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International Product Liability Review

Issue 54

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About our Product Litigation, Compliance and Mass Torts Practice

Hogan Lovells has the leading international product liability practice covering all aspects of product litigation, compliance and mass torts. We have experience of acting for clients around the world in respect of a wide range of products including food and beverages, pharmaceutical and medical devices, cars, tobacco, mobile phones, cosmetics, electrical and electronic products, chemicals and hazardous substances, toys and children's products, sporting goods, aircraft and machinery. Hogan Lovells' product liability and product safety lawyers are supported by a dedicated Science Unit and Project Management Unit.

If you would like more information about Hogan Lovells' product litigation, compliance and mass torts 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:

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FEATURE

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The Consumer Protection Act introduced major changes to the ways in which liability for defective products is established, as well as making it easier for consumers to seek and obtain redress in these cases. Simone Monty (Johannesburg) provides a summary of the existing law and its impact on manufacturers, retailers and consumers.

EUROPE – FRANCE

5 What is an "average consumer" in French consumer law

Pauline Faron (Paris) comments on a recent decision of the French Supreme Court, which considered the definition of "average consumer" in the Directive on Unfair Commercial Practices. The Court ruled that the concept of an "average consumer" should be defined objectively, without taking into account any specialist knowledge of the product area that the buyer might have.

EUROPE – GERMANY

7 Germany's legal action against the European Toy Safety Directive's chemical restrictions: recent developments

The outcome of Germany's ongoing action in the European Court is likely to influence the future legal framework for limit values for chemicals in toys within the European Union. Dr Carolin Konzal and Nicole Böck (Munich) report on recent developments.

EUROPE – ITALY

9 No-fault liability claims by professional users: new trends and consolidated principles

Christian Di Mauro and Jacopo Bartolomeo (Milan) comment on a recent Supreme Court decision which confirms that professional users can bring claims under the Consumer Code's no-fault liability regime. The case also clarified the

claimant's burden of proof in product liability cases.

EUROPE – NETHERLANDS

11 The Dutch Act on Partial Dispute Proceedings: expediting cases involving personal injury or death?

Introduced in 2010, the Dutch Act on Partial Dispute Proceedings (the "APDP") is designed to provide parties with quick and inexpensive access to court when seeking legal clarity on a particular part of their dispute. Currently limited to cases involving loss due to personal injury or death, the APDP's effectiveness is to be reviewed later this year. Karen Jelsma and Laura-Jean van de Ven (Amsterdam) comment on recent decisions involving the APDP, including those where the meaning of "partial dispute" has been in issue.

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15 Defective products: new case law on vendor responsibility

Guillermo Meilán-Iglesias (Madrid) comments on a recent Supreme Court judgment which establishes that defective products will include not only those cases where the product itself is defective, but also those cases where the actual characteristics of a product are not those described in the product brochure.

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17 Failing to comply with Court orders in England and Wales: avoid it at all costs

In the wake of the Jackson reforms, more caution is now required when litigating in England. The courts are increasingly concerned about ensuring a party's compliance with rules, practice directions and court orders and potentially serious sanctions can be imposed where non-compliance is established. Mark Hunting (London) provides a summary of recent developments in this area.

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21 Insurance clauses: Court of Appeal judgment underlines the importance of adequate details and clear drafting

In cases where an insured is seeking cover for both actual and alleged liability, and/or for defence costs, a December 2013 judgment in the Court of Appeal highlights the critical importance of the content of the insurance clause. Sara Bradstock and Dervla Simm (London) summarise the judgment and explain its significance.

NORTH AMERICA – US

24 Recent enforcement of arbitration agreements in product liability class actions

Three recent decisions by US federal district courts suggest that arbitration agreements contained in the written warranties, or terms and conditions, supplied with consumer products are now more likely to be enforced against the consumer. Oliver Armas and Samuel Zimmerman (New York) provide a summary of the cases, which appear to reverse the trend of consumers being able to avoid arbitration agreements through reliance on state law contract defences.

AFRICA – SOUTH AFRICA

27 Consumer law in South Africa

As a concept in its own right, consumer law is relatively new to South Africa, having been first introduced with the 2011 promulgation of the Consumer Protection Act, 68 of 2008. As Simone Monty reports, South African consumer law has a broad scope. As well as extending to transactions between businesses, it also incorporates rights the consumer has under the common law.

Overview

To mark the recent combination of Hogan Lovells and leading South African law firm Routledge Modise, this issue of *International Product Liability Review* features an overview of Product Liability in South Africa (page 2). As is the case in many countries around the world, we are seeing rapid developments in product liability and consumer protection law in South Africa. This leads to the development of a legal environment that raises increasing risks for product suppliers.

In this issue we also report on further development of a key concept of consumer law in France; the French Supreme Court has considered the question of who is an "average consumer" in the context of the Directive on Unfair Commercial Practices (page 5). This has important implications for product manufacturers because it determines the approach that needs to be taken when developing marketing materials for products, as well as when designing instructions and warnings to accompany the product.

On a similar theme, the Italian Supreme Court of Cassation has considered, for the first time, whether a non-consumer can bring a claim under laws implementing the European Product Liability Directive (page 9). In the case in question, the issue was whether a claim under those laws could be brought by a surgeon who injured his hand while using an allegedly defective product manufactured by the defendant. In a decision which expands the scope of liability for product manufacturers, the Court concluded that the no-fault product liability regime based on the Product Liability Directive is not limited to consumers, and could extend to persons injured by the product in the course of their professional activities.

An expansive approach to interpretation of the laws implementing the Product Liability Directive was also taken by the Spanish Supreme Court in a case which concerned the accuracy of information provided by the manufacturer about the performance characteristics of a product – in this case, a facial implant (page 15). In this case the Supreme Court concluded that, under the relevant laws, the product itself could be considered defective by reason of the inaccurate information provided in the brochure published by the manufacturer (and on this point it overruled the conclusions of the first and second instance rulings).

Still on the theme of consumer law, in the US we report on some interesting recent court decisions concerning the enforceability of arbitration clauses against consumers in putative product liability actions (page 24). As these cases demonstrate, there is scope in the US for enforcing arbitration clauses against consumers. This further highlights the value for product manufacturers in taking care to ensure that terms and conditions are properly drafted to provide the reasonable protections available to them.

Accompanying this issue of *International Product Liability Review* is a brochure describing some of the achievements of our International Product Liability practice in the past year. This illustrates the unique depth and breadth of our Product Liability practice around the world and the recognition our practice receives. It also highlights that the authors of the articles that appear in each issue of *International Product Liability Review* are people who are actively engaged on a day to day basis in dealing with these issues for our clients at a practical level.



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