CONSUMER PROTECTION LEGISLATION AND PRIVATE INTERNATIONAL LAW*

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SUMMARY

Although South African private international law is primarily based on bilateral and multilateral reference rules, the legislator in recent consumer protection legislation rather employs unilateral conflict rules by the identification of rules of immediate application and in the form of scope rules. The relevant provisions in the Electronic Communications and Transactions Act 25 of 2002, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 are discussed, together with the role that the traditional conflict rules still play. A new rule of private international law for consumer contracts is proposed; in this regard the principle of preferential treatment will play a role in the context of alternative reference rules.

1 INTRODUCTION

During the past decade South Africa's parliament adopted three far-reaching pieces of consumer protection legislation. This article investigates, against the background of South African private international law, when the South African courts will apply these laws to consumer transactions with international links. The Electronic Communications and Transactions Act,[1] the National Credit Act[2] and the Consumer Protection Act[3] will be discussed in this regard.

South African private international law is, in general, based on a system of bilateral and multilateral conflict rules, but it also contains some examples of (statutory) unilateral reference rules. A bilateral conflicts rule connects a factual scenario to a governing legal system by way of a prescribed indicator (connecting factor). Multilateral conflict rules connect a factual scenario via a

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1 25 of 2002 (hereinafter "ECTA").

2 34 of 2005 (hereinafter "NCA").

3 68 of 2008 (hereinafter "CPA"). The Zulu title of the act reads: *Umthetho Wokuvikelwa Kwabathengi*.

variety of connecting factors to a governing legal system. On the other hand, unilateral conflict rules indicate when a specific piece of legislation will be applicable in the international sphere.[4]

The legislature has opted for the inclusion of (only) unilateral reference rules in the consumer protection legislation. In ECTA this takes the form of a rule of immediate or direct application (mandatory rule),[5] whilst in the NCA and the CPA so-called scope rules[6] are employed to indicate the sphere of applicability.

2 ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT

Chapter 7 of the Electronic Communications and Transactions Act[7] contains certain consumer protection measures.[8] Section 47 of the act determines that the protection provided to consumers in Chapter 7 applies irrespective of the legal system applicable to the agreement in question (the heading of section 47 is "applicability of foreign law"). Section 48 determines that any provision in an agreement which excludes any rights provided for in chapter 7 is null and void (under the heading "non-exclusion").

Section 47 does not interfere with the traditional methods of determining the legal system governing a contract ("the proper law of the contract"), including an express or a tacit choice of law. It is simply determined that the consumer protection measures in Chapter 7 will apply in all cases heard by a South African court. The contract in question will therefore be governed by both the proper law and the *lex fori* (the law of the court). Of course, if South African law is the proper law of the contract, the whole of ECTA will be applicable.[9]

What will the position be if the proper law has higher standards of consumer protection than the *lex fori* in the context of a particular case? It is submitted that the consumer protection measures of the proper law will then

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4 *Cf* Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2003) 6-9 on multilateral and unilateral conflict rules.

5 *Cf* Collins *Dicey, Morris and Collins on the Conflict of Laws* Vol 1 (2006) 24-29 on overriding statutes; Forsyth 13-15 on directly applicable statutes; and Strikwerda *Inleiding tot het Nederlandse Internationaal Privaatrecht* (2008) 63-69 on "voorrangsregels".

6 *Cf* Collins 23-24 on self-limiting statutes; Forsyth 12-13 on self-limiting statutes and 13-15 on directly applicable statutes; and Strikwerda 63-69 on "voorrangsregels" and scope rules.

7 25 of 2002. See, in general, Van der Merwe, Roos, Pistorius and Eiselen *Information and Communications Technology Law* (2008); Buys (ed) *Cyberlaw @ SA. The Law of the Internet in South Africa* (2004); and De Villers *Consumer Protection under the Electronic Communications and Transactions Act 25 of 2002* (LLM dissertation (2004) University of Johannesburg).

8 For the purposes of the act, "consumer" means any natural person who enters or intends entering into an electronic transaction with a supplier as the end-user of the goods or services offered by that supplier (s 1). See the exclusion of certain electronic transactions in s 42(2).

