



## **Explanatory Report to the European Convention on Products Liability in regard to Personal Injury and Death**

Strasbourg, 27.I.1977

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I . The European Convention on Products Liability in regard to Personal Injury and Death, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation (CCJ), was opened to signature by the member States of the Council of Europe on 27 January 1977.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the text of the convention, although it might be of such nature as to facilitate the understanding of the provisions contained therein.

### **Introduction**

1 . Industrial development and technological progress have increasingly involved cases of producers' liability and the growth of inter-State trade has resulted in the problem of producers' liability acquiring in certain cases, an international aspect.

2. The position in the majority of member States being characterised, on the one hand, by the absence of any specific legislation, and, on the other hand, by a tendency in judicial decisions to impose greater liability on producers, the Committee of Ministers of the Council of Europe, on the proposal of the European Committee on Legal Co-operation (CCJ), set up in 1970 a committee of experts to propose measures with a view to harmonising the substantive law of the member States in the area of producers' liability.

Canada, Finland, Japan, Spain and the United States of America were invited to send observers to the committee's meetings. The International Institute for the Unification of Private Law (Unidroit), the Hague Conference of Private International Law, the Commission of the European Communities, the International Chamber of Commerce, the European Committee of insurers, the International Organisation of the Consumers' Unions, the International Organisation of Commerce and the Union of Industries of the European Communities participated in the work as observers.

Furthermore, Cogeca (General Committee on Agricultural Co-operation of the European Economic Community), AECMA (the European Association of Aerospace Manufacturers) and the European Council of Federations of Chemical Industry (CEFIC) and the Committee of European Foundry Associations submitted written observations.

3. Between 1972 and 1975 the committee of experts held seven meetings in the course of which it produced the text of the convention.

4. At the outset, the committee of experts, on the basis of a comparative study produced by Unidroit, held an exchange of views on the legal position in the different States relating to producers' liability.

It took particular note of the following :

- a. there was an absence in all countries of special rules governing the liability of producers ;
- b. case-law solutions, in some jurisdictions, being based on the general principles of legal liability had recourse to fiction to ensure the better protection of consumers and were highly complex ;
- c. there was an almost general trend towards stricter liability of producers apparently caused by a desire to protect consumers from the effects of new techniques and marketing and sales methods;
- d. it was important to introduce special rules on the liability of producers worked out at European level, since the question of products liability could no longer be confined within national frontiers.

5. In the light of these considerations the committee discussed the specific questions involved in the tentative harmonisation of national laws, and was guided not only by the desire to ensure better protection of the public, but also by the advisability of taking producers' interests into account, particularly in respect of legal certainty. The committee stressed the need to achieve a fair balance between the various interests.

6. Two preliminary questions needed to be settled by the committee

- a. the question whether it should establish a special unitary system of producers' liability instead of attempting to unify each of the regimes existing in most States, namely the systems of contractual and extra-contractual liability, or better still deal with extra -contractual liability only and exclude from its scope contractual liability ;
- b. the question whether the notion of fault ought to remain the basis of producers' liability or whether it ought to be replaced by some other concept.

7. Concerning the question mentioned in 6.a above, it was stressed, on the one hand, that the distinction between contractual and extra-contractual liability was a relative one as it differed according to the law of each State and, on the other hand, it was a doubtful dichotomy because of the difficulty in certain States of establishing any clear and precise distinction.

8. The committee first of all excluded the possibility of harmonising each of the two systems of liability separately by reason of the virtually insuperable problems which would arise in any attempt to harmonise the rules governing contractual liability (it would in fact entail an incursion into the field of the law of contracts). The discussion was therefore limited to the following two possibilities

- a. to exclude from the field of application of the proposed instrument the whole sphere of contracts possibly by following the Hague Convention on the Law Applicable to Products Liability which in Article 1, second sub-paragraph, states : "Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the convention shall not apply to their liability *inter se*" or
- b. to establish a set of rules governing liability without reference to the existence of a contract between the person liable and the person suffering damage.

9. The committee was in favour of the solution indicated under b above, which in its opinion was the only one capable of ensuring equal protection for all consumers (whether purchasers or other users) and of generating the legal certainty demanded not only by the persons suffering damage but also by the producers. Indeed, from the point of view of legislative policy, it might be difficult to justify discriminatory treatment of the consumer who had purchased a product as distinct from other consumers.

