THE PRODUCT REGULATION AND LIABILITY REVIEW

Tenth Edition

Editors
Chilton Davis Varner, Madison Kitchens and Franklin Sacha

THE LAWREVIEWS

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PREFACE

In today's global economy, product manufacturers and distributors face a dizzying array of overlapping and sometimes contradictory laws and regulations around the world. A basic familiarity with international product liability is essential to doing business in this environment. An understanding of the international framework will provide thoughtful manufacturers and distributors with a strategic advantage in this increasingly competitive area. This treatise sets out a general overview of product liability in key jurisdictions around the world, giving manufacturers a place to start in assessing their potential liability and exposure.

Readers of this publication will see that each country's product liability laws reflect a delicate balance between protecting consumers and encouraging risk-taking and innovation. This balance is constantly shifting through new legislation, regulations, treaties, administrative oversight and court decisions. However, the overall trajectory seems clear: as global wealth, technological innovation and consumer knowledge continue to increase, so will the cost of product liability actions.

This edition demonstrates how countries sought to maintain that delicate balance between consumer protection and innovation in 2022, particularly with respect to cutting-edge technological, supply chain and environmental issues. In the autumn of 2022, the European Commission took a significant step by publishing a draft revision of its 37-year-old Product Liability Directive. The revised Directive would extend product liability law not only to typical manufactured products, but also to digital products such as software and artificial intelligence systems. In addition to expanding the substantive reach of the Directive, the proposed draft would also ensure that business entities based in the European Union can be held liable for a defective product, even if the product is purchased from a manufacturer outside the European Union. That change reflects the modern global supply chain system, where products are often manufactured in one nation and sold in another through third-party distributors or fulfilment companies. Under the EU proposal, any natural or legal person who modifies a product (for instance, through a software update) or a fulfilment service provider can be liable for damage from a defective product. This change could dramatically expand companies' exposure to product liability actions. In addition, the draft Directive also includes consumer-friendly procedural changes, including requirements that manufacturers disclose evidence, flexibility for filing deadlines and a reduction in the burden of proof in complex cases (such as pharmaceutical actions). Spain has already taken steps to implement the new rules set out in the Directive.

Another theme of this edition reflects growing concerns about environmental sustainability and consumer health. For instance, France enacted new rules with the goal of promoting the 'circular economy', in which manufacturers produce goods with the intention that those goods will be recycled and reused, therefore reducing waste and promoting

sustainability. To achieve that goal, France enacted a rule that requires certain household products to include a label that informs consumers about the environmental impact of the product. The US government took significant steps in 2022 to regulate per- and polyfluoroalkyl substances (PFAS), commonly known as 'forever chemicals', with the goal of reducing the presence of PFAS in the environment and requiring companies to pay for clean-up costs. Those regulatory shifts likely augur more litigation on this front in the United States.

Although product manufacturers face a heightened regulatory environment across the globe, particularly for hot-button technological and environmental issues, they also notched important wins in the courtroom in 2022. Manufacturers of the heartburn drug Zantac scored a massive victory in the United States in a mass tort litigation arising from allegations that the drug's active ingredient causes cancer. A federal court granted the manufacturers' motions to exclude the plaintiffs' experts who sought to prove a link between Zantac and cancer, finding that no scientist outside the litigation had found that connection. The court's decision effectively ended tens of thousands of lawsuits, put the plaintiffs on the defensive in other Zantac-related lawsuits throughout the United States, and underscored the critical (and sometimes dispositive) role that experts play in product liability cases. And in a case involving asbestos liability in the construction context, Japan's Supreme Court held that asbestos manufacturers were not required to issue warnings about asbestos in building materials. Despite those victories, litigation challenges remain for product manufacturers. For example, Australia saw the removal of certain requirements for the operators of class action litigation funders, which will make it easier for plaintiffs to bring lawsuits. This litigation funding continues to grow in various jurisdictions, especially in the mass tort context. Those types of developments throughout the world underscore the need for product manufacturers to remain abreast of legal and regulatory changes in all jurisdictions where they operate or sell products.

