Chapter 11

Product Liability Claims In Contract: Europe

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1. INTRODUCTION

In parallel with the regime that applies pursuant to the Product Liability Directive, defective products may also give rise in European jurisdictions to claims in contract. The purpose of this chapter is to consider in the context of defective products the applicable contract law framework in the following five European jurisdictions: England and Wales, France, Germany, the Republic of Poland and Spain. For each jurisdiction, the following key elements are considered: the interplay of contract law with product liability claims in negligence and strict product liability law; the formation of contracts; who can bring a claim for breach of contract; what damage is covered; what must be shown to bring such a claim (by whom and to what standard); the exclusion of liability; applicable limitation periods and remedies. Contractual claims along the supply chain are also considered.

2. ENGLAND & WALES:[1] INTERPLAY WITH PRODUCT LIABILITY CLAIMS IN NEGLIGENCE AND STRICT PRODUCT LIABILITY LAW

Claims in contract may be brought at the same time as claims in strict product liability or negligence, as an alternative head of claim. However, the doctrine

1. This section was written by Julian Acratopulo, Clifford Chance, London.

of privity limits a contract-based action such that generally,[2] a claim may only be brought against a party to the contract. In practice, contract-based claims will be most prevalent in the business to business environment in resolving disputes arising between immediate counterparties in the supply chain.

Contract-based claims offer some advantages over negligence or strict product liability claims. In contrast to a negligence action, there is no requirement to establish a duty of care or a breach of this duty. Further, more categories of loss, including pure economic loss, are available. In addition, there is no need for the claimant to establish a defect in the product, as in the case of strict product liability claims.

Simply put, if the seller, supplier or manufacturer makes a contractual (express or implied) promise that goods are of a certain standard, a breach of contract occurs if the goods do not meet this standard.

2.1. What Is a Contract?

A contract is a legally enforceable agreement, which creates rights and obligations for the parties to the agreement. The formation of a contract is complete when the basic principles of offer, acceptance, consideration (i.e., payment) and the requirements of capacity and intention to create legal relations are satisfied.

A contract of sale or supply may be written, entirely oral (as is common with many consumer sales) or partly written and partly oral.

There may be express terms in the main contract, or in terms and conditions attached to invoices, that make promises as to some feature of the goods. Promises as to goods or remedies may also appear in guarantee or so-called extended warranty contracts existing between the seller or supplier and the buyer or between the manufacturer and buyer.

The contract of sale or supply may have also been preceded by pre-contractual statements as to the characteristics, qualities or capabilities of the goods. Such statements could become a term of the main contract of sale or supply or form the basis of a contract between the buyer and a third party which is collateral to the main contract of sale or supply between the buyer and the seller or supplier.[3]

There may be disagreement between parties to a contract claim as to what statements/documents constitute the contract, since it is not uncommon that no signed contract exists or can be found at the point when one party wishes to make a claim. It is therefore important that commercial parties use clear contractual documentation.

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2. As to contracts for the benefit of persons not party to the contract and the effect of the Contracts (Rights of Third Parties) Act 1999, see s. 5.1.
3. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 QB 256.

2.2. Implied Terms

Contract terms or conditions may be express (i.e., written or orally incorporated) or implied. Broadly, terms may be implied into a contract in three situations: (i) by law (e.g., pursuant to the Sale of Goods Act 1979 [the Sale of Goods Act]); (ii) in fact (i.e., where the term is not expressly set out in the contract but where the parties must have intended it to be included); and (iii) by custom of the contracting parties.

It is an implied term of any sale of goods contract between a commercial party and consumer and between commercial parties themselves, that goods sold in the course of business are of satisfactory quality and reasonably fit for their purpose[4] and that goods comply with any description or sample.[5] A seller is liable for breach of these implied terms.

Frequently, sellers specifically attempt to avoid or limit liability for defective products in the contract of supply. However, the Unfair Contract Terms Act 1977 prevents the exclusion or limitation of certain express and implied terms and subjects the same to a reasonableness test (see section 2.3 below).

2.3. Who Can Bring a Claim?

Consumers may bring a claim against the supplier who sold them the product and commonly the supplier will claim from its distributor and/or the manufacturer. Typically, claims will be brought individually although group claims by consumers in the form of a group litigation order are possible if each claimant has the same contractual basis of claim. Supply chains may be complex and liability is generally passed up the supply chain either by contract claims or recovery under contractual indemnities.

Generally, the consumer has no direct contractual remedy against the manufacturer as the buyer does not have privity of contract with the manufacturer or distributors. In this respect, contract claims are narrower than negligence or strict liability claims where the injured consumer may claim directly against the manufacturer.

Except where the manufacturer provides a form of guarantee, the law is reluctant to find a contract between the manufacturer and the ultimate buyer. In the case that the seller provides a guarantee, it is a matter of interpretation whether the guarantee forms part of the contract of sale or is a separate contract. If the guarantee is given by the manufacturer, it will be a separate contract and will be enforceable against the manufacturer. Consumer

4. Section 14, Sale of Goods Act 1979.
5. Section 13, Sale of Goods Act 1979.

guarantees are regulated by the Sale and Supply of Goods to Consumers Regulations 2002.

A third party may only enforce a term of a contract if the contract expressly provides that the third party may do so or, on examination of the contract, the term purports to confer a benefit on the third party.[6]

2.4. What Damage Is Covered?

In contract, damages are intended to place the injured party into the position they would have been in if the contract was performed. Hence, for a contractual claim, damages are not necessarily limited to compensation for personal injury and physical damage to property. Pure economic loss (loss of profits) along with any consequential loss and non-pecuniary losses may also be recovered.

2.5. What Is the Test for a Breach of Contract?

The claimant must establish that the defendant breached the contract with the claimant by supplying a product that did not meet the express or implied terms and conditions of the contract, that such breach caused the claimant loss, and that such loss is not too remote to form the basis of a claim.

There must be a causal connection between the defendant's breach of contract and the claimant's loss. The claimant may recover damages for a loss only where the breach of contract was the effective, or dominant, cause of that loss.[7] The English courts have avoided establishing any formal tests for causation, relying instead on common sense to guide decisions. In some cases, the courts may apply a standard known as the 'but for' test as a guide (i.e., but for the breach, the claimant would not have suffered the damage).

As established by *Hadley v. Baxendale,*[8] *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*[9] and *Koufos v. C. Czarnikow Ltd (The Heron II),*[10] a type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting, it: (i) occurs 'naturally', that is, 'according to the usual course of things' from the breach of contract; or (ii) can reasonably be supposed to be within the parties reasonable contemplation at the time they made the contract as a not unlikely result of the breach. The words 'not

6. Section 1(1)(a) and (b), Contracts (Rights of Third Parties) Act 1999.
7. *Galoo v. Bright Grahame Murray* [1994] 1 WLR 1360.
8. *Hadley v. Baxendale* (1854) 9 Exch. 341.
9. *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 K.B. 528.
10. *Koufos v. C. Czarnikow Ltd (The Heron II)* [1969] 1 AC 350.

unlikely' denote a degree of probability considerably less than an even chance, but nevertheless not very unusual and easily foreseeable.[11]

2.6. Burden of Proof

The burden of proving the contract, breach and damage arising from that breach lies with the claimant. The standard of proof that must be shown is known as 'the balance of probabilities' (i.e., the breach was more likely to have occurred than not).

