



ICLG

The International Comparative Legal Guide to:

Product Liability 2018

16th Edition

A practical cross-border insight into product liability work

Published by Global Legal Group, in association with CDR, with contributions from:

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URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Stephens & George
Print Group
June 2018

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ISBN 978-1-912509-14-0

ISSN 1740-1887

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EDITORIAL

Welcome to the sixteenth edition of *The International Comparative Legal Guide to: Product Liability*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of product liability.

It is divided into two main sections:

Seven general chapters. These chapters are designed to provide readers with an overview of key issues affecting product liability law, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in product liability laws and regulations in 23 jurisdictions.

All chapters are written by leading product liability lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Adela Williams and Tom Fox of Arnold & Porter for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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PREFACE

I'm delighted to have been asked to introduce the sixteenth edition of *The International Comparative Legal Guide to: Product Liability*.

The guide continues to be an ideal reference point with seven excellent general chapters covering significant developments in European, Asian and US law. This edition also has a special focus on product recalls, a practical guide around costs issues and considerations in the context of group actions in England & Wales and finally commentary on liability and insurance matters in the context of driverless cars.

As always, the bulk of the edition remains the enormously helpful country question and answer section, covering 23 jurisdictions, new to the guide this year being Albania and Kosovo.

I frequently have cause to make reference to the guide for matters concerning product liability all over the world and will continue to do so as the guide remains a thoroughly informative and comprehensive publication.

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1 Liability Systems

1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?

The product liability regulation is found in the UAE Civil Law of 1985 as amended (the Civil Code) and other regulations including any requirements within certain departments in the UAE. The rules state that liability can arise from fault in creating a product or otherwise strict in particular for the regulations found with department or the consumer protection. The articles of the law allow for parties for certain aspects to agree between one another and to depart from the articles of the law otherwise the law maintains the minimum rights for one party towards the other. Liability may also be found for breach of any statutory obligations.

1.2 Does the state operate any schemes of compensation for particular products?

No, it does not.

1.3 Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the “retail” supplier or all of these?

The clauses under the Civil Code are general and may apply to any counterpart to a transaction and the definition of a provider under the UAE Federal Consumer Protection Laws are very broad in that it not only includes the local agents and distributors but also the manufacturer whether based in the UAE or abroad. The producer or provider who supplies goods and services to the distributors, other than consumers. Article (1) of CABINET OF MINISTERS’ RESOLUTION (12) OF 2007 In respect of Executive Regulation to the Federal Law no. 24 of 2006 In respect of PROTECTION OF CONSUMERS (“CMR”) supports the consumer to go against all of the aforementioned in their complaint or case and not just the local agents or distributors. There is a common misconception that a provider of a product or service to the consumer is limited to the entity or individual who directly dealt with the consumer, which, in most cases, is the local agents or distributors based in the UAE. The definition of provider in the same law also includes any

representative office of the manufacturer based in the UAE that is somehow involved in the sale and circulation of the products and services.

1.4 May a regulatory authority be found liable in respect of a defective/faulty product? If so, in what circumstances?

No, they may not.

1.5 In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

The above CMR provides that a provider shall adopt the procedures stipulated for herein to recall goods from the local markets or consumers in the following events:

1. A defect is found by him in the goods.
2. Reports or studies prove the presence of a defect in the goods.
3. Complaints are received from consumers or the concerned bodies for the presence of a defect in the goods.
4. A memorandum is issued by the Ministry for the recall of the goods.
5. Recall procedures are initiated outside the State for the same goods.
6. It is established that the goods do not conform with the Approved Standard Specifications.

There is no obligation to recall; however, there is an obligation for the manufacturer when discovering a fault in any product or service to inform the authorities and the consumers to provide a solution so that the consumer may use the product or service without being harmed by the fault.

As to the way a claim for failure to recall may be brought, it is clearly stated in the CMR as follows:

... “In case the provider fails to recall the defective goods in accordance with this Regulation, while aware of the existence of a defect therein, this shall constitute a case of commercial fraud ... and the Department shall refer the matter to the Public Prosecution to institute criminal proceedings against the provider”.

