The Product Regulation and Liability Review

Fifth Edition

Editors
Chilton Davis Varner and Madison Kitchens

The Law Reviews

The Product Regulation and Liability Review

Fifth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Chilton Davis Varner and Madison Kitchens

The Law Reviews

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Janina Godowska

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2018, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-24-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE ASSET MANAGEMENT REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE AVIATION LAW REVIEW

THE BANKING LITIGATION LAW REVIEW

THE BANKING REGULATION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE CLASS ACTIONS LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE DISPUTE RESOLUTION REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE EMPLOYMENT LAW REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE FRANCHISE LAW REVIEW

THE GAMBLING LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE HEALTHCARE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS LAW REVIEW

THE INSOLVENCY REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE LIFE SCIENCES LAW REVIEW

THE MERGER CONTROL REVIEW

THE MERGERS AND ACQUISITIONS REVIEW

THE MINING LAW REVIEW

THE OIL AND GAS LAW REVIEW

THE PATENT LITIGATION LAW REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE PRIVATE EQUITY REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

THE REAL ESTATE LAW REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE RESTRUCTURING REVIEW

THE SECURITIES LITIGATION REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE SHIPPING LAW REVIEW

THE SPORTS LAW REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

THE TRADEMARKS LAW REVIEW

THE TRANSFER PRICING LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AZB & PARTNERS

BAKER MCKENZIE WONG & LEOW

CLAYTON UTZ

CMS RUSSIA

HEUKING KÜHN LÜER WOJTEK

INTUITY

KING & SPALDING LLP

KING & WOOD MALLESONS

LINKLATERS LLP

NISHIMURA & ASAHI

PAUL HASTINGS (EUROPE) LLP

S HOROWITZ & CO

SEPULVADO, MALDONADO & COURET

URÍA MENÉNDEZ

VIEIRA DE ALMEIDA

WEIGHTMANS LLP

WENGER & VIELI AG

WOLF THEISS RECHTSANWÄLTE GMBH & CO KG

CONTENTS

PREFACE.......... v
Chilton Davis Varner and Madison Kitchens

Chapter 1 AUSTRALIA.......... 1
Colin Loveday and Sheena McKie

Chapter 2 AUSTRIA.......... 14
Eva Spiegel and Gabriele Hintsteiner

Chapter 3 BELGIUM.......... 25
Joost Verlinden and Gert-Jan Hendrix

Chapter 4 CHINA.......... 35
Ariel Ye, Yue Dai, Xinyu Li and Tianren Li

Chapter 5 ENGLAND AND WALES.......... 45
Fiona East

Chapter 6 FRANCE.......... 57
Christophe Hénin and Julie Vasseur

Chapter 7 GERMANY.......... 71
Christoph Wagner

Chapter 8 INDIA.......... 84
Vivek Bajaj, Gautam Suseel and Sonakshi Sharma

Chapter 9 ISRAEL.......... 94
Avi Ordo and Moran Katz

Chapter 10 ITALY.......... 105
Francesca Petronio and Francesco Falco

Chapter 11 JAPAN 116
Akihiro Hironaka, Yutaro Kawabata and Yui Takahata

Chapter 12 PORTUGAL..128
Ana Lickfold de Novaes e Silva and Pedro Pires Fernandes

Chapter 13 PUERTO RICO 138
Albéniz Couret-Fuentes and Elaine M Maldonado-Matías

Chapter 14 RUSSIA 149
Sergey Yuryev

Chapter 15 SINGAPORE..159
Lim Ren Jun

Chapter 16 SPAIN...172
Alex Ferreres Comella and Cristina Ayo Ferrándiz

Chapter 17 SWITZERLAND 183
Frank Scherrer, Caroline Müller Tremonte and Caspar Humm

Chapter 18 UNITED STATES 192
Chilton Davis Varner and Madison Kitchens

Appendix 1 ABOUT THE AUTHORS..217
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS...229

PREFACE

In today's global economy, product manufacturers and distributors face a dizzying array of overlapping and sometimes contradictory laws and regulations around the world. A basic familiarity with international product liability is essential to doing business in this environment. An understanding of the international framework will provide thoughtful manufacturers and distributors with a strategic advantage in this increasingly competitive area. This treatise sets out a general overview of product liability in key jurisdictions around the world, giving manufacturers a place to start in assessing their potential liability and exposure.

