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### Need for Mercosul Harmonization: Brazil's Consumer Protection Law as the Focal Point

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# NOTES AND COMMENTS

## THE NEED FOR MERCOSUL HARMONIZATION: BRAZIL'S CONSUMER PROTECTION LAW AS THE FOCAL POINT

### I. INTRODUCTION

The demise of authoritarian regimes and the progress towards democracy and economic liberalism in South America has spurred rapid movement toward consumer protection.<sup>1</sup> The relevance of consumer protection on the international stage is magnified by the development of regional trade blocks,<sup>2</sup> such as Mercosul.<sup>3</sup> Mercosul, created in 1991, is a free trade zone comprised of Brazil, Argentina, Uruguay and Paraguay, with aspirations of becoming a customs union.<sup>4</sup> As free markets develop around the world and economic transactions move easily across borders, international harmonization of consumer law has become both relevant and necessary.<sup>5</sup> Global integration connects not only economies, but also individuals.<sup>6</sup>

Brazil's Consumer Protection Code, enacted September 11, 1990, is the most sophisticated and comprehensive piece of

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1. Robert G. Vaughn, *Consumer Protection Laws in South America*, 17 HASTINGS INT'L & COMP. L. REV. 275, 279 (1994); see Edward C. Snyder, Comment, *The Menem Revolution in Argentina: Progress Toward a Hemispheric Free Trade Area*, 29 TEX. INT'L L.J. 95, 96 (1994).

2. See Salvador J. Juncadella, *The Legal Profession in a Globalized World*, 30 U. MIAMI INTER-AM. L. REV. 1, 2 (1998).

3. This Comment will use the Portuguese spelling of Mercosul, known in the Spanish language as Mercosur.

4. Mark B. Baker, *Integration of the Americas: A Latin Renaissance or a Prescription for Disaster?*, 11 TEMP. INT'L & COMP. L.J. 309, 319-20 (1997). Between the four member countries, Mercosul contains 64 percent of South America's population and 70 percent of its combined gross domestic product. Joe Zopolsky, *Implementing the FTAA: A Survey of Hemispheric Unification Efforts within the Americas Over the Past Ten Years*, 9 CURRENTS: INT'L TRADE L.J. 91, 93 (2000).

5. GENE A. MARSH, CONSUMER PROTECTION LAW IN A NUTSHELL 3 (West Group 3d ed., 1999).

6. Dr. Raul Granillo Ocampo, *Policy Commentary: Lawyering in the Americas: Reflections on Mercosur and the Future of the Americas*, 3 SW. J. L. & TRADE AM. 373, 375 (1996).

consumer legislation<sup>7</sup> in South America and has influenced the development of consumer protection laws throughout the region.<sup>8</sup> This Comment examines the Brazilian Consumer Protection Code of 1990 (1990 Code) and the influences behind its enactment. It also compares the 1990 Code with Argentina's consumer protection law and examines the need to harmonize consumer protection laws throughout Mercosul.

## II. HISTORICAL OVERVIEW ON THE DEVELOPMENT OF MERCOSUL

Prior to the creation of Mercosul, *Mercado Comum Do Sul*<sup>9</sup> (Common Market of the South), two previously created trading block areas, the Latin-American Association of Free Commerce (ALALC) and the Latin-American Association of Integration (ALADI), proved unsuccessful.<sup>10</sup> It was not until 1986 that President Sarney of Brazil and President Alfonsín of Argentina established the foundation for Mercosul.<sup>11</sup> Since their economies were already so deeply integrated, the two presidents established a common economic trading block between the two countries.<sup>12</sup> From 1985 to 1990, the amount of trade between Brazil and Argentina grew from \$1.1 billion to \$2.1 billion.<sup>13</sup> In 1991 this union was opened to Paraguay and Uruguay with the signing of *Tratado De Assunção* (Treaty of Asuncion), which formally created Mercosul.<sup>14</sup>

7. "Consumer Law. The area of law dealing with consumer transactions—that is, a person's obtaining credit, goods, real property, or services for personal, family or household purposes." BLACK'S LAW DICTIONARY 312 (7th ed. 1999).

8. DAVID B. JAFFE & ROBERT G. VAUGHN, SOUTH AMERICAN CONSUMER PROTECTION LAWS 69 (Kluwer Law Int'l 1996).

9. LEONIR BATISTI, DIREITO DO CONSUMIDOR PARA O MERCOSUL [CONSUMER RIGHTS FOR MERCOSUL] 68 (José Ernani de Carvalho Pacheco ed., Juruá Editora Curitiba 1999).

10. *Id.* at 65-68 ("ALALC-Associação Latino-Americana de Livre Comércio... ALADI- Associação Latino-America de Integração"); see Marta Haines-Ferrari, *MERCOSUR: A New Model of Latin American Economic Integration?*, 25 CASE W. RES. J. INT'L L. 413, 414-19 (1993); see Dr. Richard Bernal, *Regional Trade Arrangements in the Western Hemisphere*, 8 AM. U. J. INT'L L. & POL'Y 683.

11. BATISTI, *supra* note 9, at 68; Galeria dos Presidentes at <http://www.presidencia.gov.br>; Presidência de La Nación Argentina at <http://www.presidencia.gov.ar>.

12. BATISTI, *supra* note 9, at 68-69.

13. Ana Maria de Aguinis, *Can Mercosur Accede to NAFTA? A Legal Perspective*, 10 CONN. J. INT'L L. 597, 599 (1995).

14. BATISTI, *supra* note 9, at 70. This treaty, signed November 29, 1991, called for establishing a common market with free circulation of goods, capital, labor and services. Sam Laird, *Latin American Trade Liberalization*, 4 MINN. J. GLOBAL TRADE 195, 217 (1995); Thomas Andrew O'Keefe, Esq., *Potential Conflict Areas in any Future*

Although Mercosul was created in 1991, its institutional structure was not developed until 1994 at the Protocol of Ouro Preto.<sup>15</sup> The Protocol established Mercosul as a legal entity with international rights.<sup>16</sup> With these international rights, Mercosul can negotiate agreements or other proposals for regional integration with third-party countries.<sup>17</sup> Attaining international rights was the first step toward full integration as a common market similar to that of the European Union, which is what Mercosul members ultimately seek.<sup>18</sup>

### III. HISTORICAL BACKGROUND OF BRAZIL'S ATTITUDE TOWARD CONSUMER PROTECTION

#### *A. Consumer Rights Early in Brazilian History*

As Mercosul's largest member and the first to innovate its consumer protection laws, Brazil has played a critical role in the development of consumer protection law.<sup>19</sup> Brazil, once a Portuguese colony, inherited Europe's civil law system, which resulted in its laws greatly resembling the Napoleonic codes of Bourgeois Europe.<sup>20</sup> The laws represented a time when privileged merchants experienced stronger legal protections than consumers.<sup>21</sup> Laws focused on the importance of freedom to contract, and often resulted in consumer susceptibility to disproportionately high interest rates.<sup>22</sup> The French civil law influences were still evident as late as 1917, when Brazil enacted 1,807 articles of its own civil code.<sup>23</sup>

Few provisions in the Brazilian civil code addressed consumer protection and many of the rules pertaining to contract

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*Negotiations between MERCOSUR and the NAFTA to create a Free Trade Area of the Americas*, 14 ARIZ. J. INT'L & COMP. L. 305, 307-08 (1997).

15. BATISTI, *supra* note 9, at 71.

16. *Id.*

17. Aguinis, *supra* note 13, at 608.

18. BATISTI, *supra* note 9, at 71.

19. See BATISTI, *supra* note 9, at 417-18.

20. Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 900 (1988).

21. Ugo Mattei, *Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default and Enforcement Rules*, 39 VA. J. INT'L L. 537, 541 (1999).

