

**Redress for Consumers in terms of the Consumer Protection
Act 68 of 2008: A Comparative Discussion***

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Abstract. The Consumer Protection Act 68 of 2008¹ is a groundbreaking piece of legislation in the realm of not only South African consumer law but also the South African law of contract. What is more, the Act also has worldwide implications as foreign companies selling goods and services in South African consumer markets will have to comply with the new legislation. In Part 1 of this paper, the avenues of redress available to the consumer in terms of the Act and the possible practical problems pertaining thereto are discussed. Part 2 deals with redress for consumers in terms of the European Union and relevant aspects of redress in the Spanish legal system. Part 3 is a comparative conclusion with regards to redress issues for consumers generally.

Part 1

A South African Perspective: Civil Courts and the Consumer Protection Act 68 of 2008

1. Introduction

The Consumer Protection Act (CPA) 68 of 2008 is envisaged to come into effect incrementally in 2010². This comprehensive and progressive act marks the dawn of a new era in consumer protection in South Africa and was brought into being with praiseworthy intentions mainly to promote fair business practices and the protection of vulnerable consumers such as low-income communities and minors³. Notably, it deals with eight Fundamental Consumer Rights that are internationally recognised and thus confirms South Africa's commitment to international consumer rights. These eight fundamental rights are:

- Right to equality in the consumer market;
- Consumer's right to privacy;
- Consumers right to choose (this right also includes a consumer's cooling-off right, right of cancellation and right to examine the goods);
- Right to disclosure of information;
- Right to fair and responsible marketing;
- Right to fair and honest dealing;
- Right to fair just and reasonable terms and conditions (which include prohibited transactions, terms and conditions); and
- Right to fair value, good quality and safety (includes safety recall and liability for damaged goods).

* This paper was originally published in Kierkegaard, S.(2010) Private Law: Rights, Duties and Conflict .IAITL

¹ Hereinafter referred to as the CPA or Act.

² Du Preez (2009) The Consumer Protection Bill; A few preliminary re-marks TSAR 48.

³ Melville (2010) The Consumer Protection Act Made Easy 1, (hereinafter Melville).

The objectives of the Act are set out in section 3 thereof and it is provided that the CPA is to be interpreted in a manner that gives effect to these purposes⁴. From its objectives, it is evident that the Act is *inter alia* premised on the recognition that justice and redress is often out of reach for consumers. In 1983 the *Hoexter Commission*⁵ specifically noted the inaccessibility of the courts, the slow pace of justice, the impediments posed by poverty and ignorance and the psychological barrier between the layman and the legal process⁶. The implementation of the CPA aims to rectify such a situation by laying the groundwork for a new role to be played by the courts in the context of the legal framework for the consumer market⁷. The aim of this discussion is to briefly discuss the institutions that may be approached for redress and to illuminate the limited role of specifically the civil courts in terms of the CPA.

As indicated, litigation is often complex, time-consuming and costly and within the realm of redress in respect of consumer rights, it may impede or frustrate access to justice rather than accommodate it. In order to provide sufficient redress for consumers, a model that allows not only for consumers to approach courts for resolving disputes and enforcing rights, but also provides for other, less costly and cumbersome avenues of redress is more appropriate. The legislature has recognized this fundamental principle of consumer protection and consequently various institutions such as the National Consumer Commission (which serves as the “consumer watchdog”), the National Consumer Tribunal (Regulatory body in terms of Act), ombuds, alternative dispute resolution agents, consumer courts, equality courts and ordinary civil and criminal courts are responsible for the application and enforcement of the CPA and the consumer rights contained therein⁸. It is already clear that various avenues of redress are available to the consumer.

2. Locus standi

The CPA has wide *locus standi* provisions. In terms of section 4(1) any of the following persons may in the manner provided for in the Act, approach a court, the Tribunal or the Commission, alleging that a consumer’s rights in terms of the Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

- a) a person acting on his or her own behalf ;
- b) an authorized person acting on behalf of another person who cannot act in his or her own name;
- c) a person acting as a member of, or in the interest of, a group of affected persons;
- d) a person acting in the public interest, with leave of the Tribunal or the court as the case may be; and
- e) an association acting in the interests of its members.

3. Routes of Redress

Section 69 of the CPA provides that a person contemplated in section 4(1)⁹ may seek to enforce any right in terms of the Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier by:

- a) referring the matter directly to the Tribunal, if such a direct referral is permitted by the Act in the case of a particular dispute;

⁴ S2 of the CPA.

⁵ In 1984 Hoexter JA was appointed as chairperson to *The Commission of Inquiry into the Structure and Functioning of the Court* (hereinafter referred to as the “*Hoexter Commission*”)

⁶ Van Eeden (2009) A Guide to the Consumer Protection Act 297 (hereinafter Van Eeden).

⁷ *Ibid.*

⁸ Melville (2010) 131.

⁹ See the discussion on *locus standi* above at nr 2.

