Pinheiro Neto Advogados was founded in 1942 and was one of the first Brazilian law firms to specialise in corporate clients. With clients in almost 60 countries, the firm's consumer relations practice is actively involved in high-profile, complex cases, for a wide-ranging client base, including automobile, pharmaceutical, insurance and food industries, as well as retail, wholesale and department stores. It provides preventative counselling on matters of strategic interest to, or with a high financial impact on, clients' business, including the negotiation of settlements. The firm also offers legal counselling and assistance in administrative proceedings at the consumer protection bodies and in product liability litigation, whether individual cases based on defective product claims or Brazilian class actions involving recall, and product defects, abusive or misleading advertisement, consumer-related adhesion and mass contracts, or abusive conduct.

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1. Product Safety

1.1 Legal Framework

In Brazil, the main laws and regulations of the product safety legal regime are the following.

- The Brazilian Consumer Protection Code enacted in 1990 establishing rules to meet consumer requirements: to respect the dignity, health and safety of consumers; to safeguard their economic interests; to improve the quality of their lives; and to transfer and harmonise consumer relations. The Brazilian Consumer Protection Code governs all legal aspects of a consumer relation, including safety requirements that products must comply with.
- Decree No 2181/1997 establishing arrangements for the organisation of the National System of Consumer Protection – SNDC – and general rules for the application of administrative sanctions related to the Brazilian Consumer Protection Code.
- Ministry of Justice Ordinance No 487/2012, which regulates the procedure for the recall of all kinds of products.
- Law 8,137/1990, which establishes crimes against consumer relations and respective sanctions.

The Brazilian Consumer Protection Code and Ordinance No 487/2012 apply to all consumer relations. Apart from that, there are some specific safety regulations according to the kind of product. Some examples are:

- Board Resolution No 55/2005, of the Brazilian Health Surveillance Agency (ANVISA), applicable to medicines;
- Board Resolution No 23/2012, of ANVISA, applicable to medical products/devices (other than medicines);
- Board Resolution No 24/2015, also of ANVISA, which regulates the collection of food and packaging or any other materials in contact with food, among others; and
- the General Telecommunications Law (Law No 9,472/1997), which prohibits the use of radiofrequency emitting equipment without certification of the Brazilian Telecommunications Agency (ANATEL).

Existence of double regulation sometimes leads to a legal antinomy. For example, currently Ordinance No 487/2012 provides that the supplier must send the recall notice to the Department of Consumer Protection and Defence (DPDC) and include the information on the model of the consumer risk warning. ANVISA's RDC No 55/2005, on the other hand, provides that the consumer warning message must be submitted to prior approval by ANVISA.

1.2 Regulatory Authorities

The main regulator for product safety in Brazil is the DPDC, which is responsible for (i) examining claims involving relevant general and national interests, (ii) applying administrative penalties and (iii) undertaking preliminary investigations and administrative proceedings, among other measures.

The federal government, states and/or Federal District and cities may also have a Consumer Protection Office (PROCON), which has the power to carry out administrative proceedings and apply administrative penalties to suppliers within the scope of their jurisdiction.

In addition, there are various rule-making and regulatory authorities with the power to establish standards to be complied with by suppliers. Each sector has its own regulatory authorities, with examples below.

- The Brazilian Health Surveillance Agency, which is responsible for promoting the health of the population by means of sanitary control of several products, such as medicines, food and cosmetics. It has the power to (i) establish rules and standards on the limits of contaminants, toxicants, disinfectants, heavy metals and other substances that may cause damage to health, and (ii) prohibit the manufacture, distribution and storage of products that may cause health damage.
- The Brazilian Telecommunications Agency, which is responsible for supervising the provision of telecommunications services, applying penalties and issuing rules to be complied with by the suppliers.
- The Brazilian Civil Aviation Agency (ANAC), which is responsible for supervising civil aviation activities in Brazil, specifically the economic aspects and technical safety of the sector.
- The Brazilian Agency of Oil, Natural Gas and Biofuels (ANP), which is responsible for supervising activities that integrate oil and natural gas and biofuel.
- The Brazilian Electric Power Agency (ANEEL), which aims to regulate the production, transmission and marketing of electric power, in accordance with the policies and guidelines of the federal government.
- The Brazilian Agency of Supplementary Health (ANS), which regulates the market for private health plans.
- The National Institute of Metrology, Quality and Technology (INMETRO), which is responsible for implementing national metrology and quality policies, and for assessing and supervising compliance with technical and legal standards as regards measurement units, measurement methods, materialised measures, measuring instruments and pre-measured products.
- The Brazilian Association of Technical Standards (ABNT), which is responsible for drafting technical standards for the production, marketing and use of goods and services in a competitive and sustainable way in domestic and foreign markets, contributing to scientific and technological development, environmental protection and consumer protection.

