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INTERNATIONAL PRODUCTS LIABILITY:
TOWARD A UNIFORM
CHOICE OF LAW RULE

James A. DeMent, Jr.

Due to increasing volumes of international trade\(^1\) and international travel,\(^2\) consumers around the world are more frequently buying and using products far removed from their original place of manufacture. As the purchase and use of internationally distributed merchandise rises, so also does the risk that a consumer may be injured by a hazardous product manufactured in a legal jurisdiction totally different from the one in which he resides.\(^3\) At present, however, a consumer injured in such circumstances often finds that his attempts to obtain redress for his injuries are thwarted by the existence of divergent laws, rules, and procedures in the various nations that might, in some way, be connected with his claim. This divergence often presents such formidable barriers to the consumer as uncertainty, delay, and burdensome legal expense. Therefore, with the greater incidence of products liability litigation that is apt to be attendant to the continuing expansion of international commerce and trade, it is imperative that many of the present impediments to a consumer's speedy redress of his injuries be removed as quickly as possible. One step in the removal of such impediments, which would help eliminate confusion and uncertainty in the area of international products liability litigation, would be the promulgation and adoption of an internationally accepted uniform choice of law rule.

1. Total world exports have increased steadily over the past decade. From 1960 to 1969, the last year for which comparative figures are available, total world exports more than doubled from $128.0 billion to $269.9 billion. \textit{The New York Times Almanac 1970} at 647 (1971).

2. An indication of the increasing trend in international travel may be taken from a comparison of the number of new and renewed passports issued between 1960 and 1969 by the United States Passport Office. In 1960 only 859,087 passports had been issued to Americans for travel abroad. By 1969, the same figure was 1,820,192. These statistics do not, of course, reflect additional American travel to such Western Hemisphere nations as Canada, Mexico, Bermuda, etc., nor do they indicate the number of individuals of other nations who also travel internationally. \textit{The World Almanac and Book of Facts} 222 (1971).

3. The well-known tragic effects of the West German manufactured drug, Thalidomide, for example, were experienced by families all over the world. Litigation arising out of the use of that drug has been settled in West Germany and Great Britain, but it still continues in Japan. See, e.g., \textit{N.Y. Times}, Mar. 24, 1970, at 11, col. 1; \textit{id.}, Dec. 19, 1970, at 3, col. 4; \textit{id.}, Jan. 3, 1971, at 11, col. 1; \textit{id.}, Feb. 19, 1971, at 5, col. 1.
I. THE DIFFICULTIES AND UNCERTAINTIES IN PRESENT INTERNATIONAL PRODUCTS LIABILITY LITIGATION

A. DIVERGENT SUBSTANTIVE LAWS

Initially, a consumer injured by a product which has entered the stream of international commerce is faced with many of the substantive issues which are routine to any civil litigation and which are ordinarily resolved by the law of the nation wherein the court hearing the case is located. Thus, no matter in which nation the consumer initiates a claim for the redress of his injuries, he must evaluate the possibility of the success of his cause of action in light of the merits of his claim as well as in light of the relevant rules of evidence and the appropriate allocations of burdens of proof which are adhered to by the court adjudicating his law suit.

Unlike the consumer injured by a domestically manufactured product, however, a consumer injured by a product of foreign manufacture is also confronted with a confusing morass of often contradictory statutes and precedents which may govern matters pertinent to his claim. If, for instance, a consumer purchases a defective product in a country different from either the one in which he resides or the one in which the product was manufactured, he is faced with the possibility that three different sets of laws may be, individually or in combination, determinative of the crucial issue of whether, in fact, he has a maintainable cause of action against the manufacturer. Even if such a suit is maintainable, recovery might be barred by a statute of limitations or by a statute preventing enforcement of the judgment in the foreign defendant's home jurisdiction. Other important issues involve the application of statutes.

4. Commerce may become “international” in three ways: first, a product may be exported abroad and then subsequently bought by a native or foreign traveler in the importing country; second, a product may be bought by a foreign traveler in the country where it was originally manufactured and then carried back by the traveler to his home country; or third, a product may be manufactured by a local division of a foreign corporation.

In the third instance, the international character of the manufacturing process would depend a great deal on whether the product was manufactured by a “branch” or a wholly-owned subsidiary of the foreign corporation. If the product were manufactured by a branch, it could properly be said to have been manufactured in “international commerce” due to the direct relationship of the branch to the parent organization. In the case of a wholly-owned subsidiary, however, it might be more appropriate to consider the manufacturing process as being purely local due to the separate legal entities represented by the parent corporation on the one hand and the wholly-owned subsidiary corporation on the other.

5. Some attempts have already been made to solve this particular problem on an international scale. The 1964 Hague Conference on Private International Law resolved to devote future work to the “Matter of Recognition and En-
which might limit a manufacturer's liability to a specific amount or which might prevent the manufacturer from being a defendant to the consumer's cause of action. 6

Clearly, then, where parties of different nationalities are involved, the choice as to which of several alternative laws will govern a claim for redress of injuries in a products liability case 7 may be, in itself, determinative of the success or failure of the plaintiff's cause of action. Thus, a careful plaintiff with adequate financial and legal resources is initially faced with the task of analyzing the possible outcome of his case under the substantive law of several different nations, each of which might possibly be the source of the "governing law" over his claim. 8

The dilemma which may be faced by a plaintiff in this respect is readily illustrated by the not too implausible case of a West German citizen who, while in France, purchases a defective product manufac-

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6. For instance, formerly under English common law, a party injured by a defectively manufactured product had to be in "privity of contract" with the manufacturer before he would be allowed to bring a claim against the manufacturer for the injuries he had suffered. This meant that the injured party had to prove that he had acquired the product directly from the manufacturer and that either the manufacturer had in some way warranted that the product was safe to be used for the purpose it was intended or the manufacturer had not exercised due care in the manufacture of the product. See Winterbottom v. Wright, 10 M. & W. 105, 132 Eng. Rep. 402 (Ex. 1842); Earl v. Lubbock, [1905] 1 K.B. 253.

