Forum Shopping in Products Liability Actions: A Comparison Between the United States, France and Germany

Lothar W. Baum

University of Georgia School of Law

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FORUM SHOPPING IN PRODUCTS LIABILITY ACTIONS:
A COMPARISON BETWEEN THE UNITED STATES,
FRANCE AND GERMANY

by

LOTTHAR WILHELM BAUM

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LOTHAR WILHELM BAUM

Approved:

[Signature]
Date 4/26/1988
Major Professor

[Signature]
Date 4/26/1988
Chairman, Reading Committee

Approved:

[Signature]
Graduate Dean

4-27-88
Date
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I. Introduction

According to the understanding of most Europeans, products liability actions in United States courts are characterized by the tremendous amounts of money which a plaintiff might recover as damages for her claims. This picture does not tell the whole truth, but provides an opportunity to raise some questions. Should the foreign victim always try to sue the American manufacturer in the United States? Because of the changes which the new Directive on products liability in the European Communities will bring, this question assumes increased significance.

In Europe, the new EC Directive on products liability was recently promulgated on July 25, 1985. According to the Directive, the various member states of the EC\(^1\), have until August 1, 1988 to adopt the new Directive.\(^2\)

The Directive, which contains elements of French and United States laws and rules governing products liability, is supposed to implement a system which is more directed towards 'strict liability' than the most current legal system in Europe. So far, some states - like United Kingdom and Spain - have already enacted laws consistent with the EC...
The declared goal of the Directive is to move farther towards a uniform European legal system. The EC Directive is merely a step on this route.

In transnational actions, in lawsuits where parties from different nations are involved, there is always the question of where a lawsuit should be brought. The importance of this question lies in the fact that the laws of the forum might decide whether the plaintiff succeeds or loses. Today, the possibility of getting involved in a transnational legal dispute is increasing, due to the constant rise in international trade between the nations. The goods which are sold to private consumers in a country are often imported or, at least, contain parts from foreign manufacturers. Sometimes goods, although manufactured abroad, are labeled with the name of a home producer or trader. A purchaser of goods who is injured by a defect might have several options on the forum in which to bring his lawsuit. Depending on which part was defective and what exactly caused the injury, the assembler, the part-manufacturer, or the various sellers can be the potential defendant of such claims. Provided that the defendants are from different countries, actions might be brought abroad and at home. Seeking the most favorable country in such a situation is known as 'forum shopping'. This term was first used in the US legal literature, where, due to the fact that the 50 states of the United States have different rules of torts and contract law, 'forum shopping' is a commonplace
phenomena. However, until recently, this problem has hardly received any attention in Europe. This is quite astonishing in light of the importance of this problem even in the European context. The prevailing view in Europe of forum shopping is a quite negative one. However, since efforts on harmonization of the international law of conflicts have been thus far unsuccessful, 'forum shopping' cannot be avoided. The chance that an international legal system for transnational disputes will be established is rather unlikely.

For certain groups of countries, for instance the member states of the European Community, the chance for harmonization of products liability laws is more likely, but only to a certain degree. Even in the EC, however, where the legal harmonization is one of the major goals, distinctions between the various member states will not disappear. Therefore, even in the future, in claims involving parties from different countries, the lawyer will have to consider where the institution of an action is the most favorable for his client.

The answer as to which 'forum' should be selected depends on different factors. First, two different countries with personal and subject matter jurisdiction have to be found for the action. The next step is to determine what 'conflicts of law rules' these courts should apply, in other words, what substantive law will they apply. This leads to the major question: which country provides the most
favorable laws? This depends primarily if not only on the substantive law, but also on the procedural provisions. Not only the particular standards, but also the rules of evidence can be crucial for a claim. Finally, the issue of enforceability and its prerequisite, the recognition of the judgment, must be examined. A judgment, which the plaintiff obtains in a foreign country, often has no actual value if it can not be enforced in his home country.

Besides the above mentioned factors, other nonlegal facts might lead to the selection of a certain forum. For instance, the mere fact of not being familiar with an other country and its law, might keep the victim's counsel from looking for a better 'forum'. However, these factors are not the major point of this thesis and will only be mentioned where they might be relevant.

The goal of this research is to state the current situation concerning products liability in the United States, the Federal Republic of Germany and more briefly, France and to compare the different systems. Emphasis will be given to the substantive laws, in particular to the new EC Directive and its adoption in the Federal Republic of Germany. Also, it will be dealt with the current German law, since this will be valid for all claims initiated before the enactment of the new ProdHaftG. Further, based on the previous analysis, it will be shown where a consumer is in the most favorable position to make out a claim against a foreign producer. Since the various parts of the chain of
distribution are also subject to liability in products liability actions, their responsibility also will be described.
II. The new EC Directive on Products Liability

Since the Directive of the European Communities on products liability will be implemented in all member states of the European Community, these rules will determine the national laws concerning products liability in the future. For this reason, the contents and the history of the Directive are briefly described in the following section.

A. History of the Directive

The EC Directive of July 17, 1985\textsuperscript{14} is the result of the "Draft Directive on Products Liability in 1976," which was presented by a working group of the EC, and later amended in 1979.\textsuperscript{15} However, the first steps were not taken by the EC but by the other major European organization, the Council of Europe.\textsuperscript{16}

This first initiative among the European states arose from the Committee on Legal Corporations (CCJ) of the Council of Europe.\textsuperscript{17} Through its committee of Experts on the Liability of Producers, a research program with the UNIDROIT was launched.\textsuperscript{18} The initial report on products liability
was received by the Council of Europe in 1972, which after three more years of deliberation, led to a draft containing rules on products liability for personal injury and death.\textsuperscript{19} On January 27, 1977 the European Convention on products liability in Regard to Personal Injury and Death, with annex, was submitted for signature.\textsuperscript{20} But to date, it has been signed only by Austria, Belgium, France and Luxembourg.\textsuperscript{21} This is partially due to fact that the members of the EC were waiting for the result of a pending draft procedure of the European Community. The EC work on the products liability began with a preliminary draft in August 1974, a second one in June 1975, and the final draft of September 1976.\textsuperscript{22} However, the draft was not approved by the Council of Ministers of the EC until July 17, 1985.

The objective of the EC Directive on products liability is to introduce a system of strict liability within all member states.\textsuperscript{23} The delay in the adopting the directive was a result of the attitude of the majority of the EC member states, which prefer the less liberal Convention of the European Council.\textsuperscript{24} But despite the reluctance of some member states, the adoption finally occurred; a goal sought and achieved by the various national consumer groups.\textsuperscript{25}

\textbf{B. The Substance of the EC Directive}

The first questions in all products liability actions, what is the applicable law and who are the parties according
to the regulations. The EC Directive is of particular importance since it might lead to substantial changes.

1. Parties according to the EC Directive

a) Plaintiff pursuant to Art. 4

According to the text of the Act, every person who suffered injuries from a defective product is protected. This also includes those persons who are bystanders, in other word, who are not bound by a contractual link to the potential defendant. The EC Directive is only applicable for the protection of private persons; it offers no protection for the damages which occurred in the business use of products. Hence, the law is limited to the private field of products liability.

b) Defendant pursuant to Art. 3 (1)-(2)

The Directive describes in its text the class of potential defendants by reference both to their role in the chain of distribution, and, secondly, to the nature of their allegedly defective product. Art. 3 (I) establishes primary liability of the producer of the defective product. But according to Art. 3(II)-(III) "importers" and also "branders" can be proper defendants for a claim based on the Directive. However, distributors as wholesalers, retailers or EC-importers, are not in the primary line of liability. Only when the producer of the product is not known or can not be determined is the retailer exposed to strict liability. Under such circumstances he will be treated as the
producer of the defective product "unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product.", Art. 3 (III). As a consequence of this rule, the retailer can not avoid his liability after the time has lapsed in which he was supposed to name the producer.  

2. Standard of Liability according to Art. 6 of the EC Directive

a) Product according to Art. 2 EC Directive

Art. 2 of the Act determines the definition of "product" under the rules of the Directive. The provisions especially excludes all immovable goods and agricultural products and game, but only if they have not yet undergone industrial processing. After such processing the producer is liable for their defectiveness. It is still questionable whether artistic products are covered by the Directive; also, other things like natural gas are difficult to subject to the Directive. Things can also be human 'organs' and 'blood'. But the general tendency of the Directive is to create a broad definition of product. As the Preamble states, 'product' should be given a comprehensive meaning to guarantee the most protection possible to the consumer. Due to this extensive understanding of product, product components are also included in the term.
b) Types of Defects

What is regarded as a defect under the Directive is regulated in Art. 6 and 7. For the crucial determination of product defectiveness, a combination of different factors is given by the law. Generally speaking, it has to be observed that in principle total safety from defects cannot exist. Therefore, only a certain grade of safety can be required of a product.36 The Directive has decided to determine the meaning of defect through an objective test.37 Basically, the Directive follows a 'consumer expectation' test theory.38 The view which the Directive has adopted, and which is similar to the US consumer 'expectation test', might lead to parallel difficulties. Especially in design defect cases the question arises whether the consumer was able to form an expectation at all.39 As the terms used in the Directive show, the standard is not one based on the expectations of an individual but of the general public.40

Art. 6(I)&(II) of the EC Directive describes those circumstances in which an article can be considered to be defective.41

(1) Presentation of the Product

Under this provision, the presentation of a product and its result concerning to the use of the product and the resulting expectation of the users are covered. The manufacturer's presentation includes the presentation of a product in the written instructions, e.g. warnings, etc.42, but also all other presentation that are authorized by the by him.
(2) Presumable-Reasonable Use of a Product

The use of a product which could be reasonably expected has to be taken into account. This does not limit the consumer only to the use for which the product was designed but also to such use which could have been foreseen by the producer. The extent of the producer's liability in such a case is still questionable. There must be at least a limit in liability for use which is beyond any expectation or imagination or which is absolutely unreasonable. Unaffected by this rules is the duty of the producer to warn of such misuse of his products which can be reasonably expected and anticipated.

(3) Time product was put into Circulation

The above mentioned elements must be considered in light of the time, when the manufacturer put the product into circulation. The moment of putting the product in the trade determines the reasonable expectations of the consumer regarding the safety and security of this particular object.

3. Defense under the EC Directive

a) Exception of Art. 6 (II) and Art. 7 (e)

Art. 6 (II) of the Directive provides a defense which can be described by the term 'state of the art'. According to that provision a product should not be considered defective for the mere reason that a newer product offers more safety than the old one did at the time it was put into circulation. But certainly this provision clarifies more
than it creates a new defense. The decision on whether a
product is defective or not is one which could be made, even
in the past, by considering the expectations and standards
at the time the product was introduced into the trade. This
is a basic legal principle which does not have to be created
by a new provision.

The other defenses of Art. 7 speak for themselves.
That the producer is not liable if he did not put the pro-
duct into circulation is basic to any notion of product lia-
bility. Therefore, the producer is not liable for goods
which are stolen and then sold or articles which are not yet
delivered. Art. 7(b) allows a defense in the event that the
defect which caused the damage did not exist at the time
product was put into circulation. This provision frees pro-
ducer from responsibility for defects which are the result
of the mistreatment by the buyer. Also, when the product
was not manufactured for sale or distribution, nor sold in
the course of his business, the manufacturer will not be
held liable. Further, there is no liability when the de-
fect was due "to compliance of the product with mandatory
regulations issued by the public authorities". This defense
gives the producer protection if the reason that his product
failed is because of his obligation to fulfill state regula-
tions and other rules. The Directive also contains a de-
fense for the manufacturer of component parts. In case the
defect is attributable to the design of the product in which
the component has been fitted according to the instructions
given by the manufacturer of the component, the producer himself is not liable.

b) Other Defenses

Besides these defenses related to the substantive law, the Directive also offers a defense based on the statute of limitations. According to Art. 10 the time limit is three years, beginning with the day "...the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer."\textsuperscript{44}

Pursuant to Art. 8, the contributory negligence of the victim results in a reduction or disallowance of recovery. Thus, the conduct of the claimant, for instance a misuse of the product, can result to a loss of his claims.

4. Derogations pursuant to Art. 15 EC Directive

Art 15 (1)(a) allows the member states to expand the definition of the term 'product' in Art. 1 of the Directive to primary products and game.

This provision permits the member states to impose stricter liability upon the producer by deviating from the rule of Art. 7(e).\textsuperscript{45} Thus, it is possible to hold a producer even if he can prove that the defect could not have been discovered according to the state of scientific and technical knowledge at the time he put the product into circulation.\textsuperscript{46}
5. Damages and Limits on Liability under the Directive

According to Art. 9 of the Directive, recovery can be granted for physical injury and death claims, as well as for damage to property. But damage to the product itself is not covered by the Directive. Also, the Directive only allows recovery for if the 'lower threshold' of 500 ECU has been reached. In addition, the damaged goods have to have a private character. This is the case if the object is generally considered only for private use or consumption. The reason for the introduction of this threshold is to limit the claims based on the Directive to the cases where substantial damages occurred. Further, Art. 14 excludes liability from nuclear accidents, which are "...covered by international conventions ratified by the Member States".

Art. 16 of the Directive permits the various member states to set a ceiling on the total amount of damages, resulting from death or personal injury and which are "...caused by identical items with the same defect". The limit, however, may be not less than 70 million ECU. This ensures, under European circumstances, a nearly unlimited guaranty for those claims.

C. Effect of the EC Directive

Generally speaking, the EC Directive is the first attempt to introduce in all member states a standard of
'strict liability'. However, this new standard is not a real 'strict' one. The manufacturer still has some means to escape his liability. The EC Directive still contains elements which take into account the conduct of the producer. The goal of the Directive is to apply the same standard of liability in all different member states and thereby promote the exchange of goods and advance the trade within the Community. At least, that is the announced aim of the Directive, which might happen in the long run. Distinctions in methods of production of safe goods will be equalized, and the resulting differences in production prices will vanish. However, other discrepancies will still endure. Since national courts will interpret the various elements of the EC Directive, true harmonization of products liability law in the Community will not occur very soon. This might not happen until the European Court of Justice renders a decision on the interpretation of the Directive. But also with regard to the Directive itself, the changes which will occur in the close future are only small ones. The provisions of the Directive are not more than a mere codification of the current systems, at least in France and Germany. Due to their expansion of the consumer protection in the past the changes in these countries will be only slight ones. In other countries, which have a consumer protection system solely based on the principles of negligence, the changes will be more significant. The EC Directive creates for countries with a developed consumer protection
system, like France and Germany, another new problem. The
EC Directive is not only a minimum standard, but the stan-
dard itself. Thus, it is not possible for countries to
impose an even stronger liability on the producer. However, it remains questionable if this is really desirable.

Concerning the question whether the implementation of
the EC Directive will lead to a uniform standard of products
liability within the various member states of the European
Community, the answer can be only a negative one. Even if
all states transform the provisions of Directive into their
national laws, the problem of different interpretations will
not disappear. These differences might even survive a de-
cision of the Court of Justice in Luxembourg. Although such
a decision will determine a standard of interpretation man-
datory for all national courts, such a holding can not de-
termine all details. In addition, the Directive itself al-
allows for inconsistence interpretations, through the option
of derogation of its provision already built in. Due to
the different cultural and social background of the various
national courts, it will still be possible to shop around
for the best forum within the European Community. But the
distinctions will become smaller; the Directive will have
the effect of making the principle standard of liability
similar.
The first question which a lawyer faces in a transnational claim is whether his client is entitled to bring suit in the potential 'fori'. This might differ depending on the relationship to the other party. Also, the consideration of possible defendants is of great interest. The claimant usually has an interest in suing as many defendants as possible because the more defendants he names the more likely it is that there is one with the financial resources to pay the compensation that the claimant seeks.

A. Parties to a Products Liability Claim

Basically, there are only two types of parties, defendants and plaintiffs. A further distinction can be made among plaintiffs between those who are in a contractual relationship with a potential defendant and those who are not. Similarly, defendants can either be in contractual relations to the plaintiff or not. Further distinctions among the defendants can be made in terms of entities legal, such as corporations, versus private persons.
1. In the United States

a) Plaintiff

The question who is a proper plaintiff in product liability actions depends on the type of action which the claimant initiates. The basic types of actions are breach of contractual warranty; implied as well as expressed warranty; liability for negligence; and, finally strict liability in tort.64

A plaintiff can be anybody who might be reasonably anticipated to use or consume a certain product and who is injured by doing that. In actions based on contractual liability, the claimant has to be a party to the contract, or at least a beneficiary of the contract.65 However, this rule was abandoned by the US courts in their endeavor to grant protection not only to the buyer, but also to the consumer of goods.66

§ 402A Restatement (Second) of Torts, which indicates a rule of strict liability67, speaks only of a "consumer" or "end user"68, but does not impose a real limitation. Those terms have to be broadly construed, referring to anybody who could be expected to use or consume the product. Otherwise, a narrow interpretation of these terms would lead to the exclusion of a certain range of victims injured by the defective product.69 Thus, courts have included passengers of cars, and also innocent bystanders in the scope of claimants under § 402A of the Restatement (2nd).70
In claims based on breach of warranty most courts allow bystanders to sue for recovery on strict liability, but a clear line cannot yet be identified.71 It is still not generally acknowledged that bystanders can recover claims based on products liability.72 But after comparing the situation of a bystander with that of a user or consumer, making a recovery dependent on the particular theory of recovery, seems to be unfair. Unlike the user or consumer the bystander does not have the chance to avoid contact with those dangerous products.73 However, in cases based on the breach of warranty bystanders are, according to § 2-318 alternative (c) of the Uniform Commercial Code (hereinafter UCC), possible claimants.74

b) Defendants

In a case based on strict liability, the seller of chattel is the primary defendant.75 With regard to the origin of a product, the first in the chain of liability is the manufacturer of the defective good.76 Manufacturers, who only assemble goods, are also liable for the defects of their component producers.77 However, liability can only be imposed on the producer of components for injuries caused by the particular defective component in contrast to the manufacturer of the whole good.78 The liability does not differ with regard to the professional or accidental seller. Even one, who is not in the business of selling, might be therefore subject to products liability.79 However, in some states, statutes have been enacted to relieve the retailer,
and sometimes also the wholesaler, from strict liability. However, in some states statutes has been introduced to relieve the seller of a defective good from strict liability.

Under certain circumstances claims can be made against the successor of the original producer of the defective good. This is an exception to the general rule of corporate law, which provides, that the succeeding company does not assume the liability of the original entity. The general rule is based on the assumption that the purchaser obtains no direct benefit and that he did not create the risk. But in some cases, the succeeding company will be held liable by the courts. For instance, where the purchasing corporation agrees to assume the responsibility of the original corporation, or where a merger or consolidation of a buying and selling firm occur. However, it should be noticed that most of the acquisitions of companies are mergers, and, thus, lead to a liability of the newly succeeding entity. Therefore, in most cases, and despite the general rule of nonliability, US courts will recognize a 'piercing of the corporate veil' by placing liability on the succeeding corporation.

2. In the Federal Republic of Germany

a) Plaintiff

As in the United States the primary plaintiff in Germany is the person who was injured by the defective product
itself, regardless of whether he was the user or end the consumer, or if he was a bystander in such an action. But this is only with regard to claims based on torts. The German laws, similar to the US system, recognize both tortious and contractual liability.\(^{87}\) Thus, these laws limit the range of the persons who can make the appropriate claims. People who are in 'direct privity' with the defendant, usually the buyer of the goods, can sue based on the contracts. Also, members of the family, dependants and other bystanders have a claim, but only under certain circumstances.\(^{88}\)

However, unlike the French laws, the German law system allows the plaintiff to sue in torts and contractual liability at the same time; one action is not excluded by the other.\(^{89}\) Although a successful action can be made by the party only if she has a valid claim against the defendant, procedurally the claimant can sue simultaneously.\(^{90}\)

Under the new ProdHaftG, the scope of potential claimants will be similar to those under tort laws. To establish a claim of liability pursuant to § 1 ProdHaftG, the only requirement is that the claimant was physically injured.\(^{91}\) Therefore, a claim can be brought by any injured person. Herein included are employees, private consumer, but also mere bystanders as well as professional buyers. However, concerning claims for damages to things, professional buyers are excluded.
b) Defendant

Concerning the liability of a producer, the same basic distinctions between contractual and tortious liability creates some differences. As in the US and France, the 'privity of contract' theory determines that a claim can be brought only against a defendant within such a relationship. Due to the lack of contractual relation, the manufacturer usually cannot be made a party of such a claim. Also, someone who sells products which are not manufactured by him, but only under his name, is not considered to be a sound defendant.

Actions based on torts can be brought against both manufacturer and distributor of the defective product, but their degree of liability might be different. Manufacturers who only assemble goods, can also be held liable. Even the 'head of the production' within a company can be held liable according to the German courts. Under certain circumstances, a claim against the successor of the original manufacturer can be made, but only if the new company is a succeeding company pursuant to § 25 HGB.

The new ProdHaftG provides in § 4 the range of the potential defendants. Pursuant to this provision, the liability is not restricted to the actual manufacturer, but includes other parties in the distribution chain. Even the producer of parts or of basic materials for the creation of the final product is subject to this liability. This responsibility encompasses also the assembler and the 'brander'
of a product, who is not currently subject to liability. 99 'Brander' is the distributor who puts his label on the goods, thus creating the impression that they originate from him. Such distributors, who are deemed to be the producer of the goods, are called 'quasi-producer' ("Quasi-Hersteller"). 100

3. In France

a) User/End Consumer as Plaintiff

As in the German or American legal system, the answer to the question of who can be a proper party depends on the kind of action. Claims can be based on contractual or tort law, but both claims cannot be made at the same time. 101 This is required by the French rule of "non-cumul", which states that a victim cannot choose between the two bases of liability, tort or contractual responsibility. 102 According to that precept, the contractual party, usually the buyer of the defective product, only has the right to sue in contracts, rather than in torts. 103 But the French courts have expanded that role to the subsequent buyers. 104 Those persons can sue the manufacturer in an 'action directe' for contractual liability even though they purchased the object from a retailer. 105

Injured persons who are not in such a direct relation with the defendant, especially bystanders but also the members of the family of the buyer of the defective product, are treated as bystanders. 106 Therefore, the only remedy
which they have against the seller or manufacturer, is the right to sue in tort.107

b) Defendant

Potential defendants in products liability actions are the seller, the supplier, and the manufacturer of the defective merchandise.108 Art. 1645 of the French Civil Code requires privity of contract between the plaintiff and the seller for an action based on warranty liability. According to French procedural law, the defendant in such an action may bring a third party proceedings for indemnity against his own seller.109 As a result of these indemnity claims, the manufacturer will ultimately be held liable for the defect. Therefore, despite the 'privity requirement', the French courts allow the victim to bring actions directly against the manufacturer.110

Because actions in tort are not based on a contractual relation between the parties, claims can also be made against the producer and distributor at the same time.

4. Differences and Conclusions

By comparing the different legal systems it can be noted that the courts by trying to establish an efficient consumer protection, have expanded the scope of the potential parties in products liability cases. However, with regard to the position of bystanders and retailers, there are still some differences. The broadest range of potential defendants exists in the United States. Here, all links in
the chain of distribution are subject to liability for a product's defectiveness and therefore can be sued. The retailer as well as the producer are included in this liability; even the producer of components or a mere retailer can be held liable. However, differences also exist between the various states; some might deviate from the broad scheme, others, for instance, have enacted statutes relieving the retailer from strict liability.

In contrast, the French and German laws still have restrictions regarding the potential defendants. These restrictions especially limit the possibility of bringing actions where the claims are based on contractual liability in case the plaintiff is a bystander. With contractual claims, both the French and the German system demand privity of contract between the plaintiff and defendant, thus limiting the range of the possible defendants to the seller of the defective product. But the French laws allows one exception; the manufacturer might be sued in a 'direct action'. In torts actions, the German law allows claimants in principle to bring claims against all different parties in the chain of distribution. This result will be explicitly stated by the rules of the new German ProdHaftG. The US law and the German law, as opposed to those of France, allow claims to be brought based on different causes of action, for instance on torts and contracts, at the same time. This allows the plaintiff to bring actions on all possible grounds and does not require a selection process which might
result in the wrong cause of action. Under US laws a succeeding company may, under certain limited circumstances, be forced to assume the liability of its predecessor. But most of the time, the 'corporate veil' protects these new companies. The situation in Germany is similarly resolved, for as in the US, the liability of the original company will be imposed on the succeeding corporation under certain circumstances.

Considering the different countries, it has to be noticed that products liability laws in all three countries are similar. However, the French laws are more restrictive with regard to contractual liability and also compel the claimant to choose between contractual or tort actions. Bystanders under the new German ProdHaftG are explicitly entitled to bring lawsuit. In contrast, some states in the United States are still reluctant to recognize such a cause of action of mere bystanders.

B. Standard of Liability

The major point of interest for the victim in a transnational action is what country provides the most favorable substantive law for his claim. The laws of one state might allow recovery while in the other forum's statutes of limitation, rules of evidence or simply a different legal standard prevent the redress of the injured party.
Hence, the claimant has to compare the available laws to make his decision.

1. In the United States

As already stated, consumers can bring an action in products liability on three different grounds: breach of contract, negligence and strict liability in tort. In most jurisdiction all three theories are available as means for recovery.\(^{111}\) This requires defining the term 'product', because this sets the starting point for such claims.

However, the exact definition of this term is still disputed.\(^{112}\) In the past, only chattel was considered a product, but this understanding had been extended by the courts to secure an effective protection of the consumers.\(^{113}\) Today, for instance, electricity\(^{114}\), and live animals\(^{115}\) (but not blood\(^{116}\)) are considered 'products'; however, those decisions are not recognized in all jurisdictions. Another attempt at clarifying the definition of product is found in the Restatement (Second) of Torts, which lists the items which can be considered as a 'product'.\(^{117}\) Some states\(^{118}\) have enacted products liability acts containing definitions; also, the Model Uniform Product Liability Act gives a definition.\(^{119}\) Thus, whether an object can be considered a 'product' for a product liability action depends on the particular case.

The definition of a 'defect' faces the same difficulties. The existence of a 'defect' can be assumed in cases of
faulty manufacturing or production, improper design, and also the manufacturer's improper instructions to the consumer on the product's use, or where the producer made a misrepresentation concerning the quality of the good. But these descriptions are not complete, and the question of which standard should be applied remains. Thus, consumer expectations can be a crucial point in determining whether the product is defective, especially since the Restatement gives support to this understanding. However, other courts differ from this understanding and use other standards, for instance, they ask if the product was 'unreasonably dangerous'. In areas like design defects, other approaches based on a more economic understanding of the defectiveness of a product, for instance the 'risk-utility-test', have been used to achieve a fair result. In design defect cases, the adjudication in general has even been questioned. However, all of the different standards are encumbered by the general obstacle to find a certain clarity in using them. But here again, the question of defectiveness depends on the individual case and on the various jurisdictions.

a) Breach of Warranty

Breach of warranty as basis for recovery is recognized by all states in the United States, except Louisiana. The liability arises from the seller's expressed or implied representation to the buyer or user of the particular good. If the resulting warranty does not comply with the actual
condition of the good and lead to damages, these can be re-
covered under this theory.

Originally, claims for breach of warranty, whether
implied or expressed, required a 'privity of contract' bet-
ween the parties. But after World War I, the courts for-
sook this condition with regard to Product Liability
cases. This was necessary because the seller usually did
not have the means to compensate and thus was not a valuable
defendant. Today, only a few jurisdiction still demand a
'privity of contract' relation between the parties.

A warranty by the seller or manufacturer can be given
explicitly or impliedly. An expressed warranty can simp-
ly be the result of an advertisement stating the quality of
the product. An expressed warranty exists, because, the
manufacturer made the public believe in the qualities of
their products. The kind of statement, that establishes
an expressed warranty is determined by the Uniform Commer-
cial Code (UCC). Thus, an expressed warranty, needs to
contain an "affirmation of fact or promise". Hence, the
issue of whether a representation made by the seller is an
expressed warranty depends on whether the statement was too
vague. However, a general trend among court judgments
cannot be deduced because the decisions only refer to
single, unique cases.

