

Consumer Protection and Mandatory Conflict of Laws Provisions

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This article proposes a framework for assessing whether any particular consumer protection law meets the policy and legal considerations of good consumer protection. The framework consists of three requirements that are posited as necessary for an effective consumer protection law: the law must promote competition in the market; enable consumers to make unimpaired decisions; and avoid legal paternalism. The proposed framework will then be applied to s 137 of the Credit Contract and Consumer Finance Act 2003, which is a mandatory conflict of laws provision in New Zealand. Section 137 is critiqued as failing to satisfy the consumer protection framework.

I INTRODUCTION

In the age of globalisation, consumers readily enter into cross-border transactions with the click of a mouse. This fact of modern life has made the interaction between mandatory consumer protection laws and conflicts of laws a significant legal concern. This article proposes a new framework for assessing the effectiveness of consumer protection law and tests the framework in the context of New Zealand's conflict of laws rules.

Part II of the article focuses on understanding the various purposes of consumer protection law. An examination of the accepted purposes of consumer protection law will reveal that the law must enable consumers to make informed decisions. As a pathway to consumer empowerment, this article presents a three-limbed consumer protection framework, emphasising the importance of both competition law and consumer protection law.

Whilst discussing consumer protection law, this article critiques fundamental assumptions surrounding consumers' inability to bargain or look after their interests. Indeed, that consumers are always the weaker party and therefore require legal protection may be viewed as misguided, amounting to no more than a self-fulfilling prophecy.

Part III focuses on applying the three-limbed framework to mandatory statutory provisions. The interaction between mandatory consumer protection laws and conflict of laws is analysed. Among a number

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of statutory provisions relating to conflict of laws, s 137 of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) forms the climax of the critique. Although s 137 of the CCCFA purports to protect consumers, it arguably fails to do so.

A rewording of s 137 is proposed so that the section is more compatible with the three-limbed framework. In suggesting a redraft, Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I) is highlighted as an exemplary legal instrument that empowers consumers.¹

II CONSUMER PROTECTION FRAMEWORK

This part considers the historical context of consumer protection and then outlines and challenges the rationales for consumer protection. It then proposes a three-limbed framework for assessing desirable consumer protection laws.

Consumer Protection — History

The origin of consumer protection is said to be the public's dissatisfaction with corporatism.² Although partly true, this is an understatement.

Jeremy Finn and Stephen Todd explain that “[i]n early law the church and state sometimes intervened in the market place to proscribe usury, regulate prices and unfair market practices”.³ These practices are examples of consumer protection law in its earliest form. In the 19th century, however, most restrictions had disappeared and the dominant philosophies of light-touch, or *laissez-faire* and *caveat emptor*, emerged.⁴ Freedom of contract was the basis for legislation such as the Sale of Goods Act 1908.⁵ In that era, all transactions were presumed to be fair because of the assumption that buyers and sellers bargained from equal positions.

But from the 1960s, legislatures around the world began to respond to complaints by consumer advocates that consumers were inherently disadvantaged, particularly when bargaining with corporations and industries. This change was marked by John F Kennedy's reference in 1962 to four basic “consumer rights”: the right to safety, the right to be informed,

1 Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I) [2008] OJ L177/6.

2 See John Maynard Keynes *The End of Laissez-Faire* (Hogarth Press, London, 1926); *Britain's Industrial Future: The Report of the Liberal Industrial Inquiry* (Ernest Benn, London, 1928); and see also Edmund Phelps “Corporatism and Keynes: His Views on Growth” in Lorenzo Pecchi and Gustavo Piga (eds) *Revisiting Keynes: Economic Possibilities for our Grandchildren* (MIT Press, Cambridge (Mass), 2008) at 95.

3 Jeremy Finn and Stephen Todd “Introduction” in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (4th ed, LexisNexis, Wellington, 2014) 1 at [1.4.1].

4 At [1.4.1].

5 At [1.4.1].

the right to choose and the right to be heard.⁶ The political philosophy towards consumer protection took a turn, with New Zealand following suit.⁷

New Zealand is currently experiencing the pinnacle of consumer protection law. It recently amended its key consumer legislation through the Consumer Law Reform Bill, which was first introduced on 20 April 2011.⁸ The Bill was divided into further amendment legislation, which reformed the Fair Trading Act 1986 (FTA), the Consumer Guarantees Act 1993 (CGA), the Weights and Measures Act 1987, the Secondhand Dealers and Pawnbrokers Act 2004 and the Carriage of Goods Act 1979.⁹

The change in philosophical attitude towards trade between professional traders and consumers demonstrates the fluidity of consumer protection in different times and spaces. It is important to remember that consumer protection law is a relatively modern legal phenomenon arising from the latter half of the 20th century.

The Purposes of Consumer Protection Law

Generally, the purposes of consumer protections law are:¹⁰

1. To promote competition;
2. To improve consumer information and to educate the public;
3. To improve the quality and safety of goods;
4. To redress inequality of bargaining power; and
5. To facilitate consumer redress.

These five purposes are analysed in turn. It is argued that the most important purpose is the promotion of competition because it empowers consumers in the long term.

1 To Promote Competition

Competition is desirable because a competitive market incentivises business rivals to reduce prices, to provide better service and to innovate.¹¹ A consumer is able to choose from a variety of options that are borne in the competitive environment where businesses differentiate their products by meeting more of the consumer's preferences. This happens because consumer preferences and desires that are not currently met provide opportunities for business rivals (or new entrants) to take away market share

6 John F Kennedy *Public Papers of the Presidents of the United States of America: John F Kennedy — Containing the Public Messages, Speeches, and Statements of the President* (United States Government Printing Office, Washington, 1963) at 236.

7 The Fair Trading Act 1986, the Consumer Guarantees Act 1993 and the Credit Contracts and Consumer Finance Act 2003 [CCCFA] are all examples of a legislative philosophy of enhanced consumer protection.

8 Consumer Law Reform Bill 2011 (287-2).

9 The Consumer Law Reform Bill was split into various Bills by the Committee of the whole House, resulting in the passage of the following: Fair Trading Amendment Act 2013; Consumer Guarantees Amendment Act 2013; Weights and Measures Amendment Act 2013; Secondhand Dealers and Pawnbrokers Amendment Act 2013; Carriage of Goods Amendment Act 2013; and Auctioneers Act 2013.

10 Finn and Todd, above n 3, at [1.4.1].

11 Matt Sumpter *New Zealand Competition Law and Policy* (CCH, Auckland, 2010) at [102].

from their passive competitors by meeting the particular preference. In an ideally competitive marketplace, businesses and consumers interact so that the demands of consumers are communicated to businesses. Businesses then compete to meet consumer demands.¹²

Conversely, businesses and consumers do not interact in the same way in a market with monopoly characteristics. A monopoly has no real competitor in the market and there exists no incentive for monopolists to reduce prices, provide better service or innovate.¹³ Consumers have no alternatives to turn to when their demands are not being met. Therefore, the promotion of competition is critical in generating meaningful options for consumers.

