

Product liability and safety in Indonesia: overview

Pheo M. Hutabarat and M. Fathan Nautika
HHR Lawyers

global.practicallaw.com/w-012-5380

SOURCES OF LAW

1. What are the main areas of law and regulation relating to product liability?

Consumer protection was covered under the Civil Code until 1999 when the Consumer Protection Law (CPL) was enacted. The CPL offers protection to consumers while encouraging and obliging them to be careful and aware when choosing products and services. The CPL also gives businesses legal certainty by setting out their obligations about quality of products and services and providing mechanisms to protect them from bad faith claims. It includes a specific chapter on product liability with the burden of proof on the supplier. An offence under the CPL or breach of the product liability provisions can result in both civil and criminal sanctions.

2. What is required to establish liability under the most common causes of action? When is a product defective? Does strict liability apply in certain circumstances?

There are several terms and conditions whose breach will result in liability for the supplier of the goods or services, including (Article 8, Consumer Protection Law):

- Distributing goods that do not comply with specified product standards (for example, where there is a difference between the actual product and the information on the label).
- Distributing defective goods without informing consumers of the defect.
- False advertising.

In addition, businesses will be strictly liable and provide indemnifications against destruction, pollution, and/or loss following consumption of the distributed goods.

3. Who is potentially liable for a defective product? What obligations or duties do they owe and to whom?

The supplying business is liable for defective products and must indemnify a customer by providing a refund, replacement, rehabilitation and/or compensation. Indemnification does not discharge the business's liability and it can still be subject to legal proceedings in some circumstances.

Defences

4. What are the defences to a product liability claim? Is there a time limit in which proceedings can be brought?

Any business with any connection to the circulation of goods will be released from its liability for losses suffered by the customers if:

- It is proved that the goods should not have been or were not intended to be circulated.
- The defect emerges afterwards.
- The defect occurs due to lack of adherence to the rules on the qualifications of the goods.
- There is negligence on the part of the consumer.
- Four or more years have passed since the goods were purchased, or the agreed claim period has been exceeded.

Even when at fault, a business will always have the right to defend itself when settling a dispute.

Excluding/limiting liability

5. Can a supplier limit its liability for defective products and are there statutory restrictions on a supplier doing this? Do consumer protection laws apply? Are guarantees or warranties as to quality implied by law? Is there a mandatory or minimum warranty period for consumer products?

Under the Consumer Protection Law, the following are all liable for defective goods/services:

- Manufacturers.
- Retailers.
- Advertising companies.
- Importers.
- Any other third party involved in selling the product or service.

A business must recall the distribution of products discovered to be defective, but this does not preclude the possibility of a civil claim and/or criminal charges arising from the distribution of the defective products. A business can limit its liability by preventing consumers from using the goods, for example, by making a public announcement and making efforts to recall the product.

Any effort will be considered by a judge in any subsequent civil or criminal claim.

Businesses that manufacture goods that can be used for at least one year or more must provide spare parts and/or an after sales service, and must honour the guarantee or warranty under the agreed contract.

PRODUCT LIABILITY LITIGATION

6. In which courts are product liability cases brought? Are product liability disputes generally decided by a judge or a panel of judges? Are juries used in certain circumstances?

Indonesia's court system has three sections:

- District courts.
- High Courts.
- Supreme Courts.

All courts can hear civil or criminal matters, including product liability claims. The Consumer Protection Law (CPL) established the Customer Dispute Settlement Board (Board) which is an alternative mechanism for processing product liability claims.

Under the CPL, an individual customer can either submit a claim for tortious liability or contractual liability to the Board or to a district court. A joint or class action or government claim can only be submitted to the district court.

The Board has the competence to examine and decide on sanctions for any allegation submitted by an individual customer in connection with:

- Damage, contamination and loss to the customer as a result of consuming the products or services (*Article 19, CPL*).
- Responsibility borne by an advertising company from any advertisement made by them (*Article 20, CPL*).
- A manufacturer's obligation to provide an after sales service and spare parts as well as guaranteeing the product for at least a year (*Article 25, CPL*).
- Any obligation to fulfil a warranty or guarantee agreed or given in a contract in connection with the defective product or service (*Article 26, CPL*).