This edition covers 10 countries and territories and includes a high-level overview of each jurisdiction's product liability framework, recent changes and developments, and a look forward to expected trends. Each chapter contains an introduction to the country's product liability framework, followed by four main sections: regulatory oversight (describing the country's regulatory authorities or administrative bodies that oversee some aspect of product liability); causes of action (identifying the specific causes of action under which manufacturers, distributors or sellers of a product may be held liable for injury caused by that product); litigation (providing a broad overview of all aspects of litigation in a given country, including the forum, burden of proof, potential defences to liability, personal jurisdiction, expert witnesses, discovery, apportionment, whether mass tort actions or class actions are available and what damages might be expected); and the year in review (describing recent, current and pending developments affecting various aspects of product liability, such as regulatory or policy changes, significant cases or settlements, and any notable trends).

Whether the reader is a company executive or a private practitioner, we hope that this edition will prove useful in navigating the complex world of product liability and alerting you to important developments that might affect your business.

We wish to thank all the contributors who have been so generous with their time and expertise. They have made this publication possible.

Chilton Davis Varner, Madison Kitchens and Franklin Sacha
King & Spalding LLP
Atlanta
March 2023

Chapter 2

AUSTRIA

Eva Spiegel and Dominik Szerencsics[1]

I INTRODUCTION TO THE PRODUCT LIABILITY FRAMEWORK

i The Product Liability Act

The Product Liability Act,[2] which implemented European Directive 85/374/EEC on liability for defective products (the Product Liability Directive) into national law, is a statutory liability regime that governs product liability in Austria. In line with the European Directive, the Product Liability Act provides for a strict (i.e., no-fault) liability scheme. Liability for damages under the Product Liability Act can be neither excluded nor limited in advance.

Under the Product Liability Act, primary liability for damage caused by a defective product is placed on the entrepreneur who either manufactured the product (the producer) or imported the product into, and put it into circulation in, the European Economic Area (the importer).

As per the definition provided in the Product Liability Act, the producer is the person who has manufactured the finished product, a raw material or a component part. Furthermore, any person who presents themselves as the producer by putting their name, trademark or other distinguishing feature on the product is regarded as the producer.

Where the producer or, in the event of products imported into the European Economic Area, the importer cannot be identified, any supplier who has put the product into circulation is liable, unless they inform the injured party within a reasonable period of the identity of the producer or the importer or the person who supplied them with the product (the preceding supplier).

The liability regime of the Product Liability Act covers liability for death, injury to body or health, and damage to items of property resulting from the defect of a product. Damage to the defective product itself is not covered. Furthermore, damage to an item of property is compensable only if it was not suffered by an entrepreneur who used the item of property predominantly in their business. Thus, damage to items of property is basically compensated only to the extent that the damage was suffered by a consumer. In any case, there is a deductible amount of €500 for damage to items of property, meaning that only the amount exceeding €500 is compensable. There are, however, no caps on liability.

1 Eva Spiegel is a partner and Dominik Szerencsics is an associate at Wolf Theiss Rechtsanwälte GmbH & Co KG.

2 Federal Act of 21 January 1988 Governing the Liability for a Defective Product, BGBl. No. 99/1988, as amended.

The Product Liability Act contains (in Section 5(1)) a definition of the term 'product defect'. A product is deemed defective if it does not provide the safety that, taking all circumstances into account, could reasonably be expected – in particular in respect of:

a the presentation of the product;
b the use to which the product can reasonably be expected to be put; and
c the time the product was put into circulation.

However, a product cannot be considered defective for the sole reason that an improved product is subsequently put into circulation.

According to case law of the Austrian Supreme Court, for the assessment of whether a product is to be deemed defective, an objective standard is to be applied based on the safety expectations of an average product user. Expectations of the safety of a product are, in general, justified only if the product user also meets their own individual responsibility, meaning that for unforeseeable or downright absurd uses, product liability usually is not triggered. However, a certain actual, even if improper, use might have to be equitably expected – for instance, if a product is intended for use by children (such as toys or playground equipment).[3]

'Presentation' of a product is any activity by which a person subject to liability introduces the product to the public or individual users, including advertisements, product descriptions, directions for use and instruction sheets.[4]

In general, the producer has the duty to instruct users on how to safely use the product and to warn of hazards involved in the use of the product and, under some circumstances, even to warn against possible improper use. However, these duties also depend on the need for protection of (possible) users of the product. Where a product might reach the hands of persons who are not familiar with the risks involved in the use of a product, or if a product is addressed to different profiles of users, the content and extent of the instructions must be aimed at the least informed and thus most endangered group of (possible) users.[5]

Whether a product is defective is to be assessed according to the time the individual product was put into circulation. A product is deemed to have been put into circulation once the entrepreneur has transferred it to another person into the latter's power of disposition or for the latter's use. In the case of a series of products, the point in time at which the individual product causing the damage was put into circulation is decisive.

