V. LIABILITY FOR DAMAGE CAUSED BY PRODUCTS INTENDED FOR OR INVOLVED IN INTERNATIONAL TRADE

Report of the Secretary-General (A/CN.9/103)*

CONTENTS

INTRODUCTION

1. At its twenty-eighth session the General Assembly adopted resolution 3108 (XXVIII) of 12 December 1973 on the report of the United Nations Commission on International Trade Law on the work of its sixth session.[1] In paragraph 7 of the resolution, the General Assembly invited the Commission:

"To consider the advisability of preparing uniform rules on the civil liability of producers for damage caused by their products intended for or involved in international sale or distribution, taking into account the feasibility and most appropriate time therefor in view of other items on its programme of work."

2. The Commission at its seventh session had before it a note by the Secretary-General[2] on this subject which set forth certain background information pertaining to that resolution, and suggested possible action by the Commission in response thereto.

3. The subject was discussed by the Commission at its seventh session, and the following decision was unanimously adopted:

"The United Nations Commission on International Trade Law,

"Having regard to General Assembly resolution 3108 (XXVIII) of 12 December 1973,

"Requests the Secretary-General to prepare a report for consideration by the Commission at its eighth session setting forth:

"(*a*) A survey of the work of other organizations in respect of civil liability for damage caused by products;

"(*b*) A study of the main problems that may arise in this area and of the solutions that have been adopted therefor in national legislations or are being contemplated by international organizations;

"(*c*) Suggestions as to the Commission's future course of action."[3]

4. This report is submitted in response to that request. The report is divided into three parts as follows: part I, survey of the work of other organizations in respect of civil liability for damage caused by products; part II, study of the main problems that may

* 6 March 1975.

[1] *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17* (A/9017), para. 75 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

[2] A/CN.9/93.

[3] Report of the United Nations Commission on International Trade Law on the work of its seventh session, *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17* (A/9617), para. 81 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

arise in this area; part III, suggestions as to the Commission's future course of action.

PART I. A SURVEY OF THE WORK OF OTHER ORGANIZATIONS IN RESPECT OF CIVIL LIABILITY FOR DAMAGE CAUSED BY PRODUCTS

(a) *The Hague Conference on Private International Law*[4]

5. During the first Special Commission of the Conference on Torts, convened in October 1967, it was decided to put the topic of products liability in the conflict of laws in the category of matters for immediate treatment. The Special Commission also decided that the subject was ripe for regulation in an international convention. The Permanent Bureau thereafter prepared a questionnaire and explanatory memorandum on the *domestic* law of member States concerning products liability, and replies were received thereto. After the eleventh session of the Conference (October 1968) had recommended that the subject be given a place of priority on the agenda, the Permanent Bureau drafted a report dealing only with the conflict of laws aspects of products liability, together with a questionnaire on this topic which was addressed to member States. The subject was thereafter considered by a Special Commission on Products Liability. The conclusions of its initial meeting held in September 1970 were set out in a memorandum. It was concluded, *inter alia*, that "it will not be impossible to draft a convention which meets with the agreement of the large majority of the Experts. The embryonic state of the subject-matter will facilitate flexibility, and for once in the history of the Hague Conference, an attempt is being made to create new law rather than to find a compromise between existing solutions."[5] The Special Commission held a second meeting in March-April 1971, and adopted a draft text of a Convention which was thereupon submitted to member States for their observations. This draft text, together with the observations of member States thereon, was considered by the First Commission at the twelfth session of the Conference in October 1972. A definitive Convention was then prepared, and this was approved by the twelfth session of the Conference.[6]

6. The object of the Convention is to determine the law applicable to the liability of manufacturers and certain other specified persons for damage caused by a product.[7] The applicable law is to be determined by certain rules set out in articles 4, 5 and 6. This law is to determine, in particular, the following issues:[8]

1. The basis and extent of liability;
2. The grounds for exemption from liability, any limitation of liability and any division of liability;
3. The kinds of damage for which compensation may be due;
4. The form of compensation and its extent;
5. The question whether a right to damages may be assigned or inherited;
6. The persons who may claim damages in their own right;
7. The liability of a principal for the acts of his agent or of an employer for the acts of his employee;
8. The burden of proof in so far 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.

The scope of application of the Convention is delimited in various ways. Thus, there are definitions of the words "product"[9] and "damage",[10] and an enumeration of the categories of persons in regard to whose liability alone the Convention is to apply.[11] 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 does not apply to their liability *inter se*.[12] The Convention does not deal with judicial jurisdiction or with the recognition or enforcement of foreign judgements rendered in a products liability case.

(b) *The Institute for the Unification of Private Law (UNIDROIT)*[13]

7. A Committee of Experts on the Liability of Producers was set up in 1970 by the Committee of Ministers of the Council of Europe, at the proposal of the Councils of the European Committee on Legal Co-operation (CCJ).[14] The terms of reference of the Committee of Experts are to propose to the CCJ measures for harmonizing the substantive law of member States of the Council of Europe in respect of the liability of producers.

8. In order to assist the Committee of Experts, and at the request of the CCJ, UNIDROIT prepared two studies. The first was a study in three volumes[15] of the law on products liability in the member States of the Council of Europe, and of the United States of America, Canada and Japan. Volume I states the law of the following States: Austria, Belgium, Cyprus, France, Germany (Federal Republic of), Ireland, Italy, Luxembourg, Malta, and the Netherlands. Volume II states the law in the Scandinavian States, Switzerland, Turkey, England and Wales, and contains a note on the reparation for damage caused by the defects in the

[4] This account is derived from "Actes et documents de la douzième session (1972), tome III, Responsibilité du fait des produits" published by the Permanent Bureau of the Conference.
[5] *Ibid.*, p. 100.
[6] For the text of the Final Act of the twelfth session, see *ibid.*, tome III, p. 246.
[7] Article 1 of the Convention.
[8] Article 8.
[9] Article 2 (*a*).
[10] Article 2 (*b*).
[11] Article 3.
[12] Article 1, para. 2.
[13] The information contained herein is derived from a communication received from the Institute, and from documents EXP/Resp. Prod. 71 (1), vols. I-III, and EXP/Resp. Prod. 72 (1).
[14] CM/Del. Concl. (70) 192, item VI.
[15] EXP/Resp. Prod. 71 (1), vols. I-III.

goods sold, as provided by the Uniform Law on the International Sale of Goods. Volume III relates to the law of Canada, the United States of America, and Japan. The second study was a memorandum on problems raised by the harmonization of laws governing the liability of producers.[16]

(c) *The Council of Europe*[17]

9. The Committee of Experts on the Liability of Producers referred to in section (b) above held seven meetings between November 1972 and March 1975, and formulated the Draft European Convention on Products Liability, together with a draft Explanatory Report containing a commentary on the provisions of the convention.

10. The Committee of Experts has requested the European Committee on Legal Co-operation to recommend to the Committee of Ministers:

(*a*) That the draft Convention be approved;

(*b*) That the Convention be opened to the signature of member States of the Council of Europe, if possible during the Tenth Conference of European Ministers of Justice at Brussels in June 1976;

(*c*) That publication of the Explanatory Report be authorized.

11. The draft Convention contains 17 articles, which deal with all important issues arising in the field of products liability. It deals, *inter alia*, with definitions of "product"[18] and "producer"[19] the basis of liability,[20] defences open to a producer,[21] and applicable periods of limitation.[22] One of its main features is the establishment of a set of rules governing liability without reference to the existence of a contract between the person liable and the person suffering the damage. The principle adopted as the basis of liability by the Committee is as follows. The producer must pay compensation for damages resulting in death or personal injuries caused by a defect in the product. A product is stated in article 2 (*c*) to have 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 injured person must prove the damage, the defect and the causal link between the defect and the damage. If these facts are proved, it is a defence to the producer if he proves that the defect did not exist when the product was put into circulation or that the defect arose after the product was put into circulation. He can also exculpate himself by proving that the product was not put into circulation by him.

12. The Committee of Experts felt that the case of damage caused by products to property could usefully be dealt with in a separate instrument, such as a Protocol. The Committee thought that it was necessary, under the Convention, to make insurance compulsory in order to make producers insure their civil liability. However, the draft Convention does not at present contain provisions on this issue.

