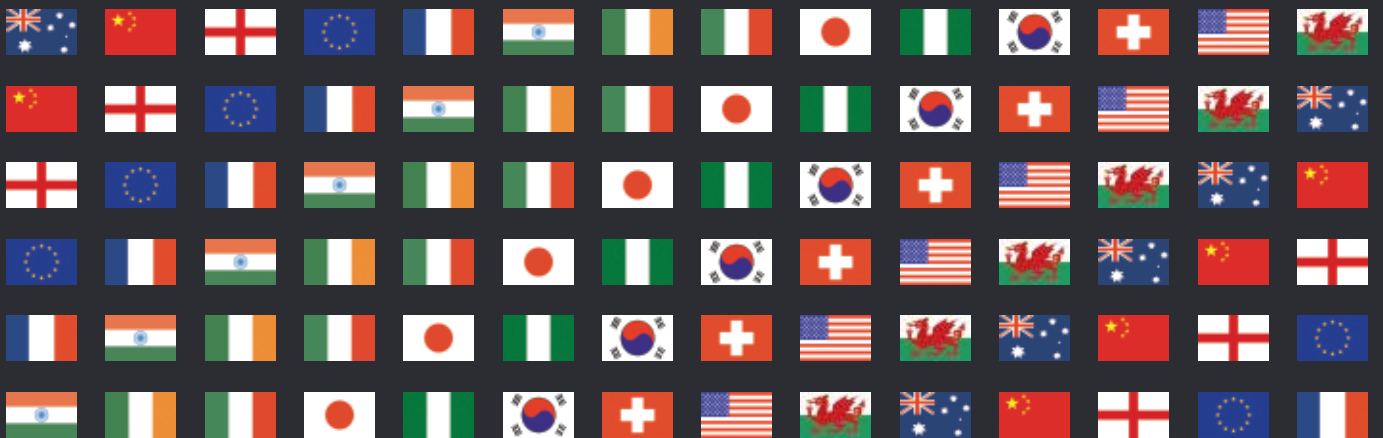


# Product Liability 2020

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# Product Liability

## 2020

**Contributing editors****Rod Freeman and Sarah-Jane Dobson****Cooley LLP**

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Lexology Getting The Deal Through is delighted to publish the thirteenth edition of *Product Liability*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China and the European Union.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Rod Freeman and Sarah-Jane Dobson of Cooley LLP, for their assistance with this volume.



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# China

Jan Holthuis, Li Jiao and Jing Wang

Buren NV

## CIVIL LITIGATION SYSTEM

### The court system

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

The people's courts are judicial organs exercising judicial power on behalf of the state. In general, the civil court system comprises the Supreme People's Court, local people's courts and specialised people's courts at various levels. The local people's courts are divided into three levels, namely:

- the basic people's court;
- the intermediate people's court; and
- the higher people's court.

In parallel with the local people's courts system, there are specialised people's courts set up for the trial of specialised cases, which include:

- military courts;
- railway courts;
- maritime courts;
- forestry courts;
- agricultural reclamation courts;
- financial courts;
- IP courts; and
- internet courts.

China practises a system of courts characterised by 'four levels and two instances of trials'. 'Four levels' refers to the four levels of courts in the hierarchy above and 'two instances of trials' means that a civil case should be finally decided after two trials; however, this is subject to retrial if there is error in the judgment.

The subject matter, nature or size of the claim will determine which level of the court it must be brought to for the first-instance trial. For example, an intermediate people's court will have jurisdiction as the court of first instance in the following types of civil case:

- major cases involving foreign parties;
- cases with significant impact in the areas over which the court exercises jurisdiction; and
- cases that the Supreme People's Court determines come under the jurisdiction of the intermediate people's courts.

A higher people's court will have jurisdiction as the court of first instance in civil cases that have a significant impact in the areas over which the court exercises jurisdiction.

The Supreme People's Court will have jurisdiction as the court of first instance in the following types of civil case:

- cases that have a significant impact on the whole country; and
- cases that the Supreme People's Court deems it should try by itself.

### Judges and juries

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

China adopts an inquisitorial system whereby the judges take a dominant role in the trial and are actively involved in fact finding by questioning the parties, advocates of the parties and witnesses. This is opposed to the adversarial system adopted by most common law countries where the fact-finding process is controlled by the parties and the judge or jury remains neutral and passive throughout the proceeding.

