

## Products Liability in International Trade Law

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### Abstract

Today, the development of international markets has caused a consequential increase in export of products. Industrial companies sell, more and more frequently, a significant portion of the products they produce to buyers domiciled abroad. Therefore, the risk of damage caused by products marketed in this way has increased simultaneously with the occurrence of conflict of laws. The legal framework, which determine the rights and obligations of the parties in an international commercial transaction, must be determined precisely. Considering the diversity of legal systems and the difference between liability regimes, harmonization by means of international agreements is widely recognized as the best solution to ensure the conformity of the legal issues which arise from international commercial transactions. Harmonization of the law on producers' civil liability for damage caused by their products intended for or involved in international sale or distribution could facilitate international trade by a unified system of liability standards. In the absence of an international convention on the liability for defective products, we allow ourselves to make proposal for an international convention on products liability applicable in the context of international trade which might be useful to the editors of this international convention in future.

**Keywords:** Liability, Product, Defect, Seller, International Trade, International Convention.

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## **Products Liability in International Trade Law**

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“Free trade among nations is largely seen as the key to economic growth, peace and better standards of living, leading to a happier state of human existence at a global level. The General Agreement on Tariffs and Trade (GATT) 1947 enshrined the philosophy of free trade using the principles of non-discrimination (also known as Most Favored Nation obligation) and the elimination of quantitative restrictions. This philosophy of free trade continues to this day in the form of GATT 1994. The gradual growth in international trade since 1950 is largely due to the influence of GATT on the world stage, and it seems that this growth is set to continue. Recently, developing countries like China and India are emerging as key players in the provision of manufactured goods and services on the international scene and are setting a trend for other developing nations to follow”.<sup>1</sup>

The economy is becoming globalized. International exchanges are growing. International trade is expanding. These are the realities of the early twenty-first century. A process of globalization of the economy

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whose main events are the intensification and liberalization of international trade is needed. Some companies have a global scope. Products are sold in five continents. Entrepreneurial strategy is focused on international development. This is synonymous with exports or establishment abroad. Capital is mobile. Financial markets are globalized. Some companies even relocate their production system to reduce their costs. By the same logic, the trade in services is becoming international. In short, the international component is consubstantial to the modern economy. This movement applies, not only, to large companies (those commonly called “multinationals”) but, also, to all companies, even SMEs. To do so, it is enough that their suppliers be established abroad so that they distribute the products manufactured abroad or develop their activities in border areas to ensure that the international dimension is present. Similarly, SMEs are no reluctant to invest abroad. The development of *e-business*, by the use of the internet, only reinforces the movement for the abolition of borders.<sup>2</sup>

The growth in the level of the global exchanges has the effect of increasingly raising the importance of international trade. This means that trade in goods and intangible property, capital movements, relocations and transnationalisation of companies and activities have become more and more important. Since the end of World War II, international trade has spread gradually. Raw materials, agricultural products and manufactured goods have all been the subject of trade of goods in the broad sense of the word. In each country the share of foreign products has expanded progressively. Since the 1970s the trade in services has been added to the trade in goods and is developing faster than the latter.<sup>3</sup>

International Trade plays a very important role in the development of the world’s economy. For example, in 2012 the export value of international trade reached a figure equal to 1683 billion EUR in European Union, 125 billion EUR in Norway, 243 billion EUR in Switzerland, 189 billion EUR in Brazil, 353 billion EUR in Canada, 1595 billion EUR in China, 225 billion EUR in India, 622 billion EUR in Japan, 289 billion EUR in Mexico, 408 billion EUR in Russia, 318 billion EUR in Singapore, 426 billion EUR in South Korea, 1203 billion EUR in the United States and the import value was 1799 billion EUR in European Union, 68 billion EUR in Norway, 230

billion EUR in Switzerland, 174 billion EUR in Brazil, 360 billion EUR in Canada, 1415 billion EUR in China, 381 billion EUR in India, 689 billion EUR in Japan, 289 billion EUR in Mexico, 246 billion EUR in Russia, 296 billion EUR in Singapore, 404 billion EUR in South Korea, 1816 billion EUR in the United States.<sup>4</sup>

