

Feature – An overview of product liability in Romania

INTRODUCTION

In Romania, before the initiation of the European Union accession process, the main statute that regulated product liability was Government Ordinance No. 21/1992 on consumer protection ("GO No. 21/1992"). Currently still in force, GO No. 21/1992 underwent subsequent amendments in order to update its contents with stricter consumer protection standards.

The process of Romania's EU accession entailed an overall harmonisation of the relevant areas of domestic law, including product liability law, with the *acquis communautaire*.¹ In this context, several statutes and regulations specifically addressing product liability law have been enacted: Law No. 240/2004 on producers' liability for damages caused by defective products (the "Producer Liability Law")², Law No. 245/2004 on the general safety of products (the "General Product Safety Law")³ and, effective as of Romania's accession to the EU on 1 January 2007, Law No. 296/2004 on a code for consumers (the "Consumer Code") and Law No. 449/2003 on the sale of consumer goods and associated guarantees (the "Consumer Guarantees Law").⁴

An overview of the main legal aspects surrounding product liability in Romania is presented below.

PRODUCT LIABILITY SYSTEMS IN ROMANIA

The Romanian system of product liability may be regarded as twofold, being grounded in both tort liability and contractual liability.

The liability of producers for damages caused by defective products, as regulated by the Producer Liability Law, is based mainly on the general tort liability principles set forth in the Romanian Civil Code (the "Civil Code").

Tort liability – fault based

Articles 998 and 999 of the Civil Code provide that any person who by his fault causes damage to another person shall be obliged to repair such damage. Fault-based tort liability may be imposed not only for deliberate conduct, but also for negligent or imprudent conduct that causes damage to another person. It may be grounded in either acts or omissions.

A person who files a claim in tort will be obliged to prove

- the act or omission
- the damage incurred
- the causal nexus between the act or omission and the damage and
- the fault of the defendant.

The defendant's fault is assessed in relation to the objective standard of a *bonus paterfamilias*, being the standard of care of a diligent and prudent person. The doctrine and the case law agree that such an objective standard is both dynamic

(since it increases proportionally to the development of human knowledge) and variable (since it must take into consideration specific conditions and external factors that influence one's acts).

Tort liability – no-fault

As mentioned, a producer's liability for damage caused by defective products under the Producer Liability Law is generally based on the rules and principles of tort. Pursuant to Article 3 of the Producer Liability Law, "the producer is held liable for the present and the future damages caused by the defects of its product". Furthermore, the Consumer Code provides in its Article 23(a) that the producer is liable not only for the present and future damages caused by a defective product, but also for damage that has been caused as a cumulative result of the defective product and the act or omission of a third party.

However, unlike the fault-based tort liability under the Civil Code, product liability under the Producer Liability Law is strict. This is because the producer is a business person (*comerçant*) and, in this capacity, the standard of care used to assess his

¹ *The body of EC legislation that candidate countries must adopt in order to become EU members.*

² *Implementing the Product Liability Directive 85/374/EC.*

³ *Implementing the General Product Safety Directive 2001/95/EC.*

⁴ *Implementing the Consumer Guarantees Directive 1999/44/EC.*

faulty acts or omissions is applied in much stricter terms. Thus, consistent with the Product Liability Directive, the Producer Liability Law provides that the person incurring the damage caused by a defective product need not prove fault, but need only prove

- the damage
- the defect in the product and
- the causal nexus between the damage and the defect of the product.

Contractual liability

Under Romanian civil law, contractual liability applies to claims arising in connection with the non-performance or improper performance of the parties' obligations under a contract that has been validly executed.

According to traditional contractual liability principles, in a sale-purchase contract it is only the purchaser who has the right to bring a contractual liability claim against the seller, and only in relation to hidden defects in the purchased good.

Pursuant to Article 27(d) of the new Consumer Code, consumers have the right to receive actual and adequate compensation for the damage suffered by the unsatisfactory quality of products and services, having resort to the appropriate procedural means provided by law. Thus, the consumer has the right to file a legal action against the seller to seek compensation for damages caused by defective products. The term "consumer" includes not only the person who purchased the product from the seller, but also any person who subsequently acquired the product from the initial purchaser. Should any of these persons incur damages resulting from a defective product, they may file a claim against the seller and assert breach of the seller's obligations under the sale-purchase contract. Needless to say, a seller who replaces the defective product or who otherwise

compensates the consumer is entitled to claim against the manufacturer of the defective product. Also, since GO No. 21/1992 makes no distinction between the categories of defect, the consumer can hold the seller liable not only for latent defects in the product, but also for apparent defects.

