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## AN EXPLANATION OF JAPAN'S PRODUCT LIABILITY LAW†

Translation by  
Thomas Leo Madden††

*Translator's Introduction:* Japan has been contemplating the implementation of a product liability system since 1972. After much discussion, the Product Liability Law (Law No. 85 (1994)) was finally promulgated on July 1, 1994. It came into force one year later on July 1, 1995. In Japanese the law is called *Seizôbutsu Sekinin Hô* (製造物責任法). The original article explains the law's historical significance and practical impact. It is commentary in style and is meant to serve as a basic guideline to help both consumers and businesses understand their respective rights and obligations under this new law.

### I. CIRCUMSTANCES SURROUNDING THE MATERIALIZATION OF THE PRODUCT LIABILITY LAW

In the wake of several serious product-related injury cases (most notable of which are the *SMON*<sup>1</sup> and *Kanemiyu shô*<sup>2</sup> incidents), Japan set

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† This Article was written through the concerted effort of the following Japanese government agencies: The First Consumers' Affairs Division of the Social Policy Bureau within the Economic Planning Agency; The Counselor's Office of the Civil Affairs Bureau within the Ministry of Justice; The Policy Planning and Evaluation Division of the Minister's Secretariat within the Ministry of Health and Welfare; The Consumer Economy Division of the Food and Marketing Bureau within the Ministry of Agriculture, Forestry and Fisheries; The Consumer Affairs Division of the Industrial Policy Bureau within the Ministry of International Trade and Industry; The Consumer Policy Division of the Transport Policy Bureau within the Ministry of Transport; and The Policy Division of the Minister's Secretariat within the Ministry of Construction. The Japanese version of this Article can be found at: NBL (エヌ・ピー・エル), No. 554, (Oct. 1, 1994) at 56.

†† I wish to extend warmest appreciation and thanks to Ms. Takako Owada for her helpful review and comments and to Mr. Rob Britt, Library Associate of the East Asian Law Department of the Law Library, University of Washington School of Law, generally for his constant willingness to assist and specifically for his help in inserting the Japanese characters into the footnotes of this translation.

This translation follows the original Article as closely as possible. However, the Article's headings, sections, and subsections have been renumbered to aid the reader and to conform with the format utilized by the *Pacific Rim Law & Policy Journal*. Also, in order to differentiate between quoted sections of the 1994 Product Liability Law and the text of the Article itself, the text of the Law is presented in italics, whereas the text of the Article is presented in a normal format. Additionally, the original Japanese version of this Article contains no footnotes. The footnotes in this translation have been included to (a) explain a particular Japanese term or phrase, (b) give general background information that may not be readily apparent to a non-Japanese reader, or (c) to include various provisions from other laws mentioned in the text so that the reader may obtain a more thorough understanding of the discussion.

<sup>1</sup> This incident involved over 5,000 persons claiming injuries due to the use of medicines containing clioquinol. The injured parties suffered from a disease affecting the nervous system known as SMON

about exploring the proper way to establish a product liability system. The first earnest studies into this undertaking began in 1972 and centered around the endeavors of the Society for the Research of Product Liability, led by Professor Sakae Wagatsuma. In 1975, the Society officially announced a draft of a general outline of a Product Liability Law.

More recently, with the issuance of European Community "Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products" (the so-called EC Directive), several European and non-European nations have enacted product liability-related legislation. In the face of such legislative development and progress internationally, a number of legislative measures and proposals were submitted and made public in rapid succession by such groups as political parties, legal scholars, and the Japanese Bar.

Within government circles, the initial investigation into the need for product liability legislation began in December 1990 with the 13th National Life Council, and was followed with a study by the 14th National Life Council's Consumer Policy Working Group. Concerned ministries and government offices, including such groups as the Council on Industrial Structure, the Central Council of Drugs, Cosmetics and Medical Instruments, and the Research Meeting for the Prevention of Consumer Injury/Remedial Measures Relating to Foodstuffs, also performed investigations relating to products within their jurisdiction.

Based on these investigations, the National Life Council, in its opinion to the Prime Minister on December 10, 1993, concluded that the immediate enactment of legislation establishing a product liability system was necessary. Moreover, the Property Law Subcommittee of the Civil Law Working Group within the Council of Legal Systems also performed its own investigation from a fundamental civil law standpoint, and published a report with the same conclusion. Furthermore, a recommendation for product liability legislation was incorporated in both the 26th Consumer Protection

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(Subacute Myel-Optico Neuropathy). Several district courts rendered judgments for the injured parties, holding that the defendant manufacturers and distributors were liable in tort for having violated their duty of care to the plaintiffs. The courts also held that the Japanese government was liable under the State Compensation Act (Law No. 125, Oct. 27, 1947). See generally ZENTARO KITAGAWA, 7 DOING BUSINESS IN JAPAN, pt. 13, § 4.04[5].

<sup>2</sup> This 1968 incident, also known as the Kanemi Rice Oil Case, involved thousands of persons who suffered injuries from PCB (polychlorinated biphenyls) poisoning. The PCB, which was being used by Kanemi Warehouse Co. as a heating medium in the production of rice oil, somehow found its way into the oil. There were at least 142 casualties. See generally *id.* § 4.04[4].

Conference's resolution regarding the promotion of consumer administration and a cabinet meeting decision regarding the policy for promoting future administrative reforms.

The Liberal Democratic Party set up a subcommittee on product liability systems within the Economics/Cost of Living Research Committee to study the product liability situation. In October 1991, the subcommittee published its "interim report," after which it continued its investigation. Also, the Coalition Party established a project to investigate product liability legislation on December 16, 1993. That investigation, concluded on April 4, 1994, pointed out the necessity of the immediate enactment of product liability legislation.

Based on these reports, the Cabinet drafted a Product Liability bill on April 12, 1994 and presented it, as Cabinet Law No. 53, to the Diet on the same day. In the Diet, the bill was referred to the Lower House's Committee on Commerce and Industry, and reviewed in collaboration with the Special Committee Concerning Consumer Issues. On April 15 the Committee on Commerce and Industry voted on the bill and on April 16 the Lower House passed the bill in a unanimous vote.

