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 (CIDIP)[1]

Claudia Lima Marques[2]

INTRODUCTION

This article presents the conclusions of our Course on International Law, in August, 2000, in the OAS (Organization of American States) about "Consumer protection: private and regional law aspects".[3] Our study centers on the need and opportunity in the region for a new Inter-American Convention on Private International Law (CIDIP) for the protection of the consumer in consumer contracts.[4] The importance of the subject is highlighted, especially by the growing electronic commerce. As national Private International Law rules are outdated, a regional solution may be an easier and more effective path to cope with today's global era, as the European example has shown.[5]

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[1] Published in Thierry Bourgoignie (Org.). Regards croisés sur les enjeux contemporains du droit de la consommation (Yvon Blais, Quebéc, Canada, 2006), p.145-190. This article was translated and adapted from the Portuguese original, entitled *"A insuficiente proteção do consumidor nas normas de Direito Internacional Privado - Da necessidade de uma Convenção Interamericana (CIDIP) sobre a lei aplicável a alguns contratos e relações de consumo"*, published in *Revista do Tribunais* (São Paulo), vol. 788, junho de 2001, ano 90, p. 11-56, by Diego Fraga Lerner, Lucas Lixinski, Miguel Augustin Kreling (UFRGS) and Felipe Ballvé Alice (UT-Austin/ UFRGS). The author thanks Dr. Jean Michel-Arrighi, OAS Juridical Director, Washington for the invitation to the Course in 2000 and Prof. Dr. Thierry Bourgoignie for the equally honorable invitation to speak at UQUAM, Montreal, Canada.

[2] Full Professor, Private International Law, Law School of the Federal University of Rio Grande do Sul, Porto Alegre, Brazil. *Doctor iuris utriusque* (University of Heidelberg, Germany), Master of Laws (University of Tübingen, Germany), Specialist in European Integration (Europa-Institut, University of Saarbrücken, Germany). Former President of *Brasilconsumer* (São Paulo). Board of the *International Association of Consumer Law* (Brussels)

[3] The full text of the Course was published by OAS, in Washington, see LIMA MARQUES Cláudia, A proteção do consumidor: aspectos de direito privado regional e geral, in *XXVII Curso de Derecho Internacional-OEA/ CJI*, Ed. Secretaría General- Subsecretaria de Asuntos Jurídicos, Washington, 2001, p. 657-780, and also in *El Derecho Internacional Privado en las Américas (1974-2000), Cursos de Derecho Internacional - vol. I (Parte 1)*, Editor Secretaría General-Subsecretaria de Asuntos Jurídicos, Washington, 2002, p. 1503-1622.

[4] We will accept the definition of consumer contracts which included in Article 5 of the ECC Convention of Rome 1980: "Article 5 - Certain consumer contracts 1. *This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.*"

[5] See CASTELLS Manuel, *End of Millennium (The Information Age: Economy, Society and culture*, volume III), Blackwell P., Oxford, 1998, p. 1: *"...this is indeed a time of change...a technological revolution, centered around information, has transformed the way we think, we produce, we consume, we trade, we manage, we communicate, we live, we die, we make war, and we make love. A dynamic global economy has been constituted around the planet, linking up valuable people and activities from all over world, while switching off from the networks of power and wealth, people and territories dubbed as irrelevant from the perspective of dominant interests..."* See also PORTO Ronaldo, Globalização e Direito do Consumidor, *Revista de Direito do Consumidor*, (32, p. 45.

Not long ago consumer protection was a matter of domestic law. Indeed, most of the consumer activity was restricted to the territory of one single country without any element of internationality.[6] Nowadays, this reality is different, and due to the opening of markets to foreign products and services, growing economic integration, regionalization of trade, increased transport facilities, mass tourism, growth in telecommunications, computers' network connections, banking[7] and electronic commerce, one has to admit that consumer transactions go beyond national borders.[8] Actually, foreign goods are available in the supermarkets of all countries of America, and services are offered by suppliers located abroad in telemarketing, through television, radio, internet, mass-like publicity in the daily life of most citizens of our local metropolis.[9]

Usually "consumer" means an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes; it also designates the legal representative of such an individual.[10] The consumer is a non-professional natural person, who acts, contracts or negotiates in the consumer market about the supply of goods and services for a purpose which can be regarded as being outside his trade or profession.

It is no longer necessary to travel or to be an *active consumer* or a tourist, to be a consumer who contracts internationally or with suppliers from other countries.[11] Production and manufacturing practices themselves today are international, and international consumer contracts and tourism have become mass-like.[12] The international *passive consumer* and the *active consumer* phenomenon have come already to our day-to-day lives. To behave as an international consumer is typical of our postmodern era.[13] In Latin America foreign services

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[6] VON HOFFMAN, Bernd, Über den Schutz des Schwächeren bei internationalen Schuldvertragen, *RabelsZ* 38 (1974), p. 401, explains that in exceptional cases it could be inserted a public policy rule could be inserted to protect the "weaker" party in contracts or in cases involving international tourism or torts.

[7] See LIMA MARQUES Claudia, Banking in the information society: a Brazilian vision, in *Consumer law in the Information Society*, WILHELMSSON Th.et al. (eds.), Kluwer International, The Hague, 2001, p. 247-262.

[8] HARGAIN, Daniel and MIHALI, Gabriel, *Circulación de Bienes en el Mercosur*, Júlio César Faira Ed., Montevidéu, 1998, p. 504.

[9] So agree BENJAMIN, Antônio Herman de V., Consumer Protection in Less-Developed Countries: The Latin American Experience, in RAMSAY, Iaian (Ed.), *Consumer Law in the Global Economy*, Asgate, Brookfield, USA, 1996, p. 50 and REICH Norbert, Consumerism and citizenship in the Information Society-The case of electronic contracting, in WILHELSSON Thomas (Ed.), *Consumer Law in the Information Society*, Kluwer, Law International, The Hague/London/Boston, 2001, p. 163ff. See LIMA MARQUES, Claudia (Org.), *Estudos sobre a proteção no Brasil e no Mercosul*, Editora Livraria dos Advogados, Porto Alegre, 1994 and El Código brasileño de defensa del consumidor y el Mercosur, in GHERSI, Carlos Alberto (Dir.), *Mercosur-Perspectivas desde el Derecho Privado*, Ed. Universidad, Buenos Aires, 1996, p. 199-226.

[10] In the U.S.: Electronic Signatures in Global and National Commerce Act June 8, 2000 - Section. 106.

[11] The distinction between active consumer (who moves from one country to another) and passive consumer (who receives the information or offer in his country and remains there) is largely used in Germany and will be followed here. See JAYME Erik and KOHLER Christian, *Europäisches Kollisionsrecht*, 1999- Die Abendstunde der Staatsverträge, in *IPRAX* 1999, p. 404.

[12] In this sense BENJAMIN Antonio Herman de V., O transporte aéreo e o Código de Defesa do consumidor, *Revista AJURIS-Edição Especial*, mar. 1998, v. II, p. 499ff.

[13] This post-modern analysis is a tribute to our PhD advisor, Prof. Dr. Dr.h.c. Erik Jayme, from Heidelberg University, who in his brilliant Hague Course launched the theory of the legal reflexes of post-modernism. See JAYME Erik, Identité culturelle et intégration: Le droit international privé postmoderne,in *Recueil des Cours de l' Académie de Droit International de la Haye*, 1995, II, p. 33 ff. (hereunder cited as Jayme, Cours).

and products even represent *status*, and are very symbolic in current consumer culture[14]. Traveling or being an active-consumer on the international scene is part of the post-modern search of pleasures, individual leisure and the accomplishment of dreams and imaginary thoughts, it is a social distinction ever more important.[15]

In fact, consumer law has an international endowment,[16] and in no other private law sector foreign and supranational models and inspirations have been so present. Consumer protection has become international: consumers and consumer interests should not be harmed, be it on the aspects of safety, quality, warranty or redress, only because they acquire a product or use a service coming from another country or supplied by a company established abroad[17]; the tourist consumer, traveler or the one who acquires products or uses services in a foreign country must have the possibility to count on a minimal protection of his interests, as well as the one who, watching publicity from a manufacturer placed abroad, decides to enter into a distance contract or to conclude a contract through electronic means.

There has been after all a substantive change in the consumer market structure,[18] as globalization reaches private consumer transactions as well,[19] bringing into light new market failures[20] and the limits of the idea of consumer "sovereignty" in the current market.[21] On the international market, the consumer position is even more vulnerable and unbalance in transactions even more obvious[22], calling for an urgent and effective protection of his interests and a positive intervention of state and international bodies.[23]

The question is whether our legal system is actually prepared to such an internationalization of consumer transactions. In our opinion, there is a great specificity in international consumer transactions, which, if representative of only a small part of the global international trade, do have an important economic and political potential (1.). The reality in most American countries is that national consumer protection laws rarely have private international law or choice of law rules specific for the protection of the weaker party, such as victims of accidents caused by foreign defective products and services,[24] tourists and consumers

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[14] FEATHERSTONE Mike, *Cultura de Consumo e Pós-modernismo*, Ed. Studio Nobel, São Paulo, 1995, p. 31.

[15] In this sense FEATHERSTONE, *op.cit.*, p. 31.

[16] See BOURGOIGNIE Thierry, *Eléments pour une théorie du droit de la consommation*, CDC-Story Sciencia, Bruxelas, 1988, p. 215ff.

[17] LIMA MARQUES Claudia, Regulamento Comum de Defesa do Consumidor do Mercosul - Primeiras observações sobre o Mercosul como legislador da proteção do consumidor, *Revista Direito do Consumidor* (São Paulo), v. 23-24, p. 79 and also, likewise in Mercosur, STIGLITZ Gabriel, El derecho del consumidor en Argentina y en el Mercosur, in *Derecho del Consumidor* (Buenos Aires), v. 6, 1995, p. 20.

[18] According to BOTANA GARCÍA and RUIZ MUÑOZ (Coord.), *Curso sobre protección jurídica de los consumidores*, Ed. Ciencias Jurídicas, Madrid, 1999, p. 8 (hereunder cited as BOTANA).

[19] See GHERSI, *La posmodernidad jurídica – Una discusión abierta*, Buenos Aires: Gowa, 1995, p. 139 ff.

[20] BOURGOIGNIE thierry, *op.cit.*, p. 64ff.

[21] BOTANA, *op.cit.*, p. 8 and BOURGOIGNIE Thierry, *op.cit.*, p. 64.

[22] CALAIS-AULOY Jean, *Droit de la Consommation*, 3.ed., Dalloz, Paris, 1992, p. 1, considers that this unbalance has always existed, only now it is qualified in such a way that one of the social goals of our time is to protect the consumer as this is put in a structurally weaker position.

[23] Also BOTANA, *op.cit.*, p. 8, mentions the current "degradación de la posición del consumidor".

[24] Few American countries have ratified the 1973 Hague Convention on the law applicable to product liability.

receiving advertisements, spam or aggressive marketing from across borders. Domestic or internal rules of private international law are usually old-fashioned[25] and the only attempt for a revision came through the Inter-American Conventions of Private International Law (hereafter CIDIPs) organized by the OAS. To date however, the CIDIPs have not imposed any favorable special connection factors in relation to consumer protection (2).

1. The need for an Inter-American Convention about the law applicable to some consumer contracts and consumer transactions

One cannot deny that the protection of the weaker party[26] has become a concern both in regional private international law, as attests the 1998 Santa Maria Protocol of Mercosur[27], and in general private international law, as illustrated by the 1980 Hague Convention project[28] and the Rome European Convention of 1980.[29]

The question is whether domestic or national rules in the Americas are enough to protect the consumer in these new markets without frontiers, such as NAFTA, FTAA and Mercosur.[30] National rules, which regulate international trade, as well as international trade

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25 Exception made of the USA and Venezuela, see PARRA-ARANGUREN, Gonzalo, *Curso general de Derecho Internacional Privado-Problemas Selectos*, Fundación Fernando Parra Aranguren, Caracas, 1991, p.51 ff.

26 In this sense BENJAMIN Antônio Herman, El Código Brasileño de Protección del Consumidor, in *Política y Derecho del Consumo*, VELILLA Marco (Director), Ed. El Navegante, Bogotá, 1998, p. 480.

