Article

An In-Depth Analysis of Choice of Law Rules in Consumer Contracts: A Focus on the African Continental Free Trade Area

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Abstract

Choice of law is a perplexing concept due to the importance of party autonomy, the diversity of connecting factors, and the variety of different contractual issues. The problem of choosing a governing law is complicated in consumer contracts by industrialised mechanisms depriving consumers of negotiation rights. The core mandate of the African Continental Free Trade Area (AfCFTA) is to establish a single market for goods and services associated with the free movement of legal persons for economic integration. This objective requires a harmonised consumer protection policy to resolve the diverse consumer protection regimes applicable in state parties within AfCFTA member states. This policy should provide suitable consumer protection mechanisms generally and in the context of choice of law specifically. Implementing a draft competition policy bestows a legitimate mandate on the AfCFTA to negotiate a continental framework on consumer protection as both fields of law complement each other to safeguard consumer rights in cross-border trade. This article argues the dynamics of providing adequate choice of law rules on consumer contracts to inform suitable mechanisms on consumer interest within the AfCFTA. The article discusses the abuse of choice of law clauses in consumer contracts, affecting consumers' rights in cross-border contracts within the AfCFTA. It suggests a harmonised consumer protection policy to regulate and mitigate these clauses. The article also examines trends in Global North jurisdictions like the European Union to inform a context-specific institutional framework for the AfCFTA's choice of law rules.

Keywords: consumer protection; harmonisation; international law; applicable law; choice of law; economic integration

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Introduction

Choice of law rules are those laws of a state that a court must decide are applicable to a contract or different aspects of a contract (Bauerfeld 1982). Intellectual debate contemplates the nexus between private international law and public international law in economic integration (Mills 2018, 3). Both fields, often overlapping, are derived from international treaties and conventions that invariably affect the implementation of domestic laws (Mills 2018, 3). Assessing the connection between public international law and private international law within the African Continental Free Trade Area (AfCFTA) is essential to harmony and policy coherence (Fernández and Mbengue 2018). Private and public international law mandates state parties to ratify extraterritorial rules, allowing for domestic rule alteration, for successful economic integration in the African context (Bamodu 1994). Ratifying the AfCFTA requires state parties to adjust domestic laws to harmonised continental rules, promoting the integration of protocols in the implementation of domestic rules.

Adopting a competition policy incidentally to protect consumer interests confers a legitimate expectation on the AfCFTA to negotiate and establish a harmonised set of rules on consumer protection. The AfCFTA should establish a consumer protection policy to safeguard consumer rights, as competition and consumer protection laws complement each other. This article suggests that a consumer protection policy should include choice of law rules on consumer protection.

Contracting amid unpredictable behaviours and inconsistent actions of legal persons often leads to the exploitation of consumers (Bigwood 2003, 25). The involvement of regulatory frameworks provides some, albeit inadequate, protection. Implementing harmonised rules on consumer protection to comprise a choice of law regime is crucial to the standardisation of consumer transactions, decisional harmony, and preventing conflicting rules within the AfCFTA (Mills 2018, 12). Although choice of law rules fall within the umbrella of private international law, establishing a single market, by implication, mandates the AfCFTA to superintend harmonised rules applicable to state parties (Forsyth 2012, 76). At the core of this discourse is the AfCFTA's policy-setting responsibility to establish an institutional framework on consumer protection containing choice of law rules to provide a harmonised approach to choice of law within the AfCFTA.

The article highlights dominant parties' abuse of choice of law clauses in cross-border contracts, affecting consumer rights. A proposed AfCFTA harmonised consumer protection policy aims to regulate and mitigate these effects on state parties. The article proposes a harmonised approach to consumer choice of law rules, considering the laws of the consumer's habitual residence, overriding mandatory rules, and public policies as a solution. The article supports the proposed institutional framework for law rule choice, emphasising its importance in ensuring certainty, predictability, and uniformity in Africa's economic integration. The article proposes a re-systematisation of consumer

protection policies among state parties, advocating for a harmonised approach across the continent, including law rules for model implementation.

The article assesses the efficacy of the European Union's (EU) special provisions on consumer choice of law rules in the EU's law applicable to contractual obligations.[1] The EU has made commendable strides in economic integration and is worth mirroring to establish context-specific consumer choice of law rules. Economic integration in Africa, while sharing a common goal with the EU by promoting trade through harmonisation (Fagbayibo 2009, 309), primarily draws inspiration from the EU's successful strides in harmonising policies and eliminating legal hindrances. This approach led to the development of a single market within the context of supranational economic integration (Badinger 2005, 50). The EU has also succeeded in harmonising its choice of law rules on consumer contracts.[2]

This article examines choice of law rules applicable to consumer contracts within the AfCFTA. The discussion focuses on the problem of consumer choice of law rules in cross-border trade with a practical discussion on the case of *Palomino v Facebook, Inc.*[3] to expressly convey the problem of choice of law rules. The article argues for a harmonised approach to consumer protection and choice of law rules with the AfCFTA. A suggested description of a harmonised approach to choice of law rules mirroring the EU's Rome I to facilitate intra-African trade is explored. The paper concludes by recommending solutions to consumer choice of law rules in the AfCFTA.