10. Concerning the question mentioned in 6.b above (the legal basis of the system of liability) the majority of the committee agreed that the notion of "fault" whether the burden of proof lay with the person suffering damage or with the producer-no longer constituted a satisfactory basis for the system of products' liability in an era of mass-production, where technical developments, advertising and sales methods had created special risks, which the consumer could not be expected to accept.

11. In view of the changes in doctrine and practice that had already become manifest in certain States, the committee declared itself in favour of a system of strict (i.e. proof of the producer's fault or absence of fault is not required) liability, to which, however, certain limits would be established.

12. Some experts felt that the most appropriate basis for a system of strict liability on the part of producers should be the notion of "dangerous product" which system would, possibly, include a list of products considered dangerous. This solution would have the advantage of indicating clearly the reason for the existence of a system of strict liability in respect of damage caused by products, namely the "risk" inherent in them.

A contrary view, however, suggested that the notion of "dangerous product" was equivocal and unsatisfactory because of the difficulty of deciding at the outset what products were dangerous, some products being dangerous by their very nature and others being likely to become so if defective, or if incorrectly used. The most serious damage was often caused by products which were not originally thought to be dangerous. In regard to the suggested list of dangerous products to which the uniform rules would apply, the opinion was advanced that such a list would necessarily be arbitrary and incomplete.

13. Some experts thought that the basis of the system of products liability should be a defect in the product. This solution would have the advantage of indicating that the manufacturer would not be liable for all damage caused by his product but only for that resulting from a defect, which was almost always the real cause of damage.

Other experts felt that this would be too restrictive as there might be cases where a product without any defect caused damage by reason of its dangerous properties, not to mention damage caused for unknown reasons.

14. In an effort to reach a compromise, a solution was proposed which retained both concepts : "the specific dangerous qualities of the product" and "the defect" of the product. Criticism was levelled at the phrase "specific dangerous qualities of the product". Several experts pointed out the difficulty of defining the exact scope of these words, a difficulty amply illustrated, moreover, by the complex problems encountered in certain countries where an attempt had been made to arrive at a valid legal definition of "danger" as a basis for responsibility.

15. In conclusion, the committee decided to consider the notion of "defect" as the basis of liability, which is defined in Article 2, paragraph c, as the absence of safety which a person is entitled to expect.

Article 2, paragraph c, introduces, as it were, the legal concept of "defect" which can be different from the meaning usually given to the word (see paragraphs 33 to 42 hereafter).

The principle at the basis of the liability retained by the committee is as follows : the producer must pay compensation for damages resulting in death or personal injuries caused by a defect in his product. The injured person must prove the damage, the defect and the causal link between the defect and the damage, while the producer can successfully defend himself by proving in particular that the defect did not exist when the product was put into circulation or, put positively, that the defect arose after the product was put into circulation - or also that the product was not put into circulation by him. The victim's own fault may completely or partially reduce liability when all the circumstances are taken into account.

16. One expert felt that a regime of absolute liability was not acceptable in the field of producers' liability. He maintained that a reversal of the burden of proof obliging the producer to prove the absence of fault would be effective protection for the consumer in the great majority of cases. It would represent considerable progress for systems of liability based on fault and would have the advantage of encouraging producers to improve the quality-control of their products. However, he added that in cases where quality-control was carried out by machines, the producer should not be able to exonerate himself by proving that the failure of the machine was not due to any fault of his. In addition, a special solution should be sought in the case of "development risks".

17. Contrary to the opinions of this expert, it was pointed out that in its present form the system established by the committee was not one of absolute liability but a mixed system. A system which merely introduced a reversal of the burden of proof would not represent any appreciable improvement on the current situation in a number of countries and, in any event, would not meet the public's demands. Such a system would be unfavourable to consumers in that, as a result of the reversal of the burden of proof, they would find themselves disputing the internal operation of the firm in question.

18. The committee decided to limit the convention only to damage causing death or personal injuries.

It in fact considered that, owing to a lack of time, it was not possible to make a thorough study of questions relating to damage caused to goods which in some respects raised different problems (for example, it was not certain that the definition of "defect" given in paragraph c of Article 2 could be applied to material damage).

