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The New German Product Liability Act

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I. INTRODUCTION

On July 25, 1985, the Council of the European Community adopted the Council Directive on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products (Directive).[1] The Directive seeks to reconcile the differing consumer protections against defective products among the Member States of the European Community (EC). Additionally, the Directive acts to improve free trade within the EC.

To implement the Directive, the West German Federal Parliament (the Bundestag) passed the Act Concerning Liability for Defective Products (Act) on December 15, 1989.[2] In accordance with the Directive requirements the new Act provides that:

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1. 28 O.J. EUR. COMM. (No. L 210) 29 (1985) [hereinafter Directive]. For other background information, see generally Dielmann, *The European Economic Community's Council Directive on Product Liability*, 20 INT'L LAW. 1391, 1391 (1986); H. KULLMANN & B. PFISTER, PRODUZENTENHAFTUNG, Kza. 3600 (1980); 1 J. SCHMIDT-SALZER, KOMMENTAR: EG-RICHTLINIE PRODUKTHAFTUNG (1986); Brüggemeier & Reich, *Die EG-Produkthaftungs-Richtlinie 1985 und ihr Verhältnis zur Produzentenhaftung nach § 823 Abs. 1 BGB*, WERTPAPIER MITTEILUNGEN [WM], Feb. 8, 1986, at 146; Buchner, *Neuorientierung des Produkthaftungsrechtes? Auswirkungen der EG-Richtlinie auf das deutche Recht*, DER BETRIEB [DB], Jan. 8, 1988, at 32; Koster, *Supreme Court Decision in Halcion: Anticipation of the EEC Directive on Product Liability*, 17 INT'L BUS. LAW. 390 (1989); Lorenz, *Europäische Rechtsangleichung auf dem Gebiet der Produzentenhaftung: zur Richtlinie des Rates der Europäischen Gemeinschaften*, in 151 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 1 (1987); Sack, *Das Verhältnis der Produkthaftungsrichtlinie der EG zum nationalen Produkthaftungsrecht*, VERSICHERUNGSRECHT [VersR], May 1, 1988, at 439; Schmidt-Rantsch, *Die Umsetzung der Produkthaftrichtlinie des Rats der EG vom 27.7.1985*, ZEITSCHRIFT FÜR RECHTSPOLITIK 437 (1987 Heft 12); Schmidt-Salzer, *EG-Richtlinie Produkthaftung: Der Entwurf für das deutsche Transformationgesetz (ProdHaftG)*, BETRIEBS BERATER [BB], July 30, 1987, at 1404.

2. Gesetz über die Haftung für fehlerhafte Producte (Produkthaftungsgesetz-ProdHaftG), 1989 Bundesgesetzblatt [BGBl] I 2198 [hereinafter Act]. For commentary on the drafting of the Act, see Produkthaftungsgesetz [ProdHaftG] §§ 1-19 in BÜRGERLICHES GESETZBUCH [BGB] (2452-63 Palandt ed. 1990); H. DIELMANN, C. MIKOSCH, T. MURPHY, K. KUNTZ, & M. VELTINS, DAS NEUE RECHT DER PRODUKTHAFTUNG (to be published Apr. 1990).

(1) Within the specific areas covered by the Act, product liability shall be no-fault (strict) liability;
(2) In addition to the actual manufacturer of the product, any party that holds itself out as the manufacturer, as well as the importer and the supplier of the product, will be held liable for damages;
(3) Compensation must be paid for personal injuries and for damage to private property.

Parties to a contract may not opt out of the Act. Case law in the area of fault liability will supplement the Act. Tort liability, based on the principle of fault liability, and governed by section 823 of the German Civil Code, is not repealed by the Act. The principles of fault liability will remain in effect for areas not governed by the Act, particularly the right to compensation for non-monetary damages, which is not covered by the Act.

II. SCOPE OF THE PRODUCT LIABILITY ACT

Section 1 governs the scope of the Act.[3] This section provides that a manufacturer will be held liable for damages due to a product defect in which a person suffers death, bodily injury or property damage. In contrast to prior law, liability does not arise from an act or omission by the manufacturer, but rather from the existence of a defect in the product.

