

HAGUE CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY

I. INTRODUCTION

The Hague Conference¹ on Private International Law, an organization whose goal² is to unify private international law,³ has tried through the use of conventions to obtain universal adherence to rules of conflict of laws.⁴ The Convention on the Law Applicable to Products Liability⁵ designates which country's substantive law to use when conflicts arise regarding the choice of laws. Thus, the Convention deals with conflict of laws and does not give jurisdiction to the forum state.⁶

With the increase in international trade and travel, consumers are coming into greater contact with foreign products.⁷ This expansion in trade increases

¹Charter of the Conference of the Hague on Private International Law, *effective* July 15, 1955, [1964] 2 U.S.T. 2228, T.I.A.S. No. 5710, 220 U.N.T.S. 121. Members of the Hague Conference include Austria, Belgium, Brazil, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Germany (Federal Republic), Japan, Great Britain, Greece, Iceland, Italy, Israel, Luxembourg, Norway, the Netherlands, Portugal, Spain, United States, Sweden, Switzerland, Turkey, and Yugoslavia. The Hague Conference has become a permanent institution, meeting in plenary session every four years. At this meeting, the work of the Permanent Bureau and the various Special Commissions is presented for ratification. Saunders, *An Innovative Approach to International Products Liability: The Work of the Hague Conference on Private International Law*, 4 LAW AND POLICY IN INT'L BUS. 187, 189 n.3 (1972) [hereinafter cited as Saunders].

²Charter, *supra* note 1, art. 1; Saunders, *supra* note 1, at 190. The conference has attempted to achieve this goal by promoting universal adherence to various standard rules of conflict of laws. The conference has not attempted to unify the internal domestic law of the member nations. Therefore, the Hague Conference is unlike the International Institute for the Unification of Private International Law (UNIDROIT) which attempts to unify the substantive internal domestic law of its members.

³H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL MATERIALS* 79 (1968). Within this paper, the term private international law refers to conflict of law and choice of law rules. Private international law generally denotes the bases upon which a court will assert jurisdiction to adjudicate, the effect to be given to judgments rendered by courts of another state or nation and choice of law.

⁴Conflict of laws rules are rules of the forum state which determine which state's law will be applied in a case where it is possible to apply several different states' substantive laws. Each forum has its own conflict of laws rules. Problems arise because these laws vary from forum to forum. This convention attempts to establish a unified system of conflict of laws so that an orderly, predictable and logical choice can be made in litigation involving multiple states.

⁵Convention on the Law Applicable to Products Liability, *opened for signature*, Oct. 1, 1973, 11 INT'L LEGAL MAT'LS 1283 (1973) [hereinafter cited as Convention].

⁶Kühne, *Choice of Law in Products Liability*, 60 CAL. L. REV. 1, n.2 (1972) [hereinafter cited as Kühne]. Rules of jurisdiction determine when a forum has authority to decide a given case, while choice of law rules dictate the most appropriate substantive law to be utilized in a given situation after the court has obtained jurisdiction.

⁷*See*, WORLD ALMANAC AND BOOK OF FACTS 79 (1972). United States exports of semi-manufactured and finished manufactured goods has increased from \$20.122 billion in 1965 to \$33.432 billion in 1970. In the same period United States imports rose from \$13.835 billion to \$29.731 billion.

As an indication of world travel, a comparison of new and renewed passports in the United States shows an increase from 859,087 in 1960 to 2,219,159 in 1970. *Id.* at 288.

the risk of injury due to defective products manufactured in foreign nations. At present, the consumer can find his claim blocked by divergent laws, rules and procedures of various nations which cause uncertainty, delay and burdensome legal expense and which make recovery almost impossible. For instance, a consumer who purchases a defective product in a country in which neither the product was manufactured nor in which he resides, may be faced with the possibility that three different sets of laws, individually or in combination, may be determinative of his case.⁸

II. TRADITIONAL LEGAL APPROACHES

A. *Substantive Law of Products Liability*

Generally, there are three theories of products liability used by the member States of the Hague Convention. These theories involve looking at both contract and tort principles as the basis for causes of action. One theory, utilized by the United States, Germany, and to some extent the Netherlands, treats products liability as essentially *sui generis*, combining both tort and contract principles.⁹ A second philosophy, practiced by France and Luxembourg, treats products liability as an aspect of contract law, subsuming non-contractual liabilities under the contract action.¹⁰ A third group, including Austria, Belgium, Italy, Greece, and the United Kingdom, allows liability in both contract and tort concurrently.¹¹ Each of these concepts can be distinguished by separate standards of proof, prescription and elements of the cause of action.¹²

An example of the consumer's problem can be illustrated by the case of a French citizen who purchases in West Germany a product made in the United States and is injured after transporting it home to France. His attempt to

⁸See Cavers, *Legislative Choice of Law: Some European Examples*, 44 S. CAL. L. REV. 340 (1970); Kühne, *supra* note 6; Note, *Products Liability and Choice of Law*, 78 HARV. L. REV. 1452 (1965).

