



ICLG

The International Comparative Legal Guide to:

Product Liability 2018

16th Edition

A practical cross-border insight into product liability work

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EDITORIAL

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

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

It is divided into two main sections:

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

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

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

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

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

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

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PREFACE

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

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

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

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

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1 Liability Systems

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

Kosovo product liability is based on the fault-based liability system under Law No. 04/L-077 “On Obligation Relationships” (hereinafter “Law on Obligation”).

Strict liability derives from Law No. 04/L-121 “On Consumer Protection” (hereinafter “Law on Consumer Protection”) only for sellers of products with a warranty period, who, during such warranty period, cannot repair the damaged products. In this case, they are obliged to give consumers similar products or to refund the money with indemnity.

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

There are no state-operated schemes of compensation for particular products.

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

The Law on Obligation provides for the liability of the producer for putting into circulation products that pose a danger to persons or belongings as well as for failing to undertake necessary measures to prevent damage through a warning in a packaging or with any other relevant measure.

Subject to the Law No. 04/L-078 “On General Product Safety” amended with Law No. 04/L-189” (hereinafter “Law on Product Safety”) the producer is defined as:

- i. a product producer established in the Republic of Kosovo and any other legal or natural person who affixes to the product his name, trade mark or other distinctive mark, or the one who processes the product;
- ii. the representative of the producer when the producer is not established in the Republic of Kosovo or the importer of the product in case there is no representative; and

- iii. any other person whose activity may affect the characteristics of the product’s safety.

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

We do not find any regulation stipulating the liability of a regulatory authority for defective products.

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

Pursuant to the Law On Product Safety, the producer shall undertake action to recall the products from consumers only as a last resort, when (i) other measures are not sufficient to prevent the risks, (ii) producers themselves consider it necessary, or (iii) producers are obliged to do so due to measures undertaken by the competent inspection body (article 5 thereof).

In addition, subject to Law No. 04/L-039 “On Technical Requirements for Products and Conformity Assessment”, if the producer considers or has reason to believe that the product placed on the market does not conform with the provisions applicable to that product, the producer is obligated to immediately take the necessary corrective measures, or otherwise withdraw the product from the market and prevent its distribution. Where the product presents a risk, the producer is obligated to inform the competent inspection authorities by specifying details, in particular the non-conformity of the product as well as any corrective action taken (article 6 paragraph 10).

A claim for failure to recall against the producer may be initiated for violation of the abovementioned legal grounds, as well as by the Law on Obligation.

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

The supply of defective products is not foreseen as a criminal offence under the Criminal Code (Code No. 04/L-082 “Criminal Code of the Republic of Kosovo, as amended”).

However, the Criminal Code lists the production and distribution of harmful medicinal and food products as criminal offences. These criminal offences are punishable by a by a fine and imprisonment of three (3) months to three (3) years.

In general, criminal charges may be brought for criminal offences of causing bodily injury or death by defective products.

Please note that Law No. 04/1030 “On liability of legal persons for criminal offences” provides for the liability of a legal person for the criminal offence of its responsible person. The liability of a legal person exists even when the actions of the legal person were in contradiction with the business policies or the orders of the legal person. The liability of the legal person is based on the culpability of the responsible person. Types of penalties that can be imposed for a criminal offence of a legal person are fines and the dissolution of a legal person.

2 Causation

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

Pursuant to the provisions of Law No. 03/L-006 “On Contested Procedure” amended with Law No. 04/L-118, the claimant has the burden of proving the facts on which it bases its claim. In this regard, the claimant should prove the fault/defect of the product and the damage resulting from such fault/defect.

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

Subject to the Law on Obligations there is a duty to compensate damages for anyone who causes damage to others, unless it is proven that the damage was caused without the fault of the defendant. In this regard, it is necessary to prove that the product to which the claimant was exposed has malfunctioned and caused injury.

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

Market-share liability does not apply under Kosovo law. The Law on Obligations provides for joint liability for damage caused by several participants.

