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EUROPEAN PRODUCT LIABILITY RULES:
A REVOLUTION IN THE MAKING?

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EUROPEAN PRODUCT LIABILITY RULES: A REVOLUTION IN THE MAKING?

BY

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In Europe, 1848 was the Year of Revolutions--France, Germany, Austria, Hungary, Italy.¹ Now, nearly a century and a half later, much of Western Europe teeters on the brink of a new revolution. Although this is an economic change rather than a political one, its impact on European society promises to be as significant as that of the failed political revolutions of 1848. The pending changes in the product liability laws of the European Common Market countries (and potentially those of other European nations) could very well affect the way in which products are manufactured and distributed on the Continent. Trade patterns and decisions regarding the location of manufacturing facilities could be affected, in as yet as yet unknown ways. Consumer expectations, and activism, and hence litigation, could increase markedly. Insurance rates and coverages will have to be rethought, to say the least. Whether European society will be able to adapt to these changes without major economic and social dislocations, no one can predict with certainty.

Once again, as was true with the political revolutions of the 1700's and 1800's, the American Revolution has preceded the European ones. The story of the gradual adoption by U.S. courts of the principle of strict liability in tort for defective products is well known to most American lawyers, and to many in other countries.² Indeed, product liability in the U.S. has now entered its counter-revolutionary stage, with many state legislatures, and even Congress, attempting to roll back the tide of liability.³ State courts are fighting to maintain their judgemade changes.⁴ The cry for "fairness" in this country is now coming from manufacturers and distributors, rather than from buyers and users.⁵

THEORIES OF LIABILITY

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.⁶ 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.⁷ 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.⁸

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.⁹

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.¹⁰ 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 quantity, and he failed to do so.¹¹

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.¹² 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 \$10,000 automobile 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.¹³

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 at least members of the buyer's family and household and guests in the buyer's home.¹⁴ In the alternate versions of this section of the UCC, other third parties are covered as well.¹⁵

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 traditionally recognized strict liability in tort in two situations: engaging in extrahazardous activities, or keeping wild animals.¹⁶ 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.¹⁷ 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.¹⁸

CURRENT STATUS OF PRODUCT LIABILITY RULES IN COMMON MARKET NATIONS

In General. There are, of course, major differences among the legal systems in operation in the 10 member-nations of the European Economic Community, or "Common Market."¹⁹ The predominant type is 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.²⁰ Even within this group, there are some significant structural 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.²¹ Denmark is most properly listed as a Civil-Law country, although without the close ties to the Roman Law of most others.²² Even where countries have adopted virtually identical code provisions, there are instances of widely divergent interpretations of those provisions by the nations' courts.²³

In contrast to the legislated code law of the continent stand the Common Law systems of England and Ireland.²⁴ Of course, English courts do not have the power of judicial review which is so freely exercised by courts in the U.S.²⁵ In the English system, Parliament is supreme, and case law rules may be overridden by a statute at any time. Most English product liability rules

are derived from case precedents, but Parliament has been quite busy in this area, too.²⁶ Ireland probably still qualifies as a Common Law system, since it lacks the comprehensive Code of most Civil-Law countries. A bewildering conglomeration of pre- and post-independence statutes also forms a significant part of Irish Law, however.²⁷

While these differences in structure and interpretation make precise generalizations difficult, some basic similarities in approach can be noted. All systems recognize that liability for distributing a defective product may be grounded in tort (negligence) or in contract (breach of the sales agreement), and that there are significant differences in how these two theories are to be applied. In general, all systems recognize that a manufacturer may be held liable in negligence for harm caused by his product to the ultimate user or to bystanders, but there are differences as to presumptions and the burden of proof. In general, these systems all take a very restrictive view of product claims based on breach of contract. A strict application of "privity of contract" prevails, so that, as a rule, only the buyer of the goods may sue for damages sustained when the product fails to perform as promised, and only the immediate seller may be sued on this basis.

An English Case Example. A classic example of the operation of these rules is provided by the English case of Daniels and Daniels v. R. White & Sons Ltd. and Tarbard.²⁸ Mrs. Tarbard sold Mr. Daniels some lemonade, which had been manufactured by White & Sons. Unknown to any of the parties, the lemonade contained carbolic acid, and both Mr. Daniels and his wife became ill after they drank it. Both Mr. and Mrs. Daniels sued the manufacturer in tort, but their claims were dismissed since they had no proof that the manufacturer's negligence had caused the presence of the carbolic acid in the lemonade.

Mr. Daniels did recover against Mrs. Tarbard, since she had breached the implied warranty of merchantability which she made to him when she sold him the goods. But since Mrs. Daniels had made no contract with Mrs. Tarbard (no "privity"), she had no similar claim against Mrs. Tarbard. Third parties can hold sellers liable for negligence, but again, proof of a failure to exercise reasonable care is necessary. Sellers of canned or bottled food products have no way of inspecting or testing the contents for quality, and are normally not negligent when they sell the food product without inspection. All reasonable buyers are aware of this procedure, and do not expect quality control--other than proper handling--on the part of the seller. Similar rules would apply to many other products sold in closed containers, without inspection. Proof of negligence against the seller would be difficult, unless there were some clear evidence of mishandling. However, negligence on the part of the seller may be shown where a potentially dangerous product is sold without a warning label and without testing by the seller for safety.²⁹ This line is not always easy to draw, and decisions will not always be totally consistent, even within the same country.