Readers of this publication will see that each country's product liability laws reflect a delicate balance between protecting consumers and encouraging risk-taking and innovation. This balance is constantly shifting through new legislation, regulations, treaties, administrative oversight and court decisions. But the overall trajectory seems clear: as global wealth, technological innovation and consumer knowledge continue to increase, so will the cost of product liability actions.

This edition reflects a few of these trends from 2017. Most notably, several jurisdictions proposed or enacted landmark legislation that will have a substantial impact on product liability lawsuits within their borders in the years ahead. For instance, last year China issued the General Provisions of the Civil Law, which constitutes the country's first step towards the codification of civil law and, among other things, lengthens the statute of limitations previously provided under the country's Product Quality Law. Additionally, various European countries dealt with thorny issues concerning whether the product liability laws of the European Union will be incorporated within, or displaced by, domestic regulation. In the wake of Brexit, the UK Parliament is debating the European Union (Withdrawal) Bill, which will implement the country's exit from the EU and ultimately determine the extent to which EU product liability laws remain operative. Similarly, the Federal Supreme Court of Switzerland recently issued a key ruling on whether a domestic regulatory authority can prohibit certain products, notwithstanding their compliance with the applicable EU harmonised norms, if it determines the products fail to meet domestic safety and health requirements.

Meanwhile, the recent introduction of the class-action mechanism in certain jurisdictions has engendered a degree of uncertainty – and potentially increased exposure – for product manufacturers. For instance, France has experienced a surge in product liability lawsuits (particularly in the healthcare sector) in recent years, which many attribute to the newfound availability of class adjudication. By contrast, Japan's adoption of the Collective Claims Act in 2016 has not yet spawned significant litigation, although it is unclear whether this is due primarily to short-term factors – such as a lack of public awareness of the Act and its inapplicability to disputes arising before October 2016 – or more inherent remedial limitations in the Act, including a claimant's inability to recover punitive damages, lost

profits or damages for personal injury or pain and suffering. Moreover, various product manufacturers continued to face increasing scrutiny throughout the global market, with many countries reporting an unprecedented rise in product recalls affecting primarily the pharmaceutical, food and beverage, and automotive industries. This edition also highlights how certain countries' product liability laws have grappled with novel issues in the modern economy, such as the emergence of autonomous vehicles and artificial intelligence. Although these changes and trends may be valuable in their own right, they also create a need for greater vigilance on the part of manufacturers, distributors and retailers.

This edition covers 18 countries and territories and includes a high-level overview of each jurisdiction's product liability framework, recent changes and developments, and a look forward at expected trends. Each chapter contains a brief introduction to the country's product liability framework, followed by four main sections: regulatory oversight (describing the country's regulatory authorities or administrative bodies that oversee some aspect of product liability); causes of action (identifying the specific causes of action under which manufacturers, distributors or sellers of a product may be held liable for injury caused by that product); litigation (providing a broad overview of all aspects of litigation in a given country, including the forum, burden of proof, potential defences to liability, personal jurisdiction, discovery, whether mass tort actions or class actions are available and what damages may be expected); and the year in review (describing recent, current and pending developments affecting various aspects of product liability, such as regulatory or policy changes, significant cases or settlements and any notable trends).

Whether the reader is a company executive or a private practitioner, we hope that this edition will prove useful in navigating the complex world of product liability and alerting you to important developments that may affect your business.

We wish to thank all of the contributors who have been so generous with their time and expertise. They have made this publication possible.