- b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
- c) if the matter does not concern a supplier contemplated in paragraph (b)
 - i. referring the matter to the applicable industry ombud, accredited in terms of section 86(2), if the supplier is subject to any such ombud; or
 - ii. applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing the consumer court;
 - iii. referring the matter to another dispute resolution agent contemplated in section 70;
 - iv. filing a complaint with the Commission in accordance with section 71; or
- d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted (our emphasis).

4. Institutions that may be approached for redress.

4.1 Matters to be dealt with by The National Consumer Commission

The National Consumer Commission is responsible to enforce the CPA by *inter alia* promoting informal resolution of any dispute arising in terms of the CPA between a consumer and a supplier; receiving complaints concerning alleged prohibited conduct or offences; investigating and evaluating alleged prohibited conduct and offences; issuing and enforcing compliance notices and negotiating and concluding undertakings and consent orders¹⁰.

Section 71 of the CPA provides that any person may file a complaint with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with the Act¹¹. The Commission may also directly initiate a complaint concerning any alleged prohibited conduct on its own motion, or when directed to do so by the Minister or on the request of a provincial consumer protection authority, another regulatory authority, or an accredited consumer protection group¹².

After concluding an investigation into a complaint, the Commission may issue a notice of non-referral to the complainant, or if the Commission alleges that an offence has been committed, it may refer the matter to the National Prosecuting Authority¹³. Alternatively, if the Commission believes that a person has engaged in prohibited conduct, it may refer the matter to the equality court or propose a draft consent order in terms of section 74 or make a referral to the consumer court of the province where the supplier has its principal place of business or to the Tribunal; or issue a compliance notice¹⁴.

If the Commission refers a matter to the Consumer court, any party to that referral may apply to the Tribunal for an order that the matter be referred to the Tribunal. The Tribunal may then order that the matter be referred to it if the balance of convenience or interests of justice so require¹⁵.

Where a matter has been investigated by the Commission and the Commission and the respondent agree to the proposed terms of an appropriate order, the Tribunal or a court, without hearing evidence may, confirm that agreement as a consent order, which may include a damages award¹⁶.

¹⁰ S99.

¹¹ S71 (1).

¹² S71(2)(a) and (b)(i)(ii) and (iii).

¹³ S73(1)(a) and (b).

¹⁴ S73(1)(c).

¹⁵ S73(4).

¹⁶ S74(3).

4.2 The National Consumer Tribunal

The National Consumer Tribunal has been established in terms of the National Credit Act, 34 of 2005 and is situated in Centurion, Gauteng. If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116 of the CPA, the complainant may refer the matter directly to the consumer court, if any, in the province within which the complainant resides¹⁷. Alternatively the matter may be referred to the Tribunal, with leave of the Tribunal¹⁸. If a matter is referred directly to a consumer court, the respondent may apply to the Tribunal, based on the balance of convenience or interests of justice.

The Tribunal must conduct a hearing in respect of any matter referred to it and may make any applicable order contemplated in the CPA or in section 150 and 151 of the National Credit Act¹⁹, such as declaring a conduct to be prohibited, interdicting prohibited conduct, imposing fines, confirming consent orders or condoning non-compliance with its rules.

The administrative fine in respect of prohibited or required conduct, which may be imposed by the Tribunal may not exceed the greater of 10 percent of the respondent's annual turnover during the preceding financial year or R1 000 000²⁰.

4.3 The Ombudsman and the Ombuds

Legislation has been adopted in many countries to provide for the office of the ombudsman to deal with grievances against the state and instances of maladministration. In South Africa, the function of the ombudsman is entrusted to the Public Protector.²¹ The Public Protector is competent to investigate any form or allegation of maladministration, abuse of power, unfair and improper conduct. The Public Protector may also investigate corruption with respect to public money and improper or unlawful enrichment.²² Should the Public Protector find evidence of the above, prosecution in a court of law may follow and may include a fine.

Though the term 'ombud' is derived from the institution of the ombudsman, there are fundamental differences between the respective institutions. The 'statutory ombud' is for example the ombud for Financial Service Providers (like banking institutions) and appointed by the Financial Services Board.²³

If the supplier complained against is a financial institution that belongs to an ombud scheme recognised under the Financial Services Ombud Schemes (FSOS) Act 37 of 2004, the matter can, as one of a number of alternatives, be referred to the ombud scheme for resolution in terms of section 70(1)(a) of the CPA²⁴. Complaints against any supplier not belonging to one of these schemes may be dealt with by an industry ombud, accredited in terms of section 82(6), if the supplier falls under any such ombud²⁵. Such ombuds may be provided for in industry codes and must be approved by the Consumer Commission²⁶.

An ombud may record a resolution or settlement as an order which, in turn, can be made a consent order by a court or the Tribunal. If a matter is not resolved by the ombud, the complainant may approach either the Commission or the Tribunal²⁷. It should be noted therefore that the modern consumer ombuds in South Africa,

¹⁷ S75(a).

¹⁸ S75(b).

¹⁹ S75(4)(a) and (b).

²⁰ S 112(1).

