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South Korea

PRODUCT LIABILITY

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This country-specific Q&A provides an overview of product liability laws and regulations applicable in South Korea.

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SOUTH KOREA PRODUCT LIABILITY



1. What are the main causes of action upon which a product liability claim can be brought in your jurisdiction, for example breach of statutory regime, breach of contract and/or tort? Please explain whether, for each cause of action, liability for a defective product is fault-based or strict (i.e. if the product is defective, the producer (or another party in the supply chain) is liable even if they were not individually negligent).

In Korea, it is possible to raise a product liability claim under the Civil Act, the Commercial Act, the Product Liability Act (PLA), the Framework Act on Consumers, the Framework Act on the Safety of Products, the Motor Vehicle Management Act, the Chemical Substances Control Act (K-REACH) depending on the subject matter. Most product liability claims are raised under the PLA or the Civil Act tort clause. The PLA mainly governs product liability litigation in Korea. Pursuant to Article 3(1) of the PLA, a manufacturer is responsible for the compensation of damages to life, persons and property caused by product defect, except for the damages incurred to the product itself. In addition, the Serious Accidents Punishment Act, enacted on January 26, 2021, and which became effective on January 27, 2022, enabled holding a business operator liable for any severe accident caused by a product defect resulting to death, injury or disease of people. Product liability claims, including claims under PLA, is generally considered a strict liability offense, whereas a product liability claim under the Civil Act or the Commercial Act is fault-based.

2. What is a 'product' for the purpose of the relevant laws in connection with which a cause of action exists. Is 'product' defined in legislation and, if so, does the definition include tangible products only? Is there a distinction between products

sold to or intended to be used by consumers and those sold for use by professionals or businesses?

Article 2 of the PLA defines "product" as movables which are industrially manufactured or processed, including movables incorporated into another movables or immovables. Real property or unprocessed agricultural and livestock products are excluded from the "products" under the PLA.

Whether software is a "product" for the purposes of the PLA is still disputed as there is no established precedent. The majority view is that software is not a movable but a type of service or information and, therefore, does not fall under the definition of "product" under the PLA. However, embedded software that is stored in a semiconductor or other storing medium may qualify as a "product". Even in such case, not the software itself but the medium storing the software will be considered as a "product" subject to PLA.

The Supreme Court further explained that the "products" subject to PLA are movables manufactured or processed through design or processing of raw materials which are supplied for commercial distribution. The commercial distribution not only includes the distribution to an unspecified large number of consumers but also the supply of a custom-made product to a specific consumer. So there is no specific distinction between products sold to or intended to be used by consumers and those sold for use by professionals or businesses. An agreement excluding or limiting any liability for damages provided under the PLA is null and void, except where a person purchases a product to be used for his own business agrees to limit liability for damages caused by the product to his own business property (Article 6 of the PLA).

3. Who or what entities can bring a claim and in respect of what type(s) of damage? Can a claim be brought on behalf of a

deceased person whose death was caused by an allegedly defective product?

In principle, only a party who suffered damages to life, persons and property caused by product defect may bring a product liability claim. Of course, and heir of a diseased may also bring a product liability claim on behalf of of the diseased. In addition, if a regulation recognizes third party's right to indemnity, such third party may bring a claim on behalf of the injured party. In Korea, it is common for an insurance company to pay the insurance money to an insured and bring an indemnity claim against the manufacturers. For example, there is a case pending before the appellate court where the National Health Insurance Service brought an indemnity claim against the tobacco manufacturers after paying the medical expenses to the smokers.

4. What remedies are available against a defendant found liable for a defect in a product? Are there any restrictions on the types of loss or damage that can be claimed?

Under the PLA, a manufacturer is liable for damages to life, persons and property caused by product defect. Damage to the product itself is excluded from the 'damage' under the PLA. The PLA provides that the Civil Act provisions for the compensation of damages must apply in the assessment of damages. Under the Civil Act, one may seek compensation for direct damages (e.g., property damage and medical expenses), indirect damages (e.g., loss of expected benefits or wages), and emotional distress. In principle, the damage is measured by comparing the value of the property it would have been without the product defect. Punitive damage is generally not recognized in Korea and, therefore, no compensation is available under the PLA other than that for the damages to life, persons and property caused by a product defect. Provided, however, that with respect to the damage to life and persons caused by a product defect, the PLA allows courts to award exemplary damages not exceeding three times the amount of actual damages if the manufacturer was aware of the alleged product defect and failed to take appropriate measures to prevent the damage to life or serious bodily injuries to persons. In addition, under the Serious Accidents Punishment Act, which became effective on January 27, 2022, any business operator will be held liable for the damages suffered due to "Serious Civic Accident". The liability of the business operator will be up to 5 times the actual damages suffered (please refer to our response to Question 30).

