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The International Comparative Legal Guide to:

Product Liability 2008

A practical insight to cross-border Product Liability work



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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?

Product liability issues in Argentina are governed by the general liability regime for damages set forth in the Civil Code and by the Consumer Protection Act No. 24,240 ("CPA"), whose provisions are applicable to any kind of goods or services market in Argentina.

The CPA applies to consumers and suppliers. The consumer, as defined by the CPA, is any individual or legal entity: (i) that acquires - both in an onerous or gratuitous manner - or uses goods or services for its final use or for its own benefit or for the benefit of its family or social group; or (ii) that without being part of a consumer relationship, acquires or uses goods or services for its final use or for its own benefit or for the benefit of its family or social group and is exposed to a consumer relationship.

Supplier is any individual or entity, private or state-owned, which in a professional manner - even if occasionally - produces, creates, imports, transforms, licences trademarks, distributes or sells goods or services to consumers.

Under CPA and Civil Code's rules, suppliers are liable in case of damages caused to persons or property resulting from the supply of a product to be defected or faulty. This liability is both fault and strict based. However, there is clear tendency nowadays to broaden the scope of CPA's liability, so as to guarantee that a harmed consumer may obtain compensation.

Liability may also arise from the agreement entered into and between the parties. Warranties limitations regarding (i) materials produced by other manufacturers, (ii) materials not bearing manufactures' name or logo, (iii) materials produced by manufacture but not specifically sold by its authorised distributor, and (iv) reasonable time limits to file claims are also valid and enforceable under Argentine law.

However, damages limitations to only replace or repair defective products, might be challenged by consumers, claiming that these limitations are void and null since, according to CPA's rules, all contractual provisions imposing liability limitations or restrictions, are deemed to be void and null.

Besides compensation for damages, suppliers might be sanctioned (notably fines) for breach of statutory obligations such as infringement of safety duties and labelling. Infringement of the

CPA is punished with: (i) warnings; (ii) fines up to AR\$5,000,000 (approximately €1,000,000); (iii) seizures of products; (iii) closing down of the facilities or suspension of the involved service during a term of up to thirty (30) days; (iv) suspension of up to five (5) years in the records of suppliers which make it possible to enter into agreements with the State; and (v) forfeiture of the concessions, privileges, tax benefits or special credits it may be enjoying.

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

The state does not operate any schemes of compensation for particular products.

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

Pursuant to the CPA, the producer, the manufacturer, the importer, the distributor, the supplier, the seller and whoever has put its name on the product or service are jointly and severally liable for defective or faulty products. They can be released only if they prove that such responsibility is alien to them. Likewise, the carrier will respond for the damages caused to the product during its transport. Notwithstanding, all of them will have recovery actions among them.

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?

There is no obligation to recall products. However, the suppliers that become aware of the dangerousness of a product shall inform the competent authorities and the consumers through sufficient advertisements.

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

Criminal sanctions apply to the supply of defective products. The supplier may face charges in cases of injuries or death caused by defective products, provided he acted intentionally.

In the case of death due to defective products, the criminal law sanctions both intentional and non-intentional actions.

2 Causation

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

According to the general principle of the Argentine legal system, the plaintiff has the burden of proving fault/defect, damages and that the defendant acted recklessly or negligently. In certain cases, however, the law sets forth a presumption in favour of one of the parties, by virtue of which the burden of proof with respect to a given fact rests not on the party alleging that fact, but rather on the opposite party. For example if the plaintiff alleges that the product does not comply with its purpose, the defendant will have to prove that this fact is not true.

Additionally, also as an exemption, the “dynamic burden of proof” test can be applied. In such case, the judge may place the burden of proof on the party which is best positioned to prove the facts.

Pursuant to the CPA, suppliers must provide all possible evidence that is in their power pursuant to the characteristics of the product or service.

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?

The test generally applied for proof of causation requires that the claimant proves that the damages were caused due to the product’s defect or fault. In other words, applicable rules determine that there must exist a causal connection between the defective or faulty product and the damage inflicted upon the claimant. Indeed, in order for liability to be imposed, the test of “proximate cause of the damage” shall be established, proving that the defective or faulty products had caused a direct influence on the generation of the damage.

Furthermore, under section 1111 of the Civil Code, no act inflicting damage upon a person due to the victim’s own conduct may give rise to liability. Therefore, the claimant’s conduct might cause an appropriate defence to liability provided: (i) the claimant directly cooperated in causing the damage; or (ii) the claimant had failed to use all available means to prevent or mitigate such damage.

The role of the claimant’s negligent conduct for exempting the defendant from liability depends on its nature (case-by-case examination) and the extent to which it determined the occurrence of harm for which relief is being sought.

Consequently, it might not be 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. On the contrary, the defendant will always be entitled to prove that claimant’s conduct had a direct influence on the generation of the damage.