The second form of warranty is an implied warranty.
Contrary to an express warranty, affirmative misrepresen-
tations are not required. According to the UCC § 2-314,
warranty "...is implied in a contract if the seller is a merchant."\textsuperscript{136}

Section 2-314 UCC provides for an implied warranty of merchantability for goods, and § 2-315, in addition, regulates the implied warranty concerning the "fitness for a particular purpose". A warranty of 'merchantability' is usually given only by merchants, who are defined in § 2-104(1) UCC. In general, such a warranty is not given in isolated sales by nonmerchants.\textsuperscript{137} In contrast a warranty of 'fitness for certain purpose' may be given by any seller\textsuperscript{138}, regardless of whether he is a merchant or not. For both warranties, the point in time to which the warranty refers is the same. The moment the product leaves control of the seller or producer, the guaranteed conditions have to be present.\textsuperscript{139}

A particular impediment concerning the recovery under breach of warranty rules is the requirement of notice. The buyer has to give notice of breach to the seller within reasonable time, § 2-607(3). This appears to be a major hindrance for recovery. Thus, the consumer, who was simply unaware of this duty, will be barred from recovery if he forgot to comply with the notice requirement.\textsuperscript{140}

b) Negligence

Before the well-known decision of MacPherson v. Buick Motor Co.\textsuperscript{141}, the US courts did adhere to the old English law rule of 'privity in contact'.\textsuperscript{142} This rule denied liability [for negligence] of the producer or seller against
persons not within 'privity of contract'. In MacPherson v. Buick Motors Co., the court dispensed with this privity obstacle, allowing claims for negligence against even a remote producer of a product. The standard for negligent liability with regard to defective products is that of a reasonable, careful person who is in the position of a seller or producer. The seller's or producer's duties include the obligations to warn of foreseeable dangers, to inspect and test new products completely, and, also, to keep the design and manufacturing of the products in compliance with the industrial or legal standards. In determining the standard for the duty of care, most courts take into consideration the compliance with 'state-of-the-art' technologies. But this standard is only relevant evidence, not the decisive factor. This standard of evidence should not be confused with 'current standard' of the industry. Nowadays, the scope of duties is sometimes described by statutes or other regulations; for instance, the Consumer Product Safety Act and the National High Way Traffic and Motorvehicle Safety Act. However, this is only a trend, and such statutes do not provide the complete standard. Generally speaking, it can be said that the manufacturer or seller has to build or handle treat a particular product by using due care.

c) Strict Liability in Torts

The first decision where strict liability was explicitly recognized by a court was in Greenman v. Yuba Power Pro-
ducts, Inc. In this case, despite the judgement of the lower court based in breach of express warranties, the Appellate Division held that the mere act of placing a defective product on the market can establish liability. In any case, where this is done with the knowledge of the manufacturer that the product will be used without inspection for faults, and where such use resulted in injuries, the producer is subject to liability. In Greenman, the court not only denied the prerequisite of a 'privity of contract' between the parties, but also the need of giving notice in breach of warranty cases. The developments following this case finally lead to the draft of a strict liability provision by the American Law Institute. The basic elements of this liability are described in § 402A Restatement (Second) of Torts. This provision explicitly imposes a strict liability only on the seller of a product. Section 402A has not resulted in a restriction of liability because it is not a prerequisite that the seller engages primarily in the sale of the particular product, although § 402A usually does not apply to an isolated sale by an occasional seller. Strict liability gives a certain guaranty in favor of the buyer of a product, but it still has to be distinguished from a warranty pursuant to the UCC or any kind given in the sale of goods. Also, 'strict liability' is not absolute liability. As stated in § 402A (1), liability applies only to 'defective' products which are 'unreasonably dangerous'. A product is considered to be 'unreasonably
dangerous' in a case where it is regarded as dangerous beyond the extent which can be contemplated by an ordinary consumer. But some states do not apply the standard of 'unreasonably dangerous'. These states apply different, but somewhat similar standards. New York uses a standard of being 'not unreasonably safe', Pennsylvania uses a standard of 'safe for its intended use'. Most but not all states have adopted the standard of § 402A Restatement (Second) of Torts. Some states, like Michigan or Massachusetts, are using principles other than strict liability in torts, however they achieve the same results. With regard to the issue of whether the product was 'unreasonable safe', the defendant can introduce evidence showing that he complied with the standard of science and technology (proof of state-of-the-art). But it should be noted that 'state-of-the-art' is an ambiguous term, regarding to its definition as well as to its use in trial. Today, in states with products liability laws, statutes usually regulate the 'state-of-the-art', in general as a defense. In states where such provisions are not available, the issue is whether this defense is permissible evidence. In the past it was generally considered to be relevant evidence, but after the Besheda v. Johns-Manville Products case the question of admissibility arose again. In this case of an asbestos-caused disease, the New Jersey Supreme Court imposed 'strict liability' for failure to warn on the defendant. The court held that this liability
could be inflicted on the manufacturer, however the risks of which the producer failed to warn, were "...undiscoverable at the time of the manufacturer". The New Jersey Supreme Court held that this defensive evidence has to be excluded because of the nature of strict liability. Since in 'strict liability' cases, unlike in actions for negligence, the conduct of the manufacturer is not relevant but the quality of the product, thus his knowledge of the defect is irrelevant. The court justified its holding on policy reasons, like 'risk spreading', 'deterrence' and also to avoid possible difficulties in the 'fact-finding process'. Although other courts have agreed with the New Jersey Supreme Court concerning the clear distinction between 'strict liability' and 'negligence', it has been criticized that the court considered the 'state of the art' defense necessarily linked to negligence but not to 'strict liability'.

However, later in Feldman v. Lederle Laboratories the New Jersey Appellate Division impliedly held that such evidence can be admissible. In its decision the court first stated that 'strict liability' is also applicable to the manufacturers of prescription drugs, since failure to warn can be held to be a kind of 'design defect'. Then the court concluded that under a 'strict liability' theory, 'failure to warn', and 'design defect' cases command for the same examination: "...whether, assuming the manufacturer knew of the defect in the product, he acted in a reasonably
prudent manner in marketing the product or in providing the warnings given. Thus, once the defendant's knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant's conduct.181 Hereby the court, applying a 'strict liability' theory, turned away from an only product orientated view, and took into account the defendant's conduct.182 Based on this analysis, the court stated that 'state-of-the-art' evidence would be relevant for measuring the reasonableness of defendant's conduct.183 Eventually, the court held that this was not meant to overrule Besheda, since Besheda did not mean that in all cases which involve 'failure to warn', the knowledge of the manufacturer is without relevance.184 The reason for this decision was, according to the court, that the strict liability theory does not make the producer to an insurer against all possible injuries arising from the use of his product.185 Therefore, not foreseeable risks have to be excluded from his liability, and thus, a defense like state-of-the-art, has to be permitted.186 Comparing Besheda with Feldman, the result is that, besides in cases similar to Besheda (asbestos caused disease)187 'state-of-the-art' will result in a bar for recovery if the producer is able to convince the jury that he had no knowledge about the risks when he put the product into the market.188 But the future will show, whether Besheda was more than a unique case of an attempt to establish a theory of 'absolute liability' or not.
Another development of expanding the liability of the manufacturer, which in Europe has been noticed with great concern\textsuperscript{189}, are presented by the theories of 'industry-wide liability theory', and the 'market-share-liability'.\textsuperscript{190} The former applies where the specific manufacturer could not be identified, but a industry-wide standard leads to the conclusion of a joint liability of the producers.\textsuperscript{191} The latter, which has also been developed in DES cases\textsuperscript{192}, shifts the costs for the injuries to the industry in case no particular defendant can be identified, but the market-share of the defendant companies is so large, that it is likely that the product was produced by the defendant.\textsuperscript{193} However, these theories have not been widely followed, and it has been proposed that this issue should be solved by the legislation.\textsuperscript{194}

2. In the Federal Republic of Germany

Today the German legal system knows two different types of liability for defective products, contractual liability and liability based on torts. Although in practice the German Law concerning products liability is that of torts, rather than of contractual responsibility.\textsuperscript{195} The reason for this posture is a practical reason since under the law of contracts, the recovery of damages is limited and also the short statute of limitation period makes it more difficult to recover under these laws.\textsuperscript{196}

An other reason for such attitude is the different in-
interpretation of 'products liability' in German Law. In cases where the damages is closely linked to the agreed qualities of a product, only the contractual remedies apply, but not those in torts. Contract laws are determined to establish a contractual guarantee of the seller or producer for the possibility to use the product in the intended way. In contrary hereto, tort law is supposed to protect the consumer from damages to this property and his person which are the results of hazards and failing safeguards. Only in case that both interests are different, tort law is applicable. Thus, such liability can be described as one which arises from the use of the defective product; it is primarily concerned with the damages to persons and property. Contractual liability covers mainly damages to the product itself; although, under certain circumstances it can cover other damages as well. However, even the different remedies might lead to different results, the German 'Bundesgerichtshof' upheld a case where a tort action was brought to evade the contractual limitation period and a disclaimer clause. The crucial elements in actions for 'Product Liability' are the range of the protected products and the existence of a defect. Therefore, these two concepts are dealt with first.

a) Under Current Law - until August 1988

(1) Breach of Warranty

Any item which is according to German law a 'thing', a tangible item ("Sache"), can be the subject of a contractual
warranty. Pursuant to § 90 of the German civil code (hereinafter BGB), 'things' are all material objects. The scope of protection depends on the sort of representation which was made.

According to German warranty laws, the seller of a product has to guarantee the absence of latent defects, § 459 I BGB, and the presence of explicitly promised qualities, § 459 II BGB. However, the warranty of the product's quality according to this provision does not provide 'real' products liability. Section 459 II 1 BGB imposes only liability for damages to the product itself, and it guarantees the obligation of the buyer to make payment. Pursuant to § 459 I BGB, the seller has to guarantee that his product is free from defects that diminish or terminate its fitness for the general or specific use provided for in the contract. Besides this implied warranty, § 459 (II) BGB provides an additional remedy in case of an expressed warranty. Pursuant to § 459 (II) BGB, breach of this contractual expressed warranty triggers the seller's liability, regardless of his negligence.

The contractual liability, based on the breach of warranties, provides only limited remedies. According to §§ 459(1), 462 BGB, the plaintiff only has the possibility of reducing the price or rescinding the sales contract. He can recover damages only if the seller made an expressed warranty regarding certain qualities of the product, § 459 (II) BGB. Thus, the query, of whether a contractual
claim for damages can be made depends on the decision of the individual court in every single case. In case the court finds an expressed warranty according to § 459 II BGB, the plaintiff will be able to obtain compensation. Due to a liberal posture of the German courts regarding this issue, a court will quite often find such explicitly promised qualities. However the requirement of 'privity of contract' and the restrictions concerning the recovery of damages limit the practical use of contractual products liability claims.

(2) Positive Breach of Contract

Originally the German law recognized only two basic forms of irregularity in contractual relations, "impossibility" and "delay". Later, this proved to cover not all possibilities in contractual relations. According to German law, every contract establishes additional duties beyond those which can be described as the main duties or obligations of a contract. These main duties are the virtual reason for the conclusion of the contract. A breach of these extra obligations can establish liability of a seller, if he or the producer was negligent. The required 'fault' element of such claim is defined according to the general contractual standard. Pursuant § 276 BGB, someone acts negligently if she fails to comply with the standard of care which is required in regular transactions. These additional obligations are not codified but are the result of the general principle for contractual performance, stated
in § 242 BGB, the so-called 'good faith' clause.\textsuperscript{219} Because these duties are not codified, their scope has been determined by case law.\textsuperscript{220} Also, the application of this theory of liability is restricted by the fact that it is only a subsidiary remedy.\textsuperscript{221} Therefore it can be applied only if no other cause of action exists, under tort law, or contractual theory. This, and the fact that the scope of the 'additional' duties is sometimes difficult to determine explains why 'positive breach of contract' is not used more often for recovery.\textsuperscript{222}

A recovery based on a contractual remedy provides some advantages for the consumer concerning the liability of the other party. According to § 278 BGB, the parties of a contract are responsible for the negligence of any assisting party, so-called "Erfüllungsgehilfe".\textsuperscript{223} But liability only arises when this assistance is provided in fulfillment of the contractual obligations of the parties.\textsuperscript{224} Like the US principle of vicarious liability\textsuperscript{225}, but unlike the situation in German torts law\textsuperscript{226}, the seller or producer who was using such aid, cannot escape his liability for the negligence of his "Erfüllungsgehilfe".\textsuperscript{227}

(3) Extra-contractual Products Liability - § 823 BGB

This part of the German law which also governs the liability of producer for the defective products belongs to the law of tort, §§ 823 BGB (Civil Code).\textsuperscript{228} In order to furnish the consumer with a workable protection against defective products, the courts have modified these rules.\textsuperscript{229}
Every tangible object is subject to this extra-contractual liability, regardless whether it is suppose to be consumed or serve as means for production, but services are excluded from liability. Possible defects includes manufacturing and design defects, and failure to warn or instruct the consumer in an appropriate way. A product is considered not defective only if it fits the intended or agreed purpose and is safe. Additionally, the product's use has to be safe and has to comply with minimum principles of safety. The standard is not defined by the expectation of the individual consumer, but rather by the reasonable expectations of the public at large. Since the product liability is only considered to be a category of violating the 'general duties of care' ('Verkehrssicherungspflichten'), the standard of defectiveness has to be an objective one, hence taking into account the reasonable expectations of the public. In determining whether the product is defective the judge will take into account additional factors. For instance, in case the product is a dangerous one, but the risks are unavoidable, he will consider all circumstances. In such case the manufacturer is only liable for damages, in case the failure to warn properly has been the certain cause of the damages; the mere likelihood is not sufficient to impose responsibility upon the producer in such situation. This concept of different duties includes a very flexible notion; thus it allows to take into account all particularities of each case.
The basic provision, § 823 I BGB, provides for liability for any wilful or negligent damage or injury to life, body, health, liberty, property or other protected interests. The first element which has to be substantiated is the occurrence of damages; and secondly, that it was caused by the defendant. Further the defendant has to be shown to have acted wilfully or negligently, and unlawfully. Negligence is defined, pursuant to § 276 BGB, as nonobservance of care which is customary under the circumstances. However, this requirement of fault is difficult to prove. In torts actions against the manufacturer where the defect was due to an incident in the manufacturing process, it is particularly difficult to recover. In these actions, the producer could, based on § 831 BGB, avoid his liability. According to this provision, the employer (master) is liable for the damages caused by his servant (employee) if the employer was at fault in the selection or supervision. Section 831 BGB provides for a presumption of fault concerning this selection and supervision, but this presumption is a rebuttable one. If the sued manufacturer proves that he has properly selected, trained and supervised his employee, he will escape liability. In the past, therefore, it was not very likely to be successful in suing manufacturers. Since the company usually could show that it had carefully selected the staff which supervised the manufacturing of a product, the employer could escape liability. The answer of the courts to this limitation on liability was the
formation of specific case law which generally limited the effect of this provision.  The case law, has imposed a general obligation on the manufacturer to protect others from injuries and damages, the general duties of care ("Verkehrssicherungspflichten"). To those duties correspondent, in case of their violations, the resulting defects. The courts assumed a duty of the manufacturer to avoid manufacturing defects ("Fabrikationsfehler"), design defects ("Konstruktionsfehler") and failure to instruct the consumer properly or to warn against dangers of the product ("Instruktionsfehler"). Furthermore, there is also the duty of the producer to monitor his products, thus creating a duty to react to the accident record of recently released goods.

Besides the basic tort provision, § 823 II BGB, creates liability for damage caused by the violation of laws protecting the rights of third parties. A great number of protective statutes in the spirit of § 823 II BGB have been enacted. These kind of statutes include all those civil and public law regulations whose major purpose is to protect an individual or a group of people rather than the public as a whole. Thus, if the producer has violated a particular statute which is a 'protective law' according to § 823 II BGB, the plaintiff does have to substantiate that the defendant's conduct directly caused his injuries. But § 823 BGB, does not mitigate the claim of the injured victim very much. Since, it has to be observed that even though, certain
'protective laws' state that they can be violated without fault, § 823 II BGB requires 'fault' on behalf of the defendant.259 Hence, § 823 II BGB limits the effect of the 'strict liability' of such protection laws by demanding for the existence of 'fault'.

(4) Special Acts: Pharmaceutical Act260

As a special law261, which provides a strict liability for the producer of pharmaceutical products, this statute introduced such a standard of liability for a manufacturer for the first time.262 Thus, no negligence has to be proven, and the only requirement for a valid claim is to establish that the drug, even properly used, had a harmful effect, and that the resulting damages are beyond the standards set by medical science.263 Considering the scope of the liability which is determined by this law, it is remarkable that even in case where the manufacturer did not act negligently, he is held liable; the same is true for dangers which could not be foreseen, so-called 'development risks'.264 But liability is only incurred when the product was used in the intended way.265

b) Under the new 'ProdHaftG'

By the 1st of August 1988 a German law implementing the rules of the EC Directive has to be adopted. The first draft of this new piece of legislation has already been finished. Briefly, the new German ProdHaftG will result in the following changes. A major change that the new law will introduce is a basic form of 'strict liability'.266 This
particular principle of liability which, until now, has been enacted only in special laws, will not lead to many changes because most of the results, with regard to the scope of liability, have been already forestalled by the jurisdiction of the German 'Bundesgerichtshof'. The new law imposes a more rigid liability on the manufacturer for a product defect. The potential defendant is primarily the manufacturer of a product, but also can be the importer of goods and sometimes, under particular circumstances, the seller. The current German law does not impose a liability for defectiveness of products which could not been avoided even under utmost care and control of the manufacturing process. The new Act, however, charges the producer with this liability, since the 'strict liability' is not related to 'fault'. The definition 'product' follows the previously used categories, but 'electricity' is now explicitly mentioned as to be a 'product'. The standard for 'defectiveness' of a product is consistent with the current standard. Basically, the manufacturer is responsible for all kind of defects. But consistent with the previous jurisdiction of the German courts, the new Act will exempt the manufacturer from liability for defects in development under 'state-of-the-art' defenses. With regard to the interference of third parties, another improvement consumer protection has been enacted. A claim of an injured consumer will not be reduced because the harm was not only caused by the product but also by an action of a third
Damages can be claimed for under the new Act in cases of death, injuries, and damages.

For agricultural production, a special exception will be included in the new law. Further, the German draft contains a ceiling of the amount of money for which the producer is liable. The proposed ceiling is 160 billion Deutsche Mark.

3. In France

The French law like the German law provides two different bases for the liability of a manufacturer for his defective products - contractual and tortious responsibility.

a) Contractual Liability

Contractual compensation can be claimed based on Art. 1641-1649 of the French Code Civil. According to Art. 1641 the seller of a product is required to warrant against hidden defects, so-called 'vice caché' in his goods. A product is defective if the defect renders it unfit for the intended use or diminishes the product's value in a way that the purchaser would not have acquired it if he had known about the defect. The intended use must be a normal one, or a use establishes in a special agreement on. Also, the defect does not have to be an obvious one, but rather may be latent; a defect which could be discovered by a superficial examination is not subject to the seller's warranty. But the seller who is unaware of the defect has,
as declared in Art. 1646 C.Civ., only limited liability. This means the purchaser can only ask for the restitution in the amount he paid for the item. In contrast, the vendor who knows about the fault at the time he sold the product is obligated to pay all the damages and losses which are suffered by the buyer. Because of the limitations of liability which are created by Art. 1646 C.Civ. and the practical difficulties to establish the 'male fides', the seller's knowledge of the defect, a buyer was not likely to make out a successful claim based on contractual liability. To answer that problem, the French courts modified the interpretation of those statutes. As a result of that modification, the scope of products has been expanded by the courts. In addition, the extent of liability of a professional seller, usually a merchant, for product defects, has been extended. The courts now require the professional seller to know of any defect; thus, he has to warrant the absence of even latent defect. This liability does even abate if the professional seller can prove that she had no knowledge of the defect, nor could reasonably have been expected to know about the defect, nor had the necessary capability to discover the defect. Due to that judicial development, a French professional seller is 'strictly liable' for latent defects of her goods. But despite this particular liability, the plaintiff in this kind of case still faces another problem. Art. 1648 C.Civ. allows for only a short time to bring such an action.
length of the time is based upon the discretion of the courts. However, a very short period of time could lead to quite unfair results. To answer this problem, the courts have held that period in which to bring a claim can be a few days to several months; it always depends on the single case.

b) Extra-contractual Compensation (Code of Obligations)

Because of the rule of 'non-cumule', the injured person who is not a buyer must seek relief in a tort claim, pursuant to Art. 1382-1384 C.Civ. According to Art. 1382 C.Civ., the claimant has to substantiate and to prove the negligence of the manufacturer.

In comparison to the buyer of a product, this seems to be an unjust impediment, because the purchaser does not have this duty; he only has to establish the defect of the product. In light of this situation, the French 'Cour de Cassation' has been willing to equate the requirements for contractual liability with those for non-contractual parties. This was necessary to provide a mere bystander and a contracting party with the same basic protection in products liability cases. Based on this posture, the French courts decided that even the 'marketing' of a defective product establishes 'per se' the fault on the part of the producer or seller.

Besides Art. 1382, Art. 1383 C.Civ. allows for the recovery of damages arising from the misuse of a product. Art. 1383 C.Civ. imposes on the manufacturer or seller the
duty to take all precautionary measures which are necessary
to avoid damages caused by the product.303

But the French courts do grant remedies which are even
more consumer orientated. Art. 1384 (1) C.Civ.304 imposes
on the persons having "control" over a certain product
liability for any damages caused by it.305 The interpreta-
tion of this provision has been expanded by the court to
provide a useful device for establishing comprehensive
liability, inter alia, in products liability cases.306 This
liability is imposed on the producer as the 'custodian' who
has control over the object at issue.307 This 'garde de la
chose'308, can be, according to the French Cour de Cassa-
tion, divided in a way that one person is the "gardien du
comportement" (responsible for the conduct of a person) and
another individual is the "gardien de la structure" (liable
for the quality and the structure of a product).309 The
producer is responsible for the quality of a product, and
thus, he is liable for damages caused by the product.310
This understanding of Art. 1384 C.Civ. gives the court a
means to impose a strict liability311 on the producer or
distributor of defective goods.312

c) Special Laws in France

Besides the general civil laws special laws exist which
impose a 'strict liability' for defective products upon cer-
tain people.313 For instance, special laws provide for
'strict liability' with regard to 'aerial cable cars'314 and
aircraft-carriers.315
4. Conclusions and Differences

In contrast to the strict liability of the United States, the EC Directive does not impose liability on 'professional distributors', nor does the 'German Prod-HaftG'. A claim based on a design defect still requires the manufacturer to be at fault since Art. 7 of the EC Directive permits the manufacturer to invoke the 'state-of-the-art' defense, as long as the EC member state did not derogate from this principle. Due to the fact that France already has imposed a rigorous standard of liability upon manufacturer and distributor, it is expected that they will opt out of the EC's Directive state of the art defense. Thus, lacking this defense, the French manufacturer faces liability which is even more rigid than in the United States.

As opposed to the US rules of contributory negligence, the EC Directive follows the theory of comparative negligence. These rules will be followed by Germany and, probably, France, since the Directive is according to the current position of the courts of both countries.

The various systems offer similar standards of liability which lead in general to the same results. The current German system, through the presumption of fault, as the new German 'ProdHaftG', will usually provide the same results because the basic principles as stated in the new law, have been already foreshadowed by the German courts. In addition, contractual remedies (breach of warranty) are not
abolished by the new law. Those principles can be used together with the new act to bring an action. However, the new law clarifies the consumer's situation and the protection available for him. Also, it makes it easier for a injured party to bring claim, since the consumer does not have to establish the fault of the manufacturer.

Some elements are required under all schemes, for instance with regard to a tort claim for product defect, all systems require that the defect exist when the product was put into circulation and that the plaintiff substantiate the causal link between the damages and the defect.

Breach of warranty actions in all three countries face the initial problem of differentiating between implied and expressed warranty. In addition, the remedies under German law for such a breach are limited, since compensation is not the usual remedy. Here, an action based on 'Positive Breach of Contract' might be helpful, but due to its subsidiary character such theory will not be applied very easily.

C. Defenses

The manufacturer, as a defendant in a products liability action, is naturally seeking to avoid the claim. Thus, the consumer who wants to shop for his best forum has to consider the possible defenses as well. The defendant's defenses can be decisive to the success of the plaintiff's claim.
1. In the United States

Defenses have to be affirmatively pleaded and are defined in the Federal Rules of Civil Procedure\textsuperscript{317} as well as in state laws.\textsuperscript{318}

a) Product Modifications and Subsequent Repairs

The defendant, whether a manufacturer or seller of product, might avoid liability if the product was modified after it left his control. These cases often involve equipment or machinery which someone attempted to alter or improve\textsuperscript{319}, for example, to increase the utility of a device.\textsuperscript{320} Modification or alteration of a product establishes a defense in strict liability, negligence and also in breach of warranty.\textsuperscript{321} Concerning strict liability the defense is explicitly mentioned in § 402 (I)(b), of the Restatement (Second) of Torts.\textsuperscript{322} However, not all alterations relieve the manufacturer of liability. In strict liability cases, the modification has to be a substantial one.\textsuperscript{323} But the courts have difficulty determining what exactly a 'substantial' alteration means. In some jurisdictions, the courts use the standard of foreseeability, while in others they ask if the modification made the product unsafe.\textsuperscript{324} But in general, foreseeability plays the decisive role in determining liability.\textsuperscript{325} Based on the elements of 'foreseeability', a modification will not free the producer from liability if it is foreseeable.
b) Misuse

'Misuse', a use which was not intended nor foreseeable by the manufacturer, is a frequently raised defense.\(^{326}\) In actions based on negligence, as well as in actions based on breach of warranty, this defense results in a barring or disallowing of the recovery.\(^{327}\) In strict liability actions, the result can also be to bar the plaintiff's recovery\(^{328}\), or to reduce the possible amount of recovery according to the state's comparative negligence doctrine.\(^{329}\) To establish misuse the product has to be handled in such unusual way that no average consumer would have expected the product to be designed for.\(^{330}\) Misuse (or 'abnormal use', or 'unforeseeable use') has generally been considered to be a superseding cause; in a few cases even where the product was defective.\(^{331}\) According to the majority of the US courts, the decisive test in these cases is whether the 'misuse' was foreseeable for the manufacturer.\(^{332}\) Thus, a defendant can escape liability if the 'misuse' or 'abnormal use' was not foreseeable to him.\(^{333}\)

c) Proximate Cause

Another possible defense is based on the interference of third persons: also, particular events can relieve the defendant of liability. With regard to the causation of the injury, the producer can defend himself by alleging that an intervening act of a third person caused the damage. For instance in negligence actions, the manufacturer can escape his liability by showing that the claimants actions were the
proximate cause of the injury. Although this is not a valid defense, if the plaintiff's alleged negligence was only the failure to detect the defect or to take safeguards against its conceivable existence. In actions on breach of warranty, negligence and also strict liability, the alteration of a product can result in an intervening or superseding cause, thus freeing the producer from his liability. Nevertheless, in case this alteration has been anticipated, or where it is not a causal link to the damages, the liability is still imposed on the manufacturer. Concerning a defense based on proximate cause, the decisive point is whether the intervening action was foreseeable. However, this foreseeability must not refer to any particular intervening act, but only to a similar conduct in general. c) Assumption of Risk, Contributory and Comparative Negligence

Another defense, which might bar or diminish the recovery is the 'assumption of risk' allegation. Because the plaintiff voluntarily assumes a risk, and thus was using the product at his own peril, it is considered to be a defense. An implied 'assumption of risk', unlike the expressed form, is an important defense in products liability actions. Assumption of risk requires at first that the claimant's conduct has been voluntary. Thus, in case the claimant's conduct is inadvertent, or he has no choice than to expose himself to the dangerous product, this will not result in an assumption of risk situation.
Linked to the voluntariness of the victim's conduct is the prerequisite that he knows about the potential risks.\textsuperscript{346} Basically, the standard of knowledge is a subjective one, and requires that the person does not only know the facts\textsuperscript{347} creating the danger, but also understand what kind of danger it is.\textsuperscript{348} Thus, in case a person is lacking the necessary comprehension, assumption of risk is not applicable.\textsuperscript{349} Assumption of risk requires further that the claimant has been unreasonably exposed to the risk\textsuperscript{350}, with other words, the claimant has to have a reasonable chance to subject himself to the changes or not.\textsuperscript{351}

If the court recognizes the assumption of risk defense, the result in actions based on negligence will lead to a complete bar of recovery\textsuperscript{352}; but only if the court still applies the common-law rule of contributory negligence.\textsuperscript{353} In jurisdictions which have enacted comparative fault laws this defense only results in a reduction of the amount which is recoverable.\textsuperscript{354} This principle has also been used in actions based on breach of express warranty.\textsuperscript{355}

In strict liability actions, assumption of risks is a valid defense.\textsuperscript{356} Thus, it will lead, similar to the situation in negligence actions, to a complete bar, or where 'comparative fault' principles have been enacted, to a reduction of the possible recovery.\textsuperscript{357}

As shown, connected with assumption of risk are the theories of contributory negligence and comparative negligence; all are based on the plaintiff's conduct.\textsuperscript{358}
Contributory negligence\(^{359}\), has as a basic notion that no one can claim damages from somebody else if his own failure to exercise due and reasonable care, proximately contributed to the harm.\(^{360}\) Thus, this principle amounts to an "all or nothing" rule, because even a very slight failure to exercise the necessary duty of care will result in a total bar for the plaintiff's recovery. Contributory negligence is considered a valid defense even in strict liability actions, thus altering the notion of 'absolute' strict liability; since it leads to a complete bar of recovery.\(^{361}\)

Because of the harsh results of the contributory negligence rule, most states have adopted the comparative negligence theory.\(^{362}\) Pursuant to this rule, the individual liability of each party will be determined according to its proportionate fault.\(^{363}\) However, this theory faces the problem how the apportionment of the relative fault should be done, sine a precise measurement is not possible.\(^{364}\) But because it amounts not in the same rigid results as the contributory negligence theory, it is the more favorable theory.

d) Disclaimer and Limitations on Liability

In *Henningsen v. Bloomfield Motors Inc.*,\(^{365}\) the court declared a disclaimer of liability invalid for public policy reasons.\(^{366}\) The bargaining power between the car buyer and the car manufacturer was too unequal; in such a situation the buyer only has the choice to accept the offer, and thus the warranty conditions, or abandon his buying
intentions. However, at least in the jurisdictions where the UCC is the governing law, US courts do allow the producer to limit his liability by the use of disclaimers, or other forms of liability restriction. The major provision, indicating the validity of such disclaimer, is § 2-316 of the Uniform Commercial Code. This provision enables the disclaiming of the implied warranty of merchantability, if the required form is satisfied; for instance the necessary writing has to be conspicuous. Also, the implied warranty is excluded in case where the buyer has examined the product (or refused to do so), but only with regard to defects which an examination would have revealed to him. In addition, the course of dealing or course of performance or trade usage can lead to a modification or even exclusion of an implied warranty.

