Walter Wilburg's 'flexible-system approach' projected onto the law of contract by means of the European Draft Common Frame of Reference Principles

L Hawthorne[*]

Abstract

During the twentieth century the development of social justice led to the promulgation of legislation to address social issues. This body of law rules alongside classic contract law and not only overlaps, but on occasion conflicts with the latter. In 1950 the Austrian jurist Walter Wilburg proposed the 'flexible system' to deal with the problem of overlapping and conflicting principles. According to the 'flexible system', Wilburg recognised the existence of a plurality of principles which need to be graded or weighted and applied concomitantly in order to establish delictual or contractual liability. This paper deals with the application of Wilburg's approach to contract law. His flexible system is reflected to an extent in both the theory and principles of the European Draft Common Frame of Reference. This paper first analyses Wilburg's flexible approach. Secondly, this flexible system is projected on to the law of contract to establish contractual liability. The foundational principles of freedom, security, and justice identified by the DCFR, are used as the graded principles to be applied in this flexible system. Each individual principle has different aspects, which provide content to the individual principle. The South African principles which echo those of the DCFR are discussed and integrated into this analysis. Finally, a flexible model to establish whether a contract is enforceable or not, is developed. The format of this model is borrowed from 'decision tree analysis'. A minimum total weight of 75 is suggested for enforceability of a contract. The principles are allocated maximum weights of: freedom=40, security=30 and justice=30. Whether a contract is enforceable or not will depend on the weight realised by the sum of the principles in a particular case. The different aspects of each principle act as chance events which may compromise the principle and cause its weight to be decreased.

---

[*] BA (Law) (LLB) (LLD) (Pret). Department of Private Law: University of South Africa.

INTRODUCTION

The acknowledgement and recognition of new values and principles in the law have brought legal scholarship to a crossroad between maintaining the *status quo* and integrating these principles into legal theory. Within the ambit of contract law, new principles are playing an important role in protecting the consumer. In Europe the Draft Common Frame of Reference (DCFR)[1] is at present the most comprehensive guide on private law. With regard to private law, the DCFR identifies the overriding principles as protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare, and finally, the promotion of the internal market.[2] With regard to the law of contract, these principles are reduced to four underlying principles. *viz* freedom, security, justice, and efficiency.[3] It is the task of legal scientists to arrange these principles in clear comprehensible structures. In a European context, the clearest way in which to achieve this is by codification. In a mixed legal system such as that of South Africa, piecemeal regulation in the form of specific legislation – *eg* consumer protection legislation – has been promulgated. Whenever a deficiency in the law is identified, politicians and interested organisations react by promulgating specific legislation. The latter is usually characterised by a complicated structure and its application is usually expensive. Consequently, politically pragmatic solutions ignore the factual interaction between the newly promulgated legislation and the existing legal structures. An example of such a situation can be found in the current tension between consumer legislation and the traditional theory of classical contract law. This *ad hoc* legislation has introduced new principles which create a 'deluge of norms' and cause confusion in the law.[4]

There are various approaches to the dichotomy which exists between protective interventionist legislation and traditional contract law. Traditionally, the fast developing body of special statutory contract law has been considered an exception to the general body of private law.[5] In terms

---

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

2 Von Bar *et al* (eds) *Draft Common Frame of Reference Principles, definitions and model rules of European private law* (DCFR) (2009) 14*ff*.

3 DCFR 60*ff*.

4 Bydlinski 'A "flexible system" approach to contract law' in Hausmaninger, Kozioli, Rabello & Gilead (eds) *Developments in Austrian and Israeli private law* (1999) 9.

5 Antoniolli 'Consumer protection, fair dealing in marketing contracts and European contract law – a uniform law?' in Collins (ed) *The forthcoming EC Directive on Unfair Commercial Practices – contract consumer and competition law implications* (2004)

of this argument, it may be maintained that the basic contractual principles remain unaffected by consumer legislation. However, there appears to be an implicit awareness that the underlying principles of consumer law are not in harmony with the fundamental structure of classical contract law.[6] This may be deduced from the high incidence of mandatory rules and terms which severely limit freedom of contract, while consumer law's specific range of remedies move away from the orthodox paradigm of private contract law.[7] The more this body of exceptional law expands, the more difficult it will be to assimilate it into the traditional legal system.[8] Ian Ramsay introduced the terms 'materialisation' and 'differentiation' to describe this process,[9] which opens the door to questioning the validity of the basic tenets of contract law, namely freedom and sanctity of contract.[10]

Thus, contract law finds itself at crossroads. One direction to integrate these two parallel systems of contract law and justify the validity of freedom and sanctity of contract, is through the application of Wilburg's[11] 'flexible system' approach to contract law and consumer legislation. As there is

288*ff*.

6 Ramsay '"Productive disintegration" and the law of contract' 2004 *Wisconsin LR* 495*ff*; Antoniolli n 5 above at 286.

7 Antoniolli n 5 above at 286.

8 *Ibid.*

9 Ramsay n 6 above, defines materialisation as the breakdown of the formal system of classic contract law, while he views differentiation of contract norms as the process in terms of which contract law is identified as different spheres of commercial, consumer and labour law with different norms reigning within each sphere *cf* also Riesenhuber *Europäisches Vertragsrecht* (2003) par 889; Canaris 'Wandlungen des Schuldvertragsrecht – Tendenzen zu seiner "Materialisiering"'. *AcP* (2000) 273, 276–292; Schwartz & Scott 'Contract theory and the limits of contract law' 2003 *Yale LJ* 541.

10 Study group on social justice in European private law 'Social justice in European contract law: a manifesto' 2004 *European LJ* 654; Furmston *The law of contract* (2003) 37.

11 Bydlinski, Krejci, Schicher & Steininger *Das bewegliche System im geltenden und künftigen Recht* (1986) 1*ff*; 'Der wissenschaftliche Weg Wilburgs' in *Festschrift zum 60. Geburtstag Von Walter Wilburg* (1965) 7*ff*.

opposition to application of open norms in South African contract law,[12] it is opportune to quote Wilburg who in 1950 stated that

> Es ist gerade der Sinn meines Vorschlages, zu vermeiden, dass das Gericht nur auf Billigkeit, auf jeweiliges Rechtsempfinden, auf gute Sitten oder ähnliche inhaltslose Begriffe verwiesen wird.[13]

He promoted an objective approach to testing for contractual liability which involved legal principles applied in a graded manner and concomitantly.

---

12 Zimmermann 'Good faith and equity' in Zimmermann & Visser *Southern cross – civil law and common law in South Africa* (1996) 218; Lubbe 'Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse reg' 1990 *Stell LR* 7; Van der Merwe & Lubbe 'Bona fides and public policy in contract' 1991 *Stell LR* 91; Van Huyssteen & Van der Merwe 'Good faith in contract: proper behaviour amidst changing circumstances' 1990 *Stell LR* 244; Miller 'Iudicia bonae fidei: a new development in contract?' 1980 *SALJ* 531; Hutchison 'Good faith in South African law of contract' in Brownsword, Hird & Howells *Good faith in contract concept and context* (1999) 213; Lewis 'Towards an equitable theory of contract and the contribution of Mr Justice FL Janssen to the South African law of contract' 1991 *SALJ* 249; Hawthorne 'The principle of equality in the law of contract' 1995 *THRHR* 157; Glover 'Contract, good faith, the Constitution and duress: contextualising the doctrine' in Glover (ed) *Essays in honour of AJ Kerr* (2006) 101; Hawthorne 'The end of bona fides' 2003 *SA Merc LJ* 271. A possible reason for the judiciary's reticence to employ open norms is mooted by Hawthorne 'Legal tradition and the transformation of orthodox contract theory: the movement from formalism to realism' 2006 *Fundamina* 71; Hawthorne 'Closing of the open norms' 2004 *THRHR* 294; Hopkins 'Standard-form contracts and the evolving idea of private law justice' 2003 *TSAR* 150; Lewis 'Fairness in South African law' 2003 *SALJ* 330; Naudé & Lubbe 'Exemption clauses – a rethink occasioned by *Afrox Healthcare Bpk v Strydom*' 2004 *SALJ* 442; Lubbe 'Taking rights seriously: the bill of rights and its implications for the development of contract law' 2004 *SALJ* 395; Glover in Glover (ed) *Essays* at108*ff*; Hutchison '"Traps for the unwary": When careless errors are excusable' in Glover (ed) *Essays* 39*ff*; Lubbe 'Contractual derogation and the discretion to refuse an order for specific performance' in Glover (ed) *Essays* 77 where he states that: 'At the doctrinal or "black-letter" level, therefore, South African law has no equivalent to paragraph 242 of the German BGB' (the good faith clause); Bhana & Pieterse 'Towards a reconciliation of contract law and Constitutional values: Brisley and Afrox revisited' 2005 *SALJ* 865; Lubbe 'Taking fundamental rights seriously: the Bill of Rights and its implications for the development of contract law' (2004) *SALJ* 395; Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA) (2007) *SALJ* 269; Hawthorne 'Constitution and contract: human dignity, the theory of capabilities and *Existenzgrundlage* in South Africa' *Studia Universitatis Babes Bolyai Serie: Jurisprudentia* available at: studia.law.ubbcluj.ro 2011 Numeral 2 (last accessed 10 July 2012).

13 Translation: 'It is the very purpose of my proposal to avoid a process in which the judge is directed only to equity, sense of justice, good morals or similar concepts that are devoid of content.'