2.7. Claims along the Supply Chain

Under the Civil Liability (Contribution) Act 1978 (the 'Contribution Act'), any person liable to another in contract may recover a contribution from any other person liable in respect of the same damage, regardless of the basis of the latter's liability.[12] The Contribution Act applies to liability in contract, tort or otherwise.[13] However, liability, for the purposes of the Contribution Act means that which has been or could be established in an action brought in England and Wales.

The amount of contribution awarded under the Contribution Act is as the court finds just and equitable having regard to the extent of the person's responsibility for the damage for these purposes. Courts will consider relative causative potency and comparative blameworthiness.

Judgment recovered against any person liable in respect of any damage is not a bar to an action or to the continuance of an action, against any other person jointly liable in respect of the same damage.[14] However, despite this, in most cases, it will be preferable for all potential defendants to be joined in the same proceedings.

The court might order another party to be joined under Civil Procedure Rule ('CPR') Part 19, if there are contribution claims. Likewise, the court may order a party to be added as a new party if it is desirable in order to resolve all the matters in dispute in the proceedings or if there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve the issue.[15]

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11. *Ibid*.
12. Section 1(1).
13. Section 6(1).
14. Section 3, Civil Liability (Contribution) Act 1978.
15. CPR 19.2(2) and 19.4.

2.8. Presumptions of Defectiveness

Breach of the implied term as to quality and fitness for purpose (see section 4 below) will not automatically mean that the product is defective for the purposes of a strict liability claim.

However, proof that a product is not fit for its general purpose (contract claim), in practice, often amounts to the same as proof that the product is not such as consumers are entitled to expect (strict product liability claim).

2.9. Limitation

A contract claim must be brought within six years of the breach of contract.[16] In claims for damages for physical injury, the time is three years from the date of the injury or the time when the claimant knew or should have known that he/she had a cause of action.

The date of knowledge is defined as the date on which the claimant first had knowledge that the injury was significant, the damage was wholly or partially attributable to the facts and circumstances alleged to constitute the breach of contract and knew the identity of the defendant.

2.10. Remedies

Terms classified as conditions are vital terms of the contract and breach of such a term will provide the claimant with the right to repudiate the contract (and/or claim damages) on the basis that the claimant has not received the benefit promised.[17]

On the other hand, warranties are understood to refer to a term of the contract, the breach of which may give rise to a claim for damages but not to a right to treat the contract as repudiated.[18] The emergence of intermediate terms has reduced the number of occasions when a term will be classified as a warranty in this sense.[19] The remedy for breach of an intermediate term depends on the effect of the breach at the time it occurs. For example, if the breach substantially deprives the claimant of the whole of the benefit of the contract, then it will be a serious breach of the intermediate term

16. Section 5, Limitation Act 1980.
17. *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827. Repudiation occurs where a party announces its intention not to perform its obligations and can constitute a breach of contract (sometimes referred to as 'anticipatory breach').
18. *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.
19. *Palmco Shipping Inc. v. Continental Ore Corp.* [1970] 2 Lloyd's Rep. 21.

and the remedy will be repudiation and/or damages. If not, then the remedy will only be that for breach of a warranty, that is, damages.

Where the buyer deals as a consumer, all the terms implied by the Sale of Goods Act are classed as significant contractual terms, and are therefore treated as conditions. In the event of a breach of a condition, the claimant will be entitled to repudiate the contract and/or claim damages. Alternatively, the Sale of Goods Act provides that the consumer may require the seller to repair or replace the goods. If the repair or replacement of the goods is disproportionate or impossible, or the seller fails to perform its obligations in this regard, the buyer may require an appropriate reduction in the purchase price or terminate the contract.

Where the buyer is not a consumer, the terms implied by the Sale of Goods Act are also treated as conditions unless the breach is so slight that it would be unreasonable for the buyer to reject them, in which case the breach is treated as a breach of warranty.

Specific performance may be available in equity to compel a party to perform a contractual obligation where damages would not be an adequate remedy. Circumstances in which it has been ordered include where there exists difficulty in quantifying damages because certain items of loss are not or may not be legally recoverable or quite simply because the defendant may not be good for the money[20] or where damages would be purely nominal.[21]

Where a contract is negative in nature or contains an express negative stipulation, breach of it may be restrained by injunction.[22] In deciding whether to restrain breach of a negative stipulation, the court will consider the 'balance of convenience or inconvenience'.[23] Interim injunctions and mandatory injunctions are also subject, among other things, to the 'balance of convenience' test.[24]

The Claimant has a legal duty to mitigate their loss (i.e., to the extent it is reasonable for them to do so they must take steps to contain or limit the amount of damage suffered by them). If the claimant does not mitigate their loss, the damages awarded to them may be reduced to the extent that they have failed to do so.

2.11. Exclusion and Limitation of Liability

A party who wishes to rely on a clause excluding or limiting their liability for breach of a term of a contract must show (i) that the exclusion clause is

20. *Evans Marshall & Co. Ltd v. Bertola SA* [1973] 1 WLR 349.
21. *Beswick v. Beswick* [1968] AC 58.
22. *Martin v. Nutkin* (1724) 2 P.Wms. 266.
23. *Doherty v. Allman* (1878) 3 App.Cas. 709.
24. *Sharp v. Harrison* [1922] 1 Ch. 502; *Texaco Ltd v. Mulberry Filling Station Ltd* [1972] 1 WLR 814.

incorporated into the contract; (ii) that the clause does cover the liability in question (if there is any ambiguity in an exemption clause, the English courts will typically construe it against the party which seeks to rely upon it); and (iii) that the clause is not subject to statutory restriction, or if it is, that the clause is nonetheless enforceable. For example, under the Unfair Contract Terms Act 1977 terms in business contracts with consumers which do not pass the 'reasonableness' test are unenforceable. In any event, it is not possible to exclude liability for death or personal injury resulting from a failure to exercise reasonable care in the performance of the contract.[25]

Breach of the statutory implied terms cannot be excluded or restricted as against a consumer.[26]

3. FRANCE:[27] INTERPLAY WITH PRODUCT LIABILITY CLAIMS IN NEGLIGENCE AND STRICT PRODUCT LIABILITY LAW

There are three possible grounds for a claimant to obtain compensation for loss caused by a defective product:

(a) where the claimant and the manufacturer of the product have a contractual relationship, the claimant must act on the grounds of contractual liability;
(b) where the claimant and the manufacturer of the product have no contractual relationship, the claimant must act on the grounds of Tort Law (based on proof by the claimant of fault or carelessness); or
(c) the claimant can always elect to base the claim on Law n°98-389 of 19 May 1998 on defective product liability[28] when the conditions are met. These provisions allow for the compensation of physical and material losses, other than those affecting the defective product itself.

