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Liaiblity for Defective Products in the Soviet Union: Socialist Law Versus Soviet Reality

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PERSPECTIVE

Liability for Defective Products in the Soviet Union: Socialist Law Versus Soviet Reality

Bruce L. Ottley*
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I. INTRODUCTION

After assuming leadership of the Soviet Union in March 1985, Communist Party General Secretary Mikhail S. Gorbachev made reconstruction (*perestroika*) of the economic system his principal domestic policy objective.¹ In blunt speeches throughout the country, he repeatedly called for a "revolutionary" restructuring of the economy to: 1) achieve greater efficiency in production; 2) introduce new methods of management; and 3) increase the quantity, quality, and variety of consumer goods.² To achieve these objectives, a number of steps were taken during Gorbachev's first years in office. The government implemented major personnel changes in its leadership,³ improved wage incentives for workers,⁴ and reduced sales of alcohol.⁵ The Law on Individual Enterprise was also enacted,⁶ allowing individuals to establish independent busi-

¹ For an analysis of the Soviet economy, Gorbachev's efforts to reform it, and the risks he faces, see M. GOLDMAN, *GORBACHEV'S CHALLENGE* (1987); Draper, *Soviet Reformers: From Lenin to Gorbachev*, *DISSENT*, Summer 1987, at 287; *Gorbachev's Gamble*, N.Y. Times, July 19, 1987, § 6 (Magazine), at 28; Galbraith, *Can the Russians Reform?*, *HARPERS*, June 1987, at 52; Kennedy, *What Gorbachev Is Up Against*, *ATLANTIC MONTHLY*, June 1987, at 29; *Gorbachev's Great Push and the Reluctant Public*, N.Y. Times, Dec. 18, 1986, at A1, col. 1; *Reforming the Soviet Economy*, *BUS. WK.*, Dec. 7, 1987, at 76 [hereinafter *Reforming*]; *For Moscow and Beijing, Air is Filled with Change*, N.Y. Times, Nov. 4, 1987, at A1, col. 1; *Uncertain Soviet Marks Milestone*, N.Y. Times, Nov. 1, 1987, § 1, at 1, col. 5.

² See Report by M. S. Gorbachev, General Secretary of the CPSU [Communist Party of the Soviet Union] Central Committee, at the Plenary Session of the CPSU Central Committee on June 25, 1987, translated in 39 CURRENT DIG. SOV. PRESS No. 27, July 29, 1987, at 3; Speech by M.S. Gorbachev at a Meeting with the Latvian Republic's Party, Soviet and Economic Aktiv, translated in 39 CURRENT DIG. SOV. PRESS No. 8, Mar. 25, 1987, at 6; *On Restructuring and the Party's Personnel Policy*, translated in 39 CURRENT DIG. SOV. PRESS No. 4, Feb. 25, 1987, at 1.

Excerpts from Gorbachev's speeches have been frequently printed in the United States press. See, e.g., *Gorbachev Makes His Push for the Good Life*, N.Y. Times, June 28, 1987, at E3, col. 1; *Gorbachev on the Future: 'We Will Not Give In'*, N.Y. Times, Dec. 22, 1986, at A20, col. 1; *Gorbachev's Uphill Struggle*, *CHRISTIAN SCI. MONITOR*, Aug. 4, 1986, at 1, col. 1.

³ See *Biographies of New Politburo Members*, translated in 39 CURRENT DIG. SOV. PRESS No. 26, July 29, 1987, at 5; *Communique of the Plenary Session of the Central Committee of the Communist Party of the Soviet Union*, translated in 39 CURRENT DIG. SOV. PRESS No. 4, Feb. 25, 1987, at 4.

Brief biographies of some of the new appointees can be found in *Gorbachev Policy Gains as 3 Allies Advance in Party*, N.Y. Times, June 27, 1987, at 1, col. 1; *In the Gorbachev Mold*, N.Y. Times, June 27, 1987, at 5, col. 1; *Gorbachev Foe Loses Politburo Post*, N.Y. Times, Oct. 22, 1987, at A6, col. 4.

⁴ See also *Income Distribution and Justice*, translated in 38 CURRENT DIG. SOV. PRESS No. 45, Dec. 10, 1986, at 6; *Earned Pay—The Reform of the Pay System Begins*, translated in 38 CURRENT DIG. SOV. PRESS No. 24, July 16, 1986, at 1; *Soviet Moves to Pay More to Better Workers*, N.Y. Times, Mar. 8, 1987, at 8, col. 1; *Restructuring and Wages*, translated in 39 CURRENT DIG. SOV. PRESS No. 37, Oct. 14, 1987, at 9.

⁵ See *Fighting Alcohol: A Two Year Update*, translated in 39 CURRENT DIG. SOV. PRESS No. 22, July 1, 1987, at 7; *They've Been Covered*, translated in 38 CURRENT DIG. SOV. PRESS No. 17, May 28, 1986, at 7. The reasons for the high rate of alcoholism in the Soviet Union and its effect on society and the economy are discussed in M. BINYON, *LIFE IN RUSSIA* 59 (1983).

⁶ The policy of permitting limited private enterprise can be traced back to the New Economic

nesses for manufacturing certain consumer goods and performing repair services. The most important step, however, was taken at a special session of the Communist Party's ("Party") Central Committee in June 1987. At that session, the Party approved and the Supreme Soviet ratified the Law on the State Enterprise.⁷ This law involved the most extensive changes in the Soviet economy since the Stalinist era.⁸

An important element in efforts to restructure the Soviet economy is improvement of the quality of consumer and industrial goods and services. Gorbachev emphasized this concern in his keynote address to the Twenty-Seventh Soviet Party Congress in February 1986. He sharply criticized poor production practices and economic inefficiency, and demanded radical improvements in the quality of consumer goods, technology, and industrial programs.⁹ The 1986 to 1990 "Five-Year Plan," approved in June 1986, addresses this problem by advocating quality improvement and doubling the output of consumer goods.¹⁰

The quality of industrial and consumer goods is an issue not only for the domestic economy but also for foreign trade. The Soviet Union relies heavily on imports for high technology products which are not available domestically.¹¹ This concern is reflected by the long-standing Soviet practice of placing clauses requiring "state of the art" equipment in contracts with foreign suppliers.¹² On the export side, exports to the West and to Eastern Europe are an important means by which the Soviet

Policy of the 1920s. See A. NOVE, AN ECONOMIC HISTORY OF THE U.S.S.R. 83 (1982). See also *Individual Enterprise: Opportunities and Obligations*, translated in 39 CURRENT DIG. SOV. PRESS No. 18, June 3, 1987, at 7; *In Soviet, Capitalism (But Don't Call It That)*, N.Y. Times, May 1, 1987, at A1, col. 1; *Soviet Law Widens Private Business*, N.Y. Times, Nov. 20, 1986, at A9, col. 1.

⁷ Law of the Union of Soviet Socialist Republics on the State Enterprise ("Law on the State Enterprise"), translated in 39 CURRENT DIG. SOV. PRESS No. 30, Aug. 26, 1987, at 8.

⁸ These changes and the reasons behind them are discussed in *Architect of Soviet Change*, N.Y. Times, July 10, 1987, at D1, col. 3; *Soviet Prices: Strawberries Are A Model*, N.Y. Times, June 28, 1987, § 1, at 1, col. 5; *New World For Russians*, N.Y. Times, June 27, 1987, at 1, col. 2; *Gorbachev Urges 'Radical' Changes To Spur Economy*, N.Y. Times, June 26, 1987, at A1, col. 6. For an analysis of the Soviet changes in the context of a worldwide shift to market mechanisms, see *The Global March to Free Markets*, N.Y. Times, July 19, 1987, § 3 (Business), at 1, col. 2.

⁹ *Gorbachev Opens 27th Party Congress*, translated in 38 CURRENT DIG. SOV. PRESS No. 8, Mar. 26, 1986, at 1.

¹⁰ *Communique on Meetings of the USSR Supreme Soviet*, translated in 38 CURRENT DIG. SOV. PRESS No. 25, July 23, 1986, at 1. See also *On the Five-Year Plan for the Economic and Social Development of the USSR in 1986-1990 and the Tasks of Party Organizations in Its Implementation*, translated in 38 CURRENT DIG. SOV. PRESS No. 24, July 16, 1987, at 2.

¹¹ For a discussion of the Soviet Union's reliance on imports of high technology, see M. GOLDMAN, *supra* note 1, at 118-47.

¹² The model purchase contract used by Soviet Foreign Trade Organizations requires that sellers provide equipment which corresponds to the "highest technical level in the seller's country . . ." (A copy of the model contract is on file with the authors).