7. The term "product liability case" is used in a general sense to refer to any litigation, whether in contract or tort, which arises from a plaintiff's attempt to recover damages for personal injuries he has sustained as a result of a defectively manufactured product. The defendant in such action may be any party, e.g., manufacturer, wholesaler, or retailer, against whom, by law, the plaintiff may assert his case.

8. The "governing law" of a products liability case is that law which is applied to, and is determinative of, the substantive issues involved in the case. For details on how one particular nation's law might be chosen as the "governing law," see text accompanying notes 28-63 infra.
tured by an American corporation and who, upon returning home to West Germany, is seriously injured by that product. When the West German citizen attempts to enforce legally his claim for redress of the damages and injuries he has sustained, the success of his efforts may well depend on the selection of one of three different laws. If, for example, West German law is held to be determinative of his claim against the manufacturer, then it is unlikely that he will be able to recover any damages at all. Under West German law, to recover damages from the manufacturer under these circumstances, the plaintiff-consumer would be required to show that the manufacturer or his employees had been negligent in the production of the defective goods. Proof of such negligence, if indeed there was any, might be difficult if not impossible to obtain.

On the other hand, were the West German consumer’s claim governed by American law, his chances of success might be much greater. Principles of strict liability have become deeply engrained in American common law, and it would not be surprising if recovery were allowed against the manufacturer, regardless of whether the manufacturer’s negligence was proved as a matter of fact.


10. RESTATEMENT (SECOND) OF TORTS § 402 A (1965) (Special Liability of Seller of Product for Physical Harm to User or Consumer):

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

See also UNIFORM COMMERCIAL CODE §§ 2-315 (Implied Warranty: Fitness for Particular Purpose), 2-318 (Third Party Beneficiaries of Warranties Express or Implied); Szladits, supra note 9; Kessler, supra note 9, at 895-911.

11. See, e.g., Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963), which held that a power tool manufacturer was absolutely responsible for personal injuries resulting from the use of his defective product.
In the middle of the two extremes presented by West German law and American law, French law might yield a result that, under the circumstances of this litigation, could easily go either way. French law does recognize a form of strict liability,12 but it is more frequently enforced against the vendor from whom the injured party directly acquired the defective product.13 If the immediate seller is insolvent or is, for some other reason, an undesirable defendant, the plaintiff may proceed directly against the manufacturer in an action recursoire.14 If, however, the plaintiff delays in bringing his suit, his recovery may be barred by a rather short statute of limitations.15 Thus, the success of the plaintiff's claim under French law might easily depend on the speed with which he brought his suit against the original manufacturer of the defective product.16

B. DIVERGENT CHOICE OF LAW RULES

Just as a careful plaintiff must analyze the different types of substantive laws which might possibly be held to govern his claim in an in-

Due to the increasing use of strict liability standards in American product liability cases, judicial preoccupation with the distinction between "contract" and "tort" actions is on the decline:

A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but it is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer. Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82 (1963). 12. Article 1382 of the French Civil Code provides:

\[\text{Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.}\]


In such cases, the victim:

may either employ the action oblique, or bring an action directe, relying upon the doctrine that each successive sale implies a transfer of all rights of action relating to the thing sold. F. LAWSON, A. ANTON, & L. BROWN, supra note 12, at 362-63. 14. F. LAWSON, A. ANTON, & L. BROWN, supra note 12, at 363.

15. Article 1648 of the French Civil Code provides that there should be a "short delay" in bringing the suit depending on "the nature of the defect or the usage of the place where the sale was made." The length of the delay is left to the discretion of the court of first instance. Szladits, supra note 9, at 247 n. 97; Kessler, supra note 9, at 923 n. 213.

16. Statute of limitations problems may be further complicated by the forum's opinion on whether such statutes are substantive or procedural to the case at hand. If the forum treats the statute of limitations as substantive, then the law which is made determinative of the merits of the case (the "governing law") becomes crucial to
international products liability case, so must he also evaluate the choice of law rules of the various forums which might adjudicate his claim. Thus, continuing the hypothetical set out above, if a West German citizen were to bring his product liability suit in West Germany or in France, a court in either nation would most likely apply the choice of law rule that the *lex loci delicti commissi* governs, i.e., that the law of the nation wherein the tort took place is controlling. Application of this single rule might not, however, lead to identical results in each country.

Both France and West Germany define the situs of a tort (the *loci delicti*) as "where the allegedly tortious conduct was carried out." Therefore, according to whatever interpretation a forum might select, the West German plaintiff's cause of action could still be governed either by the law of the United States (defendant's tortious conduct was carried out where the product was manufactured), France (defendant's tortious conduct was carried out where the defective product was sold), or West Germany (defendant's tortious act was carried out where the plaintiff was injured by the defectively manufactured product).

A similar absence of clarity may also exist by the use of several different choice of law rules within the same country, especially within the United States. In some United States jurisdictions, for instance, local state courts subscribe to the same civil law rule that *lex loci delicti commissi* governs, and they further interpret that rule to mean that this issue as well. If, however, the forum treats statutes of limitations as procedural, then the law of the forum, regardless of other choice of law considerations, is conclusive on this point. For a discussion of this topic in the federal context of United States choice of law problems, see Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

17. A plaintiff's task in an international products liability case is, therefore, twofold. In order to determine in which forum he has the greatest likelihood of success, a plaintiff must, first, determine the substantive law of the nations which might be held to govern his cause of action, e.g., West Germany, the United States, or France, and second, he must determine which choice of law rules in those nations will facilitate the selection of the law he wants to apply to his case. Thus, even after a West German plaintiff has decided that American law would probably be most beneficial to his case, he must still determine which choice of law rule in either West Germany, the United States, or France will allow the American law to be determinative.