Comparative Results, by Country, on the Daniels Facts. Since the Daniels case presents a frequently recurring fact pattern involving product liability claims, it may be instructive to compare the probable results in other Common Market countries, given similar facts. Given the considerable differences among the legal systems involved, and the wide variety of political and social history in these ten nations, the fundamental consistency of their product liability rules is really quite amazing. There are some notable instances of differences, of course, but the consistency of the basic patterns seems quite clear.

Belgium: The buyer can sue the seller in contract for breach of an implied warranty against hidden defects in the goods.³⁰ There is some disagreement as to whether the buyer can also assert a tort claim against the seller. Apparently it is possible to do so if the buyer's damage is caused by breach of a general duty of care, as opposed to one arising only from the contract between the parties.³¹ The buyer would, of course, bear the heavier burden of proving actual negligence on the part of the seller in this tort case. The advantages of this alternate theory are the thirty year statute of limitations (rather than the "short period" used for contract claims), and the possibility of a more liberal assessment of damages.³²

Unless the original seller (the manufacturer, in the typical case) has included a contract provision prohibiting its assignment, the implied warranty against hidden defects is presumed to run with the goods.³³ Thus the buyer could bring a breach of contract action directly against the manufacturer. Alternatively, the buyer would be able to sue the manufacturer if the latter's negligence could be proved.³⁴ In most cases, the manufacturer would no longer be the holder, or guardian, of the product at the point where it had been sold to a retail buyer, and thus could not be sued under the theory of liability.³⁵

Bystander third parties would have no contract claim under Belgian law against either the seller or the manufacturer.³⁶ Against either defendant, the third party could collect in tort for damages caused, if negligence could be proved.³⁷

The Belgian product liability rules thus seem consistent with the results in the Daniels case, with one exception. Mr. Daniels could bring a breach of contract claim against the manufacturer, White & Sons, who had breached their implied warranty against hidden defects in the lemonade.³⁸

Denmark: Schlesinger notes that the Scandanavian legal systems have some of the characteristics of common law systems, as well as those of civil law systems.³⁹ He also points out that Denmark, Norway, and Sweden have enacted uniform statutes covering Sales, among other topics.⁴⁰ Scandanavian product liability rules appear to be quite close to the results in Daniels. To invoke the contractual remedies of the Sales of Good Acts, it is necessary to show "that a purchase agreement has been concluded."⁴¹ The only breach of contract case would thus be buyer versus seller, unless of course the seller sought a secondary recourse against his seller--the manufacturer or an intermediate distributor.

It is apparently possible under Scandanavian law for an injured buyer to include tort claims against the seller in the lawsuit for breach of contract.⁴² Tort liability (of seller and/or manufacturer to buyer and/or bystanders) is based on fault--negligence.⁴³ In general, the plaintiff has the burden of proof, although where the product is inherently dangerous, the required standard of care may be very high and the burden thus shifted "to some extent" to the defendant.⁴⁴ The lemonade in Daniels would not seem to be an inherently dangerous product, and the results in the actual case would seem to be those which would occur under Scandanavian law.

France: The French product liability rules are particularly important, not only because of the international leadership exercised by France, but also because of the strong influence of the Code Napoleon on other civil law systems.⁴⁵ French law is one of the standards against which other systems are compared.⁴⁶ As will be noted infra, France is also a leader in the adoption of rules giving increased protection to persons injured by defective products.⁴⁷

A breach of contract claim is the buyer's sole remedy against the seller, unless the seller's failure to perform is also a violation of the criminal

law.⁴⁸ In the latter case, a tort claim may also be used. Where the buyer proves the product was defective when sold, there is a presumption that the professional seller knew of the defect.⁴⁹ The seller is unable to rebut this presumption, or to disclaim it, and is thus liable for all consequential damages.⁵⁰ This claim will, however, have to be brought within the "short period of time" used for contract claims.⁵¹

French case law indicates that the buyer has the same contract claim against the manufacturer, although there is no privity of contract between them.⁵² This liability is analogous to the Belgian theory that the implied warranty against hidden defects runs with the goods.⁵³ A manufacturer may also be held liable as the "custodian" (guardian) of a defective product which causes injury.⁵⁴ French courts have held that "the technical structure of the product...can remain under the custody and the responsibility of the original supplier."⁵⁵ This custody liability only applies, however, to "potentially dangerous products which are capable of causing damage independent of use."⁵⁶ No clear rule has been developed as to when a manufacturer would cease to be liable under this theory, if ever.⁵⁷ Sarrailhe believes that the rule will not be widely used by plaintiffs, due to the many uncertainties involved.⁵⁸

Bystanders (which include spouses and children) have no contract claim against either seller or manufacturer.⁵⁹ In an appropriate case, bystanders might be able to use the custody theory against the seller or a manufacturer.⁶⁰ Bystanders are, however, given strong protection under modern French law by a court-created presumption of fault where a defective product has been marketed.⁶¹ The bystander need only prove that damage has resulted from a defect in the product.⁶² Further, Sarrailhe states that this presumption can not be overcome by proof that the manufacturer has complied with "all

applicable mandatory technical requirements or administrative directions."⁶³ French law thus approaches a strict liability rule, at least for injuries caused to bystanders.

French law thus differs from the Daniels results in two important respects. Mr. Daniels, the buyer, would also have a breach of contract case against the manufacturer of the lemonade. While French law would agree that Mrs. Daniels was a bystander and that she had no contract claim against either the seller or the manufacturer, she would be able to collect from the manufacturer under a tort theory which approximates strict liability.

