

The Applicability of the *Consumer Protection Act 68 of 2008* to International Electronic Transactions

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ABSTRACT

Applicability of the Consumer Protection Act 68 of 2008 to International Electronic Transactions.

The promulgation of the *Consumer Protection Act 68 of 2008* (CPA) in South Africa made it easier for consumers to participate in international electronic transactions by means of electronic communication devices and the Internet. Such communication inevitably leads to legal consequences for both consumer and the supplier. The *Green Paper from the European Commission*¹ includes a clause that is very much appealing to the country like South Africa.

if the parties choose a law other than the law of the country of habitual residence of the consumer, the contract cannot deprive the consumer of the protection afforded by his law. As a result of this rule, consumers can be confident that, in the event of dispute, courts will ensure that they will benefit from at least the same level of protection as guaranteed in their country of residence.

The choice of applicable law is covered in section 5 of the CPA. This is more in line with the *Green Paper from the European Commission*. It means, *therefore*, that when the foreign suppliers sell across borders, the contracts that they conclude with consumers are subject to the different rules in force in South Africa. In this, consumers are resident, irrespective of whether a choice of law is made or not.² Both *Electronic Communication and Transaction Act 25 of 2002* (ECTA) and CPA provide a clear protection to the consumer when it comes to the choice of the applicable law to govern a transaction.

The ECTA is not a primary legislation on consumer protection but it properly complements CPA when it comes to consumer an online transaction. This means a South African consumer will be afforded the consumer protection even when contracting with a vendor in a foreign jurisdiction with a different legal system. However, it is uncertain how this provision will be enforced on an international level. A choice of law in an online transaction is one aspects of consumer legislation that has not beent yet

¹ July 2010 *Green Paper from the European Commission* 6.

² July 2010 *Green Paper from the European Commission* 6.

tested as to whether they can provide guidance for the courts when it comes to foreign jurisdictions and applicable laws in a particular electronic transaction agreement.

The applicable law in a consumer protection transaction in the UK goes to the element of preventing supplier to deprive consumer a right to redress. The South African aspects of the jurisdiction and applicable law are compared to the UK laws on consumer protection. The most crucial consumer protection aspect is to protect the weaker party. Although the issue on the applicable law is certain, the issue on (civil) jurisdiction has not been given sufficient attention by the South African consumer protection legislation. South African consumer legislation is compared to the UK and EU consumer legislation that clearly states that the consumer can sue or be sued in his place of residence. The UK consumer rights do not give a supplier and option to sue the consumer as per normal civil procedure route. In UK a supplier will only litigate against consumer at a court or body where consumer resides. This is not sufficiently covered in the South African legislation protecting consumers' rights. The CPA section 115 on civil jurisdiction is silence on the consumer instituting legal action in the body or court of his/her residence. The legal implication for this shortcoming is that the South African consumer could be sued as per normal procedure. For instance where the consumer default and such transaction is concluded in a different jurisdiction. This will mean the supplier has an option of not following the defendant and this will be worse when the foreign jurisdiction is involved. This is highly possible on the electronic transaction agreements which are standard as most of them are drafted by the suppliers in their countries and he cannot predict a law of a country he doesn't know.

Key Words

Act

Agreement

Applicable

Cause of action

Consumer

Electronic

European Union

International

Law

Occur

Online

Protection

South Africa

Transactions

UK

Opsomming

Die navorsing het te make met die evaluering van die mate van beskerming wat Suid-Afrikaanse verbruikers in terme van die gebruikersbeskerming wetgewing geniet. Die Suid-Afrikaanse posisie word vergelyk met die van die Verenigde Koninkryk. Onderzoek word ingestel na internasionale oor-grens transaksies wat elektronies plaasvind. Daar word spesifieke aandag gegee aan kontrak vorming en ander uitdagings wat gepaardgaan met sulke elektroniese transaksies – veral ten opsigte van hoe dit verbruikers beskerming affekteer. 'n Kernaspekte wat ondersoek word ten opsigte van aanlyn-transaksies hou verband met litigasie. Die siviele proses, byvoorbeeld keuse van die toepaslike reg en jurisdiksie, het beperkings wanneer dit kom by verbruikersbeskerming en die beslegting van geskille. Hier word gevind dat die belangrikste elemente vir geskilbeslegting in alle internasionale transaksies, hetsy tradisioneel of elektronies, die keuse van die toepaslike wetgewing; jurisdiksie; en die handhawing van buitelandse hofbevele of uitsprake is.

Abbreviations

CPAUK	<i>Consumer Protection Act 1987</i>
CPA	<i>Consumer Protection Act 68 of 2008</i>
DPCS	Durban Property Cleaning Services
EU	European Union
ECJ	European Court of Justice
ECTA	Electronic Communication and Transaction Act
EEA	European Economic Area
NCA	<i>National Credit Act</i>
OFT	The Office of Fair Trading
SCA	Supreme Court of Appeal
SMS	Short Message Services
UCTA	<i>Unfair Contract Act of 1977</i>
UKCLA	<i>Contracts (Applicable Law) Act 1990</i>
UTCCR	<i>Unfair Terms in Consumer Contracts Regulations 1999</i>

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CHAPTER 1

Introduction

The United Nations (hereinafter referred to as UN) is:³

a universal organisation whose objectives are to maintain international peace and security; to develop friendly relations among nations; to co-operate in the solution of international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms; and to be a centre for harmonising the actions of nations in attaining these ends.⁴

The UN in South Africa states that South Africa was one of the original 51 founding members of the UN, which came into existence on 24 October 1945. Since its inception the membership of the UN has grown to 193 States.⁵ In September 2004, South Africa published a *Draft Green Paper on the Consumer Policy Framework*,⁶ which was more in line with the UN legitimate needs of consumers, which says: ⁷

promote a fair, efficient and transparent market place for consumers and business; provide a consistent, predictable and effective regulatory framework that fosters consumer confidence, but also recognises the developmental imperatives of the South African economy; provide access to effective redress for consumers as economic citizens; recognize and support the role of activist and confident consumers in promoting a competitive economy; promote customer responsiveness in the public and private sector; and harmonise our consumer protection framework with international best practice jurisdictions.⁸

The *Consumer Protection Act 68 of 2008* (hereinafter referred to as the CPA) was signed by the President of the Republic of South Africa on the 29th of April 2009 and published in the Government Gazette on the same day. Before 1994, South Africa was very slow to consider the protection of consumer rights.⁹ The apartheid regime was not

³ <http://www.un.org.za/about/>.

⁴ Http://www.un.org/esa/sustdev/publications/consumption_en.pdf 2.

⁵ <http://www.un.org.za/about/>.

⁶ Consumer Policy Framework Green Paper: Draft G 26774 GeN 1957

⁷ Http://www.un.org/esa/sustdev/publications/consumption_en.pdf 2 - 3.

⁸ Http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf 13.

⁹ Kok The effect of Consumer protection Act on Exemption clauses standard contracts 2.

serious about consumer protection rights as was evident in their policies,¹⁰ as it was regarded as a minimal role player in the economic growth of the country.¹¹ After 1994, it meant that at some point South Africa had to fully recognise consumer rights as it was accepted in the international arena.

The CPA talks about the purpose and policy in section 3 and states that “(t)he purposes of the CPA are to promote and advance the social and economic welfare of consumers in the Republic of South Africa.”¹² South Africa promulgated national law on consumer rights for the sole purpose of protecting its citizens in line with the United Nations.¹³ The question that arises is how far South African consumer protection laws can protect its citizens, particularly in respect of international electronic transaction agreements.

Section 22 of *The Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the Constitution) guarantees the citizen’s freedom of trade, occupation and profession. This does not limit the rights of South African consumers or individuals to trade or transact with international businesses - whether online, physical or otherwise. The CPA regulates consumer activities that are taking place within the Republic of South Africa,¹⁴ section 5(1)(a) of CPA stipulates that “the CPA is applicable to every transaction occurring within the Republic, unless such transaction is exempted...”

According to the CPA, consumers in South Africa are not prohibited from entering into international electronic transactions.¹⁵ As much as section 5(1)(a) of the CPA applies to all transactions occurring within the Republic of South Africa, it may not have an absolute solution to protect the consumer in an international transaction dispute. Besides the fact that the CPA governs all consumers’ activities or transactions¹⁶

¹⁰ [Http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf) 26.

¹¹ Kok The effect of Consumer protection Act on Exemption clauses standard contracts 2.

¹² S3 of the CPA.

¹³ [Http://www.un.org/esa/sustdev/publications/consumption_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf) (II) par 2 3.

¹⁴ S3(1) of the CPA.

¹⁵ [Http://www.un.org/esa/sustdev/publications/consumption_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf) (III) par 10 3.

¹⁶ S1 of the CPA.

occurring with the Republic of South Africa,¹⁷ there is also a piece of legislation known as the *Electronic Communication and Transaction Act 25 of 2002* (hereinafter referred to as the ECTA). The ECTA partly deals with consumer protection and it also recognises electronic written agreements or data messages as being legally binding.¹⁸ The challenges involved in a lawsuit dealing with an international electronic transaction lead to the application and recourse to private international law for a remedy as the two parties to the transaction are from two different countries, which are likely to have different legal systems.¹⁹ Both the CPA and ECTA complement each other when it comes to consumer protection.²⁰ For the purpose of this research it is important to look at electronic transactions as defined by Michalsons Attorneys as to “include not only transactions conducted via a website but also transactions conducted via e-mail and sms...”²¹ South African legislation on consumer protection does not define electronic transactions.

Consumer rights protection falls squarely within the civil law, meaning that if there is a conflict (between business; supplier or manufacturer and consumer and litigation becomes inevitable), civil procedure will be the correct procedure to follow. In the event of any international electronic transaction the possibility of conflict of laws is very high. The following aspects will therefore also be dealt with in this research: firstly, the jurisdiction of the court and its competence to hear and decide a case; secondly, the laws governing the relationship between the parties as well as the rules applicable in deciding a case; and thirdly, the recognition and enforcement of a judgment rendered by a foreign court.²²

¹⁷ S5(1)(a) of the CPA.

¹⁸ Chapter 3 part 1 of ECTA.

¹⁹ [Http://www.michalsons.co.za/consumer-protection-in-electronic-transactions-ect-v-cpa/2631](http://www.michalsons.co.za/consumer-protection-in-electronic-transactions-ect-v-cpa/2631)

²⁰ S2(9) of the CPA.

²¹ [Http://www.michalsons.co.za/legal-notice-foran-online-store/839](http://www.michalsons.co.za/legal-notice-foran-online-store/839)

²² [Http://www.internationaltrade.co.uk/articles.php?CID=&SCID=&AID=33&PGID=1](http://www.internationaltrade.co.uk/articles.php?CID=&SCID=&AID=33&PGID=1)

Since English law is the source of South African contract and consumer law, it is prudent to investigate the best practices in consumer protection in the United Kingdom (hereinafter referred to as the UK).²³ According to Taylor's article:²⁴

From the time of the "Union of South Africa" of the Cape Colony, Natal, Transvaal and Orange Free State on 31 May 1910 into a self-governing parliamentary dominion within the British Empire, called the Union of South Africa, and prior to the formation from the same territory of the Republic of South Africa on 31 May 1961, much of English law was incorporated into or formed the basis of South African law.²⁵ Since South Africa's 27 April 1994 independence from its apartheid regime and the coming into being of the interim and final Constitution of the Republic of South Africa Act of 1994 and 1996 respectively, international law has more and more informed the development and application of South African law.²⁶

It is a fact that the relationship between Britain and South Africa, being a colony, left a legacy in South Africa, particularly relating to the legal system, which leads to English law being the first point of reference where there is a vacuum in South African law.²⁷

UK consumer protection legislation is found under couple of pieces of legislation, namely: the *Unfair Terms in Consumer Contracts Regulations 1999* (hereinafter referred to as the UTCCR) and *Contracts (Applicable Law) Act 1990* (hereinafter referred to as the UKCLA). In the Roma Convention of which UK is a signatory states that:²⁸

a choice of law made by the parties will not result in depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence.

CHAPTER TWO

2. South African law

²³ http://www.legalb.co.za/index_files/resources_sources.htm.

²⁴ Taylor <http://www.teluudailies.com/2011/05/union-of-south-africa-created-1910.html>

²⁵ http://www.legalb.co.za/index_files/resources_sources.htm.

²⁶ http://www.legalb.co.za/index_files/resources_sources.htm.

²⁷ http://www.legalb.co.za/index_files/resources_sources.htm.

²⁸ Article 5(2) 1980 Rome Convention On The Law Applicable To Contractual Obligations

2.1 Introduction

It is a fact that after 1994 the South African economy significantly opened up to foreign trade, resulting in new products and services entering the country.²⁹ South Africa then joined the World Trade Organisation and acceded to and negotiated a number of international trade agreements.³⁰ This enhanced South Africa's integration into global markets.³¹ It can be safely mentioned that South Africa is a participant in globalisation as defined below:³²

The term globalisation involves economic integration; the transfer of policies across borders; the transmission of knowledge; cultural stability; the reproduction, relations, and discourses of power; it is a global process, a concept, a revolution, and "an establishment of the global market free from socio-political control."

South Africa's participation in international trade and the global market necessitated a South African legislative framework for consumer protection.³³ It is therefore clear that South Africans may also enjoy the benefits of globalisation where market competition is open, by entering into whatever form of transaction of trade is permissible by law. The South African consumer protection legislative framework protects purchases, whether local or international, and all is centred around section 5(1)(a) of the CPA³⁴ and section 47 of ECTA.³⁵

2.2 Interpretation of the word "occurring" in section 5(1)(a) CPA

The term "occurring" appears in section 5(1)(a) of the CPA under the heading "the application of the CPA". The term "occurring" is used in the CPA but the CPA does not

²⁹ [Http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf) 21.

³⁰ [Http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf) 21.

³¹ [Http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf) 21.

³² Nayef et al. Definitions of Globalisation: A Comprehensive Overview and a Proposed Definition (Geneva Centre for Security Policy 3).

³³ [Http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/01559_draftgreenpaper.pdf) 24.

³⁴ This Act applies to-
a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4).