> It is impossible for a plaintiff to recover in tort unless he has been given by some law a cause of action in tort; and this law can be given only by the law of the place where the tort was committed.
the situs of the tort is where the plaintiff actually sustains bodily injury. On the other hand, other United States jurisdictions have adopted a more recent "center of gravity" or "grouping of contacts" approach to choice of law decisions. Thus in some United States jurisdictions, under the lex loci delicti approach, the law of West Germany (place of plaintiff's injury) would govern the products liability litigation at hand, whereas in other United States jurisdictions, depending on the court's decision as to which nation had the most "contacts" with the circumstances of the present litigation, the governing law might be held to be that of either the United States (the defendant's residence and the nation in which the litigation was being conducted), France (the nation in which the defective product was purchased), or West Germany (the plaintiff's residence and the nation in which he was injured).

II. THE NEED FOR A UNIFORM CHOICE OF LAW RULE

As illustrated by the foregoing hypothetical example, it is obviously crucial that a plaintiff-consumer, wishing to maximize his chances of success in a products liability suit, know with some predictability not only the substantive law of the nation that may govern his cause of action, but that he know, as well, the status of the choice of law rule in the forum wherein his action may be brought. Predictability is,

21. Id. §§ 378.1-378.4.
22. This approach is also known as the "Babcock Approach" in reference to the New York Court of Appeals' landmark decision in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963). In Babcock, the Court held that, in an automobile accident injury case in which the accident had occurred on a Canadian highway but the injured passenger-guest and the allegedly negligent motorist were both residents of New York, the issue of the motorist's negligence was to be determined in accordance with Canadian law. The Court further held, however, that the issue of whether the passenger-guest could properly maintain a cause of action against the motorist for redress of the damages she had suffered as a result of the accident was governed by the law of New York.

Extending to torts the "center of gravity" and "grouping of contacts" theories earlier applied to contracts in the case of Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (1954), the Court said:

[T]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction. Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.

12 N.Y.2d at 484, 191 N.E.2d at 285.
23. See text accompanying notes 4-22 supra.
24. See note 17 supra.
however, scarce at present in many cases of this nature. A determination of the most advantageous law and choice of law rules to a plaintiff's case often involves the tedious and time consuming efforts of numerous lawyers, judges, and expert witnesses with the ultimate result that, in retrospect, the decisions finally reached are hardly worth the expense involved in reaching them. This is especially evident when the choice of law applicable to a particular issue may vary internally within the case itself.25 The difficulty, expense, and uncertainty of single or multiple choice of law determinations may thus effectively inhibit a consumer from bringing a meritorious claim against a delinquent manufacturer.

In light of the hardships and inequities26 which might accompany this "de facto" denial of relief to an injured consumer, a uniform, easily understood international choice of law rule would be a valuable weapon for the protection of consumers who may be far removed from their potential defendants.27 The increasing volume of international trade and the increasing opportunity for consumers to be injured by products manufactured in foreign jurisdictions would appear to make such a rule not only convenient but also essential to future litigation in the important area of manufacturers' liability for the production of defective merchandise. Additionally, the successful international adoption of such a rule would serve a twofold purpose. First, it would facilitate consumer recoveries against manufacturers; and second, it would encourage manufacturers to adopt higher standards of care in their production processes in order to avoid subsequent consumer liability. Thus, not only would the consumer benefit from fewer obstacles to successful litigation, he would also benefit from more safely manufactured merchandise.

25. See, e.g., Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961), which held that a cause of action based on breach of an alleged contract of safe carriage was governed by Massachusetts law, but that the subject of the extent of recoveries allowable under a Massachusetts wrongful death statute was governed, instead, by New York law. See also note 22 supra.

26. The present uncertainty in international products liability cases favors those who are actually in the least need of reimbursement for their injuries. The wealthy consumer, able to afford large legal expenses, is really the one most likely to recover damages from a manufacturer. The poorer consumer, on the other hand, who may be in greater need of reimbursement in order to meet his high medical expenses, is the one least likely to be able to afford either the time or money necessary for a successful recovery.

27. Great distances between a plaintiff and a defendant merely emphasize the complications that may arise when a consumer is injured by a product of foreign manufacture, but choice of law complications may arise even where very short distances are involved. The controlling factor in such circumstances is the possible interplay of the law of several different nations. Distance may merely serve to compound the problems already involved.
III. PROPOSALS FOR A UNIFORM CHOICE OF LAW RULE

A. SELECTION OF THE GOVERNING LAW IN ACCORDANCE WITH PLAINTIFF’S PREFERENCE

One logical approach to the development of a predictable, uniform, easily understood choice of law rule in international products liability cases would be simply to allow a consumer injured by a defectively manufactured product to specify which of several alternative nations’ law would govern his substantive claim against the defendant-manufacturer.28 This approach was initially considered by the Special Commission on Products Liability of the Hague Conference on Private International Law.29 The Commission, motivated by the “need to protect the victim,”30 believed that this type of choice of law rule

28. It would be to the plaintiff’s best advantage, of course, to make the term “manufacturer” as all-inclusive as possible. The more parties the definition included, e.g., manufacturers, suppliers, distributors, repairers, the greater would be the number of potential defendants against whom the consumer could proceed. See note 44 infra.


The Special Commission has held two working sessions at The Hague, meeting once from September 7-12, 1970, and most recently from March 29-April 6, 1971. Eighteen countries (Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Japan, Luxembourg, Netherlands, Norway, Sweden, Switzerland, United Arab Republic, United Kingdom, United States of America, Yugoslavia) were represented at the first working session. They were later joined by Czechoslovakia and Greece at the second working session. Professor W. L. M. Reese, Director of the Parker School of Foreign and Comparative Law, Columbia University, and the United States representative to the Special Commission, was elected Rapporteur for both working sessions. As will appear below, Professor Reese has been a valuable source of authority in the preparation of this article. See, e.g., notes 33, 43, 56, and 61 infra.