9 But see the text in fn 13*ff*: some aspects of contractual liability in ECTA may be governed by other legal systems (as well).

apply.[10] This flows from the principle of preferential treatment in private international law, which provides extra protection for the socio-economically weaker party in the context of alternative reference rules.[11] Section 44(4) also points in this direction. Section 44 provides for a cooling-off period of seven days after the date of receipt of the goods (or date of conclusion of the agreement, in the case of services). Section 44(4) determines that section 44 must not be construed as prejudicing the rights of a consumer provided for "in any other law". This law could be a domestic statute (today, for instance, the CPA) but may also include a foreign legal system. Of course, if the consumer protection measures of the proper law are, in the particular context, of a lesser standard than those of the *lex fori*, the provisions of chapter 7 of the act will apply.

The provision in section 4(1) that the act applies in respect of any electronic transaction or data message is not sufficient to transform the whole act into a statute of direct application.[12] Section 47 makes it clear that a legal system other than South African law may be applicable to aspects of the contract apart from the consumer protection measures in Chapter 7.

ECTA includes provisions on evidence, connecting factors, formalities and inherent validity.[13] Of course, these provisions are not limited to consumer protection issues, as the act has a much wider scope. The law of evidence is governed by the *lex fori*[14] and, for instance, section 15, on the admissibility and evidential weight of data messages, will therefore be applicable in all cases heard by a South African court.

The content of connecting factors is also governed by the *lex fori*.[15] The South African courts will therefore in all cases apply the provisions of sections 22(2) and 23 in the context of contracts concluded by electronic means.[16] For instance, to determine the *locus contractus* (the place where the contract was concluded), section 22(2) provides that an agreement by means of data messages[17] is concluded where acceptance of the offer is received by the offeror. According to section 23(c), the acceptance must be

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10 *Cf* Collins 1649 and 1652 in the context of the Unfair Contract Terms Act, 1977 (UK); and the Consumer Credit Act, 1974 (UK).

11 See Neels "Substantiewe Geregtigheid, Herverdeling en Begunstiging in die Internasionale Familiereg" 2001 *TSAR* 692 704-708; Schröder *Das Günstigkeitsprinzip im internationalen Privatrecht* (1996); Strikwerda 38-39; and Symeonides "Private International Law at the End of the 20th Century: Progress or Regress?" in Symeonides (ed) *Private International Law at the End of the 20th Century: Progress or Regress?* (2000) 3, 28-29, 38 and 48-60.

12 *Cf* Collins 24-29 on overriding statutes; Forsyth 13-15 on directly applicable statutes; and Strikwerda 63-69 on "voorrangsregels".

13 In respect of the next four paragraphs, *cf* Collins 1652-1653 on a similar use of *dépeçage* in the context of the Consumer Credit Act, 1974 (UK).

14 See Forsyth 22; and Malan, Neels, O'Brien and Boshoff "Transnational Litigation in South African Law" (Part 2) 1995 *TSAR* 282 292.

15 *Ex parte Jones: In re Jones v Jones* 1984 4 SA 725 (W); and *Chinatex Oriental Trading Co v Erskine* 1998 4 SA 1087 (C) 1093H.

16 Except when the parties reached another agreement on the issues provided for in *eg* ss 22(2) and 23: see s 21.

17 For the purposes of the act, "data message" means "data generated, sent, received or stored by electronic means and includes (a) voice, where the voice is used in an automated transaction; and (b) a stored record" (s 1).

regarded as having been received at the offeror's (the addressee's) usual place of business or residence.

Traditionally formalities were governed by the *lex loci contractus* (the law of the country where the contract was concluded) or, in the case of contracts in respect of immovables, the *lex situs* (the law of the country where the immovable property is situated).[18] In *Ex Parte Spinazze*[19] it was decided that formalities in respect of antenuptial contracts are governed by both the *lex loci contractus* and the proper law of the contract (in the sense that the formalities of at least one of these systems must be complied with).[20] Corbett CJ indicated *obiter* that the same approach should be followed in respect of other contracts as well, although there could be exceptions[21] (one could think here of the *lex situs*, perhaps as an alternative legal system, governing formalities in respect of contracts for the sale of immovable property). In *Creutzburg v Commercial Bank of Namibia Ltd*,[22] the *obiter dictum* in *Spinazze* was quoted by Mpati AP,[23] but, as the relevant contract was in any event valid in terms of the *lex loci contractus*, it was not necessary to decide whether formal validity in terms of only the proper law would have been sufficient.[24] The provisions in ECTA in respect of formalities[25] will therefore be applicable if South African law is the *lex loci contractus* (or the *lex situs*)[26] and perhaps also when it is the proper law of the contract.