Chilton Davis Varner and Madison Kitchens
King & Spalding
Atlanta
March 2018

Chapter 12

PORTUGAL

Ana Lickfold de Novaes e Silva and Pedro Pires Fernandes[1]

I INTRODUCTION TO THE PRODUCT LIABILITY FRAMEWORK

In Portugal there is a statutory-based product liability regime, which mainly derives from the European Directive 85/374/EEC (the Product Liability Directive) but that is also complemented by a complex set of rules deriving from both European and national legislation, which overlap each other in some circumstances.

First and above all, Decree-Law 383/1989 transposed the Product Liability Directive into national law (the Product Liability Act), so governing the producer's liability coherently with the European Rules, substituting the former full application of the Civil Code regarding sale and purchase, non-fulfilment of contract and tort. It states that the producer is liable irrespective of fault (i.e., subject to strict liability) and that a product has a defect if it does not grant the safety that is to be expected, taking all circumstances into account. The Product Liability Act was amended in 2001, by Decree-Law 131/2001, to bring it in line with European Directive 1999/34/EC. It should be noted that the Product Liability Act states that its application does not affect any rights that the injured person may have under other Acts. This results in the claimant having the opportunity to choose different pathways to pursue his or her indemnity demand, either against the producer, the distributor or both.

Complementary to this, Decree-Law 69/2005, which transposed European Directive 2001/95/EC, addresses general product safety (the Product Safety Act). It imposes a general safety obligation on both the producer and the distributor.

Additionally, Law 24/1996 (the Consumer Protection Act) introduced rules concerning consumer protection that regulate the rights and obligations resulting from the sale of goods between a professional seller and a non-professional buyer. This statute, in line with the Product Liability Act, states that the producer is liable irrespective of fault. It further lists a set of rights that are granted to the consumer, such as the right to the quality of the products, to the protection of health and physical safety, to the protection of his or her economic interests, to information, to compensation for damages, to legal assistance and association with other consumers for the promotion of their mutual rights.

Decree-Law 67/2003 transposed European Directive 1999/44/EC concerning certain aspects of the sale of consumer goods and associated guarantees (the Sale of Consumer Goods and Guarantees Act), which – alongside the Consumer Protection Act – regulates the rights and obligations resulting from the sale of goods between a professional seller and a non-professional buyer. This statute also grants additional rights to the consumers, such as

1 Ana Lickfold de Novaes e Silva is a managing associate and Pedro Pires Fernandes is a senior associate at Vieira de Almeida (VdA).

the right to substitution or repair of the goods, price reduction and the termination of the sales contract. Irrespective of the seller's obligations, this statute allows the consumer to claim the substitution or repair of the goods directly from the producer.

In addition, the Civil Code holds a subsidiary importance, having its sale and purchase, non-fulfilment of contract and tort rules apply to situations where the above-mentioned statutes do not.

Finally, producers and distributors may also face misdemeanour and even criminal liability.

II REGULATORY OVERSIGHT

The main authority overseeing product regulation is the Ministry of Economy Consumer Directorate General (MECDG) and, within this, the Services and Goods Safety Commission (SGSC). The latter was created by the Product Safety Act, following the European Directive on this matter. The SGSC can broadly supervise the products and services placed and available on the market, having the competence to prohibit the manufacture or the import of products that it deems to be unsafe. It also has the power to order a recall. Further to this, the SGSC has the power to redirect its findings to the competent punitive authority, such as the Authority for Economic and Food Safety or the National Authority for Pharmaceuticals and Health Products.

The MECDG is also the Portuguese contact point within the EU Rapid Alert System for Dangerous Non-food Products.

III CAUSES OF ACTION

i Claims under the Product Liability Act

Normally, claimants will initiate proceedings under the Product Liability Act, which foresees that the producer is liable – with strict or no-fault liability – for damages caused by defective products it has introduced in the market.

Claims under this Act do not require the existence of a contractual relationship between the producer and the acquirer of the product, meaning that any injured person can initiate proceedings against the producer.

