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# Product Liability in the People's Republic of China

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# Abbreviations

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Administration of Industry and Commerce	AIC
Administration of Quality Supervision, Inspection and Quarantine	AQSIQ
China Compulsory Certification	CCC
Foreign Invested Enterprise	FIE
International Standardization Organization	ISO
People's Republic of China	PRC
Renminbi	RMB
United States Dollar	USD



# Chapter 1: General Product Liability

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## **1. Introduction**

Product quality and product liability concerns have been receiving increased attention in the PRC, as demonstrated recently by several high profile cases. Although the Product Quality Law of the PRC, promulgated in 2000, remains the basic legislation for handling such cases, the PRC government has responded to public concerns by strengthening the legal framework for regulating product quality requirements, product recall measures and consumer action. Some of these changes are directed at product quality generally, while others are directed at specific industries.

Manufacturers as well as sellers of products in the PRC should consider the liability and litigation risk presented by this relatively new legal framework. This publication is intended to provide a basic understanding of the legal framework and to raise awareness of product liability issues that manufacturers and sellers face in the PRC.

## 2. Relevant Law and Regulations

The following list is an overview of the most important laws, national regulations and opinions and interpretations of the Supreme People's Court relevant to product liability in the PRC. Additional legislation may apply in certain industries or cases.

### a) National Laws

- **Contract Law of the PRC** of 15 March 1999 ("Contract Law");
- **Law of the PRC on Protecting Consumers' Rights and Interests** of 31 October 1993 ("Consumer Protection Law");
- **Product Quality Law of the PRC** of 8 July 2000 ("Product Quality Law");
- **General Principles of the Civil Law of the PRC** of 12 April 1986 ("Civil Law");
- **Civil Procedure Law of the PRC** of 28 October 2007 ("Civil Procedure Law");
- **Criminal Law of the PRC** of 28 February 2009 ("Criminal Law");
- **Standardization Law of the PRC** of 29 December 1988 ("Standardization Law").

### b) National Regulations

- **Some Provisions on the Handling of Contraventions of the Rights and Interests of Consumers** of 12 March 2004, released by the State AIC ("Consumer Rights Contravention Provisions");
- **Provisions Concerning the Repair, Replacement, and Restitution of Certain Goods**, released by the State Economic and Trade Commission, the State Technology Supervision Bureau, the State AIC and the Ministry of Finance on 25 August 1995 ("Warranty Provisions");
- **Regulations for the Implementation of the Standardization Law of the PRC** of 6 April 1990 ("Standardization Regulations").

### c) Opinions and Interpretations of the Supreme People's Court

- **Official Reply on Whether the Aggrieved Party in a Product Infringement Case May Bring a Civil Lawsuit Against the Product Trademark Owner** of 11 July 2002 ("Official Reply of 11 July 2002");

- Opinions of the Supreme People’s Court on Several Issues Concerning the Application of the Civil Procedure Law of the PRC of 14 July 1992 (“Opinions on Civil Procedure Law”);
- Some Provisions of the Supreme People’s Court on Evidence in Civil Procedures of 21 December 2001 (“Evidence Provisions”);
- Interpretation of the Supreme People’s Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts of 8 March 2001 (“Interpretation on Emotional Damages”);
- Interpretation of the Supreme People’s Court on Compensation for Personal Injury of 26 December 2003 (“Interpretation on Personal Injury”).

#### d) Important Cases

- Shanghai Zhongmei Geophysical Prospecting Measurement Co., Ltd. v. Shanghai Jiangling Motor Sales Co., Ltd. (decided 14 April 2008), Shanghai No. 2 Intermediate People’s Court;
- Zhao Jiying et al. v. Ningbo Yinzhou Fuyang Appliance Factory People’s Court of Yuecheng District People’s Court (Yue Min Yi Chu Zi No. 1756 (2007)), Shaoxing City, Zhejiang Province;
- Qi Qingmin v. Shanghai Volkswagen Automotive Co., Ltd. (decided 27 February 2006), Beijing No. 1 Intermediate People’s Court;
- Gu Xuefeng v. Shenzhen Pepsi-Cola Beverage Co., Ltd. (decided 31 July 2001), People’s Court of Luohu District, Shenzhen;
- Chen Meijin & Lin Dexin v. Mitsubishi Auto Industry Co. (decided 10 August 2000), Beijing No. 2 Intermediate People’s Court;
- Zhou Zhi Qing v. Guangzhou Shi Zhu Jiang Beer Corporation Group (decided 13 May 1999), Guangzhou People’s Court.

### 3. Product Liability under the Product Quality Law

#### 3.1 Essential Features of Product Liability under the Product Quality Law

Under the Product Quality Law, both the manufacturer and the seller may be liable in tort. Because “manufacturer” and “seller” are not legally defined, the precise meaning of these terms is not clear. The predominant view in the Chinese literature is that the manufacturer for the purposes of the Product Quality Law is only the manufacturer of the final product, and not the parts manufacturer. However, the court will identify the manufacturer based on the presentation of the product. According to the literature, the wholesaler, retailer and importer are all regarded as the seller.

According to the universally applicable prescriptions of the Product Liability Law, the following prerequisites must be fulfilled for product liability to arise:

- (1) the product is placed on the market;
- (2) the product exhibits a design or manufacturing defect;

For this prerequisite one may refer to **Zhou Zhi Qing v. Guangzhou Shi Zhu Jiang Beer Corporation Group**. Plaintiff was injured when two beer bottles exploded under the table at which he was sitting. Scientific and technical investigation of the bottles revealed that the explosion was caused by an external force and not by a potential defect in the beer bottle. Because the product did not reveal a defect, the manufacturer was not found liable.

- (3) an injury to person or property has occurred;

In **Gu Xuefeng v. Shenzhen Pepsi-Cola Beverage Co., Ltd.**, plaintiff claimed damages after finding a bug inside a bottle of defendant’s soft drink. The product was obviously defective. However, because plaintiff discovered the bug inside his drink before opening and drinking it, the court found that no injury occurred and dismissed the claim.

- (4) the product defect caused the injury.

In **Zhao Jiying et al. v. Ningbo Yinzhou Fuyang Appliance Factory**, defendant argued that plaintiff modified the circuit of his electrical fan by himself, which should be deemed to have been the main reason for plaintiff’s electrocution. However, the court held that the nonconformity of the insulation resistance and electrical current with national quality standards contributed to plaintiff’s injury.

## 3.2 Principles of Liability

### a) Manufacturer's Liability

#### (1) Strict Liability

The manufacturer's liability is a so-called strict (or absolute) liability, i.e., the manufacturer is liable for losses caused by a defective product, regardless how the defect arose. The plaintiff may bring a product liability claim without having to prove the manufacturer's fault.

This is in contrast to the rule of Article 106 of the Civil Law, which holds that a person who injures someone or damages another's property (only) bears civil liability, if such injury or damages were caused by negligence or intent. Article 106 of the Civil Law also applies in cases of tort (also referred to in this book as tortious liability).

#### (2) Product Defectiveness

Article 46 of the Product Quality Law provides two rules for judging if a product is defective. First, a product is defective if it poses an unreasonable danger to personal safety or another's property. This is the case if the level of safety is less than a reasonable person in ordinary circumstances would expect from the product. Second, the product is defective if it does not meet applicable national or industry standards.

#### (3) Defences

Article 41 of the Product Quality Law provides that a manufacturer who proves any of the following circumstances is not liable:

- he did not put the product on the commercial market;
- the defect did not exist at the time the product was put on the market; or
- the defect was not perceptible by existing science or technical knowledge when it was put on the market.

### b) Seller's Liability

There is some contention within the Chinese literature about whether the seller is liable for damages only if he acted improperly (tortious liability) or if even where he merely sold a defective product (absolute liability). The basis for this controversy lies in the unclear relationship between Article 42 (1) and Article 43 of the Product

Quality Law. While Article 42 (1) states that the seller is only liable if the defects in the product arose from his fault, Article 43 provides that the injured party may claim damages from both the seller and the manufacturer. We believe the preferable interpretation is that the seller is only liable if he acted improperly, since the organisation of the law suggests that Article 42 (1) refers not to the internal relationship with the manufacturer, but to the external relationship with the injured party.

However, Article 42 (2) of the Product Quality Law holds the seller liable in the absence of fault when he cannot locate the manufacturer or supplier of the defective product.

The principles of liability compel the manufacturer and seller to establish a wellfunctioning system for quality management. Article 3 of the Product Quality Law requires them to establish a comprehensive internal system for quality management and to strictly maintain standards for quality assurance in the workplace, quality control and corresponding tests. Consequently, an adjudicator could find the manufacturer and the seller responsible for identifying and remedying any deficiency in this system.

### c) Licensor's Liability

Pursuant to the Official Reply of 11 July 2002, a person who allows another to use their name, trademarks or other distinguishing marks for the defective products of a third party is liable along with the actual manufacturer and the seller.

## 3.3 Joint and Several Liability

According to Article 43 of the Product Quality Law, the manufacturer and seller are jointly and severally liable for a defective product. Thus, the injured party can pursue a claim from either or both. However, if one accepts that the seller is only liable for injuries caused by product defects due to his own fault (tortious liability as mentioned above), then joint and several liability can also only exist on such basis (and not on strict liability). If the seller pays compensation but the manufacturer is responsible for the product defect, the seller has the right to recover its loss from the manufacturer. Vice versa, the manufacturer has the right of recovery against the seller if the product defect was caused by the seller.

## 3.4 Burden of Proof

Although the Civil Procedure Law (Art. 64) stipulates that the party claiming damages is obliged to provide proof for its claims, in practice the burden of proof is often placed on the manufacturer. It is then up to the manufacturer to prove that there were no defects in the product.

Further, the Supreme People's Court confirmed in its Evidence Provisions that the manufacturer of the product bears the burden of proof for the defences as set-out in Art. 41 of the Product Quality Law, which are mentioned above under 3.2 a) (3).

In **Chen Meijin and Lin Dexin v. Mitsubishi Auto Industry Co.**, the vehicle manufacturer was liable because insufficient evidence was submitted that the shattering of a windscreen was not brought about by a defect in the vehicle, or that any other external force caused the death of the driver.

However, in **Shanghai Zhongmei Geophysical Prospecting Measurement Co., Ltd. v. Shanghai Jiangling Motor Sales Co., Ltd.**, plaintiff was unable to present sufficient evidence establishing that the car was defective, and the manufacturer was not required to argue that there was an exception to a finding of liability.

These two cases show that the plaintiff (i.e., customer or injured person) in product quality proceedings will first have to provide evidence that the product in question is indeed defective. Only then will the burden of proof shift to the defendant (i.e., manufacturer or seller), who must then rely on (and provide evidence for) a defence set-out in Art. 41 of the Product Quality Law.

