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PRODUCT LIABILITY IN SWITZERLAND

**CUBA: IMPLICATIONS OF TRADE
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A SINGLE PASSPORT FOR EC INVESTMENT SERVICES

PRODUCT LIABILITY IN SWITZERLAND

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It is essential that bankers should be aware of the general principles of product liability when assessing the creditworthiness of existing and new corporate and private customers, whether producers, wholesalers, or retailers. Both bankers and lawyers should be in a position to give their customers advice with respect to risk management in the new era of product liability.

This article gives an overview of Swiss product liability rules, outlines possible claims against producers and retailers/distributors under Swiss law, adds some international considerations, and gives a number of detailed guidelines on risk management in the new era of product liability that are largely applicable in any European jurisdiction.

Definition and Classification of Terms

Product Liability

The term product liability encompasses the liability for damage caused by products which are defective, dangerous, unhealthy or otherwise unsafe. Product liability is intended to cover loss arising from physical injury, damage to property, economic loss (eg medical expenses or lost earnings) and mental distress, but not damage to the product itself.

Producer

The producer is an individual/entity who manufactures and/or assembles a product or any part thereof.

Distributor

The distributor is an individual/entity who distributes a product to the user either directly (eg as a retailer) or indirectly (eg as a wholesaler).

Consumer

The consumer is an individual/entity who uses a product. He may or may not have a contractual relationship with a distributor or a producer.

Abbreviations

CO	Swiss Code of Obligations
The Convention	Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters made in Lugano on 16 September 1989
The Directive	EC Directive 85/324 on Product Liability
EC	European Community
EFTA	European Free Trade Association
FCR	Swiss Federal Court Reporter
PILA	Swiss Private International Law Act
SFr	Swiss Francs
USA	United States of America

OVERVIEW

Overview of the Law Relating to Defective Products

Under Swiss law there is no specific law on product liability. In

particular Switzerland – which is not an EC country – has not implemented EC Directive 85/324 on Product Liability (the Directive).

Producers and distributors can be sued in Switzerland under traditional rules of contract and tort only (see **Liability in Contract** and **Liability in Tort**, below). Under both contract law and the law of tort the consumer will have to establish that the damage was caused by the use of the product (see **Causation**, below). In addition, he will have to substantiate in detail the quantum of the damage (see **Quantum of Damage**, below) These rules are laid down in the Swiss Code of Obligations (CO).

Liability in Contract

The delivery chain (eg producer-wholesaler-retailer-consumer) consists of a series of contracts, most of which are contracts of sale (CO articles 184 ff). Typically, there is no direct contractual link between the producer and the consumer. However, there is usually a contract of sale between the consumer and the retailer. Accordingly, a consumer can only sue the retailer in contract, and not the producer, with whom he has no direct contractual relationship.

This at least is the current view of the Swiss Federal Court (the highest Swiss court). The German concept of construing privity of contract between a producer and a consumer (on the basis that the contract between the producer and its immediate contractual partner, eg a wholesaler, contains an implied warranty in favour of the consumer and the consumer can sue the producer on such warranty in contract) is not followed by the Swiss courts. Further, there is no indication that this argument will be accepted by Swiss courts in the near future.

Contractual liability based on a contract of sale can be twofold: it may be for a breach of a warranty or a breach of contract. The seller can exclude any warranty and disclaim its contractual liabilities. Claims against the seller are barred one year after delivery of the product (see CLAIMS AGAINST RETAILERS/DISTRIBUTORS, below).

Liability in Tort

Since there is usually no contractual relationship between the consumer and the producer, claims against the producer can generally only be made in tort (CO articles 41 ff).

An action in tort can be based on the so-called danger rule (*Gefahrensatz/principe du risque*) or on liability of the principal (*Geschäftsherrenhaftung/responsabilité de l'employeur*). Disclaimers are not possible under the law of tort. Claims in tort are barred one year after the consumer has been injured or suffered damage (see CLAIMS AGAINST PRODUCERS, below).

Causation

Under both contract law and the law of tort, the consumer has to prove that the damage was, in the specific instance, caused by the product and that, according to general experience of life, the use of the product can reasonably be expected to cause the damage in question.

However, a producer or distributor will not be liable for damage

caused by an event which was highly unlikely to occur. That is, the producer is not responsible for unforeseeable events and the concept of remoteness of damage applies.