In a case concerning the explosion of a glass bottle of carbonised mineral water causing personal injury, the Austrian Supreme Court held that the producer of serial products must pay due regard to experience gained after the series was first launched on the market and to take these experiences into account in the further production, such as by modifying the construction, changing the production process or improving instructions to the product users.[6]

3 Austrian Supreme Court, Case No. 1 Ob 62/11s of 28 April 2011 and Case No. 9 Ob 59/15i of 28 October 2015.

4 Rudolf Welser and Christian Rabl, *Produkthaftungsgesetz* (LexisNexis, 2016), p. 102f.

5 Austrian Supreme Court, Case No. 7 Ob 49/01h of 30 March 2001 and Case No. 1 Ob 216/11p of 24 November 2011.

6 Austrian Supreme Court, Case No. 6 Ob 215/11b of 13 September 2012.

ii Other bases of liability

Apart from the Product Liability Act, liability for a defective product notably may arise out of general tort law, contract law and the concept of 'contract with protective effect for third parties'. Liability under both general tort law and contract law, as well as under this concept, is fault based.

The producer is usually a legal entity. Liability based on general tort law would require that either the producer's statutory bodies or other persons in a leading or supervisory position are at fault.[7] For the conduct of other persons whom the producer employs or engages, the producer is liable only towards third persons within very narrow limits – namely if those persons are habitually unable or unfit for the assigned work.

Under contract law, the counterparty is responsible for damage caused by a fault of its employees or any other persons used to fulfil its duties as if it acted itself, and there is a presumption of fault in the event of non-fulfilment of a contractual obligation, in which case the burden of proof shifts to the defendant to prove the absence of fault.

As it is characteristic for many product liability cases that no contract exists between the person suffering damage and the producer, relying on liability under contract law might often not be possible.

However, according to doctrine and case law developed prior to the introduction of the Product Liability Act in 1988, the contract between the producer and the first purchaser of the product unfolds protective effects through a chain of contracts towards the end customer, with the consequence that the end customer (as well as persons deemed to belong to their sphere, such as family members or employees) may seek redress against the producer as if they were in a contractual relationship. Thus, the producer is responsible for damage caused by fault of its employees or any other persons used to fulfil its duties as if it acted itself, and the end customer benefits from the reversal of the burden of proof (i.e., the producer has to prove absence of fault).

Since the introduction of the Product Liability Act, the concept of contract with protective effect for third parties has practical relevance mainly in cases where damage is not compensable under the Product Liability Act (such as, in particular, damage to property suffered by entrepreneurs) or where claims under the Product Liability Act have already become time-barred.

Liability could also arise out of the violation of a 'protective law'. For instance, the Product Safety Act is deemed a protective law by scholars.[8]

II REGULATORY OVERSIGHT

European Directive 2001/95/EC on general product safety was implemented into Austrian law by the enactment of the Product Safety Act,[9] which serves as the general source of law for product safety.

The Product Safety Act regulates safety requirements to be met by products, obligations of persons putting products into circulation and measures to be taken by government authorities, with the aim of protecting human life and health from danger from hazardous products. Legislation governing product safety on the one hand and product liability on

7 Austrian Supreme Court, Case No. 6 Ob 108/07m of 27 February 2009.

8 Welser and Rabl, footnote 4, p. 7f.

9 Product Safety Act 2004, BGBl I No. 16/2005, as amended.

the other has a complementary function: the first instrument shall ensure that only safe products are put into circulation (preventive function); the second instrument establishes the rules under which personal injury and damage to property caused by a defective product are compensated (compensation function).[10]

In addition to the Product Safety Act, there exists regulatory legislation for specific products, such as the Pharmaceutical Products Act, the Medical Devices Act, the Food Safety and Consumer Protection Act and the Chemicals Act. Product safety and product monitoring requirements under these laws are generally stricter than those under the Product Safety Act. However, as looking into these various regulations would go beyond the scope of this chapter, only the Product Safety Act is addressed here.

Under the Product Safety Act, the competent authorities are the Federal Ministry for Social Affairs, Health, Care and Consumer Protection and the provincial governors.

