J Barnard
J Barnard, Associate Professor, Department of Mercantile Law, Faculty of Law, University of Pretoria. ORCID: https://orcid.org/0000-0001-7457-5569.

E Mišćenić
E Mišćenić, Associate Professor, Faculty of Law, University of Rijeka, Croatia. ORCID: https://orcid.org/0000-0002-2695-9186.

DOI: https://dx.doi.org/10.18820/24150517/JJS44.i1.5

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2019:44(1):111-138

The role of the courts in the application of consumer protection law: A comparative perspective

Summary

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.

1. Introduction and background

The consumer's access to justice is influenced by both the substantive law and the operating characteristics of the traditional legal avenues open to the consumer.[1]

This statement by Van Eeden and Barnard confirms that the substantive law of a particular jurisdiction can greatly influence not only the consumer's access to justice, but also whether the enforcement of consumer rights (and consumer protection law) is effective. "Traditional legal avenues" assumes traditional litigation in traditional or civil courts and, in the case of consumer redress and access to justice, these avenues have been proven to be time-consuming, uncertain and expensive in the past.[2] Due to the trite imbalance of bargaining positions between businesses and consumers (consumers being the weaker party), legislative interventions have been implemented in an attempt to bring businesses and consumers on an equal footing and equal before the law.[3] The vast majority of jurisdictions (in particular the European Union [hereafter EU] and South Africa) conform to the United Nations Guidelines for Consumer Protection (hereafter UNGCP), 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.[4] The UNGCP encourages the resolution of consumer disputes in a "fair, expeditious and informal manner with the establishment of voluntary mechanisms, including advisory services and informal complaints procedures, which can provide assistance to consumers".[5] The EU and South Africa accept and follow the UNGCP and the establishment of effective redress and enforcement of consumer protection law, 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 role of the courts in relation to *effective* (or *ineffective*) alternative dispute resolution mechanisms. This contribution examines the legal positions in terms of the EU and South Africa, with the aim of affirming that the right to access to the courts is a constitutionally entrenched right and a balance between effective formal and informal enforcement (in accordance with UNGCP) should be the aim.

In the EU, consumer protection requirements are to be taken into account in defining and implementing other Union policies and activities according to art. 12 of the Treaty of the Functioning of the European Union

1 Van Eeden & Barnard 2017:92.
2 Van Heerden 2018:69-19.
3 Hawthorne 2012:348; Woker 2010:230-231.
4 United Nations Guidelines for Consumer Protection:paras. 32-34.
5 United Nations Guidelines for Consumer Protection:par. 33.

(hereafter TFEU),[6] while a high level of consumer protection is to be ensured by Union policies pursuant to art. 38 of the EU Charter of Fundamental Rights.[7] Consequently, the EU has introduced various consumer protection measures to ensure greater consumer protection throughout its Member States. The most relevant include the Unfair Contract Terms Directive (hereafter UCTD),[8] the Unfair Commercial Practices Directive (hereafter UCPD),[9] and the Consumer Rights Directive (hereafter CRD)[10]. Once these EU directives are transposed into Member States' national laws, the protection of consumer rights guaranteed by them has to be *effective*. This quest for effectiveness of EU directives at Member States' national level was developed by the judicial decisions of the Court of Justice of the European Union (hereafter CJEU). In this regard, effectiveness plays two important roles. It provides for effective protection of consumer rights at Member States level, on the one hand, and guarantees uniform interpretation and application of EU law across the Union, on the other. Nonetheless, the same CJEU case law that sets high demands for the protection of consumer rights reveals numerous obstacles that ordinary courts of Member States are facing when enforcing consumer protection law. These include the most basic questions such as the determination of whether or not a party is, in fact, a "consumer" in a national civil procedure dispute,[11] and whether consumer protection law is to be observed *ex officio* by Member States' national courts.[12]

In South Africa, the legislature attempted to bring consumer protection law in line with both the *Constitution*[13] and international instruments, by the introduction of the *Consumer Protection Act* 68 of 2008[14] (hereafter *CPA*). This comprehensive piece of legislation affects existing law in relation to the common law of South Africa as well as pre-existing legislation and particular industries. Included in the main purposes of the *Act* is to provide "a consistent, accessible and efficient system of consensual resolution

6 Treaty on the Functioning of the European Union, OJ C 202/1, 7 June 2016.
7 Charter of Fundamental Rights of the European Union, OJ C 202/389, 7 June 2016.
8 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.
9 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149/22.
10 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Directive 93/13/EEC and Directive 1999/44/EC and repealing Directive 85/577/EEC and Directive 97/7/EC, OJ 2011 L 304/64, 22 November 2011.
11 Judgment of 4 June 2015, C-497/13, *Faber,* EU:C:2015:357.
12 *Faber:*357.
13 *Constitution of the Republic of South Africa,* 1996. See also *Consumer Protection Act:* Preamble; Hawthorne 2012:343-370.
14 *Consumer Protection Act*:sec. 2(1). See also Barnard 2017:353-389.

of disputes arising from consumer transactions",[15] and "providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers".[16] Chapter 3 of the *CPA* is dedicated to the protection of consumer rights and the consumers' voice and includes the much-debated routes of redress to be followed by consumers in terms of sec. 69, as will be discussed later in this contribution. The section provides various avenues of redress to be followed and enforcement institutions to be approached prior to civil courts. These institutions include the National Consumer Commission (hereafter NCC), the National Consumer Tribunal (hereafter NCT) and Alternative Dispute Resolutions Agents (hereafter ADR agents). Only when all other options in terms of national law have been exhausted may civil courts be approached.[17] Consensual dispute resolution (and, in particular, alternative dispute resolution) plays a central role in the enforcement of consumer rights in terms of the South African position, by way of the *CPA*. However, the problematic wording and implementation of sec. 69 and other relevant provisions as well as the exclusive jurisdiction given to the civil courts where certain consumer rights are infringed, makes the legal position much less certain and thus deserves further analysis.

As will be shown, there seems to be an ongoing struggle (both in the EU and South Africa) when it comes to the role of courts in the effective enforcement of consumer protection law, *i.e.* the struggle between the courts themselves and existing mechanisms of alternative dispute resolution (hereafter ADR). Due to the abovementioned, as well as other problems regarding court proceedings such as the length and financial implications of national civil law procedures, there is a growing attitude that the enforcement of consumer protection law can be guaranteed more effectively by ADR bodies that are faster, cheaper and, therefore, more convenient for consumers.[18] ADR bodies possess specialist knowledge in a specific area of consumer protection law (for example, the Air Passenger Rights sector in the EU and the Motor Industry Ombud in South Africa). In order to evaluate the role of the courts in the (effective) enforcement of consumer protection law, the authors first define what is to be understood under the guarantee of effective enforcement in general, then discuss the position of the courts in relation to ADR mechanisms. They then compare the role of the ordinary civil and commercial courts in relation to ADR mechanisms, and finally question the most important instrument of effective protection of consumer rights, the *ex officio* control and application of consumer protection law. For purposes of this discussion, the term "*ex officio*" refers to the role of the courts' general application of consumer protection law as well as to particular instances in which the application by courts is necessary to ensure consumer protection (even where it has not been pleaded by the consumers when putting their case forward). The position in terms of the EU will be discussed first, followed

15 *Consumer Protection Act*:sec. 3(1)(g).
16 *Consumer Protection Act*:sec. 3(1)(h).
17 *Consumer Protection Act*:sec. 69(d).
18 Critically, Rühl 2015:431-456.

by a comparative discussion with the South African position. (This includes similarities and differences in the approach.) It should be noted that the contribution aims to position the courts in relation to the fairly new environment of ADR regarding consumer protection redress. In order to do so, a short insight into the ADR system for consumer redress in both jurisdictions is necessary.

2. The guarantee of effective enforcement of consumer protection law

2.1 The EU position

A long time has passed since the CJEU set "the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States".[19] Over the years, the CJEU developed and established various institutes and principles guaranteeing the effectiveness or the so-called "*full effect*" ("*effet utile*") of EU law.[20] Although the "*effet utile*" requires Member States, to which the EU Directive is addressed, "to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues",[21] the principle of effective (judicial) protection demands effective protection of rights guaranteed by the relevant EU Directive or other relevant source of EU law.