Further, under special circumstances, a court can reduce or even refuse compensation, if the consumer is contributorily negligent.

If the damage was caused by different producers and/or distributors, eg by a component manufacturer and by the assembler, the consumer may recover full compensation from either party, ie either from the component manufacturer or from the assembler (joint and several liability). However, the consumer may only receive full compensation once. Further, the producer or distributor paying full compensation may have the right to recover in part or in full from other producers/distributors.

Quantum of Damage

Under both contract law and the law of tort, the consumer may recover damage arising from physical harm, property damage, economic loss (eg medical expenses or lost earnings) and mental distress.

In the case of contributory negligence of the consumer, the court may reduce the damages recovered or deny them altogether (CO article 44(1)). Other reasons for reductions are the fact that the producer or distributor was negligent to a minor extent only, or that the injured consumer was particularly disposed to be struck by the injury or disease in question (eg weak heart in case of heart attack). This differs from the "egg shell skull" rule in English common law, which provides that a defendant "takes a plaintiff as he finds him"; that is, that a plaintiff is entitled in principle to recover damages in full for a physical injury, even if he was already particularly disposed of that injury.

If the product causes the death of a consumer, the costs in connection with death, including the costs caused prior to death, eg hospitalisation costs, lost earnings etc have to be compensated (CO article 45(2)). The claimants in this case are the descendants of the deceased.

If the deceased consumer was responsible for supporting other persons (for example, his spouse or children), these persons have a claim against the producer or distributor for survivors' benefits, ie compensation for the support they could have expected to get from the deceased person, taking into account his and their life expectancy, their chance to find an alternative supporter (eg to remarry), and the economic potential of the deceased person.

Although the amount of damages is neither limited by the Swiss Code of Obligations nor by reasons of foreseeability, the Swiss courts adopt a conservative approach. They require the consumer to substantiate in great detail all recoverable damages arising from physical harm and economic loss. Punitive damages do not exist at all under Swiss law.

Pursuant to CO article 47 the injured consumer or, if he dies, his close relations can, at the Swiss court's discretion, be awarded additional compensation for mental distress. Unlike in the USA, such damages are likely to be small.

Some examples may illustrate the reluctance of the Swiss courts in awarding compensation for mental distress.

- (a) Aeroplane crash: two children dying in front of their parents; SFr 40,000 each for the mother and for the father (FCR 112 II pp 118 ff [1986]).
- (b) Car accident: death of husband; SFr 13,000 for the wife and SFr 5,000 for each of the two children (FCR 90 II pp 184 ff [1964]).
- (c) Explosion: total blindness of 43-year-old man: SFr 25,000, reduced to SFr 20,000 due to contributory negligence (FCR 89 II pp 24 ff [1963]).
- (d) Burn of 50% of the skin, loss of all fingers, hair of the head and

one ear, distorted face, painful suffering; SFr 40,000 (62 Schweizerische Juristen-Zeitung p 384 [1966]).

- (e) X-ray burn: distorted face of 54-year-old man, long-lasting, painful suffering; SFr 15,000 (FCR 53 II pp 419 ff [1927]).

CLAIMS AGAINST PRODUCERS

As stated above, the consumer's claim against the producer is usually based in tort, either on the so-called danger rule (see **Danger Rule**, below) or on liability of the principal (see **Liability of the Principal**, below).

If the consumer bought the product directly from the producer, the consumer would also have a contractual claim, as against the retailer (see CLAIMS AGAINST RETAILERS/DISTRIBUTORS, below).

Danger Rule (*Gefahrensatz/Principe du Risque*)

About 50 years ago, the Swiss Federal Court established – under the principles of negligence (CO article 41) – the so-called "danger rule", according to which, whoever creates a dangerous condition will be deemed to have been negligent unless he proves that he took the necessary safety measures to prevent injury or loss (FCR 66 II pp 114 ff [1940], FCR 79 II pp 66 ff [1953]). Only after considerable time was the rule applied to product liability claims. In this context the danger rule says that the producer is liable in negligence if it fails to take reasonable steps to avoid damage to the consumer of its products.

