CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

AFFAIRES GÉNÉRALES
GENERAL AFFAIRS

Doc. prél. No 5
Prel. Doc. No 5

avril / April 2000

NOTE SUR LES CONFLITS DE LOIS EN MATIÈRE DE CONCURRENCE DÉLOYALE: RAPPEL ET MISE À JOUR

établie par le Bureau Permanent

* * *

NOTE ON CONFLICTS OF LAWS ON THE QUESTION OF UNFAIR COMPETITION: BACKGROUND AND UPDATED

drawn up by the Permanent Bureau

Document préliminaire No 5 d'avril 2000
à l'intention de la Commission spéciale de mai 2000
sur les affaires générales et la politique de la Conférence

Preliminary Document No 5 of April 2000
for the attention of the Special Commission of May 2000
on general affairs and policy of the Conference

Bureau Permanent de la Conférence ?Scheveningseweg 6 ?2517 KT La Haye ?Pays-Bas
Permanent Bureau of the Conference ?Scheveningseweg 6 ?2517 KT The Hague ?Netherlands

Table of contents

Table of contents 3

I. INTRODUCTION - HISTORY OF THE PROJECT 5

II. THE LAW ON UNFAIR COMPETITION - GENERAL POINTS 7

A. Introduction 7

1. The concept of the law on unfair competition 7
2. The evolution of the law on unfair competition 9

B. The international framework 11

1. The Paris Convention of 1883 11
2. The work of WIPO 13
3. The International League of Competition Law 13

III. STRUCTURE OF THE PROTECTION AGAINST UNFAIR COMPETITION IN NATIONAL LAW 15

A. Protection based on special provisions 15

B. Protection based on general rules of civil liability and/or other rules 19

IV. CONFLICTS OF LAW IN RELATION TO UNFAIR COMPETITION – COMPARATIVE LAW SURVEY 21

A. The connecting factor 21

1. The *lex* loci *delicti commissi* 21
2. The law of the market affected (*lex injuriae*) 23
3. The concepts of *market* and *effects* 27
4. Brief analysis of linkage to the law of the market affected 27

B. The criteria of the forseeability of the effects of an unfair act 29

C. Acts with effect on several markets 29

D. Specific or subsidiary linkage? 31

V. CONCLUSIONS 33

A. Summary 33

B. Organisation of future work in the domain of unfair competition 35

SELECTIVE BIBLIOGRAPHY 37

I. Introduction - History of the project

The Eighteenth Session of the Hague Conference on private international law decided to retain on the agenda of the Conference, *inter alia*, "the law applicable to unfair competition".[1] This subject has already been retained on the programme of the Conference, but without priority, for several years. The Fifteenth Session of the Conference, held in October 1984, invited the Permanent Bureau to undertake an exploratory study on the matter.[2] A note was drawn up in 1987 by ADAIR DYER, who was then First Secretary.[3] On the basis of that first study, which was quite complete, the Sixteenth Session decided to include the subject on the agenda, but without priority.[4]

The question was subsequently the subject of a "Note on civil liability for unfair competition and related conservatory measures", which was also drawn up by ADAIR DYER for the attention of the Special Commission of June 1992 on general affairs and policy of the Conference.[5] At that time the Commission recommended that the subject should be retained on the agenda of the Conference for future work "by reason of its essential and continuing interest", although it was not given priority.[6] The Seventeenth Session again adopted this recommendation.[7]

In May 1995, an "Update on civil liability for unfair competition" was again drawn up by ADAIR DYER.[8] The Eighteenth Session then confirmed that the matter should be retained on the agenda of the Conference.[9]

The object of the present Note is to take stock of the situation, by trying to offer an *updated review* of the different work carried out by the Permanent Bureau on the matter.[10] In particular, this Note will restate the principal questions raised by the subject and set out, to the extent possible, the most important developments over the past few years.

---

1 Final Act of the Eighteenth Session, Part B 4 d), *Proceedings of the Eighteenth Session (1996)*, Tome I, *Miscellaneous matters*, The Hague 1999, p. 46.

2 Final Act of the Fifteenth Session, Part B 2, *Proceedings of the Fifteenth Session (1984)*, Tome I, *Miscellaneous matters*, The Hague 1986, p. 33.

3 Exploratory Study on the law applicable to unfair competition, *Proceedings of the Sixteenth Session (1988)*, Tome I, *Miscellaneous matters*, The Hague 1991, pp. 60-103. The Special Commission of January 1988 on general affairs and policy of the Conference then asked the Permanent Bureau to prepare a supplementary study in the effort to limit the scope of the subject-matter, Study of the feasibility of drawing up an international convention dealing only with certain aspects of the law applicable to unfair competition, *Proceedings of the Sixteenth Session* (1988), Tome I, *Miscellaneous matters*, The Hague 1991, pp. 205-215.

4 Report of the First Commission, *Proceedings of the Sixteenth Session (1988), op. cit.* (footnote 3 above). pp. 242-245 and 269.

5 *Proceedings of the Seventeenth Session (1993)*, Tome I, *Miscellaneous matters*, The Hague 1995, pp. 96-106.

6 Conclusions of the Special Commission of June 1992 on general matters and policy of the Conference, *Proceedings of the Seventeenth Session (1993)*, *op. cit.* (footnote 5 above), p. 246.

7 Report of the First Commission, *Proceedings of the Seventeenth Session (1993)*, *op. cit.* (footnote 5 above), p. 331.

8 *Proceedings of the Eighteenth Session (1996)*, *op. cit.* (footnote 1 above), p. 90.

9 Report of the First Commission, *Proceedings of the Eighteenth Session (1996)*, *op. cit.* (footnote 1 above), p. 246.

10 The present Note in no way replaces the previous studies. The reader is, on the contrary, invited to refer to those earlier studies for more complete information.

II. The law on unfair competition - General points

A. Introduction

1. The concept of the law on unfair competition

What is the law of unfair competition? Taking account of the diversity of national laws on the matter, the response to this first (crucial) question is not easy to give. Very generally, the objective of rules against unfair competition is to prevent the competition which takes place on a particular market from degenerating and becoming harmful or even abusive.[11] In other words, the rules against unfair competition are intended to protect the *qualitative* aspect of competition. They are thereby to be distinguished from rules on restrictions of competition (antitrust laws) which are concerned with the structure of the market and intended to protect the *quantitative* aspect of competition. Nevertheless, it cannot be denied that the rules of law which are concerned with preventing unfair competition are, in a certain way, linked to those which are intended to prevent restrictive commercial practices. The two groups of rules are intended in practice to ensure the proper functioning of the market economy. Nevertheless it should be noted that these rules adopt different methods. Whereas antitrust laws seek to preserve *freedom of competition* by combating barriers to trade and the abuse of economic power, the law of unfair competition seeks to ensure *fair competition* by requiring all participants to play the game according to the same rules.[12] Only the latter rules are discussed in the present Note.

It should nevertheless be stressed that the distinction between an act of *unfair competition* and a *restriction of competition* is not always easy to make and the line of demarcation is not the same in all legislation. Thus, the fact that a person offers goods for sale, in a forceful manner, below their cost price, may constitute a restriction of competition in certain legislation whereas other legislation would consider such a practice as unfair competition.[13] The Exploratory Study of 1987 justifiably concluded that "one of the problems which would be posed if the Hague Conference on private international law would undertake the preparation of a convention on the law applicable to unfair competition would consist of finding an appropriate basis for distinguishing between unfair competition and restrictive or monopolistic business practices."[14] This conclusion is certainly still valid today, but it does not appear essential, at this stage in the work, to elaborate a more precise definition which would enable all restrictions of competition to be absolutely excluded from the domain of unfair competition.[15]

---

[11] See in particular the *Message* from the Swiss Federal Council of 18 May 1983 in support of the Federal Law Against unfair competition (LCD). Separate edition, No 83.038, ch. 151.3.