The second working session of the Special Commission on Products Liability reached a consensus on a “draft” Convention which, though untitled, may be thought of as a “Convention on Uniform Choice of Law Rules in International Products Liability Litigation.” This “draft” Convention will next be presented to, and discussed by, the Twelfth Session of the Hague Conference which will convene at The Hague, Netherlands in October, 1972. See generally REPORT OF THE UNITED STATES REPRESENTATIVE TO THE MEETING OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Mar. 29—Apr. 6, 1971) (unpublished materials of the United States Department of State on file in the offices of the CORNELL INTERNATIONAL LAW JOURNAL).

30. REPORT OF THE SPECIAL COMMISSION ON PRODUCTS LIABILITY, PREL. DOC. No. 3 at 3 (Sept. 1970) (unpublished material of the United States Department of State on file in the offices of the CORNELL INTERNATIONAL LAW JOURNAL).

See also Bourke, supra note 29, at 283:

In the area of products liability the need for a single rule as to choice of
might be a suitable alternative for solving many of the problems which confront, and often bewilder, plaintiffs in international products liability cases.

Under this possible choice of law procedure whereby a plaintiff is allowed to "choose" the nation's law that will govern his litigation, his choice would, of course, have to be reasonably limited to the circumstances surrounding his injury. This could easily be provided for by restricting his selection of governing law to the law of the nation in which: (1) the plaintiff "habitually resides;" 31 (2) the defendant has his principal place of business; 32 (3) the defective product was manu-

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31. The term habitual residence is difficult to define with any precision. As pointed out in American Law Institute, RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, § 11, Comment k, at 45 (1971):

Residence is an ambiguous word whose meaning in a legal phrase [contained within a statute or, analogously, a treaty] must be determined in each case. Frequently it is used in a sense equivalent to domicile. On occasion it means something 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 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.

In order to afford courts operating under an “International Products Liability Convention” a maximum of flexibility, hopefully to the end that that flexibility would be used to prevent injustice, the term “habitual resident” might best be defined in the third manner set out in Comment k to section 11 of the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS. Specifically, habitual residence would mean “something else than domicile, namely, a place where the individual . . . has settled down to live for a period of time . . . .” See note 46 infra.

Naturally, circumstances might still arise in which a plaintiff had several “habitual residences.” Presumptions might be created for judicial guidance in those cases (see, e.g., text accompanying note 63 infra), but basically, as in any “hard case,” a trier of fact would have to exercise his own best judgment in light of the equities involved in each individual case.

32. The concept of the “principal place of business” of a “legal person” (corporation) is basically a civil law principle which is often at odds with the common law preference for the concept of “state of incorporation or organization.” Under the common law principle, a corporation is governed by the law of the country from which it derives its existence. On the other hand, the civil law “principal place of business” doctrine (expressed as “sieg social” in French and as “Geschaftssitz” in German) considers the law governing the acts of a private law corporation to be that of the state in which that corporation has its “center.” The “center” of a corporation is generally identified with its “chief executive office.” Thus, “center” is often equated with “headquarters” or “the office where the central management and control are exercised.” See generally 2 E. Rabel, supra note 18, at 31-68. Cf. H. Steiner & D. Vagts, TRANSNATIONAL LEGAL PROBLEMS 83-87 (1968).

Though “principal place of business” may, at times, be as ambiguous a term as “habitual residence,” it is, in an international context, preferable to the common law concept of “state of incorporation.” The nation in which a corporation is organized may often be selected for its “convenience,” its tax advantages, or its other
factured; (4) the plaintiff acquired the defective product; or (5) the plaintiff was injured by the defective product. Often these categories would coincide, so that in reality the plaintiff might not have a choice of more than two or three nations' laws under which he might bring his claim.

This proposal may, however, be criticized for its "partiality" to consumers in that it allows plaintiffs an option that is denied to defendants. Still, in light of the potential economic and legal resources ordinarily available to manufacturers that distribute their products internationally, a rule which favored plaintiffs in this respect would do no more than put them in parity with their opponent. In other words, the plaintiff's advantage of selecting the determinative law would in most cases be more than compensated for by the manufacturer's superior financial and legal assets.

On the other hand, despite its simplicity, there may be several fundamental, irreconcilable problems in such an "optional" selection of law procedure. A proposal which allows a plaintiff to select in advance the law which will determine the outcome of his claim is not yet an established precedent in international law, and therefore, it is likely to be resisted by some nations having more conservative legal philosophies. Furthermore, despite the evident trend towards consumer protection in the United States and among other economically developed nations, a rule which tended to make manufacturers increasingly liable in money favorable legislation with respect to corporations. Thus, in products liability litigation, the nation under whose laws the defendant manufacturer was organized might only be remotely connected with circumstances of the case at hand. Second, the concept of principal place of business is not wholly unfamiliar in the common law world. In fact, in the United States, the exact words "principal place of business" are used in 28 U.S.C. § 1332 (c) (1970) which deals with determining the "citizenship" of a corporation for the purpose of federal diversity jurisdiction. Finally, the term "principal place of business" is advantageous because of its extensive use (and hence its large "familiarity" and "reputation" within the international community) in previous international treaties. An extensive list of such treaties, to which common and civil law countries alike are parties, appears in 2 E. Rabel, supra note 18, at 36 nn. 13, 15, and 16.

33. Professor W. L. M. Reese, the American expert at the two working sessions of the Special Commission, supra note 29, has disclosed that when the American delegation first presented to the members of the Special Commission an optional choice of law plan similar to the one outlined in the text above, the French representative remarked that such a proposal was nothing less than "immoral!" In light of similar reactions by other members of the Special Commission, the United States did not urge the adoption of this optional procedure as vigorously as it had originally planned. Unpublished Remarks of Professor W. L. M. Reese, Symposium on the Unification of Private International Law, Regional Meeting of the American Society of International Law, Cornell Law School, Ithaca, N.Y. (Mar. 13, 1971).


