

Division of Research
Graduate School of Business Administration
The University of Michigan

September 1983

EUROPEAN LAWS ON PRODUCT LIABILITY

Working Paper No. 345

George D. Cameron III

The University of Michigan

FOR DISCUSSION PURPOSES ONLY

None of this material is to be quoted or
reproduced without the expressed permission
of the Division of Research.

EUROPEAN LAWS ON PRODUCT LIABILITY

by
George D. Cameron III
Professor of Business Law

EUROPEAN LAWS ON PRODUCT LIABILITY

This research project was undertaken during Winter Term, 1983, as part of a sabbatical leave assignment. What follows is a summary of the research findings to date.

THE PROJECT

Purpose of the Study.--For manufacturers and sellers of goods, the revolution in product liability law during the 1960's and 1970's was one of the most significant legal developments for U.S. business. Not only U.S. firms, but foreign firms selling in the U.S. market, were and are subjected to these new and expanded theories of liability. The extent to which one country's adoption of such radically different legal rules may impede or warp international trade has not yet been fully explored.

For the most part, the product liability revolution in the U.S. did not represent a conscious choice by the policy-making branches of the government--the legislature and the executive. Policy choices were made--the published opinions contain numerous examples--but they were made by the least politically accountable branch, the courts. Moreover, because of the existence of 51 separate sovereignties, the revolution did not occur simultaneously throughout the country, and is to some extent still in progress. State legislatures are only recently (the late 1970's and the early 1980's) getting into the policy-making act on product liability, and they are functioning as a counter-revolution. Faced with the pleas of various manufacturers and distributors who are confronted with skyrocketing liability insurance premiums and potential bankruptcy or dissolution, state legislatures have been adopting statutes which cut back the scope of court decisions in this area.

As U.S. business becomes increasingly internationalized, it is important for U.S. firms to be aware of their potential product liability exposure in other countries where their goods may be manufactured or sold. This study is designed to provide such information on the laws of our major European trading partners. Product liability law has also been developing rather rapidly in several Western European nations, although no litigation crisis has appeared yet.

Scope of the Study.--Although the primary focus is on the laws of England, France, and West Germany, comparisons are also made with the laws of Scotland, Belgium, Denmark, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. Legal issues involved in product liability cases include jurisdictional bases, theories of liability, possible plaintiffs, possible defendants, possible defenses, possible damages, and procedural questions. A 1975 study for the Association Européenne d'Etudes Juridiques et Fiscales, Product Liability in Europe, listed 38 questions, many of them with multiple parts, for its eight nations' authors. (See Appendix D.)

To provide an initial structure for this research, sixteen questions were developed, as follows:

1. Does the nation recognize jurisdiction over a nonresident on the basis of the doing of local business, and if so, how extensive need the business be?
2. Does the nation recognize jurisdiction over a nonresident on the basis of a tortious product failure there?
3. What is the Statute of Limitations period for product liability claims?
4. Does the nation recognize negligence as a basis for product liability?
5. Does the nation recognize breach of warranty as a basis for product liability?

6. Does the nation recognize strict liability as a basis for product liability?
7. May an injured buyer successfully sue the manufacturer?
8. May an injured third party successfully sue the seller?
9. May an injured third party successfully sue the manufacturer?
10. To what extent is contributory negligence a defense?
11. To what extent is assumption of risk a defense?
12. To what extent is a component manufacturer liable for product failures?
13. May liability be imposed on the basis of respondeat superior?
14. May a plaintiff plead both a contract claim and a tort claim in the same case, or successively?
15. May a successful buyer/plaintiff receive both restitution and damages?
16. May liability be excluded by a contract clause to that effect?

Even with this more limited set of questions, 208 researchable points exist when 13 countries are included. For this reason, the study concentrated on England, France and West Germany, and on the availability of strict liability as a theory in product cases.

THE RESEARCH

Nearly all of the research was done at The University of Michigan Law Library, which has a very extensive Foreign Law collection. Although scheduling and other constraints prevented a European study tour during 1983, such an on-site visit is projected for 1984. The extent to which this study is lacking because of such first-hand exposure is unknown at this time. It is possible that translations of additional primary source material (cases and statutes) might be more readily available in Western Europe. Several research approaches were used, although some of them proved rather unproductive.

English-Language Periodicals.--Thus far, the single most useful source of information has been law review articles, located through the Index to Legal Periodicals. All relevant English-language periodical literature has been photocopied and analyzed, even those which pertained to only one country or to U.S. developments. Among those most useful (see the accompanying Bibliography for a more complete list) are the articles by Bartlett (1975), Fleming (1975), Gibson (1974), Hanotiau (1978), Hervey, (1981), Hollenshead and Conway (1980), Lorenz (1975), McMahon (1973), Orban (1978), Park (1978), Plummer (1980), Siegmund (1981), Sommerich (1967), and Szladits (1966). The information in these articles was analyzed in terms of the sixteen basic questions posed earlier, on a country-by-country basis. Comparisons were also made between earlier studies such as that by Szladits and Orban's more recent one. Szladits found, for example, that France and West Germany did not recognize strict liability as of 1966; Orban says that both countries now do so, at least in some cases.

The most obvious deficiency in this first search pattern is that it depends on the selections made by other persons, and relies on the accuracy of their findings. As to the accuracy question, an attempt was made to verify research findings by using other sources. The "prior selection" issue does pose some real difficulties. Since Greece, Ireland, Portugal, and Spain have only more recently been integrated into the mainstream of European commerce, few comparisons are available on their product liability laws. Luxembourg is sometimes mentioned as having a separate national legal system, and sometimes not. Most comparative studies have overlooked the existence of the separate legal system of Scotland, and have merely covered English product liability laws. These issues will require continued further research.

LEXIS. The high initial hopes for using the LEXIS computerized research system on this project proved unjustified. While there are foreign law files in the LEXIS system (English, French, EEC), the available materials were, in general, not very useful. "Product liability" and "strict liability" have only recently come into usage in Europe as terms of art, so that it is more difficult to know whether one is really accessing all available materials on the system. The EEC cases, for instance, all seemed to deal with taxation or restriction of the importing of goods. While this is not particularly surprising, it does not advance one's knowledge of product liability rules very far. LEXIS did turn up a few English cases dealing with breach of warranty in sales of goods contracts, most of them involving used cars. Some of the difficulty may have been due to the researcher's lack of skill in using the system, but it was nevertheless a big disappointment.

CCH Common Market Reporter.--The Common Market Reporter published by Commerce Clearing House contains a considerable amount of useful background information, but little direct coverage of product liability laws in the various member-nations. The following topics were photocopied and reviewed for this study: "History," S.100; "Free Movement of Goods," S.201; "Industrial Safety," S.3441.01; "Dangerous Substances," S.3450; "Legal Rights," S.5206; "Right to Information," S.5216; "Consumer Protection," pp. 2535-2536; "Court of Justice," pp. 3803-4061; and "Jurisdiction," pp. 5003-5036. This CCH set also includes a case reporter, but nearly all of the cases deal with taxation and trade regulation.

Card Catalog.--Given the scope of the Law Library's collection, one would have imagined that a considerable number of treatises would be available on so crucial a topic. Only three English-language treatises are listed under "Product Liability," but two have proved very useful. C. J. Miller and P. A.

