

a pigment of ink containing lead; these products included the doll 'Dora, a Exploradora' (Dora, the Explorer), the Tube with Three Figures, 352 units of which were sold. Less than two weeks later, Mattel announced a new recall. This time, a toy belonging to the series of metal vehicles 'Cars' was involved, the character 'Sargento' (Sergeant), which was manufactured between May and July 2007 containing high levels of lead. In addition, Mattel announced that it was to proceed with a voluntary recall of some magnetic toys manufactured between January 2002 and 31 January 2007, which included some dolls, figures, groups of playing items and respective accessories, in respect of which small but powerful magnets were at risk of falling off/becoming loose. In Portugal, this action included 22 Polly Pocket toys, three Doggie Day Care toys and a Barbie doll

accessory. The third recall, undertaken in September, included seven Barbie doll accessories (such as a dog, a cat and some toy food) and three products of Fisher-Price GeoTrax (two trains and one musical instrument). None of these items were for sale in Portugal. In Portugal, as elsewhere, the procedure was quite straightforward: Mattel informed the media about the various recalls and placed information in a section on its international website regarding the recalls. A telephone helpline number was available for parents to call if they had any worries and to find out what they should do in order to obtain a toy replacement. Sara Marçal, the company's marketing director, reported that many calls, letters and e-mails were received at the time (published in 'Meios e Publicidade' 28 September 2007).

SWITZERLAND

Mattel and the coffee pot

Lukas Buehlmann

GBF Gerspacher Bühlmann Fankhauser Attorneys at law, Zurich

buehlmann@gbf-legal.ch

Mattel's extensive product recalls last autumn did not spare the Swiss market. Around 100,000 toys produced by Mattel had to be withdrawn due to their health hazards for children. However, although the safety hazards of toys produced in China were first widely publicised through the Mattel recalls, a number of other products had to be withdrawn from the market subsequently. In November 2007, the so called 'Bindeez Magic Pearls' also had to be removed from the shelves. The beads that children used for designs and handicrafts were coated with a chemical substance which, when swallowed, converts into a powerful sedative putting the children's health at risk.

The Swiss authorities have been working on a revision of the product safety law for a number of years already. The first and foremost criticism raised with regard to the present legislation is the fact that there is no obligation for companies in Switzerland to recall dangerous non-food products and that the authorities have no possibility to intervene as is the case in the EU. One main request in this respect is that Switzerland joins RAPEX, the European rapid alert system for dangerous non-food consumer products. In spring 2007, the Federal Council of Switzerland announced a revision of the Federal Statute on the Safety of Technical Equipment and Installations of 19 March 1967, which will now be developed into a new general Statute on Product Safety. In Switzerland product safety is presently

regulated by a multitude of sectoral or product specific laws and regulations. In the case of a large number of consumer goods, Swiss law corresponds to that of the EU, and a lot of products are covered by the Bilateral Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment which entered into force on 1 June 2002. There is also a regular exchange of information between the EU and the Swiss authorities regarding non-compliant products and the measures taken in each case. With the new directive on general product safety, the EU also harmonised the safety requirements for consumer goods. It is the Swiss legislator's aim to eliminate all existing divergences with the European directive in the new law on product safety in order to allow Switzerland to adhere to RAPEX at a later stage. Each RAPEX member country has a National Contact Point through which it receives and distributes all reports of hazardous consumer goods issued by other national authorities.

It is to be assumed that the numerous product recalls of toys produced in China have exerted a catalysing effect on the efforts to improve product safety legislation. As a direct consequence of the recalls, the Swiss Ministry of Health ordered a testing campaign to be carried out at the Swiss borders by the customs authorities in summer/autumn 2007 with a view to obtaining an overview of the safety of the toys imported

to Switzerland. The toys arriving at the customs were examined thoroughly (ie, checked for flammability, physical characteristics, lead content, diluents and other chemical substances). The tests concentrated mainly on plastic toys originating from China. All the toys complied with the guidelines regarding lead content; some contained forbidden diluents, which however did not constitute a serious health hazard. Several toys did not carry all the necessary warnings. Despite this unexpectedly positive result, the Ministry announced that it would submit toys in future to further random checks. The present Swiss legislation lays the bulk of the responsibility on manufacturers, importers and dealers. They have to assume the responsibilities foreseen by the law and ensure that the products that they market are safe. The producers and importers of goods have to be in a position to produce a declaration of conformity at any time confirming that the products comply with the prevailing sectoral and product specific regulations. It is likely that more inspections will take place in future to verify the compliance with this self-control and to ask for the declaration of conformity.

When a hazardous product causes an accident, the Swiss Product Liability Act of June 18 1993 (PLA), regulates the rights of the injured party as well as the liability of the manufacturer, importer and dealer. The PLA largely adheres to the principles of the European directive on product liability. In a groundbreaking decision taken recently by the Swiss Federal Court (BGE 133 III 81, the 'Coffee pot decision'), the definition of a product defect was clarified. The case involved a glass coffee pot manufactured in China which burst in the hands of the user causing serious injuries. According to Art. 4 of the Swiss Product Liability Act, a product must show the safety features that the general public would rightfully assume it to possess, and that under any circumstances. This includes the presentation of the product as well as the use that one can reasonably assume it will be put to. If a product does not fulfil these expectations, it is defective and therefore unsafe in the sense of the PLA. The manufacturer as well as, to the same extent, the person or company who puts the product in circulation are strictly liable to

pay compensation for damage caused by this defect irrespective of any fault, ie, they cannot absolve themselves from liability by saying they applied the necessary care when developing and manufacturing the good. The victim of an unsafe product does not have to prove the exact origin of the defect in order to establish liability. This confirms the newly adopted standpoint that the concept of defect and safety is no longer defined by the design and manufacturing but by the use of a good. This new development has already had consequences in contract law as well. In another decision arrived at recently (Case 4C 321/2006, 1 May 2007), the Swiss Supreme Court stated that absence of the safety which one may legitimately expect from a product entitles a buyer to challenge the sales contract based on the concept of fundamental error. The decision dealt with the purchase of an auto-hoist which collapsed sixteen months after purchase without any external reason. Ulterior tests showed that the auto-hoist collapsed repeatedly without any external reasons, which led the Court to rule, based on the definition of defect provided in Art 4 of the Product Liability Act, that the assumed safety of the product constitutes a fundamental element of the sales contract, absence of which entitles the buyer to cancel the contract and reverse all transactions. The question is whether this decision will pave the way for producers of consumer goods such as Mattel to cancel and reverse their agreements with third party suppliers based on the concept of fundamental error, if the supplied products reveal to be unsafe.

Along with the mentioned developments in legislation, the recent recalls of toys produced in China show that companies that manufacture consumer goods abroad, especially in so called low wage countries, and put them in circulation in Switzerland, have to reckon increasingly with being made liable for the safety of these products beyond their non-contractual liability. As a result of the new developments in legislation and case-law referred to earlier, the legal hurdles the injured parties face when trying to claim their rights from product liability have diminished noticeably.