UNITED STATES RESPONSE TO PROPOSALS FOR A CONVENTION AND MODEL LAW ON JURISDICTION AND APPLICABLE LAW

DRAFT INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONSUMER CONTRACTS AND TRANSACTIONS

RESPUESTA DE LOS ESTADOS UNIDOS A LAS PROPUESTAS SOBRE JURISDICCIÓN Y DERECHO APLICABLE

PROYECTO DE CONVENCIÓN INTERAMERICANA SOBRE DERECHO APLICABLE A ALGUNOS CONTRATOS Y TRANSACCIONES INTERNACIONALES DE CONSUMO
No. 25-B

The Permanent Mission of the United States to the Organization of American States (OAS) presents its compliments to the General Secretariat and has the honor to attach hereto the comments of the United States in English and Spanish on the proposals being considered by the informal working group of the Committee on Juridical and Political Matters on consumer protection, as part of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP VII) process.

The Permanent Mission of the United States kindly requests the General Secretariat to circulate these two documents to all Permanent Missions and members of the informal working group before April 23, 2010.

The Permanent Mission of the United States wishes to avail itself of this opportunity to renew to the Permanent Missions to the OAS the assurances of its highest consideration.

Enclosure:

As stated.

The General Secretariat

Organization of American States,

United States Response to Proposals for a Convention and Model Law on Jurisdiction and Applicable Law

Executive Summary

The United States would like to thank the governments of Brazil, Argentina, and Paraguay, as well as Canada, for bringing attention to this important topic with their proposals. At this juncture, however, we are not prepared to support the proposals of those States. We believe that the economic impact of the proposals on consumers and the OAS market requires further analysis, particularly in the context of e-commerce transactions. In our view, the current private international law proposals on jurisdiction and applicable law with expansive limitations on party autonomy for choice of law may result in only limited practical protections, and could raise prices to consumers and reduce the options available to them for access to many products.

Additionally, we do not believe that the proposals as presently framed will succeed in bringing about regional harmonization, given the tension between different conceptions about judicial jurisdiction and conflict of laws (as reflected in the differing approaches in the two proposals on both issues). The CIDIP VII proposals on jurisdiction illustrate the widely differing views held by States on jurisdiction issues. The proposed Additional Protocol on International Jurisdiction over Certain Consumer Contracts and Transactions is similar to the 1996 Mercosur Santa María Protocol, which has never entered into force. The Canadian Model Law on Jurisdiction for consumer contracts also does not represent a consensus position. It is based on the 2003 Uniform Law Conference of Canada model legislation for provincial or territorial consumer protection legislation in Canada. However, in the six years since the approval of the model legislation, not one common law jurisdiction within Canada has enacted the model legislation. Additionally, the Canadian proposal on jurisdiction is substantially similar to a proposal considered by States during the Hague Conference Convention on Choice of Court Agreements negotiations. The provision proved to be extremely controversial given concerns about its potential negative impact on vendors in e-commerce transactions, and after prolonged negotiations, the final text of the Convention excluded agreements that include a consumer as a party.

The United States position during the Hague Conference negotiations was that it would not support an absolute rule against choice of forum clauses in consumer e-commerce transactions. In the United States, and other common law jurisdictions, such as those of Canada, such choice of forum clauses are generally enforced as to litigation brought by the consumer if they are adequately disclosed and are not unjust and unreasonable.

For the above reasons we do not believe that it will be possible to achieve a consensus approach on jurisdiction in CIDIP VII.

With regard to the proposals on applicable law, there are significant interpretive questions with each of the proposals that need to be explored. Both proposals raise uncertainties about when and to what extent the parties may choose the applicable law in consumer contracts, and what practical benefits and burdens to consumers and the
marketplace would result. For example, how would one as a practical matter determine whether the law chosen by the parties is the "law most favorable to the consumer" as proposed in the joint proposal for an Inter-American Convention? On the other hand, how would one determine whether "the law chosen [by the parties] would give the consumer better protection [than] the mandatory rules of the law of the consumer," as stated in the comment to the proposed Canadian Model Law on Applicable law? Would the determinations under both proposals vary case by case and issue by issue? Would these determinations vary depending on whether the issue concerned the validity of the contract, the burden of proof, the consequences of breach, the amount of any possible recovery, the probability of obtaining a recovery under the substantive law of the state (even if smaller than the amount potentially recoverable), the measure of damages, the statute of limitations, or some other standard? Would it be possible for more than one law to be applied with regard to any given dispute?

Moreover, not only are the two CIDIP VII proposals on applicable law both internally inconsistent and inconsistent with each other but they both conflict with the policy decisions taken by OAS member states when they addressed choice of law issues during CIDIP V, which produced the Inter-American Convention on the Law Applicable to International Contracts, and which generally recognizes party autonomy. The CIDIP V Mexico City Convention approach to autonomy of contract is in general consistent with the approach taken in the United States. In the United States the conflict of laws rules permitting party autonomy are subject to a generally recognized public policy exception that may prevent contractual waivers of fundamental or mandatory public policy consumer protection laws.

In short, providing special jurisdiction and conflict of laws rules for cross-border consumer claims through traditional court mechanisms at this point in time may not be the most effective way to protect consumer interests. The U.S. has made proposals that have the potential to provide practical benefits for consumers (e.g., a region wide cooperative framework for online dispute resolution, a model law for consumer payment card protection, and the U.S. proposals for a model law strengthening consumer protection authorities). In light of the fact that the OAS and its states have limited resources to pursue multiple reforms at the same time, and in order to gain more experience and data with Internet sales in developing markets, it would seem to be better to pursue these practical approaches before tackling the difficult policy issues and uncertain economics raised by the private international law jurisdiction and conflict of laws proposals.
I. Introduction.

The goal of the projects on jurisdiction and applicable law is to provide private law protections for consumers in their contractual relationships with suppliers, to provide economic benefits to consumers by increasing availability and choice and decreasing product costs, to provide consumer confidence in the marketplace, and to provide a legal framework that promotes predictability and lower transaction costs to all parties for the ultimate benefit of consumers.¹ The United States would like to thank the Governments of Brazil, Paraguay, Argentina and Canada for bringing attention to this important topic with their proposals.

We believe that the proposals have positive aspects and raise issues that should receive further study. At the same time, the stakes of such economic regulation are very high, with the proper consumer framework critical to consumers reaping the full benefits of e-commerce in the Americas. Understanding their practical effects on consumer welfare requires a detailed understanding of the e-commerce marketplace and the practical effects of the various aspects of these proposals.

Moreover, many of the legal issues involved are highly controversial. The lack of consensus on these issues, both internationally and within various countries, suggests the great difficulty of attempting to set a uniform approach at this time. In light of all these unresolved issues, we believe that further study of the proposals and related concerns and consideration of additional alternatives is necessary before coming to a position on the pending proposals.

The Inter-American Juridical Committee, after reviewing the proposals, recognized the problems associated with both approaches and stressed that in order for the CIDIP VII negotiation “to be successful, it should be guided by the need to ensure consumers engaging in cross-border commercial transactions a protection that is effective and affordable in relation to the value of claims and that leads to quickly enforceable remedies.”²

Applicable law. The United States believes that there are significant questions on the relative benefits and burdens both for consumers and suppliers that would result from these contract law proposals. In addition, there are interpretive questions with each of the proposals that should be explored. For example, as to applicable law, we are concerned that both proposals raise uncertainties about when and to what extent the parties may choose the applicable law in consumer contracts, and what practical benefits and burdens to consumers and the marketplace would result.  