Lovell compare English and U.S. rules on product liability in an excellent 1977 study; it is done in some detail, and with an historical perspective. The other work is the 1975 study referred to on page 2, supra, which asked 38 questions relating to product liability of authors from eight countries-- Belgium, Denmark, France, Germany, Italy, the Netherlands, England, and the United States. Rather surprisingly, no multi-volume study along the lines of Miller and Lovell currently exists for product liability, although there are such studies on "Foreign Penal Codes," "Industrial Property," and "Industrial Relations." (For Sweden, as an example, there are English-language translations and/or studies dealing with "The Penal Code of Sweden," "The Swedish Code of Judicial Procedure," "Ordinances, Decrees and Official Instructions relating to the Protection of Industrial Property," "Civil Procedure in Sweden," and "Law and Industrial Relations in Sweden.") Even where there is an English-language volume explaining a country's legal system, it may not have specific or extensive coverage of the country's product liability rules. The rules for Denmark, for instance, are covered in a rather perfunctory way in the chapters dealing with "Obligations" (Contracts) and "Torts." The contrast with the massive U.S. literature on this topic is striking.

Oceana Publishers.--To fill this very large and important information gap, Oceana Publications is preparing a series of monographs on product liability in 15 selected nations, including most of Western Europe. (Here again, Scotland, Luxembourg, Greece, Spain and Portugal are omitted.) While the specific number of pages of text and bibliography in each study is listed in a bibliography appearing in the Law Library Journal, and the publication date for each is listed as 1981-, only the first two studies, for Argentina and Australia, have actually been published. This series will be a valuable

addition to the literature, if a comparable mode of analysis is used for each nation's rules.

Original Materials.--While there is a wealth of material on the various foreign legal systems, dating back to early historical times (the statutes of the German city-states prior to unification, for example), most of it was not usable for present purposes. Laborious translations from the French and Spanish sources are possible, but the opportunity costs are enormous. For German, Italian, and Portuguese sources, a professional translator would be necessary. A few translations of useful source materials do exist, for example, Aubrey and Rau's Droit Civil Francais. The practical limitations of a short-term study have meant that most of these foreign-language sources have been omitted from consideration, but they can and will be utilized on a long-term basis.

FOREIGN LEGAL SYSTEMS

Countries.--Significant differences exist among the national legal systems in the 13 countries included in this study. The predominant type is of course the Civil-Law system, in which the body of legal rules is found in comprehensive statutory enactments which have been passed as of one point in time, with the idea of covering all the law applicable in that country. Under this system, court cases are not really binding rules for future cases, although the general approach of most lower courts is to follow the interpretations of the country's supreme court, at least. Even within this group, there are some significant differences. Greece relied heavily on the old Roman Law well into the 20th Century, and the legal system of Scotland did not develop in the same way as most of the Civil Law systems on the continent. Denmark is probably properly listed as a Civil Law country, although without the close ties to the Roman Law of most others.

England is the only truly Common Law country in this study, other than the U.S., but English courts do not have the power of judicial review which is so freely exercised by courts here. In the English system, Parliament is supreme, and case law rules may be overridden at any time by a statute. Most English product liability law is still case law, although some statutes have been passed. Ireland may still qualify as a Common Law system, but one cannot be sure. There is a bewildering conglomeration of pre- and post-independence statutes, but the Irish Law Reports remain an important source of law, too. Since it lacks the comprehensive "Code" of most Civil Law countries, Ireland is probably best classified as a common law country.

International Organizations.--In addition to these differences in the sources of national laws, proposals from three international bodies have impacted on European product liability law. The Hague Conference on private international law approved a Convention in 1972 for the Law Applicable to Products Liability; this is an attempt to provide greater uniformity in choosing which country's law applies to a multinational transaction. In addition, the EEC Commission has drafted a Directive and the Council of Europe a Convention, both of which deal with the substantive law of product liability and move in the direction of strict liability.

JURISDICTION

The Problem.--One of the crucial questions in any litigation is a determination of where a lawsuit can be filed and prosecuted so as to produce a judgment which will be recognized and enforced by other states and nations. The answer to this question has both strategic and tactical implications. A cost/benefit analysis of the risks involved is likely to be quite different, depending on whether a lawsuit can be prosecuted in one's home state or

country, or only in a foreign jurisdiction hundreds or thousands of miles distant. Many litigations which might be cost-justified if filed locally, might not be if one had to factor in the additional time, expense, and uncertainty involved in filing in a foreign country.

"Long-Arm" Jurisdiction in the U.S.--Lawyers here are very familiar with jurisdictional problems (and choice of law issues), since they have to deal with 50 different state legal systems. With our free movement of persons and products across state lines, a product liability case can very easily involve two or more states. A resident of state #1 buys a product in state #2, and the product causes injury in state #3. It may have been manufactured in state #4, by a company whose home office is in state #5. Who can be sued where, and for what? Even where the plaintiff has the option of using the U.S. District Court on the basis of diversity of citizenship between all plaintiffs and all defendants (no state or country is represented on both sides of the litigation), the problem still exists: which U.S. District Courts are available? In these cases, since they are based on ordinary state law rules of tort and contract, the U.S. District Courts do not have nationwide jurisdiction. Rather, they have the same territorial "reach" as would a trial court of general powers of the state in which they are located.

Under the earlier common law analysis, jurisdiction over the persons of the litigants existed under any one of three circumstances: the party was domiciled in the state where the court was located; the party had been personally served with process in the state where the court was located; or the party had consented to having the case heard there. Jurisdiction over plaintiffs can nearly always be justified under the third alternative, at least, but what about the out-of-state, non-resident defendant? This earlier common

law approach to jurisdiction had no real answer for lawsuits against the out-of-stater, except to track him down, or forget the claim.

Commencing in the 1960's, states became much more aggressive in asserting their judicial power over non-residents. In 1961, for example, Michigan passed a statute which created six additional bases for "limited" personal jurisdiction. If any of these six specified relationships existed between the nonresident and persons or things within the state, the Michigan courts could hear a claim arising out of that relationship. If a contract is made here, lawsuits relating to that contract can be heard here, even though the defendant is not resident here, is not personally served here, and does not consent to be sued here. Similarly, cases may be heard here where the defendant has caused tort consequences here, or owns or uses real or tangible personal property here, or insures a risk located here, or makes a contract elsewhere to deliver goods or services here. In addition, an individual may be sued here on claims relating to his performance as director of a corporation formed here or having its principal place of business here. Similar rules now exist in many other states.

The applicability of these alternative jurisdictional bases to product liability cases is obvious. For contract claims, the plaintiff's home state might have jurisdiction on the basis that the contract for the goods was made there, or that, although made elsewhere, it called for the delivery of goods there. For the tort theories of negligence and strict liability, the plaintiff's damages caused by the product would be the "consequences" in the plaintiff's state. Some plaintiffs, especially third parties, might also be able to use the defendant's ownership of the product within the state as a jurisdictional base. Thus far, the major disagreement which has arisen is whether a product failure within the state, without more, provides a sufficient

jurisdictional base. State courts have produced conflicting answers to this question.

Role of the U.S. Supreme Court.--In our federal system, the U.S. Supreme Court serves as the umpire when the claims of independent sovereignties conflict. That umpire role is involved in jurisdictional disputes because of two constitutional provisions--the "due process" clause and the "full faith and credit" clause. The latter provision says that each state must give full faith and credit to the public acts, records, and judicial proceedings of every other state. This rule is not discretionary; it is mandatory. Only those court judgments which are based on adequate jurisdiction over the persons of the litigants, however, need to be given full faith and credit. Ultimately, then, the U.S. Supreme Court determines how far a state can reach out with its process, by determining which state judgments are entitled to full faith and credit in other states.