5. When is a product defective? What must be shown in order to prove defect?

A claimant must prove (i) existence of the defect, (ii) damages to life, persons or property, (iii) causation between defect and damages. The PLA defines the term 'defect' as the defect of any products in manufacturing, design or warning falling under any of the following items or lack of safety that the product ordinarily should provide (Article 2(2) of the PLA).

1. Manufacturing defect: defect caused by deviation from the originally intended design due to the failure in the manufacturing process or processing of the product, regardless of whether the manufacturer faithfully performs the duty of care and diligence with respect to the manufacturing or processing.
2. Design defect: failure by the manufacturer to adopt reasonable alternative design where the damages or risks caused by the product could otherwise have been reduced or prevented.
3. Warning defect: failure by a manufacturer to give reasonable explanations, instructions, warnings and other indications on the product, where the damages or risks caused by the product could otherwise have been reduced or prevented.

6. Which party bears the burden of proof? Can it be reversed?

The claimant has the burden to prove defect. Once the claimant is able to prove certain circumstantial facts, it is presumed that the product in question had a defect at the time the manufacturer supplied such product and the damages were incurred due to the defect. Please refer to question 8 below for more details. Prior to the enactment of the PLA, a claimant was able to bring a product liability action by making a tort claim or a non-performance of liability claim under the Civil Act. In such case, the claimant had the burden to prove (i) the existence of defect, (ii) manufacturer's intentional tort or negligence, (iii) damages, and (iv) causation between the defect and damages. Pursuant to the amendment to the PLA which became effective in 2018, the existence of the defect and the causation between the defect and the damages are presumed, in the absence of proof to the contrary (Article 3-2 of the PLA), if the claimant can prove that the accident: occurred from the use of the concerned product under its normal operating conditions; happened within the realm of the manufacturer's exclusive control; and would not usually

happen without the defect in the product.

7. What factors might the court consider when assessing whether a product is defective? To what extent might the court account for a breach of regulatory duty, such as a breach of a product safety regulation?

As explained under Question 5 above, the PLA provides the definition of three types of defects in detail. Therefore, the court will determine whether a defect falls under one category of the defects or whether a product lacks safety that the product ordinarily should provide. The court determines whether a product is defective based on the technical analysis that the product in question has an inherent risk, whether the manufacturer satisfied its duty to warn under the applicable regulations, and whether it was possible to make any further warnings. It is also important to assess the damages, costs associated with recall, if any. Whether there is any other cause of damages also needs to be analyzed. The court does consider whether there is any breach of regulatory duty such as a breach of a product safety regulation, however, such consideration will be limited to the breaches that are found to have causal relationship with the damages.

8. Who can be held liable for damage caused by a defective product? If there is more than one entity liable, how is liability apportioned?

The term manufacturer is defined as (Article 2(3) of the PLA): 1. a person who is engaged in the business of manufacturing, processing or importing any product; or 2. a person who presents him or herself as any person falling under (a) above by putting his or her name, firm name, trademark or any other distinguishable feature (his or her name) on the products, or a person who made a misleading indication that he/she is the person as described under (a) above. When a manufacturer is unidentifiable, the person who supplied the product for profit, in a form of sale or lease, etc., shall be liable for damages, if the supplier knows or could have known the manufacturer's identity but fails to inform the injured party (or legal representative) of the manufacturer's identity within a reasonable time (Article 3(3) of the PLA). Where there are two or more persons liable for the same damages, they must be liable jointly and severally for the damages (Article 5 of the PLA).

9. What defences are available?

Possible defences include: (i) the risk within the permitted scope, (ii) cost-benefit analysis, (iii) nonexistence of reasonable alternative design, or (iv) nonspecific diseases to prove against causation. In addition, the defences under Article 4(1) of the PLA are also available to the manufacturer. A manufacturer can be relieved from its responsibility for damage compensation by proving that (i) the manufacturer did not supply the product, (ii) the existence of the defect was not discoverable by the state of science or technical knowledge at the time the manufacturer supplied the product, (iii) the defect was because of compliance with any act or subordinate statute at the time the manufacturer supplied the product, or (iv) in the case of raw materials or components, the defect was attributable to the design of the product in which any raw materials or components have been fitted or to the instructions concerning manufacturing given by the manufacturer of the product using them (Article 4(1) of the PLA).

10. What is the relevant limitation period(s) for bringing a claim? Does a different limitation period apply to product liability claims brought on behalf of deceased persons?