Jurisdiction. As to jurisdiction, both proposals would appear to create an absolute rule against choice of forum clauses in consumer e-commerce transactions and generally provide for jurisdiction in the courts of the consumer’s home state. This too raises issues that should receive further study. For example, these proposals would provide convenience and predictability for consumers, but would impose burdens on suppliers. In the United States, and other common law jurisdictions such as those of

At this stage in the process, it would seem that none of the current proposals would serve as an effective framework for providing consumers confidence that their legitimate expectations in contract performance by foreign suppliers will be protected through effective remedies. The Brazilian proposal offers a choice of law solution that is over-inclusive, because it prevents potentially efficient consumer-producer agreements in resolving problems of legal uncertainty, and ultimately ineffective, because it does not address . . . enforcement of judgments in the jurisdiction in which the foreign supplier’s assets can be found. Similarly, the Canadian proposal closes the door to potentially efficient non-judicial modes of dispute settlement and enforcement without a plausible roadmap for solving complex problems raised by the difference between different national systems for determining jurisdiction. . . . The substance of the proposal contemplates worldwide jurisdiction and thus ignores important limitations, sometimes of a constitutional nature, on the exercise of jurisdiction under the law of many national systems . . . . These differences, moreover, already have been found to be insuperable in negotiations at the Hague Conference on Private International Law for a global convention on the recognition and enforcement of civil judgments. The Hague Conference’s failure suggests that – even within the Western Hemisphere, which also experiences the tension between different conceptions about judicial jurisdiction – a convention on agreed bases for jurisdiction in B2C electronic commerce also may not be negotiable.  

Dr. Antonio Pérez, STATUS OF THE CONSUMER PROTECTION NEGOTIATIONS AT THE SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW, CJI/doc:288/08, rev.1), contained in Annual Report of the Inter-American Juridical Committee, at 58, 74. The Juridical Committee forwarded it to the Permanent Council “as a study that would make a significant contribution to the discussion of those issues.” Id. at 57.

3 For example, how would one as a practical matter determine whether the law chosen by the parties is the “law most favorable to the consumer” as proposed in the joint proposal for an Inter-American Convention? It is equally unclear how one would apply the additional criteria for choice of law including the application in favor of the consumer of the international mandatory rules of the forum (art. 7.1), the international mandatory rule of the country of domicile of the consumer, in some marketing cases (art. 7.2), the “hard law” exception (art. 8), as well as the harmonization clause (art. 9)? On the other hand, how would one determine whether “the law chosen by the parties” would give the consumer better protection [than] the mandatory rules of the law of the consumer,” as proposed in the Canadian Model Law on Applicable Law? Would the determinations under both proposals vary case by case and issue by issue? Would these determinations vary depending on whether the issue concerned the validity of the contract, the burden of proof, the consequences of breach, the amount of any possible recovery, the probability of obtaining a recovery under the substantive law of the state (even if smaller than the amount potentially recoverable), the measure of damages, the statute of limitations, or some other standard? Would it be possible for more than one law to be applied with regard to any given dispute?
Canada, such clauses are generally enforced as to litigation brought by the consumer if they are adequately disclosed and are not unjust and unreasonable. Forum selection clauses are neither automatically enforceable nor automatically not enforceable. Rather the unjust and unreasonable test applies to all forum selection clauses under United States law, based on the facts and circumstances before the court. For example, one court recently applied this test to an exclusive forum selection clause choosing a forum outside the United States in a transaction involving consumers, where the agreement was entered into over the Internet. In that particular case, the court upheld the forum selection clause. In other cases with different facts, it may not.

General concerns. The United States believes that the economic impact of the proposals on consumers and the OAS market requires further analysis, particularly in the context of e-commerce transactions:

- Would such limits give consumers greater confidence that their rights will be protected in cross-border transactions?
- What effects would the various proposed limitations on the ability to choose applicable law and forum in a cross-border consumer transaction have on consumer access to competitive products and prices through the online marketplace?
- What effects do these proposals have on consumers in smaller countries, where higher transaction costs may discourage more suppliers from entering those markets?
- What effects do these proposals have on consumer access to the offerings of small and medium sized businesses?
- What effect might this proposal have on emerging entrepreneurial ventures in developing economies?

In the remainder of this paper we attempt to shed further light on these questions.

We emphasize the following, each of which we believe would benefit from significant additional study:

- The United States, like every country in the OAS, wants to insure that consumers are properly protected in their cross-border transactions, including electronic commerce transactions.
- Private international law instruments with expansive limitations on party autonomy may result in limited practical protections, and may tend to raise prices to consumers and reduce the options available to them for access to many products.

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6 *Doe I v. AOL LLC.*, 552 F.3d 1077 (CA 9 2009).
7 We raise technical questions concerning each proposal in separate annexes.
• The proposals as presently framed may not bring about regional harmonization, given the tension between different conceptions about judicial jurisdiction and conflict of laws (as reflected in the differing approaches in the two proposals on both issues).

• The most practical and effective approach for protection of consumers in cross-border transactions in the nearer term may be to provide access to inexpensive and effective alternative forms of redress when a dispute arises in a consumer transaction, and to strengthen public law and the ability of consumer protection authorities to cooperate and take actions to protect their citizens.

II. The growth of e-commerce makes it critical to develop a practical framework for consumer protection in the Americas.

Consumers in the Americas stand to benefit enormously from the development of international e-commerce. Indeed business to consumer (B2C) e-commerce has increased more than six-fold in the Americas since CIDIP VII was initiated. In the U.S., B2C e-commerce generated $225.2 billion in sales in 2008, while B2B generated $3.1 trillion.8 In Latin America, e-commerce consumer sales were nearly $11 billion in 2007.9 Internet surveys also report that at present there are over 330 million internet users in the Americas,10 and that some 79% of those users have purchased online.11

The Internet can help create new jobs, new industry and service sector opportunities; promote international trade; attract foreign investment; and generally contribute to the creation and sharing of knowledge. In addition, the Internet offers an important opportunity to developing countries by providing their industries with direct access to a global marketplace.12 In this context, the importance of building a practical framework for the resolution of consumer disputes in CIDIP VII cannot be overstated.

The OECD has recently cited studies indicating that cross-border consumer e-commerce has not grown as fast as could have been expected, due, in part, to concerns about where the parties can turn if disputes arise.13 Complicating the development of a practical framework is the fact that the amount of each individual purchase remains small. Typically, consumers in the Americas make small purchases over the Internet for items such as books, DVDs, clothing and shoes, and airline tickets.14

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13 OECD, Empowering E-consumers, supra note 8, para. 11 (citing studies by the European Commission).
14 Average B2C E-Commerce Sale in Mexico, by Product Category, 2008 AMIPCI (Asociación Mexicana
In short, the failure to develop a practical framework for consumer protection in the Americas may limit future growth in B2C cross-border e-commerce and have a particularly negative effect on consumer choice and emerging entrepreneurial ventures in developing countries.

III. **Private law proposals on jurisdiction and applicable law can play only a limited role in providing effective and affordable remedies to consumers.**

As the Inter-American Juridical Committee Rapporteur explained in his study, cross-border consumer transactions, particularly those involving e-commerce, are often relatively small and not well-suited for judicial resolution:

> [M]ost consumer purchases are for relatively low-cost products or services. The value of such products or services, as almost all parties agree, almost never warrants use of extremely expensive enforcement mechanisms characteristic of ordinary civil litigation in all countries . . . .

> [W]hen a foreign supplier is involved, additional barriers impair the consumer’s ability to seek and obtain a remedy. It is unlikely that the foreign supplier will be amenable to suit in the jurisdiction of the consumer, has assets in that jurisdiction that can be used to provide the consumer an effective remedy, or comes from a state that would recognize and enforce a judicial judgment issuing from the consumer’s home jurisdiction (and, even if so, at a cost that is not prohibitive to an individual consumer or class of consumers bringing a collective or class action).^15

The 2003 Agreement between Consumers International and the Global Business Dialogue on Electric Commerce (GBDe) have also recognized the challenges of courts handling consumer e-commerce transactions:

> Business acknowledges that the application of the “country of origin” principle alone may not be sufficient to boost trust in online transactions, since consumers are unlikely to resort to the courts of other countries where merchants are resident. Conversely the application of the “country of destination” principle (the residence country of the customer) is not the right answer either, since merchants will be unenthusiastic about international transactions that could subject them to a variety of differing country laws, processes and legal reach of every country in which their online customers may live. **Moreover, for consumers this principle may only provide illusory protection, as in many cases the cost and complexity of cross-border enforcement stands in the way of effective redress.**^16

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^15 Perez study, Juridical Committee Annual Report, supra note 2, at 61.