The inherent validity of contractual provisions is in principle governed by the proper law of the contract, but the *lex loci solutionis* (the law of the country of performance) and the *lex fori* may in specific circumstances also play a role.[27] The provisions in the act that may be classified under "inherent validity"[28] will therefore generally be applicable when South African law is the proper law of the contract. In specific types of cases, these provisions will be applied *qua lex fori* or when South African law is the *lex loci solutionis*.

3 NATIONAL CREDIT ACT

Sections 4-7 of the National Credit Act[29] determine in detail when the act is applicable. Only the (unilateral) provisions that deal with the cross-border

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18 Forsyth 318-319 (the *lex domicilii* of either party may also play a role; and the other systems mentioned are perhaps alternatives to the *lex situs* in respect of immovables).

19 1985 3 SA 650 (A).

20 *Ex Parte Spinazze supra* 665A-C.

21 *Ex Parte Spinazze supra* 665D-E.

22 2006 4 All SA 327 (SCA).

23 *Creutzburg v Commercial Bank of Namibia Ltd supra* par 10 (330g-331a).

24 *Creutzburg v Commercial Bank of Namibia Ltd supra* par 10-11 (330g-331d).

25 See *eg* ss 11(1), 12 and 13.

26 The *lex situs* probably still plays a role in respect of immovables, but ECTA excludes certain transactions in terms of the Alienation of Land Act 68 of 1981 from its scope: see s 4(4) and sch 2.

27 See Forsyth 320-325; and Neels "Geoorloofdheid van 'n Kontrak en Openbare Beleid in die Internasionale Privaatreg" 1991 *TSAR* 694.

28 See *eg* ss 11 and 22(1).

29 34 of 2005. See, in general, Otto *The National Credit Act Explained* (2006); and Scholtz, Otto, Van Zyl, Van Heerden and Campbell *Guide to the National Credit Act* (2008).

effect of the act will be highlighted. Article 4(1) determines that[30] the act applies to every credit agreement[31] between parties dealing at arm's length[32] and made within, or having an effect within,[33] the Republic of South Africa. Section 4 lists certain exceptions to this rule, *inter alia* a credit agreement in respect of which the credit provider is located outside South Africa, approved by the responsible minister on application by the consumer in the prescribed manner and form.[34] The application of the Act in terms of section 4(1) extends to a credit agreement or proposed credit agreement irrespective of whether the credit provider resides or has its principal office within or outside the Republic.[35] If the act applies to a credit agreement, it continues to apply to that agreement even if a party to that agreement ceases to reside or have its principal office within South Africa;[36] and it applies in relation to every transaction, act or omission under that agreement, whether that transaction, act or omission occurs within or outside the Republic.[37]

The phrase "made within, or having an effect within, the Republic" in section 4(1) requires further comment. As stated above, the content of connecting factors is governed by the *lex fori*.[38] This applies in a bilateral and multilateral context; even more so in a unilateral framework. The place of conclusion of a contract (*locus contractus*) is a well-known traditional connecting factor.[39] The South African common law rules in respect of conclusion of contracts by telephone, fax and post need to be applied here.[40] The provisions of ECTA in respect of the place of conclusion of an electronic contract must also be applied.[41] The *locus contractus* may be fortuitous[42] but it seems that a credit agreement with no other link to South Africa will

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30 Subject to ss 5 and 6 that deal with the limited application of the act in respect of incidental credit agreements and the situation where the consumer is a juristic person.

31 See the definition in s 8, which *inter alia* employs the term "consumer". "Consumer" is defined in s 1.

32 S 4(2)(b) provides examples of parties not dealing at arm's length. See Van Zyl "The Scope of Application of the National Credit Act" in Scholtz, Otto, Van Zyl, Van Heerden and Campbell par 4-2 and 4-3 on the common law meaning of the concept.

33 Van Zyl par 4-2: "Parties to a credit agreement will accordingly not be able to circumvent the provisions of the Act merely by concluding their agreement offshore."