The claimant therefore has the option between the traditional rules of civil liability (Contract, depending on the existence of a contract, or Tort Law) or the defective product liability regime. The victim is encouraged to use the more favourable provisions of the defective product liability regime where possible (i.e., where no issue of time limitation arises, where the criteria as to who can initiate claims are met, etc.). A claimant cannot bring claims both in contract and under the defective product liability regime.

25. Section 2, Unfair Contract Terms Act 1977.
26. Section 6, Unfair Contract Terms Act 1977.
27. This section was written by Thomas Baudesson, Clifford Chance, Paris.
28. Article 1386-1 and seq. of the Civil Code, which implements the Council Directive 85/374/EEC of 25 Jul. 1985.

3.1. What Is a Contract?

A contract is an enforceable agreement creating rights and obligations for the parties to the agreement. There are four prerequisites for the validity of such an agreement:[29] (i) the consent of the parties; (ii) their capacity to enter into a contract; (iii) a definite object which forms the subject matter of the undertaking; and (iv) effective and lawful consideration (*cause*). If one of the above conditions is not fulfilled, the annulment of the contract may be sought[30] from a Court or a Tribunal. Under French Law, a judicial intervention is necessary for the contract to be void. If not, the contract will remain in force between the parties.[31] It is generally not a condition of validity for the contract to be in writing. However, the evidence of the reality and terms and conditions of a contract entered into by one or more non-professional parties has to be produced in writing.[32]

3.2. Implied Terms

Under French Law, in certain circumstances, terms can be implied into contracts as a matter of either statutory law or case law.

For instance, case law usually dictates that a 'safety obligation' is implied into sale contracts. In some cases, courts might also decide that the contract implies an 'information obligation'.[33]

Under the French sale of goods provisions, the seller usually has to fulfil two implied obligations:

(a) to deliver goods which meet the specifications stipulated in the sale contract; and
(b) to deliver goods which are fit for purpose.[34]

3.3. Who Can Bring a Claim?

As a matter of French procedure, any person who has a direct and legitimate interest in the success or dismissal of a claim may bring such a claim.[35] Although the issue is being widely debated at the moment, there is currently no such thing as a class action or a group action in France.

29. Article 1108 of the Civil Code.
30. Articles 1101–1369 of the Civil Code govern the contract.
31. Civ. 3e, 2 Jun. 1977, Bull.civ., III, n°239.
32. Article 1341 of the Civil Code.
33. See, e.g., Civ. 1ère, 13 Oct. 1996, *Bull. Civ.* I n° 287.
34. Article 1604 of the Civil Code.
35. Article 31 of the Civil Procedure Code.

Under general French Contract Law, only a party to a contract can bring a claim on the basis of that contract.[36] This is an application of the French privity of contract rule, known as the *effet relatif des conventions*.

Nonetheless, it has been ruled that when a contractual breach causes damage to a third party, the latter is entitled to sue the party in default on the grounds of Tort Law.[37]

3.4. What Damage Is Covered?

Under general French Contract Law, damages are limited to those that were foreseen or could have been foreseen at the time the contract was entered into.[38] This means that an objective test is used in order to assess what damages are covered.

If, however, there has been an intentional breach of contract, or if the damage is the result of gross negligence committed by a party to the contract, this objective test does not apply.[39] The damages are nevertheless limited to those that are an immediate and direct consequence of the breach.

There are no punitive damages under French Law. Indeed, according to the French principle of full compensation of damages (*principe de réparation intégrale*) the judge compensates all the damage and nothing but the damage.

Under general French Defective Product Liability Law, all and any kind of personal injuries are covered. As for the loss of property, this damage is covered when the amount of such loss is above EUR 500.[40] The loss of the defective product in itself is not covered under French Defective Product Liability Law, but may be recovered by the claimant on the grounds of general French Contract Law.[41]

3.5. What Is the Test for a Breach of Contract?

Under general French Contract Law there is no test for a material breach of contract. Any kind of breach, whether it is minor or of a fundamental obligation arising out of the contract, may have legal effects. These legal effects range from contractual liability (i.e., damages) to the termination of the contract, depending on the importance of the obligation which has been breached and on the consequences of the breach for the other party.

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36. Article 1165 of the Civil Code.
37. Ass. Plen., 6 Oct. 2006 *Bull Civ*. I n°9.
38. Article 1150 of the Civil Code.
39. Article 1151 of the Civil Code.
40. Established by Art. 1 of the Décret n° 2005-113 dated 11 Feb. 2005.
41. Article 1386-2 of the Civil Code.

The claimant must prove: (i) the existence of an obligation; (ii) non-performance or a default in performance of an obligation; (iii) the damage(s) suffered; and (iv) a causal link between the breach and the damage(s) suffered.

3.6. Burden of Proof

Under general French Contract Law, the burden of proof rests on the claimant. The concept of 'standard of proof' does not exist in French Civil/Commercial Law. However, Article 1162 of the French Civil Code provides that in case of doubt, an agreement shall be interpreted against the party who has stipulated, and in favour of the party who has contracted the obligation.

3.7. Claims along the Supply Chain

Under general French Contract Law, as well as under French Product Liability Law, where several persons may be held liable, the claimant can elect to sue one of them separately, or all of them, jointly. In this case, if all the co-defendants are found liable, the claimant may receive full compensation from one of them. The paying co-defendant will then have to recover payment from the other co-defendants' shares.

If the claimant elects to sue only one defendant, the latter can join any other party to the proceedings that may have contributed to the losses.

When the claimant does not act on the grounds of Defective Product Liability Law, the situation is as follows:

(a) if the claimant and the defendant are bound by a contract, the claimant must act on the grounds of general French Contract Law;
(b) if the claimant and the defendant are not bound by a contract, but the defendant is a member of the supply chain, the claimant must act on the grounds of general French Contract Law. Indeed, according to French case law, where the ownership of a product is transferred through a chain of contracts (*chaîne de contrat translatif de propriété)* and the defendant is a member of the chain, the claimant must act on the grounds of general French Contract Law;
(c) otherwise, the claimant must act on the grounds of Tort Law.

When the claimant's action is founded on general French Contract Law, valid limitation/exclusion of liability clauses can apply.[42] When bringing an action in Tort Law, these provisions are ineffective.

42. The valid limitation/exclusion of liability provisions are set out in § 3.11.

3.8. Presumptions of Defectiveness

Under general French Contract Law (as well as under French Tort Law), a product is presumed to be defective when it creates damage when used in normal conditions. Thus, if the claimant proves: (i) the damage suffered; and (ii) a causal link between the product and such damage, the product is presumed to be defective. The burden rests on the defendant to prove that the product is actually not defective or that the damage is entirely due to another cause.