27 See about the Santa Maria Convention on special consumer jurisdiction (Mercosur), our article in *Revista Direito do Consumidor*, São Paulo, vol. 32 (1999), p. 16.

28 See VON MEHREN Arthur, *Law applicable to certain consumer sales, Texts adopted by the Fourteenth Session and Explanatory Report*, Ed. Bureau Permanent de la Conférence, Haia, 1982, p. 6, who explains how this draft of convention tended to complement the Hague Convention of 1955 on the applicable law to the international sale of goods; this never came to happen, for the referred draft, concluded in 1980, and which never came to be approved, was overcome by the Rome Convention of the EEC, signed in that same year with its famous art. 5 on the same matter. It is to note that the connection factors provided by the 1980 Hague project were: party autonomy (Art. 6, sentence 1), but the law chosen by the parties could not deprive the consumer from the protection he was to be conferred by the mandatory provisions of the country of his usual residence (Art. 6, sentence 2); the conditions related to the existence, validity and forms of consent would be governed by the law of the country of usual residence of the consumer at the moment of the declaration (Art. 6, sentence 4); in case of lack of choice by the parties, the applicable law would be the one of the country of usual residence of the consumer (Art. 7) and the parties capacity and the effects of the contract would not be governed by the *lex contractus* but by treaties as independent matters (Art. 9) and public policy.

29 See Rome Convention of 1980: "*Art. 5 – Certain Consumer Contracts. 1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the rule of credit for that object. 2. Notwithstanding the rules of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or - if the other party or his agent received the consumer's order in that country, or - if the contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.*" JAYME Erik and HAUSMANN Rainer, *Internationales Privat- und Verfahrensrecht*, Beck Verlag, Munich, 1998, p. 116

30 In this sense KRÄMER Ludwig, *La CEE et la protection du consommateur*, Collection Droit et Consommation 15, Story, Bruxelles, 1988, p. 377. See also our article, *El Código brasileño*, *op.cit.*, p. 199 ff.

uniform terms (the so called *lex mercatoria*), usually are not concerned with the protection of consumers,[31] trying instead to exclude consumer contracts from their scope of application.[32]

In Europe, since the 1970's, legal scholars advocate the need for private international law to turn to the protection of the weaker party, especially consumers,[33] and to include more flexible and relevant new connection factors to this end. In the choice of law context, the so-called "neutral" and rigid connection factors better fit to the relations between equals like two manufacturers, dealers, enterprises or businessmen.[34] Thus, special private international law rules are necessary, at least until the harmonization of substantive consumer protection rules is achieved[35]

The inter-American system is clearly open to international trade and regional integration, but it still lacks of a legal system that properly protects the weaker party – the consumers - in its open market. To remedy this situation has become urgent.

Therefore, together with Argentinean and Uruguayan scholars,[36] who have studied consumer protection in international situations, we would like to suggest the draft of a specific Convention of Private International Law (CIDIP) about consumer protection in two specific situations: (a) the tourist-consumer, specially the one who enters into a timeshare or "multi-property" (*multipropriedad*) contract, and (b) the distance contracting consumer, be it through traditional means or through new electronic means, such as B2C.

Modern European scholarly writings stressing upon the need for consumer protection in global markets[37] will help us in defining the content of such a convention.

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[31] In this sense BOTANA, *op.cit.*, p. 21, citing the principles of UNIDROIT on the international commercial contracts and the Vienna Convention on International Sales of Goods of 1980.

[32] The clearest example is the uniform rules of the UN Convention on International Sale of Goods of 1980, known as the Vienna Convention of 1980, that in its Arts. 2(a) and 5, try to prevent the application of these international trade rules to the contracts with outsider consumers. See on this HARGAIN/MIHALI, *op.cit.*, p. 506 and GARRO Alejandro Miguel and ZUPPI Alberto Luis, *Compraventa internacional de mercaderías*, Ed. La Rocca, Buenos Aires, 1990, p. 81.

[33] The works of ZWEIGERT, NEUHAUS and LANDO became famous, suggesting firstly that Private International Law should include social values, and secondly that party autonomy should be abandoned in contracts between weak and strong parties, as consumer ones. Pragmatically, that Private International Law should start to choose as a connection factor the domicile of the weaker party, see VON HOFFMANN, Bernd , Über den Schutz des Schächeren bei internationalen Schuldvertragen, *RabelsZ* 38 (1974), (396-420), p. 398 ff and KROPHOLLERJan, Das Kollisionsrechtliche System des Schutzes der Schwächeren Vertragspartei, *RabelsZ* 42 (1978), (634-661), p. 634 ff.

[34] In this sense KROPHOLLER, *op.cit.*, , p. 636.

[35] In this way, qualifying the German legal system of the time as "*incomplete and unsafe for the weaker parties*", see KROPHOLLER, *op.cit.*, p. 635.

[36] Here must be mentioned especially the studies of BOGGIANO, DROMI and TONIOLLO, in Argentina, ARRIGHI and the young authors HIRGAIN/MIHALI, in Uruguay.

[37] In this sense, the strong and critical comments by JUNKER Abbo, Von Citoyen zum Consommateur- Entwicklung des internationalen Verbraucherschutzrechts, in *IPRAX* 1998, p. 67 ff, affirming that the consumer is the "citoyen", the political European citizen of the future. JUNKER inspires himself in a similar work from VON WESTPHALEN, Vom Citoyen über den Bourgeois zum Consommateur, *ZIP* 1995, p. 1643, see JUNKER, p. 67.

A. Differences between international consumer contracts and international commercial contracts

First, it is important to establish the characteristics of international consumer transactions or contracts when compared to international commercial ones.

Obviously in international trade there may also be language barriers, information gaps, diverging law rules, difficulties and insecurity about delivery and payment, warranty linked problems, safety and quality defects and poor post-sale services,[38] but these difficulties gain a special meaning when the contracting partner is a non-expert, acting outside of any professional activity, i.e. a consumer.[39]

In international consumer transactions there is an inherent informational and expertise unbalance between the contracting parties, as one has the vulnerable *status* of consumer.[40] International trade connects legal persons or professionals, dealers and entrepreneurs domiciled in different countries, but able to understand and to play with the international business scenario. With international consumer contracts this is not the reality. The consumer-partner is attracted either through aggressive marketing (for example, mass advertising, telemarketing and shopping, emotional timeshare and package travel offers, etc.), by reduced prices (discounts, tax reduction, free shipping, etc.), or by the sense of adventure (games, bets, prizes). He is not aware about specific causes of vulnerability linked to transnational contracts, such as poor knowledge of language, possible confusion or deception in the offers made, the myth of imported products being of superior quality, unknown characteristics of new products in emerging markets, lack of legal advice or of a legal department to assist in the negotiation, expectations that the brand will have post-sale services in his own country, etc. The consumer actually trusts in a non-existing legal protection. Far from this reality, international trade rules and private international law (choice of law) rules in general are built on the assumption of professionalism and expertise of both partners involved[41].

Another specificity of international consumer contracts is their lack of "continuity". Commercial contracts are characterized by repetition and the goal of international trade is to open new markets in long-lasting trade relations. International consumer contracts, on the other hand, are usually transactions for one single exchange; they do not last long, neither benefit from the international financial system or transfer of technology.[42] Being a tourist is

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[38] On the difficulties of international commerce see FELDSTEIN DE CÁRDENAS Sara, *Contratos Internacionais*, Abeledo-Perrot, Buenos Aires, 1995, p. 60 ff and MOURA RAMOS Rui Manuel, and SOARES Maria Angela Bento, *Contratos Internacionais*, Almedina, Coimbra, 1986, p. 9 ff. See also JADAUD Bernard and PLAISANT Robert, *Droit du Commerce International*, Dalloz, Paris, 1991, p. 1.

[39] European Commission, *Guia del consumidor europeo en el mercado único*, Comisión Europea, Bruxelas, 1995, p. 15 and 16.

[40] See on the vulnerability of the consumer, LIMA MARQUES, Cláudia, *Contratos no Código de Defesa do Consumidor*, 4th.ed., Ed. RT, São Paulo, 2002, p. 140 ff.

[41] A Supremo Tribunal Federal precedent does not qualify as of consumer nature, transactions of importation of raw material between two traders, *Sentença Estrangeira Contestada* N° 5.847-1, decided on 01.12.1999, Judge Maurício Corrêa. See our comments, together with Eduardo TURKIENICZ, Comentários ao acórdão do STF no caso Teka vs. Aiglon: em defesa da teoria finalista de interpretação do art. 2° do CDC, *Revista Direito do Consumidor*, v. 36 (2000), p. 221 ff.

[42] A rare exception would be the timeshare contract or multi-property, which is a long-lasting relation; see on the subject the Brazilian scholar, TEPEDINO Gustavo, *Multipropriedade Imobiliária*, Saraiva, São Paulo, 1993.

a punctual seasonal phenomenon; to buy through e-commerce software or a book in Brazil from a Californian supplier is also an isolated and discontinuous act. The rules of international trade, and private international law rules in general, are built on the basis of continuity and confidence, which results from the growth of trade relations between the same partners.

In commercial transactions primary protection goes to the seller. The one who sells or ships to a distant country a property of his own without much warranty and knowledge of his client is looking for protection. In international consumer contracts this priority is inverted.

Other characteristics of international consumer transactions are their standardization and small value. Nowadays, international consumer contracting is a mass-like phenomenon, when considering, for instance, seasonal tourism, timeshare, package holidays and mass transports.[43] But each individual transaction will have a relatively small value. This makes both the contract negotiation process and the settlement of disputes quite theoretical, as the consumer would have to undertake exaggerated expenses to (try to) enter into discussions with the supplier or to bring into a complaint.

Also, in international consumer contracts, re-execution or to repeat performance in case of breach of contract will be very difficult. In case of tourism, to re-perform an excursion, to recover days of holidays or the comfort of a hotel in a distant country are an almost impossible task. Re-execution in distance contracts may entail additional costs for the buyer, such as sending the product back and time waste.

Finally, emphasis should be given to the fact that there is a strong political-economic component in consumer protection-orientated rules. An exporting country, such as Germany, which maintains a high level of consumer protection and shows major concern for the quality of its products, will find greater international acceptance. If a tourist country, such as Brazil, increases the level of tourist protection and makes redress easier, it ensures better tourist conditions and favors the development of this important sector of economy. In other words, rules of consumer law do foster the international competitiveness of national markets, as well as they contribute to the creation of an internal market with fair competition and to the achievement of governmental policies.[44]

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[43] European scholars underline since the 80's and, specially in the 90's, that mass tourism is one of the most growing economic sectors in the European Union and that consumer protection is needed even as a competition harmonizing instrument, see, for all, LETE ACHIRICA Javier, *El Contrato de Multipropriedad y la Protección de los consumidores*, Ed. Cedec, Barcelona, 1997, p. 32-34.

[44] In this sense also GHERSI Carlos Alberto, *Razones y fundamentos para la integración regional, in: Mercosur - Perspectivas desde el derecho privado*, Ghersi (Coord.), 1993, p. 30 ff.

B. On the need for a specific set of private international law rules on consumer protection.

Brazilian legal scholars consider private international law as "the science which aims to regulate private international relations" or "private relations in international society".[44a] In this paper, we will admit the limitation of the scope of private international law as proposed by the Italian and German legal scholars[45], and consider as private international law the rules, statutes, case law development and principles, which tend to choose the law applicable to cases with connection to more than one legal system (choice of law).

1. Private international law as a factor of regional harmony and choice of law rules in consumer transactions

The relevance of the theory of post-modern private international law put forward by Erik Jayme, to whom private international law is an instrument of harmony and peace in today's global relations, must be emphasized.[46] Post-modern private international law would be able to balance and reflect at the same time the conflicting social and economic forces of our times, i.e. post-modern individualism and exacerbated cultural identity, at one hand and, on the other, the irresistible force towards approximation and economic regionalization, supranational integration and global trade.

