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Lauren Jane Kent

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The Consumer Protection Act (CPA) and conflict of laws: Does the CPA provide mandatory protections in an international commercial transaction?

CHAPTER 1 : INTRODUCTION

The Consumer Protection Act ('the CPA' or 'the Act')¹ is a relatively new piece of legislation which was finally fully enacted in South Africa from 1 April 2011.² The intended and potential application of the CPA is vast – from seemingly straightforward defined consumer sales, to services offered by clubs and associations, to franchise arrangements, and to product liability cases irrespective of whether a consumer (as defined by the CPA) is involved in the transaction.

It is clear that the standards set by the CPA were (and continue to be) relevant and necessary from a social, political and economic perspective.³

The CPA was enacted to address certain fundamental components of the modern-day South African consumer marketplace. These include the promotion and protection of consumers' economic interests; improved access to information to allow informed and individualised choices; protection from hazards that impact consumers' health and well-being; developing effective means of redress; providing for consumer education; promoting free association of consumers and advocacy of their common interests; and encouraging consumers to participate in decisions relevant to the marketplace.⁴

Notwithstanding its extensive application, the Act has not yet been fully tested by our courts. This is due to a number of reasons, not least of which is the legislature's intention that the courts be a remedy of last resort.⁵ The Act is also still in the early stages of application. In particular, neither South African nor any foreign courts have considered whether the fundamental consumer protections established by the CPA are capable of elevation to mandatory provisions of private international law.⁶ Regrettably, the drafters of the CPA did not take the opportunity to state explicitly the position – the Act is silent on whether or not it is mandatory law which must apply despite a chosen law. This dissertation explores that question.

¹ Act 68 of 2008.

² Government Gazette Notice 917 of 201, No. 33581 dated 23 September 2010.

³ Section 3(1).

⁴ Preamble.

⁵ Section 69.

⁶ These terms are used interchangeably in this dissertation.

Recommendations on how this issue should be dealt with should it arise in a South African court, as well as in a selection of *fora* worldwide, will be made.

The conflict of laws framework, including the concept of mandatory provisions (what they are and how they might apply) is explained in Chapter Two. The interaction between choice of law and mandatory provisions when determining the applicable law in an international commercial transaction is also addressed.

Chapter Three briefly compares how mandatory provisions are treated in three relevant jurisdictions, namely South Africa, the European Union and Botswana. The position of an arbitrator in an international commercial arbitration is also discussed. The non-South African jurisdictions have been chosen as their consumer protection laws were referred to during the legislative drafting process leading up to the enactment of the CPA.⁷ These jurisdictions are additionally relevant from a commercial perspective. Botswana is a neighbouring country, member of the Southern African Development Community (SADC)⁸ and member of the Southern African Customs Union (SACU).⁹ The EU is significant because of, firstly, the volume of writing relating to mandatory provisions as they are applied in the EU, secondly, the regular case law generated by the European Court of Justice ('the ECJ') and, thirdly, being South Africa's largest trading partner.¹⁰

The courts in these jurisdictions may well be called upon to adjudicate a dispute in which the CPA is potentially applicable as a mandatory provision. The approach of the courts such disputes therefore must be considered. To this list may be added countries including Uganda, Malawi, Brazil and Argentina, which were also informative in the drafting process. They have been omitted due to word limit and language constraints (particularly in the case of Brazil and Argentina where the bulk of the resources would be in Portuguese and Spanish respectively).

Chapter Four provides a brief background to the CPA, specifically the need for the rights-based approach of the legislation. Mention is made of the definitions employed to define the scope of protections in some of the countries reviewed by the South African legislature during the drafting phase.

⁷ Memorandum on the objects of the Consumer Protection Bill (B19D-2008).

⁸ Southern African Development Community website available at <http://www.sadc.int/>, accessed on 4 December 2013.

⁹ Southern African Customs Union website available at <http://www.sacu.int/>, accessed on 4 December 2013.

¹⁰ WTO *Trade Profiles* 2013 1 at 168.

The application, scope and primary rights of the CPA are discussed in Chapter Five where the focus is on the scope of the CPA as set out in section 5 – to whom and when it applies, in what sort of transactions, and the extent to which a potential conflict with other laws has been addressed.

Chapter Six deals with when and how the CPA might be considered mandatory law. Three examples are employed to illustrate this, canvassing ordinary B2C transactions, franchise agreements and the liability that can be imposed in terms of section 61 of the Act, which governs product liability cases. Comments are offered on the impact of the CPA on the entire (global) supply chain and the extent of potential liability for unsuspecting international goods traders. This chapter also considers the question of the recognition and enforcement in South Africa of a foreign judgment granted without consideration of the CPA.

Finally, concluding thoughts will be offered on whether and when the CPA is to be considered mandatory.

CHAPTER 2 : GENERAL BACKGROUND TO THE QUESTION OF CONFLICT OF LAWS AND MANDATORY PROVISIONS

I The conflict of laws framework

The rules regulating conflict of laws are those principles which apply to cases with a ‘foreign’ element: a connection with the system of law of at least one other country.¹¹ Contracts establishing rights and obligations¹² in which there is a foreign element are known as international or cross-border contracts,¹³ but this is not always clear.

The element of ‘internationality’ has been elaborated by Basedow to include ‘a cross-border carriage of goods; the issue of offer and acceptance in different states; or the delivery of goods in a state other than the one of offer and acceptance’.¹⁴ However, under the Vienna Sales Convention, the relevant elements for determining

¹¹ Dicey and Morris *Conflict of Laws* 14ed (2008) at 3; MRH De Villiers ‘Limitations on party autonomy in the context of cross-border consumer contracts: The South African position’ (2013) *TSAR* 478 at 479.

¹² As opposed to delictual or tortious duties and expectations, a discussion of which falls outside the scope of this dissertation.

¹³ De Villiers (n11) at 479.

¹⁴ Basedow ‘An EU law for cross-border sales only – its meaning and implications in open markets’ in Bonell *et al* (eds) *Liber Amicorum Ole Lando* (2012) 24 at 29 as cited in De Villiers (n11) at 479.

the ‘internationality’ of an agreement are the places of business of the seller and buyer. The fact that delivery may take place cross-border is not relevant.¹⁵

Forsyth takes a wide view of cross-border trade and opines that ‘[t]he word ‘international’ thus serves only to mark the existence of those foreign or international elements which raise the question of whether the *lex fori* is the appropriate law to apply, or not’.¹⁶

The CPA is silent on what constitutes cross-border or international trade and the Act will generally apply when a transaction (as defined) *occurs* within South Africa. The meaning of ‘occurs’ is not defined in the Act, and is discussed in greater detail in Chapter Six.

Contractual obligations between parties exist in terms of the ‘proper law’ of the contract. The proper law is the parties’ intended and chosen law (whether express or tacit/implied) or, in the absence of an intended choice, the legal norms and standards with which the parties’ contractual relationship enjoys the closest connection.¹⁷ The closest connection determination is usually made by a court or arbitrator after considering a range of different connecting factors which vary between *fora*.

Generally, connecting factors account for, *inter alia*, where the contract was concluded, the place where performance was due or took place, the place where the parties were located at the time of contracting and the general nature of the contract.¹⁸

Fundamentally, however, respect for the parties’ choice, whether express and clear, tacit or implied, derives its origins from the concept of party autonomy.¹⁹ The parties’ choice of law can operate in a limited or general manner. In a limited sense, the parties may elect to dispose of or override certain individual provisions of the law which would otherwise apply, if it were not for their choice. In the South African context, these provisions are known as the *ius dispositivum*, or those legal rules which may be derogated from by agreement.²⁰ Forsyth uses the apt example of the Roman-Dutch law warranty against latent defects in a sale transaction which may be disposed of by agreement between the parties. The sale itself remains valid (the

¹⁵ UN Convention on Contracts for the International Sale of Goods 1980 (the Vienna Sales Convention).

¹⁶ Forsyth *Private International Law* 5ed (2012) at 5.

¹⁷ Forsyth (n16) at 316-317.

¹⁸ Connecting factors will be discussed in greater detail in Chapter Two.

¹⁹ De Villiers (n11) at 480-481; Forsyth (n16) at 317-318.

²⁰ Forsyth (n16) at 317-318.

essentialia are left untouched), but the additional purchaser's protection offered by the warranty can be avoided by the seller, provided the purchaser agrees.²¹

Alternatively, the parties may make a more general election and choose to dispose of the entire legal system which would otherwise automatically apply in favour of the legal system of their desires. The chosen system can be the law of a particular country or even an international convention which regulates (aspects of) the nature of their specific transaction such as the Vienna Sales Convention.

The concept of party autonomy in conflict of laws is not, however, universally supported: its critics are vocal, although the world's courts have largely ignored these concerns and relegated them to the realm of the academic.²² Some critics believe that the operation of party autonomy in this manner effectively means that the individual is allowed to supercede the law.²³ The debate is not exclusively a local one: American and European academics recently famously discussed the issue of private rule making.²⁴

The critique is centred on the argument that the validity of the parties' choice of law requires scrutiny under *some* legal system – it cannot operate in a vacuum simply because of the parties' respective will.²⁵ Further, neither can the determination of validity be made by applying the *lex fori*, which would (on their argument) create the logical difficulty of testing the validity of the choice against the laws of a place which had no relevance to the initial choice. The question of validity should, in their view, rather be determined by the application of the 'true proper law'.²⁶

Despite these reservations, in practice and in recent legislation²⁷ it has been accepted that the need for certainty and predictability in international trade (and in the supporting contracts regulating such trade) is enhanced when parties' choice of

²¹ Forsyth (n16) at 318.

²² Ibid at 319.

²³ Ibid at 318.

²⁴ J Basedow, 'The State's Private Law and the Economy' (56) 2008 *American Journal of Comparative Law* 703-721; DV Snyder, 'Contract Regulation with and without the State: ruminations on rules and their sources. A comment on Basedow' (56) 2008 *American Journal of Comparative Law* 723-742; F Rödl, 'Private law beyond the democratic order? On the legitimacy problem of private law "beyond the State"' (56) 2008 *American Journal of Comparative Law* 743-767.

²⁵ E Spiro *The General Principles of the Conflict of Laws* (1982) at 27-28.

²⁶ Forsyth (n16) at 318-320.

²⁷ See articles 10 and 11 of the Rome I Regulation - EC Regulation 593/2008, which replaced the 1980 Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations.

law is respected.²⁸ So too can parties' reasonable expectations be met. The contrary would be the case if their choice was considered to be but one of a myriad factors potentially connecting the contract to a system of law, rather than (generally speaking) a definitive choice in and of itself.²⁹

The identification and operation of connecting factors can be an arduous task demanding of parties' time and money. The commercial disadvantages of immediately disregarding party choice are further highlighted when one considers the volatile markets and fluctuations inherent in commodity trade. Approaching the courts or constituting an arbitral tribunal to determine which law applies, when the parties have ostensibly already debated their options and made a suitable mutual choice upfront,³⁰ can be a lengthy, expensive and unnecessarily confrontational frustration which the individual parties, and world trade in general, can ill-afford.

Respect for party choice accepts that the parties may have chosen a particular law to apply for specific reasons, even if there is no obvious link to the contract. A 'neutral' third country law may have been chosen by the parties to ensure that they are equally disadvantaged at dispute resolution, to avoid any perceived bias of a particular legal system which might otherwise apply, to continue with a custom in their branch of trade (such as insurance contracts which often select English law as the applicable law), or if they are otherwise familiar with the laws of that third country.³¹

Notwithstanding the above, there are some exceptions to the general rule held dear to most regimes that party autonomy is paramount and parties' choice of applicable law should be respected.³² Schulze, addressing the challenges of off-shore joint venture agreements, confirms that party autonomy has its limits, despite the wide freedom it is generally given. Party choice will be respected provided the intention to select a particular law is *bona fide*, legal and not contrary to public policy.³³

²⁸ C Roodt 'The integration of substantive law interests and material justice in South African choice of law' (2003) 36 *Comp & Int'l Law Journal of South Africa* 1 at 6.

²⁹ Forsyth (n16) at 319.

³⁰ Notwithstanding any inequalities in bargaining position.

³¹ Forsyth (n16) at 320.

³² *Ibid* at 318; E Spiro 'Autonomy of the parties to a contract and the conflict of laws: illegality' (1984) 17 *CILSA* 197 at 197; Spiro (n25) at 28.

³³ W Schulze 'Private international law and jurisdictional problems relating to offshore joint venture agreements' (1995) *CILSA* 28 383 at 392. Schulze was discussing the approach of English law, but it is submitted that this is a universal approach – see De Villiers (n11) at 481-482.

When a particular country is connected to the contract, but the parties have intended and chosen another law to apply, the chosen law is applied as the proper law. However, if the parties have explicitly excluded the mandatory provisions of a legal system which is otherwise closely connected with the contract, courts³⁴ may not simply accept this choice: it may be vital to respect the social, economic and political interests underpinning the relevant legislation to apply the mandatory provisions, which interests justify ousting the parties' choice.³⁵ Further, if there is one country which is *wholly* connected to the contract and the contract is entirely connected with that other state, the mandatory provisions of that wholly connected state will remain applicable, and cannot be avoided by the parties' choice.³⁶

II Mandatory provisions

This of course raises the question: What are mandatory provisions or rules?

Dicey and Morris define mandatory rules as 'rules of law which apply to contractual obligations irrespective of any contrary agreement'.³⁷ Forsyth considers mandatory provisions to be '...the rules of a foreign legal system (that may render the contract void or unenforceable)'.³⁸ In De Villiers' view, '[m]andatory rules are rules the application (of) which cannot be excluded by contractual choice'.³⁹ Put another way, these are provisions which are considered peremptory, and can effectively trump the traditional rules of conflict of laws to dictate that *they* should apply, rather than the chosen law.⁴⁰

Generally speaking, if parties have chosen a law to apply, relevant statutory and common law provisions will not necessarily have the effect of ousting the choice of law, and will not apply as mandatory law unless the provision is part of the chosen law or regulates procedure in the *lex fori*.⁴¹

It is evident that mandatory rules can be understood in more than one way. Bermann succinctly summarises their dual meaning. In one sense, mandatory rules

³⁴ And, it is submitted, arbitral tribunals.

³⁵ Roodt (n28) at 13; Spiro (n25) at 9; Opinion of Advocate General Wahl in Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* [2013] ECR at 33 with reference to *Arblade and Others* Cases C-319/96 and C-376/96 [1999] ECR I-8453.

³⁶ Dicey and Morris (n11) at 1242 para 32-129.

³⁷ *Ibid.*

³⁸ Forsyth (n16) at 344. Here, 'foreign' is used in the sense of it being different to the choice of applicable law.

³⁹ De Villiers (n11) at 484.

⁴⁰ Spiro (n32) at 197; Dicey and Morris (n11) at 21 para 1-049.

⁴¹ Dicey and Morris (n11) at 21 para 1-049.

are those which cannot be derogated from by agreement between the parties. These are rules which are founded upon an essential public interest (notably the need to protect weaker parties) which justifies the absolute limitation of parties' freedom of contract.⁴² These may be referred to as non-derogable mandatory rules. In the parlance of South African jurisprudence, these would do not form part of the *ius dispositivum*.⁴³ In the EU, such rules are dealt with under article 3(3) of the Rome I Regulation.⁴⁴

Secondly, some rules might be considered mandatory if they must be applied by a court, despite the normal conflict rules pointing to an otherwise applicable law. Such norms and rules embody legal principles that are considered so vital that the otherwise applicable law is displaced,⁴⁵ and these may be referred to as overriding mandatory provisions, as is done in the EU under article 9 of the Rome I Regulation.

The two meanings are very closely connected, often confusingly so. When the parties' chosen law is set aside in favour of a mandatory rule, both party autonomy and the conflict rules of the forum are rejected. The mandatory rule is thus applied despite the parties' intention and the otherwise applicable law.⁴⁶ However, this is not necessarily always and uniformly the case. If a rule falls under the first meaning of non-derogable mandatory law, and is a norm from which the parties are absolutely prohibited from avoiding or waiving contractually, their intention and conduct to the contrary must be (and is validly) ignored. Agreements which conflict with the rules under the second meaning of overriding mandatory law do not automatically suffer the same fate. Unlike non-derogable rules, overriding mandatory rules may indeed trump the otherwise applicable law (as determined by the usual conflict rules) but these mandatory rules could be avoided by agreement between the parties. It may thus be possible to waive the benefit of such rules provided this intention is expressed clearly enough.⁴⁷

Voet classified mandatory provisions as being either prohibitive or dispositive. Prohibitive statutes were those which could never be avoided, whilst dispositive

⁴² G Bermann 'Mandatory rules of law in international arbitration' in *Conflict of Laws in International Arbitration* (2011) at 325-326.

⁴³ As discussed above at 4-5.

⁴⁴ Rome I Regulation (n27).

⁴⁵ *Ibid* at 325-326.

⁴⁶ *Ibid* at 326.