The Chinese judicial system does not provide for juries, and the bench plays the roles of both fact finding and law application. If a collegiate bench is established to adjudicate a civil claim, it generally consists of purely professional judges. However, people's jurors may be appointed to the collegiate bench to participate in the hearing of:

- cases of group interest;
- cases of public interest;
- cases concerning the general public; and
- cases that may have other major social impacts.

Similar to the jury, people's jurors' main responsibility in the bench is to conduct fact-finding in the trial. What is different is that the people's jurors enjoy the same rights as regular judges after assuming their posts and sit in the bench with the regular judges. People's jurors are selected from citizens who are non-legal professionals with certain requirements regarding:

- age;
- education; and
- historical record of conduct.

Since there is a list of eligible people's jurors in place in every people's court, the selection process for each case will be conducted through a computer on a random basis. Further, for special cases requiring people's jurors with specific professional knowledge, the people's court may randomly select the jurors from people's jurors with the required professional knowledge.

### Pleadings and timing

#### 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?

The basic pleadings are as follows:

- Civil complaint: a civil complaint is submitted by the claimant to the people's court for the filing of a lawsuit, and the number of duplicate copies to be submitted is based on the number of defendants.
- Civil pleading: the defendant will be given notice of the claim, served with a copy of the civil complaint, within five days of acceptance of the case. The defendant is allowed to file a civil pleading

within 15 days from receipt of notice of the claim and the court will deliver a copy of the civil pleading to the claimant within five days from the date on which it receives it.

- Civil complaint for counterclaims (if any): the defendant can file a counterclaim before the end of the evidence submission period. The period for evidence submission can be decided either by the parties subject to court approval or by the court (15 days minimum).

### Pre-filing requirements

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

Generally, there are no mandatory pre-filing requirements imposed before the civil proceeding can be issued, except in limited cases, which do not include product liability disputes.

However, there are some pre-filing measures available to assist in bringing a product liability lawsuit. For example, to ensure a smooth investigation during the proceeding, the enforceability of the judgment and the suspension of damages caused to the party, such party can apply to the court for the preservation of evidence, preservation of property and relevant injunctions before the action is initiated, depending on the circumstances and in the event of an emergency.

### Summary dispositions

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

Under Chinese law, judicial mediation can be considered as an alternative resolution.

When a claim is filed to the court, rather than bringing a full trial through civil proceedings, the parties concerned can request judicial mediation, provided that this is requested voluntarily under free will and the facts are clear.

Complex civil procedures are reduced if the dispute is solved through judicial mediation, which is more effective. If a mediation agreement is reached by the parties, the court will prepare a written mediation statement confirming the agreement, which has the same effect and enforceability as a judgment.

### Trials

#### 6 | What is the basic trial structure?

The Chinese judicial system adopts an inquisitorial procedure in which the parties play a relatively minor role and the judges take the lead. The Civil Procedure Law emphasises the centralism of trials, which are led by judges and where advocates fully exercise their rights. Under articles 138 to 148 of the Civil Procedure Law, a hearing is divided into several major stages, including:

- investigation;
- debate;
- final opinions of all parties; and
- judgment.

As stipulated in article 142 of the Civil Procedure law, mediation is available if it can be carried out before the judgment is made. Where the mediation is unsuccessful, the court will promptly make a judgment.

According to article 73 of the Civil Procedure Law, on consent by the court, a witness may testify by way of audiovisual transmission techniques (ie, live testimony), if they cannot attend court owing to:

- health reasons;
- a long journey and inaccessibility;

- force majeure (eg, natural disaster); or
- any other justified reasons.

Although this provision was established in 2013, live testimonies appear to have become more common in local courts since 2015. In 2017 the first case of live testimony through WeChat video took place in Guangzhou City, which has since made it easier to conduct live testimonies.

Hearings in civil litigation proceedings are accessible for the general public, except in cases involving state secrets or issues of privacy, or issues otherwise stipulated under the law.

For divorce cases and cases concerning trade secrets, hearings may not be held in public if a prior application is filed by a party.

Court documents such as judgments and orders are available to the public via an official website. There are also other websites and databases from which judgments and orders can be downloaded.

Other court documents such as witness statements and pleadings are not usually open to the public. On due authorisation, qualified Chinese lawyers may have access to these documents following the relevant procedural steps. Taking notes or making photocopies of these documents is allowed.

### Group actions

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

The Civil Procedure Law provides joint actions and representative actions for product liability claimants.

