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## Current Approaches Towards Harmonization of Consumer Private International Law in the Americas

Diego P. Fernandez Arroyo

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# Current Approaches Towards Harmonization of Consumer Private International Law in the Americas

Diego P. Fernández Arroyo\*

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## I. INTRODUCTION

Since 2003, the Organization of American States<sup>1</sup> (“OAS”) has concentrated most of its efforts and focused on the harmonization of international consumer law. It has become the current focal point of the legal harmonization process undertaken by the Inter-American Specialized Conference on Private International Law (“CIDIP”).<sup>2</sup> As its name indicates, the CIDIP is concerned with conflict issues and therefore with private international law rules understood in a broad sense (i.e. choice of law, jurisdiction, judicial cooperation and international arbitration).<sup>3</sup> However, the CIDIP VI, in 2002, has changed this “paradigm” of codification, enlarging the scope of the inter-American unification even more.<sup>4</sup> Thus, the Inter-American Model Law on Secured Transactions deals with both domestic and international relationships, and by consequence most of its provisions are substantive rules. The current state of affairs of the treatment of the subject matter of consumer protection offers a mix of proposals made by Brazil, Canada and the United States (“U.S.”), reaffirming the change operated in 2002.

Namely, Brazil presented a Draft Convention on the Law Applicable to International Consumer Contracts and Transactions, Canada proposed a Model Law on Jurisdiction and Choice of Law to Consumer Contracts, and the U.S. submitted a Draft of Legislative Guidelines on Availability of Consumer Dispute Resolution and Redress for Consumers. The U.S. Guidelines included three annexes that provide a) a Model Law on Small Claims; b) Model Rules for Cross-border Arbitration; and c) a Model Law on Government Redress.<sup>5</sup>

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1. OAS includes 35 American States from Argentina in the south to Canada in the north; only 34 are effective because Cuba has been suspended since 1962. See <http://www.oas.org>.

2. See Organization of American States [OAS], Private Int'l Law, available at [http://www.oas.org/dil/privateintlaw\\_interamericanconferences.htm](http://www.oas.org/dil/privateintlaw_interamericanconferences.htm). There is also another issue which is actually the continuation of the main subject-matter of CIDIP VI: security interests. See OAS, CIDIP VI, Washington, D.C., Feb. 4-8, 2002, Final Act, available at <http://www.oas.org/dil/CIDIP-VI-finalact-Eng.htm>. Current developments in this field address the electronic registry implementation of the Inter-American Model Law on Secured Transactions—an instrument adopted at CIDIP VI. *Id.* The OAS General Assembly adopted the agenda topics for CIDIP VII. OAS, CIDIP VII, June 6, 2006, *Convocation*, AG/RES. 2065 (XXXV-O/05), available at [http://www.oas.org/dil/CIDIP-VII\\_res.2065.htm](http://www.oas.org/dil/CIDIP-VII_res.2065.htm).

3. See generally GONZALO PARRA-ARANGUREN, CODIFICACIÓN DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA (vol. I 1982, vol. II 1998); Didier Operti Badán, *L'oeuvre de la CIDIP Dans le Contexte du Droit International Privé Actuel*, in E PLURIBUS UNUM: LIBER AMICORUM GEORGES A.L. DROZ 269 (1996).

4. See Diego P. Fernández Arroyo, *La CIDIP VI: ¿Cambio de Paradigma en la Codificación Interamericana del Derecho Internacional Privado?*, XXIX CURSO DE DERECHO INTERNACIONAL – 2002, at 465 (2003).

5. Collectively, the “Draft Model Laws.”

In the inter-American harmonisation process, as well as in other similar processes undertaken by different international organisations, it is uncommon to be confronted with three different proposals relating to the same topic. What usually happens in other international organisations, as well as in the CIDIP, is a discussion based on one project and its different versions. It is perhaps just a consequence of the characteristics of the CIDIP as a codification body, which functions essentially with the assistance of member states activity, because of the absence of a permanent secretariat specifically dedicated to private international law codification. Regardless, the existence of different available options and various approaches should not be seen as a negative figure; quite the opposite.

In addition to the interest of the subject matter itself, current efforts in the Americas give a great opportunity to test the different possible techniques to achieve international legal harmonization within a regional organisation and to analyze the compatibility between them. At the same time, chance is given to observe and compare the different approaches proposed to offer to consumers a way to solve appropriately their cross-border disputes with suppliers.<sup>6</sup> This paper will address these issues, as well as with the policies embodied by them.

## II. DIFFERENT INSTRUMENTS (FROM HARD TO SOFT LAW)

Besides its practical relevance to solve real disputes, that the current movement takes place in the Americas within the OAS is interesting from both a theoretical and a technical point of view. Indeed, three approaches have been adopted by the initiators of these three projects. The choice of the best approach—i.e. the most efficient in terms of harmonization of consumer law—should only be made after an in depth analysis of each instrument.

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6. See J.M. Velázquez Gardeta, *La Protección del Consumidor Online en el Derecho Internacional Privado Interamericano, Análisis Sistemático de las P Presentadas para la CIDIP VII (2008)* (Ph.D. thesis), *passim*.

A. *Brazilian Draft Convention on the Law Applicable to International Consumer Contracts and Transactions*<sup>7</sup>

At first sight, the instrument proposed by Brazil is a classical conflict-of-laws convention. In fact its single goal is to establish which law applies to a certain kind of private international relationship. Nevertheless, a more detailed scrutiny shows that it is all but classical, at least within the very context of rules on international consumer contracts. The key of the Brazilian draft is a combination between limited party autonomy on the one hand and the principle of the most favourable law to the consumer on the other hand.<sup>8</sup> Namely, parties may choose the law of the consumer's domicile, the law of the place of conclusion of the contract, the law of the place of performance, or the law of the provider's<sup>9</sup> domicile or seat.<sup>10</sup> For passive consumers (i.e., for contracts and transactions made while the consumer was in her or his country of domicile<sup>11</sup>), chosen law shall apply to the extent that it is the most