Note that compliance with normative standards established by the referred-to bodies is mandatory by law, pursuant to Article 39, VIII of the Brazilian Consumer Protection Code.

1.3 Corrective Actions

According to the Brazilian Consumer Protection Code, products and services placed on the consumer market cannot pose a health or safety hazard to consumers.

If a supplier acknowledges the harmful and/or hazardous nature of the product or service only after it has been placed on the consumer market, it will be responsible for a recall campaign immediately after the defect is discovered in order to correct the defect or replace the product.

The Brazilian Consumer Protection Code and Ministry of Justice Ordinance No 487/2012 establish several formal requirements that suppliers must observe during a recall procedure. The main formal requirements are immediate notice to (i) the DPDC, (ii) the state, Federal District and municipal consumer protection bodies (PROCON), and (iii) the pertinent rule-making or regulatory body. Besides that, the supplier is responsible for the advertising campaign and the follow-up reports.

With regard to the advertising campaign, the law establishes that, besides informing the relevant authorities, suppliers should immediately make consumers aware about the hazardous nature of the product by means of an 'advertising' campaign broadcast on the radio, television and print media, at suppliers' expense.

The advertisements must contain very specific information about the product, defect and its possible effects, among other requirements. The advertising campaign should be sized based on the number of consumers affected by the recall and the supplier may also use other means of communication, such as the internet and telephone or other media available.

In turn, the follow-up reports must be sent once every two months to the DPDC, PROCONs and the respective regulatory body (depending on the sector). The reports must inform the number of products collected from the market so the authorities may analyse the effectiveness of the procedure.

The current regulation does not specify a risk level for applicable corrective actions to be taken. Even if there is a remote risk to consumer health, the supplier will be responsible for commencing corrective actions and running mandatory advertising.

The above-mentioned regulation is applicable to all products, but ANVISA also has specific rules on the recall of medicines and food (Board Resolutions No 55/2005 and No 24/2015). In this regard, it is also mandatory to notify ANVISA if the supplier acknowledges the harmful and/or hazardous nature of medicines or food.

1.4 Notification to Regulatory Authorities

In Brazil, the obligation to notify the authorities in respect of product safety issues is risk-based. Thus, should a defective product pose a health or safety hazard to consumers, the reporting obligation will be triggered, regardless of the level of the risks.

Under Brazilian law, the word 'supplier' means any individual or legal entity (including unincorporated entities), public or private, Brazilian or foreign, engaged in the production, assembly, creation, construction, transformation, import, export, distribution or marketing of goods, or in the provision of services. Any such individual or entity that participated in the placement of the product or service in the market must perform the recall upon becoming aware of the danger of products or services placed in the market.

The law does not establish a specific time limit, only mentioning that the supplier must immediately inform the consumer protection authorities and the consumers. In other words, the warning to consumers and to the public authorities must be provided promptly and immediately after the supplier becomes aware of the defect. Of course it is always tricky to establish exactly when the supplier became aware of the defect, but when informing the relevant authorities about the recall campaign, the supplier must inform when it became aware of the defect and can argue that it had to conduct a proper investigation retaining technical analysis and expert opinions when it was first informed about the possibility of a defective problem.

The notification to the authorities must be in writing (in the Portuguese language) and must include detailed information, such as the:

- company's name;
- defective product;
- defect identified;
- risks and implications for consumers;
- number of defective products on the Brazilian market;
- number of consumers affected;
- geographic distribution of the defective products in Brazil and the countries to which the products were exported;
- measures already adopted and those proposed for correcting the defect and mitigating the risk;
- description of accidents related to the defective product;
- media plan;
- consumer support plan; and
- form of risk warning notice to consumers.

The notification to the authorities may be signed by the company's legal representative, whose powers must arise from

the company bylaws or from a power of attorney attached to the records of the administrative procedure.

Brazilian law also does not establish that the local entity must be involved in the recall procedure. Thus, a foreign entity may issue the notification to the authorities and to consumers. Nevertheless, it is possible – and quite common – that authorities issue notifications requesting information about the recall specifically from the local entity, in case there is one.

Besides, it is worth mentioning that there is a recommendation in place from the Group of Permanent Studies of Accidents of Consumption (Gepac) (not mandatory but rather just informative) asking that the subsidiaries or importers of suppliers of products and services subject to recall abroad inform the Brazilian authorities about these recalls, even if such products have not been distributed in the Brazilian market.

1.5 Breach of Obligations

Failure to comply with the reporting obligations mentioned above may carry administrative, criminal and civil penalties.