Germany: Under section 459 of the German Civil Code, the seller makes a warranty to the buyer that "the product sold is free from defects which might affect the value of the product or restrict its normal use or the use as expressed or implied by the contract."⁶⁴ The seller may also be held liable under specific warranties of quality or suitability, which may be found in statements made in catalogues or advertisements.⁶⁵ For sales of goods between businesses, the German Code of Commerce requires that the buyer examine the goods on delivery, and immediately notify the seller of any patent defects. Failure to do so would prevent the buyer from using such defects as the basis for a breach of warranty claim.⁶⁶

German case law also recognizes that a contract may create certain "supplementary" obligations, in addition to the main obligation of proper performance of the terms of the contract.⁶⁷ The example given by von Braunschweig involves the sale of dangerous products. In such case the seller would be negligent if he sold the product without "appropriate warnings and/or instructions," whether or not these were specifically called for by the terms of the contract.⁶⁸ The buyer may also make a claim under the general duty of care of the seller, using the same arguments as a third party.⁶⁹

The buyer would have no contract claim against the manufacturer, unless there had been a direct purchase.⁷⁰ The buyer could make a tort claim against the manufacturer, on the same basis as a bystander; in these cases negligence is presumed, once the product is shown to have been defective.⁷¹

Bystanders would normally have no claim in contract against either the seller or the manufacturer.⁷² Under certain circumstances, third parties such as family members or employees might be shown to be intended third party beneficiaries of the sale contract, and thus be able to sue the seller for breach.⁷³ A bystander could sue the seller in tort but would have to prove that the seller was negligent and that such negligence had caused the injury.⁷⁴ As to the seller, there is no presumption of negligence such as exists in France.⁷⁵ Such a presumption does exist, however, as against the manufacturer.⁷⁶

Thus, under the Daniels facts, in addition to Mr. Daniels' claim against the seller, both consumers of the lemonade could sue the manufacturer, and have the benefit of a presumption that the manufacturer was negligent.

Greece: The Graeco-Roman law of Byzantium continued to be applied in the territory of what is today the modern nation of Greece even after the conquest of Constantinople by the Ottoman Turks.⁷⁷

Although the French Commercial Code of 1804 was in force among the Greek merchant community prior to the liberation of Greece, the main civil law continued to be that of Byzantium.⁷⁸ This same system endured throughout the tortuous constitutional history of the new Greek state after independence.⁷⁹ It was only in 1946 that the long promised Greek Civil Code became a reality.⁸⁰

Coming nearly a century and a half after the Code Napoleon, it is not surprising that the Greek Code lacks the full doctrinal expositions of its

predecessor. At various stages of the Greek Code's development, however, the French and German Civil Codes were very influential.⁸¹ Zepos states that the Greek Code is "indirectly" connected with that of Germany, although it "differs essentially" from the German.⁸² Later he notes that "the whole problem of... warranty as to the quality of the goods delivered is formulated for the most part on the model of the German Civil Code."⁸³ Thus contract theories under the Greek Code would seem to follow the results indicated above for the German Code.

Greek courts already developed tort law along lines of the Code Napoleon, so that "any harm to a person caused intentionally or by negligence creates a liability for an unlawful act."⁸⁴ Presumably, in the absence of a specific indication to the contrary, the burden of proof in such cases rests with the plaintiff. Zepos notes that the 1946 Greek Code "recognizes widespread cases of strict or absolute liability," in addition to liability for the "culpably committed unlawful act."⁸⁵ As examples he gives master-servant vicarious liability, strict liability for animals, and liability for extrahazardous conditions.⁸⁶ Conspicuous by its absence is any mention of strict liability for defective products, which at the time had not even been developed in the U.S.

At least as of the time of its adoption, then, the Greek Civil Code would produce results fully consistent with those in the Daniels case: only the buyer can sue and only the seller can be sued, for breach of contract; buyer and third party can sue the seller and manufacturer in tort, but must prove negligence.

Ireland: Even though Ireland may still be described as a common law system, its product liability rules do not exactly parallel those in England, since different legislation is now in force.

The buyer may sue the seller for breach of warranty under the Sale of Goods Act of 1893, as amended in 1980.⁸⁷ The goods must match any description given, and must be merchantable, which is now defined as meaning "as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances."⁸⁸ Under Irish law, the buyer also has the alternative of suing the seller in tort for negligence.⁸⁹ Normally, the buyer would have the burden of proof, but res ipsa loquitur might be applicable in some product cases.⁹⁰ The buyer might wish to sue in tort, where the case would be tried to a jury, rather than in contract, where no jury would be used.⁹¹

The buyer would be able to sue the manufacturer in contract only where a collateral warranty had been given with the product. Otherwise, the buyer will have to prove negligence on the part of the manufacturer, as the basis for a claim in tort.⁹²

Ireland continues to apply the privity requirement for contract claims, so that, as a rule, third parties have no right to sue seller or manufacturer under a breach of contract theory.⁹³ Of course, an exception is recognized where the contract is clearly made for the benefit of a third party.⁹⁴ A statutory exception also exists in Ireland which permits a bystander to sue the seller, but not the manufacturer, for breach of contract for sale of a motor vehicle.⁹⁵ Section 19 of the 1980 Sales Act also makes both seller and manufacturer to third parties where the terms of a specific guarantee have been breached.⁹⁶ Alternatively, seller or manufacturer would be liable in any case where the third party could prove negligence.⁹⁷

In light of the continuing vitality of the privity rule in Ireland, the actual results in the Daniels case seem fully consistent with current Irish

law, since neither of the two special statutory rules would be applicable.

