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Products Liability and Choice of Law: The United States Proposals to the Hague Conference

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I. INTRODUCTION

Among Dean Wade's many accomplishments is his recent appointment as a member of the Secretary of State's Advisory Committee on Private International Law. One of the functions of this Committee is to render advice on what position should be taken by the United States on the various matters considered by the Hague Conference on Private International Law. The initial topic considered at the first meeting of the Advisory Committee attended by Dean Wade was what should be the choice-of-law rules for products liability. It seems appropriate that in these essays written in his honor there should be mention of the proposals made by the United States on this topic to the Hague Conference and of the reception that these proposals received.[1]

II. THE HAGUE CONFERENCE

The Hague Conference on Private International Law is dedicated to the standardization among nations of conflict-of-laws rules. It at-

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1. The opinions stated in this article are those of the author and are not shared necessarily by the U.S. State Department or by the other members of the Secretary of State's Advisory Committee on Private International Law.

tempts to fulfill its mission by the preparation of draft conventions that it hopes will be ratified by all, or at least by most, of its 26 member nations.[2] The Hague Conference holds plenary sessions at four-year intervals. At these sessions agreement is reached on the text of proposed conventions which previously have been prepared in draft form by Special Commissions, and a decision is made about which topics will be considered at the next plenary session of the Conference.

At a meeting of a Special Commission in October 1967, the United States representative, in accordance with his instructions, suggested that the law governing products liability would be a suitable topic for a convention. He pointed out that this field is relatively unexplored and that a convention on the subject, even if it were not widely adopted, could be expected to have considerable influence upon subsequent legislative enactments and court decisions. This suggestion was warmly received, and at the plenary session of the Hague Conference in October 1968 it was decided formally that choice-of-law rules for products liability should be placed on the agenda of the Hague Conference. Accordingly, a Special Commission was organized on which the writer served as United States Representative and as Rapporteur. This Commission met in the Hague for a week in September 1970 and for ten days during the early spring of 1971. At these meetings agreement was reached on the provisions of a draft convention on the law governing products liability, which will form one of the subjects for discussion at the plenary session of the Hague Conference in October 1972.

III. The Proposals of the United States

Prior to the first meeting of the Special Commission in September 1970, the member nations were invited to submit to the Hague Conference Secretariat their views on what choice-of-law rules should be stated in the Convention. In framing its replies, the United States was guided by the following criteria. First, a Hague Convention must state hard-and-fast rules if it is to attain its desired objectives of uniformity of result and ease of application. Such a convention is surely no place for the statement of a broad rule, such as one that calls for the application of the law of the state with the most significant relationship or of the state with the greatest concern in the issue to be decided. These rules, although

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

they may be correct and helpful, do not provide sufficiently precise guidelines to justify their inclusion in a convention. Secondly, if choice-of-law rules are to be acceptable, they must accommodate satisfactorily the interests of the various states involved and also must reflect the policies underlying the local law field that they purport to regulate. Thirdly, choice-of-law rules should lead to results that are fair to the parties involved. This requirement needs no elucidation. Fourthly, the rules should not involve distinctions that might appear unreasonable to observers. Although it seems clear that all rules of law, including those of choice of law, must distinguish between persons and between circumstances, experience shows that the courts will not remain content for long with a rule that operates in an unreasonable fashion. The confidence of the general public in a rule also will deteriorate if it leads to too many distinctions that seem to lack good horse sense. In particular, a rule of law is likely to be suspect if it distinguishes between persons who, at least from most standpoints, are similarly situated. The final criterion was that to the extent possible, choice-of-law rules should be in accord with the result reached, although not necessarily with the reasoning employed, by the majority of the decisions in point.

The first recommendation of the United States was that the Convention should be aimed primarily at obligations that are strictly tortious in character and do not involve any privity of contract. This suggestion received the approval of the great majority of representatives, and it was agreed that the Convention should not apply to situations in which the injured person acquired the product directly from the defendant. In part, this was because the obligations owed a person by his immediate supplier seem to be governed satisfactorily by existing choice-of-law rules. This was also because there is little reason to suppose that the obligations owed a person by his immediate supplier and those owed him by a person further removed in the chain of supply could be handled satisfactorily by the same choice-of-law rules. A convention that attempted to regulate both kinds of obligations inevitably would be more complex and might have a more difficult time achieving widespread adoption.