Consumer Choice of Law Rules in the Context of the AfCFTA

The AfCFTA, a pan-African trade agreement, was established through the 1991 Abuja treaty and the 2000 Constitutive Act of the African Union.[4] Executing a free trade area by fifty-four state parties reflects the resilience to actualise an economic integration amid the odds of diversity (Kuhlmann and Agutu 2020, 755). Currently, forty-seven African states have ratified the AfCFTA agreement (Kuhlmann and Agutu 2020, 755). Africa's determination to have economic integration manifests in member states signing, in March 2018,[5] the AfCFTA agreement, which entered into force in May 2019 (Kuhlmann and Agutu 2020, 755). The pursuit of economic integration through the movement of people has led to numerous intellectual discourses about the establishment of a single market for goods and services.[6] The aspirations of the continent are

1 Council Regulations (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Convention on the Law Applicable to Contractual Obligations (Rome I) Art 6 read in tandem with Art 9.

2 ibid.

3 Case 16-cv-04230-HSG *Palomino v Facebook, Inc.* [2017] (ND Cal).

4 Agreement Establishing the African Continental Free Trade Area, preamble (21 March 2018) 58 ILM 1028.

5 ibid Art 31.

6 Agreement Establishing the African Continental Free Trade Area (n 4) Art 3(a).

confirmed in the adoption of socioeconomic development-centred strategies through legal harmonisation of rules on trade (Kuhlmann and Agutu 2020, 756). In compliance with a "framework agreement" model, the AfCFTA established a primary agreement forming the foundation for negotiating protocols on aspects of trade (Kuhlmann and Agutu 2020, 756). The first phase of negotiations initiated the adoption of the Protocols on Trade in Goods, Trade in Services, and Dispute Settlement (tralac 2023, 3). Phase II negotiations discussed the adoption of intellectual property rights, investment policy, and competition policy (tralac 2023, 3).

Although both competition laws and consumer protection laws have different perspectives, both concurrently promote higher levels of consumer protection (OECD Competition Law and Policy 2008, 8). Developing a draft competition policy creates an expectation that the AfCFTA will consider a policy on consumer protection as these two distinct areas of law complement each other to ensure consumer rights entirely. Competition policies maintain that suppliers provide quality options for goods and services at affordable prices (OECD Competition Law and Policy 2008, 8). Alternatively, consumer policies initiate opportunities for informed choices that competition provides. Adopting a competition policy only attempts to control one side of the coin to attain consumer rights in totality. It is therefore anticipated that the AfCFTA will negotiate a harmonised framework on consumer protection to safeguard consumer rights in totality and include choice of law rules on consumer protection.

A proposed harmonised framework primarily focuses on the diversity of laws within the African continent, largely resulting from colonial ties (Bamodu 1994, 125). The devotion of Africa to economic integration through regional integration is unconcealed (Bamodu 1994, 125). However, an ostensible commitment to eliminating economic and political obstacles to economic integration is incomplete due to the existence of impeding diverse legal barriers (Thompson 1990, 100). A harmonised approach to economic integration is necessary to serve as the foundational point of convergence to these diverse legal barriers (Ndulo 1993, 108). Diverse legal barriers also affect consumer protection policies and choice of law rules as these are addressed through domestic regulations influenced by the different colonial legal traditions on the African continent. A continent-wide harmonised approach to consumer protection, including choice of law rules serving as common grounds for domestic competition policy within the AfCFTA, is essential.

Intellectual deliberations on international integrations have largely contemplated adopting either a harmonised or unified approach to legal uniformity and policy coherence. It is submitted that a harmonised approach fashioned to maintain the political sovereignty of state parties and suit the AfCFTA's modelled economic integration is plausible.[7] In other words, the AfCFTA is not a supranational institution; therefore, enacting a single, universally binding consumer protection regime is not feasible

7 Agreement Establishing the African Continental Free Trade Area (n 4) preamble.

(Erasmus 2020). State parties' consumer protection laws are responsible for providing substantive rules that prevent consistency due to unavoidable differences, policy preference prioritisation, and effective implementation measures (Gachuiri 2020, 7). Diversity can result in conflicting rules in determining the legal system for cross-border consumer transactions due to disjointed decisional outcomes. It is imperative to harmonise choice of law rules that are clear, transparent, predictable, and mutually beneficial to contracting parties while also preserving the political and legislative independence of state parties.[8]

The AfCFTA's consumer protection policy aims to safeguard consumers from various trade safety issues like fraud, unfair practices, misleading advertising, warranties, credit abuses, prescription drugs, and food additives (Dam 1970, 917). Harmonised consumer law safeguards consumers from fraudulent businesses and hazardous products, while consumer policy enhances consumer access to information, promotes market efficiency, and ensures fair prices and high-quality products. A harmonised consumer protection policy benefits companies by removing trade barriers. Trade restrictions make operating in Africa's internal market more expensive (Duivenvoorde 2015, 202). Companies selling products in AfCFTA markets face compliance costs due to varying rules among state parties, including consumer protection in advertising campaigns and sale promotions. The AfCFTA encourages electronic commerce, necessitating a common-policy approach to safeguard consumer rights, especially for vulnerable groups like women, children, and the elderly (Duivenvoorde 2015, 171). The proposed policy approach must address the challenges of multiple and overlapping law regime choices to achieve policy coherence.[9]

The Problem of Consumer Choice of Law Rules in Cross-border Trade within the AfCFTA

