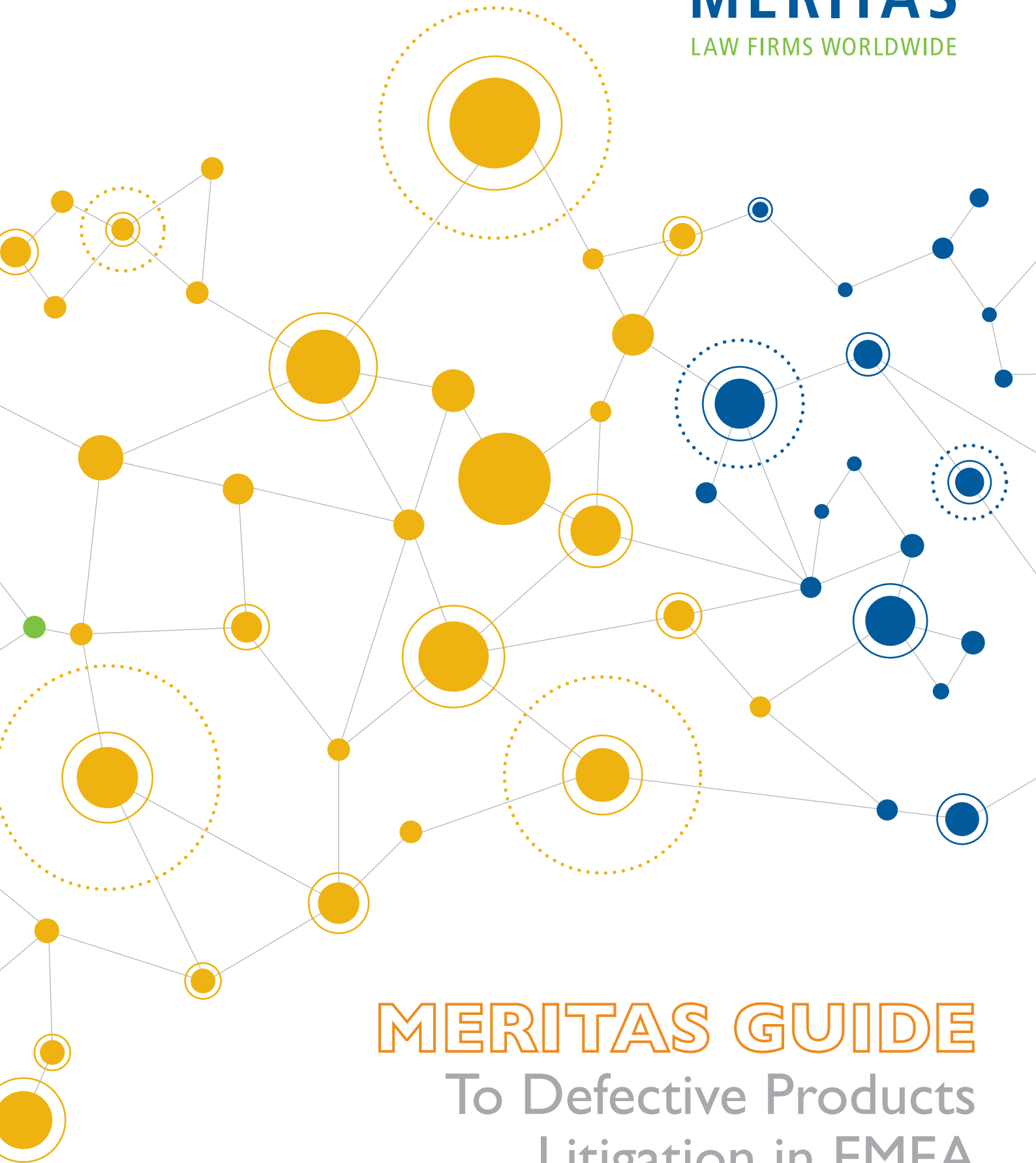




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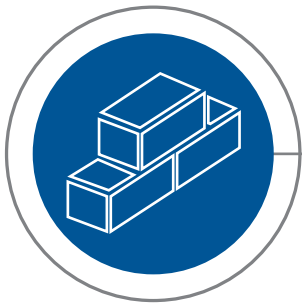
# MERITAS GUIDE

To Defective Products  
Litigation in EMEA

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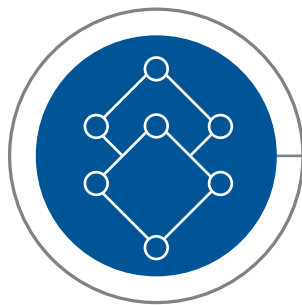
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# INTRODUCTION

## Key Issues



What claims may be brought for liability for defective products?



