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RESEARCH ARTICLE

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Some issues on perfecting the system for recalling defective products in China

Abstract Defective product recalling system is a new regime in modern civil law, characterized by its special functions to prevent and eliminate the harms concerning consumers' body and property due to potential defects of products. In legal nature, it is necessary to define "recalling defective products" as the obligation rather than the liability of manufacturers or sellers, so as to encourage both manufacturers and sellers to take effective remedies immediately upon defective products. Product recalling is of two categories, i.e., active recalling and compulsory recalling, and the breach of such recalling obligation will lead to a series of legal liabilities. Considering the importance of the recalling system and the economic development of China, it is strongly proposed that China shall formulate the Law of Defective Product Recalling.

Keywords defective product, recalling system

摘要 产品召回制度是现代民法中的一项新制度，具有预防和消除缺陷产品对公民人身和财产的危害的独特功能。从法律性质上讲，产品召回是生产者或者销售者的法律义务，而不是法律责任，这种界定可以有效发挥该制度的特殊作用。产品召回包括主动召回和强制召回两类，违反召回义务将承担多种法律责任。鉴于召回制度的重要作用和中国的经济发展状况，建议尽快制定《缺陷产品召回法》。

关键词 缺陷产品，召回制度

1 Special functions of defective product recalling system

Recalling refers to the system under which manufacturers or sellers recall the

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product from the market by force of law, and make product testing, repairing or replacement free of charge when they are informed that defects threatening the personal or property safety of consumers by some products sold or produced. (He, 2007) The recalling system is a new regime in modern civil law, the role of which are becoming more and more prominent in modern society. On the one hand, with economic globalization developing, the importance of defective product recalling system is becoming prominent. In the background of global economic development, international trade develops by a large scale, the global market of manufacturing, distribution, dealing and consumption of commodities has initially taken shape and the distribution of products crosses national borders. For many kinds of products, the consumer groups are not limited to any single country. Once potential product defects change into substantial harms, they may trigger seriously adverse effects worldwide, and foreign products may also threaten personal and property safety of Chinese nationals upon their access to Chinese market. On the other hand, as consumers pay attention to personal and property rights and the awareness of public safety is generally enhanced, the protection of the rights and interests of consumers and public safety shall be strengthened continuously, and the establishment and perfection of the defective product recalling system in legislation plays an important role in safeguarding the personal and property safety of consumers, improving product quality, promoting business development, enhancing international competitiveness of enterprises, regulating market order and maintaining public interests. (Hao, 2007) According to statistics of the relevant agencies, China accepted 702,350 consumer complaints in 2006, among which complaints on product quality and safety accounted for 66.3%. This indicated that, with rapid development of socialized production and market economy, commodity varieties and quantities are becoming increasingly rich while the probability of occurrence and existence of defective products will be higher and their adverse effects on people's life are also becoming apparent. (Li, Liu, 2007). Consequently, the establishment and improvement of product recalling system is a significant subject in the development of China.

The product recalling system is characterized by its special function to prevent and eliminate the harms concerning people's life due to potential product defects, with specific features as follows:

1.1 Preventive feature

The traditional remedies of civil rights are mainly remedies for breach of contract and remedies of tort liabilities, the application of which is usually based on the determined consequences of damages, and when the parties concerned claim for

legal remedies, damages have happened. What's different is that the initiation of product recalling is usually based on potential product defects and there is no need of actual occurrence of damages. That is to say, if individual defective products have been found to cause damages or other types of products may have potential risks of damages, the manufacturers or sellers shall immediately recall all the products of the kind and conduct testing and repairing. For instance, in the consumer market of autos, if such defects in designing as imperfect brake apparatus in cars, which may consequently threaten consumers' life and property safety or public safety, automakers shall timely recall all the cars of the kind and carry out testing and repairing or replacement. Such system is conducive to nip it in the bud and avoid the actual occurrence of potential harms of defective products so as to prevent defective products from damaging people's personal and/or property safety.

1.2 Active feature

The traditional legal remedies are based on the initiative petition of the victim. Without petition of the victim, the offender is generally not required to bear the legal liability at his or her initiatives. However, the initiation of product recalling usually does not need the petition by consumers. No matter whether consumers report defective products to the competent authorities for product recalling, so long as manufacturers find any defects in the products that shall be recalled, they shall take initiatives to recall the defective products of the kind. In this system, law provides that manufacturers shall undertake the obligation and liability for recalling, which is beneficial to the timely, full and effective safeguard of the interest of public consumers.