Choice of law rules is a system of law that reasonably (Hartley 2020, 624) governs contracts by applying connecting factors (Maniruzzaman 1999, 142). Sir Anthony Mason avers that the proper law of a contract is evidence of surrounding circumstances permissible to support the interpretation of the contract amid ambiguity.[10] Determining an applicable law is cumbersome due to conflicting state laws, the diversity of legal systems on the continent (Morris 1957, 260), and the interference of foreign elements presented in consumer contracts (Morris 1957, 260). In principle, contractual legitimacy stems from the parties' autonomy to decide their rights and obligations including choice of law clauses within the remit of a legal system (McKendrick 2018, 11). Efficiency and profit maximisation ushered the usage of standard terms to the detriment of consumers' negotiation rights resulting in exploitation (Berg 1979, 560). Standard terms compelling consumers into a take-it-or-leave-it situation, are, therefore, not a *stricto sensu*

8 Agreement Establishing the African Continental Free Trade Area (n 4) preamble.

9 ibid.

10 *Codelfa Construction v State Rail Authority* [1982] 149 CLR 337 para 22.

consensual agreement.[11] Digitisation of cross-border trade in an economic integration involves contracting on standard terms, which can lead to unfair commercial practices within the AfCFTA, such as a dominant party inserting a choice of law clause unfavourable to the consumer.

A practical demonstration of choice of law clause exploitation by the dominant party is revealed in the case of *Palomino v Facebook, Inc.*[12] The plaintiffs brought an action against the defendant, Facebook, Inc., asserting that the choice of law clause in Facebook's terms of service within the applicable statute of limitations violates New Jersey's Truth-in-Consumer Contract, Warranty, and Notice Act, which is New Jersey's fundamental policy of protecting consumers from unequal bargaining power and any illegal and misleading terms that arise out of such relationship.[13] To access Facebook's website, users must create a Facebook account and agree to or decline Facebook's terms of service.[14] The case highlights the issue of consumer rights violations due to abuse of choice of law clauses in Facebook's terms of service.

Contractual autonomy allows parties to decide the applicable legal system to consumer relations (Mills 2018, 20) and contractual proceedings (Torremans and Fawcett 2017, 448). An omission of choice propels courts to evaluate the surrounding circumstances and connecting factors for a suitable outcome (Torremans and Fawcett 2017, 625). Previously, courts applied the law of the place where the contract was completed (*lex loci contractus*) (Hartley 2020, 624). As cross-border relationships normalised, applying the *lex loci contractus* was unpopular. An alternative was the law of the place of performance (*lex loci solutionis*) (Hartley 2020, 625) because it provided a superior significant connection to the contract and unlocked the possibility of performance in different countries (Hartley 2020, 625). The common-law system invariably settled on the law chosen by the parties, or that with which the transaction had its closest and most real connection (Morris, McClean, and Beevers 2009, 353), without necessary links to the chosen legal system.[15] This approach was contested in a two-pronged argument. First, is it feasible for parties to decide, by choosing a particular legal system, whether they wish to be subject to a rule of *jus cogens* which may appear *prima facie* to apply to their contract (Lipstein 1978, 3)? If the answer is in the affirmative, is it reasonable for parties to choose any legal system however remote the connection and however capricious the choice may be (Lipstein 1978, 3)? This position reveals the deficit of choice of law.

Economic integration faces challenges due to the diverse nature of cross-border contracts influenced by connecting factors like performance location, or parties' domicile, nationality, or business location (Torremans and Fawcett 2017, 448). The

11 *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 308 1316 para c.
12 *Palomino* (n 3) para 1.
13 ibid.
14 ibid para 2.
15 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC 7 AC 277 (PC) 290.

proper law of a contract is determined by harmonised rules, preventing asymmetry and providing limited consumer protection (Rühl 2011, 575). The common-policy approach may be either through regulating information or regulating the transactions (Wein 2001, 80). The former aims to offset information disparity with no interference in the parties' free will to contract, while the latter limits freedom of contract and incurs the risk of inducing inefficient contracts (Rühl 2011, 579).

Consumers' inability to read standard terms and a gap in understanding information contribute to the failure of regulation of information. Consumers often overlook legal advice or services due to high costs, outweighing the benefits derived (Rühl 2011, 580). The cracks in addressing asymmetry in choice of law by regulating information require some limitations to choice of law clauses (Rühl 2011, 581). Harmonising choice of law rules on consumer transactions[16] can either be by modifying party autonomy or providing flexible provisions.[17]

Modifying the Rules on Parties' Autonomy to Choice of Law

Modifying parties' autonomy may be in one of these forms: exclude parties' choice of law altogether,[18] limit the parties' choice to certain laws,[19] or curtail the effects of parties' choice.[20] The AfCFTA's institutional framework should balance parties' choices and effects, allowing oversight without affecting their transaction terms. Some jurisdictions have successfully implemented this model.[21]

The Habitual Residence of the Consumer

A common institutional approach to choice of law must prioritise the parties' intentions to freely decide the law applicable to consumer contracts.[22] The converse is the case when the contract involves a dominant and a weaker party.[23] Harmonised rules should consist of parties' right to choice either by an express or tacit agreement[24] subject to choosing a "law" in the technical sense.[25] Within the framework of the EU are special rules that promote as well as limit the parties' choice of law in some selected contracts[26] and further determine the applicable law in the absence of choice.[27] The special rules