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7. OAS, Dep't of Int'l Law, Proposal of Brasil for the CIDIP Convention on Consumer Protection, CP/CAJP-2094/03 add. 3-a (Dec. 17, 2004), available at [http://oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_proposal\\_brasil\\_applicablelaw.htm](http://oas.org/dil/CIDIP-VII_topics_cidip_vii_proposal_brasil_applicablelaw.htm) [hereinafter Brazilian Draft Convention]. The Brazilian Draft Convention was born from a particular initiative of Professor Claudia Lima Marques, who proposed it in the 2000 Session of the OAS Course on International Law. See Claudia Lima Marques, *A Proteção do Consumidor: Aspectos de Direito Privado Regional e Geral*, XXVII CURSO DE DERECHO INTERNACIONAL - 2000, at 657 (2001). See also Claudia Lima Marques, *Consumer Protection in Private International Law Rules: The Need for an Inter-American Convention on the Law Applicable to Some Consumer Contracts and Consumer Transactions*, in REGARDS CROISES SUR LES ENJEUX CONTEMPORAINS DU DROIT DE LA CONSOMMATION 145 (T. Bourgoignie ed., 2006). For that reason the proposal is also known as the "Lima Marques Draft" (*Projeto Lima Marques*).

8. A favorable opinion on this option can be found in Erik Jayme, Speech Given at the Inauguration of the New Building of the Hague Academy of International Law: La Vocation Universelle du Droit International Privé—Tendances Actuelles (Jan. 23, 2007), available at [http://www.vredespaleis.nl/shownews.asp?ac=view&nws\\_id=109](http://www.vredespaleis.nl/shownews.asp?ac=view&nws_id=109).

9. The term "provider" is used in these paragraphs because it is the term used in the English version presented by the Brazilian delegation. In its Draft Model Laws, the U.S. delegation mainly uses the term "business" instead.

10. Brazilian Draft Convention, *supra* note 7, art. 2.1. Parties are only entitled to choose "a law of a state or nation." Thus, no "transnational" or "not national" set of rules or principles on consumer transactions could be chosen by the parties. See GRALF-PETER CALLIESS, *GRENZÜBERSCHREITENDE VERBRAUCHERVERTRÄGE, RECHTSSICHERHEIT UND GERECHTIGKEIT AUF DEM ELEKTRONISCHEN WELTMARKTPLATZ* 375-485 (2006) (giving a heterogeneous list of "not national" texts, including some EU instruments).

11. The subjacent idea is that a consumer deserves more protection when it is the business who "goes" to the consumer's residence to offer him a good or a service. On the contrary, if the consumer "goes" across the boundaries to buy something he should be perfectly conscious of the internationality of that relationship and accept its legal consequences. See Paul Lagarde, *Heurs et Malheurs de la Protection Internationale du Consommateur dans l'Union Européenne*, in *ETUDES JACQUES GHESTIN*, 511 (2001); A. Sinay-Cytermann, *La Protection de la Partie Faible en Droit International Privé*, in

favourable to the consumer.<sup>12</sup> If there is no valid choice of law by the parties, the applicable law will be the law of the consumer's domicile (for passive consumers) or the law of the place of contracting (for active consumers).

This draft provides that the choice of law "must be express and in writing, known and agreed in each case."<sup>13</sup> It also introduces the duty of the provider to give clear information either about the law chosen as applicable in standard terms of reference or about the possible options between different laws available to the consumer. Other provisions of this draft may modify the law applicable in principle. Thus, the court may exceptionally apply a different law from the one indicated in the convention, provided that this law is both more closely related with the contract and more favourable to the consumer. In addition, internationally mandatory rules<sup>14</sup> of the forum shall apply in any case,<sup>15</sup> while internationally mandatory rules of the consumer's domicile only apply whenever the conclusion of the contract was preceded by any negotiations or marketing activities by the provider or its representatives in that country.<sup>16</sup> Finally, the Brazilian draft also includes specific rules for travel and tourism contracts and for timesharing contracts.<sup>17</sup>

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MÉLANGES PAUL LAGARDE 737 (2005) (describing the different treatment pursuant to this distinction within the European private international law).

12. Brazilian Draft Convention, *supra* note 7, art. 2.1.

13. In the light of the current works accomplished in UNCITRAL, the agreement "in writing" can appear in various forms and is likely to raise difficulties of construction. See P. Perales Viscasillas, *¿Forma Escrita del Convenio Arbitral?: Nuevas Disposiciones de la CNUDMI/UNCITRAL*, DERECHO DE LOS NEGOCIOS, Feb. 2007, at 5; see also Toby Landau, *The Requirement of a Written Form for an Arbitration Agreement: When "Written" Means "Oral," in ICCA International Arbitration Congress Series 11, INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 19 (2003).*

14. See Commission Regulation 593/2008, On the Law Applicable to Contractual Obligations (Rome I), art. 9(1), 2008 O.J. (L 177) 6 (EC) on law applicable to contractual obligations [hereinafter *Regulation*] (not yet in force) ("Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.").

15. Brazilian Draft Convention, *supra* note 7, art. 3.1.

16. *Id.* art. 3.2.

17. *Id.* arts. 6, 7.

*B. Canadian Draft Model Law on Jurisdiction and Choice of Law*<sup>18</sup>

From the very beginning of the CIDIP VII process, Canada asserted that the way to achieve harmonization of international consumer law in the Americas consisted of elaborating a model law dealing only with jurisdiction. However, some days before the Porto Alegre (Brazil) meeting of experts in December 2006—which has been the most important event within the process of preparation of the CIDIP VII—Canada added to its Draft Model Law on Jurisdiction one provision on applicable law.<sup>19</sup> In any event, beyond the very content of the proposal, it is worth underlining Canada's constructive attitude in this venture, despite traditionally being sceptical about the regional process of codification in the Americas.