Union obtains the currency needed to purchase foreign technology.¹³ In an effort to obtain both modern equipment and raise the quality of its exports and domestically made goods, the Soviet Union recently adopted legislation permitting joint ventures with foreign businesses.¹⁴ In short, *perestroika* has sharpened the need for quality goods in the Soviet economy.

This Perspective examines the role of the Soviet legal system in improving the quality of industrial and consumer products.¹⁵ After discussing the laws governing the quality of goods and the remedies for defective products,¹⁶ the effectiveness of these laws in providing incentives for producing quality goods will be assessed. This Perspective demonstrates that while the socialist law of the USSR provides the tools for assuring product quality, these laws will not be successful until the Soviet Union deals with the more basic realities of its economic and legal systems.

II. PRODUCT LIABILITY WITHIN THE SOVIET UNION

Industrial and consumer goods in the Soviet Union are mass produced. The quality of these goods, as well as the services required to support them, have long been criticized as inferior.¹⁷ The quality of consumer goods has recently become a frequent topic of news reporting, reflecting the new openness (*glasnost*) of the Soviet press.¹⁸ In addition to the new Five-Year Plan and Gorbachev's speeches, the press has reported a number of Party conferences and resolutions which have fo-

¹³ See Brainard, *Foreign Economic Constraints on Soviet Economic Policy in the 1980s*, in THE SOVIET ECONOMY: CONTINUITY AND CHANGE 217 (M. Bornstein ed. 1981)[hereinafter SOVIET ECONOMY].

¹⁴ See *In the USSR Council of Ministers, translated in* 39 CURRENT DIG. SOV. PRESS No. 6, Mar. 11, 1987, at 15; *In the Politburo of the CPSU Central Committee, translated in* 38 CURRENT DIG. SOV. PRESS No. 52, Jan. 28, 1987, at 15.

¹⁵ For earlier articles dealing with product liability law in the Soviet Union, see Zile, *Consumer Product Quality in Soviet Law: The Tried and the Changing* [hereinafter *Consumer Product Quality*], in SOVIET LAW AFTER STALIN: PART II SOCIAL ENGINEERING THROUGH LAW 183 (D. Barry, G. Ginsburgs & P. Maggs eds. 1978); Darby, *Products Liability in the Soviet Union*, 11 INT'L LAW 179 (1977); Zile, *Law and the Distribution of Consumer Goods in the Soviet Union*, 1964 U. ILL. L.F. 212 [hereinafter *Distribution*].

¹⁶ The focus of this Perspective is on efforts to improve the quality of goods manufactured in the Soviet Union. Poor quality goods implicate contract or tort concepts if the poor quality makes them "defective," i.e., unfit for the use normally expected by consumers. Therefore, improving the overall quality of consumer goods is a necessary element of eliminating defective goods.

¹⁷ The poor quality of industrial and consumer goods in the Soviet Union has been a favorite topic of Western writers. See H. SMITH, THE RUSSIANS 78 (rev. ed. 1984); D. WILLIS, KLAS: HOW RUSSIANS REALLY LIVE 37 (1985); Denton, *Soviet Consumer Policy: Trends and Prospects*, in SOVIET ECONOMY, *supra* note 13, at 176. For a discussion of the neglect of the service sector of the Soviet economy, see S. BIALER, THE SOVIET PARADOX 70 (1986).

¹⁸ For example, the poor quality of motor vehicles was discussed in *An Industry on Economic Accountability, translated in* 39 CURRENT DIG. SOV. PRESS No. 17, May 27, 1987, at 17.

cused on raising the quality of output.¹⁹ Government officials and enterprises which continue to produce inferior goods have been singled out for criticism.²⁰ Further, the press has reported the growth of "reverse-trade" enterprises which specialize in taking defective goods returned by the public.²¹ The poor quality of consumer goods has become an issue in the Soviet Union, however, not only because such goods harm the economy and are a source of public dissatisfaction, but also because defective goods may cause personal injury and property damage.²² Due to the wide range of problems caused by poor quality products, the use of the term product liability in this Perspective will refer to both contractual and tort liability of producers for the inferior quality of their products. An examination of these alternate forms of liability reveals that "black-letter" laws can be effective in improving this quality through producer accountability.

A. Contractual Liability

1. Liability of Trade Enterprises to Consumers

The Law on State Enterprise recognizes the state-owned enterprise as "the socialist commodity producer" which "carries out the production of consumer goods and provides paid services to the population."²³ Since state enterprises are considered legal persons,²⁴ the Soviet law of obligations gives them the right to enter into contracts and creates obli-

¹⁹ See *On Expanding Product Acceptance's Sphere of Activity*, translated in 39 CURRENT DIG. SOV. PRESS No. 33, Sept. 16, 1987, at 16; *An Important Task of Social Policy*, translated in 39 CURRENT DIG. SOV. PRESS No. 21, June 24, 1987, at 10 (Party conference on increasing the production of consumer goods); *In the Politburo of the CPSU Central Committee*, translated in 39 CURRENT DIG. SOV. PRESS No. 19, June 10, 1987 (committee meeting to discuss production of consumer goods); *Conference in the CPSU Central Committee*, translated in 38 CURRENT DIG. SOV. PRESS No. 32, Sept. 10, 1986, at 32 (conference on improving the quality of machinery); *In the Politburo of the CPSU Central Committee*, translated in 38 CURRENT DIG. SOV. PRESS No. 19, June 11, 1986, at 20 (meeting of the Politburo to discuss measures for improving the quality of output); *In the CPSU Central Committee and the USSR Council of Ministers*, translated in 38 CURRENT DIG. SOV. PRESS No. 19, June 11, 1986, at 12 (resolution on consumer goods).

²⁰ See *In the CPSU Central Committee*, translated in 38 CURRENT DIG. SOV. PRESS No. 22, July 2, 1986, at 19 (ministers responsible for radio and television production "reprimanded . . . for insufficient attention to the production of consumer goods and to improving their quality").

²¹ *Returns—Or, How Much Do 'Antigoods' Cost Us?*, translated in 38 CURRENT DIG. SOV. PRESS No. 17, May 28, 1986, at 20 [hereinafter *Returns*].

²² One newspaper article reported a fire in a hotel was caused by a defective color television set, and stated that such sets had caused 5490 fires in 1985. Although the article did not cite figures, it said that "[p]eople have died, buildings have burned." *A Fire in the Picture*, translated in 39 CURRENT DIG. SOV. PRESS No. 5, Mar. 4, 1987, at 21.

²³ Law on the State Enterprise, *supra* note 7, art. 1, § 2. For a discussion of the operation of state enterprises, see Zile, *Distribution*, *supra* note 15, at 217-19.

²⁴ Law on the State Enterprise, *supra* note 7, art. 1, § 2.

gations to consumers and other state enterprises for the goods the enterprises produce and sell. The Soviet law of obligations creates both a duty to provide quality products and a remedy for purchasers of defective goods. The provisions of the law of obligations are analogous to the laws of contract and tort in common law. These two concepts will be used to examine Soviet law and the role the legal system can play in improving the quality of industrial and consumer goods.

Under Marxist theory, contracts are conceptually different under socialist law from those in common law or civil law.

Under capitalism a purchase-sale contract is a means of realizing surplus value, a form of exploitation of one class by another. In socialist society the purchase-sale contract is a means of equivalent exchange between citizens, a means for the expedient distribution of goods, with the aid of which the realization of products and the labor incomes of citizens occurs simultaneously. Under conditions of capitalism, the purchase-sale contract reflects "market elements." In socialist society the determinative influence on a purchase-sale contract is exerted by the socialist planned economy.²⁵

The most widely used form of contract in the Soviet Union is the "contract for sale" or "purchase-sale" contract, under which a seller transfers property to a buyer in exchange for money.²⁶ Under Article 245 of the Russian Soviet Federated Socialist Republic Civil Code ("Civil Code"), the quality of a product must correspond to the terms of the contract or, in the absence of specifications in the contract, to "customary demands." Like an implied warranty in common law contract theory, customary demands in socialist law require that the product function in a normal manner for a certain period of time if it is used as intended.²⁷ In addition, the quality of articles sold by retail-trade enterprises must correspond to "state standards."²⁸ A state standard is

a normative-technical document establishing a complex of norms, rules, and requirements and approved by a competent state agency; thus it is of both a technical and legal nature. It should reflect the most progressive domestic and foreign experience, as well as the results of scientific research,

²⁵ Laasik, *Sovetskoe Grazhdanskoe Pravo: Chast'Osobennaiia* [Soviet Civil Law: Special Part](1980), reprinted in J. HAZARD, W. BUTLER & P. MAGGS, *THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980s*, at 289 (1984)[hereinafter *THE SOVIET LEGAL SYSTEM*]. A general discussion of the socialist theory of obligations can be found in Y. FLEISHITS & A. MAKOVSKY, *THE CIVIL CODES OF THE SOVIET REPUBLICS* 91 (1976).

