

**Revised Proposal of the Canadian Delegation on the topic of Consumer Protection –
May 2008**

**DRAFT OF PROPOSAL FOR A MODEL LAW ON JURISDICTION AND
APPLICABLE LAW FOR CONSUMER CONTRACTS**

Preamble¹

The purpose of this Model Law is to set out uniform jurisdictional and choice of applicable law rules with respect to cross-border business-to-consumer contracts so as to promote the objectives of:

- (a) providing a predictable, fair and efficient legal framework for resolving disputes relating to cross-border consumer contracts;
- (b) providing effective and meaningful protection for consumers in their relationships with businesses;
- (c) facilitating the free movement of goods and services among States and promoting consumer confidence in the marketplace; and
- (d) providing greater consistency and enhancing judicial cooperation in disputes relating to cross-border consumer contracts.

Introductory Comments: *The preamble is intended to provide a statement of the basic policy objectives of the Model Law. With cross-border transactions increasing, it is important that the legal framework supporting consumer transactions across borders be governed by consistent principles that lead to predictable results regardless of the State in which a particular consumer or business is habitually resident. Whenever a dispute crosses borders, questions arise concerning the court which has jurisdiction to hear the dispute and which State's laws should apply to govern the resolution of the dispute. By unifying the rules applicable to consumer contractual disputes, the proposed Model Law would ensure that the same solution would be applied irrespective of the court hearing the case. Model legislation would provide greater certainty and predictability of results for resolving disputes involving more than one State. The instrument proposed is a Model Law and not an international convention.²*

¹ A new preamble clause has been added. The Preamble is intended to provide a statement of the basic purpose of the Model Law. The essential purpose of the Model Law is to establish uniform jurisdictional and choice of law rules with a view to providing a predictable, fair and efficient legal framework for resolving disputes relating to cross-border business-to-consumer contracts. The inclusion of a provision setting out the purpose of the instrument is consistent with Brazil Proposal of an Inter-American Convention on the law applicable to some international consumer contracts and transactions and the US Draft Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers.

² The form of instrument proposed is a Model Law and not a convention because the rules in this field are different from one OAS State to another. Realistically, to achieve any harmonization in this context, a first step would be to have an instrument that allows the competent legislative authorities of States some flexibility in adopting it. As a binding international instrument, a convention does not provide such flexibility and would be less likely to achieve broad acceptance. The report from the Porto Alegre meeting notes: "Comments were made that the proposal should take the form of a convention and not a model law. The opposite view was also expressed."

PART I: GENERAL PROVISIONS

Article 1 Scope of application³

1. This Model Law shall apply in international cases to consumer contracts.
2. For the purposes of Part II, a case is international unless the parties are habitually resident in the same State and the relationship of the parties and all other elements relevant to the dispute are connected only with that State.⁴
3. For the purposes of Part III, a case is international in any situation involving a choice between the laws of different States.⁵

Commentary: Article 1 limits the scope of the Model Law. The first paragraph of Article 1 makes it clear that the scope of the Model Law is limited to apply only in international cases. The second paragraph of Article 1 defines “international” for the purposes of the rules on jurisdiction found in Part II of the Model Law. It provides that a case is international unless both the following conditions are satisfied: first, the parties are habitually resident in the same State; and secondly, the relationship of the parties and all other elements relevant to the dispute are concerned only with that State. This means that the jurisdictional rules of the Model Law are intended to apply either if the parties are not habitually resident in the same State, or if some other element relevant to the dispute has a connection with some other State. The third paragraph of Article 1 defines “international” for the purposes of the rules on applicable law found in Part III of the Model Law. It provides that the Model Law is intended to apply only in situations involving a choice between the laws of different States.