(d) *Commission of the European Communities*[23]

13. The Commission of the European Communities is engaged on a project for the approximation of the laws of member States relating to products liability. A Working Group has been established for this purpose. The work has been prompted by the divergencies which exist in this field in the national laws of member States. The result of these divergencies is that the legal position of a person who has suffered damage as a result of a defective product differs in the various member States. It has been observed in the memorandum on the approximation of the laws of member States that the following consequences of these divergencies may in particular need to be corrected in the context of the Common Market:

(i) Protection of the consumer, in particular the protection of his health, safety and his right to compensation for loss or damage suffered, varies considerably. To a large extent such protection does not even exist.[24]

(ii) The differences in the laws governing the liability of the manufacturer and the dealer also adversely affect competition within the Common Market by imposing unequal burdens on the industry and trade of certain member States in comparison with competitors in other member States.[25]

(iii) These same differences also adversely affect the unimpeded movement of goods across frontiers within the Common Market.[26]

14. It has been suggested that these undesirable features may be eliminated by means of a directive which approximates the differences between the laws of member States, and which would result in the laying down of rules which protect the interests of consumers, remove distortions of competition within the Community, and eliminate obstacles to the free movement of goods.

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[16] EXP/Resp. Prod. 72 (1). This was produced in co-operation with the Directorate of Legal Affairs of the Council of Europe.

[17] The information contained herein is derived from a communication from the Directorate of Legal Affairs of the Council of Europe, and from the draft report of the Committee of Experts on the Liability of Producers containing the Draft European Convention on Products Liability and the Draft Explanatory Report as revised by the Drafting Committee. The text of the Draft Convention hereinafter cited is the text as set out in Council of Europe Document EXP/Resp. Prod. (75) 2 dated 24 January 1975.

[18] Article 2 (*a*).

[19] Article 2 (*b*), and article 3 (2) and 3 (3).

[20] Article 3 (1).

[21] Articles 4 and 5 (1). It is noted below that it is a defence to the producer to prove that the product had not been put into circulation by him. The phrase "put into circulation" is defined in article 2 (*d*).

[22] Articles 6 and 7.

[23] The information contained herein has been obtained from document XI/332/74-E, Working Document No. 1 for the attention of the working group on "products liability" (memorandum on the approximation of the laws of member States relating to product liability) and Document XI/332/74-E, Working Document No. 2 for the attention of the working group on "products liability" (first preliminary draft directive concerning the approximation of the laws of member States relating to products liability, with commentary).

[24] Document XI/332/74-E, sect. II, para. 1 (*a*).

[25] *Ibid.*, para. 2.

[26] *Ibid.*, para. 3 (a).

15. A Working Group entrusted with the work in this field has produced a first preliminary draft directive. The draft directive consists of nine articles dealing with, and providing solutions for, the major problems arising in products liability, and its objective is sought to be achieved by imposing an obligation on member States to amend their laws in so far as they are inconsistent with the provisions contained in the articles. The articles deal, i.a. with the basis of liability,[27] the definition of producer,[28] the definition of "defect" for which liability is imposed,[29] the kinds of damage for which recovery is permissible,[30] a ceiling on the quantum of compensation recoverable,[31] limitation of actions,[32] and the mandatory nature of the liability.[33]

PART II. THE MAIN PROBLEMS THAT MAY ARISE IN THE AREA OF PRODUCTS LIABILITY

Introduction

16. Civil liability for damage caused by products cannot be counted as a new legal development. Such liability has always existed under certain branches of the law of civil liability. However, some developments in the recent past have led to an increased interest in the subject. Modern technological progress has resulted in products, and particularly manufactured products, being commonly used in the day-to-day life of most people living in developed countries. Many of these products have also the potential for causing serious harm to person or property, and in fact the incidence of such damage caused by products has increased. This has focused attention on the balance which the law should strike in, on the one hand, protecting the user of these products by giving him a right to recover compensation from the manufacturer or dealer, and, on the other, in not imposing so heavy a liability on manufacturer or dealer that their respective enterprises are financially crippled, or their incentive towards the development of new products stifled. In the nineteenth century the balance was probably tilted in favour of the manufacturer, since it was believed to be important to encourage the growth of industrial enterprises. The tendency was to regard it as fair that, as part of the cost of technological advance, the user of a product should bear any loss suffered by him which he could not prove was due to the negligence of the manufacturer. In recent years there has emerged a tendency towards granting more protection to the consumer. But the exact balance struck between producer and user varies from country to country.

17. The subject may also be thought to have acquired a special importance in relation to international trade by reason of the great increase in recent years of the international sale of products. In most countries products liability is subsumed under the general rules of civil liability. These general rules often diverge on important aspects of liability, and are sometimes not very clear. These features cause difficulties in that persons are left uncertain of their rights and obligations. Further, the presence of one or more foreign elements in trade transactions involving products may cause difficulties when an injured party wishes to sue a manufacturer or dealer. Thus the place of commission of the alleged wrongful act, the place where the product was purchased, the place where the damage occurred, the place of residence of the manufacturer, and the place of residence of the injured party, may not all be located in one State. If in such a case a delict (tort) or a breach of contract is alleged, it is necessary to resort to the conflict of laws to determine the applicable law to resolve various issues which may arise. It was the prevalent uncertainty in the choice of law rules which led the Hague Conference on Private International Law to draft a Convention on the Law applicable to Products Liability.

18. The decision taken at its seventh session by the Commission[34] was that a study be undertaken of the "main" problems in this area. The decision as to whether a problem is a main one or a subsidiary one is often subjective. Thus the problem of the possible vicarious liability of the producer for the wrongful acts of his employees or of independent contractors employed by him, is omitted, although the view may be taken that this is a main problem.

19. The problems dealt with are the following:

(i) The definition of the term "product"

(ii) The persons incurring liability

(iii) The persons in whose favour liability is imposed

(iv) The kinds of damage for which compensation is recoverable

(v) The requirement that the uniform rules only apply where the goods are the subject of international trade

(vi) Limitations on the recovery of compensation

(vii) Defences available to the persons incurring liability

(viii) The basis of liability

(ix) The relationship of the uniform rules to existing rules of civil liability

(x) The period of limitation.

20. Each problem is dealt with in turn, and for the purpose of information the way in which it is treated in the Hague Convention or other texts drafted by international organizations is set out at the end of each section.

(1) *Definition of the term "product"*

21. The definition given to the term "product" would have a significant effect on the scope of legal liability. Standing by itself, the term can have a wide meaning. Thus it has been defined as "anything produced, as by generation, growth, labour, thought or

[27] Article 1.
[28] Article 2.
[29] Article 3.
[30] Article 4.
[31] Article 5.
[32] Article 6.
[33] Article 8.

[34] Report of the United Nations Commission on International Trade Law on the work of its seventh session, *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17*, (A/9617), para. 81 (UNCITRAL Yearbook, vol. V: 1974, part one, II, A).

by the operation of involuntary causes . . .".[35] However, since the object of the rules is to delimit the liability of the *producer*, it is clear that only things which have been produced as the result of human activity are intended to be included and not those produced, for example, by natural process or involuntary causes. But in view of the wide range of human activity, it may be thought that a closer definition is required.

22. One approach may be to focus on the type of human activity the application of which can result in products in relation to which liability is to be imposed. The aim would be to single out those types of activity which result in products which it is desired to bring within the scope of liability. Thus the activity may be specified in terms of a mechanical or industrial processing or packaging. However, it seems difficult to eliminate at least two types of border-line cases. The first is where the product is the result both of human activity and the operation of natural forces. The most important illustration would be crops, vegetable produce, and livestock. Thus in the case of crops, it may be argued that the primary generating force is that of nature. However, their growth may have been significantly influenced by the application of fertilizers and insecticides. The second occurs because general words used to describe a process or activity always have an area of indeterminate meaning. Thus if a phrase such as "mechanical assembling" or "industrial processing" is used, doubts will always arise in some cases whether these terms are applicable.

23. Another approach to the definition of product may be to focus on the description of the product in its finished form, and to include or exclude products by that description. Thus decisions as to inclusion or exclusion would be taken with reference to such categories as "agricultural" products, or "manufactured" products, without regard to anterior processing. Thus the fact that a mechanical process was associated with the making of the agricultural product would be irrelevant.

24. A further approach would be to seek to control the scope of liability not so much through the definition of the term "product", but through the definition of the person liable. Under this approach, it would be possible to have a very wide definition of product (e.g. as indicating "all movables, natural or industrial, whether raw or manufactured") and a narrow definition of the person liable (e.g. as indicating "manufacturers of finished products or of component parts and the producers of natural products").

25. It is suggested that in deciding on a definition of "product", the following aspects may need to be considered:

(i) What types of goods cause frequent or extensive damage, and therefore call for proper consumer protection?

(ii) Is the damage caused by certain types of goods (e.g. nuclear material, transport vehicles) already regulated by other international legislation?

(iii) Are there any types of goods, the establishment of liability in regard to which poses special problems under existing law? (e.g., manufactured goods, where the methods of manufacture are only known to the manufacturer).

