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## VIETNAMESE LAW ON CONSUMER PROTECTION

### MANUFACTURERS, IMPORTERS AND SELLERS<sup>1</sup> MUST PAY ATTENTION TO THEIR CUSTOMERS

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#### INTRODUCTION

The Law on Consumer Protection (“**LoCP**”), which took effect on July 1, 2011 and replaced the Ordinance on Consumer Protection (“**Ordinance**”), has a good track record of providing consumers with greater protection. The LoCP has both created more rights for consumers, and increased responsibilities for manufacturers, importers and sellers. After 9 years of implementation, the LoCP has created some significant changes in consumer protection. Consumers associations have been created, and, as intended, the mind-set of the community has changed. This piece will discuss the aspects of the LoCP that have had and will continue to have the greatest impact on manufacturers, importers and sellers. This includes prohibited conduct, agreements between sellers and consumers, general trading conditions<sup>3</sup>, extent of warranty, liability for defective products, and litigation.

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<sup>1</sup> We mean individuals and organizations that conduct business involving products and services. In this article we refer only to organizations. Under Article 3.2 of the LoCP, they are organizations that implement one, some, or all phases of the investment process from manufacture to the sale of goods or provision of services for a profit-making purpose. They include business entities as defined in the Commercial Law that conduct commercial activities independently and regularly but that are not required to have a business registration. Generally, they can be manufacturers, importers, or sellers. We will sometimes refer to them together as “traders”.

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<sup>3</sup> General trading conditions are rules and regulations on the sale of products and/or supply of services announced by a seller and applicable to consumers (Article 3.7 of the LoCP). Usually, general trading

## **1. Prohibited conduct**

Under the LoCP, a trader is clearly prohibited from cheating or misleading consumers in its ads, nor may it conceal information regarding its products or services.<sup>4</sup> A trader may not provide incomplete, false, or inaccurate information about the products or services it provides, about its ability to conduct business or to provide services, or about the content and characteristics of transactions between it and its customers.

A trader is prohibited from harassing a consumer by its marketing tactics. For example, it may not approach consumers to sell its products or services on two or more occasions if doing so is contrary to the expressed wishes of the consumer. For example, a consumer may object to direct messages and phone calls from sellers. The authorities have indeed investigated and stopped many instances of these practices.

In addition, a trader may not hinder or adversely affect the normal working or living conditions of the consumer. For example, a seller cannot require a consumer to make payment, even if a product or service has been supplied, unless there is a prior agreement. This means, there must be an agreement (written or oral) in which the seller agrees to sell and the consumer agrees to buy products or services and to make payment.

## **2. Contracts between traders and consumers and general trading conditions**

Contracts between sellers and consumers, along with general trading conditions, are addressed in the law in the LoCP. Under Article 14 of the LoCP, the language of a written contract must be clear and easily understood. Furthermore, the language of the contract must be in Vietnamese, unless the parties or the law provide otherwise. Sellers must make it easy for consumers to review electronic contracts in their entirety prior to execution, say, by sending soft copies of the electronic contracts and giving a reasonable period for review.

Not all clauses in sales contracts are enforceable. Article 16 of the LoCP identifies unenforceable clauses: (i) exclusion of the seller's legal liability; (ii) restriction or exclusion of the right to complain or to file a lawsuit; (iii) allowing seller unilaterally to change conditions of an agreed contract or rules, regulations which protect consumers but which do not appear in the contract; (iv) allowing the seller unilaterally to determine that consumer has failed to implement one or more obligations; (v) allowing the seller to determine or change the price at the time it delivers the goods or services; (vi) allowing the seller to interpret the contract in case there is any confusion on interpretation of terms; (vii) excluding seller's liability in case of goods or services provided by a third party; (viii) forcing consumers to comply with obligations even if seller has not fulfilled

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conditions are not negotiable. This means that consumers accept all the traders' general conditions if they make the purchase.

<sup>4</sup> See also Article 10 of the LoCP.

its obligations; or (ix) allowing the seller to transfer rights and obligations to third parties without the consumer's consent.