In the administrative sphere, should the authorities hold that the supplier violated the provisions of the Brazilian Consumer Protection Code, such as the obligation to commence a recall or the obligation to market safe and adequate products, an administrative proceeding can be initiated. If the violation is confirmed after such administrative proceeding, the supplier is subject to penalties that can be imposed separately or together. The penalties that may be imposed are the following:

- fines;
- seizure of the defective products;
- destruction of the defective products;
- cancellation of product registration at the competent authorities;
- prohibition from product manufacturing;
- suspension of product or service supply;
- temporary suspension of the activity;
- revocation of authorisation or permission for use;
- cancellation of permit for the establishment or activity;
- total or partial shutdown of the establishment, work or activity;
- administrative intervention; and
- counter-advertising.

Suppliers are also subject to criminal investigations in the event of lack of communication, late communication or insufficient communication of a recall campaign. Failure to inform the competent authorities or to withdraw harmful or hazardous products from the market is a crime carrying a prison sentence from six months to two years, and a fine.

Regardless of the administrative and criminal proceedings, consumers, public bodies and associations may also file civil and class actions seeking compensation for property and/or moral damage caused by the defective product.

For illustrative purposes, on 1 September 2010 the São Paulo State Consumer Protection Agency imposed a fine of BRL232,000.00 on two companies due to late reporting of a safety issue involving some models of vehicles. The companies filed a lawsuit to discuss the validity of the fine so imposed and, on 17 February 2016, the State Court of Appeals of São Paulo maintained the Lower Civil Court decision that held the penalty valid (Case No 0022095-11.2013.8.26.0053).

In 2011, another automaker was fined BRL1,351,000.00 for a 60-day delay in reporting a safety issue involving its vehicles.

A food company was fined BRL981,238.80 for failure to inform that an ice cream contained gluten.

In 2018, authorities also initiated investigations into the cause of accidents involving cars subject to a previous recall campaign. If the investigations conclude that the automaker did not take all the measures to correct the defect, the above-mentioned penalties may be applicable.

In addition to such penalties contemplated in the Brazilian Consumer Protection Code, depending on the product, each sector has its own regulators with the power to impose penalties. As an example, in relation to medicines, failure to run recall campaigns in accordance with ANVISA Board Resolutions No 55/2005 and No 24/2015 can subject the company to the penalties set forth in Law No 6,437/77:

- warning;
- fine;
- seizure of defective products;
- destruction of defective products;
- interdiction of defective products;
- suspension of sale and/or manufacture of the defective product;
- cancellation of product registration;
- partial or total shutdown of the establishment;
- prohibition from advertising;
- cancellation of authorisation for business operation;
- cancellation of the establishment permit and intervention in the establishment receiving public funds from any source;
- imposition of rectifying message; or
- suspension of advertising and publicity.

It is worth noting that the majority of the case precedents are in the sense that the supplier that takes all the measures established by the law in order to conduct the recall campaign remains liable for individual lawsuits related to the

defective product even if the consumer did not comply with the recall campaign and did not take the product for repair or replacement (Case No 1010392 / RJ).

2. Product Liability

2.1 Causes of Action and Sources of Law

In Brazil, the Consumer Protection Code governs all consumer relations. According to the law, consumer relations refer to the processes for production and placement of goods and services on the market, and their subsequent acquisition and use by the public. Consumer relations occur between purchasers and/or end users, and suppliers.

The law defines a consumer as any individual or legal entity that acquires or uses products or services as an end user.

In turn, 'supplier' means any individual or legal entity (including unincorporated entities), public or private, Brazilian or foreign, engaged in the production, assembly, creation, construction, transformation, import, export, distribution or marketing of goods, or in the provision of services.

There are two types of liability under the Brazilian Consumer Protection Code: liability as regards the product itself (personal injury product liability), which arises when a product or service causes harm to the consumer; and liability for a flaw in the product (property damage product liability), which arises from the defect that renders the product improper or inadequate for consumption, or reduces its value or quantity, but does not pose any risk to consumer health and safety.

In relation to product liability claims, the law attributes strict liability to Brazilian and foreign manufacturers, producers and builders, and importers are liable. In other words, they are liable regardless of fault, for redress of damage caused to consumers by defects resulting from the design, manufacture, construction, assembly, formulas, handling, presentation or packing of their products, as well as by insufficient or inadequate information as to the use and risks thereof (Article 12 of the Brazilian Consumer Protection Code).

In relation to liability for a flaw in the product, all suppliers of durable or non-durable consumer products are held jointly and severally liable for defects in quality or quantity that render the products unfit or inadequate for the consumption for which they are designed, or that decrease their value, and for defects resulting from any disparity with the information provided on the container, packaging, labels or advertising message, with due regard for variations ensuing from the nature of the products (Article 18 of the Brazilian Consumer Protection Code).

2.2 Legal Standing to Bring Claims

Any consumer suffering property and/or moral damage due to a defective product may bring an individual lawsuit against the supplier.