In short, given the small amount involved in most consumer complaints, it appears that resolving individual cross-border claims through traditional court mechanisms may be of limited practical value to consumers.  

IV. The effect of the proposals on product costs and availability.

The proposed limitations on the ability of the parties to choose applicable law and forum in cross-border consumer contracts may affect consumer access to competitive products through the online marketplace. For the various proposed limitations, it is important to consider the extent of this effect, and consider the tradeoff with the protections gained by such limitations.


Similar issues were identified during the recent negotiations concerning the European Union Regulation (EC) No. 593/2008 of the European Parliament and Council of June 17, 2008 on the law applicable to contractual obligations (Rome I). The European Parliament, in proposing a compromise amendment for consumer contracts during the negotiations, raised questions about the effectiveness of the protection afforded by the special conflict of laws rule for consumers:

With further reference to consumer contracts, recourse to the courts must be regarded as the last resort. Legal proceedings, especially where foreign law has to be applied, are expensive and slow. . . . the protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings. It is therefore considered that, particularly as regards electronic commerce, the conflicts rule should be backed up by easier and more widespread availability of appropriate online alternative dispute resolution (ADR) systems. The Member States are encouraged to promote such systems.  

(emphasis added)


In October 2009, the European Commission released a wide-ranging statistical study about cross-border e-commerce trade within the European Union. The study found that substantial cost savings and increased access to products were theoretically available to EU consumers through cross-border e-commerce transactions. Indeed, for over half of product searches involved in the study, consumers could find products in another EU country at least 10% cheaper (delivery and other costs included). Yet, the study found that 61% of all potential cross-border orders were not consummated because traders refused to serve consumers located in another EU country. The study found that many consumers were not able to register on the website of a trader located in a different EU country, that many websites refused to ship to the consumer’s country, and that many payment options were not readily available for cross-border transactions. Mystery Shopping Evaluation of Cross-Border E-Commerce in the EU Final Report, conducted on behalf of the European Commission, October 20, 2009, available at http://ec.europa.eu/consumers/strategy/docs/EC_e-commerce_Final_Report_201009_en.pdf.

Earlier, the European Commission published another report showing that while 51% of the EU27 retailers sell via the Internet, only 21% currently conduct cross-border transactions, down from 29% in 2006. The Commission reported that the main regulatory barrier to operating on a pan-EU basis was the application of fragmented national laws, including consumer protection laws, through the conflict of laws rules in the Rome I Regulations. The Commission reported:

The effects of the fragmentation are felt by business because of the conflict-of-law rules,
Moreover, as discussed at the outset, the specific applicable law and jurisdiction proposals themselves would likely create a level of uncertainty as to what extent the parties to an agreement had the freedom to choose the forum and applicable law in consumer transactions. Thus, the proposed special choice of law rules and special rules governing jurisdiction might provide smaller benefits than desired and add greater costs (which, of course, may be passed along to consumers) thereby restricting consumer access to competitive products and prices through the online marketplace.\textsuperscript{19}

V. The proposals address controversial issues that have not yet resulted in significant consensus.

We are not confident that the proposals will in practice harmonize the approach of states to applicable law and jurisdiction in cross-border consumer transactions.\textsuperscript{20}

\textit{Choice of Forum}. Earlier, the draft Hague Conference Convention on Choice of Court Agreements included a proposal on competent jurisdiction which would have voided the parties' choice of court in B2C contracts, unless the forum chosen was the country of destination. However, the provision proved to be extremely controversial given concerns about of its potential negative impact on vendors in e-commerce transactions. After prolonged consideration and negotiations, the final text of the

and in particular the Rome I Regulation, which obliges traders not to go below the level of protection afforded to foreign consumers in consumer’s home country. A trader wishing to sell cross-border into another Member State will have to incur legal and other compliance costs to make sure that he is respecting the level of consumer protection in that country. Such costs are eventually passed on to consumers or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level... The estimated administrative costs imposed by EU consumer law to businesses selling only domestically is € 5,526 for distance sellers and € 6,625 for direct sellers. These costs increase to € 9,276 for distance sellers and € 10,375 for direct sellers wishing to sell to consumers located in one or two other EU countries. The estimated administrative costs for a business wanting to sell in all 27 Member States are € 70,526 for distance sellers and € 71,625 for direct sellers.


\textsuperscript{19} Similarly, the failure to give effect to the parties’ choice of law in business to business transactions in the region may result in higher product costs. See Dana Stringer, Choice Of Law And Choice Of Forum In Brazilian Commercial Contracts: Party Autonomy, International Jurisdiction, And The Emerging Third Way, 44 Colum. J. Transnat'l L. 959 (2006) (noting that by forbidding choice-of-law clauses and throwing the enforceability of choice-of-forum clauses into doubt, the Brazilian conflicts rules foster legal uncertainty and generate transaction costs that must be passed on to Brazilian counterparties).

\textsuperscript{20} The 2003 Agreement between Consumers International and the GBDDe pointed out that:

There are widely differing views held among governments on the right type and level of consumer protection, even at the regional level of the European Union or the U.S. Complete international harmonization of applicable laws and international agreements on competent jurisdictions might be the ideal solution in theory, but it is unlikely that this can be achieved satisfactorily in practice . . . .

Alternative Dispute Resolution Guidelines Agreement, \textit{supra} note 16.
convention excluded agreements that include a consumer as a party.\textsuperscript{21} The Permanent Bureau of The Hague Conference framed the business/consumer private international law policy issue in the following manner:

A "country of origin" approach is generally favoured by business interests and other Internet users who are concerned that they will be forced to defend themselves against actions in a multitude of jurisdictions with no ability to narrow the scope of such expansive jurisdictional claims since a website is globally transmitted and it is virtually impossible to determine where a customer is located with certainty. Closely connected to this problem is the concern that each jurisdiction will apply its own, uncoordinated choice of law rules, which will in a large proportion of cases result in the application of the forum's substantive law, thereby subjecting e-commerce businesses and Internet users to a considerable number of potentially conflicting legal frameworks. This situation is made more difficult in light of the remarkable proliferation of legislation in various countries concerning the Internet and the recent development of new legal doctrines specific to the Internet. In other words, it is particularly burdensome for users to remain appraised of all of these new developments in numerous jurisdictions and it is also difficult for States to assess the impact of the Judgments Convention as it now stands, in light of the rapidly changing legal landscape which may implicate Internet users in their jurisdiction . . . .

The Permanent Bureau of The Hague Conference acknowledged the resulting lack of consensus:

Many countries are still deciding which approach is preferable [i.e. country of origin or country of destination] and some of their deliberations are contingent upon the growth of, for example, on-line dispute resolution techniques which may provide a valid alternative by which a consumer can obtain an effective remedy. In addition, the Internet may require lawmakers to re-evaluate the traditional legal doctrines as applied to consumers and businesses which are based on an assumed bargaining power differential. Because Internet businesses may be quite small and Internet consumers have instant access to enormous amounts of information, highly sophisticated analytical tools and substantial choice on-line, the relative strength of the two parties is not always obvious. The ability of consumers to make enforceable choices of law and fora might be reconsidered.\textsuperscript{22}

The CIDIP VII proposals on jurisdiction illustrate the widely differing views held by States on jurisdiction issues, and why there will be no consensus approach in the


\textsuperscript{22} Permanent Bureau of the Hague Conference, The Impact of the Internet on the Judgments Project, \textit{supra} note 12, at 8-11.
Americas on jurisdiction in CIDIP VII. The proposed Additional Protocol on International Jurisdiction over Certain Consumer Contracts and Transactions is similar to the 1996 Mercosur Santa Maria Protocol, which has never entered into force. The approach in the Santa Maria Protocol (and the proposed Additional Protocol on International Jurisdiction if adopted in its current form) are not consistent with the 2005 Hague Conference Convention on Choice of Court Agreements in certain respects. The Canadian Model Law on Jurisdiction for consumer contracts also does not represent a consensus position. It is based on the 2003 Uniform Law Conference of Canada model legislation for provincial or territorial consumer protection legislation in Canada. However, in the six years since the approval of the model legislation, not one common law jurisdiction within Canada has enacted the model legislation for jurisdiction or applicable law. Only Quebec has enacted similar legislation.

