Product Liability in Latin America

By: Leandro M. Castelli, Maria Helena Ortiz Bragaglia, Cristobal Jimeno, Lina Mendez and Domingo Rivarola Reisz

Leandro M. Castelli joined Marval, O'Farrell & Mairal in 1994 and became a partner in 2002. A member of the Litigation & Arbitration department, Mr. Castelli has extensive experience in complex litigation, especially in product liability and environmental claims. He worked at the firm of Davies Arnold Cooper (now DAC Beachcroft) in London, England on insurance and reinsurance matters. Mr. Castelli graduated as a lawyer from the University of Belgrano in 1991. He is Chair of the Consumer Protection Law Committee of the Colegio de Abogados de la Ciudad de Buenos Aires. He has also been Vice-Chair for Latin America and the Caribbean of the Lex Mundi Dispute Resolution Practice Group. He is a member of the Colegio de Abogados de la Ciudad de Buenos Aires, the Colegio Público de Abogados de la Capital Federal, the Colegio de Abogados de San Isidro and the International Association of Defense Counsel (IADC).

Maria Helena Ortiz Bragaglia is partner at the Demarest Advogados law firm. Her work is focused on civil litigation/arbitration, defending domestic and foreign companies in court and/or administrative proceedings, on civil, commercial and consumer-related matters. She is a member of the Brazilian Institute for Competition, Consumption and International Commerce Committee (Comitê do Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional – "IBRAC") and the Lex Mundi Product Liability and Product Safety group, the largest and most renowned network of independent firms in the world. She has been recognized by Chambers Latin America in 2011, 2012 and 2016.

Cristobal Jimeno is a partner at Gutiérrez, Waugh, Jimeno & Asenjo Abogados. His practice has focused on civil and commercial litigation, arbitration and the resolution of financial, insurance and construction disputes. He obtained his law degree from the University of Chile (1996). He is a member of the International Bar Association (IBA) and of the International Association of Defense Counsel (IADC). He was appointed member of the Council of the Chilean Copper Commission ("COCHILCO") (2006 – 2008) by the President of the Republic. He is currently a member of the Boards of Directors of health and insurance companies. In recent years, he has been recognized as a leading attorney in litigation and arbitration in several publications such as Chambers and Partners (Band 3, 2017).

Lina Mendez is partner of the firm Philippi Prietocarrizosa Ferrero DU & Uría. Ms. Mendez graduated as a lawyer from the Universidad de los Andes in 2012.

Domingo Rivarola Reisz is a partner of the firm Payet, Rey, Cauvi, Pérez Abogados, specializing in commercial dispute resolution, international and domestic arbitration, telecommunications, tort and contract law. He has extensive experience in general litigation, commercial litigation, regulatory litigation and civil and commercial arbitration. He is recognized for his successes in various judicial and arbitration proceedings representing international and local companies. Prior to joining the firm, he was Partner at Bullard, Falla, Ezcurra & Rivarola Abogados and Legal Counsel at the National Institute for the Defense of Competition and the Protection of Intellectual Property (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual -INDECOPI).

THE current political shift to a "more market-friendly approach" is encouraging an increasing number of companies to invest in Latin America. Inflation and fiscal deficits are falling and currencies' depreciation -which used to erode profits in dollar terms and generated an incentive for multinational firms to move to other markets in the past- is now stabilizing. This shift leaves the region fertile for business development in a reduced players' market.

For those businesses involved in the manufacturing and supply of consumer products, a proper understanding of product liability issues has a direct impact on profit. More often than not, product defects present complex cross-border situations that require a product liability risk management team with knowledge of the relevant laws across the jurisdictions at play. Failing this, the rising number of product liability cases -including class actions and punitive damages regulations in the region- may reduce profits, not only because of litigation expense, but also due to the company's potential tarnished reputation. All in all, product liability risk management should be embraced as an achievable way of increasing firm value.

While the countries in the region seem to be following each other's lead in the political shift, product liability issues still vary greatly, despite the fact that their approaches are often meant to be coordinated, as intended by the Organization of American States. These divergences reinforce both in-house and external counsel's need to understand cross-border issues where their clients' products or components are marketed.

In this article, we set out a general overview of the product liability regimes across five countries in the region. We also encourage developing close connections with Latin-American firms who have the ability and expertise to provide advice and manage the practical application of product liability issues.

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I. Argentina

A. Current rules related to product liability

Product liability is regulated by the general regime for damages in Argentina, which has its legal origin in the Civil & Commercial Code, Law No. 26,994 ("CCC") and the Consumer Protection Law No. 24,240 ("CPL"), as amended. Criminal liability may also arise in specific cases where products intentionally, or by means of serious negligence, do not comply with applicable regulations or if the sale or marketing of the product involves fraud. Consumers are further protected by fair trade laws, which establish rules for labelling and advertisement of products.

B. Definition of a "product defect"?

Neither Argentine law nor the Consumer Protection Agency provides a definition of product "defect". Frequently, the terminology found in Article 1757 of the CCC will be used, which addresses: the damages caused by virtue of the risk or defect inherent in their goods. Under this rule, the traditional three types of defect apply: manufacturing defect; design defect; and warning defect. The applicable standard is that products must provide safety against risks that are reasonably foreseeable.

Argentine scholars' opinions also refer to the European Council Directive 85/374/EEC of July 25, 1985 which states that

> A product is defective when it does not provide the safety which a

person is entitled to expect, taking all circumstances into account, including: (i) the presentation of the product; (ii) the use to which it could reasonably be expected that the product would be put; (iii) the time when the product was put into circulation' and that 'A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

In fact, the European Directive arguably does not contain a "defect" definition, but points to when a product may be defective. In this respect, the law seeks to avoid the analysis of the causes or origins of the defect that produce damage and emphasize in the circumstances when a product does not fulfil the security conditions. These circumstances ultimately will be judged by courts in each case.

C. Relevant product liability regulatory authority and their powers

The Secretary of Commerce (SC, an agency of the Ministry of Production) through the Consumer Protection Agency (CPA – *Dirección Nacional de Defensa del Consumidor*) is the federal enforcing authority for the CPL. The provinces and the City of Buenos Aires have their own local enforcing authorities.