⁹Donnelly, *Principled and Non-Principled Development: A Comparison of the Shift from Fault Principle in American Products Liability Law and the Evolution of Strict Liability in Civil Law*, 17 SYRACUSE L. REV. 419 (1966); Kessler, *Products Liability*, 76 YALE L.J. 887, 911 (1967) [hereinafter cited as Kessler]; Kühne, *supra* note 6, at 2; Prosser, *Fall of the Citadel*, 50 MINN. L. REV. 791 (1960); Prosser, *Assault on the Citadel*, 69 YALE L.J. 1099 (1959-60); Saunders, *supra* note 1, at 195; Szladits, *Comparative Aspects of Products Liability*, 16 BUFFALO L. REV. 229 (1966-1967).

Although the United States is a federal state it can be said, in general, that it combines tort and contract principles and that there is also a move toward strict liability.

In these countries the approach is basically that product liability is almost a separate, distinct cause of action. It may be based on contract or tort principles or, in the United States, in some cases, on strict liability.

¹⁰Kessler, *supra* note 9, at 922; Saunders, *supra* note 1, at 194; Sommerich, *A Comparative Survey of Products Liability Law as Applied to Motor Vehicles*, 2 INT'L LAWYER 98 (1967).

If there are several types of liability in the same case and one is in contract, then the others are subsumed in the contract action making one liable only by the terms of the contract. Saunders, *supra* note 1, at 194.

¹¹See Sommerich, *supra* note 10, at 103-123, 133-141.

¹²Saunders, *supra* note 1, at 194.

enforce his rights will be governed by the laws of one of the three countries. If the law of the United States is held determinative, he will have a greater chance of recovery under the developing principles of strict liability.¹³

If French law were used, as *lex loci delicti*, the plaintiff would have a more difficult time collecting damages. The fundamental principle of French tort law is that liability is based upon fault.¹⁴ Therefore the plaintiff would have to show damage to himself and that it was caused by an act or omission of the defendant.¹⁵

But, if there were a contract, the contract would determine the liabilities of the defendant.¹⁶ French law recognizes a form of strict liability, under an implied warranty, in cases involving an injured party and the vendor from whom the injured party directly acquired the product.¹⁷ If there are a series of sellers the plaintiff can use an *action oblique* or *action directe*¹⁸ until he finds a solvent defendant. The present trend is to consider the sub-purchaser as a third party when he sues the manufacturer and therefore give to him a cause of action in tort and not to allow the *action directe* or the suit in implied warranty.¹⁹

If German law were used the plaintiff would have to show that the defendant owed him a legal duty which he breached²⁰ and would have to prove that the defendant was at fault regardless of whether the cause of action was based on contract or tort principles.²¹ Section 831 of the German civil code at one time made it difficult to prove the defendant-manufacturer liable for he was required only to show due diligence in selecting and supervising those who worked for him.²² But in 1968, in a landmark decision,²³ the German highest court pre-

¹³RESTATEMENT (SECOND) OF TORTS § 402A (1965). See also Kessler, *supra* note 9, at 875-911; Kuhne, *supra* note 6, at 3.

¹⁴C. Civ. art. 1382 (70e ed. Petits Codes Dalloz 1971); Donnelly, *supra* note 9, at 427; Szladits, *supra* note 9, at 244. The French Code provides that "[e]very act of a person which damages another makes the person by whose fault the damage occurred liable to make reparation for such damage." Sommerich, *supra* note 10, at 128 n.23.

¹⁵A third party can recover from the manufacturer if he proves the manufacturer's negligence. Szladits, *supra* note 9, at 244.

¹⁶See, *supra* note 10.