For the determination of both issues of jurisdiction and applicable law, similar to the Brazilian Draft Convention, the Canadian proposal is also based on party autonomy but in a very different way. Essentially, a choice of forum clause is invalid for contracts involving passive consumers if the agreement was made before the commencement of the proceedings,<sup>20</sup> and if the chosen jurisdiction is not the jurisdiction in which the consumer is a resident. In the same vein, a choice of law clause is invalid for contracts involving passive consumers if the clause deprives the consumer of the protection to which he or she is entitled pursuant to the laws of the state of his or her habitual residence.<sup>21</sup> In the absence of a valid choice of forum or of the submission of the defendant, the court in the defendant's state of residence has jurisdiction.<sup>22</sup> A court also has jurisdiction if there is a real and substantial connection between the state of the court and the facts on which the consumer contract case is based.<sup>23</sup> Every claimant may prove that such a connection exists, but this connection is presumed to exist in the case of passive consumers who bring a case before the courts of their country of residence against a provider who resides in another state.<sup>24</sup> In the field of the applicable law, the subsidiary rule for passive consumers is, in absence of a valid choice-

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18. OAS, Revised Draft of Proposal For a Model Law on Jurisdiction and Applicable Law for Consumer Contracts appended to Proposal of Canada for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), CP/CAJP-2652/08 (Aug. 21, 2008), available at <http://scm.oas.org/pdfs/2008/CP20891E02.pdf> [hereinafter Canadian Draft Model Law].

19. See the proposal sent by Canada (Jan. 20, 2004), available at <http://www.oas.org/dil/proposalcanada.pdf>.

20. Canadian Draft Model Law, *supra* note 18, art. 5(1)(a).

21. See *id.* art. 7.

22. See *id.* art. 3(a).

23. See *id.* art. 3(b).

24. See *id.* art. 4.

of-law clause, the application of the law of the consumer's state of residence.

One of the scenarios of passive consummation arises when the origin of the contract was a solicitation of business in the consumer's state by the provider, and the consumer and the provider were not in the presence of one another in the provider's state when the contract was concluded. The Canadian Draft Model Law presumes that a solicitation by the provider existed, but the provider may demonstrate that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in the consumer's state.<sup>25</sup>

Canadian rules on jurisdiction allow Canadian courts to decline jurisdiction using the well known common law device of *forum non conveniens*.<sup>26</sup> In order to decide the declination of the exercise of its jurisdiction, this draft provides the court with a non exhaustive list of circumstances to take into account,<sup>27</sup> including the law to be applied and the fairness and efficiency of the legal system as a whole. In other words, the Canadian proposal also provides for a comparative evaluation of the law applicable.

C. *U.S. Draft Legislative Guidelines (with Three Annexes Providing Model Laws and Model Rules)*<sup>28</sup>

In the beginning of the CIDIP VII process, when the OAS called on Member States to propose topics to compose the working agenda, the U. S. showed a concern for electronic commerce. The U.S. presented two subjects claiming that in both cases "rules should be formulated in the form of an Inter-American treaty, although a model law would alas be

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25. See Canadian Draft Model Law, *supra* note 18, arts. 5(2) and 7(3); see also note 11 *supra*.

26. See Canadian Draft Model Law, *supra* note 18, art. 6. As reflected in the final act of the Meeting of Experts of Porto Alegre, several delegations expressed concerns about this inclusion, which is controversial in general but even more so when it comes to consumer relationships.

27. See *id.* art. 6(2).

28. OAS, Committee on Juridical and Political Affairs, Legislative Guidelines appended to Proposal of the United States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), CP/CAJP-2652/08 add.1 (Sept. 18, 2008), available at <http://scm.oas.org/pdfs/2008/CP21008E.pdf> [hereinafter U.S. Legislative Guidelines]; U.S. Legislative Guidelines, annex A. An English version of this document is available at <http://scm.oas.org/pdfs/2008/CP21008E-A.pdf> [hereinafter Annex A]; U.S. Legislative Guidelines, annex B. An English version of this document is available at <http://scm.oas.org/pdfs/2008/CP21008E-B.pdf> [hereinafter Annex B]; U.S. Legislative Guidelines, annex C. An English version of this document is available at <http://scm.oas.org/pdfs/2008/CP21008E-C.pdf> [hereinafter Annex C].



acceptable.”<sup>29</sup> The proposed subjects were a) new uniform rules on cross-border investment securities transactions, covering the electronic creation of investment securities (stocks, bonds, etc.), their registration, pledge, clearance and settlement of transactions and related transaction rights, as well as the rights and responsibilities of securities intermediaries and of other holders of rights in these securities; and b) rules to provide for electronic filings, searches and certifications in connection with local or regional electronic commercial registries. In addition, the U.S. proposed that the draft Inter-American Rules on Electronic Documents and Signatures,<sup>30</sup> which had been already presented at the CIDIP VI but not adopted on that occasion, “be again reviewed and finalized as model rules.”<sup>31</sup> Although the two main subjects proposed by the U.S. were supported by Chile and Peru, only the second subject was included in the agenda of the CIDIP VII.<sup>32</sup>

There was nothing on consumer issues in the letter from the U.S. Nevertheless, the U.S. expressed its broad support to this topic,<sup>33</sup> which had been suggested by Brazil, Canada, Mexico and Uruguay. Once the Member States reached an agreement in the Committee on Juridical and Political Affairs of the Permanent Council of the OAS, including consumer protection in the agenda and its adoption by the General Assembly, the U.S. presented, on 24 October 2006, its Draft Proposal for a Model Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers.<sup>34</sup> The document submitted, however, had not the structure of a model law, being rather a list of goals and guidelines that national legislatures should take into account to develop consumer protection.<sup>35</sup> After discussion at the Meeting of Experts held in Porto Alegre in December 2006, the U.S. revised the

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29. See the North-American letter to the OAS, (Feb. 24, 2004), available at [http://www.oas.org/dil/CIDIP-VII\\_home\\_topics\\_proposals\\_unitedstates.htm](http://www.oas.org/dil/CIDIP-VII_home_topics_proposals_unitedstates.htm).

30. OAS, United States proposed Uniform Inter-American Rules for Electronic Documents and Signatures Recitals (Oct. 3, 2001), available at [http://www.oas.org/dil/CIDIP-VII\\_topics\\_futures\\_cidips\\_electroniccommerce\\_signatures\\_3oct2001.htm](http://www.oas.org/dil/CIDIP-VII_topics_futures_cidips_electroniccommerce_signatures_3oct2001.htm).

