



ICLG

The International Comparative Legal Guide to:

Product Liability 2019

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A practical cross-border insight into product liability work

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General Chapters:

1	European Product Liability Update – Adela Williams & Tom Fox, Arnold & Porter	1
2	U.S. Product Liability Law: Recent Developments and Future Outlook – Daniel A. Spira & Teri H. Peeples, Sidley Austin LLP	6
3	An Assessment of Analytical Tools in Product Liability Matters – Perspectives from Economics, Marketing, and Consumer Behaviour – Samid Hussain & Vildan Altuglu, Cornerstone Research	12
4	The Refinement of Regulatory and Liability Issues Concerning Autonomous Motor Vehicles – Francis P. Manchisi & Ernest V. Goodwin, Wilson, Elser, Moskowitz, Edelman & Dicker LLP	19
5	Criminal Liability for Defective Products – Howard Watson & Tony Dempster, Herbert Smith Freehills LLP	26
6	The Practicalities of Managing a Global Recall – Richard Matthews & Fabian Volz, Eversheds Sutherland	32
7	Product Liability in Asia – David Goh & Bindu Janardhanan, Squire Patton Boggs	42

Country Question and Answer Chapters:

8	Australia	Clayton Utz: Colin Loveday & Andrew Morrison	45
9	Brazil	Pinheiro Neto Advogados: Sérgio Pinheiro Marçal & Laura Beatriz de Souza Morganti	55
10	Canada	Blake, Cassels & Graydon LLP: Nicole Henderson & Jessica Lam	62
11	China	Squire Patton Boggs: Kelly Liu & Wu Di	69
12	England & Wales	Michael Spencer QC, Barrister (retired from practice in January 2018) Arnold & Porter: Adela Williams	77
13	France	Squire Patton Boggs: Carole Sportes & Valérie Ravit	91
14	Germany	Noerr LLP: Michael Molitoris & Dr. Juan Carlos Dastis	99
15	Greece	Bahas, Gramatidis & Partners: Dimitris Emvalomenos	105
16	Hong Kong	Squire Patton Boggs: David Goh & Bindu Janardhanan	113
17	India	AZB & Partners: Vivek Bajaj & Sonakshi Sharma	120
18	Ireland	Matheson: Tom Hayes & Michael Byrne	128
19	Japan	Iwata Godo Law Offices: Shinya Tago & Landry Guesdon	140
20	Korea	Bae, Kim & Lee LLC: Tony Dongwook Kang & Yongman Bae	150
21	Netherlands	Legaltree: Antoinette Collignon-Smit Sibinga & Carolien van Weering	158
22	Norway	Advokatfirmaet Ræder AS: Ole André Oftebro & Kyrre W. Kielland	166
23	Poland	Wolf Theiss: Paweł Wysocki & Marcin Rudnik	174
24	Singapore	Allen & Gledhill LLP: Dr. Stanley Lai, SC & Amanda Soon	180
25	Spain	Faus & Moliner Abogados: Xavier Moliner	191
26	Switzerland	Kellerhals Carrard: Dr. Claudia Götz Staehelin & Nina Studer	201
27	Taiwan	Lee and Li, Attorneys-at-Law: Patrick Marros Chu & David Tien	209
28	United Arab Emirates	Hamdan AlShamsi Lawyers & Legal Consultants: Hamdan AlShamsi	218
29	USA	Drinker Biddle & Reath LLP: David B. Sudzus & Daniel B. Carroll	224

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Brazil

Sérgio Pinheiro Marçal



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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?

Legal consumer relations in Brazil are regulated by the Consumer Protection Code (“CDC”) and can be defined as anything relating to production and placement on the market of goods and services, and subsequent acquisition and use of them by the public. These relations are necessarily composed of purchasers and end users on one side, and suppliers on the other. **Consumers** are defined as any individual or legal entity that acquires or uses products or services as an end user.

On the other hand, **supplier** means any individual or legal entity, whether public or private, Brazilian or foreign, as well as any unincorporated entities, engaged in production, assembly, creation, construction, transformation, import, export distribution or marketing activities or in the provision of services.

The CDC distinguishes **two types of liability**, namely: liability as regards the product itself; and liability for a flaw in the product.

