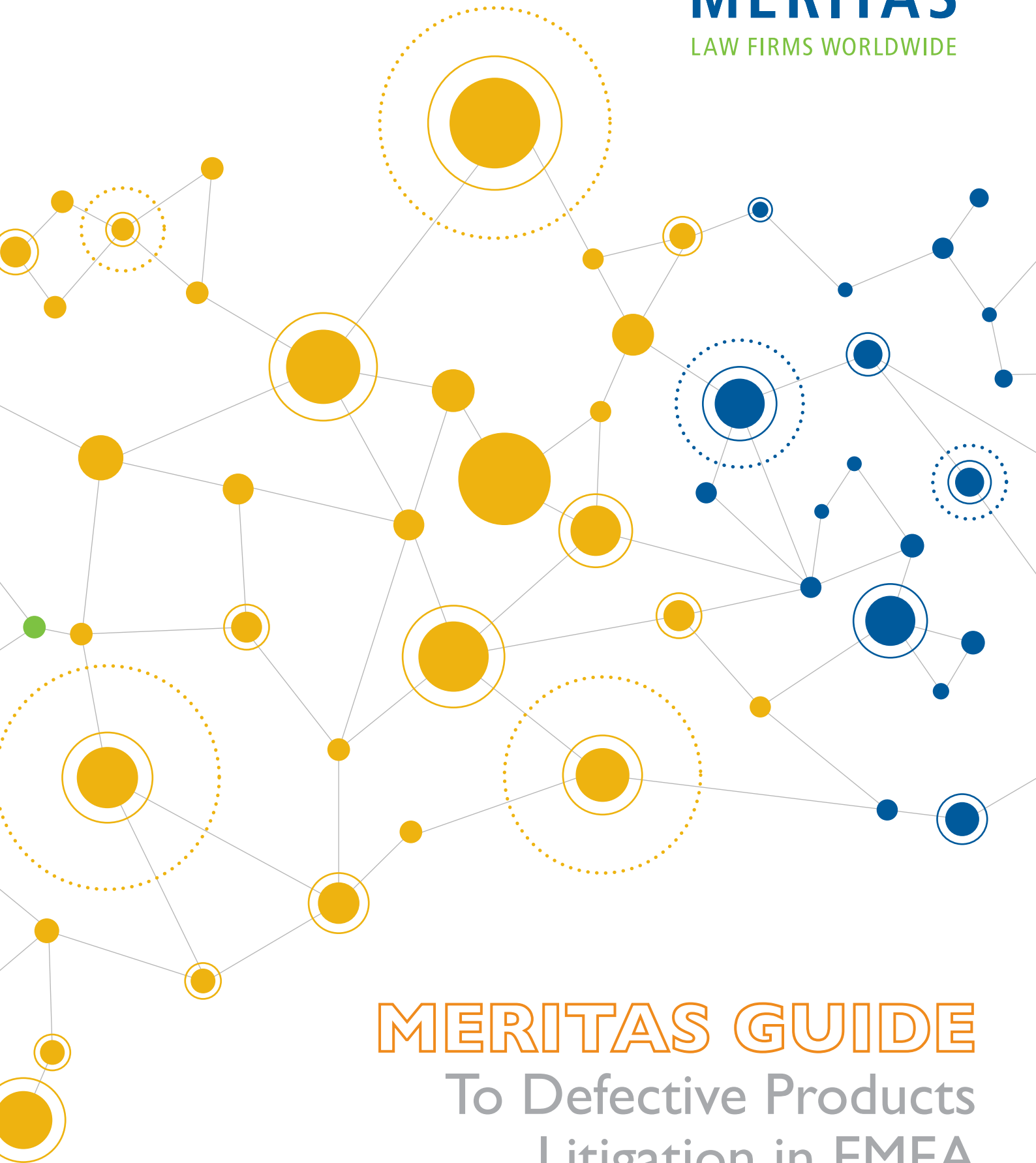




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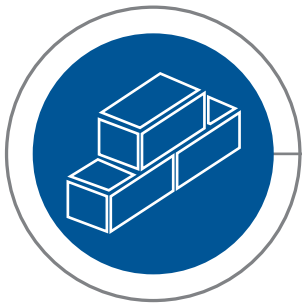
MERITAS GUIDE

To Defective Products
Litigation in EMEA

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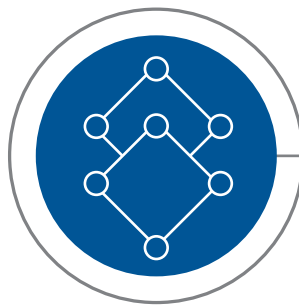
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INTRODUCTION

Key Issues



What claims may be brought for liability for defective products?



Who is liable to compensate a claimant for a claim?

