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.

For more information visit: [www.meritas.org](http://www.meritas.org) or contact any of the lawyers listed in each chapter.
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.
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.
Contact
ECIJA
Madrid, Barcelona, Valencia - Spain
www.ecija.com

MAITE MASCARÓ
Partner | Dispute Resolution, Litigation, Corporate/M&A
T: + 34 933 808 255
E: mmascaro@ecija.com

ANA PARÉS
Manager | Dispute Resolution & Litigation
T: + 34 91 781 61 60
E: apares@ecija.com
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 may be brought in contract, tort or negligence or under the General Law on Protection on the Protection of Consumers and Users (GLPCU) enacted by the Royal Legislative Decree 1/2007 of 16 November, and other complementary regulations. There are also a number of other special laws and regulations dealing with consumer protection in specific sectors or activities.

The regime for product liability of the GLPCU is of a strict liability.

The actions available under the GLPCU do not affect any other right to damages, including moral damages, that the injured party may be entitled as a consequence of contractual liability (lack of conformity of the goods or services, or any other cause of non-performance or defective performance of the contract) or of any non-contractual liability that may apply.

Criminal sanctions may apply insofar as the supply of the defective product is considered a negligent or intentional action. Such action is qualified as an offence under the Criminal Code.

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

Under the GLPCU, liability for defective products is borne by the manufacturer or the importer that introduces the product into the European Union.

In the event that the producer cannot be identified, the supplier of the product (the distributor or the retail supplier) shall be liable unless, within the term of three months, he informs the injured party of the identity of the producer or of the person who supplied the product. This rule also applies if the imported defective products do not indicate the name of the importer, even if the products identify the name of the manufacturer.

The supplier of the defective product shall be liable, however, in the event that he has supplied the product having knowledge of the defect.

In respect of a contract claim, a claim can be brought against the other contractual party. A claim in tort or negligence can be brought against a party who has breached a duty to take reasonable care resulting in damage to the claimant.

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

Under the GLPCU a claimant needs to have suffered death, personal injury or any loss or damage to property which is for private use or consumption. The product liability system coexists with the contractual and tort liability systems. Therefore, moral damages and other property damages and losses, excluded from the scope of the GLPCU, may be recovered under the general civil regulation.

Non-consumers may claim for death or personal injury and can bring a claim for damage to property or financial loss in contract or negligence.

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

Strict liability cannot be excluded under the GLPCU. Any clauses exempting or limiting the producer’s liability will be ineffective. However, the producer’s overall civil liability for death or personal injury caused by identical products with the same defects is limited to EUR 63,106,270.96.

Liability for death or personal injury caused by negligence, or damage arising from fraud or willful misconduct, cannot be excluded or restricted, whether in a consumer or a business to business context.

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

Among the categories of abusive standard term clauses, the GLPCU include clauses on jurisdiction and applicable law. Spanish Supreme Court case law has established that any submission clauses to the judges of the jurisdiction of the manufacturer or supplier in detriment of the consumer’s jurisdiction will be null and void.

Spanish Courts have jurisdiction over claims brought by consumers domiciled in Spain, regardless the manufacture, marketing and damage occurred outside Spain.

Supreme Court case law has stated that any bodily harm caused by the use or consumption of a product is non-contractual in nature. Therefore, contract theories of recovery have no application in the context of product liability involving bodily harm in the Spanish legal system.

Liability for the product’s lack of conformity can be limited by the supplier. However, in case of products supplied to consumers, terms implied by statute concerning product’s conformity cannot be excluded or restricted. A minimum three year guarantee period for conformity is set out for consumers.

In a business to business contractual context, a liability limitation clause included in standard terms might be considered abusive and therefore unenforceable if it is contrary to good faith and creates a significant imbalance between the rights and obligations of the parties.
6. **What are a manufacturer’s and a retailer’s liabilities for omitted or delayed recall campaigns?**

Any person involved in placing products at the disposal of the consumers and users, shall be obliged, within the limits of its activity, to withdraw from the market, suspend the marketing or recover from the consumer or user any products that do not meet the safety requirements, or which represent a foreseeable risk to personal health or safety on any other grounds. The public administration may order the precautionary or definitive withdrawal or recall of products from the market on the grounds of health and safety.

The producer or retailer infringement of their duty to recall the defective products may lead to criminal and/or administrative fines.

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?**

No, available Court procedures and general rules of evidence apply.

