

# Limitations on party autonomy in the context of cross-border consumer contracts: The South African position\*

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## 1 Introduction

Freedom of contract is a central tenet of South African law. In the field of private international law this principle finds expression in the doctrine of party autonomy. Party autonomy enables the parties to a contract to choose the legal system that will apply to their contract. The doctrine promotes legal certainty and predictability, an important aim of private international law. However, the doctrine presupposes that the parties are in a position to exercise an effective choice – implying an equal bargaining position as well as access to the information necessary to make an informed choice.

In the case of the consumer, and particularly the consumer participating in a cross-border contract, it is precisely this lack of equality in bargaining position as well as the absence of access to the necessary information regarding consumer protection in different countries that necessitates the limitation of party autonomy. Consumers may not be provided with an opportunity to choose, or if given an opportunity, they may not be able to make an informed choice. Mandatory rules are one of the methods employed by states to limit party autonomy. It is this method that will form the focus of the article.

This article will briefly contextualise when a consumer contract will fall within the ambit of private international law – *ie* when such a contract will amount to a cross-border contract. Following this contextualisation, the article will explain the doctrine of party autonomy as recognised in the field of private international law, and consider the *rationale* behind recognising the doctrine as well as the need for its limitation. Next the article will study the current South African approach to party autonomy and its implications for consumer protection. The discussion of the South African position will focus on the Electronic Communications and Transactions Act,<sup>1</sup> the Consumer Protection Act,<sup>2</sup> and the National Credit Act,<sup>3</sup> evaluating whether the protections provided by the aforementioned acts qualify as mandatory rules that will be applicable to cross-border consumer contracts whenever South Africa is the forum, regardless of the legal system the parties chose to apply to their contract. The application of mandatory rules of third countries falls outside of the scope of this article.

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<sup>1</sup> 25 of 2002.

<sup>2</sup> 68 of 2008.

<sup>3</sup> 34 of 2005.

## 2 Cross-border consumer contracts

A cross-border or international contract can be defined as one involving two or more countries or one that involves a foreign element.<sup>4</sup> In other words, the contract “straddles national (or jurisdictional) boundaries”.<sup>5</sup> In the context of the sale of goods, Basedow explains that a contract has an element of “internationality”, amongst other examples, in instances that involve “a cross-border carriage of the goods; the issue of offer and acceptance in different states; or the delivery of goods in a state other than the one of offer and acceptance”.<sup>6</sup> Any given contract is regulated by the law of a particular country. However, in cross-border contracts more than one legal system may claim applicability. Hence the need for private-international-law rules to resolve the conflict. In consumer contracts, the potentially applicable legal systems may for instance be that of the supplier and that of the consumer.<sup>7</sup>

Attempting to delineate consumer transaction or consumer contract is difficult, as a universally accepted definition of “consumer” is not available.<sup>8</sup> Various instruments, both foreign and domestic, contain their own definitions. The party with whom a consumer transacts is commonly referred to as the supplier<sup>9</sup> or the professional<sup>10</sup> and most definitions emphasise that such a person is acting within his trade or profession or “within the ordinary course of business”.<sup>11</sup> Naudé explains that the test for determining which activities fall within the supplier’s ordinary course of business is not the frequency with which it occurs, but rather whether an ordinary businessman would engage in such an activity in the circumstances.<sup>12</sup> The definitions of consumer on the other hand usually refer either to a person acting outside his trade or profession,<sup>13</sup> or who is the “end user of the goods or services”<sup>14</sup> concerned. It is generally assumed that the relationship between consumer and supplier involves inequality, and therefore requires specific regulation.<sup>15</sup> Certain definitions such as that contained in the electronic communications act,<sup>16</sup> and those

<sup>4</sup> Edwards “Conflict of laws” in II 2 *LAWSA* par 328.

<sup>5</sup> Twigg-Flesner “A cross-border only regulation for consumer transaction in the EU: a fresh approach to EU consumer law” 2012 *Springer Briefs in Business* 9, DOI 10.1007/978-1-4614-2047-7\_1 3.

<sup>6</sup> Basedow “An EU law for cross-border sales only – its meaning and implications in open markets” in Bonell *et al* (eds) *Liber Amicorum Ole Lando* (2012) 24 29.

<sup>7</sup> Twigg-Flesner (n 5) 4.

<sup>8</sup> See Hill *Cross-Border Consumer Contracts* (2008) par 1.04 and Tang *Electronic Consumer Contracts in the Conflict of Laws* (2009) 21.

<sup>9</sup> S 1 of the consumer act provides the following definition: “‘consumer’, in respect of any particular goods or services, means – (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3); (c) if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).”

<sup>10</sup> a 6(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter Rome I).

<sup>11</sup> See n 9 above for the definition of “consumer” in s 1 of the consumer act.

<sup>12</sup> Naudé “The consumer’s right to safe, good quality goods and the implied warranty of quality under sections 55 and 56 of the Consumer Protection Act 68 of 2008” 2011 *SA Merc LJ* 336 337 .