THE 'Flexible-system' ACCORDING TO WILBURG

Plurality of principles and values

In 1950 Wilburg, in his rectorial address, considered the tension between the relationship of the traditional system of private law on the one hand, and new legislation attempting to address societal changes on the other.[14] Disregard of the inherent contradictions between the two systems[15] creates confusion. Transposed onto the law of contract, the contradiction is manifested in classical law's reliance on freedom of contract and consumer legislation's limitation of freedom of contract.[16]

In an attempt to address this dichotomy, Wilburg proposed the 'flexible-system' to private law. In this he recognised two fundamental issues.[17] The first is that there is a plurality of values and purposes involved in specific areas of the law.[18] Recently, Hanoch Dagan[19] wrote convincingly in favour of a pluralist approach to private law and contract law as opposed to a monist approach which conceptualises an entire legal area such as contract law as revolving around one idea such as freedom of contract. In this regard Isaiah Berlin[20] stated that: 'human life is replete with competing values that cannot be reconciled, as well as with legitimate wishes that cannot be truly satisfied.' The consequence of accepting the validity of a plurality of values is that the law is not understood, interpreted or applied in terms of a single guiding principle but rather by an interaction of several independent principles which run parallel to one another.[21]

Secondly, he warns against free decision-making[22] by which he understood adjudication by judges unencumbered by principles which would lead to a jurisprudence characterised by a number of *ad hoc* points of view which may

---

14 Wilburg *Entwicklung eines beweglichen Systems im bürgerlichen Recht* (1950) 3; Bydlinski n 4 above at 9.

15 Wilburg n 14 above at 4.

16 Bydlinski n 4 above at 9.

17 Wilburg n 14 above at 4; F Bydlinski n 4 above at 10.

18 Wilburg n 14 above at 5 and 17; Bydlinski n 4 above at 10.

19 'Pluralism and perfectionism in private law' Tel Aviv University Law School Faculty Papers 2011 available at: http://law.bepress.com/taulwps/fp/art128 (last accessed 10 March 2012) at 1.

20 Introduction in *Four essays on liberty* (1969) 1*f*.

21 Wilburg n 14 above at 5 states that '*Es liegt im Sinne einer beweglichen Gestaltung, die rechtlichen Erscheinungen nicht als Körper, sondern als Ergebnis einer Kräftewirkung zu sehen. Dieser Vergleich trägt der Wandelbarkeit des Kräftespieles und der Relativität seines Wirkens Rechnung*.' And at 17 he states that '*Der Gedanke des Zusammenspiels verschiedener Kräfte, die jeweils verschiedene Stärke besitzen, kann auch das Recht der Verträge freier und vollkommener entfalten*.'

22 *Id* at 4.

be taken account of or ignored in the decision-making process.[23] What Wilburg supported is the application of principles in a particular area of the law to certain particular types of case.[24] His aim was to achieve just and equitable solutions which provide for similar treatment of similar cases.[25] He referred to these independent principles as 'forces' or 'elements'.[26] Wilburg supported multi-causal explanations of the law, whether it be the law of delict, unjustified enrichment, or contract.[27] For example, with regard to the law of delict, Wilburg recognised that all the delictual principles interplay to establish liability. Neither Wilburg nor his scholars went as far as to conceive how the grading would be effected. Nevertheless, both Wilburg and Bydlinski argue that the specific combination and weight of the principles will differ from case to case.[28]

Gradation of principles and values

The flexible system recognises a plurality of principles. These principles are applied concomitantly. Each individual principle is weighted when applied in a particular case. They are graded in their application.[29] This has the effect that legal consequences result from the interplay and comparative weight ascribed to each individual principle.[30]

Wilburg also acknowledged the fact that these principles might be antagonistic and might conflict with one another.[31] To achieve a just and fair system of private law (in the instance of this paper, contract law), these elements or principles must be balanced in order to achieve optimal justice.[32] This coincides with Willet's view[33] that adjudication should also be aimed at balancing the interests of the contracting parties in the pursuit of a fairness-based approach to contract law. Balancing the foundational

---

23 *Id* at 3*f*; Bydlinski n 4 above at 10.

24 *Id* at 12; Bydlinski n 4 above at 10.

25 Bydlinski n 4 n 14 above at10.

26 Wilburg n 14 above at 5; Bydlinski n 4 abve at 10. Neither Wilburg nor his scholars went so far as to develop the flexible theory by quantifying the weight of each principle. In this regard *cf* how Koch 'Wilburg's flexible system in a nutshell' in Koziol & Steininger (eds) *European tort law* (2001) 545 at 547, developed a theory of blocks to be applied to the principles of delict in an attempt to grade them.

27 Wilburg n 14 above at 7*ff*; Bydlinski n 4 above at 10.

28 Wilburg n 14 above at 12*f*; Bydlinski n 4 above at 10.

29 Wilburg n 14 above at 12; Bydlinski n 4 above at 11.

30 Wilburg n 14 above at 17.

31 *Id* at14; Bydlinski n 4 above at 11.

32 Wilburg n 14 above at 17 states that '*Es kommt m. E. wieder auf die Lage des einzelnen Falles im Hinblick auf die dargelegten, zusammenwirkenden Gesichtspunkte an*.'; Bydlinski n 4 above at 11.

33 Willet *Fairness in consumer contracts* (2007) 6.

contractual principles will result in the interests of the parties being balanced and so foster fairness.

Wilburg proposed that his 'flexible system' could lead to a 'more free and more perfect development of the law of contract'. This task was undertaken by his protégé, Bydlinski.

APPLICATION OF WILBURG'S FLEXIBLE SYSTEM TO THE LAW OF CONTRACT

Wilberg's 'flexible-system to private law' can be projected onto the law of contract.[34] Contract law has its own set of principles which need to be applied to determine whether a contract is valid and enforceable.[35] Wilberg's theory has received much attention since his address.[36] In this paper I shall concentrate on the interpretation of Wilburg's theory[37] by the Austrian author Bydlinski[38] who since 1967 has attempted to apply the system to contract law.

He suggests that there are four principles[39] which operate concomitantly or in opposition to one another. These are:

- private autonomy – freedom of contract;
- protection of commercial exchange – reasonable reliance on the other contracting party's statements or conduct;
- equivalence of the performances; and
- responsibility and self reliance – sanctity of contract.

---

34 Wilburg n 14 above at 17; Hönn 'Verständnis und Interpretation des Vertragsrechts im Lichte eines beweglichen Systems' in Bydlinski *et al* n 11 above at 89.

35 Koch n 26 above at 547.

36 *Cf Festschrift* n 11 above; *Walter Wilburg zum 70. Geburstag Festschrift* (1975).

37 Wilburg n 14 above at 17–19.

38 Bydlinski *Developments* (1999) 13; cf also Bydlinski *Privatautonomie und objective Grundlagen des verpflichtenden Rechtsgeschäftes* (1967); Bydlinski 'Bewegliches System und juristische Methodenlehre' in Bydlinski, Krejci, Schilscher & Steininger *Das bewegliche System im geltenden und künftigen Recht* (1986) 20–42; Bydlinski *System und Prinzipien des Privatrechts* (1997) 147*ff*.

39 Bydlinski *Developments* n 38 above at 14*f*.

These principles[40] will be briefly examined in order to lay a foundation and set the scene for a flexible approach model which implements the principles of the Draft Common Frame of Reference of 2009.

Private autonomy – freedom of contract

Private autonomy entails self-determination of legal consequences by each individual based on her own will. Essentially this means freedom of contract – that is, that persons should be free to negotiate the terms of their contracts without legislative interference. Flowing from this, is that once parties have concluded a contract, the terms of the contract should not be interfered with and should be given full effect.[41] Freedom of contract is also interpreted to mean that a person is free to select the parties she wishes to contract with and should be truly free to decide not to contract.[42] Within the ambit of these different interpretations the premise is that both contracting parties are equal.[43] However, because true equality seldom exists, the force of this principle depends on the circumstances of each individual case.[44] Consequently, private autonomy is influenced by several factors involving information obligations, such as the amount of information available to the contracting parties; the degree to which they can use the information, for example, to undertake comparative shopping; and whether they are truly free to come to an independent decision.[45]

Therefore, in perfect circumstances a decision is made with full comprehension of all that the latter entails; with full knowledge of all the relevant facts and the opportunity to make use of all relevant information; *eg* by conducting comparative research to facilitate the decision making

---

40 Hönn n 34 above at 88*ff* for an analysis of Bydlinski's elements and at 93*f* Hönn proposes his own principles namely: '*... die a) Privatautonomie, der b) vertragsbezogene Individualschutz und die c) öffentlichen Interessen. Naturgemäss bedürfen diese Prinzipien der Entfaltung in Unter-Prinzipien, was hier nur angedeutet werden kann. Hinsichtlich des (b) vertragsbezogenen Individualschutzes ist einmal vor allem das mit der Bildung und Erklärung des privatautonomen Willens verknüpfte Prinzip des aa) Verkehrs- und Vertrauensschutzes zu erwähnen. Zum anderen geht es um die bb) Bewältigung von Machtverhältnissen und sonstigen Gefahren für die Vertragsbeteiligten, wobei die Kategorie Bedeutsamkeit des Vertragsinteressens, Äquivalenz und Primärschutz durch den Wettbewerb ins Spiel kommen. Für die (c)) öffentlichen Interessen lässt sich differenzieren zwischen aa) Rechtssicherheit, bb) Gewährleistung von Wettbewerb und cc) Sozialstaatsprinzip.*'

41 Hawthorne 'The principle of equality in the law of contract' 1995 *THRHR* 157 at 163.

42 Aronstam *Consumer protection, freedom of contract and the law* (1979) 1; Hawthorne n 41 above.

43 Collins *The law of contract* (1993) (*sic*) 3*ff*.

44 Bydlinski n 4 above at14.

45 Koch n 26 above at 547.

process.[46] In this situation where there is no asymmetry regarding information, the principle of private autonomy or freedom of contract will carry sufficient weight to create enforceable legal consequences. Consequently, a decision based on full knowledge will result in a legally binding enforceable agreement. Whether this particular agreement can nevertheless be challenged will be judged in conjunction with the other principles, *ie* reasonable reliance, equivalence of performances, responsibility and self-reliance (because the principle of private autonomy was not defective in any way).

However, if agreement was reached on the basis of a mistake, duress, undue influence, or misrepresentation,[47] the principle of private autonomy is compromised to the extent that its weight may be reduced to the point where such an agreement cannot lead to enforceable legal consequences. Mistake, undue influence and misrepresentation create an asymmetry of information which could influence the free formation of agreement which could, in turn, hamper the creation of legally enforceable obligations.

Even where a free will has been formed and declared without any compromising conduct on the side of the other contracting party, its weight can be reduced because the concerned contracting party had no choice.[48] In each instance where the weight of private autonomy is reduced, the validity and enforceability of the agreement will depend on the weight of the other principles because the weight of private autonomy is less than 100%.

However, it must be noted that a lack of information or an absence of substantive freedom of contract, will not automatically render the agreement invalid.[49] The principle of freedom of contract needs to be balanced with the other principles and only, if (because there is no freedom of contract or the freedom was limited) it weighs much less or nothing compared to the other principles, will the agreement be found to be unenforceable because the principle of freedom of contract was compromised.