3.9. Limitation

The limitation regime under French Law was modified on 17 June 2008.[43] According to these new rules, the general limitation period is now five years, whether for a contract-based claim or for actions based on tort. However, the limitation period for liability actions for physical injuries, is ten years.[44] The limitation period may not be reduced by contract to less than a year or extended to more than ten years.

More specifically, under the defective product liability regime, Article 1386-16 of the French Civil Code provides that the liability of the producer cannot be sought after the expiry of a period of ten years following the placing of the product on the market. Within that ten-year period, a plaintiff must initiate proceedings for the compensation of damages on the grounds of defective product liability no later than three years from the day on which the plaintiff became aware or should reasonably have become aware of the damage, the defect and the identity of the producer.[45]

3.10. Remedies

Under French Law there are no punitive damages, only compensatory damages (cf. *supra*, § 3.4).

Under general French Contract Law, if the claimant evidences a breach of contract, depending on the seriousness of the breach, the claimant can also seek termination of the contract.

43. Statute n° 2008-561 dated 17 Jun. 2008.
44. Article 2226 of the French Civil Code.
45. Article 1386-17 of the French Civil Code.

3.11. Exclusion and Limitation of Liability

Under French Law, contractual provisions limiting or excluding liability are prohibited in sales contracts between a professional and a non-professional or a consumer.[46]

In other contracts, limitation/exclusion of liability clauses are prohibited when the damage is personal injury.

Limitation/exclusion clauses in any contract between a consumer and a professional are likely to be considered unfair and are therefore voidable if the clause results in a significant imbalance to the detriment of the consumer.[47] In such contracts, the starting presumption is that exclusion/limitation clauses are unfair unless the professional can prove otherwise.

In other contracts between professional parties, limitation/exclusion of liability provisions are valid, except:

(a) if the damage suffered is a personal injury (personal injury can never be limited or excluded in any way);
(b) if the limitation/exclusion provision applies to the breach of an essential obligation (for instance: in a sale contract, a liability limitation/exclusion provision would not be valid if it applies to the seller's obligation to deliver the goods that are the subject of the contract); and/or
(c) if the breach is intentional or is the result of gross negligence (in these circumstances, limitation/exclusion provisions are never upheld).

4. GERMANY:[48] INTERPLAY WITH PRODUCT LIABILITY CLAIMS IN NEGLIGENCE AND STRICT PRODUCT LIABILITY LAW

In Germany a product liability claim may be based on three grounds: contract,[49] tort[50] and strict liability.[51] Claims in contract may be made alongside claims based on tort and strict liability.

German courts have not relaxed the principle of privity of contract in relation to product liability claims. Accordingly, claims may only be made by third parties where the injured person and the defendant have a contractual relationship.

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46. Article R. 132-1 of the Consumer Code.
47. Article L. 132-1 of the Consumer Code.
48. This section was written by Thomas Weimann & Dimitrios Christopoulos, Clifford Chance, Düsseldorf.
49. Sections 437 and 280, German Civil Code ((*Bürgerliches Gesetzbuch*) (the 'BGB')
50. Section 823, BGB.
51. German Product Liability Act.

Claims based on contract law may offer some advantages over tort or strict product liability claims, since compensation can be claimed for pecuniary loss (*Vermögensschaden*) as well as for consequential damage caused by the defective product (*Mangelfolgeschaden*).

4.1. What Is a Contract?

A contract creates rights and obligations between two or more parties. It is formed by offer and acceptance, declared by the parties to the contract. A contract of sale or supply may be written, oral or partly written and partly oral.

The parties are free to determine the contract and the exact terms of the contract. The terms of the contract may be explicitly contained in the main agreement or attached to the main contract as general terms and conditions. General terms and conditions are terms that have been pre-formulated by one party and accepted by the other party. There are specific regulations in German law on the validity of general terms and conditions.[52] It is also possible to agree on features of the goods as well as remedies in case of default in separate guarantees or so-called extended warranties contracts existing between the seller or supplier and the buyer or between the manufacturer and the buyer.

The contract of sale or supply may have been preceded by pre-contractual statements as to the characteristics, qualities or capabilities of the goods. Such statements could become a term of the main contract of sale or supply or form the basis of a contract between the buyer and the third party that is collateral to the main contract.

4.2. Implied Terms

Contractual terms can be express or implied pursuant to the German Civil Code (*Bürgerliches Gesetzbuch*) (the *BGB*). For example, it is an implied term of any sale of goods contract that goods sold are to be of satisfactory quality and reasonably fit for the purpose when sold in the course of business.[53] Another good example of an implied term is that the goods must comply with any description or sample.[54] Any seller may be held liable for breach of these implied terms.

52. Section 305 ff., BGB.
53. Sections 433 and 434(1), BGB.
54. Sections 433, 434(1) and (2), BGB.

4.3. Who Can Bring a Claim?

Since a contract only confers rights and obligations to the respective parties of the contract (and in limited circumstances a third party, see section 5.1), only a party to the contract can bring a claim. This principle is applicable throughout the entire supply chain; a consumer may bring a claim against the seller of the product in question and the seller may bring a claim against the distributor or the manufacturer.

A consumer does not have a direct contractual remedy against the manufacturer and/or the distributor, since ordinarily there is no contract between those parties. In this regard, claims based on contract law are narrower than claims based on tort law or strict product liability law, where the injured consumer may file a direct claim against the manufacturer and/or the distributor.

However, if and to the extent the manufacturer and/or the distributor grant an individual guarantee to the consumer, the consumer may initiate a claim in contract against the manufacturer and/or the distributor.

A third party may only enforce a contract if the particular contract in question expressly provides that the third party may do so or, on examination of the contract, the intention of the contract is to confer a benefit on the third party.[55]

There is no procedure under German law for contractual claims to be brought on a class or group basis.

4.4. What Damage Is Covered?

Damages are intended to place the injured party into the position they would have been in if the contract had been properly performed. A person who is liable in damages must restore the position that would exist if the circumstances obliging him to pay damages had not occurred.[56]

Damages include compensation for personal injury and physical damage to property. Under German law, a potential claimant is also entitled to claim pure economic loss (loss of profits) along with any consequential loss and non-pecuniary losses such as damages for death or mental injury. It is common for general terms and conditions to exclude liability for consequential loss (see section 5.5 below).