35. An evolving trend towards consumer protection, for instance, is reflected in the West German cases cited and reviewed in Kessler, supra note 9, at 911-24.
damages might be resisted by nations whose industries were not yet so highly developed nor so clearly capable of withstanding harsh standards of strict products liability. 36

B. SELECTION OF THE GOVERNING LAW IN ACCORDANCE WITH PLAINTIFF'S DOMICILE

An alternative to the "optional" selection procedure as a uniform choice of law rule in international products liability litigation would be to base the selection of the determinative law of a case upon a single, non-optional criterion. The best criterion might, for instance, be a requirement that the controversy be governed by the law of the nation where the injured plaintiff was domiciled. This test would allow a consumer to assert his claim against a foreign manufacturer in accordance with laws and precedents with which the consumer was presumably very familiar. This choice of law rule would also eliminate a plaintiff's need to prove such frequently tenuous facts as where the manufacturer had his principal place of business or where the defective product was actually manufactured, as, for instance, in the case of a manufacturer who owned several subsidiary plants in different countries.

As with the "optional" approach to choice of law selection, however, the primary difficulty of such a rule is that it might prove harsh on manufacturers in developing countries who exported their products to more economically developed countries. The liability of such a manufacturer to a consumer who was domiciled in the United States, for instance, might prove ruinous in a suit where high money damages were awarded. 37 A single criterion rule based on domicile might also encourage

36. In this respect, it is interesting to note that the Special Commission on Products Liability is marked by a conspicuous absence of members from Central and South America, Africa, and Asia (exclusive of Japan). The Special Commission as well as the Hague Conference is dominated by nations with highly developed internal economies. For a list of the Special Commission's members, see note 29 supra.

37. Experience with the Warsaw Convention, 49 Stat. 3000 (1938), T.S. No. 876, 137 L.N.T.S. 11, is illustrative of the disparity which might exist between what the United States considers an appropriate "maximum" for plaintiffs' recoveries in accident-injury cases and what other countries believe that appropriate maximum should be.

The Warsaw Convention, formulated in 1929, established a limit on damages for personal injury claims in commercial airline accidents. That limit is now equivalent to $8,300. Prior to 1966, American citizens, accustomed to large verdicts in accident-injury cases, were dissatisfied with this maximum limit. Therefore, under the threat that it would denounced the Convention, effective May 15, 1966, the United States finally obtained a commitment from most American and foreign air carriers of passengers to and from the United States that they would, as of May 16, 1966, accept a $75,000 maximum limit in accident-injury claims by American citizens. Many other countries, however, still adhere to the Convention's $8,500 limitation. H. Steiner &
manufacturers to be less careful in manufacturing products that they shipped to countries whose traditional choice of law rules did not facilitate the selection of a governing law that would more easily grant a recovery to the consumer involved in a products liability case.38 Realizing that they would not be held to so high a standard of care in certain foreign jurisdictions, manufacturers might export a lower quality of merchandise than they distribute at home.39

Finally, this type of choice of law rule might also be undesirable because of the many complications that are attendant to the concept of domicile.40 Since domicile is often a more rigid concept than "habitual residence," a choice of law rule based on the former criterion might lack flexibility. Many cases could arise, for instance, in which the nation where a plaintiff was held to be domiciled would be only remotely connected to the circumstances surrounding the plaintiff's injuries and his subsequent claim for redress of damages.41

C. SELECTION OF THE GOVERNING LAW IN ACCORDANCE WITH A "HIERARCHY" OF CRITERIA

A more realistic solution to the problem of selecting a uniform choice


38. This practice could easily result in harmful consumer discrimination on the part of manufacturers. By shipping more carefully manufactured merchandise to those nations whose choice of law rules facilitated plaintiff-consumers' recoveries in products liability cases, manufacturers might be forced to "dump" their less carefully manufactured, and hence potentially more dangerous, merchandise in other countries whose choice of law rules were not so conducive to plaintiff-consumers' recoveries. Consumers in the latter type of country would then be exposed to a greater likelihood of injuries from defective products with an attendant smaller chance of success in products liability litigation.

39. Such practices are already a reality. For instance, when the United States Food and Drug Administration banned the sale of products containing cyclamates in the United States, manufacturers of the artificial sweetener continued to ship thousands of cases of cyclamate-treated canned fruits to West Germany which did not regulate the sale of such products. Other large industries also frequently engage in similar practices. Sesser, Peddling Dangerous Drugs Abroad; Special Dispensation, The New Republic, Mar. 6, 1971, at 16-17.

40. Such complications often involved the interplay of three classes of domicile: (1) domicile of origin; (2) domicile of choice; and (3) domicile by operation of law. These three classes and the legal complications to which they give rise in practice are cogently discussed in Estate of Jones, 192 Iowa 78, 182 N.W. 227 (1921).

41. This is demonstrated analogously in White v. Tennant, 31 W.Va. 790, 8 S.E. 596 (1888). In that case, involving the descent and distribution of the personal estate of an intestate decedent who had died in West Virginia, the decedent was held to be a domiciliary of Pennsylvania even though he had lived all his life in West Virginia and had never even spent a night in a new "home" he acquired in Pennsylvania approximately one month before his death.
of law rule, then, might be to arrange a "hierarchy" of criteria which would govern the selection of the applicable law in international products liability cases. Under this approach, a plaintiff's choice of the applicable law to govern his claim would not be optional, but neither would it be limited to a single unvarying criterion. Instead, there would be a set of several criteria which would specify in more or less "descending" order the circumstances under which a particular choice of law rule would be applicable.

This approach is clearly illustrated in the work of the Hague Commission on Products Liability. In the draft of its proposed convention, the Special Commission proposes that, when applicable, the liability of a manufacturer in a products liability case will be governed.

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42. The English "Text Adopted by the Special Commission" [hereinafter referred to as "Proposed Convention"] is annexed to the Report of the United States Representative, supra note 29. It is also reprinted in its entirety in the Annex, infra.

43. Article 1 of the Proposed Convention provides:

This Convention shall determine the law applicable to the liability of a manufacturer or other supplier for damage resulting from a product, with the exception of cases where the victim acquired the product from that manufacturer or other supplier.