Today, international trade is not only limited to exports or imports of products. Companies are also moving abroad to produce their products and sell them elsewhere. Today, traders are obliged to invest abroad to build factories, to exploit mines, petroleum fields, to provide assistance in the form of technology transfers. This has led to the creation of new types of international commercial contracts such as Turnkey contracts, Product in Hand contracts, and market in hand contracts among others.<sup>5</sup>

International trade law becomes increasingly important as international exchanges increase. The globalization of the economy is naturally governed by international trade law. It may constitute the common law of international commercial relations in the future. The globalization of the economy may lead to the globalization of law. This can lead to the multiplication of international sources of law.<sup>6</sup>

Today, the development of international markets has caused a consequential increase in the export of products. More and more frequently, industrial companies sell a significant portion of the products they produce to buyers domiciled abroad.<sup>7</sup> The modernization of the means of transport has both facilitated and increased exports. Therefore, the risk of damage by products sold in this way has increased leading to more occurrence of conflict of laws and more application of its rules for determining the applicable law to the liability for defective products.<sup>8</sup>

Due to the development of tourism and the freedom of movement of individuals the number of cases of products being purchased by a buyer when he is abroad has increased. This double movement results, inevitably, in the scattering of the relevant contacts. In many cases, the country of manufacture is different from that in which the product is purchased by the victim of product.<sup>9</sup> Consequently, when a faulty product is purchased in a country other than the country of residence of the purchaser, or the country of manufacture, there may be a chain of sale contracts concluded successively between a manufacturer residing in country A and a distributor domiciled in State B and a sub-purchaser in State C. The sub-purchaser may, in turn, sell this product to a user, residing, or staying, in State D. The sub-purchaser, where

they are victims of defective product, can go directly against the first link in the product distribution chain, ie the manufacturer. He may also bring a case against his seller, who may, in turn bring a claim under warranty against the manufacturer or producer.<sup>10</sup>

The legal framework, which determines the rights and obligations of the parties in an international commercial transaction, must be determined precisely. The lack of legal certainty can be an obstacle to international trade. Finally, the parties would like to know the scope and the nature of their obligations as well as the means available to them, in case of disputes. Considering the diversity of legal systems and the difference in liability regimes, harmonization through international agreements is widely recognized as the best solution to ensure legal conformity in issues that arise from international commercial transactions. International organizations such as the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations Conference on Trade and Development (UNCTAD) have focused on the preparation of international conventions on different aspects of international commercial contracts such as, the international transport of goods, international sale of goods, intermediary, factoring and standby letters of credit.<sup>11</sup>

The Industrial Revolution has challenged the basis and nature of liability. Accidents caused by machinery, whether by machines in the factory or by vehicles on the roads, have exposed individuals to the risks of an industrial society. This has resulted in the creation of civil liability, based on the theory of risk, which means that the risks of an activity must be borne by those who benefit from it. They can be covered by liability insurance. The responsibility has evolved from a subjective liability to a strict liability, and it is based on the concepts like the risk of the company (risks which may result from the companies' activities). Jurisprudence and legislation have developed the principles of product liability through warranty obligations imposed on the seller and the manufacturer. Many activities were subject to liability regimes based on the obligation to reach the agreed result. American jurisprudence has played an essential role in the development of responsibility by implementing rules based on the responsibility of those who can more easily and more rationally, from an economic perspective, take out the necessary insurance.<sup>12</sup>

The post-industrial evolution resulted in considerable changes in

lifestyle, as well as in attitudes. At the community level, policy decisions taken in favor of greater opening of economic markets, and the production of numerous new products, supported by more and more complex sale techniques, gradually led to the consideration of consumer-citizen as someone who should be protected. Gradually, therefore, legal rules were introduced for this purpose, with the intention of giving the consumer specific rights, while at the same time subjecting businesses to further constraints.<sup>13</sup>

Today, technology, industry, science and modern techniques affect all aspects of man's life. The more technology develops and society is industrialised, the more dangers threaten the consumer. Various products, of many different qualities, and across a broad spectrum of industries, whether they are manufactured in the country or are imported from abroad, have invaded the consumer market. In most cases the consumer has no knowledge of the defects, the dangers, or the quality of the product, particularly when the product is complicated and/or dangerous. Advertisements play an important role in a consumer choosing a particular product. In fact, advertising is a kind of implicit warranty on the quality and safety of a product.<sup>14</sup>