Furthermore, certain experts considered that a convention which introduced a system of strict liability could be more easily ratified by States if it was limited only to damage causing death or personal injuries.

The committee considered that the matter relating to damage caused to goods could, with useful purpose, be dealt with in a separate instrument.

19. The convention does not deal with the problem of compulsory insurance.

The committee in effect felt that it would be extremely difficult to have a uniform system of insurance, considering the variety of products, the number of producers, the different geographical situations and the varied financial characteristics of enterprises. In practice, there would be the additional difficulty of ensuring that all producers have taken out insurance when it is remembered that, in general, enterprises do not need any prior administrative authorisation to commence their activities. (it is only in the administration of such authorisation that one can effectively ensure that insurance exists, as for instance in the case of automobile insurance, where such insurance is required before registration of the vehicle.)

The committee felt that it was not necessary under the Convention to make insurance compulsory in order to make producers insure their civil liability.

## Commentary on the provisions of the Convention

### Article 1

20. This article fixes the obligations of the Contracting States. In it they undertake to make their national law conform to the provisions of the convention (see however Article 12). Each State shall be free to decide by which method this result will be achieved.

### Article 2

21. This article contains the definitions of the terms used in the convention.

22. Paragraph a defines the term "product".

The committee agreed that the convention should not cover immovables (such as buildings), liability in respect of these being governed by special rules in most States.

23. On the other hand, movables incorporated into another movable or into an immovable are included in the arrangements for liability laid down in the convention.

Some members would have preferred the convention to apply only to movables which did not lose their individuality when incorporated into immovables. This suggestion, however, was not accepted by the committee.

In fact the committee considered that the reason for the exclusion of immovables-viz. The existence, in several countries, of a liability system specific to immovables could not be invoked as, in these countries, the special rules relating to liability applied to the manufacturer of an immovable in its entirety and not to the producers of component parts.

24. The exclusion of immovables from the field of application of the convention does not prevent States from applying the system provided by the convention to this property, if they so wish.

25. There was discussion on whether waste should be considered as a "product" and, accordingly, be subject to the provisions of the convention.

The committee considered that if the producer were to use waste in some later manufacturing process or to supply it to another person for that purpose, the waste must be regarded as a product and therefore be subject to the system of liability provided for in the convention. If, however, the waste was discarded, thus becoming refuse, the convention would not apply.

26. Paragraph b defines the term "producer", that is the person who is considered as primarily liable. Paragraphs 2 and 3 of Article 3, however, indicate certain other persons who are equally liable on the same basis as the producer even though they are not real "producers" who have participated in the making of the product.

27. In formulating this definition, the committee was obliged to choose between two conflicting proposals. The first emphasised the need to guarantee to the victim maximum protection by having a fairly wide choice of persons against whom he could bring an action (manufacturers of finished products, suppliers and others including repairers and warehousemen, who constitute the commercial chain of products' production and distribution, persons mentioned in Article 3 of the Hague Convention). The other suggested that a single person should be selected, namely the real -producer", i.e. the party who has put the product into the state in which it is offered to the public.

28. Finally the committee decided that the real "producer" should be the person to be liable under the convention. It felt that it was in fact undesirable and economically wasteful as a matter of legislative policy to impose strict liability on a large number of persons, some of whom play a secondary part in the production process. The application of the convention to these persons would, moreover, have the disadvantage of inappropriately interfering in contractual relations between these persons and the buyer.

29. Nevertheless, Article 3 extends liability to certain other persons who are to be considered as having either the same liability as producers (importers and any person who has presented a product as his product by causing his name, trademark or other distinguishing feature to appear on the product) or subsidiary obligation (suppliers of a product). The committee wished, in fact, to tighten the system of liability so that no loophole would remain due to the fact :

a. that the producer was a foreigner and did not have a place of business in the country of the victim,

b. that the name that appears on the product is not that of the real manufacturer, who often has insufficient financial standing to offer an adequate guarantee to the victim, but is the name of a large store ;

c. that the product is "anonymous", i.e. it does not indicate any name of either the manufacturer or the distributor.

30. The committee agreed that the term "producer" includes the person who merely assembles the parts manufactured by other producers and the person who puts into circulation the produce of hunting, fishing and the gathering of fruit and vegetables.

