

The logo for Global Legal Group (GLG) features the letters 'GLG' in a bold, sans-serif font. The 'G' and 'L' are white, while the 'G' is orange. The logo is positioned in the top left corner of the page, which has a purple background with a cracked glass effect.

Global Legal Group

The International Comparative Legal Guide to: Product Liability 2011

A practical cross-border insight
into product liability work

Published by Global Legal Group, in association with CDR,
with contributions from:

Advokatfirmaet Wiersholm, Mellbye & Bech AS
Akin Gump Strauss Hauer & Feld LLP
Allen & Overy Luxembourg
Allen & Gledhill LLP
Arnold & Porter (UK) LLP
Averture
Bahas Gramatidis & Partners
Baker & McKenzie
Béatrice Toussaint Avocat
Borislav Boyanov & Co., Attorneys at Law
Carroll, Burdick & McDonough International LLP
Caspi & Co.
Clayton Utz
Cliffe Dekker Hofmeyr Inc.
Crown Office Chambers
Davies Arnold Cooper LLP
Engineering Systems Inc
Eversheds
Exponent, Inc.
Fiebingler Polak Leon & Partner Rechtsanwälte GmbH
Gowlings
Greenberg Traurig, LLP
Herbert Smith LLP
Hogan Lovells
Jones, Walker, Waechter, Poitevent, Carrère & Denègre L.L.P.
Kennedys
Kim & Chang
Kromann Reumert
McGrigors LLP
Monereo Meyer Marinel-lo Abogados, S.L.P.
Nelson Mullins Riley & Scarborough LLP
Pachiu & Associates
Patrikios Pavlou & Associates LLC
Pinheiro Neto Advogados
R&D Strategic Solutions
Sidley Austin LLP
Simpson Grierson
Smith & Partners
Tilleke & Gibbins
Tonucci & Partners

The logo for Commercial Dispute Resolution (CDR) features the letters 'CDR' in a bold, sans-serif font. Below the letters, the text 'Commercial Dispute Resolution' is written in a smaller font. The logo is positioned in the bottom right corner of the page.

Netherlands



Klaas Bisschop



Karen Jelsma

Hogan Lovells International LLP

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?

The law of product liability in the Netherlands is based on three grounds: contractual liability; tort-based liability; and the Netherlands Product Liability Act. The EC Product Liability Directive (European Directive 95/374/EEC on liability of defective products) (“the Directive”) is implemented in the Netherlands Product Liability Act of 13 September 1990, which entered into force on 1 November 1990. This act is now found in Articles 6:185-6:193 Netherlands Civil Code (“NCC”).

The Directive has not superseded or replaced systems of liability that existed prior to its implementation. Product liability cases may still be based on the contractual relationship between the consumer and the producer/supplier or on an unlawful act (tort) on the part of the producer/supplier.

Contractual liability only plays a role if a sales agreement between the consumer and the supplier exists (Article 7:24 NCC). The buyer may claim any damages if the product which has been delivered does not possess the qualities which the buyer was entitled to expect. The buyer may expect that the product possesses the qualities necessary for its normal use and the qualities necessary for any special use provided in the contract (Article 7:17 NCC). Supply of a product other than the one agreed does not conform to the contract. The same applies if what has been delivered varies in quantity, size or weight from what has been agreed. Further, where a sample or model was shown or given to the buyer, the product must conform to this sample or model, unless the sample or model was provided only for indicative purposes.

However, if the failure in performance consists of a defect referred to in Articles 6:185-6:192 NCC, the seller is not liable for the damage referred to in those Articles unless:

- he was aware or ought to have been aware of the defects;
- he has promised freedom from defects; or
- it relates to damage to things for which, pursuant to Articles 6:185-6:192 NCC, there is no right to compensation on the basis of the threshold provided for in these Articles, without prejudice to his defences pursuant to the general provisions for damages.

Under contractual liability law, liability to non-commercial

consumers cannot be excluded or limited by contractual provisions (Article 7:6 NCC). Although the seller may use general terms and conditions, the other party is only bound by the general terms and conditions if he knows or should have known their contents (Article 6:232 NCC). A clause in a set of general terms and conditions can be annulled if the wording and the content of such clause are unreasonable for the other party (Article 6:233 NCC). Articles 6:236 and 6:237 NCC set out contractual stipulations which are strictly forbidden (“black list”) and which are presumed to be unreasonably onerous (“grey list”) respectively.

The “black list” includes:

- a stipulation which totally and unconditionally excludes the other party’s right to enforce performance;
- a stipulation which limits or excludes the other party’s right to set the contract aside; and
- a stipulation which limits or excludes the right which, pursuant to the law, the other party has to suspend performance or which gives the user a more extensive power of suspension than that to which he is entitled pursuant to the law.

The “grey list” includes:

- a stipulation which, taking into account the circumstances of the case, gives the user an unusually long or an insufficiently precise period to react to an offer or another declaration of the other party; and
- a stipulation which materially limits the scope of the obligations of the user with respect to what the other party could reasonably expect in the absence of such stipulations, taking into account rules of law which pertain to the contract.

Before the implementation of the Directive in the Netherlands, product liability claims were generally based on Article 6:162 NCC. This provides that any person who causes injury to another by means of an unlawful act is liable to pay compensation. The term “unlawful act” includes violation of any right or a statutory duty, as well as any act or omission which violates a rule of unwritten law “pertaining to a proper social conduct”. The cases in this respect fall into three categories: manufacturing defects; inadequate warnings or instructions; and design defects.

