for them and one would expect of the parties to agree expressly on the price or to appoint a nominee to settle the price for them.<sup>224</sup>

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<sup>219</sup> Kerr *Sale and Lease* (2004) 33-55; Bradfield *et al Principles* 17-22; Scott *et al The Law of Commerce* 141.

<sup>220</sup> *Westinghouse* 1986 (2) SA 555 (A); Van den Bergh (2012) 1 TSAR63-67; Lücke ‘Illusory, Vague and Uncertain Contractual Terms’ (1977-1978) 6 *Adel LR* 1, 14.

<sup>221</sup> *Shell SA (Pty) Ltd v Corbitt and Another* 1984 4 SA 523 (C) 526F-527E, hereafter *Shell SA* 1984 4 SA 523 (C); *Lombard v Pongola Sugar Milling Co. Ltd* 1963 (4) SA 119 (D) 128 A-H, hereafter *Lombard* 1963 (4) SA 119 (D).

<sup>222</sup> In such instances, and unlike a reasonable price, judicial intervention is minimal because the price is easily ascertainable.

<sup>223</sup> Contrast this with the position in the Netherlands where a reasonable price is permissible. See chapter 5 para 5.2.6.2(B).

<sup>224</sup> Kerr *Sale and Lease* 33-34; Van den Bergh (2012) 1 TSAR 64-65; *Shell SA* 1984 4 SA 523 (C) 526F-527E; *Lombard* 1963 (4) SA 119 (D) 128 A-H.

(b) Market price

With reference to the meaning of the market value<sup>225</sup> in the context of contractual damages, the Appellate Division in *Katzenellenbogen Ltd v Mullin*<sup>226</sup> expressed the view that market does not necessarily refer to an organised entity like a municipal produce market. In *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays*,<sup>227</sup> the court said a market refers “to any source to which the purchaser might reasonably have gone, in the circumstances, in order to replace the goods which ought to have been delivered to him.” Market price would be the price charged at such a source.<sup>228</sup>

(c) Price is implied

If the price is implied,<sup>229</sup> in other words, if no mention is made of the price in the contract, then the sale will be for the usual price of the seller.<sup>230</sup>

(d) Competitor’s price list

Here the parties agree, for example, that the seller will match the lowest price on the price list of a competitor.<sup>231</sup>

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<sup>225</sup> “Markwaarde van eiendom is na my mening iets wat objektief vasstelbaar is”: *Stead v Conradie en Andere* 1995(2) SA 111 (A) 123B-C; *Rustenburg Platinum Mines Ltd v Breedts* 1997 (2) SA 337 (A) 349B-C and 351B-D. See also Van der Bergh (2012) 1 TSAR 65.

<sup>226</sup> 1997 (4) SA 855 (A) 878E-F.

<sup>227</sup> 1971 (3) SA 286 (T) 288.

<sup>228</sup> *Erasmus v Arcade Electric* 1962 (3) SA 428 (T). See also *Letaba* 1993 (1) SA 768 (A) 775B-D which dealt with a dispute regarding the determination of rental in a lease agreement. See also *Desmond Isaacs Agencies (Pty) Ltd, t/a Decorative Pieces v Contemporary Displays* 1971 (3) SA 286 (T) 287H; Zulman & Kairinos *Norman’s Law of Purchase and Sale in South Africa* 44.

<sup>229</sup> *Kerr Sale and Lease* 34.

<sup>230</sup> For example, where a person buys a newspaper from a vendor on the street or at a shop, or a person buys a loaf of bread or tin of fish or at a shop without agreeing on a price with the seller, then the price will be the usual price of the seller even if the price is higher than that of the shop next door. There need not be an existing legal relationship between the contractants. The discussion under Usual/Current price in (ii)(a) above applies here as well. See also *Rex v Kramer* 1948 (3) SA 48 (N).

<sup>231</sup> *Shell SA* 1984 4 SA 523 (C), 526F-527E. The contractants may identify a competitor or the contract may be open-ended in this regard.

(e) *Sales ad mensuram*

In the case of a sale *ad mensuram*,<sup>232</sup> the parties agree to a price per unit. Counting, weighing or measuring must then occur to finalise the price but the contract will have come into existence as soon as the price per unit was agreed upon.

(f) Course of dealing

The average price of previous dealings between the contractants may also be used to settle the price where the contract is silent on the price.<sup>233</sup>

In all of the above instances, the price is determined by making use of a specific formula. The price is ascertainable because an external objective standard, for example, the price list of the competitor or a price per unit, has been agreed upon as the basis, as *per* the *Westinghouse* principle, on which the price may be ascertained without further reference to the contractants. The contract of sale comes into existence as soon as a valid formula has been agreed upon provided, of course, that the other two requirements<sup>234</sup> have been complied with.

### 1.4.2.3 The rental as an *essentiale* of a contract of lease

As in the case of sale, the contractants are, in principle,<sup>235</sup> at liberty to agree to any rental. As previously indicated,<sup>236</sup> there is a marked similarity in the fixing of the price and rental in

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<sup>232</sup> Kerr *Sale and Lease* at 72 – 75.

<sup>233</sup> In *Singh v Sir JL Hulett & Sons Ltd* 1924 117 NPD, the contract for the sale of sugar did not contain a price. During the period 1917-1921 the price had been calculated using the seasonal as opposed to the monthly average price of sugar. The court based its decision that the price should be based on the seasonal average price on the history of the transactions from 1917-1921 between the contractants. The course of dealing is also recognised as a method of arriving at a price in international jurisdictions. See chapter 5.

<sup>234</sup> Agreement to buy and sell and agreement on the subject matter of the sale. It must be noted that agreement on *essentialia* is not a validity requirement for all contracts but is merely required for a valid contract to be identified as a specific nominate contract: Van der Merwe *et al* 245. See further chapter 4 para 4.2.4.1.

<sup>235</sup> In this regard, it must be noted that section 13 (4) and (5) of the Rental Housing Act 50 of 1999 empowers rental housing tribunals to replace a rental with one that is “just an equitable” to the lessor and lessee and with due regard to the provisions of section 13 (5) and (6).

<sup>236</sup> See paras 1.1-1.2 above.

contracts of sale and lease respectively. In both cases, the contractants may not agree to a reasonable amount as a price or rental; neither may they agree that the price or rental be unilaterally determined by one of them. In both lease and sale, the amount to be paid may either be a fixed sum or one that is ascertainable by virtue of a formula or method agreed upon between the contractants. So for example, an agreement that the rental will be what was paid by a previous tenant was accepted as valid.<sup>237</sup> The usual or customary rental will be implied where nothing is said about the rent.<sup>238</sup> The usual rent is the rent charged for that kind of property in the area where the leased property is situated.<sup>239</sup> As in the case of sale, it is also permissible for the contractants to agree to leave the rental to be determined by an ascertained or objectively ascertainable third party.

#### **1.4.2.4 Conclusion**

Our law requires certainty, not only regarding the price and rental, but also, regarding the manner in which it is arrived at. In light of the fact that contracts of sale are based on consensus where, as a general proposition, the contractant voluntarily assumes obligations, there should be certainty about these obligations, especially the one relating to the price and rental. The importance of agreement on the price and rental is underscored by the fact that, generally speaking, payment of the price and rental is the most important obligation which the buyer and tenant undertake to discharge, and receipt of payment is, arguably, the most important right the seller and lessor have.

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<sup>237</sup> Kerr *Sale and Lease* 258.

<sup>238</sup> Kerr *Sale and Lease* 258; *Lobo Properties (Pty) Ltd v Express Lift Co SA (Pty) Ltd* 1961 (1) SA 704 (C). See further the discussion in chapter 4 para 4.3.4.3(D).

<sup>239</sup> Kerr *Sale and Lease* 259. See also chapter 4 para 4.3.4.3(D).

## 1.5 The issues

It is in the context of the above that the *obiter dicta* of the Supreme Court of Appeal and the then Appellate Division that recommended the validity of contracts of sale and lease at a reasonable price and rental, respectively, or at a unilaterally determined price and rental<sup>240</sup> will be examined.

The aim is to determine their validity as principles and rules of law, and the effect of their application from a constitutional perspective as well as from the perspective of policy and practice. This will be done by focussing on whether:

- (i) they are constitutionally sound, as being in consonance with the Constitutional Court's decision that the content of public policy is to be found in "the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights."<sup>241</sup>
- (ii) they run counter to the trend where, under the influence of the Constitution, equitable considerations of good faith, fairness, and reasonableness play a more prominent role in decisions on the validity of contractual terms.<sup>242</sup>
- (iii) they promote the requirement of consensus in its broad, general sense,<sup>243</sup> between the contractants as required by the authorities.<sup>244</sup>
- (iv) they promote the requirement of certainty.<sup>245</sup>

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<sup>240</sup> See para 1.1 above.

<sup>241</sup> *Barkhuizen* 2007 (5) SA 323 (CC), paras [29] and [30]. See para 1.3.3 above. The issue is addressed in chapter 4.

<sup>242</sup> See, for example, *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ) and *Hoffmann* 2001 (1) SA 1 (CC) discussed in para 1.3.3 above. See also chapter 4 para 4.2.4.2(A) and generally chapter 2.

<sup>243</sup> In its broad, general sense, consensus means that there must be a meeting of minds between the parties. In other words, the parties must be in agreement about the terms of the contract. An offer coupled with an acceptance thereof usually results in consensus between the contractants. *Van der Merwe et al Contract* 17-45 and *Hutchison et al Contract* 13-19. See also the discussion of consensus in chapter 2 para 2.2.2 and in chapters 3, 4, 5 and 6.

<sup>244</sup> See *Kerr Sale and Lease* 3-5; *Hosten Introduction* 702-713; MacKeurtan & Hackwil *MacKeurtan's The Law of Sale of Goods in South Africa* (1984).

<sup>245</sup> See chapter 2 and in particular para 2.6. See also chapters 3, 4, 5 and 6.

- (v) they impact on the interests of the buyer and particularly:
  - (a) the common law protections, such as the implied warranties, that have historically developed to protect the buyer.
  - (b) the legislative interventions such as the Consumer Protection Act,<sup>246</sup> National Credit Act,<sup>247</sup> and the Rental Housing Act<sup>248</sup> which as a matter of law and policy, seek to benefit and protect the consumer.

The questions that will be examined in determining the legal and policy implications of adopting the *obiter dicta* include the following:

- (i) Will adoption of the *obiter dicta* result in an increase in litigation? A case may be made that litigation would be avoided if, at the outset, the contractants manifest their respective positions regarding the price that should be paid, thereby giving each an opportunity to walk away from the deal because the proposed price is unacceptable as being either too high or too low as the case may be.<sup>249</sup>
- (ii) Is it the court's function to settle disputes or to create contracts by, for example, imposing a price on the contractants?<sup>250</sup> The role and function of the court will be brought into focus where it is determined that a discretion has not been exercised *arbitrio bono viri*, this being the controlling mechanism suggested in the *NBS Boland Bank* case.
- (iii) Is there an economic or social need for a sale to be at a reasonable price?<sup>251</sup>

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<sup>246</sup> Act 68 of 2008.

<sup>247</sup> Act 34 of 2005.

<sup>248</sup> Act 50 of 1999.

<sup>249</sup> See generally in this regard the discussion in chapters 4 and 5.

<sup>250</sup> The wisdom of a court participating in the contract-creating process, in addition to its role as a dispute-settling mechanism, is questionable: *Hurwitz* 1994 (3) SA 449 (C) 453I–455G. See also Kerr *Contract* 408 n204; *Gillig* 1953 (4) SA 675 (T). Lubbe & Murray *Contract* argue that “judges are, in general, not entitled to supply terms and make contracts where the parties have not indicated their intention clearly” (307). See further chapter 4 para 4.4.

<sup>251</sup> See chapter 4 paras 4.2.4.4 and 4.3.4.3(E).

The desirability of adopting the *obiter dicta* will also be considered in light of the following:

- (i) The possible uncertainty they may produce surrounding the method of calculating the price even if it is to be done *arbitrio bono viri*<sup>252</sup> as suggested by the court in the *NBS Boland Bank v One Berg River* case.<sup>253</sup>
- (ii) The possibility that the recognition thereof may exacerbate the current unequal bargaining power<sup>254</sup> that exists between many buyers and sellers.<sup>255</sup> The possibility exists that clauses to the effect advocated in the two *obiter dicta* may be included in standard form contracts<sup>256</sup> thereby further compromising the buyer's ability to bargain and in the process inhibiting the buyer's freedom to contract.<sup>257</sup> Another possible adverse consequence is that it could undo the policy advances secured under consumer protection legislation.<sup>258</sup>
- (iii) A seller<sup>259</sup> may abuse its discretionary power and fix a purchase price that exceeds the real value of the commodity secure in the knowledge that the buyer may not have the means and/or ability to engage in costly and/or lengthy litigation<sup>260</sup>.

The issues raised above will be dealt in the context of the question whether the *status quo*, namely, the refusal to recognise the validity of contracts of sale and rental at a reasonable price

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<sup>252</sup> See chapter 4 para 4.3.

<sup>253</sup> From the perspective of the seller, the price, if left to be settled by the buyer, may be too low necessitating litigation to establish that the buyer did not exercise its discretion *arbitrio bono viri*. The same applies if the buyer is of the opinion that the seller did not exercise its discretion *arbitrio bono viri*.

<sup>254</sup> In the *Barkhuizen* 2007 (5) SA 323 (CC), the Constitutional Court confirmed that many people who have no bargaining power or who do not understand contracts, nevertheless, conclude contracts (para [65]). The Court also confirmed the principle recognised in *Afrox Healthcare* 2002 (6) SA 21 (SCA) that unequal bargaining power is indeed one of the factors that play a role in the consideration of public policy (para [59]). See also chapter 2 para 2.4.4 and generally chapters 3, 4, 5 and 6.

<sup>255</sup> *Hutchison et al Contract* 24–25.

<sup>256</sup> *Hutchison et al Contract* notes that it has been estimated that 95% of all transactions are included in this manner (25). See further chapter 2 para 2.4.2.

<sup>257</sup> *Hutchison et al Contract* 25 and *Kerr Sale and Lease* 72.

<sup>258</sup> See the discussion in chapter 4 and in particular in 4.3.4.3(E).

<sup>259</sup> Sellers are usually in the better bargaining position.

<sup>260</sup> *Kerr The Law of Sale and Lease* 72. The notions of abuse of discretionary power and costs of litigation are examined in chapters 3 and 4.



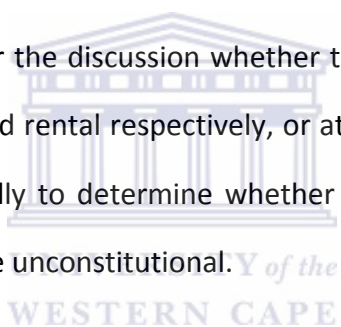
and rental respectively, or at a unilateral determined price and rental should be retained. This will be done in the chapters as follows:

## 1.6 Chapter outline

Chapter Two: Contractual freedom and certainty: the role and function of public policy and good faith

This chapter examines the current status and development of the principles of certainty and freedom of contract with reference to contractual discretionary powers, in the law of contract in general. This will include a discussion of the constitutional developments in regard to these notions.

The aim is to provide the basis for the discussion whether the recognition of contracts of sale and lease at a reasonable price and rental respectively, or at a unilaterally determined price or rental is warranted, and specifically to determine whether the recognition thereof would be contrary to public policy and hence unconstitutional.



Chapter Three: Overview of consumer protection legislation: its impact on certainty and freedom of contract.

This chapter will highlight some of the significant aspects of the protection given to consumers by the Consumer Protection Act,<sup>261</sup> the National Credit Act,<sup>262</sup> and the Rental Housing Act<sup>263</sup> and the policy considerations underlying these statutes with a view to determining (i) whether public policy considerations can operate in harmony with the principles of freedom, sanctity and certainty of contract and (ii) whether the recognition of the *obiter dicta* would conflict with

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<sup>261</sup> Act 68 of 2008.

<sup>262</sup> Act 34 of 2005.

<sup>263</sup> Act 50 of 1999.

the public policy considerations that underpin public interest legislation such as the three statutes.

Chapter Four:           The constitutional, jurisprudential and policy imperatives informing the role and function of the *essentialia* of price and rental – contractual freedom and certainty

This chapter considers the question whether it can be argued that a reasonable price, or unilaterally determined price<sup>264</sup> can be said (i) to be the result of a voluntary choice; (ii) to promote certainty;<sup>265</sup> (iii) to be reflective of the constitutional, jurisprudential and policy imperatives that inform the notion of *essentialia*<sup>266</sup> and (iv) to be in line with the policy direction of recent consumer protection legislation.<sup>267</sup>

In answering these questions, the chapter discusses the constitutional, jurisprudential and policy imperatives that inform the requirement of *essentialia* with a view to laying the foundations for a conclusion regarding the role and function of the *essentialia* of price and rental in the promotion of the principles of contractual freedom and certainty. The chapter also deals with the court's function in the determination of the *essentialia* of price and rental and how such role affects the principles of contractual freedom and certainty.

The aim in this chapter is to provide a basis for a conclusion about (i) the impact that recognition of the *obiter dicta* would have on the principles of freedom and sanctity of contract, informed consent and certainty that form the basis of the South African law of contract and (ii) whether public policy, as informed by constitutional values, that underpin the *essentialia* of price and rental support such a development.

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<sup>264</sup> As per the *obiter dicta* in *NBS Boland Bank* 1999 (4) SA 928 (SCA) and in *Genac Properties* 1992 (1) SA 566 (A) discussed in para 1.1 above.

<sup>265</sup> See chapters 2 and 4.

<sup>266</sup> See chapter 4 para 4.2.4.

<sup>267</sup> See chapter 3.

## Chapter Five: Discretionary powers in respect of price and rental in international and comparative perspective

This chapter deals with the concept of discretionary powers in respect of price and rental in international and comparative perspective. It examines the approaches in international instruments<sup>268</sup> as well as in other jurisdictions that recognise the notion of a reasonable price or rental and/or that allows the unilateral determination of the price or rental. The object will be to contrast the position in those jurisdictions with our common law approach with a view to ascertaining what lessons, if any, may be learnt from the international experience in respect of the question of law, namely, whether validity should be bestowed on contracts of sale and lease at a reasonable price or rental respectively, or at a unilaterally determined price or rental.

## Chapter Six: Conclusion and recommendations

This chapter outlines and justifies my conclusions with reference to the preceding chapters. It will determine whether our law should, in light of public policy as informed by constitutional imperatives, recognise as valid a contract of sale and lease at a reasonable price or rental respectively, or at a price or rental determined unilaterally by one of the contractants. In the process, it will determine whether the current legal position that the price and rental must be ascertained or objectively ascertainable should be retained, and whether it is sufficiently refined and developed to give expression, not only, to the principles of freedom, sanctity and certainty of contract that underpin contract law, but also, to the democratic values of human dignity,<sup>269</sup> equality<sup>270</sup> and freedom (including freedom of contract)<sup>271</sup> that underpin the Constitution.

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<sup>268</sup> These are the United Nations Conventions on Contracts for the International Sale of Goods (1980), UNIDROIT Principles of International Commercial Contracts (2004), and the Principles of European Contract Law (2003).

<sup>269</sup> Section 10.

<sup>270</sup> Section 9.

<sup>271</sup> Section 7(1).

## Chapter 2

### Contractual freedom and certainty: the role and function of public policy and good faith

#### 2.1 Introduction

This chapter deals with the current status and development in South African common law of the principles of certainty and freedom of contract with specific reference to discretionary powers within the law of contract in general. This includes a discussion of the constitutional developments concerning these principles.<sup>272</sup>

The aim is to provide a basis for determining whether the recognition of a unilateral discretionary power to settle the price and the rental as well as the recognition of a sale at a reasonable price or rental is warranted,<sup>273</sup> and whether such developments would be contrary to public policy and hence unconstitutional.<sup>274</sup>

#### 2.2 Freedom of contract

##### 2.2.1 Historical development of freedom of contract

The classical theory of the law of contract with the twin notions of freedom and sanctity of contract as its cornerstone and which is central to a capitalist, free-market economy,<sup>275</sup> has its

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<sup>272</sup> In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), hereafter *Barkhuizen* 2007 (5) SA 323 (CC), public policy was redefined as being informed by the concept of *ubuntu*, and as being a repository of (i) those values that the society hold most dear; (ii) the general sense of justice of the community (iii) the *boni mores* manifested in public opinion and incorporates the notions of fairness, justice and equity, and reasonableness and the necessity to do simple justice between individuals. See chapter 1 para 1.3.3.

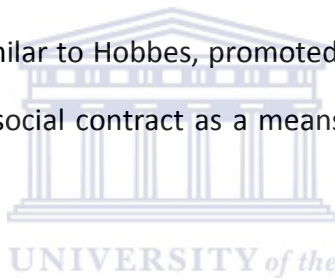
<sup>273</sup> It will be recalled that in a footnote in chapter 1 para 1.2 it was explained that there is a marked similarity between contracts of sale and contracts of lease: Cooper *Landlord and Tenant* (1994) 6-7. Hence, the practice of referring mainly to the law relating to the price in contracts of sale will be continued in the interest of brevity and avoiding repetition. Differences between the two will be highlighted.

<sup>274</sup> The possibility exists that such developments may be contrary to public policy and hence unconstitutional when measured against the Constitutional Court's findings in *Barkhuizen* 2007 (5) SA 323 (CC) as to the constituent elements of public policy. This aspect is also explored in the remaining chapters.

<sup>275</sup> Lubbe & Murray *Farlam & Hathaway Contract Cases, Materials and Commentary* (1988) 2, hereafter Lubbe & Murray *Contract*; Kessler 'Contracts of Adhesion – Some Thoughts about Freedom of Contract' (1943) 43 *Columbia LR* 629, 629-630, hereafter Kessler (1943) 43 *Columbia LR* 629.

roots in the social, economic and political philosophies of sixteenth and seventeenth centuries,<sup>276</sup> during which period “[t]he growing belief in the self-sufficiency of human reason highlighted individual freedom and autonomy vis-à-vis the state and other individuals...”<sup>277</sup>

Grotius (1583-1645), a natural law theorist, was a leading proponent of that view. He considered the right to contract a basic human right.<sup>278</sup> The explanation in his *Inleidinge*<sup>279</sup> makes it clear that the notions of freedom, equality and autonomy underpin this right.<sup>280</sup> The English philosopher, Thomas Hobbes (1588-1679) believed that, subject to the dictates of natural law, fundamental rights were absolute and could be surrendered only by the individual himself. Contract was the vehicle for such surrender, hence his support for the proposition that freedom of contract was a basic human right.<sup>281</sup> John Locke (1632-1704) emphasized individualism and, in a manner similar to Hobbes, promoted the rights of the individual to self-determination. He perceived the social contract as a means of securing the individual’s rights



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<sup>276</sup> Aronstam *Consumer Protection* 1. Aronstam argues that the principle of freedom of contract was extensively used by various theorists and commentators to give expression and content to the doctrine of freedom and liberty that characterized the libertarian philosophies of the sixteenth and seventeenth centuries (v). It “was used by philosophers to formulate a new political order; by sociologists as a means of freeing men from the toils of social status; by economists who advocated the creation of a *laissez-faire* economic system; and by legal philosophers as a means of formulating a legal order in which the individual could exercise his legal rights without vexatious constraint, a legal order in which the sanctity of his bargains would be rigidly upheld.” There is a brief discussion of the position prior to, and leading up to this period in the discussion on the related notion of consensuality in Van der Merwe, van Huyssteen, Reinecke & Lubbe *Contract: General Principles* (2012) 17-18, hereafter Van der Merwe *et al Contract*.

<sup>277</sup> Van der Merwe *et al Contract* 18.

<sup>278</sup> Aronstam *Consumer Protection* 1.

<sup>279</sup> Hugo & Lee *The Jurisprudence of Holland: The Text Translated with Brief Notes and a Commentary by R.W. Lee* Volume 2 (1936) 295.

<sup>280</sup> This development in the legal arena mirrored the development in the political arena where natural law theorists such as John Locke proposed total freedom of choice within the limits of the law of nature. Johnson, Pete & Du Plessis *Jurisprudence: A South African Perspective* (2001) 40, hereafter Johnson *et al Jurisprudence*; Aronstam *Consumer Protection* 3.

<sup>281</sup> Aronstam *Consumer Protection* 3. Smith Atiyah’s *An Introduction to the Law of Contract* (2005) 10, hereafter Smith Atiyah’s *An Introduction to the Law of Contract*. Smith traces the origin of the modern principles of contract law, including freedom of contract to the eighteenth century. He gives a very insightful discussion of the development of freedom of contract from that period till today: Smith Atiyah’s *An Introduction to the Law of Contract* 9-19.

whilst conceding that political and social security necessitated a limitation of that right.<sup>282</sup> Adam Smith (1723-1790) believed that individualism led to social order and progress, and was critical of state interference in the contractual arena.<sup>283</sup> Likewise, Immanuel Kant (1724-1804) reasoned that human beings have free will and act in accordance with their particular idea of laws.<sup>284</sup>

Building on these constructs, John Stuart Mill (1806-1873), leader of the utilitarian movement, wrote that freedom of contract as a basic human right meant that state interference with the exercise of contractual power should be kept to a minimum and that an individual had absolute freedom to pursue any contract, and on any terms.<sup>285</sup>

The theory of individual freedom was also adopted by eighteenth- and nineteenth-century proponents of the *laissez-faire* economy, most notably Adam Smith, who is widely regarded as the founder of modern economics. The *laissez-faire* economists argued trenchantly against any state interference in matters of contract because freedom of contract was essential for the continuance of trade and industry.<sup>286</sup> The market was regarded as the driver of the nation, with the function of government relegated to preserving the public order.<sup>287</sup> These thought processes were mirrored in the legal,

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<sup>282</sup> Feinman (1982-1983) 30 *UCLA LR* 829, 839; Johnson et al *Jurisprudence* 40; Smith Atiyah's *An Introduction to the Law of Contract* 10; Hosten *Introduction to South African Law and Legal Theory* (1995) 65-69, hereafter Hosten *Introduction*. The theme of the social contract theory is developed in chapter 4 paras 4.2.1-4.2.3 in the context of the nature, characteristics and function of the *essentiale* of price.

<sup>283</sup> Hawthorne 'The principle of equality in the law of contract' (1995) 58 *THRHR* 157, 163, hereafter Hawthorne (1995) 58 *THRHR*; Hawthorne 'Closing of the open norms in the law of contract' (2004) 67 *THRHR* 294, 295.

<sup>284</sup> Hosten *Introduction* 69-73.

<sup>285</sup> Current South African law still views freedom of contract as the freedom to decide whether to contract, with whom and on what terms: Van der Merwe *et al Contract* 9; *Barkhuizen* 2007 (5) SA 323 (CC) para [57].

<sup>286</sup> Hawthorne (1995) 58 *THRHR* 163; Aronstam *Consumer Protection* 5. Aronstam explains that the principle of freedom of contract was also used by socio-political commentators to "explain or advocate the social development of various societies" (5 *et seq.*). Sir Henry Maine used it to explain the development of society "from a static condition into an advanced, progressive society." The "static society" was one where obligations and functions were determined by one's status and the "progressive society" was one where obligations were freely acquired. See also *Barkhuizen* 2007 (5) SA 323 (CC) para [151]; Furmston *Law of Contract* 13, hereafter Furmston *Law of Contract*; Grace, McLane & Giesel *Corbin on Contracts* (2003) 21.

<sup>287</sup> This includes administration of justice, preservation of law and order, defence.

political and socio-economic discourse on both sides of the Atlantic and are still prevalent generally in the law of contract.<sup>288</sup>

In summary, the classical theory of freedom of contract is founded on the following key concepts: (i) an adversarial ethic in which contractants were expected to protect their own interests; (ii) the primacy of intention arising from individual self-will (autonomy) that resulted in consensus.

Hereafter follows a brief discussion of contractual autonomy and consensus.

### 2.2.2 Contractual autonomy and consensus

The fundamental value that underlies contractual freedom is autonomy,<sup>289</sup> meaning an individual's ability to independently engage in a legal act, free from manipulation, input, or the dictates of others including the state.<sup>290</sup> The belief in the self-sufficiency of human reason<sup>291</sup> means that human beings are viewed as rational human beings who have the right and responsibility to make their own choices. Thus, contractual obligations are, in principle, the result of a deliberate and voluntary act on the part of the contractants.<sup>292</sup> the individual is free to decide whether to contract, with whom and on what terms.<sup>293</sup> This gave rise to the

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<sup>288</sup> See para 2.2.5 below for authorities in support of this conclusion.

<sup>289</sup> Autonomy was a central value in the theories of the philosophers dealt with in the paragraph above and all of these still profoundly shape today's legal thinking. In, for example, *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) paras [27]-[28], hereafter *African Dawn* 2011 (3) SA 511 (SCA), the Court cautioned against over-zealous judicial intrusion in the sphere of contractual autonomy, it being a real and meaningful incidence of freedom. See also Smith *Atiyah's An Introduction to the Law of Contract* 9-10.

<sup>290</sup> Hawthorne (1995) 58 *THRHR* 163; Pretorius 'The basis of contractual liability (1) Ideologies and approaches' (2005) 68 *THRHR* 253, 259, hereafter Pretorius (2005) 68 *THRHR* 253. In *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), hereafter *Napier* 2006 (4) SA 1 (SCA) the Supreme Court of Appeal based its decision in the values of dignity and autonomy which "find expression in the liberty to regulate one's life by freely engage[ing] [in] contractual arrangements" (para [12]). See also para 2.2.4 below.

<sup>291</sup> Van der Merwe *et al Contract* 18. See para 2.2.1 above.

<sup>292</sup> Van der Merwe *et al Contract* 5-6. Smith *Atiyah's An Introduction to the Law of Contract* 1.

<sup>293</sup> Van der Merwe *et al Contract* 9. Pretorius (2005) 68 *THRHR* 266; Friedman *Law in a Changing Society* (1972) 121, hereafter Friedman *Law in a Changing Society*; Hawthorne (1995) 58 *THRHR* 163.



assumption that contracts were based on mutual consent.<sup>294</sup> Accordingly, individuals are bound by the choices so exercised, hence the principle of sanctity of contract.<sup>295</sup>

The choice so exercised may be vitiated only on formal grounds in terms of the strictly defined rules of mistake<sup>296</sup> and where consensus is obtained by improper means.<sup>297</sup> This is in accord with the classical theory of contract law. The “rigid application of long-standing rules” may, however, result in consent being present in form but not in substance, exposing contract law to stagnation and inequity.<sup>298</sup> The uncritical employment of contractual autonomy could result in the constitutional, social, and economic context in which the law of contract operates being overlooked or at best undervalued<sup>299</sup> as is illustrated in the discussion further below.<sup>300</sup>

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<sup>294</sup> Olivier *Legal Fictions: An Analysis and Evaluation* Proefschrift ter verkryging van de graad van doctor in de rechtsgeleerdheid aan de Rijksuniversiteit te Leiden (1973) 136, hereafter Olivier *Legal Fictions*.

<sup>295</sup> It is on the basis of this theory that freedom and sanctity of contracts are regarded as twin principles.

<sup>296</sup> Van der Merwe *et al Contract* 22-26.

<sup>297</sup> Van der Merwe *et al Contract* chapter 4; Pretorius (2005) 68 *THRHR* 258.

<sup>298</sup> Bhana & Pieterse ‘Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited’ (2005) 122 *SALJ* 865, 884, hereafter Bhana & Pieterse (2005) 122 *SALJ*. See also Friedman *Law in a Changing Society* 130-132.

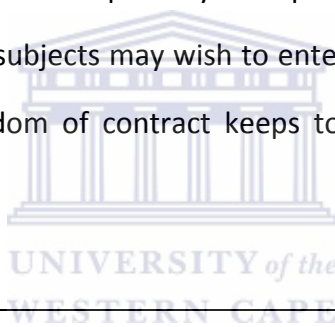
<sup>299</sup> See Sachs J in *Barkhuizen* 2007 (5) SA 323 (CC) para [145]. For example, the preference for sanctity of contract in restraint of trade cases, ignores the reality of the socio-economic situation in South Africa where poverty is rife and unemployment is endemic. It is submitted that this approach undermines the constitutional values of dignity and freedom are undermined. The role of the constitution and the constitutional values of dignity, equality and freedom in the context of contractual freedom are elaborated on in the chapters that follow. In *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C), hereafter *Advtech Resourcing* 2008 (2) SA 375 (C), the Cape High Court decried the “uncritical use of the concept of ‘contractual autonomy as part of freedom in forming the constitutional value of dignity’ holding that it “may be incongruent with the principles contained in the development clauses in the Constitution... The use of ‘contractual autonomy’ wrenched from any examination of the concept of existing power relationships is, in my view, reflective of a libertarian view of the world, clearly evident in *Magna Alloys* ... and which is in conflict with the spirit of the Constitution read as a whole which promotes an entirely different vision of our society” (para [30]). The case dealt with the enforcement of a restraint of trade clause. See also *Miller & Another NNO v Dannecker* 2001 (1) SA 928 (C) 938-9, hereafter *Miller* 2001 (1) SA 928 (C), discussed in para 2.8 below; and *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C), hereafter *Mozart* 2009 (3) SA 78 (C), where the Cape High Court defended this view when it replied to the criticism in *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D), hereafter *Den Braven* 2008 (6) SA 229 (D). See further the discussion in para 2.3.2.2(C) below. See also Bhana & Pieterse (2005) 122 *SALJ* 865, 884. This debate concerning autonomy and the presumption of consensus was foreshadowed by Van der Merwe, Lubbe & Van Huyssteen ‘The Exceptio Doli Generalis: Requiescat in Pace – Vivat Aequitas’ (1989) 106 *SALJ* 235, 240, hereafter Van der Merwe *et al* (1989) 106 *SALJ* 235. With reference to the decision of the *Bank of Lisbon* 1988 (3) SA 580 (A) court to strike down the *exceptio doli generalis*, the writers were critical of the majority judgment for expressing no “explicit belief” in the “fundamental ... responsibility of a court to ensure justice” and suggesting that adherence to the rules of a



Some other fundamental principles of contract law include public policy and good faith.<sup>301</sup> Hereafter follows an exposition of the role and function of these notions, namely, freedom of contract, certainty, public policy, and good faith. These principles are discussed with a view to establishing the effect of the accommodation in the law of contract<sup>302</sup> of the *obiter dicta* that would bestow validity on contracts of sale and lease at a reasonable price or rental respectively, or at a unilaterally determined price or rental.

### 2.2.3 The jurisprudential basis of freedom of contract

The principle of freedom of contract may be viewed as being a consequence of the reality that in a free enterprise system the law cannot possibly anticipate the content of an infinite number of atypical transactions that legal subjects may wish to enter into.<sup>303</sup> In order to accommodate this reality, the principle of freedom of contract keeps to a bare minimum “the ceremony



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system based, *inter alia*, on individual autonomy and consensuality, coupled with protection against improperly obtained consent, in itself guarantees inequity. The *Bank of Lisbon* case is discussed in para 2.3.2.1 below.

<sup>300</sup> The edifice of contractual autonomy is increasingly being chipped away by public interest legislation and/or, as is the case in South Africa, by legislation aimed at giving effect to the constitutional imperative to foster socio-economic reforms for the creation of a just and egalitarian society based on the values of dignity, equality and freedom. See the Preamble of the Constitution read with sections 1 and 7. Examples of such legislation are: the Basic Conditions of Employment Act 75 Of 1997 relating, *inter alia*, to wages and working hours, and the Broad-Based Black Economic Empowerment Act 53 of 2003 relating to government tenders. Such legislation, whilst recognising contractual autonomy, require that it be exercised with restraint to promote a political or social objective. Contractual autonomy then becomes the backdrop against which some political or social principles of justice have to operate. The latter involves the principle of paternalism in terms whereof there is interference by the state (or an individual) with the autonomy of another person. Such interference is justified by a claim that the interference is for the protection of the person interfered with or is in the public interest. Typical examples of such paternalistic legislation are the consumer protection legislation discussed in chapter 3. See also *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) paras [180]-[181], hereafter *Ferreira* 1996 (1) SA 984 (CC).

<sup>301</sup> Du Bois, Bradfield, Himonga, Hutchison, Lehmann, le Roux, Paleker, Pope, van der Merwe & Visser *Wille's Principles of South African Law* (2007) 737, hereafter *Du Bois et al Wille's Principles*.

<sup>302</sup> For example, how would the current approach to contractual autonomy, freedom of contract and certainty impact on an aggrieved contractant who objects to a price or rental determined by the other contractant as being unfair or unreasonable.

<sup>303</sup> Kessler (1943) 43 *Columbia LR* 629.

necessary to vouch for the deliberate nature of a transaction ...”<sup>304</sup> The objective of the law of contract is to facilitate and support the contractants’ freedom of contract whilst the function of the courts is to enforce contracts.<sup>305</sup>

The classical theoretical framework is that a legal subject should be free to decide whether to contract, with whom and on what terms with the contractants making their own rules.<sup>306</sup> The “proud spirit of individualism and of a *laissez faire*”<sup>307</sup> is reflected in the notions of freedom and autonomy that lie at the root of this theory; the assumption being that equality exists in the contractual arena.<sup>308</sup> In terms of this theory, the law, in general, does not concern itself with the fairness of a bargain.<sup>309</sup> The relative bargaining power of the contractants is generally regarded as irrelevant and the law does not entertain a defence to a claim of breach of contract on the basis that the defendant negotiated from a position of weakness.<sup>310</sup> As a theoretical

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<sup>304</sup> Kessler (1943) 43 *Columbia LR* 629. Kessler concludes that consequently freedom of contract is to be commended, not only, for moral reasons, but also because it is an eminently practical principle (630). In *Barkhuizen* 2007 (5) SA 323 (CC) the Constitutional Court acknowledged the moral content of principle of *pacta sunt servanda* which is the logical extension of the notion of freedom of contract (para [87]). See also Barnett ‘Contract is Not a Promise; Contract is Consent’ Georgetown Public Law and Legal Theory Research Paper No. 11-29 (2011) Georgetown Law The Scholarly Commons, 1, 4-5 <<http://scholarship.law.georgetown.edu/facpub/615>>, hereafter Barnett ‘Contract is Not a Promise; Contract is Consent.’ Although Atiyah *Law and Modern Society* (1995) describes the economic goals of the law, his observation mirrors that of Kessler when he says that “[p]rivate enterprise economics, from the days of Adam Smith onward, has tended to take it for granted that the individual pursuit of individual satisfaction within a minimal framework of the laws will produce the maximum economic advantage for everyone” (130-131).

<sup>305</sup> Olivier *Legal Fictions* (1973) 135. See also Furmston *Law of Contract* 21; Pretorius (2005) 68 *THRHR* 259. On this analysis, the court’s primary concern is not with the substantive fairness of the contract. See the discussion in the text following this footnote reference. Instead, the function of the court is limited to determining whether the “minimum requirements demanded by society for the creation of liability have been met”: Lubbe & Murray *Contract* 21. See further the discussion in chapter 4 para 4.4.

<sup>306</sup> Beale *Chitty On Contract* Volume 1 para [1-010]; Hondius & Grigolet *Unexpected Circumstances in European Contract Law* (2011) 4; Barnett ‘Contract is Not a Promise; Contract is Consent’ 4; Brownsword *Contract Law Themes for the Twenty-First Century* (2000) para [2.6], hereafter Brownsword *Contract Law Themes*.

<sup>307</sup> Kessler (1943) 43 *Columbia LR* 630; Carter & Hartland *Contract Law in Australia* para [113].

<sup>308</sup> Furmston *Law of Contract* 21; Carter & Hartland *Contract Law in Australia* para [108]; Cockrell ‘Second-guessing the exercise of contractual power on rationality grounds’ (1997) *Acta Juridica* 26, 30-32. The notion of absolute equality between contractants is illusory at best. See the discussion in para 2.4.4 below and Hawthorne (1995) 58 *THRHR* 163.

<sup>309</sup> Pretorius ‘The basis of contractual liability (3) Theories of Contract (consideration, reliance and fairness)’ (2005) 68 *THRHR* 575, 575-576 & 590-591; Hawthorne (1995) 58 *THRHR* 164.

<sup>310</sup> Beale *Chitty On Contract* Volume 1 paras [1-011]-[1-012]; Hawthorne ‘Distribution of wealth, the dependency

construct, the soundness of the principle is not questioned because the principle is applied equally to both parties,<sup>311</sup> hence the notion of equality.<sup>312</sup> The supposition is that each contractant will protect his/her interests and that by careful shopping around, oppressive bargains may be avoided.<sup>313</sup> The foregoing is predicated on the fact that legal and commercial certainty are essential ingredients of a flourishing free-market economy and that legal and commercial certainty is promoted by the recognition and practical implementation of the twin notions of freedom and sanctity of contract.<sup>314</sup>

#### 2.2.4 The South African context

In one of the earliest South African cases on freedom of contract, *Osry v Hirsch, Loubser & Co Ltd*,<sup>315</sup> the Court said that “[t]he spirit of modern Jurisprudence is in favour of the liberty of contract...” and, quoting De Villiers CJ in *Henderson v Hanekom* 20 SC at 519, explained that “[a]ll modern commercial dealings proceed upon the assumption that binding contracts will be enforced by law.” The classical theory outlined above, finds resonance in the jurisprudence of the Supreme Court of Appeal.<sup>316</sup> In *Napier v Barkhuizen*<sup>317</sup> the Court in stating that a cautionary approach should be adopted when

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theory and the law of contract’ (2006) 69 *THRHR* 48, 51-52, hereafter Hawthorne (2006) 69 *THRHR* 48; Hahlo (1981) 98 *SALJ* 70. The discussion in para 2.4.4 illustrates the continued application of this approach in South African law.

<sup>311</sup> Lubbe & Murray *Contract* 2.

<sup>312</sup> Friedman *Law in a Changing Society* 124; Cockrell ‘Substance and Form in the South African Law of Contract’ (1992) 109 *SALJ* 40, hereafter Cockrell (1992) 109 *SALJ* 40.

<sup>313</sup> Kessler (1943) 43 *Columbia LR* 630.

<sup>314</sup> See the explanation in chapter 1 para 1.3.3 and in para 2.2.2 above. See also Hutchison, Pretorius, Du Plessis, Eiselen, Floyd, Hawthorne, Kuschke, Maxwell, Naudé and De Stadler *The Law of Contract in South Africa* (2012) 22, hereafter Hutchison *et al Contract*. This approach to legal and commercial certainty still prevails in the decisions of the Supreme Court of Appeal: see *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) paras [32] and [34], hereafter *Potgieter* 2012 (1) SA 637 (SCA).

<sup>315</sup> 1922 CPD 531, 546. The case concerned the validity of an agreement for the sale of movables by means of *parate executie*.

<sup>316</sup> For example, in *Brisley v Drotosky* 2002 (4) SA 1 (SCA), hereafter *Brisley* 2002 (4) SA 1 (SCA), and *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA), hereafter *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA).

<sup>317</sup> 2006 (4) SA 1 (SCA) para [13].

“intruding on apparently voluntarily concluded arrangements,” confirms the principle that public policy demands that agreements should be honoured.

This has consistently been the approach of our courts<sup>318</sup> and was granted constitutional legitimacy when the Constitutional Court<sup>319</sup> confirmed that “[s]elf-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.” However, the Constitutional Court also cautioned that the principle of *pacta sunt servanda* is not a sacred cow and that it is subject to constitutional scrutiny.<sup>320</sup> Despite this, the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa Ltd*<sup>321</sup> re-affirmed its earlier decisions<sup>322</sup> and concluded that fairness is not a free-standing requirement for the exercise of a contractual right.<sup>323</sup> In doing so, the Supreme Court of Appeal re-established the hegemony of freedom and sanctity of contract.<sup>324</sup>



<sup>318</sup> See for example, *Brisley*2002 (4) SA 1 SCA; *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA).

<sup>319</sup> *Barkhuizen*2007 (5) SA 323 (CC) para [57].

<sup>320</sup> Para [15]. The issue is discussed in chapter 1 para 1.3.3. See also Hawthorne (1995)58*THRHR* 167.

<sup>321</sup> (Appeal) 2010 (4) SA 468 (SCA) para [27]. See also the discussion in chapter 1 para 1.3.3. It will be recalled that in chapter 1 para 1.3.3 it was explained that there are three cases involving the Applicant and that the Applicant’s name was spelt differently in two of the three cases. The precautionary measures described in chapter 1 para 1.3.3 to avoid confusion between the cases are also followed in this chapter and are repeated here for the sake of clarity. The spellings of the Applicant’s name as per the case citations will be retained and to avoid any confusion between the cases, the cases will hereafter be referred to as follows: *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ); *Breedenkamp* (return date) 2009 (6) SA 277 (GSJ); and *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA).

<sup>322</sup> For example, in *Brisley*2002 (4) SA 202 1 (SCA).

<sup>323</sup> Para [53]. See also *Potgieter* 2012 (1) SA 637 (SCA) para [34] which affirmed the *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) viewpoint. The conclusions have their origin in the classical theory principal of individual autonomy in terms whereof individuals have the freedom to decide on the terms of their contract. When once they have exercised this right, they are bound by their choices. Hence, the theory, in general, operates on a presumption of consensus and ignores any unfairness that may adhere to the contract as a result of unfair business practices such as standard form contracts (para 2.4.2 below) and subjective considerations such as unequal bargaining power or personal attributes of the contractant such as literacy levels and need: see para 2.4.4 below). The provisions of the consumer protection legislation such as those relating to information and disclosure address such considerations. See the discussion in chapter 3.

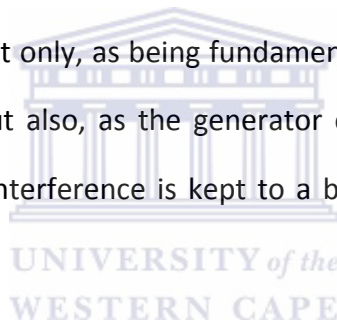
<sup>324</sup> In English law, during the period 1870-1980, there was a retreat from the dogmatism of the classical notions of freedom of contract and an embrace of a more paternalistic and regulatory approach to the law of contract. The post-1980 period has seen a duality in approach. On the one hand, there has been a tendency to revive the classical principles of contract law, whilst on the other hand there has been a strengthening of the movement

By way of summary, “[i]t may be stated with a measure of impunity that the dominant social and economic values reflected in the formal dogma, and rules of South African law of contract are those of individualism (autonomy) and self-interest.”<sup>325</sup>

## 2.2.5 Conclusion

The principle of freedom of contract, central to the classical theory, is the most powerful symbol of individualism. As a theoretical construct, freedom of contract means that the decision whether to contract, with whom, and on what terms falls within the sole province of those who have the requisite contractual capacity. Inherent in the theory is the assumption that contractants operate on the basis of complete equality.<sup>326</sup>

Freedom of contract is viewed, not only, as being fundamental to the prevailing legal, political, and socio-economic discourse, but also, as the generator of growth and modernisation. The ideal is a system in which state interference is kept to a bare minimum, private rights being



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for regulation. The rationale for the latter has changed from one of protecting the weak to one of facilitating contracting. The argument is that consumers would more readily conclude a contract if they are confident that the contract does not contain unwelcome surprises: Smith *Atiyah's An Introduction to the Law of Contract* 16-20. See also Furmston and Bradgate *The Law of Contract* (2010) para [1.52], hereafter Furmston and Bradgate *The Law of Contract*; Beale *Chitty On Contract* Volume 1 para [7-126]. The discussion of the consumer protection legislation in chapter 3 shows that such legislation may promote contracting. Whilst the principles of freedom of contract and *pacta sunt servanda* constitute salient features of both the NBW and the Principles of European Contract Law (PECL), the existence of an unequal bargaining relationship as well the application of the principles of good faith and fair dealing act to temper the application thereof: Schelhaas (General Editor) *The Principles of European Contract Law and Dutch Law A Commentary* (2002) 7 and 33. Similar considerations apply in German law: Mak *Performance-Orientated Remedies in European Sale of Goods* (2009) 7-11 and 48-50.

<sup>325</sup> Van Huyssteen, Van der Merwe & Maxwell *Contract Law in South Africa* (2012) para [16], hereafter cited as Van Huyssteen *et al Contract Law*.

<sup>326</sup> The assumption is evident in the following quotation from the early (1875) English case of *Printing Registering Co. v Sampson* LR 19 Eq at 465 as quoted in *Wells v South African Alumenite* 1927 AD 69, 73, hereafter *Wells* 1927 AD 69: “[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with the freedom of contract.” Inequality in bargaining power is discussed in para 2.4.4 below.

regarded as superior to public rights.<sup>327</sup> The hallmarks of the classical model of the law of contract<sup>328</sup> still dominates the modern law of contract<sup>329</sup> subject to varying degrees of

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<sup>327</sup> That the adherence to this line of thinking is undergoing a change in South Africa is evident from the decisions of the Constitutional Court in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), hereafter *Hoffmann* 2001 (1) SA 1 (CC); *Barkhuizen* 2007 (5) SA 323 (CC) and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), hereafter *Everfresh* 2012 (1) SA 256 (CC).

<sup>328</sup> Hutchison *et al Contract* summarizes these as consisting of freedom and autonomy of the parties; minimal state intervention; a preference for clear and certain rules, rather than open-ended standards; self-interested individualism; assumed fairness of the exchange; a discrete event; parties enjoy equal bargaining power; perfect or near-perfect competition in the market; and parties actually negotiate the terms of their contract (23).

<sup>329</sup> In England, the high-water mark of the classical theory of contract was reached during the 18<sup>th</sup> and 19<sup>th</sup> centuries whereafter judicial action and legislative intervention, in the pursuit of fairness and justice, sought to temper some of the harsh consequences: Smith *Atiyah's An Introduction to the Law of Contract* 9-16. An example of the resonance of the classical theory in the decisions of the English courts is the dictum in *Printing Registering Co. v Sampson* LR 19 Eq 465 quoted in the footnote above. Furmston *Law of Contract* 13 traces this aspect of the judgment in the *Printing* case back to Adam Smith's line of thinking. See also Atiyah *Essays on Contract* (1986) 11 *et seq*, hereafter *Atiyah Essays*; Beale *Chitty On Contract* Volume 1 (2008) para [1-011]-[1-014], hereafter Beale *Chitty on Contract* Volume 1; *Selected Readings on the Law of Contracts From American and English Legal Journals* (1931) 100-103. The role of good faith in England and in other common law jurisdictions is not as clear-cut as in the United States of America: Beale *Chitty On Contract* Volume 1 para [7-126].

Though the principle of freedom of contract underpinned the law of contract in Scotland, the concept did not reach the same zenith that it did in England: Woolman & Lake *Contract* (2001) para [1.8], hereafter Woolman & Lake *Contract*.

In the United States of America, freedom of contract is still the guiding principle of the UCC. See, for example, UCC 1-102(3). See also Kessler (1943) 43 *Columbia LR* 629-630. However, it is subject to limitation. Freedom of contract is qualified by the UCC requirements that the parties must act reasonably and in good faith and that the agreement must not be unconscionable: Warkentine 'Article 2 Revisions: An Opportunity to Protect Consumers and Merchant Consumers through Default Provisions' (1996-1997) 30 *J. Marshall LR* 39, 44, hereafter Warkentine (1996-1997) 30 *J. Marshall LR* 39; See also UCC 2-302:6 read with UCC 2-302:8 in Lawrence *Anderson on the Uniform Commercial Code* Volume 2A (2008).

Freedom of contract also forms the foundation of the Australian law of contract: Carter & Hartland *Contract Law in Australia* paras [108] and [113].

Article 1.1 of the UNIDROIT Principles of International Commercial Contracts (2004), (UNIDROIT Principles (2004)), also guarantees freedom of contract but it is subject to a mandatory duty of good faith in Article 1.7. Freedom of contract is implicit in Article 6 of the United Nations Conventions on Contracts for the International Sale of Goods, (1980) (CISG): Kröll, Mistelis & Viscasill *The United Nations Conventions on Contracts for the International Sale of Goods: Article by Article Commentary* (2011) 99-100, hereafter Kröll *et al The United Nations Convention*. Article 1:102 of the Principles of European Contract Law (2003) (PECL) also guarantees freedom of contract but the notion is subject to the requirement of good faith and fair dealing and any mandatory rules established by the PECL. The duty of good faith may not be excluded or limited: Bonell & Peleggi 'UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: A Synoptical Table' (2004) 9 *Uniform LR* 315, 334, hereafter Bonell & Peleggi (2004) 9 *Uniform LR* 315. The European Court of Justice has recognized freedom of contract as a "general principle of civil law." The notion of freedom of contract enjoys protection in Article 16 (to conduct business) of the EU Charter of Fundamental Rights and has been set as "the basic point of reference for the future development of European contract law": Beale *Chitty On Contract* Volume 1 para [1-013]. The duty of good faith in international jurisdictions is



constraints and limitations depending on the prevailing social, political and economic climate in a particular country.<sup>330</sup>

The roots of the classical theory grow very deep in the South African contract law environment as is evident in decisions that ignore considerations such as illiteracy, bargaining power and need.<sup>331</sup>

## 2.3 Public policy and its influence on freedom of contract

### 2.3.1 Introduction

The discussion in the preceding paragraphs is illustrative of the conclusion that it is trite law that the twin notions of freedom and sanctity of contract stand at the vanguard of the South African law of contract.<sup>332</sup> In general, South African courts have proved to be reluctant to pursue distributive justice<sup>333</sup> by second-guessing contracts freely entered into.<sup>334</sup> There is a

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discussed in chapter 5.

<sup>330</sup> The social, political, and economic climate prevailing in a country dictates the degree of social and state control exercised over commercial transactions. In South Africa, for example, a combination of social, economic and political factors have led to the enactment of consumer-orientated legislation such as the Consumer Protection Act 68 of 2008, the Rental Housing Act 50 of 1999 and the National Credit Act 34 of 2005. These statutes are representative of an increasing willingness on the part of the legislature to intervene in private contracts with the goal of placing contractants on a more equitable and level playing field. The courts have also played a role in this regard. For example, the ambit of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 has been extended by the courts so that the common law right of a lessor to summarily evict a tenant and any contractual provision regarding the eviction of a tenant, are subjugated to the provisions of the Act: see *Ndlovu v Ngcobo*; *Bekker v Jika* [2002] 4 All SA 384 (SCA). The decision has been criticized on the basis that the Act was not intended to regulate those cases where the occupation was initially lawful, for example, in terms of a lease agreement, but became unlawful on termination of the lawful title. Though the legislature has taken note of this criticism, steps to “rectify” the law in this regard have yet to come to pass. Public policy, as embodied in the foundational values that underlie the Constitution, has also been used by the courts, as exemplified in *Barkhuizen* 2007 (5) SA 323 (CC), as a basis for testing the validity of contractual terms. See the discussion in chapter 1 para 1.3.3 but see the discussion paras 2.3.2 and 2.3.3 below. See also Carter & Hartland *Contract Law in Australia* para 117.

<sup>331</sup> See for example, *Mathole v Mathole* 1951 (1) SA 256 (T), hereafter *Mathole* 1951 (1) SA 256 (T); *Khan v Naidoo* 1989 (3) SA 724 (NPD); *Brisley* 2002 (4) SA 1 (SCA) and *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA); the discussion in paras 2.3.1, 2.4.2-2.4.4 and 2.8 below.

<sup>332</sup> The constitutionality thereof was recognised in *Barkhuizen* 2007 (5) SA 323 (CC): see chapter 1 para 1.3.3. See also Lubbe & Murray *Contract* 21.

<sup>333</sup> Distributive justice has to do with the equal treatment of people before the law and relates to the distribution of goods whilst commutative justice is concerned with rectifying disturbances in the distribution of goods, for

reluctance to meddle with contractual arrangements out of deference to the will of the contractants and a refusal to impose their own conceptions of fairness and justice on parties' individual arrangements.<sup>335</sup>

This individualistic approach to the law of contract is one-dimensional and somewhat anachronistic.<sup>336</sup> That such an approach does not place a premium on substantive fairness (and hence distributive justice),<sup>337</sup> as opposed to procedural fairness,<sup>338</sup> is evident in that it, at best,

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example, where one person acquires goods meant for another: Johnson *et al Jurisprudence* 15; Hosten *Introduction* 24-25; Speidel 'The Borderland of Contract' (1983) 10(2) *Northern Kentucky LR* 163. See also Du Bois *et al Wille's Principles* 15-16.

<sup>334</sup> Cockrell (1992) 109 *SALJ* 59. Brownsword *Contract Law Themes* para [2.8].

<sup>335</sup> See Napier 2006 (4) SA 1 (SCA) para [13]. A duality in approach in the English courts has led to a compromise between those who believe that the flexibility of the doctrine leads to uncertainty and who have adopted the public-policy-is-an-unruly-horse adage and those who acknowledge the creative role of public policy such as Lord Denning M.R. who held that with a good rider in the saddle the unruly horse can be kept in control – it can jump over obstacles: Treitel *An Outline of the Law of Contract* (2004) 189, hereafter Treitel *An Outline*. See also McBryde *The Law of Contract in Scotland* (2007) para [19-02], hereafter McBryde *The Law of Contract in Scotland*. The South African Constitutional Court is evidently aligned with the view expressed by Lord Denning M.R: see *Barkhuizen* 2007 (5) SA 323 (CC). See also Friedman *Law in a Changing Society* 124.

<sup>336</sup> The approach, not only, spawns a reliance by contractants that the law will enforce contracts freely and voluntarily entered into, but also, generates an enthusiasm by the law to do so: see the cases dealt with in the paragraphs below. See also Cockrell (1992) 109 *SALJ* 63.

<sup>337</sup> By way of example, the following statements are instructive of the individualistic approach of the Supreme Court of Appeal. In *Brisley* 2002 (4) SA 1 (SCA) the court sought justification in the Constitution and its values for the view that the courts did not have a "general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith" (para [93]). This theme is addressed in para 2.8 below. Similar sentiments are expressed in *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) where the Court held that it was not the duty of the court "to assess whether or not a *bona fide* business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved" (para [65]). In this regard, and with reference to the rejection of the notion that the *exceptio doli generalis* forms part of our law by the court in *Bank of Lisbon* 1988 (3) SA 580 (A), Van der Merwe *et al Contract* comment that the need for "substantive justice" between contractants "remains extant" (276).

<sup>338</sup> Where improperly obtained consensus in forms such as misrepresentation, duress and undue influence play a role in procedural fairness: Van der Merwe *et al Contract* 86 *et seq.* American law follows a similar approach regarding the sanctity of contracts but with the important qualification that in order to protect freedom of contract, courts will "favour a conscionable interpretation of a contract": UCC 2-302:90 in Lawrence *Anderson on the Uniform Commercial Code* Volume 2A (2008).

English law, unlike American and Australian law does not have a general defence of unconscionability: Smith *Atiyah's An Introduction to the Law of Contract* 15; Furmston *Law of Contract* 385; Beale *Chitty On Contract* Volume 1 paras [7-014]–[7-018] and [7-126]; Beaton *Anson's Law of Contract* (2002) 299. However, considerations of fairness and justice saw the relaxation of procedural defenses to include the recognition of "economic duress" and "mistake at equity" as defences. The threat of economic duress is directed at the contractant's economic interests. The minimum requirement is the "but for" test, meaning that the contract would not have been concluded at all or on the term(s) it was made had it not been for the particular "event"



only grudgingly acknowledges that the law does limit the power of a contractant to utilize the legal infrastructure to enforce contracts.<sup>339</sup>

Against the background of individualism, public policy<sup>340</sup> fulfills a dual function in that it may operate as a sword or as a shield: it may on the one hand, be used to strike down a contract and, in the process achieve a measure of substantive fairness, whilst on the other hand, it may be used as a rationale for the enforcement of a contract.<sup>341</sup> Public policy operates as a sword in

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complained of: Beale *Chitty On Contract* Volume 1 para [7-022]; Peel *Treitel The Law of Contract* (2011) paras [10-003] and [10-005], hereafter Peel *Treitel The Law of Contract*. The test is a subjective one: whether economic duress exists depends of the coercive effect of the threat in each case. As opposed to economic duress, duress of person will exist if the threat was simply one reason why the contract was concluded: Peel *Treitel The Law of Contract* para [10-003].

Scottish law also recognizes the notion of economic duress and follows the path of English law: MacQueen & Thomson MacQueen and Thomson: *Contract Law in Scotland* (2000) para [4.26], hereafter MacQueen & Thomson *Contract Law in Scotland*; Woolman & Lake *Contract* para [6.5].

The defence of economic duress is also recognized in American common law. Economic duress requires conduct that precludes the exercise of free will on the part of a contractant. So for example, the exclusion of liability by a monopolistic entity was held to constitute economic duress. A subjective test is used in that the threat need only to have deprived the contractant of free will and absence of choice may be said to occur even in those cases where the subject-matter of the sale is a necessity and not readily available elsewhere, or where the weaker contractant is unaware of its availability: Hillman, McDonnell, & Nickles *Common Law and Equity under the Uniform Commercial Code* (1985) 4-24 to 4-28 and 6-6 to 6-7, hereafter Hillman *et al Common Law and Equity under the Uniform Commercial Code*. However, the test has become more objective in that the threat must have left the contractant with “no reasonable alternative”: Farnsworth *Farnsworth on Contracts* (2004) 261, hereafter Farnsworth *Contracts*.

It is unlikely that South Africa will, in the near future, see a development along the lines set out above as a result of the pronouncement in *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) where the Court said it is, in general, neither unlawful nor unconscionable to cause economic harm or even economic ruin in a competitive economy. Hard bargaining does not constitute duress not even where there is an imbalance in bargaining power (para [18]). The jurisdictions mentioned above also subscribe to a similar philosophy regarding hard bargains in a competitive economy but make allowances for unconscionable conduct as explained above. The *obiter* in the *Medscheme* case to the effect that there is no reason in principle why a threat of economic ruin may not, in appropriate cases, amount to duress provides scant relief because of the Court’s vague explanation that “[s]omething more – which is absent in this case – would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress” (para [18]). Emphasis added. The Consumer Protection Act 68 of 2008 discussed in chapter 3 does, however, address issues of this nature.

<sup>339</sup> Cockrell (1992) 109 SALJ 61. In *Brisley* 2002 (4) SA 1 (SCA) the court explained that a court’s function is to weigh up fundamental values, such as good faith, fairness and the *boni mores*, which sometimes conflict with each other, against each other, and “om by geleentheid wanneer dit nodig blyk te wees, geleidelik en met verdrag aanpassings te maak” (para [24]). Emphasis added.

<sup>340</sup> The problem of what constitutes the content of public policy was dealt with in chapter 1 para 1.3.3.

<sup>341</sup> Hutchison ‘Non-variation Clauses in Contract: Any Escape from the Shifren Straitjacket?’ (2001) 118 SALJ 720, hereafter Hutchison (2001) 118 SALJ 720.

terms of the public harm principle:<sup>342</sup> the law comes to the assistance of contractants in striking down contracts or terms thereof when the interests of society at large<sup>343</sup> are at stake or when it is necessary to prevent impairment of public institutions.<sup>344</sup> The law may also, in terms of the principle of paternalism,<sup>345</sup> come to the assistance of contractants in order to protect them by preventing them from acting against their own best interests.<sup>346</sup> Public policy acts as a shield when it is used to enforce contractual arrangements.

The role of public policy as a rationale for the enforcement of contracts is dealt with in the next paragraph. Its role as a sword is discussed thereafter.<sup>347</sup>

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<sup>342</sup> Cockrell (1992) 109 SALJ 61 referring to Joel Feinberg *Social Philosophy* (1973) 25.

<sup>343</sup> See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), hereafter *Sasfin* 1989 (1) SA 1 (A) where the court said that the interests of the community or public are “of paramount importance in relation to the concept of public policy” (71).

<sup>344</sup> Cockrell (1992) 109 SALJ 61. In *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), the Constitutional Court, in ordering the respondent to offer Hoffmann a contract of employment as a cabin attendant, decided that the respondent’s refusal impaired the applicant’s dignity and amounted to unfair discrimination. The court concluded that the refusal to employ Hoffmann because he was HIV impaired violated his right to equality, guaranteed in Section 9 of the Constitution. The Constitution (a public institution) and the public at large are protected in this instance. See also chapter 1 para 1.3.3.

<sup>345</sup> The principle is descriptive of (philanthropic) interference by the state or an individual in the autonomy of another latter. The interference is rationalised by a claim that the interference is for the protection of the person interfered with or is in the public interest. See further footnote explanations in paras 2.2.2 above and 2.3.1 below. See also Cockrell (1992) 109 SALJ 61; Kronman (1983) 92 *Yale LJ* 763.

<sup>346</sup> See *Breedenkamp and Others v Standard Bank of South Africa Ltd* (interim interdict) 2009 (5) SA 304 (GSJ) para [68] discussed in chapter 1 para 1.3.3. The judgment reflects the practical application of the “principle of paternalism” and reflects a line of thinking that differs significantly from that of the Supreme Court of Appeal. Further evidence of the application of the public harm principle and the principle of paternalism are to be found in public interest legislation such as the Consumer Protection Act 68 of 2008, the National Credit Act 34 of 2005, and the Rental Housing Act 50 of 1999. Relevant aspects of these pieces of legislation are dealt with in chapter 3. As will become evident in the discussion in chapter 3, the provisions of the Consumer Protection Act as well as the National Credit Act and the Rental Housing Act are designed to give effect and to promote the constitutional values of dignity, equality and freedom (these values were touched upon in chapter 1 and are discussed in more detail in chapter 4) and in the process they provide the context for effecting “critical social and economic reforms required by the Constitution” for the “transformation [of the South African society] to a more just and egalitarian society,” as concluded by Chaskalson P: Devenish *The South African Constitution* (2005) 63.

<sup>347</sup> The role of public policy in answering the question of law is discussed in chapter 4.

## 2.3.2 Public policy as rationale for the enforcement of contracts

The general approach of the Supreme Court of Appeal<sup>348</sup> is outlined first and thereafter specific instances are discussed in illustration of this approach.

### 2.3.2.1 General approach

Public policy favours the utmost freedom of contract.<sup>349</sup> It demands that a contractant must, in the absence of fraud, be held to a contract even if it contains harsh conditions.<sup>350</sup> Coming to the rescue of such a contractant is regarded as tantamount to changing the contract instead of interpreting it.<sup>351</sup> The subjective expectation of the contents of a contract is disregarded and no legal obligation rests on a contractant to draw the other contractant's attention to a clause that can be reasonably expected in a contract.<sup>352</sup>

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<sup>348</sup> The Supreme Court of Appeal, as the apex court on non-constitutional matters, has been responsible for shaping the contract law in South Africa. This is evidenced by landmark cases which have seen the erosion of equitable principles in the determination of contractual validity. This thesis highlights some of these cases. Representing pre-constitutional jurisprudence see, for example, *Bank of Lisbon* 1988 (3) SA 580 (A) (discussed in chapter 1 para 1.3.3 and para 2.3.2.1 of this chapter); *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A), hereafter *Magna Alloys* 1984 (4) SA 874 (A) (discussed chapter 1 para 1.3.3 and in para 2.3.2.2(C)) of this chapter) and representing post-constitutional jurisprudence, see, for example, *Brisley* 2002 (4) SA 202 1 (SCA) (discussed in chapter 1 para 1.3.3 and paras 2.3.2.2(A) and 2.8 of this chapter); *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) (discussed in para chapter 1 para 1.3.3 and in paras 2.2.4 and 2.8 of this chapter). The apex status of the Supreme Court of Appeal when the Constitution 17<sup>th</sup> Amendment Bill was adopted by the National Assembly on 20 November 2012 becomes law. The Bill still has to be signed by the State President and published in the Government Gazette. Currently there are two apex courts: the Constitutional Court in constitutional matters and the Supreme Court of Appeal in non-constitutional matters. The Bill extends the jurisdiction of the Constitutional Court to hear any matter it deems to raise an arguable point of law in the public interest. This effectively confirms the status of the Constitutional Court as the highest court in the land.

<sup>349</sup> *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) where the Court quoted with approval from *Sasfin* 1989 (1) SA 1 (A) 9B-F that "public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom": (para 8).

<sup>350</sup> *Wells* 1927 AD 69, 73. The case concerned the validity of an acknowledgment by the Appellant that it had concluded the contract regardless of any representations by the Respondent or its representatives. The dictum of the court was recently quoted with approval in *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) para [33].

<sup>351</sup> *Natal Motor Industries Ltd v Crickmay* 1962 (2) SA 93 (N) 98; *Lubbe & Murray Contract* 21.

<sup>352</sup> In other words, a legal obligation would exist only where a clause, objectively speaking, is unexpected: *Afrox* 2002 (6) SA 21 (SCA) paras [36] & [9]. In *casu*, the Respondent challenged the validity of a clause in a contract that he signed that indemnified the Appellant from negligence of its nursing staff. One of the grounds of the challenge was that the admitting clerk had a legal duty to bring the indemnity clause to the Respondent's

Equitable considerations do not play a role in the court's decisions.<sup>353</sup> In *Bank of Lisbon v De Ornelas* the Court found that there was no evidence of a "general substantive defence based on equity."<sup>354</sup> Roman-Dutch law was viewed as an inherently equitable legal system and equity was deemed to be subject to the principles of law and, unable to override "a clear rule of law."<sup>355</sup> The Appellate Division struck the death-blow to the doctrine of *laesio enormis*<sup>356</sup> in

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attention on his admission to the hospital. In arriving at its conclusion, the Court said that exemption clauses have become the rule rather than the exception in standard form contracts and that there is no reason why private hospitals should as a matter of principle be distinguished from other service providers.

In Germany, BGB 307 provides for a presumption of unreasonable disadvantage where a clause limits "essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized." BGB 307 further provides that a clause is ineffective if, contrary to the requirement of good faith, it unreasonably disadvantages the other contractant. The impugned clause in the *Afrox* case would have triggered BGB 307. In *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) the court held that a contractant cannot be bound by a clause that it did not or could not reasonably have been thought to have agreed to (355B-D).

<sup>353</sup> In the words of Hostens *Introduction* this approach is a refusal by the courts "to consider the needs of individual justice ... coupled with an unbending adherence to Roman Dutch principle" (530). Lubbe & Murray *Contract* comment that "the limited number of grounds on which a party may escape liability under an agreement satisfying the general requirements for the validity of contracts is indicative of our courts' adherence to the notion that public policy demands recognition of the principle of pacta sunt servanda" (387).

<sup>354</sup> 1988 (3) SA 580 (A) 605I-J, hereafter *Bank of Lisbon* 1988 (3) SA 580 (A). In rejecting and burying once and for all the *exceptio doli generalis* as a "superfluous, defunct anachronism," the Appellate Division (607B) fortified the hegemony of the individualistic approach by remaining, in the words of Lubbe & Murray *Contract* "unpersuaded by Jansen JA's attempt to demonstrate ... that *pacta sunt servanda*, freedom of contract and legal certainty were not absolute values in our law of contract" (391). The case concerned securities and mortgage bonds furnished by the Respondents as security to the Appellants for overdraft facilities. On satisfaction of its principal indebtedness, the Respondents requested the cancellation of the securities and the mortgage bonds. The Appellants declined to do so and retained the securities pending the outcome of court proceedings it intended to institute against the Respondents, an eventuality that was not within the contemplation of the contractants at the time when the contracts concerning the securities and mortgage bonds were drafted. The Respondent relied on the *exceptio doli generalis* for relief. The court, after rejecting the contention that the *exceptio* had become part of our law, and after finding that there is no "evidence of the existence of a general substantive defence based on equity" concluded that the ambit of the contracts was wide enough for the securities to also function as collateral for the contemplated court action (at 605I). Jansen JA (611 *et seq.*), in a minority judgment, disagreed with the majority that the *exceptio doli* was a "defunct anachronism" (607A-B)). The ambit of the *exceptio* was explained in chapter 1 para 1.3.3.

<sup>355</sup> At 606A-B. In English law, equitable considerations that were administered in separate courts are now administered in the same courts as the common law: Treitel *An Outline of the Law of Contract* 6. Equity also plays a role in the United States of America: Hillman *et al Common Law and Equity under the Uniform Commercial Code* 6-20 to 6-21.

<sup>356</sup> The doctrine allowed the rescission of a contract, or an adjustment in the contract price, in the absence of fraud, duress or excusable mistake, where the contract price was more than twice or less than half the value of the subject matter of the sale. The doctrine served to correct abuses of bargaining power and addressed the issue of unconscionable contracts: Lubbe & Murray *Contract* 378-381. See also Van der Merwe *et al Contract* 112; *Gillig v Sonnenberg* 1953 (4) SA 675 (TPD) 682H.

*Tjollo Ateljees (Eins) Bpk v Small*<sup>357</sup> when it refused to come to the assistance of a contractant who had been overextended by the contract. A court, before it will grant relief, must be convinced that the contractant was misled when concluding the contract.<sup>358</sup> The interests of certainty and the court's concern of its arbitrary use dictate that the power to declare a contract contrary to public policy must be used "sparingly and only in the clearest of cases."<sup>359</sup> In an earlier case, the Appellate Division in *Preller and Others v Jordaan*<sup>360</sup> warned that if judges are allowed to decide cases on what they regarded as being reasonable and fair, the criterion will no longer be the law but the judge.

The cases discussed above are representative of the approach of the Supreme Court of Appeal to uphold a contract even though it produces an inequitable result. The approach was recently reaffirmed by the Supreme Court of Appeal in the *Napier* case.<sup>361</sup> More recently, the Supreme

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<sup>357</sup> 1949 (1) SA 856 (A). The respondent sued for the rescission of sale on the basis that the promissory note issued in favour of the appellant was in the amount of £27 16s 6d whilst the value of the item sold was less than £13 8s 3d. The Court concluded that the doctrine allowed the contractant "to seek relief not against a wrong, but against his own lack of judgment, ineptitude, or folly" (873). The court viewed the principle of freedom of contract, which informed its decision to strike down the application of the *laesio enormis*, to be absolute and inviolate. However, the notion of its inviolability was qualified by the Constitutional Court in *Barkhuizen* 2007 (5) SA 323 (CC) discussed in chapter 1 para 1.3.3. The *Tjollo Ateljees* decision probably resulted in the abolition of the doctrine in the then Transvaal and Natal by section 25 of the General Law Amendment Act 32 of 1952: *Lubbe & Murray Contract* 387; *Aronstam Consumer Protection* 45. At the time when the case was heard, the doctrine had already been abolished by legislation in the Cape Colony in 1879 and in the Orange Free State in 1902: *Aronstam Consumer Protection* 44. More recently justification for the approach was sought in the Constitution. In *Knox D'Arcy Ltd and Another v Shaw and Another* 1996 (2) SA 651 (W), hereafter *Knox D'Arcy* 1996 (2) SA 651 (W), the Court said that "[t]he Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek as a matter of policy to protect them against their own foolhardy or rash decisions" (660 D-E). The case dealt with restraint of trade agreements within the context of section 26 of the the Constitution of the Republic of South Africa 1993, hereafter the Interim Constitution, that guaranteed the right to freely engage in economic activity.

<sup>358</sup> See *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 471, hereafter *George* 1958 (2) SA 465 (A). The Court, in rejecting the Appellant's appeal for relief where he had signed a document without reading the contents thereof, said that a party who seeks relief "must convince the Court that he was misled as to the words to which he was thus signifying his assent."

<sup>359</sup> *Afrox* 2002 (6) SA 21 (SCA) para [8]. See also *Sasfin* 1989 (1) SA 1 (A) 9B-F.

<sup>360</sup> 1956 (1) SA 483 (A) 500.

<sup>361</sup> 2006 (4) SA 1 (SCA). Basing its approach in the values of dignity and autonomy which "find expression in the liberty to regulate one's life by freely engage[ing] [in] contractual arrangements", the Court cautioned that the fact that a term in a contract is "unfair or may operate harshly [does not] by itself, lead to the conclusion that it offends the values of the Constitution" (para [12]). See also para 2.2.4 above.

Court of Appeal in the *Potgieter* case<sup>362</sup> again warned that the introduction of reasonable and fairness as a basis for deciding cases would lead to “intolerable” legal uncertainty.

### 2.3.2.2 Specific examples

Having sketched in broad terms the approach of the courts to public policy as a sword, the discussion will highlight a few specific examples of the use of public policy as a shield. The examples discussed below reflect some of the more common encounters that individuals have with legal and commercial practice. The examples also illustrate that the obligations that arise from these encounters often have a profound legal consequences for those involved.

#### (A) Non-variation clauses

In terms of the *Shifren* principle, a non-variation clause does, not only, not constitute a limitation of freedom of contract, but also, does not offend public policy;<sup>363</sup> rather public policy requires that it be enforced.<sup>364</sup> The courts have held that recognition and enforcement of non-variation clauses do not serve to favour the economically powerful but rather serve as protection for both contractants<sup>365</sup> from the factual and evidentiary uncertainties that may

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<sup>362</sup> 2012 (1) SA 637 (SCA) para [34].

<sup>363</sup> *Shifren & Others v SA Sentrale Ko-op Graanmaatskappy Bpk* 1964 (2) SA 343 (O) 346. See also the decision on appeal in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) 766, hereafter *SA Sentrale* 1964 (4) SA 760 (A). In this case, a tenant relied on an oral variation to a signed contract of lease that provided that variations thereto must be in writing. The problems arising from the *Shifren* principle and the approaches of the courts to deal with these are discussed in Hutchison *et al* (2001) 118 *SALJ* 720.

<sup>364</sup> *SA Sentrale* 1964 (4) SA 760 AD. The Appellate Division warned that the refusal to recognise the validity of the clause would be an “opvallende afwyking [van die] elementere en grondliggende algemene beginsel dat kontrakte wat vrylik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word” (766-7). The Court’s reasoning mirrors the rationale that underlies the *caveat subscriptor* rule that is discussed in the next paragraph.

<sup>365</sup> *Brisley* 2002 (4) SA 1 (SCA) paras [7]&[90]. The case cemented the *Shifren* principle’s place in the South African legal landscape. In affirming the soundness of the Appellate Division judgment, the Court remarked that the decision “represented a doctrinal and policy choice” that was sound and that “[c]onstitutional considerations of equality did not detract from it” but rather “enhanced it” (para [90]). The case that concerned the validity of a non-variation clause in a lease agreement entailed the Supreme Court of Appeal revisiting its earlier decision in the *Shifren* case. The Court outlined the historical context of the of the *Shifren* principle finding support for the



arise with oral contracts or oral variations of contracts.<sup>366</sup> Accordingly, the notion of potential inequality in bargaining power or disparity in financial means and protection of weaker contractants are not an issue.<sup>367</sup> The resultant commercial consequences, legal uncertainty, and evidentiary problems do not justify a departure from the *Shifren principle*.<sup>368</sup>

## (B) The *caveat subscriptor* rule

A contractant who has signed a written contract, albeit unwisely, is deemed to be bound by the terms of such contract.<sup>369</sup> Illiteracy, ignorance of,<sup>370</sup> or mistake regarding the content of the

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principle in the Appellate Division's decision to strike down Parliament's attempt to sidestep an entrenched statutory provision through a simple majority vote in the first *Harris and Another v Minister of Interior and Another* 1952 (2) SA 428 (A) of the three *Harris* cases concerning the sovereignty of Parliament (para [6]).

<sup>366</sup> Para [8].

<sup>367</sup> Para [26]. Unequal bargaining power is discussed in para 2.4.4 in this chapter.

<sup>368</sup> Para [8]. In a scathing denunciation of the attack on the *Shifren* principle, the Court poetically states: "Waar die kontraktereg die beginsel van regsekerheid nastreef, blyk dit nou dat dit op sand gebou is" (para [10]). Indicative of the frustration with untouchable status of the *Shifren* principle is the case of *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) where the Court bemoaned the fact that attempts, particularly since 1994, to develop the common law by mitigating the sometimes "harsh and inequitable consequences" that may result from its application have been rebuffed. The Court wryly observes that the *Shifren* principle has been "knocked back into place by definitive judgments from the Supreme Court of Appeal reaffirming its status and its scope and ambit of operation. This, the Court said, is coupled with "reminders to the lower courts to observe the *stare decisis* rule" (para [1]). However, interestingly and indicative of a way out of the *Shifren* stranglehold, the Court, on the facts of the case, justified the departure from the *Shifren* principle on the basis that it was invoked for purposes other than the vindication of legitimate rights. The Court reasoned that such use of the principle constituted an abuse of the process of law which offended public policy as expressed by constitutional norms and values (paras [124-126]).

<sup>369</sup> In *George* 1958 (2) SA 465 (A), the Appellate Division ruled "[t]hat when a man is asked to put his signature to a document he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature" (472-473). The rule is based on the doctrine of quasi-mutual consent in that a contractant may as a general rule reasonably conclude that by signing the document, the other contractant had signified his/her assent to the terms as contained in that document: *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) 421C-D, hereafter *Brink* 2005 (2) SA 419 (SCA).

<sup>370</sup> In *Mathole* 1951 (1) SA 256 (T), the Court applied the rule where an illiterate contractant did not express a desire that the contract be read to him/her (258-259). The Court's decision related to a clause in the contract that contained Latin phrases and in respect of which no evidence was led that the defendant sought clarification thereof. See also *Khan v Naidoo* 1989 (3) SA 724 (NPD) where an illiterate contractant was also held bound to the contract. The Consumer Protection Act provisions, discussed in chapter 3 para 3.6.3, have radically changed this position.

In American and English law, a substantially unfair contract may be set aside where the contractant is "'poor and ignorant' (e.g. illiterate)": Beale *Chitty On Contract* Volume 1 paras [7-128] and [7-136]. See also Smith *Atiyah's An Introduction to the Law of Contract* 7; Peel *Treitel The Law of Contract* para [10-044].

written document, or the fact that the contractant did not read it will, in general, be of little or no avail.<sup>371</sup> The subjective intention of the contractants when signing a contract is irrelevant<sup>372</sup> and their intention must be gathered from the language in the contract.<sup>373</sup>

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In Australia, the notion of unconscionability underpins a number of established equitable principles. Taking advantage of a contractant's weakness or vulnerability is deemed to be unconscionable: Davis, Seddon, and Masel *The Laws of Australia Contract* (2003) para 7.1[8], hereafter *Davis et al The Laws of Australia Contract*; Carter & Hartland *Contract Law in Australia* paras [1504]&[1514].

In Germany, the BGB provides for the invalidity of any legal transaction that is contrary to public policy (BGB 138). In particular, grounds of invalidity may be exploitation of a predicament, inexperience, or infirmity of will or judgment (BGB 138(2)).

In the Netherlands, the NBW 3.44(4) provides for the invalidity of a juristic act induced by special circumstances such as a state of necessity, dependency, wantonness, abnormal mental condition or inexperience.

<sup>371</sup> In *Burger v Central South African Railways* 1903 TS 571, one of the earliest cases on the topic, the Court, whilst acknowledging that there are grounds upon which a signed contract may be repudiated, confirmed that "[i]t is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature" (576). The case concerned incorporation by reference of a set of railway regulations. The court said that a signed contract may be repudiated, *inter alia*, on the grounds of fraud, undue influence, duress, misrepresentation, and, in certain instances, mistake (578). See also *Wells* 1927 AD 69, 73. These statements of law were confirmed in *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 (3) SA 231 (W) where the court said that "[o]ne is expected to read what one signs. The law goes no further than to recognize that the other party by words, by conduct or by the form the document takes may mislead or lull the signatory into believing that he need not go through every clause or he may ensure that the signatory does not go through the document carefully but only skims through it before signing, whether by induced time constraints or by other devices. The furthest Courts will go on a principle approach is to identify the issue as one of *iustus error*" (239). In *Brink* 2005 (2) SA 419 (SCA), the Appellant was granted relief on the grounds of *iustus error* from a suretyship obligation arising from a document that he had signed on behalf of the debtor. The relevant clause formed part of a document entitled "Credit Application Form" leading to the conclusion that "the form was a trap for the unwary and [that] the appellant was justifiably misled by it." It is pertinent to note, in the context of this chapter, that in the dissenting judgment it was reasoned that the form of the contract, seen as a whole, could not be described as a trap or a misrepresentation. It was said that even on the assumption that it constituted a trap of a misrepresentation, the Appellant's error was not *iustus* because a reasonable person in the Appellant's position would not have been misled by it. Failure to hold the Appellant bound by his bargain would be "to open the door to abuse and possible uncertainty" (paras [35]-[37]). See also *Afrox* 2002 (6) SA 21 (SCA) para [30]. The *Afrox* court was prepared to concede that there may be a duty to notify a consumer in those instances where the term was one that, objectively speaking, was unexpected (para [36]). Note in this regard the duty of notification imposed by section 49(3)-(5) of the Consumer Protection Act 68 of 2008 which will be discussed in chapter 3 below.

<sup>372</sup> *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) paras [15]-[17], hereafter *Freddy Hirsch* 2011 (4) SA 276 (SCA). The Appellant and the Respondent had concluded a contract in terms whereof the Appellant supplied the Respondent with spices. The case was precipitated by the presence of the Sudan 1 red dye which had been banned by the World Health Organisation and was banned for use in food products in terms of GNR1008/1996 promulgated under the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972. The issue in this case was whether a non-liability clause contained in the standard terms and conditions of the signed contract could be relied on by the Appellants. The court ruled that the fact that the Respondent's representative did not read the terms and conditions did not detract from its validity even though the representative had written the words "standard conditions not checked" immediately above her signature as well as below the relevant warranty in terms whereof she warranted that she had read the conditions.



### (C) Agreements in restraint of trade

A restraint of trade agreement is concluded usually to protect a particular trade, business, or professional activity.<sup>374</sup> The result is that two contractual principles come into consideration, namely, freedom of contract and freedom of trade, occupation, and profession.<sup>375</sup> In *Magna Alloys and Research (SA) Pty Ltd v Ellis* the Appellate Division,<sup>376</sup> in finding restraint of trade agreements to be *prima facie* valid and enforceable with the onus being on the contractant wishing to escape the restraint to prove that the restraint is against public policy,<sup>377</sup> gave free reign to the notion of freedom of contract.<sup>378</sup>

Since restraints of trade effectively amount to a limitation of the freedom of the contractant to engage in commercial activity, the question arises whether the common law as evidenced in *Magna Alloys* is at odds with the constitutional guarantee of freedom of trade occupation and

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<sup>373</sup> See para 2.4.5 in this chapter for a discussion of interpretation of contracts.

<sup>374</sup> Van der Merwe *et al Contract* 183.

<sup>375</sup> In *Afrox* 2002 (6) SA 21 (SCA), the Court confirmed that the constitutional value of freedom of contract includes the principle of sanctity of contracts (para [23]). See also *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA), hereafter *Reddy* 2007 (2) SA 486 (SCA), where the court also stated that these values inform the section 22 constitutional right to, inter alia choose a trade, profession or occupation (para [15]).

<sup>376</sup> 1984 (4) SA 874 (A) 897-898. This case concerned a clause that prevented the Respondent, for a period of two years after termination of his contract of employment and for a radius of 10 km of a defined area, from acting in competition to the business of the Appellant. See further the case discussions below. Initially, in the absence of common law authority, our provincial courts followed the English law approach which determined that the contract was *prima facie* void and unenforceable. The onus was on the contractant wishing to enforce the term to prove that the restraint was reasonable. The *Magna Alloys* court rejected the approach that followed the English law position as being “onlogies en onvanpas” (892). The English approach is predicated on accommodating the unequal bargaining power of employees. A similar position prevails in the United States of America: Calitz ‘Restraint of Trade Agreements in Employment Contracts: Time for *Pacta sunt servanda* to Bow Out?’ (2011) 22 *Stellenbosch LR* 50, 52, 63 & 64-65.

<sup>377</sup> The *Magna Alloys* approach ignores the weak bargaining power that employees generally have and further weakens the position of the employee by placing the burden of proof on the employee who may as a result of the high transaction costs of litigation (for example, costs, time, energy, uncertainty about prospects of success) be disinclined to litigate.

<sup>378</sup> The Court confirmed the common law position that the principle of freedom of contract permeates our law of contract; that any unreasonable limitation of this freedom or any limitation that harms public policy should not be tolerated; and that any agreement that is contrary to public policy will not be countenanced (890 & 892). The Court concluded that, as is the case with all other contractual terms, the enquiry should be whether such restraint should, in light of public policy, not be enforced. An agreement found to be contrary to public policy does not render it void, just unenforceable (892 & 897-8).

profession.<sup>379</sup> In the pre-constitutional dispensation, the courts clearly placed freedom of contract and hence the validity of a restraint of trade before freedom of trade.<sup>380</sup> In the post-constitutional dispensation, the question involves two competing constitutional principles, namely, the constitutionally recognised principle of freedom of contract coupled with sanctity of contract,<sup>381</sup> and the constitutional protection of the freedom of trade occupation or profession.<sup>382</sup> The weight of opinion thus far has been in favour of the former.<sup>383</sup>

The soundness of this approach is debatable given the Constitutional Court ruling in *Barkhuizen v Napier*<sup>384</sup> that the principle of sanctity of contract must be tempered by considerations of morality and public policy as informed by the notion of *ubuntu* and as discerned from the values embodied in the Constitution, and especially the Bill of Rights. An equally compelling consideration that may yet prove decisive is the current socio-economic situation with widespread poverty and rampant unemployment and its deleterious effect on constitutional values of dignity, equality and freedom.<sup>385</sup>

<sup>379</sup> Section 22 of the Constitution.

<sup>380</sup> *Magna Alloys* 1984 (4) SA 874 (A). See also *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) (one of the cases that precipitated the *Magna Alloys* decision), where the court unequivocally stated that South African laws prefer sanctity of contract over freedom to engage in commercial activity because “[f]reedom of trade does not vibrate nearly as strongly [as sanctity of contract] through our jurisprudence” (505F).

<sup>381</sup> Discussed in chapter 1 paras 1.3.1 and 1.3.3 and in para 2.4.4 above.

<sup>382</sup> Section 22 of the Constitution.

<sup>383</sup> The decisions of the Supreme Court of Appeal after the final Constitution show its aversion to a return to the pre-*Magna Alloys* position and confirm its preference for freedom of contract. For example, in *Reddy* 2007 (2) SA 486 (SCA), the Court unequivocally said that the question of onus is a matter of substantive law and that the substantive law has been settled in the *Magna Alloys* case (paras [10] & [14]). In considering the impact of section 26 of the Interim Constitution that guarantees the right to economic activity, the courts in, for example, *Waltons Stationery Co (Edms) Bpk v Fourie en ‘n ander* [1994] 2 All SA 398 (O) 399, and *Knox D’Arcy* 1996 (2) SA 651 (W) 661 confirmed the position in our law as determined in the *Magna Alloys* case.

<sup>384</sup> 2007 (5) SA 323 (CC) paras [30] & [51] discussed in chapter 1 para 1.3.3.

<sup>385</sup> In *Affordable Medicines Trust and others v Minister of Health and Others* 2006 (3) SA 247 (CC), hereafter *Affordable Medicines* 2006 (3) SA 247 (CC), the Court held, with reference to section 22 of the Constitution, that “[w]hat is at stake is more than one’s right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and is constitutive of one’s dignity ... **it is the foundation of a person’s existence**” (para [59]). Emphasis added. The decision suggests that it may not sit uncomfortably with the Court to find that public policy dictates that the constitutional value of dignity associated with employment takes precedence over the constitutional value of dignity associated with freedom and sanctity of contract. The case

The Constitutional Court's confirmation in *Barkhuizen v Napier*<sup>386</sup> of the common law position that the onus is on a contractant alleging that the enforcement of contractual term is unfair and unreasonable and hence contrary to public policy to prove it, does not settle the debate in this regard;<sup>387</sup> the reason being that the case did not concern the conflict between the constitutionally recognised principle of freedom of contract and constitutional protection of the freedom of trade occupation or profession in section 22 of the Constitution. In addition, the current approach that places the onus on the employee to prove the unfairness of the restraint

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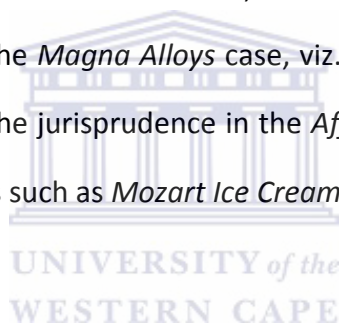
dealt with a constitutional challenge, based, *inter alia*, on section 22 of the Constitution that medical practitioners and dentists, amongst others, require a licence issued by the Director-General of the Department of Health to dispense medicines. In *Advtech Resourcing* 2008 (2) SA 375 (C), the Court, after referring to the *Affordable Medicines* 2006 (3) SA 247 (CC) case and other cases, said that "[t]hese cases support the view that an employer must justify a limitation upon the right to work, given the importance placed on the dignity of work and of the concomitant limitation or eradication of that right when a restraint operates" (para [28]). These cases suggest that the onus should be on the contractant wishing to enforce the restraint to prove that the restraint meets the requirements of section 36 of the Constitution, in that it constitutes a reasonable limitation of the section 22 right to freedom of trade, occupation, and profession. An acceptance of this line of reasoning would see the restoration of the pre-*Magna Alloys* approach. Although the court in *Advtech Resourcing* 2008 (2) SA 375 (C) characterised this as simply a reversion to the law which operated prior to 1984 and cast the burden on the employer to justify the reasonableness of the restraint, and one that does not entail a radical departure from our legal tradition, the decision, as well as the others on which it draws, may be viewed as showing a preference for the section 22 freedoms (para [28]). Equally significantly, such a development would give effect to the public harm principle and the principle of paternalism. Note, however, the counter-argument in *Den Braven* 2008 (6) SA 229 (D). The Court pointed out that placing the onus on the one seeking to enforce the restraint imposes a burden that is impossible to discharge because if a restraint of trade is regarded as *prima facie* invalid in that it infringes the right choose a trade, occupation or profession as promised in the first sentence of section 22 of the Constitution, "then I fail to see on what basis the party seeking to enforce the restraint of trade agreement can overcome the problem that it is seeking to enforce a contractual terms that breaches a constitutional right" (para [30]). The Court justified this conclusion on the basis that "[n]either the entitlement in terms of the second sentence [of section 22] to regulate the practice of a trade, occupation or profession by law nor the ability under section 36(1) to limit the rights in the Bill of Rights ... are available to be invoked by a private citizen as Ngcobo J [in *Barkhuizen* 2007 (5) SA 323 (CC)] has emphasised private citizens do not make law." The Court concluded by affirming that it does not know of any "developed system of jurisprudence that does not recognise the need, subject to some exceptions such as fraud, misrepresentation, public policy or the like, to enforce contractual obligations" (para [33]). In a poetic response, Davis J in *Mozart* 2009 (3) SA 78 (C) remarks that "[c]ontract law cannot be reduced to a museum of a past *jurisprudence*" (85F). The constitutional value of dignity (and its sister values, equality and freedom) as a constituent element of the *essentialia* of price and rental is explored in chapter 4.

<sup>386</sup> 2007 (5) SA 323 (CC) para [69].

<sup>387</sup> Van Huissteen *et al Contract Law* contend that the constitutional influence on the issue of onus is "unclear, since the relation between the weight that is attached to freedom of trade, freedom of contract, and freedom of personal choice, in general, [has been] left undefined" in cases where the constitutionality of this approach was in issue (para 262).

is questionable in that it saddles the employee, who in most cases has the weaker bargaining power and fewer resources to conduct litigation, with the transaction costs<sup>388</sup> of litigation.

It is submitted that the final determination of the question regarding the burden of proof in restraint of trade cases will be based on a consideration of public policy as redefined by the Constitutional Court in *Barkhuizen v Napier*.<sup>389</sup> A generation of cases that reflect the redefined concept of public policy include the *Affordable Medicines*, the *Mozart Ice Cream* and the *Advtech Resourcing* cases.<sup>390</sup> The emphasis that the *Affordable Medicines* case placed on the right to work as an integral component of dignity and the importance placed on socio-economic rights that filters through in the judgment,<sup>391</sup> suggest that the balance of probabilities are stacked strongly in favour of the Constitutional Court, when apprised of the matter, deciding to revert the legal position prior to the *Magna Alloys* case, viz., that restraints of trade are *prima facie* invalid and unenforceable. The jurisprudence in the *Affordable Medicines* case is strongly supported in the decisions in cases such as *Mozart Ice Cream* and *Advtech Resourcing*.



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<sup>388</sup> This involves a decision whether or not to litigate which would be dependent on various considerations, not least of which is the cognitive ability of the contractant and whether he/she has the resources (*inter alia*, means, time, energy, capacity, inclination) to prosecute his/her claim.

<sup>389</sup> 2007 (5) SA 323 (CC). The Court held that public policy is informed by *ubuntu* and is the repository of the values most dear to society, the general sense of justice of the community, the *boni mores*, manifested in public opinion and incorporates the notions of fairness, justice and equity, and reasonableness and the necessity to do simple justice between individuals. See chapter 1 para 1.3.3. In a minority judgment Sachs J commented that "[t]he jurisprudential pedestal on which it [freedom of and sanctity of contract] once imperiously stood has been singularly narrowed in the great majority of democratic societies. Our new constitutional order, I believe, further attenuates its one-time implacable application" (para [141]).

<sup>390</sup> Discussed earlier in this sub-paragraph.

<sup>391</sup> The Court held, with reference to section 22 of the Constitution, that "[w]hat is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity ... **it is the foundation of a person's existence**" (para [59])

### 2.3.3 Public policy as a rationale for not enforcing contracts

The law as a normative paradigm will not recognise any contract that is contrary to public policy.<sup>392</sup> The principle received constitutional approval in *Barkhuizen v Napier*<sup>393</sup> where the Constitutional Court reasoned that contractual terms which are inimical to the values enshrined in the Constitution are contrary to public policy and unenforceable.

However, the role played by the elusive concept of public policy, as a qualification of the *pacta sunt servanda* principle,<sup>394</sup> in the pursuit of substantive justice, receives scant recognition in our courts.<sup>395</sup> It is even more telling that public policy has not been accepted as a tool of distributive justice for ensuring substantive fairness,<sup>396</sup> and what evidence there was of this has been eroded.<sup>397</sup> Conflict with constitutional values has been found to be not sufficient to invalidate a contract or terms thereof.<sup>398</sup> The Supreme Court of Appeal has instead sought justification in the Constitution for its reluctance to strike down contracts as being contrary to public policy.<sup>399</sup> The reliance of the Supreme Court of Appeal on the values of dignity, equality,

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<sup>392</sup> One of the earliest cases expressing this is *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775 at 779. See also the cases in para 2.3.2 in this chapter. Public policy is also discussed in chapter 1 para 1.3.3.

<sup>393</sup> 2007 (5) SA 323 (CC) para [29] discussed in chapter 1 para 1.3.3. It is instructive to note that the philosophy of the *Barkhuizen* court regarding the role (and content) of public policy was foreshadowed by the minority (pre-constitutional) judgment of Jansen JA in *Bank of Lisbon* 1988 (3) SA 580 (A) when the Judge of Appeal stated that the notions of freedom of contract, *pacta sunt servanda*, and legal certainty are not “absolute values” and the status of freedom of contract and *pacta sunt servanda* as contractual values is interlinked with other socio-economic considerations such as inflation, monopolies, unequal bargaining power and standard form contracts (613).

<sup>394</sup> See *Barkhuizen* 2007 (5) SA 323 (CC) at para [87].

<sup>395</sup> The Supreme Court of Appeal has consistently stressed that it must be sparingly used in this context. See, for example, *Afrox* 2002 (6) SA 21 (SCA) para [8] and the cases referred to therein.

<sup>396</sup> See paras 2.3.2 & 2.3.3 in this chapter.

<sup>397</sup> The rejection in *Bank of Lisbon* 1988 (3) SA 580 (A) of *exceptio doli generalis* serves as an example of the latter. Likewise, the Appellate Division’s recommendation in *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (AD) to the legislature for the abolition of the doctrine of *laesio enormis*.

<sup>398</sup> “[C]onstitutional values of dignity, equality and the advancement of human rights and freedoms” do not provide a “general all-embracing touchstone for invalidating a contractual term”: *Napier* 2006 (4) SA 1 (SCA) para [11].

<sup>399</sup> In *African Dawn* 2011 (3) SA 511 (SCA), the Court, with reference to similar pronouncements in *Napier* 2006 (4) SA 1 (SCA) para [7] and in *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) para [39], confirmed the view of its predecessors that making rules of law discretionary or subject to value judgments may be destructive of the

and freedom that pervade the constitutional provisions to support its preference for the notion of freedom of contract and its corollary *pacta sunt servanda*<sup>400</sup> is, however, misplaced.

Freedom of person<sup>401</sup> does not have unlimited application neither is it immune from limitation. A wide interpretation of freedom might impede the acceptance of regulation and redistribution in the public interest, an issue which, being political in nature, falls within the province of the Legislature. The function of the courts is not to approve or disprove of such policies but rather to ensure compliance with the constitutional principles.<sup>402</sup> The same holds for contractual freedom.<sup>403</sup> Dignity and equality also serve as a brake on freedom<sup>404</sup> especially in the context of substantive, as opposed to formal equality, as in the Constitution: that much was recognised by the Constitutional Court in the *Barkhuizen* case.<sup>405</sup>

The Supreme Court of Appeal's preference for freedom and sanctity of contract and its insistence on using public policy sparingly as a sword<sup>406</sup> is at odds with the view of the Constitutional Court as expressed in *Barkhuizen v Napier*. The validity of this submission is borne out by the gloss that the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa Ltd*<sup>407</sup> placed on the *Barkhuizen* judgment.<sup>408</sup> It is also at odds with the Constitutional Court's approach<sup>409</sup> of determining the validity of contractual terms with regard to section 39 of the Constitution which requires courts of law to "promote the values that

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law and would "run counter to the spirit, purport and objects of our Constitution" (para [27]). See also *Potgieter* 2012 (1) SA 637 (SCA) para [34] to the same effect.

<sup>400</sup> See para 2.1.3 in this chapter.

<sup>401</sup> Section 12(1) of the Constitution.

<sup>402</sup> *Ferreira* 1996 (1) SA 984 (CC) paras [180]-[185].

<sup>403</sup> Bhana & Pieterse (2005) 122 *SALJ* 879.

<sup>404</sup> Bhana & Pieterse (2005) 122 *SALJ* 879-880.

<sup>405</sup> *Barkhuizen* 2007 (5) SA 323 (CC) discussed in chapter 1 para 1.3.3. See further chapter 4 paras 4.2.1-4.2.3.

<sup>406</sup> A narrow interpretation of public policy is adhered to in terms whereof it is used to justify the enforcement of contracts and contractual terms. In, for example, *Reddy* 2007 ((2) SA 486 (SCA) the Court said that public policy requires contracts to be enforced (para [21]). See also para 2.3.3 read with para 2.3.2 in this chapter.

<sup>407</sup> (Appeal) 2010 (4) SA 468 (SCA). See chapter 1 para 1.3.3. The *Potgieter* 2012 (1) SA 637 (SCA) places a similar interpretation on the *Barkhuizen* decision (paras [31]&[32]).

<sup>408</sup> Discussed in chapter 1 para 1.3.3.

<sup>409</sup> *Barkhuizen* 2007 (5) SA 323 (CC), for example, at para [28].



underlie an open and democratic society based on human dignity, equality and freedom” when interpreting the Bill of Rights<sup>410</sup> and to “promote the values the spirit, purport and objects of the Bill of Rights” when developing the common law or customary law.<sup>411</sup> This duty is particularly present where a court deals with “**value laden** concepts such as public policy...”<sup>412</sup>

### 2.3.4 Conclusion

Although social, political, and economic conditions and value systems have changed, the classical theory of freedom and sanctity of contract, with individual autonomy at its core, is still very prominent in the South African law of contract.<sup>413</sup> The idea that public policy requires the enforcement of contracts freely entered into has been “**virtually elevated into a constitutional value.**”<sup>414</sup> This is so despite the “statutory erosion”<sup>415</sup> of the common law of contract.

This approach, elevated to the status of a dogma, is succinctly encapsulated in the words of Hahlo<sup>416</sup> when the writer says:

“[P]rovided 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

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<sup>410</sup> Section 39 (1)(a).

<sup>411</sup> Section 39(2).

<sup>412</sup> *Advtech Resourcing* 2008 (2) SA 375 (C) para [25]. Emphasis added.

<sup>413</sup> The examples cited of the practical implementation of the notion of freedom of contract above, are illustrative of the reluctance of our courts to consider the harshness or oppressiveness of contractual terms freely entered into as a factor in assessing the validity of the disputed contract or contractual term. The Supreme Court of Appeal has repeatedly confirmed that notions such as *bona fides* do not independently play a role in a determination of the validity of a contract or a contractual provision. For example, in *Brisley* 2002 (4) SA 1 (SCA) the Court confirmed that “goeie trou nie ‘n onafhanklike, oftewel ‘n “free-floating,” basis vir die tersydestelling of die nie-toepassing van kontraktuele bepalings bied nie” (para [22]). In *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) the Court went to lengths to explain that the *Barkhuizen* case should not be interpreted to mean that good faith plays a role, thereby steadfastly adhering to its viewpoint so aptly expressed in its earlier decision in the *Brisley* case (para [27]). See also Lubbe & Murray *Contract* 20.

<sup>414</sup> Naudé & Lubbe ‘Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*’ (2005) 122 *SALJ* 441, 443, hereafter Naudé & Lubbe (2005) 122 *SALJ* 441. Emphasis added.

<sup>415</sup> The term borrowed from Lubbe & Murray *Contract* 26 is descriptive of recent legislative developments discussed in chapter 3.

<sup>416</sup> Hahlo (1981) 98 *SALJ* 70.

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.”

Whether the sacrosanct status of freedom and sanctity of contract, with its philosophical assumption of equality, is justified, is open to question bearing in mind that the free enterprise system is in decline due to “the innate trend of competitive capitalism towards monopoly;”<sup>417</sup> the inroads made by standard form contracts;<sup>418</sup> consumer protection legislation;<sup>419</sup> public policy as redefined in the *Barkhuizen* case<sup>420</sup> and the decisions in cases such as *Breidenkamp*,<sup>421</sup> *Hoffmann*,<sup>422</sup> *Nyandeni Local Municipality*<sup>423</sup> and *Everfresh*.<sup>424</sup> The Constitutional Court’s redefinition of public policy in the *Barkhuizen* case as embracing constitutional values is confirmation of the notion that “[t]he safeguarding of the public interest often involves the courts in a survey of not only the legal aspects of a contract but also of its moral, social and economic implications.”<sup>425</sup> However, the latter is an arena into which the Supreme Court of Appeal has been extremely reluctant to enter.<sup>426</sup> Be that as it may, the discussion in chapter 4 will argue that public policy, as redefined by the Constitutional Court, has a definitive role in the determination of the nature and function of the *essentialia* of price and rental which role will ultimately prove to be decisive in the resolution of the question of law, namely, whether South African contract law should confer validity on contracts of sale and lease at a reasonable price and rental respectively or at a unilaterally determined price or rental.

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<sup>417</sup> Lubbe & Murray *Contract* 25.

<sup>418</sup> Discussed in para 2.4.2 in this chapter.

<sup>419</sup> See chapter 3.

<sup>420</sup> 2007 (5) SA 323 (CC). The Court held that public policy is informed by *ubuntu* and is the repository of the values most dear to society, the general sense of justice of the community, the *boni mores*, manifested in public opinion and incorporates the notions of fairness, justice and equity, and reasonableness and the necessity to do simple justice between individuals. See chapter 1 para 1.3.3.

<sup>421</sup> (Interim interdict) 2009 (5) SA 304 (GSJ).

<sup>422</sup> 2001 (1) SA 1 (CC).

<sup>423</sup> *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM). See para 2.3.2.2(A) above.

<sup>424</sup> 2012 (1) SA 256 (CC). The cases reveal a trend for the acceptance in contract law, of a general principle of good faith as a constitutional value. See also chapter 1 para 1.3.3.

<sup>425</sup> Aronstam *Consumer Protection* 43. See further chapter 4.

<sup>426</sup> See the decisions discussed in this chapter, and especially the decisions by the then Appellate Division in the *Tjollo Ateljees* and *Bank of Lisbon* cases. See also the discussion of the decisions in *Brisley* 2002 (4) SA 1 (SCA); *Breidenkamp* (appeal) 2010 (4) SA 468 (SCA) and *Potgieter* 2012 (1) SA 637 (SCA).



In summary, the reluctance, in general, of the courts' to employ a broader definition of public policy that incorporates constitutional values as a standard for determining contractual validity,<sup>427</sup> coupled with the presumption of equality and free will<sup>428</sup> leads to the conclusion that our law should not recognize as valid contracts of sale at a reasonable price or at a unilaterally determined price.

Having explained the principle of freedom of contract and its revered status in South African law, it is necessary to consider the question (indirectly dealt with in the preceding section) regarding the extent to which the principle is subject to limitation.

## **2.4 Limitations on freedom of contract**

### **2.4.1 Introduction**

Chapter 1 explained that freedom to enter into contracts is subject to various limitations<sup>429</sup> in terms of the common law, statute law, and, importantly, the Constitution. This section discusses additional areas of limitation in order to determine the extent to which freedom of contract and contractual autonomy is subject to limitation and the consequences of such limitations.

### **2.4.2 Standard form contracts**

The rules of law proposed in the *obiter dicta*<sup>430</sup> would, in all probability, if adopted, find their way into standard form contracts<sup>431</sup> which it is estimated is used in ninety-five percent of all

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<sup>427</sup> See paras 2.3 and 2.8 in this chapter.

<sup>428</sup> See paras 2.2.2 above and 2.4.2 below.

<sup>429</sup> See chapter 1 para 1.3.1.1

<sup>430</sup> The proposal is to validate contracts of sale and lease at a reasonable price or rental respectively and at a price or rental determined unilaterally by one of the contractants.

<sup>431</sup> The advent of standard form contracts may be traced to the age of industrialization in the nineteenth century when mass production revolutionized, not only, the economy, but also, society as a whole. The dawn of the industrial age that resulted in mass production was accompanied by a proliferation of standard terms in order

transactions.<sup>432</sup> The following discussion concerns standard form contracts and how such contracts affect the principles of autonomy and freedom of contract, consensus and certainty. Standard form contracts play a Dr. Jekyll and Mr. Hyde role within the law of contracts.<sup>433</sup> Standard form contracts are generally employed by large corporations, public utilities,<sup>434</sup> monopolies and cartels.<sup>435</sup> In addition to achieving uniform trading practices,<sup>436</sup> such contracts are time- and cost-effective in that the same contract is used over and over, obviating the need to engage in fresh negotiations for each new contract.<sup>437</sup> Such contracts also lead to greater legal certainty in that once a court has interpreted a term or terms thereof, the expectation is that a similar interpretation will be given in the future.<sup>438</sup>

Standard form contracts, the abovementioned benefits aside, may give rise to a predisposition by their users to abuse their economic power and/or the economic need of the consumer by imposing oppressive standard contracts.<sup>439</sup> Such contracts are risk-averse for the drafters in

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to ensure mass distribution of goods and services: Zerres 'Principles of the German Law on Standard Terms of Contract' 1, 1

<[http://www.iurawelt.com/sunrise/media/mediafiles/14586/German\\_Standard\\_Terms\\_of\\_Contract\\_Thomas\\_Zerres.pdf](http://www.iurawelt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_of_Contract_Thomas_Zerres.pdf)>, hereafter Zerres 'Principles of the German Law'

<sup>432</sup> Hutchison *et al Contract* 25; Harker 'Imposed Terms in Standard-Form Contracts' (1981) 98 *SALJ* 15, 16, hereafter Harker (1981) 98 *SALJ* 15.