<sup>13</sup> See a 6(1) of Rome I.

<sup>14</sup> S 1 of the electronic communications act defines “consumer” as “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”.

<sup>15</sup> Hill (n 8) par 1.05.

<sup>16</sup> See n 14 above for the definition of “consumer” in s 1 of the electronic communications act.

contained in various international instruments,<sup>17</sup> define a consumer as a natural person or individual rather than a legal person.<sup>18</sup> The consumer act does not contain any such limitation.<sup>19</sup> Accordingly, juristic persons are included in the consumer act's definition of consumer. However, the application of the consumer act is limited by section 5(2)(b)<sup>20</sup> in terms whereof transactions with juristic persons with an asset value or annual turnover that equals or exceeds the threshold determined by the minister in terms of section 6, is excluded. Defining the concept of consumer will not be attempted in any further detail. However, it is interesting to note that the wider definition contained in the consumer act may have implications for the assumption of inequality in bargaining position that often forms the basis of discussions on consumer protection.

### 3 *The rationale behind the recognition of party autonomy*

Party autonomy is considered as “one of the most important principles in modern private international law”<sup>21</sup> and “almost universally acknowledged”.<sup>22</sup> As stated in the introduction, it allows parties the freedom to determine which legal system will apply to their transaction.<sup>23</sup> The parties' choice usually takes the form of an explicit choice-of-law clause. However, a tacit choice is also recognised.<sup>24</sup> The parties' ability to choose the forum that will adjudicate their dispute also falls within the ambit of party autonomy.<sup>25</sup> Although jurisdiction and choice-of-forum clauses will undoubtedly influence the effectiveness of the protection awarded to a consumer, they are not included within the scope of the current article.

In private international law party autonomy is often considered to be the starting point for determining the law applicable to a contractual relationship. Only in the absence of party choice will connecting factors be utilised to determine the *lex*

<sup>17</sup> See a 2 of Directive 2011/83/EU of the European Parliament and of the Council of 25-10-2011 on consumer rights; and a 6(1) of Rome I.

<sup>18</sup> Hill (n 8) par 10.7.

<sup>19</sup> s 1 of the consumer act.

<sup>20</sup> S 5(2) of the consumer act determines: “This Act does not apply to any transaction – ... (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.”

<sup>21</sup> Tang (n 8) 8. Cf Verhagen “The tension between party autonomy and European Union law: some observations on *Ingmar GB Ltd v Eaton Leonard Technologies Inc*” 2002 *International and Comparative Law Quarterly* 51 135 143.

<sup>22</sup> Tang (n 8) 8; Forsyth *Private International Law* (2012) 320; Symeonides “Party autonomy in Rome I and II from a comparative perspective” in Boele-Woelki *et al* (eds) *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (2010) 513-550.

<sup>23</sup> Schäfer *Application of Mandatory Rules in the Private International Law of Contracts A Critical Analysis of Approaches in Selected Continental and Common Law Jurisdictions, with a View to the Development of South African Law* (2010) 26.

<sup>24</sup> Forsyth (n 22) 316; Van Niekerk “Choice of foreign law in a South African marine insurance policy: an unjustified limitation of party autonomy?” 2011 *TSAR* 159 166; Zhang “Party autonomy and beyond: an international perspective of contractual choice of law” 2006 *Emory International Law Review* 511.

<sup>25</sup> Zhang (n 24) 528; Brand “The Rome I regulation rules on party autonomy for choice of law: a UA perspective” *Legal Studies Research Paper Series Working Paper No 2011 (29-12-2011)*; Tang (n 8) 8.

*causae*<sup>26</sup> or “proper law of the contract”.<sup>27</sup> The doctrine is generally supported because it promotes legal certainty and predictability.<sup>28</sup> The resultant legal certainty is desirable because it lessens the costs and effort that would normally be incurred in order to determine the applicable law in the absence of choice.<sup>29</sup> Verhagen argues that the parties to the contract are in a better position to determine the “law most suitable to govern their contractual relationship” than the conflict rules of private international law.<sup>30</sup> Accordingly, when determining the “proper law of the contract” party autonomy is regarded as the rule and any restrictions are seen as exceptions.<sup>31</sup>

From a consumer perspective the advantages attributed to the recognition of party autonomy are twofold. Firstly, the certainty engendered by its recognition translates into cost reductions for the consumer. It simplifies the position of the supplier and reduces the effort and expense associated with determining the legal position in a multitude of countries. Theoretically, this reduction in costs is passed on to the consumer by a decrease in price. Secondly, because certainty fosters an atmosphere of trust amongst suppliers, it leads to the availability of a wider range of products and services.<sup>32</sup> Arguably, the increased supply, and resulting competition in the market, benefits the consumer by further reductions in costs.<sup>33</sup> In theory, the recognition of party autonomy should also enable consumers to select a legal system that provides them with better protection than that which would apply in the absence of choice.