---

46 Bydlinski Developments n 38 above at14.

47 Van der Merwe, Van Huyssteen, Reinecke & Lubbe *Contract general principles* (2007) 25*ff* and 102*ff*; Hutchison & Pretorius *The law of contract* (2009) 81–149; Kerr *The principles of the law of contract* (2002) 33*ff* and 265*ff*; Christie & Bradfield *Christie's the law of contract in South Africa* (2011) 281–351.

48 Hönn n 34 above at 100*f* refers to '*Kontrahierungszwang für Versorgungsleistungen*' or … '*Kontrahierungszwang jenseits lebenswichtiger Güter bzw des Normalbedarfs*'

49 Bydlinski *Developments* n 38 above at15.

Thus, where the intent to contract was completely missing from one party, but her words and deeds nevertheless created the impression for the other party that it was a declaration of intent, and that impression was avoidable on the part of the former, the weight of private autonomy will be regarded as having been reduced. But the lack of intent may be compensated for by the weight ascribed to the reliance principle to the extent that the contract will be found to be enforceable.[50]

As has been pointed out, the premise in all interpretations of freedom of contract is that both contracting parties are equal. Equality between the parties is a prerequisite to attaining the ideal of freedom of contract. However, the element of equality in the concept of private autonomy has traditionally been 'formal'.[51] The flexible system takes cognisance of this fact by providing for a gradation of the various principles. Consequently, the reduced weight of private autonomy must be measured against the other principles in order to establish the validity of the transaction. The fact that the justificatory force of private autonomy is gradable, facilitates an interpretation which results in 'substantive' freedom of contract. Determination of private autonomy necessitates contextualisation of the particular circumstances of the case[52] which leads to the issue of equal bargaining power. Although it is acknowledged that to measure or establish the respective bargaining power of parties is difficult, it is submitted that the balance or imbalance of information provides an indication in this regard.[53] Furthermore, the flexible system recognises the principle of equivalence and an obvious imbalance in this regard, combined with the low weight of private autonomy, will frustrate the contract.[54]

Reasonable reliance

Reasonable reliance is manifested where one party makes a statement of her intention or conducts herself in such a manner that the other party reasonably relies upon the statement or conduct to mean that the first party has agreed to a contract. Traditionally this reliance is sufficient to constitute a basis for contractual liability and the contract will be enforceable.[55] According to

---

50 Bydlinski *Developments* n 38 above at 14,

51 Hawthorne 'The principle of equality in the law of contract' (1995) *THRHR* 158*ff*.

52 This was held in *Barkhuizen v Napier* 2007 5 SA 323 CC par 56.

53 *Cf* Hawthorne 'Making public knowledge, making knowledge public: information obligations effect truth-in-lending and responsible lending' (2007) *SAPR/PL* 477*ff*.

54 Bydlinski *Developments* n 38 above at 15.

55 Lubbe & Murray *Farlam & Hathaway Contract* (1988) 167*f*; Pretorius 'The basis of contractual liability (3): theories of contract (consideration, reliance and fairness)' 2005 *THRHR* 575 583.

Bydlinski's interpretation of Wilburg's flexible system, the principle of reasonable reliance by the one contracting party must be weighed against the declaration of intent made by the other contracting party.[56] Furthermore, he is of opinion that as a rule the reasonable reliance of the one party outweighs the other party's declared intent.[57]

This is in accordance with the South African approach to contractual liability based on the reasonable reliance of one contracting party on a declaration of intent by the other party.[58] Regarding the importance of the role of reasonable reliance in testing for contractual liability, Pretorius,[59] in his seminal work on this subject, is of the opinion that in the event of dissensus, reliance, either directly or indirectly, will be the decisive factor in establishing whether the agreement is enforceable or not.

Equivalence of performance

Equivalence of performance entails not only that the value of the exchange be more or less of equal value, but also that the legal positions supporting the distribution of risk be fairly distributed. In consequence, it is argued that there must not be an obvious imbalance regarding the parties' respective performances.[60] This principle will act as a corrective factor in instances where private autonomy is compromised – for example by mistake, undue influence, misrepresentation or unequal bargaining power.[61] Imbalances are found in situations of usury, standard contracts, and instances of warranties and cases where as a result of changed circumstances the reason for the agreement has ceased to exist.[62] Consequently, where private autonomy bears a lesser weight, *eg* where the freedom of contract was only slightly compromised by, for example, undue influence, the contract may still be found to be unenforceable because there is a significant imbalance in the performances of the two parties. However, where private autonomy is only slightly compromised by undue influence, but there is an equivalence of performance, it may be found that the agreement is valid and enforceable. In the first instance the imbalance in performance will weigh heavily and regardless of the fact that the *dissensus* is not sufficient to void the contract,

---

56 Bydlinski *Developments* n 38 above at 14.

57 *Ibid*; see also n 14 above at 17*f*.

58 Hutchison & Pretorius n 47 above at 20; Christie & Bradfield n 47 above at 13, 25; Van der Merwe *et al* n 47 above at 38*ff*; Kerr n 47 above at 25*f*.

59 Pretorius 'The basis of contractual liability (3): theories of contract (consideration, reliance and fairness)' 2005 *THRHR* 575 at 583*ff*.

60 Bydlinski *Developments* n 38 above at 14; see Wilburg n 14 above at18.

61 Hönn at 92 refers in this context to the '*Sozialstaatprinzip*'.

62 Bydlinski *Developments* n 38 above at 15.

the fact that there is a significant imbalance in performances will render the contract unenforceable. Conversely, if there is equality of performance but private autonomy was slightly compromised, the agreement may be found to be enforceable. An example of such a situation can be found in the insurance industry. The pressure placed on first time employees by insurance sales persons to conclude insurance agreements such as annuity agreements where the monthly payment outweighs the eventual return, are legendary.

Sanctity of contract

In terms of the principle sanctity of contract, agreements seriously and freely concluded must be upheld and enforced.[63] This principle involves responsibility and self-reliance. It consists of the duty to honour one's promises and to keep one's agreements. It entails abiding by one's unconscious but imputable declarations of intent which with due care could have been avoided or were made by self-created risks.[64] Wilburg held this principle to be the most important in the traditional doctrine.[65] Finally, both Wilburg and Bydlinski view private autonomy as the dominant principle.[66]

Before embarking upon the next part of the essay, it is necessary to point out that projecting Wilburg's 'flexible approach' onto the law of contract using the underlying principles accepted by the DCFR, provides a practical solution to the problem raised by the dichotomy between the emerging two parallel systems of contract law. The DCFR recognises freedom of contract, security, justice, and efficiency as the principles guiding contract law today.[67] These principles will now be analysed and applied in accordance with Wilburg's approach in an attempt to establish a formula which can be applied to both systems, classical and consumer law when determining whether an agreement is enforceable or not.

---

63 Hutchison & Pretorius n 47 above at 22; Christie & Bradfield n 47 above at 12; Van der Merwe *et al* n 47 above at 11.

64 Bydlinski *Developments* n 38 above at 15.

65 Wilburg *Entwicklung* n 14 above at 17 holds that: '*Die traditionelle Lehre geht vom Prinzip der Vertragstreue aus, nach dem jedermann an einen Vertrag, den er geschlossen hat, gebunden ist*.'; and at 18 that: *'Diese Kräfte sind gegen die Gültigkeit je nach der Schutzwürdigkeit, die sie begründen, wirksam. Sie können aber nur in höchsten Graden ihrer Stärke allein den Grundsatz der Vertragstreue, der der Sicherheit des Verkehres dient, überwinden.*'

66 Bydlinski *Developments* n 38 above at 15.

67 DCFR 60.

PRINCIPLES OF CONTRACT LAW AS RECOGNISED BY THE DCFR: FREEDOM, SECURITY, JUSTICE, AND EFFICIENCY

Introduction

The Draft Common Frame of Reference is the culmination of the work undertaken by the Study Group on a European Civil Code and the Research Group on Existing European Community Law known as the 'Acquis Group'.[68] The DCFR is the result of a call by the European Commission's Action Plan in 2003 for 'A more Coherent European Contract Law'. The DCFR incorporates in a revised form the Principles of European Contract law (PECL).[69] The aim of the DCFR is to act as a source and model for a final Common Frame of Reference. It contains principles, definitions and model rules of European private law. It aims to provide an academic model for a future 'political' Common Frame of Reference.[70] It is stated that '[t]he DCFR may furnish the notion of a European private law with a new foundation which increases mutual understanding and promotes collective deliberation on private law in Europe'.[71]; [and] … may contribute to a harmonious Europeanisation of private law'.[72]

The DCFR recognises four juristic principles as underlying the whole of the DCFR. These are freedom, justice, security and efficiency.[73] These principles do not carry equal value.[74] Following the liberal tradition, freedom is considered the most important and weighs the most;[75] while efficiency is recognised as being the least important of the principles and, in most instances, will play a minor role. Freedom, security, and justice promote welfare and empower people to achieve their full potential.[76] Therefore, while these principles are considered more fundamental than efficiency, efficiency cannot be disregarded as it underlies certain rules which cannot be explained without reference to it, *eg* all the rules relating to formalities such as a requirement of writing and the concept of prescription.[77]

---

68 *Id* at 3*ff*.
69 *Id* at 6.
70 *Id* at 7.
71 *Id* at 8.
72 *Id* at 9.
73 *Id* at 10*ff*, 17, 60*ff*.
74 *Id* at 60.
75 *Id* at *ibid*; Wilburg 17*ff*; Bydlinski 14*ff*.
76 *Id* at 60. Hawthorne 'Constitution and contract: human dignity and *Existenzgrundlage* in South Africa' n 12 above.
77 *Id* at 60.

The DCFR also acknowledges that these principles will not always interact harmoniously.[78] In certain circumstances – such as where there is an issue regarding prescription – justice could weigh less than security and efficiency. In the same vein, freedom of contract may be outweighed by justice, for instance to prevent discrimination.[79] Principles can also be auto-conflicting – for example, freedom from discrimination will restrict another's freedom to discriminate and justice, in the sense of equality, may conflict with another notion of justice such as protection of the weak.[80] It is submitted that the DCFR propogates Wilburg's dogma that principles must be applied in a flexible manner to achieve optimum results.[81] Apart from echoing Wilberg's requirement of flexibility, the DCFR also acknowledges that these principles have more than one dimension and in certain circumstances will be seen to overlap.[82] Thus, rules which ensure freedom of contract usually also ensure justice.[83] However, although the DCFR recognises Wilburg's premise, it does not offer a theoretical framework within which the principles are to be applied.