The notion of producer is quite broad and is construed in a way that protects the claimant against any possible uncertainty that may be involved with international trading and product circulation. Accordingly, the Act qualifies as producer:

a the real producer (i.e., the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part);

b the apparent producer (i.e., any person who, by putting his or her name, trademark or other distinguishing feature on the product presents him or herself as its producer);

c the importer (i.e., any person who imports into the EU a product for sale, hire, leasing or any form of distribution in the course of his or her business); and

d the supplier, if the producer cannot be identified, and unless the supplier informs the injured person, within three months, of the identity of the producer or of the person who supplied him or her with the product.

The notion of product is also very wide, comprising any movable thing, even if incorporated in another movable or immovable thing.

A product shall be deemed defective if it does not provide the safety that a person is entitled to expect, taking all circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put and the time when the product was put into circulation. This means that the application of the Act does not rely on contractual statements and clauses but rather on the safety or dangerousness of the product. Nonetheless, a product shall not be deemed defective for the sole reason that a better product is subsequently put into circulation.

The application of the Product Liability Act will not imply the waiver of any rights that an injured person may have under contractual or non-contractual liability laws. It also will not set aside criminal or misdemeanour responsibility, if existent.

ii Claims under the Consumer Protection Act and the Sale of Consumer Goods and Guarantees Act

The Sale of Consumer Goods and Guarantees Act and the Consumer Protection Act are mostly driven by general consumer protection and contractual fulfilment rather than product safety, which is the central point of the Product Liability Act. Notably, however, they provide for the possibility of a direct claim being lodged by the consumer against the producer, even if the former had no contractual relationship with the latter.

For the application of the Sale of Consumer Goods and Guarantees Act and the Consumer Protection Act, a consumer will be the acquirer of goods or services from a professional seller for non-professional use.

If the consumer's rights are not met (quality of products, health protection, physical safety, information), he or she is entitled to ask for compensation resulting from the supply of a product or service that is not according to the contract entered into between the supplier and the consumer. He or she may also ask for the substitution of the goods, for the termination of the contract or for a price reduction. These rights will follow the goods even if they are sold to a third person.

The rights provided for in the Sale of Consumer Goods and Guarantees Act will expire after two years (regarding movables) or five years (regarding immovables), starting from the date when the product or service was delivered. Notwithstanding these time limitations, the consumer will also need to notify the supplier or producer within two months (for movables) or one year (for immovables) of identifying the problem regarding the product or service.

iii Contractual claims

Contractual claims will rely on the rules of the Civil Code and will limit the claimant to launching proceedings merely against the contracting party, thus exempting the producer if there was no direct contractual relationship with the final customer.

A prerequisite for contractual liability in damages is that one of the parties has failed to fulfil his or her obligations under the agreement. This breach of agreement must, in turn, cause damage to the other party. Furthermore, there must be a causal link between the breach of agreement and the damage.

In simple terms, contractual liability arises when there is an intentional or negligent failure to perform an enforceable obligation in a given contract. This notion underlies Article 798 of the Civil Code, where it is stated that: 'The debtor who guiltily fails to perform a given obligation is liable for the damage caused to the creditor.'

According to the rules set by the Civil Code on sale agreements, in particular under Article 913, the seller has the obligation to provide products that have no defects that may

lower their value or render their use impossible. In these situations, or if the products do not have the qualities assured by the seller or necessary to ensure the use they are meant for, the seller may be liable for breach of contract.

Recourse to claims under contractual liability may be justified, where possible, for time limitation reasons, given that, in general, contractual obligations benefit from a 20-year time bar.

iv Tort claims

An injured party may also base his or her claim on non-contractual liability, which is provided for in Article 483 of the Civil Code: 'Any person who wilfully or negligently violates in unlawful terms a third party's right, or any legal provision created for the protection of third parties' interests, shall be obliged to indemnify the injured party for the damages arising from such violation.'

Extra-contractual liability arises outside the scope of an agreement when someone violates an absolute right or fails to abide by general legal provisions.

v Criminal and misdemeanour charges

Civil liability does not exclude other sources of liability, such as criminal acts and administrative or misdemeanour offences.