[12] WIPO, *Protection against unfair competition – Analysis of the Present World Situation*, Geneva 1994, No 9.

[13] See the Exploratory Study, *op. cit.* (footnote 3 above), No 33; A. DYER, Unfair Competition in Private International Law, *RCADI* 1988, Part 211, Dordrecht 1990, p. 403, with further references.

[14] See the Exploratory Study, *op. cit.* (footnote 3 above), No 33 and also No 74.

[15] By way of example, it should be added that the *Swiss Private International Law Statute* of 1987 contains two distinct provisions for these two types of torts (Articles 136 and 137). Article 136, which deals with *unfair competition*, will be the subject of a brief commentary within the framework of the present Note. Article 137 is concerned with *restrictions on competition*, that is to say various forms of unlawful restraints of competition (factual situations concerned with the law of cartels). In particular, abusive practices of undertakings with a dominant position (refusal to enter into commercial relations, discrimination by commercial partners in relation to price, etc)., constitute restrictions on competition. With regard to the private international law on restrictions of competition in general, see in particular J. BASEDOW, Souveraineté territoriale et globalisation des marches: le domaine d'application des lois contre les restrictions de la concurrence, *RCADI* 1997, Part 264, The Hague 1998, pp. 9-177; I.E. SCHWARTZ/J. BASEDOW, Restrictions on competition in: *International Encyclopedia of Comparative Law*, *Vol. III, Private International Law*, Tübingen 1995, 140 pp.

What is the position concerning the distinction between unfair competition and a violation of *intellectual property rights*? There is hardly any doubt that the protection of intellectual property rights also serves the objective of ensuring fairness in competition. For example, the unauthorised use of a trademark for a competing product not only constitutes undue exploitation of the trademark owner's goodwill, but also deceives the public as to the commercial origin and hence the characteristics of the product. It can therefore be argued that trademark law is one of the specific aspects covered by the larger field of unfair competition law and that the enforcement of trademark protection serves to prevent acts of unfair competition.[16] However, one is forced to note that the sole protection of industrial property rights is not enough to ensure fair play in the marketplace. A wide range of unfair acts are usually not dealt with by the specific laws on industrial property. Hence, unfair competition law is necessary either to supplement the laws on industrial property or to grant a type of protection that no such law can provide.[17]

The relationship between the law on unfair competition and the *law of personality* must also be the subject of a more detailed study. It is appropriate here merely to note that, in a certain number of countries, infringements of *economic reputation* constitute a particular case of infringement of personality and therefore fall under provisions concerning the law on unfair competition.[18]

2. The evolution of the law on unfair competition

Having established these yardsticks, it should be stressed that the law of competition has evolved significantly over the last few decades. In practice, whereas initially the fight against unfair competition exclusively concerned the relationship between economic competitors, it is today broadly accepted that the law on unfair competition has a more extensive role to play and that it must protect not only the interests of economic competitors but also those of consumers and the public in general.[19] The modern concept of the law of unfair competition encompasses not only *horizontal* relationships between competitors, but also *vertical* relationships which include consumers and clients. Furthermore, this enlargement of the law on unfair competition will enable account to be taken in future of the actions of third parties such as the *media* which, without participating *directly* in competition, may nevertheless play an essential role on the market and influence the competition which reigns on that market in a very significant manner. The modern concept of the law on unfair competition therefore no longer assumes the existence of a relationship of competition between economic actors exchanging identical goods or services with the same clientele.[20] This evolution has also

---

[16] WIPO, *op. cit*. (footnote 12), No 10; the functional relationship between the law against *unfair competition* and the law on *intellectual property* is also illustrated by the *Convention for the protection of producers of phonograms against unauthorized duplication of their phonograms*, signed in Geneva on 29 October 1971 under the auspices of WIPO (in force in more than 60 States). Pursuant to Article 3 of that Convention, the means available to a contracting State for its implementation shall include in particular "protection by means of the grant of a copyright or other specific right; protection by means of the law relating to *unfair competition*; protection by means of penal sanctions". [italics inserted] Mention should also be made of the *Agreement on the trade-related aspects of intellectual property rights* (TRIPs), annexed to the Marrakesh Agreements of 15 April 1994 which established the *World Trade Organisation*, which required Member States to conform to Article 10 *bis* of the Paris Convention for the Protection of Industrial Property of 1883 (Article 2(1) of the TRIPs Agreement) and specifically to prevent any use of a *geographical indication* which constitutes an act of unfair competition within the meaning of Article 10 *bis* of the Paris Convention (Article 22(2)(b)) of the TRIPs Agreement. Article 10 *bis* of the Paris Convention will be the subject of a brief outline within the framework of the present Note. See also footnote 23 above and the accompanying text.

[17] WIPO, *op. cit*. (footnote 12), No. 11.

[18] See, for example, B. DUTOIT, *Commentaire de la loi fédérale du 18 décembre 1987*, 2nd ed., Basle 1997, ad Article 136, No 11; F.-J. DANTHE, *Le droit international privé suisse de la concurrence déloyale*, Geneva 1998, pp. 35-36 and 89.

[19] See for example DANTHE, *op. cit.* (footnote 18 above), p. 21; DYER, Unfair Competition (see footnote 13 above), pp. 381-389, especially pp. 387-388.

[20] By way of example, it should be noted that the *Swiss Federal Law on unfair competition* of 1986 expressly abandoned this requirement of a competitive relationship. In Article 1, the Law declares that it "is intended to secure, in the interests of all parties, competition which is fair and not distorted". Article 2 states that "unfair or unlawful competition consists of any behaviour or commercial practice which is defective or which contravenes in any other manner the rules of good faith and which influences relations between competitors or between suppliers and clients".

not been without influence on the *basis* of the unfair character of behaviour: Whereas, in the past, the unfair character of an act was derived from the infringement of the subjective right of the economic personality being harmed, today it results from a violation of the objective right to free competition and the abusive use made of economic freedom.[21]

These basic characteristics of the law on unfair competition are largely reflected in the most recent version of the principal international instrument adopted on the matter, the *Paris Convention for the Protection of Industrial Property of 1883*, whose principal elements will be briefly presented below.

B. The international framework

1. The Paris Convention of 1883

Adopted in 1883, the *Paris Convention for the Protection of Industrial Property* has been revised on a number of occasions: In Brussels in 1900, Washington in 1911, The Hague in 1925, London in 1934, Lisbon in 1958, and Stockholm in 1967. It was also amended in 1979.[22]

Since the revision at The Hague, Article 1(2) of the Paris Convention states that the protection of industrial property has as its object, in particular, "the elimination of unfair competition."[23] Article 2 of the Convention establishes the principle of national treatment; hence "[n]ationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals". The system of legal reciprocity is therefore rejected.[24] To this right of national treatment must be added the right to unionist treatment, that is to say the right to the application of any provisions of the Convention which would ensure a more effective protection than that granted by the domestic legislation of the unionist country where the protection is claimed. It should be noted, however, that the substantive protection conferred by the Convention in relation to unfair competition is of rather limited scope. Article 10 *bis*, paragraph (1), merely states that the countries of the Union "are bound to assure to nationals of such countries effective protection against unfair competition". Since this provision is of a very general character and there is absolutely no mechanism for its enforcement, it can hardly be regarded as a self-executing provision capable of creating rights for the benefit of individuals. Consequently, if a State fails to suppress acts of unfair competition, the Convention is of no assistance.[25]

---

[21] DANTHE, *op. cit.* (footnote 18 above), p. 23.