Italy: Under the Italian Civil Code, the seller makes a warranty to the buyer that the goods sold are "free of defects which render them unfit for the use for which they were intended, or which appreciably diminish their value."⁹⁸ The buyer may collect for all damage caused, unless the seller "proves that through no fault of his he was not aware of the defect."⁹⁹ Luzzatto indicates that Italian courts "tend to deny success to users in actions against distributors where the distributor did not have any real opportunity to control the condition of the product sold (e.g., when the product was sold, packed and sealed by the producer)."¹⁰⁰ This statement seems to indicate that Mr. Daniels would have difficulty recovering even against Mrs. Tarbard, his seller, for the poisonous lemonade. Moreover, the warranty case is subject to a strict requirement that the buyer notify the seller of the defect within eight days after discovering it, unless the seller has admitted it or concealed it.¹⁰¹ Suit must also be brought within one year from the delivery date.¹⁰²

The buyer may also assert a tort claim against the seller and/or the manufacturer for negligence.¹⁰³ The buyer would have no contract claim against the manufacturer, although Italian legal writers have suggested that such recourse would be socially beneficial.¹⁰⁴ Italian courts have used a presumption of negligence against the manufacturer in some cases. One example given by Luzzatto involved defective biscuits, which had been sold in a sealed package; only negligence by the manufacturer could account for the defect even if the precise action had not been pinpointed.¹⁰⁵ The problem with this tort lawsuit is that it is uncertain whether recovery may be had for consequential damage unrelated to physical injury.¹⁰⁶

Bystanders would have no contract claim against the seller or the manufacturer.¹⁰⁷ They could, however, sue either or both for negligence, and have

the benefit of the presumption of negligence in the right sort of case.¹⁰⁸ As an additional generally-applicable theory of liability, the person engaged in an extra-hazardous activity is liable for all harm caused, unless he proves he took "all suitable measures to avoid the injury."¹⁰⁹ In a particular case, this theory might be used against a seller or a manufacturer of dangerous products.

Italian law thus seems to differ from the results in Daniels in two important ways. As noted above, even the buyer, Mr. Daniels, might have difficulty recovering against the seller, since she had no control over the quality of the product. On the other hand, Luzzatto's examples suggest that both Mr. and Mrs. Daniels would have a good case for recovery from the manufacturer of the lemonade because of the existence of a presumption of negligence.

Luxembourg: The legal system for Luxembourg is based on that of Belgium,¹¹⁰ and is only infrequently given separate treatment by legal scholars.¹¹¹ Its product liability rules would presumably be very close to those of Belgium, except for special statutory enactments.¹¹²

Netherlands: The concept of "product liability" under Dutch law excludes damages which simply occur from the loss of the benefit of the bargain due to the nonconformity, and other damages from a purely economic loss.¹¹³ Only where personal injury or damage to other property occurs is the term applied.

Where specific goods, as opposed to a generic product, have been sold, the seller makes an implied warranty against latent defects. Even in such case, however, the warranty does not apply as to those qualities subject to a specific warranty in the contract of sale.¹¹⁴ As a result, this implied warranty is of very limited use.

For generic goods, the Supreme Court has held that the buyer has a case for breach of contract if "they do not have the qualities which the buyer was

entitled to expect by virtue of the contract.¹¹⁵ This could include a claim that the seller failed to exercise reasonable care in providing adequate instruction regarding the handling and use of the product.¹¹⁶ However, a recently proposed statute will drastically change these results. A seller of a consumer product will not be liable for defects unless he knew of them, or unless he is also the producer.¹¹⁷ This statute would also seem to preclude a tort claim against the seller, which would otherwise provide an alternative basis for recovery.¹¹⁸

The buyer has no contract claim against the manufacturer, but may sue in tort for negligence. Dutch cases indicate that the manufacturer will at a minimum be subject to a very high standard of care, and quite possibly, to a reversal of the burden of proof.¹¹⁹ A car manufacturer, using parts supplied by others without inspecting them, was held to do so at its risk, even though it would not be economically feasible to reinspect each part.¹²⁰ Even though experts testified that it would be technically impracticable to prevent a leaking stopper on any hot-water bottle, the manufacturer was held negligent when one of his products failed.¹²¹ This latter case may perhaps be explained by the fact that the manufacturer testified that all bottles were tested for this very defect before they left the factory; obviously, someone had not followed the required testing program.¹²²

Bystanders, including spouses and children,¹²³ have no contract claim against the seller or the manufacturer.¹²⁴ Bystanders may have a claim against the buyer/user of such items as motor vehicles and ships, as to which strict liability has been imposed by statute.¹²⁵ Bystanders will normally sue in tort for negligence to make a claim against the seller or the manufacturer.¹²⁶ In such cases, the burden of proof may be reversed, and a very high standard of care will probably be required, as previously noted.¹²⁷

Prior to its new consumer statute, noted supra, Dutch law would have followed the contract results in the Daniels case. However, Mr. and Mrs. Daniels might recover in tort against a Dutch manufacturer because of a reversal of the burden of proof and the high standard of care required under Dutch law.

PROPOSALS FOR CHANGE

Even this brief survey of the product liability rules in the EEC's member nations indicates some of the reasons for dissatisfaction. The idea that a person such as Mrs. Daniels, who has been injured by a defective product, should be denied recovery against either the seller or the manufacturer, seems neither just nor practical. It is possible that each national system would itself evolve satisfactory protective rules; three Law Commissions in Great Britain, having investigated the problem, have recommended the adoption of strict liability.¹²⁸ The Netherlands, however, seems headed in the other direction with its new consumer sales statute, even to the point of denying the buyer a remedy against the seller.¹²⁹ Moreover, any significant differences in national laws could have effects on the distribution and manufacturing of goods within the Community, a possibility of which the EEC members are well aware.¹³⁰

The 1970s and 1980s have seen a flurry of activity at the international level, to try to modernize and clarify the law of international business transactions. The 1973 Hague Convention and the 1980 Rome Convention deal with choice of law problems.¹³¹ The U.N. Commission on International Trade Law (UNCITRAL) adopted a draft convention on contract formation and obligations in 1978, which was approved at a U.N. conference in Vienna in 1980, as the Convention on Contracts for the International Sale of Goods (CISG).¹³²

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 repose.