Indeed, under Portuguese law, the same fact (action or omission) may give rise to civil and criminal liability, and thus the infringer may be responsible for paying compensation to the injured party and be simultaneously subject to criminal penalties. As such, the producer could be held criminally liable if the defect causes death or serious harm to a person, either for an act or for an omission, even if there was only negligence.

Criminal proceedings may be initiated by the injured person and then pursued by the public prosecutor. If the damage is serious, namely in cases of death or severe injury to someone, the public prosecutor will mandatorily have to initiate proceedings against the producer or the supplier, or both.

Compensation for damages arising out of non-contractual liability may be sought within the criminal proceedings. If not, the facts proved within the criminal proceedings will be binding within the civil proceedings as long as the parties that participated in the criminal proceedings are the same that subsequently litigate in the civil proceedings. Regarding third parties, facts proved within the criminal proceedings constitute a mere presumption and are subject to counterproof.

The producer and the supplier may also be subject to fines resulting from misdemeanour proceedings initiated before the various regulatory authorities. The determination of these fines can be subject to appeal to a court of law. In addition to fines, the producer or supplier may be subject – in the more serious situations – to (1) temporary closing of their business premises; (2) prohibition from continuing their activities; and (3) restitution of any benefit obtained from public authorities.

IV LITIGATION

i Forum

Product liability claims are generally determined in civil proceedings before state courts by professional judges. In Portugal, there are no jury trials in civil proceedings and in criminal proceedings, where they are possible, they are very rarely used. Civil liability in product

liability cases may also be determined by an arbitral court, under the Portuguese Voluntary Arbitration Act (Law 63/2011), provided there is an arbitration agreement between the parties involved. There are also consumer arbitration centres, which may determine claims below €5,000.

The Portuguese court system has three levels of ordinary courts: (1) the courts of first instance; (2) five courts of appeal; and (3) the Supreme Court of Justice. There are also justice of the peace courts, which may try cases below €15,000.

The courts of first instance are divided into sections, such as civil, criminal, family and minors, commercial and labour. The civil section has general jurisdiction over all civil claims not exclusively attributed by law to other courts.

Decisions issued by the courts of first instance, where the value of the claim exceeds €5,000, can, in general, be appealed to the courts of appeal, which may, within the limits of the appeal lodged by the appellant, re-examine the facts and the applicable law. Appeals to the Supreme Court of Justice are exceptional and only for claims above €30,000. The scope of review by the Supreme Court of Justice is limited to the application of substantive law and procedural issues.

Regulatory liability will be initiated by the administrative authorities and subject to their decision. The producer will be heard in the proceedings and allowed to present its defence. The authorities' final decision can be challenged in a court of law.

Criminal proceedings will be pursued in criminal courts and will be promoted by the public prosecutor or the claimant, or both. The decision will be determined by a judge and may be appealed against.

ii Burden of proof

Product Liability Act

The general principle in Portuguese law is that the burden of proof of an allegation of facts falls upon the party who makes the allegation and wishes to rely on facts invoked.

Under the Product Liability Act, the claimant will have to prove the damage, the defect and the causal relationship between the two. The claimant will not have to prove the fault of the producer, given that under the Act the producer faces a strict liability regime.

The producer will bear the burden of proof regarding the facts that it may wish to rely on and that constitute the causes for exclusion of its responsibility that are referred to below, along with any other defences. Likewise, the producer will have the burden of proof regarding relevant dates that may result in the dismissal of the proceedings owing to the elapsing of the claimant's rights.

For causation, Portuguese law adopts the 'adequate causation' theory, generally in its negative formulation, which means that not only must the damage be a foreseeable and probable consequence of the defect, but that only damages that are a result of a totally atypical and extraordinary chain of events are excluded from liability.

Consumer Goods and Guarantees Act

Under the Sale of Consumer Goods and Guarantees Act, it is legally presumed – burdening the supplier or the producer, or both, with the need to prove otherwise – that products or services are not according to the contract if:

a they do not comply with the description given by the seller or do not possess the qualities of the goods that the seller has provided to the consumer as a sample or model;

b they are not fit for the particular purpose for which the consumer requires them and that he or she made known to the seller at the time of conclusion of the contract and that the seller accepted;

c they are not fit for the purposes for which goods of the same type are normally used; or

d they do not show the quality and performance that are normal in goods of the same type and that the consumer could reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods provided by the seller, the producer or his or her representative, particularly in advertising or on labelling.