34 S 4(1)(d). See form 1 of the regulations in terms of the act (GN R489 in *GG* 28864 of 2006-05-31). The form requires information on the parties to the agreement, the type of the credit agreement, the amount of the credit transaction and the general terms and conditions. See s 171 on the powers of the relevant minister (the member of the cabinet responsible for consumer credit matters: s 1) to publish regulations in terms of the act.

35 S 4(3)(a).

36 S 4(4)(a).

37 S 4(4)(b).

38 See fn 15.

39 See Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 24 and 78-87.

40 See *eg* Eiselen "E-commerce" in Van der Merwe, Roos, Pistorius en Eiselen 141 147-158 and Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2006) 69-71 in this regard. *Cf* Van Zyl par 4-3.

41 See ss 22(2) and 23(c) of ECTA, discussed above in fn 15*ff*.

42 Forsyth 310; Fredericks and Neels "The Proper Law of a Documentary Letter of Credit (Part 1)" 2003 *SA Merc LJ* 63 70-71; and Neels and Fredericks "The Music Performance Contract in European and Southern African Private International Law (Part 2)" 2008 *THRHR* 529 536 fn 132.

nevertheless be governed by the NCA if the case is heard by a South African court.

The phrase "having an effect within the Republic" has no antecedents in South African private international law. The closest concept is probably that of the place of performance (either the monetary or the characteristic performance)[43] (*locus solutionis*), which is the most important connecting factor in determining the proper law of a contract.[44] However, the quoted phrase seems to be of a wider scope than merely the place(s) of performance. For instance, it could be argued that any one of the following factors could indicate "having an effect within the Republic" in the context of an instalment agreement,[45] as one of the forms a credit agreement may take:[46] delivery of the goods must take place in South Africa; payment for the goods must take place in South Africa; the consumer is domiciled or habitually resident in South Africa or is a South African national;[47] the property is situated in South Africa (*locus rei sitae*); the property (for instance, a motor vehicle) is registered in South Africa (*locus libri siti*); and the destination of the goods is in South Africa (*locus destinationis*). But it is suggested that the South African domicile, habitual residence and nationality of the credit provider (seller) or the fact that the goods are to be dispatched from South Africa (*locus expeditionis*) as such will not usually be sufficient to hold that an instalment agreement has "an effect" in South Africa.[48] Van Zyl

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[43] Terminology from the Rome Convention on the Law Applicable to Contractual Obligations (1980) (a 4(2)) and EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I) (a 4(2)). See, in general, Neels and Fredericks "Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): Perspectives from International Commercial and Financial Law" 2004 *EUREDIA Revue européenne de droit bancaire et financier / European banking and financial Law Journal* 173.

[44] See Forsyth 308 and 311-313; Fredericks and Neels 2003 *SA Merc LJ* 67, 69-71 and 535-538; and Van Rooyen 87-95. See the text in fn 65.

[45] See the definition of an instalment agreement in s 1: "a sale of movable property in terms of which all or part of the price is deferred and is to be paid by periodic payments; possession and use of the property is transferred to the consumer; ownership of the property either (i) passes to the consumer only when the agreement is fully complied with; or (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred".

[46] See s 8(4)(c).

[47] Habitual residence and especially nationality are not well-established connecting factors in South African private international law, although use has been made of them recently, especially in the context of the incorporation in domestic law of the conventions drafted by the Hague Conference of Private International Law (see Neels and Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private international law – introducing the *lex causae proprietatis matrimonii*" 2008 *TSAR* 587 588-589). However, in as far as nationality is concerned, s 3 of the act states that its purpose is *inter alia* to promote and advance the social and economic welfare of *South Africans*, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by promoting the development of a credit market that is accessible to all *South Africans*, and in particular to those who have historically been unable to access credit under sustainable market conditions.

[48] *Cf* the connecting factors to determine the proper law of a contract: Fredericks and Neels 2008 *THRHR* 534-535; and Neels and Fredericks 2003 *SA Merc LJ* 67-68.

correctly argues that determining whether an agreement has "an effect" in South Africa will entail a factual inquiry in every case.[49]

If South African law is the proper law of the contract but the agreement does not fall within the scope rule of the NCA, South African law minus the NCA (that is, the otherwise applicable common law and statutory law) must be applied. The provisions of the NCA in respect of jurisdiction,[50] procedure,[51] evidence[52] (including standard of proof),[53] capacity,[54] formalities,[55] inherent validity[56] and limitation[57] will also not be applicable if the scope rule is not complied with, even if South African law governs these matters *qua lex loci contractus*, *lex causae* (proper law), *lex loci solutionis*, *lex domicilii* (the law of domicile) or *lex fori*.

