

THE PRODUCT
REGULATION AND
LIABILITY REVIEW

TENTH EDITION

Editors

Chilton Davis Varner, Madison Kitchens and
Franklin Sacha

THE LAWREVIEWS

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CONTENTS

PREFACE.....	v
<i>Chilton Davis Varner, Madison Kitchens and Franklin Sacha</i>	
Chapter 1 AUSTRALIA.....	1
<i>Colin Loveday and Sheena McKie</i>	
Chapter 2 AUSTRIA.....	15
<i>Eva Spiegel and Dominik Szerencsics</i>	
Chapter 3 FRANCE.....	27
<i>Sylvie Gallage-Alwis and Gaëtan de Robillard</i>	
Chapter 4 JAPAN	38
<i>Akibiro Hironaka, Kota Hoshina and Chisa Fukudome</i>	
Chapter 5 PORTUGAL.....	49
<i>Joana Mota and Alexandre Pedral Sampaio</i>	
Chapter 6 PUERTO RICO	61
<i>Albéniz Couret-Fuentes and Elaine M Maldonado-Matías</i>	
Chapter 7 SINGAPORE.....	73
<i>Lim Ren Jun and Jonathan Teo</i>	
Chapter 8 SPAIN.....	86
<i>Cristina Ayo Ferrándiz</i>	
Chapter 9 SWITZERLAND	98
<i>Frank Scherrer and Marcel Boller</i>	
Chapter 10 UNITED STATES	108
<i>Chilton Davis Varner, Madison Kitchens and Franklin Sacha</i>	

Contents

Appendix 1	ABOUT THE AUTHORS.....	135
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	143

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 demonstrates how countries sought to maintain that delicate balance between consumer protection and innovation in 2022, particularly with respect to cutting-edge technological, supply chain and environmental issues. In the autumn of 2022, the European Commission took a significant step by publishing a draft revision of its 37-year-old Product Liability Directive. The revised Directive would extend product liability law not only to typical manufactured products, but also to digital products such as software and artificial intelligence systems. In addition to expanding the substantive reach of the Directive, the proposed draft would also ensure that business entities based in the European Union can be held liable for a defective product, even if the product is purchased from a manufacturer outside the European Union. That change reflects the modern global supply chain system, where products are often manufactured in one nation and sold in another through third-party distributors or fulfilment companies. Under the EU proposal, any natural or legal person who modifies a product (for instance, through a software update) or a fulfilment service provider can be liable for damage from a defective product. This change could dramatically expand companies' exposure to product liability actions. In addition, the draft Directive also includes consumer-friendly procedural changes, including requirements that manufacturers disclose evidence, flexibility for filing deadlines and a reduction in the burden of proof in complex cases (such as pharmaceutical actions). Spain has already taken steps to implement the new rules set out in the Directive.

Another theme of this edition reflects growing concerns about environmental sustainability and consumer health. For instance, France enacted new rules with the goal of promoting the 'circular economy', in which manufacturers produce goods with the intention that those goods will be recycled and reused, therefore reducing waste and promoting

sustainability. To achieve that goal, France enacted a rule that requires certain household products to include a label that informs consumers about the environmental impact of the product. The US government took significant steps in 2022 to regulate per- and polyfluoroalkyl substances (PFAS), commonly known as ‘forever chemicals’, with the goal of reducing the presence of PFAS in the environment and requiring companies to pay for clean-up costs. Those regulatory shifts likely augur more litigation on this front in the United States.

Although product manufacturers face a heightened regulatory environment across the globe, particularly for hot-button technological and environmental issues, they also notched important wins in the courtroom in 2022. Manufacturers of the heartburn drug Zantac scored a massive victory in the United States in a mass tort litigation arising from allegations that the drug’s active ingredient causes cancer. A federal court granted the manufacturers’ motions to exclude the plaintiffs’ experts who sought to prove a link between Zantac and cancer, finding that no scientist outside the litigation had found that connection. The court’s decision effectively ended tens of thousands of lawsuits, put the plaintiffs on the defensive in other Zantac-related lawsuits throughout the United States, and underscored the critical (and sometimes dispositive) role that experts play in product liability cases. And in a case involving asbestos liability in the construction context, Japan’s Supreme Court held that asbestos manufacturers were not required to issue warnings about asbestos in building materials. Despite those victories, litigation challenges remain for product manufacturers. For example, Australia saw the removal of certain requirements for the operators of class action litigation funders, which will make it easier for plaintiffs to bring lawsuits. This litigation funding continues to grow in various jurisdictions, especially in the mass tort context. Those types of developments throughout the world underscore the need for product manufacturers to remain abreast of legal and regulatory changes in all jurisdictions where they operate or sell products.