The claimant has, however, to prove his or her damages and causality regarding the non-performance of the contract.

Contractual claims

Regarding contractual claims, the injured party bears the burden of proving the following requirements of contractual liability: (1) the unlawful non-fulfilment of the contract by the seller; (2) the damages; and (3) the causal link between the act or omission of the seller and the damages suffered.

Article 799 of the Civil Code provides a legal assumption of fault in contractual liability and therefore the seller bears the burden of proving that there was no wilful misconduct or negligence.

Tort claims

Non-contractual liability arises only when the general conditions of civil liability are present, which are: (1) voluntary fact; (2) unlawfulness; (3) some type of blameworthiness (fault); (4) damages; and (5) a causal link between the damages and the relevant illicit conduct (act or omission).

Contrary to contractual liability, there are, in general, no assumptions of fault regarding non-contractual liability. This is one of the key differences between these two forms of civil liability. As provided for in Article 487 of the Civil Code: 'The injured party must evidence the fault of the author of the injury, unless an assumption of fault is applicable.'

Regulatory or criminal proceedings

For any regulatory or criminal proceedings, it will be up to the prosecuting authority to prove the facts that hold its allegation.

iii Defences

Product Liability Act

Under the Product Liability Act, the producer may benefit from the exclusion of its responsibility if he or she proves (and the burden of proof lies with the producer in this respect) that:

a he or she did not put the product into circulation;

b having regard to the circumstances, it is probable that the defect that caused the damage did not exist at the time when the product was put into circulation by him or her;

c the product was neither manufactured by him or her for sale or any form of distribution for economic purpose nor manufactured or distributed by him or her in the course of his or her business;

d the defect is owing to compliance of the product with mandatory regulations issued by the public authorities;

e the state of scientific and technical knowledge at the time when he or she put the product into circulation was not such as to enable the existence of the defect to be discovered; or

f in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

If a third party contributed to the damage, the court may reduce or exclude compensation, depending on the circumstances.

The producer may also allege that the claim is time-barred, on account of there being two different time limitation periods.

The first statute of limitations period is three years and regards relevant knowledge and the beginning of proceedings against the producer. This limitation period shall begin to run from the day on which the claimant becomes aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. If the claimant does not initiate proceedings within this three-year period, the claim will be time-barred. It should be noted that the acknowledgement of the existence of a defect by the producer interrupts the counting of this three-year period, according to Article 325 of the Civil Code. This is particularly relevant when the producer orders a recall that can lead the claimant to argue that it reflects a tacit acknowledgement of the claimant's right to compensation resulting from damage caused by a defective product. Article 325 of the Civil Code stipulates, however, that the tacit acknowledgement of the claimant's right to compensation is only relevant if it results from facts that unequivocally express it.

The second limitation period is 10 years and relates to the date when the product entered into circulation. This limitation period shall begin from the date on which the producer put into circulation the actual product that caused the damage, and will not be interrupted unless the injured person initiates proceedings against the producer.

None of these time-related defences, however, allow for the request of a US-like 'motion to dismiss' and so the defendant (producer) who wishes to invoke time-barring of the claim must file its complete defence and, although this issue may be decided at the preliminary hearing that follows the written submissions, it is often the case that the proceedings go through a full trial and that the decision based on the statute of limitations is only made at the very end.

Clauses that exclude the producer's liability in relation to the injured persons are not admissible and shall be treated by courts as non-existent.

Consumer Goods and Guarantees Act

Under the Sale of Consumer Goods and Guarantees Act, the producer may allege, in its defence, that:

a the defect results from the statements of the supplier and the use of the good;

b the product was not put into circulation;

c it can be assumed that, considering all circumstances, no defect existed when the product was put into circulation;
d it did not manufacture the product for sale or any other form of profitable distribution or it did not distribute it in the course of its professional activity; or
e more than 10 years has passed since the product was put into circulation.