¹⁷Szladits, *supra* note 9, at 245; see generally Donnelly, *supra* note 9, at 426-40. Strict liability will many times not apply to the manufacturer because it applies only to the vendor of the product. Szladits, *supra* note 9, at 248. The French Civil Code also recognizes differences between bad faith and good faith vendors, holding the former to greater liability. *Id.* at 245-46.

¹⁸Szladits, *supra* note 9, at 248 & n.103. The *action oblique* allows creditors to take advantage of all the rights and causes of action of their debtor except those which are purely personal. *Id.* at n. 103. Bringing an *action directe*, an injured purchaser relies upon the doctrine that each successive sale implies a transfer of all rights of action relating to the thing sold. *Id.* at 248.

¹⁹*Id.* at 248.

²⁰Kessler, *supra* note 9, at 911-920; Szladits, *supra* note 9, at 235-236.

²¹Szladits, *supra* note 9, at 233-234. German law also codifies instances when injuries are compensable. *Id.* The German Civil Code recognizes three classes of torts: (1) illegal damage to the protected rights of life, body, health, liberty or property; (2) special conduct infringing upon the statutory provisions protecting others; and (3) conduct which willfully damages another *contra bonos mores*. *Id.* at 234.

²²Kessler, *supra* note 9, at 913 & n.146; R. SCHLESINGER, *COMPARATIVE LAW*, 379-380 n.5 (3d

vented reliance of the manufacturer on Section 831 through a shift of the burden of proof. If the plaintiff shows that the damage occurred while the product was in the defendant's control, then the defendant must prove that he did not cause the damage.²⁴

B. Choice of Law Rules

In addition to consideration of substantive law, the consumer-plaintiff must look to the choice of law rules of the different forums. In the above hypothetical, if the French citizen brought his action in either France or West Germany, then the choice of law rule would most likely select the law of the place where the tort took place,²⁵ the *lex loci delicti commissi*. However, several different conclusions may result depending upon the location given to the tortious act. The tort may be found to have occurred in the United States where the product was manufactured, in West Germany where the product was sold or in France where the plaintiff was injured. The location assigned to the tort determines which law will apply.

In the United States, no single choice of law rule governs all states. Several theories such as the center-of-gravity test,²⁶ governmental-interest test,²⁷ most-significant-relationship test,²⁸ principle-of-preference test,²⁹ better law test³⁰ and the law most favorable to the plaintiff,³¹ have been suggested and used to determine the applicable law.

III. THE CONVENTION ON THE LAW APPLICABLE TO PRODUCTS LIABILITY

A. Proposals and Debates

With these problems in mind, the United States proposed a convention on rules relating to products liability at a Special Commission meeting in October, 1967. This Convention, even if not widely adopted, could influence future national legislation and international conventions.³² In response to this proposal, several European countries suggested a convention on traffic safety. As a compromise, the various nations agreed to develop a convention on products

ed. 1970); Szladits, *supra* note 9, at 237.

²³Judgment of Nov. 26, 1968 51 BGHZ 91.

²⁴Mankiewicz, *Products Liability—A Judicial Breakthrough in West Germany*, 19 INT'L & COMP. L.J. (1970).

²⁵See Cavers, *supra* note 8, at 350-51; Kühne, *supra* note 6, at 9-10.

²⁶Kühne, *supra* note 6, at 13.

²⁷*Id.* at 16.

²⁸*Id.* at 20.

²⁹*Id.* at 23.

³⁰*Id.* at 25.

³¹*Id.* at 27.

³²Reese, *Products Liability and Choice of Law: The United States Proposals to the Hague Conference*, 25 VAND. L. REV. 29, 30 (1972) [hereinafter cited as Reese]; see also Bourke, *Birth of an International Convention—Hague Conference on Private International Law: Special Commission on Torts*, 9 HARV. INT'L. L.J. 277 (1968).

liability and another convention on traffic safety.³³

The United States suggested that the plaintiff be given the choice of several designated laws. Under this proposal, the plaintiff, in bringing action against the manufacturer, would be allowed to select either the law of the jurisdiction in which the product was manufactured, the law of the state where he received the product (by sale or otherwise), or the law of the jurisdiction where the injury occurred.³⁴ The plaintiff would be limited by the proviso that the defendant manufacturer could have foreseen that this product or a similar product would be taken to the state in question. The "state of manufacture" would include the state where a component part was made or the state where the final product was assembled. The plaintiff would have a choice between these states. In the situations involving sellers or repairers, the state of manufacture would be the state in which the article was sold or repaired.³⁵