The relevant difference between the strict liability and tort-based liability may lay in the “standard of care”. Under the Netherlands Product Liability Act the producer is liable unless he can exonerate himself by way of certain specific defences. Under general tort principles the possibilities of exoneration are in theory wider, but it is generally believed that it will make no difference in practice.

Since the Directive was implemented in the Netherlands, product liability cases have generally been based on the strict liability system. As a rule, the principles of the directive can only be used

with respect to products that have been put into circulation since 30 July 1988, which is the date on which the Directive should have been implemented.

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

No, the State does not operate any such schemes.

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

A producer or anyone who might be said to appear to be a producer may be liable for supplying a defective product. In Article 6:187, paragraph 2 NCC the definition of producer is given. Producer means the manufacturer of the finished product, raw material or other component parts. In addition, a person who presents himself as the producer of the product is considered as a producer. An entity which connects its name to a product by printing its name or trademark or any other sign on it also falls within the scope of the definition of “producer”. A licensee is regarded as a “producer” if he presents himself as such. Otherwise, he is not a producer in the sense of the product liability regulations. Also the importer may be held liable in respect of defective products. A supplier will not be liable unless he fails to inform the injured person within a reasonable time of the identity of the producer or of the person who supplied him with the product. In the event the person who supplied the product to the supplier is insolvent, liability will not revert to the supplier himself. If the producer is not known, the supplier may be held liable.

Duty of care in tort can rest on all persons who cause injury to another and may be held responsible for the damages.

1.4 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 Commodities Act (*Warenwet*) and the General Product Safety (Commodities Act) Decree (*Warenwetbesluit algemene productveiligheid*) producers and suppliers are not allowed to supply any products that they know, or should presume to be dangerous. To the extent to which it can be determined, the producer and supplier must immediately inform the Food and Consumer Product Safety Authority if they have placed a dangerous consumer product on the market, and they should include, in their notification, details of their plans to deal with the dangerous products. Possible responses are issuing a warning to consumers or effecting a product recall. Which action should be taken can be determined on the basis of the Commission publication “Product Safety in Europe: A guide to corrective action including recalls”.

If the producer and supplier fail to take appropriate action voluntarily, the Food and Consumer Product Safety Authority can order them to do so or can initiate a product recall by itself.

In addition, under Dutch law it is considered to be unlawful not to recall products from the end-users, for example when other measures are inadequate.

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

The supply of defective products is a criminal offence under the Economic Offences Act (*Wet Economische Delicten*) (“WED”). If

a producer fails to take appropriate action when it has appeared that the products supplied are defective, this could lead - amongst other things - to the following sanctions under the WED:

- a maximum of two years in prison or community service (*taakstraf*) (Article 6 WED);
- penalty of the ‘fourth category’ (*geldboete van de vierde categorie*), EUR 19,000 (Article 6 WED), which can be increased to a penalty of the ‘fifth category’ (*geldboete van de vijfde categorie*), EUR 76,000, in the event that a benefit has been obtained from the offence;
- a possible one-year ban on trading for businesses (Article 7 WED);
- confiscation of certain goods of the company (Article 7 WED); and
- publication of the judgment of the Court (Article 7 WED).

If a defective product causes the death of a consumer and the person who sold the product knew that it constituted a danger to the health of consumers, he can be imprisoned for life or he can be imprisoned for a maximum of 30 years.

2 Causation

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

In general, the party claiming damages bears the burden of proof (Article 150 Netherlands Code on Civil Procedure (“NCCP”). However, in some circumstances the Courts have lessened the burden on the claimant, or shifted it to the defendant, while still requiring the element of fault.

For liability based on tort, fault is required. The claimant has the obligation to provide *prima facie* evidence that the offender was at fault. A shift of the burden of proof from the claimant to the defendant has been accepted previously in, among others, the “*Lekkende Waterkruik*” case, where the Supreme Court ordered that the producer of the hot water bottles had to show that sufficient precautions were taken.

However, more recently in the “*Du Pont/Hermans*” case, the Netherlands Supreme Court did not accept the shift in the burden of proof as such, but ruled in favour of the claimant by stating that the question of fault could only be answered based on the circumstances submitted by the defendant to demonstrate its point of view. This included “evidence put forward by the defendant as to his/her actions and the reasons for those actions”.

In the “*Asbestos*” case, the Supreme Court gave an indication of the extent to which the producer has the duty to investigate risks associated with the product. In this case an employee became ill because of the use of asbestos in the factory of his employer. The decision related to an employer, but it is generally believed that it can also be applied to producers. According to the decision, an employer must explain how he fulfilled his duty of care with respect to the safety. If legislation in that respect is lacking or is insufficiently precise, the danger of any substances to be processed or produced must be investigated. The employer must make enquiries, including if necessary, consulting experts.

For the purposes of an action brought under the provisions of the contractual liability, Article 6:188 NCC stipulates that the claimant bears the burden of demonstrating that the product was defective and that the defect caused the damage to the claimants. Once the claimant has shown that the product was defective, the burden is on the producer/supplier to prove that the defect did not exist when the product was put on the market.

The stipulations of burden of proof apply to both contractual and

non-contractual situations. Article 6:192 NCC determines that the liability of the producer cannot be contractually limited. The same applies for sales agreements and general terms and conditions subject to these agreements.