When will South African law be the proper law of a consumer contract, for instance, a credit agreement? South African private international law does not have specific bilateral or multilateral rules to deal with consumer agreements, in general, or credit agreements, in particular. It is submitted that these may be developed by the high courts, as they "have the inherent power to … develop the common law, taking into account the interests of justice".[58] Tentatively it is suggested that the consumer in a particular case should be able to choose between the applicability of the proper law of the contract (determined in the usual way, including a choice of law) or the law of his or her habitual residence.[59] The place of habitual residence seems to

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49 Van Zyl par 4-3.

50 See ss 26(1), 27, 90(2)(k)(vi), 142(3) and 164. According to s 90(2)(k)(vi) submission to the jurisdiction of a foreign court may be unlawful.

51 See *eg* ss 83-88, 114-115, 129-152, 164-165 and 168.

52 See ss 169(1) and (3). Jurisdiction, procedure and evidence are governed by the *lex fori*: see Forsyth 21-22; and Malan, Neels, O'Brien and Boshoff 1995 *TSAR* 292.

53 See s 167. Onus of proof is governed by the proper law (*Tregea v Godart* 1939 AD 16 33; and *Laurens v von Höhne* 1993 2 SA 104 (W) 112H-J) but it is suggested that the standard of proof (*eg* balance of probabilities) is an issue for the *lex fori*.

54 See ss 89(2)(a) and (3). The subarticles pertain to capacity although it is dealt with as an issue of inherent validity in the act ("unlawful credit agreements" is the heading of s 89): see Otto "Die *Par Delictum*-reël en die *National Credit Act*" 2009 *TSAR* 417 429-430. Capacity in respect of movable property is governed by the *lex domicilii*, the *lex loci contractus* or the objective putative proper law. See Forsyth 314-318; and Fredericks "Contractual Capacity in Private International Law: Interpreting the *Powell* Case" 2006 *THRHR* 279.

55 See ss 2(3) and 93. Formalities are governed by the *lex loci contractus* and probably also the proper law: see the text in fns 18-24.

56 See *eg* ss 80 (read with s 83), 89-90, 100-106 and 164(1). Inherent validity is governed by the proper law and in some cases by the *lex loci solutionis* or the *lex fori*: see the text in fns 27-28.

57 See s 166 (complaints in terms of the act referred to or made to the national consumer tribunal or a consumer court). Limitation of actions and liberative prescription are today probably governed by the proper law: see *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 5 SA 393 (SCA); Neels "Tweevoudige Leemte: Bevrydende Verjaring en die Internasionale Privaatreg" 2007 *TSAR* 178; and Neels "Falconbridge in Africa: Classification (Characterisation) and Liberative (Extinctive) Prescription (Limitation of Actions) in Private International Law – A Canadian Doctrine on Safari in Southern Africa (*hic sunt leones!*); Or: *semper aliquid novi Africam adferre*" 2008 *Journal of Private International Law* 167.

58 S 173 of the Constitution of the Republic of South Africa, 1996.

59 *Cf* a 6 of EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I).

be the law with the closest connection to the consumer and the proper law is the law of closest connection to the contract. The consumer's choice is based on the principle of preferential treatment in private international law, which aims to protect the socio-economically weaker party (the consumer).[60]

In the interim the standard rules on how to determine the law applicable to the contract must apply. South African private international law recognises a choice of law by the parties, either expressly or tacitly.[61] A choice of South African law would include South African consumer legislation if the contract falls within its scope. If the NCA is applicable but the proper law of the contract has a higher degree of protection for the consumer in the particular context, the protective measures of the proper law should apply.[62] It has been argued above[63] that if South African law is the proper law but the NCA is not applicable, the South Africa common law applies, together with applicable legislation (but excluding the NCA). Whether the parties could expressly choose the NCA (or other consumer protection legislation) to apply outside the scope of their normal ambit is a question of domestic law, to be governed by the proper law of the contract.