In addition, court precedents have also established that relatives or persons maintaining strong affective ties with the victim may also file a lawsuit and seek compensation if they prove to have been personally affected. In fact, the case precedents from the Superior Court of Justice are in favour of the *Préjudice Daffection* doctrine, which allows close family members of a consumption accident victim to pursue indemnification for moral damages against suppliers (Case No 876448 / RJ).

Moreover, there is also the possibility to file class actions to defend consumers' rights. Class actions may be filed by the Public Prosecutor's Office; the Public Defender's Office; the federal government, states, municipalities and Federal District; the entities and bodies of the direct or indirect public administration, even if with no separate legal identity, when specifically intended to protect diffuse and collective interests and rights; and associations legally organised for at least one year, and whose institutional purposes include the protection of diffuse, collective and/or homogeneous individual rights.

2.3 Time Limits for Claims

According to the Brazilian Consumer Protection Code, the right to claim indemnification for damage caused by the defective product or service becomes time-barred within five years from the date the damage and its perpetrator become known (Article 27 of the Consumer Protection Code).

It is also worth noting that in Brazil there are circumstances that can suspend or interrupt the statute of limitation. In general, the statute of limitation is suspended when (i) the interested person is absent from Brazil on public duty, (ii) there is a suspensive condition to the obligation and (iii) the claim arises from a fact that must be entertained by the criminal courts (Article 197 and following of the Civil Code). Also in general, the statute of limitation is interrupted by (i) the judge, even if incompetent, when he orders the service of process on the defendant, (ii) a protest claim, (iii) any judicial act that declares a debtor in default and (iv) any act that unequivocally entails recognition of a right by the debtor (Article 202 of the Civil Code).

2.4 Requirements to Invoke Jurisdiction

According to Decree No 4,657/1942, Brazilian courts will have jurisdiction over product liability claims if the consumer is domiciled in Brazil or the contracted obligation has to be fulfilled in Brazil. Lawsuits are usually filed in Brazil to obtain redress on behalf of Brazilian citizens, but in theory they could also include foreign plaintiffs.

Nevertheless, unlike what happens in other jurisdictions, Brazilian law does not offer particularly favourable options for foreign plaintiffs, so cross-border actions are possible, but rare in practice.

Pursuant to Article 83 of the Brazilian Civil Procedure Code, foreign plaintiffs may be required to post bond when bringing suits in Brazil.

2.5 Pre-action Procedures and Requirements

According to the Brazilian Federal Constitution, the law shall not exclude any injury or threat to right from the assessment of the judicial branch. Thus, there are no mandatory steps to be taken before the consumer files an indemnification action related to product liability.

However, there is an increasing discussion in Brazil stating that consumers should commence conciliatory proceedings at administrative level before bringing lawsuits, as a way to diminish the number of ongoing proceedings and reach a solution for the case with efficiency.

In fact, the Brazilian Civil Procedure Code – in force since 2016 – establishes that conciliation, mediation and other consensual dispute resolution mechanisms must be encouraged by judges, lawyers, public defenders and members of the Public Prosecutor's Office, even during the course of a judicial proceeding.

2.6 Rules for Preservation of Evidence

In product liability claims, the supplier usually bears the burden of proof to evidence that the product complies with technical standards and is not defective. The consumer will only have the burden of proving the damage and the chain of causation.

There is no specific rule on preservation of evidence, but non-preservation places a direct burden of counterproof on whoever had a duty to safeguard that evidence. In this regard, if a consumer brings a product liability claim, the consumer has the duty to preserve the alleged defective product. If the consumer does not take the necessary measures and the defective product is lost, the burden to produce counterproof will be upon the consumer.

Despite the lack of a specific remedy in such situation, any party is entitled to file a motion for anticipated discovery where:

- there are grounded reasons to believe that it will become impossible or very difficult to ascertain certain facts while the lawsuit is pending;
- the proof to be produced is capable of enabling consensual dispute resolution or other suitable dispute resolution methods; or
- previous knowledge of the facts can justify or avoid filing of a lawsuit.

2.7 Disclosure of Documents

As a general rule, the parties are responsible for providing and producing their own evidence, according to their position on the case. Under the Brazilian Civil Procedure Code, the burden of proof rests (i) with the plaintiff, with respect to facts supporting its alleged right, and (ii) with the defendant, with respect to facts impairing, modifying or extinguishing the plaintiff's alleged right. In relation to product liability claims, the supplier has the burden of proving that the product is not defective, while the consumer has the burden of proving the damage and chain of causation.

However, should a request for disclosure of evidence be filed by a party, the judge may command the adverse party to disclose documents or things in its possession. Such request must contain (i) a detailed description, as complete as possible, of the document or thing to be disclosed; (ii) the purpose of the evidence, with a statement of the facts related to the document or thing; and (iii) the circumstances supporting the requesting party's claim that the document or thing does exist and is in the possession of the adverse party.