⁴⁷ *Ibid* at 327. This sophisticated distinction is evident in the Rome I Regulation on choice of law in contracts, specifically articles 3(3) and 9. See Chapter Three for further discussion.

statutes were capable of being ‘renounced’.⁴⁸ This distinction did not, however, find favour with the Supreme Court of Appeal in the *Classic Sailing* case, which considered Voet’s approach and took the view that

‘[r]ather than asking whether statutory provisions are prohibitory or dispositive, a better approach to determining whether parties may exclude the operation of statutory provisions by choice of another system of law might be to question whether they can waive the application of the provisions.’⁴⁹

The ability to waive application of mandatory provisions has been considered by the SCA, which held that provisions which affect public policy, interests or rights cannot be waived, even by a party for whose benefit such provisions were enacted.⁵⁰ The classification of the provisions as either non-derogable or overriding mandatory was neatly avoided.⁵¹

Affording precedence to mandatory provisions in this manner is motivated by the fundamental need to avoid frustrating the parameters on contracting set by the legislature of the place most closely connected to the contract. In the absence of these measures, parties could simply and easily avoid onerous requirements or prohibitions of the most closely connected law in favour of a less restrictive foreign law.⁵²

The extent to which mandatory provisions may limit respect for party autonomy and the application of the chosen law is not clear-cut.⁵³ It is clear that the intention of the legislature is key in determining the nature of a particular law and whether or not its benefits are derogable by agreement between the parties. The classification of a mandatory rule in this way is a notoriously difficult and unenviable task.⁵⁴

⁴⁸ *Representatives of Lloyd’s and others v Classic Sailing Adventures (Pty) Ltd* [2010] 4 All SA 366 (SCA) at 373 para 22.

⁴⁹ *Ibid* at 373 para 23.

⁵⁰ *South African Co-Op Citrus Exchange Ltd v Director General Trade and Industry and another* 1997 (3) SA 236 (SCA) and *De Jager and others v Absa Bank Bpk* 2001 (3) 537 (SCA). The particular approach of the South African courts is canvassed in more detail in Chapter Three below.

⁵¹ JP van Niekerk *Choice of foreign law in a South African marine insurance policy: an unjustified limitation of party autonomy?* (2011) TSAR 159 at 167.

⁵² *Irish Shipping Ltd v Commercial Union Assurance Co. plc* [1991] 2 QB 206, 220-221 (CA) as cited in Dicey and Morris (n 11) at 21 para 1-049.

⁵³ Spiro (n25) at 28.

⁵⁴ Bermann (n42) at 329.

III **The interaction between choice of law and mandatory provisions when determining the applicable law**

Mandatory provisions are potentially applicable in a wide range of different situations – there is no ‘one size fits all’ approach determining their application. Much will depend on, *inter alia*, where the contract is concluded, which foreign law is chosen or is the most closely connected to the contract, and the forum adjudicating the dispute.

Certain categories of mandatory provisions may be identified and merit discussion in order to better understand their content and potential application:⁵⁵ mandatory provisions of the system which would apply if no law had been chosen; of the chosen system; of the forum (*lex fori*); and of a further legal system (which may or may not be connected to the contract).

CHAPTER 3 : A COMPARISON OF THE APPLICABILITY OF MANDATORY PROVISIONS ACROSS THE GLOBE

Contracts provide a ‘fertile ground for choice of law problems’.⁵⁶ This chapter will briefly discuss how the conflict laws of South Africa, the European Union and Botswana deal with mandatory provisions in the contractual context. It will also deal with the position of an arbitrator in an international commercial arbitration.

I **South Africa**

The South African rules of private international law (the conflict of laws rules) require that jurisdiction must first be established before the courts may embark on identifying the applicable law.

(a) Jurisdiction

Although parties are free to agree as to which court will have jurisdiction in the event of a dispute, this choice or submission is not necessarily absolutely respected by the court.⁵⁷ Fundamentally, there must be some form of jurisdictional link between the parties and/or the dispute to the court.⁵⁸

⁵⁵ The categories are drawn from Spiro (n32) at 197-208.

⁵⁶ RF Opong *Private International Law in Commonwealth Africa* 1 at 131.

⁵⁷ *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)* 1987 (4) SA 883 (A).

⁵⁸ *Ibid*; Forsyth (n16) at 217.

Submission to jurisdiction, which may take the form of a choice of court or consent clause, is accepted by most legal systems as a basis on which jurisdiction may be exercised,⁵⁹ although such a choice is no guarantee of the effectiveness of any judgment. Provided the court deciding the matter is competent to properly exercise its jurisdiction, it should at least remain a valid judgment capable of enforcement notwithstanding the fact that no executable assets are located in that country.⁶⁰

In South Africa, a consent clause alone does not suffice – an additional jurisdictional link must be present.⁶¹ This position has been criticised for being unnecessarily limiting.⁶²

The jurisdiction of the South African courts may thus be neatly avoided by inserting a consent clause referring disputes to a friendly court that does not recognise protective and mandatory rules of the law, such as those of where the consumer resides in a consumer contract. This is problematic, particularly in consumer disputes, as many consumer-supplier relationships are regulated under a standard form contract which automatically refers disputes to (usually) a foreign court.

The consumer is not without recourse, though, and it has been held that parties cannot exclude the jurisdiction of South African courts by choice alone: the court will decide whether it will hear the matter or stay proceedings pending the findings of the forum which seemingly has ‘priority’ jurisdiction.⁶³ Any submission to jurisdiction must not be vague, unconscionable, in violation of public policy or *in fraudem legis*⁶⁴ and, as Forsyth pertinently notes, the right of access to courts is constitutionally guaranteed.⁶⁵ A consumer could therefore challenge a consent clause on the basis that it violates public policy and unreasonably limits their right of access to justice.⁶⁶

If choice is not at issue and a plaintiff has a claim sounding in money (whether contractual or delictual), the general rule is that the court with jurisdiction over the

⁵⁹ Forsyth (n16) at 217, n359.

⁶⁰ Ibid at 217; E Spiro ‘Jurisdiction by Consent’ (1967) 84 *SALJ* 295 at 305-306.

⁶¹ *Veneta* (n57); Forsyth (n16) at 217.

⁶² C Forsyth ‘Provenance and future of private international law in Southern Africa’ (2002) *TSAR* 60 at 74.

⁶³ See Forsyth (n16) at 218 and the cases cited in n372.

⁶⁴ Spiro (n60) at 302-303.

⁶⁵ Forsyth (n16) at 218.

⁶⁶ Constitution of the Republic of South Africa Act 108 of 1996, sections 34 and 36.

defendant's place of domicile can hear the dispute.⁶⁷ The establishment of jurisdiction becomes more burdensome when the defendant is neither domiciled nor resident in South Africa (i.e. the defendant is a foreign *peregrinus*). In such a case, property belonging to the defendant must be attached in order to found or confirm jurisdiction.⁶⁸

Where a ground of jurisdiction already exists (for instance, a local cause of action), the prospective plaintiff must apply to the high court where the cause of action arose for an order authorising the attachment of the defendant respondent's property to confirm jurisdiction.⁶⁹ This is the only method available for a foreign *peregrinus* plaintiff seeking to sue a foreign *peregrinus* defendant.

If the defendant is a foreign *peregrinus*, but the prospective plaintiff is domiciled or resides within the area of the court (i.e. is an *incola* of the court), attachment remains necessary,⁷⁰ but the applicant need only show that it has a *prima facie* claim and any judgment will be effective.

Once jurisdiction has been established, the court will deal with the question of the applicable law in terms of its conflict of laws rules.⁷¹

(b) Applicable law

The mere fact that a South African court has jurisdiction to hear the dispute or that a South African is a party to the dispute does not necessarily mean that South African law will apply. Although it may be that South African law is determined to be applicable, the proper law of the contract could equally be a foreign law. This determination will primarily be done by looking to the parties' intention – whether an express or implied choice was made.⁷²

There are, however, some issues relating to the contract which fall beyond the scope of the applicable law or the parties' intention. Questions of the parties' capacity to conclude the contract and other contractual formalities (such as whether the contract is required to be in writing or not, required for a valid sale of immovable

⁶⁷ Supreme Court Act, 59 of 1959, section 19; L Harms *Civil Procedure in the Superior Courts* 3ed (2003) at A-21; Forsyth (n16) at 221.

⁶⁸ Forsyth (n16) at 213 and 221; Supreme Court Act (n67), s 28(1).

⁶⁹ Harms (n67) at A-21. Claims falling within the jurisdiction of the Magistrate's Court (under R100 000 in District courts and under R300 000 in Regional Courts) require all elements to arise within the jurisdiction of the court.

⁷⁰ Harms (n67) at A-21.

⁷¹ *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D).

⁷² Forsyth (n16) at 325 and 327.

property in South Africa⁷³) are to be determined under a holistic approach which scrutinises validity primarily in terms of the law of the place where the contract was concluded,⁷⁴ but also considers the proper law or the law of the place where any immovable property is situated.⁷⁵

The parties' intention is central to the determination of the applicable law. Their intention may have been clearly expressed in a choice of law clause, or it may have to be ascertained by the court if it was implicitly made.⁷⁶

If the parties have expressly chosen a law, the South African courts will generally respect their choice and apply the chosen law. The proper law will include the municipal (internal) laws of that country, but not its private international law rules. The exclusion of the chosen law's conflict rules avoids the circularity of *renvoi*.⁷⁷

Identifying an implied choice by the parties demands consideration of a number of potentially relevant factors indicating whether an implied choice has been made and, if so, what that choice is. These can include the parties' choice of forum (not in itself a conclusive indicator of choice)⁷⁸; reference to legislation of a specific country; the location of relevant property; the residence, domicile and nationality of the parties; the place where the transaction is financed or insured; or whether there is a trade custom to select the laws of a particular jurisdiction.⁷⁹

If the parties have not expressly or tacitly chosen a law, the applicable law must be assigned by the court via an objective enquiry into which legal system has the closest connection to the contract. In this endeavour, the court is no longer concerned with the parties' intention, but rather what system is most appropriately applied to their contract.⁸⁰

South African law entertains two theories on this enquiry: the intention theory and the most real connection theory.⁸¹

According to the intention theory espoused in the Appellate Division⁸² case of *Standard Bank v Efroiken*⁸³ (at a time prior to the current appreciation for an

⁷³ Alienation of Land Act 68 of 1981.

⁷⁴ *Ex parte Spinazza and Another NNO* 1985 (3) SA 651 (A).

⁷⁵ Forsyth (n16) at 342-343.

⁷⁶ *Ibid* at 327.

⁷⁷ *Ibid* at 99-100; Oppong (n 55) at 3.

⁷⁸ *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977 (3) SA 1020 (T).

⁷⁹ *Laconian* (n71).

⁸⁰ Forsyth (n16) at 239-330.

⁸¹ As identified in *Laconian* (n71).

objective methodology), the court must determine what law the parties ought to have chosen in light of the choices they did make. The case dealt with a claim by the appellant bank against its respondent clients for reimbursement of payments it had made under letters of credit. The clients had refused to reimburse the bank because the bank had honoured the letters against presentation of non-conforming documents. In order to analyse what would have constituted conforming documents, the court had to determine the applicable law in the absence of choice by the parties.

The court held that

‘... it must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effect are to be governed...[b]ut... where parties did not give the matter a second thought, courts of law have of necessity to fall back upon *what ought*, reading the contract by the light of the subject matter and of the *surrounding circumstances, to be presumed to have been the intention of the parties*’.⁸⁴

Ultimately it was found that, although the principal sale contract was concluded in South Africa, performance by the seller (namely presentation of conforming documents) and payment by the bank’s agents against such presentation was to have taken place in the United States. Accordingly, United States law applied to the letters of credit, under which the documents presented for payment to the bank were deficient, and should not have been honoured by the bank.⁸⁵

The subjective approach of the presumed intention of the parties has been criticised as being artificial.⁸⁶ In the *Laconian* case,⁸⁷ the appellant sought recognition and enforcement of an arbitral award against the respondent under the Recognition and Enforcement of Foreign Arbitral Awards Act⁸⁸ in the Durban High Court. Two procedural defences of *res judicata* and prescription under United States law, argued to be the proper law of the arbitral award, were raised.

A charterparty had been prepared and stamped in New York by the respondent’s brokers, and was stamped in London by the respondent’s and appellant’s brokers. Payment was to have been made in US dollars to a London bank,

⁸² The Supreme Court of Appeal replaced the Appellate Division from 1996 - Schedule 6 to the Constitution (n66).

⁸³ *Standard Bank of South Africa Ltd v Efroiken & Newman* 1924 AD 171.

⁸⁴ *Efroiken* (n83) at 185, own emphasis.

⁸⁵ *Ibid* at 195 and 196.

⁸⁶ Forsyth (n16) at 330; E Fredericks and J Neels ‘The Proper Law of a Documentary Letter of Credit (Part 1)’ (2003) 15 *SA Merc LJ* 63 at 66; C Forsyth ‘Enforcement of arbitral awards, choice of law in contract, characterization and a new attitude to private international law’ (1987) 104 *SALJ* 4 at 15.

⁸⁷ *Laconian* (n71).

⁸⁸ 40 of 1977.

and the US Carriage of Goods Act was mentioned. An arbitration clause referred disputes to arbitration in London. When a dispute arose, the appellant referred it to arbitration with due notice to the respondent, but the respondent did not participate at all. The arbitrator found in favour of the appellant.

The court looked at, first, the qualification of the relevant rule (namely, whether it is substantive or procedural) and, second, how the applicable law is determined. Booysen J appeared to take the view that the law of the *lex fori* must be applied to characterise the rule of law in question. Commentators have interpreted his reasoning to lend support to the enlightened *lex fori* or *via media* approach.⁸⁹ According to the court, the legal question under each potentially applicable system must be compared for a provisional characterisation. The final characterisation of the applicable law is based on the policy underlying the rule, consideration of international harmony and the need to promote uniformity of decisions.⁹⁰

The court also considered the determination of the applicable law and, in an *obiter* statement, expressed its approval of the second theoretical approach.⁹¹ On this theory, the court determines what law has the closest and most real connection to the contract. Booysen J noted that the application of either the intention or the most real connection theories would lead to the same result⁹² but was bound to apply the intention theory endorsed by the higher authority of *Efroiken* given that the *Laconian* court was a provincial division.⁹³

In *Improvair*, another provincial division decision, the most real connection theory was again preferred. A contract was concluded between a South African and a French company. The parties neglected to select the applicable law. One of the issues in dispute was the governing law of the contract, specifically whether the proper law was French or South African law. This determination was crucial to the continued litigation: if French law applied, the action would cease and the parties would have to arbitrate according to French law. However, if South African law applied, they would not be required to arbitrate and the suit could continue.

⁸⁹ See Forsyth (n86) and J Neels 'Falconbridge in Africa' (2008) 4 *Journal of Private International Law* 167 at 183 and n96.

⁹⁰ *Laconian* (n71) at 518-519.

⁹¹ This theory was endorsed in the case of *Bonython v Commonwealth of Australia* [1951] AC 201.

⁹² *Laconian* (n71) at 527 and *Improvair (Cape) (Pty) Ltd v Etablissements Neu* 1983 (2) SA 138 (C).

⁹³ The most real connection theory enquires which law has the closest connection to the contract, a more objective approach than that under the intention theory.

Grosskopf J pointed out the well known inherent difficulties in ascertaining the proper law of the contract, namely that ‘[t]he true problem arises where no express or tacit agreement was concluded’.⁹⁴

The court examined the earlier *Efroiken* decision that the proper law is that which the parties ought to have intended in the circumstances and observed that this was based on an outdated English approach which is no longer good law. The decision in *Bonython* was then referred to, in which the more modern determination of the proper law was set out – ascertaining which system has the closest and most real connection to the contract.⁹⁵

The contract in question was concluded in France, although this was not considered important. Far more significant was the fact that the contract was to have been performed in South Africa if certain joint tenders were accepted. The contract with which the court was concerned therefore purported to deal with the formalities of the joint venture and how work would be divided if their tenders were successful.

The court also considered the balance of power between the parties and concluded that they needed each other equally in order to tender. This factor was not conclusive nor indicative of the proper law. The place of performance also yielded an innocuous result.

The court concluded that, although the scales were fairly evenly balanced, they were tipped in favour of French law, which had the closest and most real connection to the contract as this was where operational decisions and joint administration of the joint venture was conducted.⁹⁶

Confirmation from the Constitutional Court or Supreme Court of Appeal on which theory applies in contemporary South African law would be welcomed.⁹⁷

Even if the proper law has been determined (either due to party choice or by ascertaining the most closely connected law), the court cannot ignore mandatory rules. These would include domestic mandatory rules of the proper law and

⁹⁴ *Improvair* (n92) at 145.

⁹⁵ *Ibid* at 146.

⁹⁶ *Ibid* at 151-152.

⁹⁷ With effect from 23 August 2013, the Constitutional Court has been the highest court in South Africa in both constitutional and certain non-constitutional matters. The Constitutional Court may grant leave to appeal in non-constitutional matters provided an arguable point of law of general public importance is raised which the court ought to consider. If the Constitutional Court declines leave to appeal, the Supreme Court of Appeal remains the highest court in respect of non-constitutional matters. See Constitution Seventeenth Amendment Act of 2012, section 3 which effected amendments to section 167 of the Constitution (n66).

international mandatory rules.⁹⁸ Eksi adds that, although domestic legislation holds many mandatory provisions, ‘not every imperative or mandatory rule in national law is accepted as directly applicable in the private international law sense.’⁹⁹

Mandatory rules must be applied unless their application would be unlawful or against public policy, gauged against the norms of the forum (South Africa).¹⁰⁰

So-called international mandatory rules must be applied irrespective of the chosen law because they enhance economic, social and political aims of the enacting country.¹⁰¹ Although some such rules specifically state that they are to apply notwithstanding any contrary choice by the parties, this is not always the case. It then becomes a question of interpretation whether the rule was indeed intended to oust the chosen law, particularly whether the rule furthers public, rather than private, interests.¹⁰² Consumer protection legislation can be an example of furthering public interests and achieving economic, social and political aims.