The affirmative proposals of the United States for choice-of-law rules were as follows:

> The plaintiff should be given the choice of several designated laws. For example, it is suggested that in the case of manufacturers it would be fair to permit the plaintiff to choose between (a) the law

of the state of manufacture, (b) the law of the state where he received possession of the product (by reason of purchase or otherwise) provided that the defendant had reason to foresee that this particular product, or similar products manufactured by the defendant, would be taken to this state or (c), subject to the same proviso as in (b), the law of the state where the plaintiff suffered injury by reason of the use or consumption of the product. By "state of manufacture" in the case of a component part is meant either the state where work on the component part is completed or the state where is completed work on the final product which includes the component part. The plaintiff should be permitted to choose between these two laws.

In the case of sellers, the state where the sale was made should be substituted for the "state of manufacture" in the rule suggested above.

In the case of repairers, the state where the repair was made should be substituted for the "state of manufacture" in the rule suggested above.

A bystander injured by a defective product should have the choice of either (a) the law of the state of manufacture, sale or repair or (b) the law of the state where he suffered injury provided the manufacturer, seller or repairer had reason to foresee that the particular product, or similar products manufactured, sold or repaired by him, would be taken to this state.[3]

A. Uniformity of Result and Ease of Application

These proposals are in accord with the criteria employed by the United States. In the first place, they provide choice-of-law rules that would be easy to apply; a court would simply apply the law chosen by the plaintiff if this was the law of one of the designated states. The fact that—subject to these well-defined limits—it would be up to the plaintiff to choose the applicable law naturally would ease the burden on the court. It also would ensure far greater uniformity of result between potential forums than could possibly exist if the court, rather than the plaintiff, were given discretion in choosing the applicable law. A possible alternative to these proposals could have been that in all, or in nearly all, circumstances the court should apply the law of a designated state. Such a hard-and-fast rule of choice of law also would be easy to apply and would lead to uniformity of result. It would have, however, the

3. Excerpted from the Reply of the United States to the Hague Conference Questionnaire on Products Liability.

mechanistic and arbitrary quality for which choice-of-law rules so frequently have been reproached.

B. Accommodation of Interests of States

The rules proposed by the United States have the additional advantage that they would result in a satisfactory accommodation of the interests of the states involved. This can be illustrated by a situation in which either the law of the state of injury or the law of the state where the product was acquired would impose liability upon the supplier. One purpose of a rule imposing liability upon the supplier surely would be to protect the plaintiff by granting him compensation for his injury. Another purpose might be to encourage the supplier to use proper care. In either event, the purpose, or purposes, of the law clearly would be served by application of the proposed rule. Application of the proposed rule would also be appropriate in a situation in which no similar liability would be imposed upon the supplier by the law of the state of manufacture, sale, or repair. This is so because a person should be entitled at least to the protection of the law of the state in which he happens to be at the time of his injury and because that state has an obvious interest in the security of persons within its territory. Moreover, the clear trend in the law of products liability is to favor the plaintiff's interests over those of the supplier.[4] A satisfactory accommodation also would result when the law of the state of manufacture, sale, or repair, rather than that of acquisition or injury, would impose liability upon the supplier. To the extent that this law was designed to encourage the supplier to use proper care, its purpose clearly would be furthered by the application of the proposed rule. Furthermore, it is unlikely that the imposition of liability upon the supplier would run counter to the policy underlying the rule of nonliability of the state of acquisition or injury. It is unlikely, in other words, that the state of acquisition or injury would have any objection if a liability stricter than that which would be imposed by its own law for the benefit of a person injured within its territory were imposed upon an out-of-state supplier. In addition, as stated above, application of a law favorable to the plaintiff would be in line with the clear trend in the law of products liability.

It is possible, however, to imagine a situation in which the law of the state of manufacture, sale, or repair was designed only to provide compensation for injured plaintiffs and was not intended to make the supplier exercise proper care. Even in this unlikely situation, it is be-

4. *See* note 12 *infra* and accompanying text.

lieved that the proposed rule could properly be applied. Its underlying purpose probably would be furthered,[5] and surely would not be frustrated, by its application to protect out-of-state plaintiffs. Likewise, the application of such a law would be in line with the trend toward favoring the plaintiff. The situation also can be imagined in which products are manufactured solely for export and do not reach the hands of any ultimate consumer in the state of manufacture. It might well be found that in such a situation a particular law of the state of manufacture dealing with standards of care or basis of liability was not intended to reach the particular manufacturer and thus was not properly applicable. If, on the other hand, it was found that the rule was intended to reach the manufacturer, it should be as applicable as any other rule of the state.

