INTERNATIONAL

FURTHER COMMENTS ON THE HAGUE CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY

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The Hague Convention on the Law Applicable to Products Liability (Convention)[1] sets forth choice of law rules to govern international cases involving products liability. The Convention was approved by The Hague Conference of Private International Law[2] in 1972 and has recently entered into force, having been ratified by three conference members: France, Norway, and Yugoslavia. The complete text of the Convention is set forth in the appendix to this Article. Its provisions have already been discussed at some length in the literature,[3] and it seems unnecessary to repeat this discussion. What is said here will be concerned primarily with the question whether the Convention should be ratified by the United States. Mention will be made of some of the advantages and disadvantages of such action and the hardly startling conclusion will be reached that arguments can be made on both sides.

It was the United States which first proposed the law applicable to products liability to The Hague Conference as a possible subject for a convention. This was done in part for the reason that the area is largely unexplored. As a result, most countries could adhere to a convention on the subject without seriously disturbing existing law. Also, for the same reason, such a convention, even if it were not widely adopted, would probably have substantial influence upon subsequent legislation and court decisions. There was also the further consideration that certainty, predictability, and uniformity of

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[1] *See* Conférence de La Haye de Droit International Privé, Actes et Documents de la douzieme session du 2 au 21 octobre 1972, Tome III, Responsabilité du Fait des Produits, Acte final 246-50 (1974).

[2] The member nations are Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, United States (which joined in 1964), and Yugoslavia.

[3] 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 38A.01-38A.02 (1977); Reese, *The Hague Convention in the Law Applicable to Products Liability*, 8 INT'L LAW. 606 (1974).

result are probably of greater importance in products liability than in many other areas of tort and that these values could best be achieved in the international area through the medium of a convention. This United States suggestion was warmly received. A Special Commission was created by The Hague Conference to do the preliminary work[4] and ultimately in 1972, as already stated, the final text was approved.

Initially, the United States suggested that the plaintiff should be given the choice of any one of these laws; namely the law of the state of injury, the law of the state where the plaintiff acquired the product, and the law of the state of the defendant's principal place of business, provided that in the case of the state of injury or of acquisition the defendant could reasonably have foreseen that the particular product, or products of similar type which it had either manufactured or sold, would come into the state through commercial channels.[5] Such a solution, it was felt, would be both fair to the defendant and by favoring the plaintiff would be in line with the trend of products liability legislation and case law in the great majority of countries.[6] This suggestion did not meet with favor and instead the choice of law solutions embodied in articles 4 through 6, which are the key provisions of the convention, were adopted. These articles read as follows:

> Article 4
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> The applicable law shall be the internal law of the State of the place of injury, if that State is also—
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> a. the place of the habitual residence of the person directly suffering damage, or
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> b. the principal place of business of the person claimed to be liable, or
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> c. the place where the product was acquired by the person directly suffering damage.
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> Article 5
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> Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also—

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[4] The draft convention prepared by the Special Commission is discussed in Reese, *Products Liability and Choice of Law: The United States Proposal to The Hague Conference*, 25 VAND. L. REV. 29 (1972).

[5] *Id.*

[6] Sommerich, *A Comparative Survey of Products Liability Law as Applied to Motor Vehicles*, 2 INT'L LAW. 98 (1967); Szladits, *Comparative Aspects of Products Liability*, 16 BUFFALO L. REV. 229 (1966).

a. the principal place of business of the person claimed to be liable, or

b. the place where the product was acquired by the person directly suffering damage.

Article 6

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

A qualification to these articles is stated in article 7 which provides that neither the law of the state of injury nor of the habitual residence of the person directly suffering damage shall be applied if the defendant establishes that "he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels."

Some time after the Convention had been approved by The Hague Conference, The Committee on International Unification of Private Law of the American Bar Association recommended that it be ratified by the United States. When, however, the matter came before the American Bar Association House of Delegates,[7] a motion to table was carried by a substantial majority after a short debate. The most vocal opposition to the Convention came from those members of the House who belong to the plaintiffs' bar. They argued in part that United States adherence to this Convention would be to the disadvantage of American industry, and it may be that these arguments had some effect. In any event, the motion to table was passed without debate and with little opportunity having been afforded to the proponents of the Convention to state their side of the case. There is no way of knowing whether ratification of the Convention by the United States will ever be recommended by the Department of State. In any event, an attempt to assess its strengths and weaknesses may be of interest.

