

THE PRODUCT  
REGULATION AND  
LIABILITY REVIEW

EIGHTH EDITION

**Editors**

Chilton Davis Varner and Madison Kitchens

THE LAWREVIEWS

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LIABILITY REVIEW

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# PREFACE

In today's global economy, product manufacturers and distributors face a dizzying array of overlapping and sometimes contradictory laws and regulations around the world. A basic familiarity with international product liability is essential to doing business in this environment. An understanding of the international framework will provide thoughtful manufacturers and distributors with a strategic advantage in this increasingly competitive area. This treatise sets out a general overview of product liability in key jurisdictions around the world, giving manufacturers a place to start in assessing their potential liability and exposure.

Readers of this publication will see that each country's product liability laws reflect a delicate balance between protecting consumers and encouraging risk-taking and innovation. This balance is constantly shifting through new legislation, regulations, treaties, administrative oversight and court decisions. However, the overall trajectory seems clear: as global wealth, technological innovation and consumer knowledge continue to increase, so will the cost of product liability actions.

This edition reflects a few of these trends from 2020. Needless to say, the past year was unlike any other for product manufacturers, with virtually every industry across the globe materially impacted by the covid-19 pandemic. However, while many manufacturers were forced to temporarily (or permanently) halt production, others mobilised as never before to combat this public health emergency. Pharmaceutical companies developed life-saving vaccines and treatments at an unprecedented pace. Automakers converted their production lines and began manufacturing critical care ventilators for worldwide distribution. Suppliers of personal protective equipment worked overtime to meet the demands of healthcare providers and the general public. In many instances, governments worked in tandem with the private sector to facilitate vital public health measures. Regulatory agencies responded to the crisis by expediting and streamlining clinical trials. In the United States, the Secretary of Health and Human Services invoked the Public Readiness and Emergency Preparedness Act (the PREP Act) to immunise companies from tort liability stemming from the manufacture, testing, distribution and administration of products with the intention to curb the spread of the virus. In short, the challenges posed by covid-19 underscored that a well-functioning product liability regime is vital to a nation's safety, health and economic well-being.

Despite the severe disruptions caused by the pandemic, several jurisdictions also initiated important legislative and regulatory overhauls that will impact product manufacturers for years to come. The United Kingdom officially left the European Union on 31 January 2020, meaning that it is no longer subject to new EU product regulations and will be free to adopt its own product safety standards and liability rules going forward. While it remains to be seen whether the UK's product liability laws will remain largely harmonised with those of

its EU counterparts, this volume discusses a few post-Brexit developments that have already occurred. Across the Atlantic, Puerto Rico enacted a new Civil Code for the first time in 90 years, codifying many of the doctrinal developments that had emerged from product liability case law in the preceding decades. Meanwhile, other jurisdictions sought to broaden protections for consumers and, by extension, widen the ambit of potential liability for product manufacturers. For example, the Competition and Consumer Commission of Singapore attempted to crack down on unfair trade practices affecting product sales and promotions, proposing non-binding guidelines designed to foster pricing transparency. Furthermore, Switzerland dramatically expanded the statute of limitations for tort-based product liability claims – a move influenced in part by fallout from the country’s asbestos docket.

Other significant product liability developments in 2020 occurred in courtrooms (virtual ones, at least), rather than legislative bodies. Many courts grappled with novel questions concerning the types of commercial actors in a supply chain that can be held liable for product defects. In the United States, for instance, courts drew different conclusions concerning whether online retailers like Amazon can be strictly liable for website transactions involving allegedly defective products manufactured by third parties. These cases frequently called upon the court to determine whether the online retailer is a ‘seller’ of the product or a mere facilitator (akin to an auctioneer). As though the meaning of a ‘seller’ were not abstract enough, the Austrian Supreme Court dealt with an equally thorny issue last year: what constitutes a ‘product’? That case pivoted on whether allegedly misleading newspapers can be deemed a ‘product’ – and, thus, subject to the nation’s Product Liability Act – even though the ‘physical’ form of the product (i.e., printed paper) is not itself defective. The plaintiff alleged that she sustained personal injuries after reading inaccurate health advice from an herbalist author (who recommended the treatment of rheumatic pains by applying coarsely grated horseradish). The case has been referred to the European Court of Justice to determine whether intellectual ‘products’ can give rise to product liability, or whether only tangible products are subject to the Act. In Japan, meanwhile, the Supreme Court may soon issue key rulings in the nation’s long-running asbestos litigation concerning presumptions of causation in joint tortfeasor cases: specifically, under what circumstances can a court find causation when it cannot readily ascertain which manufacturer inflicted the alleged injuries? Although these changes and trends may be valuable in their own right, they also create a need for greater vigilance on the part of manufacturers, distributors and retailers to ensure compliance with increasingly complicated and evolving product liability regimes.