This latter principle was developed by the CJEU by relying on the constitutional traditions of the particular Member States and as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR).[22] This constitutional guarantee was first stated in *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, where a person's right (in terms of the particular Directive) to obtain an effective remedy in a competent court within the Member States was confirmed.[23] Nowadays, this principle is reflected in art. 19(1) of the Treaty of the European Union (hereafter TEU),[24] as well as in art. 47 of the EU Charter of Fundamental Rights (hereafter CFR).[25] EU primary law thus requires the effectiveness of enforcement of EU law. To this purpose, the CJEU developed the principles of *effectiveness* and *equivalence*, setting criteria with which national (enforcement) rules have to comply in order to guarantee efficient legal protection at the Member States level. The role of the courts in relation to other enforcement bodies is also significant to

19 Judgment of 16 January 1974, C-166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* EU:C:1974:3:par. 2.
20 For a discussion of the difficulties in the interpretation, see Heinze 2009:337.
21 Judgment of 7 May 2002, C-478/99, *Commission v Sweden,* EU:C:2002:281:par. 15.
22 Judgment of 15 May 1986, C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary,* EU:C:1986:206:par. 18.
23 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*:par. 19.
24 Consolidated version of the Treaty on European Union, OJ C 202/1, 7 June 2016.
25 Van Duin 2017:190-198; Mak 2014.

ensure *effective legal protection* in the fields covered by EU law, including consumer protection law. The EU consumer protection directives thus foresee various enforcement possibilities. For example, art. 7 of the UCTD and arts. 11 and 12 of the UCPD refer to the protection of consumers' interests before the courts or other competent administrative bodies, and art. 13 of the UCPD requires Member States to introduce penalties for unfair commercial practices that must be effective, proportionate and dissuasive. As part of elaborating on the principle of *effectiveness*, the CJEU also acknowledged the possibility of consumer protection before various national bodies.[26]

2.2 The South African position

It is imperative for consumer disputes to be resolved and, in this regard, the view of Van Eeden and Barnard is supported.[27] They state that resolving consumer disputes is not only important for consumers, but also for society in general, whereas unresolved consumer disputes are not beneficial to the social order.[28] In South Africa, the guarantee of effective enforcement of consumer protection law is stated as part of the preamble to the *CPA* and runs like a golden thread through the *Act*. The *CPA* is part of the Government's attempt to correct the effects of past discriminatory laws which burdened the nation with socio-economic problems such as poverty, illiteracy and inequality in the consumer market.[29] The international law obligations of South Africa are recognised and the *CPA* thus attempts to "develop effective means of redress for consumers".[30]

In terms of sec. 3, the *Act* purports to provide a legal framework that strives to provide a consumer market that is not only effective, efficient and sustainable, but also responsible.[31] It should be noted that, from the outset and as part of the purpose of the *CPA*, the protection of particular categories of vulnerable consumers is recognised.[32] The inclusion of these vulnerable groups is significant as they comprise a large part of the consumer market in South Africa and the access to, and the guarantee of effective redress and enforcement for them are obvious. Van Eeden and Barnard confirm that the legal framework introduced by the *CPA* has altered the substantive rules governing the business-to-consumer (hereafter B2C) relationship, but, more importantly, effected changes to the administration of the justice system pertaining to disputes between

26 Judgment of 3 October 2013, C-32/12, *Duarte Hueros,* EU:C:2013:637:par. 34; judgment of 6 October 2009, C-40/08, *Asturcom Telecomunicaciones*, EU:C:2009:615:par. 39.
27 Van Eeden & Barnard 2017:93.
28 Van Eeden & Barnard 2017:93.
29 *Consumer Protection Act*:Preamble.
30 *Consumer Protection Act*:Preamble.
31 *Consumer Protection Act*:sec. 3(1)(a), read together with sec. 3(1)(h).
32 *Consumer Protection Act*:sec. 3(1)(b), which includes low-income and low-literacy persons, minors, seniors and consumers who live in low-density populated areas.

consumers and businesses (suppliers).[33] Van Eeden and Barnard explain that this framework guarantees effective redress and enforcement by first establishing a "code of law" that applies in the consumer market and to consumer transactions, in terms of which prohibited conduct by businesses is defined and includes other ordering rules.[34] Secondly, the framework establishes a regulatory sphere of certain institutions tasked specifically with the protection of consumers and enforcement of consumer rights.[35] These institutions are the NCT, the NCC, provincial consumer courts and protection authorities, and the Minister (and Department) of Trade and Industry, all of which are subject to the *Constitution* and administrative law. Lastly, the framework establishes a role for the national courts which allows them restricted functions (with limited exceptions) that will be discussed below.[36]

As a concretisation of the guarantee of effective enforcement of consumer protection law, the consumer is further provided with the fundamental consumer right to be heard and obtain redress. Thi right forms part of the governance of the "Protection of Consumer Rights and Consumers' Voice" in Chapter 3 of the *Act*.

3. The position of the courts in relation to ADR mechanisms

It is necessary to establish the position of the courts in relation to ADR mechanisms, as this will determine the role of the courts in effective redress and enforcement for consumer protection law. As a result, an overview of the relevant consumer protection mechanisms, institutions and courts available to consumers as part of the legal enforcement framework are considered.

3.1 The EU position: The ADR/ODR regulation

As mentioned earlier, the EU and South Africa follow the UNGCP and the focus on alternative dispute resolution mechanisms for redress and enforcement. As a result, over the past twenty years, the EU has focused on the establishment of consensual dispute resolution mechanisms. In 1998, the EU Commission issued a Recommendation regarding bodies responsible for out-of-court settlement of consumer disputes followed by a Recommendation in 2001 governing out-of-court bodies involved in the consensual resolution of consumer disputes.[37] In 2008, certain aspects

33 Van Eeden & Barnard 2017:401.
34 Van Eeden & Barnard 2017:401.
35 Van Eeden & Barnard 2017:401.
36 Van Eeden & Barnard 2017:401.
37 Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 17 April 1998:31-34; Commission Recommendation 2001/311/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ L 109, 19 April 2001:56-61.

of mediation in civil and commercial matters were covered by Directive 2008/52/EC,[38] while, in 2013, the Directive 2013/11/EU on alternative dispute resolution for consumer disputes (ADR Directive)[39] was adopted. The ADR Directive is closely connected and interwoven with the Regulation (EU) No. 524/2013 on online dispute resolution for consumer disputes (hereafter ODR regulation),[40] establishing an online dispute resolution platform (hereafter ODR platform). The primary goal of this recently introduced ADR/ODR system is to contribute to better functioning of the EU digital single market.

In reality, the introduction of the European ADR/ODR regulation has not *de facto* significantly affected pre-existing enforcement mechanisms of consumer rights across the EU and suffers from many disadvantages.[41] The ODR platform is functioning as a contact point for both consumers and traders, and contains information on available ADR bodies in every Member State. Upon their request, applicants are suggested to contact the so-called national contact points (hereafter NCPs), in order to solve their dispute in an out-of-court procedure. Despite the used notion "online", the whole procedure does not guarantee an "online" solution of the dispute, due to the fact that many enlisted ADR bodies require the presence of parties or their representatives during the proceeding.[42] One could also raise the question as to whether the enlisted out-of-court bodies of various Member States can really guarantee effective protection of consumer rights, not only because of the fact that the ADR/ODR system is functioning as a mechanism for complaints of both traders and consumers,[43] but also because some ADR bodies are not independent[44] and include, for example, private companies.[45] The greatest hindrances for effective enforcement of consumer disputes on this platform are the sheer numbers and variety of ADR bodies available in every single Member State, each with its own rules, procedures and criteria.[46] In an attempt to

38 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24 May 2008:3-8.

39 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, OJ L 165, 18.6.2013:63-79.

40 Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR), OJ L 165, 18.6.2013:63-79.

41 For critical remarks on the ADR system, see Cauffmann 2016:155-160; Weber 2015:265-285.

42 For example, the Belgium Commission Conciliation Automoto/ Verzoeningscommissie Automoto, Commission de Litiges Voyages and the Croatian Mediation Centre of the Croatian Chamber of Trades and Crafts, Mediation Centre at the Croatian Insurance Bureau.

43 ODR Regulation:art. 2(2); *ADR Directive:*recital 16.

44 Critically to this issue, Eidenmüller & Fries 2016.

45 An example of an out-of-court body in Croatia is PROFI TEST d.o.o. (a registered company with limited liability), Centar za mirenje "Medijator".

