

APPENDIX J / ANNEXE J

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JURISDICTION AND CONSUMER PROTECTION

COMPÉTENCE LÉGISLATIVES ET PROTECTION DES CONSOMMATEURS

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**UNIFORM JURISDICTION AND CHOICE OF LAW
RULES FOR CONSUMER CONTRACTS**

PART X: JURISDICTION AND CHOICE OF LAW

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Introductory comments: This uniform legislation is drafted to be added as a Part to either the statute in the enacting province or territory that deals with consumer protection laws or a statute that deals with the grounds on which a court will hear a case involving parties from outside the jurisdiction and which province or territory's laws will be applied to determine the case.

The purpose of the legislation is to set out uniform jurisdictional rules with respect to cross-border business-to-consumer contracts. While jurisdictional issues have always existed, the increase in the number of cross-border transactions taking place over the Internet has elevated the importance of jurisdictional issues. With cross-border transactions increasing, it is important that the legal framework supporting consumer transactions across provincial or territorial borders be governed by consistent principles that lead to predictable results regardless of the province or territory in which a particular consumer or vendor is located.

One of the consequences of numerous consumer contracts being made every day with the consumers and vendors situated in different provinces or territories is that inevitably some of these dealings result in disputes that must be resolved. Whenever a dispute crosses over borders, questions arise concerning which court has jurisdiction to hear the dispute (choice of forum) and which province's or territory's laws should apply to govern the resolution of the dispute (choice of law). While these two issues are distinct, they raise many of the same considerations. These issues are collectively referred to as conflict of laws rules.

Although consumer transactions, whether carried out electronically or otherwise, are subject to traditional rules relating to jurisdiction, electronic commerce poses challenges to this existing framework. The absence of boundaries, which characterizes the Internet, makes it difficult to determine where a contract was concluded. The courts have used various tests to determine whether they have jurisdiction and which province or territory's laws should govern the resolution of Internet disputes.

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By unifying the conflict of laws rules applicable in the provinces and territories concerning consumer contractual disputes, the present legislation ensures that the same solution will be applied irrespective of the court hearing the case. The legislation is intended to provide greater certainty and predictability of results for resolving disputes relating to cross-border consumer contracts. The legislation applies where the dispute involves more than one Canadian province or territory as well as where it involves Canadian and non-Canadian locations. The legislation is also not limited to Internet disputes. It applies to all consumer contractual disputes, online or offline.

In developing the legislation, the following policy objectives were considered:

- consumer protection online should be no less effective than it is for consumer transactions conducted through traditional means of communication;
- consumers should be able to benefit from the protection normally afforded to them by consumer protection laws in force where they live;
- the law should be technology neutral in that it does not discriminate between different forms of technology;
- there should be certainty about rules that apply to the participants and their transactions so that they are able to predict their legal situation before engaging in commerce;
- the legal risk of operating online should not be disproportionate to a vendor's connection to the relevant forum's laws and courts;
- vendors should be able to choose whether or not to operate under a particular province or territory's legal framework; and
- the conflict of law rules should not be an impediment to the continued growth of electronic commerce.

The legislation also takes into account that there are constitutional limits on a province's power to legislate extra-provincially. In *Morguard v. De Savoye*, [1990] 3 S.C.R. 1077, the Supreme Court of Canada held that a province must respect minimum standards of order and fairness in enacting legislation that is constitutionally valid. However, a province is not debarred from enacting any legislation that may have some effect on litigation in other provinces.

In particular, the court specifically noted that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the right of the parties. It also affords some protection against being pursued in provinces or territories having little or no connection with the transaction or the parties.

Finally, while we considered including these provisions as an amendment to the *Uniform Court Jurisdiction and Proceedings Transfer Act*, the Conference preferred to leave the determination as to the appropriate statute as a matter of choice for the enacting province or territory.

PART X: JURISDICTION AND CHOICE OF LAW

Definitions

1. In this Part

“consumer contract” means [*enacting province or territory to define*],

“consumer contract proceeding” means a proceeding brought in connection with a consumer contract,

“ordinarily resident” means, with respect to a vendor, ordinarily resident as determined in accordance with section 7, 8 or 9 of the *Uniform Court Jurisdiction and Proceedings Transfer Act*,

“plaintiff” means a person who has commenced a consumer contract proceeding,

“vendor” includes a vendor’s agent,

“vendor’s jurisdiction” means the jurisdiction in which a vendor is ordinarily resident.

Commentary: Section 1 contains the definitions for the Act. Once this Part is placed in the province’s or territory’s consumer protection or jurisdiction legislation, each jurisdiction will need to determine what definitions are required. This is the same approach followed by the Consumer Measures Committee in the Internet Sales Contract Harmonization Template.

