

CREDIT CONTRACTS AND CONSUMER
FINANCE ACT 2003

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**UPDATE ON DEVELOPMENTS IN NEW ZEALAND
CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003**

Introduction

1. My task today is to discuss the Credit Contracts and Consumer Finance Act 2003, more specifically to give an overview of the Act and to particularly comment on the conflicts of laws issues which arise under the Act and the opinions you and I will be required to provide as a result.

Out With The Old

2. The Act was passed on 13 October 2003 and is to, eventually, replace the Credit Contracts Act 1981 ("CCA") and the Hire Purchase Act 1971 ("HPA").
3. The CCA and HPA had been subject to criticism for some time in that both Acts deal with the regulation of consumer finance but not in a consistent manner. The HPA focuses on credit arrangements where title in goods is retained by the vendor of those goods, and provides for a disclosure regime and various other rules for such arrangements.
4. The CCA is wider in scope but includes hire purchase arrangements within its ambit. It establishes its own disclosure regime and miscellaneous rules for relevant contracts.
5. With the passing of the Personal Property Securities Act 1999, the general approach in this area of law was reinforced as being substance over form with the determination of where title lies being irrelevant.
6. Other criticisms included the perceived harshness of the "Rule of 78" under the HPA and the misunderstandings and general confusion created by the concept of a finance rate as provided for by the CCA.
7. The Credit Contracts and Consumer Finance Act is intended to be the answer to such criticisms.

In With The New

8. The Act commenced on 14 October 2003 but only for buy back transactions.
9. All other parts of the Act only come into effect with respect to relevant contracts entered into after 1 April 2005. The HPA and CCA continue to apply, before and after 1 April 2005, to contracts entered into before 1 April 2005.

Contracts

10. The categories of contracts that will be subject to the Act are:

- credit contracts – a subset of which are consumer credit contracts;
- consumer leases; and
- buy back transactions.

Credit Contract

11. A credit contract for the purposes of the Act is:

"A contract under which credit is or may be provided"¹³

12. Credit is provided

"if a right is granted by a person to another person to:

- *defer payment of a debt;*
- *incur a debt and defer its payment;*
- *purchase property or services and defer payment for that purchase (in whole or in part)"¹⁴*

13. So, in simple terms, a credit contract is a contract that says "you can pay me later".

14. The essential difference to the CCA definition of "credit contract" is that the CCA requires an interest component¹⁵ in order for a contract to qualify as a credit contract, and the CCA also captures, as credit contracts, hire purchase arrangements.¹⁶

15. The CCA definition of a credit contract can be described in simple terms as "you can pay me later but pay me more, plus hire purchase arrangements".

Consumer Credit Contract

16. Consumer credit contracts are to the Act what controlled credit contracts are to the CCA in that while only the reopening provisions of each Act are relevant to all credit contracts, the full force of each Act (disclosure, miscellaneous rules, enforcement) apply only to the relevant sub-category.

17. A consumer credit contract is, subject to limited exceptions,¹⁷ a credit contract where:

¹³ section 7 of the Act

¹⁴ section 6 of the Act

¹⁵ section 3 of the CCA – "a sum or sums of money exceeding in aggregate the amount of the first mentioned money or money's worth"

¹⁶ section 3(1)(d) of the CCA

- the debtor is a natural person;
- the contract is primarily for personal, domestic or household purposes¹⁸;
- interest or credit fees or a security interest apply; and
- the creditor is a financier or the parties have been introduced by a paid adviser or broker.

18. This can be contrasted to the CCA definition of a controlled credit contract which is by exclusion – capturing all credit contracts except those where applying the full requirements of the Act is perceived to be unnecessary due to the nature of the debtor (e.g. a financier, a body corporate with paid up capital of \$1 million) or undesirable for policy reasons (e.g. if the total amount of credit is not less than \$250,000 or the transaction is regulated by other legislation).

19. It is worth noting that as hire purchase arrangements do not qualify as credit contracts under the new Act they can not be consumer credit contracts. As noted above, such arrangements are specifically captured by the CCA.