In that case, the adverse party will have five business days to answer such request. The adverse party may disclose the document or thing, or refuse to do so.

According to law, the judge should not accept such refusal if (i) the adverse party is legally required to disclose the document or thing, (ii) the adverse party has referred to the document or thing in the proceeding with a view to bringing evidence into the records, or (iii) the document, by its content, is common to the parties.

Should the adverse party remain silent during the relevant period or fail to disclose the document after a court decision commanding its disclosure, the judge will hold as true the facts that the adverse party sought to prove by means of the document or thing.

The lack of an acceptable reason to refuse to comply with the disclosure order may give cause to a search and seizure warrant.

2.8 Expert Evidence

The Brazilian Consumer Protection Code, which governs consumer relations, does not have particular rules on expert evidence. Thus, the applicable rules are those established by the Brazilian Civil Procedure Code.

Whenever a case involves technical aspects, the court may be assisted by an expert with forensic knowledge. For example, it is very common to have accounting, engineering, graphical and medical evidence in product liability claims.

In such situation, the court appoints its own expert and the parties are entitled to designate experts to assist in the production of evidence.

The court-appointed expert has the duty to issue a technical and impartial opinion on the matter. After that, the parties may present their own expert opinions and commentaries on the opinion of the court-appointed expert.

As a rule, each party is responsible for paying the costs of its experts and the party that requested expert evidence is responsible for paying the court expert fees. If the expert evidence was requested by the judge or by both parties, the expenses will be shared between the parties. The judge, however, can determine that the supplier should pay the cost of expert examination when the burden of proof is shifted.

After the final decision, the losing party will refund the other party the corresponding amount.

In product liability cases, consumers usually qualify for legal aid, which means that suppliers will be responsible for paying the costs of expert evidence, or a publicly funded institution will be appointed to perform the expert examination where the supplier did not ask the evidence.

2.9 Burden of Proof

Pursuant to the Brazilian Civil Procedure Code, in general it rests with the plaintiff to prove the facts supporting its alleged right. In turn, it rests with the defendant to prove facts impairing, modifying or extinguishing the plaintiff's alleged right.

In cases involving consumer relations (as product liability cases), the consumer (usually, plaintiff) must prove the damage caused by the product and the chain of causation. The supplier, on the other hand, must prove that (i) it did not place the product on the market; or (ii) although it did place the product on the market, the product is not defective; or (iii) the sole fault for the damage falls on the consumer or a third party.

According to the Brazilian Consumer Protection Code, the judge may shift the burden of proof to the supplier. Shifting of the burden of proof can occur if the claim brought by the consumer is found to be plausible, or the supplier is found to hold a dominant position in its relationship with the consumer.

2.10 Courts in Which Claims are Brought

In Brazil, there are summary and ordinary proceedings.

Summary proceedings are aimed at affording a specific treatment to certain cases that, by their own nature, call for simplified and informal procedures, backed by oral arguments and procedural economy. Such cases run before the Small Claims Court, in which cases are resolved in a timely and speedy fashion.

By contrast, ordinary proceedings are generally more complex, in which issues of fact can only be properly analysed through production of evidence and the amount in controversy is higher.

Regardless of the type of case, a consumer can file a lawsuit before a first-instance court (either summary or ordinary proceeding, specifically before a federal or state court, depending on the defendants involved in the case). Initially, a single judge will review and decide the case.

If an appeal is filed by any of the parties, the case is sent to the respective second-instance court and a panel of judges will review the case. After that, in some cases, it is possible to file a special appeal to the Superior Court of Justice and/or an extraordinary appeal to the Federal Supreme Court. After the second-instance court decision, cases filed before a Small Claims Court are only subject to an appeal to the Federal Supreme Court.

In Brazil, only specific criminal cases are subject to a jury trial.

In addition, the law does not provide for a specific threshold in awards of damages for product liability cases. Thus, the awards are calculated on a case-by-case basis and the courts usually take into consideration the amounts stated in court precedents issued in similar previous cases.

2.11 Appeal Mechanisms

As mentioned in **2.10 Courts in Which Claims are Brought**, the Brazilian legal system provides for summary and ordinary proceedings. In ordinary proceedings, the following types of appeals are available in product liability claims.

- Motion for clarification, filed before the court in which the case is ongoing, applicable when the court decision contains any omission, obscurity, contradiction or material error. The timeframe to file a motion for clarification is five business days after the decision is published in the official gazette.
- Interlocutory appeal, filed before the second-instance court against an interlocutory decision in some specific situations, such as a decision related to shifting of the burden of proof. The timeframe to file an interlocutory appeal is 15 business days after the decision is published in the official gazette.
- Appeal, filed to challenge the lower court final decision within 15 business days after the final decision is published in the official gazette.
- Special appeal, filed to challenge a second-instance decision that is contrary to a treaty or a federal law. The timeframe to file a special appeal is 15 business days after

the second-instance decision is published in the official gazette. Should the special appeal be accepted for judgment, the case will be reviewed by the Superior Court of Justice.

