# SOUTH AMERICAN CONSUMER PROTECTION LAWS

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## South American Consumer Protection Laws

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### **South American Consumer Protection Laws**

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### Introduction

Since 1990 a number of South American countries have enacted extensive consumer protection statutes. In addition, most of the remaining South American countries are considering similar statutory provisions. These statutes emphasize consumer transactional law, including regulation of the terms of contracts relating to credit and to other sales contracts. An important part of these statutes addresses consumer access to accurate information necessary to inform consumer choice. In addition, many of these statutes address product guarantees or warranties and redress for injuries caused by defective products. They also provide a range of administrative and judicial remedies. Of particular interest to producers in the United States are provisions which extend these standards — and often the remedies accompanying them — to foreign manufacturers and exporters.

The enactment of these provisions has coincided with the replacement of several authoritarian governments by democratically elected ones and with the substitution of free market principles for concepts of centralized economic planning and control. These coincidences reflect both an increased role for consumer groups and the importance of consumer transactional law in a market economy.

These enactments share several common sources or influences that provide guidance in interpreting them. The Mexican Consumer Protection Law of 1975 and the 1990 Brazilian law have played a role in the development of the statutes of several countries. A variety of sources from the European Community, particularly Spanish and French consumer law, have likewise been considered in the development of some of these statutes. Many of the enacted and proposed provisions also correspond closely to the United Nations Guidelines on Consumer Protection and the model consumer protection law drafted by the Regional Office for Latin American and the Carribbean of the International Organization of Consumers Unions (IOCU; now Consumers International).

This book seeks to provide both a commentary on each of the provisions as well as the source material necessary for an independent examination of them. A preliminary section introduces the discussion of individual countries and provides an overview of the statutory provisions and proposals, in addition to a general overview of the civil law system as it operates in South America. This section seeks to provide a foundation to the

statutes' similarities and differences. By treating the statutes as a group, it establishes some context against which to read the chapters dealing with individual countries.

A subsequent section addresses each country separately. The discussion includes a brief summary of the principal aspects of the statute or most prominent existing proposal followed by a more detailed analysis including discussion, where appropriate, of the implications of these provisions for foreign manufacturers or importers. Where available, the discussion also includes a summary of articles or other presentations commenting on the law or on pending proposals. Because of the recent promulgation of South American consumer protection laws, and the fact that most South American judiciaries do not find precedent controlling, commentary provides the principal basis for evaluating the application of the statutes.

An English translation as well as the official version of each statute follows the analysis of the law of each country. For most purposes, the provided discussion combined with the English translation should suffice, but the official version permits a closer examination, if necessary, of the original language. The similarities between these provisions and the United Nations Guidelines for Consumer Protection and the Model Law of Consumers International suggest the value of examining these standards as well. Therefore, the appendix contains the U.N. Guidelines and the Consumers International model law.

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### Overview

This section seeks to provide some context for the analysis of the specific statutes of individual countries. It provides this context by examining how the statutes as a group address some common issues. Although it discusses the statutes of individual countries as examples of different approaches, it does not seek to compare and contrast each of the individual statues. Rather, these examples enable the reader to fit any specific statute within the more general scheme of consumer protection laws in South America.

The overview will discuss enacted statutes and pending legislation together without repetition of the term, "proposal." Therefore, a general discussion of statutes will include these proposals. If an example relies on a proposed rather than enacted statute, it will refer to it as a provision rather than a statute.

A cursory examination of the civil law system as it operates in South America, as well of the uncertainties of application of the laws upon their promulgation is appropriate in assessing the consumer protection statutes. South American law reflects a strong adherence to the civil law tradition. Lawyers used to a legal system reflecting common law practices will need to become familiar with the contrasting nuances of a civil law system in order to address properly an issue involving a South American country. Coupled with these differences is the fact that statutes supporting consumer protection law in the various South American countries are recent. The Brazilian consumer protection law, for example, easily the most comprehensive of all South American codes, has been in effect only since 1990. Several of the codes are in draft form, and the final versions remain uncertain. The remaining South American statutes will change as they are applied. Lawyers and individuals who become involved in South American consumer transactional law, either directly or as responsible parties choosing to place a product into the stream of commerce need to understand the application of the laws which may contrast sharply with accepted notions of practice in the United States. The application of laws in a civil law society, and the implementation of consumer protection provisions so recently adapted need to be placed in their proper context in order to be understood and obeyed.