Under the Consumer Guarantees Law, in circumstances where consumer goods lack conformity with the contract of sale, the consumer is entitled either to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods. The consumer will be entitled to an appropriate reduction of the price or rescission only if (i) it would not be reasonable in the circumstances to ask for repair or replacement, (ii) the seller has not completed the repair or replacement within a reasonable time, or (iii) the seller has not completed the repair or replacement without causing significant inconvenience to the consumer. However, the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

Liability for breach of statutory obligations

The Consumer Code requires that so-called "economic operators" introduce onto the market only products that are safe for consumers' life, health and security. Moreover, any supplier is obliged to ensure that products traded on the market are safe and that consumers are informed of any risk factors in connection with the use or consumption of such products. The Consumer Code also generally prohibits trade in unsafe products or products that are unaccompanied by mandatory documentation attesting that they have been tested and/or certified, as applicable.

The General Product Safety Law imposes a similar obligation, requiring producers to introduce onto the market only safe products. For certain categories of products, conformity standards are imposed by special statutes (such as low voltage equipment and industrial machines). Unless a consumer can prove causation between the damage suffered and the failure to comply with the aforesaid standards, a producer will not be liable to a consumer for simply failing to observe the standards. However, breach of such standards is regarded as an administrative offence (misdemeanour) and can be sanctioned with administrative fines.

PERSONS LIABLE FOR THE DAMAGE

Both the Consumer Code and the Producer Liability Law provide that in certain circumstances liability for defective products is borne by the producer. The term "producer" covers a broad range of individuals and legal entities. According to the Producer Liability Law, the term includes

- the manufacturer of the finished product, of the raw material, or of components of the product
- anyone who presents himself as the producer by putting his name, trademark, or other distinctive element on the product
- the importer of a product into Romania,⁵ who shall be liable on the same terms as the manufacturer or
- any supplier, if the producer or importer cannot be identified and the supplier fails to provide the consumer with information necessary for the identification of the manufacturer or importer, within a reasonable period of time.

⁵ *In imposing liability on the importer into Romania, the Producer Liability Law is inconsistent with the Product Liability Directive 85/374/EEC, which defines "producer" to include the importer into the Community.*

According to the Consumer Code and the Consumer Guarantees Law, the term "producer" includes

- the economic operator reconditioning the product
- the economic operator or distributor who, in the context of its business, alters the features of the product
- the representative registered in Romania of an economic operator headquartered outside Romania
- the economic operator importing products for the purpose of a subsequent sale, lease or any other distribution form specific to its business⁶
- the distributor of an imported product, in case the importer is unknown, even if the manufacturer is mentioned or
- the distributor of the product, if the importer cannot be identified and the distributor fails to inform the injured person of the identity of the importer within 30 days of his request.

THE BURDEN OF PROOF

As an application of the Roman law principle *probatio incumbit actor* (the claimant has the burden of proof), the applicable Romanian statutory provisions on product liability explicitly state that the person incurring the damage as a result of a defective product bears the burden of proving the damage, the defect in the product and the causal nexus between the damage incurred and the defect.

Although various tests for proof of causation have been proposed by legal scholars, Romanian case law has focused on and applied the test consisting of the coexistence of (i) the so-called "necessary cause" (*cauza necesară*), which is considered to be the event in the absence of which the damage would have not occurred, and (ii) the conditions which, although not decisive for the occurrence of the damage, have favoured such occurrence. Therefore, as a general rule, both the "necessary cause"

and the favouring conditions are taken into account by courts when establishing the existence of a causal nexus and liability. As a result, irrespective of whether the defect in the product was the necessary cause of the damage or, on the contrary, just a collateral condition that contributed to the occurrence of the damage, the producer of the defective product will nevertheless be liable.