(iv) The type of damage for which liability is to be imposed. Thus if liability is only to be imposed for personal injury or death, it may be thought that products which cannot cause such damage may be excluded from the definition.

(v) The need to have a clear definition minimizing litigation on the scope of liability.

(vi) The feasibility of procuring liability insurance in respect of a product by the producer, or accident insurance by a potential victim.

26. While products which are the subject of international trade would in most cases be legally classified as "movable", such trade in immovables (such as buildings) is possible. It may be thought that trade in immovables contains many distinctive features (such as the high value of the product, the relative infrequency of such transactions, and the consequent decrease in the urgency of the need for consumer protection, and the relative rarity of loss or damage being caused by such products), which may justify the exclusion of such products from the scope of liability. If a decision is made to exclude such products, a case which may nevertheless need to be considered is the incorporation or attachment of a movable product to an immovable in such a way that it ceases to qualify as a movable and becomes part of the immovable. It may be suggested that, as long as the product retains its physical identity, liability may be imposed in respect of damage caused by it. On the other hand, liability for damage caused by immovables is in some systems governed by rules based on special considerations, and it may be felt that these rules should be left undisturbed.

Relevant provisions in the Hague Convention and other texts

27. The Convention on the Law Applicable to Products Liability of the Hague Conference on Private International Law contains the following:

"For the purposes of this Convention—

"The word 'product' shall include natural and industrial products, whether raw or manufactured and whether movable or immovable; . . ."[36]

28. Article 1 of the first preliminary draft directive of the EEC concerning the approximation of the laws of member States relating to products[37] states:

"The producer of *an article manufactured by industrial methods or of an agricultural product* shall be liable even without fault to any person who

[35] Webster's New International Dictionary, 2nd Ed.

[36] Article 2a. However, article 16 states that "any Contracting State may, at the time of signature, acceptance, approval or accession, reserve the right—(2) not to apply this Convention to any agricultural products".

[37] EEC document XI/334/74-E.

suffers damage as a result of defects in such article."[38]

The commentary on this article states the following: " 'Production by industrial method' means large quantity production. Manufacture of individual items is excluded. Since such manufacture requires special care, the principle of liability with fault is sufficient. Agricultural products are on a par with products manufactured by industrial methods. The concept 'agricultural product' is to be interpreted broadly. Animal products also count as agricultural products manufactured by a producer."

29. Article 2 (*a*) of the Draft European Convention on Products Liability is as follows:

Art. 2 (a). "The expression 'product' indicates all movables, natural or industrial, whether raw or manufactured, even though incorporated into another movable or into an immovable;".

(2) *The persons incurring liability*

30. One important factor which would affect the scope of liability is the delimitation of the persons on whom liability is imposed. In this connexion, the resolution of the General Assembly referred to above uses the word "producer". It would appear that this term has a wider meaning than "manufacturer". Thus one who grows agricultural crops or raises livestock would not normally be called a manufacturer, but may be called a producer.

31. In relation to the term "product", it was observed above that the description of the method of production could be used as a way of delimiting the meaning of that term. Correspondingly, this technique could be used to delimit the meaning of "producer". Thus, if products were defined as goods which resulted from an industrial process, the producer could be defined as the one who applied that process. However, this "linked" approach to definition is not a necessary one nor (as will appear from the discussion below) does it solve some of the problems involved. It is suggested that an approach which seeks to describe in the abstract the various meanings which the term "producer" can bear may not be useful. Rather, the meaning to be given to the term could depend on the objectives sought to be achieved in relation to the incidence of liability.

32. A broad distinction which may be relevant in this context is that between the chain of production and the chain of distribution. The chain of production may be thought to commence from the time that raw materials were first processed with a view to their use in the finished product up to the time that the finished product emerged in the condition in which it was marketed. While it is possible that the processing throughout this period is in the hands of only one person or legal entity, it is more likely in the context of modern industry that there will be several persons or legal entities involved standing in different relations one to the other. It is often difficult to describe one of these persons as being the producer, or the chief producer.

Similarly, the product would normally travel through several hands in the chain of distribution before reaching the ultimate user. While there would be no dispute that liability should be imposed on one or more persons in the chain of production, a basic question would be whether any persons in the chain of distribution should also be liable.

33. Arguments can be adduced both in favour of and against the imposition of such liability. If the basis of liability were to be fault or negligence,[39] a restriction of liability to the chain of production may be justified by the consideration that such fault or negligence giving rise to a defect arises in most cases at the stage of production. Even if the basis were strict liability, some of the rationales supporting such liability appear to suggest that liability is best attached to those concerned with production. Thus it has been suggested that strict liability will serve as a deterrent to defective manufacture. But this is most effectively achieved by imposing liability on those concerned with production. It has also been suggested that the imposition of strict liability will secure the desirable objective that the person injured is almost always compensated. Such liability can be insured against, and the cost of insurance distributed among all users by increasing the price of the product. But it is the producer who can take out insurance most easily, as it is he who knows the percentage of defective products which are inevitable in production. Further, if persons in the distribution chain were also to be subjected to liability, difficult questions may arise with regard to determining which of these persons are to be so subjected—the chain of distribution may include wholesalers, retailers, warehousemen, transporters, and lessors. It may also be thought that the term "producers" as used in resolution 3108 (XXVIII) would not normally catch up those in the chain of distribution.

34. As against these considerations, the view may be taken that subjecting selected persons in the chain of distribution to liability in addition to those in the chain of production could entail no serious disadvantages, and may result in some benefits. Thus the person injured and the producer would in most cases involving international trade have their residences in different States, and jurisdiction in an action for compensation could more easily be obtained over someone in the chain of distribution residing in the same country as the person injured. Even if jurisdiction over the producer is secured, the satisfaction of a judgement obtained may require its enforcement abroad, where alone the producer's assets may be situated: such enforcement may entail expense and difficulties. Again, one of the persons to whom the user would naturally look in relation to defects in the product would be the distributor from whom he obtained it, or the importer of the product. If the liability of the distributor or importer were excluded, it may be thought to confer insufficient consumer protection. Further, cases may occur where the product became defective as a result of handling or treatment during distribution. There may also be cases where the manufacturer or producer is unknown, and the person injured has no means of discovering his identity.

[38] Emphasis added.

[39] The basis of liability is discussed below.

35. Whether or not it is decided to exclude persons in the chain of distribution from liability, the question would remain of determining the categories of persons in the chain of production on whom liability is to be imposed. Thus A, B and C may supply the components of a product, these may be assembled by D, and the assembled entity processed by E to obtain the finished product. A, B and C may in turn have obtained primary products (such as glass, sheet metal, or insulating material) from X, Y and Z for the purpose of manufacturing the components. Perhaps the primary consideration which would be relevant in determining the range of liability would be the extent to which it is considered desirable to protect injured parties. In one view it may be thought fair that anyone who contributes skill or labour or material which is utilized in the making of the finished product should be potentially liable. The finished product is in different degrees the result of the conduct of such persons, and if the conduct of any one of them falls below the prescribed standard and causes loss, it may be thought that he should compensate the injured party. There is likely to be general agreement that the manufacturer of components and the assembler should be potentially liable. There may be room for disagreement about persons who do not make a profit out of the sale of the product or the components, such as the employees of the component manufacturer and assembler. Such persons may not have the financial capacity to bear the potential liability, and may also not be covered by liability insurance.

36. It is clear, however, that in a concrete case not everyone who may fall within the scope of liability will be held liable. For actual liability will depend on the circumstances and the basis of liability adopted. Thus, if the basis of liability is negligence, and a component is negligently manufactured, in many cases only the component manufacturer will be held liable. The assembler often neither has the means or opportunity of testing components, and failure by him to test may not constitute negligence. The widening of the categories of potential defendants does not therefore necessarily imply that a large number of persons will all be actually liable in concrete cases.

37. If it is decided to impose liability on selected persons within the chain of distribution as well, two questions may need consideration. Firstly, is liability to be imposed only on those engaged in distribution as part of a commercial transaction, or is it to be imposed also on non-commercial distributors? Examples of the latter class would be a school which distributed toys among its pupils, a host who distributed food products among his guests, or a charitable foundation which distributed clothing among the needy. From the fact that the proposed regulation of liability is intended to facilitate international trade, and to govern liability in respect of products "intended" for or involved in international sale or distribution", it is possible to conclude that the scope of liability should not extend beyond the realm of commercial transactions. In this view non-commercial distributors should not be liable, but commercial distributors anterior in the chain of distribution would remain liable.