Liability as regards the product itself is related to the concept of a **consumption accident**.

In this case, suppliers are only held safe from liability if it is proven that (i) the product was not put on the market, (ii) although it put the product on the market, there was no defect, or (iii) the accident occurred as a consequence of the **exclusive** fault of the consumer.

As for liability arising from a flaw in the product, this does not arise from any damage caused to the consumer. In this case, liability arises from the flaw itself which renders the product improper or inadequate for consumption, or from a reduction in its value or quantity.

In the CDC system, the liability is strict. There is no relevance whether it arises from a contractual or non-contractual relationship. As a general rule, the consumer may file suit against all involved in the chain of production. Those who are not directly responsible will have right of recourse against the responsible party. Only under express cases set forth under the law is there exemption from liability.

In cases in which a consumer relationship does not exist, the Brazilian Civil Code shall apply. The Civil Code provides for indemnity against illicit acts and also for contract liability. In the civil system, the indemnity for damages is irrespective of guild, when the activity normally conducted by the author of the damage implies, by its very nature, a risk against the rights of third parties.

The supplier will be considered liable in case of breach of statutory obligation resulting in a flaw in the product. Regarding a consumption accident, it is necessary that the product is considered defective according to the legal concept.

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

The State has no ancillary liability in relation to any kind of product, unless it is proven that it is directly responsible for the event which caused the damage.

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

The responsibility as regards the product itself is borne by the manufacturer, producer or builder, whether domestic or foreign, and by the importer. The importer is answerable in its capacity as *presumed supplier*, whilst the remaining are answerable in their capacity of effective supplier. The retail supplier (also a *presumed supplier*) has been excluded from the general rule, and is only answerable in a supplementary manner when the manufacturer cannot be identified or the product does not contain clear identification of the manufacturer, or when the merchant does not adequately store perishable products.

All suppliers jointly hold the liability for any flaws in the product, and for this, although it is different in case of a consumer accident, the retail supplier receives no privileged treatment.

The CDC provides for the right of return of the person who has paid against all other joint holders of responsibility, given the solidarity which exists among such suppliers.

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

No. According to several court precedents, the regulatory authorities cannot be held liable for a defective/faulty product.

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?

Products that are very harmful or hazardous cannot be placed on the market. However, both law and jurisprudence fail to conceptualise the meaning of “*very harmful or hazardous*”, so the interpretation of this phrase is subject to a case-by-case evaluation.

If a supplier acknowledges the harmful and hazardous nature of the product only after it has been placed on the market, it is responsible for immediately informing both consumers and the proper authorities by means of public media advertisements.

Ordinance 487/2012 regulates the procedure to be observed by suppliers in recalls of products and services which, after having entered the consumer market, are held to be harmful or dangerous.

Failure to comply with the Law theoretically subjects the supplier to administrative penalties. If the consumer public authorities (a) acknowledge a lack of communication that the supplier was supposed to have carried out, or (b) decide that the communication is insufficient, it shall initiate administrative procedures to find out whether the supplier has violated the law, and, if so, the penalties shall apply.

On the other hand, a criminal investigation shall be initiated to ascertain criminal liability of anyone that contributed to the lack of the mandatory communication, for late communication or for insufficient mandatory communication.

The supplier may also be sued in a civil court, whether jointly or severally, for providing indemnity for any damages caused to consumers.

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

Yes. Article 7, IX of Law 8137/90 sets forth that “selling, storing to sell or displaying for sale or otherwise delivering raw materials or goods under conditions that are unsuitable for consumption are crimes subject to two to five years’ imprisonment or a fine”. Article 64 of the CDC establishes that failing to inform or withdraw a product from the market when the supplier becomes aware of the harmful or hazardous nature of the product is also a crime (six months’ to two years’ imprisonment and a fine).

2 Causation

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

The burden of proof may be shifted to the supplier, at the court’s discretion, when (i) the claim brought by the consumer is found to be plausible, or (ii) in the event that the supplier is found to hold a stronger position in its relationship with the consumer. Whenever technical aspects are involved, the courts may order the suppliers *in lieu* of the consumers to submit proper evidence.

With respect to the damage, the burden of proof will always rest with the consumer.

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?