²¹ Van Eeden (2009) 96.

²² The Public Protector functions and is regulated in terms of the Public Protector Act 23 of 1994.

²³ In terms of the Financial Services Board Act 97 of 1990.

²⁴ Melville (2010) 129.

²⁵ Melville (2010) 130.

²⁶ *Ibid.*

²⁷ *Ibid.*

who are controlled by industry are a far cry from the original concept of the ombudsman as developed in Sweden to deal with grievances against the state.²⁸

4.4 Alternative Dispute Resolution

Apart from ombuds which facilitate alternative dispute resolution, consumers can also approach a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of a dispute in terms of the CPA. If such agent manages to resolve the dispute, the resolution or settlement may be recorded, which can include an award of damages to the complainant²⁹. If the parties to the dispute consent to that order, it can be submitted to the Tribunal or high court for it to be made a consent order³⁰.

If however, the alternative dispute resolution agent decides that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process and the complainant can then refer the matter to the Commission³¹.

4.5 Consumer Courts

In various instances the Act provides that the consumer may approach a consumer court with a complaint against a supplier. It is to be noted that the CPA defines both the concepts “court” and “consumer court”. The definition of “court” however does not include a consumer court and should thus be interpreted to refer to the ordinary courts, namely the high court, magistrates’ court and small claims court. A “consumer court” is defined as “a body of that name, or a consumer tribunal, that has been established in terms of applicable consumer legislation.”

Like the ombuds and alternative dispute resolution agents, a consumer court may record a resolution or settlement as an order which order may be made a consent order³². It should be noted however that to date only three consumer courts exist, namely in Gauteng, the Free State and in Limpopo³³, thus making this form of redress unavailable or costly to access for many indigent consumers in other parts of South Africa, and even in the more remote parts of the provinces where these courts actually exist.

4.6 Equality Courts

The equality courts are defined as having the meaning set out in the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000. For purposes of the CPA, their role is limited to matters arising from the CPA relating to discrimination as indicated in Chapter 2, Part A of the Act. Where a complainant wishes to have a contravention of Part A of Chapter 2 of the Act addressed, an equality court may be approached alternatively the complaint may be filed with the Consumer Commission, which must then refer the complaint to the equality court, if the complaint appears to be valid³⁴.

²⁸ Van Eeden (2009) 100.

²⁹ S70(3)(A). Melville (2010) 128.

³⁰ S70(3)(b). *Ibid.*

³¹ Melville (2010) 128.

³² S70(3)(a) and (b).

³³ Du Plessis (2008) Towards better service delivery by consumer courts *SA Merc LJ* 74.

³⁴ S10(1)(b). The procedure of filing with the Commission appears unnecessary and it is submitted that it would be less time-consuming to always just approach an equality court as the Commission does not have jurisdiction to entertain equality-related complaints.

4.7 The Civil Courts

The civil courts may deal with claims for damages and enforcement of rights. However, limitation in section 69 of the CPA states that the ordinary civil courts may assist a consumer only if the entire consumer's other remedies have been exhausted and it appears to make civil courts the option of last resort³⁵. It should also be noted that a person, who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct, may not institute a civil claim in a civil court unless the person simultaneously files with the registrar or clerk of the court a notice from the chairperson of the Tribunal stating whether the Tribunal decided that the conduct complained of was prohibited or required by the Act, and the date and details of the Tribunal's finding³⁶.

It can also be expected that many disputes between consumers and suppliers that cannot be resolved without eventual court intervention will involve small amounts, which can be adjudicated by Small Claims Courts, that have a jurisdictional limit of R7000, follows an inquisitorial and consumer friendly procedure and does not allow for costs orders- thus making it a cheap and accessible form of adjudication.

4.8 Criminal Courts

A Magistrates court with criminal jurisdiction is authorised by the CPA to impose, penalties, namely fines and/or imprisonment, in respect of offences created by the Act.

5. Powers of the court

5.1 Introduction

Section 4 of the CPA places specific obligations on courts and the Tribunal with regard to the realization of consumer rights by inter alia providing that in any matter brought before the Tribunal or a court in terms of the Act the court must develop the common law as necessary to improve the realization and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b) such as low-income communities or other vulnerable consumers³⁷. In addition thereto the Tribunal or court, as the case may be, is obliged to promote the spirit and purposes of the Act and make appropriate orders to give practical effect to the consumer's right of access to redress³⁸. These "appropriate orders" include, but are not limited, to any order specifically provided for in the Act and any innovative order that better advances, protects, promotes and assures the realization by consumers of their rights in terms of the Act³⁹.

5.2 Specific Powers of the Court

Section 52 of the CPA provides the ordinary civil courts with specific powers to adjudicate upon unconscionable conduct and to ensure fair and just conduct, terms and conditions.

Section 61 introduces product liability into South African consumer law for the first time. It is clear that civil courts will have jurisdiction to adjudicate these claims especially as section 61(6) provides that nothing in section 61 limits the authority of a court to assess whether any harm has been proven and adequately mitigated; determine the extent and monetary value of any damages, including economic loss; or apportion liability among persons who are found to be jointly and severally liable.