²⁶ Russian Soviet Federated Socialist Republic Civil Code ("Civil Code"), art. 237, translated in *CIVIL CODE OF THE RSFSR* (W. Gray & R. Stults trans. 1965). Each of the 15 union republics of the Soviet Union has its own civil, criminal, and procedural codes. Since there is little difference between these codes, those of the Russian Republic's Civil Code are frequently cited as representative of Soviet law. This Perspective will follow this convention.

²⁷ Civil Code, art. 245.

²⁸ *Id.*

experimental design and construction and inventions and discoveries.²⁹

Prior to the adoption of the new civil codes in 1963 and 1964, Soviet law followed a rule of "caveat emptor." Under the old rule, the seller was relieved of liability for defects in goods if they "were known to the buyer during the conclusion of the contract or could have been discovered by him with the necessary care and attention on his part."³⁰ However, a seller is now liable for any defect in a product except those revealed to the buyer prior to the sale.³¹

Article 246 of the Civil Code gives a buyer a choice among five remedies if the consumer purchases a defective product.³² First, the buyer can demand substitution of a proper article for one of improper quality—quality as defined by generic characteristics in the contract.³³ Substitution, however, is a realistic remedy only if identical goods are available. Second, the buyer can seek a proportionate decrease in the purchase price.³⁴ This is appropriate if the defect does not make the goods totally useless. Third, the seller may be required to remove the defect in the article without charge to the buyer.³⁵ Unfortunately, when the item is returned to the seller, the Civil Code does not set a time limit within which the repairs must be made. Fourth, the buyer may repair the item and seek compensation for repair expenses.³⁶ The lack of repair facilities and the poor quality of repairs, however, frequently frustrates this remedy.³⁷ Finally, the buyer may be entitled to rescission of the contract with compensation for damages.³⁸ Under Article 247 of the Civil Code, the buyer must present this claim immediately after discovering it but not later than six months after the date of delivery of the article.³⁹

For products sold through retail-trade enterprises covered by "state

²⁹ Simons, *Standards*, in *ENCYCLOPEDIA OF SOVIET LAW* 720 (F. Feldbrugge, G. Van Den Berg & W. Simons 2d rev. ed. 1985).

³⁰ Y. FLEISHITS & A. MAKOVSKY, *supra* note 25, at 139.

³¹ Civil Code, art. 246.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See H. SMITH, *supra* note 17, at 73-74 (discussion of the shortage of repair facilities and spare parts for automobiles).

³⁸ Returning the item to the factory involves extensive and detailed paperwork. In the case of defective shoes, for example, the purchaser must write a declaration of rejection in quadruplicate. The receiving clerk at the factory is required to fill out five copies of a certificate of rejection, the expert's determination (in triplicate), six copies of the invoice, a notice to the public representative informing him or her of the right to participate in the rejection proceedings (in triplicate), the bill for the expert's determination (in triplicate), the receipt for the certification of rejection (in triplicate), and the postal receipts (in triplicate). *Returns*, *supra* note 21, at 21.

³⁹ Civil Code, art. 247.

standards," the buyer has a choice of three remedies. The consumer may demand that the seller repair the defect in the product without charge, substitute one of the proper quality, or take back the product and return the purchase price.⁴⁰ The period for filing a claim is determined by the length of time set out in the state standard and is calculated from the date of the retail sale.⁴¹ However, the buyer must present a claim to the *seller* (i.e., the trading enterprise) and *not* to the producer, unless an action against the producer is specifically provided by the law. The Civil Chamber of the Russian Soviet Federated Socialist Republic Supreme Court has held that "the producer does not bear a direct liability towards the buyer of the losses caused to him, as he is not a party to the contract."⁴²

As with common law contract remedies, the detailed contract provisions of the Soviet law of obligations are intended to give the buyer what he or she expected to receive. The realities of the Soviet economy, however, have created a situation where a legal right exists without an effective remedy. Thus, there has been little incentive for purchasers of defective products to resort to the legal system since the code provisions have been mere formalities rather than enforceable obligations.

2. *Liability Between State Enterprises*

An important factor contributing to defective consumer goods in the Soviet Union is the inferior quality of goods shipped by supplier enterprises to manufacturing enterprises,⁴³ chiefly due to the fact that relationships among Soviet factories have been governed by centrally planned contracts.⁴⁴ The duties and obligations under these contracts do not arise from the parties' negotiations. Instead, central planning agencies set production and delivery quotas and pricing policies. Factories often have no choice but to accept the defective supplies and then pass on the defective product to the consumer.

The supply of goods between state enterprises is governed by a "delivery contract," which is different from the "contract for sale" between trade enterprises and individuals. Under a delivery contract, a supplier

⁴⁰ Civil Code, art. 248.

⁴¹ *Id.*

⁴² Ruling of the Civil Chamber of the RSFSR Supreme Court, 3 BULL. VERKH. SUDA RSFSR 9 (1982), quoted in Van den Berg, *Product Liability*, in *ENCYCLOPEDIA OF SOVIET LAW*, *supra* note 29, at 627.

⁴³ This is due in part to a chronic shortage of supplies and a hierarchy of allocation of those supplies. See M. BINYON, *supra* note 5, at 15-16; H. SMITH, *supra* note 17, at 301-05.

⁴⁴ For a discussion of the role of contracts in the Soviet system of central planning, see Dore, *Plan and Contract in the Domestic and Foreign Trade of the USSR*, 8 SYRACUSE J. INT'L. L. & COMM. 29, 31-75 (1980); Loeber, *Plan and Contract Performance in Soviet Law*, 1964 ILL. L.F. 128.

enterprise undertakes to transfer specified goods at a specified time (or times) to the buyer enterprise.⁴⁵ The quality of the goods supplied under a delivery contract must correspond to "state standards, technical specifications or samples."⁴⁶ A contract may provide for delivery of goods of higher quality than that required by state standards, technical specifications, or samples.⁴⁷

If the supplier enterprise delivers goods of a lower quality than that required by state standards, technical specifications, or samples, the buyer is required to refuse to accept or to refuse to pay for the goods.⁴⁸ If the buyer has already paid for the goods, the purchase price may be recovered. If the defect in the goods can be removed without returning them to the supplier, however, the buyer has a right to demand that the supplier correct the defect at the supplier's expense. In each of these cases, an action arising out of the delivery of defective goods is subject to a six month statute of limitations running from the date the buyer established the existence of the defect in the delivered goods.⁴⁹

The Soviet government decided early that disputes between state enterprises over delivery contracts should not be heard by the regular courts, but by special tribunals. Two bodies were established to resolve economic disputes: State Arbitrazh and Departmental Arbitrazh. State Arbitrazh (*gosarbitrazh*) deal with economic disputes between enterprises belonging to different regional economic councils or different ministries.⁵⁰ Departmental Arbitrazh (*vedomstvennyi*) handle conflicts within a single regional economic council or ministry.⁵¹ Although State and Departmental Arbitrazh are administrative agencies, they function like courts since their jurisdiction is compulsory and they decide disputes according to the law.⁵²

If an Arbitrazh finds that goods delivered under a contract do not meet the required standards of quality, Article 266 of the Civil Code provides that the buying enterprise can recover the "established penalty"

⁴⁵ Civil Code, art. 258.

⁴⁶ *Id.* art. 261.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* art. 262.

⁵⁰ See generally Dore, *supra* note 44, at 35-37; Loeber, *supra* note 44, at 131-33; Pomorski, *State Arbitrazh in the USSR*, 9 RUT.-CAM. L.J. 61 (1977).

⁵¹ See Loeber, *supra* note 44, at 132.