This potentially massive economic reordering comes in a deceptively brief package of 15 Articles, but then the size of their documentation has not been a reliable gauge of the power and scope of past revolutions, either. The Declaration of Independence takes up less than two pages in a textbook.¹³³ Marx and Engels issued the stirring call to arms that changed the face of the world in a Manifesto which fits on some 36 paperback pages.¹³⁴ Lenin won Russia with three words: "Peace! Land! Bread!"¹³⁵ The world trembles before Einstein's brief formula: $E=mc^2$. Brevity should not be mistaken for insignificance.

Article 15 indicates that the directive is addressed to the EEC Member States, and Article 13 requires them to conform their law within 18 months of its final adoption by the Council of the European Communities, and to so notify the Commission.¹³⁶ Article 14 further requires the Member States to provide the Commission with the text of the "main provisions of internal law which they subsequently adopt" in this field.

Article 10 provides that the liability imposed is mandatory; it "may not be excluded or limited." Article 11, however, makes it clear that this liability is supplementary. Product liability based on negligence or breach of

warranty will continue to be governed by the various national laws, and the differences there will continue.¹³⁷ A member state is free to expand or to contract its liability rules under negligence and warranty, and to impose strict liability on additional distributors, without violating the EEC Directive. Article 12 exempts liability for "injury or damage arising from nuclear accidents," which is also left to national law.

The two sentences of Article 1 announce the revolution: "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 4 adopts an absolute standard in its definition of "defective": "A product is defective when it does not provide for persons or property the safety which a person is entitled to expect." This is indeed, then, a form of strict liability, since reasonable care on the part of the manufacturer would not necessarily preclude liability. If the product is not reasonably safe for use, the producer is liable for damages caused, whether or not he did everything which he reasonably could have done to make a safe product. The "state of the art" defense is specifically rejected.

The only two defenses provided by Article 5 are proof "that he did not put the article into circulation or that it was not defective when he put it into circulation." The first defense is an obvious one: "That's not my product!"; or, "I hadn't put it into circulation yet."¹³⁸ The second defense is more troublesome. Clearly, it puts the burden of proof on the producer to show that the goods were "not defective" when they left his control. What sort of proof might a producer introduce to avoid liability? Evidence of a specific

act of mishandling by a later distributor, after the product left the producer's control would seem to meet this burden, assuming that the mishandling caused the defect involved. For example, a frozen food product is properly prepared by the processor, but is then left to thaw and is subsequently refrozen and sold by a retailer. If this "defective" product causes injury to a consumer, it does not seem to have been defective when it was put into circulation by the producer. Since the plaintiff must prove a chain of causation between the defect and the injury, his case may be defeated where there is an intervening Act of God, or where the actions of a third party or of the plaintiff himself are really the cause of the injury. The rules on these points are generally left to the various national laws.¹³⁹

"Producer" is defined by Article 2 as including the manufacturer of the finished product, component manufacturers, and anyone who represents himself as the item's producer by putting his name, trademark, "or other distinguishing feature" on the article. Where a producer cannot be identified, "each supplier" of the article is 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." Of most importance for U.S. manufacturers and exporters, "Any person who imports into the European Community an article for resale or similar purpose shall be treated as its producer." Article 3 provides for joint and several liability where two or more persons are liable for the same damage.

Article 6 defines "damage" as including death or personal injuries, and damage to property other than the defective article itself. Not all property damage is covered, however. The property must be "of a type ordinarily acquired for private use or consumption" and "not acquired or used by the claimant for the purpose of his trade, business or profession." The producer

of a car with defective brakes which caused a collision with another car would thus be liable for all personal injuries involved, but would be liable under the Directive for damage to the other car only if it was being used for personal, rather than business purposes.

Article 7 contains some important limitations on the amount of the producer's liability under this Directive. For personal injuries caused by "the same defect" in "identical articles" the maximum total liability can not exceed 25 million European units of account (EUA). For property damage, the maximums are 15,000 EUA per incident for movable property, and 50,000 EUA per incident for immovable property. The EUA is as defined in the Commission Decision of December 18, 1975. The equivalents in national currencies are to be determined at the conversion rate prevailing on the day before the final judgment as to the amount of compensation. If the Commission so proposes, the Council shall examine these maximums every three years, and revise them as necessary.

Article 8 establishes a three-year Statute of Limitations period for claims brought under 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." National law controls questions relating to the suspension or interruption of the limitation period. Article 9 provides for the expiration of a producer's liability ten years after the defective article was put into circulation, unless a lawsuit has been begun within that period.

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. In view of its substantial overlap with the EEC Directive, EEC members are unlikely to ratify the Convention until final status of the Directive is determined.

Article 1 directs the Contracting States to conform their national laws to the provisions of the Convention, by the date when it becomes effective as to each country, and to communicate to the Council's Secretary General the text of any law on which it relies for implementation. Articles 12 through 17 specify the procedures for ratification and withdrawal. Article 12 sets out the timetable for the Convention's coming into force, after ratification. Article 13 permits the Committee of Ministers of the Council to invite nonmember States to accede. Article 14 provides that a Contracting State may specify the territory in which the Convention will be operable. (Denmark, for example, could specify that its ratification did not make the Convention applicable to Greenland.) Article 16 provides for a State's withdrawal from the Convention. Article 17 requires the Secretary General to notify all member States and all Contracting States of all official actions by nations with respect to the Convention.