Consumer protection appears in this context as a "social nest" or an escape mechanism of the post-modern conflicts, because it represents the legal warranty of a minimal standard of safety and quality of services and products, being national or imported, which are exchanged in today's open markets. It also represents, from a political point of view, a compromise with market fairness. Socially, it seeks to establish a balance between the principle of party autonomy and the promotion of human rights.[47]

As teaches Jayme[48], private international law is one of the fields most sensitive to social, political and legal changes in this century: choice of law rules will enable the parties to avoid ideological conflicts and negative evaluations of national foreign laws, while maintaining the pace of international trade and economic liberalism. Private international law rules must tend to minimize the risks of radical or unacceptable solutions being applied by the courts or arbitrators of one particular country. They should also fulfill the limits of *lex mercatoria* by establishing international standards of warranty and protection for weaker parties, thus preventing that any legal gap be filled by means of a new radical national territorialism.

[44a] The first definition is given by FULGENCIO Tito, *Síntesis De Direcho Internacional Privado*, Ed. Freitas Bastos, Rio de Janeiro, 1937, p.5; and the second expression is used by BEVILAQUA Clovis, *Principios Elementares de Direcho Internacional Privado*, Ed. Historica, Rio de Janeiro, 1988, p.11.

[45] KEGEL, Gerhard, *Internationales Privatrecht*, 6.Aufl., Beck, Munique, 1987, p. 3; KROPHOLLER, Jan, *Internationales Privatrecht*, J. C. B. Mohr, Tübingen, 1990 , p. 1; VON BAR, Christian, *Internationales Privatrecht*-vol.II,BT, Beck, Munich, 1991, p. 1.

[46] In this sense, the beautiful words of JAYME, *Cours*, p.56 ff.

[47] JAYME, *Cours*, p. 49.

[48] See JAYME, *Cours*, p. 129 ff.

It is interesting to notice that countries have always reached consensus on the need for setting up, through mandatory rules or voluntary ones (*soft law*), the bases of international sales of goods and services between traders or professionals. There has not been so far a similar concern for drafting and developing private international law rules to achieve consumer protection in international sales of goods and services.[49] Despite the draft of Hague Convention in 1980 and the Rome European Convention, the subject has been scarcely debated in America.[50]

One explanation for such a failure can be that developed countries already possess legal mechanisms in their private international law system sufficient for the application of their own consumer protection rules, assuring in this way an effective protection of their nationals also in international consumer transactions. The consumer protection system existing at national level is held as being mandatory (*"lois d'ordre public"*,[51] *"lois de police"*[52]).

At the same time, there is no great interest or need by these countries for extending this same high standard of protection to consumers outside the country or the region, such as to consumers in developing countries. Then the idea grows within developing countries that a high standard of consumer protection would represent a barrier to free trade[53]. Also, local industries of developing countries are not encouraged to invest in the development of an adequate international standard of consumer protection, though this would help these industries exporting their products and services and participating more actively (and competitively) to the international market.

The task of reverting this picture is a matter of international politics. Nevertheless law can contribute by fulfilling this gap in the most neutral and less conflictive manner, which is the use of private international law, while proposing choice of law rules with a clear substantive goal[54] (and not neutral one)[55], i.e. to protect consumers.

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[49] See on the subject ARRIGHI Jean Michel, La Proteccion de los Consumidores y el Mercosur, *Revista Direito do Consumidor*, São Paulo, v. 2 (1992), p. 126 ff.

[50] In this sense TONIOLLO Javier Alberto, La protección internacional del consumidor- Reflexiones desde la perspectiva del Derecho Internacional Privado Argentino *Revista de Derecho del Mercosur*, v. 2, n. 6, dic. 1998, p. 96, commenting on the the Hague project. See also the mentioned report and project of VON MEHREN, *Rapport explicatif - Loi applicable à certaines ventes aux consommateurs*, in Actes et Documents de la Quatorzième session (1996), t. II, Ventes aux consommateurs, Buerau Permanent de la Conférence de la Haye, La Haye, 1982, p. 6 ff.

[51] The public policy exception has a clear social and protective goal, not only in the Private International Law system, but also in the countries of the European Continental Law system: , BUCHER Andreas, *L'ordre public et le but social des lois en droit international privé*, Recueil des Cours, 1993, II, t. 239, Nijhoff, Dordrecht, 1994, p. 60-69.

[52] In the traditional definition given by Francescakis and reproduced by BUCHER, *op.cit.*, p. 39: laws or rules *"dont l'observation est nécessaire pour la sauvegarde de l'organisation politique, sociale ou économique du pays."*, see Art. 7(2) EU Rome Convention of 1980 on applicable law to contractual obligations. Such rules are directly applicable. See on the Art. 18 Swiss Private International Law Statute, BUCHER, *op.cit.*, p. 39.

[53] See LIMA MARQUES Cláudia , O Código de Defesa do Consumidor e o Mercosul, *Revista Direito do Consumidor*, v. 8, p. 43 ff.

[54] JAYME Erik, in HOMMELHOFF/JAYME/MANGOLD (Ed.), *Binnenmarkt-Internationales Privatrecht und Rechtsvergleichung* (1995), p.35), *apud* JUNKER, p. 74, note 132.

[55] On the crisis of private international law, see the Course of KEGEL in Hague, apud NISHITANI, Yuko, *Mancini und die Parteiautonomie im Internationalen Privatrecht*, Universitätsverlag C.Winter, Heidelberg, 2000, p. 283.

Our proposal is for an updated use of private international law, granting these rules with social values that will bring a new opportunity for the harmony of international relations. Our call is for a new "substantive" private international law[56], which would better reflect the complex post-modern conflicts now involving human rights and public policy goals[57], and for a more "narrative"[58] private international law, which would try at the same time to promote harmony of interests[59] and to offer necessary protection to the weaker party in today's international markets.[60]

As Kropholler states already in 1978 in his famous article about the protection of the weaker party through private international law,[61] it is necessary that private international law turns to a law impregnated with social values. And we believe that it is now time to reassess the values of the private international law rules elaborated in OAS with regard to their impact on or contribution to the protection of the weaker party.

It seems perfectly reasonable to work on the definition of connection factors in inter-American private international law, which would have as a goal the protection of the weaker party (von Hoffman), the guarantee of his fundamental rights (Jayme) and substantive justice (Zweigert).[62]

North-American private international law scholars stress that the ideal of equality has constitutional origins (*the Equal Protection Clause*),[63] which brings a limit to private international law rules: these must not in an unfair manner discriminate, create privileges and immunities, but must be reasonable and have a clear social and political basis.[64] We also consider that seeking for effective equality between natural persons, the revival of human rights in post-modernity[65], bringing harmony in decisions[66] and fair balance between the interests and rights involved in the consumer relation, are all goals of private international law. This would become one additional tool for protecting the weaker party and reaching justice in global societies.

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[56] BRILMAYER Lea, *Conflicts of Law*, 2.ed, Little, Brown and Co., Boston, 1995, p.178: "*Traditional choice of law values such as predictability and the discouragement of forum-shopping are very closely analogous to procedural values. Unlike territorial scope decisions that derive from substantive preferences, however, they are typically not a product of specific domestic substantive rule, but apply across a wide range of substantive areas.*"

[57] About the *Double Coding*, see JAYME, *Cours*, p. 36.

[58] We adopt here Jayme's theory on narrative rules (JAYME, *Cours*, p. 247), highlighting that any proposal of International Convention and its official text has today an effect at least narrative, of showing the problems and pathways, of narrating goals and principles, even if its only as an inspiration, even if these rules never come into force, its efforts, such as the ones of the Hague Drat-Convention of 1980, show the existence of needs and force the search – national, regional or universal – of solutions.. On the need forinternational consumer protection see the studies of VON HOFFMAN andKROPHOLLER, in America, of BOGGIANO,amore recently BRÖCKER and TONIOLLO in Europe.

[59] See MÜLLER Friedrich, *Direito-Linguagem-Violência*, Ed. Sérgio Fabris, Porto Alegre, 1995, p. 17 ff. See HABERMAS Jürgen, *Legitimation Crisis*, Beacon Press, Boston, 1999,p. 68 ff.

[60] On the need for doctrinal studies taking position, see ARRIGHI J.M., *op.cit.*, p. 126-127.

[61] KROPHOLLER, *op.cit.*, p. 655.

[62] In this sense, TONIOLLO, *op.cit.*, p. 99 citing De Vischer.

[63] HERZOG Peter E., *Constitucional Limits on Choice of Law*, Recueil des Cours, 1992, III, t. 229, Nijhoff, Dordrecht, 1993, p. 285.

[64] id,. p. 287.

[65] JAYME, *Cours*, p. 167 ff.

[66] So BOGGIANO Antonio, *The Contribution of the Hague Conference to the Development of Private International Law in Latin America. Universality and gentus loci*, in Recueil des Cours, 1992, II, t. 233, Nijhoff, Dordrecht, 1993, p. 138.

It must be noticed that in matters relating to competition there has been a clear evolution in private international law. As known, the national rules which protect competition on the market place are being given a strong degree of extraterritoriality[67]. Like the European treaties,[68] the traditional rule of *lex loci delicti commissi* has being interpreted in a flexible way, either as the place of wrongful conduct, or as the place of impact or relevant market; and in complex torts cases the place of the company's decision-making has started to be considered.[69]

One additional comment is that in times of post-modern fragmentation, the rules of private international law must focus only on a few subject matters[70]. Private international law rules regarding consumer protection must be flexible enough so that the principle of consumer best protection be materialized and privilege at the same time regional values and economic integration (or approximation), allowing each market to, in a certain way, decide what is best for its consumers.[71]

This fragmentation and flexibility will be assessed hereunder with regard to two matters, in which national consumer protection rules will always prove to be insufficient, and for which therefore the unification of private international law rules[72] will be most relevant, also to create greater security, predictability and harmony in international trade: the protection of the tourist and the protection of the consumer entering into international distance trade, namely through electronic means.

2. Current connection factors and their inadequacy for consumer protection

Kropholler[73] teaches that it is necessary to draft specific choice of law rules for the protection of consumers, because the current connection factors (party autonomy, characteristic performance, domicile of the offeror) are based on the balance of powers existing between businessmen or enterprises. If it is allowed for the parties to choose freely the law which is to govern the contract, in mass contracts the professional will choose his law or the law of a so-called "paradise-forum". Other connection factors could be the place of performance, usually the place where the typical or characteristic performance is rendered, or the place of the contract conclusion, thus connecting the contract to the legal system of the professional offeror's country. In consumer contracts, such a balance of powers does not exist.

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[67] So concludes, examining § 98, 2,1 German GWB, MARTINEK Michael, *Das internationale Kartellprivatrecht*, Verlag Recht und Wirtschaft, Heidelberg, 1987, p. 94.

[68] So CASELLA Paulo Borba, *Comunidade Européia e seu Ordenamento Jurídico*, São Paulo, Ltr, 1994, p.430.

[69] MARTINEK, *op.cit*, p.96.

[70] See JAYME, *Cours*, p. 44, about the so-called "materialization of conflict of law rules" or the "American revolution" on conflict of law.

[71] See JAYME, *Cours*, p. 129 ff.

[72] On the positive and negative aspects of private international law unification through treaties, see NEUHAUS Heinrich P. e KROPHOLLER Jan, *Rechtsvereinheitlichung – Rechtsverbesserung?*, in *RabelsZ 45* (1981), p. 73ff.

[73] KROPHOLLER, *op.cit*, p. 398 ff.

As reminded by Jayme, the current period is one of prevalence of substantive law rules in international cases, reducing the importance of traditional international procedure[74] and self-determination by the individual (*Selbstbestimmung*) in substantive law[75]; new techniques in international conventions pay more respect to cultural and level of development differences, local mandatory rules,[76] and human rights possibly involved in each case[77]. This leads to the prevalence of the usual residence of the consumer as connecting criterion to determine the applicable law in electronic *Business-to-Consumer* transactions and also to determine the competent court.[78]

In my opinion, to achieve substantive goals through private international law rules does not pose a methodological problem in the Inter-American private international aw of the OAS. According to many authors, there is a certain tradition of "territorialism" in Latin America[79] and also in the United States,[80] there being a clear preference for the application of the *lex fori*. This easy practice of having the *lex fori* applied every time a consumer relation is dealt with or considered as a matter of public policy (*ordre public*) is well-known.

