

## *THE USE OF BLACK AND GREY LISTS IN UNFAIR CONTRACT TERMS LEGISLATION IN COMPARATIVE PERSPECTIVE*

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### I INTRODUCTION

The decision by the South African Department of Trade and Industry (DTI) to include general unfair contract terms control in their proposed new consumer protection legislation is a step in the right direction.<sup>1</sup> One important gap in the draft legislation is the lack of a ‘grey list’ of suspect terms which would usually be unfair, a mechanism widely used in unfair contract terms legislation elsewhere.<sup>2</sup> The decision to include a black list of prohibited terms is an improvement over the Law Commission’s proposed Bill of 1998 (which contained no black list).<sup>3</sup> However, comparative research suggests that its reach could have been extended somewhat. Many of the clauses commonly found in black and grey lists elsewhere are not mentioned in the draft South African legislation.

The Law Commission set out some lists in its comparative overview of the use of ‘guidelines’ elsewhere in their 1998 Report, but never considered the mechanism of black and grey lists in their evaluative comments. In the end, they proposed twenty-six ‘factors’ which a court may take into account in determining whether a contract or term is unreasonable, unconscionable or oppressive under the general clause.<sup>4</sup> These guidelines are mainly factors relevant to a wide spectrum of terms, such as ‘the bargaining strength of the parties relative to each other’. However, amongst these, one also finds nine ‘factors’ relating to specific types of terms, such as ‘whether prejudicial time limits are imposed on the consumer’.<sup>5</sup> The Law Commission never considered whether it would be useful to rather include such terms in a grey

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<sup>1</sup> Draft Consumer Protection Bill, 2006, first published for comment in General Notice 418 GG 28629 of 15 March 2006. See also Tjakie Naudé ‘Unfair contract terms legislation: the implications of why we need it for its formulation and application’ (2006) 17 *Stellenbosch LR* (forthcoming).

<sup>2</sup> As will be shown below.

<sup>3</sup> South African Law Commission *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) (1998).

<sup>4</sup> Section 2 of its proposed Bill.

<sup>5</sup> Section 2(k).

list as it is normally understood and used elsewhere, that is, a non-exhaustive, indicative list of terms which are suspect or presumed to be unfair, but may still be fair in the particular circumstances of the case. As a result, they did not consider whether more than nine such terms should be greylisted or blacklisted.

The widespread use of grey and black lists elsewhere and the tremendous support for these mechanisms in international literature<sup>6</sup> present a challenge to the approach taken thus far in South Africa and demand a comprehensive investigation of these mechanisms.<sup>7</sup> Certain authors, writing before the publication of the Law Commission's Report, have supported the use of lists of prohibited and suspect terms, but did not consider this mechanism in any detail.<sup>8</sup>

Accordingly, in the first part of this article, various general issues relevant to such lists will be examined. First, the concept of black and grey lists will be defined, as the somewhat divergent use of terminology in international practice actually identifies three strategies for listing terms. Secondly, the arguments in favour of and against the use of grey and black lists will be considered. Thirdly, different views on the appropriate scope of lists will be discussed, that is, whether they should also cover business-to-business contracts and negotiated terms. Fourthly, consideration will be given to views on how, if at all, a grey list should affect the burden of proof. Thereafter some general principles for drafting lists will be set out. The last part of the article will discuss fourteen categories of terms which are often listed, and should receive the attention of the South African legislature. It is to be hoped that it may also be helpful to legislatures of other countries considering introduction or revision of lists.<sup>9</sup>

Whether or not the South African legislation ultimately includes a grey list, it may be helpful for enforcement bodies and practitioners to know which types of terms are commonly regarded as sufficiently problematic that legislatures in many other systems have been prepared to single them out as either prohibited or usually unfair.

It should be noted that the core of the substantive provisions of unfair contract terms legislation normally consists of a general clause, which grants a power to strike down clauses on the basis of an open standard such as fairness, reasonableness or good faith, as well as a set of guidelines or factors to aid in its application, and then a black and/or grey list. Obviously, when adjudicating the fairness of a contested term, any black list will first be

<sup>6</sup> See notes 22ff below.

<sup>7</sup> Naudé op cit note 1.

<sup>8</sup> Peter Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 215–17; Gerhard Theodor Siegfried Eiselen *Die Beheer oor Standaardbedinge: 'n Regsvergelykende Ondersoek* (unpublished LLD dissertation, University of Potchefstroom, 1988) 434–5. See also Hein Kötz 'Controlling unfair contract terms: Options for legislative reform' (1986) 103 *SALJ* 405 at 415.

<sup>9</sup> Cf, for example, the suggestion by J W Carter & D J Harland *Contract Law in Australia* 4 ed (2002) 551, namely that more certainty would be created if, following the European example, the existing lists of relevant factors in the Australian state and federal legislation were to be supplemented by lists of types of clauses which are to be absolutely or presumptively ineffective.

considered, whereafter any grey list will be considered in the light of the general clause and any guidelines for its application. Non-listed terms could still be struck down under the general clause.

## II TERMINOLOGY

A black list is a list of prohibited terms which are invalid under all circumstances, whereas a grey list is a list of terms which may be unfair, but the final decision depends on the circumstances of the particular case. However, closer examination reveals more than one strategy to draft a grey list, which has caused some disparity in the use of terminology.

The German Civil Code (BGB) contains two lists. One is an extensive black list.<sup>10</sup> The introductory paragraph to the other list, called a 'grey list' by German writers,<sup>11</sup> also provides that the terms listed therein are 'invalid'.<sup>12</sup> The first impression may therefore be that this is rather another black list. A non-German writer has indeed called both lists 'black'.<sup>13</sup> The German 'grey list' only contains items with a particular 'open' or 'evaluative' element in the definition of the listed term itself, such as 'an unreasonably long period', 'an objectively justified reason' or 'a declaration . . . of particular importance'.<sup>14</sup> These factors obviously take into account the particular circumstances of the case, and its description as a 'grey' list therefore seems apt. However, once the judicial evaluation in respect of the individual evaluative element brings a term within the definition in the list, the term is 'invalid' and there is no need or opportunity for recourse to other surrounding circumstances under the general clause. The German grey list does not contain items without evaluative elements in their definition.

Other grey lists, such as that of the EC Unfair Terms Directive,<sup>15</sup> contain both items with evaluative factors and items without. An example of the latter type of item from the grey list of the Dutch *Burgerlijk Wetboek* (BW)<sup>16</sup> is a term 'which wholly or partially exempts the user of the standard term or a third party of a legal duty to pay damages'. Similarly, the grey list of the Model Law for Consumer Protection in Africa of 1996 refers to 'any provision imposing a burden of proof of any matter on the purchaser or user of any goods or services, where the burden would otherwise lie on another

<sup>10</sup> § 309 BGB.

<sup>11</sup> Hans-W Micklitz 'German Unfair Contracts Act and the EC Directive 93/13' in Julian Lonbay (ed) *Enhancing the legal position of the European Consumer* (1996) 173. See also James R Maxeiner 'Standard-terms contracting in the global electronic age: European alternatives' (2003) 28 *Yale Journal of International Law* 109 at 152.

<sup>12</sup> § 308 BGB. The introductory phrase reads as follows: 'In standard business terms, the following terms, in particular, are invalid' (translations throughout by Geoffrey Thomas and Gerhard Dannemann at <http://www.iuscomp.org/gla/statutes/BGB.htm>).

<sup>13</sup> Ewoud Hondius *Standaardvoorwaarden* (1978) 613; idem *Unfair Terms in Consumer Contracts* (1987) 183.

<sup>14</sup> § 308(1), (3) and (6)(a) BGB.

<sup>15</sup> EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC of 5 April 1993 ('the Directive'). As a minimum-harmonization directive, it prescribes a minimum level of protection. See on the status of the Directive's list, art 3(3) and the Recital as well as *Commission of the European Communities v Sweden* Case C-478/99; [2002] ECR I-4147 para 11.

<sup>16</sup> Article 6:237(f) BW (Dutch Civil Code) (my translation).

party to the contract'.<sup>17</sup> Unlike the German provision, this type of grey list does not contain an introductory paragraph invalidating the listed terms, but states that the terms therein 'may be regarded as unfair'<sup>18</sup> or are 'presumed to be unreasonably detrimental',<sup>19</sup> with the implication that, even if a clause corresponds with the description of a term in the list, it may nevertheless be fair in the particular case.<sup>20</sup>

There are therefore three useful techniques when formulating lists. One is to list clauses prohibited outright with no evaluative factors (a black list in the narrow sense). A second is to list clauses with no evaluative factors which are suspect, but may be saved in appropriate circumstances (a grey list). A third 'in-between' technique is to list clauses with evaluative elements reminiscent of the open standards of the general clause, the application of which finally determines whether the clause is prohibited or not.

It probably does not make much practical difference whether the last type of clause is stated to be prohibited, and set out in the same list as prohibited clauses with no evaluative elements (such as in Austria's black list), or set out in a separate list of prohibited clauses (as in Germany), or included in a list of suspect clauses that also contains clauses with no evaluative elements in their definition (such as in the Dutch grey list, or that of the Directive or African Model Law). If the grey list should include the latter type of clause, and I think that it should, it would make more sense to include prohibited terms with evaluative factors in the grey list, as they involve the particular circumstances of the case.

### III THE CASE FOR THE USE OF LISTS OF PROHIBITED AND SUSPECT TERMS

Simply put, black and grey lists enhance the effectiveness of the control of unfair contract terms and they lead to greater predictability.<sup>21</sup> With good reason they have been described by leading international writers as 'of crucial importance'<sup>22</sup> and 'the key element of any attempt to regulate unfair terms'.<sup>23</sup>

Lists increase the chance of the legislation having a fast, real and proactive effect. Self-imposed control is promoted, as businesses are more likely to react spontaneously to unequivocal commands in a black list and to a list of

<sup>17</sup> *Consumer Protection for Africa – Report of the Africa Conference on Consumer Protection, Harare, Zimbabwe, 28 April–2 May 1996* United Nations document ST/ESA/254 (1997). The grey list is set out in the Schedule to the Unfair Contract Terms Rules, an Annex to the Model Law. See s 4(3)(b) of these rules on the status of the list.

<sup>18</sup> Article 3(3) of the Directive.

<sup>19</sup> Article 6:237 BW.

<sup>20</sup> As confirmed in the *Sweden* case supra note 15.

<sup>21</sup> Some of the arguments in this rubric were already mentioned in the summary of the benefits of lists given by Naudé op cit note 1. The present article contains a more in-depth discussion of the entire topic; and it also responds to counter-arguments.

<sup>22</sup> Hondius *Unfair Terms* op cit note 13 at 183.

<sup>23</sup> Giorgio de Nova 'Italian Contract Law and the European Directive on Unfair Terms in Consumer Contracts' (1995) 3 *European Review of Private Law* 221 at 230.

suspect terms, than to a general criterion of unfairness, which may take a long time to work out in practice.<sup>24</sup>

The need for effective, proactive control that is not solely dependant on judicial control is obvious in the light of the costs and risks of litigation, particularly when compared to the small amounts in issue in consumer contracts.<sup>25</sup> In addition, many consumers may not even know of the possibility of challenging terms, and, to protect them, a proactive control paradigm is essential. Court judgments also have limited effect.<sup>26</sup> They only bind the parties thereto. They may not even come to the notice of other businesses and drafters, particularly as cases involving individual consumers may come before the lower courts, whose decisions are not reported. In any event, judicial control always comes too late, after the abuse has already taken place, often for years.<sup>27</sup>

Grey lists strengthen the hands of the bodies empowered to take preventive action when negotiating with less conscientious businesses to stop using unfair terms, decreasing the need for expensive and time-consuming court action.<sup>28</sup> For example, the United Kingdom's Office of Fair Trading (OFT), whose success in eradicating unfair terms is widely admired,<sup>29</sup> clearly considers lists to be useful in their negotiation with businesses.<sup>30</sup> Their system of preventative control operates largely without recourse to the courts. A threat of a grey list being used against a business in injunction proceedings is more likely to spur it into negotiations with the administrative watchdog or consumer organizations (to delete or adapt the contested clause) than a mere reference to an open-ended general clause.<sup>31</sup>

In the absence of lists, it would take a long time for the courts to develop any kind of predictability as to what is unfair.<sup>32</sup> It is obvious that the increased

<sup>24</sup> Geraint Howells 'Good Faith in consumer contracting' in Roger Brownsword, Norma J Hird & Geraint Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 91 at 98; Karl-Heinz Neumayer 'Contracting subject to standard terms and conditions' in Arthur von Mehren (ed) *International Encyclopedia of Comparative Law* vol VII ch 12 (1999) 96–97 (paras 12–96).

<sup>25</sup> Hondius *Standaardvoorwaarden* op cit note 13 at 488; C F C van der Walt 'Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg' (1993) 56 *THRHR* 65 at 75; Maxeiner op cit note 11 at 144.

<sup>26</sup> *Ibid.*

<sup>27</sup> Hondius *Standaardvoorwaarden* op cit note 13 at 488.

<sup>28</sup> The South African Law Commission correctly considered it essential for effective unfair terms control that an administrative body be empowered to take action against businesses by seeking undertakings to delete or amend unfair terms, failing which the administrative body may apply for a prohibitory interdict (injunction).

<sup>29</sup> See, for example, *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* COM (2000) 248 final (hereafter, 'Report from the Commission') at 24.