The first time the danger rule was explicitly mentioned in a product liability case was in 1961 (*Basler Juristische Mitteilungen* pp 180 ff [1961]). In this case a wine-grower had applied a plant-growth agent to his grapevines. About 70,000 grapevines were damaged by a frost as the agent caused a hypersusceptibility to frost. When the wine-grower sued the seller and the producer of the plant-growth agent, the Basle Court of Appeal ruled that the producer had created a dangerous condition and failed to take the necessary safety measures to avoid damage to the consumer. The court held that, despite the fact that the *Agricultural Yearbook* had mentioned such danger, the producer in particular failed to give warnings that the plant-growth agent should not be used for grapevines. Therefore, the producer was held negligent and liable to the wine-grower. The parties settled out of court when the case went to the Swiss Federal Court, so the point was never decided by the highest Swiss Court.

Under the danger rule, the producer must therefore either make its products safe or, if this is not possible, give sufficient warnings to the consumer.

Liability of the Principal (*Geschäftsherrenhaftung/Responsabilité de l'Employeur*)

A producer may also be sued in his capacity as principal (CO article 55). As such he is liable for the damage caused by his employees or other support staff in the course of their employment, whether they acted negligently or not. If the consumer shows that he was injured or suffered loss when using a dangerous product, the producer will be held liable unless he shows that he carefully selected, instructed and supervised the employees who manufactured the product.

In 1984, the Swiss Federal Court restricted the producer's ability to furnish such exonerating proof (FCR 110 II pp 456 ff [1984]). In the given case, a construction worker was heavily injured when a 700 kg reinforced concrete frame, lifted by a building dredger, was dropped on his right foot due to a faulty fixing set in the concrete. The Swiss Federal Court ruled that the producer was liable as principal – regardless of whether his employees were carefully selected, instructed and supervised – as the producer

could not show that he had made a final quality control inspection of the fixings set in the concrete frame. The court held that a producer of dangerous products must be able to show that he made a final quality control inspection or that the producer designed a product that, in all probability and almost certainly, excludes damage to the consumer. The court did not rule on the question whether the producer was also liable under the danger rule. The effect of the case is that since by definition it is impossible to design an inherently dangerous product so that it will definitely not cause damage to consumers, quality control inspections of dangerous products made available in Switzerland are of tremendous importance to any producer wishing to limit or exclude its liability.

Following this decision, the burden of proof on the producer is very difficult to discharge and the liability of the principal is all but strict. It follows that consumers tend to base their claims against producers primarily on liability of the principal.

Disclaimer

Disclaimers are only possible in Swiss contract law, not under the Swiss law of torts. As there is usually no contract between the consumer and the producer, the producer's disclaimer, whether in general business conditions, in instruction manuals, or in warranty forms, is not generally effective as against the consumer.

Limitation Period

All claims in tort, including claims under the danger rule and claims against a principal, are subject in Switzerland to a relatively short limitation period of one year commencing on the date on which the essential elements of damage as well as the identity of the producer liable for the damage are known to the injured consumer. In any event, the limitation period expires ten years after the date of the unlawful act, ie in the case of product liability, after the dangerous product has been manufactured (CO article 60).

Consumer's Burden of Proof and Producer's Defences

Under the danger rule, the consumer seeking recovery from the producer must prove:

- (a) the damage; and
- (b) that the product was dangerous; and
- (c) that his damage was caused by the product.

Under the rule of liability of the principal, the consumer must prove:

- (a) the damage; and
- (b) that the product was dangerous due to an act or omission of the producer's employees; and
- (c) that his damage was caused by the product (more precisely, by the employees' act or omission).

The producer has, inter alia, the following defences:

- (a) the consumer did not sufficiently substantiate his damage – in practice a very important defence; or
- (b) the producer took the necessary safety measures to prevent damage to the consumer; or
- (c) the producer carefully selected, instructed and supervised the employees who manufactured the product; or
- (d) the scientific and technical knowledge at the time did not permit the product to be seen as dangerous (“state of the art”); or
- (e) the consumer was contributorily negligent; or
- (f) the consumer was inclined to the injury or disease in question; or
- (g) the limitation period expired.

CLAIMS AGAINST RETAILERS/DISTRIBUTORS

Typically, the consumer enters into a sales contract with the retailer, but not with the wholesaler.

Against the *wholesaler*, the consumer can claim in tort only and such claims are extremely rare in Switzerland. If the wholesaler is sued at all, he would usually be sued together with the producer, in tort (see CLAIMS AGAINST PRODUCERS, above), based on the concept of joint and several liability.

Against the *retailer*, the consumer can claim for breach of warranty (see **Warranty Claim**, below), breach of contract (see **Breach of Contract Claim**, below), or in tort (see **Tort Claim**, below).