The explosion of science has caused a revolution in the manufacture of products which, in view of the globalization of trade in products, can make the dangers of consumption and incorrect consumption of products pass across borders. The consumer usually knows neither the quality of the product nor the damages and the dangers that can result from it or even the legal provisions intended to protect the consumer. He is then forced to adapt himself to the fast and incredible movement of the mass of consumer products.<sup>15</sup>

The manufacture and distribution of mass products, the opening of large supermarkets, commercial advertisements, the more frequent use of the psychological means to encourage consumers to use or buy products, have turned the consumer into the prey of the producers.<sup>16</sup>

The lack of product safety is a new social evil that is the result of the industrial revolution and the development of trade. The ordinary rules of civil responsibility can no longer protect the victim of a defective product: the liability in tort requires the victim to prove the fault of the manufacturer or the seller. It can also make him lost in the subtleties of the 'keeping of the structure and the performance'. Contractual liability, even when it is extended by the transmission of a

warranty to successive buyers, requires its conditions to be met and the absence of restrictive clauses or legal disclaimers in the contractual chains. Thus, as products cross borders much more easily, the victim of a product's defect, who is often the final consumer, is poorly protected.<sup>17</sup>

Any business has a number of risks, especially the risk of causing damage to others. The manufacture of a defective product is a commercial activity that can bring damage to the consumer. Thus, there are many actions in liability in tort that may be brought under products liability law, and in the context of international trade, we have to wonder about the applicable regime.<sup>18</sup>

The consequences of the dangerous properties of manufactured products have greatly increased and the problems that arise in this regard are not necessarily linked to the contract between seller and buyer. With the increase of marketing and distribution of mass-produced goods across national borders and between different continents, damage caused by such products and the protection of consumers are of international concern. Harmonization of the laws on producers' civil liability for damage caused by their products intended for or involved in international sale or distribution could facilitate international trade by providing a unified system of liability standards. Such harmonization would avoid the development of different laws at the national level and a possible distortion of the terms of trade.<sup>19</sup>

No one has yet forgotten the "contaminated blood" case. The world fight primarily against AIDS and other viral diseases. Modern man lives in a world where televisions, batteries, aerosols, autoclaves implode or explode frequently, varnishes, paints, solvents, and glues threaten to ignite or asphyxiate, cars are ready to escape his control. The food chain can be invaded by chemical pollutants and heavy metals. We have not yet forgotten the case of mad cows, chickens for dioxins, polluted drinks or the oil used in a dish.<sup>20</sup>

Civil liability is a liability which is independent of contract. Civil liability imposes civil obligations on commercial activities. This branch of law is of particular importance for consumers and those who trade with them. Contract law may not protect consumers. The contract law only protects the purchaser of defective products and services. Other victims of defective products will, generally, not be able to pursue the seller under contract law due to a lack of any

contractual relationship between them and the seller. Even a buyer may not be sufficiently protected if it becomes impossible to recover his/her damages from a seller who has gone bankrupt. The consumer who is also the purchaser, and the consumer who is not the purchaser, of the product, and any other person who may be a victim of a defective product may be protected through civil liability law. Defective products liability concerns cases where parties suffer damage resulting from a defective product and explains their rights in these circumstances.<sup>21</sup>

"Products liability" is a name given to the area of law concerning the liability of persons who supply products for the use of others to buyers, users and third parties for different kinds of losses caused by defects in these products.<sup>22</sup> Liability for defective products is a recent concept, resulting from the industrialization of the western countries after Industrial Revolution. However, this recent notion has already attracted a large body of literature. The adoption of a directive for the harmonization of this subject, on 25 July 1985, by the Council of the European Communities contributed to arousing a keen interest in this field of the law of responsibility. From this point onwards, each aggrieved consumer in Europe was guaranteed a minimum level of protection against damages caused by defective products equal to that established by the directive.<sup>23</sup>

