

Insufficient Consumer Protection in the Provisions of Private International Law – The Need for an Inter-American Convention (CIDIP) on the Law Applicable to Certain Contracts and Consumer Relations^{1/}

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Introduction

Having had the honor of giving classes on “Consumer Protection: Aspects of Regional and General Private Law,”² during the Course on International Law at the Organization of American States (OAS) in August 2000, where I concluded that it was both necessary and timely for us to develop in the region a new Inter-American Convention on Private International Law (CIDIP) to protect the tourist consumer and the consumer who buys at a distance, particularly with increasing levels of electronic commerce, I would now like to summarize this course, share the conclusions I reached, and submit them for critical review by my Brazilian colleagues.

The approach in the 2000 course was necessarily regional as were the solutions proposed, such as the CIDIP planned at the end of the course, but the problems we identified are also reflected in the Brazilian system, as we seek to emphasize in this article. In effect, the Brazilian rules of Private International Law now in force date back to 1942 and existing drafts—such as the draft of the New Civil Code, the OAB-SP [Brazilian Bar Association/São Paulo] draft on electronic commerce, or Jacob Dolinger’s draft of the new LICC [Introductory Law to the Civil Code]—either seek only to update the material aspects of the new form of international commerce or were withdrawn from Parliament and are now longer under discussion, leaving no special regulations relating to the problem of the law applicable to these increasingly more common international consumer contracts.^{3/}

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1. This article is the new version, comprised of excerpts from the course on “Consumer Protection: Aspects of Regional and General Private Law,” Course on International Law, IAJC/OAS, Washington/Rio de Janeiro, 2001 (in press) for release in Brazil. The author is grateful to Dr. Jean Michel-Arrighi, a renowned consumerist and Director of the Department of International Law at the OAS, Washington, for honoring me with an invitation to teach this course at the OAS in 2000 and my thanks and praise go to Professors Elmo Pilla Ribeiro (UFRGS), Michael R. Will (Saarbrücken), Alfred von Overbeck (Lausanne) and Erik Jayme (Heidelberg), great teachers who so masterfully taught me the importance and usefulness of Private International Law in our times.
 2. The entire course will be published by the OAS in Washington; see MARQUES, Cláudia Lima, Consumer Protection: Aspects of Regional and General Private Law, Course on International Law, IAJC/OAS, Washington/Rio de Janeiro, 2001.
 3. Another good example is that of the 80 Senate drafts attached to Draft Law 1825/91 updating the CDC [Consumer Protection code]. Only three (PL 884/95, PL 2646/96 and PL 2893/97) address international consumer subjects, and do so with reference to the information provided to the consumer, a subject already addressed in Art. 31 of the CDC.

The importance of the topic is evident. In this respect, if the standards of International Private Law are out of sync nationally as well, the preparation of a regional solution could be an easier and more effective route to follow in these globalized times,^{4/} as the European example has shown.^{5/}

If some time ago consumer protection was a matter of national law, since the activities of most people were limited to the territory of their own country, a typical national relationship with no international element,^{6/} today's regional and national reality is quite different. With the opening of markets to foreign products and services, with increasing economic integration, regionalization of trade, transportation facilities, mass tourism, growing telecommunications, computer network connections, and electronic commerce, there is no way to deny that consumption already crosses national borders.^{7/} Foreign goods are on supermarket shelves, services are offered by providers with overseas telemarketing headquarters, using television, the radio, the Internet, and mass advertising in the day-to-day lives of most citizens in the cities of our regional metropolises.^{8/} One need no longer travel to be an *active consumer*, a tourist consumer. One need no longer go anywhere to be a consumer who contracts internationally or deals with suppliers in other countries.^{9/} The very methods of production and assembly are now international. International consumer contacts and tourism have become activities of the masses.^{10/} The phenomenon of the *passive international consumer* and the *active international consumer* has already reached the countries of Latin America and Brazil. Consuming internationally is typical of our times. A foreign product or service means status, is

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4. On the problems with, and trivialization of, the term "globalization," see the lucid analysis by PORTO, Ronaldo, *Globalização e Direito do Consumidor*, in RDC 32, p. 45.
 5. On the European example, see our *Normas de proteção do consumidor (especialmente, no comércio eletrônico) oriundas da União Européia e o exemplo de sua sistematização no Código Civil Alemão de 1896 - Notícia sobre as profundas modificações no BGB para incluir a figura do consumidor*, in Revista de Direito Privado, vol. 4 (2000), p. 50 et seq.
 6. According to HOFFMAN, Bernd von, *Über den Schutz des Schwächeren bei internationalen Schuldverträgen*, in RabelsZ 38 (1974), p. 401, explaining that in exceptional cases the public order clause could be used to protect this "weaker party" in contracts/accidents/international tourism.
 7. As also noted by the Uruguayan experts HARGAIN, Daniel and MIHALI, Gabriel, *Circulación de Bienes en el Mercosur*, Júlio César Faira Ed., Montevideu, 1998, p. 504, cited in HARGAIN/MIHALI.
 8. The same view is held by BENJAMIN, Antônio Herman de V., *Consumer Protection in Less-Developed Countries: The Latin American Experience*, in RAMSAY, Iaian (Ed.), *Consumer Law in the Global Economy*, Asgate, Brookfield, USA, 1996, p. 50 and REICH, Norbert, *Consumerism and citizenship in the Information Society-The case of electronic contracting*, in WILHELSSON, Thomas (Ed.), *Consumer Law in the Information Society*, Kluwer Law International, Hague/London/Boston, 2001, p. 163 et seq. See MARQUES, Claudia Lima (Org.), *Estudos sobre a proteção no Brasil e no Mercosur*, Editora Livraria dos Advogados, Porto Alegre, 1994 and *El Código brasileño de defensa del consumidor y el Mercosur*, in GHERSI, Carlos Alberto (Director), *Mercosur-Perspectivas desde el derecho privado*, Editorial Universidad, Buenos Aires, 1996, pp. 199-226.
 9. The distinction between an active consumer (who travels from one country to another) and a passive consumer (who receives information and contracts in his or her own country without physically moving) is much used in Germany and will be followed here to facilitate the presentation. On use of this expression, see JAYME, Erik and KOHLER, Christian, *Europäisches Kollisionsrecht 1999- Die Abendstunde der Staatsverträge*, in IPRACT 1999, p. 404.
 10. Also BENJAMIN, Antonio Herman de V., *O transporte aéreo e o Código de Defesa do consumidor*, in Revista AJURIS-Edição Especial, March 1998, vol. II, p. 499 et seq. Also see my article *A responsabilidade do transportador aéreo pelo fato do serviço e o Código de Defesa do Consumidor - Antinomia entre norma do CDC e de leis especiais*, in Revista Direito do Consumidor, São Paulo, vol. 3 (1992), pp. 155-197.

symbolic of the current consumer culture.^{11/} Tourism, trips, being an active consumer internationally are part of the postmodern search for pleasure, individual leisure, the realization of dreams and the imagination, and are becoming an increasingly more important social distinction.^{12/}

In truth, consumer law has international application,^{13/} and in no other sector of private law are foreign and supranational models and inspiration so in evidence. In theory, the consumer should not be at a disadvantage in terms of safety, quality, guarantees, or access to justice merely because he or she buys products or uses services from another country or provided by a company headquartered abroad.^{14/} In theory, the tourist consumer or traveler who buys products and services in another country should be able to rely on minimum protection for his or her interests, as should the consumer who in response to advertising by a manufacturer located in another country decides to contract at a distance or using electronic means. Finally, there was a substantial change in the structure of the market,^{15/} a globalization of private consumer relations as well,^{16/} that brings to light the shortcomings of the market^{17/} and the limits of the notion of the consumer's "sovereignty" in today's market.^{18/} The consumer's position is increasingly weak or vulnerable and there is an inherent imbalance in consumer relationships,^{19/} necessitating effective guidance and positive intervention on the part of States and International Agencies qualified for this purpose.^{20/}

The question is whether our legal system is ready for this internationalization of consumer relations. There is a great deal of specificity in these international legal relationships, which although they represent only a portion of international trade, have extremely important economic and political potential (Part I). The reality in most countries of the Americas is that national consumer protection law, civil law, commercial law, and general law rarely contain special private international law provisions to effectively protect the weaker parties to a contract, the victims of accidents with defective products and services, tourists, those who see the advertising and aggressive and emotional marketing of our times, and finally consumers residing in or natives of these countries. The rules of

11. Here we are following the teachings of FEATHERSTONE, Mike, *Cultura de Consumo e Pós-modernismo*, Ed. Studio Nobel, São Paulo, 1995, p. 31.

12. According to FEATHERSTONE, p. 31.

13. See BOURGOIGNIE, Thierry, *Éléments pour une théorie du droit de la consommation*, CDC-Story Scienza, Brussels, 1988, p. 215 et seq.

14. As shown in the article, *Regulamento Comum de Defesa do Consumidor do Mercosur - Primeiras observações sobre o Mercosur como legislador da proteção do consumidor*, published in *Revista Direito do Consumidor*, vol. 23-24, p. 79 and also along the same lines in *Mercosur*, STIGLITZ, Gabriel, *El derecho del consumidor en Argentina y en el Mercosur*, in *Derecho del Consumidor*, vol. 6, 1995, p. 20.

15. Compare BOTANA GARCÍA, Gema and RUIZ MUÑOZ, Miguel (Coord.), *Curso sobre protección jurídica de los consumidores*, Ed. Ciencias Jurídicas, Madrid, 1999, p. 8 (cited in BOTANA).

16. On all this, see GHERSI, *Postmodernidad*, p. 139 et seq.

17. According to BOURGOINIE, p. 64 et seq.

18. According to BOTANA, p. 8 and BOURGOINIE, p. 64.

19. CALAIS-AULOY, Jean, *Droit de la Consommation*, 3.ed., Dalloz, Paris, 1992, p. 1, believes that this imbalance always existed, only it is now characterized to such an extent that protecting the consumer in a structurally weaker position is one of the social objectives of our times.

20. As indicated in *El Código brasileño*, p. 199; also, BOTANA, p. 8 mentions the current "degradation of the consumer's position."

International Private Law (here called IPrL) of these countries are generally old^{21/} and the only modernization I see is through the Inter-American Conferences on Private International Law (CIDIPs), organized within the OAS. Nonetheless, the CIDIPs have not imposed any more favorable connecting factor specifically with respect to consumer protection, as we shall see (Part II).

It is indisputable that protecting this weaker economic agent,^{22/} generally a non-professional individual who acts, contracts, or trades on the consumer market for the provision of goods and services on a non-profit basis and outside his primary professional activity is today of interest to regional Private International Law. This is demonstrated in Mercosur's 1998 Santa Maria Protocol and in general Private International Law as shown in the 1980 Draft Hague Convention^{23/} and Europe's 1980 Rome Convention.

We ask ourselves here whether efforts made to date have been sufficient or need to be boosted. National provisions should be sufficient to protect the consumer in the new borderless market, while at the same time countries should not use them to erect new barriers to the free circulation of goods and services of integrated countries or countries belonging to a free trade union or customs union such as NAFTA, the FTAA or Mercosur.^{24/} However, we note that national provisions governing international trade, as well as uniform international trade law or the so-called *lex mercatoria*, are generally not concerned with protecting the consumer,^{25/} but rather tend to exclude such contracts from their sphere of application.^{26/}

In Europe, since the 1970s, legal theorists have been upholding the need for International Private Law to look to protecting the weakest parties, particularly consumers,^{27/} including new more

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21. With the exception of the U.S. and Venezuela, see PARRA-ARANGUREN, Gonzalo, *Curso general de Derecho Internacional Privado- Problemas Selectos*, Fundación Fernando Parra Aranguren, Caracas, 1991, p. 51 et seq.
 22. According to BENJAMIN, Antônio Herman, *El Código Brasileño de Protección del Consumidor*, in *Política y Derecho del Consumo*, VELILLA, Marco (Director), Ed. El Navegante, Bogotá, 1998, p. 480.
 23. See VON MEHREN, Arthur, *Law applicable to certain consumer sales, Texts adopted by the Fourteenth Session and Explanatory Report*, Ed. Permanent Bureau of the Hague Conference, 1982, p. 6, who explains how this draft convention sought to supplement the 1955 Hague Convention on the Law Applicable to the International Sale of Goods. However, this never happened since the draft, completed in 1980, was never approved, and was superseded by the EEC's Rome Convention signed that same year with its famous Art. 5 on the same subject.
 24. According to KRÄMER, Ludwig, *La CEE et la protection du consommateur*, Collection Droit et Consommation 15, Story, Brussels, 1988, p. 377. See also our article, *El Código brasileño*, p. 199 and seq.
 25. According to BOTANA, p. 21, citing the UNIDROIT principles on international commercial contracts and the 1980 Vienna Convention on the International Sale of Goods.
 26. The most important examples are the unifying standards of the 1980 U.N. Convention on the International Sale of Goods, known as the 1980 Vienna Convention, which in Arts. 2 and 5 seek to prevent the application of these international trade rules to contracts with lay consumers. On this subject, see HARGAIN/MIHALI, p. 506 and GARRO, Alejandro Miguel and ZUPPI, Alberto Luis, *Compraventa internacional de mercaderías*, Ed. La Rocca, Buenos Aires, 1990, p. 81.
 27. Still famous are the works of ZWEIGERT, NEUHAUS and LANDO. The first suggested that IPrL should include social values; the second suggested abandoning the concept of contractual autonomy in contracts between weak and strong parties, such as consumer contracts; and the third pragmatically suggested that IPrL should choose as the connection the domicile of the weaker party to the contract.

flexible connecting factors adapted to protecting those who are vulnerable in these international private situations, given the defects of the so-called “neutral” and rigid connections that are more suited to relationships between equals or at least professional traders.^{28/} These special IPrL rules would be needed until the substantive rules on consumer protection, at least on the principal subjects of internationalization at the time, were [are??] harmonized in Europe.^{29/}

With suitable adaptations, it seems to me that it is precisely this historical moment that is now being repeated in the inter-American arena. The Americas are clearly open to international trade and to regionalization, but the legal system still has gaps and is inadequate to protect the weakest economic agents in the market, namely consumers. The system must evolve.

In this sense, aligning myself with the Uruguayan and Argentine theorists^{30/} who preceded me in studying consumer protection in international situations, I should like to take the opportunity of the invitation from the Inter-American Juridical Committee to suggest the drafting of a Specialized Convention on Private International Law on protecting the consumer in two specific situations, that of the consumer-tourist, particularly when the multi-property or time-sharing system is used, and that of the consumer who contracts from a distance, either using traditional methods or the new electronic methods. I take my inspiration from current European theory, which continues to indicate that the subject of consumer protection is basic to globalized markets^{31/} and is the way to harmonize the interests of the market with concerns regarding respect for new human rights in post-modern times, with growing individualism and increasingly more developed economic integration.^{32/}

I – The Specific Characteristics of International Consumption and the Inadequacy of the Rules of Private International Law in the Region

First we must clearly establish what the specific characteristics of international consumer relations are in comparison with international commercial relations. It is true that international commerce also involves the language barrier, the barrier of lack of information, different standards

See also VON HOFFMANN, Bernd von, *Über den Schutz des Schwächeren bei internationalen Schuldverträgen*, in *RabelsZ* 38 (1974), (396-420), p. 398 et seq. and KROPHOLLER, Jan, *Das Kollisionsrechtliche System des Schutzes der Schwächeren Vertragspartei*, in *RabelsZ* 42 (1978), (634-661), p. 634 et seq.

28. According to KROPHOLLER, 1978, p. 636.

29. KROPHOLLER, p. 635, calling the German legal system of the time “full of gaps and insecure for the weakest contractual parties.”

30. Of particular note are the studies cited here of BOGGIANO, DROMI and TONIOLLO in Argentina, ARRIGHI and the young authors HIRGAIN/MIHALI, in Uruguay.

31. According to the strong and critical presentation by JUNKER, Abbo, *Vom Citoyen zum Consommateur- Entwicklung des internationalen Verbraucherschutzrechts*, in *IPRAX* 1998, p. 67 et seq., asserting that the consumer is the European political citizen of the future. JUNKER takes his inspiration from a similar work by von WESTPHALEN, *Vom Citoyen über den Bourgeois zum Consommateur*, *ZIP* 1995, p. 1643, see JUNKER, p. 67.