³⁵ The protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.

define it or tell us what exactly is meant by the term. The importance of this term is that it is one of the key determining factors of jurisdiction and/or applicable law. A rule of interpretation of statute dictates that when one encounters ambiguity or absurdity in a word or phrase in a statute, in order to give a meaning, one should look at: grammatical interpretation; systematic interpretation; and teleological interpretation.³⁶ For current purposes the above three methods of interpretation are sufficient, the other two being historical and comparative are not relevant to a large extent.

Grammatical interpretation of the word “occurring” could be the same definition in the dictionary as the meaning of “occur”: “come into being as an event or process.”³⁷ It is said that the golden rule of statutory interpretation has long been invoked with frequency to help overcome the difficulties inherent to the linguistic formalism.³⁸ The golden rule requires adherence to “plain words” of the statutes unless this would lead to absurdity or to a result contrary to the intention of the legislature.³⁹ A court may part with the literal meaning of a word; phrase and/or provision in an attempt to eliminate the absurdity or to give effect to the true intention of the legislature.⁴⁰ If the language used in the contract is sufficiently clear, this common intention must be extracted from the contract itself, without the dubious assistance of evidence that seeks to place a gloss on the clear language of the contract.⁴¹ As it was put by Van den Heever JA in *Frumer v Maitland* 1954 3 SA 840 (A) 850:

Where the language is plain, I think, the golden canon of interpretation has been crisply stated by Greenberg JA in *Worman v Hughes and others*, 1948 (3) SA 495 at p 505 (A): ‘It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties’ intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract.’

³⁶ Du Plessis Law of South Africa / volume 25(1) First reissue volume / Statute law and interpretation.

³⁷ [Http://www.oxforddictionaries.com/definition/english/occur](http://www.oxforddictionaries.com/definition/english/occur).

³⁸ Du Plessis Law of South Africa / volume 25(1) First reissue volume /Statute law and interpretation (par 309(b).

³⁹ Du Plessis Law of South Africa / volume 25(1) First reissue volume /Statute law and interpretation (par 309(b).

⁴⁰ Du Plessis Law of South Africa / volume 25(1) First reissue volume /Statute law and interpretation (par 309(b).

⁴¹ *Frumer v Maitland* 1954 3 SA 840 (A) 850

In addition to the above case, it will be important to whoever is reading the CPA and interpreting the word “occur” to follow practice, like in the case of *Thompson v Federated Timbers and Others* (17408/09, 3984/10) [2010] ZAKZDHC 72 (8 December 2010). Although the above case refers to an insurance contract, the principle applied could be used for the purposes of interpreting the CPA. Wallis J said: “It is a basic principle of interpretation where the same language is used in different portions.”

As mentioned above the CPA does not define the word “occurring”, and then the Wallis J approach in the above case serves as a guide to the current situation. It means “occur” should be given a consistent meaning throughout the CPA. It is safe to assume that with reference to the dictionary meaning of the word “occur”, the court will apply the ordinary meaning rule:⁴²

The literalist-cum-intentionalist approach to statutory interpretation assumes that the language of a legislative instrument can be clear and unambiguous and requires that, in such an event, the language must be given effect without more ado. Clear and unambiguous language is, so it is believed, a “correct” and authentic expression of the intention of the legislature.

What could be possible interpretations of the word “occur” by South African courts? In the history of South African civil litigation to date there are some cases that tried to give meaning to the words closely related to “occur”, like “occurring”; and “event”.⁴³

In *Thompson v Federated Timbers and Others* (17408/09, 3984/10) [2010] ZAKZDHC 72,⁴⁴ the facts of the case was around the happening of the event leads to the claim against insurer.⁴⁵ In this case the term “happening of the event” can be treated as equivalent to the term “occur”.

⁴² Du Plessis Law of South Africa / volume 25(1) First reissue volume / Statute law and interpretation (par 309(d).

⁴³ *Sleightholme Farms (Pty) Ltd v National Farmers Union Mutual Insurance Society Ltd* 1967 (1) SA 13; and *Robin v Guarantee Life Assurance Company Ltd.* (417/82) [1984] ZASCA 72).

⁴⁴ <http://www.polity.org.za/article/late-notification-to-insurers-to-repudiate-or-not-to-repudiate-2011-03-23>.

⁴⁵ The plaintiff in this case, Mr. Thompson, averred that on 29 June 2007, he had sustained injuries after he tripped over an electrical cord at a shopping centre owned by the first defendant, Federated Timbers’ Home Improvement Centre (“the incident”). The first defendant pleaded that it had employed Durban Property Cleaning Services (hereinafter referred to as “DPCS”) as a

In the above case the judge's illustration of the words "on the happening of an event" should be the same way of giving similar line of interpretation to "occurring" in the CPA. Consequences of occurring in law may result in the following: cause of action; jurisdiction or both.

2.3 *Formation of contract*

The first step in a contract question is always to make sure that a contract actually exists. There are certain elements or *essentialia* that must be present for a legally binding contract to be in place. These are: offer and acceptance; consensus; possibility of performance; legal capacity and formalities.⁴⁶ These elements will apply, irrespective of whether the contract originates from an electronic transaction or otherwise, whether local or international. For the purpose of answering the research question, it will be important to give a hypothetical scenario, to look where an international electronic transaction agreement of sale of goods (HP laptops), has been entered into with the South African consumer as defined in terms of the CPA. The consumer is physically located in South Africa. The terms and conditions of sale include exemption, indemnity, waivers, limitation of liability, all in favour of the seller. The buyer paid for the laptops, the seller failed to deliver laptops to the buyer. The transaction was conducted via electronic means such as website; e-mail and/or short message service (hereinafter referred to as SMS).⁴⁷ For the sake of clarity in this scenario, a consumer is the South

professional contractor and as a result, joined DPCS to the action. DPSC notified its insurers, Zurich Insurance Company (South Africa) Limited (hereinafter referred to as Zurich), of the joinder, claiming indemnity from Zurich on the basis that the incident was a defined event under the policy. Zurich rejected the claim, alleging that DPCS failed to comply with the notification provisions of the policy. As a result DPCS joined Zurich as a third party to the action. The relevant issue to be decided was: at what stage was it reasonably possible for DPCS to have notified Zurich of the event? The notification clause required DPCS to "on the happening of any event which may result in a claim under the policy," give notice to the insurer as soon as reasonably possible. Wallis J gave judicial consideration to the term "on the happening of any event." On an analysis of the term he accentuated that it is qualified by the fact that the notice should be given "as soon as possibly reasonable", thus the words "on the happening of an event" should be interpreted as if it reads "after the occurrence of any event."

⁴⁶ Buys and Cronje *Cyberlaw@sa* ii 101-104.

⁴⁷ [Http://www.michalsons.co.za/legal-notices-foran-online-store/839](http://www.michalsons.co.za/legal-notices-foran-online-store/839).

African who is regarded as a buyer and/or offeror. The first elements of contract to be discussed are offer and acceptance.

2.3.1 *An offer and acceptance:*

According to Christie, a person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed.⁴⁸ The intention may be express or implied. Although this specialised use of the word “offer” comes to modern South African law by way of English law, the concept which it represents was well known in Roman and old Roman-Dutch law.⁴⁹ In the case of *Efroiken v Simon*,⁵⁰ a Johannesburg broker sent a Cape Town broker a telegram to the effect that he had a seller of 3 000 (three thousand) bags of oats at 11 (eleven) shillings a bag, adding the terms of delivery. The question before the Court was whether this telegram was an offer which could result in a valid contract if accepted. Gardiner J had this to say:⁵¹

There are certain offers, offers made to the whole world, acceptance of which before withdrawal constitutes a binding contract, but it is not every offer of this nature. One has to ascertain from the offer itself whether it is tentative, or whether it is meant to constitute upon acceptance a binding contract. This telegram starts: Have seller of 3 000 (three thousand) bags of oats and it goes on to give certain terms. To my mind it means this: “I have a seller, can you find me a buyer and then we may do business?” The telegram was not intended to be an offer. Statements of lowest price are not offers.

The courts have sometimes employed the language of business people and described an offer, in the sense under consideration, as a “firm” offer.⁵² This is seen in the case of *Wasmuth v Jacobs* 1987 3 SA 629 (SWA) 633D Levy J said:

It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror.

⁴⁸ [Http://www.mylexisnexis.co.za/Index.aspx#](http://www.mylexisnexis.co.za/Index.aspx#) Dictionary of Legal Words and Phrases. O OFFER.

⁴⁹ Christie. The Law of Contract (4th ed) 32.

⁵⁰ *Efroiken v Simon* 1921 CPD 367.

⁵¹ *Efroiken v Simon* 1921 CPD 367 at 370.

⁵² [Http://www.mylexisnexis.co.za/Index.aspx#](http://www.mylexisnexis.co.za/Index.aspx#) 101. Firm intention announcement.

When a South African consumer makes an offer to buy from a supplier who is in the UK via a website or e-mail, such an offer is valid if it meets the legal requirements of an offer.⁵³ In *Jafta v Ezemvelo KZN Wildlife* (D204/07) [2008] ZALC 84, Rautenbach⁵⁴ summaries the judgment set by judge Pillay.⁵⁵

Ezemvelo KZN Wildlife the organisation (Ezemvelo KZN Wildlife) e-mailed an offer of employment to Jafta. The offer was linked to a time limit. Jafta tried to respond by sending an e-mail accepting the offer but in true information technology style, his laptop malfunctioned. With the deadline looming he then reverted to an internet café. Unbeknown to Jafta, he was trumped by a glitch in the internet and his e-mail vanished in cyberspace.

Not having heard from Jafta an outgoing employee of Ezemvelo sent Jafta an urgent SMS urging him to reply. Jafta responded by SMS that he had done so earlier in the day by means of e-mail and that he had accepted the offer of employment. The outgoing employee then assumed that the e-mail that Jafta had sent from the internet café, which had gone astray, had been captured in the Ezemvelo system and left the organisation without informing them about the SMS sent by Jafta. Wildlife, not having supposedly heard from Jafta, then employed the next suitable candidate. Jafta took Ezemvelo to Court, Pillay J said:

[T]he court finds that as between Jafta, the originator, and Wildlife, the addressee of the SMS, Jafta's SMS was an electronic communication. As such Jafta's acceptance by SMS was not without legal force and effect merely on the grounds that it was in the form of an SMS. [T]he court finds therefore that Jafta did not communicate his e-mail accepting the offer to Wildlife [having found that the e-mail had not been received by the respondent]. Jafta did communicate his acceptance via SMS. An SMS is as effective a mode of communication as an e-mail or a written document. In view of these findings, the court concludes that a contract of employment came into existence.

With the court in the case above confirming the validity of the ECTA, it is clear that the offer communicated by a South African consumer is a recognised process of formation of international electronic agreement.⁵⁶

2.3.2 Acceptance

⁵³ ECTA S11 (1) information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.
(2) Information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message.

⁵⁴ Rautenbach <http://blog.masterbuilders.co.za/2008/11/sms-falls-within-legal-definition-of.html>.

⁵⁵ In the case of *Jafta v Ezemvelo KZN Wildlife*

⁵⁶ ECTA Ss11(1) and Ss11(2).

Acceptance of an offer is an express or tacit declaration of intention in which the offeree signifies his or her consent to the offer. In principle the offeror must be notified of the offeree's decision to accept the offer before it takes effect.⁵⁷ A declaration of intent is a proper acceptance only if the offeree unconditionally consents to the precise terms offered and in their entirety.⁵⁸ An "acceptance" that introduces new terms may possibly be construed as a counter-offer requiring fresh acceptance by the original offeror.⁵⁹ A requirement(s) for acceptance, a statement of intention, qualifies as an acceptance only if it complies with the following requirements:⁶⁰

(a) It must be unconditional

There can be no agreement unless the whole offer is accepted. A conditional or qualified "acceptance" of an offer is not a valid acceptance but might be a counter-offer which the original offeror may then accept or reject.⁶¹

(b) It must be accepted by the person to whom it was made

An offer can be validly accepted only by the intended offeree and by no-one else.⁶²

(c) It must be in response to the offer

This requirement, which is of special significance in the case of offers to the general public, embodies the self-evident proposition that it is impossible for a person to accept an offer of which he or she is unaware.⁶³

(d) It must be in the prescribed manner

Where an offeror makes it clear that he or she will regard an acceptance as valid only if it takes place in a particular manner, acceptance in any other manner will be ineffective.⁶⁴

In the case of Jafta above, the issue was precisely about legality of data message, more than an offer and acceptance. A binding contract is formed once unequivocal

⁵⁷ www.mylexisnexus.co.za.

⁵⁸ <http://www.mylexisnexus.co.za/Index.aspx#> (130 Acceptance).

⁵⁹ <http://www.mylexisnexus.co.za/Index.aspx#> (130 Acceptance).

⁶⁰ Kronik 2011 <http://mbabusinlawi.blogspot.com/2011/01/offer-valid-offer-acceptance.html>.

⁶¹ Legator McKenna Inc v Shea 2009 2 All SA 45 (SCA) par 17.

⁶² Govender v Maitin 2008 6 SA 64 (D) par 12.

⁶³ Bloom v The American Swiss Watch Co 1915 AD 100.

⁶⁴ Pillay v Shaik 2009 2 All SA 435 (SCA) par 53 it was held that, even where acceptance has not taken place in the manner prescribed, the offeror may be held bound if his or her conduct was such as to induce a reasonable belief on the part of the offeree that the offer had been duly accepted.

acceptance⁶⁵ of the offer can be inferred from writing or conduct of the offeree.⁶⁶ As a general rule, a contract is not concluded until the offeree has not only decided in his own mind to accept the offer, but has also communicated his acceptance to the offeror.⁶⁷ In principle an acceptance is complete only when the offeror has been informed of the acceptance by the offeree. It is vital any intended acceptance of an offer takes due cognisance of a required method of acceptance, which the offeror is entitled to insist on compliance with.⁶⁸ In the case of *Laws v Rutherford*,⁶⁹ the respondent gave appellant a three month option to enter into an agreement to cut timber on the respondent's farm. The option expired on the 26th July and it was stipulated that the appellant's acceptance or refusal should be notified by registered letter to the respondent. The appellant did not accept within the specified time and on the 27th July the respondent requested him, the option having expired, to remove certain plants which, with respondent's knowledge, he had erected on the farm. On the 28th July by letter and on the 29th July by telegram the appellant notified his acceptance of the option stating that the matter had been overlooked and that the respondent must have known that the option had been accepted because of the preparations made upon the property to commence work.