Liability based on stipulations for product liability under Articles 6:185-6:193 NCC is mainly risk liability (i.e. strict liability), but it can be seen to include some “fault” elements. One of those is the issue of the reasonably expected use of a product. This concerns the use that the producer could reasonably expect. The producer has to take into account the fact that the product may be used wrongly or for other purposes than those for which it is meant. Another fault element is found in the question of the level of safety one could reasonably expect. In case of design defects the circumstances such as the aim of the product, the seriousness of the injury, the expected frequency of injuries and the possibility of an alternative design must be taken into account. With respect to these fault elements, the burden of proof that there has been no fault rests on the producer/supplier.

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?

One component required for proving a tort has occurred is causation between fault/defect and damage. This causation is established through the test of ‘*condicio sine qua non*’. The claimant has to prove that there is causal relationship between the fault/defect and the damage. The Courts may shift the burden of proof to the defendant. The claimant also has to prove to what extent the defendant is liable. The defendant has only to compensate for damage that can be attributed to the defendant. Whether damage can be attributed is decided on the basis of the nature of the liability or the nature of the damage (Article 6:98 NCC).

Article 6:99 NCC stipulates that if the damage results from two or more events, for each of which a different person is liable, and it has been established that the damage has arisen from at least one of the events, the obligation to compensate for the damage is imposed on each of such persons. A person will only not be held liable if he proves that the damage is not the result of an event for which he is liable.

As stated under question 2.1, the claimant normally bears the burden of proof. The claimant has to prove that there was a fault/defect, that damage occurred and that a causal relationship exists between the defect/fault and the damage. As set out under question 2.1, the Courts may lessen the burden on the claimant or shift it to the defendant.

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?

In Article 6:189 NCC it is provided that if, based on 6:185 NCC, more than one person is liable for the same damages, each of them shall be liable for the whole. Thus, all defendants are jointly and severally liable. The same is provided in the general provisions in Article 6:102 NCC. In this respect, it is required that the liability relates to the same type of damage.

Suppliers of “trademark-less” products are considered as producers of the products. Suppliers of these products can only pass on their liability if they inform the injured party within a reasonable time of the identity of the producer or of an upstream supplier (Article 6:187, paragraph 4 NCC). The general principles will also apply to trademark-less products.

A producer is only partly liable (i.e. not jointly and severally liable) in situations in which damages can be “divided”, for example if it can be shown that the particular producer only caused one particular part, or type, of the damages.

In the “*Des*” case, the Supreme Court of the Netherlands rejected the concept of assigning liability by market share and imposed the burden concept of joint and several liability. Thus, regardless of proof that the defendant’s product caused the injury, and regardless of the particular defendant’s share of the relevant *Des* hormone market at the pertinent time, any prior *Des* manufacturer can now be held liable in the Netherlands on the basis of joint and several liability for the entirety of the plaintiff’s injury.

As noted above, the liability of the producer may not be limited or excluded with respect to consumers and Article 6:192 NCC. The same applies in general national law.

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?

Under Dutch case law, a producer is obliged to warn if he knows or ought to have known that the product can cause damage. If he fails to warn he can be held liable.

In the “*Rockwool*” case, the Supreme Court ordered that a manufacturer in general ought to take such measures, which can be required of a “careful manufacturer”, in order to prevent the product he brought into the market causing any damage. In *Rockwool* it was also decided that the producer of a semi-finished product has the obligation to warn both the purchasers of the semi-finished product and the purchasers of the end product.

In the “*Halcion*” case, the Supreme Court decided that a medicine is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account. The consumer is not required to expect additional effects for which he is not warned. The producer is liable if an additional effect arises that was, or could have been, foreseeable and whereby he failed to warn the consumer for the danger of an additional effect occurring.

In the Netherlands the doctrine of the ‘learned intermediary’ theory is not recognised. In the “*Halcion*” case, the Court decided that *Halcion* should have warned not only the doctors who prescribed the medicine but also the consumers. *Halcion* should not have relied on doctors to have sufficient knowledge of the pharmacy to warn the consumers by themselves.

3 Defences and Estoppel

3.1 What defences, if any, are available?

The producer is, according to Articles 6:185-6:192 NCC, not liable if he proves:

- that he did not put the product into circulation;
- that it is to be assumed that the product did not have the defect which caused the damage at the time when the producer put it into circulation;
- that he manufactured the product neither for sale nor for any other form of distribution for economic purposes;
- that the defect is due to compliance of the product with mandatory regulations issued by public authorities;
- that the state of scientific knowledge at the time when the product was put into circulation was not as to enable the defect to be discovered; or
- in the case of the manufacturer of a component, that the defect is due to the design of the finished product or that the component was made according to the instructions of the producer of the final product.

Sellers having a contractual relationship with the consumer may include the defence that the breach of contract consists of a defect referred to in Articles 6:185-6:192 NCC in circumstances in which the seller was not, and ought not to have been, aware of the defect, and had not promised that the product is free from defects.

Producers/suppliers who are sought to be held liable in tort (i.e. based on an unlawful act) can argue that there was no negligence. This argument could succeed if, for example, the defect was hidden or latent or otherwise undiscoverable by the producer/supplier at any relevant time prior to the injury.

The general provisions for damages in Book 6 NCC provide that in all actions in which there is a failure in the performance of an obligation, damages may be limited or even excluded entirely if the injury was caused by the fault or negligence of the consumer.

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?