The PLA provides for a 10-year long-term statute of limitations and a three-year short-term statute of limitations, and the statute of limitations expires when either of the statute of limitations expires. More specifically, a claim under the PLA must be brought the earlier of (i) 10 years from the delivery of the defective product or (ii) three years from the claimant's discovery of damages and relevant liabilities. For the damages caused by harmful substances or the damages that become apparent after a certain latent period, the long-term statute of limitation will be calculated from the date the damage occurred.

11. To what extent can liability be excluded, if at all?

First, consumers can only bring product liability claims against manufacturers before the applicable statute of limitations expires. In a tort claim, the court must take into account any contributory negligence on the part of a claimant in determining the liability of the manufacturer and the amount of damages (Articles 763 and 396 of the Civil Act). The principle of contributory negligence also applies to product liability claims under the PLA (Article 8 of the PLA), provided that contributory negligence is not

recognized if the claimant's negligence is ordinary and foreseeable, but is recognized if there is gross negligent on the part of the claimant or it is found that the claimant used the product knowing the defect in the product.

12. Are there any limitations on the territorial scope of claims brought under a strict liability statutory regime?

There are no specific limitations on the territorial scope of claims.

13. What does a claimant need to prove in order to successfully bring a claim in negligence?

Prior to the enactment of the PLA, a claimant was able to bring a product liability action by making a tort claim or a non-performance of liability claim under the Civil Act. In such case, the claimant had the burden to prove (i) the existence of defect, (ii) manufacturer's intentional tort or negligence, (iii) damages, and (iv) causation between the defect and damages.

14. In what circumstances might a claimant bring a product liability claim in negligence?

In Korea, it is unusual to bring a product liability claim in negligence for tort without bringing a claim under the PLA. A claim under the PLA is favourable to a claimant in that the claimant does not need to prove the intention or negligence of the other party. However, there are cases where it is unclear whether the defect would fall under one of the three types of defects defined under the PLA, in which case the claimant will consider bringing a product liability claim for tort. For example, a claimant may bring a product liability claim for tort arguing that there is a breach of regulatory duty, such as illegal advertising activities, in addition to a claim under the PLA.

15. What remedies are available? Are punitive damages available?

The Civil Act categorises the damages caused by intentional or negligent torts into ordinary damages and extraordinary damages. Ordinary damages are normally expected to incur by an instance of illegal conduct, while extraordinary damages may incur owing to the extraordinary circumstances of the injured and can be

compensated only if the offender could have foreseen such extraordinary circumstances. Punitive damage is generally not recognized in Korea.

16. If there are multiple tortfeasors, how is liability apportioned? Can a claimant bring contribution proceedings?

If two or more persons caused damages to another by their joint unlawful acts, they are jointly and severally liable for the damages (Article 760(1) of the Civil Act). Among the joint tortfeasors, the liability is apportioned in proportion to their degree of negligence. In case one tortfeasor has compensated an amount exceeding its proportion of liability, such tortfeasor is entitled to seek contribution from other tortfeasors by exercising its right to indemnity.

17. Are there any defences available?

The defences under the PLA are also available for tort claims under the Civil Act. Please refer to our response to Question 9 for more details. In addition, unlike product liability claims under the PLA, manufacturer may also be relieved from liability by proving there was no intentional or negligent tort.

18. What is the relevant limitation period(s) for bringing a claim?

The limitation period lapses on the earlier of (i) three years from the date on which the injured party or his/her legal representative becomes aware of such damage and of the identity of the person who caused it, or (ii) ten years from the time the unlawful act was committed (Article 766 of the Civil Act).

19. To what extent can liability be excluded, if at all?

First, consumers can only bring product liability claims against manufacturers before the applicable limitation period lapses. Pursuant to the principle of contributory negligence, the court must take into account any contributory negligence on the part of a claimant in determining the liability of the manufacturer and the amount of damages (Articles 763 and 396 of the Civil Act).

20. Do the laws governing contractual liability provide for any implied terms that

could impose liability in the event that the product that is the subject of the contract is defective or fails to comply with the terms of sale?

No. A contractual term favourable to consumers, such as liquidated damages clause for product defects, will be held enforceable. Any ambiguous terms in a contract will be resolved pursuant to the PLA. Although the law does not require including certain terms or conditions imposing liability in a situation where a product has caused damages, an agreement to exclude or limit any liability for damages recognized under the PLA is null and void, except where a person purchases a product to be used for his own business agrees to limit liability for damages caused by the product to his own business property (Article 6 of the PLA).