If producers, importers and suppliers know or should know from information available to them within the scope of their business activities that a product put on the market by them poses a danger to consumers that is incompatible with the safety requirements of the Product Safety Act,[11] they must notify one of the competent authorities without delay. This also applies for measures, particularly product recalls, taken by producers, importers and suppliers. Failure to meet these notification obligations constitutes an administrative offence for which fines of up to €3,000 can be imposed.

Pursuant to the Product Safety Act, producers and importers have a duty to monitor products after putting them on the market, by taking measures that enable them to recognise dangers arising from the products and to take appropriate measures to avert those dangers. These measures might, if necessary, include withdrawing the products from the market, giving reasonable and effective warnings to consumers and, if need be, recalling the products. Suppliers are required to contribute to monitoring the safety of the marketed products, such as by passing on indications of dangers that might be posed by a product and by cooperating with measures by the producers and competent authorities to avert danger.

If the producer or importer fails to take (appropriate) measures, the Federal Ministry for Social Affairs, Health, Care and Consumer Protection can take appropriate measures, including the ordering of a product recall. Contravention of these measures constitutes an administrative offence for which fines of up to €25,000 can be imposed.

Furthermore, in this context, on the basis of general civil law principles, producers (and, as the case may be, also importers and suppliers) have a product monitoring duty after the product is put on the market, entailing the duty to avert dangers discovered by taking appropriate measures. A violation of the monitoring duty may thus give rise to civil liability if persons suffer damage because of the violation.

The nature and level of risks associated with a detected danger are to be taken into account when assessing which measures are appropriate in a given case, to avert danger (principle of proportionality).

Furthermore, if deemed a protective law, violations of the Product Safety Act or measures ordered by competent authorities thereunder could directly give rise to civil liability.

10 Report from the Commission of the European Communities (COM (2000) 893 final) on the Application of Directive 85/374 on Liability for Defective Products, 21, 31.

11 Pursuant to Section 4 of the Product Safety Act, a product is deemed safe when, provided that it is put to its proper or any reasonably foreseeable use, it harbours no dangers or dangers of such a low level as are acceptable for human safety with a view to its use and to safeguarding a high level of protection.

III CAUSES OF ACTION

Causes of action for product liability claims in general have their basis in civil law, such as the Product Liability Act, general tort law, contract law and the concept of contract with protective effect for third parties described above. In addition, a product liability claim may be based on a violation of a protective law.

The placing of a defective product on the market or violations of product safety requirements may also constitute a criminal offence under the Austrian Criminal Code if, for instance, this causes bodily injury or death of a person; (substantial) environmental damage; danger to life and health to a larger number of persons; or danger to another's property to a significant extent. Apart from the responsible individual or individuals in Austria, legal entities can also be liable for criminal offences under certain conditions (as set out in the Austrian Corporate Criminal Liability Act).

Damaged persons may join criminal proceedings as private parties, which gives them the advantage to gain access to the criminal file (although access to certain documents might be restricted) and use the documents in (subsequent) civil proceedings. In rare cases, damages are awarded by the criminal court in the course of criminal proceedings. Furthermore, in a civil proceeding, damages might be awarded more easily and swiftly if the claim can be based on a criminal conviction.

IV LITIGATION

i Forum

Product liability claims are determined in civil court proceedings before state courts by professional judges. Austria does not have jury trials in civil proceedings.

Provided that there is an arbitration agreement between the parties involved, product liability (related) claims may also be determined in arbitration proceedings. Under Austrian arbitration law, arbitration agreements between an entrepreneur and a consumer can be validly concluded only for disputes that have already arisen. Consumers normally assert product liability claims in civil proceedings before state courts.

ii Burden of proof

If the claim is based on the Product Liability Act, the plaintiff has to prove the damage, the defect and the causal relationship between the defect and the damage. Because liability under the Product Liability Act is based on strict liability, the issue of fault is of no relevance.

If the defendant raises the defence that it has not put the product into circulation or not acted as its entrepreneur, then the burden of proof for that rests with it. Furthermore, if the defendant relies on the defence that the defect that caused the damage did not exist at the time it put the product into circulation, it must show that, with regard to all circumstances, this is plausible (prima facie evidence).

