

# Product Liability

in 29 jurisdictions worldwide

# 2014

Contributing editors: Harvey L Kaplan,  
Gregory L Fowler and Simon Castley



**Published by**  
**Getting the Deal Through**  
**in association with:**

- Ajumogobia & Okeke
- Anderson Mōri & Tomotsune
- Araquereyna
- Boyanov & Co
- Bühlmann Attorneys at Law Ltd
- Bulló – Tassi – Estebenet – Lipera – Torassa – Abogados
- Carroll Burdick McDonough LLP
- Cassels Brock & Blackwell LLP
- Clayton Utz
- Cliffe Dekker Hofmeyr
- DWF Fishburns
- EBA Endrös-Baum Associés
- Formosa Transnational Attorneys at Law
- Gianni, Origoni, Grippo, Cappelli & Partners
- Gorrissen Federspiel
- Headrick Rizik Alvarez & Fernández
- ILA Pasrich & Company
- Jones Day
- Jun He Law Offices
- Londoño & Arango Abogados
- Mayora & Mayora, SC
- Nobles, LLC
- Rojs, Peljhan, Prelesnik & Partners
- Shin & Kim
- Shook, Hardy & Bacon LLP
- Souto, Correa, Cesa, Lummertz & Amaral Advogados
- Van Diepen Van der Kroef Advocaten
- Yigal Arnon & Co

**Product Liability 2014**

**Contributing editors:**  
**Harvey L Kaplan, Gregory L Fowler**  
**and Simon Castley**  
**Shook, Hardy & Bacon LLP**

*Getting the Deal Through* is delighted to publish the seventh edition of *Product Liability*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 29 jurisdictions featured. New jurisdictions this year include Argentina, the Dominican Republic and the Netherlands.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

*Getting the Deal Through* gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editors, Harvey L Kaplan, Gregory L Fowler and Simon Castley of Shook, Hardy & Bacon LLP for their continued assistance with this volume.

**Getting the Deal Through**

London  
 June 2014

Global Overview	3	Dominican Republic	52
<b>Harvey L Kaplan</b> Shook, Hardy & Bacon LLP		<b>Roberto Rizik and Jaime M Senior</b> Headrick Rizik Alvarez & Fernández	
Argentina	5	England & Wales	58
<b>Mariano E de Estrada and Daniel B Guffanti</b> Bulló – Tassi – Estebenet – Lipera – Torassa – Abogados		<b>Simon Castley and Jon Hudson</b> Shook, Hardy & Bacon International LLP	
Australia	10	France	64
<b>Colin Loveday and Greg Williams</b> Clayton Utz		<b>Florian Endrös</b> EBA Endrös-Baum Associés	
Brazil	17	Germany	72
<b>Jorge Cesa, Roberta Feiten and Fernanda Girardi</b> Souto, Correa, Cesa, Lummertz & Amaral Advogados		<b>Simon Wagner</b> Carroll Burdick McDonough LLP	
Bulgaria	23	Guatemala	79
<b>Kina Chuturkova and Stela Sabeva</b> Boyanov & Co		<b>Conchita Villeda and Laura Sánchez</b> Mayora & Mayora, SC	
Canada	29	India	85
<b>Glenn Zakaib, Emily Larose and Peter Henein</b> Cassels Brock & Blackwell LLP		<b>Amir Singh Pasrich, Vinita Chhatwal and Vaijayant Paliwal</b> ILA Pasrich & Company	
China	36	Ireland	95
<b>Weining Zou</b> Jun He Law Offices		<b>Aoife Gaughan</b> DWF Fishburns	
Colombia	41	Israel	103
<b>Maximiliano Londoño, Daniel Arango, Natalia Tobón and Mauricio Moreno</b> Londoño & Arango Abogados		<b>Barak Tal and Ruth Loven</b> Yigal Arnon & Co	
Denmark	46	Italy	109
<b>Søren Stæhr and Christian Holm Madsen</b> Gorrissen Federspiel		<b>Michela Turra and Alessandra Chimienti</b> Gianni, Origoni, Grippo, Cappelli & Partners	
		Japan	116
		<b>Tetsuro Motoyoshi and Ryohei Ikeda</b> Anderson Mōri & Tomotsune	