On appeal from an order making absolute a rule *nisi* interdicting the appellant from trespassing or cutting timber on the farm, the court held that as the appellant had not notified his acceptance within the time fixed and in the absence of proof that the respondent had waived her right to demand definite written notice as stipulated, the rule had properly been made final. Some of the important elements of acceptance of an offer are the requirements to determine a time and place of acceptance.

⁶⁵ Boerne v Harris 1949 (1) SA 793 (A).

⁶⁶ Buys and Cronje Cyberlaw@sa ii 103.

⁶⁷ Kronik 2011 <http://mbabususinesslawi.blogspot.com/2011/01/offer-valid-offer-acceptance.html>.

⁶⁸ Buys and Cronje Cyberlaw@sa ii 103.

⁶⁹ 1924 AD 261.

The importance of time as to when the transaction was concluded establishes part of cause of action.⁷⁰ When a consumer (buyer) in South Africa clicks the "send" button on an e-mail or website to a UK (seller), when does the contract come into existence? Does this happen at the time of clicking "send" on the computer or at the time it reaches the recipient inbox? According to Buys and Cronje:

The moment of acceptance would generally determine not only the time the contract was entered into, but also if nothing contrary was stated in the terms of contract, the nationality of the laws that would apply to the contract and the jurisdiction that would be the appropriate forum on which any disputes would be adjudicated.⁷¹

Judge Pillay in Jafta case confirmed the provisions in the ECTA:⁷²

In the event of an electronic transaction, agreement of an acceptance is communicated to the offeror data message (could be e-mail or fax) is regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee⁷³ and is capable of being retrieved and processed by the addressee.⁷⁴

However, if the offer was not made electronically, the general principles should apply.⁷⁵ Section 23(b) of ECTA states that contracts concluded by means of a data message will commence at the place and at the time that the acceptance of the offer is received by an offeror.⁷⁶

⁷⁰ A cause of action was defined by Lord ESHER, MR in *Read v Brown* 22 QBD 131 to be "every fact which would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

⁷¹ Buys and Cronje *Cyberlaw@sa* ii 104.

⁷² *Jafta v Ezemvelo KZN Wildlife* (2009) 30 ILJ 131 (LC).

⁷³ *Jafta v Ezemvelo KZN Wildlife* (2009) 30 ILJ 131 (LC).

⁷⁴ ECTA S23. Time and place of communication, dispatch and receipt. - A data message -
(a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are on the same information system, when it is capable of being retrieved by the addressee;
(b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
(c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

⁷⁵ www.mylexisnexis.co.za.

⁷⁶ Buys and Cronje *Cyberlaw@sa* ii 97-98.

Since most electronic transactions are not limited by geographic boundaries, a question arises with regards to the effects of section 5(1)(a) of the CPA on international electronic transaction agreements involving a consumer. In short, the parties involved in electronic transactions must know where such a transaction took place and moreover where it is breached. In the appeal case of *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board and Others*,⁷⁷ the Appellant argued that because the gambling took place at the Appellant's online casino, it did not take place in Gauteng and therefore the Appellant did not need a license under the provincial and national acts. In this matter the judgment of first instance was confirmed where it was found that the gambling took place in Gauteng and the appeal was dismissed. The reasoning for the judgment was that a casino that is not based in South Africa and is not licensed in terms of South African gambling laws, (i.e. the Appellant), may not offer online gambling facilities to patrons located in South Africa.

The issue of technology is making it worse as South Africa acknowledges some principles of freedom of contract as well as *caveat subscriptor rule*. As a rule the person signing a document would be liable in terms of the reliance theory, despite his or her mistake. In *George v Fairmead (Pty) Ltd*,⁷⁸ the court held that:

When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, he assents to whatever words appear above his signature.⁷⁹ Innes CJ accepted that this condition was hard and onerous; but he pointed out that if people signed such conditions they had to be held to them, unless they could show that there was fraud involved.⁸⁰ Therefore individuals should take reasonable steps to ascertain the meaning of the contract before they sign the agreement.

Therefore the signatory is liable, whether or not he or she read the document or knew of its contents,⁸¹ even if unable to read,⁸² or ignorant of the legal meaning of the

⁷⁷ (653/10) [2011] ZASCA 155).

⁷⁸ *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A).

⁷⁹ *Burger v Central South African Railways* 1903 TS 571, 578.

⁸⁰ *Wells v South African Alumenite Co* 1927 AD 69, 73. *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* (498/05) [2006] ZASCA 101 (14 September 2006).

⁸¹ *Goedhals v Massey-Harris & Co* 1939 EDL 314.

⁸² *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 4 SA 105 (E).

document.⁸³ The effect of the *caveat subscriptor* rule is that “a party who has signed a standard form contract will be bound to all terms of that contract, no matter how onerous, unreasonable or unexpected such terms may be.”⁸⁴ The South African law does not have decided case law on the *caveat subscriptor rule* situation equivalent or related to the technology where a consumer accepts the terms and conditions of an online transaction which has private international law elements.

Taking into account the above case law, it will be safe to assume that the example given above it, means that a South African consumer, when electronically transacting and the offer is accepted by a UK seller, based on normal civil procedure rules, the contract will be regarded as having been formed or having occurred in the UK.

2.4 Cause of action and section 5(1)(a) of the CPA

In *Coetzee v SAR&H* it is stated that:⁸⁵

a cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.⁸⁶

The word 'occurring' in section 5(1)(a) of the CPA may well also fit or be described as cause of action or the drafters of the CPA meant cause of action.

In the Magistrates Court Act 32 of 1944 (hereinafter referred to as Magistrate Court Act),⁸⁷ a cause of action which arises wholly within a district is one which consists of an

⁸³ Mathole v Mathole 1951 1 SA 256 (T).

⁸⁴ Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers (498/05) [2006] ZASCA 101 (14 September 2006).

⁸⁵ Coetzee v SAR&H 1933 CPD 570.

⁸⁶ Coetzee v SAR&H 1933 CPD 570.

⁸⁷ **S29 Jurisdiction in respect of causes of action.**—(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act No. 34 of 2005), a court in respect of causes of action, shall have jurisdiction in—

(a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the *Gazette*.

act, or acts, or an omission, or omissions, which have taken place within that district.⁸⁸ In the case of an action based on breach of contract, the conclusion of the contract (offer and acceptance) and the failure to perform⁸⁹ must have occurred within the territorial jurisdiction of the court. In claims based on contractual performance it is also necessary to show that performance was due within the district.⁹⁰ Where the contract sued on is entered into by an agent duly authorised by one of the parties, the circumstances under which, and the place where the mandate was conferred on that agent, are not material facts in the plaintiff's cause of action.⁹¹

The primary cause of action regarding an electronic transaction (sale) agreement is breach of the electronic transaction agreement.⁹² It is a contract case. The plaintiff/consumer must prove three main elements: the existence of a contract,⁹³ actions that constitute breach of the agreement⁹⁴ and that the plaintiff/consumer suffered some form of damage resulting from the breach.⁹⁵ Any investigation of damage

⁸⁸ Dusheiko v Milburn 1964 (4) SA 648 (A) 660D.

⁸⁹ Segal v Lezard 1948 2 SA 1041 (C) 1046.

⁹⁰ Millman v Klein 1986 1 All SA 229 (C) 238.

⁹¹ Licences & General Insurance Co v Bassano 1936 CPD 179 185.

⁹² ECTA S20. **Automated transactions.**—In an automated transaction—

(a) an agreement may be formed where an electronic agent performs an action required by law for agreement formation;

(b) An agreement may be formed where all parties to a transaction or either one of them, use an electronic agent;

(c) a party using an electronic agent to form an agreement is, subject to paragraph (d), presumed to be bound by the terms of that agreement, irrespective of whether that person reviewed the actions of the electronic agent or the terms of the agreement;

(d) A party interacting with an electronic agent to form an agreement is not bound by the terms of the agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation.

(e) no agreement is formed where a natural person interacts directly with the electronic agent of another person and has made a material error during the creation of a data message and—

(i) the electronic agent did not provide that person with an opportunity to prevent or correct the error;

(ii) that person notifies the other person of the error as soon as practicable after that person has learned of it;

(iii) that person takes reasonable steps, including steps that conform to the other person's instructions, to return any performance received, or, if instructed to do so, to destroy that performance; and

(vi) that person has not used or received any material benefit or value from any performance received from the other person.

⁹³ Legator McKenna Inc v Shea 2009 2 All SA 45 (SCA) par 17.

⁹⁴ Government of the Republic of South Africa v York Timbers Ltd (1) [2001] 2 All SA 51 (A).

⁹⁵ Lilford (Appellant) v Black (Respondent) 1943 SR 46.

for breach of contract must logically start with an inquiry into whether the damages were caused by the breach.⁹⁶ These principles call for a two-stage inquiry, firstly into factual causation and then into legal causation.⁹⁷ To establish factual causation it must be shown that the breach was the *causa sine qua non* of the loss.⁹⁸ This quaint Latin phrase is best understood by applying the “but-for” test: Would the plaintiff/consumer have suffered the loss but for the defendant’s/supplier’s breach? As noted by Nugent JA in *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 449 (a delict case), there are conceptual hurdles to be crossed when reasoning along these lines, but they can be crossed by remembering that a plaintiff:

is not required to establish the causal link with certainty, but only to establish that the wrongful conduct [or breach of contract] was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.

If section 5(1)(a) of the CPA can be interpreted in terms of the Magistrates Act, it may not well cover the scenario above because it is the payment and non-delivery of laptops (breach of contract) that took place in South Africa. The cause of action did not wholly arise within the area of jurisdiction of the magistrates’ court.⁹⁹

A South African High Court has jurisdiction over all causes arising within its demarcated territorial area.¹⁰⁰ This jurisdiction is not restricted to matters arising *ex contractu* or *ex delicto*, but to all legal causes of which the *res gestae* occurred in its territory, provided that the defendant was in the Republic and not in a foreign country.¹⁰¹ In each instance the issue to be resolved is whether the particular cause was one of which the court could, according to the principles of the common law, rightly take cognizance.¹⁰² The

⁹⁶ International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A) 700E–701A.

⁹⁷ International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A) 700E–701A.

⁹⁸ International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A) 700E–701A.

⁹⁹ S28(1)(d) of the Magistrates Court Act 32 of 1944.

¹⁰⁰ Supreme Court Act 59 of 1959 s 19(1)(a). This provision differs substantially from Ss28(1)(d) of the Magistrates’ Courts Act 32 of 1944, which requires the cause of action to have arisen wholly in an inferior court’s area of jurisdiction.

¹⁰¹ Cargill Cotton Ginners Ltd v Fletafrica (Pty) Ltd (A5025/2011) [2012] ZAGPJHC 147 (12 June 2012).

¹⁰² Lee Finance v Mhlana 2006 4 All SA 428 (SCA); 2006 6 SA 180 (SCA) par 7.

expression “causes arising” refers not only to causes of action, but to all factors giving rise to jurisdiction under the common law.¹⁰³ Such factors do not exclude a cause of action, and a court which has jurisdiction over the area within which a cause of action arose is competent to decide a matter on that basis alone.¹⁰⁴ It has, more specifically, for example, been held that the court for the area in which a contract was entered into¹⁰⁵ or was to be performed,¹⁰⁶ wholly or in part,¹⁰⁷ and in which a delict occurred shall have jurisdiction to hear the matter .¹⁰⁸

The term "occurring" as it appears on section 5(1)(a) of the CPA, could be equated to the causes of action in the High Court here in South Africa. As mentioned above the High court considers any one of the causes of action as sufficient to give it a jurisdiction over the matter or person.

2.5 *Applicable Law*

According to Ruhl, when looking into national legal systems and international treaties, three basic models of consumer protection can be distinguished: ¹⁰⁹

The first model excludes party choice of law in consumer transactions altogether. The second model limits the parties' choice to certain laws. And the third model curtails the effects of a party choice of law.

Section 5(1)(a) of the CPA and section 47 of ECTA are all about applicable law. A clause in a contract stipulating that a specified system of law¹¹⁰ governs the contract is generally valid and enforceable.¹¹¹ The rule generally accepted in South African law is

¹⁰³ Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 6 SA 205 SCA.

¹⁰⁴ Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 6 SA 205 (SCA) par 10.

¹⁰⁵ Ex parte Naidoo 1930 TPD 792.

¹⁰⁶ Coloured Development Corporation Ltd v Sahabodien 1981 (1) SA 868 (C) 870F.

¹⁰⁷ Buys v Roodt (now Otto) 1999 3 All SA 522 (O); 2000 1 SA 535 (O).

¹⁰⁸ Ramphela v Minister of Police 1979 4 All SA 664 (W).

¹⁰⁹ Ruhl Cornell International LJ 586-587.

¹¹⁰ Smuts 2011 <http://www.golegal.co.za/commercial/electronic-cross-border-contracting-and-%E2%80%9Cproper-law%E2%80%9D>.

¹¹¹ Smuts 2011 <http://www.golegal.co.za/commercial/electronic-cross-border-contracting-and-%E2%80%9Cproper-law%E2%80%9D>.

that a contract must be interpreted according to the *lex loci contractus* or the last legally relevant act.¹¹² The CPA will apply to foreign suppliers and service providers who are engaged in any of the activities not exempted.¹¹³ Specifically, the CPA will apply in respect of all, whether or not the supplier resides or has its principal place of business in South Africa.¹¹⁴

According to Ruhl above, South African can be categorized to the first model which excludes party choice of law. This, therefore, means South African is not an exception or the only country which excludes the choice of law in its national legislation to protect its consumers' rights.