### **3.5 Conclusiveness of Expert Opinion**

The Civil Procedure Law requires experts on certain issues be appointed by the court (Art. 72). Accordingly, under the Product Quality Law, the court may instruct an institution for the testing of product quality to inspect a product in detail, and the resulting inspection report is considered expert evidence (Art. 48).

The plaintiff and the defendant may also supply evidence to prove that the product was or was not defective. In practice, however, the courts ascribe greater weight to the expert evidence of the legally appointed specialist institutions, and this expert evidence is in most cases decisive.

### **3.6 Limitation of Actions**

The injured party's claim against the manufacturer or seller for damages is barred if the limitation period has expired.

The limitation period expires two years after the injured party discovered or should have discovered the injury to his rights (Product Quality Law, Art. 45 (1)). The limitation period expires in any case ten years after the defective product is delivered to the first user, except where the period for safe use clearly indicated has not expired, in which case such later period applies (Product Quality Law, Art. 45 (2)).

The limitation period will be stayed by the commencement of an action, and also where one of the parties makes a demand or agrees to settle a claim. The limitation period starts again after the stay expires (Civil Law, Art. 140).

### **3.7 Private International Law**

PRC product liability laws and regulations also apply to foreign manufacturers who export products to the PRC. This arises from, first, the Civil Law, which applies the law of the place of the tortious conduct to claims for damages (Art. 146). It also follows from the Product Quality Law, which applies the law not just to production activities in the PRC, but also to products distributed there (Art. 2).

The Civil Law (Art. 145 (1)) and the Contract Law (Art. 126 (1)) stipulate that, unless PRC law requires otherwise, the parties to a foreign-related contract may choose the applicable law. However, both foreign and domestic producers and sellers should be aware that the Product Quality Law applies to products that are made or sold in the PRC.

## **4. Contractual Product Liability**

### **4.1 Buyer's Warranty Rights**

If the condition of a product upon sale does not meet quality standards, the Contract Law grants the buyer the right to claim for repair, replacement, remanufacture, exchange or reduction of the sale price (Arts. 155, 111 and 113). The buyer may also make a claim for damages. Similar warranty rights are expressed elsewhere, such as the Warranty Provisions (Art. 1), the Product Quality Law (Art. 40), the Consumer Protection Law (Art. 40 (8)) and the Consumer Rights Contravention Provisions (Art. 6). This liability is a strict liability and arises independent of fault – that is, the seller is liable even when not at fault for the quality defect.

Generally, the quality requirements of a product are based primarily on the contractual agreement (Contract Law, Arts. 154 and 61). Without such agreement judges will apply common usage. They will use national or industry standards or, if these do not exist, the general or particular standards that conform to the purpose of the contract (Contract Law, Arts. 154, 61 and 62 (2)).

### **4.2 Limited Possibility of Exclusion of Liability**

In order to protect the legal rights and interests of consumers, the Consumer Protection Law (Art. 24 (1)), the Contract Law (Art. 40) and the Consumer Rights Contravention Provisions (Art. 3 (1)) prohibit merchants from stipulating (through form contracts, circulars, statements and notices in business premises) provisions that are unfair or unreasonable to consumers. These laws also prohibit the exclusion or limitation of the merchant's civil liability for infringement of the legal rights and interests of consumers. Any such purported exclusions or limitations are ineffective.

Thus the exclusion of liability through general business terms is not possible in the sphere of product liability. Though the scope of liability may be to some extent defined in certain individual contracts, the parties are not allowed to "contract out" of certain liabilities. Although a commercial seller may use contractual language to evade responsibility for damage due to his simple negligence, according to the Contract Law (Art. 53), he cannot exclude liability for damage to life and limb, or for intentional or grossly negligent damage to property.

### **4.3 Limitation of Claims**

The Civil Law governs the limitation period for making a contractual product liability claim. The limitation period for damages claims for personal injury and claims for defective products is one year (Civil Law, Art. 136 (1)(2)). The period begins when

the injured party identified or should have identified the infringement of its rights (Civil Law, Art. 37). The limitation period for an international contract dispute is four years, and likewise starts running at the time when the injured party identified or should have identified the infringement of its rights (Contract Law, Art. 129). The limitation period expires no more than 20 years from when the rights were infringed. However, the People's Court may extend the period in exceptional circumstances (Civil Law, Art. 137).

As with tortious product liability claims, the limitation period is interrupted and begins to run anew if the grounds as mentioned in 3.6 above are met.

#### **4.4 Choice of Law**

The Contract Law (Art. 126 (1)) states that only the parties to a "foreign-related" contract may choose the law applicable to contractual disputes. According to the general definition in No. 178 of the Opinion on Civil Law, a legal relationship is "foreign related" if one or both parties are foreigners, stateless, or foreign legal persons; if the subject matter of the legal relationship is in a foreign country; or if the legal circumstances of the development, change or lapse of rights or duties occur in a foreign country.

If any of these conditions are satisfied, the contractual parties may chose foreign law for interpreting their contract and resolving any dispute.

However, some PRC laws and regulations prohibit the direct marketing of certain products by companies not incorporated in the PRC. For example, PRC law does not permit direct marketing of motor vehicles by companies not incorporated in the PRC. Under normal circumstances the purchaser is a PRC citizen or legal person; a contract involving foreign interests therefore would not exist and foreign law could not apply.

## 5. Damages

In product liability cases, claims by injured parties for damages fall into one of the following categories:

- (1) damages for personal injury;
- (2) damages for emotional injury;
- (3) damages for property damage or other pecuniary loss; or
- (4) punitive damages.

Damages will only be awarded to the plaintiff if he can show that the damage was actually suffered. That being said, it is widely accepted that the plaintiff in product liability cases merely has to prove the possibility that the product defect could have led to the damage in question.

### 5.1 Personal Injury

If the injured party suffers a personal injury as a result of a product defect, then the manufacturer and the seller must compensate the plaintiff for, amongst other things, the following costs (Product Quality Law, Article 44):

- medical expenses;
- nursing expenses during medical treatment;
- loss of income due to absence from work;
- in case of permanent disability, cost of self-help devices, cost of living bonus, disability damages and necessary living expenses for the invalid's dependants;
- in the case of death, the funeral costs, compensation for the death and living costs for the deceased's lifetime dependants.

### 5.2 Emotional Injury

#### a) Emotional Damages for Injury to Health and Body

The Interpretation on Emotional Damage (Arts. 1 (1) and 8 (2)) and the Interpretation on Personal Injury (Art. 18) restrict claims for emotional damages to persons who have suffered a major injury to their health or body.

## b) Emotional Damages in the Event of Death

If the product defect causes death, then the spouse parents and children of the deceased may have a claim for emotional damages in the form of damages for pain and suffering. If the deceased had none of these family members, then other near relatives can also make the claim (Interpretation on Emotional Damage (Art. 7) and the Interpretation on Personal Injury (Art. 18)). It is not yet clear to what extent, in the context of damages for the pain and suffering to relatives, the Chinese courts require as an additional element that the damage be "major" (Interpretation on Emotional Damage (Art.8)).

## c) Method of Calculation

In the calculation of the level of emotional damages the following factors must be taken into account (Interpretation on Emotional Damage, Art. 10):

- (1) the seriousness of the prohibited conduct;
- (2) the means, circumstances and manner of the prohibited conduct;
- (3) the consequences of the prohibited conduct;
- (4) the income gained as a result of the prohibited conduct;
- (5) the economic capacity of the wrongdoer to bear the liability;
- (6) the average living standard in the place of the competent court.

## 5.3 Damage to Property and Consequential Pecuniary Loss

A manufacturer of a defective product is liable for personal injuries and damage to property other than the product itself (Product Quality Law, Art 41). With regard to damage to the defective product, **Qi Qingmin v. Shanghai Volkswagen Automotive Co., Ltd.** renders some clarification. Notwithstanding Art. 41 of the Product Quality Law, damage to the defective product itself can be included in a compensation claim based on the Product Liability Law. The court relied on the general rules of the Civil Law, rather than contractual terms, for calculating damages. The court opined that requiring the injured party to base its claim against the manufacturer or seller on contractual liability could be unfair and waste judicial resources.

In addition, the injured party can claim consequential pecuniary losses caused by this damage, such as loss of profits. This follows from the requirement that the person who causes the injury must compensate "other major loss" of the injured party

(Product Quality Law, Art. 44 (2)). The question of when such losses are “major” has not yet been established in case law. If only trifling damage is excluded, the scope of this limitation would be quite narrow. The injured party may also make a claim for consequential pecuniary losses directly caused by the defective product (Product Quality Law, Arts. 40, 41 and 43).

## **5.4 Punitive Damages**

The only civil law provision that provides for punitive damages is Art. 49 of the Consumer Protection Law, which requires a merchant who acts fraudulently in the delivery of goods or services to pay the consumer additional damages up to an amount equal to the amount of the sale price of the goods purchased or the fee for the services received.

## **5.5 Contributory Negligence**

Damage awards are reduced proportionally when an injured party’s negligence contributes to the damage (Civil Law, Art. 131).

## **6. Administrative Liability**

The Consumer Protection Law provides that unless other specific regulations prevail, the competent AIC may impose administrative sanctions against a merchant who has contravened the Product Quality Law or other relevant law or regulation (Art. 50). Corresponding rules appear in the Standardization Law (Art. 20) and the Standardization Regulations (Art. 33).

### **6.1 Administrative Penalties**

Administrative penalties listed in the Consumer Protection Law (Art. 50) include the confiscation of unlawful proceeds; the imposition of a fine of between one and five times the value of the unlawful proceeds. If there are no unlawful proceeds, a fine of up to RMB 10,000 may be imposed. In serious cases, the business may be closed or the business licence withdrawn.

These administrative penalties are also applied if the merchant does not accept a consumer's proven lawful demand for acceptance of civil liability within 15 days, and the merchant has already at least twice refused the consumer's demand without legitimate grounds.

The merchant will be treated at the expiry of this 15-day period as if he had wilfully delayed, or unreasonably refused, the acknowledgement of his liability.

#### **a) Circumstances of Liability under Art. 50 of the Consumer Protection Law**

- (1) manufacture or sale of products that do not meet the requirements for protection of safety of person and property;
- (2) products fitted out with fake parts, inferior products sold as quality products, or non-compliant goods sold as compliant goods;
- (3) manufacture of products superseded by formal decree of the State, or sale of ineffective or deteriorated goods;
- (4) misrepresentation about place of manufacture, false or unauthorised use of the name or address of another's factory, false or unauthorised use of quality labels such as accreditation or award symbols;
- (5) sale of commodities that are not inspected or quarantined, if required, or forging the results of inspections or quarantines;
- (6) misleading a consumer through false information about goods or services;

- (7) deliberate delay or unreasonable refusal of consumer's requests for repair, remanufacture, replacement, exchange, completion of the quantity of goods, or compensation;
- (8) injury to the dignity or personal freedom of consumers;
- (9) other circumstances in which laws or regulations prescribe that injury to the rights and interests of consumers is to be punished.