The CPL empowers the SC as the control agency to:

(i) develop policies of consumer advocacy for sustainable consumption and environmental protection;
(ii) maintain a national register of associations of consumers and users;
(iii) receive and act on the concerns and complaints of consumers or users;
(iv) arrange for inspections related to the application of the CPL;
(v) request reports and reviews to public and private entities regarding the matters of the CPL; and
(vi) punish *sua sponte* or by request from hearings involving complainants' victims, suspected offenders, witnesses and experts.

On a lower administrative level, the CPA shall comply with the following directives:

(i) understanding on the implementation of policies and regulatory frameworks needed to protect consumer rights;
(ii) advice, orientation and broadcasting of information to consumers and suppliers;
(iii) processing consumer complaints, monitoring, and establishing sanctions if deemed applicable;
(iv) monitoring and control over suppliers' illegal or harmful behaviors;
(v) providing support to teachers, education entities as well as provincial and/or municipal agencies and civil, social, community, professional and/or business organizations agencies; and
(vi) organizing, maintaining and promoting the national register of associations of consumers and users.

Additionally, those authorities that have approved the commercialization of the product shall monitor product's compliance with specific regulations, including safety matters.

D. Product recalls or other corrective action

There is an obligation to recall a product if it is considered "potentially harmful" or "dangerous" after having introduced it into the market. In this regard, recently enacted Resolution No. 808-E/2017 of the Ministry of Production regulates this procedure, including providing: (i) the requirements for the notice to the regulator and consumers; (ii) the presentation of a dissemination plan; and (iii) reporting obligations. There is an obligation to provide progress reports in periods that should not exceed 60 days and a final report should be filed after the corrective actions is terminated. The regulator may require further measures subject to the consumer response to the corrective action conducted.

E. Notification requirements

Resolution 808-E/2017 of the Ministry of Production provides that mandatory notification to the Ministry must contain the following requirements:

(i) identification of the product or service provider including: legal status or corporate name; name or commercial business name; principal and secondary economic activities; tax ID number; address of the establishment; phone, fax and email; name and title of the responsible representatives; and existence of supplier representation from the MERCOSUR States parties, and where applicable, indicating the identification and contact details;
(ii) detailed description of the product or service, including the necessary information for its identification, especially: company name; brand; model; number or code (batch, series, chassis, barcode, etc.); initial and final date of manufacturing; manufacturing country; image in digital format of the product; quantity and date of commercial sale; stock products without sale; and when applicable, to which countries the product or service has been exported;
(iii) detailed description of the defect, supplying the necessary technical information and identifying the date and manner in which it was detected;
(iv) detailed description of the risks and their consequences;
(v) geographic location of products and services which present the defect;
(vi) indication of measures already adopted, and of proposals to correct the defect and eliminate the risk;
(vii) if any have occurred, description of accidents related to the defect of the product or service, including the following information: place and date of the accident; victims' identification; material and physical damage caused; if applicable, information from any legal action related to the accident, specifying the cause of action, the names of the parties, judicial districts and the courts where it was filed and the case number; and provisions adopted in relation to victims;
(viii) media plan; and
(ix) consumer response plan.

The national authorities referred to above may request from the provider the additional or complementary information that they deem necessary.

The local regulation states that the notification should be made "immediately"; i.e. it should be made as soon as possible. There is no specific form.

F. Penalties or sanctions for failing to comply with reporting obligations

The CPA imposes administrative penalties to the supplier for breaching its obligation to notify consumers and relevant authorities or conducting the recall, with fines up to ARS 5,000,000 (approx. USD $290,000). Other sanctions that may be imposed by these authorities are the following: warning; seizure of goods and products that are the subject matter of the infringement; closure of premises; suspension of registration in the registers of suppliers required to contract with the government for up to 5 years; forfeiture of concessions, privileges and special tax or credit systems granted in favor of suppliers. Please note that these sanctions may be applied even if there is no damage suffered by any person (i.e. they are provided to prevent future harmful behaviour to consumer rights).

General civil liability rules and specific provisions of the CPL that apply to risky and defective products, impose strict, joint and several liabilities to the producer, manufacturer, distributor, supplier, retailer and/or anyone using its brand or trademark on the product, for damages arising from the risk or defect of such product.

Moreover, the lack of notification or recall could be the grounds for a punitive damages award against the manufacturer who, having the information at hand, did not share it with the consumers and relevant authorities.

Finally, if defective products result in any harm that is punishable under applicable criminal statutes, then Argentine authorities can seek criminal sanctions against company officers who failed to report and ultimately recall a defective product. The Argentine Criminal Code does not provide for a specific rule for the failure to disclose or notify product defects. That is, the lack of disclosure is not a crime *per se* under the Argentine criminal law. Hence, the failure to notify would not be the actual criminal charge, but rather would be the basis for ascribing criminal liability based on subsequent results. For example, if a product manufacturing or design defect causes physical harm to a consumer, then the failure to take corrective measures once the company learned of the defects could substantiate charges on the count of bodily injury. In this context, please note that with limited exceptions, Argentine criminal law does not yet recognize corporate criminal liability. That is, a corporation may not be held criminally liable for actions or omissions of its agents in its behalf. Therefore, criminal liability would fall individually upon those who participated in -or directed- the crime in question, under the usual principles of criminal accountability.

G. Punitive or exemplary damages

Punitive damages are available under the CPL. Under the CPL, the court may impose, at the request of the injured party, punitive damages on suppliers in breach of legal or contractual duties. Pursuant to this provision, the amount of punitive damages will be imposed according to the "seriousness and other circumstances of the case" and regardless of other applicable sources of recourse available to the consumer. There is no standard of conduct required for the application of punitive damages, nor concept of ratios of punitive damages to compensatory damages, or limitations on multiple punitive awards for the same conduct. Punitive damages may not exceed the amount of ARS 5,000,000 (approximately USD $290,000).

H. Who in the supply chain bears liabilities, obligations or duties?

The CPL, as amended, sets forth strict, joint and several liabilities of the whole supply chain, including anyone using its brand or trademark on the product, for damages arising from the "risk" or defect of products. The carrier will be responsible for damages caused to the product as a consequence or on the occasion of the service.