46 Examples of out-of-court bodies available in Germany include Allgemeine Verbraucherschlichtungsstelle des Zentrums für Schlichtung e. V. and Anwaltliche

address this issue, the ADR Directive introduced common rules, criteria and principles applicable to all existing ADR mechanisms and procedures across the EU. The ADR Directive emphasizes the need for transparency and efficiency of ADR procedures,[47] and introduces criteria concerning their fairness and legality.[48]

Transposition of the ADR Directive into the laws of different Member States revealed problems with respect to its scope of application.[49] Due to the problematic application of ADR rules, together with pre-existing national law, numerous Member States such as the United Kingdom, Austria and Croatia significantly restricted the scope of application of ADR rules with respect to "cross-border disputes". Although the rules from the ADR Directive should apply to out-of-court resolution of domestic[50] and cross-border[51] disputes, transposition acts of these countries limited their scope of application to domestic disputes and disputes involving only traders established in their own territories.[52] This is a direct consequence of the misinterpretation of art. 5(1) of the ADR Directive, which provides that Member States must "ensure that disputes covered by this Directive and which involve a trader established on their respective territories can be submitted to an ADR entity which complies with the requirements set out in this Directive". Unfortunately for consumers, this misinterpretation left the mainstream of B2C cases, in which domestic consumers are buying online from traders established abroad in another Member State, out of their reach.[53] This is in direct conflict with the goal of the ADR Directive ensuring that "consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the Union".[54] It is also in direct conflict with recitals of its preamble, in terms of which the ADR Directive "should allow traders established in a Member State to be covered by an ADR entity which is established in another Member State"[55] and "should establish quality requirements of ADR entities, which should ensure the same level of protection and rights for

Verbraucherschlichtungsstelle NRW e. V.

47 ADR Directive:arts. 7-8.

48 ADR Directive:arts. 9 and 11.

49 ADR Directive:art. 2.

50 ADR Directive:art. 4(1)(e) – "*domestic dispute* means a contractual dispute arising from a sales or service contract where, at the time the consumer orders the goods or services, the consumer is resident in the same Member State as that in which the trader is established".

51 ADR Directive:art. 4(1)(f) – "'*cross-border dispute* means a contractual dispute arising from a sales or service contract where, at the time the consumer orders the goods or services, the consumer is resident in a Member State other than the Member State in which the trader is established".

52 For example, *The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations* 2015.

53 This is not, however, the case in all of the member states such as Italy, Ireland, Malta or France, which transposed the definition from ADR Directive:art. 4(1)(f) correctly.

54 ADR Directive:art. 2(3).

55 ADR Directive:recital 26.

consumers in both domestic and cross-border disputes".[56] By restricting the definition of "cross-border disputes" to only those involving traders from their own countries, Member States violated the minimum harmonisation standard in terms of art. 2(3) of the ADR Directive.[57]

The disadvantages discussed above demonstrate that the ADR mechanisms will not be able to extinguish the role of the courts in the enforcement of consumer protection law in the EU.[58] As noted earlier, implementation of the ADR Directive resulted in the adoption of various MS laws transposing the Directive and, therefore, did not reduce the level of legal fragmentation, or the number of available ADR mechanisms across the Member States. As a general rule, the use of ADR mechanisms is not mandatory and does not exclude the jurisdiction of courts in most of the Member States.[59] Decisions brought by ADR entities are not necessarily binding[60] and still subject to the judicial control of the courts.[61]

3.2 The South African position: Sec. 69 of the *Consumer Protection Act*

In terms of the South African position (and as indicated earlier), consensual or alternative dispute resolution is one of the main purposes of the *CPA*.[62] This also becomes clear when considering the routes of redress in terms of sec. 69 of the *Act*, giving effect to the right of the consumer to be heard and obtain redress.[63]

As will be explained, sec. 69 and the routes of redress provided in terms thereof have proven to be controversial in their interpretation, application and practical consequence.[64] Sec. 69 provides what can be described as

56 ADR Directive:recital 38.

57 This is the wording of art. 2(3) containing the so-called minimum harmonisation clause. It is a widely recognised principle in EU consumer protection law that allows a higher standard of protection, but not lower than at national level of member states. See ADR Directive:recital 16 and art. 2(2)(a).

58 Eidenmüller & Fries 2016:113; Rühl 2015:431; Cortés 2015:114-141.

59 Under the *Danish Act* 524 of 29 April 2015 on consumer complaints, it is not mandatory for consumers to use the ADR system. See also *EC Study on the Enforcement of Consumer Protection Law*, Strand II, Consumer ADR.

60 *EC Study on the Enforcement of Consumer Protection Law*, Strand I, Consumer ADR confirmed that, in most of the member states, the ADR entities cannot issue binding decisions, but parties can reach a settlement in form of an enforceable title, *i.e.* notarial deed, court settlement or an arbitration award.

61 Judgment of 26 October 2006, C-168/05, *Mostaza Claro,* EU:C:2006:675:par. 40; *Asturcom Telecomunicaciones*:615; Judgment of 27 June 2000 in joined cases C-240/98 to C-244/98, *Océano Grupo and Salvat Editores,* EU:C:2000:346. A comprehensive discussion of arbitration clauses and agreements falls beyond the scope and purpose of this contribution.

62 See discussion 2.2 above.

63 See also *Consumer Protection Act*:sec. 4(1)(a)-(d) – "Realisation of consumer rights".

64 See 3.2.2 below.

the "general" position of the courts in relation to ADR. There are, however, instances where the courts have exclusive jurisdiction in terms of the *CPA*. This completely changes the position and role of the courts; a discussion thereof is also necessary.

3.2.1 Brief overview of the entities and institutions that may be approached for redress in terms of the *CPA*

Prior to a critical discussion of sec. 69, the routes of redress and the role of the courts in relation to ADR, it is necessary to provide a concise overview of the entities and institutions that may be approached and how they are defined in terms of the *CPA*. A "court", in terms of the *CPA*, does not include a consumer court[65] and, as a working definition, includes national civil courts being the lower courts (Small Claims Court and Magistrate's Court), High Court (including the Supreme Court of Appeal and the Constitutional Court) as well as specialised courts such as the Equality Court.

For purposes of this contribution,[66] the Small Claims Court deserves further discussion. These civil courts are established countrywide in all provinces, which makes access much easier for consumers. Consumer disputes often pertain to smaller individual claims,[67] which would fall under the jurisdiction of these courts. The procedural rules are more informal than in higher courts, thus enabling the vulnerable consumer to pursue its claim without the cost of legal representation.[68] The judgment made by the Commissioner is final and only reviewable in certain circumstances.[69] If a supplier, against whom a judgment is obtained, is defiant, a consumer can enforce the judgment by transferring it to the Magistrate's Court, where the judgment can then be enforced by the sheriff by means of a writ of execution (against movable property).[70]

The primary institutions tasked with the realisation of consumer rights are the NCT and the NCC. The NCT is an independent adjudicative and *ad hoc* body established in terms of sec. 26 of the *National Credit Act* 34 of 2005 (hereafter *NCA*), with concurrent jurisdiction over consumer rights and disputes in terms of the *CPA* as well as consumer credit agreements in terms of the *NCA*. After receipt of a complaint, the NCT must conduct a hearing of the matter in accordance with the applicable provisions which is inquisitorial, quick, informal and in accordance with the rules of natural

65 *Consumer Protection Act*:sec. 1, definition "court". *Consumer Protection Act*:sec. 1, definition "consumer court" – "means a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation".

66 See concluding remarks in 5 below.

67 To a maximum of R15 000 or 945 euros.

68 *Small Claims Court Act* 61/1984; *Rules regulating matters in respect of Small Claims Courts*.

69 See note 68 above.

70 See note 68 above.

justice.[71] The NCT may make appropriate orders, including temporary relief, declare conduct as prohibited in terms of the *CPA*, impose administrative penalties, and confirm consent orders.[72] Appeal against a decision of the NCT may be made to a full panel, whereafter appeal must be made to a High Court.[73] A decision made by the NCT has the same status as a decision by the High Court.[74] The NCT may only be approached directly after referral by the NCC and in specific circumstances, as provided for in terms of the *CPA*.[75] The NCT is not regarded as a "point of first entry" for the enforcement of a consumer dispute.[76] The NCC is the institution central to effective redress and enforcement of consumer protection law and the realisation of consumer rights in terms of the *CPA*.[77] The NCC is established in terms of the *CPA* with a wide range of investigative and other powers, duties and obligations and functions as an independent juristic person. Barnard equates the NCC to the EU Commission as the "central administrative agency" to realise consumer rights and ensure effective redress and enforcement.[78] The NCC (among others) must receive complaints, investigate complaints, make consent orders, issue compliance notices[79] and, where appropriate, make referrals to the NCT or another regulatory authority with jurisdiction over the matter.[80]

Due to the consensual nature of consumer dispute resolution, ADR mechanisms and, more particularly, ADR agents as defined in terms of the *Act* play a significant role. ADR agents include the following:[81]