³⁵ Melville (2010) 131.

³⁶ *Ibid.*

³⁷ S4(2)(a).

³⁸ S4(2)(b)(i) and (ii).

³⁹ S4(2)(b)(ii)(aa) and (bb).

6. Additional powers of court

Section 76 bears the general heading “Powers of court to enforce consumer rights”. It provides that in addition to any order that a court may make under the CPA *or any other law* (our emphasis), a court considering a matter in terms of the Act may order a supplier to alter or discontinue any conduct that is inconsistent with the Act; make any order specifically contemplated in the Act; and award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of the Act.

It is further provided that the Act does not diminish any right of the consumer or the supplier to recover interest or special damages in any case where by law interest or special damages may be recoverable or to recover money paid if the consideration for the payment of it has failed⁴⁰.

7. Interim relief

A person who has applied for relief to a court, or the complainant in a complaint that has been referred to the Tribunal, as the case may be, may apply to a court, subject to its rules, or to the Tribunal, for an interim order in respect of that application or complaint, and the court or Tribunal may grant such order if there is evidence that the allegations may be true; an interim order is reasonably necessary to prevent serious, irreparable damage to that person; or to prevent the purposes of the Act being frustrated; the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and the balance of convenience favours the granting of the order⁴¹.

An interim order must, however, not extend beyond the earlier of the conclusion of a hearing into an application or a complaint; or the date that is six months after the granting of the interim order, unless such period is extended on good cause⁴².

8. Other matters

In terms of section 115(2) a person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct, may not institute a claim in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order. Alternatively, such a person, if entitled to commence an action as aforesaid, when instituting proceedings, must file with the registrar or clerk of court a notice from the chairperson of the Tribunal in the prescribed form certifying whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of the CPA; stating the date of the Tribunal’s finding, if any; and setting out the section of the CPA in terms of which the Tribunal made its finding, if any.

9. Partial Conclusion

Given the various institutions that may be approached for purposes of redress, it is evident that the CPA seeks to limit the role of the courts in an effort to protect consumers against protracted and costly litigation. It is further evident that although the Act at first glance appears to relegate the courts to the level of a last resort option and requiring that all internal remedies first be exhausted, there will be occasions on which the courts can be directly

⁴⁰ S76(2)(a) and (b).

⁴¹ S114.

⁴² S114(2).

approached due to a lack of such remedies in certain instances. Apart from this, there are also sections in the CPA which expressly provide the court with authority to adjudicate certain matters which are governed by the CPA. Within the context of product liability, redress for consumers will also be more effectively facilitated by the mechanism of class actions which will enable indigent consumers to collectively approach the court for enforcement of rights and damages.

Some forms of redress provided for by the Act, may however prove to be difficult to access. In this regard, the limited number of consumer courts available may be problematic and it can be expected that in practice, a large percentage of consumers will rather opt to approach the Consumer Commission or alternative disputes resolution agents and ombuds in an attempt to resolve disputes as expeditiously and cheaply as possible.

Part 2

10. Aspects of Consumer Protection and Redress in the European Union and Spain.

10.1 *The European Union and Consumer Protection*

The European Union (EU) is an international organisation with its main aim of securing peaceful and prosperous co-existence among its Member States. Consumer rights are of little value if they cannot be enforced. The European Union has always placed great value on the consumer being able to obtain redress,⁴³ whether it is by way of courts or out-of-court dispute resolution. By establishing important EU Directives and formulating Green Papers⁴⁴ with regards to consumer protection and being in constant communication with the member states, access to justice and redress is always an important factor. The practical implementation is, however, not as simple. What follows is a short discussion of the possible forums that can assist a consumer within the EU in general and also aspects of the redress available to the consumer in Spain as a Member State.

A 2005 study by the European Consumer Network on cross-border complaints showed that 5% of enquiries were about shoppers being unable to seek redress.⁴⁵ In December 2006, the EU adopted a new consumer protection programme for the period of 2007-2013. It has two main objectives: to ensure a high level of consumer protection through improved evidence, better consultation and better representation of consumer interests. The other main objective is to ensure the effective application of consumer protection rules through enforcement cooperation, education and redress.⁴⁶ The EU rules must be properly implemented and individuals should be able to obtain redress within any Member State. This requires better cooperation between member states. Court proceedings, especially in another jurisdiction, can be costly and time-consuming. To encourage out-of-court settlements the European Commission has developed no-cost or low-cost alternative dispute-settlement programmes. This of course does not mean that court proceedings are not available as well.

The scope of redress for consumers within the EU also includes the European Consumer Centres Network (ECC-Net). The ECC-Net is of particular help with regards to cross-border issues and disputes. It is an EU-wide network co-sponsored by the European Commission and the Member States. It is made up of 29 centres, one in each of the 27 EU Member States. They offer legal and practical advice as well as directing a consumer to a dispute resolution scheme or may even propose other solutions. The ECC-Net also attempts to solve consumer issues by for instance contacting the trader or their counterpart in another EU country.⁴⁷

⁴³ Activities of the EU – consumers. Europa.eu. Retrieved 20 July, 2010, from <http://ec.europa.eu/comm/consumers/redress/compl>.