“ Products liability law governs the private *litigation* of product accident. Its rules define the legal responsibility of sellers and other commercial transferors of products for damages resulting from product defects and misrepresentations about a product’s safety or performance capabilities. A typical products liability case involves a claim for damages against the manufacturer or retailer of a product by a person injured while using the product. The plaintiff seeks to prove that the injury was caused by some deficiency in the way the product was made or marketed, that the product was in some manner “ defective ” or falsely described. In addition, the plaintiff will attempt to demonstrate that he or she was using the product properly or at least foreseeably. Typically, damage claims include medical expenses, disability and disfigurement, pain and suffering, lost earnings and earning capacity, perhaps emotional harm, and possibly some kind of property damages, perhaps to the product itself. The defendant usually attempts to show that the product was not defective – that it was in

fact reasonably made and properly marketed. Further, the defendant often seeks to establish that the plaintiff's injuries resulted principally from the improper use of the product by the plaintiff or some other person, or perhaps something other than the product caused the harm. These are the central issues in a typical products liability case. Some products liability cases involve transactions other than the sale. Products are sometimes merely leased, licensed, or simply bailed. Or the injury-producing "product" may be something other than a typical mass-produced chattel such as a house, a toxic substance, electricity, a truck loaded by sand, an internet game, transfused blood, or a poisonous spider in a pair of pants. The defendant may be a wholesaler, a component part manufacturer, a successor corporation, an employer, a publisher, a dentist, a trademark owner, or a plumber".<sup>24</sup>

There are three products liability regimes: strict liability, negligence and contractual guarantee. Each of these regimes is based on a different theory on which the victim of a defective product can base his or her legal action.

**Strict liability:** Most of the actions of the liability for defective products are based on strict liability. Strict liability is a legal concept developed by California Supreme Court in *Greenman v. Yuba power products, Inc.* 59 Cal. 2d57 (1963). Strict liability allows the plaintiff to recover damages caused by a defective product without having to prove any fault or negligence committed by the defendant. The plaintiff must prove only that he has suffered damage from a defective product manufactured or sold by the defendant.<sup>25</sup>

**Negligence:** It is much more difficult for the plaintiff to recover damages on the basis of the theory of negligence than the theory of strict liability. To do so, the plaintiff must prove: 1) that there was a relationship between the manufacturer and the plaintiff (that the manufacturer had an obligation to take all necessary precautions for the plaintiff); (2) a breach of this duty by the defendant; (3) product's defect; (4) that he suffered the damage ; (5) and the relationship between the damage and the product's defect. In some cases where the evidence of negligence is difficult to prove, the courts implement a criterion called *negligence per se* or *res ipsa loquitur*. *Negligence per se* allows the plaintiff to prove the defendant's negligence by proving that the defendant has violated a law. *Res ipsa loquitur* allows a court to conclude that the defendant did not exercise sufficient caution in the particular

circumstances, such as a case where the facts show that the injury could only have been caused by the defendant's negligence.<sup>26</sup>

**Contractual guarantee:** There are three types of contractual guarantees breaches: (1) a breach of an express warranty given by the manufacturer or the seller of product; (2) breach of an implied warranty; and (3) violation of the guarantee of conformity of the product to a particular purpose, which is the case where the defendant is aware of expected use, the buyer relies on the superior knowledge of the defendant about the product and the defendant guarantees that the product conforms to this expected usage of the purchaser and that the product has the security that is needed for that purpose.<sup>27</sup>

Product defect cases can be divided into three different categories : 1) manufacturing defects that are mistakes or flaws that the manufacturer did not intend to achieve and which happen during the construction or production process of the product; 2) design defects which are undue hazards resulting from how a product was engineered, because the appropriate safety mechanism was not included or because the product's conceptual formulation included risks which otherwise could reasonably have been dealt with in the design phase; and 3) warning defects resulting from the absence of sufficient information on a product's hazards or how to avoid them.<sup>28</sup>