The United States proposals met with minor opposition at the conference. Reporter Willis Reese cites two areas of disagreement: first, many representatives felt that a plaintiff should not be allowed to select between the laws of two states and second, several representatives favored an objective rule governing choice of laws.³⁶ Regarding the first objection, most European nations have used a classical legal system. In the classical system, the judge determines which state's law applies rather than the complaining party.³⁷ This classical approach would clearly conflict with the discretionary approach suggested in the American proposal. Regarding the second objection, several European nations have rigidly applied the choice of law rule, *lex loci delicti commissi*.³⁸ This limited rule clearly conflicted with the expanded approach of the United States' proposal.

³³Lecture by Y. Loussouran, Private International Law Session, Hague Academy of International Law, in the Hague, Netherlands, July 19, 1973.

³⁴Reese, *Draft Convention on the Law Applicable to Products Liability*, 21 AM. J. COMP. L. 149 (1973) [hereinafter cited as Draft Convention].

³⁵Reese, *supra* note 28, at 31-32.

³⁶*Id.* at 38; *see also*, Note, *International Products Liability*, 5 CORNELL INT'L L.J. 75, 85 n.33 (1972). However, a general trend in products liability law is emerging favoring injured parties. Reese, *supra* note 28, at 38; *see also* Sommerich, *supra* note 10; Szladits, *supra* note 9. The gradual acceptance of strict liability in the United States and France is an example of this trend. *See* Donnelly, *supra* note 7; Szladits, *supra* note 7, at 229-231, 244-248. Kühne states that in determining the place of wrong, when the negligent act and the place of injury are in different locations, the German courts and most writers, have applied the law most favorable to the plaintiff (*Gunstigkeitsprinzip*). Kühne, *supra* note 6, at 10. In a case involving such a conflict, the judge shall determine what law is most favorable to the plaintiff. *See* G. KEGEL, INTERNATIONALES PRIVATRECHT 268 (3d. ed. 1971). However, West German courts have declined to apply strict liability to defendants in products liability cases. Kühne, *supra* note 6, at 10.

³⁷Y. Loussouarn, *supra* note 33. In the classical system, the judge uses syllogistic logic, applying a major premise (the *rapprochement*) and the appropriate minor premise (any qualification) and deriving the appropriate law.

³⁸*Id.* *See* note 25 *supra* and accompanying text. However Professor Loussouarn feels that the European courts are moving away from rigid application of the traditional *lex loci delicti commissi* rule and towards what he refers to as "Legal Impressionism".

In the Convention on the Law Applicable to Traffic Safety,³⁹ the *lex loci delicti* was used but with specific exceptions. In the Products Liability Convention, greater acceptance was given to selection of the property law; however, the judge was channeled within certain bounds in finding the applicable law.⁴⁰

B. Provisions of the Convention

(i) Separation of tort and contract

The Convention⁴¹ applies to actions in tort brought against a manufacturer of a finished product or of a component part, a producer of a natural product and against other persons "in the commercial chain of preparation of distribution of a product."⁴² However, the Convention does not apply to contract actions.⁴³ Article 1 of the Convention excludes application of the Convention in traditional contract actions:

Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the convention shall not apply to their liability *inter se*.⁴⁴

In transfers between persons in the chain of production and purchasers, the rights of both parties shall be determined by existing conflict of law rules for contract actions.

The United States proposed the separate treatment for tort and contract actions, arguing that it was unwise to deal with both types of actions. Existing conflict of laws rules already adequately govern cases in which the injured party received the product directly from the defendant.⁴⁵ Also, a single convention would be too complex if it regulated the different obligations owed to the injured party by his immediate supplier and by the manufacturer.⁴⁶

(ii) Forum Selection Rules

The conflict of laws rules found in Articles 4-7 form the basis of the Convention. These Articles provide rules for choosing the applicable substantive law.⁴⁷ These Articles also instruct the forum to disregard the selected state's choice of law rules.⁴⁸

³⁹Convention on the Law Applicable to Traffic Safety, 8 INT'L LEGAL MAT'LS 64 (1969).

⁴⁰*Supra* note 33.

⁴¹Convention, *supra* note 5.

⁴²*Id.* art. 1.

⁴³*Id.* art. 1; Saunders, *supra* note 1, at 195. The Convention applies "irrespective of the nature of the proceedings." *Id.* art. 1. Thus, the Convention applies in administrative and criminal proceedings. Saunders, *supra* note 1, at 196.