(a) In Reality and Law

There are valid commercial reasons that disincentivise competition in a free market. Firms may see that it is more profitable for them to collude with each other than to compete vigorously for profit.¹⁴ Price-fixing makes commercial sense because it maximises profit. However, it harms consumers by depriving them of the benefits of competition, as discussed above.

Competition law regimes address the conflict between the commercial incentives to collude and the desire for a competitive market for consumer benefits. Competition law regimes are examples of consumer protection laws as, by definition, they promote competition beneficial to consumers.

In New Zealand, the Commerce Act 1986 prohibits restrictive trade practices,¹⁵ abuse of market power,¹⁶ and business acquisitions that substantially reduce competition in the market.¹⁷ The law recognises that the ultimate goal of all businesses is to gain maximum market share and to create the most profit.¹⁸ However, the law also prohibits businesses with a substantial degree of power in a market from taking advantage of that power for an anti-competitive purpose, such as restricting the entry of potential rivals.¹⁹ Mergers between rivals may make commercial sense for the same reasons as price fixing but could be detrimental to consumers if the merged entity can reduce the market's competitiveness. Conversely, in a fiercely competitive market, mergers may have a marginal impact on the level of competition and may be necessary for the survival of those businesses. The Commerce Act and the Commerce Commission (the regulator enforcing the

12 At [103].

13 See generally [202] and [305]–[307]. Oligopoly markets share similar monopolist characteristics and suffer from market failures (at [308]).

14 Market collusion was the historical basis of antitrust law in the United States. See generally William L. Letwin “Congress and the Sherman Antitrust Law: 1887–1890” (1956) 23 U Chi L Rev 221.

15 Section 27.

16 Section 36.

17 Section 47.

18 See *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 (PC) at [23] for the position in New Zealand; and *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) at 407 for a similar position in the United States.

19 Commerce Act, s 36(1).

legislation) endeavour to recognise and prevent business acquisitions that substantially reduce competition unless redress is possible.²⁰

Similarly, other consumer protection laws should promote competition in the market and result in the generation of market options for consumers.

2 To Improve Consumer Information and to Educate the Public

The need to address the information asymmetry between consumers and businesses is one of the main rationales for consumer protection law in many jurisdictions.²¹ When there is an equal level of knowledge between two parties to a transaction, it is less likely that one party can take advantage of the other.²² But consumers generally lack the knowledge and the commercial acumen to bargain effectively with businesses.

More specifically, consumers may make decisions without fully understanding the nature of the transaction, the subject matter of the transaction or the legal consequences of the decisions.

Consumer protection law should aim to lessen information asymmetry. An understanding of why information asymmetry occurs between consumers and businesses is important to achieving this goal. Consumer protection law that aims to balance this disparity should address the underlying causes of information asymmetry.

Information asymmetry occurs primarily for two reasons: consumer ignorance and businesses' misuse of consumer ignorance.

(a) Consumer Ignorance

Consumers may be ignorant because they have no means to find information. This happens when aspects of the goods or services sought by the consumer are not obvious. Consumers generally do not know of the exact components used to make products. This information asymmetry has been widely remedied through laws requiring disclosure.²³

Consumers may also be ignorant because they do not have an incentive to obtain the information. The rational economic model explains this.²⁴ Consumers may rationally decide not to carry out investigations about particular goods or services because the cost of doing so is not justified by the perceived additional benefit resulting from the investigation.

20 Section 47; and see Commerce Commission *Mergers and Acquisitions Guidelines* (July 2013) at ch 2 for a detailed analysis framework that the Commerce Commission uses to assess mergers in New Zealand.

21 Giesela Rühl "Consumer Protection in Choice of Law" (2011) 44 CILJ 569 at 573.

22 At 572.

23 See, for example, Fair Trading Act, s 27, which provides delegated authority to create mandatory disclosure obligations in designated markets. Section 27 has been used to impose disclosure obligations under the Consumer Information Standards (Care Labelling) Regulations 2000, the Consumer Information Standards (Country of Origin (Clothing and Footwear) Labelling) Regulations 1992, the Consumer Information Standards (Fibre Content Labelling) Regulations 2000, the Consumer Information Standards (Used Motor Vehicles) Regulations 2008 and the Consumer Information Standards (Water Efficiency) Regulations 2010.

24 See generally Richard A Posner *Economic Analysis of Law* (9th ed, Wolters Kluwer, New York, 2014) at ch 3 for an explanation of standard economic rational choice model and its assumptions.

Another explanation for consumer ignorance is the behavioural economic model, which argues that consumers are irrational.²⁵ Consumers make choices that are not in their interests, even when the stakes are high. This is because of the myopic and impulsive human tendency to give undue weight to short-term benefits and matters that are immediately discernible.²⁶ Furthermore, consumers are unrealistically optimistic and ignore information that is adverse to their optimistic beliefs.²⁷ As a result, consumers are frequently ignorant of information that is adverse to their interests, even when acquiring such information is possible.²⁸

Regardless of whether consumers are acting rationally or not, consumer ignorance affects the consumer's autonomy and his or her ability to make informed decisions.

(b) Businesses' Knowledge

Businesses' knowledge of consumer ignorance is another source of information asymmetry. When a consumer is ignorant about the goods or services he or she is obtaining and gets an unwanted bargain as a result, it is arguably the consumer's fault. However, the situation is more objectionable if a business exploits the imbalanced state of affairs against a misinformed or uninformed consumer.²⁹

Arguably, the business does no more than take advantage of typical consumer behaviour in the market. For example, the default position is that there is no legal obligation to inform consumers unless consumers have made specific inquiries. As long as businesses do not misinform or mislead consumers, taking advantage of the prevailing market behaviour is not illegal. In fact, businesses expose themselves to a competitive disadvantage where they do not exploit information asymmetry. Sunstein states that "[i]n identifiable cases, those who do *not* exploit human errors will be seriously punished by market forces, simply because their competitors are doing so and profiting as a result".³⁰

25 Rühl, above n 21, at 582–583; and Cass R Sunstein "The Storrs Lectures: Behavioural Economics and Paternalism" (2013) 122 Yale LJ 1826 at 1830–1836.

26 David Laibson "Golden Eggs and Hyperbolic Discounting" (1997) 112 Q J Econ 443 at 445.

27 See generally Tali Sharot *The Optimism Bias: A Tour of the Irrationally Positive Brain* (Pantheon Books, New York, 2011).

28 This is especially true in the age of the Internet, where information is easily available.

29 Compare Rühl, above n 21, at 572, where the author describes a shift in economic scholarship indicating that the exploitation theory has not prevailed and is no longer regarded as an explanation or justification for consumer protection.

30 Sunstein, above n 25, at 1832 (emphasis in original).

3 To Improve the Quality and Safety of Goods

Another contentious purpose of consumer protection law is improving the quality and safety of goods and services.³¹ In a free and competitive market, businesses will naturally improve the quality and safety of goods; doing so will give them a competitive advantage. If the first purpose of consumer law — to promote competition — is to be achieved, then improvements in the quality and safety of goods and services should naturally follow.³²

Regulating the quality and safety of goods is necessary because market failures do not incentivise firms to compete on the bases of product quality and safety. If the regulatory change is, however, excessive, this would contribute to an unattractive business environment where consumer protection trumps or inappropriately hinders the ease of trade. Rigorous legislation, which requires a particularly high standard of safety for goods, may be a barrier for potential entrants to a market.³³ If the compliance cost is not justified by a potential return, a rational entrant will simply refuse to enter the market. Therefore, requiring a particular quality or safety standard could contribute to concentrating the market in the hands of fewer firms, making the market less competitive than it could have been without the regulation.