Although there is not an abundance of case law on this topic, our courts have had occasion to consider the application of mandatory rules. Certain categories have developed as a result.

(i) *Illegality under the proper law*

Where the proper law of the contract has been chosen by the parties, or determined by a court or tribunal, a contract that is illegal under that proper law will not be enforced.¹⁰³ In the case of *Herbst v Surti*, the Zimbabwean High Court was called upon to determine whether an agreement of sale concluded contrary to the South African Group Areas Act was valid and enforceable in Zimbabwe. The proper law of the contract (that which had the closest and most real connection) was South African law.¹⁰⁴ South Africa was also the place of performance. The court would not order performance of a contract that was unlawful in the country in which it was to

⁹⁸ De Villiers (n 11) at 484.

⁹⁹ Eksi ‘The law applicable to consumer contracts under the EU Rome Convention’ (2005) *TSAR* 299 at 308.

¹⁰⁰ *Herbst v Surti* 1991 (2) SA 75 (ZH).

¹⁰¹ De Villiers (n 11) at 484; Roodt (n28) at 13; Spiro (n25) at 29.

¹⁰² De Villiers (n 11) at 484.

¹⁰³ Forsyth (n16) at 344.

¹⁰⁴ It can be noted that the court reached its finding on the proper law after considering both the test enunciated in the *Efroiken* case (n83) (namely what ought the parties have intended to be the proper law of the contract) as well as the *Bonython* enquiry (which asks what law has the closest and most real connection), although neither case was referred to in the judgment. The Court in that matter was also not bound by the *Efroiken* precedent.

have been performed, notwithstanding any moral disagreements the court had with the nature of the legislation under focus.

*Henry v Branfield*¹⁰⁵ concerned the sale of foreign currency (Zimbabwean dollars) in South Africa contrary to the South African Exchange Control Regulations. The Durban High Court held that the proper law of the contract was South African law, as the parties were resident in South Africa at the time the contract was concluded, the contract was concluded in South Africa and final payment was to have been made here. South African law had the closest and most real connection to the contract.

The court referred to the *dicta* in the English Court of Appeal case of *Ralli Brothers*¹⁰⁶ that an international contract remains valid to the extent that it is not illegal in the country of enforcement. This principle was found to have been based on public policy and comity, which extends to the economy of a friendly country. Accordingly, the contract was unenforceable, which would have had serious consequences for the exiled elderly Zimbabwean plaintiff.

In *Cargo Motor Corporation v Tofalos Transport*¹⁰⁷, several vehicles had been sold by a South African seller to a Zambian company. Delivery took place in South Africa but payment did not follow, and a settlement agreement was concluded in Johannesburg. Performance under that agreement was to take place there, too. It was confirmed that the court will not enforce a contract if it is illegal in the place of performance.¹⁰⁸ However, notwithstanding any potential contravention of the Zambian exchange control regulations, the settlement agreement was found to be valid and enforceable in South Africa.

More recently, the Labour Court had occasion to consider the breach of an international employment contract.¹⁰⁹ The court held that the parties had tacitly, alternatively impliedly, chosen South African law and the plaintiff's claims were founded on mandatory laws of South Africa.

The court stated that '[m]andatory or peremptory rules are based on social policy or are of a public policy nature, otherwise they are merely directory. A mandatory rule must be applied by the *lex fori*. Parties can choose the law to apply to

¹⁰⁵ 1996 (1) SA 244 (D).

¹⁰⁶ *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 (CA) at 304, cited at 249.

¹⁰⁷ [1972] 1 All SA 106 (W).

¹⁰⁸ *Ralli Brothers* (n106); *Kalher v Midland Bank Ltd* [1950] AC 24.

¹⁰⁹ *Parry v Astral Operations Ltd* [2005] 26 ILJ 1479 (LC).

a directory rule.’¹¹⁰ Although the court did not point this out, the distinction can be seen as consistent with the difference between non-derogable (‘peremptory’) rules and overriding (‘directory’) provisions.

As such, the court held that the ‘complete codification’ by South African statutes of employment law meant that most of its rules were ‘mandatory, protective and of a public nature’ and applied to the contract.¹¹¹ The court was guided by the Rome Convention, even though South Africa is not a party to it, and considered the primary question to be whether the employee was deprived of mandatory rules if foreign law was chosen to apply to an employment contract. It was acknowledged that it would be tough to argue otherwise given how extensive employment legislation is.¹¹² The same could feasibly be submitted in the consumer context.

To conclude, the court will interrogate the contract from the point of view of its proper law and will apply the mandatory rules of the proper law.

(ii) *Law of the forum*

In addition to the mandatory provisions of the proper law, under South African law, the mandatory rules of the *lex fori* apply in principle to the contract, notwithstanding a choice of law. These might operate to render the contract unlawful even it is lawful under its proper law.¹¹³

The potential trumping by the *lex fori* of the chosen law is not a decision that should be taken lightly: it must be determined whether the statute is directly applicable. The intention of the legislation must clearly be to render contracts that are otherwise lawful under the choice of law unlawful by superseding the choice of law.¹¹⁴

The *Classic Sailing*¹¹⁵ case analysed this issue in more detail. There, the Supreme Court of Appeal considered a dispute over alleged non-disclosures and misrepresentations relating to a yacht by the local insured respondent to its London-based insurer, the appellant. The insurance contract contained a choice of law clause selecting English law and also provided that the South African courts would have

¹¹⁰ *Parry v Astral Operations* (n109) at 45.

¹¹¹ *Ibid* at 59.

¹¹² *Ibid* at 72.

¹¹³ Forsyth (n16) at 344.

¹¹⁴ *Ibid* at 344.

¹¹⁵ *Classic Sailing* (n48).

jurisdiction. The South African Short-term Insurance Act (the ‘South African Act’)¹¹⁶ contained provisions which conflicted with those of the English Act.

The central question the court was required to determine was the allowable extent of party autonomy in choice of law clauses: could the parties exclude mandatory provisions of the *lex fori* (South African law)?

The court accepted as its starting point that the law chosen by the parties is valid,

‘[h]owever, legality is a question to be determined by the *lex fori*. This *ius cogens* (peremptory law) of the *lex fori* cannot be excluded... complete party autonomy cannot prevail over the peremptory provision of a statute, especially where the action is brought in terms of the statute...’¹¹⁷

The court went on to find that the insurance of a vessel was expressly covered by the South African Act. This was motivated by the reasoning that the particular sections of that legislation were protective in nature – section 53 deals with non-disclosures and misrepresentations made to insurers, whilst section 54 deals with a contravention of the law on a policy. These provisions were held to operate to the benefit of the unsophisticated, unwitting and uninformed insured, rather than leaving them at the mercy of unsympathetic insurers. Additional justification for the application of the South African Act was found in the provisions of the Admiralty Jurisdiction Regulation Act¹¹⁸ which effectively provided that, although parties are at liberty to select the applicable law, their choice cannot amount to an opting out of mandatory provisions of South Africa, the *lex fori*.¹¹⁹

Accordingly, the protective provisions of the *ius cogens* (the South African Act) applied to the contract, and those aspects of the English Act which were inconsistent with its local counterpart did not apply.¹²⁰

This decision, although welcomed for confirming the principle that the *ius cogens* of the *lex fori* cannot be derogated from by agreement, has been subject to some critical comment. It has been argued that the parties in this specific case were not in unequal bargaining positions (as with some types of contracts, such as consumer and employment contracts). Rather, the insured was a shipping company –

¹¹⁶ 53 of 1998.

¹¹⁷ *Classic Sailing* (n48) at 366.

¹¹⁸ 105 of 1983.

¹¹⁹ *Classic Sailing* (n48) at 376.

¹²⁰ *Ibid* at 376.

certainly not a helpless individual insured without a working knowledge of the insurance and business world requiring the benefit of the legislative protections.¹²¹

In sum, the mandatory rules of South Africa as the *lex fori* may apply with the effect that a contract lawful under its proper law can nonetheless be found to contravene the mandatory rules of the *lex fori*.

(iii) *Foreign legal systems*

There is a third category of mandatory provisions, in addition to those of the proper law and the *lex fori*: the provisions of a third legal system. The central and relevant enquiry is that pertaining to legality under the proper law or *lex fori*. Provided the contract is legal under these systems, the view is that the contract will, by and large, remain enforceable.¹²² Legal rules foreign to the *lex fori* and proper law are generally not applicable, even if their application would mean that the contract was unlawful. However, if a contract is unlawful under the *lex solutionis* or *lex contractus*, Forsyth's view is that it would be against public policy of the *lex fori* to allow the courts to be used to enforce acts which are unlawful in the place of performance.¹²³ This is consistent with the general approach of comity and respect for the sovereignty of nation states which underpins private international law;¹²⁴ however, it should be strictly applied. The ability of parties to regulate their expectations and prescribe the parameters of their respective obligations at the outset should be respected, and not overrun by legal provisions which may have a tenuous connection to the contract.¹²⁵

In conclusion, although it might appear that the mandatory provisions of the law of the place of performance do not override the proper law (where the proper law is foreign to that of the *lex solutionis* and *lex fori*), it may offend public policy of South Africa to enforce performance under that contract.¹²⁶

¹²¹ Van Niekerk (n51) at 170.

¹²² Forsyth (n16) at 344.

¹²³ *Ibid* at 348.

¹²⁴ *Ibid* at 348.

¹²⁵ *Ibid* at 324.

¹²⁶ *Ibid* at 344.

II European Union

The central code regulating the proper law of a contract in the European Union is Rome I.¹²⁷ One of the primary aims of Rome I is to reduce forum shopping in international contracts, which is possible under the related Regulation on Jurisdiction and the Recognition and Enforcement of Judgments ('Brussels I').¹²⁸ This can be achieved if the courts which the parties choose to hear their dispute will apply the same rules, consistently, to deal with conflicts of law.¹²⁹

(a) Jurisdiction

Brussels I applies to civil and commercial matters arising between parties domiciled in EU member states.¹³⁰ Jurisdiction is generally exercised on the basis of the defendant's domicile – nationality is not relevant to the enquiry.¹³¹ Article 2 makes it clear that, in the absence of choice between parties, persons must be sued in the member state in which they are domiciled.¹³²

Some exceptions prevail.¹³³ A defendant may in some instances be sued in the courts of the member state in which performance was due even if they are domiciled in another member state. An exclusive ground of jurisdiction may exist which will also override the general rule. For instance, if a claim relates to immovable property, the courts where the property is situated will have exclusive jurisdiction regardless of the domicile of the defendant (and plaintiff for that matter).¹³⁴ One of the parties may also be entitled to greater procedural protection, such as in consumer disputes.

Parties' choice of court agreements will generally be respected by the court, and a chosen court will have exclusive jurisdiction unless otherwise agreed.¹³⁵ The choice cannot trump any existing rules on exclusive jurisdiction (for instance the exclusivity maintained by the courts in the member state where immovable property is situated).¹³⁶ If neither (or none) of the contracting parties are domiciled in a member state, their respective national laws will determine jurisdiction. However,

¹²⁷ Rome I (n27); M Bogdan *Concise Introduction to EU Private International Law* 2ed (2012) at 117.

¹²⁸ EC Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

¹²⁹ Bogdan (n127) at 117-118.

¹³⁰ Excluding Denmark - Protocol to Brussels I (n128).

¹³¹ Stone *EU Private International Law* 2ed (2010) at 52.

¹³² Article 2 Brussels I.

¹³³ Stone (n131) at 52.

¹³⁴ Art 22(1) Brussels I.

¹³⁵ Article 23(1) Brussels I; Stone (n131) at 165.

¹³⁶ Article 23(1) Brussels I.

none of the other member states are permitted to exercise jurisdiction in such an event unless and until the chosen court declines jurisdiction.¹³⁷

Unlike the situation under South African law, in the EU, there is no requirement that the international contract, dispute or parties be connected in any way with the chosen court or country.¹³⁸ Conversely, and similar to South African law, the choice itself can be made either expressly (likely in a clause in a larger agreement regulating the parties' obligations in a particular transaction) or tacitly, such as when a defendant files their appearance to defend without raising a preliminary complaint about the jurisdiction of the court.¹³⁹

There are, however, some types of contractual disputes in which one or more of the parties have traditionally been in a comparatively weaker position, and require greater protection.¹⁴⁰ Consumer disputes are one such instance that may be subject to their own jurisdictional provisions in terms of articles 15, 16 and 17 of Rome I.¹⁴¹ These articles provide that in consumer disputes (as defined) the consumer may only be sued in the courts of the member state in which the consumer is domiciled. The consumer has the option of instituting its own proceedings either in the courts in which the counter-party defendant is domiciled, or where the consumer itself is domiciled.¹⁴²

These 'carve-outs' apply where a consumer (being an individual acting outside of their trade or profession) concludes a contract for the sale of goods on credit instalments; or contracts on credit (repayable in instalments) which was extended to finance the sale of goods; or where the contract is concluded with a person who pursues their professional or business activities in the member state in which the consumer is domiciled, or otherwise directs their activities to that member state, and the particular contract is connected to those activities.¹⁴³ These instances do not oust the exclusive jurisdiction of the courts concerning immovable property rights and insurance disputes, which are subject to their own provisions.¹⁴⁴

¹³⁷ Article 23(3) Brussels I; Bogdan (n127) at 63-64.

¹³⁸ Article 23(1) Brussels I is silent in this regard. It will be recalled that South African law requires a connection to the dispute – consent alone does not suffice. See discussion at 11-12 above.

¹³⁹ Article 24 Brussels I.

¹⁴⁰ Bogdan (n127) at 53.

¹⁴¹ Stone (n131) at 54.

¹⁴² Article 16 Brussels I.

¹⁴³ Article 15(1)(a),(b) and (c) Brussels I; Bogdan (n127) at 54-55.

¹⁴⁴ Bogdan (n127) at 56.

The grounds upon which the parties can agree otherwise are strictly limited, and essentially they cannot agree to refer their disputes to the courts of a member or third state if this would prejudice the consumer.¹⁴⁵ The consumer remains entitled to institute their claim where they reside, notwithstanding any agreement between the parties to the jurisdiction of a third state to avoid consumer protections.

The purpose of these provisions is three-fold: Firstly, to protect the consumer (the presumed weaker party) from being sued in courts which are not their own, secondly, to allow the consumer the option of instituting action in their own country even if the defendant is domiciled in another member state and, thirdly, to prevent the circumvention of consumer protections under the applicable law.

The real benefits of these provisions can be enjoyed when the consumer is domiciled in a member state.¹⁴⁶ A consumer domiciled outside of a member state would only be entitled to the advantages afforded under the respective national jurisdictional laws, which may well require the consumer to sue the defendant in the country in which the defendant is domiciled.

Once jurisdiction has been determined, the question of applicable law is resolved through the application of the provisions of Rome I.

(b) Applicable law

Courts in member states are required to apply the Rome I conflict rules to every legal system in the world, irrespective of whether that country is an EU member state and/or observes the same provisions.¹⁴⁷

Rome I respects party autonomy as a central tenet, subject to certain restrictions on weaker-party contracts and mandatory provisions. Accordingly, the proper law of the contract is that chosen by the parties (either expressly or implied from the contractual terms or surrounding circumstances such a reference to legal terms from a particular system of law) or the law which is the most closely connected.

Similarly to South African law, the parties' selection of a court or arbitration venue in a specific country does not automatically and exclusively indicate a choice of that country's law as the proper law of the contract, but it may be one of a number

¹⁴⁵ Article 17 Brussels I.

¹⁴⁶ Bogdan (n127) at 53.

¹⁴⁷ Article 2 Rome I; Bogdan (n127) at 118.

of factors supporting a tacit choice of law.¹⁴⁸ However, if all other connecting factors point to one country, which is not the chosen law, the rules of that other country ‘which cannot be derogated from by agreement’ (non-derogable mandatory law) will apply.¹⁴⁹

The parties are generally at liberty to choose any existing legal system, whether this is linked to or entirely separate from the contact. They are therefore free to select a system of law with which one or the other is wholly familiar, but also one with which they are equally unfamiliar (and therefore equally disadvantaged).¹⁵⁰ As Stone explains, an ‘objective connection between the parties or the subject-matter of the dispute and the territory of the court chosen’ is not required.¹⁵¹

That being said, the parties’ choice must not prejudice the application of any mandatory provisions of the only country to which the contract is connected (such as an entirely domestic French contract in which a less restrictive law is selected). The mandatory provisions of the chosen system must be applied, but not if they conflict with those of the system that would otherwise apply in the absence of their choice.¹⁵²

As under Brussels I, certain contracts¹⁵³ enjoy the protection of explicit rules in their favour. In the case of consumers, article 6 provides that consumer contracts (as defined) are governed by the law of the country where the consumer is habitually resident. Consumer contracts are considered those concluded between an individual acting outside of their trade or profession and a person acting within the scope of their business or profession. The proper law presumption in favour of such a consumer will only operate to the extent that the other party (the ‘professional’) pursues or directs their business activities to the consumer’s country of habitual residence and the contract in question is within the context of these activities.¹⁵⁴ If the contract was concluded ancillary to their main activities, or the business/professional did not direct their business to the consumer’s country of habitual residence, the consumer cannot rely on this presumption – the applicable

¹⁴⁸ Recital 12 Rome I.