Historically, at the beginning of the development of products liability law, countries struggled to ensure compensation for damages caused to individuals by products because of the lack of legal rules in various national laws. The multiplication of this kind of damages claim provoked a doctrinal and jurisprudential reaction in legal systems that resulted in the development of a separate products liability law under the law of responsibility. The United States played a pioneer role in developing this field. Being the land of the choice of consumer society, it also saw the rise of products liability since the 1940s. Products liability was also born in other Western countries as a result of economic development, the influence of foreign laws and the occurrence of health disasters attributable to products. Everywhere, the belief has emerged that it was appropriate to subject producers and sellers to specific rules for damage caused by their products. The question was what should be the nature and content of these rules. Should they be related to the law of contract or torts? What would be the basis of the liability of producers and sellers? The question of repairable damages was also the subject of debate. Was it

appropriate to provide for compensation for damages caused to goods of professional use (goods intended for use by professionals and not by private consumers) or purely economic damages, such as loss of profits? Similarly, the question arose whether all suppliers of the same product should be subject to the same liability, or should the burden of responsibility be focused on the manufacturer. Beyond this, one could also consider whether to apply the same rules to all products or specific rules should be applied to some categories, like medicines, due to their specific nature.<sup>29</sup>

Due to the passivity of legislators in virtually all countries, it was legal experts and case law that responded to these issues, as well as all those posed by the development of a new liability regime (limitation periods, causes of exemption, etc). Some authors (predominantly European authors) were inspired by foreign laws, in particular by American law. With or without their aid, national courts gradually developed legal rules on the liability for defective products, more or less independently from the common law rules of contractual or extra-contractual responsibility. Being not wholly protective of victims, these rules were, however, considered insufficient by the majority of legal scholars. As a result, several authors, in the 1970s, felt that only legislative intervention could satisfactorily solve the problem of compensation for damages caused by defective products. At the same time, the European Economic Community institutions were beginning to worry about giving a more “social” dimension to the young European Economic Community. These two currents joined together and resulted in the appearance, around the middle of the 1970s, of the European project to harmonize liability for defective products. This project ultimately resulted in the adoption of Council Directive 85/374/EEC, of 25 July 1985, on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.<sup>30</sup>

This Directive imposes a uniform law across all European Economic Community member states. This law imposes tort and strict liability on sellers and manufacturers of products for damage caused to the victims by defective products whether or not the victim has a contractual relation with the seller. The purpose of the European directive was to harmonize and improve the remedies for damages suffered by consumers of defective products, taking as a model the US

solution (second restatement of torts), that imposed tort liability without fault on the manufacturers and sellers of defective products.<sup>31</sup>

But producers were against the directive's draft and tried to insert some provisions that were more favorable to them. In the same way, individual EEC Member States did not want to adopt laws on the liability for defective products because they assumed that this would be against their economic interests by putting their businesses at a disadvantage.<sup>32</sup>

Unlike existing solutions in the laws of the Member States such as the techniques of presumption of fault which had the disadvantage of enabling the producer to escape liability by proving the absence of his fault, the first drafts of the directive excluded this fault based exemption. To justify the imposition of a heavier responsibility on manufacturers, some authors argued that the additional costs could be added to the price of the products or covered by the insurance and therefore easily absorbed by the companies. Despite objections to European projects which had both legal and economic aspects, the directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the liability for defective products was approved and put an end to a decade of confrontation within the European institutions by stipulating in article 1 that "the producer is liable for damage caused by a defect in his product". The directive had to be transposed into national laws before July 30, 1988.<sup>33</sup>

The commission which prepared the draft of the directive had adopted as a reference the laws of particular Member States and American jurisprudence. American defective products liability jurisprudence played an important role in the development of the European community's directive. Therefore, it is necessary to refer to American law to better understand European law.<sup>34</sup> The American jurisprudence regarding the liability of products took the form of a law through section 402A of the second Restatement of Torts in 1965.<sup>35</sup>

On a worldwide level, The General Assembly of the United Nations Organization, at its 28th session, 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. 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 therefore in view of other items in its program of work.”<sup>36</sup>

In response to the General Assembly's request, the Commission examined products liability in the context of goods intended for or involved in international trade, and the desirability and feasibility of formulating uniform legal rules in that area. The Secretariat prepared a series of studies on the main problems that might arise in this area, on the solutions that have been adopted thereof in national legislations or are being contemplated by international organizations. It then submitted to governments a questionnaire on various aspects of legislation relating to the liability for defective products in their legal system.<sup>37</sup>