32. This post-modern analysis is a homage to doctoral director, Prof. Dr. Dr.h.c. Erik Jayme of the University of Heidelberg, who in a brilliant course at the Hague launched his theory on post-modern considerations in law. See JAYME, Erik, *Identité culturelle et intégration: Le droit international privé postmoderne* - in: *Recueil des Cours de l' Académie de Droit International de la Haye*, 1995, II, p. 33 et seq. (cited in Jayme, Cours).

and customs, difficulties and insecurity in delivering payment, and difficulties relating to guarantees, the level of quality and post-sale service.^{33/} However, these difficulties change when the contractual counterpart is a lay person, a consumer.^{34/} Thus, the first characteristic of international consumption is the intrinsic imbalance in terms of information and expertise between the contracting parties given the lay status and vulnerability of the consumer who is a party to the contract.^{35/} International trade, i.e., buying and selling or service delivery relationships between persons located in different countries, usually occurs between legal entities or professionals, traders or businessmen, specialists and professionals able to operate in the arena of international business. This is not the reality in international consumer trade. The consumer counterpart is taken in either by aggressive marketing methods (e.g., telemarketing, teleshopping, hyped time-sharing sales for tourists) or reduced prices (discounts, reduced taxes, free shipping, etc.), by a sense of adventure (games, lotteries, prizes) or by his or her own ignorance of the difficulties of transnational transactions (knowledge of the language too limited to understand the offer or advertising, myth of higher quality of imported products, novelty products unfamiliar in developing countries, lack of legal advice or legal department for negotiation, confidence that the branch will provide post-sale services in his or her country, etc.). The rules of international commerce, the rules of private international law in general are constructed, based on the professionalism and expertise of the contractual parties involved,^{36/} to protect the seller, the party providing the product or service, not the party who merely pays (buyer, receiver of services, “consumer”).

Another characteristic of international consumption is its lack of “continuity” or its “discontinuity.” Commercial operations are characterized by repetition and international contracts even tend to open up markets and quite cooperative and durable relationships. International consumer contracts, on the other hand, are generally an exchange that does not last long, does not benefit from the international financial system, and does not transfer technology *sensu strictu*.^{37/} For example, being a tourist is a short-term and seasonal activity, distance buying of specific software or a book from a supplier in California (U.S.) is also a casual and discontinuous phenomenon. The rules of

33. Regarding the difficulties of international commerce, see FELDSTEIN DE CÁRDENAS, Sara, *Contratos Internacionais*, Abeledo-Perrot, Buenos Aires, 1995, p. 60 et seq. and MOURA RAMOS, Rui Manuel, and SOARES, Maria Angela Bento, *Contratos Internacionais*, Almedina, Coimbra, 1986, p. 9 et seq. The existence of international commercial law, given its specificity, is even advocated; see JADAUD, Bernard and PLAISANT, Robert, *Droit du Commerce International*, Dalloz, Paris, 1991, p. 1.

34. According to the European Commission, *European Consumer Guide to the Single Market*, European Commission, Brussels, 1995, pp. 15-16.

35. On the vulnerability of the consumer, see my book *Contratos no Código de Defesa do Consumidor*, Ed. RT, São Paulo, 1999, p. 140 et seq.

36. To be noted on this subject is the decision of the STF [Brazil’s Supreme Court] in which it did not consider raw material import operations between two traders to be “consumption,” FOREIGN RULING ANSWERED No. 5.847-1, released 01/Dec/1999, Rel. Min. Maurício Corrêa. See my comments regarding this decision by the STF, together with Eduardo TURKIENICZ, *Comentários ao acórdão do STF no caso Teka vs. Aiglon: em defesa da teoria finalista de interpretação do art. 2º do CDC*, in *Revista Direito do Consumidor*, vol. 36 (2000), p. 221 et seq.

37. A rare exception would be the time-sharing or multi-property contract, which is a durable relationship, although fluid, often national or international (with trading circles). On this subject, see the Brazilian expert, TEPEDINO, Gustavo, *Multipropriedade Imobiliária*, Saraiva, São Paulo, 1993 and my article, *Contratos de time-sharing no Brasil e a proteção dos consumidores: Crítica ao Direito Civil em tempos pós-modernos*, in *Revista Direito do Consumidor*, São Paulo, vol 22 (1997), pp. 64-86.

international commerce, the rules of private international law, are usually constructed based on trust and continuity, on growing relationships: someone who buys internationally will buy again if the “performance” was adequate, [and] protection is needed for the seller who ships his property to a distant country without many guarantees and without knowing his client. In international consumer trade, the priority is the reverse, the buyer is not a trader, not an expert, but rather a lay person, who buys for price, for the claimed quality, and who often relies on non-existent legal protections and assumes enormous risks by providing his or her credit card number.

The other characteristics are limited value, mass transactions, and difficulty of repetition. International consumption is today a mass phenomenon; we only need consider reasonable tourism or time-sharing, with their international exchange circles, tourist packages for large holidays, air transport, sea cruises, etc.³⁸ Considered individually the international consumer contract has limited value for a country’s economy or for the supplier. This small value makes access to justice very difficult, means that litigation is discouraged, makes it difficult for the consumer to assume high costs, either to file a claim, to look for the supplier again, to enforce the guarantee, etc. International consumption has still one more final characteristic. As with services in general, repeating the transaction if the contracting consumer’s expectations are frustrated is very difficult. In the case of tourism, re-doing something, a trip, days on a polluted beach, recovering the comfort of a hotel in a far-away country and so on is a nearly impossible task and the response will only be monetary, with the respective losses and damages. In the area of distance contracts, the possible loss of time, of lost opportunity, and moral damages related to the poor performance of an international consumer contract are also nearly a constant. It is better to prevent and limit damages, or the response will only be monetary, with the respective losses and damages.

Finally, we note a strong political and economic component in national and international rules protecting consumers, since if an exporting country maintains a high level of protection for its consumers it increases the quality of its products, which will be more widely accepted on the international market. If a country that is a tourism destination increases the degree of protection for tourists and facilitates their access to the courts, it ensures better conditions for tourism and facilitates the development of this important economic sector. In other words, rules on consumer rights affect the competitiveness of the domestic market and international competitiveness and also contribute to the creation of a domestic market where competition is fair and governmental policies are enforced.³⁹

The trend is to develop national laws, many of them considered as part of the international public order,⁴⁰ *lois de police*, or immediately applicable laws,⁴¹ as well as to adapt or harmonize

38. Since the 1980s and particularly the 1990s, European theory has been pointing to mass tourism as one of the fastest-growing economic sectors in the European Union and insisting that consumer protection is becoming necessary even as an instrument to harmonize competition. See, with statistics on growth in the tourism sector, LETE ACHIRICA, Javier, *El Contrato de Multipropiedad y la Protección de los consumidores*, Ed. Cedec, Barcelona, 1997, pp. 32-34.

39. See also GHERSI, Carlos Alberto, *Razones y fundamentos para la integración regional*, in *Mercosur - Perspectivas desde el derecho privado*, Ghersi (Coord.), 1993, p. 30 et seq.

40. Enforcement of public order has a clear social and protective purpose, not only in the IPrL system but also in countries with a legacy of continental European law, public policies or objectives of internal social harmony, BUCHER, Andreas, *L'ordre public et le but social de lois en droit international privé*, *Recueil des Cours*, 1993, II, t. 239, Nijhoff, Dordrecht, 1994, pp. 60-69.

national rules to ensure protection for the consumer in international organizations involved in economic integration such as the European Union (EU) or Mercosur.

A) The Need for Special Rules of Private International Law to Protect Consumers

1. Private International Law with Social Values and a Role in Regional Harmony

The classical Brazilian authors conceived of Private International Law, following the path of Pillet and French theory, as “the science the purpose of which is the legal regulation of international relations of a private nature.”^{42/} or “relations of a private nature in international society,”^{43/} the purpose of which would be not just to study conflicts of law over time,^{44/} but also conflicts of jurisdiction, problems of nationality, legal status of foreigners and acquired rights. In particular, I accept the limited purpose of IPrL proposed by the Italian and German authors^{45/} and in this work I will consider Private International Law to mean rules, standards, developing jurisprudence, and the principles that tend to indicate the applicability of a law to private cases with connections to more than one legal system, only indirectly resolving the so-called conflicts of laws, as well as all the rules (substantive, assistance, qualifying, and immediately applicable) that intervene or assist (*Hilfsnormen*) in this process.^{46/} The additional subjects for resolving these conflicts of law shall be treated here as “sister” topics of IPrL and now – practically and pragmatically – contained therein, such as International Civil Procedure Law or International Civil Law. Of particular note are the efforts to define a special jurisdiction for the consumer and facilities for recognizing the enforcement of decisions, as well as efforts for increased international jurisdictional cooperation on this subject.

Similarly, I feel the need to make it clear here that we will accept the post-modern theory of Private International Law of my professor at Heidelberg, Prof. Dr. Erik Jayme, for whom IPrL is an instrument of harmony and peace in today’s globalized relations.^{47/} Post-modern IPrL would successfully balance and simultaneously represent the contradictory social and economic forces of our times, post-modern individualism combined with exaggerated cultural identity, the irresistible force of a shrinking world and economic regionalization, of areas of supranational integration, and

41. In the classic definition of Franceskakis, reproduced by BUCHER, p. 39, these are laws or rules “the observation of which is necessary to safeguard the political, social, or economic organization of the country.” See Art. 7, paragraph 2 of the EU’s 1980 Rome Convention on law applicable to contractual obligations. Such rules are directly applied. See regarding Art. 18, BUCHER, p. 39 on Swiss Private International Law.

42. This is the definition of FULGÊNCIO, Tito, *Síntese de Direito Internacional Privado*, Ed. Freitas Bastos, Rio de Janeiro, 1937, p. 5.

43. This is the expression of BEVILAQUA, Clóvis, *Princípios Elementares de Direito Internacional Privado*, Ed. Histórica, Ed. Rio, 1988, p. 11.

44. According to Rodrigo OCTAVIO, Rodrigo, *Direito Internacional Privado-Parte Geral*, Ed. Freitas Bastos, Rio de Janeiro, 1942, p. 19, stating that this is the major part of the discipline, but not the only one, which according to him would still include the legal status of foreigners and respect for acquired rights, p. 20.

45. KEGEL, Gerhard, *Internationales Privatrecht*, 6.Aufl., Beck, Munique, 1987, p. 3, KROPOLLER, Jan, *Internationales Privatrecht*, J. C. B. Mohr, Tübingen, 1990 (Cited by Kropolher/IPR), p. 1 and von BAR, Christian, *Internationales Privatrecht-vol.II,BT*, Beck, Munique, 1991, p. 1.

46. See Art. 3 of Germany’s EGBGB [Introductory Law to the German Civil Code].

47. According to the masterful teachings of JAYME, Cours, p. 56 et seq.

free globalized trade. Consumer protection is included in this context as an escape valve for post-modern conflicts, since legally it represents the guarantee of a minimum standard of security and acceptability of the services and products, whether domestic or imported, that are sold on today's open markets. Politically, it represents a commitment to fairness, ensured on the macro level by the law of competition and on the micro level, which is today increasingly more collective and diffuse, by consumer law. Finally, it seeks in social terms to balance a renewal of free will, the concentrated role of the autonomous individual who freely determines his or her private economic and consumer relations and a renewal of human rights, since receiving protection from the State is a fundamental right of citizens in many countries, and consumer rights are the human rights of the new generation.^{48/}

If, as JAYME teaches,^{49/} IPrL is one of the areas most sensitive to the social, political, and legal changes of the late 20th century, since it avoids ideological conflicts and negative assessments regarding national rights, making it possible to point to just solutions (substantively and in terms of private law) to international private conflicts without impeding or affecting the flow of international trade and economic liberalism, then inserting rules on respect for individual rights within this IPrL of the future not only minimizes the risk of adopting radical solutions, due to dissatisfaction regarding the substantive justice of international relations; it also fills the gaps in the *lex mercatoria* by establishing an international standard guaranteeing the effective rights of the weaker party in international trade, i.e., the lay economic agent. Thus, we avoid filling the gap with a new form of radical national territorialism.

It is interesting to note that while countries have always managed to reach consensus on the need to develop and guarantee, through binding law or soft law, the bases for international trade in goods and services between traders or professionals, until now there has been no great concern for developing the rules of IPrL to protect the individual consumer acting outside his professional activity as the final user of goods and services for personal or family use.^{50/} Besides the efforts of the 1980 Hague Convention and the European Conventions, the subject has been rarely discussed in the Americas, as we shall see.^{51/} It seems to me that a tentative explanation of this conscious gap in the *lex mercatoria* worldwide is that the developed countries already have legal mechanisms and IPrL sufficient to enforce their consumer protection rules, thus guaranteeing effective protection for their citizens in international consumer relations as well.

At the same time, there is no great interest or need to extend this same standard to consumers outside the region or consumer in second or third-world countries, now emerging countries. The myth is developing among emerging countries that a high standard of consumer protection would represent

48. JAYME, Cours, p. 49.

49. See JAYME, Cours, p. 129 et seq.

50. On this subject, see ARRIGHI, Jean Michel, *La Protección de los Consumidores y el Mercosur*, in: *Revista Direito do Consumidor*, São Paulo, vol. 2 (1992), p. 126 et seq.

51. According to TONIOLLO, Javier Alberto, *La protección internacional del consumidor- Reflexiones desde la perspectiva del Derecho Internacional Privado Argentino*, in *Revista de Derecho del Mercosur*, year 2, no. 6, December 1998, p. 96, on the Hague draft. See also the referenced report and draft of VON MEHREN, *Rapport explicatif -Loi applicable à certaines ventes aux consommateurs*, in *Actes et Documents de la Quatorzième session (1996)*, vol. II, *Ventes aux consommateurs*, Permanent Bureau of the Hague Conference, The Hague, 1982, p. 6 et seq.

an obstacle to free trade,^{52/} and thus new markets are being developed for the placement of goods and services already prohibited in other countries or still in the testing phase with respect to risk. This also prevents local industries in the emerging countries from investing in the development of adequate international consumer (or environmental) protection standards, indirectly preventing these industries from exporting their goods and services and participating more actively (and competitively) in the international market. Turning this picture around is an international political problem, but the law must contribute by filling in the gap in the most neutral and least conflictive manner possible, which ironically is Private International Law, with its indirect (or adversarial) rules that protect consumers, with clear substantive (and not legally neutral) objectives.^{53/}

In summary, in this work we propose the updated use of the IPrL, imbuing these standards with social values that will facilitate the harmonious international relations needed in our times. This means an IPrL with substantive solutions for the complex post-modern conflicts that now involve human rights and constitutional limits,^{54/} a “soft” IPrL^{55/} that seeks, that “addresses” – at the same time as it promotes “discussion” of^{56/} – the implementation of the protection needed for the weakest parties in today’s internationalized markets.^{57/}

52. On the error of this myth, see my article *O Código de Defesa do Consumidor e o Mercosur*, in *Revista Direito do Consumidor*, vol. 8, p. 43 et seq.

53. On the IPrL crisis, see the course by KEGEL at the Hague, cited by NISHITANI, Yuko, *Mancini und die Parteiautonomie im Internationalen Privatrecht*, Universitätsverlag C. Winter, Heidelberg, 2000, p. 283.

54. I am referring to the Double Coding in the interpretation of current standards that are not more intrinsically neutral, but embody the protection of constitutional values, particularly human rights recognized in the international legal order through Public International Law Conventions. See JAYME, *Cours*, p. 36.

55. Here I adopt Jayme’s theory on soft law (JAYME, *Cours*, p. 247), emphasizing that any draft international convention or the text derived from it today has an effect that is at least “soft” in that it shows the problems and the routes, of expressing objectives and principles, even though it may be only a source of inspiration. Even when these provisions never come into effect, the efforts to develop them, like those of the 1980 Hague Convention, demonstrate the existence of needs and propel the search—national, regional, or global—for solutions. On the need for international consumer protection, see the studies of von HOFFMAN, KROPHOLLER; in the Americas, BOGGIANO, and more recently BRÖCKER and TONIOLLO, all cited in this work.

56. If communication is one of the elements of postmodernity highlighted by Jayme, it is true that law is also a form of discourse, an increasingly delegitimized form of discourse that is constantly being deconstructed, including through discussion of the need for globalized free trade. For this very reason, I include here the idea of Habermas and the followers of current semiotic theories that discourse (in the case of the new IPrL on consumer protection or my current proposed Convention) should encourage discussion on the subject and thus become legitimate. On this subject, see MÜLLER, Friedrich, *Direito-Linguagem-Violência*, Ed. Sérgio Fabris, Porto Alegre, 1995, p. 17 et seq. For criticism of Habermas for using only fundamental rights in his chapter on paradigms of law in the theory of discourse, see HÖFFE, Otfried. *Una conversione della teoria critica sulla teoria del diritto e del estado di Habermas in Rivista Internazionale de Filosofia del Diritto*, IV series, vol. LXXI, no. 1, 1994, p. 285. See HABERMAS, Jürgen, *Legitimation Crisis*, Beacon Press, Boston, 1999, p. 68 et seq. and my work, *A crise científica do Direito na pós-modernidade e seus reflexos na pesquisa*, Article published in the review ARQUIVOS of the Ministry of Justice, Brasilia, year 50, no. 189, Jan/June 1998, p. 49 et seq., with extensive bibliography on the deconstructing effects on law of discussions of post-modernity.

