Consumer protection in international private relations
General report

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Introduction

1. Emergence of the international dimension in consumer protection

Consumer protection has developed constantly – although in various ways – in recent decades in many countries. Initially, the envisaged protection was predominantly made at a national level, limited to purely internal consumer transactions. The essential purpose of such a limitation seemed to be strongly linked to the traditional notion that these aforementioned transactions represent a reduced sum, the consideration of which did not however prevent consumer protection from becoming a constitutional duty in several legislations.[1] But some phenomena such as the internationalisation of the markets, mass tourism and, above all, electronic commerce have increased the global volume of consumer operations to such an extent that it is now absurd to consider them exclusively as questions relating to small, individual transactions. At the same time, these phenomena have led to a kind of democratisation of international consumption, which is no longer the rare privilege of the chosen few.

The fact that anyone with access to the Internet can, even without realising it, enter into genuine international contracts allows us to understand the importance and the necessity of developing the international aspect of consumer protection. If, within each legislation, consumers can be exposed to the rigours of market rules, this weakness is obviously more marked when co-contracting parties are located in a different country and/ or if their transactions are subject to foreign laws and jurisdictions. After the consolidation of "consumer law", there emerges an increasingly powerful "international consumer law" whose categories and concrete responses are, as is often the case in international law, sometimes complicated and very relative but quite indispensable.

In view of the obvious lack of adaptation to general rules as far as international contracts are concerned, this branch of international law has begun to elaborate conflict of laws rules and conflict of jurisdiction rules specifically aimed at international consumption relationships. But the increasing number of these operations, on the one hand, and their singular nature on the other hand, forces legislators to adopt other complementary mechanisms. Consequently, international consumer law cannot be content with good rules of judicial competence, of determining the relevant law and, sometimes of acknowledging and enforcing foreign decisions. All these rules are no doubt necessary. But, in addition to these elements of "classic" private international law, there is a development of mechanisms affecting the procedure, the cooperation and alternative methods of resolving litigation. Basically, one cannot ignore the existence of a "mercantilist" position, which perceives consumer law in general and the protective policies applied by public authorities as obstacles to the freedom of commerce, especially to the functioning of global markets created by electronic commerce.[2] The tension between this position and that which seeks to give a

[1] See *infra*, I.1.
[2] Critic about this position, N. REICH, "Transnational Consumer Law – Reality or Fiction?", *Penn State Int'l L. Rev.* 27, 3/4 (2009) 859, 860-861.

proper substance to rights of the individual in the face of globalisation is revealed every time that an effort is made to impose regulation (above all when there is an international attempt at unification or harmonisation).[3] The concern to find balanced solutions has long been present in legal literature.[4]

2. Comparison of law in the context of internationalisation and privatisation

The traditional usage of comparative methodology continues to be useful in teaching, elaborating and in the application of private international law. However, to be useful is not enough. It is in fact necessary to take into account the actual phenomena which require a complementary approach for comparative law, as has already been noticed by several well-known comparativists.[5] The essential considerations that should be borne in mind are, on the one hand, the transfer of law-making power from the State to international or supranational organisations; on the other hand, the transfer of a large part of legal regulation and dispute settlement from the public sector to the private sector. One must be aware of these trends and reversals in order to contribute to a better understanding of private international law and to improve the quality of private international dispute resolution.

Economic integration and international codification greatly influence national legal systems. This is proved by the existence of the supranational legal framework of the European Union (EU) and marked by the communitarisation of the law and its collateral effects, for example, the EU's membership of the Hague Conference on Private International Law.[6] Even if elsewhere in the world one cannot speak of a genuinely supranational legal structure, this claim is nonetheless true. Failing to take into account this evolution prevents comprehension of the legal systems and, consequently, prevents interpreting them correctly in the law-making process and in the resolution of real cases.

All these considerations have been taken into account during the elaboration of this Report. It is well known that traditionally the International Academy of Comparative Law appoints one person per subject area, who must write a general report on the basis of information received by national reporters. It goes without saying that the subjects of national laws dealt with in the reports on member States of the EU are likely to be residual and repetitive, as substantive law and private international law in so far as consumer law is concerned come essentially under the jurisdiction of EU law.[7] In the Americas, for instance, the specific rules of private international law relating to consumer protection are absent in

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[3] Within the framework of the Hague Conference of Private International Law, see the document "The impact of the Internet on the Judgments Project: Thoughts for the Future", Prel. Doc. No 17 of February 2002, available on the website of the Hague Conference < www.hcch.net > under "Conventions" then "Nr 37" and then "Preliminary Documents". Within the framework of the OAS, see M. J. DENNIS, "Diseño de una agenda práctica para la protección de los consumidores en las Américas", in: D. P. Fernández Arroyo / J. A. Moreno Rodríguez (ed.), *Protección de los consumidores en América. Trabajos de la CIDIP VII (OEA)*, Asunción, CEDEP / La Ley (2007) 219.

[4] See E. JAYME, "Le droit international privé du nouveau millénaire : la protection de la personne humaine face à la globalisation", *Recueil des Cours* 282 (2000) 9, 25-28, 32-34.

[5] G. A. BERMANN, "Le droit comparé et le droit international : alliés ou ennemis?", *RIDC* (2003) 527-529; M. REIMANN, "Comparative Law and Private International Law", in: M. Reimann / R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, OUP (2006) 1388 ss.

[6] A. SCHULZ, "The Accession of the European Community to The Hague Conference on Private International Law", *ICLQ* (2007) 939.

[7] This idea is clearly expressed in the introduction of the French Report: "*dans les relations internationales, la protection est presque intégralement assurée par le droit communautaire, réduisant l'intervention des normes nationales à la portion congrue*". The same may be found in the Polish Report, I.1 : "In the Polish legal system the vast majority of legal provisions, both substantive and procedural, protecting consumers involved in international transactions stem, more or less directly, from the law of the European Union" (also at I.2).

the Latin American countries. The Inter-American Conference on Private International Law is, however, working on this subject and several drafts are on the negotiating table. The Hague Conference, at a universal level, and the Mercosur, at a regional level, are also dealing with this matter. Consequently, in order to write a comparative report as accurately as possible, we have combined international, supranational and national reports, bearing in mind that several national reports were quite limited in their scope.

I. General context

1. Rules and principles in national constitutions (consumer protection as a category)

Only the most modern constitutions contain specific rules of a more or less complete nature relating to consumer protection,[8] occasionally giving this protection the character of fundamental law.[9] Many of the public legal systems which identify a constitutional rank for consumer protection are to be found in Latin America,[10] others are in Europe.[11] In the Swiss constitution (article 97), for instance, the recognition of consumer protection becomes a reality in the Confederation's obligation to legislate and in the cantonal obligation to organise a process of conciliation or simple and rapid judiciary to resolve disputes whose contentious value does not exceed an sum fixed by the Federal Council.[12] In Africa the projected new Kenyan constitution contains an article on consumer protection, which was adopted in 2004, but which was never put to a referendum and, consequently, has not taken effect.[13]

Among more recent constitutions, the Ecuadorean one of 2008 recognises the rights of users and consumers (articles 52 to 55) in the chapter pertaining to the law regarding persons and priority attention groups. Amongst the explicitly acknowledged rights, it is important to emphasize the right to be indemnified for damage caused by the deficiencies of a public service, by the defective quality of a product or the non-compliance of a product with its advertising or its description; in such cases the civil and criminal responsibility of the suppliers is provided for. The 1999 Constitution of the Bolivarian Republic of Venezuela had already foreseen the need to establish in law the procedures needed to defend consumers' rights, damage compensation and penalties for the violation of these rights.[14] But, in our opinion, one of the most interesting cases is that of the Brazilian Constitution of 1988. In addition to describing consumer protection as a fundamental right,[15] and the presence of this category in several articles of the Constitution, the constitutional clauses gave rise to an impressive legislative, doctrinal and judicial development.[16]

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[8] However, more general references such as the restriction of freedom of trade and industry by "*mesures de police sanitaire contre les épidémies et les epizooties*" may be found in old texts. See, for instance, Arts. 31 and 69 of Swiss Constitution of 1874 (Swiss Report, I.1).

[9] See G. A. RODRIGUES, "A proteção ao consumidor como um direito fundamental", *RDC* 58 (2006) 75.

[10] In Argentina, Bolivia, Brazil, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Peru, Venezuela. See J. A. AMAYA, *Mecanismos constitucionales de protección al consumidor*, Buenos Aires, La Ley (2004) 38-47, quoted in the Report of Mercosur, note 2.

[11] Among the countries here reported: Spain, Poland, Switzerland and Turkey (partially a European country and candidate to join the EU).

[12] See Swiss Report, I.1.A, notes 3-17 and accompanying text.

[13] See Report of Kenya, I.1, notes 2-3 and accompanying text.

[14] Report of Venezuela, I.1.

[15] C. LIMA MARQUES explains that "*cette reconnaissance de l'importance de la protection du consommateur parmi les droits fondamentaux au Brazil est un mandat … positif d'action … de l'État …, un droit fondamental socio-économique qui requiert impérativement une action positive des pouvoirs publics en faveur de la protection du consommateur*" (Brazilian Report, I.1.A).

[16] *Ibid.*

In the EU, given the distribution of jurisdictions, it is more interesting to note the European rules of law than the treatment reserved for them within the national constitutions. Despite the failure of the so-called "European Constitution" and its ensuing criticism, it is obvious that the regulations concerning the EU's treaties, as a "super State", fulfil a constitutional function inasmuch as they guide and limit for all the regulations and decisions of the EU and its member States. In this sense, the precepts of article 38 of the European Charter of Fundamental Rights,[17] of articles 12 and 169 of the Treaty of the Functioning of the EU (TFEU)[18] serve as "constitutional" regulations in the whole scope of community law. The first of these articles establishes, in the chapter pertaining to solidarity, the consumers' right to a "high" level of protection. But it is article 12 of the TFEU which most clearly shows the constitutional nature by establishing the obligation to consider the demands of consumer protection in the definition and enforcement of EU policies and actions. This is the present basis for the extraordinary development of protective European regulation, which does not prevent member States from being even more rigorous in their protective efforts. That is to say, that notwithstanding the "high" character of protection demanded by the original EU law, the latter merely represents the minimum possible.[19]

Occasionally, national courts apply protective constitutional legislation directly to real cases.[20] And in countries which do not admit such direct application of constitutional legislation relating to this matter, Poland for example,[21] it is accepted, on the one hand, that a person may invoke international and supranational laws of protection when there are no relevant national laws, and on the other hand, that the aforementioned constitutional legislation may serve as a parameter of constitutional validity.[22] And yet, the absence of specific constitutional legislation has not prevented some upper courts from adopting decisions in favour of consumer rights,[23] without necessarily giving their protection the status of "constitutional validity".[24] In fact, many other laws and principles often present in constitutions may be applied in litigation involving consumers.[25] This is the case, amongst others, for the laws and principles relating to competition, those which guarantee access to justice and those which forbid discrimination.[26] Occasionally, it is possible to find in the legislative development of these laws and principles the recognition of a judicial category of