In the Upper House, the Committee on Commerce and Industry began deliberation on April 20, after an explanation of the bill's purpose and effect, and an inquiry session. On April 22, after being voted on by the Committee, the bill was brought for urgent discussion in the plenary session of the Upper House, where it was unanimously approved.

On June 24, 1994, the Product Liability Law passed through a promulgation Council conference. Finally, on July 1, 1994, the Law was promulgated as 1994 Law No. 85.

## II. ARTICLE 1 *(Purpose)*

*The purpose of this law is to offer relief to a person whose life, body, or property has suffered injury due to a product defect by providing that the manufacturer, etc., shall be liable for damages incurred by the injured party, thereby contributing to the stabilization and improvement of the people's life and the healthy development of the national economy.*

## A. *Effect*

Article 1 states that the direct purpose of this law is to provide “relief to a person” injured due to a defective product. This Article further states that the objective expected to be achieved thereby is to contribute to the “stabilization and improvement of the people’s life and the healthy development of the national economy.”

## B. *Interpretation of the Text*

### 1. *The Meaning of “relief to a person”*

Those who can suffer injury to life, body, or property due to a product’s defect is not limited to consumers. Needless to say, the person mainly considered here is the user or consumer of a product for his/her ownself. However, third parties not directly using or consuming a product can also suffer injury due to a defect in that product. Additionally, this law intends to include not only natural persons<sup>3</sup> but also juridical persons.<sup>4</sup>

### 2. *The Meaning of “contributing to the stabilization and improvement of the people’s life and the healthy development of the national economy”*

The direct purpose of this law is intended to provide relief to injured parties whose injury is caused by a defective product. The second part of article 1 reflects the anticipation that, by providing this protection, the “stabilization and improvement of the people’s life and the healthy development of the national economy” will also be achieved.

More specifically, this provision refers to the effect of introducing the concept of product liability to judicial proceedings. Among some of the expected results are a clarification of issues in dispute, a standardization of

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<sup>3</sup> The Japanese term is *shizenjin* (自然人).

<sup>4</sup> The Japanese term is *hōjin* (法人). The term *hōjin* in Japanese encompasses a broad range of both public and private entities. Generally, public *hōjin* include the national and prefectural governments and other local public bodies. Private *hōjin* can be divided into three subcategories: (1) the so-called public-good *hōjin* (公益法人: *kōeki hōjin*), which includes such entities as schools, religious organizations, and social welfare organizations; (2) middle *hōjin* (中間法人: *chūkan hōjin*), such as labor unions and cooperatives; and (3) for-profit *hōjin* (營利法人: *eiri hōjin*), which include the various forms of business enterprises available in Japan: corporations (*kabushiki kaisha*), limited partnerships (*gōshi kaisha*), general partnerships (*gōmei gaisha*), and Limited Liability Companies (*yūgen gaisha*).

judgments, a change of consciousness in both consumers and industry toward product safety and resultant improved safety measures, improved efficiency in the handling of extra-judicial claims, and the establishment of a system in harmony with international standards.

### III. ARTICLE 2 (*Definitions*)

(1) *As used in this law, the term "product" means movable property that has been manufactured or processed.*

(2) *As used in this law, the term "defect" means lack of safety that the product ordinarily should provide, taking into account the specific characteristics of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer, etc., delivered the product, and other circumstances concerning the product.*

(3) *As used in this law, the term "manufacturer" means any of the following:*

(i) *any person who, by way of business, manufactured, processed, or imported the product (hereinafter just "manufacturer, etc.");*

(ii) *any person who, by putting his name, trade name, trademark, or other feature (hereinafter "representation of name, etc.") on the product, presents himself as its manufacturer, or any person who puts a representation of name, etc., on the product in a manner which may cause that person to be mistaken as the manufacturer of that product;*

(iii) *in addition to the persons indicated in the preceding Item, any person who puts on the product a representation of name, etc., of another person who can reasonably be determined to be the manufacturer-in-fact of the product in light of the manner of the product's manufacturing, processing, importation, or marketing of the product and other circumstances.*

#### A. *The Definition of "Product" (Paragraph (1))*

##### 1. *Effect*

With the advancement of science and technology and the resulting mass production and mass consumption of industrially manufactured goods, the degree with which consumer safety depends on the product's manufacturer has increased significantly. The concept of product liability shifts the

principle of liability for damages concerning a product-related accident from a “negligence”<sup>5</sup> basis to a “defect”<sup>6</sup> basis.

Based on these historical developments, this law is basically aimed at movable property which has been artificially manipulated, processed, and delivered.

## 2. *Interpretation of the Text*

### a. *The meaning of “manufactured or processed”*

The term “manufacture” refers to a series of actions which includes designing, processing, inspecting and labeling the product. In general, it means “processing, in any manner, raw material and creating a new good. It expresses a more narrowly construed concept than that of ‘production,’ and indicates the types of production associated with so-called secondary production. It is not, however, used in describing the production of primary products or the offering of services.” *Dictionary of Legal Terms*, Yuhikaku Publishing Company. The term “process” means “adding workmanship to movable property as a raw material, maintaining its intrinsic properties while adding a new attribute, thereby increasing its value.” *Id.*

### b. *The meaning of “movable property”*

The term “movable property” is defined in the Civil Code as all tangible property except real property (Civil Code articles 85<sup>7</sup> and 86<sup>8</sup>). The meaning of the term in this law is based on this concept and, as used in this law, the term is in accordance with the Civil Code definition.

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<sup>5</sup> The Japanese term is *kashitsu* (過失).

<sup>6</sup> The Japanese term is *kekkan* (欠陥).

<sup>7</sup> Civil Code article 85 provides: A “thing” within the meaning of this Code is a corporeal thing.

<sup>8</sup> Civil Code article 86 provides:

1. Land and things firmly affixed thereto are immovables.
2. All other things are movables.
3. Obligations payable to bearer shall be deemed to be movables.

### 3. *Related Items*

#### a. *Examples of products and the interpretation of the law*

##### i. *Unprocessed agricultural, forestry, livestock, and marine products*

This law does not apply to unprocessed agricultural, forestry, livestock, and marine products because they are produced basically by utilizing the power of nature and, therefore, are considerably different in the manner of production from industrially manufactured products which are processed to a significant degree.