16 Rome I (n 1) Art 6.
17 Restatement (Second) of Conflict of Laws Art 187(2).
18 Federal Act on Private International Law 1987 (Switzerland) Art 120(2).
19 Rome I (n 1) Art 5(2).
20 Rome I (n 1) Art 6(1); International Private Law and Procedural Law 2007 (Turkey) Art 26(1).
21 Rome I (n 1) Art 6 and Art 9.
22 Rome I (n 1) Art 3.
23 Preamble to the Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernization COM (2002) 654 Final.
24 Rome I (n 1) Art 3.
25 ibid.
26 Rome I (n 1) Art 4.
27 ibid.

on consumer contracts advocate the application of conflict rules that are beneficial to the consumer's interests.[28]

More precisely, Article 6 of Rome I defines contracting parties and applies to contracts between consumers and professionals.[29] The Court of Justice of the European Union (CJEU) has characterised the person who contracts with the consumer as a "person acting in the exercise of their business or professional activities" (the professional).[30] The CJEU declared the necessity to strictly construe the concept of the consumer and identified that a consumer in this context is not premised on the person's subjective situation but on the nature and the aim of the contract.[31] Only consumers who conclude contracts to satisfy an individual's private consumption fall within the context of Article 6 as economically weak persons (De Sousa Gonçalves 2015, 9).

Article 6 explicitly defines the consumer as a natural person[32] and identifies the class of consumers protected under Rome I as being consumers of a contract between an individual and a professional (De Sousa Gonçalves 2015, 9). Precise guidance in the decision of *Benincasa v Dentalkit*[33] declared that a consumer should conclude a contract outside and independently of any trade or professional purpose, whether present or future, to enjoy said protection.[34] A natural person can only enjoy protection as a consumer under Article 6 if they act outside their trade or profession.

A judge must consider the parties' right to select the appropriate law based on Rome I provisions to effectively apply Article 6.[35] However, the parties' choice cannot invalidate additional protection provided to consumers by provisions that cannot be deviated from by agreement, which would apply without choice.[36] In the absence of an identifiable choice, the consumer contracts are governed by the law of the consumer's habitual residence,[37] except for certain contracts as stated in Article 4(6) of Rome I, which are regulated under different rules (Deskoski and Dokovski 2019, 8).

Rome I include several measures for safeguarding the consumers' interests. These include Articles 3(3) and 3(4), which limit parties' choice of law for purely national and

28 Rome I (n 1) Rit 23.
29 Rome I (n 1) Art 6.
30 European Commission (2005) Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) COM (650 final) 6.
31 Case C-269/95 *Benincasa v Dentalkit* [1997] ECR I-3767 para I6.
32 Rome I (n 1) Art 6; See the definition of a consumer in Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR 1-439 para 31; Case C-95/00 *Rudolf Gabriel v Schlank & Schick* [2002] ECR I-6367 para 37; Case C-99/96 *Mietz v Yachting Sneek* [1999] CJEU ECR I-2277 para 26; Case C-269/95 *Benincasa* (n 30) para 12; Case C-89/91 *Shearson Lehmann Hutton v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] ECR I-6367 para 13.
33 *Benincasa* (n 30) para 18.
34 ibid.
35 Rome I (n 1) Art 3 with Art 6.
36 Rome I (n 1) Art 6(2).
37 ibid.

intra-EU situations to counteract an evasion of mandatory national or EU law, including substantive provisions based on the protective principle (von Bochove 2014, 147). Considerably, Rome I's position on party autonomy, combined with specific provisions on consumer contracts, strikes an appropriate balance between the consumer and business interests and protects the consumer as the weaker party (Deskoski and Dokovski 2019, 8).

Overriding Mandatory Rules and Public Policy

Regulating parties' choice of law by the compulsory rule mechanism is evident in two fundamental areas: the public policy exception and the doctrine of overriding mandatory rules. Rome I superimposes overriding mandatory rules on the law applicable to the contract to protect an interest regarded as fundamental, generally by the forum states who have adopted Rome I. Overriding mandatory rules are *iuris cogentis* rules that cannot be altered by agreement. These provisions are applicable to situations falling within their scope irrespective of the law otherwise applicable. They are rules that may not be within the limits of their subject matter fundamentally changed or replaced by foreign law.[38] In effect, overriding mandatory provisions cannot be circumvented by the choice of another country's law (von Bochove 2014, 148). Rome I asserts that a country's overriding mandatory rules are applicable regardless of its provisions influenced by a state's political, social, or economic organisation.[39] The EU regime affords a wide margin of interpretation to determine these mandatory rules (von Bochove 2014, 148). Rome I mandates states to recognise overriding mandatory rule in consumer rules on choice of law to protect public interests (von Bochove 2014, 148). The unbending rules should not solely serve individual consumer protection law interests but should also contribute to the state's overall welfare (Kuipers 2012, 145). The rules added to the harmonised framework as overriding mandatory rules protect the customer against the dominant parties' limitless options. These norms take precedence over identifying the applicable law and act as a restriction on the parties' choice within the common-policy framework. The public policy exception only applies to foreign laws that have been identified as the applicable law, yet incompatible with the fundamental principles of the forum, reflecting the social, economic, and moral values of the society.[40]

Overriding mandatory rules and state public policy share similarities in focusing on a state's political, social, economic, and organisational aspirations, but differ in application. Overriding mandatory rules in its active application restricts the scope for an application of the conflict rules and choice of law as they precede the selection of law on the basis of conflict rules based on the existence of a strong operative public policy preventing the application of foreign law (Fazilatfar 2019, 11). Public policy refers to unique governmental or member state policies that take effect after determining

38 Joined Cases C-396/96 and C-376/96 *Arblade and Leloup* [1999] I-08453.

39 Rome I (n 1) Art 9.

40 ibid Art 21.

the applicable law (Fazilatfar 2019, 14). Overriding mandatory rules in the harmonised framework protects consumers from dominant party choices, limits choices, and determines applicable law, common to all state parties in the AfCFTA upon adoption. Public policies are state and governmental measures implemented to mitigate the impact of preconceived issues. Public policies are governmental frameworks defining a state's identity and aspirations, varying across countries based on cultural values, colonial ties, and religious beliefs (Fazilatfar 2019, 11).

