

International Product Liability Review

(incorporating European Product Liability Review)

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Contacts

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, sporting goods, blood products, aircraft and trains. Hogan Lovells' product liability lawyers are supported by a dedicated Science Unit and Project Management Unit.

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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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In this issue...

1 Overview

FEATURE

2 Product liability risks for international brand owners operating in China

Eugene Chen (Shanghai) looks at how the Chinese legal framework addresses the potential product liability risks faced by brand owners doing business in China, and considers ways in which they can mitigate those risks.

EUROPE - EU

4 EU Collective Redress - The European Commission launches its long-awaited public consultation

The European Commission recently launched a public consultation on whether new, EU-wide forms of collective redress should be introduced in order to strengthen the enforcement of European law. John Meltzer and Dan Armstrong (London) consider the case for reform, and the available options.

6 General Court finds that an illegitimate decision to withdraw marketing authorisation does not give rise to compensation for the holder

Marketing authorisation for a medicinal product was withdrawn by the European Commission in 2000 - but that decision was later found to be unlawful. Matthew Felwick and Thomas Eyre-Brook (London) report on the unsuccessful application brought by the marketing authorisation holder, for an order that the Commission pay compensation for the damage suffered as a result of the illegitimate decision.

8 Consultation to introduce a new European Contract Law

The European Commission is currently considering responses to a Consultation on the possible formulation of an EU-wide contract law. Whilst the form and scope of such an instrument are at the heart of the Commission's consideration, the outcome has the potential to affect significantly what is currently an area of law left to individual member state legislatures. Claire Taylor and Lucy Owens (London) report.

EUROPE - FRANCE

10 French Supreme Court rules that an order to pay punitive damages is not, in itself, contrary to French international public policy

In a decision of 1 December 2010, the French Supreme Court has ruled that it is not per se contrary to public policy to enforce a foreign judgment for punitive damages. Whilst on the facts of the case the Court refused to enforce the punitive damages award, the decision has potentially far-reaching consequences, as Cécile Di Meglio and Karine Ponczek (Paris) report.

EUROPE - ITALY

12 First Italian class action declared admissible in product liability case

Since January 2010, class actions have been possible in Italy in relation to contractual claims, claims for product-related damage, and claims for anti-competitive and unfair commercial practices. However, only in December 2010 did a court first rule a class action to be admissible, concerning a claim for product-related damage. Francesca Rolla (Milan) reports.

EUROPE - POLAND

13 Asserting product liability claims in Poland - evolution and development

Agnieszka Majka and Grzegorz Barszcz (Warsaw) take a trip down memory lane and look at some of the key developments introduced to the Polish legal system in the last decade that have enhanced the rights of consumers for injuries caused by defective products.

EUROPE - SPAIN

17 Towards a broader notion of defective product?

The Spanish Supreme Court has recently considered the meaning of "defective product" under Spanish law. Sonia Perez and Bernadino Muniz (Madrid) review the recent case concerning breast implants in which the Court considered that a product may be defective by reason of the manufacturer having not taken steps to verify otherwise.

NORTH AMERICA - US

20 US Supreme Court to consider availability of preemption defence for generic drug manufacturers

We have reported regularly on the US court approach to federal preemption in failure-to-warn claims brought against drug manufacturers. Lauren Colton and Allison Caplis (Baltimore) now look at two cases in which claims against generic drug manufacturers were ruled by lower courts to be preempted by their compliance with the brand name labelling, and which are now to be reviewed by the Supreme Court.

22 Chinese-manufactured drywall products liability litigation: decisions and settlements of interest

Eric Statman and Courtney Colligan (New York) report on developments in the US drywall litigation in which thousands of homeowners are claiming compensation - estimated to be between \$8 billion and \$1 trillion - for damage caused to their homes by Chinese-manufactured drywall.

25 US Supreme Court grants certiorari in climate change lawsuit

Climate change litigation has increasingly become a "hot topic" in the US, with the main issue generally being whether such claims are "ordinary tort suits" or too political for the courts' jurisdiction. We may soon find out, as Trevor Jefferies (Houston) and Hannah Morbach (Munich) report.

28 US and Australia agree to co-operate on product safety

The globalisation of product safety issues has recently been highlighted by the co-operation between authorities in Australia and the US. Lauren Colton and Lindsay Goldberg (Baltimore) report on the Memorandum of Understanding signed on 13 January 2011 by the US Consumer Product Safety Commission and the Australian Competition and Consumer Commission of the Commonwealth.

