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COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

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LIST OF COMMENTS OF CANADA ON THE JOINT PROPOSAL BY BRAZIL, ARGENTINA
AND PARAGUAY FOR A DRAFT INTER-AMERICAN CONVENTION ON THE LAW
APPLICABLE TO INTERNATIONAL CONSUMER CONTRACTS
AND TRANSACTIONS (CP/CAJP-2652/08 ADD. 4 CORR.1)

Permanent Mission of Canada
to the Organization of American States



Mission permanente du Canada
auprès de l'Organisation des États américains

NOTE No. 083

The Permanent Mission of Canada to the Organization of American States presents its compliments to the Department of International Law of the Secretariat for Legal Affairs at the Organization of American States and has the honour to provide herewith a list of Comments of Canada on the Joint Proposal by Brazil, Argentina and Paraguay for a Draft Inter-American Convention on the law applicable to international consumer contracts and transactions.

The Permanent Mission of Canada avails itself of this opportunity to renew to the Department of International Law of the Secretariat for Legal Affairs at the Organization of American States the assurances of its highest consideration.

Washington, April 1st, 2010



Canada

LIST OF COMMENTS OF CANADA ON THE JOINT PROPOSAL BY BRAZIL, ARGENTINA
AND PARAGUAY FOR A DRAFT INTER-AMERICAN CONVENTION ON THE LAW
APPLICABLE TO INTERNATIONAL CONSUMER CONTRACTS AND TRANSACTIONS

The following are some of the issues that Canada has identified as requiring further clarification, discussion and/or negotiations within the Working Group.

Translations:

We have attached suggested corrections to the English and French official translations that ensure greater consistency, in our view, with the Spanish version.

Separate Optional Protocols:

Throughout the negotiations, it will be necessary to clarify the legal and practical consequences on the application of the Draft Convention of having separate optional Protocols, in light of the fact that States may decide to become a party to the Draft Convention but not necessarily to the Protocols. Discussions will also be necessary on the legal consequences of the reservation clauses contained in the draft Protocols.

Definition of consumer (article 1):

Main definition: Further clarification and/or discussion are required on the relevance and the legal/practical consequences of defining “consumer” as including the natural person acting both for personal, family or household purposes and for purposes not related to his professional activity, and of adding “*or with the purpose of reselling*” to the definition. In addition, the differences between the main definition of “consumer” and the definition of “consumer as final consignee” (article 1 of Protocol I) require clarification/discussion. Consideration must also be given to the consistency between the Spanish, English and French versions.

“Consumer by assimilation”: Further clarification and/or discussion are required on the appropriateness of extending the definition of consumer to the final consignee taking into account issues such as privity of contract. The proposed definition also raises problems as regards the interpretation of international consumer contracts (article 2 of the Draft Convention) and of international distance consumer contracting (article 4 of Protocol I), the determination of the applicable law and the application of article 6 of the Draft Convention.

Definitions of consumer found in Protocol I: Further clarification and/or discussion are required on the legal and practical consequences of having additional definitions of consumer in Protocol I, and how these additional definitions will impact the level of legal certainty.

Definition of international consumer contract or transaction (article 2):

Further clarification and/or discussion are required on the following:

The meaning of the terms: transaction, operation and contract.

The meaning of the terms “*domicile*” and “*main branch*” (and “branches” used elsewhere in the document).

The need to provide a definition of the legal person’s “domicile”.

Further clarification and/or discussion are needed on the legal and practical consequences of moving the definition of “contract and international consumer transaction as an operation” (“Operations included” - article 2(2) of the former Brazilian Draft Convention) to Protocol I. We also need to discuss the definition itself.

Other issues regarding definitions:

Further clarification and/or discussion are required on the following:

The legal and practical consequences of moving the definition of “consumer domicile” to Protocol I as well as the content of the definition itself, which appears to allow a consumer to have more than one domicile.

The impact of moving the definition of “international distance consumer contracting” to article 4 of Protocol I, especially in regard to the application of paragraphs 4(4) and 4(5) of the Draft Convention. Also, the definition of “international distance consumer contracting” raises a number of questions, notably in regard to the intended meaning of “*without their physical presence in the same State at the moment of contracting*”.

Scope of application:

At this time, the scope of application is defined in article 3 only by the matters that are excluded. We therefore need to clarify and discuss which consumer contracts are intended to be covered by the Draft Convention: contracts between parties that are domiciled in different States, contracts between parties that are domiciled in different Contracting States, contracts where at least one of the parties is domiciled in a Contracting State, etc.

There will also need to be a discussion on the list of matters that are excluded under article 3.

Determination of applicable law:

The Second Chapter is at the heart of the Joint Proposal and will therefore require extensive discussions on the appropriateness of establishing separate conflict-of-law rules based on the “passive consumer” and the “active consumer” (especially in the context of e-commerce) and on the appropriateness of the rules themselves.

In addition, the following are some of the issues that Canada has identified as requiring clarification and further negotiations.

Article 4. Contractual protection in case of distance contracts

Further clarification and/or discussion are required on the following:

The interaction between paragraphs 4(1) and 4(2).

Whether paragraph 4(2) requires a formal or a substantial comparison, and whether such comparison must be made for each issue that arises in a dispute.