<sup>433</sup> For a concise summary of some of the more important advantages and disadvantages, see the minority judgment of Sachs J in *Barkhuizen* 2007 (5) SA 323 (CC) para [135] *et seq.* See also *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 623-624.

<sup>434</sup> Hutchison *et al Contract* 239.

<sup>435</sup> In general, the legal skills and experience are concentrated on the side of the drafter. The disadvantage of this is that contract is rendered "seller-protective" at the expense of the buyer. Llewellyn 'What Price Contract? – An Essay in Perspective' (1931) 40 *Yale LJ* 704, 734, hereafter Llewellyn (1931) 40 *Yale LJ* 704. Consumer protection legislation discussed in chapter 3 seeks to regulate this consequence. The advantage is that "[t]hey materially ease and cheapen selling and distribution ... and they make the experience and planning power of the high executive available" to others. Llewellyn (1931) 40 *Yale LJ* 731; Zerres 'Principles of the German Law' 1.

<sup>436</sup> Van der Merwe *et al Contract* 269-270.

<sup>437</sup> *Barkhuizen* 2007 (5) SA 323 (CC) para [139]; Llewellyn (1931) 40 *Yale LJ* 731.

<sup>438</sup> Sachs J in *Barkhuizen* 2007 (5) SA 323 (CC) para [137]. See also Harker (1981) 98 *SALJ* 16. See also Zerres *Principles of the German Law* 1-2.

<sup>439</sup> In most cases, potential disputes issues are pre-determined in favour of the drafter. The result is that risks are slanted against the buyer and in favour of the seller in that the contract is rendered "seller-protective." Llewellyn (1931) 40 *Yale LJ* 731 and 734. See also *Barkhuizen* 2007 (5) SA 323 (CC) para [135]. Aronstam observes that standard form contracts have often been singled out as "the most undesirable device used for

that they burden the non-drafter with all the risks.<sup>440</sup> Whereas, in the case of individually negotiated contracts, it could usually be assumed that contractants understood the terms thereof, such an assumption cannot be made in the case of standard form contracts where negotiation seldom occurs.<sup>441</sup> Contractants often also lack the requisite knowledge and skill to negotiate effectively with suppliers of goods and services who by and large are better equipped in these areas of business.<sup>442</sup> The problem is aggravated by the use of jargon or obscure legalese.<sup>443</sup> Hence, they erode the consensual element of contract law. Contractants may feel dragooned into concluding contracts<sup>444</sup> that contain oppressive or unreasonable terms<sup>445</sup> because of limited options available in that the market is dominated by a few large corporations or entities or because of necessity.<sup>446</sup> Hence, the contractant's autonomy and

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oppression": *Consumer Protection* 23. See also Bhana & Pieterse (2005) 122 *SALJ* 885. Consumer protection legislation, discussed in chapter 3, seeks to regulate this consequence.

<sup>440</sup> This is typically done through exemption clauses such the one in *Afrox* 2002 (6) SA 21 (SCA).

<sup>441</sup> *Barkhuizen* 2007 (5) SA 323 (CC) paras [135], [137] and [138]. The inherent danger is that they eliminate the opportunity for arm's length negotiations and may contain terms that are presented to consumers on a "take-it-or-leave-it" basis: *Barkhuizen* para [135]; Van der Merwe *et al Contract* 270; Hutchison *et al Contract* 24-25 and 239.

<sup>442</sup> Zerres 'Principles of the German Law' 1-2.

<sup>443</sup> Sachs J in *Barkhuizen* 2007 (5) SA 323 (CC) para [135].

<sup>444</sup> In *Barkhuizen* 2007 (5) SA 323 (CC), Sachs J observed that "[t]he consumer's will does not enter the picture at all" (para [155]).

<sup>445</sup> Sachs J in *Barkhuizen* 2007 (5) SA 323 (CC) complained that the terms "tend to be weighted heavily in favour of the supplier" in that it limits or excludes "the consumer's normal contractual rights and the supplier's normal contractual obligations and liabilities" (para [135]). The implications are even more dire in the case of lay contractants who are most at risk because they have very little or no choice but to submit to the terms of the standardised contract, resigning themselves to accept whatever fate may dish out. Van Huyssteen *Onbehoorlike Beïnvloeding en Misbruik van Omstandighede in die Suid-Afrikaanse Verbintenisreg* (1980) 131 comments that a great portion of the population lacks, from a business perspective, knowledge and experience.

<sup>446</sup> Because of circumstances, for example, as prevailed in the *Afrox* case, such terms often go unnoticed. Even in those instances where the contractant does read the contract the contractual terms or the implications thereof may be incomprehensible to, or not fully understood by the contractant, especially a lay-contractant, because of their complexity. This much was recognized by the Constitutional Court in *Barkhuizen* 2007 (5) SA 323 (CC) when it observed that "many people...conclude contracts without understanding what they are agreeing to..." (paras [65], [135] and [136]). The Court commented that the terms are often couched in legalese and hidden in fine print (para [135]). See also Lewis 'Fairness in South African Contract Law' (2003) 120 *SALJ* 330, 346, hereafter Lewis (2003) 120 *SALJ* 330.

freedom of choice is limited because, generally, his/her encounter with the dealer next door will be an equally invidious one.<sup>447</sup>

The possibility and danger of exploitation and of unconscionable<sup>448</sup> contractual terms is exacerbated by the advent of the electronic age which makes it possible to conclude contracts via electronic media such as the internet and cell phone text messages.<sup>449</sup>

In summary, “[a standard form contract] is a form of contract which, in the measure of importance of the particular deal in the other party’s life, amounts to the exercise of unofficial

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<sup>447</sup> Any attempt at variation of contractual terms will, in all probability, be met by the proverbial “blank stare.” “The only freedom left for the customer is the fictitious alternative to accepting the terms presented to him: not contracting at all”: Harker (1981) 98 SALJ 17.

<sup>448</sup> Unconscionability does not have a fixed meaning. In contract law, it is used to describe situations where, in the absence of fraud or duress, it is believed that one contractant took advantage of or exploited another. It consists of a procedural as well as a substantive enquiry. The procedural enquiry aims at determining whether an element of vulnerability existed. For example, impaired intellectual ability or absence of choice (in the case of monopolies, for example). The substantive element requires proof that the contract or term itself was substantively unfair: Smith Atiyah’s *An Introduction to the Law of Contract* 300.

<sup>449</sup> Hutchison *et al* *Contract* 245. That great care must be exercised when engaging in this medium of communication is illustrated by the English case of *Immingham Storage Company Limited v Clear* [2011] EWCA Civ 89 where the respondent had signed and returned a quotation containing substantial terms agreed on, sent to it by the appellant which included the words “a formal contract will follow in due course.” The Court of Appeal concluded that in the absence of an express indication that the quotation was subject to a contract, there was an intention to conclude a valid contract. The reference to a formal contract was deemed not specific enough to exclude an intention to contract (paras [25]-[26]). A similar conclusion was reached in *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Limited* [2011] EWHC 56 (Comm) (paras [60]-[65]). In that case, the electronically signed e-mails related, *inter alia*, to a guarantee in a charter party of a vessel. The guarantee was contained in the first e-mail from the defendants and the following e-mails concerned other terms and conditions. The last e-mail which did not refer to the guarantee purported to contain a final agreement and contained a request for a “recap” of the terms. A charter party that included the guarantee was never signed. Despite this expectation that the agreement would be recorded in the future, the court held that the e-mails and other documents sent between the contractants were sufficient to establish a guarantee. The South African courts in *MV Navigator (No. 1): Wellness International Network Limited v MV Navigator and Another* 2004 (5) SA 10(C) adopted a different approach. In this case the buyer, when it made its offer, provided that “a formal agreement is to be drawn up between the seller and the buyer within 30 days” and the seller on accepting the renegotiated (increased) offer confirmed that the buyer would receive communication from the owners’ brokers who would “put together all the contracts etc.” The Court decided that a reasonable person in the position of the buyer’s managing director would not have concluded that the seller intended to sell without a formal written contract setting out the terms of the contract. The English cases confirm that parties who communicate electronically are at risk and establish that it is important for parties to protect themselves by explicitly stating that the agreement is subject to the conclusion of a formal written agreement. The use of the term “formal” does not offer any protection because it may even be interpreted as indicating that the further written agreement is a mere formality in that the substance of the contract has already been agreed upon. See also chapter 3 paras 3.6.2, 3.6.6 and 3.9.

government of some by others, via private law.”<sup>450</sup> Consequently, such contracts weaken the autonomy of the contractants, reduce their freedom and practically negate (substantive) consensus, thereby impairing the foundations of contract law. At this juncture, it is apposite to note that the legislature, responding to the challenges of standard form contracts and to the unwillingness of our courts of law to respond to the challenges presented by modern commercial practices, is increasingly called upon to intervene.<sup>451</sup>

### 2.4.3 Exemption clauses

Exemption clauses have become the norm.<sup>452</sup> An exemption clause is one that excludes a remedy that the contracting party would otherwise have had under the common law.<sup>453</sup> A contractant is obliged to point out an exemption clause only if it is unexpected in the kind of contract signed by the contractant<sup>454</sup> or where the clause undermines the essence of the contract.<sup>455</sup> Where the meaning of the language used in excluding liability is “express and unambiguous” then effect must be given to that meaning<sup>456</sup> even if the consequences are harsh. The combined effect of this and the *caveat subscriptor* rule which binds contractants even though they cannot read or understand the contract, place consumers in an invidious position. The acceptance that the exclusion of gross negligence is contrary to public policy does

<sup>450</sup> Llewellyn (1931) 40 *Yale LJ* 731.

<sup>451</sup> See chapter 3 for the discussion of consumer protection legislation as a corrective mechanism.

<sup>452</sup> *Afrox* 2002 (6) SA 21 (SCA) para [36].

<sup>453</sup> Cockrell (1992) 109 *SALJ* 62. Van der Merwe *et al Contract* cite the following examples of acceptable exemption clauses: a clause that excludes liability for gross negligence has been held not be against public policy; a clause that excludes liability for breach (even serious breach) of contract (259). See further 258-260.

<sup>454</sup> *Afrox* 2002 (6) SA 21 (SCA) para [36]. BGB305(c) also provides for the disqualification of unexpected terms. These could, in the context of the contract, relate to the content of the term or to the position of the term (for example, the heading under which the term appears) or due to the graphical layout of the term. In the case of doubt, a presumption arises against the issuer. Zerres ‘Principles of the German Law’ 11.

<sup>455</sup> *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) para [33]. The notion of the essence of the contract in relation to the *essentialia* of price and rental and unilateral price and rental determination is discussed in chapter para 4.3.3.3(D). *Shari’a* (Islamic law) prescribes that a contractual term that runs counter to the essence of the contract is deemed to be null and void. El-Hassan ‘Freedom of Contract, the Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law’ (1985-1986) 1(1) *Arab Law Quarterly* 51, 57.

<sup>456</sup> *Durban’s Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) 989H.

not automatically invalidate an exemption clause that excludes negligence.<sup>457</sup>

Exemption clauses are not contrary to public policy because of the elementary and fundamental general principle that contracts freely and voluntarily entered into must be enforced in the public interest.<sup>458</sup> Whilst it is accepted that the courts will not enforce exemption clauses which are contrary to public policy, “[t]his have very rarely been shown to the courts’ satisfaction.”<sup>459</sup> Clauses which have been held to be against public policy are those that exclude liability for fraud<sup>460</sup> or for an intentional breach of contract.<sup>461</sup> However, the common-law does not provide adequate or effective mechanisms for the control of exemption clauses.<sup>462</sup>

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<sup>457</sup> *Afrox* 2002 (6) SA 21 (SCA) para [13]. The Court, with reference to the right to have access to health care services in section 27(1)(a) of the Constitution, said that the fact that a right enjoys constitutional protection is not, in itself, a decisive consideration. The Court reasoned that freedom of contract (which includes the notion of *pacta sunt servanda*) is also a constitutional value (paras [22]-[23]).

<sup>458</sup> *Afrox* 2002 (6) SA 21 (SCA) para [24]. In England, both the courts (by way of interpretation) and the legislature by way of legislation (such as the Unfair Contract Terms Act 1977), have displayed a marked hostility to exemption clauses: Smith *Atiyah’s An Introduction to the Law of Contract* 149 *et seq.* A combination of the Unfair Contract Terms Act 1977 (which deals only with exemption clauses - see Smith *Atiyah’s An Introduction to the Law of Contract* 314) and the Misrepresentation Act 1967 has the effect of precluding attempts to exclude or limit liability even by consenting consumers. In terms of the Unfair Contract Terms Act 1977, judges have the general authority to strike down unreasonable exemption clauses. The Unfair Contract Terms Act 1977 is described as the “most conspicuous” success of the movement to modify the general rules of contract to reflect the “new” view of freedom of contract: Smith *Atiyah’s An Introduction to the Law of Contract* 15. See chapter 3 for a discussion of grey and black lists in the Consumer Protection Act in relation to exemption clauses.

<sup>459</sup> Du Bois *et al Wille’s Principles* 811.

<sup>460</sup> *Wells* 1927 AD 69.

<sup>461</sup> Van der Merwe *et al Contract* 259.

<sup>462</sup> Naudé & Lubbe (2005) 122 *SALJ* 442. The writers are of the view that an exemption clause that undermines the fundamental character of a contract should, in principle, be regarded as invalid. They argue that the exemption clause in the *Afrox* case was unexpected in that it allowed the hospital to provide a service that is at variance with what one would normally expect, namely the provision of professionally acceptable medical care. The writers fortify their view by concluding that the fact that there are hospitals and that “apparently all” medical practitioners do not contract out of this duty, show that the provision of such care is regarded as an “ethical” duty in those sectors. Accordingly, the hospital’s representative had a legal duty to bring the exemption clause to the Respondent’s attention (459). The writers are critical of the court’s conflation of medical service contracts with the “wider categories of commercial transactions” (460). In the process, the Court confirmed a uniformity of approach based on the mantra that public policy favours freedom and sanctity of contract. In this regard, it must be noted that the Consumer Protection Act 68 of 2008 contains provisions aimed regulating unfair and unreasonable terms in commercial contracts. Relevant provisions of the Act are dealt with in chapter 3.



The fact that exemption clauses have become the rule rather than the exception in standard form contracts,<sup>463</sup> and the fact that standard form contracts may leave a contractant in an invidious position, as summarized above, necessitates a brief discussion of the reality of inequality in bargaining power and the approach of the courts to it.

#### 2.4.4 Unequal bargaining power

Unequal bargaining power may, and often does, result in the “weaker” contractant playing very little or no role in the contract-creating process, the terms of the contract being dictated by the “stronger” contractant on a take-it-or-leave-it basis.<sup>464</sup> As a result, it has a debilitating effect, not only on the prized principle of freedom of contract, but also on the requirement of consensus that underlies the doctrine of *pacta sunt servanda*.<sup>465</sup>

The Supreme Court of Appeal, in giving expression to both the spirit and letter of the principle that courts do not have a discretion to set aside contracts freely and voluntarily entered into,<sup>466</sup> have had scant regard for the role and impact that unequal bargaining power has on contract formation.<sup>467</sup> Unequal bargaining power, *per se*, does not justify a conclusion that the

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<sup>463</sup> *Afrox* 2002 (6) SA 21 (SCA) paras [9]&[36]. The discussion in South African legal circles about standard form contracts and exemption clauses is mirrored in common law jurisdictions with consumer protection legislation also being used to attain an element of fairness. For English law see, Smith *Atiyah's An Introduction to the Law of Contract* 12 and 16-17; for Scottish law, MacQueen and Thomson *Contract Law in Scotland* para [7.27]; for Australian law, Davis *et al The Laws of Australia Contract* para [82].

<sup>464</sup> *Barkhuizen* 2007 (5) SA 323 (CC) para [65]; Van der Merwe *et al Contract* 258 and 269-270. The discussion and authority referred to in paras 2.4.2 and 2.4.3 in this chapter apply *mutatis mutandis* to the discussion in this paragraph.

<sup>465</sup> Bhana & Pieterse (2005) 122 *SALJ* 884.

<sup>466</sup> For example, in *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A), the Court reasoned that to allow a contractant to escape obligations “freely and solemnly” undertaken would not be “in harmony either with immanent reason or public policy” (873). In *Magna Alloys* 1984 (4) SA 874 (A), the Court said that it is in the public interest that contractants must abide by their agreements (893I-894A). In *Brisley* 2002 (4) SA 1 (SCA) the Court described the *Magna Alloys dictum* as a value that underlies the law of contract (para [23]). The *Brisley* court said that it, in principle, did not have any discretion to refuse to enforce a valid contractual term (para [12]).

<sup>467</sup> *Brisley* 2002 (4) SA 1 (SCA) para [7] where the court denied that non-variation clauses serve to protect the interests of only the powerful. In doing so, the Court lost sight of the fact that standard form contracts are normally imposed at the behest of the more powerful contractant and that the variations which the non-

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variation clause seeks to guard against are more likely to benefit the more powerful - in *casu*, the lessor: Bhana & Pieterse (2005) 122 *SALJ* 885. The writers point out that in standard form lease agreements the obligations of the lessee are usually more onerous than those of the lessor. For example, in the "Central News Agency lease agreement" at issue in the *Brisley* case, the lessor is exempted from liability for damage suffered by the lessee from any cause whatsoever, whilst the lessee is expected to compensate the lessor for damage, intentionally or negligently caused to the property by the lessee or those connected to him. More pertinently, the non-waiver is expressly worded in favour of the lessor (885-886).

The English courts recognise that private autonomy, as a characteristic of freedom of contract, can be abused by a contractant with superior bargaining power and have sought to contain the abuse: Atiyah *Essays* 11. However, an attempt by Lord Denning in *Lloyds Bank v Bundy* [1975] 1 QB 236 to recognise unequal bargaining power as a defence to "very" unfair terms where the bargaining power of the contractant was impaired by his "needs or desires" or by his "ignorance or infirmity" was rejected by the House of Lords in *National Westminster Bank plc v Morgan* [1985] AC 686: Smith Atiyah's *An Introduction to the Law of Contract* 15 n13, and 7 and 19; Furmston *Law of Contract* 23-24. Thus as in South African law, English law has not recognized, as a general principle, the invalidity of contracts secured through exploitative or unconscionable conduct. The English position is justified on the basis that the acceptance of a general doctrine would swallow up the general rule of enforcement of contracts and result in a "collapse of the institution of contract itself: Furmston and Bradgate *The Law of Contract* para [1.70]. This is also the approach of the South African Supreme Court of Appeal. However, the English legislature has sought to address structural inequality in the consumer market by black-listing those provisions which "a well-advised consumer would almost always refuse to accept in an equal bargaining situation." These are absolutely prohibited based purely on their substantive features, disregarding totally the transparency of such terms: Willett 'The functions of transparency in regulating contract terms: UK and Australian approaches' (2011) 60(2) *International & Comparative Law Quarterly* 355, 359, hereafter Willett (2011) 60(2) *International & Comparative Law Quarterly* 355. It has also grey-listed terms that "a well-advised position contractor (consumer or commercial) would normally prefer not to accept. The criterion with the latter is not equality of bargaining power but rather whether there was some semblance of negotiation. These are presumptively prohibited. Lastly, it has adopted the notion of economic duress in cases of both consumer and commercial contracts: Furmston and Bradgate *The Law of Contract* para [1.70].

South Africa addresses the problems raised by unequal bargaining power only in the context of consumer contracts especially in the grey- and black-list provisions. Grey- and black-listing lead to greater predictability. Grey lists enable regulatory bodies to deal from a position of strength when negotiating with recalcitrant business. They facilitate judicial decision-making by providing a list of suspect terms. The benefits of grey- and black-lists are discussed more fully by Naude 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 *SALJ* 128, 131 *et seq.* Grey- and black-listing in the South African consumer context is discussed in chapter 3 para 3.6.3.

In Scotland, unequal bargaining power does not exist as a general principle of law and contractants are held to their bargains no matter how harsh. The function of the courts is to enforce the contract as agreed to by the contractants. As in South Africa, the contention is that setting aside a contract on the ground of fairness alone would open the way for a "flood of claims": Woolman & Lake *Contract* para [6.10]-[613]; MacQueen & Thomson *Contract Law in Scotland* para [7.2].

The concept of unconscionability has gained statutory recognition in the United States of America. UCC 2-302 requires contracts to be treated differently where there is unequal bargaining power: Farnsworth *Contracts* 298 *et seq.* The unconscionability or otherwise is determined at date of contract. With reference to the general commercial background and the commercial needs of the particular trade or case, the test is whether clause(s) are so one-sided as to be unconscionable: Lawrence Anderson on the *Uniform Commercial Code* Volume 2A (2008) UCC 2-302:1. It is aimed at oppression and unfair surprise by protecting a buyer in a weak bargaining position from being taken advantage of: Lawrence Anderson on the *Uniform Commercial Code* Volume 2A (2008) UCC 2-302:6. Unconscionability may be either procedural (wrongdoing during the conclusion of the contract, for example, taking advantage of age, illiteracy, lack of knowledge of language) as well as substantive unconscionability (relating to the actual substance of the contract such as excessively wide exemption clauses,



grossly exorbitant or excessive prices): Beale *Chitty On Contract* Volume 1 para [7-136]. In *Kugler v Romain* 279 A.2d 640 (N.J. 1971) referred to by Warkentine (1996-1997) 30 *J. Marshall LR* 51 n56, the Court explained that drafters of the Code expected the notion of unconscionability, which is not defined in the Code, to be interpreted liberally. Very instructive in the South African context is the Court's view that the intent of the clause is not to erase the doctrine of freedom of contract "but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion." This point is made below in chapter 3 (the effect of consumer protection legislation) and in chapter para 4.2.4.2(B) (the role of the duty imposing aspect of *essentialia*). See also Lawrence Anderson *on the Uniform Commercial Code* Volume 2A (2008) UCC 2-302:8; Maurer 'Consumer Protection and Social Models of Continental and Anglo-American Contract Law and the Transnational Outlook' (2007) 14 *Indiana Journal of Global Legal Studies* 353, 359 and 369. *Johnson v Mobil Oil Corp.*, 415 F.Supp. 264, 268 (ED Mich. 1976) lists the following as some of the factors that may have a bearing on unconscionability: age, status, intelligence, business sophistication, bargaining power, explanation of terms, fairness of the seller's position (the take-it-or-leave-it approach), and the availability of alternative sources of supply. The court may arrive at a conclusion by merely listing these factors without having to illustrate "which factors are essential, which are sufficient, and which are superfluous": Hillman *et al Common Law and Equity under the Uniform Commercial Code* 6-2 to 6-4. In addition to the above factors, Warkentine (1996-1997) 30 *J. Marshall LR* lists the following: poverty, lack of education, poor English language skills, one-sided terms (55-56). The advantage of a defence of unconscionability is that it enables courts to decide cases directly on the basis of fairness without having to resort to the "manipulation of existing legal rules" (such as mistake, duress) as is the case in English law: Hillman *et al Common Law and Equity under the Uniform Commercial Code* 6-13; Warkentine (1996-1997) 30 *J. Marshall LR* 50 *et seq.* In the 1969 case of *Williams v Walker Thomas Furniture Company*, the Court set aside a credit agreement on the ground that the Ms Williams lacked bargaining power because of her lack of education: Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 359 and 369. As is evident from the discussion in this chapter, the South African Supreme Court of Appeal has denied relief on most of the grounds listed in the *Johnson* case and those listed by Warkentine.

In Australia, though the philosophical underpinnings of freedom and certainty of contract in a free enterprise system and the concern for drawn-out and costly trials as well evidentiary problems has engendered a cautious approach, equity principles imposed a duty to bargain fairly and prohibit unconscionable conduct, the emphasis being on procedural rather than substantive unconscionability: Davis *et al The Laws of Australia Contract* paras 7.1[6] and 7.1[11]. In the past 15 years the notion of unconscionability became a significant theme in the Australian law of contract. It increasingly became the basis for court challenges of contracts or contractual terms, *inter alia*, on the basis that the unconscionable conduct induced the conclusion of the contract or that the terms of the contract are unconscionable in the sense of their being unfair to one of the contractants or that the enforcement of the contract may be unconscionable: Carter & Hartland *Contract Law in Australia* paras [1501]–[1503]; Beale *Chitty On Contract* Volume 1 para [7-136]. Unequal bargaining power plays a role in determining what is unconscionable conduct. Examples are a contractant's lack of sophistication or knowledge, or insensitivity to a contractant's difficulties such as imperfect understanding of language, which deficiency ought to have been known to the other contractant: Davis *et al The Laws of Australia Contract* paras [7.1], [13] and [15]. Carter & Harland *Contract Law in Australia* paras [1506] - [1508], [1513] cite the following examples: poverty, age, youth, inexperience, illiteracy, ill health, lack of education, eccentricity and isolation. Today unconscionable conduct is regulated by sections 20, 21 and 22 of the Australian Consumer Law as contained in Schedule 2 of the Competition and Consumer Act 2010 (Cth). Section 20 in essence codifies the position as understood in equity. Section 21 regulates unconscionable conduct between business and consumers whilst section 22 regulates the position between business consumers and business suppliers: Corones *The Australian Consumer Law* (2011) paras [1.05] and [5.05-5.30], hereafter Corones *The Australian Consumer Law*. The provisions are concerned with oppressive conduct, regardless of whether the victim was misled. It involves taking advantage of the weakness or vulnerability of the other party in a manner that offends good conscience: Corones *The Australian Consumer Law* para [125]. Illiteracy, lack of experience and education are some of the factors that play a role in determining unconscionability in the South African Consumer Protection Act. See

impugned term is contrary to public policy even if the term was weighted in favour of the stronger contractant.<sup>468</sup> A more probable basis for non-enforcement would be “where a contracting party, strong or weak, seeks to invoke the writing-only requirement in deceit or to attain fraud”<sup>469</sup> or where the agreement is contrary to public policy.<sup>470</sup>

Such an approach is unmindful of the practical reality confronting a contractant who, in the event of, for example, an emergency, is placed in an invidious position of deciding whether or not to sign a contract containing an exemption clause.<sup>471</sup> Socio-economic inequalities exacerbated by the ravages of patriarchy<sup>472</sup> and lingering legacy of apartheid<sup>473</sup> have a further compounding effect on contractual inequality.<sup>474</sup> The assumption of formal equality of bargaining power “in ignorance of these realities serve to further entrench and reinforce them, and as such undermines the constitutional aspiration to create a substantively equal society.”<sup>475</sup>



further chapter 3 below.

<sup>468</sup> *Afrox* 2002 (6) SA 21 (SCA) para [12].

<sup>469</sup> Cameron JA in a separate concurring judgment in *Brisley* 2002 (4) SA 1 (SCA) para [90].

<sup>470</sup> Cameron JA para [91]. See, however, the discussion of public policy in para 2.3 in this chapter.

<sup>471</sup> For example, in the *Afrox* 2002 (6) SA 21 (SCA) where the need for medical attention coupled with anxiety and fear would significantly reduce a patient's bargaining power. In the *Afrox* case these fears were compounded by the patient's reasonable and realistic concern that treatment may be refused and that other health-care facilities may have similar contracts.

<sup>472</sup> Though equality is guaranteed in the Bill of Rights, the effects of the pre-Constitution unequal treatment of women at common law will, like the effects of apartheid probably take some time to dissipate. At common law, for example, women married in community of property, which was and still is the default matrimonial property regime, were subject to the marital power of the husband and were in the position of minors. Hahlo *The South African Law of Husband and Wife* (1975) 106-107. The Matrimonial Property Act of 1984 abolished the matrimonial power in respect of all marriages concluded after 1 November 1984. Section 29 of the General Law Amendment Act 132 of 1993 finally abolished the marital power in respect of all marriages irrespective of when the marriage was concluded. See also the founding provisions, the Preamble and section 3(1)(b)(iv) of the Consumer Protection Act 68 of 2008 that recognise these legacies from the past.

<sup>473</sup> *Du Plessis and others v De Klerk and another* 1996 (3) SA 850 (CC) para [163].

<sup>474</sup> Bhana & Pieterse (2005) 122 *SALJ* 865, 887. One of the premises for equal bargaining power is perfect knowledge. Since perfect knowledge cannot be assumed, there cannot a harmony of interests and hence equal bargaining power: Atiyah *Rise and Fall of Freedom of Contract* (1985) 703.

<sup>475</sup> Bhana & Pieterse (2005) 122 *SALJ* 887. The reality of apartheid and its associated discriminatory laws that resulted in intolerably high levels of poverty, illiteracy, and other forms of social and economic inequality has been recognised on a policy level and has been incorporated in the founding provisions of the Consumer Protection Act 68 of 2008. See the Preamble and see also section 3(1)(b)(iv) of the Act.

The element of “need” as a major factor affecting bargaining power is either side-stepped or confused with “means.” An overwhelming need for a particular product or service at a critical point in time may place a contractant at a distinct disadvantage even though the contractant is possessed of means and/or access to (legal) resources. Poverty and/or lack of access to (legal) resources do not necessarily equate to need. The converse is also true.<sup>476</sup> The personal attributes of an applicant should matter little because “identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy.”<sup>477</sup>

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<sup>476</sup> In *Barkhuizen* 2007 (5) SA 323 (CC), Sachs J reasoned that “the fact that consumer protection is especially important for the poor does not imply that it is irrelevant for the rich. The rich too have rights. They have the same entitlement as everybody else to fair treatment in their capacity as consumers. If, in our new constitutional order, the quality of public policy, like the quality of mercy and justice, is not strained, then the wealthy must be as entitled to their day in court as the poor” (para [149]).

<sup>477</sup> *Barkhuizen* 2007 (5) SA 323 (CC) para [98]. Lord Denning in *Lloyds Bank v Bundy* [1975] 1 QB 236 recognised that the bargaining power of a contractant could be impaired by its “needs or desires” and that this could serve a defence to “very unfair terms. As in South Africa, this proposition was rejected by the House of Lords in *National Westminster Bank plc v Morgan* [1985] AC 686: Smith Atiyah’s *An Introduction to the Law of Contract* 15 n13, 7 and 19.

In *African Dawn* 2011 (3) SA 511 (SCA) the Supreme Court of Appeal placed undue weight on the fact that the Respondents were persons of means, were conversant with business and had legal advice. The Respondent’s need, which was ignored, was clearly evidenced by the fact that the Respondent turned to the Appellant for bridging finance after being refused by Gateway Capital Ltd to whom the Respondent had turned after its application had been declined by a number of registered banks. Sight must not be lost of the fact that these banks declined the application, in all probability, having had access to the same information on which the Court concluded that the Respondent was possessed of means. Even an “eccentric” consumer who chooses to haggle is unlikely to find better alternatives or a different mindset to the normal “take-it-or-leave-it” elsewhere: Naude ‘Unfair Contract Terms Legislation: The Implications of Why We Need it for its Formulation and Application’ (2006) 17 *Stell LR* 361, 368, hereafter Naude (2006) 17 *Stell LR* 361. See also Willett (2011) 60(2) *International & Comparative Law Quarterly* 377. A provision in United Kingdom’s Unfair Contract Terms Bill of 2005 (proposed by the Law Commissions of England, Wales and Scotland) stipulates that one of the factors for determining the relative bargaining powers of contractants is whether the complaining party had a realistic opportunity to enter into a similar contract with other parties, but without the impugned term: Naude (2006) 17 *Stell LR* 373. In casu, the Respondent having already exhausted its options elsewhere, and having been met with rejections was clearly faced with a take-it-or-leave-it scenario. In Germany, a “very strong” presumption arises that interest rates are against good morals where the interest rate is more than twice the relevant market rate: Howells *et al Handbook of Research on International Consumer Law* 298. In the *African Dawn* case interest was charged at a rate of 5% per month. Though the Respondent had legal advice and negotiated in respect of the securities, it is clear that the Respondent’s hands were tied on the crucial aspect of the interest rate. Even (lengthy) negotiations is no guarantee that a term will be fair. Persons in a superior bargaining position can use negotiations as an opportunity to gauge the need of the other side and, hence, to press their advantage: Smith Atiyah’s *An Introduction to the Law of Contract* 319. The Respondent’s failure to negotiate in this regard was surely a result of its need for the money which was exacerbated by the rejections it had encountered. The Respondent’s “desperation” is further illustrated by the fact that the Respondent urgently required the money, and had prevailed on the Appellant to furnish the money before the securities were

## 2.4.5 Principles of construction that impact on the limitations

The following principles of construction may serve to minimize some of the harsh consequences of legal principles and business practices that limit freedom and sanctity of contract.

The golden rule of interpretation is that the court must ascertain the intention of the parties. South African courts have, in the interests of certainty,<sup>478</sup> adopted a linguistic approach to interpretation<sup>479</sup> that involves a literal interpretation of the language in the document recording the agreement.<sup>480</sup> The real intention of the contractants is ignored where wording in

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registered (para [34]). To suggest, in these circumstances, that the Respondent had a choice to walk away or to turn to another lender is unrealistic. In the words of Harker (1981) 98 SALJ 17, "[t]he only freedom left for the customer is the fictitious alternative to accepting the terms presented to him: not contracting at all." The unsoundness of the courts' approach is evident in the express acknowledgement by the Constitutional Court that "many people in this country conclude contracts without **any** bargaining power and without understanding what they are agreeing to": *Barkhuizen* 2007 (5) SA 323 (CC) para [65]. (Emphasis added). The decision sought to accommodate the interests of vulnerable or weak contractants by incorporating the notion of *ubuntu* and fairness within the context of the twin principles of freedom of contract and *pacta sunt servanda*. However, the Constitutional Court's judgment as a harbinger of reform of contract law to give expression to constitutional values was undone by the Supreme Court of Appeal in *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA). The Supreme Court of Appeal reaffirmed this approach to the *Barkhuizen* decision in *Potgieter* 2012 (1) SA 637 (SCA) paras [31]-[36]. See also the discussion in chapter 1 para 3.3 and elsewhere in this chapter.

<sup>478</sup> The courts are apprehensive that the notion of good faith is subject to interpretation and hence justice would be at the mercy of the idiosyncrasies of individual judges, thereby impairing the valued attribute of certainty of the law. In, for example, *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA), the Court said that "[m]aking rules of law discretionary or subject to value judgments may be destructive of the rule of law" (para [39]). See also *Potgieter* 2012 (1) SA 637 (SCA) paras [32] and [34]; *Joubert v Enslin* 1910 AD 6, 37; *Lubbe & Murray Contract 446 et seq.* The approach averts the possibility of fraud and perjury and protects judges from "intractable disputes of fact regarding subjective states of mind": *Lubbe & Murray* 463.

<sup>479</sup> Lewis 'The Demise of the *Exceptio Doli*: Is There Another Route to Contractual Equity? (1990) 107 SALJ 26, 35-36, hereafter Lewis (1990) 107 SALJ 26.

<sup>480</sup> *Freddy Hirsch* 2011 (4) SA 276 (SCA) at paras [15] and [16] quoting with approval from *Worman v Hughes & Others* 1948 (3) SA 495 (A). In the latter case, the Appellate Division held that "the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e., what their intention was as expressed in the contract (505A). As was said by Solomon J in *Van Pletzen v Henning* 1913 AD 82 "The intention of the parties must be gathered from their language, not from what either of them had in mind" (99). Both judgments were mentioned in the High Court of Swaziland in the matter between *Kenneth Bhekizwe Ngcamphalala v Swaziland Development and Savings Bank*, Case Number 2412/2011 where the court also applied the ordinary meaning "test."

One of the issues before the *Freddy Hirsch* court was whether the standard conditions of sale and credit on the reverse of the credit application form, formed part of the agreement. The question was whether an inscription by the Respondent's representative that the standard conditions had not been checked ("standard conditions not checked") excluded the operation of these standard conditions. The court held that the representative's subjective intention as to the meaning of the inscription was irrelevant; so also was the subjective understanding of the inscription by the Appellant's representatives (para [16]). The court accorded to the words its plain meaning and concluded that the Respondent's representative had "merely recorded that she

the document is clear or unambiguous.<sup>481</sup> The approach is contradictory and self-defeating and leads to practical absurdities.<sup>482</sup> Evidence of a less literal approach may be detected in a recent cases where the Supreme Court of Appeal held that “consideration must be given to the language used in the light of ordinary rules of grammar and syntax; the context in which the provisions occur; the apparent purpose to which it is directed and the material known to those responsible for its production.”<sup>483</sup>

By way of contrast, the English courts have moved away from an inflexible literal approach in favour of a more liberal historical-psychological approach, an approach in which the legitimate expectations of the parties are fulfilled.<sup>484</sup> The English approach is instructive and insightful

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had not checked the standard conditions. That was simply a statement of fact.” The inscription “does not amount to an intimation from her that she did not agree to be bound by those standard conditions” (para [17]).

<sup>481</sup> Lewis (1990) 107 SALJ 36; Van Huyssteen *et al Contract Law* 264-266. See, for example, the interpretation in *Freddy Hirsch* 2011 (4) SA 276 (SCA).

<sup>482</sup> Whilst it places a premium on the ascertaining the intention of the contractants, it at the same time limits the means by which such intention may be proved. In doing so, it compels courts to speculate as to the intention of the parties although evidence is available of their intention: Olivier *Legal Fictions* 137-139. See also Kerr *Principles of the Law of Contract* 219-223.

<sup>483</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18]. See along similar lines: *Hydrop Investments Ltd & Another v Shoprite Checkers Ltd* [2011] JOL 27144 (SCA) para 12.

<sup>484</sup> Lewis (1990) 107 SALJ 38-43. In *British Movietonews Ltd v London and District Cinemas Ltd* [1951] 1 KB 190 (CA), hereafter *British Movietonews* [1951] 1 KB 190 (CA), Denning LJ said that “[t]his does not mean that the courts no longer insist on the binding force of contracts deliberately made. It only means that they will not allow the words, in which they happen to be phrased, to become tyrannical masters ... The day is done when we can excuse an unforeseen injustice by saying to the sufferer “It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.” We no longer credit a party with the foresight of a prophet or his lawyer with the draftmanship of a Chalmers.” In *Prenn v Simmonds* [1971] 3 All ER 237 (HL) Lord Wilberforce said that “[t]he time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. ... We must ... enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.” See also Beale *Chitty On Contract* Volume 1 para [12-118] and paras [12-043]-[12-045]. Judicial interpretation was used to ameliorate the harsh consequences of standard form contracts and its associate, exemption clauses: Smith *Atiyah’s An Introduction to the Law of Contract* 15-16; Treital *An Outline of the Law of Contract* 85-86 and 116. It is assumed that provisions in consumer protection legislation are based on the law’s view of what is appropriate, as opposed to merely giving effect to the contractants’ intention: Smith *Atiyah’s An Introduction to the Law of Contract* 19. Such an approach leads to some of the legal results that in other systems are attained by a general requirement of good faith: Zimmermann & Whittaker *Good Faith in European Contract Law* (2000) 45-46 and 679-680, hereafter Zimmermann & Whittaker *Good Faith*.



particularly when viewed in the context of the recognition in *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd*<sup>485</sup> that “evidence of surrounding circumstances ... as an aid to interpretation would be consistent with modern thinking on language and its meaning.” Such an approach is prudent in a pluralistic society with a multiplicity of cultures and languages where nuances in cultural practices and language, and where problems in language skills and proficiency are manifest. Ignoring such nuances and problems may lead to contractual consequences somewhat removed from those contemplated by the contractant(s). A more figurative analysis would go some way towards addressing such situations.

The harshness of the literal approach to interpretation is lessened to some extent by the *quod minimum* rule that provides that words of doubtful meaning must be construed so as to place the least possible burden on the debtor.<sup>486</sup> In similar vein, the *contra preferentem* rule stipulates that in cases of doubt a contract or its terms must be construed against the party who formulated it.<sup>487</sup>

Contractants also enjoy a measure of protection from the *caveat subscriptor* rule<sup>488</sup> in that consumers are bound only if the document signed is a contract and if it reflects the true and real intention of the contractants. Contractants are, in some instances, not bound where the

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The development in Scottish law is similar to that in English law: MacQueen & Thomson *Contract Law in Scotland* para [3.42]; Woolman & Lake *Contract* para [8.3].

In Germany, contracts must be interpreted according to the requirements of good faith with customary practice taken into consideration: BGB 157.

The American courts also do not have a literal approach to interpretation. The good faith performance principle requires courts to take into account, not only, the contractual language, but also, surrounding circumstances, including an estimation of how reasonable contractants, bargaining fairly, would allocate risks: Hillman *et al Common Law and Equity under the Uniform Commercial Code* 6-26.

In Australia, the function of interpretation is “to give effect to the bargain, [and] not to deny its efficacy by a restrictive technical analysis.” Courts are reluctant to accept an interpretation that yields an unreasonable result, and adopt a common-sense approach in which the role of context is acknowledged: Carter & Hartland *Contract Law in Australia* para [704].

<sup>485</sup> 1980 (1) SA 796 (A) 805-806.

<sup>486</sup> Van der Merwe *et al Contract* 267.

<sup>487</sup> The reason being that the contractant who formulated it should have used the opportunity to express himself/herself clearly. Van der Merwe *et al Contract* 267. This rule of interpretation would usually benefit the consumer, who in most instances, has to accept a contract drafted by the seller. See para 2.4.2 above.

<sup>488</sup> Aronstam *Consumer Protection* 36 *et seq*.

terms are inconsistent with an explanation of the document given to him by the other contractant<sup>489</sup> and mistake is a defence or a basis for rectification.

## 2.5 Conclusion

The individualistic approach, favoured by South African courts, with its general assumption that choices have been made voluntarily derogates from contractual autonomy and hence the consensual aspect of contract law, attributes which are at the core of the South African approach to contract law. The approach that binds contractants regardless of considerations of reasonableness and fairness does not bode well for a contractant who, in the belief that the price or rental would be within his/her contemplation or expectation,<sup>490</sup> agrees to a reasonable price or rental or one that is unilaterally determined. Hence, contracts of sale at a reasonable price or a price that is unilaterally determined should remain invalid.

The predilection for standard form contracts coupled with the enforcement of the *caveat subscriptor*, rule in conjunction with the current approach to the golden rule of interpretation would exacerbate the legal position of the hapless contractant who in the words of Lord Denning did not have “the foresight of a prophet” or whose lawyer did not possess “the draftmanship of a Chalmers.”<sup>491</sup> Hence, a combination of standard form contracts, exemption clauses, the *caveat subscriptor* rule,<sup>492</sup> coupled with the courts’ approach to unequal bargaining

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<sup>489</sup> This exception is, in effect, nothing other than a remedy based on a misrepresentation as explained by Aronstam Consumer *Protection* 38.

<sup>490</sup> Explained in chapter 4 para 4.3.4.3(E).

<sup>491</sup> *British Movietonews* [1951] 1 KB 190 (CA) quoted by Lewis (1990) 107 *SALJ* 39.

<sup>492</sup> The approach of our courts was highlighted above in paras 2.4.2, 2.4.2 and 2.4.5 respectively. For example, our courts have, in the absence of fraud refused to come to the assistance of a contractant who signed a contract without reading the contents thereof (*George* 1958 (2) 465 (A) discussed in paras 2.3.2.1 and 2.4.5 above); or who made a subjective assumption of what the contract contains (the *Afrox* case, discussed in paras 2.3.2.1 and 2.4.4 above).



power<sup>493</sup> constitute significant impediments to the attainment of the principle of contractual fairness.<sup>494</sup> This combination of factors also impacts on the essence of the Constitution, namely, the values of an open and democratic society that promotes human dignity, equality and freedom<sup>495</sup> which the Constitutional Court has indicated infuses contract law.<sup>496</sup>

Whilst it is true that standard form contracts do have benefits for both contractants,<sup>497</sup> and that there are provisions that could ameliorate harsh consequences, the possibility and mechanisms of exploitation loom large, and cannot be discounted. The inescapable and unpalatable conclusion is that the modern commercial environment with its prevalence of, and preference for, standard form contracts places a limitation, not only, on the power of a contractant to negotiate the terms of a contract which will bind him/her, but also, on the choice as to who to contract with. Against this background, the notion of “agreement” does not “carry any connotation of real willingness.”<sup>498</sup>

The result is a constant and insidious erosion of the notion of consensus, and consequently of the valued principle of contractual freedom that stands at the vanguard of the modern law of contract. Equality of bargaining power is amongst its casualties and, by implication, the equality

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<sup>493</sup> The courts’ approach to the existence and relevance of unequal bargaining ignored considerations of good faith, fairness and equality. In doing so, “[i]t effectively vindicated *pacta sunt servanda* (based on a limited notion of formal consensus) in circumstances where this did not accord with the social and economic reality.” See Bhana & Pieterse (2005) 122 *SALJ* 887; Naudé & Lubbe (2005) 122 *SALJ* 461-462.

<sup>494</sup> Aronstam, cites the case of *Linstrom v Venter* 1957 (1) SA 125 (SWA) 127 where the Court using the example of the purchase of a motor vehicle, lamented the fact that a purchaser’s freedom of contract is often limited because “so many trading firms have adopted standard forms of contract which the purchaser has to sign or remain without the article”: *Consumer Protection* 24. The purchaser’s experience and the court’s disapproval are not confined to South Africa. Aronstam cites English case law, *Suisse Atlantique Société D’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) to the same effect: *Consumer Protection* 24.

<sup>495</sup> Sachs J is skeptical about the use of standard form contracts, holding that “[a] strong case can be made out for the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom.” *Barkhuizen* 2007 (5) SA 323 (CC) para [140],

<sup>496</sup> See chapter 1 para 1.3.3.

<sup>497</sup> See para 2.4.2 in this chapter.

<sup>498</sup> Llewellyn (1931) 40 *Yale LJ* 728 n49. The reality of consent is impacted by pressures and/or stimuli, such as standard form contracts and exemption clauses that are out of kilter with the general understanding of fair dealing.

principle and the constitutional values of freedom, equality and dignity would be further casualties.

The foregoing observations justify the conclusion that validity should not be bestowed on contracts of sale at a reasonable price or at a price that is unilaterally determined by one of the contractants.

## 2.6 Certainty

### 2.6.1 Introduction

The annals of history have proven that uncertainty is a fact of life, a fact which the law, as a discipline, has recognised<sup>499</sup> in a number of ways.<sup>500</sup> The *Twelve Tables* (approximately 450BC) is probably the earliest testimony of such recognition in Roman law. The *Twelve Tables* served, not only, to codify the customary law, but also, to publicise the law and to make it accessible to the people. It generated certainty of the law and served to eliminate exploitation.<sup>501</sup> Today, the philosophy finds expression in policy considerations underlying, for example, statute law and the doctrine of *stare decisis*.<sup>502</sup> In Public Law, for example, the doctrine of the Rule of Law, serves to protect basic individual rights by requiring the State to act “in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.”<sup>503</sup> The pronouncement of the Constitutional court in *President of the Republic of*

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<sup>499</sup> Seita ‘Uncertainty and Contract Law’ (1984) 46 *University of Pittsburgh LR* 75, 77, hereafter Seita (1984) 46 *University of Pittsburgh LR* 75.

<sup>500</sup> Currie & de Waal *The Bill of Rights Handbook* (2005) 10, hereafter Currie & de Waal *The Bill of Rights Handbook* 10.

<sup>501</sup> Hosten *Introduction* explains that the law was codified and publicised at the insistence of the plebeians who objected to the concentration of the knowledge of the law in the hands of priests who belonged to the patricians, the privileged class. The publication of the law led to the gradual breakdown of the monopoly of the law by the priests (276-277).

<sup>502</sup> See chapter 1 para 1.3.2.1

<sup>503</sup> Currie & de Waal *The Bill of Rights Handbook* 10.

*South Africa and Another v Hugo*<sup>504</sup> that “[a] person should be able to know the law, and be able to conform his or her conduct to the law” serves to illustrate the importance of certainty in modern jurisprudence. Hence, certainty promotes transparency accountability, predictability and acceptability of the law as well as of the decision-making process.<sup>505</sup> In effect, it is an underlying principle of the law in general and the same principles underlie the role of certainty in contract law which is discussed below.<sup>506</sup>

### 2.6.2 Certainty as the jurisprudential basis for the enforcement of contracts

Certainty requires that the rights and obligations set out in the contract must be sufficiently clear so that the contractants have sufficient information about their rights and obligations and it provides the judiciary with a basis for determining whether a contract was concluded, and consequently whether a breach of that contract has occurred as well as an appropriate remedy for such breach.<sup>507</sup> Certainty is attained if there is explicit agreement in the contract or when the contract identifies an external standard by which the performances may be determined by any third party without further reference to the contractants.<sup>508</sup> An agreement that is not sufficiently clear is incapable of establishing a legal relationship between the parties.<sup>509</sup>

Hence, certainty may be said to serve two functions, the one, internal, and the other, external.<sup>510</sup> As an internal regulatory mechanism, it fulfills an important function in determining

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<sup>504</sup> 1997 (4) SA 1 (CC) para [102].

<sup>505</sup> See also Brownsword *Contract Law Themes* para [9.11].

<sup>506</sup> Chapter 1 explained the role of certainty, in general, as a controlling mechanism for contractual validity with reference to examples drawn from the various branches of the law. In this part of the chapter, the role of certainty within the contract law, and its application by the courts, as well as the philosophical underpinnings of the notion of certainty, will be examined with reference to some examples.

<sup>507</sup> *Patel v Adam* 1977 (2) SA 653 (A), 666; *Seita* (1984) 46 *University of Pittsburgh LR* 78.

<sup>508</sup> *Westinghouse v Bilger* 1986 (2) SA 555 (A) 574D-E; *Shell SA (Pty) Ltd v Corbitt and Another* 1984 4 SA 523 (CPD) 526C-D; *Genac Properties v NBC Administrators* 1992 1 SA 566 (AD) 576H-J.

<sup>509</sup> Wessels & Roberts *The Law of Contract in South Africa* Vol 1 (1951) paras [77]-[80].

<sup>510</sup> These two roles of certainty also inform the discussion on the nature, content, context and role of the *essentialia* of price and rental in chapter 4 paras 4.2.4.2(B) and 4.2.4.3.

whether the contractants are in agreement.<sup>511</sup> As an external mechanism, it fulfills a controlling function for the validity of the contract as a whole in that it regulates the validity of the terms of the contract individually and collectively. It also ensures that a court of law has sufficient information to determine that the contractants intended to contract, the terms of the contract and whether a breach has occurred. The obligations to be created must be certain or objectively ascertainable,<sup>512</sup> failing which the whole contract may be rendered void unless the impugned term can be severed from the rest.<sup>513</sup> The test to determine whether a contract or one or more of its terms is sufficiently certain so as to render the obligations enforceable by the courts, is an objective one to be determined with reference to the prevailing circumstances at date of contract.<sup>514</sup>

Certainty also serves a third function, namely, that of justification for, on the one hand, the enforcement of contracts in terms of the *pacta sunt servanda* doctrine, and, on the other hand, for the rejection of a regulatory function for good faith,<sup>515</sup> and for the reluctance to engage in non-literal approach to the interpretation of contracts in order to discover the true intention of the contractants.<sup>516</sup>

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<sup>511</sup> The requirement of certainty, though a separate requirement for the validity of contracts in general, also finds expression in the requirement that the offer must be certain. Offer and acceptance constitute agreement (*consensus*) which is the first requirement for a valid contract. Van Huyssteen *et al Contract Law* para [135]; Lubbe & Murray *Contract* 307.

<sup>512</sup> *Lambons (Edms) Bpk v BMW (Suid-Afrika) Edms Bpk* 1997 (4) SA 141 (SCA) 158E-G, hereafter *Lambons* 1997 (4) SA 141 (SCA). In this case, the issue was whether a valid oral contract had been concluded appointing the Appellant as a non-exclusive BMW dealer in Bloemfontein.

<sup>513</sup> *Lambons* 1997 (4) SA 141 (SCA) 154G-I; Van der Merwe *et al Contract* 192-193. In ascertaining the performances, the courts have reference to the express terms of the contract, tacit terms and terms implied by law. Tacit terms are terms not specifically agreed upon but are unarticulated terms which have the same legal effect as an express term. Implied terms are imposed by operation of law into contracts. Hutchison *et al Contract* 242-248.

<sup>514</sup> Van der Merwe *et al Contract* 193.

<sup>515</sup> See para 2.8 below.

<sup>516</sup> See para 2.4.5 above.

In the last context, Van der Merwe *et al*,<sup>517</sup> in commenting on the decision in the *Bank of Lisbon v De Ornelas*,<sup>518</sup> express surprise at “the absence of an in-depth discussion [by the court] of general policy considerations raised by the issue” and wonder “whether their ultimate conclusion actually rests on some unexpected premise such as the desirability of the utmost degree of certainty of the law.” It is not far-fetched to conclude that in not engaging in an in-depth discussion, and in refusing to interfere, the Court was committed to upholding the doctrine of sanctity of contracts, thereby, promoting certainty of the law.<sup>519</sup> The conclusion is reinforced by the fact that the Court enforced the contract despite finding that the impugned condition gave the plaintiff an “extraordinary degree of protection.”<sup>520</sup>

Constitutional principles provide little, if any, relief.<sup>521</sup> Recently, the Supreme Court of Appeal in *Napier v Barkhuizen* confirmed the need for certainty by emphasising that public policy demands that agreements should be honoured.<sup>522</sup> Although the Constitutional Court in the *Barkhuizen* case cautioned that the principle of *pacta sunt servanda* is not a sacred cow and that it is subject to constitutional scrutiny,<sup>523</sup> the Supreme Court of Appeal in the *Bredenkamp*

<sup>517</sup> Van der Merwe *et al* (1989) 106 SALJ 240. The writers further commented that “[t]he recognition of equitable discretion inherent in the courts immediately involves notions such as freedom of contract, pacta sunt servanda and legal certainty...” and were disappointed that “[t]he majority of the court did not consider the scope of these notions” (240-241).

<sup>518</sup> 1988 (3) SA 580 (A) 605I-J discussed in para 2.3.2.1 above.

<sup>519</sup> The decisions discussed in para 2.3.2 in this chapter to illustrate the proposition that public policy has been used as an instrument of the notion of freedom of contract, may equally serve as examples of certainty of contract being used to justify the enforcement of contracts. The insistence of the court in the *Brisley* case, as evidenced in, for example, paras [21], [24] and [58] is exemplary of the Supreme Court of Appeal’s attitude.

<sup>520</sup> At 98. The decision is expressive of the Appellate Division’s reluctance, justified on the basis of promoting certainty, to use public policy to strike down contracts. See also *Sasfin* 1989 (1) SA 1 (A) 9B-F.

<sup>521</sup> In *Brisley* 2002 (4) SA 1 (SCA) the Supreme Court of Appeal dismissed the constitutional argument by proclaiming that “’n [h]of kan nie skuiling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en om ver te werp nie ... In hierdie konteks is vaagweg na konstitusionele waardes verwys sonder om spesifiek te wees. ’n Vrye regterlike diskresie is nie so ’n waarde nie” (para [24]). See also *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) para [39].

<sup>522</sup> 2006 (4) SA 1 (SCA) paras [13] and [7]. The Court held that “intruding in apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conception of fairness and justice on parties’ individual arrangements.”

<sup>523</sup> *Barkhuizen* 2007 (5) SA 323 (CC) para [15].

case<sup>524</sup> dismissed any suggestion that the *Barkhuizen* court intended a renewed role for good faith in contractual validity.<sup>525</sup> Subsequent to the *Bredenkamp* case, the Supreme Court of Appeal expressed similar sentiments in the *Potgieter* case.<sup>526</sup> In doing so, the Court confirmed its earlier philosophical view regarding the supremacy of the doctrine of *pacta sunt servanda*. The Court went further and admonished<sup>527</sup> that “[a] constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.”<sup>528</sup> “[W]eighy considerations of commercial and social certainty” required judges to exercise restraint when “intruding upon the domain of private citizens.”<sup>529</sup>



<sup>524</sup> *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA).

<sup>525</sup> In doing so it confirmed the decision in *Brisley* 2002 (4) SA 1 (SCA) where the Supreme Court of Appeal warned that granting judges a discretion to determine the reasonableness and fairness of contractual principles would result in the doctrine of *pacta sunt servanda* being overlooked with consequent legal and commercial uncertainty (para [24]). See further the discussion on good faith in para 2.8 in this below.

<sup>526</sup> *Potgieter* 2012 (1) SA 637 (SCA) paras [31]-[36].

<sup>527</sup> At para [39].

<sup>528</sup> In doing so, the Court may be seen as cocking a snook at the decision in *Advtech Resourcing* 2008 (2) SA 375 (C) where the Cape High Court sought a revision of the doctrinaire approach to restraint of trade clauses by encouraging an approach that is more cognisant of constitutional values. See the discussion in a footnote in para 2.2.2 in this chapter.

<sup>529</sup> *African Dawn* 2011 (3) SA 511 (SCA) paras [27]-[28]. In adhering to the strict common law requirements for usury, the Court not only persists in its reluctance to use public policy informed by broader standards of fairness, but also places the notions of freedom and sanctity of contract in the forefront in the interests of preserving commercial and legal certainty. Pretorius (2005) 68 *THRHR* characterises this as the formalist approach which values predictability and certainty in contract law. As opposed to this, is the contextualist approach which prefers flexible and adaptable standards that allow the courts to take into account the circumstances and equities of individual cases (268-269). The root of this may be traced to the predominance of the will theory of contract as opposed to the reliance theory which is predominant in the United States of America: Pretorius ‘The basis of contractual liability (2): Theories of Contract (will and declaration)’ (2005) 68 *THRHR* 441, 442-457; Pretorius (2005) 68 *THRHR* 581-590 and Pretorius ‘The basis of contractual liability (4) Towards a composite theory of contract’ (2006) 69 *THRHR* 102-106. The will theory, in essence, requires consensus on the terms and consequences of the agreement, an intention to be legally bound, as well as an awareness of the agreement. The reliance theory suggests that the binding element in contract law is a reasonable reliance by one party of the existence of a contract.

### 2.6.3 Conclusion

Certainty of the law has been used as a blunt instrument for the enforcement of contracts, ignoring subjective considerations such as the relative bargaining powers of the contractants, or the fact that a contractant was innumerate or illiterate. In doing so, it has been deployed in a role similar to the role that public policy plays as an instrument for the enforcement of contracts<sup>530</sup> thus leaving the hapless contractant doubly exposed to the vicissitudes of classical contract law.

Our courts, in deference to the principle of contractual autonomy, are reluctant to declare a contract a nullity because of the possibility of creating uncertainty in the law. This reluctance may exacerbate the invidious position in which contractants find themselves,<sup>531</sup> a position which has necessitated a raft of statutory interventions.<sup>532</sup> Viewed in this light, and bearing in mind that contractual obligations are often based on a presumption of consensus,<sup>533</sup> the recognition of a sale at a reasonable price or at a unilaterally determined price may leave a contractant, who has been tempted by the idea of paying a “reasonable” price, without any recourse.<sup>534</sup> Hence, the call to confer validity on contracts of sale at a reasonable price or at a price that is unilaterally determined should not be acceded to.

Certainty is a cardinal principle in law in general and in contract law in particular. Its primary function is to guard against arbitrariness and to promote predictability and reliability. In doing so, it ensures equality, thereby securing dignity.<sup>535</sup> Certainty, as represented by these valued attributes, forms the basis of the theory that the right to determine the price or rental

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<sup>530</sup> Both overlook subjective considerations in the determination of contractual validity. *Bank of Lisbon v De Ornelas* 1988 (3) SA 580 (A) (public policy); *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) (certainty). Public policy is dealt with in para 2.3.2 in this chapter.

<sup>531</sup> For example, as a result of standard form contracts.

<sup>532</sup> Relevant legislation is dealt with in chapter 3.

<sup>533</sup> See para 2.4.2 in this chapter.

<sup>534</sup> See chapter 3 and chapter 4 para 4.3.4.3(E).

<sup>535</sup> Hahlo and Kahn *The South African Legal System and its Background* (1968), 214-215 in his explaining of the virtues of the *stare decisis* doctrine that contributes to certainty.



constitutes the essence of a contract of sale and lease that cannot be surrendered by trading it for a standards-driven approach to the *essentialia* of price and rental that is based on reasonableness.<sup>536</sup>

## 2.7 The role of certainty in relation to freedom of contract

The foregoing discussion related to the misuse of certain principles of contract law<sup>537</sup> and practices in the name of freedom of contract. The misuse was justified on the grounds of the classical contract law assumption of consensus. Individuals were assumed to have free will and could, hence, under the guise of contractual autonomy contract as they pleased.<sup>538</sup> The validity of this argument was proven to be suspect with reference to, for example, the abuse of standard form contracts and exemption clauses.<sup>539</sup> It was also illustrated how the principle of certainty was used to enforce contractual terms, including those that unfairly burdened contractants.

The discussion that follows will focus on the role of the principle of certainty in counterbalancing the excesses of contractual freedom.

Unlike the law of property that operates on the basis of a closed system of rights,<sup>540</sup> the law of contract, in principle, works with an open system of rights that has its basis in the notion of freedom of contract.<sup>541</sup> An open system advances legal development and adaptation to modern conditions whereas a closed system advances legal certainty.<sup>542</sup> A danger inherent in a closed

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<sup>536</sup> This theory is developed in chapter 4.

<sup>537</sup> Autonomy, freedom of contract, consensus, public policy and certainty.

<sup>538</sup> See in particular para 2.2.2 above.

<sup>539</sup> See para 2.4 above.

<sup>540</sup> In the Law of Property, for example, there is a closed number of original ways of acquiring ownership and virtually a closed number of constructive ways in which ownership may be acquired. See further Badenhorst, Pienaar and Mostert *Silberberg Schoeman's The Law of Property* (2006) 137-174 & 180-200; Van der Merwe *Sakereg* (1989) 11-12.

<sup>541</sup> Pretorius (2005) 68 *THRHR* 258-261.

<sup>542</sup> Du Bois *et al Wille's Principles* 410.

system is that it may inhibit legal development and adaptation to modern conditions.<sup>543</sup>

Conversely, the danger of an open system is that the advances it promotes may occur at the expense of legal certainty.<sup>544</sup> The law of contract has elements of both systems in that whilst freedom of contract is the cornerstone of the law of contract, the law of contract is also concerned with the formulation of limits within which persons may bind themselves.<sup>545</sup>

A contract may be defined as an agreement that is recognised by the law and that gives rise to enforceable rights and obligations.<sup>546</sup> The two aspects that come to the fore are those of agreement and enforceability. In principle, agreement “paradoxically” signifies freedom, on the one hand, and conformity as well as consistency, on the other hand, and is, in principle, a prerequisite for enforceability.<sup>547</sup>

The paradoxical relationship between the notions of freedom, on the one hand, and conformity and consistency, on the other hand, is more apparent than real. Conformity and consistency in the guise of certainty are core and fundamental features of a healthy legal system. Agreement (which derives from freedom), and certainty (conformity and consistency) are, in essence, mirror images of one another. Agreement is, in principle, possible only if there is certainty relating to the contents and consequences of that which is being agreed upon and certainty is, in principle, possible only if agreement is reached about contents and consequences. Information and disclosure are essential in attaining agreement and maximising certainty.<sup>548</sup>

The very notion of freedom itself is founded on certain minimum requirements, namely, an

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<sup>543</sup> Du Bois *et al Wille's Principles* 410.

<sup>544</sup> Both systems, however, have the promotion of justice as their objective.

<sup>545</sup> For example, by setting out *essentialia* for the creation of a valid contract. See further Van der Merwe *et al Contract* 17 *et seq.* See also chapter 1 para 1.4.2.

<sup>546</sup> Van der Merwe *et al Contract* 7-8.

<sup>547</sup> The latter notion is self-explanatory.

<sup>548</sup> That this conclusion is axiomatic is demonstrated in the discussion of the information and disclosure provisions of the consumer protection legislation in chapter 3.

awareness of choices and the ability to make choices.<sup>549</sup> However, the provision of such an environment is not possible in an imperfect world order<sup>550</sup> hence the need for limitations. The maximisation of freedom can best be attained by balancing freedoms and restrictions. For example, the right to free speech is balanced by the corresponding obligation not to slander or defame. Obligations impose a necessary limitation on freedoms, the main objective of balancing limitations with freedoms being the safeguarding of the social and legal order and the protection of rights. Absolute freedom, meaning freedom without any limitation, could result in anarchy. Consequently, the maintenance of a healthy equilibrium between freedom and certainty becomes the hallmark of a functional legal order. In the South African context, the provisions of the Constitution and the constitutional values of dignity, equality and freedom would provide the outer boundaries of such a legal order.<sup>551</sup>

The apparent paradoxical relationship between freedom and conformity is also found in the law of contract. Agreement is, in principle, attainable only if contractants are free to decide on the nature, contents, and consequences of their actions. Such agreement must, in the interest of justice and good order, take place within a regulatory framework. The regulatory framework, as summarised in chapter 1,<sup>552</sup> especially the role played by *essentialia*<sup>553</sup> secures the role of certainty as a fundamental and core value of the law of contract.<sup>554</sup> This role of the *essentialia* is explored in chapter 4 in relation to the question of law, viz., whether contracts of sale and lease at a reasonable price and rental respectively or at unilaterally determined price or rental should be recognised as valid.

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<sup>549</sup> The discussion in chapter 3 illustrates the importance of information and disclosure in reaching an agreement and in attaining certainty about contractual obligations.

<sup>550</sup> As illustrated with reference to the text in paras 2.4.2-2.4.4 in this chapter.

<sup>551</sup> See further the discussion in chapter 4.

<sup>552</sup> The limitations placed on freedom of contract by the common law, legislation, and the Constitution. See chapter 1 para 1.3.1.

<sup>553</sup> The role and function of *essentialia* in promoting certainty is the focus of the discussion in chapter 4.

<sup>554</sup> This role is explored in more detail in para 2.6 above. See also para 4.2.3 of chapter 4 and in chapter 4 generally where the theme of freedom and conformity is developed.

## 2.8 The role of good faith in relation to freedom and certainty of contract

The concept of good faith has been proclaimed as “the *Magna Carta* of international commercial law.”<sup>555</sup> However, the extent to which the duty of good faith should operate in determining the validity and enforceability of contracts is a matter of controversy throughout the common law world.<sup>556</sup>

Bearing in mind that “[a] specific content has as yet not been given to bona fides,”<sup>557</sup> good faith may be described “[a]s an ethical value or controlling principle founded upon community standards of fairness or decency, [that] underlies and informs the entire law of contract, shaping its content and finding expression in its technical rules and doctrines.”<sup>558</sup> The discussion that follows will be confined to role of good faith as a mechanism for determining the validity or enforceability of a contract or a term(s) thereof.

Good faith as a tool of substantive fairness in the law of contract was discarded in *Bank of Lisbon v De Ornelas*<sup>559</sup> when the Court disposed of the *exceptio doli* as a “superfluous defunct anachronism ... *Requiescat in pace*”<sup>560</sup> and concluded that there was no evidence of the “existence of a general substantive defence based on equity” in Roman-Dutch law.<sup>561</sup> Accordingly, “[e]quity could not override a clear rule of law.”<sup>562</sup> Any hope of a revival of a

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<sup>555</sup> Gabriel *Contracts for the Sale of Goods: A Comparison of US and International Law* (2009) 22, hereafter Gabriel *Contracts for the Sale of Goods*.

<sup>556</sup> As per by Lord Brown-Wilkinson in *Dymocks Franchise Systems (NWS) Pty Ltd v Todd* [2002] All E.R. (Comm) 849 (PC) para [54] quoted by Beale *Chitty On Contract* Volume 1 para [1-024].

<sup>557</sup> Van der Merwe *et al* (1989) 106 SALJ 241; Van der Merwe *et al Contract* 276-279.

<sup>558</sup> Du Bois *et al Wille's Principles* 737-738. Van der Merwe *et al Contract* 277-278 says that in practical terms the notion of good faith entails that a contractant may not over-protect its interests at the unreasonable expense of the other. In the United State of America, the common law characterises the duty of good-faith performance as “resulting in an implied term ... requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations.” The definition requires that considerations of fairness and equity be taken into account: Hillman *et al Common Law and Equity under the Uniform Commercial Code* 6-25 to 6-26.

<sup>559</sup> 1988 (3) SA 580 (A). See also Lewis (2003) 120 SALJ 332.

<sup>560</sup> At 607.

<sup>561</sup> At 605.

<sup>562</sup> At 606. The following response by Van der Merwe *et al* (1989) 106 SALJ 235 to the judgment appropriately characterises, as it will be shown, the current state of the court's approach to equity today. “The majority

substantive role for good faith<sup>563</sup> was dashed in the *Brisley* case which ended what can only be described as a brief flirtation with the notion of fairness.<sup>564</sup> The Court held that good faith does not constitute an independent basis for assessing the validity of a contract or term thereof.<sup>565</sup>

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decision follows what can be described as a positivist-historical approach” and “the court approaches the sources in such a formalistic and clinical manner” with the result that “the historical method appears insensitive to the particular problems of the present” (238 and 239).

<sup>563</sup> See Hutchison (2001) 118 SALJ 741-743 who sought to find evidence of a renewed concern for substantive fairness in *Sasfin* 1989 (1) SA 1 (AD). The Appellate Division confirmed that whilst public policy favoured the utmost freedom of contract, it should also take into account the doing of simple justice between “man and man” (9G). The writer traces a line between this and a number of subsequent cases starting with the concurring minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) where good faith formed the basis for refusing to enforce a suretyship agreement. The next case is *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) where the Court interpreted the reference, at para [28], by the *NBS Boland Bank* case to Olivier’s judgment as meaning “that our highest Court has given the green light in the direction of the development of a concept of good faith in our law of contract which would render the body of contract law congruent with the values of our constitutional community” (475 and see also 475C-D). The last case is that of *Miller* 2001 (1) SA 928 (C) where the Court, relying on Olivier’s minority judgment, refused to enforce a non-variation clause because “[t]he good faith basis of a contract imposes an obligation on contractors not to exercise powers in ways which run counter to the concept of *bona fides*” (938-9). Bhana & Pieterse (2005) 122 SALJ 865 discusses the *Sasfin*, *Saayman*, *Mort* and *Miller* cases along similar lines (891-892). See also Lewis (2003) 120 SALJ 336. The remarks in the *Mort* case noted above and the general tenor of the case were referred to with approval by Sachs J in the minority judgment in *Barkhuizen* 2007 (5) SA 323 (CC) para [140]. By way of illumination Sachs J warned that the “legal convictions of the community should not be equated with the convictions of the legal community” (para [141]). This warning has not been heeded by the Supreme Court of Appeal (for example, *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) and *Potgieter* 2012 (1) SA 637 (SCA) as pointed out in the footnote below.

<sup>564</sup> The court rejected the implication in *Mort* case (475C-D) that the enforceability of a contract is dependent on the public interest (*gemeenskapsgevoel*) (para [21]). The *Brisley* court was also dismissive of the *Miller* court’s reliance on the Olivier judgment, characterising the Olivier judgment as a minority judgment of a single judge on a factual finding with which the other four judges did not agree (para [16]). The *NBS Boland Bank* court’s reference to the Olivier judgment is similarly dismissed as having been made in passing (by the *NBS Boland Bank* court) and without any analysis thereof (the Olivier judgment) (para [16]). Adding more nails to the coffin, the *Brisley* court went on to stress that the *NBS Boland Bank* court’s remark did not form part of the court’s *ratio decidendi*. The court then rendered sterile the significance of the Olivier’s judgment by dismissing it in the following terms: “Die sienings in die uitspraak van Olivier AR verteenwoordig dus **nog steeds** net dié van ‘n **enkel** regter” (para [16]). Emphasis added. See also Van Huyssteen *et al Contract Law* para 97. In another context, one that related to the implication of terms into a contract, the Supreme Court of Appeal in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para [29] held that the fact that terms can be implied if dictated by fairness and good faith “does not mean that these abstract values themselves will be imposed as terms of the contract.”

<sup>565</sup> Paras [15] & [22]. See also the *Afrox* decision where the Court confirmed the *Brisley* approach by holding that “[w]anneer dit by die afdwinging van kontraksbepalings kom, het die hof geen diskresie en handel hy nie op die basis van abstrakte idees nie, maar juis op die basis van uitgekritiseerde en neergelegte regsreëls” (para [32]). The recent case of *African Dawn* 2011 (3) SA 511 (SCA) pronounces itself along similar lines (para [28].)

Of the common law jurisdictions, the duty of good faith is most extensively utilized in the United States of America where it has been described as the cornerstone of American law: Dixon ‘Good Faith in Contractual Performance and Enforcement – Australian Doctrinal Hurdles’ (2011) 39 *Australian Business LR* 227, 228,

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hereafter Dixon (2011) 39 *ABLR* 227 who did a comparative review of the role of good faith in various jurisdictions. It has been said that there is no obligation in all of the UCC and in general contract law that is of more overall importance than the general obligation of good faith: Summers 'Good Faith Revisited: Some Brief Remarks Dedicated to the Late Richard E. Speidel – Friend, Co-Author, and U.C.C. Specialist' (2009) 46 *San Diego LR* 723, 726, hereafter Summers (2009) 46 *San Diego LR* 723. The duty is to be found in the two principal treatises on contracts, namely the UCC and the Restatement (Second) of Contracts, hereafter referred to as Restatement (Second). The repealed UCC 1-203 imposed a duty of good faith in the performance and enforcement of every contract. The contents of this duty are now embodied in the revised UCC 1-304. In addition, many other provisions of the UCC impose or define specific duties of good faith. For example, a contractant empowered to unilaterally determine the price is under an obligation to act in good faith when doing so: UCC 1-305(2). UCC 1-201(19) defines good faith as "honesty in fact in the conduct of the transaction concerned" whilst UCC 1-201(b)(20)[Rev] now defines good faith more broadly as "honesty in fact and the observance of reasonable commercial standards of fair dealing." The new definition retains the subjective element (honesty in fact) and, importantly, an objective standard (the element of commercial reasonableness), incorporating fairness: Summers (2009) 46 *San Diego LR* 728. The UCC directs that the Code must be liberally construed and applied to promote its underlying purposes and policies. Hence, the notions of good faith and reasonableness are integral to the legal landscape. In addition, section 205 of the Restatement (Second) imposes, *ex lege*, a duty, not only, of good faith, but also, of fair dealing in the performance and enforcement of a contract. Section 205 represents a major advance because it, *inter alia*, symbolizes the requirements of "contractual morality" such as the unconscionability doctrine and various general equitable principles. As "an explicit general requirement" it offers "a direct and overt tool" without which judges in the past had "to leave bad faith unaddressed or resort to indirect and covert means, thereby fictionalizing the law or otherwise begetting unclarity, unpredictability, or inequity". The Restatement (Second) has its basis in judicial decisions, academic literature and in various provisions of the UCC that contained many provisions that imposed specific duties of good faith: (811-813). Of note is UCC 1-304 that states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Note that the duty does not apply in respect of the pre-contract/negotiation stage but only in respect of the performance and enforcement of the contract. The same applies in respect the duty of good faith in Section 205 of the Restatement (Second). Though the Restatement (Second), as adopted by the American Law Institute, does not have statutory force, it is usually viewed as authoritative by the courts: Summers 'The General Duty of Good Faith – Its Recognition and Conceptualization' (1981-82) 67 *Cornell LR* 810, 810-813, hereafter Summers (1981-82) 67 *Cornell LR*; Dixon (2011) 39 *ABLR* 227, 228-229. See also Knapp, Crystal & Prince *Problems in Contract Law Cases and Materials* (2003) 441-482; Zimmermann & Whittaker *Good Faith* chapter 4. See further on good faith in chapter 5 para 5.5.5.2(D)(ii)(h).

Treitel *An Outline* records that the House of Lords in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481 at [17] explained that fairness means that a seller must not "take advantage of a consumer's necessity, indigence, lack of experience, unfamiliarity with the subject-matter of the contract, [or] weak bargaining position." Fairness, therefore, relates to matters of substance (113). A duty to act in good faith is not implied in all contracts, as is the case in the civilian law systems. English law also does not recognise that a general duty to act in good faith exists unlike the position in civil law jurisdictions: Smith *Atiyah's An Introduction to the Law of Contract* 7 and 15. See also Furmston *Law of Contract* 32. Instead, it has "developed piecemeal solutions to demonstrated problems of unfairness:" Per Bingham L.J in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 Q.B. 433 at 439 quoted in Beale *Chitty On Contract* Volume 1 para [1-022]. The English courts have expressed their reluctance to apply a good faith standard in terms similar to those expressed by the South African courts, namely, business considerations, contractual certainty and conferring an undefined judicial discretion: Beale *Chitty On Contract* Volume 1 para [1-023]. Sight must also not be lost of the considerations of equity which takes a less rigid or literal approach to contract problems than the common law: Treitel *An Outline* 6. See also Furmston *Law of Contract* 32. Adams & Brownsword *Key Issues in Contract* (1995) 253-254 summarises the state of English law in this regard in the following terms: "...English contract law urgently needs an explicit doctrine of good faith to deal more openly, more rationally, with the



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many manifestations of bad faith encountered in commercial contracting. Of course, the availability of a good faith provision does not guarantee utilization, nor the development of an articulate jurisprudence of good faith. Nevertheless, in the absence of such an explicit doctrine, we can be sure the law of contract will muddle through in an unnecessarily irrational way.” However, Smith forecasts a growing role for good faith under the influence of regulatory legislation originating in the European Union. An example of this is the European Union Directive on Unfair Terms in Consumer Contracts implemented by the Unfair Terms in Consumer Contract Regulations 1999 which gives the courts wide-ranging powers to strike down unfair terms in consumer contracts: Smith *Atiyah’s An Introduction to the Law of Contract* 20 and 25. See also Beale *Chitty On Contract* Volume 1 para [7-137]. The notion of fairness and good faith underpin legislation such as the Unfair Terms in Consumer Contract Regulations 1999 which provides for the invalidity of certain unfair terms. The United Kingdom Law Commissions have proposed a “unified regime” to replace the Unfair Terms in Consumer Contracts Regulations Act 1999 and the Unfair Contract Terms Act 1977: Willett (2011) 60(2) *International & Comparative Law Quarterly* 356. See also chapter 5 para 5.2.3.1.

Though Scottish law does not recognize a general duty of good faith, it like English law, has ways of dealing with many of the situations dealt with by other legal systems under the rubric of good faith: Zimmermann & Whittaker *Good Faith* 687-688; McBryde *The Law of Contract in Scotland* para [1-30].

Though the duty to bargain in good faith has not, unlike the position in the United States, been explicitly recognized in Australian law (Davis *et al The Laws of Australia Contract* para 7.1[6]), it has been held that it has become the norm to apply “standards of fairness which are wholly consistent with the existence in all contracts of a duty upon parties of good faith and fair dealing in its performance ... anything less is contrary to prevailing community perceptions”: *Renard Constructions (ME) Pty Ltd v Minister of Public Works* (1992) 33 Con LR 72 at 112-113, quoted in Furmston *Law of Contract* 33. See also Carter & Hartland *Contract Law in Australia* para [113]; Dixon (2011) 39 *ABLR* 227, 233 *et seq*. Dixon explains that the implied contractual term is used as the vehicle for the development of a good faith obligation. Consistent with the prescriptions of classical contract law the existence of the duty could be regarded as a question of fact, the duty being implied on an *ad hoc* basis if the presumed intention of the contractants so indicated. The existence of the duty could also be a question of law, an intention being imputed to the contractants. The courts have not settled the question whether the duty is to be implied as a matter of law or as one of fact though according to Dixon recent developments point in the direction of the latter. The law in regard to the place of good faith in the law of contract is still “evolving” (233 *et seq*).

“With its roots in classical Roman law, good faith is well recognized in civil jurisdictions”: Dixon (2011) 39 *ABLR* 227. See also Beale *Chitty On Contract* Volume 1 para [1-025] and the quotation of Bingham L.J. quoted in Beale *Chitty On Contract* Volume 1 para [1-022]. Lord Bingham characterizes the duty of good faith as a principle of “fair open dealing” or, in colloquial terms, a duty to play fair or to come clean or to put one’s cards facing up on the table.

In Germany, there is a general duty to perform in good faith with customary practice taken into consideration (BGB 242). In addition, as noted above, contracts must be interpreted according to the requirements of good faith with customary practice taken into consideration (BGB 157). BGB 242 may be relied upon without it being specifically pleaded: Dixon (2011) 39 *ABLR* 227. See further chapter 5 para 5.2.5.3(B).

In the Netherlands, good faith exists where a contractant knew or ought to have known of the facts or the law (NBW 3.11). NBW 6.2 imposes an obligation to act in accordance with the requirements of reasonableness and fairness whilst NBW 3.12 states that in determining the standard of reasonableness and fairness, generally accepted principles of law, current judicial views in the Netherlands and societal and private interests must be taken into account. See further chapter 5 para 5.2.6.2(B)

Good faith provisions are also to be found in the *French Civil Code*, the *Italian Civil Code*, the *Greek Civil Code*, *Quebec’s Civil Code*, the *Swiss Civil Code*, the *Russian Civil Code*, the *Japanese Civil Code* as well as the code adopted in 1999 in the People’s Republic of China entitled *Contract Law of the People’s Republic of China*: Dixon (2011) 39 *ABLR* 227, 228.

Good faith requirements are also to be found in international instruments. The CISG requires, *inter alia*, the observance of good faith in international relations in the interpretation of the convention 7(1). This rule of



Any other approach would be to replace the standard of the law with the standard of the judge resulting in disregard for the *pacta sunt servanda* principle because the enforceability of a contractual term would then be dependent what a particular judge would regard as unreasonable or unfair in the circumstances.<sup>566</sup> In warning that a court “kan nie skuiling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en omver te werp nie...”<sup>567</sup> the Court rejected the notion that constitutional values gave it the jurisdiction to utilize equitable

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interpretation was formulated as a substitute for a “substantive good-faith provision as some drafters of the CISG feared that a rule that required “good faith conduct might lead to “uncertainty”: Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for International Sale of Goods* (2008) 37 n187, hereafter Lookofsky *Understanding the CISG*. It must be noted, however, that since the CISG does not generally deal with questions of validity, most questions which fall under the heading of validity such as fraud, duress, mistake or unreasonableness or unconscionability of contract terms fall to be resolved according to domestic or non-CISG (1980) rules: Lookofsky *Understanding the CISG* 22. The CISG has been adopted “by no less than seventy States from all five continents including the major trading nations.” The exceptions are Japan, the United Kingdom and India: Bonell ‘The CISG, European Contract Law and the Development of a World Contract Law’ (2008) 56 *Am. J. Comp. Law* 1, 4, hereafter Bonell (2008) 56 *Am. J. Comp. Law* 1. See further chapter 5 para 5.2.7.2(G).

Article 1.7 UNIDROIT Principles (2004) refers to “good faith and fair dealing in international trade.” This mandatory obligation applies to every aspect of the contract, including the negotiation thereof: Gabriel *Contracts for the Sale of Goods* 22. See further chapter 5 para 5.2.7.3(C)&(D). Although UNIDROIT Principles has persuasive value, it has been well received in academic circles. It has also served as a model for civil codes, for example, the Civil Codes of the Russian Federation, Hungary, China, Pakistan and Turkey. Mention is also made in the UCC of provisions of UNIDROIT Principles. The UNIDROIT Principles (2004) is also increasingly used in the conclusion of international commercial contracts, and the resolution of international and domestic commercial contract disputes: Bonell ‘UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law’ (2004) 9 *Unif. LR* 5n.s. 6-17, hereafter Bonell (2004) 9 *Unif. LR* 5.

Article 1.201 of the PECL imposes a general duty to act in accordance with good faith and fair dealing: Bonell (2004) 9 *Unif. LR* 34. See also Dixon (2011) 39 *ABLR* 230. Article 1:201 of the PECL also provides for a mandatory duty of good faith and fair dealing; Bonell & Peleggi (2004) 9 *Unif. LR* 335. The Unfair Terms in Consumer Contract Regulations 1999 also explicitly incorporates a principle of good faith in the European Union: Smith *Atiyah’s An Introduction to the Law of Contract* 20.

<sup>566</sup> Para [24]. Early evidence of this view is to be found in *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) where the Appellate Division rejected the *laesio enormis* doctrine, *inter alia*, on the basis that “despite all the learning relating to the rescission of contracts on the ground of *laesio enormis* nothing has evolved out of it which could be dignified by the name of a rule of positive law” (875). In the United States of America, a similar concern that “altruism, Good Samaritanism, general benevolence, moral idealism, or the like” may cause courts to “overextend” a general requirement of good faith resulting in a “parade of the horrible” was curtly rejected. “[E]xtensive case law to date” did not support any tendency in that direction: Summers (1981-82) 67 *Cornell LR* 834.

<sup>567</sup> Para [24]. In the same vein, the Supreme Court of Appeal in *Napier* 2006 (4) SA 1 (SCA) said that “the Constitution and its value system does not confer on judges a general discretion to declare contracts invalid on the basis of their subjective perceptions of fairness or on the grounds of imprecise notions of good faith” (para [7]). The sanctity placed on principles cannot be left unchallenged. The approach is reminiscent of apartheid ideology that formulated policy in the form of principles which were immune from judicial scrutiny.

considerations to disregard contractual provisions freely entered into. The decision “closes off what is most arguably one of the most viable avenues through which to align the common law of contract with the values underlying the Constitution.”<sup>568</sup> The *Brisley* court’s approach was recently fortified by the Supreme Court of Appeal in the *Bredenkamp*<sup>569</sup> and *Potgieter*<sup>570</sup> cases. The view of the *Bredenkamp* court stands in stark contrast to the Constitutional Court’s very clear pronouncements on the role of fairness in the *Barkhuizen judgment* which is peppered with the word “fair” and variations thereof (unfair, fairness, unfairness).<sup>571</sup> The use of the words as well as the context in which they are used are indicative of an intention that fairness should play a more extensive role than the hitherto restrictive role ascribed to it by the Supreme Court of Appeal. Moseneke DCJ went much further by holding<sup>572</sup> “[t]rite as it is that our constitutional values allow individuals the dignity and freedom to regulate their affairs, they also require that

<sup>568</sup> Bhana & Pieterse (2005) 122 SALJ 889. See also Naudé & Lubbe (2005) 122 SALJ 455 who express themselves along similar lines.

<sup>569</sup> (Appeal) 2010 (4) SA 468 (SCA) discussed in chapter 1 para 3.3 and elsewhere in this chapter. The *Bredenkamp* court effectively put an end to any belief, as expressed by Kerr ‘The Defence of Unfair Conduct on the Part of the Plaintiff at the Time Action is Brought: The Exceptio doli generalis and the Replicatio Doli in Modern Law’ (2008) 125 SALJ 246 and Glover ‘Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?’ (2007) 124 SALJ 449, 454-456, hereafter Glover (2007) 124 SALJ 449, that the *exceptio doli generalis* has in a sense been restored by the *Barkhuizen* decision, and puts a damper on any hope that the decision may lead to a resurrection thereof. This much was predicted by Glover (2007) 124 SALJ 449 when he concluded that the chances of a resurrection of the *exceptio doli generalis* were “in all honesty, slim” (458).

<sup>570</sup> *Potgieter* 2012 (1) SA 637 (SCA) paras [31]-[36].

<sup>571</sup> By way of example, the following may be highlighted: the Court says that “[o]ur democratic order requires an orderly and **fair** resolution of disputes (para [31]); “... the requirement of an adequate and **fair** opportunity to seek judicial redress is consistent with the notions of **fairness** and justice ...” (para [52]); “I can conceive of no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and **fairness**” (para [48]); “That [the fact that many people conclude contracts without having any bargaining power and without understanding what they are agreeing to] will often be a relevant consideration in determining **fairness**” para [65]; “public policy imports the notions of **fairness**, justice and reasonableness ...” para [73]; “In these circumstances, I am unable to conclude that the 90-day period allowed to the applicant to sue is so unreasonable that its **unfairness** is manifest and that therefore its enforcement would be contrary to public policy” para [67]; “In my view, what contractual **fairness** in light of the Constitution requires is a special examination of the provenance of the time-bar ...” para [124]. The comment in para [70] is probably the most suggestive of a renewed role for fairness. It advises that “[w]hile it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of a ... clause if it would result in **unfairness** or would be unreasonable. The approach requires a person ... to demonstrate that in particular circumstances it would be **unfair** to insist on compliance with the clause.” (Emphasis added.)

<sup>572</sup> Para [104].

bargains, even if freely struck, may not steer a course inimical to public notions of equity and fairness, which are now constitutional values.” Further impetus for the recognition of a general duty of good faith may be detected in the *obiter dicta* of the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*<sup>573</sup> that recognizes a duty to conduct negotiations in good faith and the need for contractants to relate to one another in good faith. The decisions in *Breedenkamp v Standard Bank of South Africa Ltd*<sup>574</sup> and in *Hoffmann v South African Airways*<sup>575</sup> constitute further evidence of this trend.<sup>576</sup>

The above analysis leads to the conclusion that the development in the common law of contract has reached the judicial equivalent of a fork in the road: the one path represents a continuation of the supremacy of the principles of freedom and sanctity of contract and one that seeks to insulate itself from subjective considerations even those that have a constitutional basis; the other path recognises freedom and sanctity of contract as constitutional values<sup>577</sup> that stand on equal footing with other constitutional values such as dignity, equality, freedom and *ubuntu*: public policy as redefined<sup>578</sup> maintaining a healthy tension between the two sets of

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<sup>573</sup> 2012 (1) SA 256 (CC), hereafter *Everfresh* 2012 (1) SA 256 (CC). A clause in a lease agreement gave the Appellants the option to renew the lease on expiry on the same terms and conditions, subject to agreement being reached on the rental. The Respondents rejected the offer of renewal and argued that the renewal clause did not constitute a legally binding and enforceable right and that it was hence not obliged to negotiate. The question before the Court was whether the common law should be developed in terms of section 39(2) so as to place a duty on contractants to negotiate in good faith. The minority judgment held that the issue had merit and that it should be referred back to the High Court for determination. Whilst the majority it left the question open by deciding that it was not in the interests of justice to entertain the appeal (the Appellants having raised the constitutional issues for the first time in the Constitutional Court) the majority did acknowledge the importance of infusing the common law with constitutional values, including the value of *ubuntu* [para [71]. The Court elaborated to say that contractants “certainly need to relate to each other in good faith” [para [72].

<sup>574</sup> (Interim interdict) 2009 (5) SA 304 (GSJ). The case concerned a clause that conferred a discretionary power on the bank to terminate the contract between the bank and the applicant for any reason.

<sup>575</sup> *Hoffmann* 2001 (1) SA 1 (CC).

<sup>576</sup> The cases are discussed in a footnote in para 2.3.3 above and in chapter 1 para 1.3.3.

<sup>577</sup> *Barkhuizen* 2007 (5) SA 323 (CC) discussed in chapter 1 para 1.3.3..

<sup>578</sup> The *Barkhuizen* court redefined public policy as incorporating the concept of *ubuntu* and as being the repository of those values that the society hold most dear (para [28]), the general sense of justice of the community, the *boni mores*, manifested in public opinion (para [73]) and as incorporating the notions of fairness, justice and equity, and reasonableness (paras [51] and [73]) and the necessity to do simple justice between individuals (para [51]).

values. The evidence from other disciplines of law<sup>579</sup> and from a few recent decisions in contract law<sup>580</sup> suggests that contract law will take the second path.

### 2.8.1 Analysis

Of the English, Scottish, American, Australian, and South African legal systems, all of which have their origin in the classical philosophy of contract law, the South African approach is most closely rooted in the classical tradition. The American system, with its acknowledgment of a general defence of unconscionability, judicial interpretation, duty of disclosure, and the notions of good faith and equity, has moved the furthest in the direction of the promotion of substantive equality and fairness. Provisions relating to unconscionability have severely dented the facade of impenetrability traditionally associated with the *caveat emptor* rule, a rule which in the South African context has attained an almost reverential status often with disastrous consequences for those negatively impacted by its application.

The English system lacking only an acknowledgement of a general defence of unconscionability and considerations of good faith has also substantially loosened the bondage of the classical tradition. As is the case in America, the process has been advanced by legislative enactments.<sup>581</sup>

The Australian system with the introduction of the new Australian Consumer Law is closer to the American system, whilst the Scottish system trails the English system. These systems all acknowledge some form of relief, to a greater or lesser degree, based on equitable principles. The civilian systems being, code based, are firmly rooted in attainment of substantive equality and fairness.<sup>582</sup> The United Nations CISG (1980) has also been used as a model for the drafting

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<sup>579</sup> Some of these are discussed in chapter 4 para 4.2.4.2(A)(i). See also para 4.2.4.2(A)(ii).

<sup>580</sup> Some of these are discussed in chapter 4 para 4.2.4.2(A)(iii).

<sup>581</sup> English law has also been influenced by the European Union directives which have adopted civilian concepts such as good faith as has the CISG: Smith Atiyah's *An Introduction to the Law of Contract* 25; Kröll *et al The United Nations Convention* 119-124.

<sup>582</sup> Practically all civil codes have a good faith clause or one comparable to it: Hawthorne (2006)69 *THRHR* 58 n83.

of domestic laws.<sup>583</sup> Good faith is also firmly entrenched in the UNIDROIT Principles (2004) and the PECL.

The conclusion to be drawn is that whilst certainty is important in the aforementioned legal regimes, it is not used at the expense of contractual fairness as is the case in South Africa.<sup>584</sup>

## 2.9 Conclusion

The classical contract law orientation of the South African law of contract that has its basis in the assumption that contractants are fully knowledgeable about the facts, know the law and act rationally to further their self-interest predisposes a conclusion that all agreements to a reasonable price or rental or to a unilaterally determined price or rental are fair. This approach, operating in concert with the following factors militates against the recognition of the validity of contracts of sale at a reasonable price or at a unilaterally determined price: (i) the use of public policy and certainty as blunt instruments for the enforcement of contractual obligations;<sup>585</sup> (ii) a narrow approach to public policy that relegates the significance and role of the constitutional values of dignity, equality and freedom;<sup>586</sup> (iii) standardised rules;<sup>587</sup> (iv) the objective theory of interpretation that resists a more subjective and contextualised approach to contractual interpretation;<sup>588</sup> and (v) the rejection of individualised standards such as unequal bargaining power, unconscionability, the duty of good faith<sup>589</sup> Recognition would compromise equality of bargaining power and by extension the constitutional values of dignity, equality and freedom. In the light of the foregoing, it is concluded that validity should not be bestowed on contracts of sale at a reasonable price or at a price that is unilaterally determined.

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<sup>583</sup> Bonell (2008) 56 *Am. J. Comp. Law* 5-6.

<sup>584</sup> Para 2.6 above.

<sup>585</sup> Para 2.6 above.

<sup>586</sup> Para 2.3 above.

<sup>587</sup> For example, the parol evidence and *caveat subscriptor* rules discussed in para 2.3.2.2 in this chapter.

<sup>588</sup> Para 2.4.5 above.

<sup>589</sup> Para 2.8 above.

## Chapter 3

### Overview of consumer protection legislation: its impact on certainty and freedom of contract.

#### 3.1 Introduction

In chapter 2, the discussion of the classical law approach to the notion of freedom of contract highlighted the disadvantages and the problems associated with the recognition and application thereof. It was concluded that the approach, as applied in South African contract law, raised public policy concerns and impacted negatively on the constitutional values of dignity, equality and freedom which values should inform the practice of contract law in South Africa.<sup>590</sup>

Legislatures in different countries have recognised the disparities created by the presumption<sup>591</sup> of freedom in the market-place and have sought to address this reality by means of consumer protection legislation.<sup>592</sup> In general, consumer protection legislation is

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<sup>590</sup> See, for example, *Barkhuizen v Napier* 2007 (5) SA 323 (CC) discussed in para 1.3.3 of chapter 1 and throughout chapter 2. See also chapter 4.

<sup>591</sup> See chapter 2 and in particular para 2.2.2.

<sup>592</sup> Furmston and Bradgate *The Law of Contract* (2010) paras [1.47]-[1.51], hereafter Furmston and Bradgate *The Law of Contract*; Harvey & Parry *The Law of Consumer Protection and Fair Trading* (1992), hereafter Harvey & Parry *The Law of Consumer Protection*.

The Australian Attorney-General in introducing the Trade Practices Bill of the Commonwealth of Australia stated that unfair practices are widespread in consumer transactions, the law still being based on the *caveat emptor* principle. "The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor": Harvey & Parry *The Law of Consumer Protection* 14.

In the United States of America, the position is regulated by the Uniform Commercial Code (the UCC): Maurer 'Consumer Protection and Social Models of Continental and Anglo-American Contract Law and the Transnational Outlook' (2007) 14 *Indiana Journal of Global Legal Studies* 353, 360, hereafter Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 353.

In the European Union (the EU)), the Maastricht Treaty Establishing the European Union (1992) spelt out the EU's commitment to consumer protection by undertaking to promote consumer protection and to ensure a high level of consumer protection: Martin 'An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?' (2006) 41 *Texas International LJ* 223, 239, hereafter Martin (2006) 41 *Texas International LJ* 223. The importance of consumer protection and its realisation as a policy consideration has seen its incorporation as a main target of EU policy in EU treaties: Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 359 and 371. The most important source of regulatory legislation has been the EU Directive on Unfair Terms in Consumer Contracts 1993: Naude 'The Consumer's 'Right to Fair, Reasonable and Just Terms Under the New Consumer Protection Act in Comparative



aimed at protecting consumers from unsafe and/or flawed goods or services, fraudulent, misleading or undesirable trading practices, insufficient information,<sup>593</sup> and economic exploitation through lack of competition or excessive prices.<sup>594</sup> Another aim is to provide consumers with inexpensive, accessible and effective recourse to enforce their statutory rights. In attaining these goals, it promotes the practical realisation of the principles of freedom, sanctity and certainty of contract and thereby the dignity, equality and freedom of the contractants.<sup>595</sup>

The discussion that follows outlines the jurisprudential basis and some of the public policy considerations underlying such legislation. Thereafter follows a brief discussion of some of the developments in South African law in regard to consumer protection legislation coupled with a commentary on the interrelationship between consumer protection legislation and the principles of freedom, sanctity and certainty of contract that predominate in contract law. The aim is to lay a foundation for a determination of the extent, if any, to which an acceptance of contracts of sale and lease at reasonable price and rental respectively or at a unilaterally

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Perspective' (2009) 126 *SALJ* 505, hereafter Naude (2009) 126 *SALJ* 505. Currently, there is a proposal for a new EU Consumer Rights Directive covering unfair terms: Willett (2011) 60(2) *International & Comparative Law Quarterly* 355, 355.

In England, the Unfair Contract Terms Act 1977 was the first general statute dealing with the unfair contracts whilst the EU Directive on Unfair Contract Terms 1993 was implemented by the Unfair Terms in Consumer Contract Regulations 1999. The main purposes of the latter two are to protect consumers against substantially unfair terms and secondly to protect consumers against unfair surprises. The 1999 Regulations is more general in nature than the 1977 act which dealt mainly with exemption clauses: Smith *Atiyah's An Introduction to the Law of Contract* (2005) 15, 20, 313, 317 and 319, hereafter Smith *Atiyah's An Introduction to the Law of Contract*.

France has a separate consumer code whilst Germany incorporated protection within the BGB, its Civil Code, as has the Netherlands in the NBW: Howells, Ramsay & Wilhelmsson *Handbook of Research on International Consumer Law* (2010) 13-17, 19 and 21-23, hereafter Howells *et al Handbook of Research*.

The United Nations Guidelines for Consumer Protection 1985 and 1999, though constituting soft law, has been influential in South America, Asia and Australia. It is the first attempt at viewing consumer rights on an international scale: Howells *et al Handbook of Research* 10 and 23. The conclusion is that most legal systems, regardless of their differing legal traditions, have taken account of the need for consumer protection.

<sup>593</sup> The role and control of information is central to consumer protection law and policy: Cartwright 'Publicity, punishment and protection: the role(s) of adverse publicity in consumer policy' (2011) *Legal Studies* 1-2, hereafter Cartwright (2011) *Legal Studies*.

<sup>594</sup> Harvey & Parry *The Law of Consumer Protection*.

<sup>595</sup> The realisation of these goals will be illustrated in the discussion of each of the three pieces of legislation in this chapter. See also paras 3.6.10, 3.9 and 3.10 below.



determined price or rental<sup>596</sup> would run counter to the jurisprudential basis of and the public policy objectives of such legislation.<sup>597</sup> A further aim is to establish whether the public policy considerations underlying the legislation operate in harmony with the principles of contract law. This is relevant in light of the contention that public policy considerations as informed by the constitution and its values and imperatives may be determinative of the acceptance of the *obiter dicta*.

### 3.2 Historical development

Consumer protection statutes are of relatively recent vintage<sup>598</sup> especially in the developing world where it came to the fore in the last quarter of the twentieth century.<sup>599</sup>

One of the earliest South African statutes that sought to regulate unconscionable conduct<sup>600</sup> was the Hire-Purchase Act<sup>601</sup> which required disclosure of certain vital terms<sup>602</sup> to enable a hire-

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<sup>596</sup> As per the *obiter dicta* in *NBS Boland Bank v One Berg River Drive and others; Deeb and another v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA), hereafter *NBS Boland Bank* 1999 (4) SA 928 (SCA) and in *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (AD), hereafter *Genac Properties* 1992 1 SA 566 (AD). See the discussion in chapter 1 paras 1.1, 1.2 and 1.4.2.

<sup>597</sup> See in this chapter paras 3.4, 3.6.2, 3.7.1 (policy objectives) and para 3.5 (jurisprudential basis). The policy objectives are also dealt with in the discussion of the various provisions in this chapter.

<sup>598</sup> Cotterell argues that whilst writers such as Savigny, Sumner and Erlich saw the potential of legislation as a source of law, they could not have foreseen the potential use of legislation as a tool “to restructure ... economic enterprise on a massive scale, to promote peaceful revolution in social relations ..., and to shape attitudes and beliefs ...” that became a reality in the twentieth century: Cotterell *The Sociology of Law: An Introduction* (1992) 44, hereafter Cotterell *The Sociology of Law*. Cotterell elaborates that law as a precision instrument for social and economic planning requires a strong state, technological support for surveillance and control and networks of mass communication (44). However, the view that consumer protection legislation did not enjoy attention in the past is an over-simplification because legislation aimed at protecting consumers has been around for centuries. For example, in England, the Magna Carta in 1215 provided for uniformity of measure of wine, ale, corn and cloth and a statute of 1709 empowered justices of the peace to fix the weight and price of bread and bakers had to mark their loaves with its size and quality. There is a full discussion in Harvey & Parry *The Law of Consumer Protection* 1-6. See also Howells *et al Handbook of Research* 559.

<sup>599</sup> Howells *et al Handbook of Research* 9-10 and 48. In Germany, the dominance of consumer protection emerged with the enactment of the Standard Contract Terms Act in the 1970s although it was preceded by more than 25 years of judicial review of standard form contracts. In the United States of America, the landmark case on the recognition of the doctrine of unconscionability which was codified in UCC 2-320, was the 1969 case of *Williams v Walker Thomas Furniture Company*: Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 369. See also Pretorius 2005 (68) *THRHR* 262.

<sup>600</sup> Unconscionability does not have a fixed meaning. In contract law, it is used to describe situations where, in the absence of fraud or duress, it is believed that one contractant took advantage of or exploited another. It

purchase purchaser to understand the extent of their financial obligations. Whilst these provisions were aimed at protecting consumers,<sup>603</sup> the statute did not contain any general provision regulating unconscionable conduct.<sup>604</sup> Neither did the Rent Act and the Rent Control Act.<sup>605</sup>

The development in South African law regarding general provisions regulating unconscionable conduct may be traced back to the Conventional Penalties Act<sup>606</sup> which appears to be the first legislative enactment containing general provisions regulating the use of oppressive and unconscionable contractual terms.<sup>607</sup> Draft legislation for the introduction of fairness and reasonableness as general principles in the law of contract have not been acted on.<sup>608</sup>

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consists of a procedural as well as a substantive enquiry. The procedural aspect aims at determining whether an element of vulnerability existed, for example, impaired intellectual ability or absence of choice (in the case of monopolies, for example). The substantive element requires proof that the contract or term itself was substantively unfair: Smith *Atiyah's An Introduction to the Law of Contract* 300.

<sup>601</sup> 36 of 1942.

<sup>602</sup> Section 5(1) mandated the inclusion of terms relating, *inter alia*, to the price, deposits and instalments. It also provided for compulsory disclosure of the provisions of section 13, discussed in the footnote below, and gave the credit consumer the right to choose the official language in which the agreement was to be recorded. Furthermore, section 6(1)(d) prohibited the exclusion of clauses implied at common law.

<sup>603</sup> A major innovation was to grant the buyer the power to resile from the contract within five days (the so-called "cooling-off" period) of its conclusion where the contract was concluded at the initiative of the seller at a place other than the seller's place of business (the so-called "door-step" sales). See section 13.

<sup>604</sup> Furmston and Bradgate *The Law of Contract* at para [1.48] (2010), explains with reference to the English Hire-Purchase Acts that the law sought to regulate the bargaining process without regulating the bargain itself. The emphasis was on process rather than on the substance of an impugned provision.

<sup>605</sup> 43 of 1950 and 80 of 1976 respectively: Aronstam *Consumer Protection* (1979), hereafter Aronstam *Consumer Protection* discusses the two statutes fully (151 *et seq*). Aside from these, there are other pieces of "specialist" legislation that protect contractants in specialised areas of contract law, for example, the Alienation of Land Act 68 of 1981 and the Deeds Registries Act 47 of 1937. Whilst such legislation may serve to protect contractants, they do not have generalised provisions aimed at regulating unconscionable conduct. The other main distinguishing feature between the position then and today is that then contractants had to rely on specialist advice and assistance given by, for example, attorneys or conveyancers. Today, such advice and assistance are dispensed by statutory bodies often for free or at a fraction of the fees charged by a professional.

<sup>606</sup> Act 15 of 1962. Section 3 thereof grants to the court an equitable discretion to reduce a stipulated penalty if it is out of proportion to the actual prejudice suffered. However, in *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) the court whilst recognising the fact that a "debtor" may not be in a position to bargain with the "creditor" at date of contract is a factor to be considered, cautioned that fair play for the debtor should "not be at the expense of the creditor – he is not to suffer prejudice" (390).

<sup>607</sup> Aronstam *Consumer Protection* 49 which is part of a comprehensive discussion of early legislation aimed at protecting consumer interests (47-168).

<sup>608</sup> See South African Law Commission Project 47 Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts (1998): Huyssteen, Van der Merwe & Maxwell *Contract Law in South Africa* (2012), para [108].

In South Africa, the Consumer Protection Act 68 of 2008 is historically significant in that it constitutes the first statute aimed at providing a comprehensive legal framework for consumer protection.<sup>609</sup> It serves as an overarching piece of legislation containing generalised provisions which impacts on the Rental Housing Act and the National Credit Act and other specialist pieces of legislation such as the Alienation of Land Act.<sup>610</sup> The Consumer Protection Act read together with legislation such as the Rental Housing Act and the National Credit Act has introduced a formidable range of protections for the consumer. These three statutes are representative of legislation in the post-constitutional era designed to give expression to the constitutional ethos of freedom, dignity and equality.

The impetus for consumer protection legislation may be traced to the classical theory of contract law that, in general, did not recognise subjective considerations such as unconscionability and good faith in the determination of contractual validity. This approach which often left consumers with little or no legal protection had significant socio-economic implications.<sup>611</sup> Consumer protection law was viewed as a driver to effect socio-economic reforms.<sup>612</sup>

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<sup>609</sup> Read together with other legislation such as the Rental Housing Act 50 of 1999 and the National Credit Act 34 of 2005 it has introduced a formidable range of protections for the consumer.

<sup>610</sup> See paras 3.6.2 (National Credit Act) and 3.8.5 (Rental housing Act) in this chapter. Contracts for the sale of land have to comply with the requisites of the CPA relating, for example, to the exclusion of implied warranties. The CPA cuts across many pieces of legislation and impacts most industries that involve the supply of goods and services. See further para 3.6 below. Prior to this, the interests of consumers were addressed piecemeal in various statutes. The development from a piece-meal approach to a comprehensive one is also to be discerned in the international arena: Howells *et al Handbook of Research* 10.

<sup>611</sup> As evidenced by the discussion in chapter 2 of, for example, standard form contracts (para 2.4.2), restraint of trade agreements (para 2.3.2.2(C) and exemption clauses (para 2.4.3).

<sup>612</sup> The potential of using legislation as a tool “to restructure ... economic enterprise on a massive scale, to promote peaceful revolution in social relations ..., and to shape attitude and to shape attitudes and beliefs ...” that became a reality in the twentieth century was recognised by writers such as Savigny, Sumner and Erlich: Cotterell *The Sociology of Law* 44.

### 3.3 Socio-economic basis

Protectionist legislation, such as consumer protection legislation, is the product of socio-economic drivers.<sup>613</sup> It evolves from the recognition of the need to protect consumer rights and thereby to create a more equitable dispensation.<sup>614</sup> The need for such protection has been acknowledged both nationally<sup>615</sup> and internationally.<sup>616</sup> In South Africa, under the democratic dispensation, the Constitution plays an important role in the drive towards an equitable dispensation in the socio-economic paradigm of its citizens. Section 26 places an obligation on the State to take reasonable legislative and other measures for the progressive realisation of the right of access to adequate housing. A similar obligation on the State exists in terms of section 27 in respect of access to health care, food, water and social security.<sup>617</sup> The legislation discussed in this chapter is representative of some of the initiatives undertaken by the State in response to the challenges presented by sections 26 and 27 of the Constitution.

The constitutional imperatives must be viewed in the context of the classical theory of contract law<sup>618</sup> that propounded that absence of state interference is, not only, a necessary aspect of contract law theory, but also, the driver of a free market economy where the law of supply and demand is dominant. Ideally such a system creates an environment in which individuals buy products that they need at prices that they can afford.<sup>619</sup> The ideal, however, does not always play out in practice where individuals may contract for goods or services that they may not need at prices that they may not afford and subject to terms and conditions that they may not

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<sup>613</sup> Rycroft & Jordaan *A Guide to South African Labour Law* (1992) 225, hereafter Rycroft & Jordaan *A Guide to South African Labour Law*.

<sup>614</sup> Oughton & Lowry *Textbook on Consumer Law* (1997) 15, hereafter Oughton & Lowry *Textbook on Consumer Law*.