**Publisher**

Gideon Robertson  
[gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

**Subscriptions**

Rachel Nurse  
[subscriptions@gettingthedealthrough.com](mailto:subscriptions@gettingthedealthrough.com)

**Business development managers**

George Ingledew  
[george.ingledew@lbresearch.com](mailto:george.ingledew@lbresearch.com)

Alan Lee  
[alan.lee@lbresearch.com](mailto:alan.lee@lbresearch.com)

Dan White  
[dan.white@lbresearch.com](mailto:dan.white@lbresearch.com)



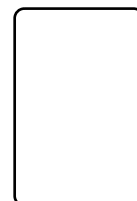
Published by  
**Law Business Research Ltd**

87 Lancaster Road  
 London, W11 1QQ, UK  
 Tel: +44 20 7908 1188  
 Fax: +44 20 7229 6910

© Law Business Research Ltd 2014  
 No photocopying: copyright licences do not apply.  
 First published 2008  
 Seventh edition  
 ISSN 1757-0786

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2014, be advised that this is a developing area.

Printed and distributed by  
 Encompass Print Solutions  
 Tel: 0844 2480 112



## CONTENTS

---

Korea	123	Slovenia	149	Ukraine	171
<b>Ghyo-Sun Park, Gea Sung Yang and Bo Kyung Lim</b> Shin & Kim		<b>David Premelč and Jakob Ivančič</b> Rojs, Peljhan, Prelesnik & Partners		<b>Volodymyr Yakubovskyy and Alexander Weigelt</b> Nobles, LLC	
Netherlands	130	South Africa	155	United States	177
<b>Michael Gerrits and Anne van Hilten</b> Van Diepen Van der Kroef Advocaten		<b>Pieter Conradie</b> Cliffe Dekker Hofmeyr		<b>Gregory L Fowler and Marc E Shelley</b> Shook, Hardy & Bacon LLP	
Nigeria	138	Switzerland	159	Venezuela	185
<b>Babatunde A Sodipo</b> Ajumogobia & Okeke		<b>Lukas Bühlmann and Adrian Süess</b> Bühlmann Attorneys at Law Ltd		<b>Pedro Ignacio Sosa Mendoza and Rodrigo Moncho Stefani</b> Araquereyna	
Russia	145	Taiwan	165		
<b>Sergei Volfson</b> Jones Day		<b>Jackson Shuai-Sheng Huang</b> Formosa Transnational Attorneys at Law			

# Brazil

**Jorge Cesa, Roberta Feiten and Fernanda Girardi**

Souto, Correa, Cesa, Lummertz & Amaral Advogados

---

## Civil litigation system

---

### 1 What is the structure of the civil court system?

The Brazilian civil court system consists of state and federal lower court judges; state and regional federal courts of appeal, mainly responsible for second instance judgments; the Superior Court of Justice (STJ), responsible for controlling the proper application of federal laws; and the Federal Supreme Court, responsible for ensuring the accurate application of the Federal Constitution in lawsuits that have major federal repercussions.

The civil court system in Brazil is ruled mainly by the Federal Constitution and the Code of Civil Procedure (CCP), Law No. 5,869/73. When a lawsuit concerns state matters involving values under 40 times the national minimum wage, Law 9,099/95, which provides for small claims, is applicable (with the subsidiary application of the CCP). When a lawsuit involves federal matters under 60 times the national minimum wage, it is Law 10,259/01 that applies to the case.

### 2 What is the role of the judge in civil proceedings and what is the role of the jury?

The civil court system in Brazil is inquisitorial and there is no jury. The role of a first instance judge is to receive and analyse the facts, arguments and evidence, while giving equal treatment to the parties. Judges must rule on each case, observing the requests made in the initial complaint and, without going beyond the extent of such requests, declare the arguments that support their judgment. As judges have a duty to investigate facts, they may also call for any further (or repeated) diligence and evidence they deem necessary for the discovery of the truth.