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23 MERCOSUR Santa Maria Protocol on International Jurisdiction in Matters of Consumer Relations (Fortaleza 1996). According to its Article 15, the Protocol will enter into force for the first two ratifying States, thirty days after the deposit of the second instrument of ratification. See Diego P. Fernández Arroyo, Current Approaches Towards Harmonization of Consumer Private International Law in the Americas, 58 Int'l Comp. Law Quarterly, 411, 419-420 (2009) (“the negotiation of fora and other jurisdictional issues are the most difficult to compromise on as jurisdiction is intrinsically linked with national legal orders and often seen as a question of sovereignty. . . . Failed experiences from other organizations [the problems arising from the discussions on a global judgment convention at the Hague Conference on Private International Law, and from the lack of the effectiveness of the MERCOSUR Santa Maria Protocol on jurisdiction on consumer contracts, adopted in 1996 and not yet entered into force]. also played a role in taking the decision not to introduce those matters into the Brazilian draft” for CIDIP VII), citing Claudia Lima Marques, As Lições da Reunião Preparatória de Porto Alegre da Conferência Especializada e Direito Internacional Privado—CIDIP VII—de Proteção dos Consumidores e das Negociações Posterior, in Proteção de los Consumidores en América. Trabajos de la CIDIP VII 79, 202, D.P. Fernández Arroyo & J.A. Moreno Rodríguez eds. (2007).

24 The Santa Maria Protocol overlaps with The Hague Conference Convention on Exclusive Choice of Court Agreements through an Annex Protocol which defines the consumer in such a way that, in some cases, a business may also be considered as a consumer under the Protocol while under a Hague Convention on Exclusive Choice of Court Agreements it is not. The conflict arises because the Hague Conference Convention on Choice of Court Agreements recognizes choice of court agreements concluded before the dispute arises while the Santa Maria Protocol apparently excludes all other bases of jurisdiction not established or permitted by the Protocol, including choice of court agreements. The same conflict would exist with regard to the CIDIP VII Additional Protocol on International Jurisdiction Over Certain Consumer Contracts (III) (which follows the Santa Maria Protocol) to the extent that the Annex Protocol on Definitions (I) permits small businesses to be considered to be consumers. See Permanent Bureau of the Hague Conference, The American Instruments On Private International Law, A Paper On Their Relation To A Future Hague Convention On Exclusive Choice Of Court Agreements, Document No. 31 of June of 2005, available at http://www.hccp.net/index_en.php?act=publications.details&pid=3518&dttid=35, at 22-23.


26 Thus, while the Canadian model legislation may have support from some sectors of Canadian civil society, it does not appear to have support from all the relevant stakeholders. The Uniform Law Conference of Canada reports that “[f]or the most part, business organizations were generally opposed to the proposal, preferring an approach that provides for freedom of contract, self-regulation, and a reduced amount of multi-jurisdictional compliance. On the other hand, consumer organizations were in favour of the proposed rules, but some expressed a preference to see even stronger jurisdiction of destination rules” Report of the Working Group, Jurisdiction and Consumer Protection in Electronic Commerce Project, August 10-14, 2004, at 2, available at http://www.ulcc.ca/en/poa2/Jurisdiction_CP_E-Commerce_En.pdf. For this reason, it seems doubtful that the model legislation would provide a basis for harmonization of laws across the Americas (and for the same reason we do not believe that the U.S. Uniform Law
Choice of Law. On applicable law, as discussed at the outset, both CIDIP VII proposals inject an unnecessary and unmanageable level of uncertainty into the freedom of the parties to choose the applicable law in consumer transactions. Moreover, not only are the two CIDIP VII proposals both internally inconsistent and inconsistent with each other but they both conflict with the policy decisions taken by OAS member states when they addressed choice of law issues during CIDIP V in Mexico City in 1994. CIDIP V produced the Inter-American Convention on the Law Applicable to International Contracts (the “Mexico City Convention”), which applies inter alia to consumer contracts. The convention itself has no special rules for the protection of consumers as the weaker party. Instead, Article 7 of that Convention provides that the contract is governed by the law chosen by the parties. Article 11 further provides that the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. Article 11 also grants the forum discretion to apply the mandatory provisions of the law of another state with which the contract has close connections. Thus, the Convention requires the application of mandatory consumer protection laws in the forum and permits the application of mandatory consumer protection laws of other states that have close connections to the transaction (including the habitual residence of the consumer).

We would point out that in its 2007 Feasibility Study on the Treatment of Foreign Law, the Permanent Bureau of The Hague Conference cited favorably the approach taken in the Mexico City Convention (Doc. No. 22B at 12):

49. Hartley points out that the provision on consumers in the European Contracts Convention [now Rome I Regulations] is theoretically interesting, but unlikely to be of practical importance because of the general provision on mandatory rules in the same Convention. Indeed, the questions that arise with regard to weaker parties can in a simple way be dealt with by the exceptions of mandatory rules and public policy. The Inter-American Convention on the Law Applicable to International Contracts follows this line: it does not contain specific rules on weaker parties, but exceptions of public policy and mandatory rules are foreseen.

The CIDIP V Mexico City Convention approach to autonomy of contract is in general consistent with the approach taken in the United States. In the United States the conflict of laws rules permitting party autonomy are subject to a generally recognized public policy exception that may prevent contractual waivers of fundamental or mandatory public policy consumer protection laws.28

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27 The Mexico City Convention does permit States to exclude certain types of contracts. Article 1 states that “[a]ny state may at the time it ratifies or accedes to the convention, declare the categories of contracts to which it will not apply.” The two states that have ratified the Convention thus far, Mexico and Venezuela, did not exclude consumer contracts.

28 See Section 187(2) of the Restatement Second of Conflict of Laws (1971, amended 1988) (allowing designation of a jurisdiction’s law if the transaction bears a reasonable relation to the jurisdiction or if there is a reasonable basis for the parties’ choice, but explicitly limiting that autonomy when the designated law would offend a fundamental policy). A 2001 amendment to Article 1 of the Uniform Commercial Code (UCC) proposed, inter alia, special conflict of laws rule for consumer contracts similar in many ways to the
In sum, the inconsistencies between the policies of the Mexico City Convention and the two CIDIP VII proposals should be evaluated and addressed and resolved in the CIDIP VII working group discussions and negotiations. In our view, another option may be to consider the possibility of a protocol to the Mexico City Convention addressing specific concerns relating to consumers.

VI. A practical approach is needed for protecting consumers in the Americas

As the Rapporteur to the Juridical Committee stressed in his concluding remarks:

One thing is clear, however. Low value cross-border B2C commerce claims can not be addressed through the traditional model of private litigation by individual claimants, seeking judgments rendered in the consumer’s home state that are enforceable in the supplier’s home state or wherever its assets can be found. The benefits of such litigation simply do not warrant its costs for consumers, and the costs of transnational litigation are even greater than the costs of domestic litigation. The OAS Member States need to consider alternative models, such as transnational class action, arbitration or private means of dispute resolution, if the CIDIP process is to be of any relevance to the problem it seeks to address. If governments are not more creative and flexible in their search for solutions, the only available solutions will be those offered by markets themselves. The risk of governmental irrelevance, therefore, should compel the Member States participating in CIDIP-VII to target a narrow, clearly defined problem – namely, the issue of small claims whose value far exceeds the ordinary costs of dispute resolution and enforcement. Serving the true needs of consumers by solving that problem will be difficult enough. Any more ambitious agenda may well do more harm than good. 29

In light of similar concerns, Article 27 of the EU’s Rome I Regulation requires that by 2013 the EC provide a special report to the European Parliament on the application of the special Rome I conflict of laws rule for consumer contracts. In calling for the special report, the European Parliament cited the need to promote inter alia “ADR in the field of electronic commerce and . . . to review to what extent on-line ADR schemes might be used . . . to increase consumer confidence in electronic commerce and obviate the need for court proceedings. . . .” If appropriate, the special report will be

European model now found in Rome I Regulations. However, no state accepted the amended conflict of laws rule and, in 2008, the proposal was withdrawn and the official text of the UCC reverted to the original rule permitting party autonomy in consumer (as well as non-consumer) contracts, provided the transaction bears a reasonable relation to the jurisdiction whose laws are chosen and sometimes subject to a court-imposed public policy limitation. In May 2008, the American Law Institute approved a substitute choice-of-law provision for the UCC, which the Uniform Law Commissioners had previously approved, that effectively reinstated the pre-revised section 1-105 of the UCC permitting party in consumer contracts (as well as non-consumer contracts) provided the transaction bears a reasonable relation to the jurisdiction whose laws are chosen and sometimes subject to a court imposed public policy limitation. See Proposal to Amend Official Text of §1-301 (Territorial Applicability; Parties’ Power to Choose Applicable Law) of Revised Article 1 of the UCC (2008)), available at http://www.ali.org/doc/uccamendment.pdf.