<sup>615</sup> For example, the Hire-Purchase Act 36 of 1942 and the Credit Agreements Act 75 of 1980, both since repealed; the Consumer Protection Act 68 of 2008; National Credit Act 34 of 2005; Rental Housing Act 50 of 1999.

<sup>616</sup> See the footnote in para 3.1 in this chapter. See also Howells *et al Handbook of Research* 13-17, 19 and 21-23; MacKee Lahave and Koning (2011) September 'Responsible Finance: Putting Principles to Work' Focus Note 73 Washington D.C. *CGAP* 4-5, hereafter MacKee *et al* (2011) September Focus Note 73 Washington D.C. *CGAP*.

<sup>617</sup> See further the discussion of sections 26 and 27 in para 3.4 below.

<sup>618</sup> See chapter 2 para 2.2.2.

<sup>619</sup> See the discussion in chapter 2 paras 2.2.1 and 2.2.4.

have control over; a real possibility being that such terms and conditions could be harsh and unconscionable.<sup>620</sup> In an environment of imbalance, be it market related or political-historical,<sup>621</sup> it becomes necessary for the State to intervene in its capacity as a public-governing authority. In the process, consumer contracts are removed from the sole governance of private law and given a public law orientation,<sup>622</sup> the primary concern whereof is the public interest.<sup>623</sup> Further impetus for this development is the increasing provision for administrative rather than judicial processes for the resolution of disputes.<sup>624</sup>

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<sup>620</sup> The following evidence presented to Select Committee of the House of Assembly in 1939 on the subject of the Hire-Purchase Bill summarises the State's concern in this regard: "There can be no question that the evidence put before us shows very clearly that very many people are tempted to buy goods that they cannot afford at all, because of the easy terms of payment offered to them, or they are tempted to buy goods at a far higher purchase price than they can afford to pay": Diemont Marias & Aronstam *The Law of Hire-Purchase in South Africa* Juta (1974) iii. See also Manuel 'SA's debt time bomb' *The Times* 4 November 2011, 1, 1-2, where the Minister warned about the level of over-indebtedness in South Africa; Renke 'Measures in South African consumer credit legislation aimed at prevention of reckless lending and over-indebtedness: An overview against the background of recent developments in the European Union' (2011) 74 *THRHR* 208, hereafter Renke (2011) 74 *THRHR* 208; Kelly-Louw 'The prevention and alleviation of consumer over-indebtedness' (2008) 20 *SA Merc LJ* 200, 204-205. Early case law that acknowledge this propensity and the dangers inherent therein are *Smit and Venter v Fourie & Another* 1946 WLD 9, 13 and *National Motors v Fall* 1958 (2) SA 570 (E) 571. See also chapter 2 paras 2.3 and 2.4.

<sup>621</sup> In South Africa, it is both. Aside from the human rights aspects (discussed in para 3.5 in this chapter below), consumer protection legislation has a political-historical context. The policy of Apartheid had negative socio-economic consequences. This is explicitly acknowledged in the Preamble of the Consumer Protection Act as well as in Section 3(1)(b)(iv) thereof.

<sup>622</sup> Rycroft & Jordaan *A Guide to South African Labour Law* 10.

<sup>623</sup> The net result of public-interest legislation is that freedom of contract may be constrained in the public interest. A lessor may, for example, be compelled to conclude a lease agreement with a lessee with whom the lessor refused to contract solely on the basis of race or gender. The *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) case (discussed in chapter 1 para 1.3.3) serves as an illustration. Similar considerations also impacted contract law in England. Examples are the Sex Discrimination Act 1995 and the Race Relations Act 1976: Atiyah *An Introduction to the Law of Contract* at 22-23. See also MacKee *et al* (2011) September Focus Note 73 Washington D.C. *CGAP* 2; Hosten *Introduction to South African Law and Legal Theory* (1995) 945. Similar developments are present in the Law of Property: Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* (2006) 4-6 and 579-583, hereafter Badenhorst *et al Property*.

<sup>624</sup> The possibility of litigation as a compliance mechanism is, in itself, insufficient. Leff is of the opinion that one cannot think of a more expensive and frustrating course than to seek goods or contract "quality" through repeated law suits against inventive "wrongdoers": 'Unconscionability and the crowd-consumer and the common law tradition' (1970) 31 *University of Pittsburgh LR* 349, 356. See also Cartwright (2011) *Legal Studies* 2. The fact that greater emphasis is placed on accessible and affordable public remedies (administrative tribunals etc.) rather than private remedies which are often time-consuming and prohibitively expensive mean that more people are provided with access to justice. The costs, risks and effort associated with litigation in the courts are beyond the means of ordinary consumers, "including middle class consumers": Naude (2009) 126 *SALJ* 526. Other factors that may impact on a decision whether or not to litigate include that the consumer may

### 3.4 Policy objectives

Chapter 2 illustrates that a lack of commercial knowledge, expertise and sophistication may result in a contractant either over-extending itself or in being exploited. This, coupled with a strict application of the classical principles of contract law could result in unforeseen and iniquitous consequences and an impairment of the constitutional values of dignity, equality and freedom. It is in this context that consumer protection legislation asserts itself. However, legislative imperatives alone do not guarantee the realisation of the desired outcomes. It must, *inter alia*, be supported by consumer awareness and an effective and affordable system of redress in the event of breach on the part of the supplier. Hence, disclosure provisions in legislation are becoming more detailed because consumer awareness is largely dependent on information and disclosure.<sup>625</sup> The main aim thereof is to assist consumers in deciding on the prudence of entering into a proposed agreement bearing in mind their needs and their financial situation.<sup>626</sup> The need for effective and affordable mechanisms for redress to prevent the legislation from becoming paper law led to the creation of administrative tribunals<sup>627</sup> to combat abuse.<sup>628</sup>

The discussion thus far may be summarised by noting that consumer protection is advanced through disclosure and information, regulation and through a more expedient and accessible

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feel intimidated by the supplier or by the court process itself or by the consumer's lack of knowledge of the legal process: Howells *et al Handbook of Research* 482-483.

<sup>625</sup> See para 3.6.3.3 below.

<sup>626</sup> Renke (2011) 74 *THRHR* 211-212.

<sup>627</sup> Administrative action tends to be faster and less costly in that no legal representation is needed. It is inquisitorial in nature, allowing the presiding officer to put question to the litigants which can be very useful in those (not so rare) instances where a party is not represented or lacks legal sophistication. Hearings must be conducted as expeditiously and as informally as possible. Allowance is made for a departure from inflexible rules of procedure which work to the disadvantage of those litigants with no access to legal representation or who lack sophistication of the law. See section 142(1)(a) of the National Credit Act 34 of 2005 that regulates the conduct of the National Consumer Tribunal.

<sup>628</sup> One of the first South African statutes to do so was the Trade Practices Act 76 of 1976. Similar tribunals to combat unconscionable abuse of bargaining power had also been adopted in the British and other legal systems: Aronstam *Consumer Protection* 54.



system of adjudication.<sup>629</sup> By employing these mechanisms, the South African consumer protection legislation serves to drive the constitutional imperative to foster socio-economic reforms for the creation of a just and egalitarian society which has its basis in the constitutional values of dignity, equality and freedom.<sup>630</sup>

### 3.5 Jurisprudential basis

The principle of paternalism<sup>631</sup> justifies State interference with individual autonomy out of altruistic concern for the welfare of its subjects,<sup>632</sup> the reasoning being that the individual will be better off or will be protected from potential harm. The autonomy of the individual is subjugated in an attempt to balance disparate societal interests.<sup>633</sup>

Consumer protection legislation in the contractual law setting is yet another example of the principle of paternalism in action. Such legislation is engaged in the pursuit of broad social goals.<sup>634</sup> Whereas the primary function of contract law in terms of the classical theory was to protect individual rights of autonomy and freedom,<sup>635</sup> consumer protection legislation is concerned with the pursuit of collective goals. The legislation has replaced the classical theory's prescription of minimal state regulation and sanction with accountability to the public at large

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<sup>629</sup> Roach & Sossin 'Access to justice and beyond' (2010) 60 *University of Toronto LJ* 373, 382, hereafter Roach & Sossin (2010) 60 *University of Toronto LJ* 373. The theory is explained below.

<sup>630</sup> See the founding provisions of the Constitution of the Republic of South Africa 1996. See also, for example, the Preamble to the Consumer Protection Act.

<sup>631</sup> The principle is descriptive of interference by the state or an individual in the autonomy of another latter. See further footnote explanations in chapter 2 paras 2.2.2 and 2.3.1.

<sup>632</sup> This development is in response to an ever-increasing sophistication and complexity of commercial contracts. In the South African context, the socio-economic structure of South African society coupled with the apartheid-induced legacy of enormous disparities in wealth, power and resources also plays a role. See the Preamble of the Consumer Protection Act. Pretorius observes that paternalistic intervention is most needed when the contractant is weak or naive: 2005 (68) *THRHR* 253, 262-263. See also chapter 2 para 2.3.2.

<sup>633</sup> Rycroft & Jordaan *A Guide to South African Labour Law* 9. There are numerous examples of the principle of paternity in public interest legislation, for example, road traffic legislation and legislation aimed at the control of dependence inducing substances.

<sup>634</sup> Atiyah *Law and Modern Society* (1995) 127, hereafter *Atiyah Law and Modern Society*.

<sup>635</sup> See chapter 2 para 2.2.



and to the appropriate ministers or organs of state.<sup>636</sup> In this may be detected an (enforced) public demonstration of a general requirement of good faith.

The enforcement of rights is primarily the responsibility of the state through its organs such as the office of the public protector the office of the ombudsman. A consequence of this development is a shift from an individualist approach where the individual has both the right and the responsibility to enforce his/her rights through (costly) litigation which may place the attainment of justice beyond the reach of many, to an approach where the enforcement of rights become the responsibility of the state through its organs such as the National consumer Tribunal.<sup>637</sup>

Thus, consumer protection legislation places a limitation on the principles of individual autonomy and freedom of contract<sup>638</sup> for the benefit of the consumer.<sup>639</sup> The major policy purposes of such legislation are, *inter alia*, (i) to ensure that the consumer is adequately informed to facilitate self-protection and informed choices; (ii) to protect the consumer from unconscionable contractual terms;<sup>640</sup> (iii) to promote the safe and satisfactory functioning of goods and services and to provide quick and affordable relief in the event of defective performance.<sup>641</sup> Such legislation give practical expression to the principle of reasonableness, fairness and good faith by targeting contracts which appear to be manifestly unfair.<sup>642</sup>

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<sup>636</sup> For example, the National Consumer Commission discussed in para 3.6.7 below.

<sup>637</sup> Discussed in paras 3.6.7 and 3.7.1 below.

<sup>638</sup> Discussed in chapter 2 para 2.2.

<sup>639</sup> It will become evident in this chapter that such legislation stimulates rather than inhibits freedom of contract and participation in commerce. Compare this with the limitations placed on individual autonomy by monopolistic business practices such as standard form contracts and exemption clauses discussed in chapter 2 paras 2.4.2 and 2.4.3.

<sup>640</sup> This is achieved by enabling the consumer to assess the basic features of the contract. These include the nature of the goods, the quality, quantity and price thereof as well as the conditions of the sale: Martin (2006) 41 *Texas International LJ* 239.

<sup>641</sup> Examples from selected consumer protection legislation are discussed below in this chapter.

<sup>642</sup> Corones *The Australian Consumer Law* para [2.55].

Perhaps not so ironically, such legislation benefits, not only, the consumer, but also the whole economic enterprise<sup>643</sup> because markets do not operate optimally and efficiently “on the basis of sub-optimal risk assessment by consumers”.<sup>644</sup> Consumers may be more willing to contract if they are informed consumers and if they know that they enjoy protection.<sup>645</sup> Rather than weakening the intrinsic values of the classical theory of contract law<sup>646</sup> it serves to strengthen them by redressing the weaknesses that resulted from its presumption of equal bargaining power.<sup>647</sup> Disclosure and information provisions promote autonomy and consensus and lend credence and content to the classical contract law assumption that contracts are the result of a rational choice.<sup>648</sup> Furthermore, disclosure and information provisions which are adhered to by suppliers close down avenues of contractual avoidance by consumers, thereby fortifying the core classical contract law principle of sanctity of contracts.<sup>649</sup>

In the International Law context, consumer rights are regarded as being of universal application, it being justified on human rights grounds.<sup>650</sup> Consumer rights contain the three main features of human rights, namely, universality,<sup>651</sup> improvement of individual well-being<sup>652</sup>

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<sup>643</sup> The introduction of consumer protection laws changes the economic profile of from one of a free-market economy to a mixed one in the sense that there is a blending of free-market policies with central regulation of trading practices: Corones *The Australian Consumer Law* [2.60]. To paraphrase MacKee *et al*, responsible trade and commerce requires a careful balancing of clients’ benefits with the providers’ long-term viability, and client protection “must be built into the design and business at every level”: MacKee *et al* (2011) September Focus Note 73 Washington D.C. CGAP 2. Consumer protection legislation have similar considerations in mind. The writers’ further observation in respect of micro-financing that “[p]roducts must offer reasonable value-for-money and minimise potential harm, such as over-indebtedness” is apposite in respect of all consumer transaction.

<sup>644</sup> Corones *The Australian Consumer Law* para [2.55].

<sup>645</sup> Smith *Atiyah’s An Introduction to the Law of Contract* 8 and 19.

<sup>646</sup> Freedom of contract, autonomy and certainty discussed in chapter 2 paras 2.2 and 2.3.2.

<sup>647</sup> The availability of information to make informed choices, the protections afforded, and the right to expedient and inexpensive redress inspires confidence with a corresponding reduction in unwillingness to contract. Freedom of contract is the ultimate beneficiary: Smith *Atiyah’s An Introduction to the Law of Contract* 16-20. See also Beale *Chitty On Contract* Volume 1 (2008) [7-126], hereafter Beale *Chitty on Contract* Volume 1; Furmston and Bradgate *The Law of Contract* para [1.52]; Oughton & Lowry *Textbook on Consumer Law* 15.

<sup>648</sup> Both the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005 have extensive provisions relating to disclosure and information. See paras 3.6.3.3 and 3.7.2.3 below.

<sup>649</sup> See the discussion of sanctity of contracts in chapters 1 para 1.3.3 and chapter 2 para 2.3.2.

<sup>650</sup> Howells *et al Handbook of Research* 18-27 and 43.

<sup>651</sup> There is a growing recognition of such rights in both national and international legislation. See para 3.1 above.

and protection against strong governments.<sup>653</sup> The evolution of consumer rights is viewed as a reaction to “post-modern global world and scientific evolution” and is regarded as a third generation right, it being a “new extension of international human rights law.”<sup>654</sup> The international jurisprudence is evident in the socio-economic provisions of the Constitution<sup>655</sup> which has given impetus to the enactment of consumer protection legislation.

Hereafter follows a brief discussion of a few of the more innovative aspects of the Consumer Protection Act, the National Credit Act and the Rental Housing Act with a view to illustrating the protections afforded to consumers. The discussion is intended to bring into sharp relief the narrowness of the approach of the Supreme Court of Appeal to contract law as illustrated in chapter 2 and thus to consider whether the conclusion reached in chapter 2 finds support in consumer protection legislation. The second aim is to determine whether the policy considerations underpinning the consumer protection legislation support the *obiter dicta* that would recognise the validity of contracts of sale and lease at a reasonable price or rental respectively, or at a unilaterally determined price or rental.<sup>656</sup>

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<sup>652</sup> The right to fair trade, safe products and access to justice are granted to maintain human dignity which is one of the founding principles of the South African constitution.

<sup>653</sup> Big businesses are equated with powerful governments and are seen as controlling the consumer: Howells *et al Handbook of Research* 18-27.

<sup>654</sup> Howells *et al Handbook of Research* 21.

<sup>655</sup> For example, sections 26 and 27.

<sup>656</sup> Chapter 2 illustrated that the Supreme Court of Appeal rejected subjective considerations such as good faith as determinants of contractual validity on the basis that it would devalue the principles of freedom and sanctity of contract. The discussion in this chapter illustrates that subjective considerations and the public policy imperatives that inform their application in the legislation not only operate in harmony with the principles of freedom and sanctity of contract, but also, serve to promote legitimacy of these principles. See, for example paras 3.6.10, 3.9 and 3.10 below. The policy considerations underpinning the legislation will assist in determining whether the incorporation of the *obiter dicta* into our law is desirable from a policy perspective.

## 3.6 Consumer Protection Act 68 of 2008

### 3.6.1 Introduction

The discussion will commence with a brief discussion of the policy objectives and the field of application of the Consumer Protection Act (the CPA). It will be followed by a discussion of a few of the more relevant<sup>657</sup> substantive provisions.

### 3.6.2 Policy objectives and field of application

One of the principal policy objectives of consumer protection legislation is to combat unconscionable conduct to ensure that the reasonable expectations of the consumer<sup>658</sup> are met and that the consumer gets what he/she paid for.<sup>659</sup> This policy objective also underlies the South African Consumer Protection Act<sup>660</sup> (CPA). The goal is buttressed by the fact that the CPA has adopted a “single enterprise approach” which imposes an obligation on all those in the supply chain to accept responsibility for the goods and services that they provide.<sup>661</sup> The result is a codification that, not only, broadens and reinforces certain common law consumer rights,

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<sup>657</sup> For the purposes of the thesis.

<sup>658</sup> The Consumer Protection Act has a wide definition of consumer. A consumer includes not only the contractant but also any person to whom goods or services are marketed, and the user of goods or the recipient/beneficiary of services even where these entities were not party to the contract.

<sup>659</sup> The goal being that consumers should enjoy more protection than before.

<sup>660</sup> It is especially evident in the Preamble as well as the purposes and policy provisions of the CPA (section 3) and in the comprehensive provisions relating to fundamental consumer rights set out in chapter 2 of the CPA. The policy objectives outlined in para 3.4 above also inform the provisions of the CPA. To avoid repetition and for the sake of brevity, these will not be outlined separately but will be highlighted in the discussion of the provisions of the CPA.

<sup>661</sup> The supply chain consists of the manufacturer and all other intermediaries down to the immediate seller even though there may be no contractual nexus between the consumer and the parties other than the immediate seller. In not requiring a contractual nexus, the position is similar to that in New Zealand, Australia, Spain and France but unlike that in the European Union where a contractual nexus is required: Howells *et al Handbook of Research* 195-196. See also Corones *The Australian Consumer Law* para [2.60]; Jacobs, Stoop & van Niekerk ‘Fundamental Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis’ (2010) 13(3) *PER/PELJ* 302, 303, hereafter Jacobs *et al* (2010) 13(3) *PER/PELJ*. The adoption of a single comprehensive regulatory framework covering a multitude of scenarios that replaces the many outdated laws that regulated consumer protection in a piece-meal manner further advances this cause. See the long title of the Act. See also Gouws ‘A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act’ (2010) *SA Mercantile Law Journal* 79, hereafter Gouws (2010) *SA Merc LJ* 79.

but also, promulgates a new generation of consumer rights<sup>662</sup> and that regulates previously unregulated business practices.<sup>663</sup>

The CPA which became fully operational on the 1<sup>st</sup> of April 2011,<sup>664</sup> in seeking to comprehensively regulate consumer relations, has taken a rights-based approach that has entrenched, enhanced and expanded consumer rights.<sup>665</sup> It applies to almost every transaction in South Africa<sup>666</sup> for the supply of goods<sup>667</sup> and services<sup>668</sup> in exchange for a consideration.<sup>669</sup> It

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<sup>662</sup> See para 3.6.3 below.

<sup>663</sup> For example, customer loyalty programmes (section 35), and the regulation of times when a consumer may be contacted for direct marketing. See section 12 read with Prohibited Times for Contacting Consumers Notice published under GN R293 in GG 34180 of 1 April 2011.

<sup>664</sup> The CPA has limited retrospective effect. Item 3 of Schedule 2 of the Act.

<sup>665</sup> The protections enjoyed by consumers at common law have, not only, not been comprehensive but where such protections did exist, they were often excluded by contract. So for example, store warranties limited a consumer's right of recourse for defective goods to repairs subject to various qualifications (e.g. the rights of repair lapsing after a specified time period). Repairing is a cheaper option than giving a refund or replacing the product. The CPA has drastically changed this practice by giving the consumer the right, subject to exceptions, to choose between full refund, replacement or repair (the consumer's three "Rs"). The right must be exercised within six months from date of receipt of the goods. Thus the CPA changes the common law significantly. At common law, the implied warranty against latent defects placed an onus on the consumer to prove (i) that the defect is latent in that it existed at date of contract and was not discernible on ordinary inspection, and (ii) that the defect rendered the goods substantially unfit for its ordinary purpose or for the particular purpose for which it was bought and of which the seller was aware: Bradfield, Lehmann, Khan, Havenga, Havenga & Lotz *Principles of the Law of Sale and Lease* (2010), 32-34, hereafter Bradfield *et al Principles*. See also Kerr *The Law of Sale and Lease* (2004) 114-120, hereafter Kerr *Sale and Lease*. A supplier in the past could simply dismiss any claim by attributing breakdown in the goods to faulty use by the consumer, thereby placing the onus on the consumer to prove otherwise. In giving the rights as described in this footnote to the consumer, the CPA places the onus on the supplier to prove that the defect was the result of improper use. In providing that the statutory rights are additional to any common law rights (section 56(4)(a); see also section 2(10)) or contractual rights expressly agreed upon, the CPA leaves unaffected a consumer's use of the common law implied warranty against latent defects in respect of defects that manifest itself after the expiry of the six months period. The CPA, not only entrenches this common law right, but also, goes further by legislating against its exclusion by the inclusion of a *voetstoots* clause (section 55 read with section 56). See further para 3.6.5 in this chapter.

<sup>666</sup> Foreign suppliers of goods or services in South Africa are also covered regardless of whether they reside in or have their principal office in South Africa. Section 5(8). The definition appears to be sufficiently wide to cover sales over the internet as well. The internet has opened up trade across borders and across continents. The problem lies not so much with its regulation but with the enforcement of any such regulation. See para 3.6.6 below. The CPA has an extensive reach and the exceptions are dealt with in section 5(2).

<sup>667</sup> This has a wide definition and includes any goods (anything marketed for human consumption whether tangible or intangible) for sale, rental, exchange or hire. Section 1.

<sup>668</sup> The concept "services" also has a wide definition and includes the performance of work, the provision of education, advice, transport and entertainment. The provision of access to or use of immovable property by way of rental is one of the services to which the CPA relates. Section 1.

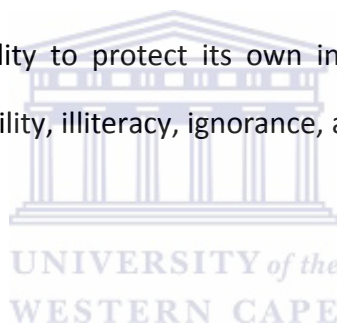
<sup>669</sup> Section 5. For the exceptions see Section 5(2)-(4) read with Section 5(5). Section 5(5) provides that exempted goods and the chain of suppliers are nevertheless subject to the stipulations of section 60 (safety monitoring and recall) and section 61 (liability for damage caused by goods). Section 61 is discussed in para 3.6.5 below.

applies to all such contracts where the supplier is an entity engaged in the ordinary course of business<sup>670</sup> and the consumer is any individual or a juristic person whose asset value or annual turnover does not exceed the threshold as determined by the Minister.<sup>671</sup> It also applies to goods bought in terms of the National Credit Act.<sup>672</sup>

### 3.6.3 Unconscionable conduct

#### 3.6.3.1 Introduction

The Act breaks new ground in that it specifically proscribes unconscionable conduct.<sup>673</sup> It regulates the conduct of the contractants from the marketing stage to the recovery of the goods from the consumer<sup>674</sup> and makes it unconscionable for a supplier to knowingly take advantage of a consumer's inability to protect its own interests due to a range of factors including, physical or mental disability, illiteracy, ignorance, and poor command of the language



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Consideration means anything given and accepted in exchange for goods and services rendered and includes anything from money to electronic credit to loyalty credit to labour, to any thing, undertaking, promise, agreement or assurance irrespective of its intrinsic value. Section 1.

<sup>670</sup> Section 5. It must be the business of the supplier of selling that particular product or service. See also *Fourie's Trustee v Van Rijn* 1922 OPD 1.

<sup>671</sup> Section 5(2). Currently the threshold is R2 million: GN 294, GG 34181, 1 April 2011. The Act seeks to protect vulnerable consumers and not big businesses, hence the threshold. The threshold does not apply to franchisees under franchise agreements.

<sup>672</sup> Section 5(2)(d). In such a case, the credit agreement is regulated by the National Credit Act but the goods are regulated by the CPA. This means, for example, that the notion of strict liability introduced by the CPA also applies to goods bought under the NCA: Melville & Palmer 'The Applicability of the Consumer Protection Act 2008 to Credit Agreements' (2010) 22 *SA Merc LJ* 272, 273 and 275. Strict liability is discussed in para 3.6.5 in this chapter.

<sup>673</sup> Section 40. Unconscionable is defined in section 1 as conduct as characterised in section 40 or conduct that is so unethical or improper that it would shock the conscience of a reasonable person. In the United States of America, the UCC provisions require that contractants must act reasonably and in good faith and that the agreement must not be unconscionable: Warkentine 'Article 2 Revisions: An Opportunity to Protect Consumers and Merchant Consumers through Default Provisions' (1996-1997) 30 *J. Marshall LR* 39, 44. See also Lawrence *Anderson on the Uniform Commercial Code* Volume 1 (2003). English law does not have a general requirement of unconscionability: Smith *Atiyah's An Introduction to the Law of Contract* 15. See also Beale *Chitty On Contract* Volume 1 para [7-126].

<sup>674</sup> Section 40(1).



of the agreement.<sup>675</sup> In doing so, it goes beyond codifying the common law ground of improperly obtained consensus.<sup>676</sup>

Hereafter follows a discussion a few of the more important aspects of the CPA<sup>677</sup> designed to combat unconscionable conduct.

### 3.6.3.2 Unfair terms

The CPA, in general, and in section 40 in particular, directs that consumer contracts be regulated by the standard of good faith<sup>678</sup> by legislating against conduct that is unconscionable, unreasonable, unfair or unjust.<sup>679</sup> Part G, of Chapter 2 of the CPA, contains extensive provisions

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<sup>675</sup> Section 40(2). See also section 3(1)b). This may be interpreted as meaning that consumers are presumed to have certain weaknesses relative to the supplier: Willett (2011) 60.2 *International & Comparative Law Quarterly* 366. Similar provisions apply in foreign jurisdictions where contracts may be set aside on the basis of unconscionability.

Both American and English law provide that a substantially unfair contract may be set aside where the contractant is “‘poor and ignorant’ (e.g. illiterate)”: Beale *Chitty On Contract* Volume 1 paras [7-128] and [7-136] See also Smith *Atiyah’s An Introduction to the Law of Contract* 7; Peel *Treitel The Law of Contract* (2011) para [10-044], hereafter Peel *Treitel The Law of Contract*.

In Australia, taking advantage of a contractant’s weakness or vulnerability is deemed to be unconscionable: Davis, Seddon and Masel *The Laws of Australia Contract* (2003) para [7.18]; Carter & Hartland *Contract Law in Australia* (2002) paras [1504] and [1514]. In terms of section 21 of the Australian Consumer Law (2010), courts must take into account all the circumstances of the case, including the relative bargaining positions of the supplier and consumer, whether the conditions imposed on the consumer were reasonably necessary for the protection of the legitimate interests of the supplier, whether the consumer was able to understand the documents relating to the goods or services, whether any unfair tactics were used, and the amount for which and the circumstances under which the consumer could have acquired identical or equivalent goods or services: Corones *The Australian Consumer Law* para [5.20].

In Germany inexperience or infirmity of will or judgment may vitiate a contract (BGB 138(2)).

In the Netherlands, special circumstances such as a state of necessity, dependency, wantonness, abnormal mental condition or inexperience play a role (NBW 3.44(4)).

<sup>676</sup> For the common law position see chapter 2 and specifically para 2.3.2.2(B). The provisions in this regard are significant because at common law illiteracy and poor command of language do not feature as considerations that may vitiate a contract. The CPA provisions also go much wider than the common law which is concerned only with improperly obtained consensus whereas this section regulates the conduct of the contractants from the marketing stage to the recovery of the goods from the consumer: Jacobs *et al* (2010) 13(3) *PER/PELJ* 347, and generally regarding unconscionable conduct (346-353). See also chapter 2 paras 2.3.2 and 2.6.3.

<sup>677</sup> For the purposes of the thesis.

<sup>678</sup> In England, the Unfair Terms in Consumer Contracts Regulations 1999 gave good faith, a notion traditionally thought as having little or no importance in English law, a central role in consumer relations: Smith *Atiyah’s An Introduction to the Law of Contract* 317.

<sup>679</sup> Section 3(1)(d). The provisions of the Act in this regard (e.g. those in sections 40, 48, 51 and 52 discussed below) are geared towards establishing a balance in the negotiating powers between consumers and supplier, a balance that has been seriously out of kilter and in favour of suppliers due to, for example, the



that specifically regulate contractual terms that are unfair, unreasonable or unjust.<sup>680</sup> The more significant of these prohibit the imposition of prices and terms that are unfair, unreasonable or unjust,<sup>681</sup> or that are so excessively one-sided, that it favours a party other than the consumer or the recipient or the goods or services,<sup>682</sup> or that are so adverse to the consumer as to be inequitable,<sup>683</sup> or that contain an assumption, or exclusion or limitation of liability or an indemnity that is unfair, unreasonable, unjust or unconscionable towards the consumer.<sup>684</sup> The levels of education, experience, sophistication, and bargaining power of the consumer and supplier relative to each other play a role in determining whether the contract or term thereof is unfair, unjust or unconscionable.<sup>685</sup>

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prevalence of standard form contracts and the approach of our courts. See the discussion in chapter 2 and in particular in para 2.4.2.

<sup>680</sup> See sections 48-52. Section 48(2)(c) seems to extend the common law liability of a contractant for a *dictum et promissum* by deeming a term to be unfair, unreasonable or unjust if a consumer relied on a statement of opinion made by or on behalf of the supplier. With a *dictum et promissum* the statement must be one of fact and not opinion: *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A). The definition of what constitutes “unfair, unreasonable or unjust” is to be found in sections 48(2)(a)&(b). A term is unfair, unreasonable or unjust if it is excessively one-sided towards a person other than the consumer or other person to whom goods or services are supplied (section 48(2)(a)) or the terms or agreement are so adverse to the consumer as to be inequitable. In terms of the EU Unfair Terms Directive a term is unfair if, “contrary to the requirement of good faith, it causes significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”: Naude (2009) 126 *SALJ* 516.

Similarly BGB 307 provides that an unclear or an incomprehensible provision may create an unreasonable disadvantage. It further provides that provisions are ineffective, if contrary to the requirement of good faith, they create an unreasonable disadvantage.

In Australia, section 24 of the Australian Consumer Law provides that a term is unfair if it would cause a significant imbalance in the rights and obligations of the parties and is not necessary to protect the legitimate interests of the advantaged party, and if it would cause detriment (financial or otherwise) if it were to be applied or relied on: Corones *The Australian Consumer Law* para [6.75]. In terms of section 23(1) and (2) of the Australian Consumer Law such a term would be void if it is contained in a standard form consumer contract: Corones *The Australian Consumer Law* para [6.20]. The provisions of the Australian Consumer Law in this regard fill the gap in Australian Consumer Protection laws left by the non-recognition by the common law courts of substantive unfairness as a basis for intervention: Corones *The Australian Consumer Law* at para [6.05]. In this regard, the Australian courts followed an approach similar to that of the South African courts, namely, the primacy of freedom of contract: see chapter 2 paras 2.2.4 and 2.4.4.

<sup>681</sup> Section 48(1)(a)(i) and (ii).

<sup>682</sup> Section 48(2)(a).

<sup>683</sup> Section 48(2)(b).

<sup>684</sup> See section 48 (1)(c). The protection afforded to the consumer in terms of section 48(1)(c) is extended to any person to whom the goods or services are supplied at the direction of the consumer. See also section 3(1)(d) which states the aim of the Act as protecting consumers from unconscionable, unfair and unreasonable trade practices or deceptive, misleading or fraudulent conduct.

<sup>685</sup> Section 52(2) and specifically subsection (b). However, the emphasis in Section 52, as in the case of section 49

The protections are strengthened by section 51 that prohibits agreements, the effect whereof is to subvert, whether directly or indirectly, the rights of the consumer.<sup>686</sup> The inclusion of provisions that grey- and black-lists contractual clauses ensure fast, real and effective consumer protection.<sup>687</sup> Grey-listing raises a presumption of unfairness and unreasonableness,<sup>688</sup> placing the onus on the supplier where it belongs.<sup>689</sup> Significant for the purposes of the thesis is the presumption of unfairness and unreasonableness of granting the supplier unilateral discretionary powers, for example, to increase a price agreed upon without giving the

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discussed in a footnote in para 3.6.3.3 in this chapter below, is on procedural fairness rather than on the substantive fairness of the impugned contract or term thereof. Section 52 requires a court to take into account the circumstances surrounding the conclusion of the contract. For example, the conduct of the contractants and whether there was any negotiation, whether the plain language requirement was satisfied: Naude (2009) 126 *SALJ* 515.

<sup>686</sup> These are the so-called black-listed clauses. A consumer cannot, for example, be required to waive its rights under the Act. Any avoidance of the supplier's statutory obligations is also prohibited. Note that these rights are in addition to the consumer's rights at common law. See section 2(10). The equivalent of section 51 in the National Credit Act is to be found in section 90 thereof. Section 90 is discussed in para 3.7.2.2 below.

<sup>687</sup> Naude (2009) 126 *SALJ* 520. Such lists enhance the effectiveness of the control of unfair terms, promote proactive conduct on the part of suppliers and strengthen the hand of administrative bodies and consumer councils to obtain a result that has wide-ranging application to the consumer industry as whole as opposed to costly litigation by consumer which, even if reported in official and/or lay publications, may benefit the consumer "alone" and which may be ignored by the rest of the consumer industry. The courts also do not fulfil a policing role unlike bodies such as the Consumer Commission, which, *inter alia*, has a monitoring function: Naude 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 *SALJ* 128, hereafter Naude (2007) 124 *SALJ* 128. The role of the Consumer commission is discussed in para 3.6.7 below.

<sup>688</sup> Some presumptions of unfairness are in relation to terms excluding or limiting the liability of the supplier in certain circumstances; excluding rights or remedies of the consumer in the event of total or partial non-performance; limiting the supplier's obligation to respect its commitments; excluding the consumer's rights to take legal action or exercise any other legal remedy; restricting the evidence available to the consumer; imposing burdens of proof on the consumer not allowed by law; allowing the supplier the right to interpret any term of the contract. See also Regulation 44 of the Consumer Protection Act Regulations published under GN R293 in GG 34180 of 1 April 2011.

The BGB contains an extensive list of black-listed terms as well as terms that are grey-listed: Naude (2007) 124 *SALJ* 130.

The EU Directive on Unfair Terms in Consumer Contracts 1993 also contains grey-list provisions. It does not contain black-list provisions: Naude (2009) 126 *SALJ* 511.

In the United Kingdom, under the influence of the EU Directive on Unfair Terms in Consumer Contracts 1993, the Unfair Terms in Consumer Contracts Regulations 1999 contain only a grey-list whereas the Unfair Contract Terms Act 1977 contains both a grey- and a black-list: Smith *Atiyah's An Introduction to the Law of Contract* 326-327.

<sup>689</sup> Naude (2009) 126 *SALJ* 521. It would cause to suppliers to revisit and redraft their standard form contracts to bring them into line with the provisions of the Act. The EU Unfair Terms Directive grey-lists terms that have the "object or effect of limiting the business's liability for statements or promises made by its employees or agents, or making its liability for statements or promises subject to formalities." Naude 523.

consumer a right to terminate the contract, or that allows the supplier to unilaterally alter the terms of the contract.<sup>690</sup>

The foregoing provisions<sup>691</sup> have their basis in considerations of fairness, reasonableness and good faith and are designed to promote conscionable conduct. It colours all the provisions of the CPA and reflects the Constitutional Court's caution that the notion of sanctity of contract must be tempered by considerations of morality and public policy as discerned from the values embodied in the Constitution, and especially the Bill of Rights.<sup>692</sup> The development of the

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<sup>690</sup> See Regulation 44(3)(h) and (i) of the CPA Regulations published under GN R293 in GG 34180 of 1 April 2011. The onus of disproving the presumption being on the supplier puts the supplier on notice to revise its contracts and trade practices and relieves the consumer from the burden of proof, a burden which many consumers would have foregone because of time, energy and financial constraints. Though such provisions are deemed to raise a presumption of unfairness only, any attempt to exercise such unilateral discretionary power will in all probably come to nought bearing in mind the purposes and policy of the Act as expressed in section 3 and in the long title as well as the innumerable references to fairness and reasonableness in the context of the protection and/or promotion of consumer rights. Other policy issues that militate against a relaxed interpretation of this provision include that contained in a front page headline warning by Trevor Manuel, Minister in the Presidency, that South Africa is facing a debt time bomb. See Manuel 'SA's debt time bomb' *The Times* 4 November 2011, 1. The Minister ascribed this to either marketing that is so powerful that "we cannot help ourselves," or to an attempt to "try and keep up with the Kunenes" The Minister referred to a release by the Reserve Bank that indicated that household indebtedness is at 75.9% of disposable income and that if the ratio is disaggregated it would indicate that "the middle classes are way in above 100% - all of next year's earnings are already spent." A list of behavioural characteristics that lead to over-indebtedness is given in MacKee *et al* (2011) September Focus Note 73 Washington D.C. CGAP 9. The writers, for example, mention that consumers tend "to discount greatly the future for the present." Evidence of this is that credit consumers are more focussed on "the allure of up-front cash than the interest and other costs that they have to pay over the life of the loan." Another feature is that consumers base their decisions on erroneous conclusions or assumptions which are often based on simple calculations. It can be added that these calculations are often also erroneous and/or based on an erroneous or wishful understanding of the true facts and/or the implications of such facts. See also Smith *Atiyah's An Introduction to the Law of Contract* 320.

<sup>691</sup> Relating to unfair terms.

<sup>692</sup> See para [30] of *Barkhuizen v Napier* 2007 (5) SA 323 (CC). The Constitutional Court explained that the test to determine the constitutionality of a contractual clause is whether it is contrary to public policy and that the content of public policy is to be found in "the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights" (paras [29] and [30]). Public policy is defined, at para [51], as being informed by the concept of *ubuntu* and, at para [28], as being a repository of "those values that the society hold most dear" and, at para [73], of "the general sense of justice of the community, the *boni mores*, manifested in public opinion" and, at paras [51] and [73], incorporates the notions of fairness, justice and equity, and reasonableness. The Court added that unequal bargaining power is another factor that plays a role in the consideration of public policy (para [59]). It also incorporates the necessity to do simple justice between individuals, (para [51]). See also para [36] where the Court held that considerations of reasonableness and fairness play a role in determining whether contracts are against public policy. See further chapter 1 para 1.3.3.

notion of unconscionable conduct will receive further impetus when regard is had to foreign law and international conventions<sup>693</sup> where the notion is already well-established.<sup>694</sup>

### 3.6.3.3 Disclosure and information

The ability to make an informed choice,<sup>695</sup> which involves a clear appreciation and understanding of the nature and consequences of an act, as well as of the nature and value of goods and services, depend on the availability of information<sup>696</sup> and on the simplicity and clarity of the language used.<sup>697</sup> The CPA<sup>698</sup> makes provision for both in that it provides for a right to disclosure of information and the manner in which information must be disclosed.

The most important obligations for the purposes of informed consent are the obligations of the supplier to display the price of the goods for sale,<sup>699</sup> to refrain from misleading advertising, product labelling and trade descriptions<sup>700</sup> and to disclose that goods have been reconditioned

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<sup>693</sup> Section 2 of the CPA empowers the courts and the National Consumer Tribunal (the Tribunal) to consult, *inter alia*, foreign law and international conventions. See further the discussion in para 3.6.6 below.

<sup>694</sup> See chapter 2 paras 2.3.1, 2.3.2.2(B) and 2.8.

<sup>695</sup> This is one of the policy objectives as set out in the Preamble. See also MacKee *et al* (2011) September Focus Note 73 Washington D.C. *CGAP* 2.

<sup>696</sup> In the perfect market of economic theory, all role-players have perfect information. Perfect information promotes equality. However, perfect markets are conspicuous by their absence renders as evidenced by the discussion of, for example, standard form contracts in chapter 2 para 2.4.2. The acknowledgment of the imperfection of the markets renders moot the value of the paradigm of perfect markets as a framework for analysis. In economic theory, as in law (see the discussion in chapter 2 para 2.2), the justification for the presumption of equality is autonomy, certainty and efficiency: Cartwright (2011) *Legal Studies* 12.

<sup>697</sup> Other considerations may be quality and detail of information provided. Intellectual ability, level of literacy and numeracy and fluency in the language used also play a role. See Section 3(1)(b)(iv) of the CPA. The United Nations Educational Scientific and Cultural Organisation (UNESCO) defines literacy as 'the ability to identify, understand, interpret, create, communicate, compute and use printed and written material associated with varying contexts': Gouws (2010) *SA Merc LJ* 79, 87. The position under the CPA must be contrasted with the harsh position under the common law. The recognition of these considerations as determinants of validity brings into sharp relief the irrationality of the insistence of South African law on certainty in the face of such considerations. See, for example, *Mathole v Mothle* 1951 (1) SA 256 (T) 258-9 where an illiterate contractant was held bound by Latin phrases that he did not understand. See also *Khan v Naidoo* 1989 (3) SA 724 (N) where an illiterate contractant was also held bound to the contract. See chapter 2 and in particular paras 2.2.5 and 2.3.2.2(B).

<sup>698</sup> In Part D.

<sup>699</sup> Section 23.

<sup>700</sup> Section 24.

or are grey-market goods.<sup>701</sup> Whilst these obligations enjoy recognition at common law,<sup>702</sup> the specificity required by the CPA<sup>703</sup> amounts to an innovation.

The existence of any term(s) that purport either to limit or to impose risks or liability for the supplier and the consumer and the nature and consequences thereof must be brought to the attention of the consumer.<sup>704</sup> Furthermore, the consumer must be given an opportunity to receive and comprehend the term(s).<sup>705</sup> A presumption of unfairness exists where the supplier

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<sup>701</sup> Section 25.

<sup>702</sup> The duty to disclose the price was required in terms of, for example, section 5(1) of the Credit Agreement Act 75 of 1980 and section 7 of the Price Control Act 25 of 1964 whilst the other two obligations are covered by the common law principle of misrepresentation.

<sup>703</sup> See for example, section 23 relating to price which is briefly discussed in para 2.6.3.3.

<sup>704</sup> Section 49(1), (2) and (4). The prescriptions of section 49(2) regulate any activity or facility that is subject to any risk that is unusual in nature or character, the presence whereof the consumer or ordinary alert consumer could not reasonably be expected to have noticed or contemplated in the circumstances. The section also regulates any activity or facility that could result in serious injury or death. Section 49 is discussed in para 3.6.3.4(B) below. Provisions such as these are intended in the main to protect consumers from unfair surprises. In England, the Unfair Terms in Contracts Regulations 1999 have a similar objective: Smith *Atiyah's An Introduction to the Law of Contract* 319. Significantly, section 49(2) further requires, in respect of section 49(2) terms, that the consumer must acknowledge the term by signing or initialling against it or otherwise have acted in a manner consistent with an acknowledgment of the notice, awareness of the risk and acceptance thereof. The plain language requirement applies (section 49(3)). However, section 49(2), though it requires the supplier to draw the consumer's attention to term, raises the spectre of the *Afrox* decision in that a consumer, whose bargaining power is weak, may sign away his/her right of recourse for death or personal injury caused by the negligent conduct of the supplier. In the *Afrox* case, it was decided that the exemption clause in question was binding because the patient had signed the document. Furthermore, because the clause was deemed to be not unexpected in contracts of the kind signed by the patient, no obligation existed to draw the patient's attention to the clause. The court did not consider the circumstances in which the document was signed. See the discussion of the *Afrox* case in chapter 2 para 2.3.2.1. See also the discussion of section 52 in para 3.6.3.2 of this chapter above.

Exemption clauses relating to bodily injury or death are by and large regarded as unfair *per se* in Europe: Naude 511. In England, the Unfair Contract Terms Act 1977 places a total ban on clauses exempting liability for negligence for personal injury or death: Smith *Atiyah's An Introduction to the Law of Contract* 324. Though the South African legislature did not follow the same route, the CPA Act brings into reckoning subjective considerations such as literacy and level of education (not recognised at common law) and thus introduced a more nuanced approach than the one used in the *Afrox* case.

<sup>705</sup> Section 49(5). This requirement would address the issues raised by, for example, the inclusion of exemption clauses such as the one in the *Afrox* case. At common law the obligation is much more narrowly constructed. The obligation is one of notification only and that obligation does not exist where the clause can be reasonably expected in the contract. Although not expressly so stated, section 49(5), read in the context of the section as a whole, places an additional and onerous burden on a supplier to prove that the consumer comprehended the term in question. It is submitted that suppliers will, in order to protect themselves, have to go beyond the provisions of the Act to ensure that the consumer has understood the term. A supplier may have to break a clause down to its nuts and bolts into a virtual "idiot's guide" so as to ensure that the consumer understands the nature and import thereof in order to comply with the requirement.

did not draw the fact, nature and consequences of a section 49 term to the consumer's attention.<sup>706</sup>

Though section 49 represents a significant improvement on the common law position relating to, for example, exemption clauses, the weakness, in general, of section 49 lies therein that it focuses on procedural fairness (dotting the "i(s)" and crossing the "t(s)) instead of the substantive fairness of the term itself. In doing so, it does not deviate from the approach of the Court of Appeal in, for example, the *Afrox* case.<sup>707</sup> Though the comprehension requirement coupled with countersigning promotes informed consent, it does not adequately address the issue of bargaining power and the substantive fairness of the impugned term.<sup>708</sup>

Equally important is the duty requiring the supplier to expressly inform the consumer that the goods are supplied in a specific condition.<sup>709</sup> Failure to do so will result in liability for any defect whether patent<sup>710</sup> or latent with the common law *voetstoots* or "as is" clause<sup>711</sup> providing no relief. The provisions of the CPA, furthermore, promote clarity and transparency by providing clear protocols to ensure compliance and enforcement.<sup>712</sup> The CPA also strengthens the

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<sup>706</sup> See section 48(2)(d)(ii). By placing the onus on the supplier to prove compliance, this provision favours the consumer who would otherwise probably not have pursued the matter due to time, effort and financial constraints.

<sup>707</sup> The case was discussed in chapter 2 paras 2.4.3 and 2.4.4.

<sup>708</sup> Naude (2009) 126 *SALJ* 510-512.

<sup>709</sup> Section 55(6)(a). This must be done in plain language. See the discussion in para 3.6.3.4 in this chapter. The consumer must expressly accept the goods in the condition so described or must knowingly have acted in a manner consistent with such acceptance. The onus would probably be a difficult one for a supplier to discharge and will probably inspire suppliers to act with greater caution.

<sup>710</sup> Section 55(2)(b) which provides a consumer with the right to receive goods of good quality, in good working order and free of **any** defects. (Emphasis added). The inclusion of the adjective "any" takes section 55 beyond the realm of being a mere codification of the common law. The provision is also not limited to material defects. This is a significant extension of the common law protection of the consumer. At common law, the consumer did not enjoy the protection of the aedilician remedies where the defect was a patent: Kerr *Sale and Lease* 137-138. See also Bradfield *et al Principles* 33.

<sup>711</sup> At common law, such a clause protects a seller, in the absence of fraud on its part, from the buyer's remedies in the event of the goods having a latent defect: see Kerr *Sale and Lease* 150; Bradfield *et al Principles* 34-35. See also para 3.6.2 above.

<sup>712</sup> For example the plain language requirement. See further para 3.6.3.4 below. Transparency promotes informed choice, market discipline and post-contractual enforcement: Willett (2011) 60.2 *International & Comparative Law Quarterly* 375-376.



consumer's right of redress by providing affordable and accessible enforcement mechanisms for the resolution of disputes or the enforcement of rights.<sup>713</sup>

The CPA contains detailed provisions regarding the disclosure of the price of goods and services.<sup>714</sup> The price of goods must be displayed on the goods and a consumer may not be charged a price higher than that so displayed.<sup>715</sup> A consumer may also not be charged for preparing an estimate unless the supplier has disclosed the price for preparing that estimate beforehand and the consumer approved of it.<sup>716</sup> Furthermore, the supplier may not charge a price that exceeds the estimate unless the consumer has consented to the increase before commencement of the work.<sup>717</sup> The consumer may not be charged for any work done unless the work is specifically authorised.<sup>718</sup> Any written contract must provide an itemised breakdown of the consumer's financial obligations.<sup>719</sup> The provisions regarding price serve to ensure that contractants are not ambushed with payment obligations that they did not bargain for and that contractants are informed and active participants in the obligation-creating process regarding the *essentiale* of price.<sup>720</sup> In the process, the principle of consensus is infused with actual value in that the consensus is real and not presumed. The *obiter dicta* that calls for the recognition of a reasonable price and rental and a unilaterally determined price and rental would undermine these policy goals by bestowing the power to determine the price to an

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<sup>713</sup> See the discussion in para 3.6.7 below.

<sup>714</sup> Section 23. For example, a consumer cannot be compelled to pay a price higher than the one on display. Section 8(1)(b) prohibits differential pricing of the same goods. The National Credit Act (the NCA) also contains provisions aimed at informing the credit consumer about the financial implications of the transaction. See section 92 of the NCA.

<sup>715</sup> Section 23(3) read with section 23(6). If two or more prices are displayed for the same product the consumer is entitled to the lowest price so displayed. Exceptions to rule are set out in section 23.

<sup>716</sup> Section 15(3).

<sup>717</sup> Section 15(2) read with section 15(4).

<sup>718</sup> Section 15(2). This is after the consumer received the estimate or the consumer has declined the offer an estimate or the consumer pre-authorised the work up to a specified maximum.

<sup>719</sup> Section 50(2)(b)(ii). After each transaction, the supplier must furnish the consumer with a sales record (section 26). Section 26(3) prescribes the minimum content thereof. *Inter alia*, it must contain the unit price, the total price as well the applicable taxes. Sections 108 and 109 of the NCA and section 5(3)(b) of the RHA are similar in content.

<sup>720</sup> See further in this regard chapter 4 and in particular para 4.2.4.3.



unknown entity (in the case of a reasonable price) and on the empowered contractants in the case of a unilaterally determined price,<sup>721</sup> thereby perpetuating the classical theory's presumption of consensus.

### 3.6.3.4 Section 22 - plain language requirement

#### (A) Introduction

In general, plain language refers to clear and succinct writing which avoids verbosity, jargon, tortuous language, convoluted sentence construction and is aimed at advancing understanding as quickly and as expeditiously as possible.<sup>722</sup> It promotes knowledge and understanding, thereby contributing to the process of making informed choices, in turn promoting the consensual requirement of contract law.

#### (B) Content

Section 22 read with section 50<sup>723</sup> of the CPA provides that consumer agreements<sup>724</sup> which are reduced to writing must be in plain and understandable language.<sup>725</sup> The test<sup>726</sup> for compliance

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<sup>721</sup> See further chapter 4 para 4.3.

<sup>722</sup> Gouws (2010) *SA Merc LJ* 81. This provision addresses some of the concerns of Sachs J when the learned judge criticised the use of obscure legalese in standard form contracts: *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [135] discussed in chapter 1, para 1.3.3. See also chapter 2 para 2.4.2.

<sup>723</sup> In terms of section 50(2)(a) the plain language requirement applies to all agreements signed by the both contractants as well as to those signed by the supplier only or by the consumer only. See also Gouws (2010) *SA Merc LJ* 85-86. The provision (section 50(2)(a)) regarding the validity of a written contract not signed by the consumer is at odds with the tenor of the Act and could lead to exploitation of the consumer: Jacobs *et al* (2010) 13(3) *PER/PELJ* 358. However, the legislature probably simply intended to confer on the consumer, and not the supplier, the power to rely on the terms of a written agreement even though it had not signed it: Naude (2009) 126 *SALJ* 514.

<sup>724</sup> Section 50(2). The requirement also applies to any notice, document or visual representation that is required by law. See section 22(1). The requirement must be met in all instances where the Act does not prescribe the use of a specific form.

<sup>725</sup> Plain language is also a requirement of the National Credit Act. Section 64 thereof provides that documents be provided in one of the official languages and section 63(1) allows the consumer to choose the official language in which a document required by the Act is be drafted.

In the European Union, the Unfair Contract Terms Directive requires the contract to be in plain, intelligible language, with doubts being resolved in the consumer's favour. Similar provisions are found in state laws in the

is whether it is reasonable to conclude that an ordinary consumer of the class of persons, for whom the document was intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services,<sup>727</sup> could be expected to understand the content, significance and import of thereof without any undue effort.<sup>728</sup> Contractual provisions that must in terms of section 49<sup>729</sup> be brought to the attention of the consumer must comply with the plain language requirement.<sup>730</sup>

### (C) The plain language test

The plain language requirement is significant in that it goes beyond the mere provision of information. It places an additional obligation on the supplier to convey the information in a manner that makes it reasonably capable of being understood. Bearing in mind that consumers are the largest economic group in the country,<sup>731</sup> the test is a comprehensive and meticulous

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United States of America: Martin (2006) 41 *Texas International LJ* 240. See also Gouws (2010) *SA Merc LJ* 79, 80.

<sup>726</sup> The test can be referred to as the lowest common denominator test: See DLA Cliffe Dekker Hofmeyr Consumer Protection Act Practical implications for your company Seminar Material (4 October 2011) 16. The test is much more generous to the consumer than, for example that of the European Court of Justice where a consumer is defined as one 'who is reasonably well informed and reasonably observant and circumspect': Howells *et al Handbook of Research* 12.

<sup>727</sup> Emphasis added.

<sup>728</sup> Section 22(2). Subsections (a)-(d) contain provisions such as the context and comprehensiveness, the organisation, form and style, the vocabulary and sentence structure of the notice that must be taken into account when making the assessment. In using the standard of the consumer with "minimal experience as a consumer of the relevant goods or services," the Act sets the bar lower than at common law where the reasonable person test prevails. In contracts of sale, the reasonable person is used as standard when determining whether the goods are of merchantable quality: Zulman *Norman's Purchase and Sale* 218. A latent defect is one that is not reasonably discoverable or discernible to the ordinary purchaser on normal inspection: Bradfield *et al Principles* 33. Unlike at common law, the Act accommodates an otherwise sophisticated consumer who lacks sophistication in the particular class of goods or services. The recent recall by Toyota of 8.5 million vehicles worldwide illustrates the fact that even sophisticated/educated consumers face difficulties when confronted with the sophistication of modern technology such as complicated electronic devices: Woker 'Why the Need for Consumer Protection Legislation? A Look at Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act' (2010) *Obiter* 217, 230, hereafter Woker (2010) *Obiter* 217.

<sup>729</sup> Discussed in para 3.6.3.3 above.

<sup>730</sup> Section 49(3).

<sup>731</sup> Du Preez 'The Consumer Protection Bill: A Few Preliminary Comments' (2009) *TSAR* 58, 82.

one, with a low common denominator<sup>732</sup> that seeks to accommodate the broadest possible cross-section of the consumer population.<sup>733</sup>

Unlike the, National Credit Act,<sup>734</sup> the Act does not specify the language which must be used. A supplier who uses either English or the dominant language of the region may be in compliance potentially leaving a consumer in the dark. However, the consumer is saved by the fact that the Act specifically seeks to ameliorate the disadvantage of consumers whose fluency in the language used is deficient.<sup>735</sup>

Though the requirement does, at the very least, improve the consumer's capacity to make an informed choice by promoting the understanding of the nature and the consequences of the contract, it does not necessarily improve the consumer's negotiating power especially in respect of standard form contracts.<sup>736</sup> Furthermore, compliance with the test is made dependent on "the class of persons for whom the agreement is intended." Aside from the difficulties of determining whether a consumer belongs to a particular class and the difficulty associated with determining what constitutes average levels of literacy, a major drawback is that it excludes from protection consumers who may not belong to that particular class or who display a level of literacy lower than that of the average.<sup>737</sup>

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<sup>732</sup> The test is based, *inter alia*, on the consumer with minimal experience as a consumer in relation to the goods and services (section 22(2)).

<sup>733</sup> Non-compliance does not invalidate the contract or the affected term(s). Section 52(2)(g) simply lists the section 22 plain language requirement as one of the factors (section 52(2)(g) to be taken into account when making a determination of whether a contract or a term thereof is unfair, unreasonable or unjust. A similar position prevails in Germany (BGB 307 dealt with in a footnote in para 3.6.3.2 above.

<sup>734</sup> Section 63(1) of the National Credit Act provides the consumer with a right, subject to certain qualifications (e.g. practicality and expense), to receive any document required in terms of the National Credit Act in an official language that the consumer reads or understands. See also the provisions of section 64 of the National Credit Act discussed in an earlier footnote in this paragraph.

<sup>735</sup> Section 3(1)(b)(iv). A court may, in such circumstances, find that the use of English or a dominant language does not satisfy the plain language requirement.

<sup>736</sup> Standard form contracts are discussed in chapter 2 para 2.4.2.

<sup>737</sup> Take, for example, an agreement which is reasonably capable of being understood by a consumer from the particular class of consumers for whom the agreement is intended and who displays average levels of literacy and who has minimal experience as a consumer in relation to the class of goods or services offered. Though such an agreement would meet the plain language requirement of section 22(2), it would leave unprotected a consumer who does not belong to that class of consumer or the consumer who possesses below-average levels

The meaning of the undue effort requirement is also problematical.<sup>738</sup> Would referral of the agreement to a professional, for example, an attorney, fall foul of the plain language requirement and hence result in non-compliance with the undue effort requirement?<sup>739</sup> Equally problematic is that a consumer of the affected group whose literacy levels exceed those of the average may escape the consequences of the contract where the plain language requirement fails because of, for example, the undue effort test.<sup>740</sup>

### 3.6.4 Equality

Section 8 of the Act prohibits unfair discrimination on a number of listed grounds.<sup>741</sup> Section 8(2) prohibits differential treatment based on any of the grounds listed in section 9 of the

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of literacy whether the consumer belongs to that particular class of consumers or not. Surely this result could not have been intended particularly when viewed through the prism of the Preamble to the Act that acknowledges, not only, variations among consumers because of differing levels of literacy and other forms of social and financial inequalities, but also, the need to offer protection to such consumers. See Gouws (2010) *SA Merc LJ* 87-88. A possible answer is that since the Act is aimed at proscribing unconscionable conduct in consumer contracts, a finding would take into account subjective characteristics such as literacy levels and language proficiency (section 3(1)(b)(i)-(iv)) in order to give effect to the purposes and policy of the Act as per section 3.

<sup>738</sup> Gouws (2010) *SA Merc LJ* 88-89.

<sup>739</sup> It can be argued that the mere referral of the agreement to an attorney means that it could not be understood without undue effort. The approach here should probably be to regard this as a question of fact. Such an approach would mean that situations may be distinguished each according to its own context. For example, a situation where an agreement is referred to a professional as matter of prudence would be distinguished from one where it is referred because it is incomprehensible as per the provisions of section 22(2).

<sup>740</sup> This consequence can probably be reconciled with the fact that the Act intends to benefit the broadest possible cross-section of the consumer population. On the other hand, the process of regulating unconscionable conduct cuts both ways in the sense that Act seeks to exclude unconscionable conduct on the part of both consumers and suppliers. Such a consumer (with literacy levels higher than the average) would probably not be able hide in the shadows of the CPA since any ruling would have to take into account such subjective characteristics (e.g. literacy levels and language proficiency) especially when viewed against the foundational principles of the CPA, namely to provide rights and protection to the historically disadvantaged, vulnerable and marginalised sectors of the consumer population: see the Preamble and section 3(1)(b)(i)-(iv) of the Act.

<sup>741</sup> For example, a supplier may not supply a different quality of goods or services to any person or category of persons or exclude persons from the supply of goods and services; give any class of consumer preferential treatment. The supplier may also not apply different criteria when assessing a consumer's ability to meet its obligations or when proposing terms and conditions of a transaction. Provision is made in section 9 for reasonable grounds for differential treatment. The NCA contains similar provisions against unfair discriminatory practices in respect of credit (Section 61).

Constitution<sup>742</sup> or in Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>743</sup> A presumption of unfairness arises in the event of any differential treatment contemplated in section 8, burdening the supplier with the onus of proving otherwise.<sup>744</sup> Similarly a presumption of unfairness exists where the supplier did not draw the fact, nature and consequences of a section 49 term to the consumer's attention.

### 3.6.5 Implied warranty of quality, strict liability and class action

A warranty of quality is implied into each transaction for the supply of goods.<sup>745</sup> The supplier warrants that the merchandise is of good quality and in good working order and that they are fit for their ordinary purpose or for the specific purpose for which they were sold where the seller was aware of this purpose. The warranty will not apply if the consumer has been expressly notified of the specific defects and has expressly accepted the goods in the condition described or acts in a manner consistent with such acceptance. This radically changes the common law position where a seller could exclude the implied warranty against latent defects by including a *voetstoots* clause.<sup>746</sup> The provision significantly enhances the position of the

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<sup>742</sup> Section 9 of the Constitution (the equality clause), prohibits discrimination on a number of grounds, for example, race, ethnic or social origin, gender, disability, religion.

<sup>743</sup> 4 of 2000. Chapter 2 which gives effect to the spirit and letter of the Constitution contains grounds of prohibition similar to those in section 9 of the Constitution. However, Chapter 2 also prohibits discrimination on specific grounds over and above those cited in section 9 of the Constitution. For example, it prohibits discrimination that causes or perpetuates systemic disadvantage or that undermines human dignity. Section 29 read with item 9b of the Schedule, for example, declares the inclusion of contractual terms, conditions and practices, the effect whereof are to perpetuate the consequences of past discrimination, as well the unfair limitation or denial of contractual opportunities, to be practices which amount to unfair discrimination. Thus, the CPA gives effect to the constitutional imperative to foster socio-economic reform and to strive for the attainment of a just and egalitarian society based on the values of dignity, equality and freedom.

<sup>744</sup> Section 10(2). Similarly a presumption of unfairness exists where the supplier did not draw the fact, nature and consequences of a section 49 term to the consumer's attention (section 48(2)(d)(ii)). See the discussion of section 49 in para 3.6.3.3 above.

<sup>745</sup> Section 56. This provision amounts to a radical redefinition of the common law implied warranty against latent defects. For example, the warranty is owed by each person or entity in the supply chain. At common law the warranty only applied to the seller and not to other persons in the supply chain: Bradfield *et al Principles* 32-34; Kerr *Sale and Lease* 106-109.

<sup>746</sup> The CPA prevents the exclusion of this warranty by the legislating against the inclusion of a *voetstoots* clause (section 55 read with section 56.) Section 90(2)(g)(ii) of the National Credit Act also has the effect of preventing

consumer who at common law stood in a relatively weak bargaining position in that the consumer was invariably faced with a take-it-or-leave-it attitude when it came to issues of this kind. The requirements of reasonableness and fairness are to be discerned in the policy considerations that underpin these provisions.<sup>747</sup> The consumer's position is further enhanced in that, in stark contrast to the position under the common law, the risk of loss remains with seller until delivery.<sup>748</sup>

The CPA imposes strict liability<sup>749</sup> for harm<sup>750</sup> resulting from defective products. A supplier<sup>751</sup> incurs liability for unsafe or defective products even in the absence of negligence. This provision is weighted heavily in favour of the consumer in that it constitutes a radical departure from the

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the *voetstoots* sale of goods on credit in that the credit grantor may not exempt itself from liability for a latent defect.

Similar provisions exist in the European Union: Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 359. In the United States of America, UCC 2-315 incorporates an implied warranty of fitness and UCC 2-314 deals with the implied warranty of merchantability, both of which resemble the South African and the European legal position except that provision is made for contractants to contract out of these implied warranties. The use of exclusions such as "as is" or "with all faults" clauses, similar to the now prohibited South African *voetstoots* clause, is permitted by UCC 2-316(3): Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 361-364. In essence, the position in the United States of America resembles the position as it prevailed at common law prior to the enactment of the Act. The conclusion is that despite the development of a strong tradition of regulating unconscionable behaviour (see chapter 2), the legal system in the United States still displays loyalty to the classical theory of contract law with its "philosophical traditions" of contractual freedom and (presumed) equality that celebrate individual property rights and freedom of contract: see Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 366. In England, a consumer has a right in terms of the Unfair Contract Terms Act 1977 to receive goods of "satisfactory" quality and which are reasonably fit for their purpose and a seller cannot exclude its responsibility for defective goods: Smith *Atiyah's An Introduction to the Law of Contract* 314.

<sup>747</sup> Botha & Joubert 'Does the Consumer Protection Act 68 of 2008 Provide for Strict Product Liability? A Comparative Analysis' (2011) 74 *THRHR* 305, 312, hereafter Botha & Joubert (2011) 74 *THRHR*.

<sup>748</sup> Section 19(2)(c). At common law, the risk of accidental loss passes to the buyer as soon as the sale is perfect, meaning as soon as an intention to buy and sell is present and the goods and price have become ascertained: Kerr *Sale and Lease* 237-240; Bradfield *et al Principles* 43-46. The change brought about by the Act is significant in that the interval between the date on which the sale became perfect and the date of delivery can be quite significant. However, the statutory implied warranty may be excluded by agreement (section 19(2)) which is probably what will happen especially in standard form contracts.

<sup>749</sup> Section 61 of the CPA. The exceptions are set out in section 61(4). Strict liability provisions also exist in the United States of America, the European Union and Australia: Botha & Joubert (2011) 74 *THRHR* 306.

<sup>750</sup> Harm includes death, injury or illness to a natural person, or loss of or physical damage to movable or immovable property or economic loss resulting from damage resulting from unsafe products, product failure, or inadequate instructions alerting the consumer hazards arising from the use of the goods. Section 61(5) read with section 61(2). Section 58 imposes an obligation on a supplier to notify or alert the consumer in respect of unsafe products, product failure, or consumer hazards.

<sup>751</sup> This includes the producer, distributor or retailer. Joint and several liability is also a possibility (Section 61(1), (2) and (3)). Moreover, the supplier may not contract out of strict liability (Section 51).



requirements for delictual liability under the common law.<sup>752</sup> The Act, not only, provides for joint and several liability in the supply chain, but it also shifts the onus from the consumer to the relevant parties in the supply chain.

In providing for class actions,<sup>753</sup> consumers and consumer organisations become enforcers of the law.<sup>754</sup> Consumer rights are immeasurably strengthened whilst suppliers are placed on notice to be vigilant. Consumers, who, through lack of resources would otherwise not have found relief, stand to benefit<sup>755</sup> whilst the financial and reputational fall-out<sup>756</sup> for suppliers, from adverse publicity,<sup>757</sup> could be devastating.<sup>758</sup>

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<sup>752</sup> Under the common law, the consumer would have had to prove, *inter alia*, fault to found liability under the *Actio Legis Aquilia* for damage caused by a defective product: Neethling, Potgieter, Visser & Knobel *The Law of Delict* (2010) 123-124; Loubser, Midgley, Mukheibir, Perumal & Niesing *The Law of Delict in South Africa* (2010) 99-100, hereafter Loubser *et al The Law of Delict* (2010). This was a difficult onus to prove especially as against a manufacturer. More difficult was pursuing a claim against a manufacturer or a person in the supply chain with whom the consumer had no contractual nexus. At common law, consequential losses for latent defects may be claimed only, *inter alia*, where the seller was also the manufacturer of the goods: Bradfield *et al Principles* 39. The common law position made it possible for manufacturers and especially those who did not directly sell to the public, to engage in unconscionable conduct such as poor quality control in the manufacturing process secure in the knowledge that the ordinary consumer had limited resources or appetite to pursue a claim. Consequently, strict liability has a preventative effect in that suppliers, and especially manufacturers who no longer enjoy the arms length protection of the common law, will exercise greater care in relation to the quality and safety of goods sold. Strict liability is also necessary because consumers often lack the specialised knowledge and resources to establish the safety of products. This is especially true in light of the increasing sophistication of modern technology: Loubser *et al The Law of Delict* 247. Further policy considerations underlying the imposition of strict liability are discussed by Botha & Joubert (2011) 74 *THRHR* 305-310 and 310-312.

<sup>753</sup> Section 4(1)(c) read with section 69. Persons acting in the public interest may also, with the leave of the Tribunal or a court, bring an action. Section 4(1)(d) read with section 69.

<sup>754</sup> In playing a much more active role in enforcing the law, their role becomes much more than being mere plaintiffs/complainants or informers: Howells *et al Handbook of Research* 71-72. In addition, a positive result benefits a whole class of people.

<sup>755</sup> Howells *et al Handbook of Research* 71.

<sup>756</sup> Reputation is relevant to the quality of product and service as well as to integrity: Cartwright (2011) *Legal Studies* 5.

<sup>757</sup> Negative publicity that may emerge from general media coverage and press releases is viewed as an important tool in securing policy objectives of consumer protection legislation. Press releases assist consumers in making informed choices. They also serve to alert consumers and suppliers about unacceptable conduct, what is being done about it, what disciplinary steps may or have been taken and what consumers and suppliers should be alert to.

The South African National Consumer Commission, for example, is tasked with increasing public knowledge by, *inter alia*, publishing orders and findings of the National Consumer Tribunal or the courts (section 96 of the Act). See also for example, the press coverage discussed in a footnote in para 3.6.7 below of possible infringements in the airline industry. Negative publicity may have a deterrent effect for both the supplier concerned or generally for the industry. A poor public image may also have many negative consequences. For



The provisions of the CPA discussed above, will probably inspire industry-led initiatives such as codes of conduct and standards of care.<sup>759</sup> Suppliers will have to review not only their commercial practices but also the terms and conditions of their contracts to bring them into line with the prescriptions of the CPA. Thus, standard terms and conditions which to date have met with judicial approval will have to be revisited and probably redrafted or excluded.<sup>760</sup>

### 3.6.6 Interpretation

The courts and the Tribunal are directed to promote the spirit and purpose of the Act and to develop the common law so as to promote the realisation and enjoyment of consumer rights by the consumer population in general and, in particular, by the vulnerable and marginalised.<sup>761</sup>

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example, it may result in a loss of business, difficulty to attract or to retain reputable employees, disillusionment in the share market of the particular supplier, difficulty in raising (inexpensive) funds from financial institutions, and difficulty in negotiating with regulatory institutions. (The National Consumer Commission, for example, plays a vital role in the development of industry codes and in recommending industry-wide exemptions from one or more provisions of the Act. See sections 82 and 5(4) respectively of the Act.)

The Confederation of British Industries and research by the Office of Fair Trading have confirmed that the threat of negative publicity has a deterrent effect for both small and large firms and is crucial in motivating compliance: Cartwright (2011) *Legal Studies* 4-12. In Los Angeles, the Restaurant Hygiene Quality Cards system that requires restaurants to post in their front windows the grade that reflected inspection findings has resulted in increased revenue for restaurants with good ratings, whilst those with low grades suffered: Cartwright (2011) *Legal Studies* 22. Negative publicity may also alert consumers, post-contract, to the fact that they have a grievance and that they have a right of redress: Cartwright (2011) *Legal Studies* 15.

<sup>758</sup> Class action to protect consumer rights is allowed in a number of countries with considerable success. The United States of America is a prime example. Class action legislation has been enacted in Canada and Australia but it is not permitted in England: Howells *et al Handbook of Research* 517-519.

<sup>759</sup> Industry-led initiatives are recognised as a factor in promoting consumer protection. It is considered that it should be at the core of such protection: MacKee *et al* (2011) September Focus Note 73 Washington D.C. *CGAP* 3.

<sup>760</sup> Further impetus for such reform may be found in, for example, the plain language provision discussed in para 3.6.3.4 above, and in the provisions regulating acknowledgement or exclusion of liability discussed in para 3.6.3.2 above.

<sup>761</sup> Section 4(2) read with section 3(1)(b). Section 3(1)(b) lists the following persons as deserving of special attention and protection: low-income consumers, consumers resident in remote, isolated or low density areas or communities, vulnerable consumers such as minors or seniors, consumers whose ability to read and comprehend is compromised by low levels of literacy, vision impairment or limited fluency in the language of communication. The list is extensive and brings into sharp relief the fact that common law did not grant any special protection to such contractants. See the discussion in chapter 2 paras 2.2.4, 2.3.2.1 and 2.3.2.2(B).

The directive that any inconsistency or ambiguity in a document issued by the supplier<sup>762</sup> should, with due regard for the purposes and policies of the Act, be resolved for the benefit of the consumer<sup>763</sup> extends the scope of the *contra preferentem rule*.<sup>764</sup> Any exclusion or limitation of a consumer's right must be restrictively interpreted for the benefit of the consumer in light of the expectations a reasonable person would have with due regard to the content of the document, the manner and form of its preparation and presentation and the circumstances of the transaction or agreement.<sup>765</sup> Where the provisions of the CPA irreconcilably conflict with the provisions of any other Act, the provisions that afford the consumer better protection, prevail.<sup>766</sup>

The CPA, in providing for reference to be had to applicable foreign law, international law, conventions declarations or protocols when its provisions are interpreted,<sup>767</sup> promotes a purposive interpretation as opposed to the literal interpretation permitted at common law.<sup>768</sup>

The significance, from a consumer rights perspective, of jurisprudence so generated is

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<sup>762</sup> This includes standard form contracts. Contrast this with the approach to standard form contracts at common law discussed in chapter 2 para 2.4.2.

<sup>763</sup> Section 4(4)(a).

<sup>764</sup> The directive that the purposes and policies of the Act should play a role is significant because it promotes a more purposive interpretation than the literal interpretation used at common law. See the discussion in chapter 2 para 2.4.5. See also Jacobs *et al* (2010) *PER/PELJ* 13(3) 307. See the discussion of the *contra preferentem* rule in chapter 2 para 2.4.5.

<sup>765</sup> Section 4(4)(b). See also section 4(2)(b) which contains provisions of similar import. In light of these considerations, the *Afrox* case discussed in chapter 2 would have been decided differently especially in light of the requirement that due regard must be had to the circumstances of the agreement.

<sup>766</sup> Section 2(9).

<sup>767</sup> Section 2(2). It has already been mentioned, in chapter 2 and in para 3.6.3.2 in this chapter, that the notion of unconscionable conduct is well-established in international law. The value, though persuasive only, of international judicial interpretation and academic comment will be of immense in the judicial arena in South Africa where the notion of unconscionable conduct suffered judicial neglect. It will also stimulate academic discourse in an area of law that is recognised in international circles as a third generation human right. See para 3.5 above.

<sup>768</sup> See chapter 2 para 2.4.5. English law recognises a less literal interpretation of contracts. See the discussion in chapter 2 para 2.4.5. The United States of America also follows a more conscionable interpretation of contracts: Lawrence Anderson *on the Uniform Commercial Code* Volume 2A (2008) UCC 2-302:90.

underscored by the fact that the decisions of a consumer court, ombud or arbitrator may be used as precedents to the extent that it has not been set aside by a higher court.<sup>769</sup>

### 3.6.7 Expedient and affordable relief

In addition to providing a new and comprehensive legal framework that entrenches consumer rights,<sup>770</sup> the CPA has also put in place a new and multi-faceted and integrated regulatory structure to promote the realisation and enforcement of those rights.<sup>771</sup>

The National Consumer Commission<sup>772</sup> is the principal authority entrusted with the task of enforcing the provisions of the Act and promoting consumer protection. Its function is not to intervene in or to directly adjudicate any dispute<sup>773</sup> but rather to promote informal dispute resolution and to investigate, refer, monitor and recommend.<sup>774</sup> Any agreement reached between the National Consumer Commission and a supplier may, by consent, be made an order of a court or of the National Consumer Tribunal.<sup>775</sup> From the enforcement perspective, the National Consumer Commission may refer matters for adjudication to consumer court or to the

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<sup>769</sup> The various High Courts, the Supreme Court of Appeal, and the Constitutional Court. See section 2(2)(c).

<sup>770</sup> The provisions of the Act discussed above are aimed at promoting respectable business practices, value-for-money exchanges, and quality services thereby minimizing the potential for harm.

<sup>771</sup> See chapter 3 thereof. The provision of effective and accessible dispute resolution mechanisms serve as a safety net in the event of a breakdown in the system.

<sup>772</sup> Its powers are investigative whereas the powers of the National Consumer Tribunal are adjudicative. The Australian Competition and Consumer Commission and the Office of Fair Trading in the United Kingdom fulfil a function similar to that of the Consumer Commission: Howells *et al Handbook of Research* 498-499.

<sup>773</sup> Section 99(a).

<sup>774</sup> Section 99. The National Consumer Commission's jurisdiction consists, *inter alia*, of investigating consumer complaints, referring them to appropriate fora (section 72(1)), monitoring markets (section 99(c)), issuing compliance notices (section 100), recommending legislative reform (section 94 read with section 98), and interacting with the Minister of Trade and Industries to develop industry codes (section 82(3)-(7)) and to advise the Minister on industry-wide exemptions (section 5(4)). It may entertain only those complaints regarding consumer contracts concluded after 1 April 2011, and fixed term agreements extending beyond April 2013 (sections 92-98). It must exercise its powers in the most cost-effective and efficient manner as possible in accordance with constitutional values and principles (Section 85(2)). In England, the Unfair Terms in Consumer Contracts Regulations 1999 grant the Director General of Fair Trading and other named bodies the power to apply for injunctions to prevent future use of unfair terms and also the power to negotiate terms with firms instead of going to court: Smith *Atiyah's An Introduction to the Law of Contract* 317.

<sup>775</sup> Section 74.

National Consumer Tribunal.<sup>776</sup> It may also refer alleged offences to the National Prosecuting Authority.<sup>777</sup> Provincial consumer authorities also have the power to issue compliance notices and to facilitate mediation and conciliation of a dispute.<sup>778</sup>

The status of the Act as an effective tool for the protection and enforcement of consumer rights is further enhanced by the roles allocated to National Consumer Tribunal, consumer courts,<sup>779</sup> courts<sup>780</sup> and alternative dispute resolution agents,<sup>781</sup> including ombudspersons,<sup>782</sup> industry ombudspersons<sup>783</sup> and conciliation, mediation or arbitration agents,<sup>784</sup> as well as inspectors and investigators.<sup>785</sup> The Act also makes provision for the establishment of industry codes of conduct<sup>786</sup> which function as self-regulatory systems<sup>787</sup> and which must be consistent with the

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<sup>776</sup> It has a right of appearance in the National Consumer Tribunal. See section 99(h).

<sup>777</sup> Section 99(i). The powers enumerated above, prevent the Commission from becoming a toothless tiger by imbuing it with the authority to enforce the provisions of the Act.

<sup>778</sup> Section 84. The powers may be exercised only in respect of persons resident, or businesses operating exclusively in the particular province.

<sup>779</sup> Section 70(1)(d). A consumer court must be distinguished from a court. The former is a body or a consumer tribunal established in terms of applicable provincial consumer legislation (definition of a consumer court in section 1).

<sup>780</sup> Section 76. The courts have jurisdiction only when all the remedies provided by national legislation have been exhausted (section 69(d)). The standard of what is just and reasonable informs the court when making any orders relating to unconscionable, unjust, unreasonable or unfair conduct (section 52(3)).

<sup>781</sup> Section 70.

<sup>782</sup> This refers to an ombud who has jurisdiction over a supplier in terms of any national legislation, for example, the financial services ombud (section 1).

<sup>783</sup> Accredited in terms of section 82(6). Besides being impartial, affordable, speedy and informal, the attraction of a statutory system of ombuds is that it provides for specialised dispute resolution.

<sup>784</sup> In terms of the definition of alternative dispute resolution agents in section 1.

<sup>785</sup> Section 88.

<sup>786</sup> Section 82.

<sup>787</sup> The value of industry codes as systems of self-regulation should not be under-estimated. They contribute to preventing harmful business practices by providing guidelines regarding acceptable conduct which the members of the particular code must adhere to and against which consumers may judge conduct. The expertise within an industry promotes early detection and resolution of abuses as opposed to state intervention which may be cumbersome and where action is often only taken after a complaint has been lodged: Woker (2010) *Obiter* 221-223. With reference to the financial services sector it has been acknowledged that providers of services to the poor must adhere to standards of care that minimises risks for their customers, who typically have low and variable incomes, little margin for error in financial decision-making, and little formal education and exposure to formal finance: MacKee *et al* (2011) September 'Responsible Finance: Putting Principles to Work' Focus Note 73 Washington D.C. *CGAP* 1. The same considerations apply to consumers generally and especially in markets with constantly changing products and product information making it difficult for the average consumer to keep up to date with the product ranges and product knowledge. The system of self-regulation which is provided for by the CPA would go a long way towards redressing this situation and improving the position of the average consumer. Adding further protection and

purposes and policies of the Act.<sup>788</sup> In addition, provision is made for accredited consumer protection groups<sup>789</sup> to initiate or intervene, to protect the interests of consumers individually or collectively, in any matter before any forum contemplated in the Act.<sup>790</sup>

The powers of the National Consumer Commission, the provincial consumer protection authorities and accredited consumer councils allow for proactive resolution of problems arising from unfair terms that have industry-wide application.<sup>791</sup> Courts have a very wide discretion in instances where the Act does not provide a remedy or the remedy is inadequate, to make

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comfort to consumers is the further requirement that any industry code must be aligned to the purposes and policies of the Act (section 82(4)). Such codes are subject to the jurisdiction of the Minister of Trade and Industry who may request the Commission to review an industry code with a view to determining its efficacy and to make recommendations to amend or to withdraw all or parts of the industry code (section 82(5)).

<sup>788</sup> Section 82(4). A consumer seeking redress has the option of referring the matter to the Tribunal (section 69(a)), or the appropriate ombud (section 69(b)). If there is no such ombud, the consumer may take the matter to the applicable industry ombudsection (69(c)(i)), or an alternative dispute resolution agent (section 69(c)(iii) read with section 70), or may apply to a consumer court (section 69(c)(ii)), or file a complaint with the Consumer Commission (section 69(iv) read with 71). The fact that there is no hierarchy of fora may lead to forum-shopping: Jacobs *et al* (2010) *PER/PELJ* 13(3) 308. In practice, most complaints will probably be directed to Consumer Commission which will probably be the most visible face of the enforcement mechanisms. The Commission, in turn, would then refer the complaint in terms of section 72 to one of the agencies mentioned in that section, for example, the Tribunal, alternative dispute resolution agent, or another regulatory authority with jurisdiction.

<sup>789</sup> The National Consumer Commission has the power of accreditation (s 78(3)) and may impose reasonable conditions on the accreditation (s 78(4)).

<sup>790</sup> Section 78.

<sup>791</sup> In 2011, the South African National Consumer Commission found the airline industry to be in breach of a number of the provisions of the CPA. For example, the validity of airline tickets ranged from three months to two years whereas section 63 of the CPA specifies that a prepaid certificate, card, credit, voucher or similar device has a life of three years; the practice of issuing non-refundable tickets falls foul of section 17(2) that provides for cancellation of any advance booking, reservation or order subject to payment of a reasonable cancellation fee; the practice of over-selling or over-booking is contrary to section 47: Power 'Airlines said to be out of kilter with the new consumer laws' *Sunday Times* 13 November 2011, <http://www.timeslive.co.za/sundaytimes/2011/11/13/airlines-said-to>. In issuing a compliance notice, the individual consumer is relieved of the burden of initiating and seeing through a complaint. The result of a consumer-driven complaint, if favourable to the consumer, would in all probability have only limited effect, benefitting only the particular consumer, leaving the supplier to continue with the unfair practice. Note that in terms of section 52(3)(b)(iii), a court may, having found that a term is unconscionable, unjust, unreasonable or unfair make an order requiring the supplier to cease any practice, or to alter any practice, form or document so as to prevent a repeat of the supplier's conduct. However, such an action would be reactive in nature in that it is dependent on a consumer lodging a court action and would be of no assistance to others who have already suffered the harm. It is instructive to note that the Office of Fair Trading in the United Kingdom has made a great deal of progress in eradicating unfair terms. It has relied mainly on negotiations with informal undertakings from businesses and has seldom made use of its injunctive powers: Naude 'Enforcement Procedures in Respect of the Consumer's Right to Fair, Reasonable and Just Contract Terms under the Consumer Protection Act in Comparative Perspective' (2010) 127 *SALJ* 515, 516 and 519-521, hereafter Naude (2010) 127 *SALJ* 515.

orders that it deems to be just and equitable after taking into consideration the principles, purposes and provisions of the Act.<sup>792</sup>

The emphasis on alternative dispute resolution mechanisms has a clear policy objective bias, namely, the promotion of access to justice. The main benefits of such mechanisms being that they are cost- and time-efficient.<sup>793</sup> Enforcement institutions such as the National Consumer Commission may also be more effective in ensuring wide-spread compliance over shorter periods of time than court action which may, at the most, only incrementally advance the cause of the consumer.<sup>794</sup> In addition, the ability to target specific policy objectives makes such bodies better suited to address the vulnerabilities of consumers.<sup>795</sup>

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<sup>792</sup> Section 52. In matters where the CPA provides insufficient remedies to correct prohibited conduct, unfairness, injustice or unconscionability, a court may make an order that is just and reasonable, taking into account the principles, purposes and provisions of the Act and with due regard to a range of factors, *inter alia*, the circumstances of the agreement and the conduct of the supplier and consumer, the state of knowledge of the consumer of the contractual terms and the implications thereof.

<sup>793</sup> From a commercial perspective, the spin-off is that the more accessible and the more affordable the protection mechanisms are the more willing people would be to conclude contracts. And a better informed public serves to magnify the spin-off. Canada is an example of the success of such bodies in promoting access to justice. Ontario's Landlord and Tenant Board proclaims itself as "Canada's highest-volume dispute resolution body, handling somewhere around 70 000 matters annually": Roach & Sossin (2010) 60 *University of Toronto LJ* 393. So also the Financial Ombudsman Service in England. It is a dispute-settling mechanism in the mortgages, loans, pensions, insurance and credit card markets: Smith *Atiyah's An Introduction to the Law of Contract* 330-331.

<sup>794</sup> This has been the experience in the United Kingdom and in Germany: Naude (2009) 126 *SALJ* 527-529. Disadvantages of "private" litigation include the fact that costs, time and effort limit access to courts; court decisions have limited effect, binding only the business concerned; judicial control is reactive in that it comes after the harm has been suffered; suppliers faced with a challenge may be tempted to settle with the particular consumer and continue to use the impugned term with other consumers; many cases would be heard in the lower courts whose decisions are seldom reported: Naude (2007) 124 *SALJ* 379-380. See also Naude (2010) 127 *SALJ* 516. The National Consumer Commission also plays an educational role. It educates consumers of their rights and facilitates complaints about breaches. It also educates the particular business/industry and other businesses/industries of deficiencies or other more systemic problems. Decisions of the Advertising Standards Authority fulfil a similar role when reported in the media: Cartwright (2011) *Legal Studies* 16. It also serves as a powerful counter-agent to suppliers who may employ the policy of "attrition through litigation," a useful tool for companies with deep pockets. Such suppliers may, through drawn-out litigation wear down even the most ardent consumer activists or media executive or through threat thereof scare them off from prying into company affairs: Richards 'Consumer Protection in the United States' (1999) 4(4) *The Harvard International Journal of Press Politics* 122, 122 & 124. In Australia, the possible enforcement actions available for unconscionable conduct in terms of the Australian Consumer Law include undertakings, public warning notices, injunctions, damages, compensatory orders and adverse publicity orders. Contraventions do not give rise to criminal liability: Corones *The Australian Consumer Law* paras [5.15-5.25].

<sup>795</sup> Roach & Sossin (2010) 60 *University of Toronto LJ* 374 & 393. Compliance with consumer protection provisions will result in vulnerable sectors of the market having better access to markets. Both the consumer and the supplier who has complied with the statutory obligations will reap the rewards of better protection. In the



### 3.6.8 E-commerce and consumer protection

Online communication is growing at an impressive rate around the world.<sup>796</sup> However, the fact that it is possible to trade across borders and continents, from the figurative boot of a car, means that the risks of fraud and other unconscionable conduct are inherently higher than in the traditional business<sup>797</sup> model due to the anonymous (there being no identified or identifiable counterparty) nature of the transaction.<sup>798</sup> Even if identified or identifiable,<sup>799</sup> the enforcement mechanisms listed above will be of little assistance to a consumer who has been overextended by unconscionable conduct<sup>800</sup> on the part of a trader who conducts business from outside of the country. Even if such agreements are in place, the prohibitive costs of cross-border or cross-continent litigation, place the attainment of justice even further beyond the



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microfinance sector, the imposition of similar rules did not adversely affect innovation and expanded access for the poorer and underserved customers: MacKee *et al* (2011) September Focus Note 73 Washington D.C. *CGAP* 8.

<sup>796</sup> The use of the internet in consumer transactions is steadily increasing, resulting in a “democratization of entrepreneurship”: Howells *et al Handbook of Research* 333-335.

<sup>797</sup> In comparison with the traditional “brick-and-mortar” businesses model, on-line transactions are more convenient and cost-effective: Zhang & Zhang ‘Does E-commerce Reputation Mechanism Matter?’(2011) 15 *SciVerseScienceDirect Procedia Engineering* 4885 <[www.elsevier.com/locate/procedia](http://www.elsevier.com/locate/procedia)> , hereafter Zhang & Zhang (2011) 15 *SciVerseScienceDirect Procedia Engineering* 4885.

<sup>798</sup> The growth in the number of smaller operators, as opposed to larger operators with more experience who may operate with legal guidance, is problematic from a regulatory perspective. The absence of an intermediary, such as media houses with in-house legal experts, means that there is no editorial control over advertising: Howells *et al Handbook of Research* 333-335. See also Zhang & Zhang (2011) 15 *SciVerseScienceDirect Procedia Engineering* 4885. Chapter 7 of the South African Electronic Communications and Transactions Act 25 of 2002 contains consumer protection measures to be applied to all cases heard by a South African court. These measures which are applicable regardless of the applicable legal system (section 47) do not exclude the protections afforded by any other law (section 44(4)). Legislative controls, however, serve to increase the legal obligations on the service provider, resulting in increased costs and possibly hindering the development of e-commerce: Zhang & Zhang (2011) 15 *SciVerseScienceDirect Procedia Engineering* 5519&5521.

<sup>799</sup> The difficulty of arriving at such agreements is illustrated by the fact that though the United States of America and the European Union have an elaborate set of consumer protection rules, the regulatory approaches to protection are substantially different: Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 359 and 356. In order to foster greater cooperation between its member states, the EU has promulgated a Regulation urging cooperation for the enforcement of consumer protection laws: Howells *et al Handbook of Research* 336.

<sup>800</sup> Website ratings that allow consumers to evaluate suppliers before doing business with them, reintroduce the “relentless regime” of *caveat emptor*: Howells *et al Handbook of Research* 335.



reach of the average consumer.<sup>801</sup> Globalisation weakens consumer protection because of the dearth of accessible enforcement mechanisms.<sup>802</sup>

From the perspective of the consumer, the best-placed scenario would be self-regulation<sup>803</sup> and regulation by regulatory bodies and independent consumer organisations that name and shame or that encourage boycotts of goods and services. Investigations conducted by, and reports issued by such mechanisms contribute to a breakdown in consumer satisfaction and consumer trust in the organisation under investigation, translating almost immediately into economic losses.<sup>804</sup> The possibility of this compels recalcitrant suppliers to comply with minimal standards of good practice and fair dealing.<sup>805</sup> Whilst name-and-shame and boycott-provoking tactics may be implementable in the national arena where it can serve a very useful and constructive function, its viability and efficacy in the global market is to be doubted.<sup>806</sup>

The discussion reveals that consumer protection legislation does not adequately address problems that may arise from e-commerce, especially cross-border e-commerce. For example, the right of redress (refund, repair, replace – s 56(2)) may prove to be illusory, or the enforcement mechanisms may prove to be ineffective, where the trader has delivered a defective product.

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<sup>801</sup> Language differences and geographical distance are additional impediments: Howells *et al Handbook of Research* 350.

<sup>802</sup> Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 359 and 381.

<sup>803</sup> In the United States of America, self-regulation is the preferred method. However, this method depends on self-discipline and a conscious effort on the part of service providers and the absence of legally enforceable rights do not assist the consumer's cause: Zhang & Zhang (2011) 15 *SciVerseScienceDirect Procedia Engineering* 5521.

<sup>804</sup> Research has shown that a favourable feedback leads to increased price as well as increased sales: Zhang & Zhang (2011) 15 *SciVerseScienceDirect Procedia Engineering* 4886 & 4889.

<sup>805</sup> Maurer (2007) 14 *Indiana Journal of Global Legal Studies* 379-381.

<sup>806</sup> For example, generating sufficient publicity on a global scale is perhaps possible only in the event of high-profile global suppliers and then also only in those instances where negative trade practices have affected a significant portion of the consumer population.

### 3.6.9 Fines and penalties

Breaches of the provisions the CPA may result in criminal conviction that incurs the imposition of a fine or a period of imprisonment or both.<sup>807</sup> The Tribunal may impose an administrative fine that may not exceed 10% of annual turnover during the preceding financial year or R1 million whichever is the greater.<sup>808</sup> The possibility of criminal sanction addresses the more serious infringements and also those situations where the financial penalty amounts to no more than a slap on the wrist.<sup>809</sup> The severity of the penalty or fine or the duration of imprisonment aside, the potential reputational damage may be equally or even more dire.<sup>810</sup>

### 3.6.10 Conclusion

The aforementioned provisions<sup>811</sup> will necessitate businesses to revisit business practices<sup>812</sup> that were based on the common law approach to, for example, standard form contracts and exemption clauses.<sup>813</sup> The possibility that contracts or terms thereof may be declared null and

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<sup>807</sup> Section 111.

<sup>808</sup> Section 112. Similar provisions are contained in section 151 of the NCA in respect of breaches of that Act.

<sup>809</sup> Examples of the predominant enforcement modes in other jurisdictions are: In the United Kingdom, financial penalties imposed by criminal courts but penalties are too low to act as a deterrent and greater use should be made of administrative financial penalties. In Australia, civil remedies predominate. The injunctive relief is often effective in stopping illegal conduct but there is limited capacity for imposing financial penalties except for the most serious cases. In the Netherlands, there is a dependence on self-regulation and enforcement of private rights which works well where the cases are simple and businesses are benevolent. However, the system is dependent on consumer activism and there is inadequate deterrent for malevolent businesses: Howells *et al Handbook of Research* 551. The South African system attempts to combine all of these strategies thereby minimising the weaknesses of each.

<sup>810</sup> Businesspersons abhor being branded as criminals and the word crime has a symbolic meaning for the public, criminal law being “stained so deeply with notions of morality and immorality, public censure and punishment, that labelling an act as criminal often has consequences that go far beyond mere administrative effectiveness”: Ball & Friedman ‘Use of criminal sanctions in the enforcement of economic legislation: A Sociological View’ (1964-1965) *Stanford Law Review* 197, 216-217.

<sup>811</sup> Relating to unfair terms; disclosure and information; implied warranty of quality, strict liability, class action; expedient and affordable relief; and fines and penalties.

<sup>812</sup> Businesses will also have to ensure that employees receive appropriate (re)training.

<sup>813</sup> The disclosure and information provisions, for example, represent a significant milestone in the development of consumer rights and alter the consumer contract landscape by significantly levelling the playing fields between the consumer and the supplier. Suppliers will, for example, no longer be able to hide behind legalise, jargon, and fine print which often characterise contracts and especially standard form contracts. The duty to notify and to bring certain terms and their nature and consequences to the attention of the consumer is a

void with the resultant economic losses, coupled with penalties and administrative fines that could be imposed, both of which could be ruinous economically and/or reputationally for businesses, will, surely, provide the impetus for compliance.<sup>814</sup>

The disclosure and information requirement, coupled with plain language requirement, concretizes the general contractual requirement that parties must be in agreement.<sup>815</sup> It serves to illustrate that the classical contract law assumption that contracts are the result of a rational choice<sup>816</sup> are best be realised if the consumer is as fully informed as possible.

The provision of a fully functional, effective and affordable system of redress serves to prevent legislation from becoming paper law. In doing so, it, not only, promotes the realisation of a core value of contract law, namely, that contracts must be honoured, but it also promotes the constitutional right to access to justice.<sup>817</sup> The enforcement mechanisms provided for in the

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significant departure from the common-law hands-off approach where the *caveat subscriptor* rule reigns supreme. The buyer-beware warning will in all likelihood be tempered by a new warning, viz., that the seller must beware.

<sup>814</sup> Momentum for change may also come from the activities of indirect compliance and enforcement mechanisms such as quality labels and independent consumer organisations which may come into being as a result of the detailed provisions of the CPA. Aspirational quality labels such as the South African Bureau of Standards serve to strengthen consumer rights by inspiring compliance. In addition, such labels promote consumer trust and loyalty by their assurance that a product or service meets certain quality thresholds: Howells *et al Handbook of Research* 138-139. Independent consumer bodies or consumer watchdogs which, for example, investigate and publish or broadcast consumer experiences, or which publish reports on the quality of goods and services, have obvious reputational implications for suppliers: Howells 138-140. Example of consumer watchdogs are: media publications or programmes such The National Consumer Forum's "Speak Out" programme on SABC 2; "Carte Blanche" on MNet; "Third Degree" on E-TV; consumer columns in newspapers, for example "off my Trolley" in the *Athlone News*, a community newspaper. Adverse publicity in community newspapers have impact at grassroots levels and may also inspire compliance.

<sup>815</sup> There is a comprehensive discussion of the consensual aspect of contract law in Van der Merwe, van Huyssteen, Reinecke and Lubbe *Contract: General Principles* (2012) 17 *et seq*, hereafter Van der Merwe *et al Contract*. See also Kerr *The Principles of the Law of Contract* 241. It can hardly be argued that there is agreement where the contractant, for example, is not *au fait* with Latin phrases or technical or legal terminology in a contract.

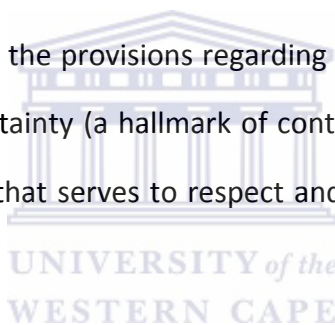
<sup>816</sup> See the discussion in chapter 2.

<sup>817</sup> Section 34 of the Constitution. Although access to courts is guaranteed on a theoretical level, the reality on a practical level is somewhat different. Considerations of the costs, time and effort of litigation often have an adverse impact on the decision to exercise the right of access to courts. Hence, access to courts is not synonymous with access to justice. The provision of relatively inexpensive and ready access to regulatory regimes, not only, lessens the need for access to courts, but also, promotes access to justice. In addition, access to justice is also attained by promoting access to markets: Roach & Sossin (2010) 60 *University of Toronto LJ* 374.

CPA, if properly resourced and utilised, will serve to give effect to the constitutional values of dignity, equality and freedom.

The price provisions<sup>818</sup> underscore the importance of price as the essence of contracts.<sup>819</sup> They characterise price transparency as one of the hallmarks of the CPA; information regarding price being a vital component of the prized notion of making an informed choice.<sup>820</sup> The provisions are also aimed at ensuring that consumers do not overextend themselves by concluding contracts without being fully aware of their financial commitments.<sup>821</sup> Hence, the provisions constitute a significant departure from the common law where there is no regulation in respect of price and contractants are, in the absence of improperly obtained consensus, bound by the price agreed upon.<sup>822</sup>

The price provisions, coupled with the provisions regarding information and disclosure, display a clear policy bias in favour of certainty (a hallmark of contract law)<sup>823</sup> as to price founded on good faith negotiations;<sup>824</sup> a bias that serves to respect and protect the contractual dignity of



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<sup>818</sup> See paras 3.6.3.2 and 3.6.3.3(D) above.

<sup>819</sup> Price as the essence of contracts of sale is explained in chapter 4 para 4.3.3.3(D).

<sup>820</sup> Contractual autonomy and the presumption of informed consent are the hallmarks of the classical theory of contract law and are discussed in chapter 2 and in particular in para 2.2.2 thereof. A 1997 research paper of the Office of Fair Trading in England concluded that to make informed choices, consumers require information about price, quality and terms of trade and that an unregulated market does not always provide this: Cartwright (2011) *Legal Studies* 13. "[I]mperfect information about prices" may also precipitate high prices: Armstrong 'Economic Models of Consumer Protection Policies.' Paper prepared for conference on "The pros and cons of consumer protection," organised by the Swedish Competition Authority, held on 11 November 2011, 2 and 7. These observations are important in the context of the question posed in this thesis regarding the *obiter dicta*. See further chapter 4 para 4.5.

<sup>821</sup> In addition, although there is no price control, the CPA does constrain the parameters within which a supplier may operate in setting a price by prohibiting a price that is unfair, unreasonable or unjust (ssection 48(1)(a)(i)). The fair value or the amount for which the goods or services could have been acquired elsewhere is, *inter alia*, used to determine whether the term is unfair, unreasonable or unjust (section 52(2)). Non-compliance renders the agreement or the particular provision void (ssection 51(3) read with the remainder of section 51 and sections 3 and 22). The provisions of the Act appear to constitute a revival of the essence of the *laesio enormis* doctrine (discussed in chapter 2 para 2.3.2.1: Jacobs *et al* 2010 13(3) *PER/PELJ* 302, 355.

<sup>822</sup> Kerr *Sale and Lease* 30; Bradfield *et al Principles* 21–22.

<sup>823</sup> See chapter 2 para 2.6.

<sup>824</sup> Certainty as to price and the role of good faith is elaborated on in chapter 4 and in particular para 4.2.4.4.

the contractants and that gives substance to the values of freedom, and equality presumptively proclaimed<sup>825</sup> by the South African courts as flagships of contract law.<sup>826</sup>

In the context of the question whether there is duty to conduct negotiations in good faith raised in the *Everfresh* case<sup>827</sup> a reductive analysis of the provisions of the CPA reveal a distinct duty to act in good faith, a duty that forms the gravamen of the contractual obligations between the contractants and which is all pervasive from the pre-contract stage through to the post-contract stage.<sup>828</sup> This analysis supports the *obiter dictum* in the *Everfresh* case in favour of a duty to conduct negotiations in good faith. The Constitutional Court said that in light of the value of ubuntu “which inspires much of our constitutional compact,” it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.<sup>829</sup> The court concluded that “[t]he proposition that common law contract principles provides meaningful parameters to render an agreement to negotiate in good faith enforceable is decidedly more consistent with section 39(2) than a regime that does not.”<sup>830</sup>

Against this backdrop, the conclusion is that there is no place in our law for a development that would recognise a sale at a reasonable price or at a unilaterally determined price in that such development would undermine the consensual and certainty aspects of contract law.<sup>831</sup> It would

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<sup>825</sup> See chapter 2 para 2.4.

<sup>826</sup> See generally chapter 2.

<sup>827</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), hereafter *Everfresh* 2012 (1) SA 256 (CC).

<sup>828</sup> See further chapter 4 para 4.2.4.4.

<sup>829</sup> *Everfresh* 2012 (1) SA 256 (CC) para [72] (majority judgment).

<sup>830</sup> *Everfresh* 2012 (1) SA 256 (CC), per Yacoob J para [36] (minority judgment). Though there was a minority judgment, the court as a whole appeared to be in agreement regarding the importance of good faith. The court differed on whether, on the facts, the matter had to be referred back to the High Court for it to consider, with reference to the facts of the case, whether to develop the common law to incorporate a duty to conduct negotiations in good faith.

<sup>831</sup> It raises the questions, *inter alia*, what constitutes a reasonable price, how it must be determined and by whom are all uncertain. See further chapter 4, para 4.3.

also run counter to the duty of good faith that pervades the provisions of the CPA and that has received favourable mention in the Constitutional Court.<sup>832</sup>

### 3.7 National Credit Act 34 of 2005

The National Credit Act<sup>833</sup> (the NCA) which came into operation on 1 June 2007 is the result of a process that commenced in 1994<sup>834</sup> when the South African Law Reform Commission reviewed the Usury Act 73 of 1968.<sup>835</sup> Its promulgation was inspired by significant political, social, and economic changes combined with technological advances<sup>836</sup> and a dysfunctional credit market<sup>837</sup> regulated by a number of statutes, some overlapping and some creating anomalies, others outdated and in need of revision.<sup>838</sup> Other factors that generated concern and that motivated the enactment of the NCA were the rising levels of over-indebtedness coupled with



<sup>832</sup> *Everfresh* 2012 (1) SA 256 (CC).

<sup>833</sup> Prior to this enactment, consumer credit legislation consisted mainly of the Hire-Purchase Act 36 of 1942, the Usury Act 73 of 1968, the Credit Agreements Act 74 of 1980 and the Exemption Notices 1992 and 1999: Scott, Baqwa, Eiselin, Humby, Kelly-Louw, Konyn, Kopel, Mukheiber, Schoeman, Smit, Sutherland and Van der Bijl *The Law of Commerce in South Africa: commercial law* (2009) 168, hereafter Scott *et al The Law of Commerce*. See also Kelly-Louw 'Introduction to the National Credit Act' 15(4) *JBL The Quarterly Law Review for People in Business* 147, hereafter Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 147. The NCA repeals the Usury Act 73 of 1968 as well as the Credit Agreements Act 74 of 1980. See the long title of the NCA.

<sup>834</sup> Whilst credit sales were in evidence since the era of Roman law, the idea of sales on instalments subject to conditions of delayed transfer of ownership coupled with a right of repossession on breach by the buyer gained prominence only in the 19<sup>th</sup> Century: Swanepoel, Makins, Lapping & Reynecke *Introduction to Mercantile Law* (1994) 157.

<sup>835</sup> Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 147.

<sup>836</sup> Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 147.

<sup>837</sup> This encompassed ineffective consumer protection, particularly for the low-income groups that comprised 85% of the population, the high cost of credit, and in some areas, the lack of access to credit: Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 147.

<sup>838</sup> Scott *et al The Law of Commerce* 169. The policy issues and the processes are discussed fully in Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 147-149. See also Scott *et al The Law of Commerce* 168-169. In the European Union, a harmonization and restructuring process also took place. The 2008 EU Consumer Credit Directive (Directive 2008/48/EC of the European Parliament and of the Council of 2008-04-23 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L133/66 22.5.2008)) had as its purpose to harmonize certain aspects of the laws, regulations and administrative procedures of member states regarding credit agreements. The Directive has policy directives which are similar to the policy considerations that underlie the NCA: Renke (2011) 74 *THRHR* 210-211.

reckless behaviour by credit providers and the exploitation of consumers by micro-lenders, intermediaries, debt collectors, and debt administrators.<sup>839</sup>

### 3.7.1 Policy objectives

The main challenge of the NCA is to impose integrity in the consumer credit market<sup>840</sup> and to clothe consumers with the necessary protection.<sup>841</sup> Its general purpose is to promote a fair and non-discriminatory marketplace for access to consumer credit by providing for the general regulation of consumer credit and improved standards of consumer information.<sup>842</sup> In addition, it also aims to resolve specific consumer market problems.<sup>843</sup> It seeks to attain this goal by creating a single system of credit regulation<sup>844</sup> and a National Credit Regulator<sup>845</sup> (the Regulator) to administer the credit industry by promoting the development of an accessible credit market,<sup>846</sup> ensuring the registration of industry role-players,<sup>847</sup> and a National Consumer Tribunal (the Tribunal) to adjudicate contraventions of, and applications made in terms of the

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<sup>839</sup> Scott *et al The Law of Commerce* 169; Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 147.

<sup>840</sup> Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 150.

<sup>841</sup> In light of these broad policy objectives, its field of application is much wider than those of its predecessors: Renke (2011) 74 *THRHR* 210.

<sup>842</sup> Vessio 'What Does the National Credit Regulator Regulate?' (2008) 20 *SA Merc LJ* 227 quotes the Chairperson of the National Credit Regulator as follows: "The National Credit Act seeks to make a fundamental change in the way in which the South African credit market operates, with specific provisions intended to address undesirable practices and improve transparency and fairness."

<sup>843</sup> The aim of the NCA, for example, is to prohibit unfair credit and credit-marketing practices, to prohibit reckless credit extension, to prevent and alleviate over-indebtedness of consumers and to curtail the high cost of credit, for example, by placing caps on interest rates (see the long title). A host of countries have adopted measure aimed at promoting responsible lending and combating reckless credit extension: Howells *et al Handbook of Research* 393-397.

<sup>844</sup> Scott *et al The Law of Commerce* 170; Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 150; Howells *et al Handbook of Research* 369.

<sup>845</sup> Section 12.

<sup>846</sup> Sections 13.

<sup>847</sup> Section 14. In terms of section 14 the Regulator must ensure and police the registration of all credit providers, credit bureaux, and debt counsellors.



provisions of the NCA.<sup>848</sup> As in the case of the Consumer Protection Act, the ethos of good faith underpins the NCA.<sup>849</sup>

### 3.7.2 Content

The NCA applies to all arms length<sup>850</sup> credit agreements<sup>851</sup> that defer some of the repayment with a fee, charge or interest in respect of the deferred payment, or afford a discount when prepayments are made.<sup>852</sup>

The NCA proposes to promote and advance the social and economic welfare of South Africans and to protect credit consumers<sup>853</sup> by promoting a fair, transparent,<sup>854</sup> competitive, sustainable, responsible, efficient, effective and accessible credit market.<sup>855</sup> The Act seeks to address imbalances in negotiating powers between consumers and credit providers<sup>856</sup> and to provide a “consistent and accessible system of consensual resolution of disputes...”<sup>857</sup> Imbalances in negotiating powers are addressed by providing, *inter alia*, for compulsory

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<sup>848</sup> Section 27(a)(i) and (ii). The Tribunal has since acquired additional powers under the Consumer Protection Act. See para 3.6.6 above.

<sup>849</sup> See, for example, section 86(5)(b) that explicitly imposes a duty of good faith on the participants in a debt review process with a view to facilitating a responsible debt rearrangement. See also section 3, the provisions whereof are all underwritten by the notion of good faith.

<sup>850</sup> See section 4. An example of an agreement that is not at arms length is one between family members where the parties are co-dependent on one another or where the one is dependent on the other (section 4(2)(b)(iii)).

<sup>851</sup> A credit agreement includes a credit facility (section 8(3)), e.g. a credit card; a credit transaction (section 8(4)), e.g. an instalment credit agreement; a credit guarantee (section 8(5)), e.g. a suretyship or a combination of these. See Section 8. There is a full discussion in Scott *et al The Law of Commerce* 171-174.

<sup>852</sup> Section 8. See also Scott *et al The Law of Commerce* 171; Kelly-Louw 15(4) *JBL The Quarterly Law Review for People in Business* 151.