1.3 Universal feature

The universal feature of the recalling system of defective products has a connotation in two aspects: (1) The universality of obligation. The product recalling system is not aimed at certain specific manufacturers but binding on broad manufacturers and sellers by force of law. In any circumstances where defective products shall be recalled according to legal provisions, manufacturers shall firstly be responsible for recalling, if necessary, the sellers of the defective products in issue are also obliged to recall the products. (2) The universality of protection. The product recalling system is designated not to protect the interest of only some or several specific consumers but offer good remedy channels to all the consumers for possible defective products of the kind. This system offers the same protection to all the consumers of the products of the kind, from which we

can see that this kind of protection is characteristic of equality.

1.4 Public benefit feature

The traditional civil law regime is based on individual interest orientation, and thus the entitlement and protection of civil rights is generally characteristic of private benefits and individuality. However, the establishment of the product recalling system is mainly designated to maintain the interest of non-specific consumers and public safety rather than the interest of individual consumers since, on the one hand, the defects of recalled products are usually potential, damages have not happened actually and it is hard to predict the damages that may occur in the future, with potential threats on the personal and property safety of the public. For instance, once the potential peril of auto brake apparatus actually occurs, it will not only cause damages to the body and property of consumers but very likely threaten social public safety. Therefore, to timely recall defective products by manufacturers is beneficial to safeguarding the interest and safety of nonspecific people. On the other hand, the testing, inspection and verification of product defects often require for advanced and complex techniques and equipment, which is unrealistic for ordinary consumers and is generally hard for them to find defects and potential harms of products. Consequently, it is rational to require manufacturers to take initiatives to recall defective products by law, which also embodies the protection of the disadvantaged consumers and the public benefit feature of this system.

1.5 Efficiency feature

It shall be noted that the term “recalling” is derogatory, which is not simply a negative assessment of the product quality of manufacturers but a kind of their legal obligations. (Zhang, 2007) In terms of efficiency, the recalling system shall also be advocated and promoted since, on the one hand, recalling products, for broad manufacturers or sellers, is aimed at preventing the potential defects of products to cause harms. If manufacturers take corresponding measures for correction or remedies of products before the occurrence of actual harms, the cost will be relatively less and the probability for the occurrence of damages will be sharply reduced. However, if remedial measures are not adopted until the potential defects of products have turned into real harms and damages have occurred to the personal and property interests of consumers and even public safety, not only individual consumers may suffer serious damages but also public safety of the whole society may be jeopardized. On the other hand, for general consumers, if defective products can be timely recalled before damage happens,

potential harms will be removed, which is a kind of remedy of rights at the lowest cost compared with the action for claim of liquidated damages upon actual occurrence of damages.

1.6 Legal nature

It shall be admitted that the product recalling system is an important feature of legal modernization. Especially this system has broken by the mode in which traditional private law mainly safeguards the private rights of individual civil subjects, and it mainly focuses on the public interest that may be affected by a certain kind of defective products, with unique features in such aspects as protection objects and remedial procedures. The author holds that the recalling system are concurrently of dual features of private law and public law in view of such aspects as the legal relations when it applies to the protection objects and the way of its initiation, since, on the one hand, the subjects in the legal relationship of the product recalling system are mainly civil subjects in private law relationship, and the legal relationship belongs to the civil legal relationship in nature, hence being characteristic of private law; on the other hand, we may not simply say that the system applies to purely civil legal relationship only, and as it mainly attaches importance to the protection of the interests of nonspecific consumers and public safety, it is different in nature from the norms of pure private law, but is characteristic of public law to some extent. Especially when any manufacturer or seller breaches their obligations of voluntary recalling and fails to recall the products that shall have been recalled, the competent governmental departments shall order for compulsory recalling and require them to bear the corresponding administrative liabilities. The order for compulsory recalling is characteristic of public law in nature.

With unique features, the recalling system may not be replaced by the traditional contract law system or tort law system.