Besides the disclaimer, the UCC offers in § 2-719 the possibility for a manufacturer to limit the remedies "... as by limiting the buyers remedies of return of the goods and repayment of the price or to repair and replacement of non-performance or goods or parts." According to this provision, the parties are basically free to form their particular remedies with regard to their needs and intentions. However, a minimum amount of adequate remedies must be available. Thus, § 2-719 [3] does not allow the limitations of consequential damages for injury of persons in cases of consumer goods.
Today, with regard to consumer products, the Magnusson-Moss Act\(^{375}\) limits the possibilities of a disclaimer or restrictions concerning 'any implied warranty', but only if it is a 'written warranty.'\(^{376}\) Some states also have enacted laws which bars the modification of implied warranties by a seller of consumer goods and services.\(^{377}\)

In cases where the warranty disclaims responsibility for negligence or strict liability, the reaction of the courts is in general a negative one.\(^{378}\) Disclaimers in strict liability actions are usually not recognized by the courts. This is especially true in situations where the claimant is an ordinary consumer.\(^{379}\) The negative posture of the courts on the object of disclaimer is reflected in Comment m to § 402A Restatement (Second) of Torts.\(^{380}\) However, in a contract between enterprises the courts might uphold the validity of a disclaimer.\(^{381}\) In that case, a need to protect the buyer does not exist, since the enterprises are, with respect to their economic bargaining position, on the same level.

2. In the Federal Republic of Germany

a) Under Current Law

The manufacturer's defenses are especially limited in the area of tortious liability. Because of the fact that the manufacturer is presumed to be at fault, he has to prove that he was not negligent. To do this, it is necessary to show a compliance with all obligations required by the law.
Using the state of the art defense, a producer may declare that a product's defect is due to an unforeseeable development risk ("Entwicklungsrisiko")\textsuperscript{382} and hence claim that he is not liable for the defect.\textsuperscript{383}

Further, as a defense, the manufacturer can show that his business was well organized.\textsuperscript{384} Manufacturers, as well as the distributors, have to organize their various businesses to secure the greatest amount of control possible over the product. Thus, a distributor has to establish a system which allows him to monitor the quality of the products that he is selling.\textsuperscript{385} This includes proof that the defendant did not act negligently in the selection of his employees.\textsuperscript{386} The defendant must further prove, that he always gave correct instructions to his staff, who were always under his control.\textsuperscript{387} In addition the manufacturer has to show that he sufficiently tested the product before starting the actual production and a later sale.\textsuperscript{388} Because of the fact that a defect usually springs out of the producer's business organization, he has to show that the defect was not due to deficiencies therein.\textsuperscript{389} Concerning assembled products, the manufacturer must prove that he examined the reliability of his supplier; hence, he did comply with the necessary standard of care.\textsuperscript{390}

b) Under the ProdHaftG

Art 6(II) excludes the manufacturer from liability arising from certain developmental risks; this defense is also known as the 'state of the art defense'. The issue is
whether the producer should be responsible for defects of his product which already existed when he put it into circulation even though the defect was not discoverable under the technological standards of that time. The adverse effects caused by medicines, which only appear after a certain period of time, are especially subject to that problem. Criterion of the possibility to discover the particular defect is hereby the generally available standard of technology and science, not the standard of the single producer.\textsuperscript{391}

c) Comparative Fault\textsuperscript{392}

The German law provides a special rule for comparative fault; according to $\S$ 254 BGB in these cases the damages must be allocated according to the different degrees of fault.\textsuperscript{393} Thus, when the manufacturer can prove that the plaintiff, the claiming consumer, was also responsible for his damages, the manufacturer's liability will be reduced.\textsuperscript{394} This decrease depends on the degree to which plaintiff's fault contributed to the damages. Section 254 BGB applies to contractual as well as tort actions\textsuperscript{395} and leads to an apportionment which is described in mathematic factors (percentages).

In some cases, the plaintiff manipulations of the product, or his other actions lead to his injuries. Here the defendant can invoke the issue of causation as a defense. Cases where the plaintiff misused or altered the product are judged in accordance with these principles. In such a case,
liability depends on whether the plaintiff's misuse was the cause of his damages. The same is also true when a product has been altered. If the plaintiff has altered a product, the courts will judge it based on the same grounds as the misuse cases. Thus, where alternation is the only ground for the cause of action the defendant is freed from liability. However, if the plaintiff's action is only an additional cause for the accident, he is still entitled to recover. This is true even if the defendant's acts were not the major cause of the injuries.

3. In France

a) Defenses of the Manufacturer

In contractual actions, the professional seller usually cannot escape liability; even if he proves that he did not know or was unable to know of the existence of the defect, liability will attach anyway. Allegation of plaintiff's misuse and pleading provided by Art. 1641-49 C.Civ. are other available defenses. According to these provisions, the manufacturer is not liable if the defect was already manifest or if the buyer was an expert in the same business field as the seller. However, where a consumer is buying a product this defense will be hardly successful.

Against a claim based on Art. 1382 or 1384 C.Civ., the manufacturer or distributor who is a 'gardien' of the product, only has a few potential defenses. He can allege that a 'force majeure' interfered, or that the action of a
third party intervened thus breaking the chain of causation, and finally, that the plaintiff was contributory negligent.402 A break in the chain of causation arises when the damages occurred a long time after delivery of the products.403 Thus, in case the defective product consists of a number of parts and it is not possible to detect the exact defective part, the courts will deny liability.404 Also, when a third party's actions are found to have caused the damages, the manufacturer can invoke defense of 'intervening cause'. Further, force majeure let the manufacturer escape liability since in this case the damages are actually due to a fortuitous event.405 Finally, in case the defendant shows that the plaintiff is the main or only cause for the damages, the defendant will escape liability based on the contributory negligence of the claimant.406 But the defendant cannot, for instance, defend himself by showing that he has complied with all mandatory requirements or administrative obligations.407

b) Disclaimer of Liability

The defendant has no right to use a disclaimer of liability in torts or contracts. Although Art. 1643 C.Civ. explicitly states that a limitation can be agreed on, the courts' general posture concerning the knowledge of defects makes this provision obsolete.408 A manufacturer is presumed to know any hidden defect, and this presumption cannot be limited, otherwise it would be destroyed.409 However, this approach has recently been challenged, particularly
with respect to relationship between manufacturers and commercial seller; thus, its justification is increasingly questioned by French authorities.410

4. Summary

A comparison of the defenses recognized by the three countries shows that especially in France the manufacturer's defenses are limited.

In contrast to Germany and most states in the United States, the state of the art defense will not be recognized in French courts. This position of the French courts will not change after the implementation of the EC Directive, since France is expected to derogate this defense. In Germany, and France, and, to a certain degree, in the United States, product misuse can be a valid defense. But while the alteration or the misuse 'per sé' excludes the liability of a manufacturer in Germany and France, some US courts put limitations on this defense by using 'foreseeability' as a criterion. Common to all three countries is the general limitation on allowing a manufacturer or seller to use a disclaimer or other methods to restrict his liability.

D. Statutes of Limitations

In products liability cases, all three countries provide different bases for bringing suit; thus the question is what statute of limitation prevails.
1. In The United States
   a) Statutes of Limitations

   In an action for breach of a warranty the UCC regulates the time limitations. According to § 2-725 (1) UCC, such an action must be commenced within four years. Section 2-725(2) states that the period of limitation begins "...when tender of delivery is made"; regardless of any knowledge by the other party. Actions for injury which are based on negligence follow the time limitation of tort actions for personal injury or damage to property. These time limitations are usually shorter, in general 2-3 years, than those under the UCC. But unlike the statute of limitation provided by the UCC, the period for tort actions commences at the moment the injury or damage occurs.

   Products liability claims based on negligence or strict liability are regulated by the general statutes of limitation for tort injury. The length of time varies between one and six years; however, most states have a period of 2 or 3 years. Also, these statutes are effective only if particular provisions concerning this subject exist.

   b) Statutes of Repose

   Another bar for an action in torts might be a statute of repose. As opposed to the statutes of limitations, this time period in which to bring action is not related to the occurrence of the actual cause of action. After this time period runs, the plaintiff is barred from bringing a
claim, even if the damages occur later or the defect is detected at a later point of time. These statutes served as an answer to the issue of an otherwise open-ended liability of the manufacturer. In those states which have statutes of repose in their codes, two different approaches are used, one based on the 'date of sale' and the other using a 'useful life' criteria. However, these methods lead to inflexibility and to non-uniform results, in the various states. This is the reason why some states have abolished these kind of statutes; also, statutes of repose were regarded to be unconstitutional. Still in some states, statutes of repose are currently in force and have to be taken into consideration.

2. In the Federal Republic
a) Under Current Law

The German laws concerning statutes of limitation take a different approach than the US law does. The German law refers only to "Ansprüchen", and not to 'absolute' rights like ownership. Also, it should be noted that the German statutes of limitation do not extinguish a right after the expiration of such period, but simply entitle the debtor to refuse the owed performance.

If the action is based on tort, the limitation period pursuant to § 852 (1) BGB is three years. The time period begins to run from the moment the victim has knowledge of the damage and the person who caused it.
regardless of any knowledge, all claims are barred after 30 years, according to § 852 I BGB. The beginning of this limitation period is not the occurrence of the damages, but the tortious act itself. Thus, the time begins running, even though damages can occur or can be detected only later.

The statute of limitations with regard to contractual claims is usually a period of 30 years. However, this is effective only for claims based on "positive breach of contract" since special provisions exist for the sale of goods. Additionally, only in case the damages are the result of a breach of a so-called 'collateral duty' and if they are unrelated to any defect covered by tort law. According to § 477 BGB, the limitation period is merely six months from the delivery of the purchased good in the case of moveables.

b) Under the ProdHaftG

According to § 12 of the proposed ProdHaftG, claims have to commenced within three years. The starting point of the time period is same as the one for torts; knowledge of the damages, the fault and the responsible person tolls the statute of limitation. But, unlike the general limitation period in torts, the time period also starts running in cases where the claimant could have had such knowledge. Thus, constructive, not actual knowledge of damages, fault, and responsibility tolls the statute of limitation. In addition, § 13 I provides a final limitation period similar to the US statutes of repose. According this provision, all
claims based on the ProdHaftG expire 10 years after the manufacturer has put the product into circulation.

3. In France

Concerning the general contractual liability, Art. 1150 of the French 'Code Civil' allows the claimant to sue within 30 years from the time of the sale. But due to the requirement of a 'bref délai' for claims based on the seller's warranty, Art. 1648 C.Civ., the buyer of a product is usually limited in his ability to bring suit. This particular time restriction depends on the discretion of the courts; thus, it can run from several weeks up to a number of months. The time limitation in which to bring an action based on tort law, pursuant to Art. 2262 C.Civ., is the same period of 30 years. In tort actions, the statute of limitation tolls at the moment the damages occurred. In cases of breach for warranty for latent defects, the starting point is the discovery of the defect. But in case the breach or the tort also resulted in a criminal act, the statutes of limitations of the criminal laws are controlling. Despite this extraordinarily long limitation period of 30 years, French courts face no flood of products liability actions. The difficulties of obtaining the necessary evidence after such a long period of time, limit successful claims.
4. Summary

Unlike the US and Germany, France has a very long limitation period of 30 years for actions based on torts; as long as no criminal acts are involved. The US, current German law and the proposed ProdHaftG provide a shorter period of up to three years. The German statute of limitation in the sales of goods is extraordinary short, only a 6 month period. The same restriction arises from warranty claims in France due to the requirement of a 'bref délai', which might result in an even shorter time period.

All countries have provisions which forfeit product liability claims, regardless when the claimant gains the knowledge, or the damages occur. However, these time periods usually are quite long; between 10 and 30 years.

E. Burden of Proof

Among the various theories of liability in the three countries, the question of 'burden of proof' arises. Since some of the liability theories are based on principles of fault, proof can be the decisive element for a successful claim. Because the unproved allegation of a specific cause of action is not sufficient for a successful claim, this issue can be crucial in determining where to commence an action.
1. In the United States

The general rule is that the plaintiff has the burden of proof, at least in the beginning of the action. In strict tort liability actions, the user only has to prove that the product was in dangerous and defective condition when it left the control of the producer, and that it was the unreasonable condition of the product which proximately caused the injury. Also, in those cases, proof of the consumer's reliance on a certain quality is not required. The basic elements of proof are similar among the different theories of liability in products liability actions. However, in certain situations the evidentiary rule of 'res ipsa loquitur' might be helpful. In product liability cases based on negligence, this theory allows an inference or presumption of the defendant's negligence, even the evidence does not directly establish how the injury occurred. Res ipsa loquitur requires that the defendant had an exclusive, either actual or constructive control over the product which allegedly caused the harm. Despite res ipsa loquitur the burden of proof remains with the plaintiff; hence, he has to prove the necessary elements, and he also has to prove that the product was defective when it left the defendant's control. In case the plaintiff is able to prove the requirements under res ipsa loquitur, thus allowing to draw the inference that the defendant is liable for the accident, the burden of rebutting this presumption will be shifted to the defendant.
Concerning actions on strict liability, the question arises whether 'res ipsa loquitur' is applicable. Since this rule is based on negligence, and strict liability is not based on fault, the rule cannot be applied in these cases. However, according to some decisions the inference which is the result of 'res ipsa loquitur', can be used to establish a defect. But since this rule can have different procedural results, it depends on the jurisdiction whether this concept is applicable in strict liability actions. In jurisdictions where 'res ipsa loquitur' results in a rebuttable presumption of negligence, it is not appropriate to apply this rule in strict liability actions. But where 'res ipsa loquitur' is merely used to establish a prima facie case of negligence, this theory can be applied.

In cases against multiple defendants, in which it is not clear who is responsible for the injuries, 'res ipsa loquitur' allows a claim without isolating one single and certain injurer. However in cases where a plausible alternative still exists, this rule might not help the plaintiff.

In strict liability actions the basic notion is to relieve the victim of a defective product from as many difficulties of proving his claim as possible. Thus, in Barker v. Lull Engineering, a design defect case, the court shifted the burden of proof to the defendant. However, this was partly due to the fact that the identification of
design defects is more difficult than the discovery of a manufacturing defect. In the latter the product "...differs from the manufacturer's intended result[s] or from other ostensibly identical units of the same product line," in contrast hereto, design defects are not identifiable by a comparison between the defect product and "... the manufacturer's plan or with other units of the same product line, since by definition the plans and all such units will reflect the same design." But this decision has not been widely followed by other courts.

In breach of warranty actions, the claimant does have to prove the existence of the warranty and the breach of that guarantee. In express warranty claims involving the safety of the product, it is not necessary to prove that the product is being 'unreasonably dangerous' or 'unmerchantable'. The situation with regard to the burden of proof is therefore more favorable for the consumer in breach of warranty actions, than in strict liability claims. Only where claims are based on breach of warranty of fitness for particular purpose this has to be proved by the plaintiff. In actions based on implied warranty for merchantability, the claimant has to prove that the good was not 'merchantable' at the time of the sale. But, unlike strict liability actions, the plaintiff does not have to prove that the product posed an unreasonable danger. Also, under certain circumstances, for instance if the strict liability claim is time barred, the claim based on
implied warranty can be more promising. In an action based on breach of the implied warranty for a particular purpose, the injured party has to prove that he communicated to the seller the particular purpose for which the product was required.

2. In Federal Republic of Germany
   a) Under current Law

   In German law, the general rule is that the plaintiff has to prove all the elements of his claim, and the defendant has to prove all the elements which are in favor of his defense. Hence, the plaintiff has to prove the existence of a defect, damages and the causation. Concerning causation, the plaintiff must establish that the manufacturer's fault or negligence led to the product's defective state, and that the defect caused the damages. Because of the difficulties, especially concerning the proof of fault, the general rules of proof have been adapted to the particular characteristics of products liability cases. As a result, the burden of proof depends on the various 'areas of risk', and the plaintiff does not have to prove the exact cause of the damages.

   Here, the plaintiff can show that the defect, and thus his damages, arise out of circumstances which were in the defendant's area of control. In the Foulpeste-case the German court decided that if someone uses an industrial product according to its intended use and suffers damages,
the producer has "... to elucidate the events which caused the defect and to establish that they did not involve any fault on his part." Since this judgment, the manufacturer of a product is actually presumed to be at fault for the defectiveness of his products. He bears the risk of not being able to establish the cause of the defect. But this 'presumption' regarding the burden of proof applies only in cases where a producer is involved; it does not apply to actions against the distributor.

In cases based on the breach of contractual warranty, the burden of proof follows the general rule. The plaintiff has to prove all the necessary facts to establish a prima facie claim. This also includes proof of causation; it is essential to prove that the defendant's conduct was an 'adequate' cause of the damages. The cause of injury has to beyond any general expectation. Only in cases where the intervening act of a third party is beyond the general expectation, can the causation chain be broken.

b) Under ProdHaftG

This law follows the general rules of proof current being used. Art. 4 of the Directive, which provides the standard of proof, has been not transformed into German law, at least not according to the proposal. Thus, the same basic rules, like those stated above will apply. However, § 1 IV ProdHaftG states that the manufacturer has the burden of proof in cases where his liability is in dispute according to § 1 II and III ProdHaftG. This rule, which follows
the EC Directive, was promulgated because the manufacturer, with regard to the manufacturing process, has the best means to produce evidence.\textsuperscript{480}

3. In France

Pursuant to Art. 1645 C.Civ., the plaintiff has to prove the existence of a 'vice caché' in a claim based on contract.\textsuperscript{481} To avoid evidentiary difficulties, the courts have imposed a presumption of fact, regarding the professional seller.\textsuperscript{482} A seller acting in the ordinary course of his business is to be presumed to have knowledge of the defectiveness of his products at the time of the sale.\textsuperscript{483} But in case where two professionals are involved, this rule does not apply since none of them has, in principle, superior knowledge.\textsuperscript{484}

In an action based on torts, pursuant to §§ 1382, 1383 C.Civ. the plaintiff usually has to prove the defendant's fault. According to this rule, the plaintiff has to prove product defect and also the particular tort that caused the defect and the damages.\textsuperscript{485} Unlike contractual claims, this would have resulted in different standards of proof for bystanders in tort claims. To secure similar treatment of the bystanders and the contracting party, the French courts have harmonized the burden of proof in contractual and non-contractual actions.\textsuperscript{486}

According to Art. 1384 (1) C.Civ. a presumption of fault is placed on the manufacturer because he had control
over his products. Thus, the plaintiff in such a case only has to prove that the manufacturer was the 'gardien' of the defective product and a causal link to the damage.

All the above mentioned presumptions are usually irrebuttable, since the consumer is usually not "...in the same trade or field."

4. Conclusion and Differences

In product liability actions, the German Law and the French Law presume the fault of the manufacturer to achieve an efficient consumer protection. In case of the French professional seller (merchant), and also manufacturer, the presumption is irrebuttable.

The US law, in general, as far as strict liability and breach of implied warranty are applicable in the particular case, imposes a very broad liability on the manufacturer. However, the French Law, and also the German law put the burden to prove the defectiveness of the product on the producer. Thus, in case difficulties concerning the proof of the existence of a defect exist, German and French laws are the better for the consumer.

Theoretically, the current German law, with its rebuttable presumption, is less favorable to the consumer than the French one. However, since the courts are very strict in allowing such a presumption to be rebutted, it is very difficult for a manufacturer to escape his liability. Usually, he will be held to be at fault. The new ProdHaftG
clarifies this situation by explicitly imposing the burden of proof upon the manufacturer.

E. Compensation and Damages

One reason why a claimant might choose a particular forum is because of the compensation which he expects to obtain. Especially in the United States, the question of recovery, and in particular the potential size of the award is of very importance. Thus, the available means of recovery in the various countries and the possible amounts have to be compared.

1. In the United States
   a) Damages in general

   The damages a plaintiff can claim for in products liability actions are basically the same as in any negligence or tort action.\textsuperscript{491} Thus, the amount of damages is determined by the doctrine of proximate cause. The damages include losses resulting from the injury caused by the defective product.\textsuperscript{492} This encompasses also damages for pain and suffering\textsuperscript{493}, future pain and discomfort.\textsuperscript{494} Also included are past\textsuperscript{495} and future\textsuperscript{496} lost earnings; also expenses for past\textsuperscript{497} and future\textsuperscript{498} medical treatment are recoverable. In addition, courts have recognized recovery for physical impairment, such as disfigurement\textsuperscript{499}, and also loss of consortium\textsuperscript{500} or enjoyment of life.\textsuperscript{501}
The amount which can be awarded depends on the discretion of the jury, and a court can only reduce a jury's award. Another issue is redress for 'pure economic losses' if the plaintiff is a mere bystander. The traditional approach is that a tortfeasor is not responsible for 'economic loss.' However, this rule has become consumed by exceptions, and there is a developing national consensus that strict liability and negligence are not appropriate remedies when the loss is purely economic.

In an action for breach of warranty, the UCC allows recovery of consequential damages, and thus economic loss; § 2-715(2)(b) UCC. But only if the injury or damages proximately resulted from a breach of warranty. In a few cases, the courts have recognized damages for the reasonable fear of 'contracting future diseases.' However, the mere fact that the plaintiff has an enhanced risk does not allow recovery. Rather, he has to show that he is suffering from present mental distress.

With regard to the amounts which US courts award, it should be noted that the average tort claim, which is not a car accident, results in an award of about $5,000, but products liability claims are estimated to be even higher. In a few cases, the amounts which plaintiffs were able to obtain was tremendously high and can reach into the millions of dollars.
b) Collateral Source Rule

This rule allows a plaintiff to compensate for his injuries even though they are already paid for by a third party. Thus, the plaintiff can recover for his medical bills even though they were already paid for by his health insurance carrier. Until recently, this rule has been in effect in every state. Given the fact that the plaintiff had paid his insurance premiums, the question is whether the defendant should benefit from this precautions. For reasons of fairness, it can be argued that the burden should be put on the tortfeasor and not on the injured party, since the former should not be allowed to benefit from the precautions of the victim. However, it has to be taken into account that the application of this rule leads to additional costs for the insurance system. Because of the additional costs, the efforts to abolish this rule seem to be appropriate. Since those costs will result in higher premiums, the collateral source rule burdens the whole of the population. Thus, the result of this rule benefits only a few, but is a detriment for the majority of the population. The basic idea that the tort system should grant fair compensation, but not to award more than that in one case, and less in the other, speaks in favor of the abolition of the rule. Nowadays, as a result of the "liability insurance crises", some states have already modified or even abolished the 'Collateral Source Rule'.


c) Punitive Damages

This kind of damages is something unknown to most European legal systems. Punitive damages (or exemplary damages) are granted as a penal surcharge in addition to compensatory damages.522 Punitive damages will be awarded only where the conduct of the tortfeasor shows evil motives or the reckless indifference to the rights of others.523 In practice, this situation occurs only where the defendants conduct encompasses elements, such as insult, fraud, malice, or wanton disregard for the safety of others.524 In a few number of cases the amount awarded as punitive damages has greatly exceeded the amount of compensation.525 In products liability cases, even awards which exceed the amount of $1,000,000 are usually affirmed on appeal.526 This kind of damages poses a great risk for the producer not only because of the huge amounts, but also because of the lack of predictability. Although the courts generally instruct the jury that a particular 'malice' or 'willful' conduct is required to award punitive damages a clear definition of this conduct is still lacking.527 In the course of the torts reform efforts, different proposals have been made with regard to punitive damages.528

Some jurisdictions, however, have already abolished the award of punitive damages.529

d) Multiple Defendants

In case the plaintiff has sued a number of defendants, for instance the various manufacturers and distributors, the
common law rule of joint and several liability is germane. According to this theory both tortfeasors are liable, and thus each of them has to pay in full, although the claimant can recover only once. But after more and more states have enacted laws on comparative fault, joint and several liability has been criticized on the grounds that it is difficult to reconcile both theories. Another problem with joint and several liability is that often the minimally liable tortfeasor had to pay all the damages because the other joint tortfeasor is not able to pay at all. As a result, some state courts have refused to apply this theory, but the majority of courts have not abandoned the principle of joint and several liability.

2. In the Federal Republic of Germany

a) Under Current Law

The scope of recovery is governed by the general rules of § 249 BGB and special provisions of the tort law. Pursuant to § 249 BGB, the plaintiff is entitled to compensation which restores him to his old situation, before the injury occurred. Thus, the basic compensation is, unlike in the US, not by payment of money; however the law states some exception from this basic rule. According to § 249, 2 BGB, the claimant can choose between compensation in kind and compensation in money; however, this right is limited. Damages, according to German law, basically encompass all disadvantages caused by a person, whether to all kind of
property, or to interest not connected with property. As a special feature § 253 BGB indicates that monetary compensation can not be granted for damages to interest not connected with property. But, pursuant to § 252 BGB the loss of future profit can be recovered.

This includes recovery for damages which resulted directly or indirectly from the injury, thus economic loss is recoverable under this provision. If this is not possible, monetary compensation will be granted. This is in effect a contractually based claim because an action solely based on torts does not cover pure economic loss ("Vermögensschaden"). In torts, only those damages which were inflicted by the rights protected by § 823 BGB, can be recovered. The rights and thus the correspondent damages, defined in § 823 I BGB, are life, health and certain types of property. Under certain circumstances, economic loss, as far as it is a result of a tort, can be recovered pursuant to § 842 BGB. Pursuant to § 843 BGB, the compensation for impairment of earning capacity has to be paid generally in periodical payments or annuities. Dependants of the victim can even ask for damages for loss of support; however, according to § 844 II BGB, this is only possible if the victim was under a legal duty to render support.

Redress for pain and suffering will be awarded only if the action is based on a tortious claim, §§ 823, 847 BGB. But it should be noted that these provisions apply only if
the damages occurred in connection with personal injury and death, but not mere economic loss.549

Pursuant § 840 BGB, defendants who are both responsible for the damages of the plaintiff are jointly and severally liable. Thus, the plaintiff can ask for the compensation from all tortfeasors but only one time, § 426 BGB.

Further, the amount of damages the plaintiff seeks can be reduced for reasons of comparative negligence according to § 254 BGB. Using this statute, the courts also impose on the defendant a duty to diminish the damages as much as possible.550

In case the plaintiff has obtained payment from his insurance carriers for his damages or medical bills, the German court is prone to deduct these amounts from the claimed compensation.551 The deduction is exercised if there is, at first, a causal link between the accident and the payments to the plaintiff.552 Further, the deduction must be reasonable and should not favor the defendant in an unfair manner.553 However, this does not give the defendant a real advantage since the claim for damages, as far as they were already paid by the various insurance carriers, are assigned to the insurance carriers who made the payment.554 Also, damages for loss of wages follow the same principles as the general losses.555 The amounts which German courts grant for personal injuries are substantially lower than in France or the United States. According to § 287 Zivilprozeßordnung (hereinafter ZPO) the German court determine the
amount based on its free discretion. Hereby, the special circumstances of each single case will be taken into account.\textsuperscript{556} The highest amount so far was just recently awarded and was about DM 500,000.\textsuperscript{557} General "tariffs" exist, for the loss of an leg, for instance are about 20,000 to 60,000 DM; paraplegia was compensated with amounts between 100,000 and 200,000 DM.\textsuperscript{558}

b) Under the New ProdHaftG

Pursuant to § 7 ProdHaftG, in case the victim dies after the accident, the recoverable damages include the costs of an attempted cure, but also the losses which the victim suffered because he was unable to work. The defendant has to pay the costs of the funeral. Further, the loss of support which result from the death of the victim can be recovered by a third person. But, as in the case of § 844 BGB, a loss of support claim arises according to a legal duty. This claim can be made out only by person, including those already pronated but not yet born, who were entitled to such support.

If the defect generated a personal injury, the costs of the cure and the loss of earnings due to the injury can be recovered.\textsuperscript{559} According to § 9 ProdHaftG, such damages can be only recovered through an annual payment if the injury resulted in a decrease or termination of the victims ability to earn his living. The same principle prevails if a loss for future support by a third party can be redressed, or the victim has additional needs due to the injury.
The draft on the new ProdHaftG does not contain a statute regulating the recovery of damages for pain and suffering, and thus follows the text of the EC Directive. But pursuant to § 15 II ProdHaftG, other provisions regulating the recovery of damages are not superseded by the new law. Hence, § 847 BGB, which allows recovery for pain and suffering can be used to gain redress for those damages.