If there was no choice of law by the parties, a variety of connecting factors may be employed to determine the proper law.[64] According to one of the approaches followed by the courts, all the connecting factors must be taken into account, the *locus solutionis* being the most important one. But according to the majority approach, the *lex loci solutionis* governs in principle unless the contract has a manifestly more significant connection to another legal system.[65] The *locus solutionis* may be interpreted to be the place of payment or the place of the characteristic performance (for instance, delivery under an instalment agreement). It has been submitted that the other connecting factors must indicate a choice between competing *leges loci solutionis*.[66]

Sections 60-66 contain provisions on consumer rights[67] and the protection thereof.[68] The protection against discrimination in respect of credit is directly linked to provisions in the Constitution[69] and the Promotion of Equality and

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60 See the text in fn 11.

61 Forsyth 295-307; and Fredericks and Neels 2003 *SA Merc LJ* 64-67.

62 See the text in fns 10-11.

63 See the text immediately after fn 49.

64 See the lists in Fredericks and Neels 2003 *SA Merc LJ* 67-68; and Neels and Fredericks 2008 *THRHR* 534-535.

65 Neels and Fredericks 2008 *THRHR* 533-535.

66 Fredericks and Neels 2003 *SA Merc LJ* 70-71; and Neels and Fredericks 2008 *THRHR* 536-538.

67 The right to apply for credit (s 60); the right to reasons for credit being refused (s 62); the right to information in an official language (s 63); the right to information in plain and understandable language (s 64); and the right to receive documents (s 65).

68 Protection against discrimination in respect of credit (s 61); and protection of consumer credit rights (s 66).

69 S 61(1) refers to the grounds of unfair discrimination listed in s 9(3) of the Constitution of the Republic of South Africa, 1996: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Prevention of Unfair Discrimination Act ("PEPUDA").[70] Sections 60–66 are applicable only if the contract falls within the scope of the act. But the relevant provisions in the Constitution and PEPUDA are rules of immediate application, governed by the *lex fori* and therefore applicable in all cases before a South African court. Of course, the NCA itself cannot be regarded as a law of immediate application, as the cross-border scope rule in section 4(1) would then not be sensible.

4 CONSUMER PROTECTION ACT

Section 5(1)(a) of the Consumer Protection Act[71] determines that the act applies to "every transaction occurring[72] within the Republic", apart from a list of exceptions in sections 5(2)-(4).[73] It is irrelevant whether the supplier[74] resides or has its principal office within or outside South Africa.[75] "Transaction" is broadly defined to include an agreement between a person acting in the ordinary course of business and another person for the supply of goods or services in exchange for consideration,[76] as well as the supply[77] of goods[78] or the performance of services[79] to a consumer[80] for consideration.[81]

The act therefore has a much wider scope than *consumer* protection only, if "consumer" is understood in its more customary sense of "a person who purchases goods and services for his [or her] own personal needs"[82] or "[the party acting] outside his [or her] trade or profession".[83] Section 1 indeed contains a definition of "consumer" which is much wider than expected.[84] However, it must be added that many of these consumers, as defined, may be excluded from protection by section 5(2)(b), which determines that the act does not apply to any transaction in terms of which the consumer is a juristic

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70 4 of 2000. S 61(1) refers to Chapter 2 of this Act.

71 68 of 2008. See, in general, Van Eeden *A Guide to the Consumer Protection Act* (2009); and Du Preez "The Consumer Protection Bill: A Few Preliminary Comments" 2009 *TSAR* 58.

72 See Du Preez 2009 *TSAR* 67-68 and 72 on the use of the word "occurring" instead of the customary "concluded" or even "made" (s 4(1) of the NCA).

73 S 5(3) makes provision for a regulatory authority to apply to the responsible minister for an industry-wide exemption from one or more provisions of the act on the ground that these provisions overlap or duplicate a regulatory scheme administered by that authority in terms of any other national legislation or any treaty, international law, convention or protocol.

74 "Supplier" is defined as "a person who markets any goods or services" (s 1).

