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PRODUCT LIABILITY

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IN THIS ISSUE

This article is a short introduction to the product liability regimes in the Asia Pacific region and their efficacy in protecting the rights of the consumer.

An Introduction to Product Liability Regimes in the Asia Pacific Region

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These days, it is almost a cliché to talk of the diversity of the product liability laws of the Asia-Pacific region, which have been described as- "*a mosaic of legal rights exists under contract, tort and statute*".

Lately, there has been a significant amount of change in product liability laws and regulations in these countries, manifesting itself in the form of consumer protection legislation. Many countries in the region are beginning to look to the type of laws and regulations that has been passed in the Europe and the Americas and considering which model suits them best. One of the key drivers in this regard is the need to protect the customer against manufacturers. This has in turn created different approaches to the legal regimes in which the issue of consumer protection is to be addressed. For example, some continue to rely on the common law to address claims whilst others have set up special tribunals to ensure safety of the products and to adjudicate over consumer complaints.

However, that is only the beginning. The next step is whether the consumer will or can have access to these regimes and the quality of the adjudicators in addressing the claims made by the consumers, in particular where most claims tend to be of lower value, such that consumers can feel that justice is being done, even if they are unsuccessful in the claim. This too is part of the progress and process of any product liability regime. In general, anecdotally, we tend to see more claims in more developed countries in Asia, such as Japan, Korea etc. and are now beginning to be more prominent and active in the South-east Asia region. Below, we touch on pertinent issues that we believe will shape the development of product liability law in the Asia Pacific region.

A. Under-Enforcement of Product Liability Law for Small-Value Claims

Manufacturers can be incentivised to supply safe consumer goods due to market (reputation) mechanisms, public safety regulation, and/or private law (especially potential tort law liability if consumers claim compensation for harm caused by defective products). The first two mechanisms work better if there is a high probability or risk of harm, as public opinion is then easier to mobilize, although public safety regulation is usually only implemented when the potential harm from unsafe goods is also high. Product liability (PL) law is therefore particularly important to incentivise manufacturers of goods that present a lower probability of harm. However, because of costs associated with enforcing PL law – ultimately through the court system – it tends to work best where the harm and therefore compensation amounts are high. Strict liability PL regimes, increasingly common in ASEAN member states, aim to lessen the burden of proof on potential plaintiffs, who no longer have to prove negligence on the part of manufacturers. Accordingly, they can make more feasible this mechanism even for defective products that generate lower levels of harm and compensation amounts.

Nonetheless, strict liability PL law is still often difficult for consumers to invoke, even in developed countries with comparatively good access to court procedures. After all, unsafe products may often just cause consequential loss to other "consumer

goods". (Only a few countries extend strict PL law coverage to consequential losses to non-consumer goods, which tend to be more extensive.) Even when personal injury results from the defective products, the harm suffered by each consumer may be low even if the aggregated harm is high. (Good recent examples may be Kanebo's skin-whitening cosmetics, recently recalled throughout Asian markets, or defective foodstuffs – if consumed in small quantities.) In such situations, each individual consumer will be reluctant to pursue claims through the court system.

Such problems are compounded in developing and even middle-income countries, where courts are under-resourced or face other generic problems, or accessing them still runs counter to prevailing social norms. This helps explain the limited impact of strict liability PL law reforms observed in South East Asia, despite some of those countries going beyond the European Union (EU) substantive law, for example by allowing consumers to claim multiple damages (i.e. more than the actual harm suffered).

The consequent under-enforcement of consumer law in this field is problematic from the viewpoint of economic efficiency as well as broader justice concerns. After all, the basic economic rationale for introducing strict liability for unsafe manufactured products is that consumers lack expertise to assess safety levels. The latter furthermore correlate only weakly with the pricing of such goods (except some that could cause catastrophic losses if risks eventuate, such as automobiles, which tend to subject to minimum public regulatory standards anyway). Even if particularly well-informed consumers are able to differentiate safety levels of various products, they may end up in the hands of third parties. The economic benefits of introducing strict liability PL law to mitigate such problems, by forcing manufacturers to "internalize" the full costs associated with putting goods into the market, is undermined if those substantive laws are inadequately enforced. This is also problematic from the perspective of justice and advancing the rule of law, a major objective particularly in developing countries and for ASEAN.