Non-faulty parties may afterwards seek contribution from the faulty party to compensate them for the damages that they have paid to the consumer.

I. Governmental websites, public record (or equivalent)

The CPA uploads all of the information on recalled products to the following website of the Inter-American Rapid Alerts System (SIAR for its Spanish acronym) of the Organization of American States (OAS):

https://www.sites.oas.org/rcss/EN/Pages/alerts/default.aspx

The SIAR is the hemispheric integrated system for the generation, management and rapid and secure exchange of information on consumer safety alerts, based on its members agreed criteria on principles, general concepts and relevant terminology for regional alerts.

J. Proposed legal or regulatory reforms

A proposal to reform Law 26,993 was passed in September 2014. This Law created three new entities to deal exclusively with consumer claims:

(i) A mandatory conciliation system (COPREC);
(ii) An administrative body with the authority to decide on monetary claims and award damages (Audit of Consumer Relations); and
(iii) A new judicial forum (National Court of Consumer Relations).

To date the COPREC is the only operating agency, while the Auditor of Consumer Relations and the National Court of Consumer Relations are still to be implemented. These entities were originally created to adjudicate consumer claims not exceeding ARS 487,300 (approximately USD $28,000). This cap was not meant apply to punitive damages up to the maximum of ARS $5,000,000 (approximately USD 290,000).

However, early this year the Federal Government and the City of Buenos Aires signed an agreement to transfer the National Court of Consumer Relations to the City of Buenos Aires by referendum of the relevant legislature's approvals. A Procedural Code of Consumer Relations is being drafted under the scope of the Sub-secretary of Justice of the City of Buenos Aires. The allocation of public funds to this task strongly suggests that the transfer likely will be effective in the near future. In light of certain provisions of the draft, we can confirm that the Consumer Courts to be implemented in the City of Buenos Aires are intended to hear all consumer claims with no applicable cap. The implementation of the Auditor of Consumer Relations is yet unclear.

II. Brazil

A. Current rules related to product liability

The Brazilian Constitution protects consumer rights as fundamental rights, established in Article 5, item XXXII.[1]

With respect to protecting health, Article 196 of the Constitution establishes that the State has the duty to promote public policies seeking to reduce harm to citizens as well as assure equal access to actions to protect them.

Along these lines, the Consumer Defense Code (Law No. 8,078/90, hereinafter referred to as the "CDC") establishes each consumer's rights, including protection for their life, health and safety.

B. Definition of a "product defect"

According to paragraph 1 of article 12 of the CDC, a product is defective when it does not offer the security that a consumer legitimately expects.

Products and services made available for consumption on the market may not cause risks to consumer health or safety beyond those that are normal and predictable as a result of the characteristics inherent to the product or service and with relation to which the suppliers are bound to supply all information related to the corresponding risks.[2]

C. Relevant product liability regulatory authority and their powers

In Brazil, the main public authorities designed to deal with product liability issues are:

(i) Department for Consumer Protection and Defense (Departamento de Proteção e Defesa do Consumidor - "DPDC");
(ii) Municipal, State and Federal District Consumer Protection agencies ("PROCON");
(iii) Public Prosecutors; and
(iv) other competent authorities (if, for example, the product is subject to health department or any type of governmental control and oversight, like pharmaceutical and food products).

D. Product recalls or other corrective action

In Brazil, the recall procedure is established in the CDC and Directive 487, dated March 15, 2012 issued by the Ministry of Justice (hereinafter simply referred to as "*MJ Directive*").

There are also norms and certain specific rules for the recall of certain products, particularly food, drugs and automobiles.[3]

If the supplier, after making a specific product or service available on the market, finds that such product or service presents a potential risk to cause harm to either health or security – and that risk is unrelated to its core essence – the supplier should immediately take every necessary step to inform consumers and correct the

[1] Art. 5., item XXXII – "The State will enact laws on behalf of consumer defense."

[2] Art. 8. "The products and services made available on the consumer market will not pose a risk to consumer health and safety, except for those considered normal and predictable as a result of their nature and use, obliging suppliers in any and all events to supply the necessary and adequate information on that respect."

[3] Resolution RDC 24/2015 from Anvisa (Brazilian National Sanitary Surveillance Agency), Resolution RDC 55/2015 from Anvisa (Brazilian National Sanitary Surveillance Agency), and Joint Directive 69, dated 12.15.2010 (Ministry of Justice and Denatran).

noncompliance. This is described in paragraph 1 of Article 10 of the CDC.[4]

The supplier shall immediately communicate its findings in writing to the DPDC, PROCON, and other competent authorities and perform a publicity campaign (or media plan).

In any such media plan, an announcement about the recall must be made in print media, as well as on the radio and television, at the expense of the supplier of the product or service.

The campaign should be designed to reach all of consumers who have acquired the product or service that is the subject of the recall. The agency hired for this purpose should study the best means and adequate time period for that announcement to ensure that the notice of the recall reaches the targeted population for the recall, allowing them to respond to the campaign.

Finally, the supplier must create a customer service plan. The company must supply detailed plans of how they will respond to consumers; how the nonconformity will be rectified; the locations and times; and the average service duration (particularly when parts need to be repaired or replaced).

Ideally, the supplier will set up a toll-free number (0800), and the supplier will make recall information available on its website.

All information must be made available in Portuguese and the recall should be free of charge, which is to say, no onus of any sort may be placed on the consumer, much less any of the measures taken to ensure consumers have been informed.

With respect to correcting the defect, the law does not pre-establish any format, and the supplier will be responsible for deciding the best way to do so. To this end, a recall may be implemented through (i) a product exchange; (ii) repair of the defect; or further, (iii) a product buyback.

It is important to note that Brazilian authorities prohibit and punish to a double standard. When recalls affect more than one country, the supplier must guarantee equal treatment of consumers, which is to say, it must define and implement a means for correcting the defect applied homogenously in each country.

E. Notification requirements

Once the harmful or hazardous nature of a product is discovered, the supplier shall immediately communicate that fact in writing to the DPDC, PROCON, and other competent authorities.