[17] Which has the same legal value than European treaties (Art. 6(1) TEU).
[18] TFEU, adopted into the framework of the "Lisbon Treaty", in force since 1 December 2009. See Report of the EU, I.1.
[19] See art. 169(4) TFEU.
[20] Thus, in Argentina, the *Cámara Nacional Federal en lo Contencioso Administrativo*, 2nd ch., has said that the protection assured by the Constitution applies even in the absence of a developing act. CNFed.Cont.Adm., 5 November 1998, *Ciancio, José M. c. Enargas*, *Doctrina Judicial* (1999-2) 1124. Equally interesting is the decision adopted by the same court in *Intergas S.A. c. Enargas*, 18 November 1999, *LexisNexis* nº 8/10280 (Report of Mercosur, note 1). See also, always in Argentina, National Court of Appeal, ch. B, 22 June 2005, *Volpi c. UBS AG*. In Brazil, see STJ – 3.a T. – REsp 170078/SP – rel. Min. Carlos Alberto Menezes Direito – j. 03.04.2001, and the decisions quoted by C. LIMA MARQUES / A. H. BENJAMIN / B. MIRAGEM, *Comentários ao Código de Defesa do Consumidor*, São Paulo, RT (2006) 75 (See Brazilian Report, I.1.A, note 22).
[21] Art. 76 of Polish Constitution of 1997.
[22] Of particular interest is the decision of the Polish Constitutional Court of 2 December 2008, K 37/07, in which the Court finds contrary to Constitution the rule which required passengers seeking to hold a carrier liable for late arrival or cancellation of a regularly scheduled transportation course to prove previously that the carrier was guilty of intentional misconduct or gross negligence. See Report of Poland, I.1, note 7 and accompanying text. See also decisions mentioned at notes 5 and 6 of the same Report.
[23] See Report of the Czech Republic, I.1; Report of Israel, I.1, spec. notes 2-7 and accompanying text.
[24] For example, in France, consumer protection has been "only" recognised having a general interest, that is to say, being able to limit property rights. See Report of France, I.1.
[25] See, for example, German Report, I.1, and Italian Report, I.1.
[26] See South African Report, I.1. and note 9.

consumer protection.[27] In other cases, such a category is directly created by specific legislation.[28]

Totally different and not exclusively attached to consumer protection, is another constitutional question relating to the existence in some States of several legal systems, due to the federal organisation of the state. This can be perceived as "an obstacle to a coherent approach"[29] or quite simply as a factor in a certain assimilation of relationships within the state and with those abroad.[30] In some federated States, the latter quite simply represents a division of jurisdictions between the federal authority and the state authority to regulate issues relating to consumer protection.[31]

2. The relevance of international and supranational sources.

Despite their obvious importance in international consumer relationships, specific legal solutions for international consumer protection are still relatively rare in much of the world. Generally, with the exception of the EU, the gaps in internal private international law cannot be filled satisfactorily by the actions of international and supranational organisations.

And yet, in addition to the adoption of laws that specifically regulate aspects of the private international law of consumer protection, one cannot ignore the impact of adopting conventions in the domain of international commerce on internal laws relating to consumer protection. For example, agreements put into effect by the World Trade Organisation (WTO) have made it possible to define a standard level of "consumer protection".[32] Of course, this does not constitute the only example of an international law causing the regulation of internal law to be modified.[33]

Instruments which are adopted, or which are being drafted, are very varied, as is their insertion in legal systems. Before now, their achievement was only possible at a regional level.

A) Universal sources

There is no "universal" instrument in effect that contains a specific set of regulations concerning international consumer protection. This does not mean that consumer protection is not of concern to international organisations. On the contrary, twenty-five years ago the

[27] That is the case, in Ethiopia, of the *Trade Practice Proclamation* of 2003 (see Ethiopian Report, I.1, notes 5-10 and accompanying text).

[28] For example, in Greece, Act 2251/1994 on Consumer Protection (see Report of Greece, I.1) ; in Italy, Consumer Code of 2005 (see Italian Report, I.1) ; in Japan, Consumer Basic Act and Consumer Contract Act (see Japanese Report, I.1) ; etc. In South Africa, several texts (*Electronic Communications and Transactions Act* of 2002, *National Credit Act* of 2005 and *Consumer Protection Act* of 2008) offer different notions of consumer (See Report of South Africa, Introduction).

[29] See Report of Australia, I.1. Even if they are not inconsistent the systems in force into one State can be quite different (see UK Report, Introduction).

[30] See Report of Quebec, I.1.

[31] That is the case, already mentioned, of Switzerland. See *supra* note 9. That division between substantial aspects (attributed to the federation or confederation) and procedural aspects (attributed to the sister States) may be found in Argentina. About the organisation of law-making power in Canada, see Canadian Report (common law), I.1.

[32] In the Report of Israel, I.2, the author explains how the Standards Law 5713-1953 had to be modified at the request of the WTO, by removing consumer protection from the list of grounds for enacting an official standard. Israeli Report also mentions the Trade Duties and Safeguards Measures Law.

[33] In the Polish Report, the author mentions the Paris Convention of 1962 (of the European Council) on the liability of hotel-keepers concerning the property of their guests, which has provoked the modification of some rules of the Civil Code, particularly to limit the effect of waivers of liability.

United Nations (UN) adopted one of the guiding principles in this domain with national legislators in mind, particularly those in developing countries,[34] who are always considered and explicitly mentioned when national laws are drafted. In the same way, other laws adopted by the UN may be applied to consumers as is the case of the Legislative Guidelines of the United Nations Commission on International Trade Law (UNCITRAL) concerning operations guaranteed by security rights in 2007 and, exceptionally, by the Vienna Convention of 1980 regarding the international sale of goods.[35] But only now does UNCITRAL envisage the possibility of working on (although non-specifically) international consumer protection, more precisely the bringing into line of different aspects international electronic commercial operations.[36]

For its part, the Hague Conference on Private International Law has often attempted to tackle the international regulation of various aspects of consumer protection. In the area of disputed jurisdictions, the Draft of a "worldwide convention of exequatur" (1999) contained the fairly controversial specific regulation of jurisdiction for consumer contracts.[37] In the area of disputed laws, in its 14th session (1980) the conference adopted the text on the law applicable to consumer sales that was prepared by Arthur T. Von Mehren,[38] which was supposed to become the basis of a future convention or a part of a convention. However, this never happened.[39] Thus, only one among the 39 international instruments adopted by the Conference contained specific provisions for consumers: the Convention of October 2nd 1973 on the law applicable to the liability for defective products.[40]

B) Regional sources

The absence of universal instruments in our subject amplifies the importance of work undertaken in organisations of a regional nature. Indeed, it is at this level that specific instruments have been adopted concerning the different aspects of international consumer law and that new instruments are being prepared. At the same time, increasing commercial relationships within regionally integrated blocks and tighter links between their member States leads to the adoption of laws and policies, which in a more or less indirect way are reflected in consumer relationships.[41]

The EU's case is paradigmatic in this respect. All the typical aspects of private international law of consumers have been scrutinised by the community legislator:

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[34] Resolution 39/248 of the General Assembly of the UN, adopted in April 1985, on the Guidelines on consumer protection (Doc. NU A/RES/39/248 (1985) 188). See D. HARLAND, "The UN Guidelines for Consumer Protection: their Impact in the First Decade", in: I. Ramsay (dir.), *Consumer Law in the Global Economy*, Aldershot, Ashgate (1997) 2.

[35] Vienna Convention is not applicable to consumer sales (Art. 2) "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".

[36] See doc. A/CN.9/706 of 23 April 2010 which contains a summary of a colloquia made by UNCITRAL in cooperation with the Pace Law School Institute of International Commercial Law et la Penn State Dickinson School of Law in Vienna in March 2010, called *A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)*.

[37] See Report of the Hague Conference, II.1, and the document "The impact of the Internet on the Judgments Project: Thoughts for the Future", quoted *supra* note 3.

[38] Hague Conference on Private International Law, *Actes et documents de la Quatorzième Session*, t. II, *Ventes aux consommateurs*, pp. II-77-II-179. For a Spanish version, see D. P. Fernández Arroyo / J. A. Moreno (note 3) 39-55.

[39] See Report of the Hague Conference, III.1.

[40] *Ibid*.

[41] T. BOURGOIGNIE / J. ST-PIERRE, "Le statut de la politique de protection du consommateur dans les systèmes régionaux économiquement intégrés. Une première évaluation comparative", *Rev. québécois de droit international* 20-1 (2007) 1.

jurisdiction, applicable law, recognition and enforcement of foreign decisions.[42] But the EU initiatives go further than that. The considerable development of material harmonisation[43] must be emphasised insofar as it concerns either general aspects of commercial contracts (for example, unfair terms), or specific consumer relationships (for example, time-sharing). Harmonisation measures also include specific rules of private international law.[44]

It would be wrong to think that the EU laws, whether private international law or substantive law, are only relevant to their member States.[45] On the contrary, their influence is felt beyond the community borders. Firstly, EU law impacts on the member States of the European Free Trade Association (EFTA) in respect of differently weighted agreements: in the context of private international law, we must mention the Lugano Convention (2007) concerning jurisdiction and the recognition and enforcement judgements, civil and commercial matters.[46] A second sphere of influence is spreading across the States who wish to join the EU, for instance Turkey, which not only bases its rules on jurisdiction and applicable law in the matter of consumer relationships on those adopted by the EU, but has also adopted within its legal framework several European texts relating to substantial law in this domain, the provisions of which are likely to play a mandatory role.[47] A third circle, unlimited in its scope, is gradually taking shape as the world's legislators and academics deem the European regulations to be exemplary models when suggesting laws relating to consumer protection.[48]

In the American hemisphere, even if several texts adopted by the Organisation of American States (OAS) within the framework of its Specialised Inter-American Conference on Private International Law (CIDIP) can be applied to litigation wherein consumers are implicated,[49] there are no special instruments in this domain. It is interesting to note that even if the Inter-American Convention on law applicable to international contracts does not explicitly exclude contracts concluded by consumers, the prevailing opinion is that, given the great recognition that the Convention gives to party autonomy, its rules are not applicable to

[42] Among other instruments we will pay attention in particular to Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (and to its previous instrument, Brussels Convention of 1968) and to Regulation 593/2008 (Rome I) on the Law Applicable to Contractual Obligations (and to its previous instrument, Rome Convention of 1980).

[43] The EU is working now in the substantial harmonisation of consumer law, on the basis of the Proposal of Directive of 8 October 2008 on consumers rights, COM (2008) 614 final. See H. SCHULTE-NÖLKE / L. TICHY (ed.), *Perspectives for European Consumer Law. Towards a Directive on Consumer Rights and Beyond*, München, Sellier (2010).

[44] Report of the EU, I.2.

[45] In those States, the weight of EU private international law is so heavy that sometimes one forgets that national rules have, notwithstanding their residual character, their own scope of application. See, for instance, Belgian Report, II.1.