⁵² Article 4 of the controlling statute provides that an Arbitrazh "shall be guided in its activity by laws of the USSR, edicts of the Presidium of the USSR Supreme Soviet, decrees and regulations of the USSR government, other normative acts, and the present statute." *Statute on State Arbitrazh Attached to the USSR Council of Ministers, Confirmed by Decree of the USSR Council of Ministers*, Jan. 18, 1974, translated in W. BUTLER, *THE SOCIALIST LEGAL SYSTEM—LEGISLATION AND DOCUMENTATION* 253 (1978).

as well as any damages caused by the delivery of the defective goods. The "established penalty" is assessed as a percentage of the value of the shipment of defective goods. Arbitrazh also hear tort claims of one state enterprise against another, such as a defective machine supplied by one enterprise which causes property damage to another enterprise.⁵³ In addition, if it is found that the defective goods were part of a systematic pattern of supplying such goods, Arbitrazh may refer the matter to the Procurator General for possible criminal sanctions.⁵⁴

According to one study, disputes over the poor quality of goods supplied under delivery contracts account for 20% of all the property disputes handled by Arbitrazh.⁵⁵ The handling of these disputes has recently been criticized by the Communist Party Central Committee and the Council of Ministers, which have accused the Arbitrazh of failing "to display proper initiative and persistence" and for exerting little influence on enterprises to improve the quality of output.⁵⁶ In 1987 the operation of the State Arbitrazh was restructured, and its powers were expanded.⁵⁷ In order to increase the influence of the Arbitrazh "on the strengthening of legality and on plan and contractual discipline in the economy," it was given the power to monitor the compliance of enterprises with legislative requirements for contracts and to issue orders to persons responsible for losses incurred in connection with the violation of contracts.⁵⁸

As with contracts between trade enterprises and individuals, the law of obligations provides detailed remedies for enterprises which receive defective supplies from other enterprises. Despite the strengthening of the Arbitrazh, however, these provisions will not be effective until enterprises fully exercise their rights against other enterprises, and delivery contracts are viewed not merely as formalities but as legally enforceable obligations.

B. Tort Liability

In the Soviet Union, tort liability for defective products is not a separate area of law as it is in the United States.⁵⁹ Remedies for Soviet

⁵³ See H. BERMAN, *JUSTICE IN THE USSR* 130 (rev. ed. 1963).

⁵⁴ See Darby, *supra* note 15, at 188.

⁵⁵ See Loeber, *supra* note 44, at 92 n.182.

⁵⁶ *On Further Improving the Performance of State Arbitration Agencies and Enhancing Their Role in Strengthening Legality and Contractual Discipline in the Economy*, translated in 39 CURRENT DIG. SOV. PRESS No. 9, Apr. 1, 1987, at 21.

⁵⁷ *Id.* at 22.

⁵⁸ *Id.*

⁵⁹ The most important development in product liability law in the United States during the past twenty years has been the shift from warranty and negligence theories of liability to a theory of strict liability. California was the first state to adopt strict liability in products liability cases. Greenman

consumers who suffer injury or loss from defective products are provided in the law of obligations sections dealing with "Obligations Which Arise from the Causing of Injury."⁶⁰ Despite the availability of social insurance, tort law in the Soviet Union has maintained its viability.⁶¹ Social insurance covers medical expenses and "temporary disability" at a minimum level of lost earnings.⁶² Victims whose losses exceed the amount of the insurance must bring suits to recover the difference between the insurance and their actual losses. These adversarial proceedings play an important role in furthering the three purposes of tort law in the Soviet Union: 1) compensating the tort victim for the material loss he or she suffers; 2) reforming the individual tortfeasor; and 3) educating the public at large to refrain from unlawful acts that might result in material damage to others.⁶³

The basis of tort law in the Soviet Union is Article 444 of the Civil Code, which provides:

Injury caused to the person or property of a citizen, as well as injury caused to an organization, is subject to compensation in full by the person who has caused such injury.

A person who has caused harm is relieved of the duty to make compensation if he proves that the injury was not caused through his fault.⁶⁴

There are a number of aspects of Article 444 and Soviet tort law which could make it applicable to cases involving defective products. First, Article 444 states that any "citizen" or "organization" which suffers per-

v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In 1965 the American Law Institute published § 402A of the RESTATEMENT (SECOND) OF TORTS, which has been widely cited by courts as a description of when strict liability should be applied. See *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

One theory of strict liability is that the manufacturer is in a better position, through pricing or insurance, to bear the inevitable losses caused by mass produced goods. This has been part of the broader trend in Western Europe, Australia, New Zealand, Canada, and the United States toward insurance as a means of compensating injuries. For a discussion of the shift of liability from tort to insurance in common law and civil law countries, see W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 161 (2d ed. 1972).

⁶⁰ Civil Code, ch. 40. There are a number of works analyzing tort law in the Soviet Union. See Osakwe, *An Examination of the Modern Soviet Law of Torts*, 54 TUL. L. REV. 1 (1979); Y. FLEISHITS & A. MAKOVSKY, *supra* note 25, at 205-20; Darby, *The Influence of Marxian Socialism on the Soviet Law of Torts*, 23 COLUM. J. TRANSNAT'L. L. 373 (1985); Rudden, *Soviet Tort Law*, 42 N.Y.U.L. REV. 583 (1967); Gray, *Soviet Tort Law: The New Principles Annotated*, 1964 U. ILL. L.F. 180; Holman & Spinner, *Bases of Liability for Tortious Injury in Soviet Law*, 22 IOWA L. REV. 1 (1936).

⁶¹ For a discussion of the development and role of insurance in the Soviet Union, see Tay, *The Foundations of Tort Liability in a Socialist Legal System*, 19 U. TORONTO L.J. 1 (1969); Hazard, *Personal Injury and Soviet Socialism*, 65 HARV. L. REV. 545 (1952); Osakwe, *supra* note 60, at 4; Gray, *supra* note 60, at 181-83.

⁶² See Rudden, *supra* note 60, at 612-14.

⁶³ See Osakwe, *supra* note 60, at 5.

⁶⁴ For a discussion of Article 444, see Osakwe, *supra* note 60, at 9-17.

sonal or property damage may recover compensation. Unlike contract law, an action in tort for injury or loss caused by a defective product would not be limited to the purchaser but includes users and bystanders. "The person who has caused the harm" is also broad enough to include both the manufacturer and the seller of the product.

Second, under Article 444 the three essential elements of liability are: 1) an "unlawful act"⁶⁵ by the defendant; 2) the fault of the defendant in committing the act;⁶⁶ and 3) a causal connection between the unlawful act and plaintiff's injury.⁶⁷ The problems of proof that confront plaintiffs in product liability cases brought under negligence or strict liability theories in the United States are not present in Soviet law. Soviet law creates a rebuttable presumption of the unlawfulness of defendant's act and his fault.⁶⁸

Third, Article 458 of the Civil Code adopts the doctrine of comparative fault rather than contributory negligence.⁶⁹ Thus, if Article 444 was applied in cases of defective products, ordinary negligence in the use of the product would not bar a consumer from recovery. If the consumer was grossly negligent or intentionally misused the product, however, the defendant would not be liable for the resulting injury. In cases where Article 458 has been applied, Soviet courts have not been willing to make detailed comparisons of fault. Instead, they have simply reduced the plaintiff's recovery by 50%.⁷⁰

Fourth, damages are limited to plaintiff's actual material loss in the Soviet Union.⁷¹ Compensation for nonpecuniary harms such as "pain and suffering" and punitive damages is not available to individuals.⁷² This eliminates from Soviet tort law a major source of controversy over product liability law in the United States and could make it easier to use Article 444 to establish liability for defective products. In addition, although property loss and medical expenses are paid in a lump sum,

⁶⁵ "Unlawful act" has been defined as "any action not permitted by law (commission), or any failure to act where the law requires an action (omission)." Osakwe, *supra* note 60, at 12; *see also* Rudden, *supra* note 60, at 602-04.

⁶⁶ Soviet commentators have defined "fault" as "an internal state of mind which manifests itself externally in the form of an unlawful conduct Such conduct could be intentional . . . and it could be negligent." SOVETSKOE GRAZHDANSKE PRAVO [SOVIET CIVIL LAW] 501 (D. Genkin & I. Kunik eds. 1967), *quoted in* Osakwe, *supra* note 60, at 14. *See also* Rudden, *supra* note 60, at 597-602.

⁶⁷ For a discussion of the required causal connection, *see* Osakwe, *supra* note 60, at 15-17; Rudden, *supra* note 60, at 586-97.

⁶⁸ *See* Osakwe, *supra* note 60, at 15; Y. FLEISHITS & A. MAKOVSKY, *supra* note 25, at 207-09.

⁶⁹ *See* Osakwe, *supra* note 60, at 33-34.

⁷⁰ *Id.* at 26.

⁷¹ *Id.* at 23-32. *See also* Rudden, *supra* note 60, at 609-12.

