

## Description of Canada's proposal on the development of a Model Law on Jurisdiction and Conflict of Laws Rules for Consumer Contracts in the context of CIDIP-VII

In the context of CIDIP-VII, Canada proposes to develop a Model Law on consumer contracts that deals with the grounds on which a court could hear a case involving parties in crossborder situations and which State's laws would be applied to determine the case.

The purpose of this would be to set out uniform jurisdictional rules with respect to cross-border business-to-consumer contracts. While jurisdictional issues have always existed, the increase in the number of cross-border transactions taking place over the Internet has elevated the importance of jurisdictional issues. With cross-border transactions increasing, it is important that the legal framework supporting consumer transactions across borders be governed by consistent principles that lead to predictable results regardless of the State in which a particular consumer or vendor is located.

One of the consequences of numerous consumer contracts being made every day with consumers and vendors situated in different States is that inevitably some of these dealings result in disputes that must be resolved. Whenever a dispute crosses borders, questions arise concerning the court which has jurisdiction to hear the dispute (the forum) and which State's laws should apply to govern the resolution of the dispute (applicable law). While these two issues are distinct, they raise many of the same considerations. These issues are collectively referred to as conflict of laws rules.

Although consumer transactions, whether carried out electronically or otherwise, are subject to traditional rules relating to jurisdiction, electronic commerce poses challenges to this existing framework. The absence of boundaries, which characterizes the Internet, makes it difficult to determine where a contract was concluded. The courts have used various tests to determine whether they have jurisdiction and which State's laws should govern the resolution of Internet disputes.

By unifying the conflict of laws rules applicable to consumer contractual disputes, the proposed instrument would ensure that the same solution would be applied irrespective of the court hearing the case. Model legislation would provide greater certainty and predictability of results for resolving disputes relating to cross-border consumer contracts. The instrument would apply where the dispute involves more than one State and would not be limited to Internet disputes. It would apply to all consumer contractual disputes, online or offline.

Canada is proposing the drafting of a Model Law and not a convention because this it is the first time an instrument on the subject is developed and because the rules in this field are different from one OAS State to another. Realistically, to achieve any harmonisation in this context, a first step would be to have an instrument that allows States some flexibility in adopting it. As a binding international instrument, a convention does not provide such flexibility and would be less likely to achieve broad acceptance. A Model Law would.

For the Model Law to provide greater certainty and predictability, it should address the following issues:

- Effectiveness of consumer protection online compared to transactions conducted through traditional means of communication – online protection should be no less effective;
- Application of consumer protection laws of the consumer’s residence – consumer should benefit from the protection normally afforded him or her.
- Technological neutrality of the Model Law – the Model Law should not discriminate between different forms of technology;
- Certainty in the rules that apply to participants and their transactions - Participants should be able to predict their legal situation before engaging in commerce;
- Vendor's connection to the forum's law and courts – The legal risk of operating online should not be disproportionate to a vendor’s connection to the relevant forum’s laws and courts;
- Vendors should be able to choose whether or not to operate under a particular State’s legal framework; and
- Growth of electronic commerce – The conflict of laws rules should not be an impediment to the continued growth of electronic commerce.

More particularly, the Model Law should include the following elements:

- **Definitions**: all the critical terms should be defined. Because the proposed Model Law is intended to be part of the States' legislation on consumer protection or on conflict of laws, it would be important to define the terms in a consistent manner with the rest of the legislation and each State will have to determine what definitions are required. However, some terms, including the following, may need to be defined for the purpose of the Model law, if not otherwise defined:
  - Consumer contract;
  - Consumer contract proceeding;
  - habitual residence;
  - Plaintiff;
  - Vendor;
  - Vendor's jurisdiction.
- **Exclusive application of the Model Law**: the Model Law needs to clarify whether a court’s jurisdiction to hear a dispute relating to a consumer contract is to be determined according to the rules in the Model Law only and not according to any other jurisdictional rules that might otherwise be applicable to consumer contracts.
- **Grounds for jurisdiction**: the Model Law needs to address the specific grounds of jurisdiction of the court. It may outline the following grounds for jurisdiction of courts in the context of consumer contracts. The court of an enacting State would have jurisdiction in consumer contracts against a person if:
  - that person is habitually resident in the enacting State at the time of the commencement of the consumer contract proceeding,
  - there is a link between the enacting State and the facts on which the consumer contract proceeding against that person is based,