- Ombud with jurisdiction;[82]

71 *National Credit Act*:sec. 142.
72 *National Credit Act*:sec. 150. An agreement that is drafted in the form of an order to be confirmed by the NCT or Court. The parties to such an order will be the respondent (supplier) and the NCC. The consent order may include an award for damages. The complainant (consumer) must consent to the award for damages.
73 *National Credit Act*:sec.148.
74 *National Credit Act*:sec.160. The structure, duties and procedures of the NCT are governed by the provisions of the *National Credit Act* and *Consumer Protection Act*.
75 *National Credit Act*:sec. 99(h).
76 Van Heerden 2018:69-21.
77 Also confirmed by *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others (unreported case no 1260/2015 (NCK) (1 April 2016))*:par. 35.
78 Barnard 2017:369, fn. 108.
79 *National Credit Act*:Chapter 3, Part B:sec. 72-75. A notice issued by the NCC to a person or association of persons whom the NCC on reasonable grounds believes has breached a provision of the *Consumer Protection Act*, in other words engaged in prohibited conduct.
80 *Consumer Protection Act*:sec. 70-75 and Chapters 5 and 6.
81 *Consumer Protection Act*:sec. 70, read together with sec. 71 and sec. 1 definitions.
82 As recognised by national law, for example the short-term insurance ombud as well as financial services ombuds in the financial sector such as the banking ombud. See further *Clientele General Insurance Ltd v National Consumer Commission* NCT/4671/2012/60(3) and 101(1)(P). It should be noted that sec. 28 of the *Financial Sector Regulation Act* 9/2017 confirms that the *Consumer*

- Industry ombud;[83]
- A person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes (other than an ombud with jurisdiction, or an accredited industry ombud to consumers);[84]
- (Provincial) consumer court,[85] and
- The NCC.

It should further be noted that the *CPA* makes express provision for the cooperate exercise of concurrent jurisdiction between the national Department of Trade and Industry and provincial consumer protection authorities (to be established within each of the nine provinces).[86]

3.2.2 General position of courts in relation to ADR

Sec. 69 provides that a person may approach the following institutions or enforcement mechanisms:

- Direct referral to the NCT, where it is permitted (sec. 69(a));
- Referring the matter to an ombud with jurisdiction (if such an ombud exists in the particular circumstances) (sec. 69(b));
- If the matter does not concern an ombud with jurisdiction, the consumer may approach the following ADR mechanisms (section 69(c)): An industry ombud; or a provincial court with jurisdiction; or an ADR agent as contemplated in terms of sec. 70; or filing a complaint with the NCC;
- Only if "all other remedies available to that person in terms of national legislation have been exhausted" may the consumer approach a civil court (sec. 69(d)).

Protection Act does not apply to financial services regulated by this *Act*. See also *Miya v MiWay Insurance Company Limited* [2016] ZANCHC 1 (unreported case no. 1260/2015 (NCK) (1 April 2016)):par. 31, where it was confirmed that, where such an ombud exists, it must be approached by the consumer.

83 Accredited in terms of *Consumer Protection Act*:sec. 82(6). At the moment, only two industry ombuds: The Consumer Goods and Services Ombud (CGSO) and the Motor Industry Ombud of South Africa (MIOSA).

84 For example, the Arbitration Foundation of Southern Africa (AFSA) or the South African Association of Mediators (SAAM).

85 *Consumer Protection Act*:sec. 1, defined as "a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation". Refers to a provincial consumer court/tribunal that operates in conjunction with the provincial consumer protection authority. Consumer courts are not civil courts and are governed by provincial consumer legislation that must be aligned with the national legislation being the *Consumer Protection Act*.

86 *Consumer Protection Act*:sec. 83.

The approach by Van Heerden is supported where it is stated that sec. 69 seems to provide for an implied hierarchy in terms of the order in which enforcement institutions should be approached, but as will become apparent, is not, in actual fact, how it is applied in practice and in terms of positive law.[87]

The NCT is listed at the top of the implied hierarchy, but, as explained by Van Heerden, should not be considered as "a point of first entry" for consumer disputes.[88] The NCT can only be approached directly in terms of particular provisions[89] and, even in the case of a direct referral, the NCC should have been approached first and should have "non-referred" the specific complaint. As an institution for the redress and enforcement of consumer protection law, the NCT has assisted in the interpretation of the *CPA* and the realisation of consumer rights. There are, however, also limitations to the jurisdiction of the NCT in that it cannot make an award for damages, but can only confirm an award for damages that formed part of a consent order.[90] It is also not privy to the determination of the fairness or unfairness of consumer contracts or the determination of unconscionable conduct in terms of the *CPA*, which falls within the exclusive jurisdiction of the national "civil" courts as discussed below. (It can make a determination on prohibited conduct in terms of sec. 51 of the *Act*).

Sec. 69(c) sets out the "ADR layers" to be approached and has also caused great frustration regarding its application and interpretation. The court in *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others*[91] had to determine whether all ADR agents within the ADR layer had to be approached or whether only one ADR agent may be approached before moving on to the next route of redress. The court confirmed that sec. 69(c) must be read in conjunction with sec. 70,[92] and confirmed that "the word 'or' points to alternative dispute resolution structures available to the consumer, which are mutually exclusive or disjunctive as opposed to conjunctive".[93] The court stated that it could never have been the intention of the legislature that consumers subject to the ombud with jurisdiction are denied access to various other dispute resolution mechanisms that are available to other consumers and thus also not accord with the purposes of the *Act*.[94] The danger in sec. 69(c) can also be that consumers have the opportunity to "forum shop", which is undesirable.[95] However, the consumer should be able to lodge a complaint with the relevant provincial consumer court if such a court is available.[96] The court importantly confirmed a

87 Van Heerden 2018:69-2.
88 Van Heerden 2018:69-21.
89 *Consumer Protection Act*:secs. 73-75, 114, 116.
90 *Consumer Protection Act*:sec 76 CPA.
91 *Miya v MiWay Insurance Company Limited*:par. 31.
92 *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others*:par. 29.
93 *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others*:par. 29.
94 *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others*:par. 30.
95 *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others*:par. 31.
96 *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others*:paras. 32 and 39, referring to Van Heerden 2018:69-19.

consumer's right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum in terms of sec. 34 of the *Constitution of the Republic of South Africa*.[97] On the contrary, in *Joroy 4440 CC v Potgieter*,[98] the court took a more narrow approach and was of the view that sec. 69(d) cannot reasonably be construed to have more than one meaning at all, as the wording of the section is clear and unambiguous. The court referred to the constitutional case of *Chirwa*[99] and confirmed that, where a specialised framework has been created for the resolution of disputes, parties must pursue their claims primarily through such mechanisms. In *Joroy*, the matter was dismissed, due to the fact that all other avenues should have been exhausted before the consumer could approach a civil court.[100] Similarly, in *Ngoza v Roque Quality Cars*,[101] the NCT held that the consumer could not have approached a civil court before it had exhausted all its other remedies. In *Sekgala v Steve's Auto Clinic (Pty) Ltd and Another*,[102] the High Court refused an application for summary judgment where the consumer lodged a complaint with the NCC and, while the process before the Commission was still underway, also instituted an action against the defendant in the High Court. The implied hierarchy in terms of sec. 69 is unclear, according to the court in *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC Economic Development, Environmental Affairs and Tourism, Free State Government and Others*,[103] and held that the consumer was dragged into unnecessary litigation.[104] In *Oos Vrystaat Kaap Bedryf Beperk v Cilliers*,[105] the court went as far as to state that, because the consumer did not initially rely on the framework as provided for in terms of sec. 69 and initiated proceedings in this manner, the consumer cannot rely on the provisions of the *CPA* regarding the matter before the court and the *Act* will not find application.

The general position of the courts in relation to ADR is clearly one where ADR is preferred (and compulsory) to approaching civil courts, as this coincides with the purposes of consumer protection law. This approach

97 *Imperial Group (Pty) Ltd t/a Cargo Motors Klerksdorp v Dipico and Others*:par. 34.

98 *Joroy 4440 CC v Potgieter and Another* NNO 2016 (3) SA 465 (FB):par. 8. See also Van Heerden 2018:69-26; *Richter NO v Schatheuna Boerdery* CC [2017] ZANCHC 60 (20 October 2017):par. 55.

99 *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC). See *Joroy 4440 CC v Potgieter and Another*:par. 10.

100 See also *Ngoza v Roque Quality Cars* (NCT/79905/2017/73(3) & 75(1)(b)) [2017] ZANCT 104 (28 September 2017):paras. 30-33.