The development risks defence has been incorporated in Article 6:185 NCC (see question 3.1 above). In the “*Sanquin Foundation*” case, the development risks defence was in discussion. The District Court held that for the purposes of assessing whether a blood product is defective, a Court must take into account “the extent of safety the public may expect of blood products”. The Court decided that the public may expect that blood products are free of HIV in the Netherlands, taking into account the vital interest in such products and the fact that in principle no alternatives exist. (In this context, it was held that the fact that the Foundation had complied with applicable regulations could not support a different conclusion.) However, the District Court also held that the Foundation had acted in compliance with the scientific and technical learning available at the moment of the blood donation and the delivery of it to the claimant, and it was therefore entitled to rely on the “development risks” defence under Article 6:185, paragraph 1, NCC.

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?

Compliance with regulatory and/or statutory requirements may be a defence (reference is made to question 3.1). See also the “*Sanquin Foundation*” case above.

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?

Although no specific rules exist that state that it is not possible, it is generally believed that a claimant cannot bring the same claim again based on the same set of facts.

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?

The producer will not be liable if he can raise one of the defences as set out in the answer to question 3.1. If the producer is liable because he has put into circulation a defective product but the damage is also caused by the behaviour of a third party, then the injured party can claim against both the producer and the third party. If the injured party only claims damages from the producer, then the producer is entitled to take recourse against the third party. This action should be brought in subsequent proceedings. The time limits that apply are set out in question 5.2.

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

The producer can allege that the damage is caused by the fault of the injured party. The obligation to pay compensation can be reduced or can be lifted if the damage can also be attributed to the behaviour of the injured party, taking into account all the circumstances of the case (Art. 6:101 and 6:186, paragraph 2 NCC).

4 Procedure

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

There is no jury system in the Netherlands.

In the Netherlands, claims must be brought in first instance before the competent District Court, unless the parties have agreed upon a different form of dispute resolution. If the amount claimed is EUR 5,000 or less, a special division of the District Court (the Cantonal division) will deal with the case (Article 93 NCCP). A legislative proposal on the extension of the competence of the Cantonal division is now pending in the Senate (*Eerste Kamer*). In first instance, a case is usually decided by a single judge.

Decisions from the District Courts (including those of the Cantonal division) are subject to appeal to the Court of Appeal as of right, unless the amount claimed is less than EUR 1,750, in which case the decision cannot be appealed at all (Article 332 NCCP). Usually, a case before the Court of Appeal is decided by a majority decision of a panel of three 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)?

In the course of Court proceedings, the Court can appoint experts,

either *ex-officio* or at the request of a party (Article 194 NCCP). Before Court proceedings are under way, a party can request that the Court allows preliminary expert advice on a certain issue (Article 202 NCCP). In addition, each party is free to file opinions of its own experts. However, such opinions are considered as coming from party experts (i.e. are taken to be partisan). In the case of conflicting opinions of the party experts, the Court usually appoints its own expert. The Court can also hear witnesses (Article 163 NCCP). In addition, a party can request the Court to allow the preliminary hearing of witnesses before Court proceedings are under way (Article 186 NCCP). However, it is for the judge to assess the evidence.

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?

There are no specific provisions under Dutch law for class actions, group litigation orders or group management proceedings as such. However, multi-party actions are in fact available by a number of means.

As a matter of law, there is no limit to the number of claimants who can bring an action and an enormous amount of claimants could simply be added in one action. This will be permitted if there is sufficient connection between the claims of the different claimants. The criteria for determining whether there is "sufficient connection between the claims" are, *inter alia*, the point in time at which the claim arose and whether the claims concern the same subject matter. Furthermore, the judges take the question of efficiency into account when determining whether the claimants can jointly take action.

Collective actions can be brought by an interest group in the form of a foundation or union, so long as the foundation or union is a legal person and its articles of association provide that one of its objectives is to take care of the (similar) interest of people having suffered damages as a result of a defective product (Article 3:305a NCC). A settlement must be attempted before such an action can be brought, and monetary damages are not available directly through these means. However, the foundation or union can seek a declaration that the producer is liable for damages. On the basis of such a declaration, the individual injured persons can then negotiate with respect to their compensation or initiate proceedings before a District Court. In such proceedings, the individual has only to prove that he suffered damages. Furthermore, a group of claimants can give a power of attorney to one party to file the claim on their behalf.

Also test cases do happen, although there is no specific provision for such cases. In such cases the claim will usually be brought by a limited number of injured persons, while for example a consumer organisation co-ordinates the action and pays the costs.

The law does not provide for a formal consolidation of multiple claims. However, if a number of claims regarding the same subject matter are pending before the same Court, the Court can consolidate the cases on the docket, which means that the various steps in the litigation will take place on the same dates.

Another option for an organisation that represents complainants is to reach a collective settlement that can be declared binding by the Court of Appeal in Amsterdam. Pursuant to the Act on Collective Settlement of Mass Damages 2005 (*Wet collectieve afwikkeling massaschade*) (the "WCAM"), the Court of Appeal in Amsterdam has the authority to declare this collective settlement binding (Articles 7:907 *et seq.* NCC and 1013 *et seq.* NCCP). The

settlement should be first reached between an association representing the individuals who suffered damage, and the party that caused the damage. If these requirements are met, the collective settlement can be declared binding by the Court of Appeal in Amsterdam for all the individuals falling under the settlement. Those who do not want to be bound by the settlement can opt out, although they must do so within a limited timeframe.

Since the introduction of the WCAM, the procedure has been used in the following occasions. One of which is a product liability case (DES). The others are cases relating to shares and/or financial products.