57. On the need to take a theoretical position, see the penetrating article by ARRIGHI, pp. 126-127.

As KROPHOLLER advocates in his famous 1978 article on protecting the weaker party through Private International Law,^{58/} we must evolve toward an IPrL imbued with social values. This also seems to me to be the time to consider the IPrL rules developed in the OAS in terms of these social values: protection of the weakest participant in the consumer and information society: the consumer.

According to BRILMAYER, the traditional values of IPrL, such as the predictability of applicable law and discouragement of forum-shopping, are analogous to procedural values, and not territorial connections, since they do not find their basis in substantive preferences in each country.^{59/} Developing this critical idea of the North American author a little more, we could assert, with JAYME,^{60/} that the new IPrL consumer protection rules, at least those derived from the European Union, which we plan to follow, have a substantive purpose. That is, these IPrL rules find their basis in the substantive preferences of this region and the supranational governmental decision to extend the European standards of consumer protection to the weakest economic agents, extending them effectively throughout the region to all citizens and residents.

Despite being at first sight “nationalist” (or post-nationalist), this substantive option does not seem to me to be incorrect, since IPrL actually continues to seek substantive legitimacy for its options as to which law should be applied. This being the case, it seems perfectly reasonable to me that the connections chosen by Inter-American IPrL to protect the region’s consumers have as their purpose the protection of the weakest parties (von HOFFMAN), their fundamental rights (JAYME) and substantive justice in the specific case (ZWEIGERT).^{61/}

North American theorists on the subject of IPrL emphasize that the ideal of equality has a constitutional origin (the equal protection clause),^{62/} which means a limitation on IPrL rules: they must not unfairly discriminate or create privileges and immunities, and they must be reasonable and have a clear social and political basis.^{63/} Today we can also consider this universal mandate, the mandate to seek equality among individuals in society (as emphasized by JAYME, a revival of human rights in the post-modern period)^{64/} as one of the objectives of IPrL, the search for harmonious decisions,^{65/} the just solution for the interests and fundamental rights involved in the consumer

58. KROPHOLLER, p. 655.

59. BRILMAYER, Lea, *Conflicts of Law*, 2.ed, Little, Brown and Co., Boston, 1995, p.178: “*Traditional choice of law values such as predictability and the discouragement of forum-shopping are very closely analogous to procedural values. Unlike territorial scope decisions that derive from substantive preferences, however, they are typically not a product of specific domestic substantive rule, but apply across a wide range of substantive areas.*”

60. On the subject of the substantive purpose of the IPrL standards derived from the European Union, see JAYME (in HOMMELHOFF/JAYME/MANGOLD (Ed.), *Binnenmarkt-Internationales Privatrecht und Rechtsvergleichung* (1995), p.35), *apud* JUNKER, p. 74, note 132.

61. Also expressed by TONIOLLO, p. 99, citing De Vischer.

62. HERZOG, Peter E., *Constitutional Limits on Choice of Law*, Recueil des Cours, 1992, III, vol. 229, Nijhoff, Dordrecht, 1993, p. 285.

63. HERZOG, p. 287.

64. JAYME, Cours, p. 167 et seq.

65. According to BOGGIANO, Antonio, *The Contribution of the Hague Conference to the Development of Private International Law in Latin America. Universality and genius loci*, in Recueil des Cours, 1992, II, vol. 233, Nijhoff, Dordrecht, 1993, p. 138.

relationship. IPrL would then be more an instrument for protecting the weakest and achieving justice in these current internationalized, integrated, or globalized societies.

We also note that in the area of fair competition there has been a clear evolution in IPrL. National standards protecting fair competition have achieved a high degree of extraterritoriality.^{66/} Thus, like the European treaties,^{67/} the traditional connection of the *lex loci delicti commissi* also came to be interpreted flexibly, either as the place of wrongful conduct, or the place of impact or relevant market, and even in illegal conduct the location of the company's decision-making came to be considered,^{68/} always seeking justice in IPrL in the specific case and greater harmony of decisions.^{69/}

Finally, it is felt that in a time of post-modern fragmentation, the rules of IPrL should focus only on certain topics, thus ensuring topical or fragmented protection as well. These should be flexible rules or at least options so that the principle of favoring the consumer can be achieved. According to JAYME, post-modern IPrL should simultaneously give preference to regional individual values and economic integration (or collaboration), allowing each market to somehow decide what is best for its consumers.^{70/} This fragmentation and flexibility will be attempted here by concentrating on two topics, for which, it seems to me, national protection of the consumer will always be insufficient and contain gaps, even in first world countries, and where unification of IPrL standards^{71/} will also be appropriate for international commerce, by creating greater security, predictability for professionals and harmony in decisions, which are some aspects of protection for tourists and protection for the consumer in international commerce at a distance or through electronic means.

2. Current Connections and Their Inadequacy for Protecting the Consumer

As KROPHOLLER demonstrates,^{72/} specific IPrL standards must be developed to protect lay, non-professional consumers, since the now-existing connections governing international commerce also have as their basis the structural balance of professional forces or interests between the agents involved (both professionals), suggesting as connections either contractual autonomy (the parties

66. Based on a review of §98, 2.1 of the German GWB [Civil Code], this was the conclusion of MARTINEK, Michael, *Das internationale Kartellprivatrecht*, Verlag Recht und Wirtschaft, Heidelberg, 1987, p.94.

67. Extraterritoriality begins with the articles of the Treaty of the European Economic Community themselves (now amended by the Treaties of Maastricht and Amsterdam in terms of numbers but not subject matter). As Casella recalls: "*Unlike Article 80 of the ECSC, Articles 85 and 86 of the EEC do not restrict the geographic area of influence of the mechanisms, which are thus not linked to the geographic location of the company, and community standards are applicable in the area of competition, although the companies may be located or controlled in a non-member country, thus establishing the extraterritoriality of their application.*"

(CASELLA, Paulo Borba, *Comunidade Européia e seu Ordenamento Jurídico*, São Paulo, Ltr, 1994, p.430)

68. On this subject and this evolution in flexibility, see DYER, Recueil, p. 413 et seq.

69. MARTINEK, p.96.

70. See JAYME, Cours, p. 129 et seq.

71. On the positive and negative aspects of unification of IPrL through treaties, see NEUHAUS, Paul Heinrich and KROPHOLLER, Jan, *Rechtsvereinheitlichung - Rechtsverbesserung?*, in RabelsZ 45(1981), p. 73 et seq.

72. KROPHOLLER, p. 398 et seq.

choose the law that will govern the contract, in the contract or later), the place of performance (usually the place where the characteristic service is performed, always by a professional in the case of international consumer contracts), or the place where the contract is concluded (connecting the contract with the legal system of the supplier's country, in distance contracts, always the supplier as well). This structural balance does not exist in international contracts concluded with lay consumers.

As JAYME correctly notes, at present substantive standards prevail in international cases, reducing the importance of the traditional international civil process.^{73/} These are times of great possibility for determination by the individual (*Selbstbestimmung*) in substantive law,^{74/} of new techniques in international conventions seeking to harmonize cultural differences and promote development through judicial cooperation and respect for local mandatory laws,^{75/} seeking to respect the human rights involved in the case.^{76/} Given the current technological revolution, this means a new prevalence for the habitual residence of the consumer as a new element of connection for determining the law applicable to business-to-consumer electronic commerce and the new criterion for determining the competence of the forum.^{77/} According to the great master from Heidelberg, this is the future of IPrL

Achieving substantive objectives through IPrL standards does not seem to present a methodological problem in the IPrL of the Americas. According to many authors, there is a certain tradition of territorialism in Latin America^{78/} as well as in the United States,^{79/} with clear preference now given to application of the *lex fori*. This simplistic solution of always applying the *lex fori* to consumer relations or relations considered to relate to (international) public order is classic, but is not appropriate or adequate in these times.^{80/}

This territorialist solution is not appropriate since it does not promote harmony of decisions and ends up increasing the tensions between international trade, which is increasingly more uniform

73. JAYME, Erik, *Zum Jahrtausendwechsel: Das Kollisionsrecht zwischen Postmoderne und Futurismus*, in IPRACT-Praxis des Internationalen Privat- und Verfahrensrechts, 2000, p. 169, recalls that the first European Community standards were all about jurisdiction, as was the Brussels II Convention dealing with Family Law, but that this method is inadequate for avoiding the great importance of substantive standards, many of which are immediately applicable in any forum, and the new alternative dispute settlement mechanisms that are often extra-jurisdictional and used with increasing frequency.

74. JAYME, IPRACT 2000, p. 170.

75. JAYME, IPRACT 2000, p. 168.

76. JAYME, IPRACT 2000, p. 171, citing judicial decision in Germany on the Chernobyl disaster, in which the *locus delicti* was considered to be in Germany where the radioactive cloud caused damages that must be compensated for by the Russian company, as well as cases involving electronic commerce in which the place where the information is distributed via the Internet, and thus the consumer's location, is being considered the competent forum.

77. JAYME, IPRACT 2000, p. 171.

78. On the different political and legal influences in the characteristic territorialism of the Latin American countries' IPrL, see SAMTLEBEN, Juergen, *Menschheitsglück und Gesetzgebungsexport- Zu Jeremy Bentham's Wirkung in Lateinamerika*, in *RabelsZ* 50 (1986), p. 475. Also see ARAÚJO, Nádía de, *Contratos Internacionais - Autonomia da Vontade, Mercosul e Convenções Internacionais*, 2ª ed., Ed. Renovar, Rio de Janeiro, 2000, p. 145 et seq.

79. RICHMAN, William M. and REYNOLDS, William L., *Understanding Conflict of Laws*, 2. ed., Times Mirror Books, USA, 1995, p. 230.

80. Also in KROPHOLLER, p. 635.

and protected, and national or regional legislation, which leaves consumers unprotected, particularly in third-world countries, allowing abuse and the use of highly differentiated standards to create, as Gabriel Stiglitz asserts, consumers of “waste,” a situation that is not sustainable over the long term. This territorialist solution is not adequate since it always leaves some national consumers unprotected, is never adequate to protect the tourist consumer, and does not effectively protect today’s consumers who contract internationally by telephone, wire, or Internet without being precisely aware of what law is applicable to the relationship or exactly what rights, substantive guarantees, and forum choices they have (or don’t have). On the contrary, there is a need to learn from the lessons of the European Court on tolerance and implicit equality of legal systems, consumer protection laws, primarily between countries participating in economic integration and legislating on a minimum standard,^{81/} as well as to recall that another country’s law may often guarantee more rights to the consumer than the local law.^{82/} Thus, we must try to use all the techniques of flexibility and current openness of IPrL and at the same time the classical techniques of security and limited options to legitimize the best solution to the concrete case of international private consumption.

This mixture of current post-modern IPrL, after the “American Revolution,”^{83/} and clear social values, must be constructed by examining the advantages and disadvantages of the connections that now exist. Thus, for example, while the contractual autonomy of the parties is today considered the most important element in the international trade connection,^{84/} it comes up against a limit with respect to consumer relations. As NEUHAUS points out, the ability of the parties to choose the law, contractual autonomy in IPrL, loses its meaning, comes to be a tool whereby the strongest control the weakest.^{85/} Analyzing the Hague Convention and CIDIP IV, the Argentine expert BOGGIANO^{86/} proposes a rule of limited autonomy to protect consumers: the parties’ choice will only prevail if this is the best law, the law most favorable to the consumer; otherwise, the law of the consumer’s

81. On this subject, see BRÖCKER, Marion, *Verbraucherschutz im Europäischen Kollisionsrecht*, Peter Lang, Frankfurt am Main, 1998, p. 107. According to the author, the court began to establish this approach of equal footing (*Gleichwertigkeit*) for national consumer protection rules and the duty of the member states of the European Union to be tolerant with respect to the application of the “foreign” law of another member country of the European Union precisely in the Cassis de Dijon case, BRÖCKER, p. 107.

82. As noted by BOGGIANO, Antonio, *International Standard Contracts*, Recueil des Cours, 1981, I, vol. 170, Nijhoff, Dordrecht, 1982, p. 138, advocating application of the law most favorable to the consumer.

83. According to Erik Jayme (JAYME, Cours, p. 44), one of the trends in post-modern or current private international law would be substantiation of conflict of laws rules and repeated application of the *lex fori*. After the so-called “American Revolution,” a theoretical or jurisprudential movement that occurred in the United States in the 1960s and reconsidered the method and the idea of justice in private international law, the conflict of laws rules would overcome their automatism and simple instrumental position, indicating a substantive law to “directly” resolve the conflict, and now taking an interest in the concrete or direct (substantive) solution of the case.

84. DE BOER, Ted. M., *Facultative Choice of Law - The procedural status of choice-of-law rules and foreign Law*, Recueil des Cours, 1996, vol. 257, Nijhoff, The Hague, 1997, p. 300.

85. In the original: “Die Parteiautonomie verliert ihren Sinn - ebenso wie die materiellrechtliche Vertragsfreiheit-, wenn sie zur Herrschaft des Stärkeren über den Schwächeren wird.”, NEUHAUS, *Die Grundbegriffe des IPR*, 1962, p. 172 *apud* von HOFFMANN, p. 396.

86. See BOGGIANO, in his text in *The Contribution*, p. 138 and 139.

domicile will apply. As general limits on contractual autonomy, the rules of international public order and the *lois de police* would prevail (Art. 1208 CCArg.).^{87/}

As we have seen, the European experience is the reverse. The Rome Convention indicates a preference for the mandatory rules of the forum (Art. 7)^{88/} and only later a special rule that places (significant) limits on contractual autonomy. However, the international autonomous trend is to give preference to contractual autonomy in choosing the applicable law, even though, due to questions of policy and public order, this choice may be limited.^{89/} MANCINI seems to be correct in arguing for contractual autonomy in IPrL, having found support for it precisely in substantive law, in the (substantive) freedom of the individual to enter into a contract that is just and useful to him, to establish its clauses and choose the law to be applied.^{90/} While IPrL now has its own bases for selecting the contractual autonomy connection factor,^{91/} NEUHAUS^{92/} proposes reversing MANCINI's idea: if the parties have substantive contractual autonomy, there may be contractual autonomy in IPrL, but if the parties do not have true substantive contractual autonomy, because one party is structurally stronger (such as professional suppliers who draw up and determine 100% of their international consumption contracts) and another party is weaker (the consumer, who is a layman or vulnerable person who usually enters into domestic contracts and only sometimes enters into international contracts, and sometimes without even realizing it), then contractual autonomy is not used as the principal connection. In such cases, there is no true substantive freedom, and there cannot be true freedom in IPrL or we will be encouraging the selection of the law that is most favorable to (and chosen by) the stronger party.

BOGGIANO's position of limited contractual autonomy truly establishes a connection "in favor of the consumer" that could well be interesting in developing the region's IPrL. It is true that judges in the Latin American countries, except those under the case law system, have little experience with open alternative rules. Nonetheless, a limited alternative is one of the instruments most often used today to ensure equitable substantive results.^{93/} Theory even calls the technique of formulating alternative rules, of indicating the substantive purpose or the desired advantage, the advantage principle (*Günstigkeitsprinzip*) and the alternative rules that lead to *favor negotii*, *favor matrimonii*,

87. BOGGIANO, *The Contribution*, p. 137.

88. 1980 Rome Convention- "*Article 7 – Mandatory rules - 1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. 2. Nothing in this Convention shall restrict the application of the rules of law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.*

89. As in the 1987 Swiss law; see in general NISHITANI, p. 291 et seq.

90. As NISHITANI indicates on p. 216 and as can be read in the lost lectures of Mancini, recovered and reproduced in Italian by Professor de Sendai, NISHITANI, p. 378 et seq.

91. According to NISHITANI, p. 318.

92. According to NISHITANI, p. 318 citing Neuhaus' phrase: "Nur und überall dort, wo die erste [materiellrechtlicher Freiheit] besteht, ist auch die zweite [kollisionsrechtlicher Freiheit] angebracht." [Neuhaus, *Die Grundbegriffe des IPR*, 1962, p. 257] Also in von Hoffmann, p. 396, citing Neuhaus.

93. According to KROPHOLLER, IPR, p. 120 (§ 20 II). As NISHITANI points out on p. 283, these new methods of continental IPrL are the direct result of the American Conflicts Revolution in IPrL.

favor legitimitatis, etc., are known^{94/} The difficulty with the rule suggested by BOGIANNO is the still broad ability to select the law, which will mean a lot of work for the competent judge in verifying whether the application of the law selected would be better than the substantive application of other laws in contact with the consumer.