101 *Ngoza v Roque Quality Cars*:paras. 30-33.

102 *Sekgala v Steve's Auto Clinic (Pty) Ltd and Another* 2017 JDR 0180 (GP).

103 *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC Economic Development, Environmental Affairs and Tourism, Free State Government and Others* [2016] ZAFSHC 105 (unreported case no. A169/2014 of 9 June 2016 (FB)):par. 34. Reported ref: [2016] 3 All SA 794 (FB).

104 *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC Economic Development, Environmental Affairs and Tourism, Free State Government and Others*:paras. 44-50.

105 *Oos Vrystaat Kaap Bedryf Beperk v Cilliers* 2019 JDR 0049 (FB):par. 6.

(favouring ADR over civil courts) assumes that the ADR is *effective* and *efficient* and that consumer disputes can be resolved quickly and without undue effort to consumers, including negative financial implications. Upon closer inspection of the current situation in South Africa, this is regrettably not the case. Although the NCC is central to effective dispute resolution in South Africa, it has been inundated with consumer disputes and seems to struggle with the manpower to handle and investigate consumer disputes. As a result, it also brought out a media statement that, in principle, it will not deal with individual disputes, but rather focus on problems that are endemic to a particular industry or specific goods or services.[106] There have, however, been a few occasions where the NCC has brought individual suppliers to task in consumer disputes, in particular unscrupulous businesses guilty of prohibited conduct in the motor industry.[107] Because of the nature of ADR, the recommendations and decisions by these institutions are not binding and are more often than not ignored by suppliers. The NCT has attempted to institute administrative fines in this regard.[108] Another result of the ineffectiveness of ADR is the tremendous amount of time it takes for consumers to actually go through all the ADR layers and, by the time disputes finally reach the NCT, they have prescribed in terms of sec. 116 of the *CPA* meaning, the complaint took more than three years to resolve.[109] The NCT has attempted to address this issue in *Lazarus*,[110] where it was held that, once the consumer dispute enters into an ADR layer, prescription is interrupted until the matter is resolved by that particular ADR agent or institution. The NCT has also attempted to resolve the issue of prescription by making "appropriate orders" in terms of sec. 4(2)(b) of the *CPA*.[111] Although provincial consumer courts have the potential to greatly assist in the resolution of consumer disputes, not all provincial legislations have been aligned with national legislation (the *CPA*) and not all of the nine provinces have established consumer courts.[112] Once a matter reaches the

106 National Consumer Commission, 'National Consumer Commission Annual Report 2013/2014' 12, http://www.thencc.gov.za/sites/default/files/annual_reports/NCC_ANNUAL%20REPORT_2014.pdf (accessed on 6 February 2019); National Consumer Commission, 'National Consumer Commission Annual Report 2015/2016' 11, http://www.thencc.gov.za/sites/default/files/annual_reports/NCC_Annual_Report_2016.pdf (accessed on 6 February 2019). See also criticism referred to with merit by Woker 2017:3.

107 *National Consumer Commission v Western Car Sales CC t/a Western Car Sales* (NCT/81554/2017/73(2)(b)) [2017] ZANCT 102 (14 September 2017); *National Consumer Commission v Highends Trading and Projects (Pty) Ltd t/a Highends Auto Services* (NCT/101932/2018/73(2)(b)) [2018] ZANCT 55 (22 July 2018).

108 See note 113 above and decisions of NCT in *Western Cars and Highends.*

109 See the critical discussion by Van Heerden 2018:116 regarding *Consumer Protection Act*:sec. 116, in contrast with the *Prescription Act* 68/1969.

110 *Lazarus and Another v RDB Project Management CC t/a Solid and Another* (NCT/36112/2016/75(1)(b)) [2016] ZANCT 15 (9 June 2016):par. 30.

111 *Lazarus and Another v RDB Project Management CC t/a Solid and Another.*

112 For example, at the time of publication, the province of the Eastern Cape does not have provincial consumer courts, although it does have a functioning provincial Consumer Protector. As a result, where suppliers do not adhere to the Protector's recommendations or no settlement can be reached, the

NCT, it seems that many disputes must first be heard to decide whether a non-referral by the NCC was valid or whether the NCT will hear the matter. Because many consumers are vulnerable, they are not necessarily aware of the time constraints and processes of the NCT, and condonation to submit documentation outside the prescribed time frames must be considered. There is also a possibility that the supplier may appeal the decision made by a single tribunal member to a full panel consisting of three members. All of these issues take considerable time and money and more often than not consumers are unrepresented (contrary to suppliers). Even after the NCT has made a final decision, there are still certain forms of relief that do not fall within the jurisdiction of the NCT. For these forms of relief, a civil court must be approached and the consumer has to start the process all over again. The situations where the civil courts have exclusive jurisdiction (and, by implication, indicates the *ex officio* role) will be discussed below.

4. The role of the courts and the *ex officio* application of consumer protection law

The placement or position of courts in relation to ADR mechanisms will inadvertently also affect the role of the courts in the application of consumer protection law. However, what will also become clear is that the courts still play an important role, not only because they are the best placed for certain consumer issues, but also because they have a role to play in instances where the central system of redress and enforcement (ADR) is not effective.

4.1 The EU position

The role of courts in the application of consumer protection law is acknowledged by both EU legislation and CJEU case law interpreting the *acquis*. Specific EU directives focus on consumer redress proceedings. The Directive 2009/22/EC on injunctions for the protection of consumers' interests[113] enables entities, that have a legitimate interest, to pursue action on behalf of consumers where collective harm has been suffered. There are also other EU law instruments facilitating enforcement of consumer rights such as the Brussels Ibis Regulation; the European Enforcement Order Regulation; the European Payment Order Regulation, or the European Small Claim Regulation relevant for cross-border disputes.[114] It should be noted that, despite the various EU mechanisms guaranteeing enforcement of consumer rights, disputes of consumers as private individuals are

dispute has to be referred to the NCC or, where possible, an industry ombud, which frustrates the dispute resolution process.

113 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1 May 2009:30-36.

114 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012:1-32.

still mostly governed by Member States' civil procedure rules that could potentially affect and undermine the effectiveness of consumer rights protection. Reasons for this include rules of Member States' civil law procedures that differ significantly with respect to jurisdiction of individual courts; formal requirements for bringing a case; types of available legal actions; parties' representation; legal aid; time limits applicable to procedural steps of the action; taking of evidence; right to appeal and review, and enforcement of judgments.[115] However, *ex officio* control by way of procedural mechanisms can be utilised within the Member States' national legal systems to promote more effective enforcement of consumer protection law.

The decision in *Duarte Hueros*[116] addressed a key question regarding the enforcement of EU consumer protection law: How far should the *ex officio* application of consumer protection law go? In order to answer this question, it is necessary to discuss significant CJEU cases setting out the duty for MS courts to apply consumer protection law on their own motion. A landmark case that interpreted the legal consequences of unfairness under art. 6(1) of the UCTD and established the *ex officio* duty for Member States' courts to determine unfairness of contract terms is the decision of *Océano Grupo and Salvat Editores.*[117] The case dealt with the prorogation clauses in B2C sales contracts and the CJEU established (for the first time) that a consumer is in a weaker bargaining position in relation to B2C relations[118] as well as in civil law procedures of this nature. The procedural law rules of the Member States enable individuals to defend themselves or require legal representation in such proceedings.[119] It was the view of the CJEU that both such scenarios are unsatisfactory for the consumer, who either ends up not raising unfairness of the agreement, due to the lack of legal knowledge, or refrains from further litigation, due to the high costs of legal representation and procedural costs. The court, therefore, emphasized that "effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion".[120] Subsequent cases such as *Mostaza Claro*[121] and *Asturcom Telecomunicaciones*[122] clearly indicate that the CJEU had elevated art. 6 of the UCTD to the level of a *public policy* rule[123] and confirmed the *ex officio* duty of courts to govern unfair contract terms. The CJEU jurisprudence reflected itself on procedural laws of Member

115 *EC Study on Enforcement of Consumer Protection Law*, https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en (accessed on 29 March 2019).

116 Judgment of 3 October 2013, C-32/12*, Duarte Hueros,* EU:C:2013:637.

117 Judgment of 27 June 2000 in the joined cases C-240/98 to C-244/98, *Océano Grupo and Salvat Editores,* EU:C:2000:346.

118 *Océano Grupo and Salvat Editores*:par. 25.

119 *EC Study on the Enforcement of Consumer Protection Law*:Strand II, Part I.