31. See North American letter, *supra* note 29. CIDIP VI was entirely accomplished in a single week. There was not even time to analyze the Uniform Inter-American Rules for Electronic Documents and Signatures Recitals.

32. See Diego P. Fernández Arroyo, *La Contribución de la OEA al Derecho Internacional Privado*, XXXII CURSO DE DERECHO INTERNACIONAL 189, 205-08 (2006).

33. See [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_proposal\\_consumer\\_protection\\_monetaryrestitution\\_unitedstates.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_proposal_consumer_protection_monetaryrestitution_unitedstates.htm).

34. OAS, Committee on Juridical and Political Affairs, Draft of United States Proposal for a Model Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers for CIDIP-VII, CP/CAJP-2424/06 (Nov. 2, 2006), available at [http://oas.org/dil/CP-CAJP\\_2424\\_06\\_eng.pdf](http://oas.org/dil/CP-CAJP_2424_06_eng.pdf) [hereinafter U.S. 2006 Draft Proposal].

35. The same document recognizes that “this proposal is drafted as a ‘conceptual’ model law.” See *id.* at n.1.

original proposal and asked the experts for additional comments. Comments and suggestions were made. According to the U.S. delegate, all of the responding delegations commented that the U.S. proposal was more in the nature of a legislative guide. Hence, the nature of the U.S. proposal was changed and became a (general) legislative guide with three (specific) model laws.

Seen as a whole, the U.S. Draft Legislative Guidelines is too long an instrument to be summarized in a few words. The nature of the proposal does not help. The same document eloquently says that “these Guidelines offer a flexible common framework of *general principles* to enable OAS members to improve access to redress for consumers, rather than a single model law for all member states.”<sup>36</sup> Notwithstanding this confession, several points of the U.S. proposal deserve attention.

Annex A provides sample legislative language for implementing a domestic small claims procedure for those states with no such procedure in place. The characteristics of a specific procedure for resolving small claims are clearly set forth at the beginning of the draft: it should be simple, expeditious, economical, and fair.

- Simple: The scope of the Model Law is broad and does not distinguish between civil or commercial claims; as long as the damage is suffered by a consumer as defined in the legislative guidelines, the Model Law should be applied.<sup>37</sup>
- Expeditious: The procedure should be in writing (but an oral hearing may be granted on an exceptional basis) and the time periods to respond to a claim and to notify a claim to render the judgment are short.<sup>38</sup> Moreover, “the tribunal may hold a hearing through an audio, video or email conference or other communications technology if the technical means are available and both parties agree.”<sup>39</sup>
- Economical: “Representation by an attorney in a small claims tribunal shall not be mandatory[;] a party may be represented by a friend or relative if the representative is familiar with the facts of the case, consistent with the procedural law of the State.”<sup>40</sup>

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36. U.S. Legislative Guidelines, *supra* note 28, § 1(4) (emphasis added).

37. Annex A, *supra* note 28, art. 3.1. Damage is defined broadly.

38. *Id.* arts. 6 and 7.

39. *Id.* art. 6.8.

40. *Id.* arts. 5.1 and 5.3.

- Fair: It is reminded that “the tribunal shall respect the right to a fair trial and the principle of an adversarial process.”<sup>41</sup> However, the right to appeal the decision rendered by the tribunal of small claims is subject to the procedural law of the forum.<sup>42</sup>

Annex C is a model law on government authority to provide redress and cooperate across borders against fraudulent and deceptive commercial practices; it is based on the experience of the U.S. Federal Trade Commission. Its aim is twofold. First, it provides for the designation or creation of a consumer protection authority in each member state that is vested with the authority to obtain redress for consumers and is able to cooperate with their foreign counterparts. Secondly, the law also purposes to “facilitate the enforcement of certain judgments for consumer redress across borders.” The draft proposes that the authority “shall have the investigation and enforcement powers necessary for the application of this Law and shall exercise them in conformity with national law.”<sup>43</sup> Procedure remains then in the domestic arena. “The competent authorities are . . . authorized to take action and obtain remedies, including, but not limited to monetary redress, for or on behalf of consumers ‘who have suffered economic harm as a result of fraudulent or deceptive commercial practices.’” Once again, a broad definition of damage as suffered by the consumer appears in this draft.<sup>44</sup> On the international level, the interesting points are the cooperation between authorities<sup>45</sup> and the specific procedure for recognition of foreign civil judgments for consumer redress.<sup>46</sup> This last issue is particularly worth noting as the draft departs from its traditional view not to interfere in the national procedural law. Here, it is proposed that

when a foreign competent authority obtains a civil monetary judgment for redress to consumers [. . .] and such authority seeks to have that judgment or order recognized and enforced in [member state], the judicial authorities may treat that judgment as equivalent to such a judgment in the name of a private party or parties, and shall not disqualify such a monetary judgment from recognition or

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41. *Id.* art. 6. 2.

42. *See* Annex A, art. 8.1. This particular point deserves more discussion and it is at least debatable that the possibility to lodge an appeal should be excluded from the harmonization approach.

43. Annex C, *supra* note 28, art. 3.2.

44. *Id.* art. 4.1.

45. *See id.* art. 5.

46. *See id.* art. 6.

enforcement as penal or revenue in nature, or based on the public nature of the law enforced, due solely to the governmental status of the plaintiff pursuing the redress claim.<sup>47</sup>

Both Annex A and Annex B are proposed as complementary to each other, and “both proposals are meant to work as alternatives for providing meaningful redress to consumers.”<sup>48</sup>

Finally, Annex B refers to model rules for electronic arbitration of cross-border consumer claims. This annex is treated here as the last one as it plays a complementary role to the other two. Indeed, Annex B provides draft model rules for electronic arbitration of consumer claims. Unlike Annexes A and C, Annex B is only conceived for cross-border relations. Hence, it is possible to deduce from this precise scope that arbitration is not seen as an option for domestic consumer claims. Indeed, this feature seems rather odd, especially in the context of the U.S. proposal. The claim cannot exceed US\$ 1,000.<sup>49</sup> The arbitration procedure is qualified as simple, economical, fast, and fair; as a result it should be effective.<sup>50</sup> Notwithstanding that, rules seem quite similar to rules in commercial arbitration but they are drafted in a more vague and incomplete fashion.<sup>51</sup> Moreover, U.S. and Canadian experiences with online arbitration is not particularly promising for other countries.<sup>52</sup>

#### D. *The Nature of the Proposals and the Issue of Their Compatibility*

Only the Draft Convention proposed by Brazil would be binding on member states. For that reason, it is also the most difficult instrument to negotiate and the most complicated to enter into force, due to the need for ratification by state parties. Advantages and disadvantages of concluding an international convention are well known. On the one hand, due to its legal nature, a convention lacks flexibility. Even if a convention provides for the possibility to ratify it with reserves, the text is, and must be, taken as a whole. On the other hand, the fact that the

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47. Annex C, *supra* note 28, art. 6.1.