4.5. What Is the Test for a Breach of Contract?

The claimant must establish that the defendant breached a contractual obligation.[57] The claimant must prove that there is a causal link between

55. Section 328, BGB.
56. Section 249, BGB.
57. Section 280, BGB.

the defendant's breach of contract and the claimant's loss. When claiming damages in respect of an allegation that the product in question was defective, the claimant must prove that the defendant delivered a product that did not meet the express or implied terms and conditions of the contract and that this breach of contract caused damage to the claimant. The defendant may then prove that it was not responsible for the breach of contract.[58]

With regard to the causal connection between the defendant's breach of contract and the claimant's loss, the claimant must prove that the breach of contract is *conditio sine qua non* for the damage suffered, that is, the loss would not have occurred without the breach of contract. Apart from that, German courts have adopted a common sense approach in determining whether there was a causal link between the breach of contract and the particular damage in question, namely that it would not be under only very particular, quite unusual and improbable circumstances that the breach would tend to lead to the damage suffered.[59]

4.6. Burden of Proof

The burden of proving breach of contract is on the injured party.[60] The consumer must prove that the product was defective and did not meet the express or implied terms and conditions of the contract and that this breach caused the loss. A defendant will avoid liability if it can establish that the damage was caused other than by the product defect and the defendant was not responsible for that other cause. The standard of proof is 'beyond a reasonable doubt' (*mit an Sicherheit grenzender Wahrscheinlichkeit*)

The burden of proof may be amended by an individual contract' but not by general terms and conditions.[61]

4.7. Claims along the Supply Chain

In accordance with the chain of supply contracts, a seller that had to pay compensation to a consumer for breach of contract may turn to the distributor in order to recover a contribution in respect of the same damage.

58. Section 280, BGB.
59. See, e.g., Decision of the Federal Court of Justice dated 7 Mar. 2001, file number: X ZR 166/99, NJW-RR 2001, 887.
60. Section 280, BGB.
61. Section 309 No. 12, BGB.

4.8. Presumptions of Defectiveness

The defectiveness of a product is not presumed and must be proven by the claimant.

The product is defective if it:

(a) does not comply with the terms of the contract;[62]
(b) is not fit for the purpose intended under the contract;[63] or
(c) is not suitable for customary use and its quality is insufficient compared to other products of a similar kind.[64]

The term 'quality' also includes characteristics which the buyer can expect from public statements as to specific characteristics of the product that are made by the seller or the producer.[65] This includes, without limitation, statements made in advertising or in identification, unless the seller was not aware of the statement and also had no duty to be aware of it, or it was addressed by price at the time when the contract was concluded, or it did not influence the decision to purchase the product.

There is also a material defect if the agreed assembly of the product by the seller, or persons who he used to perform his obligation, has been carried out improperly. In addition, there is a material defect in a product intended for assembly by the buyer, if the assembly instructions are defective, unless the product has been assembled without any error. Supply by the seller of a product different from that described is equivalent to a material defect.

The term 'defect' under contract law is similar, but not totally synonymous with the term 'defect' under strict product liability law. Pursuant to section 3 of the German Product Liability Act, a product is defective for the purposes of the Act if it does not provide that degree of safety which can be justifiably expected, having regard to all the circumstances, in particular (a) its presentation; (b) its reasonably expected use; and (c) the time when it was put into circulation.

4.9. Limitation

A contract claim for damages due to a defective product must be brought within two years after the product in question has been delivered.[66]

If and to the extent the claim for damages due to a defective product can be based on a non-contractual ground, such claim must be brought within three

62. Section 434, BGB.
63. Section 434, BGB.
64. Defective within the meaning of s. 434 of the BGB.
65. Section 4(1) and (2), German Product Liability Act.
66. Section 438 (1) and (2), BGB.

years after the claimant gained knowledge of the circumstances giving rise to the claim and of the identity of the defendant, or would have obtained such knowledge if he had not shown gross negligence.[67] However, with regard to claims for damages based on injury to life, body, health or liberty, notwithstanding the manner in which they arose and notwithstanding knowledge or a grossly negligent lack of knowledge, the statute of limitation is thirty years from the date on which the act, breach of duty or other event that caused the damage occurred.[68] The date of knowledge is defined as the date on which the claimant first had knowledge that the injury was significant, the damage was wholly or partially attributable to the facts and circumstances alleged to constitute the breach of contract and the identity of the defendant.[69]

4.10. Remedies

If and to the extent the product is defective, the claimant is not only entitled to claim damages, but to demand cure and/or reduce the purchase price and/or repudiate the contract.[70]

If and to the extent the buyer has been granted a warranty, it is entitled to claim the rights associated with this warranty. If the warranty in question has been granted by the manufacturer and/or distributor, the buyer is only entitled to claim damages, but not to repudiate the contract and/or reduce the purchase price.

4.11. Exclusion and Limitation of Liability

It is possible for a seller to exclude or limit liability.[71] However, the requirements for such exclusion or limitation vary based on whether the contract in question had been concluded with a consumer or with a commercial party.

The general position is that a clause may be inserted into a contract in order to exclude or limit one party's liability for breach of contract. However, if such limitation of liability clause is not negotiated individually between the parties to the agreement, such clause must comply with the regulations of sections 305 ff. BGB.[72]

In contracts concluded with a commercial party, for example, between a manufacturer and a distributor, the seller in question may not exclude or

67. Sections 194 and 199, BGB.
68. Section 199 (2), BGB.
69. See, for instance, Decision of the Federal Court of Justice dated 6 Feb. 1986, file number III ZR 109/84, NJW 1986, 2309.
70. Section 437, BGB.
71. Section 444, BGB.
72. Council Directive 93/13/EEC of 5 Apr. 1993.

restrict the rights of the buyer with regard to a defect insofar as the seller fraudulently concealed the defect or gave a guarantee regarding the quality of the product.[73] The general terms and conditions applicable to such contracts may not exclude or limit the liability for defects by, inter alia, limiting the claimant to making claims against third parties only or making the seller's own liability dependent upon prior court action taken against third parties.[74]

In relation to consumer contracts, it is not possible to exclude or limit any of the rights resulting from section 437 BGB (as described above). Further, according to section 475 BGB, one cannot alleviate the limitation of the claims cited in section 437 BGB by an agreement reached before a defect is notified to a commercial party, if the agreement means that claims shall be time-barred in less than two years, or in the case of second hand products, in less than one year.[75]

5. REPUBLIC OF POLAND:[76] INTERPLAY WITH PRODUCT LIABILITY CLAIMS IN NEGLIGENCE AND STRICT PRODUCT LIABILITY LAW

Under Polish law, product liability cases may be pursued under any of the three concurrent legal regimes, namely, strict product liability, tort liability or contractual liability (including guarantees).

Under the Polish Civil Code, the provisions on strict product liability do not exclude liability for damage resulting from the non-performance or improper performance of an obligation, or liability under a warranty for defects and quality.[77] This means that the consumer is allowed to choose the legal basis of his claims relating to a dangerous product; although, he is prohibited from 'mixing' contractual and strict product liability remedies.

Generally, strict product liability law is more advantageous to the injured party. However, in some cases, contract-based claims offer certain advantages over strict product liability claims. For example, contract-based claims offer certain categories of loss that are excluded under strict product liability law such as damage to property where the damaged property is used for professional use; damage to a dangerous product itself or profits which the injured party might have derived from the use thereof and damage not exceeding the equivalent of EUR 500.[78]

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73. Section 444, BGB.
74. Section 309 No. 8 b), BGB.
75. Section 475, BGB.
76. This section was written by Bartosz Kruzewski and Marcin Ciemiński, Clifford Chance, Warsaw.
77. Title VI, Art. 449 of the Polish Civil Code.
78. The limitation is imposed by Art. 449 s. 2 of the Polish Civil Code.