Additionally, improving the quality and safety of goods relates closely to information asymmetry. If a consumer knows about the state of goods in terms of their quality and safety, the consumer should be able to make an informed decision regarding their use. For example, there is an exception in the CGA where a consumer knowingly buys a faulty good.³⁴ Conversely, there is an express ground of complaint under the CGA if a business misleads and sells a faulty good to a consumer.³⁵

Generally, the law should only remedy clear market failures that inhibit competition. If this is not the case, then there is a risk that superimposing law to regulate product quality and safety may adversely affect the competitive vigour of the market.

31 See Fair Trading Act, ss 29 to 36. Those provisions set out a regime for product safety standards, product safety officers and safety of services. There are currently six product safety standard regulations in New Zealand: for baby walkers, children's nightwear, children's toys, household cots, cigarette lighters and pedal bicycles. These are established under the Product Safety Standards (Baby Walkers) Regulations 2001 and the Product Safety Standards (Baby Walkers) Amendment Regulations 2005, the Product Safety Standard (Children's Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 2008, the Product Safety Standards (Children's Toys) Regulations 2005, the Product Safety Standards (Household Cots) Regulations 2005, the Product Safety Standards (Cigarette Lighters) Regulations 1998, the Product Safety Standards (Pedal Bicycle) Regulations 2000 and the Product Safety Standards (Pedal Bicycle) Amendment Regulations 2003, respectively.

32 To the contrary, note that improving the quality and safety of goods will create a competitive business environment.

33 See OECD Competition Committee *Barriers to Entry* (Competition Policy Roundtables, DAF/COMP(2005)42, October 2005) at 33–34.

34 Section 17.

35 Section 16. See also relief available under the Fair Trading Act, s 41; and damages and relief available under the Contractual Remedies 1979 Act, ss 6, 7 and 9.

4 To Redress the Inequality of Bargaining Power

Inequality of bargaining power is a phenomenon where a business is sufficiently large that it does not have to worry about the transactional outcomes with each and every individual consumer. The sufficiently large business has the confidence to set universal terms and conditions for its dealings with consumers (standard contract) and does not engage with consumers who attempt to bargain on the standard contract. Consumers may have no other option but to engage with the businesses by accepting the standard contract. Redressing the inequality of bargaining power is achieved by adjusting retrospectively the contractual terms of consumer transactions that are deemed to be unfair to consumers. One example is the recent law reform in New Zealand that voids unfair contract terms in standard contracts.³⁶

Redressing the inequality of bargaining power between consumers and businesses is based on two assumptions that require closer examination. They are:

- (a) That businesses do not care about individual consumer dealings; and
- (b) That consumers are willing to bargain on the terms of the standard contract, but cannot.

First, it is wrong to generalise that businesses neglect individual consumers. Of course, they may be able to do so in a monopolistic environment. However, in a competitive market most businesses are restrained from behaving in this way because being unresponsive to consumers foretells an opportunity for rivals. Potential rivals will see an opportunity to enter the market and gain market share when an incumbent neglects consumer preferences. Moreover, in cases where market failures are evident, the legislature faces a dilemma: should it create further regulations (such as those dealing with unfair contractual terms) or deal with the situation through general competition law? Where the legislature opts for the former, it must bear in mind the regulatory barriers for future entrants, which may further contribute to market failure.

Secondly, the assumption that consumers cannot bargain effectively needs to be challenged. Whereas consumers may not be successful in altering a standard contract, they can shop around for substitutable goods or services on better terms. Nevertheless, consumers rationally and irrationally reach a point where they see no additional value in shopping around and so contract on standard terms.³⁷ The question is whether it should be illegal for

36 Fair Trading Amendment Act 2013. See also Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Cth) for the equivalent law in Australia.

37 Compare Sumit Agarwal and others "Stimulus and Response: The Path from Naiveté to Sophistication in the Credit Card Market" (unpublished working paper, August 2007) as cited in Rühl, above n 21, at 584. Rühl observes that consumers were able to correct initial irrational behaviour over time, thus decreasing the difference between actual and rational actions.

businesses to create standard contracts that exploit the behaviour of consumers if they are unwilling to bargain on the terms of the contract. It is debatable whether the law should provide redresses for, and thus further encourage, such consumer behaviour.³⁸

5 To Facilitate Consumer Redress

Facilitating consumer redress is a generic purpose of consumer protection law. Consumers should have redress where harm has been caused through businesses illegally taking advantage of consumers. For example, if a business has misled a consumer in the sale of a faulty good, there should be a consumer law regime that gives the harmed consumer effective redress. Under the common law, a party that has been adversely affected by a misrepresentation may sue for damages.³⁹

However, the prospect of consumer redress is often limited by practical considerations. Consumers may find it impractical to enforce rights because the legal fees involved are often disproportionate to the size of the remedy sought (usually a small claim). On the other hand, businesses have greater means and interest to litigate than an average consumer. In this context, facilitating consumer redress is a real concern of consumer protection law.

A regulator that represents consumers may provide a solution to remedying the imbalance in the ability to litigate. Most countries have regulatory bodies and these agencies form a fundamental part of enforcing consumer protection law.⁴⁰

The purpose of consumer redress is quite different to the other purposes. Enforcing laws that have already been accepted as social norms is obviously unlike creating new laws. The facilitation of consumer redress is not truly a consideration of a consumer protection law but a means of fine-tuning the law, which society regards as necessary.

6 Summary: The Five Purposes

The most important purpose is the need to promote competition in the market. Doing so addresses other purposes of consumer protection law, such as improving consumer information, improving the quality and safety of goods, and redressing inequality of bargaining power between consumers and businesses.

Consequently, consumer protection law should concentrate on promoting competition in the market. Competition law and consumer protection law should be understood and deployed in tandem. Based on this

38 Contrast Sunstein, above n 25, at 1834, for the proposition that “behavioral market failures do, in fact, justify paternalism.”

39 This rule is now codified in s 6 of the Contractual Remedies Act 1979.

40 See, for example, *Memorandum of Understanding between the Electricity Authority and the Commerce Commission* (9 December 2010); and *Memorandum of Understanding between the Financial Markets Authority and the Commerce Commission* (31 March 2014).

understanding, the next section of this article formulates a three-limbed consumer protection framework for assessing consumer protection laws.

The Three-Limbed Framework

The three-limbed framework is based on the work of Averitt and Lande, who advocate the position that competition law and consumer law must work together to protect consumer sovereignty.⁴¹ They describe the idea of consumer sovereignty as:⁴²

[T]he state of affairs that prevails or should prevail in a modern free-market economy. It is the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses. It is the state of affairs in which the consumers are truly “sovereign”

Furthermore, the essence of consumer sovereignty is described as the ability to exercise choice.⁴³ Legislatures should not dictate the terms of consumer contracts from a paternalistic viewpoint. Instead, consumer protection law should allow consumers to exercise choice. This marries well with the notion of party autonomy in contracts, where the ability of parties to dictate the terms of their own contract generally overrides judicial or legislative influence.