### 3 What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

A product liability action begins with an initial complaint that must observe some formal requirements, such as a clear description of facts, the legal grounds for the action and the amounts concerned. If the complaint observes said requirements, the judge will summon the defendant. If not, the judge orders the plaintiff to amend the complaint before ordering the summons. In ordinary civil proceedings, the defendant may present a formal answer within 15 days of the date of the proven service of summons. The answer should include, beside arguments regarding the merits, any allegations concerning preliminary issues, such as statutes of limitations, nullity of the summons, *res judicata*, etc. When a lawsuit is filed as a small claim (under Laws 9,099/95 or 10,259/01), the defendant's answer should be presented at a hearing arranged by the judge. If the defendant does not serve its answer timely to the complaint, the facts alleged by the plaintiff are presumed true, possibly leading to the acceptance of the complaint.

### 4 Are there any pre-filing requirements that must be satisfied before a formal law suit may be commenced by the product liability claimant?

No.

### 5 Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

According to the CCP, any preliminary issues (see question 3) must be alleged in the answer to the complaint prior to facing the merits of the case. The judge may decide on such matters at the beginning of the proceeding or at the end of the discovery period. If the judge accepts one of the pleaded issues, the lawsuit will be extinguished before the analysis of the merits.

### 6 What is the basic trial structure?

Trials are public. Ordinary civil proceedings, which are usually applicable in product liability lawsuits, may have a conciliatory bench trial if the parties are willing to settle the case, and usually have a trial hearing where parties speak before the judge and their attorneys to clarify or confess to the alleged facts.

Live testimony is one of the most common forms of evidence in Brazil. The parties may indicate three witnesses to corroborate each alleged fact. Witnesses are heard in the same hearing, yet separately from the parties and other witnesses. Unless the witness is a close friend, enemy, relative of the parties or is interested in the case, he or she takes an oath before the judge to tell the truth or be subject to facing criminal charges.

The plaintiff must present all documents with the initial complaint and the defendant must produce them with the answer. Parties may impugn the truth of the documents in a separate proceeding. The judge may order that the parties to the lawsuit and even third parties present further documents before the court.

Parties may also produce expert examinations to prove or disprove the alleged facts. In this case, parties can present questions to be answered by a court-appointed expert and indicate an assistant expert to follow the examination and present motions regarding the judicial expert report. Parties may also request the judge's permission to hear the judicial expert at the trial hearing.

The judgment (decision on the merits) may occur orally at the end of the trial. However, the judge usually gives parties the opportunity to present final written arguments and renders the decision *in camera*.

Parties may file an appeal against the first instance decision, which is then reviewed by the state or regional federal court of appeals in a public session led by three judges, where the attorneys can present their arguments orally. The lower court decision is usually suspended by the appeal. According to each case and also observing many formal requirements, after the Court of Appeal's

award the parties can still appeal to the Superior Court of Justice, the Federal Supreme Court or both.

- 7** Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

Yes. Law 7,347/85 regulates civil collective actions regarding liability for damage caused to consumers, to the environment and to other specified assets. Judges may sentence defendants to pay compensatory damages and to perform (or not perform) certain actions. A civil class action may be instituted by the Public Attorney's Office (PAO), the Public Defence Office, by federal, state and municipal governments, by entities and bodies of the public administration, as well as by associations that include consumer defence in their institutional scope as long as they have been incorporated for at least one year (the judge may waive this requirement in some specific instances).

The Consumer Protection Code (Laws 8,078/90 – CDC) also governs collective actions for product liability, which may be filed to protect:

- diffuse interests or rights, meaning group, indivisible rights whose holders are indeterminate persons linked by factual circumstances;
- collective interests or rights, meaning group, indivisible rights whose holders are a group, category or class of people linked by a common legal relationship; or
- homogeneous individual interests or rights, meaning those arising from a common origin.

When a collective action refers to homogeneous individual interests or rights, each individual consumer may request liquidation if the action is favourable to the plaintiff.

- 8** How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

The time for a lawsuit to get to the trial stage varies according to the district court and the number of judges, court staff, pending lawsuits and other local factors as well as the duration of the expert examination, when so required. An ordinary civil liability lawsuit may take years to get to the trial stage and may take up to four years to be judged in the first instance.