- there is a written agreement between the plaintiff and that person to the effect that the court has jurisdiction in the consumer contract proceeding,
  - during the consumer contract proceeding, that person submits to the court's jurisdiction, or
  - the consumer contract proceeding is a counterclaim in another proceeding in the court.
- **Link between the enacting State and the facts on which the consumer contract proceeding against a person is based:** The Model Law needs to outline the cases where it will be presumed that there is a link between the enacting State and the facts on which the consumer contract proceeding against a person is based, if that ground is included in the Model Law. The Model Law also needs to specify whether the list of cases is not an exhaustive one and does not limit the right of the plaintiff to prove other circumstances that constitute a link between the enacting State and the facts on which a consumer contract is based. Presumption of a connection with the forum may be drawn from the following conditions:
- the plaintiff is a consumer habitually resident in the enacting State and brought proceedings under a consumer contract in the courts of that same State against a vendor who is habitually resident in a State other than the enacting State, and
  - one of the following circumstances exists:
    - the consumer contract resulted from a solicitation of business in the enacting State by the vendor (a consumer contract is deemed to have resulted from the solicitation of business in the enacting State by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in the enacting State)
    - the vendor received the consumer's order in the enacting State (this presumption should not apply if the consumer and the vendor were in the presence of one another in the vendor's jurisdiction when the consumer contract was concluded), or
    - the vendor induced the consumer to travel to a jurisdiction other than the enacting State for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.
- **Discretion in the exercise of jurisdiction:** one additional issue to be discussed is whether it is appropriate for the court to decline to exercise its jurisdiction if there was a more appropriate forum to hear the consumer contract proceeding.
- **Limitation on choice of forum clauses:** because it is considered unlikely that most consumers would turn their minds to a choice of forum clause at the time of contracting and would only become aware of such a clause if a dispute arose, the Model Law may provide that the court should only enforce a choice of forum clause, if the clause was entered into by the parties after the commencement of the proceedings. Consequently, the Model Law may provide that a choice of forum clause would be void in the following circumstances:
- the agreement was entered into before the commencement of the proceeding,

- the agreement provides that the court of a State other than the State in which the consumer is habitually resident has jurisdiction in the consumer proceeding, and
- one of the following circumstances exists:
  - the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by the vendor and the consumer and vendor were not in the presence of one another in the enacting State when the consumer contract was concluded (a consumer contract may be deemed to have resulted from the solicitation of business in the consumer's jurisdiction by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in the consumer's jurisdiction)
  - the vendor received the consumer's order in the consumer's jurisdiction, or
  - the vendor induced the consumer to travel to a jurisdiction other than his or her jurisdiction of habitual residence for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.
- **Conflict of laws rules**: Once a court determines that it has jurisdiction to hear a consumer contract proceeding, it must then determine which substantive law should be applied to decide the merits of the dispute. Determining applicable law involves many of the same considerations that were mentioned above in relation to determining the proper jurisdictional forum:
  - Essentially, the Model Law may need to establish a special choice of law rule for certain contracts made by consumers while generally allowing the parties to select the law that will apply to their contract at the time of its formation or later on, by agreement in writing, during their contractual relationship. However, it should be considered whether the Model Law should take the approach that the choice of law agreed to by the parties cannot deprive the consumer of the protection of the mandatory rules of the State in which he or she habitually resides. The mandatory rules are those substantive rules in the State's laws that cannot be derogated from in a contract in such a way that the consumer is left with less protection.
  - There would also be a need to explore the necessity to provide a general rule for situations where the parties have not made a valid choice of law. In the absence of a valid choice of law agreement, the laws of the enacting State would apply to a consumer contract between a consumer who is habitually resident in the enacting State and vendor who is habitually resident in another State.
  - Finally, the Model Law may need to provide that the agreement on choice of law is to be "in writing" and whether such an agreement would or should be effective in law if made electronically.