## **b) Circumstances of Liability under the Standardization Regulations**

Circumstances of administrative liability are also provided in the national regulations that regulate the prescription of standards:

### **(1) Standardization Law**

According to the Standardization Law, unless there is a contrary law, the competent AIC is responsible for punishing the violation of standards prescribed by law or regulation by imposing an administrative fine, confiscating goods and confiscating unlawful profits (Art. 20).

### **(2) Standardization Regulations**

According to the Standardization Regulations, noncompliance with mandatory product standards can have the following consequences for the manufacturer or seller (Art. 33):

- cessation of production;
- prohibition on sales;
- confiscation and/or destruction of goods;
- performance of necessary technical treatment;
- imposition of a fine of up to RMB 5,000 on the person responsible;
- imposition of a fine in the sum of 20% – 50% of the value of the goods.

Other administrative sanctions may be imposed by the administrative departments responsible for standardization and the administrative departments in charge of industry and commerce in accordance with their competence (Standardization Regulations, Art. 33 (4)).

## 6.2 Duty to Act under the General Regulations

The Consumer Rights Contravention Provisions require merchants to implement the following measures without delay upon discovery that supplied goods or services are defective (Art. 2):

- cessation of sale of the defective product or supply of the defective services;
- lodgement of a defect notice with the responsible authority (e.g., the authority for industry and trade);
- timely and effective public announcement of the fault (e.g., through public media, notices in place of business, telephone, fax, email, SMS);
- recall of the defective products or provision of appropriate aid in the case of services already provided.

If these obligations are not fulfilled, the AIC has the authority to order their fulfilment and record a corresponding report in the "Information on the Reputation of Firms".

## 6.3 Obligation to Act under the Recall Provisions

At present, there is a patchwork of recall provisions for special products. The first recall provisions were promulgated for automobiles in 2004 against a backdrop of foreign manufacturers not affording Chinese consumers the same rights as enjoyed in other jurisdictions. Other recall provisions in relation to food, toys and drugs were enacted in 2007.

These provisions now require the manufacturer to recall the defective product and pay all associated costs. In some serious cases the manufacturer can be punished with an administrative fine, which can also be imposed on the seller or repairer under some circumstances. The refusal of a manufacturer to recall a defective product is punishable by the temporary suspension or withdrawal of the mandatory certification for the product.

The recall of defective products does not relieve the manufacturer of its liability to pay civil damages to buyers or third parties injured by the defective product.

The Legislative Office of the PRC State Council is currently soliciting public opinions for a draft set of defective product recall rules. The draft rules currently being considered cover all products manufactured or sold in the PRC, except for drugs and military products.

## **7. Criminal Liability**

### **7.1 General**

The Criminal Law (Arts. 140-150) also regulates the manufacture and sale of false and inferior products. Arts. 140 and 146 apply in general, whereas Arts. 141-145, 147 and 148 specifically regulate certain products, such as drugs, food and cosmetics.

### **7.2 Deception about Product Quality**

A manufacturer or seller who mixes up or adulterates products, passes fake imitations for genuine, sells seconds at a top quality price or passes unqualified products as qualified ones is punishable under the Criminal Law (Art. 40).

The penalty for this offence depends on the amount of the proceeds resulting from the sale of the defective product:

- (1) For proceeds of RMB 50,000 to RMB 200,000: imprisonment for up to two years or short term imprisonment and/or a fine of 50% to 200% of the sale proceeds;
- (2) For proceeds of RMB 200,000 to RMB 500,000: imprisonment for between two and seven years and a fine of 50% to 200% of the sale proceeds;
- (3) For proceeds of RMB 500,000 to RMB 2,000,000: imprisonment for at least seven years and a fine of 50% to 200% of the sale proceeds;
- (4) For proceeds above RMB 2,000,000: imprisonment for between 15 years and life imprisonment and a fine of 50% to 200% of the sale proceeds or confiscation of assets.

### **7.3 Failure to Comply with Safety Standards**

If a product that does not comply with the standards prescribed for the protection of safety of persons and property is produced or knowingly sold and results in damage that is "serious", a maximum term of imprisonment of five years and a fine of 50% to 200% of the sale proceeds can be imposed (Criminal Law, Art. 146).

If the consequences are "particularly serious", a term of imprisonment of not less than five years and a fine of between 50% and 200% of the sale proceeds may be imposed.

## 7.4 Subjective Elements of the Offence

Negligent conduct is only punishable if the law so prescribes (Criminal Law, Art. 15 (2)). Since there is no such prescription in Art. 140 or 146 of the Criminal Law, deliberate conduct must be a requirement for culpability. Specific intent is required by Art. 146 of the Criminal Law as an element of the offence of “selling”. This conduct is only punishable in the case of knowledgeable conduct; that is, only if the seller knew of the defectiveness of the product.

## 7.5 Persons Criminally Liable

Criminal liability falls on the firm as well as specific natural persons who have acted for the firm. A firm that has engaged in the conduct described in Arts. 140-148 of the Criminal Law will be liable for a fine (Criminal Law, Art. 150). Furthermore, the manager directly responsible and other persons directly responsible are punishable according to Arts. 140-148, respectively.

## 7.6 Relationship between Articles 140 and 141 to 148 of the Criminal Law

As a general provision, Art. 140 of the Criminal Law applies when individual cases do not fulfil the conditions of the specific articles. In **The People’s Procuratorate of Rongchang County, Chongqing Municipality v. Liao Zhengmei et al.**, two illegal manufacturers were sentenced to imprisonment for the “manufacture [or] sale of fake or inferior products” (Art. 140), and two others were guilty of the “manufacture [or] sale of food inconsistent with hygiene standards” (Art. 143).

If the conduct fulfils the elements of the offence of both Arts. 140 and 141 to 148 of the Criminal Law, then the perpetrator will be punished according to the provision that stipulates the higher penalty (Art. 149 (2)).

## **8. Jurisdiction**

### **8.1 Competency of the People's Courts**

The contractual and tortious product liability claim of the injured party underlies the jurisdiction of the courts of the PRC, as long as their jurisdiction is not excluded by an effective international choice of forum agreement or arbitration agreement.

#### **a) Breach of contract**

In claims concerning contractual product liability, the local jurisdiction of the People's Court is decided according to Art. 24 of the Civil Procedure Law. According to this provision, the People's Court where the defendant resides or where the contract was performed will have jurisdiction.

#### **b) Prohibited conduct**

For tortious liability claims, the People's Court with jurisdiction is located where the tortious conduct takes place, where the results of this conduct arose or where the defendant resides.

### **8.2 International Choice of Forum Agreement**

The Civil Procedure Law only allows using a foreign dispute resolution forum for a contract that involves a foreign interest (Art. 242). If this condition is fulfilled, then a foreign court that has actual connections with the dispute may have jurisdiction. However, enforcing foreign judgments in the PRC remains extremely difficult, partly because of the lack of Sino-foreign treaties regarding judicial cooperation.

### **8.3 Agreement to Arbitrate**

Parties may agree to arbitrate contractual and tortious product liability claims. Arbitration agreements must be in writing. An effective arbitration clause has the effect that the court of arbitration, rather than the court with local jurisdiction, adjudicates upon the claims.

The Contract Law only allows parties to a contract involving a foreign interest to select an arbitration court outside of the PRC (Art. 128 (2)). Enforcement of foreign arbitration awards has proven to be easier than the enforcement of foreign court judgments. However, difficulties remain.

# Chapter 2: Food

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## 1. Introduction

In early September 2008, reports surfaced of milk contaminated with melamine sold by the Sanlu Group and other companies, marking the biggest food safety scandal in PRC history. It has been reported that contaminated milk products claimed the lives of at least six babies and left 300,000 others with various urinary tract ailments, including kidney stones.

The case involved Sanlu Group (who produced and sold the contaminated dairy products to the public), the illegal producer of "protein powder" made with melamine and other ingredients and a third party that sold the "protein powder" to Sanlu Group. Although it appears that Sanlu Group was at first not aware of quality problems, Sanlu Group continued to sell milk contaminated by a lower level of melamine even after an inspection conducted by the Hebei Province Quality Supervision Department.

On 22 January 2009, the Intermediate People's Court of Shijiazhuang and four other district courts handed out a series of verdicts. On 26 March 2009, the Higher People's Court of Hebei Province confirmed the rulings of first instance in respect of the appeals of some of the accused, marking the end of legal procedures. However, the social impact continues to be felt, and stricter food safety standards have already been implemented.

The verdicts were unprecedented in their scale. Sanlu Group was fined RMB 49,374,822. The former chairman of Sanlu Group, Tian Wenhua, was sentenced to life imprisonment and a substantive fine for "producing and selling inferior food". Of those who produced the "protein powder", one was sentenced to death, one received a suspended death sentence and the other two were sentenced to life imprisonment for "endangering public security". Of those who sold the milk to Sanlu Group, one was sentenced to death for "producing and selling poisonous or harmful food". A total of 25 people were found guilty of various crimes.

The Sanlu case and the severity of the punishments handed out probably marks the beginning of a concerted effort to tackle food safety violations and should set a precedent for other Chinese courts in their handling of product liability claims generally, especially those that result in serious injury or death.

## 2. Applicable Provisions

In addition to the laws and regulations listed above in Chapter 1, section 2, which generally also apply to food product liability, the following laws and regulations are the main provisions promulgated specifically for regulating food safety:

### a) National Laws and Regulations

- **Food Safety Law of the PRC** of 28 February 2009 (“Food Safety Law”);
- **Implementing Regulations of Food Safety Law** of 20 July 2009 (“Food Safety Regulations”);
- **Administrative Provisions on Recall of Food Products** of 24 July 2007 (“Food Recall Provisions”);
- **Special Rules of the State Council on Strengthening the Supervision and Administration of the Safety of Food and Other Products** of 26 July 2007 (“State Council Special Rules”);

A general legal principle of PRC law is that specific provisions have precedence over general provisions as long as the former do not violate the latter. Therefore, the particular and specific stipulations in the Food Safety Law and Food Recall Provisions as well as other provisions relevant to food products apply to food product liability, provided that they conform with general laws and regulations on product liability, whether the specific food provisions are more stringent or not. On the other hand, where certain aspects are not governed by specific food safety provisions, then the general provisions set-out in Chapter 1 of this booklet apply.