#### 4 *The reasons for limiting party autonomy*

Despite its widespread acceptance, party autonomy is rarely unlimited, especially in the field of consumer contracts.<sup>34</sup> The principal justification for the limitation of the doctrine is the relatively weaker bargaining position of the consumer. Consumers act outside of their profession or trade. They are not legal experts, nor do they generally have the funds necessary to access the same level of legal advice available to suppliers. Therefore they do not have at their disposal the same knowledge and information as the supplier.<sup>35</sup> Accordingly, applying the normal rules on commercial transactions to these situations may work to the consumer’s disadvantage.

With regard to choice of law, the need for protection becomes even more pronounced. Providing suppliers an unfettered ability to choose an applicable legal

<sup>26</sup> Kuipers “Party autonomy in the Brussels I Regulation and Rome I Regulation and the European court of justice” 2009 *German Law Journal* 1505 1518. For those readers who are unfamiliar with the terminology, in private international law the term *lex causae* refers to the law that will govern the dispute before the court, as indicated by the relevant conflict of law rules. See Forsyth (n 22) lxvi.

<sup>27</sup> The term “proper law of the contract” is used to refer to the law that will govern the contract; cf Edwards (n 4) par 328. See also Forsyth (n 22) 316.

<sup>28</sup> Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 73; see also Edwards (n 4) par 329 n 12; Zhang (n 24) 553; Scoles, Hay, Borchers and Symeonides *Conflict of Laws* (2004) par 18.1 cited in n 3 by Brand (n 25) 5; Tang (n 8) 8.

<sup>29</sup> Forsyth (n 22) 320.

<sup>30</sup> Verhagen (n 21) 143.

<sup>31</sup> Kuipers (n 26) 1518.

<sup>32</sup> Commission Staff Working Document accompanying the proposal for a directive on consumer rights Impact Assessment Report available at [http://ec.europa.eu/consumers/rights/docs/impact\\_assessment\\_report\\_en.pdf](http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf) 8 cited in n 90 by Brand (n 25).

<sup>33</sup> Rühl “Consumer protection in choice of law” 2011 *Cornell International Law Journal* 570 595.

<sup>34</sup> Van Niekerk (n 24) 166; Forsyth (n 22) 316.

<sup>35</sup> Rühl (n 33) 571-572.

system may very well deprive consumers of even the minimum level of consumer protection. Theoretically they have a choice, but parties can make rational decisions with respect to choice of law only if they understand the differences between the law chosen and the otherwise applicable law.<sup>36</sup> Knowing and understanding foreign legal systems are costly and time-consuming. Since most consumer transactions involve relatively small amounts, it cannot realistically be expected that consumers inform themselves on the consequences of the choice of a particular legal system.<sup>37</sup> The stronger bargaining position of the supplier may also deprive the consumer of the opportunity to exercise any choice through the prescription of the content of the choice-of-law clause.<sup>38</sup> The different methods of limitation will be discussed below.

Although the limitation of party autonomy as a method of consumer protection is strongly supported, it is not universally favoured. An opposing argument is that since consumer transactions involve relatively small amounts the percentage of disputes brought before the courts is limited. Although unfettered party autonomy may very well disadvantage those few consumers who do litigate, the increase in cost and decrease in product availability resulting from the added burden on the supplier when party autonomy is limited is to the disadvantage of a much larger group.<sup>39</sup>

### 5 *Methods of limiting party autonomy*

Most countries do not support complete party autonomy in the context of consumer contracts but instead tend towards limitation in some form or another. However, methods of limitation differ. Rühl identifies three methods of limiting the parties' ability to choose. Firstly, parties may of course be deprived of choice altogether.<sup>40</sup> An example of a country following this approach is Switzerland. Article 120(2) of the Swiss Act on Private International Law<sup>41</sup> specifically prohibits party choice in the case of consumer contracts.<sup>42</sup> Secondly, party autonomy can be limited by determining which legal systems parties may choose from – *ie* the parties may choose only between the law of the country of the consumer's habitual residence and the law of the country where the contract is to be performed. Both the first and second methods may work to the disadvantage of the consumer by forcing a legal system to apply to the parties' transaction, which provides the consumer with less protection than might otherwise have been available, for example the law of the country where the contract was concluded.<sup>43</sup>

<sup>36</sup> Whincop and Keyes "Towards an economic theory of private international law" 2000 *Australian Journal of Legal Philosophy* 1 25 31 as cited in n 8 by Rühl (n 33) 571 and not consulted as primary source.

<sup>37</sup> Rühl (n 33) 574.

<sup>38</sup> Tang (n 8) 9.

<sup>39</sup> Brand (n 25) 162.

<sup>40</sup> Rühl (n 33) 587. See also Hill (n 8) par 12 11.

<sup>41</sup> Swiss Federal Code on Private International Law 1987 unofficial translation Swiss CPIL, Umbricht attorneys, Zurich 2007 <http://www.umbricht.ch/pdf/SwissPIL.pdf> (6-11-2012).

<sup>42</sup> Rühl (n 33) 587.