Nevertheless this expedient is no longer opportune or sufficient.[81] The territorial criterion is not opportune, for it does not promote the international harmony of decisions, increasing tensions between international trade (seeking for more and more uniformity through the *lex mercatoria*) and domestic or regional legal systems. It can also leave consumers unprotected, and create a "second class" of consumers in developing countries. Sometimes the law of another country can provide more rights to the consumer than domestic law.[82] The territorial criterion is not sufficient, for it always leaves categories of national consumers (tourists, consumers buying at distance) unprotected. This of course will hamper the development of B2C electronic commerce, the growing of which depends on a clear consumer confidence. The consumer who enters into contracts internationally by phone, cable or internet, cannot be confident if he does not have a precise knowledge of which law is applicable to this relation, which are his rights and level of protection, and which is the competent forum.

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[74] In this sense JAYME Erik, *Zum Jahrtausendwechsel: Das Kollisionsrecht zwischen Postmoderne und Futurismus*, in IPRAX-Praxis des Internationalen Privat- und Verfahrensrechts, 2000, p. 169, reminding that the first European rules were entirely devoted to jurisdiction.

[75] JAYME, *IPRAX* 2000, p. 170.

[76] In this sense JAYME, *IPRAX* 2000, p. 168.

[77] In this sense JAYME, *IPRAX* 2000, p. 171, analyzing German cases about the Tschernobyl disaster, in which the "offense place" was considered the German territory where the "radiation cloud" caused damages, which must be compensated by the Russian company and, also, the cases of electronic commerce, in which are being considered as competent the courts of the place of "distribution" of information by the Internet, so, from the place where the consumer is.

[78] JAYME , *IPRAX* 2000, p. 171.

[79] See also on the different political and legal influences for the typical territorialism of private international law of the Latin American countries, SAMTLEBEN Juergen, *Menschheitsglück und Gesetzgebungsexport - Zu Jeremy Benthams Wirkung in Lateinamerika*, in Rabels Z 50 (1986), p. 475. See also ARAÚJO, Nádia de, *Contratos Internacionais - Autonomia da Vontade, Mercosul e Convenções Internacionais*; 2. ed.,Ed. Renovar, Rio de Janeiro, 2000, p. 145 ff.

[80] In this sense RICHMAN William M. and REYNOLDS William L., *Understanding Conflict of Laws*- 2. ed., Times Mirror Books, USA, 1995, p. 230.

[81] In this sense as well KROPHOLLER, *op.cit.*, p. 635.

[82] So reminds BOGGIANO Antonio, *International Standard Contracts*, Recueil des Cours, 1981, I, t. 170, Nijhoff, Dordrecht, 1982,p. 138, calling for the application of the law most favorable to the consumer.

Examining the Draft of the Hague Convention of 1980 and the 1994 CIDIP IV of Mexico, the Argentinean scholar Boggiano[83] suggests the use for consumer protection of a rule of limited party autonomy: the parties' choice of law would only prevail if choice is made of the law most favorable to the consumer; otherwise the law of the consumer's habitual residence would govern the transaction. Furthermore, mandatory and public policy rules would prevail as general limitations to the parties' autonomy (Art. 1208, Civil Code of Argentina).[84]

The European experience indicates preference for mandatory rules (Art. 7, Rome Convention)[85] and limited parties' autonomy. The European Union, normally open to party autonomy, has chosen to provide to its own consumers minimum protection standards.[86]

As Neuhaus said, party autonomy and freedom of the parties to choose the law of contract, lose their sense, if they become an instrument of abuse and dominant power by the stronger against the weaker.[87] The approach that advocates for party autonomy gives precedence to the parties' choice of law in determining the law applicable to contracts, even if, because of governmental interests and public policy concerns, this choice remains very limited.[88] Neuhaus[89] proposes the following solution: if the parties have substantive party autonomy or equal bargaining powers, there may be party autonomy in private international law; however, if the parties do not have true substantive autonomy, because one party is structurally stronger (such as a professional supplier who drafts and determines 99% of international consumer contracts) and the other weaker (such as a person who usually concludes national contracts and rarely enters into international transactions), party autonomy cannot be a proper connecting factor, as it will encourage the choice of the most favorable law by and to the benefit of the stronger party only.

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[83] See, for all, BOGGIANO, in his text *The Contribuition*, *op.cit.*, p. 138 and 139.

[84] BOGGIANO, *The Contribuition*, p. 137.

[85] Rome Convention of 1980- "Article 7 – Mandatory Rules - 1. *When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."*

[86] On this subject see BRÖCKER Marion, *Verbraucherschutz im Europaischen Kollisionsrecht*, Peter Lang, Frankfurt am Main, 1998, p. 107. According to this author, the court started to establish this line of equality valuation (*Gleichwertigkeit*) of the national rules of consumer protection and of the duty of tolerance of the European Union member States with regard to the application of "foreign" law of another country, member of the European Union, in the case Cassis de Dijon, BRÖCKER, *op.cit.*, p. 107.

[87] *"Die Parteiautonomie verliert ihren Sinn - ebenso wie die materiellrechtliche Vertragsfreiheit-, wenn sie zur Herrschaft des Stärkeren über den Schwacheren wird."*, NEUHAUS, *Die Grundbegriffe des IPR*, 1962, p. 172 *apud* von HOFFMANN, *op.cit.*, p. 396.

[88] In this sense the Swiss law of 1987; see in general NISHITANI, *op.cit.*, p. 291 ff.

[89] NISHITANI, *op.cit.*, p. 318 citing Neuhaus: "Nur und überall dort, wo die erste [materiellrechtlicher Freiheit] besteht, ist auch die zweite [kollisionsrechtlicher Freiheit] angebracht." [Neuhaus, *Die Grundbegriffe des IPR*, 1962, p. 257]. Also von HOFFMANN, *op.cit.*, p. 396, citing Neuhaus.

Boggiano's position in favor of a limited party autonomy designates an open connection factor "in favor" of the consumer and can be relevant for the evolution of private international law in the Americas. The inter-American countries already know rules like this (*favor negotii*, *favor matrimonii*, *favor legitimitatis* etc).[90]

The difficulty with the rule proposed by Boggiano is that the possibility of choice of law still remains wide, which shall mean a hard task for the competent judge in verifying whether the chosen applicable law is better or not than the other laws in connection with the concerned consumer case. A similar suggestion, but more limited, was made by Toniollo in Argentina[91]: the judge should allow the choice of the law which is the closest to the consumer relation, according to the consumer's viewpoint. Of course one should not forget either that the larger the possibility of choice by the consumer is, the lesser is the predictability of his obligations by the supplier, which may end up in harming commerce.

Kropholler already considered, in 1978, determination of the most favorable law to the consumer as a very difficult task for the judges, as it would require to compare the substantive results of the application of various laws relating to the case.[92] This is still the case nowadays. The trend towards more harmonized substantive rules does not replace the need for specific rules of private international law.[93] This is illustrated by the introduction of new rules of private international law in European Directives, the revision made of the Rome Convention of 1980[94] and also the recently modified Article 29 of the German EGBGB which proposes a specific rule of consumer protection (Art. 29a EGBGB) when foreign laws are chosen by the parties.[95]

However Boggiano is correct when he states that rigid connection factors provide nationals with only an "illusionary safety"[96].

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[90] So teaches KROPHOLLER, *IPR*, p. 120 to 122.

[91] TONIOLLO, *op.cit.*, p. 99: "Las elecciones alternativas, son un adecuado instrumento de protección desde que permitan dejar de lado las legislaciones menos favorables, promoviendo teleologías."

[92] KROPHOLLER, *op.cit.*, p. 657.

[93] In this sense also TONIOLLO, *op.cit.*, p. 108.

[94] The 1980 Rome Convention was modified by EU's internal Regulation (Reg. 44/2000); see JAYME, *IPRAX* 1999, p.413 and in *IPRAX* 2000, p. 41 ff.

[95] The law on consumer-distance contracts, approved in 13 April 2000, introduced this new (and polemic) art. 29a EGBGB, which entered into force on July 1, 2000 (as reported by *IPRAX*, 2000, 3, p. [248] VI). *Art. 29a EGBGB. (1) If the law chosen to govern a contract is not one of a Member State of the UE or of the European Economic Area (EEA), the rules of the statutes which incorporated Directives on the consumers' protection (Statutes of consumers' protection on standard contractual terms, Statutes on distance contracts or of time-sharing), when the contract has close connections with one or more countries of the EU or of the EEA, also apply. (2) A close connection exists when: 1. the contract is concluded by virtue of a public offer, publicity or other legal acts alike performed in a State of the EU or of the EEA; 2. The other contracting party, when made statements or accepted the offer, has domicile in the countries of the EU or the EEA; 3. The law on time-sharing is applicable to the contract, governed by the law of a country not member of the EU or of EEA, when the immovable good is located in a State of the EU or of the EEA; 4. Directives on the consumers' protection in the sense of this article are: 1. Directive 93/13/CEE... on oppressive provisions; 2. Directive 94/47/CEE on time-sharing; 3. Directive 97/7/CE on distance contracts..."* Official text in German, freely translated, published in *IPRAX* 1999, p. [304] VII and in BGBL. Teil 1 Nr. 28, 29.Juni.2000, p. 901.

[96] So BOGGIANO, *The Contribution*, p. 134: "the illusion of rigid conflict rules".

A new Inter-American Convention can be the solution. Rules that aim for consumer protection derive from a governmental or public interest and therefore a Convention is preferred to a model law. In the consumer area, private and commercial interests should not prevail alone, and party autonomy should not be decisive in the choice of law process [97]. The private international law system for consumer protection must be mandatory and binding for all State Parties adhering to the new CIDIP suggested by the OAS.

Traditional connection factors, like the Brazilian rule of *favor offerentis*, which designates the offeror's residence in distance contracts, must be set aside. In consumer contracts, the offeror is always the supplier (Art. 30 Brazilian Consumer Protection Act 1990).[98] This makes the Brazilian rules of Article 9, par. 1 and 2, of the Civil Code of 1942 to be overcome.[99] Art. 9(2) provides that the obligation resulting from the contract is considered to be concluded at the place where the offeror lives, and his law should govern the contract.

In Quebec, where Article 5 of the Rome Convention of 1980 was used as a model, Article 3117 of the Code Civil du Québec of 1991[100] sets forth a limited party autonomy, and the application of the mandatory rules of the country of residence of the consumer. [101]

It is worth reminding here the difficult question of defining the term of consumer in private international law rules. We agree with Toniollo, when he affirms that the notion of consumer in private international law must be given a wide interpretation "to comprise the various situations that need protection".[102] The Rome Convention of 1980 on the applicable law to contractual obligations, in its Article 5, defines "contracts concluded with consumers",

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[97] On the subject of facultative Private International Law, see the Hague Course of DE BOER, *op.cit.*, p. 235 ff, specially, p. 303 ff.

[98] In the Brazilian case, the CDC or Statute 8.078/90, expressly determines that the offer is always from the supplier or professional *ex vi lege* in Arts. 30, 34, 35 and 48.

[99] The current text of the 1942 Brazilian Código Civil Introduction Statute is: "Art. 9. *In order to qualify and govern the obligations, shall be applied the law of the country in which these are concluded. (1) Being the obligation aimed to be performed in Brazil and depending on essential form, this shall be observed, admitted the peculiarities of the foreign law as to the external requirements of the act. (2) The resulting obligation of the contract reputes itself concluded in the place where the proponent resides.*" (In the original LICC/42: "Art. 9. *Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que se constituirem. § 1º. Destinando-se a obrigação a ser executada no Brasil e dependendo de forma essencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrínsecos do ato. §2. A obrigação resultante do contrato reputa-se constituída no lugar onde residir o proponente.*").

[100] The current text is "§3 - Du Contrat de consommation- Art. 3117. Le choix par les parties de la loi applicable au contrat de consommation ne peut avoir pour résultat de priver le consommateur de la protection que lui assurent les dispositions impératives de la loi de l'État où ila sa residence si la conclusion du contrat a été précédée dans ce lieu, d'une offre spéciale ou d'une publicité et que le actes nécessaires à sa conclusion y ont été accomplis par le consommateur, ou encore, si la demande de ce dernier y a été reçue. Il en est de même lorsque le consommateur a été incité par son cocontractant à se rendre dans un Etat étranger afin d'y conclure le contrat. En l'absence de désignation par les parties, la loi de la résidence du consommateur est, dans les mêmes circonstances, applicable au contrat de consommation."