5.1. What Is a Contract?

A contract creates rights and obligations for the parties to the agreement (and in some exceptional cases, even for third parties). In most cases, the formation of a contract is complete when the basic principles of offer, acceptance and intention to create legal relations are satisfied. The offer must be a definite proposal to execute the specific agreement. Under Polish law, there is no legal requirement for consideration, but most agreements provide for mutual obligations of the parties.

Generally, Polish law does not provide for special requirements as to the form of a contract of sale. A contract of sale may be written, entirely oral (as is common with many consumer sales) or partly written and partly oral. There are some specific requirements regarding the form of certain special sale agreements or parts thereof. For example, a guarantee issued by the seller or the manufacturer should be in the form of a written document.

5.2. Implied Terms

Contractual terms or conditions may be express (i.e., written or incorporated (if oral) in the contract) or implied by statutes, through the so-called principles of social co-existence and established custom.

In the case of sale agreements, the statutory provisions on warranties for product defects provide that the seller is liable to the buyer if the product sold:

(a) has defects which reduce its value or usefulness with respect to the purpose specified in the contract;
(b) has defects resulting from the circumstances or the designation of the product, if the product does not have the properties about which he assured the buyer; or
(c) was released to the buyer in an incomplete condition (warranty for physical defects).[79]

5.3. Who Can Bring a Claim?

Generally, the consumer has no direct contractual remedy against the manufacturer or distributor, as the buyer does not have privity of contract with those parties. In this respect, contractual claims are narrower than tortious or strict liability claims where the injured consumer may claim directly against the manufacturer. The consumer may raise contractual claims against the

79. Article 556, s. 1 of the Polish Civil Code.

manufacturer when the manufacturer is also the seller or issues a guarantee as to quality. In the latter case, unless otherwise provided for in the guarantee, the manufacturer, as guarantor, is obliged to remedy the physical defects in the product or to deliver it free from defects, if these defects are notified by the consumer within the time period specified in the guarantee.[80]

A procedure for representative actions similar to American class actions was recently introduced in Poland under the Act on the Pursuit of Claims in Multi-party Proceedings (the 'Act').[81] This is a new legal remedy that allows a number of similar cases being brought by different entities to be determined in one set of civil proceedings. The Act applies to civil proceedings instituted by at least ten persons pursuing claims of the same type, based on the same or similar fact situation. The scope of application of the Act is limited exclusively to claims in the following cases: consumer rights; product liability; and acts in tort. Under the Act, multi-party proceedings will cover the claims of persons who join the proceedings in the time-frame specified by the court – Poland has adopted the so-called opt-in model (unlike the USA).

5.4. What Damage is Covered?

The general rule under Polish law is that damages are intended to put the injured party in the position he/she would have been in if the contract had been performed. The damage includes the losses incurred by the injured party as well as the benefits which that person could have obtained had he/she not suffered the damage. Non-pecuniary damages include compensation for pain and suffering in the case of personal injury.

5.5. What is the Test for a Breach of Contract?

The claimant must establish that the defendant breached the contract with the claimant by supplying a product that did not meet the express or implied terms and conditions of the contract and that such breach caused the claimant to suffer damage. There also must be a causal link between the defendant's breach of contract and the claimant's loss.

The claimant may recover damages for a loss only where the breach of contract was the 'adequate' cause of that loss. The test for an 'adequate' causal link is whether the loss was a normal/usual consequence of the action or omission of the defendant.[82]

80. Article 577 of the Polish Civil Code.
81. The Act came into force on 19 Jul. 2010.
82. See the judgment of the Supreme Court 11 Sep. 2003, file reference III CKN 473/01 and the judgment of the Supreme Court dated 26 Jan. 2006, file reference II CK 372/05.

5.6. Burden of Proof

In the case of contractual liability, the burden of proving breach of contract, the occurrence and amount of damage suffered and the causal link between the former and the latter lies with the claimant. Polish law provides for the presumption of the defendant's fault, that is, the breach of contract resulted from circumstances for which the defendant is liable, so the burden of proving otherwise lies with the defendant.[83] Although there are no specific provisions under Polish law on the standard of proof, it is acknowledged in judicial decisions that a benchmark similar to the 'beyond a reasonable doubt' standard of proof is accepted. However, the Polish courts will accept a lower standard of proof (so-called prima facie evidence) in cases where the facts of the case are very difficult to prove (e.g., personal injury cases).

To exclude his/her liability and overcome this presumption, the defendant may prove, for example, that the damage resulted solely from the actions of the claimant or was caused by force majeure.

5.7. Claims along the Supply Chain

As a general rule of contractual liability, it is the actual seller who will be held liable for the product. The buyer may have some further remedies available against the manufacturer, if the manufacturer issued a guarantee (see section 5.10).

Under general contractual liability, if the seller was held liable for damage suffered by the buyer of a product, this does not always automatically entitle the seller to claim damages from the party that supplied the product to the seller. To do so, the seller will have to prove that the supplier breached the contract between them (see section 5.5). However, if a seller redresses the claim of a consumer buyer on the basis that the product did not correspond to the sale contract, the seller is entitled to claim damages from any of the previous sellers of the product.[84] The prerequisite for such a claim is that an action or an omission of a previous seller caused the product to fail to correspond with the sale contract.

5.8. Presumptions of Defectiveness

A breach of the implied term as to quality and fitness for purpose (see section 5.2) will not automatically mean that the product is defective for the purposes of a claim based on liability for a dangerous product. Whether such a

83. Article 471 of the Polish Civil Code.
84. Article 12 of the Act on the Particular Conditions of Sale Contracts with Consumers and on the Change of the Civil Code, dated 27 Jul. 2002 (Journal of Law 2002 no. 141 as amended).

claim may be pursued depends on whether the product was 'dangerous' within the meaning of Article 449 Section 2 of the Polish Civil Code. The fact that a product is dangerous does not automatically mean that it is defective.[85] However, in certain circumstances, such a situation will occur and accordingly, a buyer will be entitled to choose the legal basis for the claim for damages, whether to claim damages on the basis of contractual liability or liability for a dangerous product.