The different principles laid down in the DCFR and echoed in South African law will be analysed to develop a model of adjudication for all contracts. The gradation and interplay of the different principles will be illustrated.

Freedom – party autonomy

As early as 1880 Fouillée stated: *Qui dit contractuel, dit juste,*[84] the modern version of which would be that where parties are fully informed and are in an equal bargaining position at the time of conclusion of their agreement, the content can be regarded as being in their best interest as well as being fair between themselves.

The concept of freedom departs from an '*ideal typus*' of educated, affluent, healthy parties in possession of full information which enables them to make an informed decision regarding the agreement to be concluded. The DCFR attempts to create this situation by addressing, amongst others, prevention of withholding information at the pre-contractual stage of the agreement;

---

78 *Id* at 15, 60f.
79 *Id* at 61.
80 *Ibid*.
81 *Ibid*.
82 *Ibid*.
83 *Ibid.*
84 Fouillée *La science sociale contemporaine* (1880) at 410.

information about the terms of the contract;[85] and correcting inequality of bargaining power.[86]

The DCFR recognises that the principle of freedom is fundamental to the law of contract[87] and is consequently more important than the principles of security, justice and efficiency.[88] Furthermore, the DCFR emphasises the fact that the concept of freedom is multifaceted[89] and that freedom can be promoted by enhancing peoples' capabilities.[90] In the traditional approach freedom may be compromised by mistake, duress, undue influence, and misrepresentation. The DCFR proposes to bolster freedom by extending information obligations.[91]

Freedom of contract would be completely compatible with justice if the parties had full information and equal bargaining power. In a normal situation freedom of contract will also be compatible with efficiency.[92] Thus, an agreement concluded by parties not afflicted by an asymmetry of knowledge and who are in an equal bargaining position, will be profit maximising and result in gains for both parties. Consequently, where a party's freedom is compromised because of, for example, an asymmetry of information, the principles of both justice and efficiency will also be compromised. In such an instance, the balance between these three principles weighed up against the principle of security, will result in the agreement being unenforceable. Unenforceability will also result where a contract with complete freedom on the part of both parties is concluded but it is contrary to public policy. In such an instance, justice will trump freedom, security and efficiency. The DCFR accepts that freedom is multifaceted and comprises restrictions on the right to choose a contracting party, restrictions on freedom to withhold information, and inequality of bargaining power.

---

85 DCFR 67.

86 *Ibid*.

87 DCFR II – 1: 102(1) 'A valid contract is binding on the parties'.

88 DCFR 60.

89 *Id* at 61.

90 *Ibid*. *Cf* also Hawthorne 'Constitution and contract: human dignity and *Existenzgrundlage* in South Africa' n 12 above.

91 DCFR 66*ff*; DCFR II–3: 101–109. Ch 3 deals with all the rules relating to marketing and pre-contractual duties and ch 3 s 1 specifically with information duties.

92 DCFR 63.

Restrictions on the right to choose a contracting party

To protect the fundamental position of freedom, the DCFR suggests certain default rules. It states that where a contract is concluded by deliberate conduct on the side of one party, and this conduct infringes the other party's freedom or misleads her, the right to find such a contract unenforceable should be mandatory.[93] Regardless that freedom entails the right to choose a contracting party or to refuse to contract with someone, this freedom needs to be qualified where the choice involves discrimination on the grounds of gender, race or ethnic origin.[94] In such a case, justice will outweigh the protagonist's freedom of contract in favour of the other party whose freedom and human dignity will be compromised by the discrimination.

Restrictions on freedom to withhold information

The DCFR supports the introduction of mandatory rules outlawing a party from withholding information at the pre-contractual stage of contracting.[95] By introducing this limitation on freedom of contract,[96] the DCFR extends the classic defence of mistake by introducing duties to provide the other party with all the information she requires to make a fully informed decision. These rules apply in particular to consumer contracts but can, obviously, also play a role in the classic contract situation.

Inequality of bargaining power

Traditional law only addresses instances of inequality caused by mistake, misrepresentation, duress and undue influence. Such an approach fails to address new forms of inequality created by standard contracts which are most often characterised by 'unfair terms'. Where a party is offered a standard form contract the content of which she understands but is dissatisfied with, she may be unable to find another supplier with fairer terms and so be confronted with a 'take it or leave it' attitude.[97] Viewed from this perspective, the reason for introducing provisions prohibiting unfair terms also derives from freedom of contract and the realisation of party autonomy. In this case freedom together with justice will outweigh security and

---

93 *Id* at 65.

94 *Id* at 66; Book II–2:101–105.

95 *Id* at Book II–3:101–109.

96 It is submitted that although the DCFR views the requirement of information as a limitation on freedom I have argued that it does not constitute a restriction but rather an enhancement of freedom *cf* Hawthorne 'Materialisation and differentiation of contract law: can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention' 2008 *THRHR* 451.

97 DCFR 67.

efficiency and consequently, a contract with unfair terms will be found to be unenforceable.

The DCFR specifically provides in section II 7:207 (1)(a) that a contracting party who is dependant on or is in a relationship of trust with the other party, is in economic distress or has urgent needs, is improvident, ignorant, inexperienced or lacking in bargaining skill; and (b) the other party knows or could reasonably be expected to have known this, and given the circumstances and purpose of the contract, exploits the first party's situation by taking an excessive benefit or grossly unfair advantage, may void the contract.

In a South African context the CPA provides in section 40(2) that it is unconscionable for a supplier knowingly to take advantage of a consumer's inability to protect her own interest. This provision lists factors such as illiteracy, ignorance, inability to understand the language of the agreement, or mental or physical disability, but does not contain a *numerus clausus*.[98] Additional factors concerning disadvantaged consumers which may be taken into account, are provided by section 3(1)(b) which lists low income persons, remote, isolated or low density communities, minors, seniors, or other vulnerable consumers or persons with low literacy, vision impairment, or limited language ability. Further elaboration is found in section 52(2)(b) where it is provided that a court must consider the nature of the parties, their relationship, their relative capacity, education, experience, sophistication and, most importantly, their bargaining position.[99] These factors are of a personal nature and eliminate exploitation of consumers by taking advantage of their vulnerabilities. By labelling such behaviour unconscionable and void,[100] the Act levels the playing field in order to ensure fair and just conduct, terms and conditions. Introduction of these factors which are known to affect the parties' abilities to protect their interests – such as lack of choice and weak consumer bargaining strength – attempts to balance the interests of the parties.[101]

---

98 Section 40(2).

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

100 Section 40(2) and (3) read together with s 51(3).

101 Willet n 33 above.

In addition to the emphasis the DCFR places on the principle of freedom, attention is also given to the other principles of security, justice and efficiency. The principle of security plays an important role in contributing to the balancing of the principles as described by Wilburg.

Security/certainty

Contractual security means certainty[102] and comprises several aspects. It encompasses first, the obligatory force of contracts; secondly, duties which flow from what is referred to as contractual loyalty and cover a duty to behave in good faith and to co-operate, not to act inconsistently with prior declarations or conduct on which the other party has relied, the protection of a reasonable reliance, and expectations;[103] thirdly, the right to enforce performance;[104] and fourthly, that contracts are interpreted to give effect to the contract rather than a finding of unenforceability.[105]

The principle of binding force – pacta sunt servanda

In classical law cases of supervening impossibility of performance, where without the fault of either party performance becomes objectively impossible after conclusion of the contract, the debtor is exonerated from her obligations.[106] A modern development and extension of this rule covers the instance in consumer agreements where the consumer is entitled to withdraw from the contract within a specific period and in certain circumstances.[107] This is the case where a consumer contract is concluded as a result of direct

---

102 DCFR 76.

103 DCFR II 1: 103 'Binding effect'; I 1:103 'Good faith and fair dealing' (1) The expression 'good faith and fair dealing' refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. (2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment and at III–1:103 'Good faith and fair dealing' (1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship. (2) The duty may not be excluded or limited by contract or other juridical act. (3) Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.; III 1: 104 'Co-operation'; II 9:102 'Certain pre-contractual statements regarded as contract terms'.

104 III 3:301 'Right to enforce performance'.

105 DCFR 72; DCFR II – 8: 106; Hutchison & Pretorius n 47 above at 264*f*.

106 Hutchison & Pretorius n 47 above at 381*ff*; Van der Merwe *et al* n 47 above at 541*ff*.

107 In the case of the cooling off period provided for in all consumer legislation.

marketing,[108] away from the place of business, the consumer is entitled to a cooling off period within which she is entitled to withdraw from the agreement. The cooling off period provides the consumer with an opportunity (usually five days) to acquire additional information in order to decide whether she wishes to continue with the transaction or not.[109] Thus, the cooling off period enhances freedom of contract. In the event of a consumer becoming aware of information within this period as a result of which she has doubts to whether she wishes to continue with the contract she is entitled to withdraw. Thus a consumer contract cannot be found to be enforceable where the consumer makes use of the cooling off period to obtain information and decides to withdraw from the agreement. Consequently, the principle *pacta sunt servanda* is diminished under these circumstances and freedom outweighs the *pacta sunt servanda* aspect of certainty.

Contractual loyalty: good faith, fair dealing and co-operation

Certainty on the side of one party is enhanced by the obligation to act according to the dictates of good faith and fair dealing on the part of the other party.[110] However, because of the open-endedness of these concepts, the converse applies to the party who must act in good faith and practise fair dealing. To act within the ambit of these two principles may create uncertainty as the facts in each particular case are unique. Because good faith and fair dealing go beyond certainty,[111] the DCFR places these open norms under the principle of justice and therefore they will be dealt with there.

The DCFR introduces a duty of cooperation. Section III 1-104 provides that

> The debtor and creditor are obliged to co-operate with each other when and to the extent that this can reasonably be expected for the performance of the debtor's obligation.[112]

---

108 Section 1 Consumer Protection Act 68 of 2008 defines direct marketing as: 'to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of – (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; DCFR II – 5:201 'Contracts negotiated away from business premises' (1) A consumer is entitled to withdraw from a contract under which a business supplies goods. Other assets or services, including financial services, to the consumer, or is granted a personal security by the consumer, if the consumer's offer or acceptance was expressed away from the business premises.