In essence, the definition of “consumer contract” defines the scope of the legislation. The term is used throughout the legislation and is a determining factor with respect to whether the special rules regarding jurisdiction and choice of law apply to a particular dispute. While the definitions in provincial and territorial consumer protection statutes currently differ, for the most part, the main features of a consumer contract can be identified as follows:

- the contract is for the provision of goods or services for personal, family or household use;
- the vendor is acting in the course of his or her business; and
- the purchaser is an individual acting outside his or her trade or profession.

For example, the Quebec Civil Code, in Article 1384, defines the term “consumer contract” as follows:

“A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on”.

The definition of “ordinarily resident” is based on sections 7, 8 and 9 of the *Uniform Court Jurisdiction and Proceedings Transfer Act* (UCJPTA). While the UCJPTA sets out comprehensive definitions for determining the ordinary residence for corporations, partnerships and unincorporated associations, it does not define the term for natural persons. It is noted that the term “ordinarily resident” in the context of natural persons has been judicially defined in numerous cases and is a connecting factor that is widely used in Canada.

The other definitions set out in section 1 are self-explanatory.

Jurisdiction

- 2. The jurisdiction of a court in [enacting province or territory] in a consumer contract proceeding where one party to the consumer contract is ordinarily resident in [enacting province or territory] and another party to the consumer contract is ordinarily resident in a jurisdiction other than [enacting province or territory] is to be determined solely in accordance with this Part.**

Commentary: Section 2 is based on section 2 of the UCJPTA. It is intended to make it clear that a court’s jurisdiction to hear a dispute relating to a consumer contract is to be determined according to the rules in the legislation and not according to any common law jurisdictional rules that might otherwise be applicable to consumer contracts.

Jurisdiction Rules re Consumer Contracts

- 3. A court of [enacting province or territory] has jurisdiction in a consumer contract proceeding that is brought against a person if**
- (a) that person is ordinarily resident in [enacting province or territory] at the time of the commencement of the consumer contract proceeding,**
 - (b) there is a real and substantial connection between [enacting province or territory] and the facts on which the consumer contract proceeding against that person is based,**
 - (c) there is a written agreement between the plaintiff and that person to the effect that the court has jurisdiction in the consumer contract proceeding,**
 - (d) during the consumer contract proceeding that person submits to the court’s jurisdiction, or**
 - (e) the consumer contract proceeding is a counterclaim in another proceeding in the court.**

Commentary: Section 3 is based on section 3 of the UCJPTA. It sets out the grounds on which a court has jurisdiction in a proceeding *in personam*. Clause 3(a) provides that a court may assert jurisdiction over a person who is ordinarily resident in its territory at the time of the commencement of the proceedings, but does not permit a court to take jurisdiction on the basis of the defendant’s presence in the province or territory alone, without any other connection between the forum and the litigation.

Clause 3(b) provides that a court may assert jurisdiction over a defendant that is outside the enacting province or territory, where there is a real and substantial connection between the enacting province or territory and the facts on which the proceeding is based. This clause follows the approach adopted by the Supreme Court of Canada in *Morguard v. De Savoye*, [1990] 3 S.C.R. 1077.

Clauses 3(c), (d) and (e) include three ways in which the defendant may consent to the court's jurisdiction, namely, by having agreed in writing that the court shall have jurisdiction, by submitting to the court's jurisdiction during the proceedings or by invoking the court's jurisdiction as plaintiff.

Clause 3(c) provides that the agreement on choice of forum is to be a "written agreement". Each enacting province or territory will have to consider whether such an agreement would or should be effective in law if made electronically, and provide accordingly.

Real and Substantial Connection

4.(1) Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a consumer contract proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if

- (a) the plaintiff is a consumer ordinarily resident in [enacting province or territory] who has brought proceedings under a consumer contract in the courts of [enacting province or territory] against a vendor who is ordinarily resident in a jurisdiction other than [enacting province or territory], and**
- (b) one of the following circumstances exists:**
 - (i) subject to subsection (3), the consumer contract resulted from a solicitation of business in [enacting province or territory] by the vendor,**
 - (ii) the vendor received the consumer's order in [enacting province or territory], or**
 - (iii) the vendor induced the consumer to travel to a jurisdiction other than [enacting province or territory] for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.**
- (2) For the purposes of subclause (1)(b)(i), a consumer contract is deemed to have resulted from the solicitation of business in [enacting province or territory] by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in [enacting province or territory].**
- (3) Subclause (1)(b)(i) does not apply if the consumer and the vendor were in the presence of one another in the vendor's jurisdiction when the consumer contract was concluded.**

Commentary: According to section 4, a real and substantial connection is presumed to exist for certain consumer contracts. The presumption is designed to identify the jurisdiction with which the consumer contract is most closely connected. Essentially, section 4 sets out a special jurisdictional rule for proceedings relating to consumer contracts. It provides that a court in the enacting province or territory has jurisdiction where a consumer, who is ordinarily resident in the enacting province or territory, brings an action in the courts of the enacting province or territory, against a vendor that resides in another province or territory and the consumer contract satisfies any one of the three conditions set out. It should be noted that in order to qualify for the special protection of this rule, the consumer's residence in the province or territory is not, by itself, sufficient.