B. Two Judicial Mechanisms for Better Enforcement of PL Law

Such concerns, also found in other areas of contemporary consumer law and practice, have led to growing interest in enhancing mechanisms for collective redress. In the EU, for example, a major commissioned study compared approaches within the EU member states (and some other countries) that go beyond regular civil court proceedings, broadly divided into: (a) court-related procedures (injunctions or damages), (b) administrative redress mechanisms, and (c) privately-supplied Alternative Dispute Resolution (ADR) services. The EU subsequently introduced a Directive on Consumer ADR and a Regulation on Consumer Online Dispute Resolution. However, the EU and individual member states remain cautious about proposing a US-style (opt-out) class action procedure to facilitate the pursuit of individually small claims through national courts, even though such a procedure is also now well established in Canada and Australia.

1. Small Claims Courts or Tribunals

A recent study into "designing efficient consumer rights systems" criticizes the current EU approach. Eidenmuller[1] argues it is more important to promote court-based procedures facilitating enforcement of consumer law, in light of both efficiency and broader justice rationales, including "due process" values (such as the dispute resolver's neutrality, familiarity with the applicable substantive law, and accountability). They note the decline of cases being brought before small claim courts in Germany, the UK and the US, but advocate the strengthening of such rights-based procedures (found in most EU member states) by restoring especially their cost-effectiveness for consumers. Specifically, they propose a model small claims court procedure involving:

(a) a low-entry initiation mode (online, very short complaint form, but with the capacity to upload key documents related to the claim);

(b) a simple but rights-based dispute resolution procedure (requiring a prompt online response from the defendant business, highlighting areas of agreement as well as disagreement, perhaps with a facility to escalate the dispute to a more elaborate court process in the more unusual event of evidentiary issues being contested);

(c) quick enforcement of the outcome, ultimately through the regular court process (including execution against the losing party's assets, and publication of the results to guide future behaviour of other suppliers and other dispute resolvers both in and out of court).

Only a few of these features are currently found within ASEAN member states, or indeed the wider Asia-Pacific region. At least some features could be usefully harmonised by ASEAN authorities through best-practice "guidelines", including recommendations as to the maximum amounts claimable (adjusted for Purchasing Power Parity) and the types of disputes that can be addressed through such procedures.

However, the benefits of such harmonization will depend on the extent to which consumers move across jurisdictions, and it may be difficult to persuade courts, in particular, to adjust existing procedures. A further problem is that such highly expedited small claims procedures are more likely to be appropriate for consumer contract disputes, which increasingly involve transactions over the internet generating quite straightforward claims. They are unlikely to be suitable even for most (individually) small-scale PL claims, given that safety complaints typically involve more complicated issues of fact and law.

2. Multi-Claimant Actions

Traditionally, civil procedure laws have facilitated the aggregation of (smaller) claims by allowing for:

[1] Eidenmuller, Hurst and Engel, Martin. "*Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe*" Ohio State Journal on Dispute Resolution, Vol.29:2 2014

- "consolidation" of claims (but usually only by and within the same court, which is less efficient where defective goods cause harm across multiple jurisdictions); and
- "joinder" of claims (but usually only where relief is sought arising out of the same transaction or series of transactions, and with each joint plaintiff's claim typically still being considered individually).

The main difficulty for consumers with these procedures is that they have to "opt-in" by becoming parties to the court proceedings, which requires knowledge that they are underway as well as costs. Further, in countries which follow the "English rule" whereby a losing party must pay the (reasonable) lawyers' costs incurred by the winning party, there is a further disincentive to becoming party to proceedings.

These problems have traditionally been reduced in some countries following the English common law tradition, by providing for a "representative action". In Malaysia, for example: "… the plaintiff is the self-elected representative of himself and others. He does not have to obtain the consent of the other persons whom he purports to represent, and they are not liable for costs, though by estoppel and res judicata they will be bound by the result of the case". However, there usually must be a claim where numerous persons have clearly the same interest, there is no requirement to notify (potential) class members or capacity for the court to assist in notifications, the court has discretion to order the proceedings to be discontinued, and enforcement of the judgment against any non-party requires leave of the court. The Singaporean Court of Appeal recently indicated that it will take a more flexible approach towards determining whether the plaintiffs have the "same interest", and then allowing the claim to proceed (to promote access to justice), but that involved a claim concerning renegotiated club membership contracts.

By contrast, in the field of tort law claims arising from defective products, concerns about the limits of traditional "representative action" procedures have prompted public debates and some reforms related to US-style "class actions". In the federal courts in Australia since 1992, in conjunction with the introduction of strict PL law, class actions were authorized where: (i) seven or more persons have claims against the same person, (ii) those claims arise out of the same or similar circumstances, and (iii) they give rise to a substantial common issue of law or fact. Once filed, the court directs how anyone within such a class can 'opt-out' and therefore not be bound by awards of damages (which can be amounts specified or calculated in a particular manner, or an aggregate amount to be later distributed among all plaintiffs). There is no preliminary "certification" step, as in the US. Costs can only be ordered against the losing representative plaintiffs, not the other class members, and since 2006 it is clear that third-party litigation funders can finance the litigation (including providing reimbursements for cost orders against the representative claimants) in exchange for a percentage of any damages awarded by the court.

