

International Handbook on Unfair Competition

von

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Preface

International trade and globalization are a reality. Without doubt, they require free competition. Where there is competition, there is, alas, also unfair competition. As experience has shown, it is an illusion to hope that market forces alone can keep this problem in check.

It is therefore generally regarded as necessary to establish some legal safeguards against unfair market behaviour and to monitor market practices not only under the banner of freedom, but also under the banner of commercial decency. How these mechanisms are labeled is of secondary importance. The term “unfair competition law” is used here as it was more than a century ago the first (and until now only) explicit regulation in this area on an international level, the Paris Convention.

As far as we know, all developed market economies have established some legal mechanism, often in combination with judge made law and rules of voluntary restraint, to combat unfair market behavior and have counterbalanced them towards the principle of economic freedom. These mechanism typically aim at guaranteeing enterprises a level playing field in competition (which is endangered by impediment, disparagement, causing confusion, misappropriation) and at guaranteeing consumers the right to make undistorted commercial choices (which is endangered by deceptive or harassing commercial practices). Both aims are considered a necessity when it comes to promoting an efficient market system that serves the interests of all participants.

The way countries have done this, however, differs considerably. The reasons for this are mainly historical. When unfair behaviour emerged at the end of the 19th century as a side effect of free trade and growing industrialization, all countries tried to solve this new problem by applying the legal system already in force. Since this general system of law was quite diverse – the most pronounced difference being between the so-called civil law and common law countries – the approach to unfair competition was divers, too.

And this variety became even more pronounced with the emergence of consumer protection rights in the 1960s. While some countries consider competitor and consumer interests in fair commerce as being two sides of the same coin, others distinguish between the protection of competitors (which is often seen in relation to tort and IP-law) and the protection of consumers (which is often seen as an annex to antitrust law). Consequently, unfair competition law is seldom a clear cut field of law.

While on the one hand these differences should not be overrated, because almost all countries seem to achieve adequate solutions in the suppression of specific phenomena of unfair commercial behavior – in particular in core areas like advertising and marketing where the interests of competitors and consumers are inseparably intertwined – they are also, on the other hand, a hindrance to free trade.

It is generally agreed that international trade and globalization require international, unitarily accepted standards. These standards can, however, not be found

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without in-depth knowledge of how the different countries around the world see this problem.

This book aims at giving such an insight into the system of two dozen countries. In addition it discusses the current status of international and regional harmonization. Hopefully this paves the way to a better understanding of a complex problem like “unfair competition” (and maybe even to some harmonization).

Munich, November 2012

Frauke Henning-Bodewig

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