Article 2 Definitions⁶

1. For the purposes of this Model Law:

³ Article 1 has been added to clarify the scope of the Model Law. At the Porto Alegre Meeting concern was expressed about the application of the Canadian proposal to internal consumer contracts and the assumption that national rules of jurisdiction should be modified according to a Model Law. The inclusion of a clause describing the scope of the Model Law is consistent with Brazil Proposal of an Inter-American Convention on the law applicable to some international consumer contracts and transactions and the US Proposal for Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers.

⁴ Article 1(2) defines “international” for the purposes of the rules on jurisdiction and is based on a modification of Article 1(2) of the 2005 *Hague Conference Choice of Court Agreements Convention*.

⁵ Article 1(3) defines “international” for the purposes of the rules on applicable law and is based on a modification of Article 1(1) of the 1980 *Rome Convention on the Law Applicable to Contractual Obligations* (EU).

⁶ At the Porto Alegre Meeting it was suggested that further work be undertaken on the definitions contained in the proposal. Some delegates indicated that it would be desirable to include definitions in the text of the document. The definition of “plaintiff” has been deleted in response to a comment by one delegate at the Porto Alegre Meeting.

- (a) “**consumer**” means a natural person who is acting [primarily] for a personal, family or household purpose”.⁷
 - (b) “**consumer contract**” means a contract concluded between a vendor and a consumer;
 - (c) “**consumer contract proceeding**” means a proceeding brought in connection with a consumer contract;
 - (d) “**vendor**” means a natural or legal person, who is acting in the course of his or her trade, business or profession, and includes a vendor’s agent.⁸
 - (e) “**vendor’s State**” means a State other than [name of State] in which a vendor is habitually resident.
2. For the purposes of this Model Law, an entity or person other than a natural person shall be considered to be habitually resident in the State:
- (a) where it has its statutory seat;
 - (b) under whose law it was incorporated or formed;
 - (c) where it has its central administration; or
 - (d) where it has its principal place of business.⁹

***Commentary:** Article 2 sets out the definitions for the Model Law. The term “consumer contract” is used throughout the Model Law and is a determining factor with respect to whether the special rules regarding jurisdiction and applicable law will apply to a particular dispute. The main purpose of the rules protecting consumers is to protect a party which may be regarded as the weaker party. The definition of “consumer” limits the protection to natural persons. A further element of the definition is that the person is acting for a personal, family or household purpose. The fact that the consumer does not intend to use the object of the transaction personally does not preclude the qualification. Consideration will also need to be given to whether natural persons acting primarily but not exclusively for a personal, family or household use should be deemed to be “consumers” for the purposes of the Model Law.*

Article 2(1)(b) defines a “consumer contract” as contract which is concluded by a consumer, on the one hand, and a vendor, who is acting in the course of his or her trade, business or profession, on the other. This definition clarifies that the Model Law is intended to apply only to

⁷ A definition of consumer has been added. The definition of “consumer” is inspired by article 2(a) of the *United Nations Convention on Contracts for the International Sale of Goods (1980)* and by article 2(1)(a) of the *United Nations Convention on the Use of Electronic Communications in International Contracts*.

⁸ The definition of “vendor” takes its inspiration from the *1980 Rome Convention on the Law Applicable to Contractual Obligations* and the *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)*.

⁹ This provision has been redrafted to reflect the established concept of “habitual residence”. The wording of paragraph 2 is inspired by Article 4(2) of *2005 Hague Conference Choice of Court Agreements Convention*.

contracts between consumers and businesses, and not to consumer-to-consumer contracts. “Vendor” is defined in Article 2(1)(d) as a natural or legal person who is acting in the course of his or her trade, business or profession. Jurisdictions may exclude specific services from this definition such as professional services that are regulated under other statutes.

The Model Law does not contain a definition of habitual residence for natural persons. As a precise legal definition is extremely difficult to arrive at, it was felt that such a definition would provide more difficulty than certainty. However, Article 2(2) defines “habitually resident” with respect to an entity or person other than a natural person. It provides that an entity or person other than a natural person shall be considered to be habitually resident in the State where it has its statutory seat, under whose law it was incorporated or formed, where it has its central administration or where it has its principal place of business.