### Evidentiary issues and damages

- 9** What is the nature and extent of pretrial preservation and disclosure of documents and other evidence? Are there any avenues for pretrial discovery?

In Brazil there is no pretrial discovery or disclosure of evidence similar to that found in common law. It is worth noting that the only official proceeding that could be deemed similar is the investigation led by the PAO to gather evidence for a potential collective action. Such pretrial discovery is not an adversarial proceeding and consequently the parties involved are sometimes not even aware that it is occurring unless the PAO decides that the party is to be notified to produce further elements or clarifications. Besides that, according to the CCP, anyone may file a lawsuit requesting the urgent production of evidence in order to avoid the loss of proof and enable the filing of an ordinary indemnity lawsuit.

- 10** How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

Evidence may consist of documents, testimonies and technical examinations. The documents supporting each party's allegations are filed with the initial pleadings (complaint and answer, respectively) and

attached to the dockets, thereby allowing each litigating party to present a formal challenge or motion concerning its content. Brazilian case law has been permitting further documents to be presented during the course of a lawsuit provided that there is a justification for such late presentation and that the opposing party has the opportunity to be heard concerning them.

Witnesses are to be questioned in person at a hearing, which usually takes place in the state jurisdiction where the lawsuit is running. It is admissible that witnesses who do not live in the city where the lawsuit is running be deposed by the district court of his or her place of residence through an incidental proceeding initiated for such purpose. (A similar proceeding is applicable for witnesses living abroad.) Parties may present, immediately before the hearing, any impediment that may disqualify a witness.

Finally, the conclusions of technical examinations are docketed by means of written reports issued by the court-appointed expert or experts and by technical assistants appointed by the parties (if any). Parties are entitled to request that the judge notify the court-appointed expert and technical assistants to attend the hearing and to render additional clarifications regarding the examination.

- 11** May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

Yes, the court may appoint experts whenever there are technical issues to be discussed in the case. The court may even appoint more than one expert when the matter involves more than one field of knowledge.

Parties cannot influence the appointment themselves, yet the CCP provides for instances where the parties may contest the court-appointed expert whenever there is a cause for impediment or denial, or if the court-appointed expert does not meet the necessary technical qualifications required for the examination. The parties may also appoint their own technical assistants to accompany the examination.

Court-appointed experts present a written technical report, which may be challenged in writing by the technical assistants and by either party.

- 12** What types of compensatory damages are available to product liability claimants and what limitations (if any) apply?

Product liability claimants are entitled to be fully compensated for damage suffered. Claimants must demonstrate the extent of the damage and that it arose from the defective product.

The general rules for compensatory damages are provided by the Brazilian Civil Code (CC), which states that only direct loss or injury is to be compensated by the breaching agent. The injured party is entitled to compensation for any damage suffered as a direct and immediate result of the accident with the defective product, including actual damages (the actual pecuniary loss for the victim), loss of profits, moral damages, bodily injury and aesthetic damage. The loss of an opportunity may also entail damages.

The product liability claimant may be either the consumer of the product itself or any parties affected by the consumer accident (bystanders). The CDC also entitles consumers to receive redress for damage related to non-conformity, namely, whenever a product has a flaw in quality or quantity that makes the product improper or inadequate for its purpose, diminishes its value or whenever there is a discrepancy regarding the purported characteristics of the product.

- 13** Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

The Brazilian legal system does not provide for punitive damages. The principle of full reparation for damage caused is effective and

provides that compensation must be equivalent to the actual extent of the damage inflicted, meaning that the compensation cannot be greater or lesser than the extent of the said damage. An accepted exception to such principle is the limitation of liability clause, though its application is subject to some restrictions, especially in consumer relationships.

Moral damages are fully acceptable in Brazil and theoretically, every product liability case can generate a claim seeking moral damages. The values of the judicial awards depend on the characteristics of the case, such as the kind of injury suffered, the social and economic conditions of the parties, etc. These values are usually not very high yet it should be noted that case law has been taking into account the punitive and exemplary functions of compensation in order to establish the indemnification for moral damages.