<sup>853</sup> International client protection practices in the microfinance sector are evolving rapidly: MacKee *et al* (2011) September Focus Note 73 Washington D.C. *CGAP* 6-7. The article mentions that the practices in terms of the South African National Credit Act compare favourably with those of countries such as Peru and Ghana.

<sup>854</sup> Transparency is promoted when the terms are “available at point of contract; there is a reasonable opportunity to become acquainted with them; they are in clear jargon-free language and decent sized print; the sentences, paragraphs and overall contract are well structured; and appropriate prominence is given to particularly important terms (whether those that significantly reduce the rights of consumers or those that impose significant burdens on consumers)”: Willett (2011) 60(2) *International & Comparative Law Quarterly* 356.

<sup>855</sup> Section 3.

<sup>856</sup> It does so, *inter alia*, through its provisions on education of credit and consumer rights and its provisions providing for adequate disclosure of standardised information in order to make an informed choice. See section 3(1)(e).

<sup>857</sup> Section 3(h).

disclosure of information, plain language contracts, entrenching consumer rights, enforcement mechanisms and affordable avenues of redress.<sup>858</sup> Hereunder follows a few of the more significant protections that have an effect on addressing imbalances in negotiating powers.

### 3.7.2.1 Debt review and debt relief

An innovation that suspends the common law rights of a credit grantor introduced into consumer credit law with the view to assisting overburdened consumers is the obligation of a credit provider to deliver a section 129(1)(a) notice to the consumer<sup>859</sup> prior to enforcing a credit agreement.<sup>860</sup> This affords the credit consumer with an opportunity to approach a debt counsellor to propose a debt repayment plan which, if agreed to by the credit provider, would stay the credit provider's debt enforcement rights<sup>861</sup> and effectively render nugatory a *lex*

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<sup>858</sup> See also MacKee *et al* (2011) September Focus Note 73 Washington D.C. *CGAP* 7.

<sup>859</sup> Section 129(1)(a) provides that a credit provider may, on default of the consumer, bring the default to the attention of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud so that the parties may resolve any dispute under the agreement or develop and agree on a plan to bring the agreement up to date.

<sup>860</sup> Section 129(1)(b) stipulates that a credit provider may not commence legal proceedings before giving a section 129(1)(a) notice to the consumer. Though sections 129(1)(a) and 129(1)(b) are non-peremptory, the provisions of sections 130(1) and 130(3)(a) convert the provisions of section 129(1)(a) into mandatory ones. This precludes the credit provider from enforcing its rights prior to serving a section 129(1)(a) notice. See *Rossouw & Another v First Rand Bank Ltd* 2010 (6) SA 439 (SCA) para [2]; Van Heerden & Boraine 'The Conundrum of the Non-compulsory Notice in terms of Section 129(1)(a) of the National Credit Act' (2011) 23 *SA Merc LJ* 45, 45-46, 47 & 53; Boraine & Van Heerden 'To sequester Or Not To Sequester In view of the National Credit Act 34 of 2005: A Tale of Two Judgments' (2010) 13(3) *PER/PELJ* 84, 85, hereafter Boraine & Van Heerden (2010) 13(3) *PER/PELJ* 84. On non-compliance by the credit provider, a court is obliged, in terms of section 130(4)(b), to adjourn the matter and to direct the steps that the credit grantor must take prior to the resumption of the matter. The provisions and effect of a section 129 (1)(a) notice has generated a lot of academic comment. See for example, Van Heerden & Otto 'Debt enforcement in terms of the National Credit Act 34 of 2005' (2007) *TSAR* 655, 658-668; Tennant 'A Default Notice Under the National Credit Act Must Come to the Attention of the Consumer Unless the Consumer is at Fault' (2010) *TSAR* 852, 852-862; Otto 'Notices in terms of the National Credit Act: Wholesale National Confusion - *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors; Munien v BMW Financial Services; Starita v Absa Bank Ltd; FirstRand Bank Ltd v Dhlamini*' (2010) 22 *SA Merc LJ* 595, 595-607. None of these articles impugn the value of a section 129(1)(a) notice for the consumer of the debt relief process.

<sup>861</sup> Boraine & Van Heerden (2010) *PER/PELJ* 13(3) 84, 85. If not agreed to, the debt counsellor must, in terms of section 86(8)(b) refer the matter to the Magistrate's Court.

*commissoria* in a credit agreement.<sup>862</sup> A consumer has a right to apply<sup>863</sup> for debt review<sup>864</sup> to be declared over-indebted<sup>865</sup> and to have debts rescheduled.<sup>866</sup>

The aim is to grant over-indebted consumers an opportunity to rescue themselves from their economic dilemma: a dilemma which may also impact on their daily lives. A side-benefit is that it may result in an improvement in the socio-economic health of the country, an objective in the constitutional imperative to promote socio-economic reform.

### 3.7.2.2 Unlawful provisions

Section 90 contains a comprehensive list of provisions which are prohibited.<sup>867</sup> The provisions of section 90 read with the plain language provision will impact on the use of standard form

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<sup>862</sup> See Kelly-Louw 'The Default Notice by the National Credit Act 34 of 2005' (2010) 22 *SA Merc LJ* 568, 568. At common law, a *lex commissoria* enables a creditor to terminate a contract on breach by the debtor where the contract contains a specific clause to this effect: Van der Merwe *et al Contract* 306; Hutchison, Pretorius, Du Plessis, Eiselen, Floyd, Hawthorne, Kuschke, Maxwell, Naudé and De Stadler *The Law of Contract in South Africa* (2012) 286-287.

<sup>863</sup> A consumer may apply to a debt counsellor. If the debt counsellor rejects the application the consumer may, with the leave of the Magistrate's Court apply directly to the Magistrate Court.

<sup>864</sup> Section 86.

<sup>865</sup> A consumer is over-indebted when on the basis of the preponderance of information available and with due regard to the consumer's financial means, prospects, obligations and history of debt repayment, it is determined that the consumer is or will be unable to satisfy all obligations in a timely manner. See section 79(1). The number of consumers who have applied for debt review in the relatively short period since the NCA came into full effect on 1 June 2007 is an illustration of the greater number of consumers who have become over-indebted due to consumer spending: Renke (2011) 74 *THRHR* 208-209.

<sup>866</sup> Otto 'Over-indebtedness and Applications for Debt Review in Terms of the National Credit Act: Consumers Beware! *FirstRand Bank Ltd v Olivier*' (2009) 21 *SA Merc LJ* 272, hereafter Otto (2009) 21 *SA Merc LJ* 272. The debt review process may result in a debt-rearrangement plan voluntarily agreed upon by the credit consumer and the credit provider(s). This agreement must be filed as a consent order by the National Consumer Tribunal or by a court. If no such agreement can be reached, and if a finding of over-indebtedness is made, the court may make an order declaring one or more of the credit agreements reckless (see s 80 read with 81(2)) and/or that one or more of the consumer's obligations be rearranged. This may involve, *inter alia*, extending the period of the agreement and reducing the amount of each repayment or by postponing the due dates for payment (s 86(7)(c)). The requirements for a declaration of recklessness put the credit provider on notice to ascertain whether or not the consumer has the requisite knowledge and understanding to make an informed decision. The aim is to minimise the possibility of contractual default. The requirements also place the onus on the credit provider to prove that the consumer had the requisite knowledge and understanding.

<sup>867</sup> These black-list provisions are similar to the provisions of the CPA discussed in paras 3.6.3.2 and 3.6.5 above. Section 90 provides, for example, that a provision would be unlawful where the general purpose or effect thereof is to defeat the purposes or policies of the NCA, or to mislead or deceive the consumer, or to deprive a consumer of its rights in terms of the NCA or of its common law rights applicable to the credit agreement

contracts by, not only regulating the contents thereof, but also, by curtailing the use of language and style of writing that will undermine the provisions of the Act.

As in the case of the CPA, which contains similar prohibitions, these prohibitions, based as they are in public policy, serve to promote the good faith element of consumer contracts.

### 3.7.2.3 Disclosure of information

The NCA gives effect to the notion of informed consent<sup>868</sup> and promotes the balance in negotiating power by educating consumers about their rights<sup>869</sup> and by requiring disclosure of “standardised information.”<sup>870</sup> To this end, the NCA also contains comprehensive provisions on pre-agreement disclosures.<sup>871</sup> The credit provider must furnish the credit consumer with a

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(section 90(2)(c), for example, the implied warranties against latent defects and eviction), or that purports to limit or indemnify the liability of the credit provider under the NCA, or purports to limit or exempt the credit provider from any guaranty or warranty. Also prohibited is an agreement to forfeit money if the consumer seeks lawfully to terminate the agreement, or consenting to the jurisdiction of a specific court in circumstances where such court either does not have jurisdiction or has concurrent jurisdiction. The latter relates to where the contractants agree to the jurisdiction of the High Court in circumstances where the Magistrates’ Court has concurrent jurisdiction. Section 90(2)(k)(vi) of the NCA also precludes forum shopping: Van Heerden ‘Perspectives on Jurisdiction in terms of the National Credit Act 34 of 2005’ (2008) *TSAR* 840, 845-846, hereafter Van Heerden (2008) *TSAR*. Section 90 is clearly aimed at addressing the abuse of standard form contract and at trying to establish a balance between the bargaining powers of credit providers and consumers. This policy objective is also to be discerned in the Preamble to the NCA. See also Renke, Roestoff & Haupt ‘The National Credit Act: New Parameters for the Granting of Credit in South Africa’ (2007) *Obiter* 229, 251-252, hereafter Renke *et al* (2007) *Obiter*. Unlawful provisions are void and may be severed from the agreement or may result in the whole agreement being declared unlawful. A court may, in addition, make any additional order that it deems just and reasonable in the circumstances. Section 90(4).

<sup>868</sup> The Policy Framework that preceded the NCA reasoned that a more discerning and knowledgeable consumer will increase competition in the credit market and promote better levels of service: Renke (2011) 74 *THRHR* 218.

<sup>869</sup> This is done, *inter alia*, by detailing the rights of the credit consumer. See Part A, entitled ‘Consumer Rights,’ of Chapter 4. In addition, section 16 makes it a specific duty of National Credit Regulator to promote public awareness of consumer credit matters. The issue is canvassed more fully in Renke (2011) 74 *THRHR* 218-219. This duty is in line with a recommendation of the International Federation of Insolvency Practitioners (INSOL (International)) that over-indebtedness be addressed by application of the adage that prevention is better than cure: Roestoff & Renke ‘Solving the Problem of Overspending by Individuals: International Guidelines’ (2003) 24 *Obiter* 1, 8-9 hereafter Roestoff & Renke (2003) 24 *Obiter*.

<sup>870</sup> See section 3(e)(i)-(ii).

<sup>871</sup> See section 92. Different requirements apply to small credit agreements on the one hand and intermediate and large credit agreements on the other hand. This section must be read with the plain and understandable language requirement contained in section 64.

statement containing the main features of the proposed agreement.<sup>872</sup> The fact that the pre-agreement disclosure statement is binding for 5 business days presents the credit consumer with an opportunity within which to acquaint himself/herself of the contents<sup>873</sup> of the proposed agreement and to make an informed decision as to whether or not he/she wishes to conclude the contract at all or on the terms and conditions proposed in the pre-agreement statement. The pre-contract disclosure provisions also serve to promote (i) the equalisation of the bargaining powers of consumers and suppliers,<sup>874</sup> (ii) consensus and (iii) certainty. Hence, they validate the principles of freedom and sanctity of contract.

If the contract is subsequently concluded the credit consumer is entitled to a copy thereof. The copy must contain all the financial features of the contract as well as a comprehensive presentation of the consumer's rights as set out in the Act.<sup>875</sup> In addition, the credit provider must furnish the consumer with periodic statements of account for free.<sup>876</sup> These post-contract document provisions fulfil a very important policy objective of informing the consumer about

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<sup>872</sup> These include providing adequate information regarding the conditions and obligations of the agreement as well as the total costs thereof. The latter includes the principal debt, the proposed distribution of that amount, the interest rate and other costs associated with the credit: Renke (2011) 74 *THRHR* 211.

<sup>873</sup> Especially the financial obligations therein.

<sup>874</sup> Information of price, product, quality and terms provide knowledge that, in theory, may serve as bargaining tools and also forms the basis of consensus and promotes certainty. There is a full discussion of the benefits of such disclosure provisions in Renke (2011) 74 *THRHR* 212-213. See also Renke *et al* (2007) *Obiter* 253-254. The 2008 EU Consumer Credit Directive contains a provision similar to the plain language provision of the NCA: Renke (2011) 74 *THRHR* 212. The English Consumer Credit Act 39 of 1974 provides that the credit provider must furnish the credit consumer with the true cost of credit in a reasonable and understandable manner. Non-compliance renders the agreement enforceable against the debtor only on order of court: Beale *Chitty On Contracts: Specific Contracts* Volume 2 (2008) para [38-70]. See also Roestoff & Renke (2003) 24 *Obiter* 21. Furthermore, Section 3 of the (English) Misrepresentation Act 1967 prohibits terms that exclude or restrict (i) liability for a misrepresentation made before the conclusion of the contract or (ii) any remedy available to the contractant suffering the misrepresentation subject to the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977: Peel *Treitel The Law of Contract* paras [17-077] and [9-115]. See also Treitel *An Outline of the Law of Contract* (2004) 106.

<sup>875</sup> The contents of the contract must contain the detailed information set out in Regulation 30 read with Form 20.2 in respect of small agreements and in Regulation 31 in respect of intermediate and large agreements, for example, the cost of credit.

<sup>876</sup> See section 108. Different periods are prescribed for different categories of credit agreements but may be varied by agreement. Except for mortgage agreements where the period is every six months, the period between statements may not exceed three months.

his/her financial obligations to enable him/her to conduct himself/herself in a financially responsible manner.<sup>877</sup>

#### 3.7.2.4 Interest rate and the *in duplum* rule

Fees, interest rates and other charges<sup>878</sup> are strictly regulated.<sup>879</sup> The regulation of the maximum interest rates that may be charged has a long-standing history in South African consumer credit law and serves as a tool to prevent over-indebtedness.<sup>880</sup> It also serves to contain unconscionable conduct in a market that is flooded with demand for credit.<sup>881</sup> Though the Act provides for interest rates to change during the currency of the agreement, the Act stipulates that the variation must be by a fixed relationship to a reference rate stipulated in the agreement.<sup>882</sup> The design is clearly to ensure transparency and certainty and to prevent the consumer from being ambushed and subjected to unconscionable and unanticipated changes to its financial obligations. The inclusion of reference rate in the contract places a limitation on the discretionary power of the credit provider. The limitation of the discretionary power by an objective and ascertained mechanism echoes the *Westinghouse* principle and has policy significance in the context of arriving at a solution to the question of law in this thesis, namely whether to recognise a sale or lease at a reasonable price or rental or at a unilaterally determined price or rental.<sup>883</sup>

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<sup>877</sup> For example, to decide whether or not to assume the particular debt or further debt. See Renke (2011) 74 *THRHR* 218.

<sup>878</sup> These comprise the principal debt, an initiation fee, service fees, interest, the cost of credit insurance, default administration charges and collection costs.

<sup>879</sup> See Part C of Chapter 5 of the NCA. See also section 92(3) which provides parameters within which the interest rate charged may exceed the interest rate contained in the statutorily required quotation.

<sup>880</sup> Renke (2011) 74 *THRHR* 220.

<sup>881</sup> Manuel 'SA's debt time bomb' *The Times* 4 November 2011, 1-2.

<sup>882</sup> The current use of the prime Reserve Bank lending rate used by the major banks serves as an example.

<sup>883</sup> See chapter 4 para 4.3. Many countries, including, France, Belgium, the Netherlands, some Australian and some American states have interest rate ceilings: Howells *et al Handbook of Research* 397-401.



The statutory *in duplum* rule<sup>884</sup> is much more debtor-friendly and affords better protection than the common law rule which is now effectively codified and significantly expanded.<sup>885</sup> The codification means that “a spiral of ever-escalating running costs can no longer hold the consumer ransom for the rest of his/her life.”<sup>886</sup>

### 3.7.2.5 Interpretation

The NCA, like the CPA, provides for a purposive approach to interpretation<sup>887</sup> and enables the use of appropriate foreign and international law in the application or interpretation of its provisions.<sup>888</sup>

### 3.7.2.6 Expedient and accessible relief

Parties are encouraged to resolve disputes through mediation, conciliation or arbitration or to make use of either the provincial consumer courts or other such agencies before resorting to the Tribunal and the courts.<sup>889</sup> Referrals to the Magistrate’s Court are not cost-effective

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<sup>884</sup> Section 103(5). The court in *National Credit Regulator v Nedbank* 2009 (6) SA 295 (GNP) held that In terms of the statutory rule the amounts that become due during default, for example, service fees, interest or collection fees, “may not, in aggregate, exceed the unpaid balance” (319-320). The credit provider may not charge further interest subsequent to payments made by the consumer during the period of default. At common law interest may again be levied when once the unpaid interest drops below the outstanding capital. Note also the common law covers only interest charges whereas the NCA includes other charges such as initiation fees, service fees, and the cost of credit insurance: Campbell ‘The in duplum Rule: Relief for Consumers of Excessively Priced Small Credit Legitimised by the National Credit Act’ (2010) 22 *SA Mercantile Law Journal* 1, 3-5, hereafter Campbell (2010) 22 *SA Mercantile Law Journal* 1.

<sup>885</sup> Campbell (2010) 22 *SA Mercantile Law Journal* 1.

<sup>886</sup> De Villiers ‘National Credit Regulator Versus Nedbank Ltd and the Practice of Debt Counselling in South Africa’ (2010) 13(2) *PER/PELJ* 128, 151, hereafter De Villiers (2010) 13(2) *PER/PELJ*. See also Kelly-Louw ‘Better Consumer Protection under the Statutory in Duplum Rule’ (2007) 19 *SA Merc LJ* 337 *et seq*.

<sup>887</sup> See section 2. Section 2(1) determines that the provisions of the NCA must be interpreted to give effect to the purposes thereof as expressed in section 3.

<sup>888</sup> In these regards, the comments in para 3.6.7 in this chapter relating to interpretation under the CPA apply here as well. See also Van Heerden (2008) *TSAR* 841.

<sup>889</sup> See Chapter 7 of the NCA. In adopting this approach, the legislature is in line with one of the recommendations of the INSOL (International) which in May 2001 published a report recommending extra-judicial rather than judicial proceedings. Besides being less time-consuming and more cost-effective, the design of such proceedings makes it possible for the consumer’s debt problems, which often are of a non-legal nature, to be addressed in an appropriate and integrated manner: Roestoff & Renke (2003) 24 *Obiter* 8.



because such referrals are considered to be applications which require compliance with the provisions of the Magistrate's Court Act.<sup>890</sup> They do not provide the benefits of speed, simplicity and costs that characterise administrative actions.<sup>891</sup>

The provision of administrative processes serves to enhance access to justice because of its low cost structure, informal nature, and speed. The creation of the office of debt counsellor contributes to this in no small way. The debt counsellor is a neutral functionary<sup>892</sup> who does not advance any particular party's cause in the debt review process. He/she is meant to facilitate and mediate between over-indebted consumers and their credit providers to terminate disputes and/or to agree on a rearrangement of payments or an extension thereof.<sup>893</sup> Furthermore, a counsellor who has referred a matter to the Magistrate's Court "has a duty to assist the court and should be available and able to render assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the Court."<sup>894</sup>

The National Credit Regulator<sup>895</sup> is tasked with registration<sup>896</sup> and deregistration<sup>897</sup> of credit providers, credit bureaux and debt counsellors as well as dealing with complaints, promoting alternative dispute resolution,<sup>898</sup> and enforcement and compliance with the Act. He/she must

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<sup>890</sup> For example, that service of notices or documents contemplated in terms of sections 86 and 87 be effected by the Deputy Sheriff of the court, thereby adding to the costs of the already debt-compromised credit consumer.

<sup>891</sup> De Villiers (2010) 13(2) *PER/PELJ* 135-137.

<sup>892</sup> Regulation 1 of the National Credit Regulations 2006 published under GN 489 in GG 28864 of 31 May 2006 as amended by GN R1029 of 30 November 2006.

<sup>893</sup> Boraine & Van Heerden (2010) 13(3) *PER/PELJ* 84, 107; Otto (2009) 21 *SA Merc LJ* 276; Roestoff, Haupt, Coetzee & Erasmus (2009) 12(3) *PER/PELJ* 246, 251.

<sup>894</sup> *National Credit Regulator* 2009 (6) SA 295 (GNP) 313

<sup>895</sup> See Part A of Chapter 2.

<sup>896</sup> Sections 14 and 39-53.

<sup>897</sup> Sections 14 and 57-59.

<sup>898</sup> On 14 December 2010, the Regulator announced an agreement by the four big banks to a "conditional moratorium" on terminating debt reviews and attaching property: Wasserman 'Banks give indebted a break' <http://www.fin24.com/Money/Money-Clinic/Banks-give-indebted-a->.

also monitor the markets and industry and ensure that prohibited conduct is prosecuted.<sup>899</sup> As part of its enforcement functions, it must promote informal resolution of disputes.

The National Consumer Tribunal is an independent entity from the Regulator. It may adjudicate on a wide variety of applications and is responsible for hearing cases against credit providers that may contravene the Act. It must conduct its hearings in an inquisitorial manner, and as expeditiously and informally as possible and give expression to the principles of natural justice.<sup>900</sup> It may issue fines.<sup>901</sup> It may also make consent orders reflecting a resolution arrived at through an alternative forum.<sup>902</sup>

The enforcement mechanisms display an attempt at resolving problems created by (over)indebtedness in a manner that does not increase the financial burden on consumers and that gives consumers a fair opportunity of settling their debt burden in a manner that is respectful of their dignity.



### **3.7.2.7 Fines and penalties**

The provisions of these<sup>903</sup> are similar to those under the CPA and similar principles to those discussed in relation to the CPA apply.

### **3.7.2.8 Conclusion**

The provisions discussed above are indicative of some of the aims in section 3 of the NCA, namely, to discourage reckless credit extension by credit providers and to regulate aspects of consumer predicaments. The object of both is to prevent contractual default by credit consumers. The innovations significantly improve the position of credit consumers. Whilst both,

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<sup>899</sup> The functions may be delegated to parallel entities in the provinces.

<sup>900</sup> Section 142.

<sup>901</sup> See section 151 the provisions whereof resemble the provisions of section 112 of the CPA discussed in para 3.6.9 in this chapter.

<sup>902</sup> Sections 138 and 150.

<sup>903</sup> See section 151 for fines and section 161 for the penalties.

Section 129(1)(a) and debt review proceedings are aimed at alleviating the debt burden on the consumer, they also are pre-emptive in nature<sup>904</sup> by providing the consumer with alternatives aimed at debt reduction and, ultimately, debt settlement.<sup>905</sup> The provisions also seek to obviate time-consuming and costly litigation.

The possibility of a declaration that credit was recklessly extended and the adverse consequences thereof may inspire credit providers to adopt a more astute and judicious approach to credit extension. This in turn may result in a better informed consumer population that has both the capacity as well as the resources to service their debts.<sup>906</sup> In doing so, the Act preserves and promotes the notion of sanctity of contract which the Constitutional Court considered to be a constitutional value.<sup>907</sup>

In summary, the provisions of the NCA are designed to promote fair and reasonable, responsible and transparent practices in credit market, the effect whereof is to serve the needs of members of the public for credit in a manner that is respectful of their integrity and dignity.

In conclusion, it cannot be gainsaid that the consumer, under the NCA as in the case of the CPA, is better off than under the common law, the emphasis being on substantive<sup>908</sup> as well as procedural fairness.

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<sup>904</sup> This is true especially for recommendations made in terms of section 86(7)(b) discussed above.

<sup>905</sup> For example, suspension of the credit agreement may involve extending the period of the agreement and reducing the size of the periodic repayments. The pressure on the consumer is decreased both as to time and money and the possibility of ruinous litigation is minimised. It is important to note that the proceedings are not aimed at debt-cancellation but at a rearrangement of the consumer's obligations to create a win-win situation. Also important is that whilst reckless extension of credit may result in the setting aside of some or all of the consumer's rights and obligations, it does not invalidate the contract and the credit provider may still be able to recover the goods: *Boraine & Van Heerden* (2010) 13(3) *PER/PELJ* 84, 98. See also *Renke* (2011) 74 *THRHR* 227.

<sup>906</sup> Conversely, it could result in a reduction in the number of those who are overextended by debt as well as a reduction in the severity of such over-indebtedness. This would be an extremely healthy positive development from a policy perspective.

<sup>907</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) discussed in chapter 1 para 1.3.3.

<sup>908</sup> For example, subjective factors such as illiteracy, command of language, reasonableness and fairness and good faith now play a role in determining the validity of a contract or a term thereof. The common law position on such factors was outlined in chapter 2 paras 2.3.2, 2.4 2.6 and 2.9.

### 3.8 Rental Housing Act 50 of 1999

#### 3.8.1 Introduction

The Rental Housing Act (the RHA), which came into operation on 1 August 2000, was enacted to give effect to section 26 of the Constitution which invests everyone with the right of access to adequate housing.<sup>909</sup> Hence, it serves to give effect to the constitutional mandate to promote socio-economic reforms for the creation of a just and egalitarian society based on the values of dignity, equality and freedom.<sup>910</sup> In *Maphango & Others*,<sup>911</sup> the Constitutional Court placed the interpretation of the RHA firmly within the context of the Constitution and its values.<sup>912</sup>

The purpose of the RHA is, *inter alia*, to promote rental housing, to promote access to housing, to improve conditions in the rental housing market and to facilitate the provision of rental housing. It aims to do so by laying down general requirements for lease agreements, providing for the establishment of Rental Housing Tribunals in each of the provinces, and establishing conflict resolution principles for the rental housing market.<sup>913</sup>

Unlike the CPA and NCA, the RHA is not explicitly consumer orientated.<sup>914</sup> In fact, it purports in its Preamble to address the need to strike a “balance between the rights of tenants and the rights of landlords” and the need “to create mechanisms to protect both tenants and landlords

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<sup>909</sup> See the Preamble of the RHA. In *Maphango & Others v Aengus Lifestyle Properties* CCT 57/11 [2012] ZACC 2, hereafter *Maphango & Others* CCT 57/11 [2012] ZACC 2 the Constitutional Court held that the RHA is an act that was expressly enacted to give effect to the right of access to adequate housing (para 57)). The RHA may also be viewed as one of the enactments designed to promote the land reform programme in South Africa. See section 25 of the Constitution which mandates the State to embark on a process of land reform by fostering conditions to enable citizens to gain access to land on an equitable basis. Land tenure reform is one of the objectives of section 25 of the Constitution. Some of the other pieces of legislation dealing with land reform issues are the *Land Reform (Labour Tenants) Act* 3 of 1996, *Transformation of Certain Rural Areas Act* 94 of 1998, and the *Extension of Security and Tenure Act (ESTA)* 62 of 1997: Badenhorst *et al Property* 585-565. See also Van der Walt ‘Exclusivity of Ownership, Security of Tenure and Eviction Orders: a Model to Evaluate South African Land Reform Legislation’ (2002) *TSAR* 254 and especially 263 *et seq*; Carey Miller & Pope *Land Title in South Africa* (2000) 282-551.

<sup>910</sup> See Preamble of the Constitution. See also *Maphango & Others* CCT 57/11 [2012] ZACC 2 para [31].

<sup>911</sup> CCT 57/11 [2012] ZACC 2 para [57]. CHECK

<sup>912</sup> Paras [31]-[34].

<sup>913</sup> See the long title of the RHA.

<sup>914</sup> Unlike the CPA and the NCA, it is also not very innovative in that other than creating statutory naturalia and the office of the National Housing Tribunal, the RHA does not change the common law in any significant way: Badenhorst *et al Property* 403.

against unfair practices and exploitation.”<sup>915</sup> The Constitutional Court has described the RHA as superimposing its unfair practice regime on the obligations that contractants negotiate for themselves.<sup>916</sup> Thus, the RHA subjects the conduct of both landlords and tenants to the standards of fairness and equity.

However, in deciding that the eviction requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)<sup>917</sup> have to be complied with, in addition to the common law requirements of the *rei vindicatio*, in the so-called holding-over cases,<sup>918</sup> the Supreme Court of Appeal has swung the balance in favour of the tenant.<sup>919</sup> The landlord’s negotiating power to include a *lex commissoria* in the lease agreement is effectively terminated; so also any contractual discretionary power it may have had<sup>920</sup> on fulfilment of the *lex commissoria*.



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<sup>915</sup> In *Maphango & Others* CCT 57/11 [2012] ZACC 2 para [50]. The position of the landlord is regulated in order to allay concerns about its rights and to promote rental housing. This is illustrated, for example, in section 13(5)(b) which requires the Rental Housing Tribunal when making a ruling on the rental payable to take into account, *inter alia*, the need for a realistic return on investment for investors in rental housing. The position of the lessee is addressed, not only, from the perspective of equalising bargaining power, but also, to give expression to the provisions of section 26 which grants everyone the right to housing. The rental housing market has witnessed the hardships resulting from abuse of tenants “at the hands of unscrupulous landlords/landladies.” Examples of the abuse include unlawful evictions, disconnection of the water supply and illegal lockouts: Mohamed *Tenant and Landlord in South Africa: The Book for Residential Tenancies and the Rental Housing Act* (2010) 1, hereafter Mohamed *Tenant and Landlord*. See also the Preamble to the RHA. The even-handed approach is in recognition by government that “maximum private investment will be attracted within a normalised market”: Mukheiber ‘The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant’ (2000) *Obiter* 325, 326 and 350. See also Louw *The Right to Adequate Housing: Making Sense of Eviction Procedures in the Context of Rental Housing After Ndlovu v Ngcobo*. Thesis presented in partial fulfilment for the degree of Masters of Law at the University of Stellenbosch December 2004 1-2 and 8-10.

<sup>916</sup> In *Maphango & Others* CCT 57/11 [2012] ZACC 2 para [51].

<sup>917</sup> 19 of 1998.

<sup>918</sup> Holding over refers to the category of situations where the occupation commenced lawfully in terms of a valid legal basis such as a lease agreement, but became unlawful on termination of the legal basis. The Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) held that on termination of the legal basis of occupation, the lawful occupier becomes an unlawful occupier and becomes subject to the provisions of PIE.

<sup>919</sup> The procedure under PIE is more onerous than the comparatively simple and powerful (from the landlord’s perspective) common law *rei vindicatio*.

<sup>920</sup> Other than waiving its power to enforce the eviction. The *Ndlovu* decision has significantly reduced the common law discretionary powers of the landlord.

### 3.8.2 Disclosure and information

Though the RHA does not require a lease agreement to be reduced to writing, the landlord must, on request by the tenant, reduce it to writing.<sup>921</sup> All lease agreements must contain clauses that encapsulate the standard rights and obligations of the landlord and tenant as listed in section 5(3).<sup>922</sup>

Provision is made for the establishment of Rental Housing Information Offices, the functions whereof are to, *inter alia*, educate and advise landlords<sup>923</sup> and tenants about their rights and obligations and offer advice about resolving disputes including referral to the Tribunal.<sup>924</sup>

### 3.8.3 Unfair practices

An unfair practice is defined as any act or omission in contravention of the RHA<sup>925</sup> or any practice that unreasonably prejudices the rights or interests of either the tenant or the landlord.<sup>926</sup> Accordingly, a contractual clause would be unfair where it renders nugatory the statutory rights and obligations conferred on the tenant and landlord. In addition, the provisions of the CPA relating to unfair, unreasonable and unjust clauses and clauses which are

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<sup>921</sup> See sections 5(1) and 5(2).

<sup>922</sup> The rights and obligations set out in section 5(3) constitute mandatory terms, meaning that they may not be waived. See section 5(4). They include the rights and obligations in respect of joint inspection of the leased premises both before the tenant takes occupation and prior to termination of the lease, the rights and obligations in respect of any deposit that was given by the tenant. Section 5(3) was inserted as a compromise for the decision to not legislate for lease agreements to be reduced to writing. It was deemed to offer sufficient protection to tenants. The Housing Portfolio Committee regarded written lease agreements as affording landlords an opportunity to draft contract favouring them at the expense of their tenants. Accepting unwritten contracts coupled with the section 5(3) deeming provision was regarded as offering protection to tenants: Thatcher 'Rental Housing Bill (B29-99); discussion 1 September 1999' *Parliamentary Monitoring Group /Parliament of South Africa* 2 (<http://www.pmg.org.za/print/70056>). The provisions of section 5(3) are amplified by the provisions of the CPA. The provision of access to or use of rental accommodation falls under the definition of "service" in section 1 in the CPA.

<sup>923</sup> The term landlord is used in the RHA and will be used in this thesis as well.

<sup>924</sup> See section 14.

<sup>925</sup> Inserted by section 1 of the Rental Housing Amendment Act 43 of 2007.

<sup>926</sup> Section 1. Section 15(1)(f) lists a number of situations around which regulations relating to unfair practices may be formulated, for example, damage to property, demolitions and conversions, forced entry or obstruction of entry, overcrowding and health issues. Also, in criminalising unlawful lock-outs and termination of utilities (section 16(hA)), the RHA regards such conduct as constituting unfair practices.

prohibited also apply.<sup>927</sup> The CPA's requirement that contracts be substantially fair<sup>928</sup> neutralises the standard provisions in lease agreements which exclude the common law rights of a lessee.<sup>929</sup>

### 3.8.4 Enforcement mechanisms

The Rental Housing Tribunal is intended to provide an expedient and cost-effective dispute resolution mechanism.<sup>930</sup> It provides for mediation and adjudication.<sup>931</sup> Rulings of the Tribunal are considered to be an order of a Magistrate's Court and are enforceable in terms of the Magistrates' Courts Act.<sup>932</sup>

The Rental Housing Tribunal has a wide jurisdiction<sup>933</sup> to hear all disputes relating to unfair practices<sup>934</sup> which must be determined by the Tribunal.<sup>935</sup> It may also adjudicate on spoliation applications and issue attachment orders and interdicts.<sup>936</sup> It may also order the discontinuance of exploitive rentals.<sup>937</sup> Once the Tribunal rules that an unfair practice exists, it may order that

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<sup>927</sup> See paras 3.6.3.2 and 3.6.5 above.

<sup>928</sup> See paras 3.6.3.2 and 3.6.5 above.

<sup>929</sup> For example, the implied warranty of fitness.

<sup>930</sup> See the Preamble. The Director General, Department of Housing (as it was known then), Ms MZ Nxumalo-Nhlapo in reply to a question posed by a member of Housing Portfolio Committee said that both tenants and landlords did not want to resolve their disputes by engaging in "lengthy, costly proceedings." The Director-General continued to say that the whole idea is to get a speedy resolution and that most lease disputes did not involve legal questions: Thatcher 'Rental Housing Bill (B29-99); briefing, 31 August 1999' *Parliamentary Monitoring Group /Parliament of South Africa 2* (<http://www.pmg.org.za/print/7005>).

<sup>931</sup> Sections 13(2)(c) and (d).

<sup>932</sup> 32 of 1944. See section 13(13) of the RHA. A right of review lies to the High Court in its area of jurisdiction. Section 17.

<sup>933</sup> This is to give effect to the Preamble recognising the need for speedy resolution of disputes at minimum costs to the parties. However, in terms of section 13(14) it has no jurisdiction in respect of evictions orders. (Section 13(14) was inserted by section 6(d) of the Rental Housing Amendment Act 43 of 2007.) In terms of section 26(3) of the Constitution evictions may only be authorised by courts which a Tribunal is not.

<sup>934</sup> See section 13. When an issue of unfair practice contemplated in the RHA rears its head in proceedings before the Magistrate's Court, the Magistrate may refer it to the Tribunal. See section 13(11). The Tribunal appears, in terms of section 13(9), to have exclusive jurisdiction in respect of unfair practices despite the use of the adverb "may" in section 13(11): Stoop (2011) 74 *THRHR* 320-321.

<sup>935</sup> Section 13(9).

<sup>936</sup> Section 13(12)(c).

<sup>937</sup> The policy consideration to be detected is to curb exploitation of the scarcity of housing.



the provision(s) of the RHA must be complied with<sup>938</sup> or may make any order that is just and fair in the circumstances.<sup>939</sup> The advantage of the Tribunal procedure is that it is more cost and time effective than the court procedure allowing more people to exercise their constitutional right to have access to justice.<sup>940</sup>

The above provisions reduce the vulnerability of tenants in the rental housing sector to unfair discrimination which is one of the State's responsibilities<sup>941</sup> and serves to give effect to the constitutional injunction that the State must take legislative means to "foster conditions which enable citizens to gain access to land on an equitable basis."<sup>942</sup>

### **3.8.5 Application of the provisions of the CPA to the RHA**

Earlier<sup>943</sup> the CPA was described as an overarching piece of legislation that contained generalised provisions that also impact on RHA. This impact is briefly outlined below.

Though the RHA does not contain any provisions regarding plain language, the CPA provisions<sup>944</sup> apply. A contract of lease, if reduced to writing, would have to comply with the plain language provisions. These would require landlords to ensure that the language, form, style and organisation of leases are such as to render the document reasonably capable of being understood by tenants with average literacy skills and minimal experience as consumers in the rental housing market.

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<sup>938</sup> Section 13(4)(a).

<sup>939</sup> Section 13(4)(c).

<sup>940</sup> See section 34. The fact that the rulings are enforceable, obviating the need for the time-consuming and cost-incurring process of having the rulings made an order of a Magistrate's Court so that it may be enforced, adds to the benefit and value of utilising the Tribunal as a forum for dispute resolution: Stoop (2011) 74 *THRHR* 321-322, 323-324.

<sup>941</sup> See section 2.

<sup>942</sup> Section 25(5) of the Constitution.

<sup>943</sup> Para 3.2 above.

<sup>944</sup> Discussed in para 3.6.3.4 above

A lease period may not be for longer than two years.<sup>945</sup> A longer period is valid only if expressly agreed upon and the landlord (supplier) is able to show a demonstrable benefit for the tenant (consumer).<sup>946</sup> Provision is made for termination prior to the expiry of the lease period.<sup>947</sup> The tenant need not provide any reasons for early termination whilst the landlord may do so after the tenant falls in *mora* after being placed on terms by the landlord to remedy a material breach on its part.<sup>948</sup>

### 3.8.6 Fines and penalties

Contraventions<sup>949</sup> may attract a fine or imprisonment not exceeding two years or both.<sup>950</sup>

### 3.8.7 Conclusion

The information and disclosure provisions<sup>951</sup> coupled with the provisions against unfair practices<sup>952</sup> and the enforcement mechanism<sup>953</sup> constitute significant protection for tenants

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<sup>945</sup> Section 14(2)(a) of the CPA read with the Regulation 5(1) of the Consumer Protection Act Regulations Published under GN R293 in GG 34180 of 1 April 2011 provides that fixed-term consumer agreements may not exceed a maximum of two years.

<sup>946</sup> Regulation 5(1)(a) of the Consumer Protection Act Regulations Published under GN R293 in GG 34180 of 1 April 2011. The tenant (consumer) benefits in that it may be locked into a longer period only if a 'demonstrable benefit' is proved. Refusal to grant a lease because the tenant does not wish to sign for a period longer than two years would constitute an unfair practice. So also where a tenant is coerced into signing for a longer period in the absence of a demonstrable benefit. On termination of the two year period, and in the absence of any express agreement to a new fixed term, the lease automatically continues on a month-to-month basis. See section 14(2)(d).

<sup>947</sup> Section 14(2)(b) of the CPA. The tenant has to give only 20 days' notice of cancellation. A reasonable cancellation fee may be charged in terms of section 14(3)(b)(i).

<sup>948</sup> Section 14 of the CPA.

<sup>949</sup> See section 16. It relates, *inter alia*, to non-compliance with the provisions of sections 4 (tenant's rights relating to unfair discrimination and privacy; landlord's rights to, *inter alia*, rental); 5(2) (tenant's right to written contract; or 9 (composition of the Tribunal) of the RHA. Section 16(h)(A) specifically makes it an offence to unlawfully lock out a tenant or shut off the utilities to the rental housing property. Section 16(h)(A) was inserted by the Rental Housing Amendment Act 43 of 2007. The provisions of the CPA in respect of contraventions also apply. The RHA, like the CPA and NCA criminalises conduct and, in doing so, it promotes enforcement of rights and enhances compliance.

<sup>950</sup> Section 16.

<sup>951</sup> Para 3.8.2 above.

<sup>952</sup> Para 3.8.3 above.

<sup>953</sup> Para 3.8.4 above.

against unfair practices such as arbitrary evictions and disconnections of water and/or electricity supplies.<sup>954</sup> In enacting the RHA, the State has acted in terms of the obligation placed on it by section 26 of the Constitution to take reasonable measures for the progressive realisation of the right to access to adequate housing. In doing so, the State is giving effect to the constitutional imperative to effect socio-economic reforms for the creation of a just and egalitarian society based on the values of dignity, equality and freedom.

### 3.9 Analysis

In any system of regulation the purpose of essential codes of conduct may be summarised as reflecting a desire to promote a safe environment to allow participants an equal opportunity to display their skills.<sup>955</sup> In sport, for example, the rules are continually fine-tuned to cater for changing circumstances in order to safeguard and promote the essence of that which it seeks to regulate.

Likewise, consumer protection laws, introduced to keep pace with ever-changing conditions<sup>956</sup> and which target specified “abuses,”<sup>957</sup> play a complementary role in preserving the integrity of contract law, in general, and in reinvigorating the essence thereof. For example, the provisions relating to disclosure, information and consumer education<sup>958</sup> promote the *consensus ad idem*

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<sup>954</sup> Mohamed *Tenant and Landlord* 1-2.

<sup>955</sup> The *essentialia* in contract law fulfil a similar function. A prerequisite for the validity of any contract is whether the general requirements and specific requirements for a contract have been complied with. Natural terms, like essential terms, also play a role in creating an environment in which prospective contractants have an equal opportunity to participate. The nature and function of essential (and natural terms) are discussed in chapter 4 and in particular para 4.2.4.

<sup>956</sup> The assumption that rules of contract are the same for all types of contracts is increasingly eroded by the legislative enactments that provide different rules for different kinds of contracts. The observation is true for most countries where there is consumer protection legislation: Furmston *Cheshire, Firfoot and Furmston’s Law of Contract* (2007) 29 and 231-253.

<sup>957</sup> The CAA targets abuses in commercial contract law; the RHA targets the rental housing market; and the CPA targets consumer contracts generally.

<sup>958</sup> For example, the extensive provisions relating to information and disclosure of the financial implications of a transaction. Paras 3.6.3.3(D) and 3.7.2.3 above.

requirement of contract<sup>959</sup> and lend credibility to the classical contract law assumption of contractual equality and informed consent, thereby concretising and promoting the principles of freedom and sanctity of contract.<sup>960</sup> In addition to signifying a commitment to good faith, and an attempt to address the reality of unequal bargaining power,<sup>961</sup> they also promote certainty of contract by regulating contractual terms and contractual conduct, and by regulating pre-contract conduct as well as conduct during the existence of the contract.<sup>962</sup> The provision of expeditious and cost-effective rights of recourse contributes to the attainment of these goals. In promoting these principles, they also give effect and practical content to the constitutional values of dignity, equality and freedom. Hence, the provisions of the three pieces of consumer legislation illustrate that public interest considerations which have clear policy imperatives, can be utilised in harmony with existing principles of law.<sup>963</sup>



### 3.10 Conclusion

Consumer protection legislation signifies a shift from an individualist approach where a contractant had both the right and the responsibility to enforce his/her rights through litigation

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<sup>959</sup> Since perfect knowledge cannot be assumed, consumer protection legislation is aimed at increasing levels of knowledge in recognition of this weakness of the classical theory. Atiyah *Rise and Fall of Freedom of Contract* (1979) at 703.

<sup>960</sup> Howells *et al Handbook of Research* 158.

<sup>961</sup> For unequal bargaining power see chapter 2 para 2.4.4.

<sup>962</sup> The legislation promotes equitable and wholesome business practices by mandating fair and equitable business practices, thus allaying consumer fears and thereby promoting consumer confidence and inspiring consumer participation in the economic enterprise. In doing so, they advance the free market system. MacKee *et al* (2011) September Focus Note 73 Washington D.C. *CGAP* 1 and 2. The authors comment that “[o]ver time the market should reward retailer providers that adequately protect clients’ interests, affirmatively treat them well, offer a product line responsive to their needs, and deliver good value for money.” The comment made in respect of microfinance applies equally to consumer protection legislation.

<sup>963</sup> Smith *Atiyah’s An Introduction to the Law of Contract* 20. Public law legislation requiring a vehicle to be roadworthy and that drivers be in possession of a valid driver’s licence in order to use public roads curbs freedom of property for the public good. Such legislation, far from inhibiting road usage and the right to private property, promotes it by providing a safe environment for its use. Hence, they promote the constitutional values of dignity, equality and freedom of all road users.

to a paternalist<sup>964</sup> approach where the enforcement of rights also become the responsibility of the state through its organs such as the office of the National Consumer Commission and the office of the ombudsman.<sup>965</sup> Contractual autonomy becomes the backdrop against which constitutional and/or social and/or economic principles of justice operate.

Correcting the information asymmetry is of cardinal importance in promoting the making of informed choices.<sup>966</sup> The reality that the information that consumers require to make a fully informed choice is likely to be absent from many markets<sup>967</sup> dictates that the policy considerations that underlie consumer protection legislation as a paternalistic intervention mechanism, require the retention of the common law requirements regarding the essence of the contract, namely agreement on an ascertained or objectively ascertainable price and rental and militate against a relaxation thereof to accommodate the *obiter dicta*. Contractual autonomy becomes the backdrop against which constitutional and/or social and/or economic principles of justice operate.

In particular, the information and disclosure provisions in relation to price<sup>968</sup> signal the importance of price in contractual relations and the need to make informed decisions in respect of this vital area of contract creation. The removal of this aspect of contract creation on policy grounds from the will of the contractants and replacing the will with policy considerations as justification may be located in the theory that agreement on price constitutes the essence of the contract.<sup>969</sup> The conclusion that it gives rise to, namely that there is a duty to arrive at an

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<sup>964</sup> The principle of paternalism is discussed in chapter 2 paras 2.2.2, 2.3.1-2.3.2 and in para 3.5 in this chapter. Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40.

<sup>965</sup> The benefit of expedient and cost-effective access to justice, ensuring more complaints or claims are processed, and the spectre of criminal rather than civil sanction with the associated reputational damage, will likely act as insurance for compliance and pro-active action.

<sup>966</sup> Further bolstering the policy considerations underlying the information and disclosure provisions is that recent studies in behavioural economics suggest that consumer choices are guided by the short term, tend to be over-optimistic and tend to use heuristics to assess factors such as risks. See chapter 4 paras 4.3.3.3 and 4.3.4.3(E).

<sup>967</sup> Cartwright (2011) *Legal Studies* 13.

<sup>968</sup> See para 3.6.3.3(D) above.

<sup>969</sup> This theme is developed more fully in chapter 4 and specifically in para 4.3.3.3(D).

ascertained or objectively ascertainable price does not detract from the principles of contractual autonomy and freedom of contract.<sup>970</sup> Rather, it constitutes a recognition that voluntary contractual capacity is a derivative and not an absolute power. The individual is free to bind himself/herself to the extent permitted by the law.<sup>971</sup> Thus, the recognition of sales at a reasonable price or at a unilaterally determined price would run counter to the provisions of the consumer protection legislation discussed above, which provisions have strengthened the consensual and certainty aspects of contract law.

In summary, the design of the three pieces of legislation is to create market conditions, reflective of the constitutional values of dignity, equality, freedom and ubuntu:<sup>972</sup> the public policy considerations underlying the legislation and the constitutional values of dignity serve as the outer boundaries for the principles of freedom and sanctity of contract.<sup>973</sup> Thus, the three pieces of legislation demonstrate that freedom of contract can exist only within the limits of constitutionality and legality. Morality evident in the duty of good faith that pervades the legislation provides another limit.<sup>974</sup>

The approach that recognises limitations in the public interest is geared towards the attainment substantive justice,<sup>975</sup> and stands in stark contrast to the sterility of the classical theory that concentrates on procedural justice at the expense of substantive justice. It also demonstrates that the consideration of subjective factors, inspired by policy initiatives, is not inimical to the principles of law, namely freedom, sanctity and certainty of contract, and may, in fact serve to strengthen these principles. In promoting these principles, the legislation also give effect and

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<sup>970</sup> See chapter 4 para 4.2.4.2(B).

<sup>971</sup> See further chapter 4 paras 4.2.1-4.2.3; Hogg *Promises and Contract Law Comparative Perspectives* (2011) 269.

<sup>972</sup> The *Barkhuizen* case discussed in chapter 1 para 1.3.3.

<sup>973</sup> See further chapter 4 paras 4.2.1-4.2.3 for the discussion of a conceptual framework that imposes limitations on freedom and sanctity of contract.

<sup>974</sup> Horn, Kötz, and Leser, *German Private and Commercial Law An Introduction* (1982) 85. The writers conclude with the axiom that freedom of contract has never existed in unlimited form.

<sup>975</sup> Amongst others, subjective factors such as illiteracy and command of language now play a role in determining the validity of a contract or a term thereof. As indicated in chapter 2 paras 2.3.2.2(B) and 2.4.2 the use of jargon and Latin phrases did not persuade our courts to invalidate a contract or the offending contractual term.

practical content to the constitutional imperatives to promote socio-economic reforms<sup>976</sup> for the creation of a just and egalitarian society based on the values of dignity, equality and freedom. The State, in enacting these three pieces of legislation would have acted to fulfil its mandate in terms of sections 26 and 27 of the Constitution to effect the progressive realisation of the socio-economic rights to adequate housing and food, water, health and social security. The constitutional imperatives and the policy considerations that inform the role of consumer protection legislation in promoting the principles of freedom of contract and certainty, and in protecting vulnerable contractants also underpin the discussion of the role and function of the essential of price.<sup>977</sup>



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<sup>976</sup> See sections 26 and 27 of the Constitution.

<sup>977</sup> See chapter 4 and in particular para 4.2.



## Chapter 4

### The constitutional, jurisprudential and policy imperatives informing the role and function of the *essentialia* of price and rental – contractual freedom and certainty

#### 4.1 Introduction

In chapter 2 above, it was concluded that the fundamental analytical framework of contract law centred on the “voluntary choices of individuals or more specifically, the voluntary assumption of obligations” and that the function of contract law “is conceived as principally the facilitation of voluntary choices by giving them legal effect.”<sup>978</sup> It was explained that this approach is justified on the basis that public policy demands contractual autonomy, and freedom and sanctity of contract.<sup>979</sup> Adherence to these notions is deemed necessary for the promotion of legal and commercial certainty.<sup>980</sup>

Chapter 3 dealt with the policy considerations and the constitutional values informing consumer protection legislation and the impact thereof on the principles of consensus and of

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<sup>978</sup> Pretorius ‘The basis of contractual liability (1) Ideologies and approaches’ (2005) 68 *THRHR* 253, 260, hereafter Pretorius (2005) 68 *THRHR*. The corollary of this is that the law must decline to enforce choices that are not truly voluntary – an approach not generally followed as evidenced by the enforcement of exemption clauses. This has consistently been the approach of our courts (see for example, *Brisley v Drotsky* 2002 (4) SA 1 (SCA), hereafter *Brisley* 2002 (4) SA 1 (SCA) and *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 637 (SCA) and was granted constitutional legitimacy when the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) confirmed that “[s]elf-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity” (para [57]). See further chapter 2 paras 2.2.2-2.24 and below in this chapter. *Barkhuizen v Napier* 2007 (5) SA 323 (CC) is hereafter referred to as *Barkhuizen* 2007 (5) SA 323 (CC). It will be recalled that in chapter 1 it was explained that there are three cases involving the Applicant and that the Applicant’s name was spelt differently in two of the three cases. The precautionary measures described in chapter 1 para 1.3.3 to avoid confusion between the cases are also followed in this chapter and are repeated here for the sake of clarity. The spellings of the Applicant’s name as per the case citations will be retained and to avoid any confusion between the cases, the cases will hereafter be referred to as follows: *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ); *Breedenkamp* (return date) 2009 (6) SA 277 (GSJ); and *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA).

<sup>979</sup> See chapter 2 para 2.3.

<sup>980</sup> See, for example, *Brisley* 2002 (4) SA 1 SCA where the court, in affirming the decision in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 AD regarding the validity of a non-variation clause, said that the resultant commercial consequences, legal uncertainty, and evidentiary problems do not justify a departure from that decision [para [8]]. See also para [10] of the *Brisley* case and generally the discussion in chapter 2, that illustrate that the principles of autonomy, freedom, and sanctity of contracts and certainty are vital cogs in South African contract law.

freedom, sanctity and certainty of contract and concluded that policy considerations can operate in harmony with, and even promote these principles.

This chapter considers the question whether an agreement to a reasonable price or rental or a unilaterally determined price or rental<sup>981</sup> can be said (i) to be the result of a voluntary choice; (ii) to promote certainty;<sup>982</sup> (iii) to be reflective of the constitutional, jurisprudential and policy imperatives that inform the *essentialia*<sup>983</sup> of price and rental and (iv) to be in line with the policy direction of recent consumer protection legislation.<sup>984</sup>

Part one of this chapter discusses the constitutional, jurisprudential and policy imperatives that inform the *essentialia* of price and rental, laying the foundations for a conclusion regarding their role and function in the promotion of the principles of contractual freedom and certainty. Part two deals with the court's function in the determination of the *essentialia* of price and rental<sup>985</sup> and how such role affects the principles of contractual freedom and certainty.

The aim is to provide a basis for a conclusion about the impact that recognition of the *obiter dicta* would have on the principles of freedom of contract, consensus and certainty that form the basis of the law of contract in South Africa.<sup>986</sup>

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<sup>981</sup> It will be recalled that in *NBS Boland Bank v One Berg River Drive and others Deeb and another v ABSA Bank Ltd Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA), hereafter *NBS Boland Bank* 1999 (4) SA 928 (SCA), the Supreme Court of Appeal was of the view that our law should recognise the granting of a discretionary power to one of the contracting parties to unilaterally determine the price or rental in contracts of sale and lease respectively. In *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A) hereafter *Genac Properties* 1992 (1) SA 566 (A) the then Appellate Division opined that contracts of sale and lease at a reasonable price or rental, respectively, should be regarded as valid.

<sup>982</sup> Discussed in chapter 2 para 2.6.

<sup>983</sup> Discussed in para 4.2.4 below.

<sup>984</sup> Discussed in chapter 3 paras 3.4, 3.6.2, 3.7.2 and 3.10.

<sup>985</sup> As explained in a footnote in chapter 1 para 1.2 there is a marked similarity between contracts of sale and contracts of lease: *Cooper Landlord and Tenant* (1994) 6-7, hereafter *Cooper Landlord and Tenant*. Hence, the practice of referring mainly to the law relating to the price in contracts of sale followed in the previous chapters will be continued in the interest of brevity and avoiding repetition. Differences between the two will be highlighted.

<sup>986</sup> The principles of freedom of contract (incorporating consensus) and certainty were discussed in chapter 2 paras 2.2 and 2.6.

## 4.2 The constitutional, jurisprudential and policy imperatives underlying *essentialia* and their implications for the principles of contractual freedom and certainty

### 4.2.1 Introduction

The law as understood today consists of secular legal norms designed to regulate human conduct in an orderly manner to maximise harmony and opportunities for all.<sup>987</sup> The law acquires its authority from a contract between the State and its citizens in terms of which the citizens surrender their unlimited freedom<sup>988</sup> for the promotion of peaceful co-existence and prosperity. The authority of the law is, to a large extent, informed by John Locke's theory of the



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<sup>987</sup> Hosten *Introduction to South African Law and Legal Theory* (1995) 11 and 20, hereafter Hosten *Introduction*; Scott, Baqwa, Eiselin, Humby, Kelly-Louw, Konyn, Kopel, Mukheiber, Schoeman, Smit, Sutherland and Van der Bijl *The Law of Commerce in South Africa: commercial law* (2009) 1-5, hereafter Scott *et al The Law of Commerce*; Du Bois, Bradfield, Himonga, Hutchison, Lehmann, le Roux, Paleker, Pope, van der Merwe & Visser *Wille's Principles of South African Law* (2007) 20-22, hereafter Du Bois *et al Wille's Principles*; Petersmann 'Human Rights and International Economic Law: Common Constitutional Challenges and Changing Structures' 2012/07 European University Institute, Florence Department of Law EUI Working Paper LAW 1, 8  
<[http://cadmus.eui.eu/bitstream/handle/1814/21434/LAW\\_2012\\_07\\_Petersmann.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/21434/LAW_2012_07_Petersmann.pdf?sequence=1)>

hereafter Petersmann 'Human Rights and International Economic Law.'

Though a definition of the law is given here, it must be cautioned that the definition does not (and cannot in the context of this work) contain a description of the "interdependencies of the various parts of a general theory of law": Dworkin *Taking Rights Seriously* (1978) (viii), hereafter Dworkin *Taking Rights Seriously*. Dworkin explains that a general theory of law "must be normative as well as conceptual." The normative theory that includes a theory of legislation, adjudication, and compliance from the perspective of the lawmaker, the judge and the ordinary citizen, is "embedded in a more general political and moral philosophy which may in turn depend upon philosophical theories about human nature or the objectivity of morality." The conceptual theory draws on "the philosophy of language and therefore upon logic and metaphysics" (vii-ix). See also Edwards *The History of South African Law: an outline* (1996) 1-2. The conceptual framework of this chapter is discussed in the paragraph following this footnote reference.

<sup>988</sup> This happens through an implicit agreement to obey laws.

social contract.<sup>989</sup> The notion of the social contract is in line with the philosophical and jurisprudential underpinnings of the classical contract law doctrine.<sup>990</sup>

#### 4.2.2 Conceptual framework

South Africa is a constitutional democracy and the constitution is the symbolic embodiment of the social contract. The social contract is implicit in the Preamble of the Constitution. In it the people of South Africa adopt the Constitution “as the supreme law of the Republic of South Africa so as to...[l]ay the foundations for an open and democratic society in which government is based on the will of the people and every citizen is equally protected by the law.” The Constitution functions as an enabler of rights and powers but the rights and freedom are not absolute.<sup>991</sup> The Constitution places limitations on the exercise of these rights and powers by ordinary people and government officials and institutions.<sup>992</sup> The boundaries are set by the rights of others and “by important social concerns such as public order, safety, health and democratic values.”<sup>993</sup>

The rule of law which is entrenched in the founding provisions<sup>994</sup> serves to protect individual rights whilst the founding values of dignity, equality and freedom<sup>995</sup> represent the boundaries

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<sup>989</sup> Locke (1632-1704), an English philosopher, was a proponent of natural law who preached the theory of individualism which propagates a belief in the competence of people to make their own decisions and to conduct their affairs without regard to others: Feinman ‘Essay Critical Approaches to Contract Law’ (1982-1983) 30 *UCLA LR* 829, 839, hereafter Feinman (1982-1983) 30 *UCLA LR*. Locke saw the task of the State as being an impartial and objective one of protecting people’s rights and he hence grounded the justification of the state in its ability to protect human rights better than individuals could: Johnson, Pete & Du Plessis *Jurisprudence: A South African Perspective* (2001) 40, hereafter Johnson *et al Jurisprudence*. See also Smith *Atiyah’s An Introduction to the Law of Contract* (2005) 10, hereafter Smith *Atiyah’s An Introduction to the Law of Contract*; Hosten *Introduction* 66-67.

<sup>990</sup> Discussed in chapter 2 para 2.2. See also the discussion of the notion of a social contract in paras 4.2.2 and 4.2.3 of this chapter.

<sup>991</sup> Currie & De Waal *The Bill of Rights Handbook* (2005) 163, hereafter Currie & De Waal *The Bill of Rights*.

<sup>992</sup> Devenish *A commentary on the South African bill of rights* (1999) 16.

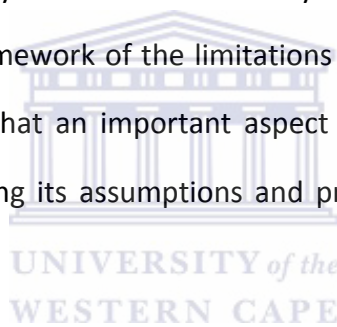
<sup>993</sup> Currie & De Waal *The Bill of Rights* 163. Section 36 of the Constitution, for example, provides the criteria for the limitation of the rights in the Bill of Rights.

<sup>994</sup> Section 1 of the Constitution.

<sup>995</sup> Section 1 of the Constitution.

of legitimate human conduct.<sup>996</sup> The conceptual framework of this chapter, as indeed of the thesis as a whole, is anchored in the fundamental rights and values of the Constitution and especially the values of dignity, equality and freedom which enjoy “double constitutionality” in the sense that they are amongst the foundational values of the Constitution<sup>997</sup> and they are also enumerated as basic human rights in the Bill of Rights.<sup>998</sup> The values also occupy a central place in our understanding of the section 36 limitation clause<sup>999</sup> as well as in the section 39 interpretation clause.<sup>1000</sup>

In the endeavour to achieve the goal of promoting peaceful co-existence and prosperity,<sup>1001</sup> the law safeguards, and, at the same time, delimits the freedom of the individual in relation to the freedom of others. One of the ways the law does so is by securing, protecting, and promoting individual freedom within the framework of the limitations placed on it by the law itself.<sup>1002</sup> It would not be inapposite to say that an important aspect of the legitimacy of the law is its attitude to the individual, including its assumptions and presumptions about the individual’s



<sup>996</sup> The consumer protection legislation (discussed in chapter 3), testify to this as well as the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 that declare the inclusion of contractual terms, conditions and practices, the effect whereof are to perpetuate the consequences of past discrimination, as well the unfair limitation or denial of contractual opportunities, to be practices which amount to unfair discrimination. See section 29 read with item 9b of the Schedule of Act 4 of 2000.

<sup>997</sup> Section 1 reads: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) **Human dignity**, the achievement of **equality** and the advancement of human rights and **freedoms**...” Section 7 provides that the Bill of Rights is a cornerstone of democracy in South Africa and that it “enshrines the rights of all people in our country and affirms the democratic values of **human dignity, equality and freedom**.” Emphasis added.

<sup>998</sup> Sections 9 (equality), 10 (dignity) and 12 (freedom and security of person).

<sup>999</sup> Section 36(1) provides that the limitation of the rights in the Bill of Rights may occur “only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...”

<sup>1000</sup> Section 39 (1) provides that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. See further the discussion of these values and rights in para 4.2.4.2 below.

<sup>1001</sup> See para 4.2.1 above.

<sup>1002</sup> For example, whilst section 16 of the Constitution guarantees freedom of expression, it also limits those rights by proscribing, for example, hate speech. The right to freedom of expression is also limited by the common law in that it extends only so far as the boundary of, for example, the delict of defamation. Another example concerns the individual’s right to control over his/her physical being which is limited by the crime that prohibits the consumption of illegal substances. See the Drugs and Drug Trafficking Act 140 of 1992.

capacity to deliberate and exercise choices.<sup>1003</sup> The law, therefore, invests the individual with power and, at the same time, curbs the individual's power of self-determination or self-realisation through acts of their choice.<sup>1004</sup> This dichotomy is also evident in the notion of *essentialia* discussed below.<sup>1005</sup>

By way of summary, the law, in essence, has a boundary-defining purpose.<sup>1006</sup> The purpose of legal boundaries is to provide vital information to regulate the creation of rights and obligations and thereby to promote certainty and to curtail disputes in order to secure a just and harmonious society. The realisation of this boundary-defining function is dependent on knowledge (actual or imputed) of these boundaries. In *President of the Republic of South Africa and Another v Hugo*<sup>1007</sup> the Constitutional Court said that “[a] person should be able to know the law, and be able to conform his or her conduct to the law.” In the absence of such knowledge, and within the context of the social contract theory, the law will have failed to identify and to communicate the boundaries that must be observed and respected. Individuals would not be able to accurately ascertain what constitutes lawful conduct and on what commitments they may rely. The result would be that “[d]isputes that might otherwise have been avoided will occur, and the attendant uncertainties ... will discourage beneficial reliance.”<sup>1008</sup>

In contract law, the boundary-defining function is realised if the consent to assume obligations is manifested “in a manner that provides a criterion for enforcement” and by the acceptance that “[o]nly a general reliance on objectively ascertainable assertive conduct will enable a legal

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<sup>1003</sup> This is illustrated by the assumptions underlying the policy initiatives of consumer protection legislation. See chapter 3.

<sup>1004</sup> See also chapter 2 para 2.7.

<sup>1005</sup> See paras 4.2.4.2(B), 4.2.4.3 and 4.2.4.4 below.

<sup>1006</sup> Barnett ‘Contract is Not a Promise; Contract is Consent’ Georgetown Public Law and Legal Theory Research Paper No. 11-29 (2011) Georgetown Law The Scholarly Commons, <<http://scholarship.law.georgetown.edu/facpub/615>> 1, 13, hereafter cited as Barnett ‘Contract is Not a Promise; Contract is Consent.’

<sup>1007</sup> 1997 (4) SA 1 (CC) para [102].

<sup>1008</sup> Barnett ‘Contract is Not a Promise; Contract is Consent’ 13.

system to perform its boundary-defining purpose.”<sup>1009</sup> *Essentialia* serve, at a basic or atomistic level, both to define and to communicate knowledge of such boundaries<sup>1010</sup> and in doing so they promote the principles of consensus and certainty which play a central role in contract law.<sup>1011</sup>

To fulfil the role of social organisation,<sup>1012</sup> the law must, *inter alia*, be certain,<sup>1013</sup> clear, transparent, consistent and uniform.<sup>1014</sup> It must not be ambiguous but must be framed with such a degree of clarity that its requirements are comprehensible. In *Dawood and Another v Minister of Home Affairs and Another*,<sup>1015</sup> the Constitutional Court held that it is an important principle of the rule of law that rules be stated in a “clear and accessible manner.” In *President of the Republic of South Africa v Hugo*,<sup>1016</sup> the Constitutional Court<sup>1017</sup> held that a norm can be regarded as law only if “it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may

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<sup>1009</sup> Barnett ‘Contract is Not a Promise; Contract is Consent’ 13-14.

<sup>1010</sup> See the discussion of *essentialia* in paras 4.2.4.2, 4.2.4.3 and 4.2.4.4 below.

<sup>1011</sup> Van der Merwe, van Huyssteen, Reinecke & Lubbe *Contract: General Principles* (2012) 192 *et seq*, hereafter Van der Merwe *et al Contract*. The requirement of certainty features as a separate requirement for the validity of contracts in general and it also finds expression in the requirement that the offer must be certain. Offer and acceptance constitute agreement (*consensus*) which is the first requirement for a valid contract: Van Huyssteen, Van der Merwe & Maxwell *Contract Law in South Africa* (2012) para [135]. See also Lubbe & Murray *Farlam & Hathaway Contract Cases, Materials and Commentary* (1988) 307, hereafter Lubbe & Murray *Contract*. The principle of certainty is sufficiently elastic to accommodate contracts where an aspect thereof has been left open for determination at a later stage subject to the key requirement that such an arrangement renders the consequences objectively ascertainable: Van der Merwe *et al Contract* 192-193 and 197-201. An example of this would be where the price of an object is tied to the price list of the seller or a competitor of the seller. See *Shell SA (Pty) Ltd v Corbitt and Another* 1984 4 SA 523 (CPD).

<sup>1012</sup> The preceding discussion revealed that one of the functions of the law is to provide justification for conduct, the law being, *inter alia*, an enabler of conduct.

<sup>1013</sup> The doctrine of *stare decisis*, a characteristic of developed legal systems, is emblematic of the principle of certainty: Hosten *Introduction* 386-388. It promotes stability, the protection of justified expectations, the efficient administration of justice, equality of treatment and the enforcement of justice: Hosten 508-509. See also chapter 1 para 1.3.2.1

<sup>1014</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para [102], hereafter *Hugo* 1997 (4) SA 1 (CC); Hosten *Introduction* 13-15; Scott *et al The Law of Commerce* 10-11.

<sup>1015</sup> 2000 (3) 936 CC para [47].

<sup>1016</sup> 1997 (4) SA 1 (CC).

<sup>1017</sup> See para [99], quoting the European Court of Human Rights in *The Sunday Times v The United Kingdom* (1979) 2 EHRR 245.



entail.”<sup>1018</sup> In the absence of such formulation, it would, indeed, be difficult to expect legally responsible behaviour between individuals, and between individuals and society at large.

In South Africa, the law finds its authority and legitimacy in the Constitution<sup>1019</sup> which provides that every aspect of the legal system must conform to its values and principles, including chapter 2 thereof, which contains the Bill of Rights. Section 2, that enshrines the Constitution as the supreme law of the Republic of South Africa, pronounces as invalid any law, or conduct that is inconsistent with it.<sup>1020</sup> The chief constitutional values are those of freedom, equality, and dignity.<sup>1021</sup>

#### 4.2.3 Contractual framework

A fundamental tenet of the social contract theory is the notion that all branches of the law have a contractual foundation hence the notion of contract is fundamental in legal science.<sup>1022</sup> Contracts allow contractants to create laws for themselves.<sup>1023</sup> In the context of this paradigm, the classical notion of freedom of contract with its emphasis on autonomy and individual liberty

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<sup>1018</sup> See also Currie & de Waal *The Bill of Rights* 10-13.

<sup>1019</sup> Sections 2, 7 and 8 of the Constitution. See also Currie & de Waal *The Bill of Rights* 8-10. See also chapter 2 para 2.8.

<sup>1020</sup> In addition, Section 39(2) enjoins every court, tribunal, or forum to promote the spirit, purport, and objects of the Bill of rights when developing the common or customary law. Section 172 provides that a court with jurisdiction must declare any law or conduct that is inconsistent with the Constitution, invalid, to the extent of its inconsistency. See also Currie & de Waal *The Bill of Rights* 8-10.

<sup>1021</sup> See section 1 of the Constitution. See also para 4.2.4.2(A) below.

<sup>1022</sup> Public law being a contract between the State in its capacity as a public governing authority and its subjects; and Private and Commercial law providing the capacity for a range of diverse contractual relationships between legal subjects. Contract is also evident in other disciplines, amongst others, theology, political science, sociology and economics. Pesqueux ‘Social contract and psychological contract: a comparison’ (2012) 7 *Society and Business Review* 1, 14-15, hereafter Pesqueux (2012) 7 *Society and Business Review* 1. See also Llewellyn ‘What Price Contract? – An Essay in Perspective’ (1931) 40 *Yale LJ* 704, hereafter Llewellyn (1931) 40 *Yale LJ* 704, for an insightful perspective on the role, function and development of contract as an avenue for creating binding relations.

<sup>1023</sup> Feinman referring to Holmes OW *The Common Law* (1881) 299-303 and Story W *A Treatise of the Law of Contract Not Under Seal* (1844) 4 in (1982-1983) 30 *UCLA LR* 832. Its purpose, *inter alia*, is to promote efficiency in transactions: Posner ‘Tribute to Ronald Dworkin and a Note on Pragmatic Adjudication’ (2007-2008) 63 *NYU Annual Survey of American Law* 9, 12. See also Kerr *Contract* 3.

would appear to reign supreme.<sup>1024</sup> However, the individual's power to create laws for himself/herself is exercised within the parameters laid down by the law, in conformity with the Constitution.<sup>1025</sup> The Constitution, as the supreme law, exercises control at a fundamental level since all laws and conduct derive legitimacy from it.<sup>1026</sup>

Since a contract represents the law made by the contractants for themselves in that it is descriptive of the rights and duties that bind them, the law governing the creation of a contract must also display, *inter alia*, the qualities and values displayed by the law in general, namely, certainty, clarity, transparency, consistency and uniformity.<sup>1027</sup> These qualities and values are promoted if the rules regulating the conduct are exact.<sup>1028</sup> The notions of certainty and clarity are also subsumed in one of the general requirements for the validity of contracts, namely, that the contractants must reach consensus by means of offer and acceptance. Both the offer and acceptance must, *inter alia*, be clear and precise in order to achieve consensus.<sup>1029</sup> Certainty<sup>1030</sup> is also one of the general requirements for the validity of a contract.<sup>1031</sup> In the context of the law-making function of contracts, the *essentialia* of each specific contract serve to give effect to the characteristics of the law by promoting certainty, clarity, transparency, consistency and uniformity.<sup>1032</sup>

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<sup>1024</sup> See the discussion in chapter 2 para 2.2 of the classical law approach to the notion of freedom of contract and the discussion in para 2.4 of that chapter of the limitations on that notion.

<sup>1025</sup> See the discussion in para 4.2.2 in this chapter above. See also Kerr *Contract* 3. Scott *et al The Law of Commerce* 42-47.

<sup>1026</sup> See sections 2, 7, 8, 39(2) and 172 of the Constitution. See also the discussion in para 4.2.2 above; Cockrell 'Second-guessing the exercise of contractual power on rationality grounds' (1997) *Acta Juridica* 26, 48-49, hereafter Cockrell (1997) *Acta Juridica*.

<sup>1027</sup> The law of contract being a subset of the law in general, it must conform to the qualities of the law in general. See para 4.2.2 above for a discussion of the latter.

<sup>1028</sup> See the discussion of rules and standards in para 4.2.4.3 below.

<sup>1029</sup> Van der Merwe *et al Contract* 48-49 and 53; Hosten *Introduction* 703; Hutchison, Pretorius, Du Plessis, Eiselen, Floyd, Hawthorne, Kuschke, Maxwell, Naudé and De Stadler *The Law of Contract in South Africa* (2012) 48-49, hereafter Hutchison *et al Contract*. O'Donovan *MacKeurtan's Sale of Goods in South Africa* (1972) 29-30, hereafter O'Donovan *MacKeurtan's*.

<sup>1030</sup> And, by implication, clarity, transparency consistency and uniformity.

<sup>1031</sup> Van der Merwe *et al Contract* 221 *et seq*; Hutchison *et al Contract* 210-216.

<sup>1032</sup> See the discussion of *essentialia* in paras 4.2.4.2(B) and 4.2.4.3 below.

A contract is essentialist in its orientation in that it encapsulates, *inter alia*, the will, the agreement, the promise, the obligation, the pledge to honour the commitment, the expectation,<sup>1033</sup> the assurance and cooperation, and the sanction of the contractants.<sup>1034</sup> These undertakings are contained expressly or implicitly in the terms of a contract.<sup>1035</sup> Accordingly, the terms<sup>1036</sup> of a contract fulfil the fundamental role of structuring the legal relationship between the contractants.<sup>1037</sup> A vital aspect is that they regulate the uncertainty regarding the conditions under which a performance may occur to minimise the risk that the cost-to-benefit ratio of a contract may be somewhat different to what may have been contemplated or anticipated at date of contract.<sup>1038</sup> Hence, contract law contains rules that have the effect of attenuating the possible adverse consequences of contracts and of reducing the risks to the contractants. The notion of *essentialia* represents one such set of rules.<sup>1039</sup>

Since price is an *essentiale* of a contract of sale, the discussion that follows concerns the constitutional, jurisprudential and policy imperatives underpinning *essentialia*<sup>1040</sup> in order to ascertain the role and function of price as an *essentiale* in contracts of sale.

<sup>1033</sup> On a psychological level, the contract represents the expectations of the contractants: Bankins *Investigating the Dynamics of the psychological contract: How and why individuals' contract beliefs change* Doctor of Philosophy Thesis, School of Management, Queensland University of Technology, Brisbane, Australia (2012) 1-2.

<sup>1034</sup> Pesqueux (2012) 7 *Society and Business Review* 14. As will be illustrated the content of these rights and obligations is not determined exclusively by the intentions of the contractants.

<sup>1035</sup> Van der Merwe *et al Contract* 241-245; Hutchison *et al Contract* 236-237; Du Bois *et al Wille's Principles* 797; Beale *Chitty On Contract* Vol 1 (2008) para [12-001], hereafter Beale *Chitty on Contract* Vol 1. The terms define the performances of the contractants, setting out, *inter alia*, the nature and description of the commodities or services due by the contractants and the manner, time and place of performance: Havenga *et al General Principles of Commercial Law* 97; Gibson *Wille's Principles of South African Law* (1970) 340.

<sup>1036</sup> The terms of a contract are classified into *essentialia*, *naturalia*, and *incidentalia*. See chapter 1 paras 1.1, 1.3.1 and 1.4.2.

<sup>1037</sup> They give practical content to the construction that the law of contract serves mainly to determine the limits within which contractants may bind themselves. See the discussion of the boundary-defining functions of the law in para 4.2.2 above.

<sup>1038</sup> In *Cobble Hill Nursing Home, In. V Henry & Warren Corp.*, 548 N.E. 2d 203, 206 (N.Y. 1989), the court said that certainty ensures that contractants are not bound by unintended contractual duties.

<sup>1039</sup> See further the discussion in para 4.2.4.2(B) below.

<sup>1040</sup> *Naturalia* and *incidentalia* are briefly discussed in two footnotes in para 4.2.4.2(B)(i) below.

#### 4.2.4 *Essentialia*

##### 4.2.4.1 Introduction

Cognisant of the context of the exigencies of the classical contract law notion of individual autonomy within which it operates,<sup>1041</sup> the term *essentialia* refers, in general, to those requirements on the compliance whereof the validity of all contracts is dependent.<sup>1042</sup> Over and above its generic meaning, the term *essentialia* encapsulates those (minimum) terms that typify the contract as belonging to a particular genus and that must be agreed upon for the validity of the contract as a member of that particular genus.<sup>1043</sup> In other words, *essentialia* specify the threshold terms that must be stipulated for a contract to belong to a particular *genus*. Consequently, the *essentialia*, not only, distinguish the different specific contracts from one another, but also, articulate the legal and economic functions of each contract.<sup>1044</sup> In this

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<sup>1041</sup> Individual autonomy being regarded as the jurisprudential fountainhead of the related concepts of consensuality, freedom of contract and *pacta sunt servanda*: Pretorius (2005) 68 *THRHR* 260. See also Lubbe & Murray *Contract* 21; chapter 2 para 2.2.

<sup>1042</sup> These *essentialia* are usually referred to as the general requirements for the validity of contracts and consist of the following: offer and acceptance, contractual capacity, formalities where required by law or by the contractants, legality, possibility of performance and certainty: Van der Merwe *et al Contract* 46-211; Hutchison *et al Contract* 149-216; Du Bois *et al Wille's Principles* 740-772; Wessels & Roberts *The Law of Contract in South Africa* (1951) paras [42-54], hereafter Wessels & Roberts *The Law of Contract in South Africa*.

<sup>1043</sup> The common law identifies specific contracts by means of their *essentialia*. A valid contract comes into existence on agreement about the *essentialia*. *Essentialia* encapsulate the essence of the contract which is fleshed out by the *naturalia*, and *incidentalia* where the latter have been agreed upon: Van der Merwe *et al Contract* 245. See also Hutchison *et al Contract* 237; Du Bois *et al Wille's Principles* 790. The fact that the *essentialia* are not complied with does not necessarily result in the overall invalidity of the contract. The contract may then fall into another genus in that it may display the *essentialia* of that genus or it may be classified as a *sui generis* or an innominate contract. So, for example, where, in a contract of "sale", the counter-performance does not consist in the payment of a sum of money but in the delivery of some object, the contract would not be a contract of sale but rather one of exchange: Van der Merwe *et al Contract* 245. The same position prevails in Australia and England: Lücke 'Illusory, Vague and Uncertain Contractual Terms' (1977-1978) 6 *Adel LR* 1, 6, hereafter Lücke (1977-1978) 6 *Adel LR* 1. In *May & Butcher v The King* [1934] 2 K.B. 17, 22 the court re-iterated that it is a "well known and elementary principle of contract law ... that, unless the essential terms of the contract are agreed upon, there is no binding and enforceable obligation."

<sup>1044</sup> Lubbe & Murray *Contract* 416. They determine the legal rights and obligations (for example, the title transferred and received) as well as the economic benefit (for example, the ability to use and enjoy or to alienate) derived by the contractants.

context, they serve an important function in that the class of contract determines the *naturalia* of the particular contract.<sup>1045</sup>

In addition to serving as a tool for identifying a contract as belonging to a specific class or category,<sup>1046</sup> *essentialia* also address the certainty requirement in each type of contract.<sup>1047</sup> *Essentialia* do so by providing the basic authoritative framework – the basic code of conduct – within which contractants are expected to fashion their rights and obligations. In the process, they identify and emphasise the most important obligations that flow from that contract.<sup>1048</sup> *Essentialia* provide not only, theoretical and practical guidance, but also, clarity and precision to the code of conduct which the contractants create for themselves.<sup>1049</sup>

By framing the boundaries of the choices facing the contractants,<sup>1050</sup> *essentialia*, not only, enable contractants to agree to a performance, but also, serve to minimize the possibility of the one being subjected to the mercy of the other, and, conversely, they maximize the consensual aspect of the contract.<sup>1051</sup> In doing so, they seek to minimize the scope for a contractant to inflict harm by pursuing economic interests<sup>1052</sup> at the expense of the other.<sup>1053</sup> In fulfilling this role, *essentialia* gives practical effect to the Aristotelian notion of distributive justice<sup>1054</sup> by

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<sup>1045</sup> Van der Merwe *et al Contract* 246-247. Havenga *et al General Principles of Commercial Law* 99.

<sup>1046</sup> Hosten *Introduction* 720.

<sup>1047</sup> Naude 'The preconditions for recognition of a specific type or sub-type of contract – the *essentialia-naturalia* approach and the typological method' (2003) 3 *TSAR* 411, hereafter Naude (2003) 3 *TSAR* 411. See further para 4.2.4.3 below.

<sup>1048</sup> Van der Merwe *et al Contract* 245; Hosten *Introduction* 770.

<sup>1049</sup> *Essentialia* are, in essence, the building blocks on which the particular contract is built.

<sup>1050</sup> This accords, not only, with the boundary-defining function of the law (see para 4.2.2 above), but also with the enabling function of contracts (see para 4.2.3 above).

<sup>1051</sup> As explained in chapter 2, above, the place of consensus is cemented into the contract law landscape.

<sup>1052</sup> Such as securing a price, quality, or terms at the expense of the other. The role of consumer protection legislation in addressing the possibility of exploitation has been discussed in chapter 3 above.

<sup>1053</sup> By requiring each contractant to participate in the decision-making the risk of exploitation is minimized.

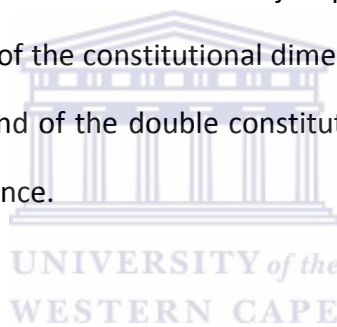
<sup>1054</sup> Aristotle distinguished between distributive and commutative or corrective justice. Distributive justice has to do with the equal treatment of people before the law and relates to the distribution of goods whilst commutative justice is concerned with rectifying disturbances in the distribution of goods, for example, where one person acquires goods meant for another: Johnson *et al Jurisprudence* 15; Hosten *Introduction* 24-25; Speidel 'The Borderland of Contract' (1983) 10(2) *Northern Kentucky LR* 163; Du Bois *et al Wille's Principles* 15-16. See also the discussion of distributive justice in chapter 2 paras 2.3.1 and 2.3.3.

treating the contractants as equals, both on a procedural as well as a substantive level.<sup>1055</sup> They promote freedom by providing, paradoxically, the framework that ensures responsible conduct. Equality is attained by imposing the framework on all the contractants. The equal treatment of all the contractants promotes dignity.<sup>1056</sup> Hence, *essentialia* embody or personify the notions of dignity, equality and freedom which are the hallmarks of the Constitution and which the proponents of the classical contract law theory presumptively proclaim as the hallmark of their doctrine.<sup>1057</sup>

#### 4.2.4.2 The constitutional dimensions of *essentialia*

##### (A) The role of dignity, equality and freedom in modern jurisprudence

In order to engage in a discussion of the constitutional dimensions of *essentialia*, it is necessary to discuss the role and function and of the double constitutional<sup>1058</sup> values of dignity, equality and freedom in modern jurisprudence.



##### (i) The position in public law

In modern jurisprudence, equality is deemed to be at the heart of justice.<sup>1059</sup> Section 9 of the Constitution<sup>1060</sup> provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law.”

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<sup>1055</sup> The role of *essentialia* as an instrument of equality is dealt with in paras 4.2.4.2(B), 4.2.4.3 and 4.2.4.4 below.

<sup>1056</sup> See the discussion of the inter-relationship between dignity and equality in the text following this footnote reference. Du Bois *et al Wille’s Principles* observe that the engine of a “constitutional value system” is driven by the “pursuit of dignity and equality” (38).

<sup>1057</sup> In chapter 2, it was explained that the principle that contracts must be honoured is justified by classical law theorist on the basis that it serves to give expression to the dignity, equality and freedom of the contractants. It was also explained that the theory operates in a vacuum in that it did not take cognisance of, for example, unequal bargaining power and the impact of standard form contracts and exemption clauses on a contractant’s freedom to negotiate with dignity. Hence, the notion of presumptive consensus. See further the discussion of the dignity, equality and freedom in chapters 1 and 2. See also chapter 9 on the right to equality in Currie & de Waal *The Bill of Rights*.

<sup>1058</sup> See para 4.2.2 above and para 4.2.4.2(B) below.

<sup>1059</sup> Hosten *Introduction* 982.

<sup>1060</sup> The equality clause.

In *Satchwell v President of Republic of South Africa & Another*,<sup>1061</sup> the Constitutional Court was confronted with the question whether sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 was in conflict with section 9(3) of the Constitution.<sup>1062</sup> The Court granted the order of unconstitutionality on the grounds that the impugned sections violated the section 9(3) prohibition against unfair discrimination on the grounds of sexual orientation and marital status.

In *Khoza & Others v Minister of Social Development & Others*<sup>1063</sup> the Constitutional Court had to comment on the constitutionality of certain sections of the Social Assistance Act 59 of 1992. The Court<sup>1064</sup> concluded that the impugned sections that disqualified non-South African citizens from receiving certain welfare grants was not a reasonable manner to achieve the realisation of the right to achieve social security and severely impacted on the dignity of such persons. It further held that the exclusions were unfair and discriminatory and infringed the right to equality.

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*<sup>1065</sup> that invalidated the common law offence of sodomy,<sup>1066</sup> the Constitutional Court focused, not only, on the section 9(3) right not to be discriminated against on the basis of sexual orientation, but also, on the rights to privacy and dignity.<sup>1067</sup>

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<sup>1061</sup> 2002 (6) SA 1 (CC).

<sup>1062</sup> The impugned sections made provision for the payment of certain benefits to the surviving spouse of a deceased judge.

<sup>1063</sup> 2004 (6) SA 504 (CC).

<sup>1064</sup> Paras [70]-[85].

<sup>1065</sup> 1999 (1) SA 6 (CC) paras [23], [28]-[30], [60]-[62].

<sup>1066</sup> Para [27].

<sup>1067</sup> In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) the Constitutional Court based its decision on the rights to equality and dignity in deciding that same-sex couples had the same right as married couples to the enjoyment of immigration benefits and privileges (paras [28]-[29], [36]-[37], [40], [42] and [53]-[54]). Similar considerations applied in *Dawood and Another v Minister of Home Affairs and Other* 2000 (3) SA 936 (CC) where the Constitutional Court held that the requirement that foreign spouses of South African citizens had to return home before their application for permanent residence could be considered was an infringement of their right to dignity (paras [35]-[37]).



The above cases are also grounded in the notion of human dignity which is probably the most important right in the Constitution.<sup>1068</sup> The recognition of same-sex life partnerships as marriages takes dignity “beyond the merely restitutive, and articulates a fundamentally transformative vision of our politics.”<sup>1069</sup> Human dignity is “a pre-imminent value in the Constitution, even more so than the right to life.”<sup>1070</sup> In *S v Makwanyane*<sup>1071</sup> the Constitutional Court said that “the rights to life and dignity are the most important of all human rights...By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”

The Constitutional Court has also said that “unfair discrimination...means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.”<sup>1072</sup>

In defining the right to dignity, the Constitutional Court, per Ackermann J, in *Ferreira v Levin*,<sup>1073</sup> placed respect for the “uniqueness” of the individual at the core of the right. Offering a

<sup>1068</sup> See chapter 10 in Currie & de Waal *The Bill of Rights*.

<sup>1069</sup> Woolman ‘On Rights, Rules, Relationships and Refusals: A Reply to Van Marle’s ‘Jurisprudence of Generosity’ (2007) 18 *Stell LR* 508, 511, hereafter Woolman (2007) 18 *Stell LR*.

<sup>1070</sup> Davis, Cheadle & Haysom *Fundamental rights in the constitution: commentary and cases: a commentary on chapter 3 on fundamental rights of the 1993 constitution and chapter 2 of the 1996 constitution* (1997) 70. The International Criminal Tribunal has said that “[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity”: Heath ‘Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law’ (DRAFT) 1, 22, <[http://works.bepress.com/jbenton\\_heath/3](http://works.bepress.com/jbenton_heath/3)>, hereafter Heath ‘Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law’ (DRAFT) 1.

<sup>1071</sup> 1995 (3) SA 391 (CC). The Constitutional Court held that the death penalty was an unconstitutional form of punishment (para [144]). The Court also held that the right to dignity was included as one of the “relevant factors” to be considered in determining whether punishment is cruel, inhuman or degrading (paras [94] and [135]). Whilst there was unanimity that the death penalty constituted cruel, inhuman and degrading punishment, there was no unanimity that it violated the right to life with the majority of the court deciding that it did.

<sup>1072</sup> *Prinsloo v Van Der Linde* 1997 (3) SA 1012 (CC), para [31]. In other words, the infringement of human dignity by virtue of unequal treatment amounts *prima facie* to unfair discrimination for the purposes of the right to equality. The case dealt with the constitutionality of section 84 of the Forest Act 122 of 1984 on the ground that it imposed a presumption of negligence on landowners in respect of fires that occurred in “non-controlled” areas whereas this presumption was absent in respect of fires that occurred in “controlled” areas. In the circumstances, the provision did not amount to an impairment of dignity in that the differentiation was not based on the attributes and characteristics of those affected.

different perspective, the Constitutional Court<sup>1074</sup> per Mokgoro J in *S v Makwanyane* defined dignity in the context of *ubuntu*.<sup>1075</sup> Mokgoro described *ubuntu* as humaneness and explains that “[i]n its most fundamental sense, it translates as *personhood* and *morality*.” It envelopes “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.”<sup>1076</sup> Hence, *ubuntu* refers to an interconnectedness between the individual and society and society and the individual. In this paradigm, human dignity, although relating to the individual, is conceived as being part of the notion of humaneness: dignity meaning compassion and caring for vulnerable members of society.

The Mokgoro definition which goes much wider than the traditional conceptions of dignity,<sup>1077</sup> acknowledges that human dignity is as much a matter of moral rights as it is of positive law.<sup>1078</sup> Because morality has to do with how people should lead their lives and how they should treat one another, the precepts of morality overlap many aspects of behaviour that are governed by rules of law.<sup>1079</sup> Morality “enjoins each actor to respect the other’s humanity ... and celebrates pursuits that involve others not only without disrespecting them (that is “using” them in Kantian terminology,) but also by furthering their own pursuits as they further the actor’s

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<sup>1073</sup> 1996 (1) SA 984 (CC), para 49, hereafter *Ferreira* 1996 (1) SA 984 (CC). This case dealt with the interpretation to be given to the guarantee of “the right to freedom of security of the person” contained in section 11(1) of the Interim Constitution. The Constitutional Court ruled against the use of evidence compulsorily obtained in a liquidation enquiry in a subsequent criminal case against the person who had given such evidence.

<sup>1074</sup> 1995 (3) SA 391 (CC), para [308].

<sup>1075</sup> See also the discussion of *ubuntu* in chapter 1 para 1.3.3.

<sup>1076</sup> Para [308].

<sup>1077</sup> Mokgoro J’s definition incorporates, *inter alia*, the notion of humanness, social justice and fairness (see also the discussion in chapter 1 para 1.3.3). National and international courts “often agree on only a few ‘core elements’ of ‘human dignity.’” These would include the beliefs that “(1) every human being possesses an intrinsic worth and moral entitlement to human rights, merely by being human; (2) this moral worth and entitlement must be recognized and respected by others; (3) also the state must be seen to exist for the sake of the individual human being, and not *vice versa*”: Petersmann ‘Human Rights and International Economic Law’ 1. See also Heath ‘Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law’ (DRAFT) 7-8 for the expanded interpretation and application of human dignity.

<sup>1078</sup> See Petersmann ‘Human Rights and International Economic Law’ 2.

<sup>1079</sup> Fried ‘The Convergence of Contract and Promise’ (2007) 120 *Harvard LR* 1, 2, hereafter Fried (2007) 120 *Harvard LR*.

pursuit.”<sup>1080</sup> The Mokgoro paradigm provides the context for the transformation of society into a more just and egalitarian one, both in the public and private law spheres.<sup>1081</sup>

The indivisibility of human dignity and equality and other human rights was expressly recognized by the Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others* when the Court observed that dignity is “a value that informs the interpretation of many, possibly, all other rights.”<sup>1082</sup> Hence, the right to dignity is foundational to the fundamental rights.

The right to dignity is also evident in section 26 of the Constitution that provides for a right of access to adequate housing. The obligation placed on the State by section 26 to provide conditions for the realisation of the right finds expression<sup>1083</sup> in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.<sup>1084</sup> The purpose of the Act is to prohibit the arbitrary eviction of unlawful occupiers; evictions must comply with prescripts of the Act. Sachs J expressed the constitutional dimensions when he declared that the main aim of the Act is to

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<sup>1080</sup> Fried (2007) 120 *Harvard LR* 3.

<sup>1081</sup> Chaskalson P is critical of the Ackermann approach in that it may constrain the lawmaker “from effecting critical social and economic reforms required by the Constitution itself and the process of transformation to a more just and egalitarian society.” Chaskalson perceives Mokgoro’s definition as providing the context for such transformation: Devenish *The South African Constitution* (2005) 63. Fried (2007) 120 *Harvard LR* is of a similar view when he writes: “Law can be, should be, but need not be a set of institutions that underwrite, facilitate, and enforce the demands and aspirations of morality in our dealings with each other (3). The consumer protection legislation, discussed in chapter 3, evidences of the resolve to attain a more just and egalitarian society. The same impetus may be perceived in the examples of contract case law discussed in para 4.2.4.2(A)(iii) below.

<sup>1082</sup> 2000 (3) SA 936 (CC). The Constitutional Court explained that the notion of dignity, which is, not only, a constitutional value, but also a “justiciable and enforceable *right* that must respected and protected,” has been used to interpret rights such as the right to gender equality (*Hugo* 1997 (4) SA 1 (CC)); the right not to be punished in a cruel, inhuman or degrading way (*Makwanyane* 1995 (3) SA 391 (CC)); and the right to life (*Makwanyane* 1995 (3) SA 391 (CC)) (para [35]). In *Makwanyane* 1995 (3) SA 391 (CC), the Constitutional Court said that “[r]ecognising a right to dignity is an acknowledgment of the intrinsic worth of human beings ... [t]his right is therefore the foundation of many of the other rights ...”(para [328]). See also para [144]).

<sup>1083</sup> Currie & de Waal *The Bill of Rights* 567.

<sup>1084</sup> 19 of 1998. Another example of legislation aimed at realising socio-economic rights in the housing sector is the Housing Development Agency Act 23 of 2008. The Act acknowledges the need to fast-track housing development to address the lack of adequate housing delivery in an environment where there is an increasing backlog in housing delivery. In order to meet its constitutional commitment the State enacted the Act to create a Housing Development Agency to co-ordinate and facilitate the acquisition of land and landed property, in a way that complements the capacities of Government across all sectors (section 2).

overcome “abuses and [to ensure] that eviction, in the future, took place in a manner consistent with the values of the new constitutional dispensation.”<sup>1085</sup> The balancing of the rights of landowners and unlawful occupiers evident in the title of the Act had to occur within the framework of the values of dignity, equality, and freedom.<sup>1086</sup> In *Government of the Republic of South Africa v Grootboom*<sup>1087</sup> the Constitutional Court held:

“The right of adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human rights. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity.”

The above decisions and, in particular, those reflecting the interconnectedness between dignity and the other foundational rights lend further weight to the Constitutional Court’s approval of the idea that sanctity of contract cannot be viewed in isolation but must be understood in the context of the core constitutional values of dignity and freedom.<sup>1088</sup> They constitute evidence of a more prominent role for the double constitutional values and especially for the value of human dignity in contract law<sup>1089</sup> and, more specifically, in the requirement of *essentialia*.<sup>1090</sup> Other evidence of a more defined role for the constitutional values may be found in the provisions of consumer protection legislation<sup>1091</sup> and other post-constitutional legislation.<sup>1092</sup>

<sup>1085</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 271 (CC) 224C.

<sup>1086</sup> Badenhorst *et al Property* 250. The approach of the Act as interpreted in the *Port Elizabeth Municipality case* seeks to replace the system in the pre-constitutional dispensation that was characterized by insensitivity and disregard for the humanity of those being evicted with a more humane and principled approach. In the pre-constitutional dispensation, for example, it happened that a local authority proceeded with the eviction of unlawful occupiers in the early hours of the morning with the assistance of police helicopters that flew overhead and police with guard dogs that patrolled the area issuing orders through loudhailers. People were threatened with arrest if they did not pack up and leave the area: *Administrator, Cape, and Another v Ntshaqela and Others* 1990 (1) SA 705 (AD).

<sup>1087</sup> 2001 (1) SA 46 (CC) para 44.

<sup>1088</sup> *Barkhuizen* 2007 (5) SA 323 (CC) paras [57] and [87]. They also serve to temper the Supreme Court of Appeal’s opinion in *Bredenkamp* (appeal) 2010 (4) SA 637 (SCA) paras [27] – [28] that sought to negate the *Barkhuizen* court’s opinion. See chapter 1 para 1.3.3.

<sup>1089</sup> See para 4.2.4.2(A)(iii) below

<sup>1090</sup> See para 4.2.4.2(B) below.

<sup>1091</sup> See chapter 3.

<sup>1092</sup> Examples of such legislation are: **Family Law:** the Recognition of Customary Marriages Act 120 of 1998, the Civil Union Act 17 of 2006; **Labour Law:** Basic Conditions of Employment Act 75 of 1997; Employment Equity Act 55 of 1998; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; **Property Law:** The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

In summary, the values of dignity, equality, and freedom symbolise the soul of the South African Constitution. They represent the clean break from the old to the new; from the undemocratic past to the egalitarian present. The Constitution being the fountainhead of all law in South Africa, its values transcend the bounds of Public Law and apply, and inspire with equal vitality, verve, and vigour in the Private Law arena.<sup>1093</sup> “The Constitution is not a piece of text, a book of rules or even a definitive set of values written down for all time. Rather, it is the legal embodiment of the values of post apartheid South Africa.” The Constitution is “nothing less than South Africa in legal form.”<sup>1094</sup>

(ii) The position in international perspective

The interconnectedness between the notions of dignity, equality and freedom, manifest in judgments of the Constitutional Court and in democratic-era legislation, is also evident in various international human rights instruments and institutions.<sup>1095</sup> The Universal Declaration of Human Rights (UDHR)<sup>1096</sup> proclaims that all human beings are “born free and equal in dignity and rights.” Because human beings “are endowed with reason and conscience,” they are expected to act towards one another in a “spirit of brotherhood.”<sup>1097</sup> The European Union Court of Justice has acknowledged that respect for human rights – including a ‘human right to respect human dignity’ – is a condition of the lawfulness of the acts of the EU institutions ...<sup>1098</sup>

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<sup>1093</sup> The *Barkhuizen* case serves to illustrate this. See further para 4.2.4.2(A)(iii) below.

<sup>1094</sup> Roederer ‘Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law’ (2003) 19 *SAJHR* 57, 78 & 80-81. See also para 4.2.2 above.

<sup>1095</sup> “[T]he holistic conception of the ‘indivisibility’ of human rights continues to be acknowledged in numerous human rights instruments since its first affirmation in the UDHR of 1948”: Petersmann ‘Human Rights and International Economic Law’ 14.

<sup>1096</sup> Text available at <<http://www.un.org/en/documents/udhr/index.shtml>>

<sup>1097</sup> Article 1 of the Universal Declaration of Human Rights adopted 10 December 1948.

<sup>1098</sup> Petersmann ‘Human Rights and International Economic Law’ 14. Hawthorne writes that that notion of equality in the Universal Declaration of Human Rights is not aimed at the elimination of all forms of social equality, but is aimed at “equality on a fundamental level to provide an equivalent life for all.” Whilst “[t]his interpretation allows for differentiation among people,” it “rejects differentiation which leads to inequality in regard to human dignity”: Hawthorne ‘The Principle of equality in the law of contract’ 1995 (58) *THRHR* 157, 159, hereafter Hawthorne 1995 (58) *THRHR* 157. Human dignity’s respected status in the international

The value of human dignity also occupies a central place in judgments of the International Criminal Court.<sup>1099</sup>

The notion of human dignity of all human beings who, as stated in the Universal Declaration of Human Rights (UDHR), “are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”<sup>1100</sup> also inform many national constitutions, regional human rights conventions and all UN human rights instruments.<sup>1101</sup> In Germany, the notion of good faith served as the entry point for constitutional values in the contract law arena.<sup>1102</sup>

### (iii) The position in contract law

In *Hoffmann v South African Airways*,<sup>1103</sup> the Constitutional Court, in ordering the respondent to offer Hoffmann a contract of employment as a cabin attendant, decided that the respondent’s refusal impaired Hoffmann’s dignity and amounted to unfair discrimination. The court concluded that the refusal to employ Hoffmann because he was HIV positive violated his right to equality, guaranteed in Section 9 of the Constitution.

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context is also evident in that it is foundational to many human rights instruments: Petersmann ‘Human Rights and International Economic Law’ 3. P

<sup>1099</sup> The Appeals Chamber of the International Criminal Tribunal for Rwanda found that ‘hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the targeted group as human beings’: Heath ‘Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law’ (DRAFT) 3-4. The writer describes the judgment as a unique and powerful precedent in the field of international criminal law, invoking the broad preambular language of the Universal Declaration Human Rights and suggests that the innovative use of dignity in the case may aid “the outward expansion of international criminal, allowing judges to address new situations and criminalize new forms of conduct” (4).

<sup>1100</sup> Article 1.

<sup>1101</sup> Petersmann ‘Human Rights and International Economic Law’ 1 & 3. In contrast to this, the United States Constitution places “the value of individual liberty at the highest level”: Currie & de Waal *The Bill of Rights* 272.

<sup>1102</sup> Markesinis, Unberath & Johnston *The German Law of Contract: A Comparative Treatise* (2006) 132. In one instance, an employee who was serving a trial period was dismissed apparently because he was homosexual. The court ruled that the dismissal was unconstitutional in that it violated his constitutionally guaranteed right to personality. The decision resembles the decision in *Hoffmann v South African Airways* discussed in chapter 1 para 1.3.3 and in the para immediately below.

<sup>1103</sup> 2001 (1) SA 1 (CC) discussed in chapter 1 para 1.3.3.

In *Barkhuizen v Napier*,<sup>1104</sup> the Constitutional Court cautioned that sanctity of contract must be tempered by considerations of morality and public policy as discerned from the values embodied in the Constitution, and especially the Bill of Rights.<sup>1105</sup> The *Barkhuizen* judgment also affirmed that the basic values of dignity, equality and freedom and the rule of law that underpin the Constitution and the Bill of Rights find expression in the principles of freedom and sanctity of contract that form the bedrock of the law of contract.<sup>1106</sup> In reconciling the competing interests represented by the notion of freedom of contract, which, in itself, is a constitutional value, and the values enshrined in the Constitution which inform public policy,<sup>1107</sup> it is evident that a contract or contractual term that is unfair, unjust or unreasonable would be one that is contrary to public policy and hence unacceptable.

In the *Affordable Medicines Trust and others v Minister of Health and Others*,<sup>1108</sup> the Constitutional Court, with reference to the Section 22 right to choose a trade, occupation or profession, reasoned that human dignity lies at the heart of the right to choose a vocation. In the same vein, the Supreme Court of Appeal in *Reddy v Siemens Telecommunications (Pty) Ltd*<sup>1109</sup> commented that the section 22 right was expressive of the connection between the right to choose a profession and the “nature of a society” based on the constitutional value of human dignity. The role of human dignity as a justification for revisiting the freedom of contract basis for the enforcement of restraint of trade cases is evident in *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn*<sup>1110</sup> where the Court, after referring to the *Affordable*

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<sup>1104</sup> 2007 (5) SA 323 (CC) discussed in chapter 1 para 1.3.3.

<sup>1105</sup> Para [30].

<sup>1106</sup> See, for example, paras [29] and [30]. Freedom and sanctity of contract are also discussed in chapter 2 para 2.2.

<sup>1107</sup> Paras [28-30], [51] and [73].

<sup>1108</sup> 2006 (3) SA 247 (CC), para [59]. The case dealt with a legislative requirement that medical practitioners and dentists, amongst others, require a licence issued by the Director-General of the Department of Health to dispense medicines.

<sup>1109</sup> 2007 (2) SA 486 (SCA), para [15].

<sup>1110</sup> 2008 (2) SA 375 (C), para [28].



*Medicines* case and other cases, opined that the onus should be on the employer to justify a limitation upon the right to work.

The role of human dignity is also not unknown or unacknowledged in pre-constitutional contract law.<sup>1111</sup> It is inherent in the enunciation in *Jajbhay v Cassim*<sup>1112</sup> that “public policy should properly take into account the doing of simple justice between man and man” which was quoted with approval in *Sasfin v Beukes*.<sup>1113</sup> In the *Sasfin* case, the court came to the rescue of the respondent who was placed in a position of economic servitude in favour of the appellant.<sup>1114</sup>

The jurisprudence evident in the above sample of judgments is that the principle of dignity operates, not only, as an interpretive tool, but also, as a constitutional value for the determination of legality and validity.<sup>1115</sup>

The jurisprudence also constitutes evidence that the purpose of the South African constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect.<sup>1116</sup> This is necessary to bring about social and

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<sup>1111</sup> That human dignity was in pre-constitutional contract law jurisprudence only grudgingly recognised as a factor, was illustrated with reference to case law in chapter 2.

<sup>1112</sup> 1939 AD 537, 544. In this case, the appellant applied for an order of ejectment on basis of the illegality of the lease agreement in that it was concluded in contravention of legislation. The court refused to relax the *par delictum* rule and hence to order the ejectment of the respondent.

<sup>1113</sup> 1989 (1) SA 1 (A) 9.

<sup>1114</sup> In this case, a cession *in securitate indebiti* vested the appellant with effective control over the respondent’s earnings and entitled the appellant to recover book debts owed to the respondent by his debtors and to retain such money regardless of whether the respondent was indebted to it in the amount or at all. The termination of the cession was at the will of the appellant and other creditors of the respondent, and neither the absence of indebtedness, nor reasonable notice of termination by the respondent would suffice to terminate the cession. In declaring the cession to be unconscionable and incompatible with public interest and therefore contrary to public policy, the Court likened the position of the respondent to that of a slave.

<sup>1115</sup> The role of dignity, equality, and freedom in the provisions of the consumer protection legislation and the policy considerations underlying these statutes was demonstrated in chapter 3.

<sup>1116</sup> The Constitutional Court in *Hugo* 1997 (4) SA 1 (CC) made this observation in the course of explaining the reason for the prohibition against unfair discrimination (para [41]). The case dealt with a prisoner, the father of a child under the age of twelve years, who sought to have a Presidential Act that granted special remission of sentence to, *inter alia*, “all mothers in prison on 10 May 1994, with minor children under the age of 12 years” declared unconstitutional on the ground that it unfairly discriminated against him on the grounds of sex or gender and indirectly against his son. In upholding the constitutionality of the Presidential Pardon, the

economic reforms for the creation of a just and egalitarian society founded on the constitutional values of dignity, equality, and freedom.<sup>1117</sup>

(B) The values of dignity, equality and freedom in relation to *essentialia*

(i) Introduction

*Essentialia* play a singularly important role in that a contract is only complete when agreement is reached on the *essentialia*, there being no need to agree on any *incidentalia*.<sup>1118</sup> The recognition that *naturalia*<sup>1119</sup> and *incidentalia* play a complementary or ancillary role highlights

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<sup>1117</sup> Court said that the prohibition against unfair discrimination was not promoted by insisting on identical treatment in all circumstances and that each case had to be decided on its own merits (para [41]). Similarly in Europe, the founding fathers (Adenauer, de Gasperi, Monet, Schuman) of the European Union placed the principles of dignity, equality and freedom at the core for the attainment of a Europe that is free from fear, misery and misfortune. Vidal Gil 'The Social State Based on the Rule of Law in the Europe of Rights' chapter 8 in Ballesteros J *et al* (eds.) *Globalisation and Human Rights, Ius Gentium: Comparative Perspectives on Law and Justice* Vol 13 Part 3 (2012) 179 < DOI: 10.1007/978-94-007-4020-4\_8.>.

<sup>1118</sup> In contracts of sale, the existence of *incidentalia* is dependent on the finalisation of agreement on the *essentialia* - without the latter the former cannot exist. *Incidentalia* are neither required nor imposed by law but consist of provisions that reflect those parts of the agreement which suit the particular needs of the contractants. Contractants may, for example, utilise *incidentalia* to regulate the risks that may adhere to the contract. *Incidentalia* give practical effect to the principles of individual freedom and autonomy that are embedded in the law of contract in that contractants may utilise *incidentalia*, within the parameters laid down by the law, to expand their legal commitments by developing and broadening the *essentialia* and *naturalia* or even by qualifying or excluding the latter where this is permissible. Some of the more common contractual terms used to this effect are suppositions, conditions, time clauses, modal clauses and exemption clauses. The contractants could, for example, provide for a clause specifying the method of calculating the purchase price. They could also provide for a clause that stipulates the date of payment. The former complements the *essentiale* that the purchase price be ascertained or ascertainable; the latter modifies the *naturalia* that, in the case of a cash sale, the purchase price must be paid on delivery: Van der Merwe *et al Contract* 247; Hutchison *et al Contract* 238; Lubbe & Murray *Contract* 416-417 and 424. Autonomy and freedom of contract are discussed in chapter 2, and specifically in para 2.2 thereof. The principles of autonomy and freedom of contract that find expression in *incidentalia* and that recently received constitutional recognition in *Barkhuizen* 2007 (5) SA 323 (CC) also inform the view that it is not the function of the courts to make, to supplement or to modify contracts. The function of the courts is discussed in para 4.4 below. The view that it is not the function of the court to make contract is also evident in the cautious approach of the courts to the importation of tacit terms into a contract. In this regard, the Court, in *City of Cape Town (CMC Administration) v Bourbon-Leftley & Another NNO* 2006 (3) SA 488 (SCA) said that the reason for the reluctance "is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreement merely because it appears reasonable or convenient to do so" (para [19]). See also Van der Merwe *et al* 242-245; Lubbe & Murray *Contract* 21 and 416-419. Kerr *Contract* 254-370. See also para 4.3.4.2(C)(viii) below.