The Court's general approach has been to see whether the particular lawsuit would violate the basic standards of due process if the defendant were forced to appear and defend. Would the maintenance of the lawsuit in the particular state "offend traditional notions of fair play and substantial justice"? The leading application of this approach is World-Wide Volkswagen Corp. v. Woodson, 100 S.Ct. 559 (1980). In that case, the fuel tank on an Audi purchased in New York exploded when the car was rear-ended by another vehicle in Oklahoma. The injured plaintiffs brought suit in Oklahoma, naming as defendants the German manufacturer, the nation-wide U.S. marketing company, the regional distributor (World-Wide), and the New York retail dealer (Seaway Motors). The trial judge of the Oklahoma court (Woodson) asserted personal jurisdiction over all four defendants. World-Wide sought a restraining order which would prohibit him from continuing the case against them. The Oklahoma

Supreme Court agreed with Woodson, and the U.S. Supreme Court agreed to hear this case as a vehicle for resolving the dispute over this jurisdictional question. The Court held that a product failure which occurs in a particular state through happenstance does not, of itself, give that state personal jurisdiction in product liability actions which may result from the failure. Jurisdiction could be asserted over the German manufacturer and its national distributor, on the basis of their nation-wide distribution and promotion. For the regional distributor and the local retailer, neither of whom had had any connection whatsoever with the state of Oklahoma or its residents, suit would have to be filed where they were incorporated or did business.

International Jurisdiction.--As seen in the VW case, foreign manufacturers and distributors doing business in the U.S. will be subject to our rules on personal jurisdiction in product liability cases. While there is no international equivalent of the full faith and credit clause, national courts will usually enforce judgments from other countries if they are convinced that the judgment was based on adequate jurisdictional grounds.

If anything, jurisdictional rules in most European nations are even more liberal than our own, even after our reforms. Trials even of criminal defendants in absentia are not unknown in Europe. Certainly most nations would enforce judgments based on the minimum contacts outlined above, and perhaps even in circumstances like those in the VW case. Under section 14 of the French Civil Code, anyone who has incurred obligations to a Frenchman may be sued in a French court. German and Austrian courts have jurisdiction over a defendant if some asset of the defendant's can be found within the country, and recovery in the lawsuit is not limited to the value of the asset. Jurisdiction in an Austrian paternity suit against Jean-Claude Killy was based on a pair of underwear he had left in a hotel there. These examples indicate that

U.S. manufacturers and distributors doing business in Europe on any regular basis are almost certainly suable there. U.S. courts would presumably enforce most of these judgments, even though they might disagree with the policy underlying some of them.

CHOICE OF LAW

Having determined where the lawsuit may be brought, one next needs to answer another basic question--where more than one state or country is involved in the litigation, whose law applies? This decision also has both strategic and tactical implications.

Procedure versus Substance.--It is universally agreed that the court where the lawsuit is being tried uses its own procedural law. Thus, where there are several possible places where the lawsuit might be filed, the plaintiff's lawyer would usually try to choose the one with the most favorable package of rules. For instance, since the plaintiff must normally bear the burden of persuading the trier of fact, plaintiffs' lawyers would usually prefer a state which permits civil juries to arrive at a verdict by majority vote, over a state which requires a unanimous verdict. Particularly in a product liability case, plaintiffs' lawyers would usually prefer a state with liberal pretrial discovery procedures, so that the defendant manufacturer's records of tests and quality control procedures could be obtained. And so on.

"Substance," on the other hand, refers to the law applicable to the existence of the claim itself. What theories of liability are available? What are the essential elements of a cause of action? What defenses are available against the claim? These substantive law questions may have to be decided according to the law of some other state or nation. The court trying the case will first have to determine whose law should apply, and then what

that law is. These choice of law rules have been changing, and there is no general consensus, even within this country, let alone on an international basis.

One other complicating factor must be mentioned. While most legal questions can be categorized as procedure or substance without too much difficulty, some issues do cause problems. What is the "burden of proof," for instance? Is it only a procedural matter, or does it go to the essence of the plaintiff's case? This is a particularly crucial point in a product liability case based on negligence. Must the plaintiff offer specific proof of the defendant's failure to exercise reasonable care in making or selling the item, or must the defendant affirmatively prove a lack of negligence once the plaintiff has proved that the product caused injury? The difference is more than semantic. Generally, the party with the burden of going forward with the evidence will lose the case if some evidence is not forthcoming. Likewise, the party with the burden of persuasion must convince the trier of fact that his version of the facts is more likely than that of the other party. Where another state or nation involved in the litigation has a different burden of proof rule than that of the forum state, an answer to the "substance or procedure" question may ultimately determine the outcome of the litigation.

Choice Rules for Contract Claims.--It is generally agreed that the law of the place where the contract is made governs its validity and enforceability. It is also generally agreed that the contract is made where the last act necessary to form the agreement occurs, i.e., where the acceptance of an offer takes legal effect as an acceptance. Legal systems differ as to just where that place is, but not as to the basic choice of law rules, once the place of making is determined.

Although there is perhaps a bit more room for argument, there is also general agreement that the law of the place of performance of the contract governs the propriety of the performances given or tendered. The law of that place would determine whether there had been a breach and if so whether it was material, or whether any nonperformance was justified. The procedural law of the forum state would then (presumably) be used to determine what remedies were available to the injured party.

It is also generally agreed, both here and in Europe, that the parties may in their contract specify that their agreement is to be interpreted according to the law of a particular state or country. Here again, if anything, European rules are even more liberal than our own.

Choice Rules for Tort Claims.--The choice rules for contracts are inherently easier to create and apply, since intended conduct is involved. For tort claims based on negligence or strict liability, unintended acts and their consequences are involved. It is thus more difficult to create and apply rules uniformly, since there is a large element of chance involved in these tort cases. Hard and fast rules can often produce illogical results in these cases. The choice rules for tort claims have thus been much debated, and modified, and are much less uniform.

Historically, the choice of law rule for tort cases was that the substance of the case was governed by the lex loci delicti, the law of the place where the tort occurred. Even under that rule, there is disagreement over where a multi-state tort "occurs." Assume that someone's negligence in a factory in state A results in the production of a defective product, which fails and causes an injury in state B. Did this tort occur where the negligent act or omission took place--state A? Or did it occur where the last act necessary to produce the plaintiff's cause of action took place--state B?

Persuasive arguments can be made on each side, and there is no clear-cut, "correct" answer.

Perhaps in part in an attempt to avoid making this difficult all-or-nothing decision, many courts and commentators have advocated a "grouping of contacts" rule. This approach looks to see which state or country has the most significant relationship to the case, considering all the facts. In the above example, a court following this newer approach would also want to know where the product was sold and where the injured plaintiffs were resident. If these locations were both in state A, then clearly A's rules should be applied to the case rather than those of state B, which is involved only because the accident happened there. Contrariwise, if the defective product was sold in state B to a resident of state B, and caused injury there, it is not unreasonable to apply B's laws to the tort case, even though the original negligence occurred in state A. The main argument against this "grouping" approach is that an infinite number of permutations and combinations of facts are possible, which tends to produce uncertainty in the rules, and thus in the long run, more litigations and fewer settlements.

The 1972 Hague Convention.--In an effort to promote uniformity, predictability, and ease of application, the Hague Conference on Private International Law proposed a Convention on choice of law rules for product liability cases. The Conference includes all Western European nations except Austria, Cyprus, Iceland, and Malta, so the ratification of this treaty/Convention by member-states would have a substantial impact on the law applicable to European products cases.

Article 4 of the Convention makes the applicable law the law of the place of injury, if that place is also the injured plaintiff's residence, or the defendant's principal place of business, or the place where the injured

plaintiff acquired the product. At least one of these three other "contacts" must coexist with the place of injury, in order for that country's law to be used.

Article 5, if it applies, overrides Article 4. The law of the plaintiff's place of residence shall be used if that place is also the defendant's principal place of business, or the place where the product was acquired by the plaintiff. A plaintiff who acquired the defective product in his home state would thus have his own state's substantive law applied to his claim. The obvious advantage of this rule to a U.S. buyer of a defective foreign product is that the more liberal U.S. product liability rules would be applied to the U.S. buyer's lawsuit against the foreign manufacturer, if the U.S. buyer had purchased the product in his home state. The foreign buyer of a defective U.S. product would, on the other hand, be left with his own country's (generally) less liberal rules in a lawsuit against the U.S. manufacturer.