[46] Originally adopted in 1988 as a parallel text to the Brussels Convention of 1968 (in its version of 1989, called San Sebastian Convention), the Lugano Convention has been modified in order to adapt it to the text of Regulation 44/2001. The new version is in force in the EU States and in Norway since 1 January 2010. The entry into force in Switzerland should be the 1 January 2011 (see Norwegian and Swiss Reports, I.2).

[47] See Turkish Report, I.2, note 6. See also Y. M. ATAMER / H. W. MICKLITZ, "The Implementation of the EU Consumer Protection Directives in Turkey", *Penn State Int'l Law Review* 27, 3/4 (2009) 551.

[48] See US Report, I.1.B, note 9, and see also L. F. DEL DUCA / A. H. KRITZER / D. NAGEL, "Achieving Optimal Use of Harmonization Techniques In an Increasingly Twenty-First Century World of Consumer Sales: Moving the EU Harmonization Process to a Global Plane", *Penn State Int'l Law Review* 27, 3/4 (2009) 641; the Ethiopian Report, II.1, mentions a Draft of private international law act of 2003 which reproduces the jurisdiction rules on consumer contracts of the 1978 version of Brussels Convention; Art. 3517 of Civil Code of Quebec follows Art. 5 of the Rome Convention of 1980 (see Report of Quebec, III); etc.

[49] For example, all the conventions dealing with cooperation (in matter of service, proof and information about foreign law, interim measures, recognition and enforcement of judgments, etc.).

the aforementioned contracts.[50] However, consumer protection is now the main theme of the work undertaken from all possible points of view by CIDIP-VII. Several texts under discussion: a draft convention on applicable law, originally presented by Brazil, which has received the support of Argentina and Paraguay; a draft model law on jurisdiction and applicable law, proposed by Canada; and a complex project, presented by the United States of America, comprising some Legislative Guidelines and four model laws as appendices (on: ODR, small claims, disputed consumer card payments and government redress for consumers).[51]

Within the framework of Latin American sub-regional integration, Mercosur adopted in 1996 an instrument relating to jurisdiction in consumer relationships, the Santa Maria Protocol, which is not yet in force but which has inspired one of the additional protocols of the draft convention presented by Brazil at CIDIP-VII.[52] Other Mercosur regulations concerning private international law are potentially applicable to consumer litigation.[53] Moreover, Mercosur has drafted some *soft laws* on fundamental consumer rights.[54] The Andean Community has also adopted many rules targeting the material harmonisation of consumer protection, of a general nature as well as having a bearing on specific points.[55] Lastly, the constitutional treaty of CARICOM (the Chaguaramas treaty) is the only one amongst the regional treaties in force in the Americas to contain a separate section with provisions relating to consumer protection.[56]

In Africa too, the organisations for economic integration, for instance the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) have drafted laws that have a direct impact on consumer rights, e.g. the COMESA regulation on competition.[57]

C) Transnational sources

The limited effectiveness of consumer law has led some authors to suggest developing a sort of transnational consumer law which should have its main roots in auto-regulation.[58] This suggestion –which is attempting to become reality by means of a long list of "non-national" laws–[59] seems to claim that it applies to consumer relationships similar ideas to those based on the *lex mercatoria* debate on professional relationships. The evident

[50] The application of these rules may also be excluded taking into account that consumer protection deals either with mandatory rules or with public policy. See *Declaración de Córdoba*, available on www.oas.org. See also J. A. MORENO RODRÍGUEZ, "La Convención de México sobre el derecho aplicable a la contratación internacional", in: D. P. Fernández Arroyo / J. A. Moreno Rodríguez (note 3) 107, 140-141.

[51] See http://www.oas.org/dil/CIDIPVII_documents_working_group_consumer_protection.htm where all these documents are available. See also J. M. VELÁZQUEZ GARDETA, *La protección al consumidor* online *en el derecho internacional privado interamericano. Análisis sistemático de las propuestas presentadas para la CIDIP VII*, Asunción, CEDEP (2009) ; D. P. FERNÁNDEZ ARROYO, "Current Approaches Towards Harmonization of Consumer Private International Law in the Americas", *Penn State Int'l L. Rev.* 27, 3/4 (2009) 693.

[52] See *infra*, II.1.

[53] Notably in matter of procedure and cooperation. See Report of Mercosur.

[54] Communication on the regional consumer rights of 10 December 1998, and the Charter consumer rights of 15 December 2000, both adopted by Mercosur Council. See R. N. GRASSI, "La politique de protection du consommateur dans le système d'intégration régionale du Mercosur", in : Th. Bourgoignie (ed.), *L'intégration économique régionale et la protection du consommateur*, Cowansville (Quebec), Yvon Blais (2009) 339.

[55] Report of the Andean Community, I.2.

[56] T. BOURGOIGNIE / J. ST-PIERRE (note 41) 18.

[57] See Ethiopian and Kenyan Reports, I.2.

[58] See G.-P. CALLIESS, *Grenzüberschreitende Verbraucherverträge. Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarkplatz*, Tübingen, Mohr Siebeck (2006).

[59] Long and very heterogeneous (including some EU rules!). *Ibid.*, at 375-485.

differences between these two types of relationship, due to the unequal role of party autonomy on all sides, have attracted some sharp criticism.[60]

3. The concept of consumer

The consumer is defined in a very diverse way in comparative law. Three principal criteria can be used to define what constitutes a consumer, in the knowledge that these criteria can be used individually or in combination.

In the first place, the type of person can be taken into account. Indeed, some legal orders exclusively reserve the description of consumer for physical persons, excluding juridical persons. Others, however, encompass both types. A sub-distinction can be employed for juridical persons: in certain countries, an association may be deemed to be a consumer, but not a corporation (civil or commercial), whereas in others, the description is not limited to a certain type of juridical person.

In the second place, the behaviour of a person who purchases goods or services plays an important part in determining the application of protective rules. Following the example of EU law, many legal orders limit the application of consumer law to passive consumers, that is to say, to those who have not taken any particular steps to purchase the goods and/ or to those who have been targeted by marketing and advertising campaigns.

Finally, some laws consider the purpose for which goods have been purchased in order to determine the application of protective instruments within consumer law. This criterion allows for a flexible appreciation of the notional consumer. Purchases made for professional reasons are excluded from this area of application of consumer law. This element is sometimes combined with the purchaser's expertise: therefore a professional who purchases goods or services for professional reasons, but in an area of activity where he/ she has no experience, may be deemed to be a consumer and may benefit from protective rules.

II. Rules of jurisdiction

A) Specific provisions

It goes without saying that the most exhaustive and most "tested" regulation of jurisdiction in consumer law is that of the "Brussels/ Lugano system", in force in EU and EFTA countries, whose domain of application extends to jurisdiction and the recognition and enforcement of decisions concerning civil and commercial matters. Although we must make distinctions according to the concrete text that is applicable in each situation,[61] the protection this system guarantees to consumers can be summed up as follows:

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[60] N. REICH (note 2) *passim*.

[61] Texts are, for EU member States, 1968 Brussels Convention in its last version of 1996 (in the original version consumer protection was much more restrictive) and Regulation 44/2001 which replaced it and, for all the members of the EU and the EFTA, 1988 Lugano Convention and its new version of 2007. The application of one text or another depends on, besides the temporary scope rules, parties domicile. 1988 Lugano Convention is parallel to Brussels Convention (Arts. 13-15) and 2007 Lugano Convention is "parallel" to Regulation 44/2001. Within the EU member States, EU texts have priority (see Art. 64 Lugano Convention of 2007). See EU Report, I.2 and II.1. See alsoi P. LAGARDE, "Heurs et malheurs de la protection internationale du consommateur dans l'Union européenne", in : *Études Jacques Ghestin*, Paris, LGDJ (2001) 511, A. BONOMI, "Les contrats conclus par les consommateurs dans la Convention de Lugano revise", *DeCITA* 9 (2008) 190, et H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, 4th ed., Paris, LGDJ (2010), 286-301.

- Protection is limited to defined persons (physical persons[62] having concluded a contract "for a purpose which can be regarded as being outside his/ her trade or profession" and to the contracts mentioned in these texts;[63]
- The consumer's co-contractor must be a professional;[64]
- The choice of court agreement can only happen when the following conditions have been met:[65] the agreement to choose a court can only occur after the dispute has arisen; the agreement allows the consumer to bring proceedings to other courts not mentioned in the applicable rules, or the consumer and his/ her co-contractor have, at the time of concluding the contract, their domicile or habitual residence in the same contracting country and confer jurisdiction on this country's courts, unless the law of the latter forbids such agreements;
- When there is no valid choice of court, the consumer has the option of bringing the proceedings in the courts where the co-contractor is domiciled or to his/ her own place of domicile ("protection forum"); proceedings may be brought against a consumer by the other party only in the courts of the consumer's domicile.

The EU's Court of Justice case law reveals a restrictive interpretation of the concept of the consumer deserving the protection of the aforementioned rules. This attitude, already present in the Brussels Convention, remains in the interpretation of Regulation 44/2001.[66] It is based on the exceptional nature of grounds of jurisdiction provided for in the section relating to the "jurisdiction over consumer contracts", as much in comparison to the general rule which attributes jurisdiction to the courts where the defendant is domiciled as to the special rule on jurisdiction for contracts.[67]

Grosso modo, when the defendant's domicile is not in a country within the Brussels/ Lugano system, the national rules of jurisdiction are applicable. In terms of contracts entered into by consumers, the rules differ from those in the aforementioned system.[68] Thus, in Belgium, in accordance with article 97 (3) of the Code of Private International Law

[62] This condition is not foreseen in the abovementioned texts (on the contrary, the Regulation Rome I, Art. 6, includes a definition of consumer) but it has been made by the EJC case law (see judgment of 22 November 2001, C-541-542/99).

[63] In any event, the conclusion of a contract is required (ECJ, 14 May 2009, C-180/06, *Ilsinger*). Regulation 44/2001 and Lugano Convention of 2007 (Art. 15(1.c)) include e-contracts by reference to all the contracts concluded with a person who "by any means directs such activities" to the State of the consumer's domicile.

[64] This condition is not foreseen in the texts but it is generally accepted (Report of the EU, II.1, note 21 and accompanying text).

[65] The acceptance of forum selection clauses could be contradictory, according to some authors, with the Directive 93/13 which forbids the unfair terms in consumer contracts, and which has priority over the Regulation. See Report of the EU, II.1, note 41, quoting P. A. NIELSEN, "Art. 17", in: U. Magnus / P. Mankowski (eds.), *Brussels I Regulation*, München (2007) 322, and ECJ, 4 June 2009, C-243/08, *Pannon*. See also the decision of the tribunal of Gent, 4 April 2007, *NjW*, 2008, 174, quoted in the Belgian Report, note 8; Art. 2(7)(λα΄) of the Greek Act 2251/1994, mentioned in the Greek Report, notes 31-32; Art. 385(3) pa. 23 of the Civil Code of Poland (Polish Report, II.1.A); Art. 52 of the Private International Law and Procedure Act of Slovenia (Report of Slovenia, II.1).