Since the main goals of a recall are to preserve consumer life, health, safety and the physical integrity, as well as to avoid/minimize any sort of loss, either as material damages or pain and suffering, a supplier should act as quickly as possible to mitigate consumer exposure to at sort of potential risk situation.

In this context, Section 1 of Article 10 of the CDC establishes that as soon as the supplier becomes aware of any hazard related to a product or service, it should immediately notify the authorities and commence the campaigns notifying the public of the recall.

Since the law does not specify a deadline and uses the temporal expression "immediate", the question of timing to start a recall has already been the subject of countless discussions. In practice, a supplier may face logistical concerns that may make it impossible to immediately start a recall, like for example, importing replacement parts and training staff to make the repairs.

Although there is no rule on this point, previous administrative decisions show

[4] Art. 10. "The supplier may not place on the consumer market any product or service that it knows or should know poses a high degree of harmfulness or hazard to health or safety. § 1 The supplier of products and services who, following introduction onto the consumer market, becomes aware of the hazards they pose, shall immediately report that fact to the competent authorities and consumers through ad campaigns. (...)".

that these bureaucratic difficulties for launching a recall do not preclude a supplier's legal duty to immediately communicate the risk to the proper authorities and to also make an advance statement (safety alert) to inform consumers about the defect in the product/service, which may include recommending interruption of its use.

Regarding the form, the communication must contain the following:

(i) complete identification of the supplier or the product or service subject to recall: company name, business name, line of work – both primary and secondary - company taxpayer or individual taxpayer id (CNPJ/CPF), state enrollment number, address, telephone number, email address and name of responsible administrators, along with their respective qualifications;
(ii) detailed description of the product or service, accompanied by information about the brand, model, lot, series, chassis, manufacturing start and end date and photo;
(iii) detailed description of the defect, accompanied by the technical information necessary to clarify the facts, as well as other information, like the date, month and year of discovery, as well as how the harm or hazard was discovered;
(iv) detailed description of the risk and its implications;
(v) quantity of products or services suffering the defect and number of consumers impacted;
(vi) details about the geographic distribution of products and services suffering the defect, placed on the market, by Brazilian state, and countries from which the products were exported or services rendered;
(vii) indication of measures already taken and measures proposed to resolve the defect and correct the risk;
(viii) description of any accidents related to the defective product or service, when applicable, containing the following information: location and date of the accident, identification of victims, material damages and physical harm caused, information on court cases related to the accident, specifying the lawsuits filed, name of plaintiffs and defendants, judicial districts and courts where each one of the cases is taking places as well as identifying numbers of those cases, and measures taken with respect to the victims;
(ix) media plan;
(x) consumer response plan; and
(xi) model document for notifying the consumer of the risk.

With respect to vehicle recalls, the supplier company has the legal obligation to send to the National Transportation Department (DENATRAN) a list of the chassis numbers of all models involved. This measure will allow recall-related information to be tied to the vehicle registration, which in the event of a sale will allow the new owner to be made aware of the recall and respond to it, in the event the prior owner had not.

For food recalls, there must be a plan to withdraw the products. That plan must be made available to health department employees and agencies, and it must include an effective tracking mechanism.

F. Penalties or sanctions for failing to comply with reporting obligations

The failure to enact a recall or its failure to enact one by the deadline or in the proper manner may subject the supplier to both administrative sanctions and criminal violations.

Administrative sanctions are established in Articles 57 et seq. of the CDC and Decree No. 2,181/97 (hereinafter simply referred to as the *Decree*).

The following practices are considered to infringe consumer rights in accordance with Item IX, "b" of Article 12 of the Decree:[5] to place on the consumer market any product or service that can cause harm to consumer health or safety, without providing clear explanatory and adequate information. Further, in accordance with Items II and III of Article 13 of the Decree,[6] the following are also considered violations: (i) failing to communicate the hazard posed by the product or service to the proper authorities, when it is released on the consumer market or upon verification at a later date that a risk exists; and (ii) failing to communicate to consumers, through ad campaigns, regarding the hazard posed by the product or services, when it is released on the consumer market or upon verification at a later date that a risk exists.

The aforementioned infringements will subject suppliers to the following penalties, in accordance with Article 18 of the Decree, which may be applied individually or combined with one another: (i) fine; (ii) product seizure; (iii) product destruction; (iv) suspension of the product's registration with the proper authority; (v) ban on manufacturing the product; (vi) suspension of the supply of products or services; (vii) temporary suspension of the activity; (viii) revocation of use concession or permission; (ix) suspension of the establishment's or activity's license; (x) total or partial ban against the establishment, work or activity; (xi) administrative intervention; and (xii) imposition of counter-advertising.

Without limitation to the civil and administrative aspects, a failure to perform a recall also subjects the supplier to criminal sanctions, including but not limited to those set forth in Article 64 of the CDC.[7]

Under Article 64, in order for a supplier's conduct to be considered a crime, it first must to meet two requirements.

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[5] Art. 12. "The following are considered infringing practices:
(...)
IX – placing any or product or service on the consumer market:
(...)
b) that can cause health or safety risks for consumers and without clear, explanatory and adequate information;
(...)".

[6] Art. 13. "The following will also be considered infringements, in accordance with the provisions set forth in Law n. 8.078, from 1990:
(...)
II -fail to communicate the hazard posed by the product or service to the proper authority, when it is released on the consumer market or upon verification at a later date that a risk exists;
III – fail to communicate the hazards posed by the product or service to consumers, through ad campaigns, when it is released on the consumer market or upon verification at a later date that a risk exists;
... ."

[7] Art. 64. "Failure to communicate to the proper authority and to the consumer the harmful or hazardous nature of the products that it becomes aware of after the product has gone to market:
Penalty – imprisonment, between six months and two years and a fine.
Sole paragraph. Whomever fails to immediately withdraw harmful or hazardous products from the market when ordered by the competent authority will also incur the same penalties as set forth in this article."

The first is malice—the agent's free and conscious desire to fail to communicate facts to the authorities and consumers or to withdraw the harmful or damaging products from the market. The level of culpability for a crime, typified in Article 64 of the CDC, has not been established.

Knowledge is the other requirement necessary to qualify as a crime. Article 64 of the CDC requires the supplier's knowledge that said products, after having been placed on the market, contain defects that may potentially make them harmful or hazardous to the consumer. If the supplier never had such knowledge, then there is no crime.