Article 6 provides that if neither of the rules from Article 4 or Article 5 is applicable, the law of the defendant's principal place of business will be used, unless the plaintiff chooses the law of the place of injury. This is a backstop rule, in the event that none of the pairs of factors required by Articles 4 and 5 exists in the case.

Article 7 contains another overriding proviso. Neither the law of the place of injury nor that of the plaintiff's residence shall be used if the defendant shows 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." In a sense, this rule is quite similar to the approach taken by the U.S. Supreme Court in the VW case and similar cases: a defendant should not be forced to appear in places where he had no

reasonable expectation that his products would be. Particularly with the addition of this proviso, the Convention's choice of law rules appear to be fair to both consumers and distributors. Even if it is not ratified by all member-nations of the Hague Conference, it will surely influence the courts as they try to work out results in specific cases.

THEORIES OF LIABILITY

Allocation of Risk of Product Failures.--Important questions of social policy underlie the legal rules on product liability. Product failures will inevitably occur in a modern, industrialized society. In tightly compressed, urbanized areas of the world, one person's use of a product will often have consequences for other persons; the automobile is the most obvious example. Who should bear the loss when someone is injured physically or financially as the result of his own or another's use of a product?

The easiest approach is to simply leave the loss with the person who initially incurs it. Living is, after all, a risky business. Why should losses resulting from human conduct be treated differently than those resulting from natural disasters? An individual can purchase insurance against both types of losses. Exposure to the actions of others is just part of the cost of living in organized society. While this approach has the benefit of eliminating nearly all of the legal overhead costs, it also produces grossly unfair results in many, many cases, as innocent parties suffer losses caused by other persons.

Negligence.--Most civilized societies recognize the principle that one whose wrongful act causes harm to another must pay for the damages caused. The problem then becomes one of defining which acts are "wrongful," in this sense, so as to produce liability. Actions which are intended to cause injury

to another's person, property, or reputation are clearly wrongful, and the law must provide remedies for those cases. But what about unintended injuries? Under what circumstances should the person whose action caused such injury have to respond in damages? Here again, simple solutions are possible. A legal system could provide that no remedy exists for unintended injuries, only for those where the harm was intended. Conversely, the legal rule could provide that whoever caused an injury must pay for it, regardless of the circumstances.

Most modern legal systems have chosen an intermediate rule: a person is liable for harm caused to another where the injury occurred because the causing party failed to exercise reasonable care. A person is thus made legally liable for unintended consequences of his action only where he is at fault, in the sense of having acted unreasonably under the circumstances. This rule thus leaves some of the risk of injury with each individual; recovery can be had against the person who caused the injury only where that person's actions were intentional or negligent.

This general theory of negligence has been used, and continues to be used, in product injury cases. A manufacturer is liable for injuries caused by a product which was negligently designed, tested, assembled, inspected, labelled, or packaged. The manufacturer was at fault, i.e., negligent, and his fault caused injury to another. European legal systems generally accept this principle, whether the injured party is a buyer of the product or a third party. The same rule can be used to impose liability on sellers and intermediate distributors, although negligence may be harder to prove. It is difficult to perceive any negligence on the part of a seller who sells a product in a closed package or container, where no inspection of the product is anticipated or customary.

Breach of Warranty.--A second possible theory of liability which can be used in product injury cases is based on the fact that a contract for the sale of the goods was made between the seller and the buyer. Where the buyer sustains physical or financial injury because the goods do not conform to the terms of the contract, he should of course have recourse against the seller. The fault principle is still at work here. Irrespective of the seller's negligence in handling and delivering the product, he is made liable because he did not properly perform the terms of the bargain he made. It really makes no difference whether the seller was directly responsible for the nonconformity in the goods; he made a contract to deliver goods of a certain type and quality, and he failed to do so.

When stated in these most basic terms, the warranty theory of liability is logical, reasonable, and fair to both parties. Complications quickly arise, however. Who is protected by the seller's warranties? Only the buyer? How about family members who are riding in the new car and are injured when its steering mechanism fails? How about an employee who is injured by a defective piece of equipment purchased by his employer? Who can be sued under this theory? Only the seller? Should not the manufacturer and any intermediate distributors be held liable on the same basis? If this is a liability imposed because the parties made a contract, can they disclaim the liability as part of their contract? Should the law impose some minimal quality standards which cannot be disclaimed by agreement? There are no easy, or uniform, answers to these questions.

The original rules, both here and in Europe, emphasized the contractual aspect of the relationship. That is, only the seller could be liable to the buyer for defects in the goods, and the provisions of the parties' contract could set the limits of that liability. The product liability revolution in

the U.S. occurred in large part because the courts saw that these rules, strictly applied, were producing harsh and unjust results. Exempting a manufacturer from any responsibility for defective products which have caused injury, when the value and quality of those products were repeatedly represented to consumers by national media advertising, simply makes no sense. Neither does permitting a seller and the manufacturer of a \$9,000 car to disclaim even a guarantee that it is of fair, average quality and is reasonably fit for normal use. "An instinctively felt sense of justice cries out against such a sharp bargain," as one court put it in invalidating such a form disclaimer.

Not only have form disclaimers had to give way, U.S. courts have generally eliminated the requirement of "privity" of contract (i.e., a direct contractual relationship between the parties) as a basis for a breach of warranty action. In most states, persons other than the buyer can sue for breach of warranty, and persons back up the chain of distribution from the seller can be sued. The Uniform Commercial Code extends the seller's warranties to cover members of the buyer's family and household and guests in the buyer's home. In the alternate versions of this section of the UCC, other third parties are covered as well.

As might be expected, European progress along these lines is not yet complete. England and the Netherlands, for example, still insist on privity as a precondition to a breach of warranty lawsuit. In these countries, only the buyer can sue, and only the seller is liable for breach of warranty. Even in France, which has probably developed as far in this direction as any European country, it is apparently still possible to disclaim liability with a clause in the sale contract, unless fraud is involved. At least some further

movement towards the U.S. position on warranty rules seems inevitable, if delayed.

Strict Liability in Tort.--As U.S. courts arrived at a position in product liability law where privity of contract was not necessary and where non-disclaimable minimum quality standards were imposed by law, they realized that a "breach of contract" analysis was not very descriptive of the situation. What was really involved here was a socially-imposed liability, not really a contractual one. The label which has come to be applied to this new social duty is "strict liability in tort."

Both English and American courts had traditionally recognized strict liability in tort in two situations: engaging in extrahazardous activities, or keeping wild animals. The basic rationale in these cases is to impose tort liability, even though the defendant has done nothing "wrong" in the sense of intentional or negligent conduct, because the defendant has by his actions increased the risk of harm to members of the public. What our state courts did was to apply this theory to the manufacturer and the distributor of a defective product. For liability to exist, the product must be found to have been defective when it left the defendant's control; it must be unreasonably dangerous to the user or consumer; it must be expected to be used without any substantial change in the condition in which it is sold; and it must cause the plaintiff's injury.

As many courts and commentators have pointed out, this is not really absolute liability, since not every product-related injury will result in liability. The point is illustrated by the recent case of Stillwell v. Cincinnati Inc., 336 N.W.2d 618 (North Dakota 1983). Kim Stillwell lost four fingers of her right hand while she was operating a press for her employer, Clark Equipment Company. The press had been sold to Clark by Cincinnati.

The accident occurred when Kim inadvertently tripped the foot switch on the press while her hand was adjusting the metal part to be stamped. She was unable to convince the court that the press was defective, although this accident would not have occurred if other control mechanisms had been used. Cincinnati had sent many warning notices to Clark and other buyers about the dangers involved in operating the machine; these had been posted by Clark; and in any case, the danger of operation was obvious. The machine was dangerous, to be sure, but not defective. Kim was limited to her recovery under the state's workers' compensation law.