48. See Annex A, *supra* note 28, at n.1; Annex C, *supra* note 28, at n.1.

49. Annex B, *supra* note 28, art. 3.a.

50. Provided that consumers continue to have access to their own courts, the option for an international arbitration proceeding should be attractive for them; in particular, from an economical point of view.

51. See Velázquez Gardeta, *supra* note 6, at 598-608, 612-15.

52. See *id.* at 577 (citing relevant case law); *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34 (Can.). See also Richard Alderman, *The Future of Consumer Law in the United States—Hello Arbitration, Bye-Bye Courts, So Long Consumer Protection* (University of Houston Law Center: Public Law and Legal Theory Series 2008-A-09, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1015517](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015517). Cf the North-American judicial approach with that of Europe in CJCE, October 26, 2006, case C-168/05, *Claro*.

text would be adopted as such, without being adapted according to the peculiarities of each state, could enable a true harmonization of consumer law. Moreover, a convention may also serve as a model law, as a number of conventions have already shown, particularly conventions adopted within the OAS.<sup>53</sup> This possibility could be particularly useful in the regulation of international consumer contracts, given that most of the national legal systems in the Americas have no rules for these contracts—neither on applicable law nor on jurisdiction.<sup>54</sup>

However, soft law is likely to be a faster way to achieve harmonization of consumer law. Indeed, model laws and legislative guides offer a degree of flexibility and adaptability in accordance with the needs and wishes of each state that facilitates negotiation. Nonetheless, it can be feared with good reason that the ultimate aim of harmonization of consumer law would not be successfully fulfilled with such an instrument whose version varies from country to country.

Instead of betting all the chances of harmonization on one instrument, a combination of different types could be chosen. For instance, the adoption of a convention regarding choice of law matters and a model law on international jurisdiction, as long as both were compatible (adopting the same fundamental policies), is an option which could be in principle feasible. However, in the concrete CIDIP VII scenario, proposals from Brazil and from Canada seem to be incompatible because of their departing philosophies. Nevertheless a convention such as the one proposed by Brazil could coexist with a model law on jurisdiction (or even with a convention on jurisdiction) other than that proposed by Canada.<sup>55</sup>

Regarding the U.S. proposal, its compatibility with both other texts is clear as far as they deal with different aspects of the same reality. U.S. (general) Draft Legislative Guidelines and U.S. (particular) drafts model laws aim at reforming the national legal systems in three particular aspects: first, the introduction of a procedure for resolving small claims in consumer contracts; second, the introduction of a procedure for the

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53. See D.P. FERNÁNDEZ ARROYO, *DERECHO INTERNACIONAL PRIVADO INTERAMERICANO* 64-65 (2d ed., Universidad Anahuac del Sur 2003).

54. See C. 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 Posteriores*, in *PROTECCIÓN DE LOS CONSUMIDORES EN AMÉRICA. TRABAJOS DE LA CIDIP VIII* 79, 204-05 (D.P. Fernández Arroyo & J.A. Moreno Rodríguez eds., 2007).

55. See E. Tellechea Bergman, *Hacia una Regulación Interamericana Sobre Jurisdicción en Materia de Relaciones Internacionales de Consumo—Esbozo de Bases a Partir de Algunos Desarrollos del MERCOSUR*, in *PROTECCIÓN DE LOS CONSUMIDORES EN AMÉRICA. TRABAJOS DE LA CIDIP VII* 79, 204-05 (D.P. Fernández Arroyo & J.A. Moreno Rodríguez eds., Asunción 2007).

electronic arbitration of the most common cross-border consumer claims; and, third, the establishment of competent consumer protection authorities vested with the power to obtain redress for consumers and to cooperate with their foreign counterparts. Obviously, none of these goals is contradictory with the adoption of a common set of rules to determine the law applicable to international consumer contracts.<sup>56</sup> The U.S. delegation has openly recognized that “these Guidelines are not intended to provide details of procedures for all attempts by individual businesses and consumers to resolve disputes directly and informally”<sup>57</sup>; on the contrary, they “are intended to complement existing . . . rules regulating or affecting business-to-consumer transactions.”<sup>58</sup>

Already in 2005, delegations assembled in the Committee of Juridical and Political Affairs of the OAS had agreed that the CIDIP VII would produce both a convention on applicable law and a model law on monetary redress. The OAS legal advisor in charge of the CIDIP at the OAS Department of International Law explained the agreement in the following words: “the convention would create a system to determinate the applicable rules to consumer litigation, whilst the model law would complement the convention with mechanisms for the redress whenever there are no more effective solutions.”<sup>59</sup>

### III. DIFFERENT ASPECTS OF CONSUMER (PRIVATE INTERNATIONAL) LAW

#### A. *The Options: From Law Applicable to ADR/ODR*

The difference of approach is also reflected in the issues covered by the three projects. The Brazilian Draft Convention is the most limited and the most concrete; it restricts itself to the issue of the applicable law. This limitation is motivated by a very good reason: the narrower the ambit of a convention, the easier it is to negotiate that convention and to bring debates to a satisfactory and promptly solution.<sup>60</sup>

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56. As it is expressly established in the final document of the Experts Meeting of Porto Alegre (‘Explanatory Introduction to the Experts Meeting carried out by the OAS—Porto Alegre, December 2-4, 2006’), “delegations agreed that the US proposal and the Brazilian proposal were complementary and not mutually exclusive.”