⁴⁴Convention, *supra* note 5, art. 1.

⁴⁵Reese, *supra* note 28, at 31; *but see* Kühne *supra* note 6, n.177.

⁴⁶*Id.*

⁴⁷Saunders, *supra* note 1, at 203.

⁴⁸*See generally* R. SEFLAN, AMERICAN CONFLICTS LAW (1968); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1967).

Article 4⁴⁹ makes applicable the internal law of the state of the place of injury, if one of three other "contacts" with the case is also present in that state and if no other state has more than one contact. The three required contacts are the habitual residence⁵⁰ of the person suffering damage, the principal place of business⁵¹ of the person claimed to be liable, or the place of acquisition of the product by the person suffering damage. Article 4 thus combines the *lex loci delicti* approach and the grouping of contacts theory. The Article considers both the location of the injury and the contacts the two parties have with that state.

The following example may aid in explaining Article 4. The individual was injured in France. If the individual's habitual residence was France, or the principal place of business of the defendant was France or the product was

Articles 4, 5 and 6 were drafted to avoid the problems of the *renvoi* doctrine. *Renvoi* describes the process of one state looking back or referring to the laws of another state which in turn refer back to the laws of the first state.

If state A's laws refer it to the law of B, then the court in state A must determine if the reference is to all of state B's law. If it does relate to all of state B's laws, then state B's conflict of laws is included. *Renvoi* becomes a problem if state B's conflict of laws refers the problem back to state A's. The *renvoi* problem is where to stop "referring back" the problem from one state to the other.

This Convention resolves the problem of *renvoi* by designating which country's law is to be used. The Convention does not designate all the laws of the country (including its conflict law) rather it specifies that only the substantive law shall be considered.

⁴⁹Convention, *supra* note 5, art. 4. The text of Article 4 provides that:

The applicable law shall be the internal law of the State of the place of injury, if that State is also—

- a. the place of the habitual residence of the person directly suffering damage, or
- b. the principal place of business of the person claimed to be liable, or
- c. the place where the product was acquired by the person directly suffering damage.

⁵⁰RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, comment k at 45 (1971); Saunders, *supra* note 1, at 197 n.32. The Convention does not define the term "habitual residence". The absence of such a definition reflects the analytical difficulty in setting exact limits upon the term. The Restatement of Conflict of Laws comments upon this problem:

Residence is an ambiguous word whose meaning in a legal phrase must be determined in each case. Frequently it is used in a sense equivalent to domicile. On occasion it means more than domicile, namely, a domicile at which a person actually dwells. On the other hand, it may mean something else than domicile, namely, a place where the individual has an abode or where he has settled down to live for a period of time, but not necessarily with such an intention of making a home there as to create a domicile. *Id.*

Several reasons have been suggested for the use of the term "habitual residence". One reason was to avoid a conflict between civil law practice and common law practice. The common law considers a person's domicile, whereas the civil law frequently considers nationality. "Habitual residence" gets around this conflict. Saunders, *supra* note 1, at 197 n.32. By avoiding this conflict, judges can arrive at an interpretation designed to give an equitable solution to the case being considered.

⁵¹Note, *International Products Liability*, 5 CORNELL INT'L L.J. 75, 84 & n.32. The "principal place of business" was included for several reasons: that the state of incorporation may be selected by the corporation for convenience and may only be remotely connected with the case, that this concept is familiar to both civil law and common law countries, and this concept has been used extensively in previous treaties.

acquired in France, then French law would be the law applied notwithstanding the location of the forum so long as no other state has two contacts.

Article 5⁵² of the Convention provides that the applicable law shall be the internal law of the state of habitual residence, if that state is either the site where the product was acquired or the principal place of defendant's business. Reexamining the previous hypothetical, if the injury occurred in France to a person whose habitual residence was Germany, and France had no other connection with the case, then the applicable law would be the law of Germany, as long as the principal place of business was Germany or the product was acquired in Germany.⁵³

If neither Article 4, nor Article 5 apply, under Article 6⁵⁴ the applicable law is the law of the state of the principal place of business of the defendant unless the plaintiff chooses the law of the state of the place of injury. Giving the plaintiff a choice favors the consumer.