38. Assuming that liability is only to be imposed on those engaged in distribution as part of a commercial transaction, it would, secondly, be necessary to identify which of the many categories of persons involved in the chain of distribution are to be made liable. It may be suggested that, as in the case of the chain of production, each case may need to be considered on its merits. Thus a carrier may be one link in this chain. But imposing liability on the carrier may cause conflicts with the several conventions regulating carrier responsibility, and may therefore be thought to be better avoided.

Relevant provisions in the Hague Convention and other texts

39. Article 3 of the Convention on the Law Applicable to Products Liability of the Hague Conference on Private International Law is as follows:

> "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."

40. Article 2 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to products liability defines "producer" in the following terms:

> " 'Producer' means any person by whom the defective article is manufactured and put into circulation in the form in which it is intended to be used."

41. Articles 2 (*b*), 3 (2), 3 (3), and 3 (4) of the Draft European Convention on Products Liability are as follows:

> *Art. 2* (b). "The expression 'producer' indicates the manufacturers of finished products or of component parts and the producers of natural products."
>
> *Art. 3 (2).* "The importer of a product and any person who has presented a product as his product by causing his name, trade-mark 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."
>
> *Art. 3 (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 to be 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."
>
> *Art. 3 (4).* "In the case of damage caused by a defect of a product incorporated into another product, the producer of each product shall be liable."

(3) *The persons in whose favour liability is imposed*

42. A question which may need consideration is the definition of the categories of persons to whom the producer is to be liable. The absence of such a definition may lead to uncertainty as to the scope of liability.

43. A possible solution may be to specify that, given an act entailing liability, the producer is to be liable to every person to whom loss results, provided that the loss is of a kind for which compensation is recoverable. The fact that the occurrence of loss to a particular person is not reasonably foreseeable would be irrelevant. This may be illustrated by the following.

44. "The standard of conduct required of the producer is the absence of negligence. A, a tyre manufacturer, negligently manufactures a tyre which is defective and likely to burst. Harm to the automobile to which it is fixed, the occupants of the automobile, and bystanders within a certain radius of a burst, is reasonably foreseeable. The tyre bursts, and the noise of the explosion is heard by B, a pregnant woman, in a house some distance from the highway, and she suffers a miscarriage in consequence. A is liable to B."

45. This result may be justified by the reflection that, as between A and B, A has fallen below a prescribed standard of conduct, while B is completely innocent. The loss should therefore fall on A.

46. An opposing view may be that liability of this nature is too extensive and imposes a burden on the producer which is so heavy that it may cripple his enterprise. Further, the obtaining of insurance cover becomes more difficult when liability is imposed for risks which are incalculable. It may therefore be thought that the producer should only be liable, for example, to particular categories of persons, or to persons to whom he stands in a defined relationship. A technique used in the common law in this connexion is to state that the producer is only liable in negligence to those to whom he owes a duty, and that he only owes a duty to those standing in a certain relationship to him, i.e., those whom he can reasonably foresee would be injured by his act.

47. An example of a solution in terms of categories of persons would be the restriction of liability only to the *user* or *consumer*. For instance, the American Restatement Second, Torts, section 402A, imposes strict liability on "one who sells any product in a defective condition unreasonably dangerous to the user or consumer" only in favour of the user or consumer.[40] This would exclude, for instance, bystanders at an accident and workers employed by the producer. A refinement of this would be to restrict liability to a *lawful* user or consumer. This would, e.g., exclude liability to a thief in the case of a defective automobile, or to one driving it without a certificate of competence. A possible solution in terms of relationship to the producer would be to impose liability only in favour of those who can be said to fall within the risk of harm created by his wrongful act. On the basis of liability only to the user or consumer, in the illustration given above A would not be liable, while on the basis of liability only to persons falling within the risk of harm it is unlikely but possible that he would be held liable. A refinement of this second basis of liability would be to make the producer liable to a person only for the particular kind of damage the risk of which is created by his wrongful act. Thus if the act creates a risk of personal injury to a particular person, and damage to the property of that person results, the producer would not be liable.

48. It may be noted that the exclusion of liability to particular persons is sometimes also reached, not by rules marking out persons in whose favour alone liability is imposed, but through rules relating to limitations on the recovery for remote consequences of an act entailing liability. Thus in the illustration given above it may be possible to say that A is not liable because the loss suffered by B was too remote a consequence of the negligence, or not a direct consequence of the negligence.

49. A special problem arises where the product causes injury which results in the death of a person. Under some systems of law the right of action is personal to the party injured and is extinguished by his death. Under other systems of law the right of action which accrued to the deceased during his lifetime passes either to his heirs or to his personal representatives. It is believed that this is a desirable result, and it may be thought that special provision may have to be made to preserve it. Many legal systems also make a wrongdoer liable to persons standing in close relation to the deceased for certain kinds of loss suffered by them, e.g., loss of support suffered by dependants, injury to feelings suffered by the next of kin. The question whether the producer should be liable to such persons may need consideration.

Relevant provisions in the Draft European Convention and other texts

50. Article 1 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to product liability states:

> "The producer of an article manufactured by industrial methods or of an agricultural product shall be liable even without fault *to any person* who suffers damage as the result of defects in such article."

51. Article 3 (1) of the Draft European Convention on Products Liability is as follows: "The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product." The restriction of the kinds of damage for which liability is imposed has the indirect consequence of limiting the persons in whose favour liability is imposed.

(4) *The kinds of damage for which compensation is recoverable*

52. A product can cause very different kinds of damage. Certainty as to the scope of liability may require the delimitation of the kinds of damage for which compensation is to be recoverable from the

[40] In a caveat, it is stated that the American Law Institute expresses no opinion as to whether the rule stated may not apply to harm to persons other than users or consumers: Restatements, Second, Torts, section 402A, Caveat, p. 348.

producer. The possible kinds of damage may be broadly categorized as (*a*) bodily injury, (*b*) injury to the mind, (*c*) damage to tangible property, and (*d*) financial loss. In most cases where damage is caused at least two of these types will coexist.

(a) *Bodily injury*

53. Freedom from bodily injury is almost universally regarded as an interest deserving protection. It is believed that there will be no dispute that compensation should be recoverable for this kind of damage. It is also likely that there will be agreement that a limited right of recovery should be available where death results. Apart from the unique event of the death itself, the other types of resulting damage can be brought under one or other of the heads mentioned above. The question of the transmissibility of the causes of action accruing to the deceased before his death, and the question of the categories of persons to whom independent causes of action may arise, has been mentioned in section (3) above.

(b) *Injury to the mind*

54. Mental injury can be of various types, e.g., a nervous shock, or feelings of humiliation or inferiority. Some types of it are often difficult to clearly distinguish from bodily injury. Thus some types of injuries to the nervous system may be regarded as falling into either category. There are other kinds of injury, such as loss of expectation of life, which are difficult to categorize, but which are perhaps most easily fitted in here. One possibility would be to require that compensation is to be payable for every type of mental injury. The main reason advanced against permitting any recovery for mental injury appears to be that it is often difficult to determine the existence or the degree of injury. However, this may not be regarded as a sufficient reason for excluding compensation altogether, as many cases occur where the fact and extent of mental injury can be clearly established. It may also be thought that peace of mind is an interest as deserving of protection as bodily security. Another possibility is to require compensation only where mental injury results from bodily injury. Determination of the truth of the claim in regard to mental injury and the extent of the injury may be easier in such a case.

(c) *Damage to tangible property*

55. The safety of tangible property in which a person has a legal right is almost universally regarded as an interest deserving protection. A requirement that compensation should be recoverable in such cases is likely to command wide acceptance.

56. A case which has provoked some discussion in the context of establishing a special régime on products liability is the case where the product is defective and does not function properly, but has not caused injury or damage to a person or object external to itself. It has been suggested that such a case should be excluded from the scope of any such régime since the injured party is given a sufficient remedy under the contract by which he acquired the product. The view may be taken, however, that a different result should obtain where the defect causes damage both to the product itself and to something external to it, e.g., where defective wiring causes a fire which burns the product itself and other property. If damage to the product itself is always excluded from the scope of the régime, the result in the latter type of case would be that the liability for the defect in the product, and for external damage caused by it, would be subject to two different legal régimes. The desirability of this result may need consideration.

(d) *Financial loss*

57. Such loss can occur as a result of the types of damage previously noted, or independently. Examples of the first case would be where bodily or mental injury caused by the product results in medical expenses or loss of earnings, or where damage to tangible property caused by the product results in the incurring of repair costs. Examples of the second would be where a dealer selling a defective product suffers loss of custom, or where the defective product is itself a business asset which cannot be used and results in a loss of profits. One approach may be to exclude all cases of financial loss from the ambit of recovery. This may be justified by the argument that the magnitude of such loss can be very great, and that to impose liability for such loss on the producer is to impose on him an unfair burden. Another supporting argument might be that such loss is often speculative and hard to prove, and that to permit recovery will involve the courts in cases which are difficult to decide. However, these arguments may be met by the response that the imposition of an unfair burden can be prevented by appropriate rules of limitation on the quantum of recovery, and that difficulties in the establishment of facts are not unusual in litigation. A middle ground between allowing recovery in all cases of financial loss, and disallowing it in all cases, would be to allow recovery when financial loss results from any of the other types of injury. Determination of the existence and extent of loss is likely to be easier in such cases.