- Extraordinary appeal, filed to challenge a second-instance decision that is contrary to a provision of the Federal Constitution. The timeframe to file an extraordinary appeal is 15 business days after the second-instance decision is published in the official gazette. Should the extraordinary appeal be accepted for judgment, the case will be reviewed by the Supreme Court.

With regard to summary proceedings, it is possible to file the following appeals.

- Motion for clarification, to be filed within five business days after the decision is published in the official gazette.
- Appeal, filed to challenge the lower court final decision within ten business days after the final decision is published in the official gazette.
- Extraordinary appeal, to be filed within 15 business days after the second-instance decision is published in the official gazette.

2.12 Defences

The Brazilian Consumer Protection Code provides for two types of liability, namely: liability as regards the product itself (personal injury product liability) and liability for a flaw in the product (property damage product liability).

The first type concerns an accident caused by the product resulting in damage to the consumer. In this case, the supplier will only be exempted from liability if it proves (i) that the product was not placed on the market by the supplier; (ii) that although the product was placed on the market, it was not defective; or (iii) the sole fault of the consumer or a third party.

By contrast, the liability for a flaw in the product does not arise from any damage caused to the consumer. In this case, liability arises from the flaw itself, which renders the product improper or inadequate for consumption, or from a reduction in its value or quantity.

The above-mentioned defences are expressly stated in the Brazilian Consumer Protection Code and shall be applicable to every consumer relation.

Moreover, after the Consumer Protection Code was enacted, part of the doctrine also appointed other circumstances that by virtue of the general principle of civil liability could exclude supplier's liability. According to such doctrine, despite not being among the referred defences established by the Consumer Protection Code, in the event of an act of God or of force majeure, the supplier would be exempted from liability in the case of an accident caused by the product. Those are well-recognised defences established in the Brazilian Civil Code – applicable to private law relations – to exempt one of the contracting parties of liability due to contractual breach.

At first, this was not a widely accepted theory and only the defences expressly established by the Brazilian Consumer Protection Code were applicable. Now, however, the majority of scholars and the case precedents are in the sense that the supplier will not be liable in the case of a force majeure or an act of God event, due to the absence of the chain of causation between the supplier's conduct and the damage suffered by the consumer.

In fact, the Superior Court of Justice has already stated that although the act of God event and the force majeure are not explicitly provided by the Consumer Protection Code, such defences can be invoked as exclusionary causes of responsibility of the service providers (Case No 985888/SP).

It is also worth mentioning that state of the art does not represent a liability exclusion provision expressly contemplated in the Consumer Protection Code and it was withdrawn from the first drafts before sending the bill to the Congressional houses in the 1990s.

Nevertheless, in some cases it is possible to construct a no-liability stand substantiated on the limit of knowledge demanded by law. To the extent that the level of understanding that the law demands from the supplier to delimit product safety and the information that will be transmitted to consumers is on the level of what is known or should be known rather than what could be known, it is possible to argue that the law does not expect that the supplier has unlimited knowledge on the product, but rather reasonable knowledge that is precisely established by the rules imposed by regulatory agencies or inspection bodies. This is an argument that has still not matured and allegedly hinges on a more extensive debate and acceptance by the academic community as also referred to below.

2.13 Regulatory Compliance

In Brazil, compliance with regulatory requirements is mandatory. A product that does not meet the applicable regulatory requirements cannot be placed on the market. In fact, placing on the market any product or service that does not comply with the rules issued by the competent regulators constitutes an abusive practice under Article 39, VIII of the Brazilian Consumer Protection Code. Moreover, Article 7, II of Law No 8,137/1990 establishes that selling or displaying for sale a product whose packaging, type, specification, weight or composition is not consistent with legal requirements or does not correspond to its official classification is a crime against consumer relations.

However, compliance with applicable rules, in and of itself, might not suffice to release the supplier from liability.

Pursuant to the Brazilian Consumer Protection Code, a product cannot be deemed defective when another product of better quality has been placed on the market. The Consumer Protection Code does not expressly address this matter, but some legal scholars defend that suppliers should not be held liable if a product defect was not discoverable within the limitations of science available at the time of the development and distribution of said product on the market.

Conversely, other legal scholars argue that if the law does not expressly exclude liability of suppliers due to the development of the product in the state of the art, such liability could not be excluded. The main argument is that the Consumer Protection Code adopts objective liability and the supplier holds the risk created by its economic activity, while consumers do not have the means to know the risks that a product poses.