2 Legal nature of defective product recalling

When discussing the perfection of the product recalling system, besides identifying its unique functions, we shall also accurately define its legal nature. There are two different views in the academic circle on the legal nature of the product recalling system. One view holds that product recalling is a kind of legal liabilities since it is a liability to the manufacturer who has not performed the obligation for providing qualified products, which is similar to the legal liabilities for repairing and replacement. (Qin, 2006) The other view holds that the recalling of defective products is a kind of statutory obligations rather than a

legal liability of manufacturers since the product recalling is not the consequence of the violation by the manufacturers of their obligations but the obligation to be undertaken by the manufacturers in accord with law, i.e., no matter whether there is any covenant on defective product recalling in the sale contract of goods, manufacturers are obliged to recall defective products of the kind so long as defective products are inspected and found. (Zhang, 2007) The author supports the second view because recalling differs from legal liabilities in nature, which is a universal obligation of manufacturers by law. Specifically, the necessity for defining product recalling as a kind of legal obligation rather than legal liability lies in that:

Firstly, it is beneficial to interpret the logical relationship between legal obligation and legal liability. The so-called legal liability refers to the adverse consequences to be undertaken by the person who fails to perform obligations, which embodies the negative evaluation and sanction to the act of the person by law. If law provides for the obligation of manufacturers to recall defective products, the manufacturers who recall products fulfill the statutory obligation rather than undertake legal liability. Only in the circumstances that the manufacturers failing to perform the obligation of recalling shall undertake the corresponding legal liabilities, such as penalties and suspension of business licenses. If damages are caused to consumers, manufacturers shall also bear the civil liabilities, including liquidated damages. Otherwise, if the product recalling is defined as a kind of legal liability, it is hard to interpret the legal nature of the adverse consequences including penalties, suspension of business licenses and liquidated damages after manufacturers undertake the legal liability for recalling.

Secondly, it is beneficial to drive manufacturers to actively find problems, timely recall defective products and prevent and mitigate potential harms. To define product recalling as a kind of statutory obligation is beneficial to promote manufacturers and other parties concerned to actively fulfill their obligations and eliminate possible harms to consumers. However, if defining product recalling as liability, since a liability occurs upon non-performance of an obligation, it seems such liability can be undertaken only upon actual occurrence of damages. Especially, the ex ante recalling by an enterprise is a normal commercial act, which, embodying the attitude of manufacturers towards consumers and aiming at preventing and mitigating harms, shall be advocated and encouraged. (Jiang, 2004) If we define product recalling as legal liability, it indicates that the enterprises has acquired a negative evaluation by law, which would not be conducive to urge and drive enterprises to actively recall defective products. Consequently, to define product recalling as legal liability is virtually not conducive to drive enterprises to actively perform their obligations of recalling.

In view of the trend of development in the future, we shall encourage enterprises to actively recall products upon finding defects or hidden harms in their products. That requests us to hold that the increase of the quantity of recalled products is not a bad thing for the society or the image of enterprises, and the recall of defective products by enterprises is the specific manifestation of their ex ante undertaking of social accountability.

Thirdly, it is beneficial to strengthen the obligation of active acts of manufacturers in consumption and purchase contracts and safeguard the performance of the obligation. If we define product recalling as a kind of statutory obligation of manufacturers in nature, and the relationship of sale contracts has been establisheded between manufacturers and consumers, the recalling of defective products by manufacturers will necessarily become the content of the contracts. The contractual obligations may be promissory or statutory, while the recalling obligation is directly based on special legal provisions, which, as the statutory obligation without the agreement of contractual parties concerned, is beneficial for the manufacturers to perform obligations.

Besides defining recalling as a kind of statutory obligation, the following issues shall be noted: (1) The subjects of recalling. The subjects of recalling obligations are principally manufacturers, what's more, they are more capable for repairing or replacing defective products at a low cost. In practice, however, due to professional labor division, manufacturers generally do not face consumers directly, and most products are sold by sellers. Therefore, when manufacturers perform the obligation of recalling, sellers are obliged to coordinate the recalling. When manufacturers refuse to perform the obligation of recalling, the competent authorities may either force upon their performance or order sellers to conduct recalling. If sellers also refuse to recall the defective products, they shall bear the corresponding liabilities. Moreover, in the circumstances where no manufacturers are affirmed or existed, sellers are obliged to take ex ante recalling. (2) The period of obligation. Manufacturers are obliged to recall products back for the delivery of the defective products to the market. Whether enterprises are willing to recall or not, no liability is exempted. For example, the General Product Safety Directive 92/59/EC (GPS Directive) concerning the European recalling system of defective products provides that the moment of "being put into circulation" is the commencement since the manufacturers shall pay attention to whether their products are safely used by consumers. (Cao, 2000) (3) Whether the consumers are required to take initiatives to file a petition. In the relationship of civil rights and obligations, the realization of civil rights is based on the performance of civil obligations. If the obligees waive their rights or fail to exercise their civil rights, the obligations of civil obligors may be discharged. But in the legal relationship