A proper application of the special rules and the mandatory rules in terms of precedence within the AfCFTA expressly recommends an assessment on a case-by-case basis comparing policies of the chosen law and the mandatory law of the forum, irrespective of the law otherwise applicable. The chosen law governs the contract if it offers more protection, while if it provides less protection, the contract is governed by both the chosen law and mandatory provisions (Rühl 2011, 591). A combination of both provides a maximum standard of consumer protection. The AfCFTA's rules on consumer contracts can be effectively implemented through a harmonised institutional approach, providing maximum consumer protection.

Institutional Framework on Special Consumer Choice of Law Rules for the AfCFTA—A Harmonised Approach

The significant interest in the efficient implementation of international policies drives research into suitable institutional frameworks for adopting protocols or conventions. The inquiry explores the dilemma of choosing between a unified approach or a harmonised approach, with unification aiming for complete substance unity (Andeans and Andersen 2011, 309) and harmonisation approximating essential national laws. Put (Honnold 1991, 109) differently, unification introduces a new law to replace the national laws (Zaphiriou 1990, 71), while harmonisation involves identifying the limits in international unifications and private cross-border transactions to provide a model law but does not amount to absolute unification (Rosett 1992, 687). Boodman states that an attribute of harmonisation is that it presupposes and preserves the diversity of the objects harmonised (Boodman 1991, 701).

Harmonisation through institutional frameworks for consumer contracts is more feasible than maintaining diverse legal identities and eliminating trade barriers through identical policies. As mentioned earlier, the AfCFTA is not a supranational institution, hence promulgating a single unified consumer protection regime with an outright binding effect is not feasible (Erasmus 2020). Successfully implementing choice of law rules on consumer contracts requires a harmonised approach to create a fertile foundation for modelling an Afrocentric standardisation of choice of law rules (Fagbayibo 2022, 47) that guarantees predictability, stability, and maintaining state's sovereignty in cross-border commercial relations (Stephan 1999, 4).

A Proposed Harmonised Consumer Protection Policy Framework Focusing on a Continent-wide Choice of Law Rules for the AfCFTA

The policy-setting responsibility of the AfCFTA confers an obligation to institutionalise choice of law rules on consumer contracts by a harmonised approach to model national laws. The policy on consumer protection should provide a comprehensive definition of "consumer" within this context. The AfCFTA should consider this to comprise a purchaser, a user, and a third party. Country-specific consumer protection policies must comply with the rights and duties of the consumer and the dominant party. For further protection, remedies like rescission of the contract, and the right to damages among other relevant issues on consumer protection should be addressed by the AfCFTA. State-centric consumer policies require integrated rules on jurisdiction, recognition, enforcement, and choice of law. These special rules are needed for free trade protection, reducing dispute settlement costs, and accounting for emerging trends.[41] The rules on choice of law should provide detailed information on definitions, scope, party autonomy, mandatory rules, and public policy.

Definitions

Consumer contracts between consumers and others for purposes outside their trade or profession are considered within the harmonised framework for the AfCFTA.[42] A natural person lacks legal, professional, technical, or trade competence in managing the consumption and use of goods and services.[43] Consumers in this context should extend to small-scale businesses that purchase goods and services from suppliers without professional competence to acquire or use the goods or services. This extension is beneficial to the AfCFTA to accommodate small-scale enterprises serving as intermediary transactors between actual professionals and natural persons.

The dominant party, to which the consumer contracts, should be a professional executing their trade or profession, focusing on commercial activities within the consumer's habitual residence country.[44] The definition must not limit professionals to conduct business solely within a state's territory, as this undermines the purpose of economic integration. Performance before concluding the contract may not occur in the country of the consumer's habitual residence, which is superfluous in the era of electronic commerce. Professionals must ensure their interests are protected in the terms of the standard consumer contract by requiring useful information (De Sousa Gonçalves 2015, 10). In case of a dispute, the terms of the standard consumer contract itself serves as proof.

41 Rome I (n 1) Rit 24.

42 ibid Art 6(1).

43 The Belgian "Commission d'Étude pour la Réforme du Droit de la Consommation" (CERDC), chaired by Thierry Bourgoignie in 2005, proposed to extend the notion of consumer to some legal moral persons in a limited sense.