The LoCP places particular focus on standard form contracts--that is, the seller's own form of contract--and general trading conditions. If a seller provides a product or service that appears on a list of essential products and services promulgated by the Government, it must register its standard form contract and its general trading conditions with the State administrative body for consumer protection.<sup>5</sup>

Sellers usually use a standard form contract or written general trading conditions. Thus, in order to protect customers' rights, the registration of these documents is deemed necessary. The State administrative body for consumer protection may, at its sole discretion, rescind or amend, or require the seller to rescind or amend, a standard form contract or general trading conditions. Ten articles in chapter III of Decree 99/2011/NĐ-CP of the Government dated October 27, 2011, which implement articles of the LoCP ("Decree 99"), relate to standard form contracts and general trading conditions. They specify general requirements for standard form contracts and general trading conditions, along with registration procedures and forms. They also deal with control of standard form contracts and general trading conditions which are not subject to registration. These regulations are only applied to sellers which have written standard form contracts or trading conditions.

Requirements on the terms and conditions of some particular contracts—including contracts entered into electronically, contracts for the supply of continuous services, and direct selling contracts—are also specified in Decree 99.

### **3. The extent of a warranty**

Under Article 21 of the LoCP, sellers must provide consumers with a warranty certificate that clearly sets out that repair under a warranty will restart the warranty. For example, if a seller or manufacturer replaces a product or a component, the warranty period for the product or the component starts from the time of replacement.

If a product or component cannot be used because it is under repair or is being replaced under warranty, the seller must provide a similar product, component, or spare part for temporary use. It may propose other solutions (for example, reducing the purchase price of the product), but such solutions should be agreed by the consumer.

If, by the expiration of the warranty period, a seller has failed to repair a broken or defective product, the seller must either replace the product or provide replacement components. If the seller cannot repair or replace a product, it must recall the product and refund the purchase price. In addition, if a seller is required to provide the same type of warranty service more than three times, but the defect remains, the seller must replace

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<sup>5</sup> See also Decision 02/2012/QĐ-TTg dated January 13, 2012 of the Prime Minister (as supplemented in 2015 by Decision 35/2015/QĐ-TTg).

the product or component. If a replacement cannot be provided, the seller must recall the products and provide a refund of the purchase price.

#### **4. Defective products**

Oddly, there is no definition of a “product” even in the LoCP. Generally, however, a “product” is an item that has been supplied by a trader, whether or not the item is manufactured in Vietnam. It includes such diverse offerings as agricultural produce, games, components, electricity, vehicles, and pharmaceutical products. As these examples show, the concept of a “product” as the term is used in the LoCP is very broad. Sellers may have difficulties in determining whether the item they are offering is a “product”. For example, are blood, body organs, and second-hand products considered “products”? If the answer is “yes”, to what extent and in what respect can they be considered defective? Who is liable for “defects” in such a product?

If there is a manufacturer and a seller, and the seller provides a defective product. Then, both parties are responsible. A consumer may file a lawsuit against either the manufacturer or the seller or both.

The Law on Quality of Products and Goods (“**LoQPG**”)<sup>6</sup> has a very restricted application. It mentions “defect” of a product. However, the word “defect” seems to mean only “poor quality”. It is preferable to follow the meaning of “defect” as elaborated upon in the LoCP. Under the LoCP, a defective product is a product which is not safe for consumers and which can cause death, personal injury, or property damage, even if those products have been manufactured in accordance with current technical standards or specifications, and even if the manufacturer is not aware of the defects at the time the products are sold. There may be defects in the technical design of mass manufactured products. Defects may arise from the manufacture, processing, transport, or storage of singly manufactured products. Defects may also result from a failure to provide adequate instructions or warnings on potentially dangerous products.

In other words, quality is not the only factor involved in determining whether a product is defective under the LoCP. One must also consider design, whether consumers are properly instructed on use, whether the consumer has been warned of dangers, and more.

#### **5. Recall of defective products**

Under Article 22 of the LoCP, manufacturers and/or importers<sup>7</sup> are liable, at their own cost, to recall defective products. They must recall products that they discover are defective. They must announce the recall in five successive issues of a central daily

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<sup>6</sup> The LoQPG came into effect on July 1, 2008. It governs the rights and obligations of a trader in respect of product quality and the management of product quality.

<sup>7</sup> The LoCP requires both manufacturers and/or importers to be responsible for the recall and to repair or replace the defect. If they fail to recall a defective product, they may be fined from VND10 million to VND30 Million

newspaper or broadcast the news of the recall on a central radio or television station five times on five successive days. The announcement must include the following:

- Description of the product;
- Reason for the recall and warnings of injury which may be caused by the defective product;
- Time, location, and form of the recall;
- Time and method to repair the defect; and
- Measures taken to ensure the consumers' interests are protected.