2.6 *Effective of jurisdiction and section 5(1)(a) of the CPA*

When it comes into jurisdiction, the basic common-law principle in respect of money claims (whether from contract, delict or otherwise) is that the plaintiff must sue in the court of the defendant: *actor sequitur forum rei*.¹¹⁵

Where the following principles were reaffirmed:

- (a) In giving a court statutory jurisdiction over a person residing in its area, the legislature has simply followed the common-law rule *actor sequitur forum rei*.
- (b) The question is one of residence, not domicile. A defendant may have his domicile at one place and his residence for the time being at another.
- (c) A person can have more than one residence, in which case he must be sued in the court having jurisdiction at the place where he is residing at the time when summons is served.
- (d) A person cannot be said to reside at a place he is temporarily visiting. Nor does a person cease to reside at a place even though he may be temporarily absent on certain occasions and for short periods.
- (e) It is an impossible task to give a precise or exhaustive definition of the word "resides" apart from setting out the above principles. Whether a person resides at a particular

¹¹² Kergeulen Sealing and Whaling Co Ltd v Commissioner of Inland Revenue (1939 (SA) 487 (A)).

¹¹³ [Http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers\(2\).pdf](http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers(2).pdf) 10-11.

¹¹⁴ [Http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers\(2\).pdf](http://www.lssa.org.za/upload/Consumer%20Protection%20Guide%20for%20Lawyers(2).pdf) 10-11.

¹¹⁵ Mayne v Main 2001 (2) SA 1239 (SCA)

place at any given time depends on all the circumstances of the case seen in the light of the applicable general principles.

(f) Although a person may have more than one residence, for the purpose of section 19(1)(a) a person can reside in only one place at any given moment.

(g) There has to be some good reason for regarding a particular place as the place of ordinary habitation for the respondent at the date of service. When it is said of an individual that he resides at a place, it is obviously meant that it is his home or place of abode, the place where he generally sleeps after the work of the day is done.

(h) Residence is a concept which conveys some sense of stability or something of a settled nature. A presence which is merely fleeting or transient will not satisfy the requirement of residence; some greater degree of permanence is necessary.

(i) A common-sense and realistic approach must be adopted when deciding whether, having regard to all the relevant circumstances, a person can be said to reside at a particular place for the purpose of section 19(1)(a). Modern-day conditions and attitudes and the tendency towards a more itinerant lifestyle, particularly among business people, require this. Not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby to escape legal accountability for their wrongful actions.

It has been held that a domestic corporation can be resident at the place where its registered office is located or where it has its principal place of business. However, the mere physical presence in South Africa of a branch of a company registered in South Africa as an external company does not constitute residence for the purpose of conferring jurisdiction on a South African court in terms of the Supreme Court Act. However, it has been held that establishing a branch office which actively carries on the company's business does constitute residence.

This means that a defendant may be sued in either the court of his residence or domicile.¹¹⁶ The ECTA deals with the jurisdiction of the courts in section 90. However, this provision refers only to the criminal jurisdiction of courts and nowhere in the statute is the civil jurisdiction of courts addressed.¹¹⁷

The CPA section 115 deals with civil jurisdiction, however it is silent on the consumer suing or being sued in his/her place of residence. According to Schulze, for a normal civil procedure route in order to determine civil jurisdiction, several connecting factors need to be identified, such as domicile, residence, creation of the contract, place of a delict and whether there has been submission to a particular court.¹¹⁸ In the absence of any specific legislation regulating civil jurisdiction in e-commerce cases (and especially legislation with a consumer protective character, a South African consumer will be subject to the general principles of jurisdiction when having to decide where to institute

¹¹⁶ Chinatex Oriental Trading Co v Erskine 1998 (4) SA 1087 (C) 1093.

¹¹⁷ Schulze SA Merc LJ 44.

¹¹⁸ Schulze SA Merc LJ 44.

legal action against the supplier.¹¹⁹ According to Schulze, in so far as international electronic commercial transactions are concerned, a local consumer may be forced to pursue his claim against the foreign supplier in a foreign forum.¹²⁰ Schulze states that:¹²¹

In practice, it will be highly unlikely that the terms and conditions of the Internet contract will not include a choice-of-jurisdiction clause, given the fact that especially a foreign supplier who trades internationally attempts to secure the 'home jurisdiction' advantage for himself.¹²²

As a result, the South African consumer will have no choice but to subject himself to the foreign supplier's own forum, a situation which is undesirable and costly.¹²³

The National Consumer Commission¹²⁴ (hereinafter referred to as NCC) has jurisdiction over any economic or commercial transaction that takes place within the borders of South Africa.¹²⁵ The former Consumer Protection Commissioner (Mamodupi Mohlala) was quoted¹²⁶ as saying:

We have jurisdiction over any transaction in the four corners of SA, irrespective of the origin of that particular product. Even if it is a product that comes from outside, if a person is not happy about that particular product, they have the right to refer the matter to us.

In the case of *B v S* 2006 (5) SA 540 (SCA) par 16 the court states that:

The most important bases of the courts have consistently accepted that the doctrine of effectiveness (referring to the power of the court to give an effective judgment) is the basis of jurisdiction.

¹¹⁹ Schulze SA Merc LJ 44.

¹²⁰ Schulze SA Merc LJ 44.

¹²¹ Schulze SA Merc LJ 44.

¹²² Schulze SA Merc LJ 44.

¹²³ Schulze SA Merc LJ 44.

¹²⁴ As defined in S1 of the CPA.

¹²⁵ [Http://mype.co.za/new/okay-south-africa-the-consumer-protection-act-is-now-in-your-hands/3687/2011/04](http://mype.co.za/new/okay-south-africa-the-consumer-protection-act-is-now-in-your-hands/3687/2011/04).

¹²⁶ De rebus The SA attorneys' journal (Featured Articles June 2011).

This doctrine may or should apply the same way in commission, tribunal and any dispute resolution institution. In the case of *Steytler v Fitzgerald*¹²⁷ it was held that in order to ascertain under the common law whether a court was the proper forum for a particular suit, regard had to be paid to the nature of the action. It has, however, been reasoned by Pollak that since the doctrine or principle of effectiveness was the basis of jurisdiction, it was not the nature of the action but the relief claimed that was decisive. There is authority which supports this approach.¹²⁸ In Brodie's case the court stated that:¹²⁹

It is now accepted that whether a court has jurisdiction depends on the nature of the proceedings, or the nature of the relief claimed, or in some cases both.¹³⁰

The crucial time for determining whether a court has jurisdiction is at the commencement of the action.¹³¹ Jurisdiction, once established, continues to exist until the end of the action even though the ground upon which jurisdiction was established ceases to exist.¹³² Section 5(1)(a) of the CPA applies to the three types of jurisdiction which is in line with the Magistrate Court Act:¹³³

- I. Personal jurisdiction is the authority over a person, regardless of their location.
- II. Territorial jurisdiction is the authority confined to a bounded space, including all those present therein, and events which occur there.
- III. Subject Matter jurisdiction is the authority over the subject of the legal questions involved in the case.

This will mean, based on section 5(1)(a) of the CPA, a South African consumer can institute legal action in South Africa against the supplier in the UK.

Where the respondent's principal office is situated outside the country, the NCC still has jurisdiction, provided that the prohibited conduct was committed within the Republic of

¹²⁷ 1911 AD 295 346.

¹²⁸ *Sonia (Pty) Ltd v Wheeler* 1958 2 All SA 38 (A).

¹²⁹ *Cf Makoti v Brodie* 1988 3 All SA 572 (B).

¹³⁰ *Cf Makoti v Brodie* 1988 3 All SA 572 (B).

¹³¹ *Coin Security Group (Pty) Ltd v Smit* 1992 2 All SA 122 (A).

¹³² *McConnell v McConnell* 1981 3 All SA 706 (Z).

¹³³ S26 to 30*bis* Magistrate Act 32 of 1944

South Africa.¹³⁴ This is not clear in the CPA as to how the NCC may establish its jurisdiction, except for the ordinary two pieces of legislation.¹³⁵

As this is consumer contract dispute related, and private law enforcement, the plaintiff/consumer has the inconvenience of suing the defendant at the defendant's residence,¹³⁶ which is reflected in the traditionally accepted maxim '*actor sequitur forum rei*'. South Africa is not a member of the Brussels/Lugano System as it is meant for European countries,¹³⁷ where the consumer (contract) dispute may not follow '*actor sequitur forum rei*'.

In South Africa the only way known to establish court jurisdiction where different legs of causes of action took place in various jurisdictions, is the High Court.¹³⁸ According to section 48 of the ECTA, an agreement attempting to exclude the consumer protection provisions of the ECTA will be null and void.¹³⁹ It is clear from this provision that parties cannot contract out of the ECTA in order to keep the ECTA from being applicable to their agreement.¹⁴⁰ Now, does this mean the clause in a consumer contract choosing British courts to have a jurisdiction will be null and void in South Africa?

The Supreme Court of Appeal (hereinafter referred to as SCA) in *Foize Africa (Pty) Ltd v Foize Beheer BV* [2012] ZASCA 123, in this case a licensing agreement was entered into between Foize Africa (a South African company) and Foize Sales BV (a Dutch company). In terms of the licensing agreement, Foize Africa was entitled to sell and distribute software and hardware for use in the telecommunications industry in certain geographical areas, including South Africa. The licensing agreement contained a foreign jurisdiction clause in terms of which:

¹³⁴ S28(1)(d) Magistrate Court Act 32 of 1944.

¹³⁵ Supreme Court Act 59 of 1959 s 19(1)(a). s 28(1)(d) of the Magistrates Courts Act 32 of 1944.

¹³⁶ Bogdan. The Brussels/Lugano Lis Pendens Rule and the "Italian Torpedo".

¹³⁷ Article 16 Lugano Convention of 2007.

¹³⁸ Supreme Court Act 59 of 1959.

¹³⁹ Erasmus 2011 Consumer protection in international electronic contracts 28.

¹⁴⁰ Erasmus 2011 Consumer protection in international electronic contracts 28.

the agreement was governed and executed according to Dutch Law; the parties irrevocably consented to the jurisdiction of the Courts of Holland for any matter arising out of or in connection with the agreement; and any dispute arising from the agreement would be finally decided by arbitration in accordance with the rules of the International Chamber of Commerce.

A dispute later arose between the parties as to whether the true holder of the marketing, distribution and intellectual property rights belonged to Foize Sales BV, or Algemeen Beheer Nederland BV, since both companies had the same sole director. Algemeen Beheer Nederland BV announced that it intended to market its product through two South African companies. As a result of the dispute, Foize Africa instituted proceedings in the North Gauteng High Court for an interim interdict to compel the respondents to honour the terms of the licensing agreement. The North Gauteng High Court refused the application due to the foreign jurisdiction clause and held that the only courts with jurisdiction were the courts in Holland.

On appeal to the Supreme Court of Appeal (hereinafter referred to as SCA) it was argued by the respondents that Foize Africa had waived its right to seek relief in South Africa and that any dispute would need to be referred to arbitration in Holland. It was further argued that the respondents were peregrine (a person who is neither a resident or domiciled in the jurisdiction of the court) and an interdict against them would be futile.

The SCA accepted that an interdict should not be granted against a peregrine in instances where the act sought to be interdicted takes place outside of South Africa, but held that this case differed: the contract was concluded in South Africa, performance was to take place in South Africa, the threatened breach occurred in South Africa and the contract was to be enforced in South Africa. In these circumstances, the court held that a court in South Africa will be able to enforce an interdict.

It was further held that a foreign jurisdiction or arbitration clause does not exclude the court's jurisdiction and that parties to a contract cannot exclude the jurisdiction of a court by their own agreement.¹⁴¹ When a party wishes to invoke the protection of a

¹⁴¹ Foize Africa (Pty) Ltd v Foize Beheer BV [2012] ZASCA 123.

foreign jurisdiction or arbitration clause, such party must serve and file a special dilatory plea and adduce evidence in support of the enforcement of such clause. Only once this is done, can a court exercise its discretion as to whether or not the exercise of jurisdiction should be stayed pending the outcome of foreign proceedings or arbitration in a foreign jurisdiction. The SCA granted an interim interdict to compel the respondents to honour the terms of the licensing agreement.

As mentioned above, the South African consumer legislation is silent or does not cover the issue of jurisdiction with clear certainty. It is not clear what was in the mind of the drafters in particular when it comes to private international law. The following pieces of legislation, namely *Maintenance Act* 99 of 1998 and *Children's Act* 38 of 2005, are very clear when it comes to the certainty of jurisdiction. Both of these laws are formulated on the basis of the “weaker party” like CPA. For instance section 6(2)¹⁴² states that:

After investigating the complaint, the maintenance officer may institute an enquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained is, resides with a view to enquiring into the provision of maintenance for the person so to be maintained.

The above section spells out with clear certainty that the court has a jurisdiction over the person to be maintained; meaning the person to be maintained will have no stress of *sequitor furum rei*. The second piece of legislation is the *Children's Act* 38 of 2005, which states that:¹⁴³

Court proceedings.—(1) An application in terms of section 22 (4) (b), 23, 24, 26 (1) (b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children's court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.

Also here the plaintiff is not given an option where to sue, the child's residence is a final deciding fact on where to sue. The CPA runs short of the sections like the one mentioned above. There is nothing in CPA or treaties/conventions stating that the South African consumer shall sue and be sued in the court of his residence and not follow the

¹⁴² Maintenance Act 99 of 1998.

¹⁴³ S29(1).

defendant. This has huge implications for private international as well as South African consumers.

2.7 Foreign judgment implementation

In accordance with section 39(1) of the Constitution, a South African court must take note of the international law when interpreting statute. Similarly the international law plays a role in respect of the validity and enforceability of electronic contracts.¹⁴⁴

The ECTA does not provide for civil jurisdiction nor does South Africa have any specific legislation regulating civil jurisdiction in e-commerce cases. In circumstances where one of the parties is based overseas, it is not uncommon for the parties to find themselves embroiled in expensive satellite litigation to determine which country's court has jurisdiction to deal with the dispute.¹⁴⁵ A situation may arise where a South African consumer or seller (e-business) may be in the position to institute litigation in a South African court, but may experience a problem with the enforcement of the civil judgment in a foreign jurisdiction. Compared to the position in respect of international and foreign law, the South African government will have to address jurisdiction relating to e-commerce to ensure legal certainty.¹⁴⁶

The South African legal system recognises foreign judgments from courts and tribunals and recently, in the case of the *Republic of Zimbabwe vs Fick*, developed this section of legal system.¹⁴⁷

Statement by the Constitutional Court of South Africa, on the judgment on the Republic of Zimbabwe vs Fick (27/06/2013).