### **3. Civil Liability**

#### **3.1 Grounds of Civil Liability**

The civil liability of producers and business operators for producing or selling unsafe food is based mainly on the Civil Law, Contract Law, Product Quality Law, Customer Protection Law and Food Safety Law.

Consumers can seek compensation for personal injury and damages suffered from sub-quality food. Under PRC law, civil claims can be based on tortious or contractual liability, as elaborated in Chapter 1.

#### **3.2 Joint and Several Liability**

The Food Safety Law (Art. 52) holds food business operators and sponsors of a centralised trade market, lessors of a sales counter and organisers of a trade fair jointly and severally liable for food safety lapses due to failure to fulfil obligations such as checking the licence of business operators or regularly checking the business operation environment and conditions.

Social organisations or other organisations or individuals who recommend certain food products to consumers that later damage their legitimate rights and interests bear joint and several liability along with the producers and business operators involved with the defective food (Food Safety Law, Art. 55).

#### **3.3 Punitive Damages**

According to Article 96 of the Food Safety Law, when someone knowingly manufactures or sells food which fails to comply with the food safety standard, consumers may, in addition to claiming damages, also require the manufacturer or the seller to pay punitive damages equivalent to ten times the price of the food.

#### **3.4 Payment Priority**

If a producer or business operator is subject to civil damages, administrative fines and capital punishment for his misconduct, their property will first be used to discharge the civil liability to their victims (Food Safety Law, Art. 97).

## 4. Criminal Liability

As mentioned in chapter 1 of this booklet, the PRC Criminal Law stipulates the criminal liabilities regarding producing and/or knowingly selling fake, inferior or defective products, including poisonous and harmful food, or food which is not up to hygiene standards (Arts. 140-150).

Arts. 143 and 144 apply specifically to food. Art. 143 subjects individuals or companies that produce or sell food which does not comply with safety standards and results in a serious food poisoning incident or other serious illness to:

- detention or imprisonment for not more than two years; and/or
- fines ranging from 50% to two times the sales revenue.

Where the defective food causes serious damage to personal health, such individuals or companies are subject to:

- imprisonment for between three and seven years; and
- fines ranging from 50% to two times the sales revenue.

Where the consequences are exceptionally serious, the individuals or companies are subject to:

- imprisonment for between seven years and life; and
- fines ranging from 50% to two times the sales revenue or confiscation of property.

The Criminal Law (Art. 144) subjects individuals or companies who add poisonous or harmful non-food materials to food when it is in production or on sale, or knowingly sell such food, to:

- detention or imprisonment for not more than five years; and/or
- fines ranging from 50% to two times the sales revenue.

Where the defective food causes a serious food poisoning incident or other serious illness or causes serious damage to personal health, such individuals or companies are subject to:

- imprisonment for between five and ten years; and
- fines in an amount ranging from 50% to two times of the sales revenue.

Where the defective food causes death or other exceptionally serious damage to personal health, the individuals or companies are subject to:

- imprisonment for between ten years and life;
- death penalty; and
- fines ranging from 50% to two times the sales revenue or confiscation of property.

A company held criminally liable for supplying defective products (including food) is itself only subject to a fine (Criminal Law, Art. 150). The person in charge of the company and other relevant responsible persons are subject to the criminal sanctions mentioned above.

## **5. Administrative Liability**

### **5.1 Duty to Act under Food Safety Law**

Promulgated on 28 February 2009, the PRC Food Safety Law entered into effect as of 1 June 2009. Compared to the Food Hygiene Law, which it superseded, the Food Safety Law attempts to ensure safe food by focusing on food safety supervision and management from an overall perspective, starting from the source to the end consumption. Complementary Food Safety Regulations were promulgated on 20 July 2009.

#### **5.1.1 Health Check Requirement**

Personnel who engage in food production and food-related business are required to have a health examination and obtain a health certificate annually.

#### **5.1.2 Establishment of a System of Compulsory Food Safety Standard**

Central and local level administrative departments of health are in charge of formulating and implementing a system on monitoring food safety. Should any potential food safety hazard be found under the monitoring system, the State Council's Administrative Department of Health must organise and establish an expert panel to perform a food safety risk assessment. The production and sale of food found unsafe must cease and, if necessary, a compulsory safety standard formulated.

A system of compulsory safety standards must be formulated and published by the State Council's Administrative Health Department. It is intended that the State Council Administrative Department of Standardization provide standard series numbers for the public's reference.

In the absence of any central government food safety standard, the local administrative health departments of provinces, autonomous regions and centrally-governed municipalities may formulate local food safety standards and must report such standards to the State Council Administrative Health Department. The Food Safety Law further requires manufacturers to organise production based on their own safety standards if government standards do not exist (Art. 25). The manufacturer's standard applies only to the manufacturing enterprise and must be reported to the provincial level administrative health department for the record.

#### **5.1.3 Abolition of the Present Exemption from Government Quality Inspection**

The Food Safety Law explicitly abolishes the quality inspection exemption for food (Art. 6). This exemption had its source in the Measures on the Administration of Product Exemption of Quality Supervision and Inspection, promulgated by the State

Administration of Quality Supervision, Inspection and Quarantine (“AQSIQ”) in 2000, and repealed by AQSIQ following the tainted milk case. Therefore, food companies may no longer rely on such preferential treatment.

#### **5.1.4 A Mandatory Recall System for Unsafe Food**

If a food product is found in violation of food safety standards, the food producer must immediately cease its production, recall the food products on the market and notify the business operators and consumers of such noncompliance. The recall and notification information must be recorded. A business operator who discovers nonconforming food products must immediately stop selling them, notify the food producer and consumers of such noncompliance and keep a record of the cessation and notification information. If the food producer fails to cease production or to recall the unsafe food product, the local quality supervision authority, the AIC, and/or the supervision and administration department of food and drugs may order the producer to recall the unsafe food product and/or to cease the business operation involving the food.

The producer must dispose of or destroy the recalled food, and report to the quality supervision department at and above county level about the recall and the disposal of the food.

The recall system provided in the Food Safety Law is consistent with similar requirements under the Food Recall Provisions.

#### **5.1.5 Inspection and Record Obligation**

Food producers that procure raw materials for food products, food additives and food-related products, and food-related business operators that procure food products, must check the licence of the suppliers and the product quality certificates.

Food producers must establish a check and inspection record system for purchased raw materials for food, food additives and food-related products, and a food ex-factory check record system. An enterprise engaging in the business operation of food products must establish a check and inspection record system.

#### **5.1.6 Licensing System**

The Food Safety Law (Art. 29) covers a licensing system for the food business, which is categorised as follows:

- food production licence;
- food circulation licence; and
- catering services licence.

These licences are valid for three years (Food Safety Regulations (Art. 20 (3))).

Government bodies authorised to grant these licences include the quality supervision department, the AIC and the food, pharmaceutical supervision and administration department at and above county level. To obtain the respective licence, the food producer and business operator should ensure that they meet food safety standards and requirements, including:

- having places for treating food raw materials and food processing, packaging and storage appropriate to the varieties and quantities of the food under their production or business operation; keeping the environment of the said places tidy and clean, and ensuring that they are at a prescribed distance from toxic and hazardous sites and other pollution sources;
- having production or business operation equipment or facilities appropriate to the varieties and quantities of the food under their production or business operation, and having the corresponding equipment or facilities for disinfection; changing clothes; toilets; day-light; illumination; ventilation; combating corrosion, dust, flies, rats and moths; washing; disposal of waste water and storage of garbage and waste;
- having professional food safety technicians and managerial personnel, and rules and regulations, for ensuring food safety; and
- having a rational equipment layout and technical flowchart so as to prevent cross pollution between the food to be processed and ready-to-eat food, and between raw materials and finished products, and to prevent the food from contact with toxic substances or unclean articles.

The food producer and business operator may be required to submit documentation showing that the foregoing conditions and requirements have been satisfied. The authorities will verify such documentation and conduct on-site inspections, if necessary, to decide whether to license the food producer or business operator.

The requirements and application process for the food additive licensing system must accord with the licensing of industrial products.

### **5.1.7 Import and Export of Food Products**

Imported food, food additives and food-related products must conform to national food safety standards. Imported food is subject to the inspection of the entry/exit inspection and quarantine institution. Products that pass inspection are issued a clearance certificate and released.

For imported food not covered by the national food safety standards, or for the initial import of a new food additive or food-related product, the importer must file an application with the State Council's Health Administrative Department and submit relevant safety assessment materials. The State Council's Health Administrative Department will decide whether to grant the licence and timely formulate corresponding national food safety standards.

Imported pre-packaged food products must bear a label and instructions in Chinese. Such labels and instructions must conform to the Food Safety Law, Food Safety Regulations, other relevant laws, administrative regulations and national food safety standards, and state the place of origin as well as the name, address and contact information of the domestic agent.

Entities that wish to export food from the PRC must go through record-filing formalities at the national level entry/exit inspection and quarantine department. An overseas food production enterprise exporting food from the PRC must be registered at the national level entry/exit inspection and quarantine department.

The food to be exported is subject to the supervision and sampling inspection of the entry/exit inspection and quarantine institution and may be released by the customs office upon issuance of the clearance certificate by the entry/exit inspection and quarantine institution.