If a German resident was injured in his French summer cottage by a United States product purchased in Italy, neither Article 4 or 5 would apply for no one state has two or more contacts. Article 6 would therefore apply United States law, since it is the place of manufacture, unless the plaintiff chose French law as the place where the injury occurred.

(iii) Foreseeability

Article 7⁵⁵ protects the defendant from being held responsible under the

⁵²Convention, *supra* note 5, art. 5. The text of Article 5 provides that:

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also—

- a. the principal place of business of the person claimed to be liable, or
- b. the place where the product was acquired by the person directly suffering damage.

⁵³The relationship between Articles 4 and 5 potentially conflicts because the requisite two contacts are possible under *each* article in the same fact situation. For example, if a Frenchman goes to Germany and buys a car manufactured in France and has an accident in Germany, a question arises as to the appropriate choice of law. German internal law would apply under Article 4 because Germany was the place of the accident and the place where the product was acquired. French internal law would apply under Article 5 because France was the habitual residence of the plaintiff and principal place of business of the manufacturer. The convention solves this dilemma in favor of Article 5. The beginning of Article 5 reads "notwithstanding the provisions of Article 4" Article 5 applies.

⁵⁴Convention, *supra* note 5, art. 6. The text of the Convention provides that:

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

⁵⁵*Id.* art. 7:

Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

internal law of a state in which he could not reasonably have foreseen that his products would be available. The defendant has the burden of proving that he could not reasonably have foreseen his product being present in that jurisdiction. If he meets his burden, the defendant is relieved of defending in the unforeseen jurisdiction. Although Article 7 does provide this protection, it does not change the responsibility of a manufacturer or processor for injuries resulting in countries in which his products were taken on a regular basis or into which it could reasonably be foreseen that the product would be taken.

The following example may aid in explaining the impact of Article 7. Consider a German citizen, whose habitual residence was in Germany, who bought in Spain a stove made totally within the United States. The principal place of business was the United States, therefore the law of the United States (the principal place of business) would be applied, unless the plaintiff chose the law of France (the place where the injury occurred).

If the defendant could not have foreseen that the product, or products of the same type, would be available in France (the place of injury) through normal commercial channels, then Article 4 would not render the defendant liable under French law regardless of other contacts in France. Similarly, under Article 5, the internal law of Germany (the habitual residence of the plaintiff) would be inapplicable if the defendant could not have foreseen that normal commercial channels would take his products into Germany.

Since neither French nor German law could be applied due to lack of foreseeability, the court would have to look to Article 7. In this case the plaintiff would not be allowed a choice of forums because the defendant could not have foreseen that his product would be available in either Germany or France. Therefore, the internal law of the United States, the principal place of business of the defendant, would be the applicable law.

(iv) Matters Governed by Conflict of Laws Rule

Article 8⁵⁶ of the Convention lists the subjects governed by the applicable law

⁵⁶*Id.* art. 8:

The law applicable under this Convention shall determine, in particular—

1. the basis and extent of liability;
2. the grounds for exemption from liability, any limitation of liability and any division of liability;
3. the kinds of damage for which compensation may be due;
4. the form of compensation and its extent;
5. the question whether a right to damages may be assigned or inherited;
6. the persons who may claim damages in their own right;
7. the liability of a principal for the acts of his agent or of an employer for the acts of his employee;
8. the burden of proof is so far as the rules of the applicable law in respect thereof pertain to the law of the liability;
9. rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

as found under Articles 4-7. Several notable inclusions here are the assignment or inheritance of rights, the burden of proof and statute of limitations.

The drafters decided not to include any provisions concerning the assignment of rights, as to an insurance company, as was done in the Convention on the Law Applicable to Traffic Accidents.⁵⁷ Two possible alternatives were considered and rejected on this point. The possibility was first suggested that the injured party be allowed to initiate action directly against the insurer under the authority of the law governing the contract between the insurer and person liable. This was considered too restrictive. A proposal was then considered which would have given the injured party an election between the law regulating the contract of insurance or the law as promulgated by the Convention. The feeling, however, was that this was too great a burden to place on the insurer.⁵⁸ As for subrogation of the plaintiff's rights they would also be decided by the law determined to be applicable.⁵⁹

The burden of proof in Article 8 should be distinguished from the burden of proof set up in Article 7.⁶⁰ Article 7, the plaintiff has the burden of proving foreseeability.⁶¹ Under Article 8, the burden of proof, as determined by the internal law of the applicable state, is utilized to determine whether actual liability is present and, if so, the extent of such liability.