⁷² *See* Osakwe, *supra* note 60, at 29.

compensation for personal injury is paid through a system of periodic payments under Article 468 of the Civil Code.⁷³

Finally, an important consideration in the application of Article 444 to product liability cases is that almost all production and retail trade enterprises in the Soviet Union are owned by the state. In order to achieve the goals of tort law, these enterprises are considered legal persons.⁷⁴ Although they are not called "corporations," state-owned enterprises have been compared to government corporations which carry on economic activities with relative financial autonomy.⁷⁵ Article 445 of the Civil Code limits traditional governmental immunity and provides that "[a]n organization is required to compensate for injury caused through the fault of its workers in the performance of their employment (official) duties."⁷⁶ Thus, state organizations are liable for injuries caused in connection with activities of an economic nature.⁷⁷

The exception to the fault principle in Soviet tort law is Article 454. Article 454 imposes liability for injuries caused by activities that create a "heightened hazard," even though these injuries were caused without fault:

Organizations and citizens whose activities are connected with increased hazard to persons in their vicinity (transport organization, industrial enterprises, construction projects, possessors of automobiles, etc.) are required to compensate for injury caused by extra-hazardous source, unless they prove that the injury arose through intent on the part of the victim or through irresistible force.⁷⁸

Although the language of Article 454 is similar to the strict liability created by the "abnormally dangerous" and "ultrahazardous activities" tests of the Restatement of Torts,⁷⁹ it has a different application:

By sources of heightened hazard are understood the properties of the things and forces of nature utilized in certain types of activity and which are not fully under human control at the present level of technique Therefore, in order to render such harm preventable and to enable Soviet citizens and

⁷³ *Id.*

⁷⁴ Law on the State Enterprise, *supra* note 7, art. 1, § 2. State economic enterprises have been treated as juridical persons since the 1930s. See H. BERMAN, *supra* note 53, at 111.

⁷⁵ H. BERMAN, *supra* note 53, at 111.

⁷⁶ Civil Code, art. 445.

⁷⁷ For a history and detailed discussion of governmental immunity in Russia and the Soviet Union, see Barry, *Governmental Tort Liability in the Soviet Union*, 20 RUTGERS L. REV. 300 (1966); Gray, *supra* note 60, at 193-96; Osakwe, *supra* note 60, at 51-52.

⁷⁸ Civil Code, art. 454. For a discussion of Article 454, see Tay, *Principles of Liability and the Source of 'Increased Danger' in the Soviet Law of Torts*, 18 INT'L & COMP. L.Q. 424 (1969); Y. FLEISHITS & A. MAKOVSKY, *supra* note 25, at 209-12; Gray, *supra* note 60, at 196-99; Osakwe, *supra* note 60, at 17-23.

⁷⁹ See RESTATEMENT (SECOND) OF TORTS, §§ 519, 520 (1979)(definitions of "ultrahazardous activities" and "abnormally dangerous").

organizations to struggle as intensively as possible to prevent hazards arising from their work or activities, the law has established heightened responsibility to the owner of a source of heightened hazard.⁸⁰

A study conducted by the Soviets limited the sources of heightened hazards to four categories: physical sources (such as automobiles, trains, ships, machines for the production of goods, electrical and thermal sources), physical-chemical sources, chemical sources, and biological sources.⁸¹ In addition, Article 454 has been applied only against those in possession of the hazard, not the creator of the hazard. Thus, under Soviet law, drivers of automobiles, and not their manufacturers, are strictly liable for the injuries caused.⁸²

Unlike the contract provisions of the Soviet law of obligations, the tort provisions contain no explicit reference to remedies for defective products. Despite the fact that Article 444 could be used by persons who suffer personal injury or property damage from defective products, it has not been used in that way. This can be attributed in part to the nature of the Soviet legal system.⁸³ Any social or legal reform must be assessed in light of the realities of this system.

III. LEGAL REFORM AND SOVIET PRODUCT LIABILITY

A system of product liability law should serve two purposes. Its immediate goal should be to provide a remedy for one who has suffered personal injury or property damage as the result of a defective product. By doing so, it should also serve a long-range purpose of providing an incentive to manufacturers and retailers to raise the quality of the products they produce and sell in order to maximize their profits and minimize their losses. Although the Soviet law of obligations contains remedies for individuals and enterprises who purchase defective goods, they have not accomplished either of the goals of a law of product liability. The reason for this has been the historically significant gap between the formal provisions of Soviet law and their operation in practice. The Law on the State Enterprise has attempted to address some of these difficulties. Whether its provisions can be used to create an effective law of product liability will depend upon several factors, however. The structure of the economic system, workers' incentive to produce quality products, the cooperation of the bureaucracy, and the nature of the Soviet

⁸⁰ Y. FLEISHITS & A. MAKOVSKY, *supra* note 25, at 209-10.

⁸¹ See Osakwe, *supra* note 60, at 21.

⁸² For a discussion of the increasing number of automobile accidents in the Soviet Union, see *Who Will Love the Car Lover?*, translated in 38 CURRENT DIG. SOV. PRESS No. 47, Dec. 24, 1986, at 18.

⁸³ See *infra* notes 127-37 and accompanying text.

legal system itself, must all be addressed for the legal reforms to achieve their goals.

A. The Structure of the Soviet Economy

The central feature of the Soviet economy for the past seventy years has been central planning.⁸⁴ This has resulted in the development of a highly structured pyramid system in the Soviet economy. At the top of the pyramid are the State Planning Commission ("GOSPLAN"), which drafts production plans, and the State Committee of Supply ("GOSSNAB"), which drafts distribution plans. On the production side, GOSPLAN prepares plans sent to each government ministry, which then divide their targets into specific production goals for each enterprise under their jurisdictions. On the distribution side, GOSSNAB determines distribution plans for ministries in charge of the particular goods distribution. These ministries then issue delivery orders to supplier and buyer enterprises which are implemented by delivery contracts between the enterprises. Since the most important conditions of delivery contracts are determined by the ministry, few details are negotiated by the enterprises themselves.

This system of central planning has had important consequences for the quality of goods produced under the plan and contract. First, the planning process has historically given high priority to allocating resources and quality control to the military and heavy industry.⁸⁵ Despite the provisions of the law of obligations, little emphasis has been placed on the quality of consumer goods.⁸⁶ There are a number of reasons for this lack of emphasis. Until the 1960s, the Soviet Union's primary tasks were modernization and the repair of the destruction caused by World

⁸⁴ For an examination of the Soviet economy from a legal perspective, see O. IOFFE & P. MAGGS, *THE SOVIET ECONOMIC SYSTEM: A LEGAL ANALYSIS* (1987). The role of central planning in the Soviet Economy is discussed in A. NOVE, *supra* note 6; F. HOLZMAN, *THE SOVIET ECONOMY* (1982); Ioffe, *Law and Economy in the USSR*, 95 HARV. L. REV. 1591 (1982); *SOVIET ECONOMY*, *supra* note 13, at 7-93; Dore, *supra* note 44; V. CHKHIKVADZE, *THE SOVIET STATE AND LAW* 188-200 (1969); Loeber, *supra* note 44, at 141-48; *THE SOVIET LEGAL SYSTEM*, *supra* note 25, pt. II.

⁸⁵ This emphasis had its origins with Stalin, who concluded that the chief priority of the economy was the expansion of heavy industry. This policy produced impressive results until the 1960s, when industrial production began to drop. See M. GOLDMAN, *supra* note 1, at 14-41; A. NOVE, *supra* note 6, at 76.

⁸⁶ According to the observations of one Soviet:

Workers in the very same factories produce good refrigerators for the military and refrigerators that are largely junk for the civilian market, but nobody cares because there is no real quality control. I have seen how they made transistors. They would make 100 and the military representative would select only one or two. Some would be thrown out as defective and the rest would go to the [civilian] market.

H. SMITH, *supra* note 17, at 314.

War II.⁸⁷ This emphasis left few resources available to the consumer sector. With the improved living standards of the 1960s came a debate (carried over to the 1970s) over whether the satisfaction of people's material needs was intrinsically "counter-revolutionary."⁸⁸ Although this debate has now been resolved in favor of the compatibility of consumer expectations with socialism, it has had a continued effect on those bureaucrats who must make ideologically correct planning decisions.

The second factor relating to quality of goods is the Soviet central planning process, with its artificial prices and lack of competition between enterprises. This process has created a system where gross output is the measure of success. Since goods are produced to fulfill the requirements of the central plan and not to satisfy the public needs there are no incentives for producer enterprises to make quality an essential element of their products. The year-end bonuses awarded to managers and workers are based upon their success in fulfilling the quantity targets of the plan.⁸⁹ Whether or not those products are defective has not been a factor in determining bonuses.

Third, the planning process has resulted in a "storming" style of production.⁹⁰ Under this system, the tempo of work is different for each ten days of the month. Little work is done during the first ten days of the month. The pace increases during the second ten days, and during the final third of the month "storming" occurs: workers put in double shifts and work weekends in an effort to meet their production quotas. An inevitable result of such a system is that the quality of the goods produced by the workers is uneven.⁹¹

The Law on the State Enterprise redefines the economic and legal basis of state enterprises in the Soviet economy and gives them new powers and incentives to emphasize quality. According to the law, the "chief task" of the state enterprise is

⁸⁷ A. NOVE, *supra* note 6, at 289-370.

⁸⁸ See, e.g., Zile, *Consumer Product Quality*, *supra* note 15, at 185-86.