¹⁴⁹ Article 3 Rome I.

¹⁵⁰ Bogdan (n127) at 123.

¹⁵¹ Stone (n131) at 174.

¹⁵² Bogdan (n127) at 125.

¹⁵³ These are contracts of carriage, consumer contracts, insurance contracts and individual employee contracts.

¹⁵⁴ Stone (n131) at 350-351.

law would be determined in accordance with the categories set out in article 4.¹⁵⁵ This would be the case if, for instance, a French seller promotes and sells shoes exclusively in Germany, which are purchased by a Swiss visitor, who returns home to Switzerland only to find that the soles aren't properly affixed. The laws of France would apply to deal with this dispute.

In addition to protecting certain classes of contracting parties, Rome I gives prominence to mandatory provisions in articles 3 and 9. In Chapter One, the distinction between non-derogable and overriding mandatory rules was explained. It was also mentioned that article 3 of Rome I stipulates that the non-derogable laws of a wholly connected country will apply despite a choice to the contrary. In turn, Article 9 deals with the stricter category of overriding mandatory rules, which Kuipers considers to be 'a special type of mandatory rules' that apply regardless of the chosen law or objective connecting factor due to the nature of interests they seek to protect.¹⁵⁶

Article 9(1) states that

'Overriding mandatory provisions are... regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.'

In addition, the mandatory rules of the law of the forum will have the final say. As article 9(2) stipulates, '[n]othing in this regulation shall restrict the application of the overriding mandatory provisions of the law of the forum'.

Finally, article 9(3) provides that the mandatory provisions of the law of the place of performance may be given effect to if these render performance under the contract unlawful.

Three types of overriding mandatory rules are thus recognised under Rome I: those of the law governing the contract; those of the *lex fori*; and those of a third country (although this is a contentious issue). The respect paid to these mandatory rules is paramount, and they will, under Article 9, apply regardless of the law which

¹⁵⁵ Article 4 sets out certain presumptions on proper law – such as the sale of goods is governed by the law of the seller's habitual residence, and the provision of services is governed by that of the service provider's habitual residence. 'Habitual residence' is, in the case of companies and other juristic persons, defined to be the place of central administration, or where the relevant branch office or agency is located. The place of habitual residence of an individual businessperson is their principal place of business (Article 19 Rome I).

¹⁵⁶ Kuipers *EU Law and Private International Law: The Interrelationship in Contractual Obligations* (2011) at 64.

would otherwise apply under Rome I – the normal conflict rules are set aside and the overriding mandatory provisions are directly applicable.¹⁵⁷

Bogdan points out, however, that the provisions do not necessarily override other laws in all circumstances. Their precedence may be limited to situations which are significantly closely connected with their country. Nonetheless, they are intended to apply at least some of the time when the ordinary conflict rules point to another legal system.¹⁵⁸ In this way, the parties' attempts to 'cleverly manipulat(e) the connecting factors or ... simply (elect) a different law'¹⁵⁹ are curtailed. This mechanism is arguably the most objective means by which the competing party interests and strengths may be fairly balanced.¹⁶⁰

The *Ingmar* case¹⁶¹ dealt with a commercial agent conducting operations in the United Kingdom for its California principal, under an agency agreement that referred disputes to California law. A dispute over commission payable after termination arose, and the ECJ held that the EU Directive on commercial agency agreements was designed to protect commercial agents, especially after termination of the contract. These provisions were held to be mandatory in nature,¹⁶² and applied to commercial agents carrying on their activity within the EU, regardless of the law which the parties chose to govern their relationship.¹⁶³

More recently, the ECJ considered whether wider protections established in the law of the forum trump minimum protections of the chosen law which were common to both laws.¹⁶⁴ In that case, both Belgian and Bulgarian law complied with the EU Directive on commercial agency agreements, more specifically the compensation and/or indemnification that could be claimed by an agent on termination of their contract. Whilst the Bulgarian law transposed the minimum provisions of the Directive, the Belgian law established more extensive rights.

When a dispute arose between a Belgian agent and their Bulgarian principal, the agent argued that it was entitled to the wider protection of Belgian law as it was

¹⁵⁷ Bogdan (n127) at 134-135.

¹⁵⁸ Ibid at 134-135.

¹⁵⁹ Kuipers (n156) at 54.

¹⁶⁰ Eksi (n99) at 311.

¹⁶¹ *Ingmar GB v Eaton Leonard Technologies*, Case C-381/98, [2000] ECR I-9305.

¹⁶² Ibid at 22 and 24.

¹⁶³ Ibid at 25-26.

¹⁶⁴ *Unamar* (n35).

mandatory law.¹⁶⁵ In turn, the Bulgarian agent argued that the parties had chosen Bulgarian law, which correctly applied the minimum standards of the Directive, and, in the interests of legal certainty and in accordance with the principle of freedom of contract, Bulgarian law should apply.¹⁶⁶

The ECJ noted that parties' freedom of contract was a cornerstone of the Rome Convention¹⁶⁷ and that therefore allegations of a 'mandatory rule' would have to be strictly interpreted. Guiding principles were formulated which can assist national courts in their assessment of whether the law that has been proposed to substitute the chosen law is indeed a mandatory rule. Courts should look at the exact terms of the alleged mandatory rule and the general structure of the law. Further, all circumstances in which the law was adopted should be considered to determine whether the law is mandatory in nature; specifically whether the legislature adopted the particular law to protect an interest that that country considered essential.¹⁶⁸

The court concluded that the mandatory provisions of the law of the forum which exceed the minimum protections common to both states and chosen by the parties can trump the chosen law, but only if it is found, after a detailed analysis, that the legislature of the forum was fundamentally required to legislate beyond the minimums established in the Directive in light of the nature and purpose of those provisions.¹⁶⁹

III **Botswana**

Botswanan private international law is not codified, and its principles are buried in (predominantly) case law, international treaties and conventions, domestic statutes and academic writings.¹⁷⁰ The approach is very closely aligned with the South African conflict of laws, and considerable reference is made, and reliance placed upon, South African case law as an authoritative source of law in Botswana.¹⁷¹

¹⁶⁵ The ECJ declined to deal with the issue of jurisdiction and looked solely at the merits of the referral.

¹⁶⁶ At 33.

¹⁶⁷ The case was decided under the Rome Convention, but it was held that the same would apply under Rome I.

¹⁶⁸ At 50.

¹⁶⁹ At 53.

¹⁷⁰ J Kiggundu *Private International Law in Botswana* (2002), at preface viii.

¹⁷¹ *Ibid* at 196, 259.

(a) *Jurisdiction*

In Botswana, as in most countries, a jurisdictional link must exist between the court's area of operation and the parties to the dispute and/or the dispute itself. Such a link could include the parties' residence or domicile, place where the contract was concluded, submission to jurisdiction and the location of any immovable property.¹⁷²

Similar to the requirement in South African law, when the courts are dealing with a claim sounding in money, the question of jurisdiction depends on the status of the parties: whether they are *incola* or *peregrinus* of the court and the same determinative factors would apply.¹⁷³

In the case of *Silverstone v Lobatse Clay Works*¹⁷⁴ the Botswana Appeal Court was called upon to determine whether a company incorporated in Botswana, with its registered head office in Botswana, was an *incola* of Botswana even though none of its shareholders were residents of the country, nor was the administration conducted in Botswana. The court confirmed that, under Botswanan law (and relying on Roman Dutch Law as it has developed in South African jurisprudence) an *incola* is either domiciled or resident within the jurisdiction of a court, whether a natural or juristic person. In a decision aligned with the South African position,¹⁷⁵ the court held that a company may be resident at its registered office, even if the central administration and control of the company is conducted elsewhere.¹⁷⁶

The earlier (South African) case of *Njikelana*¹⁷⁷ can be relied upon as authority for the principle that, where jurisdiction has already been established based on domicile, attachment of property belonging to the defendant is not necessary. Conversely, where jurisdiction has been established based on a cause of action, attachment is necessary to confirm the jurisdictional link.¹⁷⁸

If, however, both the plaintiff and defendant are *peregrini* of the court, and the cause of action arose beyond the jurisdiction of the court, the court will not have jurisdiction and nor can it be established by attachment.¹⁷⁹

¹⁷² Kiggundu (n170) at 91.

¹⁷³ Ibid at 143; Oppong (n56) at 69.

¹⁷⁴ *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* [1996] BLR 190.

¹⁷⁵ See *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) and *Dairy Board v John T Rennie & Co (Pty) Ltd* 1976 (3) SA 768 (W).

¹⁷⁶ Kiggundu (n170) at 200.

¹⁷⁷ *Njikelana v Njikelana* 1980 (2) SA 808 (SEC).

¹⁷⁸ Kiggundu (n170) at 203.

¹⁷⁹ *SS Humber v SS Answald* 1912 AD 546, *Maritime & Industrial Services Ltd v Marcierta Compania Naviera SA* 1969 (3) SA 28 (D), *Pretorius v Sweiger* [1979] BLR 124.

Parties may try to avoid the mandatory protections of a jurisdiction by inserting a choice of forum clause referring any disputes under the agreement to a less protective jurisdiction, or one that would not apply the protections. However, as discussed above, and according to the South African authorities which would most likely be applicable, the consent cannot be vague, unconscionable, contrary to public policy or fraudulent.¹⁸⁰ A consumer could thus still challenge the consent ostensibly ousting jurisdiction and therefore their access to mandatory protections.

Only once jurisdiction has been established can the Botswanan courts begin to look at the question of applicable law.

(b) Applicable law

As has been mentioned above, Botswanan private international law is founded on many of the same principles of its South African counterpart, and many of the foundational concepts should therefore be familiar to South African lawyers.¹⁸¹

Broadly speaking, every international contract has a proper, governing law which usually (but not exclusively) determines disputes arising out of the contract. The parties are ordinarily free to select the proper law, but if they do not, the system which has the closest and most real connection to the contract is the proper law.¹⁸²

Respect for party autonomy, a fundamental tenet of freedom of contract in Botswanan law, allows an express or implied choice. The South African authorities cited in support of these conflict cornerstone principles confirm that party autonomy must be supported,¹⁸³ whilst case law on the early ‘ticket cases’ reiterates that a choice can be implicitly made and evidenced by factors such as the place of conclusion of the contract, the nationalities of the parties and the place of payment.¹⁸⁴

In the event that the parties make no choice, whether express or implied, the proper law of the contract must be assigned. ‘[T]he general rule (is)...that the rights of parties to the contract are to be judged by the laws of that country by which they intend to bind themselves or rather by which they may be justly presumed to have bound themselves.’¹⁸⁵

¹⁸⁰ Forsyth (n16) at 217-220 and Spiro (n57) at 302-303.

¹⁸¹ *Silverstone* (n174).

¹⁸² Kiggundu (n170) at 259.

¹⁸³ *In Re Erskine* (1895) 12 SC 27, *Commissioner of Inland Revenue v Estate Greenacre* 1936 NPD 225.

¹⁸⁴ *Stretton v Union Steamship Co (Ltd)* (1881) EDC 315.

¹⁸⁵ *Castle Mail Packets Co v Mitheram & Toteram* (1892) 13 NLR 199 at 201.

The South African authorities on determination of applicable law should be followed by the Botswanan courts, in the absence of clear Botswanan precedent. The Cape case of *Improvair*¹⁸⁶ (detailed above in the discussion of applicable law in South Africa) is considered authority for the determination of the proper law of a contract in the absence of choice, and the preferred means is the most real connection test.

As regards mandatory rules, certain principles are pertinent. Firstly, the mandatory rules of the proper law cannot be avoided or ousted by a choice of law. In addition, the mandatory rules of the *lex fori* will apply, despite a choice of law to the contrary, as they relate to consumers. Finally, although the mandatory rules of a third country may not appear relevant, they may be indirectly applicable to the extent that Botswanan public policy would be violated if performance was enforced under the contract.¹⁸⁷

IV **International commercial arbitration**

(a) *Jurisdiction*

Party autonomy is paramount to whether the arbitral tribunal has jurisdiction to adjudicate the dispute or not.¹⁸⁸ Agreement to arbitrate is essential, and the parties' ability to regulate, by agreement, the procedure and applicable law is limited only by public policy or any rules which may apply to the arbitration due to their choice.¹⁸⁹

(b) *Applicable law*

Provided the arbitration agreement is valid, the tribunal appointed in terms of that agreement is empowered to adjudicate the dispute within the bounds of their referral. The validity, effect and interpretation of the arbitration agreement itself is governed by the proper law of that agreement.¹⁹⁰

In determining the applicable law, the arbitrator must in the first instance have respect for the parties' choice and in its absence, the proper law must be assigned. In so doing, the arbitrator is not subject to the same conflict rules that restrict a national court. Under the ICC arbitration rules, parties are free to agree to rules to be applied

¹⁸⁶ *Improvair* (n92).

¹⁸⁷ For fuller details, see discussion at 12-21 above and the sources relied upon.

¹⁸⁸ JP van Niekerk 'Aspects of Proper Law, Curial Law and International Commercial Arbitration' (1990) 2 SA Merc LJ 117 at 123.

¹⁸⁹ T Carbonneau *The Law and Practice of Arbitration* 4ed (2012) 1 at 2, 47-48 and 50.

¹⁹⁰ Van Niekerk (n188) at 121.

that must be applied to the merits of their dispute. But if there is no agreement, the arbitrator must apply the rules of law ‘which it determines to be appropriate’.¹⁹¹

Ultimately, the arbitrator must determine the law that has the closest and most real connection to the agreement. Many factors may be considered to establish a sufficient connection, such as the place of conclusion, the place of performance, the nationality or domicile of the parties, any customs or trade practices, or even the general principles of the *lex mercatoria* including the UNIDROIT principles.¹⁹²

Mandatory rules may apply at arbitration in the same way as they would in court. Whilst national courts are considered bound to refuse to enforce an arbitration agreement, or refuse to recognise and enforce an arbitral award, due to the public policy of the forum, the same may not be said for an arbitrator or tribunal presiding over an international arbitration. According to Bermann, an arbitrator ‘would seem to be free of the public policy constraints of any state’.¹⁹³ An arbitrator remains, however, subject to the reality that an award which ignores mandatory provisions may not be recognised and enforced for being contrary to public policy.¹⁹⁴

There appears to be consensus amongst courts and commentators that, at the very least, an arbitral tribunal must apply the mandatory rules of arbitral procedure of the forum. These mandatory rules regulate the validity of the proceedings and permit the issuance of a valid award that is enforceable in that forum.¹⁹⁵

If the law of the forum is also the applicable law, it is clear that the mandatory substantive rules of the forum would also apply. However, if the proper law is that of a foreign country, it is less clear whether the mandatory rules of the forum would continue to apply. It has been argued¹⁹⁶ that only those norms governed by the law of the forum would apply (the ‘*ordre public interne*’ as categorised in French law) rather than any outside, international norms (‘*ordre public international*’). Certainly, the tribunal would need to ensure that the particular rules were intended to apply to the situation at hand, a determination which can necessarily only be made on a case by case basis.

¹⁹¹ Article 21, ICC Rules of Arbitration, 2012.

¹⁹² International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, Rome, 2010; Carbonneau (n189) at 105-106.

¹⁹³ Bermann (n42) at 330.

¹⁹⁴ A-S Papeil ‘Conflict of overriding mandatory rules in arbitration’ in *Conflict of Laws in International Arbitration* (2011) 341at 355.

¹⁹⁵ Bermann (n42) at 330.

¹⁹⁶ Ibid at 331.

The position is much clearer in the case of mandatory rules of the chosen law: these should be applied, unless they are not relevant to the dispute or if their application would offend other mandatory rules or norms. Such other mandatory rules or norms could include those of the forum.¹⁹⁷

The potential application of mandatory rules of a third country could also arise at an international arbitration. Like a judge, an arbitral tribunal could be faced with the dilemma of whether or not to apply mandatory norms of a country that is neither the chosen law nor the law of the forum.¹⁹⁸ This is a vexed question with no clear answer.

Unlike judges, an arbitrator is generally free from the bounds of conflict rules of the jurisdiction and therefore enjoys much greater flexibility than their judicial counterparts. Arbitrators are thus, in theory at least, at liberty to apply the rules of a third country where appropriate.¹⁹⁹

Various guiding criteria have been suggested to enable rational and reasonable inclusion of third country mandatory rules: the existence and strength of the particular country's link to the dispute; the tribunal's view on the value of applying the rule(s); and whether the outcome of such application would be appropriate.²⁰⁰ Despite these proposals, it would seem clear that the actual application of mandatory rules and norms of a third country would be the exception rather than the rule.²⁰¹

In the United States' Supreme Court case of *Mitsubishi*, the court assumed that an arbitral tribunal in Japan would read the arbitration clause widely enough to include claims under United States competition/anti-trust law, despite the parties' intention for Swiss law to apply to disputes. Their choice was narrowly interpreted to be limited to contractual claims only.²⁰²

The mandatory rules of a third country could also become relevant and appropriately applied if the tribunal is aware at the outset that enforcement of any award would be sought in that specific country.²⁰³ It would be nonsensical and contrary to the interests of justice to ignore its mandatory rules or public policy norms in such a situation.