#### Litigation funding, fees and costs

**14** Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

Legal aid is very common in Brazil and may be requested at any stage of the proceedings simply by presenting an affidavit regarding the claimant's inability to afford the costs of the lawsuit without harm to their or their family's subsistence. The defendant may oppose legal aid, but has the burden of proving that the claimant has sufficient financial resources to afford the expenses.

**15** Is third-party litigation funding permissible?

Third-party litigation funding is not ruled by any law nor is it common practice in Brazil. However, given that it is allowed in other countries, Brazilian scholars are beginning to discuss the matter.

**16** Are contingency or conditional fee arrangements permissible?

Parties and their attorneys may settle fee agreements that observe the Attorney's Professional Conduct Code. Fees should be established with moderation by considering complexity, the value in dispute and the time to be spent on the matter, among other criteria. Success fees are also admissible. The Brazilian Bar Association of each state provides a suggested fee chart to be followed by attorneys, who should not charge fees below the minimum on the chart, but may establish fees above it.

The fees set by the judge to be paid by the losing party to the winning party's attorney do not infringe the attorney's right to receive the fees previously agreed on with the party, unless stated in writing within the fee agreement.

**17** Can the successful party recover its legal fees and expenses from the unsuccessful party?

The successful party can recover all court costs from the unsuccessful party by requesting that the unsuccessful party be notified to pay back the court expenses. If the party does not comply with the notification, the creditor may extend the lawsuit to collect the debt. The judge will also order the unsuccessful party to pay a fee to the successful party's attorney. These fees may be up to 20 per cent of the amount involved in the case. It is important to point out that these fees are not to be paid to the successful party but rather to the successful party's attorney. Therefore, these fees do not aim to recover the party's expenses.

At present, there is a discussion in Brazil as to whether the successful party may recover the fees agreed upon between the successful party and their attorney. Although major case law does not allow it, some courts have accepted the request made by the successful party to also recover these agreed fees. Moreover, the Superior Court of Justice has this year rendered a decision granting this request to a

successful party, which in turn tends to influence future decisions of lower and state courts regarding the matter.

#### Sources of law

**18** Is there a statute that governs product liability litigation?

Product liability litigation is mainly governed by the CDC and subsidiarily by the CC and CCP. The CDC is grounded on the principle of the strict liability of suppliers.

The CC, on the other hand, provides the general rules for civil relationships and tort liability. Civil liability is a fault-based system and strict liability is the exception. The general hypotheses for strict liability relate to the company that puts the product on the market and of agents who perform risky activities.

**19** What other theories of liability are available to product liability claimants?

Before the enactment of the CDC, product liability claims used to be grounded on breach of contract or on the breach of a general duty of care (tort) by demonstrating that the supplier had committed some form of negligence. Such scenario was radically altered in 1990 when the CDC came into force and established strict liability as the general rule for product liability. It is worth remembering that this consumer legislation applies even to non-consumers whenever they are victims of a consumer accident.

**20** Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

The CDC is the main legislation concerning product liability in Brazil. Consumer protection has a constitutional status and the rules provided by the consumer legislation are mandatory. Among the basic rights ensured to consumers, one can highlight the protection of life, health and safety against risks arising from dangerous products; adequate information about products; correctness in advertising; prevention and redress of damages; and effective and facilitated defence of rights. It also provides the criteria for the definition of defective products and non-compliance defects, the remedies available to consumers, strict and joint liability of agents involved in the supply chain, the instances in which the supplier might not be deemed liable towards the consumer and the applicable statute of limitations. It imposes several duties on the suppliers, related not only to the adequacy and safety requirements of products, but also to the offer and advertising of such products. It also establishes several commercial practices deemed abusive against consumers and consequently forbidden to suppliers, and establishes applicable procedural rules in product liability litigation, whether individually filed or brought by the legitimate parties by means of a collective action.