The civil law tradition, as it is practiced in South American countries, follows a more formalistic approach to the law than the common law system that is applied in North America. Deference is given to application of a civil code as it is written, with little resort

to extraneous considerations such as the moral or economic implications of decisions. The lack of reliance on precedent in most South American systems reinforces this formalistic approach. Case law is virtually non-existent as a source of law. As explained above, judges are expected to apply the law as it is developed by the legislature. As a result, each case is tried anew, regardless of the possibility of a similar case having already been decided, even one from the same court and with facts "on all fours" to the case at bar. In addition to the inability to consider potential mitigating or exacerbating circumstances not directly related to the case, limits lawyers to setting out the facts of a case and arguing for a favorable interpretation of the civil code.

A lawyer seeking to pursue a claim will also need to become familiar with South American civil procedure. Practices among several of the South American countries differ from each other as well as from the general applications of U.S. civil procedure. Enough similarities appear to exist among the South American countries, however, to allow a lawyer familiar with the civil procedure of one country to become proficient in the general applicable procedures of the others. Perhaps the most striking contrast between North and South American civil procedure is the reliance of South American judges on an inquisitorial, as opposed to an adversarial process. Judges use the documentary evidence supplied in advance by both parties as the record of the case. Further, the documents supplied in most civil procedure processes replace the right of persons having an interest in a case to appear as live witness. The fact-finding mission, as a result, remains largely in the hands of the judge rather than the party seeking to establish a claim. These processes, together with other elements in the succession of events in a civil proceeding, such as the absence of discovery mechanisms, appear to greatly limit the lawyer in the production of evidence. The greater obligation of the judge to reassess each case without recourse to prior judgments would appear to burden additionally the judicial process.

As with the promulgation of any new set of statutes, the provisions will be applicable to the extent they are enforced. Many of the South American countries will likely follow the example of Brazil and implement a grace period for businesses and corporations to become accustomed to the new standards and practices. However, even with such instruction and direction, compliance with the laws cannot be assured. As a result, the development of consumer protection agencies, both government directed and independently created, become a necessary and important component to the implementation of consumer protection laws. Besides providing a grassroots education to consumers, particularly those in poorer sections where illiteracy may affect an individual's decision-making abilities, such agencies and watch-dog groups are entrusted to remain vigilant over compliance with proper procedures as established by the statutes. Organizations such as Consumers International continue to play an important role by providing educational and information to smaller groups, as well as monitoring actions occurring at an international level that may have an adverse effect on a South American population.

Most of the South American consumer protection statutes share a similar approach. They seek to protect the free market for consumer goods and services by regulating consumer contracts and by ensuring minimum standards for those goods and services. They accept a free market in goods and services. Not surprisingly, these statutes primarily concern consumer transactional law.

These consumer laws support free market economies in a number of ways. Consumer laws can help ensure that consumers receive higher quality goods at less cost. By assuring consumers of fair procedures, consumer are encouraged to participate in the market. By assuring consumers of minimum standards for goods and services, consumer laws increase confidence in the market. In addition, consumer wealth benefits producers; in turn, more demanding national consumers can strengthen the international competitiveness of producers.

The proposed statute of Paraguay includes in its consumer protection statute provisions that go beyond regulation of consumer transactional law, such as the regulation of unfair trade practices. This regulation, however, also supports a free market economy because it protects the competitive character of the market by prohibiting improper or anti-competitive practices.

In addition to regulation of consumer transactional law, other statutory provisions substitute some form of central control of the consumer economy for market mechanisms. For example, the statutes of Colombia, Ecuador, and Venezuela rely, in varying degrees, upon price controls regarding at least some consumer products.