Whether a product is "processed" or "unprocessed" will be determined by taking into consideration, on a case by case basis, various circumstances of all acts which added something to the particular product, and a judgment should be made in light of generally accepted ideas.

Heating (roasting, boiling, grilling), flavoring (seasoning, salting, smoking), grinding into flour, squeezing into juice, etc., are illustrated examples of certain acts which are considered to be in accordance with the concept of "processing." In contrast, simple cutting, freezing, refrigerating, drying, etc., are not considered in principle to fall within the meaning of "manufactured or processed."

##### ii. *Blood products and live vaccines*

Blood products<sup>9</sup> and live vaccines are processed blood or viruses and, therefore, are both included in the term "product."

##### ii-a. *Reference information: determination of defective blood products and live vaccines*

(i) Defectiveness of a blood product used in blood transfusions (which includes both whole blood products and blood products which contain one or more components of blood) must be determined by taking into consideration the following characteristics of the product in a comprehensive manner:

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<sup>9</sup> The Japanese term is *ketsueki seizai* (血液製剤). It refers to products made by preparing or processing blood in certain manners (e.g., Fibrinogen, Gamma Globulin, albumin, etc.).



- (a) whether the product is used in life-threatening situations, there is no other medical treatment available, and the product is highly effective.
- (b) whether there are warning labels to the effect that there is a possibility of viral infections as a result of blood transfusions and/or side effects as a result of immunoreactions.
- (c) whether, although it is technically impossible to completely eliminate the risk of viral infections and/or side effects as a result of immunoreactions, the blood products are distributed after being subjected to the world's highest standard of safety measures.

Consequently, viral adulteration and side effects resulting from immunoreactions, etc., that cannot be technically eliminated under the current standard of science and technology are interpreted as not falling within the purview of defect.

(ii) Similarly, in the case of live vaccines, the determination of whether a defect exists is made upon a comprehensive consideration of the product's distinctive characteristics and various other circumstances. It is understood, therefore, that a side effect cannot automatically be said to be a defect.

*iii. Used articles*

So long as it falls within the purview of "manufactured or processed movable property," a used article is also a product.

However, whether a manufacturer, etc., is liable when its product is bought and sold as a used article demands careful consideration of (1) the manner of use and the state of any alterations or repairs, etc., attributable to the previous user, and (2) any inspections, servicing or repairs, etc., attributable to the seller of the used article.

b. *Real estate*

This law does not apply to real estate for the following reasons:

- (1) relief based on contractual obligations is readily applicable to real estate;
- (2) remedial measures are already available for injuries to third parties due to any defective structure on land under Civil Code article 717;<sup>10</sup>
- (3) the long-lived character of real estate and any deterioration, maintenance or repairs during its life must be given sufficient consideration; and
- (4) real estate is outside the purview of the product liability laws of EC nations.

Moveable property that makes up a part of real estate (window glass, wallpaper, etc.) is within the purview of this law if it was movable property at the time it was delivered.

c. *Intangible property*

This law does not apply to intangible property because it is not within the purview of movable property. Consequently, incorporeal energy in the form of electricity and the like, and software, etc., are not subject to this law.

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<sup>10</sup> Civil Code article 717 provides:

1. If any damage has been caused by another person by reason of any defect in the construction or maintenance of a structure on land, the person in possession of the structure shall be liable in compensation for damages to the injured party; however, if the person in possession has exercised due care in order to prevent the occurrence of such damage, compensation for the damage shall be made by the owner.
2. The provisions of the preceding paragraph shall apply *mutatis mutandis* in cases where any defect exists in the planting or the support of bamboos or of trees.
3. If, in the cases mentioned in the preceding two paragraphs, there exists any other person who is responsible for causing the damage, either the possessor or the owner may exercise the right to obtain reimbursement against such other person.

However, any product into which software is incorporated is understood to be subject to this law, and it is possible that the software's defective condition can be interpreted as the product's defect.

*d. Repairs and installations*

Repairs and installations are not "manufacturing or processing" because both are something that take place after the delivery of a product and are not considered to have either created a new product or added a new attribute.

*B. The Definition of "Defect" (Paragraph (2))*

*1. Effect*

The term "defect" set forth in this law falls within the broader term "flaw" which appears in Civil Code article 570<sup>11</sup> regarding warranty against flaws.<sup>12</sup> But the product liability law does not apply to a simple flaw in the quality of a product which will not give rise to a safety-related injury.

*2. Interpretation of the Text*

*a. The meaning of "the specific characteristics of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer, etc., delivered the product, and other circumstances concerning the product"*

In order to accommodate the expressed need for a clear and accurate concept of the term "defect" and the need to prevent a proliferation of disputable issues (resulting in an increased burden of proof for the defendant), this law expresses three factors to be considered comprehensively and objectively in determining the existence of a defect: (1) the specific characteristics of the product; (2) the ordinarily foreseeable manner of use of the product; and (3) the time when the manufacturer, etc., delivered the product.

<sup>11</sup> Civil Code article 570 provides: If any latent flaws exist in the object of a sale, the provisions of article 566 shall apply *mutatis mutandis*, except in the case of a compulsory sale by official auction.

<sup>12</sup> Civil Code article 570 uses the term *kashi* (瑕疵), while the Product Liability Law uses the term *kekkan* (欠陥). Generally speaking, these two terms may be used interchangeably. However, in order to distinguish between them, *kashi* will be referred to as "flaw" and *kekkan* as "defect."

The substance of these three considerations are listed below. In an actual trial, the weight of each factor will differ in response to the details of each particular case and each element will be considered comprehensively in determining a particular defect.

i. *The meaning of "the specific characteristics of the product"*

"The specific characteristics of the product" are the state of affairs peculiar to the product itself. They include labels on the product (how to prevent accidents, etc.), the product's utility (with a comparative consideration of any possible risks), cost versus effectiveness (the standard of safety of a product in the same price range or an alternative design within a reasonable price range), the probability of the occurrence of an injury and the extent thereof, the product's normal duration of use and its useful life, etc.

ii. *The meaning of "the ordinarily foreseeable manner of use of the product"*

This is the state of affairs of the product at the time of its use. It includes the product's reasonably foreseeable use and the possibility of the user of the product being able to prevent the occurrence of an injury.

iii. *The meaning of "the time when the manufacturer, etc., delivered the product"*

This is the state of affairs of the product at the time it is delivered by the manufacturer, etc. It includes the degree of safety required in society at the time of delivery of the product and the technical feasibility of realizing that level of safety (the situation of safety regulations and the possibility of adopting an alternative design).

iv. *The meaning of "other circumstances concerning the product"*

"Other circumstances" includes the obviousness of the risk (the user's degree of knowledge with regard to the method of use of the particular product), the extent of the product's variability of quality, and force majeure circumstances, such as natural calamities.