One obvious advantage of the Convention is that it would afford predictability and uniformity of result as well as ease in the selection of the state of the applicable law. These are important values. Predictability with respect to the law to be applied would facilitate the task of lawyers in settling a products liability case and would be of assistance in the setting of insurance rates. This value would

[7] Meeting of the A.B.A. House of Delegates, Feb. 1974 (unpublished report).

also aid suppliers of products in planning their transactions and in reaching a decision on whether to make their goods available for sale in a given country. Ease in the selection of the applicable law is also a factor that should not be disregarded. The courts have many things to do, of which selection of the state of the applicable law is hardly the most important. Accordingly, clear and precise rules that would assist in the performance of this latter task have distinct advantages.

Ratification of the Convention by the United States would also be to the advantage of American industry. Apart from the assistance the Convention would bring in the planning of transactions, it would insure the application on occasion of more favorable rules of law. By and large, rules of products liability are more favorable to the consumer in the United States than in any other country of the world.[8] Also in tort actions involving multistate contacts, American courts have shown a distinct tendency in recent years to apply a law favorable to the plaintiff.[9] Hence, as things now stand, there is a good chance that, at least in a suit brought in the United States, an American supplier of a defective product would be held liable under the law of an American state for injury suffered in a foreign state by a national or resident of the latter state. And this might be true even in a situation where the plaintiff had purchased the product there.[10] Such a holding would be impossible under the Convention since it provides in articles 4 and 5 for application of (a) the law of the state of injury if that state is the habitual residence of the person directly suffering damage or the place where the person acquired the product or (b) the law of the state of habitual residence of the person directly suffering damage if that state is the place where the person acquired the product. So far as injuries in the United States are concerned, the Convention would treat American and foreign suppliers with an even hand. Both would normally be held liable under the law of an American state. If, by any chance, the provisions of articles 4 and 5 were not applicable in a particular case, the plaintiff would usually have a choice between application of the law of the

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[8] *See* Sommerich, note 6 *supra*; Szladits, note 6 *supra*.

[9] *See, e.g.*, Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973); Bernard v. Harrah's Club, 16 Cal.3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976); Tooker v. Lopez, 24 N.Y. 2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 289 N.Y.S.2d 734 (1968).

[10] *Cf.* In re Paris Air Crash, 399 F. Supp. 732 (D.C.Cal. 1975); Kasel v. Remington Arms Co., 24 Cal. App.3d 711, 101 Cal. Rptr. 314 (1972).

place of injury or of that of the defendant's principal place of business. And where the law of the American state of injury was the one more favorable to the plaintiff, this, of course, would be the law selected.

The Convention, as is appropriate, lays down hard-and-fast rules of choice of law. Nevertheless, it would be unlikely to lead to the application of a fortuitous law, namely that of a state having no substantial relationship either to the parties or the occurrence. This is because articles 4 and 5 require that at least two important contacts be located in the selected state. Also, under article 7, neither the law of the place of injury nor that of the plaintiff's habitual residence may be applied unless the defendant has reason to foresee that "the [particular] product or products of the same type would be made available in that state through commercial channels." Once these latter requirements have been met, the place of injury or that of plaintiff's habitual residence could hardly be considered fortuitous.

The Convention is pro-consumer in the sense that the plaintiff is given the privilege of choosing between the law of two states in the limited circumstances covered by article 6. This is as it should be. As has already been said, the clear trend of products liability and case law throughout the world has been to favor the consumer,[11] and the Convention should be in line with the trend. On the other hand, a supplier would have little reason to object to this limited option. He could only be held liable under one of two laws. Of these, one is the law of the supplier's principal place of business with which he should be familiar and with whose requirements he would, at least under ordinary circumstances, be under a duty to comply. The other is the law of the state of injury, but, by reason of article 7, the supplier could only be held liable under this law if he had reason to foresee that the particular product or his own products of the same type would enter the state through commercial channels.

A matter of perhaps lesser significance involves international relations. By ratifying the Convention, the United States would add to its good will among the members of The Hague Conference. In addition, this step would give the United States greater influence in future Conference debates. This is because the delegates would be more likely to be persuaded by the arguments of a country which has shown by its past actions that it is prepared to ratify Hague

[11] *See* Sommerich, note 6 *supra;* Szladits, note 6 *supra.*

conventions[12] than by those of one which has given no such indication. Factors such as these should not induce the United States to ratify a bad convention. But in the case of a convention that is good they should provide an additional reason for ratification.