The Board's decision is a final and binding and it cannot be appealed. However, a disappointed party can file an objection to the Board's decision with the relevant district court (*Supreme Court Regulation Number 01 of 2006 regarding Procedures of Objection Submission on the Board Decision*). In practice, based on its examination, the district court can annul the decision made by the Board.

The Board cannot impose any criminal sanctions. Criminal sanctions can only be imposed by a district court based on an investigation conducted by the police or civil service official. Any prosecution must be carried out by the public prosecutor to the district court.

In Indonesia, courts are made up of presiding judges and no jury system is in place. Any decision by the Board must be made by a panel of commissioners consisting of an odd number, and with a minimum of three commissioners.

7. How are proceedings started?

The proceedings are started by submitting the initial pleading. A subsequent hearing follows, during which the defendant:

- Presents a written response to the claimant's claim
- Submits a counterplea.
- Deals with the response to the counterplea.
- Presents evidence and examinations of witnesses.
- Submits a conclusion.

The court then reviews the submissions and sets a date for the judgment to be announced. The defendant can also submit a counterclaim against the claimant as this is typically dealt with at district court level.

The Consumer Protection Law allows consumers to bring joint or class actions and to be represented by a consumer organisation that assists consumers in filing class actions against businesses for misleading or deceptive marketing.

8. Who has the burden of proof and to what standard?

In general civil proceedings, both in breach of contract as well as tort, the pleading must be proved by the claimant (*Article 1865, Civil Code*).

However, there is strict liability on businesses for product liability in the sense that the business must indemnify customers for damages, contamination or loss incurred as a result of the consumption of the goods or services provided by it (*Article 19, Consumer Protection Law*). In strict liability cases, the burden of proof shifts from the claimant (in this case, the customers) to the defendant (in this case, the business). Therefore, where there is any loss, damage or contamination incurred by a customer as a result of using a product or service, it is the business that must prove that there has been no fault or negligence on its part.

9. How is evidence given in proceedings and are witnesses cross-examined?

See *Question 7*.

The claimant and the defendant will be given an opportunity to present their evidence and any witnesses. Indonesian judges play an active role in relation to the examination of evidence and have the discretion to call for or reject direct or expert testimony. They can also refuse to consider evidence as they see appropriate and individually interpret the parties' evidence and arguments. There is no procedure for compelling the opposing party to present facts or documents reflecting examination outside the court hearing.

New evidence can be presented on appeal to the High Court, however this practice is not typically permitted in the Supreme Court, although the court has the discretion to admit new evidence in the interests of justice.

10. Are parties able to rely on expert opinion evidence and are there special rules or procedures for it?

See *Question 9*.

The judges' discretion plays important part in determining whether expert opinion is appropriate or not.

11. Is pre-trial disclosure/discovery required and which rules apply? If not, are there other ways to obtain evidence from a party or a third party?

Indonesian procedural laws follow the tradition of a civil law system and do not acknowledge any procedure relating to discovery or depositions. Evidence can only be obtained by opposing parties when it is presented in front of the judges.

12. Is there liability for spoliation of evidence/a remedy for destruction of or failure to preserve evidence (in particular, the product)?

The general rules on evidence in civil procedures state a strong preference for original evidence and documentation, however, authenticated duplicates are acceptable. The Civil Code and the Civil Procedure Law set out that evidence can consist of written evidence, witness testimony, inference, acknowledgements and oaths. Therefore, if evidence has been destroyed, or there has been a failure to preserve it, it can be substituted if the claimant can secure other evidence in its place, for example witness testimony.

13. What types of interim relief are available before a full trial and in what circumstances?

Indonesian court procedure allows for interim injunctions to be granted to the claimant before examination of the material case. The judge can add the claimant's claim to the interim injunction to prevent the defendant from taking any action that will hamper the interests of the claimant in submitting its case to the court. To enable an interim court injunction to be considered, the claimant's evidence must be based on a *prima facie* proof that supports the necessity for the request. If the interim injunction is granted, the court will prohibit the defendant from interfering with the interests of the claimant.

14. Can the successful party recover its costs associated with the litigation, such as legal fees and experts' costs and to what extent?

Theoretically, the winning party can recover its costs through a civil law suit in court. However, recovering costs associated with litigation (such as legal fees and experts' costs) is rarely deemed acceptable by judges in practice.