The fact that the proposed rules would favor the plaintiff is believed to be a strength rather than a weakness. Among the factors that should be borne in mind in framing choice-of-law rules are the policies underlying the relevant substantive field.[6] Any choice-of-law rule that hinders the implementation of these policies is certain to be discarded quickly, but one that furthers them is likely to prove successful. One difficulty is that all diverse policies underlying a given field often cannot be furthered by a single choice-of-law rule.[7] When there is one basic policy, or when the policies involved all seem to point in the same direction, however, an important measure of a choice-of-law rule's success is the extent to which it succeeds in furthering the underlying policy or policies. This fact has been appreciated by the courts. For example, it seems clear that the basic policy underlying the law of trusts is the protection of the expectations of the settlor. For this reason, courts almost invariably will uphold the validity of a testamentary trust that satisfies either the requirements of the state of the testator's domicile at death or those of the state of administration.[8] Protection of the expectations of the parties also is

5. The underlying purpose of the products liability law of the state of manufacture would be furthered except in the unlikely event that this law was intended only to protect persons injured in the state of manufacture or sale.

6. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

7. Torts is a good example. With only rare exceptions, tort rules are designed both to deter tortious conduct and to compensate an injured party. W. PROSSER, TORTS § 4 (11th ed. 1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, comment *c* (1971). The policy of deterrence would seem to require application of the law of the state of conduct, while the policy of compensation presumably would be furthered best by application of the law of the state of plaintiff's domicile or perhaps by that of the state of injury.

8. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note ch. 10, § 268 (1971); *see, e.g.*, Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 992 (1937); Hutchinson v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Cross v. United States Trust Co., 131 N.Y. 330, 30 N.E. 125 (1892); *In re* Chappell, 124 Wash. 128, 213 P. 684 (1923).

undoubtedly the basic policy underlying the field of contracts. For this reason, the courts normally will apply a law that would uphold the contract unless this would result in the serious infringement of the policy of a state with the greatest concern in the issue.[9] Likewise, in deference to the basic policy of workmen's compensation, the courts go to great lengths in refusing to grant recovery in tort or wrongful death under their own law in a suit by an injured employee against his employer, if the employer has insured against the particular risk under another state's workmen's compensation statute that gives him immunity from this liability.[10] Although it is not yet possible to point to a similar clear example in the field of torts, the fact remains that in a great majority of the recent choice-of-law cases involving torts the courts have applied a law that granted recovery to the plaintiff.[11] It seems not implausible to suggest that in doing this the courts were motivated by a policy favoring compensation for injury and for spreading the risk, although they did not explicitly so state in their opinions.

Even if this is not a correct evaluation, the trend in the law of products liability in nearly all nations of the world has been to favor the plaintiff by imposing increasingly strict standards of liability upon the supplier.[12] A choice-of-law rule giving the plaintiff a choice between two or more laws would be in line with this trend and, therefore, would stand a better chance of gaining widespread acceptance.

C. *Fairness to the Parties*

The proposed rules also would be fair to the parties involved. Clearly,they would be fair to the plaintiff since they so obviously favor him. They also would be fair to the supplier since he could only be held liable

9. *See, e.g.*, Pritchard v. Norton, 106 U.S. 124 (1882); A. EHRENZWEIG, CONFLICT OF LAWS §§ 175-84 (1962); R. LEFLAR, AMERICAN CONFLICTS LAW § 148 (1968). The courts have gone to great lengths to apply a law that would uphold the validity of a contract against the charge of usury. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971).

10. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 184 (1971); *see, e.g.*, Wilson v. Faull, 27 N.J. 105, 141 A.2d 968 (1958); Elston v. Industrial Lift Truck Co., 420 Pa. 97, 216 A.2d 318 (1966).