29 Is the Consumer Product Safety Commission's new complaint database a defective product?

Alvin Lindsay (Miami) describes the new publicly available database which enables consumers - and many others - to submit product complaints electronically to the CPSC. The database is controversial as the CPSC is not required to investigate such reports or check their accuracy, and manufacturers are provided with little time to

respond before any report is publicly posted on the database.

NORTH AMERICA - CANADA

30 The dawning of a new era: tough new Canadian consumer product safety laws get the go-ahead

Siobhan Thomson (London) reports on the Canada Consumer Product Safety Act, which received Royal Assent on 15 December 2010. It took three attempts for the bill to be passed, and the new legislation marks a substantial overhaul of the Canadian consumer product safety regime.

ASIA PACIFIC - AUSTRALIA

31 Exclusion clause in product liability insurance policy given narrow reading by High Court

In our first edition of *International Product Liability Review*, we report on a recent decision of the Australian High Court which gives key and influential guidance on the construction of exclusions and endorsements.

Overview

You have in your hands a copy of *International Product Liability Review*, the product of the natural evolution of our long-standing quarterly publication, *European Product Liability Review*, which was first delivered to our readers in December 2000.

When launched more than a decade ago, our publication filled a significant informational gap for product manufacturers and suppliers. Ours was the only regular publication dedicated to reporting on important developments in product liability and product safety across Europe. Drawing on the experiences and resources of the substantial European Product Liability team within Lovells (as it then was), *European Product Liability Review* quickly established itself as a unique and reputable source of information for product manufacturers and suppliers doing business in Europe.

As regular readers of *European Product Liability Review* will know, it was not long before we began to feature articles covering developments around the world beyond Europe - from regions such as Asia, the Middle East, Africa, Australia and the Americas. This was partly a reflection of our own experiences in increasingly working with clients to help them solve their regulatory and liability issues around the world but it was also a reflection of the fact that, more generally, we were witnessing a rapid "globalisation" of product risks, with all regions creating new challenges for clients. As time went on, the "international" section of *European Product Liability Review* continued to grow.

With the groundbreaking combination of Lovells with Hogan & Hartson in May 2010, the global reach of our product liability team expanded to a new level. Against that background, we decided it was time to formalise the evolution of our publication, and to rename it "*International Product Liability Review*".

As part of this change, we have made some small modifications to our layout, the better to accommodate the geographical spread of the articles. Our intention, however, is to maintain the same objective that has been the hallmark of our publication since its inception: to provide a unique resource to international product manufacturers and suppliers - communicating information and global insights, based on our experiences, which are not available through any other source. This means that, when we cover issues in the US - one part of the world in which there are already countless publications reporting on product liability developments - our focus will be on reporting and analysing the developments that will be of particular significance for international product manufacturers.

This issue of *International Product Liability Review* features an article from arguably the most interesting region of the world from a product liability perspective - China. Whilst on the one hand, much of the recent focus on China has been in relation to products manufactured there and exported to other parts of the world, the flip side is that China has a rapidly developing internal market, which is of increasing interest to suppliers all around the world. This is a market of uncertain risks for international businesses, and the feature in this issue focuses on one aspect of that risk for consumer product manufacturers - that of competing in a market where counterfeit versions of the same product are often widely available (page 2).

In Europe, "collective redress" remains firmly on the agenda (page 4); inevitably, developments in this controversial process of reform will continue to feature in future issues of *International Product Liability Review*. At national level in Europe, reforms in this area have occurred much more quickly and, as we now see in Italy (page 12), are starting to have a practical effect for product manufacturers.

This issue also includes an interesting overview of the product liability regime in Poland (page 13) which traces the development of the laws and practices from their roots in a socialist state economy, and provides a fascinating insight into the transition of those laws as the market economy developed, and then more recently as Poland entered the EU. This is an excellent case study of how product liability risks are changing rapidly as markets develop under the influence of both internal and external factors.

From the US, Chinese drywall litigation continues to gather momentum, drawing the Chinese manufacturers into the American courts (page 22). The stakes are high, and developments here may well have implications for other international manufacturers of products that end up being marketed widely in the US. Also in the US, courts continue to grapple with "preemption" (page 20) - another issue of enormous significance for international manufacturers of products sold into increasingly regulated markets in the US. The world is also watching there the development of "climate change" litigation (page 25), as theories of liability which have developed in that jurisdiction may well subsequently find traction in Europe and in other parts of the world.

It is a varied international menu in this issue of *International Product Liability Review*. On behalf of the Editorial Team, I hope you enjoy the articles and the new format.

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