3. In France

Concerning contractual liability, Art. 1150 C.Civ. provides that, the plaintiff can only recover such damages which were foreseeable to the defendant at the time the contract was made. In tort actions, however, full compensation can be recovered by the claimant. A strict liability claim against a merchant seller allows for a recovery beyond the mere expenses of the sale; it includes all damages suffered by the purchaser.

Pecuniary loss, which is economic loss, encompasses damages suffered by the buyer, such as costs of medical treatment, loss of future earnings, incapacity, and even the inability to continue a sport or a profession. Even purely commercial loss, 'préjudice commercial' which is the reduced value of the product without actual damages, can be recovered. But this is only possible under a claim based on the warranty for a hidden defect, 'vice caché', or in a suit claiming that the product was not in compliance with the conditions of the contract.
Nonpecuniary loss includes 'domage moral' caused by physical and mental suffering and also loss of enjoyment of life.\textsuperscript{564} The French laws require the damages, which a plaintiff seeks to recover, to be certain, in other words 'assessable'. Therefore, future loss can be recovered, but only if such loss can be assessed with certainty at the time of the claim. This includes also loss of an opportunity, the so-called 'perte d'une chance'.\textsuperscript{565} In cases where the victim dies, the heirs can proceed with a claim for two different types of damages; 'préjudice morale' (loss of a loved one) or for 'préjudice materiel' (loss of maintenance).\textsuperscript{566}

4. Summary

All three legal system have basically the same kinds of damages and compensation: compensation, economic loss, and damages for pain and suffering. Economic loss can be recovered only based on contractual claims, and pain and suffering requires an action in torts. Due to the collateral source rule in most US states, the recoveries can be higher than in Germany, where payments of third parties concerning the damages are usually deducted from the awarded compensation.

Punitive damages, which can be recovered in the United States, are not known in Germany, nor in France. However, even in the United States the possibility of recovering punitive damages depends on the individual state since some states have already enacted laws limiting this kind of
damages. The biggest difference between Germany and France, on the one hand, and the United States, on the other hand, are the amounts which can be recovered in these countries. Awards which are much higher in the United States, than in Germany and France, are possible; however, they are not the rule. The United States in general has a higher level of compensation, thus a higher amount can be usually recovered. French judges are also more generous than their German counterparts. But here the awards are still lower than in the United States.

However, considering the different size of possible recovery, it should be taken into account, that in Germany and also in France the health insurance and the social insurance pay for most of the costs which American plaintiffs have to pay out of their pockets. The medical bills will be paid by the insurance carrier, which will seek compensation from the tortfeasor, who quite often has liability insurance to cover these expenses.

F. Cost and General Procedure

1. In the United States

One of the factors which makes it easier for plaintiffs in the United States to find a qualified lawyer for their claims is the 'contingent fee' system, which provides the basis for the attorney's fees. Under this system, the lawyer that he will represent the client for a certain
percentage of the amount recovered in the lawsuit. In general, the percentage, which varies with the kind of claim, amounts in products liability actions to 40% in ordinary tort litigation. Despite this general advantage, the system also has some detriments. Due to the high transactions costs in product liability lawsuits, there is an increasing disparity between actual losses and actually obtained compensation, especially in cases where higher losses are involved. Thus, the victim might receive a fairly large award, but his actual litigation costs consume a major part of it. Some states have tried to address this problem by introducing caps on the attorney's fee, but so far this has not been very successful. Unlike in Germany and in France, the successful plaintiff cannot recover his own attorney's fee as damages.

Another peculiarity of the US system, in comparison to the French and German one, is the participation of juries in the proceedings. Unlike ordinary torts cases, juries tend to award higher amounts in product liability actions. This is partly due to the fact that often "deep-pocket" defendants are involved in these types of actions. Also, it has to be noted that juries tend to favor the consumer and not the manufacturer.

The scope of pretrial discovery is another factor that might establish the United States as a more favorable forum than France or Germany. This seems particularly appropriate in product liability cases, since it is necessary for a suc-
cessful claim to obtain essential information from the other party. The available means for acquiring this evidence consists of a broad variety of different measures. Thus, a party in the US could ask the German or French company for evidence, by using a letter rogatory from the court. Nowadays, this is simplified by the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters (1970). However, Germany and France and most other members of the Convention have "reserved" their right to refuse "pretrial discovery of documents". As a result, obtaining evidence in countries like the two mentioned for pretrial discovery purposes is hardly possible. Thus, one advantage with US system, the pretrial evidence rules, has only a limited value in transnational lawsuits. Besides in a pretrial stage, obtaining evidence has been improved and accelerated since the enactment of the Hague Convention among the various countries. Also, the general US rules of discovery are in favor of the consumer. Since the evidence which the plaintiff can require from the defendant goes very far in comparison with French or German laws. Additionally, the Hague Convention allows the plaintiff to obtain evidence from the European countries, since the reservations against US demands of evidence are only with regard to the pretrial discovery process. Another advantage of litigating products liability claims in the United States, is the availability of attorneys and experts, specialized in products liability actions. While these specialist are not available in other
countries, they are quite expensive and will raise the costs of litigation.

2. In the Federal Republic of Germany

Unlike their American counterparts, German attorneys are not permitted to work on a contingent fee basis; their fees are regulated by statutes.\(^581\) A scale, which depends on the amount in dispute, determines the fee. This scale provides basic units for a certain amount in dispute. The number of basic units which the attorney receives as his fee depends on the stages the proceedings run through. Another principle of German law which is contrary to the US rules, is that the loser has to pay the winning party's costs and the attorney's fee, § 91 ZPO.

Thus, the winner can claim all the litigation costs from the other party. This includes expenses for witnesses and experts\(^582\), and his lawyer's fee.\(^583\) But the cost are determined by the court; thus they can be lower than anticipated. It is not necessary for a case to be presented by attorneys if the amount at dispute is below DM 5,000. This type of claim has to be brought before the local court, the 'Amtsgericht\(^584\)'. However, if the claimed damages exceed this amount, the 'Landgericht\(^585\) has jurisdiction and an attorney has to represent the plaintiff.\(^586\)

For those people, who are too poor to bring action, or who can not afford to pay a lawyer for their defense, legal assistance is available.\(^587\) Such legal aid can even be
granted to foreigners, but only if reciprocity between their laws and the German legal system exists, and the foreign country's procedures are similar to those used in Germany.\textsuperscript{588} Another element in the German judicial process, which is unlike the US one, is the absence of a jury. In German trials, the decisions are made by professional judges. Laymen only participate in decisions involving a few commercial matters.\textsuperscript{589}

One disadvantage in Germany is the lack of lawyers who are specialized in products liability. Also, no specialized expert witnesses are available, at least not in such numbers as in the United States. This however is a result of the rules of evidence according to which the judge, not the parties, determines whether an expert witness is necessary.

3. In France

Here, the lawyers are also not allowed to act on the basis of contingent fees. But the government provides a financial assistance to help people with financial needs. Even foreigners can participate in this program, but they have to be residents of France. \textsuperscript{590}

French courts do not use juries, and, like in the German system, the decisions are made by professional judges.\textsuperscript{591} A French attorney is only needed if the action is brought in the "tribunal de grande instance" but not in the "tribunal d'instance".\textsuperscript{592}

The French legal system, like the German system, also lacks
specialized attorneys and expert witnesses for product liability claims.

G. Summary and Conclusion

A comparison of the three legal systems shows that the scope and range of the consumer protection in the different legal systems is determined by the intention of the court to guarantee an effective protection. The expansion of the liability to a form of strict liability, whether in the form of a shift in the burden of proof (as in FRG), or as an irrebuttal presumption (as in France), can be only justified by the fact that the producer is still in an economically more powerful position and the fact that the consumer has no real choice. He cannot realistically bargain for warranties, because the producer does not depend on the single consumer. As a simple buyer of ordinary goods he does not have the possibility nor the power to force the producer to guarantee a certain quality of the goods. In this light, the different elements of a cause of action, especially the term 'defect', has to be understood. The courts use the interpretation of these terms as a vehicle for their true purpose, to grant the consumer a certain level of protection. This is also the reason why in France and also in Germany the term 'product' as well as the term 'defect' has been interpreted sometimes in a very broad way. In Germany, the courts were able to expand the liability of the producer
solely by using a presumption of fault. Therefore, under German law, the existence of a 'defect' in a product is connected with the duty of a producer to build a product which is as safe as possible. This principle allows the German courts, unlike their US counterparts, to be very flexible with regard to the assumption of a defect. But because of the notion that the safety and the utility of a product are factors which have to be balanced against each other, the courts did allow some exceptions to liability, for instance, the so-called "Ausreiβerhaftung," and also state-of-the-art has been recognized as valid defense of the manufacturer.

However, after the implementation of the new German ProdHaftG, those exceptions will be more limited. The new law imposes a basic strict liability on the producer, similar to that in the United States. The "Ausreiβerhaftung" will be abandoned, but the defense of 'state of the art' will still be possible. Thus, even in the future, elements of fault will be relevant in these cases.

Besides under the new law, the seller, if identical with the producer, is still liable under the contractual warranty rules. In addition, the consumer has, as a subsidiary remedy, a claim based on "positive breach of contract" against the manufacturer. However, these rules are only of limited practical use.

The French Courts are more strict, and unlike the German courts, they even refuse to recognize a 'state of the art' defense, or a "Ausreiβerhaftung" defense; hence, even
defects that cannot be avoided in a regular production lead to liability.

Liability has been expanded because of the various 'special laws' imposing strict liability in France and Germany, for instance, the 'Pharmaceutical Act' in Germany. These regulations inflict true 'strict liability', on the producers or operators of certain goods, without referring to elements of fault.

The US courts usually favor the consumer; but this position is intensified by the fact that in the United States a jury quite often decides a case. But jury members are usually also consumers; thus, they tend to deliver verdicts in favor of the injured plaintiff. Representatives of the interests of the insurance companies or producers are hardly found on the jury bench.

Regarding damages, one difference in the United States, as compared to France and Germany, is that only the United States allows punitive damages, all the other states do not recognize such kind of damages. But it has to be borne in mind that there is a trend in some US states against punitive damages. Economic loss and damages for pain and suffering can be claimed in all three fori. Economic losses are generally only recognized in contract actions; pain and suffering are only allowed in claims based in tort.

One difference which might be decisive for the election of a forum is the size of the possible awards. Here, the general trend is that the French courts are more generous
than the German ones, but in the US the highest amounts can be recovered. However, the average US award is only slightly higher than those in France and Germany, if take into account the that there a lot of the victim's costs are covered by the social welfare system. Under certain circumstances, however, the amounts which can be recovered in the US greatly exceed that which is possible in France or Germany. But still, extreme large awards are the exception and not the rule. Also, the EC directive has introduced a ceiling on the national level. This could, in mass actions, result in reduced compensation. However, in general the ceiling will not be reached by the various claims.
IV. Jurisdiction

The question of what substantive law is the most favorable has already been examined. The following discussion of transnational jurisdiction examines the major issue of forum shopping. Since this issue only arises in cases where two different jurisdiction are available, the plaintiff has a real choice between different 'fori'.

Transnational jurisdiction means that the courts have 'international jurisdiction' over the potential defendants, thus the authority to adjudicate actions with foreign parties.

1. In the United States

For a court to have jurisdiction, it must have the subject matter jurisdiction, the power to hear the particular kind of case, and the personal jurisdiction, the authority to render a decision over the parties. The main question here is whether a foreigner can be sued in United States courts by the US consumer. Conversely, can foreigners sue US-manufacturer in the United States without limitation?
a) In General

With regard to the subject matter jurisdiction, it could be difficult to find the right court in which to bring suit. But this usually does not create a final impediment for the claims of foreigners in the US, nor for US actions brought against the foreign manufacturer. This lack of difficulty is because every state has, at least, one trial court of unlimited civil jurisdiction, which is competent to adjudicate any action and to render a judgement for any amount.594

Jurisdiction 'in personam' refers to the court's power over the parties involved in a lawsuit. Here, two different situations are possible: the US consumer can sue the foreign manufacturer in a US court, or the US producer can be sued by a foreign consumer. Foreigners can sue in the US courts due to bilateral treaties, or based on constitutional guarantees.595 According to the structure of the American legal system, two different courts, federal and state ones, can have jurisdiction.596 The federal court has jurisdiction, if a diversity of citizenship between the parties involved exists597, and the amount in dispute exceeds the sum of $10,000.598 Because of the different nationalities of plaintiff and defendant in transnational actions, and also the size of the amounts usually at dispute in products liability cases, these conditions are in generally met.

State courts also have original jurisdiction in those cases, but based on other grounds. Tort and contract law is
state law; thus, a state court has the authority to adjudicate products liability cases where defendants are involved who are residing in its district.\textsuperscript{599}

The situation is different if a foreigner is sued in a US court. Because the courts theoretically only have power over the people who are living within their districts, another reason for extending US jurisdiction has to be found.\textsuperscript{600}

In some states so-called long arm statues exist, allowing the courts to expand their jurisdiction over foreigners.\textsuperscript{601} There are two basic forms of long-arm statutes: one which indicates that jurisdiction over foreigners can be exercised if it is permitted under the US Constitution.\textsuperscript{602} Other state laws provide a long-arm statutes, which specify when such jurisdiction may be exercised.\textsuperscript{603} Those state rules have also been to applied by federal courts, because these courts must use the procedural laws of the state in which they reside.\textsuperscript{604}

In states where no long-arm statutes exist, or where these statutes only contain a reference to the Constitution, the common law has to decide whether the US court might impose jurisdiction over a foreign defendant. In \textit{International Shoe Co. v. State of Washington}\textsuperscript{605} standards for determining when a foreigner could be drawn into US courts were set.\textsuperscript{606} According to that decision, a foreigner has to have a minimum contact with the forum states, or the United States.\textsuperscript{607} This requirement can establish a US court's
jurisdiction unless, due to certain circumstances, this result would violate "traditional notions of fair play and substantial justice". Thus, the resulting twofold standard requires 'minimum contacts' and 'reasonable fairness'. These conditions are satisfied, in general, where a manufacturer's goods create the necessary contact with the forum by establishing a "stream of commerce" contact. Later the courts even asserted personal jurisdiction based on the fact that major interest of the US were violated. But in World-Wide Volkswagen Corp. v. Woodson the Supreme Court denied the Oklahoma's courts personal jurisdiction over a nonresident regional distributor and retailer from the east coast. The court noted that the mere foreseeability of a possible contact with the forum of Oklahoma was not sufficient to establish personal jurisdiction. Only where the foreigner could reasonably have foreseen to be '... haled into court there', such extension of jurisdiction can be justified. When the defendant purposely transacts business to the new foreign market, he knows that he might become subject to litigation. Later, the courts facing situations where products only eventually reach the US, used the International Shoe approach to render different decisions. Courts rendered different decisions by placing the focus on the different elements of the International Shoe test. Some courts primarily considered the question of whether the foreigner simply put the goods into the stream of commerce, thus allowing them to reach the United
States. Other jurisdictions emphasized the issue of whether the foreigner, while putting the goods into the stream of commerce, did this on purpose and directed this action to the 'forum state'. In Burger King Corp. v. Rudzewicz, the court stated that if the defendant purposely avail himself of the privilege to engage in activities in the 'forum', he thus invokes the protection and benefits of the forum laws. In Helicopteros Nacionale de Colombia v. Hall the Supreme Court stated that jurisdiction can be based on either of two grounds: that certain contacts with the forum state exist and that from these activities the cause of the action arises; or that a sufficient commercial relation between the forum and the foreign company exists.

The latest development concerning personal jurisdiction was the US Supreme Court's decision in Asahi Metal Industry Co. v. Superior Court of California. According to the Court, the mere foreseeability or knowledge of a company that some of its products will end up as goods sold in a US state does not constitute personal jurisdiction. Jurisdiction only exists in cases where there is an additional contact which manifests the intent to serve the market of the forum state. However, the decision in Asahi should be carefully considered since there was only a slight majority which sustained the opinion of Justice O'Connor.

Usually a foreign company can not be sued when the alien corporation has its own subsidiary in the United
States, as long as the US subsidiary is acknowledged as being independent. But according to the rules of the Restatement (Second) Conflicts of Law, § 52, the jurisdiction over the subsidiary can lead to the jurisdiction over the parent company. Decisive to jurisdiction is whether a 'control relationship' between the parent and the subsidiary exists or not. Such 'control relationship' exists if the parent controls the majority of the subsidiary's Board of Directors, or where an underlying 'unity of purpose' did exist; thus, the parent is be subject to the personal jurisdiction as well as the subsidiary. Wherefore, despite formal separation between parent and subsidiary, where the parent exercises continuing supervision and intervention in the subsidiaries affairs, the latter's activities are still attributable to the parent. Hence, a foreign company is not safe even after Asahi.

The mere fact that a possible foreign defendant has property in the US-forum does not allow a court to exercise jurisdiction over him. In this situation, the state courts also apply the International Shoe test. However, the Supreme Court indicated in a note that they did not consider whether quasi-in-rem jurisdiction was sufficient to bring foreigners before US courts, when no other forum was available. This led to a discussion that the mere existence of US property might lead to jurisdiction, although so far no court has decided in this way.
b) Forum non conveniens

But even where the court finds personal jurisdiction, the action still can be dismissed on 'forum non conveniens' grounds.639 According to this principle, a court can dismiss the action640, if it finds that the 'balance of conveniens' weighs heavily in favor of another forum.641 The elements considered when forum non conveniens is at issue includes: "...ease of access to source of proof, availability of compulsory process for attendance of unwilling witnesses" and other factors which are supposed to ease the performance of judicial process.642 In Piper Aircraft Co. v. Reyno643 all decedents and beneficiaries were foreigners and only the defendants (and the appointed administratrixes of the estate) were Americans. The District Court explicitly stated that US courts are not so reluctant to dismiss on 'forum non conveniens' grounds if the foreign plaintiff "...seeks the benefits from more liberal tort rules provided for the protection of the citizen and the residence of the United States."644 The Court of Appeals reversed and remanded, inter alia because a non-conveniens dismissal is not possible if the laws of the other forum are less favorable to the plaintiff than those of the US.645 Finally, the Supreme Court held that, the plaintiff's choice of 'forum' is given less deference if they are foreigners. Also, the fact that the other forum's laws are less favorable was not considered to be enough in itself to bar dismissal.646 Despite these rules, there is no unlimited authority of the courts to
dismiss claims based on 'forum non conveniens' grounds.\textsuperscript{647} As in the \textit{Gulf-Oil} case, the Supreme Court explicitly stated that such dismissal presupposes at least two 'fori' in which the defendant is amenable to proceed. If this is not the case, a dismissal would result injustice, and be inappropriate.\textsuperscript{648} A reason for dismissing a case can even be found in the effort to "...avoid unnecessary problems of conflict of laws and the application of foreign law".\textsuperscript{649} In other words, the mere convenience of the courts might be reason enough for a dismissal. Foreign claimants should be aware that their choice of the United States as forum state, is not given heavy weight by discretion of the US-courts.\textsuperscript{650} A definite prediction as to when a foreign claim might be dismissed, cannot be given.\textsuperscript{651} In \textit{Union Carbide Corp. Gas Plant Disaster at Bophal, India, in December 1984}\textsuperscript{652} the Court used the test according to \textit{Piper v. Reyno}.\textsuperscript{653} Because India provided an appropriate legal system and most of the witnesses and the heirs were living in India, the balance of the analysis was in favor of India as forum.\textsuperscript{654} Whether in the future, such claims will likely be dismissed, depends on the intention and attitude of US courts towards the US manufacturer. Especially, at issue is whether the courts will show a particular interest in monitoring the manufacturer's conduct with regard to the foreign markets or not.\textsuperscript{655}
2. In the Federal Republic of Germany

If a foreigner wants to bring a lawsuit in Germany he has to follow the general rules. Unlike the US laws which follow the common law distinction between 'in rem', 'quasi in rem' and 'in personam' jurisdiction, the jurisdiction provided by the German laws is basically a personal one.\textsuperscript{656}

In principle, the German law requires a plaintiff to bring suit in the residence of the defendant. For instance, for individuals, pursuant to § 12 ZPO, the proper court is the one in the district where the individual has his residency.\textsuperscript{657} Section § 32 ZPO provides that tort claims against the alleged tortfeasor can be filed at the place where the tort occurred. Jurisdiction can also be established where corporations or other commercial enterprises have their site(§§ 17 & 21 ZPO).\textsuperscript{658} When the defendant is a corporate branch, § 21 (1) ZPO expands the range of jurisdiction over such legal entities, regardless of whether they have foreign parent.\textsuperscript{659} When a number of courts have jurisdiction the claimant can chose to sue in any of them.

The answer to the question of when a foreigner can be sued in German courts depends on the international jurisdiction of the German courts. In Germany, the jurisdiction of the courts is governed by the rules of the German civil procedure law, the Zivilprozeßordnung (ZPO).\textsuperscript{660} Those regulations do not contain special provisions regulating the international jurisdiction, though they are regarded as an implied regulation of this subject matter.\textsuperscript{661} Therefore, it
is generally acknowledged that in case a German court has local jurisdiction according to the general rules, it also has international jurisdiction in that lawsuit.\textsuperscript{662} The conditions, which give a certain court the power to adjudicate a claim, are subject matter and personal jurisdiction.

The subject matter jurisdiction of German courts is regulated according to the provisions of the German Court Organization Act.\textsuperscript{663} Section 71 and § 23 ZPO indicates that the subject matter jurisdiction of a German court only depends on the amount in dispute, in determine whether a lower or a higher court has jurisdiction.\textsuperscript{664}

In transnational disputes, the personal jurisdiction of the German Courts is determined according to §§ 17, 21, 23 ZPO. Other provisions also allow a court to gain jurisdiction over defendants, but they are not relevant for transnational disputes.

Section 23 ZPO grants personal jurisdiction over absent aliens, natural or legal persons, when the foreign person or legal entity has some property in Germany. The latter provision has been construed very broadly by the courts\textsuperscript{665}; even very small values can be sufficient to establish jurisdiction over monetary claims.\textsuperscript{666} This rule, as held by the Civil Supreme Court (Bundesgerichtshof), explicitly applies to transnational transactions and thus to foreign parties. The reason for this posture of the German courts is the fact that often the enforcement of judgment and also their recognition abroad cannot always be guaranteed.\textsuperscript{667} Thus, this
provision is mainly important to claims against aliens. This provision can lead to a surprising situation of expanded jurisdiction; A US tourist who forgot parts of his clothes in a German hotel room, is, based on this fact, subject to German jurisdiction and might be sued in a German court for the hotel bill. This extreme expansion of jurisdiction has been widely criticized by some authorities, and this has lead to a more narrow interpretation of the personal jurisdiction. If no other connection to the court's district exists except for the assets, then this forum lacks the necessary jurisdiction. But since these judgments were not rendered by the highest courts, this jurisprudence is not binding and most courts will still follow the broad interpretation of § 23 ZPO.

Unlike the US legal system, 'forum non conveniens' is not a helpful means to mitigate the effect of § 23 ZPO. The German legal system still does not recognize this doctrine. The German courts strictly follow the view that if jurisdiction was conferred upon a court according to the ZPO, this court has to adjudicate the matter, regardless of whether the plaintiff is foreigner or German.

But sometimes § 23 ZPO can be useful to foreigners, too. This situation occurred in Morgan Guarantee Trust Comp. v. Islamic Republic of Iran, where the German court issued an attachment order for the stockholding of Iran in a major German steel company (Krupp AG); the American bank was hereby taking advantage of the fact that the Iranian
Goverment had some assets in West Germany. Thus, if a foreigner wants to sue another foreigner in German courts, this can be done as long as the defendant has some assets in Germany.

2. In France

The French system is similar to the German one; however the scope of jurisdiction is even broader. The French courts tend to claim extensive jurisdiction in all cases where French citizens are involved.

a) Foreign Defendants in French Courts

The situation in France is determined by of Art. 14 and Art. 15 C.Civ.; they are the only provisions in the French legal system which deal with the question of foreign recognition.\(^{677}\) Especially Art. 14 C.Civ. furnishes the French courts with a broad authority over foreign defendants. It allows French courts to summon foreigners who are not even residents of France, if the action is based on a dispute concerning an obligation concluded in France with a French individual. French courts also have jurisdiction if the contractual relation results from an action in a foreign country, as long as the foreigners contracted with a French resident or citizen. Thus, jurisdiction depends solely on the French nationality of the plaintiff. French courts have, in addition to the wide power given by Art. 14 C.Civ., broadly interpreted of the application of this rule.\(^{678}\) For instance, the expression 'obligation' has been construed to
include torts and various other legal duties. Most interpretation even neglect the need for any relationship between the rights which are at dispute and France Only a few exceptions to this broad interpretation of personal jurisdiction are acknowledged; for instance, if the real property which is the object of the litigation is located in another country, the 'situs' becomes the determining factor in evaluating jurisdiction.

Art. 14 gives a French citizen the right to sue an alien in French courts even if he is not a resident or is not residing in France. Thus, this provision allows a French citizen to sue practically any foreign producers products liability cases.

b) Foreign Plaintiffs

Foreigners also have far reaching possibilities of suing French citizen in France. The main principle of French civil procedure is that a suit has to be brought in the defendant's domicile. Thus, if an American or a German plaintiff wants to bring action against a French resident, they have to do this in the district court where the defendant lives. The same principle governs when the claim is based on a noncommercial contract, for example, between a seller and buyer. But even if a French citizen has no domicile or residence in France, he can be sued there. Art. 15 C.Civ. permits a foreigner to sue French nationals without domicile or residence in France. But this provision usually has no importance in products liability cases.
because the manufacturer usually has a site in France. However, it allows suit against a manufacturer who is a French citizen, but, who, what will be a very rare case, has no site in France. A French court can always claim to have jurisdiction over French citizen.

4. European Convention on the Jurisdiction of Courts and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

This convention, which has an important effect on the recognition and enforcement of judgments rendered within the European Community (EC), also regulates the jurisdiction of the various EC member states. The goal of the Convention was to provide a specific forum for actions involving goods, which are not used in business or profession. The Convention allows the plaintiff to bring all defendant together in one forum, since the co-defendants can be sued in the forum of the primary defendant. Theoretically, the Convention allows the plaintiff to bring action in any country which signed it. However, most of the signatory states still are reluctant to use these rules and, for instance, require a specific agreement of the parties, before applying the Convention. The Convention, which was amended in 1978, now contains now a provision providing the consumer with a special forum. According to this provision, even an explicitly made choice of law agreement cannot deprive him of the consumer protection laws of his home country.
However, this protection is subject to further limitations. But despite these limitations, the Convention basically allows a consumer the choice to sue in any member state within the European Communities.

5. Service of Process

Besides finding the personal jurisdiction over a defendant, a valid judgement must comply with other procedural conditions. For instance, for a court jurisdiction to have over a defendant, the proper service of the defendant is required under the US Constitution. Service of process is a mandatory procedural precondition, which has to be complied with to avoid dismissal.

In the case of the foreign defendant who is not a resident of the United States but is sued in a US court, the Federal Rules of Civil Procedure for the extraterritorial service apply. According to those rules, service can be made according to the Federal statutes or by the rules and statutes used by the state courts. The rules also provide for personal service by individual delivery or by an agent or officer of the court.

Regarding France and Germany, which are signatories of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters as is the United States, additional means of service are available. Pursuant to Art.5 of the Convention, service has to be made through a central authority which each country
must designate. The procedure usually requires translation, payment of certain fees, and the use of special application forms. Under the Convention, the service of a foreign defendant can be simplified and accelerated. However, even if the Convention applies the other means of service still are available, since these are excluded by the Convention.

The German law, like the US law, requires the service of a defendant, but it is only a mere notification of the defendant. Service in Germany will be done according to § 166 ZPO and usually initiated by the court itself. Under certain circumstances, such service can be also brought by the plaintiff himself, but only in a few cases. Under German law, the consequences of improper service are quite different from the US posture concerning improper service. According to the German law, improper service only has some procedural detriments, but the claim will not be dismissed on such grounds. Besides this, the lack of proper service can be cured during the trial.

French law also demands that the defendant receive notice of the action against him. However, like the German law and unlike the US system, the improper service will not result in a dismissal of a case. But the lack of service still imposes some detriments upon the plaintiff; however, here also, improper service can be cured according to the French civil procedure law.
Both countries, France and Germany, are also member states of the above mentioned Convention, and thus they have the same means to obtain service as in the United States.

Another considerable difference between the United States and the civil law countries France and Germany exists with regard to the lack of jurisdiction. Because in the United States, according to the § 4 of the Restatement (Second) of Judgments, Tentative Draft 1978, a judgement rendered by a court which lacked jurisdiction will be subject to collateral challenge. In Germany and in France, however, the current rule is that the rendering of such a judgment is final and binding once the time for appeal has run out.701

But both countries, France as well as Germany, recognize that such a judgment - without jurisdiction - might be not recognized in another country, and therefore enforcement might be rejected.702

6. Conclusion

All three countries allow plaintiffs to commence lawsuit against foreigners in their courts. Most states in the United States have established far reaching jurisdiction, due to the existence of long-arm statues, or through correspondent court decisions.

The German Courts have also a far reaching authority under to § 23 ZPO. But compared to jurisdiction in the United States, it is only a limited one, since some property or other assets are presupposed for German courts to have
jurisdiction. But because the value or amount of this property can be, very small, the jurisdictional rules can lead to surprising results. Especially foreigners usually are not aware what small piece of property can lead to jurisdiction of a German court.