[22] Whilst the great majority of countries have ratified all the revised texts, there are some countries which have not done so. An older text therefore remains in force in relations with those countries which have not ratified the new version. In order to know which text is applicable in different States, it is necessary to check the list of accessions. That list is published each year in the first issue of the Official Review of the Paris Union (*Industrial property and copyright*); it is also possible to consult the Internet site of WIPO (http://www.wipo.org/fre/main.htm). It is sufficient here to stress that the Paris Convention is almost universally accepted since, on 20 December 1999, there were 157 States Parties to the Convention.

[23] At first sight, this alignment between the protection of industrial property rights (patents, designs and registered industrial models, registered trade marks, etc.,) and protection against acts of unfair competition might appear surprising. In fact, by contrast with titles to industrial property, which are issued on application by offices of industrial property and confer exclusive rights over an object, protection against unfair competition is not based on the delivery of a title but on the general idea that acts contrary to honest commercial practices must be prohibited. Nevertheless, several forms of unfair competition have close links with the protection of industrial property rights. Consequently, numerous countries consider, by virtue of general principles borrowed from the domain of protection against unfair competition, that the unauthorised use of a non-registered trademark is unlawful (passing-off, see explanations contained in the text). Slavish imitation is another example (unlawful use of a patent which has expired). See WIPO, *op. cit*. (footnote 12), Nos 2 and 3.

[24] J. DERRUPPE, Concurrence déloyale ou illicite, Dalloz, *Répertoire de droit international*, Part 1, Paris 1998, No 28.

[25] *Ibid*., No 31.

Although the Paris Convention does not confer substantive protection against unfair competition, it is nevertheless of great practical interest for our purposes, since it does contain a *definition* of unfair competition.[26] This definition is in two parts: A *general description* and a *list of behaviour expressly prohibited*. Pursuant to Article 10 *bis*, paragraph (2), "any act of competition contrary to honest practices in industrial or commercial matters" constitutes an act of unfair competition. The scope of this definition certainly remains rather subjective and leaves national legislators an important power of assessment.[27] But it is concretised by a non-exhaustive list enumerating various forms of unfair competition which are expressly prohibited. Pursuant to Article 10 *bis*, paragraph (3), the following, in particular, shall be prohibited:

> "1. All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor;
>
> 2. False allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor;
>
> 3. Indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quality of the goods."

What is therefore covered is essentially *acts of confusion*, strategies to *denigrate a rival undertaking* and *inaccurate publicity*. Whereas the first two examples form part of the traditional domain of competition law (protection of competitors), the third example, which was added at the time of the Lisbon revision, takes account primarily of the interests of consumers and even the public in general.[28] Accordingly, the Convention today reflects a *broad concept* of the law of competition since it seeks to protect equally *competitors*, *consumers*, and the *public in general* (so-called tridimensional function of the law of unfair competition)

2. The work of WIPO

The Paris Convention is administered by the World Intellectual Property Organisation (WIPO), which has for a long time devoted particular attention to the law of unfair competition. In recent years, two important documents have been published by that Organisation. The first is a study entitled *Protection against unfair competition - Analysis of the Present World Situation*.[29] This was followed by the publication, in 1996, of *Model Provisions on Protection against Unfair Competition*.[30]

3. The International League of Competition Law

In addition, it should be pointed out that, at its Congress in Berlin in September 1994, the International League of Competition Law adopted the following *Resolution*:

---

[26] On the definition of unfair competition, see the Exploratory Study, *op. cit.* (footnote 3 above), Nos 26-36; DYER, Unfair Competition (see footnote 13 above), pp. 389-407.

[27] DERRUPPE, *op. cit.*, (footnote 24 above) No 32, who correctly stresses that if a State does not punish certain acts of competition reprimanded by another State, it will always be possible to claim that such acts are not considered as contrary to honest commercial practices.

[28] It should be noted that an analogous definition, albeit slightly more detailed, is contained in Articles 20 and 21 of the *General Inter-American Convention for trademark and commercial protection*, signed in Washington on 20 February 1929.

[29] *Analysis of the Present World Situation presented by the International Bureau of WIPO*, Geneva, 1994, 88 pp.

[30] *Model Provisions on Protection Against Unfair Competition, Articles and Notes presented by the International Bureau of WIPO*, Geneva, 1996, 68 pp.

"1. Competent national authorities provide for effective protection against unfair competition at least according to the standards of article 10 bis of the Paris Convention, and, where necessary to achieve such protection, by adopting specific laws relating to unfair competition rather than by piecemeal legislation;

2. states and international organisations accelerate the harmonisation of laws relating to unfair competition based on the preceding recommendation.

3. For example: the following principles should be taken into account:

––with respect to deception, that

a) the mere risk of deception is in principle sufficient to constitute unfair competition and

b) the intention to deceive is not required to constitute unfair competition.

––with respect to comparative advertising, that the reference to another's mark or name should be permitted only to the extent that such reference does not take unfair advantage of and is not detrimental to the distinctive character or reputation of the mark or name."[31]

III. Structure of the protection against unfair competition in national law

Unfair competition law is formulated differently according to the country. Furthermore, the structure of the protection conferred by national legislation against unfair competition shows marked divergences. *Two principal approaches* must be distinguished. The protection may be ensured either (A) through a special law or specific provisions inserted into legislation of general scope or (B) through general rules on civil liability.

A. Protection based on special provisions

Within the framework of this first group, a further distinction must be made. Firstly, there are those States which have adopted a *special law* on unfair competition. This is the case, in particular, in Germany, Austria, Belgium, Denmark, Spain, Finland, Japan, Luxembourg, Peru, the Republic of Korea, Sweden and Switzerland.[32] By contrast, other States have included in laws of general scope (competition laws in the broad meaning of that term) *specific provisions* on unfair competition. This is the case, in particular, in Bolivia, Brazil, Bulgaria, Canada, Columbia, Hungary, Mexico, Romania and Venezuela.[33]

In both cases, the provisions often contain a *general clause* on the acts prohibited, frequently based on Article 10 *bis*, paragraph (2) of the Paris

---

[31] *International Review of Competition Law*, 1994, No 175, p. 13.

[32] List contained in the WIPO study, *op. cit*. (footnote 12), p. 20, footnote 2. For references to legislative texts, see the *List of legislative texts concerning protection against unfair competition* (national and regional legislation), printed as an Annex to the same study.

[33] *Ibid.*, p. 20, footnote 3. Peru has adopted not only a law prohibiting unfair competition but also a decree-law specifically dealing with advertising standards for the protection of consumers.

Convention.[34] Only a general clause is in practice able to take into account the evolution of morality and techniques. Such a clause is then complemented by a non-exhaustive catalogue of behaviour which is typically unfair.[35] A complete commentary of all those acts which are prohibited would be beyond the scope of the present Note. However, according to the classification proposed by BAUMBACH/FEDERMEHL,[36] which is frequently adopted, four categories may be distinguished:

- Acts which are intended essentially to *influence demand* (examples: deception [demand is based upon incorrect information which creates a belief that an offer is more advantageous than another] and constraint [particularly aggressive publicity]);
- Acts which have the effect, in particular, of *impeding the competing offer* (examples: disturbing the supplies of a competitor, enticement of employees, boycott, free and massive distribution of original copies [and not samples]);
- Acts which *exploit the worth of a competitor* (examples: creation of a risk of confusion, exploitation of the goodwill, work or organisation of a competitor);
- Finally, the particular case of *violation of legal or contractual obligations* (examples: violation of provisions concerning liquidation operations, lotteries and social dumping).[37]

Such provisions provide in general for civil or penal sanctions. Sometimes they repeat provisions which are contained in general legal texts such as Civil Codes (Code of Obligations, Commercial Codes).