If the claim is based on liability in tort, then the plaintiff has to prove the damage, causation, unlawfulness, that the conduct causing the damage was unlawful and that the conduct causing the damage was at least negligent. The same holds if the claim is based on breach of contract or on contract with protective effect for third parties, with the exception that the defendant has to prove the absence of fault (negligence or intent).

In civil proceedings, the general standard of proof is 'highly probable'.

For causation, the *conditio sine qua non* test is applied by asking the hypothetical question of whether the damage would have occurred irrespective of the conduct (or, respectively, the product defect) at issue. If this were the case, the conduct (or, respectively, the product defect) was not causal. However, doctrine and case law, in addition, apply the theory of adequate causation, meaning that damage that is the result of a totally atypical and extraordinary chain of circumstances of cause and effect is excluded from liability.

However, prima facie evidence may serve to the benefit of the plaintiff. If facts are established that, according to general experience, allow conclusions on a certain course of events, such as the existence of a product defect and the causal relationship between defect and damage, the judge may regard this as proven, unless the defendant can show that the damage might have occurred owing to an atypical course of events.[12]

iii Defences

Under the Product Liability Act, liability can be excluded by proving:

a that the defect can be attributed to a specific mandatory legal provision or official instruction with which the product had to comply;

b that the state of scientific and technical knowledge at the time the product was put into circulation by the person against whom an action is brought was not such as to enable the existence of the defect to be discovered ('state of the art' defence); or

c that if the person against whom an action is brought has produced merely a raw material or a component part, the defect was caused by the design of the product in which the raw material or component part was fitted or by the instructions given by the producer of the product.

Further defences available to the defendant are that it did not put the product into circulation or did not act as its entrepreneur, or that the defect that caused the damage did not exist at the time it put the product into circulation.

Outside the Product Liability Act, the defendant can invoke any defences that might serve to disprove the allegations of the plaintiff and fault.

A further defence both under and outside the Product Liability Act is contributory fault by the damaged party or a person for whose conduct the damaged party is responsible, which – if successful – might lead to a reduction of the damage the defendant has to compensate.

Furthermore, the defendant may plead the statute of limitations. There are relative and absolute statutes of limitations. The relative statute of limitations is three years and begins to run from the time the damaged party became aware (or at least could reasonably have become aware) of the damage and the person who caused the damage. The absolute limitation period under the Product Liability Act is 10 years, starting from the time the party liable for compensation put the product into circulation. For damage claims outside the Product Liability Act, the absolute statute of limitation is 30 years, starting from the time the damage occurred.

12 Hanns Fitz, Alexander Grau and Peter Reindl, *Produkthaftungsgesetz* (MANZ Verlag Wien, 2004), p. 257.

iv Personal jurisdiction

Austrian jurisdiction for product liability (related) claims is an issue if the defendant does not have its seat in Austria, or (as is the case in most product liability cases) there is no contractual relationship between the damaged party and the defendant from which Austrian jurisdiction (e.g., because of a jurisdiction clause in favour of Austrian courts) derives.

If the defendant has its seat outside the European Union[13] or in a state that is not party to the Lugano Convention[14] (i.e., in a third state), the question of Austrian (international) jurisdiction is to be determined based on the Austrian Law on Jurisdiction. Pursuant to Section 92a of the legislation, Austrian jurisdiction for damage claims is given if the act causing the damage occurred in Austria. According to the Austrian Supreme Court, within the meaning of this provision, if the place where the act causing the damage and the place where the damage occurred are not identical, solely the place where the act causing the damage occurred is of relevance.[15] In product liability cases, this is basically the place where the defective product was manufactured. This is without prejudice to any liability of the importer of the product.

Notwithstanding the above, jurisdiction for claims against a producer based in a third state might be given in the case of a 'joinder of parties' – for instance, if the producer is sued together with the importer who has its seat in Austria. A precondition for the establishment of a place of jurisdiction based on joinder of parties is that the parties in the joinder are joined parties within the meaning of Section 11 of the Austrian Code of Civil Procedure, meaning that they are linked by equal legal or factual grounds, or that they are jointly and severally liable. In a case such as this, the applicable law might also have to be looked into. According to Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

a the law of the country in which the person sustaining the damage had their habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

b the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

c the law of the country in which the damage occurred, if the product was marketed in that country.

However, the applicable law shall be the law of the country in which the person claimed to be liable is habitually resident if they could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c), above.