<sup>1119</sup> *Naturalia* are terms that automatically latch onto a contract when agreement is reached on the *essentialia*. The valued attributes of freedom of contract and individual autonomy (see chapter 2) survive this imposition in that contractants are, in theory, at liberty to exclude the operation of *naturalia* from their contract: Van

the role of *essentialia* as encapsulating the essence<sup>1120</sup> of the legal relationship between contractants. Hence, *essentialia* identify and define the most important and the most fundamental obligations of the contractants and a degree of fidelity<sup>1121</sup> commensurate with its status is apposite. The requisite degree of fidelity is inherent in or prescribed by the duty-imposing and power-conferring components of *essentialia* which concretize the double constitutional values of dignity, equality and freedom.<sup>1122</sup> Bearing in mind that it has long been recognised that freedom of contract is not an end in itself but that it is a vehicle for self-determination,<sup>1123</sup> the doctrines of freedom of contract and paternalism operate simultaneously, each exerting a corrective influence on the other.<sup>1124</sup>

*Essentialia*, in providing for certainty, clarity and transparency in contractual obligations, and thereby concretizing the constitutional values of dignity, equality and freedom, give expression to the constitutionally entrenched principle of the rule of law.<sup>1125</sup> In this context, it must be borne in mind that *essentialia* allow freedom of contract by authorizing contractual relations

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der Merwe *et al Contract* 246-247. See also Du Bois *et al Wille's Principles* 790; Wessels & Roberts *The Law of Contract in South Africa* para 263; Vorster 'The bases for the implication of contractual terms' (1988) 2 *TSAR* 161, 166, hereafter Vorster (1988) 2 *TSAR* 161; Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40, 53 *et seq*, hereafter Cockrell (1992) 109 *SALJ* 40 53. *Naturalia* are deemed to be complementary and not abrogatory in nature. Vorster (1988) 2 *TSAR* 167. There is no closed list of *naturalia* and additional *naturalia* could be recognised to align the law to changing circumstances and new needs: *A Becker & Co v Becker and Others* 1981 (3) SA 406 (A) 419F-H; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA), para [28]. Existing *naturalia* could also function to accommodate changed circumstances: Van der Merwe *et al Contract* 246; Vorster (1988) 2 *TSAR* 178. It is generally understood that they originate in statute, precedent, custom, trade usage or old authorities: Vorster (1988) 2 *TSAR* 167; Cornelius 'The unexpressed terms of a contract' (2006) 17 *Stell LR* 494, 499-500; Van der Merwe *et al Contract* 246; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531, hereafter *Alfred* 1974 (3) SA 506 (A).

<sup>1120</sup> See also para 4.3.3.3(D) below.

<sup>1121</sup> In the sense of factual accuracy, precision, reliability, conformity, dependability.

<sup>1122</sup> See para 4.2.4.2(B)(ii) below.

<sup>1123</sup> Zimmermann *The New German Law of Obligations: Historical and Comparative Perspectives* (2005) 205. The discussion of the consumer protection legislation in chapter 3 serve to illustrate that the Act does not so much limit freedom of contract as to give expression to the notion of self-determination of contractual content. In doing so, it has incorporated the constitutional values of dignity, equality and freedom into the law of contract. See the chapter 3 para 3.6.10, 3.9 and 3.10

<sup>1124</sup> The consumer protection legislation, discussed in chapter 3, illustrate this symbiosis.

<sup>1125</sup> Section 1(c) of the Constitution. On a Public Law level, the rule of law protects basic rights by requiring the State to act in accordance with pre-announced, clear and general rules which must be enforced impartially and in accordance with fair procedures: Currie & de Waal *The Bill of Rights* 10-13.

within certain parameters. They promote equality by requiring compliance with certain prerequisites. They also conform to the value of *ubuntu* in that they seek to protect vulnerable members of society by requiring both contractants to have a say in a fundamental aspect – the essence - of their contractual relations. They also conform to the narrower definition of dignity in *Ferreira v Levin* in that, in the process of setting out the respective rights and obligations of the contractants, they provide for the uniqueness of the individual to come to the fore. On both readings of the notion of dignity,<sup>1126</sup> *essentialia* allow control over issues that have a definitive bearing on the cost-to-benefit ratio of their contract.

In summary, the notion of *essentialia* as imposing a positive duty of compliance on contractants does not detract from the principles of contractual autonomy and freedom of contract but rather enhances them.<sup>1127</sup> The recognition of *essentialia* as imposing a positive duty on contractants serves to give expression to societal norms that embody values such as good faith, dignity, equality and freedom. In complying with the demands made of them by *essentialia*, contractants act in concert with these societal norms.<sup>1128</sup>

(ii) The duty-imposing and power-conferring characteristics of *essentialia*

*Essentialia*, like legal norms, are both duty-imposing as well as power-conferring.<sup>1129</sup> Thus, like legal norms, they have a boundary-defining function<sup>1130</sup> as well as an enabling function.<sup>1131</sup> The duty-imposing aspect requires contractants to reach agreement on the *essentialia* within certain

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<sup>1126</sup> See para 4.2.4.2(A)(i) for the Mokgoro and the Ackermann interpretations.

<sup>1127</sup> *Essentialia* provide the parameters within which individuals are free to bind themselves to ensure contractual integrity and to give expression to the function of law as one of promoting a peaceful and harmonious society based on the universal values of dignity, equality and freedom. See para 4.2.4.2(A)(ii) above.

<sup>1128</sup> Hogg *Promises and Contract Law Comparative Perspectives* (2011) xiii-xiv, hereafter *Hogg Promises and Contract Law*.

<sup>1129</sup> Hosten *Introduction*. The authors explain that legal norms refer “generally to that component of a legal system which directs the behaviour of human beings by imposing duties or conferring powers on them...” (18-19).

<sup>1130</sup> The boundary-defining function of the law is discussed in para 4.2.2 above.

<sup>1131</sup> The enabling function of contracts is discussed in para 4.2.3 above.

parameters,<sup>1132</sup> whereas the power-conferring aspect permits contractants the freedom to determine the specifics of the *essentialia* within the confines of the parameters so set.<sup>1133</sup> This is in line with the social contract theory where there is a simultaneous promotion and limitation of individual rights and freedoms.<sup>1134</sup> In contracts of sale, for example, it is required that contractants must agree on the price and that the price must be objectively ascertainable *ex facie* the agreement,<sup>1135</sup> which affords the contractants the liberty to decide by which method the price will be determined.<sup>1136</sup>

*Essentialia* reflect the tension evident in the law of contract between certainty and flexibility.<sup>1137</sup> The duty-imposing aspect which places all contractants in the position of formal,<sup>1138</sup> procedural<sup>1139</sup> and substantive equality,<sup>1140</sup> both as far as risk<sup>1141</sup> and recourse are concerned, promotes certainty whilst the power-conferring aspect is conducive of flexibility.

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<sup>1132</sup> The duty is an absolute one that is based on principle and policy as explained in the text following this footnote reference.

<sup>1133</sup> In a similar vein Dworkin in *Taking Rights Seriously* distinguishes duty-based theories from rights-based theories. Whilst both place the individual at the centre, regarding his/her decision to be of fundamental importance, the former treat codes of conduct as “of the essence” and conformity is obligatory, with adverse consequences following on non-conformance. In the latter, codes of conduct are instrumental in protecting the rights of others (172).

<sup>1134</sup> Discussed in paras 4.2.1 and 4.2.2 above.

<sup>1135</sup> This includes the express and tacit terms of the contract. See Lubbe & Murray *Contract* 314 and the cases mentioned there.

<sup>1136</sup> In this context, the thesis is concerned with the question whether an agreement to pay a reasonable price or a unilaterally determined price (being the manifestation of the exercise of the power-conferring component of the *essentiale*) satisfies the duty imposed on the contractants.

<sup>1137</sup> See the discussion of the tension in chapter 1 para 1.3.3.

<sup>1138</sup> Formal equality is attained in that the duty displays the characteristics of uniformity, consistency, predictability, generality and impartiality: Hosten *Introduction* 29-30.

<sup>1139</sup> The notion of procedural equality is aimed maximizing equality amongst the members of society by taking cognizance of socio-economic inequalities.

<sup>1140</sup> In the first half of the nineteenth century, equality was understood to mean formal equality in the sense that equality is promoted by the uniform application of a principle regardless of the individual (the notion of equal treatment under the law). Formal equality, however, resulted in the entrenchment of social and economic inequalities. During the last quarter of the nineteenth century, the notion of procedural equality gained acceptance when the law began to recognise and to correct social inequalities. The notion of substantive equality that takes the discourse further and includes taking affirmative steps to redress existing social and economic inequalities, is a product of legal discourse in the late twentieth century: Hawthorne 1995 (58) *THRHR* 158-160. See also Petersmann ‘Human Rights and International Economic Law’ 8.

<sup>1141</sup> The importance of the “risk-regulatory” role cannot be over-emphasised, more so if one takes into account the fact that it is illusory to accept, as matter of principle that equal bargaining power exists. See the discussion in chapters 2 and 3 in regard to bargaining power.

Hence, the *essentialia* promote equality, and hence dignity,<sup>1142</sup> on the formal, procedural and substantive levels. The duty-imposing element of *essentialia* promotes formal equality in that compliance is incumbent on everyone without exception. In promoting formal equality (requiring joint decision-making), *essentialia* also serve to give expression to the principles of autonomy and consensus which are central to classical theory of contract law. In doing so, it acknowledges the classical contract law's recognition of these notions as being inherently worthy of respect and of protection. It also acknowledges the fact that this recognition was granted constitutional legitimacy in the *Barkhuizen* case.<sup>1143</sup>

By imposing a duty on both contractants to negotiate and reach agreement on a price, the law seeks to level the playing field,<sup>1144</sup> thereby affording both sides the opportunity to participate, in a meaningful way, in the decision-making process. The classical contract law notion of the primacy of individual liberty and autonomy also find practical expression in the duty to negotiate and reach agreement on the price.<sup>1145</sup>

The concept of joint participation is enhanced by the fact that the power-conferring function must be exercised within defined parameters. This is evidenced by the requirement in contracts of sale that the agreement between the contractants must be such that the price must be ascertained or objectively ascertainable. The notions of reasonableness and fairness are inherent in the requirement that the price must be ascertained or objectively capable of ascertainment.<sup>1146</sup> In other words, the general rationale for the requirement of objective

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<sup>1142</sup> See the discussion of the interconnectedness between the notions of dignity and equality in para 4.2.4.2(A) above.

<sup>1143</sup> *Barkhuizen* 2007 (5) SA 323 (CC) discussed in chapter 1 para 1.3.3 and in chapter 2.

<sup>1144</sup> An uneven playing field exists as a result of, for example, standard form contracts, exemption clauses, and unequal bargaining power brought about by, *inter alia*, economic and social inequalities. See chapter 2 para 2.4.

<sup>1145</sup> See also Hosten *Introduction* 30-31 and the discussion in chapter 2 para 2.8.

<sup>1146</sup> In *Westinghouse v Bilger* 1986 (2) SA 555 (A), hereafter *Westinghouse* 1986 (2) SA 555 (A), the Appellate Division held that "there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a price. They must either fix the amount of that price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without reference to them" (547C-D). The decision affirms the principle that it should be possible for even a total stranger to



ascertainability is the promotion of reasonable and fairness in contract. Hence, reasonableness and fairness cannot function as an alternative to the requirement of objective ascertainability.<sup>1147</sup>

The considerations underlying the duty-imposing and power-conferring aspects of *essentialia* as discussed above (and below) find resonance in the policy considerations underlying the duty of disclosure, especially in regard to price, in the consumer protection legislation<sup>1148</sup> and are, similarly, suggestive of a duty to negotiate in good faith.<sup>1149</sup>

In summary, the duty imposed to reach consensus on the price responds both to the requirement of good faith that is evident in consumer protection legislation and that is implicit in contract law (though the notion has not received express recognition by the South African courts)<sup>1150</sup> as well as to the public policy protection of vulnerable consumers.<sup>1151</sup> In so doing, the duty provides additional protection for the reasonable expectations of the contractants. By tying the hands of the contractants, *essentialia* have the effect of promoting credible commitments amongst contractants and of aligning their material interests. By requiring agreement on the price, the law seeks to bring force to bear on contractants to minimise the risk factor by providing, where relevant, for future uncertainties. By insisting on compliance

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ascertain the price by utilising the external standard specified in the contract; the contractants then playing no role in this process other than to pay and to receive the price. See also *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) 14G-H, hereafter *Murray & Roberts* 1991 (1) SA 508 (A); *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 (4) SA 141 (SCA) 158F-H, hereafter *Lambons* 1997 (4) SA 141 (SCA); *Kerr Sale and Lease* 30-34. The rental requirement in contracts of lease is similarly formulated in *Proud Investments v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A) 746G-H. See further chapter 1 paras 1.2 and 1.4.2.2(A).

<sup>1147</sup> Considerations of reasonableness and fairness, and good faith (see para 4.2.4.4 below) provide justification for the duty-imposing component that requires contractants to jointly decide on the price and rental. Hence they provide the rationale why the right corresponding to the duty may not be surrendered by agreeing to a reasonable price or rental or to a unilaterally determined price or rental.

<sup>1148</sup> The discussion in chapter 3 revealed that price transparency is one of the hallmarks of the Consumer Protection Act; information regarding price being a vital component of the prized notion of making an informed choice.

<sup>1149</sup> See the discussion of good faith in chapter 3 and in particular in paras 3.6.10, 3.9 and 3.10. See further the discussion of *essentialia* and the duty of good faith in para 4.2.4.4 below.

<sup>1150</sup> See the discussion in chapter 2 para 2.8.

<sup>1151</sup> See the discussion in chapter 3 above.



with the duty-imposing aspect, contract law minimises the potential for disputes, thereby promoting the (continued) existence of an ordered and orderly contract. In promoting the above, the duty-imposing component of *essentialia* facilitates procedural and substantive fairness, and, in the process, gives practical effect to the constitutional values of dignity, equality, and freedom. Hence, the right corresponding to the duty to agree on a price belongs to the category of rights which is too fundamental to bargain away by, for example, concluding an agreement that allows for a reasonable price or for the unilateral determination of the price. Against this background, the introduction of a unilateral discretionary power to settle the price or rental<sup>1152</sup> would impoverish the constitutional values as constituent elements of the duty-imposing and the power-conferring components of *essentialia* and have the effect of introducing uncertainty, thereby increasing the element of risk.<sup>1153</sup>

(iii) Reconciling the duty-imposing and power-conferring aspects of *essentialia*

*Essentialia* by their very nature constrain contractual autonomy and individual freedom but in doing so they promote certainty, fairness, equity and stability in the legal order. They do so by protecting the reasonable expectations of the contractants by requiring both sides to plan their future (basic) commitments efficiently and as accurately as possible at date of contract. The significance of this role is underlined by the fact that whilst the principles of contractual autonomy and individual liberty, valued by classical law contract lawyers, permit the

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<sup>1152</sup> See para 4.3.3 below. It will be recalled that in *NBS Boland Bank* 1999 (4) SA 928 (SCA) the court was of the view that an agreement that gave one on the contractants the power to unilaterally determine the price or rental in contracts of sale and lease respectively, should be regarded as valid.

<sup>1153</sup> Such a development would run counter to the policy considerations underlying legislation seeking to give effect to the constitutional imperative to promote socio-economic reforms for the attainment of a just and egalitarian society. See, for example, the legislation discussed in chapter 3; the Housing Act 107 of 1997 (to promote and coordinate the building and provision of housing); the Development Facilitation Act 67 of 1995 (to fast track the development of land; to improve security of tenure to land users); the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (provides the procedure for the eviction of persons who occupy land unlawfully); the Basic Conditions of Employment Act 75 Of 1997 (relating to wages and working hours). The uncertainty and risk may also diminish the value of, and trust in contract as an obligation-creating mechanism.

qualification and even exclusion of *naturalia*,<sup>1154</sup> this possibility does not exist in relation to *essentialia*. The policy considerations underlying *essentialia*<sup>1155</sup> may therefore be said to trump the considerations informing the notions of contractual autonomy and individual liberty<sup>1156</sup> in that they preclude the exclusion of the core protective mechanisms imposed by the law, namely, that the content of the agreement on the *essentialia* must be objectively ascertainable *ex facie* the contract.

It was pointed out earlier<sup>1157</sup> that rigid adherence to rules may compromise individual and judicial discretion, with good faith, fairness, and reasonableness amongst the casualties, whilst (excessive) flexibility may dilute certainty, with the rule of law and respect of the law as possible casualties. Furthermore, it was suggested that public policy, as informed by the provisions and values of the Constitution appears to be the mechanism favoured by the Constitutional Court to achieve a balance between certainty and flexibility.<sup>1158</sup> It is submitted that the same mechanism favours maintaining the balance between the duty-imposing and power-conferring aspects of *essentialia* that the *Westinghouse* principle<sup>1159</sup> brings. In other words, public policy, as informed by constitutional values, militates against the evisceration of the duty-conferring aspect that would result from the recognition of contracts of sale at a reasonable price or a unilaterally determined price.<sup>1160</sup>

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<sup>1154</sup> Where such exclusion is permitted by the law.

<sup>1155</sup> Discussed in para 4.2.4.2(B)(i) and (ii) above.

<sup>1156</sup> See chapter 2 paras 2.2 and 2.3 for a discussion of the principles of autonomy and individual liberty.

<sup>1157</sup> In chapter 1 para 1.3.3.

<sup>1158</sup> See *Barkhuizen* 2007 (5) SA 323 (CC) paras [87] and [28] discussed in chapter 1 para 1.3.3.

<sup>1159</sup> The principle requires that the price must be objectively ascertainable *ex facie* the contract.

<sup>1160</sup> This being the question of law under investigation in this thesis.

#### 4.2.4.3 *Essentialia* as rules or standards

##### (A) *Essentialia* as rules

The significance of the role of *essentialia* can further be illustrated with reference to difference between rules and standards.<sup>1161</sup> Whilst both constitute legal norms that are used to determine and adjudicate human conduct, rules impose stricter limits on the exercise of discretion in conduct and adjudication, whilst standards are more open-ended,<sup>1162</sup> allowing for greater latitude for discretionary conduct and “fact-specific” adjudication.<sup>1163</sup> In practice, the costs<sup>1164</sup> to the judiciary in determining whether a litigant has complied with a standard or to a contractant to prove that a standard has not been complied with,<sup>1165</sup> or to an individual who has to wrestle with the problem of determining which level of precaution is sufficient to escape censure, is significantly higher than in the case of rules. Rules provide a model of clearly defined



<sup>1161</sup> The rule being that a reasonable price or a unilaterally determined price does not satisfy the requirement that the price must be objectively ascertainable *ex facie* the contract. Viewed as a standard, such agreements would constitute valid contracts of sale. See the discussion in chapter 5.

<sup>1162</sup> For example, the standards of the reasonable person, good faith and unconscionability.

<sup>1163</sup> Feldman & Lifschitz ‘Behind the Veil of Legal Uncertainty’ (2011) Vol 74 Bar ILan Univ. Pub Law Working Paper No 11-10, 125, 126-127 <<http://ssrn.com/abstract=1633429>>, hereafter Feldman & Lifschitz (2011) Vol 74 Bar ILan Univ. Pub Law Working Paper No 11-10; Feinman (1982-1983) 30 *UCLA LR* 829, 844-845. Standards are fact specific in that the facts of the case have a large bearing on the outcome. This may give rise to a multiplicity of precedents that may compromise certainty, uniformity and clarity: Speidel ‘Restatement Second: Omitted Terms and Contract Method’ (1981-82) 67 *Cornell LR* 785, 791-792. Camero ‘Level Up: Employing the Commerce Clause to Federalize the Sale of Goods’ 1, 13 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2027482](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027482)> [last accessed on 06 December 2012]. Accepted for publication 2013. Publication details as follows: Jennifer Camero, Level Up: Employing the Commerce Clause to Federalize the Sale of Goods, 50 *San Diego Law Review* (2013); Danzig ‘A Comment on the Jurisprudence of the Uniform Commercial Code’ (1974-1975) 27 *Stanford LR* 621, 632 & 626-631, hereafter Danzig (1974-1975) 27 *Stanford LR*; Murphy, Speidel & Ayres *Studies in Contract Law* (2003) 29; Ayres & Gertner ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’ (1989-1990) 99 *Yale LJ* 87, 89 n13. See also chapter 5 para 5.2.2.2(D)(i)(c).

<sup>1164</sup> In a broad sense this would include factors such as time, effort, energy, costs associated with litigation.

<sup>1165</sup> In the context of the notion of a reasonable price or one that is unilaterally determined, the onus would be on the “disempowered” contractant who would have to bear the brunt of the transaction costs associated with litigation. These include having to decide whether or not to litigate which would be dependent on considerations such as the likelihood of success, capacity and inclination to prosecute the claim, cognitive ability, resources available in terms of means, time and energy.

and highly administrable principles that promote individual autonomy and consensus that form the basis of contract law.<sup>1166</sup>

Any society, regardless of size and complexity, “that seeks the advantages of modernity ... requires rules to guide the conduct of individuals...”<sup>1167</sup> The effective functioning of such rules requires that “the rules must display a significant degree of regularity, comprehensibility, and stability – what Professor Lon Fuller has called the ‘internal morality of law.’”<sup>1168</sup> Conventional wisdom suggests that rules are to be preferred when an activity occurs frequently.<sup>1169</sup> “Uniformity and universality are essential characteristics of it ... The essential meaning and intention of the rule must be uniform.”<sup>1170</sup> It is these qualities that make rules typically easier to apply. In addition, rules are easier for the public to understand and hence for the public to predict their effects and to tailor their (the public’s) conduct accordingly. The resultant certainty inspires confidence in contract as an obligation-creating mechanism.<sup>1171</sup> The costs of legal advice are also lower.<sup>1172</sup>

However, the characterisation of *essentialia* as rules does not suggest a mechanical application thereof. It was explained above that the duty-imposing part requires the participation of both contractants in the setting of the price whilst the power-conferring part allows for the exercise of discretion within certain parameters, and, that individually and cumulatively, the two give expression to the notions of reasonableness and fairness and the constitutional values of dignity, equality, and freedom. Hence, the approach allows for a purposive adjudication in that

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<sup>1166</sup> Kennedy ‘Form and Substance in Private Law Adjudication’ (1975-1976) 89 *Harvard LR* 1685, hereafter Kennedy (1975-1976) 89 *Harvard LR* 1685.

<sup>1167</sup> Fried (2007) 120 *Harvard LR* 1, 1.

<sup>1168</sup> Fried (2007) 120 *Harvard LR* 1, 2; Feinman (1982-1983) 30 *UCLA LR* 829, 844.

<sup>1169</sup> Allen *Law* describes a legal rule as establishing a “generalization for an indefinite number of cases of a certain kind” (384). See also Kennedy (1975-1976) 89 *Harvard LR* 1689.

<sup>1170</sup> Allen *Law* 384.

<sup>1171</sup> Feinman (1982-1983) 30 *UCLA LR* 829, 844. Certainty allows for planning and increases the likelihood that private activity will follow a desired pattern. It also disinhibits contractants who would otherwise be cautious when “gains are subject to sporadic legal catastrophe.” Kennedy (1975-1976) 89 *Harvard LR* 1688-1689.

<sup>1172</sup> Feldman & Lifschitz (2011) Vol 74 Bar ILan Univ. Pub Law Working Paper No 11-10, 127.

a court may examine the conscionability of the product of the exercise of the power-conferring aspect of *essentialia*. A process of purposive adjudication would facilitate the alignment of classical contract law with the social and policy goals that underpin, for example, consumer protection legislation which, in turn, are in alignment with the constitutional values of dignity, equality, and freedom.<sup>1173</sup>

#### (B) *Essentialia* as standards

Standards, on the other hand, “do best when behaviour varies so greatly that any particular scenario is rare.”<sup>1174</sup> Standards allow for “purposive adjudication,” the idea being that “a ‘just’ legal outcome should be produced on the facts of each case, even if this involves introducing a measure of uncertainty.”<sup>1175</sup> It has been suggested that standards, though affording realisation of the notion of altruism, produce *ad hoc* decisions which have little value as precedents.<sup>1176</sup> Thus, rules promote certainty by minimising the role of judicial discretion<sup>1177</sup> whilst standards have the opposite effect.<sup>1178</sup>

#### (C) Analysis

When viewed from the perspective of the distinction between rules and standards, the notions of a reasonable price and a unilaterally determined price, both of which would operate as standards, introduce uncertainty<sup>1179</sup> which would be exacerbated by the casuistic interpretation

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<sup>1173</sup> See chapter 3. See also the cases discussed earlier in this chapter and the examples of legislation in other areas of the law that reflect similar aspirations.

<sup>1174</sup> Feldman & Lifschitz (2011) Vol 74 Bar ILan Univ. Pub Law Working Paper No 11-10, 127.

<sup>1175</sup> Cockrell (1992) 109 *SALJ* 43.

<sup>1176</sup> Kennedy (1975-1976) 89 *Harvard LR* 1685. See also chapter 5.

<sup>1177</sup> This is in line with the philosophy of the Supreme Court of Appeal as is evident in the discussion of relevant cases in chapter 2 and particularly in paras 2.6 and 2.8 thereof.

<sup>1178</sup> See also chapter 5 para 5.2.2.2(D)(i)(c).

<sup>1179</sup> The incompleteness of the generalization, this being a consequence sought to be avoided by legal rules, “may produce results which are antithetic to the very purpose of the generalization”: Allen *Law* 385. See also para 4.3.4 below regarding the indeterminateness of the standard of a reasonable price.

thereof.<sup>1180</sup> It is further submitted that a ‘just’ legal outcome is best attained by allowing the contractants to determine what is just with reference to their own personal circumstances.<sup>1181</sup> For example, the plain language requirement of the Consumer Protection Act<sup>1182</sup> exemplifies the notion of self-determination and hence the constitutional value of human dignity. The conclusion that recognition of a reasonable price and a unilaterally determined price would introduce uncertainty, and that contractants are in the best position to judge what is just for themselves is supported by the notion that “[l]aw and justice exist for the regulation of actual rights and duties.”<sup>1183</sup>

Since contracts of sale occur daily at a frequency that is probably immeasurable, it is reiterated that the rules framework for *essentialia* best suit the needs and aspirations of those who engage in it. This is especially true in relation to payment of the price (and rental), it being a fundamentally important self-imposed obligation.<sup>1184</sup> The significance of this observation is underscored by the fact that contracts of sale (and lease) are practically the most important contract in modern commercial society.<sup>1185</sup> One of the purposes of negotiation, bearing in mind

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<sup>1180</sup> Bearing in mind the fundamental role played by *essentialia* (as explained in paras 4.2.4.2(B) and 4.2.4.3)) the casuistic development of the *obiter dicta* may further estrange the (lay-) contractant from the intricacies of the law as courts, in arriving at solutions, consider “the deposits of their own or their predecessors’ prior dealings with similar situations.” In the process the law of contract would give “the cautious and canny layman an advantage over his unschooled adversary”: Llewellyn (1931) 40 *Yale LJ* 713-714. See further in this regard the discussion of the notions of reasonableness, the reasonable person as well as that of the *arbitrio boni viri*, and the problems associated with the notion of developing a gold standard for the test of reasonableness in para 4.3.4 below.

<sup>1181</sup> Since the contractant is knowledgeable about his/her personal circumstances, the contractant would, in theory, be in the best possible position to determine what is “just” for himself/herself. In chapter 2 para 2.2, it was shown that the classical approach to contract law, followed in South Africa, emphasises values of individual freedom and equality. It was also shown there that utilisation of legal rules on the assumption that the values are realised could result in hardship, for example, in the case of unequal bargaining power. The policy issues underlying consumer protection legislation (discussed in chapter 3) are clearly aimed at countering abuses that resulted from an adherence to the classical law approach to the notions of individual freedom, autonomy and the presumption of consensus.

<sup>1182</sup> Chapter 3 para 3.6.3.4

<sup>1183</sup> *Allen Law in the Making* (1964) 385, hereafter *Allen Law*.

<sup>1184</sup> See further para 4.3.3.3(D) below.

<sup>1185</sup> Robbers *The Legal Systems of European States An Introduction to German Law* (2003) 240. Van der Bergh notes that Van der Linden (1756-1835), a Roman-Dutch writer, acknowledged that contracts of sale were the most common transactions in society: Van der Bergh “The Roman tradition in the South African contract of

that price is amongst the major determining factors in decisions to purchase, is to augment customer information and to facilitate comparative shopping.<sup>1186</sup> Thus in terms of the methodology of the legal realists that is committed to the task of testing ‘the desirability, efficiency and fairness of inherited legal rules and institutions in terms of the present day needs of society,’<sup>1187</sup> the rule-orientated approach to *essentialia* is apposite in that it promotes, not only, business efficiency and fairness, but also the constitutional values of dignity, equality and freedom, by requiring contractants to negotiate and agree on a crucial aspect of the law that they create for themselves. In preventing the usurpation of the right to negotiate and reach agreement on a price,<sup>1188</sup> freedom of contract as well as social justice is promoted. Hence, the trade-off between certainty and discretion in favour of certainty is justified.<sup>1189</sup>

Furthermore, our courts have interpreted public policy as suggesting that contractants are bound by their voluntarily assumed choices and have expressed a marked reluctance to come to the assistance of a contractant on the basis of “vague” notions such as good faith.<sup>1190</sup> In this regard, it was commented that “the limited number of grounds on which a party may escape liability under an agreement satisfying the general requirements for the validity of contracts is indicative of our courts’ adherence to the theory that public policy demands recognition of the principle of *pacta sunt servanda*.”<sup>1191</sup> The principle of contractual autonomy would suggest that there is nothing wrong with an agreement to grant unilateral discretionary power because the

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sale” (2012) 1 TSAR 53, 62. Bearing in mind the approximately 200 year gap between the two observations, it is probably not incorrect to conclude that the observations hold true for all time.

<sup>1186</sup> See the policy considerations underlying consumer protection legislation discussed in chapter 3.

<sup>1187</sup> Priest ‘Contracts Then and Now: An Appreciation of Friedrich Kessler’ (1994-1995) 104 *Yale LJ* 2145, 2150; Van Zelst *The Politics of European Sales Law: A Legal-Political Inquiry Into the Drafting of the Uniform Commercial Code, Vienna Sales Convention, the Dutch Civil Code and the European Consumer SA* (2008) 40.

<sup>1188</sup> Usurpation would be a consequence attendant on the recognition of both a reasonable price and a unilaterally determined price.

<sup>1189</sup> Lending further support to the conclusion that certainty ought to be favoured is the theory that “when the social norms of non-compliance serve individuals’ self-interests, legal rules are preferable to legal standards as a tool to achieve compliance.” Feldman & Lifschitz (2011) Vol 74 Bar ILan Univ. Pub Law Working Paper No 11-10, 127.

<sup>1190</sup> See the discussion of good faith in chapter 2 para 2.8.

<sup>1191</sup> Lubbe & Murray *Contract* 387. See also chapter 2 para 2.3.



contractants had agreed thereto. Hence, so the argument would go (ignoring considerations such as unequal bargaining power)<sup>1192</sup> the element of risk was assumed voluntarily. However, the validity of this argument is negated by the fact that factors such as limited markets and information costs<sup>1193</sup> limit the choice of contractual partners and contractual terms. Hence, the voluntary nature of the allocation and acceptance of risk is highly suspect.<sup>1194</sup>

A rule-based approach promotes negotiation which is vital in contract-creation in that it induces disclosure thereby providing vital information.<sup>1195</sup> Negotiation promotes awareness and allows a contractant to pay due attention to the various options available to him/her. It also promotes awareness of options available to the other contractant over which he/she (the first mentioned contractant) has no control and which may have a bearing on his/her own decision. Equally important, is that it allows a contractant to take into account personal priorities, enabling him/her to attain those consequences most favourable to him/her.<sup>1196</sup> Negotiation on price, in a nutshell, promotes informed decision-making on a cardinally important aspect of contractual relations. In the result, it creates a much sounder basis for the public policy imperative that contracts must be honoured.<sup>1197</sup> These benefits underpin the information and disclosure and plain language provisions of the consumer protection legislation discussed in chapter 3.

In contradistinction to this, negotiation as a self-protective mechanism in the context of the standard of reasonableness vanishes like mist in the sun. Agreements to a reasonable price or one that is unilaterally determined prevent the public from “do[ing] the best that they can for

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<sup>1192</sup> See for example, the discussion of cases such as the *Afrox* case in chapter 2.

<sup>1193</sup> For example, the cost, time and energy expended in making comparisons; cognitive limitations to anticipate consequences and/or to identify and provide for future developments.

<sup>1194</sup> See also the discussion in chapters 2 and 3.

<sup>1195</sup> The importance of information and disclosure is illustrated in the discussion of the consumer protection legislation in chapter 3.

<sup>1196</sup> Speidel ‘Unconscionability, Assent and Consumer Protection’ (1970) 31 *University of Pittsburgh LR* 359 n3, hereafter Speidel (1970) 31 *University of Pittsburgh LR* 359.

<sup>1197</sup> The conclusions are supported by the consumer protection legislation provisions relating to disclosure discussed in chapter 3.

themselves, given their circumstances.”<sup>1198</sup> Such agreements detract from, not only, the principle of contractual autonomy, but also, the requirement of consensus.

#### (D) Conclusion

The submission is that the integrity of contract as a regulatory institution that promotes contractual trust and integrity, and the constitutional values as enunciated in the *Barkhuizen* case<sup>1199</sup> is best attained in a rule-based dispensation - the rule being that the price must be objectively ascertainable *ex facie* the contract. Hence, it stands to reason that the security of human rights and capital investment can best be guaranteed by a rule that is known today and that can be enforced tomorrow.<sup>1200</sup> The *essentiale* of price, cast as rules, serve to ensure that one of the fundamental principles underlying legality and contractual validity, namely, that contractants have knowledge of the nature and consequences of their (contractual) conduct, is not frustrated. The standard of the *arbitrio boni viri*,<sup>1201</sup> denigrated as “generalised second-guessing of the exercise of contractual powers on rationality grounds...”<sup>1202</sup> would fly in the face of these attributes and specifically of the attribute that the law must provide, *inter alia*, certainty, predictability and uniformity and in so doing promote the dignity, equality and freedom of the contractants.

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<sup>1198</sup> Schwartz ‘Justice and the Law of Contracts: A Case for the Traditional Approach’ (1986) 9 *Harvard Journal of Law and Public Policy* 107, 108.

<sup>1199</sup> 2007 (5) SA 323 (CC). In chapter 1, it was concluded that the judgment confirmed that the basic values of dignity, equality and freedom and the rule of law that underpin the Constitution and the Bill of Rights find expression in the principles of freedom and sanctity of contract that form the bedrock of the law of contract.

<sup>1200</sup> Reavley ‘The Rule of Law for Judges’ (2003) 30(1) *Article 2 Pepperdine LR* 1.

<sup>1201</sup> In *NBS Boland Bank* 1999 (4) SA 928 (SCA) the standard of the *arbitrio boni viri* was proffered as a safeguard against the possibility of exploitative conduct that may result from the unilateral exercise of power to settle the price. See further para 4.3 below.

<sup>1202</sup> Cockrell (1997) *Acta Juridica* 32.

#### 4.2.4.4 *Essentialia* and the duty of good faith

As in the case of the rule of law,<sup>1203</sup> *essentialia* have both a formal and a substantive component:<sup>1204</sup> in compliance with the former, the conduct must not be arbitrary or capricious whilst in respect of the latter, *essentialia* exact respect for the rights of the individual contractants. Capricious conduct is averted by requiring both contractants to decide jointly. Substantive fairness is attained by providing parameters within which joint decision-making must be exercised. Thus, *essentialia* serve to preclude unconscionable conduct in that they allow for both contractants to participate in the process of making meaningful choices whilst at the same time minimizing the possibility of contractual terms that are unreasonably favourable to one of the contractants.<sup>1205</sup>

In general, a contract is deemed to be unconscionable when there is an absence of a meaningful choice on the part of one of the contractants (procedural unconscionability) coupled with contract terms that are unreasonably unfavourable to one of the contractants (substantive unconscionability).<sup>1206</sup> In the context of contracts of sale, the requirement that the price must be objectively ascertainable *ex facie* the contract, at one stroke ensures the contractants meaningful choice on the price (procedural conscionability) and simultaneously serves to prevent one of the contractants from unilaterally setting the price (substantive conscionability). Hence, it also operates to minimise the risk of weak (for example, poor, illiterate, needy) consumers who may serve as inviting targets for opportunistic sellers.<sup>1207</sup>

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<sup>1203</sup> See paras 4.2.2 and 4.2.4.2(B) above. See also Currie & de Waal *The Bill of Rights* 12-13.

<sup>1204</sup> See also para 4.2.4.2(B)(ii) above.

<sup>1205</sup> Exploitation consequent on the exercise of a unilateral discretionary power or the imposition of unfair or unreasonable terms is avoided.

<sup>1206</sup> Horowitz 'Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts' (1986) 33 *UCLA LR* 940.

<sup>1207</sup> The invidious position of such weak consumers, both in the commercial as well as in the legal domain, was dealt with in general in chapter 2. Chapter 3 illustrated the policy initiatives to overcome such weaknesses.

The discussion thus far suggests a duty to conduct negotiations in good faith.<sup>1208</sup> For example, earlier,<sup>1209</sup> it was shown that the duty-imposing and power-conferring aspects of *essentialia* embody the notions of dignity, equality and freedom. It was also shown that *essentialia* reflect the pursuit of a balance between certainty and flexibility (freedom/discretion) that characterizes the law.<sup>1210</sup> It was further shown that in the South African constitutional dispensation, the balance between certainty and flexibility is sought to be attained by the utilization of the values of dignity, equality and freedom.<sup>1211</sup> The standard of good faith that in practical terms entails that a contractant may not over-protect its interests at the unreasonable expense of another<sup>1212</sup> reflects the constitutional values of dignity, equality and freedom as defined and explained by the Constitutional Court.<sup>1213</sup> Hence, the concept of good faith as being reflective of the values of dignity, equality and freedom is inherent in the notion of *essentialia*. This much is borne out in the *obiter dicta* in *Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd*.<sup>1214</sup> In that case, the Appellants had argued that the Constitutional Court, as per its constitutional mandate,<sup>1215</sup> should develop the common law by imposing on contractants a duty to negotiate in good faith and in accordance with the values of *ubuntu*. The Constitutional Court responded by suggesting that in light of the value of *ubuntu* “which inspires much of our

<sup>1208</sup> The very strong *obiter dicta* in the *Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) in favour of the recognition of a duty to negotiate in good faith supports such a conclusion. See the discussion in the text after this footnote reference.

<sup>1209</sup> Para 4.2.4.2(B) above.

<sup>1210</sup> Paras 4.2.4.2(B) and 4.2.4.3 above.

<sup>1211</sup> Para 4.2.4.2(A)(i) above.

<sup>1212</sup> Van der Merwe *et al Contract* 277-280.

<sup>1213</sup> See, for example, the cases referred to in para 4.2.4.2(A)(iii) of this chapter above. In giving practical content to the values of dignity, equality and freedom, negotiations would be open and transparent and based on full disclosure. The result would see a tempering of the adversarial paradigm in which each contractant seeks to exact the best possible deal without giving up too much with a resultant diminution in the level of trust that each has for the other. Contracts would be regarded as cooperative ventures where contractants are perceived as being engaged in a mutually beneficial relationship based on trust and joint action as seems to be the case in some civil law jurisdictions: Flechtner ‘The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’ (1997-1998) 17 *Journal of Law and Commerce* 187, 202-204.

<sup>1214</sup> 2012 (1) SA 256 (CC).

<sup>1215</sup> See section 39(2).

constitutional compact,” it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.<sup>1216</sup> Indeed, the solution to the question concerning a duty to conduct good faith negotiations that arose for decision in the *Everfresh* case could have been located in the *essentiale* (of rental) which incorporates the duty of good faith. This conclusion is supported by the court’s finding that “[t]he proposition that common law contract principles provides meaningful parameters to render an agreement to negotiate in good faith enforceable is decidedly more consistent with section 39(2) than a regime that does not.”<sup>1217</sup>

The beginnings of the recognition of a duty to negotiate in good faith may be located in the decision of the Supreme Court of Appeal in *Southernport Developments (Pty) Ltd v Transnet Limited*.<sup>1218</sup> The *Southernport* Court concluded that in an agreement that required the contractants to conduct good faith negotiations, the inclusion of a deadlock-breaking mechanism in the form of an arbitrator whose decision would, in the event of a dispute, be final and binding, was sufficient to render the agreement enforceable.<sup>1219</sup> The *Southernport* decision may be viewed as a precursor to the recognition of a general duty to negotiate in good faith.<sup>1220</sup>

The final step that needs to be taken and one that is already on the cards in view of the very

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<sup>1216</sup> At para [72].

<sup>1217</sup> Per Yacoob J para [36].

<sup>1218</sup> 2005 (2) SA 202 (SCA). The Appellant sought to enforce an agreement in terms whereof the Respondent had agreed to enter into good faith negotiations regarding the lease of certain properties. A further term in the agreement provided that in the event of a deadlock, the dispute would be referred to an arbitrator whose decision would be final and binding. The Respondent contended that the agreement to conduct good faith negotiations amounted to nothing more than an agreement to agree. In an earlier case (*Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA)) the Supreme Court of Appeal held that an agreement to agree was unenforceable because of the absolute discretion it vested in the contractants to agree or to disagree; the court would be unable to enforce the agreement in the event of a breakdown in negotiations. The *Southernport* court distinguished the *Premier, Free State* decision on the basis that the latter did not contain a deadlock-breaking mechanism.

<sup>1219</sup> See also *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A) 775-776 where the inclusion of a provision for arbitration rendered valid an option to renew a lease at a rental still to be negotiated; Van der Merwe *et al* *Contract* 195; Bhana *Annual Survey of South African Law* 205-206.

<sup>1220</sup> This is so despite the fact that the Court, at para [16], was at pains, despite its reference to the recognition of a duty to negotiate in good faith in labour law, at para [12], and in overseas jurisdictions, at paras [13]-[16], to make it clear that good faith, in itself, did not constitute a consideration that would render an agreement to negotiate, enforceable.

strong *obiter dicta* in the *Everfresh* case,<sup>1221</sup> is to discard the requirement of a deadlock-breaking mechanism.<sup>1222</sup> Such an approach finds support in the submission that the duty to negotiate in good faith is implicit in the notion of *essentialia* as discussed above. Further support may be found in the constitutional values of dignity, equality, and freedom and the values that inhere in the notion of *ubuntu* all of which are evident in the duty-imposing and power-conferring components of *essentialia*.<sup>1223</sup>

The provisions of the consumer protection legislation<sup>1224</sup> discussed in chapter 3 that illustrate that the public policy considerations and the constitutional values that inform the legislation can operate in harmony and even promote contract law principles, lend further support. Indeed, they underscore the conclusion that good faith requires the contractants to agree on a price that is objectively ascertainable *ex facie* the contract. The introduction of a duty of good faith in the pre-contract stage does not detract from the principle of certainty. Certainty is maintained by the fact that both contractants are required by the duty-imposing component of *essentialia* to agree to a price that is objectively ascertainable *ex facie* the contract. The duty of good faith, being an integral component of *essentialia* requires compliance with the duty-imposing function and at the same times serves as a boundary to regulate the substantive fairness of the negotiations and the resultant agreement (the power-conferring function of *essentialia*.)<sup>1225</sup>

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<sup>1221</sup> See, for example, paras [20], [23], [24], [36], [37], [71] and [72]. See also Van der Merwe *et al Contract* 196.

<sup>1222</sup> The discarding of the deadlock breaking mechanism has already been mooted. In *Indwe Aviation (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd* 2012 JDR 0924 (WCC), in an application for an interdict, Baartman J was of the view that the inclusion of an objective dispute resolution mechanism as per the *Southernport* case was not a *sine qua non* for enforcing an agreement to negotiate in good faith (para [30]). Hence, the *Indwe* and *Everfresh* judgments both point to a duty to negotiate in good faith. In light of these judgments it appears that it will probably only be a matter of time before such a duty receives judicial recognition.

<sup>1223</sup> See para 4.2.4.2(B) above.

<sup>1224</sup> Discussed in chapter 3. For example, in the pre-contractual duty of disclosure on the supplier, the plain language requirement, the provisions concerning grey- and black-listed terms.

<sup>1225</sup> See the discussion in para 4.2.4.2(B) above.

#### 4.2.5 Conclusion

*Essentialia* are not meant to be a mechanical and a value-free set of rules. In seeking to promote considerations of economic efficiency and distributive fairness, they serve to provide a foundation on which contractants may anchor their choices so as to obtain, in principle, mutually satisfactory consequences. An unsound foundation may result in uncertainty and the frustration of the intended outcome(s), with the valued notions of dignity, equality and freedom being further casualties.

The preceding discussion focused on the constitutional values of *essentialia*<sup>1226</sup> and contextualised its policy relevance.<sup>1227</sup> It also located the notion of *essentialia* within the framework of rules<sup>1228</sup> and clarified its relationship to the duty of good faith.<sup>1229</sup> From these discussions, it is evident that *essentialia* serve to limit the risk of the contractants by stipulating the minimum requirements demanded by society for the creation of legal liability.<sup>1230</sup> In setting minimum standards, *essentialia* promote justice by providing an approach to the creation of contractual obligations that is even-handed, one that avoids excessive rigidity<sup>1231</sup> and permits individualism. They also serve a communitarian<sup>1232</sup> purpose, *inter alia*, to promote consensus and certainty,<sup>1233</sup> to prevent disputes regarding content, and to counteract possible malpractices.<sup>1234</sup> Accordingly, it follows that the communitarian orientation of *essentialia* is

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<sup>1226</sup> See para 4.2.4.2(B) above.

<sup>1227</sup> See paras 4.2.4.2(B) and 4.2.4.3 above.

<sup>1228</sup> See para 4.2.4.3 above.

<sup>1229</sup> See para 4.2.4.4 above.

<sup>1230</sup> In paras 4.2.1 and 4.2.2 above, the law was described as having, in essence, a boundary-defining purpose. The discussion there also applies here.

<sup>1231</sup> See the duty-imposing and power-conferring functions in para 4.2.4.2(B) above.

<sup>1232</sup> “While individualism is a thesis of separation, communitarianism, as does *ubuntu*, stresses the value of connection: members of society are viewed as being interdependent on one another and who place their needs and cares on par with those of others. Feinman (1982-1983) 30 *UCLA LR* 842-844.

<sup>1233</sup> Certainty is discussed in chapter 2 para 2.6.

<sup>1234</sup> These functions ascribed in *Neethling v Kloppe en Andere* 1967 (4) SA 459 (A), 464, to formalities are also descriptive of the functions of *essentialia*. Section 2(1) of the Alienation of Land Act 68 of 1981 that requires any alienation of land to be reduced to writing and to be signed by or on behalf of the contractants on their written authority exemplifies these functions. The purpose thereof “is to promote legal certainty regarding the authenticity and contents of contracts, thereby limiting litigation and preventing malpractice and fraud”:



conclusive of the fact that the rights and obligations of the contractants are not determined exclusively by the intentions of the contractants.<sup>1235</sup> Since communitarianism emphasizes “reciprocity, solidarity and co-operation, and is committed to an ethics of altruism in terms of which the interests of others make a legitimate claim on us,”<sup>1236</sup> the role and function that *essentialia*, as described above, make them a perfect vehicle for the practical implementation of the concept of *ubuntu* and for incorporation of the constitutional values of dignity, equality and freedom in the contract law paradigm.<sup>1237</sup>

Earlier, it was concluded that the Constitutional Court<sup>1238</sup> confirmed that the basic values of dignity, equality and freedom and the rule of law that underpin the Constitution and the Bill of Rights find expression in the notions of freedom and sanctity of contract that form the bedrock of the law of contract. It is submitted that the recognition of the *obiter dicta* that recommend the recognition of a contract of sale and lease at a reasonable price and rental respectively, or at a unilaterally determined price or rental would compromise the freedom of a contractant to participate in the formation of one of the cardinal aspects (the essence) of the contract.<sup>1239</sup> Such recognition would call into question the ability of a contractant to compete on a platform of equality with a resultant deleterious effect on the contractant’s dignity. It is submitted that the constitutional values of dignity, equality and freedom which are inherent in the notion of *essentialia* act as a constitutional restraint on contractual autonomy that render an agreement to a reasonable price or a unilaterally determined price, invalid as being contrary to public

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Hutchison *et al* Contract 161. See also *Slabbert and Others v Slabbert and Others* (A55/2011) [2011] ZAFSHC 165 (20 October 2011). The requirement of writing also responds to the fact that the contract is enforced or administered or implemented by third parties or state officials. Fried (2007) 120 *Harvard LR* 4. The formalities in consumer protection legislation, discussed in chapter 3, also exemplify the legislator’s concern to reduce risk and to promote certainty as well as to reduce the possibility of (prohibitively) costly litigation.

<sup>1235</sup> The same orientation is evident in the consumer protection legislation discussed in chapter 3.

<sup>1236</sup> Cockrell (1992) 109 *SALJ* 42.

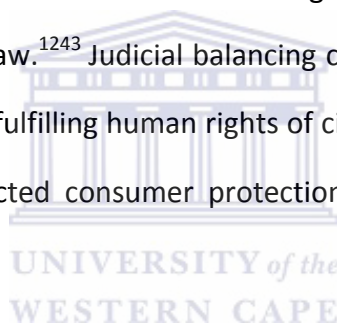
<sup>1237</sup> See the discussion in chapter 1 para 1.3.3 read with para 4.2.4 in this chapter.

<sup>1238</sup> *Barkhuizen* 2007 (5) SA 323 (CC) discussed in chapter 1 para 1.3.3.

<sup>1239</sup> Price as the essence of the contract is discussed in para 4.3.3.3(D) below.

policy.<sup>1240</sup> Hence, the values of dignity, equality and freedom confer constitutional legitimacy on the jurisprudential and policy considerations, as discussed in this chapter that underpin *essentialia*. Put differently, *essentialia* serve as the embodiment or practical manifestation of the notions of dignity, equality and freedom of all human beings engaged in the contractual domain.

That the constitutional aspects of the role and function of *essentialia*<sup>1241</sup> are deserving of more attention is supported by the fact that in the sphere of International Economic Law, a process of “judicial balancing” of human and economic rights has been operative in European courts for years and is now also being emulated in regional courts outside of Europe.<sup>1242</sup> In addition, more United Nations human rights institutions are acknowledging the need to strengthen human rights in International Economic Law.<sup>1243</sup> Judicial balancing can contribute to poverty reduction and to protecting, respecting and fulfilling human rights of citizens<sup>1244</sup> as is evident in the policy perspectives of the recently enacted consumer protection legislation.<sup>1245</sup> The protection of,



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<sup>1240</sup> The correctness of this line of reasoning has been recognised where an agreement infringes on an individual's bodily integrity. For example, see the minority judgments of O'Reagan and Sachs JJ in *S V Jordan and Others (Sex Workers Education and Advocacy Task force and Others as Amici Curiae)* 2002 (6) SA 642 (CC). See also the situation where the agreement “reduces a person to economic servitude” - *Coetzee v Comitis* 2001 (1) SA 1254 (C). The *Jordan* case dealt with the statutory prohibition of prostitution which was challenged on several grounds whilst the *Coetzee* case dealt with a contract that incorporated the National Soccer League Rules and Regulations, which prevented a professional soccer player from moving from one soccer club to another without obtaining the prior consent of the first club. This line of reasoning is also to be detected in pre-constitutional jurisprudence. See, for example, *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 13-14, where the court declared an agreement that placed the respondent in a position of economic servitude was unconscionable and incompatible with public interest and therefore contrary to public policy. See also Naudé & Lubbe ‘Exemption Clauses – A Rethink Occasioned by *Afrox Healthcare Bpk v Strydom*’ (2005) 122 SALJ 441, 452, hereafter Naudé & Lubbe (2005) 122 SALJ.

<sup>1241</sup> See para 4.2.4 above.

<sup>1242</sup> Petersmann ‘Human Rights and International Economic Law’ 2-3.

<sup>1243</sup> Petersmann ‘Human Rights and International Economic Law’ 2-3.

<sup>1244</sup> Petersmann ‘Human Rights and International Economic Law’ 2-3.

<sup>1245</sup> See the discussion in chapter 3.

respect for and fulfillment of human rights<sup>1246</sup> are also objectives of our own constitutional dispensation and there are tentative signs of their reception in contract law.<sup>1247</sup>

### 4.3 Unilateral discretionary powers and reasonable price or rental

#### 4.3.1 Introduction

It was postulated that a contract constitutes a record of the rights and obligations and of the nature and consequences of the legal relationship between the contractants.<sup>1248</sup> Contractants must have a clear understanding of their legal commitments towards one another. Such understanding is to be gained from the terms of their contract, the most significant of which constitute the *essentialia*. Hence, *essentialia* constitute the fountainhead of all that legally connect contractants.<sup>1249</sup> Agreement on price is one of the *essentialia* in contracts of sale and agreement on rental in contracts of lease.

The fundamental purpose or essence of a contract of sale and lease<sup>1250</sup> is agreement on the exchange of the goods for a sum of money. At common law, the parties may agree on any price,

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<sup>1246</sup> This would include poverty reduction, the provision of adequate health and educational services. See sections 26 and 27 of the Constitution.

<sup>1247</sup> See the discussion in para 4.2.4.2(A)(iii) above and in chapter 1 para 1.3.3. The Supreme Court of Appeal has not been very receptive to the idea of integrating public law principles in the sphere of contract law. See, for example, *Brisley* 2002 (4) SA 1 (SCA) where the court said "'n [h]of kan nie skuiling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en omver te werp nie..." (para [24]). See also *Bredenkamp* (appeal) 2010 (4) SA 637 (SCA) para [39] and *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) paras [31]–[36], hereafter *Potgieter* 2012 (1) SA 637 (SCA). These cases are discussed in chapter 1 para 1.3.3 and in chapter 2 para 2.2.4 (*Bredenkamp*); para 2.8 (*Brisley*); para 2.3.2.1 (*Potgieter*). The call for the integration of private and public law echoes the criticism of the Critical Legal Scholar movement of the distinction between private and public law: Van Doren 'Critical Legal Studies and South Africa' (1989) 106 *SALJ* 648, 659–661.

<sup>1248</sup> Para 4.2.4.2(A)(iii) above.

<sup>1249</sup> Zulman & Kairinos *Norman's Law of Purchase and Sale in South Africa* (2005) 1–3, hereafter Zulman & Kairinos *Norman's Law of Purchase and Sale* for a list of definitions of a contract of sale going back to Gaius (*Institutionem*) 3.1.39.

<sup>1250</sup> See para 4.3.3.3(D) below for a discussion of price and rental as the essence of the contract. As stipulated earlier, only the position relating to sale will be referred to because of the similarity between sale and lease. This is done to avoid repetition and for the sake of brevity.

there being no rule that the price must reflect any particular criterion,<sup>1251</sup> the only requirement being that the price must be certain in the sense that it is either ascertained or objectively ascertainable. The need for certainty regarding price is to ensure that the contract, in its essential aspects, reflects the wishes of the contractants.<sup>1252</sup>

The requirement that the price must be ascertained does not present a problem.<sup>1253</sup> Regarding the requirement of ascertainability, the common law accepts that the price is ascertainable where a nominee has been appointed to fix the price<sup>1254</sup> or where the contract contains a formula.<sup>1255</sup> In both instances (nomination and formula) the *Westinghouse* principle<sup>1256</sup> is complied with, the contract coming into existence on agreement about the nominee or the formula.<sup>1257</sup> However, problems arise when the external standard, itself, is considered to generate uncertainty. This has been the gravamen of the argument advanced against the recognition of a reasonable price<sup>1258</sup> and a unilaterally determined price.<sup>1259</sup> Before discussing

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<sup>1251</sup> Be it, for example, the market price or the cost of manufacture or that it must approximate such a price: See *Kerr Sale and Lease* 30 and 258-262. See also *Bradfield Sale and Lease* 21-22; *Cooper Landlord and Tenant* 55-59; *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) 185D-E, hereafter *Benlou* 1993 (1) SA 179 (A); *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 (2) SA 170 (W) 173G-I and 175H-I. However in respect of consumer sales, Section 48(1)(a)(i) of the Consumer Protection Act 68 of 2008, prohibits a price that is unfair, unreasonable or unjust. The fair value or the amount for which the goods or services could have been acquired elsewhere is a factor that is used to determine whether the term is unfair, unreasonable or unjust (Section 52(2)). Likewise, in contracts of lease, section 13 (4) and (5) of the Rental Housing Act 50 of 1999 empowers Rental Housing Tribunals to replace a rental with one that is "just an equitable" to the lessor and lessee. It is submitted that the two provisions give expression to the submission that the notion of good faith is an integral component of *essentialia* (see para 4.2.4.4), and that the power-conferring component of *essentialia* is subject to the duty of good faith.

<sup>1252</sup> Zimmermann *The Law of Obligations The Roman Foundations of the Civilian Tradition* (1990) 254, hereafter *Zimmermann Obligations* (1990).

<sup>1253</sup> See chapter 1 para 1.4.2.2(B).

<sup>1254</sup> See chapter 1 para 1.4.2.2(C) and para 4.4 above.

<sup>1255</sup> See chapter 1 para 1.4.2.2(C).

<sup>1256</sup> The principle requires agreement on a criterion or criteria on the basis whereof the price may be objectively determined without further reference to contractants. See further chapter 1 paras 1.1 and 1.2.

<sup>1257</sup> Nomination and formula are representative of the general contract law principle that an agreement that does not fully set out its consequences may, nevertheless, be effective provided that it lays down an external standard which renders the consequences thereof objectively ascertainable. The standard, itself, must be clear and the facts necessary for its application must be established: *Van der Merwe et al Contract* 197-201. See further chapter 1 para 1.4.2.2(C).

<sup>1258</sup> See, for example, *Adcorp Spares P.E. (Pty) Ltd v Hydromulch (Pty) Ltd* 972 (1) SA 663 (TPD) 668.

the notion of a unilateral discretionary power to settle the price and the notion of a reasonable price, it is apposite to restate the question of law under investigation.

#### 4.3.2 Restatement of the legal question

It is well established law that the price agreed upon must be certain in that it must be either ascertained or objectively ascertainable.<sup>1260</sup> This requirement constitutes one of the protective mechanisms devised and refined by our common law to promote certainty and to prevent abuses and disputes regarding the counter-performance expected of the buyer.<sup>1261</sup> Confounding the simplicity of this fundamentally important requirement is the devil in the detail, namely, what ought to be the accepted routes for arriving at such agreement? This question has pertinently presented itself in legal discourse as a result of an *obiter dictum* of the Supreme Court of Appeal<sup>1262</sup> that suggests that a discretionary power to unilaterally settle the price and rental meets the requirement of certainty. Such power, the Court explained, would have to be exercised *arbitrio bono viri* as required at common law in respect of the exercise of any discretionary power.<sup>1263</sup> A closely related question is whether contracts of sale and lease at a reasonable price or rental, respectively, should be regarded as valid as suggested in another *obiter dictum* of the then Appellate Division.<sup>1264</sup> Accordingly, the question of law is whether South African law should confer validity on contracts of sale and lease at a reasonable price and rental, respectively, or at a unilaterally determined price or rental.

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<sup>1259</sup> See, for example, *Westinghouse* 1986 (2) SA 555 (A) 574D-E; *Genac Properties* 1992 1 SA 566 (AD) 576I-577B; *Lambons* 1997 (4) SA 141 (SCA) 158F-H.

<sup>1260</sup> This is evident from definitions of the contract of sale from the time of Gaius to the present: Kerr *Sale and Lease* 3–5 and 30–34. See also Zulman & Kairinos *Norman's Law of Purchase and Sale* 1-2 and 41-46.

<sup>1261</sup> See the discussion in paras 4.2.4.2(B) and 4.2.4.3. See also Kerr *Sale and Lease* 66; Zimmermann *Obligations* (1990) 254-255.

<sup>1262</sup> *NBS Boland Bank* 1999 (4) SA 928 (SCA) para [32] discussed in chapter 1 paras 1.2 and 1.4.2.

<sup>1263</sup> Para [25].

<sup>1264</sup> *Genac Properties* 1992 (1) SA 566 (AD) 578 B-C discussed in chapter 1 paras 1.2 and 1.4.2.

### 4.3.3 Unilateral discretionary power to settle the price or rental and the notion of certainty in constitutional, jurisprudential and policy perspective

#### 4.3.3.1 Introduction

In order to answer the question in respect of a unilateral discretionary power to settle the price, it is necessary to discuss the concept of unilateral discretionary power.

#### 4.3.3.2 Unilateral discretionary power

The concept refers to the situation where the contractants agree that one or more terms of the contract should be determined at the discretion of one of them.<sup>1265</sup> Hence, it permits post-contract division of the “contractual pie”<sup>1266</sup> and allows the power-holder to change the legal position of another for better or for worse.<sup>1267</sup> The latter in turn “labours under a liability in the sense that his or her legal status is susceptible to alteration”<sup>1268</sup> by the power-holder. The wielding of power allows for three possibilities: (i) an exercise of power that favours the interests of the empowered contractant; or (ii) one that favours the disempowered contractant; or (iii) one that favours both in that it is neutral.

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<sup>1265</sup> For example, an agreement that empowers a contractant to individualise the subject-matter of the sale from a *genus* or from a number of specified alternatives. Van der Merwe *et al Contract* 203.

<sup>1266</sup> A phrase borrowed from Feldman, Schurr & Teichman ‘Reference Points and Contract Interpretation: An Empirical Examination’ (2012) 1, 9, available at [http://scholar.google.co.za/scholar\\_url?hl=en&q=http://works.bepress.com/context/teichman/article/1008/type/native/viewcontent&sa=X&scisig=AAGBfm1FLL3r\\_G6RrcE83njMvWzJCp8uMQ&oi=scholaralrt](http://scholar.google.co.za/scholar_url?hl=en&q=http://works.bepress.com/context/teichman/article/1008/type/native/viewcontent&sa=X&scisig=AAGBfm1FLL3r_G6RrcE83njMvWzJCp8uMQ&oi=scholaralrt) hereafter Feldman *et al* ‘Reference Points and Contract Interpretation’ (2012). The phrase means that certain aspects of the contract are left to be decided after the conclusion of the contract. In this instance, one of the contractants is granted the exclusive power to make such decision.

<sup>1267</sup> Cockrell (1997) *Acta Juridica* 26. Power may originate, for example, in Public Law or in Private Law. An example in Public Law is the Expropriation Act 63 of 1975 that empowers a range of governmental institutions to expropriate property for a public purpose against payment of compensation. At Private Law, power originates, for example, in the Law of Persons and the Law of Contract. In the Law of Persons, the common law allows for the appointment of a *curator bonis* to manage the affairs of a person who is legally deemed to lack the capacity to manage his/her own affairs: Boezaart *Law of Persons* (2010) 147-150. In the Law of Contract, a contract may contain, for example, a *lex commissoria* which empowers the creditor (the empowered contractant) to cancel the contract on breach by the debtor. The creditor also has this power where, in the absence of a *lex commissoria*, time is of the essence. Van der Merwe *et al Contract* 299; Hutchison *et al Contract* 286-287.

<sup>1268</sup> Cockrell (1997) *Acta Juridica* 26.

Of the three possibilities, the first is the most likely to happen in practice. It was confirmed in an empirical study that contractants are more likely to adopt a self-serving approach in the interpretation of contractual terms in order to minimise losses than to maximise profits.<sup>1269</sup> The writers elaborate by explaining that in the realm of losses “people ... tend to view their contractual obligations more selfishly” than when they are “in the domain of gains.”<sup>1270</sup> A holder of a right [object] would tend to view the sale of the right [object] as a loss<sup>1271</sup> whereas the acquirer, in turn, would view the acquisition of the right [object] as a gain. Furthermore, once a decision has been made to acquire, the tendency is to confirm and justify it and to selectively process and rationalise information that supports that decision rather than information that does not. This is known as cognitive dissonance.<sup>1272</sup> Translated into the sales contract context, it means that when once a person has decided to buy a product, he/she will rationalise the purchase even in the face of the uncertainties manifest<sup>1273</sup> in the notion of a reasonable price or in a term conferring power to settle the price on the seller. This reduction of human interaction to the pursuit of profit as well as the maintenance of self-interest is derided by the legal philosophers Bataille, Lévinas and Derrida who are critical of this dominant ethic of the “national and international capitalist economy” with Derrida being of the view that the law cannot serve the interests of justice if it is at the mercy of this ethic because then it

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<sup>1269</sup> Feldman *et al* ‘Reference Points and Contract Interpretation’ (2012) 3-4. The study built on a large body of both psychological and economic studies that suggested that people treated “payoffs framed as gains and payoffs framed as losses distinctly”: Feldman *et al* ‘Reference Points and Contract Interpretation’ (2012) 1, 2.

<sup>1270</sup> Feldman *et al* ‘Reference Points and Contract Interpretation’ (2012) 21; Van der Walt ‘Law: The Sacrificial Tension between Justice and Economics’ (2005) 16 *Stell LR* 244, hereafter Van der Walt (2005) 16 *Stell LR* 244, who refers to Derrida’s characterisation of the economy as a “restricted economy” meaning one in which “the self only engages with others on condition that, at best, some profit can be made out of the transaction or, at worst, no loss will be incurred in the transaction.”

<sup>1271</sup> This is the so-called endowment effect where one values things more when once they have been acquired. Riesenhuber ‘English common law versus German *Systemdenken*? Internal versus external approaches’ (2011) 7(1) *Utrecht LR* 117, 128, available at <<http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/URN%3ANBN%3ANL%3AUI%3A10-1-101164/149>>, hereafter Riesenhuber (2011) 7(1) *Utrecht LR*.

<sup>1272</sup> Riesenhuber (2011) 7(1) *Utrecht LR* 117-128.

<sup>1273</sup> See also para 4.3.4.3(E) below.



would be unjust.<sup>1274</sup> It is submitted that the *obiter dicta* that would recognise a sale or lease at a reasonable price or rental, or a price or rental to be unilaterally determined, serve to promote this ethic and would, hence, be unjust.<sup>1275</sup>

In the context of a contract of sale, the results of the empirical study would mean that a seller (the one “losing” the object) would strive to be paid a higher price than that which the buyer would be prepared to pay to acquire the object being sold. The law seeks to circumscribe this perfectly logical (from a common sense perspective) attitude by requiring the price to be objectively ascertainable at date of contract. In providing a platform for negotiation, the requirement seeks to pre-empt a consequence that does not fulfil the mutual interests of the contractants so that, in theory at least, a mutually satisfactory arrangement is attained. Contractants are normally in the best position to judge their own interests, hence the “substance of agreements that result from [their own] consent [is] also likely to be *fair*.”<sup>1276</sup> In the event of a unilateral-discretionary-power scenario, such negotiation is absent. Bearing in mind that in terms of the traditional economic model of contract-decision-making, contractants are “expected to maximise the monetary benefits they can extract from the transaction,”<sup>1277</sup> and against the background of Feldman *et al*’s empirical study,<sup>1278</sup> it is not inconceivable that the power-wielder would be likely to adopt a self-serving approach and try to exact maximum benefit from the transaction. The possibility that it would also increase the scope for exploitation, or, that it may find its way into standard form contracts and the abuses attendant on such contracts, can also, likewise, not be discounted. Online transactions exacerbate the

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<sup>1274</sup> Van der Walt (2005) 16 *Stell LR* 244-245.

<sup>1275</sup> See the discussion in the text that follows this footnote reference.

<sup>1276</sup> Barnett ‘Contract is Not a Promise; Contract is Consent’ 11.

<sup>1277</sup> Feldman *et al* ‘Reference Points and Contract Interpretation’ (2012) 2; Posner ‘The Law and Economics of Contract Interpretation’ unpublished paper, (2005) Paper 56 American Law & Economics Association Annual Meetings 1, 11, hereafter Posner ‘The Law and Economics of Contract Interpretation’ unpublished paper, (2005) Paper 56 American Law & Economics Association Annual Meetings 1. Contractants will design their contracts to best serve their interests.

<sup>1278</sup> Outlined earlier in this sub-paragraph.

problem in that they enable sellers to manipulate the manner of contract formation, increasing the scope for exploitation.<sup>1279</sup>

It is anticipated that the seller, as the contractant who usually has the stronger bargaining power,<sup>1280</sup> will be the one who, in most cases, will be vested with the unilateral power. The result would be a perpetuation of the traditionalist capitalist order (criticised by Bataille, Lévinas, and Derrida) which is in stark contrast to the current approach of using the law as a tool to achieve the socio-economic reforms called for by the Constitution.<sup>1281</sup> This will, in all probability, result in the gains attained by the enactment of consumer protection legislation in the equalisation of bargaining power being reversed and contribute to the stunting of future developments in that direction. This conclusion is reinforced when regard is had to the elevated status accorded to the principle of freedom and sanctity of contract in the South African legal context.<sup>1282</sup> The principle enables sellers to legislate by contract with the result that the notion of freedom of contract becomes the exercise of power by contract.<sup>1283</sup> Accordingly, and as illustrated in chapter 2 above, the principle does not guarantee that all persons are able to utilise it to the same extent. Hence, the need for a rule-orientated approach to *essentialia* in order to prevent in the words of Kessler “freedom of contract from becoming a one-sided

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<sup>1279</sup> Tasneem ‘The Legal Issues of Electronic Contracts in Australia’ (2011) 1(2) *Int. J. Manag Bus. Res.* 85, 87 <[www.SID.ir](http://www.SID.ir)>, hereafter Tasneem (2011) 1(2) *Int. J. Manag Bus. Res.* 85. This observation made in respect of the exploitation of persons without contractual capacity, applies equally to persons who, because of socio-economic circumstances seduce themselves into buying products which they may not need and/or on terms that they cannot afford. These aspects were considered in chapter 3. In chapter 2, it was explained that an inability to make comparisons due to a lack of market choices and/or weak bargaining power and/or lack resources (including time, energy, money, cognitive ability) leads to the disempowerment of contractants, exposing them to manipulation and exploitation. The same considerations could result in contractual discretionary clauses and clauses to pay a reasonable price being foisted upon disempowered contractants, for example, by way of standard form contracts.

<sup>1280</sup> See the discussion in chapters 2 and 3.

<sup>1281</sup> See the discussion in para 4.2.4.2(A) above and the discussion elsewhere in this chapter of other legislation, such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See also the discussion of the consumer protection legislation in chapter 3.

<sup>1282</sup> See the discussion in chapter 2 and in particular in para 2.2.4.

<sup>1283</sup> Kessler ‘Contracts of Adhesion – Some Thoughts About Freedom Of Contract’ (1943) 43 *Columbia LR* 629, 640, hereafter Kessler (1943) 43 *Columbia LR*.

privilege.”<sup>1284</sup> A rule-orientated approach is in accord with the notion of the constitutional values of dignity, equality and freedom as empirical values, as well as operating as constitutional constraints to the notion of freedom of contract.<sup>1285</sup>

#### 4.3.3.3 Unilateral discretionary price or rental

##### (A) The current position and criticism thereof

The current imperative against a unilateral discretionary power to settle the price<sup>1286</sup> is supported by a wealth of authorities and may be traced back to the Digest.<sup>1287</sup> Our courts have, with respect, “glibly” rejected such contracts as being void for vagueness.<sup>1288</sup> This rejection, as well as the rationale for it, has been the subject of criticism, the contention being that the only difference between a situation where the contractants agree on a third party nominee and one where the contractants agree that one of them would settle the price on their behalf is one of “the identity of the person who is to make the determination.”<sup>1289</sup> Accordingly, it is argued that “[e]ither both of these propositions are vague or neither is vague.”<sup>1290</sup> Similarly, the Supreme

<sup>1284</sup> Kessler (1943) 43 *Columbia LR* 640.

<sup>1285</sup> See the discussion in para 4.2.4.3 above.

<sup>1286</sup> See, for example, in *Shell SA (Pty) Ltd v Corbitt and Another* 1984 4 SA 523 (CPD) the court said that a contract is not legally enforceable “if it is made to depend solely upon the will of one of the parties what part he should perform” (525).

<sup>1287</sup> Wessels & Roberts *The Law of Contract in South Africa* para 430-433; Kerr *Sale and Lease* 55; Van der Merwe *et al Contract* 201-202; Joubert *General Principles of the Law of Contract* (1987) 180; Cooper *Landlord and Tenant* 57; Mostert, Joubert & Viljoen *Die Koopkontrak* (1972) 11; Van der Bergh *TSAR* 2012 (1) 61; Kerr & Glover ‘May Essential Provisions of a Contract be Determined by One of the Parties Alone’ (2000) 117 *SALJ* 201, 202-205, hereafter Kerr & Glover (2000) 117 *SALJ*; Lubbe ‘Kontraktuele diskresie, potestatiwe voorwaardes en die bepaaldheidsvereiste’ (1989) 2 *TSAR* 159, 165; Hawthorne ‘The contractual requirement of certainty of price’ (1992) 55 *THRHR* 638, 639-640. See also *Shell SA (Pty) Ltd v Corbitt and Another* 1984 4 SA 523 (CPD), 525; *Murray & Roberts* 1991 (1) SA 508 (A), 514G-H; *Beretta v Beretta* 1924 TPD 60; *Schneier & London v Bennet* 1927 TPD 346; *Roberts v Forsyth* 1948 (3) SA 926 (N).

<sup>1288</sup> See, for example, *Davidowitz v Van Drimmelen* 1913 TPD 672, 676; *Westinghouse* 1986 (2) SA 555 (A) 574D-E; *Murray & Roberts* 1991 (1) SA 508 (A) 514G-H; *Genac Properties* 1992 1 SA 566 (A) 576I-577B; *Lambons* 1997 (4) SA 141 (SCA) 158F-H; *NBS Boland Bank* 1999 (4) SA 928 (SCA) para [9].

<sup>1289</sup> The former is accepted as a valid agreement whilst the latter is not. Kerr *Sale and Lease* 57 *et seq.*

<sup>1290</sup> Kerr *Sale and Lease* 57 *et seq.* See also Kerr & Glover (2000) 117 *SALJ* 201; Van der Merwe *et al Contract* 204.

Court of Appeal in *NBS Boland Bank v One Berg River*<sup>1291</sup> reasoned that an arrangement conferring on a nominee the power to fix the price is as “uncertain” as in the case where the power to fix the price is left to the discretion of one of the contractants.<sup>1292</sup> Accordingly, the court suggested<sup>1293</sup> that an arrangement conferring a unilateral discretionary power should not be void for vagueness.

It is submitted, however, that the justification for the invalidity on the ground of “vagueness,” unfortunately, obfuscates the real issue.<sup>1294</sup> With respect, the case for invalidity is not on the imprecise basis of the notion of vagueness. Rather, such an agreement is suspect on the basis that a unilateral discretionary power is at odds with the objective standard required to render the agreement ascertainable.<sup>1295</sup> It is the objective element that gives expression to the constitutional values of dignity, freedom, and equality that the classification of the requirement as an *essentialia* seeks to promote.<sup>1296</sup> By insisting on joint participation in the process of nomination, both contractants, in theory, have an equal say in the ultimate determination of the essence of the contract,<sup>1297</sup> namely the price, thereby promoting the notions of fairness and justice. This contention is supported by the fact that the courts make it clear that the basis for invalidity is the fact that **the performance depends on the will of one of the contractants**.<sup>1298</sup>

This reasoning also supports the non-recognition of unilateral price determination as opposed to price determination by a nominee. Zimmermann’s twin suggestions for the existence of the

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<sup>1291</sup> 1999 (4) SA 928 (SCA), para [9]. See also the *obiter dictum* in *Benlou* 1993 (1) SA 179 (A) 185F-G; Daube Studies in the *Roman Law of Sale: dedicated to the Memory of Francis De Zulueta* (1959) 23.

<sup>1292</sup> See also *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*. 1993 (1) SA 179 (A) 185F-G.

<sup>1293</sup> Para [32].

<sup>1294</sup> See also *Kerr Sale and Lease* 58; Kerr & Glover (2000) 117 *SALJ* 208-209.

<sup>1295</sup> See also the *Southernport Developments (Pty) Ltd v Transnet Limited* 2005 (2) SA 202 (SCA) case (discussed in para 4.2.4.4 above) where an agreement containing an open term was regarded as valid because it contained a deadlock-breaking mechanism. The mechanism sufficed to introduce the objective standard to render the agreement valid.

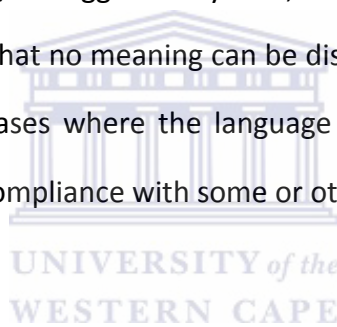
<sup>1296</sup> See paras 4.2.4.2(B) and 4.2.4.3 above. See also Van der Bergh (2012) 1 *TSAR* 53, 61.

<sup>1297</sup> See para 4.3.3.3(D) below.

<sup>1298</sup> See, for example, *Murray & Roberts* 1991 (1) SA 508 (A) 514G-H, where the court expressed the view that a contract would be “void for vagueness” if the “prestation of either party” “depends entirely on the will of a party”.

rule in Roman times support this thesis. Unilateral discretionary power would, in the words of Zimmermann, remove “the institutional check against the danger of gross and unreasonable contractual imbalance.”<sup>1299</sup> Support is also to be found in the policy considerations underlying consumer protection legislation as discussed in chapter 3.<sup>1300</sup>

In a case decided a century ago, the court expressed itself as follows: “If a person who claims that he had made a contract proves that it depends wholly on his own will what part of it he should perform, then according to my view there is no contract.”<sup>1301</sup> Unfortunately, the court, in summarising its conclusion, ambushes itself by resorting to the tired and over-worked phrase, namely, that “[the contract] is void for vagueness.”<sup>1302</sup> The characterisation of a term as being “void for vagueness” should, as suggested by Kerr,<sup>1303</sup> be reserved for those cases where “the language used is so obscure that no meaning can be discovered.” It should not be used, as has been done, to cover those cases where the language “is crystal clear” but the contract suffers a fatal defect due to non-compliance with some or other legal requirement.<sup>1304</sup>



#### (B) Retention of the *status quo*

The *obiter dictum* in *NBS Boland Bank*<sup>1305</sup> in advocating that the discretion must be exercised “*arbitrio bono* [sc: *boni*] *vir*” [the decision of a reasonable person/a reasonable decision]<sup>1306</sup>

<sup>1299</sup> *Obligations* (1990) 254. Zimmermann goes on to postulate, firstly, that the rule was to obviate the possibility of “a breakdown of the transaction...due to the fact that in end the price might either be lacking or be unascertainable.” Secondly, there is the possibility that the concentration of too much power in the hands of the “empowered” contractant may lead to abuse of the “disempowered” contractant.

<sup>1300</sup> The policy considerations of the Alienation of Land Act 68 of 1981 were discussed in a footnote in para 4.2.5 of above. In America, referring to the Statute of Frauds, the court in *Walker v Keith* Kentucky Court of Appeals 382 S.W.2d 198 (Ky. 1964), hereafter *Walker* 382 S.W.2d 198 (Ky. 1964) said that the purpose of writing is to assure certainty of the essential terms of a contract and thereby to avoid controversy and litigation.

<sup>1301</sup> In *Dawidowitz v Van Drimmelen* 1913 TPD 675-676. Emphasis added.

<sup>1302</sup> *Dawidowitz v Van Drimmelen* 1913 TPD 672, 676. See also Kerr *Sale and Lease* 60.

<sup>1303</sup> Kerr *Sale and Lease* 65.

<sup>1304</sup> For example, that the contract does not contain a price or where the formula does not provide adequate information from which the price can be determined. In these instances, the contract of sale is invalid because the price is not ascertained or ascertainable and hence does not meet the requirement of certainty, and not because the contract is vague.

<sup>1305</sup> 1999 (4) SA 928 (SCA) paras [24-25].

takes issue with the reasoning that a unilateral discretionary power confers an unfettered discretion and that hence it is invalid as a price-setting mechanism. The suggestion is that since the discretionary power is qualified by the *arbitrio boni viri* notion, the basis for the rejection of such power, namely, that it leaves it to the will of the empowered contractants, falls away. However, the court leaves the question open and admits of the possibility that such a unilateral discretionary power may be invalid as being against public policy.<sup>1307</sup>

The court's reasoning elicits the following questions about the proposed limitation to the unilateral discretionary power in the guise of the *arbitrium boni viri*: What benefit does the assurance of the notion of the *arbitrium boni viri* hold for a contractant who does not litigate due to the high transaction costs thereof?<sup>1308</sup> Another question concerns the options available to a contractant where a price is "more shocking" than another with neither reaching the threshold of unconscionability,<sup>1309</sup> or where it is (way) beyond the means of the particular contractant or was not contemplated or anticipated **by either or both contractants** at date of contract.<sup>1310</sup> In terms of the jurisprudence of the Supreme Court of Appeal,<sup>1311</sup> a contractant who finds himself/herself in any one of these situations would be bound by the contract<sup>1312</sup> and would have to suffer the consequences, legal and otherwise, attendant on an inability to pay. In respect of the second question, and on an analysis based on the acceptance of the notion of

<sup>1306</sup> Claassen *Dictionary of Legal Words and Phrases* vol. 1 146-147. See also *Erasmus and Others v Senwes Ltd and Others* 2006 (3) SA 529 (T) 538, hereafter *Erasmus* 2006 (3) SA 529 (T).

<sup>1307</sup> At para [30]. See further the discussion in this regard in the text following this footnote reference as well as in para 4.3.4 below. See also van der Merwe *et al Contract* 210.

<sup>1308</sup> These include, *inter alia*, the costs, time, effort, cognitive ability, and concerns regarding the prospect of success especially when faced by large corporations. In chapter 3, it was shown that provisions of the consumer protection legislation were designed to obviate the need for litigation and hence the incurring of the (high) transaction costs associated therewith.

<sup>1309</sup> Bagchi 'Managing Moral Risk: The Case of contract' (2011) 111 *Columbia LR* 1878, 1908.

<sup>1310</sup> In para 2.3 of chapter 2, it was illustrated that contracts, including those signed by "weak" contractants, bear a stamp of presumptive validity. Our Supreme Court of Appeal has, for example, held that the mere fact that a contractual term is unfair or that it operates harshly does not serve as an independent basis for concluding that it offends constitutional principles, confirming the court's reluctance to employ fairness as a standard for judging contractual validity. See further chapter 2.

<sup>1311</sup> See chapter 2. The consumer protection legislation discussed in chapter 3 reveals an awareness of this and discloses an attempt at corrective action on the part of the legislature.

<sup>1312</sup> See the various pronouncements of the Supreme Court of Appeal discussed in chapter 2.

unconscionability, it would be argued that there is no procedural unconscionability in that there was not an absence of meaningful choice: both participated in formulating the contractual term. It would also not be substantively unconscionable even though the price may not be what the contractant contemplated or anticipated. However, it was shown that the mode of analysis adopted by the Supreme Court of Appeal<sup>1313</sup> and its strict adherence to the principles of contractual freedom and autonomy as a basis for enforcing the contract, not only, unduly exaggerates the scope that the individual has to make rational choices, but also, overestimates the capacity of contractants to make rational choices.<sup>1314</sup>

A contractant in such a predicament could possibly find refuge in the notion of good faith that requires, not only, honesty between contractants, but also, that a contractant should “in die nastrewing van eie belang” display “n mate van erkenning en respek” towards his/her counterpart.<sup>1315</sup> The unreasonable advancement of own interest at the expense of the other contractant may constitute a breach of the notion of bona fides.<sup>1316</sup> Such an approach would find resonance in the “mirror notions” of dignity and *ubuntu*.<sup>1317</sup> However, the current approach of the Supreme Court of Appeal to the notion of good faith reveals a disinclination to utilise the notion in situations where contractants have been overreached.<sup>1318</sup> Adding further insult to injury, is the then Appellate Division’s reasoning in rejecting the reception of the *exceptio doli generalis* in our law.<sup>1319</sup> It will be recalled that the Appellate Division in *Bank of Lisbon v De Ornelas*<sup>1320</sup> criticized the *exceptio* “for being a loosely articulated defence that ran counter to the notion that courts ought not to descend into the arena to settle disputes

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<sup>1313</sup> In respect of voluntariness of consensus. See, for example, chapter 2 paras 2.2.4, 2.3.2 and 2.4.3.

<sup>1314</sup> See chapter 2 generally and in particular paras 2.2.4, 2.3 and 2.4.

<sup>1315</sup> Lubbe (1991) 1 *Stell LR* 20.

<sup>1316</sup> Lubbe (1991) 1 *Stell LR* 20.

<sup>1317</sup> See chapter 1 para 1.3.3 and para 4.2.4.2(A)(i) above.

<sup>1318</sup> See chapter 2 para 2.8.

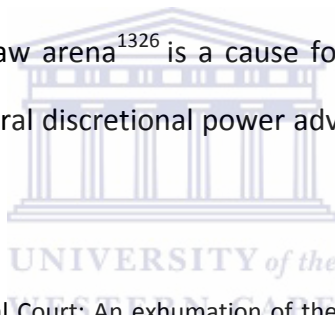
<sup>1319</sup> See chapters 1 and 2.

<sup>1320</sup> 1988 (3) SA 580 (A), hereafter *Bank of Lisbon* 1988 (3) SA 580 (A).



concerning the fairness and equity of contractual terms agreed to by the parties.”<sup>1321</sup> A similar line of reasoning runs through the judgments of the then Appellate Division and the current Supreme Court of Appeal until the present.<sup>1322</sup> Furthermore, and perhaps more importantly, the narrow scope allowed for public policy as a mechanism to come to the assistance of contractants also does not bode well for such a contractant.<sup>1323</sup>

A matter of even greater weight and concern is the “passive” role ascribed to the Constitution by recent judgments of the Supreme Court of Appeal.<sup>1324</sup> The judgments reflect “a philosophy of non-interference of public law with private contractual relationships and a disregard for the inequality of [the] bargaining position of the employee [contractants] which was prevalent in legal thinking when *Magna Alloys* was decided.”<sup>1325</sup> The tenor of the cases regarding the role of the Constitution in the contract law arena<sup>1326</sup> is a cause for concern and constitutes another reason why the notion of a unilateral discretionary power advocated in *NBS Boland Bank*<sup>1327</sup> or a



<sup>1321</sup> Glover ‘Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?’ (2007) 124 *SALJ* 449, 450.

<sup>1322</sup> See the case law discussed in chapter 2.

<sup>1323</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), hereafter *Afrox Healthcare* 2002 (6) SA 21 (SCA), discussed in chapter 2, serves as an example of a situation where a contractant received short shrift from the law. See further the discussion generally in chapter 2.

<sup>1324</sup> Representative of this approach of the courts in this regard is the decision in *Brisley* 2002 (4) SA 1 (SCA) where the Court, in warning that a court “kan nie skuiling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en omver te werp nie...,” rejected the notion that constitutional values gave it the jurisdiction to utilize equitable considerations to disregard contractual provisions freely entered into (para [24]). In the same vein, the Supreme Court of Appeal in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) said that “the Constitution and its value system does not confer on judges a general discretion to declare contracts invalid on the basis of their subjective perceptions of fairness or on the grounds of imprecise notions of good faith” (para [7]). The *Brisley* court’s approach received affirmation in the recent Supreme Court of Appeal decision in *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) and in *Potgieter* 2012 (1) SA 637 (SCA) discussed in chapter 1 para 1.3.3 and in chapter 2 and in this chapter. See also the discussion generally in chapter 2.

<sup>1325</sup> Calitz ‘Restraint of Trade Agreements in Employment Contracts: Time for *Pacta Sunt Servanda* to Bow Out?’ (2011) 22 *Stellenbosch LR* 50, 54. The writer reached this conclusion after considering the post-Constitution decisions that confirmed the authoritative nature of the *pacta sunt servanda* doctrine and that confirmed the common law as enunciated in the *Magna Alloys* case as settled law and that proclaimed that the Constitution had no influence on that position.

<sup>1326</sup> See the case discussions in chapter 2 regarding the primacy of the classical approach to contract law in the face of constitutional considerations.

<sup>1327</sup> 1999 (4) SA 928 (SCA).

reasonable price as suggested in the *Genac Properties JHB (Pty) Ltd v NBC Administrators CC*<sup>1328</sup> should not, figuratively speaking, be allowed out of Pandora's box.

### (C) Unilateral price and rental determination and public policy

Unilateral determination of the price falls foul of the notion of public policy as redefined by the Constitutional Court in *Barkhuizen*.<sup>1329</sup> Such a term is inherently unfair in that it opens the door for exploitation.<sup>1330</sup> It is also unjust and unreasonable in that it deprives the "disempowered" contractant of the right to negotiate and reach agreement on a fundamentally important aspect – the essence<sup>1331</sup> - of the contract and requires him/her to accept a unilateral determination of a crucial aspect of his/her contractual obligations. In the circumstances, any such submission would be constitutionally unsound and indefensible in that it constitutes an erosion of the notions of dignity, equality and freedom.<sup>1332</sup> In addition, unilateral determination does not meet the standards exacted by the Constitutional Court judgments on the notion of dignity.<sup>1333</sup> In the Mokgoro paradigm,<sup>1334</sup> the recognition of a unilateral discretionary power lends itself to the exploitation of the vulnerable members of society thereby impeding the process of transformation to a more just and egalitarian society and rendering it incompatible with the spirit and purport of the Bill of Rights.<sup>1335</sup> In the context of Ackermann's hypothesis,<sup>1336</sup> the

<sup>1328</sup> 1992 1 SA 566 (AD). See further para 4.3.4 below for a discussion of the difficulties in defining the notion of a reasonableness in relation to price.

<sup>1329</sup> 2007 (5) SA 323 (CC). See chapter 1 para 1.3.3 as well as para 4.2.4.2(A)(iii) above.

<sup>1330</sup> Zimmermann *Obligations* (1990) suggests that this was the motivation for the rule against unilateral price determination in Roman law (254).

<sup>1331</sup> See para 4.3.3.3(D) below.

<sup>1332</sup> See the discussion of the values of dignity, equality and freedom in chapter 1 para 1.3.3 as well as in para 4.2.4.2 above.

<sup>1333</sup> See para 4.2.4.2(A)(i) above.

<sup>1334</sup> See para 4.2.4.2(A)(i) above.

<sup>1335</sup> See section 39(1)&(2) of the Constitution. In this context, it is apposite to repeat that Sachs J in *Barkhuizen* 2007 (5) SA 323 (CC) expressed a concern with standard form contracts. The learned judge's recognition of its potential for abuse is evident when he, at paras [184] and [185], leaves for future consideration the question whether onerous and unilaterally imposed standard-form contracts of adhesion should, in general, be regarded as offensive to public policy in our new constitutional dispensation. In *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ), the court summarised Sachs J's comments as expressing a concern with "the

concentration of the power to fix the price in the hands of one contractant would operate at the expense of the individuality and uniqueness of the other contractant. Hence, the defect is one of principle and not of fact. In other words, the problem does not lie with the exercise of the discretion but with the principle of awarding a discretion. The fact that the decision-maker's power is circumscribed by the notion of the *arbitrio boni viri* as suggested in the *NBS Boland Bank obiter dictum* does not remedy this defect.<sup>1337</sup>

Equally problematical is that the *arbitrio boni viri* notion becomes the focus of attention only **after** a complaint has been lodged. It saddles the disempowered contractant with the burden of deciding whether or not to litigate.<sup>1338</sup> The burden of prosecuting the claim and of proving non-compliance with the suggested standard rests like a yoke on the shoulders of the disempowered contractant, who in most cases will be the one in the weaker bargaining position and, hence in theory, the one who has the least resources at his/her disposal to discharge the onus.<sup>1339</sup> In this context, it is apposite to repeat that ever-escalating legal costs exacerbated by

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manner in which large powerful organizations wield oppressive contractual power in a way that allows them to impose onerous and unfair contractual terms on subordinate contractual parties" (paras [60] and [68]). In light of these pronouncements and bearing in mind the strict adherence of the Supreme Court of Appeal to the principles of freedom and sanctity of contract (see chapter 2), it is submitted that similar concerns about the possible abuse or exploitation of unilateral discretionary power or a formula of a reasonable price are not without merit. That such terms may find their way into standard form contract is an aggravating consideration. A seller (sellers are usually in the better bargaining position) may abuse his/her discretionary power and fix a purchase price that exceeds the real value of the commodity secure in the knowledge that the buyer would be deterred from litigating by the transaction costs of litigation. The importance of these considerations justifies their repetition in this context. See also Kerr *The Law of Sale and Lease* 72; Kerr & Glover (2000) 117 *SALJ* 207. The possibility that sellers may be required by consumer protection legislation to bring such clauses to the notice of the contractant does not detract from the argument.

<sup>1336</sup> See para 4.2.4.2(A)(i) above.

<sup>1337</sup> The standard of the *arbitrio boni viri* is discussed in para 4.3.4 below.

<sup>1338</sup> The decision whether or not to institute an action would be dependent on various considerations, not least of which is the cognitive ability of the disempowered contractant and whether he/she has the resources (*inter alia*, means, time, energy, capacity, inclination) to prosecute his/her claim. The fact that provision is made in the Consumer Protection Act and in the Rental Housing Act (see chapter 3) for the price and rental to be challenged provides cold comfort for many aggrieved contractants because of high transaction costs. Naude 'The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective' (2007) 124 *SALJ* 128, 152-155, hereafter Naude (2007) 124 *SALJ*.

<sup>1339</sup> In this respect, it would, in essence, mirror the development in restraint of trade cases where the employee, who traditionally has the weaker bargaining power, has the burden of proving that the restraint is unfair. The

economic disadvantages “weaken consumers’ protection when they attempt to assert their legal rights and protections.”<sup>1340</sup> This would see the further entrenchment of, not only, the classical approach to the doctrine of sanctity of contract<sup>1341</sup> over considerations of fairness and equity, but also, of the layers of inequality that permeate South African Society. The latter consequence would have a paralysing effect on the constitutional imperative to foster socio-economic reform for the transformation of the South African society into a more just and egalitarian one.

(D) Unilateral price and rental determination in relation to the essence of the contract

The argument may also be made that a unilateral discretionary power to settle the price and rental runs counter to the essence of a contract of sale and lease. In the early days when there was no money, no distinction was made between a contract of exchange and one of sale. The purpose of a contract of exchange was, and still is, to exchange one thing for another. Hence, agreement on what was to be exchanged constituted the essence of the contract. However, the practicality of barter/exchange became increasingly problematic due to the difficulty in finding a person that required something that one had and that had something that one required.<sup>1342</sup>

In the course of time, a substance “to which a permanent or uniform value was attached, was used to facilitate the disposal of commodities.” Sale in its modern form with price as an *essentiale* came about when this substance later acquired the stamp of approval of the state,

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nefarious consequences of an approach that burdens the “weaker” contractant were discussed chapters 2 and 3 above, as well as in para 4.2.4.3(C) above and elsewhere in this chapter.

<sup>1340</sup> Junke Xu ‘Who Will Protect Chinese Consumers? The Past, Present and Future of Consumer Protection Legislation in China’ (2011-2012) 24 *Loyola Consumer LR* 22. See also Naude (2007) 124 *SALJ* 151-155; Naude ‘Unfair Contract Terms Legislation: The Implications of Why We Need it for its Formulation and Application’ (2006) 17 *Stell LR* 361, 379-380; Naude ‘Enforcement Procedures in Respect of the Consumer’s Right to Fair, Reasonable and Just Contract Terms under the Consumer Protection Act in Comparative Perspective’ (2010) 127 *SALJ* 515, 516-517.

<sup>1341</sup> See the discussion of the adherence of the Supreme Court of Appeal to this approach chapter 2 paras 2.2-2.3.

<sup>1342</sup> Mommsen, Krueger & Watson *The Digest of Justinian* 18.1.33.1 Volume 2 (1985) 513.

acquiring the status of coinage or money which had no intrinsic value but had an artificial value that determined its worth.<sup>1343</sup>

According to Thomas Aquinas,<sup>1344</sup> the nature and essence of a contract is defined by its end or purpose.<sup>1345</sup> The purpose determines the body of rules that apply to the transaction.<sup>1346</sup> The most important of the constitutive rules are the *essentialia* on which there must be sufficiently certain agreement to give effect to the contractual purpose;<sup>1347</sup> the *essentialia* of a contract being “regarded as the obligations entailed by its definition.”<sup>1348</sup> In a contract of sale, the purpose is to exchange a sum of money for the permanent use and enjoyment of an object.<sup>1349</sup> The view of Thomas Aquinas was developed by the medieval commentator, Baldus, and the Scholastics who required that contractual provisions agreed to by the parties had to be consistent with the nature of the contract.<sup>1350</sup> In other words, the provisions had to be consistent with the contract’s purpose. This meant that contractants were constrained from modifying the consequences of the contract so as to derogate from the nature of the contract itself.<sup>1351</sup> The writers, Naude and Lubbe, then develop this theory by calling for a substantive limitation on contractual freedom.<sup>1352</sup> The result would be that contractants would not be able to contract out of, for example, the exclusion of the implied warranty against eviction because this would relieve the seller of his/her most fundamental obligation, namely, to transfer free

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<sup>1343</sup> O’Donovan *MacKeurtan’s* 2. The notion of *essentialia* as being the essence of the contract is also mentioned elsewhere in this chapter and more notably in paras 4.2.5 and 4.3.1 above. See also Horn, Kötz & Leser *German Private and Commercial Law: An Introduction* (1982) 116.

<sup>1344</sup> The content of this paragraph is based on the discussion and development of the philosophy of Thomas Aquinas by Naudé & Lubbe (2005) 122 *SALJ* 445-462.

<sup>1345</sup> At 446.

<sup>1346</sup> Naude (2003) 3 *TSAR* 415.

<sup>1347</sup> Naude (2003) 3 *TSAR* 415.

<sup>1348</sup> Naudé & Lubbe (2005) 122 *SALJ* 446. This echoes the discussion of the nature and content of *essentialia* in paras 4.2.4.1 and 4.2.4.2(B)(i) above.

<sup>1349</sup> In lease it is for the temporary uses and enjoyment of immovable property.

<sup>1350</sup> Naudé & Lubbe (2005) 122 *SALJ* 447.

<sup>1351</sup> The current prohibition against a *pactum reservati dominii* (a clause that reserves ownership in favour of the seller) is an example of a prohibition of a contractual arrangement that is inconsistent with the purpose of a contract of sale. Kerr *The Principles of the Law of Contract* 177-178.

<sup>1352</sup> Naudé & Lubbe (2005) 122 *SALJ* 447-460.

and undisturbed sustained use and enjoyment.<sup>1353</sup> In reasoning that the essence of a contract is no longer a metaphysical concept, but rather a criterion deriving from the basic socio-economic purpose of the parties, the writers conclude that the essence of a contract has policy relevance and technical meaning that go beyond mere classification of contracts.<sup>1354</sup>

Using the Thomastic theory, as developed, and the historical development of coinage as a basis, it is submitted that the price is the *quid pro quo* for receiving the benefit of the bargain. Hence, agreement thereon constitutes the essence of the contract of sale and has policy relevance.<sup>1355</sup>

Without agreement, the purpose of the contract cannot be realised.<sup>1356</sup> In other words, the

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<sup>1353</sup> Such paternalistic intervention is evident in recent consumer protection legislation. For example, the Consumer Protection Act 68 of 2008 precludes a buyer from contracting out of the implied warranty against latent defects by agreeing to a voetstoets clause: see chapter 3 para 3.6.5. The constitutionality of such paternalistic intervention was acknowledged by the Constitutional Court when it recognised that the RHA superimposed its unfair practice regime on the obligations that contractants negotiate for themselves: *Ntombizodwa Yvonne Maphango & Others v Aengus Lifestyle Properties* CCT 57/11 [2012] ZACC 2 para [51].

<sup>1354</sup> Recognition of the essence-of-the-contract thesis and its policy relevance may be found in the Consumer Protection Act 68 of 2008. For example, the strict liability provisions that entails that a consumer has a right to expect that goods are reasonably suitable for the purposes for which they are generally intended, that they are in good working order and free of defects, and that they are usable and durable for a reasonable period of time. See further the discussion in chapter 3 para 3.6.5. Referring to *Afrox Healthcare* 2002 (6) SA 21 (SCA), discussed in chapter 2, the writers, Naude & Lubbe (2005) 122 *SALJ*, conclude that the decision in the *Afrox* case was incorrect in that the exemption clause that indemnified the Appellant from negligence of its nursing staff, varied the consequences of the contract in a manner that ran counter to the essence of the contract in that it undermined "the reciprocity between the essential obligations envisaged by the parties." Accordingly, the writers conclude that the exemption clause offended the underlying principles of good faith and the dignity of the patient and that in the circumstances it was surprising and ought to have been disclosed by the Appellant. With reference to the *Bürgerliches Gesetzbuch* (BGB) the impugned clause in the *Afrox* case would have triggered BGB 307 that provides for a presumption of unreasonable disadvantage where a clause limits "essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized." BGB 307 further provides that a clause is ineffective if, contrary to the requirement of good faith, it unreasonable disadvantages the other contractant.

<sup>1355</sup> See also *Walker* 382 S.W.2d 198 (Ky. 1964) where the court said that "[n]othing could be more vital in a lease than the amount the lessee agrees to pay and the lessor agrees to accept for the use of premises." The court, furthermore, commented that the determination of the price in contracts of sale "lies at the heart of [the contract.]"

<sup>1356</sup> Naude (2003) 3 *TSAR* 411 & 412. See further the discussion of *essentialia* in para 4.2.4 above. In *Joseph Martin Jr., Delicatessen, Inc. v Schumacher* Court of Appeals New York 1981, 52 N.Y.2d 105, 436 N.Y.S2d 247, 417 N.E.2d 541, hereafter *Joseph Martin* 1981, 52 N.Y.2d 105 the Court said, in relation to rental, that definiteness as to material matters is of the very essence in contract law. The contract had provided for the renewal of a lease agreement at annual rentals "to be agreed upon." The court reasoned that the rental must be the product of an agreement between the contractants. The court proceeded to explain that the rental need not be expressly agreed upon but could be arrived at with reference to "an objective extrinsic event, condition or standard on which the amount was made to depend."

obligation to agree on a price<sup>1357</sup> is inextricably tied up with the basic purpose of a contract of sale which is to exchange a sum of money for the permanent use and enjoyment of a commodity. The same logic applies in the case of a contract of lease where the rental is the *quid pro quo* for the temporary use and enjoyment of immovable property. Unilateral discretionary power runs counter to this purpose, notwithstanding the argument that the contractants have (freely) agreed thereto,<sup>1358</sup> because it deprives the “disempowered” contractant from participating in the formulation of the essence of the contract. Such deprivation offends the notion of good faith<sup>1359</sup> and the dignity<sup>1360</sup> of the disempowered contractant.

The argument may be made that a unilateral discretionary power does not differ from the seller’s power, in the absence of an agreement (express or implied), to individualise the goods or to exercise his/her discretion regarding the quality of the goods to be delivered.<sup>1361</sup> However, it must be remembered that such discretion does not exist in respect of the actual (nature of the) goods that form the subject matter of the sale or the quantity thereof, a matter that concerns the essence of the contract. These must (as in the case of the price) be ascertained or objectively ascertainable.<sup>1362</sup> In the case of the price, “quality,” is not an issue, hence the only issue is for agreement to be reached on the price (the amount to be paid). Here as in the case of the goods, agreement must be reached in that the price must be ascertained or objectively ascertainable.

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<sup>1357</sup> See the discussion of the duty-imposing and power-conferring aspects of *essentialia* in para 4.2.4.2 (B) above.

<sup>1358</sup> The presumptive voluntariness of an agreement is questionable as shown in chapters 1, 2 and 3.

<sup>1359</sup> Good faith requires that a contractant should, when advancing his/her own interests, display a measure of acknowledgment and respect for the interests of the other contractant. Lubbe ‘*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg’ (1991) 1 *Stell LR* 7, 20, hereafter Lubbe (1991) 1 *Stell L*. See also the discussion of *essentialia* and good faith in para 4.2.4.4 above.

<sup>1360</sup> See the discussion in paras 4.2.4.2 above.

<sup>1361</sup> Van der Merwe *et al Contract* 203.

<sup>1362</sup> Kerr *Sale and Lease* 22-24.



## (E) Conclusion

Unilateral determination of the price and rental would fall foul of the communitarian function of *essentialia* in that the apportionment of the risk would be slanted in favour of the contractant who commands the discretionary power. It would also constitute unconscionable conduct in that though the contractants may have jointly decided on unilaterality, such agreement falls foul of the non-arbitrary, non-capricious requirement of the law<sup>1363</sup> and at the same time it allows for the unilateral finalization of a vital term that could unreasonably favour the contractant bestowed with the discretionary power. The recognition of a unilaterally determined price and rental (as well as that of a reasonable price and rental) would impede effective and comprehensive planning in that price and rental are crucial and indispensable determinants in the planning process.<sup>1364</sup> The proposition that price (or rental) can affect the future of the whole organization holds true for any institution, whether private or public, and whether small, medium or large.<sup>1365</sup>

Agreement on price and rental constitutes the essence of the contract and has policy relevance and, hence, the right connected thereto, is inalienable. The removal of this aspect of contract creation on policy grounds from the will of the contractants is justified on the basis that agreement goes to the root of the contract or that it constitutes the essence of the contract.<sup>1366</sup> This justification constitutes a recognition of the submission<sup>1367</sup> that the outer boundaries of

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<sup>1363</sup> See the discussion in paras 4.2.2 and 4.2.4.4 above.

<sup>1364</sup> "In contract, ...a fixed term is often better than an open term because parties can determine appropriate performance better and more cheaply than courts": Gergen 'The use of open terms in contract' (1992) 92 *Columbia LR* 997, 1000, hereafter Gergen (1992) 92 *Columbia LR* 997.

<sup>1365</sup> Schlechtriem 'Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods' 1, 29, published by Manz, Vienna: 1986 and reproduced with their permission <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html>> [last accessed on 16 November 2012].

<sup>1366</sup> Precedent for this exists, for example, in the consumer protection legislation discussed in chapter 3 and the examples mentioned in a footnote in para 4.3.3.3(D) above.

<sup>1367</sup> See the discussion in para 4.2.4.2(B) above.

freedom in respect of contract creation are dependent on that which is permitted by the law.<sup>1368</sup>

In summary, the recognition of a unilateral discretionary power to determine price would compromise the autonomy of the “disempowered” contractant in a vital area of contract creation, negatively impacting on his/her dignity.<sup>1369</sup> This would run counter to the policies that underlie the consumer protection legislation.<sup>1370</sup> Public policy considerations that militate against its recognition are in line with the constitutional values as discussed earlier in this chapter.<sup>1371</sup>

#### **4.3.4 Reasonable price and rental and the notion of certainty in constitutional, jurisprudential and policy context**

As a precursor to a discussion of the notion of a reasonable price, it is appropriate to first discuss the notions of reasonableness, the reasonable person, and the *arbitrio boni viri*

##### **4.3.4.1 Reasonableness, the reasonable person and the notion of *arbitrio boni viri***

It is apposite, at this juncture, to preface the discussion by referring to the contents of chapter 2 where it was argued that “there is no obvious body of doctrine which allows for the judicial second-guessing of contractual powers on rationality grounds.”<sup>1372</sup> The reticence was ascribed to the classical theory of contractual freedom and autonomy and the assumption that the

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<sup>1368</sup> Hogg *Promises and Contract Law* 266-269.

<sup>1369</sup> See para 4.2.4 above.

<sup>1370</sup> Discussed in chapter 3.

<sup>1371</sup> See para 4.2.4 above.

<sup>1372</sup> The phraseology is that of Cockrell (1997) *Acta Juridica* 30. The writer elaborates by saying that “there is no established or settled body of doctrine which allows for second-guessing to occur on a generalised basis” (31). Quoting from Beatson J ‘Public influences in contract law’ in Beatson & Friedman (eds) *Good Faith and Fault in Contract Law* (1995) at 267, in which the authors describe an analogous position in English law, Cockrell concludes that, in the context of contractual powers, it seems that discretion is ‘often taken to mean that a matter is remitted to the unrestricted choice of a person’ (30-31). The concern, as was illustrated in chapter 2, relates to those situations where there is no delineation of the discretion in the contract with reference to objectively ascertainable and verifiable factors in the sense of the *Westinghouse* principle.

contractants are in the best position to determine what is in their best interest.<sup>1373</sup> Whilst the control and limitation of power in public law may be ascribed to paternalism<sup>1374</sup> and accountability,<sup>1375</sup> the same cannot be said for contractual relationships where it is presumed that contractants bargain from a position of equality.<sup>1376</sup> Hence, the absence of a “trigger” for judicial intervention means that “paternalistic intervention is [deemed to be] inappropriate ... and no ties of accountability link private contracting parties.”<sup>1377</sup>

With the above in mind,<sup>1378</sup> it is conceded that the notion of reasonableness is well known in law. The notion boils down to an acceptance that “the law is free to assume, contrary to fact if need be, that all members of the community come to largely similar, if not identical, conclusions when asked what reason demands in particular circumstances.”<sup>1379</sup> Put differently, the notion of reasonableness involves “considering the matter as a reasonable man would and then deciding as a reasonable man would normally decide.”<sup>1380</sup>

The “curiously enigmatic”<sup>1381</sup> notion of *arbitrio boni viri*<sup>1382</sup> is defined as the decision of a reasonable person or a reasonable decision.<sup>1383</sup> In *Benlou Properties (Pty) Ltd v Vector Graphics*

<sup>1373</sup> See chapter 2 and in particular paras 2.2.2 and 2.3.3.

<sup>1374</sup> As evidenced in, for example, environmental law legislation, road traffic legislation.

<sup>1375</sup> To counteract the power dynamics inherent in state-public relationships. The same considerations, paternalism and accountability, would apply in respect of power exercised in other branches of Private law, e.g. in the case of the appointment of a *curator bonis*.

<sup>1376</sup> See the discussion in chapter 2 and in particular paras 2.2.4 and 2.2.5.

<sup>1377</sup> Cockrell (1997) *Acta Juridica* 31-32. See the discussion of the strict application of the *pacta sunt servanda* doctrine in chapter 2 paras 2.3.1 and 2.3.2. See also the discussion of the limited role of good faith South African contract law chapter 2 para 2.8. Good faith is also dealt with in this chapter and particularly in para 4.2.4.4 above.

<sup>1378</sup> The classical law bent of South African contract law as outlined in chapter 2, above and especially in paras 2.3 and 2.4.

<sup>1379</sup> Lücke (1977-1978) 6 *Adel LR* 14. See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para [41], hereafter *Steenkamp* 2007 (3) SA 121 (CC), to similar effect and Neethling, Potgieter, Visser & Knobel *The Law of Delict* (2010) 36, hereafter *Neethling et al The Law of Delict*.