120 *Océano Grupo and Salvat Editores:*par. 26.

121 *Mostaza Claro*:675.

122 *Asturcom Telecomunicaciones*:615.

123 *Mostaza Claro:*par. 38.

States and is, for example, recognisable in conclusions of the Croatian Supreme Court establishing an *ex officio* duty of ordinary courts to determine unfairness of contract terms only if the claimant had submitted so-called "traders business standard contract terms" together with an action.[124] The development of the *ex officio* duty regarding consumer protection law went far beyond what was initially expected.

For most of the Member States' courts, the establishment of an *ex officio* duty in respect of unfair contract terms was actually not an issue, due to the simple reason that unfair contract terms are null and void[125] and the nullity is generally observed *ex officio* by courts in Member States' civil law proceedings.[126] This conclusion can be supported with results from the abovementioned *EC Study on Enforcement of Consumer Protection Law* confirming the awareness of courts and other enforcement bodies of this important duty.[127] In this regard, it seems that the majority of courts across the EU are uncertain as to whether they are obligated to apply consumer protection law on their own motion, and if so, the exact legal ground to do so. To our knowledge, procedural rules of Member States do not contain a rule explicitly obliging courts or other enforcement bodies to apply consumer protection law of their own accord. The result is that, in many Member States, consumer protection law, with the exception of rules on unfair contract terms, is not applied *ex officio*. In Member States such as Croatia,[128] Denmark[129] and Italy,[130] this duty can also emanate from general principles of laws requiring *ex officio* observance of provisions of a mandatory nature, including those on consumer protection. One such example is the rule regularly included in EU consumer protection directives that prohibits the waiver of consumer rights and as such altering the nature of many consumer protection rules.[131] Only in rare Member States such as Portugal, the duty of the courts and possibly other enforcement bodies is to, *ex officio*, apply consumer protection law based on the CJEU approach to *public policy rules*.[132] It was not only in jurisprudence on unfair contract terms that the CJEU recognised the importance of mandatory provisions of art. 6 of the UCTD for public interest and public policy, but also in other cases dealing with, for example, off-premises contracts and the right to withdrawal (cooling-off rights), non-conformity of goods, or provisions

124 Conclusions of the Supreme Court of the Republic of Croatia, No. Su-IV-155/16 of 12 April 2016.
125 Unfair Contract Terms Directive:art. 6(1).
126 For example, the *Croatian Obligations Act*:art. 327(1).
127 *EC Study on the Enforcement of Consumer Protection Law*:Strand II, Part I.
128 Under the *Croatian Civil Procedure Act*, the *ex officio* control represents an obligation for the judge.
129 Under the *Danish Administration of Justice Act*:sec. 338, the courts have a general obligation to apply *ex officio* "mandatory rules that cannot be waived".
130 According to the *Italian Consumer Code*:art. 143(1), the rights of consumers may not be waived and any agreement in breach of this legal provision is null and void.
131 See, for example, Consumer Rights Directive:art. 25.
132 *EC Study of the Enforcement of Consumer Protection Law.*

of credit agreements.[133] In these instances, the CJEU concluded that Member States' courts are obliged to observe certain rules arising from EU directives of their own motion.[134] In the *Faber*-case,[135] the CJEU held that art. 5(3) of Directive 1999/44/EC must be regarded as a provision equivalent to national rules of public policy, "that is to say, as a rule which may be raised of its own motion by the national court".[136] The case concerned the so-called six-month presumption rule, according to which the burden of proof on conformity of goods is reversed to the seller during the first six months.[137] This is soon to be extended to two years, according to art. 8(3) of the proposed Online Sales Directive,[138] which also means a longer period for Member States' courts to comply with their *ex officio* duty. However, Member States' courts are still uncertain regarding the nature of consumer protection law rules as transposed from EU directives. Some Member States do follow an *ex officio* application of consumer protection law, with regard not only to "protective rules",[139] but also to the whole body of law of the particular Member State.[140]

4.2 South African position

The courts not only play an important role for the effective redress and enforcement of consumer protection law, but also give effect to the purpose of the *CPA*. This is confirmed by sec. 2(1) of the *Act*. When interpreting and applying the provisions of the *CPA*, a court may consider appropriate foreign and international law, conventions, declarations and protocols; the court may consider any decision of a consumer court, ombud, or arbitrator in terms of the *Act* to give effect to consumer protection law.[141] Similar to the EU, there is also provision for a collective redress mechanism as part of the *locus standi* of persons or groups who may approach a court.[142] Civil courts further have, as is the case in the EU, their own regulated civil procedure rules that must be followed and include rules pertaining to jurisdiction, time frames for lodging documentation, and the type of relief

133 Judgment of 26 February 2015, C-143/13, *Kásler and Káslerné Rábai,* EU:C:2014:282; judgment of 26 February 2015, C-143/13, *Matei*, EU:C:2015:127:par. 50. See also Mišćenić 2018(c):127-159.

134 Mišćenić 2018(c):127.

135 Judgment of 4 June 2015, C-497/13, *Faber,* EU:C:2015:357.

136 *Faber:*par. 49.

137 *Consumer Sales Directive*:art. 5(3).

138 Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods 2015/0288 (COD).

139 De Wulf 2016:181.

140 Cour de cassation de Belgique, 14 Avril 2005, n° C.03.0148.F/1. This approach is followed by Member States such as Germany and Greece. Despite the fact that Croatian courts have the legal background for *ex officio* application of consumer protection law, in practice they are not aware of its mandatory nature.

141 *Consumer Protection Act*:sec. 2(2) – to the extent that such a decision has not been set aside or reversed by a higher court.

142 *Consumer Protection Act*:sec. 4(1).

sought.[143] Sec. 76 of the *CPA* deals with the powers of a court to enforce consumer rights. A court may (in addition to any other order made in terms of the *CPA* or any other law) also order a supplier to discontinue or alter any conduct inconsistent with the *Act*; make a specific order in terms of the *CPA*, and make an award for damages for collective injury to a class of consumers.[144] It is further confirmed that the *CPA* does not diminish the right of either the consumer or the supplier to claim for interest, special damages or recover money paid in a civil court of law.[145] A person may, in terms of sec. 114, apply for interim relief to a court subject to its rules.

As explained earlier, there are instances where courts will have exclusive jurisdiction which emphasises their role in consumer redress. Equality Courts have exclusive jurisdiction only in matters where the consumer's right to equality in the consumer market (Chapter 2, Part A) is infringed. In correlation with the EU position, the most prominent role of the courts to apply consumer protection law *ex officio* is determining unconscionable conduct (sec. 40), unfair contract terms, and unfair consumer contracts (sec. 48 and reg. 44). The jurisprudence surrounding fairness in South Africa is vast and is based on a constitutional premise as to whether or not an agreement is contrary to the values enshrined in the *Constitution*.[146] The benchmark for the determination of fairness (or unfairness) has been equated with agreements being unfair, because they are against public policy or exploit the weaker contracting party.[147] The *CPA* (similar to the UCTD) contains a list of terms that are, in all circumstances, regarded as unfair and, therefore, prohibited and void (sec. 51)[148] as well as a list of contract terms *presumed* to be unfair (reg. 44).[149] Sec. 52 provides considerations that a court must take into account to determine whether or not a transaction or agreement (whole or in part) is unconscionable, unjust, unreasonable, or unfair and may declare the whole or part of such an agreement void, restore money, and order compensation.[150] The practical frustration in this regard is that it very seldom happens that a consumer dispute deals with one exclusive issue. More often than not, a consumer dispute will include issues where the process in terms of sec. 69 must be followed as well as issues where civil

143 See the *Magistrates' Courts Act* 32/1944 and Rules, the *Superior Courts Act* 10/2013.

144 *Consumer Protection Act*:sec. 76(1).

145 *Consumer Protection Act*:sec. 76(2).

146 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC); *Botha v Rich NO* 2014 (4) SA 124 (CC); *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC).

147 *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA); *Naidoo v Birchwood Hotel* (2012 (6) SA 170 (GSJ); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). See also Hawthorne 2014:410.

148 Also referred to as "black listed terms". See Naudé 2017:140, where the writer refers to these terms as "red listed terms".

149 Also referred to as "grey listed terms". See Naudé 2017:140, where the writer refers to these terms as "orange listed terms".