21. What remedies are available, and from whom?

A claimant can hold the other party liable for product defects pursuant to the terms of a contract. As explained above, a contractual term less favourable than the terms under PLA is null and void, in which case the claimant may bring a claim under the PLA.

22. What damages are available to consumers and businesses in the event of a contractual breach? Are punitive damages available?

Unless the contract provides for a liquidated damages clause, the damage to be compensated is measured the same way as the case of a non-contractual claim. That is, a manufacturer is liable for damages to life, persons and property caused by product defect, and one may seek compensation for direct damages (e.g., property damage and medical expenses), indirect damages (e.g., loss of expected benefits or wages), and emotional distress. In principle, the damage is measured by comparing the value of the property it would have been without the product defect. It is also possible to include a penalty clause in a contract, provided that the court may find such clause to be partly or entirely unenforceable in case the penalty is excessive.

23. To what extent can liability be excluded, if at all?

An agreement excluding or limiting any liability for damages provided under the PLA is null and void, except where a person purchases a product to be used for his

own business agrees to limit liability for damages caused by the product to his own business property (Article 6 of the PLA). Again, consumers can only bring product liability claims against manufacturers before the applicable limitation period lapses. In the context of a contractual claim, a 5-year limitation period applies to commercial claims (claims arising from commercial activities as defined under the Commercial Act), and a 10-year limitation period applies to other civil claims. Pursuant to the principle of contributory negligence, the court must take into account any contributory negligence on the part of a claimant in determining the liability of the manufacturer and the amount of damages (Article 396 of the Civil Act).

24. Are there any defences available?

The other party may assert any defences available under the contract. In addition to the defences provided under the contract, it would also be possible to assert defences under the PLA.

25. Please summarise the rules governing the disclosure of documents in product liability claims and outline the types of documents that are typically disclosed.

Korea does not have a discovery system similar to the system in the U.S. It is, however, possible to make a request to the court to order the other party to produce specific documents or make an application for inquiry of facts. It is possible for a party who possesses the documents in question to refuse to produce the documents claiming that they contain trade secrets. Failure to comply with the court's order to produce documents without justifiable cause may result in the court accepting the other party's claim regarding the contents of the documents to be true.

26. How are product liability claims typically funded? Is third party funding permitted in your jurisdiction and, if so, is it subject to regulation?

The legal costs are generally funded by the claimant. Unless it is proven that a party has no chance of winning the case, upon the request by a party or at its own discretion, the court may grant legal aid to a party unable to pay for the litigation costs. A party applying for legal aid must submit to the court the evidence of its financial status. Legal aid includes deferred payment of court fees and attorneys' fees and exemption from the deposit for court fees. In addition, Korea Legal Aid

Corporation, a public organisation, provides legal assistance (including representation during trial) to individuals with financial difficulties at a minimal fee or free of charge. There is no law or regulation specifically prohibiting third-party litigation funding in Korea. In principle, in a lawsuit where the property right is disputed, an entrustment of the litigation to a third party by the person who owns the respective property right or who has the authority to manage or dispose of such property rights is not allowed as arbitrary entrustment of litigation. Entrustment of litigation may be allowed in limited circumstances where there are reasonable needs or reasons. In any event, entrustment of litigation must not take place in order to avoid the principle of representation by attorneys or in violation of the Trust Act. Contingency or conditional fee arrangements are permitted in Korea and there is no legal restriction on the maximum amount of such fee. It is not required for a party to inform the other party of such fee arrangement.

27. Can a successful party recover its costs from a losing party? Can lawyers charge a percentage uplift on their costs?

In principle, the unsuccessful party bears the costs of a litigation. If only part of a claim has been recognized by the court, the court decides the cost distribution ratio taking into account the ratio of the claim recognized. However, not all costs may be recovered as the amount of legal fees that can be recovered will be determined based on the ratio set forth under the court rules. It is possible for lawyer to charge a percentage uplift on their costs.

28. Can product liability claims be brought by way of a group or class action procedure? If so, please outline the mechanisms available and whether they provide for an 'opt-in' or 'opt-out' procedure. Which group action mechanism(s) is most commonly used for product liability claims?