It is the adoption of this third theory of product liability which will revolutionize European law, as it has that of the U.S. Thus far, the process has been a very gradual one, on a country-by-country basis. England continues to be a strong holdout against strict liability in tort in product cases. Denmark insists on a finding of fault (negligence) as the basis for liability. Greece, Italy, Portugal, and Spain have not yet adopted the doctrine. The Benelux countries (Belgium, the Netherlands, and Luxembourg) have done so. Where a "professional seller" is involved, French law has created a presumption of knowledge of hidden defects in the item sold. This presumption is usually irrebuttable, and thus produces a kind of strict liability. Several French courts have also reasoned that the manufacturer is the "guardian" of the structure of his products, and is therefore liable when this thing "in his charge" causes injury due to a defect it contains. This latter analysis is not yet generally accepted as a part of French law.

The situation in West Germany is also less than crystal clear. Sales contracts may be covered under either the Civil Code or the Commercial Code. A special statute on the liability of drug manufacturers became effective in January 1978. Under its provisions, the drug manufacturer is made strictly

liable for all "non-negligible" personal injuries caused by his product. For other consumer products, once the plaintiff proves the existence of a defect as the cause of his injury, the burden of proof shifts to the manufacturer to show an absence of fault by pinpointing the exact cause of the defect and showing that it occurred despite his exercise of all reasonable care. If, for example, it could be shown that a properly selected, trained, and supervised employee had made a mistake in the production process and thus caused the defect, the manufacturer would not be liable under West German law. This is not yet really "strict liability," in the U.S. sense, although in the absence of such proof the West German plaintiff would win.

Since it is clear that strict liability is still in its early stages of development (or has been flatly rejected) in most of Western Europe, the proposals of the EEC Commission and the Council of Europe are tremendously significant. The adoption of either proposal would represent a substantial change in product liability law for most member-nations.

The EEC Commission Directive.--Unlike its regulations, which are directly binding on individuals in all member-nations, EEC directives are binding only on the nations themselves, and permit flexible implementation by each. The directive on product liability approved in 1976 by the EEC Commission is designed to equalize competitive conditions for producers and protection for consumers within the member nations. This equalization is to occur by adopting a form of strict liability for defective products, but only as a supplementary basis for action. Many cases will undoubtedly continue to be decided under pre-existing national legal rules, since intermediate distributors are not generally covered by the directive and since it has a relatively short (10 years from the date of marketing) statute of limitations.

Although the directive does not preempt national law, its final adoption would nonetheless be an important step. It would introduce the rule of strict liability into the manufacturing and distribution systems of many nations for the first time. There would then certainly be considerable reason for also adopting the principle as part of the countries' national laws, so as to provide uniform results in product injury cases.

The Council of Europe Convention.--The Council includes Austria, Cyprus, Iceland, Malta, Norway, Sweden, Switzerland, and Turkey, in addition to the EEC members. The Council actually began work on European product liability just before the EEC Commission; a committee draft was completed in 1974, and the convention was approved and opened for accession on January 27, 1977. Austria, Belgium, France, and Luxembourg signed almost immediately, although signature does not mean final ratification by the member-nation. The convention takes legal effect when ratified by at least three members. EEC members are unlikely to ratify this convention until final status of the EEC directive is determined.

The substantive provisions of the convention are quite similar to the rules of the directive, with two exceptions. The convention applies only to personal injuries caused by defective products; it excludes claims for property damage. And second, it contains no limits on the amount of recovery permitted, as the directive does. With these two differences, the rules for a European version of strict liability are substantially the same.

UNCITRAL's Contracts Convention.--One other effort in the direction of uniformity must be mentioned, although its effects on international product liability law are more indirect. Since 1930 efforts have been under way to unify the international law of contract formation and contractual obligations. Western European representatives, through the International Institute for the

Unification of Private Law (UNIDROIT), produced drafts of a uniform law on contract formation (U.L.F.) and one on sales contract obligations (U.L.I.S.). Ratifying nations agreed to incorporate the provisions of the uniform laws into their national laws. The drafts were presented for adoption in 1964, but neither has been widely adopted. Only seven nations--Belgium, Italy, San Marino, Gambia, the Netherlands, the United Kingdom, and West Germany-- have adopted the U.L.F. The U.L.I.S. has been adopted by these seven, plus Israel. The U.K. adopted with the proviso that these laws would apply only when the parties to the transaction so specified.

The U.N. became involved in this process in 1966, when it established the Commission on International Trade Law (UNCITRAL). The Commission has 36 member-states, representing all geographic, political, and economic groups of nations. Even the socialist countries have been active participants in, and strong supporters of, the work of UNCITRAL. As the result of a series of meetings between 1970 and 1978 by a fourteen-member working group, UNCITRAL adopted a draft convention on contract formation and obligations in 1978. The U.N. General Assembly convened a conference in Vienna in 1980, and the draft convention was approved, as the Convention on Contracts for the International Sale of Goods (C.I.S.G.).

In a situation where the contracting parties are from two nations which have each ratified the Convention, the CISG will apply to the transaction unless the parties themselves provide otherwise. There are, however, significant exceptions from CISG's coverage: consumer sales; contract validity; title to the goods; and liability for death or personal injury caused by the goods. It is these exceptions which minimize CISG's impact on product liability law, in which personal injuries to consumers and others is the crucial area of liability. Liability for financial losses caused to a

commercial buyer by a lack of quality in the goods is covered, however. These warranty rules, based on the provisions of the contract and on commercial practice, are very similar to those found in the U.S. in the Uniform Commercial Code. Remedies provided for breach of warranty situations are also much the same.

While the imminent adoption of CISG will certainly improve the climate for international business transactions, CISG will have only an indirect impact on international product liability law. It does adopt the freedom of contract principle, so that the contracting parties may avoid its provisions if they wish. Its exemptions for consumer sales and for personal injuries mean that most product liability cases will fall outside its provisions. Its warranty provisions are by no means revolutionary, or even unusual. CISG's main significance is that it is another major step towards a unified international business law.

CONCLUSION

The potential significance of these developments in European product liability, for both European and non-European businesses and consumers, is obvious. There is clearly a need for ongoing research on this topic, so that U.S. businesses and business students have current information and are thus enabled to make more informed decisions. This research will be continued.

BIBLIOGRAPHY

TEXTS AND TREATISES

- Association Européenne d'Etudes Juridiques et Fiscales. Product Liability in Europe. London: Kluwer-Harrap Handbooks, 1975.
- CCH Common Market Reporter. Commerce Clearing House.
- Civil Law Translations. Aubry & Rau, Droit Civil Francaise, Book VI. Obligations. St. Paul: West Publishing Co., 1965.
- Gammeltoft-Hansen, Hans, Bernhard Gomard, and Allan Philip, eds. Danish Law: A General Survey. Copenhagen: G.E.C. Gads Publishing House, 1982.
- Miller, C.J. and P.A. Lovell. Product Liability. London: Butterworths, 1977.
- Redmond, P.W.D. General Principles of English Law. Fourth Edition. London: Macdonald & Evans Ltd., 1974.

PERIODICALS

- Akehurst, Michael. "Decisions of the Court of Justice of the European Communities during 1979." British Yearbook of International Law, 51 (1980), 343-353.
- Bartlett, Jeffrey W. "EEC Developments Affecting Products--Registration and Liability," Food, Drug, & Cosmetic Law Journal, 30 (1975), 483-494.
- Bishop, R. Doak and Paul D. Reynolds. "An Export Primer: Legal Aspects of Exporting from the United States," Houston Journal of International Law, 2 (Spring 1980), 333-361.
- Durham, Bryant. "Hague Convention on the Law Applicable to Products Liability," Georgia Journal of International and Comparative Law, 4 (Winter 1974), 178-191.
- El-Erian, Abdullah. "The International Court of Justice and the Concept of Universality," Columbia Journal of Transnational Law, 19 (1981), 197-211.
- Fischer, Hugo. "The Convention on the Law Applicable to Products Liability," McGill Law Journal, 20 (May 1974), 44-84.
- Fleming, John G. "Draft Convention on Products Liability (Council of Europe)," American Journal of Comparative Law, 23 (1975), 729-741.
- Gibson, R. M. S. "Products Liability in the United States and England: the Difference and Why," Anglo-American Law Review, 3 (1974), 493-522.