Consumer Leases

20. These are leases of goods where:

- the lessee is a natural person;
- the lease is primarily for personal, domestic or household purposes;
- the lessor is "in the business"; and
- the lease is for more than one year or the lessor has an option to buy the subject goods.

21. The Act also provides¹⁹ that a lease that meets the first three criteria listed above where money paid under the lease is greater than the cash price of the goods or the lessee has an option to buy the relevant goods at a nominal sum will be treated as a consumer credit contract.

22. In this way the Act applies the same rules to a hire purchase arrangement as apply to a secured loan, satisfying the substance over form approach – albeit by a back door route.

Buy Back Transactions

23. These are arrangements where a natural person, for personal domestic, household, or investment purposes, sells his/her home, continues to live in it paying rent to the financier/purchaser, but where he/she has a right to repurchase the house at a later date.

¹⁷ section 15 of the Act

¹⁸ not for business purposes

¹⁹ see section 16 of the Act

24. Inclusion of such transactions within the Act's ambit was a late addition to deal with what were considered to be a particularly unscrupulous practice - the intention being to stamp out this "industry".

Rules

25. Different disclosure requirements and rules as to fees, prepayments and interest charges apply depending on the type of contract in question. These are outside the scope of this paper but are not materially different from the position under the CCA.

Enforcement

26. The consequences of non-compliance with the Act are essentially the same as for the CCA, including:

- prohibition of creditors continuing to do business;
- statutory damages;
- fines; and
- prohibition on enforcement of contracts.

27. Credit contracts, consumer leases and buy back transactions can all be reopened if their terms are considered to be oppressive or where the exercise of a right under such a contract is considered to be exercised in an oppressive manner or where a party has been induced to enter the contract by oppressive means. The test of "oppressiveness" is the same as under the CCA.

Conflicts of Laws

28. The specific issue to be covered by this paper is the conflicts of laws issue.

29. The Credit Contracts Act, section 7, provides as follows:

"Nothing in this Act shall apply in respect of a credit contract or part of a credit contract if the contract or part is not governed by the law of New Zealand."

30. The same section was effectively replicated in the Consumer Credit Bill (which became the Act) but was the subject of submissions, notably from the NZLS:

"The Society considers that the Consumer Credit Act should apply to all credit contracts, guarantees and leases entered into in New Zealand for New Zealand consumers, and the other party to contracts should not be able to avoid the legislation by simple choosing the laws of another jurisdiction to govern the contract."

31. In its report the Select Committee noted:

"We are concerned that the bill may not expressly prevent a creditor stating in the contract that the law of another jurisdiction governed the contract. We therefore recommend the bill be amended to limit 'choice of law' clauses. This will ensure any dispute over a credit contract will be decided in New Zealand under New Zealand law. Any attempt by creditors to contract out of the bill via a 'choice of law' clause will therefore be prevented."

32. As a consequence a late change was made, resulting in section 137 of the Act which reads as follows:

"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."

33. This is not as definitive as the Select Committee recommendation as it leaves open the possibility that the Act may still not apply to such a contract with a New Zealand consumer. However, what it does do is make it more difficult to be definitive as to whether the Act will, or will not, be applicable to certain contracts.

What Law Applies?²⁰

34. The system of law which will determine most issues in relation to a contract is its "proper law".
35. If the parties expressly choose a system of law to govern the contract, that will generally be the proper law. If the parties do not expressly choose the proper law the Courts will determine it from the terms of the contract and the surrounding circumstances.

Express Choice of Proper Law

36. If the parties have expressly selected a system of law to govern their contract, that choice will be given effect by a New Zealand court provided that it is bona fide and legal, and there is no public policy reason for avoiding the choice.
37. Under New Zealand law there are three principal limits on the effectiveness of a choice of law clause, being:

- where a choice of law clause is included in the contract in bad faith, or for reasons contrary to public policy – for example, to avoid the application of a mandatory New Zealand statutory provision, or in an attempt to render valid

²⁰ See The Laws of New Zealand – Conflict of Laws paras 115 to 122

an otherwise purely domestic transaction that is invalid under New Zealand common law;

- where a New Zealand statute provides for such choice to be ineffective; or
- where a New Zealand court will apply mandatory rules of New Zealand law in respect of a transaction whether or not a contract is governed by New Zealand law.