Bearing in mind its practical importance, it is appropriate here briefly to mention the impact of provisions concerning *misleading advertising* and *comparative advertising* elaborated by the European Community. A first Directive enacted on 10 September 1984 concerned the approximation of the laws, regulations and administrative provisions of the Member States concerning *misleading* advertising.[38] After several years of preparation, and following a long conciliation procedure between the European Parliament and the Council, this Directive was finally amended and supplemented by a Directive of 6 October 1997 so as to include *comparative* advertising within the first Directive.[39] The original Directive therefore now pursues a double objective. On the one hand, it is intended to protect consumers, competitors and the public in general against misleading advertising and its unfair consequences. On the other hand, it is intended to regulate comparative advertising which is in principle accepted, on condition that it respects specific requirements.[40]

In the United Kingdom, Ireland, Spain, Portugal, France, Sweden and Finland, Directive 97/55/EC will only have a limited impact since comparative advertising is already authorised in those countries. On the other hand, the Directive will fundamentally change the position in Belgium and Luxembourg, where comparative advertising was

---

[34] See, for example, Article 3, (a) - (m), of the Swiss Federal Law on unfair competition, available on the Internet site of the Federal Administration (http://www.admin.ch/ch/index.fr.html).

[35] The above-mentioned Swiss Law refers to no less than 22 cases!

[36] A. BAUMBACH/W. HEFERMEHL, *Wettbewerbsrecht. Gesetz gegen den unlauteren Wettbewerb. Zugabeverordnung, Rabattgesetz und Nebengesetz*, 18th ed. Munich 1995.

[37] See DANTHE, *op. cit.* (footnote 18 above), pp. 29-34.

[38] Council Directive 84/450/EEC of 10 September 1984, on the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJEC No L 250, 19 September 1984).

[39] European Parliament and Council Directive 97/55/EC of 6 October 1997 (OJEC No L 290, 23 October 1997) The new title is now *Council Directive of 10 September 1984 concerning misleading and comparative advertising*.

[40] The Directives entered into force on 13 September 1984 (84/450/EEC) and 12 November 1997 (97/55/EC). The deadlines fixed for the implementation of the legislation in the Member States were 1 October 1986 (84/450/EEC) and 23 April 2000 (97/55/EC).

previously prohibited. Finally, this Directive will provide a legislative framework in the Netherlands, Denmark, Austria, Germany, Italy and Greece, where there was previously no legislative text on the matter.[41] That said, it is to be expected that the Directive will not eliminate all the nuances which differentiate the approaches in the various Member States of the European Community in the application of the substantive law of comparative advertising. The experience gained in the field of product liability demonstrates that a directive does not completely eliminate the necessity for conflicts of laws rules in practice.[42]

B. Protection based on general rules of civil liability and/or other rules

In other countries, protection against unfair competition is ensured by the general rules on *civil liability*. This is the case in a certain number of countries with a civil law tradition, in particular in France, Italy and the Netherlands.[43] In France, for example, the principles established in the caselaw based on Article 1382 of the Civil Code (according to which any unlawful act gives rise to an obligation for its perpetrator to make reparation) still today provide the principal basis of protection against unfair competition, at least in relations between competitors.

Equally, the various jurisdictions which make up the *United Kingdom* have not developed a separate legal regime for protection against unfair competition and have adopted an approach based on common law and equity. The principal basis for this judicial construction is provided by actions based on the common law tort of passing off.[44] An action for passing-off (misrepresentation of source) is intended to put an end to someone "passing-off" the goods of one producer or seller as those of another. The protection provided by the recognition of the tort of passing-off is generally considered to be sufficient for competitors. Furthermore, civil remedies for competitors are restricted to isolated cases under uncodified principles of tort liability. In addition to passing-off, such claims are mainly for protection against injurious falsehood, which penalises incorrect statements made with intent to harm the commercial interests of another, or the divulging of confidential information (breach of confidence). On the other hand, so far as consumer protection is concerned, provisions intended to protect consumers against acts liable to mislead them were adopted as far back as 1862. They have since been supplemented by an independent series of consumer protection laws, in particular the Consumer Protection Act of 1987.[45]

Unfair competition law in the *United States of America* also developed from judicial decisions based on the common law tort of passing-off. As in the United Kingdom, there is no general common law tort of unfair competition in the United States. However, since 1946, statutory relief is available to a trader against false allegations concerning his product made in interstate commerce (section 43(a) of the trademark law commonly referred to as the *Lanham* Act).[46] In 1988 this provision was extended to cover false or misleading representations concerning the product or service of another party.[47] A federal agency, the Federal Trade Commission (FTC), established in 1914, has

---

41 See the information on the Internet site of the European Commission (http://europa.eu.int/comm/dg24/policy/developments/adve01_fr.html).

42 See the Note of 1992, *op. cit.* (footnote 5 above), p.104; see also DANTHE, *op. cit.* (footnote 18 above), p. 120.

43 WIPO, *op. cit*. (footnote 12), p. 21, footnote 6.

44 See in particular DYER, Unfair Competition (see footnote 13 above), pp. 391-396.

45 WIPO, *op. cit*. (footnote 12), No 15.

46 15 U.S.C. 1125, text available on the Internet (http:\\www.bitlaw.com\source\15usc\1125.html).

47 For a general overview of the *Lanham* Act, see the explanatory remarks of the International Trademark Association (http:\\www.inta.org\lanham.htm).

jurisdiction in principle to pursue any unfair or deceptive act or practice committed in or affecting interstate commerce. However, it should be noted that the Federal Trade Commission Act gives no right of action to injured competitors or consumers, whereas the legislation against unfair business practices, which all the federal States have enacted, does allow proceedings to be brought by interested parties.[48]

IV. Conflicts of law in relation to unfair competition – comparative law survey

A. The connecting factor

1. The *lex loci delicti commissi*

In order to determine the law applicable to wrongful acts, the traditional rule has looked to the place where the act was committed as the connecting factor (*lex loci delicti commissi*).[49] It has long been recognised, however, that this solution gives rise to difficulties where the wrongful act was committed in a different State from the State in which the damage was suffered (distance torts). This type of situation frequently occurs in relation to economic and commercial torts, which include unfair competition. A complete analysis of the different positions adopted by the legislatures or national courts in relation to distance torts is beyond the scope of the present Note.[50] It may simply be pointed out that, in relation to unfair competition, the majority prefer the place *where the damage becomes apparent* rather than the place where the competitive acts were committed.

Once this principle is accepted, it is then necessary to determine the *concrete criteria*, according to which the place of the damage must be localised. Most writers tend to favour seeking out the market which is affected by the unfair practices (*Marktauswirkungsprinzip*).[51] It is appropriate to refer here to the view of BISCHOFF, who also identifies the market as the central element in the law on unfair competition: "It therefore appears natural to localise the unfair competition in the place where the market in which the competitors' interests have collided is situated, and then to ask the law of the country where that market is - which rule is applicable, which conduct is considered as fair competition in its eyes and which conduct, on the contrary, oversteps the limits to that freedom to cause damage to another which, in the final analysis, is what constitutes freedom of competition".[52] In a judgment of 21 October 1999 the Court of Appeal of Grenoble adopts the same reasoning and, having found that "the damage complained of was suffered [...] on the French market", applies French law.[53]

---

48 WIPO, *op. cit*. (footnote 12), No 16; see also Note of 1992, *op. cit.* (footnote 5), p. 103.

49 It has already been noted that the general tort of unfair competition is unknown in common law. Consequently, the *Restatement 2nd Conflict of Laws*, of the United States of America contains no provision expressly dealing with the law applicable to unfair competition and the problem must be settled by application of the general principle concerning civil liability (section 145) or the provisions concerned with specific unlawful acts, in particular Fraud and Misrepresentation (section 148) or Defamation, Multistate Defamation and Injurious Falsehood (sections 149-151).

50 The reader is referred to the *Note on civil liability for damages arising from transboundary damage to the environment: A case for The Hague Conference*, drawn up by Christophe Bernasconi and also prepared for the attention of the Special Commission on general affairs and policy of the Conference in May 2000 (see in particular the third chapter of the first part of that Note).