Although the Securities-Related Class Action Act (Act No. 7074 of 20 January 2004, as amended), which may apply to certain illegal acts (e.g., false or insufficient filing of securities reports or business reports, etc.), has been effective since January 2005, there is no general class action system in civil proceedings in Korea (including product liability cases). The 'appointed-party' system in Korea has some similarities with the class action system but is different in that, under the 'appointed-party' system, only those participating in the trial are entitled

to the benefit of the court's findings and award. In addition, if the rights and obligations subject to a lawsuit are relevant to two or more persons or an identical factual or legal cause gives rise to a claim, it may be possible for several persons to become the plaintiffs or defendants to a lawsuit (there are not many cases where there are several plaintiffs or defendants because it is difficult to satisfy the requirements under the law). The court's decision on such case only applies to the parties to the lawsuit which is different from a class action or group action. In practice, in case there are several victims to a product liability case, it is common for the victims to appoint one legal representative to represent them in the lawsuit.

29. Please provide details of any new significant product liability cases in your jurisdiction in the last 12 months.

Energy storage system (ESS) facility fire case: There were 23 ESS facility fire incidents between 2017 and 2019. Due to the disagreement between the battery manufacturer and the facility management company on which party is liable for the fire incidents, the public and private joint investigation committee was established to investigate into the fire incidents. There are still disputes over the cause of fire and there are on-going disputes among the battery manufacturer, the facility management company, and their respective insurance companies. Several lawsuits have been filed in 2020 in connection with ESS. After the court implied that it may find the battery to be defective once it is confirmed that the original point of ignition was the battery, most cases have been settled.

Agent Orange case: Starting early 2020, Vietnam War Veterans and the widows of the veterans refiled the Agent Orange case before the Korean courts. Two additional cases have been filed in 2022. The cause of action is similar to that of the cases previously filed.

Indemnity claim by the National Health Insurance Service (NHIS): As for the tobacco case filed by the NHIS against the tobacco companies, the trial court dismissed the claims made by NHIS on November 20, 2020. The court found that there is no legal basis for NHIS to make a direct claim against the tobacco companies and no sufficient ground to find causation between smoking and lung cancer. NHIS appealed the decision of the court of appeal, and issues including the hazard or risks of additives are being intensely disputed among the parties.

30. Are there any policy proposals or regulatory and legal developments that could impact current the product liability framework, particularly given the advancements in new technologies?

Due to the fast technology development in Korea, there are increasing concerns on the safety of consumers which lead to new legislations. Recently, a bill for the amendment of the PLA was proposed so that the manufacturers or the processors of products that require high degree of technical skills (e.g. motor vehicles) are held liable for product defects unless the manufacturers or the processors can prove lack of intention or negligence.

One other example is the heavy regulation on the chemical substances. In order to balance technology development and consumer protection, the Regulatory Reform Committee continuously monitors the market and how the regulations are implemented. On January 26, 2020, the Serious Accidents Punishment Act was introduced. The initial bill was proposed in response to repeated workplace accidents. However, the concept of "Serious Civic Accident" was introduced last minute as a subcategory of "Serious Accident". "Serious Civic Accident" refers to accident caused by product defect resulting in (i) death of one or more persons or (ii) injury or disease of 10 or more persons. The Serious Accidents Punishment Act requires the business operator to take protective safety measures. The business operator may be subject to criminal sanctions (incarceration of up to 7 years or fine of up to KRW 5 billion) or may be held liable for compensatory damages for an amount not exceeding 5 times the actual damages for failure to comply with the obligations under the Serious Accidents Punishment Act. The issues surrounding the Serious Accidents Punishment Act and how it would affect the businesses of the companies operating in Korea are still the most

hotly debated legal issues in Korea.

31. What trends are likely to impact upon product liability litigation in the future?

The recent trend has been to implement more consumer friendly regulations, such as presumption of defect or alleviation of the burden to prove causation, which can also be found in court decisions. There is increased concern on consumer safety which is expected to lead further legislations and court decisions to such direction. There is a possibility that an amendment to the PLA imposing the burden to prove product defect on the manufacturer or allowing group action in product liability case may be proposed. Although the burden to prove causation will stay with the claimant, it is possible that the legislation or the courts accept the presumption of causation or statistical causation analysis in the future.

The Korea Department of Justice once proposed a class action bill which was under review by the Ministry of Government Legislation in 2020. However, the bill lost momentum with the arrival of the new president and administration in 2022, and whether the bill will pass still remains to be seen. According to the class action bill proposed by the Department of Justice, a group of 50 or more people would be eligible for class action regardless of the industry. It will further alleviate the victims' burden of proof and introduce discovery system which is similar to the discovery in the U.S. Once passed, the class action bill is expected to bring a legal environment favourable to the victims. The Department of Justice also proposed an amendment to the Commercial Code which will broaden the applicability of punitive damage clause. According to the proposed amendment, a person involved in business or trade who causes damages to another wilfully or gross negligently, will be liable for compensation up to 5 times the actual damages. This may also be applicable to a product liability case.

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