

International Product Liability Review

Issue 53

Contents

Overview	1
Feature - A landmark year for consumer privacy protection in China	2
Europe - France	5
Europe - Germany	8
Europe - Italy	10
Europe - Netherlands	13
Europe - Spain	17
Europe - UK	19

DECEMBER

2013

About our Product Liability Practice

Hogan Lovells has the leading product liability practice covering all aspects of product safety as well as civil and criminal liability. We have experience of acting for clients in respect of a wide range of products including food, pharmaceuticals, cars, tobacco, mobile phones, cosmetics, electrical and electronic products, toys and children's products, sporting goods, blood products, aircraft and machinery. Hogan Lovells' product liability lawyers are supported by a dedicated Science Unit and Project Management Unit.

If you would like more information about Hogan Lovells' product liability practice, please visit our website at www.hoganlovells.com or contact the Product Liability Group Leader, Thomas Rouhette, at thomas.rouhette@hoganlovells.com or any of the lawyers listed on the back page of this publication.

ABOUT INTERNATIONAL PRODUCT LIABILITY REVIEW

In December 2000, Lovells (as it then was) launched its quarterly *European Product Liability Review*, the only regular publication dedicated to reporting on product liability and product safety developments in Europe for international product suppliers, and others interested in international product issues. Over the next ten years, this unique publication featured hundreds of articles, from authors across our network, covering issues in Europe and, increasingly, further afield. Reflecting the growing globalisation of product risks, and following the creation of Hogan Lovells through the combination of Lovells with Hogan & Hartson in May 2010, the publication was renamed *International Product Liability Review* in March 2011.

Hogan Lovells' *International Product Liability Review* continues to be the only regular publication dedicated to reporting on global developments in product liability and product safety regulation. It is distributed worldwide free of charge to our clients and others interested in international product issues. If you would like additional copies of this publication, please return the form enclosed with this edition, or contact a member of the editorial team by e-mail:

Rod Freeman
rod.freeman@hoganlovells.com

Claire Taylor
claire.taylor@hoganlovells.com

Valerie Kenyon
valerie.kenyon@hoganlovells.com

Alex Woods
alex.woods@hoganlovells.com

Zen Cho
zen.cho@hoganlovells.com

This issue of *International Product Liability Review* is produced with the support of our International Co-ordination Panel:

Jacopo Bartolomeo (Milan)
jacopo.bartolomeo@hoganlovells.com

Christelle Coslin (Paris)
christelle.coslin@hoganlovells.com

Lindsay S Goldberg (Baltimore)
lindsay.goldberg@hoganlovells.com

Karen Jelsma (Amsterdam)
karen.jelsma@hoganlovells.com

Ji Jienji (Shanghai)
ji.jienji@hoganlovells.com

Valerie Kenyon (London)
valerie.kenyon@hoganlovells.com

Carolin Konzal (Munich)
carolin.konzal@hoganlovells.com

Eugenio Vázquez (Madrid)
eugenio.vazquez@hoganlovells.com

In this issue...

1 Overview

FEATURE

2 A landmark year for consumer privacy protection in China

Eugene Chen and Jieni Ji (Shanghai) look back on a year of significant change in the area of consumer privacy protection in China. In response to recent developments, multinational companies should revisit their data privacy policies to ensure they comply with the various legal requirements, particularly with respect to the maintenance and usage of customer data.

EUROPE - FRANCE

5 Is anxiety-related loss now automatically established? Not exactly...

Recent decisions in the French Supreme Court have led some to believe that systematic compensation is now automatically available to those suffering anxiety-related loss. Sylvie Gallage-Alwis and Claire Massiera (Paris) argue that this should not be assumed.

EUROPE - GERMANY

8 Grand coalition's agenda for consumer law and the judiciary in Germany

In the wake of the election of the 18th German Bundestag in Autumn 2013, Matthias Schweiger and Robert Baustel (Munich) provide an overview of the "grand coalition's" agenda for reform of consumer law and the judiciary. It is clear that the coalition plans to expand the level of protection available to consumers in the German market.

EUROPE - ITALY

10 Italian case law on liability of "notified bodies"

A recent Italian court decision has assessed the liability for damages of a notified body where its conformity assessment of machinery was negligently executed. Francesca Rolla and Filomena Pacifico (Milan) summarise the judgment and assess its impact on future cases in this area.