- b. *The meaning of "lack of safety that the product ordinarily should provide"*

This is the language which expressly states that the term "defect" set forth in this law is meant to cover the situation where the life, body or property of not only the user of the product, but also any third party other than the user, may be threatened by the product's lack of safety.

3. *Related Items*

- a. *The relationship with administrative safety regulation*

The significance of administrative product safety regulations is that they are enforcement regulations which establish the minimum standard to be met in manufacturing and/or selling a product for the purpose of preventing product-related accidents and that they serve as guidelines for evaluating business' product-safety measures as well as customers' purchase and use of the product. In contrast, the Product Liability Law establishes rules for remedies when an injury from a product-related accident has occurred and, rather than being a substitute for administrative product safety regulations, is mutually complimentary with those regulations.

The significance and objective of the Product Liability Law and these regulations differ from each other, and the compliance or non-compliance of a product with administrative product safety regulations does not always coincide with the determination of the existence or non-existence of a defect or product liability. However, in a suit for damages, compliance with safety regulations is an important consideration when deciding whether a defect is responsible for an accident involving a regulated product. The establishment in a reasonable manner of the technical standards used by safety regulations will enable better foreseeability of a defect determination as well as product safety for both businesses and consumers.

With regard to a product to which safety regulations apply and an accident occurs as the result of a defect, if it is determined that (1) there is a cause and effect relationship between a deficiency in the safety regulations and the occurrence of the defect, and (2) there was "intent or negligence" (illegal exercise or non-exercise of administrative regulatory authority) by

"a public official who is in a position to wield governmental powers," a requisite condition for reparation by the State pursuant to article 1 of the State Compensation Act,<sup>13</sup> the State will be held liable under the State Compensation Act, regardless of whether the manufacturer, etc., is liable under the Product Liability Law.

*b. The time standard for judging a defect*

In order for a manufacturer, etc., to be held liable for damages based on a defect, it is necessary that the defective product possesses the defect (i.e., lacks ordinary safety) at the time the product is delivered (i.e., at the time when the product leaves the control of the manufacturer, etc.). A determination that the product lacked ordinary safety at such time is also necessary.

*c. Identification of the defective part*

When an injured party attempts to hold a manufacturer, etc., liable and demands damages, it is necessary for him/her to clearly identify exactly where in the product it was defective.

In such a case of identification, the degree of specificity should take into consideration the specific characteristics of the product. An assertion or proof of the existence of a defect should suffice if it is convincing enough in light of the socially accepted idea of a defect.

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<sup>13</sup> Article 1 of the State Compensation Act (Law No. 125, Oct. 27, 1947) provides:

1. When a public official who is in a position to wield governmental powers of the State or of a public body has, in the course of performing his duties, illegally inflicted losses upon another person either intentionally or negligently, the State or the public body concerned shall be liable to compensate such losses.

2. If, in the case mentioned in the preceding paragraph, the governmental official involved was intentional or guilty of gross negligence, the State or the public body concerned shall have the right to obtain reimbursement from such official.

C. *The Definition of "Manufacturer, etc." (Paragraph (3))*

1. *Effect*

The aim of product liability is to offer a remedy to injured parties in this modern age of mass production and mass consumption. Considering the fact that reliance liability, risk liability, compensation liability, etc., have all collectively been shifted from a negligence basis to one of fault liability, it is appropriate to include a party who manufactured, processed, imported or labeled a product in a certain manner within the scope of that type of liability.

2. *Interpretation of the text*

a. *The meaning of "by way of business" (Item (i))*

This law limits the subject of liability to those parties who have manufactured, processed, or imported by way of business. This stems from the fact that product liability is a principle of law developed as industrial mass production and mass consumption have become the general norm.

"By way of business" means conducting the same act repetitively and continuously.

b. *The meaning of "any person who . . . manufactured, processed, or imported" (Item (i))*

The manufacturer, etc., is the person who by way of business manufactures or processes a product and, through his/her own volition, delivers it. Such person is naturally included as a subject of liability.

An importer, although he does not directly contribute to the creation of a defect by manufacturing or processing a product, is also considered to be a subject of liability. This is because the importer is the party who, by supplying the product in the domestic market, brings into the country the particular risk. In light of the difficulty with which consumers confront in directly suing an overseas manufacturer, etc., importers are subject to this law in the same manner as are manufacturers, etc.

- c. *The meaning of "any person who, by putting his name, trade name, trademark, or other feature (hereinafter "representation of name, etc.") on the product, presents himself as its manufacturer" (article 2(3)(ii))*

A situation where a person falls within the purview of the first part of article 2(3)(ii), is when a person who, even though having not personally manufactured, processed, or imported the product, has displayed his own representation of name, etc., as the "Manufacturer: XX" or as the "Importer: XX."

- d. *The meaning of "any person who puts a representation of name, etc., on the product in a manner which may cause that person to be mistaken as the manufacturer of that product" (article 2(3)(ii))*

A situation where a person falls within the purview of the second part of article 2(3)(ii), is when a person, even though having not attached to the product a title as illustrated in the preceding paragraph (3), simply attaches, for example, a brand name which causes the consuming public to mistake it for the true manufacturer.

- e. *The meaning of "any person who puts on the product a representation of name, etc., of another person who can reasonably be determined to be the manufacturer-in-fact of the product in light of the manner of the product's manufacturing, processing, importation, or marketing of the product and other circumstances." (article 2(3)(iii))*

This item applies to a person who, in contrast to the preceding two paragraphs (3 and 4), indicates his representation of name, etc., with such titles as "Distributor: X" or "Seller: Y," etc., is recognized by the consuming public as a manufacturer, etc., of a similar product, and is the exclusive seller or distributor of the concerned product.