The case will be tried as a joint action, subject to the consent of the parties, if:

- either party comprises two or more people;
- the object of the action is the same or of the same category; and
- the court holds that the case can be tried as a joint action.

Representative actions are a kind of joint action. In a representative action, one party comprises numerous people and the action is brought by a representative elected among such persons. The procedural acts of the representative will be binding on all members of the party that they represent. However, the representative's modification or relinquishment of claims, recognition of the other party's claims or involvement in mediation will be subject to the consent of the parties that they represent.

Collective actions mostly occur in labour disputes – in particular, in cases of equal pay for equal work.

Representative bodies are allowed to bring public interest actions regarding product liabilities. However, such actions are restricted. Under article 47 of Law of the People's Republic of China on the Protection of Rights and Interests of Consumers, the China Consumers' Association and consumer associations established at provincial level may only file a lawsuit with a people's court for actions that harm the legitimate rights and interests of many consumers.

### Timing

#### 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?

First-instance civil claims are generally concluded within six months from the commencement of the proceeding, which includes the following stages:

- Starting the proceeding: the civil proceeding starts when the claimant's complaint is registered and filed by the court.
- Notice to the defendant and defence: the defendant will be given notice of the claim, served with a copy of the claimant's statement of claim, within five days of acceptance of the case. The defendant

must file a statement of defence within 15 days from receipt of notice of the claim and the court must deliver a copy of the statement of defence to the claimant within five days from the date on which it receives it.

- Evidence submission: the period for evidence submission can be decided either by the parties subject to the court approval or by the court (15 days minimum).
- Counterclaims (if any): the defendant can file a counterclaim before the end of the period for evidence submission.
- Hearing: the court will notify the parties and other participants in the action three days before the hearing. During the court hearing, the procedure is generally divided into the investigation of the facts and the presentation of arguments.
- Rendering judgment: if a judgment is issued immediately after the hearing, the written judgment will be served to the parties within 10 days. If a judgment is issued on a fixed date, the written judgment will be served to the parties immediately after the issuing.

Under exceptional circumstances, an extension of six months may be granted, subject to the approval of the president of the court. For a further extension, the approval of the higher-level court is required.

However, these time limits do not apply to trials of foreign-related civil cases.

## EVIDENTIARY ISSUES AND DAMAGES

### Pretrial discovery and disclosure

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

Similar to pretrial discovery and disclosure, the Civil Litigation Law and its interpretations have established a set of evidence-focused rules for the pretrial stage. This is called the 'pretrial exchange of evidences' (PEE).

PEE is designed for both parties to produce, exchange and cross-examine evidence in order to unravel disputed issues. PEE also serves as a tool to expedite and better manage litigation proceedings. PEE can be held when the court permits a party's application or in more complicated and high-profile cases, where the courts should convene PEE.

During the PEE, the courts will hear and keep record of facts and evidence on which the parties have no objection, and those with which the parties dispute. A party may submit rebuttal evidence in response to the evidence submitted by the other party. Further exchange may be arranged at the courts' discretion. In general, PEE should not be held more than twice, unless the case is particularly significant or complicated, and the courts deem that an additional PEE is necessary.

Evidence can also be preserved through interim relief, if it can be demonstrated to the courts' satisfaction that without this, evidence is more likely to be tempered with by the other party and thus pervert the course of justice. Whether interim relief can be granted at the pretrial stage depends on the urgency and necessity of the circumstances. Conditions may also be imposed before interim relief is granted (eg, the courts may request applicants to provide a certain amount of guarantee).

### Evidence

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

Pursuant to the Civil Litigation Law, the evidence accepted by Chinese courts can be categorised into:

- personal statements;
- documentary evidence;

- physical objects;
- audiovisual materials;
- electronic data;
- witness testimony;
- examination reports; and
- investigation records.

Of these, documentary evidence is the most commonly used one.

During a trial, the claimant should first present its evidence to the court, followed by a cross-examination conducted by the defendant. It is then the defendant's turn to present its evidence and for the claimant to cross-examine.

For each item of evidence, cross-examination should be focused on:

- authenticity;
- legality; and
- relevance.

Parties are expected to give their views on each of these aspects and the reasons why the evidence in question is falsified, illegally obtained or irrelevant.

People who have knowledge of the facts are obliged to testify in court as witnesses. The courts have the power to summon witnesses to testify at the trial and, when requested, witnesses must do so accordingly. Under certain circumstances and if the courts permit it, a witness may testify by way of:

- written testimony;
- audiovisual transmission techniques;
- audiovisual materials; or
- other means.