22. BATISTI, *supra* note 9, at 158.

23. *Id.*; see Barker, *supra* note 20, at 900-01.

interpretation and warranty favored merchants.<sup>24</sup> Brazilian judges applied the civil code to consumer contracts, but its scope and character limited available claims and remedies.<sup>25</sup> Perhaps the greatest obstacles to meaningful consumer protection were the written procedures of civil law and bureaucratic formality of the courts.<sup>26</sup> This restricted consumers' access to the legal system, especially those of lower socio-economic status.<sup>27</sup>

The first step toward the current standard of consumer protection in Brazil came in 1988 with the development of the Brazilian Constitution.<sup>28</sup>

### B. Brazil's 1988 Constitution and Consumer Protection

The 1988 Constitution, often called the "Citizens Constitution," brought significant legal reforms to Brazil, including creating the basis for the future enactment of a consumer protection code.<sup>29</sup> The Brazilian Constitution contains several provisions that address consumer protection.<sup>30</sup> In fact on "paper, constitutional rights are better protected in Brazil than in virtually any other country."<sup>31</sup> These provisions create an obligation to enact legislation regarding consumer protection and to create an economic order that obeys the principles of consumer protection.<sup>32</sup> For example, article 5, which speaks of equality under the law, specifically directs the state to promote consumer protection.<sup>33</sup> Article 150, section 5<sup>34</sup> is devoted to the principle of availability of information, such as information related to taxes placed on goods and services.<sup>35</sup>

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24. Vaughn, *supra* note 1, at 279.

25. *Id.*

26. *Id.*

27. *Id.*

28. BATISTI, *supra* note 9, at 169-70.

29. Daniela Trejos Vargas, *Brazil—The Reintroduction of a Democratic State and the Liberalization of a Preciously Closed Economy*, 13 FLA. J. INT'L L. 125, 126 (2000).

30. BATISTI, *supra* note 9, at 185.

31. Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 SW. J. L. & TRADE AM. 291, 318 (2000).

32. BATISTI, *supra* note 9, at 185.

33. Constituição da República Federativa do Brasil de 1988 [C.F.], art. 5, XXXII (Braz.) ("O Estado promoverá, na forma da lei, a defesa do consumidor."), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990).

34. C.F. art. 150, § 5 (Braz.).

35. BATISTI, *supra* note 9, at 171; C.F., art. 150, § 5 (Braz.).

Another example is article 170, clause V, which discusses the general principles of economic activity, specifically stating that the economic order is founded in the value of human labor and free initiative.<sup>36</sup> The article states that economic order must guarantee dignity to all citizens, observing among other principles, the principle of consumer defense.<sup>37</sup> With article 170, consumer defense is anchored to the concept of economic order, signifying that consumer protection does not only mean protecting the consumer as an entity, but also protecting the individual consumer's economic integrity.<sup>38</sup>

Thus, although the constitutional provisions recognize the importance of consumer interest, they do not adequately provide legal protections for consumers.<sup>39</sup> The provisions set goals and standards emphasizing the need and importance of further statutory protection.<sup>40</sup> The Consumer Protection Code of 1990<sup>41</sup> was the Brazilian government's answer to the need for further statutory protection.<sup>42</sup>

#### IV. OVERVIEW OF THE 1990 CONSUMER PROTECTION CODE

The 1990 Code reflects the popular movement advocating socio-economic equality in society.<sup>43</sup> The 1990 Code addresses "the protection of consumer health and safety, product and service liability, business practices, contracts of adhesion, deceptive practices, debt collection and unfair contractual clauses."<sup>44</sup> It also establishes judicial and administrative sanctions.<sup>45</sup> An imperative

36. C.F. art. 170, cl. V (Braz.) ("A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observando os seguintes princípios: . . . V – defesa do consumidor."); see also Dr. Raul Anibal Etcheverry, *The Mercosur: Business Enterprises Organization and Joint Ventures*, 39 ST. LOUIS U. L.J. 979, 990 (1995).

37. C.F. art. 170 (Braz.) ("V – defesa do consumidor.").

38. BATISTI, *supra* note 9, at 171.

39. Vaughn, *supra* note 1, at 280.

40. *Id.*

41. Código de Proteção e Defesa do Consumidor [C.D.C], Lei No. 8078, 11 de Setembro de 1990 (Braz.), reprinted and translated in JAFFE & VAUGHN, *supra* note 8 and available at <http://senado.gov.br>.

42. See BATISTI, *supra* note 9, at 170.

43. Vaughn, *supra* note 1, at 282-83.

44. *Id.*

45. *Id.* at 283.

aspect of the code is its recognition of the vulnerability of consumers in the market.<sup>46</sup>

### A. Influences and Models Used in Drafting the 1990 Code

Due to its expansive structure, the 1990 Code encompasses consumer protection more thoroughly than other laws.<sup>47</sup> The 1990 Code, however, does not exhaust the subject.<sup>48</sup> To fully comprehend the magnitude of the 1990 Code, it is necessary to examine preexisting models that influenced its creation: the Mexican Federal Consumer Protection Act of 1975<sup>49</sup> and the United Nations Guidelines for Consumer Protection.<sup>50</sup>

#### 1. The Mexican Federal Consumer Protection Act of 1975

The Mexican Federal Consumer Protection Act of 1975 (FCPA) greatly influenced consumer protection law in Brazil.<sup>51</sup> Mexico, the first country in Latin America to enact consumer protection laws, followed the example of the United States' consumer protection laws.<sup>52</sup> Mexico's move towards consumer protection resulted from the influx of foreign investment by U.S. corporations after World War II,<sup>53</sup> and as a response to the initial surge in consumer protection in the United States in the late 1960s and 1970s.<sup>54</sup> Considered practical and modern by most Mexicans, the FCPA is second in public approval only to the Mexican Constitution.<sup>55</sup> Under Mexican law, the FCPA's provisions rank just below constitutional precepts in importance.<sup>56</sup> The statute

46. *Id.*

47. BATISTI, *supra* note 9, at 301.

48. *Id.*

49. Ley Federal de Protección al Consumidor [Federal Consumer Protection Act], D.O., 22 de Diciembre de 1975 (Mex.).

50. Guidelines for Consumer Protection, G.A. Res. 248, U.N. GAOR, 39<sup>th</sup> Sess. (1985), reprinted in JAFFE & VAUGHN, *supra* note 8 [hereinafter Guidelines].

51. Vaughn, *supra* note 1, at 281.

52. Jorge A. Vargas, *An Overview of Consumer Transactions Law in Mexico: Substantive and Procedural Aspects*, 10 N.Y.L. SCH. J. INT'L & COMP. L. 345, 346-49 (1989).

53. *Id.*

54. MARSH, *supra* note 5, at 6.

55. Vargas, *supra* note 52, at 358. "Mexicans are very proud of their Constitution. In general, this vital document tends to be characterized as the fundamental law that resulted from the twentieth century's first social revolution, the Mexican revolution of 1910 . . . ." Jorge A. Vargas, *Mexico's Legal Revolution: An Appraisal of Its Recent Constitutional Changes, 1988-1995*, 25 GA. J. INT'L & COMP. L. 497, 501 (1996).

56. See Vargas, *supra* note 52, at 358.

fosters a consumer protection consciousness in Mexicans that has assisted in balancing consumer-merchant relationships by providing a simple means for settlement procedures that dispenses with the need to hire costly attorneys.<sup>57</sup>

Composed of ninety-nine articles divided into thirteen chapters, the FCPA regulates all consumer-merchant transactions.<sup>58</sup> The FCPA has been amended twenty-nine times since it entered into force on February 5, 1976.<sup>59</sup> The FCPA expresses four distinct legal principles that govern all of its provisions.<sup>60</sup> First, the FCPA's provisions are federal, giving the Mexican Congress the power to legislate matters of commerce.<sup>61</sup> Second, the provisions concern social interest and public order, norms that are derived from the sovereign power of the state.<sup>62</sup> Third, the provisions may not be waived by an agreement of the parties.<sup>63</sup> Fourth, the FCPA controls and regulates any consumer transaction, despite any contradictory stipulations created by other statutes.<sup>64</sup>

In addition, the FCPA embodies eight substantive legal principles designed to protect consumers: (1) Consumer protection norms may not be legally renounced; (2) Legal relationships between merchants and consumers should be based on the principle of truthfulness; (3) Contracts should be subject to the principle of transparency, and contractual arrangements should be drafted in a precise and clear manner; (4) Warranties of any goods or services should be legally enforceable; (5) Public authorities should have the power to establish maximum interest rates; (6) Consumers should have the legal right to modify, through judicial means, unilateral clauses in contracts of adhesion; (7) Consumers should have access to administrative procedures to correct and change misleading practices used by merchants and (8) Competent

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57. *Id.*

58. *Id.* at 359.