The French courts, when a French national is involved in the claim, exercise an even more far-reaching jurisdiction than the US courts. They claim to have jurisdiction over all French people, thus haling foreigners, who have business contacts with French nationals, into their court.

Regarding the possibilities of foreigners suing in a foreign court, some limitation apply in all states. A particular restriction, of which every foreigner suing in an US court has to be aware, is the existence of the forum non conveniens doctrine. Since this theory allows the US courts to dismiss cases, where the major reason for initiating the action in the US was to seek higher compensation or other benefits from the American forum, this creates a real danger for foreign forum shoppers.

The more liberal discovery rules in United States, especially with regard to pretrial discovery, usually favor the plaintiff. But pretrial discovery are not advantageous when the evidence is abroad. Because the European countries (Germany and also France) do not assist litigants in US pretrial discovery.

The costs of litigation are higher in the United States than in Germany or France, due to the higher amount US at-
Attorneys obtain and the costs which arise from the use of highly paid expert witnesses. In Germany and France, the attorneys are usually only allowed to charge an amount which is fixed by the laws. Also, the costs for experts are much lower, since they are also subject to state regulations.

The contingency fee system is also not a convincing reason for French or Germans to sue in the United States, since both countries provide means of legal assistance.
V. Choice of Law/Conflicts of Laws

Another question of great importance in transnational lawsuits is the issue of which law the foreign court will apply. Due to the involvement of parties from different nations, the place where events crucial to the litigation occurred, can be different. For instance, the place where a contract was concluded, and the place where the damages have occurred could be different. Also, the place where the cause for the damages was set, and the place where the damages finally occurred, can be different. Thus, two different legal systems are relevant to the incident at dispute. Therefore, this conflict of laws question leads to the problem what choice of law, the court will apply.

A. In United States

1. Traditional Approach

Here, the traditional approach to conflicts of law problems has been different depending on the form of liability, contractual or torts.703
Concerning a seller's choice of law clause, the Restatement of Conflicts of Law (Second), § 187, indicates that in general such a clause will not be given effect. Since the enactment of the UCC, and its adoption by the most US states, the rule of Section 1-105(1) has gained importance.704 Thus, choice of laws rules are possible, but only if the choice of forum is embodies in a reasonable contact. But in products liability cases, this clause only has a limited importance because often the parties did not stipulate a choice of law clause in sales contract. However, the foreign manufacturer might use these clauses in his standard sales forms.

In contracts without choice of law clauses, the Restatement705 indicates that in commercial cases, the law which both parties have chosen may govern the case.706 According to § 1-105 UCC the party autonomy can determine the applicable law up to a certain extent.

2. In Product Liability Actions

However, in products liability actions, the idea of consumer protection establishes the need for a different posture. In claims based on contracts, a choice of law clause might be held invalid if it denies the consumer the protection, provided by the UCC.707

Therefore, the law of the place of delivery usually will govern a sale involving moveable goods.708 But the provisions provided by the Restatement are not the law and
cannot serve as a definite base to tell what law will be applied.\textsuperscript{709}

However, most product liability cases are based on torts and not on contracts. The approach which US courts take concerning this kind of actions is based on different theories.

In general, the American courts follow the rule of 'lex loci delicti'; thus, the place of the wrong determines the applicable law.\textsuperscript{710} This traditional rule and its mechanical method of defining the appropriate law is opposed by modern approaches. One is the so-called 'interests-analysis'.\textsuperscript{711}

According to this approach, the courts decides based on the different interests of int parties in the various fori. For instance, some courts simply count the 'contacts' made by the parties in their forum. In \textit{Babcock v. Jackson}, the New York (N.Y.) Court of Appeals compared the relative contacts and interests in the litigation between New York and the place of the injury, a province of Canada.\textsuperscript{712} As a result, the court held that the contacts with New York and also the interest of New York in the claim were superior to those of Canada. Both parties involved were residents of New York; only the accident happened in Canada.\textsuperscript{713} Later, in \textit{Neumeier v. Kuehner}\textsuperscript{714} the court based its decision on the 'lex loci delicti' rule without the contact or interest analysis.\textsuperscript{715} In \textit{Kasel v. Remington Arms Co.}, the California court applied its own laws because California had a stronger interest in the case than Mexico.\textsuperscript{716} This interest
basically consisted of the fact that California law allows a substantial recovery, but not the laws of Mexico.\textsuperscript{717}

As a result of all the efforts of American courts to solve the conflicts of law problem, it can be noted that a clear and predictable general rule of law still does not exist.\textsuperscript{718} However, the recent decisions of the courts, as stated above, illustrate some general tendencies in the judicial approach to the conflict of law issues. Courts generally apply the law of the forum, the law of the United States. But where the plaintiff is an alien, the US courts have shown a tendency to solve conflicts of the law based on the forum non conveniens grounds.

B. Federal Republic of Germany

1. The General Rule

German courts generally base their decisions in tort cases on the rule of 'lex loci delicti'.\textsuperscript{719} This rule has been developed from Art. 38 EGBGB.\textsuperscript{720} According to this provision, the courts have to apply the laws of the place where the tort occurred. But in case the injuries and the cause of these damages happened in different countries, the question arises of what law should be applied. The German courts have allowed both places to be regarded as 'lex loci'.\textsuperscript{721} Since the decision of the 'Reichsgericht' the German courts follow the 'elective concurrence rule.'\textsuperscript{722}
In contrast to the 'lex loci' rules, Art.38 EGBGB applies the law of the 'lex fori'. This provision limits a claim in excess of that permitted by German law. As result of this provision, the law which is the most restrictive will apply in cases against the German tortfeasor. But Art. 38 EGBGB has been used as a public policy device to favor German parties, and thus it has been criticized by foreign authorities.

Today, the position of the courts in products liability cases is still, as stated by the German 'Bundesgerichtshof' in the Beromyl-case, to apply the law according to the 'lex loci delicti' rule. This means that despite the international critics, which tend to favor an interest analysis, the courts still apply the law according to the place where the tort occurred.

In cases where contractual relations between the parties exist, claims based on torts might be decided according to the 'contractual law'. But in cases where the user has been injured or his property has been damaged, the law of the sales place is supposed to be ruling.

2. Public Policy Exceptions

The application of foreign law can be further excluded according to Art.6 EGBGB. This provision allows an exception to the general rule of 'lex loci fori' in extreme cases where the foreign law is considered a violation of Constitutional Rights and other German principles, the so-called
'ordre public'. But a violation of German 'ordre public' is very rare in legal disputes in which US parties and Germans are usually involved. However, the 'ordre public' becomes important in cases where the law which has to be applied according to the conflict of laws rules violates German 'ordre public'. For instance, this might be an issue when the punitive damages allowed by U.S. laws are imposed on a manufacturer. Punitive damages are usually considered to violate principles of the German legal system since it is, according to the German view, a fine which belongs to the criminal law and not to the civil laws.

C. In France

1. Basic Approach

Like the German courts, the French courts use a theory which follows the 'lex loci delicti'; this doctrine is gathered from Art. 3 (1) C.Civ.

But exactly what is considered the 'loci delicti' is not clear if the place of the action and the injury differ from each other. In one of the few cases where French courts had to approach this problem, the court decided that the issue of whether liability existed, had to be decided according to foreign laws. However, in other cases the French courts applied the law where the damages occurred. But the new Code of Civil Procedure, which was introduced 1976, provided a twofold approach to this issue.
In tort claims, according to the Code, the law of both places, the place where the cause of the damages was created or either the place where the damages occurred, can be now chosen.734 There has been a trend in French decisions to select French law in cases where at least two 'fori' exist.735 The highest French court rendered a decision reaffirming the 'lex loci delicti' rule even in torts involving foreigners.736 The lower courts, however, have used 'public policy' grounds to avoid the application of foreign law, hence applying the French laws.737 Since product liability claims are usually decided by the lower courts, French courts are likely to apply French law.738


But France is also a member state of the Hague Convention on the Law Applicable to Products Liability (1973).739 The rules of that Convention apply even if no reciprocity exists; for example, if the other state is not a signatory state or even none of the parties are citizens of one of these states.740 The applicable law does not even have to be that of one of the member states.741 The rules of the Convention are based on two basic ideas: first that no single contact should be determinant but a combination of these factors should be analyzed, and second, that the applicable law should always be foreseeable to the product manufacturer.742 The factors which decide what law is
applicable in a conflict of law situation is primarily the location of the injury and the residence of the injured consumer. Thus, most French courts follow the 'lex loci delicti' pattern. In addition to these rules, other factors like habitual residence, and principal place of business are taken into account. Despite the fact that the Convention applies, even without any reciprocity, it has some limits and provides for exceptions. The most important limitation is due to the purpose of the Convention not to interfere with national, existing laws, especially in the area of sales. According to Art. 1(2) of the Convention, claims between two subsequent links of the chain of distribution are explicitly excluded from its scope. The range of the Convention is therefore restricted to claims based on torts, but only apply if no contractual relation between the two parties exists. Thus, this limitation has a far reaching effect on the application of the Convention because, as a practical matter, a claimant will usually make claim against the closest party in the chain of distribution, the seller of the product. But in this particular case, the application of the Convention is explicitly excluded. However, in case the remote manufacturer is the only defendant and the action is only on torts, the Convention applies.
D. Conclusions and Differences

Summarizing the posture of all three countries, it can be said that they still favor a 'lex loci delicti' approach; Thus, the place of the wrong determines the applicable law. But they also use an interest analysis technique to mitigate the sometimes harsh results of the 'lex loci delicti' rule. Nevertheless, the law which is applicable in all different systems can be determined with certainty, and it also generally follows that the law which governs is that of the place where the wrong occurred.

But all countries have certain means to find exceptions the general rule, whether based on 'comity' or 'ordre public'. These exceptions allow the courts of the various countries to protect the interests of their own citizen by not applying foreign laws.

Especially regarding the laws of the United States and the possibility of punitive damages, countries like France and Germany use 'ordre public' notions to avoid applying these laws. The same is true about the large amounts of compensation recoverable under US laws. A plaintiff should be aware that in French or German courts, even when US law might be applicable, extreme large damages or punitive damages will not be granted by the courts. To obtain this kind of compensation, the plaintiff has to sue in the United States, and it has to be a case governed by US laws.
VI. Recognition and Enforcement of Foreign Judgments

Another element to be considered of forum shopping is the question of whether the foreign judgment will be recognized and enforced in the plaintiff's country, or if an award obtained in the home state will be recognized and enforced in the country of the foreign manufacturer. Depending on the place where the assets of the foreign defendant are located, a favorable judgment can be worthless if it cannot be used to recover.

A. In the United States

Although the US Constitution requires that full faith and credit be given to judgments this does not encompass the awards of foreign states. Thus, before a litigant can enforce a foreign judgment, it is necessary for him first to find a court which recognized it. Only then, can the plaintiff use the judgment which he obtained in another, foreign court. Considering the federal structure of the United States, another question is whether state law or federal law should govern this subject.
1. Basic Factor of Comity

In the United States the courts will recognize a foreign judgment, according to principles of comity and not law, when such a judgment does not conflict with a jurisdiction's public policy. In Hilton v. Guyot, the United States Supreme Court stated what remains a relatively accurate statement of the US law and results in the general recognition of foreign judgments. According to this case, the plaintiff has to comply with the following requirements for his foreign judgement to be recognized: a final judgement; subject matter jurisdiction of the deciding court; proper jurisdiction over the parties or the subject of the dispute; proper notice of the proceedings and an opportunity to present a unbiased defense; and finally, regular proceedings according to a civilized standard of justice. In cases where a foreign judgement is based on personal jurisdiction, the US court will only recognize the award if the foreign court exercised property jurisdiction over the parties. Hence, the US court will not only consider the proper application of the foreign laws, but also the principles of American 'due process' rules. The other relevant factors for the recognition of foreign judgments include absence of fraud; lack of violations of United States public policy and principle; full reciprocity; adequacy of notice to the adverse party; the absence of res judicata and collateral estoppel and the finality of the judgement.
The most disputed among this list of factors is usually the issue of reciprocity that requires foreign courts to recognize judgments of US courts which are similar to those of its own country. However, even the lack of the reciprocity will not preclude US courts from giving effect to a foreign judgment, the judgment must be based on 'in rem' or 'quasi in rem' jurisdiction or favorable to US citizen. Some jurisdictions have also rejected the 'lack of reciprocity' requirement, and also the Uniform Foreign Money Judgments Recognition Act, which does not require reciprocity as a precondition for the recognition of a foreign judgment.

2. The Uniform Foreign Country Money Judgment Recognition Act

The Uniform Foreign Country Money Judgment Recognition Act allows recovery of foreign judgments which provide for the payment of money if certain conditions are met. To be recognized and enforced under this Act the foreign judgments must be final, conclusive, and enforceable where it was rendered. The Act also contains mandatory grounds for not enforcing a foreign judgment. Such reasons include lack of personal or subject matter jurisdiction, or lack of due process compatible to that provided by the U.S. Constitution. Also, § 3 of the Act provides that a foreign judgment has to be enforced similar to the manner used by the state that rendered it. But this position is not yet
acknowledged by all courts; also, many courts still reject registration as means for recognition according to the Uniform Enforcement of Foreign Judgement Act. 774

B. In the Federal Republic of Germany

Unlike in the United States, German statutes and the German courts strictly distinguish between recognition and enforcement of foreign judgments. This distinction results from different provisions, which apply to these two stages. 775

1. Recognition according to § 328 ZPO

The enforcement of foreign judgments in the Federal Republic is governed by the provision of the "Zivilprozeßordnung (ZPO)", § 328 (recognition) and §§ 722, 723 (enforcement) ZPO. 776

Unlike France, the recognition of foreign judgment does not require a separate proceeding in the Federal Republic, but enforcement does. 777 The precondition to recognizing a foreign judgement is that it meets the standard of § 328 ZPO. This dictates the following elements: the foreign court must have had jurisdiction over the parties (§ 328 I No.1 ZPO); due process must have been fulfilled (§ 328 I No.2 ZPO); the decision shall not oppose a former German or foreign judgment (§ 328 I No.3 ZPO) and cannot violate the
German 'ordre public' (§ 328 I No.4 ZPO); finally reciprocity is required (§ 328 I No.5 ZPO). If the foreign judgment meets these standards, it will be recognized. However, when a foreign judgment allows a German defendant to recover more than a foreign defendant could have recovered in German courts, the issue of 'ordre public' emerges. Since § 328 I No.4 ZPO does not allow the German judge to examine the merits of a foreign judgement, the issue emerges of whether the amount or the particular of compensation, for instance punitive damages, can be recognized. The 'ordre public', which sets the standard for the recognition, is determined by the basic principles of the German society and their structure. The posture of the courts with regard to the recognition of punitive damages and very high compensation awards is similar to their approach to the choice of law issues. Thus, such awards will not be recognized, nor enforced.

Regarding the relationship between the US and France and Germany, the Uniform Foreign Money Judgment Recognition Act usually satisfy the requirements of reciprocity between the legal systems; thus, in general, recognition and enforcement between this countries are without problems. The recognition and enforcement of German judgments in France are now governed by the Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters. According to this agreement, German judgments will be usually recognized and enforced in France.
2. Enforcement pursuant to §§ 722, 723 ZPO

After the recognition of the foreign judgment, it further needs a so-called "Vollstreckungsurteil", a particular decision which states that the foreign decision is enforceable.\(^{783}\) When the foreign judgment is not final, but is subject to appeal, § 723 ZPO allows its enforcement, although a bond has to be posted.\(^{784}\) The foreign judgment can be held enforceable without researching the legality of the foreign decision if that judgment meets the requirements of § 328 ZPO.\(^{785}\) But if a defense later emerges this can be used to prevent the enforcement decision of the courts.\(^{786}\)

The enforcement of a French judgment is, like the recognition, controlled by the "Brussels Convention" of the European Community.\(^{787}\) There are only a few, explicitly enumerated grounds for rejection.\(^{788}\) Considering the general requirements, a money judgments of a US courts, which does not violate German 'ordre public' will be usually acknowledged by German courts.

C. In France

In cases where a French citizen is a party, French courts have been quite reluctant to recognize the foreign judgement.\(^{789}\) The former posture of the French courts was to examine the merits of the foreign judgments, thus basically question the lawfulness of the foreign decision.\(^{790}\)
But today, the French courts have abandoned this theory and require only, in accordance with Art. 2123 C.Civ. and Art. 546 of the French Civil Procedure Code, an 'exécutoire' proceeding. By doing this, the plaintiff has to initiate a proceeding to obtain a writ stating that the foreign judgment can be enforced in France.

The party asking for such a writ has to prove that the foreign judgment has been rendered by a foreign court with legitimate jurisdiction. Further, recognition is excluded where the French court had exclusive jurisdiction of the matter. This exclusive jurisdiction allows pursuant Art. 15 C.Civ. the French courts to deny the validity of a foreign judgment against a French defendant (citizen or resident); the French courts take a similar position towards Art. 14 C.Civ.

A recognition also requires that the foreign court have used due process procedures; further, it had to apply choice of law rules which are in compliance with the French one.

Also in France, the foreign judgment has to comply with the French 'ordre public', and finally, the foreign judgment has to be one that was enforceable in the foreign state. With regard to the 'ordre public', US judgments which award very high compensation or punitive damages will face the same problems in Germany, because the French courts do not recognize such awards. Concerning the size of the compensation, French courts may be not as likely as German courts to refuse recognition and enforcement, since in
France awards are usually higher than in Germany.  

D. Enforcement within the European Community

Both countries, France and the Federal Republic of Germany are members of the European Community, thus, already mentioned, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, regulates the recognition and enforcement involving the two states. The effect of the Convention results in the recognition and enforcement of judgments of the various member states without special procedure. In the case of an action brought against the defendant in one member state, the Convention allows such a defendant to utilize other judicial means in another member state. The Convention allows a judgment in certain cases to be rejected. Such refusal of the recognition is permitted if the foreign judgment violates public policy or the principles of international private law. The main effect, however, is that the Convention forces member states to abolish their judicial resistance to each other. With regard to American plaintiffs, the Convention does not directly apply but can have still some advantages. Provided that an American plaintiff achieved the recognition of his judgement in one member state of the European Community, he can enforce it in all the other states. Thus, the US plaintiff whose US judgment was recognized by a German court may seize the assets of the defendant in France or United Kingdom.
E. Conclusion

With regard to the relations among all three states, it can be noted that the recognition and enforcement of money judgment in products liability cases usually does not cause difficulties. But this is not true for injunctions and, of course, for US requests concerning pretrial discovery. Also, a plaintiff obtains certain advantages by asking for recognition within the European Communities, either in the Germany or France. In such a case, the foreign plaintiff has more freedom to act within all member states; he can even obtain the injunction to freeze the assets in a state different from the one in which he had brought suit.

All three states allow for the rejection of foreign judgments, especially based on 'ordre public' (public policy) grounds. But only in case of punitive damages and extremely high awards of compensation will a foreign judgment be rejected. For the US citizen suing in Germany or France, this means that he cannot count on getting compensation for his US punitive damages award. The US courts, however, will generally recognize German and French money judgment, since there is seldom a 'public policy' reason for their rejection. Also, the implementation of the Uniform Foreign Money Judgment Recognition Act has facilitated this procedure. However, all different 'fori' still face the same practical difficulties; the money judgment has to be
translated into domestic currency. Comparing the United States and Germany and France, it seems that in the European Community, due to the already accomplished harmonization of laws, the recognition and enforcement is easier to achieve than in the United States, where the various states still lack a uniform posture. But the plaintiff with an US judgment has to be aware that compensation, which are extremely high according to European standards, and also punitive damages are not going to be recognized in Germany nor in France.
After an analysis presentation of the different legal systems, the question raises if there are any advantages of one system that might encourage a foreign plaintiff to sue in this 'forum'. Concerning the substantive law, prerequisite for any forum shopping is that the rules of conflicts of law, especially the rule of lex loci delicti, does not prevent the selection of a better forum. Because if the courts of the different countries adhered to this rule, all courts would apply the same substantive. In such a case, the plaintiff can only seek for better procedural laws in the various countries, but not for the substantive law. However, even then other factors than only the substantive law might be more favorable in one country than in the other.

A. The United States

Choosing the United States as a forum has certain advantages. The availability of strict liability and the more developed interest in consumer protection might be
incentives to bring a claim in a US court. The extensive availability of evidence due to the pretrial discovery, gives the plaintiff an advantage in comparison to countries like France and Germany; however, only with regard to evidence in the US. The fact that in the United States attorneys are available, who are specialized in product liability might be an other favorable reason to bring a lawsuit in the US. Also the possibility of having expert witnesses at hand, who are also specialized in the various product liability cases, speaks in favor of the US. The same is true with regard to the US contingent fee system, which permits the plaintiff without the necessary financial sources to institute a lawsuit against the producer. Not having to pay the attorney's fee in the case of an unsuccessful action is another incentive to sue in the United States. Also, the role of juries in products liability cases is another factor which speaks in favor of the American forum. Because juries are usually composed of consumers, they have a tendency to render judgments in favor of the harmed plaintiff. Especially with regard to the rendering of damages for pain and suffering, the counsel who can seize the opportunity and influence the jury members gains a higher amount than is possible in France or Germany.

On the other hand, a real problem for the foreigner, who wants to sue in the US, is the possibility of dismissal, based on forum non conveniens grounds. This risk is especially high in cases where the parties who are involved have
no other relation to the United States except for the US citizenship of the defendant.

Also, the statutes of limitations could have expired in the plaintiff's home country because of an attempt to initiate a claim in the United States. Even when the foreign plaintiff might win, he has to be aware that attorney's fees can be a very substantial part of the amount awarded, up to 40% of the amount granted. Also, the expenses for experts and other costs might, substantially reduce the awarded amount. The availability of punitive damages in the United States should not be a real incentive, because recovering such damages is not certain and states are introducing more and more regulations to collect, or limit such damages. Also, the damages for pain and suffering are often later reduced by the courts.

But there is still a situation in which it might be advantageous for the foreign plaintiff to sue in the United States, when US citizens are also involved in the incident which caused the injuries, for instance airplane accidents. There, the danger of dismissal on 'forum non conveniens' grounds is very unlikely. In such cases, the US courts normally will affirm the existence of US interests, thus allowing to proceed the action. Here, it is almost certain that the US forum is the best one. Because it is possible to take advantage of the larger damages which can be granted and still keep loss low, such as attorney's fees. Nevertheless, it should be always kept in mind that the various
states of the United States do not have uniform laws. Even though the basic rules of product liability are similar in most states, there might be important differences which can be crucial to the decision of whether to bring suit in a particular US state or not.

But in most cases, particularly in ordinary cases without extraordinary and severe injuries, the difficulties of bringing a suit abroad must be balanced with the worth of the effort. The hope of obtaining a high award is, in ordinary products liability cases, hardly justified. Even though US awards are higher than in Germany or France, there are a lot of costs, which the US citizen has to pay by himself, what are covered by insurance and social benefits in the two European countries.

B. Germany and France

In comparison to the United States, the possibilities which exist in Germany or France are in most regards not worse. In Germany, the situation for the consumer will slightly improve with the enactment of the new 'ProdHaftG'. This will expose the producer of goods to a true form of strict liability. However, the responsibility of the manufacturer or seller in France already has the character of a strict liability, because it rarely allows any means of defense. Even the German courts seldom allow the manufacturer to escape his responsibility, and under the new
ProdHaftG, it will be even harder for a manufacturer to escape his liability. Unlike France, Germany allows, and will allow under the new laws, the manufacturer a state of the art defense. Another advantage with a German forum, in comparison with the United States, might be the different meaning of the term 'defect' in the German laws. Since this term is very flexible and also very vague, under the German law, it offers claims of defectiveness which are not possible under the laws of some US jurisdictions. The situation with regard to the burden of proof is also more advantageous in the two European countries than in the United States. Defendants in Germany, and also in France, only have to prove that the defect did not exist when the product was in control. At least, this is the result of the EC Directive, but also under the current laws, the situation is quite similar, due to the presumption of fault on behalf of the manufacturer.

With regard to the relations between Germany and France, the German plaintiff might have an advantage by bringing his claim in France. Under the European Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters, he can bring a lawsuit in France, benefiting from the 'stricter liability' laws there.

Also, due to the existence of special laws which impose a strict liability on the manufacturer, Germany and France may have incentives for US citizen to seek recovery there.
For instance, the German Pharmaceutical Act imposes a real strict liability on the manufacturer.

The French legal system has, in contrast to the US and Germany, the disadvantage that the plaintiff has to choose between a contractual claim and one based on torts. Since the recovery of economic loss is usually only possible under contractual theories, this might prevent the recovery of a part of the damages.

However, due to the fact that jury trials do not exist in the German and French civil law system, the influence of an attorney in a weak case might be less. The decision is made by professional judges, who are normally not as likely to become manipulated than a jury is.

Also, both countries offer damages similar to those in the United States, but, as stated above, punitive damages are unknown. Ceilings on compensation, as provided by the new ProdHaftG or the Pharmaceutical Act, are not a real threat to adequate recovery, since their actual size is high enough.

In both Germany and France the discovery rules do not allow the extensive request of evidence from the other party before trial. Also, the kind of specialized expert witness, as known in the United States, are not available in both countries. However, professionals, named by the French or German court as expert witnesses, are available.

Also, the fact that no contingency fee system is permitted does not establish a real impediment to litigation,
since both countries offer financial assistance for claimants who cannot afford litigation.

C. The "Best" Forum

Usually, bringing a claim against the US manufacturer in the Unites States is too troublesome for a foreign plaintiff to outweigh his risk and expenses which such undertaking. Only in a few cases, where a dismissal because of forum non conveniens grounds is not likely, and, according to the practice of the courts, high compensation can be anticipated can the United States courts be recommended. In all the other cases, where the consumer's damages are not extremely severe and extraordinary, France and also the Federal Republic, allow actions which serve the interests of the victims. Here, it also has to be kept in mind that the French and German social welfare system, unlike the situation in the United States, covers most of the expenses with regard to injuries. US citizens, instead, sometimes have to sue and bring action to recover their medical bills.
VIII. Conclusion

In summarizing the comparison of the different systems, it has to be said that there is no one forum for products liability claims, which is the best. What is the best forum depends on the facts of each single case. Also, the mere possibility of getting higher compensation in one country cannot always outweigh the accompanying difficulties.

Consumers in European countries, like France and Germany, benefit from a well developed scheme of laws dedicated to protect the consumer. This situation will be improved by the implementation of the EC Directive in the various domestic laws. But, French and German citizens benefit even more from their better social security systems.

There are cases where forum shopping can be recommended, but only in cases, where extraordinary circumstances or extreme damages are involved.

French and German special strict liability laws, may give an incentive for US consumers to initiate action in one of the two countries.

Also, Conventions of the European Community, give French and German citizens the possibility to shop for their
best forum in the EC, and not necessarily in the United States.

Summarizing the arguments with regard to the best forum for American, French or German consumers, the following points can be made:

It may be favorable for French or German consumers to sue in the United States,

- where he can expect to achieve a higher award of damages, because the amounts for punitive damages, pain and suffering, etc. can be much higher,
- when property damages are involved, since under the EC Directive this liability is limited,
- where specialized attorneys and experts are necessary to establish a claim, since in Germany and France neither are available in such quality and quantity as found in the United States,
- where it is necessary to obtain extensive evidence, since only the US discovery rules allow this,
- where the large number of claims might meet the national ceilings according to the EC Directive,
- where the German claimant is not able to bring claim for economic loss, because the statutes of limitation period for claims based on breach of warranty has already elapsed,
- where the 10 year statute of repose of the EC Directive has elapsed, and a US forum without this limitation exists.
It can be more favorable to sue in German or French courts,
- where the special strict liability laws, for instance the German Pharmaceutical Act, applies,
- where it is difficult to prove fault on behalf of the producer, since the EC Directive does not require this,
- where assets of the defendant are in the various countries of the European Community, since a Convention makes the judgement valid and enforceable in all member states,
- where contributory negligence would disallow a compensation in the US, since the German and French law is based on comparative fault.

It can be favorable for a US or German consumer to sue in France,
- where a state of the art defense of the manufacturer might prevent any recovery, since French law does not recognize that kind of defense,
- where the German or US standards for defectiveness do not recognize the particular defect, since French courts impose a very strict liability on the manufacturer.

However, it should be noted that the decision to initiate suit, requires a careful balancing of the above mentioned factors.
ENDNOTES

1. The term EC (as the abbreviation of "European Community") is technically not identical to the term EEC, which stands for European Economic Community. The EEC is a confederation established by the treaty of Rome, which includes: Belgium, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and the United Kingdom. The EEC is merely one of the three communities embraced in the expression "European Communities". But those three different entities are linked by a single Council of Minister, a single commission and merged executives. The two other, not so well-known communities are the European Atomic Energy Community (EAEC) and the European Coal and Steel Community (ECSC).