### Expert evidence

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

Instead of appointing experts, Chinese law and practice has developed another system, which bears similar features to experts but is operated differently. This is called 'judicial appraisal'.

Judicial appraisal has been widely adopted by Chinese courts in civil and commercial litigation. In general, a list of institutes – either companies or organisations – with recognisable qualifications and experience in a particular field is provided, from which the claimant or defendant may choose a party to conduct the judicial appraisal procedure and present reports to support its claims.

Mutual appointment is also acceptable. However, if no consensus can be reached between both parties, the courts are empowered to appoint an institute from the list. In some courts, this is achieved through a judicial lottery system. As the name indicates, the judicial lottery system enables a qualified judicial appraisal institute to be chosen randomly through a lottery machine.

In any case, the courts have discretion and can act on their own accord to initiate the judicial appraisal procedure, if they deem it necessary.

The results of the judicial appraisal are often set out in an official report. This report is then presented to the courts for cross-examination and further consideration. If the courts deem it necessary, an inspector from the chosen institute – who is in charge of the judicial appraisal and often the signatory of the report – can be summoned to testify and be cross-examined by all parties. During cross-examination, the parties may, if the courts permit, have a specialised expert ask specific and technical questions to the inspector of the judicial appraisal institute.

## Compensatory damages

### 12 | What types of compensatory damages are available to product liability claimants and what limitations apply?

Compensatory damages available to product liability claimants generally include:

- bodily injury;
- damage to property; and
- moral damages.

Article 44 of the Product Quality Law sets forth detailed compensatory damages in relation to bodily injury and damage to property.

If a defective product causes bodily injury, the responsible party must compensate for:

- medical and nursing expenses during medical treatment; and
- the loss of income owing to absence from work and other reasonable expenses.

If the bodily injury results in the claimant being permanently disabled, the responsible party must also cover the costs of:

- self-supporting equipment;
- living allowances;
- disability compensation; and
- living expenses of any dependants of the disabled person.

If the defective product causes death, the responsible party must compensate for:

- funeral expenses;
- death compensation; and
- the living expenses of any dependents.

If a defective product causes damage to property, the party responsible must:

- restore the property to the original condition; or
- provide compensation.

Compensatory damages for psychological injury are available when there is an injury or damage to the claimant's life, health or body.

Such damages are subject to the test of seriousness. If the injury is not serious, the claim may not be supported, in which case, the courts may – depending on the circumstances – give alternative orders to:

- cease infringement;
- restore reputation;
- eliminate the effects; or
- issue an apology.

However, if the consequences are sufficiently serious, the courts may, in addition to the orders above, order an appropriate amount of compensatory damages to the injured party reflecting the psychological injury.

These positions are reiterated under article 22 of the Tort Law.

## Non-compensatory damages

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

Punitive compensation is available to product liability claimants under Chinese law. This is mainly enshrined in the Tort Law.

According to article 47 of the Tort Law, where a manufacturer or supplier manufactures or sells a product knowing that it is defective and, as a result, causes death or serious injury, the injured party is entitled to claim for punitive compensation.

Following the promulgation of the Law on Protection of Rights and Interests of Consumers (the Consumer Rights Law) in 2014, the

maximum amount of punitive compensation has been confined to two times the amount of (the consumers') losses.

The implication of this is, for example, if consumers (ie, those who purchase products for their own consumption only) were to be found dead or have their health seriously damaged because of the defects of the products concerned, of which the sellers had prior knowledge, the consumers would be entitled to claim for punitive damages for no more than twice the amount of their losses. Such losses are defined under articles 49 and 51 of the Consumer Rights Law, which includes:

- reasonable expenses for treatment and rehabilitation;
- loss of income;
- assisted living facilities and disability compensation in the event of disability; and
- funeral expenses and death compensation in the event of death.

## Other forms of relief

### 14 | May a court issue interim and permanent injunctions in product liability cases? What other forms of non-monetary relief are available?

There are no specific regulations on interim or permanent injunctions issued by a court for product liability cases.

The forms of non-monetary relief provided by Chinese law in product liability cases mainly include:

- the repair, replacement or return of the product; and
- product recall (ordered by State Administration of Market Regulation and its local counterparts).

## LITIGATION FUNDING, FEES AND COSTS

### Legal aid

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

Under Chinese law, legal aid plays a limited role and public funding is not available in product liability litigation.