Combining the ideas of consumer sovereignty and party autonomy, the three-limbed framework for assessing the effectiveness of consumer protection laws is posited as follows:

- (a) The law must promote competition in the market so that businesses are incentivised to present consumers with a wide range of options to choose from;
- (b) The law must ensure consumers can choose effectively from among those options, with their critical faculties unimpaired by illegal business conduct; and
- (c) The law should not dictate the terms of standard contracts if the consumer has, in a competitive market, chosen effectively among the available options.

1 Competition in the Market to Provide a Range of Options

The first obligation requires any law purporting to protect consumers to be pro-competition. The need for consumer protection law to promote competition in the market has been highlighted in the preceding sections.

41 Neil W Averitt and Robert H Lande “Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law” (1997) 65 Antitrust L J 713 at 713–714.

42 At 715 (footnotes omitted).

43 At 716.

Competition creates a broad range of market alternatives for consumers. A competitive market is one in which businesses are responsive to consumer preference; as a result, options that suit consumer preferences abound. Consumer protection laws must, therefore, be aligned with competition law regimes in order to ensure that the market remains competitive.

However, there are consumer protection laws that purport to protect consumers but in fact produce anti-competitive results. Where consumer protection law imposes stringent regulatory requirements on businesses, the compliance costs inadvertently affect businesses that are either in the market already or are contemplating market entry. Taken to an extreme, a costly regulatory environment undermines a free market where businesses are able to compete with minimal government intervention. The result may be a significant decrease in the options available to consumers.

The legislature must ensure that any consumer protection law it passes imposes minimal regulatory barriers and maintains competition in the market so that consumers obtain the benefits of both a competitive market and consumer protection regimes.

2 Consumers to Choose Effectively from the Options

The second requirement is that consumer protection law allows consumers to choose effectively from the options generated in a competitive environment. The ability of consumers to exercise choice — with their critical decision-making ability unimpaired by such violations as non-disclosure of material information — is tantamount to an effective consumer protection law regime. Even if consumers have a range of options, they may be misled into believing that a particular option is better than the rest due to deception or the unavailability of material information.

The second requirement is thus related to, but distinct from, the first requirement. Averitt and Lande suggest that the two requirements cannot merge although they necessarily interact.⁴⁴ The first requirement is external to consumer behaviour (competition between firms) whereas the latter relates directly to consumer behaviour at the time of entering into a contract.⁴⁵

3 Refraining from Dictating the Terms of the Contract

If consumer protection law is meant to empower consumers to make unimpaired choices, then it must not prescribe terms within consumer contracts. Indeed, many consumer protection laws simply dictate terms for consumers,⁴⁶ leading to an approach that is paternalistic and inflexible, overriding consumer preferences and autonomy. The approach assumes that all consumers behave alike and so require the same remedy. This may not be the case and individual consumers may want different outcomes in a contract.

⁴⁴ Averitt and Lande, above n 41, at 734.

⁴⁵ At 734–735.

⁴⁶ See, for example, Consumer Guarantees Act, ss 5–13.

Consumer protection law must allow consumers to exercise choice over the terms of the contract effectively. As will be discussed further, s 137 of the CCCFA is one example of a consumer protection law that dictates the terms of a contract for the consumer rather than providing consumers an exercisable choice. The law may be designed to protect consumers, but it gives them no freedom to choose or to alter contractual terms.⁴⁷

In summary, paternalistic laws generally deprive consumers of their autonomy by assuming that all consumers think and behave alike, whilst imposing regulatory requirements on businesses. Where possible, a consumer protection law must provide options rather than simply imposing a one-size-fits-all solution.

4 Summary: Three Requirements of Effective Consumer Protection Law

The three requirements outlined above cannot be applied universally across different markets or different legal disciplines.⁴⁸ Nevertheless, they provide a general framework that empowers consumers. The framework seeks to promote competition in the market with minimal governmental intervention. The framework also recognises that intervention may be necessary to address areas that competition law cannot resolve. The approach is *laissez-faire*, requiring that lawmakers be less paternalistic while allowing the market to empower consumers.

The next part assesses the CCCFA, an example of consumer protection legislation in New Zealand, against the three-limbed framework.

III CREDIT CONTRACTS AND CONSUMER FINANCE ACT, SECTION 137

This part begins by surveying the CCCFA and focuses specifically on s 137 as an example of an ineffective consumer protection law. The three-limbed framework is then used to assess the CCCFA and s 137. The article then recommends an alternative drafting that better meets consumer protection objectives.

Consumer Protection Legislation in New Zealand

Consumer protection legislation in New Zealand, such as the CGA, the FTA and the CCCFA, largely satisfy the requirements of the three-limbed framework. These Acts do not directly address the first limb of the framework but they do address the second and third limbs. In particular, they

47 Contrast Sunstein, above n 25, where the author argues that it is necessary for the government to take a paternalistic approach where behavioural market failures cause social harm.

48 See, for example, Edward J Janger and Susan Block-Lieb "Consumer Credit and Competition: The Puzzle of Competitive Credit Markets" (2010) 6 ECJ 68 at 71 and 78, where the authors argue that classic ideas of competition law are of limited applicability in the consumer credit market.

empower consumers rather than impose paternalistic clauses. The FTA, for example, prohibits parties in trade from engaging in misleading or deceptive conduct.⁴⁹ This ensures that consumers can effectively exercise their autonomy by choosing between available options.

The following part focuses on consumer protection law relating to mandatory conflict of laws provisions, specifically s 137 of the CCCFA. This area is reassessed in light of the three-limbed framework.

Conflict of Laws and the Applicable Law of Contract

A brief survey of conflict of laws rules is necessary to understand their interaction with consumer protection laws in relation to consumer contracts. First, conflict of laws is described generally, including a consideration of conflict of laws rules in relation to the law of contracts. Secondly, the linkage between conflict of laws and consumer protection law is explained more fully.

1 Conflict of Laws and Contracts

Conflict of laws, also known as private international law, is concerned broadly with determining the jurisdiction of courts, choosing the applicable law and enforcing foreign judgments in multijurisdictional cases.⁵⁰

When a case is brought before a domestic court that involves foreign parties, transactions or events, the court determines whether it has jurisdiction to hear the matter. If the court determines that it has jurisdiction, it then decides whether it is appropriate to exercise that jurisdiction. The next issue for the court to determine is the applicable law. The issue is whether the court applies domestic law or the law of a foreign country that is more closely connected to the transaction. Finally, if the judgment of a foreign court is brought before a domestic court, the court determines whether that foreign judgment is enforceable. The common law has developed detailed rules to determine these three principal issues.

In relation to theories underpinning conflict of laws as it relates to the law of contracts, the principal driver is respect for party autonomy. As Lord Reid said:⁵¹

Parties are entitled to agree what is to be the proper law of their contract [T]here is no doubt that they are entitled to make such an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled.

