# Conflict of laws in the South African courts: an(other) recent missed opportunity

Posted on behalf of Jason Mitchell, barrister at Maitland Chambers in London and at Group 621 in Johannesburg.

An Australian, Hannon, wants to book a Southern African safari with his partner, Murti, as a surprise birthday gift. He sees one he likes on an Australian travel website. Hannon fills in the online form.

It turns out that the website is just the agent for a South African company, Drifters Adventours. Drifters emailed Hannon the price and payment details. Attached to the email is a brochure. The brochure says, "Drifters do not accept responsibility for any loss, injury, damage, accident, fatality, delay or inconvenience experienced while on tour." The brochure also says, "You will be required to complete and sign a full indemnity prior to your tour departure."

Fast forward a few months, and Hannon and Murti arrive in Cape Town. At some point, Hannon signs an indemnity (for himself and, purportedly, on Murti's behalf too). Murti is none the wiser. The indemnity excludes Drifters's liability for everything and anything. It also states, "This contract between Drifters and the client will be deemed to be the only contract between Drifters and the client The place and conclusion of contract will always be taken as South Africa, and any disputes, claims, or actions brought against Drifters can only be made under South African jurisdiction, and the parties agree to submit to the non-exclusive jurisdiction of the South African Courts."

Hannon and Murti, and a few others in the tour group, take their seats on the converted Toyota safari truck. After a few days along South Africa's west coast, they reach Namibia. A few days later, they arrive in Botswana. One day, while in Botswana, Murti got out of her seat to fetch something from a locker at the back of the truck (the brochure said she could). Murti tripped and fell against a window. The window fell from its frame. Murti hit the road.

Murti sued Drifters in Johannesburg. Drifters pointed to the exclusion of liability

in the first disclaimer in the brochure and in the second disclaimer that Hannon signed. The High Court found for Murti, holding that the first disclaimer was too vague (even if it were binding on Murti) and that Hannon did not have actual or ostensible authority to bind Murti to the second disclaimer. The Supreme Court of Appeal dismissed an appeal. The Court agreed with the High Court's findings that there was no evidence that Murti agreed to the first disclaimer and that Hannon did not have authority to bind Murti to the second disclaimer. The Court also held that Drifters did not adequately draw the disclaimers to Murti's attention in the way that s.49 of the Consumer Protection Act requires.

So far so good. But why does South African law apply? The Court doesn't say. It can't be because of the dispute resolution clause in the second disclaimer: after all, the court just found that the disclaimer does not bind Murti (and besides, there is no choice of South African law in what is a largely incoherent clause). This is a(nother) regrettable oversight. It is by no means obvious that South African law applies. The delict likely occurred in Botswana (Murti alleged that negligent driving caused her injuries, though she also alleged a negligent failure to maintain the truck and a negligent failure to warn). Just last year, the Supreme Court of Appeal confirmed that "[t]he law applicable to a delict shall be the lex loci delicti, but the lex loci delicti may be displaced in favour of the law of the country with a manifestly closer, significant relationship to the occurrence and the parties" (then-Acting Justice Koen, who wrote this judgment, signed onto that judgment).

If the accident happened in Botswana, then, as a starting point, Botswana law should apply. Although Drifters is a South African company and the tour began and ended in South Africa, it is not evident that South Africa has a manifestly closer, significant relationship to the accident and the parties involved. These are the only factors that point towards South Africa.

The closest the Court comes to a conflict of laws analysis is its conclusion (and it's just that: a conclusion) that the (South African) Consumer Protection Act applies because, under s.5(1), the Act applies to "every transaction occurring within the Republic". It is, of course, possible for the forum to apply its own statute to override an otherwise applicable law (or overriding mandatory provisions, in the Rome language). But, as I have argued elsewhere, much more is needed than Parliament simply saying, 'This Act applies to anything that happens in the Republic': see To override, and when? A comparative evaluation of the doctrine of

mandatory rules in South African private international law is found in the 2013 SALJ 757, where a better example is section 47 of the Electronic Communications and Transactions Act, which states that "the protection provided to consumers … applies irrespective of the legal system applicable to the agreement in question." Like before, maybe the Court would have gotten to the same answer with a copy of Forsyth's Private International Law close by (that is, a careful conflicts analysis could point to South African law anyway, or Botswana law could be the same, or the Court could have applied the Consumer Protection Act as a mandatory rule). But that's not really the point. When litigation involves foreign elements—Australians on holiday, a South African tour guide, a car crash in Botswana—courts should be alive to the possibility that another law governs.