51 See the opinions, already referred to, of the Court of the Federal Republic of Germany in the famous decision of 20 December 1963 in *RCDIP* 1965, p. 678, with Note by E. MEZGER. See also DERRUPPE, *op. cit.* (footnote 24 above), No 19.

52 J.-M. BISCHOFF, La concurrence déloyale en droit international privé, *Travaux du comité français de droit international privé*, 1969-1971, Paris 1972, pp. 61-62.

53 Judgment available on the Internet (http://www.jura.uni-sb.de/FB/LS/Witz/211099v.htm).

2. The law of the market affected (*lex injuriae*)

The solution which consists of seeking out the market affected by the acts of unfair competition corresponds with a *Resolution* of the Institute of International Law and has also been adopted by several national legislatures.

At its Session in Cambridge in 1983,the Institute of International Law adopted a *Resolution* which provided, in Article II: "Where injury is caused to a competitor's business in a particular market by conduct which could reasonably be 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".[54]

At its Amsterdam Congress in October 1992, the International League of Competition Law adopted a similar *Resolution* concerning advertising:

> "I.a Confirming the Resolution adopted in 1967 at the Nice Congress on the law on unfair competition, it must be clarified in relation to advertising that the applicable law should be that of the country where the advertising in dispute had its effects, that is to say affected the public; where the advertising produced effects in several countries, the respective national laws of each of the countries concerned should be applied.
>
> b It should be considered that advertising has affected the public in a country where it could be received or is available and it could be perceived by that public as being addressed to it, for example by reason of its text, language or objective.
>
> c Nevertheless, in relation to any allocation of damages, the law of the place of origin of the advertising would be applicable if the defendant establishes that he could not reasonably forsee that his behaviour would cause harm to the complainant in the country where the advertising was received.
>
> II. It is desirable that efforts to achieve harmonisation of the applicable rules should be pursued."[55] (translation by the Permanent Bureau)

The principle that the applicable law is the law of the market affected has also been adopted by several national legislatures. The first country to expressly adopt the linkage to the effect on the market was *Austria* (section 48(2) of the Law on private international law, which came into force on 1 January 1979).[56] This approach was followed by *Switzerland*. Article 136, first paragraph of the Swiss Private International Law Statute provides that "[c]laims of unfair competition are governed by the law of the country on whose market the unfair act has its effect".[57] Finally, a similar draft provision is presently before the Parliament of the *Netherlands*.

The *Spanish* legislature has also opted for linkage to the law of the market affected but, by contrast with the Swiss, Austrian and Netherlands provisions which reflect an explicit choice in favour of the *bilateralist* method and which may therefore lead to the application of the *lex fori* or any foreign law, the Spanish rule adopts the *unilateralist* method. Section 4 of the *Spanish Law on unfair competition* of 10 January 1991 states

---

[54] Article II of the Resolution, text printed in *RCDIP* 1983, p. 790.

[55] *International Review of Competition Law* 1992 (No 168), p. 51.

[56] For a complete presentation see M. SCHWIMANN, *Internationales Privatrecht einschließlich Europarecht*, 2nd ed., Vienna 1999, pp. 67-68; DANTHE, *op. cit.*, (footnote 18 above), pp. 106-109.

[57] The adoption of Article 136(1) brought about a double change to the jurisprudential solution adopted by the Federal Tribunal in relation to unfair competition. Firstly, the new provision abandons in this field the linkage to the *lex loci delicti* in favour of linkage to the *lex injuriae*. Secondly, it ceases to grant to the injured party the possibility of choosing the most favourable law (*Günstigkeitsprinzip*), and instead chooses a localising connecting rule which is purely objective, see DANTHE, *op. cit.* (footnote 18 above) p. 81.

that the substantive legislation in question is applicable to acts producing or capable of producing substantial effects *on the Spanish market*.[58]

The *German Law of 21 May 1999 on the private international law of non-contractual obligations and goods* contains no specific rule on the tort of unfair competition.[59] But the history of this reform appears to suggest that the principles previously applied by the German courts continue to have the force of law, even in the absence of any specific rule. Furthermore, the place where the action had an effect (the market affected) remains the connecting factor in the field of unfair competition.[60]

Finally, the *Proposal for a European Convention on the law applicable to non-contractual obligations* elaborated by the *European Group for private international law* also provides for linkage to the law "of the country whose market is affected by the harmful act".[61]

The tendency is therefore unquestionably in favour of the application of the law of the market affected.[62] This result is obtained either as a result of a concretisation of the general principle of the *lex loci delicti* or by way of a specific linkage in this regard. The question arises, however, as to how precisely the term *market affected* is to be understood and how it is to be localised in a concrete manner.

---

58 *Ley de Competencia Desleal*, Article 4, provides; "La presente Ley será de aplicación a los actos de competencia deseal que produzcan o puedan producir efectos sustanciales en el mercado español". See the Note of 1992, *op. cit.* (footnote 5 above) pp. 98-100.

59 BGBl. I 1026; this law entered into force on 1 June 1999. It should also be noted that the new laws of private international law of *Italy* (Law of 31 May 1995, No 218), *Tunisia* (Law No 98-97 of 27 November 1998 enacting the "Code of private international law"), and *Venezuela* (Law of 6 August 1998 on private international law) do not contain any specific provisions in this regard.

60 See the famous decision of the *Bundesgerichtshof* of 30 June 1961 in the *Kindersaugflaschen* (baby bottles) Case, *BGHZ* 35, p. 329 at 336, which marks the abandonment of the theory of *ubiquity* in relation to unfair competition in favour of linkage to the place "wo wettbewerbsrechtliche Interessen der Mitbewerber aufeinanderstoßen", that is to say the place where the interests of competitors clash (according to the theory of ubiquity, both the law of the place where the act was committed and the law of the place where its results took effect could be applied); DANTHE, *op. cit.* (footnote 18 above), pp. 110-113.

61 Article 4(b) of the Proposal, reproduced in *RCDIP* 1998, pp. 802-807. It should be stressed here that the *European Community* is presently drafting a Community instrument on the *law applicable to non-contractual obligations*. This instrument, which will take the form of a Community regulation, is intended to supplement the *Rome Convention on the law applicable to non-contractual obligations of 19 June 1980*.

62 By contrast, the *European Directive on television without frontiers* (Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJEC No L 298 of 17 October 1989, p. 23 *et seq*; Directive 97/36/EC of the Parliament and Council of 30 June 1997 amending Council Directive 89/552/EEC on the co-ordination of those activities, OJEC No L 202 of 30 July 1997, pp. 60 *et seq*.) adopts, for the limited domains falling within the field of application of the Directive, the principle of the law of the *country of origin*. Thus, the Member States must generally accept that television programmes originating from other Member States may be broadcast on their territory. The *Draft Directive on electronic commerce* (Proposal for a European Parliament and Council Directive on certain legal aspects on certain legal aspects of electronic commerce in the Internal Market (18 November 1998, OJEC No C30 of 5 February 1999, p. 4 *et seq*.; COM (98) 586 final; Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market (1 September 1999), COM (99) 427 final) is also based on the principle of the *country of origin*. On the implications of Community law for unfair competition see P. BERNHARD, *Das internationale Privatrecht des unlauteren Wettbewerbs in den Mitgliedstaaten der EG*, Würzburg 1994; see also DANTHE, *op. cit.*, (footnote 18 above), pp. 113-122; B. DUTOIT, Une Convention multilatérale de droit international privé en matière de concurrence déloyale: mythe ou nécessité?, in *E pluribus unum: liber amicorum Georges A.L.Droz. Sur l'unification progressive du droit international privé*, The Hague 1996, pp. 55-57. These implications are very important, taking account of the influential role assumed by the CJEC for the future of a European law of unfair competition. It is true that a linkage to the place where the act of unfair competition has its effect may cause difficulties for the logic of a *common market*: the principle of the free movement of goods and services in practice limits the competence of the States of the Union to define the conditions for access to and distribution on their territory. Furthermore, the requirement imposed upon a trader to respect foreign regulations may possibly constitute a restriction on trade between the Member States of the Union. In its caselaw, the Court of Justice tries to find a balance between the interests of the State of origin, the State of the market and the Union, see the analysis contained in H.D. TEBBENS, Les conflits de lois en matière de publicité déloyale a l'épreuve du droit communautaire, *RCDIP* 1994, pp. 451-481, in particular pp. 473-479.