<sup>43</sup> Hill (n 8) par 12 12.

Thirdly, the effect of the parties' choice may be restricted.<sup>44</sup> This is the method followed in *inter alia* the Rome Convention<sup>45</sup> and Rome I.<sup>46</sup> Parties to consumer contracts are free to choose the law applicable to their transaction as long as this choice does not take away from the protections provided by the mandatory rules of the otherwise applicable legal system.<sup>47</sup> The otherwise applicable legal system is that of the consumer's home country.<sup>48</sup> The approach followed in the Rome Convention and Rome I regulation is an example of the "preferential law" approach.<sup>49</sup> Accordingly, the parties' choice will be respected unless the mandatory rules of the consumer's country of habitual residence provide the consumer with better protection.<sup>50</sup> The protection awarded by the consumer's home country is taken as the starting point, the minimum level of protection. The argument in support of this form of limitation is that a consumer will be in a better position to determine his or her rights since the law of the home country is more likely to be familiar to the consumer. Furthermore, it is more likely that information with regards thereto is available in a language known to the consumer. Legal advice should therefore be more accessible.<sup>51</sup>

The third method is widely supported but leads to its own set of problems since it reduces the level of legal certainty. It involves a weighing up of the level of consumer protection provided by the systems in question. Depending upon its interpretation, it may also lead to the application of a complex mixture of legal rules. Hill gives the example of a situation where the chosen law, that of country A, provides for a shorter cooling-off period than that of the mandatory rules of the country of the consumer's habitual residence, country B. However, in other respects the law of country A provides superior protection. What is to be the result? Will the law of country A apply since the overall protection is stronger? Will the law of country A apply to the rest of the contract and that of country B apply to consumer protection since the parties' choice derogates from the protection provided by at least one of the home country's mandatory rules? Or will the law of country A apply with the exception of the cooling-off period which will be the longer of the two periods, that of country B?<sup>52</sup> Smits is of the opinion that where the chosen law provides the consumer with less protection the result is that the courts will apply a mixture of the chosen law and the mandatory rules of the consumer's country of habitual residence.<sup>53</sup> This view is supported by Rühl, who states that the third method, curtailing the effect of party choice, necessitates "an issue-by-issue comparison between the chosen law and the mandatory law of the consumer's habitual residence".<sup>54</sup>

<sup>44</sup> Rühl (n 33) 587.

<sup>45</sup> a 3 EEC Convention on the Law Applicable to Contractual Obligations of the European Communities (1980) (hereinafter Rome convention).

<sup>46</sup> a 3 Rome I.

<sup>47</sup> The general principle of freedom of choice (party autonomy) is set out in a 3(1) of the Rome convention as well as a 3(1) of Rome I; the limitation of party autonomy in consumer contracts is set out in a 5 of the Rome convention and a 6 of Rome I.

<sup>48</sup> The exact wording of a 5 of the Rome convention and a 6 of Rome I refer to the consumer's "habitual residence". Cf Healy "Consumer protection choice of law: European lessons for the United States" 2009 *Duke Journal of Comparative & International Law* 535.

<sup>49</sup> Hill (n 8) par 12 12.

<sup>50</sup> Rühl (n 33) 589.

<sup>51</sup> Rühl (n 33) 589.

<sup>52</sup> Hill (n 8) par 12 14.

<sup>53</sup> Smits "Party choice and the common European sales law, or: how to prevent the CESL from becoming a lemon on the law market" *Maastricht European Private Law Institute Working Paper* no 2012/13 15.

<sup>54</sup> Rühl (n 33) 591.



The concept of mandatory rules is central to the approach of restricting the effect of the parties' choice.<sup>55</sup> Mandatory rules are rules the application which cannot be excluded by contractual choice. However, this simple explanation is insufficient. As Schäfer points out, these rules may operate on either a domestic or international level.<sup>56</sup> The domestic mandatory rules of a particular legal system will always apply when the law of that system is the *lex causae* or "proper law of the contract". These rules remain subject to choice of law rules, and accordingly will not apply to a contractual relationship if the parties choose another legal system to apply.

International mandatory rules on the other hand are not subject to choice of law rules and should be applied regardless of the parties' choice that is a "directly applicable rule capable of overriding the chosen law".<sup>57</sup> Identifying which rules are internationally mandatory is problematic. Some rules expressly state their territorial scope – that is expressly state that the rule is to apply regardless of the parties' choice of another legal system. However, when the rule does not contain a clear indication as to its scope it is the task of the court to decide whether the rule "was intended to override the normal choice of law process".<sup>58</sup> In general, rules that further the economic and political concerns of a state are regarded as internationally mandatory. However, a rule that "predominantly serves the interests of the contracting parties" is considered to be merely mandatory in a domestic sense.<sup>59</sup> But rules that serve the interests of contracting parties are seen as internationally mandatory if they fall into the category of so-called protective rules – rules intended to protect the weaker party to a contract. Schäfer warns that rules within the protective category should be regarded as internationally mandatory only by exception "if the rule in question pursues the public interests of the community, rather than private interests".<sup>60</sup>

Thus far we have seen that although much can be said in support of party autonomy, in the case of consumer contracts it is usually limited. This limitation is warranted by the weaker bargaining position of the consumer and his or her lack of knowledge as to the legal systems which may apply to the contract. Different methods for limiting party autonomy exist. The article will now turn to the South African position. Does South African law limit party autonomy by restricting the effect of the choice of applicable law by insisting on the application of its mandatory rules? If this is indeed the case, which consumer protection measures can be seen as mandatory rules? In order to answer this question the article will evaluate the consumer protection provisions of the electronic communications act, the consumer act, and the National Credit Act.