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?

If it cannot be established which of several possible producers manufactured the defective products, they will all be jointly and severally liable towards the claimant. The judge could apply market-share as a criterion to regulate the liability.

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?

A failure to warn will give rise to liability. Pursuant to the CPA suppliers, as defined in question 1.1 above, must provide to consumers information which is true, detailed and complete on the essential characteristics of the products and services.

Suppliers must deliver attached to the product an instruction manual in Spanish that shall describe the use, installation, maintenance and safety specifications applicable to products market in Argentina. It is not enough defence for the manufacturer to claim or even prove that proper information on the product was supplied to the intermediary in the chain of supply between the manufacturer and consumer. The answer does not change if the product could only be obtained through the intermediary who has a separate obligation to assess the suitability of the product for the particular consumer. All appropriate specifications must be attached to the product.

If the suppliers become aware of the dangerousness of a product, they shall inform the competent authorities and the consumers through sufficient advertisements.

3 Defences and Estoppel

3.1 What defences, if any, are available?

Pursuant to the CPA, the producer, manufacturer, importer, distributor, supplier, seller and/or anyone using its brand or trademark on the products or service will be released from joint liability if it is proved that the responsibility was beyond such party.

They could also defend themselves by proving: a) force majeure; or b) as a general rule, the causal relation (causation) is broken where damage derives from an intervening cause, i.e. the conduct of another person (third-party negligence), provided that such conduct is outside the control of the defendant or the occurrence of an intervening event interrupting the causal connection. Accordingly, damages might not be ascribed to the defendant if the causal relation was broken.

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?

There is no statutory art/development risk defence or 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.

However, it could be argued as a defence by the defendants who should prove that the fault/defect was not discoverable.

As soon as the supplier becomes aware of the dangerousness of a product he shall inform the competent authorities and the consumers through sufficient advertisements.

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?

Eventually, there is no statutory 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. It could be argued that the defendant acted lawfully regardless of the potential infliction of damage upon the claimant or any other third party. In principle, not all damages give rise to damage compensation if the defendant's conduct was lawful, i.e. regular exercise of a right or the fulfilment of statutory requirements.

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?

In certain cases, such as decisions adopted by a criminal court on the standard used to ascribe liability, some forms of estoppel could prevent claimants from re-litigating issues of fault, defect or the capability of a product to cause a certain type of damage provided they arise in separate proceeding brought by a different claimant.

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?

Defendants can claim in the same proceeding that the fault/defect was due to the actions of a third party for which they have no duty to respond. Defendants may also seek a contribution or indemnity towards any damage payable to the claimant either in the same proceeding or in a subsequent proceeding. There is a two-year period limit to commence such proceedings.

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

Defendants can allege that the claimant's action or any other third party caused or contributed towards to damage. To that end, the defendant may furnish evidence showing that the damage has taken place upon the concurrence of an intervening event interrupting the causal connection either in whole or in part.

4 Procedure

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

In the case of court proceedings, courts are formed by individual

judges, who pass the first sentence. These decisions are subject to appeal - provided legal requirements are met - at appeal courts (usually made up of three judges) with decisions reached by simple majority. These appellate decisions are usually final, except where conditions exist for them to be brought before a supreme court (federal or local, as the case may be).

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)?

Upon request of the interested party, the court has the power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties.

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?

Under CPA rules, there is a specific group or class action procedure for multiple claims. Such claims may be brought by consumers' associations provided that they can act to protect consumers' general interest and not particular situations.

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

Pursuant to the CPA, consumers' associations authorised by the pertinent authorities, the Public Prosecutor and administrative agencies duly authorised to apply CPA's rules may bring claims on behalf of a number of claimants, provided that they act to protect general interests and not particular cases.

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

Normally, it will take at least 60 days to get to trial. Prior to filling a lawsuit for product liability, a mediation process takes place during 60 days, in which the parties hold a series of face-to-face hearings - guided by a mediator - where they try to reach an out-of-court settlement. The 60-day period is extendable if both parties agree.

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?

The court may try preliminary issues, the results of which determine whether the remainder of the trial should proceed. Those issues shall relate to matters of law as well as issues of fact.

4.7 What appeal options are available?

National legislation and most provincial procedural codes adopt a two-level system, consisting of lower and appellate courts, which permits any judicial decision to be appealed before a higher court with a view to its reversal or amendment. Final judgements, interlocutory decisions and ordinary decrees causing damage which cannot be remedied in the final decision, may be appealed. The only exceptions to the above are cases in which the amount at stake

does not exceed a certain sum fixed by law and other judgments expressly excluded by law, where appeal is not admissible.