The penalties applied to whomever commits such a crime include imprisonment between six (6) months and two (2) years plus fines (cumulative penalties).

G. Punitive or exemplary damages

Punitive or exemplary damages are not contemplated in Brazilian law. As a general principle, only certain and direct damages caused to a person are subject to be recovered.

H. Who in the supply chain bears liabilities, obligations or duties?

Under Brazilian law, every participant of the consumer chain involved in production, assembly, creation, construction, transformation, importation, exportation, distribution or sale of products or rendering of services are considered suppliers. This broad definition is established in the introduction of Article 3 of the CDC.[8]

With respect to recalls, both Article 10 of the CDC,[9] as well as the MJ Directive in its Article 2, [10] expressly establish that the supplier – *lato sensu* – has the obligation to perform a recall, so that there can be no doubt that every participant in the supply chain has a responsibility to consumers and consumer protection agencies and government bodies to adopt measures related to the recall. As such, all suppliers will be subject to civil, administrative and criminal sanctions should they fail to act in accordance with the law.

Obviously, only one participant of the supply chain needs to take steps to implement the recall for the obligation to be deemed fulfilled. In other words, there is no need for multiple requests for a recall for the same defect just because there are various participants in the supply chain.

I. Governmental websites, public record (or equivalent)

Last September, DPDC launched a new portal (http://portal.mj.gov.br/recall) to provide consumers with information regarding the ongoing recalls.

The site is still being maintained by the servers of the Ministry of Justice and the idea is that companies will also have access

[8] Art. 3. "A supplier is any individual or legal entity, public or private, domestic or foreign, as well as any entities without legal personality, which involve activities of production, assembly, creation, construction, transformation, import, export, distribution or sale of products and services. (...)"

[9] Art. 10. "The supplier may not offer on the consumer market any product or service that it knows contains a high degree of harmfulness or hazard to health or safety.

§ 1 The supplier of products and services who, following their introduction to the consumer market, becomes aware of a hazard they may represent, shall immediately report that fact to the competent authorities and consumers, through ad campaigns.

§ 2 The ad campaigns referred to in the previous paragraph will be broadcast in print media, radio and television, at the expense of the supplier of the product or service.

§ 3 Whenever they become aware of a hazard present in products or services poses to consumers, the federal government, states, federal districts and municipalities shall be informed of it."

[10] Art. 2. "The product and service supplier who following its introduction to the consumer market, becomes aware of the health or hazard risk it possesses, should immediately report that fact (...)".

to this internet Web site to eventually include their own information.

J. Proposed legal or regulatory reforms?

Currently, no.

III. Chile

A. Current rules related to product liability

Chile does not have a regulation or law that specifically regulates product liability in the broad sense.

There are, however, specific laws applicable to specific products or markets which contain special provisions relating to defective products (including cosmetic products, medical devices, electrical or fuel-based products).

Along with such laws and provisions, the Consumers Protection Law (No. 19.496, as amended, hereinafter "CPL") also provides some rules applicable to defective products, which, nonetheless, have a limited scope of application.

Finally, the Chilean Civil Code contains general provisions governing contractual and tort liabilities that can be applied when the production or supply of a defective product constitutes a breach of contract, or when its consumption or use causes harm to a person.

B. Definition of a "product defect"?

Chilean legislation does not define "product defect" nor differentiate between types of defects.

The definition and development of new typologies of defective products is a task currently conducted by scholars and has not yet been adopted or recognized either by Chilean legislation or case law. Scholars have categorized defective products in "unsuitable products" (i.e. products which do not fulfil their expected purpose); "unsafe products" (i.e. products which inherently involve hazards, not attributable to improper design or manufacture); and properly "defective products" (i.e. products with safety issues attributable to bad design or improper manufacture).

However, the National Consumers Bureau ("*Servicio Nacional del Consumidor*" or SERNAC), the entity in charge of protecting consumers' rights and supervising the compliance of the CPL, has not acknowledged this distinction and has interpreted that all products that do not comply precisely with the characteristics published or offered for them constitute a defective product.

C. Relevant product liability regulatory authority and their powers

In Chile, there is no public authority specifically designed to deal with product liability issues.

However, for defective products that create safety issues, the CPL provides that any manufacturer, importer, distributor or service provider which becomes aware of any potential harm related to their respective products or services must duly notify the "competent authority" of such defect or harm (Art. 46 CPL). It is necessary to determine if there is a specific law or regulation that provides jurisdiction to a specific authority to determine whether notification must take place (e.g. regarding cosmetic products the competent authority is the Public Health Institute, regarding electrical or fuel-based products such notification must be raised before the Energy and Fuel Bureau).

However, the CPL itself creates a specific authority with general jurisdiction over consumers' issues which might involve defective products: SERNAC.

Within SERNAC's more relevant powers in relation to product liability are: (i) to oversee full compliance of the CPL and all regulation related to consumers' rights, including the power to represent consumer interests in judicial procedures; (ii) to

require information from suppliers of products and services; (iii) to gather information and conduct research programs in relation to products and services; and (iv) to perform analysis of products offered in the market.

Please note, however, that the Chilean Congress has recently approved a mayor amendment to the CPL (not yet in force), which significantly enhances SERNAC's powers.

D. Product recalls or other corrective action

Recall (a preventive measure undertaken by initiative of the supplier of a specific product) is not expressly regulated by Chilean law.

The CPL does regulate the obligation of manufacturers, importers, distributors and service providers to notify the "competent authority" (SERNAC and if any, a specialized authority) of any unforeseen defect or risk of their products. After such notification, it is the authority who decides which measures must be adopted. In the notification, the supplier may propose a recall and its conditions.

Nevertheless, SERNAC has drafted a Guide for Suppliers that contains outlines and suggestions for voluntary recall campaigns. This Guide is not mandatory and has no legal or regulatory enforceability either against suppliers or authorities.

E. Notification requirements

There is no obligation to notify the authority if a supplier decides to perform a product recall, but manufacturers, importers, distributors or service providers must notify the competent authority the existence of any unforeseen defects or risk in the products or services they provide.