This law shall apply irrespective of the kind of proceeding that may be involved.

Thus, the Convention would not cover cases where the plaintiff bought a defective product directly from a manufacturer. Under such circumstances, it would be unlikely that the two parties would be citizens of different nations anyway, and therefore a uniform choice of law rule, at least from an international perspective, would be irrelevant.

This exclusion was also made to avoid possible complications with "privity of contract" notions as well as various tort-contract dichotomies which exist in many jurisdictions. Unpublished remarks of Professor W. L. M. Reese, supra note 33. See also note 6 supra.

44. The term "manufacturer," as used by the Special Commission, has a very broad meaning. Article 2 of the Proposed Convention provides:

In this Convention "manufacturer or other supplier" shall include:

(a) a manufacturer or other supplier of the finished product or of a component part;
(b) a person in the commercial chain of distribution of the product; and
(c) any person who gives possession of the product for value.

See note 28 supra.

45. The Proposed Convention, Article 6, defines the matters governed by the law selected under its provisions as follows:

Matters governed by the law made applicable by this Convention shall include:

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 existence and kinds of injury or damage which may have to be compensated;
4 the kinds and extent of damages;
5 the question whether a right to damages may be assigned or inherited;
6 the persons who have suffered damage and who may claim damages in their own right;
7 vicarious liability, including the liability of a principal for the acts of his agent or of a master for the acts of his servant;
initially by "the internal law of the state of the habitual residence at the time of the accident of the person directly injured by the product."\(^{46}\) This choice of law rule, though initially controlling in international products liability litigation, is made contingent upon the condition that the manufacturer of the defective product approve of the distribution of his merchandise in the country of the plaintiff's habitual residence.\(^{47}\) If, therefore, the facts show that the manufacturer did not expressly or impliedly approve of the distribution of his product in the nation where the plaintiff habitually resides,\(^{48}\) then the second

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8 the burden of proof;  
9 rule 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.  

46. The term "habitual residence" was introduced at the first working session of the Special Commision by the Dutch expert, J. C. Schultsz. It represents an attempt to eliminate the prospect that the notion of "domicile" might "rear its ugly head." \textit{REPORT OF THE SPECIAL COMMISSION ON PRODUCTS LIABILITY, supra} note 30, at 9.  

While the use of this term in an international convention may eliminate many of the problems attendant to the concept of domicile, it may well, owing to its lack of precision, introduce additional problems of its own. Professor David Cavers has noted in this respect:

"The concept of "habitual residence" as a substitute for "domicile," with its encrustation of parochial specifications, is making substantial progress abroad, especially in the Hague Conventions, but the bounds of the new concept have yet to be worked out in application."


47. Interestingly, the Convention does not specifically limit its provisions to "purchasers" only. Thus, an individual injured by a defectively manufactured product may still come within the coverage of the Convention, even though he did not directly purchase the product himself. Article 3 of the Proposed Convention (emphasis supplied) provides:

"The applicable law shall be the internal law of the State of the habitual residence at the time of the accident of the person directly injured by the product. This law, however, shall not apply if neither this product nor products of the same origin and the same type were available in that State through commercial channels with the consent, express or implied, of the person claimed to be liable."

The language of this article does not appear to require the plaintiff to buy the defective product in the country in which he habitually resides in order for the exception to apply. Thus, if a West German bought an American product in France, this choice of law rule would not become applicable unless the American manufacturer consented to the distribution of his product in West Germany, the "habitual residence . . . of the person directly injured by the product." See note 59 \textit{infra}.  

48. Circumstances could arise where a determination of a manufacturer's "implied" approval would be difficult to prove as a matter of fact. In such case, the fact finder would have to determine whether, in his best judgment, the manufacturer could have "reasonably foreseen" that his product would have been used in the country in question. See note 61 \textit{infra}.
rule in the "hierarchy" becomes operative.
In the convention being worked on by the Special Commission, this second rule would be that the controversy was governed by the law of the country wherein the plaintiff was injured, i.e., where the "accident occurred." Again, this rule would be subject to a "proviso" similar to the one in the first rule, that is, for the rule to become effective, the manufacturer must have approved the distribution of his product in the country where the product was acquired.

Finally, if the circumstances of the case do not allow the first or the second rule to be brought to bear, then the law of the nation in which the defendant manufacturer had his "principal place of business" would ultimately control the litigation. Of course, other options might be added to this hierarchy of applicable laws as, for instance, the law of the nation where the defective product was manufactured or the law of the nation where the product was acquired.

49. Article 4 of the Proposed Convention provides, in part:
   If the law designated in article 3 does not apply, the applicable law shall be the internal law of the State in which the accident occurred.
50. Article 4 of the Proposed Convention continues:
   This law, however, shall not apply if neither the product nor products of the same origin and the same type were available in that State through commercial channels with the consent, express or implied, of the person claimed to be liable.
51. Article 5 of the Proposed Convention states:
   If neither of the laws designated in articles 3 and 4 applies, the applicable law shall be the internal law of the State of the principal place of business of the manufacturer of the finished product shall determine the liability of all of them.

No attempt was made by the Special Commission to define the term "principal place of business." Report of the United States Representative, supra note 29, at 5. But see note 32 supra.

52. The first draft Convention prepared by the Special Commission at its initial working session (September 7-12, 1970) did, in fact, contain such an option. Article 4 of that Convention provided that if the manufacturer had not approved of the sale of his products in the nation in which the consumer purchased the defective product or in the nation in which the consumer was injured, then "the law of the place of manufacture of the product" would be the governing law in a products liability case. Illustrations of Proposals Discussed by the Special Commission on Products Liability, Prel. Doc. No. 4 at 2 (Dec. 1, 1970) (unpublished material of the United States Department of State on file in the offices of the Cornell International Law Journal).