No Express Choice of Proper Law

38. Where the parties to a contract have not expressly chosen the proper law, a court may be prepared to infer a choice of law from the circumstances surrounding the contract. English courts have inferred an intention that a contract should be governed by English law, for example, from an agreement that disputes should be arbitrated in London, from reference to English statutes, and even from matters such as the language and form in which the contract is drafted.
39. New Zealand Courts have sought to determine the proper law by considering the terms of the contract and the surrounding circumstances in an attempt to identify the legal system with the closest and most real connection with the transaction.
40. The following factors have been considered by New Zealand and English Courts in determining the proper law when there is no express choice:
- the place where the contract was made;
 - the place where the contract is to be performed;
 - the nature and location of the subject matter of the contract;
 - the currency in which payment is to be made;
 - the place of the parties' residence or business;
 - the terminology of the contract;
 - the form of the documents;
 - a connection with a previous transaction;
 - a choice by the parties that arbitration is to take place in a particular country;
 - a choice by the parties that the Courts of a particular country are to have jurisdiction over the contract; and
 - the fact that the contract, or a particular term, is void or invalid under one system of law but valid under another.
41. English and Australian Courts have taken the approach that it is only where a choice of law is neither expressed, nor capable of being inferred, that the court should turn to consider the system of law with which the transaction has its closest and most real connection.
42. The tendency in New Zealand, is for courts to be wary of the fiction of imputing to parties to a contract an intention that they never had. In any event there may be little practical difference between an attempt to find an implied intention from a consideration of the circumstances of

the contract and a search for factors connecting the transaction with a particular system of law. The latter is at least a more realistic description of the process.

Opinions

43. So what does this all mean in the context of opinions.
44. When asked to consider a credit arrangement which is expressed to be governed by the laws of a jurisdiction other than New Zealand we now need to consider whether the Act is applicable to it in the same way as if no choice of law had been expressed.
45. Under the CCA an express choice of law could, as a general rule, be relied on to be applied by the New Zealand Courts and an opinion could usually be given in that regard.
46. Whether the Credit Contracts and Consumer Finance Act applies to any given contract will now require a consideration of the various factors referred to above to identify the legal system with the closest and most real connection with the transaction, notwithstanding any express choice of law clause in the contract.
47. Options available when giving an opinion in this environment include:
- assuming the non- New Zealand law expressly selected by the parties will, even after taking into account section 137, be the "proper law" and giving the opinion on the basis that the Credit Contracts and Consumer Finance Act was not applicable (cute, but not particularly helpful to the client);
 - analysing the various "connecting factors" to determine what the proper law of the contract would be, ignoring any express choice of law, and:
 - if this leads to the conclusion that the Act would not apply then record that view – perhaps by way of a qualification to any opinion;

where there is a real prospect that the Act will apply, recommend compliance. This is of greatest significance where the relevant contract would come within the definition of a consumer credit contract (or treated as one by section 16 of the Act), consumer lease or buyback transaction as the contract will then need to comply with all relevant disclosure requirements and other applicable rules.²¹ Where the contract would only qualify as a credit contract (but not a consumer credit contract) then the issues are less significant as it is only the reopening provisions that need to be considered – the form of the contract is less likely to require amendment. In such case a qualification in any opinion noting that the Act may apply in which case enforceability would be subject to "oppressiveness" arguments would be appropriate, perhaps with a view expressed on the likelihood of the contractual terms meeting the test of oppressiveness.

²¹ The Act includes amongst other things provisions regulating the charging of interest, level of fees, payments and prepayments and provides for rights of cancellation and relief on statutory "hardship" grounds.