Having now mentioned some of the reasons which would support ratification, let us now turn to those that point in the opposite direction. The first is that the Convention lays down hard-and-fast rules of choice of law. If it did not, it would have few of the advantages that a convention is supposed to bring. On the other hand, rules of this sort are almost certain to evoke the displeasure of the plaintiffs' bar. This is because a considerable number of courts in the United States are currently employing what might be described as a no-rule, *ad hoc* approach in choice of law cases involving torts. And, with rare exceptions, the law ultimately applied by these courts in deciding a case has favored the plaintiff.[13] Any choice of law rule, no matter how phrased, that calls for the application under stated circumstances of the law of a given state is likely to work on occasion to the plaintiff's disadvantage. And for this reason any convention containing choice of law rules will meet with opposition.

Beyond this, the Convention would undoubtedly lead on occasion to results that many would consider unfortunate. Frumer and Friedman provide an example in their treatise on products liability.[14] They posit a situation where a New York resident, in response to an advertisement in a New York newspaper, purchases an automobile of Swedish manufacture while vacationing in Spain. His intention is to use the automobile in Spain and then to return with it to New York. While driving in Spain, the New Yorker is killed by reason of a defect in the automobile and thereafter suit is brought in New York against the Swedish manufacturer to recover for his wrongful death. Neither New York nor Swedish law places a limit on the amount that can be recovered in a death action. Spain, on the other hand, does impose such a limit and would also, it is assumed, make it more difficult than would the law of New York or Sweden to establish liability in a products liability case. In this situation, New York and Sweden would appear to be the states of greatest interest.

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[12] The United States has already ratified two Hague conventions: The Convention on the Service Abroad of Documents, *done* Nov. 15, 1965, 20 U.S.T. 361, 658 T.I.A.S. No. 6638, and the Convention on the Taking of Evidence Abroad, *done* Mar. 7, 1970, 28 U.S.T. 2555, T.I.A.S. No. 7444.

[13] *See, e.g.*, cases cited in note 9 *supra*.

[14] 3 L. FRUMER & M. FRIEDMAN, *supra* note 3, § 38A.02 (1977).

Yet, under article 4 of the Convention, Spanish law would be applicable since the automobile had been purchased and had caused injury in Spain. Such a result seems unfortunate. Two things, however, can be said in reply. The first is that situations of this sort would not occur with any frequency. And the second is that any rules devised by man will lead on occasion to undesirable results. The ultimate question is whether the advantages of a proposed rule would outweigh its disadvantages.

A more basic drawback of the Convention is that it is not as consumer-oriented as the United States would have wished. The United States, it will be recalled, suggested originally that the plaintiff be permitted to base his claim on any one of these laws, namely that of the place of injury, of the place of acquisition, or of the principal place of business of the supplier.[15] Such a formulation, it will be noted, would permit the plaintiff to choose Swedish law in the situation discussed by Frumer and Friedman and thus would avoid the unfortunate result to which the provisions of the present Convention would lead. This suggestion of the United States did not, however, prove acceptable to a majority of the delegates. A compromise of conflicting views became inevitable and the present Convention was the result.

A further possible disadvantage of the Convention is that it provides in article 8 that the great majority of issues which can arise in a products liability case should be determined by a single law, namely that selected by application of articles 4 through 6. This runs counter to much modern thinking to the effect that choice of the applicable law should depend upon the particular issue and, as a result, that the law of different states should frequently govern different issues in the same case.[16] So, for example, there is authority that in a suit between residents of state X arising from an automobile accident in state Y, the law of Y should be applied almost invariably to determine standards of conduct, but that there will be occasions at least when it would be appropriate to have X law govern issues involving the measure of damages[17] and immunity from ordinary liability in tort.[18] Distinctions such as these can perhaps

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[15] *See* text at note 5 *supra*.

[16] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[17] *See, e.g.*, Long v. Pan American World Airways, 16 N.Y. 2d 377, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

[18] *See, e.g.*, Babock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Haumschild v. Continental Casualty Co., 7 Wis.2d 130, 95 N.W.2d 814 (1959).

usefully be made on a case by case basis by courts in the United States. They could not, however, be made in a Convention. To begin with, legal thought in the great majority of countries would currently disagree with the notion that choice of the applicable law should depend upon the particular issue. In addition, a Convention must state hard-and-fast rules in order to achieve its purpose of bringing predictability and uniformity of result to the law. Likewise, the rules set forth in a convention should be relatively simple in order to gain substantial acceptance.