This option was, however, dropped by the second working session of the Special Commission (March 29 - April 6, 1971). The term "principal place of business" was substituted for "place of manufacture." Report of the United States Representative, supra note 29, at 5.

53. This option was also adopted by the first working session of the Special Commission. Article 3a of the draft Convention prepared by that working session provided:
   If the condition pertaining to the approved sale of similar products as stated
The addition of further "steps" in the hierarchy, however, might create more confusion than the plan was designed to prevent. A determination of the nation in which the defective product was manufactured might be very difficult in the case of a large international firm which manufactured identical products in two or more countries. An additional criterion such as where the product was acquired might depend on purely fortuitous circumstances and might also be difficult to rely on in cases where the injury had begun in one country but had culminated in another.\footnote{54}

Moreover, a hierarchy of choice of law rules may have its own disadvantages. Despite its value as a means of adding certainty and predictability to choice of law problems in international products liability cases, such an approach may, in practice, fail to operate equitably. Inequities in the operation of such a plan might result from inadequately or poorly defined terms\footnote{55} or from the effect of the several "exception" clauses which are an important element of the plan.\footnote{56} Though such inequities do not necessarily present insurmount-

\footnote{54} in article 2 [making the law of the nation of plaintiff's habitual residence determinative of the case] is not fulfilled: \par
\hspace{.5cm} a. the liability of a manufacturer towards a person directly suffering damage who acquired the product himself shall be governed by the law of the country in which the product was acquired; \ldots

Illustrations of Proposals Discussed by the Special Commission on Products Liability, supra note 52, at 1.

The second working session of the Special Commission, however, simply abandoned this criterion, preferring instead a choice of law rule dependent, in the alternative, on the nation wherein the consumer was injured. Report of the United States Representative, supra note 29, at 6.

\footnote{54} This could easily be the case where a defectively manufactured pill was taken in one country but produced no ill effects until the consumer was elsewhere. A criterion based on where the pill was purchased would seem totally without significance in determining which nation's law was to govern the consumer's cause of action under such circumstances.

\footnote{55} The deliberations of the Special Commission on Products Liability clearly reflect this fact. A considerable amount of the Special Commission's time was devoted to a consideration of such crucial terms as "manufacturer," "habitual residence," and "product." Report of the Special Commission on Products Liability, supra note 30, at 3-4, 9-10. See also Report of the United States Representative, supra note 29, at 4-5.

\footnote{56} Professor Reese has illustrated this point by means of the following example: Consider \ldots the case where in New York a Frenchman is injured both by the product of a large New York manufacturer, whose products are sold in France, and by the product of a small New York manufacturer, whose products are only sold in the United States. Under the convention, the more lenient French law would be applied to determine the liability of the large manufacturer [because he had consented to the distribution of his product in France, the nation in which the buyer habitually resided] while the more onerous New York law would be applied to the small manufacturer [because he had not consented to the distribution of his product in France and, thus, the governing law of the litigation in which he was involved would be the law of
able obstacles to the creation of an effective uniform choice of law rule consistent with an "hierarchial" approach, it is obvious that further refinement of this plan is necessary before it could be adopted on a world-wide basis.

D. SELECTION OF THE GOVERNING LAW IN ACCORDANCE WITH A "LIMITED HIERARCHY" OF CRITERIA

A substantial improvement of the above discussed "three-step" hierarchial approach to a uniform choice of law rule would be to refine that approach into a more "limited hierarchy" for the selection of the governing law of an international products liability case. One such refinement would be to eliminate the fortuitous criterion of "place of accident" as determinative of the applicable law. The nation in which a consumer habitually resides and the nation in which he may be injured by a defectively manufactured product may, of course, often be one and the same. In light of the increasing mobility of the world's population, however, there may be a substantial number of instances in which the nation wherein a plaintiff habitually resides and the nation wherein he is injured are not the same. Therefore, a more equitable priority than (1) habitual residence, (2) place of accident, and (3) principal place of business would appear to be simply (1) habitual residence and (2) principal place of business. A "two-stage" hierarchial approach such as this would reduce confusion and problems of factual proof to a minimum. As compared to a "three-stage" approach, for instance, this alternative would eliminate by one-half opportunities for litigation on the potentially hard to prove fact of whether the manufacturer had given his "consent" to the sale of his product in the country in question. This point would still be relevant at the first stage of determining the applicable law (plaintiff's habitual residence) but would not be in issue again at the second stage (principal place of business). Thus, a manufacturer's "consent" to the distribution of his merchandise would need to be proved only in the state where he had his principal place of business. Discrimination such as this might conceivably violate the equal protection clause of the Fourteenth Amendment to the Constitution. In any event, such discrimination would, on occasion, almost surely shock our sense of justice.

REPORT OF THE UNITED STATES REPRESENTATIVE, supra note 29, at 8.

Though Professor Reese pointed out the inequities which might arise under the Convention in the circumstances of the example set out above, his arguments were rejected, "because of what was thought to be the overwhelming importance of simplicity and predictability." REPORT OF THE UNITED STATES REPRESENTATIVE, supra note 29, at 8.

57. See text accompanying notes 42-56 supra.
58. See note 2 supra.
This type of choice of law rule would also eliminate the possibility that a consumer and a manufacturer would be involved in litigation which was governed by substantive laws totally unfamiliar to either of them. It would be fair to assume that a consumer is familiar with the law of the nation in which he habitually resides and that a manufacturer is familiar with the law of the nation wherein he has his principal place of business. But neither a consumer who vacations in a foreign nation nor a manufacturer who turns his product over to an independent foreign wholesaler is likely to bother to acquaint himself with the peculiarities of a foreign nation in which an accident may fortuitously occur. Therefore, any subsequent products liability case which depended on a detailed analysis of the law of a nation with which neither the consumer nor the manufacturer was familiar could easily involve a considerable amount of confusion, expense, and delay, otherwise at least partially avoidable by the elimination of the "place of accident" criterion from the applicable choice of law rule.

