

# **MANAGING THE PRODUCT RECALL WITH RESELLERS NOT BELONGING TO THE DISTRIBUTION OR FRANCHISE NETWORK**

**- PANEL 3 -**

# INTRODUCING THE PROBLEM:

## WHY PRODUCT RECALLS ARE A LEGAL HEADACHE TO NON-NETWORK RESELLERS

(and Why Non-Network Resellers Are a Legal Headache to Manufacturers)

- **No Contractual Safeguards:** Big retailers often refuse to sign agreements that protect manufacturers during recalls, leaving manufacturers exposed.
- **Power Imbalance:** These resellers hold significant market power and can dictate terms, making recalls harder to manage.
- **Legal Risks:** Manufacturers are still liable for product safety and compliance with consumer protection regulations, even if resellers don't cooperate.

# RELEVANT CASE-LAW IN PORTUGAL

## Supreme Court of Portugal, Case No. 987/2015

Facts: A manufacturer of electrical appliances issued a recall due to a safety defect. A large supermarket chain, which was not part of the manufacturer's distribution network, refused to cooperate, arguing that it had no contractual obligation to do so.

Ruling: The court held that the manufacturer was ultimately responsible for ensuring the safety of its products, regardless of the reseller's cooperation. The court emphasized that consumer protection laws (under the Código do Consumidor) take precedence over contractual limitations.

## Supreme Court of Portugal, Case No. 1234/2018

A manufacturer was held liable for a defective product sold through a non-network reseller. The court ruled that the manufacturer's duty to ensure product safety cannot be delegated, even if the reseller refuses to cooperate.

## Lisbon Court of Appeal, Case No. 456/2019

Facts: A recall was initiated due to a trademark infringement claim by a competitor. The reseller, a department store, refused to remove the products from its shelves, citing potential revenue loss.

Ruling: The court ruled in favor of the manufacturer, stating that intellectual property rights must be respected, and resellers cannot ignore recalls based on financial considerations. The court also noted that manufacturers must act swiftly to mitigate damages.

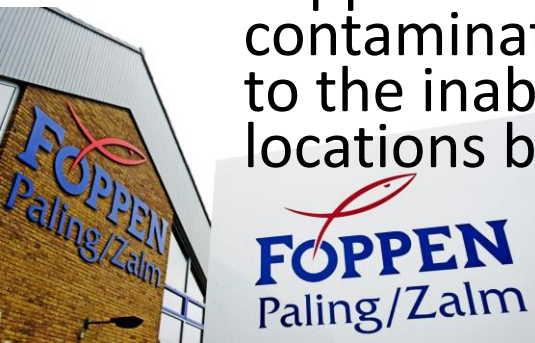
## Porto Commercial Court, Case No. 321/2021

Facts: A manufacturer of children's toys issued a recall after a regulatory body deemed the products unsafe. The reseller, a large retail chain, delayed the recall process, leading to public backlash.

Ruling: The court held that the reseller's delay constituted a breach of its duty of care under consumer protection laws. The manufacturer was partially absolved of liability, but the court stressed the importance of clear communication and coordination between manufacturers and resellers.

## THE SMOKED SALMON CASE (1) - FACTS

- In 2012, a salmonella outbreak occurred in the Netherlands, traced back to smoked salmon products produced by Foppen Paling & Zalm, a Dutch fish processing company.
- Nearly 1,200 laboratory-confirmed cases, with an estimated 23,000 actual cases and four deaths.
- Foppen did not foresee the risk of salmonella in smoked salmon, as it was not a known hazard in the industry.
- On 28 September 2012, all smoked salmon products from Foppen were recalled from various retailers. These retailers did not belong to Foppen's distribution network, which complicated the recall.
- Foppen initially chose a limited recall strategy, because it believed the contamination was limited to specific production lines in the Greek facility. Due to the inability to distinguish between products from different production locations based on packaging, the NVWA mandated a broader recall.



## THE SMOKED SALMON CASE (2) - CHALLENGES

- **Delayed communication:** Initial oral advice from NVWA led to confusion and delays as resellers awaited written instructions. Incomplete consumer information and underutilised communication channels exacerbated the issue.
- **Reluctance to Act Promptly:** Major retailers and resellers hesitated, awaiting detailed information, which slowed the recall and increased consumer risk. Financial and operational concerns contributed to this reluctance.
- **Inadequate Preparation:** Foppen's ERP system and recall procedures were insufficient for rapid traceability and large-scale recall management, highlighting the need for better preparedness and regular testing.