Relevant provisions in the Hague Convention and other texts

58. It may be noted that article 2 (b) of the Convention on the Law Applicable to Products Liability of the Hague Conference on Private International Law provides that

> "For the purposes of this Convention . . .
>
> "(*b*) The word 'damage' shall mean injury to the persons 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 damages."

59. Article 4 of the EEC preliminary draft directive concerning the approximation of the laws of member States on products liability:

> "Damage shall not include the defective article. Contractual claims of the purchaser of the article shall remain unaffected. Compensation of non-recurring damage shall be excluded."

The explanatory notes to the article state that

> "Liability for the defective article itself is excluded from the rules and remains a matter for the contractual relations between the parties. Such liability should continue to be governed by the law of purchase and sale. Financial loss suffered by the purchaser of a defective article through his having paid an excessive price can be compensated according to traditional rules."

The commentary on the article also states that the inclusion of non-pecuniary damage would unduly broaden the extent of liability.

60. Article 3 (1) of the Draft European Convention on Products Liability is as follows:

> "The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product."

The explanatory report on the draft convention states that damage to goods was excluded from the scope of the convention both because of a lack of time in which to make a thorough study of the problems which might arise if the scope was widened to include such damage, and because certain experts felt that a system of strict liability could be more easily ratified by States if it was limited only to damage causing death or personal injuries.

(5) *The requirement that liability should be imposed only where the products are the subject of international trade*

61. Liability is, under the wording of General Assembly resolution 3108 (XXVIII), to be restricted to damage caused by products "intended for or involved in international sale or distribution". It is likely that this wording was not intended to be final and definitive, but only to lay down a guideline as to the possible ambit of liability. Nevertheless it is believed that an analysis of the wording as it stands may be helpful both towards indicating its exact meaning, and also in deciding on the advisability of any restriction or extension.

62. It is clear that goods may be intended for international sale or distribution without ever becoming actually involved in such sale or distribution, and vice versa. Further, the criteria of intention and involvement are clearly separate. One would depend on the state of mind of the producer or distributor prior to manufacture or sale, while the other would depend on the fact of sale or distribution outside the state of manufacture. It is clear, however, that the intended objective of the unification of liability is the removal of certain obstacles to international trade presently existing by reason of divergencies in national laws. This objective would not be advanced by unifying liability in respect of products merely intended for international trade, but not involved in it. It would appear, therefore, that what is envisaged is the creation of a special régime of liability for products which are actually the subject of international trade transactions. The result of such a course of action would be the existence of two régimes for products liability: that of unified liability where the products are the subject of an international trade transaction, and that of national law in other cases.

63. In this context two matters may be usefully examined:

(*a*) The requirement that there be an international trade transaction.

(*b*) Difficulties created by this requirement.

(a) *The requirement that there be an international trade transaction*

64. There are two elements to the requirement that there be an international trade transaction: first, the identification of what marks out a trade transaction as "international"; and secondly, what is meant by a "trade transaction". Perhaps the most important international trade transaction, and the one specifically mentioned in the resolution, is the international sale. The United Nations Convention on the Limitation Period in the International Sale of Goods provides that "a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States" (art. 2 (*a*)). The criterion that, to make a sale international, the buyer and seller must have their places of business in different States, is also used in the revised Convention on the International Sale of Goods as it has been approved by the Working Group on International Sales at its first six sessions (art. 1 (1); see A/CN.9/100, annex 1). A question which would need consideration is whether this criterion is appropriate to all trade transactions, or whether other criteria have to be specified for other types of transactions. There are various types of transactions in goods which may be considered to be "trade transactions". In addition to the sale, the hire and pledge of goods may be considered to be a "trade transaction". However, there may be other transactions which do not fall neatly under specific heads, and the goods may relate to such transactions in various ways. In these cases the connexion between the transaction and the products sufficient to attract liability may require closer definition than the use of such general words as "the subject of" or "involved in" the transaction.

65. The term "international distribution" used in the resolution may be better regarded, not as a trade transaction, but as a state of affairs resulting from either trade or non-mercantile transactions. The question whether distribution which does not result from a trade transaction should attract liability has been considered in section (2) above.

(b) *Difficulties created by this requirement*

66. The difficulty created by this requirement is that products may be the subject of several successive trade transactions, only one of which may be an international trade transaction. This may be illustrated by the following example. A, the manufacturer, residing in State X, sells products to an exporter, B, in the same State. B sells them to a foreign importer C, residing in State Y. C sells them to D, a wholesaler resident in State Y, who sells them to a retailer E, also resident in the same State, who in turn sells them to a user F resident in State Y who is injured by the

products. The products were only involved in international trade at the stage of the sale from B to C. Should liability be imposed on A, and (assuming that liability is also to be imposed on persons in the chain of distribution) on B, C and D? One view may be that the fact that goods have been the subject of international trade at some point should be sufficient to attract liability. This view may not result in the imposition of liability contrary to the normal expectations of commercial circles if the persons on whom liability is imposed fall within a narrow category (e.g. the "manufacturer"). If, however, liability is also imposed on persons in the chain of distribution, the result would be the applicability of the uniform rules in the above example to C and D. This may be contrary to their reasonable expectations, since they were engaged in purely domestic transactions, and would only contemplate the application to these transactions of domestic law. It may be observed that neither the United Nations Convention on the Limitation Period in the International Sale of Goods, or the revised Convention on the International Sale of Goods as it has been approved by the Working Group on International Sales at its first six sessions[41] would apply to the transactions between A and B, C and D, D and E, and E and F.

67. A possible response to this difficulty may be, in addition to the requirement that the products be the subject of an international trade transaction, to also impose one or more further preconditions to the imposition of liability which would make such imposition not unreasonable.

Such further preconditions may be:

(*a*) That the person sued knew, or could reasonably foresee, that the products would be, or had been, the subject of an international trade transaction.

(*b*) That the person sued and the person injured were resident in different States.

68. A more radical response to the difficulty may be the abandonment of the requirement that one element delimiting the scope of liability should be the involvement of the products in international trade. At present, whether or not the products in question are the subject of international trade, under any legal system the applicable law which would be chosen by a court to decide a question of products liability would be a national law. If a foreign element is involved in the case, the applicable national law would be chosen by the choice of law rules of the court. A unification of national laws on products liability would automatically result in a unification of laws applicable where the products were the subject of international trade. This approach would have the merit of simplicity in that it envisages only one legal régime for products liability, whether the products are the subject of domestic trade or international trade. However, in the light of differences of view which still exist in different States as to the desirable solutions to major issues involved (such as the basis of liability, and the kinds of damage for which compensation is to be recoverable), it may be thought that this approach is too ambitious.

[41] A/CN.9/100, annex 1 (reproduced in this volume, part two, I, 2).

(6) *Limitations on recovery of compensation*

69. The damage caused by a product can consist not only of immediate results, but of results of a lesser or greater degree of remoteness. These may be predictable consequences of a defect, or wholly unpredictable. From the point of view of the user who has suffered loss it may be argued that he should by the payment of compensation be placed in exactly the same position as if the incident causing damage had not occurred. This may be supported by the view that as between an innocent party (the user) and a blameworthy party (the producer) it is fair that all losses should fall on the latter. From the point of view of the producer, it may be argued that to impose liability in those terms would have a crippling effect on his enterprise. It may therefore be suggested, for instance, that fairness demands that his liability should be confined to consequences which are likely to fall within the particular risk he has created. Thus if his wrongful act in relation to the product has created a risk of personal injury, he should not be held liable if damage to property ensues. All legal systems have rules for drawing the limits at which the recovery of compensation is halted. To attain this objective, use is made of concepts such as causation, and "remoteness" of damage. The following are some of the ways in which they may be used.

70. (*a*) As the results of a wrongful act spread further and further away in time and sequence from the act itself, it may be possible to argue that a particular item of resulting damage was not "caused by" the wrongful act. This argument will become increasingly attractive as other forces (e.g., acts of other persons, natural forces) exert a concurrent influence on the results. Liability can in this way be limited. The theories of causation employed by different legal systems appear to diverge, and all appear to be complex, but they all seek the objective of containing liability within limits regarded as desirable.