57. U.S. Legislative Guidelines, *supra* note 28, art. 2.2.

58. *Id.* art. 2.1 (emphasis added).

59. See J.M. Wilson Molina, *CIDIP VII: trabajos preparatorios para la Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado*, in INTERNET, COMÉRCIO ELETRÔNICO E SOCIEDADE DA INFORMAÇÃO—DECITA, REVISTA DE DIREITO DO COMÉRCIO INTERNACIONAL NO. 5/6, at 600-01 (Adriana Dreyzin de Klor & D.P. Fernández Arroyo eds., 2006).

60. See Lima Marques, *supra* note 54, at 190, 205.

However, it is here submitted that harmonization should be first achieved on the jurisdiction issue.<sup>61</sup> As consumer law contains many mandatory provisions, their application depends heavily on the jurisdiction seized. Notwithstanding, the negotiation of *fora* and other jurisdictional issues are the most difficult to compromise as jurisdiction is intrinsically linked with national legal orders and often seen as a question of sovereignty. That is the reason why, in spite of the fact that before the beginning of the official discussions in the cyber-forum of the CIDIP, several voices called informally for the inclusion of jurisdictional issues within the scope of the draft. The idea that prevailed, however, was to reserve jurisdictional matters for the near future.<sup>62</sup> Failed experiences from other organisations also played a role in making the decision not to introduce those matters in the Brazilian Draft.<sup>63</sup>

The Canadian Draft Model Law encompasses both issues of applicable law and jurisdiction. Nevertheless, only the latter was primarily identified by Canada as an issue to be treated by the CIDIP VII.<sup>64</sup> Treatment of the applicable law issue was added later, and it consists of only one article.<sup>65</sup> Although more inclined to address jurisdictional issues, Canada walks side by side with Brazil on the traditional conflicts road. Both countries, as well as almost all the states represented in the CIDIP VII debate, find that there is still room to regulate private international law for “classical” issues in consumer matters.<sup>66</sup>

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61. See Tellechea Bergman, *supra* note 57, at 213.

62. *Id.* at 213-17.

63. See Lima Marques, *supra* note 54, at 202 (underlining specially the problems arisen 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 in force).

64. See Canadian Draft Model Law, *supra* note 18, at 2. “In recognition of the exponentially increasing cross-border electronic transactions involving consumers, Canada notes the need to develop jurisdictional practicable and reasonably predictable rules for cross-border business and consumer transactions on the Internet.”

65. Given its declared preference for a model law rather than a convention, this addition seems an attempt to offer an option to the Brazilian proposal. See *id.*

66. This view is also shared in Europe. Indeed, the European Union has included specific rules for international consumer contracts in the Regulation 44/2001 (“Brussels I” Regulation, on jurisdiction and recognition and enforcement of judicial resolutions; see also Michael WILDERSPIN, *Le règlement (CE) 44/2001 du Conseil: conséquences pour les ontrats conclus par les consommateurs*, REV. EUR. DROIT CONSOMMATION, 2002 no. 1, at 5), and recently in “Rome I” Regulation (law applicable), modernizing the old rules on the same subject already present, respectively, in the 1968 Brussels Convention and in the 1980 Rome Convention. Also the recent updating of 1988 Lugano Convention (a “parallel convention to the 1968 Brussels Convention, linking EU states with EFTA states) has touched consumer provisions. See also Andrea Bonomi, *Les Contrats Conclut par les Consommateurs dans la Convention de Lugano Révisée*, in LA

The U.S. Draft Legislative Guidelines intend to go further in the direction of a treatment of consumer law as a whole because they propose new remedies to settle disputes arising between consumers and professionals. As mentioned above, the Guidelines propose to build a system of legal cooperation between State authorities. The project is ambitious as it also creates a common system for alternative dispute resolution that is generalized to almost all consumer disputes. The implicit idea is that conflict rules (both on applicable law and jurisdiction) are not effective (and then not necessary) to deal with consumer contracts.<sup>67</sup> In the opinion of the U.S., what all of the OAS member states need is a set of rules on small claims, authorities protecting consumers, and online arbitration. Such a proposition hides at least two serious flaws. First, a good part of the proposed rules proposed apply to internal cases rather than international ones. Secondly, in order to operate at an international level, some of the rules require either complementing rules or concluding agreements with other states. For example, according to article 4.1 of the U.S. Draft Model Law on small claims (Annex A), the claimant shall submit a claim form “to the relevant tribunal.” Thus, for this rule to be workable in the international scenario, jurisdictional rules are necessary to know which court could take the case, i.e. which is the relevant tribunal. If the U.S. drafters considered only purely domestic cases, then the proposal has nothing to do with the Brazilian Draft and the issue of mutual compatibility is complete solved.

### *B. Need of Choice of Law Rules*

Due to the fact that there are no inconsistencies between the proposals from Brazil and from the U.S. (or, in other words, accepting the compatibility between different instruments dealing with different aspects of the same matter), one can still evaluate the need and the opportunity of each one. U.S. delegates have expressed the idea that, to the extent that consumer disputes are usually of a small monetary value, litigation in “ordinary” courts does not make sense because proceedings will be very expensive and long and, by consequence, unaffordable for consumers.<sup>68</sup> According to this perspective, rules on applicable law would be worthless because consumer disputes should not be solved

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CONVENTION DE LUGANO. PASSÉ, PRÉSENT ET DEVENIR 65 (A. Bonomi, E. Cashin Ritaine & G.P. Romano eds., 2007).