of product recalling, manufacturers are the obligors of recalling while the corresponding obligees of civil rights are nonspecific consumers who are unable to exercise their rights actively. Nonetheless, manufacturers of defective products shall actively perform their legal obligations of recalling, no matter whether the victims of defective products file claims against manufacturers and actively seek remedies correspondingly, and even regardless whether consumers are aware of the defects of products, once the recalling procedure is initiated, all the consumers of defective products of the kind can acquire effective remedies. (4) The application of statute of limitations. Civil liabilities have statute of limitations, which is usually two years in China. However, in terms of defective products, damages may happen a long time later or not at all, and thus, if the product recalling system also adopts the restrictions of the statute of limitations, it will be hard for consumers to acquire remedies after the statute of limitations when defective products and their harms still exist, which is apparently irrational and adverse to safeguarding the rights and interest of consumers and public safety.

3 Two modes of recalling

Recalling is mainly of two modes: Active recall and compulsory recall. The two modes differ from each other to a large extent in specific procedures. Generally, only when the providers of products do not initiate active recalling procedures will the relevant governmental department supervise the implementation of compulsory recalling procedures by law.[1] In other words, compulsory recall refers to the recall enforced by the competent authorities in the circumstances where the enterprises should have conducted recalling but not done.

3.1 Active recall

Active recall is also called voluntary recall, which means that once finding defects in some kind of products might cause damages to people's body and property, manufacturers shall take initiatives to recall such products, and conduct testing, repairing or replacement. Active recalling of defective products actually

[1] The Administrative Measures for Drug Recalls provides that recalling shall be divided into two categories, i.e., active recall and responsible recall. Article 25 provides: "Where drug administrations, based on investigation and evaluation, believe the potential safety hazards as specified in Article 4 herein exist, and drug producers should have recalled the products that were not actively recalled, they shall be ordered to recall such drugs."

embodies social accountability of enterprises, and no enterprise may be exempted the liabilities from its sold products. The traditional civil law sticks to caveat emptor, which means that after sellers sell the goods, they will bear no liabilities thereof, and the consequences of damages from defective products shall be undertaken by purchasers. However, great changes have taken place in modern social and economic life. On the one hand, purchasers are disadvantageous in acquiring information, and it is hard for them to wholly know the quality of products. On the contrary, sellers who are in an advantageous position can fully get to know the information of products more easily and the possible defects of products. Hence, it is sellers who shall bear the obligations for active recalling of products. On the other hand, in view of public safety, a great amount of products, especially foods, drugs, and automobiles, will be of more potential to cause material influence on consumers' body and life safety, and the quick flow of such products will get a number of consumers involved in wide distribution. Once a product has defects, inestimable ill consequences may follow. Therefore, the performance by the enterprise of its obligation for active recall is beneficial to maintaining the public safety of the society. In the circumstances of active recalling, manufacturers and sellers of defective products are not only obliged to make active recalling but also obliged in the following respects:

Firstly, track to see whether the products have defects. In accordance with law, enterprises shall take initiatives to perform the obligation of recalling, which requests that enterprises shall be obliged to track whether their products have defects from the date that products launched in the market. In this regard, enterprises shall establish the tracking mechanism of product quality, especially for the products that might harm consumers' body or public safety. Moreover, manufacturers shall regularly conduct investigation and evaluation on the sold products so as to timely find any potential defects. In case of finding a case where damages have actually happened, manufacturers shall take initiatives to carry out a large-scale investigation so as to decide whether it is necessary to recall the products of the kind.

Secondly, make information disclosure of defective products. Once finding some kind of products have defects that may harm consumers' body or public safety, manufacturers shall timely disclose the fact of defective products to the consumers and inform to recall them back by certain means. That is to say, on the one hand, manufacturers shall inform the consumers of the situation that the products they purchased should be recalled via the reserved information of the consumers. On the other hand, manufacturers shall announce such situation to the public via mass media or other reasonable channels. Since the contact information of consumers may have changed or the products have been

transferred to others, it is difficult to contact the actual users of defective products simply via the reserved information. It shall be noted that even though manufacturers have released information of defective products, manufacturers shall still bear the corresponding liability for the damages caused if the consumers have not obtained the information but still use the defective products.