The CPL provides that manufacturers, importers, distributors and service providers must notify the competent authority of the existence of any unforeseen defects or risk in the products or services they provide "without delay". This requirement, accordingly, does not set a fixed term for such notification, but rather an opportunity for it. Such notification must be made, consequently, as soon as the defect has become known to the supplier.

SERNAC has published a form in its website for such purposes:

http://www.sernac.cl/wp-content/uploads/2012/10/Formulario-de-notificaci%C3%B3n-alertas-2016.xlsx

F. Penalties or sanctions for failing to comply with reporting obligations

From a civil perspective, pursuant to the general provisions of contractual and tort liabilities set forth in the Civil Code, and which are adopted by the CPL in its Article 23, suppliers are liable for all certain and direct damages inflicted upon a person due to the defects of their products and services that can be attributed to the supplier's negligence. This includes pecuniary and non-pecuniary damages (punitive damages are excluded).

From an administrative perspective, "product defects" are sanctioned in accordance with Article 23 of the CPL, which establishes fines that can rise up to 50 UTM (about USD $3,700).

G. Punitive or exemplary damages?

Punitive or exemplary damages are not contemplated under Chilean law. As a general principle, only certain and direct damages caused to a person may be recovered.

H. Who in the supply chain bears liabilities, obligations or duties?

Pursuant to Article 23 of the CPL, any supplier that negligently causes harm in the sale or in the provision of a service is obliged to compensate the damages caused

by his conduct to the victim. Given that Article 23 explicitly refers to the "sale" of a good or the "provision" of a service, it is uncertain if it reaches other agents of the supply chain that do not directly "sell" or "provide". This issue has not been definitely settled by case law or scholars.

Notwithstanding the foregoing, if the victim decides to claim responsibilities under the general rules of tort responsibility set forth in the Civil Code, then he can raise a claim against any of the agents of the supply chain as long as their participation and responsibility in the harm can be proven.

I. Governmental websites, public record (or equivalent)

Despite the absence of any specific regulation on product liability and the lack of any established web site or public record for such purposes, SERNAC publishes all recall campaigns made under Article 46 of the CPL on its website:

http://www.sernac.cl/category/seguridad-de-productos/alertas-de-seguridad-de-productos/

Currently, publications are kept online indefinitely.

J. Proposed legal or regulatory reforms

The National Congress has recently approved a major amendment to the CPL which has now only a few minor steps remaining to be enacted officially as law.

Concerning product liability, one of the most relevant aspects of the amendment lies in the new powers granted to SERNAC.

After the enactment of the amendment, this agency will be able to:

(i) directly sanction any supplier that breaches the CPL;
(ii) SERNAC's previous powers to oversee the fulfilment of the CPL are enhanced, gaining the faculty to enter the supplier's facilities in order to supervise compliance of the law;
(iii) SERNAC's interpretation of consumer regulation, made through specific administrative instruments, will be taken as the valid and mandatory interpretation of such regulation; and
(iv) SERNAC will be able to issue general instructions to complement the CPL. This last authority may be crucial for product liability due, precisely, to the deficiency of the law in this matter.

Finally, the reform increases fines that may be imposed in case of breach of the CPL. The general sanction is increased from 50 UTM (USD $3,700) to 300 UTM (USD $22,000).

IV. Colombia

A. Current rules related to product liability

Law 1480 of 2011 provides the general rules regarding consumer protection in Colombia. Additionally, Decree 679 of 2016 provides specific rules regarding defective products; Decree 1074 of 2015 provides specific rules regarding product warranties; and *Circular Única* sets forth specific rules regarding warranties, information and advertising of products and services.

B. Definition of a "product defect"

Law 1480 of 2011 defines a "defective product" as any good that, due to an error in the design, manufacture, construction, packaging or information, does not offer reasonable safety conditions to consumers.

C. Relevant product liability regulatory authority and their powers

The Colombian regulatory authority on consumer protection is the Superintendence of Industry and Commerce ("SIC"). According to Decree 4886 of 2011, the SIC has the authority to:

(i) impose sanctions of up to 2,000 minimum legal wages (approx. USD $490,000) for breaches of Law 1480 of 2011;
(ii) perform inspections, and issue any other evidence in order to verify facts or circumstances related to breaches of law;
(iii) order, as a preventive or definitive measure, the cessation and correction of the information or advertising that does not meet the legal requirements or that concerning unhealthy products;
(iv) order, as a preventive or definitive measure, cessation of the manufacture and marketing of products that may threaten life and safety of consumers, or that do not comply with technical regulation, sanitary or phytosanitary measures; and
(v) publish information related to natural or legal persons that have been sanctioned for breaches of Law 1480 of 2011.

D. Product recalls or other corrective action

According to Law 1480 of 2011, in the event a member of the production, supply and marketing chain has knowledge or has evidence that at least one manufactured, imported or marketed product has a defect, or that could harm health, life or safety of people, must implement corrective measures over the products that have been marketed and over those which have not. In accordance with Decree 679 of 2016, the following measures must be implemented:

By the producer and importer:

(i) suspend production or purchase orders of the product until a corrective measure is implemented. In this case, the product must be isolated and labeled in order to prevent the product from being marketed;
(ii) inform all the suppliers and sellers, within three (3) calendar days, about the defect in the product;
(iii) inform distributors and sellers about the immediate suspension of the marketing and distribution of the defective product until a corrective measure is implemented;
(iv) inform consumers about the defective products, through adequate means; and

(v) inform the SIC about the defect of the products.

By the supplier and seller:

(i) suspend distribution and marketing of the defective product;
(ii) request the producer or importer the information that must be communicated to consumers;
(iii) inform consumers about the defective products; and
(iv) inform the SIC about the product defect.

In the event a defective product has been marketed, the supplier or seller must directly and immediately inform consumers about the corrective measures implemented by the producer or importer, and the means by which the product will be recalled, isolated, restored or refunded.

Once the defective product has been identified and isolated, the producer or importer must destroy the product or, if possible, correct the defect ensuring the risk to health, life, or safety of consumers has been eliminated.