67. See also CALLIESS, *supra* note 10, at 134-36.

68. See M.J. Dennis, *Diseño de una Agenda Práctica para la Protección de los Consumidores en las Américas*, in PROTECCIÓN DE LOS CONSUMIDORES EN AMÉRICA: TRABAJOS DE LA CIDIP VII 219-21 (D.P. Fernández Arroyo & J.A. Moreno Rodríguez eds., 2007).



before the courts. Besides, the very determination of the applicable law would be expensive in comparison with the amount of the disputes.<sup>69</sup>

Even if it is admitted that most of consumer disputes involve small amounts of money, it is hardly possible to share the U.S. vision about “classical” consumer protection methods. There is no logical connection between these two assertions. The fact that alternative remedies might be useful does not necessarily mean that any other method is worthless. Even the International Chamber of Commerce (“ICC”), which does not show much sympathy towards “classical” conflicts approaches, agrees with its necessity. The “ICC believes that the greatest majority of consumer complaints will be resolved either by a company’s internal customer service or similar mechanism, or through ADR. However, *this does not preclude the need for a predictable legal framework* in which to address the few disputes that persist.”<sup>70</sup> The same has been said in the European context, in relation to the Regulation establishing a European small claims procedure.<sup>71</sup>

There is still another reason to adopt conflicts rules in matters of consumer law. Almost all American countries have rules more or less developed on consumer law. Some Latin American states maintain a high standard of protection. On the contrary, almost no national legal system in the Americas has specific rules for international consumer relationships.<sup>72</sup> For these reasons, despite the attraction of the Draft model laws, Latin American states have demonstrated their interest in the Brazilian Draft Convention.<sup>73</sup>

#### IV. POLICIES

Other than the different choices for the most appropriate instrument or combination of instruments used to achieve harmonization of consumer law, the success of the enterprise depends largely on the policies adopted by the states and by the OAS. Consumer protection

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69. *Id.* at 232.

70. ICC: Electronic Commerce Project’s Ad hoc Task Force, Policy statement: Jurisdiction and applicable law in electronic commerce, June 6, 2001, *available at* <http://iccwbo.org/id478/index.html> (emphasis added). Surprisingly, although M. J. Dennis, *supra* note 68, at 224, cites this document, he does not mention this statement.

71. See Council Regulation 861/2007, 2007 O.J. (L 199), 2. See also Ewoud Hondius, *Towards a European Small Claims Procedure?*, in LIBER AMICORUM BERND STAUDER 131, 142 (2006) (“A small claims procedure should not replace the consumer complaints tribunals. A competition between the two systems cannot be harmful.”).

72. See Paula M. All, *El Diseño y la Pprogresiva Construcción de un Sistema de Protección del Consumidor a Escala Americana. Avances y Desafíos Pendientes*, in PROTECCIÓN DE LOS CONSUMIDORES EN AMÉRICA: TRABAJOS DE LA CIDIP VII 273, 277-78 (Diego P. Fernández Arroyo & J. A. Moreno Rodríguez eds., 2007).

73. See Lima Marques, *supra* note 54, at 204.

needs more than an adequate system of rules and proceedings. Education, advertising, and promotion of good conduct are among the long list of activities that public powers may develop to promote consumer protection at every level (local, national, supranational or regional). Notwithstanding the foregoing the policies embedded in the different proposals need to be evaluated.

Subject to some conditions, the Brazilian Draft Convention foresees that the most favourable law to the consumer should be applied. This principle reflects one policy, which is clearly focused on the protection of the consumer. Of course, this policy needs to be counterbalanced by the option to choose the law and the consequent legal certainty that the Convention would offer to providers.<sup>74</sup> Such an option should be analyzed in the context of the current state of affairs in the Americas, which shows that national legal systems are very heterogeneous and that the courts usually apply the *lex fori* to solve international consumer contracts.

This policy is not always the one pursued by all the states negotiating in the working group of the OAS. Some OAS member states—specifically Canada and the U.S., as well as two members of the Inter-American Juridical Committee (“IJC”),<sup>75</sup>—have criticized the use of the most favourable law principle. According to those delegations, this principle would be difficult to apply in practice.<sup>76</sup> Therefore applicable law would hardly be predictable. As an answer to these critics, the Brazilian delegation has proposed a rule containing several subsidiary criteria that determine which law should be reputed as the most favourable to the consumer. The first law most favourable to the consumer is the law of consumer’s domicile; the second is the law of the common residence of the consumer and one of the branches of the provider, and so on.<sup>77</sup> It is here submitted that the introduction of these criteria is not a good answer since it might result in the loss of the key point of the Brazilian Draft Convention. On the one hand, in most cases, it will come back to the expanded idea that the better law for consumers

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74. See Brazilian Draft Convention, *supra* note 7, pmb1. (“[H]aving in mind . . . the need to provide for an adequate protection to the consumer . . . and to give greater juridical security to all the parties intervening in consumer transactions.”).

75. See the documents OAS/Ser.Q, CJI/doc.230/06 corr. 1, 18 August 2006 (Antonio F. Pérez and J.G. Rodas); OEA/Ser.Q, CJI/doc.227/06, 9 August 2006 (Antonio F. Pérez).

76. The U.S. delegation sent the experts a list of hypothetical cases aimed at demonstrating the difficulties of applying the most favorable law test. However, cases included in the US document do not seem hard to solve. According to Claudia Lima Marques, students of the XXXIV OAS Course on International Law (2007) who faced this matter for the first time could resolve them in less than ten minutes. See Lima Marques, *supra* note 54, at 180-81.

77. See Brazilian Draft Convention, *supra* note 7, art. 6(2).

is the law of their own domicile.<sup>78</sup> Since this law is the one provided by the Brazilian Draft Convention for cases in which there is no valid choice of law, the Convention would give only one solution—and the typical one—for contracts concluded by passive consumers. On the other hand, many critics are opposed to following the principle of the most favourable law to the consumer itself. Therefore, no change in its application will serve to satisfy those critics.