## 5.2 Administrative Penalties

Potential administrative penalties imposed on conduct that does not conform to the Food Safety Law are as follows (Food Safety Law, Arts. 84, 87 and 89 and Food Safety Regulations, Arts. 55-58):

- confiscation of illegal proceeds
- confiscation of food and food additives illegally produced
- confiscation of utensils, equipment, raw materials etc. used for illegal operation
- imposition of fines
- cessation of business
- withdrawal of the business licence

The following conduct may be deemed to be relevant circumstances under which these administrative penalties must be assumed by the relevant food producer or business operator:

- (1) engaging in the production of food or food additives, or business operation involving food, without administrative licensing;
- (2) misconduct in the production or sale of food, or a business operation involving food, such as:
  - producing food with non-food raw materials, or food containing non-food-additive chemical substances and other substances potentially hazardous to human health, or producing food with recycled food as raw materials;
  - producing or engaging in a business operation involving food in which substances that are hazardous to human health exceed the limits as prescribed in the food safety standards;
  - producing or engaging in a business operation involving staple or supplementary food exclusively for infants or other specific groups of people, of which the nutrient ingredients do not meet the food safety standards;
  - engaging in a business operation involving food that is putrid or deteriorated, spoiled by rancid oil or fat, mouldy, infested with pests, contaminated and dirty, mixed with strange objects, adulterated and impure, or abnormal in sensory properties;
  - engaging in a business operation involving the meat of poultry, livestock, wild animals and aquatic animals that died from disease, poisoning or another unknown cause, or related meat products;
  - engaging in a business operation involving meat that has not been quarantined or has failed the quarantine by the animal health inspection institution or meat products that have not been inspected or have failed the inspection;
  - engaging in a business operation involving food past its expiration date;
  - producing or engaging in a business operation involving food expressly banned by the state for anti-disease purposes or for other special reasons;
  - producing food with new food raw materials or producing a new food additive or new food-related product without undergoing the food safety assessment;
  - refusing to recall or stop the business operation of the food product which does not conform to the food safety standards, after the relevant competent department so orders;
  - engaging in a business operation involving food contaminated by packaging materials, containers, transportation vehicles, etc.;

- producing or engaging in a business operation involving pre-packaged food or food additives without labels, or producing or engaging in a business operation involving food products or food additives with labels or instruction for use that do not conform to the provisions of the Food Safety Law;
  - purchasing or using food raw materials, food additives or food-related products which do not conform to food safety standards;
  - adding medicines to food;
  - when a change in the production or sale of a food product leads to noncompliance with relevant requirements, failing to take remedial measures, cease the production and operation and report to competent authorities, or reapply for a licence; or
  - a catering services provider's failing to perform the obligations on purchase control of raw materials or inspect the food or raw materials to be processed, or continuing to use the food or raw materials found to be putrid, deteriorated or abnormal in sensory properties.
- (3) food producer or business operator fails to perform due obligations as to ensure the safety of food.
- (4) illegally importing or exporting food, food additives, food-related products.

For each of the above circumstances, the administrative penalties apply respectively in accordance with the Food Safety Law.

# Chapter 3: Toys

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## 1. Introduction and Applicable Provisions

In recent years several toy makers have had to recall their Chinese-made toys due to potential or existing defects that could have been harmful to the users.

In 2007, for example, consumers discovered that the lead content in the coating for certain toys sourced by Mattel in the PRC and sold in the United States far exceeded the allowable legal standard. The company had to recall all these toys from the market, including toy brands such as Big Bird, Elmo, Dora and Barbie. The total value of recalled toys reached USD 2 million.

As stated in Chapter 2, section 2, the laws and regulations listed above in Chapter 1, section 2 generally also apply to toy product liability cases. In addition, the main legal provisions specifically promulgated for regulating toys are as follows:

- **Provisions on Administration of Mandatory Products Certification** promulgated on 3 July 2009 (“Mandatory Certification Provisions”);
- **Measures for Administration of Mandatory Products Certification Institutes, Inspection Institutions and Laboratories** promulgated on 23 June 2004 (“Mandatory Certification Measures”);
- **PRC Certification and Accreditation Regulations** promulgated on 3 September 2003 (“Certification Regulations”);
- **Measures on Administration of Inspection and Supervision of Import and Export of Toys** promulgated on 2 March 2009 (“Toy Import and Export Measures”);
- **Provisions on Administration of Recall of Children’s Toys** promulgated on 27 August 2007 (“Toy Recall Provisions”).

As is the case with specific rules that govern food safety, specific rules that govern toy safety have precedence over general legal principles of PRC law as long as they do not violate these principles. In the absence of specific rules, the general provisions in Chapter 1 of this booklet apply.

## **2. National Safety Technical Code for Toys**

The National Safety Technical Code for Toys (“Code”) entered into effect on 1 October 2004, repealing the older National Standard for Toy Safety. The Code is a general technical standard of compulsory application to all toys sold in the PRC, which means that any toy which fails to conform to this Code may not be produced, sold in or imported into the PRC.

### **2.1 Definition of Toys**

The Code defines “Toys” to mean products or materials designed for playing or otherwise targeted at children under the age of 14.

### **2.2 Scope of Application**

The Code applies to all toys sold or distributed (including toy samples and toys given free of charge), produced in or otherwise targeted at the PRC market. The Code applies to all toys, whether used properly or misused, provided that such misuse could be reasonably foreseeable considering that the target group for toys are children with limited legal responsibility. The Code does not apply to toys where the target users are not children, or toys which require supervision or other special requirements for use.

The Code stipulates different safety requirements for toys designed for children of different age ranges in light of children’s intelligence, physical strength and ability to handle dangers.

### **2.3 General Principles**

- after proper use or reasonable overuse toys must still conform to the requirements of the Code and not harm the safety or health of the user or any third person;
- the scope of the Code is of a general nature and does not cover all possible potential dangers of toys in detail;
- the Code does not exempt the parents from their responsibility to choose proper toys and to supervise and keep children safe in accordance with requirements of children of different age groups;
- the Code adopts the standard of toy safety formulated by the International Organisation of Standardization (ISO08124-1: 2000), and Appendixes A, B and C of the Code provide the relevant technical requirements and testing methods for toys.

## **2.4 Instruction for Use**

Instructions for use must be provided with the toy. They can be provided in different forms, such as separate instruction manuals, information on the packaging, labels and signs. The instructions must provide information on the safe use of the toys and must conform to the requirements of the Code as well as the Instructions for Use of Products of Consumer Interest – Part 5: Toys.

## **2.5 Implementation and Supervision**

Toys which fail to conform to the Code may not be produced in, sold in or imported to the PRC market. Any person or entity may report violations of the Code.

The government has adopted a supervision and inspection system for toy quality that includes spot checks. Where safety certification or production licensing is required, relevant laws and regulations apply (as further set-out below).

## **2.6 Legal Liabilities**

The purpose of the Code is to protect children as broadly as possible against dangers posed by toy defects, including design defects, manufacturing defects and defects in materials.

The Code provides that the PRC Standardization Law, the PRC Product Quality Law and other relevant laws and regulations apply for determining liability for violating the Code.

### **3. China Compulsory Certification**

Products listed in the PRC Products Catalogue for Mandatory Product Certification may be sold, imported or otherwise used in business activities only after satisfying the following:

- passing the China Compulsory Certification (also known as CCC);
- bearing the certification mark.

In the toy industry, according to Catalogue on Toy Product for CCC-3C Mandatory Product Certification, the following six categories of toys fall within the scope of the CCC:

- cars for children;
- electronic toys;
- plastic toys;
- metal toys;
- projectile toys; and
- dolls.

#### **3.1 Certification Process**

According to the Mandatory Certification Provisions and the Mandatory Certification Measures, the producer, seller or importer may engage a certification institute designated by the State Certification and Accreditation Administration to conduct the CCC. In normal cases, such certification institute makes a decision on certification and must notify the producer, seller or importer thereof within 90 days from the day of engagement.

#### **3.2 Administrative Liability**

- (1) For producers, sellers, importers and/or business operators who produce, sell, import or use the products without due CCC, the administrative liabilities include an order for proper certification, fines ranging from RMB 50,000 to RMB 200,000 and confiscation of illegal proceeds (Certification Regulations, Art. 67).

- (2) Products that are not certified according to the Mandatory Certification Provisions are subject to administrative liabilities including fines of not more than RMB 30,000 (Art. 25). In addition, an order of proper certification within a statutory time limit may be imposed.
- (3) Products that have passed the CCC but do not have a certification mark used in a way consistent with relevant legal provisions are subject to an order for correction within a statutory time limit, failing which the relevant producer, seller, importer or other business operator may be fined up to RMB 10,000 (Mandatory Certification Provisions, Art. 26).

## **4. Import and Export Inspection**

The Toy Import and Export Measures became effective on 15 September 2009. This Measure applies to products required to be inspected before importation or exportation according to applicable laws and regulations, and such products as listed in the catalogue for compulsory inspection.

### **4.1 Import**

The AQSIQ is in charge of nationwide inspection, supervision and administration of import and export of toys. Local inspection and quarantine agencies address the inspection, supervision and administration of import and export of toy products within the area under their respective administrative jurisdiction. These agencies must issue an inspection certificate for imported toys that meet safety standards. Where the imported toys do not conform to the safety standards, the agencies will issue a disposal notice. If the toys have defects which may endanger personal health or safety, or harm property or the environment, the inspection and quarantine agency will issue an order to return or destroy the defective toys. Toys with other defects may be re-worked under the supervision of the agencies and sold or used after the quality is confirmed by another inspection.

### **4.2 Export**

#### **a) registration**

Enterprises can engage in the production and export of toys only after the toys intended for export are registered with the inspection and quarantine agencies.

#### **b) inspection standard**

The inspection is subject to the technical regulations or standards of the importing country. Where parties to the trade agree on technical standards more stringent than the above technical regulations or standards, such agreement prevails. If no technical standards in the importing country are available, the technical standards of the PRC apply.

#### **c) inspection results**

If toys do not comply with the safety standards, the inspection and quarantine agencies at the place of production will issue a noncompliance notice. If the toys comply with the safety standards, the inspection and quarantine agencies will issue a certificate of compliance. Such certificate of compliance will stipulate a

period of time during which the consignor must apply for testing of the toys with the inspection and quarantine agencies at the port of exit. Only toys that pass such test can be exported.

Where a consignor fails to export the toys within the inspection validity period or changes the country or region of destination to one where with different inspection standards, the consignor may apply for a new inspection with the inspection and quarantine agencies.

## **5. Recall**

The Toy Recall Provisions are applicable for recalling toys produced or sold in PRC.

### **5.1 Information Management**

The AQSIQ must set up an information system on the defects and recall of children's toys. Local quality and technology supervision departments must collect the information regarding the defects of children's toys and consumer complaints arising therefrom and report to the AQSIQ.

In order to promote such information system, the manufacturers of children's toys must record the information regarding the product design, purchase of raw materials, production and sale, labels as well as the consumer complaints, product damage, disputes and product recalls in foreign countries and file the said information with local quality and technology supervision departments. Similarly, the sellers of children's toys must record the information on purchase and sales, and must properly maintain the information on consumer complaints, product damages and disputes.

### **5.2 Defect Investigation and Risk Assessment**

A manufacturer who becomes aware of any potential defects of its toy products must promptly conduct an investigation to ensure whether such potential defects exist. Where the quality and technology supervision department at and above provincial level starts a defect investigation, the manufacturer and the seller must assist in and provide necessary documents for the investigation. If the toys are found defective, an assessment on the risks of the defects must be conducted in accordance with relevant law and regulations. The result of the assessment will form the basis for determining whether or not to recall the defective products.

### **5.3 Defective Toy Recall**

Toys can be voluntarily recalled by the manufacturer or the AQSIQ can order a compulsory recall.