31. Although the committee was aware of the problem, it did not consider it to be desirable to deal in the convention with the problems created by bankrupt producers.

32. It is worth noting that paragraph 4 of Article 3 supplements the term "producer" by establishing the liability of the producer of the component part and when a defect in this part caused the damage (see paragraphs 50 and 51 below).

33. Paragraph c defines the term "defect", a concept which is at the heart of the system of liability established by the convention.

34. In the early stages of its deliberations the committee attempted to define the idea of "defect" by indicating in a positive way the causes of the defect. Thus, it considered that there would be a defect when the product was unsuitable for the purpose for which it was designed. Examples of defects were also put forward in this definition (in particular, it was suggested, a defect could arise from either the design or the manufacture ; it could also arise from the storage, packing, labelling of the product or from any mis-description of the product or from a failure to give adequate notice of its qualities, its characteristics or its methods of use).

This definition was not retained, as it did not cover all cases of liability for products, in particular in the case of a product that, although it achieves the result for which it was made, nevertheless causes damage (for example, a contraceptive pill which is suitable for birth control but causes injury).

35. Accordingly the committee formulated a definition of defect taking as the basic elements "safety" and "legitimate expectancy".

This, however, does not involve the safety or the expectancy of any particular person. The use of the words "a person" and "entitled" clearly shows that a product's safety must be assessed according to an objective criterion. The words "a person- do not imply any expectation on the part of a victim or a given consumer. The word "entitled" is more general than the word "legally" (entitled) ; in other words, mere observance of statutory rules and rules imposed by authorities does not preclude liability.

The committee did not wish to use the term "reasonably" Such an expression in French ("*raisonnablement*") could diminish the consumer's rights, since it could include considering economic factors and assessing expediency which ought not to be taken into account in determining the safety of a product.

36. In determining whether a defect exists it will be necessary, consequently, to take account of all the circumstances, for example, if the product was utilised more or less correctly or used in a more or less foreseeable way (if the actions of the consumer amount to fault, but the product nevertheless is regarded as defective, the situation will be governed by Article 4).

The committee did not, of course, wish to enumerate all these circumstances, but it did expressly indicate one, namely the presentation of the product, so that in all the States the notion of "defect" would cover incorrect or incomplete directions for use or warnings. As it is, the legislation or judicial decisions of some States consider that only "intrinsic" defects are real defects and hold that incomplete or incorrect directions or warnings do not amount to "intrinsic" defects.

The expression "presentation of the product" ought to be interpreted as including not only warnings or directions which are incorrect or incomplete, but also the absence of directions for use or warnings. The marketing of the product is also included in the expression "presentation of the product".

37. The question was posed as to whether it would not be expedient to stipulate the time at which the safety of a product must be determined. It was suggested that the safe nature of the product must be judged at the time the product was put into circulation and not at the time when the damage occurred.

The committee was against including any stipulation of this kind in paragraph c since it would implicitly admit as an exception "development risks". Moreover, the definition of "defect" in paragraph c gave the judge a sufficient margin of appreciation to enable him to take the time factor into account.

38. As the convention provides for a system of "strict" liability and in so far as it does not expressly stipulate that the producer may be discharged of his liability if he proves that damage is the result of a "development risk" such risks are not to be regarded as an exception and are therefore covered by the convention.

This concerns damage produced by a cause that could not be foreseen or avoided given the state of scientific knowledge at the time when the product was put into circulation. In other words, the defect existed when the product was put into circulation but was not and could not be known to the producer. The defect could be revealed only as the result of a subsequent scientific discovery.

39. Some experts maintained that "development risks" should be a ground for exclusion of liability in the case of technically advanced products. Any stipulation to the contrary might discourage scientific research and the marketing of new products.

40. Against this opinion it was argued that such an exception would make the convention nugatory since it would reintroduce into the system of liability established by the convention the possibility for the producer to prove the absence of any fault on his part. Exclusion of liability in cases of "development risk" would also invite the use of the consumer as a "guinea-pig".

41. In conclusion the committee considered that the problem was one of social policy, the main question being whether such risks should be borne by the consumer or the producer and/or, in whole or in part, by the community.