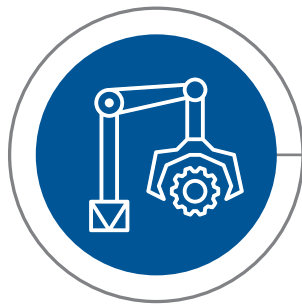
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences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



NETHERLANDS

Contact

Lexence
Amsterdam - Netherlands
www.lexence.com

MATTIAS KIK
Senior Associate | Litigation
T: +31 2 0573 6769
E: m.kik@lexence.com

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

There are a number of different provisions of the Dutch Civil Code (“DCC”) (*Burgerlijk Wetboek*) that provides for liability of defective products. The following distinction can be made between these different provisions:

- i. Strict liability for defective products: articles 6:185 through 6:193 DCC contain specific provisions on product liability. These articles are the Dutch implementation of the EU Product Liability Directive (85/374/EEC). Liability under these provisions is strict based. The types of damages which can be claimed are limited. The liability extends to damage caused by:
 - a. death or personal injuries (including mental damage);
 - b. the product to another object, which is usually intended for private use or consumption and which has been used by the person suffering the loss mainly for private purposes, with an excess or deductible of EUR 500 (article 6:190 (1) DCC).
- ii. Fault-based liability: the product liability provisions are without prejudice to all other rights of actions of the injured party (article 6:193 DCC). An injured party can thus also rely on the general provisions for a wrongful act (article 6:162 DCC). Liability under this provision is, in principle, fault based. However, as a basic rule, the Supreme Court (*Hoge Raad*) has accepted that a party acts wrongfully when it brings a product onto the market that causes damage when being used for the normal use intended for that product, even when that party lacks relevant knowledge (e.g. Supreme Court 22 October 1999, NJ 2000, 159).

- a. Under the general liability provisions, the damages which can be claimed are broader in scope, namely according to article 6:95 DCC financial loss and other loss, the latter to the extent that the law confers a right to damages. Article 6:96 DCC provides a further outline of what financial loss could be. Examples are the loss incurred and the profit deprived.
- iii. Contractual liability: a seller can also be held contractually liable for a defective product by the injured party (article 6:74 and, more specifically, for consumer sales, article 7:24 DCC).

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 product liability provisions, the producer, in principle, bears responsibility for a defective product (article 6:185 DCC). A ‘producer’ is defined in article 6:187 (2) DCC as: (a) the manufacturer of a finished product, (b) the producer of any raw material, (c) the manufacturer of a component part, and (d) any person who, by putting his name, trade mark or other distinguishing features on the product, presents himself as its producer.

Article 6:187 (3)-(4) DCC extends the scope of the meaning of ‘producer’ by providing that strict liability for defective products also applies to: (e) any person who imports a product into the European Economic Area for sale, hire, leasing or for any form of distribution in the conduct of his commercial activities, and (f) any supplier or importer of the product, in the event a producer cannot be identified, unless the supplier informs the injured party within a reasonable time of the identity of the producer or importer who supplied him with or who has imported the product into the European Economic Area.

Under the general liability clauses, such as a wrongful act (article 6:162 DCC) and/or a failure in performance of an obligation (e.g. article 6:74 DCC), other parties can be liable as well.

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

Only those who have suffered damage in the sense of article 6:190 DCC can bring a claim under article 6:185 DCC. The liability regulated by articles 6:185 through 6:193 DCC are limited to liability for death or personal injury, and damage to or destruction of property intended for private use or consumption and used as such by the injured party. This means that claims are generally pursued by consumers.

A person who has suffered damage due to a faulty product but whose damage is not listed in article 6:190 DCC can nevertheless pursue claims under tort law (article 6:162 DCC) or under contract law (article 6:74 and, more specifically, for consumer sales, article 7:24 DCC).

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

The liability of the producer based upon the product liability regime of article 6:185 DCC cannot be limited or excluded by contract, according to article 6:192 (1) DCC.

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

The Dutch provisions regarding jurisdiction in international cases are set out in articles 1 through 14 of the Dutch Code of Civil Procedure (“DCCP”). According to article 2 DCCP, the Dutch court has jurisdiction in cases which should be commenced

by a writ of summons and where the defendant is domiciled in the Netherlands.

Brussels I Regulation (no.44/2001) (“**Brussels I**”) applies in cases relating to civil and commercial matters and where a defendant is domiciled in a Member State. According to article 2 Brussels I, a person who is domiciled in a Member State should be sued in the courts of that Member State. A person can only be sued in another state if Brussels I provides for that.

Whether the Dutch courts are able to exercise jurisdiction over a matter outside the EU is determined under the rules of private international law. Overall in product liability cases, a claimant can bring proceedings against a defendant domiciled outside the Netherlands before a Dutch court if:

- i. the place of event giving rise to the damage is in the Netherlands, and/or
- ii. the place where the harmful event occurred is in the Netherlands.