1. **The DES case** (which was the reason that the WCAM law was initially introduced): On 1 June 2006 the Court declared the DES settlement between the DES centre - the organisation protecting the interests of the DES daughters - and the pharmaceutical companies who had marketed DES, binding.
2. **The Dexia case**: On 25 January 2007 the Court declared the Dexia Bank's settlement with the Lease Loss Foundation, the Eegalease Foundation, the Dutch Consumers' Association and the Dutch Equity Holders' Association binding.
3. **The Vie d'Or case**: On 29 April 2009 the Court declared the Vie d'Or settlement binding. The Vie d'Or settlement relates to compensation of the damages caused by the insolvency of Life Insurer Vie d'Or to the old policyholders of Vie d'Or.
4. **The Shell case**: On 29 May 2009 the Court declared the non-US Shell Settlement Agreement binding. It is for the first time that the Court has given a decision concerning a worldwide settlement. The Dutch Class Action Act has demonstrated with this that it can be of great success not only when Dutch victims are involved but even when the victims are located all over the world.
5. **The Vedior case**: On 15 July 2009 the Court declared the Vedior settlement binding. The Vedior settlement agreement relates to alleged damages suffered by shareholders of Vedior, in connection with the sudden development in the Vedior share price on Friday morning 30 November 2007.
6. **The Converium case**: On 12 November 2010 the Court rendered an important decision in the Converium settlement case about its international jurisdiction in cases based on the WCAM. The decision of the Court is a provisional decision. Article 6 of the European Convention on Human Rights and the principle of hearing both sides of the argument (*hoor en wederhoor*) prevented the Court from giving a final decision. It remains to be seen whether the Court will reverse its decision once defences have been submitted on the jurisdiction issue and a hearing of the case has taken place. Such hearing will most probably take place in the second half of 2011.

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

As set out before, collective actions can be brought by an interest group in the form of a foundation or a union such as a consumer association. However, in such action no claim for monetary damages can be made. The claim against pharmaceutical companies over birth defects allegedly caused by the anti-miscarriage drug diethylstilbestrol (DES) is an example of a collective action, brought by the DES foundation. As said under question 4.3, the WCAM was applicable and the Amsterdam Court of Appeal declared the DES settlement binding.

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

It is difficult to estimate the length of time to progress a product

liability claim in the first and second instances, because the length of time a case can take before the District Court and the Court of Appeal is highly dependent on whether the Court wants to hear witnesses and/or takes expert advice. These are usually the delaying factors.

It is important to know that in Dutch litigation no such thing as a trial (a hearing in which all evidence is presented to the Court, followed by a final decision) exists. A hearing before the Dutch Courts usually consists only of the oral arguments of both parties summarising their cases. The Courts can render interim decisions, which may include partial decisions and/or instructions to the parties regarding the further conduct of the litigation such as an order to prove certain statements, an order that expert advice will be taken etc. However, each case must sooner or later end with a final decision, allowing or denying, in whole or in part, the relief sought. If a lot of witnesses are to be heard and/or extensive expert advice is ordered, a final decision might be rendered within one to two years after service of the writ.

In practice, the length of time of the appeal procedure is usually shorter than in first instance. This is because most of the time no new evidence is introduced in appeal.

With the above in mind, the following estimates can be given:

- first instance: final decision within one to two years after service of the writ; and
- appeal: final decision within one to one and a half years after service of the appeal writ.

A Supreme Court appeal takes approximately one and a half to two years from service of the Supreme Court appeal writ until the first decision. This is usually also the final decision. The Supreme Court rarely renders interim decisions.

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?

There is no trial about preliminary issues in the Netherlands.

4.7 What appeal options are available?

As set out above, claims must be brought in the first instance before the competent District Court (*Rechtbank*), unless the parties have agreed upon a different form of dispute resolution. There are 19 District Courts in the Netherlands. Which of those has jurisdiction in a given case will depend on where the defendant resides.

If the amount claimed is EUR 5,000 or less, a special division of the District Court (the Cantonal division) will deal with the case. Decisions from the District Courts (including those of the Cantonal division) are subject to appeal to the Court of Appeal (*Gerechthof*) as of right, unless the amount claimed is less than EUR 1,750, in which case the decision cannot be appealed at all.

There are five Courts of Appeal in the Netherlands and which of those has jurisdiction to hear an appeal depends on which District Court rendered a first instance decision.

Decisions from the Court of Appeal are subject to appeal to the Supreme Court (*Hoge Raad*). The Supreme Court appeals are limited to points of law and points of insufficient motivation (that is: allegations that the Court of Appeal did not provide sufficient reasons for their decision, or that their reasoning was incomprehensible).

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?

Every issue in dispute, legal or factual, must be decided by the Court. In the course of proceedings the Court may order either *ex officio* or at the request of a party that expert advice must be taken on certain issues (usually technical or medical issues if it is a product liability case). Before Court proceedings are under way, a party can request that the Court allows preliminary expert advice on a certain issue. In addition, each party is free to file the opinions of its own experts. However, party experts are taken to be partisan. In the case of conflicting opinions of the party experts, the Court usually appoints its own expert, although the Court will not be bound by that experts' advice.

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 formal pre-trial in the Netherlands or other kind of discovery as such.

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

Under Dutch procedural law each party has the obligation to disclose the entire truth. A party can request the production of certain documents, and the Court may draw adverse inferences from non-disclosure or incomplete disclosure. The Court may also order a party to submit certain evidence. Usual forms of evidence include documents, witness statements and expert opinions.

4.11 Are alternative methods of dispute resolution available e.g. mediation, arbitration?

Under Dutch law the alternative methods of dispute resolution available are arbitration, binding advice and mediation.