150 *Consumer Protection Act*:sec. 52(2).

courts have exclusive jurisdiction (sec. 40, 48, and so forth). In *National Consumer Commission v Western Car Sales CC t/a Western Car Sales,*[151] the NCT made its frustration infinitely clear. The matter dealt with the unscrupulous conduct of a motor dealership, including the agreement concluded with the consumer pertaining to a defective motor vehicle and the supplier's attempt to escape liability. The NCT referred to many problematic clauses in the consumer agreement and held that the clauses mislead the consumer and are specifically prohibited by sec. 51 of the *CPA*.[152] The tribunal went further and stated that there is a difference between secs. 51 and 48, because,

> while the Tribunal has the power to declare conduct which contravenes sec. 51 as prohibited, the same cannot be said for sec. 48. On a plain reading of sec. 48, read with sec. 52, it would appear that the power to apply the provisions of sec. 48 remain exclusively reserved for a court of law. It would in any event appear to be a case of splitting of charges to find a contravention of sec. 51 would also amount to a contravention of sec. 48.[153]

This would mean that the consumer had to institute proceedings in a civil court on the same set of facts. This was not the intention of the legislator and is a clear frustration of the effectiveness that consumer protection law aims to provide. The only option open to the NCT was to deter the supplier by instituting an administrative fine in terms of sec. 112, which was paid into the National Revenue Fund.[154] It can be argued that the psychological effect of this on a consumer is negative, because the consumer has done everything to obtain redress. Ultimately, however, although actual expenses may be reimbursed by the NCT, the consumer does not experience a "win" or monetary compensation for loss or damages suffered. This is complicated by the fact that none of the ADR agents or the NCT may make an award for damages, as this also falls under the exclusive jurisdiction of the civil courts.[155]

Regrettably, it seems that, since the implementation of the *CPA* more than eight years ago, only one reported case exists where the courts have attempted to provide guidance regarding the fairness of a consumer agreement in terms of Part H. In *Four Wheel Drive Accessory Distribution*

151 *National Consumer Commission v Western Car Sales CC t/a Western Car Sales*.

152 *National Consumer Commission v Western Car Sales CC t/a Western Car Sales*:par. 40.

153 *National Consumer Commission v Western Car Sales CC t/a Western Car Sales*:par. 42.

154 An administrative fine may not exceed the greater of 10 per cent of the respondent's (supplier's) annual turnover during the preceding financial year, or R1 000 000. The NCT has, however, never instituted the maximum amount against businesses and in *National Consumer Commission v Western Car Sales CC t/a Western Car Sales* reduced it to a much smaller amount taking into account sec. 112(3).

155 The NCT ordered a reimbursement of an amount, but the damage suffered by the consumer was much more extensive. See also *National Consumer Commission v Highends Trading and Projects (Pty) Ltd t/a Highends Auto Services*.

CC v Rattan NO,[156] the supplier instituted an action for repair costs based on the non-performance by Mr Rattan (the consumer) of an alleged term in a standard-form agreement. The consumer agreement was printed on one page, had 25 clauses and many sub-clauses, and was in text so small that "the court could not read [it] easily even with the aid of a magnifying glass".[157] The alleged term was that the car would be insured for 72 hours, whereafter the consumer had to insure it, or be liable for its damage. The car was indeed damaged, when, after 48 hours, the consumer was shot and killed while driving it. The supplier then brought the action against the consumer's deceased estate, which the court dismissed on the following grounds: the supplier did not have *locus standi*; it was impossible for the consumer to insure the vehicle, and the standard-form agreement was contrary to public policy and invalid.[158] Importantly, for purposes of this discussion, the court applied the *CPA ex officio*, by ruling that the agreement infringed the rights of the consumer in terms of sec. 22 (the right to plain and understandable language), sec. 40 (not to be subject to unconscionable conduct), and sec. 48 (against suppliers entering or administering transactions in an unfair, unreasonable or unjust manner).[159] It is hoped that this is only the beginning of many more judgments where the courts take their *ex officio* role in the determination and interpretation of unfair consumer agreements in terms of the *CPA* more seriously. One should, however, take note that, had it not been for the supplier bringing its action to the civil courts, the much-needed interpretation of unfair consumer agreements might not have realised. The courts' approach in the *Four Wheel Drive* case, by applying a broad and inclusive application of the *CPA*, is commendable and should be preferred over the distractive interpretation of the *Act* in the decisions of *MFC (a division of Nedbank Ltd) v Botha*;[160] *Eskom Holdings Limited v Halstead-Cleak*,[161] and *Oos Vrystaat Kaap Bedryf Beperk v Cilliers*.[162]

There are court decisions that have (*ex officio)* provided some guidance on consumer protection matters (outside normal routes of redress and the problematic interpretation of sec. 69, as discussed earlier). In the case of *Vousvoukis v Queen Ace CC t/a Ace Motors*,[163] the court confirmed the application of the consumer's right to safe, good quality goods (sec. 55) and the implied warranty of quality (sec. 56) to defective second-hand motor vehicles. Similar to the CJEU *Faber* case, the court also provided guidance regarding the six-month presumption period and time, in which the remedies in terms of sec. 56 may be implemented. The courts furthermore provided an important interpretation regarding pre-existing common law

156 *Four Wheel Drive Accessory Distribution CC v Rattan* NO 2018 (3) SA 204 (KZD).
157 *Four Wheel Drive Accessory Distribution CC v Rattan*:arts. 25 and 27.
158 *Four Wheel Drive Accessory Distribution CC v Rattan*:par. 70.
159 *Four Wheel Drive Accessory Distribution CC v Rattan*:paras. 58, 63, 67.
160 *MFC (a division of Nedbank Ltd) v Botha* [2013] ZAWCHC 107.
161 *Eskom Holdings Limited v Halstead-Cleak* 2017 (1) SA 333 (SCA).
162 *Oos Vrystaat Kaap Bedryf Beperk v Cilliers* 2019 JDR 0049 (FB).
163 *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 (3) SA 188 (ECG).

principles where the *CPA* is applicable.[164] The courts have also interpreted the applicability of *CPA* provisions to the lease of residential property in *Transcend Residential Property Fund Limited v Mati*;[165] *Makah v Magic Vending (Pty) Ltd*,[166] and *Mosai v Masike* 2018 JDR 0926 (FB).

5. Concluding remarks

There are various consumer protection enforcement mechanisms across the EU Member States, but not all of them are *effective* as required by EU law. The most prominent is the ADR, the role of which became particularly relevant with the introduction of the European ADR/ODR regulation enabling online dispute resolution.[167] However, this new EU legislation, no matter how attractive it sounds, has not brought significant improvements to the enforcement of consumer rights as was originally the intention.[168] Many out-of-court bodies do not offer "online" dispute resolution and require the presence of the parties and their representatives during the proceedings. Although the new ADR rules demand expertise, independence and impartiality of the staff working in ADR bodies, the forms which these bodies can take include private dispute resolution bodies, thus bringing the above criteria in question. As indicated earlier, even though the common standards for ADR bodies all around the EU were introduced, the ADR Directive has unfortunately not managed to lower the level of legal fragmentation or to diminish the variety of out-of-court procedures within the Member States. They all continued to exist and function in terms of their own rules, to which new laws transposing the standards and criteria from the ADR Directive were added. In some respects, the misinterpretation of the ADR Directive rules managed to reduce the level of consumer protection even further. Ultimately, the ADR system suffers from too many flaws to be able to ensure "effective legal protection in the fields covered by Union law",[169] including consumer protection law.[170] The question remains, however, as to whether the judicial protection can guarantee the same? The analysis has made it clear that procedural law rules that enjoy the protection of the Member States' procedural autonomy were so often measured upon the yardstick of CJEU principles of effectiveness and equivalence. Despite settled CJEU case law that raised consumer protection rules to the level of public policy, the Member States' courts seem to be reluctant to the idea of *ex officio* application of consumer protection law. The provisions of the Member States' consumer protection laws are undoubtedly of mandatory nature and that is why they should be observed by the Member States' courts. It seems that there is a disguised intention of the CJEU to create an

164 *Vousvoukis v Queen Ace CC t/a Ace Motors*:paras. 113-120.
165 *Transcend Residential Property Fund Limited v Mati* 2018 4 SA 515 (WCC).
166 *Makah v Magic Vending (Pty) Ltd* 2018 3 SA 241 (WCC).
167 See, for example, Creutzfeldt 2016:169-175.
168 On shortcomings of the ADR system, see Loos 2016:61-80.
169 Treaty of the European Union:art. 19(1).
170 Eidenmüller & Fries 2016:113 also express serious doubts as to the improvement of the consumer protection enforcement by the ADR/ODR regulation.

interpretation equalising all consumer protection law with the public policy rules. The rulings in cases such as *Océano Grupo and Salvat Editores, Duarte Hueros* or *Faber* all share the common reasoning and are based on the concept of the "weak consumer",[171] who, due to a lack of knowledge and ignorance of the law, "will not rely on the legal rule that is intended to protect him".[172] If the right argument for *ex officio* application of EU consumer protection law transposed into Member States' laws is actually a weaker position of the consumer, in terms of both his bargaining power and his level of knowledge, rather than the principle of effectiveness, then the consumer protection law is always to be applied *ex officio*.