109 DCFR 74f.

110 DCFR 76.

111 In South Africa a consumer's right to fair dealing is introduced by the CPA. *Cf* Part F 'Right to fair and honest dealing' sections 40–47.

112 DCFR III–1:104.

The principle of cooperation not only underpins certainty but justice as well, and plays an important role in providing content to the meaning of both these principles.[113] In consequence there is an interplay between the principles of *pacta sunt servanda*, good faith, cooperation, fair dealing and freedom. To cooperate actively involves the sharing of information which provides leverage to freedom.

Justice

The principle of justice pervades the DCFR and plays a fundamental role in contract law adjudication.[114] It is difficult to define and measure and furthermore is subjective. Cases of injustice are recognisable,[115] and contracts involving injustice are unenforceable.[116] Justice may conflict with the other principles – freedom, certainty and efficiency – but will be difficult to displace. The different facets of justice involve equality in the sense of treating like parties alike; not allowing a party to rely on her own unlawful, dishonest, or unreasonable conduct; not allowing one contractant to take unfair advantage of the weakness, misfortune or kindness of others; and not making grossly excessive demands. Justice can also be interpreted in a protective and preventative manner, ie as protecting the weak and vulnerable by prohibiting certain actions.[117] The different aspects of justice will be dealt with in order to provide content to the concept and indicators which could affect its relative weight as opposed to the principles of freedom, security and efficiency.

---

113 In a South African context a duty to co-operate has been acknowledged on two fronts: the first relates to an instance of classical law *viz* long-term agreements and the second to consumer law relating to the requirement of disclosure and information. In regard to the first instance in *South African Forestry Co Ltd v York Timbers* (2005) 3 SA 323 (SCA) Brand JA found (at 341C–D) that the corollary of the rights conferred by the contract on Safcol constituted an obligation on York Timbers not to frustrate Safcol in the exercise of its rights. Thus it is justified to deduce that in innominate, long term contracts there is an implied term that contracting parties should not frustrate their counterpart in the performance of the terms of their agreement. In short, parties are obliged to cooperate. In regard to the consumer law requirement relating to disclosure of information sections 22–28; and s 49 of Act 68 of 2008 deal with notices required for certain terms and conditions.

114 DCFR 84.

115 In his seminal work on good faith, Summers 'Good Faith in general contract law and the sales provisions of the uniform commercial code' *Virginia LR* 1968 at 201*ff* developed a method of defining what good faith is by excluding what bad faith is. In this way one defines the negative action which qualifies as bad faith which then translated into the positive gives the duty of good faith.

116 DCFR 84.

117 DCFR 84. This protection is contained in the prohibitions contained in consumer protection legislation and the *naturalia* of the classical law of contract.

Equality – treating like alike

The rules against discrimination are the most obvious manifestation of a principle of equality in the law of contract and are dealt with in both the DCFR and South African common law and consumer legislation.[118] Equality manifests itself in respect of other general contract law rules such as the rules relating to the order of performance of obligations in reciprocal agreements: that one party need not perform before the other.[119] Equality is also present in the rules on withholding performance until the other party performs,[120] and in the rules allowing one party to terminate the contract where the other party repudiates.[121] The default rules regarding a plurality of debtors or creditors also fall within the ambit of equality since solidary debtors and creditors are liable or entitled in equal shares.[122] There may be circumstances where the rules to ensure security have to be balanced by considerations of justice; for example when freedom of contract may be limited to prevent discrimination or to prevent abuse because of inequality of bargaining power, or justice has to be balanced as equal treatment may conflict with protection of the weak.

Not allowing a party to rely on her own unlawful, dishonest or unreasonable conduct – the principle of good faith and fair dealing

Although the main purpose of the rules relating to mistake, duress, undue influence and misrepresentation is to ensure that a party can void her contract on the basis that her freedom of contract had been compromised to the extent that the impingement outweighs justice, security and efficiency, there is also a second consequence which prevents the other party from gaining an advantage as the result of her own dishonest or unreasonable conduct. This secondary effect impacts on the principle of justice and will cause a contract to be unenforceable not only because freedom has been compromised, but because it would be unjust to allow a contracting party to rely on her unlawful conduct.[123]

---

118 DCFR 85; Book II–2:101–105; and III–1:105 (these provisions all deal with discrimination);*cf* ch 2 part A of the CPA which deals with fundamental consumer rights and specifically the right to equality in the consumer market.

119 DCFR 85; Hutchison & Pretorius n 47 above at 313; Christie & Bradfield n 47 above at 437*ff*; Van der Merwe *et al* n 47 above at 390; Kerr n 47 above at 609.

120 DCFR 85; Hutchison & Pretorius n 47 above at 310; 314*ff*; Christie & Bradfield n 47 above at 437*ff*; Van der Merwe *et al* n 47 above at 394*f*; Kerr n 47 above at 608; the *exceptio non adimpleti contractus* is a remedy which allows a party to withhold her own performance until the other party has performed.

121 DCFR 85; Hutchison & Pretorius n 47 above at 295*ff*; Christie & Bradfield n 47 above at 538; Van der Merwe *et al* n 47 above at 365; Kerr n 47 above at 585*f*.

122 DCFR 85; Hutchison & Pretorius n 47 above at 219*f*; Joubert *General principles of the law of contract* (1987) 311*ff*; Christie & Bradfield n 47 above at 260*ff*.

123 DCFR 86*f*.

In the DCFR, the aspect of justice which entails not allowing a party to gain an advantage from her dishonest behaviour, manifests in the duty to act in accordance with good faith and fair dealing. It is specified that 'a person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non performance, or in exercising a right to terminate an obligation or contractual relationship.'[124]

It is noteworthy that the DCFR, which emanates from the European legal tradition, ascribes a different meaning, content and effect to good faith than is the case in South Africa.

In a South African context it is acknowledged that good faith is not a free floating principle capable of independent application; but rather it is an underlying value that informs various rules and principles of the law of contract.[125] It constitutes an abstract value rather than an independent substantive rule. It goes so far as to underpin substantive law. Apart from the rules of mistake, duress, undue influence and misrepresentation, good faith is manifested in the doctrine of public policy. The rule in this regard was clearly enunciated in *Barkhuizen v Napier*[126] where it was held that a (constitutional) challenge regarding the fairness of a contractual term involves testing whether the challenged term is contrary to public policy as evidenced by the values contained in the Constitution and the Bill of Rights. Public policy represents the general sense of justice of the community.[127] It imports fairness, justice and reasonableness,[128] and can prevent enforcement of a contractual term where such enforcement would be unjust or unreasonable.[129]

---

124 DCFR III–1: 103. The *Principes directeurs* in Art 0.301 titled 'General duty of good faith and fair dealing', go further in that they state that 'each party is bound to act in conformity with the requirements of good faith and fair dealing, from the negotiation of the contract until all of its provisions have been given effect'. In art 0.302 dealing with 'performance in good faith', they also deal with performance by demanding that 'every contract must be performed in good faith. The parties may avail themselves of the contractual rights and terms only in accordance with the objective that justified their inclusion in the contract'. These two provisions together are wider than the provision in the DCFR, but it has been noted that it is doubtful whether there would be any real difference in the practical implementation

125 Hutchison & Pretorius n 47 above at 167; Christie & Bradfield n 47 above at 12; Van der Merwe *et al* n 47 above at 96; Kerr n 47 above at 301*f*.

126 2007 5 SA 323 (CC).

127 At par [73].

128 *Ibid*.

129 At pars [70] and [73]. The determination of fairness of the challenged term involves a two-fold test. Two questions need to be posed in order to determine what qualifies as

However, the South African common law has been supplemented by the Consumer Protection Act[130] (the CPA) which has introduced provisions contextualising the relative situation of the parties.

Both the DCFR and the South African law are in the process of refining the principles of freedom and justice by moving away from formal and so-called objective content towards a realistic and substantive understanding. Thus, if a contractant concludes an agreement while being objectively free, the contract will not be enforced if the principle of justice is compromised because enforcement in the light of the circumstances or taking account of the relative situation of the parties is considered contrary to public policy. Furthermore, enforcement will not be effected where the consumer lacks the ability to protect her own interests. In this regard factors such as illiteracy, ignorance, inability to understand the language of the agreement or mental or physical disability will compromise justice to the extent that it trumps freedom. These factors also fall into the category of unfair exploitation, which will prevent enforcement of a freely concluded agreement because it is unjust. The DCFR[131] understands unfair exploitation to include an instance where a contracting party had a relationship of dependency or trust with the other contractant, or was improvident, ignorant, inexperienced or lacking in bargaining skills. These factors which contextualise unfair exploitation are

---

fair: first, whether the term itself is unreasonable and secondly, if the term is found to be reasonable, whether it should be enforced *taking into account the circumstances of the particular case and the relative situation of the parties*. The first part relates to the question concerning the objective terms of the contract ie whether the particular clause in the contract passes the considerations of reasonableness and fairness, since public policy would preclude enforcement of a contractual term if this would be unjust or unfair. If it is found that the objective terms pass public policy muster the second part of the test is activated *viz* whether these terms are 'contrary to public policy in the light of the relative situation of the contracting parties', or 'whether the clause should be enforced in the light of the circumstances'. At this stage the 'relative situation of the parties' and 'in the light of the circumstances' has not been contextualised.

130 68 of 2008.

131 DCFR 87; II–7:207 'Unfair exploitation' (1) A party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and (b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage. (2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed. (3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it.

also present in a South African context as illustrated above with reference to the CPA.

