

YOUR IACL Newsletter May 2020

Dear IACL Members,

In these challenging times, we are all navigating through uncertainty for ourselves, our loved ones, and our community. We hope you are staying healthy and safe.

The International Association of Consumer Law, May 2020 Newsletter covers as usual the news from the jurisdiction, conferences, journals, call for papers and articles. The purpose of the newsletter is to keep members up to date with the latest developments in our association and across the world.

Please do circulate it to any new person you think may want to take part in our activities and become a member. Please feel free to also send your news items via email to serkankaayaa@yahoo.com . For any items that may not be able to wait that long, you can contact us to post on our website <http://www.iacl.net.au> or our Facebook page <https://www.facebook.com/IACLaw/>.

Christine Riefa, on behalf of the IACL board.

Contents

1. IACL Webinar Series
2. News from the Jurisdiction
3. Book/ Article Announcements
4. Conferences - Call for papers

1. IACL Webinar Series

IACL Webinar Series Co-ordinated by Geraint Howells

One of the silver linings of the current tragedy is the increased interconnectivity being achieved through technological means. IACL has very successful biennial conferences and we hope we can use technology to keep the discussions going in between. To that end we have two webinars lined up as detailed below. We hope that you will be able to join. Apologies that the timing may not suit everyone – this is one of the many problems of living on a globe! Please feel free to propose future speakers by emailing Geraint.Howells@manchester.ac.uk

Christine Riefa, Brunel University, UK and Séverine Saintier, University of Exeter, UK, "Vulnerable consumers and access to justice" Wednesday 20th May, 13-14:15 (UK Time).

JOINING INSTRUCTIONS for ZOOM will be forwarded nearer the time.

C. Riefa, S. Saintier (eds), *Vulnerable Consumers and the Law: Consumer protection and access to justice* (Routledge 2020, forthcoming) charts the difficulties encountered by vulnerable consumers in their access to justice. Through contributions by eminent academic, practitioners and consultants, the book demonstrates that despite the

development of ADR, access to justice is still severely lacking for the vulnerable consumer. The book highlights that a broad understanding of access to justice, which encompasses good regulation and its public enforcement is an essential ingredient alongside access to the mechanisms of traditional private justice (courts and ADR) to protect the vulnerable consumer. Indeed, many of the difficulties are linked to normative obstacles and that a lack of access to justice is a vulnerability in itself that can exacerbate existing ones. Because a lack of access to justice may contribute to ‘pushing’ already vulnerable consumers into social exclusion it is not simply about economic justice but also about social justice. The book however also shows that lack of access to justice is *not* irreversible nor is it necessarily linked to consumer apathy. New technologies could provide solutions. The book concludes with a plea for developing ‘inclusive’ justice systems with more emphasis on public enforcement alongside more effective courts systems to offer the vulnerable with adequate means to defend themselves.

Next Webinar: Kathleen Engel, Suffolk University, US and Iain Ramsay, Kent University, UK, “Perspectives on the impact Covid-19 on Credit and Debt” - Thursday 4 June 2020 13-14.15 (UK time).

JOINING INSTRUCTIONS for ZOOM will be forwarded nearer the time. Details on the content of the webinar to follow.

2. NEWS FROM THE JURISDICTIONS

South Africa

Report by SJH van der Merwe

Senior Attorney, Notary Public and Lecturer

LANDMARK JUDGMENT SET TO CHANGE THE SOUTH AFRICAN DEBT COLLECTION LANDSCAPE

During August 2018 an application was filed with the Western Cape High Court, South Africa in which the Stellenbosch University Law Clinic, Summit Financial Partners, and 10 of their clients request judicial intervention which has the potential to dramatically impact on the South African financial landscape relating to debt collection practices. This case follows in the wake of the Stellenbosch University Law Clinic’s earlier work in the 2016 landmark Constitutional Court case of University of Stellenbosch Legal Aid Clinic & others v Minister of Justice and Correctional Services & Others, where the highest court in the country agreed that several practices, relating to the abuse of emolument attachment orders, were unconstitutional.