1.6 Do criminal sanctions apply to the supply of defective products?

Yes, the UAE consumer law prescribes penalties for breach. The primary sanction is a fine of between AED 10,000 and AED

1,000,000 for a wide range of offences, including:

1. displaying, offering, promoting or advertising any goods or services which may inflict damage on the consumer in the course of ordinary usage;
2. labelling the product other than in compliance with legal requirements;
3. failing to provide appropriate warnings to consumers as to the risks associated with the product;
4. failing to comply with approved standard specifications; and
5. artificially creating market conditions which control market price and forces an increase in the price of products.

2 Causation

2.1 Who has the burden of proving fault/defect and damage?

As a general rule, this responsibility is on the claimant, and he/she must prove that they were harmed by the defendant's breach, and indeed that the defendant did breach his duty of care, to begin with. In product liability matters, defendants are strictly liable. The defendant's intention is of no importance to the outcome of the case, we can understand the answer through the provisions of the regulation namely the CMR which allows that the consumer submits his complaint describing the condition of the goods as stated in the CMR and then the competent authorities which was established for this purpose, examine the complaint and defective goods.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure? Is it necessary to prove that the product to which the claimant was exposed has actually malfunctioned and caused injury, or is it sufficient that all the products or the batch to which the claimant was exposed carry an increased, but unpredictable, risk of malfunction?

Essentially, there are three causes of product liability: defective design; defective manufacture; and failure to properly instruct consumers on the proper use of a product or warn consumers of latent dangers in a product. The aim of product liability laws are to minimise the damage caused by defective products and to compensate those who have been affected.

The Ministry of Economy (MOE) has the power to recall a product. In practice, it is the local coordinating bodies, such as Abu Dhabi Quality and Conformity Council (ADQCC) or Dubai Municipality with assistance from Emirates Authority for Standardisation and Metrology (ESMA) which investigates compliance breaches and coordinates between suppliers and the MOE to organise a product recall.

The ADQCC and Dubai Municipality have the power to take samples of products and arrange for them to be tested against the applicable standards set by ESMA. When a breach is discovered, the supplier is notified and given an opportunity to undertake their own investigations, and, where agreed, may obtain their own test report. After the outcome of further testing, additional reports may be commissioned by the regulator and a decision is then made as to whether the defect merits a recall. If that is the case, as neither the ADQCC nor the Dubai Municipality have the necessary enforcement powers, the MOE is asked to authorise the recall based upon the

available evidence. The MOE usually accepts the recommendations of the ADQCC or Dubai Municipality that a product should be recalled, unless the supplier successfully negotiates an alternative solution.

The incidence of product recalls in the UAE is on the increase. As the ESMA continues to set applicable standards for a wider range of products, the opportunity for investigation and testing increases, and once a *prima facie* case of non-compliance is established, the regulators are under a duty to act in the interests of consumer safety. Both the Dubai Municipality and the ADQCC have been active in recalling products from the market, and, of course, once one Emirate has ordered a recall, it is almost inevitable that the supplier will be required to recall the product in neighboring Emirates. The ADQCC have recalled thousands of products since its establishment in 2009, primarily following testing which proved that the product did not comply with standards set by the ESMA. Recently recalled items include an array of electrical appliances (where there are obvious safety concerns), including juicers, blenders, rice cookers and deep-fat fryers.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

The law does not explicitly recognise the market-share concept liability; however, it can be understood by reading the competent regulations. Manufacturers and Suppliers are potentially liable for defective products, therefore if there are several of them that have manufactured a product it will be in the details in a court proceedings that liability will be attached to one of them. Under the UAE Consumer Protection Laws, providers can be held liable for defective products in a strict sense. Providers are defined in a broad sense as including local agents, distributors, manufacturers and anyone involved in the circulation of the product or service. Notwithstanding the above, each of the manufacturer or supplier can be found liable according to the different articles found in the regulation where: the supplier can be liable and must not display or offer goods that are defective, the supplier will be liable if a defective product is sold, a supplier will also be liable for not respecting labeling requirements, and for matters relating to warranties and after-sales services and producers (or manufacturers) will also be liable for providing defective products.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of "learned intermediary" under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

Yes, failure to warn gives rise to liability. Essentially, there are three causes of product liability: defective design; defective manufacture; and failure to properly instruct consumers on the proper use of a

product or warn consumers of latent dangers in a product. The aim of product liability laws is to minimise the damage caused by defective products and to compensate those who have been affected.

As to the information source, the regulations in its interpretation of the Principal Provider did not distinguish between the chain of providers including the traders and distributors.

3 Defences and Estoppel

3.1 What defences, if any, are available?

The defences that a defendant can have are to demonstrate that they are not liable for the defects and can be a range of defences including third party factors and acts of God. A useful defence of limitation can be one of the defences.

3.2 Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

The general product liability law does not allow for development risk defence and, as a general rule, a latent/hidden defect may be established after the product is sold and when the defect is discovered and, at such time, there may be a claim made. The Civil Code does not have any requirements on the Buyer and offers the protection to the manufacturer in that, if the defect was visible or appeared, the Buyer may not rely on any defence in such an instance. However, case law has also established that there is a requirement when dealing with goods/products that any reasonable person would require an expert to inspect such goods and that the Buyer be required to inspect goods when it would be reasonable to do so; therefore, in certain circumstances, any seller of goods may rely on the fact that it was prudent for a reasonable person to have inspected the goods to a specific level before purchasing them, thus offering a defence against the buyer for not having inspected the goods as any reasonable man should.

3.3 Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

Yes, it may be relied upon but notwithstanding the compliance to statutory requirements, the Civil Code can find the manufacturer liable under the general liability articles.

3.4 Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

Different claimants are able to re-litigate against the seller of the same product. The seller would have a very strong defence of having already litigated in respect of the goods/products; however, it does not forbid the courts to make a ruling in favour of claimants who are not the initial claimants who filed suit.

3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings, is there a time limit on commencing such proceedings?

Yes, they can do this during the litigation with the claimant by an additional lawsuit against the claimant and the third party, the standard laws of limitation will apply in this instance.

3.6 Can defendants allege that the claimant's actions caused or contributed towards the damage?

The defendant can allege that the claimant's actions cause and contributed towards the damages and, in such a case, the judge can order partial damages in line with the proportion that the claimant's actions caused the damage.

4 Procedure

4.1 In the case of court proceedings, is the trial by a judge or a jury?

The trial is by a judge and without a jury.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

Yes, when a case is filed, the court may appoint an expert by its own discretion; also, the consumer tends to request the appointment of a technical court expert to deal with the case in its claim.

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure 'opt-in' or 'opt-out'? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?

The consumer's case before the Court can be brought on the basis of tortious liability or contractual liability and for breaching the UAE Federal Consumer Protection Laws. There is no class action for this kind of suit.

4.4 Can claims be brought by a representative body on behalf of a number of claimants e.g. by a consumer association?

Yes, it can be brought by the local competent authority within the concerned Emirate to which any law authorises.

4.5 How long does it normally take to get to trial?

In product liability disputes an application can be brought before a judge and parties properly served in approximately three months, thereafter the judge and parties will submit responses and evidences to the courts, or otherwise the courts appoint experts and makes orders, until the courts eventually deliver judgment.

4.6 Can the court try preliminary issues, the result of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

The courts may by law try preliminary issues like jurisdiction; however, generally the courts will deliver one judgment at the end which will deal with all the matters or otherwise a preliminary matter.

4.7 What appeal options are available?

The parties have a right to appeal the Consumer Protection Department's decision before the Ministry of Economy. Any judgment of the courts can be appealed to the Appeal Courts of the UAE.

4.8 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Yes, the court usually appoints one or more expert to provide their opinion regarding the disputed matters, parties are able to rely on expert opinion evidence. To this effect, the normal practice is to appoint technical court experts who have the knowledge, experience, and expertise in respect of the case at hand.

4.9 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

The courts can request that an expert attend before the courts and be examined if requested by a party or if the courts find it necessary; however, the general practise is that courts will rely on expert reports and, in case of any further examination required, the courts will direct the expert to look into additional matters and provide an addendum report.

4.10 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In the UAE there is no mandatory pre-trial disclosure, parties are not obligated to file documents before the matter is before the courts. After a case is heard in court, a party to the litigation may request the court to compel his opponent to submit documents in accordance with the evidence laws.

4.11 Are alternative methods of dispute resolution required to be pursued first or available as an alternative to litigation e.g. mediation, arbitration?

There is no general requirement for alternative methods of dispute to be followed before the suit, and only in exceptional cases does the law require parties to follow an alternative dispute resolution before claiming before the courts.

4.12 In what factual circumstances can persons that are not domiciled in your jurisdiction be brought within the jurisdiction of your courts either as a defendant or as a claimant?

The law on jurisdiction in the UAE can entertain a case against a person that is domiciled outside the UAE if the action is concerned with an obligation concluded, executed, or its execution was conditioned in the UAE and if one of the defendants has a residence or domicile in the UAE.

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

Yes, there are several time bars in bringing or issuing proceedings, in respect of latent defects within six months, and in respect of general tort law and in respect of harm done within three years.

5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

The time bars do vary according to the fault and whether or not the defect was latent and other circumstances surrounding the case. In some instances the time bar is immediate, the Civil Code provides that if the seller disposes of the goods as owner after becoming aware of the old defect, his option to sue lapses.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

The period of limitation shall begin to run once the plaintiff has discovered the fraud or concealment.

6 Remedies

6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?

The CMR provides that consumers shall have the right to select the manner of remedying any defective goods, either by way of replacement, repair, or refund of price; provided that the type and nature of defective goods together with the time to be taken in remedying the defect shall be taken into consideration. The consumer shall, according to the type and nature of defective goods together with the time to be taken in remedying the defect, be entitled to obtain substitute goods to avail thereof free of charge, until the remedy procedures are completed.

6.2 What types of damage are recoverable e.g. damage to the product itself, bodily injury, mental damage, damage to property?

Please refer to question 6.1 above. Furthermore, the customer may claim before the courts for harm done in certain circumstances the CMR laws may restrict a customer's claim of damages by its operation.

6.3 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

Our experience is that the UAE will not compensate a person for future damage, rather, once the damage is sustained, the courts will assess the damages and compensate accordingly.

6.4 Are punitive damages recoverable? If so, are there any restrictions?

No, they are not.

6.5 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

No, there is no such limit.

6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?

There are no such rules, with the exception of infants; a settlement of any claims by infants may involve the public prosecutor who may be required to accept the settlement.

6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the claimant in respect of the injury allegedly caused by the product. If so, who has responsibility for the repayment of such sums?

This is generally not the case and authorities will not sue another company on behalf of any person entitled to their services.

7 Costs / Funding

7.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party?

A successful party can recover most of the court fees and fees associated with the courts and incidental expenses. A successful party is very rarely awarded his own legal costs with the exception of a nominal amount towards legal fees.

7.2 Is public funding, e.g. legal aid, available?

No, it is not.

7.3 If so, are there any restrictions on the availability of public funding?

This is not applicable in the UAE.

7.4 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

No, it is not.

7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding outside the DIFC is seldom used.

7.6 In advance of the case proceeding to trial, does the court exercise any control over the costs to be incurred by the parties so that they are proportionate to the value of the claim?

No, it does not.

8 Updates

8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in your jurisdiction.

Answer not available at time of print.

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Hamdan AlShamsi Lawyers & Legal Consultants was established in 2011. It has since become a name synonymous with success and is well-known in the legal circuit. The success of the law firm is due to its specialisation in advising on commercial issues, insurance, due diligence, family law, intellectual property law, banking, companies law and other matters locally, and its dedication towards offering unparalleled, high-quality and culturally sensitive legal services, while adhering to the highest standards of integrity and excellence.

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