59. *Id.* The fact that most consumer transactions are regulated under a single statute represents an advantage to the Mexican consumer, in comparison to the United States where several statutes and several federal agencies are involved. *Id.* at 362-63. In addition, the creation of a single agency under the Office of the Attorney General for Consumer Protection also adds to consumer advantage in Mexico. *See id.* at 360-363.

60. Vargas, *supra* note 52, at 359.

61. *Id.*

62. *Id.*

63. *Id.* at 359.

64. *Id.* at 360.



authorities should regulate advertising and sales practices.<sup>65</sup> These eight principles have shaped and continue to shape Mexican consumer transactions today.<sup>66</sup>

Although initially modeled after U.S. consumer protection laws, Mexico's consumer law has proceeded down an original and effective path better suited to the Mexican legal and economic realities.<sup>67</sup> Perhaps it is because of this diversion from U.S. law that the Mexican act had such a great impact not only on Brazil's consumer laws, but also on other Latin American consumer laws.<sup>68</sup> Nevertheless, it is important to recognize that the Mexican statute draws heavily on the laws of the United States.<sup>69</sup> The Consumer Credit Act,<sup>70</sup> the Magnuson-Moss Act<sup>71</sup> and the Federal Trade Commission Act<sup>72</sup> were all used as models by the Mexican government for the FCPA.<sup>73</sup>

## 2. The United Nations Guidelines

The United Nations Guidelines for Consumer Protection (hereinafter Guidelines),<sup>74</sup> adopted by the General Assembly of the United Nations in 1985, also greatly influenced the development of the 1990 Code.<sup>75</sup> The General Assembly set forth objectives that ranged from assisting countries in the protection of their consumer populations, to encouraging the development of market conditions so that consumers have greater choices at lower

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65. *Id.* at 351-53.

66. *Id.* at 353.

67. *Id.* at 382.

68. *See generally* Vaughn, *supra* note 1.

69. Vaughn, *supra* note 1, at 282.

70. Consumer Credit Protection Act, 15 U.S.C. § 1601 (2000). Title I of the CCPA is commonly known as the Truth in Lending Act (TILA). MARSH, *supra* note 5, at 6. It contains the requirement that creditors who extend consumer credit have to disclose essential credit terms before credit is extended. *Id.* TILA also regulates the terms of credit advertising and supplies a framework for the sale of products relating to the credit transaction. *Id.* Title II, Extortionate Credit Transactions, makes its primary target those who extend credit at usurious interest rates and use force to collect the amount due. *Id.* at 7. Title III, Restriction on Garnishment, limits the amount that is subject to creditor garnishment, while also prohibiting termination of an employee by its employer due to one's garnishment. *Id.* The CCPA was amended in 1970 and 1974 to add credit card provisions. *Id.*

71. Magnuson-Moss Act, 15 U.S.C. § 2301 (2000). The Act is considered the most detailed and comprehensive act regarding warranties. Vargas, *supra* note 52, at 364.

72. Federal Trade Commission Act, 15 U.S.C. § 41 (2000).

73. Vaughn, *supra* note 1, at 282.

74. Guidelines, *supra* note 50.

75. Vaughn, *supra* note 1, at 283.

prices.<sup>76</sup> The Guidelines address physical safety of consumers, quality of consumer goods, protection of economic interest, distribution facilities for essential goods, judicial or administrative relief and educational programs.<sup>77</sup>

The Guidelines also call for international cooperation with an emphasis on regional agreements.<sup>78</sup> They do not, however, call for an international standard beyond the willingness of individual countries to cooperate.<sup>79</sup> The similarities between the Brazilian 1990 Code and the statutes of other Mercosul countries are considerable, since the subjects addressed in the codes closely parallel the subjects presented in the Guidelines.<sup>80</sup>

#### V. ANALYSIS OF BRAZIL'S CONSUMER PROTECTION CODE OF 1990

Although the Brazilian Constitution called for the enactment of a Consumer Protection Code 120 days after the passing of the Constitution, that date being May 10, 1988, the 1990 Code did not come into existence until September 11, 1990 more than two years later.<sup>81</sup> For approximately a year and half, heated debate ensued over the proposal of the 1990 Code among consumer organizations, local consumer associations and many influential corporate/business groups.<sup>82</sup> Perhaps this is why the 1990 Code

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76. See generally Guidelines, *supra* note 50. The Guidelines set forth the following objectives: "Taking into account the interests and needs of consumers in all countries, particularly those in developing countries; recognizing that consumers often face imbalances in economic terms, education levels, and bargaining power; and bearing in mind that consumers should have the right to access to non-hazardous products, as well as the importance of promoting just, equitable and sustainable economic and social development, these guidelines for consumer protection have the following objectives: (a) To assist countries in achieving and maintaining adequate protection for their population as consumers; (b) To facilitate production and distribution patterns responsive to the needs and desires of consumers; (c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers; (d) To assist countries in curbing abusive business practices by all enterprise at the national and international levels which adversely affect consumers; (e) To facilitate the development of independent consumer groups; (f) To further international cooperation in the field of consumer protection; (g) To encourage the development of market conditions which provide consumers with greater choices at lower prices." See *id.*

77. Vaughn, *supra* note 1, at 283.

78. *Id.*

79. *Id.*

80. *Id.* at 284.

81. BATISTI, *supra* note 9, at 187.

82. See Vaughn, *supra* note 1, at 284.

contains a number of significant innovations; one is the critical recognition of consumers' vulnerability in the market.<sup>83</sup>

The 1990 Code is often referred to as Law number 8078 (Law 8078), which may seem unusual because codes are generally compilations of several laws.<sup>84</sup> Law 8078 is so comprehensive and detailed in character that it constitutes a code, with no need to enact supplementary laws for further definition.<sup>85</sup> The Consumer Protection Code is structured into six titles: Title I, Consumer Rights; Title II, Penal Infractions; Title III, Consumer Protection in Court; Title IV, National Consumer Defense System; Title V, Collective Consumer Convention; and Title VI, Final Provisions.<sup>86</sup> The individual titles are further divided into chapters.<sup>87</sup>

To facilitate the analysis of the 1990 Code, the following discussion has been divided into eight different topics: (A) coverage; (B) consumer rights and governmental responsibility; (C) credit transactions, credit records and debt collection; (D) provisions regarding consumer sales; (E) advertising and promotion; (F) defect in goods and services; (G) dangerous products and (H) enforcement. A similar topical analysis will repeat itself in this Comment's discussion of the laws of Argentina.

### A. Coverage

The 1990 Code encompasses a broad range of consumer products and services, from durable and non-durable goods to material and immaterial assets.<sup>88</sup> "Services" as defined by the 1990 Code include any activity provided for the consumer, such as banking, financial, credit and security activity.<sup>89</sup> Activities that involve employment relationships are exempted from the Code's definition of services.<sup>90</sup> The broad scope of the statute also covers the definitions of "consumers" and "suppliers."<sup>91</sup> A "consumer" is defined as either an individual or a legal entity that is an end-user of a product or service.<sup>92</sup> A "supplier" is an individual or legal

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83. JAFFE & VAUGHN, *supra* note 8, at 73.

84. See BATISTI, *supra* note 9, at 188.

85. See *id.*

86. BATISTI, *supra* note 9, at 188.

87. *Id.* at 188-89.