<sup>1380</sup> *Vanderbijlpark Health Committee and Others v Wilson and Others* 1950 (1) SA 447 (A) 458. See also *Minister of Safety and Security and Another v Rudman and Another* 2005 (2) SA 16 (SCA) para [65] to similar effect.

<sup>1381</sup> A description borrowed from Cockrell (1997) *Acta Juridica* 32. The description becomes clear in the discussion following this footnote reference.

<sup>1382</sup> Cockrell (1997) *Acta Juridica* 32, categorises the notion as one of a number of “discrete ‘pockets of intervention’” that involves “generalised second-guessing of the exercise of contractual powers on rationality grounds ...” He goes on to say that “[t]hese are doubtless marginalised zones of law...” The concept “second-

(Pty) Ltd<sup>1384</sup> the notion of *arbitrio boni viri* was equated with that of a reasonable person. The court said that an agreement conferring a discretion is usually “subject to a term implied by law; viz, that A must exercise an *arbitrium boni viri* and that B is consequently only liable in respect of expenditure which a reasonable person in the position of A could have incurred.”<sup>1385</sup> In *Machanick v Simon*<sup>1386</sup> the court said that the discretion must be exercised *arbitrio boni viri*, as a reasonable man [person] would. Accordingly, it is argued that the notion of *arbitrio boni viri* introduces an element of reasonableness and fairness that allows for judicial control of an unreasonable exercise of contractual power. The *arbitrio boni viri* notion that involves taking a decision honestly, according to the standard of the objective reasonable man, taking into account all the circumstances of the case<sup>1387</sup> therefore comes into play to limit what would otherwise have been an unfettered discretion.<sup>1388</sup> The notion involves an *ex post facto* application<sup>1389</sup> of the standard of reasonableness. In light of the foregoing, it may be concluded that any difference between the notion of the *arbitrio boni viri* and the reasonable person is

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guessing” is used in the context of the power of a court to decide whether a power has been legitimately exercised whilst “rationality grounds” has to do with substantive issues and not procedural issues such as whether the correct procedure for the exercise of the power has been followed. The notion of “rationality grounds” concerns the question whether the law considers the empowered contractant to have “acted in a manner which the law regards as being substantively illegitimate” Cockrell 28.

<sup>1383</sup> Claassen *Dictionary of Legal Words and Phrases* Vol. 1, 146-147. See also Erasmus 2006 (3) SA 529 (T) 538.

<sup>1384</sup> 1993 (1) SA 179 (A) 188B.

<sup>1385</sup> At 188B. The fact that the court later, at 189C, says, in the context of the facts of the case, that it not necessary to decide whether the respondent is liable for the expenditure which is objectively reasonable, or the expenditure incurred *arbitrio boni viri* does obfuscate the matter somewhat. However, in light of its earlier unambiguous statement at 188B and the fact that the court does not during the course of its judgment draw a clear distinction between the two, it is suggested that the court did not regard the two as being two distinct notions.

<sup>1386</sup> 1920 CPD 333, 338.

<sup>1387</sup> *Machanick v Simon* 1920 CPD 333, 338, hereafter *Machanick* 1920 CPD 333. The court said that the discretion must be exercised *arbitrio boni viri*, as a reasonable would. See also Cockrell (1997) *Acta Juridica* 32-34.

<sup>1388</sup> *NBS Boland Bank* 1999 (4) SA 928 (SCA) para [25]; Cockrell (1997) *Acta Juridica* 34.

<sup>1389</sup> For example, a plaintiff in a claim for damages for breach of contract is under a duty to mitigate his/her loss by taking such steps as a reasonable person in his/her position would have taken. The test of reasonableness takes into account all the circumstances of the case and “relates to the conduct of the plaintiff **after** breach of contract has been committed...” (Emphasis added). Van der Merwe *et al Contract* 367. See further the discussion in the text that follows this footnote reference.

more apparent than real<sup>1390</sup> though some court decisions have tried to differentiate between the two.<sup>1391</sup> Hence it is concluded that the notion of reasonableness is inherent in the *boni viri* notion and the same considerations apply.<sup>1392</sup>

However, there are significant problems that bedevil the determination of a gold standard for the test of reasonableness for the purposes of the implementation of the *obiter dicta*, namely the recognition of a reasonable price and rental, and unilateral power to determine the price and rental, the power being limited by the *arbitrio boni viri* notion. From a practical and policy perspective, these problems, discussed below, militate against the appropriateness of the standard of reasonableness as a determinant of the essence of a contract of sale and a contract of lease, namely, the price and rental.<sup>1393</sup>

#### 4.3.4.2 A gold standard for the test of reasonableness

The test for reasonableness is an objective one<sup>1394</sup> and may be determined *ex post facto*<sup>1395</sup> or *ex ante*. In the case of the former, the reasonableness of conduct is determined with the wisdom of hindsight whilst in the case of the latter, the reasonableness is determined from “the

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<sup>1390</sup> The conclusion is supported by the contextual references to the *arbitrio boni viri* notion in cases such as *NBS Boland Bank* 1999 (4) SA 928 (SCA) para [25]; *Joosub Investments (Pty) Ltd v Maritime and General Insurance Company Limited* 1990 (3) SA 373 (C), hereafter *Joosub Investments* 1990 (3) SA 373 (C); *Machanick* 1920 CPD 333, 338-341.

<sup>1391</sup> For example, in *Joosub Investments* 1990 (3) SA 373 (C), the court said that a clause granting a discretion must be interpreted either as “importing the standard of the *arbitrio boni viri*, or at the least as precluding the party from making an unreasonable decision” (383E). The court continues to say that “[i]n both classes of case, an objective standard is taken to be implied and the decision is justiciable by the Court.” Though the court appears to be drawing a distinction between the two when it refers to “both classes,” it also seems to suggest that the notion of *arbitrio boni viri* incorporates the notion of reasonableness when it says that the clause must be interpreted as importing the *arbitrio boni viri* standard or “at least” as precluding an unreasonable decision. See also McLennan who concludes that the exercise of a discretion *boni viri* on interest payments must be done both fairly and reasonably: McLennan “Unilateral Determination of Contractual Performance: The Interest-rate Controversy Solved – but what next?” (2000) 12 *SA Merc LJ* 485 487. The conclusion accords with the approach in the United States of America (last para of chapter 5 para 5.2.2.2(D)(i)(c) and in the Netherlands (chapter 5 para 5.2.6.2(B)).

<sup>1392</sup> See also Cockrell (1997) *Acta Juridica* 34 n40.

<sup>1393</sup> For the discussion of price as the essence of the contract see para 4.3.3.3(D) above.

<sup>1394</sup> *Steenkamp* 2007 (3) SA 121 (CC) para [41]; Du Bois *et al Wille's Principles* 1100.

<sup>1395</sup> A view held by most text-book writers. See Du Bois *et al Wille's Principles* 1100.

perspective of a reasonable person in the position of the defendant.”<sup>1396</sup> The results may differ depending on whether an *ex post facto* or *ex ante* approach is used.<sup>1397</sup>

In the Law of Contract, the “officious bystander” test<sup>1398</sup> used to determine whether a tacit term may be read into a contract, has its roots in the reasonable person test.<sup>1399</sup> In terms of the reliance theory, a reasonable belief of consensus is required in order to satisfy a demand for full contractual rights.<sup>1400</sup> In the Law of Delict, reasonableness is used as a criterion to judge the appropriateness of conduct that has already occurred<sup>1401</sup> or as a criterion for determining whether or not to impose liability for conduct.<sup>1402</sup> In Property law, when deciding whether conduct amounts to nuisance, the test of reasonableness has been said to involve drawing a balance between the interests of the respective parties in the light of prevailing circumstances.<sup>1403</sup>

From the examples of the application of the standard of reasonableness above, it may be concluded that the standard of reasonableness could (i) comprise the notion of a reasonable person as a dispassionate, balanced and objective bystander, one who has no personal interest

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<sup>1396</sup> Du Bois *et al Wille's Principles* 1100.

<sup>1397</sup> On an *ex post facto* approach the conduct of a defendant who shoots in self-defence when confronted with a “real-looking” toy gun may be deemed to be unreasonable and hence wrongful. An *ex ante* examination would result in the conduct being reasonable and hence not wrongful. The illustration comes from Du Bois *et al Wille's Principles* 1100.

<sup>1398</sup> Discussed in para 4.3.4.2(C)(viii) below.

<sup>1399</sup> The bystander when placed in the position of the contractants must display the “the degree of shrewdness, knowledge and prudence of persons ordinarily engaged in the conclusion of the relevant contract”: Lubbe & Murray *Contract* 418. See also Kerr *Contract* 354-370.

<sup>1400</sup> In other words, would a reasonable person in the position of the contractant, having regard to all the circumstances, believe that he/she was assenting to the terms proposed by the other contractant? It serves to protect the reasonable expectations of a contractant. Whilst the will theory is the primary basis for contract, the reliance theory steps in where it is clear that there was not a meeting of minds. Van der Merwe *et al Contract* 33-37; Kerr *Contract* 9-17, 20, 23; Hutchison *et al Contract* 15-20.

<sup>1401</sup> For example, in delict, where the defence of necessity is raised in a case of conduct resulting in physical injury, the wrongfulness of the conduct will depend on the whether the act of necessity was reasonable in the circumstances: Neethling *et al The Law of Delict* 93; Du Bois *et al Wille's Principles* 1099.

<sup>1402</sup> For example, where the foot-and-mouth virus escapes from a laboratory causing the death of livestock. This causes loss not only to the farmers but also to the truck drivers who would normally have transported the cattle to the abattoir. It would be reasonable to impose liability in the case of the former but not in the case of the latter. From the English case of *Weller & Co Ltd v Foot-and-Mouth Disease Research Institute* [1996] 1 QB 569.

<sup>1403</sup> *Gien v Gien* 1979 (2) SA 1113 (T) 1122C.

in the dispute or the issue at hand and who judges with the benefit of hindsight (*ex post facto*). It could also involve (ii) considering the conduct of a reasonable person in the position of the plaintiff, be it the buyer or seller (*ex ante*), or (iii) it could involve a process of balancing the interests of the respective contractants in the light of the facts of the case.<sup>1404</sup>

(A) The *ex ante* approach

Regarding the second approach, the question<sup>1405</sup> arises whether the buyer or the seller can be said to meet the standard of the reasonable person, both parties having a subjective and personal interest in the ultimate price.<sup>1406</sup> The definition of a reasonable person and the mechanics of the reasonable person test as *per* the *Vanderbijlpark* decision<sup>1407</sup> automatically exclude the buyer and the seller from consideration. Hence, a reasonable price cannot be determined by placing the reasonable person in the position of the plaintiff, being either the buyer or the seller.<sup>1408</sup> This approach is also objectionable in that it ignores the interests of the defendant (the buyer or the seller) in determining the essence of the contract,<sup>1409</sup> detracting from his/her dignity.

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<sup>1404</sup> In the international arena, there does not appear to be unanimity as to whether the standard of reasonableness involves a subjective or objective approach. Some delegates to the 1977 UNCITRAL Conference in Vienna regarded it to have a subjective value whilst others were in favour of an objective approach. Some delegates regarded the notion of foreseeability as being objective in orientation whilst others criticised it as being too subjective. Eörsi 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 32(2) *The American Journal of Comparative Law* 333, 344.

<sup>1405</sup> A rhetorical one, it is submitted.

<sup>1406</sup> See in this regard paras 4.3.4.2(C)(iii)-(iv) and (vi) below.

<sup>1407</sup> See the footnote reference in para 4.3.4.1 above and the text connected thereto.

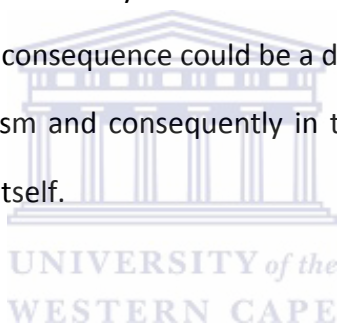
<sup>1408</sup> Both have a subjective interest in the matter at hand and (strongly) biased points of departure.

<sup>1409</sup> See the discussion in para 4.3.3.3(D) above.



(B) The balancing of interests approach

On the third approach,<sup>1410</sup> the test of reasonableness would involve striking a balance between the interests of the respective parties taking into account all the prevailing circumstances. Striking such a balance could be well-nigh impossible where the contractants have dissimilar competencies.<sup>1411</sup> Given the disparity, the probability of a (sharp) dissonance in what each perceives to be a reasonable price, should not be surprising.<sup>1412</sup> Furthermore, a reasonable price is one which would have to be decided with reference to the facts of each case, which would be peculiar to each case. It is one that would be difficult to decide with reference to other cases.<sup>1413</sup> Consequently, a body of precedent would be difficult to develop, with adverse consequences for the notion of certainty and the ability of contractants to plan their contractual relations.<sup>1414</sup> A further consequence could be a decline in the confidence in contract as an obligation-creating mechanism and consequently in the respect for, and, confidence in the regulatory function of the law itself.



(C) The *ex post facto* approach

The first approach, viz., that a reasonable price is that which a reasonable person, being neither the buyer nor the seller, would deem reasonable having regard to the totality of circumstances

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<sup>1410</sup> Viz., that a reasonable price is that which a reasonable person, being neither the buyer nor the seller, would deem to be reasonable having regard to all the circumstances of the case,

<sup>1411</sup> This may include cognitive ability, business acumen/sophistication, experience, means, need etc. These and other related considerations, as well as the harmful consequences of ignoring such considerations were highlighted in chapters 2 and 3.

<sup>1412</sup> This is confirmed by an empirical study that proved that contractants are likely to adopt a self-serving approach in the interpretation of contractual terms. Feldman *et al* 'Reference Points and Contract Interpretation' (2012) 3-4.

<sup>1413</sup> *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 (1) SA 195 (RA) 196H. However, the possibility of striking a balance cannot be ruled out where both parties display the same or similar attributes.

<sup>1414</sup> One of the benefits of certainty is that it enables commercial efficiency in that contractants can plan the obligations that they wish to assume.

surrounding the case, is equally problematical. The following problems, many of which also impact on the second and third approaches discussed above, may be highlighted.<sup>1415</sup>

(i) The identity of the reasonable person

Who is this reasonable person? How does one go about cloaking him/her with an identity? Is he/she “the ‘rational’ man [/woman] employed as a model by game theorists and Chicago-school economists?”<sup>1416</sup> Or is he/she the average person in the informal settlement of Imizamo Yethu (Hout Bay, Cape town) or the informal settlement of Du Noon (Milnerton, Cape Town), or the average person in Main Road in Cape Town, or in Main Road in Gugulethu, or in Main Road in Bishopscourt, or Main Road in Athlone? Is the reasonable person to be selected per informal settlement, suburb, or city, or province? Or is there a one-size-fits-all standard for the reasonable person?<sup>1417</sup>

It has been said that a person’s cultural context has a bearing on that person’s understanding of concepts and that a word may not have the same meaning when used twice, not even by the same person.<sup>1418</sup> The discrepancies in interpretation and understanding are heightened by the level of abstraction of the word or phrases in question.<sup>1419</sup> In this instance, the phrase in question is a “reasonable price” which it is submitted<sup>1420</sup> bears a high level of abstraction. Ronald Dworkin, in *Laws Empire*, makes the point that interpretation in fields such as law is concerned with purpose and that “the purposes are those of the interpreter.”<sup>1421</sup> These

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<sup>1415</sup> The discussion in chapter 4 illustrates that the international experience does not provide any comfort in these regards.

<sup>1416</sup> Speidel (1970) 31 *University of Pittsburgh LR* 363.

<sup>1417</sup> See also Speidel (1970) 31 *University of Pittsburgh LR* 363 for comments along similar lines.

<sup>1418</sup> Curran ‘Cultural Immersion, Difference and Categories in U.S. Comparative Law’ (1998) 46(1) *American Journal of Comparative Law* 43, 49, hereafter Curran (1998) 46(1) *American Journal of Comparative Law* 43. See also chapter 5 para 5.2.7.2(E)(ii) for a discussion along similar lines of the problems presented by language issues in attaining uniformity in international practise as envisaged by the United Nations Convention on Contracts for the International Sale of Goods (1980).

<sup>1419</sup> Curran (1998) 46(1) *American Journal of Comparative Law* 50.

<sup>1420</sup> And as proven in this paragraph.

<sup>1421</sup> Curran (1998) 46(1) *American Journal of Comparative Law* 58. See also Hunter Taylor ‘Uniformity of

considerations militate against the introduction of the standard of reasonableness in the determination of the crucial aspect of contractual relations relating to price and rental.

The conclusion is that the selection of the reasonable person as “a standard for personal behaviour” constitutes an arbitrary choice<sup>1422</sup> in that he/she does not and, indeed, cannot reflect the characteristics and attributes of the particular contractant(s). Any price that the court arrives at using this method would amount to making or remaking the essence of the contract.<sup>1423</sup> In arriving at a price that is reasonable in the circumstances, a court would be supplying a price that reflects the community standards of what is fair and reasonable.<sup>1424</sup> Such price may not have been within the contemplation or expectation of one or both of the contractants at date of contract, thereby ignoring the intention of one or both.<sup>1425</sup> This discredits the consensual principle of contracts and impacting on the dignity of the contractants. Hence, the imposition of such a price is questionable on the grounds of contract law principles as well as from a constitutional and policy perspective.

#### (ii) The totality of circumstances approach

The rhetorical question arises whether such a cardinal and essential aspect of a contract of sale should be left to the unpredictability of an unbridled horse by the name of “totality of circumstances.” In a casuistic system, the infinite number of possibilities that could arise from

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Commercial Law and State-by-State Enactment: A Confluence of Contradictions’ (1978-1979) 30 *Hastings LJ* 337, 350-352.

<sup>1422</sup> Feinman (1982-1983) 30 *UCLA LR* 829, 840.

<sup>1423</sup> For price as the essence of the contract see para 4.3.3.3(D) above.

<sup>1424</sup> The constitutional problems associated with the determination and imposition of such standards are highlighted in this chapter especially in paras 4.2 above and 4.4 below.

<sup>1425</sup> Van der Bergh (2012) 1 *TSAR* 53 observes that a reasonable price means that a court or a third party will state the price thus “placing a word (or a price) in the mouths of the contracting parties” which would not necessarily agree with what the contractant(s) had in mind (67). See also para 4.3.4.2(C)(viii) below for a summary of Kerr’s criticism in Kerr ‘Implied Provisions in Contracts: Is There to Be a New Role for/of the Hypothetical Bystander? Conflicting Supreme Court of Appeal Decisions’ (2006) 123 *SALJ* 195, hereafter Kerr (2006) 123 *SALJ* 195, of the role of the courts in this regard. See also further in this sub-paragraph.

an almost unquantifiable number of variables<sup>1426</sup> does not bode well for the establishment of a system of precedent and for the promotion of certainty in this vital area of contractual relationships.<sup>1427</sup>

Furthermore, the basis for the rejection of the doctrine of *laesio enormis* in *Tjollo Ateljees*<sup>1428</sup> that served to address the issue of unequal bargaining power militates against the recognition of the *obiters*.<sup>1429</sup> The court questioned the pertinence of the doctrine in a modern commercial setting with its “highly complicated commercial organisation and its ingenious selling devices ...” Within the context of the particular question of law at hand in this chapter,<sup>1430</sup> and whilst not admitting to the correctness of the decision in the *Tjollo Ateljees* case, it is submitted that the *arbitrio boni viri* notion<sup>1431</sup> suffers similar vicissitudes.<sup>1432</sup>

### (iii) Diversity of sellers

The modern market-place has a multiplicity of institutions offering a multiplicity of goods for sale. The multiplicity of institutions include, manufacturers, suppliers, agents, large wholesalers, small wholesalers, large retailers, small retailers, upmarket stores, downmarket stores, speciality stores, designer stores, boutiques, convenience stores, pop-up shops, corner-shops, *spaza* shops, factory shops, flea-marketers, door to door salespersons, private sellers, e-

<sup>1426</sup> See the explanation further down in the text following this footnote reference. Also take into account the problems in arriving at an identity for the “reasonable person” discussed in para 4.3.4.2(C)(i) above.

<sup>1427</sup> See also chapter 5 para 5.2.2.2(C), for a discussion about the uncertainty created by a multiplicity of precedents that results from the incorporation of the standard of reasonableness in price determination.

<sup>1428</sup> *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A), hereafter *Tjollo Ateljees* 1949 (1) SA 856 (A), also discussed in chapter 2 para 2.3.2.1.

<sup>1429</sup> The Court dismissed the doctrine as inherently arbitrary and preposterous, observing that “on closer inspection ... it appears to be full of pitfalls and anomalies” and concluded that “it is not surprising that there never was unanimity as to detail in its application to practical affairs” (863).

<sup>1430</sup> The question of law in this chapter is whether an agreement for a unilaterally determined price or a reasonable price promotes certainty and consensus and whether it is in line with the constitutional, jurisprudential and policy imperatives that inform the notion of *essentialia* and also whether it is in line with the role of the courts in this context.

<sup>1431</sup> Which incorporates the standard of reasonableness. See para 4.3.4.1 above.

<sup>1432</sup> See sub-para (iii)-(v) immediately below for a discussion of some of the concerns alluded to by the *Tjollo Ateljees* court.

wholesalers, e-retailers, private electronic sellers. The electronic market (represented by on-line shop-fronts, electronic market places, online auction sites, business to business and business to consumer infrastructure) which may offer a similar range of sellers has its own unique range of challenges, not least of which are the challenges presented by cross-border and cross-continent sales. The “lack of material presence” of the contractants “coupled with the inability of the internet in reflecting attributes of the person”<sup>1433</sup> are amongst the factors contributing to the difficulties presented by e-commerce because the anonymous nature of e-commerce makes it more conducive to unconscionable conduct.<sup>1434</sup>

#### (iv) Diversity of buyers

Having considered the notion of reasonableness in relation to the attributes of the seller, the question arises whether buyers should be regarded as a homogenous group, bearing in mind that buyers come from all walks of life with a complexity of needs, wants, inspirations, aspirations, and life experience. Equally important is the question whether the buyer is a private buyer or an institutional buyer, bearing in mind that “[p]eople tend to be less price sensitive when someone else pays the bill or *shares the cost*.”<sup>1435</sup>

#### (v) Diverse marketing philosophies

Further muddying the waters in determining the determination of a reasonable price is the question as to how to factor in the disparate marketing and sales philosophies and practices, and marketing and sales techniques which have a bearing on the price at which products are

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<sup>1433</sup> An awareness of, for example, the business sophistication of the counterpart may inspire a more cautious approach to contracting.

<sup>1434</sup> See Tasneem (2011) 1(2) *Int. J. Mang. Res.* 85-86. See also the discussion on e-commerce in chapter 3 para 3.6.8.

<sup>1435</sup> Perreault, Cannon & McCarthy *Essentials of Marketing: A Marketing Strategy Planning Approach* (2010) 455, hereafter *Perreault et al Essentials of Marketing*. See also para 4.3.4.2(C)(vi) below.

sold. In the *Tjollo Ateljees* case,<sup>1436</sup> the court observed, in 1949, that the modern commercial setting is a “highly complicated commercial organisation” which has “ingenuous selling devices.” The following may serve to illustrate the court’s concern.

Marketing strategies are influenced, *inter alia*, by the pricing objective that the seller chooses.<sup>1437</sup> Some of the pricing objectives include profit margin maximization; profit maximization; revenue maximization; quality leadership; quality maximization; and survival.<sup>1438</sup>

Pricing may also depend on factors such as the product mix of the seller, the life cycle of the product,<sup>1439</sup> and product demand/popularity.<sup>1440</sup> Some sellers use an “auction approach” which involves sequential price reductions over time. In this approach, the initial offering of the product is at a high price. The idea is to sell as much as possible at that high price and thereafter to embark on a series of step-by-step price reductions until the product is sold out.<sup>1441</sup> Other sellers may use the availability of competition, substitutes, or alternatives as the basis for its price-setting technique.<sup>1442</sup> Yet others may make use of marginal analysis as a price-setting technique which shows how “costs, revenue, and profit change at different prices.” On this model, the price is determined by the quantity that will be sold, hence the seller “needs an estimate of the demand curve to compute total revenue.”<sup>1443</sup>

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<sup>1436</sup> *Tjollo Ateljees* 1949 (1) SA 856 (A).

<sup>1437</sup> Van Niekerk *An investigation into the factors that most often contribute to the insolvency of franchisee businesses in the Western Cape*, Research report presented in partial fulfilment for the degree of Master of Business Administration at the University of Stellenbosch Business School 27 January 2012, 50, hereafter cited as Van Niekerk *An investigation into the factors that most often contribute to the insolvency of franchisee businesses in the Western Cape* 50.

<sup>1438</sup> Van Niekerk *An investigation into the factors that most often contribute to the insolvency of franchisee businesses in the Western Cape* 50.

<sup>1439</sup> A product that has a short life cycle will command a higher price in order to maximise profits over the shortest period of time. Van Niekerk *An investigation into the factors that most often contribute to the insolvency of franchisee businesses in the Western Cape* 51.

<sup>1440</sup> Van Niekerk *An investigation into the factors that most often contribute to the insolvency of franchisee businesses in the Western Cape* 51.

<sup>1441</sup> Perreault *et al Essentials of Marketing* 453.

<sup>1442</sup> Perreault *et al Essentials of Marketing* 450.

<sup>1443</sup> Perreault *et al Essentials of Marketing* 448.

(vi) Personal attributes of the contractants

Should the personal attributes of the contractants, for example, whether the contractant had access to legal counsel, is wealthy, needy, literate, numerate, or knowledgeable about the goods or the nature and consequences of the transactions play a role, bearing in mind that such considerations play little or no role in the determination of contractual liability?<sup>1444</sup> If the answer is in the affirmative, the further question arises as to what extent such personal circumstances should play a role in the determination of a reasonable price. Or, should the standard of the *arbitrio boni viri*, ignoring for a moment the difficulties implicit in this standard,<sup>1445</sup> be the gold standard in this context? If so, what if the *boni viri* is not reflective of, for example, the standards, means, knowledge, and intelligence of either the buyer or the seller or of both. Mindful of the policy considerations that underlie consumer protection legislation,<sup>1446</sup> the latter consideration raises the question, once again, whether the recognition of a reasonable price is desirable from a policy perspective.

Further complicating the issue of defining a reasonable price is that some consumers (regardless of factors such as wealth, economic status) “don’t devote much thought to what they pay for the products they buy.”<sup>1447</sup> Also relevant is that consumers often have a “reference price” being a price they have in mind or expect to pay for a product and that different buyers have different reference prices for the same goods. For example, a person who loves reading may have a higher reference price for a novel than a person who does not.<sup>1448</sup> On this logic, reference prices may also differ depending on the occasion or the purpose for which the purchase is made. For example, a buyer who buys a product as Valentine’s Day gift would probably have a higher reference price than if he/she went out to buy the product with no

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<sup>1444</sup> See the discussion in chapters 2 and 3.

<sup>1445</sup> See the discussion of the difficulties in para 4.3.3 above, as well as in the whole of para 4.3.4.

<sup>1446</sup> See the discussion in chapter 3.

<sup>1447</sup> Perreault *et al Essentials of Marketing* 453.

<sup>1448</sup> Perreault *et al Essentials of Marketing* 453.



special occasion or purpose in mind. Perreault comments that “[c]onsumers are [also] less price sensitive the greater the *significance of the end benefit* of the purchase.”<sup>1449</sup>

All of the above considerations<sup>1450</sup> raise many questions. For example, should the kind of store and/or the store philosophy and/or store practices, sales techniques and/or sales practices play a role and if so to what extent? Does the location of the store play a role? For example, should it matter whether the store is located in an upmarket or downmarket shopping precinct or whether it is located in a township, upmarket residential area, or industrial area? Should location play a role and if so to what extent? What if there is a mix of all the above? The likelihood of wide fluctuation in prices for the same commodity in a market presenting such a wide array of considerations is not inconceivable. Does it matter whether or not the contractant was aware, or ought to have been aware, or was unaware of these practices and/or philosophies? If it does matter, to what extent should it shape a court’s decision?

(vii) Date for determination of a reasonable price or rental

From the above discussion of the wide range of variables, it is evident that it is problematic to arrive at a gold standard against which the standard of reasonableness could be tested. On the assumption that a gold standard is determinable, the question arises whether the date of contract is to be used as the point at which reasonableness is to be judged or should it be the date at which empowered contractant decided on the price or is it to be decided at date of delivery. All three options are plagued with problems.<sup>1451</sup> The value of the object may have either decreased or increased from the one date to the other. This may operate to the disadvantage of the contractant on the receiving end of the exercise of the discretionary power. The parole evidence rule as well as the “four corner’s” approach to interpretation of written

<sup>1449</sup> Perreault *et al Essentials of Marketing* 450.

<sup>1450</sup> In para 4.3.4.2(A)&(B) and the parts of para 4.3.4.2(C) preceding this footnote reference.

<sup>1451</sup> See also the discussion of the problem in chapter 5 para 5.2.2.2(D)(i)(b), where it is indicated that in some international jurisdictions and instruments the date of contract is used whilst others use the date of delivery.

contracts<sup>1452</sup> would place a potentially paralysing limitation on the court's ability to resolve the dispute by curtailing the breadth of the evidentiary enquiry. Where does it leave the contractant who wishes to introduce evidence extrinsic to the written contract to support his or her position?

(viii) Certainty regarding the test for reasonableness

Standards that are beset by too many variables<sup>1453</sup> present difficulties in administration that cast a cloud over any hope for effective policing.<sup>1454</sup> Certainty regarding the test is paramount as is evident from Kerr's criticism of three recent decisions of the Supreme Court of Appeal.<sup>1455</sup>

The three decisions are *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC Seven Eleven*;<sup>1456</sup> *Transnet Ltd V Rubenstein*;<sup>1457</sup> and *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd & another*.<sup>1458</sup> In respect of the test governing the reading of a tacit term into a contract, Kerr points out that the Supreme Court of Appeal contradicted itself as to the nature of the hypothetical bystander test. In the *Consol* case, the court held that a term would be inferred if the contractants confirm it in response to a question asked by the hypothetical bystander. In the other two cases,<sup>1459</sup> the court adopted an "objective" approach that ignored the "actual but unexpressed" intention of the contractants. The distinction being that in the latter approach, a term is implied on the say-so of the hypothetical bystander, whereas in the *Consol* approach (the correct one according to precedent) a term would be implied only on a positive response by the contractants to a question by the hypothetical bystander. That the two

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<sup>1452</sup> The parole evidence rule precludes evidence of pre-contractual negotiations whilst the "four corner's" approach excludes all extrinsic evidence. See the discussion in chapter 2 para 2.4.5.

<sup>1453</sup> The submission is that the standard of a reasonableness in relation to price and rental (that includes a unilaterally determined price since it regulated by the standard of the *arbitrio boni viri*) is one such standard.

<sup>1454</sup> Speidel (1970) 31 *University of Pittsburgh LR* 363.

<sup>1455</sup> Kerr (2006) 123 *SALJ* 195. The discussion that follows is based on this article.

<sup>1456</sup> 2005 (5) SA 186 (SCA), hereafter *Seven Eleven* 2005 (5) SA 186 (SCA).

<sup>1457</sup> 2006 (1) SA 591 (SCA), hereafter *Transnet Ltd* 2006 (1) SA 591 (SCA).

<sup>1458</sup> 2005 (6) SA 1 SCA, hereafter *Consol Ltd* 2005 (6) SA 1 SCA.

<sup>1459</sup> *Seven Eleven* 2005 (5) SA 186 (SCA) and *Transnet Ltd* 2006 (1) SA 591 (SCA).

approaches may lead to different results is not to be disputed in light of the illustration by Du Bois *et al.*<sup>1460</sup> A similar conflict in approach can only exacerbate the already uncertain paradigm in which the standard of reasonableness in relation to price and rental is located.

Casting more shadows on the requirement of certainty is the warning that if the approach advocated in *Seven Eleven* and *Transnet Ltd* cases<sup>1461</sup> that envisage a “new role for the hypothetical bystander”<sup>1462</sup> were to be followed, the result would be that contractants “would no longer have the opportunity they now have to form their own contracts in their entirety.”<sup>1463</sup> The approach suggests that a court could view contracts from a perspective very different from that of the contractants who, because of their knowledge, did not consider it necessary to put what they know into words. The consequence would be that courts would end up making contracts whilst disregarding the intention of the contractants, something which the court have consistently affirmed it would not do.<sup>1464</sup> Such objectification of consent has prompted the stinging (but perhaps exaggerated) rebuke that the objective methodology of determining contractual content is the “greatest” of the legal fictions that expands “the scope of ‘consent’ far beyond what the parties ever had in mind.”<sup>1465</sup>

Regardless of whether the rebuke is exaggerated or not, the objectification of consent with reference to price would be most unfortunate in that it would debase the principals of contractual autonomy and consensus by excluding a contractant from the participating in the

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<sup>1460</sup> Du Bois *et al Wille’s Principles* 1100 referred to in para 4.3.4.2 above – the “toy-gun” incident. It will be recalled that Du Bois *et al Wille’s Principles* 1100 argued that on an *ex post facto* approach the conduct of a defendant who shoots in self-defence when confronted with a “real-looking” toy gun may be deemed to be unreasonable and hence wrongful whilst an *ex ante* examination would result in the conduct being reasonable and hence not wrongful. The say-so of the hypothetical bystander can be equated to the *ex post facto* examination of the conduct whereas the positive-response-by-the-contractant approach approximates an *ex ante* examination.

<sup>1461</sup> *Seven Eleven Corporation* 2005 (5) SA 186 (SCA), *Transnet* 2006 (1) SA 591 (SCA).

<sup>1462</sup> Kerr (2006) 123 SALJ 196.

<sup>1463</sup> Kerr (2006) 123 SALJ 204.

<sup>1464</sup> Kerr (2006) 123 SALJ 195, 204. See further para 4.4 below.

<sup>1465</sup> Macneil ‘Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law’ (1977-1978) 72 *North Western University LR* 854, 884.

determination of the essence of the contract, namely, the price,<sup>1466</sup> thereby devaluing contract law as an obligation-creating mechanism. It would also seriously impair the dignity of the contractants bearing in mind the cardinal role played by the value of dignity in the constitutional and, hence, generally in the legal paradigm.<sup>1467</sup>

#### 4.3.4.3 The notion of a reasonable price or rental

##### (A) The current position

The decision in *Adcorp Spares P.E. (Pty) Ltd v Hydromulch (Pty) Ltd*<sup>1468</sup> is illustrative of the common law rejection of an agreement to pay a reasonable price as a formula that complies with the requirement that the price must be objectively ascertainable *ex facie* the contract.<sup>1469</sup>

The Court held that an agreement to pay a reasonable price does not constitute an objective standard on the basis of which a price may be ascertained.

The *Adcorp Spares P.E. (Pty) Ltd v Hydromulch (Pty) Ltd* court reasoned<sup>1470</sup> that an agreement at a reasonable price leads to uncertainty because the price cannot be determined with reference to “something which in itself is not certain.”<sup>1471</sup> The Court concluded that an agreement to pay a fair and reasonable price is too uncertain to give rise to a valid contract of sale. The Court’s problem centred on the failure to find satisfactory answers to the questions as to what is the

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<sup>1466</sup> See the discussion generally in this chapter and, in particular, in para 4.3.3.3(D) above.

<sup>1467</sup> See para 4.2.4.2 above.

<sup>1468</sup> 1972 (1) SA 663 (TPD) 668. See also, for example, *Erasmus v Arcade Electric* 1962 (3) SA 418 (T), hereafter *Erasmus* 1962 (3) SA 418 (T).

<sup>1469</sup> The notion of a reasonable price was unknown in Roman law. It also appears not to have found favour in Roman-Dutch law where the contract of sale played an important role in international trade. Development of the economy was highly valued in a mercantile society and the notion of a reasonable price was not accepted because of the problems that it might create in practice. It was simply seen as a negotiating tool in the process of arriving at an agreement. Van der Bergh *TSAR* 2012 (1) 61-63.

<sup>1470</sup> At 668.

<sup>1471</sup> See also *Erasmus* 1962 (3) SA 418 (T) 419G-420B. A valid formula would, for example, be a usual price. In this instance, the usual price refers to a factual position, namely the usual price of the seller. See further the discussion in chapter 1 para 1.4.2.2(C).

true meaning of a fair and reasonable price,<sup>1472</sup> who must determine it<sup>1473</sup> (the buyer, the seller or an undetermined third party or a court) and how is it to be calculated. The Court, furthermore, found it problematic that the answers depended on the opinion of some undetermined person or persons. These considerations led the Court to conclude that because a reasonable price does not provide a factual basis for the calculation of a price, it is too uncertain to give rise to a valid contract of sale. The Court was clearly concerned with the ambiguity inherent in the notion of a reasonable price and that that may lead to different interpretations, providing fertile ground for litigation.

The difficulty of the Court may be illustrated with reference to a card game where two players are required to draw a card, the one half of which is black and the other half which is white. The one player may view the card from the perspective of the black half and the other from the perspective of the white half, both players being unaware that they are viewing the card from a different perspective.<sup>1474</sup> The result is that they have different perceptions of the same thing.<sup>1475</sup> Such a result could conceivably follow on the determination of a reasonable price where the buyer and seller view the reasonable price from two totally different perspectives. The requirement of certainty in relation to price seeks to avert such possibilities. The requirement of certainty constitutes one of the protective mechanisms devised and refined by our common law to prevent abuses and disputes regarding the counter-performance expected

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<sup>1472</sup> It is submitted that, generally, contractants have different ideas as to what constitutes a reasonable price, hence it cannot be said that they are in agreement about what a reasonable price is until they have specified the price or an objective method of determining it. Until they have done so by exercising their right to negotiate, an agreement to a reasonable price is indefinite and uncertain.

<sup>1473</sup> Perillo *Corbin on Contracts* Vol 1 Revised Edition (1993), hereafter *Perillo Corbin on Contracts* Vol 1, observes that reasonableness is a matter of opinion and that opinions differ even though the opinions may be equally honest and well informed (595).

<sup>1474</sup> Grant, Kline & Quiggin 'Differential awareness, ambiguity and incomplete contracts: A model of contractual disputes' (2012) *Journal of Economic Behaviour & Organization* 1, 2-3 <[http://ac.els-cdn.com/S0167268112000443/1-s2.0-S0167268112000443-main.pdf?tid=e7e54d5a-3ec2-11e2-a80b-00000aab0f6b&acdnat=1354701941\\_e72fd5711c909a015f713802c4f15af2](http://ac.els-cdn.com/S0167268112000443/1-s2.0-S0167268112000443-main.pdf?tid=e7e54d5a-3ec2-11e2-a80b-00000aab0f6b&acdnat=1354701941_e72fd5711c909a015f713802c4f15af2)>.

<sup>1475</sup> Both see the same card but for the one it is black and for the other it is white.

of the buyer.<sup>1476</sup> Hence, certainty regarding the essential aspects of a contract, including price, serves to protect the integrity of the obligation-creating function of contracts and protects the dignity of the contractants by ensuring that the contract reflects their wishes.<sup>1477</sup>

#### (B) Criticism of the current position

Zeffert is critical of the approach as represented in the *Adcorp* case, arguing that a fair and reasonable price is not void for vagueness because "...that which can be reduced to certainty is certain and an agreement to pay a reasonable price **may be** capable of being reduced to certainty **if the court is able** to determine what is reasonable and fair in the circumstances..."<sup>1478</sup> Such an approach does not promote certainty of the law. Aside from being circuitous, the argument is based on a number of speculative imponderables. The law would serve very little purpose if the price cannot be reduced to certainty prior to the court's intervention. If the court has to determine the price, a contractant may be prejudiced by a result which was not reasonably anticipated or contemplated at the date of contract.<sup>1479</sup>

Also critical of the *Adcorp* court, was the Appellate Division,<sup>1480</sup> which in an *obiter dictum* declared that it was difficult to comprehend on what principle a sale at a reasonable price or even a lease at a reasonable rental, should be regarded as invalid.<sup>1481</sup> In expressing itself thus, the court found comfort in the position adopted in England and the United States of

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<sup>1476</sup> Zimmermann *Obligations* (1990) 254-255; Kerr *Sale and Lease* 66.

<sup>1477</sup> Zimmermann *Obligations* (1990) 254.

<sup>1478</sup> 'Sales at a Reasonable Price' (1973) 90 *SALJ* 113. Emphasis added.

<sup>1479</sup> See the argument in para 4.3.4.3(C) below. See also para 4.3.3.3(A) above and para 4.4 below.

<sup>1480</sup> In *Genac Properties* 1992 1 SA 566 (AD). The case dealt with the terms of a contract of lease.

<sup>1481</sup> At 576I-578D.

America<sup>1482</sup> and in contracts of service where an agreement for a reasonable remuneration is permissible.<sup>1483</sup>

### (C) Response to the criticism

Zefferit,<sup>1484</sup> in appealing for a less dogmatic approach, refers to *Elite Electrical Contractors v The Covered wagon Restaurant*<sup>1485</sup> which concerned a contract of service. In the *Elite* case the court concluded that a fair and reasonable price for goods supplied and services rendered created sufficient certainty in the contract so as to make it unnecessary for the court to declare the contract void for vagueness. It must be noted, however, that there are significant differences between a contract of sale and a contract of service which makes it possible to conclude service contracts at a reasonable fee. Zefferit, with respect, correctly points out<sup>1486</sup> that in the case of a contract of service there is: (a) a tangible result on the basis of which a just and reasonable remuneration may be calculated; (b) an industry standard against which a reasonable remuneration may be measured; (c) a social need for a reasonable remuneration for work done because it often happens that work is done in circumstances where no fixed payment can be stipulated in advance. These factors cannot be said to apply in the case of a contract of sale. It is, for example, the industry standard that furnishes the objective basis for the determination of a reasonable fee for services rendered. No such industry standard exists in the case of contracts for the sale of goods, more so where the goods are rare or unique.<sup>1487</sup> There also does not

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<sup>1482</sup> At 578B-C. The court also echoed the view of Zefferit 'Sales at a Reasonable Price' (1973) 90(2) *SALJ* 113, hereafter Zefferit (1973) 90(2) *SALJ* 113. The position as it obtains in England, the United States of America and a few other jurisdictions is discussed in chapter 5.

<sup>1483</sup> In support of its view in connection with contracts of service, the Court, at 577G-578D cited the case of *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) 649C-D. The *Chamotte* court was of the view that authority exists for a reasonable remuneration.

<sup>1484</sup> (1973) 90 *SALJ* 113.

<sup>1485</sup> 1973 (3) SA 418 (RA).

<sup>1486</sup> At 113

<sup>1487</sup> See chapter 1 para 1.4.2.2(C)(ii)(a).



appear to be a social need for the recognition of a sale at a reasonable price.<sup>1488</sup> On the contrary, social need, as evidenced by recent consumer protection legislation, seems to favour a legal position that favours pre-contractual disclosure, clarity, and certainty.<sup>1489</sup> In addition, the current common law<sup>1490</sup> provides sufficient elasticity to accommodate situations where the contractants do not expressly agree on a price or where they unwilling or unable to<sup>1491</sup> settle a price themselves.<sup>1492</sup> Consequently, it is submitted that a sale at a reasonable price is, not only, misleading,<sup>1493</sup> but also, the need for such a sale is non-existent.<sup>1494</sup>

Even if one were to accept that the standard of a reasonable price is capable of practical implementation, the question still remains whether as a matter of principle, a reasonable price constitutes a valid formula. Whilst it is conceded that issues relating to mode and time of performance may be settled by employing the standard of reasonableness,<sup>1495</sup> the same cannot

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<sup>1488</sup> See para 4.3.4.3(E) below.

<sup>1489</sup> See, for example, the provisions of consumer protection legislation discussed in chapter 3 that characterised price transparency as one of the hallmarks of the legislation: information about price being regarded as an essential component of the prized notion of making an informed decision. Hence, price transparency contributes to contractual autonomy and consensus, the hallmarks of South African contract law: see chapter 2 and in particular paras 2.2.4 and 2.4. Important in this context is the 1997 research paper of the Office of Fair Trading in England that found that in order to make informed choices, consumers require information about price, quality and terms of trade and concluded that an unregulated market may not always provide this: Cartwright P 'Publicity, punishment and protection: the role(s) of adverse publicity in consumer policy' *Legal Studies* (2011) 1,13 <<http://onlinelibrary.wiley.com/doi:10.1111/j.1748-121X.2011.00212.x>>, hereafter Cartwright (2011) *Legal Studies*. "[I]mperfect information about prices" may also precipitate high prices: Armstrong 'Economic Models of Consumer Protection Policies.' Paper prepared for conference on "The pros and cons of consumer protection," organised by the Swedish Competition Authority, held on 11 November 2011, 2 and 7 <<http://mpira.ub.uni-muenchen.de/34773/>>.

<sup>1490</sup> See the explanation of objective ascertainability in chapter 1 paras 1.1 and 1.4.2. See further chapter 5 para 5.3 regarding the elasticity of the common law requirement of objective ascertainability.

<sup>1491</sup> Whether for lack of knowledge and/or expertise and/or confidence in their ability to set a price.

<sup>1492</sup> For example, the possibility of nomination provides adequate relief where either or both the contractants does/do not possess the requisite knowledge and/or experience to settle the price.

<sup>1493</sup> See the discussion in para 4.3.4.3(E) below.

<sup>1494</sup> Such a development, it must be emphasised, is superfluous given the current formula that are regarded as valid, and would serve to create confusion instead of clarity in contracts of sale. See in this regard the discussion of the characteristics of the law, *inter alia*, clarity and transparency, in para 4.2.4 above. See also chapter 5 para 5.2.2.2(E)-(F).

<sup>1495</sup> The determination of what is reasonable in the context of time of delivery is fairly easily established with reference to factors such as the nature of the goods (e.g. perishables) or the purpose (e.g. wedding) thereof.

be said for more “crucial” aspects of performance, such as price or quantity.<sup>1496</sup> A direct appeal to reasonableness, devoid of any objective qualifying standard(s), does not facilitate effective determination.<sup>1497</sup> The determination of what is reasonable is largely “a matter of discretion and good sense and is therefore not capable of being subjected to hard and fast rules.”<sup>1498</sup> The (reasonable) price or rental is not settled until a judge determines what is reasonable in the circumstances.<sup>1499</sup> The litigant claiming a reasonable price comes to court without a complete cause of action.<sup>1500</sup> “He is saying to the judge or jury: ‘Complete our contract for us, and then enforce it.’ It is the same as if the ‘contract’ had said: ‘for a price to be fixed by a judge or jury.’<sup>1501</sup> Whilst it is patent that litigation is often inevitable and that courts should not shirk from its responsibility of resolving difficult problems, it is equally patent that courts should not expend their time, energy, and resources to create contractual rights and obligations in

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<sup>1496</sup> In relation to open terms as to quantity, and, after referring to a number of English and Australian cases, it has been concluded that, in Australia, “in all the cases there was an objective standard, contained in the contract, by which the quantity could be measured”: Howard ‘Open Terms as to Quantity in Contracts for the Sale of Goods’ (1977) 5(3) *University of Tasmania LR* 308, 309. The writer observes that whilst a court may be able to preserve other open terms in contracts with reference to the standard of reasonableness, this is not possible where the open term relates to quantity (308). It is submitted that the same considerations apply in respect of price.

<sup>1497</sup> Lücke (1977-1978) 6 *Adel LR* 14. The writer gives the example of a restraint of trade agreement that was held to be incapable of being given geographical limitation where the stipulation was that the restraint should operate for a “reasonable distance” from a certain point. See also *Adcorp Spares P.E. (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (1) SA 663 (TPD); *Westinghouse* 1986 (2) SA 555 (A). See also Menzies J in *Hall v Busst* (1960) 104 C.L.R. 206, 235, hereafter *Hall* (1960) 104 C.L.R. 206.

<sup>1498</sup> Lücke (1977-1978) 6 *Adel LR* 1. A similar position prevails in Australia. The writer doubts that reasonableness is an “externally existing standard” arguing that “[o]ne does not have to be a legal realist to see that a point which is settled by reference only to ‘reasonableness’ is not really settled until a judge determines what was reasonable in the circumstances”: Lücke (1977-1978) 6 *Adel LR* 13. Perillo *Corbin on Contracts* Vol 1 agrees that the legal effect of a promise to pay a reasonable price is a promise to pay sum that a court or jury may determine in case of a dispute (595).

<sup>1499</sup> Perillo *Corbin on Contracts* Vol 1 595. Menzies J in *Hall v Busst* (1960) 104 C.L.R. 206 is of the view that where an object does not have market value, a reasonable price “would be no more than an agreement to pay what the court should fix as its value. I am inclined to think such a bargain [an agreement to sell at a reasonable price] would be no contract ...” (235).

<sup>1500</sup> *Hall* (1960) 104 C.L.R. 222.

<sup>1501</sup> *Per Fullagar J Hall* (1960) 104 C.L.R. Fullagar J concludes that “...clearly a contract in those terms could not be enforced, for no breach antecedent to litigation could be assigned” (222). See also Perillo *Corbin on Contracts* Vol 1 595. A sentiment similar to that in the *Hall* case but this time in respect of the absence of certainty regarding rental was expressed in *Joseph Martin* 1981, 52 N.Y.2d 105.

essential aspects of contractual relations.<sup>1502</sup> The latter is a right accorded to the contractants by contract law through the requirement of *essentialia*. Underscoring this is the fact that price-determination by a court is the result of a litigious and adversarial process which the fixing of a price was never intended to be.<sup>1503</sup>

The above argument may be slanted differently. When contractants agree on a reasonable price, their rights are no longer fixed by contract. The determination thereof is automatically shifted to an unknown entity, presumably the courts, to be determined in the light of uncertain criteria. The court is tasked with the responsibility of determining the scope of relevant evidence to establish the certainty that cannot be extracted from the contract. This, in effect, results in the court perfecting the contract for the contractants. In doing so, the court is not enforcing the contract as agreed upon by the contractants, neither is the court interpreting the contract, but rather it would be conceptualising its own idea of what the contract ought to have said. This does not contribute to certainty.<sup>1504</sup> In contrast to this, when contractants appoint a nominee, they do so on the basis of their trust and confidence in the knowledge and expertise of the nominee whose knowledge and expertise in the particular field<sup>1505</sup> would serve as the criteria in light whereof the price would be determined.

It is submitted that an agreement to sell at a reasonable price is no more than an agreement to agree, the final price still to be determined by the parties either by express agreement or by way of nomination or by way of a formula.<sup>1506</sup> Until that happens the contract remains incomplete. The price becomes ascertained or objectively ascertainable and the contract

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<sup>1502</sup> *Walker* 382 S.W.2d 198 (Ky. 1964). See further the discussion regarding the function of the courts in the determination of price in para 4.4 below.

<sup>1503</sup> *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd & Another* 1994 (3) SA 449 (C) 454D, hereafter *Hurwitz* 1994 (3) SA 449 (C)

<sup>1504</sup> *Brownsword Contract Law Themes for the Twenty-First Century* (2000) para 9.11.

<sup>1505</sup> *Dublin v Diner* 1964 1 SA 799 (D) 804D, hereafter *Dublin* 1964 1 SA 799 (D).

<sup>1506</sup> See also *Hall* (1960) 104 C.L.R. where the court said that in the case of a sale at a reasonable price the actual price can only be arrived at either by further agreement between contractants or by a court. The latter notion was unacceptable to the court (222). See the discussion earlier in this sub-paragraph.

becomes complete only when the parties determine what the purchase price is expressly (price ascertained), or by nomination, or by way of a formula (price objectively ascertainable). The constitutional, jurisprudential and policy imperatives underlying *essentialia*,<sup>1507</sup> the duty of good faith that is inherent in *essentialia*,<sup>1508</sup> and the very strong *obiter dicta* in the *Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd*<sup>1509</sup> favouring the recognition of a duty to conduct good faith negotiations, require that negotiations to reach express agreement, or agreement on a nominee or a formula, must be conducted and that such negotiations must be conducted in good faith<sup>1510</sup> and in the spirit of *ubuntu*. Under such a construction, a contractual term for a reasonable price would not invite invalidity. Instead, it would be construed as a duty to negotiate in good faith, failing which a court may order a “recalcitrant” contractant (one who in bad faith does not want to negotiate the price) to negotiate in good faith. If, however, good faith negotiations fail to perfect the contract, then each contractant should be at liberty to withdraw from the negotiations.<sup>1511</sup> Such an approach will ensure fidelity by the court to its function as an arbiter of fact and law<sup>1512</sup> as well to ensure fidelity to contract law’s regard for the true intention of the contractants.<sup>1513</sup>

In light of the above, it stands to reason that the standard of reasonableness cannot be applied in “the absence of any agreed basis of calculation.”<sup>1514</sup> Since a court cannot enforce a contract

<sup>1507</sup> Discussed in paras 4.2.4.2(B) and 4.2.4.3 above.

<sup>1508</sup> See para 4.2.4.4 above.

<sup>1509</sup> 2012 (1) SA 256 (CC).

<sup>1510</sup> Perillo *Corbin on Contracts* Vol 1 579 argues that the minimum obligation created by an agreement to agree is a duty to negotiate in good faith.

<sup>1511</sup> Farnsworth ‘Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations’ (1987) 87 *Columbia LR* 217, 240-241, hereafter Farnsworth (1987) 87 *Columbia LR* 217.

<sup>1512</sup> See the discussion in para 4.4 below.

<sup>1513</sup> Knapp ‘Enforcing the Contract to Bargain’ (1969) 44 *New York University LR* 673, 682-685 and 723. Farnsworth (1987) 87 *Columbia LR* observes that the act of negotiation contains an implicit undertaking of a “serious intent” to reach agreement with the other contractant (234).

<sup>1514</sup> Lücke (1977-1978) 6 *Adel LR* 15. It is submitted that the notion of reasonableness is satisfactory only (i) if the contract provides for an objective standard (e.g. an agreement to buy all the bricks to be used in the building of a specific house at R1 per brick) or (ii) if it provides for the necessary machinery (e.g. the auditor of the company); or (iii) there was a previous course of dealing between the contractants which could serve as an objective point of reference.

unless it can determine what it is,<sup>1515</sup> the conclusion is that the standard of reasonableness is insufficient as a determinant of one of the essential obligations of the contractants. Uncertainty about an essential term precludes the creation of an enforceable contract.<sup>1516</sup>

Given all the uncertainties associated with the standard of reasonableness, and weighed against the requirement that the purchase price must be certain, and the need for such certainty as explained above, the only logical conclusion is that the decision in the *Adcorp* case is the correct one: a stipulation that a sale at a reasonable price does not constitute a valid formula for the conclusion of a contract of sale.

#### (D) Position in respect of lease agreements

It is axiomatic that an ascertained or objectively ascertainable rental promotes stability in business transactions.<sup>1517</sup> Rental is the price the lessee agrees to pay and the lessor agrees to accept in exchange for the use and occupation of premises. Nothing can be more vital in a lease agreement.<sup>1518</sup>

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<sup>1515</sup> The contractants must express their intention in a manner that is capable of being understood. The fact that they have actually agreed is of no consequence where a court cannot determine the terms of the contract with reference to the facts and circumstances of the case. Perillo *Corbin on Contracts* Vol 1 525. See also *Walker* 382 S.W.2d 198 (Ky. 1964) where the court said a contractant must have an enforceable contract before he/she can enforce it. See also the discussion in chapter 5 para 5.2.2(D)(i)(a).

<sup>1516</sup> Perillo *Corbin on Contracts* Vol 1 525.

<sup>1517</sup> *Walker* 382 S.W.2d 198 (Ky. 1964). The court had to decide on the validity of a rental renewal option that left the rental to be agreed upon between the lessor and lessee and the monthly rental to be fixed on “the comparative basis of rental values as of the date of renewal with the rental values at this time reflected by the comparative business conditions of the two periods.” The court held that this amounted to an agreement to agree which it could not enforce. Regarding the formula, the court held that it neither fixes the rent nor furnishes a positive key to its establishment. Echoing some of the concerns relating to the indeterminateness of the notion of a reasonable price raised in para 4.3.4 above, the court questioned whether the notion of “comparative business conditions” related to local business conditions, or national business conditions, or conditions that affected the lessee’s particular business. The court’s declaration that the degree of certainty is the controlling consideration echoes the approach in South African law. An example of a formula that contains a definite objective standard which introduces the requisite degree of certainty is in the case of *Jackson v Pepper Gasoline Co.* 280 Ky. 226, 133 S.W.2d 91 126 A.L.R. 1370 where contract stipulated that the rental would be “an amount equal to one cent per gallon of gasoline delivered to the said station.”

<sup>1518</sup> Knapp, Crystal & Prince *Problems in Contract Law Cases and Materials* (2003) 274. The axiom has equal validity in relation to the *essentiale* of price in contracts of sale.

In *Lobo Properties (Pty) Ltd v Express Lift Co SA (Pty) Ltd*,<sup>1519</sup> the court held that the usual rental is the rent charged for that kind of property in the area where the leased property is situated. The notion of a usual rental gives expression to the objective ascertainability requirement as per the *Westinghouse* principle in that it may be determined with reference to the industry standard in the rental market.<sup>1520</sup> In rental, the industry standard is determinable with reference to various factors including the location of the rental property and the average rental charged in such areas. Commercial and residential areas have a fairly general and distinct socio-economic profile. It is this generality that could facilitate the determination of an industry standard that would serve as an objective criterion for the determination of a usual rental.<sup>1521</sup> Support for this proposition may be found in the following: (i) consumer mobility is limited by lease durations; (ii) the number of transactions, in general, are not as voluminous as in the sale sector - the same consumer typically concludes a single rental agreement at a time relative to multiple transactions that the consumer would enter into in the purchase and sale market; (iii) in the rental market, the category of supplier is fairly well-defined,<sup>1522</sup> so also the type of rental property.<sup>1523</sup> These considerations may militate against wide fluctuations in rental occurring within specific nodes, thereby contributing to market stability and the ability to arrive at an objective industry standard for the determination of a usual rental. Accordingly, there would be compliance with the *Westinghouse* principle which requires a formula, for example, an industry standard, that could be used by an outsider to settle the price without further reference to the contractants.<sup>1524</sup> However, it is conceivable that an industry standard may not exist in certain

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<sup>1519</sup> 1961 (1) SA 704(C) 708-710A.

<sup>1520</sup> The industry standard was one of the criteria used by Zeffertt (1973) 90(2) *SALJ* 113 to distinguish contracts of sale from service contracts where an agreement for reasonable remuneration for work done is permissible based on the existence of an industry standard.

<sup>1521</sup> As indicated before, it is the objective standard that makes possible a system of individualised justice as well as a system of precedent for other contractants.

<sup>1522</sup> For example, private, corporate, estate agent.

<sup>1523</sup> For example, residential, commercial, industrial, private, holiday.

<sup>1524</sup> *Westinghouse* 1986 (2) SA 555 (A). See also Lücke (1977-1978) 6 *Adel LR* 14.

instances.<sup>1525</sup> It is submitted that in such cases contractants would usually agree on a fixed amount of rental as would be the case in a contract of sale of rare, precious or unique commodity.

Agreement to a reasonable rental would mean that the decision is left to an undetermined third party or to a court of law which would bring into play the difficulties outlined earlier in this chapter.<sup>1526</sup> Hence, the use of the term reasonable rental should be avoided because of the problem of definition as well as its misleading connotations.<sup>1527</sup>

#### (E) Economic, social, and moral considerations

It is generally accepted that there is often an unequal power relationship between seller and buyer.<sup>1528</sup> Our recent economic history is testament to the fact that consumers hardly need encouragement to spend,<sup>1529</sup> the market-place being awash with consumers who enthusiastically purchase products which they can hardly afford and thereby consign themselves to the scrapheap of economic ruin as evidenced by the increase in sequestrations and liquidations.<sup>1530</sup> Sequestrations and liquidations can have a devastating effect of lives of those affected. Cabinet ministers have in the past warned consumers to curb spending or run the risk of being stressed financially and emotionally.<sup>1531</sup>

The recently enacted National Credit Act<sup>1532</sup> is one of the measures designed, *inter alia*, to restrict access to credit and to reverse this trend. Despite this, the recently UNISA-Momentum

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<sup>1525</sup> This could be, for instance, where the rental property has unique properties. An example would be where the property is the only one in the country or the location boasting certain historical or architectural features.

<sup>1526</sup> See para 4.3.4 above.

<sup>1527</sup> See para 4.3.4.3(E) below.

<sup>1528</sup> See chapters 2 and 3.

<sup>1529</sup> Part of this may be ascribed to the fact, as confirmed by empirical evidence, that contractants, not only, underestimate, but also, choose to ignore low probability risks: Eisenberg 'Why There is No Law of Relational Contracts' (1999-2000) 94 *Northwestern University LR* 805, 812, hereafter Eisenberg (1999-2000) 94 *Northwestern University LR* 805.

<sup>1530</sup> See the discussion in chapter 3.

<sup>1531</sup> Amukelani Chauke *The Times* Friday, 20 April 2012, 5.

<sup>1532</sup> 34 of 2005.



research<sup>1533</sup> paints a different picture.<sup>1534</sup> It reveals that “[m]ore than half of the country’s households are living beyond their means and have taken on too much debt consequently...”<sup>1535</sup> Bernadene de Clercq,<sup>1536</sup> is reported as putting the blame for the unhealthy financial position of about 50.35% of South Africans on “irresponsible spending.”<sup>1537</sup> BNP Paribas Cadiz Securities report that there are more people using credit in South African than there are people who have jobs.<sup>1538</sup> Causing grave concern is the number of indebted consumers who are still managing “to source additional unsecured loans” suggesting that lenders are “finding loopholes to circumvent the National Credit Act.”<sup>1539</sup> The number of unsecured borrowers is expected to grow exponentially with the entry of banks into the lucrative, but risky, unsecured lending market, that relies solely on the consumer’s promise to repay the loan, to offset weak corporate demand for credit.<sup>1540</sup>

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<sup>1533</sup> UNISA-Momentum Household Financial Wellness Index Results: 2011 released on 19 April 2012, available at <[http://www.unisa.ac.za/contents/faculties/ems/docs/Financial\\_wellness\\_index\\_April2012.pdf](http://www.unisa.ac.za/contents/faculties/ems/docs/Financial_wellness_index_April2012.pdf)> See also Amukelani Chauke *The Times* Friday, 20 April 2012, 5.

<sup>1534</sup> It reveals that in terms of financial wellness, 30% of households are in the “Anchored Unwell” category whilst a further 30% are in the “Drifting Unwell” category with a further 20% in the “Drifting Well” category. Only 20% are in the “Anchored Well” category meaning that the household is firmly entrenched as being financially sound. The “Anchored Unwell” category means that the households are deeply rooted in this category with very little prospect of rising out of their predicament. The “Drifting Unwell” means the category is unstable and at risk of becoming “Anchored Unwell” due to negative influences such as higher taxes, interest rates or a sharp increase in prices. “Drifting Well” means that whilst the category is well, it is at risk of becoming “Drifting Unwell” due to the negative influences mentioned before.

<sup>1535</sup> Editorial in *The Times* Friday, 20 April 2012, 9. The same editorial suggests that the research findings correlate with research conducted by the National Credit Regulator in January 2012 that disclosed that, as at September 2011, 8.83 million of the country’s 19.1 million credit-active consumers had impaired credit records. The editorial goes on to suggest that an investigation into whether the act needs tightening up would not be inappropriate. See also the discussion in this regard in chapter 3 para 3.3.

<sup>1536</sup> Head of the personal finance research unit at UNISA.

<sup>1537</sup> Amukelani Chauke *The Times* Friday, 20 April 2012, 5.

<sup>1538</sup> Shevel Adele *Sunday Times Business Times Supplement* 06 May 2012, 3.

<sup>1539</sup> Editorial in *The Times* Friday, 20 April 2012, 9.

<sup>1540</sup> ABSA is reported as being prepared to pay R10.13 billion for the store credit card business of Edcon, South Africa’s largest clothing retailer. The deal will enable ABSA to extend credit and sell other financial products to about four million customers of Edcon. The Reserve Bank fears that the entry of banks into this sector may worsen the already dangerously high level household debt in relation to disposable income. The ratio currently stands at 70%: Reuters report 7 June 2012 *The Times (Business Times)* 9. The report by the National Credit Regulator to Portfolio Committee of Trade and Industries about the huge debt burden and the increase in the number of unsecured loans shocked the latter to undertake to place possible amendments to the

Against this background, the recognition of a reasonable price or unilateral discretionary power to settle the price may encourage further indiscriminate spending on the part of consumers and reverse the policy directions of recent consumer protection legislation.<sup>1541</sup> How much more attractive would a “reasonable price,” or, for that matter, a price to be determined later, not sound to a buyer?<sup>1542</sup> It blunts the reality of a known amount of money that could have acted as a disincentive to buy or that could have acted as an incentive for further reflection.<sup>1543</sup> It may allow businesses and “frequent participants in the market-place” to exploit their superior legal and/or commercial sophistication<sup>1544</sup> to entice people to buy products which they cannot afford

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credit environment before parliament. SAKE 24 5 August 2012  
<http://www.sake24.com/Ekonmie/Skuldwette-dalk-gewysig-20120805>.

<sup>1541</sup> It would exemplify the two-step-forward, one-step-backward proverb. For the two steps forward, see the discussion of the policy directions in chapter 3 above.

<sup>1542</sup> The temptation created may be equated to the “buy now pay later” marketing strategy that tempt buyers to over-extend themselves. The misplaced optimism in the “it-will-not-happen-to-me” syndrome is evident in the sub-conscious reasoning of contractants who delude themselves into over-extending themselves. In a study in the United States of America it was found that the respondents have an optimistic view of their own position. Though the respondents correctly estimated that over fifty percent of American couples would eventually divorce, all the correspondents rated their own chance of divorce as being nil: Eisenberg (1999-2000) 94 *Northwestern University LR* 805, 811. A similar optimism, an optimism already evident in the increasing number of persons swelling the alarmingly large ranks of the over-indebted (see para 4.3.4.3(E) above and chapter 3 para 3.3) could lead to contractants embarking on contract-creation at a reasonable price or a unilaterally determined price in the optimistic belief about their ability to pay the eventual price (whether reasonable or not).

<sup>1543</sup> McKee *et al* identify a number of behavioural characteristics that lead to over-indebtedness in ‘Responsible Finance: Putting Principles to Work’ 2011 September Focus Note 73 Washington D.C. CGAP 9. The following may assist in understanding why contractants may be attracted to a reasonable price or one that is to be determined unilaterally: (i) consumers tend “to discount greatly the future for the present” - evidence thereof is that credit consumers are more focussed on “the allure of up-front cash than the interest and other costs that they have to pay over the life of the loan;” (ii) consumers tend to base decisions on erroneous conclusions or assumptions which are often based on simple calculations. To this may be added that these calculations are often also erroneous and/or based on an erroneous or wishful understanding of the true facts and/or the implications of such facts. See also Smith Atiyah’s *An Introduction to the Law of Contract* 320. The correctness of these observations is borne out by South Africa’s debt “time bomb”: Trevor Manuel, Minister in the Presidency, *The Times* 4 November 2011 at 1. The Minister ascribed the persistently high levels of (over)indebtedness to either marketing that is so powerful that “we cannot help ourselves,” or to an attempt to “try and keep up with the Kunenes.” (The latter is a reference to a certain individual who hosted a function where sushi was served on semi-naked bodies of young ladies. The extent of the problem is evident from the Minister’s reference to a release by the Reserve Bank that indicated that household indebtedness is at 75.9% of disposable income and that if the ratio is disaggregated it would indicate that “the middle classes are way in above 100% - all of next year’s earnings are already spent.”

<sup>1544</sup> Feinman (1982-1983) 30 *UCLA LR* 829, 845.

or may not need. The result would be that the existing patterns of inequality in society would be exacerbated or, at best, be maintained.

#### 4.3.5 Conclusion

The discussion of the indeterminateness of the standard of reasonableness in relation to price<sup>1545</sup> highlights some of the problems that would result from the *obiter dicta* that call for the recognition of sales at a reasonable price or a unilaterally determined price. The discussion also illustrates that it would be burdensome for a court to conduct an elaborate enquiry to determine what price or rental the contractants would have decided on as being reasonable had they negotiated the price or rental themselves.<sup>1546</sup> In *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co.*,<sup>1547</sup> the court said that valuations are characterised by inferences and conjectures which are difficult to reduce to exact reasoning or to explain to others. Expert witnesses have their own set of conjectures according to their own experience and personal sagacity leaving “more than ordinary room for ... guesswork.”<sup>1548</sup> Posner postulates that “no matter how elaborate the enquiry a substantial probability of error would remain and an erroneous interpretation undermines the utility of contracting as a method of organizing economic activity.”<sup>1549</sup>

The conclusion is that the recognition of the *obiter dicta* would introduce an unacceptable element of uncertainty into the domain of the essence of the contract, namely, that of the determination of the price and rental. The uncertainty, if allowed to come to pass by the recognition of the a reasonable price and rental and that of a unilaterally determined price and

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<sup>1545</sup> Outlined earlier in this para.

<sup>1546</sup> The court would have to engage in an elaborate enquiry as indicated earlier in the text of this para. See also Speidel (1970) 31 *University of Pittsburgh LR* 363.

<sup>1547</sup> (1901) AC 373, 391.

<sup>1548</sup> See also *Walker* 382 S.W.2d 198 (Ky. 1964).

<sup>1549</sup> Posner ‘The Law and Economics of Contract Interpretation’ unpublished paper, (2005) Paper 56 American Law & Economics Association Annual Meetings 10.

rental would adversely affect the ability of people to plan their contractual obligations<sup>1550</sup> with a corresponding reduction in the trust and respect for the notion of contract law as an obligation-creating mechanism.

Mindful of the findings of the UNISA-Momentum report, the ease with which credit is still obtained despite the provisions of the National Credit Act, the ease with which consumers can delude themselves to become indebted,<sup>1551</sup> and the effect that the over-indebtedness may have on individuals and those near or dear to them, it would be unconscionable for the law to facilitate and thereby to perpetuate economic hardships by giving effect to the *obiter dicta*. The conclusion that contractants may, in circumstances where it is not prudent to do so, contract more readily because of the deceptive attractiveness of a reasonable price or one that is determined later, is not without merit. The conclusion is supported when viewed in the context of the blunt reality of a known price that may have given pause for further reflection or that could have dissuaded the contractant from concluding the contract.

The imponderables<sup>1552</sup> introduce an unacceptable element of uncertainty<sup>1553</sup> into the domain of the essence of the contract, namely, that of the determination of the price that the notion of reasonableness is intended to regulate. The uncertainty introduced by the standard of reasonableness in the context of price determination and the possibility of misuse and abuse, especially in the context of the persistently high levels of (over)indebtedness militates against the recognition of the *obiter dicta*.

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<sup>1550</sup> Kennedy (1975-1976) 89 *Harvard LR* 1688-1689.

<sup>1551</sup> Bearing in mind also that consumers tend to underestimate or ignore risks. Eisenberg (1999-2000) 94 *Northwestern University LR* 805, 812.

<sup>1552</sup> Outlined earlier in this para.

<sup>1553</sup> See also the remarks by Peckham J in *United States v Trans-Missouri Freight Association* 166 US 290 (1896), 331-332, in deciding that the antitrust legislation in issue prohibited all restraints of trade and not only unreasonable restraints. After posing several questions relating to the difficulty of pinning down the notion of reasonableness, the learned judge concluded that to hold otherwise would be to leave the determination of reasonableness to the companies imposing the restraint. See also Speidel (1970) 31 *University of Pittsburgh LR* 363.

The conclusion is that the constitutional and policy imperatives underlying the *essentiale* of price militate against the recognition of a unilateral discretionary power to determine the price and rental and the recognition of contracts of sale and lease at a reasonable price and rental respectively.<sup>1554</sup>

#### **4.4 The role of the courts in the determination of the price and rental: dispute-settling or hortatory?**

##### **4.4.1 Introduction**

The judicial process has two main functions, namely, a dispute-settlement function and a hortatory function.<sup>1555</sup> In the case of the former, the emphasis is to dispense justice by deciding individual disputes in the light of all the circumstances relevant to that dispute. The latter function “emphasises that the law is part of a complex set of arrangements designed to provide incentives and disincentives for various types of behaviour.”<sup>1556</sup> “The rule-orientated approach (to the *essentialia* of price and rental) accords with the hortatory function, whereas the construction technique or *ad hoc* approach (standards-based) accords with the dispute-settlement function. A desire to do justice in an individual case is often likely to conflict with a desire to encourage or discourage particular types of behaviour in the future.”<sup>1557</sup> An increase in the dispute-settling function makes predictability of decisions more difficult thereby adversely affecting the possibility of planning.<sup>1558</sup>

The discussion that follows investigates the courts’ role as being either hortatory or dispute-settling in relation to the determination of price and rental.

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<sup>1554</sup> As per the *obiter dicta* in *NBS Boland Bank* 1999 (4) SA 928 (SCA) and *Genac Properties* 1992 (1) SA 566 (AD) respectively.

<sup>1555</sup> This paragraph reflects the views of Atiyah as restated by Vorster (1988) 2 TSAR 183.

<sup>1556</sup> Vorster (1988) 2 TSAR 183.

<sup>1557</sup> Vorster (1988) 2 TSAR 183.

<sup>1558</sup> Vorster (1988) 2 TSAR 183.

#### 4.4.2 The current position

By way of introduction, it is necessary to repeat that it was concluded that individual autonomy coupled with the presumptive equality of the contractants serve as the rationale for the principles of freedom and sanctity of contract.<sup>1559</sup> The principles find expression in the reluctance of the courts to engage the issue of determining contractual liability based on the substantive fairness of the contract.<sup>1560</sup> Given the respect accorded to the autonomy and presumptive equality by our courts of law as evidenced in their insistence on the doctrine of *pacta sunt servanda*, it is not surprising that the courts do not view their role as being one also of making or remaking contracts.<sup>1561</sup> The courts' refusal to recognise the validity of a sale at a reasonable price or at a unilaterally determined price<sup>1562</sup> could also be justified on the basis that such recognition would require of the courts to make or to remake contracts.<sup>1563</sup> The following caution issued in the American case of *Slayter v Pasley*,<sup>1564</sup> is apposite in this context:

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<sup>1559</sup> In chapter 2. See for example, the discussion in chapter 2 of *Tjollo Ateljees* 1949 (1) SA 856 (A); *Bank of Lisbon* 1988 (3) SA 580 (A); *Brisley* 2002 (4) SA 1 (SCA); *Afrox Healthcare* 2002 (6) SA 21 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) and *Potgieter* 2012 (1) SA 637 (SCA).

<sup>1560</sup> Representative of this approach of the courts in this regard is the decision in *Napier* 2006 (4) SA 1 (SCA). The court held "that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements" (para [13]). In *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA) the Court, quoted with approval the dictum in *Wells v South African Alumenite Company* 1927 AD 69, 73, that in the absence of fraud, contractants must be held to a contract even if it contains harsh conditions (para [33]). In *Natal Motor Industries Ltd v Crickmay* 1962 (2) SA 93 (N), the Court said that coming to the rescue of such a contractant would be tantamount to changing the contract instead of interpreting it (98). See further the case law in chapters 1 and 2.

<sup>1561</sup> See also Lubbe & Murray *Contract* 21. Further evidence is the cautionary approach of the courts when it is faced with problem of keeping a contract alive by reading terms into it. See the discussion of tacit terms in para 4.3.4.2(C)(viii) above. See also Perillo *Corbin on Contracts* Vol 1 529. Smith traces the reluctance of the courts to the nineteenth century tendency of the judges to elevate contract law into the central place in the law of obligations. This resulted in a reluctance to impose obligations that had not been voluntarily assumed. Thus, a denial by judges that they had the power to make or remake contracts: Smith Atiyah's Introduction to the Law of Contract 10.

<sup>1562</sup> See the discussion in paras 4.3.4.3(A) above. See chapter 1 paras 1.2 and 1.4.2.

<sup>1563</sup> See para 4.3.4.3(C) above.

<sup>1564</sup> 199 Or. 616 (1953), 628. The case dealt with a rent renewal agreement that required the contractants to agree on the rental at date of renewal. In refusing to recognise the notion of a reasonable rental, the court endorsed the established approach that the rental must be specified with such a degree of certainty and definiteness that nothing is left for future determination (620). See also *Joseph Martin* 1981, 52 N.Y.2d 105

“We should be hesitant about completing an apparently legally incomplete agreement between persons sui juris enjoying freedom of contract and dealing at arms’ length by arbitrarily interpolating into it our concept of the parties’ intent merely to validate what would otherwise be an invalid agreement, lest we inadvertently commit them to an ostensible agreement which, in fact, is contrary to the deliberate design of all of them. It is a dangerous doctrine when examined in the light of reason ... [It] import[s] a quality of jural ego and superiority not consonant with long-accepted ideas of legalistic propriety under a democratic form of government ... [It] will open the door to repeated opportunities to that which, in principle, courts should not do and, in any event, are not adequately equipped to do.”

Further evidence of the courts’ reluctance to make or remake contracts is to be discerned in the courts’ approach to objections raised by a contractant to the price set by a nominee. In such instances, the courts’ have declared themselves willing to come to the assistance of a plaintiff where the price set by the nominee is “so grossly excessive that it bears no reasonable relationship at all to the value of the shares at the relevant time, and is a manifestly unjust and unfair price ...”<sup>1565</sup> Having decided to come to the assistance of the plaintiff, the question arises whether it falls within the power of the court to force on the contractants a price which it deems to be reasonable in light of the evidence it relied on in coming to its initial decision.<sup>1566</sup> If answered in the affirmative, it would amount to making or remaking the contract.

There is a dearth of case law on this point but what there is suggests that the courts do not consider it appropriate to enforce a price on the contractants. In both the *Gillig*<sup>1567</sup> and the *Dublin* cases<sup>1568</sup> the plaintiffs were dissatisfied with the price a nominee had placed on the sale of shares. In the *Gillig* case, the Court accommodated the plaintiff (the seller) on equitable principles<sup>1569</sup> by not enforcing the price set by the nominee. The Court went on to say that because the plaintiff is accommodated on purely equitable principles, equity must also be done

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which dealt with a term for mutually agreed upon rental in a lease renewal agreement. Both cases are also dealt with in chapter 5 paras 5.2.2.2(A)&(B)(i).

<sup>1565</sup> *Dublin* 1964 1 SA 799 (D) 805A. Courts have come to the assistance of aggrieved contractants where the nominee acted improperly in determining the price (for example, where there was fraud, collusion, caprice) or where the price arrived at is manifestly unfair in effect or substance. Van der Merwe *et al Contract* 230.

<sup>1566</sup> Or alternatively, the price which it used as a yardstick to come to its initial decision, viz., the decision that the price determined by the nominee is improper or that it is unreasonable.

<sup>1567</sup> 1953 (4) SA 675 (TPD).

<sup>1568</sup> 1964 (1) SA 799 (D).

<sup>1569</sup> It based its decision on the *laesio enormis* principle that was still recognised at the time. See the discussion in of the principle chapter 2 and in particular in para 2.3.2.1.



to the defendant (the buyer). On this basis, the Court found that it would only be fair to allow the defendant the choice to decline to continue with the contract or to continue with the contract “on the modified price found to be the true and fair value of the *res vendita*.”<sup>1570</sup> The basis for granting the buyer a choice was the Court’s reluctance to enforce a “new contract” on him.<sup>1571</sup> What the modified price (which the court refers to) is to be, is not clear. Is it, for example, to be determined by the court using the evidence it has before it, or must it be referred to another nominee? This is not clear from the decision or from the decision in the *Dublin* case.

In *Dublin v Diner*,<sup>1572</sup> the court held that where the price set is so grossly excessive that it bears no reasonable relationship at all to the value of the shares at the relevant time, and is a manifestly unjust and unfair price, the buyer would be legally justified in refusing to pay the price. It left open the question whether the other party (the seller in this case) has an election as suggested in *Gillig v Sonnenberg*.<sup>1573</sup> In both cases, there was no attempt by the court to suggest what a reasonable price is or should be, let alone to enforce its view of what it considered to be a reasonable price. It left the future of the contract to the discretion of the contractants.<sup>1574</sup>

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<sup>1570</sup> At 683D-E.

<sup>1571</sup> At 683 E-G, the court explained itself by saying that the defendant was prepared to buy at a price to be fixed by the nominee. If the nominee’s determination is so defective as to entitle the plaintiff to refuse sell at that price, the buyer was entitled not to continue with the transaction and “to resist a **new contract** being forced upon him.” Emphasis added.

<sup>1572</sup> 1964 (1) SA 799 (D).

<sup>1573</sup> At 805A-B.

<sup>1574</sup> In the *Gillig* case it would be the defendant who would have to decide whether to continue at a new price. If the defendant rejected that option, the contract would terminate. In effect, the contract would be voidable at the option of the defendant. In terms of the *Dublin* case, where the Court did not grant the defendant the same option, the contract would be voidable at the option of the plaintiff, who the Court said would be justified in not continuing with the contract at the price set by the nominee. The difference between the approaches of the two courts has significant implications for the contractants. A similar reluctance is to be discerned in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 (2) SA 225 (A). The agreement was that the price in an ongoing sales agreement may be increased by mutual agreement from time to time. The Court refused to perfect the agreement by providing a (reasonable) price (233I-234H and 235C-D). See also *Hurwitz* 1994 (3) SA 449 (C) to similar effect (453I-455G). It is respectfully submitted that the approach of our courts in this regard is the correct one.

In *NBS Boland Bank*, the Court also does not express a view on the competency of the courts to settle the issue on behalf of the contractants where an empowered contractant had not exercised its discretion *arbitrio boni viri*.

It is submitted that the fact that the *Gillig* and *Dublin* courts did not determine a modified price constitutes evidence of the court's reluctance to become involved in the contract-creating process since the court was "not the functionary chosen by the parties in their contract to quantify the performance."<sup>1575</sup> Judicial determination of [price and] rental is "unattractive" because (i) it is the result of a litigious and adversarial process which is not what rent-fixing [or price-fixing] was meant to be; (ii) it involves "legal and other costs," some of which is irrecoverable by even the successful party; and (iii) it involves the possibility of appeals which if they come to pass add further time delays as well as further layers of costs.<sup>1576</sup>

#### 4.4.3 Considerations against a price and rental determining role

It is submitted that a court that does intervene would be imposing its own views rather than giving effect to what the contractants committed themselves to. Given the jurisprudential and policy considerations underlying the *essentiale* of price,<sup>1577</sup> any such imposition would constitute an infringement of the freedom of the contractant(s) to contract and hence impinge on the dignity of the contractant(s).<sup>1578</sup> Additionally, the courts may become engaged in rewriting contracts that may fall outside of its expertise.<sup>1579</sup> Hence, the current common law

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<sup>1575</sup> *Hurwitz* 1994 (3) SA 449 (C) 453F. See also *Walker* 382 S.W.2d 198 (Ky. 1964) where the court expressed similar concerns.

<sup>1576</sup> *Hurwitz* 1994 (3) SA 449 (C) 454D-F.

<sup>1577</sup> As discussed above in this chapter.

<sup>1578</sup> In *Slayter v Pasley*, 199 Or. 616 (1953) 264 P.2d 444, the Court warned against completing legally incomplete agreements for fear of committing the contractants to an ostensible agreement which is, in fact, contrary to their deliberate intention. Such "[j]udicial paternalism should be as obnoxious to courts as is legislation by judicial fiat." The court reasoned that "[b]oth import a quality of jural ego and superiority not consonant with long accepted ideas of judicial propriety under a democratic form of government" (628-629).

<sup>1579</sup> *Choi* (2003) 103 *Columbia LR* 63. For example, in *Bethlehem Steel Corp. v Litton Industries, Inc.* 468A.2d 748, (Pa. Supr. Ct. 1983), the court declined to supply price escalation clauses for the building of ships because of the "complexity" of the industry terms. Due regard is had for the fact that expert evidence may be called in a

provisions are to be preferred to the *obiter dicta*<sup>1580</sup> because contractants are in a better position to jointly determine performance appropriate to their personal needs and requirements, and they can also do so more cheaply.<sup>1581</sup>

It has been suggested<sup>1582</sup> that where a contract fails because the nominee's nomination is unjust there should be no judicial substitution of the price where the contractants intended the determination to be made by the specified nominee only and by no-one else. It is further suggested that the price should be settled by a court as the appropriate *bonus vir* in those situations where the contractants simply identified the nominee as belonging to a particular class.<sup>1583</sup> With respect, the distinction between an identified and an unidentified nominee is not helpful and amounts to splitting of hairs. The fact that the contractants referred to a nominee as a member of a particular class does not necessarily give rise to a presumption that the nominees did not intend to rely on him/her solely, or did not consider him/her on the basis of his/her particular qualities or skills. Neither does it mean that they trusted his/her judgment in that field any less than the judgment of person who was specifically named.<sup>1584</sup> It is submitted that in most cases contractants appoint a nominee (whether by name or by membership of a

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court of law. However, aside from the fact this may not always be possible because of resource issues, the task of determining the term may be beyond the scope and competency of the court because, as in the instant case, "the nature of the negotiations in the shipbuilding industry and the extreme complexity of the undertaking, an escalation clause requires careful negotiations between the parties and must be custom tailored to fit the project" (757-758).

<sup>1580</sup> The *obiter dictum* in *NBS Boland Bank* 1999 (4) SA 928 (SCA) suggests our law should recognise a price determined unilaterally subject to the *arbitrio boni viri* notion. The other *obiter dictum* in *Genac Properties* 1992 1 SA 566 (AD) suggests that a contract of sale and lease at a reasonable price and rental, respectively, should be valid.

<sup>1581</sup> Gergen (1992) 92 *Columbia LR* 997, 1000; *Walker* 382 S.W.2d 198 (Ky. 1964).

<sup>1582</sup> *Kerr Sale and Lease* 50-55; *Kerr & Glover* (2000) 117 *SALJ* 206.

<sup>1583</sup> For example, "the auditor for the time being of the company" as was the case in *Gillig v Sonnenberg* 1953 4 SA 675 (T). In other words, in those cases where the determination was made not on the basis of attributes of a particular person in whom they trusted or on whose skills and qualities they relied. *Kerr Sale and Lease* 50-55; *Kerr & Glover* (2000) 117 *SALJ* 206. The writer asks the reader to infer that in the case where a nominee is specifically named, the contractants intended that nominee and no other to settle the price. The contract then fails if that nominee is unable or unwilling to settle the price or fixes a price that is considered to be excessive. However, where the nominee is referred to as belonging to a particular group or category of persons, the contract continues and a new value has to be set by a court where the initial nominee produces an unjust estimation.

<sup>1584</sup> See *Hurwitz* 1994 (3) SA 449 (C) 459E to similar effect.

particular trade or profession) either because they do not trust their own ability, knowledge or skill to settle on a price, or because of differences of opinion between them. In both cases, the nominee is appointed because of the nominee's actual or presumed independence and integrity and/or ability and/or knowledge and/or skill.<sup>1585</sup> Hence, it does not make any difference whether or not they identified the nominee by name. The intention of the contractants in both instances is not to get an arbitrary estimation "but a just estimation, *tanquam boni viri*."<sup>1586</sup>

#### 4.4.4 Conclusion

The recognition of the *obiter dicta* that call for the validity of a sale at a reasonable price or at a unilaterally determined price will lead to an increase in the dispute-settling function of the judiciary with a concomitant **reduction** in certainty and predictability.<sup>1587</sup> If the courts, in addition, were to embark on a path of contract-making, it would create uncertainty regarding the sanctity of contractual arrangements. This would serve to diminish the values of dignity, equality, and freedom that are so important, not only, in the current constitutional regime<sup>1588</sup> but also, to the policy initiatives underlying consumer protection legislation.<sup>1589</sup> The increase in consumer protection legislation with its hortatory orientation may be viewed as a corrective mechanism to restore the balance between the two functions of the judicial system. The discussion of the constitutional, jurisprudential and policy imperatives that inform the notion of

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<sup>1585</sup> In *Dublin* 1964 1 SA 799 (D) 804D, the court concluded that "both parties presumably relied upon the ability, competence and integrity of the third party nominated by them, much in the same way as they might rely on an arbitrator."

<sup>1586</sup> Phrase borrowed from *Machanick* 1920 CPD 339. See also Van der Bergh (2012) 1 TSAR 61.

<sup>1587</sup> Vorster (1988) 2 TSAR reflects that Atiyah has similar concerns about the "dramatic" rise in England of the dispute-settling function at the expense of the hortatory function (183).

<sup>1588</sup> See the discussion of the values in para 4.2.4.2 above.

<sup>1589</sup> See chapter 3 in this regard and in particular paras 3.9 and 3.10.

*essentialia*,<sup>1590</sup> is evidence that *essentialia* also have a hortatory orientation and could complement this purpose.

Furthermore, the decisions in the *Dublin* and *Gillig* cases are in alignment with the general approach of the courts that it is not the function of a court to make or remake contracts.<sup>1591</sup> A view that a court may determine a price that binds the contractants is nothing less than suggesting that a contract may be concluded at a price to be fixed by a court,<sup>1592</sup> which would be to ascribe to the courts a function that is alien to its constitution, in that it is neither dispute-settling nor hortatory in nature.<sup>1593</sup> This observation supports the conclusion that validity should not be bestowed on contracts of sale and lease at a reasonable price and rental respectively, or at unilaterally determined price and rental.



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<sup>1590</sup> Paras 4.2.4.2(B), 4.2.4.3 and 4.2.4.4 above.

<sup>1591</sup> This is an inevitable consequence of a jurisprudence that places individual autonomy and responsibility at the vanguard of its approach to freedom and sanctity of contract. See the discussion in chapter 2 regarding the court's reluctance to second-guess contracts freely entered into. In *Alfred* 1974 (3) SA 506 (A) the Court in dealing with the implication of tacit terms into a contract said that courts "cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so" (532). See also *Clements v Simpson* 1971 (3) SA 1 (A) 7; *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 236; *Lubbe & Murray Contract* 21, 414-417 and 424. A similar situation prevails in England. Beaton *Anson's Law of Contract* (2002) writes that the law "will not re-write a contract for the parties or imply additional provisions merely because it would be reasonable to do so" (7). See also Beale *Chitty On Contract* Vol 1 para [1-061]. Section 9 of the English Sale of Goods Act 1979 (also discussed in chapter 5 para 5.2.3) in providing for the dissolution of the contract where the nominee is unable or unwilling to settle the price, also disqualifies the court from setting the price.

<sup>1592</sup> See in support the *dicta* in para 4.3.3 above from *Hall* (1960) 104 C.L.R. 222.

<sup>1593</sup> The gap-filling role that would be imposed on courts by the standard of reasonableness (that includes the *arbitrio boni viri* notion) would impair the ability of contractants to legislate contracts for themselves and would amount to a delegation of legislative authority to the courts, an act that would result in a gross violation of the doctrine of separation of powers. Danzig (1974-1975) 27 *Stanford LR* argues that the Article 2 provisions of the UCC, including the one referring to the notion of a reasonable price, amount to a delegation of legislative decisions to courts. Apposite in this context, is his dismissal of the legislative function ascribed to courts as being based on a "triad of dubious assumptions that self-evident ideal resolutions of situational problems exist, that they can be discovered by careful scrutiny of actual situations, and that once articulated they will be widely accepted." He concludes that the UCC is "phrased as a piece of legislation that, save for its comprehensiveness, reads very much like a judicial opinion" (634-635).

## 4.5 Conclusion

The possibility of disputes clogging up the judicial machinery at the expense of those who can ill-afford the judicial processes cannot be discounted. The uncertainty, the impaired ability to plan and the challenges associated with accessing the courts raise serious policy concerns.<sup>1594</sup>

The review of the constitutional, jurisprudential and policy imperatives of *essentialia* in relation to price-determination and of the role of the courts in this connection reveals that the creation of contractual obligations is as much the result of the intention of the contractants at work as it is of legal policy. The exigencies of modern commercial practice,<sup>1595</sup> reinforced by the complexities of modern commercial practices,<sup>1596</sup> necessitate a measure of control for the promotion of a fair and level playing field.<sup>1597</sup> The objective of such control would be to create the best possible opportunity for each contractant to maximize his/her autonomy without derogating from that of the other, thereby fulfilling the constitutional imperatives of dignity, equality, and freedom. This objective is fulfilled by conceptualizing the *essentiale* of price as a rule that consists of a duty-imposing as well as a power-conferring component.

Insulating agreement on price and rental from the will of the contractants is justified on the basis that agreement on price and rental constitutes the essence of the contract and has policy relevance<sup>1598</sup> and hence the right that flows from the power-conferring component of

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<sup>1594</sup> The challenges of accessing the courts were highlighted in chapter 3. The policy concerns support the duty-imposing and power-conferring interpretation of the nature of *essentialia* as discussed and explained in para 4.2.4.2(B) above.

<sup>1595</sup> Bargaining power is an important consideration in this context. The extent to which the notion of individual autonomy holds true depends on “the degree to which [the contractant] has the wherewithal to individualize the phases of the bargain to his desires—or, as the case may be, to sub-divide a single situation into a variety of specialized bargains to meet his needs”: Llewellyn (1931) 40 *Yale LJ* 716. Hence bargaining power, to a significant extent, also depends on the flexibility of the bargain in question: Llewellyn (1931) 40 *Yale LJ* 717. See also *Tjollo Ateljees* 1949 (1) SA 856 (A) (discussed in chapter 2) where, in rejecting the doctrine of *laesio enormis*, the court questioned the pertinence of the doctrine in a modern commercial setting with its “highly complicated commercial organisation and its ingenious selling devices ...”

<sup>1596</sup> See the discussion in para 4.3.4.2 above.

<sup>1597</sup> See also in this context the discussion of marketing practices in chapter 4 para 4.3.4.2(C)(v).

<sup>1598</sup> Despite the risk of repetition, the context of the discussion makes it incumbent to refer to the findings in the 1997 research paper of the Office of Fair Trading in England. It concluded that to make informed choices, consumers require information about price, quality and terms of trade and that an unregulated market may

*essentialia* is,<sup>1599</sup> on constitutional and policy grounds, incapable of being alienated. Within this paradigm of **control**, one may say that its role exemplifies the practical operation of the doctrine of paternalism that serves to regulate contractual relations in a manner that is conducive of justice and equity.<sup>1600</sup> The constitutionality of such paternalistic intervention was acknowledged by the Constitutional Court when it recognised that the Rental Housing Act superimposed its unfair practice regime on the obligations that contractants negotiate for themselves.<sup>1601</sup> Viewed in this light, the *essentiale* of price represents “the democratic impulse to treat all persons as equals and to recognise the capacity of [contractants] for self-actualisation and self-government.”<sup>1602</sup>

The public policy considerations<sup>1603</sup> also support the paternalism evident in the proposition for a rule-based approach to the *essentiale* of price that prefers certainty in relation to price over the individualism of freedom of contract that is evident in the call for the acceptance of the standard of reasonableness as a price-setting mechanism. A rule-based approach requires information and disclosure which, as evidenced in the discussion of the consumer protection legislation in chapter 3, promotes the making of informed choices, hence, giving concrete expression to the consensual aspect of contract law. The result is that a rule-based approach

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not always provide this: Cartwright (2011) *Legal Studies* 13. It has also been suggested that imperfect information about prices may also precipitate high prices: Armstrong “Economic Models of Consumer Protection Policies.” Paper prepared for conference on “The pros and cons of consumer protection,” organised by the Swedish Competition Authority, held on 11 November 2011, 2 and 7. The information contained in these two pieces of research support the argument against the recognition of a reasonable price or a unilaterally determined price. The uncertainty that results from the indefiniteness of such prices may be equated to the uncertainty that may result from unregulated markets. Equally important for the question posed by the *obiter dicta* is the possibility that the indefiniteness may result in a spike in prices. Such consequences may lead to an exacerbation of the problem of (over) indebtedness and negate the policy objectives of the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008.

<sup>1599</sup> See para 4.2.4.2(B) above.

<sup>1600</sup> The principle of paternalism is also evident, for example, in the consumer protection legislation discussed in chapter 3 as well as in the remedies prescribed for breach of contract in the absence of agreement regulating the consequences of a breach.

<sup>1601</sup> *Ntombizodwa Yvonne Maphango & Others v Aengus Lifestyle Properties* CCT 57/11 [2012] ZACC 2 para [51].

<sup>1602</sup> Woolman (2007) 18 *Stell LR* 522.

<sup>1603</sup> Also evident in the consumer protection legislation discussed in chapter 3 and in *Barkhuizen* 2007 (5) SA 323 (CC) and *Hoffmann* 2001 (1) SA 1 (CC) discussed in chapter 1 para 1.3.3.



would, as in the case of the consumer protection legislation,<sup>1604</sup> operate in harmony with the principles of contract law, even in a modern commercial setting. Hence, a rule-based approach that requires a contractual term from which the price and rental are objectively ascertainable without further reference to the contractants is, like consumer protection legislation, in consonance with equity-based jurisprudence and public policy and is similarly committed to the constitutional values of dignity, equality and freedom.

Justification for the exclusion of rental from being determined by the standard of reasonableness, including unilateral determination of rental, is supported by the provisions of section 26 of the Constitution and the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.<sup>1605</sup> Viewed against the recognition of the right of access to adequate housing as a constitutionally protected right and a basic human need, an approach to the determination of the essence of the contract, namely rental,<sup>1606</sup> based on the indeterminate standard of reasonableness or based on the unilateral exercise of discretion would not be justifiable. Both these approaches do not provide the requisite degree of certainty in an area of contract law that affects the fundamental right of human beings to access to housing. This is exacerbated by the potential for abuse of discretionary power in a society where there is a shortage of adequate housing.<sup>1607</sup> The fact that the disadvantaged contractant, who it is submitted will be the tenant because of shortage of housing, may have a (free) right of recourse to courts is of little comfort: such contractant would be saddled, not only, with the burden of proof, but also, with the transaction costs of litigation.<sup>1608</sup>

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<sup>1604</sup> See chapter 3 para 3.9.

<sup>1605</sup> 19 of 1998. See the discussion of the two acts in para 4.2.4.2(A)(i) above and in chapter 3.

<sup>1606</sup> See para 4.3.3.3(D) above.

<sup>1607</sup> See Badenhorst *et al Property* 254-255.

<sup>1608</sup> These include the risks involved with litigation, the time, energy and other such resources required to conduct litigation.

The conclusion is that a development that recognises sales at a reasonable price or one that is unilaterally determined would:

- (i) run counter to the constitutional imperatives that inform *essentialia*.<sup>1609</sup>
- (ii) run counter to the constitutional imperative to foster socio-economic reforms and to strive to create a just and egalitarian society.<sup>1610</sup>
- (iii) run counter to the policy considerations underlying recent legislation,<sup>1611</sup> and court decisions<sup>1612</sup> that recognise contractual autonomy but that require that it be exercised with restraint to promote a constitutional and/or a social and/or an economic objective.
- (iv) be economically, socially, morally, and legally indefensible.<sup>1613</sup>
- (v) not promote certainty and consensus.<sup>1614</sup>

Accordingly, validity should not be bestowed on contracts of sale at a reasonable price or at unilaterally determined price.



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<sup>1609</sup> See para 4.2.4 above.

<sup>1610</sup> See the discussion in para 4.2.4.2 above. The goals are also in evidence in the consumer protection legislation discussed in chapter 3.

<sup>1611</sup> See the legislation discussed in chapter 3. See also the Basic Conditions of Employment Act 75 Of 1997 (regulating, *inter alia*, wages and working hours, the Broad-Based Black Economic Empowerment Act 53 of 2003 (regulating the granting government tenders), the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The purpose of the Act is to prohibit the eviction of unlawful occupiers that does not comply with the prescripts of the Act. The definition of unlawful occupiers was extended by the Supreme Court of Appeal to include those cases where the occupation was initially lawful (for example, in terms of a lease agreement or mortgage) but subsequently became unlawful on termination of, for example, the lease agreement, or the mortgage. As a result, the ambit of the Act was been extended so that the common law right of a lessor to summarily evict a tenant and any contractual provision regarding the eviction of a tenant, are now subject to the provisions of the Act. See *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA).

<sup>1612</sup> *Barkhuizen* 2007 (5) SA 323 (CC); *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ) and in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC). The cases are discussed in chapter 1 para 1.3.3 and in chapter 2.

<sup>1613</sup> See para 4.3.4.3(E) read with the provisions of the consumer protection legislation discussed in chapter 3.

<sup>1614</sup> See the discussion throughout this chapter. See also the discussion in chapter 2 paras 2.2.2 (consensus), 2.6 (certainty).

## Chapter 5

### Discretionary powers in respect of price and rental in international and comparative perspective

#### 5.1 Introduction

In the chapter 2 the legal position as it obtains in international instruments, both at a national and international level, was briefly explored by way of comparison to the South African position regarding the principles of consensus, freedom, sanctity and certainty of contract. Similarly, chapter 3 concerned a comparison of the legal position in respect of consumer protection legislation and the impact of the policy considerations underlining consumer protection legislation on contract law principles. Chapter 4 explored the content, role and function of the *essentialia* of price and rental in the contract law and how reasonableness as a standard for determining price and rental relates to this.

The discussion in this chapter will be confined to an examination of the position in the United States of America, England, Scotland, Germany and the Netherlands<sup>1615</sup> regarding contracts of sale and lease at a reasonable price and rental respectively, or at a unilaterally determined price or rental. The position as it obtains in international instruments such as the United Nations Conventions on Contracts for the International Sale of Goods,<sup>1616</sup> UNIDROIT Principles of International Commercial Contracts,<sup>1617</sup> and the Principles of European Contract Law<sup>1618</sup> will also be examined.

The objective in this chapter is to compare the position in those jurisdictions with the current legal position in South Africa and to ascertain what lessons, if any, may be learnt from the international experience in respect of the question of law under investigation in

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<sup>1615</sup> These countries were referred to by the Supreme Court of Appeal in *NBS Boland Bank v One Berg River Drive* 1999 (4) SA 928 (SCA) in support of its call for the recognition of contracts of sale and lease at a reasonable price or rental, as well as for the recognition of the proposition that the price or rental may be unilaterally determined by one of the contractants.

<sup>1616</sup> The convention concluded in 1980 is hereafter referred to as the CISG.

<sup>1617</sup> The principles, settled in 2004, are hereafter referred to as the UNIDROIT Principles (2004).

<sup>1618</sup> The principles, settled in 2003, are hereafter referred to as the PECL.

this thesis, namely, whether South African contract law should recognise the validity of (i) contracts of sale and lease at a reasonable price or rental respectively<sup>1619</sup> and (ii) at a unilaterally determined price or rental.<sup>1620</sup>

## 5.2 Comparative law

### 5.2.1 Introduction

In the discussion below of the position in the five national jurisdictions,<sup>1621</sup> and the three international law instruments,<sup>1622</sup> it becomes apparent that with the exception of one,<sup>1623</sup> they recognise the standard of reasonableness, in principle, as providing the relevant degree of certainty required by the *Westinghouse* principle for the validity of contracts of sale and lease respectively.<sup>1624</sup> The discussion will therefore focus on the standard of reasonableness and the mechanisms for determining a reasonable price or rental in the various jurisdictions with a view to determining the desirability and benefit of importing the notion of reasonableness as a standard for determining the *essentialia* of price and rental in contracts of sale and lease respectively.

The discussion will commence with an examination of the position in the United States of America and thereafter of the position in each of the other four national jurisdictions. Thereafter, the position in each of the three international instruments will be examined.

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<sup>1619</sup> As suggested in an *obiter dictum* in *Genac Properties v NBC Administrators* 1992 (1) SA 566 (AD).

<sup>1620</sup> As suggested in an *obiter dictum* in *NBS Boland Bank v One Berg River* 1999 (4) SA 928 (SCA). It will be recalled that in a footnote in chapter 1 para 1.2 it was explained that there is a marked similarity between contracts of sale and contracts of lease: Cooper *Landlord and Tenant* (1994) 6-7. Hence, the practice of referring mainly to the law relating to the price in contracts of sale followed in the previous chapters will be continued in the interest of brevity and avoiding repetition. Differences between the two will be highlighted.

<sup>1621</sup> The United States of America, England, Scotland, Germany and the Netherlands.

<sup>1622</sup> The CISG, UNIDROIT Principles (2004), and the PECL.

<sup>1623</sup> Namely, the CISG.

<sup>1624</sup> The *Westinghouse* principle requires that the price must be certain in that it is either ascertained or objectively ascertainable with reference to something which in itself is certain. For example, a formula such as the usual price or a price list that could be used by an outsider to settle the price without further reference to the contractants. See further chapter 1 paras 1.2, 1.4.2.2(C) and chapter 4 para 4.2.4.2(B)(ii).

## 5.2.2 The United States of America

### 5.2.2.1 Background

Prior to the introduction of the Uniform Commercial Code,<sup>1625</sup> the law was similar to that in South Africa in that the validity of a contract, in respect of its *essentialia*, was dependant on whether an objective standard of determination, independent of the contractants, was available.<sup>1626</sup> Certainty as to the material aspects, especially in relation to price and rental, was deemed to be of the essence in contract law. The methodology for the determination of the rental (and price) had to be contained within the “four corners” of contract.<sup>1627</sup>

### 5.2.2.2 The position under the Uniform Commercial Code

#### (A) Background

The common law position in relation to price in contracts of sale underwent a radical transformation by UCC 2-305.<sup>1628</sup> Article 2, which applies only to the contracts for the sale of goods,<sup>1629</sup> was introduced to promote uniformity in the various legal jurisdictions in the United States of America<sup>1630</sup> and to facilitate commercial transactions.<sup>1631</sup> Thus, the position in respect of the essential of rental in contracts of lease is still regulated by the common law

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<sup>1625</sup> Hereafter referred to as the UCC. All references to the UCC and the texts of the UCC relied on in this chapter comes from the various volumes of Lawrence *Anderson on the Uniform Commercial Code*.

<sup>1626</sup> Choi ‘Contracts with Open or Missing Terms under the Uniform Commercial Code and the Common Law: A Proposal for Unification’ (2003) 103 *Columbia LR* 50, 56-61, hereafter Choi (2003) 103 *Columbia LR* 50.

<sup>1627</sup> For example, in *Davis v Cleve March Hunt Club* 405 S.E.2d 839 (Va. 991) an agreement for a “mutually agreed rent” was rejected on the basis that it was not objectively ascertainable. It was deemed to be too indefinite because it did not have a “specified method or guideline for fixing rent” (842). In *Joseph Martin Jr., Delicatessen, Inc. V Schumacher* Court of Appeals New York 1981, 52 N.Y.2d 105, 436 N.Y.S2d 247, 417 N.E.2d, hereafter *Joseph Martin* 1981, 52 N.Y.2d 105 the Court, in rejecting the renewal of a lease agreement “at annual rentals to be agreed upon,” reasoned that “before the power of the law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained” (541). See also *Slayter v Pasley*, 199 Or. 616 (1953), 264 P.2d 444 to the same effect. See also Choi (2003) 103 *Columbia LR* 53-54;

<sup>1628</sup> The provisions of Article 2 have resulted in a moderation in the insistence by some courts that an agreement must have a price or a price perfecting mechanism: Perillo *Corbin on Contracts* Volume 1 Revised Edition (1993) 579, hereafter *Perillo Corbin on Contracts* Vol 1. See also Lawrence *Anderson on the Uniform Commercial Code* Vol. 2A (2008) 424 & 428, hereafter *Lawrence Anderson* Vol. 2A (2008).

<sup>1629</sup> This means that all other contracts are regulated by the law applicable in each state.

<sup>1630</sup> UCC 1-201(2)(c).

<sup>1631</sup> See para 5.2.2.2(B)(iii) chapter below.

which requires that it must be ascertained or objectively ascertainable.<sup>1632</sup> Hence, it is not inapposite to conclude that the approach in respect of the *essentiale* of rental accords with the current state of law in South Africa.<sup>1633</sup>

## (B) UCC 2-305

### (i) Introduction

UCC 2-305 reads:

“U.C.C. 2-305 Open Price Term

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price is left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.”<sup>1634</sup>

The purpose of UCC 2-305 is to give effect to the agreement made<sup>1635</sup> and, in doing so, it changes the common law in that it does not provide for the invalidity of a contract of sale simply because the price term has been left open. The validity of such contracts are, in

<sup>1632</sup> See, for example, *Davis v Cleve March Hunt Club*, 405 S.E.2d 839 (991) at 842 *Joseph Martin* 1981, 52 N.Y.2d 105. Both cases are discussed in a footnote in para 5.2.1 above. It has been suggested that Comment (e) to Section 33 of the Restatement (Second), Contract appears to endorse the application of UCC 2-305 to other “open price” contracts that would include lease agreements but it must be noted that that the Restatement (Second) has persuasive value only: Knapp, Crystal & Prince *Problems in Contract Law Cases and Materials* (2003) 7-8 and 277-278, hereafter Knapp *et al Problems in Contract Law*. See also Farnsworth *Contracts* (2004) para 1.8; Choi (2003) 103 *Columbia LR* 72. Section 204 of the Restatement (Second) also appears to support a wider application that would include lease agreements. It has been observed that the Code has been influential in cases not governed by it and that some jurisdictions have begun to apply the UCC approach to open terms in service contracts as well: Perillo *Corbin on Contracts* Vol 1 541-542 and 580-581; Choi (2003) 103 *Columbia LR* 50, 52-53 & 73. Open terms in service contracts are also recognised in South African. See *Elite Electrical Contractors v The Covered wagon Restaurant* 1973 (3) SA 418 (RA), and chapter 4, para 4.3.4.3(C). Though there appears to be views expressed in favour of wider application of UCC 2-305, it does not support a conclusion that UCC 2-305 applies to rental agreements as well. See the cases of *Davis* and *Joseph Martin Jr* discussed earlier.

<sup>1633</sup> See chapter 1 para 1.2.

<sup>1634</sup> From Lawrence *Anderson* Vol. 2A (2008) 418-419.

<sup>1635</sup> UCC 2-305 serves to accommodate the possibility that contractants may enter into transactions “without having specific knowledge of all the factors involved or into transactions in which the factors are variable or fluctuating”: Lawrence *Anderson* Vol. 2A (2008) 422 & 424.

terms of UCC 2-204(3),<sup>1636</sup> dependent on two considerations, viz., whether the contractants intended to make a contract and whether there is a reasonably certain basis for granting an appropriate remedy. If these two considerations (intention and remedy) are present, the contract is *prima facie* valid and enforceable.<sup>1637</sup>

Hence, under the general interpretation of UCC 2-204(3), the intention of the contractants coupled with the possibility of a remedy, acquire a dominant place in the determination of the validity of a contract of sale. The intention as a predominant requirement is reinforced by UCC 2-305(1) that provides that contractants, if they so intend, may conclude a contract despite a price not being agreed upon<sup>1638</sup> and in UCC 2-305(4) that provides that there is no contract if the contractants did not intend to be bound unless the price is fixed or agreed upon.<sup>1639</sup> The contract stands or falls on these two enquiries (intention and possibility of a remedy) which are the touchstones of the UCC provisions on indefinite contracts.<sup>1640</sup> Under the aforementioned construction,<sup>1641</sup> agreement on price becomes a secondary consideration.