This edition covers 14 countries and territories, and includes a high-level overview of each jurisdiction’s product liability framework, recent changes and developments, and a look forward at expected trends. Each chapter contains a brief introduction to the country’s product liability framework, followed by four main sections: regulatory oversight (describing the country’s regulatory authorities or administrative bodies that oversee some aspect of product liability); causes of action (identifying the specific causes of action under which manufacturers, distributors or sellers of a product may be held liable for injury caused by that product); litigation (providing a broad overview of all aspects of litigation in a given country, including the forum, burden of proof, potential defences to liability, personal jurisdiction, discovery, whether mass tort actions or class actions are available and what damages may be expected); and the year in review (describing recent, current and pending developments affecting various aspects of product liability, such as regulatory or policy changes, significant cases or settlements and any notable trends).



Whether the reader is a company executive or a private practitioner, we hope that this edition will prove useful in navigating the complex world of product liability and alerting you to important developments that may affect your business.

We wish to thank all the contributors who have been so generous with their time and expertise. They have made this publication possible. We also wish to thank our colleague Franklin Sacha, who has been invaluable in assisting us in our editorial duties.

**Chilton Davis Varner and Madison Kitchens**

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# PORTUGAL

*Joana Mota and Alexandre Pedral Sampaio<sup>1</sup>*

## I INTRODUCTION TO THE PRODUCT LIABILITY FRAMEWORK

Portugal has enacted regulations on product liability by means of Decree-Law No. 383/89 of 6 November (the Product Liability Law), pursuant to Article 19(1) of Council Directive 85/374/EEC of 25 July 1985 on product liability (the Product Liability Directive).

As it is based on European Community (EC) Directives, the Portuguese product liability system is, therefore, based on strict liability; that is, liability without fault on the part of the manufacturer. This is an exception in Portuguese law, and the Product Liability Law provides for a unique liability system. In Portugal, there are two different but related liability systems: one based on the general rules on civil liability (contractual liability and liability in tort) and another formed by the special rules based on strict liability contained in the Product Liability Law.

The Product Liability Law was later amended by Decree-Law No. 131/2001 of 24 April, implementing Directive 1999/34/EC of 10 May 1999, which amended the Product Liability Directive by extending the principle of strict liability laid down in the Product Liability Directive to all types of products, including agricultural raw materials and game, and eliminating the maximum amount of liability for producers.

Before the enactment of the Product Liability Law, there were only a few scholarly works on product liability. Recently, the number of publications by legal scholars on product liability has seen a marked increase, as has the case law.

In addition to these rules, Article 60 of the Portuguese Constitution includes the basic provisions governing consumers' rights. According to Article 60(1):

*Consumers shall have the right to the good quality of the products and services they consume, to education and to information, to the protection of their health, safety, and economic interests, as well as to the compensation for damage.*

The first Portuguese Consumer Protection Law was passed in 1981 by Law No. 29/81 of 22 August. This Law has been repealed by the Consumer Protection Law, which was approved by Law No. 24/96 of 31 July 1996, as amended. Article 3 of the Consumer Protection Law acknowledges a number of rights for the benefit of consumers, such as the rights to:

- a* good quality of goods and services;
- b* protection of health and physical security;

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<sup>1</sup> Joana Mota is a managing associate and Alexandre Pedral Sampaio is a senior associate at Uría Menéndez – Proença de Carvalho.