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

The Spanish legal system does not provide for a general disclosure procedure. However, a prospective claimant may apply for pre-action document disclosure where preliminary proceedings have commenced. This is an extraordinary procedure aimed at preparing the claim and intended to verify the suitability of the respondent to be a party of the subsequent proceedings and the object of the claim. In preliminary proceedings, where the respondent or the person in possession of the documents refuses the order to disclose, it is possible for the court to enter and search the premises to obtain the documents requested by the claimant. There are no pre-trial depositions under the Spanish procedural system.

The Civil Procedure Act allows for interim relief. However, it is not specifically applicable to product liability issues and would rarely be applicable in product liability regulation. Precautionary measures related to product liability are more generally considered from a product safety perspective.

No pre-action warning letter is requested.

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)?**

In strict liability claims under the GLPCU, damages are available to compensate the injured person for death, personal injury and damage to goods intended for private consumption or use, other than the defective product itself, and for a value exceeding EUR 390.66.

In a contractual claim, the remedies available include the resolution of the contract and/or claim damages, the repair or replacement of the product, and the total or partial repayment of the purchase price, depending on the nature of the term breached.

Repair or replacement will be free of charge for the consumer and user, including the necessary expenses incurred to correct the lack of conformity of the products with the contract, especially the shipping costs, as well as the costs related to labor and materials.
10. What are the costs of defective products litigation? Who ultimately bears such costs? Who is responsible for experts’ costs?

Civil proceedings in connection with defective product litigation give rise to costs derived from legal representation and attorney’s fees plus any additional cost the consumer may incur to prove the damage (e.g. expert opinions, sworn translations, etc.) The costs of defective products litigation follow the general criterion of the Civil Procedure Act, i.e., the losing party bears all costs. In case the claim is only partially upheld by the court, each party shall bear its own costs.

Expert costs follow the same general rule as explained above.

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

Under the GLPCU the party claiming liability must provide evidence of the
i. existence of a defect in the product;
ii. damage or injury; and
iii. causal relationship between the two.

The Supreme Court requires that the evidence of the existence of a causal link must be clear and precise, and not based on mere deduction, conjecture or probability. The claimant must therefore provide solid and substantial evidence that the damage is a result of the defect and the causal link.

However, in practice, courts also accept that the causal link may be proven by means of judicial presumptions and often reach decisions that come close to applying the “more probable than not” rule. The Spanish courts have developed various concepts of legal causation similar to those found in other jurisdictions, such as in relation to proximate causes, foreseeability and superseding or intervening causes.

In case the manufacturer pleads that is incurring in a situation of exclusion of liability, the burden of proof is on the manufacturer.

In a contract and negligence claim the burden of proof is on the claimant.

12. Is the state of the art defence available?

Yes, manufacturers or importers have a defence and are not liable if the state of scientific and technical knowledge at the time of putting the product into circulation did not allow the existence of the defect to be discovered. Therefore, manufacturers whose production activity adheres to the scientific and technical knowledge available at the time of putting their products into circulation are relieved of liability.

Under the GLPCU, the development risk or state of art defence is not available in the case of drugs and foodstuffs meant for human consumption, meaning that there are reinforced duties to conduct research into the safety of those products.

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

The action for civil liability arising from defective products under the GLPCU shall be exercised within a period of three years from the time the victim suffered the damage. Liability claims will be barred ten years after the time the product was placed into circulation (where no legal action is instigated within that period).

The limitation periods for claims in contract and negligence are five and one year respectively. Depending on the nature of the contract, different limitation periods might apply.

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

Under the LGDCU, associations of consumers and users of the supra-autonomous area, legally constituted and registered in the State Registry of Consumers and Users Associations shall have the right to represent their associates and to exercise the corresponding actions in defence, in defence of the association or of the general, collective or diffuse interests.

In addition, according to Article 11.3 of the Spanish Civil Procedure Act, when a harmful fact affects to a plurality of consumers, their defence could be assumed by the Consumers and Users Associations. Nevertheless, this matter would only concern the Consumers and Users Associations which (under the Law) are sufficiently representative. This representability can be proved by the Associations showing their implantation in the territory where the harmful fact took place, number of associates, etc.

The reference of a harmful fact entails the existence of a requirement of commonality. It will be necessary to prove an identity in the events happened.

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

According to the Spanish Civil Procedure Act, Spanish litigation has no determined time to end or an average duration. It usually depends on the workload of the Court and the development of the trial (if one party decides to appeal the judgement, for example). It usually takes a year or two to have a judgement, which could be seen as the average duration of defective products litigation, but it has not to be necessarily like that.