E. Notification requirements

In the event a member of the production, supply and marketing chain has knowledge or evidence that at least one manufactured, imported, or marketed product that has a defect, or that a product could harm health, life, or safety of people, must inform the SIC, within three (3) calendar days, the following, the member must provide notification, including:

(i) clear, truthful and sufficient identification of the name and type of product that has been marketed, including the reference and batch number, import or production date and, if possible, date, number of defective units and places in which the product was marketed;
(ii) a photograph or image of the defective product;
(iii) a description of the measures that will be implemented;
(iv) a description of the defect or danger of the product;
(v) number and description of the damages caused and the victims of the product, indicating the age of the affected or dead people;
(vi) identification of the most representative suppliers or sellers, providing their contact information; and
(vii) if applicable, a description of the procedure that will be implemented to recall the product and to refund the purchase price (return expenses cannot be charged to consumers).

F. Penalties or sanctions for failing to comply with reporting obligations

The SIC may impose the following sanctions for breaches of Law 1480 of 2011 and Decree 679 of 2016:

(i) fines of up to 2,000 minimum legal monthly wages (about USD $490,000);
(ii) temporary closure of the business for up to 180 days;
(iii) for repeat offenders, permanent closure of the business or withdrawal of a web page or any other means of electronic commerce;
(iv) temporary of definitive prohibition to produce, distribute or offer certain products;
(v) order the destruction of a defective product;
(vi) impose successive fines of up to 1,000 minimum legal monthly wages, for failure to comply with orders or instructions; and

(vii) in the event it is proven that directors, managers, legal representatives, fiscal auditor, partners, owners or any other natural persons have authorized or performed conducts that breach Law 1480 of 2011, the SIC may impose sanctions of up to 300 minimum legal monthly wages (approx. USD 74,000) and prohibit their business activities for up to five (5) years.

G. Punitive or exemplary damages?

Colombian law does not provide punitive or exemplary damages caused for breaches of contractual and non-contractual obligations.

However, in the event a producer or seller is found liable for breach of a contractual or legal duty, the SIC may impose a fine of up to 150 minimum legal monthly wages (about USD $37,000).

H. Who in the supply chain bears liabilities, obligations or duties?

According to Law 1480 of 2011, the producer and seller are jointly and severally liable for damages caused by the defective products.

Notwithstanding, as indicated above, all members of the production, distribution and marketing chain have the obligation to implement corrective measures and to inform the SIC and consumers about the defective product.

I. Governmental websites, public record (or equivalent)

The SIC has a web page where the authority publishes a list of the products that have been recalled due to safety problems. However, Decree 679 of 2016 does not provide a term of permanence for the publications.

The link to the web site is the following:

http://www.sic.gov.co/ consumo-seguro

J. Proposed legal or regulatory reforms

There are no legal or regulatory reforms pending in Colombia regarding product liability.

V. Peru

A. Current rules related to product liability

The Code of Protection and Defense of the Consumer approved by Law N° 29571 ("*Consumer Protection Code*") is the Peruvian consumer protection statute.

The Consumer Protection Code regulates, among other topics, consumers' rights, including the right to access suitable products that do not represent a risk or danger to their life, health or physical integrity; and, the right to receive sufficient, true, timely and accessible information to make a decision that suits their interests, as well as to adequately use of the goods and services. The Consumer Protection Code also regulates suppliers´ obligations, information standards, hazard warnings, mandatory product labeling information, advertising requirements as well as product´s liability.

Administrative liability will arise when a supplier breaches any provision of the Consumer Protection Code. However, civil liability will apply only in the cases where a defective product causes any damage to the physical integrity of consumers or consumers' goods. In these cases, damage awards cover all the consequences caused by the product, including past and future pecuniary losses as well as emotional and moral harm. The Consumer Protection Code and the Peruvian Civil Code establish the principle of strict liability.

B. Definition of a "product defect"

The Consumer Protection Code establishes a definition for "product defect". According to Article 102 of the Consumer Protection Code a defective product is a product that represents a risk to the safety of consumers, considering relevant circumstances like:

(i) the design of the product;

(ii) the way in which the product has been placed in the market, including its appearance, the use of any trademark, the advertisement of the product, and its instructions of use or warnings;

(iii) the foreseeable use of the product; and,

(iv) the materials, content and condition of the product.

The Consumer Protection Code specifically refers to the defects that may appear in repaired products. In these cases, the Consumer Protection Code states that the consumer is entitled to ask the supplier to repair the product again within 30 days after receiving the product that was originally improperly repaired.

C. Relevant product liability regulatory authority and their powers

The National Institute for the Defense of Competition and Consumer Protection (INDECOPI) is the regulatory authority in charge of protecting consumers' rights; supervising that the information provided in the markets is correct; and securing the suitability of goods and services taking into account the information provided; and avoiding discrimination.

INDECOPI´s Consumer Protection Commission (*The Commission*) is in charge of solving disputes and enforcing rules regarding product liability. On the other hand, the National Authority of Consumer Protection, which is also part of INDECOPI, is in charge of recalls.

Relating to product liability, the Commission is entitled to order suppliers to repair a defective product. If repairing a product is not possible, the Commission may also order a supplier to exchange the product for another product that has identical or similar characteristics. When neither repairing nor replacing the product

is possible or reasonable according to the circumstances, the Commission may order the supplier to refund the money that the consumer paid for the product, including statutory interest.

Additionally, the Commission may impose sanctions such as:

(i) warnings;
(ii) pecuniary sanctions up to 450 Tax Units[11] (about USD $565,000);
(iii) corrective measures such as: (i) confiscate and destroy products, labels, packing and any other good that is being subject of a claim; (ii) order the publication of a rectifying or informative notice; and, (iii) in the case of very serious or recurrent infractions, the Commission is entitled to: a) request the competent authority to temporarily close an establishment for a maximum term of six months; or b) request the competent authority to disqualify temporarily or permanently a supplier. In general, the Commission is entitled to order any corrective measure that intends to revert the effects of the offending conduct or to prevent the offending conduct to occur again.