Colombia lacks a recent comprehensive statute. Its provisions are similar to those contained in more recently enacted consumer protection statutes of other South American countries, but fail to address all of the issues generally covered by those statutes.

The remaining South American statutes recognize the importance of consumer rights in a free market economy. Therefore, several of the statutes include an articulation of consumer rights. The statement of these rights varies but includes rights to information adequate to empower consumer choice, to fair dealing and fair treatment, particularly in the content of contractual provisions, to safe and effective products and services, to redress of wrongs and recovery for injuries, to prevention of harm, to organize and participate in decisions affecting consumer interests, and to expect the support and assistance of the government where appropriate. The Venezuelan statute underscores the importance of these rights by providing that they cannot be waived.

Consumer rights, although general in character, define the purpose of these statutes and frame the interpretation of the more specific provisions. These rights also imply many of the justifications for consumer protection provisions. These justifications are also reflected in more specific provisions of the statutes.

In regulating consumer transactions, the statutes broadly define consumer products

and services. For example, the Argentinean statute covers certain real estate transactions, some occasional sales between consumers, and most transactions involving the end purchaser of a good or service The statutes, however, contain some limitations on the definition of consumer transactions. Commercial transactions — those transactions between entities in the chain of distribution and sales — are often excluded; also excluded are most sales of goods between consumers, as well as certain types of professional services. These professional services include those provided by lawyers and doctors and in some cases by other professionals such as architects and accountants.

Of course, the statutes vary one from another, some to a considerable degree in specific areas. In many areas, the Brazilian consumer protection statute is the most comprehensive in South America. It contains a number of provisions not covered by other statutes; it addresses other topics in more depth than many of the other statutes. Still, many of the statutes suggest approaches or standards not contained elsewhere.

Generally, the statutes share many similarities. These similarities reflect the common origins of and influences on these provisions. These similarities also arise from the coverage of consumer transactional law and the common philosophy of the statutes. These commonalities permit examination of these statutes as a group.

These statutes recognize the importance of consumer choice; most statutes address consumer access to accurate information regarding products and services. They also recognize that disparities in information and in bargaining power require protection of consumer interests by ensuring that consumer contracts are fair and equitable.

### Consumer Access to Information

All of the consumer protection codes address the disclosure of information regarding products, services, and terms of sale. Sometimes this disclosure is stated in the broadest terms, such as in the Peruvian statute which requires that the seller provide all information necessary for the consumer to make a suitable selection of a product. Not surprisingly, all of the statutes view price as a crucial piece of consumer information by requiring that price be fully disclosed to the consumer. Other statutes go further to reduce any confusion about price. For example, the statute of Venezuela requires that only one price appear on a product; if more than one price is displayed, the producer must provide the good or service at the lowest displayed. In other instances, a seller may be bound by prices that appear in flyers, brochures, or advertising.

Other statutes take steps to ensure that any advertised price reduction will be legitimate by requiring that the nonsale price of the good also be provided. The Peruvian provision also specifically addresses the classical "bait and switch" ploy in which a popular item is offered at a reduced price but upon inquiry the consumer finds that it is unavail-

able and is importuned to purchase another product instead. Price reductions must indicate the number of products available at the reduced price.

The statutes of several countries, including Argentina, Peru, and Venezuela, require a document to accompany the sale of a good or service. This document not only provides a record of the negotiation and agreement but also is used as a mechanism to ensure that consumers obtain information about the product at a meaningful time. Common information contained in these documents include price, weight or other characteristics, terms of the agreement, dates of delivery, identity of the provider, expiration date or useful life, warnings of risks, and instructions regarding use and maintenance.

Many of the statutes also address product promotions including the use of gifts, free products, lotteries and other incentives. The items promised must be made available and the terms and conditions of any promotion must be clearly indicated. In a few instances, such as in Venezuela, some administrative review of promotions can occur.