29 Perez Study, Juridical Committee Annual Report, supra note 2, at 77.

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accompanied by proposals to amend the special Rome I conflict of laws rule for consumer contracts.\(^\text{30}\)

More recently, the European Commission tabled proposals in October, 2009 with the European Parliament that would *inter alia* develop a single, EU-wide set of rules for consumer transactions through a new Consumer Rights Directive, promote alternative dispute resolution schemes, improve cross-border payment mechanisms, encourage use of the new EU cross-border small claims procedure, and promote increased efficiency of cross-border enforcement by consumer enforcement authorities.\(^\text{31}\)

Of course, the OAS should not automatically assume that the same balance of protections that is acceptable for the European Community would be appropriate for the OAS. European integration has meant less disparity with regard to economic policy and consumer protection. For example, in the OAS, unlike the EU, it would not be possible to develop a single set of consumer laws applicable in the Americas, through OAS directives harmonizing consumer protection laws. In addition, it is far easier for the EU to amend the Rome I Regulations on applicable law and Brussels I regulations on jurisdiction,\(^\text{32}\) if they are seen as having too great a cost on the development of e-commerce, than it is for the OAS to amend any Convention adopted in the CIDIP process. States involved in the CIDIP negotiations need to be sure that any new balance struck would stand the test of time.\(^\text{33}\) Thus additional study is appropriate.

We also submit that it might be less important, in the consumer area, to focus on jurisdiction and choice of law for individual consumer disputes given the key public dimensions of substantive consumer law and policy. It is important to draw a distinction between what private international law rules will apply to a particular transaction and what a jurisdiction’s regulatory or prescriptive authority will apply in relation to business to consumer transactions and activity. The proposals by Canada and Brazil/Argentina/Paraguay relate solely to what private international law rules will apply in a particular transaction. The proposals have no effect on what jurisdiction’s regulatory or prescriptive authority will apply (because there is no privity of contract with regulatory authorities). This is important because of the role of public authorities in consumer protection in the Americas.

A study prepared on Regulatory Jurisdiction in Canada for the Office of Consumer Affairs, Industry Canada, argues that better results for consumers can be achieved through regulatory protection rather than through private international law rules on jurisdiction and applicable law:


the private law aspects of consumer contracts, while important, will often be quite academic: the value of consumer contracts particularly those consummated over the Internet tends to be quite small, while the cost of pursuing private lawsuits is high. . . . Questions of where proceedings may be brought and whose law applies, will as a result, not often arise. . . . Given that consumer remedies in relation to e-commerce problems will often amount to Pyrrhic victories even where successful, consumer protection authorities may have a particularly important role in ensuring that fair business practices are being followed online, and imbuing consumers with the sense they can practice safe e-shopping.34

To this end, the U.S. proposal includes a model law that would effectively assist consumer protection authorities in their efforts to ensure fair business practices in cross-border consumer e-commerce. The U.S. proposal includes:

- A model law for establishing competent consumer protection authorities vesting them with the authority to obtain redress for consumers enabling them to cooperate with their foreign counterparts and facilitating the enforcement of certain judgments for consumer redress across borders.

- An OAS-ODR Initiative for electronic resolution of cross-border e-commerce consumer disputes designed to promote consumer confidence in e-commerce by providing quick resolution and enforcement of disputes across borders, languages, and different legal jurisdictions.

- A model law for alternative dispute resolution of cross-border B2C e-commerce claims whereby payment card issuers are responsible for considering the claims of the consumer against a merchant for unauthorized use, non-delivery or non-conforming goods and services.

- A model law for low cost expedited small claims tribunals offering consumers access to monetary redress at a cost and burden not disproportionate to the amount of their claim.

- A legislative guide on redress and dispute resolution including provisions that would recommend states permit collective or representational legal actions for common consumer injuries.

We would urge review and consideration of these proposals, which may ultimately provide more efficient and more effective ways of protecting consumers in the Americas than exceptional conflict of law and jurisdiction rules for litigation that is not likely to occur.

34 Online Consumer Protection: a Study on Regulatory Jurisdiction in Canada, prepared for the Office of Consumer Affairs, Industry Canada, July, 2001 (Roger Tassé, O.C., Q.C., Maxime Faille, Gowing Lafleur Henderson LLP), available at http://www.ulcc.ca/en/clst/index.cfm?sec=4&sub=4n; see also 15 U.S.C. ss. 45 (as amended 2006) (U.S. prohibition on unfair and deceptive practices includes practices involving foreign commerce that cause or are likely to cause foreseeable injury within the United States, or involve material conduct within the United States, and available remedies include restitution to domestic or foreign victims).
Conclusion

We suggest that providing special jurisdiction and conflict of laws rules for cross-border consumer claims through traditional court mechanisms at this point in time may not be the most effective way to protect consumer interests. The U.S. has made proposals that have the potential to provide practical benefits to consumers (e.g., the U.S. proposals for a model law strengthening consumer protection authorities, a region wide cooperative framework for online dispute resolution, and the model law for consumer payment card protection). In light of the fact that the OAS and its states have limited resources to pursue multiple reforms at the same time, and in order to gain more experience and data with Internet sales in developing markets, it would seem to be better to pursue these practical approaches before tackling the difficult policy issues and uncertain economics raised by the private international law proposals on jurisdiction and applicable law.

As a process matter, it is important to solicit the views of consumer regulators, businesses, industry associations, consumer groups, and civil society, given the direct effect of the proposals on all these groups, and the practical experience many of them have had with cross-border commerce issues.35

We look forward to continuing to work with the participants in the Consumer Protection Working Group to explore ways to reconcile the challenges of providing for predictable, fair principles on choice of law and jurisdiction.

As the basis for discussion amongst OAS member state participants during our next phase of work in reviewing the proposal, we offer a number of additional questions and comments, with regard to the Brazilian/Argentine/Paraguayan proposal for a Convention in Annex I and the Canadian proposal for a Model Law in Annex II.

35 The Department of State convened four public meetings of its OAS CIDIP Study Group on December 14, 2009, and January 15, February 1, and April 9, 2010, to continue the discussion of issues relating to choice of law, applicable law, jurisdiction, enforcement of judgments, and dispute resolution that are being considered in the Organization of American States CIDIP process. Participants included U.S. government consumer regulators, businesses, industry associations, consumer groups, and civil society.
ANNEX I

Additional Questions Concerning Joint Proposal for Inter-American Convention On The Law Applicable To International Consumer Contracts And Transactions

We offer the following preliminary questions in the hope that the answers to them will help members of the Working Group more fully understand the proposed Inter-American Convention. (Of course, if the Working Group decides to take up the Joint Proposal, the United States, along with other States, will likely pose more detailed questions).

Chapter 1 – SCOPE OF APPLICATION
I – DEFINITIONS

Article 1. Definition of Consumer

1. Definition of Consumer

Is the proper way to define the scope and reach of the convention through defining the term “consumer” or, alternatively, the terms “international consumer contract or transaction” and “international distance consumer contracting”?\(^{36}\)

If the buyer of goods or services acted outside of his or her trade or business, and therefore was acting as a consumer, but the seller neither knew nor reasonably should have known that fact, should the transaction be within or outside the general scope of the Convention?