This edition covers 10 countries and territories and includes a high-level overview of each jurisdiction’s product liability framework, recent changes and developments, and a look forward to expected trends. Each chapter contains an 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, expert witnesses, discovery, apportionment, whether mass tort actions or class actions are available and what damages might 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 might 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.

Chilton Davis Varner, Madison Kitchens and Franklin Sacha

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Atlanta

March 2023

PORTUGAL

*Joana Mota and Alexandre Pedral Sampaio*¹

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 1989 (the Product Liability Law), pursuant to Article 19(1) of the Product Liability Directive.²

As the Portuguese product liability system is based on European Community (EC) directives, it 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 amended by Decree-Law No. 131/2001 of 24 April 2001, 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 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. The number of publications by legal scholars on product liability has seen a marked increase, as has the case law in recent years.

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 1981. This Law has been repealed by the current Consumer Protection Law, which

1 Joana Mota is a managing associate and Alexandre Pedral Sampaio is a senior associate at Uría Menéndez – Proença de Carvalho. The authors would like to thank their colleagues Luís Bértolo Rosa and Filipa de Matos for assistance with the update of the references to legal provisions included in the chapter.

2 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

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;
- 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, its Article 12 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.

In addition, Decree-Law No. 84/2021 of 18 October 2021 (the Sale of Consumer Goods Law) regulates consumer rights in the purchase and sale of goods, digital content and services, transposing Directives (EU) 2019/771 and (EU) 2019/770 and revoking Decree-Law No. 67/2003 of 8 April 2003, and applies to contracts for the sale of consumer goods (including goods with digital elements incorporated into them and real estate properties), as well as 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 2005 (as amended by Decree-Law No. 9/2021), transposing the Product Safety Directive,³ 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 Article 5 of the Consumer Protection Law.

On 28 September 2022, the European Commission adopted proposals for two directives that aim to modernise the liability rules and adapt them to the digital economy:

- a* the first directive would adapt non-contractual civil liability rules to artificial intelligence (the AI Liability Directive); and
- b* the second directive relates to liability for defective products, repealing the Product Liability Directive.

The purpose of the AI Liability Directive is to ensure that victims of harm caused by artificial intelligence technology can access reparation in the same manner as if they were harmed under any other circumstances. The new directive on liability for defective products intends to modernise the existing rules on the strict liability of manufacturers for defective products, including smart technology and pharmaceuticals.

3 Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.

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. The DGC is the single liaison office for the purposes of application of Regulation (EU) 2017/2394 of the European Parliament and of the Council of 22 December 2017, 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 EU Rapid Alert System (the Safety Gate/Rapid Exchange of Information System (RAPEX)) for dangerous non-food products and is responsible for the management of the RAPEX network in Portugal, which is made up of the national market control entities.

ASAE, the Authority for Economic and Food Safety, is the regulatory authority, as well as 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.

There are other sectorial administrative bodies and public institutions responsible for enforcing consumer rights in Portugal, such as Infarmed (the National Authority for Pharmaceuticals and Health Products), which is responsible for monitoring and overseeing the quality and safety of medical products and medical devices, and the IMPIC (the Portuguese Institute for Public Markets, Real Estate and Construction), which has the power to monitor the real estate and construction sectors and to regulate the activities carried out therein, to initiate administrative offence proceedings and to apply the respective fines and ancillary penalties.

Finally, although not public bodies, non-governmental consumer protection organisations, such as DECO (the Portuguese Association for Consumer Defence) 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 these 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, which 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 themselves out as manufacturer by putting their 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, whereas the Civil Code governs contractual liability and liability in tort.

As regards contractual liability, under Articles 5 to 9 of the Sale of Consumer Goods Law, the seller is required to comply with subjective and objective conformity requirements in respect of delivery and installation of goods, as well as, in respect of goods with digital elements, the updates (including safety updates) that are necessary to ensure their conformity.

According to Article 15 of the Sale of Consumer Goods Law, in cases of non-conformity the consumer will be entitled to repair or replacement of the product, 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 included in the Civil Code are very similar to those in the Sale of Consumer Goods Law (see above); however, in situations in which the Civil Code applies, there is no presumption that the non-conformity existed at the time when the goods were sold under the terms of a contract.

IV LITIGATION

i Forum

In respect of civil proceedings, product liability claims may be decided by either 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.