75 S 5(8)(a).

76 See the definition of this English-law concept in ss 1 and 43(1)(a).

77 See the definition of "supply" in s 1 (see fn 91).

78 See the definition of "goods" in s 1.

79 See the definition of "service" in s 1.

80 See the definition of "consumer" in s 1.

81 See s 1.

82 See Anderson *Collins English Dictionary* (2006) *sv* "consumer" (first meaning).

83 See a 6(1) of EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I).

84 "Consumer, in respect of any particular goods or services" *inter alia* denotes "a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business" (s 1).

person[85] whose asset value or annual turnover, at the time of the transaction, equals or exceeds a certain threshold value determined by the responsible minister in terms of section 6.

If South African law is the *lex loci contractus*, the CPA will therefore generally apply, even if the contract is not otherwise connected to the Republic. The domestic rules that determine where a contract is concluded (including these dealing with contracting by post, telephone, fax and electronic data message)[86] must be applied, as connecting factors are governed by the *lex fori*.[87]

Section 5(1)(b) determines that the CPA, in addition, applies to "the promotion[88] of any goods or services, or of the supplier of any goods or services, within the Republic".[89] The act may therefore be interpreted to apply to the promotion in South Africa of goods or services, as well as to the promotion in the Republic of a supplier of any goods or services. But it is also possible that the phrase "or of the supplier" should be read as "or the supply".[90] The act will then also be applicable to the supply[91] of goods or services in South Africa; and it is indeed generally accepted that the *lex loci solutionis* may play a role in respect of the *manner* of performance.[92] If the latter reading is preferred, section 5(1)(b) should, moreover, receive a purposive interpretation[93] in that the CPA should be held to apply to the contract as such (not merely to (the manner of) performance) if such performance (for instance, delivery of the goods or the rendering of services) is agreed to take place in South Africa (irrespective of whether the contract was concluded in the Republic). This interpretation will be appropriate in the

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85 See the definition in s 1: contrary to the common law, partnerships and trusts are juristic persons for the purposes of the act.

86 See the text in fns 39-41.

87 See fn 15.

88 See the definition of "promote" in s 1 (the concept includes advertising).

89 There are two exceptions: the exempted promotion of those goods or services in terms of subsections (3) and (4) (s 5(1)(b)(ii)) and the promotion of those goods or services that cannot reasonably be the subject of a transaction to which the act applies in terms of paragraph (a) (s 5(1)(b)(i)). S 5(1)(b)(i) is not immediately clear: which goods or services cannot reasonably be the subject of a transaction occurring within South Africa? Perhaps this subsection refers to unlawful transactions in terms of the *lex fori*; perhaps to the advertising of goods and services that are not (readily) available in South Africa.

90 *Cf* Charter and Solik "Application of the Consumer Protection Act" in CLA Cliffe Dekker Hofmeyr *Consumer Protection Act matters* (Spring 2009) 2. This interpretation is more readily compatible with the definition of "promote" in s 1.

91 The word "supply" is, "in relation to goods", defined in s 1 *as to include* "sell, rent, exchange and hire in the ordinary course of business for consideration". It is submitted that the substituted "supply" in s 5(1)(b) should have its ordinary meaning of "to make available or provide" (Anderson *sv* "supply" (second meaning)), *eg* delivery in the case of goods.

92 See Collins 1611-1613; and a 12(2) of EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I).

93 See Du Preez 2009 *TSAR* 65. S 2(1) determines that the act must be interpreted in a manner that gives effect to the purposes set out in s 3. The interpreter may consider appropriate foreign and international law and appropriate international conventions, declarations or protocols relating to consumer protection (s 2(2)). Also see ss 4(2)-(3).

light of the stated purpose of the act, namely to "promote and advance the social and economic welfare of customers in South Africa".[94]

If South African law is the proper law of the contract but the agreement does not fall within the scope of the CPA, South African law minus the CPA (that is the otherwise applicable common law and statutory law) must be applied. The provisions of the CPA in respect of jurisdiction,[95] procedure,[96] standard of proof,[97] capacity,[98] formalities,[99] inherent validity[100] and limitation[101] will also not be applicable if the scope rule is not complied with, even if South African law governs these matters as *lex fori*, *lex domicilii*, *lex loci contractus*, *lex causae* or *lex loci solutionis*.[102]

There are no specific rules on how to determine the proper law of a consumer contract in South African private international law, but a tentative proposal is made in paragraph 3 above.[103] In the absence of a choice of law,[104] the standard rules of South African private international law of contract will often lead to the applicability of the *lex loci solutionis*.[105] If the CPA is applicable but the proper law of the contract has a higher degree of protection of the consumer in the particular context, the protective measures of the proper law should apply.[106] This suggestion is supported by section 2(10): "No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law."[107] Of course, the common-law provisions of South African private international law, referring to the proper law of the contract, must also be taken into account in this regard.