Article 15 prohibits a Contracting State from adopting the Convention with reservations, other than those permitted by an Annex. The Annex to the Convention permits two such reservations. A Contracting State may preserve a national law rule which reduces or disallows compensation only where the injured or damaged person has been guilty of gross negligence or intentional conduct. A Contracting State may also limit the amount of a producer's liability under the Convention, but the limit shall not be less than 200,000 DM for each person suffering death or personal injury, and 30,000,000 DM for "all damage caused by identical products having the same defect."

The liability imposed on the producer by the Convention is mandatory, says Article 8; it "cannot be excluded or limited by any exemption or exoneration clause." Further, Article 10 prohibits the Contracting States from adopting any conflicting rules, "even if those rules are more favourable to the victim." But, as was true with the EEC Directive, the producer's liability imposed here is supplementary to existing national law on warranty and negligence (Article 11). Article 9 excludes liability for nuclear damage and the liability of producers inter se.

Unlike the Directive, the Convention defines "product." Included in the definition are "raw" products as well as manufactured ones, and "natural" products as well as "industrial" ones (Article 2-a.). Under Article 2-d, "put into circulation" is defined as delivery to another person. Article 2-b defines "producer" as including manufacturers of finished products and of component products, and producers of natural products. Article 3-2 adds importers and any person who adds his name, trademark, or other distinguishing feature to a product. Like the EEC Directive, Article 3-3 holds a supplier liable as producer unless he discloses the name of the producer or of his supplier within a reasonable time, when requested to do so by a claimant. The manufacturer of a defective component is liable along with the assembler of the final product, unless the component manufacturer proves that "the defect results from the design or the specification" of the assembler (Article 3-4). Article 3-5 provides that where several persons are liable for the same damage, "each shall be liable in full (in solidum)."

Liability under the Convention is imposed by Article 3-1: "The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product." Except for its omission of liability for property damage, the Convention's definition of defective is virtually identical to

that used in the Directive: "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." The "having regard" test would seem to be implicit in the Directive, too, although not explicitly stated therein. Since the Convention's definition of "defect" also focuses on the product, rather than on the behavior of the producer, strict liability is also being imposed here. Since the "state of the art" defense is not expressly rejected in the Convention (as it was in the Directive), it may be available as one of the "circumstances" to be considered when determining whether a product is defective.

Article 5 contains the same two defenses as Article 5 of the Directive, but with some differences. A producer is not liable under the 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." The first defense is virtually identical to that of the Directive. Under the second Convention defense, however, the producer may have an easier time of meeting the burden of proof, since he need only prove a probability. The second Directive defense required the producer to prove that "it was not defective" when put into circulation. This may turn out to be a mere semantic difference, since the normal standard of proof in a civil case is one of preponderance anyway. The second clause in Convention defense (b) is unclear. Is it a mere redundancy, or is it intended to provide an alternate basis for avoiding liability? If a product is "defective," as defined, and if the defect did not exist when it left the control of the producer, then the defect must have come "into

being afterwards." It's hard to imagine a case where these two clauses would have different meanings, but European courts may find some.

Article 4 of the Convention specifically states that contributory negligence of the injured party or one of his employees may be used as a basis for reducing or disallowing compensation. Under the Directive, this point was left to the various national laws. The Annex to the Convention permits a country to preserve its national law on this point if it wishes to do so. The Convention also provides that where the injury was caused by both a defect and the act of a third party, a producer's liability will not be reduced (Article 5-2).

Although it was more specific on other definitions than the Directive, the Convention contains no definition of "damage," other than the statement of the liability rule: "compensation for death or personal injuries caused by a defect in his product." As previously noted, liability for property damage is excluded under the Convention. While the Directive contains mandatory limits on the amount of compensation to be paid, those stated in the Convention are permissive, as part of the Annex, noted above.

Article 6 contains the same three-year Statute of Limitations as the Directive, in very similar language. Article 7 contains essentially the same language on the Statute of Repose (10 years after the product was put into circulation) as the Directive.

CONCLUSIONS

The full impact of either of these proposals on Europe's economic and social system cannot be predicted at this time. It may be that there will be less motive to litigate product liability cases than in the United States, which lacks a national medical compensation system. It may be that a (somewhat) less litigious European society may not use strict liability to the

extent that American plaintiffs have. It may very well be that the absence of a contingent fee system for lawyers will discourage litigation of all but the most serious product claims. The absence of juries and the consequently much smaller damage awards may also militate against bringing less serious injuries to court. Finally, the European nations may be able to work out a program of producers' insurance which will enable most such claims to be settled out of court, for relatively modest amounts.

On the other hand, it is equally possible that none of the above suppositions will prove accurate, and that European manufacturers could find themselves buried under a litigation landslide. Given Europe's current economic problem,¹⁴⁰ such an additional burden could have dire consequences, not only for the European nations, but also for their trading partners. At the very least, U.S. manufacturers exporting to Europe need to be aware of these developments in European product liability law.

