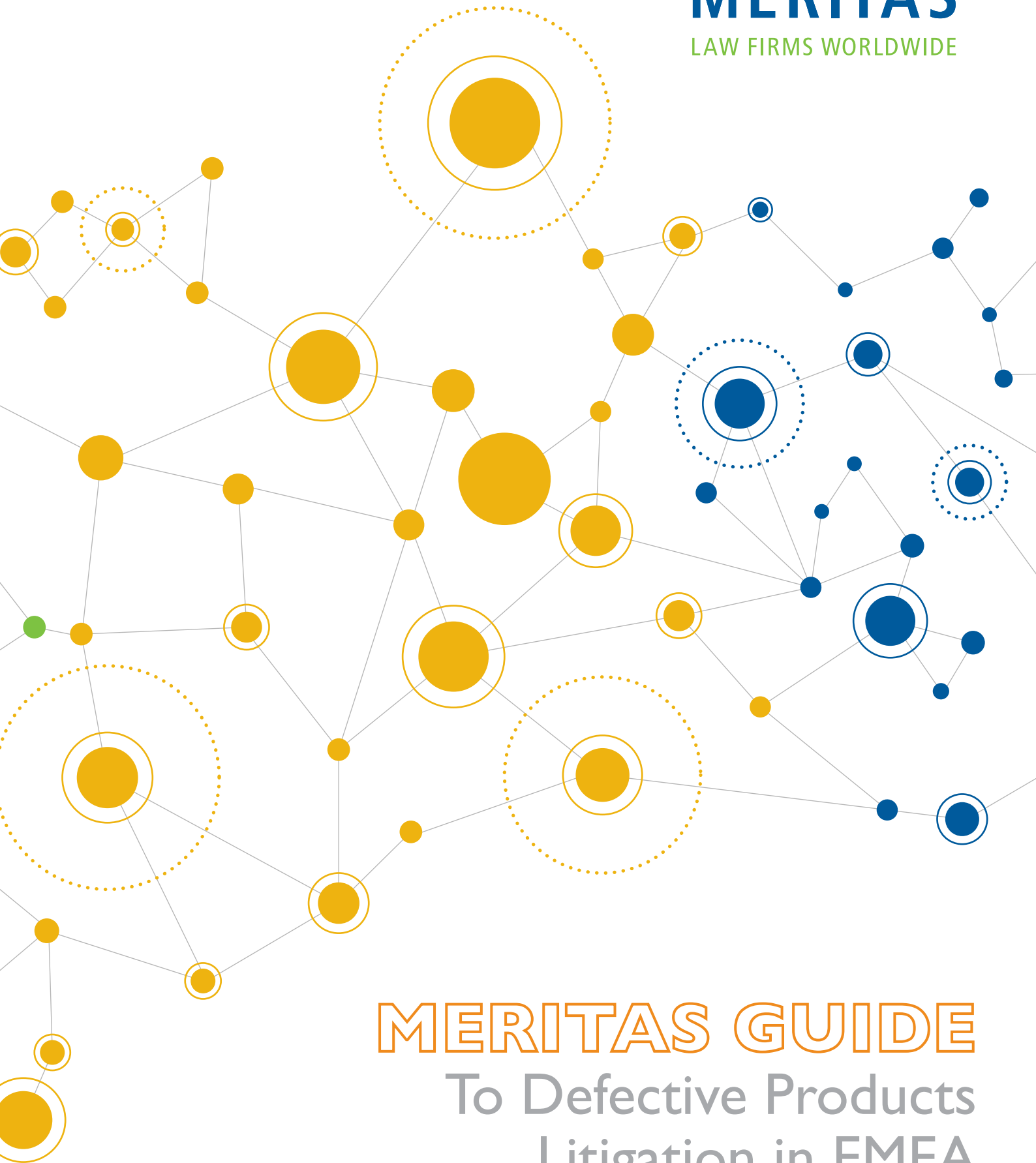




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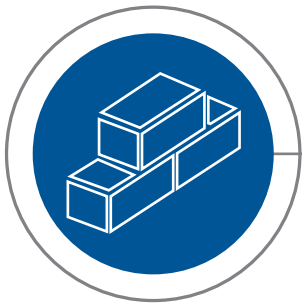
MERITAS GUIDE

To Defective Products
Litigation in EMEA

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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?

In terms of section 61 of the Consumer Protection Act 68 of 2008 (hereinafter referred to as “the CPA”) claims may be brought for damages or harm caused wholly or partly, irrespective of whether the harm resulted from any negligence.