Contractual claims

Regarding contractual claims, the defendant can invoke any variety of defences that may serve to disprove the facts alleged by the claimant and fault (regarding which, as mentioned, there is a legal presumption).

Tort claims

In any tort claim, apart from invoking any facts that contradict and counterprove the facts alleged by the claimant, the defendant may allege that the claim is time-barred upon completion of three years after the injured person had the knowledge of his or her right, even if he or she does not know who is responsible for it and the full extension of damages. This limitation period is extended to five years if the injury resulted from an act or event that may constitute a crime.

Regulatory or criminal proceedings

Regarding regulatory or criminal proceedings, the defendant may invoke a variety of defences that do not especially relate to product liability.

iv Personal jurisdiction

The answer to this point has different approaches depending on whether the producer is a European Union national or not.

If the product manufacturer is a European Union national, European Parliament and Council Regulation No. 1215/2012 will apply. Therefore, if the claim has a contractual basis, the proceedings shall be initiated before the court where the obligation should have been fulfilled. In a situation regarding the sale of goods or the providing of services, it is considered that the place where the obligation should have been fulfilled is that where, according to the contract, the goods or services were or should have been delivered or provided. If the claim has a non-contractual basis, the proceedings shall be initiated before the court where the damage has occurred.

If the product manufacturer is not a European Union national and no other specific international regulation applies, the Portuguese Civil Procedure Code rules regarding international competence will be applicable. Under Article 62 of the Civil Procedure Code, the Portuguese courts will be internationally competent if: (1) the fact that gives rise to the claim occurred, even if only partially, in Portugal; (2) the claimed right can only become effective if proceedings are initiated before Portuguese courts; or (3) there is, regarding the claimant, a significant difficulty in filing the claim abroad. In any case, there must be some kind of relevant connection between the object of the proceedings and the Portuguese legal system.

v Expert witnesses

There is no obstacle regarding intervention of experts within proceedings being discussed in Portugal. Experts may, however, intervene in three different capacities.

First, the parties are entitled to present written expert opinions to better defend their allegations or to raise doubts regarding statements made during the proceedings, even by other experts. The parties may indicate these expert witnesses to testify as part of their defence who, alongside the factual witnesses, will be heard on specific and technical issues.

Additionally, an expert (single or panel of three) may be appointed by the court to perform an independent expert analysis, either at the parties' request or by court determination. These experts will draft a written report and may be heard during the trial to provide clarifications.

Lastly, both the parties and the judge may appoint experts who, although not witnesses, may assist them before and during the trial. These experts are not heard and merely assist the judge and the parties in understanding the specific matters being discussed.

vi Discovery

There is no common law-style 'discovery' system in Portugal. Parties must lodge the documents they consider necessary to substantiate and support their claims themselves and are not obligated, unless ordered by the court, to disclose documents that would hinder their claims.

The parties may, however, request specific documents (which must be identified to the extent possible, since 'fishing expeditions' are prohibited) that are in the possession of the counterparty or even of a third party or official entity. If the facts the applicant wants to demonstrate through those documents are relevant to the case, the court will then notify the other party or the third party to present them.

Further to this, parties are entitled to appoint as witness any person they want, who shall be notified to appear before the court or otherwise be subject to the payment of a fine and ultimately to compulsory transport to the court.

Parties can also request the deposition of the counterparty regarding unfavourable facts for confession purposes. The party has, in principle, the prerogative of appointing whom it wants to represent it before the court.

The court – with or without previous party request – can determine that an expert's analysis or a judicial inspection be performed.

vii Apportionment

Under the Portuguese general product liability regime, if several persons are responsible for the damages, they will be jointly and severally liable. The injured party may claim damages from one or all liable parties. If the proceedings are filed against only one party, that party may either request the joinder of the other parties to those proceedings or it may later claim contribution in the payment to the other liable parties.

Regarding the internal relations between the liable parties, if the actual contribution of each cannot be precisely determined, they will answer equally.