There are two types of appeals: free appeals (*apelación libre*); and restrictive appeals (*apelación en relación*). Free appeal applies only to final judgments pronounced in ordinary and summary proceedings. In all other cases, only restrictive appeals may be filed. A free appeal allows for the review of the case by a higher court; new facts may be alleged and evidence may be offered, though to a very limited extent. In the case of restrictive appeals, new facts may not be alleged and new evidence may not be offered.

Only in some specific cases provided for in the law, it is possible to have a second appeal of a judgment by means of an ordinary appeal before the national Supreme Court of Justice.

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?

Upon request of the interested party, the court will appoint experts to assist them in considering technical issues. There are no restrictions on the nature of such evidence. The extent of such evidence will be set forth by the parties and by the judge. The parties may jointly agree and propose in writing the name of an expert and the issues to be examined. However, it is the court which finally appoints the expert, determines the issues to be examined, reduces or increases the list of issues submitted by the parties and fixes the time for the submission of evidence.

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?

Factual or expert witnesses are not required to present themselves for pre-trial deposition. Witness statements/expert reports are not exchanged prior to trial.

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

The judge could issue an order to disclose documentary evidence either before court proceeding are commenced if requested by the plaintiff. The plaintiff may request that certain preliminary measures be taken with the purpose of securing crucial evidence that otherwise could not be evaluated during the trial.

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

There are several alternative methods of dispute resolution available: procedure before regulatory authorities entitled to apply CPA's rules, mediation and arbitration.

The CPA's regulatory authorities may initiate administrative procedures in case of alleged infractions to the CPA, for instance, due to damages inflicted on a consumer by defective or faulty products. Additionally, these procedures may be initiated if requested by affected parties or he who acts on defence of consumers' general interest. A conciliatory hearing will take place and the defendant will have to file its defence and proofs. Afterwards, the regulatory agency will issue a decision on the matter subject to its jurisdiction. In case of damages proved by the claimant, the regulatory authority can order the defendant to pay

compensation up to the amount of AR\$3,000 (approximately €600).

In the City of Buenos Aires a compulsory mediation proceeding is established to provide direct communication among the parties, guided by a mediator, for the solution of the dispute out of court. The mediation process takes place during 60 days, being renewable if agreed by both parties.

Arbitration courts may also be set forth in agreements. On the other hand, pursuant to the CPA, the applicable authority will bring about the organisation of arbitration courts formed by arbitrators that will resolve the conflicts that may arise within CPA's scope.

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

The Civil Code sets forth a 10-year time limit on bringing or issuing proceedings with respect to contractual obligations and a 2-year time limit with respect to an illegal action.

The CPA establishes a 3-year time limit to bring judicial or administrative actions, within its scope. However, other longer statute of limitations may apply if they are beneficial to the consumer. The running of the time limit will be interrupted by new violations to the CPA and by the filling of administrative or court proceedings.

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?

These time limits are statute of limitation provided by the Civil Code and the CPA applicable to contractual or non-contractual relationships. They do not vary depending on whether liability is fault based or strict. Neither the age nor the condition of the claimant affects the calculation of the time limits.

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

Concealment or fraud actions in which the producer may be engaged, can suspend for one year or interrupt (meaning the initiation of a new period) the running of the statute of limitations.

6 Remedies

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

The remedies available for consumers and purchasers of defective products are: (i) to terminate the purchase agreement and to recover the purchase price; (ii) to request another product or service of the same kind; or (iii) to request the specific performance of the agreement, inasmuch as possible. In addition to such remedies, the purchaser shall be entitled to claim for damages. Compensation for damages shall consist in returning things to their original state except if this is impossible in which case the indemnity will be set in money. The aggrieved party may also choose money reparation. Affected parties may also bring a *quanti minoris* action under the general liability system, requesting the reimbursement of part of the purchase price.

The CPA sets forth that the applicable authority may determine the existence of a direct damage (any perjury or detriment to the consumer's right that can be economically appreciated) and oblige the supplier to indemnify it up to a total amount of approximately AR\$3,000 (approximately €600).

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

In all cases damages must be proved by the plaintiff who must supply any necessary information so that the court determines the amount of compensation. On the other hand, judgments are limited to the contentions at the trial; judges may not provide for a higher compensation than the amount claimed, or indemnify moral damages if not demanded in the complaint.

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?

Damages cannot be recovered if the product has not yet malfunctioned and caused injury.

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

Pursuant to the CPA, punitive damages are recoverable. The judge may apply a civil fine in favour of the consumer, if requested by the affected, provided the supplier has not complied with its legal or contractual obligations. The fine will be set forth in relation to the seriousness of the event and other circumstances of the case, independently of other indemnifications that could apply. The civil fine may not exceed the amount of AR\$5,000,000 (approximately €1,000,000).

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?

There is no maximum limit on the damages recoverable from one manufacturer. The compensation must cover all damages ordered to be compensated by the judge.