To summarize: ratification of the Convention by the United States would have many advantages, including the benefits it would bring to American industry. On the other hand, the Convention is not as pro-consumer as the United States would have wished and might be thought to have still other weaknesses. Inevitably, a decision of what action to take must involve a balancing of values.

Appendix

CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY

The States signatory to the present Convention,

Desiring to establish common provisions on the law applicable, in international cases, to products liability,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

Article 1

This Convention shall determine the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product, including damage in consequence of a misdescription of the product or of a failure to give adequate notice of its qualities, its characteristics or its method of use.

Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability *inter se*.

This Convention shall apply irrespective of the nature of the proceedings.

Article 2

For the purposes of this Convention—

a. the word "product" shall include natural and industrial products, whether raw or manufactured and whether movable or immovable;

b. the word "damage" shall mean injury to the person or damage to property as well as economic loss: however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damage;

c. the word "person" shall refer to a legal person as well as to a natural person.

Article 3

This Convention shall apply to the liability of the following persons—

1. manufacturers of a finished product or of a component part;
2. producers of a natural product;
3. suppliers of a product;
4. other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

It shall also apply to the liability of the agents or employees of the persons specified above.

Article 4

The applicable law shall be the internal law of the State of the place of injury, if that State is also—

a. the place of the habitual residence of the person directly suffering damage, or

b. the principal place of business of the person claimed to be liable, or

c. the place where the product was acquired by the person directly suffering damage.

Article 5

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also—

a. the principal place of business of the person claimed to be liable, or

b. the place where the product was acquired by the person directly suffering damage.

Article 6

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

Article 7

Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

Article 8

The law applicable under this Convention shall 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 damage for which compensation may be due;
4. the form of compensation and its extent;
5. the question whether a right to damages may be assigned or inherited;
6. the persons who may claim damages in their own right;
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 or limitation, and the interruption and suspension of this period.

Article 9

The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market.

Article 10

The application of a law declared applicable under this Convention may be refused only where such application would be manifestly incompatible with public policy ("ordre public").

Article 11

The application of the preceding Articles shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State.

Article 12

Where a State comprises several territorial units each of which has its own rules of law in respect of products liability, each territorial unit shall be considered as a State for the purposes of selecting the applicable law under this Convention.

Article 13

A State within which different territorial units have their own rules of law in respect of products liability shall not be bound to apply this Convention where a State with a unified system of law

would not be bound to apply the law of another State by virtue of Articles 4 and 5 of this Convention.

Article 14

If a Contracting State has two or more territorial units which have their own rules of law in respect of products liability, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial units to which the Convention applies.

Article 15

This Convention shall not prevail over other Conventions in special fields to which the Contracting States are or may become Parties and which contain provisions concerning products liability.

Article 16

Any Contracting State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right—

1. not to apply the provisions of Article 8, subparagraph 9;
2. not to apply this Convention to raw agricultural products.

No other reservations shall be permitted.

Any Contracting State may also when notifying an extension of the Convention in accordance with Article 19, make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension.

Any Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

Article 17

This Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twelfth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 18

Any State which has become a Member of the Hague Conference on Private International Law after the date of its Twelfth Session, or which is a Member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to this Convention after it has entered into force in accordance with Article 20.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 19

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 20

This Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in the second paragraph of Article 17. Thereafter the Convention shall enter into force

—for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance or approval;
—for each acceding State, on the first day of the third calendar month after the deposit of its instrument of accession;
—for a territory to which the Convention has been extended in conformity with Article 19, on the first day of the third calendar month after the notification referred to in that Article.

Article 21

This Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 20, even for States which have ratified, accepted, approved or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 22

The Ministry of Foreign Affairs of the Netherlands shall notify the State Members of the Conference and the States which have acceded in accordance with Article 18, of the following—

1. the signatures and ratifications, acceptances and approvals referred to in Article 17;

2. the date on which this Convention enters into force in accordance with Article 20;

3. the accessions referred to in Article 18 and the dates on which they take effect;

4. the extensions referred to in Article 19 and the dates on which they take effect;

5. the reservations, withdrawals of reservations and declarations referred to in Articles 14, 16 and 19;

6. the denunciations referred to in Article 21.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the . . . day of . . . , 19 . . , in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Twelfth Session.