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

The section essentially incorporates a "targeting concept" into the rule for determining which court has jurisdiction to hear a dispute. If a vendor specifically targets or solicits a consumer in a particular province or territory, it is assumed that the courts of that province or territory should exercise jurisdiction to hear a dispute relating to the consumer contract. However, subsection 4(2) is intended to provide the vendor with the option to limit his or her jurisdictional risk by taking reasonable steps to avoid concluding contracts with consumers that reside in the enacting province or territory. A vendor could therefore reduce uncertainty by targeting only those provinces or territories in which he or she understands and accepts the legal framework. If the vendor wishes to avoid the requirements of a particular province or territory, he or she could exclude or "de-target" that province or territory.

The targeting concept is intended to avoid the uncertainty associated with subjecting the vendor to the jurisdiction of any place in which his or her web site is accessible. The Working Group was concerned that defining the term "solicitation" would place the onus on a consumer to establish that the consumer contract resulted from a solicitation of business in the province or territory where the consumer has his or her ordinary residence. Instead, subsection 4(2) places the onus on the vendor to demonstrate that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in the enacting province or territory. Although consideration was given to defining the phrase "reasonable steps" in the legislation, the Working Group concluded that any attempt at defining the phrase could become outdated very quickly because of the nature of the technology regarding blocking or screening mechanisms. Nevertheless, it is anticipated that criteria that a court might take into account in assessing whether a vendor has taken such reasonable steps could include:

- whether the vendor's web site included a disclaimer indicating that the vendor would not enter into contracts with consumers from a particular province or territory;

- whether the vendor asked the consumer for details of his or her location and identity during the course of the transaction;
- whether the vendor used technological blocking or screening mechanisms to prevent access by a consumer to the vendor's web site; and
- whether the vendor took steps, such as programming its web site, so as not to accept orders from, or allow shipment to, residents of provinces or territories with whom it does not intend to transact business.

Under subsection 4(3), a consumer who makes a purchase while in the vendor's jurisdiction will not be extended the protection of the special jurisdictional rule, if the consumer and the vendor were in the presence of one another when the consumer contract was concluded. Where a consumer goes into a physical store location in the vendor's jurisdiction and knowingly takes on the risk of conducting trade in another jurisdiction, the consumer would not be entitled to the benefit of the protection of the special jurisdictional rule.

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

The third condition is where the consumer contract is entered into as a result of the consumer travelling to the vendor's jurisdiction and giving his or her order in the vendor's jurisdiction, if the consumer's journey was assisted by the seller for the purpose of inducing the consumer to buy. It covers what one might describe as "cross-border excursion-selling." For example, this situation could arise where a store-owner in one province or territory arranges for bus trips for consumers in a neighbouring province or territory with the main purpose of inducing the consumers to buy in his or her store.

The rationale for the special consumer jurisdictional rule in section 4 is that the consumer is usually the weaker party, especially if he or she has paid for the goods or services in advance.

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

Discretion About the Exercise of Jurisdiction

5.(1) After considering the interests of the parties to a consumer contract proceeding and the public interest, a court of [enacting province or territory] may decline to exercise its jurisdiction in the consumer contract proceeding on the ground that the court of another province or territory is a more appropriate forum in which to try the consumer contract proceeding.

- (2) **In deciding the question of whether it or a court of another province or territory is the more appropriate forum in which to try a consumer contract proceeding, a court of [enacting province or territory] shall consider the circumstances relevant to the consumer contract proceeding, including**
- (a) **the comparative convenience and expense for the parties to the consumer contract proceeding and for their witnesses in litigation in the court or in any alternative forum,**
 - (b) **the law to be applied to issues in the consumer contract proceeding,**
 - (c) **the desirability of avoiding a multiplicity of legal proceedings,**
 - (d) **the desirability of avoiding conflicting decisions in different courts,**
 - (e) **the enforcement of an eventual judgment, and**
 - (f) **the fair and efficient working of the Canadian legal system as a whole.**

Commentary: Section 5 is based on section 11 of the UCJPTA. It is meant to codify the doctrine of *forum non conveniens* and is consistent with the principles set out by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [1993] 3 W.W.R. 441. In general, a court may decline to exercise jurisdiction if there is a more appropriate forum to hear the consumer contract proceeding.