4. Numbers published by the U.S.Department, Office for Industry & Trade, show an increase of approximately 95% with regard to the export from Germany to the U.S. and about 90% increase concerning the exports from France to the U.S. over the last 5 years (1980 - 1985). However the numbers of goods exported from the U.S. to the both countries, Germany and France, have decreased in the same period of time. But due to the weak dollar and the resulting cheap U.S. goods, the U.S. exports in general, and especially in the countries of the European Community have increased steadily during the last year. Thus the consumer abroad and in the U.S. is facing more and more goods from an other country.

5. Concerning heavy machinery and factory equipment a different situation might exist because of the traditional strength of nations like Us, Germany of France in this field. Those items are not imported as much as more basic and cheaper consumer goods.

6. See BLACK'S LAW DICTIONARY 590 (5th ed. 1979); where 'Forum Shopping' is described as 'Such occurs when a party
attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgement or verdict".

8. See e.g. Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286(1980); In this case the passengers of a 'Audi' who were badly injured in a car accident, sued Worldwide Volkswagen, the Volkswagen Corporation in Germany and all parties in the distribution chain in a state court in Creek-County, Oklahoma. From previous experience it was known that the juries in this court were in general generous with regard to the rendered compensation. For reasons of this conditions, the attorney for the defendants brought the case up to the Supreme Court only to obtain the jurisdiction of a Federal Court which was known for more reluctant juries. See Juenger, Supreme Court Intervention in Jurisdiction and Choice of Law - A Dismal Prospect, 14 U.C.Davis L.Rev. 907, 911 (1981).

9. For example, in a speech hold in 1982, Prof. Juenger stated that up to then only two German articles on this subject had been published; see Juenger & Samtleben, supra note 7, at 708.

10. See In re Paris Aircrash of March 3, 1974, 399 F.Supp. 732, 737 (C.D.Cal. 1975); here survivors of victims of the turkish airplane which crashed in a forest close to Paris brought action in the United States and finally obtained a compensation which they never would have gained in a European court.


15. Concerning the History of the Draft see, 1 W. FREEDMAN, INTERNATIONAL PRODUCTS LIABILITY, § 5.17 (1986); see also, Note, The European Community's Products Liability Directive: Is the US Experience Applicable ?, 18 Law & Pol'y Int'l Bus. 795, 798-809 (1986); Note, Defining the Limits of Liability:

16. The European Community (EEC or EC) is often confused with the Council of Europe, but both organizations are different and also work on different, however overlapping areas. Also the countries which are in the two formations, are not identical; the Council includes besides the EEC memberstates also states like Austria and Switzerland. Unlike the EEC which is action mainly on economic matters, the Council is not restricted in its work. According to its charter, it has to deal with social, cultural, scientific and legal matters; see 3 MODERN LEGAL SYSTEM CYCLOPEDIA, Western Europe (A) ECC Countries 681, 683 (1984).

17. Id.

18. UNIDROIT stands for "Institute for the Unification of Private Law" an international institute; see D.T.WILSON, INTERNATIONAL BUSINESS TRANSACTIONS (2d ed. 1983).


21. Id.; see, also, 1 W.FREEDMAN, supra note 15, at § 5.16. The reason for the FRG not to ratify that convention was because at the same time similar developments and efforts had been started ( PHI, Sonderdruck, July 1987, 96).

22. See 1 W.Freedman, supra note 15, at § 5.16.


24. Id., at 40.

25. See 1 W.FREEDMAN, supra note 15, at § 5.17.

26. Here, for the purpose of this contribution, the bystander is defined in distinction to a consumer or user of a product who is considered as being a natural or legal person who has purchased a defective product.

27. Art.3 defines the producer as follows: "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, trademark, or other distinguishing feature on the product presents himself as a its producer."
28. The liability does not embrace the importers of the EC itself; it is not applicable to imports from one EC-member-state into the other. Only imports into the Communities are subject to the "importer" rule of Art. 3 (II).


30. Art.2: "[m]eans all moveable, with the exception of primary agricultural products and game, even though incorporated into another moveable or into an immovable....includes electricity."


32. However the liability for those 'products' is restricted under Art.7(b) of the Directive.

33. ".... protection of the consumer requires that all producers involved in the production process should be made liable, insofar as their finished product, component part or any raw material supplied by them was defective."

34. See, 1 W.Freedman, supra note 15, at § 5.18.

35. See, D.TEBBENS, INTERNATIONAL PRODUCTS LIABILITY 146 (1979), Tebbens mentions the example of the elevator in a building which is necessary included.

36. See, Taschner, Die künftige Produzentenhaftung in Deutschland, 1986 Neue Juristische Wochenschrift [hereinafter NJW] 611, 615: Taschner gives certain examples for the scope of safety which can be asked for in the different situations.


38. Art. 6: "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 be reasonably be expected that the product would be put;
   (c) the time when the product was put into circulation."


41. See Art. 6, supra note 38.

42. See Griffiths, supra note 37, at 223.

43. This defense of 'state of the art' belongs to the well-known means of a producer to protect himself against the liability for a defect product. But in European countries which follow not the common-law system, such defense was not explicitly used in this particular category. With the Directive this legal term, which belongs to the anglo-american legal terminology, is introduced in all member states of the EC. However, it has to keep in mind that the interpretation of this defense and its contents is a matter of the different national courts and therefore a broad variety of understandings might and probably will emerge. The term will not be clear and unambiguous.

44. See Art. 10(1) of the EC Directive.

45. Art. 7(e) states: "The producer shall not be liable if he proves: .......
(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....

46. See This provision also allows the parties to go 'forum shopping' within the EC; see D.TEBBENS, supra, note 35, at 142.

47. This is a difference to the rules established by the European Convention on Products Liability. There the application of the provision to damages to property was explicitly excluded, see Albanese & Del Duca, Development in European Product Liability, 5 Dick.J.Int.'l.L. 198 (1987).

48. See 1 W.FREEDMAN, supra note 15, at § 5.18. A reason to include damages to the product itself does not exist, because such cases are governed by the 'sales law' of the various states. Therefore in such case an action for breach of contract, based either on implied or expressed warranty for the product can be started.

49. For the exchange of the ECU in the different currencies of the EC-memberstates, declares Art. 18 (1),(2) that the value has to be calculated based on the exchange rates of the 25 July 1985.

50. Art. 9 (b) of the Directive.

52. See 1 W.FREEDMAN, supra note 15, at § 5.19.


54. See Coe, supra note 51, at 211: This is a result of the European practice in Products Liability actions which allow not the recovery of such amounts which can be redressed in US courts.


56. See Art.7 of the Directive, where the manufacturer can escape liability if he proves that the defects where not detectable according to the technical and scientific standard at the time the product was put into circulation. He can also escape his general responsibility if he proves that the defect of his product was caused by the accomplishment with mandatory regulations of the government. But it has to keep in mind that according Art. 15 (1)(b) the memberstates can provide even in this cases a liability.

57. According to Art. 177 (b) of the Treaty of Rome, the Court of Justice has the authority to decide on the interpretation of acts of the European Institutions.


59. Id.; this includes countries like Spain, Italy, Portugal and Greece.

60. Also Luxembourg, Belgian and Denmark belong to this kind of country.

61. The proposal of the commission, for instance, did contain a clause stating that the Directive was only a set of minimum-standards; see Bourgoignie, Produkthaftung: Alte Argumente für eine neue Debatte?, 1 Europäische Zeitschrift für Verbraucherrecht 4 (1986).

62. This is at least the fear which the various consumer protection groups already complaint of.

63. See Art. 15 EC-Directive.

64. See D.TEBBENS, supra note 35, at 15-22; see, also 1 W.FREEDMAN, supra note 15, at § 1.15.
65. See UCC § 2-318, but this applies only if a warranty, either expressed or implied, is found.
66. By doing this the courts overcome the "privity of contract" principle in those cases. These were especially addressed to the development of liability of the seller of food and beverages towards third person. As a result of that development, the courts found that neither 'vertical' nor 'horizontal' privity was longer necessary to recover, and finally this liability was also extended on products which were not determined for human consumption, like animal food; see D. Tebbens, supra note 35, at 19.


68. See § 402A 1 Rest. 2d, "...to the user or consumer...",

69. But note that the courts make distinctions: e.g. rescuers were allowed to recover for breach in implied warranty, because "...danger invites rescue"; see Guarino v. Mine Safety Appliance Co., 255 N.E. 2d 173 (N.Y. 1969). See also Court v. Grzelinski, 379 N.E. 2d 281 Ill. 1985), the court held that the "...fireman's rule, saying that the landowner does not owe a duty of care to a fireman fighting a negligently started fire, was not pertinent to products liability cases based on strict liability.

70. See, e.g., Wentworth v. Kawasaki, Inc. (1981 NH) 508 F. Supp. 1114; this corresponds also with the intentions of the drafters of § 402A Restatement (2nd), as it is indicated by the comments to this provision. According hereto, the terms "user" and "consumer" were not meant to be literally taken. See Jackson v. Johns-Manville Sales Corp. 727 F. 2d 506 (Miss. 1984), on reh, en banc, ques certified, vacated, in part, on other grounds 757 F. 2d 614, certificate for ques dismissed en banc (Miss) 469 So. 2d 99, later proceedings on other grounds 781 F. 2d 394, cert. den. (US) 92 L. Ed 743.

71. See Elmore v. American Motors Corp., 451 P. 2d 84 (Al. 1984). The courts held that the driver of a car involved in a head-on collision, which was caused by a defect in the other car, was a proper plaintiff against the seller of that car; see, also Jackson v. Johns-Manville Sales Corp., 727 F. 2d 506, 512 (5th Cir. 1984), where the court held that all those persons are protected by Products Liability who where ":...within the area of [contemplated or normally] intended use..." and "...who can reasonably foreseen to be en-dangered."

73. See M.S. SHAPO, supra note 67, at ¶ 16.02[2][a]; see also South Austin Drive In Theater v. Thompson, 421 S.W. 2d 939 (Tex.Civ.App. 1967); see also Baird v. Bell et al., 491 F. Supp. 1129 (N.D. 1980).

74. It has to be noted that this is only true under alternative c of the section, but not under the other alternatives. Thus, it depends on the alternative which the different states have adopted whether a bystander can be a plaintiff or not.

75. § 402A (1) Rest. 2d, mentions expressly "[O]ne who sells any product ... is subject to liability ...".

76. See Comment f to § 402A Rest. 2d (1965) states that the rule "...applies to any manufacturer".

77. See M.S. SHAPO, supra note 67, at ¶ 10.03[6]; see also Ford Motor Co. v. Mathis, 322 F. 2d 267, 274 (5th Cir. 1962), where the court held that the buyer of an assembled good does not distinguish between the assembler or manufacturer, thus the latter has to liable for the former. See also Helene Curtis v. Pruitt, 385 F. 2d 841 (5th Cir. 1967).


81. See J.A. HENDERSON & A.D. TWERSKI, id., at 181.

82. However, in general companies which are acquiring the assets of another corporation, do not assume its liability by doing that. See Travis v. Harris Corp., 565 F. 2d 443, 446 (7th Cir. 1979). See also R.W. HAMILTON, THE LAW OF CORPORATIONS IN A NUTSHELL 426, 427 (1987).

83. This is the consequence of the fact that cash sales let the relation between shareholders and their respective corporation without change. Only in case of a merger, the liability is transferred upon the new corporation; see, e.g., Dayton v. Peck, Stow & Wilcox Co., 739 F. 2d 690, 693 (1st Cir. 1984).
84. See, e.g., Ostrowski v. Hydra-Tool Corp., 479 A. 2d 126,127 (Vt. 1984); this court mentioned that a transfer of liability would result in a "...potential economic threat to small businesses".

85. See M.S. SHAPO, supra note 67, at ¶ 13.01. Also, in case the new company is nothing more than a continuation of the seller's one. Finally, the succeeding corporation is held liable where the transaction was only made to escape liability for such obligation. See, e.g., Leamais v. Cincinnati Inc., 565 F. 2d 437, 439 (7th Cir. 1977). See also Santa Maria v. Owens-Illinois et. al., 808 F. 2d 848 (Ill. 1986); in this case asbestos or asbestos related products were in involved. Since the contact with this material often happened a long time ago, the question whether a succeeding company is liable for her predecessor. In this particular case the judge denied such succeeding responsibility.


88. See H.U. STUCKI & R.P. ALTENBURGER, PRODUCT LIABILITY: A MANUAL OF PRACTICE (1981),- Germany -, at 36, 38. Generally, only the victim who has a contractual relationship with the defendant can sue him based on the contractual liability. Other person, such as dependants, family members, etc. are limited to the prospects of bystanders. Even German courts does recognize a certain right of bystanders to sue based on contractual liabilities ("Drittschadensliquidation"), this very seldom the case, see BGH 1969 NJW 269. The claim of a bystander against the distributor, for instance, is limited to the same claim as he can initiate against a user.

89. See D. TEBBENS, supra note 35, at 79. That means that plaintiff can combine his claims in torts and contracts as alternative bases of a sought of recovery. This characteristic of the German law is also know as 'parallelism of the law of liability'("Zweispurigkeit des Haftpflichtrechts"); see Esser, Die Zweispurigkeit unseres Haftpflichtrechts, 1953 Juristische Zeitung (JZ) 129. The principle of the option to sue on torts as on contracts at the same time has been explicitly recognized by the BUNDESGERICHTSHOF (the
highest German court with jurisdiction in civil matters) in the 'Fowl-pest case' ("Hühnerpest-Fall"), see BGH 1977 NJW 378, as permissible in cases where the liability of the manufacturer was challenged.

90. But certainly a plaintiff can not recover more than his actual losses by initiating both claims, see H.U.STUCKI & P.R.ALTENBURGER, supra note 88,-Germany-, at 16.

91. See text of § 1 ProdHaftG;

92. Notice that in general the contractual liability is only a limited one with regard to the possible recovery. The remedy which the law offers the purchaser of such a product depends on the kind of fault which is attached to the product; thus the claim can result in nothing more than the repair, return or price reduction, see H.U.STUCKI & P.R.ALTENBURGER, supra note 88,-Germany-, at 7, 9.

93. See BGH 1980 NJW 1219.

94. See De Leyssac, France in PRODUCT LIABILITY IN EUROPE, A COLLECTION OF REPORTS PREPARED FOR THE CONFERENCE ON PRODUCT LIABILITY IN EUROPE TO BE HELD IN AMSTERDAM ON 25TH AND 26TH SEPTEMBER 1975, 55, 56 (1975). But there is a limitation due to the role of mere dealers in the chain of distribution: Because German courts do not require the seller of a product to inspect it for hidden defects, they are not liable for such kind of fault, see 1 W.FREEDMAN, supra note 15, at § 5.07.

95. See BGH, 1975 NJW 1827.

96. The 'head of the production' is an individual, for instance the engineer who is responsible for a certain part of the production.


98. Hereby the Act follow the rules of the EC Directive in Art. 3.

99. See § 4 (1) of the Draft of the ProdHaftG.

100. Id.

101. See Ecolivet-Herzog, supra note 23. For more information on the French Legal System see: A. VON MEHREN & J.GORDLEY, supra note 87, 579, 590-687; D.TEBBENS, supra note 35, at 83-97; Albanese & Del Duca, supra note 47, at 198; 1 W.Freedman, supra note 15 at § 5.08.
102. It is an established principle of French Law that between parties in contractual relation, necessary is a direct contractual privity, only a contractual action can be brought to court; a claim based on tort liability is not possible; see B. NICHOLAS, FRENCH LAW OF CONTRACTS 30, 53 (1982) and also D.TEBBENS, supra note 35, at 93.

103. See, Albanese & Del Duca, supra note 47, at 199. However, it has to be noted that French Courts had indicated that it is not always necessary for a party to be in "direct privity" with the vendor to be considered a contracting party; it might be sufficient to be the owner of the defective product at the moment the fault was detected; see, Ecolivet-Herzog, supra note 23, at 4.

104. See Orban, supra note 87, at 348.

105. See D.TEBBENS, supra note 35, at 87; a 'leapfrog' action for economic reasons.


107. See, Orban, supra note 87, at 347.

108. See, Ecolivet-Herzog, supra note 23, at 3; also Albanese & Del Duca, supra note 47, at 199; there they mention decisions of the Cour de cassation regarding actions against both, the distributors and the producer of defective products.


110. See De Leyssac, supra note 94, at 55, 56.

111. Negligence is recognized in all 50 states, see Wade, On the Nature of Strict Liability For Products, 44 Miss. L.Rev. 825, 825-26 (1973). Recovery for breach of warranty, provided by the UCC is also, with the exception of Louisiana, generally available, see [1986] 1 Prod.Liab.Rep. (CCH) § 1023. Strict liability is recognized in 33 states which courts have adopted the rules of the § 402A Restatement (2d); in 8 more states the courts have adopted 'strict liability' standards, and in 5 other states codification of strict liability has been enacted; see Am Law Prod Liab, § 16:9, § 16:13, § 16:24.

112. See, e.g., Dubin v. Michael Reese Hospital, 393 N.E. 2d 588 (111.1979), rev'd, 415 N.E. 2d 350 (1980). Here the Illinois Appellate Court held X-radiation to be a product
but the Supreme Court of Illinois later said that it was not necessary to decide whether such radiation was a 'product'.

113. Therefore even houses, rental apartments or a commercial unit was held to be a 'product', see D.W.NOEL & J.J.PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 1 (1980).

114. See Pierce v. Pacific Gas & Electric Co., 212 Cal. Rptr. 283 (Cal. App. 1985); here 'electricity' was held to not only a service but a 'product'.

115. See, e.g., Beyer v. Aquarium Supply Co. (Div.of Hartz Mountain Corp.) 404 N.Y.S. 2d 778 (N.Y. App.Div. 1977); where a hamster was held to be a product and hence strict liability was applied. But note that the table of products given by the Restatement does not contain animals.

116. See Model Uniform Products Liability Act, which expressly excludes blood. Most states have adopted similar statutes, thus precluding the strict liability in blood transfusion cases' see, e.g., St.Luke's Hospital v Schmaltz 534 P. 2d 781 (Colo. 1975). Today a growing number of states have passed laws, which exclude 'blood' from strict liability. The reason for this is based on policy, since the states are trying to avoid a shortcoming of 'blood' due to strict liability. But see also Gallagher v. Cutter Laboratories, cited in 1 FREEDMAN, supra note 15, §1.12, note 142; there blood was considered as a product.

117. See Restatement (Second) of Torts, § 402A, Comment d.

118. e.g., Illinois Revised Statutes Chapter 110, ¶ 13-213(a)(2).

119. See Model Uniform Products Liability Act, § 102[C]; "Product means any object possessing intrinsic value, capable of delivery either as assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components are excluded from this term. The "relevant product" under this Act is that product, or its component part or parts, which gave rise to the product liability claim."


121. D.W.NOEL & J.J. PHILLIPS, supra note 113, 8. But note that this position is controversial; see M.S.SHAPO, supra note 67, ¶ 8.05.
122. Restatement (Second) of Torts, § 402A Comment i.

123. See M.S. SHAPO, supra note 67, at ¶ 8.04[1].


125. See Henderson, Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication, 73 Colum. L.Rev. 1531, 1538 (1973); however, the courts have hardly followed this view, see, e.g., Bernier v. Boston Edison Co., 403 N.E. 2d 391, 396 (Mass. 1980).

126. This is for reasons that Louisiana as the only US-State with a Civil Law system, had not had a respective statute enacted. Today the UCC, which governs this remedy, has been put into force in all states, but with regard to certain provisions regulating the breach of warranties Louisiana did not so, see [1986] 1 Prod.Liab.Rep. (CC) ¶¶ 1020, 1023.

127. See D.W. NOEL & J.J. PHILLIPS, supra note 113, at 17. This position was stated by an English court in Winterbottom v. Wright, 152 Eng.Rep. 402 (1842); the US courts followed this position during the 19th century until the MacPherson decision.

128. The leading case with regard to abolishment of the 'privity-requirement' was Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960); see also W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971). For additional information about this development see Noel, Manufacturer of Products- The Drift Toward Strict Liability, 24 Tenn.L.Rev. 963 (1957).

129. See D.W. NOEL & J.J. PHILLIPS, supra note 113, at 26. Thus a claim against the remote manufacturer was not possible.

130. See Am Law Prod Liab, § 18:1.

131. See, e.g., Baxter v. Ford Motors Co., 35 P. 2d 1090 (Wash. 1932); where the plaintiff relied on the advertised quality of the good. The representation contained in the advertisement was held to establish an express warranty. The courts have held that producers who are using the modern means of advertisement to make representations that their products have special qualities, however they don't, then those manufacturer should be liable.
132. See M.S. SHAPO, supra note 67, at ¶ 3.03. This responsibility is even imposed on advertisers who are, with regard to the chain of distribution, quite remote to the seller;

133. UCC § 2-313 (1)(a)

134. Id.

135. See D. TEBBENS, supra note 35, at 17.

136. See § 2-314 (1) UCC.

137. See UCC § 2-314, Comment 3.


140. See also UCC § 2-607 Comment 4 (1977).

141. See 111 N.E. 1050 (N.Y.Ct.App. 1916), where the court refused to apply the "Winterbottom v. Wright" rule.

142. This rule is based on the case Winterbottom v. Wright (1892), 10 M & W 109.

143. Restatement (Second) of Torts, §§ 282-283 (1965).

144. See Robb, A Practical Approach to the Use of State of the Art Evidence in Strict Products Liability cases 77 Nw. U. L. Rev. 1, 7 (1982). The author states that often the question of State-of-the-Art has been labeled as defense, but he does consider this a "misnomer". According to his understanding, state-of-the-art is merely a factor describing the owed duty of the manufacturer. This opinion is shared by the most jurisdictions in the US, see id., at 7 n.20.


147. See Am Law Prod Liab 3d, at § 12:5; the violation of one of this rules can establish negligence per se.

148. See M.S. SHAPO, supra note 67, at ¶ 5.02.

149. See 377 P. 2d 897 (Cal. 1963).
150. See id.

151. Id.

152. See Restatement (Second) of Torts, § 402A (1965).

153. See Comment f to § 402A Rest. 2d.; however, the courts did have done so in the past, see, e.g., Bevard v. Ajax Mfg. Co., 473 F. Supp. 35 (E.D. Mich 1979); the court stated that even the one-time seller of a used machine had a duty of care.

154. See Comment m to § 402A Rest. (2d) of Torts.

155. See Nesselrode v. Executive Beechcraft Inc. 707 S.W. 2d 371 (Mo. 1986).

156. The interpretation is derived from the comment i of the Restatement (2d) of Torts, § 402A.

157. New York, Pennsylvania and California belong to this states. There argument against this standard is that it involves principles of negligence which can confuse a jury and thus misguide the jurors.


162. MASS. GEN. LAWS ANN. Chp. 106, § 2-318 (West 1978); they are using a liability theory which is an adaption of the warranty principles to the needs of consumer protection.

163. Other states are Delaware, North Carolina and Virginia; see Stuby, supra note 80, 216, 220 (1987).

164. See Robb, supra note 144, at 10. This can be done by proving that the product is not defective or that it was unavoidable unsafe; id. at 10 n. 33 and 34.

165. This expression has been defined as "customary industry practice", but also as the "aggregate of product-related knowledge which may be feasibly be incorporated into a
product", and also as "the aggregate of product-related knowledge existing at any given point in time", see Note, Product Liability Reform Proposal: The state of the Art Defense, 43 Alb.L.Rev. 941, 945-496 (1979). See generally M.S.SHAPO, supra note 67, at ¶ 10.01.

166. E.g., Indiana Code § 33-1-1.5-4 (defense to strict liability); for a survey see Am Law Prod Liab, 28-35.


169. See, e.g., 447 A. 2d 539 (N.J. 1982).

170. The defendant producer of the asbestos raised the "state of the art defense", alleging that, at the time the product was put into circulation, no one knew or could have known, according to the stand of science and medicine at that time, of the inherent danger of this product; see id, at 542.

171. Id., at 205-208, 447.

172. For a more detailed representation of the issue, see Birnbaum & Wrubel, supra note 146.

173. Id., at 545; here the court followed one of his earlier decisions, Freund v. Cellofilm Properties, Inc., 87 432 A. 2d 925 (N.J. 1981), where it stated that "...there is no need to prove that the manufacturer knew or should have known of any dangerous propensities of its product - such knowledge is imputed."

174. Id., at 547-549.


176. See Birnbaum & Wrubel, supra note 146, at 33. The two commentators mention that in case of a 'strict liability' action the question of 'state of the art' is naturally linked with the product and not with the conduct of the manufacturer. Thus, in a case of failure to warn, the product, due to the lack of knowledge of its defectiveness, could not have been made safer by any warning - since nobody knew about the necessity of a warning.
177. See Feldman v. Lederle Laboratories, 479 A. 2d 374 (N.J. 1984). In this case the teeth of a young woman were permanently gray stained as a result of a drug which she had taken as a little child. The plaintiff claimed that the manufacturer failed to warn her from the risk of decoloration.

178. Id., at 377.

179. Id., at 380.

180. Id., at 385.

181. Id.


183. Id., at 386; see also O'Brien v. Muskin Corp., 463 A. 2d 298 (N.J. 1983).

184. Id., at 387.


186. Id.

187. It should be noted that after Feldman, defendants in New Jersey courts have argued that even in asbestos cases Besheda was not longer applicable; as a result in two cases the judges agreed, see Herber v. Johns-Manville, No. 82-2081 (D.N.J. Nov. 30, 1984), and also Kreider v. Keene Corp., No. 81-2794 (D.N.J. Oct. 17, 1984); in another case the judge disagreed with this view, see In re Asbestos Litigation Venued in Middlesex County, No. L-2740-81 (N.J.Supr.Ct. Sept. 21, 1984(Keefe, J.) Following this confusion, the New Jersey Supreme Court issued a court order stating that Besheda still applies "...to all pending asbestos cases.", see In re Asbestos Litigation Venued in Middlesex County, Nos.M-338/339/340/341 (N.J.Supr.Ct. Dec. 4, 1984)(Clifford, J.) reh'g denied, No. 23, 265 (Dec. 19, 1984).

188. See Birnbaum & Wrubel, supra note 146, at 42.

189. See De Lousanoff, supra note 147, at 72, 79-80.

190. See M.S. SHAPO, supra note 67, at ¶ 12.21 [5].

191. see, e.g., Sindell v. Abott Laboratories, 607 P. 2d 924 (Cal. 1980), cert. denied 101 S.Ct. 286 (DES-case); see
also Comment, DES and a Proposed Theory of Liability, 46 Fordham L.Rev. 963 (1978).

192. DES = Diethylstilbestrol

193. See Sindell v. Abott, 607 P. 2d 924, 937 (1980). The court held, that a "substantial percentage is required", and stated further that the liability of each defendant will be limited according to his market-share.

194. See M.S. SHAPO, supra note 67, at ¶ 12.21 [6].

195. See PALANDT-[AUTHOR] THOMAS, BÜRGERLICHES GESETZBUCH, at § 823 Anm. 16 D) (47.ed 1988); that is also the position of the jurisdiction, see Bundesgerichtshof in Zivilsachen [hereinafter BGHZ] 51, 91.

196. Because of the fact that the liability under tort law is easier to substantiate and also easier to prove.

197. See PALANDT-THOMAS, supra note 195, at ¶ 823 Anm. 15) a).

198. This interest is known as "Nutzungsinteresse"; see PALANDT-THOMAS, supra note 195, at ¶ 823 Anm. 15) A).

199. This kind of interests which tort law has to protect is called "Integritätsinteresse"; see PALANDT-THOMAS, supra note 165, at ¶ 823 Anm. 15) A).


201. See H.U. STUCKI & P.R. ALTENBURGER, supra note 88,-Germany-, at 6. Thus this understanding may differ from the that in other european countries.

202. Id.

203. See BGH 1977 NJW 378.

204. See PALANDT-PUTZO, supra note 195, at ¶ 433 Anm. 1)a).

205. § 90 BGB: "Things in the understanding of the Act are only material objects."

206. See D.TEBBENS, supra note 35, at 66-68.

207. § 459 BGB (Civil Code) states that the seller of a product warrants that the sold product is free from defects which might affect the value of the product or restrict its normal use or the use as expressed or implied by the contract.
208. See Orban, supra note 87, at 353; also Albanese & Del Duca, supra note 47, at 200; For a translation of the German statute, see H.U.STUCKI & P.R. ALTENBURGER, supra note 88, -Germany-, at 7. In addition, § 459(I)(2) states a fault which is only insignificant, does not establish liability.

209. The expressed warranty of § 459 (II) BGB requires that the seller explicitly guarantee a certain feature or quality of the sold merchandise, see PALANDT-PUTZO, supra note 195, at § 459 Anm.4) a). Note that this explicit warranty can be concluded from an expressed as well from an implied declaration of the vendor; whether such guarantee was given has to be determined in any single case, see Semler, Warenbeschreibungen oder Zusicherungen einer Eigenschaft, NJW 1976, 406. The assumption of an implied warranty in such a case has to be taken only cautious, see BGH 1980 NJW, 1619.

210. According to § 463 BGB.

211. See Orban, supra note 87, at 353; see also the text of § 462 BGB.

212. § 463 BGB gives the purchaser in such a case the choice to ask, instead of price reduction or rescission of the contract, for damages.

213. See Orban, supra note 87, at 353; see also PALANDT-PUTZO, supra note 195, at § 459 Anm. 5) which gives a detailed survey of the decisions of the German courts.