3. The concepts of *market* and *effects*

Linkage to the law of the market affected combines two relatively vague concepts, that of *market* and that of *effects*. These terms must be given concrete forms. With regard to the *market*, DUTOIT specifies that it consists of "the place where an economic agent offers his product and enters into a struggle with his competitors, accepting that, in case of doubt, the domicile (or seat) of the clients concerned should be adopted".[63] Legal writers generally accept that, in the context of unfair competition law, the concept of market must be understood in a more restrictive manner than its general economic meaning, that is to say as a *market limited to the territory of a single country*.[64] Thus, linkage to the market affected pinpoints the State in which the person whose interests are damaged (competitor, consumer and/or the public in general) is directly affected or threatened by a malfunctioning of the interplay of competition.[65]

In relation to *effects*, legal writers generally accept that only the *direct* and *substantial* effects of a restriction on competition are to be taken into consideration.[66] Secondary (subsidiary) effects or simple repercussions are not taken into account. Accordingly, the application of a law which only comes into play by chance is excluded. Thus, the simple economic injury suffered by a European company as a result of a lowering of the quoted rate for its shares on the New York stock exchange would not be sufficient to lead to the application of American law. The *Resolution* of the Institute for International Law of 1983 also restricts those effects capable of serving as a connecting factor since the explanatory commentary to Article II defines injury as "the *immediate* effect of the act of the defendant upon the business of the claimant".[67] Accordingly, it should be stressed that in order to adopt it as a connecting factor, the direct and substantial effect *does not need to be realised in concrete form*. It is sufficient that behaviour *threatens* objectively to have a prejudicial effect on competition. The *Spanish Law on unfair competition* referred to above expressly takes account of this point.[68] Swiss legal writers also accept that this is the position, even though Article 136 of the Swiss Private International Law Statute is silent in this regard.[69]

4. Brief analysis of linkage to the law of the market affected

Linkage to the law of the market affected, at first sight, has the advantage of increasing *forseeability*. For example, it allows the company seeking to launch an advertising campaign in several countries, from the State in which it has its central administration, to know *ab initio* the legal system according to which the (un)fair character of its campaign will be judged. Accordingly, legal security does not justify as such the choice of the place where the result of the act is felt as the connecting factor.[70] Other connecting factors could also contribute to increasing predictability, if they are known or identifiable in advance. In our opinion, the principal argument in favour of linkage to the law of the market affected is that this would correspond to the *legitimate expectation of the person injured*, since it renders exclusively applicable the law governing the economic environment of the latter. This result is all the more

---

63 DUTOIT, op.cit.(footnote 18 above) ad Article 136, No 2.

64 DANTHE, *op. cit.* (footnote 18 above), p. 95 with further references.

65 DANTHE, *op. cit.* (footnote 18 above), p. 95.

66 See the famous *Tampax* judgment of the German *Bundesgerichtshof* of 23 October 1970, *GRUR* 1971, p. 153 which speaks of the "kollisionsrechtliche Spürbarkeitsgrenze", that is to say a conflict of laws impact threshold which must be crossed; see also the judgment of the CJEC in *A. Ahlström Osakeyhtiö and Others* v. *Commission of the European Communities*, Reports 1988, pp. 5193 *et seq*. at 5212.

67 *RCDIP* 1983, p. 790 [italics added].

68 See footnote 58 above ("actos de competencia deseal que produzcan o puedan producir efectos sustanciales").

69 See DANTHE, *op. cit.* (footnote 18 above), pp. 94-95, DUTOIT, op.cit. (footnote 18 above), ad Article 136, No 2.

70 DANTHE, *op. cit.* (footnote 18 above), p. 82.

justified because the person injured often does not know the place where the unfair act affecting him was

committed.[71] Another advantage of this linkage lies in the fact that it respects *equality of treatment* between all economic actors on the same market. They are all subject to identical rules of economic interplay, irrespective of their nationality or the place from which they are acting.[72] Finally, it should be pointed out that linkage to the effects of an act is in conformity with public international law. As rightly stressed by DANTHE in his excellent work

> "the interest which States have in regulating all behaviour which produces effects on their national market is generally recognised - at least in relation to unfair competition - and the connecting link to the effects of behaviour appears to conform with the heads of jurisdiction accepted in public international law. Once economic behaviour is characterised by its effects, the criteria [of the market affected] expresses a reasonable relation between the designated national law and the alleged act, even though the latter was committed on the territory of another State".[73] (translation by the Permanent Bureau)

B. The criteria of the forseeability of the effects of an unfair act

According to the *Resolution* of the Institute of International Law adopted in 1983, the law of the market affected only applies to conduct "which could reasonably have been expected to have that [prejudicial] effect".[74] Where injury was not forseeable, the *Resolution* proposes a subsidiary linkage to "the internal law of the State which has the most significant relationship with the parties, their conduct and the injury" (Article IV of the *Resolution*).[75] Such a regime would appear to favour entrepreneurs and other economic agents for two reasons. Firstly, the forseeability clause protects them against an unexpected application of an unreasonable law, thereby facilitating economic planning. Secondly, the subsidiary linkages proposed in the *Resolution* would lead, in most cases, to the application of the law of the place where the conduct was committed or where the seat of the companies concerned is situated. Furthermore, it should be noted that those laws do not necessarily have significant links with the economic effect of the conduct constituting unfair competition. The subsidiary connecting factors proposed in the *Resolution* may therefore destroy the principal objective of substantive law consisting in regulating the behaviour of economic actors on a specific market. Precisely because those laws did not intend to put in question the exclusive character of linkage to the effect on the market, none of the provisions concerning conflicts of laws with regard to unfair competition referred to above (the Austrian, Spanish and Swiss laws) adopted the criteria of forseeability. Accordingly, those laws leave it to the trial judge to take account of a lack of forseeability when the law is applied to the merits of the case.[76]

C. Acts with effect on several markets

What is the linkage if an act of unfair competition produces effects on several markets at once? Let us take the example of deceptive advertising on a large scale with effects on different national markets. Does such a position lead to a multiplication of applicable laws or is it necessary to isolate a common linkage for all effects? This question is undoubtedly one of the most delicate and difficult in this field. According to a first group of writers, the unlawfulness of an act with effects in several markets must be assessed

---

71 DANTHE, *op. cit.* (footnote 18 above), pp. 82-83, with further references.

72 DANTHE, *op. cit.* (footnote 18 above), p. 83, with further references.

73 DANTHE, *op. cit.* (footnote 18 above), pp. 83-84, references omitted.

74 *RCDIP* 1983, p. 790.

75 *Ibid*., pp. 791-792.

