

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Cambridge - 1983

The Conflict-of-laws Rules on Unfair Competition

(Twenty-first Commission, Rapporteurs : Messrs Willis L.M. Reese and Frank Vischer)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Whereas the Institute, at its Edinburgh Session in 1969, adopted a Resolution on Delictual Obligations in Private International Law, dealing with the general field of the law of tort ;

Whereas the time has come for the Institute to deal with specific areas of that field of law ;

Whereas unfair competition is an area of growing importance in the law ;

Whereas the choice-of-law problems involving this area have not everywhere been given the attention that they deserve ;

Whereas the present appears to be a desirable time to make a contribution towards a solution of these problems,

Adopts the following Resolution (with explanatory Notes) :

Article 1

The area covered by this Resolution can broadly be defined, as in Article 10bis of the Paris Convention for the Protection of Industrial Property, as “any act of competition contrary to honest practice in industrial or commercial matters”.

In particular this Resolution covers :

- 1) passing off one's goods as those of another ;
- 2) improper appropriation of a competitor's efforts, including the sale of a competitor's goods under the representation that these goods are of one's own manufacture and improper appropriation and disclosure of trade secrets ;
- 3) improper advertising ;
- 4) defamation or disparagement of a competitor in relation to his products or business ;
- 5) unfair price competition, such as selling below cost or price discrimination ;
- 6) improper interference with a competitor's business, as, for example, by enticing his employees to leave his employ, inducing breach of a competitor's contract or interference with a competitor's supplier and customer relations.

On the other hand, this Resolution does not cover trademark, patent and copyright infringement or any liability arising from special legislation concerning restrictive or monopolistic practices.

Note : This list of matters covered and excluded seems reasonably self- explanatory. Trademark, patent and copyright infringement is excluded on the ground that, except where otherwise provided by treaty, statutes providing such protection are not given extraterritorial effect. On the other hand, the intention is to include passing off by means of a confusing tradename irrespective of whether this name is entitled to trademark protection in one or more States. For example, the Resolution is intended to cover the situation where a trademark registered in State X but not in State Y is treated as a tradename under Y law with the result that a person who associated that name with his goods in State Y would be liable for passing off under Y law. Restrictive or monopolistic practices such as cartels and monopolies are excluded on the ground that they present special problems.

Article II

1. Where injury is caused to a competitor's business in a particular market by conduct which could reasonably have been expected to have that effect, the internal law of the State in which that market is situated should apply to determine the rights and liabilities of the parties, whether such conduct occurs in that State or in some other State or States.

Note : As the term is used in this Resolution, a "market" is limited to the territory of a single State.

The application of the law of the market is conditioned by the foreseeability of the injury to the competitor's business. The applicable law where such injury is not foreseeable is determined by Article IV.

The rules in this paragraph and the following paragraph of Article II apply even in situations where both the plaintiff and the defendant are citizens or domiciliaries of another State whose law differs from that of the State where the injury occurs. By "injury" is meant the immediate impact of the defendant's act upon the plaintiff's business. So, if in State X the defendant passes off his goods as those of a competitor which is incorporated and has its principal place of business in State Y, State X, rather than State Y, is the place of injury .

The expression "internal law" is employed to refer to the whole law of the State selected, with the exception of its choice-of-law rules, thus including both law applicable within the territory and special law (if any) adopted to operate in particular fields with extraterritorial effect.

Examples of situations covered by this rule are where the defendant in State X sends goods into State Y, or advertises his goods in State Y, or arranges for the publication in State Y of statements that defame the plaintiff or disparage the plaintiff's products.

There will be situations where what the defendant did was prohibited by the local law of the State where he acted but not by the local law of the State where injury was done to the plaintiff's business. An example would involve a radio broadcast from State X which is heard in State Y and which contains advertising of a sort which is prohibited by X local law but not by the local law of Y. The local law of Y should here be applied to determine whether the defendant is liable to the plaintiff for any injury caused to the latter's business in Y. And this should be true even in a situation where the plaintiff is a citizen or habitual resident of State X. Y local law should be applied in these instances for the reason, among others, that equal treatment should be accorded to all persons injured in Y.

One special situation in which reference to the market affected would not assist in determining the choice of law is that contemplated by subparagraph (6) of Article I (see the Note to Article III, paragraph I).