<sup>30</sup> The OFT *Unfair Contract Terms Guidance* (February 2001) demonstrates how the OFT has used the list to negotiate undertakings with businesses. See also DTI Consumer and Competition Policy Directorate (United Kingdom) *European Commission Review of Directive 93/13/EEC on Unfair Terms in Consumer Contracts: UK Response to the European Commission* (2001) (hereafter 'UK Response') para 17.

<sup>31</sup> The flexibility of a grey list, as used in the UK, has often led to agreement between the OFT and businesses to rewrite a particular listed term so that it does not go beyond the business's justifiable interests and is clear to consumers.

<sup>32</sup> Aronstam op cit note 8 at 215–7; Eiselen op cit note 8 at 430; Kötz op cit note 8 at 415; Hugh Beale 'Legislative control of fairness: The Directive on Unfair Terms in Consumer Contracts' in Jack Beatson & Daniel Friedmann *Good Faith and Fault in Contract Law* (1995) 231 at 246; Ewoud Hondius 'The reception

predictability at an early stage, which lists supply, benefits everyone involved — businesses, drafters of standard terms, consumers considering challenging terms, bodies empowered to bring preventive proceedings, and courts.<sup>33</sup>

The more specific the rules, the easier it is for a business to know what is required,<sup>34</sup> and which risks it must bear or insure against or shift onto the consumer in a fairer manner.<sup>35</sup> Listing also increases the chance that rewriting of standard terms would be a once-off expense, as a grey list gives increased guidance to drafters as to the types of clauses that should be treated with caution.<sup>36</sup> If certain clauses are deemed so unfair in all situations to warrant blacklisting, this at least assures businesses that all their competitors are in exactly the same position.<sup>37</sup>

Judicial officers may find their task of reaching and motivating decisions on unfairness easier where they have a suspect list to draw on.<sup>38</sup>

It is therefore not surprising that lists of prohibited and/or suspect terms are found in many laws across the world, and that there is overwhelming support for their use in the international literature.<sup>39</sup> In 2001, after six years of experience with the EC Directive's grey list, the UK Government pointed out that almost all respondents to their consultation paper on the implementation of the Directive, from all sectors, said that the list is useful and should be retained.<sup>40</sup> The European Commission agreed in 2000 that the list provides useful guidance to everyone involved.<sup>41</sup> Comparative lawyers

of the Directive on Unfair Terms in Consumer Contracts by member states' (1995) 3 *European Review of Private Law* 241 at 247; Maxeiner op cit note 11 at 153; Hugh Beale 'Unfair terms in contracts: Proposals for reform in the UK' (2004) 27 *Journal of Consumer Policy* 289 at 304. Cf Carter & Harland op cit note 9 at 551.

<sup>33</sup> Beale (2004) 27 *Journal of Consumer Policy* 289 op cit note 32 at 304.

<sup>34</sup> Howells op cit note 24 at 98

<sup>35</sup> Beale 'Legislative control of fairness' op cit note 32 at 246.

<sup>36</sup> Hondius *Standaardvoorwaarden* op cit note 13 at 615; Hondius *Unfair Terms* op cit note 13 at 230.

<sup>37</sup> Beale 'Legislative control of fairness' op cit note 32 at 246.

<sup>38</sup> Hondius *Standaardvoorwaarden* op cit note 13 at 615.

<sup>39</sup> Most European countries have either a black list or a grey list, or both (see *Report from the Commission* op cit note 29 at 17 for details). The grey list of the Model Law for Consumer Protection in Africa (op cit note 17) replicates the list in the Zimbabwean Consumer Contracts Act 6 of 1994. Other countries with lists include Brazil (Consumer Protection Code of 1990), Thailand (Unfair Contract Terms Act, BE 2540 (1997)) and Japan (Consumer Contract Act 129 of 2001). Certain clauses are prohibited in the Australian Trade Practices Act of 1974, although grey lists have not been used there. See also, apart from the writers cited in previous footnotes in this section, Susan Bright 'Winning the battle against unfair contract terms' (2000) 20 *Legal Studies* 331 at 349; Peter Dyer 'Implementation of Directive 93/13/EEC in Sweden' in European Commission *The 'Unfair Terms' Directive, Five years on: Evaluation and future perspectives, Brussels Conference 1–3.7.1999* (1999) (hereafter 'European Commission Brussels Conference') 261 at 265; Nikos Tzortzopoulos 'Practical implementation of Directive 93/13/EEC in Greece' in European Commission *Brussels Conference* 281 at 285; *Opinion of the Economic and Social Committee on the 'Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts'* OJ 2001/C 116/25 at C 116/121 (hereafter 'EESC 2001 Opinion'). Various other European writers discuss the lists of the Directive and their systems without specifically pointing out the advantages of this mechanism, but they clearly accept the merits thereof. See, for example, Elizabeth MacDonald *Exemption Clauses and Unfair Terms* 2 ed (2006) 249 ff.

<sup>40</sup> *UK Response* op cit note 30 para 17. The respondents included representative business respondents, such as the Confederation of British Industry, consumer groups, legal respondents, such as the General Council of the Bar, academics and enforcement bodies, such as the OFT (see Annex 1 to the document).

<sup>41</sup> *Report from the Commission* op cit note 29 paras 24–30.

have also claimed that the lack of effectiveness of certain laws in practice had been partly due to the absence of black and grey lists in those legal systems.<sup>42</sup>

The most common objection against a grey list is that it may undermine the level of protection that would otherwise be available, as courts may regard unlisted terms as unimpeachable.<sup>43</sup> The Working Committee of the South African Law Commission insisted on only a general clause with no guidelines of any kind (and, by implication, no lists), because of the danger of courts considering themselves bound exclusively by those guidelines.<sup>44</sup> However, the Working Committee did not discuss and evaluate comparative experience with the use of guidelines and lists and was also opposed to any system of abstract or preventive control, proposing only judicial control over contracts with individual consumers.<sup>45</sup> It gave no reasons for this stance, which clearly ignores the inherent insufficiency of judicial control as the sole control paradigm.

The Law Commission rejected the Working Committee's proposal in their final Report and included a chapter on an Ombud with preventative powers and twenty-six factors or guidelines, nine of which are reminiscent of a grey list.<sup>46</sup> Its justification for guidelines was that

'no preventative action is possible without guidelines and that informed self-control by drafters of standard and model contracts, action by representative bodies, negotiations with a view to settling disputes, etc, are all heavily dependant upon there being a large measure of predictability regarding the question of what will be acceptable and what not in regard of contracts.'<sup>47</sup>

Indeed, any danger that judicial control will be compromised by the use of lists, despite clear drafting to prevent that, is 'balanced out' by the more serious danger that effective, proactive, self-imposed control, as well as preventative control, which are not dependant on judicial control, would be compromised if there are no lists.<sup>48</sup> Speculation that grey lists would reduce consumer protection in court proceedings could just as well be countered by speculation that, in the absence of a grey list, there is a danger that conservative judicial officers would not vigorously use the open standard in a general clause, without any further more direct indications as to when, at the very least, they must have good reasons *not* to pronounce a clause unfair.

The concern that courts may limit their control to listed clauses simply highlights the need to spell out in simple, clear language that the list is a minimum or non-exhaustive list, so that other clauses not mentioned therein

<sup>42</sup> Maxeiner op cit note 11 at 122 in respect of the USA and Hondius *Unfair Terms* op cit note 13 at 178 in respect of French and Danish law before implementation of the Directive. Cf also Hondius *Unfair Terms* op cit note 13 at 207.

<sup>43</sup> This argument is mentioned, but not supported, by Eiselen op cit note 8 at 431, in the *Report from the Commission* op cit note 29 at 10, and by Neumayer op cit note 29 at 97.

<sup>44</sup> *Unreasonable Stipulations in Contracts and the Rectification of Contracts* South African Law Commission Working Paper 54 Project 47 (1994) at vii, 31–2.

<sup>45</sup> *Ibid*, and at iv and 7. The Working Committee was prepared to invite comment on preventative control by an administrative body, however (at 7).

<sup>46</sup> Section 2.

<sup>47</sup> Report op cit note 3 at vii, 168.

<sup>48</sup> Cf *ibid* at 162 on guidelines.

may also be unfair.<sup>49</sup> An explanatory memorandum should preferably be published with the legislation, in which the impossibility of enumerating all the types of clauses that may be unfair in different types of contract is emphasized.<sup>50</sup>

It is ironic that opponents of a grey list seem to imply that courts will not possess the ability to determine that they are not bound exclusively by lists or guidelines, despite clear wording to that effect, yet assume that courts have the ability to apply the general clause in a manner sensitive to the circumstances of each particular case.<sup>51</sup>

It is also significant that the OFT has taken action against a number of other commonly occurring terms that do not directly correspond to those in the UK grey list.<sup>52</sup> It is to be hoped that in South Africa the National Consumer Commission and perhaps consumer organizations will be similarly in the forefront of eradicating unfair terms, given that many consumers lack the resources and knowledge to challenge unfair terms. These bodies would, like the OFT, know full well that the grey list is non-exhaustive and does not allow a *contrario* reasoning in respect of unlisted clauses, and would vigorously put this view to a court. German courts have also used the general clause to pronounce unlisted clauses unfair in appropriate cases.<sup>53</sup>

The South African Working Committee's very short Bill was also recently supported by Jaco Barnard (without a comparative study of unfair terms control and without reasons why only a judicial-control paradigm is favoured).<sup>54</sup> Barnard mentions the same objection as the Working Committee to guidelines,<sup>55</sup> but in the main he seems to be critical of the mere idea of any 'rules' or 'categories' in this context, which courts could use to hide behind 'a claim of neutrality', as opposed to them making a reasoned value judgment in the circumstances of each case.<sup>56</sup> He states that legislation should be 'as open-ended as possible' because

'each time a court is faced by a question whether a contract should be enforced or not, it should be guided in its interpretation and decision by the relational, the collective and the transformative as opposed to a mechanical application of precedent. What is needed is real value judgments in stead of

<sup>49</sup> See text at n 133 ff below.

<sup>50</sup> Law Commissions in the UK also proposed that an explanatory memorandum be published with the legislation which they propose should replace the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. See Law Commission for England and Wales & Scottish Law Commission *Unfair Terms in Contracts – Report on a reference under section 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005) (hereafter 'English and Scottish Law Commissions Report').

<sup>51</sup> Cf the criticism of the Working Committee's objection by Liberty Life at 161 of the final report op cit note 3.

<sup>52</sup> OFT *Unfair Contract Terms Guidance* (February 2001) Introduction and Parts III and IV. See also Hugh Beale (ed) *Chitty on Contracts; Vol I: General Principles* 29 ed (2004) 924–5; MacDonald op cit note 39 at 245–6.

<sup>53</sup> BGHZ 82, 21 is an example.

<sup>54</sup> Alfred Jacobus Barnard *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (unpublished LLD dissertation, University of Pretoria 2006) 241.

<sup>55</sup> *Ibid* at 204.

<sup>56</sup> *Ibid* at 240–1.



claims of neutrality. It is because of this concern with particularity that I believe that legislation in this context should be as open-ended as possible.<sup>57</sup>

However, he focuses only on the insufficient paradigm of judicial control,<sup>58</sup> and, in addition, it must be said that the use of non-exhaustive guidelines and a grey list by a court cannot be equated with the 'mechanical application of precedent' and does not preclude a decision guided by 'the relational, the collective and the transformative' at all. A properly drafted non-exhaustive grey list by definition makes it clear that a decision as to whether a clause is unfair involves a value judgment in regard to fairness in the particular circumstances of the case, always taking into account the overriding general clause, which typically refers to open standards such as reasonableness and good faith. However, when a clause does fall within a grey or black list, there is a greater chance that a business would cease to rely on it or remove it voluntarily.

Barnard seems to be influenced by the view that 'in the law of contract individualism links up with a preference for the rule form and altruism with a preference for the law in the form of standards,'<sup>59</sup> which apparently leads him to be suspicious of anything other than 'open standards' in the context of contractual fairness. It is interesting to note that Stewart Macaulay, another writer who warns against formalism's predilection for rules, and who also generally favours open standards to facilitate context-sensitive value judgments, has recognized that a principled stand in favour of open standards only is problematic.<sup>60</sup> He states that

'it is also true that in some situations more formality and relatively clear default rules may be justified. . . . Perhaps paradoxically another area [where this is the case] might be consumer transactions where one side almost certainly will not be represented by lawyers [in concluding contracts]. Clear rules here might cut the costs of consumers seeking remedies; consumers can seldom afford to battle about reasonableness and unconscionability when the product in issue cost only a few thousand dollars.'<sup>61</sup>

In contrast to Barnard's criticism is the criticism of grey lists by the 'European Consumer Law Group', before finalization of the Directive, namely that such lists 'may be interpreted too individualistically and procedure-oriented,' which leads them to favour absolute prohibitions in a black list only.<sup>62</sup> This is not a convincing reason to jettison the grey-list technique as a supplement to a black list. As long as judges are aware of the possibility of striking out terms on the basis of generalized substantive unfairness in appropriate cases, they should be allowed to also have recourse to the facts of an individual case, including the manner or 'procedure' in which the contract was concluded.<sup>63</sup> The advantage of a grey list is that it can

<sup>57</sup> Ibid.