214. See Orban, supra note 87, at 353.


216. For an survey of the development of this remedy see N.HORN, H.KÖTZ & H.G.LESER, supra note 97, at 105-7.

217. See H.U.STUCKI & P.R. ALTENBURGER, supra note 88, -Germany-, at 9. These 'additional obligations' are called in German "positive Vertrags-(Forderungs-)verletzung (pVV)" see also TEBBENS, supra note 35, at 68. The development of the pVV was initially based on a broad interpretation (by the "Reichsgericht", the precursor of the "Bundesgerichtshof (BGH)" of § 276 BGB. But today the base of that remedy is seen in a legal gap which has to be closed by customary law. This is done by analogy to §§ 286, 326 and 280, 325 BGB; see BGHZ 11, 83; see also K.LARENZ, SCHULDRECHT: ALLGEMEINER TEIL, § 24 1 a (6th ed. 1983).

218. § 276 BGB: "A debtor is responsible, unless it is otherwise provided, for wilful default and negligence. A person who does not exercise ordinary care acts negligently.

219. § 242 BGB, this is the so-called "Generalklausel (General Rule)" of the German law; § 242: "The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration"; translation from VON MEHREN & GORDLEY, supra note 87, at 1190.

220. See PALANDT-HEINRICHS, supra note 195, at § 276 Anm. 7.

221. See N.HORN, H.KÖTZ & H.G.LESER, supra note 97, at 107.

222. An other reason originates from the difficulties of proof. The plaintiff has to prove the defendant was at fault and this can be, especially in areas where the defendant has alone control, very difficult and rather impossible.


224. See TEBBENS, supra note 35, at 69.

225. Basically, this is an imputation of liability upon one person for the actions of another individual, thus it is a form of "indirect legal responsibility", see BLACK'S LAW DICTIONARY 1404 (5th ed. 1979).

226. § 831 BGB allows the employer to render an 'exculpatory-proof', thus allowing to escape his liability in this situation; see ZWEIGERT & KÖTZ, supra note 215, at 296-297.

227. § 278 (2) BGB allows a disclaimer for the liability, but only for intentional acts of the "Erfüllungsgehilfe"; see PALANDT-HEINRICHS, supra note 195, at § 278 Anm. 9). See also A.T.VON MEHREN & J.R.GORDLEY, supra note 87, at 1193.

228. § 823: "A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom." Translation from A.T.VON MEHREN & J.R.GORDLEY, supra note 87, at 557.

229. Especially by using the means of shifting the burden of proof between the parties in favor of the plaintiff.


231. Id.
232. See BGH 1972 Der Betriebsberater [hereinafter BB], 13ff.


234. See BGH 1959 VersR 523,524.

235. See H.U. STUCKI & P.R. ALTENBURGER -Germany-, supra note 87, at 19; see also BGH 1972 VersR 559.

236. See D. TEBBENS, supra note 35, at 75.

237. See PALANDT-THOMAS, supra note 195, at § 823 Anm. 15) D) c) dd). But in such a case, the unavoidable risks correspond with higher standards of duties concerning the proper warning and instructing of the consumer.

238. Id.

239. See D. TEBBENS, supra note 35, at 75; this includes elements like economic situation and also the feasibility of rigid safety measures.

240. See translation, supra note 228.

241. PALANDT-THOMAS, supra note 195, at Einf. v. § 823 Anm. 6).

242. In German law that does mean that the defendant has to act intentionally or negligently, pursuant to § 276 (I) (1) BGB, for the text of that provision see A.T. VON MEHREN & J.R. GORDLEY, supra note 87, at 1193.

243. See H.U. STUCKI & P.R. ALTENBURGER, supra note 88,-Germany- at 19. Hereby the required degree of care follows objective standards, and the subjective standard of the party concerned is not material. Thus the party who is responsible for the manufacture or distribution of the product is obliged to take all precautions necessary, possible and adequate to avoid any defect occurring in the product. But a definition of those obligations can't be given in general terms since the necessary degree of care will differ in the specific case.

244. See TEBBENS, supra note 35, at 74. One of the reason for these difficulties is the fact that the actions which has to be proven to be negligent usually have occurred in the domain of the defendant manufacturer. Since the consumer has no control over this area and also in general lacks about this scope of activity, problems of proof are the direct results of this circumstance.
245. § 831 BGB: "A person who names another for a task is obliged to compensate for any damage which the other unlawfully causes to a third party in the performance of the task. The duty to compensate does not arise if the principal has exercised necessary care in the selection of the person charged; and, where he has to supply apparatus or equipment or to supervise carrying out of the task, has also exercised ordinary care as regards such supply or supervision or if the damage would have arisen notwithstanding the exercise of such care." Translation from A.T. VON MEHREN & J.R. GORDLEY, supra note 87, at 559.


247. This proof is known as 'Exculpatory Proof' ("Entlastungsbeweis").

248. This defense, the "decentralized exculpatory evidence" ["Dezentralisierter Entlastungsbeweis"); see BGH 1964 VersR 297] worked in favor of the big companies. For reasons of this provision stating a form of vicarious liability, a claim against a German company was not very likely to be successful. The originate of the § 831 BGB was the time of the beginning industrialization; it was supposed to avoid too many obstacles for the developing industry which were a result of the low safety standards at that time.

249. See TEBBENS, supra note 35, at 75.

250. E.g. The violation of a duty to construct a device in a safe manner corresponds a constructing defect as result.


252. See 163 RGZ 21, e.g. the defective brakes of an automobile.

253. BGH 1959 NJW 1676, e.g. to warn of the fact that a certain product (here: anti-corrosion paint) was highly inflammable.

254. See TEBBENS, supra note 35, at 75.

255. 'Protective Laws" is the literal translation of the german term "Schutzgesetz". Those laws are aimed to protect the rights of third parties, which includes in general also the bystanders. § 832 II BGB: "The same obligation is placed upon a person who infringes a statute intended for the protection of others. If according to the provisions of the statute its infringement is possible even without fault, the duty to make compensation arises only in the event of fault." Translation from A.T. VON MEHREN & J.R. GORDLEY, supra
note 87, at 557; see also H.U. STUCKI & P.R. ALTENBURGER, supra note 88, -Germany-, at 17.

256. See, example given:
- Futtermittelgesetz (Feed Distribution Act) of 25 July 1975 BGBl I 1975, p. 1745.

257. See K. ZWEIGERT & H. KÖTZ, supra note 215, at 270.

258. See H.U. STUCKI & P.R. ALTENBURGER, supra note 88, -Germany-, at 24; see also PALANDT-THOMAS, supra note 195, at § 823 Anm. 9).

259. Id., at § 823 Anm. 9) c).


261. Under very special circumstances § 826 BGB, can furnish a base for a claim on products liability. But because of the excessive and malicious conduct which is required under the statute, such cases are very seldom. § 826 BGB: "A person who wilfully causes damages to another in a manner contrary to good morals is obliged to compensate the other for the damage." Translation from A.T. VON MEHREN & J.R. GORDLEY, supra note 87, at 558.

262. Note that besides the Pharmaceutical Act, the Atomic Energy Act ("Atomgesetz") of the 31 October 1976, BGBl I 1976, 3053, provides also a strict liability for the owners and operators of nuclear plants and ships using such source of energy; see H.U. STUCKI & P.R. ALTENBURGER, supra note 88, -Germany-, at 32.

263. See Albanese & Del Duca, supra note 47, at 202.

264. See PALANDT-THOMAS, supra note 195, at § 823 Anm. 16) E) b).

265. See STUCKI & ALTENBURGER, supra note 88, -Germany-, at 32.

266. See § 1 of the Draft.
267. Such acts are for instance the Pharmaceutical Act, the Law on Liability (of Railway, Electricity Supply, Mining etc. Undertakings for Death, Personal Injury and Property Damage = Haftpflichtgesetz (HaftpflG) and the Road Traffic Act (Strassenverkehrsgesetz (StVG)).


269. Importers have become subject to liability because this seemed in light of the so-called 'cheap-products'-imports from countries with low production costs. To avoid a distortion of the sales conditions between German manufacturers and the 'cheap-country' importers.

270. § 4 of the Draft is identical to Art.3 of the EC Directive.

271. See PALANDT-THOMAS, supra note 195, at § 823 Anm. 16) D) dd); this liability is known as "Ausreißerhaftung" ('stray-shot liability').


273. § 3 ProdHaftG is, with regard to the text, identical with Art. 6 of the EC Directive.

274. § 1 (1) No.5 of the Draft states this exemption of liability.

275. § 6 (2) of the Draft of the ProdHaftG; but for the part of the damages which can be allocated to the actions of the third party, the manufacturer has a claim for compensation against this third party.

276. § 1 & §§ 7-10 of the Draft of the ProdHaftG.

277. This was told by the German Justice Department upon oral request.

278. See § 10 of the german draft; which states, according to art. 16 (1) of the EEC Directive, that "Any Member State may provide that a producer's total liability for damages resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU."

279. approximately 98 billion US $

280. The contractual liability covers also the obligation which are based on the law of sales; because the part of the
law is merely a certain aspect of contractual law, it can be
treated in the same chapter; see Albanese & Del Duca, supra
note 47, at 198.

281. See Orban, supra note 87, at 346.

282. See De Leyssac, supra note 94, at 55.

283. See Art. 1641 C.Civ., which defines such 'defect', see
also Ecolivet-Herzog, supra note 23, at 4. The issue whether
a product is defective is one of facts, thus the decisions
of the courts of the first instance will not be reviewed by
the French Cour de Cassation.

284. See Orban, see note 87, at 348; there is a brief, but
detailed review of the elements in a claim based on contra-
tual liability pursuant to 6
Art. 1641-1649 C.Civ.

285. See H.U.STUCKI & P.R.ALTENBURGER, supra note 88, -
France-, at 20.

286. Art. 1645 C.Civ.; see also D.TEBBENS, supra note 35,
at 83.

287. See D.TEBBENS, supra note 35, at 84, 85.

288. See Albanese & Del Duca, supra note 47, at 198; see
also H.U.STUCKI & P.R.ALTENBURGER, supra note 88, -France-,
at 16, 17.

289. See Orban, supra note 87, at 349; also Ecolivet-Her-
zog, supra note 23, at 7.

290. The courts have and still do distinguish between the
occasional seller, he is subject to Art. 1646, and the mer-
chant for whom selling is his business, here Art. 1645 ap-
plies; see Ecolivet-Herzog, supra note 23, at 7.

291. Id.

292. See D.TEBBENS, supra note 35, at 85.

293. See Albanese & Del Duca, supra note 47, at 197; also

294. See Art. 1648 C.Civ.: according to that provision it
is necessary to enter such an action "dans un bref délai
suivant la nature des vices et l'usage du lieu où la vente a
été faite"; see also Orban, supra note 87, at 347; also De
Leyssac, supra note 94, at 58.

295. See D.TEBBENS, supra note 35, at 86.
296. See Ecolivet-Herzog, supra note 23, at 8.

297. Id.

298. The Cour De Cassation is the highest French court with regard to civil matters. Its authority covers only the legal issues; therefore the court has to accept the factual findings of the lower courts. See MODERN LEGAL SYSTEM CYCLOPEDIA, supra note 16, Supplement (1), P 30.67.


300. 'Marketing' is here understood as displaying products for sale.

301. Id.

302. Id.

303. Id.

304. § 1384 (I):" A Person is liable not only for the damages he causes by his own act, but also for that caused by the acts of persons for whom he is responsible or of things that he has under his guard. Translation from A.T.VON MEHREN & J.R.GORDLEY, see supra note 87, at 555.

305. Id., at 1193.

306. See 1 W.FREEDMAN, supra note 15, at § 5.08.

307. See Albanese & Del Duca, supra note 47, at 199. They mention there other duties of the producer, but those are only derivations of the original liability created by the Art. 1384 C.Civ.


309. See De Leyssac, supra note 94, at 63.

310. See Orban, supra note 87, at 349.


312. See Maddox, supra note 55, at 510. He mentions that by the virtue of Art. 1384, other parties in the distributor chain are liable, e.g. not for inspecting the product adequate. But note that this liability can be burdensome for the innocent final user of a product, because he as the 'gardien' of the good (he has control over it) might be held
responsible for injuries resulting from e.g. exploding bottle. Only for reasons that in such case the defendant can sue the vendor seeking indemnity; see TEBBENS, supra note 35, at 92.

313. For an overview see H.U.STUCKI & P.R. ALTENBURGER, supra note 88, -France-, at 32-34.


315. Art. L. 141-2 of the Civil Aviation Code declares the operator of an aircraft being strict liable to persons and property located on the ground.

316. See Schmidt-Salzer, supra note 18, at 1110.

317. See $ 8(c) Federal Rules of Civil Procedure: Affirmative Defenses; see also 1 W.FREEDMAN, supra note 15, at $ 2.01.

318. In States which have already enacted Products Liability laws, those statutes usually contains certain provisions about defenses against such claims. For a survey see Am Law Prod Liab, $ 39:1.

319. E.g. Hanlon v. Cyril Bath Co., 541 F. 2d 343 (3d Cir. 1975); where the accident was caused by a modified switch to operate a press.


322. § 402A (I) (b) "... is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if ....[b] it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."


325. For instance in Guffie v. Erie Strayer Co., 350 F. 2d 378 (3d Cir. 1965), where the plaintiff was injured in his attempt to fix a defect which originated from the manufacturer.


327. See Am Law Prod Liab 3d, § 42:16, § 42:17; whether the defense result in a bar or only in less recovery, depends on the various statutes, and if the jurisdiction still follow the traditionally contributory negligence rules, or if they already have enacted comparative rules.

328. E.g. under Tennessee and Indiana Statutes, Tennessee Code § 29-28-108, and Indiana Code § 33-1-1.5-4(b)(2); but also the case law of some other states comes to the same result, for an overview, see Am Law Prod Liab 2d, § 42:18 n. 4.

329. See id., n.5.


333. See, also Comment h to the Restatement (Second) of Torts.

334. See Am Law Prod Liab, § 1:82.


336. See Am Law Prod Liab 3d, § 1:91.


341. Restatement (2d) of Torts, § 496B, comment b.

342. See SPEISER, KRAUSE & GANS, supra note 341, at § 12:49

343. Since only in case the exposure to these dangers was an intentional or deliberate act of the plaintiff, he could have been able to assume the additional risks. Only in case he was able to avoid those risks, it is fair that the manufacturer can use this fact as defense; see Am Law Prod Liab, § 41:8.


345. See also Vargo, Something New and Something Old: Defenses to Strict Liability, 15 Trial 48 (1979); the author demands that the claimant had to be presented with different alternatives to give him a real choice.

346. See Am Law Prod Liab 3d, § 41:10.

347. see, e.g., Dura v. Horned, 703 P. 2d 396 (Alaska 1985); for an overview see also Am Law Prod Liab 3d, § 41:11 n. 80.


349. see, e.g., Christner v. E.W.Bliss Co., 524 F. Supp. 1122 (MD Pa 1981)( applying Pennsylvania law). The question of comprehension increasingly gains importance in claims against cigarette manufacturers. Especially, if minors are deemed unable 'per sé' to understand the risks connected with smoking, this might lead to extraordinary difficulties for the tobacco industry; see Note, Plaintiff's Conduct as a Defense to Claims against Cigarette Manufacturers, 99 Harvard L.Rev. 809, 815, 816 (1986).

350. see, e.g., Deere Co. v. Brooks, 299 S.E. 2d 704 (Ga 1983), on remand 305 S.E. 2d 675.

351. See Mauch v. Manufacturers Sales & Service, Inc., 345 N.W. 2d 338 (ND 1984); it has been even questioned if the 'reasonable' assumption of risk was intended to be a defense in 'strict liability' actions.

352. This is conform with § 496A Restatement (2d) of Torts.

353. E.g. in Alabama, the 'contributory fault' principle is still good law; see, e.g., Bonner Welders, Inc. v. Knighton, 425 So. 2d 441 (Ala 1982);
354. For an overview see Am Law Prod Liab 3d, § 41:25.


356. However the Restatement 2d § 402A Comment n states that negligence on behalf of the claimant, in case it consists only of not discovering the defect, or not taking appropriate safeguards against potential risks, does not free the manufacturer from liability.

357. See, for further references, Am Law Prod Liab 3d, § 41:28 n.25 and n.29. It should be mentioned that in California 'assumption of risk' as separate defense has been abolished as far as it has the effect of contributory negligence; see id.

358. See, also Li.Yellow Cab.Co., 532 P.2d 1226,1241 (Cal. 1975).

359. See Butterfield v. Forrester, 11 East 60, 103 Eng Rep 926 (1809); the origin of the theory of 'contributory negligence' is usually attributed to this case.

360. See SPEISER, KRAUSE & GANS, supra note 341, at § 12:3.

361. See McGowne v. Challenger-Cook Bro. 672 F.2d 652 (8th Cir. 1982).


366. Id.

367. See M.S.SHAPO, supra note 67, at ¶ 17.06 [3].

368. E.g. Tokyo Marine & Fire Insurance v. McDonnell-Douglas Corp., 617 F.2d 936 (2d Cir. 1980); here a producer's disclaimer from strict liability was held valid.

369. See M.S.Shapo, supra note 67, at ¶ 17.02.

370. See § 2-316(2) UCC; See, also § 1-201 (10) for a definition of the term 'conspicuous'.

371. See Comment 8 and § 2-316 [3][b].
372. See § 2-316 (3)(c); see also B. STONE, UNIFORM COMMERCIAL CODE IN A NUTSHELL, at 69 (1984).

373. See § 2-716 Comment i.

374. See Comment 1,3 to § 2-719(3) UCC.


378. See, e.g., Blanchard v. Monical Mach. Co., 269 N.W. 2d 564, 567 (Mich. 1978); where the court held that a UCC disclaimer does not bar a common-law tort liability for negligence.

379. See, e.g., Sipari v. Villa Olivia Country Club, 380 N.E. 2d 819, 823 (Ill. App. 1978); here the court held that the 'strict liability' does not depend on the contractual relations of the parties. Hence the disclaimer clause on a rental ticket was held to be invalid to preclude the lessors 'strict' liability.

380. "... warranty must be given a new and different meaning if used in connection with § 402A".

381. See Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F. 2d 146, 149. (3d Cir. 1974).

382. See PALANDT-THOMAS, supra note 195, at § 823 Anm. 16) bb).

383. See Maddox, supra note 55, at 512.

384. See 51 BGHZ 91.


386. BGH 1973 NJW 1602; that means he has to show that he was not negligent with regard to every single employee.

387. Id.

388. See H.U. STUCKI & P. R. ALTENBURGER, supra note 88, at 42-44; see, also PALANDT-THOMAS, supra note 195, at § 823 Anm. 16). The manufacturer has to show that no "Organisationsmangel" (no fault in organizing the business) existed.
389. See D. TEBBENS, supra note 35, at 75.

390. Id.

391. See, Taschner, supra note 36, at 614.

392. The literal translation of the German title of section 254 of the BGB is "Contributory Fault". Actually it is similar to the US rules of "Comparative Fault", since it is not a total bar to the claim of the victim but reduces the damages the plaintiff can claim for.

393. § 254 BGB: "If any fault of the injured party has contributed to causing the injury, the obligation to compensate the injured party and the extent of the other compensation to be made depend upon the circumstances, especially how far the injury has been caused by one party or the other." Translation from A. VON MEHREN & J. R. GORDLEY, supra note 87, at 1191.

394. However this provisions is literally speaking of damages, its major application is in allocation the different degree's of faulty causation concerning accidents. Therefore this rule is here and in addition later, under the subheading damages, mentioned.

395. See PALANDT-HEINRICHS, supra note 195, at § 254 Anm.2.

396. Since the current German Law is not based on standards of 'strict liability', in this case the action of the defendant is considered to be the only cause for the accident. The fact that the producer has put this product into circulation is without significance. This posture of the German courts appears also from there definition of a 'defect'. Because this definition contains the expression "...use it was made for.", thus eliminating misuse as cause of action.

397. See, BGH 1968 VersR 804.

398. See Maddox, supra note 55, at 510.

399. See Orban, supra note 87, at 348 n. 18.

400. See De Leyssac, supra note 94, at 58.

401. Id.


403. Id., at 50.
404. Id.

405. 'Force Majeure': "...superior or irresistible force."; see BLACK'S LAW DICTIONARY 581 (5th ed. 1979).

406. Such 'contributory negligence' does exist for instance in case the plaintiff failed to comply with the manufacturers instructions,

407. Id.

408. See Ecolivet-Herzog, supra note 23, at 7 n 24.

409. See De Leyssac, supra note 94; see also Albanese & Del Duca, supra note 47, at 200.

410. See De Leyssac, supra note 94, at 60. The main argument against such extensive warranty of the vendor and the limitations concerning disclaimers is that hereby the future development of technology is hampered and an unjust heavy burden posed on the manufacturer of even new goods.

411. See D.TEBBENS, supra note 35, 35.

412. For a survey of the different time periods see Am Law Prod Liab, § 47:2; note that various states have special statutes of limitations in their Products Liability Laws.

413. See 51 Am Jur 2d, Limitation of Actions, § 135.


416. E.g., California Code of Civil Procedure § 340 (General Tort Statute), Louisiana Revised Statutes, Art. 3492 (General Tort Statute) - all one year -; Georgia Code § 9-3-33 (General Tort Statute) two years; New York Consolidated Laws CPLR § 214(5)(General Tort Statute) three years, and up to 6 years in Maine, Maine Revised Statutes Title 14 § 752 (General Tort Statute).

417. See Am Law Prod Liab, § 47:2.


419. The term "statutes of repose" is understood differ-


421. GA. Code Ann. § 105-106(b)(2) (1984): "...within ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury."

422. See Martin, supra note 421, at 767-68.

423. See for an overview, Merlo, supra note 420, at 238 n 38.

424. Merlo, supra note 420, at 241, states that the trend with regard to the states statutes of repose is against this kind of statutes; however because of the need to answer the potential open-ended liability of the manufacturer, he asks for a federal, thus uniform statute of repose.

425. Here it should be noted that the German law does not know a statute of limitation ("Verjährung") concerning the commencement of actions, but that only "Ansprüche", thus "Rights by which the holder can demand that another person should do something or something or refrain from doing something", see E.J.COHN, MANUAL OF GERMAN LAW 70 (1968), can be object to this kind of limitation. Also, it should be noticed that absolute rights like ownership, cannot be terminated by German "Verjährung".

426. See § 222 I BGB; see E.J.COHEN, supra note 426, at 90.

427. § 852 (1) BGB:"The claim for compensation for any damage arising from the delict is barred by prescription in three years from the time at which the injured party has knowledge of the injury and of the identity of the person bound to make compensation and, without regard to such knowledge, in thirty years from the doing of the act." Translation from A.VON MEHREN & J.R.GORDLEY, supra note 87, at 566.

428. See § 852 BGB, id.

429. See PALANDT-THOMAS, supra note 195, at § 852 Anm.3


431. § 195 BGB; see E.J.COHEN, supra note 426, at 90.
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432. See N.HORN, H.KÖTZ & H.G.LESER, supra note 77, at 131.

433. See id., at 131.

434. § 13 I ProdHaftG.

435. See De Leyssac, supra note 94, at 61.

436. See H.U.STUCKI & P.R.ALTENBURGER, supra note 88,-
France- at 22. However, courts increasingly tend to ease
this burden for the claimant. Thus they held that the 'bréf
delai' has to be of such length, to allow a diligent buyer
to commence his action in the particular case; see D.TEBBENS, supra note 35, at 95.

437. Art 2262 C.Civ.: Toutes les actions, tant réelles que
personnelles, sont précrites par trente ans, sans que celui
qui allège cette prescription soit obligé d'en rapporter un
titre, ou qu'on puisse lui opposer l'exception déduite de la
mauvais foi.
"All actions, real as well as personal, are prescribed by
thirty years, without the one who alleges such prescription
being obligated to show a right thereto or an inferred ob-
jection of bad faith being able to be raised against him";
translation from J.H. CRABB, THE FRENCH CIVIL CODE 406

438. See id., at 24.

439. See D.TEBBENS, supra note 35, at 95.

440. Id.; In case a felony has been committed it is 10
years, for a misdemeanor 3 years and for minor offenses only
1 year.

441. See W.PAGE KEETON et.al., PROSSER & KEETON LAW OF
TORTS, 239 (5th. ed. 1984).

442. See Engberg v. Ford Motor Corp. (S.D. 1973), 205 N.W.
2d 104; overruled on other grounds in Smith v.Smith 278 N.W.
2d 155.

443. see, e.g., Brandenburg v. Weaver Mfg. Co., 222 N.E.
2d 348 (4th Dist. 1966).

444. See Lanzrick v. Republic Steel Corp., 218 N.E. 2d 185
(OH 1966).

445. See Lane v. Redman Mobil Homes, Inc. 624 P. 2d 984,
988 (1981); where the court held that in actions based on
negligence, breach of implied warranty of fitness for a par-
ticular purpose and strict liability have as same elements
of proof: the existence of a defective product, which was in
existence at the time the object left the control of the producer and a causation link between defect and damages.

446. See Fuller v. Sears, Roebuck & Co., 186 Cal Rptr 26 (1982). It should be noted that 'res ipsa loquitur' does not require an inference of defendant's negligent, but only allow to make that conclusion; see Jenkins v. Whittaker Corp. 785 F. 2d 720 (9th Cir. 1986), applying Hawaii law.


449. Restatement, Torts 2d § 328D, Comment (f).


453. See Jagmin v. Simonds Abrasive Co., 211 N.W. 2d 810 (Wis. 1983). Here, a kind of 'res ipsa loquitur' inference was used to establish the defectiveness of a product. In this case the plaintiff was able to show that he was using the product in a proper way and that there were no other causes for the defect since the product left the manufacturer's control.


455. See, e.g., Jenkins v. Whittaker Corp., 785 F. 2d 720 (9th Dist. 1986).


457. See, Brothers v. General Motors Corp., 658 P. 2d 1108, 1110 (Mont. 1983); where in a car accident the existence of a number of various effects precludes the inference of a defect based on 'res ipsa loquitur'.


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460. See, id., at 236. Another case where the court shifted the burden of proof is Sindell v. Abbott Laboratories, 607 P. 2d 924, 935 (Cal. 1980). Here the defendant manufacturer had to prove that they did not manufactured the drug which injured the plaintiff; by establishing the so-called 'market share liability' the court held that, since the defendant's market share was "... a substantial percentage", "... the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished." See, id., at 937.

461. See J.B.MCDONNELL & E.J.COLEMAN, supra note 378, at chap. 1, ¶ 1.03 [3].

462. Id.


465. However, this view is not generally accepted in all jurisdictions; see id. n.44.


468. See Rosener & Jahn, Germany, supra note 94, at 75.

469. See H.U.STUCKI & P.R. ALTENBURGER, supra note 88, Germany, at 27.

470. The difficulties arise from the fact that the manufacturer has to be at fault where the plaintiff, the consumer, has no control. Usually the plaintiff has not the means to show and also proof acts which happened in the factory of the manufacturer. German Law does not know the extensive rules of discovery as they exist in the US law.

471. See PALANDT-THOMAS, supra note 195, at § 823 Anm. 16) D) ff).

472. See H.U.STUCKI & P.R. ALTENBURGER, supra note 88, at 27.

473. See 51 BGHZ 91; "Hühnerpestfall"(Fowlpest-case); in this case the a veterinarian was administering an insufficiently immunized vaccine to the chickens of the plaintiff, a poultry farmer. As a result fowlpest occurred which caused about 100,000 DM of damages.

475. See D. TEBBENS, supra note 35, at 77.

476. See H.U. STUCKI & P.R. ALTENBURGER, supra note 88,-Germany-, at 28.

477. Id., at 13.

478. See PALANDT-HEINRICHS, supra note 195, at Vorbem v § 249 Anm. 5) c).

479. See BGHZ 3, 268. However, in case where not a single item which is built according to the specifications of the buyer, but one which belongs to a certain kind, thus an industrial product is object of the sale, the seller has to prove that there was not a defect when it left his control. See, 26 BGHZ 224; see also PALANDT-PUTZO, supra note 195, at § 459 Anm. 6).

480. See amtl. Begründung to § 1 ProdHaftG.

481. See De Leyssac, supra note 94, at 57.

482. See Orban, supra note 87, at 348.

483. See Ecolivet-Herzog, supra note 23, 7.

484. See De Leyssac, supra note 94, at 59-60.


486. Id.


488. See Albanese & Del Duca, supra note 47, at 199,200.

489. Id., at 348.


491. See Am Law Prod Liab 3d, § 60:1.

492. E.g. medical expenses, loss of earnings, costs of repairs, future pain and discomfort, see for a survey Am Law Prod Liab, § 60:3.


497. See Hendrix v. Raybestos-Manhattan, Inc. 776 F. 2d 1492 (11 Cir.1985).


501. See Howell v. Gold, Inc., 800 F. 2d 482 (5th Cir.1986). This kind of damages are also provided by statutes of some jurisdictions, e.g. Florida Statute § 768-80.

502. See, e.g., Coca-Cola Bottling Co. v. Parker, 451 So. 2d 786 (Ala. 1984); the courts will reduce the amount if the awarded sum show a clear abuse or passionate exercise.