5.9. LIMITATION

As a general rule, a buyer's contractual claim based on the sale contract must be brought within ten years of the date of the contract's breach and the damage. However, if the sale was concluded in the course of business activities (i.e., the buyer is not a consumer), the claim must be brought within three years.[86]

To exercise the remedies under the statutory warranty, the buyer must notify the seller of the defect within a month of the date he/she learned or should have learned about the defect.[87] A more stringent condition applies to sale contracts where neither party is a consumer. In such contracts, the rights under the statutory warranty expire if the buyer failed to examine the goods within the customary period of time after delivery and failed to notify the seller of the defects immediately.[88]

The rights under the statutory warranty for physical defects expire after a year from the date of delivery of the goods.[89] The rights under the statutory warranty for legal defects expire after a year from the date when the buyer learned about the defect.[90] If the damage occurred as a result of the buyer incurring its own liability, the one year limitation period starts running when the judgment issued in the case becomes final.[91]

5.10. REMEDIES

Under the statutory warranty for physical defects (see section 4), if a product is defective, the buyer is entitled to demand either that the price be lowered or that the contract be terminated. However, if the seller immediately provides a product free of defects or removes the defects, the buyer is not entitled to

85. See Z. Banaszczyk in K. Pietrzykowski, *Kodeks cywilny – Komentarz do artykułów* (Warsaw, 2008), 1485.
86. Article 117, s. 2 of the Polish Civil Code.
87. Article 563, s. 1 of the Polish Civil Code.
88. Article 563, s. 1 of the Polish Civil Code. The customary period of time for the examination of the goods depends each time on the circumstances of the particular sale.
89. Articles 568 of the Polish Civil Code.
90. Articles 576 of the Polish Civil Code.
91. Articles 576, s. 1 of the Polish Civil Code.

terminate the contract provided that the product was not replaced or repaired previously and the defects are minor.

Some additional remedies under the statutory warranty for physical defects apply to the sale of a mass product and to the sale of a product where the seller is at the same time the manufacturer. In the former situation, the buyer may ask the seller to deliver the product in the agreed quantity, free of defects and to cover damage caused by delay. In the latter situation, the buyer is entitled to ask the seller to remove the defect within a certain time limit, with the reservation that if the seller fails to do so, the buyer will be entitled to terminate the contract.

If the buyer terminates the contract or demands that the purchase price be lowered, he/she may also claim damages that resulted from the defect. This provision applies accordingly when the buyer demands that the seller provide the goods free of defects or that the defects be removed. The buyer may claim the full damages if they result from a circumstance for which the seller is liable. Otherwise, the buyer may only claim damages limited to the costs, such as the cost of concluding the contract, the cost of collecting, transporting, storing and insuring the products bought. This is called a 'negative contractual interest' and is described as the damages the buyer incurred in the belief that he/she was purchasing objects free of defects. The above provisions concerning the right to claim damages apply to the remedies under the warranty for physical as well as legal defects.[92]

A buyer is free to exercise his/her rights under the statutory warranty (for physical or legal defects) and under a guarantee independently. The parties to a sale contract are free to agree the terms of the guarantee. The relevant provisions of the Civil Code apply only when the provisions of sale contracts raise doubt as to the remedies available. Article 577 of the Civil Code states that the buyer is entitled to demand that the entity that issued the guarantee remove the physical defects in the goods sold or deliver goods free of defects.

A buyer who is a consumer may demand that the seller repair the product or replace it if it does not correspond with the sale contract. A secondary remedy for the buyer (which applies when repair or replacement is impossible or involves excessive cost for the seller) is a claim for a lower price or the right to terminate the contract.

5.11. Exclusion and Limitation of Liability

Liability for a dangerous product cannot be excluded or limited.[93] Furthermore, strict product liability may not be excluded or limited either by contract or by the choice of a foreign law jurisdiction.[94]

92. Article 566 of the Polish Civil Code.
93. Article 449 of the Polish Civil Code.
94. Article 449 of the Polish Civil Code.

Standard form contracts with consumers may not contain clauses that exclude liability to a consumer for personal injury or that exclude or significantly limit liability for a breach of contract (non-performance of improper performance of a contract).[95] To be admissible, such clauses must be individually agreed between the parties.[96]

Moreover, the statutory warranty for physical defects may be excluded from sale contracts with consumers only when a specific provision of law allows this. Such exclusions are rare and include, for example, sales made during enforcement and insolvency proceedings.

6. SPAIN:[97] INTERPLAY WITH PRODUCT LIABILITY CLAIMS IN NEGLIGENCE AND STRICT PRODUCT LIABILITY LAW

Strict product liability protection, whether or not the injured party is privy to a contract, is governed by Royal Decree 1/2007, which came into force on 1 December 2007 and approved the new law regarding Consumers (the *Consumers Law*).

The Consumers Law consolidated the existing legislation on consumers, defective products and other issues into one legal set of rules that contains provisions regarding certain sale or supply contracts as well as liability derived from defective products.

As with the previous legislation, strict product liability claims are aimed at damage caused by goods or services objectively intended for private use or consumption that have been used in such manner by the injured party.

Article 128 of the Consumers Law establishes the compatibility of strict product liability actions with contract-based claims and tort law based claims.

The nature and requirements of product liability claims differ substantially depending on the basis for the claim. Whilst contract-based claims offer some advantages in terms of limitation, consumer and strict product liability claims ease the burden of proof and widen the scope of parties that one may claim against.

95. Article 385, s. 1 of the Polish Civil Code.
96. Article 385, s. 1 of the Polish Civil Code.
97. This section was written by Jose Antonio Cainzos, Clifford Chance, Madrid.

6.1. What Is a Contract?

A contract is an agreement between two or more people aimed at creating reciprocal obligations. Every contract requires the existence of a certain object, proper consent of the parties and cause for the obligations established.

There are no special provisions regarding the form of the contract. This means that sale agreements may be written, oral or partly written and partly oral. The full scope of the contract and all the terms agreed (especially if there is a contract in writing) would be a matter of interpretation for the Courts.

In the case of standard form consumer contracts, the Consumers Law and Law 1/1998, regarding General Contractual Conditions, are relevant, as some contractual clauses may be considered abusive and rendered void by those legal provisions.

6.2. Implied Terms

Contract terms or conditions may be express and/or implied by law. Products must comply with these contractual terms.

Goods sold or supplied must comply with quality and description conditions, as agreed in the contract. Pursuant to Article 1.484 of the Civil Code, any defect that diminishes the use for which the goods were acquired in such a way that the purchaser would have paid less for them, should be remedied by the seller.

Where one party to the contract is a consumer, the terms offered by the seller or supplier in its advertisements and commercial information are implied into the contract. However, should the contract agreed contain clauses more beneficial for the consumer, those shall prevail over the terms offered. Furthermore, there exists a good faith presumption in favour of consumers, where contracts do not contain key provisions and any relevant pre-contractual information is omitted.[98] In effect, the good faith presumption means such contracts are interpreted in favour of protecting consumers.

6.3. Who Can Bring a Claim?

Any party to a contract may bring an action against the other when the latter does not comply exactly with the terms agreed. Therefore, any party in the supply chain may claim against the counterparty that sold them the product if there has been a breach of contract.

98. Articles 61 and 65 of the Consumers Law.

In most cases, the final purchaser will not have any contractual remedy against commercial parties higher up the supply chain, but such parties may make claims against each other under their respective contracts.