Because many of the goods being marketed in South America may be imported, the statutes require that relevant product information, including labels, be presented in the national language, in the national currency, and in the metric decimal system. The use of another language seems permitted if the information is also provided in Spanish. In addition, Argentina requires that this product information be complete, clear and easily legible.

Labeling also provides a way of ensuring that consumer receive certain relevant product information. The labeling provisions of Uruguay that apply to foods and medicines illustrate some of the types of information contained on labels of other products as well. The Uruguayan labeling provision implements a resolution of the Southern Common Market (MERCOSUR), a trading group consisting of Uruguay, Paraguay, Brazil, and Argentina. These requirements include the name of the product, its origin, the name and address of the manufacturer or importer, the net contents, the applicable date of minimum duration, a list of ingredients, the applicable production lot, instructions for use, and conditions of storage. Paraguay specifically requires that the labels of medicines inform of any side effects.

Generally products must carry appropriate warnings and instructions. Warnings must be clear, detailed, and adequate. Instructions must provide guidance on how to safely use a product or service and how to reduce any risks accompanying it. Many statutes also require warnings when a risk or danger is discovered after the introduction of the product into the market. The statutes vary as to how extensive the warning must be, to whom it must be given, and the means that must be taken to disseminate it.

The statutes address somewhat differently when a warning must accompany a product or service. For example, the statute of Peru requires a warning as to all "foreseeable" risks that arise in the "ordinary and proper use" of the product or service. Paraguay requires a warning on all products determined to be dangerous or noxious by the World

Health Organization. Statutes also can vary on the effect on consumers' recovery for injuries following a warning. The statutes of Ecuador and Brazil illustrate different positions. The law of Ecuador provides that, as to risks for which a warning has been given, adequate use of the product is the responsibility of the consumer. Brazilian law, however, expressly provides other consumer remedies.

Statutes often specifically address warnings on cigarettes and other tobacco products or on different categories of alcoholic beverages. As noted below, specific restrictions are often placed on the advertising of these products.

Because of the importance of consumer credit sales, many statutes require that sellers give the consumer sufficient information to evaluate the offer of credit and to decide whether to purchase the product or service on credit. This informational obligation may be broadly stated, as in the Paraguayan provision that requires information sufficient to permit the consumer to determine his or her rights and responsibilities at any time during the duration of the contract. Although the exact information disclosed may vary it normally includes: the price of the good or service, the size of the initial installment, the total interest to be paid, the effective rate of interest, the amount and character of any additional charges such as administrative fees, the total amount paid (which must not be higher than the initial cash price plus interest and fees), the number of installments and the interval between them, and whether the consumer has the right to liquidate the balance ahead of schedule with a corresponding reduction in interest. The Brazilian code seems to provide a right of prepayment. The Peruvian statute contains an additional provision that when a credit sale is made with an advance payment but is subject to credit approval, that approval will be conclusively presumed unless the consumer is notified otherwise within fifteen days of the credit sale. In Argentina, the sale may be nullified if the seller fails to provide the required credit information. Venezuela does not require the disclosure of information regarding credit sales but only imposes prohibitions against usury. Colombia likewise does not require the disclosure of any credit information but permits either party to a sale of a consumer good or service on credit to withdraw from the contract of sale within two days of its creation.

Brazil also regulates the acquisition of credit or personal information regarding the consumer. The Brazilian statute is the only one regulating data banks and others holding consumer credit records.

### Advertising

Given the importance of advertising in providing product and service information and the possibilities of abuse of advertising, it is not surprising that several statutes address the advertising of consumer products. Generally, advertising is broadly defined to include

publicity in newspapers and magazines, on radio or television, in brochures, pamphlets, flyers, or in other means of communication.

The Brazilian statute requires that advertising be identified. When advertising is contained in a format that also includes news or opinion, any advertising must be clearly identified as such. Statutes recognize the influence of advertising in other ways. Several statutes, including those of Argentina, Brazil, and Uruguay, state that producers are bound by assertions made in advertising about the characteristics of the products. In effect, these assertions are made part of the contract between the seller and consumer. These statutes do not require that the assertions rise to the character of express guarantees of the attributes of the product; the consumer does not have to show any reliance on the advertising. Therefore, advertising is given a direct legal effect through the consumer contract.