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<sup>1636</sup> UCC 2-204(3) reads:

"Even though one or more terms are left open a contract of sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

<sup>1637</sup> The term indefiniteness relates to contracts where one or more terms have been left undetermined. For example, a contract of sale which does not specify the price of the product. See UCC 2-204(3). Indefiniteness will result in invalidity only if the "construction becomes futile": Perillo *Corbin on Contracts* Vol 1 577 and 580. See also Murphy, Speidel & Ayres *Studies in Contract Law* (2003) 421-422, hereafter Murphy *et al Studies in Contract Law*; Lawrence *Anderson* Vol. 2A (2008) 431. The position in respect of absence of intention accords with the South African approach where an intention to contract is one of the *essentialia* of a valid contract of sale. However, unlike the position in the United States of America, South African law does not engage on an enquiry about the possibility of a remedy until and unless all the *essentialia* inclusive of price are present and a breach of contract has been proven.

<sup>1638</sup> See also UCC 2-305(4) to the same effect.

<sup>1639</sup> In *Bethlehem Steel Corp. v Litton Industries, Inc.* 468A.2d 748 at 757-758 (Pa. Supr. Ct. 1983), hereafter *Bethlehem Steel* 468A.2d 748 the Court, relying on UCC 2-304(3) commented that a court could not create a contract by employing the various rules of interpretation and construction if the contractants did not intend for a contract to come into existence. A court could proceed to determine the terms of the contract only if such mutual intention was present. In the absence of such intention, the court's enquiry must terminate.

<sup>1640</sup> Perillo *Corbin on Contracts* Vol 1 580 n34.

<sup>1641</sup> In UCC 2-305 read with UCC 2-204(3).



Hereafter follows a brief exposition of the UCC 2-305 Open Price Term<sup>1642</sup> that regulates the law relating to the notion of a reasonable price and the notion of a unilaterally determined price.

(ii) Content of UCC 2-305

In general, UCC 2-305 provides that a contract does not come into existence where the contractants intended to be bound only if the price is fixed or agreed upon and the price is not so fixed or agreed upon.<sup>1643</sup>

Of importance is that UCC 2-305 further provides that contractants may conclude a contract of sale even though the price is not settled. UCC 2-305 presumes all such contracts to be valid with the aim of preserving them and filling in any gaps provided that contractants intended to make a contract and provided that there is a reasonably certain basis for granting an appropriate remedy.<sup>1644</sup>

Where the contractants have the intention to contract but leave the price to be agreed upon and they fail to agree, then in terms of UCC 2-305(1)(b) the “price is a reasonable price at the time of delivery.”<sup>1645</sup> The same applies where nothing is said about the price (UCC 2-305(1)(a))<sup>1646</sup> or where the price is to be fixed in terms of an agreed market or other

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<sup>1642</sup> Though the UCC provision does not expressly mention missing terms, the courts generally interpret the term “open” to include both terms left to be negotiated and missing terms. Choi (2003) 103 *Columbia LR* 55.

<sup>1643</sup> UCC 2-305(4). See also Murphy *et al Studies in Contract Law* 422.

<sup>1644</sup> UCC 2-304(3). Choi (2003) 103 *Columbia LR* 64.

<sup>1645</sup> See also Murphy *et al Studies in Contract Law* 422. In stark contrast to this, there is a reluctance to fill the gap relating to quantity by trying to ascertain what would have been a reasonable quantity: Murphy *et al Studies in Contract Law* 425. The problems associated with determining what constitutes a reasonable quantity are said to be “virtually insuperable.” Thus, despite an intention to contract, a contract *sans* an agreement on quantity should fail for “indefiniteness”: Murphy *et al Studies in Contract Law* 421-422. It is submitted that similar problems bedevil gap-filling as far as price is concerned. See also the discussion of the problems associated with the “hypothetical contracting” approach and the “majoritarian” approach in American law in the text following this footnote reference. See also the discussion and the conclusions reached in chapter 4 above generally, and in particular in para 4.3.4.2 thereof regarding the problems associated with the notion of a reasonable price.

<sup>1646</sup> In terms of South African common law, the price would be the usual price of the seller which provides a much simpler and less contentious method of calculation and one that promotes greater certainty. See chapter 1 para 1.4.2.2(C)(ii)(a).

standard as set or recorded by a third person or agency and it is not so set or recorded (UCC 2-305(1)(c)).

The effect of UCC 2-305(1) is that agreements to agree are enforceable and it also rejects the unenforceability of such contracts on the basis of “indefiniteness.”<sup>1647</sup> In such contracts, the contractants are obligated by UCC 1-304[Rev]<sup>1648</sup> to negotiate in good faith to arrive at a price. Failure to do so exposes the particular contractant to liability for breach of contract.<sup>1649</sup>

Where the price is left to be fixed other than by agreement between the contractants and the price-fixing is frustrated through the fault of one of them, then the “innocent” contractant has an option to treat the contract as cancelled or he/she may fix a reasonable price (UCC 2-305(3)). An open price contract would only fail where there is no reasonable basis for determining a substitute price.<sup>1650</sup>

Section 204 of the Restatement (Second), which has persuasive value only,<sup>1651</sup> is of the similar import to UCC 2-305.<sup>1652</sup> However, unlike UCC 2-305, the Restatement (Second)

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<sup>1647</sup> Lawrence *Anderson* Vol. 2A (2008) 21.

<sup>1648</sup> UCC 1-304[Rev] provides that all contracts are subject to the duty of good faith in their performance and enforcement. The UCC has been undergoing a process of revision since 1991 hence the qualification [Rev] which indicates the UCC as revised: Van Zelst *The Politics of European Sales Law: A Legal-Political Inquiry Into the Drafting of the Uniform Commercial Code, Vienna Sales Convention, the Dutch Civil Code and the European Consumer SA* (2008) 46, hereafter Van Zelst *The Politics of European Sales Law*.

<sup>1649</sup> *Milex Products, Inc. v Alra Laboratories, Inc.*, 237 Ill. App.3d 177, 177 Ill. Dec. 852, 603 N.E. 2d 1226 (2d Dist. 1992) concerned the manufacture of pharmaceutical products at a price to be negotiated. The Court concluded that a valid contract had been concluded that imposed on the contractants a duty to negotiate in good faith. In general, the duty to negotiate in good faith is one that prevents a contractant from renouncing the agreement or abandoning the negotiations or insisting on conditions that do not form part of the preliminary negotiations (1234). In South Africa, an agreement to agree or an agreement to negotiate in good faith is regarded as invalid. See, for example, *Southernport Developments (Pty) Ltd v Transnet Limited* 2005 (2) SA 202 (SCA) and *Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC). Both cases are discussed in chapter 4 para 4.2.4.4. Good faith is also not recognised as a general regulatory norm in South Africa. See chapter 2 para 2.8. The approach in England (para 5.2.3.2(A) below) is similar to the South African one.

<sup>1650</sup> Perillo *Corbin on Contracts* Vol 1 577; Murphy *et al Studies in Contract Law* 422.

<sup>1651</sup> Knapp *et al Problems in Contract Law* 7-8.

<sup>1652</sup> Section 204 provides that where a “bargain is sufficiently defined to be a contract” and the contractants have not agreed “with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.” UCC 2-204(3) is to the same effect: Murphy *et al Studies in Contract Law* 422-423.

provisions are not limited to contracts for the sale of goods and are intended to cover all exchange transactions.<sup>1653</sup> Hence, lease agreements are covered as well.

(iii) Rationale for the notion of a reasonable price

The courts in the United States of America derive their justification for gap-filling from the Uniform Commercial Code, the provisions whereof are based on an acknowledgment that contractants form part of a market and that it is their understanding that they act in concert with market forces even if the price is left to be settled later by agreement or by a mechanism that proves unsuccessful.<sup>1654</sup>

(iv) Approaches to the application of UCC 2-305

In applying the default rules of the UCC 2-305,<sup>1655</sup> the approach is to give to the contractants what they would have contracted for had they expressly contracted.<sup>1656</sup> This approach which seeks to uncover the intention of the contractants, is known as the “hypothetical contracting” approach<sup>1657</sup> which resembles the hypothetical bystander test used in South African law to read tacit terms into a contract.<sup>1658</sup> However, the “hypothetical contracting” approach is said to be beset with difficulties<sup>1659</sup> that have often resulted in the courts inferring what the majority of contractants in a particular setting would have done.<sup>1660</sup> This

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<sup>1653</sup> Murphy *et al Studies in Contract Law* 422.

<sup>1654</sup> Perillo *Corbin on Contracts* Vol 1 579. For example, where a formula for the calculation of the price fails because the state (or other organisation) no longer issues the price index that forms part of the formula.

<sup>1655</sup> As set out above in para 5.2.2.2(B) above.

<sup>1656</sup> DiMatteo *Law of International Contracting* (2009) 20, hereafter DiMatteo *Law of International Contracting*; Choi (2003) 103 *Columbia LR* 64.

<sup>1657</sup> Murphy *et al Studies in Contract Law* 425-426.

<sup>1658</sup> See chapter 4 para 4.3.4.2(C)(viii).

<sup>1659</sup> See also the discussion in chapter 4 para 4.3.4.2(C)(viii) where it was shown that inconsistencies about the nature and content of the hypothetical bystander test may lead to problems that may include imposing terms into contracts which were not within the contemplation of the contractants.

<sup>1660</sup> Murphy *et al Studies in Contract Law* 425-426.

approach, known as the “majoritarian” approach,<sup>1661</sup> signals a departure from the hypothetical contracting standard<sup>1662</sup> and appears to enjoy judicial preference.<sup>1663</sup>

(v) Factors considered in determining a reasonable price

The UCC does not specify a list of factors or guidelines for giving content to the notion of a reasonable price.<sup>1664</sup> The following is a summary of some of the factors which may play a role in the determination of a reasonable price. The description of the factors is followed by an analysis thereof.<sup>1665</sup>

(a) Market price

UCC 2-305(1)(c) expressly authorises an open-price term that may be resolved with reference to the markets.<sup>1666</sup> A court may have regard for the fair market value at the time and place of delivery or it may choose the prevailing price in the market where the seller contracted to sell.<sup>1667</sup> However, a reasonable price is not necessarily the quoted or list price neither is it necessarily the actual selling price,<sup>1668</sup> nor the market price.<sup>1669</sup> It has also been

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<sup>1661</sup> The problems and the policy and jurisprudential considerations relating to the determination of what the contractants would have wanted were outlined in chapter 4 para 4.3.4.2.

<sup>1662</sup> Murphy *et al Studies in Contract Law* 425-426.

<sup>1663</sup> DiMatteo *Law of International Contracting* 20. The following comment accompanying Section 204 of the Restatement (Second) expressly disclaims reliance on the hypothetical approach.

“Sometimes it is said that the search is for the term the parties would have agreed to if the question had been brought to their attention. Both the meaning of the words used and the probability that a particular term would have been used if the question had been raised may be factors in determining what term is reasonable in the circumstances. But where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.”

See Murphy *et al Studies in Contract Law* 425.

<sup>1664</sup> Lawrence *Anderson* Vol. 2A (2008) 440.

<sup>1665</sup> See para 5.2.2.2(D) below.

<sup>1666</sup> Lawrence *Anderson* Vol. 2A (2008) 442.

<sup>1667</sup> Lawrence *Anderson* Vol. 2A (2008) 432-433 & 442.

<sup>1668</sup> In *Coca-Cola Bottling Co. Of Elizabethtown, Inc. V Coca-Cola Co.*, 988 F2d. 386 (3d Cir. 1993), hereafter *Coca-Cola Bottling* 988 F2d. 386 (3d Cir. 1993), one of the issues before the court concerned the market price of sugar used to calculate the price of the sugar-based Coca-Cola syrup supplied to the bottling companies. The Court had to decide whether it related to the (lower) actual selling price as claimed by the bottling companies or to the (higher) “quoted” or “list” price as claimed by Coca-Cola. The formula proposed by the Court suggests that a market price is the price made known to users upon inquiry prior to sale less any discounts, allowances or rebates which are available to users or which are made known upon inquiry prior to sale (paras [52], [66], [138], [140], [141] and [147]). In South African law, market

suggested that a reasonable price is one which is “normally going to be cashed out as closely related to the market price.”<sup>1670</sup>

(b) Course of performance, course of dealing and usage of trade

As a guide to an understanding of the notion of reasonableness, recourse may be had to UCC 1-303 [Rev]<sup>1671</sup> which provides that the “course of performance,”<sup>1672</sup> “course of dealing”<sup>1673</sup> and “usage of trade”<sup>1674</sup> may be used to assist in the interpretation of

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does not necessarily refer to an organised entity like a municipal produce market. *Katzenellenbogen Ltd v Mullin* 1997 (4) SA 855 (A) 878E-F. It may refer “to any source to which the purchaser might reasonably have gone, in the circumstances, in order to replace the goods which ought to have been delivered to him.” *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T) 288. Market price would, therefore, be the price charged at such a source. See chapter 1 para 1.4.2.2(C)(ii)(b).

<sup>1669</sup> In *Perdue v Crocker International Bank*, 702 P. 2d 503 – Cal: Supreme Court 1985 919, 927, hereafter *Perdue* 702 P. 2d 503, the Court did not support the defendant’s contention that a price equal to a market price cannot be held unconscionable, saying that the courts do not only consider market value but also the cost of the goods or services to the seller, the inconvenience imposed on the seller and the true value of the product or services.

<sup>1670</sup> Murphy *et al Studies in Contract Law* 425.

<sup>1671</sup> See specifically UCC 1-303(d)[Rev]. See also UCC 1-201(b)(3) that defines an agreement as “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303.” The use of course of dealing and/or trade usage as touchstones for the determination of a reasonable price are also to be found in the other jurisdictions under discussion in this chapter.

<sup>1672</sup> UCC 1-303[Rev](a). This refers to a sequence of conduct between the contractants under the contract in question subsequent to its formation. There is no indication as to the number of acts that would be required to constitute a course of performance: Lawrence *Anderson* Vol. 2A (2008) 442; Lawrence *Anderson on the Uniform Commercial Code* Vol. 1A (2004), 1008-1009, 1017-1019 and 1055, hereafter Lawrence *Anderson* Vol. 1A (2004). The notion of a course of performance is recognised in South African law although not in relation to price. In *Comwezi Security Services (Pty) Ltd and Mohammed Shafie Mowzer NO v Cape Empowerment Trust Ltd* (759/11) [2012] ZASCA 126 (21 September 2012) the Court said that where there is a perceived ambiguity in a contract, the subsequent conduct between the contractants in implementing the agreement could be taken into account in preferring one interpretation to the other (para [15]).

<sup>1673</sup> UCC 1-303(b)[Rev]. This refers to a sequence of previous transactions between the contractants. Here also there is no guidance as to the number of transactions that would be required to constitute a course of dealing: Lawrence *Anderson* Vol. 1A (2004), 1009, 1054-1055 and 1058-1060.

<sup>1674</sup> UCC 1-303(c)[Rev]. This refers to any practice or method of dealing which has been regularly observed in a place, vocation, or trade so as to justify an expectation that it will be observed with respect to the transaction in question. In *Frigalimont Importing v BNS International* 190 F. Supp. 116 (S.D.N.Y. 1960), hereafter *Frigalimont* 190 F. Supp. 116 (S.D.N.Y. 1960), the court said that the usage must be of such a long duration and so well established and universal that a “violent” presumption arises that the contractants contracted with reference to it and made it part of the agreement. However, it does not have to be ancient or certain as required at common law to establish a custom. See also Comment 8 to UCC 1-303[Rev]. In terms of UCC 1-303(d)[Rev] the contractants must be engaged in the particular trade or vocation or must be aware or should have been aware of such usage of trade: Lawrence *Anderson* Vol. 1A (2004) 1009 and 1034. See also DiMatteo *Law of International Contracting* 20-21.

contractual terms.<sup>1675</sup> Evidence of these factors would give rise to a presumption of reasonableness.<sup>1676</sup> In the event of a conflict between the aforementioned three factors or between these factors and an express term then the express term would take precedence over the three factors. In the absence of an express term a course of performance would take precedence over a course of dealing and a usage of trade. A course of dealing, in turn, would take precedence over a usage of trade.<sup>1677</sup>

(c) Seller's usual selling price, "posted" price, price in effect, formulae

It has been submitted that the price gap in contracts of sale and service can also "be more readily and justly filled by recourse to the 'market' for the goods or services,<sup>1678</sup> or to the parties' own 'course of dealing,'<sup>1679</sup> or to a multitude of factors called 'reasonableness.'"<sup>1680</sup>

Where reference to the "market" is not possible because the goods may not be frequently traded in the marketplace, the reasonable price may be the seller's usual selling price,<sup>1681</sup> a 'posted price,'<sup>1682</sup> or a written document may incorporate other documents or formula such as the cost of production plus a reasonable profit.<sup>1683</sup>

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<sup>1675</sup> The case of *Frugalment* 190 F. Supp. 116 (S.D.N.Y. 1960) may be used to illustrate these notions. In issue in the case was whether the use of the word "chicken" in a contract referred to young chickens as per trade usage as alleged by the plaintiff, or whether it was a generic term referring to all chickens regardless of age. The express terms of the contract providing no clue, the court then considered the fact a second consignment bearing the same qualities as the first one was sent despite plaintiff's protests. The court also considered that there was no course of previous dealing between the contractants. Lastly, the court considered conflicting evidence of trade usage. The court finding no guidance from any of these factors gave judgment against the plaintiff because it had not discharged the onus of proving that the word "chicken" referred to young chickens only.

<sup>1676</sup> The presumption would be rebutted by proof of unconscionable conduct in the establishment of the course of performance, course of dealing or usage of trade: Lawrence *Anderson* Vol. 1A (2004) 1016.

<sup>1677</sup> UCC 1-303(e)[Rev].

<sup>1678</sup> The use of a market as a factor for determining a reasonable price has already been dealt with in para 5.2.2.2(B)(v)(a) above. In respect of service contracts, the position advocated does not appear to differ from that in South African law as commented on by Zeffert (1973) 90 *SALJ* 113. See chapter 4, para 4.3.4.3(C).

<sup>1679</sup> This appears to be similar to a "course of dealing" under UCC 1-303 (b) [Rev] discussed in sub-para (b) above: Lawrence's *Anderson* Vol. 2A (2008) 451.

<sup>1680</sup> Perillo *Corbin on Contracts* Vol 1 574-575 and 581-583.

<sup>1681</sup> This is similar to the notion of an implied or usual price in South African Law. See chapter 1 para 1.4.2.2(C)(ii)(a) and (c).

<sup>1682</sup> A posted price is a written statement of (crude oil) prices circulated publicly among sellers and buyers of crude oil: *North Central Airlines, Inc. v Continental Oil Co.*, 574 F.2d 582 (D.C. Cir. 1978), para [22]. In *Havird Oil Co., Inc. v Marathon Oil Co., Inc.* 149 F.3d 283, 1998-2 Trade Cas. (CCH) 72212, 41 Fed. R. Serv.



(d) Price at the time and place of delivery, incorporation by reference

A reasonable price has also been determined with reference to the price at the time<sup>1684</sup> and place of delivery. The price recorded by a state organ or any official organisation may be used as evidence of a reasonable price.<sup>1685</sup> The method used in calculating the price in the past between the contractants may also serve as an indication that that method is to be used in the instant case.<sup>1686</sup>

Where a reasonable price cannot be determined because of insufficient evidence, the contract fails for indefiniteness.<sup>1687</sup> This could probably relate to a sale of rare, unique or precious goods. Such and similar goods, because of their rarity and or unique qualities, do not attract a usual price or market value and, hence, a contract could be void if it does not specify the price or an objective method of computing it.<sup>1688</sup>

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3d 86, 36 U.C.C. Rep. Serv. 2d 63 (4<sup>th</sup> Cir. 1998), hereafter *Havird Oil* 149 F.3d 283, 1998-2, the price of petrol was set at the “posted Wholesale Reseller Price”, also known as the “rack price” in the industry, at the terminal where delivery is made (para [1]). A “posted price” is similar to a “price in effect.” The former is the price in “jobber” contracts (bulk buyers intermediaries who do not sell directly to consumers but who distribute to other dealers or to municipalities, police and fire departments etc.) whereas the latter is the price charged to franchisees. A posted price is usually less than a price in effect: *Mathis v Exxon Corp.*, 302 F.3d 448 (5<sup>th</sup> Cir. 2002), para [I], hereafter *Mathis* 302 F.3d 448 (5<sup>th</sup> Cir. 2002). See also *Neugent v Beroth Oil Co.*, 149 N.C. App. 38, 560 S.E.2d. 829, 47 U.C.C. Rep. Serv. 2d 102 (2002), para [I], hereafter *Neugent* 149 N.C. App. 38. Both a posted price and a price in effect are similar in notion and effect to a “price list” price that was accepted in *Shell SA (Pty) Ltd v Corbitt and Another* 1984 4 SA 523 (CPD) as complying with the requirement of objective ascertainability. See the discussion in chapter 1 para 1.4.2.2(C)(ii)(d).

<sup>1683</sup> *Neugent* 149 N.C. App. 38. The contract provided that the sale would be at the “dealer buying price” which is a formula price term that allows the supplier to make price adjustments in response to commercial dynamics in the market (para [I]). The term referred to the price effective at date of delivery in the supplier’s pricing area where the motor fuel sales facility was located (para [III](C)). The court held that the agreement was binding and that the pricing structure could not be departed from without the consent of the dealer (para [III](D)). See also Perillo *Corbin on Contracts* Vol 1 543-544 and 580. This is similar to the use of a formula in South African law that meets the standard of objective ascertainability. See chapter 1 para 1.4.2.2(C)(ii).

<sup>1684</sup> The time of delivery is in terms of UCC 2-305(1).

<sup>1685</sup> In *Lamberta v Smiling Jum Potato Co.*, 3 U.C.C. Rep. Serv. 981 (Dep’t Agric. 1966), which concerned the sale of potatoes, the federal-state market news report for the city on the day after delivery was used as evidence of such reasonable price: Lawrence *Anderson* Vol. 2A (2008) 440.

<sup>1686</sup> Lawrence *Anderson* Vol. 2A (2008) 451. The course of dealing in UCC 1-303(b)[Rev] discussed in sub-para (b) above is to the same effect.

<sup>1687</sup> *Coca-Cola Bottling* 988 F.2d. 386 (3d Cir. 1993) para [104]. See also Lawrence *Anderson* Vol. 2A (2008) 450.

<sup>1688</sup> This is the position in South African law in relation to rare and precious goods. Note, however, that in the Netherlands the possibility of a reasonable price is recognised even in respect of rare or unique items. See para 5.2.6.2(B) below.



(vi) Unilateral discretionary power to determine price

By way of introduction, it must be re-iterated that UCC 1-304[Rev] imposes a non-variable duty<sup>1689</sup> of good faith in the performance and enforcement of contracts.<sup>1690</sup> In relation to the unilateral determination of a price, UCC 2-305(2) imposes, over and above the duty in UCC 1-304[Rev], a duty of good faith where a price is to be fixed by either the buyer or the seller.<sup>1691</sup> Good faith is a question of fact and means honesty in fact and the observance of reasonable commercial standards of fair dealing.<sup>1692</sup> The duty is interpreted as having both subjective and objective features<sup>1693</sup> in that it requires honesty in fact (subjective honesty) and the observance of reasonable standards of fair dealing (objective reasonableness).<sup>1694</sup> The duty requires the courts to interpret contracts within the commercial context in which they were created, performed and enforced. Failure to comply with the duty constitutes breach of contract.<sup>1695</sup>



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<sup>1689</sup> The duty may not be excluded. However, the contractants may agree on the standards by which good faith may be measured subject to the core requirement that the standard(s) agreed upon must not be unreasonable: UCC 1-302(b)[Rev]. The duty of good faith in America is the most well-developed of the common law jurisdictions. See chapter 2 para 2.8.

<sup>1690</sup> The duty, however, does not extend to pre-contract negotiations. This is unlike the position in Dutch law. See para 5.2.6.2(C)(ii) below.

<sup>1691</sup> The duty of good faith does not apply where the contract contains a fixed price: Lawrence *Anderson* Vol. 2A (2008) 430. Thus the position resembles the approach in South Africa where price agreed upon is not, in the absence of improperly obtained consensus, subject to judicial scrutiny.

<sup>1692</sup> UCC 1-201(b)20 [Rev].

<sup>1693</sup> In *Mathis* 302 F.3d 448 (5<sup>th</sup> Cir. 2002) a group of franchisees challenged, on the grounds of breach of the duty of good faith, the price Exxon had set for the sale of gasoline pursuant to a clause expressly granting Exxon the power to set the price. The price was found to be objectively reasonable in that it compared favourably with the price charged by Exxon's competitors. On a subjective analysis, however, the Court found that Exxon had breached its duty to exercise good faith when setting the price. The Court reasoned that Exxon had set the prices so as to force the franchisees out of business to be replaced by Exxon-owned businesses. In *Havird Oil* 149 F.3d 283, 1998-2 the Court found that there was compliance with the reasonable commercial standards of fair dealing in trade in that the price for the petrol was set in the "middle of the pack" of all the wholesalers in the area.

<sup>1694</sup> Drahozal 'Usages and Implied Terms in the United States' September 2012 12, hereafter Drahozal 'Usages and Implied Terms in the United States'; Knapp *et al Problems in Contract Law* 442 and 804.

<sup>1695</sup> Comment 1 to UCC 1-304[Rev] in Lawrence *Anderson* Vol. 1A (2004) 761. See the *Milex* case discussed in a footnote in sub-para (B)(ii) above; Drahozal 'Usages and Implied Terms in the United States' 13.

(C) Arguments in favour of the open contract provisions of UCC 2-305

It has been said that the litigation that results from open-term contracts, establishes precedents which have social and economic utility.<sup>1696</sup>

However, the opposite argument is equally, if not more valid. The standards-based approach requires the law to be found in each situation.<sup>1697</sup> Such casuistic investigation and determination of the law will result in a greater number of decisions being set on a greater range of issues. Since the decisions are generally fact-specific (the law must be found in each situation) it may have very little precedent value. Hence, the indeterminacy and the casuistic nature of the enquiry inherent in the standard of reasonableness renders it inarticulate as a mechanism that provides the “overarching account of contractual obligation that contract theory requires.”<sup>1698</sup> One of the major problems of the standard of reasonableness in the context of the discussion at hand, is the difficulty in identifying and defending the appropriate standard to be used to distinguish enforceable commitments from non-enforceable ones.<sup>1699</sup>

The increase in the number, range and diversity of precedents and the reduction in the precedent value thereof may contribute to uncertainty of the law. Uncertainty makes it more difficult and confusing to navigate the contract law arena which may result in distrust of contract law as an obligation-creating mechanism. In effect, the multiplicity of precedents that construe the legal standard of a reasonable price might just have the effect of justifying the imposition of an immutable rule.<sup>1700</sup> Such an eventuality would bring the approach based on open-price terms full circle back to a rule-based one based on the requirement of

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<sup>1696</sup> Choi (2003) 103 *Columbia LR* 65.

<sup>1697</sup> Llewellyn’s theory was that an “immanent” law is to be found in any situation and that the role of the court was to discover this ‘immanent’ law. See the discussion in para 5.2.2.2(D)(i)(c) below.

<sup>1698</sup> Murphy *et al Studies in Contract Law* 29.

<sup>1699</sup> Murphy *et al Studies in Contract Law* 29; Kennedy (1976) 89 *Harvard LR* 1690, concludes that case law will give rise to rules that are so closely bound to the facts of the particular case as to serve very little or no precedential value.” See also the discussion chapter 4 para 4.3.

<sup>1700</sup> Ayres & Gertner ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’ (1989-1990) 99 *Yale LJ* 87, 89 n13, hereafter Ayres & Gertner (1989-1990) 99 *Yale LJ* 87.

objective ascertainability.<sup>1701</sup> The rule-based approach has greater precedent value in that it reduces to a minimum the occasions for judicial lawmaking. The generality of the rule ensures that decisions have far reaching effects, presenting fewer occasions for judges, litigants and prospective contractants to be confronted with conflicting lines of authority.<sup>1702</sup> The overall result is increased certainty of the law and a corresponding increase in trust to use contract as an obligation-creating mechanism.<sup>1703</sup> The result gives effect to the important principles of freedom and certainty of contract.<sup>1704</sup>

#### (D) Arguments against the open contract provisions of UCC 2-305

The rationality of the provisions of UCC 2-305 may be challenged on both jurisprudential and policy grounds. The jurisprudential concerns are dealt with first and thereafter the policy issues will be considered.



##### (i) Jurisprudential concerns

##### (a) Rationality of UCC 2-204(3)

The provisions of UCC 2-204(3)<sup>1705</sup> may be criticised on the basis that it is impractical to determine whether a breach has occurred and what the appropriate remedy is when the terms of the contract itself is unclear.<sup>1706</sup> In England, Section 8 of the Sale of Goods Act<sup>1707</sup> is

<sup>1701</sup> See chapter 1 paras 1.1 and 1.2.

<sup>1702</sup> Kennedy (1976) 89 *Harvard LR* 1690. See further para 5.2.2.2(D)(i)(c) below regarding rules and standards. See also chapter 4 para 4.2.4.3.

<sup>1703</sup> Certainty promotes predictability which, it is submitted, facilitates the process of conducting business and, hence, is beneficial for economic development.

<sup>1704</sup> Chapter 2 paras 2.2 and 2.6.

<sup>1705</sup> The predication of the existence of a valid contract of sale on the existence of an intention to contract coupled with the existence of a remedy. In para 5.2.2.2(B)(i) above, it was explained that the open term provisions of UCC 2-305 apply only if the requirements of UCC 2-204(3) have been met.

<sup>1706</sup> In *Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 548 N.E. 2d 203, 206 (N.Y. 1989), the court said that a court cannot determine whether a contract has been breached and what an appropriate remedy would be until and unless it has established what the agreement is. In the same vein, the court in *Ross-Simons of Warwick, Inc. v Baccarat, Inc.*, 182 F.R.D. 386, 395 (D.R.I. 1998) declared that certainty is an "important characteristic" of a contract because a court can enforce an agreement only if it can specify the obligations undertaken by the parties. In *Bethlehem* 468 A.2d 748 at 757-758 (Pa. Supr. Ct. 1983) the court based its finding of an absence of an intention to contract on the existence of the very gap it was asked to fill, namely, the furnishing of a price escalation clause. The court said "the absence of the terms necessary to calculate the price to be allowed for inflation and to apportion that escalation over time,"

similarly criticized for presupposing that the contractants had concluded a valid contract and then suggesting methods by which the price may be ascertained. It is pointed out that the first point to be considered in an action on sale is to find out whether a contract was concluded and the absence of an agreement on the price may provide good evidence that the parties had not yet reached a concluded contract.<sup>1708</sup> The UCC approach is similarly counterintuitive and does not promote certainty.<sup>1709</sup>

Furthermore, UCC 2-204(3)'s other touchstone, namely, that of intention, raises evidentiary issues concerning the determination of contractual intent. There are several approaches to determining intention including examining the four corners of the document, or looking at the conduct and language of the contractants or examining the surrounding circumstances. The issue of which method to use is further complicated by rules of interpretation such as the parole evidence rule and the *caveat subscriptor* rule. To what extent should reliance be placed on, not only, what the contractants wrote or said, but also, on what they did not write or say? A court, in determining contractual intent, is required to choose amongst at least three interpretive strategies.<sup>1710</sup> Camero describes the jurisprudence as demonstrative of the "chaos" in determining intent.<sup>1711</sup>

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pointed to the absence of an intention to contract. Similar criticism is levelled at Section 8(2) of the English Sale of Goods Act 1979. See para 5.2.2.2(D)(i)(a) below.

<sup>1707</sup> The touchstone in England is the existence of an intention to buy and sell. See para 5.2.3.2(A) of this chapter below.

<sup>1708</sup> Atiyah, Adams and MacQueen *The Sale of Goods* (2005) 30. UCC 2-305 is similarly criticised by the New Formalists. See para 5.2.2.2(D)(i)(c) below.

<sup>1709</sup> The requirement of certainty in contract creation ensures, *inter alia*, that the judiciary has sufficient information to determine that a contract has or has not been concluded and that the terms of the contract are sufficient to determine that a breach of contract has occurred and whether an appropriate remedy exists: Van der Merwe, van Huyssteen, Reinecke and Lubbe *Contract: General Principles* (2012) 192 *et seq*, hereafter Van der Merwe *et al Contract*; Hutchison, Pretorius, Du Plessis, Eiselen, Floyd, Hawthorne, Kuschke, Maxwell, Naudé and De Stadler *The Law of Contract in South Africa* (2012) 210-216, hereafter Hutchison *et al Contract*.

<sup>1710</sup> Scott 'The Case for Formalism in Relational Contract' (2000) 94 *Northwestern University LR* 847, 849.

<sup>1711</sup> Camero 'Level Up: Employing the Commerce Clause to Federalize the Sale of Goods' 1, 13 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2027482](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027482)>. Accepted for publication. Publication details as follows: Jennifer Camero, Level Up: Employing the Commerce Clause to Federalize the Sale of Goods, 50 *San Diego Law Review* (2013), hereafter Camero 'Level Up.' See also Hunter Taylor 'Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions' (1978-1979) 30 *Hastings LJ* 337, 346-348. The generality of Camero's conclusion aside, it does provide support for the conclusions drawn in chapter 4 para 4.3 regarding the problems of determining contractual intent in relation to price.

Thus, the reliance on contractual intention, at the expense of the *essentiale* of price, for the determination of contractual validity is a problem that may result in uncertainty.<sup>1712</sup> The uncertainty does not promote legal and commercial efficiency in that contractants may have difficulty in planning and in allocating risks and they could be presented with outcomes that they had neither anticipated nor contemplated.

(b) Date of determination of the reasonable price

The rule that the reasonable price must be determined at date of delivery is also to be found in English<sup>1713</sup> and German law.<sup>1714</sup> In the Netherlands,<sup>1715</sup> the CISG<sup>1716</sup> and the UNIDROIT Principles (2004)<sup>1717</sup> the applicable date is the date of contract.

Pre-determining a date for computation of a reasonable price is problematic because the date makes a huge difference in that market conditions or circumstances, generally, may have undergone a radical change from one date to the other.<sup>1718</sup> There appears to be no reason to justify a general presumption that contractants would have preferred either one of the two dates in the ordinary course. In general, a buyer who wishes to escape the risk of price fluctuations would want to place the risk on the seller by opting to contract for the price at date of contract. The converse is equally true: a seller who wishes to allocate the risk of price fluctuations to the buyer, would, in general, contract for a cost-based price calculated at date of delivery.<sup>1719</sup>

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<sup>1712</sup> The possibility of different outcomes regarding the issue of contractual validity may be illustrated with reference to the English case of *May & Butcher v The King* [1934] 2 KB 17, also discussed in para 5.2.3.2(A) below. The price, *inter alia*, was to be determined from time to time by the buyer and the seller as the quantities of the stock became available. The court found that the clause revealed an intention not to be bound until and unless agreement on the price had been reached. The court *a quo* had found that the contractants had meant to be bound: Beale *et al Ius Commune Casebooks for the Common Law of Europe Cases, Materials and Text on Contract Law* (2010) 322, hereafter Beale et al *Ius Commune Casebooks*.

<sup>1713</sup> See para 5.2.3.2(B)(iii) below.

<sup>1714</sup> See para 5.2.5.3(C) below.

<sup>1715</sup> See para 5.2.6.1 below.

<sup>1716</sup> See para 5.2.7.2(B) below.

<sup>1717</sup> See para 5.2.7.3(B) below.

<sup>1718</sup> This could be due to, for example, war, natural disasters, need or even artificial manipulation by one of the contractants: Bridge *Benjamin's Sale* para [13-079], hereafter Bridge *Benjamin's Sale*.

<sup>1719</sup> Ayres & Gertner (1989-1990) 99 *Yale LJ* 96 n44.

Neither of the two approaches<sup>1720</sup> accords with the generally accepted view that default clauses such as the open price terms under discussion, should, in order to reflect some vestige of the consensual aspects of contract law, reflect the position that the contractants would have contracted for had they expressly agreed on the issue at hand.<sup>1721</sup>

(c) Rules versus standards

The jurisprudential basis for determining price terms with reference to standards rather than rules is subject to criticism and, hence it is necessary to examine the debate.

The introduction of the open term provisions in the UCC was justified on the basis that the law exists in “patterns of conduct and relationships and, when discovered, provides a more reliable source of certainty than does the rigid, external system of classical contract law.”<sup>1722</sup>

In this context, it is worth noting that the UCC was inspired by the Legal Realist Movement of which Llewellyn was one of the main proponents.<sup>1723</sup>

The Realists advocated a move to a system of “standardized, flexible, group related and ‘reasonable’ contracts.”<sup>1724</sup> Hence, the UCC’s “open texturedness and focus on flexible rules which were dependent on fact-specific determinations.”<sup>1725</sup> Llewellyn argued that “an immanent law” was to be found in any situation and that the role of the ‘law authority’ was to discover this ‘immanent law.’<sup>1726</sup> Thus, he believed that legal rules must relate to the facts “and must fit the realities of the transactions they govern.”<sup>1727</sup> Llewellyn’s focus on

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<sup>1720</sup> The price determined at date of contract or at date of delivery.

<sup>1721</sup> Ayres & Gertner (1989-1990) 99 *Yale LJ* 96.

<sup>1722</sup> Speidel (1981-82) 67 *Cornell LR* 791.

<sup>1723</sup> Van Zelst *The Politics of European Sales Law* 40; Wiseman ‘The Limits of Vision: Karl Llewellyn and the Merchant Rules’ (1986-1987) 100(2) *Harvard LR* 465, hereafter Wiseman (1986-1987) 100(2) *Harvard LR*. Wiseman provides an insightful analysis of Llewellyn’s contribution to the creation of the UCC (465 *et seq*). The Realists believed that the chaos that resulted from the depression in the 1930s could be managed only by replacing the traditional views of ordering the market with a realistic approach based on the facts of everyday life. The final UCC product is reflective of the regulatory ideals of the New Deal era of politics and is a consequence of the political reality of the 1940s and early 1950s: Van Zelst *The Politics of European Sales Law* 40-42; Danzig ‘A Comment on the Jurisprudence of the Uniform Commercial Code’ (1974-1975) 27 *Stanford LR* 621, hereafter Danzig (1974-1975) 27 *Stanford LR* 621.

<sup>1724</sup> Van Zelst *The Politics of European Sales Law* 41.

<sup>1725</sup> Van Zelst *The Politics of European Sales Law* 41.

<sup>1726</sup> Van Zelst *The Politics of European Sales Law* 41.

<sup>1727</sup> Wiseman (1986-1987) 100(2) *Harvard LR* 470.

mercantile commercial transactions invited the criticism that it “resulted in less protection to consumers than they needed.”<sup>1728</sup>

The UCC approach which is based on the notion that the law exists in “patterns of conduct and relationships and, when discovered, provides a more reliable source of certainty than does the rigid, external system of classical contract law,” prompted the declaration that “[a] more complete triumph of standards over rules is hard to imagine.”<sup>1729</sup>

However “[t]he problem with standards is that they may lead the court to water without explaining how to drink.”<sup>1730</sup> Standards such as reasonableness are difficult concepts to define and lead to “dramatically” different opinions on the same provision.<sup>1731</sup> The method is criticised for promoting decision-making according to the facts of a particular situation and not according to the logic of a statute or a juristic concept.<sup>1732</sup> It requires consideration of the commercial context “without clarifying how the diverse data were to be assembled and used.”<sup>1733</sup> This has prompted the “new formalists” to argue that the gap-filling role of the courts in open term contracts is fraught with difficulty because they must consider “all of the relational and contextual factors” in order to arrive at the correct result. Courts are faced with almost insurmountable difficulties “when filling in the gaps on the basis of ‘information that is either unobservable to one or both of the parties or unverifiable to the

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<sup>1728</sup> Wiseman (1986-1987) 100(2) *Harvard LR* 519. Camero comments that the UCC seems to be preferred by the business community because the Commissioners who drafted the code “always favor the needs of business over that of the consumer.” Camero ‘Level Up’ 10. Drahozal ‘Usages and Implied Terms in the United States’ 1-5.

<sup>1729</sup> Speidel (1981-82) 67 *Cornell LR* 791.

<sup>1730</sup> Speidel (1981-82) 67 *Cornell LR* 791.

<sup>1731</sup> Camero ‘Level Up’ 13. See also the discussion in chapter 4 paras 4.3 and 4.3.4.3(A).

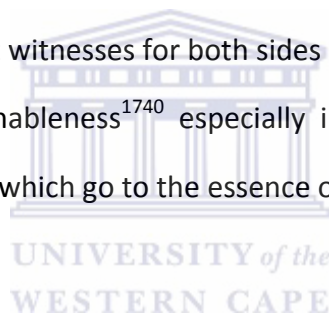
<sup>1732</sup> Danzig (1974-1975) 27 *Stanford LR* 621-632. See also the discussion in chapter 4 para 4.2.4.3 regarding rules and standards viewed in a constitutional context.

<sup>1733</sup> Speidel (1982) 67 *Cornell LR* 792. Reference is made to the notion of commercial reasonableness throughout the UCC without the notion being defined. The definition by the courts, namely, that it includes commonly accepted commercial practices of responsible businesses which afford all parties fair treatment does not take the matter further: Drahozal ‘Usages and Implied Terms in the United States’ 11-12. See also the discussion in chapter 4 para 4.2.4.3 above regarding rules and standards as well as the discussion in para 4.3.4.2 regarding the elusiveness of securing a definition of the standard of reasonableness in relation to price and rental.



courts.”<sup>1734</sup> Hence, the “new formalists” argue for a diminished role for the courts in gap-filling.

Whilst UCC 1-303[Rev]<sup>1735</sup> provides some tools for giving content to the notion of reasonableness, it does so within a commercial context, effectively rejecting lay-interpretations and dictionary meanings thereof.<sup>1736</sup> The conclusion is reinforced by UCC 1-201(b)(20)[Rev] that defines good faith with reference to the observance of “reasonable commercial standards of fair dealing.”<sup>1737</sup> In addition, trade usages normally arise in smaller communities such as professional groups, trade unions and business associations.<sup>1738</sup> The problem is that usages of trade often involve esoteric knowledge which is seldom known outside of the particular community.<sup>1739</sup> The highly complex, technical and specialised nature of the evidence to prove such a trade usage coupled with the reality that a court is often faced with a bank of expert witnesses for both sides adds to the difficulty of proving or disproving a standard of reasonableness<sup>1740</sup> especially in relation to a highly subjective issue<sup>1741</sup> such as price and rental which go to the essence of the contract.<sup>1742</sup>



#### (d) Conclusion

It is submitted that the fact that the standard of reasonableness is not necessarily concretised with reference to objective considerations introduces an element of

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<sup>1734</sup> Choi (2003) 103 *Columbia LR* 63. See also the discussion in chapter 4 para 4.3.

<sup>1735</sup> Discussed in para 5.2.2.2B(v)(b) above.

<sup>1736</sup> Lawrence *Anderson* Vol. 1A (2004) 1015.

<sup>1737</sup> Emphasis added.

<sup>1738</sup> DiMatteo *Law of International Contracting* 21 n29. It is submitted, it is easier for customs and usages to arise and to be recognised in such smaller communities as opposed to larger communities characterised mobility and by a diversity of transactions and participants.

<sup>1739</sup> DiMatteo *Law of International Contracting* 24.

<sup>1740</sup> DiMatteo *Law of International Contracting* 25. In *Folk v Central Nat. Bank & Trust Co.*, 567 N.E. 2d 1 (ILL. App. 1990) the Court, in deciding on the quality of asphalt work at a race-track, was faced with a raft of witnesses on both sides (4-7). These included a consulting engineer, a specialist in asphalt installation, race car drivers, a professional engineer, officials of the national racers association and an engineer testing company. Though the case did not concern the standard of reasonableness, the range of expert witnesses, the technical issues and the complexity thereof offer a glimpse of the challenges that may be faced in determining what is reasonable in a particular factual scenario. See further para 5.2.2.2(D)(i)(b) above in regard to trade usages.

<sup>1741</sup> See chapter 4 para 4.3.4.2(C).

<sup>1742</sup> See chapter 4 para 4.3.3.3(D).

uncertainty<sup>1743</sup> that is exacerbated by the unquantifiable number of variables that may impact the standard as well as by the infinite number of possibilities that could arise from a consideration of these variables.<sup>1744</sup> It is suggested that the uncertain paradigm of the notion of reasonableness in the context of the essence of the contract of sale and lease, namely, price and rental determination, does not promote the accepted view that freedom of contract is not an end in itself but that it is a vehicle for self-determination.<sup>1745</sup>

(ii) Public policy concerns

(a) Gap-filling function of UCC 2-305

The presumption underlying the UCC 2-305 provisions is that if the gap fillers are reasonable, then the contractants would have consented to them.<sup>1746</sup> Aside from the fact that the presumption is not supported by the majoritarian approach favoured by the courts,<sup>1747</sup> the UCC does not indicate what factors should play a role in determining a reasonable price.<sup>1748</sup> Case law also suggests that the success in the determination of a reasonable price is not always guaranteed.<sup>1749</sup> The justification for gap-filling, namely the reasoning that contractants act in concert with market forces,<sup>1750</sup> presupposes the existence of a market and that the market has some semblance of organisation. In doing so, the UCC appears to ignore the interests of ordinary contractants as opposed to the business community.<sup>1751</sup> This view of contract law, intent as it is on serving the interests of the markets, transforms contract law into a “body of devices”

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<sup>1743</sup> See also para 5.2.2.2(D)(ii) below and chapter 4 para 4.2.4.3.

<sup>1744</sup> See chapter 4 para 4.3.4.2.

<sup>1745</sup> Zimmermann *The New German Law of Obligations: Historical and Comparative Perspectives* (2005) 205, hereafter Zimmermann *The New German Law of Obligations*. The discussion of the Consumer Protection Act (CPA) in chapter 3 above serves to illustrate that the CPA does not so much limit freedom of contract as to give expression to the principle of self-determination of contractual content. In doing so, it has incorporated the constitutional values of dignity, equality and freedom into the law of contract.

<sup>1746</sup> Choi (2003) 103 *Columbia LR* 64.

<sup>1747</sup> See para 5.2.2.2(B)(iv) above.

<sup>1748</sup> Lawrence *Anderson* Vol. 2A (2008) 440.

<sup>1749</sup> Murphy *et al Studies in Contract Law* 422.

<sup>1750</sup> See para 5.2.2.2(B)(iii) above.

<sup>1751</sup> Knapp *et al Problems in Contract Law* 6.

serving the business community and their interests “instead of as a body of means geared towards obtaining general social ends.”<sup>1752</sup>

(b) Reliance on market price

Whilst market price is useful as an indicator, it is submitted that the approximation of a reasonable price to that of a market price (“closely related”)<sup>1753</sup> muddies rather than clarifies the standard of reasonableness. It may give rise to conflicting interpretations as to the extent to which a price must track the market price in order for it to meet the requirement of reasonableness. Phrased differently, how close to the market price must the judicially determined price be in order for it to satisfy the requirement of reasonableness? Other questions that may arise concern the considerations to be used to determine whether the price is to be one set at above or below the market value? Is the determination to be made from the perspective of the buyer who, it can be assumed, would expect the price to be set below the market value or from the perspective of the seller in which event he/she would expect a price higher than the market value? What considerations determine what should be the maximum allowable margin above or below the market value? Lastly, why must the reasonable price be one that tracks the market value - why can it just not be the market price? As concluded in chapter 4 above, configurations such as these do not contribute to the notion of certainty.<sup>1754</sup>

Furthermore, the notion of a market price which is supposed to give content to the notion of a reasonable price is itself not subject to definition. It may or may not be a quoted price,

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<sup>1752</sup> Pound ‘The Call for a Realist Jurisprudence’ (1931) 44 *Harvard LR* 697, 708, hereafter Pound (1931) 44 *Harvard LR* 697, in an essay critical of the then emerging New Realist movement. A development that serves principally the interests of the markets would, in South Africa, run counter to the constitutional imperative to effect socio-economic reforms for the creation of a just and egalitarian society based on the values of dignity, equality and freedom. The implementation of this imperative has already been commenced in South Africa. See for example the consumer protection legislation discussed in chapter 3. It is also evident in other public interest legislation as well as in Constitutional Court decisions discussed at various points throughout the thesis. See for example, the reference to some of these in chapter 4 paras 4.2.4.2(A) and 4.5.

<sup>1753</sup> See para 5.2.2.2(B)(v)(a) above.

<sup>1754</sup> Para 4.3.

or a list price or the actual selling price.<sup>1755</sup> The uncertainty inherent in the tentativeness of the definition is unsatisfactory from a policy perspective in that it does not provide guidance to the market or to individuals for planning purposes.

(c) Reliance on course of performance, prior dealings and trade usages

Though the rationale for the open term provisions are to attain uniformity in trade and to facilitate commercial transactions, it appears that some sectors of the commercial world have developed their own system in which the UCC provisions do not play a dominant role.<sup>1756</sup> In an empirical study, it was found that the concepts of “usages of trade” and “commercial standards” as used in the UCC may not exist,<sup>1757</sup> or may be far more general in scope and conditional in form than is commonly assumed.<sup>1758</sup>

In respect of commercial transactions, the fact that most traders use trade terms (that operate across borders) drafted by their trade organisations calls into question the need



<sup>1755</sup> See para 5.2.2.2(B)(v)(a) above.

<sup>1756</sup> The National Grain and Feed Association (NGFA) is an organisation that also serves to resolve contract disputes amongst its members. In doing so, the arbitrators follow a hierarchy of authority that first considers the terms of contract. If these are insufficient, reliance is placed on the NGFA Trade Rules and thereafter on trade practice. The UCC is considered only if the first three sources are insufficient. This happens very rarely in practice. The duty of good faith also does not play a major role in deliberations of the NGFA: Bernstein 'Merchant Law in a Merchant Court: Rethinking the Codes Search for Imminent Business Norms' (1995-1996) 144 *U. of Penn. LR* 1765, 1776-1777, hereafter Bernstein (1995-1996) 144 *U. of Penn. LR* 1765. One of the reasons for the NGFA approach is the transaction costs, including time, money, expertise, effort and delays, of litigation: Bernstein 1790. Another reason is the higher risk of adjudicative error brought about when courts resort to extralegal provisions by going outside of the contract: Bernstein 1795. This supports the argument made in chapter 4 para 4.3.4.2(C)(i) that the court's perception of the reasonable person may lead to the imposition of a price that was neither anticipated or contemplated at date of contract. Bernstein 'Usage in Courts: The Flawed Evidentiary Basis of Article 2's Incorporation Strategy' (21 Dec, 2011) (draft paper) 1, <[http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=1882596](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1882596)> observes that "[m]any merchant industries that have opted out of the legal system and the Code and that have replaced it with privately run legal systems, have rejected incorporation [of gap-filling] in favour of a relatively plain meaning textualist approach to interpretation" (35-36).

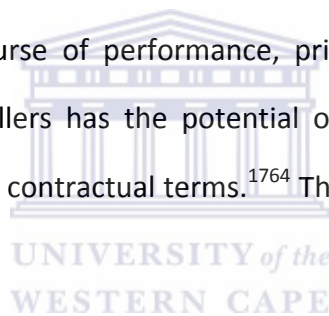
<sup>1757</sup> Not even in relatively close-knit merchant communities.

<sup>1758</sup> Bernstein 'The Questionable Empirical Basis of Article 2's Incorporation Strategy...' Chicago University Working Paper No 74 (2d Series) 1, 8 <<http://www.law.uchicago.edu/Publications/Working/index.html>> . The difficulty experienced by trade associations to codify their own usages and practices is indicative of the difficulty of proving commercial trade usages and practices. See chapter 4 para 4.3.4.2(D) for a discussion of the difficulty experienced by the National Hay Association in defining a reasonable time in relation to payment.

and value of uniform codes<sup>1759</sup> founded on open term provisions.<sup>1760</sup> The preference for arbitration for commercial dispute resolution further dilutes the rationale for open term provisions.<sup>1761</sup>

Decisions to the effect that a reasonable price may or may not be a market price<sup>1762</sup> do not engender certainty about the meaning and application of the notion of market price as a determinant of reasonableness. Contractants who agree to a reasonable price or who leave the price term open on the assumption that a market price constitutes a reasonable price would be in for a rude surprise because the notion of a market price being reasonable is in itself open to scrutiny on a host of factors such as the cost of the goods or services to the seller, the inconvenience imposed on the seller and the true value of the product or services.<sup>1763</sup>

In addition, the reliance on course of performance, prior dealings and trade usages as interpretative tools or as gap-fillers has the potential of transforming informal business practices into legally enforceable contractual terms.<sup>1764</sup> This may cause contractants to stick



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<sup>1759</sup> This would include the open term provisions of the other jurisdictions under discussion.

<sup>1760</sup> Ortiz & Viscasillas 'The scope of the Common European Sales Law: B2B, goods, digital content and services' (2012) 11(3) *Journal of International Trade Law and Policy* 241, hereafter Ortiz & Viscasillas (2012) 11(3) *Journal of International Trade Law and Policy* 241.

<sup>1761</sup> Ortiz & Viscasillas (2012) 11(3) *Journal of International Trade Law and Policy* 242. Arbitrators drawn from the trade or industry would make use of the trade terms recognised in the trade or industry.

<sup>1762</sup> In *Au Rustproofing Center, Inc. v Gulf Oil Corp.*, 755 F.2D 1231 (6<sup>TH</sup> Cir. 1985), hereafter *Au Rustproofing Center* 755 F.2D 1231 (6<sup>TH</sup> Cir. 1985) the Appellant's contention that the Respondent's prices for gasoline were unreasonable because Appellant's competitors sold gasoline for less than what it buy could from the Respondent, was rejected as being "insufficient to establish that prices set by Gulf contravened reasonable commercial standards in the gasoline market or otherwise constituted bad faith or commercially unreasonable behaviour" (para [23]). See also *TCP Industries, Inc. v Uniroyal, Inc.* 661 F2. 542, 9 Fed. R. Evid. Serv. 742, 32 U.C.C. Rep. Serv. 369 (6<sup>th</sup> Cir. 1981), hereafter *TCP Industries* 661 F2. 542, 9 Fed. R. Evid. Serv. 742 where the court used the example of a prior course of dealing price which is higher or lower than market price. Such higher or lower price, according to the court, could be found to be a reasonable price. See also *Perdue* 702 P. 2d 503, 927, discussed in a footnote in para 5.2.2.2(B)(v)(b).

<sup>1763</sup> See *Perdue* 702 P. 2d 503 discussed in a footnote in para 5.2.2.2(B)(v)(a) above.

<sup>1764</sup> Bernstein (1995-1996) 144 *U. of Penn. LR* 1796-1797. For example, a contractant who has accepted late delivery or late payment in an ongoing contract may find that the indulgences become recognised as a course of performance having the effect of preventing the contractant from putting an end to late delivery or late payment in the future.

to the letter of the contract and constrain them from making temporary accommodations that would benefit the other contractant(s).<sup>1765</sup>

(d) Reliance on a “multitude of factors called reasonableness”

The statement that gap-filling in relation to price can be achieved with reference to a “multitude of factors called reasonableness”<sup>1766</sup> is devoid of any meaning and content and hence, provides no guidance for prudent planning.<sup>1767</sup> It compromises certainty especially when viewed through the prism of the concerns regarding the difficulty of defining reasonableness in relation to price.<sup>1768</sup> The approach leaves the door open for judicial contract-creation and the imposition of a contractual obligation which may not have been anticipated or contemplated by either, or both, of the contractants at date of conclusion of the contract.<sup>1769</sup>



(e) “Trapping” of contractants

Gap-filling also runs counter to public policy that resists the “trapping” of contractants by unintended contractual duties and ones that they had no intention of being bound by.<sup>1770</sup> It also detracts from the principle of, not only, freedom of contract, but also, freedom FROM contract. Open term provisions based on standards such a reasonableness that allow courts to impose terms into contracts that contractants may not have contemplated or anticipated may discourage contractants from experimenting with new forms of agreements because of the uncertainty that results from the possibility that courts may impose terms that were

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<sup>1765</sup> The latter scenario would run counter to the spirit of the law evident in the debt restructuring provisions of the National Credit Act<sup>1765</sup> designed to ease the burden of over-indebtedness. See chapter 3 para 3.7.2.1.

<sup>1766</sup> Perillo *Corbin on Contracts* Vol 1 574-575 and 581-583.

<sup>1767</sup> In the absence of a qualifying attribute as to the nature of the factors, for example, a reference to objective factors, contractants who rely on the open price provision have to wait to see which side the dice will fall on.

<sup>1768</sup> See chapter 4 para 4.3.

<sup>1769</sup> See chapter 4 for the implications of this for contractual autonomy, consensus, certainty and the public policy objectives and constitutional imperative. See also the contents of this para. (5.2.2.2(D)).

<sup>1770</sup> Choi (2003) 103 *Columbia LR* 62-63. See also chapter 4 paras 4.3.4.2(C) and 4.4 in this regard.

neither contemplated nor anticipated.<sup>1771</sup> Thus, it may diminish the value of three cardinal principles of contract law, namely, (i) the liberty to contract, (ii) the consensual principle, and (iii) certainty. It is submitted that such consequences must be avoided when it concerns fundamental issues such as price and rental determination that go to the root of the contract.<sup>1772</sup> The principle of certainty, evident in all branches of the law,<sup>1773</sup> ensures that contractants are not bound by unintended or unanticipated contractual obligations.

#### (f) Reasonable price not capable of determination

It may happen that the contract is rendered invalid because of the evidentiary issues relating to the determination of contractual intention or simply because the court is unable to determine a reasonable price.<sup>1774</sup> Such a result could have serious consequences for one or both of the contractants who relied on the provisions of UCC 2-305 to come to their assistance.<sup>1775</sup>



<sup>1771</sup> Choi (2003) 103 *Columbia LR* 62-63.

<sup>1772</sup> See further the discussion in chapter and in particular in para 4.3.4.3(D).

<sup>1773</sup> It is worth repeating the Constitutional Court's caveat that "[a] person should be able to know the law, and be able to conform his or her conduct to the law": *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC), para [102]. Uncertainty about consequences may generate disputes that might otherwise have been avoided and it may also discourage "beneficial reliance": Barnett 'Contract is Not a Promise; Contract is Consent' 1, 13 <<http://scholarship.law.georgetown.edu/facpub/615>>. The eventual result could be an erosion of the law as an institution for the creation of a just, egalitarian society based on the values of dignity, equality and freedom: such a result being against the constitutional imperative in South Africa. See further chapter 4 and in particular para 4.2.2.

<sup>1774</sup> This result could prevail despite a finding of an intention to contract and a reasonably certain basis for granting an appropriate remedy as required by UCC 2-304(3): *Coca-Cola Bottling* 988 F2d. 386 (3d Cir. 1993) para [104]. See also Lawrence *Anderson* Vol. 2A (2008) 450; Murphy *et al Studies in Contract Law* 42; Perillo *Corbin on Contracts* Vol. 1 577.

<sup>1775</sup> The price may have been left open because one or both of the contractants may, at date of contract, have felt that they lacked the necessary foresight to determine the price. The price could also have been left open due to incomplete bargaining or excessive initial optimism about performance of contract. The contractants, may, in all three instances, have relied on the provisions of UCC 2-305 to fill in the gap. Knapp *et al Problems in Contract Law* 359.



(g) Approaches to the application of UCC 2-305

The conflicting approaches to the application of UCC 2-305<sup>1776</sup> provide further grist to the mill of the argument against the standard of reasonableness as a determinant of the *essentialia* of price and rental. The choice between a hypothetical versus majoritarian approach, underscores Kerr's warning regarding the importance of having a clear vision about the nature and content of the test to be applied in determining the existence of a tacit term.<sup>1777</sup>

On the majoritarian approach, the price is implied by the "fabrication of the objective reasonable person."<sup>1778</sup> The notion of objective reasonableness is beset with problems of definition and application.<sup>1779</sup> In addition, the preference for the majoritarian approach in the context of price would result in the courts legislating contractual terms that go to the essence of the contract.<sup>1780</sup> The courts would be imposing terms that may not have been anticipated or contemplated by the contractants, resulting in the courts playing a contract-creating role, a result that Lücke warned against.<sup>1781</sup> Aside from implications for the principle of certainty, the result would be a devaluation of the notion of contractual autonomy by denying contractants input in determining the essence of their contractual relations. Such a consequence would, not only, negate the policy gains made by consumer protection legislation aimed at empowering contractants to play a more proactive and informed role in the formulation of their contractual obligations,<sup>1782</sup> but also, serve to strip them of their contractual dignity.<sup>1783</sup>

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<sup>1776</sup> The hypothetical and majoritarian approaches. See para 5.2.2.2(B)(iv) above.

<sup>1777</sup> See chapter 4 para 4.3.4.2(C)(viii).

<sup>1778</sup> DiMatteo *Law of International Contracting* 20. See also chapter 4 para 4.2.4.2(C)(i).

<sup>1779</sup> See chapter 4 para 4.3.4.2.

<sup>1780</sup> Price and rental as the essence of a contract of sale are discussed in para 4.3.3.3(D).

<sup>1781</sup> See chapter 4 paras 4.3.4.2(C)(viii), 4.3.4.3 and 4.4.

<sup>1782</sup> See chapter 3. See also Zimmermann *The New German Law of Obligations* 205.

<sup>1783</sup> See chapter 4 para 4.3.4.3(C).

(h) The duty of good faith

Though the general understanding is that good faith serves to exclude any surprises<sup>1784</sup> and to give effect to the intention of the contractants, or to honour their reasonable expectations, the possibility of an unfettered discretion has received judicial recognition by a Chief Justice, albeit in a minority judgment.<sup>1785</sup> The decision, if it gains traction, would not only render the duty redundant, but would also devalue the requirement of consensus.

In complying with the good faith requirement, the empowered contractant is only required to set a price that is reasonable pursuant to reasonable commercial standards of fair dealing in the trade.<sup>1786</sup> Thus, a reasonable price does not necessarily mean that the price must be a market price or a competitive price.<sup>1787</sup> It is submitted that this proposition affirms the conclusion<sup>1788</sup> that the introduction of the standard of reasonableness in the determination of the price would introduce uncertainty and should not receive recognition as a matter of law, policy and economics.



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<sup>1784</sup> Lawrence *Anderson* Vol. 2A (2008) 445.

<sup>1785</sup> In *Amoco Oil Co. v Ervin*, 908 P.2d 493 (Colo. 1996), hereafter *Amoco* 908 P.2d 493 (Colo. 1996), a lease agreement empowered Amoco to modify the rental paid by its franchisees subject to a duty to give adequate notice. Amoco was found to have breached the duty of good faith by double-charging for an asset when it modified the rental. In a dissenting judgment, the Chief Justice held that it is possible to draft an agreement granting an unfettered discretion. According to the Chief justice, this was the position in the instant case where the only duty on Amoco was to give adequate notice of the revised rental. The judge reasoned that to hold otherwise would be to allow the franchisees to “use the jury as a tool to renegotiate the lease agreement after their legal formation.” The franchisees had the option of accepting or rejecting the initial lease agreement containing the rental modification clause. In accepting the initial agreement, they had consented to Amoco’s absolute discretion.

<sup>1786</sup> UCC 1-201(b)(20)[Rev]; *TCP Industries* 661 F.2. 542, 9 Fed. R. Evid. Serv. 742.

<sup>1787</sup> In *Au Rustproofing Center* 755 F.2d 1231 (6<sup>TH</sup> Cir. 1985), discussed an earlier footnote in para 5.2.2.2(D)(ii)(d), the Appellant’s contention that the Respondent’s prices for gasoline were unreasonable because Appellant’s competitors sold gasoline for less than what it buy could from the Respondent, was rejected as being “insufficient to establish that prices set by Gulf contravened reasonable commercial standards in the gasoline market or otherwise constituted bad faith or commercially unreasonable behaviour” (para [23]). See also *TCP Industries* 661 F.2. 542, 9 Fed. R. Evid. Serv. 742 where the court used the example of a prior course of dealing price which is higher or lower than market price. Such higher or lower price, according to the court, could be found to be a reasonable price. See also *Harvey v Fearless Farris Wholesale, Inc.* 589 F.2d 451 (1979) 461 to similar effect.

<sup>1788</sup> See chapter 4, and, in particular, para 4.3.4.3(E).

As a norm, factors such as a “‘posted price’ or a future seller’s or buyer’s ‘given price,’ ‘price in effect,’ ‘market price,’ or the like satisfies the good faith requirement.”<sup>1789</sup> The apparent purpose of this provision is to relieve suppliers in industries where such price terms are used from the burden of proving the price charged to be a reasonable one.<sup>1790</sup> In regard to these considerations, it is important to note that the presumption of reasonableness that arises places the burden of rebuttal on the buyer who may not be able to carry the transaction costs thereof.<sup>1791</sup> Proving subjective dishonesty may also be extremely challenging from an evidentiary perspective. The evidentiary problems of proving non-compliance with the duty are compounded by the fact that the full potential of the duty has not been realized due to the “spirited” disagreement about the meaning and application of the duty<sup>1792</sup> coupled with a tendency by the courts to resist making a finding of bad faith.<sup>1793</sup>

#### (E) Observations

In essence, the discussion of the meanings given to a reasonable price<sup>1794</sup> leads to the following observations:

- (i) The approaches as to what constitutes a reasonable price are not free of difficulties.<sup>1795</sup>
- (ii) The meanings ascribed to a reasonable price do not provide useful criteria that could facilitate planning or that assist in resolving the problems of the indeterminateness of the standard of reasonableness in relation to price.<sup>1796</sup>

<sup>1789</sup> Comment 3 to UCC 2-305 in Lawrence *Anderson* Vol. 2A (2008) 422; Perillo *Corbin on Contracts* Vol 1 580. See also *Mathis* 302 F.3d 448 (5<sup>th</sup> Cir. 2002), for a discussion of the legislative history of UCC 2-305 and Comment 3 (para [III]).

<sup>1790</sup> *Neugent* 149 N.C. App. 38 para [III](D). However, absence of honesty in fact (subjective good faith) takes such prices outside of the norm, resulting in non-compliance with the good faith requirement of UCC 2-305(2): *Mathis* 302 F.3d 448 (5<sup>th</sup> Cir. 2002), at para [III], discussed in a footnote in para 5.2.2.2(B)(vi) above.

<sup>1791</sup> For example, time and resources. The issue relating to transaction costs was discussed in chapters 3 and 4 above.

<sup>1792</sup> Furmston & Tolhurst *Contract Formation: Law and Practice* (2010) para [11.70].

<sup>1793</sup> Murphy *et al Studies in Contract Law* 668.

<sup>1794</sup> In paras 5.2.2.2(B)(iv)-(vi) above.

<sup>1795</sup> The majoritarian approach and the hypothetical contracting standard discussed in paras 5.2.2.2(B)(iv) and 5.2.2.2(D)(ii)(g) above. See also chapter 4 para 4.3.4.

- (iii) In some instances, the notion of a reasonable price is sought to be determined with reference to an objective criterion that is, in itself, certain.

In respect of the third observation, it is self-evident that the examples of a reasonable price, if transplanted into the South African context, could be accommodated under requirement that the price must be objectively ascertainable without further reference to the contractants.<sup>1797</sup> Other interpretations of a reasonable price do no more than subsume under the generic term of reasonableness those rubrics which the South African common law has used as mechanisms for determining whether the price is objectively ascertainable.<sup>1798</sup> The conclusion is that the South African requirement of objective ascertainability is fluid enough to meet the needs of modern commercial enterprise whilst at the same time adhering, not only, to the principle of certainty, but also, the consensual imperative of contract law and, in doing so, sustaining the constitutional values of the dignity, equality and freedom.<sup>1799</sup>



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<sup>1796</sup> The meanings confirm that the standard lends itself to interpretation which does not contribute to certainty. See for example, the decision in *Au Rustproofing Center* 755 F.2D 1231 (6<sup>TH</sup> Cir. 1985) (discussed in a footnote in para 5.2.2.2(D)(ii)(c) above) where the Court concluded that a reasonable price is not necessarily one that is market related or even competitive. See further para 5.2.2.2(D)(ii)(b)-(h). Regard must also be had for the fact that the use of the majoritarian approach may lead to the imposition of a price (para 5.2.2.2(D) above) that is the result of the court's formulation of the objective reasonable person (chapter 4 para 4.3.4.2(C)). See also chapter 4 para 4.3 for a discussion of the uncertainty created by the standard of reasonableness.

<sup>1797</sup> For example, the "course of performance" or "usage of trade" may be accommodated under the rubric of an implied price. The notion of a course of performance is known in South African law although not in relation to price. As indicated earlier, the Court in *Comwezi Security Services (Pty) Ltd and Mohammed Shafie Mowzer NO v Cape Empowerment Trust Ltd* (759/11) [2012] ZASCA 126 (21 September 2012) said that where there is a perceived ambiguity in a contract, the subsequent conduct between the contractants in implementing the agreement could be taken into account in preferring one interpretation to the other (para [15]).

<sup>1798</sup> For example, the seller's usual price or a formula or a course of dealing in para 5.2.2.2(B)(v)(c) above. A posted price or the price according to the seller's price list from time to time or a price as contained in the federal or state market news report are all similar to a price list which is recognised in South African law. See *Shell SA (Pty) Ltd v Corbitt and Another* 1984 4 SA 523 (CPD). See further chapter 1 para 1.4.2.2(C). The acceptance of a reasonable fee in contracts of service was succinctly explained and distinguished from sale by Zeffert (1973) 90 SALJ 113. See chapter 4 para 4.3.4.3(D).

<sup>1799</sup> See the discussion in chapter 4.

## (F) Conclusion

The experience in the United States of America confirms the concerns raised in chapter 4 regarding the indeterminateness of the standard of a reasonable price and the uncertainty it generates. The cases discussed do not provide meaningful criteria for planning purposes in that the meanings ascribed to a reasonable price are not anchored in objective considerations that could have precedent value.<sup>1800</sup> In addition, it may happen that the contract is rendered invalid because of evidentiary issues relating to the determination of contractual intention or simply because the court is unable to determine a reasonable price.<sup>1801</sup> Such a result could have serious implication for one or both of the contractants who relied on the provisions of UCC 2-305 to come to their assistance.<sup>1802</sup>

The duty of good faith, like the cases discussed, is also inarticulate in providing criteria that could have precedent value. Of concern is the judicial recognition given to the possibility of an unfettered discretion,<sup>1803</sup> a possibility that would render the duty of good faith nugatory. The line of reasoning, albeit in an *obiter dictum*, has enormous implications for consensus, especially in the context of discretionary powers in standard form contracts<sup>1804</sup> and the attendant possibility of abuse.

Thus, the American experience of the duty of good faith as a check on discretionary power, serves to support the submission that the recognition of a unilateral power to settle a price is a matter to be determined in the light of principle and policy rather than on the basis of the method of its implementation or the mechanisms to be used to curtail its unfair

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<sup>1800</sup> See paras 5.2.2.2(D)(ii)(b)-(h) above.

<sup>1801</sup> This result could prevail despite a finding of an intention to contract and a reasonably certain basis for granting an appropriate remedy as required by UCC 2-304(3): *Coca-Cola Bottling* 988 F2d. 386 (3d Cir. 1993) para [104]. See also Lawrence *Anderson* Vol. 2A (2008) 450; Murphy *et al Studies in Contract Law* 42; Perillo *Corbin on Contracts* Vol 1 577.

<sup>1802</sup> The price may have been left open because one or both of the contractants may, at date of contract, have felt that they lacked the necessary foresight to determine the price. The price could also have been left open due to incomplete bargaining or excessive initial optimism about performance of contract. The contractants, may, in all three instances, have relied on the provisions of UCC 2-305 to fill in the gap. Knapp *et al Problems in Contract Law* 359.

<sup>1803</sup> See the discussion of *Amoco* 908 P.2d 493 (Colo. 1996) in a footnote in para 5.2.2.2(D)(ii)(h).

<sup>1804</sup> It has been estimated that 95% of all transactions are using standard form contract. Hutchison *et al Contract* 25. See further chapter 2 para 2.4.2.

exploitation.<sup>1805</sup> The propositions advanced earlier against the recognition of such power has its roots in the constitutionally entrenched notions of dignity, equality and freedom,<sup>1806</sup> policy considerations<sup>1807</sup> as well as in the common law principles of freedom of contract, consensus and certainty which has been granted constitutional legitimacy by the *Barkhuizen* court.<sup>1808</sup>

Furthermore, the criticism directed at using contract law as an instrument to promote the interests of the business community rather than as an avenue for attaining “general social ends”<sup>1809</sup> reinforces the conclusions reached in chapter 4<sup>1810</sup> of the positive influence of macro socio-economic considerations as informed by the Constitution on law and legal policy.<sup>1811</sup> It also supports the conclusion<sup>1812</sup> that the constitutional and policy imperatives aimed at fostering socio-economic reforms for the transformation of South African society into a just and egalitarian one militate against the recognition of a reasonable price or one that is unilaterally determined.

Hence, as concluded in chapter 4, the notion of a reasonable price or one that is unilaterally determined is unacceptable as a matter of principle and policy.<sup>1813</sup> The American experience may be said to support the retention of the *Westinghouse* principle that the price must be objectively ascertainable rather than to justify the adoption of the standard of reasonableness.

The conclusions reached in regard to the American experience find resonance, as will be seen, in the discussion of the other jurisdictions in this chapter.

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<sup>1805</sup> See chapter 4 para 4.2.4.4 and chapter 6 paras 6.5-6.6.

<sup>1806</sup> See chapter 4 para 4.2.4.2.

<sup>1807</sup> See, for example, the discussion in chapter 3.

<sup>1808</sup> The judgment was discussed in chapters 1, 2, 3 and 4.

<sup>1809</sup> Pound (1931) 44 *Harvard LR* 708 in an essay critical of the then emerging New Realist movement. See para 5.2.2.2(D)(ii)(a) above.

<sup>1810</sup> Para 4.2.

<sup>1811</sup> The UCC emphasis on the market also runs counter to the human rights components and social transformation goals evident in recent consumer protection legislation in South Africa, and in the jurisprudence emerging in cases such as *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) and *Barkhuizen* 2007 (5) SA 323 (CC), discussed in chapters 1 para. 13.3.

<sup>1812</sup> Chapter 4 para 4.5.

<sup>1813</sup> The submission is that the notion of reasonableness as a gap-filling mechanism is meaningless and potentially misleading to naive or gullible buyers. See chapter 4 para 4.3.4.3(E).

The next jurisdiction considered is England.

## 5.2.3 England

### 5.2.3.1 Introduction

The position relating to a reasonable price is regulated by Section 8 of the Sale of Goods Act 1979.<sup>1814</sup> The general principles of contract apply where the provisions of Section 8 of the Sale of Goods Act do not find application, as in the case of lease agreements.<sup>1815</sup> The general rule of contract law is that a contract is not enforceable where the contractants leave a vital part of their contract undetermined, subject to further negotiation or where the ambiguity in the contractual language cannot be resolved by recourse to the parol evidence rule. A court will not add what it considers to be a reasonable or usual term because it is a basic principle of contract law that the contractants must make their own contract and must settle its terms themselves.<sup>1816</sup>



### 5.2.3.2 The Sale of Goods Act 1979

Section 8 of the Sale of Goods Act 1979 reads:

“8(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.

8(2) Where the price is not determined as mentioned in sub-section (1) above the buyer must pay a reasonable price.

8(3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.”

#### (A) Content of statutory provisions relating to reasonable price

Despite a lack of detail, a contract of sale is valid as soon as an agreement to buy and sell is reached provided that the remaining details, inclusive of the determination of the price, can

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<sup>1814</sup> The history of sales at a reasonable price in England goes back to the Sale of Goods Act of 1893: Beale, Bishop & Furmston *Contract Cases & Materials* (2008) 412, hereafter Beale *et al Contract Cases & Materials*. See also Schmitthoff *The Sale of Goods* (1966). The provisions of the current Section 8 are substantially the same as the provisions of Section 8 of the Sale of Goods, 1893.

<sup>1815</sup> In terms of section 1(1) and 2(1), the Sale of Goods Act 1979 applies only to contracts of sale.

<sup>1816</sup> Bridge *Benjamin's Sale* para [2-016]. The position is similar to that in South African law. See the discussion in chapter 4 para 4.4.



be determined by the standard of reasonableness.<sup>1817</sup> Section 8(2) of the Sale of Goods Act 1979 provides that a reasonable price must be paid where the contract does not in terms of section 8(1) specify a price or a manner of fixing a price or where there is no course of dealing between the contractants.<sup>1818</sup>

Where the contractants intended the price to be fixed by a further agreement, the statutory provision does not apply and the contract would fail. In *May & Butcher Ltd v The King*<sup>1819</sup> the court refused to uphold the validity of the contract because the contract was not silent on the price. Under the 1893 Sale of Goods Act, as in the case of the 1979 Act, the default reasonable price provision would apply only if the contract was silent on the price. The Court held that there was no silence on the price because a term in the contract provided that the contractants were to agree on the price. There being a failure to agree on the price, the contract was, accordingly, not valid. An agreement to agree or to negotiate in good faith is also invalid and is not rescued by the provisions of Section 8(2).<sup>1820</sup> However, the same does not apply where the contractants agreed on particular method of ascertaining the



<sup>1817</sup> Beale *Chitty On Contract* Volume 1 (2008) paras [2-113], hereafter Beale *Chitty on Contract* Volume 1; Peel *Treitel on The Law of Contract* (2011) para [2-085], hereafter Peel *Treitel on The Law of Contract*.

<sup>1818</sup> Section 8(2) resembles the position under UCC 2-305(1)(a). One important difference is that it does not make gap-filling by the court dependent on a determination of whether there is a reasonably certain basis for an appropriate remedy as required by UCC 2-204(3). The English approach appears to be much narrower than the approach in the United States of America in that a reasonable price will be read into the contract only if the contract made no reference to a price at all or where the method for determining the price is ineffective or meaningless. In United States of America, an agreement to agree also may also precipitate the application of the open price provisions whereas this is not the case in England. The English approach is criticised, as is the American approach (para 5.2.2.2(D)(i)(a) above), for presuming the existence of a contract in the absence of a price term when its very absence may constitute proof that there is no contract: Peel *Treitel on The Law of Contract* para [2-085]. In the event of a nominee entrusted with the task of determining the price being unable or unwilling to fix the price, the contract falls away. Section 9(1) of the Sale of Goods Act 1979; Bridge *Benjamin's Sale* para [2-049].

<sup>1819</sup> [1934] 2 KB 17, 20. The case concerned the sale of the total stock of old tentage. The price, *inter alia*, was to be determined from time to time by the buyer and the seller as the quantities of the stock became available.

<sup>1820</sup> In *Courtney and Fairburn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 All ER 716, the Court of Appeal held that an agreement "to negotiate fair and reasonable sums" did not satisfy the requirement of certainty in that it did not contain a price or a method of calculating it. The clause amounted to an agreement to agree. The decision confirms that an agreement to agree is invalid and does not invite the application of a reasonable price: Peel *Treitel on The Law of Contract* para [2-092]. Note that agreements to agree would not fail under UCC 2-305(1)(b)). In the American case of *Milex* which is factually similar to the *Courtney* case the court held the contract to be valid. See the discussion in a footnote in para 5.2.2.2(B)(ii) above. The South African approach is the same as the English approach. See chapter 4 para 4.2.4.4.

price, but that method proves to be ineffective.<sup>1821</sup> Where one contractant refuses to nominate a nominee to settle the price, the validity of the contract will depend on whether or not the appointment of the nominee is essential.<sup>1822</sup>

## (B) Factors considered in determining a reasonable price

### (i) Introduction

The Sale of Goods Act 1979 does not provide guidance for understanding the standard of reasonableness other than to provide that a reasonable price is a question of fact to be determined in light of the circumstances of each case.<sup>1823</sup> Hence, the Act does not provide any guidance in relation to the challenges of determining a reasonable price.<sup>1824</sup> In addition, the duty of good faith does not apply because English law does not recognise a general duty



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<sup>1821</sup> In *Nicolene Ltd V Simmonds* [1953] 1 All ER 822, the court was faced with a clause (a sale of steel bars was made subject to the usual conditions of acceptance) which was meaningless because such conditions of acceptance did not exist. The Court of Appeal drew a distinction between a clause yet to be agreed on and a clause which is meaningless. In the case of the former, there was no contract for lack of certainty, but, in the case of the latter, the meaningless clause did not affect the validity of the contract.

<sup>1822</sup> In *Sudbrook Trading Ltd v Eggleton* [1982] 3 All ER 1 an option to buy in a lease agreement provided for the appointment of valuers by the lessor and lessee respectively. On the option being exercised, the lessor refused to appoint a valuer. The House of Lords construed the method of calculating the price (valuation) as an agreement to sell at a fair and reasonable price and held that it constituted mere machinery for the calculation of the price and did not constitute an essential element of the contract. Hence, the sale could proceed at a reasonable price. The *Sudbrook* decision does not promote certainty in that it leaves the door open for another court to hold that the price-fixing mechanism is essential. This happened in *Gillat v Sky Television Ltd* [2000] 1 All ER (Comm) 461 where a clause that provided for the valuation of shares to be referred to “an independent chartered accountant” was held to not constitute mere machinery. The court reasoned that the contractants had entrusted to the judgment of the unnamed independent chartered accountant the decision as to which of various approaches (an earnings-based approach, assets-based approach or a discounted-cash-flow-basis approach) should be used to determine the price. Accordingly, the court held that it was not entitled to substitute its own opinion. See also Beale *Chitty On Contract* Volume 1 para [2-113]; Bridge *Benjamin’s Sale* paras [2-017] and [2-046]-[2-052]. Note that UCC 2-305(1)(c) also provides for a reasonable price where the method of calculation proves to be ineffective. However, UCC 2-305(1)(c) does not make the application of a reasonable price dependent on whether the method of calculation is essential or non-essential. The criticism in chapter 4 para 4.4.3 in respect of the named and unnamed nominee also applies in respect of the essential - non-essential approach. See also chapter 4 para 4.3.3.3(D) for a discussion of price as the essence of the contract.

<sup>1823</sup> Section 8(3) of the Sale of Goods Act 1979.

<sup>1824</sup> See chapter 4 para 4.3.

to act in good faith.<sup>1825</sup> Hereafter follows a discussion and evaluation of the factors considered by courts when completing open price term contracts.

(ii) Prior course of dealing, trade usage

It has been held that in striving to uphold contracts, it is the duty of courts, especially in commercial contracts in a trade with which both contractants are familiar, “to construe such documents fairly and broadly, without being too astute or subtle in finding defects...”<sup>1826</sup> In the process, courts may take into account terms from trade custom or may have regard to the terms from a previous course of dealing between the contractants.<sup>1827</sup> In addition, any uncertainty may be resolved by reference to some machinery or formula (e.g. an arbitration clause) where such device, if “liberally construed, was wide enough to provide a method alternative to agreement...”<sup>1828</sup>

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<sup>1825</sup> Unlike the United States of America (para 5.2.2.2(D)(ii)(h) above), Germany (para 5.2.5.3(B) below) and the Netherlands 5.2.6.2(B) below). See also Furmston *Cheshire, Firfoot and Furmston’s Law of Contract* (2007) 32; Smith & Atiyah *Atiyah’s An Introduction to the Law of Contract* (2005). The English courts have expressed their reluctance to apply a good faith standard in terms similar to those expressed by the South African courts, namely, business considerations, contractual certainty, conferring an undefined judicial discretion: Beale *Chitty On Contract* Volume 1 para [1-023]. Bingham LJ comments that English law, unlike many civil law systems, does not recognize an overriding principle that contracts should be made and carried out in good faith. Instead, the law “has developed piecemeal solutions to in response to demonstrated problems of unfairness:” *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433, 439. The case concerned the failure of a lending library to disclose to the borrower the existence of a clause in the contract imposing a fee for late return. The borrower was relieved of the penalty fee on the ground that the lender had failed in its duty to reasonably and fairly bring the clause to that borrower’s attention.

<sup>1826</sup> *Hillas & Co Ltd v Arcos Ltd* (1932) 147 L.T. 503, 514, hereafter *Hillas* (1932) 147 L.T. 503.

<sup>1827</sup> *Bridge Benjamin’s Sale* para [2-017]. In *Hillas* (1932) 147 L.T. 514 an option to buy timber (specifications whereof not determined) for a price to be calculated by reference to the official price list was alleged to be expressed in vague and uncertain terms. The House of Lords held that the option was enforceable because the uncertainty could be resolved by having recourse to the principal contract of which it was part, as well as to the previous dealings between the contractants and the practice in their trade. In *Foley v Classique Coaches Ltd* [1934] 2 K.B. 1 an agreement to agree was held to constitute an agreement at a reasonable price presumably on the basis that it contained an arbitration clause in the event of a failure to agree on the price and because it formed part of a larger contract. It would appear as if the inclusion of criteria for the determination of the price (price list in *Hillas* and arbitration in *Foley*) facilitated the decisions to uphold the validity of the contracts: Beale *Chitty On Contract* Volume 1 paras [2-130] and [43-040]; Atiyah *An Introduction to the Law of Contract* 116. In South Africa, a reference to a price list is recognized as valid. So also is reference of a matter to arbitration as deadlock breaking mechanism. This is similar to the *Southernport* case discussed chapter 4 para 4.2.4.4. See further para 5.2.2.2(D)(ii) above for criticism of course of dealing and trade usage factors.

<sup>1828</sup> *Bridge Benjamin’s Sale* para [2-017].

### (iii) Market price

In computing a reasonable price, reference may be had to the current market price<sup>1829</sup> at the time and place of delivery<sup>1830</sup> or to “some other figure (e.g. the cost of production).”<sup>1831</sup>

When using the market price, care must be taken that such price may be affected by accidental circumstances that may prevail at the appointed time and place. Thus, the market price may or may not be conclusive evidence of a reasonable price.<sup>1832</sup> This does not contribute to certainty and impacts adversely on the ability to plan.

The reference to “some other figure” is also troublesome in its vagueness. The vague promise that the price may be settled by some other figure such as the cost of production would be unsettling to contractants who may wish to rely on the provisions of Section 8(2). There is no clarity as to what the other figure is or could be and how such figure is to be used in computing the price.



### (C) Unilateral discretionary power to determine price

The Sale of Goods Act 1979 is silent on the issue of unilateral price determination.

The concept of unilateral price determination does not appear to be recognised at common law despite a *dictum* in *May & Butcher Ltd v The King*<sup>1833</sup> that a price may be left to the unilateral determination of one of the contractants. Furthermore, nothing is said in that case about a controlling mechanism such as that the determination must be reasonable.<sup>1834</sup>

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<sup>1829</sup> Beatson *Anson's Law of Contract* 62.

<sup>1830</sup> The date of delivery is also used in America. UCC 2-305. See para 5.2.2.2(D)(i)(b) above for criticism of specifying a date.

<sup>1831</sup> Bridge *Benjamin's Sale* para [2-047].

<sup>1832</sup> Bridge *Benjamin's Sale* para [2-047] explain that the market price may be affected by a host of factors, not least of which may be that the seller deliberately held back delivery to take advantage of changing market conditions or to create a demand or an outbreak of unrest may create a temporary shortage in supply leading to a spike in the price. In these instances the market price would then be highly unreasonable.

<sup>1833</sup> [1934] 2 KB 17 at 21.

<sup>1834</sup> Von Bar & Clive *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* Volume I (2009) 600, hereafter *Von Bar & Clive Principles*. On the same page, it is said that the same applies in Scottish and Irish law. See also Lando & Beale *Principles of European Contract Law Parts 1 and 2* (2000) 311, hereafter *Lando & Beale Principles of European Contract Law*. A contrary view is that an agreement to a unilateral determination of the price is valid provided that the empowered contractant acts *bona fide*: Bridge *Benjamin's Sale of Goods* (2010) para [2-045]. However, it is submitted

### 5.2.3.3 Conclusion

The explanations of the standard of reasonableness in relation to price, as in the USA experience, display an approach that nods in the direction of the objective ascertainability criterion of the *Westinghouse* principle which it has already been suggested lends itself to interpretation to accommodate concepts such as trade usages and past practices.<sup>1835</sup>

The English approach also leaves considerable leeway for uncertainty in that, for example, the application of the default reasonable price term is left to the unpredictability of a determination of whether a price-fixing mechanism is deemed to be essential or not.<sup>1836</sup> In addition, trade usage, prior dealings and market value are not definitive of a reasonable price but are factors that a court may take into account with others in determining a reasonable price. Reference to trade usage and prior dealings also do not serve to illuminate the standard of reasonableness where one or both of the contractants are not engaged in the particular trade or in any trade whatsoever or where there is no trade usage or prior dealings between the contractants.<sup>1837</sup>

As has already been pointed out,<sup>1838</sup> the presumption that a valid contract exists is problematic in that the absence of an agreement on price may provide good evidence that a contract had not been concluded.

The absence of a general duty of good faith<sup>1839</sup> in the determination of a reasonable price does not appear to have had any influence on the meanings given to a reasonable price. These meanings are similar to those in America where the duty of good faith is entrenched in the law.<sup>1840</sup> Hence, it is submitted that the inclusion or exclusion of the duty of good faith

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that the absence of a general duty of good faith (para 5.2.3.2(B)(i)) does not support Bridge's contention. The Sale of Goods Act 1979 differs from UCC 2-305(2) which expressly recognises unilateral price determination subject to the duty of good faith. See the discussion of UCC 2-305(2) in para 5.2.2.2(B)(vi) above. See also Beale *et al Contract Cases & Materials* 271.

<sup>1835</sup> See para 5.2.2.2(F) above.

<sup>1836</sup> See the discussion of the *Nicolene* and *Gillat* cases in a footnote in para 5.3.2.2(A) above. See also chapter 4 para 4.4.3.

<sup>1837</sup> See the criticism in 5.2.2.2(D)(ii)(c) above.

<sup>1838</sup> See para 5.2.2.2(D)(i)(a) above.

<sup>1839</sup> See para 5.2.3.2(B)(i) above.

<sup>1840</sup> See para 5.2.2.2(D)(ii)(h) above.

does not seem to materially affect, alter or improve the position of the one contractant over the other. In any event,<sup>1841</sup> the issue of the recognition of a reasonable price or a unilaterally determined price is one to be decided as a matter of principle and policy based on the constitutional values of dignity, equality and freedom.<sup>1842</sup>

The difficulties associated with giving content to the concept of reasonableness as a criterion for the determination of a price causes an erosion of the principle of certainty, thus confirming the conclusion that the standard of reasonableness as a price-setting mechanism should not be countenanced in the South African context.<sup>1843</sup> A development that recognises a reasonable price would run counter to the notion of contractual autonomy that forms the basis of the South African law of contract;<sup>1844</sup> watering down the exercise of contractual autonomy in respect of the essence of the contract.<sup>1845</sup> The principles of consensus and certainty would be further casualties. Such a consequence would, not only, run counter to the policy directions of consumer protection legislation that seek to grant contractants a greater role in determining their contractual destiny,<sup>1846</sup> but would also undermine the constitutional values of dignity, equality and freedom.<sup>1847</sup> This is not acceptable on constitutional as well as on public policy grounds.<sup>1848</sup>

## **5.2.4 Scotland**

### **5.2.4.1 Introduction**

The Scottish approach to open terms is similar to that in America and England in that the object of contract law is to facilitate commercial transactions and not to create obstacles in

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<sup>1841</sup> See para 5.2.2.2(F) above.

<sup>1842</sup> See chapter 4 para 4.2.4.4 and chapter 6 paras 6.5-6.6.

<sup>1843</sup> See chapter 2 para 2.9, chapter 3 para 3.10 and chapter 4 para 4.5.

<sup>1844</sup> See the discussion in chapter 2 para 2.2.2.

<sup>1845</sup> See the discussion in relation to the essence of the contract in chapter 4 para 4.3.3.3(D).

<sup>1846</sup> See the discussion in chapter 3 above.

<sup>1847</sup> See the discussion generally in chapter 4 above and, in particular, para 4.2.4.2.

<sup>1848</sup> See the discussion of the constitutional and public policy considerations that runs throughout chapter 4.

the way of solving practical problems.<sup>1849</sup> The touchstone for the implication of terms is whether it is possible to enforce the contract.<sup>1850</sup> Thus, it is not the function of the courts to imply terms which were not agreed upon in order to create a contract.<sup>1851</sup>

#### 5.2.4.2 The notion of a reasonable price

Section 8(2) of the Sale of Goods Act 1979 also applies in Scotland and the same considerations to apply in respect of open price terms as in England.<sup>1852</sup> It would appear as if Scottish law also allows the determination of a reasonable rental where a rental is not stipulated in the lease agreement.<sup>1853</sup>

#### 5.2.4.3 Unilateral discretionary power to determine price

As in the case of English law, there does not appear to be a rule permitting unilateral determination of a price.<sup>1854</sup>

#### 5.2.4.4 Conclusion

The conclusions reached in respect of the legal position in England apply equally here.

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<sup>1849</sup> McBryde *The Law of Contract in Scotland* (2007) para [5-12], hereafter McBryde *The Law of Contract in Scotland*.

<sup>1850</sup> McBryde *The Law of Contract in Scotland* para [5-14].

<sup>1851</sup> For example, if a lease does not specify the terms thereof, there is no enforceable agreement: McBryde *The Law of Contract in Scotland* para [5-14]. See also Walker *The Law of Contract and related obligations in Scotland* (1985) para [8.6], hereafter Walker *The Law of Contract*.

<sup>1852</sup> Woolman & Lake *Contract* (2001) 32; *R & J Dempster v Motherwell Bridge and Engineering Co Ltd* [1964] ScotCS CSIH 1 (03 July 1964) also cited as 1964SLT 353, 1964 SLT (Notes) 82, 1964 SC 308 308, [1964] ScotCS CSIH\_1, 2 BLR 104 available at <[http://www.bailii.org/scot/cases/ScotCS/1964\\_SC\\_308.html](http://www.bailii.org/scot/cases/ScotCS/1964_SC_308.html)>. McBryde *The Law of Contract in Scotland* paras [5-13] to [5-15] and [5-22]; Walker *The Law of Contract* para [8.3].

<sup>1853</sup> McBryde *The Law of Contract in Scotland* paras [5-13] to [5-15].

<sup>1854</sup> Von Bar & Clive *Principles* 311.



## 5.2.5 Germany

### 5.2.5.1 Introduction

The following provisions of the *Bürgerliches Gezetzbuch* (BGB) are pertinent to the discussion of open price terms:

BGB 154:

“If parties have not agreed on all points on which agreement is required according to the declaration even of only one party, the contract is, in case of doubt, not entered into. An agreement on individual points is not binding even if recorded.”

BGB 315:

“Specification of performance by one party

- (1) Where performance is to be specified by one of the parties to the contract, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it.
- (2) The specification is made by declaration to the other party.
- (3) Where specification is to be made at the reasonably exercised discretion of a party, the specification made is binding on the other party only if it is equitable. If it is not equitable, the specification is made by judicial decision; the same applies if the specification is delayed.”

BGB 316:

“Specification of consideration

If the extent of the consideration promised for an act of performance is not specified, then in case of doubt the party that is owed the consideration is entitled to make the specification.”

BGB 317:

“Specification of performance by a third party

- (1) Where the specification of performance is left to a third party, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the third party.”

BGB 319:

“Ineffectiveness of specification; substitution

- (1) If the third party is to specify performance at its reasonably exercised discretion, the specification made is not binding on the parties to the contract if it is evidently inequitable. The specification is made in this case by judicial decision; the same applies if the party cannot or does not want to make the specification or if it delays it.
- (2) If the third party is to make the specification at its free discretion, the contract is ineffective if the third party cannot or does not want to make the specification or if it delays it.”

With reference to BGB 154, it may be said that, in general, in Germany, as in the United States of America and England, a contract is not valid where the contractants have not agreed on all the terms on which they intended agreement to be reached. Hence, in order for the courts to play a gap-filling role, there must be no indication that the contractants intended that agreement must be reached on that issue.

Though the BGB does not specifically provide for the imposition of a reasonable price and rental in the event of contractual silence on price and rental, such imposition may be implied from an analysis of BGB 154, BGB 315 and BGB 316, the latter two articles dealing with unilateral price determination.

The two articles dealing with unilateral price and rental determination, namely, BGB 315 and BGB 316,<sup>1855</sup> form the basis of the discussion and conclusions reached in respect of a reasonable price and rental. The two concepts - reasonable price and rental and unilaterally determined price and rental - are therefore discussed simultaneously below.

#### 5.2.5.2 Reasonable price and rental, and unilateral determination of price and rental

BGB 315 permits unilateral determination of the contract price and rental. An examination of BGB 315(1) reveals that the article contemplates two scenarios where a contractant is empowered to settle the price and rental unilaterally. The first is where the empowered contractant's discretion must be exercised in an equitable manner whilst in the second instance the empowered contractant has a free discretion. BGB 315(1) provides that when doubt exists about the nature of the discretion in the event of unilateral price and rental determination, the assumption is that the exercise of discretion is regulated by the standard of reasonableness.<sup>1856</sup> Hence, the provision creates a presumption of reasonableness<sup>1857</sup> which would be rebuttable on proof that the contractants had agreed that the empowered contractant has a free discretion.

Where the empowered contractant is bound by the standard of reasonableness, the court has the power of substitution if the determination is inequitable (BGB 315(3)).<sup>1858</sup> Where the empowered contractant is not bound by the standard of reasonableness,<sup>1859</sup> it seems that the contract would be avoided if the price or rental were found to be unreasonable, the

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<sup>1855</sup> The provisions are not specific to contracts of sale and hence apply to contracts of lease as well.

<sup>1856</sup> BGB 315(1): "Where performance is to be specified by one of the parties, **then in case of doubt** it is to be assumed that the specification is to be made at the reasonably exercised discretion of the party making it." Emphasis added.

<sup>1857</sup> Zimmermann *Obligations* 255.

<sup>1858</sup> Judicial gap-filling is also permissible where the "empowered" contractant delays in making the determination: BGB 315(3).

<sup>1859</sup> That is, where there is no doubt that the empowered contractant has a free discretion: BGB 315 (1).

court having no power of substitution. This conclusion is founded on the silence on the issue in BGB 315(3) and is sustained by analogy with the provisions of BGB 319(2).<sup>1860</sup>

Where the contract is silent on the extent of the counter-performance (for example, the price), BGB316 allows the creditor-contractant to determine the performance in which event, and, in the absence of any indications to the contrary, the provisions of BGB 315, as outlined above, would presumably apply.<sup>1861</sup>

### 5.2.5.3 Approaches to the determination of a reasonable price and rental

#### (A) Logical or normative implications

German law, on a conceptual level,<sup>1862</sup> follows an approach to contractual interpretation where there is a gap in the contract that corresponds to the “hypothetical bystander” approach of South African law.

When filling in gaps in a contract, the court has to ascertain “the logical or normative implications” of the contract.<sup>1863</sup> A contract is deemed to be incomplete only if the term is necessary to ensure the purpose of the contract.<sup>1864</sup> The approach limits the discretion of the courts to impose terms or to interfere with the terms of the contract, the function of the court being limited to completing the contract.<sup>1865</sup> Hence, a term is read into the contract

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<sup>1860</sup> BGB 319 operates in conjunction with BGB 317. BGB 317(1) provides that where a third party has been appointed to settle the price, then in the case of doubt, it is assumed that the third party must exercise his/her discretion in a reasonable manner. Hence BGB 317(1) is strikingly similar to BGB 315(1) in that it also creates a presumption of reasonableness. See also Lando & Beale *Principles of European Contract Law* 312. BGB 319(1) provides for judicial substitution where the third party should have exercised his/her discretion in an equitable manner but fails to do so or cannot or does not want to do so. However, in terms of BGB 319(2), no judicial substitution occurs where the third party had a “free discretion” and cannot or does not want to make a determination or delays in doing so. The contract would simply be rendered “ineffective.” See also Hawthorne ‘The contractual requirement of certainty of price’ (1992) 55 *THRHR* 638, 647, hereafter Hawthorne (1992) 55 *THRHR* 638; Von Bar & Clive *Principles* 603. Presumably the same would apply where the third party had a free discretion but the price is objectionable.

<sup>1861</sup> Kröll, Mistelis & Viscasillas *The United Nations Convention on Contracts for the International Sale of Goods (CISG)* (2011) hereafter Kröll *et al The United Nations Convention* suggests that the empowered contractant would be bound by the standard of reasonableness (816).

<sup>1862</sup> Markesinis, Unberath H & Johnston *The German Law of Contract: A Comparative Treatise* (2006) 140, hereafter Markesinis *et al The German Law of Contract*.

<sup>1863</sup> Markesinis *et al The German Law of Contract* 141.

<sup>1864</sup> Markesinis *et al The German Law of Contract* 141.

<sup>1865</sup> Markesinis *et al The German Law of Contract* 141.

only if it is one to which the contractants would have agreed to had they actually considered the unforeseen situation (the so-called hypothetical intention of the contractants.)<sup>1866</sup> In one case, the court refused to enforce a contract on the basis that the contract did not include any precise or determinable factors to help the expert make his/her decision.<sup>1867</sup>

## (B) Good faith

However, the strict approach of the hypothetical intention test is somewhat diluted when good faith is taken into account in determining contractual intent.<sup>1868</sup> The requirement of good faith which also applies to the negotiation stage,<sup>1869</sup> invalidates a clause which unreasonably disadvantages one of the contractants.<sup>1870</sup> In the performance of a contract, customary practices may be taken into account in determining whether there is compliance with the duty of good faith.<sup>1871</sup> Thus, the standard of good faith, which is the standard used to determine contractual intent in interpretation,<sup>1872</sup> enables the court to give expression to the objective meanings of the terms of the contract<sup>1873</sup> and to imply contractual terms more readily than English courts by going beyond the four corners of the contract.<sup>1874</sup> The open-endedness of the notion of good faith has caused German academics to caution that the

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<sup>1866</sup> Markesinis *et al The German Law of Contract* 141. The approach is then similar to the hypothetical approach in the United States of America (see para 5.2.2.2(B)(iv) above) and to the “hypothetical bystander” test in South Africa (see chapter 4, para 4.3.4.2(C)(viii)). The officious bystander test of English law also operates on the same principle: Markesinis *et al The German Law of Contract* 140.

<sup>1867</sup> The contractants had agreed that in the event of their failure to decide on the terms, inclusive of the rental, of a lease renewal contract, the outstanding terms would be determined by an expert nominated by the chamber of commerce: Kötz & Flessner *European Contract Law* Volume 1: Formation, Validity, and Content of Contracts; Contract and Third Parties (1997) 47-48. The name of the case is not provided in the source.

<sup>1868</sup> Markesinis *et al The German Law of Contract* 141.

<sup>1869</sup> BGB 311.

<sup>1870</sup> BGB 307.

<sup>1871</sup> BGB 242.

<sup>1872</sup> BGB 157: Markesinis *et al The German Law of Contract* 134.

<sup>1873</sup> Markesinis *et al The German Law of Contract* 134. This approach resembles the majoritarian approach of American law. See para 5.2.2.2(B)(iv) above. See chapter 4 para 4.3.4 for a discussion of a reasonable price and the problems related thereto.

<sup>1874</sup> Markesinis *et al The German Law of Contract* 138-139.

requirement of good faith does not give the courts a ‘free mandate’ to assign contractual terms on the basis that they reflect the reasonable intentions of the contractants.<sup>1875</sup>

#### (C) Dealer or manufacturer’s price list

The reasonableness of a unilaterally determined price is generally determined in light of the dealer or manufacturer’s price list at date of delivery.<sup>1876</sup> The courts have upheld unconditional discretionary power only if the contract allowed the “disempowered” contractant to withdraw from a contract where between date of contract and date of delivery, the price rises by much more than the cost of living. The right to withdraw does not apply in contracts between business persons because they can undertake the heavy burden of establishing that the price set by the empowered contractant is not in accordance with fair valuation.<sup>1877</sup>



#### 5.2.5.4 Conclusion

The distinction drawn between those situations where a free discretion is allowed and those where the free exercise of discretion is curbed by the requirement of reasonableness makes uncertain the role of reasonableness in the context of price determination. Surely the standard of reasonableness should act as an equitable restraint on all exercises of unilateral discretionary power otherwise it serves little purpose except in those cases where it is clear that the contractants intended the discretionary power to be exercised within the bounds of reasonableness or where such intention is presumed.<sup>1878</sup> The alternative increases the possibility of abuse of power.

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<sup>1875</sup> Markesinis *et al* *The German Law of Contract* 141. Markesinis *et al* observe that the importance of BGB 242 lies in its “blandness” that has “allowed it to become the peg on which numerous value judgments of German courts could be hung” (120).

<sup>1876</sup> The date of delivery is also utilised in the United States of America, England, Scotland. The date of contract is used in the Netherlands and in the CISG. See para 5.2.2.2(D)(i)(b) above for criticism of prescribing a date for the determination of a reasonable price.

<sup>1877</sup> Kötz & Flessner *European Contract Law* Volume 1 49-50

<sup>1878</sup> The presumption arises if there is doubt about whether the discretion is limited or unlimited. See BGB 315(1).

As in the case of the jurisdictions discussed before, the provisions in the BGB are similarly inarticulate about the meaning and content of a reasonable price and rental.<sup>1879</sup> Accordingly, the provisions invite the same criticism, viz., that they, not only, produce uncertainty, but also, the possibility of judicial determination of a price and rental which may not be what the contractant(s) had anticipated or contemplated at date of contract. Hence the open term provisions insofar as they relate to price and rental would, in the South African context, be unacceptable on constitutional and policy grounds.<sup>1880</sup>

## 5.2.6 The Netherlands

### 5.2.6.1 Introduction

Prior to the advent of the *Nieuw Burgerlijk Wetboek*,<sup>1881</sup> the law in the Netherlands required, as does the law in South Africa, that the price must be ascertained or ascertainable. In the absence thereof, the contract would be void.<sup>1882</sup> NBW 7.4 changed this, making it possible for the Dutch courts to play a gap-filling role.<sup>1883</sup>

### 5.2.6.2 The *Nieuw Burgerlijk Wetboek*

#### (A) Introduction

NBW 7.4 that deals with open price terms reads as follows:

“Where a sale has been entered into without a determination of the price, the buyer owes a reasonable price; in determining that price, one takes account of the prices usually stipulated by the seller at the time of entering into the contract.”<sup>1884</sup>

Article 7.4 does not establish a general principle and, hence, does not regulate the position in the case of lease agreements in this regard. It has been contended that provisions similar

<sup>1879</sup> The discretion inherent in the duty of good faith (para 5.2.5.3(B) above) makes for unpredictability making it difficult for contractants to plan their contractual obligations.

<sup>1880</sup> See the discussion in chapter 4 above.

<sup>1881</sup> Hereafter referred to as the NBW. The NBW came into effect on 1 January 1992: Hawthorne (1992) 55 *THRHR* 647.

<sup>1882</sup> Asser-Hijma *Serie Bijzondere Overeenkomsten (Koop en Ruil)* Vol 5.1 215, hereafter Asser-Hijma *Serie Bijzondere*.

<sup>1883</sup> The NBW, unlike the BGB, makes specific provision for the judicial gap-filling where the contractants have not agreed on a price.

<sup>1884</sup> The English translations in this chapter are from texts in Busch *The Principles of European Contract Law and Dutch Law: A Commentary* (2002), hereafter, Busch *The Principles*.

to those in Article 7.4 that apply in the case of mandates,<sup>1885</sup> deposit<sup>1886</sup> and construction<sup>1887</sup> lay the foundation for a general rule.<sup>1888</sup>

#### (B) Content of Article 7.4

Article 7.4 provides for the payment of a reasonable price where the contract is silent on the price to be paid or where there is insufficient information from which to determine the price. As in all the other jurisdictions under discussion, Article 7.4 does not apply where the contractants considered agreement on the price to be essential for the creation of the contract.<sup>1889</sup> Article 7.4 also does not apply where the contractants negotiated about the price but failed to reach consensus.<sup>1890</sup>

Where the sale is a once-off sale or where the subject matter of the sale is rare or unique so that there is no usual or market price, it has been suggested that the sale is not void.<sup>1891</sup> In such instances, recourse must be had to Article 7.4 and the buyer would have to pay a reasonable price which would be determined with reference to the price of other goods sold by the seller or with reference to the opinion of experts.<sup>1892</sup>

Also influencing Article 7.4 is the duty of good faith,<sup>1893</sup> used synonymously with the standard of reasonableness and fairness, which permeates all branches of the Dutch law of obligations.<sup>1894</sup> The duty, which is said to exist where a contractant knew or ought to have

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<sup>1885</sup> Article 7:405.

<sup>1886</sup> Article 7:601.

<sup>1887</sup> Article 7.12.3. Busch *The Principles* 268. See also Asser-Hijma *Serie Bijzondere* 222.

<sup>1888</sup> Busch *The Principles* 268. See also Asser-Hijma *Serie Bijzondere* 222. However, it is submitted that the fact that the legislature made specific provision for only sales contracts, mandates, deposits and construction and the fact that there appears to be no constraint on the legislature to include lease agreements, constitute proof that lease agreements were not intended to be governed under the rubric of open price terms.

<sup>1889</sup> Busch *The Principles* 269.

<sup>1890</sup> HR 10 December 1999, 5 (*Peters v Peters*) referred to in Busch *The Principles* 269. This is similar to the position in England law (para 5.2.3.2(A) above) but unlike that in America (para 5.2.2.2(B)(ii) above).

<sup>1891</sup> This is unlike the case in South African law (para 1.4.2.2(C)(ii)(a) of chapter 1 above).

<sup>1892</sup> Asser-Hijma *Serie Bijzondere* 177.

<sup>1893</sup> Article 3.11.

<sup>1894</sup> Hartkamp *et al Contract Law in the Netherlands* 49. See also Wessels 'Civil Code Revision in the Netherlands: System, Contents and Future' (1994) 41(2) *Netherlands International LR* 163, 181, hereafter Wessels (1994) 41(2) *Netherlands International LR* 163.



known of the facts or the law, is central to the code and regulates all stages of the contract including the negotiation stage.<sup>1895</sup>

### (C) Factors considered in determining a reasonable price

#### (i) Usual price of seller

The price usually stipulated by the seller at date of contract<sup>1896</sup> is taken into account in determining a reasonable price.<sup>1897</sup> Article 7.4 does not create a presumption that the contractants intended the price to be the normal price<sup>1898</sup> and a court which does not peg the price at seller's usual price, may adduce expert evidence to find a solution.<sup>1899</sup> An indication of the unreasonableness of the seller's usual selling price is where the price is so extreme that the seller is obliged to mention it to buyers before concluding a sale.<sup>1900</sup> The notion of "so extreme" is subject to interpretation and seems to predict a finding of unreasonableness only in exceptional circumstances.