Section 8 protects the consumer against discriminatory practices, with reference to section 9 of the Constitution and chapter 2 of PEPUDA. If the CPA is not applicable, section 8 cannot be invoked. But the relevant provisions of the Constitution and PEPUDA are laws of immediate application, governed by the *lex fori*, and will therefore as such be applicable in all cases before a South African court. Of course, due to the existence of the cross-border scope rule in section 5, it cannot be argued that the entire CPA is a law of immediate application.[108]

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94 S 3(1).
95 See s 69, 75-76 and 115.
96 See *eg* s 52, 68-78 and 114-115.
97 See s 117.
98 See s 39.
99 See s 7(1) and 50.
100 See *eg* s 13-15, 17, 48 and 51.
101 See ss 61(4)(d) and 116.
102 See the text in fns 13-28 and 50-57.
103 See the text in fns 58-60.
104 See the text in fn 61.
105 See the text in fns 64-66.
106 See the text in fns 10-11 and 62.
107 Also see s 2(9)(b).
108 Also see the text in fns 12 and 67*ff*.

Section 61 of the CPA makes provision for product liability on a no-fault basis (strict liability).[109] This section is applicable in a South African court if any goods are supplied[110] within South Africa, even if in terms of a transaction that is otherwise exempt from the application of the act.[111] Perhaps only transactions exempt in terms of section 5(2)-(4) are referred to; but it is also possible that sections 5(5) and 5(1)(d) were intended to refer to transactions exempt under section 5(2)-(4) *together with* transactions that are *in principle* not subject to the CPA in terms of section 5(1)(a) and (b). A purposive interpretation of the act[112] would probably indicate the latter reading, especially as section 2(10) retains any common-law consumer remedies.[113] In any event, if the scope rule is complied with, the *lex fori* will apply to product liability.[114] This is also true of liberative prescription or limitation in terms of section 61(4)(d) of the act.[115]

5 CONCLUDING REMARKS

The conflict rules in the consumer protection legislation do not fit the general structure of South African private international law. The conflict rule in ECTA[116] may still be acceptable due to its unambiguous formulation but not the scope rules in the NCA[117] and the CPA,[118] as they employ fortuitous connecting factors (*locus contractus*)[119] and unclear terminology.[120] It is submitted that the best solution would be to repeal all the conflict provisions in the consumer protection legislation and substitute them with a special private international law rule for consumer contracts, "consumer" to be defined in the traditional way.[121] The consumer should be able to choose between the applicability of the consumer protection measures in either the proper law of the contract or the law of his or her country of habitual residence.[122]

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[109] See, in general, Loubser and Reid "Liability for products in the Consumer Protection Bill 2006: A Comparative Critique" 2006 *Stell LR* 412.

[110] See the definition of "supply" in s 1 in fn 91.

[111] See s 5(5) read with s 5(1)(d). This also applies to s 60 (subsection 2 makes provision for a recall programme).

[112] See the text in fns 93-94.

[113] Also see Neels 2001 *TSAR* 707-708 on the principle of preferential treatment in the international law of delict.

[114] Contrast a 5 of EC Regulation 864/2007 on the Law Applicable to Non-contractual Obligations (Rome II) on the legal system applicable to product liability; Forsyth 325-340 on delictual liability in private international law; and Neels 2001 *TSAR* 707-708.

[115] S 61(4)(d) makes provision for limitation or liberative prescription of a period of three years. Limitation and liberative prescription are today probably governed by the proper law: see fn 57.

[116] S 47 of ECTA.

[117] S 4(1) of the NCA.

[118] S 5(1)(a) of the CPA.

[119] S 4(1) of the NCA and s 5(1)(a) of the CPA. See fn 42.

[120] S 4(1) of the NCA: "having an effect within the Republic of South Africa".

[121] See the text in fns 82-83.

[122] See the text in fn 59.