<sup>58</sup> He does not address the Law Commission's argument that judicial control is not sufficient in the consumer context, and that preventative control benefits from the use of guidelines.

<sup>59</sup> Op cit note 54 at 211.

<sup>60</sup> 'The real and the paper deal: Empirical pictures of relationships, complexity and the urge for transparent simple rules' (2003) 66 *Modem LR* 44.

<sup>61</sup> Ibid at 64.

<sup>62</sup> European Consumer Law Group 'Opinion on the proposal for a Council Directive on Unfair Terms in Consumer Contracts' (1991) 14 *Journal of Consumer Policy* 107 at 114.

<sup>63</sup> See Naudé op cit note 1.

include more terms than a black list, increasing the chance of self-imposed control in a wider range of clauses and strengthening the hands of administrative bodies or consumer organizations engaging in negotiations over clauses not covered by the black list. A country with practically no experience of the general control of unfair contract terms (like South Africa) would probably tread carefully when drawing up a black list, and may not feel ready to draw up the kind of extensive black lists found in some European countries. Where there is any doubt as to whether a clause which seems substantively unfair may be justifiable in special circumstances, such an inexperienced country may do well by greylisting the term. Experience can then confirm whether it should be blacklisted, whilst in the meantime such a country garners the advantages for self-control and preventative control of a grey list.

Nordic governments, too, opposed inclusion of the Directive's indicative or grey list in the text of their legislation,<sup>64</sup> but the Directive's grey list was added to the preparatory materials of the legislation, which play an important role in Nordic statutory interpretation.<sup>65</sup> In Sweden the Market Court refers to the list and the Swedish Consumer Agency uses it as a starting point in its negotiations with businesses and organizations.<sup>66</sup> This is reported by a Swedish practitioner, Peter Dyer, without any criticism being raised of reduced consumer protection.<sup>67</sup> Moreover, Ulf Bernitz, a prominent Swedish expert on the control of unfair contract terms, pleads for inclusion of a grey list in the legislation itself.<sup>68</sup> Another reason for the Nordic governments' opposition to inclusion of the grey list in the legislative text itself was the possibility of confusion, as certain terms were already 'outlawed' in their domestic legal orders.<sup>69</sup> However, clear drafting could indicate that terms which are prohibited outright according to other sources of law remain prohibited, or such terms could be blacklisted.

Lastly, the question arises whether it is better to grey-list clauses, rather than merely to refer to such clauses in a list of 'factors' (each time preceded by 'whether') as was done by the South African Law Commission and the Victoria Fair Trading Act 16 of 1999 (Australia).<sup>70</sup> Greylisting is more appropriate because it emphasizes that the listed terms are under substantial suspicion. The effect of placing such clauses in a list of 'factors' is not clear enough. A practical consideration is that a list of general guidelines or factors is also useful,<sup>71</sup> and to include all types of terms which are suspect as factors in such a list as well would make it too unwieldy.

<sup>64</sup> *Sweden case supra note 15 supra*; *Report from the Commission op cit note 29 at 10.*

<sup>65</sup> *Dyer op cit note 39 at 264.*

<sup>66</sup> *Dyer op cit note 39 at 265.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *European Law in Sweden – Its Implementation and Role in Market and Consumer Law* (2002) 234.

<sup>69</sup> *Report from the Commission op cit note 29 at 16.*

<sup>70</sup> Section 32X.

<sup>71</sup> See, for example, s 14(4) of the Draft Unfair Contract Terms Bill in the English and Scottish Law Commissions' *Report op cit note 50 at 135* (hereafter referred to as 'UK Bill').

#### IV SPHERE OF APPLICATION

The proposed South African consumer protection legislation defines 'consumers' widely to include small businesses<sup>72</sup> and all non-juristic persons, including where they act for purposes related to their business.<sup>73</sup> The unfair-terms portion of the legislation also applies without differentiation to negotiated and non-negotiated terms.

The extent to which unfair contract terms legislation should allow review of business-to-business (B2B) contracts and negotiated terms is a controversial and complex question, which cannot be addressed in this article. Nevertheless, I will consider views on the desirability of restricting lists to business-to-consumer (B2C) contracts and non-negotiated terms, even when a legal system decides to allow review of (some) B2B contracts and/or negotiated terms as well.<sup>74</sup> But first five different ways in which legal systems have responded to this issue will be set out.

##### *Five different approaches in international practice*

First, the same list or lists could apply to B2C and B2B contracts and to non-negotiated and negotiated terms, without differentiation in the text of the legislation itself. The black list of the proposed South African legislation applies without differentiation to all types of terms and to the B2B contracts covered by the Bill.

Secondly, some countries' lists apply to B2C contracts only, with B2B contracts being subject to the general clause. This is the case in Germany and the Netherlands, and it is also consistent with the approach of the Principles of European Contract Law (PECL).<sup>75</sup> The PECL's unfair-terms provision is aimed at B2B contracts and private contracts, given that the Unfair Terms Directive already provides for mandatory minimum consumer protection.<sup>76</sup> The PECL includes no black or grey list, but only a general clause plus guidelines for its application.<sup>77</sup> The Official Commentary notes that 'listing terms as being per se unfair in contracts between professionals are generally held to be all but impossible because of the diversity of commercial contracts.'<sup>78</sup> It adds that courts may still find the Directive's list useful, particularly in respect of commercial contracts between small and large

<sup>72</sup> Defined with reference to turnover and asset value.

<sup>73</sup> This was the position in the published version of the draft legislation. There are subsequent indications that the DTI intends to narrow the definition of 'consumer' in the version of the draft legislation that they intend to introduce into parliament, in which case all B2B contracts with small businesses will not be regulated (e-mail from Ms Magauta Mphahlele of the DTI to the author of 22 September 2006).

<sup>74</sup> For the purposes of this discussion, 'consumers' are persons who enter into contracts wholly or mainly for purposes unrelated to their business or profession. A 'non-negotiated term' refers to a term drafted in advance, where the consumer has not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. It therefore includes a term pre-formulated for a specific contract.

<sup>75</sup> Ole Lando & Hugh Beale (eds) *The Principles of European Contract Law: Parts I and II* (2000).

<sup>76</sup> *Ibid* at 266.

<sup>77</sup> Article 4:110.

<sup>78</sup> *Op cit* note 75 at 266.

businesses.<sup>79</sup> As in Germany and the Netherlands, the PECL provides only for review of non-negotiated terms in this article.

A third technique is to stipulate separate lists for B2B and B2C contracts. Portugal has a black and grey list for all types of standard terms (that is, including in B2B contracts),<sup>80</sup> with additional lists which only apply to B2C contracts.<sup>81</sup>

Fourthly, Austria's consumer protection law has a black list which applies to both negotiated and non-negotiated terms,<sup>82</sup> plus an additional black list which applies to non-negotiated terms only.<sup>83</sup>

The proposed Unfair Contract Terms Bill of the English and Scottish Law Commissions is illustrative of a fifth, more complex, approach.<sup>84</sup> The Bill prohibits different terms in respect of consumer contracts, small-business contracts<sup>85</sup> and other B2B contracts, with some overlap. These prohibitions are set out in the different sections dealing with each of these types of contracts. The grey list in Schedule 2 applies to negotiated and non-negotiated terms in B2C contracts,<sup>86</sup> but only to 'standard terms' in respect of small-business contracts. No grey list is proposed for other B2B contracts.<sup>87</sup>

### *B2B contracts*

There are compelling reasons for restricting lists of terms to B2C contracts, even when unfair terms legislation covers B2B contracts as well. Alternatively, the B2C lists, or a different set of lists, could be extended to non-negotiated terms in business-to-small business contracts.

The diversity of commercial transactions requires more flexible treatment than B2C contracts.<sup>88</sup> In the latter context, the balance of inexperience, sophistication, commercial dependence, and bargaining strength is more uniform than in B2B contracts. Some clauses, particularly suitable in commercial transactions, are likely to be unfair in the consumer context, such as mandatory arbitration clauses,<sup>89</sup> and should only be listed in the B2C context. B2C lists tend to have a reflective effect on B2B contracts anyway,

<sup>79</sup> Ibid at 268.

<sup>80</sup> Articles 18 and 19 of Decree-Law No 446/85 of 25 October 1985 on unfair contract terms, as amended by Decree-Law No 220/95 of 31 January 1995.

<sup>81</sup> Articles 21 and 22. See also the EESC 2001 *Opinion* on cit note 39 at C 116/125 which supports this approach.

<sup>82</sup> § 6(1) Konsumentenschutzgesetz (some items with evaluative elements such as those in the German 'grey' list).

<sup>83</sup> § 6(2).

<sup>84</sup> Op cit note 50.

<sup>85</sup> Defined in terms of number of employees.

<sup>86</sup> That is, contracts by natural persons acting outside the scope of their business or profession.

<sup>87</sup> Which is only subjected to limited control. The current position in the UK is that the grey list in the Unfair Terms in Consumer Contracts Regulations ('UTCCR', which largely replicates the Directive) applies to non-negotiated terms in consumer contracts, whereas the Unfair Contract Terms Act, 1977 ('UCTA') prohibits certain clauses in B2C and B2B contracts and subjects certain other types of clauses to a reasonableness standard.

<sup>88</sup> PECL Official Commentary op cit note 75 at 266; Konrad Zweigert & Hein Kötz *Introduction to Comparative Law* 3 ed (translated by Tony Weir) (1998) 344; Hondius *Standaardvoorwaarden* op cit note 13 at 619.

<sup>89</sup> See note 236 below.

particularly in favour of unsophisticated, small businesses, so that it is not imperative for lists to apply to B2B contracts as well. This is the experience in Germany and the Netherlands, where courts have often found terms listed for B2C contracts to be unfair in B2B contracts under the general clause.<sup>90</sup>

### *Negotiated terms*

An advantage of restricting lists to non-negotiated terms is that the lists could be considerably extended.<sup>91</sup> A number of terms that would be unobjectionable if negotiated are suspect when imposed through standard terms.<sup>92</sup>

The Austrian model of one list for all terms and an additional one for non-negotiated terms should also be considered. As noted before, a grey list could be useful in respect of small business contracts, but then it should only apply to non-negotiated terms.

## V THE EFFECT OF A GREY LIST ON THE BURDEN OF PROOF

The Law Commissions in the UK stated quite rightly that the question how greylisting should affect the burden of proof is a difficult one.<sup>93</sup> The European legislative provisions and literature on this topic reveal three approaches.

First, the burden of proof could depend on whether a clause is listed. Greylisted clauses could be declared presumptively invalid, whereas the burden of proof rests on the party challenging unlisted terms.

A second approach is for the legislation to be silent on the question of the burden of proof. Some hold that there can be no question of a burden of proof in this context, as the unfairness of a term is a question of law for neutral assessment by the court.

The third approach is to provide explicitly for the burden of proof to remain on one party, regardless of whether a clause is listed.

These three approaches will be considered in turn, after which a recommendation will be made.

### *Onus-reversal approach*

The Dutch Civil Code takes the approach that greylisted clauses are presumptively unfair.<sup>94</sup> This reverses the normal burden of proof, which would ordinarily have fallen on the person alleging unfairness.

This approach has the advantage of a clear status being accorded to the grey list. By contrast, the silence of the Directive on the burden of proof may

<sup>90</sup> Maxeiner op cit note 11 at 153; Danny Busch; Ewoud H Hondius & Hugo J van Kooten, et al (eds) *The Principles of European Contract Law and Dutch Law* (2002) 216.

<sup>91</sup> Hondius op cit note 32 at 244.

<sup>92</sup> Todd D Rakoff 'Contracts of Adhesion: An essay in reconstruction' (1983) 96 *Harvard LR* 1173 at 1266.

<sup>93</sup> Law Commission for England and Wales & Scottish Law Commission *Unfair Contract Terms – a Joint Consultation Paper* (Law Com Consultation Paper No 166, Scot Law Com Discussion Paper No 119) (hereafter 'English and Scottish Law Commissions Consultation Paper') 110.

<sup>94</sup> Article 6:237 BW.

lead to conflicting views on this issue.<sup>95</sup> Placing the onus on the consumer in respect of unlisted clauses is also said to give at least some benefit to traders who followed the guidance of the list.<sup>96</sup>

On the other hand, to do so may increase any supposed danger that courts would too easily assume that non-listed terms are fair, whereas it is simply impossible to draft a comprehensive list which covers all conceivable contract types and situations. The Law Commissions in the UK also take the view that the imposition of any onus on a consumer would be too great a burden.<sup>97</sup>

#### *No question of a burden of proof*

At a 1999 conference on the Directive's implementation, the Health and Consumer Protection Director-General suggested that one cannot really speak of a burden of proof in this context, as the unfairness of a term is a question of law rather than of fact.<sup>98</sup> On this view, greylisting is merely one indication of unfairness, which courts must consider together with all other relevant circumstances. Simon Whittaker, author of the relevant chapter in *Chitty on Contract* argues that the European Court of Justice would probably conclude that 'the issue of fairness is not itself an issue proper for the imposition of a burden of proof, but rather for a neutral judicial assessment'.<sup>99</sup> This is said to be the implication of its decision in *Oceano Grupo Editorial SA v Murciano Quintero*<sup>100</sup> that a national court is entitled to raise the issue of unfairness of its own initiative. Whittaker finds the decision incompatible with a simple imposition of a burden of proof: there is no need for the consumer to claim or establish unfairness.<sup>101</sup> However, thereafter he distinguishes two situations: one is where the court raises the matter of its own initiative and is able to decide the question of unfairness on the facts already before the court. The other is where additional facts are needed for the court to reach a decision, in which case a burden of proving these facts becomes relevant. It therefore appears that he does accept that it would be useful to allocate a burden of proving facts from which the court can assess the unfairness of a clause for this type of situation.

That 'unfairness' is a question of law does not preclude imposition of a presumption of unfairness of listed terms as a matter of logic. This could be described as a 'presumption of law', the rebuttal of which would involve

<sup>95</sup> Cf *Zealander & Zealander v Laing Homes Ltd* [1999] CILL 1510 (list merely contains guidelines and creates no presumptions) and *Director General of Fair Trading v First National Bank plc* [2000] 1 All ER 240 at 254.

<sup>96</sup> English and Scottish Law Commissions *Consultation Paper* op cit note 94 at 110.

<sup>97</sup> English and Scottish Law Commissions *Report* op cit note 50 at 11.

<sup>98</sup> As reported by Vincenzo Roppo 'Workshop 3: The definition of "unfairness": the application of Article 3(1), 4(1) – and of the annexes of the directive' in European Commission *Brussels Conference* (op cit note 39) 125 at 128.

<sup>99</sup> Beale op cit note 52 at 912–3 para 15–065. See also Simon Whittaker 'Judicial interventionism and consumer contracts' (2001) 117 LQR 215–8.

<sup>100</sup> [2000] ECR I-4941.

<sup>101</sup> Beale op cit note 52 at 912, para 15–064.

proof of, and argument on, the facts of the case. In addition, even though the legislation should explicitly allow a court to raise the issue of unfairness of its own accord, a clear provision in respect of the burden of proof remains useful to allocate the risk of non-persuasion if the state of the evidence precludes a clear conclusion.<sup>102</sup> Although it would strictly speaking be more correct to speak of a burden of proving facts from which the court may assess the question of unfairness, it is probably convenient shorthand to speak of a burden of proving unfairness or fairness, provided that it is clear that a court may raise the issue of unfairness of its own initiative. The English and Scottish Law Commissions' Bill specifically provides that a court may raise the issue of unfairness on its own initiative,<sup>103</sup> but also provides for the imposition of a burden of proof once the issue of unfairness is raised.<sup>104</sup> If nothing is said on the burden of proof in the belief that none can be involved, the courts could still reach conflicting conclusions on whether and how the burden of proof remains relevant.<sup>105</sup>

#### *Provision for an unchanging burden of proof*

The third approach accepts that a position should be taken on the burden of proof, but that this should not vary according to whether a term is listed, the list being merely a persuasive factor which throws substantial suspicion on the terms therein. Thus, the French legislation implementing the Directive apparently places the burden of proof on the consumer, whether or not a term is listed.<sup>106</sup> The English and Scottish Law Commissions propose a more complex approach: in cases involving individual consumers, the burden of proof should be on the business once the issue of unfairness is raised, regardless of whether the term in question is greylisted.<sup>107</sup> On the other hand, the OFT or other regulatory body should carry the burden of proof in preventive injunction proceedings,<sup>108</sup> as should a small business that challenges a term.<sup>109</sup>

A justification for the burden to remain on the business is that it is the party seeking an advantage by deviating from existing residual rules (non-mandatory law). As these rules typically represent a fair balancing of interests, it is fair to require the business to justify departure from them,<sup>110</sup> especially as the non-negotiated terms of a consumer contract can often not be regarded as the result of the self-determination or autonomy of the consumer.<sup>111</sup> This

<sup>102</sup> In South Africa the burden of proof is sometimes equated with 'the risk of non-persuasion' (eg P-J Schwikkard & Steph E van der Merwe *Principles of Evidence* 2 ed (2002) 537).

<sup>103</sup> Section 21, op cit note 71.

<sup>104</sup> Section 16(1).

<sup>105</sup> Cf note 96 above.

<sup>106</sup> Beale op cit note 52 at 911, citing loi no 95-96 of 1 February 1995, Art 1, new Art L 132-1, al 3 Code de la consommation.

<sup>107</sup> Section 16(1). In the UK individual consumers cannot bring abstract proceedings for an injunction. The situation envisaged here is where a contract with an individual consumer is considered by a court.

<sup>108</sup> Section 16(2).

<sup>109</sup> Section 17(2).

<sup>110</sup> English and Scottish Law Commissions *Report* op cit note 50 at 48.

<sup>111</sup> Naudé op cit note 1.

argument cannot apply to the core terms (as to price and subject-matter) whereas the proposed South African legislation specifically gives consumers the right to buy at a fair price. Hopefully intervention would be limited to a manifestly unjust price at the most.<sup>112</sup> If the legislature continues on this path, there should be an explicit provision that the burden of proving the price to be (manifestly) unjust is on the consumer. It seems fair that in abstract, preventive proceedings the burden of proving unlisted terms unfair should rest on the party challenging the term, certainly in respect of unlisted terms, as they have more resources than consumers and the opposite rule would be ‘unduly restrictive for businesses’.<sup>113</sup> The English and Scottish Law Commissions’ justification for the burden being placed on a small business challenging a term is that they require less protection than consumers.<sup>114</sup>

The disadvantage of the English and Scottish Law Commissions’ approach is its complexity, but this in itself should not be decisive, as the different contexts may well justify differentiated treatment.

### *Evaluation*

Certainly, an explicit provision on the burden of proof or a presumption of unfairness is helpful as an allocation of the risk of non-persuasion. The policy arguments in favour of the different ways in which this could be done are rather evenly balanced (although the French solution of the burden always remaining on the consumer should be rejected).

As long as it is clear that unlisted clauses may also be unfair, and that the court has the power to intervene *mero motu*, a presumption of invalidity in respect of greylisted clauses but not in respect of unlisted clauses, does not create a danger of courts unduly regarding unlisted clauses as unimpeachable.

On balance, however, the English and Scottish Law Commissions’ solution of always placing the burden on the business when an individual consumer is involved and the issue is raised appears to be the best for that context. This eliminates any danger of too much weight being placed on the absence of a term from the list. However, in proceedings which do not involve an individual consumer, that is, in preventive, abstract interdict proceedings and where a small business is involved, the listed clauses should be presumptively unfair, whereas the burden of proving unlisted clauses should be on the party challenging the term. The administrative body or consumer organizations or small businesses challenging unlisted terms require less protection than individual consumers. Yet the ‘substantial suspicion’ which the grey list raises against its contents might as well translate into a presumption of invalidity. The legislation should therefore provide that listed clauses are presumed to be unfair, but that, in cases involving individual consumers, the burden of proving a clause to be fair is always on

<sup>112</sup> How exactly this should be done is beyond the scope of this contribution, no research having been conducted on this aspect.

<sup>113</sup> English and Scottish Law Commissions *Report* op cit note 50 at 55.

<sup>114</sup> *Ibid* at 135.



the business once the issue is raised by the consumer or by the court of its own initiative.

## VI GENERAL PRINCIPLES TO GUIDE THE DRAFTING OF THE LISTS

Some of the literature on lists offers broad general principles to guide their drafting. These principles relate to issues such as prerequisites for inclusion and mechanisms for regular updating.

### *Prerequisites for inclusion and length of lists*

The contents of black and grey lists would obviously vary from country to country, depending on variables such as other legislation and common-law rules which already impose mandatory implied terms, or outlaw certain clauses, or prescribe detailed rules in regard to the treatment of certain clauses.<sup>115</sup> It is too difficult — and unnecessary — for the lists to reflect all these rules.<sup>116</sup> To include all common-law rules might also hinder the development of those rules through judicial guidance.<sup>117</sup>

To keep them manageable, lists should focus on terms which are not desirable across different types of contracts. Mandatory rules unique to specific types of contracts should rather be dealt with in sector-specific legislation, or, in the relevant parts of any consumer-protection legislation.<sup>118</sup> The unfair-terms legislation should state that it is additional to, and not intended to replace, other statutory and common-law measures of control.<sup>119</sup>

Peculiar trade practices may also justify blacklisting of clauses which are irrelevant in other countries. For example, the South African Bill blacklists clauses which authorize the supplier of services to take control of the consumer's bank card and personal identification number and to withdraw money from his account when payments are overdue.<sup>120</sup> This type of agreement is probably unimaginable in Europe.

A term should obviously only be blacklisted if a clear case can be made out that it will always be unfair for violating generally accepted principles in all

<sup>115</sup> For example, the South African common law rules against exclusion of liability for fraud or intentional harm and against exclusion of the seller's liability to repay the price upon eviction, the mandatory implied terms to protect tenants under the Rental Housing Act 50 of 1999 and the Conventional Penalties Act 15 of 1962, which grants courts discretionary power to control penalty clauses.

<sup>116</sup> English and Scottish Law Commissions *Report* op cit note 50 at 23–4.

<sup>117</sup> Cf *Ibid* at 24.

<sup>118</sup> However, it has also been suggested that separate lists could be drafted which would only apply to a particular type of contract. Cf *UK Response* op cit note 30 at para 17. In my view, this could be done by the enforcement body in a non-binding guidance after experience with enforcement in different sectors. See, for example, the OFT Guidance on package holiday contracts available on their website.

<sup>119</sup> Another technique is to include dragnet clauses in the black list itself. See, for example, ss 2(a) and (b) of the proposed South African consumer protection legislation, listing, for example, a clause which directly or indirectly purports to waive or deprive a consumer of a right set out in the Act.

<sup>120</sup> Section 57(2)(f).

conceivable circumstances.<sup>121</sup> Countries such as Germany, Portugal and the Netherlands have extensive black lists. On the other hand, the English and Scottish Law Commissions propose only the blacklisting of exclusion or limitation of liability for bodily injury or death caused by negligence, and of certain mandatory implied terms in sale or supply of goods contracts.<sup>122</sup> As pointed out before, a country new to statutory unfair terms control, with no prior history of virulent common-law intervention and whose socio-economic circumstances are different to European countries, may legitimately be wary of blacklisting too many clauses immediately.

A grey list, on the other hand, should preferably be as comprehensive as possible.<sup>123</sup> It is more useful to guide businesses and consumers than a set of guidelines,<sup>124</sup> and a comprehensive list decreases the supposed danger of courts unjustifiably regarding unlisted clauses as unimpeachable.

It is probably advisable to 'strike a balance between the amount of detail given in respect of each type of term and the need to keep the list as comprehensive as possible but of manageable proportions.'<sup>125</sup> One technique to achieve this, while ensuring that businesses are adequately put on notice, is to word some items rather generally to encompass different types of terms, but to refer to particular sub-types in a list of examples to each term published in an explanatory memorandum to the legislation. The English and Scottish Law Commissions used this technique in their proposed Unfair Contract Terms Bill. For example, they list 'a term excluding or restricting liability to A for breach of contract' which may at first sight only bring terms worded closely to this formulation to mind. However, the list of examples in the explanatory memorandum emphasize that other terms which indirectly have this effect are also covered. Such examples include 'a term which requires claims to be made within a short period of time' and 'a term in a contract for the repair of goods which provides that an ineffective repair will be corrected only if a person returns the goods to a particular place at his own expense'. By contrast, many legal systems with longer lists chose to include these types of terms in the list itself, and this, in my view, is the best approach.<sup>126</sup> If a legislature decides instead that a short grey list is desirable, it should certainly use the explanatory memorandum as suggested. The more direct a command to businesses in respect of a particular term, the more likely they are to remove it voluntarily.

<sup>121</sup> English and Scottish Law Commissions *Consultation Paper* op cit note 94 at 14; European Commission *Communication on unfair terms in contracts concluded by consumers presented to Council on 14 Feb 1984* (1984) EC Bull, Suppl 1/84, based on COM (84) 55 final, 14; EESC 2001 *Opinion* op cit note 39 at C 116/121.

<sup>122</sup> The decision to provide for the latter expressly is based on the UK's duty to implement the EC Sale of Consumer Goods and Associated Guarantees Directive 99/44/EC (English and Scottish Law Commissions *Report* op cit note 50 at 23–4).

<sup>123</sup> Beale 'Legislative control of unfairness' op cit note 32 at 246.

<sup>124</sup> *Ibid.*

<sup>125</sup> UK DTI Consumer & Competition Policy Directorate *Commission Review of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (Consultation Paper)*(2000) (hereafter 'UK DTI Consultation Paper') para 4.8. Cf EESC 2001 *Opinion* op cit note 39 at 121.

<sup>126</sup> See Part VII below.

To give an idea of the length of lists in some other countries, the German 'grey' list of prohibited terms with an evaluative element has eight paragraphs, and the black list thirteen, but if the sub-types blacklisted in sub-paragraphs are counted as well, about twenty-four (thus a total of thirty-one listed terms). The Dutch Civil Code's grey and black lists contain fourteen items each. In the Portuguese legislation, eleven terms are blacklisted in respect of any standard term contract, and a further six in respect of consumer contracts. The grey list of terms with an evaluative element, which applies to all standard term contracts, has ten items, and the one applicable to consumer contracts only, eleven (thus a total of thirty-eight listed terms). The Directive's grey list with seventeen paragraphs is shorter, but additional sub-types of terms are sometimes specifically mentioned as well.<sup>127</sup>

#### *Provision for regular update*

As it would be impossible to list exhaustively all clauses which could be suspect, and in view of the constant ingenuity of drafters, the lists should be regularly revised.<sup>128</sup> The English and Scottish Law Commissions propose to empower the Secretary of State to add to or amend the list.<sup>129</sup> However, I agree with Ewoud Hondius that such a delegated power raises questions of legitimacy.<sup>130</sup> Instead, the legislation should provide that the administrative enforcement body should regularly review the black and grey lists and recommend amendments by Parliament. In the meantime, the administrative enforcement body should report case law and experience with extra-judicial enforcement on a broad front to increase the effectiveness of the legislation.<sup>131</sup>

#### *Wording*

It is important to use simple, clear language in order that consumer advisers and business people who are not lawyers are able to understand the legislation.<sup>132</sup> It is especially important that the status of the lists be spelt out in simple, unambiguous language to prevent any possible impression that unlisted clauses are generally above suspicion. A description of the grey list as 'non-exhaustive and indicative only' is convenient shorthand, but experience shows that this terminology (used in the Directive) may be confusing on its own.<sup>133</sup> The following wording could be considered in this regard:

<sup>127</sup> Hugh Beale would have liked to see a fuller grey list than merely that of the Directive in the UK legislation ('Legislative control of fairness' op cit note 32 at 246).

<sup>128</sup> Hondius *Standaardvoorwaarden* op cit note 13 at 615; European Consumer Law Group op cit note 62 at 111; Beale 'Legislative control of unfairness' op cit note 32 at 256; EESC 2001 *Opinion* op cit note 39 at 121; English and Scottish Law Commissions *Report* op cit note 50 at 45; *UK Response* op cit note 30 at para A2(ii).

<sup>129</sup> English and Scottish Law Commissions *Report* op cit note 50 at 45.

<sup>130</sup> *Standaardvoorwaarden* op cit note 13 at 617.

<sup>131</sup> As the OFT does. See also Naudé op cit note 1.

<sup>132</sup> English and Scottish Law Commissions *Report* op cit note 50 at 3–5, 19–21.

<sup>133</sup> Cf Geraint Howells & Thomas Wilhelmsson *EC Consumer Law* (1997) 105.

*'Non-exhaustive and indicative list of terms that may be unfair*

- (1) A term is presumed to be unfair if it has the object or effect of a term: (a) excluding. . . (b). . .
- (2) The list in [subsection/paragraph] (1) above is not exhaustive so that other terms may also be unfair.
- (3) The list is indicative only so that a term covered by the list may be fair in view of the particular circumstances of the case.'

The first sentence, which refers to the 'object or effect' of a term serves to prevent arguments that only terms which are worded in exactly the same way are covered.<sup>134</sup>

Experience with the Directive led the European Commission to state that vague wording of a listed item, which may result in it relating to a large number of very different contractual terms, leading to disputes, weakens the practical impact and usefulness of the list.<sup>135</sup> They identified clause 1(b) of the Directive's list (exclusion or limitation of liability for breach) in this regard, noting that a third of cases contained in the CLAB database by 2000 concerned this item.<sup>136</sup> The English and Scottish Law Commissions decided thereafter to retain clause 1(b) in their grey list, but added some sub-types in the list of examples.<sup>137</sup> The fairness of exemption clauses for breach is very much dependant on the individual facts of a case, and disputes are probably unavoidable.<sup>138</sup> Nevertheless, listing such clauses could be justified because many will be unfair; and at least the list serves to put businesses on notice that they should carefully consider whether their particular circumstances justify an exemption or limitation of liability. This remains a useful function of the list.

## VII TERMS GENERALLY INCLUDED IN LISTS

Fourteen major categories of terms often encountered in black and grey lists are identified and discussed under this rubric.

One function of grouping categories of terms together in the manner attempted here is that such systematic ordering of the listed clauses may help to make black and grey lists more manageable.<sup>139</sup>

The discussion draws on the lists of the Directive (replicated in the UK Unfair Terms in Consumer Contracts Regulations 1999), and of the relevant legislation in Germany,<sup>140</sup> Austria,<sup>141</sup> the Netherlands,<sup>142</sup> Portugal,<sup>143</sup>

<sup>134</sup> MacDonald op cit note 39 at 250; Beale op cit note 52 at 917. This wording is used in the Directive.

<sup>135</sup> *Report from the Commission* op cit note 29 at 16.

<sup>136</sup> *Ibid.* The CLAB database is a free online database of cases decided under the Unfair Terms Directive.

<sup>137</sup> Schedule 2 para 2.

<sup>138</sup> If consumer protection legislation should grant consumers (mandatory) guarantees of quality in respect of goods, as the DTI proposes, this class of term would lose some significance. Cf Maxeiner op cit note 11 at 135.

<sup>139</sup> Cf *UK Response* op cit note 30 at para 18; European Economic and Social Committee *Opinion on the proposal for a Council Directive on Unfair Terms in Consumer Contracts* (1991) OJ 91/C 159/13 at C 159/37.

<sup>140</sup> §§ 308 and 309 BGB.

<sup>141</sup> § 6 Konsumentenschutzgesetz.

<sup>142</sup> Articles 6:236 and 6:237 BW.

<sup>143</sup> Articles 18, 19, 21 and 22 of Decree-Law No 446/85 of 25 October 1985 on unfair contract terms, as amended by Decree-Law No 220/95 of 31 January 1995.

Brazil,<sup>144</sup> Japan,<sup>145</sup> Thailand<sup>146</sup> and the Model Law for Consumer Protection in Africa.<sup>147</sup> It also refers to the black list of the proposed South African consumer protection legislation and the grey list of the English and Scottish Law Commissions' Unfair Contract Terms Bill of 2005.<sup>148</sup> The South African Law Commission's investigation team's list of problematic clauses which 'should receive the critical attention of the legislature' is also taken into account, as are some of the 'factors' in the South African Law Commission's proposed Bill of 1998, which are reminiscent of a list. The same applies to the list of 'factors' of the Victoria Fair Trading Act 16 of 1999. Also referred to is the list of twenty-eight terms formulated by the Council of Europe in 1976, 'which are considered in the majority of member States to be unfair to consumers'.<sup>149</sup>

It should be noted that sector-specific terms, such as those relating to remedies for non-conforming goods, are not mentioned here, because I hold the view that they should be controlled by way of mandatory terms. All the terms listed in the instruments considered are not necessarily mentioned here, but only those which are commonly listed in more than one system. Sometimes a listed item should rather explicitly be a requirement for the incorporation of a term, and then it is also not included in this discussion. For example, the Directive greylists a term which has the object or effect of binding the consumer to terms with which he had no real opportunity to become acquainted.<sup>150</sup> This situation should rather be controlled by a separate provision on incorporation of terms. For example, the Dutch and German Civil Codes contain a separate provision which provides, in effect, that a standard term is not incorporated into the contract or is voidable if the user did not give the other party a reasonable opportunity to become acquainted with the term.<sup>151</sup> The proposed South African legislation should include a similar provision.

A further caveat is that, with some exceptions, the discussion in this part takes no definite view on whether the terms mentioned belong more properly in a black list or in a grey list. The footnotes should indicate their status in the different laws considered.

The terms are identified with non-negotiated terms in consumer transactions in mind, but in some laws surveyed certain listed items also apply to business-to-small business contracts or to B2B contracts generally, or to

<sup>144</sup> Article 51, Consumer Protection Code of 1990 (Código de Defesa do Consumidor).

<sup>145</sup> Articles 8 and 9, Consumer Contract Act 129 of 2001.

<sup>146</sup> Section 4, Unfair Contract Terms Act BE 2540 (1997).

<sup>147</sup> See note 17. The (short) grey list is set out in the Schedule to the Unfair Contract Terms Rules, an Annex to the Model Law.

<sup>148</sup> The UK Bill's grey list is set out in Schedule 2.

<sup>149</sup> Council of Europe *Unfair Terms in Consumer Contracts and an appropriate method of control: resolution (76)47 adopted by the Committee of Ministers of the Council of Europe on 16 November 1976 and explanatory memorandum* (1977) at 14–6.

<sup>150</sup> Item (i).

<sup>151</sup> Section 6:233 BW; § 305(2).

negotiated terms.<sup>152</sup> For the sake of convenience I will use the term ‘business’ to refer to the party who drafted the term in advance and benefits from it, and ‘consumer’ to refer to the other party.

The fourteen categories are:

1. terms granting unilateral decision-making power to the business (in other words, control over the life of the contract and its terms);
2. other terms which unfairly prevent the parties from having equal rights;
3. terms governing the duration of the contract;
4. exclusion or restriction of liability normally imposed by law ;
5. indemnity clauses;
6. exclusion or restriction of remedies normally available to the consumer (some laws assume this to be included in item (4) above, but others provide separately for restriction on particular remedies);
7. procedural hindrances to the consumer’s right to take legal action (in other words, terms relating to disputes or proceedings);
8. exclusion of reliance on prior and subsequent undertakings and representations;
9. fictional declarations or receipts;
10. payment of compensation or penalties by the consumer, including liquidated damages clauses and forfeiture clauses;
11. transfer of rights and/or obligations to a third party;
12. unfair imposition of risk;
13. terms relating to security;
14. unfair enforcement clauses.

1. *Terms conferring unfair unilateral decision-making power upon the business*

A wide range of listed terms can be classified under this category. These include:

- (a) terms according to which the consumer is bound to the contract whereas the business’s obligation to perform depends on satisfaction of a condition wholly within the latter’s control;<sup>153</sup>
- (b) terms granting the business an unreasonably long or insufficiently defined period for acceptance of the consumer’s offer<sup>154</sup> — this overlaps to some extent with the previous item;
- (c) terms granting the business an unreasonably long or insufficiently defined period for performance of the contract;<sup>155</sup>
- (d) terms which entitle the business to unilaterally alter or depart from the performance undertaken by him, such as the characteristics of the

<sup>152</sup> See Part III *supra*.

<sup>153</sup> Item (c) in the Annex to the Directive; para 3 of the English and Scottish Law Commissions’ Bill’s list (hereafter ‘UK Bill’); s 51(IX) Brazilian legislation (‘leaves supplier with option whether to conclude the contract, while obligating the consumer’). See also Aronstam *op cit* note 8 at 215–7.

<sup>154</sup> Item 1 of the Council of Europe’s list *op cit* note 150; art 6:237(a) BW; § 308(1) BGB; § 6(1)(1) Austrian Konsumentenschutzgesetz.

<sup>155</sup> Article 6:237(e) BW; § 308(1) and (2) BGB. Cf Council of Europe *op cit* note 150 item 7.

- product or service to be provided<sup>156</sup> — and such terms would typically only be greylisted<sup>157</sup> or otherwise qualified by evaluative factors such as ‘without good reason’ or ‘unless this is reasonable’;<sup>158</sup>
- (e) terms which entitle the business to unilaterally increase the price specified, or to link it to the price at delivery, without allowing the consumer to terminate upon a price increase;<sup>159</sup>
  - (f) terms which allow the business to unilaterally modify the terms of the contract generally;<sup>160</sup>
  - (g) terms which leaves the determination of whether the business has performed the contract to itself;<sup>161</sup>
  - (h) terms entitling the business to free itself of its duty to perform without an objectively justifiable reason<sup>162</sup> — and sometimes lists would refer in this regard specifically to terms entitling the business to terminate the contract<sup>163</sup> and/or to terms entitling the business to withhold fulfilment of its obligation without good reason;<sup>164</sup>
  - (i) terms giving the business the exclusive right to interpret any term of the contract.<sup>165</sup>

Some lists suggest that these types of terms may be ‘saved’ if the consumer is given a corresponding power. For example, item (d) of the Directive’s list refers to terms ‘permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract’. Five of the types of terms mentioned in the list of ‘factors’ to be taken into account under the Victoria Fair Trading Act 16 of 1999, also reflect this kind of approach.<sup>166</sup>

The unfairness of, say, the supplier terminating the contract on a discretionary basis for no good reason, would not be removed merely by pointing to a non-negotiated term which also gives the consumer that power. It should therefore not be accepted as a matter of course that the absence of reciprocity is all that makes such terms objectionable.

<sup>156</sup> Item (k) Directive; para 12 UK Bill; § 308(4) BGB; § 6(2)(3) Austrian Konsumentenschutzgesetz; cf s 3(2) UCTA, the ‘factor’ in s 2(j) of the South African Law Commission’s Bill and s 32X(g) Victoria Fair Trading Act.

<sup>157</sup> As in the Directive.

<sup>158</sup> See, for example, item (k) Directive; para 12 UK Bill; § 308(4) BGB.

<sup>159</sup> Item (l) Directive; paras 13 and 14 UK Bill; cf s 32X(f) Victoria Fair Trading Act.

<sup>160</sup> Council of Europe op cit note 150 item 5; item (j) Directive; para 11 UK Bill; art 22(e) Portuguese legislation; cf s 32X(d) Victoria Fair Trading Act.

<sup>161</sup> Article 6:236(d) BW (blacklisted); para 15 UK Bill; § 6(1)(10) Austrian Konsumentenschutzgesetz; art 21(b) Portuguese legislation; Council of Europe op cit note 150 item 6. See also the ‘guideline’ in s 2(ii) of the South African Law Commission’s Bill; cf s 32X(h) Victoria Fair Trading Act.

<sup>162</sup> § 308(3) BGB; see also the authorities in the next two footnotes.

<sup>163</sup> § 308(3) BGB; art 6:237(d) BW (grey list); § 6(2)(1) Austrian Konsumentenschutzgesetz; art 18(f) and 22(b) Portuguese legislation; para (8) UK Bill; cf items (f) and (g) Directive; s 32X(h) Victoria Fair Trading Act; s 4(3) Thailand Unfair Contract Terms Act; Aronstam op cit note 8 at 215–217.

<sup>164</sup> Council of Europe op cit note 150 item 9; cf art 6:237(d) BW (grey list); s 4(4) Thailand Unfair Contract Terms Act.

<sup>165</sup> Item (m) Directive; art 18(e) Portuguese legislation; cf s 32X(h) Victoria Fair Trading Act.

<sup>166</sup> Sections 32X(a)–(e).

The following types of terms listed above require further discussion.

- (i) *Unilateral alteration of or departure from the performance undertaken (item (d) above)*

Whereas unilateral modification clauses without a right to compensation are blacklisted in Portugal,<sup>167</sup> it is more realistic to greylist such clauses,<sup>168</sup> or in any event to qualify them with evaluative factors such as ‘without good reason specified in the contract’<sup>169</sup> or ‘unless this is reasonable’.<sup>170</sup>

Terms allowing unilateral modification of the characteristics of the product or services may sometimes be reasonable when the contract states that this would only be done when circumstances beyond the company’s control prevents it from rendering the agreed performance, in which case the consumer will immediately be notified and the product be replaced with one of superior standard and value. Allowing the consumer to terminate the contract and to claim compensation may also save such a clause.

- (ii) *Unilateral price increases (item (e) above)*

There is divergence amongst legal systems as to how exactly to word the item dealing with unilateral price increases.

The English and Scottish Law Commissions’ Bill (which generally follows the Directive’s list rather closely) has improved the Directive’s ‘price increase item’. The UK Bill greylists a term ‘entitling [the business] to increase the price specified in the contract, unless there is also a term entitling [the consumer] to cancel the contract if the business does increase the price’.<sup>171</sup> It also greylists a term ‘requiring [the consumer] to pay whatever price is set for the goods at the time of delivery (including a case where the price is set by reference to a list price), unless there is also a term entitling the consumer to cancel the contract if that price is higher than the price indicated to it when the contract was made’.<sup>172</sup>

The Austrian, Dutch and German legislative provisions are more detailed, perhaps because they are not content with greylisting price increase clauses, but blacklist these. They blacklist a term allowing a price increase within a specified short period after conclusion of the contract, namely two,<sup>173</sup>

<sup>167</sup> Section 19(i).

<sup>168</sup> Article 6:237(c) BW.

<sup>169</sup> For example, item (k) Directive (‘enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided’), and item (j) Directive (‘enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract’). See also Council of Europe op cit note 150 item 5, and paras 11 and 12 UK Bill.

<sup>170</sup> § 308(4) BGB; § 6(2)(3) Austrian Konsumentenschutzgesetz

<sup>171</sup> Paragraph 14. Cf with item (l) Directive.

<sup>172</sup> Paragraph 13 UK Bill.

<sup>173</sup> § 6(2)(4) Austrian Konsumentenschutzgesetz.



three<sup>174</sup> or four months<sup>175</sup> respectively.<sup>176</sup> A German court held that a clause allowing a price increase after four months could be unfair as well under the general clause. Thus the decision to put a definite time scale in such clauses seems unwise, and a vaguer, greylisting approach is preferable.

The first part of the Austrian black list, which applies to negotiated terms as well, only permits a right to modify prices where this is factually justified, in circumstances described in the contract, which are independent of the business's will, as long as downward adjustment is also provided for, that is, if the factors stated to be relevant to the alteration of the price justify a decrease in price.<sup>177</sup> These are the types of factors which are relevant to the consideration of a more generally worded greylisted item, such as that of the UK legislation. It is probably not necessary to spell them out in the grey list itself.

Although the UK Bill's formulation is commendable, it is more complex than it seems, because, as under the Directive, an exception is later made in respect of contracts for the sale of foreign currency, and for transfer of securities, financial instruments or anything else, the price of which is linked to fluctuations in prices quoted on a stock exchange, or a financial index or market rate.<sup>178</sup> These exceptions, which also apply to other items in the list, will be discussed in more depth under the next rubric.

(iii) *Unilateral variation of (the rest of) the contract (item (f) above)*

Some instruments do not contain a separate item on unilateral alteration of performance or price, but only lists in a more general manner 'terms whereby the supplier reserves the right to decide unilaterally to modify or repudiate the contract otherwise than on proper grounds which are expressly stated in the contract'.<sup>179</sup>

Some of the laws that explicitly list unilateral alteration of performance or price increases, add such a general item to ensure all other unilateral variations are covered.<sup>180</sup>

Both the UK Bill and the Directive provides for detailed exceptions to the listing of this type of term.<sup>181</sup> First, these instruments except unilateral changes in interest rates and other charges in financial services agreements, provided the consumer or small business is informed of the variation as soon as is practicable and is allowed to cancel the contract.<sup>182</sup> Secondly, the listing

<sup>174</sup> Article 6:236(i) BW.

<sup>175</sup> § 309(1) BGB.

<sup>176</sup> Article 6:236(i) BW. The German provision does not apply to goods or services supplied in the course of a recurring obligation. The Austrian provision also only applies in respect of performances to be made within two months after the contract.

<sup>177</sup> § 6(1)(5) Konsumentenschutzgesetz.

<sup>178</sup> Paragraph 24 of Schedule 2, which applies (inter alia) to paragraphs 13 and 14 of the list. The UK Bill has improved the Directive's list of exemptions.

<sup>179</sup> Council of Europe op cit note 150 item 5.

<sup>180</sup> For example the Directive in item (j). See also para 11 UK Bill; cf s 32X(d) Victoria Fair Trading Act.

<sup>181</sup> See also art 22(2),(3) and (4) Portuguese legislation.

<sup>182</sup> Paragraphs 22(3) and (4) of Schedule 2.

of unilateral variation of terms does not apply to a term in a contract of indefinite duration if the contract also provides that the business user must give reasonable notice of the variation, and the consumer may then cancel the contract.<sup>183</sup> Lastly, there is also an exception in regard to the variation of terms in contracts for the sale of foreign currency, and for the transfer of securities, financial instruments, etc.<sup>184</sup>

The OFT petitioned the English and Scottish Law Commissions to recommend scrapping all the exceptions to the list.<sup>185</sup> They argued that the list of exceptions had been the cause of considerable problems and conflicting interpretations.<sup>186</sup> These had also been used by some parties to argue for the exclusion of such terms from the fairness test altogether, not merely from the grey list.<sup>187</sup> The Law Commissions responded by confirming the OFT's interpretation of the law, namely that the exceptions are exempt from the grey list but still subject to the fairness test.<sup>188</sup> However, they chose to retain the exceptions in reformulated form, as they considered that an indication that certain terms are not likely to be regarded as unfair is useful, and as these exceptions provide formal 'recognition of the legitimate interests of suppliers of on-going services in markets that are prone to uncertainty or contain variable pricing elements'.<sup>189</sup>

This is a sensible approach, but the explanatory memorandum to the legislation should make it very clear that these excepted clauses are still subject to the fairness test of the general clause and the plain language and legibility requirements.

(iv) *terms entitling the business to free itself of its duty to perform without an objectively justifiable reason (item (h) above)*

The EC Directive and the UK Bill correctly provide separately for rights to terminate contracts of indefinite duration on the one hand, and other contracts, on the other.<sup>190</sup>

The absence of a mirror provision which also allows the consumer to terminate the contract is not all that causes unfairness, contrary to what the UK Bill and Directive suggests.<sup>191</sup> It would be best to refer to a term entitling the business to free itself of its duty to perform, whether by terminating the

<sup>183</sup> Paragraph 23 of Schedule 2.

<sup>184</sup> Paragraph 24 of Schedule 2.

<sup>185</sup> English and Scottish Law Commissions *Report* op cit note 50 at 47.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> Paragraph 6 UK Bill refers to 'a term entitling B to cancel the contract without incurring liability, unless there is also a term entitling A to cancel it without incurring liability.' See also item (f) Directive. Paragraph 8 UK Bill then refers to 'a term in a fixed-term contract or a contract of indefinite duration entitling B to terminate the contract without giving A reasonable advance notice (except in an urgent case).' The latter clause should not refer to a fixed-term contract, as a fixed term contract does not normally entitle a party to terminate it by notice anyway. Item (g) in the Directive's list correctly omits the reference to a fixed-term contract.

<sup>191</sup> Paragraph 6 UK Bill, item (f) Directive.

contract or otherwise, without an objectively justifiable reason. A separate item should then greylist a term in a contract of indefinite duration entitling the business to terminate the contract without giving the consumer reasonable advance notice (except in an urgent case). The inclusion of a mirror image provision in favour of the consumer would then merely be a factor when the fairness of the grey listed clause is considered.

## 2. *Other terms which unfairly prevent the parties from having equal rights*

An example of such a clause is one which grants the business the right to claim costs of legal action or interest on a particular higher scale than otherwise applicable, whereas the consumer is not granted the same right.<sup>192</sup> Such clauses are common in South African standard terms. Although this category is not explicitly listed in any of the lists surveyed here, such terms should be held to be unfair. The example supplied could perhaps be classified under the tenth category discussed here, which relates to payment of compensation or penalties by the consumer.

## 3. *Terms governing the duration of the contract*

Several lists refer to terms governing the duration of contracts for the recurring supply of goods or services. The items listed may concern, first, the initial duration of such contracts; or, secondly, the automatic extension of contracts of fixed duration. In this regard, some lists control the length of the new period, and, usually, the notice period for an expression of a desire by the consumer not to extend the contract.

The Dutch and German Civil Code list a contract for the recurring (or periodic) supply of goods which binds the consumer for more than one or two years respectively.<sup>193</sup> The Portuguese legislation simply blacklists terms which provide for excessive periods for contracts to remain in force or for cancelling them.<sup>194</sup>

Both the Dutch and German Codes blacklist a tacit extension of the contractual relationship which binds the consumer for a period of more than one year,<sup>195</sup> whereas the Council of Europe's list refers to 'an unreasonably long period' in this regard.<sup>196</sup>

Terms which set an unreasonably early date before expiration of a fixed term contract's current period for the consumer to express a desire not to extend the contract are also often listed.<sup>197</sup> Once again, the German Civil

<sup>192</sup> See also *Munckenbeck & Marshall v Harold* [2005] All ER (D) 227; Beale op cit note 52 at paras 15–076 and 15–086.

<sup>193</sup> § 309(9)(a) BGB (blacklisted); art 6:237(k) BW (greylisted).

<sup>194</sup> Article 22(a).

<sup>195</sup> § 309(9)(b) BGB; art 6:236(j) BW.

<sup>196</sup> Op cit note 150 item 4.

<sup>197</sup> Item (h) Directive; para 9 UK Bill; art 22(h) Portuguese legislation; cf Council of Europe op cit note 150 item 3.

Code prefers to put a specified time limit on this notice period, namely three months prior to the expiration of the current period.<sup>198</sup>

The South African Consumer Protection Bill has mandatory provisions on agreements for continuous services which obviate the need to list the kinds of clauses considered above in any black or grey list of clauses in the part on unfair terms.<sup>199</sup>

#### 4. *Terms excluding or restricting liability normally imposed by law*

Some laws are content with only one or two widely framed items in their list which refer to terms limiting the supplier's liability. An example is art 6:237(f) of the Dutch Civil Code which simply greylists a clause 'which wholly or partially exempts the business or a third party of a legal obligation to pay damages'.<sup>200</sup>

Other instruments have a general clause but also make provision for specific types of liability.<sup>201</sup>

A third practice is to list some or all of the following types of terms in this category:

- (a) excluding or limiting the legal liability of the supplier for negligently caused personal injury or death;<sup>202</sup>
- (b) excluding or limiting liability for intentional harm or gross negligence;<sup>203</sup>
- (c) excluding or limiting liability for negligence generally;<sup>204</sup>
- (d) excluding or limiting liability for breach of contract (non-performance);<sup>205</sup>
- (e) excluding or limiting liability for misrepresentations;<sup>206</sup>

<sup>198</sup> § 309(9)(c) BGB. Certain exceptions apply.

<sup>199</sup> Section 46(2)(b)(ii) to (v).

<sup>200</sup> Cf s 32X(k) Victoria Fair Trading Act.

<sup>201</sup> See Council of Europe op cit note 150 items 11–12.

<sup>202</sup> Prohibited in s 1(1) UK Bill (replicating s 2(1) UCTA); § 309(7)(a) BGB; § 6(1)(a) Austrian Konsumentenschutzgesetz; art 18(a) Portuguese legislation. Greylisted in item (a) Directive (injury or death caused by an act or omission of the supplier).

<sup>203</sup> § 309(7)(b) BGB; arts 18(c) and (d) Portuguese legislation. Of course laws which list liability for negligence generally (see next footnote) would not need to make separate provision for intentional harm and gross negligence, unless they want to blacklist the latter and greylist the former.