The committee considered that, as insurance made it possible to spread risk over a large number of products, producers' liability, even for development risks, should not be a serious obstacle to planning and putting into circulation new and useful products.

The committee therefore decided that development risk should not constitute an exception to producers' liability.

42. On the other hand the committee agreed that a distinction should be made between -development- risks" and other situations in which the "time factor" played a part and which were covered by the definition of a "defect".

This is a case of -subsequent defects", that is to say defects which were not considered as such. when the product was put into circulation but became "defects" in the meaning of the definition, as the result of new technological discoveries. In other words, the product is manufactured in accordance with the rules in force at the time when it is put into circulation but can no longer be regarded as complying with the rules governing safety following new scientific and technological development. The defect may then be revealed by comparison with a similar product manufactured according to the new methods,

It is, for example, obvious that if a person buys in 1977 a refrigerator manufactured in 1948 which lacks certain safety devices (such as a door that can be opened from inside) included in 1977 models, that person is not entitled to expect the same degree of safety as would be offered by a refrigerator manufactured in 1977.

43. Paragraph d defines the term "put into circulation". This definition indicates the moment when the producer becomes liable under the convention, and so separates this type of liability from that which is provided by the ordinary rules of law. For example, in certain States the producer will be liable as the "keeper" of the product until it is put into circulation and liable under the -products liability" system after it has been put into circulation.

The committee of experts agreed that the producer did not put the product into circulation within the terms of paragraph d merely by giving the product to a scientific or other institute to carry out tests. In fact, in this case, the producer has not made all the controls concerning the quality of the product.

### **Article 3**

44. This article sets out the principle of liability on which the convention is based. It is up to the injured party to establish the damage, the defect and the causal link between damage and defect, whereas the producer would be able to free himself of liability in particular by proving that the defect did not exist at the time when the product was put into circulation (see subparagraph b of paragraph 1 of Article 5).

45. One expert stated that so far as his country was concerned, it would be difficult to accept such a principle since, according to the ordinary rule under which the plaintiff had to furnish proof of his grounds for taking legal action, it was incumbent upon the plaintiff to prove that the defect existed at the time the product was put into circulation by the producer. A solution

placing such a burden of proof on the injured party would be desirable because it would not only conform to general principles of law in most countries, but would also have the effect of deterring parties from instituting ill-founded legal proceedings.

46. The committee was against such a proposal since it would be difficult, if not impossible, for an injured party who in many cases would have received the product from another consumer or who had not himself used the product to prove the existence of a defect when the product was put into circulation. The present wording of sub-paragraph b of paragraph 1, Article 5, enabled a judge to reach his own conclusions after comparing the different probabilities revealed by the circumstances of a given case or in the light of experience. If necessary this problem could be satisfactorily settled by expert investigation and report,

47. Paragraphs 2 and 3 indicate the other persons who are liable under the convention ; such persons' liability may be primary (when they are treated like the producer) or subsidiary (see paragraph 29 above), However, as far as the liability of the importer is concerned, see also Article 16.

The use of the expression in paragraph 2 "who has presented a product as his product" indicates that the basis of liability in this case is the fact that, by inducing the user to believe that he is the producer, the person who has placed his name on the product in such a way that this product appears to be his takes it upon himself to ensure the safety of the user.

A further advantage of the said expression is that it excludes from the field of application of the convention persons whose names appear on the product, either as a means of advertisement (for example a garage whose name appears on a car) or because the law so requires (in one State, for example, retailers must put their names on products), without, however, having the intention to appear as the "producer". This term also excludes the person who grants a licence.

48. In the case of imported products, the committee considered that an indication of the name of the foreign producer (who may have no establishment or assets in the importing country) was insufficient ; if the product, therefore, does not indicate the importer's identity, the supplier must indicate the name of the person from whom he obtained the product or the importer.

49. A reservation (see Reservation No 3 in the annex to the convention), however, allows States to exclude from the scope of the convention the retailer of primary agricultural products who discloses to the claimant all information in his possession, even though this information may be insufficient to identify the supplier. The expression "agricultural products" also includes, in this context, the produce of fishing and animal products.

The reason for this reservation is that, as in most cases these products come from different sources, it is difficult for the retailer to determine, sometimes after a fairly long period of time, the source of a given product which has often been mixed with other similar products from different suppliers.