88. JAFFE & VAUGHN, *supra* note 8, at 72.

89. C.D.C., tit. I, ch. I, art. 3, para. 2 (Braz.).

90. *Id.*

91. *Id.*

92. C.D.C., tit. I, ch. I, art. 2 (Braz.).

entity, public or private, Brazilian or foreign that is involved in the production, assembly, creation, construction, transformation, import, export, distribution or marketing of products, or the rendering of services.<sup>93</sup>

### *B. Consumer Rights and Governmental Responsibility*

Chapter III, Title I of the 1990 Code lays out nine basic consumer rights: (1) protection of human life and health against harmful or hazardous practices in the supply of goods and services; (2) education and disclosure about the proper consumption of goods and services, thereby ensuring freedom of choice and equality in contracts; (3) adequate and clear information about differences in products and services with correct specification of quantity, character, composition, quality, price and risks; (4) protection against misleading and abusive advertising, against coercive and unfair business practices and against deceptive practices regarding the supply of goods and services; (5) contractual right to modify clauses that establish disproportionate installments and to revise whole contracts where subsequent occurrences render them excessively burdensome; (6) effective prevention and redress of individual and collective property and moral damages; (7) access to judiciary and administrative means; (8) defense of consumer rights by placing the burden of proof on the supplier in civil proceedings, when, at the court's discretion, the consumer's allegation is likely to be true or when the consumer is at a disadvantage in accordance with experience; (9) (vetoed);<sup>94</sup> and (10) adequate and effective general delivery of public services.<sup>95</sup>

Chapter II, Title I establishes a national consumer relations policy.<sup>96</sup> This policy recognizes the vulnerability of the consumer by preserving the economic interests, dignity, safety and health of consumers.<sup>97</sup> The recognition of consumer vulnerability illustrates the government's assumption of responsibility to protect consumers in market relations.<sup>98</sup> The chapter lays out a number of

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93. *Id.*

94. Originally there were ten basic consumer rights, but the ninth was vetoed and only appears as the word "vetoed" in the 1990 Code. *Id.*

95. C.D.C., tit. I, ch. III, art. 6 (Braz.).

96. C.D.C., tit. I, ch. II (Braz.).

97. JAFFE & VAUGHN, *supra* note 8, at 73.

98. *Id.*

effective government actions to be used in the protection of consumers.<sup>99</sup>

### C. Credit Transactions, Credit Records and Debt Collection

Article 52, Title I of the 1990 Code regulates disclosure of information regarding credit transactions.<sup>100</sup> Article 52 provides that prior to a credit transaction, the supplier must provide the customer with adequate information regarding: (1) the price of the product or service in national currency; (2) the default interest rate and the actual annual interest rate; (3) surcharges allowed under the law; (4) the number and interval of installments and (5) the total amount to be paid, with or without financing.<sup>101</sup> Article 52 also specifies that fines to a consumer from failure to satisfy a credit obligation cannot be greater than ten percent of the installment.<sup>102</sup> Further, the consumer is entitled to prepay the debt in full or in part with a proportional reduction in interest and other applicable charges.<sup>103</sup>

Consumer rights regarding credit records and data banks are also located in Title I.<sup>104</sup> The 1990 Code provides that consumers shall have access to any credit information regarding personal and consumer data, as well as their respective sources.<sup>105</sup> Further, consumer records and data must be objective, clear, truthful, easily understood and free of negative information that is more than five years old.<sup>106</sup> If there is an inaccuracy within the records, consumers may demand correction, and the clerk of records has five business days to communicate the changes to all who received the inaccurate information.<sup>107</sup>

The 1990 Code also addresses requirements on maintenance, collection and dissemination of credit information.<sup>108</sup> Chapter V,

99. C.D.C., tit. I, ch. II, art. 4 (II) (Braz.). The government actions include those "[a)] by direct initiative; (b) by incentives for creation and development of representative organizations; (c) by State presence on the consumer market; (d) by product and service warranties with adequate quality, safety, durability and performance standards." *Id.*

100. C.D.C., tit. I, ch. VI, art. 52 (Braz.).

101. *Id.*

102. C.D.C., tit. I, ch. VI, art. 52, para. 1-2 (Braz.).

103. *Id.*

104. C.D.C., tit. I, ch. V, § VI (Braz.).

105. *Id.* § VI, art. 43.

106. *Id.* § VI, art. 43, para. 1.

107. *Id.* § VI, art. 43, para. 3.

108. JAFFE & VAUGHN, *supra* note 8, at 74. If the consumer has not requested that a credit record be created, the consumer must be informed of the creation of such record.

section 5 limits the techniques that can be used to collect consumer debts.<sup>109</sup> For example, collection shall not subject consumers to ridicule or any type of constraint or threat.<sup>110</sup> Threat is not defined, which suggests that it likely covers the threat of legal action used against a defaulting consumer by the creditor.<sup>111</sup>

#### *D. Provisions Regarding Consumer Sales*

The 1990 Code pays special attention to offers in the context of the sale of goods and services and to abusive clauses in consumer contracts.<sup>112</sup> An offer or presentation as to product or service must identify the characteristics, quality, quantity, composition, price, warranty, validity terms, and origin of the product or service in question.<sup>113</sup> Offers and presentations must disclose any risks to consumers' health and safety, and must also be accurate, clear and easily read in Portuguese.<sup>114</sup>

If the supplier of goods and services refuses to comply with the offer, presentation or advertising requirements, the consumer may choose to: (1) require forced compliance with the terms of the offer, presentation or advertising; (2) accept another equivalent product or service or (3) rescind the contract and seek restitution of any losses, damages or advance payments.<sup>115</sup> If a product's manufacture or import ceases, offers of goods for sale by foreign manufacturers or importers shall guarantee the supply of replacement parts or components.<sup>116</sup> Supply shall be maintained for a reasonable time pursuant to the law following the termination of production or import.<sup>117</sup> A reasonable time is determined by examining the character of the product, the length of time that the product was being imported, the number of

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*Id.* Once the statute of limitations has passed, no information regarding the consumer debt can be provided that would impede obtaining additional credit from suppliers. *Id.*

109. C.D.C., tit. I, ch. V, § V (Braz.).

110. *Id.* § V, art. 42.

111. JAFFE & VAUGHN, *supra* note 8, at 74.

112. *Id.* at 75.

113. C.D.C., tit. I, ch. V, § II, art. 31 (Braz.).

114. *Id.*

115. C.D.C., tit. I, ch. V, § II, art. 35 (Braz.).

116. *Id.* § II, art. 32.

117. *Id.* This provision is important in the context of the Mercosul because it gives consumers the confidence to buy imported products, knowing that the replacement parts will be available. Such a provision is not necessary for domestic manufacturers because the Brazilian government has jurisdictional power to compel the domestic manufacturer to make replacement parts available. See generally BATISTI, *supra* note 9.

products sold in the country, the extent of marketing and the character of the replacement parts.<sup>118</sup>

The 1990 Code identifies certain provisions in contracts for the sale of goods or services as unfair and thereby void.<sup>119</sup> Many of the prohibited provisions concern the ability of the supplier to unilaterally alter contractual terms and obligations pertaining to contract enforcement.<sup>120</sup> The remaining contractual prohibitions are more general in scope such as the ban on provisions that violate environmental regulations.<sup>121</sup>

In addition to prohibiting unfair clauses, the 1990 Code also proscribes a number of deceptive business practices.<sup>122</sup> The prohibition is intended to prevent suppliers from taking advantage of consumers.<sup>123</sup> Along the same lines, the 1990 Code also regulates contracts of adhesion. A contract of adhesion is one in which the clauses have been approved by competent authorities or established unilaterally by the supplier of goods or services without the consumer being able to bargain or substantially modify the contents.<sup>124</sup> Contracts of adhesion must be clearly worded and

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118. JAFFE & VAUGHN, *supra* note 8, at 75.