<sup>55</sup> Van Niekerk (n 24) 166.

<sup>56</sup> Schäfer (n 23) 31. Cf Erauw "Observations about mandatory rules imposed on transatlantic commercial relationships" 2003-04 *Houston Journal of International Law* 263 266.

<sup>57</sup> Zhang (n 24) 549.

<sup>58</sup> Schäfer (n 23) 326.

<sup>59</sup> Schäfer (n 23) 326.

<sup>60</sup> Schäfer (n 23) 326. Cf Verhagen (n 21) 144 where the author states that "[i]n order to attribute the status of a directly applicable rule to a statutory provision, it is not sufficient that such a provision is a mandatory rule which specifically aims to protect certain parties".

## 6 *The South African approach to the use of mandatory rules in limiting party autonomy*

### 6.1 General

Although the doctrine of party autonomy is recognised in South African private international law,<sup>61</sup> the extent of the recognition is uncertain. Roman-Dutch law draws a distinction between *ius cogens* and *ius depositivum*. *Ius depositivum* refers to legal rules that parties to a domestic contract may exclude and *ius cogens* to those legal rules that they may not. Forsyth illustrates the difference through the following examples: *ius depositivum* includes the risk rule in a contract of sale. When entering into a domestic contract of sale – one that does not have a foreign or international element – parties are free to exclude the application of this rule. On the other hand, *ius cogens* includes the rule that in South Africa the sale of immovable property has to be in writing. If parties to a domestic contract for the sale of immovable property fail to reduce their contract to writing, the contract will be void. The parties cannot choose to exclude this rule.<sup>62</sup> The South African case law referring to party autonomy concerns instances of choice of law excluding the South African *ius depositivum*. To what extent a South African court will allow parties to exclude *ius cogens* is still unclear.<sup>63</sup> Schäfer explains that mandatory rules are part of the *ius cogens*, but not all rules that form part of the *ius cogens* are mandatory in an international sense.<sup>64</sup>

Given that party autonomy is sometimes referred to as a “universally recognized approach”,<sup>65</sup> the author argues that South African courts will likely follow this trend and recognise party autonomy concerning both South African *ius cogens* and *ius depositivum*. Given the impact of party autonomy on certainty and predictability, the author is in favour of its general recognition. Rules that are internationally mandatory will fall outside the ambit of party autonomy and will apply regardless of whether South African law is the *lex causae*.<sup>66</sup>

The question of mandatory rules came to the fore in the case of *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd*.<sup>67</sup> While the case did not concern consumer protection but rather maritime insurance, it did discuss the application and identification of mandatory rules. The parties concluded an insurance contract that contained an express choice-of-law clause in favour of English law, thereby excluding sections 53 and 54 of the Short Term Insurance Act.<sup>68</sup> The court stated that the starting point in determining which law will govern the dispute is the recognition of the parties’ choice of the proper law of the contract.<sup>69</sup> However,

<sup>61</sup> Sibanda “The strict approach to party autonomy and choice of law in e-contracts in South Africa: does the approach render South Africa an unacceptable jurisdiction?” 2008 *De Jure* 321 323.

<sup>62</sup> Forsyth (n 22) 317-318.

<sup>63</sup> Forsyth (n 22) 321-322.

<sup>64</sup> Schäfer (n 23) 308.

<sup>65</sup> Rühl (n 33) 586.

<sup>66</sup> Schäfer (n 23) 307.

<sup>67</sup> 2010 4 All SA 366 (SCA) par 21.

<sup>68</sup> Act 53 of 1998.