76 See on these questions DANTHE, *op. cit.* (footnote 18 above), pp. 89-91, with further references.

separately in each State, in the light of the law applicable there.[77] In the example given, it would be the responsibility of the party commissioning or disseminating the information to ensure that the advertising is in conformity with the law of all the States in which it is received. Some other writers, however, consider such territorial partitioning as impracticable, particularly within the framework of unfair competition committed on the Internet (unfair advertising placed on an Internet site becomes available to any computer connected to the network). Furthermore, those writers suggest a subsidiary linkage, in particular the application of the law of the place where the act was committed (principle of the country of origin).[78]

Those opposed to market partitioning point out, in particular, that such a solution would lead in practice to alignment with the most strict law, with quite inappropriate consequences: The law of a marginal market could thereby impose its very rigorous conception of matters. Such a conclusion does not appear to be justified.[79] It has already been noted that only substantial effects of a restriction of competition may lead to a linkage with the effects on a particular market. Accordingly, a marginal crossing of borders (such as, for example, a simple spill-over) may be ignored.[80] The condition that the damage on a particular market must be of a *substantial nature* therefore serves as a safeguard in the application of the linkage to effects. It would also avoid the unjustified consequences associated with territorial partitioning. This may also be the conclusion in relation to acts of unfair competition committed on the Internet.

D. Specific or subsidiary linkage?

It should be noted that Article 136(2) of the Swiss Private International Law Statute provides for a specific linkage in the case where an act of unfair competition *only affects a single competitor and has no impact on the public*: "If the unlawful act is directed exclusively against the operational interests of a specific competitor, the applicable law shall be that of the country in which the injured establishment is located". This covers, in particular, acts of enticement of the employees of a competing undertaking, corruption, industrial espionage or inducement to breach of contract. The Statute also provides that where an act of unfair competition violates an existing legal relationship between the perpetrator and the person injured, claims based on such action are governed by the law applicable to that legal relationship (Article 136(3), which reserves the application of Article 133(3)). This subsidiary linkage also presupposes that the interests of third parties are unaffected.[81]

---

[77] This solution was adopted in particular by the *Institute of International Law*, Article II, paragraph 2 of the Cambridge Resolution, REESE/VISCHER, The conflict-of-laws rules on unfair competition, *Yearbook of the International Law Institute*, vol. 60, part II, pp. 297 and 299. Article II, paragraph 2, reads as follows: "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". A Resolution adopted by the International League against Unfair Competition in 1967 has the same tenor, DYER, Unfair Competition (see footnote 13 above), p. 419. See also DUTOIT, *op. cit.* (footnote 18 above), ad Article 136(2). For an act of unfair competition committed on the Internet, see in particular H. KRONKE, Applicable Law in Torts and Contracts in Cyberspace, in K. BOELE-WOELKI/C. KESSEDJIAN (ed), *Internet - Which Court Decides? Which Law Applies? Quel tribunal décide? Quel droit s'applique?* The Hague 1998, p. 71.

[78] See BISCHOFF, *op. cit.* (footnote 52 above), pp. 64-66, and more recently N. DETHLOFF, Les règles européennes de conflit de lois qui régissent la concurrence déloyale, *Communications commerciales*, December 1999, pp. 2-11.

[79] See W. WENGLER, Die Gesetze über unlauteren Wettbewerb und das internationale Privatrecht, *RabelsZ* 1954, p. 422.

[80] See on these questions in particular DANTHE, op.cit. (footnote 18 above), pp. 92-94 and pp. 96-100, with numerous further references.

[81] In truth, this subsidiary linkage is not undisputed. In fact, even if the act of unfair competition was committed within the framework of a licensing agreement or an exclusive concession, the application of the law of contract to the act of competition may appear to be open to question, to the extent that the latter law may be in conflict with the objectives of the law of the market and therefore deprive the injured undertaking of the protection to which it would normally be entitled on the market in question, see DUTOIT *op. cit.* (footnote 18 above), ad Article 136, No 8, who suggests that the inappropriate nature of a linkage to the law of the contract would possibly lead to reliance on the exception (contained in Article 15) to impose the application of the law of the market.

V. Conclusions

What conclusions can be drawn from this brief presentation of the conflicts of laws with regard to unfair competition for the work of the Hague Conference? Perhaps reference can be made once again to the excellent contribution of Professor DUTOIT to the Collection of Essays in honour of Mr DROZ, former Secretary General of The Hague Conference. At the end of his study, Professor DUTOIT affirms that conflicts of laws with regard to unfair competition constitutes "for the Hague Conference a field of action particularly worthy of interest".[82] There is hardly any doubt that the drafting of a *Convention on the law applicable to unfair competition* could be very useful from two standpoints. Firstly, it would enable clarification to be provided for the commercial players who today have no means of knowing with certainty whether it is the substantive law of the country in which they exercise their activity or the country where the consequences of their acts are felt, which govern their possible liability.[83] Secondly, a Convention would also enable very helpful guidance to be given to the courts of numerous countries which are today confronted with conflicts rules which are often too general or ambiguous to enable an effective connecting link to be established with regard to unfair competition. More generally, it should be stressed that not only do the technical problems associated with the drafting of such a Convention appear to be well identified, but furthermore the basic outline of possible solutions is relatively clearly discernible.

A. Summary

Following the example of the Paris Convention of 1883, a Convention intended to have a global coverage on conflicts of laws in relation to unfair competition should unquestionably take as its basis a *tridimensional* or *functional* conception of unfair competition and seek to cover both the protection of competitors as well as consumers and the public in general. [84] It should therefore apply not only to behaviour with an influence over relations between competitors, but also to behaviour with an influence on relations between suppliers and clients, and even to any behaviour capable of disturbing the proper functioning of competition on a particular market.[85]

Furthermore, it would probably be appropriate for the Convention to define in as general and broad a manner as possible the concept of unfair competition. One could envisage that a general definition or description would contain the following three elements: The alleged act would form part of a process of economic competition, it would have an unfair character which could, as the case may be, provide the basis for its unlawfulness and it would injure the interests of different agents.[86] Only a broad approach would enable account to be taken of the great diversity of definitions or descriptions contained in national laws on this matter. But equally, a broad approach would not signify that any behaviour falling within the field of application of the Convention should be regarded as reprehensible. It would be for the governing law (*lex causae*) to determine whether the behaviour in question was in practice reprehensible or not. In other words, the governing law could be more restrictive in its assessment of the unfair character of behaviour than the Convention in the definition of its substantive scope of application. The governing law might also not consider the alleged behaviour as falling under the law of unfair competition.

---

82 DUTOIT, *op. cit.* (footnote 62 above), p. 66.

83 Exploratory Study, *op. cit.* (footnote 3 above), No 90.

84 DUTOIT, *op. cit.* (footnote 62 above), p. 64.

85 *Ibid.*

86 See on these elements DANTHE, *op. cit.* (footnote 18 above), pp. 20 *et seq*.

Finally, and in particular, there is hardly any doubt that the general tendency in favour of linkage to the law of the market affected would result in much greater forseeability if a treaty were to unify this approach at the global level.[87] Accordingly, it might be appropriate to examine whether it is necessary to provide for specific linkage in the case of acts of unfair competition exclusively affecting the *operating interests of a specific competitor*.

In the context of the scope of the applicable law, several questions would require examination, in particular that of *renvoi* (generally excluded in the field of unfair competition) and that of determining whether the parties might choose the applicable law etc., after the occurrence of the act causing damage. Finally, it would be appropriate to examine whether would be necessary to insert in such a Convention provisions which would *limit the compensation* which might be granted by the courts to that provided for under the *lex fori*.

B. Organisation of future work in the domain of unfair competition

How might future work of the Conference be organised practically in the domain of unfair competition in the future?

If the Conference decides to embark upon more concrete work concerning the law applicable to unfair competition, the Permanent Bureau would explore all possibilities with a view to co-operation with other interested international organisations, in particular the World Intellectual Property Organisation. Close collaboration with WIPO would logically fall within the framework of the growing contacts which the Conference has established with that Organisation. One of the initiatives to be examined would consist in establishing a *working group* which would bring together experts on private international law and the substantive law on unfair competition. It goes without saying that the composition of such a group would need to be representative and balanced. Consequently, it would be imperative that the group would bring together experts from all the major legal systems. The working group could be given the task of examining in more detail all the questions which would need to be addressed by a Convention or other instrument concerned with the law applicable to unfair competition and should then adopt *recommendations* which could then guide the future work of the Conference on the matter.