Expert, documentary and testimonial evidence are admitted to prove causation. As a general rule, although suppliers are subject to strict liability, it is necessary that the claimant evidences the causal relation (causation) between the actual damage suffered and an unexpected injurious effect relating to the product and the damage itself.

Nevertheless, some court precedents admit that it is unnecessary to prove a direct causation link, being sufficient to prove that the defective product may have contributed to the increase of the risk and/or to its existence.

It is worth mentioning that Brazilian law does not protect the mere expectation of a right. That is, the duty to indemnify arises from evidence of the actual occurrence of damage. Therefore, the mere exposure to an increased, but unpredictable, risk or malfunctioning does not create the duty to indemnify if there is no proof of harm from such exposure to the malfunction or risk.

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?

There is no legal provision covering the referred hypothesis. Although liability for product defects is strict, proof of causation will, at all times, be required. Thus, it is possible to develop the legal argument that a given producer should not be made liable in the absence of proof that the damage was caused by a product of such producer. On the other hand, since solidarity cannot be presumed, it is therefore inconceivable to determine joint liability among producers based on *market share* or similar criteria.

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?

Yes. The supplier has a legal obligation to provide adequate and clear information on different products and services, with correct specifications as to quantity, characteristics, composition, quality

and price, as well as any risks they entail. Lack of adequate information gives rise to liability on the supplier, particularly as to product risks. Brazilian law does not provide for the “learned intermediary” theory.

CDC expressly provides that in case of consumption accident, the supplier will be released from liability only if it is evidenced that: he did not place the product on the market or otherwise render the service; the defect does not exist; or the accident is exclusively attributable to the consumer.

3 Defences and Estoppel

3.1 What defences, if any, are available?

As mentioned above, the supplier is only released from liability if it is evidenced that: he did not place the product on the market or otherwise render the service; the defect does not exist; or the accident is exclusively attributable to the consumer. The risks reasonably inherent to a certain product or service, as well as proper disclosure to consumers, must always be taken into account for liability purposes.

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?

There is no statutory definition concerning the matter.

A significant number of jurists understand that the supplier’s good faith and their initial unawareness of the hazard that occurred shall not exempt it from liability for any damages that may arise. There are others who believe that the risk of development-exempt supplier’s liability was adopted by the CDC, following a suggestion of the European Economic Community.

Nevertheless, the CDC determines that a product shall not be deemed defective merely because another product, with a better quality, has been placed on the market.

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?

It is a possible legal argument that if a given company complies with all the rules and regulations determined by the State, it cannot be held liable for damages caused by a given product.

There are, however, opinions in the sense that as liability for the product itself is strict, it is not dependent on any actual fault of the supplier who has proof that the product is not defective.

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?

Awards issued in similar or precedent individual suits are not binding. The court must review each specific case based on its own

conviction and analyse the evidence brought by the claimant to his specific suit. Court precedents admit the use of evidence previously used in another case in specific situations; as long as objection was raised as to the production of such evidence, in whose production the party against which the evidence was produced had participated, in addition to the fact of the issue to be proved being identical.

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?

Two situations should be considered for this answer. If the third party responsible for the damage has no relation to the product supply, this excludes liability from the supplier. If the third party is a player in the supply chain, as a general rule, the consumer may file suit against all involved in the chain of production. Those who are not directly responsible will have right of recourse against the responsible party.

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

Pursuant to the CDC, the supplier will be released from liability only if it is proved that damage resulted exclusively from fault of the consumer.

4 Procedure

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

The trial shall be issued by a judge.

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)?

Technical specialists may carry out the work involved for pursuing these purposes. Expert witnesses act as assistants to the court, and it is the court who appoints them for the purpose of conducting a *bona fide* review of the evidence and the facts and to submit, in the form of an expert opinion, a report on his conclusions which can, therefore, be derived.

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?

Class actions are allowed in Brazil, where it is possible to discuss interests of a class of litigants in the same action. Such class actions may be filed by entities legally recognised as legitimate entities, such as: the Public Prosecution Office; Federal, State and Municipal Governments; and the Federal District, consumer protection government bodies and entities and associations legally set up to protect consumers. Class actions are quite common in Brazil.

The opt-out system applies only to those who file an individual action discussing the same interest addressed in a class action.