As used in this Item, "in light of the manner of the product's manufacture, processing, importation, or marketing of the product and other circumstances" has the following respective meanings:



- a. The meaning of “the manner of . . . . manufacturing, processing” includes circumstances such as the manufacturing of identical or similar products, the possession of facilities for the manufacture and inspection of the concerned product, and the carrying out of a final shipping inspection, etc.
- b. The meaning of “the manner of . . . . importation” includes circumstances such as the manufacturing or importation of similar products, and any re-packing and/or packing of the product subsequent to its being imported into the country, etc.
- c. The meaning of “the manner of . . . . marketing” includes circumstances such as being the exclusive seller of the product in the domestic market place upon being supplied by the manufacturer or the importer.

#### IV. ARTICLE 3 (*Product Liability*)

*The manufacturer, etc., shall be liable for damages resulting from injury to a person's life, body, or property caused by a defect in the delivered product which he manufactured, processed, imported, or put a representation of name, etc., as described in article 2(3)(ii) or (iii). However, this Article shall not apply if such damage is limited to such product itself.*

##### A. *Product Liability*

##### 1. *Effect*

This Article provides the basis for holding a manufacturer, etc., responsible for product liability. As a special provision to the law governing unlawful acts (Civil Code article 709),<sup>14</sup> which requires either intent or negligence, this Article provides for the requirement of a defect as the condition to the obligation to pay damages.

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<sup>14</sup> Civil Code article 709 provides: A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.

## 2. *Interpretation of the Text*

- a. *The meaning of "manufactured, processed, imported, or put a representation of name, etc., as described in article 2(3)(ii) or (iii)."*

It is necessary that any manufacturer, etc., to whom the definitions expressed in article 2(3) of this law apply, actually manufactured, processed, imported, or placed a representation of name, etc., as described in article 2(2), (3)(ii) and (3)(iii) on the defective product whose defect caused the accident from which the claim for damages arises.

- b. *The meaning of "a defect in the delivered product"*

"Deliver" means the transfer of possession resulting from personal intention. There is no inquiry into whether or not it was transferred for consideration. Also, because liability is limited to a defective product that has been delivered through one's own volition, a manufacturer, etc., will not be held liable in a situation where, for example, an injury results from the defect of a product that was stolen from the manufacturer's warehouse.

Refer to article 2(2) for the term "defect."

- c. *The meaning of "caused by a defect"*

In order for the manufacturer, etc., to be wholly liable for any injuries attributable to a defective product, it is necessary that the injury result from the product's defect and that there exist a reasonable cause and effect relationship between the defect and the injury.

- d. *The meaning of "damages resulting from injury to a person's life, body, or property"*

The aim of this law is to protect a person's life, body, or property. In this context, "person" includes not only natural persons, but juridical persons as well.

When only mental injury results, without any injury to a person's life, body, or property, it is understood that, in principle, no right to claim damages for injury arises.

### 3. *Reference Information: General Principles of the Burden of Proof*

With regard to the burden of proof in a situation where damages are claimed under this law because of an injury due to a defective product, the burden of proving the requirements established in article 3 is placed on the person bringing the claim.

Under the current system of tort law, the burden of proving negligence, occurrence of injury and the causal relationship between the negligence and the injury is placed on the person claiming damages. With product liability, except for exchanging the term "negligence" for "defect," the general principles of burden of proof are not changed.

Currently, in determining whether or not a defect or cause and effect relationship exists, the courts are attempting in a fair manner to reduce the injured party's burden of proof on a case by case basis by flexibly applying empirical rules and factual presumptions depending upon the nature of each business in question as well as the status of the production of evidence. Such a method will continue to be applied to future cases as flexibly and positively as possible.

#### B. *The Scope of Damages*

##### 1. *Effect*

The right to a claim for damages based on this law naturally requires the occurrence of an injury. The scope of those damages will basically be determined by the same "reasonable causation" principles that have been adopted in tort law. However, damage to the product itself that does not produce so-called "extended damages"<sup>15</sup> is not the subject of liability under this law.

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<sup>15</sup> The Japanese term is *kakudai songai* (拡大損害). It is sometimes translated as "enlarged damages" and, with regard to contracts, it is sometimes used to refer to consequential damages.

## 2. *Interpretation of the Text*

### a. *The meaning of "damages resulting from injury"*

Certain court decisions have, in the past, analogously applied the damages provisions of Civil Code article 416,<sup>16</sup> which set forth the damages arising from a default of obligations, to the scope of damages arising from an unlawful act. The courts are currently basing their decisions on the concept that the liability for damages is determined to the extent that a "reasonable cause and effect relationship" can be determined.

Although product liability transfers the source of liability from "negligence" to "defect," its true nature lies essentially in tort. Product liability was legislated in conformity with judicial precedents and actual court proceedings regarding the scope of damages which were based on the traditional theory of negligence liability hitherto in existence in Japan. Thus, there are no special reasons why the general theory of tort damages should be changed with respect to product liability only. Therefore, it is appropriate to approach the damages issue in product liability by analogously applying the damages provisions of article 416 of the Civil Code.

### b. *The meaning of "this Article shall not apply if such damage is limited to such product itself"*

Where so-called extended damages (personal injury or material injury to items other than the defective product itself) have not taken place and only the product itself has been damaged, no remedy is available under this law.

Where, because of a defect, the product itself has been damaged but there has been no extended damages, it is often difficult to make the subtle factual distinction between a situation where the product is damaged because of a defect and a situation whereby the product doesn't qualify as defective, but is considered to be of flawed quality. Because of this

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<sup>16</sup> Civil Code article 416 provides:

1. A demand of compensation for damages shall be for the compensation by the obligor of such damages as would ordinarily arise from the non-performance of an obligation.
2. The obligee may recover the damages which have arisen through special circumstances too, if the parties had foreseen or could have foreseen such circumstances.

difficulty, there is a danger that abusive and inappropriate claims regarding such quality flaws may be filed. Policy-oriented requests that this danger be eliminated were taken into consideration. However, it was determined that redress for damage suffered only by the defective product itself be best left to the remedies available through warranty liability or default of obligation liability and be excluded from product liability.