- c* education of consumers and the right to be informed;
- d* protection of economic interests;
- e* prevention and recovery of both property damage and personal injuries arising from harm to individual, collective or diffuse interests;
- f* accessible and quick justice; and
- g* participation, through civil associations, in the legal and administrative determination of their rights and interests.

On the basis of the rights laid down in Article 3 of the Consumer Protection Law, Article 12 of the Law sets the specific provision on the right to the prevention of damage and recovery of damages. Under this provision, the consumer is entitled to be compensated for any property damage or personal injuries resulting from defective goods or services. The producer is also responsible, even if there is no fault on its part, for the damage caused by defects in products it places in the market.

Additionally, Decree-Law No. 67/2003 of 8 April, as amended (the Sale of Consumer Goods Law), applies to contracts for sale of consumer goods, including the repair and replacement of defective products.

In this respect, it is also important to refer to Decree-Law No. 69/2005 of 17 March, transposing the Product Safety Directive (Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety), which provides for general rules on consumer rights regarding the safety of products and services, pursuant to Article 60(1) of the Portuguese Constitution and of Article 5 of the Consumer Protection Law.

Finally, specific aspects that give rise to product liability are governed by provisions of the Civil Code, more specifically when the rules described above do not apply (e.g., pre-contractual liability, some aspects of contractual liability, termination of the contract).

## II REGULATORY OVERSIGHT

In Portugal, the main authority responsible for enforcing consumer rights is the Directorate General of Consumers (DGC). This authority ensures the proper functioning of the European Consumer Centre in Portugal. Moreover, the DGC is the single liaison office for the purposes of application of Regulation (EC) No. 2017/2394 of the European Parliament and of the Council of 22 December, in its current version, on cooperation between national authorities responsible for the enforcement of consumer protection laws. In addition, the DGC is the national point of contact for the Community Rapid Alert System (the RAPEX System) for non-food dangerous products and is responsible for the management of the RAPEX network in Portugal, which is made up of the national market control entities.

Moreover, the Authority for Economic and Food Safety (ASAE) is the regulatory authority, and also the criminal police body, primarily responsible for supervising and preventing compliance with the regulatory legislation for the exercise of economic activities in the food and non-food sectors, as well as the evaluation and communication of risks in the food chain. It is the national liaison body, with counterparts at European and international levels.

Other sectorial administrative bodies, such as Infarmed (the National Authority for Pharmaceuticals and Health Products), have responsibility in monitoring and overseeing the quality and safety of medical products and medical devices.

Finally, although not public bodies, consumer protection non-government organisations, such as the Portuguese Association for Consumer Defence (DECO), play an important role in raising awareness of possible defects in products through independent testing and reviews.

### III CAUSES OF ACTION

Manufacturers' liability is based on strict obligations. According to Article 1 of the Product Liability Law, which states the basic principle applicable to this matter: 'The manufacturer is liable, irrespective of any fault on its part, for damage caused by defects in the products it has put into circulation.'

Examining this provision, the relevant aspects are that:

- a the manufacturer's product must have been put into circulation;
- b there must be a defect in the product;
- c there must have been damage; and
- d this damage must have been caused by the defect in the product.

In such cases, the manufacturer will be liable, even if there is no fault on its part, which, as given above, is an exception in Portuguese private law. Article 483(1) of the Civil Code states the general principle on liability in tort:

*Any person who, either deceitfully or negligently, unlawfully violates somebody else's right or any legal provision aimed at the protection of the interests of others, shall be bound to indemnify the injured person in respect of the damage caused by the violation.*

Article 483(2) of the Civil Code states that 'only where specifically provided for by the law shall there be an obligation to indemnify beyond fault'.

The concept of a defect is defined by Article 4 of the Product Liability Law. Article 4(1) states:

*A product is defective when it does not provide the safety which may be legitimately expected from it, taking all circumstances into account, including its presentation, the use to which it is reasonably expected to be put, and the moment it was put into circulation.*

This definition adopts the provisions of Article 6 of the Product Liability Directive, which is that a defective product is one that lacks safety and is likely to cause damage to persons and property. However, what is important is not so much the product's fitness for the purpose for which it is intended, but the degree of safety that consumers may legitimately expect from the product.

