



## LEGAL FOCUS

# Bringing subrogation claims against product manufacturers in China is challenging



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## Product liability litigation in China is arduous and challenging, particularly for insurers that first need to substantiate their subrogation rights



Jan Holthuis, Li Jao and Jing Wang  
Buren

Given China's position as a global manufacturing power, there have been numerous cases in which international companies have been involved in product liability claims that have roots in China. In many cases, the claimant's insurer will look to seek subrogation rights to claim against the local manufacturer. The challenges of doing this are numerous and considerable patience and local expertise are required to have a hope of success.

The good news is, according to Article 60 of the People's Republic of China (PRC) Insurance Law, when claims were caused by third parties, insurers are entitled to claim indemnity up to the amount of the damages reimbursed to the insured.

The opinion of PRC Supreme People's Court has further clarified that whether the insurance payment made by the insurer was reasonable has no practical influence on the interests of the third party.

Therefore, once a claim has been paid, the insurer automatically gains subrogation rights, providing it can give proof of payment to the insured to the Chinese court.

However, in practice, before agreeing subrogation, the court is likely to want to see confirmation of the following issues: is the policyholder the right holder in the assigned claim; are the alleged damages covered by the insurance policy; and is the compensation paid pursuant to the governing law?

### Same rules apply

Although under Chinese law the insurer brings a third-party claim in its own name, the rules applicable to the claim will be the same rules governing the claim the insurer would have brought against the third party, based on either breach of contract or tort.

Contractual damages in China generally include the direct losses and expected benefits (interests). Chinese law follows the rule of

foreseeability, which requires the damages should only be awarded if they are the probable consequences of the breach and such consequences are foreseeable by the parties at the time of contract. There is no agreed test in contract law to determine foreseeability and in practice it is up to the court what damages are foreseeable.

The specific scope of damages caused by defective products is unclear; however, in practice it is generally accepted that apart from property damages, the pure economic loss should be recoverable and the test of proximity cause and foreseeability will be used by the court to determine this.

It is important to be aware subrogated product liability claims in China must be brought within the defined time period. In 2013 the Supreme People's Court confirmed that the clock starts running from the insurer's obtaining subrogation rights (ie, the payment of the claim).

By default the claimant has a three-year period to protect its rights and interest, from the date on which the claimant is aware of or ought to be aware of any infringement of its rights and interests. There are special rules separately stipulating the limitation period for disputes arising from international sale of goods contracts (four years) and product liability claims (two years).

Generally, the default position in civil litigation proceedings is the claimant must prove its claims to avoid unfavourable judgment.

Years of practice in Chinese courts has create a precedent and *prima facie* evidence is usually required.

The test for such *prima facie* evidence is objective, namely it is reasonably believed the products in question may contain flaws or defects that may cause or contribute to the accident. The test and threshold are by no means uniform. Considerations are given to special circumstances in each case and reflect the claimant's capability for gathering evidence. The allocation of burden of proof is well within the remit of courts' discretion and varies from case to case.

### Judicial authentication

To prove the "defective" nature of a subject product, judicial authentication has been widely adopted by Chinese courts. A list of companies or organisations with recognisable qualifications and experts is available, from which the claimant or defendant may choose someone to present reports in supporting its claims. Mutual appointment is also acceptable between claimant and defendant. However, if no agreement can be reached, courts are empowered to appoint someone from the list through a judicial lottery system.

The situation becomes rather opaque when it comes to reports provided by an expert from a foreign institution or company, as Chinese courts may struggle to verify their credibility. It will most likely not be accepted by Chinese courts, so use opens up a whole front of risks. To put it into a prod-

uct liability context, although the burden of proof for consumers or end users to initiate a claim is a *prima facie* one, whether a foreign expert report (FER) may help tip the scale depends on, to a large extent, its credibility and the court's discretion.

It is therefore recommended to gather proof of relevant international, national or trade standards; how those standards have (or not) been met; to preserve all or part of the defective products in anticipation of assessment at the later stage; and to search for suitable Chinese experts in the relevant field in preparation for a second expert report to be produced by them commenting on the first FER and arrange for such experts to testify in Chinese courts.

Product liability litigation in China is an arduous and challenging expedition, particularly for insurers that first need to substantiate their subrogation rights before the Chinese court. On top of the necessary long-term mindset, it is perhaps pragmatic to arm oneself with ammunition for multi-tier approaches at the outset. It is also great of value to involve a legal team combining expertise in international insurance practice and Chinese local expertise in recovery right of insurers and product liability claims, if the insurer hopes to have success. ■

Jan Holthuis and Li Jiao are partners and Jing Wang is a senior adviser at Buren, a member of Global Insurance Law Connect