The manufacturer will be held liable for property damage only for objects other than the product itself.[4] Additionally, the object must have been intended for personal use or consumption and must have been primarily used in the intended manner by the injured party.[5] The determination of whether the damaged object was one intended for personal use or consumption can be difficult. If it is determined that the purpose or actual use of the object was not personal, fault liability under the general provisions of the German Civil Code may apply.[6]

The Act defines "product" as any movable object, regardless of the means of manufacture or whether the product has been installed into another object of movable or real property.[7] Water, gas and electricity are also products within the meaning of the Act. Exceptions to the Act include natural products of agriculture, (products of animal husbandry, bee-keeping, fishing and products of the soil) which have not undergone

3. Act, *supra* note 2, § 1.
4. *Id.* § 1(1).
5. *Id.*
6. *Id.*
7. *Id.* § 2.

initial processing. This exception also includes products of hunting.[8]

The Act does not apply to products placed on the market prior to January, 1990, the effective date of the Act.[9] Those products remain subject to the provisions of the German Civil Code dealing with fault liability for torts. Thus, the Act is not a sudden leap into a new liability dimension, but instead is designed to gradually bring about increased manufacturer liability.

III. THE DEFINITION OF DEFECT

A defect in a product on the market serves as the basis of the new product liability. Under section 3 of the Act, a product is defective when, taking into consideration all circumstances, it does not provide the level of safety which can justifiably be expected. Some specific but nonexclusive circumstances listed under section 3 for consideration are the presentation of the product, the use which can reasonably be expected of the product, and the time when the product was placed on the market.[10] The justifiable expectations of the general public, rather than the individual expectations of a specific consumer, control.[11]

The presentation of the product includes all activities which introduce the product to the general public. The primary means of presentation are the description of the product on its packaging, its instructions for use, and the product advertising.[12] Product presentation can greatly influence consumer expectations regarding safety. Thus, if safety aspects are highly emphasized while negative characteristics of the product are not mentioned, and if the product does not meet the resulting high safety expectations, the product may be determined to be defective under section 3.[13]

The reasonably expected use of the product refers to the use of the product for its intended purpose. The safety expectations of a product are not restricted to this use, but extend to any common or foreseeable misuse of the product as well. However, reasonable expectations of safety cannot be extended to an entirely improper or unreasonable use

8. *Id.*

9. *Id.* §§ 16, 19.

10. Schubert, *BR Deutschland/EG: Verschuldenselemente in Fehlerbegriff des neuen Produkthaftungsrechts*, PRODUKTHAFTUNG INT'L, Mar. 1989, at 74, 84-85.

11. *See* ProdHaftG § 3 in BGB (§ 3(b) at 2457 Palandt ed. 1990); Kort, *"Stand der Wissenschaft und Technik" im neuen deutschen und "state of the art" im amerikanischen Produkthaftungsrecht*, VERSR, Nov. 1, 1989, at 1113-15.

12. Act, *supra* note 2, § 6(1).

13. *Id.*

under the circumstances.[14] In those cases, the manufacturer will not be held liable. In the case of a foreseeable misuse, section 6 of the Act provides that contributory negligence by the injured party may reduce the manufacturer's liability.[15]

The time when the product is placed on the market is determinative for the purpose of setting safety standards.[16] If the reasonable level of safety which can be expected from the product increases after the product's manufacturing, but before placing it on the market, the failure of the product to meet the higher safety standards constitutes a defect within the meaning of the law. However, if the reasonable safety expectations increase after the product has been placed on the market the product will not be required to meet this higher standard. Similarly, a product is not deemed to be defective merely because an improved product later appears on the market.[17]

In addition to the circumstances listed in section 3 of the Act, the determination of the justifiable safety expectations can depend on other factors, such as the nature of the product.[18] Thus, the side effects of some products such as tobacco products or alcohol are known and accepted by society. Safety expectations might also depend on the price of the product. A person who buys a low-priced product can expect it to be safe under normal circumstances, but he cannot necessarily expect it to meet the same safety standards as a product in the highest price category. For example, one may expect the brakes on a less expensive automobile to function properly. However, one cannot reasonably require the additional level of safety resulting from higher-priced features such as antilock brakes and air bags. Of course, justifiable safety expectations are not static, but are subject to constant change. Innovations in science and technology which initially benefit only products of the highest quality may eventually become standard features, so that a later product not meeting this higher standard would then be considered defective.