- Goldring, John and Mark Richardson. "Liability of Manufacturers for Defective Goods," Australian Law Journal, 51 (March 1977), 127-145.
- Hanotiau, Bernard. "The Council of Europe Convention on Products Liability," Georgia Journal of International and Comparative Law, 8 (1978), 325-341.
- Harland, D. J. "Products Liability and International Trade Law," Sydney Law Review, 8 (December 1977), 358-399.
- Henegan, Maureen A. "Long-Arm Jurisdiction in Products Liability Actions: an 'Effect Test' Analysis of World-Wide Volkswagen Corp. v. Woodson," Albany Law Review, 45 (Fall 1980), 175-205.
- Hervey, Tom. "Winner Takes All," Modern Law Review, 44 (September 1981), 575-580.
- Hill, Roy. "Buyer and Seller Beware," International Marketing, (July 1982), 22-23.
- Hollenshead, Neill H. and Mary R. Conway. "An Overview: International Products Liability," Trial, 16 (November 1980), 50-54.
- Johnson, Cyrus M., Jr. "International Products Liability and Long-Arm Jurisdiction: Hutson v. Fehr Bros., Inc.," North Carolina Journal of International Law and Commercial Regulation, 5 (Spring 1980), 319-325.
- Jolowicz, J. A. "Product Liability--the E.E.C. and the House of Lords," Cambridge Law Journal, 39 (November 1980), 263-269.
- Kleckner, Simone-Marie. "Major Publications of the United Nations Office of Legal Affairs," Law Library Journal, 74 (Winter 1981), 69-86.
- Lashbrooke, E. C., Jr. "Suits against International Organizations in Federal Court: OPEC, a Case Study," California Western Law School, 12 (Spring 1982), 305-324.
- Le Tallec, Georges. "The Common Commercial Policy of the EEC," International and Comparative Law Quarterly, 20 (October 1971), 732-745.
- Lewis, Richard. "Products Liability: the Chain of Indemnity," New Law Journal, 130 (August 14, 1980), 739-740.
- Lorenz, Werner. "Some Comparative Aspects of the European Unification of the Law of Products Liability," Cornell Law Review, 60 (1975), 1005-1026.
- McGovern, Francis E. "The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future," Forum, 16 (1981), 416-450.
- McMahon, Bryan M.E. "Liability for Defective Products: the Draft European Convention on Products Liability," The Irish Jurist, 8 (Summer 1973), 227-251.

- Neuhaus, Joseph E. "Power to Reverse Foreign Judgments: the British Clawback Statute under International Law," Columbia Law Review, 81 (June 1981) 1097-1133.
- Orban, Frank A., III. "Product Liability: A Comparative Legal Restatement-- Foreign National Law and the EEC Directive," Georgia Journal of International and Comparative Law, 8 (1978), 342-406.
- Park, William W. "International Products Liability," Trial, (September 1978), 24-27.
- _____. "International Products Liability Litigation: Choosing the Applicable Law," International Lawyer, 12 (1978), 845-855.
- Reese, Willis L. M. "Further Comments on the Hague Convention on the Law Applicable to Products Liability," Georgia Journal of International and Comparative Law, 8 (1978), 311-324.
- _____. "The Hague Convention on the Law Applicable to Products Liability," International Lawyer, 8 (1974), 606-617.
- _____. "Products Liability and Choice of Law: the United States Proposals to the Hague Conference," Vanderbilt Law Review, 25 (1972), 29-41.
- Payne, John M. "Jurisdiction in Personam: World-Wide Volkswagen v. Woodson," Forum, 15 (Summer 1980), 1023-1030.
- Pell, Terence J. "The Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts," Cornell International Law Journal, 14 (Winter 1981), 97-115.
- Plummer, Gayle M. "Products Liability in Britain," Anglo-American Law Review, 9 (1980), 65-91.
- Schofield, P. J. "Products Liability and the EEC," Journal of Business Law, (March 1980), 127-129.
- Siegmund, John. "Current Developments in Product Liability affecting International Commerce," Journal of Products Liability, 4 (1981), 109-141.
- Silkenat, James R. "Efforts toward Harmonization of Business Laws within the European Economic Community," International Lawyer, 12 (1978), 835-844.
- Sommerich, Otto C. "A Comparative Survey of Products Liability Laws as Applied to Motor Vehicles," International Lawyer, 2 (1967), 98-161.
- Stephenson, Graham. "In Statutory Defence of Traders," New Law Journal, 131 (July 23, 1981), 783-786.
- Sutterfield, James R. "In Personam Jurisdiction--How Long Is the 'Long-Arm' in Products Liability?," Insurance Law Journal, (August 1980), 447-460.

Szladits, Charles. "Comparative Aspects of Product Liability," Buffalo Law Review, 16 (1966), 229-249.

Winship, Peter. "New Rules for International Sales," American Bar Association Journal, 68 (October 1982), 1231-1234.

HAGUE CONVENTION

Appendix A

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 or 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 specialized agency of that Organization, 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 authorized 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.

Appendix B

EEC DRAFT DIRECTIVE

Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

(Presented by the Commission to the Council on 9 September 1976)
[Bulletin of the European Communities, Supplement 11/76]

Article 1

The producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect.

The producer shall be liable even if the article could not have been regarded as defective in the light of the scientific and technological development at the time when he put the article into circulation.

Article 2

"Producer" means the producer of the finished article, the producer of any material or component, and any person who, by putting his name, trademark, or other distinguishing feature on the article, represents himself as its producer.

Where the producer of the article cannot be identified, each supplier of the article shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the article.

Any person who imports into the European Community an article for resale or similar purpose shall be treated as its producer.

Article 3

Where two or more persons are liable in respect of the same damage, they shall be liable jointly and severally.

Article 4

A product is defective when it does not provide for persons or property the safety which a person is entitled to expect.

Article 5

The producer shall not be liable if he proves that he did not put the article into circulation or that it was not defective when he put it into circulation.

Article 6

For the purpose of Article 1 "damage" means:

- (a) death or personal injuries;
- (b) damage to or destruction of any item of property other than the defective article itself where the item of property
 - (i) is of a type ordinarily acquired for private use or consumption; and
 - (ii) was not acquired or used by the claimant for the purpose of his trade, business or profession.

Article 7

The total liability of the producer provided for in this directive for all personal injuries caused by identical articles having the same defect shall be limited to 25 million European units of account (EUA).

The liability of the producer provided for by this directive in respect of damage to property shall be limited per capita.
--in the case of moveable property to 15,000 EUA, and
--in the case of immoveable property to 50,000 EUA.

The European unit of account (EUA) is as defined by Commission Decision 3289/75/ECSC of 18 December 1975.

The equivalent in national currency shall be determined by applying the conversion rate prevailing on the day preceding the date on which the amount of compensation is finally fixed.

The Council shall, on a proposal from the Commission, examine every three years, and, if necessary, revise the amounts specified in EUA in this Article, having regard to economic and monetary movement in the Community.

Article 8

A limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this directive. The limitation period shall begin to run on the day the injured person became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer.

The laws of Member States regulating suspension or interruption of the period shall not be affected by this directive.

Article 9

The liability of a producer shall be extinguished upon the expiry of ten years from the end of the calendar year in which the defective article was put into circulation by the producer, unless the injured person has in the meantime instituted proceedings against the producer.