#### **a) Voluntary Recall**

If an investigation determines that the toy products are defective, the manufacturer must:

- immediately cease the production of the products in question
- publish information on the defect for the general public
- notify the sellers to cease sale of the products
- notify the consumer to stop using the products
- voluntarily recall the defective products

The manufacturer must formulate a recall plan and submit it to the local quality and technology supervision department at provincial level for filing. Any changes in the plan must be reported to the supervisory department, which will keep the AQSIO informed of the filing and changed information. Where the local quality and technology supervisory department finds the voluntary recall is not as effective as anticipated, it may urge the manufacturer to take more effective measures, or the department itself may take other measures in accordance with the law. Within 15 working days after the lapse of the recall period as set out in the recall plan, the manufacturer must voluntarily submit an overall recall summary to the supervisory department.

## **b) Compulsory Recall**

Where the toy products are defective and the manufacturer fails to perform a voluntary recall, or where the toy products are found to be defective by spot check and may cause damage to personal health and safety, the AQSIO should order a compulsory recall and inform the local quality and technology supervisory department at provincial level (at the place of business of the manufacturer) to take corresponding measures.

After receiving the order from the AQSIO, the manufacturer must:

- immediately cease the production and sale of the products in question
- submit a recall plan to the AQSIO within five working days, which, if approved, is the basis for the recall (if such recall plan is not approved, the recall must be conducted in accordance with requirements as stipulated by the AQSIO)
- submit a step-by-step recall summary during the recall
- formulate and maintain a record for the compulsory recall and submit an overall recall summary within 15 working days after the lapse of the recall period

## 5.4 Legal Liabilities

Arts. 35–41 of the Toy Recall Provisions provide the manufacturer’s administrative liabilities for violations.

### a) Administrative Penalties

- warning
- order of correction
- imposition of fines

### b) Circumstances of Liability

- failure to file relevant information or to establish information record according to the Toy Recall Provisions
- failure to conduct an investigation into a potential defect in a timely manner; refusal to assist the quality and technical supervisory department at and above provincial level in the defect investigation; or failure to report the investigation result to the quality and technical department at and above provincial level pursuant to the Toy Recall Provisions
- failure to cease the production of the defective children toys (Toy Recall Provisions, Arts. 21 and 28)
- failure to publish information on the defects to the general public, to notify the sellers to cease the sales of the products, to notify the consumer to stop the consumption of the products or to voluntarily recall the defective products pursuant to Arts. 21 and 22 of the Toy Recall Provisions
- failure to formulate a recall plan (Toy Recall Provisions, Art. 23), or failure to submit a overall recall summary (Toy Recall Provisions, Art. 29)
- failure to submit various documents (Toy Recall Provisions, Arts. 26, 32 and 34)
- failure to perform recall obligation (Toy Recall Provisions, Art. 31)

The Toy Recall Provisions contain administrative penalties for all these deficiencies.

# Chapter 4: Pharmaceuticals

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## 1. Relevant Laws and Regulations

The following list provides an overview of the most important laws and national regulations that are relevant to pharmaceutical quality liability in the PRC. Additional legislation may apply in certain cases.

### a) National Laws

- **Administration of Pharmaceuticals Law of the PRC** of 28 February 2001 ("Pharmaceuticals Law")
- **Criminal Law of the PRC** of 28 February 2009 ("Criminal Law");

### b) National Regulations

- **Implementing Rules of Administration of Pharmaceuticals Law** of 4 August 2002, released by the State Council ("Pharmaceuticals Rules");
- **Administrative Norms on Quality in Production of Pharmaceuticals**, released by the State Supervisory Administration for Pharmaceuticals on 18 June 1999 ("Pharmaceuticals Production Norms");
- **Administrative Norms on Quality in Trading of Pharmaceuticals**, released by the State Supervisory Administration for Pharmaceuticals on 30 April 2000 ("Pharmaceuticals Trading Norms");
- **Measures for the Administration of Pharmaceuticals Registration**, approved by the State Administration for Food and Pharmaceuticals on 18 June 2007 ("Pharmaceuticals Registration");
- **Special Rules of the State Council on Strengthening the Supervision and Administration of the Safety of Food and Other Products** of 26 July 2007 ("State Council Special Rules");
- **Measures for the Administration of Pharmaceuticals Recalls**, approved by the State Administration for Food and Pharmaceuticals on 6 December 2007 ("Pharmaceuticals Recall Measures")

## 2. Legal Concepts

In general, defective pharmaceuticals can be classified by two categories, fake pharmaceuticals and inferior pharmaceuticals, both of which are prohibited from production and sale. The Pharmaceuticals Law provides the conditions and circumstances under which pharmaceuticals are deemed either fake or inferior (Arts. 48 and 49).

According to Art. 48 of Pharmaceuticals Law, pharmaceuticals, as a general rule, are deemed to be fake if:

- (1) the ingredients of the pharmaceutical do not conform with the ingredients specified in the state pharmaceutical standard; or
- (2) it is a non-pharmaceutical product being passed off as a pharmaceutical or it is one kind of pharmaceutical being passed off as another kind of pharmaceutical.

Pharmaceuticals are in particular treated as fake if:

- (1) the State Council's pharmaceuticals regulatory department has prohibited the use thereof;
- (2) the Pharmaceuticals Law requires that approval be obtained for the production or import of the pharmaceutical but the same are produced or sold without such approval, or the Pharmaceuticals Law requires that the pharmaceuticals be inspected but the same are sold without having been inspected;
- (3) they have gone bad;
- (4) they have been contaminated;
- (5) they were produced with raw materials for which the Pharmaceuticals Law requires an approval number, but no such approval number was obtained; or
- (6) the indication(s) or primary function(s) indicated on the pharmaceutical exceed the stipulated scope of indications or primary functions.

Pharmaceuticals containing ingredients that do not conform to state pharmaceutical standards are deemed inferior (Pharmaceuticals Law, Art. 49).

Pharmaceuticals are treated as inferior if:

- (1) the period of safe use is not indicated or has been altered;

- (2) the batch number is not indicated or has been altered;
- (3) its expiration date has passed;
- (4) the packaging materials or the container in direct contact with the pharmaceutical has not been approved;
- (5) a colorant, preservative, flavouring, corrective or excipient has been added without permit; or
- (6) other circumstances where the pharmaceuticals do not conform with the pharmaceutical standards.

### **3. Tortious Product Liability and Contractual Product Liability**

As pharmaceutical quality liability falls within the general scope of product liability, customers who are injured and harmed by the pharmaceuticals may claim against the pharmaceuticals producer or trader on the ground of either tortious product liability or contractual product liability as explained in detail in Chapter 1 of this booklet.

## 4. Administrative Liability

Unless specific laws governing the supervision and administration of product safety exist, the State Council Special Rules apply (State Council Special Rules, Art. 2). Therefore, this section focuses on two legal provisions, the Pharmaceuticals Law and the State Council Special Rules.

### 4.1 Licensing System

The PRC has adopted a licensing system for pharmaceutical manufacturing, trading and medicinal preparations (Pharmaceuticals Law, Arts. 7, 14 and 23). Enterprises or medical institutions cannot engage in such activities without a licence. Nonconforming entities could bear the following administrative liabilities:

- closing down of operations in accordance with the law;
- confiscating of illegally produced or sold pharmaceuticals;
- confiscating of illegal proceeds derived therefrom; and
- a fine of between two and five times the value of pharmaceuticals illegally produced or sold.

### 4.2 Production and Sale of Fake or Inferior Pharmaceuticals

The production (including compounding) and sale of fake or inferior pharmaceuticals are prohibited (Pharmaceutical Law, Arts. 48 and 49).

In case of fake pharmaceuticals, the following administrative liabilities may be incurred:

- confiscation of illegally produced or sold pharmaceuticals;
- confiscation of illegal proceeds derived therefrom;
- a fine of between two and five times the value of pharmaceuticals illegally produced or sold;
- revocation of the perpetrator's pharmaceutical approval certificate, if any;
- suspension of production or business and rectification; and/or
- in serious cases, revocation of the Pharmaceutical Production Licence, Pharmaceutical Trading Licence or Preparation Compounding Licence for a Medical Institution, if any.

In case of inferior pharmaceuticals, the following administrative liabilities can be incurred:

- confiscation of illegally produced or sold pharmaceuticals;
- confiscation of illegal proceeds derived therefrom;
- a fine of between the value of pharmaceuticals illegally produced or sold and three times such value;
- in serious cases, suspension of production or business and rectification; and/or
- revocation of the Pharmaceutical Production Licence, Pharmaceutical Trading Licence or Preparation Compounding Licence for a Medical Institution, if any.

The raw materials, excipients, packaging materials and production equipment exclusively used in the production of the fake or inferior pharmaceuticals by the producer should be confiscated. In addition to the above, where the circumstances are serious, the person directly in charge and other directly responsible personnel of an enterprise or other entities producing or selling fake or inferior pharmaceuticals are not permitted to engage in the production and trade of pharmaceuticals for ten years.

#### **4.3 Certification under Pharmaceuticals Production Norms, Pharmaceuticals Trading Norms and Other Relevant Quality Control Standards**

Pharmaceutical producers and traders must arrange production or trade in pharmaceuticals in accordance with the Pharmaceuticals Production Norms and the Pharmaceuticals Trading Norms (Pharmaceuticals Law, Arts. 9, 16 and 79) (hereinafter collectively "Pharmaceuticals Norms").

A pharmaceutical producer or a pharmaceutical trader who fails to conform to the above Pharmaceuticals Norms is subject to the following administrative liabilities (Pharmaceutical Law, Art. 79):

- warning, order of correction within a specified time limit.

In case of failure of correction within the said time limit:

- suspension of production or business;
- rectification;
- a fine of between RMB 5,000 and RMB 20,000; and/or

- in serious cases, revocation of the Pharmaceutical Production Licence or Pharmaceutical Trading Licence.

#### 4.4 Purchase and Sale of Pharmaceuticals

Except for the traditional Chinese medicinal materials not subject to the issuance of approval numbers, pharmaceutical producers, pharmaceutical traders and medical institutions must purchase pharmaceuticals from enterprises qualified to produce or trade in pharmaceuticals (Pharmaceuticals Law, Art. 34). Violations are subject to the following administrative penalties (Pharmaceuticals Law, Art. 80):

- order of correction;
- confiscation of purchased pharmaceuticals;
- a fine of between two and five times of the value of pharmaceuticals illegally purchased;
- confiscation of illegal proceeds;
- in serious cases, revocation of the Pharmaceutical Production Licence or Pharmaceutical Trading Licence.