After examining the Secretariat's report, the Committee of the Whole II expressed its appreciation to the Secretariat for the thorough work it had carried out in respect of products liability.<sup>38</sup>

The views expressed in the Committee of the Whole II led to the consensus that, in view of the different stages of development of the law on products liability, it was not at that time desirable to continue work on the subject and that, amongst the other matters on the Commission's agenda, it should not be retained with priority status. An attempt to unify the law in the field would have burdened the Commission's resources for a long time to come and that was not warranted under those circumstances. It had also been pointed out that, in many countries, the subject of products liability had not yet fully been studied and also the economic and insurance implications of a uniform scheme could not be fully grasped.<sup>39</sup>

After reviewing the work done by the Committee of the Whole II, the Commission, at its 185<sup>th</sup> meeting on 17 June 1977, decided not to pursue work on the subject of products liability at that time and to review the matter in the context of its future program of work at a future session if one or more Member States of the Commission took an initiative to that effect.<sup>40</sup> But this project has not yet been pursued by UNCITRAL which has not developed any international convention on the liability for defective products to date.

Given the development of products liability law and economy in many countries of the world since 1977 and considering the growing importance of international Trade, we believe that today, the obstacles that prevented UNCITRAL to prepare a uniform act on products liability

at that time are, if not completely removed, at least strongly weakened.

In 1973, the Hague Conference of private international law developed a convention known as the Hague convention of 2 October 1973 on the law applicable to the liability for defective products. This convention settles exclusively the problems of conflict of laws. It has been designed to determine the law applicable to the responsibility of certain people for the damage caused by a product. It does not determine the substantive rules applicable to the liability for defective products.

In the same way, no international convention has been developed by UNCTAD on the subject of liability for defective products and the United Nations convention on contracts for the international sale of goods (1980) does not apply to products liability. This gap is causing legal problems at an international level with regard to the conflict of laws and the determination of the law applicable to the liability for defective products.

In the absence of an international convention on the liability for defective products, we propose an international convention on products liability applicable in the context of international trade which might, in the future, be useful to the editors of this international convention.

This Convention has been inspired from the European Union directive (1985) concerning liability for defective products, French law of products liability and the third restatement of torts (products liability restatement) in the United States of America and begins by determining its sphere of application and contains rules to determine the competent court to settle a product liability dispute as well as the rules determining the area of liability as regards to products and those who are responsible. It also contains the rules applicable to the liability regime and to the means of exemption from liability. Finally, it ends by providing final provisions.

In this Convention, the concept of the product and the persons who are responsible for the defect in a product has been so widely defined that it includes all kind of products and all sellers and distributors of products. Concerning the regime of responsibility, we chose strict liability in tort as the only regime guaranteeing the total repair of the damage caused to the victim of a defective product by exempting him from proving the fault of the product seller or distributor and by not distinguishing between the plaintiffs based on the nature (contractual or tortious) of their relationship with the defendant. On the other hand,

in the determination of the means of exemption from liability, we tried to establish a kind of balance between the interests of consumers and producers by determining the development risks as a reason for the exemption of producer from liability.

This Convention could be written as follows:

## « Products Liability Law »

### Sphere of application

#### *Article 1*

- (1) This Convention applies to the parties whose places of business are in different States:
  - (a) when the States are Contracting States; or
  - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear, either from the contract, or from any dealings between, or from information disclosed, by the parties at any time, before or at the conclusion of the contract.

#### *Article 2*

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

### Jurisdiction

#### *Article 3*

The defendant is subject to general jurisdiction of the Member state in which he is domiciled.

#### *Article 4*

For the purposes of this Convention, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

- (a) statutory seat, or

- (b) central administration, or
- (c) principal place of business.

#### *Article 5*

A person domiciled in a Member State may, in another Member State, be sued:

1. in matters relating to a contract, before the courts of a Member State where, under the contract, the products were delivered or should have been delivered or the services were provided or should have been provided.
2. in matters relating to tort, before the courts of the place where the defective product has been used or the damage occurred.