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

Subject to article 5, paragraph 1.1 of the Law on Product Safety, the producers should provide consumers with adequate warnings so that consumers may assess the risks related to the product during normal use, when such risks are not clearly visible.

Non-compliance with the above legal provisions may result in civil action or the imposition of fines against manufacturers.

There is no principle of “learned intermediary” or any other principle that would discharge the duty owed by the manufacturer, under Kosovo Law.

3 Defences and Estoppel

3.1 What defences, if any, are available?

As mentioned above, the liability under the Law on Obligations exists for producers that have put products into circulation that pose a danger to persons or belongings as well as for failing to undertake necessary measures to prevent damage through a warning in the packaging or with any other relevant measure. In this regard, the producer can avoid liability if it proves that it did not put the product into circulation or that has undertaken all necessary measures to prevent the damage.

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

Under Kosovo law, there is no state of the art/development risk defence.

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

Kosovo legislation does not state that compliance with regulatory or statutory requirements constitutes a defence for the producer. However, under the Law on Obligation, there is no duty to compensate damages for the one who causes damage to others, if it is proven that the damage was caused through no fault of its own. In this regard, the producer could rely on such defence, i.e. that it complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product, in order to prove the lack of fault for defects in the products.

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

Under Kosovo law, a final judgment in a case on the same issues between the same parties is considered *res judicata*. There are no provisions that would prevent re-litigation in separate proceedings by a different claimant.

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

There are no provisions that would prevent the defendant from filing a claim against third parties either in the same proceedings or in subsequent proceedings. Subject to the Law on Obligations, the claim for the compensation of the damage is prescribed after three (3) years from the date the injured party became aware of the damage and the person who caused the damage.

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

There are no specific provisions that would prevent defendants from alleging that the claimant's actions caused or contributed towards the damage.

4 Procedure

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

Court proceedings are conducted before a judge or a panel of judges; there is no jury. Most cases before the Basic Court (first instance court) are adjudicated by a single judge, while cases before the Appeal and Supreme Court are adjudicated in panel of three (3) judges.

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

The Court appoints experts at its own discretion or at the request of the parties, who provide their relevant findings and opinions to the case. However, such an expert is not entitled to sit with the judge.

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

Kosovo law does not provide for class or group actions. However, subject to the provisions of the Law on Contested Procedure, the claim can be raised jointly by many plaintiffs or against several defendants (i) if their rights, respectively obligations derive from the same factual or legal basis, (ii) the subject matter of the contest are claims or obligations of the same kind that are based on same factual and legal grounds provided that the same court is competent to decide on each claim and for each defendant, or (iii) such possibility is foreseen by another law.

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

Although there are no specific legal provisions in this regard, in theory, there are no restrictions for interest groups to bring actions on behalf of several individuals in order to protect their common interests.

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

It takes several months from the date of filing of the lawsuit until to scheduling the first hearing. Depending on the complexity of the case, the trial will consist of preliminary hearing and several oral hearings. The trial before the first instance court may last from one to three years.

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

Kosovo courts can decide preliminary issues first. Subject to the provisions of the Law on Contested Procedure, if the court decision depends on the preliminary resolution of whether there is any subjective right or legal relationship as to why the court or any other competent body has not made a decision (preliminary issue), then the court is entitled to settle the issue itself. The court's decision on the preliminary matter has legal effect only in the proceedings in which such a decision has been made.

4.7 What appeal options are available?

In contested procedure, parties may submit a complaint against the decision of the first instance court, within fifteen (15) days from the day a copy of the verdict is delivered. The Court of Appeal makes a decision regarding such complaint.

Against the decision of the second-instance court, the parties may submit a revision within thirty (30) days of the date of delivery of the decision. The Supreme Court of Kosovo decides on the revision.

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

As mentioned above, the court, at its own discretion or at the request of the parties, may appoint independent experts who provide their findings and opinions on technical issues. There are no restrictions with regards to the nature or extent of such evidence.