#### 4.5 Import and Export

Pharmaceuticals must be imported through a port which is authorised for the importation of pharmaceuticals (Pharmaceuticals Law, Art. 40). Every import has to be registered by the importer with the pharmaceutical regulatory department of the place where the port is located. If the importer fails to register with the pharmaceutical regulatory department, the administrative liabilities as below may be imposed (Art. 81):

- warning and order of correction within a specified time limit;
- in case of failure of correction, revocation of the registration certificate for pharmaceuticals importation.

Imported pharmaceuticals must comply with the relevant technical standards and the requirements on inspection (State Council Special Rules, Art. 8). If the importer or seller practices fraud in the course thereof, the importer or seller could bear the following administrative penalties:

- confiscation of pharmaceuticals and illegal proceeds;
- a fine of three times of the value of the pharmaceuticals.

The producer or trader of exported products must ensure that product quality complies with the standards of the country or region where they are exported, or with the stipulations of the contract (State Council Special Rules, Art. 7). In some cases laws and regulation require pre-export inspection. If the producer or trader evades inspection or practices fraud in the course thereof, the following administrative penalties may be imposed:

- confiscation of pharmaceuticals and illegal proceeds;
- a fine of three times the value of the pharmaceuticals.

## 4.6 Examination and Acceptance of the Pharmaceuticals

Pharmaceutical traders must establish and implement a system for the examination and acceptance of the pharmaceuticals they purchase to verify the pharmaceutical quality certificates and other marks before accepting them (Pharmaceuticals Law, Art. 17). The traders must require the suppliers to provide inspection reports issued by qualified inspection institutes in terms of a batch of the products purchased (State Council Special Rules, Art. 5). Products without the inspection report are not allowed to be sold. If the trader is in violation of such requirement, the following are the subsequent administrative liabilities:

- order to cease the sale;
- confiscation of illegal proceeds and products illegally sold;
- a fine of three times the value of the products;
- in serious cases, revocation of the licence.

## 4.7 Recall

Promulgated and effective on 6 December 2007, the Pharmaceuticals Recall Measures govern the recall of pharmaceuticals sold in the PRC. "Defect" refers to the unreasonable danger in pharmaceuticals which may endanger the personal health and safety and which is caused by the research, development or production of the pharmaceuticals in question.

### 4.7.1 Classes of Recall

Where a manufacturer of pharmaceuticals finds potential defects in the pharmaceuticals it produced, it must conduct a pharmaceutical defect investigation, which may also

be conducted by the pharmaceutical regulatory department. In the latter case, the manufacturer must provide assistance. After the pharmaceutical defect investigation, a defect assessment must be arranged.

Based on the pharmaceutical defect assessment, recalls for defective pharmaceuticals can be divided into three classes:

- first class recall, for pharmaceuticals that may cause serious harm to a person's health;
- second class recall, for pharmaceuticals that may cause temporary or reversible harm to a person's health;
- third class recall, for pharmaceutical that generally would not cause harm, but are recalled for other reasons.

#### **4.7.2 Recall Process**

Recalls of defective products are either voluntary, as initiated by the manufacturer, or compulsory, as initiated by the competent authority.

##### **a) Voluntary Recall Process**

The manufacture who initiates the recall must:

- formulate a recall plan and prepare for implementation;
- inform relevant trading companies and other entities to cease the sale or consumption of the defective pharmaceuticals;
- at the same time, report the recall to the pharmaceutical regulatory departments at provincial level.

For first class recalls, the notice and report must be made within 24 hours after making a recall decision; for second class, 48 hours; and for third class, 72 hours.

- After the commencement of the recall, the assessment report and the recall plan must be filed with the pharmaceutical regulatory department within one day in cases of first class recalls, three days in cases of second class recalls and seven days in cases of third class recalls. For first class recalls, after receiving the required materials, the regulatory department must report to the State Food and Drug Administration.

- During the recall process, reports must be issued to the pharmaceutical regulatory department at the provincial level every day for first class recalls, every three days for second class recalls and every seven days for third class recalls.
- The manufacturer must keep detailed records of the disposition of the recalled pharmaceuticals.
- After completion of the recall, the manufacturer must submit the overall conclusion of the recall to the pharmaceutical regulatory department at the provincial level.
- Within ten days after receiving the overall conclusion, the pharmaceutical regulatory department must arrange examination and assessment of the recall, and notify the manufacturer of the results.

#### **b) Compulsory Recall Process**

- The regulatory department makes a decision on the recall and notifies the manufacturer.
- After receiving the notice, the manufacturer informs relevant trading companies and using entities to cease the sale or consumption of the defective pharmaceuticals.
- A recall plan is formulated and preparations for implementation are made.

In addition, the items noted for voluntary recalls also apply in a compulsory recall process.

For both voluntary recall and compulsory recall, if the pharmaceutical regulatory department finds the result of the recall unsatisfactory, or finds it necessary to take more effective measures, it may require the manufacturer to arrange another recall or expand the scope of the recall.

### **4.7.3 Legal Liabilities**

According to the Pharmaceuticals Recall Measures, the following administrative liabilities may be incurred:

#### **a) Administrative Penalties**

- warning;
- order of correction within a specified time limit;

- a fine (either three times the value of the pharmaceuticals or RMB 3,000);
- revocation of Pharmaceutical Approval Certificate;
- revocation of Pharmaceutical Production Certificate.

#### **b) Liability Circumstances**

- failure to arrange voluntary recall despite awareness of potential defects;
- refusal to arrange recall after receiving notice of compulsory recall;
- failure to inform relevant trading companies and pharmaceutical users to cease the sale or consumption of the defective pharmaceuticals;
- refusal to take measures as duly required by the pharmaceutical regulatory department;
- failure to keep a detailed record of the recall process;
- failure to establish a recall system, refusal to provide assistance in the pharmaceutical defect investigation conducted by the regulatory department, failure to submit relevant materials as required by the Pharmaceuticals Recall Measures and failure to report to the regulatory department for filing in cases of alteration of the recall plan.

## 5. Criminal Liability

Arts. 141 and 142 of the Criminal Law apply specifically to pharmaceuticals. Manufacturers and sellers of fake pharmaceuticals that could seriously harm a person's health are subject to:

- detention or imprisonment for not more than three years; and/or
- a fine of between 50% and two times the sales revenue.

Manufacturers and sellers of fake or inferior pharmaceuticals that cause serious harm to a person's health are subject to:

- imprisonment for between three and ten years; and
- a fine of between 50% and two times the sales revenue.

Manufacturers and sellers of fake pharmaceuticals that cause death or other exceptionally serious harm to a person's health are subject to:

- imprisonment for between ten years and life;
- capital punishment;
- a fine of between 50% and two times the sales revenue or confiscation of property.

Manufacturers and sellers of inferior pharmaceuticals that cause exceptionally serious consequences are subject to:

- imprisonment for between ten years and life; and
- a fine of between 50% and two times the sales revenue or confiscation of property.

If a company is held criminally liable for supplying defective products (including pharmaceuticals), the company itself is only subject to a fine (Criminal Law, Art. 150). The person in charge of the company and other relevant responsible persons are subject to the criminal sanctions mentioned above.

# Chapter 5: Motor Vehicles

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## 1. General

### 1.1 Introduction and Applicable Provisions

Due to the potentially serious consequences of driving a defective motor vehicle, this is another area strictly governed by product liability provisions.

As mentioned in Chapter 1, motor vehicles, inter alia, fall within the scope of the newly formulated Defective Products Recall Rules, which have been published by the PRC State Council for soliciting public opinion. In fact, the automotive industry was the first industry in the PRC to be a target of product liability measures. On 12 March 2004, the Administrative Regulations on the Recall of Defective Motor Vehicles (“Motor Vehicle Recall Regulations”), the first set of recall provisions in the PRC, were jointly promulgated by the AQSIQ, the State Committee of Development and Reform, Ministry of Commerce and the General Administration of Customs.

In addition to the laws and regulations mentioned in Chapter 1 hereof, which generally apply to motor vehicles, specific legislation also applies in this area. The Motor Vehicle Recall Regulations, the most important legislation in this area, apply to any import, export, sale, leasing or repair that occurs in the PRC (Art. 2).

### 1.2 Important Cases

- **Shangdong Yutai Safflower Products Co., Ltd. v. Chang’an Ford Mazda Auto Co., Ltd.** (decided 15 December 2008), Beijing Chaoyang District People’s Court;
- **Liu v. Beijing Daimler-Benz Chrysler Auto Co., Ltd. and Haerbin Yuegang Xianfeng Automobile Sale and Maintenance Co., Ltd.** (decision date unknown, but handed down after 3 November 2008), Beijing No. 1 Intermediate People’s Court;
- **Yang v. Qirui Automobile Co., Ltd. and the Beijing Tengyuan Auto Service Centre** (decided 15 March 15 2004), Beijing Chaoyang District People’s Court;
- **Deng and Li v. Auto Trading Co., Ltd., Beijing** (decided 6 August 2003), Beijing No. 2 Intermediate People’s Court;

- **Chen Meijin and Lin Dexin v. Mitsubishi Auto Industry Co., Ltd.** (decided 10 August 2000), Beijing No. 2 Intermediate People's Court No.2;
- **Zhang Jieting v. Toyota Automobile Co., Ltd.** (decided 16 May 1996), Beijing Intermediate People's Court (Haidian);
- **Dong Jing Chun v. Si Ping Zhuan Yong Automobile Factory Corporate Group** (decision date unknown, but handed down after 10 January 1995), Jilin Higher People's Court.

## 2. Essential Features of Product Defectiveness

### 2.1 Technical Safety Standards for Motor Vehicles

Manufacturers must comply with PRC technical safety standards for motor vehicles. These standards cover areas such as:

- maximum height, breadth and length of vehicles;
- engine power;
- layout;
- compulsory fitting of seatbelts;
- vehicle lighting;
- fuel tank;
- noise level.

### 2.2 Defects in Cars – Examples from Case Law

#### a) Defective Windscreen

In *Chen Meijing and Lin Dexin v. Mitsubishi Auto Industry Co.*, plaintiff's husband was driving in plaintiff's sports utility vehicle, which was manufactured by defendant. While driving, the vehicle's windscreen shattered and injured Mr. Lin, who died as a result of the accident.

The Beijing No. 2 Intermediate People's Court accepted, in accordance with the principle of *res ipsa loquitur* ("the thing speaks for itself"), that the shattering of the windscreen would not normally have occurred unless someone (the manufacturer) was negligent, or there was a defect. In addition, defendant did not bring any evidence to show that the windscreen was not defective or that another external force had led to the breaking of the windscreen.