13 If the defendant is domiciled within the European Union, to proceedings instituted after 10 January 2015 Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) applies, and to proceedings instituted before 10 January 2015, its predecessor, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, is applicable.

14 The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies in relation to Switzerland, Norway and Iceland.

15 Austrian Supreme Court, Cases Nos. 7 Ob 541/92 of 23 April 1992, 2 Ob 157/04h of 1 July 2004, 7 OB 173/17t of 20 June 2018 and 3 Ob 152/19p of 11 September 2019.

As regards claims against a defendant domiciled in a Member State of the European Union, the provision that a person domiciled in a Member State may be sued in another Member State, in matters relating to tort, delict or quasi-delict, 'in the courts for the place where the harmful event occurred or may occur', is of main relevance in product liability cases lacking a contractual relationship between the damaged party and the defendant. Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) contains this provision in Article 7(2), and its predecessor, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in Article 5(3). Likewise, the Lugano Convention (in Article 5(3)) refers to the courts of the place where the harmful event occurred or might occur.

According to the interpretation of the European Court of Justice (ECJ), in a case where the place of occurrence of the event that might give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either place.[16]

The Austrian Supreme Court, in a decision of 28 November 2012,[17] made a request for a preliminary ruling to the ECJ regarding the determination of the 'place of the event giving rise to the damage' in relation to product liability, by posing the question of whether this is the place where:

a the producer is established;
b the product was put into circulation; or
c the product was acquired by the end user.

The case underlying this request involved a dispute between a bicycle producer based in Germany and an Austrian plaintiff (a consumer) who had bought the bicycle from an Austrian-based company. While riding this bicycle in Germany, the plaintiff suffered a fall and was injured. He subsequently sued the German producer for damages under the Product Liability Act before a court in Austria. According to the plaintiff, his fall from the bicycle was caused by the fact that the fork ends had detached themselves from the wheel fork owing to a manufacturing defect. For the purpose of establishing jurisdiction of the Austrian court, the plaintiff relied on Article 5(3) of Regulation No. 44/2001, claiming that the place of the event giving rise to the damage was located in Austria because the bicycle was bought there, in the sense that the product was made available to the end user by way of commercial distribution.

In its judgment of 16 January 2014, the ECJ ruled on the request by the Austrian Supreme Court that Article 5(3) of Regulation No. 44/2001 must be interpreted as meaning that, where a producer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured.[18] Given that Article 7(2) of Regulation No. 1215/2012 is identical to Article 5(3) of Regulation No. 44/2001, it seems safe to say that the same interpretation applies. This also holds for Article 5(3) of the Lugano Convention.

16 European Court of Justice, Case C-51/97 (*Réunion Européenne*); Case C-189/08 (*Zuid-Chemie*).

17 Austrian Supreme Court, Cases Nos. 7 Ob 187/12v and 7 Ob 19/14s of 28 November 2012.

18 European Court of Justice, Case C-45/13 (*Andreas Kainz*).

v Expert witnesses

The judge can appoint experts at its discretion to assist in establishing the facts of the case. In product liability cases, it is usual that the judge appoints an expert. The parties may propose experts and reject an expert on the grounds of bias; however, the final decision rests with the judge.

The parties may present private expert opinions, but courts regard a private expert opinion only as a private document attesting to the author's opinion. A private expert opinion might serve as an instrument to question or to raise doubt as to the court-appointed expert's opinion.

vi Discovery

Austrian law does not provide for (pretrial) discovery proceedings.

In Austrian civil proceedings, it is each party's responsibility to produce the evidence necessary to support their case. There are only very limited conditions under which a party might be obliged to disclose certain evidence upon the other party's request. These conditions are specified in the Austrian Code of Civil Procedure, according to which documents are subject to disclosure if:

a the opponent itself relied on the document in the course of the proceedings;
b the opponent is obliged to hand the document over by a substantive law; or
c the document is qualified as a joint deed between the parties.

Joint deeds are documents created in the interest of the party requesting disclosure, documents that contain information regarding reciprocal rights and obligations between the parties, or any documents that are in fact written negotiations between the parties.

The party requesting disclosure has to clearly specify the evidence (i.e., the document or documents) that it wishes to see; requests to produce 'all relevant' documents are prohibited. If the above criteria are met, the court can order the opposing party to produce the requested documents. However, a court order to the opposing party to produce documents is unenforceable. Failure to comply with the order may be sanctioned only inasmuch as the court can take this behaviour into account in its evaluation of the entire case.