(*b*) Another approach taken is to introduce an independent rule that damage which is caused cannot be the subject of compensation if it is too remote. This requires the statement of rules defining remoteness of damage. Here again different tests are used, and these also are often complex. A test that is often used is whether the damage was reasonably foreseeable by the defendant at the time of the wrongful act. Difficulties have been experienced with this test in certain situations, e.g., where a particular item of some damage of a particular kind (personal injury to the head) is foreseeable, and another unforeseeable item of damage of the same kind (injury to the leg) results; or where damage of a particular kind (personal injury) is foreseeable, and damage of another kind (damage to property) results; or where damage of a particular kind to one person is foreseeable, and damage of the same kind results to another.

71. A question which may need consideration is whether it is desirable that provisions should be formulated seeking to resolve these issues. It has been noted that the limits of recovery are based on considerations of policy as to which person should bear a particular item of loss, and views on such considerations can vary in different States. This reflection may

lead to the conclusion that these matters may be left to be regulated by national law, since unification may not be practicable. Alternatively, it may be thought that a test based on reasonable foreseeability could gain wide acceptance.

72. The basis of liability adopted may also be relevant in deciding on the limits of recovery. Thus if a general rule of strict liability was adopted, it might be thought that fairness to the producer demands that the limits of recovery should be narrow, since he would be held liable in a larger number of cases than if the basis was negligence. Conversely, if a general rule of liability based on negligence was adopted, it might be thought that the limits of recovery might be wider.

73. The imposition of a monetary ceiling on recovery may also deserve consideration. Such a ceiling may lessen the attention which would be given to elements such as causation and remoteness. It would also enable producers to assess exactly the extent of potential liability, and this would facilitate the taking out of liability assurance.

Relevant provisions in the draft European convention and other texts

74. Article 5 of the EEC preliminary draft directive concerning the approximation of the laws of member States relating to products liability is as follows:

"The producers liability for payment of damages shall be limited to:

"—. . . units of account in the case of physical damage;

"—. . . units of account in other cases.

"Every loss shall be a separate ground of liability for payment of damages."

The explanatory notes to this article state that "Both the extent and duration of the producer's liability for payment of damages should be limited in order that it may be made calculable and thus insurable. . . . Since, in the field of consumer protection, adverse effects to health are more serious than pecuniary losses, liability for payment of damages in respect of physical damage should be fixed at a higher level than that for material damage."

75. The Draft European Convention on Products Liability leaves these questions to be decided by national law. It may be noted in this context that the Convention only imposes liability where a product causes death or personal injury.

(7) *Defences which may be available to the person sought to be made liable*

76. Under all national rules relating to delict (tort) a person sought to be made liable has available to him certain defences which exclude or reduce liability. While many such defences are common to most systems, the exact scope of the defence can vary with each system. It may be thought that any scheme of liability needed to specify such a set of defences. Justice to the producer seems to demand that they be admitted in many cases, and the interest in reaching uniformity of liability would seem to require that their nature and extent be indicated as clearly as possible.

77. The following defences may need consideration:

(*a*) Assumption of risk;

(*b*) Contributory negligence;

(*c*) Negligence of a third person;

(*d*) *Force majeure.*

(a) *Assumption of risk*

78. This defence arises in a situation where a person, with knowledge of a risk, nevertheless voluntarily decides to submit to it. Such a situation may arise in the field of products liability when a user of a product, after being informed of or having discovered a defect, voluntarily decides to use it, or continue to use it. The defence is admitted on the theory that in such circumstances the person who has created the risk is absolved from a duty to take care, or cannot be called a wrongdoer if damage ocurred.

79. One view may be that this defence should be admissible. A practical justification of the defence is that in the circumstances in which it operates the person injured cannot fairly complain of the damage caused to him. Another view may be, however, that since one of the objects of the imposition of liability is to deter producers from falling below desired standards of conduct, action of the kind described above on the part of the person injured should not be a defence. Again, if the basis of liability is strict, it may be thought that to admit the defence would be to mitigate the strictness unduly.

(b) *Contributory, or comparative, negligence*

80. This defence arises when the negligence of the party injured is a contributory cause of the damage suffered. Where the basis of liability is negligence, the modern solution is to reduce the compensation payable to the party injured in proportion to his responsibility for his own loss. If the basis of liability is strict, the admissibility of the defence may be open to debate. One view is that the contributory negligence of the injured party may not displace some of the reasons which led to the imposition of such responsibility. Thus strict liability may be imposed in relation to products because the producer is best able to absorb and distribute the losses caused. This reason would be unaffected by the contributory negligence of the injured party. But another view may be that the fact that the injured party did not take reasonable care for his own safety is a valid reason for reducing the amount payable to such party, since such reduction would operate as an incentive for users and consumers to take due care, which in turn would lead to a reduction in the incidence of loss or damage.

(c) *Negligence of a third person*

81. Where the negligence of a third person has contributed to the damage concurrently with the act of the producer, there would appear to be no reason to exculpate the latter from liability. However, the question may arise as to whether he should be liable for the full damage caused, or whether it should be diminished to accord with the degree to which his act caused the damage.

(d) Force majeure

82. Where the alleged wrongful act has been the result of forces outside the control of the actor which he could not prevent by the exercise of reasonable care, under most legal systems there is no civil liability for such act. It is believed that there would be general agreement that this state of affairs should be a defence, although circumstances giving rise to its operation may be rare in the field of products liability. Express provision for such a defence may even be thought to be superfluous, since most legal systems would not regard and act compelled by *force majeure* as the effective cause of the damage.

Relevant provisions in the Draft European Convention

83. Articles 4 and 5 (2) of the draft European convention on products liability are as follows:

Art. 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."

Art. 4 (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."

Art. 5 (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."

84. The explanatory notes on article 4 state that the words "having regard to all the circumstances" in subparagraph 1 above were included to enable the judge to assess the relative importance of the fault in relation to the defect shown by the product.

(8) *The basis of liability*

85. The basis on which liability is to attach for damage caused by products is an important issue. Under most existing national laws liability in delict (tort) for such damage is either based on intentional wrongdoing, or on negligence, or is strict, i.e., arises independently of negligence or wrongful intention.[42] All three forms of liability can coexist within the same legal system. In regard to contractual liability, under the common law system liability would arise on a breach of an express or implied contractual term relating to the product. Under many civil law systems, in addition to this form of liability, the sale of a product could result in liability falling on the seller on the basis of a guarantee against hidden defects. If the product contained a hidden defect, and the seller was unaware of it at the time of sale, he could be compelled to return the price against return of the product, and to reimburse the buyer for expenses occasioned by the sale. Alternatively he could be compelled to reduce the price. If he was aware of it, he would be liable in damages for losses sustained by the buyer. This system of contractual liability is designed to operate only as between parties in contractual relationship. Thus where A, a manufacturer has sold a product containing a hidden defect to B, a wholesaler, who in turn sells to C, a retailer, who sells to D, the user, D could not sue A for breach of a contractual term as there is no contract between them.[43] Nor can he return the product to A and demand a return of the price as he never dealt with A. Since it is possible that liability need not be restricted to cases where the person sought to be made liable and the claimant are in a contractual relationship, it may be more useful to consider the suitability of the bases of liability in delict (tort).

(a) *Intentional wrongdoing*

86. Where a product is made or modified by a person with the intention of thereby causing damage to another, and damage consequently ensues, almost all legal systems would hold the person so acting liable. But this basis of liability may be regarded as relatively unimportant because such conduct would be extremely rare, and liability only on that basis would confer protection in very few instances.

(b) *Negligence*

87. A producer would be liable under almost all systems of national law on this basis if damage caused by a product was the result of negligent conduct on his part in relation to the product. Negligent conduct may be defined as conduct which falls below the standard to be expected of a reasonable man in the circumstances. Definition in these terms makes for flexibility, and allows various factors to be taken into account in fixing the standard, such as the available state of knowledge in relation to the product, the magnitude of possible harm from the product, and the behaviour to be normally expected of the user.

88. It is probably the case that liability for negligent conduct exists under most legal systems, although the limits of liability may vary. Even legal systems which impose strict liability appear to have concurrent liability based on negligence. Liability for negligent conduct in relation to products would merely be a specific application of this general principle of liability. The imposition of liability on this basis would therefore have the advantage that it would harmonize with existing legal rules and concepts. It has also been suggested that the standard of reasonable care strikes the right balance between the producer and the person injured in that it results in the loss caused by the producer's negligent conduct falling on him, and the loss falling on the party injured if the conduct was not negligent. This suggestion has been supported in the following ways. A person should not be held liable for his actions unless they fall below a standard recognized by the law as desirable. If his conduct does not fall below that standard, he is not blameworthy; and as between two persons, neither of whom are blameworthy, the loss should lie where it falls. In the special case where the manufacture of the product was the

[42] The degree of strictness can vary with the defences permitted to the defendant, e.g., contributory negligence, assumption of risk of the person injured, or *force majeure*.