¹⁹⁷ Bermann (n42) at 331.

¹⁹⁸ *Ibid* at 332.

¹⁹⁹ *Ibid* at 332-333.

²⁰⁰ *Ibid* at 333.

²⁰¹ *Ibid* at 334.

²⁰² *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985).

²⁰³ Bermann (n42) at 334.

Lastly, the mandatory rules of a third country may be considered in a ‘blended’ application of laws. As Bermann suggests, the tribunal could accept that, in terms of the parties’ chosen law, illegality is a defence to claims for performance under the contract, but then look to the laws of the place of performance for the content of what constitutes illegality.²⁰⁴

To conclude this subsection, it may be remarked that, in the absence of choice, the tribunal must apply the law it deems the most appropriate. Part of this should include the freedom to seek and apply mandatory rules from a variety of nations, whether these seem directly relevant (in the case of the proper law or law of the forum) or even indirectly so (such as those of a third country with a less obvious link to the dispute). Where the parties have chosen the proper law, the freedom of the tribunal to apply mandatory rules from other systems is more curtailed out of respect for party autonomy. However, as discussed above, this does not exclude the application of mandatory rules from other systems even if they do not appear to be pertinent at first glance.²⁰⁵ This can be to the benefit of weaker parties at arbitration who might initially seem to have agreed to that mandatory protective mechanisms do not apply – there remains room to argue otherwise.

CHAPTER 4 : BACKGROUND TO THE CONSUMER PROTECTION ACT

This chapter will consider the need for the rights based approach of the CPA through an examination of the purpose of this legislation, together with a discussion of the legislative drafting process itself. This will incorporate reference to the inspiration the legislature drew from different jurisdictions and the general trends in consumer protection which may be distilled from some of these countries. The countries included Argentina, Brazil, Chile, India, the United Kingdom, Finland, Botswana, Malawi, Uganda and Canada; but only India, the European Union, Canada and Botswana are discussed.²⁰⁶

²⁰⁴ Bermann (n42) at 335.

²⁰⁵ Ibid at 339.

²⁰⁶ Memorandum (n 7).

I **Need for consolidated and bespoke consumer protection legislation in South Africa**

Until the CPA was promulgated, South African consumer (and related) rights enjoyed protection under a disparate legal framework which dealt with elements of what could be considered consumer rights: there was no consolidated, single body of law which dealt with a designated group of defined consumers and consumer transactions.²⁰⁷ The Memorandum on the Objects of the Consumer Protection Bill cites that, although consumers were protected to a degree under these provisions, they were outdated and incidental rather than central to consumer protection.²⁰⁸

Consumers were entitled to the respect of certain fundamental rights under legislation including the National Credit Act ('the NCA'),²⁰⁹ the Electronic Communications and Transactions Act ('the ECTA'),²¹⁰ the Competition Act,²¹¹ the Companies Act,²¹² the Financial Advisory and Intermediary Services Act ('FAIS'),²¹³ the Standards Acts,²¹⁴ the Foodstuffs, Cosmetics and Disinfectants Act²¹⁵ and the Rental Housing Act²¹⁶ and their respective regulations to name but a few. The common law, of course, was also applicable.

One of the obvious consequences of this fragmented approach was that consumers were not aware of and did not have a full appreciation for their unconsolidated rights. This was not a phenomenon unique to South Africa. According to Van Eeden, following World War II there was an international focus on consumer rights and relationships with big business. It became clear to scholars that fundamental disparities between business and the end user, where consumers were unfairly treated and exposed to dangerous or poor quality products, were allowed to perpetuate. Furthermore, consumers had little opportunity for redress – their pockets were often simply not deep enough to propel their complaints through the courts.²¹⁷ However, as the world steamed towards industrialisation, so too did consumer rights

²⁰⁷ E Van Eeden *Consumer Protection Law in South Africa* (2012) 1 at 2.

²⁰⁸ Memorandum (n 7) at 80.

²⁰⁹ Act 34 of 2005.

²¹⁰ Act 25 of 2002.

²¹¹ Act 89 of 1998.

²¹² Both Act 61 of 1973 and Act 71 of 2008.

²¹³ Act 37 of 2002.

²¹⁴ Act 8 of 2008 and Act 29 of 1993.

²¹⁵ Act 54 of 1972.

²¹⁶ Act 50 of 1999.

²¹⁷ Van Eeden (n207) at 21.

experience an overhaul. The individual consumer came to be recognised as representative of ‘the consumer interest’ with a ‘distinct and identifiable role and interest in society’.²¹⁸

In addition to the disjointed approach to consumer rights in South Africa, some industries over-regulated (the banking and insurance industries are arguably two of the most regulated in our society), whilst others were not properly regulated nor policed (the residential housing market in particular relies heavily on self-regulation to ensure that the rights of tenants are not trampled upon). The opportunity for abuse and misuse of the law was often too tempting.²¹⁹

As a result, and as a primary purpose, the CPA endeavours to ‘promote and advance the social and economic welfare of consumers’.²²⁰ It intends to achieve this ideal through a multi-faceted approach²²¹ founding a legal framework to establish a fair, accessible, efficient and sustainable consumer market; reducing the difficulties experienced by low income households, rural communities and marginalised people²²² in accessing quality goods and services; encouraging fair business practices; enhancing consumer education and information which will bolster consumer responsibility; and providing for an efficient dispute resolution system.²²³

With an overwhelming focus on the rights of consumers, the CPA has been criticised for not considering the position of suppliers with more understanding. De Stadler considers this ‘regrettable’²²⁴ and cautions that small to medium enterprises will bear the brunt of this oversight, as their ability to compete in the market may struggle to balance with that of their larger competitors.²²⁵

Ultimately, however, the drafters of the CPA must be lauded for merging into one cohesive Act (and its accompanying regulations) the results of decades of research, debate and study from across the globe. The market has been overhauled and clear legislative provisions now apply to unfairness in contracts, product liability and sales of goods and services. Perhaps most significant is the task placed at the

²¹⁸ Van Eeden (n207) at 21-22.

²¹⁹ Memorandum (n 7) at 80.

²²⁰ Section 3(1).

²²¹ Section 3(1)(a) to (h).

²²² Such marginalised people could include minors, the elderly, the illiterate, those with visual or hearing impairments, or those with limited understanding of the language of any advertisement, notice, warning, label, instruction or contract.

²²³ Memorandum (n 7) at 81; Van Eeden (n207) at 25.

²²⁴ E de Stadler *Consumer Law Unlocked* (2013) 1 at 4.

²²⁵ *Ibid.*

door of the courts.²²⁶ When interpreting the CPA, a court must promote the spirit and purposes of the Act and make appropriate, practical orders to advance, protect and promote the fulfilment of the rights embodied in the CPA.²²⁷ The common law, too, must be developed in order that consumer rights may be fully realised.²²⁸

II Comparison with other jurisdictions: who is entitled to protection?

Generally speaking, the people entitled to protection under the classification of ‘consumers’ is defined quite widely across the globe. The definition of ‘consumer’ is central and can include both natural and juristic persons entering into transactions for consideration or otherwise (with ‘consideration’ being narrowly or widely defined), and may also extend to third parties who were not privy to the initial transaction between a supplier (as defined) and a consumer.

Some jurisdictions, however, restrict the definition of ‘consumer’ with the effect that the protections characteristic of consumer legislation may be limited to natural persons acquiring goods or hiring services for private purposes. There is almost universal acceptance that consumer protection legislation does not apply to protect consumers in transactions of a strictly business nature, although this is not always the case,²²⁹ and is not the case in South African law.

Similarly, the definitions of ‘supplier’, ‘trader’, ‘distributor’ and ‘manufacturer’ can widen or restrict the scope of consumer protections.

These general introductory observations are now expanded upon with reference to specific jurisdictions.

(a) India

The Indian Consumer Protection Act of 1986 adopts a wordy definition of ‘consumer’, highlighting the difficulty with defining consumers as a group. A person will only qualify as a consumer if consideration has been paid, deferred or promised, or partly paid or promised, for the purchase of any goods or the hire of any services. The definition includes not only the person who purchased or hired the particular goods or services but also any third party user or beneficiary of such goods or services. However, any user or beneficiary using the goods or services for their own

²²⁶ Van Eeden (n207) at 25.

²²⁷ Section 4(2)(b).

²²⁸ Section 4(2)(a).

²²⁹ Mauritius Law Reform Commission *Report on Review of Aspects of Consumer Protection Laws and Proposals for Reform* (2010) 1 at 83.

commercial purposes (for instance to on-sell or sub-lease) is excluded from the definition, and therefore the protections of the legislation.²³⁰

Manufacturers and traders are separately defined, a significance relevant to the liability provisions. The definition of ‘manufacturer’ is wide enough to include any person who makes the goods or parts; assembles goods and claims the end product as their own; or puts their own mark in the goods and claims their manufacture. ‘Trader’ is broadly defined to extend to any person who sells, distributes (including the manufacture) or packages goods.²³¹

(b) European Union

Consumer protection legislation in the European Union takes the form of multiple Directives issued for specific instances directly relevant to consumers. For example, there are specific Directives dealing with Unfair Terms in Consumer Contracts²³², Contracts Negotiated Away From Business Premises²³³, Package Travel, Package Holidays and Package Tours²³⁴ and General Product Safety²³⁵. Each of these Directives define consumers, suppliers and producers independently: there is no single definition that features throughout. Rather, the definitions of the relevant role-players are tailored for the specific conduct or situation the particular Directive seeks to regulate.²³⁶

The most general definition of ‘consumer’ seems to be found in the Directive dealing with unfair contractual terms. This considers a consumer to be a natural person acting outside of their trade, business or profession. A similar version is included in the Directive regulating contracts concluded away from business premises.

Protection is extended to third parties in package holiday deals under the package holiday Directive – this is not limited strictly to the individuals who purchased the package in question. Holidaymakers who had their packages bought on their behalf, or transferred to them, are also entitled to protection.

²³⁰ Section 2(d) of the Indian Consumer Protection Act, 1986.

²³¹ Ibid section 2(j) and (q) respectively.

²³² Directive 93/13/EEC.

²³³ Directive 85/577/EEC.

²³⁴ Directive 90/314/EEC.

²³⁵ Directive 92/59/EEC.

²³⁶ The EU has also enacted legislation applicable to product liability, and consumer protection in the EU is thus not limited to contractual dealings.

‘Producers’ are defined in the Directive dealing with product liability for defective products to include manufacturers of raw materials, products or their components, any person representing that they are a producer, or anyone importing products into the community. If the producer cannot be identified, the supplier is presumed to be the producer. A ‘supplier’ is generally defined to be persons (natural or juristic) who deal with consumers in a trade or professional context.

(c) Canada

The definition of ‘consumer’ under the Ontario Consumer Protection Act, 2002, is arguably the most restrictive. In section 1, a consumer is simply defined as ‘...an individual acting for personal, family or household purposes’ which excludes by implication juristic persons, even small businesses, and any business transactions within or above any prescribed monetary thresholds. The onus will be on the consumer to establish that their conduct was for personal, family or household purposes only. Although this definition limits the potential pool of consumers, it is easily understandable and abundantly obvious who a consumer is and in what instances.

A definition of ‘manufacturer’ is absent, but a ‘supplier’ is widely defined to be a person whose business it is to sell, lease or trade in goods and services, including their agents or any person purporting to be a supplier or a supplier’s agent.²³⁷

(d) Botswana

Section 2 of Botswana’s Consumer Protection Act 1998 provides that a consumer is a person who does not transact for business purposes (some of which purposes are specifically listed). A ‘consumer’ is any person or non-profit organisation who is offered or supplied foods or services (a ‘commodity’, including investments) who does not intend to use the goods for on-sale, re-hire or manufacture for gain.

Suppliers are not defined but a ‘business’ is considered to offer, supply or make available commodities or services for consideration, or solicit and receive any investment.

²³⁷ Section 1 Ontario Consumer Protection Act, 2002.

(e) Conclusion

These definitions are fundamental when determining who is entitled to consumer protection and in what circumstances.

CHAPTER 5 : RELEVANT PROVISIONS OF THE CONSUMER PROTECTION ACT

The application and scope of the CPA will be considered, following a discussion of the primary rights the CPA seeks to promote.

I Foundation rights

The CPA is founded on ten cornerstone rights which guide the fulfilment of its ‘core purpose... [which is] to promote and advance the social and economic welfare of consumers in South Africa’.²³⁸ These rights are highlighted together with a brief overview of the legislative means by which these may be realised.

The right to equal access to the consumer market is based on the right not to be unfairly discriminated against as set out in the Constitution²³⁹ and the Promotion of Equality and Prevention of Unfair Discrimination Act.²⁴⁰ Accordingly, provision is made to avert (and in some instances prohibit) unfair discrimination between suppliers and consumers, and to promote consumers’ access to goods and services, as well as the availability, quality and pricing of such goods and services.²⁴¹

The consumer’s right to privacy is also based on a fundamental right in the Bill of Rights.²⁴² In the context of consumer transactions, the relevant provisions are primarily aimed at curbing unsolicited direct marketing, and regulating the time and place of such activities.²⁴³

The consumer’s right to choose is given prominence in the CPA. Consumers are entitled to select goods after examination and comparison of price. ‘Bundling’ of products is specifically prohibited unless there is an economic advantage for the consumer (i.e. the ‘bundled’ goods are cheaper than if they were sold individually). Fixed term agreements entered into after the commencement of the CPA are also

²³⁸ Memorandum (n 7) at 81.

²³⁹ Constitution (n66).

²⁴⁰ Act 4 of 2000.

²⁴¹ Memorandum (n 7) at 83.

²⁴² Section 14, Constitution (n66).

²⁴³ Memorandum (n 7) at 83.

strictly regulated, and consumers now have the right to cancel fixed term agreements (as defined) subject to certain limits and reasonable charges. Further, maintenance or repairs may only take place with the consumer's prior approval. Linked to the limitations on direct marketing, a five day cooling off period will apply to any direct marketing sales.²⁴⁴

In terms of the right to disclosure and information, consumers must be able to understand the terms and conditions of the agreements they conclude, and the services and merchandise they use and consume. Such an informed choice requires prices to be displayed, accurate trade descriptions of goods, sales receipts, disclosure of commissions,²⁴⁵ suitable identification of work and delivery people, and plain, understandable language in printed material (such as advertisements and contracts).²⁴⁶

Consumers are also entitled to receive fair and responsible marketing, which right includes a general prohibition against misleading, fraudulent or deceptive marketing. As will likely have become apparent, much stricter rules now apply to direct marketing initiatives, and promotional competitions (which previously fell under the Lotteries Act²⁴⁷) are governed by the CPA to ensure that the competitions and prizes are appropriately run.²⁴⁸

The CPA further prohibits any unfair, forceful or unconscionable conduct throughout a transaction – from marketing, to supply of goods or performance of services, to the recovery of goods from consumers.²⁴⁹

Unfair, unjust and unreasonable contractual terms and conditions are prohibited under the Act and its regulations. Any limitations of liability on the part of the supplier must clearly be drawn to the attention of the consumer, and certain agreements or clauses are rendered void *ab initio*.²⁵⁰ This would apply to cross-border trade in the consumer's favour.

To advance the right to fair value, good quality and safety, the CPA establishes a regime of liability irrespective of negligent conduct in the realm of product liability. Consumers have a general right to receive goods that are of good quality

²⁴⁴ Memorandum (n7) at 84.

²⁴⁵ The earning of commission which is subject to regulation under other legislation is excluded.

²⁴⁶ Memorandum (n7) at 84.

²⁴⁷ Act 57 of 1997.

²⁴⁸ Memorandum (n 7) at 85.

²⁴⁹ Ibid at 85.

²⁵⁰ Ibid at 86; section 51, regulation 44.

and free from defects, unless they have expressly agreed to purchase goods in a disclosed condition. In addition to any other liability (which may accrue under the common law or other legislation), section 61 provides that any producer, distributor or supplier (as defined) is strictly liable for any harm caused, wholly or partially, due to a product defect or failure, subject to certain exceptions. Such harm includes death, disability, injury, illness and loss and/or damage to property.²⁵¹ The extent of this potential liability in the conflict of laws realm is examined in further detail in Chapter Six below.

Linked to the consumer's right to fair value, good quality and safety is the supplier's accountability to consumers. Suppliers are responsible for any deposits paid, and must honour vouchers and credits for up to five years after they are issued (a departure from common practice by suppliers to limit the opportunity to redeem vouchers for a far shorter period, not to mention the 'standard' prescription period of three years)^{252 253}.

These rights would remain empty promises without the consumer's right to be heard and obtain redress. The Consumer Commission has therefore been established to deal with consumer complaints and violations of consumer rights.²⁵⁴ The efficacy of this Commission has, however, been hamstrung by various constraints, not least of which have related to budget limitations and personnel issues since inception. As a result, the Commission has not (yet) had as much of an impact as it may otherwise have had on changing conduct in the market.