Arbitration can be agreed in advance as well as at the moment the dispute arises. Arbitration leads to a judgment that will be capable for enforcement. Parties can also choose the method that a third party will use to give a *binding advice* on the dispute. In the Netherlands this usually will be a disputes committee, such as the consumer conciliation board. Finally, parties can choose *mediation*. Mediation is a method of reaching a resolution of the dispute without recourse to judicial procedures. The parties will be supported in their negotiations by an independent party until a mutually acceptable solution is found.

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?

A cause of action for damages based on a contract of sale cannot be brought after two years from the time the buyer informs the seller that the product is not in compliance with the contract (Article 7:23 NCC). The general limitation period for failure to perform a contractual obligation is five years.

The cause of action for damages on the basis of an unlawful act cannot be brought after a lapse of five years after the commencement of the day following the day on which the aggrieved party became aware of both the damage and of the person or legal entity liable. In any event an action cannot be brought after a lapse of twenty years following the event that caused the damage.

In cases in which the damage results from air, water or soil pollution or from the realisation of a danger as defined in Article 6:175 NCC, the limitation period is extended to thirty years.

In cases brought under the product liability provisions, often several persons can be considered “producers” of one and the same product. Then, the question arises whether each product can invoke expiry of the limitation period if the injured person “became aware, or should reasonably have become aware” of the identity of at least one of them more than three years previously, since the cause of action against the producer becomes barred by the lapse of three years (Article 6:191 NCC). The broad definition of “producer” and the fact that the product liability provisions allow the injured person to claim from any of several producers, compensation for the whole of his damages means that the answer is generally favourable for the injured person.

Article 6:191, paragraph 2 NCC provides that an injured person’s right to compensation from a producer is forfeited upon the expiry of ten years from the time the producer puts the offending product into circulation. It is worth noting that the ultimate limitation period under the usual tort rules is twenty years, so to that extent the Netherlands product liability act provisions could be said to offer less protection to consumers.

It is also important to note that, under Dutch law, limitation periods are distinct from forfeiture. The expiry of a limitation period means that a cause of action can no longer be brought, whereas forfeiture effectively extinguishes the underlying right to the compensation. General limitation rules do not apply to forfeiture. Thus, whereas a limitation period may be interrupted by the commencement of legal proceedings, such proceedings cannot in effect postpone a forfeiture provision. Also, under the general rules, the defence of the expiry of a limitation period must be specifically raised by the defendant. The 10-year forfeiture period under the Product Liability Act can be raised *ex officio* by the Court.

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

In the case of concealment or fraud it is likely that the Courts will order that it is contrary to reasonableness and fairness to invoke a time limit.

6 Remedies

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

In this context, pursuant to Dutch law, distinction must be made between an agreement between a *consumer and a supplier* on the one hand and, on the other hand, an agreement between *two professional parties*. A lot of the conditions set out in Title 1 of Book 7 NCC are only mandatory in the event that a contract of sale is concluded with a consumer. In any other situation these conditions are directory law, meaning that in a contract of sale concluded between professional parties, such parties will have the possibility to deviate from such conditions.

In the event that the product does not conform to the contract, the buyer in a consumer sale will have the following rights (Articles 7:21 and 7:22 NCC):

- delivery of which is lacking;
- repair;
- replacement; and
- in the event that repair or replacement will not be possible or cannot be reasonably required, the consumer may claim dissolution of the contract or reduction of the price.

The rights mentioned above can be used together with and without prejudice to the rights which may be used on the basis of the general contract law (Article 7:22, paragraph 4 NCC), such as compensation for damages, dissolution of the contract on the basis of 6:265 NCC and/or the right to suspend performance.

In the event that the non-conformity relates to a *safety defect* pursuant to Part 6.3.3 NCC (Articles 6:185-6:192 NCC), then, in principle, the seller will not be liable for the damage as mentioned in Part 6.3.3 (Article 7:24, paragraph 2 NCC).

As said under question 1.1 this will only be different in the following exceptions:

- the seller was aware or ought to have been aware of the defects;
- the seller has promised freedom from defects; and
- the damage relates to things for which, pursuant to Articles 6:185-6:193 NCC, there is no right to compensation on the basis of the threshold provided for in these articles, without prejudice to his defences and pursuant to the general provisions for damages.

If the non-conformity does not relate to a safety defect the seller will be liable under the general principles of Book 6 NCC (Article 7:24, paragraph 1 NCC).

Pursuant to the Product Liability Act (Article 6:190 NCC) the producer will only be liable for two kinds of consequential damages, such as personal injury and/or property damage caused to another product which is normally used for private use and from which the amount of the loss exceeds a sum amounting to the franchise of EUR 500.

In the event that the consumer has suffered damages different from those as set out above, then the seller will be liable under the general principles of Book 6 NCC (Article 7:24, paragraph 1 NCC). Do note however that, pursuant to Article 7:25 NCC, the seller then in principle will have the right of recourse against the producer.

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

Claimants can recover what is known as damages in kind (for

example replacement of products). They can also, in certain circumstances, get advance payment of damages in summary proceedings. Advance payment might be awarded by the judge in the summary proceedings if the view is that it is likely that damages will be awarded in the proceedings on the merits and if the claimant has an urgent interest in obtaining advanced payment.

Damages for death can be claimed only by those persons referred to in Article 6:108 NCC. These include the spouse, the registered partner and the children of the deceased, at least up to the amount of the maintenance to which they are entitled by law. Other relatives by blood or marriage of the deceased can claim damages provided that at the time of his death the deceased maintained them.