44 Rome I (n 1) Art 6(1)(a).

The habitual residence of corporate entities should be specified as the place of central administration.[45] The habitual residence of a natural person should serve as the principal place of business.[46] If a contract is concluded within the operations of a branch, agency, or other establishment, the location of the branch or agency serves as the habitual residence.[47] The point at which habitual residence exists is the time of concluding the contract.[48]

Scope of Applicability

The proposed harmonised framework for the AfCFTA must encompass the scope within the choice law rules apply. The proposed rules should be applicable to contracts involving professionals directing commercial activities in the consumer's habitual residence within the AfCFTA.[49] The scope of the AfCFTA applies to all consumer contracts, except for goods and services supplied to consumers outside their habitual residence.[50] The law of the other country applies in such instances. The defined scope should further exclude a contract for the carriage of goods and services[51] as these are governed by domestic laws.[52] Contracts relating to a right *in rem* in immovable property or the tenancy of immovable property[53] should be omitted from the scope of application as the regulation of these forms of contracts are administered under state laws such as conveyancing decrees. Agreements involving rights and obligations that constitute a financial instrument, and other forms of financial services, must be governed separately as financial institutions are administered under separate domestic legal regimes.[54]

Party Autonomy

The proposed framework of the AfCFTA should focus on the autonomy of parties in contracting. The express or implied autonomy of parties in consumer contracts dictates the choice of applicable law. A harmonised approach should, nonetheless, limit this autonomy that allows dominant parties to solely decide on standard terms. A limitation is that the choice of another country's law by the parties cannot prejudice the law of the country that cannot be derogated from by the agreement.[55]

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45 Rome I (n 1) Rit 39.
46 ibid Rit 19.
47 ibid Art 19.
48 ibid Art 19.
49 ibid Art 6(1)(a).
50 ibid Art 6(4)(a).
51 ibid Art 6(4)(b).
52 Sale of Goods Act 137, 1962 (Ghana)
53 Rome I (n 1) Art 6(4)(c).
54 ibid Art 6(4)(d).
55 ibid Rit 15 and Art 3(3).

Applicable Law in the Absence of Choice

The AfCFTA's proposed policy should consider adopting the law of the consumer's habitual residence if the parties fail to decide on the applicable law. The choice of law rules of the consumer's habitual residence must only apply provided that the professional pursues or directs the commercial or professional activities to that country.[56] The protection should comprise rules more favourable to consumer interest.[57] Deciding on the consumers' habitual residence is premised on easy accessibility to specific legal knowledge and services void of language barrier or exorbitant cost (Okoli and Omoshemime 2012, 513). In addition, all standard form consumer contracts by professionals should conform to the laws of the consumer's habitual residence (Plender and Wilderspin 2009, 168–169).[58]

Overriding Mandatory Rules and Public Policy

An infringement that constitutes a manifest breach of a rule of law essential for legal order must be identified for a rule to override the chosen law.[59] Successfully implementing mandatory rules necessitates quality state consumer protection policies addressing pertinent issues. The harmonised framework of the AfCFTA must avoid rules restricting overriding mandatory provisions to choice of law rules.[60] The unlawful performance of a consumer contract must attract the application of mandatory rules. The nature, purpose, and consequences of applying mandatory rules must be considered.[61] A restrictive construction must be adhered to by the AfCFTA harmonised policy to distinguish the provisions of the forum that cannot be derogated from by agreement.[62] The establishment of overriding mandatory rules does not invalidate a harmonised approach to choice of law; rather, overriding mandatory rules are rules that the harmonised policy introduces to pre-empt a decision made by the dominant party that violates the rights of consumers.

The harmonised policy needs to include provisions recognising the public policies of state parties. Public policy overrules the application of contravening choice of law provisions. This is important to preserve the diversity and maintain the political sovereignty of state parties even under the harmonised policy by the AfCFTA as state public policies differ on grounds of cultural underpinnings. Courts should decline to apply a choice by the parties if the application would be manifestly incompatible with the public policy of that forum (Dickinson 2012, 5). The courts should equally decline to apply a law proposed by the harmonised framework if it contravenes the public policy of state parties. This is conceivable because the harmonised framework offers a point of

56 Rome I (n 1) Art 6(2).
57 ibid Rit 23.
58 ibid Rit 25.
59 Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc* [2009] ECR I-02563 para 27.
60 Rome I (n 1) Art 9(2).
61 ibid Art 9(3).
62 ibid Rit 37.

similar convergence to legal barriers on choice of law regulations although not being absolute.

Conclusion

Consumer exploitation incorporating choice of law clauses in consumer contracts within the AfCFTA is an imminent issue worth contemplating. The AfCFTA secretariat should consider a harmonised consumer protection policy to regulate fraud, unfair business practices, and misleading advertising, as the secretariat is in the process of establishing protocols for successful implementation. The harmonised protection policy should establish rules on choice of law to restrict dominant parties' influence on consumer rights. A policy ensuring consumer interests in choice of law will boost confidence, stimulate trade, and foster economic integration. The policy should define the consumer as a natural person and the dominant party as a professional in the scope of their profession. The policy must consider the scope of the application and uphold the parties' autonomy to decide the applicable law to their contract.

The AfCFTA should establish special rules for consumer choice of law, allowing the application of the law of the consumer's habitual residence in the absence of choice of law. The proposed harmonised policy should allow for overriding mandatory rules to challenge dominant party choices that infringe on consumer rights or negatively impact them. These rules must be common rules that apply to all state parties after adopting and ratifying the proposed policy. The article further proposes that the harmonised framework should uphold the distinct public policies of state parties on consumer contracts to preserve the diversity and maintain the political sovereignty of state parties.