504. e.g. Berg v. General Motors Corp., 555 P. 2d 818,822 (Wash. 1976). In some, however only a few states, the recovery for 'economic loss' under a 'strict liability' action was allowed; e.g. Cova v. Harley Davidson Motor Company, 182 N.W. 2d 800 (Mich. 1970), see also for an overview Mid-Continent Aircraft Corp. v. Curry County Spraying Service, Inc. 572 S.W. 2d 308, 310 (Tex.1978)[but in this case the court held that there was no need to allow recovery for economic loss under strict liability rules, especially, where the contractual remedies allow the recovery of that loss]. For a general overview, see Bieman, Overview of State Strict Products Liability Laws, 10 J. Prod. Liab. 111 (1987).

505. Purely economic means where no personal injury or property damages exist. See also Schwartz, Economic Loss in American Tort Law, 23 San Diego L.Rev. 37, 75 (1986).
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506. See Am Prod Liab, § 60:4.


508. See Am Law Prod Liab 3d § 60:17, § 60:9; Note that hereby not only 'asbestos' cases, e.g., Eagle-Pichters Industries, Inc.v. Cox (1985, Fla. App. D 3) 481 So. 2d 517, are affected, see McAdams v. Eli Lilly & Co., 638 F.Supp 1173 (N.D.Ill. 1986).

509. See generally Am Law Prod Liab, § 60:9.

510. Supra note 4.


512. See 1 W.FREEDMAN, supra note 15, at § 1.05.

513. e.g. Stambaugh v. International Harvester, (Ill.1984) where the trial court reduced a jury award of $15,650,000 to $8,150,000. See also Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983), the appellate court upheld a jury verdict of $2,000,000 compensatory damages and $3,000,000 in punitive damages; see generally 1 W.FREEDMAN, supra note 15, at § 1.06.

514. See BLACK'S LAW DICTIONARY 238 (5th ed. 1979).


516. Id. n.4 for an overview of those states which have abolished this rules by statutes.

517. see, e.g., Morrison, One Member's Reflections on the American Bar Association Tort Commission, 14 J.Legis. 167, 175.


519. Especially, because in case the paid medical bills would be deducted from the compensation, the insurance carrier might bring a claim against the tortfeasor to recover these costs.

520. In addition it can be argued, that the tortfeasor is not supposed to become punished or rewarded, but this would be the result of the application of the collateral source rule; see Vagley, Nuter & Beck, Working toward a Fairer Civil Justice System 11 (1987).
521. E.g., Alaska, Arizona and Rhode Island concerning medical malpractice; Florida with regard to car accidents; and New York, Massachusetts and Oregon have basically abolished this rule, see NCSL State Legislative Report In Resolving the Liability Insurance Crisis: State Legislative Activities in 1986.

522. See Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L.Rev. 1257 (1976). See also Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U.Chi.L.Rev. 1, 58 (1982). The award of punitive damages require that the plaintiff is entitled to the award of compensatory damages, but it is not necessary that such damages are actual granted to him; see Am Law Prod Liab, § 60:37.

523. Restatement (Second) of Torts 2d, § 908 (2) (1965).

524. See 29 ALR 3d 988.

525. See Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757; the jury awarded punitive damages in the amount of $125 million, however this sum was later reduced by the court to $3.5 million. Also, e.g. Ford Motor Co. v. Stubblefield, 319 S.E. 2d 470 (GA. 1984), $8 million in a case in which the fuel tank of a car (Ford Mustang) caused the accident; for further references see Owen, Foreword: The Use and the Control of Punitive Damages, 11 Wm.Mitchell L.Rev. 309-10 (1985).


528. See Gilmartin, Status and Trends in Products Liability Laws: Punitive Damages, 14 J.Legis. 249, 256-60 (1987); as means used by the states to limit 'punitive damages', especially for "excessive Verdicts", are the enactment of statutory caps or the proposal that only judges should determine the amount and not the jury; see also Fulton, Punitive Damages in Product Liability Cases, 15 Forum 117 (1979).

529. E.g., New Hampshire has abolished punitive damages in products liability cases by statute (N.H. Revised Statutes § 507:16) and in Louisiana, due to the lack of special provision allowing punitive damages, they are not permissible in Products Liability cases; see, e.g., Philippe v. Browning Arms Co., 375 So. 2d 151 (Ca.App. 1979), aff'd, 375 So.2d 310.

531. See J.HENDERSON & A.TWERSKI, supra note 80, at 46.

532. See ABA Tort Commission, 14 J.Legis. 167, 174 (1987). The Commission recommended the abolishment of joint and several liability in case of 'substantial disproportionate shares of liability' between the various tortfeasors.

533. See J.A.HENDERSON & A.D.TWERSKI, supra note 80, at 47. See also Coney v. J.L.G.Industries, Inc. 454 N.E. 2d 197, 204-206 (Ill. 1983)

534. See PALANDT-THOMAS, supra note 195, at § 823 Anm. 12).

535. § 249 BGB: "A person who is bound to make compensation shall bring about the condition that would have existed if the circumstances making him liable to compensate had not occurred. If compensation is required to be made for injury to e person or damage to a thing, the creditor may demand, instead restitution in kind, the sum of money necessary to effect such restitution." Translation from A.VON MEHREN & J.R.GORDLEY, supra note 87, at 1191.

536. See E.J.COHN, supra note 426, at 105.

537. Since it can be executed only in the case the damaged object still exists and, in addition, in such case the recovery is limited to the amount which is necessary to repair the object; see PALANDT-HEINRICHS, supra note 195, at § 249 Anm. 2)'b)aa).

538. See E.J.COHN, supra note 426, at 104.

539. Id.

540. Id.

541. See Translation of § 249 BGB in Endnote #136.

542. See D.TEBBENS, supra note 35, at 81.

543. See H.U.STUCKI & P.R. ALTENBURGER, supra note 80,-Germany-, at 30.

544. Id., at 30.

545. See D.TEBBENS, supra note 35, at 82.

547. See PALANDT-THOMAS, supra note 195, at § 844 Anm. 4).

548. § 847 I BGB: "In the case of injury to the body or liberty, the injured party, may also demand fair compensation in money for nonpecuniary damage. The claim is not transferable, and does not pass to the heirs, unless it has been acknowledged by contract or an action on it has been commenced." Translation from A.VON MEHREN & J.R.GORDLEY, supra note 87, at 565.

549. Id., at 1193.

550. This obligation includes for instance the duty of the plaintiff to notify the defendant if he anticipates an extreme degree of damages to happen.

551. See PALANDT-HEINRICHS, supra note 195, at Vorbem v § 249 Anm. 7) A).

552. See 49 BGHZ 61. The causal connection has to be a 'adequate' one, thus risks which are allocated to the general risks of life do not comply with this requirement.

553. See 10 BGHZ 108; see, also 91 BGHZ 210, 361; the deduction also must obey the purpose of the compensation. However, despite this jurisdiction, German authorities challenge these guidelines as not appropriate and not clear enough. But so far the courts follow the traditional rules.

554. According to § 67 VVG ("Vertragsversicherungsgesetz"="Insurance Contract Act"), the claims of the injured party are transferred to the insurance carrier. Thus the carrier will bring action against the tortfeasor or against his insurance company.

555. Pursuant to § 116 SGB X (Sozialgesetzbuch Teil X = "Social Welfare Act, Chapter X") the claims of the employer who received compensation for his lost wages, are transferred to his social insurance carrier.

556. E.g. severeness and degree of damages, the economic situation of claimant and defendant; also factors like the degree of impediment for the personal lifestyle, even the time the victim was separated from his family; see PALANDT-THOMAS, supra note 195, at § 847 Anm. 4) a).

557. Under the current exchange rate this about $ 300,000.

558. Approximately $ 60,000 and $ 85,000. See N.HORN,H.KÖTZ & H.G.LESER, supra note 77, at 155; although their numbers are not up-to-date they show the basic policy of the German courts with regard to the compensation for injuries.
559. See § 8 ProdHaftG.

560. See H.U. STUCKI & P.R. ALTENBURGER, supra note 88,-France-, at 5.

561. See D. TEBBENS, supra note 35, at 84, 96. Note that this include even unforeseeable economic loss of commercial purchasers.


563. Id.

564. See D. TEBBENS, supra note 35, at 84, 96. Note that this includes even unforeseeable economic loss of commercial purchaser.

565. E.g., where someone is unable, because of his injuries to obtain a better job, even he has the necessary qualification.

566. See De Leyssac, supra note 94, at 65.


568. Id., at 38. In cases where it is difficult to establish a claim the rate may be higher, and in an easy case it might be lower.

569. For instance in cases where the loss was in the range between $ 500,000 to $ 1,000,000, the rate of recovery was only about 67%. In contrast hereto, in cases where the losses were small or no loss at all, the rate of recovery was the highest; see Dodd, A Proposal for Making Product Liability Fair, Efficient and Predictable, 14 J.Legis. 133, 138 (1987); the author used a study of the 'Insurance Service Office: A Technical Analysis of Survey Results 1977, 11, which showed that in actions where the losses were below $ 100,000 the rate of recovery by the plaintiff was even higher than 100 %.

570. See 1 W. FREEDMAN, supra note 15, at § 1.05.

571. The Federal Tort Claims Act (if the US are a defendant) and some states, e.g. California have limiting provisions; see J.S. KAKALIK & N.M. PACE, supra note 512, at 38.


573. This is the result of studies in court districts in San Francisco and Chicago; see M.A. PETERSON, Civil Juries in

574. 'Deep-pocket' describes defendants who have rich financial sources to make compensatory payments, like companies and factories.

575. See, supra note 574, at vii.

576. Id., at vii. With regard to the difference of the awards granted by juries in rural and in urban areas, the study showed that the average award did not differ very much. Only the extraordinary high awards were more likely to obtain in urban places, see id., at xii.

577. Such means are, for example, depositions (FED.R.CIV.P. 30, 31 & 28(a), interrogatories (FED.R.CIV.P. 33 & 34), requests for admission (FED.R.CIV.P. 26 (b) and production of documents or other tangible things (FED. R. CIV. P. 34).


580. See Societe Nationale Industrielle Aerospitale v. U.S. District Court for the District of Iowa, 782 F.2d 120 (8th Cir. 1986). Here the US court decided that the Convention does generally not prevail against US pretrial discovery rules, but that each case has to be decided on the basis of 'comity'.

581. §§ 114-127 GKG ("Gerichtskostengesetz" = "Statute on Court Costs").

582. It must be noticed that in Germany the fees of witnesses and experts are regulated by the law. Thus, according to this Act (ZSEG ("Zeugen- & Sachverständigenentschädigungsgesetz" = Witnesses and Experts Fees Act), the regular compensation (They obtain compensation not fees!) is about $ 25-35 per hour.

583. See N.HORN, H.KÖTZ & H.G.LESER, supra note 77, at 49, 50.

584. District Court. With regard to the organization of the German courts see H.J.LIEBESNEY, FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS 296-298 (1981). The description as a local court does not mean that it has to be a real small court; some German 'Amtsgerichte' have hundreds of judges.

585. "Superior Court"

587. See Rosener & Jahn, supra note 94, at 82. In such case the potential plaintiff or defendant goes to an attorney of his choice and the lawyer will submit a petition for legal aid with the claim. Then the court decides the petition and grants the aid if two conditions are fulfilled: That the allegation in the claim -assumed they are true- establish a prima-facie case, and the financial assets of the petitioner (savings, wages and all property) does not exceed a certain limit.

588. Id., at 81,82.

589. See H.J. LIEBESNEY, supra note 583, at 297.

590. Id., at 65.

591. See H.U. STUCKI & P.R. ALTENBURGER, supra note 88, France- at 33.

592. See H.J. LIEBESNEY, supra note 583, at 309.

593. See L. BRILMAYER, AN INTRODUCTION IN THE AMERICAN FEDERAL SYSTEM 19 (1986).

594. But Federal Courts have only limited jurisdiction, as it is explicitly conferred by federal statutes; see 28 U.S.C. § 1251 et seq.

595. See Kennelly, supra note 12, at 469. To bring action as a foreigner not even residency is required, see Kloeckner Reederei und Kohlenhandlung v. A/S Hakedal, 210 F.2d 754, 756.

596. According to studies of the RAND institute, see J.S. KAKALIK & N.M. PACE, supra note 425, at 13, only 5% of the approximately 911,000 tort filings (in 1985) were brought in Federal Courts. However, in transnational claims, it is more likely to bring action in Federal Courts.


601. See Lilly, supra note 506, at 85, 89. Those statutes are constitutionally permissible if they comply with Inter-
national Shoe's standard of minimal contact and, in addition, contain provisions for notice of the absent defendant.


603. See, e.g., § 1.03 of the Uniform Interstate and International Procedure Act; § 1.03, 13 U.L.A. 461 (1979).

604. See § 4 (e) Fedr. R.Civil Procedure.

605. See 326 U.S. 310 (1945).

606. See Lilly, Jurisdiction over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 95, 116 (1983). However this case involved two US parties, though from different states, the standard found in here is also applicable to foreigners.


613. Id., at 279.

614. Id.


616. Id.

617. See Wheeler, supra note 515, at 23.


619. See 466 U.S. 408.
620. *Id.*


622. *Id.*, at 94.

623. *Id.* Here, the Japanese company involved in the action had not this necessary contacts.

624. The majority of the judges sustained Justice O'Connor, but on different grounds. Most of them indicated that in general they still adhered the "stream of commerce" test a major requirement to impose jurisdiction over a foreign defendant.


627. *See* Restatement (Second) Conflicts of Law, § 52 Comment B.§ 52: "Foreign Corporation - Other Relationships. A state has the power to exercise judicial jurisdiction over a foreign corporation, not only in circumstances stated in §§ 43-51, but also in other situations where the foreign corporation has such relationship to the state that it is reasonable for the state to exercise jurisdiction."


630. *Id.*

631. This kind of expansion of jurisdiction is especially of importance in antitrust suits since the United States exercise in this kind of cases a far reaching jurisdiction; it is enough that the actions have an effect on the US economical relations, *see* Swan, International Antitrust: The Reach and the Efficacy of United States Laws, 63 Or.L.Rev. 177, 188 (1984).

632. *See* United States v. Scophony Corp., 333 U.S. at 814; This was an antitrust-case where the defendant violated the Clayton-Act.


(plus other corporate rights) could not be seized by the forum state.

635. Since the jurisdiction is not over the property, the thing itself [ = in rem jurisdiction ], but over the rights of individuals in the thing [ = quasi in rem ], see W.M. RICHMAN & W.L. REYNOLDS, Understanding Conflicts of Law, 2 (1984).

636. See Shaffner v. Heitner, supra note 635.

637. See V.P. NANDA & D.K. PANSIUS, supra note 629, at § 1.03 [4].

638. Id.


641. See V.P. NANDA & D.K. PANSIUS, supra note 528, § 4.01 (1986).


644. Id.

645. See Piper Aircraft Co. v. Reyno, 630 F.2d. 149, 164 (3d Cir. 1980).

646. See V.P. NANDA & D.K. PANSIUS, supra note 629, at § 4.03[3][a]. According to the court the less favorable laws in the alternate forum can never be a barr since this is usually the case; see Piper Aircraft Co. v. Reyno, 454 U.S. 235 at 250. But see, supra note 639.

647. See Kennelly, supra note 12, at 458.

648. See V.P. NANDA & D.K. PANSIUS, supra note 629, at § 4.03 [3] [b].

649. Id., at 737.

651. See 1 FREEDMAN, supra note 15, at § 8.02, § 8.03. There he gives a detailed survey of the jurisdiction of US courts with regard to that subject. See also In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in December 1984, 634 F. Supp. 842 (S.D. N.Y. 1986), aff'd as modified, 809 F.2d 195 (2d Cir. 1987); here the judge granted Union Carbide's motion to dismiss on forum non conveniens grounds.

652. Id.

653. See Piper, supra note 646, at 256.

654. Id.


656. However in §§ 24-26 ZPO actions for 'in rem' are possible ("dingliche Gerichtsstände"), but they have in comparison to the Common law jurisdiction only a limited effect concerning 'res judicata' and 'collateral estoppel', since they bind only those persons who were parties in actions 'in rem'.

657. The term of residency on which this practice is based, is determined by §§ 7, 8, 9, & 11 BGB (German Code of Civil Laws). In case the individual does not have a residency and even the latest one can not be detected, yet one abroad, the place where he was living the last time, rather his domicile, will be commanding.

658. See Dryander, Jurisdiction in Civil and Commercial Matters under the German Code of Civil Process 16 Inter'l. Law. 671, 676 (1982). However here exist a particular problem with regard to the definition of the term "site/seat" ("Sitz") of a commercial entity. Usually it is the seat according to the charter of the company.

659. This is of quite importance, since foreign companies have to consider how far they want to expand their business activities in Germany without becoming subject to jurisdiction of the German courts.


661. ZÖLLER-[author], ZIVILPROZESSORDNUNG, 14th ed., at § 1 note 8 (1984).

662. See, BGH 44, 47; 63, 220; 69, 44. This is the view of the majority and is today the rule the courts do follow.
However, even if the international jurisdiction of German courts is given, it is still uncertain, whether the necessary jurisdiction of one specific German court can be established. Because the finding of international jurisdiction does not provide the jurisdiction of a certain court. Even if the international jurisdiction has been established a dismissal based on lack of subject matter and local jurisdiction can occur, see, ROSENBERG-SCHWAB, Zivilprozeßrecht 97 (1981). This is a result of the different functions of international and local jurisdiction. Especially in cases of 'forum non conveniens' dismissal in other countries, it is possible to have a local jurisdiction but not an international jurisdiction in a certain case.

663. See "Gerichtsverfassungsgesetz" of 25 May 1975, BGBl I, 1077.

664. Pursuant to § 71 The German Superior Court (Landgericht) is authorized for all civil claims in his district if not the District Court (Amtsgericht) is competent to hear the case. The District Court has the subject matter jurisdiction if the amount in dispute does not exceed 5000 DM.


666. See 2 E.J.COHN, supra note 426, at 173.

667. See B.Grossfeld, supra note 666, at 137.

668. See ZÖLLER-VOLLKOMMER, supra note 662, at § 23 Anm. I)

669. See Dryander, supra note 659, at 671.

670. Which is not unique to Germany, e.g. Swiss, Austria, Japan, Denmark and Greece have similar laws.

671. See for an overview of the critics, ZÖLLER-VOLLKOMMER, supra note 662, at § 23 Anm. 7) I) 1).

672. Id.

673. See Oberlandesgericht Frankfurt, Wertpapiermitteilungen (WM) 754 (1982).

674. See ZÖLLER-GEIMER, supra note 662, at IZPR Anm. 342. Although some authorities support the introduction of those principles into german law, see, e.g., OLG Frankfurt, Das Standesamt (StaZ) 1975, 98; LG Hbg. Wertpapiermitteilungen (WM) 78, 985.)
675. See ZÖLLER-GEIMER, supra note 662, at IZPR Anm. 344.

676. The case, which is unpublished, is reported in: Schumann, Aktuelle Fragen des Gerichtsstandes des Vermögens (§23 ZPO), 93 Zeitschrift für Zivilprozeß (ZVP) 408, 422 (1980).

677. See H.J.STEINER & D.F.VAGTS, supra note 601, at 45.


679. Id.

680. See H.J.LIEBESNEY, supra note 583, at 299.


682. See 2 W.FREEDMAN, supra note 15, at § 11.07. The intend of the Convention was to facilitate and to unify the law within Europe, in particular in the field of laws. However, so far the Convention has been signed only by nine states, only members of the EC. Thus, a real harmonization of the judicial process in Europe has not been reached, since most countries are not willing to give up parts of their sovereignty - this includes jurisdiction.

683. See Art. 13, § 4 of the Convention.

684. See Art. 6 (1) of the Convention.

685. In Veluco Conservenfabrieken BV v. Michel de Marc, cited in 2 W.FREEDMAN, supra note 15, at § 11.07, the Belgium court held that due to the lack of an agreement of the foreign defendants, the Belgium court had no jurisdiction.


687. See 2 W.FREEDMAN, supra note 15, at § 15.05.

688. Id.

689. See Dryander, supra note 659, at 673.

690. See V.P.NANDA & D.P.PANSIUS, supra note 629 at § 2.01.


692. See Bishop, Service of Process And Discovery in International Tort Litigation, 23 Tort & Ins.L.J. 70, 72 (1987).
693. Other methods permitted under these rules, are using letter rogatory, or means furnished by the law of the other country. Also service is finally available through local attorneys, and even by mail addressed and dispatched by the clerk of the court. See V.P. NANDA & D.K. PANSIUS, supra note 629, at § 2.02 [2].

694. For a list of the member states see 8 MARTINDALE HUBELL LAW DICTIONARY 2 (1987). The most West European states are members of this convention.

695. See Bishop, supra note 693, at 75; the exact process of service can be made as prescribed by the internal laws and according to any specific manner required by the applicant, unless this is incompatible with the countries laws.

696. See V.P. NANDA & D.K. PANSIUS, supra note 629, at § 2.02 [2].

697. Id.

698. See ZÖLLER-GEIMER, supra note 662., at § 166 Anm.1.

699. However, proper service is necessary to render a judgement on the merits valid, see Id.

700. For instance, §§ 181, 183, 184, 187 and 295 ZPO allow such measurements.

701. See Dryander, supra note 659, at 675.

702. Id., see also § 328 ZPO (recognition of foreign judgments).

703. See Reese, American Choice of Law, 30 Am. J.Comp.L. 135 (1966); see, also D. TEBBENS, supra note 35, at 219-277; and e.g., arguing in favor of an 'Interest Analysis', Kozyris, A Postscript to the Symposium, 46 Ohio St.L.J. 569 (1985).

704. See D. TEBBENS, supra note 35, at 220.

705. See Restatement, Conflicts of Laws (Second), §§ 189,190 (1971).


708. Rest. 2d, § 191.

709. Id.

710. See Comment d to Restatement, Conflicts of Law (Second), § 145 (1971).


717. See 1 FREEDMAN, supra note 15, § 8.04.

718. See Kozyris, supra note 704, at 569.


721. See PALANDT-HELDRICH, supra note 195, at Art. 38 EGBG Anm 3) A); see, also BGH 1981 NJW 606.

722. "Alternative Anknüp fung"; See D. TEBBENS, supra note 35, at 192 note 129. This rule allows the courts to adjudicate an action based on the law of one of the 'loci delicti', whether or not the condition of liability under the other local laws are given.

723. With regard to the higher damages which are in other nations are rewarded, e.g. in the United States. Thus it restricts the foreign claims.

725. BGH 1987 NJW 1606.

726. See PALANDT-HELDRICH, supra note 195, at § 38 EGBGB Anm. 2c) cc).

727. Id.

728. See PALANDT-HELDRICH, supra note 195, Art. 6 EGBGB Anm. 1).

729. However some German authors question if this 'ordre public' could not be used to deny an US request for pretrial discovery.

730. Art. 3 (1) "Les Lois de police et de sûreté obligent tous ceux qui habitent le territoire."

731. See TribCiv Versailles 12 March 1957, (1957) RevFrDrAer 276 (Veuve de Franceschi c, Hiller Helicopters); this case is described in D.TEBBENS, supra note 35, at 303. The case involved a French test pilot who dies while testing a Californian made helicopter.

732. Id.

733. See TriCiv Sarrguemines 30 October 1957, in JURIS-CLASSEUR, DROIT INTERNATIONALE, SOURCES EXTRA-CONTRACTUELLES DES OBLIGATIONS, facs. 553, Suppl.2, 1968, at p. 2 (No. 28s.) In this case the pollution of a transboundary river pollution was subject of the decision.

734. See D.TEBBENS, supra note 35, at 304.


736. See D.TEBBENS, supra note 35, at 304 note 52. A very frequent form of this kind of tort are car accident abroad.

737. Id.

738. See Morse, supra note 725, at 51, 54.


740. As result of the Convention, a French court which had to decide a case involving a German or US consumer against the French producer, had to apply the german or american
rules on Products Liability even non of both states is a member of the Convention.


742. See 2 W. FREEDMAN, supra note 15, at § 11.02, where he gives a list of the provisions which shows these principles.

743. Id.

744. See 2 Freedman, supra note 15, at § 10.02 note 11; there is a table of the most important provision of that convention given. See, also Reese, The Hague Convention on the Law applicable to Products Liability, 8 Int.'l. Law. 606 (1974).

745. See 2 W. FREEDMAN, supra note 15, at § 11.02.

746. See D. TEBBENS, supra note 35, at 337-338; see, also 2 W. Freedman, supra note 15, at § 11.02.

747. Id.

748. See C.G.J. MORSE, TORTS IN PRIVATE INTERNATIONAL LAW, 341, 342 (1978); see also 2 W. FREEDMAN, supra note 15, at § 11.02.


752. See 2 W. FREEDMAN, supra note 15, at § 14.03; However, most courts hold in favor of the state authority, see, e.g., Hyde v. Hyde, 562 S.W. 2d 194 (Tenn. 1978), an argument against this posture is that state courts invade the field of foreign affairs, see, e.g., Zschernig v. Miller, 304 U.S. 64, (1938). See, also Dryander, supra note 659, at 429.

753. Comity as opposed to the legal obligation "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other"; 159 U.S. at 163-64 (1895).

754. See 159 U.S. 113 (1985); "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other...."

756. See V.P. NANDA & D.K. PANSIUS, supra note 629, at § 11.02 [1].

757. See, e.g., Griffin v. Griffin, 327 U.S. 220 (1946); here the court stated that 'due process' requires that no other jurisdiction can give effect without complying with 'due process'.


762. See Sangiovanni Hernandez v. Dominicana de Aviacion, 556 F. 2d 611 (1st Cir. 1977).


765. See Reese, supra note 761, at 791.

766. Id.


770. This Act has been put into force in several states; for a table of those states see 2 Freedman, supra note § 14.10.
771. See § 2 of the Act.

772. However, as stated above, the 'full faith and credit' does not apply directly to the judgement of foreign states, but due to its general importance in the United States courts uses its standards to evaluate the foreign judgement; see, e.g., Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912).

773. See 2 W. FREEDMAN, supra note 15, at § 14.11.

774. Id.

775. §§ 328 ZPO regulates the recognition of foreign judgement, while the enforcement of the recognized judgement is covered by §§ 722, 723 ZPO.


777. See ZÖLLER-GEIMER, supra note 662, § 328 Anm. 51.


779. See BGH 22, 24; This expression has the character of a so-called "general-clause", thus it is determined by the various decisions of the German court, but not by the law itself. Also, as a "general-clause" the definition is not a fixed one, but changes with the modification of the social structure and the standard of values in the German society. Examples for the violation of the German public policy ('Ordre public') are cases where the foreign judgement was obtained through means of bribery or fraud; see Kraus, Enforcement of Foreign Money Judgments in the Federal Republic of Germany - some Aspects of Public Policy 17 Tex. Int'l J. 195, 196 (1982).

780. See Note, 22 Juristische Zeitung (JZ) 903, 906 (1983). Punitive damages are similar to fines in German Criminal Law, but have no alike counterparts in the civil law. Hence they are an extraordinary infringement of the basic principles of the German legal system. Thus they violate the 'ordre public' and 'per sé' can not be recognize This rule also allows to shorten excessive attorney's fees; at least in case where the lawyer is a member of the German bar his fees has to stay in the German range, which much lower than in the United States; see 51 BGHZ 290 (1969).

781. See V.P. NANDA & D.K. PANSIUS, supra note 629, at § 12.02 (4).
782. 15 O.J.Eur.Comm. (No. L. 299) 32 (1972); the Convention is also known as "Brussels Convention".


784. See Kraus, supra note 780, at 196 n.10.

785. Id.

786. See Bertram-Nothnagel, supra note 777, at 389.

787. The "Brussels Convention" is the European Convention on the Jurisdiction of Courts and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, see supra note 685. See also D.TEBBENS, supra note 35, at 292-297.

788. Art. 27 and 28 of the Convention.


790. See V.P.NANDA & D.K.PANSIUS, supra note 629, at § 12.05.

791. See H.J.STEINER & D.F.VAGTS, supra note 601, at 68.

792. Id.


794. See H.J.STEINER & D.F.VAGTS, supra note 601, at 73.

795. See V.P.NANDA & D.K.PANSIUS, supra note 629, at § 12.05 [1].

796. Particularity the latter kind of damages are unique to American laws and have nothing close in French civil law.

797. See H.U.STUCKI & P.R. ALTENBURGER, supra note 88,- France- at 32.

798. See 2 W.FREEDMAN, supra note 15, at § 14.11. The intend of the Convention was to facilitate and to unify the law within Europe, in particular in the field of laws. However, so far the Convention has been signed only by nine states, only members of the EC. Thus, a real harmonization of the judicial process in Europe has been not reached,
since most countries are not willing to give up parts of their sovereignty - this includes jurisdiction.

799. See V.P. NANDA & D.K. PANZIUS, supra note 629, at § 12.02.

800. See Art. 26 of the Convention.

801. See Art. 27 of the Convention.

802. See V.P. NANDA & D.K. PANZIUS, supra note 629, at § 12.03 (4). Other grounds for refusing the rejection are, e.g., where a default judgment was rendered but no proper service was made and under 'res judicata', where a state has already rendered another, contrary sentence.
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