[101] According to SIQUEIROS José Luis, *Contribucion de las CIDIP-I, II y III al Desarrollo del Derecho Internacional Privado*, XIII Curso de Derecho Internacional, Secretaria General, OEA, 1987, p. 170 this was one of the great contributions of CIDIPS when determining that the Inter-American domicile approached the figure of usual residence in vogue in Europe, see also CIDIP-II-1979 – Convention about natural person's residence. See also OPPERTI BADAN, *Estado Actual del Derecho International Privado en el Sistema Inter-Americano*, IX Curso de Derecho Internacional, v. I, Secretaria General, OEA, 1983, n. 2.7 and ALMEIDA, Ricardo Ramalho, A convenção Interamericana sobre domicílio das pessoas físicas em direito internacional privado, in CASELLA, Paulo Borba and ARAUJO, Nádia (Coord.), *Integração Jurídica Interamericana - As Convenções Interamericanas de Direito Internacional Privado (CIDIPs) e o Direito Brasileiro*, Ltr, São Paulo, 1998, p. 217,

[102] TONIOLLO, *op.cit.*, p. 95.

as the ones that have as a goal to provide or supply a person for a use which can be considered outside his professional activity".[103] A similar definition, both subjective and negative[104], can be found in the Brussels Convention of 1968[105] and the Lugano Convention (art. 13), which provide for a special system of protection under Articles 14 and 15.[106]

Consumer related features that could be accepted by a majority of countries are the concepts of *non-professionalism, natural person* (personal, collective or family use of products and services purchased or used), *contractor* or *final user*[107] and *victim of defective products and services.*[108] On the other hand, the definition of all victims of defective products as consumers is not necessary, as existing conventions, i.e. the The Hague Convention of 1972 on Product Liability, do actually provide enough protection in private international law with special connection factors such as the person suffering damage (victims or consumers).[109] A number of other international conventions deal with liability deriving from accidents connected to the production chain, and these are taken into consideration by the draft CIDIP on catastrophic accidents and trans-boundary pollution, and therefore should not be mentioned in the new CIDIP.

Here is the legal definition of consumer that is suggested in the new CIDIP:

"1. *For the purposes of this Convention, consumer means any natural person who, in a relation with a professional trader and in transactions, contracts and situations governed by this Convention, acts for a purpose which can be regarded as outside the scope of his professional activity".*

According to Kropholler, the setting-up of special rules on consumer protection in international commerce, should follow the following: (1) to respect the application of

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[103] JAYME/KOHLER, *IPR-Texte*, p. 107.

[104] TONIOLLO, *op.cit.*, p. 95.

[105] Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters: *Article 13- Jurisdiction over consumer contracts - In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer', jurisdiction shall be determined by this Section, without prejudice to the provisions of Article 4 and 5 (5), if it is: 1. a contract for the sale of goods on installment credit terms; or*

2. a contract for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods; or 3. any other contract for the supply of goods or a contract for the supply of services, and (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and (b) the consumer took in that State the steps necessary for the conclusion of the contract. Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State. This Section shall not apply to contracts of transport.

[106] Similar definition was included, on 06.29.2000, in the German Civil Code. *"BGB- § 13 Verbraucher - Verbraucher ist jeder natürliche Person, die ein Rechtsgeschäft zu einem Zweck abschliesst, der weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden kann."* (BGB - § 13 - Consumer - Consumer is any natural person, who concludes a legal act, whose end does not have commercial connection or with his professional activity. BGB § 13- Consumidor - Consumidor é qualquer pessoa física, que conclui um negócio jurídico, cuja finalidade não tem ligação comercial ou com sua atividade profissional).

[107] So it is in the legal systems of Italy, France, Germany, England, Belgium, as examined in detail by KLESTA DOSI Laurence, Lo status del consumatore: prospettive di diritto comparato, *Rivista di Diritto Civile*, 6, .1997, p. 669 to 675. About the repercussion of these ideas in the Mercosur countries, see RIVERA Julio César, *Interpretación del Derecho comunitario y noción de consumidor – dos aportes de la Corte de Luxemburgo*, in *La Ley*, Buenos Aires, 1998, p. 520ff.

[108] Also BENJAMIN, *op.cit.*, p. 500.

[109] See REESE, W.L.M. Explanatory report, in *Actes et documents de la douzième session*, 2 au 21 ocotobre 1972, Conférence de la Haye de droit International priveé, Hague, 1974, p. 252ff.

mandatory rules (in German, *Sonderregelung für zwingende Normen*),[110] (2) to elaborate special rules for certain types of contracts or particular matters[111], (3) to use traditional bilateral rules,[112] (4) to select objective connection factors, and (4) in case of consumer contracts, to choose another connection that the one of characteristic performance,[113] but give priority to connection factors of the weaker contractual sphere (*Recht der Vertragsphäre des Schwächeren*). Hence the parties' intent or the possibility that the law of the contract be chosen by the stronger contracting party are limited[114] and further corrections are imposed through public policy rules[115] and a loophole clause[116].

In the convention to be proposed, it seems more adequate to use the method of the Rome Convention of 1980: to give preference to mandatory rules[117] (such as the new Art. 29a EGBGB), [118] to impose an increasingly limited possibility of choice of law, and to propose a narrow definition of consumer.

In order to protect third parties and bystanders, it is suggested to include a rule broadening the sphere of application of the protective provisions:

"2. *Regarded as consumers are also third parties, such as family members of the main consumer or other bystanders, who directly enjoy the services and products contracted for, in contracts governed by this Convention, as final consignee of such contracts*".

And a special definition of the consumer is suggested for travel and timeshare contracts:

"3. *In the cases of travel and timeshare contracts, the following are regarded as consumers:*

a.the main contracting party or the natural person who buys or agrees to buy the travel, the package holiday package or the timeshare for his own use;

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[110] KROPHOLLER, *op.cit.*, p. 648.

[111] id., p. 655.

[112] id, p. 657 and 660.

[113] id, p. 656.

[114] id, p. 656.

[115] id., p. 655.

[116] id., p. 657.

[117] It is about the Private International Law technique of identifying some laws or internal rules, which by their importance and public policy nature, must be followed by all and in all private relations with strong contacts to that country. This is usually known by the French expression "lois d'application immédiate", made popular by the studies of the Greek professor Francescakis since 1958, despite the very similar study of the Italian De Nova ("norme sostanziali autolimitate", "norme di applicazione necessaria"), dated from 1959. The other French expression "lois de police", has also been made popular; on this, SCHWANDER Ivo, *Lois d'application immédiate, Sonderanknüpfung, IPR-Sachnormen und andere Ausnahmen von der gewöhnlichen Anknüpfung im internationalen Privatrecht*, Schulthess, Zurique, 1975, p. 132 to 184.

[118] JAYME/KOHLER point out 5 consumer directives that have particular rules of Private International Law: unfair terms (Directive 93/13/EEC), timeshare (Directive 94/47/EC), distance contracts (Directive 97/7/EC), warranties (Directive 1999/44/EC) electronic commerce (Directive 2000/31), all mentioned in art. 29a EGBGB; JAYME/KOHLER, *IPRAX* 1999, p. 411 to 413. *Art. 29a EGBGB.*

b. the beneficiaries or third parties on behalf of whom the main contracting party buys or agrees to buy the travel, the package holiday or the timeshare and those who enjoy the travel, the package holiday or the timeshare for a length of time, even though they are not the main contracting party;

c. the assignee or the natural person to whom the main contracting party or the beneficiary assigns the travel, the package holiday or the timeshare.."

The following is added to guarantee that the most favorable to the weaker party will be followed:

"*4. If the law applicable by virtue of this Convention defines in a wider or more favorable manner who is to be regarded as a consumer or treats other agents as consumers, the judge entitled to adjudicate the matter may take into consideration such an expanded scope of application of this Convention, as long as it is more favorable to the consumer's interests.*"

Kropholler concludes his analysis by affirming that traditional private international law rules, as revised, could be used to protect the weaker party and that European continental private international law could and should include social values.[119]

In full agreement with this statement and taking into consideration the post-modern view of private international law pursuant to the doctrine of Erik Jayme, the need seems obvious for a better protection of consumers entering into international contracts within the regional or Inter-American system. This new argumentation in favor of the protection of the weaker party is a good opportunity to draft an Inter-American Convention about the law applicable to some consumer contracts and consumer transactions.

2. Insufficient consumer protection in Americas' private international law rules and general conventions on the sale of goods

In Mercosur, scholars have always warned that, due to the different levels of consumer protection at national level among the four member countries, the rule of the law of origin could not be an adequate solution, as it would leave unprotected consumers of the addressee countries.[120] The option adopted by the Common Market Group Resolution n.126/94,[121] approved on 16 December 1994, was in the same direction, thus imposing in all consumer contracts the commercialization or destination market rule, i.e. the application of the law of the country where the product or service is actually marketed, until the efforts for legislative harmonization lead to positive results.[122]

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[119] KROPHOLLER, *op.cit.*, p. 660, defends that Private International Law rules should absorb this social dimension of the weakers' protection: "Das IPR Savignyscher Prägung nimmt die sozialen Gebote der Zeit in sich auf".

[120] See DROMI, *op.cit.*, p. 365. This has always been STIGLITZ G. proposal, in, *El derecho del consumidor en Argentina y en el Mercosur*, published in Argentina, *La Ley*, 19/5/95 and in Brazil, in: Direito do Consumidor, v. 6, p. 20.

[121] MERCOSUR/GMC/RES. 126/94, in *Boletim de Integração Latino-Americana*, 15,p. 133.

[122] Resolución 126/94 GMC./Mercosur- "*Art 2. Hasta que sea aprobado un Reglamento común para la defensa del consumidor en el Mercosur, cada Estado Parte aplicará su legislación de defensa del consumidor y reglamentos técnicos pertinentes, a los produtos y servicios comercializados en su territorio.*"

If on one hand there is a very clear evolution towards increased consumer protection at domestic or national levels, the same cannot be said in terms of consumer protection through private international law. There are few special choice of law rules dealing with consumer protection. Nevertheless if national rules on consumer protection in the Inter-American countries would be considered as mandatory or public policy ones, there would be no need for a convention on the matter: the consumer, resident or national of a OAS State, would always be protected by the application of his domestic rules.

This conclusion is not fully true, though, as it presents two gaps.

First, it leaves the tourist consumer without protection when this returns to his country, for his protection would then require the extraterritoriality of the concerned protective laws, whose characteristic is exactly to be territorial. The international tourist consumer would be protected only when the national judge applies the *lex fori*[123]. It has to be noted, however, that most of the connection criteria currently recognized by Inter-American countries are either the *choice of the parties* in international contracts, the *place of performance* or the *domicile of the offeror*[124]. All these criteria will lead to the application of the foreign law in contract relations with national consumers.

Secondly, it leaves the inter-American consumer without protection, when the probable court to hear his demand is in a foreign country, for example, when he contracts at distance or by electronic commerce. Indeed it is very unlikely that mandatory or public policy rules from the country of the consumer's residence will be applied by the judge or arbitrator of another country, as this was illustrated by numerous studies.[125]

This is why it is necessary to define an inter-American consumer protection set of rules for these two sectors, as proposed next. In order to do so, both existing national private international law rules and conventions on international sales of goods effective in inter-American countries are assessed hereunder.

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[123] These cases are very rare, but there is already a *leading case* in Brazil. In a recent decision the Supreme Court of Justice held a Brazilian branch office liable for the warranty of a product purchased in the United States (distributed by the head office in Japan and produced possibly in Indonesia or China), of the Panasonic brand, all according to the Brazilian Consumer Protection Code, considered "law of immediate application". The REsp. 63.981-SP, whose rapporteur was Minister Sálvio de Figueiredo, decided on 4 May 2000, with the following abstract: *"Consumer Law. Good acquired abroad with defect. Obligation of the national company of same trade mark and group to repair the damage. The current reality indicates we are living in a world of globalized economy. The great corporations have lost the nationality mark to become world companies. Left the provinces and reached universality. By the peculiarities of the specimen, the Brazil Panasonic Limited is held liable for the fault of the product of Panasonic label acquired abroad."* See my comments in the article Normas de proteção do consumidor (especialmente, no comércio eletrônico) oriundas da União Européia e o exemplo de sua sistematização no Código Civil Alemão de 1896 - Notícia sobre as profundas modificações no BGB para incluir a figura do consumidor , in *Revista de Direito Privado* 4 (São Paulo), p. 85 ff.