There is no clear separation of responsibility between the manufacturer and the importer in respect of a recall.

## **6. Strict liability and defenses**

- **Strict liability**

Article 608 of the Civil Code says “individuals, legal persons, or other persons who carry out the manufacture or business involving the sale of products, services without ensuring quality standards, thus causing damage to a consumer, are liable for damages.” The Supreme Court’s Committee of Judges has interpreted this article in Resolution 03<sup>8</sup>. Resolution 03 stipulates that liability in tort arises when the following elements exist: (1) a loss has been suffered and the loss is material or mental; (2) an illegal act/omission has occurred; (3) there is a causal relationship between the illegal act/omission and the loss; (4) the person who causes the loss is at fault or was negligent. In other words, when they are at fault, traders must pay damages for defective products.

However, Article 23 of the LoCP has changed the standards detailed under Resolution 03. Under Article 23, sellers are now liable to pay compensation for death, personal injury, or property damage caused by their defective products (but not “defective services”) even if they were unaware of or not at fault for the defects.

- **Defenses**

Under the LoQPG, manufacturers, importers, or sellers are not liable in certain theoretical circumstances. However, defenses in the LoQPG have been displaced by the more practical language of the LoCP. Traders have defenses under the LoCP. They can be excused from liability if they can prove that the defects could not have been found by *scientific or technical standards at the time the sellers supplied the products to consumers.*<sup>9</sup> This defense is different from those defenses allowed in the LoQPG.

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<sup>8</sup> See Point 1, Part I of Resolution No. 03/2006/NQ-HĐTP dated 8 July 2006 (“**Resolution 03**”).

<sup>9</sup> Article 24 of the LoCP.

The LoQPG provides that a trader's liability for defects may be limited or eliminated in a few other circumstances that relate to consumers' own conduct. For example, manufacturers, importers and retailers are not liable for defective products if retailers sell and consumers use products whose shelf-life has expired<sup>10</sup> or if the damage is caused as a result of the purchaser's or the consumer's own fault.<sup>11</sup> In cases where the damage is the fault of the sellers, the manufacturer may be free of liability. Likewise, the seller may be free from liability when the damage is the fault of the consumer.

Manufacturers, importers, and sellers are exempt from liability when the statute of limitations for a complaint or the initiation of a lawsuit has expired.<sup>12</sup> Under the LoQPG,<sup>13</sup> the statute of limitations is two years from the time the manufacturer, the importer, or the seller and a customer are notified of the damage, provided that the damage is caused during the shelf-life of the products. If products do not specify a shelf-life, there is no liability after five years from the date of delivery to the manufacturer, importer, or seller.

In addition, manufacturers or importers are not responsible for damage caused by a defective product when notice of a recall of the defective products has been issued before the products cause damage.<sup>14</sup> Moreover, the sellers will not be liable to purchasers or consumers where notice that the products are defective has been properly issued, yet they still purchase and use the products.<sup>15</sup>

The last defense for traders subject to product liability is that products are defective because they comply with regulations of competent state agencies.<sup>16</sup> This defense is already quite narrow. However, the term "competent state agencies" is not defined. Are they central or local agencies or neither? This defense may prove difficult to invoke.

## **7. Litigation**

Conflicts between consumers and traders can be resolved through negotiation, mediation, arbitration, or in court.<sup>17</sup> However, a dispute that relates to damage to the State, the interests of a number of consumers, or the public interest is not subject to negotiation or mediation.

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<sup>10</sup> Article 62.1.a of the LoQPG.

<sup>11</sup> Articles 62.1.g, f of the LoQPG.

<sup>12</sup> Articles 62.1.b & 62.2.b of the LoQPG.

<sup>13</sup> Article 56.3 of the LoQPG

<sup>14</sup> Article 62.1.c of the LoQPG.

<sup>15</sup> Article 62.2.c of the LoQPG.

<sup>16</sup> Articles 62.1.d & 62.2.d of the LoQPG.

<sup>17</sup> See Article 17 of the Law on Commercial Arbitration, if there is an arbitration clause in the general trading conditions for the sale of a product or services, and if a dispute arises, the consumer is still entitled to select either arbitration or a court to resolve the dispute.