<sup>69</sup> *Classic Sailing* case par 21.



the court was not in favour of complete party autonomy and concluded that the mandatory rules of the forum would still apply.<sup>70</sup>

The *Classic Sailing* case makes no distinction between domestic and international mandatory rules. As pointed out above, the classification of rules as internationally mandatory is often difficult. Certain rules may expressly state that they are to apply regardless of whether the legal system to which they belong is the *lex causae* or not, but this is not always the case. The *Classic Sailing* case makes use of the “waivability test” to determine the mandatory nature of legal rules. Usually parties are able to waive statutory provisions enacted in their favour. However, such a waiver is not possible if public policy will be undermined.<sup>71</sup> If the provision cannot be waived it is mandatory, and cannot be excluded through choice of applicable law. Adding waivability to the mix has been criticised as over-complicating the matter. Where a statute expressly states that a provision cannot be contracted out of, it is of course the end of the matter. It is at least domestically mandatory. Where it states that the provision will apply regardless of the otherwise applicable law it is clearly meant to be internationally mandatory. The more complicated situation is to decide which rules are mandatory by implication. Van Niekerk suggests that where the measure or rule in question is designed to protect the weaker party, for example the consumer, it should apply regardless of a choice-of-law clause.<sup>72</sup> As stated earlier, Schäfer warns that protective rules, even those protecting the weaker party, “should be classified as internationally mandatory only as an exception”, the decisive factor being whether these rules protect concerns of a private or of a public nature. Rules whose main purpose is the balancing of interests of contracting parties should therefore only be considered mandatory on a domestic level.<sup>73</sup> What remains is to examine on what level the protective measures contained in the electronic communications act, the consumer act, and the National Credit Act, are intended to operate. Will a South African court apply these measures even where parties have chosen to exclude the application of South African law to their contractual relationship?

## 6.2 The Electronic Communications and Transactions Act

The combination of sections 47 and 48 of the electronic communications act means that the consumer protection provisions contained in chapter 7 of the act can be regarded as mandatory both in a domestic and international sense. Section 47 determines that chapter 7 will apply regardless of the otherwise applicable law, and according to section 48 if parties try to exclude the application of any rights contained in the chapter the provision attempting to do so will be null and void.

The question arises whether these provisions deprive the parties of any choice regarding the application of the chapter or whether they lead to the preferential law approach. At first glance the provisions seem to prohibit party choice altogether. This interpretation has led to arguments that sections 47 and 48 may render South

<sup>70</sup> *Classic Sailing* case par 21. Forsyth points out that an “incautious reading” of the *Classic Sailing* case may lead to the conclusion that parties may exercise a choice only regarding the *ius depositivum*, but that a careful reading reveals that Lewis JA used the term *ius cogens* when referring to directly applicable statutes. Directly applicable statutes are considered part of *ius cogens* but not all rules that fall within the category of *ius cogens* can also be classified as directly applicable; cf Forsyth (n 22) 321 and n 69 above.

<sup>71</sup> *Classic Sailing* case par 23. Cf Van Niekerk (n 24) 161.

<sup>72</sup> Van Niekerk (n 24) 161.

<sup>73</sup> Schäfer (n 23) 326.

Africa an “unacceptable jurisdiction”.<sup>74</sup> Sibanda argues that if chapter 7 of the electronic communications act will always apply when a dispute comes before a South African court, regardless of any other considerations (that is stronger connection to the otherwise applicable law), suppliers may choose to avoid South Africa as a jurisdiction altogether.<sup>75</sup>

However, the electronic communications act may be interpreted to favour the preferential approach as section 48 states that provisions attempting to exclude any rights provided in chapter 7 will be null and void. Accordingly a choice-of-law provision choosing a legal system that adds rights to chapter 7 may be valid. Neels draws attention to section 44(4) to illustrate that the act itself points to the preferential law approach.<sup>76</sup> Section 44(4) states that the section should not be interpreted so as to prejudice rights conferred on the consumer by “any other law”. Any other law can be interpreted to include a foreign legal system.<sup>77</sup> As mentioned previously, the preferential law approach seems to be the preferred method of limiting party autonomy. In light of Neels’ arguments, specifically the reference to section 44(4), the author is of the opinion that this interpretation is more likely than the strict approach feared by Sibanda. The aim of consumer protection legislation is to grant consumers a minimum level of protection and not to deprive them of the increased protection that the exercise of party autonomy may provide.

### 6.3 The Consumer Protection Act

The consumer act applies to “every transaction occurring within” South Africa (apart from the exclusions in section 5(2) – (4)).<sup>78</sup> According to section 51 of the consumer act a supplier cannot make a transaction subject to a term or condition aiming to defeat the purposes and policy of the act or to deprive a consumer of a right in terms of this act. A provision trying to do so is void.<sup>79</sup> Provided the transaction “occurred” within South Africa, the consumer act will apply regardless of the parties’ choice of law. Accordingly, the law is at least of a domestically mandatory nature.

Nevertheless, the consumer act does not determine that its provisions will apply irrespective of which country’s law might be the otherwise applicable law. If South Africa is the forum,<sup>80</sup> but the transaction itself did not occur in South Africa, will the consumer act apply or will the consumer protection of the chosen law take preference?

Although the consumer act does not contain an express provision that renders it internationally mandatory, the protection of weaker parties, such as consumers, is normally considered to be fundamental public policy and may be seen as internationally mandatory or directly applicable.<sup>81</sup> The *Classic Sailing* case states that mandatory rules of the forum will apply regardless of party choice. If

<sup>74</sup> Sibanda (n 66) 322.

<sup>75</sup> Sibanda (n 66) 322.