DEFENCES

Producers who are defendants in product liability lawsuits may assert several reasons why they should be exonerated or their liability limited. Pursuant to Article 7 of the Producer Liability Law, the producer of a defective product may be exonerated of liability if he can prove that

- he is not the person who released the product on the market
- the defect that caused the damage did not exist at the moment the product was released on the market or the defect occurred afterwards due to causes for which he bears no responsibility
- the product has not been manufactured for sale or distribution for profit and such product has not been manufactured or distributed in the exercise of the producer's business operations
- the defect is the result of the observance of certain mandatory conditions that have been imposed on the basis of regulations issued by the relevant authorities
- the level of scientific and technical knowledge existing at the moment when the product was released on the market prevented the producer from discovering the defect
- the defect is the result of the consumer's failure to observe the instructions provided as part of the technical documentation that accompany the product, the existence of which need to be proved on the basis of a technical survey and/or

- he is the manufacturer of a component of a product and the defect was caused by the design of the product into which the component was integrated or by the wrong instructions given by the manufacturer of the product into which the component was integrated.

Article 8 of the Producer Liability Law provides that the relevant court may exonerate the producer or limit his liability where the damage is caused not only by the defect in the product but also by the fault of the injured consumer or of another person for the acts of which the injured consumer may be held liable. In addition to the defences provided by the specific product liability legislation, other defences that can be asserted by the producer, based on the general principles of civil law applicable in Romania, are

- the fault of a third party and/or
- the occurrence of a force majeure.

Under the Consumer Guarantees Law, the seller has a defence to any claim for lack of conformity if it can show that, at the time the contract was concluded, the consumer was or ought reasonably to have been aware of the lack of conformity, or that the lack of conformity was due to materials supplied by the consumer.

LIMITATION PERIODS

The limitation period varies depending on the basis for the product liability claim.

If the claim is based on the strict liability of the producer, then according to Article 11 of the Producer Liability Law a claim for damages incurred as a result of a defective product must be brought within three years of the date upon

6 Neither the Consumer Code nor the Consumer Guarantees Law specifies whether it is the importer into Romania or the importer into the Community who is defined as the "producer".

which the claimant became or should have become aware of the damage, the defect and the identity of the producer. In any case, such claim must be brought within 10 years of the date the producer released the product onto the market.

Under Article 70 of the Romanian Commercial Code, for claims based on breach of contract, latent defects in a product need to be notified to the seller within two days of the date that the purchaser becomes aware of them, whereas for apparent defects the seller must be notified within two days of the delivery date of the product. Provided the defects in the product have been duly notified to the seller, the purchaser has a three-year period within which to file a claim to recover the incurred loss.

For product liability claims based on breach of contract, a distinction should be drawn between defects occurring within the warranty or validity period and those occurring within the average life of the product. For defects occurring within the warranty or validity period, the consumer may oblige the seller to remedy the defects, to replace the defective product or to reimburse the purchase price. However, the lapse of the warranty period does not exonerate the seller from liability and he would continue to be liable for latent defects during the entire average life of the product.

Under the Consumer Guarantees Law, the seller will be liable if the lack of conformity becomes apparent within two years of delivery of the goods, and the consumer has informed the seller of the lack of conformity within two months of the date he detected it. The Consumer Guarantees Law presumes that any lack of conformity that becomes apparent within six months of delivery of the goods existed at the time of delivery, unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

RECOVERABLE DAMAGES – TORT

For product liability claims grounded on tort, the Producer Liability Law provides a detailed enumeration of damages that may be recovered if the producer is found liable.

Pecuniary damages

The Consumer Code regards as "damage" any damage caused to consumers by the use of a dangerous or defective product. According to the Consumer Code, such damage can be material, or can concern bodily or health injury, as well as death. Similarly, the Producer Liability Law makes reference to death, bodily injury or health injury for which personal damages may be awarded as a result of the liability of the producer. Also, the producer is liable for damaging or destroying any product, other than the defective product in issue, that has a value exceeding RON 200 (approximately €60), provided that such product is designed for private use or consumption and was used by the injured person for such personal purposes.

Non-pecuniary (moral) damages

The problem of compensating for non-pecuniary (moral) damages has been historically a source of controversy, especially during the communist regime. In 1952, the Supreme Court ruled that "no material compensation may be granted for moral damages", grounding such decision on the inconsistency between socialist fundamental principles which consider the main source of revenue being the work rendered by man, on the one hand, and speculative gains deriving from an allegedly moral damage, on the other hand. Gradually, certain corrections to this position were made which enabled limited awards to be made of non-pecuniary compensation for those asserting moral damages.