[124] See that the characteristic performance was not considered an opportune connecting factor, not even for inclusion in CIDIP V, so NOODT, TAQUELA, Maria Blanca, Convención interamericana sobre Derecho aplicable a los contratos internacionales, in *El Derecho internacional privado interamericano en el umbral del siglo XXI*, Diego FERNANDEZ ARROYO (Org.) Ed. Eurolex, Madrid, 1997, p. 104.

[125] See 1979 CIDIP II – General Rules of Choice of Law. After an exhaustive analysis of German law and case law, we come to the conclusion that there is no obligation to the German judge to avail himself of the mandatory rules of other countries; only the mandatory rules of the European Union member States must be observed, due to art. 7 1 1980 Rome Convention, so BECKER, Michael, Zwingendes Eingriffsrecht in der Urteilsanerkennung, in *RabelsZ 60* (1996), p. 737.

A. Domestic private international law rules to protect consumers in inter-American countries

It is interesting to observe that, except for the United States[126] and Canada, there are rare domestic rules of private international law which concern specifically the protection of consumers in the American countries.

Private international law in Quebec, ascertained in the Civil Code of 1991, provides for several open rules (Art. 3076), the recognition of mandatory rules from other countries (Art. 3079), a strict public policy regarding the incompatibility of the resulting effect of the application of foreign law (Art. 3081) and a general loophole clause (Art. 3082).[127] It also includes a specific rule for consumer contracts (Art. 3117),[128] which does acknowledge the parties' intent, but also considers as binding to the court mandatory rules in circumstances identical to the ones of Article 5 of the 1980 Rome Convention, and which indicates that in case the parties have made no choice, the law of the consumer's residence will apply. The Quebec's Civil Code also provides for a specific rule applicable to accidents involving defective products (Art. 3128), according to which the victim (not mentioned the term *consumer*) can choose between the law of the country in which the producer has its establishment and the law of the country where the product was acquired.

In Latin America, the Chilean 1855 Civil Code, as modified in 1996, does not contain any special rule about consumer protection in private international law.[129] The rules of private international law of Mexico do not mention specifically consumers either.[130] Both the Colombia's "Estatuto del Consumidor" of 1982 (Decree 3.466 of 2 December 1982),[131] and Article 20 of the Civil Code of 1873 on the applicable law to contracts, do not mention the term of consumer.[132]. Private international law of Ecuador,[133] Costa Rica,[134] El Salvador,[135] Guatemala,[136] Nicaragua[137], Panama,[138] Peru[139] and Honduras[140] do not have special rules regarding consumer protection.

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[126] See Art. 3545 about *products liability* and Art. 3547 about *contractual obligations* of the new statute of Louisiana, Statute 923 of 1991 (published full-text in *IPRAX* 1993, p. 56 ff), in KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *Aussereuropäische IPR- Gesetze*, Max-Planck-Institut, Hamburg, 1999, p. 1002 ff.

[127] See text in DOLINGER Jacob, and TIBÚRCIO Carmen, *Vade-Mecum de Direito Internacional Privado*, Ed. Renovar, Rio de Janeiro, 1994, p. 297-298.

[128] See text in DOLINGER, *Vade Mecum*, p. 297-298.

[129] In this sense KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p.174 ff.

[130] The reform process of the Civil Code was established by a Decree of 11 December 1987, reproduced in DOLINGER, *Vade Mecum*, p. 393.

[131] Published in *Revista Direito do Consumidor*, v. 27 (1998), p. 228-239.

[132] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 414.

[133] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 210 ff.

[134] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 204 ff.

[135] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 228 ff.

[136] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 268 ff.

[137] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 608 ff.

[138] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 620 ff.

[139] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 664 ff.

[140] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 268 ff.

In Venezuela a general consumer protection statute was adopted in 1995.[141] and a new private international law statute in 1998, but neither text do mention specifically consumer protection issues. Even though, the new Venezuelan statute brings updated provisions on the application of national mandatory rules (Art. 10), calls for fair connection rules in concrete cases (Art. 7) and brings a rule in favor of the victim in case of accidents or illicit acts, which may favor the consumer (Art. 32).[142]

In Mercosur countries, the situation is not any better. In Paraguay, neither the consumer protection statute of 1998,[143] nor the Civil Code of 1985 contain special rules for international consumer transactions and, in contractual matters, the law of the place of performance of the obligation is designated as the applicable law (Art. 17).[144] The same in Uruguay, which says nothing on the matter in its consumer protection law of 1999,[145] and the Civil Code of which (dated 1868 and amended in 1994) also designates the law of the place of performance as the law applicable in contracts (art. 2399).[146]

The Brazilian rules of private international law are rigid and old-fashioned ones. They do not mention the consumer, and provide for only one general rule about public policy (Art. 17 LICC/42). In contractual matters, despite scholars' efforts, the dominant rule remains the *lex loci celebrationis* (Art. 9, LICC/42: *"To qualify and govern the obligations, shall be applied the law of the country in which these are concluded"*)[147]. The rule of Article 9(1) LICC/42 imposes a cumulative application of the Brazilian rule as to the form, in case of performance in Brazil. The rule of Article 9(2) CCIS/42 is used to identify the place of the offer in contracts concluded between absent or distant people, such as most of international contracts nowadays. According to Article 9(2), *"the obligation arising from the contract reputes itself concluded in the place where the offeror resides"*, hence designating the law of the place of the supplier's residence to govern contracts concluded by electronic commerce with consumers (B2C), or timeshare contracts. In the case of accidents caused by defective products and services, the applicable rule is also the one stated in Article 9, now interpreted as *lex loci delicti*, i.e. the law of the place where the illicit act was perpetrated or the law of the place where the harm and its consequences took place.[148] The new 2002 Brazilian Civil Code has no rule about the subject.

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[141] Published in *Revista Direito do Consumidor*, v. 26 (1998), p. 307-327.

[142] See Decree 36.511 of 6 August 1998, in KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 958-995.

[143] Ley 1.334 of 27 October 1998, published in *Revista Direito do Consumidor*, v. 30 (1999), p. 247-255

[144] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 638.

[145] Ley 17.189 of 20 September 1999, published in *Revista Direito do Consumidor*, v. 33 (2000), p. 262-270.

[146] KROPHOLLER Jan, KRÜGER Hilmar, RIERING Wofgang, SAMTLEBEN Jürgen, SIEHR Kurt, *op.cit.*, p. 910.

[147] See ARAÚJO, *op.cit.*, p. 108. On the controversy about party autonomy in Brazil and in various Latin American countries, see BOGGIANO, *The Contribution*, p. 132 ff.

[148] LIMA MARQUES, Claudia Novos rumos do Direito Internacional Privado quanto às obrigações resultantes de atos ilícitos (em especial de acidentes de trânsito), *Revista dos Tribunais*, São Paulo, v. 629 (mar/1988), p. 72 ff.

Argentinean scholars have for long proposed special and more protective rules for international consumer transactions, especially in standard contracts.[149] Argentinean private international law rules (Arts. 1205 to 1214, Civil Code) contain no special provisions for the protection of consumers[150]. Articles 1206 and 1210 provide for the application of the *lex loci executiones* and the *lex loci celebrationes*, but scholars remind that, according to the traditional viewpoint, the first connection factor will usually designate the law of the supplier as the applicable one[151] The second connection factor refers to the law of the place of "signature" of the contract, leading frequently to the application of the Argentinean *lex fori*, leaving unprotected the tourist consumer and the one who contracts at distance or by electronic means.[152] Scholars propose that the consumer be allowed to elect either the "law of the place of the product purchase", which would be especially important in both cases mentioned, or the "consumer's most favorable law"[153]. In tort matters, the traditional rule is also in Argentina the *lex loci delicti* (Art. 43 of the 1940 Montevideo Treaty), understood as the law from where the tort or wrongful act took place (*lex loci actus*). This rule has been under severe criticism and it has been suggested that, in case of harm caused to the consumer, the law of the habitual residence of the one who suffers the damage be used, a solution similar to the 1973 The Hague Convention.[154] Other scholars propose that the consumer-victim could choose either the law of the place of residence of the person or enterprise held liable, or the law of the place where the product was purchased.[155]

While domestic laws still have severe gaps on this matter, the consumer protection issue becomes more and more dealt with in recent private international law doctrinal studies[156] Scholars are practically unanimous on the need for special protection in consumer international transactions. Party autonomy is not seen as an appropriate rule when one of the parties is weaker, such as in consumer contracts.[157] And proposals are made for the harmonization of private international law rules through Mercosur[158] and other international organisms.[159]

B. Lack of special rules regarding consumer protection in general international conventions on trade of goods in the inter-American system

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[149] BOGGIANO, *International*, p. 55, and *The Contribution*, p. 134 ff.

[150] TONIOLLO, *op.cit.*, p. 98.

[151] In this sense TONIOLLOt, *op.cit.*, p. 100.

[152] In this sense also warns TONIOLLO, *op.cit.*, p. 102.

[153] TONIOLLO, *op.cit.*, p. 101, 102 and 107.

[154] TONIOLLO, *op.cit.*, p. 108 and 110.

[155] As suggested by TONIOLLO, *op.cit.*, p. 110.

[156] BOGGIANO, *The Contribuition*, p. 139, TONIOLLO, *op.cit.*, p. 94 ff, LIMA MARQUES, Cláudia, Direitos do Consumidor no Mercosul: Algumas sugestões frente ao impasse, *Revista Direito do Consumidor*, São Paulo, v. 32 (1999), p. 16 ff. BRILMAYER, *op.cit.*, p. 174, includes a topic *"The postulate of Consumer Sovereignty"* not to address consumer protection, but to build an analogy to the sovereignty of State decisions, whose policies or interests shall be protected in Private International Law.

[157] See BOGGIANO, *International*, p. 55 ff and BOGGIANO, *The Contribuition*, p. 138.

[158] See TONIOLLO, *op.cit.*, p. 97.

[159] BOGGIANO, *The Contribution*, p. 138, works with the possibility of a general manifestation of a Hague or regional Conference, through the OAS.

Globalization, approximation and integration of markets, and the internationalization of private relations are among the greatest challenges of today's consumer law.[160]

As expressed by Jean-Michel Arrighi, the consumer is the "protagonista olvidado".[161] Both inter-American Treaties and those dedicated to regional integration, such as the ALADI's Treaty and Asunción Treaty, which created Mercosur in 1991, do not contain the word "consumer".[162] Existing international conventions on private international law and international civil procedure - *Protocolos de Cooperação Judicial do Mercosul* and os *Tratados de Cooperação Bilateral* - have not focused on the elaboration of special rules for the protection of the consumer in the area[163] and the few projects effectively put forward never became effective.[164]

There is a consensus by Brazilian, Uruguayan and Argentinean scholars on the approach that Mercosur should not be redrafted to include all the questions already settled in the CIDIPs, being more useful and relevant to make use of these CIDIPs and their ratification by all member countries of Mercosur.[165]

But in none of the CIDIPs signed up to now the matter of consumer protection is given any special attention. The main focus is on international trade law in business-to-business relations, accidents not arising from defective products, protection of minors, family and succession law matters, and general rules of private international law and on international civil procedure.[166]

The OAS has so far prepared CIDIPs about bills of exchange, checks, letters rogatory, evidence, power of attorney, commercial companies, arbitral awards, precautionary measures, proof and information on foreign law, domicile of natural persons, general rules of private international law, adoption of minors, legal persons, jurisdiction, food, international carriage of goods by road, return of children, international contracts and traffic of minors.[167]

This gap in the inter-American system deserves a more detailed study. The 1994 Mexico Convention (CIDIP-V) on the law applicable to international contracts does not even mention the word *consumer*. The Contracting Parties may, when signing and ratifying the Convention, and pursuant to express authorization under Article 1 CIDIP-V, "*declare the categories of contracts to which this Convention shall not apply*" (Art. 1, Proposition 4). They may,

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[160] Also MACEDO JÚNIOR, *op.cit.*, p. 45 e 53.