Thus, the courts generally follow the parties' intention. The main reason for respecting party autonomy is the need for certainty between commercial

⁴⁹ Section 9.

⁵⁰ See generally Lord Collins (ed) *Dicey, Morris and Collins on The Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012).

⁵¹ *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (HL) at 603.

parties and their dealings. But where the intention of the parties is not expressly stated, the courts apply conflict of laws rules in order to ascertain the contract's "proper law" — a legal term referring to the governing law of a contract. This process, involving more time and money, determines the appropriate jurisdiction and the substantive laws governing the contract. The absence of conflict of laws provisions in contracts thereby causes significant additional cost to commercial parties. Therefore, prudent commercial parties usually include a clause in their contract defining the jurisdiction of their respective domestic courts (jurisdiction clause) and the governing law of the contract (governing law clause).⁵²

2 Conflict of Laws and Consumers

Standard consumer contracts typically include conflict of laws provisions. Although most consumer contracts are between consumers and traders resident in the same state, multijurisdictional transactions are increasingly common. Globalisation means large corporations interact with consumers all around the world. Generally those corporations try to subject themselves to the law of their home jurisdiction in order to limit the scope of their liability and provide for commercial certainty. Online contracts almost always include governing law and jurisdiction clauses in favour of the retailer.⁵³ Consumers habitually accept the general terms and conditions without considering the conflict of law provisions specifically.

The issue of consumer protection arises within this environment. Consumers generally do not appreciate the implications of agreeing to conflict of laws provisions.⁵⁴ When issues arise, consumers are surprised to find that they have contracted to litigate in a foreign court or subject themselves to the laws of a foreign country. Legal fees become disproportionate to the claim in issue and so consumers choose not litigate and are ultimately left without redress.

In this context, consumer protection law has played a key role in ensuring that conflict of laws provisions in consumer contracts do not abuse the weaker party. This is generally achieved by the use of mandatory conflict of laws provisions that override parties' choice of governing law. The problem in New Zealand, however, is that the mandatory statutory protections have not been effective — the mandatory conflict of laws provision under s 137 of the CCCFA provides a case study for further discussion.

⁵² Jurisdiction clauses and governing law clauses are important negotiation tools between commercial parties.

⁵³ The standard agreements will also often include mandatory arbitration clauses. See for example "eBay User Agreement" (15 June 2015) eBay <www.pages.ebay.com>; and "Conditions of Use" (24 June 2015) Amazon <www.amazon.com.au>.

⁵⁴ Rühl, above n 21, at 574.

Credit Contract and Consumer Finance Act

Credit contracts have historically been subject to state intervention and scrutiny.⁵⁵ In New Zealand, this meant that credit contracts were originally subjected to both English legislation and common law principles.⁵⁶ The laws relating to credit contracts were then formally legislated in two stages: first, with the introduction of the Hire Purchase Act 1971; and secondly, with the enactment of Credit Contracts Act 1981. In early 2000, the Government conducted a review of the law and — recognising the need to update the law in a quickly digitalising society — consequently adopted the CCCFA.⁵⁷ More recently, Parliament has made further reforms to the CCCFA due to concerns that the law was becoming outdated.⁵⁸ The CCCFA thus incorporates a long history of both statutory and common law principles.

The underlying goal of the CCCFA is to empower consumers by requiring disclosure of key information on credit contracts.⁵⁹ Borrowers have statutory rights and creditors are required to give effect to statutory provisions. In particular, creditors:

- (a) Must disclose key information about a contract in a way that is clear and accurate;⁶⁰
- (b) Cannot impose oppressive requirements on borrowers or enforce contracts in an oppressive way;⁶¹ and
- (c) Must disclose any fees and make sure they are reasonable.⁶²

On the other hand, borrowers:

- (a) Can cancel their contract within three working days after receiving disclosure;⁶³
- (b) Have the right to repay what they owe in their contract early;⁶⁴ and
- (c) Can ask lenders to change the contract if they are suffering unexpected hardship.⁶⁵

These statutory rights and obligations ensure that consumers are better informed. They promote competition, efficiency and good practice in the

55 Finn and Todd, above n 3, at [1.4.1].

56 At [1.1.1] and [1.5.1].

57 Richard Scragg “Credit Contracts and Consumer Finance Act” in Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (4th ed, LexisNexis, Wellington, 2014) at [22.1.1]. See also Peter McCordle “Consumer Credit Law to be Reviewed” (press release, 1 July 1999) which was followed by a series of public consultations that led to the proposal of new legislation.

58 See Ministry of Consumer Affairs *Review of the Operation of the Credit Contracts and Consumer Finance Act 2003* (September 2009) at 4–5 for reform proposals.

59 Section 3. See also Ministry of Consumer Affairs, above n 58, at 7–9.

60 Sections 17–26, 32–35 and sch 1.

61 Sections 117–131 deal with courts’ power to reopen and readjust oppressive credit contracts.

62 Sections 41–45.

63 Sections 27–31.

64 Sections 49–54.

65 Sections 55–59.

credit market. The regime endorses transparency around interest rates and fees, which in turn pressures creditors to compete with lower interest rates, fees, service quality and innovation. At the same time, borrowers' rights in relation to oppressive credit contracts ensure that consumers can exercise their options without being unfairly impaired. The regime prevents consumers from entering into contracts whose terms they do not fully understand. Finally, the consumer credit law regime is not paternalistic because redress is not imposed on consumers by default. Other remedies under the Act include statutory damages and injunctions.⁶⁶

Generally, the CCCFA satisfies the three-limbed framework. But s 137 does not.

1 Section 137 of the CCCFA

Section 137 is the mandatory conflict of laws provision of the CCCFA. It states:

This Act applies to a credit contract, guarantee, lease, or buy-back transaction if the contract, guarantee, lease, or transaction—

- (a) is governed by the law of New Zealand; or
- (b) would be governed by the law of New Zealand but for a choice of law provision in the contract, guarantee, lease, or transaction.

Section 137 appears straightforward and invites a simple interpretation. Yet a closer reading of the provision unearths two complicated legal tests that do not aid in the consumer law framework. Section 137 is critiqued first from a purely legal perspective and then, secondly, by applying the three-limbed framework to the section.

(a) The First Test: s 137(a)

Section 137(a) applies the CCCFA to a contract if it “is governed by the law of New Zealand”. This rule possibly applies in two scenarios. The first is where parties have stipulated that the law of New Zealand will apply. The second is where parties have not stipulated any applicable law but the proper law of the contract is the law of New Zealand. Both scenarios present difficulties regarding interpretation and scope.

Where the section applies because the parties have agreed that the law of New Zealand governs the contract, it functions well if the consumer is resident in New Zealand. If the consumer is not resident in New Zealand, the section renders the CCCFA mandatory and applicable to consumers based overseas. The application is almost universal provided that the contract states that the governing law of the contract is that of New Zealand. It is unlikely that Parliament intended the legislation to have such a broad scope

⁶⁶ Sections 88–92 and 96–98.

and application.⁶⁷ The universal scope of the legislation — even to consumers who have no connection to New Zealand — is therefore likely to be an oversight.