This morning, the Constitutional Court handed down a judgment dismissing an appeal against a decision of the Supreme Court of Appeal. This matter involved the expropriation

¹⁴⁴ Tft.unctad.org/wp-content/uploads/2014/07/ecom.manM2_.2013.doc.

¹⁴⁵ Richards 25 September 2014 <http://www.footanstey.com/bulletins/2426-jurisdiction-what-happens-where-a-contract-has-a-cross-border-element>.

¹⁴⁶ Watney http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232#_ftn48.

¹⁴⁷ [Http://www.polity.org.za/article/sa-statement-by-the-constitutional-court-of-south-africa-on-the-judgement-on-the-republic-of-zimbabwe-vs-fick-27062013-2013-06-27](http://www.polity.org.za/article/sa-statement-by-the-constitutional-court-of-south-africa-on-the-judgement-on-the-republic-of-zimbabwe-vs-fick-27062013-2013-06-27).

of the respondent farmers' land by the government of Zimbabwe (Zimbabwe) pursuant to its constitutionally-authorised land reform policy. The farmers approached the Southern African Development Community Tribunal (Tribunal) for relief and the Tribunal decided in their favour. Zimbabwe failed to comply with its decision. The farmers again approached the Tribunal for relief. The Tribunal found in their favour and granted a costs order against Zimbabwe. Again Zimbabwe failed to comply.

The farmers approached the North Gauteng High Court, Pretoria (High Court) for the registration and enforcement of the costs order in South Africa. The High Court ordered the registration and execution of the costs order against property of Zimbabwe in South Africa. Zimbabwe applied to the High Court for the rescission of the order, which application was dismissed. Zimbabwe appealed unsuccessfully to the Supreme Court of Appeal. Aggrieved by that outcome, Zimbabwe sought leave to appeal to the Constitutional Court.

In a majority judgment, written by Mogoeng CJ, the Constitutional Court developed the common law on the enforcement of foreign judgments and orders to apply to those of the Tribunal. The majority held that the High Court correctly ordered that the costs order be enforced in South Africa. The Court held that that development was provided for by the SADC legal instruments on the enforcement of the decisions of the Tribunal in the region.

The majority also held that the Constitution enjoins our courts to develop the common law in order to facilitate the enjoyment of the rights provided for in the Bill of Rights such as the right of access to courts, compensation for expropriation and the rule of law, which in terms of the amendment to the Constitution of Zimbabwe would have been denied to the farmers had the costs order of the Tribunal not been enforced. For these reasons the appeal was dismissed with costs.

In a separate judgment, Jafta J would have dismissed the application for leave to appeal on the basis that it is not in the interest of justice to grant leave. He differs with the main judgment on the need to develop the common law since, in his view, the Supreme Court of Appeal had already developed it by extending the application of the rule under which foreign judgments are enforced to orders of international tribunals.

In a separate concurrence, Zondo J holds that on balance he agrees with the majority judgment that leave to appeal should be granted and with the reasons for dismissing the appeal. However, he disagrees with the reasoning that where a litigant has chosen specific grounds for impugning the jurisdiction of a court, it may not in later proceedings attack the jurisdiction of the first court on new or fresh grounds, which he holds is too widely stated in the main judgment.

CHAPTER 3

The UK Consumer Protection Legislation Framework

3.1 *Introduction*

The UK, as member state of the European Union (hereinafter referred to as EU), is bound by the consumer protection directives of the European Union.¹⁴⁸ According to Roa in his article states that:¹⁴⁹

Domestic (UK) laws originated within the ambit of contract and tort but, with the influence of EU law, it is emerging as an independent area of law. In many circumstances, where domestic law is in question, the matter is judicially treated as tort, contract, restitution or even criminal law.¹⁵⁰

3.2 UK Consumer Legislation

Consumer Protection issues are dealt with when complaints are made to the Director-General of Fair Trade. The Office of Fair Trading (hereinafter referred to as OFT) will then investigate, impose an injunction or take the matter to litigation.¹⁵¹ Many of the consumer protection laws e.g. Unfair Contract Act of 1977 (hereinafter referred UCTA), Consumer Protection Act 1987 (hereinafter the CPAUK), Unfair Terms in Consumer Contracts Regulations 1999 (hereinafter the UTCCR), The Contract (Applicable Law) Act 1990 (UKCLA), Distance Selling Regulations 2000 or Unfair Terms in Consumer Contracts Regulations 1999 (15 years ago) are actually UK implementations of EU directives.¹⁵² Satariano states that:¹⁵³

Online sales contracts often have private international law implications in that they raise the question of which law is to govern the contract: is it to be the law chosen by the parties, the law of the country where the seller is based, or the law of the country where the buyer is based?¹⁵⁴

A question of validity of an online contract in the UK was best summarised by the Delaware Court of Chancery recently in *Newell Rubbermaid Inc.*¹⁵⁵

¹⁴⁸ [Http://www.out-law.com/en/articles/2011/november/consumer-rights-directive-to-be-transposed-by-13-december-2013/](http://www.out-law.com/en/articles/2011/november/consumer-rights-directive-to-be-transposed-by-13-december-2013/).

¹⁴⁹ Rao 2013 http://kpcraoindia.blogspot.com/2013_04_01_archive.html para iv

¹⁵⁰ [Http://www.consumer-consumerrights.com/consumer-rights-uk.html](http://www.consumer-consumerrights.com/consumer-rights-uk.html).

¹⁵¹ [Http://www.consumer-consumerrights.com/consumer-law-uk.html](http://www.consumer-consumerrights.com/consumer-law-uk.html)

¹⁵² Kolah May 2014 <http://conversation.cipr.co.uk/2014/05/28/new-distance-selling-regulations-take-effect-13-june-2014/>.

¹⁵³ Satariano <http://www.hg.org/article.asp?id=32160>

¹⁵⁴ Satariano <http://www.hg.org/article.asp?id=32160>.

¹⁵⁵ *Newell Rubbermaid Inc. v. Storm*, No. 9398-VCN (Del. Ch. Mar. 27, 2014)

that clickwrap agreements are valid and enforceable contracts. As defined by the court, a clickwrap agreement is “an online agreement that requires a webpage user to manifest assent to the terms of a contract by clicking an ‘accept’ button in order to proceed.” In this particular case, the clickwrap agreement concerned receipt of employee benefits that were conditioned on compliance with various post-employment restrictions. The case was brought by Newell Rubbermaid, whose subsidiary manufactures and sells infant and juvenile products. Newell sought a temporary restraining order seeking to enjoin a former employee (Defendant) from violating post-employment non-solicitation and confidentiality conditions of restricted stock unit awards that the Defendant was awarded over the course of several years. The defendant accepted the restricted stock unit awards through a third-party website that required her to review and accept the terms of the restricted stock unit awards grant program by clicking the “accept” button. The 2013 grant award program added confidentiality and non-solicitation provisions, which the defendant claimed were not sufficiently conspicuous on the website. The defendant resigned from Newell in early 2014, taking a new position at a direct competitor in the infant and juvenile products market. Newell alleged that the defendant solicited two Newell employees to leave the company. Consequently, Newell sought a restraining order, arguing that it had enforceable non-solicitation and confidentiality agreements with the defendant.

The court granted Newell the restraining order, finding that the defendant was bound by the agreement formed when she clicked the “accept” box next to the phrase “I have read and agree to the terms of the Grant agreement.” The court found that the defendant’s affirmative action evidenced her assent to the agreement with actual notice of the terms. Despite acknowledging the “harsh” result for the defendant, who claimed not to know about the restrictive covenants, the court explained that the defendant found “herself in this position because of her willingness to accept an agreement without reviewing its terms when there should have been no doubt that she was assenting to a valid, enforceable contract.”

The above case will apply to the scenario in this research, meaning the validity of the online consumer transaction agreement will not be questionable. However, the issue will rest on the fairness of the terms and conditions.

3.3 *Definition of consumer*

I. Unfair Contract Terms Act 1977

In the UK there are a number of laws covering consumer protection rights. The same laws define consumer differently, but with the same purpose of protecting. In the Unfair Contract Act of 1977 (hereinafter referred to as UCTA), the judge took into account the

background in the case of *Angoil v Air Transworld* in order to come to its judgment..¹⁵⁶
The analysis of Alsop is that:¹⁵⁷

Angoil was a substantial company, but never involved in the aviation business. Air Transworld had bought and sold aircraft many years before but now was doing nothing. Mr Mosquito claimed that the private jet was being purchased for his own use and therefore not in the course of business. The judge found that the nature of the business carried on by Air Transworld at the time of the contract could only be that of owning and operating an aircraft, because that was its sole function in the past and sole intended function in the future. There was also evidence that it had been negotiating to purchase another aircraft from Dassault. Therefore, Air Transworld did not deal as a consumer. The judge did indicate, incidentally, that a jet could be "of a type ordinarily supplied for private use or consumption", despite the \$27m price tag.

The indications from this and other cases are that it will generally be difficult for a company to show that it is acting as a consumer. The point does not arise in relation to the use of the word "consumer" in legislation originating from Europe, because in that legislation consumers can only be individuals.

II. UTCCR

While on the other hand UTCCR defines consumer regulation 3(1) as

"Consumer" means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession;...

In the *Alfred Overy v Paypal* case,¹⁵⁸ the first question for the court was whether the claimant entered into the Agreement as a consumer. Before turning to the validity of the terms under the UTCCR, the court first considered whether the claimant was eligible to the protection afforded by the UTCCR. In order to fall within the scope of the UTCCR, the claimant would need to have entered into the Agreement as a "consumer" in terms of UTCCR (Regulation 3(1)). The court held that the claimant did not enter into the Agreement as a consumer and, as a result, he was not entitled to the protection afforded by the UTCCR. In coming to this decision, HHJ Hegarty QC referred to the

¹⁵⁶ *Air Transworld Limited v Bombardier Inc* [2012] EWHC 243.

¹⁵⁷ Alsop 2012 www.charlesrussellspeechlys.com.

¹⁵⁸ *Alfred Overy v Paypal (Europe) Ltd* [2012] EWHC 2659 (QB).

claimant having opened the Paypal Account not only for the purpose of receiving payments in connection with the Competition but also so that he could receive payments relating to his photography business. HHJ Hegarty QC commented that this latter purpose for opening the Paypal Account "could not reasonably be regarded as one which was insignificant or negligible."

The above case is illustrate the level of protection afforded to consumers by the UK legislation framework. *The Enterprise Act 2002* states that:¹⁵⁹

For the purpose of UK domestic infringement, a consumer is an individual who receives, or seeks to receive, goods or services from a supplier.¹⁶⁰ The supplier must be acting in the course of business, but does not need to have a place of business in the UK.¹⁶¹ So a consumer must be an individual who is not acting in the course of business, although the definition does extend to individuals who are setting up businesses but have not yet begun to trade.¹⁶²

According to the UK's Enterprise Act 2002, the definition of consumer was deliberately worded to include individuals setting up a business, in order to ensure that operations such as scam homeworking schemes and vanity publishers would be caught by the Part 8 enforcement mechanism.¹⁶³ Except in this limited regard, business consumers are not covered.¹⁶⁴

3.4 *Brief overview of the Treaties and Conventions signed by the UK impacting on consumer protection*

The UK is the signatory to several treaties and conventions that are related to consumer protection:

3.4.1 *Brussels I Regulation and Lugano Convention*

¹⁵⁹ S 210 of Enterprise Act 2002 <http://www.legislation.gov.uk/ukpga/2002/40/section/210>

¹⁶⁰ S 210 of Enterprise Act 2002 <http://www.legislation.gov.uk/ukpga/2002/40/section/210>.

¹⁶¹ S 210 of Enterprise Act 2002 <http://www.legislation.gov.uk/ukpga/2002/40/section/210>.

¹⁶² S 210 of Enterprise Act 2002 <http://www.legislation.gov.uk/ukpga/2002/40/section/210>.

¹⁶³ S 210 of Enterprise Act 2002 <http://www.legislation.gov.uk/ukpga/2002/40/section/210>.

¹⁶⁴ S 210 of Enterprise Act 2002 <http://www.legislation.gov.uk/ukpga/2002/40/section/210>.

The Brussels Convention¹⁶⁵ was amended and it is known as Brussels I Regulation.¹⁶⁶ Brussels I Regulation and Lugano are two separate conventions. Both these conventions are about Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. Lugano is the latest; this Convention was enacted on 30 October 2007 but came into force in January 2010. Both these Conventions permit the consumer to sue or be sued in the country of his domicile, Article 14 and Article 16 respectively are the same in both Conventions.¹⁶⁷

The Brussels I Regulation governs issues of jurisdiction and enforcement of judgments between countries who signed up to the Brussels Convention. According to publications parliament in UK:¹⁶⁸

The Regulation lays down uniform rules to settle conflicts of jurisdiction and facilitate the mutual recognition and enforcement of judgments, court settlements and authentic instruments within the EU in civil and commercial matters.¹⁶⁹ It also includes rules to assist courts in settling jurisdictional matters.

The general rule arising from the Brussels I Regulation is set out in Article 2 of the regulation, which states simply that persons shall be sued in the member state in which they are domiciled.¹⁷⁰ For a business this would be where the company has its principal place of business.¹⁷¹ However, there are a number of exceptions to the above general rule. In these exceptions to the general rule a plaintiff/consumer may have a choice of jurisdiction in which to bring his legal proceedings.

¹⁶⁵ Brussels Convention of 1968.

¹⁶⁶ Regulation (EC) No 44/2001 of 22 December 2000.

¹⁶⁷ Article 14 and Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the State bound by this Convention in which that party is domiciled or in the courts of the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the State bound by this Convention in which the consumer is domiciled.

¹⁶⁸ <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/148/14804.htm>.

¹⁶⁹ <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/148/14804.htm>.

¹⁷⁰ Article 2 General rule of jurisdiction

- 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

- 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

¹⁷¹ Article 2 General rule of jurisdiction.