However, once "extended damages" have occurred, the injured party's burden may become excessive if such extended damages are to be reviewed on the defect liability basis and the damage to the defective product itself is reviewed on the basis of contractual liability. This is because of the fact that there may be different parties against whom the claims must be brought and there are different requirements and conditions to be met in proving or asserting their respective liability. It is appropriate, therefore, that the fundamental principles of the tort system be followed and the damage to the product itself also be subject to compensation for damages in such a case.

### 3. *Related Items*

#### a. *Mental distress*

In accordance with previous judicial practice, mental distress is naturally included in damages under the Product Liability Law.

#### b. *Lost income*

Whether or not lost income may be the subject of damages is to be decided in a reasonable manner according to the legal principle of reasonable cause and effect relationship.

#### c. *Non-personal damage to businesses*

Where the party injured from a product-related accident is a business (including a juridical person), as well as where business-related property has been damaged, such injuries are subject to compensation under this law within the demarcated scope of reasonable causation.

d. *Punitive damages, discharged sums, and limited liability sums*

This law does not adopt the concept of punitive damages, discharged sums,<sup>17</sup> and limited liability sums<sup>18</sup> that are manifest in the product liability laws of certain other countries.

V. ARTICLE 4 (*Exemptions*)

*The manufacturer, etc., shall not be liable under the provisions of article 3 if it is shown:*

1. *that the state of scientific or technical knowledge at the time when the manufacturer, etc., delivered the product was not such as to enable the existence of the defect in the product to be discovered; or*

2. *that, where the product is used as a component or raw material of another product, the defect is exclusively attributable to compliance with the design-related instructions given by the manufacturer, etc., of such other product and the defect is not due to any negligence on the part of the manufacturer of such component or raw material.*

A. *The Effect of This Article*

This Article exempts a manufacturer, etc., liable under article 3 for product liability from having to pay damages pursuant to the provisions of article 3 if the manufacturer, etc., can prove certain circumstances. This Article, however, has no effect on any liability arising pursuant to the Civil Code or other laws.

In particular, this Article provides two possible defenses: the so-called "state-of-the-art defense"<sup>19</sup> and the so-called "component/raw material producer's defense."

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<sup>17</sup> The Japanese term is *menseki-gaku* (免責額).

<sup>18</sup> The Japanese term is *sekinin gendo-gaku* (責任限度額).

<sup>19</sup> The Japanese term is *kaihatsu kiken no kôben* (開発危険の坑弁).

*B. The State-of-the-Art Defense*

*1. Effect*

“State of the art” refers to the risk of being unable, through the level of scientific and technical knowledge at the time the product is placed into distribution, to detect any inherent defect which may exist in such product. Holding a manufacturer, etc., liable for such development risk would also hinder R&D and technical development, which might in turn harm the material interests of consumers. It is for this reason that the state-of-the-art defense is needed to exempt the manufacturer, etc., if it proves that the defect in question merits state-of-the-art qualification.

Expressly specifying state-of-the-art as a defense has made it clear that the manufacturer, etc., has the burden of proof with respect to foreseeability based on advanced scientific and technical knowledge. This will contribute to the expediency of trials.

Incidentally, many foreign nations acknowledge the state-of-the-art defense.

*2. Interpretation of the Text*

*a. The meaning of “scientific or technical knowledge”*

The term “knowledge” as used in this law means all the knowledge established to such a degree as to potentially influence the decision of the existence of a defect. It is the collective knowledge which objectively exists in society, and not the knowledge possessed by any particular individual.

In order to be exempted under the state-of-the-art defense, it is necessary to prove that the particular defect’s existence could not be known in light of the highest level of knowledge available at the relevant time.

*b. The meaning of “not such as to enable the existence of the defect in the product to be discovered”*

The state-of-the-art defense exempts a defendant from liability when a product is determined to have a defect if the defendant proves at trial that such defect could not have been known by the scientific or technical knowl-

edge available at the time of delivery of such product and if such contention is accepted as being objective. The availability of the state-of-the-art defense is not affected by the size of operation or the technical level of any individual defendant.

C. *The Component/Raw Material Producer's Defense (Item (2))*

1. *Effect*

In so far as product liability focuses on the existence of a defect in a product as the basis for imposing liability for damages, a manufacturer of components or a producer of raw materials will also be held liable if such components or raw materials are defective.

However, there are cases in which a defect results as a consequence of such component manufacturer or raw material producer having to comply with design-related instructions given by the manufacturer who manufactures a product into which the components or raw materials are incorporated. It is considered unjust and inappropriate, therefore, to hold that component manufacturers or raw material producers who follow such instructions are as liable as the manufacturer who gave the instructions with respect to the avoidability of the defect and resultant damages.

For the above reason, component manufacturers and raw material producers are exempted from liability from a policy standpoint if a defect in a component or raw material is solely attributable to design-related instructions given by the manufacturer of another product into which the component or raw material was incorporated and if it is proven there was no negligence on the part of the component manufacturer or the raw material producer with respect to the occurrence of the defect.

2. *Interpretation of the Text*

a. *The meaning of "where the product is used as a component or raw material of another product"*

Whether or not a particular product is a component or raw material of another product is not determined by whether the particular product was delivered by its manufacturer, etc., as a component or raw material, but



rather whether it was actually used as a component or raw material of another product.

This defense does not apply to the manufacturer, etc., of any component or raw material which is directly incorporated into any real property, which is not a product, because this defense provides "where the product is used as a component or raw material of another product."

*b. The meaning of "design-related instructions"*<sup>20</sup>

This defense requires that a design defect already be extant in the particular component or raw material at the time such component or raw material leaves the hand of its producer and that the defect be entirely caused by the "design-related instructions." It is naturally necessary, therefore, that the "design-related instructions" must bring about a concrete change to the design of the component or raw material or must specify the design itself.

The decision of whether or not such defect is exclusively attributable to such instructions will hinge upon the determination of whether or not such component manufacturer or raw material producer was able to adopt a design alternative to such defective design under the then-existing circumstances, including the fact that such instructions were given and assumed.