Damages for personal injury, which include physical and mental injury, are recoverable under Article 6:107 NCC. These include, for example, hospital costs and costs for future care. In principle, only the injured person should be compensated for such damages. However, a third party (other than an insurer), who has incurred such costs for the benefit of the injured person is also entitled to compensation, provided that the costs would have been recoverable by the injured person himself.

Mental injury refers to illness and harm which is not triggered by physical injury. Damages for mental injury can be claimed only in respect of unlawful acts (that is in tort).

Article 6:190 NCC (the Netherlands Product Liability Act) is limited to personal injury of a physical nature and does not include mental injury. However, the term "personal injury of a physical nature" is construed to include illness and harm which is a consequence of a physical injury, and could include pain and suffering related to that physical injury. On 1 September 2009 the Court of Appeal of 's-Hertogenbosch gave a decision in a case in which *emotional* damages were claimed based on the Netherlands Product Liability Act. The Court of Appeal of 's-Hertogenbosch decided - and confirmed the judgment of the European Court of Justice of 10 May 2001 - that if claims are based on the Netherlands Product Liability Act, *emotional* damages will *not* qualify for compensation, since Article 6:190 NCC explicitly limits the compensation of damages in case of product liability to damages caused by death or personal injuries.

Non-material damages can also be claimed in the Netherlands in respect of unlawful acts, pursuant to Article 6:106 NCC. The damages should be "fairly assessed" and largely relate to damage to the claimant's honour, reputation or right to privacy. Generally, very modest amounts are awarded for non-material damages in the Netherlands.

Reasonable costs made to avoid or limit damages (costs of mitigation) can also be claimed based on Article 6:96 NCC.

Punitive damages are not available in the Netherlands.

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?

No case law exists in this respect in the Netherlands. It is unlikely that a Court would grant a claim in the Netherlands in such a case, unless one can prove that the reasonable costs of medical monitoring are the consequence of the damages

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

Under Dutch law punitive damages are not recoverable.

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 Netherlands did not limit the level of damages recoverable for death or personal injury under the provisions of the Netherlands Product Liability Act and there are no set limits on recovery under national provisions.

However, based on Article 6:109 NCC, the Court can limit damages, taking into account the type of liability at issue, the legal relationship between the parties and the financial capacity of both parties. It is generally accepted that the Courts must be very restrictive in applying Article 6:109 NCC to limit recovery. As the Courts have freedom to determine the level of damages to be paid, there can be no real indication of the level of damages to be expected. The Court will consider what is reasonable in the circumstances.

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?

No special rules apply.

Under the WCAM there is no court necessary for the formation of the settlement. The Court of Appeal in Amsterdam comes into play not until the parties have reached the settlement. However, the Court does have the power to reject a request to declare a collective settlement binding. This will be the case if the settlement does not comply with the specific requirements. So although there is no Court approval required for the settlement itself, for the consequences parties will need the approval of the Court of Appeal in Amsterdam.

In addition to the above, a legislative proposal has been submitted in relation to the WCAM in order to enable parties to go to court at an early stage, so as to arrange a collective settlement. During a so-called 'pre-trial appearance' the judge can then assist parties in formulating the key points of the dispute. Furthermore it can encourage parties to come to a settlement. Furthermore a legislative proposal has been submitted on a procedure for requesting 'preliminary rulings' from the Dutch Supreme Court. On the basis of this legislative proposal lower courts will be able to submit questions on points of law directly to the Supreme Court.

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?

No. There is no Government authority under Dutch law who will have the power to do so.

Concerning consumer goods, a relevant Government authority under Dutch law is The Food and Consumer Product Safety Authority (*VWA*). As said under question 1.4, the VWA monitors compliance with the Commodities Act and the General Product Safety Commodities (Act) Decree. The VWA will take measures if a company does not fulfil his obligations out of these two statutory regulations. The VWA can prohibit the company to place consumer products on the market which are considered as dangerous, can order the company to undertake a product recall or can initiate a

product recall by itself. If the VWA incurred costs for taking one of these measures, then it will have the right to recourse this loss against the company responsible.

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 unsuccessful party is usually ordered to pay the legal costs of the successful party (Article 237 NCCP). The costs to be paid are fixed by the Court, according to a scheme, which is based on the “value of the case”, i.e. the amount claimed. The costs as fixed by the Court are usually much lower than the actual costs. The successful party has no action at his disposal to claim the remaining part of his legal costs. This system has been criticised for a long time, but it is not expected to change in the near future.

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

Pursuant to the Act on Legal Aid (*Wet op de Rechtsbijstand*), a distinction must be made between single householders and people who run a joint household with one or more persons. Single householders with an income of less than approximately EUR 24,600 per year and people who run a joint household with one or more persons with an income not more than EUR 34,700 per year have a right to legal aid paid by the State if certain criteria are met (Article 12 in conjunction with Article 34 of the Act on Legal Aid).

Those criteria are *inter alia*: the legal interests must concern the Netherlands and the costs of the legal aid must be in reasonable proportion to the interest of the case. The aid consists of the payment of most of the individual’s own legal fees. The individual always has to pay a small amount himself. Recipients of legal aid must pay an income-related fee. The lowest fee for 2011 is EUR 101, and the highest is EUR 757. In criminal cases fees are generally not payable. The costs of legal aid must be a reasonable proportion to the interest of the case.

In addition to the above, the individual has to pay the court fees and, in the event he loses the case, the other party’s costs, as ordered by the court.