No grossly excessive demands

This aspect of justice reflects the rules which affect *pacta sunt servanda*, ie the binding force of contracts. The DCFR holds that justice in this sense is manifested in the following instances: where it is objectively impossible for a debtor to perform because of circumstances beyond her control;[132] another instance which allows contractual obligations to be terminated as they have become too onerous because of a change of circumstances is when the obligation qualifies as 'manifestly unjust to hold the debtor to the obligation';[133] a creditor also does not have a right to enforce a performance where performance would be unreasonably burdensome or expensive.[134] This aspect of justice is also manifested in the rule that the sanction of a penalty clause for non-performance can be reduced where it is considered 'grossly excessive' in the circumstances.[135] It is critical that justice manifested in 'grossly excessive' behaviour must be limited, and that the emphasis must fall on 'grossly'. The DCFR points out that 'there is nothing against people benefitting from a good bargain or losing from a bad one.'[136] It is this aspect of justice which clearly illustrates that the principles of freedom, justice,

---

132 DCFR 87; DCFR III–3:104.

133 DCFR III–1:110 Variation or termination by court on a change of circumstances (1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. (2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court. (3) Paragraph (2) applies only if: (a) the change of circumstances occurred after the time when the obligation was incurred; (b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; (c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and (d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

134 DCFR III–3:302.

135 DCFR III–3:712 'Stipulated payment for non-performance' (1) Where the terms regulating an obligation provide that a debtor who fails to perform the obligation is to pay a specified sum to the creditor for such non-performance, the creditor is entitled to that sum irrespective of the actual loss. (2) However, despite any provision to the contrary, the sum so specified in a contract or other juridical act may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.

136 DCFR 88.

certainty and efficiency conflict and that it is necessary to establish a balance between them. Therefore, if a contract is concluded under circumstances where the parties are truly free, the principles of security and efficiency are met, but, for example, the penalty clause for non-performance appears excessive, it will have to be established that it is 'grossly' excessive in relation to the loss resulting from the non-performance and the other circumstances before the contract will be found to be unenforceable.

The DCFR relates these cases to a facet of the principle of justice. In South Africa, the aspect of 'grossly excessive demands' is manifested in the facet of justice referred to as public policy. As mentioned, public policy may be defined as the legal convictions of the community.[137] It can be argued that striking down a contract would be justified if enforcement of the contract would be regarded as unconscionable and incompatible with the dictates of public policy. This principle was enunciated in the milestone decision of *Sasfin v Beukes*.[138] In keeping with the adhortation by the DCFR to limit application of this aspect of justice, Smallberger JA qualified the rule by two riders.[139] In respect of the first prerequisite, he held that: 'Agreements which are *clearly inimical to the interests of the community*, (my emphasis) whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.' The second rider he formulated as follows: '… that public policy favours the utmost freedom of contract, …'.[140] Consequently, *Sasfin* decreed that harm had to have been caused to community interests not only to an individual contracting party, and that over and above this standard, freedom of contract reigned supreme. Public policy as understood within the definition provided in the *Sasfin* case, is thus narrow and limited.[141] Therefore, only where justice is compromised by 'grossly excessive demands' will it outweigh freedom, security and efficiency and result in unenforceability.

---

137 Hutchison & Pretorius n 47 above at 456; Christie & Bradfield n 47 above at 17; Van der Merwe *et al* n 47 above at 199.

138 1989 1 SA 1 (A).

139 At 7.

140 At 9.

141 Barnard-Naudé '"Oh what a tangled web we weave … ". Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract' (2008) *Constitutional Court Review* 155 at 174 is of the opinion that *Sasfin* only goes so far as to check the worst features of the South African liberal contract law system and made no room to tinker with its regular operation characterised by formalism.

Protecting the vulnerable

Protecting the vulnerable is considered an aspect of justice by the DCFR and originates in the rules of consumer protection law.[142] These rules, amongst others, apply to unfair terms,[143] marketing, pre-contractual duties,[144] and the right of withdrawal.[145] This protection is also found in the South African CPA.[146] An additional aspect of protection of the vulnerable is linked to unfair terms, and relates to the issue of equivalence of performance which echoes Wilburg's fundamental principles. In a South African context it is submitted that equivalence of performance is dealt with in section 48(1)(a) which provides that goods or services may not be offered at an unfair, unjust or unreasonable price.[147] Contravention of these legislative rules supports a finding of unenforceability.

Furthermore, it can be argued that apart from the statutory rules protecting consumers, all the default rules cabined within the *naturalia* of the classical law are aimed at providing protection to the vulnerable contractant.[148] These rules deal with the duty of care and allocation of risk,[149] liability in the event of breach,[150] rules relating to performance,[151] and the rules relating to interpretation.[152] Of particular relevance in this regard are rules relating to interpretation. These are the *quod minimum*[153] and *contra proferentem* rules[154] which provide examples of default rules that make for justice.[155] In

142 DCFR 88.

143 DCFR II–9: 4; *Cf* the comprehensive analysis by Naudé 'The consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective' 2009 *SALJ* 505; and 'Enforcement procedures in repsect of the consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective' (2012) *SALJ* 515.

144 DCFR II–3.

145 DCFR II–5.

146 *Cf* infra 4.4.2.

147 S 48(1)(a). S 48(1)(b) prohibits marketing or contracting in an unfair etc manner and thus deals with procedural fairness. S 48(1)(c) repeats S 48(1)(a)(ii) and narrows the scope of the terms.

148 *Cf* Hawthorne 'Contract law's choice architecture: the hidden role of default rules' (2009) 72 *THRHR* 599*ff* for a comprehensive survey of the *naturalia*.

149 *Id* at 606*ff*.

150 *Id* at 608.

151 *Ibid*.

152 *Id* at 609.

153 Van der Merwe *et al* n 47 above at 307; Hutchison & Pretorius n 47 above at 265*f*.

154 Van der Merwe *et al* n 47 above at 307; Hutchison & Pretorius n 47 above at 265*f*; Christie & Bradfield n 47 above at 232*ff*; *British America Assurance Co v Cash Wholesale* 1932 AD 70; *Fedgen Insurance Ltd v Leyds* 1995 3 SA 33 (A).

155 *Walker v Redhouse* 2007 3 SA 514 (SCA); *Drifters v Adventure Tours CC v Hircock* 2007 2 SA 83 (SCA); *Essa v Divaris* 1947 1 SA 753 (A); *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982

both instances, a particular interpretation is adopted in preference of another. In terms of the *quod minimum* rule, words with a doubtful meaning must be construed in such a manner that the least burden is placed on the debtor or promissory.[156] The *contra proferentem* rule provides that a contract or its terms must in the event of doubt and ambiguity, be construed against the party by whom or on behalf of whom the term was drafted.[157] This rule finds its basis in the argument that the party who chose the terms of the contract had the opportunity of stating her will clearly and if she failed to do so, the interpretation most in favour of the other party will be adopted.[158] Whenever it is unclear who has selected the words, it is presumed that they were chosen by the creditor and they are then interpreted in favour of the debtor.[159] When applying the *contra proferentem* rule to exemption clauses[160] or an exclusion of liability clause in an insurance contract,[161] the terms are strictly construed against the party relying on the exemption of liability.[162] Consequently, even if a standard contract has been entered into with utmost freedom, these rules will, in the event of ambiguity, still protect a contractant against an unjust interpretation by the other contracting party.

EFFICIENCY

In both the DCFR and South African contract law, the principle of efficiency is manifested in the rules of information obligations, the remedies for non-performance and prescription.[163] The principle of efficiency will be less

---

(SCA).

156 *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 3 SA 99 (A) 122–123; Reinecke and Van der Merwe *Insurance* (2002) 168*f* par 234 for reasons justifying the rule.

157 *Colonial Mutual Life Assurance Society Ltd v De Bruyn* 1911CPD 103, 129; *Cairns (Pty) Ltd v Playdon and Co Ltd* 1948 3 SA 99 (A) 122–125; *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 851 (SE).

158 *Cairns (Pty) Ltd v Playdon and Co Ltd* 1948 3 SA 99 (A) 121–122; *De Beer v Ingram* 1931 OPD 33 38; *British American Assurance Co v Cash Wholesale* 1932 AD 70 74–75; *Ex parte Steinberg* 1940 CPD 1 6; *De Chazal De Chamarel's Estate v Tongaat Group Ltd* 1972 1 SA 710 (D) 717; *Zietsman v Allied Building Society* 1989 3 SA 166 (O) 177D–E; Van der Merwe *et al* n 47 above at 307; Christie 224.

159 *Ibid.*

160 *Bristow v Lycett* 1971 4 SA 223 (RA) 236; *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 2 SA 794 (A) 803F–806H; *Lawrence v Kondotel Inns (Pty) Ltd* 1989 1 SA 44 (D) 53D–54F; *Zietsman v Van Tonder* 1980 2 SA 484 (T). Christie 246.

161 *Stewart Taylor Holdings (Pty) Ltd v Shield Insurance Co Ltd* 1981 1 SA 577 (D) 580A–H; *Price v Incorporated General Insurance Ltd* 1983 1 SA 311 (A) 315G–316B.; Christie & Bradfield n 47 above at 232*f*.

162 Christie & Bradfield n 47 above at 232.

163 Prescription promotes both efficiency and certainty. It facilitates efficiency in that claims have to be made promptly *Cf* DCFR 98 and for South African law; Hutchison & Pretorius n 47 above at 385; Van der Merwe *et al* n 47 above at 554*ff*.

robust than that of freedom, justice and security which are ends in themselves.[164] However, contract law is a branch of legal science where efficiency is highly valued, especially the notion of market efficiency which, according to many individuals, is a core function of contract law.[165]

Information obligations

Information obligations, a prominent feature of consumer protectionism, do not only constitute aspects of efficiency and justice but also of freedom.[166] According to the DCFR[167] information obligations support protection of the weak as well as general economic welfare since they promote better competition which also leads to greater market efficiency. This aspect of efficiency constitutes an example where the principles overlap and complement each other. The obligation of providing a consumer with information regarding the terms, nature and effect of a particular contract, does not only support efficiency but also freedom in that the consumer is placed in a position to make an informed decision as well as exercising her right to comparative shopping which promotes market efficiency.[168] Although information obligations can be said to interfere with freedom of contract, such interference is justified because it not only promotes freedom of contract but also economic welfare.[169]

The DCFR deals comprehensively with the obligation to provide information, especially for businesses marketing to consumers.[170] There is also specific regulation governing to the following information duties: provision of information when contracting with a consumer who is at a particular disadvantage;[171] information duties in real time distance communication;[172] information obligations when a contract is concluded by electronic means;[173] the form of the information obligations;[174] the