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

There is no requirement for experts or witnesses to present themselves for pre-trial deposition. In order to support their claims, parties in court proceeding should submit their facts and evidences during the trial, including expert opinions and witnesses.

Please note that subject to Law No. 03/L-006 “On Contested Procedure” amended by Law No. 04/L-118 (hereinafter “Law on Contested Procedure”), the appointed expert has a duty to respond to court summons and to submit findings and opinion. Also, any person summoned as a witness has a duty to testify.

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

There are no pre-trial procedures; however, the Law on Contested Procedure lists several elements that each submitted lawsuit must contain, such as: a) the main request; b) the facts on which the plaintiff bases the claim; c) the evidence which establishes such facts; d) the value of the dispute; e) the legal basis; and f) other formal requirements. Therefore, the plaintiff should submit such documents to prove decisive facts from the lawsuit.

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

There is no obligation to apply alternative methods of dispute resolution unless the parties have agreed the application of such methods in advance.

However, subject to the provisions of the Law on Contested Procedure, the court may propose that litigants resolve their dispute through mediation, if it deems it necessary, taking into account the nature of the dispute and other circumstances. Such a proposal may be submitted by the parties themselves until the main hearing is completed.

Disputes can be settled by arbitration if there is an agreement between parties to that effect.

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

Kosovo courts have jurisdiction if the defendant has residence in Kosovo, regardless of where the claimant is domiciled.

In the adjudication of disputes related to protection of the rights that are based on a warranty issued by the producer, as well as the court with general territorial jurisdiction for the defendant, the court with general territorial jurisdiction for the seller who has provided the buyer with the warranty from the producer is also competent.

5 Time Limits

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

Yes, the Law on Obligations provides for such time limits.

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

A claim for the compensation of damages becomes statute-barred three (3) years from the date the claimant became aware of the damage and of the person that inflicted it. In any case, the claim becomes time-barred five (5) years after the damage occurred. Time limits should be raised by the defendant since they are not examined *ex officio* by the court. Time limits are stipulated by law, and the court has no discretion to disapply them if the party invokes them. Age, conditions or any other factor of the claimant has no effect on the calculation of time limits.

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

Concealment or fraud can interfere with the ability of the applicant to identify the person who inflicted the damage and thus postpone the beginning of the three-year time limit.

In addition, the Law on Obligations stipulates that when the damage is caused by a criminal offence and a longer limitation period is stipulated for criminal prosecution, the claim for compensation of damage shall become time-barred upon the expiry of the period stipulated for the criminal prosecution.

6 Remedies

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

Subject to general rules on indemnification of material damage, the Law on Obligation provides for the restoration of the previous situation and monetary compensation. The responsible person has a duty to restore the situation which was in place before the damage was caused. If the restoration does not completely eliminate the damage, the responsible person has the duty to pay monetary compensation for the rest of the damage. When restoring the previous situation is not possible, or when the court considers that it is not necessary, the court will order the payment of an appropriate amount of money on behalf of indemnity. In addition, the court will order payment of monetary compensation, if the claimant seeks this kind of remedy.

Monetary compensation is most common for compensation of damage due to defects in products.

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

Depending on the legal grounds of the claim, both monetary and non-monetary damages suffered by the consumer due to defects in products may be recovered.

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

There are no such damages provided by Kosovo law.

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

There are no punitive damages provided by Kosovo law.

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

There is no statutory maximum limit on the damages recoverable under the Kosovo law. They are recovered to the extent of damage caused by the defective product.

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

There are no group/class actions under Kosovo law, therefore no special rules apply regarding the settlement of claims or proceedings. Law on Contested Procedure stipulates that the parties are free to make a court settlement during their dispute. Minors do not have procedural capacity and should be represented by their legal representatives.

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

There are no specific regulations in this regard.