Two years on, in University of Stellenbosch Law Clinic & others v The National Credit Regulator & others the applicants approached the court regarding what they identified as the unilateral, unregulated manner in which creditors and collection agents add costs, including legal fees, to debtor’s accounts both before and after judgment. As a result of this practice, which they argued was in contravention of section 103(5) as read with

section 101(1)(b) to (g) of the National Credit Act 34 of 2005 (“NCA”), financial experts have estimated that more than a billion rand has been illegally over deducted from thousands of distressed debtors by unscrupulous credit providers. In the case of just one of these debtors, who was also one of the applicants in the matter, an amount of R5 100 had been collected on an initial debt of R600.

In a landmark judgment delivered on 13 December 2019, the Court issued a declaratory order confirming the NCA’s so-called statutory in duplum rule (meaning amounts accruing against an arrears debtor during the time they remain in default may not exceed the amount of the unpaid balance at the time of default) covered all costs associated with the collection of the outstanding amount, including legal fees. Another aspect of the judgment that will bring relief to debtors is that any legal costs associated with collection must be taxed or agreed with the debtor before it can be added to the debtor’s account. In his judgment, Hack AJ emphasised the responsibility of creditors who regularly extended reckless credit in attempts to capture debtors in a debt trap: “I take judicial notice of the notorious fact that consumers are constantly being cajoled and encouraged [to apply] for credit.”

3. NEW BOOKS / ARTICLES TO BE AWARE OF ...

Willem H. van Boom, Jean-Pierre I. van der Rest, Kees van den Bos & Mark Dechesne, “Consumers Beware: Online Personalized Pricing in Action! How the Framing of a Mandated Discriminatory Pricing Disclosure Influences Intention to Purchase” Social Justice Research (2020). Online businesses collect a wealth of data on customers, often without properly informing them. Increasingly, these data can be used for behavioral price discrimination. In this two-study article, we explore how consumers would respond if businesses were compelled to disclose their use of discriminatory behavioral pricing techniques. Using different disclosure frames, we examine the effects of disclosure on purchase intention and purchase probability. The findings indicate that specific disclosure frames affect purchase intentions. Furthermore, we find that a disclosure frame that is more in line with a consumer’s self-interest increases purchase intention. Specifically, the frame indirectly influences intention to purchase through its effect on the perception that the use of behavioral pricing information serves self-interest. In this way, our study draws attention to a potentially unanticipated effect of regulatory intervention. Implications for future research and legal policy are discussed, focused on the need to design and empirically test the effectiveness of disclosures online. <https://doi.org/10.1007/s11211-020-00348-7>

Christian Twigg-Flesner, A comparative Perspective on Commercial Contracts and the impact of COVID-19 - Change of Circumstances, Force Majeure, or what?
Available _____ at _____ :
<https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?filename=17&article=1239&context=books&type=additional>

Emilia Miscenic, Silvija Petric, “Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima (Unfairness of Currency Clause in CHF and HRK/CHF Loans)” (2020). The book is elaborating extensively many issues linked to credit agreements in which the principal was denominated or expressed in Swiss Francs as foreign currency (CHF and HRK/CHF loans). The book is analysing legal framework for conclusion of consumer credit agreements, legal regulation and use of unfair contract terms in mentioned contracts and approach of national case law to these important issues. By studying relevant national jurisprudence and the established case law of the CJEU, authors reflect upon possible legal consequences of use of unfair commercial practices and unfair contract terms in credit agreements

Meškić, Z., Kunda, I., Popović, D.V., Omerović, E. (eds.)” The Effectiveness of Judicial Enforcement of the EU Consumer Protection Law” Balkan Yearbook of European and International Law, Springer, (2019/2020). Through its case law, the CJEU has developed and established various legal institutions and principles guaranteeing the effectiveness of EU law including consumer protection law. Although much time has passed since the CJEU required from Member States’ courts to give the “Community (now: Union) law its full effect within the framework of the judicial systems of the Member States”, more recent cases demonstrate the serious struggles of the courts when it comes to the enforcement of the EU consumer protection law. The effectiveness of the judicial protection of consumer protection rights is sometimes undermined by the most basic questions, such as who qualifies a person as a “consumer” in a national civil law dispute, the court or the claimant? Moreover, recent studies of the European Commission demonstrate that the national courts are barely aware of their duty in an ex officio application of the EU consumer protection law. With the exception of the courts’ duty to examine the unfairness of contract terms in business-to-consumer (B2C) relations of their own motion, they seem to be reluctant to the idea of an ex officio application of consumer protection law. This paper examines the position of courts in this new environment of allegedly more effective enforcement mechanisms and questions to what extent the Member States’ courts are obliged to apply the EU consumer protection law ex officio.
https://doi.org/10.1007/16247_2019_8