#### (ii) Law, usage, reasonableness and equity

Article 7.4 is supplemented by Article 6:248(1)<sup>1901</sup> that provides for judicial gap-filling on the basis of the law, usage or the requirements of reasonableness and equity. The validity of any rule binding the contractants that emanates from a law, usage or juridical act is subject to the requirement of reasonableness and fairness. In addition, Article 6.2(1) imposes an

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<sup>1895</sup> Mak *Performance-Orientated Remedies in European Sale of Goods* 106.

<sup>1896</sup> Reasonableness is determined at date of contract. The same applies under CISG. However, in the United States of America, England and Scotland the operative date is the date of delivery.

<sup>1897</sup> Article 7.4. See also Asser-Hijma *Serie Bijzondere* 176; Busch *The Principles* 268.

<sup>1898</sup> This unlike Article 6:104 of the PECL discussed in para 5.2.7.4(C)(i) of this chapter below. Busch *The Principles* 269.

<sup>1899</sup> Busch *The Principles* 269.

<sup>1900</sup> Asser-Hijma *Serie Bijzondere* 176.

<sup>1901</sup> Busch *The Principles* 269. Article 6:248 reads:

- (1) "A contract has not only the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from law, usage or the requirements of reasonableness and equity.
- (2) A rule binding upon the parties as a result of the contract does not apply to the extent that, in given circumstances, this would be unacceptable according to the standards of reasonableness and equity."

obligation to act in accordance with the requirements of reasonableness and fairness or good faith. The test for reasonableness and fairness is an objective one that requires, not only, that the contractant did not know, but also, that he ought not to have known about it.<sup>1902</sup>

The references to reasonableness and fairness refer to the contractants' duty to observe reasonable commercial standards and fair dealing.<sup>1903</sup> The standard of reasonableness is used to determine the existence and content of the legal relationship between the contractants by explaining, supplementing and correcting their contract.<sup>1904</sup> The requirement of reasonableness expects of contractants to act as reasonable persons and to have regard for one another's reasonable interests. The standards that must, in terms of Article 3:12,<sup>1905</sup> be taken into account when determining reasonableness are (i) generally accepted principles of law, (ii) current juridical views in the Netherlands and (iii) the particular societal and private interests involved.<sup>1906</sup> The judgment of an objective person and the general usage in the trade or industry will normally fall under the notion of juridical views.<sup>1907</sup> Taken together Articles 3:12, and 6:248 define the notion of reasonableness in very broad terms, possibly because the notion pervades the whole of the NBW and because it applies to all stages of the contract, including the pre-contractual stage.<sup>1908</sup> Thus, even an express term may be set aside if its enforcement would be grossly unjust in the circumstances. This would probably only happen in exceptional situations.<sup>1909</sup>

The courts are obliged to indicate in its judgment which interests and which principles it took into account. Ultimately, the facts and circumstances of the case as well as the nature

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<sup>1902</sup> Article 3.11. Hence, it requires both the objective and subjective reasonableness as in the case with the duty of good faith in the United States of America. See para 5.2.2.2(B)(vi) above.

<sup>1903</sup> Hartkamp *et al Contract Law in the Netherlands* 49; Busch *The Principles* 49.

<sup>1904</sup> Busch *The Principles* 63.

<sup>1905</sup> Article 3:12 reads:

"In determining what reasonableness and equity require, reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved."

<sup>1906</sup> Article 3:12.

<sup>1907</sup> Busch *The Principles* 64.

<sup>1908</sup> Busch *The Principles* 63.

<sup>1909</sup> Hartkamp *et al Contract Law in the Netherlands* 50.

and purpose of the contract will prove conclusive as to the particular interests that will prevail.<sup>1910</sup>

#### (D) Unilateral discretionary power to determine price

Whilst the NBW does not make provision for unilateral price determination, express provision was made for it in Article 1501.2 of the BW. The fact that the provision was not repealed by the NBW means that the possibility of a unilaterally determined price has been left open. This, coupled with the recognition of freedom of contract, leads to the conclusion that it is possible for a price to be determined unilaterally.<sup>1911</sup>

Any unilateral price determination would, however, be subject to the provisions of articles such as Article 3:40(1)<sup>1912</sup> that provides for the nullity of contractual terms that are contrary to good morals or public order.<sup>1913</sup> The exercise of a unilateral discretionary power would also have to be exercised with due regard for the non-derogable provisions of Article 6:248.<sup>1914</sup> Article 6:248(1) requires the empowered contractant, when exercising such power, to take into account “the legitimate interests of the other party<sup>1915</sup> and, more specifically, to determine the content of the term in a reasonable way.”<sup>1916</sup> A finding of unreasonableness would render the term non-binding<sup>1917</sup> and constitute a breach of

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<sup>1910</sup> Busch *The Principles* 63-64.

<sup>1911</sup> The principle of freedom of contract is implicit in Article 6:248(1) that provides that a contract has the juridical effect agreed by the contractants subject to qualifications relating to law, usage and the requirements of reasonableness and fairness. See Busch *The Principles* 33 and 270; Asser-Hijma *Seire Bijzondere* 216-217; Lando & Beale *Principles of European Contract Law* 311.

<sup>1912</sup> Article 3:40(1) reads

“A juridical act which by its content or necessary implication is contrary to good morals or public order is null.”

<sup>1913</sup> Thus the validity of the contractual term granting unilateral discretionary power may be attacked on this basis. Busch *The Principles* 33, 197 and 270.

<sup>1914</sup> Busch *The Principles* 271; Asser-Hijma *Seire Bijzondere* 216-217. The problem is that the burden of proof and the transaction costs of litigation would probably fall on the contractant with the weaker bargaining power since it would not be illogical to assume that the discretionary power would, in most instances, lie in the hands of the contractant with the stronger bargaining power.

<sup>1915</sup> A conundrum posed by this requirement relates to the extent to which the “empowered” contractant is obliged to endeavour to ascertain what the legitimate interests of the other contractant may be. See further chapter 4 para 4.3 for a discussion of the possible permutations that could bedevil best efforts of a court in this regard.

<sup>1916</sup> Busch *The Principles* 270.

<sup>1917</sup> Article 6:248(2). See also Busch *The Principles* 270-271; Von Bar & Clive *Principles* 600.

contract, enabling a court to play a gap-filling role by supplying a reasonable price in terms Article 7.4.<sup>1918</sup>

#### (E) Problems of generality and contradictions arising from reasonableness

Whilst Article 3:12 of the NBW provides a conceptual framework for the standard of reasonableness, it is not without problems. The first element (generally accepted principles of law) is problematic in that the different principles of law may be contradictory. The second one (current juridical views in the Netherlands) does not necessarily reflect general views or patterns of behaviour in that it involves an investigation of the views of specific groups of persons, e.g., insurers, to which the contractants may belong. Hence, it does not necessarily concern general patterns of behaviour.<sup>1919</sup> The last element (the particular societal and private interests involved) is equally problematic in that the interests may contradict each other<sup>1920</sup> or the other two elements. In the light hereof, the conclusion that reasonableness is determined by very general and sometimes contradictory principles of law is justified.<sup>1921</sup>

The broad formulation of the test for reasonableness<sup>1922</sup> that provides courts with more latitude when deciding on the reasonableness of conduct<sup>1923</sup> is not conducive of certainty in that it reduces the value of precedent. Its economic and/or social utility is compromised in that it may not provide the requisite guidance to contractants during the various stages of contract-creation, or to contractants who have to decide on a course of conduct when facing possible breach of contract or possible litigation. The formulation also does not exhibit any overt sensitivity for the wishes of the contractants, thereby demonstrating an apparent lack of regard for the consensual requirement in this vital area of contract law, namely, the determination of the price.

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<sup>1918</sup> Asser-Hijma *Serie Bijzondere* 216; Busch *The Principles* 270-271; Von Bar & Clive *Principles* 600.

<sup>1919</sup> Busch *The Principles* 63.

<sup>1920</sup> The three elements are set out in Busch *The Principles* 63.

<sup>1921</sup> Busch *The Principles* 64.

<sup>1922</sup> In Article 3:12.

<sup>1923</sup> Busch *The Principles* 64.

### 5.2.6.3 Conclusion

Article 7.4 does not introduce the measure of certainty that it seems to do at first blush because it does no more than place a reasonable price in the context of an objective standard, viz., the usual price of the seller. Certainty is further eroded by Article 6:248(1) that provides for judicial gap-filling on the basis of the law, usage or the requirements of reasonableness and equity, read with Article 3:12 that sets out the standards for determining reasonableness.<sup>1924</sup>

None of the provisions contained in the conceptual framework serve to address the problems associated with the standard of reasonableness in relation to the determination of price and rental.<sup>1925</sup> Indeed, the broad and general provisions as well as the contradictory aspects of Article 3:12<sup>1926</sup> confirm the difficulties associated with the notion of a reasonable price.<sup>1927</sup> It is difficult to resist the temptation to note here that at the time of its introduction some commentators were critical of the NWB, saying that the use of open norms will result in increased litigation and an increase in uncertainty.<sup>1928</sup> It is submitted that the criticism could have been written specifically with the open-endedness of Article 7.4 read with the other articles discussed above, in mind.

The view has also been expressed that Article 6:248(2)'s requirement that the term, given the circumstances, must be "unacceptable" according to the criteria of reasonableness and equity means that a court "may intervene only by way of exception."<sup>1929</sup> Be that as it may, the provisions of Article 6:248 add additional layers to an already complex enquiry, multiplying the already substantial risks and uncertainties associated with the standard of reasonableness in relation to price.<sup>1930</sup>

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<sup>1924</sup> See paras 5.2.6.2(C)(ii) and 5.2.6.2(E) above.

<sup>1925</sup> See chapter 4 para 4.3.

<sup>1926</sup> Busch *The Principles* 63-64. See the discussion in paras 5.2.6.2(C)(ii) 5.2.6.2(E) above.

<sup>1927</sup> See chapter 4 para 4.3.

<sup>1928</sup> Wessels (1994) 41(2) *Netherlands International LR* 166. In para 5.2.2.2(C) above, the observation was made that the increase in litigation could result in a reduction in the legal, economic and social value of the decisions made.

<sup>1929</sup> Hartkamp *et al Contract Law in the Netherlands* 50; Busch *The Principles* 271.

<sup>1930</sup> See the discussion in chapter 4 above.

It is submitted that the broadly framed provisions are representative of the philosophy of keeping the contract alive, even if it operates at the cost of the actual intention of the contractants. Hence, they do not alleviate the concerns expressed in chapter 4 regarding the indefiniteness of the standard of reasonableness in relation to price and rental determination and its implication for consensus and certainty. The Dutch approach would be hard to justify in the context of policy, and the values underpinning the constitution.<sup>1931</sup>

## **5.2.7 International Instruments**

### **5.2.7.1 Introduction**

The international instruments discussed below are all inspired by the desire to attain uniformity in trade<sup>1932</sup> and to facilitate commercial transactions.<sup>1933</sup> The discussion of these instruments will focus on the provisions relating to open price terms and aspects incidental thereto. Most of the instruments resolve the problems posed by open term contracts in relation to price with reference to the standard of reasonableness.

### **5.2.7.2 The United Nations Convention on Contracts for the International Sale of Goods (1980)**

The discussion that follows will commence with a brief introduction setting out some of the more salient aspects of the CISG provision. Thereafter, it engages in a discussion of the relevant provisions that regulate the CISG approach to open terms in relation to price determination.

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<sup>1931</sup> See the discussion in chapters 3 and 4 above. See also the discussion in paras 5.2.2.2(E)&(F) above.

<sup>1932</sup> Honnold 'Symposium—Ten Years of the United Nations Sales Convention' (1997-1998) 17 *Journal of Law and Commerce* 181, 182 (commenting on the UCC and the CISG), hereafter Honnold (1997-1998) 17 *Journal of Law and Commerce*.

<sup>1933</sup> As also is the case in the other jurisdictions discussed in this chapter.

## (A) Introduction

The United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)<sup>1934</sup> was inspired by “the need to free international commerce from the Babel of diverse domestic legal systems.”<sup>1935</sup> It is aimed at attaining uniformity in international trade<sup>1936</sup> rather than at devising new, improved, or reformed provisions of sales law.<sup>1937</sup>

The CISG applies to contracts of sale<sup>1938</sup> and the provisions thereof do not extend to other types of contracts, inclusive of lease agreements. It regulates the legal relationship between contractants whose places of business are in different Contracting States where the contractants have agreed to its application or where the rules of Private International Law in the State in which litigation takes place so dictate.<sup>1939</sup> The CISG does not apply to non-commercial sales (consumer sales) and hence it leaves domestic consumer sales contract



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<sup>1934</sup> Text available at <<http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>> The origins of the CISG may be traced to before the Second World War when attempts were made, under the auspices of the League of Nations, at creating uniformity in the international sale of goods: Amato ‘U.N. Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts’ (1993) 13 *Journal of Law and Commerce* 1, 2, hereafter Amato (1993) 13 *Journal of Law and Commerce*. See also Farnsworth ‘Formation of Contract’ in Galston & Smit *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984) 3-1, 3-2, available at <<http://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html#304>> hereafter Farnsworth ‘Formation of Contract’.

<sup>1935</sup> Honnold J *Documentary History of the Uniform Law for International Sales* 1 (1989) as quoted in Flechtner ‘The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’ (1997-1998) 17 *Journal of Law and Commerce* 187, hereafter Flechtner (1997-1998) 17 *Journal of Law and Commerce* 187.

<sup>1936</sup> The importance of uniformity flows, not only, from the Preamble to the CISG, but also, from Article 7(1) which provides that uniformity in application is one of the basic interpretive principles of the CISG. Of the five national jurisdictions discussed above, only Germany (signed 1981, ratified 1989 and in force 1990); Netherlands (signed 1981, accepted 1990 and in force 1992); United States of America (signed 1981, ratified 1986 and in force 1988) have adopted the CISG: Kröll *et al The United Nations Convention* LVII-LVIII.

<sup>1937</sup> Flechtner (1997-1998) 17 *Journal of Law and Commerce* 187. Though uniformity is the aim, the CISG does make provision for declarations and reservations in terms whereof Contracting States may opt out of certain parts of the CISG (Article 92). States may contract out of, *inter alia*, Articles 14(1) and 55: Kröll *et al The United Nations Convention*. The two articles are discussed in para 5.2.7.2(B) below.

<sup>1938</sup> Article 4.

<sup>1939</sup> Article 1 of the CISG. See also Kröll *et al The United Nations Convention* 21; Boele-Woelki ‘Principles and Private International Law. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts’ (1996) 1 *Uniform LR* 652, 669, hereafter Boele-Woelki (1996) 1 *Uniform LR*; Bridge *Benjamin’s Sale* para [1-024].



provisions intact.<sup>1940</sup> Where it applies, the CISG is mandatory, superseding the domestic sales law.<sup>1941</sup>

## (B) Regulation of open price terms

### (i) Article 55 of the CISG

Article 55<sup>1942</sup> which fulfils a gap-filling role for an omitted price reads as follows:

“Where a contract has been validly concluded but does not expressly or impliedly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.”

Article 55 applies where a contract is silent on the price provided that the contract is valid in all other respects, and that there is nothing to the contrary, either expressly or impliedly, in such contract. The gap-filling role of Article 55 of the CISG comes into play only if there is no express or implied price<sup>1943</sup> stipulation in the contract or if the contract does not otherwise provide for the determination of the price.<sup>1944</sup> It will also not apply where the contractants agreed to fix the price at a later point in time.<sup>1945</sup> Article 55 comes into operation only “in the absence of any indication to the contrary.” It, therefore, operates as a last resort where the interpretation of the contract does not lend itself to the determination of a price.<sup>1946</sup>

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<sup>1940</sup> Article 2.

<sup>1941</sup> Boele-Woelki (1996) 1 *Uniform LR* 669; Schultz ‘Rolling Contract Formation Under the UN Convention on Contracts for the International Sale of Goods’ (2001-2002) 35 *Cornell International LJ* 263, 266.

<sup>1942</sup> Article 55 is located in Part III (Sale of Goods) of the CISG. Parts II (Formation of the Contract) and III form the “substantive core” of the CISG: Lookofsky *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for International Sale of Goods* (2008) 47, hereafter Lookofsky *Understanding the CISG*.

<sup>1943</sup> A price would be implied through the inclusion of a price list of which the buyer was aware, or ought to have been aware or through trade usages and practices. Kröll *et al The United Nations Convention* 812. See also *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* United Nations (2008) 178, hereafter *UNCITRAL Digest of Case Law*, available at <<http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>> These variations of an implied price can be accommodated in the South African context under the current rubric of a usual/current price or the rubric of an implied price. See chapter para 1.4.2.2(C)(ii)(a)&(c).

<sup>1944</sup> Kröll *et al The United Nations Convention* 812.

<sup>1945</sup> *UNCITRAL Digest of Case Law* 59. In this regard, it differs from UCC 2-305(1)(b) which provides for a reasonable price where the contractants agreed to agree on a price but fail to do so.

<sup>1946</sup> Kröll *et al The United Nations Convention* 811. Article 55 is, for example, not applicable where the contractants had implicitly indicated the need to reach agreement on the price in the future: Case Law on UNCITRAL Texts (CLOUT) Case No 139 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 3 March 1995] quoted in Gabriel ‘The Buyer’s Performance under the CISG: Arts 53-60 Trends in the Decisions’ (2005-2006) 25 *Journal of Law and*

Where a contract is silent on the price, the applicable price is not the reasonable price but the price “generally charged”<sup>1947</sup> at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.”

The price which is determined at date of contract, any fluctuations thereafter being irrelevant,<sup>1948</sup> is based on three objective criteria, namely, the price which is (a) paid for the same goods; (b) in the particular line of business or common market; and (c) in comparable circumstances.<sup>1949</sup> Controversy reigns about the approach to be adopted where such objective features are lacking.<sup>1950</sup> One of the views, and one that accords with the CISG’s philosophy to maintain the continued existence of the contract, is that the applicable domestic law should be used to fill the gap and that the contract should be deemed to be invalid only if domestic law provides no solution.<sup>1951</sup>

## (ii) Article 14(1) of the CISG

Article 41(1) forms part of Part II Formation of Contracts. Article 92 allows states to contract out of Part II.

### Article 14(1)

“A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.”

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*Commerce* 273, 275, hereafter Gabriel (2005-2006) 25 *Journal of Law and Commerce* 273. In this regard, the provisions of Article 55 resemble the provisions of Section 8(2) of the English Sale of Goods Act. See the discussion thereof in para 5.2.3.2(A) above. They differ from the UCC 2-305 in that they do not apply where (i) the contractants leave the price for future agreement and then fail to agree thereon (UCC 2-305(1)(b)); and (ii) where the method agreed upon fails (UCC 2-305(1)(c) and UCC 2-305(3)).

<sup>1947</sup> Note that all the other jurisdictions link the price to the standard of reasonableness. Under the UNIDROIT Principles, reasonableness comes into play only if a trade price is not available which is peculiar because the standard of reasonableness encompasses a trade price as is evident from the discussion of the position in, for example, United States of America.

<sup>1948</sup> Kröll *et al The United Nations Convention* 814.

<sup>1949</sup> Kröll *et al The United Nations Convention* 814.

<sup>1950</sup> An example would be where there is no market in the goods which are produced solely for the buyer: Kröll *et al The United Nations Convention* 815. The rules of Private International Law would probably have to come into play to determine the applicable domestic law or the *Malev* approach would probably prevail in such an instance. The *Malev* court held that there is no market in aeroplane engines and hence Article 55 did not apply. The *Malev* case is discussed hereafter.

<sup>1951</sup> Kröll *et al The United Nations Convention* 815.

The provisions of Article 55 are thrown into disarray by Article 14(1) which provides that a valid offer only arises if the offer expressly or implicitly fixes the price or provides for the determination thereof.<sup>1952</sup> Article 14(1) operates as a compromise offered to those nations that preferred closed-term price provisions. It is reflective of the legal position countries such as South Africa which are less receptive to the notion of open price terms. Socialist countries as well as some civil law systems were against the notion of open term contracts preferring certainty and foreseeability over flexibility.<sup>1953</sup> An objection that informed the opposition to Article 55 was that unilateral price determination could work to the disadvantage of the weaker contractant contracts. Another factor was that in Socialist countries contractants may be required to conform to a predetermined macroeconomic government plan.<sup>1954</sup>

Article 14(1) is clearly aimed at some form of specificity and definiteness because without these qualities a court cannot determine whether enforceable obligations have been created.<sup>1955</sup> The implication is that there is no offer and, hence, no intention to contract, where the proposal does not fix the price or does not make provision for determining the price<sup>1956</sup> or where the contract does fix the price (and the goods and quantity), but the offer cannot be understood by “a reasonable person of the same kind [as the offeree] ... in the same circumstances [as the offeree].”<sup>1957</sup> This conclusion which is supported by case law,<sup>1958</sup>

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<sup>1952</sup> Article 14(1) provides that a requirement for a valid offer is that the proposal must, *inter alia*, be “sufficiently definite.” Article 14(1) further provides that a proposal is sufficiently definite if it “indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.” This is referred to as the “absolute validity requirement.” Accordingly, a contract is concluded when agreement is reached on “the essential minimum content,” namely, agreement on goods, quantity and price: Kröll *et al The United Nations Convention* 224 and 812.

<sup>1953</sup> Though the aim of the CISG was to attain uniformity of approach, the discussions surrounding the introduction of Article 55 created controversy which probably led to the incorporation of Section 14(1) as a compromise: Kröll *et al The United Nations Convention* 811. See also Garro ‘Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods’ (1989) 23 *The International Lawyer* 443, 463-465, hereafter Garro (1989) 23 *The International Lawyer* 443; Mistelis ‘Article 55: The Unknown Factor’ (2005-2006) 25 *Journal of Law and Commerce* 285, 287, hereafter Mistelis (2005-2006) 25 *Journal of Law and Commerce* 285; Farnsworth ‘Formation of Contract’ 3-1, 3-7.

<sup>1954</sup> Cvetkovic ‘The Characteristics of an Offer in CISG and PECL’ (2002) 14 *Pace International LR* 121, 126 n16.

<sup>1955</sup> Lookofsky *Understanding the CISG* 48-49.

<sup>1956</sup> Lookofsky *Understanding the CISG* 50.

<sup>1957</sup> Article 8(2).

suggests that the Article 14(1) requirement is complied with on the application of criteria that approximate the objectively ascertainable requirement of South African law.

In *Pratt & Whitney v Malev Hungarian Airlines*, the Supreme court of Hungary determined that an offer that did not specify the price of all the engines was not sufficiently definite in terms of Article 14(1) and was, hence, not binding.<sup>1959</sup> The Court ruled that in order for a contract to be sufficiently definite it had to expressly or impliedly fix the price or make provision for its determination.<sup>1960</sup>

A contrary point of view that rejects the compromise premise is that Article 55 provides a default-rule position, with the courts playing a gap-filling role. This would negate any suggestion that an absence of a price term was necessarily fatal under Article 14(1).<sup>1961</sup>

Another view is that the contradiction between Articles 14(1) and 55 leaves Article 55 redundant.<sup>1962</sup> Various other solutions have been offered.<sup>1963</sup> However, the differences in

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<sup>1958</sup> Lookofsky *Understanding the CISG*, gives the example of a Hungarian case where “a seemingly nebulous” oral communication was held by the court to be sufficiently definite in that the course of prior dealings between the contractants impliedly determined, *inter alia*, the price of the goods. The decision is based in Article 9 (1) that provides that contractants are bound by any practices that they have established between themselves served as a basis for the court’s conclusion (49 and 96). Lookofsky does not give the name of the case.

<sup>1959</sup> Lookofsky *Understanding the CISG* 50-51. The court, apparently, did not reflect on the relationship between Article 14(1) and Article 55: Lookofsky *Understanding the CISG* 50-51 and 96. Apparently, the court also did not apply Article 55 because the court held that there was no market price for aircraft engines: Kröll *et al The United Nations Convention* 812 n6. See also Flechtner (1997-1998) 17 *Journal of Law and Commerce* 213; Gabriel (2005-2006) 25 *Journal of Law and Commerce* 275-276.

<sup>1960</sup> Flechtner (1997-1998) 17 *Journal of Law and Commerce* 212. See also Mistelis (2005-2006) 25 *Journal of Law and Commerce* 294. The *Malev* decision may be viewed as being illustrative of an interpretation filtered by the prism of national law and serves as a practical illustration of some of the criticisms levelled at the CISG: Amato (1993) 13 *Journal of Law and Commerce* 18-20. For the criticisms see para 5.2.7.2(E) below. Given the clear provisions of the UCC 2-305 on the matter of open price terms, the decision would probably have gone the other way had the case been decided in a court in the United States of America or in Germany: Amato (1993) 13 *Journal of Law and Commerce* 18-20. It may be mentioned that the law in France mirrors the law in South Africa in so far as it requires that the price must be objectively ascertainable without further reference to the contractants: Amato (1993) 13 *Journal of Law and Commerce* 19. See further the discussion of the South African position in chapter 1 paras 1.1, 1.2 and 1.4.

<sup>1961</sup> Lookofsky *Understanding the CISG* 50. Lookofsky cites the Austrian Supreme Court as adopting a more liberal approach (51). See also Kröll *et al The United Nations Convention* report Honnold *Uniform Law* (1999) at para [325.3] as suggesting that Article 55 allows for open contracts (812-813 fn 8).

<sup>1962</sup> Farnsworth ‘Formation of Contract’ 3-8. Amato (1993) 13 *Journal of Law and Commerce* concludes that the decision in the *Malev* case does not help in reconciling controversy surrounding the relationship between Articles 14(1) and 55 (4-18). Amato also concludes that conflicting academic interpretations (Honnold v Farnsworth) of this relationship also do not assist in reaching an understanding of the *Malev* court’s decision. The disjunct between Articles 14(1) and 55 was also recognised but not resolved by those who participated in the drafting of the CISG: Amato (1993) 13 *Journal of Law and Commerce* 9-11.

approach to the conflicting provisions of Articles 14(1) and 55 in academic and judicial circles and the inability to arrive at a solution is reflective of the debate that gave rise to the “compromise” provisions and do not inspire confidence in the strive towards uniformity in the international arena.<sup>1964</sup>

(C) Factors considered in determining the price “generally charged”

(i) Market price

Reference to a market price is permitted by Article 55 of the CISG.<sup>1965</sup> Where a uniform market or stock-exchange exists, the prevailing price at such market or stock-exchange will be determinative.<sup>1966</sup> For the purpose of realising the provisions of Article 55, it is sufficient if a price range is identifiable from which a median price may be deduced.<sup>1967</sup> The particular line of business or market is deemed to be the market to which both contractants

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Hence, the legislative history of the two articles is not of much use in resolving the controversy surrounding the two articles: Felemegas *An International Approach to the Interpretation of the United Nations Convention for the International Sale of Goods (1980) as Uniform Sales Law* (2007) 193.

<sup>1963</sup> Lookosky *Understanding the CISG* suggests a solution that resembles the position under UCC 2-305 read with UCC 2-204(3). (The UCC provisions are discussed in para 5.2.2.2(B) above). The proposal is that if the true intention of the contractants (determined in light of the provisions of Article 8) reveals an intention to be bound without a fixed or ascertainable price, then the default (gap-filling) provisions of Article 55 should apply (51 and 96-97). The implication of this is that the provisions of Article 14 would then apply only in that category of cases where the contract provides for a method of determining the price.

Kröll *et al The United Nations Convention* proposes that price be a “sufficient” but not a “necessary” condition for the validity of a contract (813).

It is submitted that another solution could be found in the fact that in terms of Article 4(a) of the CISG, the CISG does not regulate the validity of contracts. The result of this exclusion is that the validity of contracts must be determined by the national law of the contractants identified by the rules of Private International Law as being the applicable law. The solution suggested is that Article 14(1) should be applied in those instances where the national law identified by Private International Law for the determination of the validity of the contract does not, for the sake of certainty, recognise open term contracts. Accordingly, Article 55 would apply only where the national law, identified by the rules of Private International Law as the applicable law for the determination of the validity of the contract, does not regard certainty as being paramount, and hence is not averse to the notion of open term contracts. It is admitted that such an interpretation would give rise to two strands of precedents – one, based in Article 55, that operates in countries that favour open terms and another one, based in Article 14(1), that operates in countries that do not favour open terms. However, the proposed solution would resolve the conflict that has dogged the relationship between the two articles up to now. Furthermore, it would prevent conflicting precedents being established regarding the relationship between Articles 14(1) and 55 which have the effect of nullifying the Article 7(1) attempt at obtaining uniformity.

<sup>1965</sup> Mistelis (2005-2006) 25 *Journal of Law and Commerce* reports that a French court concluded that Article 55 referred to a market price (292).

<sup>1966</sup> Kröll *et al The United Nations Convention* 815.

<sup>1967</sup> Kröll *et al The United Nations Convention* 815.

belong.<sup>1968</sup> The position where no market exists appears to have been settled by the Hungarian Supreme Court in the *Malev* case. The court held that Article 55 of the CISG was not applicable because there was no market (for aeroplane engines).<sup>1969</sup>

#### (ii) Usual price list

In giving effect to Article 55 of the CISG, it has been said that the method relies on “objective or objectifiable facts and circumstances, such as the common list price for the goods.”<sup>1970</sup> In a case decided in Germany, the contractants did not specifically discuss the price of the goods but had exchanged a seller’s “purchase list” which contained a price list. The Appellate Court concluded that the ‘usual list price can be taken as the price agreed upon.’<sup>1971</sup> A Swiss court determined an omitted price based upon the usual invoice price of the seller.<sup>1972</sup>



#### (iii) Usage and practice

Article 55 of the CISG must also be read with Article 9(1) of the CISG which provides that contractants are bound by any usage to which they have agreed or by any practice which they have established for themselves.<sup>1973</sup> In terms of Article 9(2) of the CISG contractants, unless otherwise agreed, are bound by a usage of which they “knew or ought to have known” and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.”

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<sup>1968</sup> Kröll *et al* *The United Nations Convention* 814.

<sup>1969</sup> Hence the decision based on Article 14(1) that a valid contract had not been concluded. Mistelis (2005-2006) 25 *Journal of Law and Commerce* 294.

<sup>1970</sup> Mistelis (2005-2006) 25 *Journal of Law and Commerce* 296.

<sup>1971</sup> Mistelis (2005-2006) 25 *Journal of Law and Commerce* 291. The article does not provide the citation of the case.

<sup>1972</sup> Mistelis (2005-2006) 25 *Journal of Law and Commerce* 294. The article does not provide the citation of the case. See also *UNCITRAL Digest of Case Law* 59. The usual price list or an invoice price would comply with the objective ascertainability requirement of South African law of sale.

<sup>1973</sup> This would include both what is referred to in the USA (para 5.2.2.2(B)(v)(b) above) as a course of performance and a course of dealings.



Thus, though the provisions of Article 55 of the CISG seem to indicate an open-ended approach (“the price generally charged” under “comparable circumstances”), the interpretations discussed above<sup>1974</sup> are anchored in objectively ascertainable considerations and enjoy recognition in South African law.<sup>1975</sup>

#### (D) Unilateral price determination

The CISG does not provide for unilateral determination of the contract price. It is submitted that the probable reason for this may be located in the same reasons that countries objected to the enactment of the Article 55 open term provision, as well as the possibility of exploitation of poorer nations.<sup>1976</sup>

#### (E) Arguments against the open price term provision

##### (i) Burden of proof

Article 55 is not clear about who has the burden of proving what the “trade” price is. Kröll *et al* cite some commentators as being of the view that the price has to be determined *ex officio* with the co-operation of the contractants, whilst others hold the view that the onus is on the contractant alleging the price.<sup>1977</sup> The lack of clarity gives rise to uncertainty and the possibility exists that decisions may reflect the bias of contracting states to interpret the provisions along national lines.<sup>1978</sup>

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<sup>1974</sup> Namely market price, usual price list and usage and practice.

<sup>1975</sup> The notion of a market price is recognized whilst practices and usages may resort under the rubric of “implied terms.” See chapter 1 para 1.4.2.2(C)(ii). The price as per the seller’s price list is recognised - *Shell SA (Pty) Ltd v Corbitt and Another* 1984 (4) SA 523 (CPD)). Furthermore, where a contract is silent on the price it is accepted that the price is the usual price of the seller. See chapter 1 para 1.4.2.2(C)(a)&(c).

<sup>1976</sup> See further paras 5.2.7.2(E)(iii)&(iv) below.

<sup>1977</sup> Kröll *et al* *The United Nations Convention* 815-816. Kröll *et al* cite Magnus, in *Stuadinger Kommentar* (2005) as being in favour of the *ex officio* approach, whilst Benicke, in *MünchKommHGB* (2007) is cited as being in favour onus being on the contractant alleging the price.

<sup>1978</sup> See further para 5.2.7.2(E)(iii) below.



## (ii) Interpretative differences

Factors such as differences in meaning in national languages,<sup>1979</sup> and differences in academic training and thinking and in professional training and practice may mean that the use of uniform international words does not necessarily translate into uniform application or interpretation of those words.<sup>1980</sup> Even the notion that the wording is uniform is not accurate because of differences in, not only, the official CISG language versions of the document but also in the translations thereof into the various national languages.<sup>1981</sup> It has also been said that the great anomaly of legal language is the “inability to define its crucial words in terms of ordinary factual counterparts.”<sup>1982</sup> Finally, declarations and reservations also contribute to non-uniformity.<sup>1983</sup>



<sup>1979</sup> Honnold 'The Sales Convention in Action—Uniform International Words: Uniform Application?' (1988) 8 *Journal of Law and Commerce* 207, 207-208, hereafter Honnold (1988) 8 *Journal of Law and Commerce* 207. Honnold explains by quoting the realists as warning that “[e]ven if you get uniform laws you won’t get uniform results.” He ascribes the truth in this adage to the fact the lawyers work with “blunt, unreliable tools” called words. “Words” are “mushy, ambiguous things even for ordinary communications.” Honnold quotes Edna St. Vincent Millay as writing that translating the simple phrase “Home Sweet Home” into French “would drive a Frenchman to Gallic gesticulation.”

<sup>1980</sup> Honnold (1997-1998) 17 *Journal of Law and Commerce* 185. Cultural contexts may also contribute to different interpretations. Hence, language cannot perfectly represent the world. It has also been suggested that the same word may not have the same meaning twice, not even when used by the same person. Curran 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (1998) 46(1) *American Journal of Comparative Law* 43, 49, hereafter Curran (1998) 46(1) *American Journal of Comparative Law* 43.

<sup>1981</sup> The six CISG official translations are: Arabic, Chinese, English, French, Spanish and Russian. Flechtner (1997-1998) 17 *Journal of Law and Commerce* 189. An attempt to deal with such language problems may be detected in the fact that there were only two official working languages used in the drafting of the Principles of European Contract Law (2003) (PECL), namely, English and French. During the drafting of the PECL, English increasingly became the language of choice but where a term could not be translated into French, serious consideration was given to dropping such term. Significant also was the fact that attempts were made to find “new, neutral terms wherever possible” in order to overcome “[t]he disadvantage of adopting the English terms’ common law history”: Busch *The Principles* 17.

<sup>1982</sup> Hart *LA Definition and Theory in Jurisprudence* (1919), 7-8, quoted in Curran (1998) 46(1) *American Journal of Comparative Law* 49 n12 and 50.

<sup>1983</sup> Flechtner (1997-1998) 17 *Journal of Law and Commerce* 193-197. In the USA, UCC 2 dealing with Sales has also not been uniformly adopted in the States that adopted it: Camero J 'Repair the Roof When the Sun is Shining: Enacting a Federal Sales Act to Supplant Uniform Commercial Code Article 2' 4-6.

Another important factor contributing to non-uniformity is the national lens through which tribunals tend to view international rules.<sup>1984</sup> Instructive in this respect, are the varying interpretations given to Article 8(3) of the CISG that provides that “due consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties” when ascertaining the intention of the contractants. Some commentators have interpreted this provision as renouncing the parole evidence rule whilst others take the view that it does not.<sup>1985</sup> Courts in jurisdictions that regard contracts as being the product of an adversarial relationship would opt for the former interpretation whilst in a jurisdiction that views contracts as cooperative ventures,<sup>1986</sup> the courts would opt for the latter interpretation.<sup>1987</sup> That South African contract law falls into the former category is apparent from its alignment with the classical approach to contract law.<sup>1988</sup> Courts are also said to adopt interpretations that favour developed countries. Article 39 of the CISG requires a buyer to notify a seller of non-conformity within a reasonable period of time.<sup>1989</sup> The adoption of a strict interpretation of the requirement by the courts is said to operate in favour mainly of developed countries.<sup>1990</sup>

<sup>1984</sup> Amato (1993) 13 *Journal of Law and Commerce* 3. See also Mistelis (2005-2006) 25 *Journal of Law and Commerce* 292-293; Murray ‘The Neglect of the CISG: A Workable Solution’ (1997-1998) 17 *Journal of Law and Commerce* 365, 366, quotes Honnold J as emphasising “the lack of a common heritage of judicial technique and substantive law among Contracting States” as problematic to the attainment of uniformity in the interpretation of the provisions of the CISG; Honnold (1988) 8 *Journal of Law and Commerce* 208.

<sup>1985</sup> Flechtner (1997-1998) 17 *Journal of Law and Commerce* 200-201.

<sup>1986</sup> In an adversarial paradigm, each contractant would seek to exact the best possible deal without giving up too much with a resultant diminution in the level of trust that each has for the other. Where contracts are deemed to be a cooperative venture, contractants are perceived as being engaged in a mutually beneficial relationship based on trust and joint action: Flechtner (1997-1998) 17 *Journal of Law and Commerce* 202.

<sup>1987</sup> Flechtner (1997-1998) 17 *Journal of Law and Commerce* 200-204. Flechtner illustrates this point with reference to an American judgment where it was held that the CISG had no impact on the application of the Texas parole evidence rule. On the other hand, a German court recognised the principle that an oral agreement can contradict a written one.

<sup>1988</sup> This alignment is outlined in chapter 2.

<sup>1989</sup> A buyer who wishes to claim for defective goods must notify the seller within a reasonable period of time (Articles 38, 39 and 44). Aside from the fact that not all domestic legal systems have such a rule, Germany has been identified as being too strict in its interpretation of what constitutes a reasonable period of time: Honnold (1997-1998) 17 *Journal of Law and Commerce* 185.

<sup>1990</sup> Alaoudh (2012) 26(4) *Arab Law Quarterly* 481.

Though principle of uniformity may be well-founded in theory, the reality dictates otherwise. As indicated<sup>1991</sup> factors may exist that impact on the attainment of uniformity. The conclusion is that uniformity may be not always be the most viable option and that choices may be dictated by socio, economic, political, or constitutional considerations which may be equally, if not more, central to the development of a nation.

### (iii) National interest

Some sales-related issues are not subject to the jurisdiction of the CISG. One of the most important concerns the validity of contracts, an issue which was pertinently placed outside the scope of the CISG.<sup>1992</sup> The purpose of the exclusion is to preserve national rules that embody important public policies and social values that cannot be waived by agreement.<sup>1993</sup> Thus, there is a recognition that national and international policies are not, and need not, always be in alignment. The conclusion is strengthened by the fact of the inclusion of the both the closed term provisions of Article 14(1) and the open term provisions of Article 55<sup>1994</sup> as well as by the fact that states may contract out of either or both.<sup>1995</sup>

Given the above, and the vastly different legal, economic, social and political contexts in which transactions occur, it is inevitable that differences in approach, application and results would occur, leading to the realisation that global uniformity in respect of the *essentialia* of price and rental is probably unattainable. It also proves that uniformity may not necessarily be desirable given macro socio-economic, political, policy and constitutional considerations that may predominate in countries.

### (iv) Policy issues

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<sup>1991</sup> In this sub-paragraph as well as in the discussion of declarations and reservation and the compromise provisions of Articles 14(1) and 55.

<sup>1992</sup> Article 4(a). Kröll *et al* *The United Nations Convention* 62.

<sup>1993</sup> Flechtner (1997-1998) 17 *Journal of Law and Commerce* 198-199.

<sup>1994</sup> See para 5.2.7.2(B)(i) in this regard.

<sup>1995</sup> Article 92 allows states to contract out of Part II of the CISG (Article 14(1) falls into Part II) and out of Part III of which Article 55 forms part.

It is questionable whether global uniformity should be the goal given the different social, legal, economic, political and developmental imperatives that prevail in the different countries in the world. The CISG does, indeed, accommodate such imperatives by providing for declarations and reservations and by omitting some sale-related issues from its jurisdiction. The underlying purpose of the declarations and reservations is the preservation of national laws that embody important public policies and social values.<sup>1996</sup> The recognition of provisions that allow States to opt out of certain provisions also serves to underscore the idea that uniformity should not be an inviolable principle of law.<sup>1997</sup>

The issue of uniformity aside, open terms do not serve the interests of developing countries<sup>1998</sup> especially when viewed through the prism of unfavourable terms of trade for raw materials (to the detriment of poorer countries) in relation to the ever-increasing price of manufactured goods (benefitting richer countries).<sup>1999</sup> Courts located in developed countries where goods are manufactured and priced would probably impose (unreasonably) high prices for manufactured goods.<sup>2000</sup> In addition, greater price transparency prevails for raw materials produced by poorer countries but not for manufactured and industrial goods imported by these economies.<sup>2001</sup> Similar considerations apply in a national context and even if legislation such as the South African Consumer Protection Act were to provide the disempowered contractant with comprehensive and effective protection, the latter would

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<sup>1996</sup> Flechtner (1997-1998) 17 *Journal of Law and Commerce* 200-204.

<sup>1997</sup> Uniformity should, at best, serve as a consideration in interpreting the CISG rather than an inviolable principle. This is the underlying theme in Flechtner (1997-1998) 17 *Journal of Law and Commerce* 187.

<sup>1998</sup> In this regard, it has been said that determining the trade price should not be difficult where it concerns raw materials or semi-completed products. However, a different picture emerges when the subject matter of the sale is a manufactured product: *UNCITRAL Digest of Case Law* 178. The observation lends support for the reservations developing countries have of open term contracts.

<sup>1999</sup> Garro (1989) 23 *The International Lawyer* 443-483.

<sup>2000</sup> Eörsi 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 32(2) *The American Journal of Comparative Law* 333, 463 n88, hereafter Eörsi (1983) 32(2) *The American Journal of Comparative Law* 333.

<sup>2001</sup> Schlechtriem 'Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods' 1, 50, published by Manz, Vienna: 1986 and reproduced with their permission <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html>>

still be burdened, not only, with discharging the onus of proving unconscionable conduct , but also, with the transaction costs associated therewith.<sup>2002</sup>

The foregoing observations underscore the conclusion in chapter 4 that the standard of reasonableness should not, on constitutional and policy grounds, be countenanced in the crucial aspect of contractual relations concerning price.

#### (F) Observations

The inclusion of Article 55 is described as an “uneasy compromise” between conflicting approaches (open price terms and closed price terms).<sup>2003</sup> Very insightful for the purpose of this thesis is the comment that it does not make any sense to regard the one approach as better than the other (open terms v closed terms) because rules of law are determined by the economic model that lies behind them.<sup>2004</sup> To this one may add that socio-economic and political considerations as well as constitutional values also play a role.<sup>2005</sup> Also insightful is that the CISG, despite its stated purpose of creating uniformity in international sales,<sup>2006</sup> is reflective of Western legal tradition (both common law and civil law) and ignored Asian values and Islamic law in its codification.<sup>2007</sup>

The CISG provisions that constitute recognition that differences in national policies, as influenced by macro socio-economic considerations, exist and that these differences should be recognised offer support for the argument<sup>2008</sup> that policy and constitutional imperatives in the South African context do not support the Supreme Court of Appeal’s call for uniformity with the position in England, Scotland, Germany, the Netherlands and the United

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<sup>2002</sup> See the discussion in chapter 3 above.

<sup>2003</sup> Garro (1989) 23 *The International Lawyer* 463-464. See also Mistelis (2005-2006) 25 *Journal of Law and Commerce* 287; Eörsi (1983) 32(2) *The American Journal of Comparative Law* 341-343.

<sup>2004</sup> Eörsi (1983) 32(2) *The American Journal of Comparative Law* 343.

<sup>2005</sup> See the discussion in chapter 4 above.

<sup>2006</sup> See the Preamble as well as Article 7(1) of the CISG.

<sup>2007</sup> Bell ‘New Challenges for the Uniformisation of Laws: How the CISG is Challenged by ‘Asian Values’ and Islamic Law’ (2011) 11, 15-16, hereafter Bell New Challenges. Bell explains that in Islamic law which has experienced a great resurgence, a price must be certain and determined. It cannot be aleatory and a market price at a future date or even a price to be determined by a third party would be regarded as speculative: Bell New Challenges 13. So also would the notion of a reasonable price to be determined by a judge: Bell New Challenges 23 and 26. Hence, both Articles 14 and 55 would be repugnant in the context of Islamic law.

<sup>2008</sup> The argument runs throughout chapter 4.

States of America by recognising sales and leases at a reasonable price and rental respectively, or a unilaterally determined price or rental.<sup>2009</sup>

Non-conformity created by language, translations, idiom, interpretations that reflect national policies or bias all feed into the debate whether to adopt open price provisions in conformity with international practice. The discussion of the CISG provisions that illustrate some of the causes of non-conformity are indicative that conformity is not always desirable and that the development of the law and legal policy is dictated by national norms and policies, and macro socio-economic policies all of which may be informed by constitutional imperatives. This raises the rhetorical question whether on a constitutional and jurisprudential level the law should serve the national or the international interests. The recognition that uniformity is not an inviolable principle of law<sup>2010</sup> is instructive in relation to the recommendation of the South African Supreme Court of Appeal<sup>2011</sup> that South African law in relation to the *essentialia* of price and rental should be brought in line with the law in England, Scotland, Germany, the Netherlands and the United States of America.<sup>2012</sup>

#### (G) Conclusion

Inasmuch as the CISG supports the validity of contracts in the absence of an agreement on price, the factors used, pursuant to Article 55, in filling in price gaps are not supportive of the use of the standard of reasonableness in determining the price. Some of the factors, namely, market price, usual price list, and usages and practices<sup>2013</sup> have their roots in objective considerations and are reflective of the South African requirement of objective ascertainability rather than the standard of reasonableness.

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<sup>2009</sup> in *NBS Boland Bank v One Berg River* Para [16].

<sup>2010</sup> Flechtner (1997-1998) 17 *Journal of Law and Commerce* 187. See the discussion in para 5.2.7.2(E)(iv) above.

<sup>2011</sup> *NBS Boland Bank v One Berg River Drive* 1999 (4) SA 928 (A).

<sup>2012</sup> A similar inference may be drawn in relation to the *obiter dicta* of the then Appellate Division in *Genac Properties v NBC Administrators* 1992 (1) SA 566 (AD).

<sup>2013</sup> Discussed in para 5.2.7.2(C)).

Article 55 of the CISG also does not dispel any of the uncertainties and problems that surround the standard of reasonableness.<sup>2014</sup> Instead, the uncertainties are compounded.<sup>2015</sup> The uncertainty regarding the question of onus compounds these uncertainties. Furthermore, in settling on a median price or a price that approximates the median, it overlooks the fact that buyers and sellers, in general, have different approaches to contracting,<sup>2016</sup>

Since the CISG was intended to represent a compromise between existing legal traditions,<sup>2017</sup> the fact that Article 14(1) with its restrictive view was retained despite consistent opposition from, amongst others, the United States of America,<sup>2018</sup> is indicative that the restrictive view is well supported in national legal regimes.<sup>2019</sup> More importantly, the retention of Article 14(1) is also indicative that the restrictive view is not viewed as being unsound in the context of the legal and economic order of the modern world.

In addition, there is a recognition and acceptance that the laws of countries may differ because of differences in national and economic policy considerations. Hence, the acceptance of the constitutional and policy considerations for the retention in South Africa of the objective ascertainable requirement in relation to price determination<sup>2020</sup> finds support in the CISG acknowledgement.

The concerns expressed at an international level by developing countries in relation to both the open terms provision and the possibility of interpretations of CISG provisions favouring developed countries suggest that similar concerns, at a national level (in South Africa) in

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<sup>2014</sup> See the discussion in chapter 4.

<sup>2015</sup> The reference to a market price to fill price gaps creates lacunae in that it ignores that a market may not exist or that contractants may operate in different markets or that there may be no uniformity in the market. For example, there may be different approaches in the countries of the respective contractants or there may be divergent practices in different countries.

<sup>2016</sup> Furthermore, in setting a price that approximates the median, the question arises whether it is going to be set above or below the median and by how much will or should it deviate from the median.

<sup>2017</sup> Amato (1993) 13 *Journal of Law and Commerce* 2. See also MacQueen & Zimmermann *Edinburgh Studies in Law Volume 2 European Contract Law Scots and South African Perspectives* (2006) 21-22.

<sup>2018</sup> Farnsworth 'Formation of Contract' 3.7.

<sup>2019</sup> Objections to the notion of open-term contracts were raised by Socialist countries as well as by some countries with a civil law system. Mistelis (2005-2006) 25 *Journal of Law and Commerce* 287.

<sup>2020</sup> See the discussion in chapter 4.



relation to the recognition of a reasonable price and rental and a unilaterally determined price and rental, are not without merit. The context of the skewed socio-economic reality in South Africa lends further weight to these concerns.

The absence of a general duty of good faith<sup>2021</sup> suggests that the drafters did not consider good faith as playing a significant role in the context of the open-price provision. The assumption is borne out by the fact that the *Malev Airlines* court evidently did not consider the notion of good faith to constitute sufficient grounds for invoking the provisions of Article 55 of the CISG. Hence, the recognition of the duty of good faith does not, in itself, justify the adoption of the standard of a reasonable as suggested by the *obiter dicta*.

The conclusion is that the provisions of the CISG do not support the reception into South African of the contracts of sale at a reasonable price or at a unilaterally determined price.

### 5.2.7.3 UNIDROIT Principles of International Commercial Contracts (2004)

#### (A) Introduction

The UNIDROIT Principles of International Commercial Contracts (2004), (UNIDROIT Principles),<sup>2022</sup> which have global application and which are intended to promote uniformity,<sup>2023</sup> only apply to business to business transactions,<sup>2024</sup> and may, in general, only be used where the contractants have agreed to its application.<sup>2025</sup> Its application is not

<sup>2021</sup> Bell New Challenges 27. Article 7(1) simply provides that in interpreting the convention, regard must be had to “the need to promote...the observance of good faith in international trade.” Lookofsky explains that the rule of interpretation was formulated as a substitute for a “*substantive* good-faith provision as some drafters of the CISG feared that a rule that required “good faith *conduct* might lead to “uncertainty”: Lookofsky *Understanding the CISG* 37 n187. It must be noted, however, that since the CISG does not generally deal with questions of validity, most questions which fall under the heading of validity such as fraud, duress, mistake or unreasonableness or unconscionability of contract terms fall to be resolved according to domestic or non-CISG (1980) rules: Lookofsky *Understanding the CISG* 22.

<sup>2022</sup> Text available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>

<sup>2023</sup> Article 1.6 of the UNIDROIT Principles. See also Bonell & Peleggi ‘UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: A Synoptical Table’ (2004) 9 *Uniform LR* 315, 334, hereafter Bonell & Peleggi (2004) 9 *Uniform LR* 315.

<sup>2024</sup> Busch *The Principles* 15 and 16.

<sup>2025</sup> It may also be applied where the contractants have not specified a specific contractual regime that will be applicable. Preamble of the UNIDROIT Principles.

limited to contracts of sale as in the case of the CISG.<sup>2026</sup> Hence it covers lease agreements as well.

## (B) Reasonable price and rental

The following provisions have a bearing on the position relating open price terms:

### Article 5.1.7

- (1) "Where contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

### Article 2.1.13

"Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form."

The open price provisions do not apply where the contract contains a contractual provision for the determination of a price<sup>2027</sup> or where a contractant insisted on agreement on the price as a precondition for the validity of the contract and no such agreement is reached.<sup>2028</sup> Hence, an agreement to agree does not invalidate the contract.<sup>2029</sup> In the absence of such contractual provision or precondition, the presumption is that price is the price generally charged at the time of the conclusion of the contract<sup>2030</sup> in the particular trade for a similar transaction under similar circumstances. The presumption may be rebutted by proving that it does not satisfy the test of reasonableness which forms part of Article 5.1.7. Where a trade price does not exist, a reasonable price will be implied.<sup>2031</sup> Hence, the UNIDROIT Principles adopt a two-stage approach<sup>2032</sup> in that a reasonable price is implied only if there is no trade price.

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<sup>2026</sup> Kröll *et al* *The United Nations Convention* 236.

<sup>2027</sup> Article 5.1.7(1).

<sup>2028</sup> Article 2.1.13. A similar position prevails in the other jurisdictions under discussion in this chapter. See also Beale *et al* *Ius Commune Casebooks* 327.

<sup>2029</sup> Article 2.1.14 provides that the contract remains valid where the contractants agree to agree on a term (price) and do not subsequently reach such agreement. The provisions of Article 5.1.7(1) would then come into operation.

<sup>2030</sup> See para 5.2.2.2(D)(i)(b) above.

<sup>2031</sup> Article 5.17(1). See also Gabriel *Contracts for the Sale of Goods: A Comparison of US and International Law* (2009) 189-190.

<sup>2032</sup> This is unlike Article 55 of the CISG which was discussed in para 5.2.7.2(B)(i) above, and Article 6:104 of the PECL which is discussed in para 5.2.7.4(C)(i) below.

The problems created by Article 14(1) of the CISG<sup>2033</sup> are not replicated in the UNIDROIT Principles where Article 2.1.2 simply requires (i) that the offer must be sufficiently definite to permit conclusion of the contract by mere acceptance by the offeree, and (ii) that it must indicate the offeror's intention of being bound in the event of acceptance by the offeree.<sup>2034</sup> Thus, it leaves out reference to price (and quantity) as determinants of definiteness,<sup>2035</sup> obviating the contradiction that characterises Articles 14(1) and 55 of the CISG.<sup>2036</sup>

Article 5.1.7(1) is supplemented by the provisions of Article 4.8 that provides that in supplying an omitted term that is appropriate in the circumstances, the court shall have regard for the intention of the contractants, the nature and purpose of the contract, good faith and fair dealing as well as reasonableness. However, the UNIDROIT Principles does not contain a definition of reasonableness unlike the PECL (Article 1:302).<sup>2037</sup>

#### (C) Past practice and usage as factors in determining a reasonable price and rental

In determining a reasonable price, the contractants are bound by any practice they established between themselves,<sup>2038</sup> or by a usage that is "widely known and regularly observed"<sup>2039</sup> in international trade by parties in the particular trade concerned except where the application thereof would be unreasonable."<sup>2040</sup> The exception provides the court with considerable leeway in not enforcing a trade usage where one is proven.

The discretionary aspect coupled with the absence of guidelines for the interpretation of the notion of reasonableness in the context of price, confirms the aspects of uncertainty and

<sup>2033</sup> Discussed in 5.2.7.2(B)(ii) above.

<sup>2034</sup> Kröll *et al The United Nations Convention* 236.

<sup>2035</sup> The probable explanation for this is that the provisions of Article 2.1.2 are not confined to contracts of sale: Kröll *et al The United Nations Convention* 236.

<sup>2036</sup> Article 2:201(1) of the PECL, discussed below, is phrased in terms similar to that of Article 2.1.2 of the UNIDROIT Principles. The PECL is also not limited to contracts of sale - Article 1:101(1).

<sup>2037</sup> Discussed in para 5.2.7.4(C)(ii) below. See also Bonell & Peleggi (2004) 9 *Uniform LR* 336.

<sup>2038</sup> Article 1.9(1).

<sup>2039</sup> Article 1.9(2). Article 1:105(2) of the PECL is less restrictive in its interpretation in that it simply requires a usage that is "considered generally applicable in the same situation as the parties." See para 5.2.7.4(C)(ii) below.

<sup>2040</sup> Article 1.9(2).

indeterminateness associated with the standard of reasonableness as discussed in chapter 4 above.

It would appear from the foregoing that the contract would be invalid where the subject-matter of the sale is rare or unique so that an application of the above considerations proves futile in the establishment of a price.<sup>2041</sup> Such a result accords with the position in South Africa.<sup>2042</sup>

#### (D) Unilateral discretionary power to determine price and rental

Article 5.1.7(2) provides that where the price that was unilaterally determined is found to be manifestly unreasonable, a reasonable price shall be substituted notwithstanding anything to the contrary in the contract. Thus the discretion is not unfettered. The reasonableness of unilaterally determined price would be subject to scrutiny in terms of Article 1.7 which places a non-derogable duty of good faith and fair dealing in international trade on contractants. However, applying the duty to conditions in international trade is problematic in that standards may vary from one business sector to another. There may also be a variance within one sector depending on the socio-economic and political environment within which the trade sector operates and also on the differences in size and technical skills that occur within different components that make up the trade sector.<sup>2043</sup>

#### (E) Conclusion

As in the case of the jurisdictions discussed earlier, some of the mechanisms used to determine a reasonable price and rental have their basis in the South African requirement of objective ascertainability.<sup>2044</sup> The mechanisms for determining a reasonable price and rental simply serve as guidelines, as in the case of the other jurisdictions, and courts may deviate from these. The guidelines, such as there are, provided for the determination of a

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<sup>2041</sup> *Asse-Hijmar Serie Bijzondere* 218.

<sup>2042</sup> See the discussion in chapter 1 para 1.4.2.2(C)(ii)(a) and in chapter 4 paras 4.3.4.3(C) and (D).

<sup>2043</sup> *UNIDROIT PRINCIPLES* 17-21.

<sup>2044</sup> For example, reference to trade usage or earlier practices between the contractants.

reasonable price and rental, do not dispel any of the reservations expressed in chapter 4 in relation to a reasonable price and rental.

#### 5.2.7.4 Principles of European Contract Law (2003)

##### (A) Introduction

The genesis<sup>2045</sup> of the Principles of European Contract Law (2003) may be traced to a dinner held after a symposium on the harmonisation of private international law in 1974 in Copenhagen when Professor Ole Lando<sup>2046</sup> had a “brainwave: to harmonise the substantive of Europe in order to integrate the common market. This led to the formation of the Commission on European Contract Law that commenced its activities in the early 1980’s. The result of their deliberations is the Principles of European Contract Law (2003).<sup>2047</sup> The provisions of the PECL are intended to be applied as general rules of contract law in the European Union.<sup>2048</sup> The PECL, which is localised to Western Europe, applies to all transactions: business to business; consumer transactions and private contracts.<sup>2049</sup> Hence, it covers contracts of lease as well and, like the CISG and UNIDROIT Principles (2004), it is intended to promote uniformity.<sup>2050</sup> The application of the PECL (2003) is not peremptory and will apply only between contractants who have agreed to its application.<sup>2051</sup>

##### (B) Reasonable price and rental

The provisions dealing with that deals with open price contracts reads:

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<sup>2045</sup> The history is drawn from Busch *The Principles*.

<sup>2046</sup> Professor of Private International Law at the Copenhagen Business School.

<sup>2047</sup> Hereafter referred to as the PECL. Text available at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_part1\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_part1_og_II.htm)

<sup>2048</sup> Article 1:101(1) and all text references to the PECL are from Bonell & Peleggi (2004) 9 *Uniform LR* 358.

<sup>2049</sup> Busch *The Principles* 15 and 16; Boele-Woelki (1996) 1 *Uniform LR* 656.

<sup>2050</sup> Article 1:106. See also Bonell & Peleggi (2004) 9 *Uniform LR* 334.

<sup>2051</sup> Article 1:101(2). It may also apply where the contractants have not agreed to a specific system of (national or international) law (Article 1:101(3)) or where the chosen system of law does not provide a solution (Article 1:101(4)). It serves as a source of law within the European Union. Busch *The Principles* 29.

Article 6:104

“Where the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price.”

Article 6:105

“Where the price or any other contractual term is to be determined by one party and that party’s determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted.”

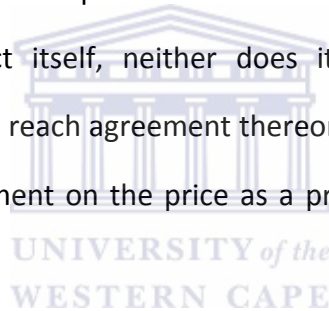
Article 1:302

“Reasonableness

Under the Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contracts, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.”

In order to avoid the voidance of a contract for lack of certainty, a reasonable price is used where the contract does not contain a price or a method of determining the price.<sup>2052</sup> The principle applies to all contracts where a price has to be paid for the counter-performance of the other contractant, inclusive of lease agreements.

However, it does not apply where the price can be deduced directly or indirectly, explicitly or implicitly, from the contract itself, neither does it apply where the contractants negotiated the price but failed to reach agreement thereon.<sup>2053</sup> It also does not apply where a contractant insisted on agreement on the price as a precondition for the validity of the contract.<sup>2054</sup>



### (C) Factors considered in determining a reasonable price and rental

#### (i) Normal price

Article 6:104 is said to create a presumption that the contractants in such a situation intended to be bound by the normal price.<sup>2055</sup> However, there is no explanation of what constitutes a normal price. Is it, for example, the normal price of the seller or is it the normal price charged by traders in the particular type of goods?

#### (ii) Good faith, usages and practices

<sup>2052</sup> Article 6:104. This simple provision advances a less complicated approach to judicial power to maintain a contract which stands in contrast to Article 55 read with Article 14(1) of the CISG, and Article 5.1.7 of the UNIDROIT Principles See also Busch *The Principles* 268.

<sup>2053</sup> Busch *The Principles* 268.

<sup>2054</sup> Article 2:103(2). Similar provisions are contained in the other jurisdictions under discussion.

<sup>2055</sup> Busch *The Principles* 268, with reference to Comment B to Article 6:104.

Article 1:302 provides that the standard to be used in determining the reasonableness of the price is that which a person acting in good faith in the same situation as the contractants, would consider to be reasonable. In particular, the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account. The article is not peremptory insofar as it concerns usages and practices. A court is by no means limited to those factors as is evident from the fact that the Article requires the court to have regard for the nature and purpose of the contract and the circumstances of the case.<sup>2056</sup>

A usage may be described as a course of dealing or a line of conduct which has gradually manifested itself in a trade or industry.<sup>2057</sup> However, the usage does not apply where it would be unreasonable to do so.<sup>2058</sup> This gives the court, as in the case of Article 1.9(2) of the UNIDROIT Principles (2004), a wide discretion to disregard established usages.

A practice refers to a precedent established as a result of a sequence of previous conduct under a particular transaction between the contractants.<sup>2059</sup> Contractants are bound by their practices as well as by any usages to which they have agreed.<sup>2060</sup> The application of such practices and usages, unlike usages to which the contractants have not agreed, are not subject to disqualification on the basis of unreasonableness.<sup>2061</sup> This is peculiar because practices may also be unreasonable. The fact that contractants had followed a particular practice in the past should not give rise to an irrebuttable presumption of reasonableness. The possibility that a practice could have arisen as a result of factors such as unequal

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<sup>2056</sup> See also Busch *The Principles* 62.

<sup>2057</sup> Comment A to Article 1:105 of the PECL in Busch *The Principles* 40.

<sup>2058</sup> Article 1:105(2). It will be considered to be unreasonable, for example, where the usage prevails only at the place of business of one of the contractants. Busch *The Principles* 41. Article 1:105 reads:

“Art. 1:105: Usages and Practices

(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves.  
(2) The parties are bound by usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.”

<sup>2059</sup> Comment A to Article 1:105 of the PECL (2003) in Busch *The Principles* 40.

<sup>2060</sup> Article 1:105(1).

<sup>2061</sup> Article 1:105(1).



bargaining power which would render the practice unreasonable, cannot be discounted. A practice will take precedence over a usage (not specifically agreed upon between the contractants) in the event of a conflict between the two.<sup>2062</sup>

#### (D) Unilateral discretionary power to determine the price and rental

Article 6:105 permits unilateral discretionary power to settle the price or any contractual term subject to the peremptory proviso<sup>2063</sup> that the determination must not be grossly unreasonable. In the event of gross unreasonableness, the court plays a gap-filling role by substituting the price with a reasonable price, notwithstanding anything to the contrary in the contract.<sup>2064</sup> In deciding whether the determination is grossly unreasonable, a court is guided by the provisions of Article 1:302 of the PECL (2003) discussed above.<sup>2065</sup> Though peremptory, the inescapable conclusion is that the proviso places the burden of proof and the transaction costs on the “disempowered” contractant who, as suggested in chapter 4 above, in most cases would be the contractant with the weaker bargaining power.<sup>2066</sup> Furthermore, the high onus of “gross unreasonableness”<sup>2067</sup> serves to caution that courts must apply the article with “great reserve.”<sup>2068</sup> Hence, a finding of unreasonableness may occur only by way of exception.

#### (E) Conclusion

The contents of the notion of reasonableness in the PECL (2003) resemble, in the main, those of the jurisdictions and the international instruments discussed earlier. In the main, the PECL provisions on reasonableness and the interpretation thereof do not contribute to a better understanding of reasonableness in that they do not address the issue of the

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<sup>2062</sup> Busch *The Principles* 41.

<sup>2063</sup> The proviso may not be excluded by agreement between the contractants. Busch *The Principles* 270.

<sup>2064</sup> Busch *The Principles* 270.

<sup>2065</sup> See the discussion in para 5.2.7.4(C)(ii) above.

<sup>2066</sup> The adverse implications thereof were discussed in chapter 4 above.

<sup>2067</sup> Emphasis added.

<sup>2068</sup> Busch *The Principles* 270.

indeterminateness of the standard of reasonableness<sup>2069</sup> in any meaningful manner. Hence, they do not give expression to the principle of certainty, with attendant adverse consequences for beneficial reliance on contract law as an obligation-creating mechanism.

### 5.3 Conclusion: comparative and international law

The presumption that a valid contract exists despite the absence of agreement on a price is jurisprudentially unsound in that the absence of agreement provides good evidence that contract has not been concluded. The presumption is also problematic in that it promotes uncertainty.<sup>2070</sup> Contractants who have not expressly made their agreement conditional on agreement on a price may be surprised to find that they are contractually bound. Aside from the evidentiary problems that the presumption gives rise to,<sup>2071</sup> a contractant who is thus surprised would have to bear the burden of proof and the costs of litigation to disprove the existence of the contract.

The indeterminacy and the casuistic nature of the enquiry may generate such a large number, range, and diversity of precedents that it reduces the social and economic utility of the precedents.<sup>2072</sup> The aforementioned could lead to a distrust of role of contract law as an obligation-creating mechanism and consequentially to an erosion of the function of the law as a regulatory institution.

Some of the meanings accorded to the concept of reasonableness by the other jurisdictions and by the international instruments either already find expression in South African contract law<sup>2073</sup> whilst some others may be accommodated under the umbrella requirement of objective ascertainability, which, as already explained, is sufficiently elastic to incorporate

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<sup>2069</sup> See chapter 4 para 4.3.

<sup>2070</sup> See paras 5.2.2.2(D)(i)(a) and 5.2.3.2(A) above.

<sup>2071</sup> See para 5.2.2.2(D)(i)(a) above.

<sup>2072</sup> See para 5.2.2.2(D)(i)(a) above.

<sup>2073</sup> For example, the seller's usual price, or a formula, or a price list the price according to the seller's price list from time to time in para 5.2.2.2(B)(v)(c) above.

considerations like usages and practices.<sup>2074</sup> Where the concept of reasonableness is not anchored by objective factors such as price lists, practices and usages,<sup>2075</sup> the international law and practice do not provide any succour to someone seeking to overcome the problems associated with the standard of reasonableness in relation to price and rental determination.<sup>2076</sup> The developments in South Africa concerning the place of the constitutional values of dignity, equality and freedom in the wider body of law, and, in contract law in particular, render the indeterminateness of a reasonable price problematic.<sup>2077</sup> The indeterminateness that may lead to the imposition of terms that were not anticipated or contemplated would result in the relegation of the uniqueness of the individual contractants and would fall foul of the values of dignity and *ubuntu* that infuse contractual law in the constitutional era.<sup>2078</sup> The indeterminateness would also fall foul of the policies that have inspired constitutional legislation such as the Consumer Protection Act.<sup>2079</sup>

The inclusion in the CISG of both open-price terms (Article 55) and closed-price terms (Article 14(1))<sup>2080</sup> and the exclusion of the important issue of the validity of contracts from the jurisdiction of the CISG constitute acknowledgment that constitutional and/or macro socio-economic and/or political considerations determine the content of national law. They also constitute an admission that the one system is not better than the other. The compromise to include Article 14(1) suggests that the closed-price model has considerable support in the international community.<sup>2081</sup> Thus, the argument, on constitutional and

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<sup>2074</sup> For example, the “course of performance” and the “course of dealing” may be accommodated under the rubric of an implied price. See further the conclusions reached in paras 5.2.2.2(E)&(F) above.

<sup>2075</sup> See para 5.2.2.2(D)(ii)(b)-(h) above.

<sup>2076</sup> See chapter 4 para 4.3

<sup>2077</sup> Similar developments are evident in the international arena. See the discussion of the national and international developments in this regard in chapter 4 para 4.2.4.2(A).

<sup>2078</sup> See the discussion in chapter 4 para 4.2.4.2(A)(iii). Dignity also plays a role in the international arena. See chapter 4 para 4.2.4.2(A)(ii).

<sup>2079</sup> See chapter 3.

<sup>2080</sup> See para 5.2.7.2(B) above.

<sup>2081</sup> See chapter 5 paras 5.2.7.2(F)&(G). The closed price model was included despite sustained pressure from America against its inclusion.

policy grounds, for the retention in South Africa of the objective ascertainability requirement in relation to price determination,<sup>2082</sup> has support in international law.

The discussion also reveals that the open term provisions in the United States of America, England, and under the CISG are limited to contracts of sale and do not apply to contracts of lease. The probable reason for this is that the purpose of the open term provisions in those jurisdictions is to serve the commercial markets.<sup>2083</sup> It is submitted that another reason may be located in the public policy considerations underpinning the socio-economic rights to shelter and family life. These rights enjoy recognition in the South African Constitution<sup>2084</sup> as well as in international instruments.<sup>2085</sup> The exclusion of rental from the being determined by the standard of reasonableness on these policy bases would orientate contract law, using Pound's idiom, from a body of devices that principally serve the interests of the markets to an instrument geared towards obtaining general social ends.<sup>2086</sup>

Finally, and in light of the prominent role that good faith plays in most of the jurisdictions under discussion, it is necessary to comment on its role. The duty, grounded as it is in the facts of the particular case, does not, and indeed, it cannot,<sup>2087</sup> provide much in the way of criteria that could have precedent value in the determination of a reasonable price. Furthermore, when viewed in the context of the meanings ascribed to a reasonable price in those jurisdictions that recognise a general duty of good faith and those that do not,<sup>2088</sup> the absence of such duty neither resolves nor exacerbates the indeterminateness of a

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<sup>2082</sup> See chapter 4.

<sup>2083</sup> As suggested by Pound (1931) 44 *Harvard LR* 708.

<sup>2084</sup> Sec 26 of the Constitution discussed in chapter 3 paras 3.3 and 3.8.1 and in chapter 4 paras 4.2.4.2(A)(i) 4.5.

<sup>2085</sup> The International Covenant on Economic, Social and Cultural Rights of 1966. Part III thereof recognizes socio-economic rights such as the rights to family life, adequate food, clothing and housing. Section 2(1) obliges member states are to take measures for the progressive realization of the rights contained in the Covenant. South Africa signed the Covenant in 1994 but has not yet ratified it. [http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtmsg\\_no=IV-3&src=TREATY](http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtmsg_no=IV-3&src=TREATY), accessed on 23 November 2012.

<sup>2086</sup> Pound (1931) 44 *Harvard LR* 708 in an essay critical of the then emerging New Realist movement.

<sup>2087</sup> From a jurisprudential perspective, it is not meant equipped to do so. See also Van der Merwe *Contract* 196.

<sup>2088</sup> A general duty exist in the all the jurisdictions except for England (para 5.2.3.2(B)(i)), and the CISG (5.2.7.2(G)).

reasonable price. The discussion confirms that good faith does not address the issue of certainty. What it does is to serve as a standard against which conduct of the contractants may be judged.<sup>2089</sup> Be that as it may, the contention is that the recognition of a reasonable price or a unilaterally determined price is one to be decided as a matter of principle and policy based on the constitutional values of dignity, equality and freedom. The duty of good faith is seen as supporting this conclusion.<sup>2090</sup>

In summary, the legal provisions in the different jurisdictions referred to by the SCA in the *obiter dicta*<sup>2091</sup> as well as in the international instruments examined, do not resolve or provide guidelines that would address the problems associated with the standard of reasonableness outlined above.<sup>2092</sup> The legal provisions and international instruments also do not address the constitutional, jurisprudential and policy deficiencies of replacing the requirement of agreement on the *essentialia* of price and rental with the standard of reasonableness. In the absence of any meaningful contribution in this respect, it is submitted that the legislative instruments discussed in this chapter do not provide any incentive for the adoption in South African law of the standard of reasonableness as a mechanism for the determination of price and rental. Hence, the international experience does not justify a departure from the common law rule that requires certainty in that the price must be ascertained or objectively ascertainable *ex facie* the contract.

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<sup>2089</sup> Van der Merwe *et al Contract* 277-278; Hutchison *et al Contract* 28-32.

<sup>2090</sup> See the discussion in chapter 4, para 4.2.4.4 and chapter 6 paras 6.5-6.6.

<sup>2091</sup> *NBS Boland Bank v One Berg River Drive and others* 1999 (4) SA 928 (SCA) and *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (AD)

<sup>2092</sup> See chapter 4 para 4.3.

## Chapter 6

### Conclusion and recommendations

#### 6.1 Introduction

The central theme of this thesis, which has its genesis in *obiter dicta* in *NBS Boland Bank v One Berg River Drive and others Deeb and another v ABSA Bank Ltd Friedman v Standard Bank of South Africa Ltd*<sup>2093</sup> and in *Genac Properties JHB (Pty) Ltd v NBC Administrators CC*<sup>2094</sup> concerns the question whether South African law should recognise the validity of contracts of sale and lease where the contractants had agreed on a reasonable price and rental respectively, or on a price or rental to be unilaterally determined by one of them.

The thesis's aims is to determine whether a development in our law that recognises the validity of a contract of sale and lease at a reasonable price and rental, respectively, or at a unilaterally determined price and rental would be contrary to public policy as informed by the constitutional values of dignity, equality and freedom and whether such a development would promote consensus and certainty of the law which are foundational principles of the South African law of contract.

With the above in mind, this chapter outlines and justifies my conclusions with reference to the preceding chapters. It will also recommend whether or not the *status quo* should be retained and whether the current provisions in our law relating to price are sufficiently refined and developed to give expression, not only, to the needs of commercial reality, but more importantly, to the democratic values of human dignity, equality and freedom (including freedom of contract) that underpin the Constitution of the Republic of South Africa 1996.<sup>2095</sup> In arriving at a conclusion, it is necessary to review the findings in the preceding chapters.

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<sup>2093</sup> 1999 (4) SA 928 (SCA), hereafter *NBS Boland Bank* 1999 (4) SA 928 (SCA).

<sup>2094</sup> 1992 (1) SA 566 (A), hereafter *Genac Properties* 1992 (1) SA 566 (A).

<sup>2095</sup> Hereafter the Constitution.

## **6.2 Background issues**

The first chapter served to introduce various aspects of legal principle and policy that influence the question of law under investigation, as well as to lay the groundwork for the issues to be discussed in the chapters that followed it.

The chapter introduced the concepts of certainty and freedom of contract (that includes contractual discretionary powers), the inter-relationship between the two and their bearing on the question of law. The discussion also entailed an examination, as does the whole thesis, of the values underlying the Constitution and how these impact on the principles of freedom and certainty of contract and on the question of law.

No conclusions were drawn regarding the question of law. The discussion established that freedom and certainty of contract have a very fundamental role in the determination of the question of law. It also established that the tension between the two (freedom and certainty of contract) insofar as they may give rise to different conclusions regarding the question of law, had to be resolved with reference to public policy as informed by the values espoused by the Constitution.

## **6.3 The role of certainty and freedom in the South African law of contract**

Chapter 2 explored more extensively the current status and development in South African common law of the principles of certainty and freedom of contract with specific reference to contractual discretionary powers.

The discussion revealed that the fundamental analytical framework of the South African law of contract is centred on the “voluntary choices of individuals or more specifically, the voluntary assumption of obligations” and that the function of contract law “is conceived as principally the facilitation of voluntary choices by giving them legal effect.”<sup>2096</sup>

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<sup>2096</sup> Pretorius ‘The basis of contractual liability (1) Ideologies and approaches’ (2005) 68 *THRHR* 253, 253 & 260.



Pre-constitutional jurisprudence evidenced an erosion of the values of fairness, equity and good faith coupled with a reversion to “a libertarian view of the world.”<sup>2097</sup> Not only has this reversion received further impetus in the post-constitutional setting, but the Supreme Court of Appeal, has also not responded to the constitutional imperative to promote the spirit, purport and objects of the Bill of Rights when developing the law (of contract). The Court’s judgments display a “hostility, not only to constitutional values, but also to broader concerns of equity and fairness...”<sup>2098</sup>

The South African approach to freedom and sanctity of contract is criticized on the basis that the practice of law should also involve a process of constructive interpretation that seeks to achieve procedural and substantive fairness, and that takes cognizance of prevailing socio-economic circumstances. Should the law do so, the role of the constitutional values of dignity, equality and freedom in the determination of contractual obligations and the resolution of contractual disputes is enhanced and the attainment of justice is facilitated.

It was concluded that the strong classical contract law influence, grounded as it is in the principles of freedom and sanctity of contract, on the South African law of contract militates against the reception into our law of the notion of contracts of sale and lease at a reasonable price and rental respectively, or at a unilaterally determined price and rental as proposed in the *obiter dicta*. The conclusion is informed by: (i) the presumptive consensual nature of South African contract law that binds contractants regardless of considerations of reasonableness and fairness and that ignores challenges to contractual validity that are not founded on the grounds of improperly obtained consensus; (ii) court decisions led by the Supreme Court of Appeal that

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<sup>2097</sup> *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and another* 2008 (2) SA 375 (C) para [30]. The doctrine expounded individual freedom and liberty and informed the classical contract law approach to freedom and sanctity of contract. See chapter 2 para 2.2.1.

<sup>2098</sup> Bhana and Pieterse ‘Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited’ (2005) 122 *South African Law Journal* 865, 865.

have “virtually elevated into a constitutional value”<sup>2099</sup> the idea that public policy requires the enforcement of contracts; (iii) an approach that ignores the “statutory erosion”<sup>2100</sup> of classical contract law by public interest legislation;<sup>2101</sup> (iv) court decisions that have ignored<sup>2102</sup> the Constitutional Court’s redefinition of public policy<sup>2103</sup> as being informed by *ubuntu* and the constitutional values of dignity, equality and freedom, and as incorporating the notions of fairness, justice and equity, and reasonableness and the need to do simple justice between individuals; (v) an approach that ignores unequal bargaining power and that, in the interest of certainty, pays scant regard for unconscionability as a determinant of contractual validity; (vi) the Supreme Court of Appeal’s aversion to the recognition of good faith as a general underlying principle of contractual interpretation; and (vii) its reluctance to utilise constitutional values in the evaluation of contractual validity.<sup>2104</sup>



<sup>2099</sup> Naudé and Lubbe (2005) 122 *SALJ* 441, 443.

<sup>2100</sup> Lubbe and Murray *Contract* (1983), 26.

<sup>2101</sup> See, for example, the legislation discussed in chapter 3.

<sup>2102</sup> For example, *Bredenkamp and Others v Standard Bank of SA Ltd* (appeal) 2010 (4) SA 468 (SCA). It will be recalled that in chapter 1 para 1.3.3 it was explained that there are three cases involving the Applicant and that the Applicant’s name was spelt differently in two of the three cases. The precautionary measures described in chapter 1 para 1.3.3 to avoid confusion between the cases are also followed in this chapter and are repeated here for the sake of clarity. The spellings of the Applicant’s name as per the case citations will be retained and to avoid any confusion between the cases, the cases will hereafter be referred to as follows: *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ); *Breedenkamp* (return date) 2009 (6) SA 277 (GSJ); and *Bredenkamp* (appeal) 2010 (4) SA 468 (SCA). See also *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 651.

<sup>2103</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC), hereafter *Barkhuizen* 2007 (5) SA 323 (CC). See also *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ) and *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), hereafter *Hoffmann* 2001 (1) SA 1 (CC). The cases are discussed in chapter 1 para 1.3.3 and in chapters 2 and 4. See also *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) discussed in chapter 2 para 2.3.2.2(A).

<sup>2104</sup> See, for example, *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

#### 6.4 The role and impact of consumer protection legislation on the principles of certainty and freedom of contract

Chapter 3 dealt with the impact of three legislative enactments<sup>2105</sup> on the principles of freedom and certainty of contract. The three pieces of legislation protect consumer rights by imposing limitations on freedom of contract. The aim was to determine the extent to what the acceptance of the *obiter dicta*<sup>2106</sup> would run counter to the jurisprudential basis and the public policy objectives of the enactments. A related objective was to determine whether public policy considerations can operate in harmony with contract law principles such as freedom, sanctity and certainty of contract.

The legislation was found to exemplify the constitutional imperative, evident in the post-constitutional ethic,<sup>2107</sup> to foster socio-economic reforms for the transformation of the South African society into a just and egalitarian one; one founded on the constitutional values of dignity, equality, and freedom. Whilst the legislation recognise contractual autonomy as the appropriate social and legal mechanism to regulate one's own affairs, they require that autonomy be exercised with restraint to promote a constitutional and/or a social and/or an economic objective.<sup>2108</sup> The latter involves the principle of paternalism in terms whereof there is interference by the state with the autonomy of another person. The policy basis for the interference is that it protects the person interfered with, or that it is in the public interest. The result is that practical content is given to the constitutional values of dignity, equality, and freedom. The foregoing is founded on the view that the creation of contractual obligations is as

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<sup>2105</sup> The Consumer Protection Act 68 of 2008; the National Credit Act 34 of 2005 and the Rental Housing Act 50 of 1999.

<sup>2106</sup> The *obiter dicta* proposed the validity of contracts of sale and lease at a reasonable price and rental respectively or a unilaterally determined price and rental.

<sup>2107</sup> Examples of other legislation which display this ethic are the Basic Conditions of Employment Act 75 of 1997 and the Broad-Based Black Economic Empowerment Act 53 of 2003 which also address the inequality in bargaining power between suppliers and consumers.

<sup>2108</sup> The same recognition is evident in court decisions, for example, in *Barkhuizen* 2007 (5) SA 323 (CC); *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ) and in *Hoffmann* 2001 (1) SA 1 (CC), discussed in chapter 1 para 1.3.3.

much a result of policy as it is of the intention of the contractants at work. The discussion found that public interest considerations which have clear policy imperatives can be utilised in harmony with existing principles of contract law and may even serve to strengthen these principles.<sup>2109</sup>

In summary, the policy considerations underlying the legislative enactments that give expression to the contractual principles of consensus and certainty; that recognise the duty of good faith, and that concretises the constitutional values of dignity, equality and freedom, support the rejection of the proposals to confer validity on contracts of sale and lease at a reasonable and rental respectively, or at a unilaterally determined price and rental. Such contracts would give effect to the classical theory of contract law based on an adversarial system in terms of whereof a contractant is free to bind himself/herself even if it were to his/her detriment. This consequence would be contrary to the communitarian orientation of the legislation which is in line with the constitutional imperative to effect socio-economic reform for the creation of a just and egalitarian society based on constitutional values, including those of dignity, equality and freedom. Thus the legislation support the retention of the regime that imposes a duty to agree on an ascertained or objectively ascertainable price as a paternalistic restraint favouring extra-consensual normative control over party autonomy and the classical contract law orientation that characterises South African contract law.

## **6.5 Constitutional, jurisprudential and policy imperatives informing the role and function of the *essentialia* of price and rental**

Chapter 4 concerned the question whether a reasonable price or rental, or a unilaterally determined price or rental can be said (i) to be the result of a voluntary choice; (ii) to promote

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<sup>2109</sup> See chapter 3 paras 3.6.10, 3.9 and 3.10.

certainty; and (iii) to be reflective of the constitutional, jurisprudential and policy imperatives that inform the *essentialia* of price and rental.

The review of the constitutional, jurisprudential and policy imperatives of *essentialia* in relation to price and rental determination, and of the role of the courts in this connection, revealed that the creation of legally enforceable obligations must be informed by the constitutional values of dignity, equality and freedom. The communitarian orientation of the *essentialia*<sup>2110</sup> that promotes consensus and certainty and that prevents disputes and counteracts possible abuses, transforms the *essentialia* from being sterile validity requirements into repositories of the constitutional values of dignity, equality and freedom, thus making them perfect vehicles for the implementation of these constitutional values in practice. These values act as a constitutional restraint on individualism and render agreements for a contract of sale and lease at a reasonable price and rental respectively, or at a unilaterally determined price or rental invalid as being contrary to public policy. Hence, such agreements fall foul of the communitarian function of *essentialia*. In addition, unilateral determination of price and rental would impinge on the non-arbitrary and non-capricious requirement of the law by slanting the apportionment of risk and contractual power in favour of the contractant who commands the discretionary power.

In light of the proposition that price and rental can shape or cripple the future of an organisation or individual, the uncertainty regarding the eventual price or rental, engendered by the indeterminateness of the standard of reasonableness, could stifle effective and comprehensive planning which may negate the purpose of legislation aimed at reducing the levels of indebtedness. The result could be an insidious deterioration in the trust in, and respect for, contract law as an obligation-creating mechanism. This may be exacerbated by the

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<sup>2110</sup> In chapter 4 para 4.2.5 where it was explained that communitarianism, as does *ubuntu*, stresses the value of connection: members of society are viewed as being interdependent on one another and who place their needs and cares on par with those of others.

transaction costs of conducting litigation and by what could be a burdensome process for the courts to conduct elaborate enquiries to determine the reasonableness of the price and rental.<sup>2111</sup>

The uncertainty, the inability to plan, the adverse impact on the levels of indebtedness, the challenges of accessing the courts and the skewed apportionment of risk raise serious policy concerns which go to the root of the constitutional values of dignity, equality and freedom.

Thus, the principles informing the constitutional, jurisprudential and policy imperatives demand a rule-based approach to the essential of price. Within a rule-based paradigm, the essential of price contains both duty-imposing as well as power-conferring functions. Both functions confirm the theory that agreement on price and rental goes to the root (essence) of the contract and has policy relevance<sup>2112</sup> and that, accordingly, the right connected thereto, is inalienable. The duty-imposing function places an absolute duty on contractants to negotiate and reach agreement on the price and rental and promotes certainty in that price and rental has to be either ascertained or objectively ascertainable. In requiring both contractants to be engaged in the creation of a contractual obligation which speaks to the essence of their contract, the duty-imposing function promotes certainty and at the same time gives expression to the contract law requirements of free choice and consensus. In thus giving effect to the constitutional imperative to infuse constitutional principles and values (such as dignity, equality and freedom) in contract law, it is in alignment with public interest legislation<sup>2113</sup> as well as

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<sup>2111</sup> The time, energy, costs, effort, and risks associated with litigation limit access to courts. Contractants may also feel intimidated by the seller, especially if it is a large corporation or by the court process itself or by his/her lack of knowledge of the legal process.

<sup>2112</sup> Agreement promotes predictability, allowing the public to tailor their (the public's) conduct accordingly. The resultant certainty inspires confidence in contract as an obligation-creating mechanism. Certainty allows for planning and increases the likelihood that private activity will follow a desired pattern.

<sup>2113</sup> For example, the consumer protection legislation discussed in chapter 3. Other examples are: **Family Law:** the Recognition of Customary Marriages Act 120 of 1998, the Civil Union Act 17 of 2006; **Labour Law:** Basic Conditions of Employment Act 75 of 1997; Employment Equity Act 55 of 1998; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; **Property Law:** the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Constitutional Court decisions.<sup>2114</sup> The power-conferring function allows the contractants the freedom to negotiate a price and rental within the parameters of objective ascertainability. The exercise of the power would be subject to scrutiny by the standards of reasonableness, fairness and good faith which would serve as controlling mechanisms to prevent unconscionable or exploitative conduct. The duality<sup>2115</sup> in the nature of the *essentialia* of price and rental promotes, not only, informed choice, consensus and certainty, but also, both procedural as well as substantive fairness.

The recognition of a duty to negotiate in good faith as per the *obiter dicta* in the *Everfresh Market Virginia v Shoprite Checkers (Pty) Ltd*<sup>2116</sup> is in line with the conclusion that both contractants should determine the price and rental: the duty informs and underpins the duty-imposing component of the *essentialia* of price and rental. The duty would be incumbent on **both** contractants which is nothing more and nothing less than the conclusion in this thesis, namely, that the determination of the price and rental should not be left to the discretion of one of the contractants, neither should it be left to the imaginary reasonable person. The imposition of a duty to negotiate in good faith on **both** contractants promotes the contract law requirements of consensus (that incorporates informed choice) and certainty.

In summary, a rule-based approach that requires an agreement from which the price and rental is objectively ascertainable without further reference to the contractants gives effect to equity based jurisprudence in that it advances the constitutional principles of dignity, equality and freedom, inclusive of *ubuntu* as defined by both Mokgoro J<sup>2117</sup> and Ackerman J,<sup>2118</sup> which principles are incorporated in the control mechanism of public policy as redefined by the Constitutional Court in the *Barkhuizen* case.

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<sup>2114</sup> See chapter 4 para 4.2.4.2.

<sup>2115</sup> Referring to the duty-imposing and power-conferring components.

<sup>2116</sup> 2012 (1) SA 256 (CC), hereafter, *Everfresh* 2012 (1) SA 256 (CC).

<sup>2117</sup> *S v Makwanyane* 1995 (3) SA 391 (CC), para [308]. See chapter 4 para 4.2.4.2(A)(ii)

<sup>2118</sup> *Ferreira v Levin* 1996 (1) SA 984 (CC). See chapter 4 para 4.2.4.2(A)(ii)



## 6.6 The notions of a reasonable price or rental and one determined unilaterally in comparative and international perspective

The recognition of open price terms in the international jurisdictions<sup>2119</sup> is based on an assumption that a valid contract exists despite the absence of agreement on a price. The assumption is criticised for being jurisprudentially unsound and for creating uncertainty. In addition, the standard of reasonableness which requires an examination of the facts of each case could result in a large number of precedents with a corresponding reduction in certainty and the social and economic utility thereof.<sup>2120</sup> The combined effect of the foregoing could be a reduction in the utility and value of contracts as an obligation-creating mechanism.

The review of the international jurisdictions also revealed that some of the interpretations of reasonableness are located in the requirement of objective ascertainability. However, where this is not the case, the international experience does not solve the problems associated with the indeterminateness of the standard of reasonableness as a controlling mechanism in relation to price and rental. Instead, the international experience confirms the conclusion reached in chapter 4 that the indeterminateness creates uncertainty and undermines the consensual aspect of contract law. The erosion of the principles of consensus and certainty at the expense of one of the contractants would diminish that contractant's right to dignity, equality and freedom, rights that infuse contract law and the wider body of law in the constitutional era.<sup>2121</sup>

The duty of good faith which features prominently in the international contract law landscape by its very nature does not address the issue of certainty. It serves, at best, as a standard against which conduct is measured<sup>2122</sup> and hence it does not resolve the problems associated

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<sup>2119</sup> United States of America, England, Scotland, Germany and the Netherlands as well as in international instruments, namely, the United Nations Conventions on Contracts for the International Sale of Goods, UNIDROIT Principles of International Commercial Contracts (2004), and the Principles of European Contract Law.

<sup>2120</sup> See chapter 5 paras 5.2.2.2(D)(i)(a), 5.2.3 and 5.4.

<sup>2121</sup> Dignity also plays a defining role in the international arena. See chapter 4 para 4.2.4.2(A).

<sup>2122</sup> Van der Merwe *et al Contract* (2012) 169.

with the indeterminateness of a reasonable price. This is borne out by the fact that the meanings ascribed to a reasonable price do not materially differ in those jurisdictions that recognise a general duty of good faith and those that do not.<sup>2123</sup> The duty also does not mitigate the fact that the standard of reasonableness in relation to price and rental does not place the contractants in a position of formal, procedural and substantive equality insofar as both risk and recourse is concerned. The exercise of good faith lies within the discretion and control of the empowered contractant. In the event of a dispute, the disempowered contractant would be saddled with the burden of proof and the transaction costs of challenging the price so determined.<sup>2124</sup> Thus, the duty of good faith would not save the constitutional values of dignity, fairness and equality as core elements of the *essentialia* of price and rental, from being emasculated by the standard of reasonableness.

The international experience also does not address the constitutional, jurisprudential and policy deficiencies of coupling the requirement of agreement on the *essentialia* of price and rental with the standard of reasonableness. In the absence of any meaningful contribution in these respects, it is submitted that the international experience cannot serve as authority for the implementation of the notion of a reasonable price and rental in the South African law of contract.

Further support for the retention of the current position in South Africa may be found in the international compromise that led to the inclusion in the CISG of both Article 55 (open-price term) and Article 14(1) (closed-price term). The compromise constitutes an acknowledgment that conformity is not an inviolable principle and that rules of law are determined by constitutional and/or macro socio-economic and/or political considerations in each jurisdiction, and that the one (open-price term) is not necessarily better than the other (closed-price term).

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<sup>2123</sup> A general duty exist in the all the jurisdictions except for England (chapter 5, para 5.2.3.2(B)(i)) and the CISG (5.2.7.2(G)).

<sup>2124</sup> The disempowered contractant will probably be the one having the weaker bargaining power and may not be able to carry the transaction costs.

The compromise also proves that the closed-price term model is well supported in many countries. Furthermore, the acknowledgement<sup>2125</sup> that an open-price provision may contradict national policy directions such as those that underpin macroeconomic government plans<sup>2126</sup> supports the conclusion that the recognition of the standard of reasonableness in relation to price and rental would run counter to the constitutional imperatives for socio-economic reform and the policy considerations in consumer protection legislation designed to give effect to these imperatives.<sup>2127</sup> The recognition of a contract of sale and lease at a reasonable price and rental respectively, or at a unilaterally determined price or rental may be perceived as impeding such reform.

Hence, the retention of the *status quo* does not mean that South Africa would be “out of step with modern legal systems”<sup>2128</sup> because the retention of the *status quo* is defensible on the basis of international law and practice<sup>2129</sup> and on the grounds of existing contract law principles<sup>2130</sup> and on constitutional grounds and is reflective of the policy considerations underpinning public interest legislation.<sup>2131</sup>

## 6.7 Overall conclusion

“Sherlock Holmes and Dr Watson go on a camping trip. They set up their tent, have a modest repast, and go to sleep. In the middle of the night, Holmes wakes Watson up and asks him,

<sup>2125</sup> That led to the compromise to include both Articles 14(1) and 55 in the CISG. See chapter 5 para 5.2.7.2(B).

<sup>2126</sup> See chapter 5 paras 5.2.7.2(B)(ii) and 5.2.7.2(B)-(F).

<sup>2127</sup> Another example relating to the law of property are the imperatives in section 25 of the Constitution which are intended to simultaneously protect existing property rights whilst at the same time permitting legislative reforms with the aim of correcting historical imbalances of property and wealth. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is an example of legislation aimed at promoting security of tenure. Other examples are *The Extension of Security and Tenure Act (ESTA)* 62 of 1997, the *Interim Protection of Informal Rights Act* 31 of 1996 and *The Communal Properties Association Act* 28 of 1996.

<sup>2128</sup> As suggested in *NBS Boland Bank* 1999 (4) SA 928 (SCA) para [16].

<sup>2129</sup> See the inclusion in the CISG of Article 14(2) regarding closed price terms (chapter 5 para 5.2.7.2(B)(ii)), and of Article 4(a) which places the requirements for the validity of a contract outside of the scope of the CISG (chapter 5 para 5.2.7.2(E)(iii)) to accommodate national interests.

<sup>2130</sup> For example, freedom of contract, consensus and certainty.

<sup>2131</sup> See the discussion in chapter 3.

‘What do you see?’ Watson looks up and sees the night sky and tells Holmes so. ‘What does it mean?’ Holmes asks. Pondering this deep question, Watson answers, ‘It means the universe is vast and mysterious and our knowledge limited. It means that we can only understand what we can observe and that - Holmes interrupts him. ‘No, you idiot,’ he says. ‘It means someone has stolen our tent.’<sup>2132</sup>

The story illustrates that the truth in the obvious is often overlooked; likewise in contract law. Freedom is often equated with non-regulation of conduct.<sup>2133</sup> The truth that is often overlooked is that freedom, including freedom of contract, functions best in a robust regulatory environment backed up by the rule of law.<sup>2134</sup> John Locke observed that ‘where there is no Law, there is no Freedom.’<sup>2135</sup> In other words, freedom is enabled by law and without law, one cannot have freedom.<sup>2136</sup> Hence, the imperative is to regulate contractual relationships to ensure that human relationships, on all levels,<sup>2137</sup> comport with minimum standards that are compatible with the norms and expectations of a free and democratic society.<sup>2138</sup>

In contract law, the rules of contract, *inter alia*, the *essentialia* of price and rental set the minimum standards for a regulatory framework that best promotes the values of a free and democratic society based on dignity, equality and freedom. They represent the distillate and wisdom of legal choices that have evolved over the centuries about the protections that civilians have a right to expect when entering the contractual domain and the risks associated therewith. In doing so, they promote individual choice within the framework of the law.<sup>2139</sup>

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<sup>2132</sup> Singer ‘Subprime: Why a Free and Democratic Society Needs Law’ (2012) 47 *Harvard Civil Rights-Civil Liberties Law Review* 141, 141-142, hereafter Singer (2012) 47 *Harvard Civil Rights-Civil Liberties LR* 141.

<sup>2133</sup> See chapter 2 paras 2.2.1 and 2.2.2.

<sup>2134</sup> See chapter 3 paras 3.9 and 3.10.

<sup>2135</sup> Singer (2012) 47 *Harvard Civil Rights-Civil Liberties LR* 144.

<sup>2136</sup> See chapter 4 paras 4.2.1-4.2.3.

<sup>2137</sup> Be it personal, social, economic, business, or legal.

<sup>2138</sup> Singer (2012) 47 *Harvard Civil Rights-Civil Liberties LR* 143-144. The consumer protection legislation discussed in chapter 3 are illustrative of this imperative. See also chapter 4 paras 4.2.1-4.2.3.

<sup>2139</sup> Singer (2012) 47 *Harvard Civil Rights-Civil Liberties LR* 149.

The *exceptio doli generalis* and the doctrine of *laessio enormis* no longer form part of our law. However, their philosophical underpinnings as tools of equity cannot be overstated and a revival thereof is to be discerned in the consumer protection legislation.<sup>2140</sup> The redefinition of public policy in *Barkhuizen*<sup>2141</sup> is confirmation that the fundamental rights and the values of the Constitution find expression in the concept of public policy. Thus, in the words of Van Huyssteen,<sup>2142</sup> “matters of policy and socio-economic factors can no longer be ignored and passed over as being the exclusive domain of the legislature [when courts are engaged] in the process of finding a fair balance between the interests of the parties...”

In respect of the duty of good faith the submission is that good faith serves as a justification for the duty-imposing aspect of the *essentialia* of price and rental that requires both contractants to jointly participate in the determination of an ascertained or objectively ascertainable price or rental. Thus, the duty to participate gives expression to the constitutional values of dignity, equality and freedom. The role of these values in the contract law arena was recognised by the Constitutional Court when it cautioned that the notion of sanctity of contract must be tempered by considerations of morality and public policy as discerned from the values embodied in the Constitution, and especially the Bill of Rights.<sup>2143</sup> A contract that provides for a reasonable price or rental or for a unilaterally determined price or rental deprives the disempowered contractant from participation in the good faith negotiations<sup>2144</sup> to arrive at a price or rental; this runs counter to the imperatives of public policy as redefined and as reflected in public interest legislation examined earlier. The recognition of a general duty of

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<sup>2140</sup> See chapter 3.

<sup>2141</sup> 2007 (5) SA 323 (CC).

<sup>2142</sup> Van Huyssteen *et al Contract Law in South Africa* (2012) para [26].

<sup>2143</sup> *Barkhuizen* 2007 (5) SA 323 (CC), para [30] discussed in chapter 1, para 1.3.3 and in chapters 2 and 4 above.

<sup>2144</sup> One of the values of negotiation is that they serve to reveal otherwise unobtainable information about personal preferences and economic opportunities that may be valuable in the process of allocation and acceptance of contractual obligations and the associated risks, and, in the process, they promote economic or allocative efficiency. Murphy *et al Studies in Contract Law* (2003), 27-28.

good faith that seems imminent in light of the *obiter dicta* in the *Everfresh* case supports this conclusion.

In evaluating the discussion and conclusions reached in the preceding chapters, it is submitted that a development that recognizes a reasonable price or rental or one that is determined unilaterally, is neither reflective of current socio-economic policies as represented by the consumer protection legislation and case law,<sup>2145</sup> nor is it conducive to bringing justice any closer to the people. Equity may require modification of a rule where such rule causes hardship,<sup>2146</sup> but the discussion has shown that no hardship is caused by the adherence to the generality of the rule that the price must be ascertained or objectively ascertainable. On the contrary, hardship is more likely in the event of a unilateral discretionary power to settle a price or rental or an agreement to a reasonable price or rental. It is, therefore, submitted that equity is not advanced by discarding the characterisation of the requirement that the price or rental must be ascertained or objectively ascertainable as a rule, and replacing it with the standard of reasonableness. Instead, equity is advanced by the certainty, clarity, transparency that results from the classification of the requirement as a rule.

The totality of arguments presented above lead to the conclusion that the *obiter dicta* in the *NBS Boland Bank* and in the *Genac Properties* cases<sup>2147</sup> which advocate the recognition of contracts of sales and leases at a reasonable price and rental respectively, and at a unilaterally determined price or rental, are indefensible in law and undesirable as a matter of policy and practice.

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<sup>2145</sup> *Barkhuizen* 2007 (5) SA 323 (CC) (chapter 1 para 1.3.3); *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) (chapter 1 para 1.3.3); *Affordable Medicines Trust and others v Minister of Health and Others* 2006 (3) SA 247 (CC), (chapter 2 para 2.3.2.2(C)); *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) (chapter 2 para 2.3.2.2(C)); *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) (chapter 2 para 2.3.2.2(C)); *Nyandeni Local Municipality v Hlazo* 2010 (4) 261 (ECM) (chapter 2 para 2.3.2.2).

<sup>2146</sup> *Allen Law in the Making* (1964) 385.

<sup>2147</sup> 1999 (4) SA 928 (SCA) and 1992 (1) SA 566 (AD).

It is indefensible in law in that

- (i) it would be constitutionally unsound, as being against the notion of public policy as redefined by the Constitutional Court.<sup>2148</sup>
- (ii) it would contradict the trend towards the equitable considerations of good faith, fairness and reasonableness playing a more prominent role in decisions on the validity of contractual terms.<sup>2149</sup>
- (iii) it would not promote the principle of *consensus* in its broad, general sense,<sup>2150</sup> between the contractants as required by the authorities.<sup>2151</sup>
- (iv) it would result in the surrender of the freedom to contract at the most basic level in that it would disempower the disempowered contractant from participating in the formulation the price and rental which constitute the essence of the contract.<sup>2152</sup>
- (v) the indeterminateness of the standard of reasonableness in relation to price and rental could complicate the development of a body of precedent, resulting in a reduction in certainty and the ability of contractants to plan their contractual relations.<sup>2153</sup> This could lead to a decline in the confidence in contract as an obligation-creating mechanism and consequently in the respect for, and, confidence in the regulatory function of the law itself.

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<sup>2148</sup> See *Barkhuizen* 2007 (5) SA 323 (CC) discussed in chapter 1 para 1.3.3.

<sup>2149</sup> This trend has emerged under the influence of the Constitution in cases such as *Barkhuizen* 2007 (5) SA 323 (CC) (chapter 1 para 1.3.3); *Hoffman* 2001 (1) SA 1 (CC) (chapter 1 para 1.3.3); *Affordable Medicines Trust and others v Minister of Health and Others* 2006 (3) SA 247 (CC), (chapter 2 para 2.3.2.2(C)); *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) (chapter 2 para 2.3.2.2(C)); *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) (chapter 2 para 2.3.2.2(C)); *Nyandeni Local Municipality v Hlazo* 2010 (4) 261 (ECM) (chapter 2 para 2.3.2.2).

<sup>2150</sup> See chapter 2 para 2.2.2.

<sup>2151</sup> See *Kerr Sale and Lease* (2004) 3–5; *Hosten Introduction* (1995) 702–713; *Hackwil MacKeurten's The Law of Sale of Goods in South Africa* (1984) 4–5.

<sup>2152</sup> See chapter 4 para 4.3.3.3(D).

<sup>2153</sup> See chapter 4 para 4.3.4.



(vi) it would, generally speaking, be detrimental to the interests of the buyer and would run counter to:

- (a) common law protections, such as the implied warranties, that have historically developed to protect the buyer.<sup>2154</sup>
- (b) legislative interventions such as the consumer protection legislation discussed in chapter 3 which, as a matter of law and policy, seek to benefit and protect the consumer.<sup>2155</sup>

From a policy perspective, it is undesirable in that:

- (i) it would run counter to the constitutional imperative to promote socio-economic reforms for the attainment of a just and egalitarian society based on the constitutional values of dignity, equality and freedom as evidenced by public interest legislation.<sup>2156</sup> In this context, and taking into account the UNISA-Momentum report on the persistently high levels of indebtedness despite the provisions of the National Credit Act, it could cause a further spike in the levels of indebtedness and over-indebtedness.
- (ii) it could lead to unnecessary litigation. The proposition is that litigation would be avoided if, at the outset, the contractants manifest their respective positions

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<sup>2154</sup> See chapter 1 para 1.3.1.2(D).

<sup>2155</sup> Despite these and other legislative efforts, Sachs J at para [184] in the *Barkhuizen* case is of the opinion that South Africa lags behind “other parts of the industrialized world” insofar as consumer protection is concerned.

<sup>2156</sup> For example, the consumer protection legislation discussed in chapter 3 above. Other examples are, the Basic Conditions of Employment Act 75 Of 1997 relating, *inter alia*, to wages and working hours and the Broad-Based Black Economic Empowerment Act 53 of 2003 relating to government tenders. Another example, is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the ambit whereof has been extended by the courts so that the common law right of a lessor to summarily evict a tenant and any contractual provision regarding the eviction of a tenant, are subjugated to the provisions of the Act. See *Ndlovu v Ngcobo*; *Bekker v Jika* [2002] 4 All SA 384 (SCA). Such legislation, whilst recognising contractual autonomy, require that it be exercised with restraint to promote a political or social objective. Contractual autonomy becomes the backdrop against which political or social principles of justice have to operate. The latter involves the principle of paternalism in terms whereof interference by the state with the autonomy of another is justified by a claim that the interference is for the protection of the person interfered with or is in the public interest.

regarding the price that should be paid, thereby giving each an opportunity to walk away from the deal if the proposed price is unacceptable as being either too high or too low as the case may be.

- (iii) it could burden the weaker contractant with the burden of proof and the transaction costs of litigation.
- (iv) it could raise questions about the role and function of a court where it determines that a discretion has not been reasonably exercised. The wisdom of a court participating in the contract-creating process is questionable.<sup>2157</sup> According to Lubbe, “judges are, in general, not entitled to supply terms and make contracts where the parties have not indicated their intention clearly.”<sup>2158</sup>

It is undesirable in practice because:

- (i) of the uncertainty surrounding the method of calculating the price and rental.
- (ii) recognition thereof may exacerbate the current unequal bargaining power<sup>2159</sup> that exists between many buyers and sellers and between lessors and tenants.<sup>2160</sup> The possibility exists that clauses to the effect advocated in the two *obiter dicta* may be included in standard form contracts thereby further compromising the buyer and the tenant’s ability to bargain and in the process inhibiting the buyer and the tenant’s freedom to contract. This would negate the policy gains made by the consumer protection legislation discussed in chapter 3.
- (iii) a seller or lessor<sup>2161</sup> may abuse his/her discretionary power and fix a price or rental that exceeds the real value of the commodity secure in the knowledge

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<sup>2157</sup> See the discussion in chapter 4 para 4.4;

<sup>2158</sup> Lubbe & Murray (1983) *Contract* 307.

<sup>2159</sup> The *Barkhuizen* case para [59] confirmed the principle recognised in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) that unequal bargaining power is indeed one of the factors that play a role in the consideration of public policy.

<sup>2160</sup> See chapter 2 para 2.4.4.

<sup>2161</sup> Sellers are usually in the better bargaining position.

that the buyer or tenant may not have the means to engage in costly and/or lengthy litigation.<sup>2162</sup>

In the *Barkhuizen* case, Sachs J expressed a concern that underscores the points made in (ii) and (iii) above. The learned judge's discomfort with standard form contracts and its potential for abuse is evident when he leaves for future consideration the question whether onerous and unilaterally imposed standard-form contracts of adhesion should in general be regarded as offensive to public policy in our new constitutional dispensation.<sup>2163</sup> In the *Breedenkamp* case, the court summarised Sachs J's comments as expressing a concern with "the manner in which large powerful organizations wield oppressive contractual power in a way that allows them to impose onerous and unfair contractual terms on subordinate contractual parties."<sup>2164</sup>

The current provisions in our law relating to the price and the rental are sufficiently refined and developed to give expression, not only, to the needs of commercial reality, but more importantly, to the democratic values of human dignity, equality and freedom (including freedom of contract) that underpin the Constitution.<sup>2165</sup>

In summary, the discussion in this thesis supports the theory that the *Westinghouse* principle that the price must be ascertained or objectively ascertainable is based on a policy judgment that contract law should be certain. The soundness of this judgment is borne out by the constitutional imperative to effect socio-economic reform for the creation of a just and egalitarian society based on the constitutional values of dignity, equality and freedom and the broader legislative policies as evidenced in recent consumer protection legislation.

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<sup>2162</sup> Kerr *The Law of Sale and Lease* (2004) 72.

<sup>2163</sup> Paras [184] and [185].

<sup>2164</sup> *Breedenkamp* (interim interdict) 2009 (5) SA 304 (GSJ), para [56]. See also comments in similar vein in paras [60] and [68].

<sup>2165</sup> Sections 10, 9 and 7(1) respectively of the Constitution.

Furthermore, it is founded on the fundamental principle that contracts are discrete transactions where contractants reach agreement on all material terms at date of contract. Finally, it is based on an aversion to the difficulties in supplying a term on which the contractants had not agreed upon. In this regard, the approach of the courts is reflective of the sensitivities of the delicate interstitial role played by courts.

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