FOOTNOTES

1. Craig, EUROPE SINCE 1815, (New York: Holt, Rinehart, and Winston, 1961), Chapter 5, The Revolutions of 1848, 128-150.
2. Prosser, The Assault Upon the Citadel, 69 YALE LAW JOURNAL 1099-1148 (1960); and The Fall of the Citadel (Strict Liability to the Consumer), 50 MINNESOTA LAW REVIEW 791-848 (1966). The New Jersey court led the way in Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (New Jersey, 1960). For an early comment on Henningsen, see Southwick, The Disenchanted Consumer--Liability for Harmful Products, 18 MICHIGAN BUSINESS REVIEW 5-11 (January 1966).
3. New Hampshire, for example, enacted a comprehensive reform statute in 1978. This statute was ruled unconstitutional by the State Supreme Court in Heath v. Sears, Roebuck & Co., 464 A.2d 288 (New Hampshire, 1983).
4. E.g., Heath, supra.
5. See, e.g., The Devils in the Product Liability Laws, BUSINESS WEEK, (February 12, 1979), 72-75, 77-78.
6. Legal theory in any country must deal with this issue. See, e.g., D'Hamale and Fallon, Belgium, 4-16; Sarrailhe, France, 3-39; von Braunschweig, Germany, 7-29, in Stucki, PRODUCT LIABILITY: A MANUAL OF PRACTICE IN SELECTED NATIONS, (New York: Oceana Publications, Inc., 1981).
7. D'Hamale and Fallon, supra note 6, at 11-14.
8. See works cited, note 6.
9. Von Braunschweig, supra note 6, at 26.
10. See works cited supra note 6: D'Hamale and Fallon, at 4-10; Sarrailhe, at 10-23; von Braunschweig, at 7-15.
11. Id.
12. Prosser, Assault Upon the Citadel, supra note 1.
13. Henningsen, supra note 2.
14. U.C.C., Section 2-318, Alternate A.
15. U.C.C., Section 2-318, Alternate B and Alternate C.
16. Each of these categories presents definitional questions. Prosser, HANDBOOK OF THE LAW OF TORTS, 3rd edition (St. Paul: West Publishing Company, 1964), 510-517, 519-532.
17. Gregory and Kalven, CASES AND MATERIALS ON TORTS, (Boston: Little, Brown and Company, 1969), 584-631; RESTATEMENT OF TORTS (SECOND), S402A.

18. Stillwell v. Cincinnati Inc., 336 N.W.2d 618 (North Dakota, 1983).
19. The ten nations are Belgium, France, Germany, Italy, Luxembourg, and the Netherlands (the original six); Denmark, Great Britain, Ireland; and Greece (the last to be admitted). Scotland has a separate legal system, but its product liability rules approximate those of England. Dodson, Bodek, and Wright, United Kingdom, in Stucki, supra note 6, at 1-3 and 64-66. Portugal and Spain have applied for admission. International Legal Notes, 56 AUSTRALIAN LAW JOURNAL 89-91 (February 1982). Meanwhile, Greenland (an overseas territory of Denmark) has dropped out. Harhoff, Greenland's Withdrawal from the European Communities, 20 COMMON MARKET LAW REVIEW 13-33 (March 1983).
20. Lipstein, The Doctrine of Precedent in Continental Law with Special Reference to French and German Law, 28 JOURNAL OF COMPARATIVE LEGISLATION & INTERNATIONAL LAW 34-44 (1948).
21. Zepos, The New Greek Civil Code of 1946, 28 JOURNAL OF COMPARATIVE LEGISLATION & INTERNATIONAL LAW 56-71 (1946); Schlesinger, COMPARATIVE LAW, (New York: The Foundation Press, 1959), at 193.
22. Schlesinger, supra note 21, at 196; Gammeltoft-Hansen, Gomard, and Philip, DANISH LAW: A GENERAL SURVEY, (Copenhagen: G.E.C. Gads Publishing House, 1982).
23. For example, the differing interpretations of the same Civil Code section by French and Dutch courts. Brevet, The Netherlands, in Stucki, supra note 6, at 6.
24. "England," Wales and Northern Ireland are subject to the same legal system. Dodson et al., supra note 19, at 1-3. Ireland is, of course, now an independent nation. Healy, Ireland, in Stucki, supra note 6.
25. The Heath case, supra note 3, provides an excellent example of judicial review in a product liability context.
26. Dodson et al., supra note 19, list the Civil Aviation Act 1949, the Consumer Credit Act 1974, the Fair Trading Act 1973, the Consumer Safety Act 1978, as examples, at 11.
27. Healy, supra note 24, at 1-4.
28. [1938] 4 All E.R. 258; cited by Dodson et al., supra note 19, at 6-7.
29. Fisher v. Harrods, [1966] 1.Lloyds Reports 500; cited by Dodson et al., supra note 19, at 7.
30. D'Hamale and Fallon, supra note 6, at 4-7, and 30.
31. Id., at 16-17.
32. Id., at 17.

33. Id., at 7.
34. Id., at 32-33.
35. Id., at 14.
36. Id., at 28.
37. Id., at 28.
38. Id., at 7.
39. Schlesinger, supra note 21, at 196.
40. Id.
41. Haraldsen, Norway, in Stucki, supra note 6, at 4. Cf. Magrell, Nilsson, and Sanden, Sweden, in Stucki, supra note 6.
42. Gammeltoft-Hansen et al., supra note 22.
43. Id.
44. Magrell et al., supra note 41, at 4.
45. Schlesinger, supra note 21, at 190-198; Markham, NAPOLEON AND THE AWAKENING OF EUROPE, (New York: Macmillan Publishing Co. Inc., 1965), at 54-56 and 101-102. According to Markham, "The Code was the container in which the principles of the French Revolution were carried throughtout Western Europe, even as far as Illyria and Poland." Markham, at 101.
46. For example, D'Hamale and Fallon, supra note 6, at 51 fn 46; Brevet, supra note 23, at 6.
47. Sarrailhe, supra note 6, at 41-43.
48. Id., at 44.
49. Id., at 44; Brevet, supra note 23, at 6.
50. Sarrailhe, supra note 6, at 44.
51. Id., at 44 and 22.
52. Id., at 45-46.
53. Supra, at note 33.
54. D'Hamale and Fallon, supra note 6, at 51 fn 46.
55. Sarrailhe, supra note 6, at 28.
56. Id., at 29.

