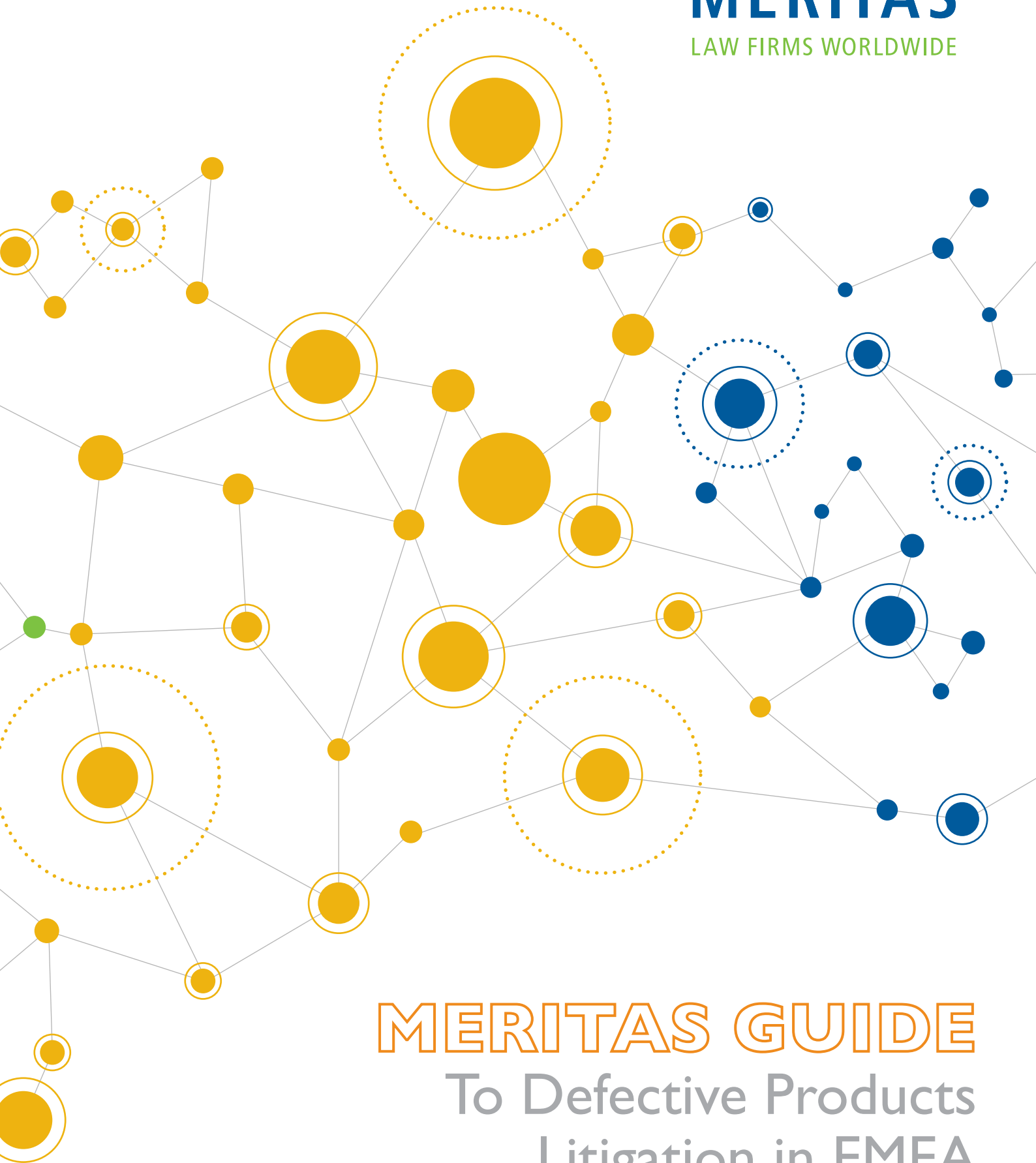




MERITAS[®]

LAW FIRMS WORLDWIDE



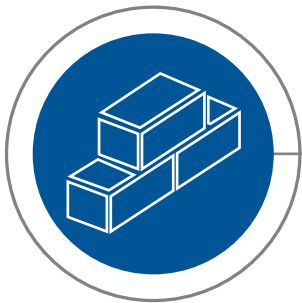
MERITAS GUIDE

To Defective Products
Litigation in EMEA

ABOUT MERITAS

Meritas is a premier global alliance of independent law firms working collaboratively to provide in-house counsel and business leaders with access to qualified legal expertise throughout the world.