The U.S.<sup>79</sup> and the members of IJC mentioned above<sup>80</sup> have also argued that the Brazilian proposal could be discriminatory because “exporters might be subject to the laws of the exporting country or to those of the importing country, depending upon which ones are most favourable to the consumer . . . [but] a business within the importing country would only be subject to the rules of that country, since the draft convention only applies to a cross-border international consumer contract.”<sup>81</sup>

All these questions deserve further discussion. Nevertheless, it is possible to ascertain that the introduction of a substantial policy in a conflicts convention is not new within the CIDIP process. As a matter of fact, the 1989 Inter-American Convention on Support Obligations (CIDIP IV), in force in twelve Latin-American states, establishes in its article 6 that “support obligations, as well as the definition of support creditor and debtor, shall be governed by whichever of the following laws the competent authority finds the most favourable to the creditor: a. that of the state of domicile or habitual residence of the creditor; b. that of the state of domicile or habitual residence of the debtor.”<sup>82</sup>

In the same vein, the very principle of the existence of a consumer’s right to the access to justice and its concrete scope are controversial issues. Again, such a principle is defended by some OAS member states,

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78. This idea that is present in the European private international law system in the 1980 Rome Convention (article 5) and in Regulation ‘Rome I’ (article 6) is particularly useful when all the member states have a good level of consumer protection. In fact, the EU is revising all its consumer *acquis* in order to achieve a complete harmonization on the matter. See, e.g., *Commission Green Paper on the Review of the Consumer Acquis*, COM (2006) 744 final (Aug. 2, 2007). This EU feature provokes doubts and criticism as it is reflected in T. Wilhelmsson, *Full Harmonization of Consumer Contract Law?*, Z. EUR. PRIV., 2008 no. 2, at 225; Norbert Reich, *Die Stellung des Verbraucherrechts im ‘Gemeinsamen Referenzrahmen’ und im ‘optionellen Instrument’ – Trojanisches Pferd oder Kinderschreck?*, in LIBER AMICORUM BERND STAUDER 364-69 (2006).

79. Document sent to the experts of OAS member states.

80. See sources cited *supra* note 75.

81. Generally discrimination is understood as the unequal treatment of the same (or comparable) situations, which is not the case in this example.

82. See generally R. Herbert & C. Fresnedo de Aguirre, *Flexibilización teleológica del derecho internacional privado latinoamericano*, in LIBER AMICORUM JÜRGEN SAMTLEBEN 55 (2002).

but others do not proclaim it as a right. A common position on this issue should be taken before adopting specific provisions regarding either jurisdiction or ADR. Furthermore, online dispute resolution (“ODR”) mechanisms already exist in several parts of the world and in diverse ways for both consumer disputes and other kinds of controversies.<sup>83</sup> The existence of these mechanisms has not eliminated the use of (and, therefore, the need for) other mechanisms and tools for conflicts resolutions.

All in all, the remaining question is what would be the consequence of leaving the Brazilian proposal aside. As mentioned above, Latin American countries have no specific conflicts rules on consumer contracts. Whenever a court in a Latin American state faces international consumer contracts, the general attitude is to deny party autonomy and apply the *lex fori*. In some situations, courts seem not to be aware of the internationality of cases.<sup>84</sup> Even where party autonomy is accepted in general, without distinctions, rules on consumer contracts are usually seen as mandatory provisions and are, therefore, excluded from the scope of party autonomy.<sup>85</sup> Thus, although consumer contracts are not explicitly excluded from the scope of the 1994 Mexico City Convention on the law applicable to international contracts (CIDIP V), the prevailing opinion is that consumer contracts are not covered by that Convention.<sup>86</sup> In addition, current national projects on private international law (Argentina, Uruguay) do not allow choice of law clauses (or choice of forum clauses) in consumer contracts.

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83. Inter alia, the Electronic Consumer Dispute Resolution (ECODIR, [www.ecodir.org](http://www.ecodir.org)) for consumer transactions; the Cibertribunal Peruano ([www.cibertribunalperuano.org/portalcibertribunal/principal.aspx](http://www.cibertribunalperuano.org/portalcibertribunal/principal.aspx)) for domain names, etc.

84. See N. de Araujo, *Contratos Internacionais e Consumidores nas Américas e no MERCOSUR: Análise da Proposta Brasileira para uma Convenção Interamericana na CIDIP VII*, in *CADERNOS DO PROGRAMA DE PÓS GRADUAÇÃO EM DIREITO—PPGDIR./UFRGS* 5, at 107, 119 (2006) (citing the *Panasonic* case, *Superior Tribunal de Justiça*, Resp 63.981, Aug. 13, 2001, *RSTJ*, No. 137, 12 (Jan. 2001), 387).

85. See C.D. Iud, *Los Acuerdos de Prórroga de Jurisdicción Concluidos por Consumidores en el Derecho Argentino*, in *PROTECCIÓN DE LOS CONSUMIDORES EN AMÉRICA. TRABAJOS DE LA CIDIP VIII* 421, 436 (D.P. Fernández Arroyo & J.A. Moreno Rodríguez eds., 2007) (citing the decision of the Argentinean National Court of Appeal, Chamber B, of 22 June 2005, *Volpi c/ UBS AG*, applying article 16 of the Argentinean Constitution to void a clause which submitted the contract to the jurisdiction and to the laws of Switzerland); see also D.P. Fernández Arroyo, *Chronique de jurisprudence argentine*, *JDI*, at 199, 204-05 (2008). Cf Sinay-Cytermann, *supra* note 11 (discussing the French decision, Cass. 1ere civ., 23 mai 2006 *JDI* (2007) 537).

86. See The Declaración de Córdoba, available at [www.oas.org](http://www.oas.org). See also J.A. Moreno Rodríguez, *La Convención de México sobre el Derecho Aplicable a la Contratación Internacional*, in *PROTECCIÓN DE LOS CONSUMIDORES EN AMÉRICA. TRABAJOS DE LA CIDIP VIII* 107, 140-41 (D.P. Fernández Arroyo & J.A. Moreno Rodríguez eds., 2007).

## V. FINAL REMARKS

Three final conclusions can be drawn from the current approaches towards harmonization of consumer laws in the Americas.

First, consumer law needs an integral treatment. A single model law or convention is not enough to solve the problems caused by consumer transactions; a good combination of several instruments—and policies—would be preferable. The adoption of the Brazilian proposal, which is ready to be submitted for approval in a diplomatic conference, must not (and will not) preclude the implementation of others consumer protection mechanisms.

Second, given that most international consumer transactions are made by electronic means, any instrument adopted with the goal of harmonization should be suited to dealing with e-commerce. Nonetheless, even if online consumers become increasingly significant, the Internet does not constitute the only way to conclude consumer contracts. Consumer relationships still survive outside the net. Therefore, the best regulation on consumer law requires a complete treatment of the matter, online and offline.

Third, it should be taken into consideration that some instruments can require high investments unaffordable for some Latin American countries. Therefore, much information should be taken into account.