PART II: JURISDICTION

Article 3

Jurisdiction Rules for Consumer Contracts

A court has jurisdiction in a consumer contract proceeding that is brought against a person¹⁰ if:

- (a) the person is habitually resident in [name of State] at the time of the commencement of the consumer contract proceeding;¹¹
- (b) as provided for in Article 4, there is a substantial connection between [name of State] and the facts on which the consumer contract proceeding against that person is based;¹²
- (c) subject to Article 5, there is a written agreement between the parties to the effect that the court has jurisdiction in the consumer contract proceeding;¹³
- (d) during the consumer contract proceeding the person submits to the court’s jurisdiction; or

¹⁰ In this provision, the term “person” is used in the generic sense. It covers natural persons and corporate entities. This notation is made to clarify the meaning of “person” in Article 3. This revision is made in response to a concern noted by the US Delegation in regards to Article 3.

¹¹ The term “ordinarily resident” has been replaced with “habitually resident” to reflect the concept more commonly used in international conventions. For example, see Article 5(2) of the *1980 Rome Convention on the Law Applicable to Contractual Obligations*.

¹² The drafting of Article 3 has been revised in response to comments made at the Porto Alegre Meeting. In particular, Article 3(b) has been revised to specifically include a reference to Article 4 which sets out circumstances in which a substantial connection is presumed to exist for the purposes of Article 3(b).

¹³ Article 3(c) has been revised to include a reference to Article 5 which requires a court to refuse to enforce a forum selection clause in certain circumstances. The report from the Porto Alegre Meeting states “... some were of the view that it would be preferable to redraft Article 3 and in particular, include a reference in article 3 to article 6 which requires a court to refuse to enforce a forum selection clause in certain circumstances.”

- (e) the consumer contract proceeding is a counterclaim in another proceeding in the court.

***Commentary:** Article 3(a) provides that a court may assert jurisdiction over a person who is habitually resident in its jurisdiction at the time of the commencement of the proceedings, but does not permit a court to take jurisdiction on the basis of the person's presence in the State alone, without any other connection between the forum and the litigation.*

Article 3(b) provides that a court may assert jurisdiction over a person that is outside the State, where there is a substantial connection between the State and the facts on which the proceeding is based.

Articles 3(c), (d) and (e) include three ways in which a person may consent to the court's jurisdiction, namely, by having agreed in writing that the court shall have jurisdiction, by submitting to the court's jurisdiction during the proceedings or by invoking the court's jurisdiction as plaintiff in a counterclaim. Article 3(c) provides that the agreement on choice of forum is to be a "written agreement". Each State's legislation determines whether such agreement would be effective in law if made electronically, and provides accordingly.

Article 4 ***Substantial Connection***¹⁴

1. Without limiting the right of a person who has commenced a consumer contract proceeding to prove other circumstances that constitute a substantial connection between [name of State] and the facts on which a consumer contract proceeding is based, a substantial connection between [name of State] and those facts is presumed to exist if:

- (a) a consumer, who is habitually resident in [name of State], has brought a proceeding under a consumer contract in the courts of [name of State] against a vendor, who is habitually resident in a State other than [name of State]; and

- (b) one of the following circumstances exists:

- (i) subject to paragraphs 2 and 3, the consumer contract resulted from a solicitation of business in [name of State] by the vendor,

- (ii) the vendor received the consumer's order in [name of State], or

- (iii) the vendor induced the consumer to travel to a State other than [name of State] for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

2. For the purposes of subparagraphs 1(b)(i) of this Article, a consumer contract is deemed to have resulted from the solicitation of business in [name of State] by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers habitually residing in [name of State].

¹⁴ It was noted that the drafting of Article 4 was heavily influenced by the common law. In order to simplify this Article, the reference to "real and substantial connection" has been revised to refer only to "substantial connection".

3. Subparagraph 1(b)(i) of this Article does not apply if the consumer and the vendor were in the presence of one another in the vendor's State when the consumer contract was concluded.