Governmental reviews conclude that such class action procedures have significantly improved access to justice for consumers, despite initial concerns about frivolous lawsuits and over-enthusiastic plaintiffs' lawyers. Major judgments and settlements have been reached in PL claims. This contrasts with only one example of the regulator (Australian Competition and Consumer Commission) using its power to get advance consent from an individual plaintiff to bring a claim under the strict PL law regime introduced also in 1992.

From 1999 in Indonesia, in addition to the possibility of a consumer protection NGO filing a representative suit, the Consumer Protection Act (Law No 8 of 1999) has provided for a class action procedure, supplemented by Supreme Court Rules introduced in 2002 However, it includes a court certification step, and most suits are against government authorities and not related to defective products. A major impediment is the high costs involved (relative to average incomes) in notifying potential class members. As legal aid funding from the government is very limited, one commentator advocates introducing a third-party litigation funding regime.

In Thailand, an update to Thailand's Act Amending the Civil Procedure Code of Thailand (No. 26) B.E. 2558 (the "Act") was made in December 2015. The amendment made class action lawsuits available in Thailand for the first time, opening up opportunities to aggregate small claims that would otherwise not be effective to litigate. Clearly, the possibility to become a defendant in a class action lawsuit significantly increases the risk of doing business for companies and operators in Thailand. However, class action lawsuits are only allowed by the Act to be filed by the Plaintiff, meaning that there is no Defendant class action. All courts in Thailand – except Municipal Courts – have jurisdiction for class action claims. It is the Judge that decides if the case satisfies the criteria specified for class action. Courts in Thailand have the power to allow, to define the scope and characteristics of the class, and to terminate the class action. Further, the 'opt-out' rule is used, which means that anyone who does not wish to be a part of the group can declare their wish of not wanting to be included in the group. Declaring such wish does not deprive them of the right to pursue individual claims later. People in the group have forty-five (45) days to opt-out. Once a judgment is rendered, the Plaintiff may only appeal as a group; there are no individual appeal rights. There has been now significant jurisprudence built up around the class action regime and has clearly added another string to the consumer's bow.

In Vietnam, the Consumer Protection Act 2011 allows representative actions to be brought by certified social organisations registered for consumer protection. However, these currently lack the resources and expertise to pursue such actions.

Japan, which has exercised significant influence on law reform discussions and initiatives in Vietnam and other ASEAN member states, also enacted an innovative two-stage class action mechanism on 11 December 2013. Due to take effect from 2016, the Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers (Law No 96

of 2013) will allow "specified qualified consumer organisations" to bring PL and other consumer law claims, but only for a declaratory judgment on liability of the business operator. This judgment binds members of the class represented by the organisation, which have to meet legislative criteria of minimum numbers of claimants and a common cause for the damages, and predominantly common issues. If the court upholds liability, the successful organisation and (on its request) the defendant business must notify potential plaintiffs. They must then "opt-in" to allowing the organisation to proceed to the second stage: filing individual claims for damages (which, if successful, can include a fee or costs reimbursement for the organisation).

C. Recommendations

The risk of systematic under-enforcement of consumer law rights, especially for individually small-value PL claims, requires improvements in judicial procedures:

- Small claims courts or tribunals should be made more accessible especially for consumers claiming against suppliers for isolated manufacturing defects.
- For unsafe goods with design or warning defects, which typically affect higher volumes of products and therefore more consumers, regular courts also need to introduce multi-plaintiff procedures so consumers can obtain collective redress efficiently and consistently. In particular, more ASEAN member states should consider introducing class action procedures, especially on an "opt-out" basis (at least partially, as in Japan). Comparative research indicates that this is much more effective that "opt-in" schemes, even in developed countries. The experience in Australia and Canada suggests that permitting individual consumers and litigation funders to take the lead in class actions, not just certified consumer organisations (as now already in several countries in Asia), does not lead to abusive lawsuits and settlements.

If and when class or representative actions are introduced more widely in ASEAN member states, policy-makers must also consider limiting the validity of arbitration agreements that waive such rights. This remains a controversial issue particularly in the US, albeit arising more often in the context of direct contractual relationships created between consumers and suppliers. As for mediation of PL disputes between consumers and manufacturers, the limited caseloads for industry association based schemes in Japan suggests little scope for dispute resolution procedures out of court.

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