[87] See the Note of 1992, *op. cit.* (footnote 5 above), p. 106.

Bibliographie séléctive / Selective bibliography

AMERICAN LAW INSTITUTE – *Restatement of the Law Third - Unfair Competition*, St. Paul 1995.

BÄR, R. – Internationales Kartellrecht und unlauterer Wettbewerb, in: *Beiträge zum neuen IPR des Sachen-, Schuld- und Gesellschaftsrechts, Festschrift für Prof. R. Moser*, Zurich 1987, p. 143-178.

–– Das internationale Privatrecht (Kollisionsrecht) des Immaterialgüterrechts und des Wettbewerbsrechts, *Schweizerisches Immaterialgüter- und Wettbewerbsrecht, I/1, Grundlagen*, Bâle 1995, p. 123-141.

VON BAR C. – Wettbewerbsrechtlicher Verbraucherschutz und internationales Lauterkeitsrecht, in: *Internationales Verbraucherschutzrecht. Erfahrungen und Entwicklungen in Deutschland, Liechtenstein, Österreich und der Schweiz. Referate und Diskussionsberichte des Kolloquiums zu Ehren von Fritz Reichert-Facilides*, Tübingen 1995, p. 75 ss.

BASEDOW, J. – Souveraineté territoriale et globalisation des marchés: le domaine d'application des lois contre les restrictions de la concurrence, *RCADI* 1997, Tome 264, p.9-177.

BAUMBACH A. / HEFERMEHL W., *Wettbewerbsrecht. Gesetz gegen den unlauteren Wettbewerb. Zugabeverordnung, Rabattgesetz und Nebengesetz*, 18ème éd., Munich 1995.

BERNHARD P. – *Das internationale Privatrecht des unlauteren Wettbewerbs in den Mitgliedstaaten der EG*, Würzburg 1994.

BISCHOFF J.-M. – La concurrence déloyale en droit international privé, *Travaux du comité français de droit international privé, 1969-1971,* Paris 1972, p. 53-79.

BUCHER, A. – Les actes illicites dans le nouveau droit international privé suisse, in: *Le nouveau droit international privé suisse,* CEDIDAC No 9, Lausanne 1988, p. 107-141, spéc. p. 130-133.

DANTHE, F.-J. – *Le droit international privé suisse de la concurrence déloyale*, Librairie Droz, Genève 1998, 323 p.

DERRUPPÉ J. – Concurrence déloyale ou illicite, *Répertoire de droit international, Tome I,* Dalloz, Paris 1998.

DETHLOFF N. – Les règles européennes de conflit de lois qui régissent la concurrence déloyale, *Communications commerciales,* Décembre 1999, p. 2-11, disponible sur Internet à l'adresse suivante:
http://europa.eu.int/comm/dg15/comcom/newsletter/edition22/text_fr.pdf

–– *Marketing sur Internet et droit en matière de concurrence internationale*, disponible sur Internet à l'adresse suivante:
http://europa.eu.int/comm/dg15/comcom/newsletter/edition12/page07_fr.htm

DUTOIT, B. – Une Convention multilatérale de droit international privé en matière de concurrence déloyale: mythe ou nécessité?, in: *E pluribus unum: liber amicorum Georges A. L. Droz. Sur l'unification progressive du droit international privé,* La Haye 1996, p. 51-66.

–– Convergences et divergences des droits nationaux de la concurrence déloyale dans la CEE, in: *Un droit européen de la concurrence déloyale en formation ? Actes du Colloque de Lausanne*, Genève 1993/1994.

–– Droit de la concurrence déloyale et rapport de concurrence: un couple indissociable? Un essai de réponse comparative, in: *Mélanges en l'honneur de Jacques-Michel Grossen*, Bâle 1992, p. 297 ss.

–– *Droit international privé suisse – Commentaire de la loi fédérale du 18 décembre 1987*, 2ème éd., Bâle 1997, ad art. 136.

DYER, A. – Unfair Competition in Private International Law, *RCADI* 1988, Tome 211, Dordrecht 1990, p. 377-446.

EGUCHI, J. – *History of Amendments to the Unfair Competition Prevention Act of Japan - From a Developing Country to a Developed Country*, Osaka University Law Review 1994, p. 1-5.

FERRARI L. – *Die Anknüpfung an die Marktauswirkung im schweizerischen IPRG und ihre Konkretisierung*, Bâle 1993.

IMHOF-SCHEIER, A. – La loi applicable à la publicité internationale en droit international privé suisse, *ASDI* 1985, p. 57-90.

Institut de droit international – Session de Cambridge, *Annuaire de l'Institut de droit international*, Vol. 60-II, Paris 1984, p. 292-302.

KABEL, J.J.C. – Grensoverschrijdende reclame en oneerlijke mededinging, *Ars Aequi*, 1993, No 10, p. 714.

KRONKE, H. – Applicable Law in Torts and Contracts in Cyberspace, in: K. BOELE-WOELKI/C. KESSEDJIAN (éd.), *Internet – Which Court Decides? Which Law Applies? Quel tribunal décide? Quel droit s'applique?,* La Haye 1998, p. 65-87.

LEIBLE, S. – Das spanische Gesetz gegen den unlauteren Wettbewerb*, Zeitschrift für Rechtsvergleichung* 1992, p. 257-280.

OMPI/WIPO – *Protection contre la concurrence déloyale - Analyse de la situation mondiale actuelle / Protection against unfair competition - Analysis of the Present World Situation*, Genève/Geneva 1994.

PETER, B. – *Das internationale Privatrecht des unlauteren Wettbewerbs in den Mitgliedstaaten der EG*, Baden-Baden 1994.

REESE W. / VISCHER F., The conflict-of-laws rules on unfair competition, *Annuaire de l'Institut de Droit International*, vol. 60 (Session de Cambridge 1983), tome I: Travaux préparatoires, p. 107 ss; tome II: Délibérations, p. 155 ss, Paris 1983.

REICH, N. – Rechtsprobleme grenzüberschreitender irreführender Werbung im Binnenmarkt - dargestellt am deutschen, französischen und englischen Recht unter besonderer Berücksichtigung des EG-Rechts, *RabelsZ* 1992, p. 444-520.

SACK, R. – Die kollisions- und wettbewerbsrechtliche Beurteilung grenzüberschreitender Werbe- und Absatztätigkeit nach deutschem Recht, in: *Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil 1988*, Weinheil 1988, p. 320 ss.

SCHRICKER, G. – *Neuere Entwicklungen im Recht des unlauteren Wettbewerbs in Europa,* Osaka University Law Review 1993, p. 45-71.

SCHWANDER, I. – Das UWG im grenzüberschreitenden Verkehr (IPR-Probleme des unlauteren Wettbewerbs)*,* in: C. BAUDENBACHER, *Das UWG auf neuer Grundlage*, Berne 1989, p. 161.

SCHARTZ I. / BASEDOW J. – Restrictions on Competition, *International Encyclopedia of Comparative Law*, Vol. III, Chapter 35, Tübingen 1995, 140 p.

SCHNYDER ANTON K. – *Wirtschaftskollisionsrecht – Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter besonderer Berücksichtigung von Markrecht*, Zurich 1990, spéc. p. 397-430.

TEBBENS, H.D. – Les conflits de lois en matière de publicité déloyale à l'épreuve du droit communautaire, *RCDIP* 1994, p. 451-481.

WENGLER, W. - Die Gesetze über unlauteren Wettbewerb und das internationale Privatrecht, *RabelsZ* 1954, p. 401-426.