A person, who includes a producer, importer, distributor or retailer of any goods, may be held liable for harm which resulted in: (1) the death of, or injury to, any natural person; (2) an illness of any natural person; (3) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and (4) any economic loss that results from harm contemplated in supra (1)-(3). Liability is based upon strict liability on the part of the producer, importer, distributor or retailer and does not depend upon actual negligence.

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

In light of strict liability, all the various parties in the supply chain who caused the damage, whether it is the importer, distributor, retailer or producer are potentially liable. The CPA states that liability is joint and several in such instances.

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

The CPA does not make mention of the term “buyer”, but rather “consumer”. In this regard, the CPA makes no distinction between a consumer and

a professional buyer. A consumer, in respect of any particular goods or services, is defined as follows:

- a. a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- b. a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of [the CPA] by section 5(2) or in terms of section 5(3);
- c. if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- d. a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)”.

In light of the above, a consumer would include a layman and a professional buyer.

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

Yes, section 61(4) of the CPA provides for instances where liability does not arise and is therefore excluded. Section 61(4) reads as follows:

Liability of a particular person in terms of this section does not arise if—

- a. the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
- b. the alleged unsafe product characteristic, failure, defect or hazard—
 - i. did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or

- ii. was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case sub paragraph (i) does not apply;
- c. it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or
- d. the claim for damages is brought more than three years after —
 - i. the death or injury of a person contemplated in subsection (5)(a);
 - ii. the earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b); or
 - iii. the earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or
 - iv. the latest date on which a person suffered any economic loss contemplated in subsection (5)(d)”.

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

A consumer's rights remain protected under the CPA, irrespective of whether goods are manufactured within or outside of South Africa. To this end, section 5(8) of the CPA provides that the CPA extends to a matter irrespective of whether the supplier resides or has its principal office within or outside of the Republic.



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

The CPA does not expressly mention any direct consequences or liabilities for omitted or delayed recall campaigns, but section 60 mentions that the National Consumer Commission (hereinafter referred to as “the Commission”) may require a producer to conduct an investigation or carry out a recall programme on any terms required by the Commission, in the event that a producer or importer of goods have not taken any steps required.

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, normal procedures and 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?

In terms of sections 69 and 70 of the CPA, possible pre-action measures would appear where a consumer aims to resolve a dispute with a supplier by referring the matter to the National Consumer Tribunal, industry ombud, consumer court, dispute resolution or by filing a complaint with the Commission.

A warning letter is not necessarily required, but the CPA in section 71 states that a matter may be initiated by filing a complaint with the Commission.

There are certain limitations in bringing an action, which are canvassed in section 116 of the CPA. These limitations include that a complaint may not be referred to a Tribunal or consumer court more than three years after the act or omission that is the cause of the complaint and that a complaint may not be brought against a wrongful person who is already a party to proceedings in light of the CPA for similar conduct.

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 various remedies which are available to a consumer are encompassed in sections 56(2), 56(3) and 76 of the CPA. General remedies include awards for damages, special damages or to recover or reimburse monies paid towards a product or certain goods. Defective goods or products can also be repaired or replaced.

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

There are no costs involved with the referral of a dispute or matter to the relevant Commission, ombud or Tribunal. The consumer will, however, bear the normal costs of litigation proceedings before court, but will be able to recover such costs from the manufactures, importer, distributor or retailer, if the consumer is successful.

I 1. Who has the burden to prove that a product is defective? Is it always the buyer?

The general principle is that a party or person who claims or alleges a fact, must prove it. Therefore, the onus rests on a consumer to prove his or her case on a balance of probabilities.

I 2. Is the state of the art defence available?

The state of the art defence refers to a defence in which a manufacturer could not have known about a particular danger or hazard in a product by using the scientific or technical knowledge available at the time the product was manufactured.

In South Africa, the above mentioned defence is available and liability does not arise with reference to section 61(4)(b)(i). This section states that liability does not arise in the event where the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied by that person to another person alleged to be liable.

Section 61(4)(c) further provides that liability does not arise in instances where it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard.

I 3. What are the deadlines within which a claimant must notify defects and/or commence proceedings? Can such deadlines be frozen or extended?

Section 56(2) of the CPA states that the consumer may return the goods to the supplier, without penalty and at the supplier's risk an expense, within six months after the delivery of any goods to a consumer.

The consumer ultimately has three (3) years to institute legal proceedings from the date of which the consumer had knowledge about the defect. (See the Prescription Act 68 of 1969 in this regard).

I 4. What are the rules for bringing a claim in a class/collective action?

The rules are exactly the same for bringing a collective claim against multiple people and bringing a claim against a single person.

I 5. What is the average duration of defective products litigation?

The average duration of defective products litigation is 3 (three) years.