

Re: Comments on Canada's Proposal on a Model Law on Jurisdiction and Conflict of Law Rules for Consumer Contracts

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This document contains some personal views and comments on Canada's "*Model Law on Uniform Jurisdiction and Applicable Law for Consumer Contracts*" to be considered for the coming preparatory meeting at the UFRGS, in Porto Alegre, Brazil, on December 2-4, 2006.

Definitions

"*ordinarily resident*". The rules regarding the domicile of natural persons and business varies significantly between common law and civil law jurisdictions. In many legislations- as is the case of Mexico's-, for instance the law goes even further and establishes a legal presumption that "*a person is an habitual resident when he remains in a certain place for more than six months*"¹. Therefore, considering the existing differences and the scope of definitions, it would be convenient to set forth a definition of "*resident or habitual resident*" within such instrument that reflects both legal systems.

Exclusion of Other ground for Jurisdiction

This provision is of the utmost importance for a local court to establish its jurisdiction in a cross-border consumer contract. Therefore, we strongly encourage to establish as a rule: first, the jurisdiction where the consumer has his domicile or habitual residence (pursuant an agreed definition); second, the jurisdiction of the execution of the contract; and third the domicile or venue where the business or vendor may be located.

Jurisdiction Rules for Consumer Contracts

(b) "*the real and substantial connection*" is a doctrine that has been developed mainly in common law jurisdictions, and it is usually determined on a case-by-case court analysis rather than applying strict written codified rules. The '*real and substantial connection*' considers notions of '*reasonableness*' and '*fundamental fairness*' and is often used by common law courts in order to assert '*personal jurisdiction*'² on a person who is not a habitual resident of a state, while at the same time, it seeks to afford some protection to defendants against being pursued in jurisdictions having little or no connection with the transaction of the parties. However, countries with civil

¹ See article 29 of the Federal Civil Code

² Personal jurisdiction has traditionally been used in the US to pursue a legal action against a company or person that is not physically located within the territory or state where the plaintiff has his/her place of business or residence.

law systems have not fully developed that concept into their legislation yet, and some have done so very narrowly within their jurisprudence. The ‘*real and substantial connection*’ clause presumption contained in section 4.1 of Canada’s proposal does generally help to clarify the doctrine when a court or tribunal in a civil law country sought to assert jurisdiction on a consumer contract, however it would be in the discretionary interest of such court to establish jurisdiction by applying the substantive rules on jurisdiction and the competence of tribunals contained in the Civil Code and the Code of Civil Proceedings, and pursuant the Supreme Court’s existent jurisprudence (if existent), and not on the case law and *stare decisis* process developed in other common law jurisdictions. We recommend reexamining the definition and try to reflect to a certain extent the jurisprudence and case law developed in civil law countries members of the OAS with regards to the ‘*real and substantial connection*’ issue.

It is important to note that Canada’s has been very proactive in the regulation of electronic commerce since 1998³, and its proposal would mostly favor countries with a solid consumer protection framework on electronic commerce and long distance consumer contracts. However, there are some countries of the OAS, including Mexico that have not yet implemented specific rules on cross-border consumer contracts, and we believe that a convention would likely help such countries to adopt a uniform and more consistent framework on jurisdictional rules for international contracts as opposed to following a model law, which is non-binding and where most of the cases, it might lead to meaningful legal differences and incompatibilities during its implementation process.

Regardless of the path the OAS decides to choose (*Convention or Model Law*) it is important that both instruments reflect the “*Country of Destination Approach or Rule*”⁴ in order to provide legal certainty to consumers in those contracts entered on the Internet whereby the parties have different domiciles. Also, it is recommended that the OAS together with government members analyze the model law proposed by Canada, its possible effects on Internet consumer activities particularly in countries with a civil law system, and if possible, provide a summary report that enumerates the advantages and disadvantages of its implementation with the input of all the members of this working group following the conclusion of the preparatory meeting in Porto Alegre.

Finally, and in order for OAS to come up with a viable legal frame solution for jurisdiction on consumer contracts, it is important to remind that the *OECD Consumer Protection Guidelines in the Context of Electronic Commerce* contains a provision on jurisdiction and applicable law, which textually recommends the following: “*B2C cross-border transactions should be subject to the existing framework on applicable law and jurisdiction, and if countries are considering modifying the existing framework or apply it differently, they should continue to ensure effective*

³ See the OECD’s Ministerial Declaration on Consumer Protection in the Context of Electronic Commerce Committee on Consumer Policy, (Ottawa 7-9 October 1998) available at: <http://www.oilis.oecd.org/oilis/1998doc.nsf/4cf568b5b90dad994125671b004bed59/64d1366d4d7272fec12566de004d70fd>

⁴ This rule or principle affords a consumer the protection under the rules of its domicile or country of residence and the express prohibition to withdraw from it own jurisdiction regardless that a contract establishes otherwise, *see* art. 90 section VI) of Mexico’s Federal Consumer Protection Law. Under the country of destination rule, consumers may be able to pursue legal action against companies or service providers in the courts of their own jurisdiction.

*and transparent consumer protection in the context of the continued growth of electronic commerce. Also, governments should seek to ensure that the framework provides fairness to consumers and businesses, facilitates electronic commerce, results in consumers having a level of protection not less than that afforded in other forms of commerce, and provides consumers with meaningful access to fair and timely dispute resolution and redress without undue cost or burden*⁵

We hope these comments help to enrich the dialogue during the coming preparatory meeting at the UFRGS, in Porto Alegre, Brazil

Best regards,

⁵ OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, section VI A).