119. C.D.C., tit. I, ch. VI, § II, art. 51 (Braz.).

120. JAFFE & VAUGHN, *supra* note 8, at 76. For example, there can be no clause allowing the supplier the option to cancel the contract while at the same time obligating performance from the consumer, allowing the supplier to unilaterally change the price, or allowing the supplier to unilaterally terminate the contract. *Id.* In addition, a contractual provision "cannot provide for compulsory arbitration, obligate the consumer to pay collection charges without a similar obligation on the supplier, transfer liability to third parties, reverse the burden of proof to the detriment of the consumer, deprive the consumer of an option of refund of the amount already paid when that remedy is provided in the code, waive the rights of indemnification for needed improvements, or reduce liability for defects in products and services." *Id.*

121. JAFFE & VAUGHN, *supra* note 8, at 76.

122. C.D.C., tit. I, ch. V, § IV, art. 39 (Braz.). A product or service supplier shall not: (1) condition the supply of a product or service to the supply of another product or service; (2) refuse to meet consumer demand if there is stock available; (3) send or deliver to consumer, without prior request, any product or service; (4) avail themselves of the consumer's weakness or ignorance, due to age, health, knowledge or social status to foist their products and services; (5) demand from consumer excessive profit advantage; (6) execute services without preliminary estimate and express authorization of the consumer, except when resulting from prior practices of the parties; (7) pass disparaging information regarding acts performed by the consumer while exercising their rights; (8) place products in the market without complying with the rules of the appropriate official bodies and (9) fail to stipulate a deadline for performance of obligation, or unilaterally establishing the initial terms or performance. *Id.*

123. JAFFE & VAUGHN, *supra* note 8, at 76.

124. C.D.C., tit. I, ch. VI, § III, art. 54 (Braz.).

legible.<sup>125</sup> The Code's regulation of adhesion contracts reflects the view that suppliers enjoy greater bargaining power than consumers.<sup>126</sup> Thus, the 1990 Code seeks to restrict abuses and redress inequalities between suppliers and consumers.<sup>127</sup> This is further reflected by the 1990 Code's general rule of interpretation, that any consumer contract should be interpreted in favor of the consumer.<sup>128</sup>

### *E. Advertising and Promotion*

The 1990 Code prohibits all misleading and unfair advertising.<sup>129</sup> Advertising is misleading when it is entirely or partially false or when it misleads the consumer regarding the product or service's nature, characteristic, quality, quantity, properties, origin, price or any other data.<sup>130</sup> According to the 1990 Code, a consumer may also be misled by omissions of information.<sup>131</sup> Advertising is unfair when it discriminates, incites violence, exploits fears and superstitions, takes advantage of children's poor judgment and inexperience, disregards environmental values, or induces consumers to harm their health or neglect their safety.<sup>132</sup> The advertiser bears the burden of proof in all matters concerning the accuracy and truthfulness of its advertising.<sup>133</sup> The 1990 Code seeks to ensure that advertising empowers and informs, rather than inhibits and deceives consumers.<sup>134</sup>

### *F. Defect in Goods and Services*

According to the 1990 Code, suppliers of durable or non-durable products are jointly liable for defects in quality or quantity that decrease a product's value or make it unfit or inadequate for its designed consumption.<sup>135</sup> Suppliers are also liable for defects that result from disparities in the information provided in the

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125. *Id.* § III, art. 54, para. 3.

126. JAFFE & VAUGHN, *supra* note 8, at 77.

127. *Id.*

128. *Id.*

129. C.D.C., tit. I, ch. V, § III, art. 37 (Braz.).

130. *Id.* § III, art. 37, para. 1.

131. *Id.*

132. *Id.* § III, art. 37, para 2.

133. *Id.* § III, art. 38.

134. JAFFE & VAUGHN, *supra* note 8, at 78.

135. C.D.C., tit. I, ch. IV, § III, art. 18 (Braz.).



product's container, on packaging and labels or in the advertising regarding the products' nature.<sup>136</sup> In such an event, the consumer is entitled to demand replacement of the defective part or product.<sup>137</sup>

Three specific remedies are available to the consumer if the defect is not corrected within thirty days: (1) replacement of the product by another of the same kind, in perfect condition for use; (2) immediate refund of the price paid without prejudice to any losses and damages claimed and (3) proportionate price reduction.<sup>138</sup> The parties may agree to extend or shorten the time period during which a consumer can claim a remedy, but the time period may not be less than seven days nor more than one hundred and eighty days.<sup>139</sup> Furthermore, in adhesion contracts, consumers must separately agree to its terms in an express statement.<sup>140</sup>

In addition to regulating defective products, the 1990 Code addresses the characteristics that make products unfit for use or consumption.<sup>141</sup> This regulation also applies to service suppliers.<sup>142</sup> A service supplier is liable for defects rendering service unsuitable for consumption, decreasing the service's value or for failing to comply with the information contained in the offer or advertisement.<sup>143</sup> The consumer is entitled to the same remedies available in product defect correction.<sup>144</sup>

### G. Dangerous Products

Products and services placed in the consumer market shall not endanger the health or safety of consumers, except for those risks considered normal and foreseeable due to the nature and use of

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136. *Id.*

137. *Id.*

138. *Id.* § III, art 18, para. 1.

139. *Id.* § III, art. 18, para. 2.

140. *Id.*

141. *Id.* § III, art. 18, para. 6. Unfit for use of consumption means: (1) the product's terms of validity have expired; (2) the product has deteriorated or been altered, adulterated, damaged, falsified, spoiled or harmed; (3) the product is harmful to life or health, (4) the product does not comply with manufacturing, distribution or packaging regulations and (3) the product proves to be in adequate for its designed purpose. *Id.*

142. *Id.* § III, art. 20.

143. *Id.*

144. *Id.* "(1) [R]e-execution of the services, at no additional cost when applicable; or (2) immediate restitution of the price paid, without prejudice to any losses and damages claimed; or (3) proportionate price reduction." *Id.*

the product.<sup>145</sup> Under all circumstances suppliers must provide necessary and adequate information to the consumer.<sup>146</sup> Suppliers of potentially harmful products must provide noticeable and adequate information as to a product's hazardous nature, and may not knowingly place extremely harmful products into the consumer market.<sup>147</sup>

The 1990 Code holds manufacturers, including foreign manufacturers, producers, importers, distributors and sellers, strictly liable for defects that cause injury to consumers.<sup>148</sup> According to the 1990 Code, a product is defective when it does not offer legitimate safety features that take into consideration relevant concerns, such as use and risk factors that are reasonably associated with the product at the time it was placed into circulation.<sup>149</sup> Normally, the manufacturer, builder, producer or importer is liable unless it is evident that they did not place the product on the market.<sup>150</sup> If the manufacturer did in fact place the product on the market, he or she will not be held liable if the defect is found not to exist or if the culpability belongs exclusively to the consumer or to a third party.<sup>151</sup> The merchant, however, is only liable if the manufacturer, builder, producer or importer cannot be identified, the product lacks the manufacturer's identification or, in the case of perishable goods, the goods were not properly conserved.<sup>152</sup>

Service suppliers will be held liable under the same circumstances as product suppliers.<sup>153</sup> This analogous treatment also presents itself in the above discussion of product and service defects.

#### *H. Enforcement*

The last chapter of Title I and the remaining titles of the 1990 Code discuss enforcement. Chapter VII, Title II only deals with

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145. C.D.C., tit. I, ch. IV, § I, art. 8 (Braz.).

146. *Id.*

147. *Id.* § I, arts. 9-10.

148. *Id.* § II, art. 12.

149. *Id.* § II, art. 12, para. 1.

150. C.D.C., tit. I, ch. IV, § II, art. 12, para. 3 (Braz.).

151. *Id.*

152. *Id.* § II, art. 13.

153. *Id.* § II, art. 14. Regardless of culpability, a service supplier is liable for damages caused to consumers by defects relating to services provided, as well as liable for insufficient or inadequate information as to the utilization and risks. *Id.*

administrative sanctions.<sup>154</sup> Although the remaining titles of the 1990 Code present alternative methods for enforcing the Code such as penal infractions and judicial action, this Comment will only discuss Title I.<sup>155</sup>

Federal and state authorities, and federal district authorities concurrently exercise enforcement powers.<sup>156</sup> These authorities issue guidelines and monitor production, manufacture, distribution and consumption of products and services.<sup>157</sup> The 1990 Code provides twelve administrative sanctions to address violations of the consumer guidelines.<sup>158</sup>

#### VI. ANALYSIS OF CONSUMER PROTECTION LAW IN ARGENTINA: LAW NO. 24.240

Law number 24.240 embodies Argentina's consumer protection law.<sup>159</sup> The law was drafted on September 22, 1993 and it was published in its final form on October 15, 1993 after the Executive powers vetoed ten articles from the original draft.<sup>160</sup> Law 24.240 consists of three titles and is divided into sixty-six articles, discussing consumer rights, material rights and instruments of implementation.<sup>161</sup>

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154. C.D.C., tit. I, ch. VII (Braz.).