[161] ARRIGHI, *op.cit.*, p. 126.

[162] ARRIGHI, *op.cit.*, p. 126.

[163] See SIQUEIROS, *op.cit.*, p. 159 ff.

[164] An example of such good efforts is the Protocol of Santa Maria drafted during the Summit of Ministers of Justice of Mercosur in 1996. See our comments in *Revista Direito do Consumidor*, vol. 32 (1999), p. 16 ff.

[165] Likewise FERREIRA DA SILVA, *op.cit.*, p. 199 and NOODT, *op.cit.*, p.134. Also FERNANDEZ ARROYO, *op.cit.*, p. 49 and GHERSI Carlos Alberto and LOVECE Graciela, *Contrato de tiempo Compartido (Timesharing)*. Editorial Universidad, Buenos Aires, 2000, p. 105.

[166] On this subject, TIBÚRCIO Carmen., in CASELLA/ARAÚJO, *op.cit.*, p. 49 ff.

[167] DREYZIN DE KLOR Adriana, *El Mercosur- Generador de una nueva fuente de derecho internacional privado*, Ed. Zavalia, Buenos Aires, 1997, p. 242-244.

for example, declare that CIDIP V is not applicable to business-to-consumer contracts, but this statement is usually forgotten by the States when they ratify the Convention[168]: this is seen as regarding international trade, and therefore it is taken for granted that trading involving consumers is excluded.[169]

If Siqueiros' original proposal of expressly excluding contracts concluded with consumers had not been suppressed, it would have been better.[170] The fact that CIDIP V does not address the matter of consumer contracts is a great opportunity missed,[171] which may be recovered only by means of a new special convention. Then the subject matter would be definitely excluded from the scope of application of CIDIP-V.

As a matter of fact, the connection factors chosen by CIDIP-V are more appropriate to international business-to-business relations: they privilege party autonomy (Art. 7), remain quite flexible (with the possibility to choose a new applicable law other than that to which the parties were previously subject, Art. 8), they allow for *dépeçage* (Art. 7)[172] and include an open ended rule (Art. 9), which designates as being applicable, when the parties have not chosen the law to be applied, the one of the State with which the contract has the *closest connection*.[173] Choice remains open and wide, without any guidance, not even the condition of a "reasonable or close connection" to the law chosen by the parties.[174] This has brought some difficulties to the ratification of the Convention by Brazil.[175]

It must be emphasized that the important Rome Convention of 1980, under Article 5, introduces into the private international law system of the European Community a special uniform rule for consumer protection. This convention provides for special private

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[168] Mexico and Venezuela did not use this declaration to exclude consumer contracts, see HERNANDEZ-BRETON Eugenio, *Internationale Handelsverträge im Lichte der Interamerikanischen Konvention von Mexico über das auf internationale Verträge anwendbare Recht*, in *IPRAX*, 1998, p. 378 ff.

[169] Article 5 of the Convention CIDIP-V reads as follows: "Art. 5. This convention does not determine the law applicable to: a) questions arising from the marital status of natural persons... b) contractual obligations intended for succession matters, testamentary questions, marital arrangements or those deriving from family relationships; c) obligations deriving from securities; d) obligations deriving from security transactions; e) parties' agreements concerning arbitration or selection of forum; f) questions on law of corporations, including the existence, capacity, function and dissolution of companies and legal persons in general. Art. 6. The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention."

[170] Likewise NOODT, *op.cit.*, p. 126.

[171] Also NOODT, *op.cit.*, p. 132.

[172] Convention, Art. 7 : «The contract shall be governed by the law chosen by the parties...such selection may relate to the entire contract or to part of it ». Art. 8: « The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, such modification shall not affect the formal validity of the original contract nor the rights of third parties ».

[173] Art. 9: « If the parties have not chosen the applicable law, or if their selection proves to be ineffective, the contract shall be governed by the law of the State with which it has the closest connection. The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest connection. It shall also take into account the general principles of international commercial law recognized by international organizations. Nevertheless, if a part of the contract were separable and it had a closer tie with another State, the law of that State could, exceptionally, apply to that part separable from the contract». See details in NOODT, *op.cit.*, p. 94.

[174] Likewise NOODT, *op.cit.*, p. 94.

[175] Likewise ARAÚJO, p.188. FERREIRA DA SILVA, *op.cit.*, p. 194 ff, NOODT, *op.cit.*, p. 96.

international law rules for consumer protection now applicable in all 25 member States of the European Union, member countries of the European Economic Area and other countries like Switzerland. Moreover, Article 2 of the Convention requires that this to be applied by the judge also in relation to other countries, i. e. countries that are not signatories of the Rome Convention, confirming its *self-executing*, uniform and universal character.[176].

The 1994 CIDIP-V Mexico Convention contains no rule similar to Article 5 of the Rome Convention. It is true that Latin-American scholars do consider in an almost unanimous way that the domestic rules adopted to protect consumers are public policy ones and hence would fall under the exception of Article 11 [177]. This reads as follows: "*No obstante lo previsto en los artículos anteriores, se aplicarán necessariamente las disposiciones del derecho del foro cuando tengan caráter imperativo. Será a discreción del foro, cuando lo considere pertinente, aplicar las disposiciones imperativas del derecho de otro Estado con el cual el contrato tenga vínculos estrechos.*"[178]

Article 11, however, is not enough to guarantee the effective protection of the weaker party for two reasons already mentioned: (1) it leaves the tourist consumer, who always buys in an "international" context, without special protection as he will be assured only the protection of the law of the country that he visited; and (2) it leaves the inter-American consumers with no special protection when they contract at distance or by e-commerce, because the mandatory rules of the country of the consumer's residence will be applied with "*discrécion*"[179] by the judge of the competent jurisdiction, which will usually the one of the supplier.

Therefore, if national rules of consumer protection are most commonly considered in the inter-American countries as being of public policy, the need for a Convention on the subject is urgent, especially with regard to the growing of distance standard contracts, mass tourism and B2C e-commerce in the region. CIDIP-V, more in accordance with the *lex mercatoria*, does not seem adequate and sufficient for protecting consumers in the inter-American system.

Finally, it must also be reminded that the major conventions on international commerce always sought to exclude from their scope of application the contracts concluded with consumers for domestic, family or non-professional use.[180] This is true with the The Hague Convention[181] on the law applicable to contracts for the sale of goods of 1986 (Arts.

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[176] Likewise KILLIAN Wolfgang, *Europaisches Wirtschaftsrecht*, Beck Verlag, Munich, 1996, p. 319 classifies it as an European uniform Private International Law.

[177] HERNÁNDEZ-BRETÓN, *IPRAX* 1998, 384, also reporting the enforcement of CIDIP V between Mexico and Venezuela in 14.1.1997, *IPRAX*, p. 379.

[178] OEA/Ser.K/XXI.5, CIDIP V/Doc. 46/94, vol. I e II, 1996, p. 29.

[179] OEA/Ser.K/XXI.5, CIDIP V/Doc. 46/94, vol. I e II, 1996, p. 29.

[180] In this sense HARGAIN, MIHALI, *op.cit.*, p. 506.

[181] It is about an updating of the 1955 Convention. See on the little acceptance of these Conventions among States, but of its significative importance as a legislative model, ARAÚJO, *op.cit.*, p. 124 ff.

2(c) and 5(d))[182], as well as with the United Nations Convention on Contracts for the International Sale of Goods of 1980, known as the Vienna Convention[183] (Arts. 2(a) and 5).[184] This solution was adopted either to prevent conflicts with domestic laws declared to be mandatory,[185] or because of too many differences in the respective consumer protection systems worldwide.[186]

The truth is that the matter was never addressed directly in the conventions that unify substantive rules in international trade, nor is it in the model law from UNIDROIT or UNCITRAL[187], nor was it the subject of a CIDIP or a The Hague Convention.[188] Only the UN Resolutions on consumer protection (1985 and 1999) have been an inspiring influence for national legislators.

Several American countries are linked by the Vienna Convention of 1980 on sales of goods.[189] This Convention made by UNCITRAL is one of the greatest successes in the unification of rules in international trade. It focuses entirely on international sales contracts between traders and tries to exclude from its scope international contracts between consumers and product suppliers.[190] Nevertheless its application to consumer contracts, although exceptional, remains possible.[191] Indeed, Article 2 of the Vienna Convention states that the Convention «*does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known*

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[182] Art 2: « The Convention does not apply to: ...c) sales of goods bought for personal, family or household use; it does, however, apply if the seller at the time of the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use». Art. 5: « The Convention does not determine the law applicable to ...d) the effect of the sale in respect of any person other than the parties ».

[183] See on the importance and acceptance of this Convention between American States, ARAÚJO, *op.cit.*, p. 127ff.

[184] «*This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;...*»

[185] So advocates GARRO/ZUPPI, *op.cit.*, p. 81: "*La razón principal de excluir la venta a consumidores del ámbito de aplicación ha sido de evitar un eventual conflicto entre las normas de la Convención y las leyes de orden público de protección al consumidor. La legislación especial de protección al consumidor ha sido incorporada en estos últimos años a numerosos ordenamientos jurídicos, inclusive en algunos países de América Latina, como México.*" Also HARGAIN, MIHALI, *op.cit.*, p. 507.

[186] In this sense HOFFMANN, *op.cit.*, p. 396, KROPHOLLER, *op.cit.*, p. 636, BOTANA, *op.cit.*, p. 9, HARGAIN and MIHALI, *op.cit.*, p. 506, citing the opinion of LIBLE.

[187] UNCITRAL's model law addressing electronic commerce expressly states that it does not repel any protective provision and seems to want to exclude consumer contracts concluded through digital means from its application sphere Art.1: « Ámbito de aplicación - La presente Ley* será aplicable a todo tipo de información en forma de mesaje de datos utilizada en el contexto de actividades comerciales.*La *presente ley no deroga ninguna norma jurídica destinada a la protección del consumidor*» Or « Scope of application – This Law* applies to any kind of information in the form of a data message used in the context of commercial activities. * This Law does not override any rule of law intended for the protection of consumers.»

[188] See VON MEHREN Arthur, *Law applicable to certain consumer sales, Texts adopted by the Fourteenth Session and Explanatory Report*, Ed. Bureau Permanent de la Conférence, The Hague, 1982, p. 6.

[189] The following inter-American countries had ratified the Convention, until 1995, Argentina, Chile, Ecuador, Canada, Cuba, Mexico and United States, and signed, Venezuela. See SCHLECHTRIEM Peter, *Internationales UN-Kaufrecht*, J.C.Mohr, Tübingen, 1996, p. 225-226. For updated data, consult www.un.org/Depts/Treaaty/bible/Part_I_E/X_/X_10.html

[190] On possible conflicts between the Convention and special statutes, such as on consumer credit or on contracting concluded away from business premises, see WARTEMBERG Konrad W., *CISG und deutsches Verbraucherschutzrecht: Das Verhaltnis der CISG insbesondere zum VerbrKrG, HaustürWG und ProdHaftG*, Nomos Verlag, Baden-Baden, 1998. p. 101-104.

[191] SCHLECHTRIEM, Rdn.23-32, especially p. 19.

that the goods were bought for any such use".[192] Such a possible application of this uniform law in relation to contracts concluded by consumers is seen by most scholars as not welcome.[193]

One should stress upon that the philosophy itself of this Convention is also to exclude international consumer contracts, as a way to efficiently protect consumers in international commerce. This explains the reluctance of dealing in one single Convention with international commerce between professionals and international consumer transactions. The legal regime applied to contracts between equals and experts cannot be the same as the one applied to contracts in which one party is much weaker than the other.