Commentary: *According to Article 4, a substantial connection is presumed to exist for certain consumer contracts. The presumption is designed to identify the State with which the consumer contract is most closely connected. Essentially, Article 4 sets out a special jurisdictional rule for proceedings relating to consumer contracts. It is a "key provision" of the Model Law. It provides that a court in a State has jurisdiction where a consumer, who is habitually resident in that State, brings an action against a vendor that habitually resides in another State and the consumer contract satisfies any one of the three conditions set out in subparagraphs (b)(i) to (iii).*

The first condition contemplates that the consumer contract resulted from a solicitation of business in the enacting State, where the consumer habitually resides. Paragraph 2 of Article 4 specifically provides that the contract will be deemed to have resulted from the solicitation of business in the enacting State, unless the vendor demonstrates that he or she took reasonable steps to avoid concluding contracts with consumers habitually residing in that State.

Article 4 essentially incorporates a "targeting concept" into the rule for determining which court has jurisdiction to hear a dispute. If a vendor specifically targets or solicits a consumer in a particular State, it is assumed that the courts of that State should exercise jurisdiction to hear a dispute relating to the consumer contract. However, Article 4(2) is intended to provide the vendor with the option to limit his or her jurisdictional risk by taking reasonable steps to avoid concluding contracts with consumers that habitually reside in the enacting State. A vendor could therefore reduce uncertainty by targeting only those States in which he or she understands and accepts the legal framework. The targeting concept is intended to avoid the uncertainty associated with subjecting the vendor to the jurisdiction of the courts of any State in which his or her web site is accessible.

Some could be concerned that defining the term "solicitation" would place the onus on a consumer to establish that the consumer contract resulted from a solicitation of business in the enacting State, where the consumer has his or her habitual residence. Instead, Article 4(2) places the onus on the vendor to demonstrate that he or she took reasonable steps to avoid concluding consumer contracts with consumers habitually residing in that State. A court might take into account in its assessment whether a vendor took the following steps:

- whether the vendor's web site included a disclaimer indicating that the vendor would not enter into contracts with consumers from a particular State;*
- whether the vendor asked the consumer for details of his or her location and identity during the course of the transaction;*
- whether the vendor used technological blocking or screening mechanisms to prevent access by consumers from a particular State to the vendor's web site; and*
- whether the vendor took steps, such as programming its web site, so as not to accept orders from, or allow shipment to, residents of States with whom it does not intend to transact business.*

Article 4 is intended to represent a balanced approach that protects consumers and is fair and predictable for vendors. It is inspired by the concern to protect the consumer as the party deemed to be the economically weaker and less experienced in legal matters than the vendor. Even if vendors are required to defend themselves against an action in the enacting State, they are probably better able and better placed, on average, to cope with this than are consumers. In international litigation, consumer protection is dependent upon the availability of a forum close

to the consumer's habitual residence. The need to litigate in a foreign court would often deter consumers from enforcing their rights.¹⁵ In view of the small claims at stake, proceedings conducted in a foreign court would be costly and inefficient. The requirements in Article 4 are intended to ensure that the special protection applies only to consumer contracts that have an adequate connection with the consumer's State of habitual residence.

Under Article 4(3), a consumer who makes a purchase while in the vendor's State will not be extended the protection of the special jurisdictional rule, if the consumer and the vendor were in the presence of one another when the consumer contract was concluded. Where a consumer goes into a physical store location in the vendor's State and knowingly takes on the risk of conducting trade in that State, the consumer would not be entitled to the benefit of the protection of the special jurisdictional rule. However, in other cases, the protection of the special jurisdictional rule is extended to the "mobile consumer", regardless of where the consumer concludes the contract. In particular, Article 4 does not limit the protection of the special jurisdictional rule to cases where the consumer has taken the steps necessary for the conclusion of the contract in the enacting State in which the consumer is habitually resident.¹⁶

The second condition entitling a consumer contract to fall within the scope of the special jurisdictional rule is where the order was received by the vendor in the enacting State. For example, this condition could involve a vendor receiving orders at a fair or exhibition taking place in the State in which the consumer habitually resides.