Article 10

Liability as provided for in this directive may not be excluded or limited.

Article 11

Claims in respect of injury or damage caused by defective articles based on grounds other than that provided for in this directive shall not be affected.

Article 12

This directive does not apply to injury or damage arising from nuclear accidents.

Article 13

Member States shall bring into force the provisions necessary to comply with this directive within eighteen months and shall forthwith inform the Commission thereof.

Article 14

Member States shall communicate to the Commission the text of the main provisions of internal law which they subsequently adopt in the field covered by this directive.

Article 15

This directive is addressed to the Member States.

APPENDIX C

DRAFT EUROPEAN CONVENTION ON PRODUCTS
LIABILITY IN REGARD TO PERSONAL
INJURY AND DEATH

Preamble

The member States of the Council of Europe, signatories of this Convention,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Considering the development of case law in the majority of member States extending liability of producers prompted by a desire to protect consumers taking into account the new production techniques and marketing and sales methods;

Desiring to ensure better protection of the public and at the same time, to take producers' legitimate interests into account;

Considering that a priority should be given to compensation for personal injury and death;

Aware of the importance of introducing special rules on the liability of producers at European level,

Have agreed as follows:

Article 1

1. Each Contracting State shall make its national law conform with the provisions of this Convention not later than the date of the entry into force of the Convention in respect of that State.
2. Each Contracting State shall communicate to the Secretary General of the Council of Europe, not later than the date of the entry into force of the Convention in respect of that State, any text adopted or a statement of the contents of the existing law which it relies on to implement the Convention.

Article 2

For the purpose of this Convention:

- a. the expression "product" indicates all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable;

- b. the expression "producer" indicates the manufacturers of finished products or of component parts and the producers of natural products;
- c. a product has a "defect" when it does not provide the safety which a person is entitled to expect, having regard to all the circumstances including the presentation of the product;
- d. A product has been "put into circulation" when the producer has delivered it to another person.

Article 3

- 1. The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product.
- 2. The importer of a product and any person who has presented a product as his product by causing his name, trademark or other distinguishing feature to appear on the product, shall be deemed to be producers for the purpose of this Convention and shall be liable as such.
- 3. When the product does not indicate the identity of any of the persons liable under paragraphs 1 and 2 of this Article, each supplier shall be deemed a producer for the purpose of this Convention and liable as such, unless he discloses, within a reasonable time, at the request of the claimant, the identity of the producer or of the person who supplied him with the product.
- 4. In the case of damage caused by a defect in a product incorporated into another product, the producer of the incorporated product and the producer incorporating the product shall be liable. However, if the former proves that the defect results from the design or the specification of the latter, he shall not be liable under this Convention.
- 5. Where several persons are liable under this Convention for the same damage, each shall be liable in full (in solidum).

Article 4

- 1. If the injured person or the person suffering damage has by his own fault, contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances.
- 2. The same shall apply if an employee of the injured person or of the person suffering damage has, in the scope of his employment, contributed to the damage by his fault.

Article 5

- 1. A producer shall not be liable under this Convention if he proves:

- a. that the product has not been put into circulation by him, or
 - b. that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards.
2. The liability of a producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.

Article 6

Proceedings for the recovery of the damages shall be subject to a limitation period of three years from the day the claimant became aware or should reasonably have been aware of the damage, the defect and the identity of the producer.

Article 7

The right to compensation under this Convention against a producer shall be extinguished if an action is not brought within 10 years from the date on which the producer put into circulation the individual product which caused the damage.

Article 8

The liability of the producer under this Convention cannot be excluded or limited by any exemption or exoneration clause.

Article 9

This Convention shall not apply to:

- a. the liability of producers inter se and their rights of recourse against third parties;
- b. nuclear damage.

Article 10

Contracting States shall not adopt rules derogating from this Convention, even if these rules are more favorable to the victim.

Article 11

This Convention shall not affect any rights which a person suffering damage may have according to the ordinary rules of the law of contractual and

extracontractual liability including any rules concerning the duties of a seller who sells goods in the course of his business.

Article 12

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.
2. This Convention shall enter into force on the first day of the month following the expiration of six months after the date of deposit of the [third] instrument of ratification or acceptance.
3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification or acceptance.

Article 13

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite non-member States to accede.
2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect on the first day of the month following the expiration of six months after the date of its deposit.

Article 14

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory to which this Convention shall apply.
2. Any Contracting State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorized to give undertakings.
3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 16 of this Convention.

Article 15

1. No reservation shall be made to the provisions of this Convention except those mentioned in the Annex to this Convention.
2. The Contracting State which has made one of the reservations mentioned in the Annex to this Convention may withdraw it by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective the first day of the month following the date of its receipt.

Article 16

1. Any Contracting State may, insofar as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall take effect on the first day of the month following the expiration of six months after the date of receipt by the Secretary General of such notification.

Article 17

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

- a. any signature;
- b. any deposit of an instrument of ratification, acceptance or accession;
- c. any date of entry into force of this Convention in accordance with Article 12 thereof;
- d. any reservations made in pursuance of the provisions of Article 15, paragraph 1;
- e. withdrawal of any reservations carried out in pursuance of the provisions of Article 15, paragraph 2;
- f. any communication received in pursuance of the provisions of Article 1, paragraph 2, Article 14, paragraphs 2 and 3;
- g. any notification received in pursuance of the provisions of Article 16 and the date on which denunciation takes effect.

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

Done in English and French, both texts being equally authoritative, in a single copy, which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory and acceding States.

ANNEX

Each of the Contracting States may declare, at the moment of signature or at the moment of the deposit of its instrument of ratification, acceptance or accession, that it reserves the right:

1. to apply its ordinary law, in place of the provisions of Article 4, insofar as such law provides that compensation may be reduced or disallowed only in case of gross negligence or intentional conduct by the injured person or the person suffering damage;
2. to limit, by provisions of its national law, the amount of compensation to be paid by a producer under this national law in compliance with the present Convention. However, this limit shall not be less than:
 - a. 200,000 DM, or an equivalent sum in another currency, for each deceased person or person suffering personal injury;
 - b. 30,000,000 DM, or an equivalent sum in another currency, for all damage caused by identical products having the same effect.

Appendix D

QUESTIONNAIRE

Questions

A. Who may be liable?

1. Is PL confined to the manufacturer (M) or could it also (or exclusively) apply to the supplier (S)?
2. (a) Does the fact that M is liable exempt S from liability?
(b) If so, does the same answer apply if M is outside the jurisdiction of the country where the damage occurs?

If PL applies to S you are invited to answer the following questions, where possible separately, in respect of both M and S, even if the questions are worded with respect to M only.

B. Requirements for PL

3. What effect does the absence or presence of direct or indirect privity of contract between M and the victim have on PL?
4. What effect does exclusion or limitation of liability in
 - (a) a contract
 - (b) general conditions of sale
 - (c) special notices on the product, its packaging, or directions for the use thereof have on PL vis-à-vis
 - (1) the contracting party
 - (2) third parties?
5. Does PL require a 'defective condition' of the product and, if so, what is the meaning of this requirement?
6. Does the law make a distinction between dangerous products and other products and, if so, what is the meaning of this distinction?
7. (a) Is PL dependent on there being negligence or fault on the part of M?
(b) If so, is it necessary that gross negligence (faute grave) on the part of M be established or will a lesser degree of negligence suffice to found PL?
(c) Does fault or negligence of a third party or the victim affect the liability of M and, if so, to what extent?
8. (a) If PL is not dependent on there being negligence or fault on the part of M what then, if it exists at all, is it based upon?
(b) If, as a general rule, PL is not dependent on the presence of negligence or fault on the part of M, will M nevertheless be held not liable when he has taken adequate measures to prevent any damage being caused in the use of the product?
(c) What would the nature of such 'adequate measures' be?