Regarding successor liability, the Portuguese legal regime will hold liable whomever acquires the rights and obligations of the formerly liable corporation.

viii Mass tort actions

There are no 'class actions' in the US sense in Portugal.

However, it is possible for several claimants to consolidate their claims in a single proceeding, without any limitation of numbers. The claimants' requests may differ from each other but they must originate from the same fact or facts. For example, if a major car company recognises a defect, several claimants may begin proceedings jointly, although claiming their own damages that result from said defect. The advantages resulting from this kind of action are mainly legal costs. The disadvantages are the complexity of the proceeding involving several claimants, which would tend to lengthen the duration of the proceedings.

The Portuguese legal system also provides for an 'action to defend general interests' that allows any citizen, association, local authority or the Public Prosecution Service to initiate proceedings for the defence of public health, environment, quality of life, cultural heritage and public dominion issues, as well as the protection of the consumption of goods and services. These actions are, however, seldom used.

ix Damages

Portuguese law is based on the general principle that damages should place the injured party in the same position he or she would have been in had the event causing the damage not occurred. This includes both economic and non-economic (moral) damages. Punitive damages are not provided for and there is no cap on the amount of damages that can be awarded in the Portuguese legal system.

Under the Product Liability Act, damages are subject to the same general principles referred to above. However, damage to, or destruction of any item of property – other than the defective product itself – can only be awarded if the item of property is ordinarily intended for private use or consumption and was used by the injured party for his or her private use or consumption. If the damage to goods satisfies these two conditions, damages may only be awarded if they exceed €500.

Criminal and misdemeanour sanctions can be imposed both on the producer company and on specific individuals within the corporation (if there is individual responsibility).

V YEAR IN REVIEW

2017 was a quiet year for product liability, without changes in law or case law.

In Portugal, injured parties mainly continue to claim directly from the supplier and the producer, having, in most cases, some difficulties in identifying them when they are foreign entities with no seat in Portugal. These difficulties tend to delay proceedings, but ultimately the producer does end up being summoned to the proceedings.

Insurance companies are joined to the proceedings mostly at the request of the producer or the supplier and they tend to follow the defence strategy set out by the latter.

Portugal, like most EU Member States, has not implemented the principles set out in the European Commission's Recommendation on Collective Redress, 2013/396/EU.

Appendix 1

ABOUT THE AUTHORS

ANA LICKFOLD DE NOVAES E SILVA

Vieira de Almeida

Ana Lickfold de Novaes e Silva has a law degree from the faculty of law of the Catholic University of Portugal and has completed postgraduate degrees in banking, securities and insurance law at the University of Coimbra faculty of law, and in management and corporate law at the Nova University of Lisbon faculty of economics. Ana joined VdA in 2004 and is managing associate in the litigation and arbitration practice group, focusing mainly on civil and commercial litigation, and representing national and foreign companies in significant disputes before the courts of Portugal and Portuguese and international arbitration centres, namely the International Chamber of Commerce. Among those claims, she has represented and advised various multinational corporations in relation to product liability litigation, including in the automotive and pharmaceutical sectors. Ana was co-author of *Commentary to the Voluntary Arbitration Law* (2014).

PEDRO PIRES FERNANDES

Vieira de Almeida

Pedro Pires Fernandes holds an LLB and a master's degree from the University of Coimbra, with a focus on contractual and tort law. Further to this, he completed a European private law course at Salzburg University and, additionally, an extension course on arbitration at the Nova University of Lisbon. Pedro joined VdA in 2011 and is currently a senior associate in the litigation and arbitration practice group. In this capacity, he has been involved in several disputes, focusing mainly on commercial and civil matters, both in arbitration and litigation. Among those claims, he has represented and advised a number of multinational corporations regarding product liability litigation, including in the automotive and pharmaceutical sectors

VIEIRA DE ALMEIDA

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 34 00
Fax: +351 21 354 03 25
ans@vda.pt
ppf@vda.pt
www.vda.pt

Law
Business
Research

ISBN 978-1-912228-24-9