Limitation on Forum Selection Clauses

- 6.(1) Notwithstanding that an agreement pursuant to clause 3(c) purports to give a court of [enacting province or territory] jurisdiction in a consumer contract proceeding, that agreement is void if**
- (a) **the agreement was entered into before the commencement of the proceeding,**
 - (b) **the agreement provides that the court of a jurisdiction other than the jurisdiction in which the consumer is ordinarily resident has jurisdiction in the consumer proceeding, and**
 - (c) **one of the following circumstances exists:**
 - (i) **the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by the vendor and the consumer and vendor were not in the presence of one another in [enacting province or territory] when the consumer contract was concluded,**
 - (ii) **the vendor received the consumer's order in the consumer's jurisdiction, or**
 - (iii) **the vendor induced the consumer to travel to a jurisdiction other than his or her jurisdiction of ordinary residence for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.**

- (2) **For the purposes of subclause (1)(c)(i), a consumer contract is deemed to have resulted from the solicitation of business in the consumer's jurisdiction by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in the consumer's jurisdiction.**

Commentary: Subsection 6(1) provides that a forum selection clause that was entered into before the commencement of the proceedings is void if:

- it provides that a court of a jurisdiction other than the jurisdiction in which the consumer resides has jurisdiction; and
- one of the following three circumstances exists:
 - the consumer contract resulted from a solicitation of business in the jurisdiction in which the consumer ordinarily resides;
 - the consumer's order was received by the vendor in the jurisdiction in which the consumer ordinarily resides; or
 - the consumer was induced by the vendor to travel to another province or territory for the purpose of forming the contract and the vendor assisted the consumer's travel.

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

Choice of Law Rules re Consumer Contracts

- 7.(1) **Subject to subsection (2), a consumer who is ordinarily resident in [enacting province or territory] and a vendor who is ordinarily resident in a jurisdiction other than [enacting province or territory] may agree in writing that the law of a particular jurisdiction will apply to their consumer contract.**
- (2) **An agreement pursuant to subsection (1) is invalid to the extent that it deprives a consumer who is ordinarily resident in [enacting province or territory] of the protection to which he or she is entitled pursuant to the laws of [enacting province or territory] if**
- (a) **the consumer contract resulted from a solicitation of business in [enacting province or territory] by the vendor and the consumer and the vendor were not in the presence of one another in the vendor's jurisdiction when the consumer contract was concluded,**

- (b) the vendor received the consumer's order in *[enacting province or territory]*,
or
- (c) the vendor induced the consumer to travel to a jurisdiction other than
[enacting province or territory] for the purpose of forming the consumer contract,
and the vendor assisted the consumer's travel.
- (3) For the purposes of clause (2)(a), a consumer contract is deemed to have resulted
from the solicitation of business in *[enacting province or territory]* by the vendor
unless the vendor demonstrates that he or she took reasonable steps to avoid
concluding consumer contracts with consumers residing in *[enacting province or
territory]*.
- (4) In the absence of a valid agreement pursuant to subsection (1), if one of the
circumstances described in clauses (2)(a) to (c) exists, the laws of *[enacting province
or territory]* apply to a consumer contract between a consumer who is ordinarily
resident in *[enacting province or territory]* and a vendor who is ordinarily resident
in a jurisdiction other than *[enacting province or territory]*.

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

Essentially, section 7 establishes a special choice of law rule for certain contracts made by consumers. It generally allows the parties to select the law that will apply to their contract at the time of its formation or later on, by agreement in writing, during their contractual relationship.

However, subsection 7(2) embodies the principle that the choice of law agreed to by the parties, cannot deprive the consumer of the protection of the mandatory rules of his or her jurisdiction if one of the circumstances mentioned in clause 7(2)(a) to (c) exists. The intention of subsection 7(2) is to protect the weaker party in a consumer contract from being deprived of the mandatory rules afforded to him or her by the law the province or territory in which he or she ordinarily resides. Subsection 7(2) will only be applied if the mandatory rules of the consumer's ordinary residence give the consumer better protection than the protection afforded by the choice of law selected in the consumer contract. The mandatory rules are those substantive rules in provincial or territorial laws that cannot be derogated from in a contract in such a way that the consumer is left with less protection.

As mentioned previously, in order for protection afforded by subsection 7(2) to apply, one of the three conditions set out must exist.

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

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

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