[43] Under certain legal systems, D may have a "direct action" against A (or indeed B or C), on the basis that each buyer who makes a subsale transfers with the goods any potential rights of action he may have against a third person. But in most legal systems there is no such action. Further a valid exemption clause will prevent the "direct action" lying against the party in whose favour such clause operates.

result of utilizing recent scientific or technological advance, it has also been argued that, if the loss fell on the manufacturer in the absence of negligence, he would be deterred from making valuable experiments and innovations in relation to his products. Making the loss fall on the party injured in such a case could be regarded as making him bear the legitimate cost of such experiments and innovations which will ultimately benefit the community.

89. Under most legal systems, the burden of proving negligence in the manufacture of the product lies on the injured party. This burden may be difficult to discharge, since he may not have evidence relating to the details of the manufacturing process. In response to this difficulty, some legal systems have imposed on manufacturers the burden of disproving negligence, where the injured party establishes that the defect causing damage was present when the product left the hands of the manufacturer. This solution has the merit of, in theory, not interfering with the well-established basis of liability for negligence, while at the same time preventing the imposition of an unfair burden of proof on the injured party.

(c) *Strict liability*

90. This may be described as liability imposed despite the absence of wrongful intent or negligence. The main arguments in favour of the imposition of such liability in this field appear to be the following:

(i) It is suggested that the rules of liability based on negligence sometimes operate unfairly against the party injured when they require him to prove negligence. Where the process of manufacture is complex or distributed over a wide area, the person injured will often be unable to prove negligence even where it is present because he has no access to evidence relating to the manufacture.

(ii) Many manufactured products are a source of danger to human life and safety, and it is felt that the public interest demands maximum protection for those likely to be injured. Strict liability would act as an incentive to the manufacturer to take the greatest possible care in the course of manufacture.

(iii) The person who markets a product, by doing so, represents to the public that it is suitable and safe for use. By advertising it, he often attempts to strengthen this belief, and by selling it he makes a profit. When loss is caused through the use of the product, it may seem unfair to allow him to escape the payment of compensation by pleading that he was not negligent.

(iv) In many cases the immediate supplier to the injured party will be held strictly liable for damage caused on the basis of the breach of an express or implied condition as to the fitness of the goods. This supplier can in turn hold his supplier liable on a similar basis and so on backwards up the chain of supply until the manufacturer is ultimately reached. This is an expensive and time-consuming process, which can be obviated if the manufacturer is held strictly liable directly to the injured party. It may be noted, however, that it is not always the case that the last supplier or other persons anterior to the last supplier in the chain of supply, are strictly liable in contract. For the contracts entered into by those persons may contain clauses excluding such liability.

(v) Where liability is based on negligence, the person injured alone bears the loss where injury is caused by a product in relation to which the manufacturer has not been negligent. The loss may well be of considerable magnitude, and one which that person can ill afford to bear. If in such cases the manufacturer is held strictly liable, he can insure against such liability, and add the cost of insurance to the cost of the product. By this means the costs of compensating injured parties are spread over the whole consumer public.

(vi) It is sometimes suggested that the manufacturer or supplier rather than the injured party should bear the risk of loss caused without negligence because they are better equipped financially to stand the loss. But while this may be the case with large-scale manufacturers or suppliers, it may not be so with others.

91. All proponents of strict liability, however, do not appear to advocate that liability should be imposed merely by reason of the fact that damage has been caused by a product. Thus, in relation to the law of the United States one authority takes the view that strict liability should only be imposed on the seller where a product is sold "in a *defective condition unreasonably dangerous* to the user or consumer or to his property".[44] One reason for this additional requirement is that very few products can be so manufactured that they are not a source of danger under abnormal use. Another reason is that there are some products, such as vaccines, whose use is unavoidable in certain circumstances but which carry with them certain known dangers. It is intended by this formulation to restrict liability to the case of a product which is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge, common to the community, of its characteristics. Other conditions which are imposed by this authority are that the seller should be engaged in the business of selling the product, and that it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. It may be suggested however that the marketing of a product which is dangerous to the extent indicated may constitute negligence, and that on this formulation the two bases of liability may not be far apart. The difficulty of determining when a product is "unreasonably dangerous" may also be thought to introduce an undesirable degree of uncertainty.

[44] Section 402A, Restatement of the Law, Second, p. 347 (emphasis added).

92. It may be noted that strict liability, as does negligence, may present to the injured party the difficulty of proving which one in a line of persons handling the product was responsible for the act entailing liability (i.e. the act of marketing a defective product in an unreasonably dangerous condition). One suggestion in this connexion has been that the party injured should only bear the onus of proving the existence of a defect, and that the defect caused the loss, leaving it to the producer to prove that he was not responsible for the defect.

93. The previous account of negligence and strict liability has proceeded on the basis that one or the other basis alone is to apply to the totality of possible cases where damage is caused by a product. However, it has been suggested that fairer results may be achieved by distinguishing different types of cases where damage is caused by a product, and applying different bases of liability depending on the nature of the case. The types of case which are sought to be distinguished are the following:

(i) Where the defect in a product which results in damage has ocurred because of a design which is faulty by accepted standards existing at the date of design, e.g. brakes in an automobile which are badly designed.

(ii) Where the defect which results in damage has occurred by reason of faulty production of a single article, the design being proper, e.g. where the brakes are properly designed, but inferior metal is used in their production in one car.

(iii) Where the product conforms to existing standards of design and production, but has dangerous qualities, e.g. glue which is satisfactory as glue, but is highly inflammable.

(iv) Where the product conforms to existing standards of design and production, and is sufficiently tested at the time of production, but where during use it proves defective and causes damage.

In regard to (i) above, it is suggested that negligence is an adequate basis of liability, since negligence in designing is not difficult to prove. In regard to (ii), negligence may not exist by reason of the fact that a certain percentage of error in quality control and inspection is inevitable. It is suggested that the loss caused by such error should fall on the manufacturer, and that this result can be achieved through strict liability. Further, even if there has been negligence in such a case, the evidence of it would exist within the manufacturer's factory and be inaccessible to the injured party. In regard to (iii), it is suggested that the relevant question is whether the manufacturer has given adequate warning of the dangerous qualities. If he has, it is suggested that he should not be liable. Failure to do so would constitute negligence, and this is thought to be an adequate basis for liability. In regard to (iv) it is suggested that different views are possible depending on the balance regarded as desirable in the protection of the interest involved. If liability is imposed only where there has been negligence, the protection of person and property from injury would give way at a point (i.e. at the point where there is an absence of negligence by reason of conformity with existing standards of manufacture) to the interest in technical experiment and innovation and the progress which may thereby be achieved.

94. It is possible to envisage variations in the basis of liability depending on other factors. Thus it may be felt that some interests (such as personal safety) demand greater protection, and strict liability may be imposed only where products cause personal injury.

Relevant provisions in the Draft European Convention and other texts

95. It may be noted that article 1 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to products liability states:

> "The producer of an article manufactured by industrial methods or of an agricultural product shall be liable *even without fault* to any person who suffers damage as a result of defects in such article." (emphasis added)

96. Article 3 of the Draft European Convention on Products Liability states: "The producer shall be liable to pay compensation for death or personal injuries caused by a defect in his product." The explanatory report on the draft convention states that: "in view of the changes in doctrine and practice that had already become manifest in certain States, the Committee declared itself in favour of a system of 'strict' (i.e. proof of the producer's fault or absence of fault is not required) liability, to which, however, certain contours would be established."

(9) *Relationship of a unified scheme of liability to existing rules of civil liability*

97. A subject which may need consideration is the possible relationship of a hypothetical unified scheme of liability to the existing rules for the civil liability of producers. Products liability appears to be presently regulated by different national laws under the following categories:

(*a*) Delict (tort)

(*b*) Contract.

However, under some legal systems, liability is not imposed on a basis which is clearly identified as either contract or delict. It should also be noted that under most legal systems an action can be based alternatively in delict or contract between two parties in respect of the same act where the state of facts can justify an action on either basis. Under others, if the state of facts is sufficient to found an action in contract, the action in delict is excluded.

98. The relation between a unified scheme of liability and the existing law may take one of four possible forms:

(*a*) It can entirely replace the existing law of delictual and contractual liability.

(*b*) It can replace the law of delictual liability alone.

(*c*) It can replace the law of contractual liability alone.