Who is liable to compensate a claimant for a claim?

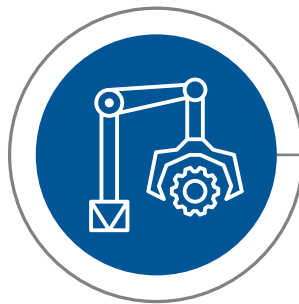
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences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



# GERMANY

## Contact

Arnecke Sibeth Dabelstein  
Frankfurt, Munich, Hamburg,  
Berlin, Leer, Dresden, - Germany  
[asd-law.com](http://asd-law.com)

**DR. ANTON MARIA OSTLER**  
Partner | IP, IT, Commercial, Sports,  
Media & Entertainment Department  
T: +49 89 388 080  
E: [a.ostler@asd-law.com](mailto:a.ostler@asd-law.com)

**ALEXANDER FEITZINGER**  
Senior Associate | IP, IT, Commercial,  
Sports, Media & Entertainment  
Department  
T: +49 89 388 080  
E: [a.feitzinger@asd-law.com](mailto:a.feitzinger@asd-law.com)

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

The following rights are available to the buyer, of which the first six derive from the German Civil Code (Bürgerliches Gesetzbuch, BGB):

1. The right to demand supplementary performance (Nacherfüllung): The primary right is the buyer's right to supplementary performance. It for both the right to repair and the right to a new delivery.
2. The right to terminate the contract (Rücktritt): In the event of initial impossibility of supplementary performance, subsequent impossibility, failure, as well as performance-related and non-performance-related secondary liability violations, a withdrawal from the contract is possible.
3. The right to claim price reduction (Minderung): Under the same conditions governing the buyer's right to terminate the contract, the buyer may also opt for a reduction in the purchase price.
4. The right to claim compensation in lieu of performance (Schadensersatz statt der Leistung): In the event of initial impossibility, subsequent impossibility, failure and performance-related as well as non-performance-related secondary liability violation of the supplementary performance claim, a claim for damages instead of performance can be asserted. For a successful claim for damages, the seller must be held responsible for the suffered damage.
5. The right to claim compensation for breach of duty (Schadensersatz wegen Pflichtverletzung): A claim for damages in addition to the performance can only exist if the due supplementary performance can still be provided. For a successful claim for damages, the seller must be held responsible for the damage suffered.
6. The right of revocation (Widerruf): In certain cases, the consumer may, by revocation within a specified

period - usually 14 days - break the contract without giving any reason.

7. The right to claim compensation for other material damage caused by the product according to the product liability law (ProdHaftG).

Only the right to compensation according to the product liability law (7. above) is a strict tort liability, the others derive from the contractual relationship.

### Product liability Law (Produkthaftungsgesetz, ProdHaftG):

The ProdHaftG provides for different liability limits depending on the damage suffered. In general, the ProdHaftG does not admit claims for compensation for the defective product itself, but only for compensation for other material damage caused by the product. The damage to property must be in the private sphere and must not have arisen in the course of a commercial or freelance activity. A maximum limit for property damage is not provided, but a deductible in the amount of EUR 500 must be paid by the injured party. This ensures that only really serious damage is regulated by the product liability law (ProdHaftG).

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

According to the German Civil Code (BGB), the seller, as the contracting party, is generally liable to compensate the buyer. The seller can, under certain circumstances, seek redress from his supplier.