II **Application and scope of the CPA**

Section 5 of the CPA defines the scope of the Act. The Act will apply to every transaction occurring in South Africa (whether or not the supplier is based in the country), the advertising, marketing and selling of goods and services by suppliers (who are not excluded), and transactions where the supplier does not make a profit, provided the transaction is not excluded.²⁵⁵

²⁵¹ Memorandum (n7) at 86.

²⁵² Section 11(d), Prescription Act, 68 of 1969.

²⁵³ Memorandum (n 7) at 86.

²⁵⁴ Ibid at 87.

²⁵⁵ Section 5 states:

‘5 Application of Act

1. This Act applies to –

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- a) **every transaction occurring within the Republic**, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);
 - b) the **promotion of any goods or services**, or the **supplier of any goods or services, within the Republic**, unless –
 - a) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
 - b) the promotion of those goods or services has been exempted in terms of subsections (3) and (4).
 - c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and
 - d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5).
2. This Act does not apply to any transaction –
 - a) in terms of which goods or services are promoted or supplied to the State;
 - b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6;
 - c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);
 - d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;
 - e) pertaining to services to be supplied under an employment contract;
 - f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act 66 of 1995); or
 - g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act 66 of 1995).
 3. A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of – ...
 - a) Any other national legislation; or
 - b) Any treaty, **international law**, convention or protocol.
 4. ...
 5. If any **goods are supplied within the Republic** to any person in terms of a **transaction that is exempt** from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are **nevertheless subject to sections 60 and 61**.
 6. For greater certainty, the following arrangements must be regarded as a transaction between a supplier and a consumer, within the meaning of this Act:
 - a) the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;
 - b) a solicitation of offers to enter into a franchise agreement;
 - c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
 - d) a franchise agreement or an agreement supplementary to a franchise agreement; and
 - e) the supply of any goods or services to a franchisee in terms of a franchise agreement.
 7. The **application of this Act** in terms of subsections (1) to (7) **extends to a matter irrespective of whether the supplier** –

The Act does not apply to transactions where goods and services are promoted or supplied to the State; transactions involving a consumer that is a juristic person with an asset value or annual turnover falling above the threshold determined by the Minister;²⁵⁶ transactions that are exempt in terms of section 5(3) and (4); transactions giving effect to collective bargaining agreements²⁵⁷ or collective agreements;²⁵⁸ the provision of any education, information, advice or consultation regulated by FAIS; any banking or related services including advice under FAIS or the Long- and Short-term Insurance Acts;²⁵⁹ and any employment agreements.

The definitions of certain key terms require consideration. Fundamentally, a ‘transaction’ that is subject to the provisions of the CPA is defined to mean an agreement between a supplier acting in the ordinary course of business with a consumer for the supply of goods or services for consideration, including franchise agreements.

A ‘consumer’ is a person to whom goods and services are marketed, or a person who contracts with a supplier, in the ordinary course of the supplier’s business and any users or beneficiaries of those goods or services regardless of whether they were a party to the initial transaction, unless the transaction has been specifically exempted. A franchisee under a franchise agreement (as contemplated under the CPA) is also included in the definition of consumer.²⁶⁰

The definition of ‘supplier’ is not as clearly stated in the Act. A ‘supplier’ is defined to mean ‘a person who markets any goods or services’; the definition of ‘market’ means the promotion or supply of any goods or services; whilst ‘promote’ means to advertise, display or offer goods or services in the ordinary course of

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- a) resides or has its principal office **within or outside the Republic**;
 - b) operates on a for-profit basis or otherwise; or
 - c) is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership; or
 - d) is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public. (emphasis supplied)

²⁵⁶ In terms of section 6 of the Act. The threshold is currently determined at R2 million – Government Gazette no. 34181, 1 April 2011

²⁵⁷ As defined in terms of section 23 of the Constitution (n66) and the Labour Relations Act, 66 of 1995.

²⁵⁸ As defined in section 213, Labour Relations Act (n257).

²⁵⁹ Acts 52 and 53 of 1998 respectively.

²⁶⁰ Section 1.

business to the public for consideration or representations or inducements to that effect.²⁶¹

A ‘distributor’ of goods is a person who, in the ordinary course of business, is supplied with goods by a producer, importer or another distributor and on-supplies the goods either to another distributor or to a retailer.²⁶²

Particularly relevant to cross-border trade, an ‘importer’ is considered to be any person who brings goods (or causes them to be brought) from outside South Africa into the country with the intention to supply the goods in the ordinary course of business.²⁶³

‘Goods’ are extremely widely defined. They include anything marketed for human consumption, other tangible objects (including written or encodeable media such as compact discs), literature, music, films, data, photographs or other intangible products that have been written or coded as well as any related licence, a legal interest in land or other immovable property beyond that which is considered a ‘service’ (as defined), gas, water and electricity.²⁶⁴

The definition of ‘service’ is similarly broad. It includes any work done for the benefit of another person, the provision of any advice or information (other than that regulated by FAIS), and any banking or financial services that are not otherwise regulated under named legislation.²⁶⁵ The definition also includes transportation of people or goods, the provision of accommodation, sustenance, entertainment, electronic communication infrastructure, access to an event or facility, access to and use of rented premises, and the rights of a franchisee under a franchise agreement.²⁶⁶

The Act will thus generally apply only in instances where the defined criteria set in terms of section 5 are met. However, as is provided for under section 5(5), the provisions regulating safety monitoring and recall, and liability for damage caused by goods (product liability)²⁶⁷ will apply to the supply of any goods within South Africa to any person in a transaction (whether or not that transaction is exempt) and

²⁶¹ Section 1. The consideration is not limited to financial compensation and can include bartering or promises.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ FAIS (n213), the Long-term Insurance Act (n259) or the Short-term Insurance Act (n116). The insurance industry was in terms of Schedule 2, sub-item 10, given 18 months to align its regulatory framework with the protections of the Act.

²⁶⁶ Section 1.

²⁶⁷ Sections 60 and 61 respectively.

importers, distributors and retailers of the goods may therefore attract the concomitant liability in circumstances where the Act would otherwise not apply.

The following simple example illustrates the effect of this provision: if a government department purchases a product, the transaction would not normally be subject to the Act as the state is specifically excluded as a consumer from the benefits of the Act. However, section 5(5) read with section 61 extends the application of the Act to instances where consumer safety is impacted, regardless of the identity of that consumer. The state would, in these circumstances only, be entitled to the protections the Act offers consumers. A more detailed scenario will be proffered in Chapter Six.

Section 5 does not spell out what constitutes a ‘transaction occurring in [South Africa]’.²⁶⁸ Precisely what is meant by ‘occur’ is unclear and neither does the definitions clause provide any clarity on this requirement. This has unfortunate consequences for international trade, which desires certainty in an increasingly uncertain and volatile market place. According to the Oxford Dictionary,²⁶⁹ ‘occur’ means ‘happen; take place’. On this understanding, one or more elements of the transaction must take place within the country in order for the CPA to be applicable: the contract should be concluded here, the goods should be produced or delivered here, or even payment of the contract price should be made into a South African bank account for there to be a possibility of the Act applying. Where there is no tenable link between the transaction and South Africa, it would seem abundantly clear that the Act will not apply (in the absence of any choice of law provision appointing South African law, or in the absence of the jurisdiction of the South African courts).

It is appropriate to briefly mention that, in order to resolve exclusively CPA-related disputes, certain preliminary steps must be taken. The Act does not abolish existing common-law rights, and if only a common law right is affected (such right not being in the CPA), the consumer may proceed directly to court in the usual manner. The situation is slightly more complicated when the consumer has both common law and CPA rights: they may still rely on their common law rights and approach the court for relief in terms of the common law, but the enforcement

²⁶⁸ Section 5(1)(a).

²⁶⁹ Concise Oxford English Dictionary (12ed) 2011.

procedures set out in the Act must first be followed to prosecute their CPA rights. This requires the exhaustion of all other remedies (namely the referral of the complaint for investigation by the Consumer Commission, any industry ombud or directly to the Consumer Tribunal). Only once all the consumer's other options have been exercised may a court with jurisdiction be approached.²⁷⁰ To that end, the Act specifically requires persons who have suffered loss or damage due to prohibited or non-compliant conduct, and who have civil damages claims, to also file at that court a notice from the Consumer Tribunal detailing its findings – specifically, whether the conduct was found to be prohibited or required by the Act.²⁷¹

The court is empowered to declare that a transaction was unconscionable, unjust, unreasonable or unfair, and may order that money or property be returned to the consumer; compensation for losses or expenses relating to the agreement and the litigation; or requiring the supplier to cease or alter any practice, form or document to prevent recurrent conduct, as the case may be.²⁷²

CHAPTER 6 : WHEN AND HOW WOULD THE CONSUMER PROTECTION ACT POTENTIALLY BECOME MANDATORY IN INTERNATIONAL COMMERCIAL TRADE?

This chapter will deal with when and how the CPA might be considered mandatory through the use of three practical examples to illustrate the inter-play between the provisions of the Act and everyday commercial life: an ordinary B2C²⁷³ transaction; a franchise agreement,²⁷⁴ and a 'big business' (falling above the Ministerial threshold) in a product liability scenario under section 61. Recommendations will also be offered as to how this question should be resolved by national courts and commercial arbitration *fora*. Last, the question of the recognition and enforcement in South Africa of a foreign judgment granted without consideration of the CPA will be considered.

It may be mentioned that once it has been determined that the CPA is mandatory and must be applied to the particular transaction, a further question arises

²⁷⁰ Section 69.

²⁷¹ Section 115(2)(b).

²⁷² Section 52(3).

²⁷³ Business to Consumer.

²⁷⁴ In terms of sections 5 and 7.

as to whether it is possible to avoid some of the particular provisions within the Act itself. Certainly, various protections and rights are non-derogable. Part G of the Act²⁷⁵ for instance canvasses prohibited and unfair, unreasonable and unjust contract terms and agreements, read together with the regulations to the Act.²⁷⁶ It is, however, possible to vary some of the Act's provisions. For example, although section 55(2)(a) and (b) provide for the consumer's right to safe, quality goods, section 55(6) allows this standard to be avoided, but only if the consumer is expressly told of the goods' condition and has expressly agreed to accept the goods in that condition. Full consideration of this question is beyond the scope of this paper and will not be discussed further.

I When might the CPA apply as mandatory law?

Cross-border commercial transactions take place on a virtually continuous basis. Many of these may be linked directly or indirectly to South Africa through the residence or place of business of the parties, the place of contracting or performance or even the place of production of the goods themselves. The goods may also be put to use in South Africa, after purchase and modification outside of the country.

Chapter Three explained that mandatory rules of the proper law of the contract will apply, and in the employment context it was shown that most of the rules of South African employment law are 'mandatory, protective and of a public nature.'²⁷⁷ In addition, the mandatory rules of the forum must apply particularly where legislation is protective in nature. Lastly, enforcement of a contract that is legal in the place of performance may nonetheless offend mandatory provisions of the *lex fori* due to its public policy.²⁷⁸

The difficulty is that the Act itself does not expressly state whether it is mandatory law at all, let alone the distinction between non-derogable or overriding mandatory law. Under the NCA and ECTA, the position is clear. The NCA provides that any contractual provisions, including requiring a consumer to waive a right or agreeing to limit the supplier's liability, are void or voidable.²⁷⁹ The ECTA states that its protections 'appl[y] irrespective of the legal system applicable to the

²⁷⁵ Sections 48-52.

²⁷⁶ Specifically subregulation 44 of The Regulations in terms of the CPA (n 1).

²⁷⁷ *Parry v Astral Operations* (n109) at 59.

²⁷⁸ See Chapter Three, pages 17-21.

²⁷⁹ Section 55 NCA (n209).

agreement in question'²⁸⁰ and that '[a]ny provision in an agreement which excludes any rights provided for in this Chapter is null and void'.²⁸¹

The CPA, however, requires a deeper analysis. Section 5 clearly states that the Act applies to a transaction occurring within South Africa. Section 48 contains a general prohibition against suppliers offering, marketing and negotiating in an unfair, unjust or unreasonable manner, and requiring consumers to waive their rights or the supplier's obligations under unfair, unreasonable or unjust contract terms. A term or agreement is deemed to be unfair, unreasonable or unjust if it is excessively one-sided against the person to whom goods or services are supplied; is inequitable, or the consumer relied on a misrepresentation; the transaction itself was subject to a term or notice that was unfair, unreasonable, unjust or unconscionable; or such term was not properly brought to the attention of the consumer.²⁸²

Regulation 44 lists terms that are presumed not to be fair and reasonable. A term in a consumer agreement between a supplier operating for profit and acting mainly for business and a consumer who concluded the agreement for reasons mostly unrelated to their business will be presumed to be unfair if it, amongst others, 'provid[es] that a law other than that of the Republic applies to a consumer agreement concluded and implemented in the Republic, where the consumer was residing in the Republic at the time when the agreement was concluded.'²⁸³

Neither the section nor the regulations explicitly state whether all choices of foreign law are automatically deemed to be unfair, unjust or unreasonable, with the result that it would be arguable on a 'choice by choice' basis whether, in that particular instance, the choice of foreign law was unjust.

Regulation 44 appears to restrict parties' ability to agree to foreign law as the proper law where the consumer is a South African resident not acting for business purposes and the supplier is acting for profit and in line with their profession, and the consumer contract is concluded and implemented here. The presumption that such a clause is unfair or unreasonable would not apply if either one of the requirements was not met (for instance, it is concluded and implemented here but the South African consumer was residing in England at the time, or the supplier is a bowling

²⁸⁰ Section 47 ECTA (n210).

²⁸¹ Section 48 ECTA (n210).

²⁸² Section 48(2)(a)-(d).

²⁸³ Reg 44(3)(bb).

club not acting for profit). In such instances, the choice of foreign law must be tested to determine whether it is unfair, unjust or unreasonable in the circumstances.

The consumer could then approach the court for an order declaring the term unjust, which could also require compensation or for the supplier to cease using such a term.²⁸⁴

Section 51 deals with prohibited transactions, terms and agreements. A supplier is prohibited from insisting on terms that defeat the purposes or policy of the Act, deprive a consumer of their rights, avoid their obligations or otherwise authorise the supplier to do anything outside of the bounds, or in avoidance of, the Act.²⁸⁵ Such terms or agreements are void.²⁸⁶

Read together, these provisions prohibit parties in certain circumstances from contracting out of the protections of the Act (including its territorial scope) by selecting foreign law to apply to the agreement. Such clause would be presumed unfair or unreasonable, and the supplier would bear the onus of proving otherwise.

Transactions falling beyond the scope of section 48 read with regulation 44 may still be prohibited (under section 51), unfair or unreasonable if they purport to avoid the protections of the Act. Conversely, it could be argued that a choice of foreign law, although ostensibly attempting to contract out of the protections of the Act, and therefore void under section 51(3), is nonetheless permitted if the foreign law contains greater protections than the CPA. This would be consistent with the approach of the ECJ in *Unamar*.²⁸⁷

Instruction can be drawn from *Unamar* on how to determine whether a law is mandatory or not. It will be recalled that the decision requires national courts of member states in the EU to take account of the exact terms of the proposed mandatory law, its general structure and all the circumstances surrounding the enactment of the law to determine whether it is mandatory in light of the intention of the legislature to protect an essential interest.

What are the exact terms of the CPA?²⁸⁸ Essentially, the CPA provides for the protection of fundamental economic and social rights based on the Bill of Rights through a number of provisions aimed at balancing market inequities, particularly

²⁸⁴ Section 52(3).

²⁸⁵ Section 51(1)(a) and (b).

²⁸⁶ Section 51(3).

²⁸⁷ *Unamar* (n35).

²⁸⁸ See Chapter Five for pertinent sections.

inequalities in bargaining power which characterised the B2C experience. Linked to its terms is the general structure of the Act, which enjoys consistency and harmonious support of the rights-based approach.²⁸⁹ The structure of the Act is logical and reference is made to the Constitutional (and other) aims it seeks to address, and the international norms that were considered. The preamble is clear on the historical context in which the CPA was enacted, and the circumstances in which the Act was deemed necessary to protect vital interests.

Once it has been determined that a particular law is mandatory, and it is submitted that the CPA would indeed be considered mandatory on this analysis, one can delve into the nuances of non-derogable versus overriding mandatory provisions which have already been highlighted.²⁹⁰

Under the first meaning (of non-derogable rights that absolutely cannot be avoided), the CPA embodies vital rights in the public interest – those of weak parties which have been historically economically and socially abused. As such, its provisions cannot be contracted out of or otherwise avoided.

If the second meaning of mandatory is ascribed (under which overriding rules may displace the otherwise applicable law if there is a clear intention to do so), it might be possible for the parties to avoid the provisions of the Act should they reach clear agreement. Where there is no such agreement (and the court has to determine the closest and most real connection to the contract), the CPA would trump the otherwise applicable law.

This is tested with reference to three practical examples.

II **Three practical examples**

(a) *Ordinary B2C transactions*

Ordinary trades in South Africa between businesses and their customers (those who are not excluded) are hit squarely by the Act, including those with a cross-border element. An example is the sale of rare books by a Botswanan seller to a South African individual purchaser, with a choice of Botswanan law.

²⁸⁹ *Principal Immigration Officer v Bhula* 1931 AD 323.

²⁹⁰ See 7-10.