Witnesses have the duty to appear before the court and to answer truthfully. Parties (including a company's statutory representatives, such as the CEO) are generally treated as witnesses, but they are under no duty to appear before the court or to give testimony. Furthermore, Austrian law provides for grounds of refusal by parties or witnesses to answer questions during testimony in specific circumstances (e.g., confidentiality, business or trade secrets, and if examinations expose the party or witness to the risk of criminal prosecution).

vii Apportionment

The Product Liability Act provides for joint and several liability where two or more persons are liable for the damage caused by a defective product. As explained in Section I, this can be the producer of the finished product, a raw material or component part, or the person who presents themselves as producer, the importer or any supplier who did not (in a timely fashion) make the required naming for exempting themselves from liability. Thus, if there is more than one person liable under the Product Liability Act, the person who has suffered losses can choose whether they seek redress against one, or all, of them. If a person liable for compensation under the Product Liability Act has paid damages, though neither the person themselves nor one of their employees has caused the defect, they are entitled to

claim full reimbursement from the producer of the defective finished product, raw material or component part. If several parties are liable for reimbursement, the liability towards the person compensating the damage is, again, joint and several. If several parties liable under the Product Liability Act have contributed to the defect, the extent of the claim for reimbursement of the person who has compensated the damage against the other parties depends on the circumstances – in particular on the extent to which one or the other party is responsible for the damage or to which the damage was caused by bringing about a product defect.

Outside the Product Liability Act, joint and several liability may, inter alia, arise if two or more persons unlawfully and negligently contributed to the damage but the proportion to which each contributed cannot be determined.

Austrian law does not provide for market share liability.

The Product Liability Act does not contain a provision regarding successor liability for companies that have acquired the product manufacturer or other persons in the distribution chain. Thus, the general rules apply.

Section 1409 of the Austrian Civil Code contains a mandatory provision that provides for the statutory assumption of liabilities by the acquirer of a business or substantial part of assets for debts pertaining to the business or assets of which the acquirer knew or should have known at the time of the transfer. The acquirer becomes jointly liable with the seller for these debts; however, the acquirer's liability is limited to the market value of the acquired assets.

Pursuant to Section 38 of the Austrian Commercial Code, a person who acquires (by way of singular succession) and continues a business assumes all business-related relationships of the seller, including all connected rights and liabilities, as of the date of the transfer of the business. The seller, however, remains liable for these liabilities only as far as they become due during a period of five years from the date of the transfer. The acquirer's liability is not limited; however, the acquirer and the seller may agree on exclusions of liability. An agreement such as this is effective in relation to third parties only if it was registered in the commercial register or published in a commercially customary manner or notified to the third party on an individual basis.

viii Mass tort actions

Austrian law does not (yet) provide for mass tort actions. However, the Austrian Procedural Code offers instruments that permit the bundling of a series of related claims or proceedings under certain conditions, thus enabling a number of plaintiffs to bring their claim against one defendant. This instrument is, in particular, a formal joinder of parties, which presupposes that the subject matter of the claims is based on similar factual grounds and jurisdiction of the court is given for each individual claim.

Furthermore, Austrian case law has in the preceding years developed the 'class action of Austrian style' under which, if the claims are first assigned to another person or legal entity, this person (legal entity) may then bring the claims as sole plaintiff in one action, provided that the bases of the claims, as well as the questions of fact and law, are, in principle, the same.

ix Damages

In cases of personal injury both under the Product Liability Act and fault-based liability under general civil law, compensation covers medical treatment costs, loss of income and appropriate damages for pain and suffering (which may also include mental damage and suffering owing

to the loss of a close relative). In the praxis of courts, as measurement criteria for damages for pain and suffering, certain amounts for days of severe, moderate and mild pain and suffering are applied, and these are usually calculated by a court-appointed medical expert.

As regards damage to property, under the Product Liability Act, there is a deductible amount of €500, and damage to the defective property itself is not covered. Furthermore, under the Product Liability Act, pure financial losses are not recoverable.

Austrian law does not allow for punitive or exemplary damages.

For criminal liability, see Section III.