Under article 10 of the Legal Aid Regulations, the claimant may only apply for legal aid when claiming:

- state compensation;
- social insurance benefits or the minimum subsistence allowance;
- a pension or relief fund;
- alimony, upbringing or support;
- labour remuneration; or
- civil rights and interests arising from voluntary felon fighting.

However, the Supreme People's Court Provisions regarding the Judicial Assistance to Parties with Economic Difficulties provide that any party to litigation that faces genuine economic difficulties can defer payment of, reduce or be exempt from litigious costs subject to the decision of the court.

### Third-party litigation funding

### 16 | Is third-party litigation funding permissible?

Third-party litigation funding is neither prohibited under Chinese law nor sufficiently developed.

In recent years, some Chinese commercial organisations have begun to practise third-party litigation funding at an exploratory stage. For example, in 2015 Bangying was established to provide legal consulting and litigation funding. However, there is still no unified norm or common practice in regard to third-party litigation funding. As the



legislation has not yet caught up with the market, there is also a lack of supervision on market entrance.

### Contingency fees

#### 17 | Are contingency or conditional fee arrangements permissible?

Contingency fees (also referred to as the 'risk agency charging method') can be chosen by and between lawyers and clients. The contingency fee means that:

- there is no fee if the party loses; and
- lawyers charge a relatively high proportion of the amount awarded when they win a case; however, the maximum amount must not exceed 30 per cent of the amount specified in the risk agency contract.

Further, there are certain kinds of cases in which contingency fee arrangements cannot apply, although these do not include product liability claims.

### 'Loser pays' rule

#### 18 | Can the successful party recover its legal fees and expenses from the unsuccessful party?

Under article 29 of the Measures on Litigation Fee Payment, the successful party can recover its court costs from the unsuccessful party, unless the successful party voluntarily bears these costs.

Generally, the successful party cannot recover its attorney fees and other expenses under the court's orders unless:

- the parties have agreed in a contract that the lawyer fees generated for the winning party will be borne by the losing party and a dispute arises relating to the contract, in which case, the court order the lawyer fees as agreed; or
- when the law explicitly prescribes that the losing party must bear (reasonable parts but not all of) the lawyer fees of the winning party; such cases include:
  - personal injury compensation cases;
  - copyright, trademark or patent infringement cases;
  - unfair competition cases;
  - contract disputes in which the creditor has exercised the right of revocation; and
  - legal aid cases.

## SOURCES OF LAW

### Product liability statutes

#### 19 | Is there a statute that governs product liability litigation?

The Product Quality Law is a unified statute that governs product liability claims. Article 41 of the law imposes strict liability on the producer of a defect product. This means that a producer may be held liable without finding a fault (negligence or tortious intent), provided that the existence of a defect of the product, the damages thereof and the causality between the defect and the damages can be established. The subjective fault of the producer will not be taken into account. Producers can only be exempted from liability under one of the following statutory circumstances stipulated in paragraph 2, article 41 of the Product Quality Law:

- the product has not been put into circulation;
- the defect causing the damage did not exist when the product was put into circulation; and
- the level of science and technology at the time that the product was put into circulation was not sufficient to detect the existence of the defect.

In comparison, article 42 of the Product Quality Law imposes a false-based liability on the seller of a defective product under which the intent or negligence on the part of the seller must be established in order to hold it liable. However, although lack of fault by the seller can be established, article 42 further stipulates that if the seller is unable to identify the producer of the defect product or is unable to identify the supplier thereof, it must bear the liability for compensation.

The Product Quality Law does not provide exclusive legal grounds for product liability claims against a producer or seller. A damaged party can seek other causes of action based on tort law, contract law or consumer rights law.

### Traditional theories of liability

#### 20 | What other theories of liability are available to product liability claimants?

Chapter 5 of the Tort Law sets out the provisions on product liability. Article 41 stipulates that the manufacturers will bear tort liability in the event of product defects that have caused others to suffer damages. Pursuant to article 42, tort liability will only be borne by the seller in the event of product defects as a result of its negligence that have caused others to suffer damage. However, the seller must bear tort liability if it fails to specify the manufacturer and distributor of the defective products.

The product liability claimant may also bring a claim based on breach of contract where a contractual relationship is formed. Article 153 of the Contract Law stipulates that a seller must deliver the product in accordance with the agreed quality requirements. Article 155 of the Contract Law further provides that should the quality of the product fail to meet the quality requirements agreed, the buyer is entitled to hold the seller liable for breach of contract.