Warranty Claim

Under Swiss sales law, the retailer must supply the consumer with a product that not only accords with any express representations, but also shows the physical and legal qualities that are necessary for its intended use (CO article 197).

However, the retailer will not be liable if the consumer was aware, or should have been aware, of the deficiency of the product (CO article 200).

The consumer must notify the retailer as soon as he discovers the product's deficiency. Ordinarily, this means within a couple of days. Otherwise, the deficiency is presumed to be accepted, save in the case in which its existence was intentionally concealed or its disclosure withheld by the retailer (CO article 201).

The retailer selling the defective product is strictly liable for the damage directly arising from the breach of warranty, such as medical and litigation expenses and lost earnings (CO article 208(2)). As for further damages, the retailer is put under an obligation to show that he was not blameworthy (CO article 208(3)). There is an ongoing controversy as to where the borderline between direct damage and further damage has to be set.

Breach of Contract Claim

Alternatively, a consumer has the possibility of suing the retailer for breach of contract (CO articles 97 ff).

The Swiss Federal Court has held that the consumer must not only prove the breach of contract by the retailer, causation and the quantum of damage, but also that he immediately complained to the retailer once he discovered the defect. The retailer is not strictly liable and may prove that he was not blameworthy.

Thus, if the consumer is not successful in a warranty claim against the retailer, it is unlikely that he will succeed in a breach of contract claim, the latter not holding the retailer strictly liable, but allowing him the opportunity to prove that he was not blameworthy.

Tort Claim

In theory a claim in tort, comparable to the one against the producer, can also be brought against the retailer.

The retailer might be negligent in selling a dangerous product, thereby creating a dangerous situation. But a retailer is usually under a lesser obligation to take safety measures than a producer, since typically he has no influence on the technical safety measures and warnings of the product.

Disclaimer

A retailer who sells a product to a consumer can exclude any and all warranties (CO article 199). In addition, the retailer may, in the absence of wilful misconduct or gross negligence, on the part of himself or his employees, disclaim its contractual liabilities (CO articles 100/101).

Such disclaimer under a contract of sale is also effective against tort claims made in the context of contractual liability.

Limitation Period

The period of limitation for contractual warranty claims against a retailer is one year after delivery of the product. If the retailer intentionally deceives the consumer, the limitation period is ten years (CO article 210).

The period of limitation for breach of contract claims is ten years (CO article 127). However, if a breach of contract claim is made in the context of a product purchased from a retailer, the one-year limitation period for a warranty claim applies (FCR 77 II p 249 [1951], FCR 63 II p 407 [1937]).

At the time of writing, the Swiss Federal Court has not decided whether the one-year limitation period for warranty claims (starting with delivery of the product to the consumer) applies equally to tort claims against the retailer.

Consumer's Burden of Proof and Retailer's Defences

The consumer seeking recovery from the retailer under sales law must prove:

- (a) his damage; and
- (b) a breach of warranty or of a contractual obligation; and
- (c) that his damage was caused by the product (more precisely: by the breach of warranty or of the contractual obligation).

The retailer has, *inter alia*, the following defences:

- (a) the consumer did not sufficiently substantiate his damage – in practice a very important defence; or
- (b) the consumer did not promptly notify the retailer of the product's deficiency – also a very important defence; or
- (c) the consumer was aware, or should have been aware, of the deficiency; or
- (d) the retailer has disclaimed warranties and contractual liabilities; or
- (e) the retailer is not blameworthy for the breach of the contractual obligation; or
- (f) the consumer was contributorily negligent; or
- (g) the consumer was inclined to the injury or disease in question; or
- (h) the limitation period has expired.

INTERNATIONAL CONSIDERATIONS

Attempt to Introduce the Directive

The current Swiss law governing product liability is in many ways outdated. Landmark decisions by EC courts might be taken note of as a matter of comparison, but they would under no circumstances have a guaranteed impact on the Swiss courts' decisions.

Attempts to introduce special product liability legislation were made in 1979, but were soon abandoned. There is nevertheless a call for a complete revision of the law of tort, including product liability, and a Special Commission has been dealing with this since the autumn of 1988. In March 1991, a new attempt to introduce specific product liability legislation – *de facto* implementing the Directive – has been made in the Swiss Parliament. It is too early to predict what form the future Swiss law of tort, and especially product liability law, will take. The report of the Special Commission was completed in July 1991 and the revised product liability law might be enacted in 1993 or 1994. The legislative process would be accelerated if the Agreement on the European Economic Area (EEA) were to be approved by the Swiss population in a referendum which, currently, is scheduled for 6 December 1992.