155. C.D.C., tits. II & III (Braz.).

156. C.D.C., tit. I, ch. VII, art. 55 (Braz.).

157. *Id.*

158. C.D.C., tit. I, ch. VII, art. 56 (Braz.). "[Administrative sanctions include]: (1) fines; (2) product seizure; (3) destruction of product; (4) cancellation of product registration; (5) prohibition of product manufacture; (6) suspension of product or service supply; (7) temporary suspension of activity; (8) revocation of concession or permission to use; (9) cancellation of license of establishment or activity; (10) total or partial closing down of the establishment, work or activity; (11) administrative intervention; (12) imposition of counter-advertising." *Id.*

159. *Proteccion y Defensa de Consumidor* [Protection and Defense of the Consumer], Ley 24.240, 22 de Setiembre de 1993 (Arg.), *reprinted and translated in* JAFFE & VAUGHN, *supra* note 8. For the sake of brevity, the comparative analysis of consumer protection has been limited to a single Mercosul country—Argentina. The decision to discuss Argentine law was based on the relationship between Brazil and Argentina. Together, these two countries developed the idea for the creation of the common market that became Mercosul. Furthermore, as neighbors, Brazil and Argentina share an extensive history of integration and cooperation. See BATISTI, *supra* note 9, at 65-71. In 1994 alone, eighty-five percent of the total trade occurring within Mercosul was between Brazil and Argentina. Aguinis, *supra* note 10, at 601.

160. BATISTI, *supra* note 9, at 306-07.

161. *Id.* at 307.

### A. Coverage

Law 24.240 defines consumers as those physical and legal persons who are end-users themselves or who contract for end-use by family or social group.<sup>162</sup> The law's regulations apply to an assortment of consumer transactions including the sale or lease of personal property, contracts for services and, on occasion, the acquisition of real estate.<sup>163</sup> Although the statute regulates transactions between consumers and providers, it does not regulate transactions between consumers.<sup>164</sup> Providers are defined as any physical or legal persons, of a public or private nature, who produce, import, distribute or place goods or services on the market.<sup>165</sup> This definition does not, however, include professionals such as lawyers and doctors.<sup>166</sup> These professionals only fall under the regulation of the statute in respect to advertising offers of services to the public.<sup>167</sup> Law 24.240 makes clear that its content should always be interpreted in the consumers' favor.<sup>168</sup>

### B. Credit Operations

Article 36 regulates credit operations. In credit sales of goods and services, nine requirements must be specified under penalty of nullification: (1) cash price; (2) balance owed; (3) total of interest payments; (4) current annual interest rate; (5) form of amortization period; (6) other pertinent costs; (7) number of payments to be made and their frequency; (8) extra or additional costs and (9) total financed amount to be paid.<sup>169</sup> Article 36 further specifies that the Central Bank of Argentina will adopt measures conducive to compliance by the entities under its jurisdiction.<sup>170</sup>

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162. *Ley 24.240*, tit. I, ch. I, art. 1 (Arg.).

163. JAFFE & VAUGHN, *supra* note 8, at 17.

164. *Id.*

165. *Ley 24.240*, tit. I, ch. I, art. 2 (Arg.).

166. JAFFE & VAUGHN, *supra* note 8, at 17.

167. *Id.*

168. *Id.*

169. *Ley 24.240*, tit. I, ch. VIII, art. 36 (Arg.).

170. *Id.*

### C. Provisions Regarding Consumer Sales

The statute regulates consumer sales that take place in the consumer's residence or place of employment.<sup>171</sup> The statute also regulates sales conducted through correspondence and other similar contexts.<sup>172</sup> Under these circumstances, consumers have the right to revoke an acceptance within five days.<sup>173</sup> The five-day period begins on the date of delivery or when the contract is concluded, whichever date is later.<sup>174</sup> The revocation of acceptance, however, does not result in consumer liability.<sup>175</sup>

The right of revocation cannot be waived through a contractual provision.<sup>176</sup> In fact, any document presented to the consumer, which is intended to affect the sale, must contain the right to revocation in clear writing.<sup>177</sup> If a consumer receives a good that was not requested, the good cannot be automatically charged to the consumer in a debit system or any other system that obligates the consumer to prove that the charge should not incur.<sup>178</sup>

### D. Regulation of Contract Terms

An offer directed at an undefined group of consumers must contain the precise date of its beginning and termination, in addition to any conditions and limitations.<sup>179</sup> Additionally, the contract must not limit or disclaim responsibility for damages, broaden the rights of the seller, waive or restrict consumer rights, or transfer the burden of persuasion from seller to consumer.<sup>180</sup> If these prohibited terms are included in the contract, the validity of the remaining terms is not affected.<sup>181</sup> The statute further specifies that if the prohibited terms are found then the contract is a contract of adhesion and enforcing agencies must ensure that

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171. JAFFE & VAUGHN, *supra* note 8, at 18.

172. *Id.* For example, other similar contexts may be through postal, telecommunication or electronic means.

173. Ley 24.240, tit. I, ch. VII, art. 34 (Arg.).

174. *Id.*

175. *Id.*

176. JAFFE & VAUGHN, *supra* note 8, at 18.

177. Ley 24.240, tit. I, ch. VII, art. 34 (Arg.).

178. Ley 24.240, tit. I, ch. VII, art. 35 (Arg.).

179. Ley 24.240, tit. I, ch. III, art. 7 (Arg.).

180. JAFFE & VAUGHN, *supra* note 8, at 18.

181. *Id.*

similar contracts do not contain equivalent terms.<sup>182</sup> Moreover, nullification of the entire contract is possible if there is evidence that the seller acted in bad faith when including the prohibited terms in the contract.<sup>183</sup>

### *E. Advertising and Promotion*

The statute addresses advertising by regulating contract terms, as discussed above. Offers made to undefined groups require precise dates, conditions and limitations.<sup>184</sup> Sellers must also honor claims made in advertising or other channels of communication directed to consumers.<sup>185</sup> The assertions made through advertisements are considered contracts between the seller and the consumer.<sup>186</sup>

### *F. Defect in Goods and Services*

The Argentine statute differentiates between services and durable goods when determining the appropriate action regarding repair and replacement.<sup>187</sup> With respect to durable goods, the statute requires manufacturers, importers and vendors to assure that parts and supplies, as well as technical services, are available to consumers.<sup>188</sup> Durable goods must contain a certificate of guarantee that is written in Spanish and easy to understand.<sup>189</sup> At a minimum, this certificate must contain the following items: (1) identification of vendor, manufacturer, importer or distributor; (2) description of the product with technical specifications; (3) conditions of use, installation and maintenance; (4) length of the guarantee and (5) conditions specifying where repairs will take place.<sup>190</sup>

If the product is repaired under the guarantee, the guarantor must furnish the consumer with a record indicating the nature of the repair, the parts replaced or repaired, the date the consumer delivered the product for repair and the date the product is

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182. Ley 24.240, tit. I, ch. IX, art. 38 (Arg.).

183. Ley 24.240, tit. I, ch. IX, art. 37 (Arg.).

184. JAFFE & VAUGHN, *supra* note 8, at 18.

185. *Id.* at 19.

186. *Id.*

187. *Id.* at 16.

188. Ley 24.240, tit. I, ch. IV, art. 12 (Arg.).

189. Ley 24.240, tit. I, ch. IV, art. 14 (Arg.).

190. *Id.*

returned to the consumer.<sup>191</sup> In the event the repair is unsatisfactory, the consumer has three options: (1) substitution of the good (2) return of the good for a full refund of the sum paid or (3) a proportional rebate of the price according to the value of the good in its defective condition.<sup>192</sup> The statute calls for similar regulations for services and adds specific provisions that apply only to services.<sup>193</sup>

As with durable goods, the provider of a service must furnish the consumer with a guarantee.<sup>194</sup> The provider is required to correct all defects discovered without cost and within thirty days from the conclusion of the service.<sup>195</sup> Such defects must be repaired with new materials of suitable quality.<sup>196</sup> The statute also regulates the terms of repair estimates, calling for eight essential items that must be listed.<sup>197</sup>

### G. Dangerous Products

To increase public awareness of potential dangers linked to products, the statute specifies that producers, importers, distributors or sellers must provide clear, detailed and truthful information.<sup>198</sup> The information must be related to the essential characteristics of the product at issue.<sup>199</sup> Additionally, the product must not present any bodily danger to consumers when used in a foreseeable manner.<sup>200</sup> In the event the product poses a danger to the consumer, an instruction manual must accompany the product into the market to ensure consumer safety.<sup>201</sup> Even if the instruction manual is imported, the manufacturers/importers are

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191. Ley 24.240, tit. I, ch. IV, art. 15 (Arg.).

