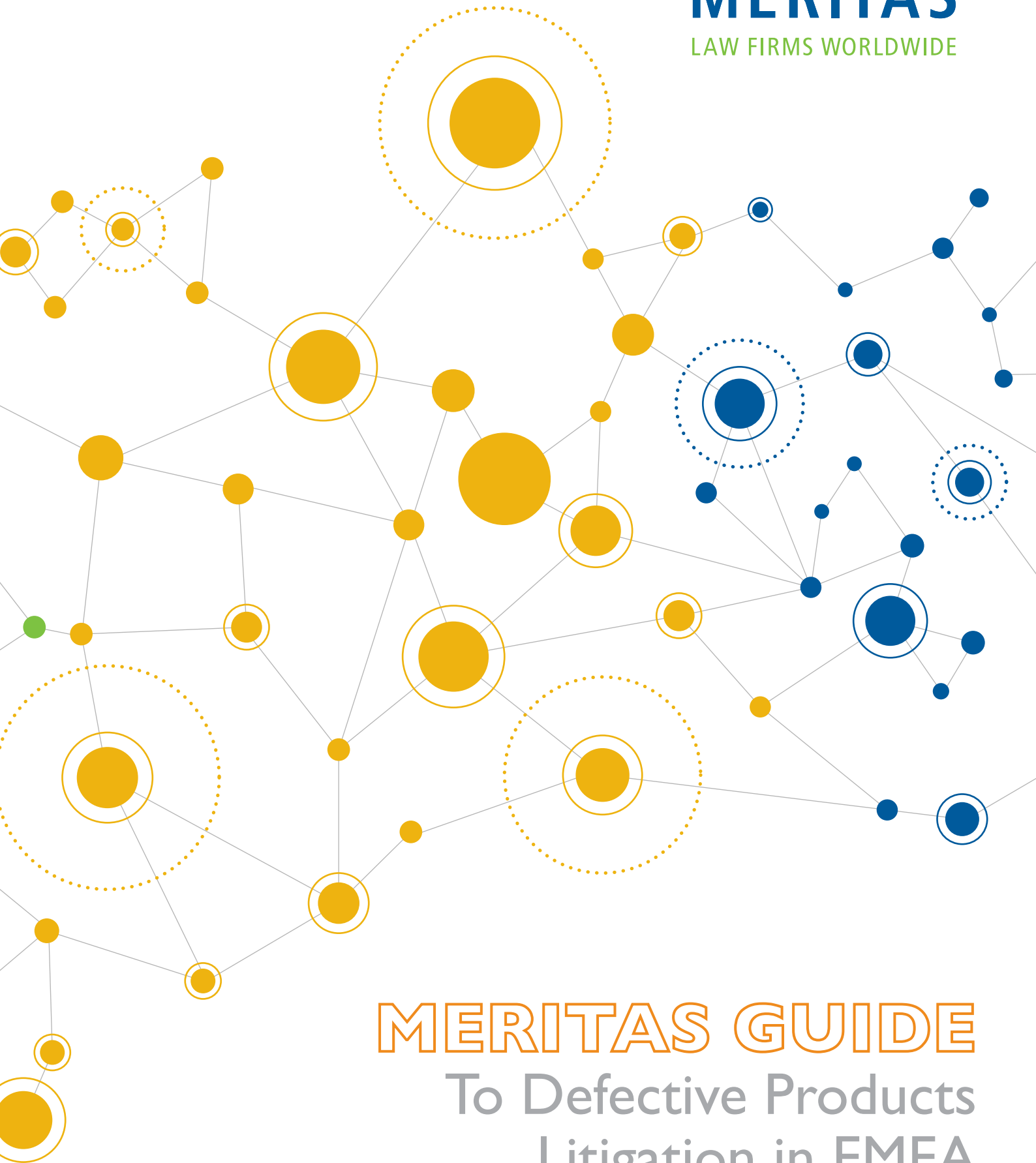




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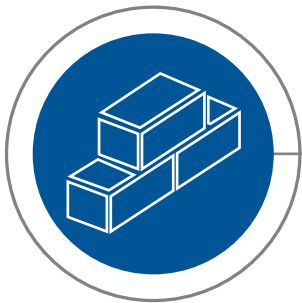
MERITAS GUIDE

To Defective Products
Litigation in EMEA

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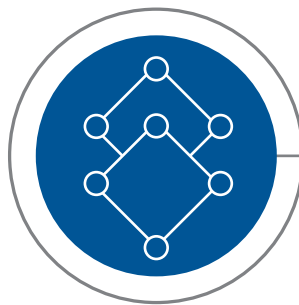
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INTRODUCTION

Key Issues



What claims may be brought for liability for defective products?