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

See question 7.2 above.

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

Contingency and conditional fee arrangements and even “no win no fee” arrangements with lawyers are to some extent allowed, particularly in personal injury cases. However, in practice only a limited number of lawyers will accept these arrangements. The vast majority of lawyers work on the time-spent fee basis only.

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

No third party funding of claims is not permitted under Dutch law.

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 the Netherlands.

In addition to the cases which have been settled under the WCAM (please refer to question 4.3):

- On 7 April 2010 the District Court of Alkmaar rendered a decision in a case in which the question had to be answered whether or not a manufacturer could be held liable for damages caused by a defective product on the basis of wrongful act, because the damages suffered did not relate to the damages pursuant to Article 6:190 NCC and the claim did therefore not fall within the scope of the Product Liability Act. The District Court ruled that although the statutory regulations of the Product Liability Act did not apply, Dutch case law nevertheless confirmed that a manufacturer in general ought to take such measures, which can be required of a “careful manufacturer”, in order to prevent the product he brought into the market causing any damage. The District Court explicitly referred in this respect to the decisions of the Supreme Court in the “*Rockwool*” case and the “*Du Pont/Hermans*” case. In line with the legislation and case law the District Court decided, however, that there was insufficient reason to believe that the manufacturer acted wrongfully towards the plaintiff. The District Court ruled that foreseeability was an important factor in establishing whether or not the manufacturer had exercised a reasonable duty of care by putting the defective product on the market. In addition the District Court considered that the mere fact that the plaintiff suffered damages as a result of using the defective product was insufficient to allow the conclusion that the manufacturer acted wrongfully.
- On 14 April 2010 the District Court of The Hague gave a decision in a case in which the plaintiff claimed that the supplier could be held jointly and severally liable together with the installer of the product. In addition it was brought forward that in its relationship with the installer the supplier would be responsible for the damages suffered, because the installer was entirely blameless. In favour of the supplier the District Court decided, however, that since it was established as an undisputed fact that the supplier was not the manufacturer of the product and both the plaintiff and the installer were aware of the identity of the manufacturer - pursuant to article 6:187, paragraph 4 NCC - the supplier could not be held jointly and severally liable and so articles 6:10 and 6:12 NCC did not apply either.
- On 4 February 2011 the Supreme Court rendered a decision in a case in which it considered that in order to hold a manufacturer liable on the basis of wrongful act (pursuant to article 6:162 NCC) for a product he brought into the market, it is not needed to prove that the defective product *in general* or the (entire) *species* of the defective product as such caused damages when used normally for its intended purpose. By ruling that for the liability of the manufacturer pursuant to 6:162 NCC it should not only be established that the relevant product in question was defective, but that it should be proven that the *entire type* (the species) of the product in question as such was defective, the Court of Appeal had shown an incorrect interpretation of law, said the Supreme Court.

**Klaas Bisschop**

Hogan Lovells International LLP
Keizersgracht 555
1017 DR Amsterdam
The Netherlands

Tel: +30 20 55 33 600
Fax: +30 20 55 33 777
Email: klaas.bisschop@hoganlovells.com
URL: www.hoganlovells.com

Klaas Bisschop joined the Amsterdam office of Hogan Lovells as a partner in 2001. He is a leading practitioner in product liability, and a member of Hogan Lovells' International Product Liability Network. Klaas is a specialist in litigation and heads the litigation department of the firm's Amsterdam office. He is regularly involved in product liability cases for clients in, amongst others, the pharmaceutical, automotive and tobacco industry. Klaas has been responsible for litigation before the Dutch Courts, the European Court of Justice and Arbitral Panels.

**Karen Jelsma**

Hogan Lovells International LLP
Keizersgracht 555
1017 DR Amsterdam
The Netherlands

Tel: +30 20 55 33 600
Fax: +30 20 55 33 777
Email: karen.jelsma@hoganlovells.com
URL: www.hoganlovells.com

Karen Jelsma joined Hogan Lovells in 2007 and is one of the litigators within the Amsterdam office of Hogan Lovells. She deals with all aspects of contract law and (class action) litigation. Her litigation practice focuses on product liability and commercial matters. Karen also provides advice on issues such as product safety and product recalls, including the notification of product recalls to the Dutch authorities.



With over 2,500 lawyers operating from the world's leading financial, commercial and political hubs, Hogan Lovells is one of a small number of truly international law firms.

Hogan Lovells' International Product Liability practice is renowned for its market leading work. Our innovative International Product Liability Network enables us to assist clients to manage product liability risks in every corner of the globe.

We cover all aspects of product liability including risk prevention and management, compliance with product safety regulations, labelling, product recalls and personal injury claims, with particular emphasis on multi-party and cross-border litigation.

Our lawyers have been closely involved in many of the major product liability issues, having advised in over 30 countries on a wide range of products including pharmaceuticals, biological products, food and drink, medical devices, motor vehicles, aircraft, tobacco, mobile phones and asbestos.

To find out how Hogan Lovells can help you around the world, please contact:

John Meltzer, Head of Hogan Lovells' International Product Liability Practice,
Tel: +44 20 7296 2276 or john.meltzer@hoganlovells.com

The International Comparative Legal Guide to: Product Liability 2011

Other titles in the ICLG series include:

- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Gas Regulation
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Public Procurement
- Real Estate
- Securitisation
- Telecommunication Laws and Regulations

To order a copy of a publication, please contact:

Global Legal Group
59 Tanner Street
London SE1 3PL
United Kingdom
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk