

GETTING THE DEAL THROUGH

Product Liability

in 36 jurisdictions worldwide

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Civil litigation system

1 What is the structure of the civil court system?

The structure of the civil court system is subject to cantonal state law and therefore differs from canton to canton.

Generally, cantons are divided into jurisdictional districts with District Courts operating as courts of first instance. Cantonal Superior Courts serve as appellate bodies for judgments rendered by these District Courts but also as courts of first instance for a limited number of subject matters and claims.

Some cantons – Zurich, Bern, St Gall and Aargau – have established a specialised Commercial Court (*Handelsgericht*), which has sole cantonal jurisdiction over commercial matters. In the Cantons of Zurich and St Gall there is additionally a Court of Cassation, which reviews judgements rendered by the Superior Court and the Commercial Court.

The Swiss Federal Supreme Court is Switzerland's highest court and the sole federal court in civil matters. Final cantonal decisions may be appealed to the Swiss Federal Supreme Court for violation of federal law if the amount of the judgement exceeds 30,000 Swiss francs (approximately €18,600).

The civil procedure in cantonal courts is governed by cantonal codes of procedure (which differ to quite some extent, depending on the canton and the issue). In general, the following comments only refer to civil proceedings in the Canton of Zurich.

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

In principle, litigation in civil matters in Switzerland is adversarial. Therefore the parties have to present and establish the facts of the case to the court. However, judges are obliged to inquire if the pleading of a party is unclear, incomplete or vague. Furthermore, the questioning of witnesses, parties and experts in the evidentiary proceedings is conducted by the judge. Judges render their decision by freely weighing the presented evidence.

There are no juries in civil matters in Switzerland.

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?

In order to institute an action the claimant is to file a statement of claim with the competent court including the relief sought and a detailed description of all relevant facts. In addition, the claimant is to file or indicate available documentary evidence and indicate other means of evidence he or she wishes to rely on.

The court serves the statement of claim on the defendant and sets a time limit by which the defendant has to submit his or her statement of defence. The subsequent (second) submissions of the claimant and of the defendant are subject to the same procedure.

The court usually sets a time limit of 20 days, which is usually extendable two to three times, by 20 days each time.

4 What is the basic trial structure?

Litigation is predominantly conducted in writing. In an 'assertion phase' the parties present the facts of the case to the court by exchanging briefs (see question 3) and by submitting documentary evidence. In a subsequent 'evidentiary proceeding' the court takes evidence (on relevant and disputed facts that cannot be proven sufficiently by documentary evidence) in a hearing. These hearings usually take hours rather than days. Live testimony is usually not too extensive: the courts in practice tend to rely on documentary evidence. In general, the proceedings are public.

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

Swiss procedure laws do not provide for class action mechanisms or actions by representative bodies in product liability litigation.

However, claimants may bring a claim against the same defendant together as a group of claimants if the cause of action is sufficiently similar or identical, the same court is competent for all claims and if the same procedure is applicable to all individual claims.

6 How long does it typically take a product liability action to get to the trial stage of the proceedings and what is the duration of such a trial?

Since proceedings are primarily conducted in writing there is no trial stage. After submission to the court, the statement of claim is usually served on the defendant within a short period (see questions 3 and 4). There is a hearing to take evidence (which usually takes hours rather than days).

The overall duration of the proceedings depends on a multitude of factors, in particular the complexity of the case.

Evidentiary issues and damages

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

There are no pre-trial discovery procedures in Switzerland and there is, in general, no obligation to disclose documents and other evidence before the evidentiary proceedings.

However, pursuant to the Code of Civil Procedure of the Canton of Zurich parties should file documentary evidence in their possession to their briefs and make reference to any evidence they wish to rely on.

On the request of a party, the court may order a party to the proceedings as well as a third party to produce documents in its possession if another party to the proceedings wishes to rely on these as evidence (and if the court regards the issue as relevant).

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

The way evidence is presented to the court varies depending on the type of evidence. In general, there are the following means of evidence: witnesses, experts, parties' testimony, documentary evidence and inspections by the court.

Parties and witnesses give evidence by live testimony. Experts usually file written reports, but they may also render their opinion in the course of a hearing. Documentary evidence is to some extent submitted by the parties as attachment to their briefs (see question 7). An inspection of objects by the court can either be conducted in a hearing or outside the courtroom.

Questionings are always conducted by the judge, while the parties are entitled to subsequently ask additional questions. There are no cross-examinations.

- 9** Does the court have the authority to appoint experts? May the parties influence the appointment and may they present the evidence of self-selected experts?

The court has the authority to appoint experts. Parties may propose a specific expert to the court and can comment on and object to the decision of the court to appoint a specific expert.

Experts give evidence by written report or orally. In the latter case they are questioned by the court. Parties may ask additional questions. However, there is no cross-examination.

The parties may present the evidence of self-selected experts. However, such expert opinions do not qualify as means of evidence. In practice, a party may present the findings of its self-selected expert as part of its pleadings and file the report as an exhibit to its brief, and such party-selected expert opinion may, depending on the reputation of the expert and the quality of the report, actually have quite some influence on the court.

- 10** What types of compensatory damages are available to product liability claimants and what limitations apply?

Pursuant to article 1 paragraph 1(a) of the Product Liability Act (PLA) (see question 16) compensatory damages are available for all damages caused by death or personal injury. Furthermore, compensation for damage to, or for destruction of, any item of property other than the defective product itself, provided that the item of property is of a type ordinarily intended for private use or consumption and was used by the claimant mainly for his own private use or consumption is available based on the PLA

(article 1 paragraph 1(b)). However, a producer is only liable for damages in excess of 900 Swiss francs (approximately €559) to such property (article 6 paragraph 1 PLA).

Since the PLA provides only for a supplemental cause of action, damages that are not recoverable under the PLA may be claimed based on other legal grounds, in particular tort or contract law.

Based on tort liability all damages caused by death or personal injury as well as all damages to property other than the defective product itself, in particular damages to commercially used property, can be recovered. Furthermore, a judge may award based on tort law an adequate sum of money as reparations where a person has been killed or has sustained bodily injury (article 47 Swiss Code of Obligations (CO)). The judge will base his or her decision regarding the award of reparations mainly on the degree of the injury and the degree of fault of the tortfeasor.

Damages to the defective product itself can only be recovered based on contract law (eg, article 97 et seq, and 197 et seq CO).

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

Punitive, exemplary, moral or other non-compensatory damages are not available in Switzerland and are considered incompatible with Swiss public policy. Pursuant to article 135 paragraph 2 of the Federal Act on Private International Law (PIL) a Swiss court may not award punitive damages even if the applicable foreign substantive law provides for such damages.

Litigation funding, fees and costs

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

A party can be exempted from paying court fees if it can show that it is unable to pay these costs and that the case at hand is not without any reasonable chance. If necessary for the protection of the rights of such a party, a cost-free attorney can be appointed by the court.

A potential defendant can contest the grant of such aid by means of a submission to the court.

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

Parties may fund litigation by third parties and may promise in return a share of the result to such third parties.

- 14** Are contingency or conditional fee arrangements permissible?

Contingency fee arrangements with attorneys are not permissible in Switzerland. However, attorneys may enter into an arrangement as to success fees, but only in addition to a non-conditional, basic remuneration (which must, however, cover at least the attorney's costs and expenses and also contain some profit element).

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

The loser pays rule applies. The successful party can recover its legal costs (attorney fees and expenses) from the unsuccessful party. Whilst the unsuccessful party has to bear all court costs,

the amount of legal costs (attorney fees and other expenses) to be compensated is governed by a statutory tariff schedule and mainly depends on the amount in dispute.

Sources of product liability laws

16 Is there a product liability statute that governs products litigation?

In 1994 the Product Liability Act (PLA) was enacted. To a large extent the provisions of this statute resemble the EEC Directive 85/374 on product liability.

The PLA provides for a strict liability for manufacturers, importers and suppliers (see question 23) for personal injuries and damages to items of property in private use caused by defective products. A product is defective pursuant to the PLA if it does not provide the safety which a person is entitled to expect (see question 21).

The PLA provides only for a supplemental cause of action and does not affect any rights that a claimant may have based on other legal grounds. Thus, an injured person may base a claim on the PLA or alternatively on tort, contract or public law (article 11 paragraph 1 PLA).

17 What other theories of liability are available to product liability claimants?

Apart from the PLA, damages may alternatively be recovered based on tort, contract or provisions of public law regulating specific kinds of products, industries or activities.

General tort law provides for a fault-based liability of any person who unlawfully causes damage to another (article 41 et seq CO). However, liability based on tort law is predominantly derived from the liability of the principal (article 55 CO). Pursuant to this provision, a principal, such as a company, is liable for damages caused by its employees or other auxiliary persons in the course of their employment or business.

Under contract law damages may be recovered based on general contractual liability (article 97 et seq CO) or based on special contractual provisions, such as sales warranties (article 197 et seq CO) or the responsibility of the contractor (article 368 et seq CO). In general, contractual liability is fault-based.

A claim may furthermore be based on statutes regulating specific kinds of products, industries or activities and that contain product liability provisions.

While tort law is an important basis for product liability claims, contractual liability only plays a subordinate role in product liability litigation in Switzerland.

Although the following comments mainly refer to product liability based on the PLA, references will also be made to tort law, given the importance of tort law as cause of action in product liability, in particular in large-scale litigation.

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

There is no consumer protection statute (as to the PLA, see above).

19 Can criminal sanctions be imposed for the sale or distribution of products determined to be defective?

The PLA does not provide for criminal sanctions. However, criminal liability might arise under the Swiss Penal Code (SPC). In product liability cases criminal liability will usually arise from negligent bodily injury (article 125 SPC) and involuntary man-

slaughter (article 117 SPC).

Pursuant to article 102 SPC, not only individuals, but also a company can be liable under the Penal Code if the responsible individual cannot be identified within the organisation and the criminal act occurred within the company's course of business.

Additionally, certain statutes governing special products, industries or activities provide for criminal sanctions (eg, article 13 of the Federal Act on the Safety of Technical Installations and Appliances (STEG)).

However, the conditions for criminal sanctions differ from those of the PLA, tort and contract law. A liability arising under the latter therefore does not lead automatically to criminal sanctions.

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

There are no such novel theories available.

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

Pursuant to the definition in article 4 PLA, a product is defective if it does not provide the safety which a person is entitled to expect taking all circumstances into account. In particular the following circumstances have to be taken into account (article 4 paragraph 1 PLA):

- the presentation of the product to the public;
- the usage of the product one would reasonably expect that the product would be put; and
- the time the product was put into circulation.

A product defect pursuant to this definition can, among others, be the result from a deficient construction or design of the product, a defect in the process of manufacturing or a failure to properly instruct the users or consumers of the product.

22 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? On what standard must defect be proven?

The standard by which the defect of a product is determined is the legitimate expectation of a user or consumer in the safety of the product. A product has to provide a degree of safety that a normal and average user of the target group of the product is entitled to expect. The actual expectations of an individual are not relevant.

The claimant has to prove that the product does not provide the safety that could be expected at the time it was put into circulation. However, he or she does not need to prove that the relevant defect was already present when the product was put into circulation.

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

Pursuant to article 2 PLA, the 'producer' is strictly liable for injuries and damages caused by a defective product. The statute provides for a broad definition of the term 'producer' which includes (pursuant to article 2 paragraph 1 PLA):

- the manufacturer of a finished product, the manufacturer of a component part as well as the producer of any raw material;
- any person who, by putting his or her name, trade mark or other distinguishing feature on the product presents him or

- herself as its producer; and
- any person importing a product for sale, hire, leasing or any form of distribution in the course of his or her business into Switzerland.

Each supplier of a product is subsidiarily liable if he does not disclose the identity of the producer or the person who supplied him or her with the product and, if applicable, the importer upon request of the injured person within a reasonable period of time.

The claimant is burdened to prove that the defendant is a producer within the definition of article 2 PLA.

In general, tort and contract law provide for a fault-based liability of manufacturers and suppliers.

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

In order to establish liability there has to be a so called 'adequate causation' between the defect of the product and the injury or damage. A defect constitutes an adequate causation for an injury or damage if the defect is in accordance with everyday experience and the usual course of events suitable to cause the damage. The damage therefore has to be caused by the defect to a substantial degree, mere natural causation is not sufficient.

The claimant seeking relief has to prove the adequate causation link between product defect and damage.

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

The PLA does not contain any provisions on post-sale duties, such as a duty to recall defective products or a duty to supplement warnings. However, such duties might arise pursuant to legal doctrine under tort law (article 41 and 55 CO). In Swiss law, legal doctrine – being defined as legal treatises written by scholars, university professors, lawyers, and others – has, in principle, the same relevance as case law (cf article 1 paragraph 3 Swiss Civil Code).

Pursuant to such doctrine, a producer has a duty to monitor its products after sale in order to take the appropriate measures if hitherto unknown sources of danger give rise to risk of damages. If a producer realises that its product might lead to damages, it has to take all appropriate measures to prevent potential future damages. This includes the obligation to, if possible, immediately change the design of the product or otherwise halt production, to change the relevant documentations and instructions or both. It furthermore obliges the producer to take all appropriate measures to prevent damages resulting from products already put into circulation, be it through the publication of new instructions and warnings or via a recall of the respective products.

Limitations and defences

- 26** What are the applicable limitation periods?

The limitation periods differ between the various legal grounds of liability.

Claims for the recovery of damages brought under the PLA are subject to a relative statute of limitations of three years, which period begins to run from the day the claimant became aware or reasonably should have become aware of the damage, the defect and the identity of the producer (article 9 PLA).

Additionally, article 10 PLA provides for an absolute statute of limitations barring any claims that are brought later than 10 years after the defective product that caused the damage was put into circulation.

Claims based on tort law are subject to a relative statute of limitations of one year after the day the claimant was aware or reasonably should have become aware of the damage and the liable person (article 60 paragraph 1 CO) and to an absolute statute of limitations of 10 years after the tortious act.

The general statute of limitations for contractual claims is 10 years. However, a claim based on sales warranties is barred one year after the delivery of the purchased product and furthermore requires an immediate notice of defects by the buyer.

- 27** 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 of proof and by what standard is the defence determined?

Pursuant to article 5 paragraph 1(e) PLA, the producer is not liable if, based on the state of scientific and technical knowledge at that time the product was put into circulation it was not in a position to discover the defect.

The producer bears the burden of proof that the defect was not discoverable at the time it was put into circulation.

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

Under the PLA a producer is not liable if it proves that the defect occurred due to compliance with mandatory regulations issued by the public authorities (article 5 paragraph 1(d)).

However, a producer is obliged to design a product according to the latest state of scientific and technological knowledge. The compliance with existing voluntary standards does therefore not exempt a producer from liability if the standards do not represent the latest state of scientific or technological knowledge.

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

In addition to the above mentioned defences, article 5 paragraph 1 PLA provides for further statutory defences. Accordingly, a producer is not liable if it proves:

- that it did not put the product into circulation;
- that, 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 it; or
- that the defective product was neither manufactured for sale or any other form of distribution for economic purposes nor manufactured or distributed in the producers' course of business.

A producer of raw material or of a component is not liable if it can show that the defect resulted from the design of the product in which the raw material or component was incorporated or that the defect resulted from the instructions given by the producer of the final product (article 5 paragraph 1 PLA).

Outside of the scope of the PLA there is a variety of possible defences exempting the producer from liability. Pursuant to article 44 CO the judge may reduce or completely deny any liability based on tort law for damages if the damaged party consented to the act causing the damage or if circumstances for which the damaged party is responsible have caused or aggravated the damage.

Jurisdiction analysis

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

The PLA largely follows the EEC directive on product liability and therefore effected an approximation of the Swiss product liability law to provisions of the European Community despite the fact that Switzerland is not a member state. Although Swiss product liability law features a high degree of legal development, its utilisation by consumers to redress perceived wrongs is in practice rather limited.

31 Have there been any recent seminal events or cases that have particularly shaped product liability law?

There have been no recent events that have particularly shaped product liability law in Switzerland.

32 Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs?

See question 30.



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