### Consumer legislation

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

The Law on Protection of Rights and Interests of Consumers (the Consumer Rights Law) is the main legislation protecting the rights and interests of consumers who purchase and use commodities or receive services for living consumption, and imposing duties on business operators (including producers and sellers). Under article 40 of the Consumer Rights Law, where a consumer suffers personal or property damage resulting from the defects of a commodity purchased, they can claim compensation directly from either the seller or the producer.

### Criminal law

#### 22 | Can criminal sanctions be imposed for the sale or distribution of defective products?

Section 1, Chapter 3 of the Criminal Law sets out the crimes relating to the production and sale of counterfeit and inferior commodities, including 11 provisions covering nine crimes committed by producers or sellers that are subject to sanctions. Depending on the type and seriousness of the crime committed, the sanctions imposed include:

- monetary penalties;
- imprisonment with a maximum of life imprisonment; and
- the death penalty.

### Novel theories

#### 23 | Are any novel theories available or emerging for product liability claimants?

There are no novel theories available or emerging.



## Product defect

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

Pursuant to article 46 of the Product Quality Law, the term 'defect' refers to the posing of an unreasonable danger in a product that threatens personal safety or the safety of third-party property. Where a product is regulated by national or industrial standards for the protection of personal health or personal or property safety, the term 'defect' refers to the non-compliance of the product with such standards. According to judicial practices, product defects can be categorised into:

- design defects;
- manufacturing defects;
- warning defects; and
- installation defects.

## Defect standard and burden of proof

25 | 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?

According to the Product Quality law, where national or industrial standards for the protection of personal health or personal or property safety govern and regulate a product, the product will be deemed defective when it does not comply with those standards. If no national or industrial standard available can be relied on, the defect in a product will be established based on the general statutory definition of a 'defect', which refers to the posing of an unreasonable danger in the product that threatens personal safety or the safety of third-party property. Whether unreasonable danger exists in a product is generally determined by the court on an individual case-by-case basis. According to judicial practice, the consumer expectation test is normally adopted, which refers to the expectation of safety that a reasonable consumer will have when such product is in normal use, within its general scope of purpose for use.

In general, as the claimant, the injured party bears the burden of proof with respect to the statutory constituent elements establishing the product liability (ie, defect, damage and causality between the two), while the producer as the defendant bears the burden of proof with respect to the statutory exemption circumstances provided in article 41 of the Product Quality Law or the seller as the defendant bears the burden of proof with respect to its lack of fault and the identification of the producer or supplier of a defective product. Failure to fulfil the burden of proof will result in the loss of the case. However, in judicial practice, considering that the claimant normally lacks expert knowledge and information of the product – especially in cases where the product is manufactured with complex technical processes and with advanced technology – the court may lower the standard of proof on the claimant's side. In this case, a reasonable connection between the defect in the product and the damage incurred will suffice. If the claimant has fulfilled the initial burden of proof, the defendant will be ordered by the court to furnish evidence to prove the non-existence of the defect in the product or its satisfaction with the statutory exemption circumstances.

As an exception, article 23 of the Consumer Rights Law stipulates that for business operators providing durable goods (eg, motor vehicles, computers, televisions, refrigerators, air-conditioners, washing machines) or renovation services, where a consumer discovers a defect within six months from the date of receipt of the goods or services and there is a claim, the business operator will bear the burden of proof pertaining to the defect.

For civil claims, including product liability claims, the courts widely adopt 'preponderance of the evidence' as the standard of proof, based on which the evidence with greater probative value will be upheld by the courts.

## Possible respondents

26 | Who may be found liable for injuries and damages caused by defective products? Is it possible for respondents to limit or exclude their liability?

Both the manufacturers and the sellers (including the direct seller, importer and distributor) may be held liable for injuries and damage caused by defective products. Article 43 of Product Quality Law and article 43 of Tort Liability Law both extend the subject scope of product liability to all sellers engaged in commercial sales.

Respondents may contractually limit or exclude their liability to the extent permissible by Chinese law. Under Chinese law, if a standard clause operates to exclude the liabilities of the party proposing the standard clause, to increase the liabilities of the other party or to remove important rights enjoyed by the other party, this clause shall be without effect. The clauses that exclude the liability relating to personal injuries sustained by the other party shall also be without effect.

## Causation

27 | 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?