11. *See, e.g.*, the recent decisions of the New York Court of Appeals: 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, 290 N.Y.S.2d 734 (1968); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *But see* Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

12. Sommerich, *A Comparative Survey of Products Liability Law as Applied to Motor Vehicles*, 2 INT'L LAW. 98 (1967) (discusses the law of Austria, Belgium, England, France, Germany, Italy, Netherlands, Soviet Union, Spain, Sweden, Switzerland, and the United States); Szladits, *Comparative Aspects of Product Liability*, 16 BUFFALO L. REV. 229 (1966).

under a law if he had reason to foresee its application. The supplier hardly could complain about being subjected to liability for an out-of-state injury under the law of the state of manufacture, sale, or repair. Of course, under the proposed rules the plaintiff would not choose application of this law unless it imposed a greater liability upon the supplier than the law of the state of acquisition or of the state of injury. But the supplier obviously could be expected to insure with reference to this law, and it is questionable whether this insurance cost would be markedly increased by the fact that he would be subjected to a greater measure of liability for out-of-state injuries under this law than under the law of the state of acquisition or of injury.[13] Nor could the supplier properly complain about application of the law of the state of acquisition or of injury, since under the proposed rules the law of such a state would not be applicable unless the defendant had reason to foresee that the particular product, or similar products that he manufactured, sold, or repaired would be taken to that state. To repeat, the proposed rules would ensure that the supplier could be held liable only under a law whose application he and his insurer would have reason to anticipate.

D. Unreasonable Distinctions

The proposed rules also would restrict the need for making distinctions that might appear unreasonable to many. Of course, the proposed rules would favor the plaintiff over the supplier, but this, as has been stated, is in line with the basic trend in the law of products liability.[14] By giving the plaintiff a choice between two or more laws, the proposed rules would require the drawing of fewer distinctions between plaintiffs and between suppliers than would the usual choice-of-law rules, which place reliance upon a single contact. For purposes of illustration, let us compare the proposed rules with a system calling for the constant application of the law of the place of injury. It is unlikely under the proposed rules that a distinction would have to be drawn as frequently between plaintiffs who are injured by similar products of the same manufacturer and who are otherwise similarly situated, simply because the plaintiffs sustained injury in different states. To be sure, there would be situations in which each plaintiff would elect to have his rights against the manufacturer determined under the law of the state of his injury. On the other hand, there also would be situations in which both plaintiffs would elect

13. *Cf.* Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

14. *See* note 12 *supra* and accompanying text.

the law of the state of manufacture, and, in this case, no distinction would be made between plaintiffs. The rules also would decrease the number of situations in which distinctions must be drawn between suppliers. One example would be the case in which products of two manufacturers from the same state are sold to different persons in state *X* and cause injury to one of these persons in state *Y* and to the other in state *Z*. In this situation, it might seem unreasonable for one manufacturer's liability to be determined under the law of *Y* and the other's under the law of *Z*. Such an eventuality, of course, could occur occasionally under the proposed rules, but it would not do so in every case, since there would be cases in which both plaintiffs would elect to have their rights determined under the law of the state of manufacture or under that of the state of acquisition. In short, fewer distinctions would be drawn under the proposed rules than under rules calling for the application of a single law, such as that of the place of injury, the place of acquisition, or the habitual residence of the plaintiff.[15]

E. Consistency with Existing Precedent

Finally, support for the proposed rules can be found in existing authority, especially in American case law. To be sure, no known court, in a products liability case involving multistate contacts has stated explicitly that the plaintiff may elect to base his claim against the supplier on the law of any one of the states mentioned in the proposed rules. Nevertheless, courts in the United States occasionally have applied the law of each of these states to permit recovery against the supplier. In other words, there is authority in the United States for basing recovery against the supplier on the law of the state in which the plaintiff suffered injury by reason of his use or consumption of the product,[16] on the law of the state in which the plaintiff received possession of the product,[17] or on the law of the state of manufacture or sale.[18] The rationales employed by the courts in these cases have ranged all the way from a strict vested rights approach, under which the law of the state of injury is

15. *See* note 25 *infra* and accompanying text.

16. *See, e.g.*, Southern Ariz. York Refrigeration Co. v. Bush Mfg. Co., 331 F.2d 1 (9th Cir 1964); Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940); Heath v. John Deere Co., 308 F. Supp. 235 (W.D. Okla. 1969); Conlon v. Republic Aviation Corp., 204 F. Supp. 865 (S.D.N.Y. 1960); Wojciuk v. United States Rubber Co., 13 Wis. 2d 173, 108 N.W.2d 149 (1961).