The third condition is where the consumer contract is entered into as a result of the consumer travelling to the vendor's State and giving his or her order in that State, if the consumer's journey was assisted by the seller for the purpose of inducing the consumer to buy. It covers what one might describe as "cross-border excursion-selling." For example, this situation could arise where a store-owner in one State arranges for bus trips for consumers habitually resident in a neighbouring State with the main purpose of inducing the consumers to buy in his or her store. The rationale for the special consumer jurisdictional rule in Article 4 is that the consumer is usually the weaker party, especially if he or she has paid for the goods or services in advance.

Finally, it should be noted that the presumption in Article 4 is a rebuttable presumption. In addition, Article 4 in no way limits the right of the consumer to prove other circumstances that determine a substantial connection between the State and the facts on which the consumer contract proceeding is based.

Article 5

Limitation on Forum Selection Clauses

1. Notwithstanding that an agreement pursuant to Article 3(c) purports to give a court jurisdiction in a consumer contract proceeding, that agreement is void if:

(a) the agreement was entered into before the commencement of the proceeding;

¹⁵ Max Planck Institute for Comparative and International Private Law – *Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, p. 55.

¹⁶ Article 5 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations has been regarded by several academic writers as not giving the mobile consumer proper protection. See the "Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization".

(b) the agreement provides that the court of a State other than [name of State] has jurisdiction in the consumer proceeding; and

(c) one of the following circumstances exists:

(i) the consumer contract resulted from a solicitation of business in the [name of State] by the vendor and the consumer and vendor were not in the presence of one another in [name of State] when the consumer contract was concluded,

(ii) the vendor received the consumer's order in the [name of State], or

(iii) the vendor induced the consumer to travel to a State other than [name of State] for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

(2) For the purposes of subparagraph (1)(c)(i), a consumer contract is deemed to have resulted from the solicitation of business in the [name of State] by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers habitually residing in the [name of State].

Commentary: The rationale for Article 5 is that it is considered unlikely that most consumers would turn their minds to a choice of forum clause at the time of contracting. In all likelihood, a consumer would only become aware of such a clause if a dispute arose. As such, the provision provides that the court should only enforce a choice of forum clause, if the clause was entered into by the parties after the commencement of the proceedings.

Article 6 ***Discretion about the Exercise of Jurisdiction***¹⁷

1. After considering the interests of the parties to a consumer contract proceeding and the public interest, a court may decline to exercise its jurisdiction in the consumer contract proceeding on the ground that the court of another State is a more appropriate forum in which to try the consumer contract proceeding.

¹⁷ At the meeting in Porto Alegre, concerns were raised regarding the inclusion of forum non conveniens in the draft proposal. It was suggested that this provision be deleted as unnecessary or introducing into civil law jurisdiction a concept of common law. Other views were expressed that it was necessary that "forum non conveniens" be included in the proposal. For a discussion of the concepts of "forum non conveniens" and "lis pendens" see the Explanatory Report for the 2005 Hague Conference Choice of Court Agreements Convention by Professors Trevor Hartley (UK) and Masato Dogauchi (Japan) p. 44:

"132. There are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another State. The first is *forum non conveniens*. This is a doctrine mainly applied by common law countries. Its precise formulation varies from country to country, but in general one can say that it permits a court having jurisdiction to stay (suspend) or dismiss the proceedings if it considers that another court would be a more appropriate forum. The granting of a stay or dismissal is discretionary and involves weighing up all relevant factors in the particular case. It applies irrespective of whether or not proceedings have been commenced in the other court (though this is a factor that may be taken into account).