Under some circumstances, compliance with the prescribed standards will exclude any further liability by the manufacturer.[19] In other cases, compliance with technical standards and norms, such as DIN,

14. *See* Judgment of July 7, 1981, Bundesgerichtshof [BGH] (Federal Supreme Court), W. Ger., 34 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2514 (1981 Heft 46) (glue-sniffing considered to be unusual and unreasonable misuse).

15. Act, *supra* note 2, § 6(1).

16. *Id.* § 3(1)(c).

17. *Id.* § 3(2).

18. *See* ProdHaftG § 3 in BGB (§ 3(c) at 2457 Palandt ed. 1990).

19. Act, *supra* note 2, § 1(2)(4).

VDE, or DVGW norms[20] can be significant in the determination of reasonable safety expectations. Compliance with such norms in the manufacture of a product does not necessarily mean that the product is not defective.[21] However, compliance will create the presumption that the product in question meets reasonable safety standards.

Case law on product liability generally distinguishes between design, manufacture, and instruction defects.[22] In addition, there may be a duty to test and observe products.

The design or development defect results from a violation of the manufacturer's duty to design and adequately test products during the development phase to ensure that they can be used without danger.[23] Under the prior fault-based product liability law, the manufacturer was liable only when intent or negligence could be proven.[24] Under the new law, the manufacturer will not be held liable if the defect could not have been detected at the time the product was placed on the market, based on the available knowledge of science and technology at that time. The term "knowledge" encompasses objective, general, expert knowlege, not only the limited subjective knowledge of the individual manufacturer. Thus, the manufacturer will escape liability only if the defect was not detectable in light of all the relevant knowledge available at the time.

It should be pointed out in this context that article 15 of the Directive provides an option whereby the Member States can extend strict liability to cover undetectable defects. The new product liability laws in Luxembourg and Norway provide this extended liability for development risks. The trend in the countries with Francophone populations tends in this direction as well. Present drafts of product liability statutes in Finland and Sweden also include liability for development risks. In 1995 the EC Commission will present a report on liability for development risks,

20. These are semi-official standards which are usually set by trade associations. The letters DIN stand for Deutsche Industrie Normen (German Industry Norms), VDE means Verband Deutscher Electrotechniker (Association of German Electricians), and DVGW means Deutscher Verband des Gas- und Wasserfaches (German Association of Gas and Water Industries).

21. *See* Judgment of Oct. 7, 1986, BGH, 40 NJW 372 (1987 Heft 7) (failure to warn against risk of inflammation linked to zinc spray; the court found it irrelevant that under technical standards the requirements with regard to duty to warn were even lower than the actual instructions given by the manufacturer).

22. BGB § 823 (§§ 293-297 at 1603-04 Münchener Kommentar 1986).

23. Judgment of Mar. 17, 1981, BGH, 80 Bundesgerichtshof in Zivilsachen [BGHZ] 186, 199 (pesticide); Judgment of Nov. 24, 1976, BGH, 67 BGHZ 359 (electrical devices); Judgment of Mar. 10, 1970, BGH, VERSR, May 20, 1970, at 469.

24. *See* BGB § 832(1), *reprinted in* THE GERMAN CIVIL CODE 136 (I. Forrester, S. Goren, & H. Ilgen trans. 1975).

at which time it may call for the extension of liability for undetectable defects.

A production defect is one that arises in the manufacture of the product and is not discovered by quality control procedures.[25] Under prior tort law it was possible for the manufacturer to avoid liability if under strict standards of proof he could show that the defect was an escapee, i.e., was caused by an unavoidable failure in the manufacturing process or by an employee.[26] This exception is no longer available to the manufacturer under the new law; the manufacturer's liability is now unrestricted.

Case law imposes a duty of product observation.[27] This duty requires the manufacturer to observe the use of his products by consumers. Under certain circumstances, the manufacturer may be required to warn product users about the risks of defective products or to recall products from the market. The Act does not govern the product observation duty,[28] leaving intact the duties to observe, warn and recall which developed in German case law and legal literature.

Instruction defects (failure to warn) consist of deficiencies in the instructions for use of the product, particularly insufficient warning of potential dangers.[29] Such instruction defects also serve as a basis for strict liability.