## THE SMOKED SALMON CASE (3) - STRATEGIES

- **Broad Public Warnings:** NVWA's press releases and updates on their website and social media effectively informed consumers directly, bypassing slow-acting resellers.
- **Direct Communication:** Foppen and NVWA contacted retailers via phone, meetings and email, clarifying necessary steps and ensuring compliance.
- **Engagement External Agencies:** An external agency managed customer communication, media relations, and public inquiries, streamlining the recall.
- **Monitoring and Enforcement:** NVWA inspections at supermarkets ensured compliance, with follow-up inspections and audits to monitor recall effectiveness.
- **Collaboration Industry Bodies:** Coordination with the *Centraal Bureau Levensmiddelenhandel* and *Federatie Nederlandse Levensmiddelen Industrie* aligned efforts across the sector, disseminating information and best practices to members for a coordinated response.

## THE SHOWER GEL CASE (1)

- COSMETIQUE, a big French cosmetic manufacturer, has developed a shower gel formula and produces it exclusively for SAPONI, a small Italian company. COSMETIQUE labels the bottles with SAPONI brand.
- SAPONI sells online in the EU: (i) to consumers through its website and social media (ii) to retailers through the wholesale section of the website – no distribution/exclusivity/franchising with the retailers. Retailers resell through shops / websites / online marketplaces.
- Long-standing business relationship between the two companies: (i) a licence agreement subject to French law and courts of Paris (ii) a very simple framework sales contract, subject to Italian law and courts of Milan, CISG not excluded.



## THE SHOWER GEL CASE (2)

- One day, the German regulatory authority starts an investigation on the formulation of the shower gel and issues an **order to withdraw and recall the product in Germany** → RAPEX notification → all EU markets
- SAPONI complies to the order and issues for each product returned a voucher for the price value. The retailers are asked to return and are reimbursed, some claim loss of profits: SAPONI settles, grants discounts or pays extra money. It then turns to COSMETIQUE to be indemnified
- COSMETIQUE (i) **refuses to reimburse** SAPONI claiming that the German authority was wrong and SAPONI should have disputed the order (ii) **claims payment** of the latest deliveries
- The contracts in force between the parties do not regulate the issue.
- SAPONE wants to negotiate and avoid litigation, but COSMETIQUE obtains an European payment order for the open invoices. Litigation is inevitable.



## **THE SHOWER GEL CASE (3)**

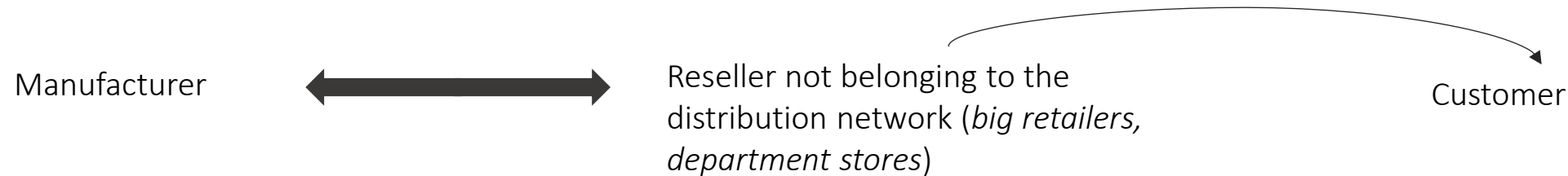
### Possible litigation issues:

- Burden of the proof of the defects
- Value of the decision of the German authority in the contractual relation between the parties
- Time limit for notice of the claim
- Limitation time (prescription) for judicial action
- Mandatory nature of limitation time / Interruption / Suspension

→ WHAT COULD HAVE BEEN DONE IN ORDER TO AVOID ALL THIS?

# POTENTIAL ISSUES AND HOW TO SOLVE THEM?

## LEGAL FRAMEWORK



### SALES AGREEMENT

vs.