57. Id., at 29.
58. Id., at 30.
59. Id., at 44.
60. For example, a fact pattern such as that in the Embs case, where a shopper in a store was injured by an exploding bottle as she passed near a display. Embs v. Pepsi-Cola Bottling Company of Lexington, Kentucky, Inc., 528 S.W. 2d 703 (Ky., 1975).
61. Sarrailhe, supra note 6, at 25, 41, 42.
62. Id., at 25.
63. Id., at 26.
64. Von Braunschweig, supra note 6, at 7.
65. Id., at 7-8.
66. Id., at 7.
67. Id., at 9-10, 38.
68. Id., at 9-10.
69. Id., at 38.
70. Id., at 39.
71. Id., 37, 39.
72. Id., at 35-37.
73. Id., at 36, 56 fn 71.
74. Id., at 26, 37.
75. Id., at 19-27.
76. Id., at 27-28.
77. Zepos, GREEK LAW, (Athens, 1949). See also, Forbes, The Greek View of Law, 64 JURIDICAL REVIEW 214-228 (1952); Spiliotopoulos, Judicial Review of Legislative Acts in Greece, 56 TEMPLE LAW QUARTERLY 463-502 (No. 2, 1983).
78. Zepos, supra note 77, at 37-41 and 52-53.
79. Id., at 43-52; Spiliotopolous, supra note 77.
80. Zepos, supra note 77, at 52-75.

81. Id., at 64-67; Zepos, supra note 21, at 56-60.
82. Zepos, supra note 21, at 60.
83. Id., at 67.
84. Id., at 67.
85. Id., at 67-68.
86. Id., at 67-68.
87. Healy, supra note 24, at 48-79.
88. Id., at 52-59.
89. Id., at 5 and 95.
90. Id., at 36-39.
91. Id., at 95.
92. Id., at 109.
93. Id., at 46-47.
94. Id., at 46-47, 102-103.
95. Id., at 102-104.
96. Id., at 103-104.
97. Id., at 102-103.
98. Luzzato, Italy, in Stucki, supra note 6, at 8.
99. Id., at 9.
100. Id., at 26-27.
101. Id., at 9.
102. Id., at 9.
103. Id., at 26-27.
104. Id., at 27 fn 17, and 28.
105. Id., at 15-16.
106. Id., at 26.
107. Id., at 24.

108. Id., at 15-16.
109. Id., at 18-19.
110. 14 ENCYCLOPEDIA BRITANNICA, Luxembourg, 452.
111. Schlesinger, supra note 21, has one entry for Luxembourg in his comprehensive bibliography: Cohn, Luxembourg: Legislation in Exile, 25 JOURNAL OF COMPARATIVE LEGISLATION & INTERNATIONAL LAW 40-46 (1943).
112. See discussion supra, at notes 30-38.
113. Brevet, supra note 23, at 5.
114. Id., at 5.
115. Id., at 7.
116. Id., at 7.
117. Id., at 6 fn 8.
118. Id., at 2, 33-34.
119. Id., at 19-21.
120. Id., at 20.
121. Id., at 20-21.
122. Id., at 21.
123. Id., at 33.
124. Id., at 30.
125. Id., at 30.
126. Id., at 31-32.
127. Id., at 19-21.
128. Dodson et al., supra note 19, at 4-6.
129. See discussion supra, at note 117.
130. Wautier, European Attempts at Harmonizing Laws Related to Product Liability, in Stucki, supra note 6, at 1; see also, Mahotiere, TOWARDS ONE EUROPE, (Baltimore: Penguin Books Inc., 1970).
131. Wautier, supra note 130, at 83-89.

132. Winship, New Rules for International Sales, 68 AMERICAN BAR ASSOCIATION JOURNAL 1231-1234 (October 1982).
133. Ferguson and McHenry, THE AMERICAN SYSTEM OF GOVERNMENT, eighth edition, (New York: McGraw-Hill, Inc., 1965), 687-688.
134. Feuer, BASIC WRITINGS ON POLITICS AND PHILOSOPHY: KARL MARX AND FRIEDRICH ENGELS, (Garden City, New York: Doubleday & Company, Inc., 1959), 1-41.
135. Moorehead, THE RUSSIAN REVOLUTION, (New York: Bantam Books, 1959); Wilson, TO THE FINLAND STATION, (New York: Doubleday & Company, Inc., 1953), 456-474; Tucker, THE LENIN ANTHOLOGY, (New York: W.W. Norton & Company, Inc., 1975).
136. Wautier, supra note 130, at 7.
137. Id., at 26-32.
138. Id., at 65-66.
139. Id., at 66-71.
140. Sullivan, Europe: Can Its Downslide Be Reversed?, NEWSWEEK, (April 9, 1984), 44-48; Common Market Proposes a Relaxation of Antitrust Rules to Encourage Research, WALL STREET JOURNAL, (October 27, 1983), 35; Common Market Leaders Resolve Dispute, ANN ARBOR NEWS, (June 26, 1984), C3; Norman, Many Problems, Limited Powers Await Delors at Common Market Commission, WALL STREET JOURNAL, (July 26, 1984), 28.

SUPPLEMENTARY 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-a-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.