---

164 DCFR 60.
165 *Cf* the law and economics movement within contract law. Cf in general Schäfer & Ott *The economic analysis of civil law* (2004); Posner *Economic analysis of law* (1998).
166 *Cf* supra 4.2 Freedom – party autonomy.
167 DCFR 96*f*.
168 DCFR 97.
169 *Ibid*.
170 DCFR II–3:102.
171 *Id* at 103.
172 *Id* at II–3: 104.
173 *Id* at II–3: 105.
174 *Id* at II–3: 106.

information duty regarding the price and any additional charges;[175] and information regarding the address and identity of the business.[176]

Remedies for non-performance

The remedy of damages and penalty stipulations support the principle of efficiency. The DCFR provides that '[W]here the terms regulating an obligation provide that a debtor who fails to perform the obligation is to pay a specified sum to the creditor for such non-performance, the creditor is entitled to that sum irrespective of the actual loss.'[177] South African contract law makes provision for quick and provable relief in the event of breach of contract by recognising clauses which entail a pre-estimate of damages, penalty clauses, and forfeiture clauses.[178] In the event of breach, parties often agree to pay a pre-determined amount of money to the innocent party so as to facilitate establishing the amount of loss that could result from such a breach.[179] Penalty clauses entail payment of a penalty in the event of a breach. These clauses aim to act as a deterrent for breach and not as a pre-determined amount of damages.[180] Forfeiture clauses also act as a deterrent because they provide that if one party cancels the agreement, the party in breach forfeits the right to restitution of any performance already made.[181] Clearly these rules support efficiency but it is doubtful whether they would trump freedom, no matter how cumbersome the undertaking of pre-estimate of damages, the penalty or forfeiture was in the circumstances. They might load justice which could trump freedom, but if they were not unjust such obligations would be enforceable as they make for market efficiency.

---

175 *Id* at II–3: 107.

176 *Id* at II–3: 108.

177 *Id* at III–3:712 (1); however as was seen under the section dealing with justice the DCFR III–3:712 (2) that if the amount is 'grossly excessive' in relation to the loss resulting from the non-performance it may be reduced; *cf supra* 4.4.3.

178 Hutchison & Pretorius n 47 above at 339*ff*; Christie & Bradfield n 47 above at 584*ff*; Kerr n 47 above at 788.

179 Hutchison & Pretorius n 47 above at 339.

180 Hutchison & Pretorius n 47 above at *ibid*; Christie & Bradfield n 47 above at 584; Kerr n 47 above; Van der Merwe *et al* n 47 above at 442*ff*; *cf*. The Conventional Penalties Act 15 of 1962.

181 Hutchison & Pretorius n 47 above at *ibid*.

ANALYSIS – MODELLING DECISIONS: DECISION TREE ANALYSIS[182]

Introduction

Projection of Wilburg's 'flexible system' onto the law of contract will not be complete without the suggestion of a model indicating how application of the flexible system will be effected in order to make a decision on whether a contract is enforceable or not. It is consequently necessary to propose such a model. Various models have been developed within the engineering discipline to facilitate decision making. Decision analysis is effected by means of decision models which can be illustrated by graph.[183] It is submitted that the 'decision tree' model may be appropriate to legal decisions regarding the enforceability or not of an agreement, and it is from this model that I will borrow to illustrate the application of Wilburg's flexible approach in order to decide whether an agreement is enforceable or not. The theoretical structure of the model which will be used entails identifying the elements of the situation,[184] which are classified as, first, values and objectives; second, decisions to make; third, uncertain chance events; and fourth, consequences.[185]

Projected onto the law of contract the elements of the model of analysis will be as follows:

- The values and objectives will be the principles of freedom, justice, security and efficiency.
- The decision to make is to decide whether the contract is enforceable or not.
- Third, the uncertain chance events in each case will be the aspects of each principle, *viz*: freedom of contract involves the chance events of (1) restrictions on the right to choose a contracting party; (2) restrictions on freedom to withhold information and (3) inequality of bargaining power.

Security involves the chance events (1) the principle of binding force; and (2) contractual loyalty, good faith, fair dealing and co-operation. Justice involves the chance events of (1) the principle of equality; (2) not allowing a party to rely on her own unlawful, dishonest or unreasonable conduct (the principle of good faith and fair dealing); (3) no grossly excessive demands; and (4) protecting the vulnerable which includes the exclusion of unfair

---

182 I would like to thank Mr Harry Thomas (B Eng (Chem) (Hons)) for drawing my attention to the theories of decision analysis.

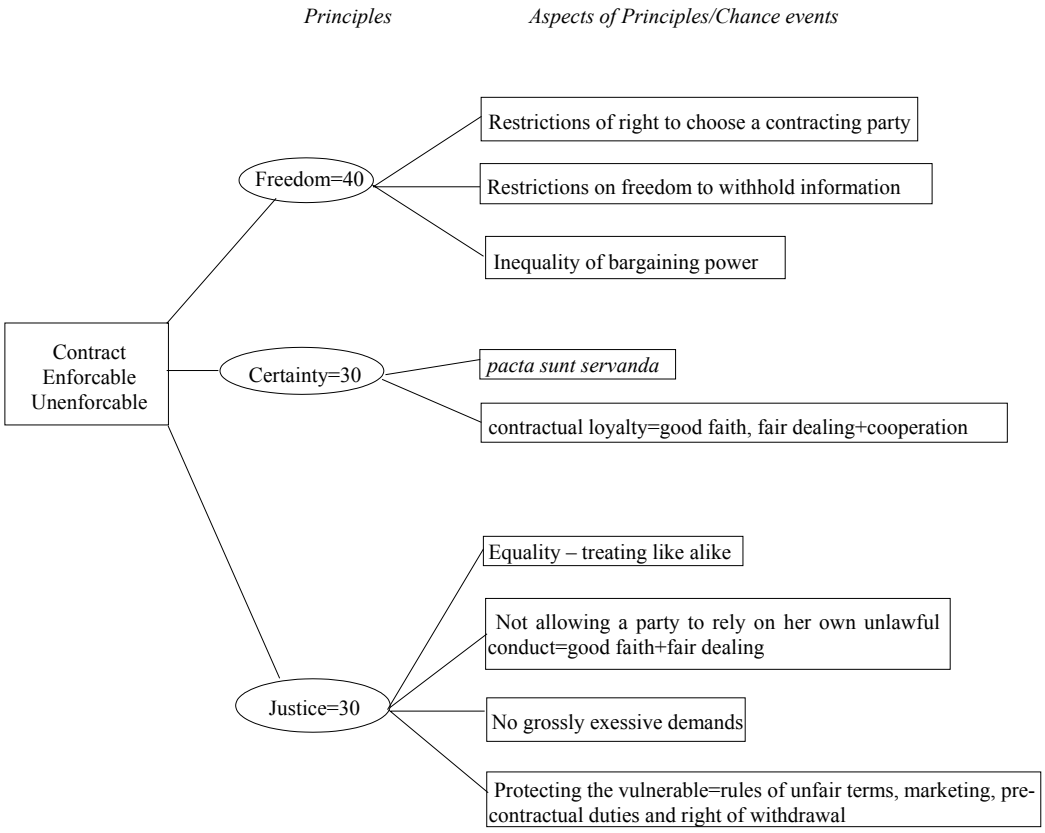
183 Clemen & Reilly *Making hard decisions with decision tools* (2001) 19.

184 *Id* at 21.

185 *Ibid*.

terms. Efficiency involves the chance events of (1) information obligations; (2) remedies for non-performance and prescription. Graphically the decision to be made is represented by a square, while smaller circles represent principles.[186] The branches from a circle represent the possible aspects of each individual principle (in engineering terminology the so-called chance events). The third decision element encompasses the consequence.[187]

Decision-tree representation of enforceability of contract decision



[186] *Id* at 69.
[187] *Ibid*.

Application of the flexible system in South African contract law

Simple explanation

South African contract law does not explicitly recognise the principles accepted by the DCFR. However, as indicated there are parallels between the principles of freedom, justice, security and efficiency of the DCFR and South African contract law. For purposes of the exercise of applying Wilburg's flexible approach in a South African context, it is submitted that acceptance of the principles of freedom, justice and security (understood as certainty) will be used to determine the enforcement or not of a contract in South Africa. Efficiency does not play a fundamental role in deciding the enforceability or not of a contract and will not be considered.

Although neither Wilburg, his scholars, nor the DCFR took the step of allocating weights to the principles, it is generally accepted that freedom constitutes the cardinal principle. Consequently a weight allocation of freedom=40, justice=30 and certainty/security=30 is proposed. In the best of worlds the outcome of each contractual relationship would be 100. However, an all-or-nothing approach is unrealistic and as a working hypothesis 75 will be chosen as the limit for contractual enforceability. To illustrate the application of the flexible system, three examples will be given followed by an hypothetical application to recent controversial case law.

Example 1

In the event of a chance event such as mistake, freedom is compromised and consequently its weight must be reduced. A material mistake will result in a reduction of minus 40. Thus, regardless of the value accrued to justice and security, the contract does not reach the required limit of 75 and will therefore not be enforceable. However, in an instance where a mistake qualifies as non-material and freedom is therefore compromised to a lesser extent, for instance by 10, such a contract may still be found to be unenforceable if justice and security are compromised to an extent that a value of less than 75 is reached

Example 2

In an instance where the chance event qualifies as inequality and there is an absence of equality between the contracting parties – such as in cases of a monopoly, absence of choice, necessity, lack of education, illiteracy, ignorance, inability to understand the language of the contract or a disability – freedom will be compromised to a weight which will depend on the circumstances of the individual case. Assuming that because of one of these chance events freedom grades 30, the validity of the contract will depend on

the grade allocated to justice and certainty. Inequality of bargaining power between the two parties is bound to have led to the chance event of compromised equivalence of performance, as well as raising the chance event of protection of the vulnerable which would compromise justice. A gradation of 10 for justice would consequently lead to unenforceability even if certainty scored 30 because the total score achieved is 70.

Example 3

Prescription and formalities are facets of legal certainty. Consequently application of prescription reduces the weight of legal certainty because *pacta sunt servanda* is affected. A weight reduction of minus 20 results in unenforceability because the limit of 75 has not been achieved.