IV. DEFENSES AGAINST LIABILITY

Section 1 of the Act lists a number of defenses against liability. In addition to the abovementioned defense of developing defects under section 1, the manufacturer will not be held liable if he did not place the product on the market; if at the time the product was put on the market, it was not defective; if the manufacturer did not produce or market the product for sale or for any other form of distribution with a business purpose; or if the defect resulted from compliance with compulsory legal

25. Judgment of July 13, 1956, BGH, VERSR, Oct. 1, 1956, at 625 (carousel); Judgment of June 7, 1988, BGH, BB, Aug. 30, 1988, at 1624 (exploding soft drink bottles).

26. Judgment of Nov. 26, 1968, BGH, 51 BGHZ 91 (chicken innoculations).

27. *See* Judgment of Mar. 17, 1981, BGH, 80 BGHZ 186, 199; Judgment of Feb. 4, 1986, BGH, DB, July 23, 1986, at 1113 (roll bar). A duty to observe can also exist regarding accessories produced by third parties if the producer of the principal object had reason to believe that the accessories were unsuitable and made the use of the principal object unsafe. *See, e.g.*, Judgment of Dec. 9, 1986, BGH, WM, Feb. 7, 1987, at 176 (motorcycle handlebar accessory).

28. Kort, *supra* note 11, at 1113-21.

29. *See* Judgment of Oct. 7, 1986, BGH, DB, Jan. 30, 1987, at 268; Judgment of Jan. 24, 1989, BGH, VERSR, Mar. 22, 1989, at 399 (asthma spray).

provisions in effect at the time the product was put on the market.[30]

Under section 1, a supplier will not be held liable if the defect resulted from the design of a product in which the supplier's component was installed later. Similarly, the supplier will not be held liable if the defect resulted from instructions or orders of the manufacturer of the product.[31]

Contracts or agreements excluding liability are not permissible in the area of product liability. Liability to an injured party can never be excluded. In addition, liability cannot be modified by means of an agreement between the product manufacturer and the supplier to the disadvantage of the injured party.[32]

The manufacturer bears the burden of proof for all of these defenses.[33] The plaintiff must prove both the existence of the defect and the causal connection between the defect and the injury.[34] The injured party can use the principle of prima facie proof to meet his burden of proof.[35]

V. LIABLE PARTIES

The manufacturer is the primary liable party. Section 4 defines a manufacturer as one who produces a basic material, a component part, or the final product. One who exclusively uses premanufactured parts to construct and market a final product is also considered a manufacturer.[36]

Any party holding itself out as a manufacturer by placing its name, its trademark or any other characteristic mark on a product is defined as a manufacturer.[37] This provision addresses regional and national department stores or chain stores that buy products from manufacturers and then market and sell them under their own names or trademarks.

One who produces under license is another type of manufacturer defined by section 4. Liability attaches to the licensee not only for production defects but also for design defects. The licensor, on the other hand, is not a manufacturer; however, he may be deemed a quasi-manufacturer if by use of his trademark or other characteristic mark he holds

30. Act, *supra* note 2, § 1(2)(3).
31. *Id.* § 1(3).
32. *Id.* § 14.
33. *Id.* § 1(4).
34. *Id.*
35. With regard to the shifting of the burden of proof, the producer must show he was not liable for the product defect. *See* Judgment of Nov. 26, 1968, BGH, 51 BGHZ 91; Judgment of Mar. 17, 1981, BGH, 80 BGHZ 186.
36. Act, *supra* note 2, § 4(1).
37. *Id.*

himself out as a manufacturer.[38] This occurs most often when products are manufactured in a foreign country and are then marketed under the trademark of a domestic company. To adequately divide the risk between the licensor and the licensee, these liability risks should be considered in drafting license agreements. Release clauses and the purchase of liability insurance are the most common methods of protection. Section 5 provides that in the case of multiple manufacturers, all will be held jointly and severally liable.[39] This includes the case of a manufacturer and a quasi-manufacturer.

Section 4 deems a party who imports products into the EC from third countries for the purpose of sale, rental, lease, or any other form of distribution with a business purpose, a manufacturer. This provision also applies to the re-importer of products originally manufactured within the EC. The inclusion of the importer within the definition of manufacturer increases consumer protection. Without importer liability, the consumer would be forced to pursue burdensome legal remedies against a manufacturer in a non-EC country.