### DISTRIBUTION AGREEMENT

- usually consisting of a short purchase contract and (long) general terms and conditions forming an integral part thereof,
- the contract proposal is usually made by a reseller,
- contracting parties usually negotiate a short purchase agreement only. **What about general terms and conditions?**

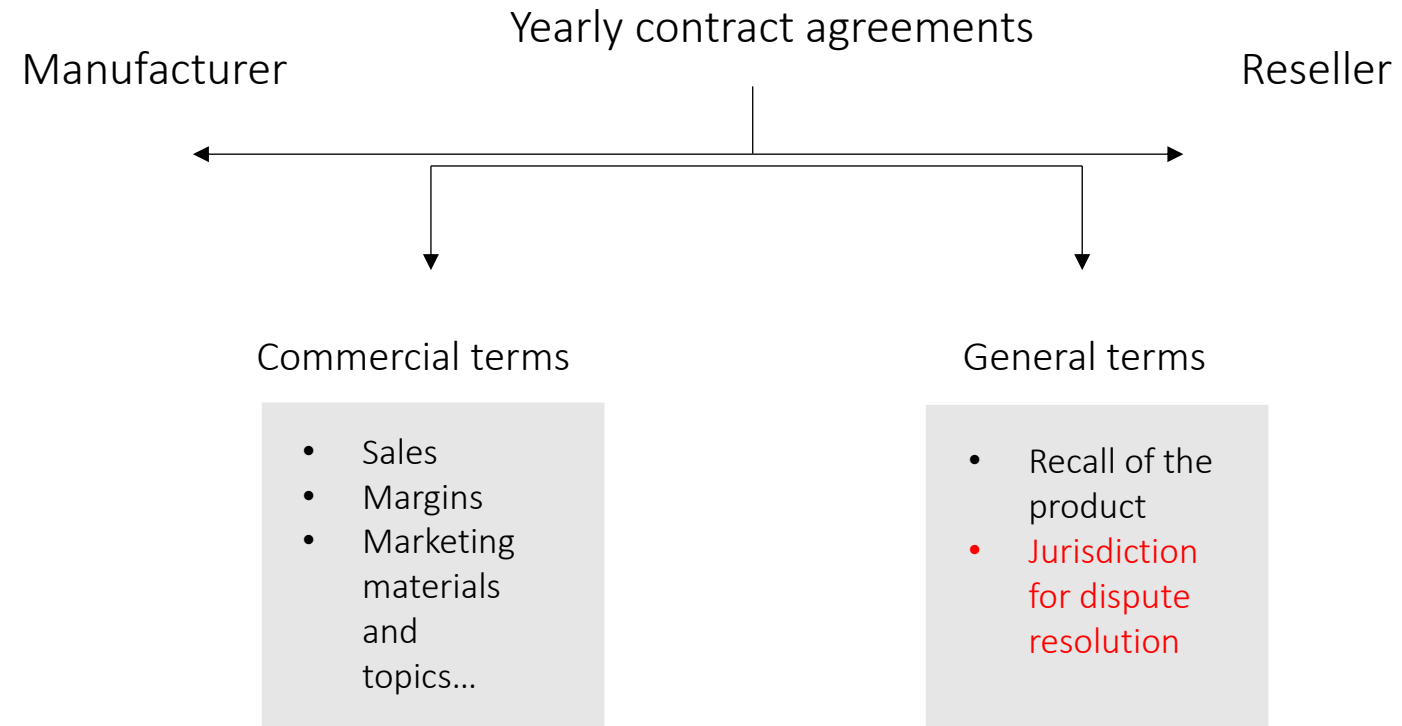
For Slovenia:

- Mixed agreement: according to case law
- Combination of:
  - Sales agreement,
  - Agency agreement,
  - Licence agreement etc.

Italy? The Netherlands?

# TYPICAL STRUCTURE OF SALE AGREEMENT

**ISSUE:** General terms are usually not even discussed when negotiating a sales agreement, although they usually regulate in detail the rights and obligations of the contracting parties (including product recall).



# PRACTICAL PROBLEMS WITH PRODUCT RECALLS

- How to manage product recalls
  - Transportation costs, destruction costs,
  - „bad-name“?
- What if the reseller starts a product recall? Potential dispute?
- Claims from customers: financial burden for a reseller?
- Manufacturer encounters financial difficulties... how can the reseller protect its position?
- Insurance? Is this the key to solving the problems?



## PRODUCT RECALL

Dear customers,

We are recalling the product Choceur Choco Changer, 150 g, milk chocolate with salted caramel, with a best before date of 21/10/2025 and lot number 159916, supplied by Libeert SA, due to a possible contamination with metal fragments.

As a precaution, we kindly ask customers not to consume the product, but instead return it to any HOFER store, where the purchase price will be refunded even without a receipt.

The product was available for sale in all HOFER stores across Slovenia; however, the batch with the specified details has been removed from sale. This notice does not necessarily imply that the deviation from expected product quality was caused by the manufacturer or the retailer.