With regard to the preceding question, Article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG] provides that the 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 nor ought to have known that the goods were bought for any such use . . . ” In order to provide greater certainty and predictability concerning the intersection between the model legislation and the CISG, both of which might apply to a particular transaction, the definition of consumer in the draft Inter-American Convention should make clear that it does not apply if the seller neither knew nor had reason to know that the buyer was concluding the contract for personal, family or household purposes.

Article 2. Definition of International Consumer Contract or Transaction

1. Is it appropriate to use the term “domicile” when the meaning of the term includes subjective matters of intention (i.e. to remain in one location) that a vendor ordinarily will not know or have reason to know?

\(^{36}\) See Articles 2 and 3 infra; see also Article 6(1) of the Rome Regulations.
2. Note that the convention refers to both "international consumer contract or transaction" and "international contract or transaction" to define its scope. What is the difference between an "international consumer contract" and "an international consumer transaction"? Would it be better for the convention to define its scope so as apply to "international contracts" entered into with consumers as defined in article 1, consistent with approach taken in the Mexico City Convention?

3. The Convention should clarify that it only applies in an international consumer contract when the consumer and the vendor are both habitually residents of states that are parties to the Convention. The Convention should not apply when the consumer alone is habitually resident in a state that is a party to the Convention.

II – SCOPE OF APPLICATION
Article 3. Excluded matters

We believe that there would need to be an extensive discussion of the additional types of international contracts and claims arising out of contracts that would be excluded from the scope of any convention (in addition to those in the bracketed text). Contracts that might reasonably be excluded include:

Contracts for services rendered exclusively in a place other than a country in which the consumer has his habitual residence? See Article 6(4)(a) of the Rome I Regulations?

Contracts for the carriage of passengers and goods. See Article 6(4)(b) of the Rome I Regulations?

A contractual right in rem in immovable property or tenancies of immovable property. See Article 6(4)(c) of the Rome I Regulations?

Rights and obligations which constitute a financial instrument and rights and obligations which constitute the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings. See Article 6(4)(d) of the Rome I Regulations?

A contract concluded with a multilateral system which brings together multiple third-party buying and selling interests in financial instruments. See Article 6(4)(e) of the Rome I Regulations?

Contracts related to property or goods dependent on financial market fluctuations, contracts in markets with standard rules, such as stock exchanges?

Contracts to provide financial services, credit card transactions, or loan
agreements? If financial transactions and credit card transactions are of concern, is it more useful for states to address best practices and the specific legal or regulatory regimes available for protection of cardholders through the U.S. proposal for a model law on consumer payment cards? Would any provision regulating financial instructions need review and approval by financial service regulators?

Claims concerning the validity of intellectual property rights or infringement of intellectual property rights?

Chapter 2 – APPLICABLE LAW
I – GENERAL RULES
Article 4. Contractual protection in distance contracting

1. (Limited and valid choice of applicable law – Passive consumer).

Is it appropriate to exclude a choice of law made by the parties if the law chosen is not “the law most favorable to the consumer”? Would it be better to maintain the present degree of freedom allowed to the parties to choose an applicable law under the Mexico City Convention Article 7? Are the limitations set forth in Articles 11 and 18 of that Convention sufficient to protect consumers?\(^\text{37}\)

How would one determine the “law most favorable to the consumer” as proposed in Article 4(1)? Isn’t any comparison of dissimilar consumer-protection regimes inherently subjective?

Would applying the law “most favorable” to the consumers only in transnational cases discriminate in favor of domestic producers (which would only need to comply with national law)? \(^\text{38}\)

\(^{37}\) See Mexico City Convention, Article 11 (stating “the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements” and “[i]t 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.”) and Article 18 (allowing exclusion of the law provided for by the Convention only “when it is manifestly contrary to the public order of the forum”); see also Rome I, Articles 6 & 9.

\(^{38}\) One of the questions that has been posed to us during our public meetings is whether the draft convention would discriminate, from a competition and trade perspective, between businesses in different countries. As we understand the draft convention, exporters might be subject to the laws of the exporting country or to those of the importing country, depending upon which ones are most favorable to the consumer. On the other hand, a business within the importing country would only be subject to the rules of that country, since the draft convention only applies to cross border international contracts. Because it is probably fair to suppose that, if “the law most favorable” to a consumer is the law of the exporting country rather than the consumer’s home law, this means that the law of the exporting state might be applied in an international transaction while of the law of the consumer’s state would be applied in a wholly domestic transaction. If the exporting country’s law imposes greater costs on producers than does the importing country’s law, then this would give a domestic producer an unfair and discriminatory cost advantage against foreign producers. Exporters from any country in region would face the same additional costs whenever their consumer protection laws, in whole or in part, are deemed to be “more favorable to the
Does the draft convention effectively place a due diligence requirement on businesses to research the entire law of contracts in every country where goods and services might be supplied to consumers to determine which consumer protection rules are mandatory?

Can a law be considered “most favorable” to consumers if it has the effect of substantially increasing the cost of a given good or service, or substantially inhibiting competition?\textsuperscript{39}

Are there any international choice of law instruments that use an analogous “law most favorable” standard in consumer cases? Are there any regional or international choice of law instruments that specify that the parties’ choice of law to the law most favorable to the consumer? Are there any countries within the region that currently specify that the parties’ choice of law will only be applicable if it is the law “most favorable to the consumer”?\textsuperscript{40}

2. Determination of law most favorable to the passive consumer.

How would the options contained in bracketed Article 4(2) operate in practice? Are they intended as a presumption or as a binding determination?\textsuperscript{40} If the options are intended as a presumption, and if the law of the consumer’s domicile is more favorable than the law chosen by the parties but the law of the place of contracting is even more favorable, which law applies?

Does Article 4(2) provide a reasonable listing of the alternatives that should be available to the parties in choosing what law applies to the contract? For example, why would the Convention even apply if there is a common residence between the consumer and one of the branches of the provider of goods or services (draft Article 4(b))? In e-commerce, what is the place of contracting or the place of the delivery (draft Article 4(c))? What is the place of contracting or delivery if the vendor sells or licenses software to the consumer and the consumer downloads the software from the Internet? Is a contract concluded online by a consumer necessarily “made” by the consumer in his or her country of habitual residence? Are all contracts concluded online electronically deemed to be made by the consumer in his or her country of habitual residence even if the consumer is not in that country at the time of contracting?

\textsuperscript{39} Applying the law most favorable to a particular consumer after a case arises (or the law most detrimental to the particular business), may very well not result in the creation of an environment that provides the greatest overall economic benefit to consumers as a group.

\textsuperscript{40} If the latter, then the drafting should be revised to make clear that the parties are free to choose the law when the contacts described in Article 2 are present.
Should a distinction be drawn between a business that offers a product through a web site in a way that does not take reasonable steps to avoid contact with the consumer’s forum and one that takes reasonable steps to avoid contact with the consumer’s forum?

3 (Place of conclusion in distance contracting)

What is international distance contracting? Is there a difference between international distance contracting (article 4(3)) and international distance consumer contracting (article 4(4))?

4. (Subsidiary application of the law of the consumer’s domicile – Passive consumer)

We appreciate the addition of the bracketed text in article 4(4) providing that the vendor of a product is entitled to rely upon the address provided by the consumer in the contract for purposes of determining the habitual residence of the consumer? Should this be a dispositive or a rebuttal presumption?

5. (Subsidiary rule for passive consumers)

Would the application of the draft rule regarding passive consumers encourage some vendors to not specify a choice of law in the contract when they are entering into a contract with a consumer whose habitual residence is in a country that does not have adequate consumer protection laws?

Does article 9 of the Mexico City Convention provide a more appropriate rule where the parties have not selected the applicable law, or their selection proves ineffective (i.e., the contract shall be governed by the law of the state with which it has the closest connection)?

If the law has not been chosen by the parties, will the law of the country of the habitual residence of the active consumer or law of the place of contracting for the passive consumer necessarily provide adequate protection for the consumer?