With more than **7,500 lawyers** in over **90 countries** worldwide, our member firms offer a full range of high-quality, specialised legal services, allowing you to confidently conduct business anywhere in the world.



1990
Founded



90
Countries



7,500+
Experienced
Lawyers



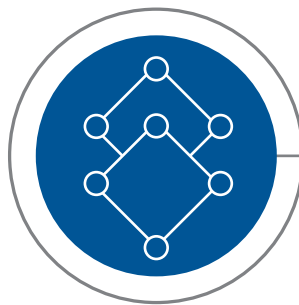
180+
Law Firms

Built upon a **rigorous system of quality control**, Meritas connects clients with carefully qualified, business legal expertise around the world.

Meritas Litigation and Dispute Resolution Group brings together Litigators and Arbitrators from across the Meritas network to share knowledge and expertise on the latest hot topics and work together on behalf of clients in all manner of contentious issues.



234
Global
Markets



20+
Practice and
Sector Groups



2,000
Referrals
Annually

For more information visit: www.meritas.org or contact any of the lawyers listed in each chapter.

INTRODUCTION

Key Issues



What claims may be brought for liability for defective products?



Who is liable to compensate a claimant for a claim?

If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences including heavy fines and imprisonment, not to mention the loss of business revenue.

Understanding the laws and regulations that concern defective products and the liabilities that may result is therefore vital for any company doing business across Europe, Middle East and Africa.

The trend in many countries has been to **strengthen consumers' levels of protection** in respect of defective products, particularly within the EU.



Is there a difference if you are a consumer or professional buyer of the product?



Can a manufacturer of a defective product limit their liability?

Whilst a consumer may recover damages for losses caused by negligent acts or omissions, there are **important differences** between jurisdictions as to how principles of fault liability are applied. For example, in civil law jurisdictions, the burden of proof is often reversed once a defect and damage is proved and a defendant must prove that it was not negligent. In contrast, in common law jurisdictions, the burden generally rests on the claimant to prove all aspects of the claim.

The following Meritas guide asks these are other **key questions** related to defective products litigation and provides answers as they relate to **30 countries across EMEA**.

Please note: this guide is for general information purposes only and is not intended to provide comprehensive legal advice. For more information, or for detailed legal advice, please contact any of the lawyers listed at the end of each chapter.

The information contained in this guide is accurate as at 1 August 2018. Any legal, regulatory or tax changes made after this date are not included.



SWITZERLAND



Contact

Wenger & Vieli Ltd.
Zurich, Zug - Switzerland
www.wengervieli.ch

GEORG ZONDLER

Partner | Litigation
T: +41 0 58 958 5858
E: g.zondler@wengervieli.ch

1. What claims may be brought for liability for defective products? Is liability based on fault/negligence, or strict liability, or both?

Defective product claims can in the first place be brought in accordance with the sales contract and/or the legal provisions of the Swiss Code of Obligations (“CO”). Most often, the legal provisions are modified by general terms and conditions (“GTC”), which is standard for consumer products. In addition, general tort law and/or the Product Liability Act (the “PLA”) may apply.

The liability under the PLA is a strict liability, requiring a defective product (and, of course, a damage) only, while contractual or tort claims require a fault by the seller or other liable party. In case of tort, the fault must be proven by the claimant, in case of contractual claims the defendant must show that he was not at fault.

2. Who is potentially liable to compensate a claimant in such a claim? The manufacturer, the importer, the distributor or the retailer/shop?

Depending on the legal basis, potentially all of the above parties can be sued. Claims under the contract can only be brought against the seller (retailer), while claims under the PLA are directed against the manufacturer and the importer. Tort claims can be brought against anyone involved, provided that they have caused a damage by wilful or negligent act.

3. Are there differences if the buyer is a consumer or a professional buyer?

Basically no, but there is a number of specific consumer provisions found in various laws. In particular, a consumer may claim that the GTC of a seller contain unfair provisions which lead to a substantial imbalance of rights and duties between seller and consumer, as per art. 8 of the Unfair Competition Act. See also question no. 5 on the forum for consumer actions and no. 13 on limitation periods.

4. Can the seller or other potentially liable party exclude or limit its liability?

Contractual liability can be limited or excluded except if defects have been fraudulently concealed from the buyer. Normally, sellers’ GTC amend and modify the legal rights to a substantial extent, e.g. by modifying notice periods (to the benefit of the buyer) or by excluding the right to cancel the contract (to the benefit of the seller).