EC Producers Subject to the Directive in Switzerland

The Swiss Private International Law Act (PILA) expressly deals

with product liability, providing for a choice by the consumer between the law of the producer's domicile and the law of the place where the product was purchased (PILA article 135(1)). A consumer seeking recovery from an EC (or US) producer or distributor before a Swiss court may therefore choose, instead of Swiss law, the law of the EC country (or the US state law) where the product has been manufactured or where he has purchased the product. This will most likely put him in a more favourable position.

However, the Act also explicitly states that the awards rendered by a Swiss court based on foreign product liability law may not exceed the amount that could be awarded under Swiss law (PILA article 135(2)). Thus, if US law is applied by a Swiss court, Swiss public policy would probably prevent the court from awarding punitive damages.

Swiss Producers Subject to the Directive in EC Countries

On the other hand, products manufactured in Switzerland will be subject to stringent product liability rules whenever imported into and sold in the EC (Directive article 3(2)).

Given this internationalisation of product liability laws, the producer friendly Swiss law will only apply throughout where products have been both manufactured and sold to the consumer in Switzerland.

Impact of the Lugano Convention

Until recently, Swiss producers and distributors could be sued at their Swiss domicile only (article 59 of the Swiss Constitution). However, the Lugano Convention was brought into force in Switzerland on 1 January 1992. Under the Lugano Convention, producers and distributors can be sued both in their place of domicile and at the place where the product causes harm (articles 2(1) and 5(3)). Accordingly, Swiss producers and distributors may be sued in any EC or EFTA country where their products cause harm. In addition, Swiss courts will recognise and enforce foreign judgments rendered against Swiss producers and distributors under the Lugano Convention (articles 26(1) and 34(2) of the Convention).

On the other hand, under the Swiss Private International Law Act, foreign producers and distributors can be sued at their foreign domicile or, if the product causes damage in Switzerland, at the place where the product causes harm (PILA article 129). The jurisdiction to deal with product liability claims lies with the ordinary cantonal courts. Their judgment can generally be appealed to the Swiss Federal Court, ie the highest Swiss court.

Other Conventions: Judicial Assistance

A Swiss court may call a witness from abroad, however he may not have to travel to Switzerland. He can request to be questioned by a court at his domicile. The Swiss court will, in this case, apply for judicial assistance to the respective country, based on applicable treaties or established practices between the two countries. Switzerland is a member of the 1954 Hague Convention on Civil Procedure but has not yet ratified the succeeding 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents or the 1970 Hague Convention on the Taking of Evidence in Civil and Commercial Matters, respectively.

RISK MANAGEMENT IN THE NEW ERA OF PRODUCT LIABILITY

Quality Control

Under the danger rule, the producer of a dangerous product has to take the necessary safety measures to prevent injury and loss. One of the safety measures is quality control. In addition, the Swiss Federal Court has ruled that a producer of dangerous products will

be held liable as principal, if he has not made a final quality control inspection.

Where possible, the producer must examine the component parts of the product, especially if they are manufactured by a third party. If the producer wants to have recourse to a component manufacturer, he must be able to prove that the necessary quality checks were made before the components were installed. The producer should also keep appropriate documentation evidencing control of the components.

It is clear that the main way to avoid delivery of defective products is final quality control. It is the last opportunity to check a product before it leaves the plant and is put into the streams of commerce and finally sold to the consumer. The best control is to check each and every product, eg checking every bottle of mineral water by refraction of light. If the product is likely to cause serious damage more rigorous checks may be necessary, eg safety controls in the car industry. Further, it might be advisable to test the product under extreme conditions or by durability and solidity control. If it is not possible to check each product, final quality control should be effected by spot-checks.

Final quality control must guarantee that all safety standards are met, that warnings are on the product itself or attached thereto and that the instruction manuals are delivered with the product. If the number of products is small, the product should be photographed with safety measures, warnings and manuals before packaging.

Final quality control is primarily the producer's task and the producer cannot disclaim liability by claiming that the distributor should have made its own checks.