50. Under paragraph 4, producers of a component part are liable when a defect has caused or contributed to the damage.

As a result the victim will have in this case a choice of action against either the producer of the component part (paragraph 4) or the producer of the finished product (Article 3, paragraph 1, combined with paragraph b of Article 2) or both at the same time (under paragraph 5 of Article 3).

51. The committee considered that there was no need for the convention to contain a provision enabling the producer of the component part to establish that he is not liable by proving that the defect resulted from the design or instructions of the producer of the product into which it was incorporated.

The reasons is that it follows from Article 3, paragraph 1, taken together with Article 2, paragraph *b*, that the producer of a component part is liable only if that component part is defective, and this is for the injured party to demonstrate and prove. The point about the question of defectiveness, according to Article 2, paragraph *c*, is whether the component part considered in itself - that is, as an autonomous product-does not provide the safety that may legitimately be expected of it.

If the component part in itself satisfies legitimate safety requirements the liability of the producer of that part cannot be invoked. This principle applies even if the finished product as a whole is defective because the component part, owing to the general design of the producer of the finished product, was unsuitable for incorporation into that finished product, and also if the component part was manufactured according to technical specifications provided by the manufacturer of the finished product and it then transpires that those specifications were erroneous. Article 3, paragraph 4, does not apply in such cases.

If on the other hand, the component part, considered as an independent product that is, without regard for its subsequent use by the manufacturer of the finished product-does not meet the safety requirements that may legitimately be expected of it, then the producer of that component part is liable, under Article 3, paragraph 1, taken together with Article 2, paragraphs *b* and *c*.

52. Paragraph 5 establishes joint liability when, by virtue of paragraph 1 of Article 3 (combined with paragraph *b* of Article 2) or paragraphs 2, 3 and 4 of this article, several persons are liable for the same damage under the convention.

53. Article 3 does not define damage, leaving it to national law to stipulate the heads of damage (for example pain and suffering etc.) which can be claimed under the convention and the measure of damages. The committee was aware that this solution might give rise to undesirable "forum shopping", but it believed that this disadvantage was acceptable in view of the fact that any attempt to harmonise national law on this subject would raise considerable difficulty which might jeopardise the success of the convention.

In this respect it was pointed out that the Committee of Ministers of the Council of Europe had adopted Resolution (75) 7 relating to compensation for physical injury or death, which contains principles concerning this subject.

Furthermore, Article 3 does not indicate those persons who are entitled to compensation. This question therefore is left to be determined by the national law of each State.

54. Under the convention the extent of liability cannot be limited.

However, taking into account the fact that in certain States where strict liability has been introduced the amount of compensation has always been the committee, in order to facilitate the ratification of the convention by the greatest possible number of States, permitted the reservation (No. 2) contained in the annex to the convention.

This reservation allows States to limit the compensation awarded to each person and the compensation awarded for a series of damage caused by identical products having the same defect subject to the condition that these limits shall not be less than the amounts set out in the reservation itself.

It should be noted that these limits apply to each producer so that if the same defective product is manufactured by two different producers, but not in the case of co-producers, each will be liable up to the maximum limit provided for under the reservation. However, if, according to Article 3, several persons are liable *in solidum* for the same product, their total liability should not exceed the maximum limits provided for under the reservation.

It should also be noted that the reservation is drafted so that States in particular may either :

a. limit liability for all products without distinction ; or for certain products only, either for each person or for a series of damage or for both

or

b. limit liability for development risks only, either for all products without distinction, or for certain products only.

55. The term "person" as used in paragraphs 2 and 5 of Article 3 includes not only natural persons but also legal persons.

#### **Article 4**

56. This article concerns the extent to which an injured person was responsible for causing the damage. The use of the terms "injured person" and "person entitled to claim compensation" was intended to make it clear that it was permissible to take into consideration not only the fault of the injured person but also, where this is relevant according to national systems of law, the fault of the person seeking compensation, e.g. following the death of the injured person.

The words "having regard to all the circumstances" were included in the text of paragraph 1 in order to enable the judge to assess the relative importance of the fault in relation to the defect shown by the product.