These instructions can be in the form of drawings, structural specifications, performance specifications, design specifications, etc., depending on the particular characteristics of the product. In particular, they are not limited to drawings of the components or raw materials but encompass instructions on the structure, the physical properties, the quality performance and design specifications.

*c. The meaning of "the defect is not due to any negligence on the part of the manufacturer of such component or raw material"*

When seeking to apply the second defense provided in article 4, it is required that the defendant producer of components/raw materials prove that it was not negligent. Concretely, upon a comprehensive consideration of the particular producer's technological level and various other circumstances such as its business format and the relationship between such

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<sup>20</sup> The Japanese term is *sekkei ni kan suru shiji* (設計に関する指示).

producer and the person placing the order, if it can be concluded that the occurrence of the defect in question could not have been foreseen or the result could not have been avoided, the defect will be deemed "not due to any negligence" on the part of the components/raw materials producer.

#### VI. ARTICLE 5 (*Time Limitations*)

(1) *The right to claim damages provided in article 3 shall be extinguished by prescription if the injured person or such injured person's legal representative does not exercise such right within three years from the time the injury and the liable party become known to the injured person or his legal representative. The same shall also apply upon the expiration of ten years from the time the manufacturer, etc., delivered the product.*

(2) *The time period in the second sentence of Paragraph (1) of this Article shall be calculated from the time the injury arises if such injury is caused by substances which are harmful to human health when they remain or accumulate in the body, or where the symptoms of such injury appear after a certain latent period.*

#### A. *Effect*

Considering the necessity to insure legal stability, this Article has the effect of limiting an injured person's right to claim damages under article 3 upon the passage of a specified period of time.

#### B. *Interpretation of the Text*

1. *The meaning of "The right to claim damages provided in article 3 shall be extinguished by prescription if the injured person or such injured person's legal representative does not exercise such right within three years from the time the injury and the liable party become known to the injured person or his legal representative" (short-term extinctive prescription)*

This Article has similar aims as the general principle of extinctive prescription in tort law (Civil Code article 167(1)).<sup>21</sup> The reason for

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<sup>21</sup> Civil Code article 167(1) provides: A claim shall lapse if it is not exercised within ten years.

providing a short-term extinctive prescription is based on the following grounds: (1) the necessity of expediently establishing legal relationships in order to clarify the existence of liability, determine the amount of damages, etc.; and (2) the fact that there is no merit in protecting such persons as do not exercise their right within three years from the time the identity of the wrongdoer is known.

2. *The same shall also apply upon the expiration of ten years from the time the manufacturer, etc., delivered the product (long-term limitation)*

The short-term extinctive prescription in tort law mentioned above uses, as the starting point of calculation, the "time the injury and the wrongdoer are known." So long as the injury and the wrongdoer remain unknown, therefore, liability continues indefinitely. For that reason and from the standpoint of social stability, a long period of "twenty years from the time of the illegal act" is provided in tort law (Civil Code article 724).<sup>22</sup> Moreover, according to judicial precedents, this period differs from extinctive prescription in that it is interpreted as a disqualification.

Based on similar principles, this law provides that the period of prescription starts running ten years from the time the product is delivered. A prescription period of ten years was chosen in light of the following considerations: (1) the fact that, due to the swift technological advancements of recent years, society's ideas about the safety of products are rapidly changing; (2) the normal life or period of use or service of products (even among products whose period of use is relatively long, the average life is about ten years and the average period of use is about seven years); (3) the preservation period of inspection documents and records, etc.; and (4) legislative examples of various foreign countries.

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<sup>22</sup> Civil Code article 724 provides:

The right to demand compensation for the damage which has arisen from an unlawful act shall elapse by prescription if not exercised within three years from the time when the injured party or his legal representative became aware of such damage and of the identity of the person who caused it; the same shall apply if twenty years have elapsed from the time when the unlawful act was committed.

3. *The meaning of "shall be calculated from the time the injury arises if such injury is caused by substances which are harmful to human health when they remain or accumulate in the body, or where the symptoms of such injury appear after a certain latent period" (special provision of long-term limitation)*

In consideration of the nature of product liability, this law establishes a disqualification period (period of liability) that starts from the time the product is delivered by the manufacturer, etc. However, injuries caused by a defect in a product include (1) injuries caused by harmful substances that have accumulated or remained in the body, and (2) injuries whose symptoms appear after a certain latent period after the use of a product. Both types of injuries are the kind that cannot be anticipated within a certain period from the time the product begins to be used.

The application of a disqualification period (the period of liability) which is based on the normal use period of a product to these kinds of injuries would make it impossible to file a lawsuit under this law for damages which arise after the passage of such period (ten years after the delivery of the product). For this reason, this law has created a special provision that starts the period of liability running from the "time the injury arises" in order to protect persons who suffer these kinds of injuries.

## VII. ARTICLE 6 (*Application of the Civil Code*)

*Where this law does not provide otherwise, the liability of the manufacturer, etc., for damages caused by a defective product shall be subject to the provisions of the Civil Code (Law No. 89, 1896).*

### A. *Effect*

In addition to the Civil Code's system of tort liability based on negligence, this law introduces a system of product liability that is a new form of tort where a defect is the source of the liability. As such, it is a special provision within the tort system of liability under the Civil Code. For this reason, the provisions of the Civil Code are to be applied to any matter not provided otherwise in this law.

Examples where provisions of the Civil Code are to be used are (1) comparative fault (Civil Code article 722(2)),<sup>23</sup> (2) joint and several liability (Civil Code article 719),<sup>24</sup> and (3) manners of compensation for damages (Civil Code articles 722(1)<sup>25</sup> and 417<sup>26</sup>).

## *B. Examples of the Application of Civil Code Provisions*

### *1. Comparative Fault*

Civil Code article 722(2) expressly provides that comparative fault is generally applied to unlawful acts (torts).<sup>27</sup> Comparative fault is a system which reduces the amount of damages paid by the wrongdoer where it would be unfair to burden such wrongdoer with bearing all the responsibility for damages because of certain circumstances regarding the injured party's behavior. The injured person's "negligence" is hence taken into consideration in determining the amount of damages to be compensated.