In conclusion, compliance with regulatory requirements must be proven by the supplier to avoid the presumption that the product had a manufacturing or design defect. The supplier must also prove that the defect could not be identified when the product was developed, due to the state of the art and the scientific resources available. Those arguments, however, might not be accepted by the courts as sufficient to dismiss a product liability case since courts and most legal scholars hold that suppliers are liable for the risk of developing products.

2.14 Rules for Payment of Costs

As a rule, each party is responsible for paying its own expenses during the development of the case. After the final decision, the losing party will be obligated to reimburse the other party fully for all the expenses incurred, such as court fees and legal costs.

In the sphere of consumer relations, plaintiffs (consumers) usually qualify for legal aid. In Brazil, legal aid may be requested on the grounds of a personal statement of inability to pay court fees and legal costs.

Legal aid beneficiaries are not required to reimburse the other party immediately when they lose the case. If the beneficiary is defeated, enforceability of the obligations arising out of his defeat will be stayed and such obligations may only be enforced if, within five years, the insufficient income condition no longer exists.

2.15 Funding Availability

Apart from public funding (legal aid), there is no regulation on other forms of litigation funding in Brazil.

2.16 Class Actions, Representative Proceedings or Co-ordinated Proceedings

Class actions in Brazil are regulated by Law No 7,347/1985 and by the Brazilian Consumer Protection Code, which is commonly used in Brazil to discuss product liability cases and environmental damage, among others.

With regard to product liability cases, class actions can be filed to protect homogeneous individual rights, consisting of landmark initiatives geared toward representing consumers collectively and expediting resolution of recurrent lawsuits involving common interests of a class. Under Law No 7,347/1985 (Article 5) and the Consumer Protection Code (Article 82), the parties with standing to bring a class action to defend the rights of citizens in court are:

- the Public Prosecutor's Office;
- the Public Defender's Office;
- the federal government, states, municipalities and Federal District;
- the entities and bodies of the direct or indirect public administration, even if with no separate legal identity, when specifically intended to protect diffuse and collective interests and rights; and
- associations legally organised for at least one year, and whose institutional purposes include the protection of diffuse, collective and/or homogeneous individual rights.

Further, the Public Prosecutor's Office must also intervene in class actions as a law oversight authority (when it is not a plaintiff in the class action). In Brazil, there is generally no requirement for class-representative adequacy as to the parties with standing to file class actions.

For illustrative purposes, it is pertinent to mention a class action filed by the Public Prosecutor's Office with the purpose to seek compensation for property and/or moral damages caused by a milk producer. The Rio Grande do Sul Court of Appeals upheld the lower court decision, recognising the company's liability for placing in the market nutritive deficient milk, with the addition of harmful substances to the consumer's health. Due to that conduct, the company was sentenced to pay indemnification for collective moral damages of BRL500,000.00 and to publish the full content of the decision in newspapers (Case No 70077499531).

It is also worth noting the public civil action filed by the Commission of Consumers Defence of the Rio de Janeiro Legislative Assembly, against a washing machine's manufacturer, pleading for a recall campaign involving the safety lock system of the washing machines manufactured by the company (Case No 0095226-78.2010.8.19.0001).

The public civil action was grounded on a motion for anticipated discovery and an indemnification lawsuit filed by a single consumer, due to an accident involving one of the

washing machines, in which a child lost an arm after managing to open the washing machine door while it was operating.

In spite of the accident, the Rio de Janeiro Court of Appeals ruled the public civil action groundless, recognising that the existence of a single report of a consumer regarding eventual defects in the safety lock system could not motivate a recall campaign. The Court of Appeals also stated that according to the expert report, the original characteristics of the product were modified by the consumer after the placing of the product in the market. Therefore, the decision acknowledged that the original product, presented in the consumer's market, did not have any defects. Lastly, the Court of Appeals registered that the product was manufactured more than ten years before the indemnification lawsuit was filed and that neither plaintiff nor the expert examination proved the existence of a defect.

In addition to class actions, the Brazilian Civil Procedure Code sets out specific rules on incidental proceedings for resolution of same subject matter lawsuits. Such proceedings were introduced in Brazil in 2016 to (i) expedite administration of justice and access to court relief, (ii) reduce caseload and (iii) set uniform standards in court decisions. In general, they can be brought in the case of repeated disputes involving the same matters in controversy (matters of law only) and a risk of violation against equal treatment and legal certainty. As a rule, all lawsuits (including class actions) are stayed until this proceeding is adjudicated upon and all subsequent judgments must follow the decision on the incidental proceeding for resolution of same subject matter lawsuits. Nevertheless, the Brazilian court precedents system is not meant to grant court relief directly to plaintiffs, but rather to define legal principles to be followed in all individual and class actions. Consequently, individual lawsuits or class actions will still be necessary to address threats or injuries to rights and interests.