**21** Can criminal sanctions be imposed for the sale or distribution of defective products?

The CDC, Law No. 8,137/1190 (crimes against consumer relations) and the Penal Code establish some types of conduct that are deemed crimes against the consumer relationship, including the following:

- the omission of clearly visible information regarding the dangerousness of a product on its packaging, receptacle or related advertising;
- the failure to notify the competent authority and consumers about the dangerousness of products when such features are known after the product was put onto the market, or the failure to remove such defective products from the market immediately after being instructed to do so by the competent authority;
- the promulgation of false or misleading affirmations or omission of relevant information regarding products;



- producing or promoting misleading or abusive advertising; and
- producing or promoting advertising when the party is aware (or ought to be aware) that it may induce dangerous behaviour.

**22** Are any novel theories available or emerging for product liability claimants?

No.

**23** What breaches of duties or other theories can be used to establish product defect?

In Brazil, the notion of what makes a product defective is directly related to safety and the supplier's general duty to only market products that do not entail any risks to the physical integrity of consumers or to their assets. The potential breaches that may establish that a product is defective arise from the product's design, manufacture, construction, assembly, formulation, manipulation, presentation and packaging. Further, the breach of the duty to render sufficient and adequate information on the usage and risks of a product will in itself suffice to characterise a product as defective.

**24** By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

The general rule provided by the CCP establishes that the plaintiff has the burden of proving all facts which ground the claim. In addition, the CDC establishes that the burden of proof may be shifted to the defendant whenever the claim is plausible and the consumer is deemed to be especially disadvantaged compared with the supplier or producer. The CDC also provides for some circumstances which must be taken into account to determine whether a product can be deemed defective, which are: its presentation, the usage and risks which are reasonably expected from the product and the time when the product was put on the market.

As to the standard of proof, it is important to mention that the Brazilian legislation does not rule on this matter and there is no consistent interpretation in case law. Scholars have indicated that the preponderance of evidence may be used to guide the judicial appreciation of evidence whenever the claim involves private civil matters, which is usually the case in product liability. If there is a penal repercussion, however, clear and convincing evidence must apply.

**25** Who may be found liable for injuries and damages caused by defective products?

The CDC provides that the manufacturer, producer, constructor and importer, whether domestic or non-Brazilian, may be found jointly liable for injuries and damage caused by defective products. Sellers are also deemed liable whenever:

- the aforementioned agents cannot be identified;
- the product is supplied without clear identification of the manufacturer, producer, constructor or importer; and
- they have not stored perishable products adequately.

The shareholder's assets may also be used to satisfy corporate obligations towards consumers whenever there is abuse, excess of power, infraction of the law or violation of company by-laws, bankruptcy, insolvency, termination or non-operation due to mismanagement and even when the legal entity is deemed an obstacle to the redress of consumer damages.

**26** What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

The main rule regarding causation in Brazil is provided by the CC, which states that redressable damage and injuries are those directly and immediately resulting from the defect. There are several theories formulated by scholars aiming at defining the causal link for liability purposes. The main one is the 'theory of adequate causality', which restricts the cause of damage to that which would be adequate and indispensable to cause a given result. It is also possible to interpret such theory in a negative sense, aiming at discovering the inadequate cause, which would lead to the exclusion of a potential event as a cause.

As to the burden of proof, the consumer must demonstrate that the defective product is one of the potential causes of the damage. Therefore, the supplier is to bring evidence that the defect does not exist or, if it does, that there is no causal link.

**27** What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

The main post-sale duty relates to the obligation to report whenever it is found that a product may be deemed dangerous to the health or safety of consumers. The supplier must notify the competent authorities – federal, state and municipal – and also provide clear and sufficiently well-advertised information to consumers (recall).

Another post-sale duty consists of the obligation imposed on manufacturers and importers to guarantee that components and spare parts are available on the market throughout the manufacturing or importation period of their products and for a reasonable time after manufacturing or importation is ceased.

The breach of such post-sale duties may lead to administrative and penal repercussions, without prejudice of the obligation to redress any damage suffered by consumers.

#### Limitations and defences

**28** What are the applicable limitation periods?

A defective product can generate damages not only to the consumer, but also to suppliers in relations between two companies. If it is a consumer who is somehow harmed by a defective product, his or her right to compensation is time-barred after five years. This period begins to run on the day on which the consumer becomes aware of the damage and of the identity of its producer.