[66] See EU Report, II.1, notes 24-26 and accompanying text and the decision already mentioned ECJ of 14 May 2009, *Ilsinger*, par. 58.

[67] See EU Report, II.1 and notes 22-23, 27-30 and the accompanying text. See also the decisions of the ECJ of 11 juillet 2002, C-95/00, *Rudolf Gabriel v. Schlank & Schick*, par. 39, and of 3 July 1997, C-269/95, *Benincasa v. Dentalkit*, par. 16-18.

[68] In Italy the Act 218/1995 extends the application of the Brussels Convention and its modifications to all the cases, that is to say, that the rules of the Regulation 44/2001 also apply when the defendant is not domiciled in a EU member State (Italian Report, II.1, which calls that European instrument "law 2001/44"). In Spain, the jurisdiction rules of the Judiciary Power Act have been drafted upon the influence of the Brussels Convention, including rules on consumer contracts; by consequence ECJ case law must be taken into account as to the interpretation of those rules (see Spanish Report, II.1.A).

and in Denmark, in accordance with article 245 (2) of the Administration of Justice Act,[69] only the agreement to choose a legal court after the dispute has arisen is binding on the consumers.[70] In Switzerland, the choice of court is possible as long as the consumer is not unfairly deprived of the court protection provided for him/ her in Swiss law.[71] In Germany, article 94 (c) of the Civil Procedure Code (ZPO) – the only provision specifically relating to consumer relationships – establishes the rules of jurisdiction exclusively for door-to-door selling.[72] In Poland, no conditions relative to the type of contract or to the actions of the consumer's co-contractor are necessary for the consumer to bring proceedings in the local courts, provided that the consumer has undertaken the relevant steps to conclude the contract, even if he/she does not have his/ her domicile in Poland.[73] In the United Kingdom, whereas Scottish law and the law applicable to inter-UK relationships have adopted rules of jurisdiction for consumer contracts based on the EU model, the determination of jurisdiction by the traditional system of English law does not provide for any specific rule on this topic and is largely at the judge's discretion.[74]

The legal orders of other EU member-states do not contain any specific measure regarding jurisdiction over consumption. This is the case in the Czech Republic,[75] France[76] and Greece.[77] And more importantly yet, in applying article 4 of all the European instruments on jurisdiction, when the defendant is not domiciled in a member State of the "Brussels/ Lugano system", the plaintiff can appeal against this to the exorbitant grounds of jurisdiction available within the European States, a right that is absolutely forbidden when the defendant is domiciled in a contracting country (article 3). That is to say that all the grounds, rightly forbidden in principle (plaintiff's nationality, service of process, defendant's property), are perfectly valid against the "foreign" defendant.[78]

Naturally, the European continent is not alone in adopting rules of jurisdiction in matters relating to our subject. The Canadian province of Quebec has introduced jurisdiction in terms of consumer contract in its Civil Code. The basic rule, contained in article 3149, states that the Quebec courts have jurisdiction when the consumer has his/her domicile or residence in Quebec, the waiver of the right to bring proceedings in court not being binding on the consumer.[79] This rule must be applied whilst taking into consideration the general provisions of jurisdiction, which are founded on the links between the defendant or the dispute and the province of Quebec.[80] Outside of Quebec, Canada does not have any specific rules of jurisdiction in this area. However, as we have already noticed Canada has presented a draft model law on jurisdiction and applicable law as regards consumer

[69] Danish Report, II.1. Moreover, in Denmark, the Sales Act the definition of consumer includes juridical persons.
[70] In the same vein, Art. 4-6(3) of the Civil Procedure Act of Norway (Norwegian Report, II.1.A).
[71] Art. 5 line 2 of Swiss Private International Law Act (PILA). According to Art. 114 line 1 PILA, "*le consommateur ne peut pas renoncer d'avance au for de son domicile ou de sa résidence habituelle*" (Swiss Report, II.1.A).
[72] See Report of Germany, II.1.A.
[73] Art. 1103 of the Civil Procedure Code of Poland, modified in 2008, in force since the 1 July 2009. See Polish Report, II.1.A.
[74] In the UK Report, II.1 (in the notes 27-31 and accompanying text, may be found the restrictive interpretation of the consumer notion whenever the rules based on the European patterns are applied).
[75] See Czech Report, II.1.A, note 8.
[76] See French Report, II.1.A.
[77] See Report of Greece, II.1.
[78] See D. P. FERNÁNDEZ ARROYO, "Compétence exclusive et compétence exorbitante dans les relations privées internationals", *Recueil des Cours* 323 (2006) 197 ss.
[79] However, in the decision *Dell Computer Corp. c. Union des consommateurs* [2007] 2 R.C.S. 801, the Supreme Court of Canada accepted the submission to arbitration abroad, considering that Art. 3149 was not applicable to this case. The law has been modified in order to avoid such decisions. See J. M. VELÁZQUEZ GARDETA, "Cuando el elemento extranjero se convierte en la excusa imperfecta (*Dell Computer Corp. c. Union des consommateurs*)", *RDC* 73 (2010) 266.
[80] See Report of Quebec, II.1.

contracts within the framework of ongoing work at CIDIP-VII (OAS). This draft makes provision for the following grounds of jurisdiction: the defendant's habitual residence, the substantive connection between the forum and the facts of the case, the express choice of court (in certain conditions) and the tacit choice of court; but all these grounds can be swept aside by the court on the basis of *forum non conveniens* doctrine.[81]

At the other extreme of the American continent, the Mercosur in 1996 adopted an international convention named the Santa Maria Protocol on international jurisdiction in consumer relationships[82] which could only become effective after the adoption of another instrument which was to harmonise consumer law within the countries belonging to this organisation (Mercosur Common Law for consumer protection), which has never been adopted.[83] The most important provisions of the Protocol are: on the one hand, the option for the consumer to bring actions in the court where he/ she is domiciled, or in the court where the co-contractor is domiciled, or in the place where the contract was concluded, or in the place where the goods were delivered or where the services were provided; on the other hand, the professional, who may only bring proceedings in the courts where the consumer is domiciled, is allowed, in certain conditions, to dispute the complaint, to offer evidence, to resist an appeal, or to set in motion procedural measures which will go before the judges where he/ she is domiciled. The Protocol does not contain any arrangements for the choice of court agreements, even to forbid them. Despite the failure of this instrument in the context of specific integration, it recently served as the basis for the "additional Protocol on international jurisdiction for certain contracts and for certain consumer transactions", proposed in 2009 by Argentina, Brazil and Paraguay within the context of CIDIP-VII, as an appendix to the draft Convention on applicable law.[84]

Far from Mercosur, Turkish law regarding jurisdiction contained in article 45 of the Private International Law Act of 2007, reflects a similar attitude: the consumer has several options; on the contrary, the co-contractor can only summons the consumer to appear before the court where the latter is domiciled. However, article 47, which authorises submission to foreign courts in general, expressly forbids the *derogatio fori* in terms of consumer contracts.[85]

In Japan, a legislative draft dating from 2009 contains rules of jurisdiction in terms of contracts concluded by consumers, of which the general criterion is to recognise the jurisdiction of the Japanese courts when the consumer is domiciled within that country.[86]

B) Jurisdiction in the absence of specific provisions

When the legal system in question does not provide any specific rule of jurisdiction, court responses can be very unpredictable in the matter of deciding on their jurisdiction

[81] See OAS Report, II.1 (insisting on the contradictory character of the North American case law applying the so-called doctrine of online consumer contracts).
[82] Mercosur/CMC/Dec. nº 10/96.
[83] See Report of Mercosur, II.1.
[84] It is worthy to note that none of the Mercosur Member States has specific provision on jurisdiction in respect of our subject. However, in Uruguay, a project of a general Statute on Private International Law is currently submitted for discussion in the Parliament, according to which the Uruguayan Courts would have jurisdiction if the defendant's domicile is in Uruguay, if Uruguyan law is applicable (Art. 56.1 and 2) and, when the consumer is the plaintiff, if the place of conclusion or performance (delivery of goods or services) is in Uruguay (Art. 58.d). The choice of court is forbidden (Art. 59.2). See Report of Uruguay, II.1. The text of the Project is reproduced in *DeCITA* 11 (2009) 429.
[85] According to some authors, the grounds of jurisdiction set out in Art. 45 PILA would be exclusive. See Turkish Report, II.1.
[86] See Japanese Report, II.1.

regarding consumer contracts. On the one hand, one option consists of applying the same rules of jurisdiction established for contracts. On the other hand, one can equally deny any international dimension to the present situation and treat it as a purely local matter. For the first option, the most representative examples are the United States and Canada (*common law*)[87] and, for the second option, Brazil.

In the United States, determination of jurisdiction in terms of consumer contracts is not dissimilar to the general rule: the plaintiff must demonstrate that the defendant has "minimum contacts" with the court; the courts can declare *forum non conveniens* and the choice of court agreements are generally accepted.[88] American case law has made real innovations regarding consumer contracts where contracts are concluded online. Amongst the determining criteria for this, the most famous – and, undoubtedly, the most controversial – is the sliding scale test that had its origins in the *Zippo* case,[89] which was based on the nature of information furnished by the defendant's web-site. In the Canadian system of common law, the choice of court is permitted to a large extent, although the agreements come under very close scrutiny in consumer contracts.[90]

In Brazil, both case law and scholars accept that the jurisdiction of Brazilian courts is based on article 101 (I) of the Code of consumer protection (CDC) – which is not really a rule of international jurisdiction – when the consumer is domiciled in Brazil and brings proceedings in a Brazilian court, even if the products have been purchased abroad (*Panasonic* ruling), if the time-sharing service contract has been fulfilled abroad (*Punta de Leste* case), but only if the consumer is a physical person.[91] The preliminary clauses for agreeing a court have been deemed unfair by the Ministry of Justice[92] and the Superior Court of Justice has described the rule in article 101 (I) of the CDC as a "public policy" rule.[93]

2. Recognition and enforcement of foreign decisions relating to consumption

In general, rules on the recognition and the enforcement of foreign decisions are not very specific in terms of consumer protection. However, if the ground of jurisdiction provided for in this matter is defined as a "protection forum", consistency should lead to a more rigorous assessment of the jurisdiction of the judge of origin when the foreign judgement is recognised. In this sense, the Brussels/ Lugano system expressly establishes an exception, in the matter of consumer contracts, to the rule which forbids the aforementioned assessment in the general.[94]

In the same vein, the Swiss Private International Law Act (PILA) establishes specific indirect rules of jurisdiction in the matter of consumer contracts. Thus, article 149 (2) (b) anticipates that the foreign judgement will be recognised provided "that it has been made in the place of domicile or usual residence of the consumer and that the conditions anticipated by article 120 (1) are met". In the same way, the Santa Maria Protocol (Mercosur) points out in article 12 that the grounds of jurisdiction incorporated in the Protocol must be considered

[87] The common law systems which are reported in this book (Ghana, United Kingdom, Kenya, Australia, Israel…).
[88] See US Report, II.1.
[89] *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997).
[90] According to the Canadian Report (common law), II.1, "courts assess these contracts with 'greater scrutiny". See the cases mentioned in notes 38 and 39 of the Report. In a similar sense, see Australian Report, II.1, and the quotation of the decision *Oceanic Sun Special Shipping Line Co Inc vs. Fay* (1988) 165 CLR 197.
[91] See Brazilian Report, II.1.B, notes 96-99 and accompanying text.
[92] Cl. n°. 8, Portaria 4/98.
[93] Report of Brazil, *loc. cit.*, notes 106-107.
[94] See Art. 35 of Regulation 44/2001.

to be indirect grounds of jurisdiction when it is a question of applying the Mercosur rules on the recognition and enforcement of decisions.[95] In Quebec, despite the non-binding nature of the choice of court agreements on the consumer, a measure enshrined in the Civil Code (article 3168 duplicates the wording of article 3145 but only for consumers domiciled in Quebec), a foreign decision based on such an agreement can nonetheless have an impact in Quebec, upon condition that the consumer should have brought proceedings in the foreign court or that he/ she should have defended himself/herself on the merits.[96]

That said, even in the absence of a positive rule like the latter, it seems logical that if the consumer deserves protective treatment from the jurisdiction, the enforcement of foreign decisions in this matter should also be subject to stricter monitoring, unless this permits the systematic negation of the outcomes, which would be, in some cases, detrimental to the consumer him/herself.[97] It is obvious that the scrutiny would not be made only regarding the jurisdiction of origin. Other grounds, such as violation of due process[98] or violation of public policy, might be also invoked.