⁴⁴ Such as the Green Paper for Consumer Collective Redress.

⁴⁵ Review of EU Consumer Protection Rules. Europa.eu. Retrieved 20 July 2010, from <http://europa.eu/rapid/pressReleaseAction.do>.

⁴⁶ European Union website – Activities of the European Union. Retrieved 20 July 2010 from <http://europa.eu/pol/cons/index.htm>.

⁴⁷ European Union website. Retrieved on 20 July 2010 from http://ec.europa.eu/consumers/ecc/index_en.htm.

There are various EU directives that set out the most basic consumer rights and deals with consumer protection in some way. These directives⁴⁸ are:

- The Directive on Sales of Consumer Goods and Guarantees (1999/44/EF);
- The Unfair Contract Terms Directive (93/13/EEC);
- The Distance Selling Directive (02/65/EC);
- The Doorstep Selling Directive (85/577/EEC);
- The Directive on Injunctions (98/27/EC);
- The Price Indication Directive (98/6/EC);
- The Package Travel Directive (90/314/EEC) and the
- The Timeshare Directive (94/47/EC).

10.1.1 The Role of the European Court in Consumer Matters within the Legal System of Member States

Howells and Weatherill describe Directives as the “most fertile source of EC consumer protection law” but also believe that there is one important limitation on the impact of the directives on national level.⁴⁹ On the one hand Art. 249 (ex 189) EC determines that a Directive shall be binding on each Member State but leaves it to the national authorities to choose the form and methods of implementation. On the other hand where a Member State fails to implement a Directive such default may lead to proceedings against that State before the European Court. The gap in legal protection seems to be that protection under a Directive is unavailable to the consumer before a national court until such time as the appropriate implementing measures are put in place. Such a gap would obviously weaken the impact of the Directive as a legal instrument. Unfortunately wilful non-implementation or delayed implementation is a common occurrence.⁵⁰

The European Court has developed jurisprudence in order to enhance the impact at national level of unimplemented directives. A Directive is capable of being applied directly by national courts against the State. However, its limits lie in the Court’s refusal to accept that Directives can be enforced between private parties. Unimplemented Directives therefore cannot be enforced by one private party (the consumer) against another (the trader for instance), but rather against the State. This, according to Howells & Weatherill⁵¹ is damaging to the consumer. If a Directive has been implemented, the consumer can rely on the national implementing measures, which could be interpreted in the light of the Directive. If it has not been implemented, the consumer is denied protection envisaged under Community law. The consumer may attempt to persuade the national court to interpret existing national law, if any exists, to accord to the Directive. This is an uncertain route however dependent on the capability and willingness of the particular national judicial system. Although the consumer may sue the State for compensation, this will be unrealistic in cases of small-case individual loss. Suing the State can be a daunting prospect and will most likely dissuade the majority of consumers. In essence, the consumer simply wishes to exercise a right to withdraw from a contract, and if necessary claim for breach thereof.

10.1.2 Consumer Protection Cooperation Regulation

The European Commission (EC) adopted a “consumer enforcement package” to strengthen EU wide enforcement of consumer rules.⁵² The package sets out five priority areas for action as well as a report on the first two years of the application of the Consumer Protection Cooperation Regulation CPC No 2006/2004. The main aim of the Regulation is to establish an EU wide network of public authorities to enforce consumer rules in

⁴⁸ MEMO/07/48 dated 08/02/2007 states that a review is needed on these directives and to what extent legislation should be harmonized throughout the EU.

⁴⁹ Howells G & Weatherill S (2005) Consumer Protection Law 2nd Ed, Burlington; England: Ashgate 138.

⁵⁰ Howells & Wheaterill (2005) 138-139.

⁵¹ *Ibid.*

⁵² Media summary of Consumer Enforcement Package issued 02/07/2009. IP/09/1080. Brussels.

the Member States. Under the CPC Regulation a new EU pan-European network of national enforcement authorities was created for coordinated enforcement action against cross border breaches of consumer rights. The network sets up a mechanism of mutual assistance, but more importantly also receives requests to take enforcement action. The CPC Regulation might also encourage consumers in cross-border issues to take action against rogue suppliers rather than becoming part of the unreported statistics on infringed consumer rights.