15. What types of appeal are available?

The High Court is the first level of appeal in civil or criminal matters and reviews lower court decisions on questions of law and fact. A High Court decision can be appealed by way of removal to the Supreme Court (the highest judicial body in Indonesia) on the basis of a question of law. Under certain and limited conditions, a final and legally binding Supreme Court decision can be sent for review. One of the conditions is there is a new fact (*novum*) that is important and might affect the case.

Class actions/representative proceedings

16. Are class actions, representative proceedings or co-ordinated proceedings available? If so, what are the basic requirements? Are they commonly used?

Class actions are common in Indonesia. The Consumer Protection Law specifically supports the possibility of submitting class action petitions to the civil court. The basic requirements are set out in Indonesia Supreme Court Regulation No. 1 of 2002 on the Procedures for Class Actions.

The most basic and common requirement is that the judge must consider whether the petition has fulfilled the class action criteria, including that:

- There is a large number of petitioners.
- There is a common question or similarity in facts or situations.
- The class representative is seriously protecting the interests of any represented members.

Litigation funding

17. Is litigation funding by third parties allowed? Is it common? Are contingency fee or no win no fee arrangements allowed?

There are no specific rules or prohibitions on litigation funding.

Remedies

18. What remedies are available to a successful party in a product liability claim?

The principal remedies in a product liability claim are:

- Compensation for costs, damages and loss of profits.
- Cancellation of the contract and restitution of the purchase price.
- Payment of costs related to legal proceedings.

Where criminal sanctions are imposed, they carry a maximum of five years in prison or a fine up to IDR2 million if the business violates Article 8 of the Consumer Protection Law on below-standard products, or Article 11 on misleading advertisements.

19. How are damages calculated and are there limitations on them? Are punitive or exemplary damages available and in what circumstances?

The most common grounds for a civil claim requesting compensation damages for consumers can be submitted to the court based on:

- Breach of contract.
- An unlawful act/tort.

Under general contract or tort, the damage caused by the product and the subsequent compensation must be proved by the claimant. Typically, contractual damages will not be available to a claimant for losses that were not foreseeable at the time the contract was entered into. Article 1247 of the Civil Code sets out this obligation and provides an exception where non-

performance was caused by some deception on the part of the other party.

Liability for businesses under the Consumer Protection Law (CPL) can be both civil and criminal. The CPL sets out the limitations on fines and imprisonment and they differ based on the circumstances of the breach of the CPL. The business in breach also must indemnify the consumer for damage incurred as a result of using the defective goods or services. The compensation will be provided to the customer in the form of:

- A refund.
- Replacement of the goods.
- Funding of health care.
- An allowance for the damage or injury incurred.

In relation to punitive or exemplary damages, the Indonesian courts can:

- Confiscate goods.
- Provide injunctive relief.
- Recall the circulation of goods.
- Revoke business licences.

20. Is liability joint and several/how is liability apportioned, including where a partially responsible entity is not a party to the proceedings?

In theory, a customer who purchases a defective product will sue the retailer from whom they purchased the product. The retailer can then claim an indemnity from the wholesaler or the manufacturer. However, in practice, retailers are hardly ever held responsible for claims for defective goods. Therefore, customers file for the tort for negligence against the manufacturer but this results in lower compensation than if a claim were raised directly against a retailer.

PRODUCT SAFETY

21. What are the main laws and regulations for product safety?

Other than the Consumer Protection Law which sets out most of the standards for product safety, it is also regulated by the Minister of Trade, who regulates licences for the distribution of goods. In addition, the head of the Drug and Food Control Board (*Badan Pengawas Obat dan Makanan*) supervises the standard of drugs, foods and beverages supplied in Indonesia.

22. Are there general regulators of product safety issues? Are there specific regulators for particular goods or services? Briefly outline their role and powers.

Product safety in Indonesia is mostly supervised by the Drug and Food Control Board (DFCB). Goods, especially drugs, foods and beverages that are distributed in Indonesia must pass tests, checks and licensing from the DFCB before they can be legally distributed. The DFCB can, at its own discretion, specify requirements for particular goods to fulfil. If the business (including manufacturers and wholesalers) fails to obtain approval from the DFCB, or does not meet its standards, the goods are deemed to be illegal and can be terminated if they contain any substance that is not allowed in Indonesia.