It must not be forgotten that, even nowadays, despite the development of international judicial cooperation and the very great acceptance of internationally movement of judicial and arbitral decisions (reflected in most of the reports), some legal orders do not commit themselves to enforcing foreign decisions unless a treaty in force ordains it. This is the case, for example, of Denmark.[99]

III. Applicable law

1. Specific conflict of law rules in terms of international consumer law

Yet again, the best known model is the EU one. Indeed, firstly the Rome Convention of 1980 on the law applicable to contractual obligations (for contracts concluded before December 18th 2009), then the Regulation 593/2008 (known as "Rome I") which "communitarised" it (for contracts concluded after this date), include specific rules to determine the law applicable to consumer contracts in their articles 5 and 6 respectively. Obviously, other (general) rules within each of these texts are also applicable should the case arise.

Contrary to the Regulation 44/2001 and other texts governing the jurisdiction and enforcement of decisions, which leave space for the enforcement of national rules (generally, when the defendant's domicile is not within the Brussels/ Lugano system), the Rome Convention and the Regulation Rome I have a universal character. This means that their rules can be applied to all situations which come into their material and temporal scope of application. Thus, the national rules on the law applicable to consumer contracts are only applicable to international litigation if the contract was concluded before the entry into force of the Rome Convention (or the Regulation Rome I). Moreover, we know that we must also take into account the possible application of consumer rules contained in the substantive EU

[95] Las Leñas Protocol of 1992, in force in the four member States of Mercosur.
[96] See Report of Quebec, II.3.A.
[97] See, under notes 8-10 of Turkish Report, the discussion about the exclusive character or not of the grounds of jurisdiction on consumer contracts in the Turkish Private International Law Act. The admission of such a character would prevent the recognition of any foreign decision on that subject in Turkey.
[98] See Report of Quebec, II.3.B.
[99] See K. HERTZ / J. LOOKOFSKY, *EU-PIL. European Union Private International Law in Contract and Tort*, København, DJØF Publishing (2009) 137, quoted in Danish Report, note 8.

law (notably, the protective guidelines relating to unfair terms, time-sharing, distance contracts, etc), for which the criteria of application remain problematic.[100]

In spite of the uncertainties generated during the drafting of the Regulation,[101] the real content of article 6 has ultimately remained faithful to its predecessor, although it brings the definition of contracts into line with that of article 15 of Regulation 44/2001 and introduces a modification in order to adapt the provision to electronic contracts. The general rule remains the application of the law of the country of the consumer's habitual residence. Parties can, however, submit the contract to the law of another state, which will be applicable insofar as the choice does not deprive the consumer of the protection guaranteed by the law of his/her habitual residence, which must be verified *ex officio* by the judge.[102] If the test fails, the law of the habitual residence applies, no means of rectification (exception clause) having been provided. In this way, the EU legislator is trying to find a compromise between the freedom of contract and the protection of the weak party, as did the negotiators involved with the Rome Convention.[103]

At the geographical heart of the EU, but outside it, Switzerland also establishes (article 120 PILA) that the law applicable to consumer contracts is that of the country of the consumer's habitual residence when the contract is concluded. This law will be applicable from the moment that one of the conditions of the article has been met, that is to say when the supplier has received the order in this country, when the finalisation of the contract has been preceded by an offer or by advertising in this country or when the consumer has been encouraged by the supplier to go to this country. Swiss law saves its judges from the task of comparing laws, by explicitly ruling out the choice of law clauses.[104] We must mention that article 120 PILA has been referenced by a draft Ethiopian law in 2003. Following this model, the application of Ethiopian law (which contains no consumer protection rules), would still be guaranteed for passive consumers who are domiciled in that country, whereas the consumer from a very protective country would benefit from the application of his/her own law when entering into a contract with an Ethiopian professional (for example, a coffee producer).[105]

This draws the attention on the real protection afforded by the systematic application of the law of the consumer's habitual residence. Everything leads to think that this option can only fulfil its protective function if the law in force in that country contemplates an acceptable level of protection. Such a consideration seems to have formed the basis of the writing of the draft inter-American convention on the law applicable to certain international consumer contracts introduced by Brazil in the context of work on the codification of private

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[100] EU Report, notes 52-60 and accompanying text.

[101] See Regulation proposal, document COM (2005) 650 final.

[102] Although the courts achieve this task in various different ways (see J. BASEDOW, "Internationales Verbrauchervertragsrecht - Erfahrungen, Prinzipien und europäische Reform", in: *Festschrift für Erik Jayme*, I, München, Sellier (2004) 16), it is clear that this entails a comparison between the chosen law and the law of the consumer's habitual residence. This effort requires to define previously what should be considered as "mandatory" in the law of the habitual residence. See EU Report, notes 67-74 and accompanying text.

[103] This European approach was adopted in Quebec, which Art. 3117 of the Civil Code is based on Art. 5 of the Rome Convention. See the Report of Quebec, III. This approach can also be found in Art. 7 of the Draft Model Law presented by Canada in the framework of CIDIP-VII (OAS).

[104] Swiss Report, III.1. A and B.

[105] The Reporter finds a possible solution for that situation in another provision of the same draft which reproduces Art. 19 PILA (the one which authorises the application of foreign mandatory rules). See the Ethiopian Report, notes 38-47 and accompanying text. Another example of law relativity on this subject, but which is very different, can be found in the provision enshrined in Art. 9(b) of the Defective Products (Liability) Law, 5740-1980 in Israel, according to which the said law is not applicable when the person having suffered a damage is outside of this State (Israeli Report, III.1).

international law followed by the OAS (CIDIP).[106] The basic idea consists of applying, amongst the laws connected with the envisaged legal relationship, the most favourable law to the consumer.[107] The draft has already undergone a long process of negotiations, which are reflected in the numerous changes that have been made, including the modification of its structure (placing some rules in various additional protocols). Despite the ensuing criticisms, the draft has received the enthusiastic support of some countries. This support could be seen from the fact that in the draft version presently being discussed – known as the "Buenos Aires Proposal (2009)" – Argentina and Paraguay appear next to Brazil.[108]

The main specific rules of the draft convention set out, for passive consumers (article 4), that the applicable law will be "the law chosen by the parties" who can opt for the law of the consumer's domicile, the law of the place of conclusion, the law of the place of performance or the law of the domicile or seat of the provider of goods or services; such law shall be applicable to the extent that it is more favourable to the consumer. In the case of active consumers (article 5), the parties can choose the law of the place of conclusion of the contract, the law of the place of performance or the law of the consumer's domicile; in the absence of a valid choice, the contract will be governed by the law of the country where the consumer and the professional physically entered into the contract. The draft also includes, in addition to measures relating to "mandatory international norms",[109] the duty of information for the professional and, relating to specific travel and time-sharing contracts, an exception clause known as "hard" according to which "the law specified as applicable in this Convention may not be applicable in exceptional cases, if, considering all the circumstances of the case, the connection of the law indicated as applicable proves to be superficial and the case itself is more closely related to another law, more favourable to the consumer."

Even if it has received the support of certain neighbour States, the draft Brazilian convention does not seem to have convinced the authors of the Uruguay's draft of private international law Act which is rather close to the European model. Indeed, the latter sets out in article 50(5) that the law applicable to consumer contracts will be, in the first instance, that of the country where the goods have been acquired and the services used; if this law cannot be determined, then the law of the consumer's domicile will apply. When the contract is a distance contract or when the professional has made offers or specific advertising in the consumer's domicile, the law of the consumer's domicile is applicable, provided that the consumer has given his/her consent there.[110]

2. Current solutions in the absence of specific rules on applicable law

[106] See the text written by the author of the original project (presented in 2000), C. LIMA MARQUES, "Consumer Protection in Private International Law Rules: The Need for an Inter-American Convention on the Law Applicable to Some Consumer Contracts and Consumer Transactions (CIDIP)", in : T. Bourgoignie (ed.), *Regards croisés sur les enjeux contemporains du droit de la consommation*, Quebec, Yvon Blais (2006) 145. See also OAS Report, III.

[107] The most favourable law has been defined in Art. 4(2) in order to reply to the critics made on the apparent uncertainty and the costs that such criterion would entail (See M. DENNIS, note 3). The first adopted definition is the one of the law of the consumer's domicile, which could weaken the innovative character of the project, above all if we compare it with the option of introducing substantive presumptions. In any case, comparing possible solutions is a very common activity for the courts. See J. M. VELÁZQUEZ GARDETA, "El derecho más favorable al consumidor, la mejor solución también para los contratos de consumo online", in : D. P. Fernández Arroyo / N. González Martín, *Tendencias y relaciones del derecho internacional privado americano actual*, México, UNAM / Porrúa / ASADIP (2010) 29.

[108] See C. LIMA MARQUES / M. L. DELALOYE, "La Propuesta de 'Buenos Aires' de Brasil, Argentina y Paraguay: El más reciente avance en el marco de la CIDIP VII de protección de consumidores", *RDC* 73 (2010) 224.

[109] One of these adapted to online contracts can be found in Art. 7(2).

[110] See Uruguayan Report, III.1.

When there are no rules provided for the determination of the law applicable to consumer contracts, the available options resemble those mentioned in the absence of rules of jurisdiction. That is to say, either the application of conflict rules for contracts in general (where the dominant trend is to recognise party autonomy),[111] or the ignoring of the international character of the relationship by automatically applying the law of the court.