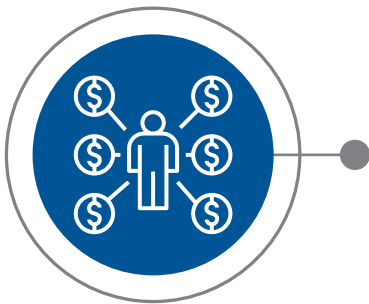


Who is liable to compensate a claimant for a claim?

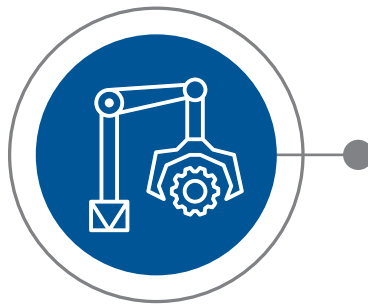
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences 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.

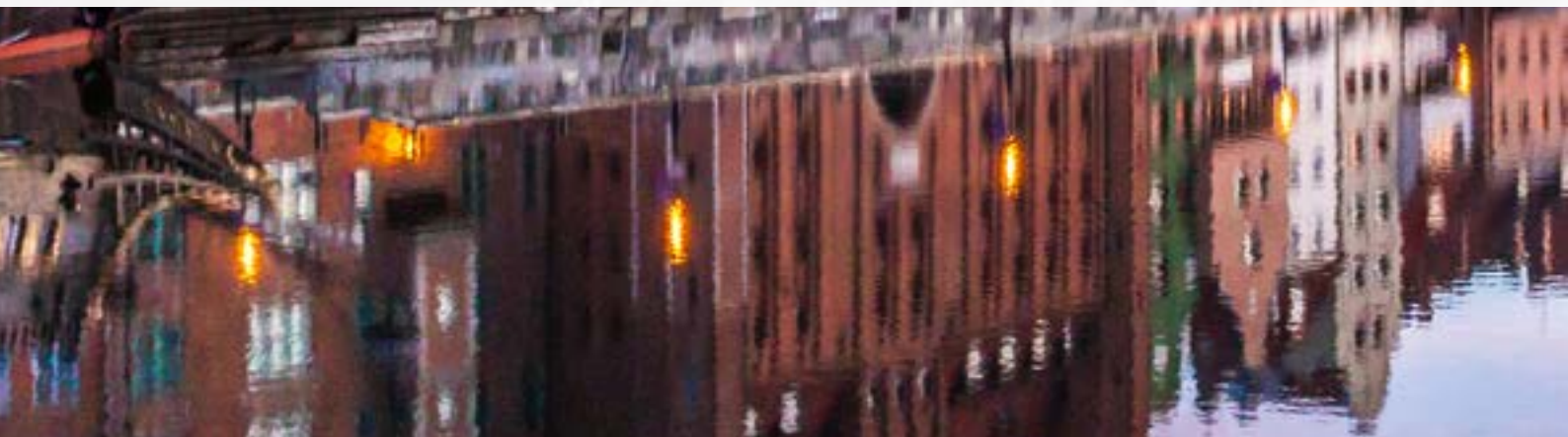
The following Meritas guide asks these are other **key questions** related to defective products litigation and provides answers as they relate to **30 countries across EMEA**.

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.



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

Liability for defective products is regulated by provisions of the Polish Civil Code (“**The Code**”).

Generally speaking, the Code stipulates the following types of liability:

1. statutory warranty for defects (strict liability);
2. statutory contractual liability (fault/negligence);
3. statutory liability for hazardous product, implementing the EU Product Liability Directive (strict liability);
4. optional contractual liability, if a contract is established (e.g. guarantee).

The specific claims depend on the type of liability. In principle, the following may be available to the purchaser:

1. repair
2. delivery of product free of defects
3. reduction of price
4. rescission of contract
5. compensation for damage.

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

In general, the doctrine of privity of contract determines who is liable for defects. Therefore, in principle the liability is on the other party to the contract, i.e. the seller.

As regards hazardous product, however, this principle is modified. Thus, liability is placed on the producer, anyone who held themselves out to be the producer and/ or an importer.

Only if the above mentioned persons are unknown, liability shall be borne by the seller, unless the seller provides the aggrieved party with name and address of one of the above and - in the case of imported goods - an importer.