In general, the Act does not subject a dealer of a defective product to liability. However, section 4 contains an exception to this principle. When the identity of the primarily liable manufacturer or quasi-manufacturer cannot be determined, the distributor will be held liable as a manufacturer. The distributor can exculpate himself by providing the name of the party from whom he obtained the product to the injured party. This process will continue up a distribution chain until either the manufacturer or the importer is found. These parties will then be held liable under section 4. If the manufacturer is located, the distributor will be exculpated regardless of whether or not the injured party is able to actually obtain compensation from the manufacturer (e.g., if the manufacturer becomes insolvent).

VI. POTENTIAL LIABILITY

Sections 7 through 11 of the Act govern the extent of potential liability. The manufacturer will be held liable to the injured party only for pecuniary damages and not for non monetary damages. However, non monetary damages (e.g., pain and suffering) may be compensable under general principles of tort liability that remain in effect.[40]

The Act compensates for personal injury essentially the same way as

38. *Id.* § 4(2).
39. *Id.* § 5.
40. *Id.* § 15(2); BGB § 823 (§ 15(c)(ff) at 938 Palandt ed. 1990) (referring to BGB § 847).

prior law. The injured party may receive compensation for medical treatment as well as for monetary losses resulting from an inability or reduced ability to work.[41] As under the German Civil Code, compensation for future damages is made in the form of periodic payments.[42] Under section 7 of the Act, the rights of legal dependents to compensation for the wrongful death of a party responsible for their support parallel the provisions of section 844 of the German Civil Code.[43]

Section 10 limits liability for personal injury to a maximum of 160 million marks, not including damage to property. This limit applies regardless of whether there has been a single major injury or a series of injuries.

The Act places no limit on liability for property damage. However, as already mentioned, compensation is only required for damage to objects used in the personal sphere. Damage to the defective product itself is not covered. In addition, the injured party must bear damages to property up to an amount of 1,125 marks. This deductible amount removes cases with only nominal damages from the scope of the Act. The injured party retains the right to sue under general tort principles for damages that fall under the minimum amount.[44]

VII. STATUTE OF LIMITATIONS

Right to compensation under the Act expires three years from the time the injured party discovered or should have discovered the damage, the defect, and the identity of the liable party.[45] This is identical to the statute of limitations for general tort claims under section 852 of the German Civil Code.[46] However, in contrast to the German Civil Code, negligent failure to discover the damage, the defect, or the identity of the liable party can start the statute of limitations running under the Act. Under section 13, liability claims under the Act also expire ten years from the time the manufacturer placed the defective product on the market.[47] This reduces the alternative limitations period of the German Civil Code from thirty to ten years.[48]

41. Act, *supra* note 2, § 8.

42. BGB § 843(1), *reprinted in* THE GERMAN CIVIL CODE, *supra* note 24, at 138.

43. Act, *supra* note 2, § 7; BGB § 844, *reprinted in* THE GERMAN CIVIL CODE, *supra* note 24, at 138.

44. *See* Act, *supra* note 2, § 15(2).

45. *Id.* § 12(1).

46. BGB § 852(1), *reprinted in* THE GERMAN CIVIL CODE, *supra* note 24, at 139.

47. Act, *supra* note 2, § 13(1).

48. BGB § 852, *reprinted in* THE GERMAN CIVIL CODE, *supra* note 24, at 139.

VIII. PRODUCT LIABILITY INSURANCE

In order to provide protection against product liability, particularly products belonging to a high risk group, it is advisable to obtain product liability insurance. Parties drafting agreements such as dealer contracts and license agreements should consider the need to fairly distribute the risks among the parties.