The proposed harmonised framework aims to enhance consumer protection, promote predictability, and enhance consumer confidence in cross-border transactions, ensuring a result-oriented outcome in choice of law (Healy 2009, 535). The proposed AfCFTA's consolidated consumer protection framework envisages to ensure consistency and reliability in interpreting law provisions in consumer contracts. The article only considers choice of law rules among other areas in a consumer protection regime. Academic research is crucial for achieving a holistic, result-oriented outcome in other areas of consumer protection within the AfCFTA.

References

Andeans, Mads, and Camilla Andersen, eds. 2011. *Theory and Practice of Harmonisation*. Cheltenham: Edward Elgar Publishing.

Badinger, Harald. 2005. "Growth Effects of Economic Integration: Evidence from the EU Member States." *Review of World Economics* 141: 50–78. <https://doi.org/10.1007/s10290-005-0015-y>

Bamodu, Gbenga. 1994. "Transnational Law, Unification and Harmonization of International Commercial Law in Africa." *Journal of African Law* 38 (2): 125–143. https://doi.org/10.1017/S0021855300005489

Bauerfeld, Richard J. 1982. "Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?" *Columbia Law Review Association, Inc.* 82 (8): 1659–1691. https://doi.org/10.2307/1122297

Berg, Kenneth Frederick. 1979. "The Israeli Standard Contracts Law 1964: Judicial Controls of Standard Form Contracts." *International and Comparative Law Quarterly* 28 (4): 560–574. <https://doi.org/10.1093/iclqaj/28.4.560>

Bigwood, Rick. 2003. *Exploitative Contracts*. Oxford: Oxford University Press.

Boodman, Martin. 1991. "The Myth of Harmonization of Laws." *The American Journal of Comparative Law* 39 (4): 699–724.

Dam, Kenneth W. 1970. "Consumer Protection: An Overview." *Antitrust Law Journal* 39 (4): 917–925.

De Sousa Gonçalves, Anabela Susana. 2015. "The E-commerce International Consumer Contract in the European Union." *Masaryk University Journal of Law Technology* 9 (1): 5–20. <https://doi.org/10.5817/MUJLT2015-1-2>

Deskoski, Toni, and Vangel Dokovski. 2019. "*Lex Contractus* for Specific Contracts under the Rome I." *Iustinianus Primus Law Review*: 1–12.

Dickinson, Andrew. 2012. "The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles on the Law Applicable to International Commercial Contracts." *Sydney Law School* 12 (81): 5–31.

Duivenvoorde, Bram B. 2015. *The Consumer Benchmark in the Unfair Commercial Practices Directive*. Cham: Springer. <https://doi.org/10.1007/978-3-319-13924-1>

Erasmus, Gerhard. 2020. "How will Phase II of the AfCFTA be negotiated, ratified and implemented?" tralac. <https://www.tralac.org/blog/article/14463-how-will-phase-ii-of-the-afcfta-be-negotiated-ratified-and-implemented.html>

Fagbayibo, Babatunde. 2009. "Towards Harmonisation of Laws in Africa: Is OHADA the Way to Go?" *The Comparative and International Law Journal of Southern Africa* 42 (3): 309–322.

Fagbayibo, Babatunde. 2022. *Transcending Member States: Political and Legal Dynamics of Building Continental Supranationalism in Africa*. Springer Link. <https://doi.org/10.1007/978-3-031-12451-8>

Fazilatfar, Hossein. 2019. *Overriding Mandatory Rules in International Commercial Arbitration*. Cheltenham: Edward Elgar Publishing. <https://doi.org/10.4337/9781788973854.00009>

Fernández Arroyo, Diego P., and Makane Moïse Mbengue. 2018. “Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction.” *Columbia Journal 0f Transnational Law* 56: 797.

Forsyth, Christopher. 2012. *Private International Law, The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts*. 5th ed. Juta.

Gachuiri, Elizabeth. *African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol?* UNCTAD Research Paper No. 56 UNCTAD/SER.RP/2020/15, 7. <https://unctad.org/system/files/official-document/ser-rp-2020d15_en.pdf>

Hartley, Trevor. 2020. *International Commercial Litigation: Text, Cases and Materials on Private International Law*. 2nd ed. Cambridge: Cambridge University Press. <https://doi.org/10.1017/9781108774819>

Healy, James. 2009. “Consumer Protection Choice of Law. European Lesson for the United States.” *Duke Journal of Comparative & International Law* 19: 535–588.

Honnold, John O. 1991. *Clive M. Schmitthoff, Selected Essays on International Trade Law*, edited by Chia-Jui Cheng. Dordrecht: Martinus Nijhoff Publishers/Graham & Trotman.

Kuhlmann, Katrin, and Agutu Lisa Akinyi. 2020. “The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development.” *Georgetown Journal of International Law* 51 (4): 753–818. <https://doi.org/10.2139/ssrn.3599438>

Kuipers, Jan-Jaap. 2012. *EU Law and Private International Law: The Interrelationship in Contractual Obligations*. Leiden: Martinus Nijhoff. <https://doi.org/10.1163/9789004206724>

Lipstein, Kurt. 1978. *Harmonisation of Private International Law by the EEC*. Institute of Advanced Legal Studies. University of London.

Maniruzzaman, Munir A. F. M. 1999. “Choice of Law in International Commercial Contracts–Some Fundamental Conflict of Law Issues.” *Journal of International Arbitration* 16 (4): 15–41.