(i) *Jurisdiction and choice of court or consent clause*

Before a choice of law can be considered, the court seized with the matter must have jurisdiction. As was discussed above,²⁹¹ jurisdiction may be ousted by a consent clause that refers the dispute to a particular forum, in order to circumvent weaker-party protections. Such clauses may thus provide a simple and effective means of eliminating the potential application of the CPA. In South Africa, these clauses are not immutable: they may be open to challenge on the basis of, *inter alia*, public policy and the constitutionally guaranteed right of access to justice.

A consumer could therefore argue in the South African courts that public policy would be violated, and their right of access to justice unjustifiably infringed, if the supplier was allowed to rely on a consent clause (usually in the form of a clause tucked at the end of a standard form contract) to avoid the fundamental and constitutionally entrenched rights embodied in the CPA and designed for the specific purpose of protecting consumers.²⁹²

Only once the court has determined it has jurisdiction can it consider any further choices or the determination of the proper law.

(ii) *Choice of law*

The choice of Botswanan law does not singularly avoid the provisions of the CPA, especially if action is instituted in South Africa. Provided jurisdiction can be established, the mandatory provisions of South African law as the *lex fori* will apply.²⁹³ Furthermore, and irrespective of what meaning a court ascribes to the term ‘mandatory law’, it is submitted that the Act will constitute mandatory law that must be applied in favour of the consumer.

Under the first meaning (that postulating non-derogable rights that cannot be avoided), the CPA embodies vital rights in the public interest – those of weak parties. As such, its provisions cannot be contracted out of or otherwise avoided.²⁹⁴ If the second meaning of mandatory is ascribed (under which overriding rules displace the otherwise applicable law), it might be possible for the parties to avoid the provisions of the Act should they reach a clear agreement on this point. Where there is no such

²⁹¹ See 10-12.

²⁹² The discussion on the need for a consolidated approach to consumer protection (see 35-37) and the foundation rights of the CPA (see 40-42) will be useful in any such argument.

²⁹³ *Classic Sailing* (n48)

²⁹⁴ Section 51 and regulation 44.

agreement (and the court has to determine the closest and most real connection to the contract), the CPA would trump the otherwise applicable law.

The sale constitutes a transaction that is subject to the Act, and no exclusions apply to limit the extent of the protections of the CPA. This is because it concerns a transaction that occurs within South Africa²⁹⁵ – an element (delivery) took place here. The purchaser would thus be entitled to the benefits of the Act, including the right to return defective goods.²⁹⁶ If the situation was reversed, and the supplier was in South Africa, and the consumer in Botswana, the same should apply: because the transaction occurred in South Africa, it is irrelevant where the consumer was based at the time, and the sale would be subject to the Act.

The same would not apply if, for instance, the purchaser was a large book retailer with an annual turnover or asset value in excess of R2 million – the transaction would be beyond the scope of the Act.

The choice of foreign law would also be presumed to be unfair²⁹⁷ if the choice was made and implemented here. If the agreement was concluded in Botswana (for example, the seller made the offer to sell and the purchaser's acceptance reached the seller in Botswana), then the presumption would not apply.

However, should the chosen foreign law contain consumer protections that supercede those under the CPA, it is submitted that the consumer would be entitled to claim the greater protections, as was successfully achieved by the weaker party in *Unamar*. Party autonomy would thus be justifiably limited.²⁹⁸

(iii) Transaction occurring outside of South Africa and relevance of choice

On a strict reading of section 5, if a transaction did not occur within South Africa, the Act would not apply. If the transaction took place entirely outside of South Africa (both the seller and purchaser being in Botswana, and the contract concluded, performed and the goods paid for in Botswana) but the parties chose South African law to apply, as the transaction did not '[*occur*]' within the Republic',²⁹⁹ the protections under the CPA would seemingly not apply.

²⁹⁵ Section 5.

²⁹⁶ Section 20.

²⁹⁷ Reg 44(3)(bb).

²⁹⁸ Oppong (n56) at 138.

²⁹⁹ Section 5(1).

It is submitted the court should adopt a purposive approach to its interpretation and find that a consumer is entitled to the protections of the Act, notwithstanding the fact that the transaction took place outside the country.³⁰⁰ This is because the courts are enjoined to promote the spirit and purposes of the CPA, and are empowered to make innovative orders to advance the realisation of the rights and protections of the Act.³⁰¹ The Act is explicit in its purpose to protect weaker parties, improve consumers' economic interests, and ultimately improve social and economic inequalities.³⁰² This can only be achieved if a purposive approach is taken to the interpretation and application of the Act. It is submitted that this would be the correct approach, and the Act may nevertheless apply.

Furthermore, if any provision of the CPA is capable of different reasonable meanings within their context, the Act requires the court to adopt the meaning that 'best promotes the spirit and purposes of th[e] Act, and will best improve the realisation and improvement of consumer rights generally', specifically those of the elderly, minors, people in rural areas and otherwise vulnerable or disadvantaged consumers.³⁰³ This argument could be made in favour of both non-derogable and overriding mandatory law.

The definition of 'court' is not limited to South African courts; only consumer courts are specifically excluded from that definition. Therefore, regardless of whether a South African or foreign court was approached, the same purposive interpretation should be adopted and the version that is most advantageous and beneficial to the consumer should be favoured, in the event that the Act does apply as mandatory law under the conflict rules of the forum.

Similar circumstances involving the EU are not difficult to imagine: for instance, a German property developer sells the contents of a South African holiday home to an Irish purchaser. The Irish purchaser can elect to sue the seller in Irish courts³⁰⁴, and Rome I applies to determine the proper law which would either be chosen or assigned as the law where the consumer is habitually resident. A choice of law would not oust the mandatory protections of the CPA, which is applicable due to

³⁰⁰ I Laher 'The Consumer Protection Act and cross-border transactions' Polity.org website. If the Act does not apply in these circumstances, the common law would apply which would not necessarily be unfair.

³⁰¹ Section 4(2)(b)(i) and (ii).

³⁰² Preamble.

³⁰³ The full group is set out in section 3(1)(b).

³⁰⁴ Rome I (n27) articles 15,16 and 17.

the fact that delivery takes place in South Africa.³⁰⁵ Because at least three countries are connected to the transaction, article 3 of Rome I would not apply whether a law is chosen or assigned (the CPA would thus not be seen as absolutely unavoidable). Article 9(1) would apply, in terms of which it could be argued that the CPA contains overriding provisions that cannot be contracted around because of their importance in safeguarding the socio-economic rights of consumers in South African transactions.

(iv) No choice of law

If the book sale agreement was silent on choice of law, the governing law would have to be determined by the conflict of law rules of the court with jurisdiction to hear the matter. This could feasibly be a South African or, more likely, a Botswanan court in the current example. The courts of either of these countries would adopt a similar approach (earlier it was highlighted that Botswanan law is aligned with South African law in this arena³⁰⁶) and will seek to establish the law the parties ought to have chosen,³⁰⁷ or the country with the most real connection to the contract.³⁰⁸ At commercial arbitration under the ICC for one, the arbitrator would be tasked with determining the law which was most appropriate,³⁰⁹ alternatively that with the most real connection.

Should the enquiry determine that South African law governs the agreement, the Act will certainly apply. Even if the transaction did not occur within South Africa, the Act may nevertheless continue to apply on a purposive interpretation of the legislation.

If it transpires that Botswana (or another foreign country) has the closest and most real connection to the contract, and the transaction takes place entirely outside of South Africa, the answer is clear: the CPA is not applicable. However, if an element of the transaction occurs in South Africa (for instance if the contract was concluded here and all other elements were to take place in Botswana), the Act will, as would be the case when a foreign law is chosen by the parties, constitute mandatory non-derogable law that must be applied in favour of the consumer. Even on a looser interpretation of ‘mandatory’ that considers certain provisions capable of

³⁰⁵ The transaction thus ‘occurs’ here - section 5(1).

³⁰⁶ Chapter 3, part III.

³⁰⁷ *Efroiken* (n83).

³⁰⁸ *Bonython* (n91), *Improvair* (n92).

³⁰⁹ Article 21, ICC rules (n191).

overriding the governing law if they are of social, economic or political importance to the authoring legislature, if there is no agreement on choice of law, the CPA will override the otherwise applicable law.

(v) *Summary*

Table A provides a broad summary of the above discussion. It takes account of the variables of choice of law, an absence of choice, whether or not the transaction takes place in South Africa and whether South Africa is the *lex fori*.

	Transaction occurring in South Africa and/or the <i>lex fori</i> is South Africa	Transaction occurring outside South Africa
Choice of law: South African	The CPA will apply (the question of whether it is a mandatory law does not arise).	The CPA will apply by virtue of the parties' choice on a purposive interpretation of the Act. However, on a literal, restrictive interpretation of the definitions clause (however unlikely), the Act would not apply but South African common law would apply.
Choice of law: Foreign	The CPA will apply, as it is non-derogable mandatory law which cannot be avoided by the parties no matter how clear their intention. If the CPA is interpreted as overriding legislation, the parties' intention must be unequivocal and clear in order to oust the application of the Act. Tacit or implied intention, it is submitted, would not suffice. In addition, in a classic consumer sale, attempts to contract out of the Act by appointing foreign law are presumed unfair, and may also be prohibited and therefore void. ³¹⁰	The CPA would not apply and foreign law would apply.

³¹⁰ Sections 48 and 51, regulation 44.

No choice and applicable law determined to be South African	The CPA will apply by virtue of the applicable law (the question of whether it is a mandatory law does not arise).	The CPA may apply on a purposive approach to protect the consumer (whether they are South African or not). However, on a literal, restrictive interpretation of the Act, the transaction would fall outside the scope of the Act.
No choice and applicable law determined to be foreign	The CPA will apply, as it is non-derogable mandatory law which cannot be avoided by the parties no matter how clear their intention. Even if the CPA was considered only an overriding mandatory law (which the parties could avoid provided their intention is clearly enough expressed), the unequivocal intention to oust the provisions of the Act is not present.	The CPA would not apply. In the absence of any link to South Africa, it cannot be considered as mandatory in either sense.

Table A: Summary of whether and when the CPA would apply as mandatory law³¹¹

(b) Franchise agreements

Read with the definition of ‘consumer’, which includes a franchisee in a franchise agreement,³¹² the South African franchise industry is governed by section 7 and regulation 2.³¹³

A franchise agreement is concluded between a franchisor and franchisee under which the franchisee pays the franchisor, who grants to the franchisee the right to carry on business under the franchisor’s system or marketing plan within the whole or a specific part of South Africa. The operation of the franchisee’s business will be closely associated with the branding and advertising owned or licensed by the

³¹¹ It is submitted that the same principles would apply at commercial arbitration, subject to the reality that arbitral *fora* differ from courts in civil litigation. Arbitrators are not limited by a court’s national rules and have greater freedom to determine which law has the closest connection to the contract. However, the arbitrability of the dispute may be impacted by the protective nature of the legislation - B Audit ‘How Do Mandatory Rules of Law Function in International Civil Litigation?’ in *Mandatory Rules in International Arbitration* 53 at 54. Further discussion is beyond the scope of this analysis.

³¹² Section 5(6)(b)-(e).

³¹³ Although the bulk of the Act applies to franchise agreements concluded after the effective date, franchise agreements concluded prior to 1 April 2011 are subject to a limited application of the Act - Schedule 2(3)(2).

franchisor. The agreement itself regulates the business relationship between the franchisor and franchisee, including the goods or services to be supplied to the franchisee.³¹⁴

Franchisees (even if juristic persons) operating beyond the R2 million threshold³¹⁵ are not excluded from the protections of the Act as consumers: franchisees are understood to be in a weaker bargaining position than franchisors³¹⁶ and are thus deserving of protection regardless of their annual turnover or asset value.

The CPA contains explicit requirements on a minimum, baseline level of standards that franchise agreements (as defined) must meet. Certain disclosures must be made in plain language, upfront in a written agreement which must contain prescribed information.³¹⁷ A failure to follow the regulatory prescriptions will render the offending provision(s) void.³¹⁸

The Act and regulations also require every franchise agreement to contain clauses aimed at preventing unreasonable fees or consideration being paid, and unreasonable conduct between parties relating to the risks and legitimate business interests of the franchisor, franchisee and the franchise system as a whole.³¹⁹

Franchise agreements in terms of which franchise operations will take place within South Africa will therefore be subject to the CPA. The Act is not intended to apply to franchise businesses operating outside of South Africa, even if the franchisee is South African. The definition of ‘franchise agreement’ explicitly grounds the provisions of the Act ‘within all or a specific part of the Republic’.³²⁰ This clear geographical stamp is absent in the provisions dealing with the general application of the Act. A franchise operation carrying on business beyond the South African borders would therefore not be subject to the provisions, and nor would the franchisee enjoy the protections, of the CPA.

³¹⁴ Section 1.

³¹⁵ Section 6.

³¹⁶ N Mellville ‘The Consumer Protection Act Made Easy’ (2010) 1 at 111.

³¹⁷ See regulation 2(3) for a comprehensive list on the information a franchise agreement must contain at a minimum.

³¹⁸ Regulation 2(2)(e).

³¹⁹ Regulation 2(2)(b).

³²⁰ Section 1.

If South African law was the applicable law, once again the CPA would not apply (for the same reasons), and the dispute would fall to be dealt with under the common law.

However, if an international hamburger franchisor intended to establish or develop its South African footprint through the use of the franchise model, the agreement must comply with the provisions of the Act and its regulations, which include the termination of such agreements by the parties. The effect of the prohibition on terms that are excessively one-sided, or inequitable to the consumer mean that franchisors can no longer simply create a convenient ‘escape hatch’ based on trivial reasons to cancel a franchise agreement.³²¹

Much like the choice of a foreign law cannot oust the provisions of the CPA in a B2C sale, neither will such a choice limit the application of the Act in franchise deals. If a foreign law is chosen or determined, the Act should be interpreted as being non-derogable mandatory law which cannot be avoided, regardless of the parties’ intention to contract out of this.³²² In the event that the Act is interpreted to be merely overriding mandatory law, it is possible that it could be avoided by a clear expression of this intention. However, as has already been argued, a literal interpretation of the Act would be counter to the unambiguous aims and intentions of the legislature.³²³

(c) *Product liability*

Section 61 of the CPA governs product liability cases causing death, injury, illness or loss or physical damage to property – these are no longer governed by the common law. The provisions apply to producers, importers, distributors or retailers (as defined) of goods³²⁴ irrespective of whether the Act applies generally and regardless of the R2 million threshold, and other exempt categories, for consumers. They will be liable for any harm suffered by a consumer due to the supply of unsafe goods; product failure defect or a hazard in the goods; or inadequate instructions or warnings being provided with the goods. Such liability will accrue ‘irrespective of whether the harm resulted from any negligence on the part of the producer, importer,

³²¹ Section 40(1), section 48(2).

³²² Section 51 and regulation 44.

³²³ As has been canvassed above, the franchisee could argue as a preliminary point that a consent clause ostensibly ousting the jurisdiction of the South African courts should be rejected to the extent that it is *contra bonos mores* or unconstitutional.

³²⁴ ‘Services’ are notably absent from the section and the provisions will therefore not apply to liability for damage caused by services.

distributor or retailer, as the case may be'.³²⁵ The Act has therefore been said to impose a 'strict liability framework' on producers, importers, distributors and retailers, a defining characteristic when one considers that the common law requires fault (in the form of negligent or intentional conduct) as a pre-requisite for delictual liability.

The case of *Wagener v Pharmacare*³²⁶ highlighted the near impossible task claimants faced in proving fault in product liability cases under the common law. Nevertheless, the Supreme Court of Appeal declined to develop the common law to impose strict liability on a manufacturer of anaesthetic drugs, deciding to leave the necessary investigations and analysis for this development to the legislature. The enactment of section 61 is the result of that invitation.

The provisions of section 61 only apply to death, injury, illness or loss or physical damage to property and related economic losses. Recourse to the common law remains the only avenue for cases involving pure economic loss.

Certain defences may be raised. Defendants could avoid liability if the hazard, failure or defect is due to compliance with public regulation; the hazard, failure or defect did not exist at the time it was supplied to that defendant or arose wholly due to their compliance with instructions; it is unreasonable for that defendant to have discovered the hazard, failure or defect given their role in the supply chain; or more than three years have passed since the death or injury of a natural person, or the discovery of the material facts of an illness, loss or damage or related economic loss.³²⁷

Liability is joint and several, and claimants are free to act against any participant in the supply chain; there is no requirement to pursue the producer first, for instance.³²⁸ Rather, the onus will be on the liable defendant(s) to recover their respective loss up the supply chain, and subject to any limitations of liability that might have been agreed upon between suppliers.³²⁹

As Loubser and Reid explain, the Act '... furthers the important objective of facilitating access to justice for all consumers; consumers who find it difficult to

³²⁵ Section 61(1).

³²⁶ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* [2003] 2 All SA 167 (SA).

³²⁷ Section 61(4)(a)-(d).

³²⁸ Section 61(3).

³²⁹ M Loubser and E Reid *Product Liability in South Africa* (2012) 1 at 120-121.

bring a claim against the producer are... offered a readily accessible choice of defendants to pursue'.³³⁰

A 'producer' includes any person who grows, mines, generates, creates, manufactures or otherwise produces goods within South Africa, or who applies a mark on the goods, with the intention of supplying the goods within the ordinary course of business.³³¹ An 'importer' is any person who brings goods into South Africa with the intention of supplying the goods in the ordinary course of business. This definition allows a South African consumer to pursue the importer under section 61 when they cannot easily identify a foreign producer, subject to the statute's defences. The importer would then have to explore recovering that loss up the supply chain; it would not be the responsibility of the consumer to establish which party was at fault and when.