(d) Do they include an obligation to ensure as far as possible by means of research, experiments, and supervision that the product does not possess any latent dangerous qualities?

(e) Do such measures have to be taken independently of the application of existing legislative provisions concerning the standards of production, for example for health or security reasons?

(f) If PL may exist in spite of adequate measures having been taken, is there a possibility to escape PL in the case of force majeure?

9. Does failure by M to comply with statutory requirements (whether or not provided with a criminal law sanction) affect his position as a defendant?

10. What effect, if any, does a governmental licence or approval have on PL?

11. (a) Is PL limited to cases where damage could be foreseen?

(b) If so, does this liability presuppose that M in the particular case has foreseen the possibility of damage, or does it depend on the fact that any M of the products in question should have considered the risk of the damage caused (subjective versus objective foreseeability)?

C. Burden of proof

12. With whom does the burden of proof lie with respect to the questions listed under 7, 8 and 9?

13. To what extent, if any, is there a presumption that the damage was caused by the product because damage has occurred and could have been caused by the product, so that, on this point, the burden of proof will rest upon the defendant?

14. Same question as under (13) with respect to presumption of negligence.

15. To what extent is evidence by way of statistics admissible?

16. To what extent has the defendant (M) a duty to disclose certain facts which the plaintiff cannot establish?

D. Nature and measure of damages

17. Are damages awarded (and, if so, to what extent) in the event of:

(a) personal injury

(b) injury to tangible things

(c) consequential damage

(d) purely economic loss (out-of-pocket loss unaccompanied by injury to a person or to a tangible thing)?

18. In the case of person injury, does the assessment of damages taken into account:

(a) direct financial loss, such as expenses of medical treatment

(b) loss of prospective earnings

(c) pain and suffering?

19. Are damages for personal injury normally awarded as a lump sum or by way of periodical payments?

20 (a) If the victim's loss is covered by his own insurance, is this factor taken into account in mitigation of damages?

(b) Does it make a difference whether the insurance is of fixed sums or to cover the exact amount of the damage?

21. If the victim becomes entitled to social security or other state benefits as a result of his injury, are these taken into account in mitigation of damages?

22. If the victim's injury is magnified by a factor peculiar to him (e.g. he had already lost one eye and now loses the other), is this factor taken into account?

23. Is there any limit to the amount of damages to be compensated:

(a) statutory

(b) by way of judicial mitigation

(c) by reason of foreseeability?

E. Consequences of death--unborn child

24. If the victim's injuries are fatal, have his heirs or personal representatives a right of action against M?

25. What factors are taken into account in assessing damages in the case referred to under (24)?

26. If the victim dies after, but not as a result of the injury what right of action do his heirs or personal representatives have?

27. Can a person sue in respect of an injury suffered by him while still unborn?

F. Limitation period

28. What is the applicable period of limitation?

29. From what moment does this period run?

G. Applicable law (private international law)

30. What is the general rule as to the applicable law in cases of PL with international connecting factors?

31. Does under the law of conflict of laws in your country the applicable law determine:

- (a) the basis and extent of liability
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability
- (c) the kinds of damage for which compensation may be due
- (d) the form of compensation and its extent
- (e) the question whether a right to damages may be assigned or inherited
- (f) the persons who may claim damages in their own right
- (g) the liability of a principal for the acts of his agent or of an employer for the acts of his employee
- (h) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability
- (i) 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?

H. Insurance

32. Is it customary for manufacturers or suppliers of goods to insure against PL?

33. In cases where the insurer of the victim accepts liability to indemnify the victim, is the insurer subrogated to all rights of the victim against all other parties?

34. In the case referred to under 33 does the insurer have the absolute right to conduct, settle or compromise the action, notwithstanding that the admission of liability or the compromise of a claim may be injurious to the goodwill of the insured?

I. Procedure and costs

35. Does the law recognize civil actions brought by one plaintiff on behalf of himself and a class of persons who may have suffered injury in similar circumstances?

36. Are lawyers permitted to act on a 'contingent fee' basis?

37. To what extent is the successful plaintiff or defendant customarily awarded indemnity against his own legal costs (including costs of expert witnesses)?

38. Does the State provide financial assistance to impecunious claimants

- (a) own nationals
- (b) foreigners?

Appendix E

TEXT: THE DRAFT CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS (1978)*

PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter I. Sphere of application

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

Article 2

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels or aircraft;
- (f) of electricity.

Article 3

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labor or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

* Approved by UNCITRAL on 16 June 1978. UNCITRAL, Report on Eleventh Session (1978) 9-30.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

Article 5

The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions.

Chapter II. General provisions

Article 6

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.

Article 7

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 8

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 9

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 10

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

Article 11

Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article

PART II. FORMATION OF THE CONTRACT

Article 12

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes the provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 13

(1) An offer becomes effective when it reaches the offeree.

(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable.

Article 14

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable, or

(b) if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 15

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 16

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph (3) of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article.

Article 17

(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, inter alia, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by

virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

Article 18

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Article 19

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 20

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 21

A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention.

Article 22

For the purposes of Part II of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PART III. SALES OF GOODS

Chapter I. General provisions

Article 23

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

Article 24

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 25

Unless otherwise expressly provided in Part III of this Convention, if any notice, request or other communication is given by a party in accordance with Part III and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 26

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 27

(1) A contract may be modified or abrogated by the mere agreement of the parties.

(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter II. Obligations of the seller

Article 28

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 29

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods--in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place--in placing the goods at the buyer's disposal at that place;

(c) in other cases--in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 30

(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

Article 31

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date; or

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 32

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

Section II. Conformity of the goods and third party claims

Article 33

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

Article 34

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

Article 35

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

Article 36

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 37

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

Article 38

The seller is not entitled to rely on the provisions of articles 36 and 37 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 39

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

Article 40

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

Section III. Remedies for breach of contract by the seller

Article 41

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) exercise the rights provided in articles 42 to 48;

(b) claim damages as provided in articles 70 to 73.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 42

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

Article 43

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 44

(1) Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty or reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request of notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

Article 45

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) or article 43 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) in respect of late delivery, after he has become aware that delivery has been made; or

(b) in respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period.

Article 46

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

Article 47

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provision of articles 42 to 46 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 48

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Chapter III. Obligations of the buyer

Article 49

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the price

Article 50

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

Article 51

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

Article 52

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 53

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

Article 54

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 55

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

Section II. Taking delivery

Article 56

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 57

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

(a) exercise the rights provided in articles 58 to 61;

(b) claim damages as provided in articles 70 to 73.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 58

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

Article 59

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 60

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) or article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59, or the declaration by the buyer that he will not perform his obligations within such an additional period.

Article 61

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request

from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after the receipt of such a communication, the specification made by the seller is binding.

Chapter IV. Provisions common to the obligations of the seller and of the buyer

Section I. Anticipatory breach and installment contracts

Article 62

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

Article 63

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

Article 64

(1) In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach with respect to that installment, the other party may declare the contract avoided with respect to that installment.

(2) If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Exemptions

Article 65

(1) A party is not liable for a failure to perform any of his obligations if he provides that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Section III. Effects of avoidance

Article 66

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provision of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 67

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this articles does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

Article 68

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 67 retains all other remedies.

Article 69

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section IV. Damages

Article 70

Damages for breach of contract by one party consist of a sum equal to the loss including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 71

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought good in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70.

Article 72

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 70.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 73

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

Section V. Preservation of the goods

Article 74

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 75

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

Article 76

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 77

(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

Chapter V. Passing of risk

Article 78

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 79

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

Article 80

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

Article 81

(1) In cases not covered by articles 79 and 80 the risk passes to the buyer when the goods are taken over by him, or if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

Article 82

If the seller has committed a fundamental breach of contract, the provisions of article 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach.

Article (X)

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration.