

The Future of Consumer Credit Regulation

Creative Approaches to
Emerging Problems

Edited by
Michelle Kelly-Louw
James P. Nehf and
Peter Rott

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After his legal exam in 1986, Manfred Westphal worked as a lawyer (mainly in civil and consumer law) from 1987 to 1990. From 1991 to 1992 he worked in the Department for Foreign Affairs. From 1993 to 2001 he was head of the financial services unit in AgV, the German Consumer Organization. After introducing a new structure and a merger from three into one institution in 2001 he has been head of the financial services department in the Verbraucherzentrale Bundesverband (vzbv), the federation of German consumer organizations. He also is member in several European committees and panels, e.g., the Payment Systems Market Group of DG Internal Market, the Consultative Panel of CEBS, the Committee of European Banking Supervisors, and the Financial Services Consumer Group of DG Sanco and DG Internal Market. He is a member and vice chairman of FIN-USE, a forum of 15 consumer and SME-oriented experts consulting the European Commission on financial services.

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Preface

This book contains a selection of peer-reviewed papers presented at the 11th International Conference on Consumer Law, organized by the Centre for Business Law at the University of South Africa (UNISA). Consumer law researchers from all over the world presented interesting papers that covered a wide range of issues. In order to prepare a conference volume with a more coherent theme, a series of papers related to various aspects of consumer credit were selected for this book, whilst other papers have been published elsewhere in various international journals. The contributions were selected on the basis of their inherent quality and aimed at an international audience of subject specialists, both in academia and practice. Reviewers made recommendations on the original texts which were then adjusted by the authors accordingly.

The tradition of organizing International Conferences on Consumer Law, which began with a series of conferences in Brazil in the late 1980s, is upheld by the International Association of Consumer Law (IACL) (www.iaclaw.org). This informal association today gathers around 200 consumer law researchers from all parts of the world. Its objects are to encourage legal education and scientific research and to share information on an international level in the study of consumer law and policy, including the exchange of research findings and the organization of seminars. Through the IACL we want to encourage development of consumer law and consumer law research in all parts of the world and are happy to invite all those interested to join our efforts.

The proceedings of many of the previous IACL conferences have been published as well. Such publications are Iain Ramsay (ed.), *Consumer Law in the Global Economy: National and International Dimensions* (1997), Thomas Wilhelmsson, Salla Tuominen & Heli Tuomola (eds), *Consumer Law in the Information Society* (2000), Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice* (2003), and Iain Ramsay, John Salloum, Naomi Horrox & Geoff Mowatt (eds), *Risk and Choice in Consumer Society* (2007). We are glad to add this volume to the list of IACL publications, and we are grateful to the editors who agreed to bring it to press: Michelle Kelly-Louw from UNISA, who was the local organizer for the conference, Peter Rott from the University of Bremen, and James Nehf from Indiana University, all of whom serve on the IACL board. I am convinced that the book will be well received both in the consumer law community and more generally among those interested in the regulation of financial services.

Thomas Wilhelmsson,
President of the International Association of Consumer Law (IACL),
Professor of Civil and Commercial Law, University of Helsinki.

Introduction

The regulation of consumer credit in many countries is in a state of transition. Regulatory models that evolved in previous decades were designed to address issues arising in consumer credit markets that existed at the time. As credit markets evolved and new forms of consumer credit emerged, regulators found that existing laws either did not cover new forms of credit, or if they did, the regulatory regimes were inadequate to address the unique set of problems raised in the modern era. During this same period, the number and frequency of cross-border consumer transactions have increased dramatically, as consumers have become more mobile and as distance selling (via the Internet or otherwise) has become more prevalent. Consumers and credit providers began to understand that regulatory laws differ greatly among countries, and regulators began to focus on harmonization efforts that would level the playing field, reduce barriers to cross-border trade, and ease the burden of enforcing consumer rights across national lines.

With the convergence of these two forces, consumer credit law is currently in an exciting period of revision and rebirth. It remains to be seen whether the new era will bring stronger mandates on credit providers to recognize and protect consumer rights or whether pressures to open and expand credit markets will move regulatory regimes to more market-based approaches to problems that arise. It is clear, however, that consumer credit scholars and policy makers will increasingly benefit from comparative studies that share the successes and failures of various national legal systems.

This book explores new and emerging consumer credit issues with essays from leading legal authorities in Europe, North America, Australia, and Africa. It proceeds in three parts. Part I examines, and in some cases proposes, new paradigms for thinking about consumer credit. Some authors look at consumer credit issues globally, while others focus on a novel idea or problem existing in the author's country of residence. *Gail Pearson* leads with a chapter on financial literacy in Australia, which examines how consumer education can be considered a regulatory device to protect important consumer interests. She maintains that financial literacy not only allows consumers to understand financial services and therefore to protect themselves in the market for financial services, but literacy is also important to an individual's civic responsibilities as a citizen and market participant in the modern world. She discusses how the Australian literacy project can contribute to both goals. *Iain MacNeil* analyzes how the use of broad standards such as 'fair and reasonable' for consumer protection in the field of financial services can be a valuable alternative to the very detailed and complex legal provisions of EC law and UK law in this field. Using the jurisdiction of the Financial Ombudsman Service in the UK as an example, he demonstrates that

legal certainty is not necessarily compromised by a broad standards approach. *Rashmi Dyal-Chand* focuses on weaknesses in the regulation of credit cards in the United States, as contrasted with the protection consumers enjoy in the field of mortgages. She criticises the disclosure regime as being insufficient to protect the uninformed borrower and proposes to use mortgage law as inspiration for the regulation of credit card contracts. *Manfred Westphal* concludes Part I with a discussion of recent events in Europe that led to the adoption of an important new consumer credit directive. He critiques the new law and its likely affect on consumer rights.

Part II examines the issue of responsible lending and the problems arising when credit is extended to consumers on terms that may exacerbate their financial predicament. *Therese Wilson* challenges the idea that there is a contradiction between encouraging financial institutions to lend to people with low incomes, and requiring financial institutions to lend responsibly, taking into account a potential borrower's capacity to repay in order to avoid over-indebtedness. She suggests that the failure of mainstream financial institutions to lend to people with low incomes exacerbates over-indebtedness and financial exclusion. *Mary Spector* deals with a particularly dangerous and expensive type of loan that is present on the United States market: the payday loan. She describes and analyzes the legislative measures taken to prevent abusive payday loans and demonstrates how these have been time and again avoided by the credit industry. Spector recommends multiple strategies, including interest rates caps, but also stresses the need for strong enforcement by state and federal agencies. *James Nehf* looks at payday loans and other "micro-lending" alternatives in the unique circumstances faced by American immigrants. Recent immigrants often have low-paying jobs, sparse credit histories, and difficulties obtaining credit through more conventional sources. He discusses the regulation of various micro-lending alternatives, their effect on immigrant communities, and the ways in which those communities are addressing consumer credit concerns through new community-based initiatives.

Part III moves to subject of debt relief and consumer insolvency law, where many countries are struggling to find ways to relieve over-indebted consumers from insurmountable debt obligations, yet balance the rights of creditors to receive a fair return on their extensions of credit. *Michelle Kelly-Louw* discusses the evolution of a long-standing aspect of consumer credit regulation in South Africa – the 'in duplum rule' – and its recent adoption in statutory form as part of the National Credit Act. The concept of capping accumulated interest at an amount equal to the principle amount may prove useful to regulators in other nations as they struggle to limit the societal impact of over indebtedness. *Robert Landry* and *Amy Yarbrough* examine the relationship between health care costs and consumer over-indebtedness, and how problems with health care delivery in the United States are affecting consumer bankruptcies. They compare legal regimes in England and France and argue that lessons can be learned from both systems. *André Boraine* provides a detailed account of debt relief administration in South Africa. This authoritative analysis of a very important issue will be of particular interest to comparative insolvency law scholars, as the South African system has unique attributes, strengths, and weaknesses. *Anneli Loubser* concludes the book with an insightful discussion of the differences between

consumer and small business bankruptcies in South Africa, and makes a forceful case for treating certain small businesses like consumers for many bankruptcy purposes.

James P. Nehf
Michelle Kelly-Louw
Peter Rott

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PART I

Emerging Paradigms