Whether the term “residence” used in paragraph 4(2)(b) refers to mere residence or habitual residence and the resulting legal and practical consequences.

The interaction between paragraph 4(2)(c) and paragraph 4(3).

Whether paragraph 4(3) establishes a rebuttable or non-rebuttable presumption and what rule will apply in case of fraud.

Discussions on article 4 will also need to extend to the interaction with articles 7 and 8 of the Joint Proposal and the content of these provisions.

Article 5 - Tourist’s Contractual protection or in case of the active consumer

Further clarification and/or discussion are required on the following:

In e-commerce transactions, the appropriateness of treating consumers differently depending on whether they are present in the State of their domicile or outside this State at the time of contracting.

Whether paragraph 5(2) applies where the parties are physically in the presence of one another or physically present in the same State.

In the absence of a valid choice of law, what rule is intended to apply where the consumer is outside his State of domicile at the time of contracting but not in the presence of the professional, or where the consumer and the professional are not present in the same State.

Article 6 – Choice and information of applicable law

Further clarification and/or discussion are required on how the “*in writing*” requirement for e-commerce transactions will be met and on the interpretation of the terms “*known and agreed to in each case*” used in paragraph 6(1).

Article 7 - Internationally mandatory rules

The Canadian proposal refers to “mandatory rules”, which are those substantive rules of law of the consumer’s State of habitual residence that cannot be derogated from in a contract in such a way that the consumer is left with less protection (consistent with Article 3(3) of the Rome Convention). The Joint Proposal refers to “internationally mandatory rules” in article 7 and to “mandatory rules” in article 11. The concepts of “mandatory rules” and “internationally mandatory rules” and their application in the context of the Canadian Proposal and the Joint Proposal must be clarified and discussed.

As for article 7 of the Joint Proposal, further clarification and/or discussion are required on the following:

The application of internationally mandatory rules in cases where they may offer less protection than the law otherwise applicable in accordance with the Draft Convention.

In the case of the “passive consumer”, the interaction between paragraph 7(2) and paragraphs 4(1) and (2).

Article 8 - Substantial exception clause (*hard clause*)

Further clarification and/or discussion are required on how and in what type of cases the hard clause would apply.

Article 9 - Harmonization Clause

The text of this provision also appears in article 2 of Protocol II, so clarification is required.

Also, further clarification and/or discussion are required on whether the terms “*requirements of consumer protection*” are intended to cover something other than the “*law more favourable to the consumer*” and, if so, what.

Article 10 - Travel and tourism contracts

Further clarification and/or discussion are needed on the relevance of having separate rules for travel and tourism contracts and, if separate rules are required, the appropriateness of the rules themselves.

Article 11 - Timesharing contracts and similar contracts of use of immovable property in turns

Further clarification and/or discussion are required on the following:

How “*Without prejudice to the rules set forth above*” is intended to limit the application of article 11.

The different approaches used in articles 7(2) and 11 as they affect the application of mandatory rules.

The application of article 11 in cases where the parties were located in different States at the time the pre contracts or the contracts were signed.

Fourth Chapter – Final Clauses

The final clauses of the proposed Draft Convention will require further examination and discussion, once the substantive provisions have been finalized. Overall, they will have to be reviewed in light of, and to ensure consistency with, similar provisions that appear in other international private international law instruments.

The following are some of the issues of concern that we have identified so far.

Article 21

This article will need to be reviewed notably to provide for the date of the coming into force of the Draft Convention regarding a territorial unit for which a State makes a declaration pursuant to paragraph 18(2) of the proposed Draft Convention.

Protocol II

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

Further clarification and/or discussion are required on the policy rationale for including the *lex fori* in addition to the law governing the contract.

Article 6 - Mandatory rules of the State where the timeshared property is located

Further clarification and/or discussion are required on the following:

The absence of a reference to the rules set forth in the Draft Convention, contrary to article 11 of the Draft Convention.

Why the mandatory rules of the country of the location of the facilities “*can also be considered*” by the court, while articles 7 and 11 of the Draft Convention provide that mandatory rules “*shall apply*”.

Protocol III

We must discuss the possibility of including jurisdictional rules in the Draft Convention in order to enhance its effectiveness.

Article 1 - (General Rule)

Further clarification and/or discussion are required on the following:

The scope of application of this special jurisdictional rule, which appears to cover situations where it may not be fair to assume that the professional should expect to be sued in the consumer's jurisdiction.

The addition of a "targeting concept" similar to that found in the Canadian proposal ("solicitation of business") and other international instruments.

The need to provide the professional the opportunity to limit its jurisdictional risk.

Article 2 - (Alternative Solutions)

Further clarification and/or discussion are required on the following:

To what extent this article actually provides "alternative solutions" in light of the rules applicable to the passive and the active consumer under the Draft Convention.

Whether the alternative solutions constitute a sufficient connection to establish jurisdiction.

The absence of rules dealing with choice of court clauses/agreements, attornment or counterclaims.

Article 3 - (Branches, agents or representatives)

Alternative drafting should be discussed.

Article 5 - Procedural acts performed at a distance

We must discuss the practical application of this provision in the absence of administrative cooperation mechanisms and whether or not other approaches, such as videoconferencing, could constitute better options.