Barnard, J., Mišćenić, E., “The role of the courts in the application of consumer protection law: A comparative perspective, Journal for Juridical Science, vol. 44., br. 1., (2019) The vast majority of jurisdictions (in particular, the European Union and South Africa) conform to the United Nations Guidelines for Consumer Protection, whereby governments are encouraged to establish and maintain legal and administrative measures to enable a consumer to obtain redress through both formal and informal procedures, with particular regard to the needs of vulnerable (low-income) consumers. The Guidelines for Consumer Protection encourage the resolution of consumer disputes in a manner that is not only fair and expeditious, but also includes the establishment of voluntary mechanisms and procedures. In this regard, the European Union and South Africa have established redress and enforcement of consumer protection mechanisms with a primary focus on consensual consumer dispute resolution and, more specifically, alternative dispute resolution. This does not, however, diminish the important role and responsibility that courts have in the effective enforcement of

consumer protection law. This contribution aims to establish the role of the courts in this regard, not only for the advancement of consumer rights and consumer protection law, but also taking into account the ex officio role of the courts in relation to the effective (or ineffective) alternative dispute resolution mechanisms that are currently in place. The contribution analyses the comparative positions in the European Union and South Africa. In terms of the European Union position, focus is placed on the application of the relevant consumer directives within Member States, taking into account pre-existing national law and its interpretation by national courts. The primary focus, in terms of the South African position, is an analysis of the enforcement institutions and redress provisions contained in the Consumer Protection Act 68 of 2008, taking into account the interpretation of these provisions by the relevant institutions and the courts. This contribution highlights problematic issues with the current alternative dispute resolution mechanisms, resulting in ineffective consumer protection and the ex officio role of the courts to address these issues. It aims to confirm that the right to access to the courts is a constitutionally entrenched right and a balance between effective formal and informal enforcement should be the aim. <https://journals.co.za/content/journal/10520/EJC-17ca2b7834>

Nottage, Luke R., Improving the Effectiveness of the Consumer Product Safety System: Australian Law Reform in Asia-Pacific Context, Sydney Law School Research Paper No. 20/05 (2020) The Australian Government is undertaking public consultations over possible improvements to the 2010 Australian Consumer Law (ACL) regime, including again the idea of adding a European-style general safety provision (GSP). To bolster the case for such reform, Part 2 of this paper analyses 2017-9 data trends from the OECD Global Recalls Portal for Australia compared to several comparable economies, especially in the Asia-Pacific region where Australia now has most of its trade and investment links. The analysis finds a persistently high per capita recall rate for Australia, compared to several jurisdictions including Korea, Japan and especially the USA. However, the analysis identifies various legal and other factors across the jurisdictions that impact on interpreting such data. Part 3 therefore begins by highlighting some more specific patterns uncovered from an ongoing joint research project comparing child product safety trends particularly in Australia and the US. It highlights various concerns regarding recalls in Australia, as well as weaknesses in Australia's ACL regime (in addition to the lack of a GSP), in coordinating with sector-specific regulation, and in private law mechanisms that could more indirectly promote consumer product safety. Some estimated economic costs from current levels of reported injuries, as well as of many recalls, further reinforce the case for adding a GSP. Part 4 concludes that this improvement to the ACL could be combined with some of the other reform options outlined by the Australian Government's consultation Regulatory Impact Statement, as well as the introduction of a novel "product safety substantiation order" power. The conclusions and analysis should be helpful for other jurisdictions considering product safety law reforms in an increasingly globalised and digital economy and draw already on comparisons with regulatory regimes and issues particularly in the Asia-Pacific region. <https://ssrn.com/abstract=3530671>

4. CONFERENCES – CALL FOR PAPERS

Call for Papers: Fourth University of Pretoria International Consumer Law Conference (UPICLC) – Proportionality and consumer regulation: Time for a balanced approach? 21-23 September, 2020

The dynamics of the consumer market are such that it transcends borders and realms. The products and services traded in this market are evolving and changing on a daily basis. They are increasingly sophisticated and complex.