A remarkable example of the first option is that of the United States, where party autonomy also prevails in consumer contracts.[112] However, it is striking that there is an enormous disparity among the national laws which are potentially applicable to consumer relationships.[113]

The opposite trend, typical of countries like Brazil, consists of denying party autonomy and of automatically applying the *lex fori*. In certain cases, the courts do not seem to have realised the international aspects of the relationships.[114] Moreover, even in the countries where party autonomy is generally accepted, the rules relating to consumer contracts are often considered as mandatory rules, thereby ruling out party autonomy.[115]

IV. Procedure

Making access to justice easier for consumers by the adoption of favourable rules of jurisdiction is of little use if the countries which have jurisdiction do not take into account the specificity of consumer litigation at a procedural level. International consumer protection can indeed only be guaranteed if consumers have effective access to justice, if they are not discouraged from seizing courts because of the inherent costs of obtaining justice as well as the length of the proceedings.

The right of access to justice for consumers can be achieved through two types of measures, which it is also possible to combine. On the one hand, some countries have adopted special procedures, or have even established special courts to rule on consumer litigation. On the other hand, international consumer protection can be achieved by means of special types of action, such as class or group actions.

1. Specific procedures for consumer claims

A) The creation of special or specialised courts

One of the means of guaranteeing the consumer access to justice is, following the example of Australia, Brazil, Israel and Turkey, to create special or specialised courts that

[111] See Venezuelan Report, II.1.B et III.
[112] See Report of the United States, III.1.
[113] *Ibid.*
[114] See N. de ARAUJO, "Contratos internacionais e consumidores nas Américas e no Mercosur: Análise da proposta brasileira para uma convenção interamericana na CIDIP VII", *Cadernos do Programa de Pós Graduação em Direito UFRGS* 5 (2006) 107, 119 (with references to the *Panasonic* case, *Superior Tribunal de Justiça*, Resp 63.981, 13 August 2001, *RSTJ*, nº137, 12 (2001), 387). Such attitude can be found everywhere. See the Ethiopian Report, III, which mentions the case *Emma Vakaro v Customs Administration* (Supreme Court of Ethiopia), Civ.app. no.852/73, *JEL* Vol.5, no 1 (1968) 327.
[115] As in Argentina. See C. D. IUD, "Los acuerdos de prórroga de jurisdicción concluidos por consumidores en el derecho argentine", in : D. P. Fernández Arroyo / J. A. Moreno Rodríguez (note 3) 421, 436. See also the decisions quoted in the French Report, III.1.D, in particular, Cass. Civ. 1e., 23 May 2006, *Époux Richt c/ Commerzbank* (mentioned in note 40).

are competent in the matter of cross-border litigation. These courts function according to a particular procedure. For example, in Australia, the Small Claims Tribunal (1973), decides on small claims litigation relating to the supply of goods or services, according to a procedure which takes place without representation by a lawyer unless both parties agree to be represented.[116] In Brazil, where the creation of small claims courts is more recent, dating from 1984, the procedure before the specialised courts (there is no "special" court, but there is a specialisation of state and federal common law courts) is free and also takes place without representation, up to a sum corresponding to a minimum of twenty times the person's salary.[117] These courts have been a big hit in Brazil and adjudicate 80% of consumer disputes. Small claims courts have also been introduced in Israel and are based within the Magistrates Courts. The rapid handling of these cases is facilitated by the flexible procedural rules to be followed: these courts are authorised to conduct proceedings in as efficient manner as possible, without complying with the procedural rules applicable in other courts. The court must authorise a party to be represented by a lawyer; another system of free representation – by associations – has also been established.[118] In Turkey there is a dual system. On the one hand, there are consumer courts, before which consumer must lodge any action worth less than 2.446,03 TL. These consumer courts are specialised courts.[119] Above that sum, the consumer has one option. He/ she can indeed resort to arbitral consumer courts.

In two other jurisdictions, Ethiopia and Quebec, such courts also exist but are reserved for domestic claims. In Ethiopia, specialised courts, - named social or *Kebele* courts, and composed of non professional judges - settle small claims, which are defined differently in different States. However, these courts do not have jurisdiction for cross-border disputes. The way they function has moreover been criticised for disregarding the proper administration of justice.[120] Quebec has established a consumer protection Office, apparently with very wide prerogatives;[121] it receives consumer complaints in particular. However, Quebec's consumer protection Act is silent on the role of this Office in international consumer relationships.

A common feature of all these courts is to be open only to physical persons and to provide a very lightweight system of representation, not to say inexistent. Suppressing the use of lawyers allows the overall cost of the proceedings to be reduced.

Nonetheless, these States remain an exception, as in the other States under present scrutiny, consumer disputes are resolved before not specialised courts: for example, in France, the *Tribunal d'instance* has jurisdiction in this kind of cases.[122]

B) The adoption of a particular procedure for small claims settled by not specialised courts

Many countries, however, provide for a particular procedure for small claims, whether peculiar or not to consumer litigation. On this point, it matters little whether the procedures peculiar to small claims be the sole province of consumer litigation or open to any other type of litigation; the most important thing is that consumers can take advantage of a simplified, less expensive and shorter procedure.

[116] See Australian Report, IV.1.
[117] See Brazilian Report, IV.3.
[118] See Israeli Report, IV.1.
[119] See Turkish Report, IV.1.
[120] See Ethiopian Report, IV.1, particularly note 48.
[121] See Report of Quebec, IV.1.
[122] See French Report, IV.1.

With the exception of Regulation 861/2007 of 11 July 2007 establishing a European small claims procedure, which creates a *special* procedure for *cross-border* litigation, no other legal system provides for a special procedure for international consumer litigation. In general, the simplified procedural rules, adopted to settle small claims, are also applicable when the consumer plaintiff neither resides in nor originates from the country where he/she has lodged an action.

In addition to the member States of the EU,[123] where the provisions of aforementioned Regulation 861/2007 apply, it must be noted that a good number of other countries have this kind of procedure. Norway, South Africa, Switzerland and Uruguay have instituted simplified small claims proceedings, all of which are applicable to international consumer relationships.

Moreover, several EU member States use a particular small claims procedure, established before the adoption of Regulation 861/2007 and which remains applicable to claims that are not covered by the scope of application of the aforementioned Regulation. Spain, for instance, distinguishes between two types of procedure, according to whether the sum comes to a maximum of 30,000 Euros or to a maximum of 9,000 Euros. In the latter case, the procedure is oral and the court seizure is simplified.[124] Denmark and Poland[125] have their own particular rules too.

The definition of what constitutes a small claim, for which the consumer litigation is often archetypal, differs greatly from one country to another. The following table shows the maximum sums that can be demanded in the small claims courts. Unsurprisingly, this sum is quite high in rich countries that are mindful of (international) consumer protection. However, compared to other sums, the threshold defined by Regulation 861/2007 appears ridiculously low. The European procedure for small claims could, by virtue of this, not offer the desired degree of protection.

Table recapitulating the monetary thresholds defining small claims (highest to lowest)

Canada(general average for the English-speaking provinces)	25,000	CAD	24,200 USD
Norway	125,000	NOK	19,650 USD
Switzerland	20,000	CHF	18,900 USD
Spain	9,000	EUR	11,380 USD
Brazil	Equivalent to 40 minimum salary instalments		11,345 USD
Denmark	50,000	DKK	8,480 USD
Israel	30,000	NIS	7,500 USD
United Kingdom	5,000	GBP	7,500 USD
Scotland	3,000	GBP	4,500 USD
Poland	10,000	PLN	3,100 USD
Northern Ireland	2,000	EUR	3,000 USD
Slovenia	2,000	EUR	2,530 USD
European Union	2,000	EUR	2,530 USD

[123] See EU Report, IV.1.
[124] See Spanish Report, IV.1.
[125] See among others the detailed Report of Poland, IV.1.

Uruguay[126]	100	UR	1,790 USD
Turkey	2,446	TRY	1,580 USD
Ethiopia (Addis-Abeba)	-	-	400 USD
Ethiopia (Amhara region)	-	-	120 USD

Mention must be made of the countries that do not provide for any particular procedure intended to facilitate the settlement of small consumer claims. Among the legal orders within this study, five of them[127] do not provide for simplified procedure of any sort.

2. Particular procedural mechanisms (group actions)

In addition to specific adjustments in procedural terms, made to enhance consumer access to justice, certain legal orders have adopted certain types of action, especially relevant in consumer litigation which involves, due to using standard contracts, many victims and much damages.

In the great majority of countries observed, these types of action have not been instituted *for* the consumers, but can be used for consumer litigation. Only Israel has enacted class actions just for consumers, with an amendment to its consumer protection law in 1994.[128] It must, however, be noted that the American proposal to CIDIP-VII (the legislative guidelines) goes in the direction of a special collective action in the matter of consumer litigation,[129] applicable as much to domestic as to international relationships.

Observation of the different rules in force within the States having been the subject of a report shows a great variety of these types of action. If one flags up the general features, it is possible to distinguish on one side, actions initiated by physical persons, which group together to bring an action (the American model, put in place in Australia, Canada (all provinces taken together), the United States of America and Denmark, and on the other side, actions which can only be brought by accredited consumer and user associations (the European model). Class action established in Israel results from a hybrid model, as it can be initiated as much by a physical person as by an association for consumer protection.[130]

A) Collective actions initiated by a group of physical persons

The North American model, which can be found for example in Canada as well as Australia and, much more recently, Denmark,[131] is based on actions brought by the consumers themselves. As noted by the American reporters, it is moreover the most common means used in the United States[132] to compensate consumers for any damage suffered. Without doubt, it is interesting to note that the United Kingdom does not provide for such an action, to such an extent that an author, quoted by the reporter, maintains that: "as far as England is concerned, the legal system has failed to provide effective solutions to the challenge of finding mechanisms whereby consumers who individually have suffered small losses can group together so that litigation becomes a viable option".[133]

[126] Uruguayan Law 18.507 of 26 June 2009 indicated the amount in float unities, which is not the national currency of Uruguay (amount equivalent in USD as of 1st July 2009). See Report of Uruguay, IV.1.
[127] Chile, Ghana, Kenya, Tunisia, Venezuela.
[128] See Israeli Report, IV.2.
[129] See OAS Report, IV.2.
[130] See Israeli Report, IV.2.
[131] An Act adopted in 2008 has introduced the concept of class action in Danish law. See Report of Denmark, IV.2.
[132] See US Report, IV.2.
[133] J. HILL, *Cross Border Consumer Contracts*, Oxford, OUP (2008), 164.

However, bringing class actions raises several difficulties when the "class" includes consumers who are not domiciled in the States in which such an action is brought. This is noted at the same time in the United States Report and both the Canadian Reports (common law and Quebec). Indeed, in international situations, the common character of the question of law or fact (commonality) uniting the class members, as well as the typical character of the claim brought by the class representative (typicality), generally required to bring a class action in the United States, are likely to be difficult to uphold. In Canada, class actions involving foreign consumers can only be allowed once it has been demonstrated that these consumers have a real and substantial connection to the action. There is also some difficulty regarding the fate of the consumers when the class action procedure is described as opting out. Indeed, in these cases, it is no doubt much too ambitious that consumers who live abroad, and who have not declared that they do not wish to be part of the class, are bound by the court decision. This objection does not seem to have been taken into account by the North American proposal to CIDIP-VII relating to the establishment of consumer class actions in the OAS member States, which does not distinguish whether the litigation is international or not.