It should be noted that Brazil has no system similar to MDL (multidistrict litigation), which is available in the USA, for group individual actions or class actions.

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

Yes. Please see the answer above.

4.5 May lawyers or representative bodies advertise for claims and, if so, does this occur frequently? Does advertising materially affect the number or type of claims brought in your jurisdiction?

No. There are legal provisions which prohibit the use of marketing for the dissemination of legal services for the specific purpose of attracting clients.

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

It may extend over a period of five years, on average.

4.7 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?

The court must provide for the correctness of the suit as from the moment it receives the initial petition, and may dismiss it if it does not meet the legal requirements. After the initial reply has been submitted, the court can review preliminary issues related to matters of law. Once the proceedings have been cleared and put in due form, the court can issue its award based on the state of the records or order a finding of evidence. There is no trial by jury for civil claims.

4.8 What appeal options are available?

Brazilian procedure establishes a single judge in the first instance and a panel of three judges in the second instance. In specific cases, review by superior courts will be admitted to analyse constitutional matters, federal law violation and case law contradictions.

There are the following types of appeal: (1) appeal; (2) interlocutory appeal (seeks review of interlocutory decisions); (3) request for clarification; (4) special appeal (may be brought before the Superior Court of Justice as a last instance against an award which is contrary to a treaty or a Federal Law); and (5) extraordinary appeal (may be brought before the Supreme Federal Court if the challenged decision contravenes provisions of the Federal Constitution).

4.9 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?

Please refer to the answer to question 4.2.

4.10 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 pre-trial in the Brazilian procedural system. The judge has the power to interrogate the parties and the witnesses. The judge may take the deposition of any party at any stage of the proceedings, but ordinarily parties and witnesses testify only under the final public hearing.

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

Documentary evidence is introduced in the initial stage of ordinary proceedings by attachment to the pleadings. The judge will also admit documentary evidence at a later stage to support unforeseen facts or to refute evidence presented by opposing counsel.

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

Mediation and arbitration are alternative methods available and are regulated by law as a faculty. In the Brazilian civil procedural system that came into force in 2016, the plaintiff may require a mediation or conciliation hearing to be scheduled before the defendant presents the answer in a court civil claim.

4.13 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?

Brazilian Courts have jurisdiction to analyse conflicts when (i) the defendant, from any country, has domicile, agency, branch or subsidiary in Brazil, (ii) the obligation must be fulfilled in Brazil, and (iii) the action arises from a fact occurred or practised in Brazil.

5 Time Limits

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

Yes, time limits do exist.

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?

For apparent defects: 30 days for a non-durable product or service; and 90 days for durable products or services. The terms are calculated as from the delivery of the product or from the completion of the performance of the service.

For hidden defects: 30 and 90 days as in the case of apparent defects, but the term commences at the time the hidden defect becomes apparent.

The CDC stipulates that the right to demand indemnity for damages caused by the product or the service prescribes after a term of five

years, to be calculated as from the time the damage and its authorship becomes known.

The court does not have the power to interfere in the terms defined by the CDC. By the same token, the age or the conditions of the consumer do not interfere with the reckoning of the terms.

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

The limitation period starts running when consumers become aware of the defectiveness of the product or the injury. If there is any fraud, the period for claiming damages caused by the product or service will only start running when the damaging act is unveiled.

6 Remedies

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

The consumer can file court claims against suppliers for the redress of damages caused by defective products.

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

Losses and damages encompass: (i) actual damages, which correspond to all losses incurred by the victim by virtue of the harmful event (including those of a material nature and for pain and suffering, i.e. moral damages); and (ii) loss of profits, which represents the legitimate and expected gains which the same failed to receive, due to the accident.