133. *Lis pendens*. The second doctrine is that of *lis pendens*. This is applied mainly by civil law countries. It requires a court to stay (suspend) or dismiss proceedings if another court has been seised first in proceedings involving the same cause of action between the same parties. It is not discretionary, does not involve the weighing up of relevant factors to determine the more appropriate court and applies only when proceedings have already been commenced in the other court."

2. In deciding the question of whether it or a court of another State is the more appropriate forum in which to try a consumer contract proceeding, a court shall consider the circumstances relevant to the consumer contract proceeding, including

- (a) the comparative convenience and expense for the parties to the consumer contract proceeding and for their witnesses in litigation in the court or in any alternative forum,
- (b) the law to be applied to issues in the consumer contract proceeding,
- (c) the desirability of avoiding a multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fairness and efficiency of the legal system as a whole.

Commentary: Article 6 reflects the doctrine of forum non conveniens. In general, a court may decline to exercise jurisdiction if there is a more appropriate forum to hear the consumer contract proceeding.

PART III: APPLICABLE LAW

Article 7

Applicable Law Rules for Consumer Contracts

1. Subject to paragraph 2, a consumer who is habitually resident in [name of State] and a vendor who is habitually resident in a State other than [name of State] may agree in writing that the law of a particular State will apply to their consumer contract.

2. An agreement pursuant to paragraph 1 is invalid to the extent that it deprives a consumer who is habitually resident in [name of State] of the protection to which he or she is entitled pursuant to the laws of [name of State] if:

- (a) the consumer contract resulted from a solicitation of business in [name of State] by the vendor and the consumer and the vendor were not in the presence of one another in the vendor's State when the consumer contract was concluded;
- (b) the vendor received the consumer's order in [name of State]; or
- (c) the vendor induced the consumer to travel to a State other than [name of State] for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

3. For the purposes of paragraph 2(a), a consumer contract is deemed to have resulted from solicitation of business in [name of State] by the vendor unless the vendor

demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers habitually residing in [name of State].

4. In the absence of a valid agreement pursuant to paragraph 1, if one of the circumstances described in subparagraphs 2(a) to (c) exists, the laws of [name of State] apply to a consumer contract between a consumer who is habitually resident in [name of State] and a vendor who is habitually resident in a State other than [name of State].

Commentary: *Once a court determines that it has jurisdiction to hear a consumer contract proceeding, it must then determine which substantive law should be applied to decide the merits of the dispute. Determining applicable law involves many of the same considerations that were mentioned above in relation to determining the proper jurisdictional forum.*

Essentially, Article 7 establishes a special choice of law rule for certain contracts made by consumers. It generally allows the parties to select the law that will apply to their contract at the time of its formation or later on, by agreement in writing, during their contractual relationship. However, in order to protect the weaker party to a consumer contract, Article 7(2) embodies the principle that the choice of law agreed to by the parties, cannot deprive the consumer of the protection of the mandatory rules of the law of his or her State of habitual residence if one of the circumstances mentioned in subparagraphs 2(a) to (c) exists. Article 7(2) will only be applied if 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. The mandatory rules are those substantive rules of law that cannot be derogated from in a contract in such a way that the consumer is left with less protection. As mentioned previously, in order for protection afforded by Article 7(2) to apply, one of the three conditions set out must exist.

Article 7(3) specifically provides that the contract will be deemed to have resulted from the solicitation of business in the enacting State, unless the vendor demonstrates that he or she took reasonable steps to avoid concluding contracts with consumers habitually residing in that State.

Article 7(4) also sets out a general rule for situations where the parties have not made a valid choice of applicable law. In the absence of a valid choice of law agreement, the laws of the enacting State apply to a consumer contract between a consumer who is habitually resident in the enacting State and vendor who is habitually resident in another State, provided that one of the circumstances described in Articles 7(2)(a) to (c) exists.

Finally, Article 7(1) provides that the agreement on choice of law is to be "in writing". Each enacting State will have to consider whether such an agreement would or should be effective in law if made electronically, and provide accordingly.