Liability for tort or under the PLA cannot be contracted out.

5. What are the rights of the consumer if products are manufactured outside your jurisdiction or the EU?

A consumer is also entitled to bring claims at his domicile while a professional party must start action before the court of the contract or, if there is no forum clause, at the seat of the defendant.

For tort claims, there is also a forum at the place where the illicit act was committed or where its effects took place.

6. What are a manufacturer’s and a retailer’s liabilities for omitted or delayed recall campaigns?

In addition to civil liability, a manufacturer, importer or retailer may be fined with up to CHF 20,000 for negligence or CHF 40,000 for a wilful act if they fail to comply with orders of a competent authority, including also orders to recall a product (see Product Security Act).

7. Is there a specific procedure or are there specific rules of evidence for defective products litigation, or do normal/summary procedures and rules of evidence apply?

Normal procedures apply. For dispute values up to CHF 30,000 the simplified procedure applies which mainly aims at expediting the matter.

8. What kind of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?

No specific procedures must be followed before issuing proceedings. However, a buyer is subject to rather strict inspection and notification duties under contract law (see below question no. 13).



9. What sort of remedy is generally available to the buyer of a defective product (replacement of the product, repayment of purchase price and other damages)?

Under contract law, the buyer can only request rescission of the contract or reduction of the price (art. 205 CO). Very often, this legal right is replaced by provisions of the GTC which only grant a right of repair or replacement.

The rights under tort or the PLA are limited to replace the damage suffered from a defective product; with the PLA in particular limiting such damages to personal injury and damage of consumer products, with the exclusion of damages to the defective product.

10. What are the costs of defective products litigation? Who ultimately bears such costs? Who is responsible for experts' costs?

The costs of defective products litigation follow general rules and depend on the amount in dispute. Court organization and costs are governed by cantonal law and thus differ from Canton to Canton. Very often, the claimant must advance court costs and will be awarded a claim to recover these from the defendant, if he wins the case. The winning party is generally also awarded an indemnity for its legal costs payable by the losing party. Unless the dispute value is very high, this amount does normally not cover the full costs.

The costs of a court appointed expert must be advanced by the party calling on such expert (normally the party

carrying the burden of proof) and will be included in the court costs to be compensated by the losing party. Expert reports submitted by a party together with legal briefs are treated like pleadings of such party and the costs may be taken into consideration in the party indemnity.

11. Who has the burden to prove that a product is defective? Is it always the buyer?

It generally is the burden of the claimant to prove the factual elements of his claims, in particular defect of the product and damages suffered as a consequence thereof.

12. Is the state of the art defence available?

A state of the art defence is available only under the PLA but could be used also in other claims since a fault by the manufacturer (and possibly also the importer or retailer) might be hard to prove if the product was state of the art when brought onto the market.

13. What are the deadlines within which a claimant must notify defects and/or commence proceedings? Can such deadlines be frozen or extended?

Under contract law a buyer must inspect the product as soon as feasible in the normal course of business and notify a defect without delay (art. 201 CO). These duties, however, are very often modified in GTC to the effect that a defect can be notified at any time before the warranty period runs out. The warranty period is two years (five years for goods incorporated

into immovable property) and it is not possible to reduce these periods in a consumer - professional seller relationship. The limitation period can be interrupted (meaning it will start anew) by any action under art. 135 CO, in particular starting of debt enforcement or court proceedings.

Tort claims must be brought within one year and claims under the PLA within three years after the injured person gained knowledge of the damage and the person liable therefore. In both cases there is there is a maximum period of 10 years after the damaging act or omission (tort) or after the product was put on the market (PLA).

14. What are the rules for bringing a claim in a class/collective action?

Switzerland does not yet know class action procedures. A group of claimants can possibly bring a joint action against one or more defendants if the basis of their individual claims is the same for all of them (e.g. the same product with the same defect). However, there are not many known cases of such collective actions in Switzerland. A draft amendment of the Swiss Code of Civil Procedure proposes to introduce collective action but it is open when it will be dealt with by the legislator and in what form it will pass, if at all.

15. What is the average duration of defective products litigation?

This is difficult to answer as it not only depends on the Canton where the case is heard but also on elements such as local court, applicable procedure (in writing or in hearings) and also behaviour or tactics of the parties. As a very rough indication one might say that a first instance decision could be expected within maybe 12 - 18 months.