The internal law will also determine the period for statutes of limitation including when they begin. By having the forum state consider the statute of limitations of another jurisdiction, the Convention moves away from the *lex loci* ideas of procedure used by the common law courts and toward *lex causa*. But under Article 16(1) a state does not have to accept this provision.

(v) Supplemental Use of the Law of the Place of Acquisition

Article 9⁶² follows the basic policy of selecting the law most favorable to the plaintiff. Therefore, even if the applicable law chosen under Articles 4-6 is not that of the state where the product was introduced into the market, rules of the state of acquisition of the product can be considered as to conduct and safety of the product.

An example of this would be where a product was made in Japan (principle place of business) and was bought in the United States by a Frenchman (habitual residence France) and the injury occurred in France. The applicable law under Article 4 would be French law. But strict safety standards for products,

⁵⁷Convention on the Law Applicable to Traffic Accidents, *supra* note 39; Saunders, *supra* note 1, at 205.

⁵⁸Saunders, *supra* note 1, at 205.

⁵⁹See generally *id.* at 206.

⁶⁰Saunders, *supra* note 1, at 204-205.

⁶¹See pp. 185-186 *supra*.

⁶²Convention, *supra* note 5, art. 9:

The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market.

set up by the Federal government in the United States, could be considered by the forum court. The plaintiff would be aided if the safety standards set by the United States were more demanding on the defendant-manufacturer than the standards established by France.

But, Article 9 could also be applied to help the manufacturer. If a firm in the United States had goods that would not meet safety requirements of the United States, they could "dump" these products in a country that had lesser standards. If the product was bought in the developing country and, in an adjoining country, injured a person whose habitual residence was in the United States, then Article 5 would apply United States law. However, Article 7 would prevent application of the law of the place of habitual residence of the plaintiff, *i.e.*, the United States. The injury to a United States resident was arguably not foreseeable. The manufacturer sent the product to the other country to avoid the United States law. Article 4 could not be applied because there is no other contact with the state of the place of injury. Therefore, under Article 6, the plaintiff would have a choice of the law of the place of business or the law of the place of injury. In this situation he would logically choose the law of the place of business of the defendant since it has stricter manufacturing standards. Article 7 does not foreclose application of the law of the principle place of business, *i.e.*, the United States. The defendant would be subject to the internal law of a State that he tried to avoid. Article 7 is intended to protect the defendant from application of a foreign law; therefore, it provides no help when he wishes the foreign law to be applied.

Therefore, under Article 9, the court could consider the fact that, although under United States law the product was unsafe, the law of the developing country allowed the product to be purchased there. But, Article 9 would not necessarily help the manufacturer because it states only that the court is not precluded from looking at the law of the state where the product was acquired.

(vi) Additional Provisions

Articles 10-14, dealing with public policy, reciprocity and federal clauses, are standard articles in most conventions. Article 10⁶³ would prevent application of any law specified by the convention that would be shocking to the moral sense of the forum state. Article 11⁶⁴ provides the applicable law will be used even if it is the law of a state not party to the convention. The convention would operate independent of any requirement of reciprocity.

⁶³*Id.* art. 10:

The application of a law declared applicable under this Convention may be refused only where such application would be manifestly incompatible with public policy ('ordre public').

⁶⁴*Id.* art. 11:

The application of the preceding Articles shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State.

Articles 12, 13 and 14⁶⁵ are federal state clauses. Federal clauses allow countries like the United States and Canada to sign the Convention. Article 12 would treat each state as a separate country with a body of laws that could be applicable. But, under our Federal system, the United States government cannot by treaty enter an area reserved to the states. Therefore, Article 14 says that when a federal country ratifies the Convention, it can designate which of the states have chosen to be covered by it and these can be added to or withdrawn with adequate notice.

By treating each state in a federal system as a country, the convention might cause the law of a jurisdiction foreign to the United States to be applied, when such would not be the case in a unified, nonfederal country. However, under Article 13, a federal state would not be bound to apply the law of the foreign country if a nonfederal state would not be similarly obligated.

An example of this would be where the plaintiffs, whose habitual residence was New Jersey, purchased in New York a motorcycle made in Japan (principal place of business) and was injured, in Georgia, by a defect in the motorcycle. Suppose that the defendant could have foreseen that his product would be available in New York and New Jersey but not in Georgia. Without Article 13, a court in the United States would have to apply Japanese law, for neither New York nor New Jersey had two or more contacts and Georgia was not foreseeable by the defendant. But, if all the events had happened in France, French law would be applicable under the Convention. Therefore the federal state does not have to apply the Convention in such a situation.