A further refinement of the hierarchial approach to a uniform choice of law rule could be made through a careful use of specific burden of proof allocations. The smooth operation of an international choice

59. Consider, for instance, the case of a West German consumer who bought an American product in France and who, instead of being injured in West Germany, was injured in France. In such circumstances, the American manufacturer could, under a "three-stage" hierarchial approach, first dispute that he had approved of the distribution of his product in West Germany (plaintiff's habitual residence). Then, if he successfully proved that point, he could further contend that he did not approve of the distribution of his product in France (situs of the accident). In a "two-stage" approach, the only issue would be the manufacturer's approval of the distribution of his product in West Germany.

60. Of course, many cases would arise where one of the parties was unfamiliar with the law selected to govern the case at hand. Thus, if the law of the plaintiff's habitual residence was determinative, then the manufacturer might be handicapped by his unfamiliarity with that law. The opposite would be true if the law of the manufacturer's principal place of business were determinative. Nonetheless, the elimination of the "place of accident" criterion would greatly reduce the likelihood that both parties in the case would be strangers to the governing law.

61. At present, the Proposed Convention, Article 6(8), has only the following reference to "burden of proof":

Matters governed by the law made applicable by this convention shall include:

8 the burden of proof; . . .

In the Report of the United States Representative, supra note 29, at 8, Professor Reese stated that:

There was [at the Special Commission's second working session] considerable argument as to which party should have the burden of proving, or disproving, that goods of the same origin and type were available in that country with the consent, express or implied, of the defendant. . . . I argued that the burden should be on the defendant. A number of persons supported me,
of law rule could also be facilitated by providing that, in international products liability cases, there would always exist a rebuttable presumption on behalf of the consumer that the manufacturer had consented to the distribution of his product in the country of the consumer's habitual residence. The burden of proving otherwise, therefore, would ordinarily fall upon the manufacturer. Similarly a rebuttable or perhaps even a conclusive presumption could exist that a manufacturer's principal place of business is in the nation under whose laws it is organized. If that is clearly not the case, as for instance where a manufacturer has organized in a nation solely for the sake of "convenience," then a second rebuttable (or conclusive) presumption could exist that the manufacturer's principal place of business is located in the nation wherein the manufacturer sells (in terms of gross receipts) the greatest portion of its merchandise.

Another valuable presumption would be that, in the absence of clear evidence to the contrary, the nation in which a consumer purchases a defectively manufactured product is also the nation in which he "habitually resides." This presumption would be of little value in circumstances where the consumer was clearly a transient in the country in which he purchased the defective product. On the other hand, the presumption would be very useful in "close" cases in which the plaintiff spent his time equally among several different countries. If one of those countries were also the place where he bought the defective product, then, for the purposes of an international products liability case, that would also be the country of his "habitual residence."

Thus, when the hierarchial approach to international choice of law problems is condensed into a less complicated "two-stage" format and is made more definitive by specific burden of proof provisions, it becomes potentially the most satisfactory means yet available to eliminate the confusion and uncertainty in present international products liability litigation. By arranging the applicable law to an international products liability case in a standard, easily understood order, this approach eliminates many of the former barriers to consumer recovery for injuries from defective merchandise, while, at

while others disagreed on the ground that the defendant should not be required to prove a negative. Eventually, it was decided to say nothing on the subject.

62. The case might arise in which it would be to the consumer's advantage that the law of his country of habitual residence did not apply. This would be true if the law of the nation wherein the manufacturer had his principal place of business was more lenient than the law of the consumer's habitual residence. In such cases, the burden of proof would then be shifted to the consumer to prove that the presumption was not true.

63. See notes 31 and 46 supra.
the same time, protecting manufacturers from the possible arbitrariness of a single, invariable criterion on which a choice of the governing law might be based. Like the other proposed rules, it offers advantages of uniformity and predictability, but, unlike the other proposed rules, it best achieves an optimum balance between the interests of consumers on the one hand and the interests of manufacturers on the other. Therefore, while much remains to be done before an international convention becomes a reality, there is still hope that with the increasing scope of international trade and travel, consumers may eventually have a uniform and, more importantly, predictable choice of law rule to use in their attempts to seek reimbursement for injuries suffered as a result of defectively manufactured merchandise.
ANNEX

“TEXT ADOPTED BY THE SPECIAL COMMISSION”

Article 1
This Convention shall determine the law applicable to the liability of a manufacturer or other supplier for damage resulting from a product, with the exception of cases where the victim acquired the product from that manufacturer or other supplier.
This law shall apply irrespective of the kind of proceeding that may be involved.

Article 2
In this Convention “manufacturer or other supplier” shall include:
(a) a manufacturer or other supplier of the finished product or of a component part;
(b) a person in the commercial chain of distribution of the product; and
(c) any person who gives possession of the product for value.

Article 3
The applicable law shall be the internal law of the State of the habitual residence at the time of the accident of the person directly injured by the product. This law, however, shall not apply if neither this product nor products of the same origin and the same type were available in that State through commercial channels with the consent, express or implied, of the person claimed to be liable.

Article 4
If the law designated in article 3 does not apply, the applicable law shall be the internal law of the State in which the accident occurred. This law, however, shall not apply if neither the product nor products of the same origin and the same type were available in that State through commercial channels with the consent, express or implied, of the person claimed to be liable.

Article 5
If neither of the laws designated in articles 3 and 4 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.
If, however, several manufacturers or other suppliers are claimed to be liable, the internal law of the State of the principal place of business of the manufacturer of the finished product shall determine the liability of all of them.

Article 6
Matters governed by the law made applicable by this Convention shall include:
1 the basis and extent of liability;
the grounds for exemption from liability, any limitation of liability and any division of liability;

the existence and kinds of injury or damage which may have to be compensated;

the kinds and extent of damages;

the question whether a right to damages may be assigned or inherited;

the persons who have suffered damage and who may claim damages in their own right;

vicarious liability, including the liability of a principal for the acts of his agent or of a master for the acts of his servant;

the burden of proof;

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.