192. Ley 24.240, tit. I, ch. IV, art. 17 (Arg.).

193. JAFFE & VAUGHN, *supra* note 8 at 20.

194. *Id.*

195. Ley 24.240, tit. I, ch. V, art. 23 (Arg.).

196. Ley 24.240, tit. I, ch. V, art. 20 (Arg.).

197. Ley 24.240, tit. I, ch. V, art. 21 (Arg.). An estimate must include the following: (1) name, domicile and other identification of the service provider; (2) description of the work to be done; (3) detailed description of the materials to be used; (4) prices of materials and labor; (5) time frame for work to be done; (6) whether guarantee has been granted and its scope and duration; (7) time frame for accepting estimate and (8) registration number. *Id.* The provider must tell the consumer about any work or materials not included in the original estimate prior to performance. Ley 24.240, tit. I, ch. IV, art. 22 (Arg.).

198. JAFFE & VAUGHN, *supra* note 8, at 21.

199. *Id.*

200. *Id.*

201. *Id.*

responsible for its translation into Spanish before the product can sell in Argentina.<sup>202</sup>

### *H. Enforcement*

The Argentine statute provides for judicial and administrative enforcement.<sup>203</sup> The statute reserves national enforcement authority to the Secretary of Industry and Commerce, while local authority rests with the City of Buenos Aires and other local governments.<sup>204</sup> Although the statute affords local governmental authority, the Secretary of Industry and Commerce retains authority to act regardless of where the infraction occurs.<sup>205</sup>

The statute assigns the following six responsibilities to the Secretary of Industry and Commerce: (1) draft and implement consumer defense policies; (2) maintain a national register of consumer associations; (3) receive and direct consumer inquiries and complaints; (4) inspect and examine application of this law; (5) solicit reports and opinions from public and private entities and (6) arrange hearings with the participation of the injured parties, accused parties, witnesses and experts.<sup>206</sup>

Once an infraction is verified, the Secretary of Industry and Commerce looks to the six possible sanctions expressed in the statute.<sup>207</sup> According to the circumstances, the sanctions are applied independently or jointly.<sup>208</sup> In ascertaining the sanctions, the Secretary must consider several factors including the damage to the consumer or user, the market position of the violator, the degree of intent and the importance of the benefit obtained.<sup>209</sup>

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202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Ley 24.240, tit. II, ch. XI, art. 43 (Arg.).

207. Ley 24.240, tit. II, ch. XII, art. 47 (Arg.) "Sanctions [include] . . . (a) Warning; (b) Fines ranging from 500 pesos to 500,000 pesos; (c) Confiscation of merchandise; (d) Closing of establishment or suspension of the service for thirty days; (e) Suspension of registries allowing contracting with the state for up to five years; and (f) Loss of possession of concessions, privileges, tax breaks or special credits." *Id.*

208. *Id.*

209. Ley 24.240, tit. II, ch. XII, art. 49 (Arg.).



## VII. COMPARATIVE ANALYSIS OF CONSUMER PROTECTION IN BRAZIL AND ARGENTINA

The laws of Brazil and Argentina reflect similar approaches to protection, however, there are a number of differences between them.<sup>210</sup> The most obvious difference between the approaches of Brazil and Argentina is that consumer protection in Brazil is addressed in a code, while in Argentina it is addressed in a statute. As a result, the Brazilian approach affords more consumer protection, since it is more encompassing. Brazil's 1990 Code contains provisions that are not present in the Argentine statute, and it addresses, in depth, many topics that the Argentine statute cannot.<sup>211</sup>

For example, the Brazilian code covers the topic of credit transactions in greater depth than the Argentine statute does. The 1990 Code addresses credit protection beyond basic credit information, including reporting and access to the credit information.<sup>212</sup> The 1990 Code also allows consumers to challenge inaccuracies that might be found in a databank<sup>213</sup> for which the Argentine statute does not provide.<sup>214</sup> In contrast, the Argentine statute allows the consumer to revoke any installment contract that contains more than four installments within five days, an area not specifically mentioned in the 1990 Code.<sup>215</sup>

In their discussion of sales contracts, both countries recognize the potential disadvantages consumers might encounter due to their weaker bargaining position.<sup>216</sup> The laws address this view by

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210. Vaughn, *supra* note 1, at 322.

211. JAFFE & VAUGHN, *supra* note 8, at 4.

212. Robert Vaughn, *Chilean Consumer Protection Standards and the United Nations Guidelines on Consumer Protection: A Comparative Study Revealing Regional Conflicts*, 22 N.C. J. INT'L L. & COM. REG. 1, 33-34 (1996) [hereinafter *Chile*].

213. Vaughn, *supra* note 1, at 293.

214. See Ley 24.240, tit. I, ch. VIII, art. 36 (Arg.) (Regulating credit operations). The Argentine Senate did not approve a Law for the Protection of Personal Data until 1998. David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 16 (1999). This law "requires express consent before information can be collected, stored, processed, or transferred. Collection of sensitive data is given additional protections and is prohibited unless authorized by law. International transfer of personal information is prohibited to countries without adequate protection." *Id.*

215. Vaughn, *supra* note 1, at 294.

216. *Id.* at 295.

regulating contracts of adhesion.<sup>217</sup> Even though both countries address sales contracts, the 1990 Code deals with this topic more comprehensively.<sup>218</sup> The 1990 Code illustrates the fact that certain prohibitions rest on assumption of power relations and disparities in bargaining power.<sup>219</sup>

The area with the greatest disparity in regulation is advertising. Among the general similarities, both countries bind producers to assertions regarding product characteristics made during advertising.<sup>220</sup> The 1990 Code goes further by regulating all misleading and unfair advertising.<sup>221</sup> The 1990 Code also encompasses a broader spectrum of advertising by combining specific regulations with a very broad definition of misleading advertising.<sup>222</sup> In addition, the 1990 Code places the burden of proving truthfulness in advertising on the advertiser and also authorizes counter-advertising as a remedy.<sup>223</sup>

Laws regarding defects in goods are similar in Brazil and Argentina. Both countries address the guarantees required by law and available remedies when the guarantees are not observed.<sup>224</sup> The 1990 Code defines several characteristics that make products unfit for consumption.<sup>225</sup> Brazil regulates both unfit and defective

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217. *Id.*

218. C.D.C., tit. I, ch. VI (Braz.) (Regulating contractual protection).

219. Vaughn, *supra* note 1, at 298.

220. Chile, *supra* note 212, at 39-40.

221. C.D.C., tit. I, ch. V, § III, art. 37 (Braz.).

222. Vaughn, *supra* note 1, at 300.

223. Chile, *supra* note 212, at 40; see Ross D. Petty, *Advertising Law and Social Issues: The Global Perspective*, 17 SUFFOLK TRANSNAT'L L. REV. 309, 333 (1994). The law of advertising also provides an excellent example of how the disparities in regulations influence other areas of the law. This example comes in the form of comparative advertising. Although comparative advertising is free from government control in Brazil, there is indirect regulation because the 1990 Code places restrictions on misleading advertising and requires an advertiser to prove any claims made in an ad. Jenna D. Beller, Comment, *The Law of Comparative Advertising in the United States and Around the World: A Practical Guide for U.S. Lawyers and Their Clients*, 29 INT'L LAW. 917, 942 (1995). Nonetheless, comparative advertising is increasing in Brazil since comparative advertising empowers consumers and since consumer protection has become an important public issue. *Id.* Similarly in Argentina, there is no explicit regulation on comparative advertising. *Id.* at 941. Since the law calls for all assertions made in an ad to become part of the contract between the consumer and the advertiser, there is also indirect regulation of comparative advertising in Argentina. *Id.*

224. Vaughn, *supra* note 1, at 304.

225. C.D.C., tit. I, ch. IV, § III, art. 18, para. 6 (Braz.).

products under the same code.<sup>226</sup> By contrast, Argentina only regulates defective products.<sup>227</sup>