A 'distributor' is any person who, in the ordinary course of business, is supplied with any goods by a producer, importer or other distributor and on-supplies the goods to another distributor or a retailer. A 'retailer' is a person who supplies the goods to the consumer in the ordinary course of business. As has been discussed,³³² the definition of 'supply' is extremely wide and there is no requirement that the supplier must reside or have its principal place of business in South Africa. It is therefore possible, subject to the rules on jurisdiction, that a foreign supplier could be sued and held liable under section 61.

If, for instance, a South African textile company purchased an industrial sewing machine directly from a Dutch manufacturer, which was defective, causing a fire and significant damage, at first glance the Act would not apply. This is because the manufacturer does not fit the definition of 'producer' – it did not manufacture or produce the goods within South Africa. However, it would be considered a retailer and therefore subject to the Act as it supplied the goods to the textile company within the ordinary course of its business. If the supply agreement had contained a choice of law clause selecting a foreign law to apply, the provisions of the CPA would apply as non-derogable, mandatory law and potentially in terms of section 51 if the choice was to avoid the application of the Act. Any limitations of liability permitted under

³³⁰ Ibid at 120.

³³¹ Section 1.

³³² 43-45 above.

that foreign law would not survive the provisions of the Act and the retailer would be held liable, subject to any statutory defences which may be raised.

The situation would be different if the Dutch manufacturer had sold the machine to an importer which on-supplied it to the textile company. In that case, the textile company would previously (under the common law and prior to the Act) have had a contractual claim against the importer only (which would likely have been limited in their agreement) and not the manufacturer. It would have had a delictual claim against the importer and manufacturer (subject to jurisdiction rules), but it would have had to prove the elements of conduct, fault, wrongfulness, causation and loss in order to succeed. Now, it can simply proceed against the importer in terms of section 61 despite any attempts to contractually limit liability and need not prove fault. The importer would then seek to recover its losses up the supply chain but, unlike the claim of the end-user (here, the textile company), the recovery would be subject to contractual limitations of liability and indemnities.

To reiterate an earlier point, selecting foreign law as the proper law cannot assist foreign producers, suppliers or importers in avoiding the Act. Clauses that purport to do so are treated as prohibited, and therefore void.

III Recognition and enforcement in South Africa of a foreign judgment or arbitral award without consideration of the CPA

In addition to its application to a dispute before a court or arbitral tribunal, the CPA could be taken into account when recognition and enforcement of a court judgment or arbitral award is sought. Generally, countries will recognise others' judgments, but certain restrictions apply. The New York Convention regulates the recognition of the vast majority of arbitral awards made across the world today, signatories' courts will generally recognise and enforce foreign arbitral awards subject to seven grounds of refusal.³³³

South African common law applies to the recognition and enforcement of all foreign judgments aside from those issued in Namibia.³³⁴ Under the common law, a foreign judgment is not directly enforceable in South Africa, but forms an independent cause of action. As such, it will be enforced by our courts provided the

³³³ Article 5, UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

³³⁴ The Enforcement of Foreign Civil Judgments Act, 32 of 1988 applies to designated countries. Namibia is the only country designated at present.

issuing court had jurisdiction to adjudicate the dispute; the judgment is final and has not become superannuated; the judgment was not obtained fraudulently; the judgment does not involve enforcement of penal or revenue laws of a foreign state; that enforcement is not contrary to the Protection of Businesses Act;³³⁵ and that the recognition and enforcement would not be contrary to public policy.³³⁶

Similar grounds for refusal are evident in the New York Convention. According to article 5, the onus is on the defendant/award debtor to establish that the arbitration agreement was invalid or the parties were incapacitated; they did not receive proper notice of the proceedings; the tribunal exceeded its powers; the composition of the tribunal was not in accordance with the parties' agreement; or the award is not final or binding. The court may, *mero motu*, refuse to recognise the award if the subject matter of the arbitration was not arbitrable according to the law of the place of enforcement; or if to do so would be contrary to public policy.

Public policy is a ground common to the refusal to recognise judgments and arbitral awards. Equally common is that neither procedure examines the merits of the decision itself. The balance between public policy and avoiding the merits of the award is not easily struck and courts must be cautious not to intrude into the sovereign territory of a foreign judiciary under the guise of the public policy ground for refusal.³³⁷

The CPA is silent on the consequences of a judgment or arbitral award granted after application of consumer standards that are lower than those the consumer would have been entitled to under South African consumer legislation. The recognition and enforcement of such a judgment or award may be contrary to South African public policy; this is a question that has not been considered by our courts.

If a foreign court has failed to take into account the provisions of the CPA in circumstances when these should have applied as mandatory (whether non-derogable or overriding), the court may not recognise the judgment (or award) and it may therefore not be enforceable on grounds of public policy or possibly a contravention of the Protection of Businesses Act.³³⁸ Forsyth points out, however, that a judgment will not be refused recognition on the basis that it is inconsistent with South African

³³⁵ Act 99 of 1978.

³³⁶ *Jones v Krok* [1995] 2 All SA (A); reiterated in *Purser v Sales* 2001 (3) SA 445 (SCA); confirmed in *Government of the Republic of Zimbabwe v Fick and others* 2013 (1) BCLR 1103 (CC).

³³⁷ This difficult balance is illustrated in *Society of Lloyd's v Ilse* [2006] JOL 16874 (C).

³³⁸ 99 of 1978.

law. The standard is much higher and ‘[r]ather, it must violate a fundamental policy of the law’.³³⁹

It is submitted that a foreign decision that fails to take account of the welfare of the consumer in a transaction subject to the Act would be *contra bonos mores*, and a South African court would not apply it, unless greater protections were applied in the consumer’s favour.

CHAPTER 7 : CONCLUSION

The CPA was introduced to effect substantive change in consumers’ lives. This paper has concluded that its protections should generally apply whether the transaction is entirely local or there is a cross-border, international element.

A background on the relevance of conflict of laws and the question of mandatory provisions was provided in Chapter Two. Building on this foundation, the global debate in which this area of law finds itself was contextualised in Chapter Three, whilst Chapter Four summarised the need for an enhanced consumer protection regime in South Africa in particular. Comparative experience was drawn upon to explain the reach of such provisions in different jurisdictions.

The provisions of the Act itself regulate many instances of its application in international transactions where a choice of law has been made, whilst in other situations, the nature and purposes of the Act demand that it is respected and applied as non-derogable mandatory law. In yet other circumstances, the CPA should be treated as overriding mandatory law.

The particular extent of the application of the Act can then be determined with reference to the Act itself – for instance, an exemption or threshold may apply. These, and other, questions were unpacked in Chapters Five and Six.

It is clear that, no matter how clearly parties might express their intention for a foreign law to apply to their transaction and any disputes that may arise from it, their autonomy to do so may be limited by the CPA. The purposes and aims of the Act are tailored towards the essential upliftment of fundamental social and economic rights of consumers in the South African market, such that the provisions of the Act simply

³³⁹ Forsyth (n16) at 464.

cannot be avoided. The only exception to this position that can be foreseen is if the chosen foreign law allows the consumer greater protection.

The consequences of a foreign court or arbitral forum ignoring or overlooking mandatory law have also been discussed: the judgment or award will not be recognised by our courts (and therefore is rendered unenforceable against the judgment debtor in South Africa) for being *contra bonos mores*.

Private international law in Africa is very much still in a developmental phase, and increasing pressure will be put on it to address *res nova* questions.³⁴⁰ This paper aspires to positively contribute to the expanding discourse and analysis.

³⁴⁰ Oppong (n56) lviii at plix.

BIBLIOGRAPHY**Primary sources****Legislation*****South Africa***

Constitution of the Republic of South Africa Act 108 of 1996.

Constitution Seventeenth Amendment Act 2012.

Consumer Protection Act 68 of 2008.

Regulations in terms of the Consumer Protection Act 68 of 2008.

Consumer Protection Bill (B19D-2008).

Government Gazette Notice 917 of 201, No. 33581 dated 23 September 2010.

Government Gazette no. 34181, 1 April 2011.

Supreme Court Act 59 of 1959.

Alienation of Land Act 68 of 1981.

Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

Enforcement of Foreign Civil Judgments Act 32 of 1998.

Protection of Businesses Act 99 of 1978.

National Credit Act 34 of 2005.

Electronic and Communications and Transactions Act 25 of 2002.

Competition Act 89 of 1998.

Companies Act 61 of 1973.

Companies Act 71 of 2008.

Financial Advisory and Intermediary Services Act 37 of 2002.

Standards Act 29 of 1993.

Standards Act 8 of 2008.

Rental Housing Act 50 of 1999.

Prescription Act 68 of 1969.

Labour Relations Act 66 of 1995.

Long-term Insurance Act 52 of 1998.

Short-term Insurance Act 53 of 1998.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Lotteries Act 57 of 1997.

Foreign

Botswana Consumer Protection Act, 1998.

EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I).

EC Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I).

EC Directive 93/13/EEC on Unfair Terms in Consumer Contracts.

EC Directive 85/577/EEC on Contracts Negotiated Away From Business Premises.

EC Directive 90/314/EEC on Package Travel, Package Holidays and Package Tours.

EC Directive 92/59/EEC on General Product Safety.

Indian Consumer Protection Act, 1986.

Ontario Consumer Protection Act, 2002.

United Nations Convention on Contracts for the International Sale of Goods 1980.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Case Law

South Africa

Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd 1977 (3) SA 1020 (T).

Cargo Motor Corporation v Tofalos Transport 1992 (1) WLD 186.

Commissioner of Inland Revenue v Estate Greenacre 1936 NPD 225.

De Jager & Others v Absa Bank Bpk 2001 (3) SA 537 (SCA).

Ex parte Spinazza and Another NNO 1985 (3) SA 651 (A).

Government of the Republic of Zimbabwe v Fick and others 2013 (1) BCLR 1103 (CC).

Henry v Branfield 1996 (1) SA 244 (D).

Herbst v Surti 1991 (2) SA 75 (ZH).

Improvair (Cape) (Pty) Ltd v Etablissements Neu 1983 (2) SA 138 (C).

Jamieson v Sabingo 2002 (4) SA 49 (SCA).

Jones v Krok [1995] 2 All SA (A).

Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1986 (3) SA 509 (D).

Maritime & Industrial Services Ltd v Marcierta Compania Naviera SA 1969 (3) SA 28 (D).

Principal Immigration Officer v Bhula 1931 AD 323.

Purser v Sales 2001 (3) SA 445 (SCA).

Representatives of Lloyds & Others v Classic Sailing Adventures (Pty) Ltd 2010 (5) SA 90 (SCA).

SA Co-Op Citrus Exchange Ltd v Director General Trade and Industry & Another 1997 (3) SA 236 (SCA).

Society of Lloyd's v Ilse and others [2006] JOL 16874 (C).

SS Humber v SS Answald 1912 AD 546.

Standard Bank of South Africa Ltd v Efroiken & Newman 1924 AD 171.

Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (AD).

Tsung v Industrial Development Corp of SA Ltd 2006 (4) SA 177 (SCA).

Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation) 1987 (4) SA 883 (A).

Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd [2003] 2 All SA 167 (SA).

Foreign

Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A).

Bonython v Commonwealth of Australia [1951] AC 201.

Castle Mail Packets Co v Mitheram & Toteram (1892) 13 NLR 199.

Dairy Board v John T Rennie & Co (Pty) Ltd 1976 (3) SA 768 (W).

In Re Erskine (1895) 12 SC 27.

Ingmar GB Ltd v. Eaton Leonard Technologies Inc., Case C-381/98, 2000 E.C.R. I-9305.

Irish Shipping Ltd v Commercial Union Assurance Co. plc [1991] 2 QB 206.

Kalher v Midland Bank Ltd. 1950 AC 24.

Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc. 473 US 614 (1985).

Njikelana v Njikelana 1980 (2) SA 808 (SEC).

Pretorious v Sweiger [1979] BLR 124.

Ralli Brothers v Compañia Naviera Sota y Aznar [1920] 2 KB 287 (CA) at 304.

Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd [1996] BLR 190.

Stretton v Union Steamship Co (Ltd) (1881) EDC 315.

United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, Case C-184/12, 2013 E.C.R. .

Secondary sources

Books

Bermann, G and Mistelis, L *Mandatory Rules in International Arbitration* (2011) JurisNet, LLC, New York.

Bogdan, M *Concise Introduction to EU private international law* 2ed (2012) Europa Law, Groningen.

Carbonneau, TE *The Law and Practice of Arbitration* 4ed (2012) Juris, New York.

Concise Oxford English Dictionary 12ed (2011) Oxford University Press, Oxford.

De Stadler, E *Consumer Law Unlocked* (2013) SiberInk, Cape Town.

Dicey, A, Morris, J and Collins, L *Conflict of Laws* 14ed (2008) Sweet & Maxwell, London.

Ferrari, F and Kroll, S (eds.) *Conflict of Laws in International Arbitration* (2011) Sellier European Law Publishers, Munich.

Forsyth, CF *Private International Law* 5ed (2012) Juta, Cape Town.

Harms, L *Civil Procedure in the Superior Courts* 3ed (2003), LexisNexus Butterworths, Durban.

Kiggundu, J *Private International Law in Botswana* (2002) Bay Publishers, Gaborone.

Kuipers, J-J *EU law and private international law: the interrelationship in contractual obligations* (2012) Martinus Nijhoff, Leiden.

Loubser, M and Reid, E *Product Liability in South Africa* (2012) Juta, Claremont.

Mellville, NJ *The Consumer Protection Act Made Easy* (2011) Book of Life, Pretoria.

Opperman, I and Lake, R *Understanding the Consumer Protection Act* (2012) Juta, Cape Town.

Oppong, F *Private International Law in Commonwealth Africa* (2013) Cambridge University Press, Cambridge.

Spiro, E *The General Principles of the Conflict of Laws* (1982) Juta & Co, Wynberg.

Stone, P *EU Private International Law* (2010) Edward Elgar, Cheltenham.

Van Eeden, E *Consumer Protection Law in South Africa* (2012) LexisNexus Butterworths, Durban.

Journals

Basedow, J 'The State's Private Law and the Economy' (56) 2008 *American Journal of Comparative Law* 703.

De Villiers, MRH 'Limitations on party autonomy in the context of cross-border consumer contracts: The South Africa Position' (2013) *TSAR* 478.

Eski, N 'The law applicable to consumer contracts under the EU Rome Convention' (2005) *TSAR* 299.

Forsyth, C 'Enforcement of arbitral awards, choice of law in contract, characterization and a new attitude to private international law' (1987) 104 *SALJ* 4.

Forsyth, C 'The provenance and future of private international law in Southern Africa' (2002) *TSAR* 60.

Fredericks, E and Neels, J 'The Proper Law of a Documentary Letter of Credit' (2003) 15 *SA Merc LJ* 295.

Neels, J 'Falconbridge in Africa' (2008) 4 *Journal of Private Int. Law* 167.

Rödl, F 'Private law beyond the democratic order? On the legitimacy problem of private law "beyond the State"' (56) 2008 *American Journal of Comparative Law* 743.

Roodt, C 'The integration of substantive law interests and material justice in South African choice of law' (2003) 36 *Comp & Int'l Law Journal of South Africa* 1.

Schulze, H 'Private international law and jurisdictional problems relating to offshore joint venture agreements' (1995) 28 *CILSA* 383.

Schulze, W 'Private international law and jurisdictional problems relating to offshore joint venture agreements' (1995) *CILSA* 28 383.

Snyder, DV 'Contract Regulation with and without the State: ruminations on rules and their sources. A comment on Basedow' (56) 2008 *American Journal of Comparative Law* 723.

Spiro, E 'Autonomy of the parties to a contract and the conflict of laws: illegality' (1984) 17 *CILSA* 197.

Spiro, E 'Jurisdiction by consent' (1967) 84 *SALJ* 295.

Van Niekerk, JP 'Aspects of Proper Law, Curial Law and International Commercial Arbitration' (1990) 2 *SA Merc LJ* 117.

Van Niekerk, JP 'Choice of foreign law in a South African marine insurance policy: an unjustified limitation of party autonomy?' (2011) *TSAR* 159.

Other

Opinion of Advocate General Wahl in Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* [2013] ECR available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=137402&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=37644>, accessed 22 November 2013.

Southern African Development Community website available at <http://www.sadc.int/> accessed 4 December 2013.

Southern African Customs Union website available at <http://www.sacu.int/>, accessed 4 December 2013.

Laher, I 'The Consumer Protection Act and cross-border transactions' available at Polity.org website <http://www.polity.org.za/article/the-consumer-protection-act-and-cross-border-transactions-2010-11-09>, accessed 21 February 2014.

ICC Rules on Arbitration, 2012.

International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, Rome, 2010.

Mauritius Law Reform Commission *Report on Review of Aspects of Consumer Protection Laws and Proposals for Reform* (2010).

World Trade Organisation *Trade Profiles 2013* available at http://www.wto.org/english/res_e/booksp_e/trade_profiles13_e.pdf, accessed 12 March 2014.