IV. SOME PROBLEMS IN AND CRITICISMS OF THE CONVENTION

Articles 4, 5 and 6 fail to deal with the situation of multiple defendants. The Draft Convention⁶⁶ contained such a provision⁶⁷ but it was left out of the final

⁶⁵Convention, *supra* note 5, art. 12-14:

Article 12

Where a State comprises several territorial units each of which has its own rules of law in respect of products liability, each territorial unit shall be considered as a State for the purposes of selecting the applicable law under this Convention.

Article 13

A State within which different territorial units have their own rules of law in respect of products liability shall not be bound to apply this Convention where a State with a unified system of law would not be bound to apply the law of another State by virtue of Articles 4 and 5 of this Convention.

Article 14

If a Contracting State has two or more territorial units which have their own rules of law in respect of products liability, it may, at the time of signature, ratification, acceptance or approval, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial units to which the Convention applies.

⁶⁶*Supra* note 34.

convention. An illustration may demonstrate the potential problem. In this example, the injury occurred in France, to a German (habitual residence Germany), from a product acquired in Spain. If the final product was manufactured in the United States, by a company whose principal place of business was in the United States, but contained component parts made by a company whose principal place of business was in Japan, a question would arise whether the plaintiff could choose United States law and subject the Japanese defendant to that law. Or, in the same situation, if another company contributing component parts had its principal place of business in France or Germany would German or French law automatically apply? The drafters have left the courts with the problem of applying different laws to different defendants.⁶⁸ The plaintiff in our hypothetical would be able, under Article 6, to choose either the law of the place of injury or of the principal place of business of the defendant. Here, if the plaintiff chose United States and Japanese laws to apply to each defendant respectively, the court would have the difficulty of applying two laws in the same case. This could cause different liabilities for different manufacturers in the same case.

A similar problem would occur if two plaintiffs with different habitual residences for example Germany and France, sue for injuries resulting from the same product and no other contacts are in any one state. They could choose different applicable laws. Or, if the injury occurred in either Germany or France, then that nation's law would apply to one plaintiff but the other plaintiff could choose the law of the state of the principal place of business of the defendant. The defendant would face the possibility of two suits on the same facts being brought in different jurisdictions.

Lastly, the choice of forum problem has not been resolved in federal state nations. Article 13 provides an exception to application of the convention rules. If each state within the federal-state applies its own choice of forum laws, then the convention has had no effect. The plaintiff would be left where he started, choosing the forum and its law. Moreover, by letting the plaintiff choose that law, a foreign manufacturer could be brought under the most stringent laws possible. Thereby, a plaintiff might possess only his preconvention remedies.

V. CONCLUSION

By recognition of the tremendous growth in scope of problems involving defective products manufactured in foreign nations, the Convention has taken an important step towards establishing uniform and conclusive methods for choosing the law to be applied in products liability cases.

Prior to this Convention, utilization of different theories of products liability substantive law and different interpretations of the choice of law doctrines of

⁶⁸Saunders, *supra* note 1, at 202. The Draft Convention said the principal place of business of the manufacturer of the finished product would control. But if only the component parts companies were used, that would cause a law to be applicable having no nexus to the problem.

⁶⁹*Id.*

the members led to situations in which the plaintiff was left with very little recourse against any foreign manufacturer. This Convention has taken the first step toward stabilizing the international regulation of products liability law, and through a compromise between the classical European position and the United States position, has followed, to a large extent, the policy of favoring the plaintiff, giving him the opportunity for the first time to have a meaningful cause of action against foreign manufacturers.

The United States, the one member country with significant legislation on the subject, has only recently taken a strong position regarding the liability of manufacturers. Coupled with the fact that European countries have little or no legislation regarding product liability, this Convention must be viewed as only a beginning, though extremely important, step toward consumer protection. As the substantive laws of nations move toward strict liability, or at least to favoring the consumer, as has happened in the United States, then the need for conflict of law rules will diminish. A plaintiff will then be able to get similar substantive treatment regardless of the law used. Until that happens, this Convention, as a good primary step, establishes fair and ascertainable rules for choosing the applicable law.

Bryant Durham