10.1.3 The European Small Claims Procedure Regulation

Though the European Small Claims Procedure Regulation (ESCP) is not restricted to consumer disputes, it is nevertheless an effective forum in an attempt to broaden the disadvantaged consumer. The ESCP was adopted in 2007 and applies from January 2009. The material scope of the regulation is very similar to the Brussels I Regulation. There is a restriction on the claim amount. The claim may not exceed € 2000 at the time that the claim form is received by the court or tribunal with jurisdiction. The amount also excludes all interest, expenses and disbursements. The ESCP covers pecuniary as well as non-pecuniary claims. The ESCP also envisages a written procedure. Although the original proposal was that the ESCP should be available to domestic and cross-border cases this proved to be controversial and it is therefore only limited to cross-border cases. Cross-border cases are those where one of the parties is domiciled in another Member State other than the Member State of the court or tribunal that hears the dispute.⁵³ It is also important to note that ESCP does not displace national procedure law in cross-border cases; it provides a separate legal procedure which claimants may pursue as an alternative to national procedure.

All courts and tribunals where the ESCP can be commenced are required to play an active role in the process by translating the parties' factual assertions into legal relevant claims and defences. Wherever appropriate, the court shall also seek to reach a settlement between the parties and no legal representation is allowed.

There are two significant reasons why the ESCP is not utilised sufficiently. Firstly, where the procedures are based on oral hearings, some of the costs of the proceedings result from the fact that the consumer has to take time off work and travel abroad to wherever the court sits.⁵⁴ Secondly the general rule of "loser pays" principles applies with regards to costs. A potential consumer-claimant, if unsuccessful in his claim, faces the prospect of having to reimburse the supplier's/trader's legal costs and can be a big economic risk.⁵⁵

10.1.4 Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) schemes have been developed across Europe to help citizens engaged in a consumer dispute who have been unable to reach an agreement with the trader (supplier). ADR schemes usually use a third party such as an arbitrator, mediator or an ombudsman to help the consumer and the trader to reach a solution. In this sense ADR within the EU is very similar to the basic ADR process in South Africa. However, these out-of-court mechanisms have been developed differently across the EU. Some are the fruit of public initiatives both at central level (such as the consumer complaints board in Scandinavian countries) or at local level (such as the arbitration courts in Spain). They can also spring from private initiatives such as mediators or ombudsmen for a certain sector. Collective ADR is also available within the EU. Consumer centres play a big role in promoting and directing consumer disputes by bringing together the parties (the consumer and trader/supplier) particularly in cross-border issues and encouraging the matter to be solved out of court.

⁵³ Hill J (2008) *Cross-border Consumer Contracts*. Oxford, New York: Oxford University Press 160-162.

⁵⁴ Hill (2008) 161.

⁵⁵ *Ibid.*

10.1.5 Green Paper on Consumer Collective Redress

A trend was identified toward increasing mass claims with regard to consumer disputes. Expanding mass consumer markets with consumers shopping cross-border and on the internet create a high potential for large groups of consumers being harmed by the same or similar practices of a supplier or trader. Collective redress could be a means to handle these types of claims. On 27 November 2008 the EC adopted the Green Paper on Consumer Collective Redress. The advantage of such a Regulation is twofold. Firstly, it would encourage consumers to act collectively rather than individually. Seeking redress on a collective scale is therefore not as daunting and costly as it would have been for the individual consumer. Secondly, the Regulation would promote a uniform process of redress through the Member States. Thereby also enforcing collective redress in those Member States where it is not part of the national law.

10.2 Aspects of Consumer Protection in Spain

10.2.1 Basic Concepts Regarding the Sources of Law Applicable to Consumer Matters.

The sources for civil and commercial matters in Spanish law are private codified law. The sources are laws, customs and general legal principles, with the last two being of secondary importance. Ignorance of the law is no excuse for not complying with it. Case law and precedent do not create law, but criteria repeatedly laid down by some higher courts complement the legal order. The judgments of the Constitutional Court which declare that a law or a rule with force of law is unconstitutional are generally applicable. Rights must be asserted in accordance with the requirements of good faith. The law does not protect abuses of rights or anti-social assertion of rights. The national legislator is exclusively competent in all cases to deal with rules on the application and enforcement of rules of law including contractual obligations.

In relation to other matters, several Autonomous Communities have their own civil law systems covering certain matters, with rules (known as *interregionallaw*) determining in which cases the relevant civil law must be applied and in which the national Civil Code must be applied. These Communities retained their own Historic Civil Law ("*Derecho Foral*") and have recognized legislative powers through their Autonomous Parliaments to preserve, amend and implement their Historic Civil Law. Conflicts of jurisdiction between the State and the Autonomous Communities are settled by the Constitutional Court, which determines which one has competence to adopt rules of law in the matter in question.

The basic civil court body is the "Court of First Instance" which, together with the Magistrates' Courts, is the courts to which civil and commercial cases are first referred. Therefore they can be described as "ordinary courts" or "common courts". There is no distinction in Spain between the Courts of First Instance. All of them are at the same level. The only exception to this are the Magistrates' Courts which in first instance hear civil cases relating to small amounts (less than €90) and where the magistrate in charge is not a professional judge.

For judicial purposes, the territory of Spain is divided into "Municipalities", "Districts", "Provinces" and "Autonomous Communities". Districts are territorial units consisting of one or more bordering municipalities belonging to the same province, and they are the most important territorial division since they form the area in which Courts of First Instance have jurisdiction. In the communities where this is required because of the workload, which is currently almost all of them, there are various courts of the same class which are designated by number in accordance with the order in which they were established.