Documentation

Under the danger rule, the producer will be requested to furnish evidence as to his having taken the necessary safety measures to prevent injury and loss. Further, the producer in its capacity as a principal has to show that it has carefully selected, instructed and supervised the employee who manufactured the defective product.

Therefore the producer should keep all documents in connection with the development and the manufacturing of a product. It seems somewhat paradoxical to give such advice at a time when most companies are trying to rationalise production by limiting the paperwork. At least, microfilm and other storing possibilities facilitate record-keeping by the producer.

Firstly, complete documentation is essential to mount an effective defence in a product liability case. Secondly, documentation can prove valuable in efforts to improve a product that has caused damage, irrespective of whether or not a product liability claim has been filed. Thirdly, it is important that the documents are systematically recorded and that they never have to be laboriously pieced together at short notice.

Record-keeping must have already begun before the development of the product. During this time, the producer may make inquiries of various component manufacturers and they may give answers as to the feasibility and risks of such component parts. Such correspondence, particularly any kind of assurances by component manufacturers, must be recorded. Consumers of pharmaceutical products especially may make claims after many years that the producer commenced production trading in a field which was not sufficiently researched at that time. The documentation might then reveal how the producer coped with the particular problem and whether he received assurances from component manufacturers, scientists or other third parties. During the time before the development of the product, it can also be necessary to keep records of the statutory provisions countrywide or worldwide.

During the development of the product, the following documents should be kept and recorded: internal regulations with duties of various employees, protocols of accident possibilities, test results including tests of alternative components or products, and all documents evidencing which changes of the product have been considered and why they have or have not been realised. During the

time of the development it may be necessary to appoint a risk manager. It is obvious that the work of such a person has to be carefully documented and recorded.

During manufacturing of the product it is necessary to keep the following documents: market tests, evaluation of consumer complaints and internal reports of defects of the product, results of quality control, including control of the products of component manufacturers and final quality control of the product. If possible, final quality control may be recorded by photo or by video evidencing, eg that warnings and instruction manuals have been attached to the product. During the time of manufacturing it may also be necessary to record which employee worked at what place/machine at which time, especially if a safety measure of a product is installed or controlled. Further, it will be helpful to record how employees have been instructed and continuously educated. Such documents can be used by the producer as exonerating proof if he is sued in his capacity as a principal.

If potentially highly dangerous products, eg cars or pharmaceutical products, are manufactured, the producer must develop a concept that gives clear instructions as to which documents have to be made and collected and how, how long and where they have to be recorded and how, by whom and when they may be destroyed.

Warnings

Wherever possible, the producer should install technical safety measures on its products and thus avoid liability under the danger rule in the first place.

Childsafe/foolproof construction, safety boxes that prevent direct contact of a consumer with dangerous parts of the product, or automatic security systems, eg circuit breakers which interrupt power supply when the casing is opened, are always preferable to mere warnings.

Where technical safety measures are not possible, the danger rule requires that warnings be placed on the product itself, on the packing material or in the instruction manual.

Warnings must be:

- (a) complete (the consequences of wrongful use must be explained); and
- (b) comprehensible (symbols are better than text; written warnings should be made at least in all the national languages of Swiss consumers, ie in German, French and Italian); and
- (c) perceptible (warnings on the product itself are always preferable to warnings on the packing materials or in the instruction manual); and
- (d) proportional (danger to life and limb must be pointed out by colour or bold type).

Disclaimers

Under Swiss law, disclaimers are only possible under contract law, but not under the law of torts.

Disclaimers of the producer are generally null and void, as there is no contractual relationship between producer and consumer. Nevertheless, a disclaimer may be of some value as it may take the function of a warning.

Only the retailer selling the product to the consumer may disclaim its liability. However, such a disclaimer is not comprehensive. Liability for wilful misconduct and gross negligence cannot validly be disclaimed. The retailer may only disclaim liability for its "slight negligence".

Disclaimers are thus not a safeguard against product liability claims.

Recall of Products

Another safety measure that may have to be taken under the danger rule is the recall of products.

To date, the Swiss authorities have not asked producers in

spectacular ways to recall their products as, eg, in the USA. A recall may nevertheless be necessary in Switzerland based on management decisions, especially if a product is recalled worldwide.

The recall of products which are prone to create risks, eg cars, tyres, pharmaceutical products, children's toys etc, should be planned in advance. The planning must deal with the various possible scenarios of a recall and should especially address the problem of how to inform customers, either directly or through the mass media.