'Preponderance of the evidence' is the standard of proof based on which the causation between the defect and injury or damages must be established. Generally, the claimant (the injured party) should bear the burden of proof with respect to the causation. However, in judicial practice, considering that the injured party, compared to the defendant (producer or seller), normally lacks professional knowledge of and information on the product concerned, a reasonable connection between the defect and the damage established by the injured party would be deemed sufficient by the court. Thereafter, the defendant must provide evidence to prove the non-existence of the product defect or its satisfaction with the statutory exemption circumstances.

## Post-sale duties

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

Article 45 of the Tort Law stipulates that where a product endangers the personal or property safety of others owing to defects, the injured party has the right to request that the manufacturer and seller bear tort liability (eg, elimination of obstruction or danger).

Article 46 of the Tort Law also obliges the producers and sellers to promptly adopt remedial measures (eg, warnings or product recalls) where product defects are discovered after the products are put into circulation. In the event of damages caused by failure to adopt remedial measures promptly or failure to adopt effective remedial measures, the manufacturer and the seller will bear tort liability.

## LIMITATIONS AND DEFENCES

### Limitation periods

29 | What are the applicable limitation periods?

As per the Product Quality Law, the limitation period for claims of damage compensation owing to alleged product defects is two years from the date on which the claimant became aware or should have known that his or her rights have been infringed.

However, as of 1 October 2017, the general rules on the limitation period for civil claims have been amended in accordance with the

general rules of the Civil Law, according to which the default limitation period is three years (ie, the claimant has a three-year period to protect its civil rights, commencing from the date on which the claimant became aware of or should have been aware of any infringement of his or her rights and interests and the identity of the obligor).

Claimants' rights will be extinguished after 10 years from the date on which the defective product causing the damage was delivered to the first consumer, except in cases where a period of safe use was clearly stated on the product and that period has not expired.

### State-of-the-art and development risk defence

**30** | 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?

The state-of-the-art and development risk defence is available under article 41 of the Product Quality Law. Pursuant to this, the manufacturer may be exempted from liability if it is able to prove any of the following:

- the defective product has not been put into circulation;
- the defect did not exist when the product was put into circulation; or
- the defect was not discoverable within the limitations of science and technology at the time that it was put into circulation.

To be successfully exemplified by using this defence, the manufacturer bears and should therefore discharge the burden of proof.

### Compliance with standards or requirements

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

Compliance with mandatory or industrial standards is generally considered as an influential factor in determining whether the products were defective or not. When defining the term 'defect', pursuant to article 46 of the Product Quality Law, this should refer to an unreasonable danger in the products that threatens personal safety or the safety of third-party property. Where a product is governed by national or industry standards for the protection of health, personal safety or the safety of property, the term 'defect' should mean non-compliance of such standards.

In this sense, products failing to meet established standards would be considered as defective products, but merely meeting established standards may not be a sufficient condition to be used as a defence against the alleged defect, as the product may still contain an unreasonable danger threatening personal safety or the safety of third-party property.

### Other defences

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

Other defences available to a product liability defendant include the claimant's fault and the action of a third party.

However, under certain circumstances, defences such as 'action of a third party' may only be available on a procedural front. For example, article 44 of the Tort Law sets forth the rights for seeking legal recourse when the defects were caused by the negligence of third parties (eg, transportation and warehousing companies). The manufacturers and sellers should first compensate the injured party and then seek legal recourse against the transportation and warehousing companies.

## Appeals

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

In summary, the Chinese judicial system is a two-tier system. The losing party in the first instance may appeal to higher courts, whether that is an intermediate court (if the trial court is a district court) or a high court (if the trial court is an intermediate court). If, in a high-profile case, the trial court is a high court, then the appeal must be filed to the Supreme Court.

The appeal must be filed within 15 days or 30 days (in the case of a foreign party) after the date on which the written judgment of the first instance is served. The appeal may be based on issues of both law and fact. As a general rule, after the appeal court gives its judgment, the case is closed.

Dissatisfied litigants can file for a retrial before the Supreme Court, but only under exceptional circumstances would the Supreme Court grant such an application.

## SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

### Settlement

**34** | What rules and procedures govern the settlement of product liability cases?

In the case of consumer goods, according to article 39 of Law on the Protection of Rights and Interests of Consumers, disputes over consumer rights and interests between consumers and business operators may be resolved through the following approaches:

- negotiating a settlement with the business operator; or
- requesting mediation through a consumer association or any other mediation organisation established pursuant to the law.