Thirdly, report the information on product recalling. Manufacturers shall timely report the competent authorities of the information on the defects of products, the scope of the products with possible defects, the recalling measures and the final recalling. Of course, considering the influence of defective products on public interest, manufacturers shall also disclose information to the public.

Upon recalling, manufacturers shall ensure the elimination of hidden safety hazards through such measures as free testing, repairing or replacement. The measures to be adopted depend on the actual circumstances of the defects of specific products and the extent of their impacts on personal safety and the safety of the public. (Hao, 2007)

3.2 Compulsory recall

Compulsory recall refers to the recall of enterprises ordered by the competent authorities when enterprises do not take initiatives to recall, which is called the ordered recall in Chinese Administrative Measures for Drug Recalls. Compulsory recall is actually a kind of administrative measure adopted by the competent authority. We hold that the competent authority shall be authorized by law to order recall when they believe that the products should be recalled by enterprises. The relevant provisions in the current legislation are not perfect, and thus the ordered recall system shall be improved in the legal provisions as soon as possible. Firstly, at present, many enterprises have not established the corresponding tracking mechanism of product quality, and still take selling as the end of liability. Without awareness of tracking service, it is hard for them to find the defects of products, and hence they fail to take active recalling. In such case, the active supervision by government is needed, and if necessary, an order shall be given to enterprises to recall their defective products. Though finding defects of their products, some enterprises are afraid of the reduction of profits and the decrease of product reputation, and consequently they will not take active recalls, resulting in the continuous flow of defective products. In the circumstances, ordered recall can reduce the damages to consumers' body and the property of the public by defective products. Secondly, if the consumers file a petition and

report to the competent departments concerned,[2] the government shall order manufacturers to recall their products. Thirdly, as administrative authority, the government shall be responsible for protecting the safety of the public, and what's more, since some defective products flow into foreign countries, which will impair the image and creditability of China, it is necessary to authorize the competent authorities to order for recall. Certainly, when ordering recall, the government shall conform to the relevant conditions and procedures prescribed by law, and otherwise, the abuse of public power may occur, impairing the rights of enterprises for normal production and management and causing unnecessary interference with enterprises.

We believe that compulsory recall shall meet the following requirements: Firstly, there shall be evidences to prove that products have hidden safety hazards, which may threaten consumers' body and property safety. If they are only common minor flaws, it is unnecessary to order recall. Secondly, defective products may jeopardize the safety of the public. If the products other than vehicles are sold within quite a small range, there is no need to take compulsory recall. Thirdly, the competent authorities of the government shall inform enterprises to take recall, and enterprises may put forth dissent. If the dissent fails to hold water, the competent authorities may adopt compulsory measures for ordering enterprises to recall the products.

In nature, the ordered recall is a kind of administrative supervision. If the obligors of recalls go against the obligation of recalling, the administrative organs will urge the performance of the obligation of recalls by ordered recall proceedings. If the obligors still refuse to perform the obligation of recalls after the receipt of the notice for ordered recalls, the administrative organs may adopt compulsory administrative measures including warning, penalties and temporary suspension of business licenses so as to supervise the obligors to perform the obligation. But the voluntary recall is the main form of recalling, which shall be encouraged by law. (Tian, 2007) From the experience and practice of developed countries, voluntary recall is the main form of recalling. (Hao, 2007) The more the voluntary recalls, the more effective the recalling system is. It is insufficient to depend only on the government to enforce the implementation of recalls. After all, the administrative resources of the government are limited and it is impossible to discover all the defective products. Furthermore, the compulsory recall procedures of the government are comparatively complicated. Thus, a large quantity of recalls shall be conducted

[2] For instance, Article 19 of China's Administrative Regulations on Recalling Defective Auto Products provides: "Any company or individual is entitled to report the possible defects of auto products to the competent authorities and local administrative institutions."

by voluntary recall.