1. Contract - a person may be sued in the jurisdiction where the contract was to be performed.¹⁷²
2. Tort - a person can be sued in the state where the harmful event occurred as well as his place of domicile.¹⁷³
3. Connected proceedings.¹⁷⁴
4. Consumer contracts - the plaintiff can bring proceedings in his own state or in the state of the Defendant.¹⁷⁵

In *Ms "X" v Banque Privée Edmond de Rothschild*,¹⁷⁶

A Luxembourg bank faced a claim brought by one of its French customers in the French courts. The bank challenged jurisdiction based on a governing law and jurisdiction clause in the following terms (in translation):

"The relationship between the bank and the customer is subject to Luxembourg law. Any disputes between the customer and the bank will be submitted to the exclusive jurisdiction of the courts of Luxembourg. The bank nevertheless reserves the right to bring proceedings in the customer's home or any other court of competent jurisdiction in the absence of an election for the above-stated jurisdiction."

The Supreme Court held that the jurisdiction clause effectively imposed no obligation on the bank, which was not restricted to bringing proceedings in Luxembourg. For this reason, the clause was "*potestative*" vis-à-vis the bank. Under general French law, a clause which operates solely based on the choice of one party may be considered "*potestative*" and in consequence void. While the agreement in question was governed by Luxembourg law, the Supreme Court nevertheless applied the "*potestative*" principle and refused to apply the jurisdiction clause. The Court further held that the clause in question infringed article 23 of the Brussels I Regulation in that it was contrary to the purposes of finality engendered in article 23.

It is noted that a *potestative* is a condition made in a contract, the fulfilment of which is entirely in the control of one of the parties to the contract.

In the current case scenario, there seems to be nothing that could prevent the UK court to rule in the same manner as in this case.

3.4.2 *Rome Convention and Rome I Regulation*

¹⁷² Article 5(1).

¹⁷³ Article 5(3).

¹⁷⁴ Article 5(1).

¹⁷⁵ Article 5(4).

¹⁷⁶ *Ms "X" v Banque Privée Edmond de Rothschild*, No11-26.022 (26 September 2012) A

Article 5 - Certain consumer contracts¹⁷⁷ indirectly do not permit choice of law, in particular those laws that deprive the consumer of protection.¹⁷⁸ In the case of the consumer contract not having a choice of applicable law, the Rome Convention stipulates that the law of the country where the consumer is domiciled will apply.¹⁷⁹ However, the Rome I Regulation¹⁸⁰ states that:¹⁸¹

Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

Now it can be safely concluded that UK consumer protection legislation, when promulgated, take into accounts these conventions and treaties. Conventions and treaties are core in private international law for UK consumers.

3.5 *UK position on applicable law clause*

For the purposes of avoiding repetition, issues related to the formation of the contract, in particular an offer and acceptance will not be discussed as the law of contract is governed by common law most of the time. However, it is important to highlight that the

¹⁷⁷ 1980 Rome Convention on the law applicable to contractual obligations.

¹⁷⁸ Rome Convention Article 5(2). Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and gave his order there, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

¹⁷⁹ Article 5(3). Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

¹⁸⁰ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

¹⁸¹ Rome I regulation 25.

UK law generally recognises electronic communication as binding in law.¹⁸² The research will study those critical areas which are important in private international law, directly affecting consumer protection. In the UK consumers are protected under the UTCCR Regulation 9,¹⁸³ which states that:

These regulations shall apply notwithstanding any contract terms which apply or purport to apply to the law of Non-Member State, if the contract has a close connection with the territory of the Member State.

In the scenario given above the electronic transaction entered into between the South African consumer and the UK seller or supplier, failure of the UK seller to deliver laptops is equal to contravention of the UTCCR regulation 5(5).¹⁸⁴ In *Westminster Building Company Limited and Andrew Beckingham*,¹⁸⁵ which was dealing with adjudication clause.

¹⁸² **The Brussels I Regulation**

Prorogation of jurisdiction

Article 23

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

¹⁸³ These regulations shall apply notwithstanding any contract terms which apply or purport to apply the law of Non-Member State, if the contract has a close connection with the territory of the Member State.

¹⁸⁴ UTCCR schedule 2 regulation 5(5) (1)(o).

¹⁸⁵ *Westminster Building Company Limited v Andrew Beckingham* [2004] Adj.L.R. 02/20.

Mr Beckingham contended that the adjudication clause in the contract was not binding on him since it was unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999. These are applicable to this contract since Mr Beckingham is a consumer that is a *natural person who, in [contracts concluded between a seller or supplier and a consumer] is acting outside his trade, business or profession*. The Regulations provide that if a term is unfair it is not binding on the consumer. The adjudication term would be unfair and hence not binding on Mr Beckingham if:

1. It was not individually negotiated; 2. It is contrary to the requirement of good faith; 3. It causes a significant imbalance in the parties rights and obligations arising under the contract to the detriment of Mr Beckingham as a consumer; and 4. It is unfair taking into account the nature of the goods or services for which the contract was concluded, by referring at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and all the other terms of the contract. For all these reasons, I conclude that the adjudication clause, on the facts of this case, is not unfair and is binding on Mr Beckingham.

Based on the above case law and information, there is no doubt that the UK supplier's failure to deliver is in contravention of the contract and UTCCR 5(1),¹⁸⁶ but now the consumer is outside the jurisdiction of the UK or EU. Unpacking Regulation 9 general, it excludes the choice of law of the non-member state, 'These regulations shall apply notwithstanding any contract terms which apply or purport to apply to the law of Non-Member State....' According to the supplier the applicable law in the electronic transaction agreement entered into is regulation 9.¹⁸⁷ In *Rhodia Ltd. v Neon Laboratories Ltd.*, AIR 2002 Bombay 502), the choice of law was upheld:¹⁸⁸

the Bombay High Court upheld the validity of a contract wherein the parties had expressly agreed that the disputes would be settled under English law in English courts. The court held that, even when the agreement was signed by some of the parties in France, a country to which none of the parties belonged, the parties would be governed by the law which they chose under the agreement.

Another case of *Heifer International Inc v Helge Christiansen Arkitekter*¹⁸⁹ according to the analysis of Saunders:¹⁹⁰

the Court then had to assess Heifer's claim that the arbitration clause should not be given effect because Heifer is a "consumer" and the term is unfair under the terms of the Unfair Terms in Consumer Contracts Regulations 1999 No. 2083. On that point, he concluded that the clause was not inherently unfair. Heifer had chosen to follow the advice of its Danish lawyers over its English lawyers, and whilst the place of performance was England, much of the work was carried out in Denmark. Heifer wanted to retain a Danish Architect and Danish workmen, and Heifer's Danish lawyers actually prepared the agreement. In addition, whilst the Arbitration proceedings would be conducted in Danish, the Court found that it was likely that an interpreter would be made available. There was no suggestion that Heifer was not in the position to be able to pay an interpreter or that the Arbitration Board would not give Heifer a fair hearing. The Court also found that the arbitration agreements were not unfair on any of the defendants. The dispute was therefore found to fall within the exclusive jurisdiction of the Arbitration Court of Copenhagen.

¹⁸⁶ UTCCR
Unfair Terms

5.—(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

¹⁸⁷ UTCCR.

¹⁸⁸ <http://indiankanoon.org/doc/435841/>.

¹⁸⁹ *Heifer International Inc v Helge Christiansen Arkitekter* KS MAA PAR [2008] 2 All ER (Comm) 831.

¹⁹⁰ Saunders 2008 Mondaq business briefing March 6 2008 issue.

The above cases could well support the argument of the supplier in the normal civil procedure. However, Regulation 9 of UTCCR and section 27 of UCTA are in favour of the consumer.¹⁹¹

As a general rule, and in order of priority, the applicable law is: ¹⁹² (i) the law of the country where the damage occurs; (ii) the law of the country where both parties were habitually resident when the damage occurred; (iii) the law of the country with which the case is manifestly more closely connected than the other countries.¹⁹³ It authorises the parties to choose, by mutual agreement, the law that will be applicable to their contract.¹⁹⁴ The roman figure (i) above serves as advantage to South African consumer and is in line with article 17 which states that:¹⁹⁵

The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

The choice of law in the electronic transaction agreement entered into in the UK can also be governed by the UKCLA. Article 5(2) states that:

Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

¹⁹¹ UCTA 27 Choice of law clauses.

(1)Where the law applicable to a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) sections 2 to 7 and 16 to 21 of this Act do not operate as part of the law applicable to the contract.

(2)This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both)—

(a).....; or

(b)in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

¹⁹² UCTA

¹⁹³ UCTA.

¹⁹⁴ UCTA.

¹⁹⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council Of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or,,,

The above article 5(2)¹⁹⁶ and regulation 25¹⁹⁷ both seek to protect the consumer as they do not permit a choice of law which deprives the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence.

In a recent judgment of *Allen v Depuy International Ltd* [2014] EWHC 753 dealing with product liability, the High Court (Stewart J) determined that in personal injury claims by non-EU (herein referred to as Cs), arising out of allegedly defective prosthetic hip implants manufactured by an English company, the applicable law, under the Private International Law (Miscellaneous Provisions) Act 1995 section 11, was that of the country where the C sustained injury. Had English law been applicable, the Consumer Protection Act 1987 would not have in fact benefited the Cs since it did not extend to damage caused outside the United Kingdom or European Economic Area (hereinafter referred to as EEA):

The Facts

D manufactured the implants in England. The Cs represented a cross section of a much larger group of a few hundred overseas residents from a wide variety of countries, who had each been implanted with the devices. All the other claims had been stayed pending the ruling on preliminary issues in the 10 sample claims. The first to fourth Cs (C1-C4) had their implants in New Zealand or Australia, and the remaining Cs (C5-C10) had theirs in South Africa. After experiencing problems with the implants from an adverse reaction to metal debris, the claimants issued proceedings in England, as D's country of domicile, alleging that the devices were defective. It was common ground that the Cs had sustained injury in the country in which they first suffered the alleged symptoms.

The Questions To Be Determined

It fell to be determined whether:

- i. the event giving rise to damage (EGRD), for the purposes of Regulation 864/2007 art.31, was prior to January 11, 2009, by which time all the prostheses had been manufactured, distributed and implanted, or after that date;
- ii. if the EGRD was before January 2009, which law was applicable to the claims;

¹⁹⁶ Contract (applicable law) Act of 1990.

¹⁹⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

- iii. if English law applied to any of the claims, whether the CPAUK applied.

The Conclusions That Were Reached

- i. Where a manufacturer faced a claim of liability for a defective product, the place of the EGRD was that where the product in question was manufactured. The EGRD should therefore be *the date of the manufacture or distribution of the defective prostheses or, if that was incorrect, the date of implantation*. There was no other intervening or proximate cause of the Cs' injuries. Any date other than that of the manufacture/supply (or implantation) would present substantial practical problems. It was undesirable for the EGRD to depend upon an individual's reaction to an implant: that would be contrary to the desirability of legal certainty contained in the recitals to the Regulation (see paras 11, 14-15 of judgment).
- ii. Under the 1995 Act, the general rule was that the applicable law was the law of the country where the individual was when he sustained the injury. There was no reason to displace that rule under s.12 of the Act (comparing the significance of the factors which connect the tort with the country whose law would be applicable under the general rule and those which connect the tort with another country). English law was not, therefore, applicable. The applicable law for C1-C4 was that of New Zealand, and C5-C10 that of South Africa (paras 17, 27, 33).
- iii. Even if English law had been applicable to the claims, the 1987 Act would not apply to them. The Act had no territorial effect beyond the United Kingdom, European Union or European Economic Area. Consumers who suffered damage outside the EEA and who had no connection with it, and defective products whose marketing and supply was outside the EEA, were not within the scope of the Act (para.32).

A landmark High Court ruling has clarified the territorial application of the CPAUK. The court also considered the application of the EU Rome II Regulation and the Private International Law (Miscellaneous Provisions) Act 1995 in product liability cases.¹⁹⁸ The decision confirms that UK manufacturers are not liable under the CPAUK for injuries sustained outside the UK, although a query still exists as to whether it extends to injuries sustained within the European Economic Area.¹⁹⁹

3.6 Jurisdiction on consumer electronic transaction agreement

The jurisdiction clauses can only add to consumers' rights to litigate, not subtract from them, according to section 1(q) of schedule 2 of UTCCR. The UK and EU situation when looking at case laws seems to be a kind of give some certainty to consumers

¹⁹⁸ Deringer <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=18d923a8-e731-4cc4-a562-b080cce7f977>.

¹⁹⁹ Deringer <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=18d923a8-e731-4cc4-a562-b080cce7f977>.

involved in a transaction with whoever they are contracting with. The following cases namely: (C243/08) between Pannon GSM Zrt. and Erzsébet Sustikné Győrfi and case (C 137/08) between VB Pénzügyi Lízing Zrt. and Ferenc Schneider. The European Court of Justice (hereinafter referred to as ECJ), said that:

Courts in the EU must examine and rule on terms in consumer contracts that may be unfair even if no consumer has complained about them. The duty will exist when a company seeks to enforce a consumer contract. Courts must make the checks regardless of whether or not any party in a dispute has asked them to, the Court said. Contracts that companies ask consumers to sign for the provision of goods or services often have clauses in them which determine which court will be used in the case of a dispute. This is often a court close or convenient to the business, and can be one far from the consumer. This could have the effect of denying the consumer justice, the ECJ said.

[A contract term which] obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile ... may make it difficult for him to enter an appearance," said the ECJ ruling. "In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence.

Consumer contracts tend to be written by the business and presented as such for agreement by a consumer, without negotiation on individual clauses. Because of this the European Union created the Unfair Terms in Consumer Contracts Directive, which renders unenforceable any consumer contract clause that was not negotiated and which was unfair.

The ECJ said that, in line with a ruling from it last year, courts had a duty in every case to examine clauses in consumer contracts which specify a court different to the consumer's nearest court as the place where the dispute will be heard. The courts must first assess whether that contract term falls within the EU rules on unfair terms and then assess if it breaks them, the ECJ said.

The national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.