<sup>76</sup> Neels “Consumer protection legislation and private international law” 2010 *Obiter* 121 123-124. Neels points out that s 47 is restricted to the consumer protection provisions of the electronic communications act and does not render the whole of the electronic communications act a directly applicable statute.

<sup>77</sup> Neels (n 82) 123.

<sup>78</sup> s 5 of the Consumer Protection Act 68 of 2008.

<sup>79</sup> s 51 of the Consumer Protection Act 68 of 2008.

<sup>80</sup> *Eg* in a situation where the parties included a choice of forum clause in their contract.

<sup>81</sup> Van Niekerk (n 24) 167. The author refers to consumer-protective provisions as prohibitory measures that parties cannot contract out of by a choice of foreign law. Early on the same page the author indicates that mandatory rules, prohibitory statutes, *ius cogens* etc can be used interchangeably.

we consider the provisions of the consumer act and apply the waivability test, we conclude that as parties cannot waive the rights conferred by the consumer act these rules are to be considered mandatory. Accordingly, it is possible to argue that the protection of the act will always apply if South African law is the *lex fori* even if it is not the chosen law or the otherwise applicable law. If we apply van Niekerk's test and look at rules aimed at protecting the weaker party we reach the same conclusion – namely that the protections contained in the consumer act should apply regardless of party choice.

Once more this may lead to an interpretation that deprives parties of any choice. However, a choice-of-law clause providing the consumer with more protection will neither defeat the purpose and policy of the act nor deprive the consumer of rights contained therein. Since such a clause does not contravene section 51 of the consumer act, it is not prohibited by the act and thus a preferential approach is possible and preferable. According to Neels<sup>82</sup> this interpretation is supported by section 2(10), which states: “[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.”<sup>83</sup>

#### 6.4 The National Credit Act

The scope of application of the National Credit Act is set out in section 4 of the act, which states that the National Credit Act applies to credit agreements “between parties dealing at arm’s length”<sup>84</sup> that are made within the Republic or has an effect within the Republic.<sup>85</sup> The exceptions are listed in section 4(1)(a)-(d). Section 90(2)(b)(i) determines that any contractual provisions in a credit agreement that attempt to waive a right set out in the act or deprive a consumer of a right set out in the act are unlawful. The inclusion of such a provision in a credit agreement will render the contract as a whole void.<sup>86</sup> The National Credit Act does not expressly state that its protections will apply regardless of the otherwise applicable law, but as previously mentioned in the context of the consumer act, the waivability test as laid down in the *Classic Sailing* case, or in the alternative Van Niekerk’s test, will lead to the conclusion that the protections contained in the National Credit Act should apply regardless of the wishes of the parties. The act’s consumer protection provisions are set out in sections 60-66 and are linked to both the provisions of the Constitution<sup>87</sup> and the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>88</sup> Both of the aforementioned Acts are “rules of immediate application”<sup>89</sup> and therefore mandatory. Accordingly, the author is of the opinion that South African courts will consider the consumer protection provisions of the National Credit Act as applicable in spite of the parties’ choice of another applicable legal system. The same arguments as mentioned in connection to the preferential law approach in the context of the consumer act also apply here. A provision in a credit agreement that provides the consumer with better protection than that contained in the act cannot

<sup>82</sup> Neels (n 82) 132.

<sup>83</sup> s 2(10) of the consumer act.

<sup>84</sup> See s 4(2)(b) for further clarification on the concept “at arm’s length”.

<sup>85</sup> See Neels (n 82) 126-128 for a comprehensive discussion on the meaning of “made or having an effect within the Republic”.

<sup>86</sup> s 90(3) of Act 34 of 2005.

<sup>87</sup> s 9(3) of the Constitution of the Republic of South Africa, 1996.

<sup>88</sup> Act 4 of 2000.

<sup>89</sup> Neels (n 82) 130.

be interpreted as an attempt to waive rights contained therein or to deprive the consumer of any of its protections. Therefore courts should allow parties the greater protection of the chosen law, with the consumer act's protective provisions as the minimum standard.

## 7 Conclusion

Given the importance of freedom of contract within South African law, as well as the benefits of legal certainty and predictability, South African courts should recognise party autonomy with regard to both *ius depositivum* and *ius cogens* in consumer contracts. But, as is the case in the other jurisdictions discussed, party autonomy should be limited. The limitation suggested by the author is restriction of the effect of the parties' choice. The aim of the approach, as stated earlier, is to provide the consumer with a minimum level of protection. In order to ascertain whether this is the method that the courts are likely to follow, one needs to determine whether the consumer-protective provisions contained in the electronic communications act, the consumer act and the National Credit Act are internationally mandatory – that is will South African courts apply these provisions irrespective of the parties' attempt to choose another legal system to apply to their contract?