A manufacturer of material, raw material or a component part of a product shall bear a liability equal to that of a producer, unless the only cause of the damage was a defective construction of the product or instructions given by the producer.

If the seller cannot indicate the producer or anyone who held themselves out to be the producer and/ or an importer, he shall be released from liability if he indicates the person from whom he himself has purchased the product.

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

Yes, as far as warranty is concerned.

Generally, the scope of available remedies is wider if the buyer is a consumer.

Second, warranty cannot be limited or excluded, unless specific provisions allow that (in non-consumer context warranty can be freely modified or outright excluded).

Third, the law provides for several important exceptions or presumptions that help consumers in potential litigation, e.g. if the defect manifests itself within one year following the sale, it shall be presumed to have existed at the transfer of risk from the seller to the buyer.

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

With regard to statutory warranty, yes (please see above).

With regard to general contractual liability, yes, except for intentional acts or omissions.

Limitations and exclusion of liability pertain only to damage to property.

Liability for a damage caused by a hazardous product may not be excluded or limited.

The producer shall not bear any liability if the hazardous properties of a product were revealed after it had been introduced to trade, unless they have resulted from a cause inherent in the product beforehand. Nor shall the producer bear any liability if the hazardous properties of the product could not be foreseen on the basis of the state of the art in science and technology at the time of introducing the product to trade or if the properties resulted from the observance of provisions of law.

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

The place of manufacture does not affect consumer rights.

If defendant is domiciled in Poland, the Polish Courts have jurisdiction and it does not matter if the manufacture, marketing and damage all occurred outside Poland.

If a claimant suffers injury in Poland, the Polish Court is likely to have jurisdiction over a claim on the basis that the harmful event happened in Poland.

Situations where the claim is subject to other's country jurisdiction are regulated by the EU provisions on jurisdiction or by the bilateral agreements.



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

Failure by producers and distributors to withdraw the defective product from the market can lead to fines of up to PLN 100,000, under the General Product Safety Regulations 2003.

Depending on the circumstances, such acts or omissions could also lead to criminal liability.

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?

Normally available Court procedures apply.

However, as mentioned above, law favours the buyer-consumer by providing for important presumptions that shift the burden of proof to the defendant.

There may be other presumptions favourable to the plaintiff, depending on the type of liability.

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

Given that warranty liability is strict liability, there are many time limits that must be observed in order to preserve claims against the seller. Suffice to say, that the purchaser should immediately notify the seller of the defects. In principle, warrant expires after 2 years following the sale, 5 for real property.

A statement of claim should also be preceded by call for settlement.

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)?

Please see point 1 above.

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

Generally, a statement of claim is subject to a court fee of 5% of the demand (in case of monetary claims).

Initially, litigation costs are on the plaintiff.

In Poland, the law is the English rule, i.e. ultimately the loser pays all legal costs, that is court fees and winner's attorney's fees.

However, since the reimbursement of attorney's fees is regulated, the amount actually reimbursed may be dramatically less than the actual cost of a lawyer. Thus, in reality often times the American rule is the law in action, i.e. a party pays its own attorney's fees irrespective of the outcome.

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

Generally, the burden of proof with respect to all elements of the claim is on the claimant. This includes the existence of defect.

12. Is the state of the art defence available?

The state of the art defence is available only in the context of liability for hazardous products.

The producer shall not bear any liability if the hazardous properties of a product were revealed after it had been introduced to trade, unless they have resulted from a cause inherent in the product beforehand. Nor shall the producer bear any liability if the hazardous properties of the product could not be foreseen on the basis of the state of the art in science and technology at the time of introducing the product to trade or if the properties resulted from the observance of provisions of law.

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

Generally, an action in tort must be brought within three years following the damage and the knowledge of who the tortfeasor is.

In B2B context, the general statute of limitations is 3 years.

Otherwise, the statute is currently 10 but soon it will be reduced to 6 years.

These cannot be modified in any way. The lapse of the statute can be frozen (under extraordinary circumstances) or interrupted, e.g. by acceptance of liability by the debtor.

Other than that, under warranty provisions the buyer must give notice, otherwise he may lose his claims (please see above).

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

Class action proceedings are available for product liability claims, in so far as there are procedural mechanisms available that enable claims to be considered in a grouped fashion i.e. in cases where claims are of one kind, there are at least 10 claimants and the claims are based on the same factual basis.

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

Duration depends heavily on the location of the court and the availability of court-appointed experts. In general, obtaining a judgment from the court of first instance may take between 16 to 30 months.