Application to Afrox Healthcare v Strydom[188] *and* Barkhuizen v Napier[189]

Afrox Healthcare v Strydom

The appellant, Afrox is the owner of a private hospital. Strydom, the respondent, was admitted to this hospital for an operation and remained in hospital for post-operative medical treatment. Upon admission the parties concluded a contract which contained an exemption clause absolving Afrox from negligent conduct by its employees. During the post-operative care, certain negligent conduct by one of the hospital's nursing staff led to complications which caused Strydom to suffer damages. Strydom argued that the negligence on the part of the nurse constituted a breach of contract by Afrox and instituted an action claiming damages suffered. Strydom contended that the indemnity clause was contrary to public policy and the spirit, purport and objects of the Bill of Rights which, in light of the right to have access to health care services in terms of section 27(1), had to be understood as including a duty on health care establishments to provide professional and reasonable care; he also argued that the exemption clause was in conflict with the principles of good faith, and that the admission clerk had a legal duty to draw his (Strydom's) attention to the exemption clause which he had failed to do.[190] Strydom supported his contentions by arguing that he had been in an unfair bargaining position relative to Afrox at the time of conclusion of the contract. A provincial division having found in favour of Strydom, on appeal the Supreme Court of Appeal rejected Strydom's three arguments. Consequently, the appeal was upheld. The court also held that an inequality of bargaining power would not on every occasion be contrary to public policy

---

188 2002 6 SA 21 (SCA); Hawthorne & Pretorius *Contract law casebook* (2010) 215*f*.

189 2007 5 SA 323 (CC); Hawthorne & Pretorius n 188 above at 223*f*.

190 At par [7].

causing the contract to be unenforceable. It added that there was no evidence that Strydom was in a weaker bargaining position than Afrox at the time of the conclusion of the contract.[191] In regard to the argument that the reach of the exemption clause – which appeared to exempt Afrox even from damages suffered as the result of gross negligence of its employees – rendered it contrary to public policy, was found to be irrelevant because Strydom had failed to allege that the damage he suffered was due to the gross negligence of the nurse.[192] Lastly, the court held that the indemnity clause was reasonably expected, from an objective viewpoint, to form part of the contract in question, and therefore that there was no duty on the admission clerk to point the clause out to Strydom.[193]

Applying the chance events of this set of facts to determine the weight allocation of the principles could play out as follows:

Freedom: freedom would be compromised in two respects. First, there is a restriction on withholding information, thus it can be argued that the indemnity clause should have been pointed out to the patient. Freedom would be compromised by, for instance, – 10; secondly it could be argued that freedom is compromised becuase the parties were in an unequal bargaining position which results in a further diminution of freedom by – 10. Thus freedom scores 20.

Certainty: certainty is seriously compromised since the chance event of contractual loyalty is compromised. This standard contract failed to fulfil the requirements of good faith, fair dealing, and cooperation on the part of the appellant. Certainty thus scores 5.

Justice: the chance event which could compromise justice is that the indemnity clause is an unfair term. The other chance events, treating like alike, not allowing a party to rely on her own unlawful conduct, no grossly excessive demands, and protecting the vulnerable play no role in this scenario. The indemnity clause qualifies as an unfair term and consequently justice scores 15.

The score to this set of facts is 40 which makes the agreement unenforceable coming to a conclusion contrary to that of the Supreme Court of Appeal.

---

191 At pars [11]–[14] and [24].
192 At par [13].
193 At par [24].

Barkhuizen v Napier

The appellant, Barkhuizen, concluded a short term insurance policy to insure his 1999 BMW 328i with a Lloyds syndicate, represented by Napier, the insurer. The motor car was written off in an accident and Barkhuizen instituted a claim for the amount for which the car had been insured. The respondent repudiated the claim on the basis that the car had been used for business purposes while it had been insured for private use. The appellant only instituted action two years after the repudiation. The summons was countered with a special plea stating that the insurer had been released from liability because the applicant had failed to serve summons within 90 days of being notified of the repudiation of his claim.[194] Normally the insured would have had three years in terms of the Prescription Act 68 of 1969 to institute his action against the defendant. However, in this case the insurance contract had limited the period to 90 days. Unless Barkhuizen served summons on Napier within three months from the date on which Napier repudiated the claim, Barkuizen would lose his right to enforce the contract. Barkhuizen contended that the time limitation clause could not be enforced because it violated his right in terms of section 34 of the Constitution to have the matter determined by a court. The High Court upheld this contention and made an order declaring the time limitation clause to be contrary to section 34.[195] On appeal to the Supreme Court of Appeal it was found that section 34 of the Constitution did not prevent enforcement of time-bar provisions in contracts which had been freely and voluntarily entered into, and that there was no evidence that the agreement had not been entered into freely and voluntarily.[196] The Supreme Court of Appeal consequently upheld the appeal. Barkhuizen then appealed to the Constitutional Court which held that the correct approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, particularly those in the Bill of Rights.[197]

The Constitutional Court laid down the following test to determine whether enforcement of a particular contractual term is contrary to public policy or not. The court reduced the matter to the question whether such a term is fair

194 At pars [2]–[3].
195 At par [9].
196 At par [17].
197 At pars [28]–[30].

and reasonable. In order to determine what qualifies as fair two questions need to be posed: first, whether the term itself is unreasonable, and secondly, if the term is found to be reasonable, whether it should be enforced taking into account the circumstances of the particular case.[198] The court found that the time-bar clause was not unreasonable and unfair and consequently that its enforcement would not be contrary to public policy. The appeal was thus dismissed.

Applying the chance events of this set of facts to determine the weight allocation of the principles could play out as follows:

Freedom: freedom would be compromised in respect of the obligation not to withhold information. The respondent should have drawn the insured's attention to the amended prescription period which was hidden in a prolix of addenda.[199] Freedom would be compromised by a weight of – 10. Tied up with the chance event of the restriction on freedom to withhold information is the aspect of inequality of bargaining power. Any consumer contracting with Lloyds is in an unequal bargaining position which would consequently also affect freedom reducing its weight by a further – 10. Freedom thus weighs 20.

Certainty: certainty would be compromised by the chance event of contractual loyalty. In the DCFR it is held that contractual loyalty provides the contracting parties with certainty. Thus a consumer derives her right to fair dealing from contractual loyalty.[200] The CPA introduces an obligation to offer fair reasonable and just terms and conditions and it can be argued that the insurance company failed in fulfilling this obligation to the insured.[201] The insurance company also failed its obligation to co-operate in that it failed to provide a notice to the insured that the agreement contained a limitation of the insurance company's risk and liability because the prescription period had been seriously shortened in the standard contract. Certainty would be compromised by a weight of – 20 and consequently weighs 10.

198 At pars [56]–[59].
199 At 133–134.
200 Part F of the Consumer Protect Act 'Right to fair and honest dealing' sections 40–47.
201 Section 48(1)(b) and (c).

Justice: It is probable that justice would only be compromised to a lesser extent. Two aspects of justice could apply: first 'protection of the vulnerable', and secondly that the shortened prescription period qualifies as an unfair term. In regard to the first aspect it is doubtful whether the insured fits the category of a vulnerable contractant who requires protection. However, the fact that the term qualifies as unfair would compromise justice by a weight of – 5 thus weighing 25.

The score achieved on this set of facts is 55 which provides for the conclusion that the agreement is unenforceable. This is contrary to what was found by the Constitutional Court, but in keeping with academic commentary.[202]

CONCLUSION

This model is basic and the examples are guidelines. It is acknowledged that each lawyer will have her own evaluation of the facts and allocation of weight to the different principles. It is also probable that each lawyer has her own conscious or subconscious method and/or model. However, application of Wilburg's 'flexible system' eliminates exclusive adherence to one principle, be it freedom of contract or (social) justice. The need to consider other principles and their different aspects which act as chance events, introduces an holistic approach, albeit that each individual jurist will differ in her recognition of ruling principles, different aspects of each principle, weight allocation for each principle, and gradation in accordance with the circumstances of each case. It is submitted that the inevitable identification of principles and their aspects or chance events, their gradation, and their mutual interplay and conflicts introduces a degree of objectivity, which chooses the royal road between hard-hearted application of doctrine and soft-hearted equity.

Finally, the main aim of this paper has been to develop a model to aid adjudication which takes cognisance of both traditional classical contracts as well as consumer contracts. Such a model requires respect for freedom and

---

202 *Cf* in general Rautenbach 'Constitution and contract – exploring 'the possibility that certain rights may apply directly to contractual terms or the common law that underlies them' 2009 *TSAR* 613; Sutherland 'Ensuring contractual fairness in consumer contracts after Barkhuizen v Napier 2007 5 SA 323 (CC) Part 1' 2008 *Stell LR* 390 at 394*ff*; Bhana & Pieterse 'Towards a reconciliation of contract law and constitutional values: Bisley and Afrox revisited' 2005 *SALJ* 865; and Woolman 'The amazing vanishing bill of rights' 2007 *SALJ* 762.

sanctity of contract, which form the corner stones of classical contract law. Without these fundamental principles adjudication may disintegrate in uncertainty, and become what Bydlinski refers to as a 'deluge of norms'.

Wilburg's 'flexible-system' offers an attempt to provide a degree of certainty in that it makes provision for the application of specific principles, which are graded and applied concomitantly to achieve a balance. The fact that these principles are weighted allows for application to different types of agreement, classical or consumer.

Adaptation of the principles identified by the DCFR within a South African model may address the tension which currently exits between the two systems of contract law, viz classic and consumer. Another important effect of application to both systems is that the consumer protection rules of information obligations will be transposed onto classical contract law. This rule supports freedom of contract and thus addresses the concerns of those who are of the opinion that consumer law limits freedom of contract. Furthermore, acceptance of the DCFR principles of freedom, justice, and security limit the number of open norms all of which have a given content. Application of these principles in a graded manner and concomitantly to establish a balance between them facilitates consistency in adjudication and, as Wilburg held, limits pure discretionary adjudication. Thus, Willburg's quotation with which I started this paper is an appropriate conclusion:

> Es ist gerade der Sinn meines Vorschlages, zu vermeiden, dass das Gericht nur auf Billigkeit, auf jeweiliges Rechtsempfinden, auf gute Sitten oder ähnliche inhaltslose Begriffe verwiesen wird.[203]

[203] Translation: 'It is the very purpose of my proposal to avoid a process in which the judge is directed only to equity, a sense of justice, good morals or similar concepts that are devoid of content.'