Lastly, the constitution of a class is sometimes considered as a fundamental consumer right. For example, article 8(1) of the Ontario Consumer Protection Act sets out that one cannot waive in advance its participation in a class action; the introduction of an arbitration clause in a consumer contract subject to Ontario law does not avoid the possibility of a class action. Preference is given to collective appeal, which gives strong protection for the consumers from Ontario.

B) Representative actions reserved solely for accredited consumer associations

Another system of consumer protection which guarantees efficient access to justice is that of representative actions. In this case, consumers themselves are not the plaintiffs; instead an association of consumers and users, which has previously been accredited by a judicial or governmental authority, takes on the defence of the interests of consumers who have suffered damage of common origin. This model is found in many European States, which justifies its description of European model. The *ação coletiva* found in Brazilian law stems from the same model.

In fact the German, Brazilian, Spanish, French, Greek, Italian and Slovenian systems have in common that they provide that consumer interests can be represented before the court by a consumer protection association, therefore by an entity distinct from the consumers themselves. To resume the text of article 422-1 of the French Code for consumption relating to joint representative action: "when several identified consumers, physical persons, have suffered individual damage which have been caused by the behaviour of the same professional, and which have a common origin, any nationally accredited and recognised representative association in the matter of applying the measures in the 1st title can, if it has been mandated by at least two of the consumers concerned, seek redress before any court in the name of the consumers. The mandate cannot be solicited by televised or radio broadcast public campaigns, nor by advertising, pamphlets or personalised letters. It must be given in writing by each consumer".[134] Without being totally identical, obviously, this action is close to the *Verbandsklage* of Slovenian law,[135] to the new group action established by article 140-bis of the Italian consumer code,[136] or yet to the

[134] See French Report, IV.2.
[135] See Slovenian Report, IV.2.
[136] See Italian Report, IV.2.

ação coletiva found in Brazilian law, of which the holders are the Union, the federated States and the municipalities, as well as associations formed more than a year previously and whose object is directly related to consumer protection.[137] Recently added to this list are the *Defensoria Pública*, State owned companies and foundations.

Does it substitute the class action or is it rather a feature of continental civil laws?[138] Are these actions less efficient than action based on the North American model? Appreciation of the practical application of such measures is not easy, as each one responds to different conditions of application. In France, it seems that the joint representation action has not given rise to significant results, and it is even considered that the contribution of this mechanism is practically nil.[139] In Spain, the text is criticised for its lack of clarity,[140] whereas the Italian report spreads a certain optimism in supposing that the putting into action of the new article 140-bis of the consumer code will reinforce consumer protection. This, of course, remains to be seen.

The European Union, for its part, remains rather faint-hearted in this matter. The 2008 green book on collective actions open to consumers[141] has not yet given rise to any proposals for regulations.

V. Arbitration and alternative dispute resolution (ADR)

The specificity of consumer litigation requires that we wonder about its means of settlement, and about the viability of dispute settlement mechanisms generally used to resolve commercial disputes. Many legal orders authorise the settlement of consumer litigation by arbitration; some provide as well for special mechanisms to settle disputes.

1. Arbitration

Arbitration rests on the principle of equality of the parties. And yet, disputes involving consumers depart hypothetically from this principle. It is therefore legitimate to wonder about the arbitrability of such litigation. If international consumer litigation is observed to be arbitrable in most legal orders, nonetheless particular rules, attentive to consumer protection, still apply.

A) Arbitrability of consumer litigation

a) The principle: the arbitrability of consumer litigation

[137] See Brazilian Report and the references in notes 122 and 125: Th. MORAIS DA COSTA, "Le droit constitutionnel : la protection des droits fondamentaux", in: D. Païva de Almeida, *Introduction au Droit Brésilien*, Paris, L'Harmattan (2006) 73; A. GIDI, "Class Actions in Brazil- A model for Civil Law Countries", *AJCL* 51 (2003) 11.

[138] See the remark made by the author of the French Report, IV.2. and the debate that arose in France relating to this matter: L. CADIET, "Illusoire renforcement du droit des actions de groupe ?", *JCP G* (1992) I, 3587, § 6 ; L. BORÉ, "L'action en représentation conjointe. *Class action* française ou action mort née ?", *D.* (1995) 267. See also the German Report, IV.2, which mentions, speaking of UKlag (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen*), that it is "a kind of class action particularly available for international consumers' disputes").

[139] See French Report, IV.2.

[140] See Spanish Report, IV.2. and the reference made to L. CARBALLO PIÑEIRO, *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en Europa*, Santiago de Compostela, USC (2009).

[141] Green Paper on Consumer Collective Redress of 27 November 2008 COM(2008) 794 final – (unpublished in the Official Journal).

The question of arbitrability of litigation involving consumers is generally not controversory. The former has indeed been very largely accepted in the national systems reported. Except for Chile[142] and Brazil[143], which explicitly forbid arbitration clauses in consumer contracts, the other laws, either implicitly or explicitly, authorise the settlement of consumer dispute by means of arbitration. Certainly, in Australia as in Belgium, scholars are divided on what interpretation to give to the absence of specific provision in this respect. According to the Australian reporter, it is possible to interpret article 32 X of the Fair Trade Act as excluding arbitration in matters relating to consumers.[144] A similar interpretation is to be found in article 32 of the Belgian Act on Trade Practice.[145]

When consumer litigation is considered arbitrable, which corresponds to the large majority of laws here studied, the arbitrability is nonetheless subject to certain conditions.

b) Conditions of arbitrability

In certain legal orders, the arbitrability of consumer disputes is only admissible if arbitration was agreed after the dispute has arisen. This is the case in the laws of Norway,[146] Denmark[147] and in the Canadian province of Ontario (which constitutes an exception in Canada).

Sometimes, it is a formal condition which applies. Thus, the German (article 1031 ZPO) and Norwegian (article 11 of the law on arbitration, inspired by the German law) laws set out that the arbitration clause must not only be expressly stipulated, but that it must also feature in a separate document, distinct from the contract, which *only* contains the convention of arbitration. This is a means of drawing the consumer's attention in particular and of guaranteeing his/ her consent to arbitration, and therefore his /her waiver to State courts. Norwegian law even clarifies that the absence of information given to the consumer on the consequences of an arbitral award can cause the clause to be non-binding on the consumer. The protection can reveal itself to be largely ineffective, insofar as, as has been noted by the German reporter, these instruments only apply if arbitration takes place in these States (in Germany for the application of article 1031 ZPO and in Norway for the application of article 11 of the Norwegian law on arbitration). And yet, given that the choice of seat of the arbitral tribunal can be left in the hands of the party which drafted the clause or of the arbitral tribunal that has been constituted, these protective measures in favour of the consumer can be put aside without too much difficulty. The respect of formal conditions depends sometimes on administrative authorisation. Thus, for example, in Alberta, the Fair Trading Act provides that arbitration agreement concluded in these matters which have not received approval of the Ministry cannot be enforced. According to the Canadian reporter (common law), the application of this particular instrument is, however, very limited.[148]

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[142] See Report of Chile: "As a consequence of the foregoing, it would be impossible that these matters might be submitted to international commercial arbitration in Chile".

[143] Two texts seem indeed to bring a contradictory answer. Art. 4 of the Arbitration Act on Adhesion Contracts is generally interpreted as sustaining the arbitrability of such disputes (S. MENDES, "Arbitragem e Direito do Consumidor", *RBA* (2003) 189) whereas Art. 51, IV of the Brazilian Code of Consumption considers the arbitration clauses inserted in consumer contracts as void. See Brazilian Report, IV.1.

[144] See the Australian Report, V.1.

[145] According to Report of Belgium, V.1.

[146] See Norwegian Report, V.1.

[147] Pursuant to Art. 7(2) of the Arbitration Act of Denmark (553/2005) as modified by 106/2008 Act, the consumer cannot be bound by an arbitration agreement entered into before the dispute has arisen. See Danish Report, V.1.

[148] See Canadian Report (common law) and the references mentioned under V.1.

B) Consumer arbitration agreement's regime

a) The relative absence of specific rules relating to international consumer arbitration

In States where such litigation is likely to be resolved through arbitration, few of them adopted specific provisions on the matter.[149] Consumer arbitration is therefore subject to the same rules as those applied in matters of commercial arbitration. Also, when international arbitration is governed by a set of rules distinct from those relating to domestic arbitration, the same dichotomy occurs as for consumer arbitration.

This assertion must be put into perspective. In addition to the provisions relating to arbitration, consumer arbitration obeys the rules of consumer law, particularly the provisions relating to unfair terms.

b) Submission of arbitration clauses to the regime of unfair clauses

Even in the absence of specific provisions in their respect, many national reports mention the risk that arbitration clauses, which are concluded before or after a dispute has arisen, are governed by the rules on unfair terms, which can lead, in many cases, to declaring these clauses non-binding on the consumer. Directive 93/13 of 5 April 1993 concerning unfair terms in consumer contracts sets out in this respect that the terms which have the object or effect of "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions(....)" (letter q of the annex listing terms) may be declared unfair, in accordance with article 3(1) of the Directive. Thus, in EU law, any arbitration clause inserted into a consumer contract is *a priori* dubious and can be termed an unfair clause. It is nonetheless a question of an option ("can") not an obligation.

Logically, the treatment of arbitration clauses within EU member states having transposed the Directive should be identical. For example, in French law, in the matter of domestic consumer relationships, an arbitration clause preventing the consumer from bringing proceedings before the State courts is deemed unfair and therefore sanctioned by being non-binding on the consumer.[150] On the other hand, when the relationship is international, the arbitration clause concluded in a consumer contract is deemed to be valid, and that is the case, whatever might be the weak position of the consumer.[151] This is also the case in Czech law[152] and in Polish law too, of which article 385(3) point 23 of the Civil Code limits the possibility of submitting a dispute involving a consumer to arbitration and declares, in case of doubt, that such a clause is unfair. In the United Kingdom, article 91 of the English arbitration Act of 1996 establishes that an arbitration agreement is declared unfair (in the sense of the Unfair Terms in Consumer Contracts Regulations 1999) and is, consequently, non-binding as long as the claim does not exceed £5,000 GBP.