4 Liabilities for breach of recalling obligation

Now that recalling is only a kind of legal obligations, manufacturers obliged to recall who violate the obligation shall bear the corresponding legal consequences, i.e., they shall bear legal liabilities by law. Since recalling is of a certain binding force by law, it is necessary to render a compulsory recall system. Some scholars hold that the recalling is an obligation without legal liability, and thus, it can be classified in the category of social accountability. The author holds that recalling, in a broad sense, is a kind of social accountability indeed, but it is not a social accountability without legal sanctions, if there are no legal sanctions in case of breach of the recalling obligation, there will be no legal liability, and consequently, it will be hard to realize the purpose of the recalling system.

The author believes that the violation of recalling obligation will not generally trigger civil liabilities, because recalling is mostly not based on the actual damages and the remedies for damages for breach of contract and tort liability. As discussed above, the recalling by manufacturers may be deemed as a statutory obligation, and the occurrence of the obligation is decided on the defects and potential harms of the products. Therefore, once certain kind of commodities is confirmed to have defects to be recalled, manufacturers or sellers shall take initiatives to perform the recalling obligation in a timely manner, regardless whether this kind of commodities entering the market or having caused actual damages to consumers. Civil liabilities, especially tort liability, require for the occurrence of damage consequences, and thus civil liabilities are all remedies and the major functions of tort law lie in latter compensation for damages. However, the product recalling system is an ex ante remedy system. The recalling system is based on potential damages, whereby the products are recalled prior to the actual damages caused by product defects to consumers' body and property, and remedies including repairing are adopted so as to avoid harms. Before the exposure of potential defects of products, they are only hidden hazards, and generally the personal and property safety of the consumers have not been harmed. In such situation, consumers may not exercise tort claims against manufacturers or sellers but request the counterparts of the contracts to undertake the liabilities for breach of contract, including repair, replacement or return of goods on the basis of sale contracts. If consumers have not purchased products from manufacturers directly, no contractual relationship has been formed with manufacturers and consequently, the consumers may not directly

require manufacturers to bear any contractual liability. When the potential defects of products are exposed, causing personal and property damages to the consumers, the consumers may request the counterparts to the contract to bear the liability for breach of contract in accordance with the requirements of the Law of the People's Republic of China on the Protection of the Rights and Interests of Customers and the Product Quality Law of the People's Republic of China or require sellers and manufacturers to bear joint liabilities for compensation of damages according to the requirement of tort law. If no actual damages occur, manufacturers shall not undertake the liability for tort damages directly to consumers either, since compensation for tort damages is decided on actual damages. In case of no actual damages, if the breach of the recalling obligation leads to the consequence of civil liabilities, the recalling system will accompany a kind of special civil liability, which is different from the traditional civil liability system, and it is hard to get a reasonable interpretation in principle. However, in special cases, especially where the obligors of recalling who clearly know that their products shall be recalled refuse to take recalls or still refuse to recall when consumers have filed a petition for recalling, the obligors of recalling are subjectively malicious, and it is worth discussing whether certain civil liabilities may be established on the obligors of recalling by law. Even if established, such civil liabilities are mainly manifested as a kind of tort liability, which may trigger punitive damages or increase the consequences of compensation for mental damages.

After recalling defective products, the main purpose of the obligors of recalling is to prevent the potential harms caused by the defects of products, and the principal methods to realize such purpose is to test, repair or replace the recalled defective products of the kind, consequently eliminate potential safety hazards of the recalled products, and then return those products to the original consumers. In view of such process, the ex ante recall of the products by the obligors of recalling and the adoption of such measures as testing, repair or replacement thereof is an integral part of the contractual obligations of manufacturers.

The major consequence of the breach of the recalling obligation by the recalling obligors is the administrative liability, since it is usually difficult for consumers in practice to find potential defects of products and it is hard for a quantity of consumers to require manufacturers to undertake civil liabilities. The rights and interests of vast consumers need to be realized by imposing liabilities on manufacturers by administrative organs. This sort of liabilities is concurrently of the dual features in private law and public law. The fundamental purpose of establishing the product recalling system lies in protecting the personal and property safety and public safety of nonspecific consumers, which embodies the

law for public interests and the trend of social development. The breach by manufacturers of the product recalling obligation surely constitutes a threat to public interest and public safety. As the guard of social public safety and interests, the government shall timely correct such illegal acts in accordance with administrative regulations so as to avoid large-scale damages. Such correction includes the liabilities of administrative law, i.e., warning, bulletin criticism, penalties and suspension of business licenses against lawbreakers. Especially, when products shall be recalled, the right of enterprises selling the products shall be limited, and the enterprises that still sell defective products of the kind shall undertake severe administrative liabilities. The manufacturers who fail to recall defective products shall undertake criminal liabilities when public safety is seriously damaged.