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?

Settlements of proceedings need to be approved by the judge or by the regulatory agency.

In case of settlement of group actions filed by consumer associations, Public Prosecutor or regulatory agencies on behalf of consumers' general interest, there are certain rules of proceedings set forth by CPA to guarantee that the decision rendered by the judge can be extended to all the consumers in the same situation, regardless of their lack of intervention in the claim.

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?

Government authorities concerned with health and social security matters could 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 alleged caused by the product. However, this is not customary in Argentina.

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 successful party can recover the court fees or other incidental expenses and their own legal costs of bringing the proceedings, from the losing party. Exceptionally, costs are not imposed on the losing party, for example when the defendant recognised that the claims of the adversary were fair.

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

As a general principle, applications for the benefit to bring a claim without facing the court tax and other proceeding costs in civil courts are available to those individuals without the financial means.

Additionally, the CPA sets forth that all judicial actions initiated within its scope will be exempt from the court tax. The defendant may prove the consumer's economic solvency and in such case the benefit will be terminated.

Therefore, in all matters related to consumer claims, the Argentine legal system provides consumers with the right to litigate without the burden of costs.

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

There are no other restrictions on the availability of public funding than the above mentioned.

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

Please refer to our answer to question 7.2 above.

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

Please refer to our answer to question 7.2 above.

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 Argentina.

The recent amendment to the CPA, enacted on March 12, 2008, entails several changes to the relationship between the insurance companies and the insured, mainly the following:

Applicable Law: The CPL will supersede any other specific law which govern the insurance activity, mainly, laws 17,418 and 20,091.

Application Authority: The amendment establishes the concurrent power to apply the law between the federal (i.e. the Domestic Trade Secretariat) and the local authorities, displacing the Insurance Superintendence.

Ways of Termination: The Amendment incorporates in section 10 ter, the consumer's right to terminate the agreement by the same means used to reach to the agreement, and the obligation of the company's receiving such termination of the contract to send free of any charge a written evidence within the subsequent 72 hours as of termination request.

Statute of limitations: With regard to the statute of limitations of the judicial, administrative and sanctions provided in the CPA, the amendment modified section 50, providing a 3-year period of prescription, unless other laws establishing more favorable periods for the consumer are applicable.



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María Morena del Río joined Allende & Brea in 2003, focusing her practice in administrative law. She graduated from the "Universidad de La Plata" in 1995 and joined Allende & Brea in 2003 after obtaining a Masters Degree in Administrative Law from "Universidad Austral" in 1998 and after extensive practice in Administrative law. She has specialised in administrative law and economic regulatory practice. She has vast experience dealing with national, provincial and local authorities and agencies. Particularly, Mrs. Del Río has been actively involved in advising companies in regulatory matters at Federal and local authorities. She has also participated in many public tenders and award process to obtain government licences, construction contracts, authorisations and permits.

Publications: "Appeals against the gas and electricity regulatory authority" (El Derecho, 1999), "Argentine public procurement" (Global Competition Review, 2005). She has lectured in conferences on administrative contracts and consumers right's claims.

Mrs. Del Río was named partner of the firm in December 2006 and is a member of the Bar Association of the City of Buenos Aires (Colegio Público de Abogados de la Ciudad de Buenos Aires).



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Cecilia Victoria obtained her law degree from Universidad Católica Argentina in 2005. Between 2003 and 2004 she participated as an Exchange Student in the Université d'Orléans, in France.

In 2005 Ms. Victoria was appointed by the Ministry of Justice of Argentina, to participate as an assistant (as expert in banking and finance law) to Rafael La Porta Drago, a prestigious member of the Commission of Jurists formed to compile the Argentine Law Digest. She participated as a teaching assistant in the Bankruptcy course at the Universidad Católica Argentina from 2006 to 2008.

Ms. Victoria has represented clients on a broad range of matters, including general corporate law, commercial agreements, mergers and acquisitions, financings, issuance of corporate bonds and shares listed on stock exchanges, banking and high technology.

ALLENDE & BREA ABOGADOS

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Our lawyers advise large, medium and small companies on a permanent basis or act as special counsel in a broad range of areas from commercial litigation, governmental litigation, banking, capital markets, mergers & acquisitions, general corporate, antitrust, aviation, intellectual property, real estate, tax, labour, environmental, and insurance, among other areas.

Allende & Brea has assembled a network of correspondents that enables the firm to provide global legal coverage for clients throughout Latin America, Europe, North America and the Pacific Rim.

The firm's lawyers are bilingual in Spanish and English, with special expertise in Portuguese, French, and Korean. Many of the firm's lawyers have over the years obtained Master of Laws degrees at U.S. universities, and have held foreign lawyer's positions at major New York law firms.