We are now on the frontiers of the Fourth Industrial Revolution, which drives the search for a new regulatory landscape aligned with the challenges that this exciting epoch presents. If our aim is to protect consumers, especially vulnerable ones, we need to consciously consider, now more than ever, the type of approach we support. Is more intrusive and expansive regulation the answer? Should we completely rethink and innovate our approach to consumer protection and take it to new dimensions? Or do we need to consider a more balanced and proportional approach?

We invite you to join us in this exciting debate where we can freely share ideas in the interest of expanding knowledge and shaping policy in the area of consumer protection. At the 4th University of Pretoria International Consumer Protection Law Conference, we would like to explore the concept of a balanced approach between proportionality and consumer regulation and how it affects all the various aspects, policies, theories, areas and rights that is considered to be part of Consumer Protection. This would include for example General Consumer Protection, Financial Consumer Protection and Credit Law, E-Commerce, and other related areas.

Send your abstract of no more than 500 words to Jani van Wyk at jani.vanwyk@up.ac.za by 30 June 2020.

Contact Jacolien Barnard at jacolien.barnard@up.ac.za or Jani van Wyk for more information <https://www.up.ac.za/cf-upiclc2020>

In addition ... African realities and approaches to Consumer Protection

The UPICLC 2020 will include a concurrent stream of presentations for participants from other African jurisdictions (or any other jurisdiction) to disseminate the position relating to the conference theme and the position in Africa or a particular African country/countries.

We will also have a one-day workshop on 21 September 2020 facilitated by the Attorney General Alliance Africa (“AGA Africa”) on inter alia debt collection, credit reporting, privacy, e-commerce and secured transactions involving movable assets with a comparative perspective of the United States of America and how these transactions relate to the South African and African positions. Any other jurisdictions are welcome to attend!

Important information

Abstracts: Abstracts must be submitted no later than 30 June 2020 and must not exceed 500 words. The abstract must contain the following information of the candidate: title, surname, affiliated institution, position held at institution and an e-mail address where the candidate can be reached. This information does not form part of the word count for the abstract.

All abstracts are peer-reviewed. Candidates are requested to proofread their abstracts to ensure that the language and style is of high quality.

All presentations at the conference will be in English and no provision is made for translators. As such, prospective participants need to be proficient in English or make provision for their own translators to accompany them. Feedback on submitted abstracts will be given within two weeks of date of submission of the abstracts

Venue: The conference will take place from 21 to 23 September 2020 at the new Future Africa Campus of the University of Pretoria.

Accommodation is available at the venue and must be arranged directly with the venue. Visit the Future Africa website at www.futureafrica.science for more information.

Conference fee: 3 500 ZAR which includes the AGA Africa-workshop, evening welcoming function, conference dinner, and refreshments and lunch on the days of the conference. Delegates are responsible for their own travel and accommodation expenses.

Masters and doctoral candidates, as well as post-graduate research fellows qualify for a reduced fee of 1 750 ZAR upon application to the conference committee. Delegates who only wish to attend one of the two conference days, together with the workshop, qualify for a reduced conference fee of 2 000 ZAR upon application to the conference committee.

Important dates

30 June 2020	Last day for submission of abstracts
14 August 2020	Last day for payment of conference fee
21 August 2020	Publication of draft program on conference website
21 September 2020	AGA Africa-workshop Evening: UPICLC Welcoming function
22 September 2020	UPICLC Day One Evening: UPICLC Conference dinner
23 September 2020	UPICLC Day Two