Taking into account the fact that certain States intend to introduce in a general manner in the law relating to extra-contractual liability the principle that compensation may only be reduced or disallowed in cases of the victim's gross negligence or intentional conduct, the committee drafted a reservation (Reservation No. 1 contained in the annex to the convention) providing that these States may derogate from the provisions of Article 4 so as to preserve their national law.

57. Paragraph 2 indicates that the compensation may also be reduced or disallowed when the fault was committed by a person for whom the injured person or the person claiming compensation is responsible under national law (for example, as the case may be according to the different laws, the legal representative, the employee, the children).

#### **Article 5**

58. This article enumerates the circumstances which exclude the producer from liability, apart from the victim's own fault which is dealt with in Article 4.

59. Sub-paragraph a of paragraph 1 is intended to enable the producer to establish that he is not liable by proving that he has not put the defective product into circulation, for example, the product was put into circulation by a person who stole it. Such a provision is fully justified since, the basis for liability being a defect in the product, it is only fair that the producer should be given the opportunity of deciding himself when a product is fit for consumption.

60. Some experts would have liked to see the phrase "or that he had made appropriate efforts to have it withdrawn" added to sub-paragraph a.

The committee was against such an exclusion which, on the one hand, would reintroduce fault into the convention's system of liability and, on the other hand, since it was phrased in general terms, would deprive the convention of part of its substance.

61. Sub-paragraph *b* of paragraph 1 enables the producer to establish that he is not liable by proving that the defect was not attributable to him. The evidence may either show that the defect did not exist at the time when the product was put into circulation ("*preuve negative*") or that after the product was put into circulation a third party created the defect ("*preuve positive*").

62. Sub-paragraph *c* excludes from the scope of the convention the case of a person who has made a product which was not produced for sale or in the course of his business.

On the other hand the case of a product given without payment but produced in the course of a business and the case of a product which is not produced in the course of a business but is produced in order to be sold are not excluded from liability under the convention.

63. Paragraph 2 deals with the case where the damage is caused partly by the defect in the product and partly by the act of a third party. In this case liability should rest entirely on the producer since he may in any event proceed to recover his loss against the third party.

64. The committee did not think that it was necessary to make special provision in the case where :

a. the intervention of a third party or employee or *force majeure* occurred before a product was put into circulation ;

b. the intervention of a third party or *force majeure* occurred after the product was put into circulation and is the sole cause of the defect ;

c. the intervention of a third party or *force majeure* although the product has a defect, is the sole cause of the damage.

In fact, the committee felt that in the case envisaged in a above, liability should rest entirely on the producer ; in the case envisaged in b above, Article 5, paragraph 1.b already provides a defence, and in the case envisaged in c above, the chain of causation between the defect and the damage is broken.

65. In the case where *force majeure* (or *cas fortuit*) as understood by the ordinary law of the different States relating to liability, in conjunction with a defect in the product contributed to the damage, the committee decided not to make any specific provision in the convention having regard to the small number of cases of liability on account of the products themselves in which the problem might arise and *to the* difficulty of finding a definition of *force majeure* acceptable to all States. Consequently, these problems will be determined by the internal law of each State.

## **Articles 6 and 7**

66. These articles deal with the time-limits within which the action may be brought.

In order to avoid forum-shopping, which would prevail in the absence of a provision in the convention, because of the existence of different limitation periods due to some States applying *lex fori* while others apply *lex causae* there was general agreement in the committee that this question should not be left to national law.

67. The committee decided on two time-limits. The first is a three year limit (see Article 6). For the better administration of justice and avoidance of abuses, proceedings for the recovery of damages are to be barred unless taken within three years of the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

The committee thought it expedient to lay down three conditions (awareness of the damage, of the defect and of the producer's identity) in order to protect the victim in all possible eventualities ; a person is often aware of the damage and the producer's identity without realising until long after the damage occurred that it was due to a defect.

68. The second time-limit (see Article 7) of ten years is intended to preserve a balance between consumers' and producers' interests.

As the producer's liability under the convention is increased it is important that the producer should not be held liable for damage resulting from a cause which manifests itself after a period of ten years. A fixed time-limit has the additional advantage of facilitating insurance and amortisation.