Alternatively, s 137(a) applies where parties have not stipulated the governing law but the proper law of the contract is New Zealand law. A court determines the proper law by assessing the contract and its surrounding circumstances. The *Laws of New Zealand* provide a number of the factors that must be considered, reproduced below:⁶⁸

- (a) the place where the contract was made;
- (b) the place where the contract is to be performed;
- (c) the nature and location of the subject-matter of the contract;
- (d) the currency in which payment is to be made;
- (e) the place of the parties' residence or business;
- (f) the terminology of the contract;
- (g) the form of the documents;
- (h) a connection with a previous transaction;
- (i) a choice by the parties that arbitration is to take place in a particular country;
- (j) a choice by the parties that the courts of a particular country are to have jurisdiction over the contract; and
- (k) the fact that the contract, or a particular term, is void or invalid under one system of law but valid under another.

These factors do not provide a formula for obtaining the proper law. Rather, they assist a court, which will weigh those various factors, in determining whether a particular legal system is more closely connected to the contract than another. Importantly, this approach to determine the proper law of the contract provides no certainty as to the outcome.

The fact that one of the parties is a consumer has not been traditionally considered a factor in the court's determination of the proper law of the contract. The CCCFA, for example, is silent on this point.⁶⁹ Consumers will be forced to litigate on a relatively ambiguous section in order to determine the proper law of the contract. This is a burdensome process — seeking redress may not be justified in the eyes of rational consumers.

The Commerce Commission, which publicly enforces the CCCFA and may litigate on behalf of consumers, will face similar troubles to consumers. The Commission has to address individual contracts that may have different outcomes depending on the particular circumstances of those contracts and the parties to them.⁷⁰ In sum, there is a high degree of

67 See (7 October 2003) 611 NZPD 8840 where Stephen Franks MP raised the negative unintended consequences of the Credit Contract and Consumer Finance Bill 2003 (2-2) on closer economic relations due to the scope of its application. Don Brash MP replied that the issue should have been raised at the Select Committee stage, so could not be considered at the third reading of the Bill.

68 *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [118] (footnotes omitted).

69 Contrast Rome I, above n 1, art 6, which directly addresses the determination of the proper law in consumer contracts.

70 See CCCFA, s 111.

uncertainty under the first test of s 137. There is no guarantee that New Zealand law will apply simply because the consumer is located in New Zealand.

(b) The Second Test: s 137(b)

Section 137(b), the second test in s 137, applies to a contract if it “would be governed by the law of New Zealand but for a choice of law provision in the contract”. The purpose of this test is to prevent parties — specifically, creditors — from opting out of the CCCFA by agreeing that the law of a different legal system applies.⁷¹

Section 137(b) faces similar interpretive issues as the first test while also raising its own unique problems. For the second test to apply, New Zealand law must have been the applicable law in the absence of an express choice of law clause. To determine whether New Zealand law would have been the proper law of the contract, the court needs to identify the proper law, explained above. This is a cumbersome and time-consuming process. It is debatable whether the average consumer has the means or will to litigate a statutory provision that suffers from such definitional vagueness.

Another issue is that the second test has a different scope than the first test. The first test requires applying the CCCFA if the proper law of the contract is New Zealand law; that is, the *only* applicable law in relation to the contract is the law of New Zealand.⁷² Under the second limb, foreign law may still govern the contract even though the CCCFA applies. To explain, s 137(b) states specifically that the CCCFA applies if the proper law of the contract would have been the law of New Zealand. It does not state that the law of New Zealand applies. Accordingly, there remains the possibility that the parties’ choice of law may also apply alongside the CCCFA.

The possibility that more than one legal system may apply to a consumer contract creates considerable confusion in interpreting and applying the CCCFA. It also creates burdens that may be too costly for consumers involved in small claims to overcome.

(c) Jurisdiction Clauses

Section 137 is silent on the issue of jurisdiction.⁷³ Many e-commerce contracts will have both jurisdiction and governing law clauses in favour of the place of business. If parties have stipulated that the courts of New Zealand are to have exclusive jurisdiction, that stipulation does not necessarily mean that the CCCFA will apply to the contract. The CCCFA needs to be applicable under the first test. That is, the jurisdiction clause in favour of New Zealand and other relevant factors must indicate New Zealand law as the most closely connected legal system to the contract.

71 Section 135 already makes it illegal for parties to contract out of the CCCFA, which appears to be extended by the test under s 137(b).

72 By definition, for s 137(a) to apply, the governing law of the contract must be the law of New Zealand.

73 Including arbitration clauses, which have a similar effect to foreign jurisdiction clauses.

Conversely, a credit contract could stipulate that a foreign court is to have exclusive jurisdiction over any disputes arising from the contract. Section 137 is again silent on how to deal with such stipulations. An exclusive jurisdiction clause has traditionally been considered a strong factor for a stay of proceedings.⁷⁴ Courts generally stay proceedings if the relevant contract has a foreign jurisdiction clause. It is likely that a foreign jurisdiction clause in a contract involving consumers in New Zealand constitutes an unfair contract term because it limits the consumer's right to sue another party.⁷⁵ The burden, however, is unnecessarily high for consumers because they must persuade a New Zealand judge to read down a foreign jurisdiction clause.⁷⁶

The CCCFA does not empower a New Zealand court to disregard a foreign jurisdiction clause. Nothing in the legislation stipulates that New Zealand courts have exclusive jurisdiction over contracts of the kind governed by the CCCFA regime. Although it is inconsistent that the CCCFA applies where there is a foreign governing law clause in the contract, the same is not true where there is only a foreign jurisdiction clause. Creditors may exploit this conceptual gap by omitting a foreign choice of law clause as these are addressed by s 137 but including a foreign jurisdiction clause (about which the CCCFA is silent).⁷⁷ This is an unsatisfactory gap in the protection of New Zealand consumers.

(d) Summary: Legal Analysis of Section 137

Section 137 attempts to apply the CCCFA to both contracts governed by New Zealand law and those that would have been governed by New Zealand law but for a choice of law clause. Yet the drafting of the section prevents consumers from accessing the protection it purports to offer. First, consumers must litigate in order to give effect to the section but there is no certainty in what the outcome might be. And there is no default option in the absence of litigation. Where a consumer is risk averse, the better option may be to forgo his or her claim because the cost of litigation may outweigh any damages awarded. Secondly, there are conceptual gaps in s 137. The lack of any consideration of foreign jurisdiction clauses opens an opportunity for businesses to avoid the application of the CCCFA. As a result, s 137 fails to protect consumers because of its definitional vagueness and the difficulty of enforcement.

74 Lord Collins, above n 50, at [12.116]–[12.118].

75 See Fair Trading Amendment Act 2013, s 36, which inserts into the Fair Trading Act at s 46M examples of unfair terms in standard form consumer contracts, including “a term that limits, or has the effect of limiting, one party's right to sue another party”.

76 See Fair Trading Amendment Act 2013, s 36, which allows a person to seek a declaration from a District Court or the High Court that a standard form contract contains an unfair contract term.

77 But see the Fair Trading Act, s 5C, which may limit the application of foreign jurisdiction clauses.

2 Section 137 and the Three-Limbed Framework

The problems identified with s 137 become even more apparent when discussed in the context of the three-limbed framework.