⁸⁹ Under the Stalinist model, the main criteria for success has been quantity. "The more a worker or a manager produced, the better . . . Those who were able to increase production won appropriate recognition, material and nonmaterial, from their superiors." M. GOLDMAN, *supra* note 1, at 20-21. See also Kroll, *Breach of Contract in the Soviet Economy*, 19 J. LEGAL STUD. 119, 122-23 (1987).

⁹⁰ This system of production is discussed at length in M. BINYON, *supra* note 5, at 14-33; H. SMITH, *supra* note 17, at 285-89.

⁹¹ As one commentator noted:

[W]hen someone buys a household appliance, he tries to buy one with a certificate saying that it was produced before the 15th of the month and not after the 15th . . . If the item was made before the 15th, obviously it was not made in a rush and the customer thinks, 'maybe it will work.' If it was made after the 15th, there's a good chance it will stop working pretty quickly.

H. SMITH, *supra* note 17, at 287-88.

satisfying in every way the social requirements of the national economy and of citizens for its output (work, services), which should have high consumer properties and be of high quality, and doing so with the smallest possible outlays, as well as increasing its contribution to the acceleration of the country's social and economic development⁹²

In order to accomplish these goals, state enterprises are given greater authority to make business decisions under the new law.⁹³ Ministries and central planning agencies will focus on long-range planning and will no longer be involved in the day-to-day supervision of enterprises.⁹⁴ Along with this greater independence, enterprises will be expected to operate "on the principles [of] full economic accountability and self-financing"⁹⁵ and to compete among themselves in a "highly important form of socialist competition."⁹⁶

Enterprises are also given the right to set prices for their goods. Prices are expected to "reflect socially necessary outlays on the production and sale of output, its consumer properties, quality and effective demand."⁹⁷ By ensuring the "production and sale of the best output (work, services) with the smallest possible costs," the enterprise "obtains a large economic-accountability income and an advantage in its production and social development and in pay for its employees."⁹⁸ These profits may be used to pay workers "according to their labor contribution," with no limits placed on workers' earnings.⁹⁹ The enterprises are also given the power to transfer unneeded or unproductive workers.¹⁰⁰ Enterprises which cannot compete and which "operate . . . at a loss for a long time" will be declared insolvent and terminated.¹⁰¹

Although it is too early to know what effect the Law on the State Enterprise will have on the Soviet economy and quality of products,

⁹² Law on the State Enterprise, *supra* note 7, art. 1, § 3.

⁹³ According to Article 1, § 2, of the Law on the State Enterprise, the enterprise "sells output, performs work and provides services in accordance with the plan and contracts and on the basis of . . . self-management and the combination of centralized management and the independence of the enterprise." An enterprise "has the right, at its own initiative, to make all decisions if they are not at variance with existing legislation." *Id.* art. 2, § 5.

⁹⁴ The principal function of the ministries and planning agencies is the development of "the state plan of economic and social development." The enterprise then "independently works out and confirms its own plans and concludes contracts" based upon the plan and consumers' orders. *Id.* art. 2, § 1.

⁹⁵ *Id.* art. 2, § 2.

⁹⁶ *Id.* art. 2, § 4.

⁹⁷ *Id.* art. 17, § 6.

⁹⁸ *Id.* art. 2, § 4.

⁹⁹ *Id.* art. 3, § 2; art. 14, § 1.

¹⁰⁰ *Id.* art. 8, §§ 2, 4.

¹⁰¹ *Id.* art. 23, § 1. Soviet economist Abel Aganbegyan has argued that "unprofitable enterprises . . . must be liquidated in the interests of society." See *There's Nowhere to Retreat To*, translated in 39 CURRENT DIG. SOV. PRESS No. 35, Sept. 30, 1987, at 12, 13.

some predictions can be made from the experience of Byelorussian light industry and retail stores, which have been operating under the system envisioned by the Law of State Enterprises since the beginning of 1987.¹⁰² In at least one retail store, the incentive of bonuses and commissions has shifted both managers' and workers' emphases to satisfying consumer desires and raising quality by refusing to pay suppliers for defective goods. Although there is still a shortage of some goods, the store has begun to negotiate contracts directly with manufacturers and hopes to sell coveted items at a higher price.¹⁰³

It is unclear what effect the law will have on the "storming" style of production. If the rigid quotas set by the central planning agencies are abandoned, and more independence and flexibility is given to industry to deal directly with retail stores through delivery contracts, a more orderly production process may develop. However, the government must also allocate sufficient resources and quality control to the consumer sector. Reforming those aspects of the economic system that have resulted in defective consumer goods will also require the support of the workers and the cooperation of the bureaucracy.

B. Worker Attitudes

In order for the Soviet campaign for economic reform to succeed, it must have the support of the workers. They must see that it is in their interests not only to increase productivity but also to raise the quality of the goods they produce. While there is support for the government's new policies among the workers, there is also skepticism about whether the policies will ultimately succeed. The need for change in worker attitudes will require the Soviet government to divert resources it now spends on the military. For example, the government will need to improve its outmoded economic infrastructure and create more efficient machinery for light industry and consumer goods.¹⁰⁴

The Soviet government recognizes the role that incentives can play in motivating workers to increase the quantity and quality of production.¹⁰⁵ However, previous attempts to use material incentives were not successful in raising worker motivation because of the lack of high-quality consumer goods on which the extra income could be spent.¹⁰⁶ In

¹⁰² See *One Russian Store Offers Silks Instead of Sneers*, N.Y. Times, Sept. 20, 1987, § 1, at 18, col. 3 [hereinafter *One Russian Store*].

¹⁰³ *Id.*

¹⁰⁴ M. GOLDMAN, *supra* note 1, at 11-12.

¹⁰⁵ For a discussion of the Soviet view of the effect of worker motivation on the quality of production, see *A Social Resource*, translated in 38 CURRENT DIG. SOV. PRESS No. 2, Feb. 12, 1986, at 1.

¹⁰⁶ According to a study by the Soviet Official Institute for the Study of Consumer Demand and

addition, the Soviet economic system provides a number of trade-offs for its workers. On the one hand, workers face a shortage of consumer goods of inferior quality, low pay, and routine work. On the other hand, rent is low, medical treatment is free, and education is subsidized.¹⁰⁷ Further, while workers may be criticized for the defective goods they produce, they are rarely dismissed. Thus, it is not surprising that worker morale has suffered with the introduction of quality control inspectors into factories and the failure to count defective goods in determining plan fulfillment and bonuses.¹⁰⁸

The Soviet government is trying to convince workers to give up the system that has shaped their lives for seventy years and embrace the changes and the uncertainty inherent in the Law on the State Enterprise and the Law on Individual Enterprise. The government has proposed three approaches: 1) improve the skill of workers through advanced training and retraining in new technologies; 2) create conditions that will permit workers to make full use of their creative potential; and 3) provide workers with incentives for active participation in the production process.¹⁰⁹ There are some indications that these approaches will work. For example, the success of a cooperative brigade of workers organized to repair televisions and radios indicates that these factors may play an important role in improving efficiency and quality.¹¹⁰

Retail Trade, the demand for goods exceeds their supply by more than \$30 billion a year. See *One Russian Store*, *supra* note 102; S. BIALER, *supra* note 17, at 57-80.

¹⁰⁷ Most workers feel that these benefits, particularly job security, outweigh the disadvantages of the marketplace. See H. SMITH, *supra* note 17, at 90-91.

¹⁰⁸ See Goldman, *An Experiment in Chaos?*, N.Y. Times, Aug. 2, 1987, § 3, at F3, col. 1.

¹⁰⁹ *The Main Social Force for Acceleration*, translated in 38 CURRENT DIG. SOV. PRESS No. 43, Nov. 26, 1986, at 7. In the first month after the Law on Individual Enterprise went into effect, approximately 10,000 Moscow residents indicated a desire to obtain a permit or get a license. However, one Soviet official stated that the government had expected that there would be three or four times as many applicants. See *Work for Enterprising People*, translated in 39 CURRENT DIG. SOV. PRESS No. 23, July 8, 1987, at 19. Applicants who intended to work exclusively in individual enterprises, without also being employed in a state enterprise or institution, were denied a permit. *Id.* at 20.