This idea, which is central to the 1980 The Hague Convention, European law and domestic consumer protection rules in industrialized countries, is not to be found yet in the inter-American space.[194]

3. Conclusion: Draft of an Inter-American Convention of Private International Law on the law applicable to some consumer contracts and consumer transactions

The European experience of over 40 years of harmonization of substantive rules and of unification of private international law rules, Article 2 of the 1980 Vienna Convention, the critical assessment made by scholars of existing conventions regarding international contracts and the *ratio* itself of the rule of Article 11 of CIDIP-V lead us to conclude that consumer protection is a matter to be excluded from the common system regulating international trade, both regionally and universally.

The question must be approached in the ambit of private international law with special connection factors in favor of the weaker party. As already said hereabove, "*The parties' autonomy in private international law gets senseless – as well as freedom of contracts in substantive law – if it starts to be an instrument of dominance of the stronger over the weaker.*"[195]

I conclude, therefore, on the need and opportunity today to elaborate a special convention by OAS, establishing connection factors and special rules for consumer protection in international consumer contracts.

The draft or proposed text that we would like to submit to further discussions reads as follows.

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[192] HARGAIN, MIHALI, *op.cit.*, p. 506.

[193] See the European scholarly writings quoted by WARTEMBERG, *op.cit.*, p. 19.

[194] See VON MEHREN, *op.cit.*, p. 2-3. The definition of consumer (Art. 2) and the exclusions (Arts. 4 and 5) of the project are today, - however, not up to date.

[195] NEUHAUS, *Die Grundbegriffe des IPR*, 1962, p. 172.

Proposal for a CIDIP-VII Inter-american Convention

I. GENERAL PROVISIONS

Article 1. Definition of consumer

1. For the purposes of this Convention, consumer means any natural person who, in a relation with a professional trader and in transactions, contracts and situations governed by this Convention, acts for a purpose which can be regarded as outside the scope of his professional activity.

2. Regarded as consumers are also third parties, such as family members of the main consumer or other bystanders, who directly enjoy the services and products contracted for, in contracts governed by this Convention, as final consignee of such contracts.

3. In the case of travel and timeshare (multipropriedad, multi-property) contracts, the following ones are regarded as consumers:

a. the main contracting party or the natural person who buys or agrees to buy the travel, the package holiday package or the timeshare for his own use;

b. the beneficiaries or third parties on behalf of whom the main contracting party buys or agrees to buy the travel, the package holiday or the timeshare and those who enjoy the travel, the package holiday or the timeshare for a length of time, even though they are not the main contracting party;

c. the assignee or the natural person to whom the main contracting party or the beneficiary assigns the travel, the package holiday or the timeshare.

4. If the law applicable by virtue of this Convention defines in a wider or more favorable manner who is to be regarded as a consumer or treats other agents as consumers, the judge entitled to adjudicate the matter may take into consideration such an expanded scope of application of this Convention, as long as it is more favorable to the consumer's interests.

Article 2. General contractual protection

1. Contracts and transactions involving consumers, especially those contracts concluded at a distance by internet, phone or other methods of telecommunications, when the consumer is in his country of domicile, shall be governed by the law of this country or by the law most favorable to the consumer.

The parties can choose the law, provided that the chosen law is that of the place of conclusion of the contract, the place of the contract performance, the place of the characteristic performance, or the domicile or place of business of the supplier of the products and services and that this law is the one most favorable to the consumer.

2. To contracts concluded by the consumer when outside of his country of domicile, the law chosen by the parties shall apply, provided the chosen law is that of the place of conclusion of the contract, the place of performance, or the one of the consumer's domicile.

Article 3. Mandatory rules

1. Notwithstanding the preceding articles, the mandatory rules of the country of forum shall necessarily apply for the protection of the consumer.

2. If the conclusion of the contract was preceded by any negotiations or marketing by the supplier or its representatives, especially advertising material, mail, e-mail messages, prizes, invitations, maintenance of branch offices or representatives, and other activities focused on the supply of products and services and the creation of a captive customer base in the country of the consumer's domicile, this country's mandatory rules shall necessarily apply for the protection of the consumer, in addition to those of the country exercising jurisdiction and to the law applicable to the contract.

Article 4. Loophole clause

The law indicated as applicable by virtue of this Convention might not be applicable in certain cases, if, considering all the circumstances relevant to the case, the connection with the law indicated as applicable is insufficient and the case itself is closely related to another law, which is more favorable to the consumer.

Article 5. Excluded matters

This Convention is not concerned with:

a. transport contracts governed by international conventions;

b. insurance contracts;

c. contractual obligations expressly excluded from the sphere of application of the CIDIP V on international contracts;

d.contracts for international transactions conducted between traders and businessmen;

e. all other contracts and consumer transactions, as well as the obligations arising from them, governed by specific conventions.

II. SPECIFIC CONTRACTS

Article 6. Travel and tourism contracts

1. Individual travel contracts concluded in package or with combined services, such as a tourist group or together with other hotel and/or tourist services, shall be governed by the law of the consumer's place of domicile, if it is also the place of business or branch of the travel agency which sold the travel contract, or where the offer was made, or advertising or any prior negotiations by the dealer, carrier, agency or its representative occurred.

2. In all other cases, to individual travel contracts concluded in package or with combined services, such as a tourist group or together with other hotel and/or tourist services, the law of the place where the consumer declares his acceptance of the contract shall apply.

3. To travel contracts not governed by international conventions, concluded through standard contracts or standard terms, the law of the place where the consumer declares his acceptance of the contract shall apply.

Article 7. Timeshare contracts

1. The consumer protection mandatory rules of the country of physical location of the leisure and hotel facilities, which rent, lease or sell the right of use in timeshare property, when located in States parties to this Convention, apply cumulatively to these contracts in favor of the consumers.

2. The rules of the country where the offer is made, where advertising or any marketing activity, such as phone calls, invitations for receptions, meetings, parties, shipment of prizes, raffles, all-paid trips or incentive programs, among other business activities, are conducted by representatives or owners, organizers and managers of the timeshare, or where pre-contracts or contracts for the right of use/enjoyment of property are signed, shall be interpreted in favor of the consumer, regarding information, cooling-off periods and other causes for termination of the contract or pre-contract, as well as the rules relating to the content of the contract, payment methods and the possibility of signing credit card receipts during this period.

Proposition de Convention Interaméricaine de Droit International Privé (CIDIP) sur la Loi applicable à certains contrats et à certaines relations de consommation

I. RÈGLES GÉNÉRALES

Article 1. Définition du consommateur

1. Aux fins de la présente Convention, le consommateur est toute personne physique qui, face à un professionnel, et dans les transactions, contrats et situations relevant de la présente Convention, agit à des fins qui n'entrent pas dans le cadre de son activité professionnelle.

2. Sont également considérés consommateurs les tiers, membres de la famille du consommateur principal, ainsi que ses proches, qui jouissent directement des services et des produits acquis, dans les contrats relevant de la présente Convention, en tant que destinateurs finaux.

3. Dans les contrats de voyage et de multipropriété, sont considérés comme des consommateurs:

a. le contractant principal, ou la personne physique qui acquiert ou qui s'engage à acquérir le forfait touristique, le billet de voyage ou le service de multipropriété pour un usage personnel;

b. les bénéficiaires ou les tiers au titre desquels le contractant principal acquiert ou s'engage à acquérir le forfait touristique, le billet de voyage ou le service de multipropriété, ainsi que ceux qui en jouissent temporairement, encore qu'ils ne figurent pas comme contractants principaux;

c. le cessionnaire ou la personne physique auxquels le contractant principal ou le bénéficiaire cède ses droits au forfait touristique, au billet de voyage, ou ses droits de multipropriété.

4. Si la loi désignée comme étant la loi applicable par la présente Convention adopte une définition plus large ou plus protectrice du consommateur ou considère comme tels d'autres agents, le juge compétent peut prendre en compte ces extensions du champ d'application de la présente Convention, pour autant que cette extension s'avère plus favorable aux intérêts du consommateur.

Article 2. Protection contractuelle générale

1. Les contrats et les transactions avec les consommateurs, spécialement ceux conclus à distance par moyens électroniques, par opération de télécommunication ou par téléphone, lorsque le consommateur se trouve dans son pays de domicile, sont régis par la loi de ce pays ou par la loi plus favorable au consommateur, choisie par les parties, tant qu'elle est la loi du lieu de la conclusion du contrat, ou celle du lieu de l'exécution du contrat, ou celle de la prestation caractéristique, ou celle du domicile ou du siège du fournisseur des produits ou des services.

2. Est appliquée aux contrats conclus par le consommateur lorsqu'il se trouve en dehors du pays de son domicile, la loi choisie par les parties, parmi celles du lieu de la conclusion du contrat, du lieu de l'exécution de celui-ci et du lieu du domicile du consommateur.

Article 3. Règles impératives

1. Nonobstant les dispositions des articles précédents, sont nécessairement appliquées les règles de la loi du pays du for qui présentent un caractère impératif, dans le but de la protection du consommateur.

2. Si la conclusion du contrat a été précédée de toute activité commerciale ou de marketing, par le fournisseur ou par ses représentants, en particulier la publicité, l'envoi de correspondances, les courriers électroniques, les cadeaux, les invitations, le maintien de succursales ou de représentants, ainsi que d'autres activités visant à la fourniture de produits

et de services et à l'attraction de clientèle dans le pays du domicile du consommateur, sont obligatoirement appliquées les règles impératives de ce dernier pays, en cumul avec celles du for et celle applicable au contrat ou à la relation de consommation.

Article 4. Clause échappatoire

Nonobstant la loi désignée applicable par la présente Convention, à titre exceptionnel, il pourra être fait application de la loi du pays qui présente un lien plus étroit avec la situation, considérant toutes les circonstances, lorsqu'elle est plus favorable au consommateur.

Article 5. Exemptions

Ne sont pas soumis aux dispositions de la présente Convention :

a. les contrats de transport régis par des conventions internationales ;

b. les contrats d'assurance ;

c. les obligations contractuelles expressément exclues du champ d'application de la CIDIP V sur les contrats internationaux ;

d. les contrats commerciaux internationaux entre commerçants ou professionnels ;

e. les contrats et relations de consommation, ainsi que les obligations qui en découlent, régis par des conventions spéciales.

II. CONTRATS SPÉCIFIQUES

Article 6. Contrats de voyage et de tourisme

1. Les contrats de voyage individuels, conclus à forfait ou avec services combinés, comme groupe touristique ou conjointement avec d'autres services hôteliers et/ou touristiques, sont régis par la loi du lieu du domicile du consommateur, si ce domicile coïncide avec le lieu du siège ou de la succursale de l'agence de voyages qui a été partie au contrat de voyage ou avec le lieu où a été faite l'offre, la publicité, ou tout acte juridique préalable posé par le commerçant, le transporteur, l'agence ou ses représentants commerciaux.

2. Dans les autres cas, s'applique aux contrats de voyage individuels, conclus à forfait ou avec services combinés, comme groupe touristique ou conjointement avec d'autres services hôteliers et/ou touristiques la loi du lieu où le consommateur donne son acceptation du contrat.

3. Est appliquée aux contrats de voyage non régis par des conventions internationales, conclus par le biais de contrats d'adhésion ou de conditions générales, la loi du lieu où le consommateur donne son acceptation du contrat.

Article 7. Contrats de multipropriété ou « timeshare »

1. Les règles impératives de protection des consommateurs du pays où se trouvent les établissements de loisirs et d'hébergement en multipropriété, situés dans les États signataires de la présente Convention, sont appliquées en cumul à ces contrats, au bénéfice des consommateurs.

2. Les règles du pays où est réalisée l'offre, la publicité ou toute activité de marketing, telles les opérations par téléphone, les invitations pour réceptions, rendez-vous, fêtes, l'envoi de cadeaux, les primes, l'offre de séjours ou d'avantages gratuits, entre autres activités commerciales réalisées par les représentants ou par les propriétaires, par les organisateurs et les administrateurs de systèmes de multipropriété, ou la signature de pré-contrats ou de contrats de multipropriété ou de droit d'usage d'immeubles, sont interprétées en faveur du consommateur, à propos de l'information, du droit de repentir et de ses délais, des causes de résolution du contrat ou du pré-contrat, ainsi que les règles relatives au contenu du contrat, aux modes de paiement et à la possibilité de signer des billets de prélèvement de cartes de crédit pendant cette période.