*10.2.2 Transposition of EU Consumer Directives into National Legislation.*⁵⁶

The national legislator transposed the EU Directives applying various legislative techniques. For the Doorstep Selling Directive (85/577), the Spanish parliament passed individual implementing acts. The Price Indication Directive (98/6) was integrated into domestic law through a Decree law whilst the Directive of Injunctions have been implemented solely via amendments to existing statutory laws. The Directive of Unfair Contract Terms (93/13) the legislator adopted a set of different measures consisting of national separate transposition law, amendments to existing statutory laws on national level, codes of conduct and administrative sanctions.

What makes the enforcement and redress with regards consumer protection in Spain unique and in some instances problematic is the fact that every Autonomous Community (Comunidad Autonoma such as Basque Country, Catalonia and Madrid) still has its own rules on consumer protection. It can be found in each Community's Law on Internal Trade or specific Decrees. The exclusive competence of these Autonomous Communities, however, is limited to the public law provisions relating to consumer protection, as for example, the regulations governing that the relationships between individuals shall be under exclusive competence of the State.

Regulatory efforts were made by the Spanish government to convince the members of the EU of the ability of the Spanish Public Authorities to adapt to the highly developed consumer framework of the EU. In this regards the General Consumer Protection Act (GPCA) of 1984 was enacted. The GPCA is highly protective of consumer interests and sets forth a comprehensive legal framework for the protection of consumers. This includes enforcement and redress. The Royal Legislative Decree 1/2007 approves the revised text of the GPCA and other complementary laws and also repealed certain acts (for example Laws 26/1984).

*10.2.3 Individual and Collective Redress Mechanisms*⁵⁷

At the national level, it is possible to distinguish between two competent authorities: the general rule is that competent authority is the First Instance Courts. On September 1st, *Juzgados de lo Mercantil* (Commercial Courts) came into operation to take over exclusive competence in intellectual property and unfair competition from the First Instance Courts. Commercial Courts have also exclusive competence in cases belonging to other specific legal areas, such as insolvencies, transport, Maritime Law, advertising, competition, etc. In the appeal stage, First Instance Court or Commercial Court will refer the procedure to the *Audiencia Provincial* (Court of Appeals).

Collective redress mechanisms in Spain foresees means for collective redress intended to protect a series of individual interests such as collective redress to protect collective consumer interests (injunctions). The collective action in defence of consumers and users' rights and interests is the first Spanish version of a collective redress mechanism, through which most relevant cases in consumer law are currently dealt with. This scheme is usually deployed in large-scale consumer claims affecting a significant number of consumers, but it has a general application to many consumer contracts as well. The LEC has not regulated a specific procedure for the protection of the consumers' collective interests but there are lots of specialties. It has produced a substantially non-uniform and non-systematic procedure, and also contradictions, and some amount of inconsistencies among rules. Collective actions in Spain can be grouped depending on their object. For instance telecommunications services, financial services and product liability. The remedies available by means of collective redress are damages (quantification of damages is mandatory). Since there are no specific rules for the calculation of the compensation, the ordinary rules apply. According to Section 12.2 LCGC, consumers can accumulate injunctions to actions for the refund of the amounts improperly charged as a consequence of the clauses affected by the decision as well as to actions for damages caused by the application of the void clauses. Courts will usually order the publication of the decision and the publication of the voided term in the Spanish

⁵⁶ Schulte-Nölke (Ed.) (2008) EC Consumer Law Compendium, Comparative Analysis. Retrieved on 22 July 2010 from http://ec.europa.eu/consumers/enforcement/index_en.htm.

⁵⁷ Osterloh M et al (Ed.) (2008) Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union – country report Spain. Retrieved on 22 July 2010 from Cross Border Enforcement and Cooperation http://ec.europa.eu/consumers/enforcement/index_en.htm.

Standard Terms Register (*Registro de Condiciones Generales de la Contratación*). The *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (Civil Procedure Act; LEC) deals with individual consumer disputes in Civil Courts. Nevertheless, there are other rules affecting consumer individual claims such as:

- Section 128 of *Act 1/2007*. This section regulates the consumer's right to compensation for damages caused by the consumption or use of products.
- Section 12.2 of Law 7/1998, of 13th April, on General Contractual Conditions or Standard Form Contracts (LCGC) allows consumers to accumulate injunctions, the action for the devolution of the amounts charged because of the standard terms, as well as the action for damages.
- Section 23.1 RD Leg. 1/2007, in connection with Section 11.1 LEC, states that not only consumers individually, but also consumer associations and organised groups can bring actions for the defence of consumers and users' rights and interests.
- The LEC (Civil Procedure Act) regulates the action in defence of rights and interests of consumers. With other relevant consumer issues, general provisions in the LEC will apply.