This safety must be ascertained taking into account all relevant circumstances – with special reference being made to the presentation of the product, its expected use and the moment when the product was put into circulation.

The concept of manufacturer used by the Product Liability Law is very broad, as is mentioned expressly in the preamble to the Law.

According to Article 2 of the Product Liability Law, 'manufacturer' means the producer of the finished product, of a component part or of any raw material (the effective manufacturer), as well as any other person who holds itself out as manufacturer by putting

its name, trademark, or any other distinguishing feature on the product (the apparent manufacturer). In addition, specific categories of importers and suppliers are deemed manufacturers (presumptive manufacturers) for the purposes of the Product Liability Law.

Strict liability is imposed on the manufacturer for damage caused by defective products, though specific defences are available to reduce or exempt liability. Strict liability requires only that the product was put into circulation, that there was damage or injury and that the defective product caused the damage or injury. When the defect may be attributed to others, such as the producer of components or raw materials, the liability may be joint and several.

The Product Liability Law provides that damages in the case of product liability are limited to those related to death or personal injuries and damage to any item of property other than the defective product itself. The Consumer Protection Law sets forth provisions for the right to recovery of damages, while the Civil Code governs contractual liability and liability in tort.

As regards contractual liability, under Article 2 of the Sale of Consumer Goods Law, the seller is required to comply with the sale and purchase agreement in respect of delivery of goods. According to Articles 4, 6 and 7 of the Sale of Consumer Goods Law, in cases of non-conformity, the consumer will be entitled to repair or replacement of the product, or to an appropriate price reduction, or termination of the contract.

The rules of the Civil Code regarding contractual liability apply when dealing with other products that are not consumer goods (e.g., in sales agreements for professional use). The remedies set forth in the Civil Code are very similar to the ones set forth in the Sale of Consumer Goods Law (see above).

## IV LITIGATION

### i Forum

In respect of civil proceedings, product liability claims may either be decided by a judge or a panel of judges:

- a* in a judicial court;
- b* by an arbitrator or an arbitral court; or
- c* by justices of the peace (if the value of the claim does not exceed €15,000).

There are no jury trials in civil proceedings under Portuguese law.

With respect to criminal proceedings, any potential criminal liability will be determined by a judge or a panel of judges in criminal courts following an indictment by the public prosecutor, a charge by the injured party, or both. Although there may be jury trials in specific criminal proceedings (depending on the type of crime) under Portuguese law, they are very rarely used and, most likely, would not have jurisdiction over product liability cases.

The organisation of the Portuguese judicial system, which is unitary and uniform throughout the territory, is regulated by Law No. 62/2013 of 26 August, as amended. Judicial courts are divided into courts of first instance (at least one per judicial district), courts of appeal (five throughout the country) and the Supreme Court of Justice. Although the Portuguese judicial system has three levels of ordinary courts, in civil matters the decisions of the courts of first instance could potentially only be subject to appeal in cases where the value of the claim exceeds €5,000 and decisions of the courts of appeal could potentially only reach the Supreme Court (in which case the scope of review would be limited to the control of the

application of the law) in cases where the value of the claim exceeds €30,000. In criminal matters, although there are no general limitations to appeals of court decisions, there may be specific limitations depending on the type of crime and the penalty incurred.

As mentioned above, civil liability in product liability cases may also be heard by an arbitrator or an arbitral court under the Portuguese Voluntary Arbitration Law (Law No. 63/2011 of 14 December), provided that both the claimant and the defendant agree to settle their dispute in this way. There are also consumer arbitration centres created under Decree-Law No. 425/86 of 27 December and Law No. 144/2015 of 8 September, as amended, although for some centres their jurisdiction is limited to cases where the value of the claim does not exceed €5,000.

Finally, certain product liability-related administrative offences may give rise to fines to be applied by the competent administrative authorities following administrative proceedings. These fines may be appealed against in an administrative court.