6. (On-line Choice of Law)

What do the terms “distance online” and “interactive choice” mean?

Would an e-commerce transaction involving a web page or email text which sets forth the choice of law options be deemed to be clearly and noticeably communicated in the prior information given to the consumer? If the choice of law provision upon which a vendor relies was “clearly and noticeably communicated in the prior information given to the consumer,” why should the law of the state identified in the provision not govern the contract?
Article 5. Contractual protection of the tourist or active consumer

1. (Limited and Valid Choice of Applicable Law. – Active Consumer)

If an active consumer enters into a contract with a vendor, should the choice of law specified in the contract govern the contract if it also coincides with the place of negotiations, the location of the contract’s subject matter or the law of the vendor’s domicile, seat, residence, or place of doing business? Should there be a presumption that the contract will be governed by the choice of law specified in the contract if it has a reasonable connection to the parties or the transaction?

2. (Subsidiary rule for Active consumers)

In e-commerce, what is the place of conclusion? 41

Article 6, Choice and Information of Applicable Law

1. (Information to the Consumer about Choice)

Must the parties’ choice of law be express or, in the event that there is no express agreement, can it be evident from the conduct of the parties and from the clauses of the contract, considered as a whole, consistent with Mexico City Convention, Article 7. 42 Can the parties’ choice of law “relate to the entire contract or to a part of the same”? 43

Is the reference to “if possible in the contract itself” intended as a substantive standard? Should the parties only be able to select one applicable law?

2. (A posteriori choice of law)

May the parties agree at any time that all or part of the contract is subject to a law other than that to which it was previously subject, whether or not the previous law was chosen by the parties, consistent with Mexico City Convention Article 8? 44

Should the parties’ choice after a dispute has arisen be limited to the “options provided for in Articles 4 and 5”?

3. (Law Applicable to Prior Information)

What other provisions of the convention relate to prior information? What is the

41 See supra comments to Article 4.3.
42 See also Rome I, Art. 3(1).
43 See Mexico City Convention, Art. 7 and Rome I, Art. 3(1).
44 See also Rome I, Art. 3(1).
law "presumably applicable" to the contract once it has been concluded? Would it be better for the law of the forum to determine the essence and validity of the consent to the parties to the contract as set forth in the Mexico City Convention, Articles 12 & 13?

Article 7, International Mandatory Rules.

1. (Mandatory rules of the forum)

Does the convention restrict the application of the overriding mandatory provisions of the law of the forum as opposed to the "international mandatory rules"? How does the concept of international mandatory rules differ from the mandatory rules of the forum as provided in Article 11(1) of the Mexico City Convention and Article 9 of the Rome I Regulations?

2. (Mandatory Rules of the consumer’s domicile)

How would the Court apply the "international mandatory rules" of the country of the consumer’s domicile "wherever possible"? Would the application of the international mandatory rules of the consumer’s domicile depend on whether those rules would be more favorable to the consumer than the mandatory rules of the forum and the law most favorable to the consumer as determined in Articles 3 & 4? Would it be better for it to "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 connections"?

Article 8, Hard Clause

We are concerned about the unpredictable, open-ended effect of the exception clause. How would a court determine whether "the connection with the law indicated as applicable proves to be superficial" and "the case itself is more closely related to another law, more favorable to the consumer"?

For example, could a judge override (a) the application of the law of the place of contracting by the active consumer, if there is no valid choice of law, as provided in Article 6(5); (b) the choice of law made by the parties, if it is based on the domicile or seat of the goods or services supplier and it is the law most favorable to the consumer, as in Article 4(2); or (c) the choice of law made by the parties, if it is based on the place of contracting or performance and the consumer is active, as in Art. 6(4)? Is the intent of this provision to allow a judge to override the application of the convention if the choice of law is particularly unfair to the vendor (e.g., where the consumer actively seeks out the vendor in another location)?

Article 9. Harmonization Clause

How is this provision intended to operate in practice? Would it be possible for a

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45 See Mexico City Convention Article 11(2).
court to utilize laws of different states on different issues (i.e. dépeçage or scission), or, alternatively, does the law most favorable to the consumer govern all the legal issues to a transaction? For example, could a court use different state laws in considering each issue affecting a consumer such as the amount of any possible recovery, the statute of limitations, or the substantive law applicable to the dispute?

II – RULES FOR SPECIFIC SITUATIONS
Article 10, Travel and Tourism Contracts

Article 10 appears to limit autonomy of contract in unacceptable ways in travel and tourism contracts. Does Article 10 permit the parties to an individual travel contract to choose the law of the place of the service provider (such as the car agency, hotel, or restaurant)? What constitutes an “individual international travel contract concluded as packages or with combined services”? Does Article 10 cover ship cruises, airline tickets combined with hotel bookings or car rentals combined with hotel bookings? How does one determine where an e-commerce contract offer is “made”?

Article 11, Timesharing Contracts

Generally, the law of physical location of the timeshare contract asset must be deemed to govern most aspects of the contract for practical reasons. Does Article 11 mean that certain issues related to the property (e.g., title transfer issues, condominium fees) would be governed by the law of the place where marketing has taken place and not by the law of physical location of the timeshare contract asset? Does Article 11 mean that only the laws that are favorable to the consumer apply cumulatively? Is the Convention intended to apply to immovable property other than time shares?

Chapter 3 – GENERAL CLAUSES

Article 12. Law of States Not Party

Is the convention intended to apply to transactions where the state of the consumer’s habitual residence, the state of the seat of the goods or service supplier, or the state of the place of celebration are not parties to the Convention?

Note that the Mexico City Convention permits party autonomy in the choice of law and thus the law chosen is not limited to the consumer’s habitual residence, the seat of the goods or service supplier, or the place of celebration of the contract. That Convention was intended to increase certainty and predictability, and thus benefit the flow of commerce. Any new choice of law instrument should achieve the same results.

Article 13, Reservations

The article permitting reservations should be consistent with Article 13 of the

46 Cf., Mexico City Convention, Art. 9.
Inter-American Convention on General Rules of Private International Law and Article 23 of the Mexico City Convention. Under these instruments, and international law in general, reservations are permitted, provided that they are not inconsistent with the object and purpose of the Convention. The suggestion that reservations can only be made if they are consistent with the goal of giving the most favorable protection to consumers is contrary to international law.

Article 14, *Ordre Publique International*

How does this provision compare with the Mexico City Convention, Article 18? How would the provision be applied in practice?

Article 15, Notification and Follow-up

What is the role of the committee? How would its members be selected? Is it envisioned that the committee would be charged with interpreting the Convention? Who would pay for the expenses of the committee?

Chapter 4 – FINAL CLAUSES

We reserve our comment on the final clauses.
ADDITIONAL PROTOCOL ON DEFINITIONS (I)

Would adding additional optional protocols on definitions and application risk creating multiple differing legal regimes, thereby further fragmenting rather than harmonizing private international law concerning applicable law? Are we correct that each of the protocols would include final clauses?

Article 1, Consumer as final consignee

Would a contract fall within the scope of the convention if the purchaser and vendor are located in the same jurisdiction but the “final consignee” is located in another state?

Article 2, Possible extension of the definition of consumer

Is it appropriate through an optional protocol to give a state court or state legislature authority to override specific decisions taken by the OAS member states in defining the scope and application of the convention? Would such a provision allow some states parties to create a separate legal regime for cross-border contracts after the Convention enters into force? Would a state have unlimited authority to determine what constitutes a “wider or more favorable” definition of a consumer”? Could a state define as a “consumer” those entities (as opposed to natural persons) that operate small businesses, notwithstanding any decision by the OAS to the contrary? How would the court “take into account such an expanded scope of the Convention, to the extent that it is more favorable to the consumer’s interests”? Should there be an express carve-out for small businesses? If so, how might that be formulated? Is the better approach to permit a State party to declare, at the time it ratifies or accedes to the Convention, the categories of contracts to which the Convention will not apply.\(^{47}\)

Why is the term international consumer contract or transaction defined in both article 2 of the Convention and article 3 of the Additional Protocol? In determining real and objective contacts the Convention would take into account both the domicile and habitual residence of the Parties? What does the “situation of the goods” mean?