Both countries do, however, regulate dangerous products.<sup>228</sup> Brazil and Argentina mandate that suppliers inform the public of a product's potential dangers.<sup>229</sup> The 1990 Code, however, protects consumers from dangerous and unsafe products with a more comprehensive design.<sup>230</sup> According to the 1990 Code, "[l]iability is without 'culpability' or fault and falls on both foreign and Brazilian manufacturers, producers, builders, and corporations."<sup>231</sup> The 1990 Code additionally addresses injuries sustained by direct and indirect purchasers and provides for liability to bystanders.<sup>232</sup> On the other hand, Argentina regulates matters not addressed by Brazil's 1990 Code. Specifically, the Argentine statute imposes more extensive joint liability on manufacturers, importers and sellers.<sup>233</sup>

Enforcement is crucial to the survival of these laws in each country.<sup>234</sup> In creating their enforcement systems, Brazil and Argentina established powerful enforcement agencies.<sup>235</sup> The powers granted to these agencies include collecting information, enforcing standards and receiving and adjudicating complaints.<sup>236</sup> Furthermore, the agencies maintain the discretion to apply a variety of sanctions provided by their respective laws.<sup>237</sup> Brazil and Argentina provide both administrative and judicial enforcement in pursuit of enforcing consumer protection.<sup>238</sup>

#### VIII. THE NEED FOR HARMONIZATION WITHIN THE MERCOSUL NATIONS

Global economies bring many advantages to consumers, but at the same time can deprive individuals of benefits afforded to

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226. *Id.*

227. Ley 24.240, tit. I, chs. IV-V (Arg.).

228. C.D.C., tit. I, ch. IV, §§ I-II (Braz.); Ley 24.240, tit. I, ch. IV (Arg.).

229. *Chile, supra* note 212, at 53; C.D.C., tit. I, ch. IV, § I, arts. 8-10 (Braz.).

230. *Chile, supra* note 212, at 53.

231. *Id.* at 53-54.

232. *Id.* at 54.

233. *Id.* at 56.

234. Vaughn, *supra* note 1, at 311.

235. *Chile, supra* note 212, at 62.

236. *Id.*

237. *Id.*

238. *Id.* at 63.

them as citizens and consumers of their native countries.<sup>239</sup> Harmonization is the process by which differing national laws are made comparable to those of other countries to accomplish a specific goal.<sup>240</sup> The goal of Mercosul is to achieve economic integration and facilitate economic activity among its members.<sup>241</sup> Disparities among the consumer protection laws of Brazil and Argentina illustrate that a certain level of harmonization is necessary for countries to properly function within a trading block, such as Mercosul.<sup>242</sup>

Trading unions like Mercosul create incentives for harmonizing conflicting provisions.<sup>243</sup> When a country joins an economic union, it gives up the advantages associated with protectionism to gain greater access to other markets in the union.<sup>244</sup> The obligation to adhere to the laws of other nations often results in the loss of sovereignty and can be a source of national controversy.<sup>245</sup> When viewed in the context of free trade, however, harmonization furnishes positive results for member countries.<sup>246</sup> Harmonization of disparate laws is necessary in

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239. John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT'L & COMP. L. 1, 1 (1998). "Rights and remedies acquired under the law of one nation may be recognized and enforced in another nation, but this is not a guarantee and may be difficult as well as technically complex. . . ." *Id.* at 56.

240. Craig L. Jackson, *The Free Trade Agreement of the Americas and Legal Harmonization* (The American Society of International Law, Wash. D.C.), June-Aug. 1996 at 1; George A. Zaphiriou, *Unification and Harmonization of Law Relating to Global and Regional Trading*, 14 N. ILL. U. L. REV. 407, 416 (1994).

241. Jackson, *supra* note 240, at 1; Jose Tavares de Araujo, Jr. & Luis Tineo, *Harmonization of Competition Policies Among Mercosur Countries*, 24 BROOK. J. INT'L L. 441, 442 (1998).

242. *Chile*, *supra* note 212, at 4; see Hannu Honka, *Harmonization of Contract Law Through International Trade: A Nordic Perspective*, 11 TUL. EUR. & CIV. L.F. 111, 113 (1996).

243. *Chile*, *supra* note 212, at 4.

244. Jackson, *supra* note 240, at 1-2.

245. *Id.*; see Jurgen Basedow, *International Antitrust: From Extraterritorial Application to Harmonization*, 60 LA. L. REV. 1037, 1047-48 (2000); see also Frances E. Zollers et al., *Consumer Protection in the European Union: An Analysis of the Directive on the Sale of Consumer Goods and Associated Guarantees*, 20 U. PA. J. INT'L ECON. L. 97, 129-30 (1999).

246. Jeffery Atik, *Environmental Standards within NAFTA: Difference by Design and the Retreat from Harmonization*, 3 IND. J. GLOBAL LEGAL STUD. 81, 89 (1995). Harmonization promotes solidarity and interdependence within a regional organization and creates a common standard that enhances the organization's common political entity. *Id.* at 90.

order for Mercosul to achieve successful hemispheric integration as a common market.<sup>247</sup>

Mercosul countries must also achieve a certain level of harmonization regarding consumer protection. In the event that the common market is effectively integrated, member countries will benefit from free circulation of goods and services.<sup>248</sup> A country's consumer standards could affect this flow of goods and services as a result of additional costs of compliance imposed on importers.<sup>249</sup> Without harmonization, variations in the laws will reflect their differing approaches to consumer protection, thus making free trade more difficult.<sup>250</sup> For example, a consumer in Brazil will enjoy a higher degree of protection than in Argentina given the broader scope the Brazilian Code. Argentine exporters are held to a higher standard of protection once their goods enter the Brazilian market than they would otherwise experience in Argentina. Brazilian exporters experience the opposite effect because their goods entering the Argentine market are regulated according to Argentine law.

For a common market to properly exist, homogenous regulation of warranties, risks and advertising is necessary.<sup>251</sup> This is important so that consumers are fully aware of their rights, particularly with regard to product defects.<sup>252</sup> Furthermore, Mercosul's success is tied to consumer confidence.<sup>253</sup> Consumers need to be confident that when they purchase goods in Argentina they are afforded the same level of protection provided by Brazilian law and vice versa.<sup>254</sup> "[T]he ideal of free movement of goods would be a hollow goal if consumers did not believe their

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247. Frank J. Garcia, "Americas Agreement"—A Interim Stage in Building the Free Trade Area of the Americas, 35 COLUM. J. TRANSNAT'L L. 63, 124 (1997); see Atik, *supra* note 246, at 84.

248. Aguinis, *supra* note 13, at 602.

249. Chile, *supra* note 212, at 4.

250. Hans Claudius Taschner, *Harmonization of Products Liability Law in the European Community*, 34 TEX. INT'L L.J. 21, 22 (1999).

251. BATISTI, *supra* note 9, at 417.

252. *Id.* at 417; see William Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 410 (1997).

253. See David J. Schwartz, Note, *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, 28 GA. J. INT'L & COMP. L. 527, 527 (2000).

254. See *id.* at 528.

economic rights would be protected when purchasing abroad.”<sup>255</sup> Enforcement is the area with the greatest need for harmonization.<sup>256</sup> “[C]onsumer laws exist only to the extent they are enforced.”<sup>257</sup> Implementation is what defines law.<sup>258</sup> Without implementation and enforcement, for all practical purposes, there is no law.

## IX. CONCLUSION

Brazil led the consumer protection movement in South America with the 1990 Code. Guided by the laws of Mexico and the U.N. Guidelines, Brazil enacted the most comprehensive consumer protection code available in South America. Enforcement of consumer protection laws is the cornerstone of a free market, particularly in vast trading blocks such as Mercosul. Since Mercosul is built on a foundation of free international trade, harmonization of its consumer protection laws is vital. Although Brazil and Argentina have differing approaches to consumer protection, their similarities are more prominent and form the crucial basis for harmonization and the continual success of Mercosul.

*Renata A. Guidry\**

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255. George T. Brady, Comment, *Consumer Protection in the European Community: Hope for the Consumer or Unfulfilled Promises?*, 23 N.C. J. Int'l L. & Com. Reg. 155, 161 (1997). Especially problematic are transactions concerning the applicable law in invoking commercial guarantees. *Id.* at 156.

256. See Vaughn, *supra* note 1, at 311.

257. *Id.* at 311.

258. *Id.*

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