Contract law generally does not allow a non-party to bring a claim directly against the manufacturer as permitted under the strict product liability regime. However, where a party to the contract is a consumer, claims may in certain circumstances, be brought against the manufacturer (see section 6.7 below).

Consumers may claim: (i) individually; (ii) in groups formed by claimants with the same contractual basis of claim; or (iii) through Associations of Consumers regulated by law.

The parties may agree on the law governing consumer claims. However, provisions contained in Spanish law regarding abusive terms are applicable to the contract in any event when the seller/supplier has only a narrow connection (*estrecha relación*) to any member of the European Union.[99]

6.4. What Damage Is Covered?

Where the buyer is not a consumer, general contract remedies award the injured party both the damages caused (*damnum emergens*) and the profit that could have been obtained (*lucrum cesans*). Accordingly, in a contractual claim, a commercial party may claim the reimbursement of the amount paid and subject to proof, the reasonable benefit that would have been obtained.

6.5. What Is the Test for a Breach of Contract?

The seller breaches the contract by supplying a product that does not meet the express or implied terms and conditions of the contract.

Breach of contract occurs from the moment the seller fails to fulfil its obligation in the way agreed (whether it relates to the product itself, the term of completion of the contract, the quantity of the goods sold, etc.).

When claiming damages derived from the breach of contract, the claimant needs to prove: (i) the existence and extent of the damage; (ii) negligence by the seller; and (iii) the link between the damage and the breach of contract.[100]

Failure to fulfil seller/supplier obligations is considered a breach of contract (see section 6.7 below).

Regarding consumers, Article 116 of the Consumers Law provides that a product meets the terms of the contract when it: (i) matches the description

99. Article 67 of Consumers Law.

100. This requirement has been strengthened after the Sentence of the Supreme Court of 21 Nov. 2009 that absolved both the seller and the manufacturer as the damage was considered to be caused only by negligence of the consumer.

provided by the seller in its offer; (ii) is suitable for the ordinary purpose of products of the same kind; (iii) is suitable for a use that the consumer communicated to the seller prior to the contract formation; and (iv) presents the quality and conditions that are usual for a product of its kind.

6.6. Burden of Proof

The general rule in Spanish law is that the burden of proving the facts and rights alleged lies with the Claimant. However, under Article 123 of the Consumer Law, the burden of proof in certain product liability claims switches to the Defendant. Article 123 of the Consumer Law states that where a Claimant brings a claim for damage caused by a defective product within six months of that product having been delivered it will be assumed that the defect existed in the product at the point of delivery. It is for the Defendant to demonstrate that it did not.

Under Spanish law there are no previously determined rules regarding the standard of proof that a court will apply.

6.7. Claims along the Supply Chain

Contract-based claims may only be initiated against parties to a contract. In this sense, claims will ascend in the supply chain from the acquirer of the goods (whether a consumer or not) to the manufacturer.

All the parties liable due to a defective product are jointly and severally liable, although any person liable to another in contract may recover a contribution from any other person liable in respect of the same damage.

Notwithstanding that there is no sales contract, consumers may claim against the manufacturer: (i) directly under Article 124 of the Consumers Law if claiming against the seller in contract represents an excessive burden for the consumer;[101] (ii) if the manufacturer has freely issued a commercial warranty that binds him with the purchaser (here, there would be two contracts); or (iii) if the defective product provisions are applicable in strict liability claims.

6.8. Presumptions of Defectiveness

A breach of contract does not necessarily mean that a product is defective under the provisions of Royal Decree 1/2007.

101. This position enables a consumer to bring the equivalent of its contractual claim against the manufacturer when the seller cannot easily be identified or is no longer in existence.

However, any mismatch between the product and the terms and conditions agreed in the contract gives rise to responsibility under both the Consumers Law and simple contract-based claims.

6.9. LIMITATION

Generally, under Spanish law, contract claims may be brought within fifteen years of the breach of contract.

Regarding contracts of sale, defects arising in goods sold have to be repaired by the seller within a six month term from the delivery of the goods. However, the Supreme Court has generally extended this short term to the fifteen year term referred to in section 6.7 so that sale or supply contract claims are compatible with general contract breach claims.[102]

In relation to consumers, according to Article 123 of the Consumers Law, the seller is liable for any breach of contract that may be detected in the product within two years from the delivery of the product. The right of action lapses after three years from the delivery of the product. This shortens the period of fifteen years referred to in section 5.7 above, but reflects the fact that sellers face strict obligations to consumers under the Consumer Law. Further, Article 123 provides a statutory basis for an extension of the six month period referred to in 10.1 above.

6.10. REMEDIES

Breach of contract under the Spanish Civil Code may refer to vital or non-vital terms of the contract. Should the breach relate to a non-vital term, there would be a defective performance of the contract and the remedies are intended to balance the consideration delivered by each party. When the breach refers to vital terms of the contract,[103] the injured party may elect to: (i) compel the other party to fulfil its obligations in the terms of the contract; or (ii) terminate the contract, being able in both cases to claim for any damages that the breach may cause.

Where the buyer is a consumer, the law provides for remedies upon breach of contract by the seller. The consumer may opt to either demand the repair of the product or its substitution. Should neither of these alternatives be possible, the consumer may elect between asking for a reduction of the price or termination of the contract.

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102. See, e.g., Sentence n°. 812 of the Civil Chamber of the Supreme Court, 9 Jul. 2007 and Sentence n°. 964 of the Civil Chamber of the Supreme Court, 10 Oct. 2006.

103. For example, when the product supplied mismatches so greatly with the product agreed such that it is considered to be the delivery of a different object (*alliud pro alio*).

6.11. Exclusion and Limitation of Liability

Pursuant to Article 1.102 and 1.103 of the Civil Code, parties to a contract may by agreement exclude all liability arising from negligence, irrespective of the nature of the damage (i.e., liability for personal injury or death), but cannot exclude any liability where there has been wilful misconduct.

However, when one of the parties to the contract is a consumer, Article 86 of the Consumers Law deems abusive, null and void every clause that limits or restrains consumer rights according to law. In the same way, Article 130 of the Consumers Law provides that any restriction or limitation of the liability arising from defective products is ineffective.

7. CONCLUSION

As can be seen above, in all of the jurisdictions considered, contract law in principle provides an avenue for a party to seek redress from its counterparty for damage caused by a defective product, whether in parallel or as an alternative to tort and strict liability claims. The laws of contract in all of the above jurisdictions apply some of the same basic principles for example, causation, incorporation of implied terms, privity of contract and so on. At the same time, unsurprisingly given their different jurisprudential history, there are a number of legal and procedural distinctions between the jurisdictions, for example, in the Republic of Poland and Germany, the existence of consideration is not a legal requirement for the formation of a contract. Accordingly, although some of the principles of contract overlap, in Europe it is important to consider contractual liability for damage caused by a defective product on a county by country basis.