5 Proposals on making law of defective product recalling

In view of the current Chinese laws, the remedies for consumers and the regulation for defective products are mainly provided in the Product Quality Law of the People's Republic of China and the Law of the People's Republic of China on Protection of the Rights and Interests of Consumers. Though the two laws have adopted relatively detailed provisions on the obligations of manufacturers and the rights of consumers and the product responsibilities, the product recalling system has not been covered. The above-mentioned laws clearly grant to consumers the rights of return and replacement for goods, however, which are different from the recalling system. For instance, the Law of the People's Republic of China on Protection of the Rights and Interests of Consumers provides for the means of remedies when the quality problems of products exist in the angle of consumers, without emphasis on the obligation of active recall on the part of business operators. Consequently, if consumers fail to exercise the aforesaid rights actively, defective products may still be in the circulation and use, which is likely to cause threats to personal safety and property safety of citizens. Of course, the relevant Chinese administrative rules and regulations also provide the recalling system for defective products. For example, the State Administration of Quality Inspection promulgated the Administrative Regulations on the Recalls of Defective Auto Products in October 2004 and the State Council promulgated the Special Regulations on Strengthening the Administration of Safety Supervision for Foods and Other Products in July 2007, which provide that in case of finding any potential safety hazards in products, the production enterprise shall actively take recalls. The State Food and Drug Administration also formulated the Administrative Measures for Drug Recalls on December 6, 2007. Though those rules and regulations have recognized the

recalling system of certain products, they are binding on low levels, and what's more, due to lack of systematic arrangement, the construction and implementation of such system is restricted, which can not be applied as rules for judging the relevant disputes over recalling. Hence, it is necessary to formulate the Law of Defective Product Recalling.

In view of comparative law, the recalling system has been widely adopted in developed countries, and especially in European and American countries, the product recalling system has been relatively mature, and part of those countries have formulated separate statutes and laws. (Wang, 2007) Among them, the US is the first country establishing the product recalling system in the world, whose product recalling system is of various remarkable features, and most importantly, it is provided by the legislature in the form of national law. The law provides not only the basic requirements and procedures for implementing product recalling but also the sanction measures for violation of the provisions on product recalling. (Yang, 2007) We shall learn from those experiences, and think of the reasons for separately formulating the Law of Defective Product Recalling as below:

(1) The application scope of the recalling system is relatively broad. The recalling system is applicable to autos and food as well as drugs and other products that may cause damages to the body and property of consumers and the safety of the public. With the development of science and technology, people can not currently find whether hi-tech products have defects or not, but with further progress of the science and technology in the future, hidden defects may be found therein, which requires law to enlarge the application scope of the recalling system. Many negative consequences may come up, if without compulsory recalling system, for instance, most of the consumers do not know that products have defects and if manufacturers do not perform recalling obligation actively, a large quantity of infringement on the interests of consumers may occur. Especially for such consumer goods as food and drugs that play an important role in daily life, if found defective, the product recalling system is of an important significance.

Generally speaking, the objects of recalling are the products with quality problems. However, that does not mean all the products with flaws shall be recalled. Therefore, it is necessary to set some standards and limits to recalling. The formulation of those standards shall mainly depend on whether the potential harms of products may cause damages to the body or property of consumers or public safety. For instance, the auto brake system manufactured by enterprises may have problems and the food may have some defects that may harm the public. It shall be pointed out that even though the defects of products may not be found according to the existing science and technology but may be disclosed in the future, such products may also be deemed to reach the standard of recalling.

Article 41 of the Product Quality Law of the People's Republic of China provides for the circumstances for waiver of product responsibilities of manufacturers, including "where no defects of the products are found based on the science and technology level when they are put into circulation". Accordingly, as believed, now that the existing science and technology can not find those defects, the products shall not be recalled. The author holds that though Article 41 of the Product Quality Law provides for the waiver of responsibilities, it does not mean that manufacturers are not obliged to recall defective products. Furthermore, Article 41 aims at the products with flaw rather than defective products. Even if a defect of products can not be found at present, manufacturers shall also be obliged to recall the products if their defect may be detected with further development of science and technology and such defect causes threat to public safety. For instance, if the side effect of some biological drugs to human body has not been found when produced, but such side effect exposes when launched in the market and is found by new technology, the manufacturer shall timely recall the relevant drugs unconditionally.