However, if a company suffers damage as a result of one of its suppliers' products – in which case the CC applies – its right to be compensated is time-barred three years from the date when the damage occurred. The CC provides few situations in which these limitation periods can be interrupted. If any of the listed events happen, the limitation period starts anew. A limitation period can only be interrupted once.

**29** Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

There is a discussion among legal scholars as to whether producers should be held liable in such cases and Brazilian courts have not yet had enough cases regarding these possible exclusions to set up a clear line of interpretation.

The argument for the acceptance of these defences is that one cannot be liable for uncontrollable risks. Also authorising this interpretation is article 12, section 2, CDC, which states that a product is not deemed defective for the sole reason that another better product has subsequently been introduced into the market.

The counterargument is that the wording of said article does not clearly exclude producer liability in cases of development risks or state-of-the-art developments and article 12, section 3, which lists producer defences in product liability cases, mentioning neither term. Although CDC legislators attempted to use wording similar to that found in Directive 85/374/ECC, they did not make it as clear as article 7e of the said directive.

Having said that, should these defences be deemed applicable, the product will not be considered defective and since it is the producer that carries the burden of proving the product is non-defective, it must also prove that the state-of-the-art and the scientific or technical knowledge available when the product was put into circulation did not enable the discovery of the defect.

**30** Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

The standard applied by Brazilian law to define a product as defective relates to the safety that consumers are legitimately entitled to expect from it. Analysing the case from a consumer perspective, compliance with mandatory or voluntary requirements is viewed as a fundamental prerequisite for any given product to be put on the market. Therefore, compliance with such requirements is not a sufficiently strong criterion to fully meet safety standards.

Notwithstanding this, it is highly recommended that the defendant prove said compliance in the lawsuit in order to stave off the basic assumption that the product was indeed defectively manufactured or designed, or both.

**31** What other defences may be available to a product liability defendant?

Article 12, section 3, CDC, lists three basic defences. The defendant must prove that:

- they did not introduce the product into the market;
- the alleged defect does not exist; or
- the damage was caused by exclusive fault of the consumer or a third party.

The nature of this list has been object of legal discussions, namely as to whether it is exhaustive or not. For instance, another accepted defence is external force majeure – any event beyond the producer's control happening after the product is placed on the market.

**32** What appeals are available to the unsuccessful party in the trial court?

Every trial court sentence can be subject to an appeal and though the right to appeal cannot be contractually excluded, it can be waived after the trial court award.

In the second instance appeal, which usually suspends the trial court decision, the case will be judged by a group of three judges who comprise one of the chambers of the Court of Appeals. If two of said judges take a decision contrary to the trial court sentence, the unsuccessful party can appeal to a group formed by judges from two of the court chambers (an *embargos infringentes* appeal).

When the second instance appeals are exhausted, the unsuccessful party can file a special appeal, an extraordinary appeal, or both before the Superior Court of Justice and the Federal Supreme Court, respectively. Both special and extraordinary appeals deal only with issues of law, not of fact. Special appeals can be filed if a federal law has not been observed by the Court of Appeals and whenever the Court of Appeal's decision differs from that rendered by another Court of Appeals. Though quite rare in product liability cases, an extraordinary appeal can be filed when a constitutional provision has been neglected by the court or if the appellant demonstrates that

#### Update and trends

Some provisions of the CDC are expected to change or be amended over the next few months. A relevant emerging trend relates to Bill 281, which aims to alter the CDC. Among other issues, the bill stipulates that legislation and contracts must be interpreted and, when applicable, judicially integrated (in the event of an omission) in the most favourable manner for the consumer. In other words, the bill entitles consumers to have their product liability claims ruled on by means of the most favourable statute for their case, regardless of its subjective scope of application. This means that even though it is the CDC that governs consumer relationships, a claimant could choose, for instance, to make use of the statute of limitations established by the CC, given that it provides for a longer term than does the CDC. Moreover, the new law may extend the suppliers' obligation to disclose information regarding health and safety to include the potentiality of the product to cause environmental impact. In this case, the obligation to initiate a recall would arise not only from risks to the health and safety of consumers, but also from the risk of an environmental impact.

the case has a general repercussion. Both appeals rarely suspend the lawsuit and, therefore, are not able to stave off the provisional enforcement of the decision.