#### *Article 6*

A consumer who has concluded a contract for a purpose which can be regarded as being outside his trade or profession may bring an action against the other party to a contract either before the courts of the Member State in which that party is domiciled or before the courts of the place where the consumer is domiciled.

#### *Article 7*

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with products liability, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be by an express consent of the parties to jurisdiction of the courts of a State in the contract or by doing so after the commencement of the dispute.

### **Area of Liability**

#### *Article 8*

For the purposes of this convention 'product' means all movables, even though incorporated into another movable, including the products of the

soil, of stock-farming of hunting and fishing, the blood, the human body parts and products resulting therefrom. 'Product' includes electricity.

*Article 9*

A product is put in circulation when the producer divest himself of it voluntarily. A product is only subject to one put in circulation.

*Article 10*

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

*Article 11*

For the purposes of this Convention:

- (a) One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.
- (b) One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailers, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.
- (c) One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).

*Article 12*

For the purposes of this convention 'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark

or other distinguishing feature on the product presents himself as its producer.

*Article 13*

Where, as a result of the provisions of this Convention, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

*Article 14*

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.

*Article 15*

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition :

- (a) is accompanied by an agreement for the successor to assume such liability; or
- (b) results from a fraudulent conveyance to escape liability for debts or liabilities of the predecessor; or
- (c) constitutes a consolidation or merger with the predecessor; or
- (d) results in the successor becoming a continuation of the predecessor.

**The Liability regime**

*Article 16*

The seller or distributor of a defective product is subject to liability whether or not he is bound by a contract with the victim.

### *Article 17*

The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.

### *Article 18*

For the purposes of this Convention, 'damage' means:

- (a) damage caused by death or by personal injuries;
- (b) damage to, or destruction of, any item of property other than the defective product itself.

This Article shall be without prejudice to national provisions relating to non-material damage.

### *Article 19*

The aggravated damage due to product's defect:

- (a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.
- (b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product's seller's liability is limited to the increased harm attributable solely to the product defect.
- (c) If proof does not support a determination under subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.
- (d) A seller of a defective product that is held liable for part of the harm suffered by the plaintiff under subsection (b), or all of the harm suffered by the plaintiff under subsection (c), is jointly and severally liable or severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

### *Article 20*

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.

### *Article 21*

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
  - (a) the presentation of the product;
  - (b) the use to which it could reasonably be expected that the product would be put;
  - (c) the time when the product was put into circulation.
2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

### *Article 22*

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

- (a) was of a kind that ordinarily occurs as a result of product defect ; and
- (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

### *Article 23*

In connection with liability for defective design or inadequate instructions or warnings:

- (a) a product's noncompliance with an applicable product safety statute or regulation renders the product defective with respect to the risks sought to be reduced by the statute or the regulation; and
- (b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

### *Article 24*

General rule governing causal connection between product defect and harm: Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.

## **The exemption from liability**

### *Article 25*

The producer shall not be liable as a result of this Convention if he proves:

- (a) that he did not put the product into circulation; or
- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
- (c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
- (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
- (f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

### *Article 26*

The producer, seller or distributor cannot invoke the cause of exemption provided for in (e) of the preceding article when the damage was caused by an element of the human body or by products derived from it.

### *Article 27*

The producer, seller or distributor may be responsible for the failure even though the product has been manufactured in compliance with the rules of art or existing standards or that it was the subject of an administrative authorization.

### *Article 28*

Apportionment of Responsibility between the plaintiff, the sellers and

distributors of defective products and others:

- (a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.
- (b) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.

*Article 29*

Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party.

*Article 30*

The producer, seller or Distributor is not responsible when the damage was caused by force majeure.

*Article 31*

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.

*Article 32*

1. A limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Convention. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.
2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Convention.

*Article 33*

The rights conferred upon the injured person pursuant to this Convention shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

**Final provisions**

*Article 34*

This Convention shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member States.

*Article 35*

This Convention shall not apply to products put into circulation before the date on which the provisions of this Convention enter into force.

*Article 36*

This Convention is addressed to the Member States.

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