## **ii Burden of proof**

### ***Administrative and criminal liability and general remarks on civil liability***

In administrative and criminal proceedings, the burden of proof lies with the entity prosecuting the case, who must prove the facts that uphold its allegation.

In civil proceedings, as a general rule under Portuguese law, the burden of proof also lies with the party that makes the allegation and wishes to rely on the facts invoked in the claim. Although the obligation to indemnify (set out in Articles 562 et seq. of the Portuguese Civil Code) has a sole framework applicable both to contractual claims (whose general regime is set out in Articles 798 et seq. of the Portuguese Civil Code) and tort claims (set out in Articles 483 et seq. of the Portuguese Civil Code), whereas in tort claims the damaged party must prove the fault of the alleged offender, this fault is presumed in contractual claims as per Article 799 of the Portuguese Civil Code. Apart from this, in both tort and contractual liability claims the damaged party must prove:

- a* a voluntary action or omission of the offender (corresponding to a breach of a general obligation in tort claims or of a contract in contractual claims);
- b* the unlawfulness of such action or omission;
- c* a damage; and
- d* the causal link between the damage and the action or omission, which is assessed according to the adequate causation theory in light of Article 563 of the Portuguese Civil Code, which states that '[t]he obligation to indemnify shall only exist in respect of those damages that the damaged party would probably not have suffered should the injury not have taken place'.

### ***Product Liability Law***

Under the Product Liability Law, given the strict nature of the manufacturer's liability, the damaged party shall only bear the burden to prove the damage, the defect in the product and that the defect was the relevant (adequate) cause of the damage.

### ***Sale of Consumer Goods Law***

Under the Sale of Consumer Goods Law, even though the seller's or the manufacturer's liability (or both) is not strict, its fault in the non-conformity of the goods sold under the terms of the relevant contract is presumed if the goods:

- a* do not comply with the description given by the seller or do not possess the qualities of the goods that the seller has provided to the consumer as a sample or model;
- b* are not fit for the specific use that the consumer applies to them, provided that the consumer made the seller aware of such use and the latter accepted it;
- c* are not fit for the use for which goods of the same type are normally used; or
- d* do not have the standard qualities and performance of goods of the same type and that a consumer could reasonably expect, based on the nature of the goods and, if applicable, to their public presentation (in particular, advertising or labelling).

In light of the above and assuming that fault is presumed, the consumer only bears the burden to prove the non-conformity of the goods with the contract and the causation between such non-conformity and the damage caused to it (this being the impossibility of using the goods as expected).

### **iii Defences**

#### ***Product Liability Law***

Article 5 of the Product Liability Law provides for several defences available to the manufacturer. In particular, it shall not be held liable if it proves one (or more) of the following:

- a* that it did not put the defective product into circulation;
- b* that, having regard to the circumstances, it is probable that the product was not defective at the time it was put into circulation;
- c* that the product was neither manufactured by it for sale or any form of distribution for economic purpose nor manufactured or distributed by it in the course of its business;
- d* that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;
- e* that the state of scientific and technical knowledge at the time when it put the product into circulation was not such as to enable the existence of the defect to be discovered; and
- f* that, in the case of a component of a product, the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Another defence available to the manufacturer is provided by Article 7(1) of the Product Liability Law, according to which the liability of the manufacturer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the damaged party. However, no such defence shall apply and hence, the manufacturer's liability shall remain in full effect, if:

- a* although, having contributed to the damage caused by the defective product, the damaged party did not act with intent, recklessly or with serious negligence; or
- b* the fault that contributed to the damage was of a third party.

Should there be such a contributory fault by the damaged party, the court (or other authority hearing the case) may, taking into consideration the circumstances of the case, either:

- a* determine the full indemnification of the damages (if contribution or fault of the damaged party was not relevant when compared to the defect of the product); or
- b* reduce or even disallow the payment of an indemnity (if, on the contrary, the defect of the product played a very minor role in the damage when compared to the contribution of the damaged party).

There are also certain situations that are not mentioned in the Product Liability Law but that could constitute defences available to the manufacturer. In particular, when a person has assumed the risk of using a defective product despite having been made aware of its defectiveness, the manufacturer should not be held liable for the damages caused by the product. In addition, it is currently understood that the *force majeure* defence is available to a manufacturer of defective products and that his or her liability may be reduced or even excluded as a consequence of this.