7 Costs / Funding

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

The court decides regarding the costs of the procedure in its final decision. The party that loses the trial has the obligation to refund

all costs of the opposing party. Such costs include the court fees, some expenses, as well as legal costs of bringing the proceedings. The court will only consider the expenses that were necessary to prosecute the case at court, by carefully considering all the circumstances. If the claimant succeeds only in part, the court may decide that each party is to bear its own costs.

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

Yes, based on Law No. 04/L-017 “On Free Legal Aid”.

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

Free legal aid is provided to persons who fulfil the following criteria:

- i. qualification criteria – are citizens or residents of the Republic of Kosovo or other persons defined by law, or rules of international law, that bound Republic of Kosovo; and persons to whom assistance on free legal aid is provided on the basis of reciprocity;
- ii. financial criteria – benefit from social assistance, or are in a similar situation to persons who benefit from social assistance and persons whose gross family incomes are lower than the average family incomes; and
- iii. legal criteria by assessing validity of the case such as the real value of the claim, argumentative power of the evidences presented by the applicant; and probability for the success of the claim.

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

The Kosovo Law is silent regarding conditional or contingency fees.

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

Third party funding is not regulated.

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

The court does not exercise any control over the costs to be incurred by the parties. Each party carries in advance its own costs that are caused by its procedural actions.

8 Updates

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

We do not find any recent decision published by Kosovo courts related to product liability. Kosovo has not yet adopted a specific legal regulation on product liability, and consumers can only rely on limited provisions of the Law on Consumer Protection and the Law on Obligations.

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Mr. Boga has solid expertise as advisor to banks, financial institutions and international investors operating in major projects in energy, infrastructure and real estate. Thanks to his experience, Boga & Associates is retained as legal advisor on regular basis by the most important financial institutions and foreign investors.

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Sokol also conducted a broad range of legal due diligences for international clients considering to invest in Albania or Kosovo in the fields of industry, telecommunications, banking, real estate, etc.

He is an authorised trademark attorney and has an expertise in trademark filing strategy and trademark prosecution, including IP and litigation issues.

Sokol is continuously ranked as a Leading Lawyer in the well-known guides *Chambers Global*, *Chambers & Partners* and *IFLR 1000*.

Sokol graduated in Law at the University of Tirana in 1996 and is admitted to practice in Albania and Kosovo. He is also an arbiter listed in the roster of the American Chamber of Commerce of Kosovo.

He is fluent in English and Italian.

BOGA & ASSOCIATES

LEGAL • TAX • ACCOUNTING

Boga & Associates, established in 1994, has emerged as one of the premier law firms in Albania, earning a reputation for providing the highest quality of legal, tax and accounting services to its clients. The firm also operates in Kosovo (Pristina) offering full range of services. Until May 2007, the firm was a member firm of KPMG International and the Senior Partner/Managing Partner, Mr. Genc Boga was also Senior Partner/Managing Partner of KPMG Albania.

The firm's particularity is linked to the multidisciplinary services it provides to its clients, through an uncompromising commitment to excellence. Apart from the widely consolidated legal practice, the firm also offers the highest standards of expertise in tax and accounting services, with keen sensitivity to the rapid changes in the Albanian and Kosovo business environment.

The firm delivers services to leading clients in major industries, banks and financial institutions, as well as to companies engaged in insurance, construction, energy and utilities, entertainment and media, mining, oil and gas, professional services, real estate, technology, telecommunications, tourism, transport, infrastructure and consumer goods.

The firm is continuously ranked as a "top tier firm" by *The Legal 500*, by *Chambers and Partners* for Corporate/Commercial, Dispute Resolution, Projects, Intellectual Property, Real Estate, as well as by *IFLR 1000* in Financial and Corporate and Projects. The firm is praised by clients and peers as a "law firm with high-calibre expertise", "the market-leading practice", with "a unique legal know-how", a "highly regarded team" distinguished "among the elite in Albania" and described as "accessible, responsive and wise".

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