According to the Product liability law consumers can also claim damages from the manufacturer and other parties as listed at indented bullet points below, including cases where the product comes from a jurisdiction outside the EU. Product liability does not require a contract between the manufacturer and the user, nor is proof/evidence of the manufacturer's responsibility for

the damage a requirement. The user is protected from certain hazards arising from a faulty product regardless of the fault of the manufacturer, even if these have only become apparent after the product has been placed on the market. It is therefore a strict liability.

- The quasi-manufacturer: Even those who are not the actual manufacturer of a product must be treated as such if they pretend to be manufacturers by affixing their name, brand or other distinguishing mark.
- The importer who introduces a product with an economic purpose from a third country, is liable as a manufacturer. The law in effect deems it unreasonable for the injured party to have to assert his rights in a third country. The import must be done as part of the business activity and for the purpose of distribution.
- The supplier of a product can be held liable as a manufacturer if he cannot name his supplier / importer or manufacturer. In case of an import from a third country, the supplier is also liable if he can name the manufacturer but not the importer. The liability of the supplier is to be regarded as an alternative solution - this is intended to prevent avoidance of liability when anonymous products are placed on the market.

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

### Selling to a consumer

The sale of consumer goods is in the law of obligations the sale of a movable thing by an entrepreneur as a seller to a consumer as a buyer. The legal consequences of the sale of consumer goods initially consist in the fact that certain general regulations of the purchase right do not apply, for example the transition of risk to the buyer in the moment of sending the product in case of the so called sale by dispatch (Versendungskauf).

A further restriction concerns the liability of the seller in case of defects. The previously usual extensive warranty exclusion (no warranty at

all) is no longer possible today. This has special significance in cases of used car purchase from a commercial car dealer.

In the sale of consumer goods, the limitation period for warranty claims cannot be contractually reduced to less than two years for new items and to not less than one year for used items, to the detriment of the buyer.

Finally, where the existence of defect at the time of delivery (a requirement for liability) is suspected, the seller may attempt to challenge the claim by presenting counter-evidence.

#### **Selling to an entrepreneur**

A trade purchase is a contract of sale over a thing that is a trade for at least one of the parties involved. In principle, such contracts are settled in accordance with the provisions of the German Civil Code (BGB). However, the German Code of Commerce (Handelsgesetzbuch, HGB) contains some legal adjustments for commercial trades: § 373 HGB and § 374 HGB extend the possibilities for the debtor; if the creditor is in default of acceptance, whereby the debtor may deposit the goods at a suitable place. The debtor may also have them auctioned off and deposit the proceeds to the creditor. In § 377 and § 379 HGB the commercial duty of reprimand, denying an entrepreneur's warranty rights if he/she objects to a material defect too late, is stipulated.

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

§ 444 of the German Civil Code (BGB) states that the warranty rights of the buyer can also be excluded or limited by contract. However, this does not apply if the seller has fraudulently concealed the defect or has assumed a quality guarantee.

A special feature applies to the sale of consumer goods. § 475 para 1 BGB severely limits the contractual exclusion of liability to consumers. If general terms and conditions are involved, § 309 No. 8b BGB is to be observed, which contains further restrictions on contractual exclusion of liability.

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

According to the product liability law (ProdHaftG), producers, importers or suppliers can be held liable for products that were manufactured outside the EU.

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

The Product Safety Act (Produktsicherheitsgesetz, ProdSG) provides an important legal basis governing product recalls. It requires manufacturers, importers and distributors to ensure that only safe products are marketed. In addition, manufacturers must actively monitor the market. For example, market surveillance requires manufacturers to carry out random checks, investigate complaints and inform traders.

If a recall is necessary, manufacturers must also take precautions to ensure that the hazard can be eliminated quickly, effectively and reliably. As part of their risk management, manufacturers must therefore have in place measures and protocols to be followed in the event of a necessary recall.

Manufacturers, importers and other distributors face fines of up to EUR 100,000 if they intentionally or negligently violate the provisions of the Product Safety Act (ProdSG).

#### **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 civil law procedures apply.

For the burden of proof generally § 363 BGB applies: If the buyer has accepted the good as fulfilment, the buyer has the burden of proof for a)

the material defect and b) that the defect was present from the beginning. Notwithstanding, the sale of consumer goods § 474 BGB reverses the burden of proof by stipulating that in the first six months after delivery the defect shall be deemed to be present at the time of delivery.