(a) First Limb: Competition in the Market

Section 137 does not create any competitive pressure in the market. Whilst the CCCFA as a whole encourages price competition in the credit market, the conflict of laws provision under s 137 creates an adverse competitive effect by discouraging foreign creditors from entering the market.⁷⁸ This is because the section has the consequence of imposing the CCCFA as the applicable law in all consumer contracts in a broad and vague manner. In turn, foreign businesses may perceive it as a regulatory and legal barrier to market entry.

The wording of s 137 potentially imposes the CCCFA on litigants in New Zealand or located overseas.⁷⁹ In either case, both consumers and foreign businesses would need to litigate to determine the applicability of the CCCFA. This process is likely to be costly for all involved. In effect, the options available to foreign creditors are to:

- (a) State in their consumer contract that the law of New Zealand is the applicable law, including the CCCFA;
- (b) State in their consumer contract that the law of their habitual residence is the applicable law (and by doing so purport to exclude the applicability of the law of New Zealand); or
- (c) Not conduct business in New Zealand because of the potential litigation.

The first option may be feasible for foreign creditors who are of a sufficient scale that an additional investment in learning about New Zealand law is not burdensome. The second option will be available either because the foreign creditors are not aware of s 137 or because they are willing to face litigation over s 137. The third option may be the reality for businesses that lack sufficient scale or for businesses that had previously taken the second option and, upon finding the process of litigation too costly, decide to cease business in New Zealand.

Similarly, consumers may be deterred from entering into consumer contracts with foreign businesses for the same reasons. If the undesirable experiences of litigating consumer contracts become commonplace, consumers may generally avoid foreign creditors.

The possibility that foreign businesses will be discouraged from entering the New Zealand credit market, or that New Zealand consumers

⁷⁸ See (7 October 2003) 611 NZPD 8840 where Mr Franks raises this very issue in the context of Australian creditors entering the New Zealand market.

⁷⁹ The former case is where a foreign creditor is sued in New Zealand; the latter is where the foreign creditor sues a New Zealand consumer in the foreign country.

will avoid foreign creditors, are theoretical but not unrealistic. If the anti-competitive effect is real, then s 137 fails to satisfy the first limb of the three-limbed framework. Unless there are significant public policy reasons (for example, to protect New Zealand creditors against foreign competition), the preceding analysis shows that s 137 fails to foster competition in the market and consequently limits the options of consumers.⁸⁰

(b) Second Limb: Unimpaired Decision-Making Power

The second limb relates to consumers' ability to make effective and unimpaired decisions in choosing between available market options. In the credit market, this means being able to effectively compare creditors (offering different products to suit the consumers' needs) and to make an informed decision. In general, the CCCFA achieves the objectives of the second limb. However, s 137 hinders consumers' ability to make an effective and unimpaired decision among available options where foreign creditors are involved.

Because foreign creditors, as well as consumers, cannot be certain how s 137 operates, the section does not empower consumers to make unimpaired and effective decisions. There is inherent difficulty in knowing the exact meaning of a conflict of laws provision in a contract because the reader must understand the consequences of applying different legal systems to the relevant contract. The difficulty in understanding the implications of s 137 can be said to adversely affect consumers' effective and unimpaired decision-making powers.

(c) Third Limb: Empowerment versus Legal Paternalism

The final limb of the consumer protection framework focuses on empowering consumers. Generally, the CCCFA does not have features that are paternalistic. The legislation empowers consumers by requiring transparency between competing creditors and retrospectively provides relief to consumers who have been subject to oppressive terms in their credit contracts. Consumers are empowered to seek solutions to legal issues that they face and no arbitrary legal redress is forcibly imposed on consumers. On the other hand, s 137 does treat consumers as a homogenous group, evidencing some paternalism.

Setting aside the issue of interpretive uncertainty with s 137, the section purports to impose the CCCFA as the only available option available to consumers. There is no other choice. If the credit contract is governed by the law of New Zealand, or would have been governed by the law of New Zealand but for a choice of law clause stating otherwise, then that contract is subject to the CCCFA. The opinions of consumers regarding the advantages or disadvantages of the CCCFA are disregarded. If a consumer enters into a

⁸⁰ See (7 October 2003) 611 NZPD 8840. The debate between Mr Franks and Mr Brash shows that the parliamentarians did not consider s 137 as a means of limiting competition in the market.

contract with a foreign creditor whose domestic law provides better protection to the consumer than the CCCFA, that foreign law may not apply.⁸¹ Section 137 fails to empower consumers at an individual level and so is a manifestation of legal paternalism.

3 Summary: Legislative Problem and Solution

It is not suggested that Parliament intended the CCCFA to cause legal uncertainty, increase paternalism or create effects adverse to consumer protection. However, it is undesirable that s 137 does not accord with the consumer protection framework.

Solving the problems with s 137 may be achieved simply through amending that section. If an amendment is proposed, that amendment must not be treated as a one-off fix but rather as a case study in which other conflict of laws provisions in consumer protection legislation are examined. International experience with similar provisions offers useful guidance. In particular, conflict of laws provisions in consumer contracts in Europe reflect the richness of legislative and judicial thought in this area.

The next part studies the European solution to conflict of laws in the consumer protection context, before drawing on the European legislation in drafting a new s 137.

The European Insight

In this part, Rome I will be studied as a guiding model for determining the governing law for contractual obligations and, more specifically, for consumer contracts. Finally, this section proposes adopting the European instrument to the CCCFA.

1 Background to Rome I

Rome I governs conflict of laws rules relating to contractual obligations in the European Union.⁸² It is an instrument largely based on its predecessor, the Rome Convention,⁸³ with the interpretive guide of the Giuliano-Lagarde

81 This will be the case if the litigation took place in New Zealand and the court determines the governing law to be New Zealand law.

82 Note that the examination of Rome I may be moot in the European consumer credit context. Directive 2008/48/EC on Credit Agreements for Consumers [2008] OJ L133/66 harmonises and regulates consumer credit law and repeals Council Directive 87/102/EEC for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit [1987] OJ L42. The Directive is similar to the CCCFA in spelling out the legal obligations of creditors and protections for borrowers and additionally harmonises the European credit market. All member states of the EU have to apply the same substantive rules, avoiding the need for conflict of laws rules. However, the Directive has no influence outside the EU, where national rules and Rome I remain applicable. For example, in resolving disputes arising out of credit contracts between residents of a member state and a non-member state of the EU (such as New Zealand), the rules in Rome I may be applicable in determining the governing law.

83 Convention 80/934/EEC on the Law Applicable to Contractual Obligations [1980] OJ L266.

Report.⁸⁴ Rome I seeks to achieve uniformity in the rules for determining the law applicable to contractual obligations in the EU.