### *2. Joint and Several Liability*

Injury arising from a defective product can involve a multiple number of liable persons, such as the manufacturer of a finished product and the manufacturer of components thereof. Injury can also arise and escalate as a result of a certain act by a person other than the manufacturer of a product, holding such person liable for negligence. In either situation, compensation to the injured party for damages will be imposed joint and severally.

Where an accident occurs due to a defective product and the duty to pay damages joint and severally is imposed, each liable party's burden will

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<sup>23</sup> Civil Code article 722(2) provides: If there is any fault on the part of the injured party, the Court may take it into account in assessing the amount of the damages.

<sup>24</sup> Civil Code article 719 provides:

1. If two or more persons have by their joint unlawful act caused damage to another, they are jointly and severally liable to make compensation for such damage; the same shall apply if it is impossible to ascertain which of the joint participants has caused the damage.

2. Instigators and accomplices are deemed to be joint participants.

<sup>25</sup> Civil Code article 722(1) provides: The provisions of article 417 shall apply *mutatis mutandis* to the compensation to be made for the damage which has arisen from an unlawful act.

<sup>26</sup> Civil Code article 417 provides: In the absence of any different agreement, the amount of compensation for damages shall be assessed in money.

<sup>27</sup> See text of article 722(2) *supra* note 23.

be determined in accordance with each party's extent of contribution to the injury. In a joint and several case, the person who fulfills the duty to pay damages to the injured party is entitled to recover the amount that is paid in excess of its liability contribution from the other liable parties.

### 3. *Immunity by Special Agreements (Disclaimers)*

The validity of a disclaimer is also governed by the principles of tort under the Civil Code. If a person provides a disclaimer against his product liability, the effect of such disclaimer only extends to the other person directly involved in the immediate transaction. It does not extend to every person to whom the product is delivered. Also, if the label or the operation manual of a product contains a disclaimer limiting or exempting in advance the wrongdoer's liability for damages, such disclaimers are often interpreted to be invalid as being contrary to the public order and good morals when the validity of such disclaimer becomes an issue between the parties to the transaction (Civil Code article 90)<sup>28</sup> (at least, any disclaimers relating to bodily injury have been uniformly interpreted as being invalid on the ground that they violate the public order and good morals).

### 4. *The Principle of Payment in Money for Damages*

Pursuant to Civil Code articles 722(1)<sup>29</sup> and 417,<sup>30</sup> payment in money is the principle method of compensation for damages arising from an unlawful act.

## VIII. SUPPLEMENTARY PROVISIONS

### (1) *Enforcement Date, etc.*

*This Law shall come into force the day after one year from the date of promulgation and shall apply to the products delivered by a manufacturer, etc., after this Law comes into force.*

### (2) *Partial Amendment of the Law on Compensation for Nuclear Power-Related Damage*

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<sup>28</sup> Civil Code article 90 provides: A juristic act which has for its object such matters as are contrary to public policy or good morals is null and void.

<sup>29</sup> See text of article 722(1) *supra* note 25.

<sup>30</sup> See text of article 417 *supra* note 26.

*The Law on Compensation for Nuclear Power-Related Damage (Law No. 147, 1961) shall be partially amended as follows:*

*In Paragraph (3) of article 4 of that Law, "and the Law relating to the Limitation of the Liability of Shipowners (Law No. 94, 1975)" shall be amended as, "the Law relating to the Limitation of the Liability of Shipowners (Law No. 94, 1975) and the Product Liability Law (Law No. 85, 1994)."*

A. *Enforcement Date, etc.*

1. *The Meaning of "[t]his law shall come into force the day after one year from the date of promulgation"*

This law will come into force one year from its promulgation and thus applies to any product delivered by a manufacturer, etc., subsequent to such enforcement date.<sup>31</sup>

Because the idea of product liability is an entirely new concept in Japan and it will have a far-reaching impact on both juridical as well as societal behavioral norms, a period of one year is fixed in this law's supplemental provisions in order to allow affected persons time to understand how the new system works and to prepare accordingly.

Thus, this law will be put into force on July 1, 1995.

2. *The Meaning of "[t]his law . . . shall apply to the products delivered by the manufacturer, etc., after this law comes into force"*

This provision states that the law will apply to the products delivered by the manufacturer, etc., after the law comes into force. Generally speaking, it is the principle of the civil law not to impose duties on persons or restrict persons' rights retroactively. Because the basis for deciding product liability is based on the delivery of a defective product that has been manufactured, processed or imported, or been affixed with a certain label, it is expressly provided that the application of this law is limited to those products delivered subsequent to this law's enforcement date.

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<sup>31</sup> The Product Liability Law was promulgated on July 1, 1994 and came into force on July 1, 1995.

3. *The Meaning of "The Law on Compensation for Nuclear Power-Related Damage (Law No. 147, 1961) shall be partially amended as follows"*

The Product Liability Law, which provides non-negligence liability upon manufacturers, etc., is established as a special civil law. In order to maintain the purpose of the Law on Compensation for Nuclear Power-Related Damage,<sup>32</sup> which provides for non-negligence liability of nuclear power plant operators and the concentration of responsibility upon such operators for damages resulting from the operation of a nuclear reactor, Paragraph (2) of the Supplemental Provisions excludes the application of the Product Liability Law to such damages.

- A. *Reference Information: The Prior and Current Versions of Article 4(3) of the Law on Compensation for Nuclear Power-Related Damage*

1. *Article 4(3) Prior to the Product Liability Law*

Commercial Code (Law No. 48, 1899) article 798(1) and the Law Relating to the Limitation of the Liability of Shipowners (Law No. 94, 1975) shall not apply to nuclear power-related damages resulting from the operation of a nuclear reactor.

2. *Article 4(3) Subsequent to the Product Liability Law*

Commercial Code (Law No. 48, 1899) article 798(1), the Law Relating to the Limitation of the Liability of Shipowners (Law No. 94, 1975) and the Product Liability Law (Law No. 85, 1994) shall not apply to nuclear power-related damages resulting from the operation of a nuclear reactor.

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<sup>32</sup> The Japanese term is *genshi-ryoku songai no baishô ni kan suru hôritsu* (原子力損害の賠償に関する法律).