Specifically in terms of consumer rights, there are the following general indemnity obligations:

- (i) indemnity of damages caused due to defects arising from design, manufacture, construction, assembly, formula, handling, presentation or packaging of the products, as well as for insufficient or inadequate information concerning its use and risks;
- (ii) indemnity for damages caused due to defects related to the rendering of the services, as well as to insufficient or inadequate information concerning the enjoyment and risks thereof;
- (iii) indemnity for defects in quality or quantity which render the products improper or inadequate for consumption or which reduce their value, as well as defects arising from inconsistency with information included in the container, packaging, labels or advertisement, subject to the variations inherent to the nature of the product, the consumer being entitled to demand replacement of the defective parts;
- (iv) indemnity for defects in product quantity whenever, and subject to variations inherent to the nature of the product, its net content is less than that indicated in the container, packaging, label or advertisement, the consumer being entitled to demand, at the consumer's option: a) *pro rata* reduction in the price; b) replacement of the product by another of the same kind, free from such defects; or c) immediate reimbursement of the amount paid, subject to monetary indexation, at no detriment to the obligation to provide indemnity for any losses and damages; and

- (v) under the provision of services for the purpose of repairing a given product, the supplier will be implicitly bound to use original, adequate and new spare parts or components, or which conform to the technical specifications of the manufacturer, save, as to the last mentioned, upon the express authorisation of the consumer to proceed otherwise.

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?

Under Brazilian law, there is no indemnity for a future or hypothetical damage. Accordingly, expenses incurred for medical monitoring can only be recovered if the damage actually occurred. In this case, such expenses will be included in the calculation of the indemnity for the property damage suffered by the victim.

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

No. However, what has been accepted recently is the theory of discouragement, according to which the amount of the award for pain and suffering must be set at reasonable levels to discourage its repetition.

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?

The actual number of claims arising from the same incident is irrelevant, since the main purpose of the law is to ensure full recovery for all victims of the incident or accident.

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?

For individual actions dealing with disposable rights, the only requirement is the consent of parties with powers thereto. If there are persons without powers (e.g. minors), an authorised representative and/or the Public Prosecution Office must intervene.

In class actions, the settlement calls for a number of factors that hinder their implementation.

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?

This discussion is not yet effective in Brazil, and there is no precedent thereon.

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 losing party shall pay all court costs, as well as the other side's attorneys' fees. Attorneys' fees are normally fixed at 10 to 20 per cent of the amount of the award. Recovery of the party's own costs does not automatically arise from the winning award and will, at all times, be subject to the reasonability criterion and to an effective proof that it represents a material damage.

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

Public funding is limited to very specific situations in Brazil. Legal aid is one of these situations.

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

Judicial assistance will be granted to those who need it in the manner established by law and restricted to a limited budget. An indigent receiving legal aid is excused from payment of all judicial costs.

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

Public funding cannot be through conditional or contingency fees. The grant of it depends exclusively on the existence of previous circumstances provided by law.

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

Public funding cannot be through conditional or contingency fees. The grant of it depends exclusively on the existence of previous circumstances provided by law.

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 Brazilian civil procedural system is different from the American system, especially the discovery phase and trial. As a rule, the Court exercises no control over the costs to be incurred by the parties, but expert examination, e.g., has to be conducted by the Court who appoints an expert and fixes his fee.

8 Updates

8.1 Please provide a summary of any new cases, trends and developments in Product Liability Law in your jurisdiction including how the courts are approaching any issues arising in relation to new technologies and artificial intelligence.

The Brazilian model for recalling the very harmful and hazardous products or services is different from the American model, in which the risk classification is a determining factor for the recall. Although the legal rules that determine the procedures to be adopted by the suppliers who have to make a recall of their products is from 2012, it is anachronistic. In view of that, the Brazilian Ministry of Justice recently announced a public consultation for the update of consumer products recall. It is an important initiative that seeks for the improvement of product recall effectiveness.

Lastly, the discussions about the use of new technologies and artificial intelligence are not yet effective in Brazil, and there are no precedents thereof.

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PINHEIRONETO

A D V O G A D O S

Pinheiro Neto Advogados is a Brazilian, independent, full-service firm specialising in multi-disciplinary deals and in translating the Brazilian legal environment for the benefit of local and foreign clients. Founded in 1942, Pinheiro Neto Advogados was one of the first Brazilian law firms to serve foreign clients as well as the first Brazilian law firm to specialise in corporate clients. With clients in almost 60 countries, the firm was recognised in 2014 by the Brazilian government as the number one exporter of legal services from Brazil. The firm advises and represents both local and international clients in a broad range of sectors, including automotive, banking and financial services, construction and materials, energy and natural resources, environment and waste management, health care, oil and gas, real estate and technology.

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- Corporate Immigration
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- Corporate Tax
- Cybersecurity
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- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
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