<sup>204</sup> Section 1(2) UK Bill is not part of the list in Schedule 2 but effectively greylists such liability: ('Business liability for other loss or damage resulting from negligence cannot be excluded or restricted by a contract term or a notice unless the term or notice is fair and reasonable.'). This replicates s 2(2) UCTA. See also item 2 African Model Law; art 18(b) Portuguese legislation (terms which exclude or limit, directly or indirectly, responsibility for non-contractual damage caused in the sphere of interest of the other party or third parties).

<sup>205</sup> Item (b) Directive; para 2 UK Bill; clause (xiv) of the list of problematic clauses identified by the South African Law Commission's investigation team (at 10 of the Report op cit note 3); s 4(1) Thai Unfair Contract Terms Act. Sometimes more specific provisions are blacklisted such as terms 'excluding or restricting the business's obligation to bear the costs of remedying defective work or goods, particularly in respect of costs of transport, labour and materials' (§ 309(8)(b)(cc) BGB). I am not concerned here with clauses which exclude liability for latent defects. Such liability should be imposed by way of mandatory implied terms (mandatory rules).

<sup>206</sup> Council of Europe op cit note 150 item 2; s 57(2)(e)(i) SA Bill (blacklisting a clause which 'expresses an acknowledgement by the consumer that before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier').

- (f) excluding or limiting the business's obligation to respect commitments by its agents;<sup>207</sup>
  - (g) excluding or limiting vicarious liability for agents or employees;<sup>208</sup>
- The following terms in this category merit further discussion.

(i) *Liability for personal injury or death (item (a) above)*

Many countries have prohibited exclusion or limitation of business liability for personal injury or death caused negligently and it is recommended that this approach should be followed, or that, at the very least clauses of this kind should be greylisted explicitly, particularly in South Africa where the Supreme Court of Appeal upheld such a clause in a hospital admission form not too long ago.<sup>209</sup>

It may be argued that a developing country like South Africa should be careful about prohibiting businesses from limiting their liability, since they may be less likely to be able to afford insurance than businesses in developed countries; and unable to trade profitably if their prices should include insurance cover for large claims for personal injury, or if they are subject to claims without insurance. This may be said to be particularly pertinent in respect of potential liability towards overseas residents visiting South Africa, as medical costs and loss of earnings overseas would be much higher than in South Africa. However, this in itself is no justification for shifting the risk onto consumers as a matter of course in the non-negotiated terms, as consumers are even less likely to be able to bear the loss involved and cannot guard against the negligence of the business. Businesses offering services to overseas tourists should insure sufficiently against the possibility of higher claims than those to be expected from South Africans; and they should include the cost of such insurance in the price quoted to such tourists, or otherwise insist on adequate travel insurance in respect of the activity offered before asking the tourist to agree to the exemption clause.

The OFT has taken the line that a 'possible route to fairness where the contract involves an inherently risky activity is that of using warnings against hazards which provide information, and make clear [that] the customer needs to take sensible precautions, but do not have the effect of excluding or restricting liability'.<sup>210</sup>

Because liability for bodily injury or death caused by negligence is often excluded by a notice, for example in a car park, the UK approach of a separate provision in the legislation providing that such liability cannot be excluded by a term or notice is sensible.

<sup>207</sup> Item (n) Directive; Council of Europe op cit note 150 item 2; s 57(2)(e)(i) SA Bill.

<sup>208</sup> Section 32X(i) Victoria Fair Trading Act.

<sup>209</sup> *Afiox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). In *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) the court at least left it open whether liability for negligently causing the death of another could be excluded (para 12). The court said that it is arguable that such a clause would be contrary to public policy, especially given the high value placed on the sanctity of life by the common law and the Constitution.

<sup>210</sup> *Unfair Contract Terms Guidance* (February 2001) 1.12. An example of how this was done is given at 59.

Some laws find it necessary to define ‘personal injury’ to include ‘any disease and any impairment of physical or mental condition’<sup>211</sup> or refer in the list to ‘the moral or physical integrity or the health of persons’.<sup>212</sup>

(ii) *Liability for negligence (item (c) above)*

Some legal systems which list exemption clauses in respect of bodily injury, death and gross negligence, do not list exemptions for other harm caused by negligence, being content for these to be subject only to the general clause.<sup>213</sup>

Another approach is to blacklist exclusion of liability for delict or tort, but only prohibit limitations of liability in respect of intent or gross negligence.<sup>214</sup>

Those that do list exclusion and limitation of liability for negligence generally indicate that there may be situations in which such clauses are fair, by greylisting such terms<sup>215</sup> or qualifying the listing with a phrase such as ‘to an unjustified extent’<sup>216</sup> or ‘unless this is reasonable’.<sup>217</sup> Indeed clauses excluding or limiting liability for negligence may sometimes be reasonable. This could be the case, for example, if ‘it is reasonably practicable to obtain the service elsewhere, if the task is very difficult with a high risk of failure, or where it would be impossible to obtain adequate insurance cover against a potential liability that would be ruinous without insurance’.<sup>218</sup>

Nevertheless, exemption clauses in respect of negligence should still be greylisted as that puts the business on notice that it should carefully consider the justification of limiting or excluding liability, and not be content with inserting an exemption clause as a matter of course.

Because liability for negligence is often excluded by a notice, for example in a car park, the UK approach of a separate provision in the legislation providing that such liability cannot be excluded by a term or notice unless the term or notice is fair and reasonable is sensible.<sup>219</sup>

(iii) *Liability for breach (item (d) above)*

The legal systems considered again diverge as to how exactly to deal with exclusions or limitations of liability for breach.

Some do not specifically refer to this type of term as other items would already cover it. For example, the Dutch Civil Code refers instead to the

<sup>211</sup> Section 32 UK Bill, replicating s 14 UCTA.

<sup>212</sup> Article 18(a) Portuguese legislation.

<sup>213</sup> For example, Germany.

<sup>214</sup> Articles 8(3) and (4) Japanese Consumer Contract Act.

<sup>215</sup> For example, in the Zimbabwean legislation and African Model Law.

<sup>216</sup> Council of Europe op cit note 150 item 12.

<sup>217</sup> Section 14 UCTA (which also applies to B2B contracts).

<sup>218</sup> J Beatson *Anson's Law of Contract* 28 ed (2002)198, with reference to *Smith v Eric S Bush* [1990] 1 AC 831 858-9. See also Maxeiner op cit note 11 at 169; cf *Stag Line Ltd v Tyne Ship Repair Group Ltd* [1984] 2 Lloyd's Rep 211.

<sup>219</sup> Section 1(2) UK Bill, replicating s 2(2) UCTA.

exclusion or restriction of the different types of remedies normally available for breach.<sup>220</sup>

The Directive chose to refer to two types of exemption clauses: those that relate to bodily injury and death and those which have the object and effect of an inappropriate exclusion or limitation of the consumer's legal rights in the event of breach.<sup>221</sup>

### 5. *Indemnity clauses*

The Dutch Civil Code blacklists indemnity clauses in respect of consumer contracts, referring to terms which oblige the consumer to compensate a third party for damage caused to him by the business or a person or property for which the business is liable, or which obliges the consumer to contribute a greater portion than she would be obliged to do under law.<sup>222</sup>

The English and Scottish Law Commissions decided that it is unnecessary to replicate in their Bill s 4 UCTA which imposes a reasonableness requirement on indemnity clauses in consumer contracts, as they would be sufficiently covered by the general clause.

### 6. *Terms excluding or restricting specific contractual remedies normally available to the consumer*

As noted above, the UK Bill and the Directive assumes that the item on liability for breach includes restrictions on the consumer's remedies other than damages, such as the right to terminate or a right to retention. The UK Bill defines 'excluding or restricting liability' in its list of definitions as including 'excluding or restricting a right or remedy in respect of the liability'.<sup>223</sup> However, these instruments do refer in a separate item in the list to terms restricting the consumer's right to withhold or suspend performance in the case of breach<sup>224</sup> as well as to exclusion of the right to set-off claims.

Other legal systems' lists provide explicitly for limitations on these types of remedies, sometimes in addition to a general item on exclusion of limitation of liability,<sup>225</sup> sometimes without such an item.<sup>226</sup> The following types of terms are involved:

- (a) excluding or restricting the consumer's right to claim performance;<sup>227</sup>
- (b) excluding or restricting the consumer's right to terminate the contract;<sup>228</sup>

<sup>220</sup> Article 6:237(a), (b), (c), (f), (g) BW. Cf s 32X(k) Victoria Fair Trading Act.

<sup>221</sup> Item (b). See also paragraph 2 UK Bill.

<sup>222</sup> Section 6:236(h) BW.

<sup>223</sup> Section 30(1). See also the explanatory memorandum to the grey list.

<sup>224</sup> Paragraph 17 UK Bill.

<sup>225</sup> Such as the Council of Europe's list op cit note 150 (general item on limitation of liability in item 12, specific items on remedies in items 14–18 and 21).

<sup>226</sup> As in the Dutch Civil Code.

<sup>227</sup> Article 6:236(a) BW (blacklisted). See also the 'factor' in s 2(s) of the South African Law Commission's Bill.

<sup>228</sup> Article 6:236(b) BW (blacklisted); § 309(8)(a) BGB; art 18(f) Portuguese legislation; Council of Europe op cit note 150 items 14 and 15.

- (c) excluding or restricting the consumer's right to withhold or suspend performance;<sup>229</sup>
- (d) excluding or restricting the right to set-off claims as allowed by law;<sup>230</sup>
- (e) excluding or restricting a right of retention;<sup>231</sup>
- (f) compelling the consumer to sue a third party first before he will be able to act against the party proffering the term.<sup>232</sup>

Because the Dutch legislation does not have a separate item on exclusion of limitation of liability generally, it also greylists exclusion or limitation of the consumer's right to claim damages otherwise allowed by law.<sup>233</sup>

As noted before, if a legislature decides not to refer explicitly to limitations on these remedies, but is content with a clause referring to exclusion or restriction of liability, it would be necessary to refer to these types of clauses in the examples in the explanatory memorandum, as they may not spring to mind immediately when exclusion or restriction of liability is considered.

#### 7. *Unfair procedural limitations on or hindrances to the consumer's right to take legal action*

In this regard, one often finds an item containing a general definition such as the heading of this section, sometimes coupled with some particular examples in the same item or thereafter.<sup>234</sup> The following clauses in this category are sometimes listed explicitly:

- (a) compulsory arbitration clauses in respect of consumer contracts;<sup>235</sup>
- (b) terms which alter the normal burden of proof to the detriment of the customer;<sup>236</sup>

<sup>229</sup> Article 6:236(i) BW (blacklisted); § 309(2) BGB; § 6(1)(6) and (7) Austrian Konsumentenschutzgesetz; Council of Europe op cit note 150 items 17 and 18; para 17 UK Bill; cf art 18(g) Portuguese legislation.

<sup>230</sup> Item (b) Directive; para 17 UK Bill; art 6:237(g) BW (greylisted); § 309(3) BGB; § 6(1)(8) Austrian Konsumentenschutzgesetz; Council of Europe op cit note 150 item 21. See also the 'guideline' in s 2(v) of the South African Law Commission's Bill.

<sup>231</sup> § 309(2)(b) BGB (in so far as the right of retention arises from the same contractual relationship); art 18(g) Portuguese legislation.

<sup>232</sup> Section 2(u) of the South African Law Commission's Bill.

<sup>233</sup> Article 6:237(f) BW. See also arts 8(1) and (2) Japanese Consumer Contract Act.

<sup>234</sup> The Unfair Terms Directive lists a term with the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract' (item (q)). See also para 20 UK Bill, s 13(1)(a) UCTA.

<sup>235</sup> Greylisted in item (q) Directive; replicated in, for example, the UK UTCCR; prohibited outright for consumer contracts in § 6(2)(7) Austrian Konsumentenschutzgesetz, art 51(VII) Brazilian legislation and in respect of claims below a certain amount in the UK (Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999 No 2167 reg 3. Article 6:236 BW prohibits a compulsory arbitration clause unless the clause provides the consumer at least one month after the business has relied in writing upon the clause, to chose for the dispute to be decided by a court.

<sup>236</sup> Item (q) Directive; Council of Europe op cit note 150 item 25; § 309(12) BGB; § 6(1)(11) Austrian Konsumentenschutzgesetz; art 21(f) Portuguese legislation; art 51(VI) Brazilian legislation; item 6 African Model Law and Zimbabwean Consumer Contracts Act. See also clause (i) of the problematic provisions identified by the South African Law Commission's investigation team which 'should receive the critical attention of the legislature' (at 8 of the Report op cit note 3). Cf the 'factors' in s 2(p) of the South African Law Commission's Bill and s 32X(m) Victoria Fair Trading Act.