Advertising must not be false and must not induce error (or mislead the consumer) regarding the nature, characteristics, quality, quantity, properties, origin, price or other data regarding the product or service. The Venezuelan statute requires that advertising claims about the product can be verified in an objective way. The Brazilian code places on the advertiser the obligation to prove the truthfulness of claims contained in the advertising; other statutes require that the advertiser be prepared to substantiate claims made.

Advertising must contain warnings in many of the circumstances where the producer would have to provide the warning to the purchaser. Special attention is paid to the advertising of alcohol and tobacco either by requiring that advertising carry specific warnings or, as in Paraguay, that it take place on radio and television during certain restricted periods. Some statutes, such as that of Peru, prohibit alcohol and tobacco advertising from being directed at minors.

Restrictions are also placed on advertising for other reasons. Brazil prohibits advertising that incites violence, takes advantage of a child's lack of judgment or experience, or induces a consumer to behave in a way that is harmful to the consumer's health or safety. Ecuador prohibits advertising that damages historic, patriotic, cultural or religious values. In the Paraguayan provision, advertising may not use scenes of marked violence, or of a macabre or erotic tone. In other countries, such as Ecuador, special agencies are established to regulate advertising.

Some of the statutes are silent on comparative advertising while others expressly permit it; some provisions could be interpreted to prohibit comparative advertising. For example, Venezuela permits claims regarding the disadvantages or risks of a competitor's products, but directs that the advertiser be prepared to prove the claim. The Paraguayan provision could be interpreted to prohibit comparative advertising altogether.

Peru requires that the identity of those offering testimonials be provided. Some statutes require that testimonials only be offered by persons who have had recent and personal experience with the product or service.

The Brazilian statute provides for counteradvertising as a remedy for misleading

advertising. The cost of counteradvertising is borne by the advertiser responsible for the misleading advertisement. Other statutes use advertising as a remedy for other violations of the consumer protection statutes. This advertising would inform consumers that particular sellers or producers had violated the law. Normally, this advertising would be paid by the producer found to have violated some other part of the consumer protection statute.

Not surprisingly, because of the importance that these statutes attach to consumer access to accurate and adequate information, they provide for significant regulation of advertising. Broad definitions of advertising and of misleading advertising, the number of specific limitations on advertising, the requirements for claim substantiation, the inclusion of advertising claims in the consumer contract, recognition of counteradvertising as a remedy, and the creation of enforcement mechanisms demonstrate the scope of regulation of advertising.

#### **Consumer Contracts**

The statutes also recognize that disparities in information and in bargaining power require regulation to ensure fair and equitable consumer contracts. To this end, the statutes address consumer contracts.

Contracts of adhesion receive the most attention in these statutes. Adhesion contracts are those in which terms are imposed upon the consumer in the sense that the consumer does not have the opportunity to bargain regarding the terms of the contract. These contracts must be clear, not unduly complex, legible and easily comprehensible. These contracts must also be complete in that they do not require reference to other documents that are not available to both parties at the time that the contract is created. Clauses that limit consumer rights must be prominently displayed.

Because of the potential for abuse, those who draft adhesion contracts have an obligation to act in good faith and the rights and responsibilities of the parties set out in them must be fairly balanced and equitable. Particular clauses, inserted by the parties and more favorable to the consumer, are to be applied when they conflict with prearranged clauses in a contract of adhesion. Ambiguities are to be interpreted in favor of the consumer against the person who drafted the contract.

Most of the statutes limit the types of terms and clauses that can be included in contracts of adhesion. Although these limitations may vary, the statute of Venezuela illustrates some of these common limitations. Adhesion contracts may not allow one party to dissolve the contract unilaterally, increase prices or charges, make the consumer responsible for omissions or errors of the provider, or deprive the consumer of the right to compensation for defects in the product.

Some provisions, such as Chile, invalidate the entire contract of adhesion if it con-