In respect of 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 or 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 2013, 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 be subject to appeal only in cases where the value of the claim exceeds €5,000, and decisions of the courts of appeal could potentially reach the Supreme Court (in which case the scope of review would be limited to the control of the application of the law) only 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.

Civil liability in product liability cases may also be heard by an arbitrator or an arbitral court under the Portuguese Voluntary Arbitration Law,⁴ 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 1986 and Law No. 144/2015 of 8 September 2015, as amended, although for some centres their jurisdiction is limited to cases where the value of the claim does not exceed €5,000.

⁴ Law No. 63/2011 of 14 December 2011.

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, which 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 Article 562 et seq. of the Portuguese Civil Code) has a sole framework applicable both to contractual claims (whose general regime is set out in Article 798 et seq. of the Portuguese Civil Code) and to tort claims (set out in Article 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 the 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 bear the burden only 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, as a general rule, fault for a non-conformity of movable goods sold (including goods with digital elements) that becomes apparent within two years of the time when the goods were delivered is presumed, unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity.

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

After a period of two years from the delivery of the goods to the consumer, the seller shall still be liable for any lack of conformity that becomes apparent within the next year (i.e., a total of three years from the time when the goods were delivered to the consumer), but

in this case there shall be no presumption of fault on the part of the seller and therefore the consumer shall also bear the burden of proving that the lack of conformity existed at the time when the goods were delivered.

In the case of sale and purchase of real estate properties, during a period of 10 years in respect of structural defects or five years in respect of non-conformity of other construction elements, the seller's fault for 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 same qualities as the goods the seller provided to the consumer as a sample or model;
- b* are not fit for the specific use that the consumer puts them to, provided that the consumer made the seller aware of that and the latter accepted it;
- c* are not fit for the use that goods of the same type are normally put to; 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, on their public presentation (in particular, advertising or labelling).

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, this defence shall not 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 that of a third party.

Should there be 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 with 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 with 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 its 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 elapse 10 years after the date the product was put into circulation, unless they have 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 40 of the Sale of Consumer Goods Law, if the consumer directly demands that the manufacturer of a defective product, piece of digital content or service repairs or replaces it – and provided that the demand is not impossible or disproportionate taking into account the value the product, digital content or service 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* the non-conformity results solely from the seller’s statements about the product, digital content or service, and its use or misuse;
- b* the product, digital content or service was not put into circulation by it;
- c* under the circumstances, it can be assumed that the product, digital content or service did not lack conformity at the moment it was put into circulation;
- d* the product, digital content or service 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; or
- e* more than 10 years have elapsed since the product, digital content or service was put into circulation.

In the case of refurbished goods, the consumer can demand the repair or replacement directly from the manufacturer only in cases where the manufacturer is responsible for refurbishing the item.

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 the harmful event would be the putting into circulation of the defective product (in which case, for the Portuguese courts to have jurisdiction, 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 of 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 a 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, 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 these 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, 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 (Articles 41 and 42), a seller before whom the consumer's rights referred to in Section III, above (i.e., repair or replacement of a defective product), 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 1995, 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 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 rights-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 actions 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., if 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 actions because of the potentially large number of people covered by these actions); and
- c* in relation to citizen 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.

In relation to the rules applicable to mass tort actions, the European Union has adopted the Representative Actions Directive.⁵ The aim of this Directive is to give powers to organisations or public bodies designated by EU Member States to seek injunctive or redress measures on behalf of groups of consumers through representative actions (including cross-border representative actions), which includes seeking compensation from traders that infringe consumer rights in areas such as financial services, travel and tourism, energy, health, telecommunications and data protection. However, Portugal has not yet concluded the necessary transposition of this Directive into national law, so the impacts on the legal regime for mass tort actions in Portugal are unknown to date.

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 of Portuguese law apply concerning: the obligation to indemnify; causation; and indemnifiable damages – 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 these 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 this way by the damaged party.

In specific cases, the ‘private use’ criterion may be of limited use, especially in respect of 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 these items of property.

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

5 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

V YEAR IN REVIEW

In September 2022, the European Commission adopted proposals for two directives that aim to modernise the liability rules and adapt them to the digital economy: the AI Liability Directive and a directive concerning liability for defective products, repealing the Product Liability Directive. The market for product liability is primarily based on injured parties suing producers or vendors directly. Insurance companies may be called on to participate in judicial proceedings, mostly at the request of producers or vendors, and they generally adhere to the same line of defence prepared by them.

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