On a separate note, Article 11 of the Product Liability Law provides for a three-year limitation period for the right to claim damages, starting from the date on which the damaged party became aware, or should have become aware, of the damage, defect and identity of the manufacturer. In addition, according to Article 12 of the Product Liability Law, the rights of the damaged party to recover damages will lapse 10 years after the date the product was put into circulation, unless he or she has submitted a claim to court (or to another authority competent to hear the case) within this period.

### ***Sale of Consumer Goods Law***

Pursuant to Article 6 of the Sale of Consumer Goods Law, if the consumer directly demands that the manufacturer of a defective product repairs or replaces it, and provided that such demand is not impossible or disproportionate taking into account the value the product would have if there were no lack of conformity; the significance of the lack of conformity; and whether the alternative remedy could be completed without significant inconvenience to the consumer, the manufacturer may oppose the consumer's claim based on any of the following grounds:

- a* that the defect results solely from the seller's statements about the product and its use;
- b* that the product was not put into circulation by it;
- c* that, under the circumstances, it can be assumed that the product was not defective at the moment it was put into circulation;
- d* that the product was neither manufactured by it for sale or any form of distribution with the purpose of earning profit, nor manufactured or distributed by it in the course of its business; and
- e* more than 10 years have lapsed since the product was put into circulation.



#### **iv Personal jurisdiction**

Under Article 7 of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012, as amended, applicable in Portugal as a Member State of the European Union, a manufacturer domiciled in the European Union may be sued in Portugal:

- a* in matters relating to a contract – if Portugal is the place of performance of the obligation in question (e.g., if the sale was made in Portugal or if the product was delivered or should have been delivered in Portugal, regardless of the fact that the product is, or is not, advertised in Portugal); and
- b* in matters relating to tort, delict or quasi-delict – if Portugal is the place where the harmful event occurred or may occur. In claims of this nature, it is arguable whether the harmful event would be the actual occurrence of the damage caused by a defective product (in which case the place where the product was manufactured, sold or advertised would play no role at all and the Portuguese courts would have jurisdiction to hear any claim where the damages occurred in Portugal) or if such harmful event would be the putting into circulation of the defective product (in which case, for the Portuguese courts to have jurisdiction over such claims the product would have to be either manufactured, sold or advertised in Portugal, or, at least, to a Portuguese audience).

If the manufacturer is not domiciled in a European Union Member State, pursuant to Article 62 of the Portuguese Civil Proceedings Code, the Portuguese courts would have jurisdiction to hear claims where:

- a* the element (or part thereof) that constitutes the cause of action to a claim was carried out in Portugal;
- b* the right invoked by the damaged party may not be effective unless the claim is brought to the Portuguese courts; or
- c* there are considerable difficulties for the damaged party to make a claim to a foreign court.

#### **v Expert witnesses**

There is no obstacle to the intervention of expert witnesses in Portugal. In fact, both the parties and the court or arbitrators may retain industry experts, or experts of another nature, to testify as part of their defence (in the former case) or to perform an independent expert analysis that would help the court or arbitrator to reach its decision (in the latter case).

The testimony, reports or evidence produced by experts are freely considered by the court or arbitrator and should not bind the latter.

#### **vi Discovery**

The common-law style of discovery is not available in Portugal because there is no general disclosure procedure in the Portuguese legal system. However, pursuant to the inquisitorial principle and the principles of cooperation and good faith between all the parties intervening in the proceedings that, among others, regulate Portuguese civil proceedings, whenever one of the parties justifiably claims a serious difficulty in obtaining a document, the court shall attempt to achieve the removal of that obstacle. For instance, the parties shall respond to or provide, as applicable, whatever is asked from them with relevance to the case and submit themselves to the necessary inspections ordered by the court. In addition, the parties are

entitled to appoint as witness any person they wish, who is obliged to appear before the court or otherwise be subject to the payment of a fine. Parties can also request the deposition of the counterparty regarding unfavourable facts, for the purpose of obtaining a confession.