Article 4, International distance consumer contracting

As noted in comments to Article 2 of the Convention above, the Convention should clarify that it only applies to an international consumer contract when the consumer and the vendor are both habitually residents of states that are parties to the Convention.

Article 5. Definition of consumer domicile

Would it be better for the Convention to define and use the term habitual residence and not consumer domicile, consistent with the terminology used in the Mexico City Convention and the Rome I Regulations? We had understood that Brazil agreed during the Porto Alegre negotiations that it would change the reference to “habitual residence” and not use “domicile.”

In Article 5(b), should the Convention apply in situations where the consumer does not have a habitual residence?

In Article 5(c), should the residence of the consumer depend on whether an incompetent person has been abandoned by their legal representative? When should a person be able to invoke the law of another state in asserting incapacity?

Article 6, Reservations

See discussion above concerning Article 13 of the Convention. Note the article should be numbered 6 (not 7).

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48 See, e.g., Mexico City Convention, Art. 1, 2, 22.
49 See Rome Regulations, Article 11.
ADDITIONAL PROTOCOL ON APPLICATION OF THE CONVENTION (II)

Article 1-2, Harmonization

Article 2 of the Additional Protocol appears to restate Article 9 of the Convention.

Article 3, Law applicable to the contract

What does “it must be a Law of a State or Nation” mean? What does the phrase exclude? Why should the parties be limited to selecting only one applicable law?

Article 4, Criteria of the hard clause

See discussion above concerning Article 8 of the Convention.

Article 5, Existence and validity of the contract and the choice of law

How would one determine which law applies to the existence and validity of the contract if the law of the lex fori is different from or conflicts with “those of this Convention” and the law most favorable to the consumer? Would it be better for the law of the forum to determine the essence and validity of the consent to the parties to the contract as set forth in the Mexico City Convention, Articles 12 &13? (How does this compare with Article 8 of the main convention?)

Article 6, Mandatory rules of the country where the property utilized is located

Does Article 6 mean that only the laws that are favorable to the consumer apply cumulatively? See discussion above concerning Article 11.

Article 7. Exclusion of Renvoi

What is the meaning of the provision, particularly as compared with the Mexico City Convention, Article 17 and the Rome I Regulations, Article 20.

Article 8, Information and Proof of Consumer Law

How would a federal state implement this provision? Is it envisioned that the United States would designate 50 central authorities, since the common law in each of the 50 states vary significantly concerning choice of law? We are concerned about the practical difficulty of implementing this provision.

Article 9, Reservations

See discussion above concerning Article 13 of the convention.

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50 Cf., Mexico City Convention, Art. 9.
ADDITIONAL PROTOCOL ON INTERNATIONAL JURISDICTION
OVER CERTAIN CONSUMER CONTRACTS AND TRANSACTIONS (III)

Article 1, General Rule

Is there a difference between consumer contracts and consumer transactions? If so, what is the difference? Does this rule apply even if the consumer entered into the transaction in person in a different State and the contract was performed in that State?

Article 2, Alternative solutions

Where is the service performed in cases, such as software contracts, where the contract is concluded online and the software is downloaded online? Where is a corporate defendant domiciled? Statutory seat? Center of main interests? Place of central administration?

Article 3, Subsidiaries, branch offices, agencies, or representatives

In an Internet transaction, how can it be determined whether the provider “acted in a consumer relationship through a subsidiary, branch office, agency or any other type of representation”?

Article 4, More than one defendant

Is this rule intended to apply when the suppliers have no connection to each other and their transactions have no connection other than the fact that the consumer was a party to both transactions?

Article 5, Procedural steps taken at distance

How would this work if the court with international jurisdiction would try the case with a jury? How would this work for testimony, as opposed to submission of documents? Would the consumer’s attorney’s need to travel to the provider’s jurisdiction to cross-examine witnesses, observe demeanor, etc?
Annex II

Additional Questions Concerning Canadian Model Law on Jurisdiction and Applicable Law for Consumer Contracts

We offer the following preliminary questions in the hope that the answers to them will help members of the Working Group more fully understand the proposed Model Law. (Of course, if the Working Group decides to take up the Canadian proposal, the United States, along with other States, will likely pose more detailed questions).

Article 1, Scope of Application

Should the term “international contract” be defined broadly or narrowly for purposes of the model law? Why is the internationality factor that triggers application of the Model Law different than the internationality factor that triggers application of the Mexico City Convention?

Why does the Model Law utilize a different internationality factor for choice of forum issues than for choice of law issues?

What “other elements” would be considered in paragraph 2?

What consideration has been given to excluding from the scope of the Model Law special types of contracts (e.g. contracts of carriage, contracts concerning rights in rem in immovable property, contracts concerning financial instruments and other commercial specialties, etc.)? Careful study of the need for exceptions will be necessary in order to fully evaluate the proposed Model Law.

Should the Convention apply to a transaction if the vendor demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract for personal, family or household purposes and would not have entered into the contract if it had known otherwise? Should the Convention apply to a transaction if the vendor demonstrates that it neither knew nor had reason to know the habitual residence of the consumer and thus did not know or have reason to know that the consumer contract would create an “international case”?

Article 2, Definitions

Under Article 2(1)(d), what level of professionalism would be required to qualify as a “vendor” so that a transaction is not the “consumer-to-consumer” contract prohibited in the comments? Would a hobbyist or part-time online seller qualify as a vendor for purposes of the model law?

Article 3, Jurisdiction Rules for Consumer Contracts

Does “person” refer only to individuals, or to legal entities as well?
Article 4, Substantial Connection

Assertion of jurisdiction over vendors to the full extent provided in the Model Law would test, and perhaps breach, constitutional limitations on jurisdiction in the United States. Would such assertion of jurisdiction run afoul of limitations in other member States?

Article 5, Limitation on Forum Selection Clauses

Do the limitations on forum selection clauses apply only to judicial forums, or do they also apply to alternative dispute mechanisms?

Article 6, Discretion about the Exercise of Jurisdiction.

We appreciate the fact that the Canadian proposal on jurisdiction in Article 6 requires that courts be given discretion in the exercise of jurisdiction (i.e., forum non conveniens). Under Canadian law, as well as the law of most common law countries like the United States, a court may decline to exercise its jurisdiction if it believes a court of another state also has jurisdiction to hear the claim and that court can better render justice in the circumstances. We recognize that the proposal conflicts with the approach taken by civil law countries, which do not normally recognize the concept of forum non conveniens. In a civil law jurisdiction, when the requirements of jurisdiction and venue are met, the court must hear the case, although it may suspend the proceeding. However, a few civil law jurisdictions, notably Québec in Canada, and Louisiana in the United States, have adopted the important principle of forum non conveniens.

Article 7, Applicable Law Rules for Consumer Contracts

Why does paragraph 1 exclude oral choice of law agreements and implicit choice of law agreements?

The Commentary seems inconsistent with the text of Article 7(2). The text neither mentions “mandatory” rules nor limits its application to situations in which “the mandatory rules of the law of the State of the consumer's habitual residence give the consumer better protection than the protection afforded by the choice of law selected in the consumer contract.” Does Canada intend that Article 7(2) be interpreted as described

51 See Quebec Civ. Code 1994, art. 3135 (“Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.”).

52 See La. Code Civ. Proc. Ann. Art. 123(B) (West Supp. 1993) (“Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice . . . .”).
in the Commentary? If so, how would a court determine whether the mandatory rules of the law of the consumer would give “better protection” than the law chosen by the parties?

Under Article 7(2), as explained in the Commentary, if there is a choice of law clause in a consumer contract the consumer will get the benefit of whichever of the law chosen and the law of the State of the consumer’s habitual residence provides better protection. On the other hand, if there is no choice of law clause, Article 7(4), which does not provide for a “better protection” rule applies. Why does this difference exist? Wouldn’t it create an incentive for vendors not to include choice of law paragraphs?

What happens if there is no choice of law agreement but the circumstances described in subparagraphs (a)-(c) are not present?