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LIMITE

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**NOTE**

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from : the Presidency

to : Working Party on "Rome II"

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**Subject:** Working document relating to a special rule for damage caused by

- products
  - unfair competition
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**SEMDOC**

Statewatch European Documentation &  
Monitoring Centre on justice and home  
affairs in the European Union

PO Box 1516, London N16 0EW, UK  
tel: 0181 802 1882 (00 44 181 802 1882)  
fax: 0181 880 1727 (00 44 181 880 1727)

A. Law applicable to liability for damage caused by products

1. Cases illustrating the problem

- a) A product is produced in A(ustria), where the seller has his place of business. It is sold in B(elgium), where the user/consumer has his habitual residence. Owing to a failure in the production process, the consumer suffers damage in C(anada), where he uses the product while on vacation. He seeks compensation from the manufacturer.
- b) variation on case a) : the product (a medicine) was not correctly stored by a pharmacy in B(elgium). This spoiled the product, and the damage results therefrom. The user seeks compensation from the pharmacy.
- c) variation on case a) : the product is a gas cooker which explodes and burns down several motorhomes. A third party (owner of one of the motorhomes) seeks compensation from the manufacturer.

2. The law of the following States could be envisaged as the **law applicable** to claims for compensation by the user (consumer) or the bystander:

the State:

- a) where the event/damage occurred
- b) where the defect occurred
- c) where the product was introduced into the market
- d) where the product was produced/sold
- e) to which the sales contract has the closest connection
- f) where the user/buyer/person who suffered damage has its habitual residence
- g) where the manufacturer/seller has his place of business

3. Discussion of the options

- a) If this State is not the State of habitual residence of the consumer or is not otherwise connected with the case, application of this State's law would be surprising for both sides, the consumer and the manufacturer (see case a)). For the bystander, however, it could be an appropriate solution.
- b) Sometimes even the manufacturer may have difficulties in establishing where the defect occurred, in particular where the production process was a complex one.
- c) Introduction into the market is a vague concept and does not seem to add much to the solution. For the bystander this solution is clearly inappropriate.
- d) The place of production is determined by the manufacturer alone and often does not establish a relevant connection with the case, whereas the place where the product was acquired could be relevant at least for the user (not for the bystander).
- e) In relations between the manufacturer, who is not party to the contract, and the user, the contract is not a predominant factor. If the parties to the contract have selected a law, this choice would indirectly affect the manufacturer, who is not party to the contract.

- f) This solution favours the user, because the burden of information about a foreign law lies with the other party i.e. the manufacturer. He would be virtually obliged to take all laws into account.
  - g) Manufacturers would be able to avoid liability through the choice of their place of business; manufacturers in a State with strict liability rules would be at a disadvantage in competing with producers from other States.
4. Solution a) seems to be the most appropriate as a general rule. For special cases where this solution is not appropriate or where another solution would be better, a provision could be added to the effect that the law of the country with which the case is most closely connected should be applicable. Such cases could be defined if the general approach is not preferable.

The following cases could be considered as special cases, where the general rule does not apply:

- user and manufacturer/supplier are situated in the same State
  - the user acquired the product in the State where he has his habitual residence.
5. Furthermore, it might be necessary to take into account the **rules of conduct and safety** of a different law. If, for example, the toxic properties of a product do not exceed the limits provided for in the State where it is sold, but do exceed those limits in the State where it is used (where the user has his habitual residence), should the manufacturer be held liable for damages resulting from those toxic properties?

B) Law applicable to claims arising from unfair **competition**

1. **Cases illustrating the problem**

A firm in Austria sells its product not only in Austria but also in Germany. A German competitor announces in a gazette published in Germany but read in Austria as well that the Austrian product is dangerous. This announcement is not correct; nevertheless it leads to a loss of profit for the Austrian firm, because customers both in Germany and in Austria cancel their contracts or withdraw their orders. The Austrian firm seeks compensation from the German firm and applies for an injunction.

2. The law of the following States could be envisaged as the **law applicable** to claims for compensation or applications for an injunction:

the State:

- a) where the event occurred
- b) where the damage occurred
- c) where competitor acted
- d) where the firm has its place of business
- e) where the product/service was offered
- f) where the action of the competitor takes effect
- g) where the injunction is to take effect

### 3. Discussion of the options

- a) If the event is constituted by the competitor's action, the choice of the law applicable would, in the final analysis, lie with the competitor. Furthermore, it might be difficult to establish where this place was. If the event is constituted by the customers' decision, the choice-of-law rule would lead to application of the laws of different States. It is difficult to establish where a decision is taken. It does not help much to define the place of the event as the place where the customers' decision is carried out.
  - b) Sometimes even the firm may have difficulties in establishing where the damage occurred, in particular where the firm is international in structure.
  - c) Same objection as to a).
  - d) If, in the example above, Austrian law is more restrictive than German law, this solution would put the Austrian firm at an advantage vis-à-vis German competitors.
  - e) The product/service might be offered in different States. This option does not lead to one law.
  - f) This option introduces a vague concept; it would be necessary to define the place of effect. This could be the place of business of potential customers. Normally this concept would again lead to different laws.
  - g) If, in the example above, an injunction is sought in the Austrian courts and the injunction is to take effect in Austria, the conditions of Austrian law would have to be met. Nevertheless, the injunction should be enforced in Germany if necessary. The place of enforcement is to be distinguished from the place of the effect in terms of a choice-of-law provision.
4. Option f) appears to be appropriate, if it were possible to solve the problem that it could refer to more than one law. This problem could be solved by applying
- the law of the State of the main effect (this would enforce the law of the larger economies)
  - the law chosen by the claimant (this would give effect to the most rigorous law)
  - all those laws cumulatively (same effect as mentioned above)
  - all laws, but only in respect of the damage caused in the respective State (it would be necessary to assess the profit that could have been drawn from potential customers in the respective State)
5. Furthermore, it might be necessary to take into account the **rules of conduct** of another law.