Other than the above-mentioned, there are no special rules and procedures governing the settlement of product liability cases.

### Alternative dispute resolution

**35** | Is alternative dispute resolution required or advisable before or instead of proceeding with litigation? How commonly is ADR and arbitration used to resolve claims?

In the case of consumer goods, article 39 of Law on Protection of Rights and Interests of Consumers regulates several forms of alternative dispute resolution (ADR), including lodging a complaint with the relevant administrative authorities and requesting arbitration based on the arbitration agreement entered into with the business operator.

Meanwhile, according to Civil Procedure Law, people's courts may carry out mediation in the trial of civil cases pursuant to the principle of voluntary participation by litigants.

Compared to litigation, ADR and arbitration is still far less commonly used in China to resolve product liability claims.

## JURISDICTION ANALYSIS

### Status of product liability law and development

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

The Tort Law and the Product Quality Law form the basis for the regulatory regime of Chinese product liability, which includes:

- the Law on Protection of Rights and Interests of Consumers;
- the Food Safety Law;

- the Drug Administration Law;
- the Regulations on Quality Responsibility for Industrial Products; and
- other regulations with respect to product recall and regulating product liabilities of special products.

The laws continue to develop and evolve to enhance protection standards and coverages. For example, in April 2019, the State Administration for Market Regulation announced its plan to overhaul the Product Quality Law. Further, the State Administration of Market Regulation issued the Interim Provisions on the Administration of Recall of Consumer Goods and the Interim Measures for the Administration of Supervisory Spot Checks on Product Quality at the end of 2019. The former provisions adopt a single standard to define 'defect', expand the scope of recall and realise the whole process management of the recall.

Although product liability claims are relatively infrequent among civil claims, there appears to be a rising trend of product liability claims redressed in the judicial way, particularly for food safety and medical equipment claims.

**Product liability litigation milestones and trends**

**37** | 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 none.

**Climate for litigation**

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

In recent years, the level of consumer protection and awareness in China has grown. Further, the sanctions imposed on law breakers are increasing.

In addition, more and more consumers are taking up judicial weapons to protect their legal rights and interests with a positive success rate. The laws have also paved the way for public interest actions initiated by the China Consumers Association on behalf of consumers.

**Efforts to expand product liability or ease claimants' burdens**

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

The limitation period has been prolonged to three years.

In 2016 the Supreme People's Court issued a judicial interpretation in relation to the trial of collective actions of consumer public interests, which provided clearer and more detailed rules for the China Consumer Association to bring collective actions against defective products causing damage to indefinite consumers in the marketplace.

**UPDATE AND TRENDS**

**Emerging trends**

**40** | Are there any emerging trends or hot topics in product liability litigation in your jurisdiction?

In April 2019 the State Administration for Market Regulation announced its plan to overhaul the Product Quality Law. Although limited details have been publicised about this ongoing programme, the expected overhaul of this major legalisation is likely to have a profound impact on product liability litigation.



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As China hosts the world's largest e-commerce market by transaction value (US\$5.61 trillion in 2018), product liability disputes arising from the infringement of personal or property rights owing to the defects of products purchased through e-commerce platforms have become an increasingly important topic. In September 2019 the Supreme People's Court released the Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Cases by Internet Courts, under which internet courts in Beijing, Guangzhou and Hangzhou will govern on a centralised basis within their respective jurisdictions several types of first-instance case, which should be accepted by grassroots people's courts, including product liability disputes owing to defective products purchased online.

Meanwhile, in the field of e-commerce, the phenomenon of the 'endless defective products' of livestream sales is a hot topic. The Code of Conduct for Livestream Sales, which was implemented on 1 July 2020, further stipulates product liability and strictly controls the quality of products and services.

**Coronavirus**

**41** | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

To cushion businesses from the impact of the covid-19 pandemic, the Chinese central government and local governments have been rolling out a package of supporting policies that include policies on taxation, social security, financing incentives, fiscal subsidies, and the cost reduction of energy and rent. Several measures such as giving a refund of

excess VAT credits to the production enterprises of key supplies, implementing the reduction or exemption of employer contributions in staff insurance for a period, and extending the repayment period of the loan to the bank have been taken to help businesses and individuals to cope with financial difficulties owing to the covid-19 pandemic.

To make full use of benefits provided by such supporting policies, we advise businesses and individuals to keep abreast of the new regulations and national policies, and also keep a watchful eye on whether the local governments have released corresponding implementation measures.

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