There can be no doubt as to the focus on effective redress and enforcement of consumer protection law in South Africa. As indicated in the analysis above, consensual dispute resolution and ADR are central to resolving consumer disputes and this becomes clear when the routes of redress in terms of sec. 69 are analysed. Providing for a specialised ADR framework for the enforcement of consumer protection law is not something unique to the South African position, but fundamental to consumer protection law globally, especially countries who adopted the UNGCP as is the case with the EU. What was also made clear was the courts' position in relation to ADR and its particular role regarding redress and enforcement. The reality is, however, that the routes of redress and the enforcement framework (in particular, ADR) are failing consumers in South Africa. The most prominent reasons were elucidated earlier, but include the non-binding nature of ADR findings; the fact that the infrastructure of certain of the ADR agents are not in place and thus cannot provide effective enforcement;[173] the large amounts of non-referrals issued by the NCC and their stance on individual dispute resolution; the long time frame getting through the routes of redress in terms of sec. 69 for consumers; the inability of the NCT to make an award for damages; the exclusive jurisdiction of the courts pertaining to unconscionable conduct and unfair terms, and the complete lack of co-operation by unscrupulous suppliers to the detriment of consumers with valid claims. Due to the problems within the ADR framework, the courts can play a valuable role in resolving consumer disputes. In this regard, the Small Claims Courts, in particular, can greatly assist the South African position. As shown earlier,[174] these civil courts are established in all provinces, prescribe to a more informal process, deal with smaller individual claims, and judgments may be more readily enforced through the prescribed execution process. The analysis shows that, even in instances where the courts have an

171 *Martín Martín:*par. 77 – "Such a provision, therefore, comes under the public interest justifying (...) a positive intervention by the national court in order to compensate for the imbalance between the consumer and the trader in the context of contracts concluded away from business premises."

172 Judgment of 21 April 2016, C-377/14, *Radlinger and Radlingerová,* EU:C:2016:283:par. 65.

173 Provincial legislation has not been aligned with national legislation in all provinces and not all provinces have consumer courts.

174 See 3.2.1 above.

ex officio duty (*i.e.* making a determination regarding unconscionable conduct; unfair contract terms, and even determining the application of the CPA), they seem just as reluctant as their EU counterparts.[175]

The important role of the courts in the enforcement of consumer protection law does not take away the significance of ADR. However, until the most prevalent issues in this regard have been resolved in whatever manner may be appropriate (legislative intervention, and so forth), the courts can assist in giving effect to a consumer's basic constitutional right to have his/her matter be heard (in a timely manner) before a court of law. In particular, giving effect to the aim of consumer protection law to protect the vulnerable consumer being the *weaker* party. "The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".[176]

Bibliography

BARNARD J
2017. The role of comparative law in consumer protection law: A South African perspective. *South African Mercantile Law Journal* 2017:353-389.

BASEDOW J, HOPT KJ, ZIMMERMANN R & ILLMER M. (EDS.)
2009. *Handwörterbuch des Europäischen Privatrechts, Volumen I*. Tübingen: Mohr Siebeck Verlag.

CAUFFMANN C
2016. Critical remarks on the ADR Directive. In C Cauffmann and J Smits 2016:155-160. https://doi.org/10.2139/ssrn.2885509

CAUFFMANN C & SMITS J
2016. *The citizen in European private law: Norm-setting, enforcement and choice.* Cambridge: Intersentia. https://doi.org/10.1017/9781780687223

CORTÉS P
2015. A new regulatory framework for extra-judicial consumer redress: Where we are and how to move forward. *Legal Studies* 35(1):114-141. https://doi.org/10.1111/lest.12048

CREUTZFELDT N
2016. Implementation of the consumer ADR Directive. *Journal of European Consumer and Market Law* 5(4):169-175. https://doi.org/10.1093/acprof:oso/9780198766353.003.0009

DE WULF V
2016. L'office du juge en matière de contrats destinés aux consommateurs. In C Verdure (ed.) 2016:181-220.

EIDENMÜLLER H & FRIES M
2016. Against false settlement: Designing efficient consumer rights enforcement systems in Europe. In H-W Micklitz and A. Wechsler (eds.) 2016:87-113.

175 See discussion of position and case law in 3 and 4 above.

176 Van Eeden & Barnard 20187:510 refer to *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC):paras. 31-33.

HAWTHORNE L
2012. Public Governance: Unpacking the Consumer Protection Act.*Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* (75):345-370.

2014. Concretising the open norm of public policy: Inequality of bargaining power and exploitation. *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* (77):343-370.

HEINZE C
2009. Effektivitätsgrundsatz. In J Basedow, KJ Hopt, R Zimmermann and M Illmer (eds.) 2009:337-420.

LOOS MBM
2016. Consumer ADR after implementation of the ADR Directive: Enforcing European consumer rights at the detriment of European consumer law. *European Review of Private Law* 24(1):61-80. https://doi.org/10.2139/ssrn.2685651

MAK C
2014. Rights and remedies. Article 47 EUCFR and effective judicial protection in European private law matters. In HW Micklitz (ed.) 2014:236-258. https://doi.org/10.1093/acprof:oso/9780198712107.003.0008

MICKLITZ HW (ED.)
2014. *The constitutionalization of European private law.* Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198712107.001.0001

MICKLITZ H-W & WECHSLER A (EDS.)
2016. *The transformation of enforcement: European economic law in global Perspective.* Oxford: Hart Publishing.

MIŠĆENIĆ E
2018a. Croatian consumer protection law: From legal approximation to legal fragmentation. *Studia Iuridica Toruniensia* 2018:189-222. https://doi.org/10.12775/SIT.2018.010

2018b. Protection of Consumers on the EU Digital Single Market: Virtual or Real One? In: Viglianisi Ferraro A, Jagielska M and Selucka M (Eds.). *The Influence of the European legislation on National Legal Systems in the Field of Consumer Protection.* 2018. Cedam, Kluwer Law International:219-246.

2018c. Uniform Interpretation of Article 4(2) of UCT Directive in the Context of Consumer Credit Agreements: Is it possible? *Revue du droit de l'Union européenne.* 2018:127-159.

NAUDÉ T
2017. Towards augmenting the list of prohibited contract terms in the South African *Consumer Protection Act* 68 of 2008. *Tydskrif vir die Suid-Afrikaanse Reg* 2017(1):138-148.

NAUDÉ T & EISELEN S
2018. *Commentary on the Consumer Protection Act.* (2018 update). Durban: LexisNexis.

RÜHL G
2015. Alternative and online dispute resolution for (cross-border) consumer contracts: A critical evaluation of the European legislature's recent efforts to promote competitiveness and growth in the internal market. *Journal of Consumer Policy.* 38(4):431-456. https://doi.org/10.1007/s10603-015-9296-2

VAN DUIN A
2017. Metamorphosis? The role of Article 47 of the EU Charter of Fundamental Rights in cases concerning national remedies and procedures under Directive 93/13/EEC. *Journal of European Consumer and Market Law* 6(5):190-198. https://doi.org/10.2139/ssrn.3034205

VAN EEDEN E & BARNARD J
2017. *Consumer protection law in South Africa*. 2nd edition. Durban: LexisNexis.

VAN HEERDEN C
2018. Section 69. In: T Naudé and S Eiselen 2018:69-1-69-25. https://doi.org/10.1159/000487722

VERDURE C (ED.)
2016. *Contrats et protection des consommateurs.* Louvain-la-Neuve: Anthemis.

VIGLIANISI FERRARO A, JAGIELSKA M & SELUCKA M (EDS.)
2018. *The influence of the European legislation on national legal systems in the field of consumer protection.* Cedam: Kluwer Law International.

WEBER F
2015. Is ADR the superior mechanism for consumer contractual disputes? An assessment of the incentivizing effects of the ADR Directive. *Journal of Consumer Policy* (38(3)):265-285. https://doi.org/10.1007/s10603-015-9291-7

WOKER T
2010. Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the *National Credit Act* and the *Consumer Protection Act*. *Obiter* (31):217-231.

2017. Evaluating the role of the National Consumer Commission in ensuring that consumers have access to redress. *South African Mercantile Law Journal* (29.1):1-16.