#### Jurisdiction analysis

**33** Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

The CDC, the basic law regulating this matter, was enacted in 1990 and Brazilian courts have decided on a broad range of product liability cases over these 24 years. Given that such cases usually deal with technical issues, whose profiles change according to the alleged defect, there is always a degree of uncertainty in every case, especially in novel ones. However, it can be said that Brazilian law in general has achieved a reasonable level of maturity regarding product liability matters.

**34** Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

There have been no recent laws, cases or groups of cases that have particularly changed the profile of product liability in Brazil. However, at least two recent STJ decisions have consolidated the interpretation of CDC rules and are worth mentioning:

- the fourth panel of the STJ has denied smokers' claims seeking compensation for damage caused by the consumption of cigarettes. One of the bases for such decisions is the now-clearer difference between a defective product and the inherent dangerousness of a product; and
- the third panel of the STJ has recently decided on a case stating that even a reseller can be classified as a consumer, and thus be protected by CDC rules, if he or she has suffered damage caused by a defective product.

**35** Describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

In Brazil, the CDC is a very well-regarded legislation and consumer protection is a highly legislated area. Moreover, as stated earlier, consumer protection is referred to in the Constitution as a fundamental right and in this scenario, judges tend to protect consumers and thus litigation is used as a tool to redress perceived wrongs.



**36** Describe any developments regarding 'access to justice' that would make product liability more claimant-friendly.

The CDC and related statutes are oriented by 'access-to-justice' guidelines and were enacted to protect consumers both contractually and procedurally.

Consumer rights are not disposable by contract even if consumers have received an advantage for this disposition (for instance, a lower price). Procedurally, consumer cases can be judged by small claims courts, which are faster, free of charge in the first instance and have highly flexible applicable procedures. Moreover, access to legal aid is quite easy and statute-of-limitations periods are larger than in other similar situations.

Three points should be highlighted in this context: the burden of proof, punitive damages and the importance of collective actions:

- the burden of proof is shifted by law (eg, in the instance of the defective quality of a product) or may be shifted at the discretion of the judge if a consumer's allegations are plausible or when the consumer has a significant (economic, technical or legal) weakness compared to the other party. (see question 23);

- punitive damages are prima facie not applicable in Brazil, yet moral damages are not only allowed by the Constitution, but also theoretically applicable in almost every civil liability case. Hence, moral damages are sometimes used by judges as punitive damages, though the awards are usually lower than in nations that apply punitive damages; and
- collective actions are quite common, especially given the large number of entities that have standing to sue, the most important of which is the PAO, which in Brazil is also competent for civil matters. The PAO may investigate the case before the lawsuit, requesting information and documents from the investigated parties and third parties. The PAO may also negotiate agreements with the investigated parties to define measures to be taken to solve the problem and to compensate the victims.



**Jorge Cesa**  
**Roberta Feiten**  
**Fernanda Girardi**

**jorge.cesa@soutocorrea.com.br**  
**roberta.feiten@soutocorrea.com.br**  
**fernanda.girardi@soutocorrea.com.br**

Av Carlos Gomes, 700, 13th Floor  
 90480-000 Porto Alegre-RS  
 Brazil

Tel: +55 51 3018 0500  
 Fax: +55 51 3018 0501  
 www.soutocorrea.com.br

# GETTING THE DEAL THROUGH

## Annual volumes published on:

Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Banking Regulation  
Cartel Regulation  
Climate Regulation  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Enforcement of Foreign Judgments  
Environment  
Foreign Investment Review  
Franchise  
Gas Regulation  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Licensing  
Life Sciences  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Private Antitrust Litigation  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Shipbuilding  
Shipping  
Tax Controversy  
Tax on Inbound Investment  
Telecoms and Media  
Trade & Customs  
Trademarks  
Vertical Agreements



**For more information or to  
purchase books, please visit:**  
[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Strategic Research Partner of the  
ABA Section of International Law



Official Partner of the Latin American  
Corporate Counsel Association