- (c) terms which unduly restrict the evidence available to the customer<sup>237</sup> or which otherwise exclude or restrict rules of evidence or procedure;<sup>238</sup>
- (d) unfair choice of forum clauses;<sup>239</sup>
- (e) unfair choice of a different law to the one where the conclusion and implementation of the contract occurred or is foreseen;<sup>240</sup>
- (f) terms which impose unreasonably brief limitation periods for complaints or claims;<sup>241</sup>
- (g) terms that require the consumer to take unreasonable action in order to exercise contractual rights.<sup>242</sup>

The English and Scottish Law Commissions' (separate) definition of 'excluding or restricting liability' also embraces several of these types of clauses, such as 'making a right or remedy in respect of the liability subject to a restrictive or onerous condition'.<sup>243</sup>

Term (g) mentioned above could also be subsumed by a more general additional category, namely terms requiring a declaration or notice by the consumer to the business or a third party to be in a particular form that is stricter than a writing requirement or to special requirements with regard to receipt.<sup>244</sup>

#### 8. *Exclusion of reliance on prior and subsequent undertakings and representations*

The Directive and the English and Scottish Law Commissions' Bill grey list terms with 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.<sup>245</sup> This is preferable to the South African draft legislation's provision, which prohibits a narrower type of term, namely, an 'acknowledgement by the consumer that before the

<sup>237</sup> Item (q) Directive; art 21(d) Portuguese legislation. Cf the 'factors' in s 2(p) of the South African Law Commission's Bill and s 32X(l) of the Victoria Fair Trading Act.

<sup>238</sup> Section 13(1)(d) UCTA; s 30 UK Bill; clauses (xi) and (ii) of the clauses identified by the South African investigation team as problematic (at 8 & 10 of the Law Commission's Report op cit note 3).

<sup>239</sup> Article 19(g) of the Portuguese legislation which prohibits a forum choice which involves grave inconvenience for one of the parties, without the interests of the other party justifying this. See also clauses (vii), (viii) and (ix) of the South African investigation team's list of problematic clauses (at 9 of the Report op cit note 3).

<sup>240</sup> Article 19(h) of the Portuguese legislation which prohibits a choice of foreign law, when the inconvenience this causes to one of the parties are not compensated by serious and objective interests of the other party. See also clause (v) of the South African investigation team's list of problematic clauses (at 9 of the Report op cit note 3).

<sup>241</sup> Council of Europe op cit note 150 item 26; the 'factor' in s 2(k) of the SA Law Commissions' Bill ('whether prejudicial time limits are imposed on the other party'); art 6:236(g) BW; cf art 22(l) of the Portuguese legislation. The Dutch and German Civil Codes refers to specified time limits in this regard (art 6:236(g) BW; § 309(8)(b)(ee) and (ff) BGB).

<sup>242</sup> Article 22(o) of the Portuguese legislation prohibits terms which require, for performance of acts under the contract, formalities which are not provided for by law or which commit parties to take unreasonable action in order to exercise contractual rights. An example is clause 5.3 of Afrox's standard terms according to which the customer must, within 3 days of the alleged breach or defect occurring, give Afrox 30 days written notice by prepaid registered post to rectify any defect or breach of agreement (available on their website <http://www.afrox.co.za/customer/sale.fgm>, last accessed 10 June 2006).

<sup>243</sup> Section 13(1)(b), replicated in s 30 UK Bill.

<sup>244</sup> § 309(13) BGB; § 6(1)(4) Austrian Konsumentenschutzgesetz; cf art 22(o) Portuguese legislation.

<sup>245</sup> This is the wording of para 16 of the UK Bill's list, which is similar, but preferable to item (n) of the Directive's list.

agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier.<sup>246</sup> The Directive's and UK Bill's wider formulation is better able to catch all sorts of terms aimed at achieving this effect.

### 9. *Fictional declarations or receipts*

Some laws list 'deeming provisions' whereby a declaration or statement is deemed to be made by the consumer (fictional declaration) or a declaration is deemed to be received by him under certain circumstances (fictional receipt).<sup>247</sup>

The South African Law Commission's Bill provides that the following 'factor' may be considered in deciding whether a term is, for instance, unconscionable: 'whether the term provides that a party against whom the term is proffered shall be deemed to have made or not made a statement to his detriment if he or she does or fails to do something, unless (i) a suitable period of time is granted to him or her for the making of an express declaration thereon, and (ii) at the commencement of the period, the party proffering the term undertakes to draw the attention of the party against whom the term is proffered to the meaning that will be attached to his or her conduct'.<sup>248</sup> This formulation is based on the blacklisted clause in § 308(5) BGB, which also inspired § 6(1)(2) of the Austrian consumer legislation and should be used. It catches a wider range of deeming clauses than the formulation of the new South African Bill, which prohibits a clause which 'expresses an acknowledgment that the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer, and that have or has not in fact been delivered or rendered to the consumer.'

In respect of fictional receipts, the BGB is stricter than the South African and Austrian formulations. It simply blacklists 'a provision which provides that a declaration by the business of particular importance is deemed to have been received by the consumer'.<sup>249</sup> By contrast, the South African 'factor' is 'whether a term provides that a statement made by the party proffering the term which is of particular interest to the party against whom the term is proffered shall be deemed to have reached the party against whom the term is proffered, unless such statement has been sent by prepaid registered post to the chosen address of the party against whom the term is proffered'.<sup>250</sup>

Although the Directive or the UK legislation does not list fictional declarations or receipts it is noteworthy that the OFT has acted against and considers as usually unfair 'consumer declarations about contractual circum-

<sup>246</sup> Section 57(2)(e)(f).

<sup>247</sup> § 308(5) and (6) BGB; § 6(1)(2) and (3) Austrian Konsumentenschutzgesetz; cf s 6:236(l) and (m) BW; s 2(g) and (f) of the South African Law Commission's list of 'factors'. Cf also MacDonald op cit note 39 at 249 on action taken by the OFT against similar clauses.

<sup>248</sup> Section 2(g).

<sup>249</sup> § 308(6) BGB.

<sup>250</sup> Cf also § 6(1)(3) Austrian Konsumentenschutzgesetz; art 6:236(l) and (m) BW.

stances, such as that the consumer has read the terms of the agreement or has examined goods prior to purchase.<sup>251</sup>

10. *Payment of compensation or penalties by the consumer (including forfeiture clauses)*

Laws often provide separately for the following types of clauses which involve the consumer paying compensation, whether afresh or in the form of the forfeiture of moneys already paid:

- (a) penalty clauses;<sup>252</sup>
- (b) 'liquidated damages' clauses (lump-sum payments for damages);<sup>253</sup>
- (c) forfeiture clauses, whether linked to breach by the consumer or not;<sup>254</sup>
- (d) clauses relating to other compensation, for example, reimbursement of expenses or compensation for use of property.

In South Africa, it would be unnecessary to list penalty clauses as the Conventional Penalties Act<sup>255</sup> deals comprehensively with penalty clauses, including liquidated-damages clauses and forfeiture clauses, by granting judges an equitable discretion to reduce them.

Some legislation also lists clauses obliging the consumer to pay compensation when the contract is cancelled for other reasons than her breach, which cannot therefore be described as 'penalty clauses'.<sup>256</sup> For example, in addition to its listing of penalty clauses and lump-sum damages claims, the German Civil Code lists terms whereby the business, upon termination of the contract by either party, can demand unreasonably high remuneration for the utilization or use of a thing or a right, or for performance made; or can demand unreasonably high reimbursement of expenditure.<sup>257</sup> The English and Scottish Law Commissions also propose listing a term entitling the business, if the consumer exercises a right to cancel the contract, to keep sums she has paid in respect of services which the business has yet to supply. These would be part of forfeiture clauses in a wider sense.<sup>258</sup>

11. *Transfer of rights and/or obligations to a third party*

Terms which allow the transfer of the business user's obligations and/or rights to a third party to the detriment of the consumer are listed in several countries, but with quite different formulations. It is recommended that the

<sup>251</sup> UK Law Commission *Consultation Paper* op cit note 94 at 99, with reference to the OFT's *Unfair Contract Terms Guidance* of 2001, group 18(e).

<sup>252</sup> Item (e) Directive; para 5 UK Bill; art 19(c) Portuguese legislation; § 309(5) BGB (lump-sum claims for damages controlled by prerequisites to protect consumers) and § 309(6) BGB (penalty clauses blacklisted); S 6:237(i) BW (greylisted); art 9 Japanese Consumer Contract Act; Council of Europe op cit note 150 item 28 (listing an excessive obligation upon non-performance). Cf § 6(1)(13) *Konsumentenschutzgesetz*.

<sup>253</sup> *Ibid.*

<sup>254</sup> Item (d) Directive; para 4 UK Bill.

<sup>255</sup> Act 15 of 1962.

<sup>256</sup> Article 6:237(i) BW.

<sup>257</sup> § 308(7) BGB.

<sup>258</sup> See also s 57(2)(f) of the draft South African legislation.

list treats a transfer of rights separately from a transfer of obligations, as in the Dutch Civil Code and the English and Scottish Law Commissions' Bill. The latter simply greylists 'a term entitling the business to transfer its obligations without the consumer's consent'<sup>259</sup> and then, separately, 'a term entitling the business to transfer its rights in circumstances where the consumer's position might be weakened as a result.'<sup>260</sup> The latter item is similar to s 6:236(f) BW, which blacklists a term which, upon transfer of rights to a third party, allows the exclusion or limitation of powers and defences which would have been available to the consumer against the third party transferee.<sup>261</sup> The UK provision, being wider, is preferable. Concerning the transfer of obligations, the Dutch Civil Code has a more elaborate provision, probably explained by its inclusion in the black list and not the grey list as under the UK Bill. Section 6:236(e) BW prohibits prior agreement to transfer of obligations, unless the consumer is given the right to cancel, or the business user remains liable for performance by the third party, or the transfer occurs in connection with the transfer of a business of which all the rights and obligations are transferred. These seem sensible 'exceptions' and the item should be formulated in this manner.

The formulation in the German, Austrian and Portuguese black lists are too rigid and would not allow all the types of exceptions mentioned in the Dutch clause, which are indeed reasonable.<sup>262</sup> The Directive's item, on the other hand, does not sufficiently protect consumers. It lists a transfer of obligations only in so far as 'this may serve to reduce the guarantees for the consumer'.<sup>263</sup> However, this does not sufficiently recognize that it may be unfair in itself for a consumer to discover that someone else is to perform a service than the business trusted by her, even where she still has the same rights or 'guarantees' under the contract against the third party.

## 12. *Unfair imposition of risk*

The New Zealand Law Commission identified as problematic clauses which make goods at buyer's or owner's risk while in possession of the seller or repairer.<sup>264</sup> Such clauses are sometimes encountered in South African contracts: the customer carries the risk in respect of defective goods brought back for repairs.<sup>265</sup> Either the narrower New Zealand formulation or a wider

<sup>259</sup> Paragraph 18 UK Bill. Cf s 32X(j) Victoria Fair Trading Act ('whether the term has the object or effect of permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent').

<sup>260</sup> Paragraph 19 UK Bill; item (p) Directive.

<sup>261</sup> See also Council of Europe op cit note 150 item 2; and clause (vi) of the list of terms identified as problematic by the South African Law Commission's investigation team (at 9 of the Report, op cit note 3).

<sup>262</sup> § 309(10) BGB; § 6(2)(2) Austrian Konsumentenschutzgesetz; art 18(l) Portuguese legislation.

<sup>263</sup> Item (p) Directive.

<sup>264</sup> This is reported by the South African Law Commission at 150 of their Report op cit note 3, where they list clauses identified by the New Zealand Law Commission as justifying intervention. The original report by the New Zealand Law Commission is not available to me.

<sup>265</sup> For example, clause 4.10 of Afrox's standard terms (supra note 243).

formulation listing terms modifying the rules regarding the distribution of risk should be used to discourage such clauses.

### 13. *Terms relating to security.*

Both the Council of Europe's list and the New Zealand Law Commission have identified as problematic terms whereby the supplier can require excessive security.<sup>266</sup>

The Council of Europe also lists 'terms whereby the supplier imposes on the consumer, without good reason, immediate payment of an excessive part of the price prior to performance of the contract,' a listing which would be supported by the OFT, who identified terms requiring full payment in advance in contracts such as home improvement agreements as usually unfair, because it operates like a prohibition on set-off.<sup>267</sup>

The blacklisting of clauses relating to bank cards and PINs in the South African legislation also relates to this category.<sup>268</sup>

### 14. *Unfair enforcement clauses*

Both the OFT and the South African DTI propose to take action against unfair enforcement clauses, such as clauses authorizing entry to the consumer's premises for the purpose of repossessing goods.<sup>269</sup> The draft South African legislation blacklists similar clauses and the OFT has often convinced businesses to delete or revise such terms.<sup>270</sup>

## VIII CONCLUSION

Black and grey lists of prohibited and suspect terms are important mechanisms to increase the effectiveness of unfair contract terms legislation. The need for a proactive, preventative control paradigm makes them especially desirable in the consumer context. It is no wonder that such lists are used in many legal systems and that many experts agree that they are important to any endeavour to regulate unfair contract terms effectively. This contribution has drawn on experience in other legal systems to identify some general principles which should be considered when drafting or revising black and grey lists. Particular types of terms which are often listed have also been identified.

<sup>266</sup> Council of Europe op cit note 150 item 24; South African Law Commission Report op cit note 3 at 149 (see note 265).

<sup>267</sup> Robert Bradgate 'Experience in the United Kingdom' in European Commission *Brussels Conference* (op cit note 39) 35 at 48–9.

<sup>268</sup> Note 121 above.

<sup>269</sup> Section 57(2)(g) of the draft South African legislation (authorization of repossession of goods, undertaking to sign in advance documentation in respect of enforcement, consent to pre-determined value of costs relating to enforcement of the agreement); OFT *Unfair Contract Terms Guidance* (February 2001) 141 who lists as group 18(c) 'unfair enforcement clauses.'

<sup>270</sup> *Ibid.*