- **Who is a petitioner?**

The LoCP gives consumers and social organizations the right to petition for remedies if they discover violations of consumers' rights. A social organization can represent consumers to carry out the petition, or it may petition on behalf of the public's interests in its own name.<sup>18</sup> To clarify, consumers are purchasers and/or users of products or services for the purpose of consumption (as opposed to manufacture or resale) by an individual, a family, or an organization.<sup>19</sup> Social organizations, in these circumstances, are organizations whose by-laws state that they are entitled to participate in activities involving consumer protection.<sup>20</sup>

Although the law is silent on what claims customers can bring in an action against sellers, manufacturers, importers, or brand owners, consumers can bring a claim against a trader with whom they interact directly (usually the seller) or a trader that is clearly stated to be responsible for the product in the manual or other similar documents.

- **Who is liable for product defects?**

According to Article 23 of the LoCP, traders are liable to compensate for any damage caused by defective products. In this context, traders are organizations that manufacture or import products, or hold themselves out to be manufacturers or importers by affixing their own name or trademark to the products ("**brand owners**"). Sellers may be liable if they fail to identify the manufacturers, importers, or brand owners of the defective products. However, the LoCP has not separated liabilities among manufacturers, importers, or brand owners. They must arrange among themselves who will ultimately be liable for defective products in their business contracts.

- **Burden of proof**

Under articles 25, 26, and 42 of the LoCP, petitioners bear the burden of proof in cases involving a trader's alleged violation of consumers' rights. In other articles, however, the burden is on traders to prove they are not at fault. The provisions placing the burden of proof on petitioners make the most sense in relation to service liability. However, articles 25, 26, and 42 are difficult to understand when applied to defective products. That is, traders bear liability for defective products whether or not they are at fault. Therefore, we believe that in claims relating to product defects, the burden is on traders to prove that their products are safe for use by consumers or that, for other reasons, they are exempt from payment or compensation.

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<sup>18</sup> Article 28.1.b of the LoCP.

<sup>19</sup> Article 3.1 of the LoCP.

<sup>20</sup> Article 27 of the LoCP. See further Articles 24, 25 of the Decree 99.

- **Remedies**

If consumers and traders have entered into a contract, damages will be assessed according to their contract and applicable law. The LoCP is of particular interest to traders, as it applies to standard form contracts and general trading conditions between traders and consumers.

In tort claims, damages are calculated based on “actual” loss under the CC and Resolution 03. For example, if a consumer suffers personal injury due to a defective product, the responsible trader may be held liable for the reasonable costs to treat, nurse, and rehabilitate the injured person. It may also be liable for functional losses and impairment, loss of or reduction in the actual income of the injured person, and reasonable costs and actual income losses of the care providers of the injured person during the period of treatment. If the injured person loses his or her ability to work and requires a permanent care provider, the trader must also pay reasonable costs for taking care of the injured person. The trader may also be responsible to compensate the injured party for mental suffering.<sup>21</sup> Vietnam does not apply punitive damages.

Traders may also be held liable in other ways. Under Decree 185/2013/NĐ-CP of the Government dated November 15, 2013 on administrative sanctions against violations in commercial activities, production of, trading in counterfeit or prohibited goods and consumer protection (as supplemented in 2015 by Decree 124/2015/NĐ-CP), if a trader fails to comply with regulations on contracts between traders and consumers and general trading conditions, the trader may be subject to penalties ranging from VND10 million to VND30 million. In accordance with Article 26 of the LoCP, they may be required to eliminate any clause which breaches consumers’ rights from their standard form contract and/or general trading conditions. If a trader commits a repeat offence, its name will be placed on a list of traders who have breached consumers’ rights. They may also be forced to recall and/or destroy the product, or to stop supplying the product. Their right to operate may be revoked or temporarily suspended.

## **CONCLUSION**

The LoCP provides new protections for consumers, and places new burdens on traders. Despite the addition of a few defenses, since the LoCP came into effect, traders now bear liability without fault for their defective products, including products of poor quality [regardless of whether the damage was caused during manufacture, processing, transport, or storage stage], products with a deficient technical design, or products with insufficient instructions or warnings. Both consumers and some special social organizations have standing to initiate a legal action against traders. The burden of proof necessary to prove a claim against traders is low, and claimants generally need only to provide evidence of the damages they have suffered rather than evidence concerning the

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<sup>21</sup> Articles 590.1, 2 of the Civil Code.



safety or design of the traders' products. In light of these challenges, traders should take proactive measures to minimize their risks of liability under the LoCP's new provisions by investigating and assuming the quality of their products.