#### **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 effective rescission of the purchase contract can only be done if the seller gets a reasonable period for supplementary performance (repair or new delivery).

Of course, if the supplementary performance has failed, there is no need to set a deadline (§ 440 para 1 Var. 2 BGB). The supplementary performance has failed if, in case of repair, after the second attempt the original defect is still present or a new defect was created. A replacement delivery has failed if the replacement item has the same or another new defect and if a second attempt does not promise a chance of success.

#### **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)?**

The following remedies are available to the buyer, as outlined above:

1. Right to demand supplementary performance (Nacherfüllung)
2. Right to terminate the contract (Rücktritt)
3. Right to claim price reduction (Minderung)
4. Right to claim compensation in lieu of performance (Schadensersatz statt der Leistung)



5. Right to claim compensation for breach of duty (Schadensersatz wegen Pflichtverletzung)
6. Right of revocation (Widerruf)
7. Right to claim compensation for other material damage caused by the product according to the product liability law (ProdHaftG).

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

After the litigation has been settled, the court will charge the costs to the loser of the lawsuit. The winner can then demand reimbursement from the loser. It is also possible that the judge shares the costs between plaintiff and defendant, e.g. 60% to 40%.

If the decision is made in the court of second instance, the court will always award the costs of both instances to the loser of the second instance, even if the latter has won in the first instance.

The so-called dispute-value (Streitwert) is decisive for the calculation of the legal fees and court costs. This is generally the amount that is disputed, whether out of court or judicial.

If a certain amount of money is claimed, for example EUR 30,000, the dispute-value amounts to EUR 30,000. The fee of the lawyer is determined by the fee table for lawyers.

For example, if the dispute-value is EUR 30,000 and the case is settled by a judicial decision in the first instance and the opponent wins, the costs for the whole case would be approximately EUR 7,100, of which EUR 1,200 are the cost for the court and the rest are the cost for the lawyers of the claimant and opponent.

The costs for a judicially appointed expert are to be paid by the loser of the case.

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

To be able to assert claims arising from a warranty for defects, the deficiencies claimed must, of course, be proven. As a rule, this obligation is met by the buyer in the case of a purchase contract. The situation is different when it comes to the sale of consumer goods - where there is a reversal of the burden of proof according to § 476 BGB (see above).

Requirement for the latter is that the seller is an entrepreneur, the buyer is a consumer and that the alleged defect occurs within six months of the purchase. Then it is assumed in favor of the buyer that the defect already existed when handing over the object of sale, and the seller must prove that the material defect could not have been present at time of delivery.

## 12. Is the state of the art defence available?

A defect may arise from the fact that the product in question deviates negatively from the respective state of the art; this basically requires a manufacturer-independent comparison.

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

German law has deadlines after which claims can no longer be enforced. The statute of limitations therefore serves to establish legal peace after the expiry of the period in which claims can be enforced and to provide for a time limit in which a legal enforcement of one's own claims can be carried out.

The regular limitation period is three years. The regular limitation for sales of goods is two years. This period cannot be shortened for consumer sales.

However, the statutory limitation periods can be influenced under certain conditions. In the case of an inhibition, the limitation period is calculated differently, only the periods before and after the inhibition is considered. An inhibition of the statute of limitations paralyzes the continuation of the limitation period for their respective duration.

An inhibition can arise:

- when the claimant brings a lawsuit before court,
- when the claimant requests a legal court order,
- etc.

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

In Germany, class action suits are generally not permitted. Each claimant must normally demonstrate individual concern, individual harm, and causality between the two. However, there are currently strong political initiatives to also include such class action proceedings in German law (so called "Musterfeststellungsklage")

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

It is very difficult to predict the duration of litigation for a specific case. The length of litigation varies from district court to district court, from judge to judge and from state (Bundesland) to state. It also depends on whether it is settled by a compromise agreement in court or by a judicial decision. The fastest state for civil cases is Bavaria where a judicial decision is obtained on average in 6 months, whereas in Thuringia on average it takes 10 months, according to the German Federal Statistical Office's 2015 survey of legal proceedings.