The case involved Ferenc Schneider, who took out a car loan in Hungary from VB Pénzügyi Lízing Zrt. When Schneider failed to fulfil his obligations under the contract the company terminated the loan contract and took a case against him in the court identified in the contract.

Hungary's rules of civil procedure state that the court with jurisdiction in the dispute should have been the one closest to where Schneider lived. So the Hungarian court asked the ECJ if it could rule the jurisdiction term in that contract to be unfair, even if Schneider had not asked it to. The ECJ said that it should, and that the ECJ had the authority not only to tell the court to do that, but to also advise it on the criteria to be used in judging a contract term fair or unfair.

The jurisdiction of the Court of Justice extends to the interpretation of the concept of 'unfair term' used in Article 3(1) of the Directive and in the annex thereto, and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the Directive, bearing in mind that it is for that court to

determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case.

The ruling follows an ECJ judgment from last year in which a woman was told that legal action against her by her mobile phone provider would take place in a court 275 miles away. The ECJ said in that case that courts have not just the right, but also an obligation, to assess the fairness of jurisdiction clauses, and that only if courts do that will consumers be protected.

The EU and UK in the above cases set a standard which any developing country cannot afford to ignore. The consumer protection rights require the courts or tribunals to go an extra mile to probe fairness of the transaction or clauses in the transaction, no matter whether they were brought to the attention of the court or not.

CHAPTER 4

4.1 *Comparison of South Africa and UK consumer legislation*

The ECTA²⁰⁰ and UTCCR,²⁰¹ when defining "consumer", refer to an individual or natural person. The South African National Credit Act (hereinafter referred to as NCA) is one of the laws which define the word consumer.²⁰² NCA does not differentiate between natural person and juristic person.²⁰³ In South Africa ECTA and National Credit Act became secondary legislations to protect the interest of consumers after the CPA came into being. However, in the current case scenario ECTA supplements the CPA as it specializes on electronic communication and transaction.²⁰⁴ According to the CPA, consumer is defined as inclusive of juristic person.²⁰⁵ Effectively the consumer

²⁰⁰ ECTA section 1 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.

²⁰¹ Regulation 3(1).

²⁰² National Credit Act 34 of 2005.

²⁰³ NCA section 1 "consumer", in respect of a credit agreement to which this Act applies, means-
(a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement.

²⁰⁴ Sphere of application
(1) Subject to any contrary provision in this section, this Act applies in respect of any electronic transaction or data message.

²⁰⁵ "Person" includes a juristic person.

protection rights prohibit trading practices that are unfair to consumers.²⁰⁶ There are four different types of practices to consider:²⁰⁷

Practices prohibited in all circumstances; Misleading actions and omissions; Aggressive practices; and General duty not to trade unfairly. For the last three practice types above it is necessary to show that the action of the trader has an effect (or is likely to have an effect) on the actions of the consumer.²⁰⁸ There does not have to be a physical consumer as this is a test looking at how the average consumer is - or is likely to be - affected.²⁰⁹

The UK legislations identify three different types of consumer:²¹⁰

average consumer; targeted consumer; and vulnerable consumer, recognising that different types of consumers may react to a practice in different ways.²¹¹

Part 8²¹² of the Enterprise Act of 2002 can only be used where there is harm caused to a group of consumers.²¹³ A consumer will be someone who is not acting in the course of a business, although it can be an individual who is setting up a business but has not yet begun trading.²¹⁴

The definition of consumer in the consumer legislation of both countries encapsulates an individual and a juristic person. The CPA is very precise on the point of a juristic person being a consumer, and further section 6 of the CPA grants the Minister the freedom to determine the threshold.²¹⁵ The Enterprise Act of 2002 in Part 8 is where the

²⁰⁶ [Http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt](http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt).

²⁰⁷ The Consumer Protection from Unfair Trading Regulations 2008.

²⁰⁸ [Http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt](http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt).

²⁰⁹ [Http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt](http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt).

²¹⁰ The Consumer Protection from Unfair Trading Regulations 2008.

²¹¹ [Http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt](http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt).

²¹² Part 8 of the Enterprise Act of 2002 enables specified enforcers to apply to the courts for an Enforcement Order to stop a business from breaching certain legislation, where the breach harms the collective interests of consumers. Such breaches are known as either 'domestic infringements' or 'community infringements'.

²¹³ Enterprise Act of 2002.

²¹⁴ S210(4)(b) Enterprise Act of 2002.

²¹⁵ CPA Section 6. Threshold Determination

1) On the early effective date as determined in accordance with item 2 of Schedule 2, and subsequently at intervals of not more than five years, the Minister, by notice in the *Gazette*, must determine a monetary threshold applicable to the size of the juristic person for the purposes of section 5(2)(b).

2) The initial threshold determined by the Minister in terms of this section takes effect on the general effective date as determined in accordance with item 2 of Schedule 2, and each

definition of consumer is likely to match or include a juristic person like in South Africa. In South Africa section 5(2)(b) provides a clear guideline as to when a juristic person can be categorised as a consumer.²¹⁶ It is, therefore, not wrong to conclude that there will be no dispute on the description of a consumer in the international electronic transaction agreement entered into between a South African and a UK supplier. It will not matter much if the South African buyer/consumer has met the requirements of the CPA.

The UK is in the process of promulgating new consumer legislation; The Consumer Rights Bill²¹⁷ will change the definition of a consumer:

2 Key definitions

(3) “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.

For now it is not clear how this will change the consumer law in the UK. The modified definition of consumer is still subject to court interpretation as it has not yet been tested as the bill is not enacted. It is clear that the UK court will have to interpret ‘.... are wholly or mainly.....’

Since it has been established that a South African buyer meets the definition of consumer in both countries, the next question or issue is comparison of an applicable law. The South African position is that both the CPA section 5 (1) (a) and section 47 of ECTA,²¹⁸ prohibit contracting out of South African law. A similar position under the UK law, section 1(q) of schedule 2 of UTCCR; and UKCLA article 5, supersedes any

subsequent threshold takes effect six months after the date on which it is published in the *Gazette*.

²¹⁶ S5. UKCLA

2) This Act does not apply to any transaction-

a).....;

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.

²¹⁷ S2(4) Consumer rights Bill 18.06.2014.

²¹⁸ Foreign law S47.

The protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.

arrangement or agreement between the consumer and supplier on the choice of applicable law. The second part of Regulation 9²¹⁹ seems to have similar consequences to section 47 of the ECTA on the application of a foreign law in these countries.²²⁰

4.2 Disclaimer on choice of law clause

It is not something strange to find a disclaimer in the online contract, but this may not stop a transaction between a consumer and the supplier based in different countries. However, this comes with many challenges:²²¹

The disclaimer that includes a choice of law clause faces several difficulties. First of all, such clauses are not recognised in all situations and generally the validity of the clause would be determined not by the law stated in the clause, but according to the law of the country where the affected party is located. It might also be very difficult to show that the visitor to the website not only read but also accepted the choice of law clause.

The above quotation will have similar bearing in the current scenario. A UK supplier could be adamant to say the consumer in South African accepted a disclaimer; therefore, a binding contract was formed. The above quotation is well supported by the two cases, one South African²²² and the second a UK case.²²³ In both cases a choice of law was clear but due to the fact that the affected parties were located in their countries, the judges entertained these matters:²²⁴

First, one should note that it is not strictly necessary that the applicable law is the same as that of the country exercising jurisdiction. Indeed, it is not unusual for the English Commercial Court to have jurisdiction over matters governed by a foreign law. However, it is normal for the parties to choose as the applicable law, that which is the law of the court having jurisdiction (or the law of the state in which arbitration is to be heard). This is obviously because the judges and arbitrators of these courts/arbitrations will be better versed in their "home" law.

²¹⁹ UTCCR.

²²⁰ ECTA S47 foreign law.

The protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.

²²¹ Bygrave and Svantesson Jurisdiction issues and consumer protection in cyberspace (par 3.2.4)

²²² Foize Africa (Pty) Ltd v Foize Beheer BV [2012] ZASCA 123.

²²³ Heifer International Inc v Helge Christiansen Arkitekter KS MAA PAR [2008] 2 All ER (Comm) 831.

²²⁴ Heifer International Inc v Helge Christiansen Arkitekter KS MAA PAR [2008] 2 All ER (Comm) 831.

It should be noted that, while the above is of general applicability to commercial contracts, Rome I does contain a number of provisions restricting the choice of law in consumer contracts and certain other types of contracts.

Under the new EU law, a consumer's local consumer laws will apply where the seller either "pursues his commercial or professional activities" in the customer's country of habitual residence or "by any means, directs such activities to that country". "Directing activities" towards a country could include offering a choice of languages on your website, providing prices in euros or giving delivery costs for other EU states. Directing activities means .

This principle is aimed at online traders, and essentially prevents them from choosing a law to govern their contracts with consumers which would put the latter at a disadvantage. According to this principle, where a trader "directs" his business activities to any country, a consumer contract with a person habitually resident in that country must respect the mandatory consumer rights provisions of that country's law, such that the consumer is not in a worse position than if the law of his own country of residence governed the contract.

According to Ruhl ²²⁵ the second model of consumer protection exists in the European Union. This is unlike in the South African position, it does not exclude choice of law in consumer transactions, but it limits party autonomy to certain laws.²²⁶ According to Article 5(2), sentence 3 of the Rome I-Regulation, parties to a contract of carriage may only choose the law of the passenger's habitual residence, the law of the carrier's habitual residence or central place of administration, the law of the place of departure, or the law of the place of destination.²²⁷

4.3 Exclusive Jurisdiction Clause

The key elements discussed above in an international transaction agreement cannot be separated. According to Juenger:²²⁸

Analytically, these three categories are distinct. For centuries jurists have drawn a line to line to separate choice of law, on the one hand, from jurisdiction and the recognition of

²²⁵ Ruhl Cornell International LJ 586-587.

²²⁶ Ruhl Cornell International LJ 586-587.

²²⁷ Ruhl Cornell International LJ 586-587.

²²⁸ Gawith. Litigation for international online consumer transactions is not cost effective - A case for reform? 202.

foreign judgment on the other. The choice of the applicable law is regarded as a substantive matter, whereas jurisdiction and recognition are considered to be procedural. Functionally, however, the three are intertwined. An attorney will be hesitant to litigate in a forum whose choice of law rule invokes a law that defeats his client's claim and he ought to advise against suing in a court whose judgment cannot be enforced in the forum and will not be recognised elsewhere.

As mentioned above, South African consumer legislation is silent on the issue of civil jurisdiction.²²⁹ Although South Africa is a member of UN, the UN Guidelines for Consumer Protection (as expanded in 1999) are not sufficiently clear that a consumer has a right to sue in the court where he is domiciled.²³⁰ In the current scenario the case of *Lokman Emrek v Vlado Sabranovic C-218/12*²³¹ may best suit the South African consumer.²³² Its summary is as follows:

The preliminary question arose in the context of proceedings between Mr Emrek, a consumer, and Mr. Sabranovic, a French trader selling second-hand motor vehicles. On his website, Mr Sabranovic had mentioned both a French telephone number and a German mobile phone number, including the respective international codes.

While Mr Emrek had not learned about Mr Sabranovic's motor vehicle business from the website but, instead, through acquaintances, he claimed that the commercial activities concerned were, through the website, also directed at German consumers. Therefore, he considered Article 15(1)(c) of the Brussels Regulation to apply. Mr Emrek also argued that Article 15(1)(c) does not require the establishment of a causal link between the means used to direct the activity to the EU Member State in which the consumer is domiciled, in this case the Internet site, and the conclusion of the contract with the consumer.

The German court decided to stay the proceedings and question the ECJ on whether, for Article 15(1)(c) of the Brussels Regulation to apply, it is sufficient that a foreign trader clearly directs its activities to another EU Member State or, instead, whether there is an unwritten condition requiring a causal link between the offer and the contract.

The ECJ started by pointing out that the actual wording of Article 15(1)(c) of the Brussels Regulation does not expressly require a causal link.

It continued its analysis by claiming that such a causal link would be contrary to the aim of the Regulation, which is to protect the weaker party to a cross-border sales contract (*i.e.*, the consumer). Moreover, it could be extremely difficult to prove such a causal link.

²²⁹ ECTA section 90 Jurisdiction of the Court.

A court in the Republic trying an offence in terms of this Act has jurisdiction where –

²³⁰ E. Measures enabling consumers to obtain redress

32. Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organisations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers.

²³¹ www.mondaq.com.

²³² *Lokman Emrek v. Vlado Sabranovic C-218/12*.

This uncertainty could dissuade consumers from bringing actions before the national courts of their domicile. Therefore, the ECJ found that there is no unwritten condition requiring a causal link.

However, the ECJ added that, should a causal link exist, this would be strong evidence of the fact that the activity of the trader was directed to the EU Member State in which the consumer is domiciled.

As mentioned above, there is nothing in South Africa allowing the consumer to sue in his court of domicile but for UK the Brussels Regulation permits this.²³³ This could be the way to go for South Africa irrespective of the fact that the Brussels Regulation is an EU treaty of convention.²³⁴

For Article 15(1)(c) to be applicable, there would need to be evidence prior to a contract being concluded that the trader envisaged doing business with consumers from one or more Member States, including that in which the consumer resides. The Court makes clear that such evidence does not include mention on a website of the trader's e-mail address, geographical address or telephone number (some of this information being mandatory in the case of services offered on-line following the adoption of the E Commerce Directive) but goes on to set out a number of non-exhaustive factors which are capable, possibly in combination, of demonstrating the existence of an activity "directed to" the Member State where the consumer lives.

The UK in this issue of jurisdiction relies heavily on conventions and treaties. According to Office of Fair Trading: ²³⁵

The terms dealing with exclusive jurisdiction are likely to be considered unfair if they prevent consumers from instituting legal proceedings in their local courts, for example by requiring exclusive jurisdiction of, say, the courts in England and Wales despite the contract being used in another part of the UK having its own laws and courts.²³⁶

²³³ Article 15 Section 4 is decisive for jurisdiction in matters relating to agreements with consumers - 1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a).....

(b).....

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

²³⁴ [Http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=83437](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=83437).

²³⁵ Office of Fair Trading (IT consumer contracts made at a distance) December 2005.