The Small Claims Court in Spain may also provide a form of redress for the Spanish consumer keeping in mind that there is a jurisdictional limit. Oral proceedings are applicable to claims not exceeding €3000. An application may be submitted by means of a standardized form if the claim is for less than €900. These forms can be obtained at Courts of First Instance. If the claim exceeds €900, legal representation is compulsory. The procedure is usually oral. The only written document is the application. This might cause problems in the implementation or possible appeal of such consumer disputes. The judgment is equal in formal terms to that handed down in the ordinary procedure, although in some cases the judgment cannot have the effect of a final court decision (*res judicata*), namely summary procedures in which the possibilities of pleading are limited to specific points.

10.2.4 Alternative Dispute Resolution

In Spain, the main out-of court mechanism is arbitration. A Consumer Arbitration System is operated by local boards (*Juntas Arbitrales de Consumo*) at regional,⁵⁸ and municipal levels, dealing with consumer-to-business disputes in all sectors. In addition, there are a few institutional arbitration schemes created in specific areas (electronic trade, road transport, sport) and by *Autocontrol*, the Spanish System of Commercial Communication Auto-regulation. Arbitration is regulated by the Law on Arbitration, Law 60/2003 of 23 December 2003.⁵⁹ This Law also applies to special arbitration mechanisms, the one most used in practice being arbitration in consumer affairs to solve disputes relating to the consumption of goods and services covered by Law 26/1984 of 19 July 1984 on General Consumer and User Protection. Arbitration in Spain can be based on law or on equity. Generally speaking, arbitration solves disputes by applying the law in force, unless the parties have given express authorization to solve the dispute solely on the basis of equity. This criterion of equity, in other words without applying the legislation in force, is the one used to underpin an arbitration decision in some institutional arbitration proceedings such as those relating to consumer affairs. Arbitration involves replacing, with the agreement of the parties, the intervention and judgment of the courts by those of an arbitrator. This comes under private law, although in recent years its institutional aspect is being developed by consumer affairs ministries and chambers of commerce.

In civil courts, for proceedings involving amounts exceeding €3 000, there is a compulsory conciliation procedure subsequent to submitting the application and the response by the defense. This conciliation procedure is led by the judge, who is obliged to promote efforts to obtain an agreement. The court proceedings go ahead only if this does not succeed. Conciliation is one of the functions assigned to Court Clerks in the terms laid down by procedural laws, involving mediation work specific to them. This function will not take effect until the entry into force of the Law on Voluntary Jurisdiction.

⁵⁸ Sanco D (Ed) (2009) Study on the use of Alternative Dispute Resolution in the European Union. Retrieved on 23 July 2010 from http://ec.europa.eu/consumers/redress_cons/adr_en.htm.

⁵⁹ European Judicial Services Network on civil and commercial matters – Spain (civil justice system). Retrieved on 23 July 2010 from http://ec.europa.eu/civiljustice/news/whatsnew_en.htm.

10.3 Partial Conclusion

Although the European Union envisages a uniform system of redress within the EU countries for consumers, it is clear the actual implementation of the Directives is more complex within each national legal system. It would seem that a consumer would have redress in his or her national legal systems even if a Directive has not been implemented at all or incorrectly. This option is limited however in that it only applies to cross-border consumer agreements. It is also clear that consumers falling within the jurisdiction of Spanish law do have more than one option for redress available although some forms of redress are more easily accessible and perhaps more viable than others.

PART 3

11. Conclusion

It could be argued that too many avenues of redress are available to the consumer in terms of the CPA, leaving it open for suppliers to direct the flow of consumer queries and disputes to the most convenient avenue for them. It is also clear that consumers need to be educated about the various routes of redress, especially the more vulnerable consumers such as illiterate consumers. Foreign suppliers that need to comply with the CPA also need certainty on the correct avenues for consumer redress in South Africa.

Historically the civil courts have been a primary and costly avenue for dispute resolution. The legislator however limits the role of the civil courts as one of last resort in order to protect the consumer against the cost and delay involved in litigation. On the other hand, the CPA provides that the consumer may approach consumer courts that focus on the disputes of consumers and aims to settle disputes more efficiently. These courts have been in existence for some time and although approaching them seems to be viable in theory it would not have the intended result of providing access to consumer justice unless consumer courts are established in each province when the Act comes into full operation.

Alternative Dispute Resolution in the EU and more specifically Spain seems to be a successful vehicle for consumer redress. From a South African perspective, it would seem that alternative dispute resolution mechanisms will be utilised more frequently because of other redress issues and problems. Stringent regulation of this type of redress therefore is advisable. As discussed in Part 1, the role of the small claims court in smaller consumer matters could also play a more prominent role in future. Directions can be taken from the application of the European Small Claims Court (Part 2) in this regard. The international trend of collective redress that is also included in the CPA is definitely a consideration for future redress action and also gives the individual consumer a chance to add his or her complaint to something with “teeth”. In the end only one consideration should flow like a golden thread throughout the area of consumer protection: whether the relevant avenue of redress provides sufficient protection to the consumer.