In some cases, when a claim has been filed but not yet resolved, the Commission is entitled to order precautionary measures to guarantee the fulfilment of the future final decision of the Commission. These precautionary measures are the following: a) order the cessation of the activity that is being claimed; b) confiscate or order the immobility of products, labels, packing, and any other good that is being subject of a claim; c) adopt the necessary measures for the custom authority to avoid the entrance of a product that is being subject of a claim; d) order the temporary closure of an establishment; and e) order any other measure that aims to avoid any harm that may be caused by the activity that is being claimed or that aims to stop the activity that is being claimed.

It is important to note that INDECOPI is not entitled to order payment of compensatory damages. Only the judicial power is entitled to do so. Therefore, besides the administrative procedure in INDECOPI, the consumer may also file a civil claim for damages.

D. Product recalls or other corrective action

The regulatory framework regarding recalls is provided by the Consumer Protection Code and the Supreme Decree N° 050-2016-PCM.

According to the Consumer Protection Code, when a supplier detects the existence of unforeseeable risks relating to products or services that have been already placed in the market, the supplier is obliged to take reasonable measures to eliminate or reduce the danger immediately. These measures are:

(i) notify the competent authorities;
(ii) take the product or service off the market;
(iii) complete the replacement or repair of the product; and
(iv) immediately warn consumers.

Once the supplier detects the risk or has enough evidence that a risk might occur, the supplier must warn consumers within five (5) days.

[11] Currently, the Peruvian Tax Unit (UIT) is S/. 4,050.00 (four thousand fifty Soles) which is equivalent to USD $1,250 approximately.

E. Notification requirements

In Peru it is only mandatory to notify the National Authority of Consumer Protection if the defective products or services represent an unforeseeable risk.

Once a supplier detects a risk or has enough evidence that a risk might occur, the supplier must notify the National Authority of Consumer Protection within five (5) business days. This term may be extended for another ten (10) business days.

There is a specific form that the supplier must file with the National Authority for Consumer Protection while notifying of the recall. This form must contain detailed information about the supplier, the characteristics of the product or service that is being recalled, the number of products or services that have been placed in the market. Also, in this form the supplier must explain what measures will be adopted to eliminate or reduce the risk created by the product or service. The supplier must also present a copy of the warning that was circulated among the consumers.

The National Authority for Consumer Protection is entitled to request more information from the suppliers if needed. The Authority is also entitled to interview suppliers and request the modification of any warning that has been circulated to consumers if it doesn´t fulfil the legal requirements.

INDECOPI will publish the warning exactly as it was presented by the supplier. The warning that will be published in the media must have the word ¡WARNING! on top of the page and must state that *"[The supplier [suppliers name] warns that the product/service [name of the product or service] may cause risks for the health and/or safety of the consumers",* following this format:

¡ADVERTENCIA!

La empresa "X" advierte que su producto/servicio "Y" presenta riesgos para la salud y/o seguridad de los consumidores.

FOTOGRAFÍA Y/O DESCRIPCIÓN DEL PRODUCTO O SERVICIO*

Dichos riesgos se deben a que «descripción detallada del defecto o característica del producto o servicio generador del riesgo».

A fin de resguardar la seguridad y salud de nuestros clientes, hemos adoptado las siguientes medidas: «descripción de las medidas adoptadas por el proveedor para mitigar el riesgo generado por el producto o servicio y el plazo a partir del cual se implementaron o implementarían».

Para mayor información, favor contactarse con nosotros a través del siguiente teléfono «número de teléfono» o escríbanos al siguiente correo electrónico «dirección de correo electrónico».

On September 5, 2016, INDECOPI´s Board of Directors approved a form that must be filed with the National Authority of Consumer Protection when notifying a recall. This form must include the following information:

(i) supplier´s identification;
(ii) information regarding all providers that participated in the supply chain;
(iii) simple and detailed information of the product or service that is being recalled (e.g., brand, model, series, manufacture date, country of origin, among others);
(iv) detailed description of the defect or characteristics of the product that caused the risk and description of the possible accidents that the defective product or service might cause;
(v) the number of products or services placed in the market and the number of products or services that have been already acquired by consumers;
(vi) geographic distribution of the product or service that is being recalled;
(vii) description of the measures adopted by the supplier in order to eliminate or reduce the risk originated by the product or service that is being recalled;
(viii) copy of the warning that has been circulated among consumers;

(ix) period in which the supplier will repair or replace the product or service that is being recalled; and
(x) other relevant information depending on the case (e.g., pictures, Customs Authority public deed, copy of the communications between the supplier and the manufacturer, laboratory proofs, CDS, USB, among others).

F. Penalties or sanctions for failing to comply with reporting obligations

The direct consequence of failing to comply with reporting obligations relating to product recalls is a breach of the provisions of the Consumer Protection Code. Article 28 states that a supplier must notify competent authorities when he/she detects the existence of not foreseeable risks regarding to products or services that have been already placed in the market. The Commission is entitled to initiate an administrative proceeding against that supplier and to impose pecuniary sanctions up to 450 Tax Units, as well as corrective measures.

G. Punitive or exemplary damages?

In the product liability context, punitive or exemplary damages are not contemplated in Peru. The Peruvian Civil Code and the Consumer Protection Code state that civil liability will apply only in the cases where a defective product causes damage to the physical integrity of consumers or consumers' goods. In these cases, damage awards cover all the consequences caused by the product, including past and future pecuniary losses as well as emotional and moral harm.

H. Who in the supply chain bears liabilities, obligations or duties?

Regarding both administrative liability and civil liability for defective products, all suppliers are jointly liable to consumers. However, in order to obtain reimbursement, each supplier may file an action against the provider that supplied the defective product or against the provider that caused the defect.

According to the Consumer Protection Code, "suppliers" are all the individuals or companies that take a part in the supply chain, including manufacturers, import agents, distributors, wholesalers, and retailers, among others.

On the other hand, according to the Consumer Protection Code, the people who qualify as "consumers" are individuals or small companies that acquire, use, or enjoy products or services as final consumers for his/her own benefit, his/her family's benefit, or for a social benefit acting outside the scope of a business or professional activity. In the case of small companies, the products and/or services that are claimed must not be related to their core business.

The Consumer Protection Code applies to all consumer-supplier relationships that take place in Peruvian territory or that have effects in Peru. Finally, the statute of limitations for consumer claims is two (2) years after the product defect is detected.