(2) Separate legislation of the recalling system is beneficial to protecting the fundamental civil rights and maintaining public safety. In the development of productivity, physical and cultural prosperity and increasing improvement of the living standard of people, while the varieties and quantities of consumer goods increase by geometric series, the threat arising out of the defects of products to the fundamental civil rights (inclusive of personal right and property right) of consumers, escalates constantly. Thus, the maintenance of public safety is also an important issue. Separate legislation of the recalling system offers an important support to maintain the fundamental civil rights and public safety, which may provide full-dimensional institutional standards on the corresponding issues. To determine the standards on defective products, improve the procedures for performing the obligation of recalling and clarify the legal liabilities of the recalling obligors by law, the recalling obligors may be promoted to recall products in a timely and active manner and eliminate adverse effects of defective products on production and human life, hence, maintaining fundamental civil rights of citizens in production and life as well as public safety.

(3) Only by special legislation may the recalling defective products be defined as statutory obligation. Only when the obligation of recalling defective products is clearly provided in legislation, can the legal basis be specified for making low-level laws, including administrative laws and regulations. Some scholars suggest that the clauses of defective product recalling shall be provided in the tort law. The author thinks that is inappropriate, since the recalling of products is not a legal liability in nature, and in many cases, it is hard to incorporate it into the framework of infringement in civil liabilities. To define the recalling

obligation of manufacturers through legislation, it is required to establish the relevant supplementary systems, and especially when manufacturers fail to perform the recalling obligation, the corresponding sanctions shall be imposed to guarantee the implementation of it.

(4) The recalling system, as the development of productivity and socialized production, has formed a set of complete system in private law and public law. As far as the content and scope in private law are concerned, it differs from the liabilities of tort and contract, and it is hard to adjust it by traditional contract law and tort law. Thus, it shall be separately prescribed. (Gu, 2007) In terms of public law, the recalling system involves a myriad of provisions on the management of product quality and the standards on quality certification, which remains to be improved through legislation. Up to now, we have no standards on the quality of some products or otherwise the standards are outdated, which urgently requires the governmental departments to research and formulate the standards on product quality. Upon determining specific technical standards, if finding products with potential harms, the enterprises shall be taken initiatives to recall the products as soon as possible. If enterprises fail to perform the obligation of recalling, they shall undertake corresponding legal liabilities. Therefore, a set of specific and operable technical standards shall be stated, which are the premises for establishing the recalling system. After the establishment of the standard system, if enterprises fail to recall defective products, the competent authorities of the government will make them bear liabilities concerning product quality. Otherwise, there is no basis on which the government imposes penalties on the relevant enterprises, and consequently, there is no basis for its legal enforcement.

References

Cao Jianming (2000). Union Law — From European Common Market to European Economic and Monetary Union. Hangzhou: Zhejiang University Press, 198

Gu Suhong (2007). Liabilities for recall of drugs and implementation obstacles and strategies. Economic Research Guide, 6

Hao Xiangying (2007). Legal thinking on building food recalling system. Journal of Zhengzhou Institute of Aeronautical Industry Management (social science edition), 4

He Guanghui (2007). On specific construction of China's detective product recalling system. Social Science Journal, 1

Jiang Chenxin (2004). On recalling system of defective products. Journal of Guangxi Administrative Cadre Institute of Politics and Law, 1

Li Hui, Liu Ning (2007). Discussion on China's auto recalling system at legal level. Market Modernization, 20

Qin Encai (2006). Legal thinking on China's recalling system of defective products. Legal World. 2006-10

Tian Li (2007). On China's recalling system of defective products. Economic Problems, 10

Wang Jing (2007). Legal thinking on construction of product recalling system and protection of customers' rights and interests. Shanghai Enterprises, 2
Yang Hui (2007). On protection of customers' rights and interests by the recalling system of defective products. Journal of Anhui University (philosophy & social science edition), 4
Zhang Xiaorui (2007). Failure of problematic products lies in good excuses. Beijing News, 2007-11-22, B10

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