Businesses can also be responsible for more compensation if damages or losses arise in the future.

Product recall

23. Do rules or regulations specify when a product recall is required or how companies should make decisions regarding product recalls and other corrective actions? Are any criteria specified?

Product recall can be:

- Mandatory, resulting from a ban imposed by the Drug and Food Control Board.
- Voluntary, where the goods are recalled by the wholesaler or the manufacturer.

Mandatory recall will result in the termination of distribution and the goods will be destroyed. Other sanctions can also be included such as a warning, temporary suspension, or termination of the relevant licence.

24. Are there mandatory advertising requirements for product recalls? Are there other rules governing how a product recall should be conducted?

The Drug and Food Control Board can include in its decision a prohibition on any further advertisement of the recalled products. The product recall itself must also be announced.

25. Is there a mandatory obligation to report dangerous products or safety issues to the regulatory authorities?

In addition to obligations set out by government authorities requiring businesses to report periodically on any product and safety issues, the Drug and Food Control Board (DFCB) also encourages businesses and customers to be aware of products in circulation. There is a mechanism for customers to use if they wish to report any dangerous products or safety issues in relation to products on the general market. For more information, customers can contact the Consumer Complaint Service Unit (ulpk.pom.go.id/ulpk).

Non-compliance with the obligation to report dangerous products or safety issues by businesses can result in:

- A warning from the DFCB to immediately report to it.
- Suspension of the business licence or the DFCB's approval.
- Temporary suspension of the business's distribution permit.
- Revocation of the distribution permit.

There are many drugs for which distribution permits have been revoked due to abuse and misuse. Mostly, revocations follow cases of death after consuming drugs, or where other significant damage or loss is suffered.

26. Is there a specific requirement to provide progress reports and/or keep the authorities updated about the progress of corrective actions? In practice, do authorities expect periodic update reports?

The Drug and Food Control Board's approval to distribute goods is temporary. Therefore, businesses must periodically update

the DFCB on its distributed goods to obtain renewal of its approval. In addition, businesses must report to the DFCB within the validity period for its approval on a periodic basis. Through this system, the DFCB is continually updated and has control over distributed goods.

RECENT TRENDS AND REFORM

27. Are there any recent trends in product liability and safety law? Have there been any recent significant changes or important cases? Are there any legal or procedural issues that are attracting particular interest in your jurisdiction?

Recently, top management in one of the largest insurance companies in Indonesia was a suspect in an insurance claim rejection issue. The issue was that the process was too complicated to allow the customer to claim insurance properly. The bottom line was that the customer was misinformed and misinterpreted the insurance policy and there was ignorance on the part of both the customer and the insurance company agent in understanding the relevant provision in the insurance policy.

The claim was revoked and the investigation stopped but this issue may arise again in the future if there is still ignorance from both parties when it comes to understanding and being well informed about products or services that are being bought or sold.

28. Are there any proposals for reform and when are they likely to come into force?

Both consumers and businesses have proposed revisions to the law, including:

- Clarity on the responsibility between the providers of goods.
- Improvements to the consumer dispute procedures for litigation and non-litigation settlement.
- Additional powers for government authorities over consumer protection.
- Splitting the liability of businesses into contractual liability and product liability.

Despite the call for change, there has not yet been any amendment to the Consumer Protection Law.

Practical Law Contributor profiles

Pheo M. Hutabarat, Partner

HHR Lawyers

T +6221 29885988

F +6221 29885989

E pheo.hutabarat@hhrlawyers.com

W www.hhrlawyers.com

M. Fathan Nautika, Senior Associate

HHR Lawyers

T +6221 29885988

F +6221 29885989

E fathannautika@hhrlawyers.com

W www.hhrlawyers.com

Professional qualifications. Lawyer, Indonesia

Areas of practice. Capital markets and securities; banking and finance; project finance; energy and natural resources; corporate and investment; mergers and acquisitions; insolvency and corporate reorganisation; commercial disputes and litigation; real property; franchise, agency and distribution; manpower and human resources.

Professional qualifications. Lawyer, Indonesia

Areas of practice. Corporate and investment; natural resources and infrastructure.