### **vii Apportionment**

As a general rule under Portuguese law, if damages are caused by multiple parties, then their liability is joint and several in tort claims and joint (but not several) in contractual claims.

When it comes to damage caused by defective products under the Product Liability Law, pursuant to Article 6 thereof, if several people are responsible for the damage they will be jointly and severally liable. When it comes to the internal relations between such people, the circumstances of the case shall be taken into consideration, in particular the risk created by each person, the degree of fault of each person and the respective contribution for the occurrence of the damage. If there is doubt regarding the role played by each person involved, then their liability shall be divided equally between them.

In the case of a lack of conformity of a product with the contract of sale under the Sale of Consumer Goods Law, as an exception to the general rule referred to above, in addition to the joint and several liability of the seller and the manufacturer of a product, the representative of the manufacturer in the area where the consumer is domiciled is also jointly and severally liable towards the consumer (the same defences referred to in Section IV.iii, above, will be available to that representative). Furthermore, pursuant to the Sale of Consumer Goods Law (Article 7), a seller before whom the consumer's rights referred to in Section III, above, have been exercised has a right of redress against the professional from whom the product was purchased for all damages caused by the exercise of the consumer's rights.

Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the manufacturer, a previous seller in the same chain of contracts or any other intermediary, the final seller is entitled to pursue remedies against the person or persons liable in the contractual chain.

### **viii Mass tort actions**

Pursuant to Article 52(3) of the Portuguese Constitution, Article 2(1) of Law No. 83/95 of 31 August, as amended, and Article 31 of the Portuguese Civil Proceedings Code, any citizen or association defending specific general interests, such as consumer rights, may submit claims to protect those general interests (citizen's actions), including to request the corresponding indemnification on behalf of the damaged parties. In these citizen actions, the claimant represents, by its own initiative, all the remaining right-holders in question (who have not opted out after being given the chance to do so by the court) without the need for an express mandate or authorisation.

In addition to the citizen's action referred to above, pursuant to Article 36 of the Portuguese Civil Proceedings Code, it is possible for several claimants to consolidate their claims into a single proceeding, without any limitation as to the number of claimants, provided that they have the same cause of action (e.g., the same type of defective product caused damaged to several persons who bought it). However, the court may decide to separate the claims if it understands that a serious inconvenience would arise if the claims were to be heard jointly.

Some of the advantages resulting from both types of actions referred to above include:

- a* the reduction of legal costs to the interested parties;

- b* the reduction of the number of claims reaching the court system (this is particularly noticeable in citizen's actions, because the potentially large number of people covered by such actions); and
- c* in relation to citizen's actions, the fact that they may benefit people who would have never made an individual claim and, hence, would otherwise not have benefited from the result of the claim.

The main disadvantages of these actions are their complexity and, possibly, the longer duration of the proceedings.

#### **ix Damages**

Only damages that have been caused by defects in products (and not the matter of causation) are covered by the Product Liability Law. The general provisions concerning the obligation to indemnify, causation and indemnifiable damages apply, in particular Article 563 of the Portuguese Civil Code, as referred to in Section IV.ii, above. However, pursuant to Article 8 of the Product Liability Law, the recoverable damages in the case of product liability are limited to those related to death or personal injuries and to property other than the defective product, provided, in the latter case, that such damages exceed €500. In addition, recoverable damages are limited to those caused to property of a type ordinarily intended for private use or consumption and that has mainly been used in such way by the damaged party.

In specific cases, the 'private use' criterion may be of limited use, especially in respect to items of property normally used for both private and professional purposes. In any event, the damaged party will bear the burden of proving the prevalent private use of such items of property.

There is no maximum amount of damages that may be recoverable.

## **V YEAR IN REVIEW**

No significant changes have occurred in the past year as regards product liability, either from a case law or from a legislative perspective.

The market for product liability is primarily based on injured parties suing producers or vendors directly. Insurance companies may be called upon to participate in judicial proceedings, mostly upon the request of the producers or vendors, and they generally adhere to the same line of defence prepared by them.

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