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

There is no obligation to recall defective products or pay damages for a failure to recall defective products under the product liability system of articles 6:185 through 193 DCC. Liability is only incurred under the special product liability regime for putting a defective product into circulation, not for neglecting to withdraw it. Furthermore, no statutory duty to recall exists in Dutch law. Nevertheless, not withdrawing a defective product can be regarded as unlawful under tort law (article 6:162 DCC).

An obligation to recall can also be imposed under administrative law. Pursuant to the so called Commodities Act (*Warenwet*) and the General Product Safety (*Commodities Act*) Decree (*Warenwetbesluit algemene*

productveiligheid), it is prohibited to bring products onto the market of which the producer or supplier knows or should know that they can be dangerous for humans when used for the intended use. When a party knows that it supplies dangerous products, it should inform the Food and Consumer Product Safety Authority (“**FCA**”) (*Voedsel en Waren Autoriteit*) immediately. The FCA has the authority to order or initiate the recall of such products, should the recall not be undertaken voluntarily or be done inadequately.

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 and rules of evidence are applicable.

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

According to Dutch law all parties are required to bring forward all facts which could be relevant for the decision. Nevertheless, there is no obligation to disclose documentary evidence before court proceedings. However, at the request of a party (with a legitimate interest) and subject to strict conditions (to prevent ‘fishing expeditions’), a court may order the other party to disclose or submit certain specified documents (article 843a DCCP).

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)?

Several remedies are available, either under the product liability or general liability provisions, such as monetary compensation and a declaratory relief. The nature and applicability of the remedy depends on the legal basis of the remedy. As a result, a distinction can be made between the following categories of remedies:

- General performance-based remedies: specific performance or other injunctions;
- Performance-based remedies: notably applicable in business to consumer relationships, allowing a consumer, party to a sales agreement, to demand delivery, repair or replacement of the defective product (article 7:21 in conjunction with article 7:22 DCC);
- Pecuniary remedies: compensation for damages; contractual penalties; and recovery of the other party’s breach of a judicially imposed penalty;
- General non-pecuniary remedies: declaratory relief; injunctive relief (including product recall); judicial termination; and annulment or nullification of an act or agreement.

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 depends on the particular case in question. Costs shifting applies in Court proceedings. The successful party is entitled to court fees, incidental costs such as costs for expert evidence and legal fees (article 237 through 239

DCCP). The legal fees which need to be recovered are not the actual costs. According to the “court-approved scale of costs” a fixed amount will be rewarded, which is often far less than the actual costs. As a general remark, a court may always order a party to pay its own legal costs even if it is the successful party.

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

In principle, the party that relies on legal consequences following from the facts or rights invoked by that party has the burden of proving those facts and rights (article 150 DCCP). When it comes to general liability provisions, the claimant consequently has to prove fault, defect and damage. The product liability provisions contain a specific provision on the burden of proof, namely article 6:188 DCC. This article stipulates that the injured party has to prove damage, defect and the causal relationship between defect and (actual) damage. When the injured party has proven that a product is defective and that defect caused damage, the burden is on the producer to prove (amongst others) that the defect did not exist when the product was brought onto the market. Nevertheless, the court has several ways to meet the interest of the injured party, for example by reversing the burden of proof, which often seems to occur in liability cases.

12. Is the state of the art defence available?

Such defence is available. It is up to the producer to prove that the defect was not discoverable. The chances of success are low.

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

The limitation period depends on the grounds invoked. These limits are statutory limitation periods that could result in unsuccessfully upholding a claim, as the court may deem the claim to be expired. Time limits can be interrupted by initiating legal proceedings or by sending a letter in which the claimant or injured party unambiguously reserves its right or title to performance, damages or any other remedy.

If the claimant relies on the product liability clauses, the claim will be time-barred three years after the injured party became or should have become aware of the damage, the defect and the identity of the producer (article 6:191 (1) DCC). In any event, the claim will be time-barred ten years after the product has been brought onto the market (article 6:191 (2) DCC).

Claims based on contractual obligations or wrongful act will be time-barred after five years following the day the injured party became or should have become aware of the information needed to commence proceedings such as the damage and liable party. In spite of the knowledge of the injured party, the claim will in any event collapse after the absolute limitation period – which in most cases is 20 years – has expired.

If a buyer concludes that the product did not fulfil its obligations under the agreement, he has to notify the seller thereof promptly after he has or should have discovered the shortcoming (article 7:23 DCC and article 6:89 DCC). If the injured party fails to comply with this requirement, its potential right lapses.

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

A class action as known in the common law system does not exist in the Netherlands, but nevertheless, article 7:907 DCC enables an interest group to have a collective settlement on mass damages declared binding by the Amsterdam Court of Appeal. However, this requires a settlement between one or more interest groups and one or more liable parties. The settlement will be binding with regard to the persons whose interests might be represented by the interest group, unless such person opts out within a time frame set by the judge of at least three months.

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

As an estimation, claimants should expect one year in regular proceedings, and 2-3 years in more complex proceedings to obtain a final judgment.