

Melamine scandal highlights product liability challenges

Recent reports of melamine contamination of imported milk products have had a profound global impact, not only on the Chinese milk product manufacturers and exporters, but on other businesses in the supply chain. In Thailand, the effect of the melamine scandal on local business is reflected in lost sale opportunities and a general reduction in consumer confidence. The melamine scandal also highlights a point of concern for business operators providing products in Thailand: the impact of recent legislative changes on litigation of product liability claims. This article highlights these recent changes and suggests proactive strategies to reduce the potential liabilities for business operators.

Consumer Case Procedure Act of 2008: The Consumer Case Procedure Act of 2008 (CCP), which became effective on Aug 23, 2008, is a concerted effort by legislators to reduce the burden on consumers by simplifying claims against business operators and by eliminating filing fees and costs during the preliminary phase of litigation. The process is further simplified in that complaints may be filed by interested third parties, such as the Consumer Protection Board or associations acting on behalf of their members.

Not only is the cost burden removed under the CCP, but it also requires that a claimant only prove injury or damage resulting from the business operator's product or services. It is not necessary to prove fault or negligence. Furthermore, where there are factual issues known by the business operator, such as those related to the manufacture, design, assembly, and the provision of services, the burden of proof falls on the business operator.

The CCP also provides broad authority to the courts. For example, the CCP provides claimants with the right to seek, before or during trial, temporary injunctions and other protective measures against a business operator. Courts also have the right to impose punitive damages and liability on business operators, even if they have not been directly named in the complaint. Finally, where there is a judgment of liability against a business operator, that judgment can be used in a later consumer case involving the same defendant and nexus of facts.

Product Liability Act of 2008: In February of 2008 Thailand joined the ever-growing list of countries with specific product liability legislation. The Product Liability Act of 2008 (PLA), which becomes effective on Feb 20, 2009, imposes strict liability on business operators involved in the manufacture and sale of a defective product that causes harm to an individual.

Under the PLA, it is sufficient for an injured customer to prove that he was

injured or suffered damage from the operator's defective product while using the product in the way it was intended. A defendant-operator can therefore be held liable for the harm resulting from a defective product even if he has exercised reasonable care in its manufacture and sale. Further, a claimant need not have contracted with the defendant in order to claim for damages under the PLA.

Under both the CCP and the PLA, business operators are defined broadly. For example, an entity involved in the manufacture, distribution, sales, import, or in the granting of licences for others, could potentially face liability should the product sold contain a defect that causes harm to the user. This is particularly important for many manufacturers, who are not only involved in the manufacture and sale of products, but who also maintain strong brand recognition and intellectual property ownership rights.

With the implementation of the PLA, any injured person can sue, even if he is not the buyer or user of the product. Additionally, the Consumer Protection Committee, set up under the PLA, as well as any consumer advocacy group recognised under consumer protection laws, can sue on behalf of injured parties. Finally, the PLA specifically provides that in addition to compensation for actual damages, the court may award compensation for mental and punitive damages. For example, the court may award punitive damages if it can be shown that the defendant produced, imported or sold the product knowing that it was defective, acted with gross negligence or where it knowingly failed to take proper action to prevent further damage, such as by prompt product recall.

Proactive measures to limit liability: The melamine scandal and the implementation of laws reducing the historic burdens on filing individual products liability claims highlight the need for businesses to act prudently and, where unforeseen product crises arise, decisively in reducing liabilities and restoring consumer confidence. This can be done in various ways, including conducting thorough due diligence of partners in the supply chain. It can also be achieved through evaluation of product recall benefits. This is particularly important since Thailand has no specific legislation regarding product recall, but otherwise provides broad regulatory authority of agencies in seeking co-operation of business operators and imposing recall where necessary.

Written by Michael Ramirez, Consultant in the Dispute Resolution Department of Tilleke & Gibbins International Ltd. Please send comments or suggestions to Marilyn Tinnakul at marilyn@tillekeandgibbins.com