Two decisions rendered by the EU Court of Justice must be mentioned, which stated on the one hand, in the *Mostaza Claro*[153] decision, that a court, when an action to annul an

[149] One exception: in Spain, the *Real Decreto* 231/2008 organises an arbitration system which is peculiar to consumer arbitration.
[150] Art. R. 132-2, 10° of the French Code of Consumption. The author of the French Report notices that "the term belongs however to the 'grey' list of the terms for which the professional is allowed to prove the contrary and not to the 'black' list of terms which are incontestably presumed to be abusive".
[151] See the both decisions rendered by the French Court de cassation mentioned in the French Report: *Jaguar* (1997) and *Rado* (2004).
[152] See the Czech Report, V.1.
[153] *ECJ* of 26 October 2006, C-168-05, *Mostaza Claro v. Centro Movil Milenium SL*.

arbitral award is brought before it, must determine if the arbitration clause is invalid, notwithstanding the fact the consumer has not invoked the invalidity of the arbitration clause during the arbitral procedure, but only at the stage of annulling the award. On the other hand, in the *Asturcom Telecommunicaciones*[154] case, the Court of Justice decided that when proceedings are brought before a court relating to an action enforcing an arbitral award that has become definitive and rendered without the consumer's participation in the procedure, it must declare *ex officio* if an arbitration clause concluded between the supplier of goods or services and a consumer is unfair.[155]

2. Alternative methods of dispute settlement

By alternative methods of dispute settlement, we mean all the mechanisms for resolving disputes other than bringing proceedings before a State court or to arbitration (in the traditional sense, that is to say the process by which a third party to the dispute, an arbitral court, gives an award that has the same effect as a judgement). We exclude therefore from this definition of arbitration the systems of online dispute resolution, often known as electronic arbitration, which are not, in the proper meaning of the term, arbitration procedures.

By virtue of their informal, flexible, rapid and generally less costly character, these alternative means (mediation, conciliation, online arbitration) are particularly appropriate for resolving international consumer dispute.

It would be futile to try here to give an exhaustive list of all the possibilities contained in the legal orders which have been reported. Only a few remarkable traits deserve mention.

In the first place, these alternative methods are very generally *optional* for the consumer. It is a question, therefore, of a *supplementary* mechanism put at the consumer's disposal, which can in the case of failure, or if he/ she so wishes, be brought before a State court as of the arising of the dispute.[156]

In the second place, the organisations of these alternative mechanisms are very diverse. It may be a question of a system of public entities. In Denmark and in Norway, consumers can bring matters to the Consumer Complaints Board (Denmark) or to the Consumer Disputes Commission (Norway), which are, in both these countries, independent public entities. Bringing matters to this body is limited to claims for a sum between 800 DKK (approximately 105 Euros) and 100,000 DKK (approximately 13,300 Euros) in Denmark. This "commission" system or "complaints board" is also available for international litigation; it suffices that the Danish or Norwegian courts should have jurisdiction for the litigation which has been brought before them so that these bodies may know of the dispute. In both cases, the procedure is written, the consumer does not appear.[157] In Brazil, mediation is achieved by State or Federation agencies.[158] In Greece, also, a committee for the amicable settlement of disputes, accessible by consumers, has been established in each prefecture.[159] The Ombudsman model is also to be found in different legal orders. In other States, the alternative mechanisms rest with private entities. In Ghana, for example, the law obliges the

[154] *ECJ* of 6 October 2009, C-40/08, *Asturcom Telecomunicaciones SL v. Maria Cristina Rodríguez Nogueira*.
[155] See EU Report, V.1.
[156] South Africa seems to be an exception. See South African Report, V.2. See also German law (Art. 15a EGZPO) which can force a consumer to conciliate if the amount in dispute does not exceed 750 Euros. See German Report, V.2.
[157] See Reports of Denmark and Norway, V.2.
[158] See the very detailed Report of Brazil, V.2.
[159] See Greek Report, IV.2.

suppliers of goods and services by electronic means to inform consumers on the electronic trading site of the selected alternative means of dispute resolution.[160]

Thirdly, the *sectorisation* of these alternative means must be noted. In many States, consumers have access to a service of litigation regulation that intervenes in a specialised domain. Consultation of the Slovenian, Swiss and Norwegian Reports illustrates this trend toward micro-distribution of litigation according to the sector of activity (banks, insurance, health insurance...).

Lastly, the development of online procedures must be noted. This mechanism is essentially established for disputes resulting from, but not solely, electronic commerce. UNCITRAL wants to begin working on the online regulation of disputes in international electronic commercial operations and is taking a particular interest in consumers.[161] The European Union also wishes to promote this means of settlement, notably by launching ECODIR (Electronic Consumer Dispute Resolution Platform).[162] The German and Italian reports also mention local initiatives to implement online dispute resolution mechanism: in the *Land* of Baden-Württemberg, a pilot scheme known as "*Online-Schlichter*" offers an online dispute resolution service relating to internet purchases. In Italy, the Milan Chamber of Commerce has set up a service known as "*RisolviOnline*" in order to settle the same type of disputes.[163] Annex A of the draft submitted by the United States to CIDIP-VII in February 2010 must also be mentioned.

VI. Cooperation of the authorities

The question asked to national reporters and regional and international organisations concerns the cooperation between national authorities with the intention of promoting and guaranteeing an efficient protection to cross-border consumers.

It goes without saying that such cooperation is organised in a much more efficient way within regional organisations of economic integration. This is, therefore, these specific reports that should be taken into account.

Before exploring the different mechanisms of integration, we must not forget, at the international level, the Hague Convention of 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters which has been very successful. It is also worth mentioning the OECD (Organisation for Economic Cooperation and Development) guidelines governing consumer protection against fraudulent and misleading cross-border commercial practices published in 2003[164] that recommended that the member States should establish a framework permitting closer, more rapid and more efficient cooperation between entities charged with monitoring consumer protection. Very little information is, however, available on the application of these guidelines.

Within the European Union, authorities promoting member States' consumer rights are connected by different networks created especially to find amicable settlements in European consumer litigation. For example, FIN-NET (Network for the extrajudicial resolution of

[160] Pursuant to Art. 47(n) of the Electronic Transactions Act 2008 (Act 772). See Report of Ghana, V.2.
[161] See Secretariat's note of 23 April 2010 on the possible future works on online dispute resolution in electronic commerce transactions, A/CN.9/706.
[162] See EU Report.
[163] See Reports of Germany and Italy, V.2.
[164] Available at: http://www.oecd.org/dataoecd/24/18/2956424.pdf (in both languages).

financial services sector litigation) of which Iceland, Liechtenstein and Norway are also members, or of the EJE network (Network for the extrajudicial resolution of consumer litigation) which have merged to form a single office, ECC-Net (European Consumer Centres Network).[165] Regulation 2004/2006 of 27 October 2004 on consumer protection cooperation aims to create reinforced cooperation between the European Commission and the State authorities, designated by each member State and "responsible for the enforcement of the laws that protect consumers' interests (...) in order to ensure compliance with those laws and the smooth functioning of the internal market and in order to enhance the protection of consumers' economic interests."[166]

As yet, both the systems of integration in Latin America reported here contain few measures of cooperation between authorities. In the Mercosur, cooperation agreements have been concluded, but those are limited to tourism and alerts to defective products (SIMDEC – Mercosur Common Information System about Consumer Protection and Defective Products).[167] An agreement for free service and legal assistance in consumer litigation has also been concluded between Mercosur member States.[168] Within the Andean Community, there does not seem to be any system of cooperation between entities of member States.[169]

Since 2003, OAS has made great efforts in terms of harmonisation of international consumer law.[170] Amongst them, there is a very original contribution in the domain of cooperation between authorities which stems from the submission of the legislative guidelines by the United States,[171] in which Annex D (Draft Model Law on Government Redress for Consumers Including Across Borders) suggests measures of cooperation. The aim of this law is to establish within member States judicial authorities in the matter of consumer protection (on the model of the Federal Trade Commission – FTC – in the United States), and to make them responsible for obtaining redress for damage suffered by consumers and to allow them to cooperate with the equivalent authorities of other member States.

More particularly, article 5 of Annex D concerns cross-border cooperation. Notably, it provides that the competent authorities shall notify foreign competent authorities of investigations that affect these foreign countries, so as to alert them of possible wrongdoing in their jurisdiction; share information with the foreign competent authorities and help each other with their investigations.

Final considerations

Reading particular reports shows us that international consumer law is in a period of complete transformation. In spite of the universally recognised importance of our subject, it is surprisingly noticeable that a considerable number of States have not yet developed specific rules in this matter. And it is still more striking that where they do exist, rules on electronic commerce do not care about the details of international consumer contracts.

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[165] See EU Report, V.2.
[166] Art. 1 of Regulation 2004/2006.
[167] See Brazilian Report and the reference quoted: R. A. C. PFEIFFER, "Consumer Defense in Mercosur: A Balance and Recent Challenges", in : T. Bourgoignie (ed.) (note 54) 40.
[168] Dec. CMC/DEC/49/2000 of 15 December 2000.
[169] See Report on the Andean Community, VI.
[170] See OAS Report, I.2.
[171] In its last version of 12 February 2010.

In the States and regions which have adopted rules on the concrete aspects of international private consumer law and created special conflict of laws rules and jurisdiction rules juris, these efforts have been followed by the search for other instruments capable of protecting consumers in procedural spheres, arbitration, alternative means of dispute settlement and international cooperation. But even in a domain like that of rules of applicable law, there is space for new proposals. Without departing from the conflicts methodology, the most interesting is, no doubt, that of replacing the rigid criterion of application of the law of the consumer's habitual residence, as representing the criterion based on the presumption that it is the most favourable to the consumer, for another more flexible and yet more concrete criterion consisting of the most favourable law to the consumer from a substantial point of view. That said, it must be emphasised that in order to achieve an optimal level of protection, no combination of legal mechanisms is sufficient. Apart from the latter, a set of political, economic and educational measures must be implemented, without which the best legal instruments are destined to fail.

But in the domain of law, the concern for the subject is not merely legislative. The international dimension of consumer protection attracts more and more attention from the main academic milieus. Part of the increasingly significant work of the sector's principal scholarly institution, *the International Academy of Commercial and Consumer Law,* is dedicated to the international aspects of the subject. It is sufficient to see the work presented at the Bamberg Conference in 2008,[172] a trend which seems to be maintained for the Conference to be held in Toronto in 2010.

However, the relevance of international consumer law goes beyond the realm of specialists. This is evidenced by the fact that the *International Academy of Comparative Law* has chosen this topic as one of the two subjects of private international law at its four-yearly Congress. The comparativists of the whole world want to know the different ways in which national, supranational and international legislators are striving to guarantee cross-border consumer protection. Indeed, there are few topics which reveal such an aptitude for reflecting on the current challenges of law in general and of private international law in particular. Thus, the tensions between general interests and commercial interests, the limits of traditional mechanisms for resolving disputes, the complementarity of hard and soft law, the development of international and supranational dimensions of legal regulation, the impact of using electronic means, etc., reveal their most surprising manifestations in this domain. The interest of the internationalists is not less than that of the comparativists. Not by chance did the International Law Association, at its Congress in Rio de Janeiro in August 2008, create a specific Committee relating to international consumer law. Henceforth, next to more or less classic matters of international law (international human rights, international commercial arbitration, use of force, space law, climate change, etc),[173] a new evolving category is emerging that is also full of a transformative power.

[172] 14th Biennial Meeting of the International Academy of Commercial and Consumer Law, Bamberg, Germany (July 30 – August 3, 2008), *Penn State Int'l L. Rev.* 27, 3/4 (2009).
[173] http://www.ila-hq.org/en/committees/index.cfm