2.17 Significant Recent Cases

Over the years and since the Brazilian Consumer Protection Code was enacted in the 1990s, there have been many product liability cases (some are still ongoing) such as tobacco litigation and many car product liability issues. Since then, case precedents have also been continuously developing in relation to product liability issues.

In a recent and noteworthy product liability decision, the Superior Court of Justice recognised that a supplier could not be held liable for adverse reactions caused to a consumer by a specific medicine if such adverse reaction was specifically and expressly referred to as a warning in the product leaflet (1599405/SP).

In another recent but worrying decision, the Superior Court of Justice stated that a Brazilian company could be held liable for a defective product sold by an affiliate company based abroad and that was purchased by the consumer in a foreign country. Invoking the apparent supplier doctrine, the Superior Court of Justice considered that a company that uses a renowned worldwide brand to market its products should be considered as an apparent supplier and thus be held liable for the defective product manufactured abroad (REsp 1.580.432/SP). This is not a consolidated and binding decision of the Superior Court of Justice so far and a lot of movement and discussion on this issue is expected in the next years.

With regard to recent product liability cases, it is worth mentioning the recall of the airbags produced by the Japanese company Takata. The defect of such airbags gave cause to the largest recall procedure of the automotive industry in Brazil, affecting, according to the authorities, approximately 3.5 million vehicles produced by 15 automakers. There are several ongoing judicial and administrative proceedings related to the defective airbags. Such cases involve not only Takata but also the automakers that allegedly did not carry out an investigation or a recall procedure to substitute the defective component.

There is also an ongoing product liability case involving a baby cot marketed in Brazil by Fisher-Price. The product was already recalled in the USA after being connected with the death of more than 30 children. In Brazil, the supplier estimates that there are 5,709 products to be collected and strongly recommends that consumers immediately suspend the use of the cots.

3. Product Law Policy

3.1 Policy Trends

Data protection and the Internet of Things (IoT) have been receiving growing and significant attention from regulators.

With regard to data protection, for many years, Brazil has navigated in a scenario without a personal data protection law and a clear rule on the duties of the supplier after detecting data breaches. On 10 July 2018, that scenario changed. Brazilian Congress approved Bill No 53/2018, which received presidential sanction on 14 August 2011, and Law No 13,709/2018, called the Brazilian General Data Protection Act, is now in effect.

In turn, there is no regulation on the Internet of Things in Brazil. The only law that mentions the Internet of Things is Decree No 9,319/2018, which establishes the national system of digital transformation. The referred-to decree only mentions that "in recognising the transformative potential of the Internet of Things, actions and incentives should be established for the continuous evolution and dissemination of associated devices and technologies."

Nevertheless, authorities are aware of the necessity to regulate the matter and in September 2018 the Brazilian Telecommunications Agency opened a public consultation aiming to re-evaluate the regulation with the purpose of expanding Internet of Things applications.

3.2 Future Policy

Recently, the Brazilian Consumer Protection Office opened a public consultation to amend Ministry of Justice Ordinance No 487/2012, which regulates the procedures that suppliers must fulfil to launch a recall campaign. The amendment seeks to conform the recall procedure to the current reality of new technologies, making it more agile and consistent with the necessities of the digital era.

Other than that, there is a current trend on cities and states trying to enact specific state or city Consumer Protection Codes (for example, the State of Pernambuco enacted a State Consumer Protection Code and the City of São Paulo is moving fast in the legislative process to enact the City of São Paulo Consumer Protection Code).

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Contrary to the Federal Law (the Consumer Defence Code enacted in 1990), the state or city Consumer Protection Codes are being drafted to try to regulate specific themes and sectors, such as supermarkets, transport, cinemas, gas, pharmacies, hotels and lodges, health plans, internet and auto insurance, public services, shows and events, among others.

The state or city Consumer Protection Codes would have additional application to the Brazilian Consumer Protection Code, which has a national character. It is worth recording, however, a possible discussion on the constitutionality of these state or city Consumer Protection Codes. The Federal Supreme Court (STF) has already analysed at least two direct actions of unconstitutionality regarding the possibility of states/cities to enact supplementary rules regarding consumer law.

In the judgment of ADI 5745 / RJ, by majority vote, the STF considered that, in the case of subjects related to competing jurisdiction (CF, Article 24, item V), the legislative activity of the Member States by extending consumer guarantees would be valid. However, in the judgment of ADI No 5158 / PE, also by majority vote, the STF considered that "from the systematic interpretation of Arts 1º, IV, 5º, 24, V e VIII, 170, IV e 174, all of the Federal Constitution, can be extracted impediments to the state legislature when the elaboration of consumeristic norms", thus "being forbidden extrapolations of competing competence and violations of the principles of isonomy, free initiative and free competition, especially with regard to the creation of state burden on suppliers".