The problem has now been solved pursuant to the fall of communism in Romania and the award of compensation for moral damages has been acknowledged by various post-communist statutes, including the Producer Liability Law (which clearly states in Article 2(3) that the statutory provisions prescribing compensation for moral damages are fully applicable) and GO No. 21/1992, as recently amended by Law No. 476/2006.

RECOVERABLE DAMAGES – CONTRACT

If the claim is grounded on contractual liability, the consumer may request compensation both for actual incurred damage (*damnum emergens*) and for lost benefits (*lucrum cessans*) deriving from the breach of contract by the seller of the product.

PROCEDURAL ISSUES

Product liability lawsuits deriving from torts are regarded by the Romanian Civil Procedure Code as civil law-based claims and, therefore, no pre-trial stage is provided.

However, product liability lawsuits that derive from a breach of contract represent commercial law-based claims. For commercial law-based claims, Article 7201 of the Civil Procedure Code provides for a pre-trial stage, called "direct conciliation" (*conciliere directă*), which the claimant must undergo before filing the claim with the relevant court. This pre-trial stage consists mainly of an invitation to conciliation submitted by the potential claimant to the potential defendant for a date not earlier than 15 days from the submission of the notification. If the parties fail to reach an amicable settlement of their dispute, then the claimant may immediately (or, if the defendant fails to honour the invitation for conciliation, after 30 days from the submission of the notification) file the claim with the relevant court.

After a claim has been filed, the litigation moves to trial. The duration of the court proceedings varies depending on the complexity of the case. It can take several years before a final and enforceable court decision is passed.

Under the Civil Procedure Code, as a general rule, a first instance judgment may be appealed on factual and legal grounds, whilst decisions passed by appeal courts may subsequently be challenged exclusively on strictly provided statutory grounds.

For product liability claims based on torts of the producers, whether fault based or no-fault as provided under the Producer Liability Law, the claim is adjudicated at first instance by the relevant Lower Court (*judecătorie*) if the value of the claim is lower than RON 500,000 (approximately €145,000) and by the relevant Tribunal if the value of the claim exceeds that amount. The decision of the court of first instance (either the Lower Court or the Tribunal) can be appealed at second instance to the relevant Tribunal or to the Court of Appeal (*curtea de apel*) respectively. Finally, the decisions passed by the Tribunal or Court of Appeal at the second instance may be challenged at third instance (*recurs*) at the Court of Appeal or at the High Court of Justice and Cassation (*Înalta Curte de Justiție și Casație*), respectively.

For product liability claims based on a breach of contract and filed by consumers against sellers, since they are regarded by the Romanian procedural law as commercial law-based claims, the Civil Procedure Code provides for a different competence of the courts. Thus, the relevant Lower Court is competent to rule on claims with values below RON 100,000 (approximately €30,000), while the relevant Tribunal is competent for values exceeding that amount. At second instance, the decisions of the aforesaid courts may be appealed to the relevant Tribunal

and Court of Appeal, respectively, and at third instance to the relevant Court of Appeal or the High Court of Justice and Cassation, respectively.

COSTS AND LEGAL AID

According to Article 274 of the Romanian Civil Procedure Code, the successful party is entitled to recover from the unsuccessful party all court expenses and other incidental expenses (fees of technical experts, expenses in connection with witnesses etc). The court is bound to award full compensation for all such costs that are appropriately proved to have been incurred.

The successful party is also entitled to recover the fees paid to its lawyers in connection with the proceedings. However, the court has the power to increase or decrease the amount of compensation, at its discretion, whenever it considers that the fees paid to the lawyer by the successful party have been too low or too high by reference to the value of the claim or to the amount of work actually rendered by the lawyer in connection with the respective proceedings.

According to the Civil Procedure Code, legal aid may be granted by the court, partially or totally, at any stage of the trial, but only to a person who proves that he cannot afford to pay the costs associated with the proceedings without jeopardising his own or his family's means of subsistence. The court is entitled to grant legal aid which consists mainly of exemptions from or reduction of the applicable judiciary fees and making available a pro bono lawyer for legal assistance and representation.

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