TONIOLLO makes a similar, but more limited, suggestion on alternatives, arguing that when applying Argentine rules the judge should seek to be consistent with the mandate to protect the consumer and allow the consumer (not the judge) to choose between application of the law of habitual residence (Art. 1209,1210,1212,1213 CCArg.), *lex loci celebrationis* (Art. 1205 CCArg.) or *lex loci executionis*, depending on which is more favorable to the consumer's claims.^{95/} This alternative solution is also interesting, since it allows one to choose the law closest to the consumer relationship, in the view of the consumer. On the other hand, the greater the consumer's ability to choose, the less predictability as to the law applicable for the supplier, which could—if widespread—ultimately harm trade.

Note that in 1978 KROPHOLLER already considered determining the law most favorable to the consumer to be a very difficult task for judges, since the use of this open connection, typical of the current Restatement in the United States, presupposes comparing the substantive result of a hypothetical application of the various laws involved in the case and only then determining which is more favorable to the consumer's interest and would thus be applicable.^{96/} On the other hand, the now acclaimed German author felt that the progressive harmonization of substantive rules to be carried out by the European Union would reduce the need for special IPrL rules, which would, however, continue to be necessary in private relationships involving non-European third countries.^{97/} We now know that the evolving harmonization of substantive rules only specifies the role of IPrL as an instrument for greater integration and does not replace those rules,^{98/} as demonstrated by the new IPrL rules in the Directives, the revision of the Rome Convention, and even the German autonomous law, which amended Art. 29 of the EGBGB on consumer protection to specifically include a rule giving preference to substantive law in some contracts (Art. 29a EGBGB).^{99/}

However, BOGGIANO is correct when he states that rigid connections only give nationals “illusory security,”^{100/} since no one is now unaware of the phenomena of *forum-shopping*, alternative dispute settlement mechanisms, and consumer's abandonment of international litigation (suppressed suit). Thus, with most inter-American countries continuing with rigid connections for consumer contracts and new and open solutions for the rest of international commerce, it is unlikely that these suits will come to be resolved by the local judge. Inter-American IPrL must lead to the evolution of national private international law in the area of consumer protection as well. It is alarming that the

94. As indicated by KROPHOLLER, IPR, pp. 120-122.

95. TONIOLLO, p. 99: “alternative selections are an adequate instrument of protection provided they permit setting aside the least favorable legislation, promoting teleologies.”

96. KROPHOLLER, p. 657.

97. KROPHOLLER, p. 657.

98. Also in TONIOLLO, p. 108.

99. The law on contracting at a distance with consumers, approved on April 13, 2000, introduced this new (and controversial) Art. 29a EGBGB, which took effect on July 1, 2000 (as reported in IPRAX, 2000, 3, p. [248] VI. Regarding the studies on amending Art. 29 to include Art. 29a in the EGBGB, see STAUDINGER, p. 414 et seq. The text is also found in IPRAX, 1999, 4, p. [304]VII.

100. In BOGGIANO, *The Contribution*, p. 134: “the illusion of rigid conflict rules.”

rules that seek to protect the consumer are also representative of a state interest, mandatory rules. The IPrL rules suggested by the OAS should have the same mandatory nature as well. In other words, this is not a subject where private and commercial interest prevails, where contractual autonomy will be able to decide even the nature of the IPrL rule, whether mandatory or optional (facultative choice of law).^{101/} Given the imbalanced nature of the private relationship itself that is the subject of the proposed regional rules, IPrL for the protection of the consumer as proposed here should be an IPrL that is mandatory and binding for all States Party to this future international convention or CIDIP.

The traditional connections must be superseded in order to protect the weaker party to the contract. For example, the rules of *favor offerentis*, with respect to form, and the connection of the offeror's residence in contracts between absent parties, known in Brazilian law, are also inadequate to the challenges of trade with consumers and their protection in these times. In the case of contracts or consumer relations, the offeror is always the supplier (see Art. 30 of Brazilian Law 8078/90), even though the contract is supposedly called an adhesion contract or the general contractual conditions of the "offer" are submitted for acceptance by the consumer. We know that it is the offeror who draws up and determines the "offer" and thus such forms and the supplier's or professional's advertising mean that today the consumer offer is always made by the supplier.^{102/}

This reality means that the Brazilian rules in Art. 9 §2 of the LICC/42 and Art. 9 §1 the LICC/42 are superseded.^{103/} Art. 9 §2 provides that the obligation arising from the contract is deemed to be constituted in the place where the offeror resides, thus establishing application of the law of the place of residence of the supplier to govern contracts between absent parties, even consumer contracts. It is necessary then to overcome these rules and to choose for consumer contracts, in contrast to commercial international contracts, a connection that is more favorable to the consumer, like that in Art. 5 of the Rome Convention, which gives preference to the law of the country where the consumer has his or her habitual residence as the rigid connection (Art. 5.3 of the 1980 Rome Convention), if there is no express indication of choice.

This same Article 5 of the 1980 Rome Convention^{104/} establishes that the choice of a law to govern the consumer contract, i.e., the contractual autonomy connection, may not exclude the

101. On the subject of optional IPrL, see the course at the Hague by DE BOER, p. 235 et seq., especially p. 303 et seq.

102. In the Brazilian case, the CDC, Law 8.078/90, expressly establishes that the offer is always from the supplier or professional *ex vi lege* in Arts. 30, 34, 35 and 48. See my comments in *Contratos*, p. 288 et seq.

103. The current text of the LICC/42 is: "Art. 9. *Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que se constituírem. §1. Destinando-se a obrigação a ser executada no Brasil e dependendo de forma essencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrínsecos do ato. §2. A obrigação resultante do contrato reputa-se constituída no lugar onde residir o proponente*"

104. The text of the Article is as follows: "Article 5. *Certain consumer contracts - 1. This article applies to a contract the object of which is the supply of goods or services to a person ("the consumer"), for a purpose that can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object. 2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of law of the country in which he has his habitual residence: - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or - if the other party or his agent received the consumer's order in that country, or - if the contract is*

application of mandatory protection rules and laws in the country of the consumer's habitual residence if a) the invitation, advertising, or some action to conclude the contract occurred in that country (e.g., advertising for a sea cruise organized in Argentina and shown on television or cable in Brazil); b) if the supplier or his agent receives the reservations or contracts in the country of the consumer's habitual residence (e.g., multi-property contracts in Uruguay, Punta del Este, with consumers residing in Brazil are signed in Brazil by free agents who invite consumers to cocktail parties or meetings, offering them prizes and advantages, where the undertaking will be explained and the proposal signed, and future payments made through letters of credit also signed at the sales meetings on Brazilian soil); c) when the contract is for the sale of goods and the consumer travels to purchase these goods, but the trip was organized by the supplier for the purpose of obtaining contracts (e.g., excursions organized to purchase goods in a free trade zone or in a specific foreign factory), as is made clear in Art. 5.2 of the 1980 Rome Convention on the law applicable to binding obligations arising from the contracts.^{105/} In the Inter-American case, the best rigid connection would be that of the domicile, understood as the habitual residence, as in Art. 3 of the Santa Maria Protocol (Mercosur)^{106/} or the tradition of the CIDIPs^{107/} and their uniform substantive rules.^{108/}

Finally, we must deal with the difficult topic of the definition of the consumer in IPrL rules. We agree with TONIOLLO when he states that the concept of the consumer for IPrL must have the necessary breadth "to encompass the varied situations that require protection."^{109/} The 1980 Rome Convention on the law applicable to contractual obligations, in effect in the UE, defines in Art. 5 "contracts concluded with consumers" as contracts whose object is to provide or supply something to a person for a use that can be considered outside his professional activity.^{110/} A similar negative and

for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy."

105. JAYME, Erik and HAUSAMANN, Rainer, *Internationales Privat- und Verfahrensrecht*, Beck Verlag, Munique, 1998, p. 116.

106. ARAÚJO, Nádia, MARQUES, Frederico Magalhães and REIS, Márcio, *Código do Mercosur-Tratados e Legislação*, Ed. Renovar, Rio de Janeiro, 1998, p. 161.

107. According to SIQUEIROS, José Luis, *Contribucion de las CIDIP-I, II y III al Desarrollo del Derecho Internacional Privado*, XIII Course on International Law, General Secretariat, OAS, 1987, p. 170. This was one of the great contributions made by the CIDIPs in establishing that the Inter-American domicile was similar to the concept of the habitual residence popular in Europe. See also, CIDIP-II-1979- Convention on Domicile of Natural Persons.

108. As stated by OPERTTI BADAN, *Estado Actual del Derecho Internacional Privado en el Sistema Interamericano*, IX Course on International Law, vol. I, General Secretariat, OAS, 1983, no. 2.7, the major innovation of the 1979 CIDIP-II on the domicile of natural persons was the use of uniform substantive rules. According to ALMEIDA, Ricardo Ramalho, *A convenção Interamericana sobre domicílio das pessoas físicas em direito internacional privado*, in CASELLA, Paulo Borba and ARAUJO, Nádia (Coord.), *Integração Jurídica Interamericana- As Convenções Interamericanas de Direito Internacional Privado (CIDIPs) e o Direito Brasileiro*, Ltr, São Paulo, 1998, the rules of CIDIP-II are not "substantive" but "qualifying," p. 217. It happens that in the German tradition (see KROPHOLLER, p. 80, KEGEL, IPR, 35, STEINDORF, Ernst, *Sachnormen im internationalen Privatrecht*, Vittorio Klostermann, Frankfurt am Main, 1958, p. 30), the supplemental substantive rules (*Hilfsnormen*), are considered substantive rules of IPrL (*materielles Sonderrecht*). Thus, we agree with the opinion of the Uruguayan expert OPERTTI, OAS Course, no. 2.7.

109. TONIOLLO, p. 95.

110. JAYME/KOHLER, IPR-Text, p. 107.

subjective definition^{111/} can be found in the 1968 Brussels Convention and in the Lugano Convention (Art. 13), providing a pretext for the special protection system in Arts. 14 and 15.^{112/}

In this respect, it seems to me that the characteristics of consumers that could be acceptable for most countries would be that they are *non-professional, individuals* (recall the familiar, collective or personal use of the goods and services purchased or used), *final contractors or end users* (in the case of a tourism) and *victims of defective goods and services*.^{113/} Extending the protection to the non-consumer who is simply a user is controversial and could be easier to swallow if we define those covered by each of the fragmented consumer protection rules by topic or contract type, as the European Union has done by forgoing a broad generic definition of the consumer. On the other hand, all victims of defective products need not be defined as consumers since conventions now in existence such as the 1986 Hague Convention are able to provide sufficient protection in IPrL, with special connections for the victims of consumer accidents. Various other international conventions deal with civil liability for accidents, often linked to the chain of production, including the CIDIP provisions on catastrophic accidents and transboundary pollution. However, this subject will not be addressed in our suggestions.

It is also important to emphasize in general terms that a definition of the “relational” consumer is recognized, i.e., this specific and ephemeral status actually only occurs when there is a professional economic agent, the supplier, company, or trader in professional to layman relationships and not in professional to professional or layman to layman relationships.^{114/}

Our suggested definition of the consumer would be: *A consumer [for the purposes of this Convention] is any natural person who, with a professional and in transactions, contracts and situations covered herein [by this Convention], acts for a purpose that does not fall within the sphere of his or her professional activity.*

According to KROPHOLLER, the special rules to protect consumers as the weaker parties in international commerce should adhere to the following method: respect the application of mandatory rules (in German, *Sonderregelung für zwingende Normen*),^{115/} develop rules by contractual types or topics,^{116/} use classical bilateral rules,^{117/} choose objective factors of connection, and in the case of

111. TONIOLO, p. 95.

112. A similar definition was included, on 29/June/2000, in the German Civil Code. In the original: “BGB- § 13 Verbraucher - Verbraucher ist jeder natürliche Person, die ein Rechtsgeschäft zu einem Zweck abschliesst, der weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden kann.” (BGB- § 13- Consumer – A consumer is any natural person who concludes a legal matter the purpose of which has no commercial connection or connection with his or her professional activity.)

113. Also in BENJAMIN, p. 500.

114. As in the legal systems of Italy, France, Germany, England, Belgium, examined in detail by KLESTA DOSI, Laurence, *Lo status del consumatore: prospettive di diritto comparato*, in *Rivista di Diritto Civile*, 6, Nov./Dec. 1997, pp. 669-675. On the influence of these ideas in the Mercosur countries, see RIVERA, Julio César, *Interpretación del Derecho comunitario y noción de consumidor - dos aportes de la Corte de Luxemburgo*, in *La Ley*, Buenos Aires, 1998, p. 520 et seq.

115. KROPHOLLER, p. 648.

116. KROPHOLLER, p. 655.

117. KROPHOLLER, p. 657 and 660

consumer contracts, choose a connection other than the characteristic performance,^{118/} giving preference to connections in the contractual sphere of the weaker party (*Recht der Vertragsphäre des Schwächeren*), and limit contractual autonomy or the ability to choose the applicable law on the part of the supplier, trader, or stronger contractual party,^{119/} and impose corrections with public order clauses^{120/} and escape clauses,^{121/} following the example of the current Swiss law.

In the convention to be proposed, it seems to me more positive to use the method of the 1980 Rome Convention, of a combination between preference given to immediate application of the forum rules^{122/} (like the new Art. 29a of the EGBGB), with an increasingly more limited ability to choose the law, and a limited, more specific definition of the consumer. We need to protect family and companion third parties, direct users and also non-professionals, and the suggestion for this is to include a rule expanding the scope of application of the rules: “*Also considered consumers are third parties belonging to the family of the principal consumer or other companions who have direct usufruct of the contracted goods and services, in contracts covered by this Convention, as the final recipient thereof.*” A special rule is also suggested for the specific definition of the consumer in multi-property or time-sharing contracts: “*3. In the case of travel and multi-property contracts, consumers are considered to be: a. the principal contracting party or natural person who buys or agrees to buy the tourist package, the trip or time-sharing for their own use; b. the beneficiaries or third parties in whose name the principal contracting party buys or agrees to buy the trip or tourist package and those who have usufruct of the trip or multi-property for some period of time, even though not principal parties to the contract; c. the transferee or natural person to whom the principal contracting party or beneficiary transfers the trip or tourist package or use rights.*”

As for protective connections, it seems preferable to me at the moment to follow the Mercosur model, using the specific Santa Maria Protocol on consumer relations, and propose rigid

118. KROPHOLLER, p. 656.

119. KROPHOLLER, p. 656.

120. KROPHOLLER, p. 655.

121. KROPHOLLER, p. 657.

122. This involves the technique of Private International Law of identifying some domestic laws or rules that, given their importance and intimate contact with a country's governmental or public order interests, must be followed by everyone and in all private relationships with strong contacts with those countries. These are the so-called “laws immediately applicable” to nationals and foreigners and for all private relationships, without any need to go through the IprL method of identifying an applicable law, since these “immediately applicable” laws or *lois de police* always have claims to generic and extraterritorial application, regardless of whether they belong to public or private law, provided they establish strong interests involving the organization of a country's society. Since the so-called immediately applicable law is direct or resolves the conflict directly, its acceptance and hierarchical identification with IprL is a technique (a term used with increasing frequency) for “substantivizing” the new conflicts of laws rules. This phenomenon is generally known by the French expression *lois d'application immédiate* popularized since 1958 in the studies of the great Greek professor Francescakis, despite the very similar 1959 study by the Italian De Nova (*norme sostanziali autolimitate, norme di applicazione necessaria*). The second French expression, *lois de police* or mandatory rules, is also more widely known than the German expression indicating mandatory laws, *zwingende Normen* (Savigny's term was *Gesetzen von streng positiver, zwingender Natur*). For all this, see SCHWANDER, Ivo, *Lois d'application immédiate, Sonderanknüpfung, IPR-Sachnormen und andere Ausnahmen von der gewöhnlichen Anknüpfung im internationalen Privatrecht*, Schulthess, Zurich, 1975, pp. 132-184.

connections to govern specific consumer contracts, suggesting a limited alternative rule, choice by the judge of the law “favorable to the consumer,” in the general rule for consumer contracts. Thus, there is not much room left for contractual autonomy at this initial point, even to differ from the 1994 CIDIP V and to be alert to North American protectionist trends and current limiting trends in the European experience.

Kropholler ends his analysis by stating that the classical IPrL rules, dressed up in today’s clothes, could be used to protect the weaker party to contracts, that the continental European IPrL could (or should) include values and a social dimension, as was the mandate (*Gebote*) of his time.^{123/} Agreeing with this assertion and taking into account the post-modern view of IPrL according to the teachings of Erik Jayme, I feel that this is now the mandate or *Gebote* for the Inter-American System, as we shall see below.

B) Inadequate National Protection for the Consumer in IPrL in the Americas and in the General Conventions on Trade in Goods

In Mercosur, the theoreticians always warned that, given the varied levels of national protection in the four countries, the origin-based system could not be adopted because it would leave consumers in the destination country unprotected.^{124/} This was precisely the choice made under Common Market Group Resolution no 126/94,^{125/} approved on December 16, 1994, imposing the rules of the place of sale with respect to the consumer protection rules to be applied until efforts toward legislative harmonization yielded positive results.^{126/} This involves a specific rule of unified private international law designed to protect the consumer by establishing—indirectly—which law is applicable in the event of consumer disputes and imposing the rule of the destination country: goods and services flowing freely in Mercosur must respect the law of the country where they will be sold, the law of the destination market, with respect to consumer protection. This rule thus establishes a spatial and territorial field of application for national consumer rights rules^{127/} and rejects the European rule of applying the laws of the country where the good or service originated.

If on the one hand we have quite reasonable evolution of the substantive protection provided to the consumer through his or her national law, the same thing cannot be said on the subject of special protection through IPrL. One might think that, since national consumer protection rules are generally considered in the Inter-American countries as belonging to the international public order,

123. Note that KROPHOLLER, p. 660, argues that the closer connection mandated by classical IPrL rules can effectively protect the consumer, the weaker contracting party, in that the classical IPrL rules dressed up in today’s clothing can absorb this social dimension of protecting the weaker party: “Das IPR Savignyscher Prägung nimmt die sozialen Gebote der Zeit in sich auf.”

124. See DROMI, p. 365. This is also suggested by STIGLITZ, *El derecho del consumidor en Argentina y en el Mercosur*, published in Argentina, La Ley, 19/5/95 and in Brazil, in: *Direito do Consumidor*, vol. 6, p. 20.

125. MERCOSUR/GMC/RES. 126/94, in: *Boletim de Integração Latino-Americana*, 15, p. 133.

126. Resolution 126/94 GMC/Mercosur- “Art 2. Until common consumer protection regulations are approved in Mercosur, each State Party shall apply its own consumer protection law and pertinent technical regulations to the goods and services sold in its territory.”

127. See also CIURO CALDANI, Miguel Angel, *Hacia la proteccion equilibrada del consumidor en el Derecho Internacional privado*, in *Investigación y docencia*, 18, 1991, Rosario, p.50.

lois de police or mandatory rules of the “immediately applicable” type, there would be no need for a convention on the subject: the consumer who is domiciled in or a native of a country would always be protected by the probable application of these rules. This conclusion is inadequate, since it has two flaws:

1) It leaves tourist consumers unprotected when they return to their countries, since their protection presupposes the extraterritoriality of these laws, while the characteristic of these laws is precisely their territoriality. The national tourist consumer would only be protected were the national judge to apply precisely the *lex fori* to these international relationships.^{128/} However, we note that most of the factors of connection currently existing in the Inter-American countries are based on *contractual autonomy* in international contracts, the *place where the contract is concluded*, or the *place of residence of the party proposing* the contract. All these more common connections will lead to the application of foreign law in contractual relationships with national consumers, since it is the foreign supplier who draws up the contracts concluded with tourists, for example, and includes the clause selecting “his” law, also the place of execution and of characteristic performance, which is always where the supplier is found or a third country, as in the case of electronic consumer commerce, since the consumer only pays for the good or service. In addition, these days the party proposing the contract is a professional supplier, but the consumer is no longer also a professional.^{129/}

2) It leaves Inter-American consumers unprotected when the likely forum for their suits is in a foreign country, such as when they contract at a distance or through electronic commerce. This is because it is not certain that the mandatory or public order rules of the country where the consumer is domiciled will be applied (in the absence of a special international convention) by the judge or arbitrator in another country, as exhaustive studies of first-world jurisprudence have shown.^{130/}

That is why protection for Inter-American consumers must be established with respect to precisely these two topics, as we suggest below. However, since the previous assertions regarding the inadequacy of using the international public order and connections used more frequently in our Inter-

128. These cases are very rare, but there is a leading case in Brazil. In a recent decision, the STJ [Superior Court] made the Brazilian branch responsible for the product guarantee on a Panasonic product purchased in the U.S. (distributed by the parent company in Japan and possibly produced in Indonesia or China), all according to the Brazilian Consumer Protection Code, considered an “immediately applicable law.” REsp. 63.981-SP, Min. Sálvio de Figueiredo reporting, was decided on May 4, 2000, with the following summary: “*Consumer Law. Defective product purchased abroad. Obligation of the national company of the same brand to repair the damage. The current reality is that we are living in a globalized economy world. Large corporations have lost the stamp of nationality in order to become global companies. They left provincialism behind and achieved universality. Given the peculiarities of type, Panasonic do Brasil Ltda. answers for the defect in a product of the Panasonic brand purchased abroad.*” See my comments in the article *Normas*, in *Revista de Direito Privado* 4, p. 85 et seq.

129. Note that the characteristic performance was not considered appropriate, not even for inclusion in CIDIP V. See also NOODT, TAQUELA, Maria Blanca, *Convención interamericana sobre Derecho aplicable a los contratos internacionales*, in *El Derecho internacional privado interamericano en el umbral del siglo XXI*, Diego FERNANDEZ ARROYO (Org.) Ed. Eurolex, Madrid, 1997, p. 104.

130. After an exhaustive review of German law and jurisprudence, the conclusion was that a German judge has no obligation to use the mandatory rules of third countries; only the mandatory rules of EU member countries must be honored, given Art. 7.I of the 1908 Rome Convention, according to BECKER, Michael, *Zwingendes Eingriffsrecht in der Urteilsanerkennung*, in *RabelsZ* 60 (1996), p. 737.

American countries are complex assertions, we need to examine in detail the national IPrL rules and the general conventions on international trade in goods in effect in these countries in order to verify those assertions.

1. Examination of Some Autonomous National IPrL Rules in the Americas

It is interesting to note that, with the exception of the United States^{131/} and Canada, there are few national rules of International Private Law that specifically address consumer protection in the countries of the Americas. As for Quebec's IPrL, developed in the 1991 Civil Code, it is interesting to note its methodological updating, because it provides various open rules (Art. 3076), recognition of mandatory provisions of another State (Art. 3079), a strict public order when the practical result of applying the foreign law is consistent (Art. 3081) and a general escape clause (Art. 3082).^{132/} It also has a specific rule for consumer contracts (Art. 3117),^{133/} allowing contractual autonomy, but considering the mandatory rules of the forum to be required under circumstances identical to those in Art. 5 of the Rome Convention and indicating, in the absence of a chosen forum, the law of the consumer's residence as being applicable.

The Civil Code of Quebec also has a specific rule for accidents involving products (Art. 3128), establishing that the victim (there is no mention of the term consumer) may choose between the law of the state where the product's manufacturer has his establishment or residence and the law of the State where the product was purchased, besides considering its IPrL rules mandatory for any damage suffered in Quebec or resulting from a raw material originating in Quebec (Art. 3129).

In Latin America, the 1855 Civil Code of Chile, amended in 1996, does not contain any special rule on consumer protection in IPrL.^{134/} Mexico's IPrL rules also make no particular mention of consumers.^{135/} Colombia's Consumer Protection Statute dates from 1982 (Dec. 3.466, December 2, 1982),^{136/} but its Civil Code of 1873, in Art. 20 on the law applicable to contracts and goods, does not mention the consumer.^{137/} As reported by the German legal scholars, until 1999 they were no special consumer protection laws in the Private International Law of Ecuador,^{138/} Costa Rica,^{139/} El Salvador,^{140/} Guatemala,^{141/} Nicaragua,^{142/} Panama,^{143/} Peru,^{144/} and Honduras.^{145/}

131. See Art. 3545 on *product liability* and Art. 3547 on *conventional obligations* in the new Louisiana law, Law 923 of 1991 (published in its entirety in IPRACTICE 1993, p. 56 et seq.), in KROPHOLLER, Jan, KRÜGER, Hilmar, RIERING, Wolfgang, SAMTLEBEN, Jürgen, SIEHR, Kurt, *Aussereuropäische IPR-Gesetze*, Max-Planck-Institut, Hamburg, 1999, p. 1002 et seq.

132. See text in DOLINGER, Jacob, and TIBÚRCIO, Carmen, *Vade-Mécum de Direito Internacional Privado*, Ed. Renovar, Rio de Janeiro, 1994, pp. 297-298.

133. See text in DOLINGER, *Vade Mecum*, pp. 297-298

134. According to KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 174 et seq.

135. Civil Code Reform was established by Decree of December 11, 1987, reproduced by DOLINGER, *Vade Mecum*, p. 393.

136. Law published in its entirety, in Brazil, in *Revista Direito do Consumidor*, vol. 27 (1998), pp. 228-239.

137. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 414.

138. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 210 et seq.

139. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 204 et seq.

140. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 228 et seq.

141. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 268 et seq.

142. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 608 et seq.

143. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 620 et seq.

Venezuela's consumer protection law dates from 1995.^{146/} The new Venezuelan law on Private International Law came later and dates from 1998, but its 64 articles make no specific mention of consumer protection, despite mentioning several times the "general principles of International Commercial Law." Even so, the new Venezuelan law includes updated rules on the application of mandatory national rules (Art. 10), on the equitable connection for the specific case (art. 7) and, in particular, it provides a rule favoring the victim in the case of accidents or illegal acts, which may benefit consumers (Art. 32).^{147/}

The situation is no better in the Mercosur member countries. In Paraguay, the consumer protection law dates from 1998,^{148/} and its 1985 Civil Code mentions nothing about consumers and, in the area of contracts, indicates that the applicable law is the law of the place where the obligation is executed (Art. 17).^{149/} Uruguay's consumer protection law dates from 1999,^{150/} and its 1868 Civil Code, amended in 1994, indicates the law of the place of execution as the applicable law for relations involving obligations (Art. 2399) and the Montevideo Treaties of 1889.^{151/} Brazil's IPrL rules are rigid and old, make no mention of the consumer, and provide only a broad law on the public order (Art. 17 of the Introductory Law to the Civil Code, LICC/42). In contractual matters, despite the efforts of legal scholars, the current rules make contractual autonomy virtually impossible.^{152/} Applicable in this case is the *lex loci celebrationis* (first paragraph of Art. 9 of the LICC/42: "*Obligations shall be governed by the law of the country where they were established*"). The rule of Art. 9§ 1 LICC/42 imposes cumulative application of the Brazilian law in terms of form, in the case of execution in Brazil. The rule in Art. 9§ 2 of the LICC/42 is used to identify the place of the offer in contracts between distant parties or from a distance, like the majority of international contracts nowadays. According to §2 of Art. 9, "*the obligation resulting from the contract is deemed to be established in the place where the party proposing the contract resides,*" thus establishing the application of the law of the residence of the supplier to govern contracts between absent parties, even consumer contracts, such as contracts concluded via computer, in electronic consumer commerce, or in time-sharing or multi-property contracts. In the area of accidents involving defective goods and services, the applicable rule is also Art. 9, now interpreted as the *lex loci delicti*, the law of the place where the illegal act was committed or the law of the place where the damage and its consequences occurred.^{153/}

144. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 664 et seq.

145. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 268 et seq.

146. Published in its entirety, in Brazil, in *Revista Direito do Consumidor*, vol. 26 (1998), pp. 307-327.

147. See Decree 36.511, of August 6, 1998, in KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, pp. 958-995.

148. Law 1.334, October 27, 1998, to be published in its entirety, in *Revista Direito do Consumidor*, vol. 30 (1999), pp. 247-255

149. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 638.

150. Law 17.189, of September 20, 1999, published in its entirety, in *Revista Direito do Consumidor*, vol. 33 (2000), pp. 262-270.

151. KROPHOLLER/KRÜGER/RIERING/SAMTLEBEN/SIEHR, p. 910.

152. On all this, see ARAÚJO, p. 108. On the dispute regarding contractual autonomy in Brazil and various Latin American countries and the contribution made by CIDIP and the Hague Conventions, see BOGGIANO, *The Contribution*, p. 132 et seq.

153. On this Brazilian version of the German theory of ubiquity and the theoretical criticisms of these rigid connections, see MARQUES, Claudia Lima, *Novos rumos do Direito Internacional Privado quanto às*

Argentine theory always suggests more protective special rules for consumer relations, particularly for adhesion contracts.^{154/} As for the contractual arena, which is what most interests us, the national or autonomous rules of Argentine IPrL are found in Arts. 1205 to 1214 of the Civil Code and there are no special rules for consumer protection, but the new constitutional mandate should “illuminate” the application of these rules.^{155/} Articles 1209 and 1210 provide for the application of the *lex loci executiones* and *lex loci celebrationes*, but theory notes that, from a traditional perspective, the first connection will generally indicate as applicable the law of the supplier, who provided the principal characteristic performance, i.e., performance not linked to the payment of money by the consumer, establishing “unjustified” privilege for the supplier.^{156/} The second connection benefits the application of the law of the place of “signing” of the contracts, often leading to application of the Argentine *lex fori*, but leaves unprotected the tourist consumer and the consumer who contracts at a distance or through electronic means, situations that are increasingly more common these days.^{157/} The theory then suggests that the consumer may choose between the “law of the place where the good is purchased,” which would be especially important in the two cases mentioned, and a connection for a law more favorable to the consumer, as well as the development of rules similar to Art. 5 of the 1980 Rome Convention.^{158/} As for illegal actions against consumers, in Argentina the traditional connection is also the *lex loci delicti* (Art. 43 of the 1980 Montevideo Treaty), understood as the law of the place where the criminal action occurs (*lex loci actus*), but it is already subject to severe criticism and it is suggested that, in consumer relations, the law of the habitual residence of the injured party could be used, a solution similar to that of the 1973 Hague Convention.^{159/} Some theorists suggest that the consumer victim can choose between the law of the place where the person to whom responsibility will be attributed has their principal establishment and the law of the place where the good was purchased.^{160/}

While national legislation is still lacking in this sector, in IPrL theory the topic of consumer protection is increasingly included as the subject of a new focus in Private International Law.^{161/} There is nearly unanimous agreement among legal scholars regarding the need for special protection for the consumer in international consumer relations as well and in the regional decision in favor of the consumer. Contractual autonomy is not an appropriate rule if one of the parties is weaker, as in the case of contracts concluded with consumers.^{162/} Thus, harmonization of the IPrL rules through

obrigações resultantes de atos ilícitos (em especial de acidentes de trânsito), in Revista dos Tribunais, São Paulo, vol. 629 (Mar/1988), p. 72 et seq.

154. According to the famous course at the Hague by BOGGIANO, *International*, p. 55 and *The Contribution*, p. 134 et seq.

155. TONIOLLO, p. 98.

156. TONIOLLO, p. 100.

157. Also noted by, TONIOLLO, p. 102.

158. TONIOLLO, p. 101, 102 and 107.

159. TONIOLLO, p. 108 and 110.

160. Suggested by TONIOLLO, p. 110.

161. BOGGIANO, *The Contribution*, p. 139, TONIOLLO, p. 94 et seq., MARQUES, Cláudia Lima, *Direitos do Consumidor no Mercosur: Algumas sugestões frente ao impasse*, in Revista Direito do Consumidor, São Paulo, vol. 32 (1999), p. 16 et seq. BRILMAYER, p. 174, already included the topic “*The postulate of Consumer Sovereignty*” not to address consumer protection but to draw an analogy with the sovereignty of states’ decisions regarding which policies or interests they will protect in IPrL, along the lines of *Law and Economics*.

162. See BOGGIANO, *International*, p. 55 et seq. e BOGGIANO, *The Contribution*, p. 138.

Mercosur^{163/} and other international organizations is proposed.^{164/} In international civil procedure the challenges of economic globalization and regionalization are also calling for an effective response to protect weaker parties with privileged jurisdictions and alternative mechanisms for resolving disputes.

2. Examination of Some General Conventions on International Trade in Goods and Consumer Protection

Here it is important for us to remember that the large conventions on international trade also sought to exclude contracts entered into with consumers for domestic, family, or non-professional use from the sphere of application of their rules.^{165/} This is true of the 1986 Hague Convention^{166/} on the Law Applicable to Contracts on the International Sale of Goods (Arts. 2(c) and 5(d))^{167/} or the 1980 U.N. Convention on Contracts for the International Sale of Goods, known as the 1980 Vienna Convention^{168/} (Art. 2(a) and Art. 5).^{169/} This is either to avoid conflicts with national laws considered part of the international public order,^{170/} or because the differences in consumer protection are always weighted in favor of the industrialized countries and first world exporters.^{171/} The truth is that the subject has never been addressed directly in conventions unifying substantive rules, not even in a model UNIDROIT or UNCITRAL law,^{172/} nor has it been the subject of a CIDIP or Hague Convention.^{173/} The U.N. resolutions alone have provided inspiration for national laws.

163. See TONIOLLO, p. 97.

164. BOGGIANO, *The Contribution*, p. 138, works with the possibility of general provisions through the Hague Convention or regional provisions through the OAS.

165. According to HARGAIN/MIHALI, p. 506.

166. This is an update of the 1955 Convention. On the limited acceptance of these conventions among States, but their enormous importance as legislative models, see ARAÚJO, p. 124 et seq.

167. In the original: “*Art.2. The Convention does not apply to:c) sales of goods bought for personal, family or household use; it does, however, apply if the seller at the time of the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use. Art. 5. The Convention does not determine the law applicable to ...d) the effect of the sale in respect of any person other than the parties.*”

168. On the importance and acceptance of this convention in the countries of the Americas, see ARAÚJO, p. 127 et seq.

169. In the original: “*Art. 2. This Convention does not apply to sales: a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use.*”

170. According to GARRO/ZUPPI, p. 81: “*The principal reason for excluding consumer sales from the sphere of application has been to avoid a potential conflict between the rules of the Convention and public order laws on consumer protection. In recent years, special consumer protection legislation has been incorporated in many legal systems, including some Latin American countries such as Mexico.*” As noted in HARGAIN/MIHALI, p. 507.

171. According to HOFFMANN, p. 396, KROPHOLLER, p. 636, BOTANA, p. 9 and HARGAIN/MIHALI, p. 506, citing the opinion of Libbe.

172. The model UNCITRAL law (which actually deals with international trade) on electronic commerce expressly states that it does not override any rule of law intended to protect consumers and seems to want to exclude consumer contracts entered into via computer from its sphere of application with the language: “*Art. 1. Sphere of application – This Law * applies to any type of information in the form of a data message in the context of commercial activities.* This Law does not override any rule of law intended for the protection of consumers.*”

173. The 1980 Hague draft is mentioned. See VON MEHREN, Arthur, *Law applicable to certain consumer sales, Texts adopted by the Fourteenth Session and Explanatory Report*, Ed. Permanent Bureau of the

It is interesting to note that many countries in the Americas are signatories of the 1980 Vienna Convention on the International Sale of Goods.^{174/} This Convention prepared by UNCITRAL is one of the greatest successes in efforts to unify international trade rules. It focuses entirely on sales contracts between traders and tries to exclude from its sphere of application international contracts between consumers and suppliers of goods,^{175/} even though its exceptional application to such contracts is possible.^{176/} This is because Art. 2 of the 1980 Vienna Convention provides that: *This Convention does not apply to sales: a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use.* Thus, if an attorney in Chile uses his office letterhead to order a desk for his computer at home from a factory in Argentina, the Argentine manufacturer may believe that the product is to be used for the client's work and thus the Vienna Convention would apply to govern this sale.^{177/} This involves an exception linked to the principle of reasonability, since it was reasonable and legitimate that the merchant would not know that his contractual counterpart was a consumer.^{178/} The danger of this possible application of uniform law to contracts concluded by consumers is, in the view of most scholars, that the Convention would have primacy, because it is uniform law, over any of the national consumer protection laws.^{179/} That is why I prefer here to emphasize the spirit of the Convention to exclude international consumer contracts as a way to effectively protect national consumers in international trade. This spirit is a good indication of the difficulty of dealing in the same convention, or in internal law, with international trade between professionals and international consumer relations between a professional and a lay person or consumer. The legal treatment of relationships between equals cannot be the same as the legal treatment of relationships between those who are not equal, between professionals and lay persons, between the strong and the weak. This was precisely the central idea of the 1980 Hague Draft, which was superseded by the European Conventions and internal amendments in the industrialized countries, but not in the Americas.^{180/}

Hague Conference, 1982, p. 6. This draft sought to supplement the 1955 Hague Convention on the law applicable to international trade in goods, but this never happened because the draft, completed in 1980, was not approved and was superseded by the EEC's Rome Convention signed in the same year, Article 5 of which covers the same subject.

174. As of 1995, the following Inter-American countries had ratified the Convention: Argentina, Chile, Ecuador, Canada, Cuba, Mexico and the United States, and Venezuela had signed it. See SCHLECHTRIEM, Peter, *Internationales UN-Kaufrecht*, J.C.Mohr, Tübingen, 1996, pp. 225-226. For updated data, see: www.un.org/Depts/Treaty/bible/Part_I_E/X/_X_10.html

175. We use the verb "try" since application of the Vienna Convention to consumer contracts has been demonstrated, in agreement with German law, with respect to special laws on consumer credit, contracting outside a commercial establishment and liability for defective products, according to a doctoral thesis by WARTEMBERG, Konrad W., *CISG und deutsches Verbraucherschutzrecht: Das Verhältnis der CISG insbesondere zum VerbrKrG, HaustürWG und ProdHaftG*, Nomos Verlag, Baden-Baden, 1998 pp. 101-104.

176. According to SCHLECHTRIEM, Rdn.23-32, particularly p. 19.

177. Example adapted from the one cited by SCHLECHTRIEM, p. 19.

178. According to HARGAIN/MIHALI, p. 506.

179. On European theory's unanimity regarding this primacy, see WARTEMBERG, p. 19.

180. Note that the connections provided by the 1980 Hague draft were: contractual autonomy (Art. 6(1)), but the law chosen by the parties could not deprive the consumer of protection afforded him by the mandatory laws of the country of his habitual residence (Art. 6(2) of the draft), conditions relating to the existence, validity and forms of agreement would be governed by the law of the country of the

Europe's experience in over more than 40 years of efforts to harmonize substantive rules and unify IPrL rules and Article 2 of the 1980 Vienna Convention lead us to conclude that, both regionally and globally, consumer protection was always a topic to be separated from regular international trade and addressed in IPrL with more secure, predictable and positive connections for the weaker economic agent. I conclude, therefore, that it appropriate for the OAS to draw up a CIDIP convention on this subject.

II – On the Need for an Inter-American International Private Law Convention on the Law Applicable to Certain Contracts and Consumer Relations

“The Americas deserve a prominent place in the history of the codification of Private International Law”^{181/} starting with the initiative of Simon Bolívar in 1826,^{182/} and to paraphrase the Brazilian expert Rodrigo Octavio,^{183/} “it surely holds first place in official efforts” to develop rules protecting the specific interests of consumers, at least nationally, in the United States, Canada and Mexico, as we shall see below. In Private International Law, no region has made such extensive codification efforts as the Americas, with the nine Montevideo Treaties (1888-1989), the Bustamante Code of February 20, 1928, and the Inter-American Conferences on Private International Law since 1975 (CIDIPs).^{184/} In the area of consumer rights, European regional efforts are the most famous and productive, perhaps due to the supranational integration model chosen, with conventions on the law applicable to contracts (1980 Rome Convention) and jurisdiction (1968 Brussels Convention), with special rules and connections for consumers, that ultimately superseded the strict limits of the EU Member States and today unite practically the entire region through the parallel conventions. However, it seems to us that now is the time to change this situation and defend the need for and appropriateness of an Inter-American Convention on Private International Law on the Law Applicable to Certain Contracts and Consumer Relations.

1) Lack of Special Rules on Consumer Transactions and Contracts in the Inter-American System: the Consumer, a Forgotten Agent?

consumer's habitual residence at the time of declaration. (Art.6(4)), in the absence of choice made by the parties, the applicable law would be the law of the country of the consumer's habitual residence (Art. 7 of the draft), the ability of the parties and the effects of the contract would not be governed by the *lex contractus* and would be treated as separate issues (Art. 9) and the public order exception, see VON MEHREN, Arthur, *Law applicable to certain consumer sales*, Texts adopted by the Fourteenth Session and Explanatory Report, Ed. Permanent Bureau of the Hague Conference, 1982, pp. 2-3. The definition of the consumer (Art. 2) and the exclusions (Arts. 4 and 5) from the draft are no longer current today, even though in a more detailed review of the 1980 draft we find many of the elements desirable as of today in the area of effective consumer protection in IPrL

181. Rodrigo OCTAVIO, p. 218.

182. OCTAVIO, p. 219 et seq.

183. Paraphrasing Rodrigo OCTAVIO, p. 218: “The Americas deserve a prominent place in the history of codification of International Law, and it surely holds first place in official efforts for work of this type.”

184. According to Jayme, Cours, p. 65. See also FERNANDEZ ARROYO, *La Codificación*, p. 69 et seq.

Globalization, the approximation of markets, the integration of markets, openness to foreign goods and services, and the international nature of private relations are, according to current theory, the great challenges of consumer law.^{185/}

As clearly expressed by Jean-Michel Arrighi, the consumer is the “forgotten protagonist.”^{186/} In the Inter-American treaties as well in those on integration such as the 1980 LAIA Treaty or Mercosur’s 1991 Treaty of Asuncion, the word “consumer” is not found.^{187/} Nor does the subject of consumer protection merit any special attention in any of the CIDIPS signed to date, as their subject matter focuses on law relating to international trade between professionals, accidents not involving defective products, the protection of minors, family and inheritance rights, the general area of Private International Law and International Civil Procedure.^{188/}

To date the OAS has formulated CIDIPs on bills of exchange, checks, letters rogatory, evidence, power of attorney and representation, commercial companies, awards, precautionary measures, proof and information of foreign law, domicile of natural persons, general rules of IPrL, adoption of minors, legal status, jurisdiction, support obligations, international transport, return of children, international contracts, and traffic in minors.^{189/}

On the other hand, while we have the European Union’s example of success in harmonizing the substantive rules on consumer protection and covering many of the subjects mentioned above, in contrast, the approach in the Americas has been more than a “negative” integration on the subject. NAFTA, for example, has not legislated on the subject,^{190/} perhaps due to the already good level of consumer protection in the more developed countries, with the tendency to use the *lex fori* even for tourists and to choose their own law in international contracts. The gap in the other integration organizations in the Americas is perhaps due to the limited importance of the subject in economies that are less developed or still developing their markets. Also to be considered is the failure^{191/} or at least the current impasse in efforts to harmonize the substantive rules of Mercosur,^{192/} indicating the minimal interest regarding the idea of protecting weaker parties in the policy of some governments,^{193/} particularly when—in theory—compared to the economic interests of trade

185. Also in MACEDO JÚNIOR, pp. 45-53.

186. ARRIGHI, p. 126.

187. ARRIGHI, p. 126.

188. On this subject, see Carmem TIBÚRCIO, in CASELLA/ARAÚJO, p. 49 et seq.

189. DREYZIN DE KLOR, Adriana, *El Mercosur- Generador de una nueva fuente de derecho internacional privado*, Ed. Zavalía, Buenos Aires, 1997, pp. 242-244.

190. On the subject of the “negative form of integration,” that only eliminates discrimination and barriers to trade, see the critique of the Mexican Gustavo VEGAS-CANOVAS, in LUSTIG, Nora, BOSWORTH, Barry and LAWRENCE, Robert, *North American Free Trade - Assessing the Impact*, The Brookings Institution, Washington D.C., 1992, pp. 200 and 201, who would like to see integration more in the style of the European Union with a “positive form of integration,” with legislation to protect populations.

191. The expression comes from FERNANDEZ ARROYO, Diego P., *La nueva configuración del Derecho Internacional Privado del Mercosur: Ocho respuestas contra la incertidumbre*, in *Revista de Derecho del Mercosur*, Buenos Aires, year 3, no. 4, August 1999, p. 51.

192. As I stated in *Revista Direito do Consumidor*, São Paulo, vol. 32 (1999), p. 16 et seq.

193. Also in MOSSET, ITURRASPE, Jorge and LORENZETTI, Ricardo Luis, *Defensa del Consumidor-Ley 24.240*, Ed. Rubinzal-Culzoni, Buenos Aires, 1994, p. 17, stating that: “Some sectors want to see in “consumer protection” an “attack on the businessman” and consider it “incompatible” with a market

liberalization and increased exports, even of products of lesser quality and safety. Harmonizing (or even more unifying) substantive consumer protection rules is a difficult theoretical task that requires a clear mandate in terms of the objectives to be reached and the level of protection desired (“third-world” or international). It is a task that requires legitimacy to legislate and bring about the incorporation in national law of the substantive rules that are developed. This is a task that, for example, Mercosur has not been able to achieve and that the European Union has successfully achieved over the last 40 years.

The same reality also applies in the Inter-American countries with respect to procedural rules seeking to ensure special procedural rights for consumers or provide them easier access to justice in international cases. While in Europe there are special procedural directives^{194/} and an “Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market” was developed,^{195/} in the Americas national rules providing special jurisdiction in the case of international consumer contracts or ensuring free access to special small claims courts or quicker and less expensive (international) consumer conflict resolution mechanisms are rare. We note that these international issues may be considered highly complex because they involve rules of Private International Law. The cost of litigating in foreign countries and in cases involving the application of foreign law can be high, limiting consumers’ willingness to claim their rights or have recourse to the justice system. Existing international private law and international civil procedure conventions, like the CIDIPs, Mercosur’s Legal Cooperation Protocols and the Bilateral Cooperation Treaties, did not formulate special rules to protect consumers in the region^{196/} and the few drafts that were actually drawn up never took effect.^{197/}

There is a certain degree of consensus in Brazilian and Argentine theory that it is unnecessary and inappropriate for Mercosur to redo or reformulate on a regional basis all the subjects already covered in the CIDIPs and that it would be better and more appropriate to use these CIDIPs and that they be ratified by all the Mercosur member countries.^{198/} Thus, the importance of examining CIDIP V. If CIDIP V on international contracts, following the model of the EU’s 1980 Rome Convention, had provided some special rule for international consumer contracts, a special convention on the subject would not be necessary. Unfortunately, Art. 5 of CIDIP-V on international contracts does not

economy to protect the consumer” concluding, on p. 19, that: “in the more advanced countries the consumer is defended,...the consumer of goods and services is protected and companies are controlled. Absolute freedom, *laissez faire*, is not suited to the post-industrial stage or ‘technical civilization.’ This is a version for export, arising from the most extreme circles of liberalism...”.

194. See Directive 98/27/CE on inhibitory actions in the area of protecting consumers’ interests, discussed by BOTANA, p. 8.

195. COM 96, 13 final, February 14, 1996, discussed by BOTANA, p. 7-8.

196. See SIQUEIROS, p. 159 et seq.

197. An example of these good efforts that never took effect is the Santa Maria Protocol drawn up by the Meeting of the Ministers of Justice of Mercosur in 1996. Currently under study are the amendment of its text (Acta 01/2000 RMJ), the inclusion of new members, Bolivia and Chile, and the development of a totally new treaty. See my critique, *Revista Direito do Consumidor*, São Paulo, vol. 32 (1999), p. 16 et seq.

198. According to FERREIRA DA SILVA, p. 199 and NOODT, p. 134. Other quite critical comments appear in FERNANDEZ ARROYO, p. 49 and GHERSI, Carlos Alberto and LOVECE, Graciela, *Contrato de tiempo Compartido (Timesharing)*, Editorial Universidad, Buenos Aires, 2000, p. 105.

expressly exempt consumer contracts, nor have any of the countries that ratified it made any special statement on the subject.^{199/} This gap in the Inter-American system merits more detailed study.

2) 1994 Mexico Convention (CIDIP-V) on the Law Applicable to International Contracts in Comparison with the European System of Consumer Protection in These Contracts

The 1994 Mexico Convention (CIDIP-V) on the Law Applicable to International Contracts does not mention the word consumer. It is true that when signing, adhering to or ratifying the Convention, the States Party may, as expressly authorized by Article 1 of CIDIP-V "*declare the categories of contract to which this convention shall not apply*" (Art. 1, fourth paragraph). For example, they may declare that CIDIP V does not apply to contracts between traders and lay consumers, but this declaration means less protection and is generally forgotten by the States when they ratify the Convention,^{200/} which is essentially concerned with international trade, and thus presupposes excluding trade involving consumers.^{201/}

It would have been better if the original proposal of SIQUEIROS to expressly exclude contracts concluded with consumers had not been eliminated.^{202/} Not to have dealt with the subject in 1994 in a special rule, particularly in view of Europe's successful experience, was a great lost opportunity^{203/} that can only be remedied with a new special convention. Thus, the subject would definitely be excluded from the sphere of application of CIDIP V.

In effect, the connections chosen by the 1994 CIDIP-V are more suited to international relationships between traders; they are current connections such as contractual autonomy (Art. 7 of CIDIP-V), flexibility (like the ability to select a new applicable law, changing the previous one, Art. 8, and *dépeçage*, Art. 7)^{204/} and even open (like the open-ended rule in Art. 9 indicating as applicable,

199. "Art. 5. This Convention does not determine the law applicable to: a) questions arising regarding the marital status...; b) contractual obligations intended for successional questions, testamentary questions, marital arrangements or those deriving from family relationships; c) obligations deriving from securities; d) obligations deriving from securities transactions; e) the agreements of the parties concerning arbitration and selection of forum; f) questions of company law..." See OAS/Ser.K/XXI.5, CIDIP V/Doc. 46/94, vol. I, 1996, p. 29.

200. The record indicates that Mexico and Venezuela did not make use of this declaration to exclude consumer contracts, see HERNANDEZ-BRETON, Eugenio, *Internationale Handelsverträge im Lichte der Interamerikanischen Konvention von Mexico über das auf internationale Verträge anwendbare Recht*, in IPRACT, 1998, p. 378 et seq.

201. The CIDIP-V text is as follows: "*Art. 5. This Convention does not determine the law applicable to: a) questions arising from the marital status...; b) contractual obligations intended for successional questions, testamentary questions, marital arrangements or those deriving from family relationships; c) obligations deriving from securities; d) obligations deriving from...securities transactions; e) the agreements of the parties concerning arbitration and choice of forum; f) questions of company law...and juridical persons in general. Art. 6. The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention.*"

202. As noted by NOODT, p. 126.

203. Also noted by NOODT, p. 132.

204. The text of the CIDIP-V Convention is as follows: "*Art. 7. The contract shall be governed by the law chosen by the parties...Said selection may relate to the entire contract or a part of same. Art. 8. The*

in the event there is no effective choice of law, the law of the State with which the contract has the *closest ties*).^{205/} The ability to choose the law is broad, with no guidance and CIDIP V requires no “reasonable contact” of the law selected by the parties.^{206/}

This open and updated technique of IPrL made it difficult for Brazil to ratify the Convention^{207/} in the case of Mercosur. While this fact is not important from a regional perspective, it should be emphasized that this technique was never used, not even in Europe, where despite the 1980 Rome Convention’s being supplemented by a series of IPrL rules with specific topics in the new Directive, none of them accepted unlimited contractual autonomy in consumer contracts or changing the law (fictitious or real) through a declaration of the desire of the parties. There is always a spirit of minimum protection of the consumer provided by the mandatory laws of his or her country of residence or domicile, the use of an open connection favoring the consumer to allow the judges of the forum (possibly selected as well) to determine which law has the “closest ties” or is more favorable to the consumer’s interests, or rigid, classical and subjective connections, with a clear purpose of protecting the weaker economic agent, with the connection in the consumer’s habitual residence.

The European Union has always been concerned with ensuring a system of transactions in the internal market that would make it possible for these “international-integrated” negotiations and contracts to guarantee security and suitability for consumers. The free movement of goods, services, capital and persons allows these transactions to multiply and the objective of the policy of consumer protection is to allow these transactions to occur in the best way possible.^{208/} We emphasize that the significant 1980 Rome Convention introduces in European Community IPrL a special uniform rule for consumer protection, namely Art. 5. This convention prescribes the special consumer protection IPrL for all 15 EU countries and today for the countries of the European Economic Area, plus some countries like Switzerland. According to Art. 2, European national judges must also use it with respect to third countries, i.e., countries not signatory to the 1980 Rome Convention, effectively establishing its self-executing, uniform and universal nature.^{209/}

parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not effect the formal validity of the original contract nor the rights of third parties.”

205. The text of the CIDIP-V Convention is as follows: “*Art. 9. If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties. The court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations. Nonetheless, if a part of the contract were separate from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract.*” See details in NOODT, p. 94.

206. In NOODT, p. 94.

207. In ARAÚJO, p.188. FERREIRA DA SILVA, p. 194 et seq., NOODT, p. 96.

208. According to Commission member VANDEN ABEELE, M., *Orientations de la politique communautaire de protection des consommateurs*, in FALLON/MANIET (Coord.), *Sécurité des produits et mécanismes de contrôle dans la Communauté européenne*, CDC/Institut Universitaire Européen de Florence-Story Scienza, Bruxelles, 1990, p. 273.

209. In KILLIAN, Wolfgang, *Europäisches Wirtschaftsrecht*, Beck Verlag, Munique, 1996, p. 319, classifies European uniform IPrL.

Note that the European Economic Community, today the EU, preferred not to use the expression “international contract” in its specific convention, the Rome Convention of June 19, 1980.^{210/} This Convention governs the law applicable to “contractual obligations,” and applies both to obligations of an internal nature and to those of an international nature, pre- and post-contractual obligations that were categorized as “contractual” in nature and fall within its sphere of action.

The special rule for consumer contracts, different from the general law on contractual autonomy for commercial international contracts, appears in Art. 5 of the 1980 Rome Convention.^{211/} Art. 5 of the Rome Convention establishes that the selection of a law to govern a consumer contract, i.e., the connection in contractual autonomy, may not exclude the application of mandatory protection laws of the country of the consumer’s habitual residence, if a) the offer, advertising or some action to conclude the contract occurred in that country; b) if the supplier or his agent received the order for or concluded the contract in the country of the consumer’s habitual residence; c) if the sale of goods is involved and the consumer travels to purchase these products, but the trip was organized by the supplier for the purpose of obtaining a contract, as clearly expressed in Art. 5.2 of the 1980 Rome Convention on the law applicable to contractual obligations.^{212/} As the objective connection most favorable to the consumer, the convention gives preference to the law of the country where the consumer has his habitual residence as the rigid connection (Art. 5.3 1980 Rome Convention), in the absence of an express choice of law.^{213/} This rule will protect even tourists, if there was no selection of law in the contract.^{214/} These rules are quite wise and were, despite 20 years of application, maintained in the current suggestions on amending the Convention in regulations. It is true that special IPrL rules for consumer protection in special contracts were included in the new Directives (our next subject) and that the new Council Resolutions require greater protection for the tourist consumer and protection for the consumer who contracts through electronic methods or at a distance.

We must also emphasize that the Rome Convention on the law applicable to contractual obligations of October 9, 1980 included transport contracts, but honors other international conventions existing on the subject, such as conventions on air, rail, maritime transport, etc. And, on

210. We know that defining the category of “international” contracts is not easy. Truthfully, contracts are “national,” always tied to a state law or a convention or international agreement (PEREIRA, José Edgard Amorim, “Contrato Internacional do Comércio,” in: *Revista de Direito Civil*, no. 47, p.7). It is each State’s rules of International Private Law that indicate the points of connection, of a contract’s ties to a legal system, ties that are sufficiently strong to determine the law applicable to the contract and to its various related issues (capacity, form, etc). Therefore, what we call international contracts would be contracts relevant for the rules of Private International Law (Georgette NAZO, *Tipificação dos Contratos Internacionais*, in: *RT* 564, p. 27). The most famous international conventions tried to avoid uncertain terminology, clearly defining their sphere of application. Thus, the 1980 Vienna Convention on the International Sale of Good defines in Art. 1 the sales governed by the convention as those executed between persons domiciled or headquartered in different countries. Thus, the will of the parties, choosing a foreign law or foreign forum, is prevented from turning a “domestic contract” into an “international contract.” On the other hand, this definition, disregards as an important element in determining a contract’s “internationality” the place where the contract is performed.

211. See text of Art. 5 reproduced earlier in this work.

212. JAYME/HAUSMANN, p. 116.

213. See BRÖCKER, p. 53, noting that in other relations the preference is for characteristic performance (Art. 4 of the Convention), which is not appropriate in the case of consumer contracts.

214. BRÖCKER, p. 53, who presents criticisms of this article and the suggestion of some German authors to opt for the law of the place of the “consumption market.”

the subject of passengers, the consumer protection rule in Art. 5 does not include “contracts of carriage” (Art. 5.4), but only trips combining travel with accommodations (Art. 5.5). What is applicable here is Art. 7 of the Convention providing for application of the mandatory rules of the law of the forum, also for the benefit of consumers.^{215/}

The 1980 Rome Convention will soon be transformed into an Internal EU Regulation,^{216/} since Private International Law (and International Civil Process) has come to be considered a subject for the subsidiary competence of the EU. Meanwhile, there are reports that their approval is being blocked by the British Government and will take some time yet.^{217/} The IPrL rules contained in the Directives complete the European IPrL system for consumer protection in international contracts.

The work of the Commission on reform of the 1980 Rome Convention is still not ready, but German IPrL theory already anticipates that it will cover only three subjects: 1. Inclusion of the rights of agents or representatives in the Convention’s scope, since Art. 1.2(f) of the Convention now excludes this; 2. Inclusion of the IPrL rules now contained in the Directives, particularly the consumer protection directives, like the new Art. 29a of the Introductory Law to the German Civil Code (EGBGB), and 3. Amendment of Art. 7 on immediately applicable rules (*Eingriffsnormen*) to consider IPrL advances in this area.^{218/} As we see, the reforms will be minimal, but will all have significant effects on the subject of consumer protection under discussion here, which is no doubt evident in the EU as well.

The consumer protection directives that contain IPrL rules are directly related to the planned reforms of Art. 7 of the Convention on the immediate application of the mandatory rules of the forum country and the country of the consumer’s habitual residence. The application of the mandatory rules of the forum shall remain unchanged (Art.7.2) but the reforms seek to make it clear that application of the mandatory rules of the country of the customer’s habitual residence must only occur if these rules, besides seeking to protect the individual’s interests, also represent the governmental interests of that State (draft Art.7.3).^{219/} This would be a reform more in the style of the current North American Restatement, which already seems to be happening in practice, and in the view of judges, with less impact. The important and indirect meaning of the reform is that it establishes a clear hierarchy or preference for Art. 7 over Arts. 5 and 6 of the Convention. The reform would give rise to the necessary hierarchy of initially applying Art. 7 of the Rome Convention and only later would the judge apply Art. 5, particularly with respect to consumers.^{220/} European theory has for some time been debating whether the judge should first take into account the forum country’s mandatory or immediately applicable rules (or international public order rules), substantive rules protecting the individual in general, and only later apply the rule “favoring the consumer,” Art. 5 of the Convention,

215. See BRÖCKER, p. 58 et seq.

216. JAYME, IPRACTICE 1999, p. 413. The proposed regulation to replace the Brussels Convention is already ready, COM (1999)348 final, published in its entirety in IPRACTICE 2000, p. 41 et seq.

217. Unofficial information published by editors, in IPRACTICE 2000, p. 164, V.

218. According to JUNKER, Abbo, *Empfehl es sich, Art. 7 EVÜ zu revidieren oder aufgrund der bisherigen Erfahrung zu präzisieren?*, in IPRACTICE 2000, p. 65.

219. As suggested by JUNKER, IPRACTICE 2000, p. 73: new “*Art. 7.(3) Eine Bestimmung, die ohne auf das auf den Vertrag anzuwendende Recht den Sachverhalt zwingend regelt, darf nicht nur dem Ausgleich oder dem Schutz privater Interessen dienen, sondern muss wesentliche politische, wirtschaftliche oder soziale Interessen des Staates schützen, desse innerstaatlichen Recht die Bestimmung angehört.*”

220. Conclusion reached in JUNKER, IPRACTICE 2000, p. 71.

which expressly imposes application of the mandatory rules of the country of the customer's habitual residence (generally also the forum country, in accordance with the Brussels Convention), if it is more favorable to the consumer in the consumer contract. The order and hierarchy of these articles is controversial and legal scholars are divided on the subject. Since Art. 7 is general and Art. 5 is specific, the latter should thus have preference in consumer contracting cases.^{221/} The reform would make it clear that Art. 7 is a sort of "preference for the weaker party" (including non-consumers), providing protection for individual rights,^{222/} and Art. 5 is particularly for consumers on the subjects it covers. Jurisprudential practice, at least in the German Federal Civil Court, has been the reverse: it only applies Art. 7 when Art. 5, which is special and therefore has precedence, fails to sufficiently protect the consumer or has gaps.^{223/} In particular, I consider this latter position more defensible, i.e., giving preference to the special rule of Art. 5 for consumer contracts and if this article proves to be inadequate, having recourse to Art. 7 of the Convention, in the current version. The reform will have to decide which is the best route for the EU. Still to be examined are the so-called "IPrL Directives."

JAYME/KOHLER points to five consumer protection directives that contain specific IPrL rules. These cover unfair terms in consumer contracts (Directive 93/13/EEC), time-sharing or multi-property contracts (Directive 97/47/EC), distance contracting (Directive 97/7/EC), guarantees (Directive 1999/44/EC) and electronic commerce (Directive 2000/31).^{224/}

The first consumer protection directive to contain specific IPrL rules was the 1993 directive on unfair contract clauses (Directive 93/13/EEC).^{225/} This Directive includes in Art. 6(2) a unilateral IPrL rule^{226/} that is often criticized because, unlike Art. 5 of the Rome Convention, it does not define what is understood by "close connection."^{227/} JUNKER considers Art. 6.2 to be international mandatory law in the sense of Art. 7.2 of the Rome Convention and that it should have priority over Art. 5.^{228/} Other authors criticize the directive because it protects the European consumer from application of the law of States not belonging to the EU, demonstrating a certain lack of confidence in the consumer protection laws of third countries, while the Rome Convention gave equal treatment to the laws of third countries and countries belonging to the EU or European Economic Area, only

221. This is the interpretation of the German government, which accepted Art. 5 in Art. 29 of the EGBGB (Introductory Law to the German Civil Code) and Art. 7 in Art. 34 of the EGBGB. See JUNKER, IPRACTICE 2000, p. 67. On the incorporation in the German EGBGB of the Rome Convention rules, see BRÖCKER, p. 34 et seq.

222. According to JUNKER, IPRACTICE 2000, p. 69.

223. See German BGH jurisprudence, from 1993 to 1997, in JUNKER, IPRACTICE 2000, p. 67. The same author indicates that, in the area of labor, which has a special worker protection rule in Art. 6 of the 1980 Rome Convention, the practice of the German Federal Labor Court (BAG) has been the reverse, giving preference to Art. 7 over Art. 6 of the Convention, in JUNKER, IPRACTICE 2000, p. 67. Criticism of the BGH's position of subsidiary application of Art. 7 is also found in EBKE, Werner F., *Schuldrechtliche Teileitwohnrechte an Immobilien im Ausland und kein Widerrufsrecht: Zum Ende der Alfälle*, in IPRACTICE 1997, p. 270.

224. JAYME/KOHLER, IPRACTICE 1999, pp. 411-413. Já JUNKER, IPRACTICE 1998, pp. 70-73 only discusses the directives on unfair clauses, time-sharing or multi-property contracts, and guarantees as belonging to IPrL, a position we do not adopt, since the directive on distance contracts is very important in the international protection of consumers, as now demonstrated by the special directive on electronic commerce.

225. JUNKER, IPRACTICE 1998, p. 70.

226. In Jayme, IPRACTICE 1999, p. 412, JUNKER, IPRACTICE 1998, p. 71 and BRÖCKER, p. 128.

227. See, on all this, BRÖCKER, p. 129.

228. In JUNKER, IPRACTICE 1998, p. 71.

connecting at the level of protection in the consumer's country of residence.^{229/} The text of the provision, freely translated [in original Portuguese document; translator cites verbatim the English version of the Directive], is as follows:

"Art. 6. (2) Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States."^{230/}

The acceptance or transposition of this IPrL rule derived from Directive 93/13/EC caused much controversy, but Germany, for example, amended its law on general contractual conditions (AGBGB) and removed the language of its IPrL rule in this law (§12 AGBG) and in the law on insolvency.^{231/} The new paragraph 12 in the law on general contractual conditions ended up having precedence—in the case of adhesion contracts—over Article 29 of the 1987 Introductory Law to the German Civil Code (Art. 29, EGBGB), which was specific to consumer protection and literally incorporated Art. 5 of the Rome Convention.^{232/} This diminished the scope of the aforementioned Arts. 5 and 29 of the EGBGB, both of which allowed the judge to choose the law that provided the "best protection to the consumer." (*Günstigkeitsprinzip*), a true "favor the consumer" rule, even though we know that the protection provided by the Directive is only minimum or standard and never intended to be best protection.^{233/}

The second Directive that introduced an IPrL rule was the one on time-sharing (Directive 94/47/EC). Art. 9 of that directive, also unilaterally (whereas Art. 5 of the Rome Convention is a bilateral and updated rule),^{234/} introduces protection not only for the buyer but also for other users^{235/} stating that:

"Art. 2. For purposes of this Directive:

- 'purchaser' shall mean any natural person who, acting in transactions covered by this Directive, for purposes that may be regarded as being outwith his professional capacity, has the right which is the subject of the contract transferred to him or for whom the right which is the subject of the contract is established."^{236/}

229. In BRÖCKER, p. 127.

230. JUNKER, IPRAX 1998, p. 71.

231. BRÖCKER, p. 131 e 174.

232. In JUNKER, IPRAX 1998, pp. 71-72.

233. In BRÖCKER, p. 132 and JUNKER, IPRAX 1998, p. 71. JAYME, IPRAX 1999, p. 412, also refers to Finland's text as the one that best preserves the balance between Art. 5 of the Convention and the Directive.

234. BRÖCKER, p. 135.

235. According to the critique by BRÖCKER, p. 133.

236. Official Spanish text, LETE, p.345. [English text cited via <http://www.clcmembers.co.uk/HTMLobj-172/eurpeantimesharedirective.pdf>]

“Art. 9 The Member States shall take the measures necessary to ensure that, whatever the law applicable may be, the purchaser is not deprived of the protection afforded by this Directive, if the immovable property concerned is situated within the territory of a Member State.”^{237/}

The incorporation or transformation of this Directive was also quite problematic^{238/} and the system became “excessive, unnecessary and complicated”^{239/} with the Directive on distance contracts. Article 12.2 of Directive 97/7/EC establishes the following unilateral rule^{240/} for the protection of European consumers:

“Art. 12 (2). The Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States.”^{241/}

This rule is criticized because it tries (and manages to) ensure worldwide protection for consumers through the imposition of a European standard, while the objective of the Rome Convention was to allow contractual autonomy and even so to ensure the best protection for European consumers.^{242/} Some scholars reach the conclusion that directives are not apt instruments for harmonizing IPrL rules.^{243/} The transposition of this directive as well as the time-sharing directive in Germany was also much criticized for including a new paragraph in the Introductory Law to the German Civil Code, Art. 29a of the EGBGB.^{244/}

It is interesting to note that in all the directives the consumer was always defined as a natural person acting outside of their profession, for private purposes, rather than as a professional.^{245/} There was theoretical discussion on correcting the contractual limit of protection granted by the directives. Note that the definition of “consumer” in the case of the 1990 Directive was always different, given the need to protect the final user of the service and the contracting party, which is supported by theory and should be taken into account in IPrL.^{246/} In addition, the Time-Sharing Directive, which still addresses a type of tourism, extends its protection to the user in general. This aptly demonstrates the

237. Official Spanish text, LETE, p. 348. [English text cited via <http://www.clcmembers.co.uk/HTMLObj-172/eurpeantimesharedirective.pdf>]

238. JAYME, IPRAX 1999, p. 412 notes that each country transformed it differently: Italy and Spain also provide the protection of the national law, if the immovable property is situated there; Luxembourg ensures the protection of its law, even if the immovable property is situated outside the EU and EEA; the Belgian law would prohibit selecting laws outside the countries that signed the Rome, Brussels, and Lugano Conventions.

239. In BRÖCKER, p. 136.

240. BRÖCKER, p. 136.

241. English text cited via www.spamlaws.com/docs/97-7-ec.pdf

242. In BRÖCKER, p. 138.

243. The general conclusion in BRÖCKER, p. 138 and JUNKER, IPRAX 1998, p. 74.

244. JAYME, IPRAX 1999, p. 406, asserting that the placement of Art. 29a was unfortunate, in that it impeded the use of Art. 36 on the interpretation of community rules.

245. In LORENZ, Werner, *Kollisionsrecht des Verbraucherschutzes: anwendbares Recht und Internationale Zuständigkeit*, IPRAX 1994, p. 429, excluding the “Private-Private” relationship or “consumer-consumer” relationship, given the sphere of application of the directives, always directed to the activities of professionals, suppliers.

246. Also in JUNKER, IPRAX 1998, p. 69.

limits of special rules, such as the rule of Art. 5 of the 1980 Rome Convention, which was accepted in Germany in the Introductory Law in 1987 (EGBGB) and after the IPrL rules in the aforementioned directives had to be eliminated, since it left without any special protection travelers in tourism packages who were not the contracting parties, the users of time-sharing or multi-properties who were not the original contracting parties, and contained other gaps. While the rule of Art. 5 of the 1980 Rome Convention has not yet been changed, there was a substantial change in the EGBGB with the introduction of a new special article to incorporate the IPrL rules of the new Directive, i.e., Art. 29a of the EGBGB. Whereas Art. 29 of the EGBGB was already considered complicated and not very “solid,”^{247/} the new Art. 29a is still more complicated and difficult, discriminates against extra-European laws and actually leads to application of supplemental European country law.^{248/}

While this new article of the Introductory Law to the German Civil Code is being criticized, it is true that the earlier incorporation of the 1980 Rome Convention was not proving to be adequate to protect tourists, as the cases of time-sharing and sale outside the commercial establishment, generally called the “Grand Canaries” cases, showed.^{249/} In any case, it was necessary to transform the numerous IPrL directives.

Finally, Directive 1999/44/EC on guarantees also introduces an IPrL rule, confirming the trend of new special and unilateral rules in each consumer protection directive.^{250/} Art. 7.2 on guarantees is similar to various earlier directives and establishes as follows:

“Art. 7. (2) Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States.”^{251/}

Note that Directive 2000/31/EC seeks to protect consumers and recognize the fact that an on-line transaction actually occurs in the destination country of the good or service, the consumer’s country and not in the country of origin of the good or service (Whereas No. 22), but it introduces a

247. As indicated by JUNKER, citing Christian von BAR, in IPRAX 1998, p. 68.

248. “Art. 29.a EGBGB. (1) If the law selected to govern a contract is not that of a Member State of the EU or European Economic Area, rules of laws that incorporated consumer protection directives (consumer protection laws on general contract conditions, distance contracts and time-sharing) are also applicable, when the contract has a close tie with one or more of the countries in the European Union (EU) or European Economic Area (EEA). (2) A close tie exists when: 1. The contract is concluded based on a public offer, advertising or similar business actions carried out in one of the States of the EU or EEA .2. The other party to the contract, upon declaring their will or accepting the offer, has a domicile in the countries of the EU or EEA. (3) The law on time-sharing is applicable to the contract, governed by a law of a country not a member of the EU or EEA., when the immovable property is situated in an EU or EEA State. (4) Consumer protection directives in the sense of this article are: 1. Directive 93/13/EEC...on unfair clauses; 2. Directive 94/47/EEA on time-sharing;3. Directive 97/7/EC on distance contracts.” Original text in German, translated freely, published in IPRAX 1999, p. [304] VII and in BGBL. Teil 1 No. 28, 29. Jun.2000, p. 901.

249. On cases that happened to German tourists in the Spanish islands, in Portugal but also in Turkey and Tunisia, see FIRSCHING/VON HOFFMANN, 376 (Rdn. 73).

250. In JAYME, IPRAX 1999, p. 412.

251. English text cited via http://europa.eu.int/eur-lex/pri/en/oj/dat/1999/l_171/l_17119990707_en00120016.pdf.

very complicated system of limits and exclusions. In summary, for consumers the general country of origin principle, country of the supplier, does not apply. In order to know which law applies to consumer contracts, we have to go to the general regime of Directives (unfair clauses, distance contracts, and guarantees), plus the 1980 Rome Convention. This is because the Directive expressly states in Art. 1.4: “*This Directive does not establish additional rules on private international law, nor does it deal with the jurisdiction of Courts.*”^{252/} According to prevailing theory on the Directive on distance contracts (and now electronic commerce),^{253/} advertising in the country of the consumer’s habitual residence is sufficient to establish the “closest connection”^{254/} and the requirements of Art. 5 of the Rome Convention and Art. 29 of the German EGBGB: the law of the country where the consumer resides shall apply!

As we see, the European rules place significant limits on contractual freedom in IPrL; they are special rules (*Sonderrechte*) that are very protective of consumers. Even so, the Council ordered they be eliminated and a greater degree of consumer protection be provided, particularly with respect to protecting the tourist consumer, also called the active consumer, and with respect to contracting in the information society or in electronic commerce.^{255/}

Returning to our examination of the 1994-CIDIP V Convention of Mexico, the conclusion is that none of its rules introduces the clarity of Art. 5 of the 1980 Rome Convention or the current European system, with special Directives for specific types of contracts. It is true that Latin American theorists are almost unanimous in considering that national consumer protection rules belong to the international public order and would, therefore, be excluded in the exception under Art. 11 of CIDIP V, thus avoiding any harm to regional consumers due to more “flexible” connections and the contractual autonomy allowed under other articles of the 1994 CIDIP V.^{256/} In effect, Art. 11 of the CIDIP seeks to temporize the situation, giving preference to the mandatory rules of the *lex fori*, as in the following text: “*Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties.*”^{257/}

Thus, if national consumer protection rules are generally considered in the Inter-American Countries to belong to the international public order, *lois de police* or mandatory rules of the “immediately applicable law” type, there would be no need for a convention on the subject, since the consumer domiciled in or native of a country would always be protected by the probable application of these rules. However, Art. 11 of CIDIP-V is not adequate for the effective protection of the weaker agent, due to the two reasons stated earlier: 1. It leaves the tourist consumer, who always buys “internationally,” without any special protection, since he will usually litigate in foreign fora, since the rule of Art. 11 of CIDIP only ensures the tourist the protection of the consumer protection law of

252. English text cited via <http://www.spamlaws.com/docs/2000-31-ec.pdf>.

253. According to THORN, Karsten, Verbraucherschutz bei Verträgen im Fernabsatz, in IPRAX 1999, pp. 4-5.

254. Along the same lines, see VON BAR, p. 323 (Rdn. 437).

255. As reported by JAYME/KOHLER, IPRAX 1999, p. 404.

256. On all this, see HERNÁNDEZ-BRETÓN, IPRAX 1998,384, also reporting the entry into effect of CIDIP V between Mexico and Venezuela on 1/14/1997, IPRAX, p. 379.

257. OAS/Ser.K/XXI.5, CIDIP V/Doc. 46/94, vol. I and II, 1996, p. 29. [English cited via http://www.oas.org/dil/CIDIPV_convention_internationalcontracts.htm]

the country he visited. If he litigates in his own country, he will be able to have the protection of his own substantive consumer protection laws. 2) It leaves the Inter-American consumer without any special protection when he contracts at a distance or through electronic commerce. This is because it is not certain that the mandatory or public order rules of the consumer's domicile will be applied when this is left "up to"^{258/} the judge of the competent forum, which is usually that of the supplier.

To conclude, the choices made in CIDIP V in the area of factors of connection and legislative technique, despite being up-to-date and consistent with the *lex mercatoria*, do not seem to me to be adequate and sufficient in the area of protecting consumers in the region.

Conclusion: Suggestion for a Future CIDIP Convention

The lessons learned from theory, from existing conventions on international contracts and the very *ratio* of the rule in Art. 11 in CIDIP-V, which seeks to give preference to local mandatory laws of the forum over the law selected by the parties, leads us to conclude that regionally (as well as globally) consumer protection was always a subject to be separated from normal international commerce and should be treated in IPrL with more secure, predictable and positive connections for the weaker agent. We repeat here NEUHAUS' famous phrase: "*Contractual autonomy in Private International Law loses its meaning—like contractual freedom in substantive law—and becomes an instrument whereby the stronger control the weaker.*"^{259/}

I conclude, therefore, that there is a need for the OAS to draw up a specialized convention on consumer protection, establishing factors of connection and special rules for this purpose. I take the opportunity of this study to propose that the Inter-American Juridical Committee (IJC/OAS) study the advisability of drawing up an Inter-American Convention on Private International Law with respect to certain consumer contracts and transactions. For this purpose, taking my inspiration from the small draft prepared for the 1980 Hague Convention^{260/} and the teachings of current theory, I submit some suggested rules for review.

PROPOSAL FOR CIDIP CONVENTION

258. OAS/Ser.K/XXI.5, CIDIP V/Doc. 46/94, vol. I and II, 1996, p. 29.

259. To repeat the lovely sentence in the original: "Die Parteiautonomie verliert ihren Sinn - ebenso wie die materiellrechtliche Vertragsfreiheit-, wenn sie zur Herrschaft des Stärkeren über den Schwächeren wird.", NEUHAUS, *Die Grundbegriffe des IPR*, 1962, p. 172 *apud* von HOFFMANN, p. 396.

260. The draft convention provided only 10 articles and the following connections: contractual autonomy (Art. 6, sentence 1), but the law selected by the parties could not deprive the consumer of the protection guaranteed him by the mandatory rules of the country of his habitual residence (Art. 6, sentence 2 of the draft), conditions relating to the existence, validity and form of consent would be governed by the law of the country of the consumer's habitual residence at the time of declaration. (Art. 6, sentence 4), in the absence of a choice made by the parties, the applicable law would be the law of the country of the consumer's habitual residence (Art. 7 of the draft), the ability of the parties and the effects of contracts would not be governed by the *lex contractus* but independent issues would (Art. 9) and the public order exception typical of the Hague Conference (Art. 10: "*L'application d'une loi déterminée par la Convention ne peut être écartée que si cette application est manifestement incompatible avec l'ordre public.*"). See VON MEHREN, *Textes adoptées*, p. 2 e 3.

I – GENERAL PROVISIONS

SCOPE OF APPLICATION

Art. 1. Definition of Consumer

1. Consumer, for the purposes of this Convention, is any natural person who, with a business or professional, in transactions, contracts and situations governed by this Convention acts for a purpose which can be regarded as outside the scope of his professional activity.

2. Regarded as consumer are also third parties, such as family members of the main consumer or other accompanying persons, who directly enjoy the services and products contracted for, in contracts governed by this Convention, as final consignee of such contracts.

3. In the case of travel and multi-property contracts, the following are regarded as consumers:

- a. the main contracting party or the natural person who buys or agrees to buy the holiday package, the trip or the time share for this own use;
- b. the beneficiaries or third parties on behalf of whom the main contracting party buys or agrees to buy the trip or the holiday package and those who enjoy the trip or the multi-property for a length of time, even though they are not the main contracting party;
- c. the assignee or the natural person to whom the main contracting party or the beneficiary assigns the trip or the holiday package or the rights of use;

4. If the law applicable by virtue of this Convention defines in a wider or more favorable manner who is to be regarded as a consumer or treats other agents as consumers, the judge entitled to adjudicate the matter may take into consideration the expanded scope of application of this Convention, if it is more favorable to the consumer's interests.

Art. 2. General contractual protection

1. Contracts and transactions involving consumers, especially those contracts concluded at a distance by Internet, telephone or other methods of telecommunications, when the consumer is in his country of domicile, shall be governed by the law of this country or by the law most favorable to the consumer. The parties can choose the law, provided that the chosen law is that of the place of conclusion of the contract, the place of the contract performance, the place of the characteristic performance, or the domicile or place of business of the supplier of the products and services and that this law is the one most favorable to the consumer.

2. To the contracts concluded by the consumer when outside of his country of domicile the law chosen by the parties shall apply, provided the chosen law is that of the place of conclusion of the contract, the place of performance, or the consumer's domicile.

Art. 3. Mandatory rules

1. Notwithstanding the preceding articles, the mandatory rules of the country of forum shall necessarily apply for the protection of the consumer.

2. If the conclusion of the contract was preceded by any negotiations or marketing by the supplier or its representatives, especially shipment of advertising material, mail, e-mail messages, prizes, invitations, maintenance of branch offices or representatives, and other activities focused on the supply of products and services and the creation of a captive customer base in the country of the consumer's domicile, this country's mandatory rules shall necessarily apply for the protection of the consumer, in addition to those of the country exercising jurisdiction and to the law applicable to the contract or to the consumption relation.

Art. 4. Loophole clause

1. The law indicated as applicable by virtue of this Convention might not be applicable in certain cases, if, considering all the circumstances relevant to the case, the connection with the law indicated as applicable is insufficient and the case itself is closely related to another law, more favorable to the consumer.

Art. 5. Excluded issues

1. This Convention is not concerned with:
 - a. Transport contracts governed by International Conventions;
 - b. Insurance contracts;
 - c. Contractual obligations expressly excluded from the sphere of application of the CIDIP V on international contracts;
 - d. Contracts for international transactions, conducted between traders and businessmen;
 - e. All other contracts and consumption relations, as well as the obligations arising from them, involving consumers governed by specific conventions.

II – PROTECTION IN SPECIFIC SITUATIONS

Art. 6. Travel and tourism contracts

1. Individual travel contracts concluded in package or with combined services, such as a tourist group or together with other hotel and/or tourist services, shall be governed by the law of the consumer's place of domicile, if it is also the place of business or branch of the travel agency which sold the travel contract, or where the offer was made, or advertising or any prior negotiations by the dealer, carrier, agency or its autonym representative occurred.

2. In all other cases, to individual travel contracts concluded in package or combined such as a tourist group or together with other hotel and/or tourist services, the law of the place where the consumer declares his acceptance of the contract shall apply.

3. To travel contracts, not governed by international conventions, concluded through standard contracts or standard terms, the law of the place where the consumer declares his acceptance of the contract shall apply.

Art. 7. Time-share or multi-property contracts

1. The consumer protection mandatory rules of the country of physical location of the leisure and hotel facilities, which rent, lease or sell the right of use in multi-property or time share property, located in the States parties to this Convention, apply cumulatively to these contracts in favor of the consumers.

2. The rules of the country where the offer is made, where advertising or any marketing activity, such as telephone calls, invitations for receptions, meetings, parties, shipment of prizes, raffles, all-paid trips or incentive programs, among other business activities, are conducted by representatives or owners, organizers and managers of the time-share or multi-property, or where pre-contracts or contracts for the multi-property or for the right of use/enjoyment of property are signed, shall be interpreted in favor of the consumer, regarding information, the right to change one's mind and deadlines, as well as the causes of termination of the contract or pre-contract, and thus determine the exact content of the concluded contract and the possibility of payment or of signing credit card receipts during this period.