17. *See, e.g.*, Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962); Bowles v. Zimmer Mfg. Co., 277 F.2d 868 (7th Cir. 1960); McCrossin v. Hicks Chevrolet, Inc., 248 A.2d 917 (D.C. Ct. App. 1969); Hardman v. Helene Curtis Indus., Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

18. *See, e.g.*, Decker v. Fox River Tractor Co., 324 F. Supp. 1089 (E.D. Wis. 1971); Southland Milling Co. v. Wege Fat, Inc., 248 F. Supp. 482 (E.D. Ill. 1965).

applied,[19] to a modern governmental-interests analysis.[20] What seems to emerge clearly from the cases taken as a whole, irrespective of the rationales employed, is a judicial desire to apply a law favorable to the plaintiff. The great majority of cases, and particularly the more recent ones, have applied a law that would permit recovery against the supplier.[21] The cases thus give some support to the position taken in the proposed rules that the plaintiff should be able, at least in some situations, to choose between the laws of two or more states.

IV. EPILOGUE

"The best laid plans o' mice an' men gang aft a-gley."[22] The proposals of the United States did not meet with favor at The Hague and were disapproved by two-thirds of the representatives present. The reasons for this disapproval were essentially two in number. First, the representatives did not wish to give the plaintiff a choice between the law of two or more states. A similar objection to the proposed rules undoubtedly would be made by some quarters in the United States. The second reason for the disapproval of the rules was the notion that choice-of-law rules should be objective in character and should not favor one party over the other. The merits of this notion are difficult to grasp, since all systems of law contain rules of substantive law that are designed to favor certain classes of persons and, in particular, to protect the weak against the strong. It is difficult to understand why the same should not be done by choice-of-law rules. In particular, it is difficult to understand why it is in any way improper for choice-of-law rules to seek to further the policies underlying the substantive field of law to which they apply. Clearly, the whole trend in the law of products liability has been to favor the plaintiff over the supplier.[23] Why then would it be improper for choice-of-law rules relating to products liability to do the same?

Although the proposals of the United States were rejected, the Special Commission on Products Liability advanced a novel proposition of its own. This is contained in Articles 3, 4, and 5 of the Draft

19. *See* note 16 *supra*.

20. *See, e.g.*, McCrossin v. Hicks Chevrolet, Inc., 248 A.2d 917 (D.C. Ct. App. 1969).

21. *See* notes 16-18 *supra*. On rare occasions some courts have applied a law favorable to the defendant. *See, e.g.*, Texas Motorcoaches, Inc. v. A.C.F. Motors Co., 154 F.2d 91 (3d Cir. 1946); Ryan v. Clark Equip. Co., 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1969); Hermanson v. Hermanson, 19 Conn. Supp. 479, 117 A.2d 840 (1954); Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948).

22. Robert Burns, *To a Mouse*, in AN ANTHOLOGY OF FAMOUS ENGLISH AND AMERICAN POETRY 188 (W. Benét & C. Aiken eds. 1945).

23. *See* note 12 *supra*.

Convention that will be submitted to the Twelfth Session of the Hague Conference in October 1972. These Articles read as follows:

ARTICLE 3

The applicable law shall be the internal law of the State of the habitual residence at the time of the accident of the person directly injured by the product. This law, however, shall not apply if neither this product nor products of the same origin and the same type were available in that State through commercial channels with the consent, express or implied, of the person claimed to be liable.

ARTICLE 4

If the law designated in Article 3 does not apply, the applicable law shall be the internal law of the State in which the accident occurred. This law, however, shall not apply if neither the product nor products of the same origin and the same type were available in that State through commercial channels with the consent, express or implied, of the person claimed to be liable.

ARTICLE 5

If neither of the laws designated in Articles 3 or 4 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.

Article 3, the basic provision, can be described appropriately as plaintiff-oriented, since, subject to the exception stated in the second sentence, it calls for application of the law of the state of plaintiff's habitual residence. The reasoning behind this provision is undoubtedly that, between plaintiff and defendant, the plaintiff is the party more in need of protection and accordingly should, whenever considerations of fairness to the defendant permit, be given the protection accorded him by his own personal law. This provision, however, is inconsistent with the notion frequently expressed at the meetings of the Special Commission that choice-of-law rules should be objective and not favor one party over the other. On the other hand, it does not go as far as the United States proposals since it does not permit the plaintiff to choose between the laws of two or more states.