The question arose whether a ten-year limit is appropriate to a wide range of different products, some of which are expected to last more than ten years (e.g. machinery) and others to be consumed in a shorter period (e.g. foodstuffs),

Though aware of the complexity of the problem, the committee considered ten years an acceptable period in view of the need to fix some limit (ten years being a fair average) and the desirability of affording producers some security.

69. It should be noted that where there are several producers there may be different starting dates under Article 7, action thus becoming barred at different times.

Another point to consider is that, whereas the period provided for in Article 6 can be suspended or interrupted (being a period of limitation of action), the fixed period laid down in Article 7 cannot be.

#### **Article 8**

70. This article concerns clauses limiting or exonerating the producer's liability.

The committee was in general agreement that in relation to personal injuries, the producer ought not to have the power to limit or avoid his liability by means of a contractual clause.

71. The problems which arise because of incorrect and incomplete directions for use or warnings (or because of their absence) are dealt with in the definition given to the word "defect" (see paragraph 36 above).

#### **Article 9**

72. The convention does not apply to certain matters which are expressly set out in this article.

The fact that the rights of recourse which may be used on the basis of paragraph 5 of Article 3 (liability of producers *inter se*) and paragraph 2 of Article 5 (rights of recourse between producers and third parties having contributed to the damage) are not dealt with by the convention allows national legislators to adopt special rules on the subject if necessary. The committee in fact did not wish to adopt rules in a very complicated field where contractual relations between different producers are very important.

The committee excluded nuclear damage as it did not wish to interfere with international conventions concluded in this matter or with specific national laws adopted by States concerning civil liability for nuclear damage.

#### **Article 10**

74. Although Article 1 of the convention, in so far as it requires States to make their laws conform with the provisions of the convention, already prevents States from ratifying the convention while adopting different rules for matters dealt with by the convention (either expressly or impliedly), the committee considered that it was appropriate to repeat this principle in a separate article. Owing to the existence in other conventions (see for example Article 13 of the European Convention on Civil Liability for Damage Caused by Motor Vehicles) of provisions allowing more favourable rules for the victims, the silence of this convention in the matter might have misled States into believing that such a possibility would be open to them after ratifying this convention. The committee, taking into account the fact that the convention attempts to achieve a fair balance between the interests of consumers and those of producers, considered it appropriate to indicate clearly that States may not ratify the convention and make rules which are more favourable for victims.

#### **Article 11**

75. This provision was inserted in the convention to make it possible for States having guarantee funds or insurance systems replacing the liability of producers to be Parties to the convention.

#### **Article 12**

76. This article was adopted by the committee to make it clear that the convention merely introduces a supplementary right of action against the producer but is not intended to modify the ordinary law of tortious liability, which remains in full force. Accordingly, in the event of damage caused by a product, the injured person may take action either under the system established by the convention, or on the ground of fault or, depending on the case in question and on systems of municipal law, under the terms of the contract. Municipal law will be able to regulate the relationship between these different systems of liability as well as any incompatibility between them.

77. The article also points out that the convention does not impose any obligations on States in regard to rules concerning the duties of the seller who sells goods in the course of his business. This precision was considered necessary as, in certain States, the question was raised whether or not this law was part of the ordinary law of contractual liability.

#### **Article 16**

78. Article 16 was included in the convention to take account of the principle of free circulation of goods in certain groups of States, such as the European Communities. It is for this reason that States have been given the possibility to make the declaration provided for in this article.

However, in order to avoid any loophole which might arise from the fact that importers of products between these States will no longer be liable under Article 3 and that these products may come from a third State, the committee considered that when these States, by reason of an international agreement binding them, avail themselves of the declaration provided for in Article 16, the importer in these States of products coming from a State outside this group of States will be liable in all the States bound by the said agreement for damage caused by these products.

#### **Articles 13 to 15 and 17 to 19**

79. These articles – which contain the final provisions – have been drawn up on the basis of models approved by the Committee of Ministers of the Council of Europe for the European conventions and agreements drawn up within the framework of that organisation.

80. The convention does not contain any transitory provisions to determine whether the rules relating to liability adopted in internal law on the basis of the convention apply only to damage caused by products put into circulation after the entry into force of the convention or if they also govern damage caused by products put into circulation prior to its entry into force. Consequently this problem should be determined by national legislators.