²³⁶ Office of Fair Trading (IT consumer contracts made at a distance) December 2005.

It is noted that UK laws on consumer protection are not too rigid when it comes to applicable law in the contract. The UK allows a space to look at where the contract is most closely connected. This is not permissible in South Africa. The UK is not open for negotiation on the issue of jurisdiction on consumer matters; a consumer can be sued or sued in the court of his residence. The South African legislation is silent on this, which creates the possibility of exposing or rendering the protection of the consumer vulnerable, in particular on the international arena or transactions.

CHAPTER 5

Conclusion

A promulgation of CPA in South Africa, which was done in line with the United Nations consumer rights protection, marked the end of unfair practices of the past apartheid regime. The CPA as well as ECTA closed an option of foreign law in a transactions, in particular section 5(1)(a) of CPA. The protection offered by section 5(1)(a) of the CPA to consumers is not absolute when it comes to international electronic transactions. The word “occur” in section 5(1)(a) of the CPA needs a relevant and proper interpretation as it is key in private international law problems. The meaning of the word “occurs” in a formation of the electronic transaction contract cannot be interpreted ignoring the impact of ECTA as whole. The consumer rights protection problems fall within the civil law, meaning if there is a conflict (of laws) between business; supplier or manufacturer and consumer and litigation becomes inevitable, civil procedure will be the correct procedure to follow.

In any international electronic transaction the possibilities of conflict of laws is very high. Therefore the following aspects should be dealt with: firstly, the jurisdiction of the court and its competence to hear and decide a case; secondly, the laws governing the relationship between the parties as well as the rules applicable for deciding a case; and thirdly, the recognition and enforcement of a judgment rendered by a foreign court. This is done by studying South African and UK law on consumer protection. After

establishing the South African and UK positions, then compare them. UK law selection is strategic in that the UK is the developed country and its previous relationship with South Africa. The comparison of consumer protection rights measures the level of protection afforded by each country.

The normal elements of contract formation, such as offer and acceptance, are not limited to traditional ways of contracting. It is noted that the availability of the website in a particular country has a great impact in the formation of the contract. The case of *Casino Enterprises (Pty) Ltd (Swaziland)* is a clear example that an offer made on the internet in South Africa constituted a perfect acceptance of an offer. In short, a gambling transaction had legal implications, which attracted the court's attention.

The case above clarifies where the cause of action took place, this could also assist in determining the issue of jurisdiction. The case of *Jafta*, although it is a labour matter, clarified the legal consequences of acceptance and the legal effect of text message in the (offer and acceptance) formation of a contract. These two cases established a clear framework on an online transaction in South Africa.

The primary consumer protection rights legislation (CPA) in particular section 5(1)(a), as well as section 47 of ECTA, are both very clear on the applicable legislation when a foreign person transacts with a South African in South Africa. The CPA is also binding to the non-South African as long as they are transacting within the borders of South Africa.

The section 47 of ECTA has a similar impact to section 5(1)(a) of the CPA. By virtue that a transaction took place in South Africa, a consumer may invoke a protection both in terms of the ECTA and CPA. The CPA makes it inevitable for the consumer to have alternative applicable law, but the consumer can be sued or sue according to the normal civil procedure route.

The CPA and ECTA gives certainty to South African consumers, in that it will be South African national laws that will be followed (applied), even when transacting with foreign country in South Africa. This then is correct that section deals with applicable law in South African consumer legislation framework is the victory in consumer protection. The CPA and ECTA do not provide for the option of anyone contracting under the auspices of these laws to be at liberty to exclude them, in particular when it involves consumer rights protection. However, the protection afforded in these laws has not been tried and tested to withstand private international law tests to adequate consumer protection in South Africa. This eliminates the debate or application of the general rules of private international law when it comes to the application of consumer protection legislation where the South African consumer is involved in a transaction that took place in South Africa. Applicable law, however, is not complete without jurisdiction and enforcement of judgment elements.

A South African court has discretion to entertain a matter where its jurisdiction by agreement but a person or a performance will take place in that particular jurisdictional area. The element of jurisdiction has a great impact on the person who is presumed to be in a weaker position. This means that all legislation dealing with a person who is presumed to be the weaker party, must attempt by all means to be precise when protecting the rights of such a person. The CPA is silent about jurisdiction; it is only the ECTA that speaks about jurisdiction, even though it only relates to criminal cases and not civil cases. This is not sufficient to protect consumers who are regarded as the weaker party to a transaction according to the CPA. It is not clear what was in the minds of the drafters when it came to jurisdiction in the CPA, unlike the Maintenance Act and Children's Act, which are very clear when it comes to the protection of the weaker party in a legal action.

South African consumer legislation as it stands it is not clear as to why a consumer is not following *sequitor furum rei* like all other civil matters. There is nothing in the CPA or ECTA which says the consumer can sue or be sued in his court of residence. The issue of jurisdiction can be intertwined with the United Nations Guidelines on Consumer

Protection which provides for access to effective redress for consumers as economic citizens. The same provision is covered in the CPA. The effective redress for consumers shall not be limited to the protection of the local consumer; it must also have an element of international protection of consumers' rights. Most of the time consumers' rights to redress local is not too much of an issue, therefore, legislation drafters were not supposed to be ashamed of locking civil jurisdiction to South African to CPA.

The treaties and conventions in the UK played a major role in shaping consumer protection legislation. ECJ passed judgments which are very persuasive in the developing countries. The presence of the ECJ is an advantage to all countries which fall under the EU.

The comparison of UK and South African consumer protection legislation showed that the South African definition of a consumer is inclusive of business while in the UK it was more of an individual person. The applicable law clauses have challenges that are not always recognised, EU consumer protection states that a supplier should respect the mandatory consumer protection laws of the country where the consumer resides. This is different with South African consumer protection laws. CPA section 5(1)(a) and ECTA prohibit foreign law application.

The absence of civil jurisdiction and its limitation in the CPA do not protect South African consumers in the world market, as it may force the South African consumer to sue the defendant in the country of his residence since such rights are not entrenched in the CPA or anywhere in South African legislation. In a *vis versus* position any foreign supplier who has read the CPA may draft a contract with a South African consumer choosing his foreign jurisdiction and there is nothing in the CPA which prohibits a supplier from selecting his court in the country of his residence to have jurisdiction over the matter.

The failure to entrench civil jurisdiction into the CPA has a great impact and exposes the South African consumer to outside border litigation, which has serious financial implications for consumers.

The whole intention of the CPA is to protect the rights of the South African consumers. Should the drafters take the economics of the country as a risk to international business, it is very common to any legislation to have exceptions to the general rule. This is seen on the application of the CPA - there are some exceptions as well as some thresholds which are determined by the Minister from time to time. A proper and perfect example of legislation relating to the protection of the weaker party, such as the Maintenance Act and Children's Act, is the required kind of protection to be entrenched in the CPA.

The CPA should spell out clearly that the consumer can be sued or sue in the court of his residence. This will at least not be the subject of court interpretation when it comes to international transactions involving consumers.

It is noted that UK laws on consumer protection are not too rigid when it comes to applicable law in the contract. The UK allows space to look at where the contract is mostly closely connected. This is not permissible in South Africa. The UK is not open for negotiation on the issue of jurisdiction on consumer matters; a consumer can be sued or sue in the court of his residence. South African legislation is silent on this, which has the potential of exposing the consumer to inadequate protection, particularly in the arena of international transactions.

CHAPTER 5

Conclusion

The promulgation of the CPA in South Africa, which was done in line with the United Nations consumer rights protection, marked the end of unfair practices of the past

apartheid regime. Section 5(1)(a) of the CPA as well as the relevant sections of the ECTA closed the option of the application of foreign law in a transaction. The protection offered by section 5(1)(a) of the CPA to the consumer is not absolute when it comes to international electronic transactions. The word “occur” in section 5(1)(a) of the CPA needs a relevant and proper interpretation as it is key in private international law problems. The meaning of the word “occur” in the formation of the electronic transaction contract cannot be interpreted without ignoring the impact of ECTA as a whole. The consumer rights protection challenges fall within the civil law, the implication of which is that if there is a conflict (of laws) between a business, supplier or manufacturer and a consumer and litigation becomes inevitable, civil procedure will be the correct procedure to follow. In any international electronic transaction the possibility of conflict of laws is very high, therefore, the following aspects should be dealt with: firstly, the jurisdiction of the court and its competence to hear and decide a case; secondly, the laws governing the relationship between the parties as well as the rules applicable for deciding a case; and thirdly, the recognition and enforcement of a judgment rendered by a foreign court. This will be achieved by studying and comparing the South African law and UK law positions on consumer protection. The rationale for using UK law as a basis for comparison is the inherent similarities and historic ties of the two systems (the UK legal system and the South African legal system). The comparison of consumer protection rights, measures the level of protection afforded by each country.

It is clear that South Africa is not an exception in Electronic Commerce as it promulgated the ECTA which also covers issues like Consumer rights focused on legislation and policies. This assists in the facilitation of commercial activity through the use online businesses and Internet-based consumer activity.

The normal elements of contract formation, such as offer and acceptance, are not limited to traditional ways of contracting. It is noted that the availability of the website in a particular country has a great impact on the formation of the contract. The case of *Casino Enterprises (Pty) Ltd (Swaziland)* set a good example about an offer made on the internet in South Africa as the judge found that the gambling took place in South

Africa without a proper gambling license. In short, a gambling transaction conducted via the internet had legal implications which attracted the court's attention. The same case clarifies one of the important elements of contracts of this nature, namely where the cause of action took place for the purposes of jurisdiction. The case of Jafta, although a labour matter, clarified the legal consequences of acceptance and the legal effect of text message in the (offer and acceptance) formation of a contract. These two cases established a clear framework for online transactions in South Africa.

The primary consumer protection rights legislation (CPA), in particular section 5(1)(a) as well as section 47 of ECTA, are both very clear on the applicable legislation when a foreign person transacts with a South African citizen in South Africa. The CPA is also binding to the non-South African as long as there is transacting within the borders of South Africa. Section 47 of ECTA has a similar impact to section 5(1)(a) of the CPA. By virtue of the fact that a transaction took place in South Africa, a consumer may invoke the protection of both the ECTA and the CPA. The CPA makes it inevitable for the consumer to have alternative applicable law besides the CPA but the consumer can be sued or sue according to the normal civil procedure route.

Applicable law as covered in CPA and ECTA gives an advantage to consumers worldwide in that it will be South African national laws that will be applicable, even in a foreign country. It is correct that applicable law in South African consumer legislation is the victory in consumer protection. The CPA and ECTA do not provide for the option of anyone contracting under the auspices of these laws being excluded, in particular when it involves consumer rights protection. However, the protection afforded in these laws are not yet tried and tested to withstand private international law tests to adequate consumer protection in South Africa. This eliminates the debate or application of the general rules of private international law when it comes to the application of consumer protection legislation where the South African consumer is involved in a transaction that took place in South Africa. Applicable law, however, is not complete without jurisdiction and enforcement of judgment elements.

A South African court has discretion to entertain a matter where it has jurisdiction by agreement, but a person or a performance will take place in that particular jurisdictional area. The element of jurisdiction has a great impact on the person who is presumed to be in a weaker position. This means that all legislation dealing with a person who is presumed to be the weaker party must attempt by all means to be precise when protecting the rights of such a person. The CPA is silent about jurisdiction; it is only the ECTA that speaks about jurisdiction, even though it only relates to criminal cases and not civil cases. This is not sufficient to protect consumers who are regarded as the weaker party to a transaction according to the CPA. The intention of the drafters of the CPA is not clear when it comes to jurisdiction, unlike the Maintenance Act and Children's Act, which are very clear when it comes to the protection of the weaker party in a legal action.

South African consumer legislation as it stands is not clear as to why a consumer does not follow *sequitor furum rei* like in all other civil matters. There is nothing in the CPA or ECTA which says the consumer can sue or be sued in a court in his country of residence. The issue of jurisdiction can be intertwined with the UN Guidelines on Consumer Protection, which states that access should be provided to effective redress for consumers as economic citizens. The above provision is also covered in the CPA. The effective redress for consumers will not be limited to the protection of the local consumer transaction only; it must have also an element of international protection of consumers' rights. Most of the time consumers' rights to redress in South Africa are not too much of an issue, therefore, legislation drafters were not supposed to be ashamed of entrenching civil jurisdiction into the South African CPA.

The treaties and conventions in the UK played a major role in shaping the South African consumer protection legislative framework. The ECJ passed judgments which are very persuasive in the developing countries. The presence of the ECJ is an advantage to all countries under the jurisdiction of the EU.

A comparative analysis of the UK and South African consumer protection legislation showed that the South African definition of consumer is inclusive of business, while the UK referred more to an individual person. South Africa got it right in respect of the definition of consumer and the UK is also in the process of including businesses in their definition the applicable law clauses have challenges that are not always recognised. EU consumer protection states that a supplier should respect the mandatory consumer protection laws of the country where the consumer resides. This is different with South African consumer protection laws (CPA section 5(1)(a) and ECTA), since the application of foreign laws is prohibited.

The absence of civil jurisdiction and its limitation in the CPA does not protect South African consumers in the world market as it may force South African consumer to sue the defendant in the country of his residence, since such right is not entrenched in the CPA or anywhere in South African legislation. In a *vis versus* position any foreign supplier who has read the CPA, may draft a contract with a South African consumer choosing his foreign jurisdiction and there is nothing in the CPA which prohibits a supplier from selecting the laws of his country of residence to have application in a transaction.

The failure to entrench civil jurisdiction in the CPA has a great impact and exposes the South African consumer to outside border litigation, which has serious financial implications for consumers. The intention of the CPA is to protect the rights of the South African consumers. It is possible that the drafters thought that it may result in the international community being reluctant to do business with South African consumers and that it would have bad economic consequences for the country. This view could be correct but, it is very common for any legislation to have exceptions to the general rule. A proper and perfect example of legislation relating to the protection of the weaker party is the Maintenance Act and the Children's Act. This kind of protection should be entrenched in the CPA.

The CPA should spell out clearly that the consumer can be sued or sue in a court in the country of his residence. This will at least prevent the issue from becoming the subject of court interpretation when it comes to international transactions involving consumers.

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