#### b) Inadequate Operating Instructions

In *Zhang Jieting v. Toyota*, the Beijing Haidian Intermediate People's Court held that operating instructions that came with the vehicle and did not sufficiently warn the user about the possible malfunction of the airbags constituted a defect. The defectiveness of a product due to non-existent or inadequate operating instructions

derives from Art. 18 (1) of the Consumer Protection Law. This regulation requires that a product that poses a danger to person or property be equipped with a clear warning, an explanation of the product's functions and instructions to avoid danger.

### c) Defectiveness of the Rim and Spokes of a Steel Rim

**Dong Jing Chun v. Si Ping Zhuan Yong Automobile Factory Corporate Group** was based on the following facts: Plaintiff was driving a truck manufactured by defendant when the back wheels broke and caused the vehicle to roll over. The permissible weight of the vehicle was ten tons. However, plaintiff had clearly overloaded it with vehicle parts. The gross weight of the laden vehicle at the time of the accident was 12.9 tons.

The Jilin Province Higher People's Court held that the rim and spokes of the vehicle's steel wheels were faulty as the wheels exhibited not only microscopic fissures, but also additional impurities in the processed steel.

The Court rejected defendant's argument that it could not be held liable for impurities in the steel since it was only responsible for the assembly of the vehicle, and not for the manufacture of the raw materials.

The Court further explained that plaintiff's contributory negligence did not exclude finding the seller partially liable. Since it was established that plaintiff had overloaded the vehicle, and that this had contributed to the overturning of the vehicle, defendant was only liable for 80% of the damage and plaintiff had to bear the remaining 20%. This decision had its source in Art. 131 of the Civil Law, which provides that if the injured party bears part of the fault for the injury suffered, then the civil liability of the injurer will be reduced. In other words, the PRC has adopted the "comparative fault-based" system in the adjudication of damages. This differs from the United States, in particular, in which the "contributory negligence system" ("all or nothing principle") is applied.

### d) Excessive Noise Levels

In July 2002, Mr. Yang purchased a Qirui brand car from the Beijing Tengyuan Auto Service Centre. Finding the operational noise of the vehicle was unbearably loud, he had the car repaired six times. The Beijing Tengyuan Auto Service Centre could not, however, remedy the noise problem.

The Beijing Chaoyang District People's Court held in **Yang v. Qirui Automobile Co. Ltd. and the Beijing Tengyuan Auto Service Centre** that the car was defective because the noise produced by plaintiff's vehicle was louder than that of other vehicles of the same model.

**e) Engine Explosion and Crooked Connecting Rod**

In **Shandong Yutai Safflower Products Co., Ltd. v. Chang'an Ford Mazda Auto Co., Ltd.**, plaintiff bought a car manufactured by defendant on 26 July 2008. One month later, the engine of plaintiff's car exploded.

During the court proceedings, a report from an expert witness showed that the explosion of the engine was due to a crack in a connecting rod. However, as the engine had been stored for too long after the explosion, the expert witness could not reach a definite conclusion whether the crack in the connecting rod was due to misuse by plaintiff or a manufacturing defect.

Defendant argued that the explosion was caused by improper use. However, the court held that since it could not be excluded that the explosion was due to a manufacturing defect, and since defendant did not bring any evidence to prove that the car was not defective, defendant should be held responsible for the consequence caused by the explosion.

**f) Defective Airbag (Case No. 1)**

In **Deng and Li v. Auto Trading Co. Ltd. in Beijing**, plaintiff bought a BMW from defendant on 16 February 2002. On March 21, the four airbags on the passenger side of the vehicle opened without any external impact. The activation of the airbags injured the passenger's face and eyes.

Defendant argued in court that the opening of the airbags was caused by an earlier accident that the vehicle was involved in. The State Oversight Authority for Car Quality and a testing centre determined that plaintiff's vehicle had previously been in at least one accident, but that this did not cause the activation of the airbags. The Beijing No. 2 Intermediate Court decided that the activation of the airbags could be traced back to a design fault involving road and traffic conditions in China.

The court went so far as to say that even if the product defect did not directly cause injury to plaintiff, the seller would be liable.

**g) Defective Airbag (Case No. 2)**

**Liu Wenzhi v. Nuohua Corp.** was based on the fact that the airbags of plaintiff's car, manufactured by defendant, did not open on impact during an accident. As a result, plaintiff lost consciousness and suffered a broken nose, and plaintiff's memory was permanently impaired as a result of the impact.

The Beijing court held that, although the fitting of airbags was not compulsory according to Chinese law at the time of the accident, defendant was liable, since

it had affirmed a higher safety standard by installing airbags and providing documentation for this safety equipment in the driver's handbook.

According to the court, the car manufacturer had a duty to inform the consumer of the inherent limitations of the airbags. Defendant had to reveal the following facts:

- the airbags did not function properly if the speed of the vehicle at the time of impact was less than 14 – 16 km/h;
- the airbags would not be released if the object of collision was "stable";
- the airbag functioned only in frontal collisions.

This decision shows that compliance with Chinese safety standards does not necessarily protect the manufacturer from liability. Chinese courts will apply higher safety standards if the manufacturer has imposed these on itself. This stance is also revealed in Art. 1 of the Consumer Rights Contravention Provisions. This provision now establishes that if a manufacturer makes a commitment to a consumer that is stricter than the prescribed legal requirements, it must fulfil the assumed obligations.

#### **g) Defective Airbag (Case No. 3)**

**Liu v. Beijing Bentz-Daimler Chrysler Auto Co., Ltd. (first defendant) and Haerbin Yuegang Xianfeng Automobile Sale and Maintenance Co., Ltd.** (second defendant) was based on the fact that the driver's side airbag in plaintiff's car, manufactured by first defendant and sold by second defendant, did not open on impact during an accident. However, the airbag of the front passenger seat opened. As a result, the person on the passenger seat was only injured, whereas the driver, Liu, died.

The Beijing court held that both airbags should have opened at the same time. The fact that one airbag opened while the other one did not indicated a defect. Comparing the passenger's less severe injuries to Liu's, the court further held that the defect in the car caused Liu's death and held both defendants jointly and severally liable.

### **3. Administrative Liability**

The AQSIO announced in 2004 the Motor Vehicle Recall Regulations, which came into force on 1 October 2004.

From the promulgation of the Motor Vehicle Recall Regulations to the end of 2008, a total of 1,840,000 defective motor vehicles relating to 180 vehicle types manufactured by 54 PRC and foreign car manufacturers were recalled. In 2008, such recalled motor vehicles amounted to 538,629, which exceeds the total number of the previous four years.

#### **3.1 Definition of Motor Vehicle Defect**

Art. 5 (2) of the Motor Vehicle Recall Regulations defines "defect" as an unreasonable danger for the safety of people or property, which arises as a result of the design, manufacture or from other grounds of a group, model or category of vehicle products in an identical and general way, or if the vehicle products are otherwise not in compliance with relevant national vehicle safety standards.

#### **3.2 Principles for Constituting a Motor Vehicle Defect**

- (1) a testing authority has determined through tests that automobile products do not comply with the technical regulations and national standards for vehicle safety;
- (2) a design or manufacturing defect has caused damage to person or property;
- (3) no injury to person or property has occurred, but on the grounds of measurements, tests and reasoning from the evidence it is determined that in particular circumstances the defect may cause injuries.

#### **3.3 Enforcement Mechanisms**

The manufacturer may voluntarily recall a defective product (Motor Vehicle Recall Regulations, Art. 9 (2)). If the manufacturer fails to do so, the competent authority may order the manufacturer to execute the mandatory recall (Motor Vehicle Recall Regulations, Art. 9 (3)). The AQSIO is responsible for the organisation and administration of recalls that are conducted throughout the nation (Motor Vehicle Recall Regulations, Art. 6 (1)). The corresponding technical authorities at the regional level are responsible for the regional recall actions (Motor Vehicle Recall Regulations, Art. 6 (3)). Any unit or person has the right to report possible product defects to the authorities and thereby initiate a recall action (Motor Vehicle Recall Regulations, Art. 19 (1)).

### 3.4 Fundamental Duties and Consequences of Breach of Duty

- (1) Manufacturers or importers of motor vehicle products are responsible for recalling defective vehicle products that they have produced or imported according to the Motor Vehicle Recall Regulations, and bear the cost of remedying the defects and the necessary transportation fees. The sellers, lessor and repairers of vehicle products must assist the manufacturers in performing their recall obligations. (Motor Vehicle Recall Regulations, Art. 3).
- (2) If the manufacturer has confirmed the defect and decides to implement a voluntary recall, it must inform the relevant authorities in writing within five working days and request the sellers within ten working days to cease sales. Foreign manufacturers must also request the importer within ten working days to stop the import and sale of the product (Motor Vehicle Recall Regulations, Arts. 20 (1), 25 (4) and 26).
- (3) If the competent authority has ordered the manufacturer to implement a mandatory recall, the manufacturer must request the seller, within five days after receiving the authority's order, to cease selling the defective product. Within this same period a foreign manufacturer must announce to importers a stop to import and sales (Motor Vehicle Recall Regulations, Art. 31 (1)).
- (4) Sellers, lessors or repairers may in a serious case be punished with an administrative fine of RMB 1,000 to RMB 5,000 if they do not (Motor Vehicle Recall Regulations, Arts. 41 and 17):
  - report the potential defect to the manufacturer and the relevant authorities;
  - cooperate with the competent authority in executing the investigation and provide the necessary documentation;
  - cooperate with the manufacturer in recalling the defective vehicle products.
- (5) A fine of RMB 10,000 to RMB 30,000 may be imposed on the manufacturer if (Motor Vehicle Recall Regulations, Art. 42):
  - it deliberately conceals the seriousness of a defect;
  - the relevant parties seek to conduct a voluntary product recall in order to evade supervision by the responsible authorities;
  - the recall of defective products fails to reach the anticipated objective due to the faults of the manufacturers, which causes the reoccurrence of damage.

### **3.5 Recall Term**

The term for recall of the defective motor vehicle products, in case of assembly, is the period from its delivery to the first owner of the vehicle to the period of safe use as instructed by the vehicle manufacturer (Motor Vehicle Recall Regulations, Art. 7). If the vehicle manufacturer fails to clarify the period of safe use, or if it is less than ten years, the term will be ten years after the date when the seller delivers the car to the first owner.

The use period for components and parts of car products that are easily damaged is the time limit for their recall. The time limit for recalling car tyres is three years from delivery to the first owner of a vehicle.

### **3.6 Liability of Damages**

The recall of defective vehicles does not relieve the manufacturer from its obligation to pay damages to vehicle owners or third parties injured by the defective product (Motor Vehicle Recall Regulations, Art. 44).

### **3.7 Conclusion**

Because implementing voluntary and mandatory recalls that follow the Motor Vehicle Recall Regulations can be costly and time-consuming, manufacturers should prepare ahead for this possibility.

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