IX. THE STATUS OF PRODUCT LIABILITY THROUGHOUT EUROPE

Article 19 of the EC Council Directive on Product Liability requires Member States to change their national laws by July 25, 1988.[49] Most of the Member States did not meet this requirement. The situation in the individual countries is as follows:

(1) Great Britain implemented the Directive in part 1 of its Consumer Protection Act of 1987, which governs product liability. This legislation entered into effect on March 1, 1988.[50]

(2) Italy implemented the Directive by a presidential decree on July 30, 1988.[51]

(3) Greece implemented the Directive by a ministerial decree on July 30, 1988.[52]

(4) Luxembourg implemented the EC Directive in its law of April 21, 1989.[53]

(5) Denmark implemented the EC Directive by means of a law effective June 7, 1989.[54]

(6) The Netherlands has drafted a law.[55]

(7) Belgium, France, Ireland, Portugal, and Spain each have preliminary drafts for product liability statutes.[56]

Outside the European Community, the situation is as follows: Aus-

49. Directive, *supra* note 1, art. 19, at 33.

50. Consumer Protection Act, 1987, ch. 43, *reprinted in* 39 HALSBURY'S STATUTES 188, 190 (J. Bowman 4th ed. 1988).

51. Presidential Decree-Law No. 224, May 24, 1988, Gaz. Uff. No. 146, June 23, 1988.

52. Ministerial Regulation No. B7535/1077, Mar. 31, 1988, Government Gazette 230/B/22, Apr. 1988.

53. Law Concerning Civil Law Liability for Defective Products, Apr. 21, 1989, Journal Officiel du Grand-Duche de Luxembourg, A-No. 25, Apr. 28, 1989, at 522.

54. Law Concerning Product Liability, No. 371, June 7, 1989, Lovtidende A No. 371.

55. *See* Van Wassenaer von Catwijck, *Neuregelung der Produkthaftung in den Niederlanden*, PRODUKTHAFTUNG INTERNATIONAL [PHI] 48 (1988).

56. *See* Schubert, *Umsetzung der EG-Produkthaftungs-Richtlinie: eine Zwischenbilanz* (to be published in RECHT DER INTERNATIONALEN WIRTSCHAFT (1990)).

tria adopted a federal statute similar to the EC Directive on January 21, 1988.[57] Norway adopted a new product liability statute on January 23, 1988.[58] Finland and Sweden have each drafted laws based in part on the EC Directive.[59]

X. CONCLUSION

The purpose of the new EC product liability law is to introduce the concept of strict liability into all of the Member States and to expand the range of liable parties. However, the goal of standardization pursued by the EC Directive has not yet been achieved. The Directive itself provides some options to the Member States to diverge from the provisions of the Directive. For example, under article 15 of the Directive, agricultural products prior to initial processing may be subjected to the rules of strict liability.[60] Article 15 also provides an option involving liability for development risks.[61] Here, the Member States are permitted to hold the manufacturer liable even if the science and technology available at the time of marketing were not capable of detecting the defect.[62] Finally, the Act leaves the introduction of a liability limit of not less than 70 million European Currency Units (ECU) for personal injury to the discretion of the Member States.[63]

The Member States have made varying use of these options. The legal ramifications are that the extent of liability for a defective product will depend on where the claim is filed. In some cases, the courts of more than one country may have potential jurisdiction. A defendant manufacturer may generally be sued at the place of incorporation.[64] Under the Directive, a judgment may be enforced anywhere in the EC in accordance with article 5 of the European Convention of September 27, 1968, on Jurisdiction and Enforcement of Court Judgments in Civil and Commercial Matters.[65] In addition, the choice of forum continues to influence not only by the applicable substantive law, but also by differing

57. 99 Federal Law Concerning Liability for a Defective Product, Jan. 21, 1988, Austrian Federal Gazette 99/1989.

58. Lov om Produktansvar [Product Liability Law], No. 104, Dec. 23, 1988, Norsk Lovtidend 1025.

59. *See* Schubert, *supra* note 56.

60. Directive, *supra* note 1, art. 15(1)(a), at 32.

61. *Id.* art. 15(1)(b), at 32.

62. *Id.*

63. *Id.* art. 16(1), at 32.

64. ZIVILPROZESSORDNUNG [ZPO] § 17.

65. 8 I.L.M. 229 (entered into force Feb. 1, 1973), *reprinted in* 1972 BGBl II 774.

procedural law. For these reasons, a great deal of forum shopping may still occur.

Although a complete harmonization of the laws of Member States of the European Community with regard to product liability has not yet been achieved, the adoption of the new German Product Liability Act and similar laws in other EC countries will lead to increased uniformity in this area.