2. Where conduct causes injury to a competitor's business in a number of markets situated in different States, the applicable law should be the internal law of each State where such a market is situated.

Note : This formulation would be applicable for example in a situation where the defendant's broadcast from one State is heard in a number of States or where the defendant in one State packages his goods to resemble those of the plaintiff and then ships them into a number of States to be sold there on the retail market. On rare occasions, it might be that the application of the internal law of each State of injury would be rendered impracticable by reason of the number of States where injury was suffered. Such circumstances might justify recourse to the law of the State of most significant relationship under Article III.

Article III

In exceptional situations in which the State whose internal law would be applicable under the rules stated in Article II does not have a sufficiently significant relationship with the parties, their conduct and the injury, the internal law of the State indicated by the most relevant connecting factors, or by the majority of the relevant connecting factors, should be applied.

Note : In determining whether a State has a sufficiently significant relationship, a court should take into account all relevant factors, including the nationality and domicile of the parties, the relationship of the States concerned to the parties and the occurrence, and the question or questions before the court.

One situation in which this rule might be applied is that, mentioned above, in which injury is suffered in so many States as to render impracticable the application distributively of the internal law of each place of injury. In such a situation the internal law to be applied would usually be that of the State where the defendant's conduct had the greatest immediate impact upon the plaintiff's business, provided that it is possible to identify such a State. Otherwise the governing law would usually be the internal law of the State of the plaintiff's principal place of business.

Article IV

Rights and liabilities resulting from unfair competition in situations that are not covered by the rules stated in Article II should be determined by the internal law of the State which has the most significant relationship with the parties, their conduct and the injury.

Note : The rules stated in Article II will not cover all possible situations. There may, for example, be rare situations where a place of injury cannot be identified.

Another example, mentioned above, involves sub-paragraph (6) of Article I. The improper enticement of a competitor's employees to leave his employ may not directly involve any market. In such a case, the applicable choice-of-law solution cannot be found in Article II, and Article III must be resorted to.

Again, application of the law of the market is excluded under Article II above if the defendant establishes that he could not reasonably have foreseen that he would by his conduct be injuring the plaintiff's business in a particular State. In such a situation, a court might find that the internal law of the State where the defendant's conduct took place should be applied.

As to determination of the State of "most significant relationship", see the Note to Article III.

Article V

Notwithstanding Articles II, III and IV; preparations for an act of unfair competition may be restrained by injunction under the law of the State where those preparations are made.

Note : The State where the act is done has a natural interest in restraining acts designed to lead to an act of unfair competition in another State. Whether an injunction is the appropriate form of relief will depend on the procedural law of the forum : the appropriate substantive law to be applied will usually be the local internal law, but may, in appropriate cases, be the internal law of the State where the contemplated act of unfair competition is to be performed.

Article VI

The above-stated rules determine, in particular :

- 1) the basis and extent of liability ;
- 2) the grounds for exemption from liability, any limitation of liability and any division of liability ;
- 3) the kinds of injury for which relief can be given ;
- 4) the measure of damages, but excluding all questions of multiple damages ;
- 5) the question whether a claim to relief may be assigned or inherited ;
- 6) subject to the rules of the forum concerning standing to sue, the persons who may seek a remedy ;
- 7) the liability of a principal for the acts of his agent or of an employer for the acts of his employee ;
- 8) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability ;
- 9) rules of prescription and limitation, including rules relating to the commencement of a period of prescription of limitation, and the interruption of this period.

Note : This formulation is based upon provisions found in a number of Hague Conventions, e.g., Article 8 of the Convention of the Law Applicable to Products Liability.

Most of what is said here is thought to be self-explanatory.

Paragraph (3) refers to the interests that are entitled to legal protection ; it includes, for example, the question whether damages can be recovered for loss not quantifiable in pecuniary terms.

Paragraph (6) deals with situations where the forum may deny standing to sue to an entity which has a right of action under the law governing unfair competition as laid down in this Resolution, for example class actions and suits by associations representing consumer interests. The effect of the paragraph is the cumulative application of the procedural law of the forum and the applicable substantive law.

Article VII

The rules set forth in this Resolution need not be applied if they would lead to a result which would be manifestly incompatible with the public policy (*ordre public*) of the forum.

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(30 August 1983)