The test for determining whether a rule is internationally mandatory is unclear. The *Classic Sailing* case does not make a distinction between rules that are domestically mandatory as opposed to internationally mandatory and the waivability test does not bring clarity. Using the protection of the weaker party to a contract as a measure to determine which rules of the forum should apply, regardless of the wishes of the parties, is a possible solution. However, Schäfer's criticism that this may hinder uniformity of decision<sup>90</sup> should be kept in mind. If the courts apply the waivability test it will probably lead to the conclusion that the consumer protection measures contained in the electronic communications act, the consumer act, as well as the National Credit Act, should find application whenever South African law is the *lex fori*. Van Niekerk's test, which aims at protecting the weaker party, will lead to the same conclusion. The author supports the idea that consumers who come before a South African court should be provided with a minimum level of protection encompassed in the three acts previously considered.

The next step in the inquiry is to choose the method by which party autonomy is to be limited. Should parties be deprived of choice altogether or should our courts support the preferential law approach? Judging between depriving parties of any choice and the preferential law approach is difficult. As mentioned before, proponents of the first approach argue that it optimises legal certainty. This leads to lower costs and more suppliers entering the cross-border market. On the other hand it might render South Africa an unacceptable jurisdiction, since the supplier will always have to conform to South African standards. This may be an inconvenience either because of the costs involved in complying with the protection or the costs involved in adapting their contracts specifically for the South African market preventing them from choosing a single applicable law in transactions with consumers in a multitude of countries.

Proponents of the preferential law approach argue that this approach recognises the importance of party autonomy and limits it only where necessary. Furthermore, it will lead to the application of the highest level of consumer protection possible

<sup>90</sup> Schäfer (n 23) 325.

in the circumstances. The counter-argument, as mentioned previously, is the lack of legal certainty resulting from this approach. At the start of their relationship it may be difficult for the parties themselves to judge which system provides the better protection. The approach also fails to recognise that parties may have a rational reason for choosing less protection such as obtaining goods or services at a lower price. Weighing up the possible disadvantages in the event that a dispute arises against the immediate advantage of a lower price is by no means irrational. The preferential law approach is widely recognised and the electronic communications act, the consumer act and the National Credit Act can be interpreted in a manner that allows for this approach.

A further possible method of limiting party autonomy is allowing the consumer to choose between the chosen law and the higher level of protection of the *lex fori* or the law of the consumer's habitual residence, if and when the dispute does arise. The court will follow the preferential approach only if the consumer requests it to do so. The argument that a consumer cannot make a rational choice if he or she does not understand the different legal systems is less convincing in this scenario, since the consumer will have to acquire legal advice in any case. Ultimately, the preferential law approach is favoured in Europe and amongst most academics, and South African courts will probably tend to follow this approach as well, and apply the rules that provide the consumer with the best possible protection in the circumstances.

#### SAMEVATTING

##### **BEPERKINGS OP PARTY OUTONOMIE IN DIE KONTEKS VAN OORGRENS- VERBRUIKERSKONTRAKTE: DIE SUID-AFRIKAANSE POSISIE**

Die artikel ondersoek die redes vir die erkenning en beperking van party outonomie in oorgrens-verbruikerskontrakte en evalueer die huidige Suid-Afrikaanse posisie in hierdie verband aan die hand van Suid-Afrikaanse verbruikersbeskermingswetgewing en *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* (2010 4 All SA 366 (HHA)).

Kontrakteervryheid is van sentrale belang in die Suid-Afrikaanse reg. In internasionale privaatreg vind hierdie beginsel neerslag in die leerstuk van party outonomie. Hierdie leerstuk behels dat kontrakspartye die regstelsel kan kies wat op hul kontrak van toepassing moet wees. Party outonomie voorveronderstel egter dat die kontrakspartye in 'n posisie is om 'n effektiewe keuse uit te oefen. Dit verg 'n mate van gelykheid in die partye se onderhandelingsposisie en toegang tot die nodige inligting om die keuse uit te oefen. By verbruikerskontrakte, veral dié met 'n internasionale dimensie, word algemeen aanvaar dat albei ontbreek en party outonomie gevolglik beperk moet word. Die vernaamste wyse waarop party outonomie beperk word, is dwingende reëls wat toepassing vind ongeag die partye se poging om 'n ander toepaslike reg te kies. Hierdie dwingende reëls kan verskillende gevolge inhou: dit kan naamlik die partye ontnem van enige keuse rakende die toepaslike reg, die keuse beperk tot gespesifiseerde regstelsels waaruit die partye kan kies, of die gevolg van die uitgeoefende keuse beperk. Laasgenoemde behels dat die verbruikersbeskermingsbestel wat aan die verbruiker die meeste beskerming bied in 'n bepaalde situasie toegepas sal word. Die artikel ondersoek die begrip "dwingende reël" en evalueer die bepalings van Suid-Afrikaanse verbruikersbeskermingswetgewing om te bepaal of hierdie bepalings as sodanig klassifiseer en ook of die toepassing van hierdie bepalings partye van enige keuse sal ontnem of bloot die effek van hul keuse sal beperk. Vir doeleindes van hierdie artikel word uitsluitlik gefokus op die dwingende reëls van die *lex fori*.