2 *General Approach for Contractual Obligations*

Under Rome I, three alternative steps determine the proper law of a contract. These are:

- (a) Whether there is an express choice of law;⁸⁵ if not
- (b) Whether there is an implied choice of law, which is clearly demonstrated by the terms of the contract or the circumstances of the case;⁸⁶ if not
- (c) Identifying the legal system that is most closely connected to the contract.⁸⁷

Article 3(1) of Rome I says: “[a] contract shall be governed by the law chosen by the parties”. That choice must be made expressly or be clearly demonstrated by the terms of the contract or circumstances of the case. Where the parties have failed to indicate a choice, art 4 provides a formulaic guide for choosing the legal system that is most closely connected to the contract. Article 4(3) provides additional flexibility by allowing the legal system of a “manifestly more closely connected” country to apply to a contract even when the formulaic approach in subarts (1) and (2) indicates a different choice of law.

The operation of arts 3 and 4 of Rome I and the principles underlying these provisions are largely similar to the principles under the common law. Of course, the Rome I provisions are more formulaic than their common law counterparts. But the primary consideration in determining the applicable law is the parties’ choice and, in the absence of the parties’ choice, the legal system that is objectively the most closely connected to the contract. While similar for general contracts, any similarity between the two systems does not extend to consumer contracts.

3 *Specific Approach for Consumer Contracts*

Article 6(1) states that consumer contracts between a consumer (a natural person not contracting in his trade or professional capacity) and another person acting within the exercise of his or her trade or profession have special protections in favour of the consumer. Such contracts shall be governed by the law of the country of the consumer’s habitual residence provided that the professional:

⁸⁴ Mario Giuliano and Paul Lagarde “Report on the Convention on the law applicable to contractual obligations” [1980] OJ C282/1. This report was the basis of the Rome Convention.

⁸⁵ Rome I, above n 1, art 3(1).

⁸⁶ Article 3(1).

⁸⁷ Article 4.

- (a) Pursues his or her commercial or professional activities in the country where the consumer has habitual residence; or
- (b) By any means, directs such activities to that country or to several countries including that country; and
- (c) The contract falls within the scope of that activity.

This section presents a balanced approach to consumer contracts because it is both broad and narrow. It is broad because it sets out a general rule requiring the law of the consumer's habitual residence to apply to the consumer contract. At the same time, it is narrow because of the definitional limits to the key concepts used under the article. First, a consumer is narrowly defined. Secondly, there are requirements that the trader be pursuing a professional activity in the country of the consumer's habitual residence or at least be directing such activities to that country by any means.

In addition, art 6(2) allows parties to choose which law governs the contract under art 3 of Rome I. However, this is subject to the baseline protection in art 6(2) that the chosen law does not deprive the consumer of any mandatory protections afforded to him or her by art 6(1) if there had been no choice of law. Article 6(2) therefore provides a "better law" approach, which empowers consumers to exercise party autonomy whilst also providing a baseline consumer protection. This is a reasonable balance between party autonomy and legal paternalism, whereby consumers enjoy the best of both ideals.

Finally, art 6(3) states that where art 6(1) does not apply, the proper law of the contract is derived by applying arts 3 and 4. Article 6(3) thereby ensures that the consumer protection is unwarranted where art 6(1) is not applicable and so the default rules on determining the proper law of contracts should apply.

Article 6 as an overall regime arguably is a model statutory section on conflict of laws rules for consumer contracts.

4 Article 6 and the Three-Limbed Framework

Consumer protection under art 6 accords with the three-limbed framework.

(a) First Limb: Competition in the Market

The legal certainty that exists as a result of Rome I arguably promotes competition in the market and creates more options for consumers. In the absence of the Rome I regime, choice of law in contractual matters would depend on conflict of laws rules of national courts, which vary substantially. For small businesses, the uncertainty in the applicable law of the consumer contract constitutes a considerable hindrance in entering into or expanding in a market. Having a unified and clear regime, as achieved through the wording of art 6, allows businesses to engage with consumers with the least amount of legal risk. Accordingly, art 6 significantly reduces a barrier to entry in the market.

(b) Second Limb: Unimpaired Decision-Making Power

The Rome I regime helps consumers to exercise their choice over the available options effectively and without impairment. Article 6(2) empowers consumers to decide on the applicable law governing a consumer contract. If that choice is obviously improper because it deprives consumers of the legal protection they would have enjoyed under their domestic laws, art 6(1) allows the better alternative legal system to apply to the consumer contract. In effect, consumers are allowed to make a choice but if that choice was impaired, they are provided with the better alternative available.

(c) Third Limb: Empowerment versus Legal Paternalism

The European regime empowers consumers by allowing them to choose the applicable law of the contract. This is an interesting comparison to the CCCFA regime, which makes the CCCFA the applicable law irrespective of consumers' preference. Rome I instead allows consumers to choose a particular law and intervenes only to the extent that the consumers are at an unjust disadvantage.

For the above reasons, the Rome I regime merits consideration for adoption in New Zealand.

Case for Adoption in New Zealand

The following is a proposed redraft of s 137 of the CCCFA that is substantially similar to art 6 of Rome I.

- (1) Subject to subsection (2), this Act applies to a credit contract, guarantee, lease, or buy-back transaction if New Zealand law is the law of the country of consumer's habitual residence and provided that the professional:
 - (a) pursues his commercial or professional activities in New Zealand; or
 - (b) by any means, directs such activities in New Zealand
 and the contract falls within the scope of that activity.
- (2) A consumer may agree with the professional that the law of another states applies and that this Act does not apply to a credit contract, guarantee, lease, or buy-back transaction, provided that this subsection does not derogate the consumer of any mandatory protection afforded to him or her under section 137(1) if there had been no choice of law.
- (3) Where section 137(1) or 137(2) does not apply, this Act applies to a credit contract, guarantee, lease, or buy-back transaction if New Zealand law is the proper law of the contract.

The proposed wording addresses most of the issues raised by the initial analysis of s 137. The three-limbed framework analysis conducted above when assessing the usefulness of Rome I applies equally to the proposed s 137. Compared to the previous wording of s 137, the risk of litigation is substantially reduced because of the section's increased clarity. The wording also reduces a legal barrier to entry for businesses. Furthermore, the ability of parties to first agree on a governing law but then fall back on the CCCFA similarly allows consumers to exercise their choices effectively. Finally, the new s 137(2) operates to empower consumers whilst striking an appropriate balance to incorporate some level of legal paternalism.

Overall, the proposed section and the approach to consumer protection it promotes will likely improve the status of conflict of laws provisions in consumer protection regimes in New Zealand. The proposed draft wording of the new s 137 could easily be altered to suit other consumer contracts in New Zealand.

IV CONCLUSION

The article began by surveying the basis of consumer protection, followed by an analysis of the accepted purposes of consumer protection law. It then posited that consumer protection law must empower consumers with autonomy. To this end, a three-limbed framework was presented, which encapsulated the importance of competition law, as well as consumer protection law, for the end goal of consumer empowerment.

By way of illustrating the proposed consumer protection framework, the interaction between consumer protection law and conflict of laws rules was described. In particular, s 137 of the CCCFA was critiqued as posing inherent difficulties in its application. Finally, a possible rewording of s 137 was proposed so that the section is more compatible with the consumer protection framework.

It is hoped that the attempt at formulating the three-limbed framework to examine existing and future consumer protection laws will bring a fresh perspective to policy discussions on consumer protection law.