McKendrick, Ewan. 2018. *Contract Law: Textbook, Case and Materials*. 5th ed. Oxford: Oxford University Press.

Mills, Alex. 2018. “Connecting Public and Private International Law.” In *Linkages and Boundaries in Private and Public International Law*, edited by Veronica Ruiz Abou-Nigm, Kasey McCall-Smith and Duncan French. Bloomsbury.

Mills, Alex. 2018. *Party Autonomy in Private International Law.* Cambridge University Press. <https://doi.org/10.1017/9781139941419>

Morris, John HC, David McClean, and Kisch Beevers. 2009. *Conflict of Laws.* Thomson Reuters.

Morris, Levin. 1957. "Party Autonomy: Choice-Of-Law Clauses in Commercial Contracts." *Georgetown Law Journal* 46 (2): 260–280.

Ndulo, Muna. 1993. "Harmonisation of Trade Laws in the African Economic Community." *International & Comparative Law Quarterly* 42 (1): 101–118. <https://doi.org/10.1093/iclqaj/42.1.101>

OECD Competition Law and Policy, "The Interface between Competition and Consumer Policies" DAF/COMP/GF. June 5, 2008, 8. <https://www.oecd.org/daf/competition/40898016.pdf>

Okoli, Chukwuma Samuel Adesina, and Gabriel Arishe Omoshemime. 2012. "Rome Convention, Rome I Regulation and Rome II Regulation." *Journal of Private International Law* 8 (3): 513–545. https://doi.org/10.5235/JPRIVINTL.8.3.513

Plender, Sir Richard, and Michael Wilderspin, QC. 2009. *European Private International Law of Obligations.* Sweet & Maxwell.

Rosett, Arthur. 1992. "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law." *The American Journal of Comparative Law* 40 (3): 683–697. <https://doi.org/10.2307/840594>

Rühl, Giesela. 2011. "Consumer Protection in Choice of Law." *Cornell International Law Journal* 44 (3): 570–609.

Stephan, Paul B. 1999. "The Futility of Unification and Harmonization in International Commercial Law." *University of Virginia School of Law, Law and Economics Research Paper Series* 99: 1–40. <https://doi.org/10.2139/ssrn.169209>

Thompson, Bankole. 1990. "Legal Problem of Economic Integration in the West African Sub-Region." *African Journal of International and Comparative Law* 2 (1): 85–102.

Torremans, Paul and Fawcett, James eds. 2017. *Cheshire, North & Fawcett: Private International Law*. 15th ed. Oxford: Oxford University Press.

tralac. 2023. "The African Continental Free Trade Area: A Tralac Guide 10." 10th ed. May 2023, 3. <https://www.tralac.org/documents/resources/booklets/4803-afcfta-a-tralac-guide-10th-edition/file.html>

Von Bochove, Laura Maria. 2014. "Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law." *Erasmus Law Review* 3: 147–156. <https://doi.org/10.5553/ELR.000030>

Wein, Thomas. 2001. “Information Problems and Market Failure: The Perspective of Economics.” In *Party Autonomy and the Role of Information in the Internal Market*, edited by Stefan Grundmann, Wolfgang Kerber, and Stephen Weatherill, 80–97. Berlin: De Gruyter.

Zaphiriou, George A. 1990. “Harmonization of Private Rules between Civil and Common Law Jurisdictions.” *The American Journal of Comparative Law* 38: 71–97. <https://doi.org/10.2307/840534>

Legislation

Sale of Goods Act 137, 1962 (Ghana)

Federal Act on Private International Law, 1987 (Switzerland)

Act on International Private and Procedure Law, 5718, 2007 (Turkey)

International Treaties and Convention

African Union. “Agreement Establishing the African Continental Free Trade Area” (2019). <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>

Commission Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernization COM (2002) 654 Final.

Council 80/934/EEC: Convention on the Law Applicable to Contractual Obligations Opened for Signature in Rome on 19 June 1980/Consolidated Version CF 498Y0126(03).

Council Report on the Convention on the Law Applicable to Contractual Obligations’ Giuliano and Lagarde Report OJ C282 (October 31, 1980).

European Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650, Final 7; Green Paper, COM (2002) 654 final, para 3.2.8.3.

Restatement (Second) of Conflict of Laws.

The Incoterms or International Commercial Terms, updated at Incoterms (2022).

Uniform Commercial Codes (1952).

Cases

Joined Cases C-396/96 and C-376/96 Arblade and Leloup [1999] ECR I-08453.

Case C-269/95 *Benincasa v Dentalkit* [1997] CJEU ECR I-3767.

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] 149 CLR 337.

Case C-133/08 Interfrigo SC (ICF) v Balkende Oosthuizen BC [2009] ECR I-9687.

Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc* [2009] ECR I-02563.

Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR 1-439.

Case C-99/96 *Mietz v Yachting Sneek* [1999] CJEU I-2277.

Mount Albert Borough Council v Australasian Temperance and General Assurance Society [1938] AC 224.

Case 16-cv-04230-HSG *Palomino v Facebook, Inc.* [2017] (ND Cal).

Case C-95/00 *Rudolf Gabriel v Schlank & Schick* [2002] CJEU ECR I-6367.

Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 WLR 308.

Case C-89/91 *Shearson Lehmann Hutton v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] CJEU I-6367.

Vita Food Products Inc v Unus Shipping Co Ltd [1939] UKPC 7 AC 277 (PC).