V YEAR IN REVIEW

In 2022, the Austrian Supreme Court heard a product liability case regarding an intrauterine device (IUD).[19] The first plaintiff had had an IUD manufactured by the defendant inserted by her gynaecologist. She nevertheless became pregnant. On 4 January 2020, she gave birth to a healthy child. The first and second plaintiffs alleged that the unplanned pregnancy occurred due to a rupture of the IUD resulting from a batch and product defect for which the defendant was responsible under the Product Liability Act.

The first plaintiff sought compensation for the pain suffered in connection with the pregnancy and the birth, as well as reimbursement of expenses. She also filed for a declaratory judgment as regards the liability of the defendant for all future consequential damages of the unwanted pregnancy and birth. However, the first plaintiff did not allege that she was injured by the broken IUD. Neither did she claim that she was aware of the rupture of the IUD before its removal nor did she seek compensation for emotional pain.

The second plaintiff, the father of the child, filed for a declaratory judgment that the defendant is liable for all future consequential damages resulting from his obligation to support his wife.

According to the established case law of the Austrian Supreme Court, the birth of a healthy, albeit unwanted, child with all the associated burdens does not constitute compensable damage in the legal sense. The purpose of tort law is not to pass on disadvantages that merely represent one side of the existence and thus of the personal intrinsic value of the child and that are ordered by family law. In this respect, the principles of personal dignity and family welfare take precedence in the balancing process. With this reasoning, the Austrian Supreme Court rejected the claim of the first plaintiff.

With regard to the second plaintiff, the Supreme Court pointed out that only pecuniary damages were claimed and that these damages are not compensable under the Product Liability Act.

In Austrian legal literature, this decision is criticised in part.[20] One criticism is that this decision is in conflict with the case law of the ECJ and the Austrian Supreme Court.

Previously, the ECJ ruled that the costs of surgery to remove a potential defective pacemaker from a patient could be reimbursed on the grounds that the damage was caused by an injury to body within the meaning of the Product Liability Directive.[21] The Austrian Supreme Court regarded part of a broken pair of scissors remaining in the body after surgery

19 Austrian Supreme Court, Case No. 8 Ob 69/21m of 25 May 2022.

20 Martina Schickmair, 'Keine Produkthaftung nach Bruch der "Spirale" und Geburt eines gesunden Kindes', *iFamZ* 2022, pp. 233–235.

21 European Court of Justice, Cases C-503/13 and C-504/13 (*Boston Scientific Medizintechnik*).

as an injury to body and affirmed liability under the Product Liability Act for the resulting psychological impairment of the patient.[22] From this it might be concluded that the mere fact of having a defective medical device inserted qualifies as injury to body as defined by the Product Liability Act.

Currently, mass proceedings against a Spanish manufacturer of allegedly defective IUDs are pending in Austria. This will show whether the Austrian Supreme Court confirms the view taken in the above-mentioned decision or whether this was a singular decision due to the particular facts of the underlying case.

In autumn 2022, the European Commission presented a draft for the revision of the Product Liability Directive. Particularly due to digital transformation and the modern digital and circular economy, modernisation of the 37-year-old Directive has become long overdue. In the future, European product liability will apply not only to movable objects and electricity, but also to digital production files and software, including artificial intelligence systems.

In light of the increasing trend for consumers to purchase products directly from non-EU countries without there being a manufacturer or importer based in the EU, the updated Directive aims to ensure there is always a business entity based in the EU that can be held liable for defective products even though bought directly from manufacturers outside the EU. This means that in addition to the manufacturer and the importer, any natural or legal person that modifies a product (e.g., through software updates) and fulfilment service providers can be held liable for damage caused by the defective product. For companies, this change is probably one of the most significant because it means that economic operators must prepare themselves for significant product liability risks of their own.

The draft not only expands the personal and factual scope of application, but it also intends to facilitate the enforcement of claims for consumers. The burden of proof will be facilitated in the future by various presumptions. Furthermore, the legal concept of 'disclosure of documents', based on the Anglo-American model and previously unknown in Austrian civil procedural law, shall apply.

22 Austrian Supreme Court, Case No. 4 Ob 48/16m of 30 March 2016.

Appendix 1

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Eva Spiegel became a partner at Wolf Theiss in 1998 and has broad experience in international dispute resolution and insolvency matters. She is a member of the firm's dispute resolution practice group and insolvency and restructuring team. Eva regularly advises and represents clients in liability disputes, banking and insurance litigation, and contentious insolvency matters.

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