Most of the applications were for personal services, such as sewing clothes, providing photography services, and driving taxis. "Very few" were from persons wishing to build or repair consumer goods. *Id.* There are a number of reasons for this. First, the uncertainty of what is permitted under the law has resulted in local bureaucratic opposition. This has led the government to emphasize that "individual labor, if it falls within the bounds of the law, is socially useful activity that all of us need." *Individual Labor*, translated in 39 CURRENT DIG. SOV. PRESS No. 36, Oct. 7, 1987, at 1. Second, many persons have expressed reluctance to seek permits because they fear that the new economic policies will not last. *Id.* at 2. Finally, some persons who are engaged in illegal occupations fear they will no longer be able to get the materials they need to continue working if they get a license. *Id.*

¹¹⁰ In 1985 the Elektron Radio and TV Repair Association in Tallin, Estonia, was given authority to rent out a workshop to a cooperative brigade of workers. The brigade paid a set fee per worker and 30% of what it earned to the government. Anything above that amount was distributed to the

A survey of workers in Moscow and the Central Asian republic of Kazakhstan, however, reveals that the reforms support the policy changes but are uncertain and even distrustful about what they will mean to their lives.¹¹¹ For example, 62% of the workers at a Moscow plumbing factory felt that the new policies would simply mean more work for them.¹¹² One-third of these workers said they were waiting to see how the policies turned out.¹¹³ Many workers complained that they had not even seen any of the changes.¹¹⁴ This attitude demonstrates some of the difficulties the government faces. Until the workers see real changes in the economic system, they will be reluctant to work harder to improve the quality of the goods they produce. However, even if the changes envisioned by the Law on the State Enterprise are successful, it may be years before their full effect is felt in all enterprises.

C. Bureaucratic Resistance

In addition to convincing workers that an increase in productivity and the quality of the goods is in their self-interest, the Soviet government must also deal with bureaucratic resistance stemming from the confusion, skepticism, resistance—and in some cases opposition—of Party members, bureaucrats, and factory managers.¹¹⁵ While some Party members oppose the changes for ideological reasons,¹¹⁶ the resistance of many factory managers and bureaucrats is motivated by economic self-interest. Under the Law on State Enterprise, a factory which produces defective products and is unable to be financially independent will be closed and its workers transferred to other jobs.¹¹⁷ If such a closure occurs, the managers will also lose their positions and the bureaucracy will lose part of the reason for its existence.¹¹⁸ In other cases, opposition to

workers. The financial rewards, coupled with the ability of the workers to control their work and take an active part in the management of the cooperative, led to an improvement in the quality of the repair work. According to an article in *Izvestia*, the wait for repairs decreased from two weeks to one day.

Similar experiments have been tried, with success, in other parts of the Soviet Union. See M. GOLDMAN, *supra* note 1, at 75. For a discussion of the success of "cooperative cafes" in raising the quality of restaurant food and service, see *Co-op Cafe, More from Lenin than Escoffier*, N.Y. Times, Nov. 26, 1987, at A4, col. 3.

¹¹¹ *Restructuring and the Economic Mechanism: The Reality of Hopes*, translated in 39 CURRENT DIG. SOV. PRESS No. 18, June 3, 1987, at 5.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 5-6.

¹¹⁵ For a discussion of the attitude of the bureaucracy to the new economic policies, see S. BIALER, *supra* note 17, at 130-36; Draper, *supra* note 1, at 297-300.

¹¹⁶ See *supra* note 115.

¹¹⁷ Law on the State Enterprise, *supra* note 7, art. 23.

¹¹⁸ This was the explanation offered for the continued operation of a refrigerator factory, despite

the new policies is the result of the traditional reluctance of factory officials and bureaucrats to experiment with new techniques.¹¹⁹ The success of the new economic reforms and laws and an improvement in the quality of consumer goods, therefore, will require not only a change in factory and government personnel, but a change in the attitude, education, motivation, and ambition of these officials.

The attitude toward the government's new policies is illustrated by the bureaucracy's approach to the new state quality control agencies which have been established to monitor the quality of industrial output.¹²⁰ A newspaper investigation revealed that "acceptance at the local level has been accompanied by paper shuffling and is being hindered by bureaucratic fetters."¹²¹ The press attributed this to "stereotyped thinking, the custom of surrounding any and all endeavors with necessary and unnecessary paperwork, the habit of 'playing it safe,' and the lack of proper initiative, independence and competency."¹²² The agency employees complained that a large part of their time was spent in submitting memos and reports to organizations that had no direct effect on their work.¹²³ The press criticized the bureaucratic limitations on the agencies' work. These limitations are certainly an obstacle that may prevent the government from restructuring the economy and raising the quality of industrial and consumer products.¹²⁴

D. Characteristics of the Soviet Legal System

In considering what role the law of obligations can play in providing remedies for defective products and improving the quality of products, the characteristics of the Soviet legal system and the role played by the individual and enterprises in socialist legal thought are crucial.¹²⁵ The

widespread recognition of the poor quality of its product. See M. GOLDMAN, *supra* note 1, at 254-55.

¹¹⁹ For a discussion of bureaucratic resistance to change, see M. GOLDMAN, *supra* note 1, at 104-05, 254-55; H. SMITH, *supra* note 17, at 300-11.

¹²⁰ *Once More on the "State Product Acceptance Exam,"* translated in 39 CURRENT DIG. SOV. • PRESS No. 4, Feb. 25, 1987, at 29.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ The Soviets have expressed concern over whether vested interests can prevent economic restructuring. See *Restructuring in the Economy*, translated in 39 CURRENT DIG. SOV. PRESS No. 3, Feb. 18, 1987, at 1.

¹²⁵ There are numerous works describing the Soviet legal system. The most recent are W. BUTLER, *SOVIET LAW* (1983); *Marxism and the Law*, 23 COLUM. J. TRANSNAT'L L. 217-496 (1985); Osakwe, *The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System*, 21 TEX. INT'L L.J. 1 (1985); Minan & Morris, *Unraveling an Enigma: An Introduction to Soviet Law and the Soviet Legal System*, 19 GEO. WASH. J. INT'L L. & ECON. 1, 4 n.33 (1985)(a detailed list of books

problems faced by the Soviet legal system and its use of codes and judicial decisions do not differ significantly from those legal systems that constitute the "civil law tradition."¹²⁶ However, the role of the Communist Party and Marxist ideology have led some to classify the Soviet Union as part of a separate "socialist legal system."¹²⁷

One basis for distinguishing the common law tradition and the civil law tradition from the socialist legal tradition is the different role the individual plays in socialist legal systems. The common law and civil law have been strongly influenced by the French Revolution and its emphasis on the individual's deciding his or her own best interest.¹²⁸ The role of government in this tradition is to minimize the inevitable friction between competing individual interests. An example of this is seen in the shift from warranty and negligence theories of liability to a theory of strict liability in product liability cases in the United States. This change did not result from a government policy, but from a series of suits brought by individuals against manufacturers, wholesalers, and retailers.¹²⁹

Socialist legal theory rejects the Western concept of individualism and views the individual as a product of society.¹³⁰ It is society that should determine what is in the interests of its members. This is expressed in the 1977 USSR Constitution, Article 6:

The leading and guiding force of Soviet society and the nucleus of its political system, of all state organizations and public organizations is the Communist Party of the Soviet Union. . . . The Communist Party, armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of the home and foreign policy of the USSR, directs the great constructive work of the Soviet people, and imparts a planned, systematic and theoretically substantiated character to their struggle for the victory of communism.¹³¹

In the Soviet Union, changes in the application of legal principles do not come from the initiative of private individuals but are regulated and controlled by the government. In addition, the role of the courts in socialist

and articles published during the past seven years dealing with Soviet law and the Soviet legal system).

¹²⁶ A "legal system" has been defined as:

[A] set of deeply rooted, historically conditioned attitudes . . . about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught.

J. MERRYMAN, *THE CIVIL LAW TRADITION* 2 (2d ed. 1985).

¹²⁷ *Id.* at 4. See also M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 672-964 (1985)(detailed discussion of "the socialist legal tradition").

¹²⁸ H. BERMAN, *supra* note 53, at 97.

¹²⁹ For a discussion of this development, see *supra* note 59 and accompanying text.

¹³⁰ See H. BERMAN, *supra* note 53, at 97-100.

¹³¹ Translated in S. FINER, *FIVE CONSTITUTIONS* 149-50 (1979).

legal theory and the civil law tradition is very different from that in common law systems.¹³² Their function is to apply the articles of the code to the particular case before the court. Precedent plays no formal role in socialist and civil law theory. Consequently, the courts' interpretation of code sections cannot be used to fashion new legal theories or remedies which will then be applied in future cases. In socialist law and civil law systems, it is the function of the legislature to make new laws in response to the changing conditions of society. In the Soviet Union, this function is the sole responsibility of the Supreme Soviet, in response to the objectives and priorities set out by the Communist Party.¹³³

Despite the language in the law of obligations, the nature of the Soviet legal system gives individuals who purchase defective products or who are injured by such products remedies. The contract provisions of the law of obligations require that products meet "customary demands" or state "standards." Yet remedies under these provisions are limited, and the process for obtaining these limited remedies is cumbersome. Consequently, individual recovery, although allowed, is discouraged by the Soviet legal system. This is consistent with the minimal role of individuals in Socialist legal theory.

Although individuals in the Soviet Union have not brought actions under the tort articles of the law of obligations, Article 444 could be used to minimize defective products and to compensate for the personal and property damage they cause. Article 444 is "designed to encourage [state managers of enterprises] to avoid fault in what they do, and to perform efficiently by organizing production, transportation or the provision of services in such a way that accidents are minimized."¹³⁴ The application of Article 444 to recover for damage caused by defective products would also be consistent with the principles of the Law on the State Enterprise, under which enterprises will be economically responsible.

In addition, one United States commentator has suggested that Article 454 could be used to create strict liability for defective products.¹³⁵ However, neither the list prepared by the Soviets nor the collections of cases on this provision contain any examples of its application to defective products.¹³⁶ The policy of economic accountability underlying the

¹³² For a discussion of the role of the judiciary in civil law and socialist law systems, see J. MERRYMAN, *supra* note 126, at 39-47; M. GLENDON, M. GORDON & C. OSAKWE, *supra* note 127, at 747-90.

¹³³ The role of the Supreme Soviet is discussed in M. GLENDON, M. GORDON & C. OSAKWE, *supra* note 127, at 728-43.

¹³⁴ J. HAZARD, *MANAGING CHANGE IN THE U.S.S.R.* 139 (1983).

¹³⁵ Darby, *supra* note 15, at 185.

¹³⁶ The two principal collections of cases on Soviet law in general and tort law in particular are J. HAZARD, W. BUTLER & P. MAGGS, *THE SOVIET LEGAL SYSTEM*, *supra* note 25, and J. HAZARD &

Law on the State Enterprise supports the application of strict liability to manufacturers for the damage their products cause consumers.¹³⁷ Strict liability would permit enterprises that satisfy consumer demands for quality products to make a profit. Those whose products repeatedly cause personal injury or property damage would go out of business. Strict liability would also provide an incentive to workers to produce quality products since their wages and the survival of their jobs would be tied to the quality of the products they produced.

IV. CONCLUSION

Soviet attempts to restructure the domestic economy, and the new laws that have been enacted to implement those policies, demonstrate the nation's desire both to eliminate defective goods and to improve the quality of consumer goods manufactured in the Soviet Union. The translation of these policies and laws into an effective law of product liability, however, will require overcoming the conflict that exists between the laws and realities of Soviet society.

Despite the detailed contract provisions of the Soviet law of obligations, those provisions have failed to further either of the goals of product liability. They have neither provided an effective remedy for consumers or enterprises that purchase defective products nor served as an incentive to manufacturers to improve the quality of the products they manufacture and sell. The reasons for this lie in the realities of the economic system. Application of the contract provisions in suits brought by consumers or manufacturing enterprises would have seriously threatened the central planning which is the heart of the Soviet economic system. Not only would it have disrupted the quota system, it would have shifted control over an important aspect of manufacturing (i.e., quality control) from the bureaucracy to individuals. Such a fundamental alteration of the economy and the role of the individual will not occur without the consent of the government.

The tort articles have been even less helpful to individuals since they do not deal specifically with personal injury and property loss caused by defective products. While the language of Articles 444 and 454 could be used for product liability cases, they have not been in the past. It is doubtful whether they can be used in the future because the nature of the Soviet legal system prevents the judicial expansion of existing principles

I. SHAPIRO, *THE SOVIET LEGAL SYSTEM* (1962). Neither of these collections contains any tort cases dealing with defective products.

¹³⁷ This policy is discussed in *Full Economic Accountability*, translated in 38 *CURRENT DIG. SOV. PRESS* No. 51, Jan. 21, 1987, at 11.

into new areas. Adequate remedies for personal injury and property damage must come from the legislature.

While not specifically addressed to defective products, the Law on the State Enterprise and Law on Individual Enterprise have raised the quality of goods manufactured and sold by enterprises within the Soviet Union or produced for export. The success of these laws will depend upon how effective the government is in dealing with a number of factors which have deep roots in Soviet economic history: 1) the emphasis on military spending rather than civilian investment; 2) the rigid controls of central planning; 3) inadequate incentives to motivate workers; 4) the resistance of the bureaucracy to change; 5) the inexperience of factory officials with market-oriented planning and decisionmaking; and 6) out-dated equipment.

Whether the Soviet Union is successful in improving product quality will ultimately depend upon the fate of the complex structure of economic reform which includes serious political and economic risks. Politically, some critics have expressed dissatisfaction with the slow pace of reform.¹³⁸ Others have criticized those who want to keep the central planning system but temper it with prices set by consumer demand, more competition, and small-scale enterprises. These critics propose more reliance on free markets as a solution to the country's economic problems.¹³⁹ Gorbachev's reforms have also been challenged by those who feel that they go too far and threaten the Party bureaucracy.¹⁴⁰

Economically, the move toward a decentralized market-oriented

¹³⁸ The most prominent critic of the slow pace of change was Boris N. Yeltsin, former head of the Moscow Communist Party organization. See *Aide Who Assailed Gorbachev's Pace Ousted in Moscow*, N.Y. Times, Nov. 12, 1987, at A1, col. 1 [hereinafter *Aide Ousted*].

¹³⁹ L. Popkova, an economist with an institute of the Soviet Academy of Science, has stated that free markets promise more efficiency and greater abundance than central control. Her comments have drawn attention both in the Soviet and Western press. See *Where are the Pastries the Lightest?*, translated in 39 CURRENT DIG. SOV. PRESS No. 35, Sept. 30, 1987, at 9; *Soviet Article Doubts Economic Line*, N.Y. Times, May 9, 1987, at 4, col. 4. For responses to Popkova's views, see *Here's What the Pastries Amount To*, translated in 39 CURRENT DIG. SOV. PRESS No. 35, Sept. 30, 1987, at 10; *Plan or Market*, translated in 39 CURRENT DIG. SOV. PRESS No. 35, Sept. 30, 1987, at 10.

¹⁴⁰ The wife of one senior party official wrote to a Moscow newspaper: "Don't snipe at us. We are the elite and you cannot halt the stratification of society. You are not strong enough. We will rip the puny sails of perestroika [reconstruction] and you will be unable to reach your destination." *After Yeltsin, Gorbachev?*, N.Y. Times, Nov. 22, 1987, § 5, at 27, col. 2.

The removal of Boris Yeltsin in November 1987 is an example of the strength of those who resist the restructuring of the Soviet economy and society. Although Yeltsin, a senior official who had been appointed by Gorbachev, was criticized for "major shortcomings" of leadership, he was also a critic of the party leadership and the slow pace of reform. Marshall Goldman has predicted that "the Yeltsin affair may some day be seen as the first sign that Mikhail S. Gorbachev's efforts to reform Soviet society and economic life would end in failure." *Id.* See also *Aide Ousted*, *supra* note 138; *Excerpts From Moscow Speeches by Yeltsin and His Critics*, N.Y. Times, Nov. 14, 1987, at 6, col. 1; *Gorbachev Accuses Former Ally of Putting Ambition Above Party*, N.Y. Times, Nov. 13, 1987,

economy may result in a period of stagnation for the Soviet economy and a growth rate of less than 2% for the rest of the decade.¹⁴¹ Although the Net Material Product (the gross national product minus services and depreciation) rose by 3.5% in 1985 and 4.1% in 1986, a growth rate of only about 2.5% in 1987 has been predicted.¹⁴² Part of this decline has been attributed to the campaign against defective manufactured goods.¹⁴³ This decline, coupled with the threat to job security, a tougher work ethic, stricter discipline, and bureaucratic opposition, could produce disruptions in the economy capable of threatening Gorbachev's leadership. The need for protection from defective goods and the desire for higher quality consumer goods, could be jeopardized. The real losers in such a case would be the Soviet people.

at A1, col. 4; *Excerpts from Tass Account of Gorbachev's Talk on Yeltsin*, N.Y. Times, Nov. 13, 1987, at A12, col. 1.

¹⁴¹ This prediction is contained in a report written by the Central Intelligence Agency for the Congressional Joint Economic Committee. See *Glasnost is Seen Disrupting Soviet*, N.Y. Times, Sept. 15, 1987, at A6, col. 4.

¹⁴² See *Reforming*, *supra* note 1, at 78.

¹⁴³ At one tractor factory, for example, government quality-control inspectors rejected 15-20% of the tractors. At other factories, they have been rejecting as much as 30% of the output. See *A Tractor Factory Tries to Pull Its Own Weight*, BUS. WK., Dec. 7, 1987, at 79; *Reforming*, *supra* note 1, at 78.