EUROPE - NETHERLANDS

12 Amendments to the Dutch Collective Settlement Act

Recently introduced amendments to the Dutch Collective Settlement Act enlarge its applicability and make it more attractive for parties to reach a settlement. As Karen Jelsma (Amsterdam) reports, it remains to be seen how these amendments will work in practice, but it appears likely that both businesses and consumers will benefit as a result.

EUROPE - SPAIN

16 Defective products: conflicting judicial decisions on the vendor's responsibility

Although General Law 1/2007 for the Protection of Consumers and Users (the "GLPCU") provides a specific set of rules for product liability cases, judicial decisions can still be found that apply different rules to allocate responsibility to producers, suppliers and distributors. Marina Sabido (Madrid) comments on two recent conflicting decisions on vendor responsibility.

EUROPE - UK

19 Proposed consumer rights reform may expose businesses to liability for faulty apps and other digital content

The draft UK Consumer Rights Bill sets out quality standards for digital content and remedies for consumers where the content is faulty. Vera Wichers (London) reviews the impact of the Bill on businesses providing digital content, and considers its impact on the creators of such content.

21 Consideration of the meaning of "product" in a combined contractors' liability policy

Sarah Johnson (London) comments on a recent Commercial Court decision that considered the meaning of "product" in relation to product liability cover provided under a combined contractors' liability policy. Among other matters, the Court considered that works and materials provided under a construction contract did not amount to a "product".

In this issue...

24 Duty to mitigate loss following breach of contract does not require innocent party to accept vague remedial offer by party in breach

Siobhan Thomson and Jack Carvel (London) comment on a recent English Court of Appeal decision concerning an innocent party's duty to mitigate its loss arising from a breach of contract. The decision suggests that the contracting parties' relative positions will be taken into account in determining what steps should be taken by the innocent party, and highlights the need for manufacturers and suppliers of faulty products to provide clear and complete details of any offer of reparation.

26 The “Phurnacite Workers Group litigation”: continuation of group litigation order unlikely to materially increase the level of costs incurred

Zen Cho (London) summarises a recent decision of the English High Court, where the judge examined whether the group litigation order in the ongoing Phurnacite Workers Group litigation should be discharged.

Overview

Not for this first time, our feature article in this issue of *International Product Liability Review* highlights important developments in the People's Republic of China. International businesses continue to grapple with a changing risk environment in that part of the world, and in this issue we focus on the rapidly developing regime for data privacy protection in China (page 2). This is part of an interesting global trend. Privacy regulation has been a feature of the European regulatory landscape for decades, with the long-standing cultural concerns to protect privacy in countries such as France influencing the development of increasingly demanding rules at an EU level. Initiatives to provide for the protection of privacy and personal data are, following that lead, emerging in other parts of the world, and the developments in China are significant for international businesses active in Chinese markets.

We also report on the interesting debate in France surrounding the question of whether compensation is payable for anxiety resulting from historical exposure to asbestos. The question of liability for creating "anxiety" has arisen from time to time over the past decade in a number of European countries, as we have reported in previous issues of *International Product Liability Review*, and we can expect the issue to continue to arise. Whilst some suggest that recent cases in France have opened the door more widely to such claims, as explained in the detailed analysis in this issue (page 5), the cases do not necessarily point to that conclusion. This has broader issues for product manufacturers, extending beyond the field of asbestos liability, and certainly extending beyond France.

On the question of the expanding scope of liability in Europe, we also report on the recent developments in Italy where the courts have considered the liability of testing/certification agencies operating as "notified bodies" under European product safety regulations (page 10). The issue raises questions of significant interest not only for notified bodies, but also for product manufacturers in regulated sectors, and their insurers.

We also report on proposed legal reforms in the UK which, in part, reflect an attempt to deal with the unique consumer protection issues raised by new technologies. The reforms are likely to give rise to new liability issues for those who supply apps and other digital content to consumers in the UK (page 19). Not only does this open up the question of liability for

software and similar "products", it also has implications for suppliers of more conventional products that incorporate or are designed to function in conjunction with software. This will certainly be an issue discussed in future issues of *International Product Liability Review*.



Rod Freeman

London

rod.freeman@hoganlovells.com