One virtue of Article 3 is that, subject to the exception stated in the second sentence, it calls for application of the law of a state—that of the plaintiff's habitual residence—that has an obvious interest in the determination of the question whether the plaintiff should be given recovery against the supplier. Another possible virtue is that it would favor the economic interests of the United States, because among the nations of the world the rules of products liability in force in this country proba-

bly are the most favorable to the consumer.[24] As Article 3 is now written, a United States citizen who purchases the product of a foreign manufacturer frequently would have his rights against the manufacturer determined by the law most favorable to him—the law of the state in the United States where he habitually resides—even if the injury occurs in the country of that manufacturer's principal place of business. On the other hand, a United States manufacturer of a defective product that causes injury to a foreigner frequently would have its obligations to him determined by the law of the foreigner's habitual residence, which is more favorable to the manufacturer. Moreover, this would happen even though the foreigner purchased and was injured by the product in the United States.

Article 3 also would give rise to distinctions that undoubtedly would appear unreasonable and unfair to some persons and that might indeed transgress the prohibitions of equal protection.[25] Take, for example, the situation in which two Frenchmen make purchases in the same New York store. One purchases the product of manufacturer *A*, a large corporation whose products are sold in France and throughout the world, and the other purchases the product of manufacturer *B*, a small corporation whose products are sold only in New York. As Articles 3 and 5 are presently written, the rights of the first purchaser would be determined by the law of France, the state of his habitual residence, but the rights of the second purchaser would be determined by New York law, since the goods of manufacturer *B* are sold only in New York. This would mean that the rights of two Frenchmen who each did essentially the same act in New York would be governed by different laws and that one would have rights under the more favorable law of New York, whereas the other's rights would depend upon the less favorable law of France. Likewise, manufacturer *A*, which is large and presumably strong financially, would have its obligations determined under the more favorable law of France because its products are sold in that country. On the other hand, manufacturer *B*, which is small and might well be weak financially, would have its rights determined under the less favorable law of New York because its products are sold only in that state. Likewise, the rights of a New Yorker who purchases the product of a French manufacturer

24. *See* note 12 *supra*.

25. The Supreme Court has held, generally speaking, that discriminations that cannot legally be made by the states under the equal protection clause of the fourteenth amendment are likewise prohibited to the Federal Government by reason of the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

in France would be determined by New York law if similar products of that manufacturer are sold in New York. As a result, he might receive better treatment than would a Frenchman who on the same day and in the same store had purchased the identical product of this same manufacturer.

These hypothetical cases seem to illustrate a weakness of rules calling for application of what might be termed a party's personal law, such as the law of the state of his domicile or habitual residence.[26] These rules inevitably will lead to the drawing of distinctions between persons who in most respects are similarly situated. At least in the opinion of this writer these distinctions often would be unfair and invidious. It is believed that a more hopeful approach is afforded by choice-of-law rules that either seek to further the basic policy underlying the substantive law field involved, as the United States proposals would have done, or else seek to arrive at the best possible accommodation of the policies underlying the relevant local law rules of all states having significant contact with the parties and the transaction. Rules such as this would reduce to a minimum the need for drawing distinctions between persons who in most respects are similarly situated. By seeking to further the relevant local law policies, they also would have the best chance of gaining widespread acceptance.

V. CONCLUSION

The rules proposed by the United States and those embodied in the draft Convention reveal a marked difference in approach. A principal point of difference involves the question whether choice-of-law rules should take cognizance of relevant local law policies and seek to further those policies. An affirmative answer to this question is given by the rules proposed by the United States. The contrary position is taken in the Convention. The latter is remarkable in that it calls for the frequent application of the law of the state of the plaintiff's habitual residence. By doing so, the Convention gives preeminence to one party's personal law in determining rights and liabilities in tort. This will lead to results that may seem unjust and unreasonable since it will require the drawing of distinctions between persons whose position is essentially similar.

26. For a discussion of the relative advantages and disadvantages of a "personal law of torts" see D. CAVERS, THE CHOICE-OF-LAW PROCESS 150-59 (1965); Note, *Products Liability and Choice of Law*, 78 HARV. L. REV. 1452, 1465-66 (1965).