Most recalls require that a crisis manager be appointed who has to select a planned recall scenario and organise the recall step by step. The producer will have to inquire on the defect of the product and improve the product, eg its safety measures, at this point.

Corporate Structure

Most individuals limit their liability by trading through a company. Further limitation of liability through the use of corporate structure has not been seen to be necessary in Switzerland for various reasons.

Generally speaking, limitation of liability seems of lesser importance in Switzerland than in the EC or USA, as the Swiss courts take a conservative attitude and do not award excessive damages in product liability claims. In particular, punitive damages do not exist in Switzerland. Second, product liability claims can be insured in Switzerland without major problems and there is no reluctance of insurance companies in this field as, for example, in the USA. Third, Swiss courts may impose liability on affiliated companies by piercing the corporate veil (or by considering one company to be the other's principal under CO article 55). However, at the time of writing there is no precedent in which liability has been imposed on an affiliated company in the field of product liability. Finally, limitation of liability by corporate structure might be criticised by the media and lead to poor public relations.

Accordingly, the concept of limitation of liability by corporate structure is generally not recommended in Switzerland. Nevertheless, it is no secret that several Swiss producers have established subsidiaries for performing especially risky business which is separate from the main objects of the company.

Insurance

A producer who has taken all possible safety measures (technical safety measures, warnings, quality control etc), as required by the danger rule, and which, in his capacity as a principal, has carefully selected, instructed and supervised his employees, is likely to avoid liability.

However, there remains a certain risk which calls for insurance. In Switzerland, the appropriate insurance coverage is known as enterprise liability insurance (*Betriebshaftpflichtversicherung/assurance responsabilité civile d'entreprise*).

Enterprise liability insurance may cover damage arising from personal injury, property damage, economic loss and mental distress. However, economic loss and mental distress are usually only covered if they are a result of personal injury or property damage.

EC and USA importers usually ask the Swiss producer for their vendor's liability to be included by vendor's endorsement in the producer's enterprise liability insurance. Such insurance cover is possible in Switzerland, so long as the EC or USA importer is not negligent himself (eg by delivering the incorrect product or by imprudently labelling the product). The following points should be borne in mind when an enterprise liability insurance policy is taken out in Switzerland:

- (a) Switzerland is a very small market. The possibility that a product manufactured in Switzerland will be used in one of the surrounding EC countries or, for example, in the USA is obvious. Worldwide insurance coverage is, therefore, recommended for most products.
- (b) For the same reason, insurance companies with branches

worldwide are to be preferred.

- (c) Worldwide insurance should be made on one and the same insurance principle (eg insurance cover based on causation, based on damage, or based on consumer claims). Missing insurance and double insurance must be avoided.
- (d) It should be borne in mind that worldwide insurance may be very expensive as certain countries much more readily award high damages for personal injury and mental distress. In this context it is important to reiterate that the producer may be sued by the consumer for the entire damage even if component manufacturers or other third parties are equally liable (joint and several liability).
- (e) It is not possible to insure against criminal liability in the Swiss insurance market.
- (f) It is, as a rule, not possible to insure against punitive damages in the Swiss insurance market.
- (g) However, the costs of a recall of products can be insured to a certain extent.

SUMMARY

Switzerland is not an EC member and therefore is not required to implement the Directive.

Product liability claims can be based on traditional rules of contract and torts only. Claims against the producer can be made only in tort (unless the product is directly sold to the consumer). The unique Swiss legal construction making producers liable under the danger rule (for dangerous products) together with their liability as principals (for damage caused by their employees) are quite effective tools for consumers.

Nevertheless, product liability has not been given much public attention in Switzerland, as the Swiss courts are very reluctant to award large damages to consumers. The low awards may be explained by the following facts: Swiss consumers are generally very well insured against personal injury and property damage, compensation is granted by professional judges rather than by lay juries, and lawyers may not be paid contingent fees.

On an international level, foreign producers importing their products into Switzerland may be sued in Switzerland either under Swiss law or under the law where the product has been manufactured. On the other hand, Swiss producers exporting their products into the EC or USA may be sued in the country where the product is finally sold to the consumer either under Swiss law or under the foreign law. As a consequence, although Switzerland may, at first sight, appear to be a "producers' heaven", producers should comply with the more stringent product liability laws of the EC countries and of the USA. □

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