(*d*) It can coexist with existing liability under national law, leaving the latter undisturbed to the extent it does not derogate from the former.

99. Since the object of a unified scheme of liability is the elimination as far as possible of the diversities presently existing under different national laws, this would be realized to the greatest extent by the adoption of the course of action described in (*a*) above. In so far as this involves the replacement of both the law of delict and the law of contract, the merit of these courses of action can be discussed together. In so far as the replacement of the laws of delict is concerned, there appears to be no serious objection to this course. The liability to be imposed under the hypothetical scheme of liability would correspond to that existing under the law of delict in that its imposition would be largely independent of the will of the parties.

100. The replacement of contractual liability, however, may be thought to create difficulties. The nature of contractual obligations is largely determined by the agreement of parties. The nature and extent of liability may also be similarly determined. A possible view is that this large measure of freedom to determine the nature and extent of liability should be preserved in the area under discussion, since different situations may require the creation of different obligations and liabilities in different transactions. Thus a manufacturer whose quality control mechanism has broken down in respect of the production of a certain lot of goods may sell these with notice of that fact at a lower price with an express exemption clause exonerating him from liability for negligence. Again, under certain trading conditions a manufacturer may choose to assume a stricter liability than that imposed by the uniform rules. On this view, it may be suggested that where the liability of a producer is regulated by contract, such liability should not be disturbed. In effect, therefore, parties in contractual relationship would be free to derogate from the standards of conduct and degrees of liability set by the hypothetical scheme of liability.

101. Another view, however, may be that it would be desirable to enforce the degree of liability prescribed in such a scheme as a minimum standard irrespective of whether parties have agreed that a different degree should apply. On this view such liability would coexist with contractual liability, and the injured party could enforce the former it he chose to do so. Disclaimers seeking to reduce or eliminate that standard would be of no effect. This view could be supported by the argument that it would prevent producers, who are sometimes in a superior bargaining position in relation to users, from inserting contractual provisions which unfairly reduce their liability. A counter-argument to this would be that under many legal systems provisions of law exist which strike out clauses which are unconscionable, or contrary to good faith in that they unduly favour one party. It does not follow, therefore, that the unified scheme of liability does not apply means that unfair contractual provisions will always be enforced.

102. The relationship between the hypothetical scheme of liability and the existing law described in (*d*) above results in that scheme of liability establishing minimum standards, while national laws are free to grant additional rights to the persons injured. If the minimum standards so established are fixed at the highest common factor of acceptance among States in relation to the issues involved, they would stand a good chance of wide acceptance. States wishing to confer additional consumer protection would be free to do so. The objection to this course of action may be that the achievement of the objectives of uniformity and simplicity sought to be achieved would to some extent be adversely affected. Producers and their insurers would continue to have to ascertain the national law of each State, which may be complex or unclear.

Relevant provisions in the Hague Convention and other texts

103. Article 1 of the Convention on the Law Applicable to Products Liability of the Hague Conference on Private International Law states:

> "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*".

Thus cases where the two parties are in a contractual relationship would be excluded from the scope of the Convention.

104. Article 1 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to products liability is as follows:

> "The producer of an article manufactured by industrial methods or of an agricultural product shall be liable even without fault to any person who suffers damage as a result of defects in such article."

The explanatory note to this article states that "the producer shall be liable to any injured party. This liability, which may be qualified as tortious, *is given without any consideration of contractual relations which may exist between the manufacturer and the injured party.*" (emphasis added)

Article 8 states:

> "Liability as defined in article 1 shall be mandatory. It may not be excluded or restricted by contract.
>
> "Claims of the injured party against the producer or the seller based on other legal grounds shall remain unaffected."

The explanatory note to this article states that "In order to protect the consumer, whose position is relatively weak by comparison with that of the producer, article 8 provides that the liability defined in article 1 is binding, i.e. it may neither be excluded or restricted. . . . Paragraph 2 makes it clear that claims in respect of product liability do not exclude other claims. Where the injured party is able to enforce claims for damages pursuant to other individual national laws this should continue to be so."

105. Articles 11 and 11 *bis* of the Draft European Convention on Products Liability are as follows:

> *Article 11.* "This Convention shall not affect any rights which a person suffering damage may have

according to the general rules of the law of contractual and extra-contractual liability."

Alternative 11 bis. *Alternative 1.* "No derogation by national law from the provisions of this Convention shall be allowed."

Alternative 2. "This Convention shall not prevent Contracting States from making rules more favourable to persons suffering damage."

Alternative 3. "Each Contracting State shall have the right to make rules more favourable to persons suffering damage, with regard to one or more limited classes of products."

It has been observed in the explanatory notes to the article that the object of this article is to make it clear that the Convention leaves undisturbed both contractual and extra-contractual rights available to an injured party under national law.[45]

(10) *The period of limitation*

106. The imposition in the uniform rules of a limitation period after the expiry of which claims could not be brought against the producer would be necessary to prevent the bringing of state claims and to achieve finality in business affairs. The creation of a body of rules on this subject raises many difficult issues. Among these are the length of the limitation period, the point of time at which it commences, under what circumstances the running of time may be interrupted, under what circumstances the period may be extended, the consequences of the expiry of the period, and the method of its calculation. These and other relevant issues have been extensively discussed during the preparatory work for the United Nations Convention on the Limitation Period in the International Sale of Goods,[46] and the techniques adopted in that Convention may in many cases be appropriate for a scheme of products liability. However, decisions on certain issues (such as the length of the limitation period) will have to be made afresh in the new context.

Provisions in the Draft European Convention and other texts

107. Article 6 of the EEC Preliminary Draft Directive concerning the approximation of the laws of member States relating to products liability is as follows:

"Claims for damage must be brought within a reasonable period. This period shall commence when the article is first used.

"Notwithstanding such period, claims may no longer be brought after... years from the date on which the article is put into circulation by the producer."

The explanatory notes to this article state that "a rigid period could hardly do justice to the wide range of cases. The question of the period to be regarded as reasonable in a particular case should be left to the courts."

108. Articles 6 and 7 of the Draft European Convention on Products Liability are as follows:

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 ten years from the date on which the producer put into circulation the individual product which caused the damage."

PART III. SUGGESTIONS AS TO THE COMMISSION'S FUTURE COURSE OF ACTION

109. It would appear that, in deciding whether work on products liability should continue, the Commission should consider the possible impact on international trade of unified rules on liability. In addition, the Commission may also wish to consider the extent to which considerations relating to consumer protection should be taken into account in such further work.

(a) *Possible impact on international trade of a unification of the rules of liability*

110. As to the possible impact of a unification of liability on international trade, it may be noted that in the course of the preparatory work of the Commission of the European Communities towards the approximation of the laws of member States within the Common Market relating to products liability, it has been argued that differences in the extent of liability imposed on producers may adversely affect fair competition between them. It has been suggested, for instance, that if the loss caused to a consumer by a product is always transferred back to the producer through the imposition on him of strict liability, his position in relation to the costing of his products may have to be different from that of a producer who is only liable if he has been at fault. For the cost of the products of the former must be higher to absorb cases of liability which are not imposed on the latter. It has accordingly been argued that a unification of the basis of liability will result in an equalization of their respective competitive positions and that this in turn may lead to greater uniformity in the prices of products. It may be argued that the elimination of other legal differences in the extent of liability may have similar economic consequences. It does not appear that questions of this nature can be resolved on the basis of legal analysis.

(b) *Consumer protection*

111. The need for adequate consumer protection in the context of the increasing frequency of damage caused by products, and the increased potential for causing damage inherent in such products, has formed an element in the discussions on products liability both at a national and international level. The Commission may wish to consider whether this element is one which needs to be taken into account in future work.

(c) *Main issues of a legal nature*

112. If the Commission decided that work on this subject should be carried forward, various issues of a legal nature would have to be determined. These have

[45] Document EXP/Resp. Prod. 75 (2), para. 69.
[46] A/CONF.63/15.

already been set forth in part II above. The central issue involved would appear to be the delimitation of the scope of liability. This scope would depend, *inter alia,* on decisions taken with regard to the types of products in regard to which liability may be imposed, the classes of persons on whom, and in whose favour, liability may be imposed, the kinds of damage for which compensation may be recoverable, and the kind of transaction falling within the scope of liability. Such decisions must to some extent be based on considerations of policy.

(d) *Future work*

113. On the assumption that work in respect of products liability is to be carried forward, the Commission may wish to request the Secretariat to undertake further preparatory work designed to enable it to decide at a later stage whether unification of rules in respect of liability is desirable and feasible. Such preparatory work might relate to some or all of the issues referred to in paragraph 112 above, and also the extent to which different legal systems in fact reach broadly similar solutions to such issues.