For more information, you can contact us Monday to Friday from 8:00 to 19:00 and Saturday from 8:00 to 16:00 at 01/8346 600 or via email at [info@podpora.hofer.si](mailto:info@podpora.hofer.si).

Thank you for your understanding.  
Your HOFER team

# CONCLUSIONS & FINAL THOUGHTS

*Build relationships, know the law, and have a plan.*

- Build strong relationships with resellers to foster cooperation.
- Leverage local laws to enforce compliance when necessary
- Offer incentives to resellers to encourage participation in recalls.
- Develop a clear and actionable recall plan to minimize delays and legal risks.

*In the end, it's not about avoiding recalls—it's about handling them.*

*(We prepared the following clauses for future usage)*

## CONTRACTUAL CLAUSES - EXAMPLES

„In the event that the cause of the product recall lies with the Seller, the **Buyer reserves the right to charge the Seller for the costs of carrying out the recall**. At the same time, **the Buyer may**, in accordance with the provisions of these General Terms and Conditions, **charge the Seller a contractual penalty and claim compensation for any damages incurred by the Buyer due to the recall.**“

„The Seller agrees that the Buyer, where permitted by legislation, will return to the Seller all regular items that have been Removed, Withdrawn, or Recalled.“

„In the event of a Recall of goods, **the Buyer will charge the Seller**, in addition to the return of the Net purchase value for the defective goods, **a contractual penalty**, which is specified in the Agreement and calculated based on the Net purchase value of the defective goods. The Buyer also has the right to **claim reimbursement for all costs**, including the reimbursement of penalties paid by the Buyer and the Buyer's responsible person based on decisions from inspection authorities, as well as the costs of analyses carried out due to the Seller's failure to fulfill contractual obligations or due to defective goods.“

### Recall clauses concerning food products:

Regarding the quality and safety of food, the Seller must implement internal control based on the principles of the HACCP system, which allows for the identification of microbiological, chemical, and physical agents that may pose a risk to health. The Seller must ensure traceability of the goods and an effective system for carrying out the Withdrawal, Recall, or Removal of goods.

# PRODUCT RECALL AND REMEDIAL ACTION CLAUSE

## 1. Cooperation in the Event of a Product Recall

1.1. In the event of a product recall, the Manufacturer and the Retailer agree to cooperate fully and promptly to ensure the efficient and safe execution of the recall process. This includes, but is not limited to:

1.1.1. The Manufacturer shall immediately notify the Retailer in writing of the recall, specifying the reason for the recall, the affected products, and the scope of the recall (e.g., batch numbers, expiration dates, or geographic distribution).

1.1.2. The Retailer shall promptly remove the recalled products from its shelves, online platforms, and distribution centers, and shall cease all sales and promotions of the affected products.

1.2. Both parties shall work together to ensure clear and consistent communication to customers, regulatory authorities, and other stakeholders.

## 2. Costs Associated with the Recall

2.1. The Manufacturer shall bear all costs associated with the recall, including but not limited to the costs of retrieving, transporting, and storing the recalled products.

2.2. The Retailer shall provide reasonable assistance in the retrieval and storage of the recalled products, but all verifiable associated costs (e.g., labor, transportation, and storage) shall be reimbursed by the Manufacturer within 30 days of receipt of an itemized invoice from the Retailer.

## 3. Replacement of Recalled Products

3.1. The Manufacturer shall, at its own expense, provide replacement products to the Retailer as soon as reasonably possible, ensuring that the Retailer's shelves/storage are restocked without undue delay.

3.2. If the Manufacturer is unable to provide replacement products within [14] calendar days of the recall notice, the Manufacturer shall compensate the Retailer for lost sales and any additional costs incurred due to the unavailability of the product. Such compensation shall be calculated based on the average weekly sales of the affected product over the preceding [12] weeks.

#### 4. Customer Notification

- 4.1. The Manufacturer shall be responsible for drafting and disseminating public notifications regarding the recall, including press releases, website notices, and social media announcements.
- 4.2. The Manufacturer shall provide the Retailer with all necessary information, including the reason for the recall, affected product details, and instructions for customers, within 24 hours of initiating the recall.
- 4.3. The Retailer shall coordinate with the Manufacturer to ensure that all customer notifications are consistent in messaging, clear, accurate, and compliant with applicable laws and regulations.
- 4.4. The Retailer shall use the most effective communication methods available (including using its own channels) to ensure that the maximum number of affected customers are informed in the timeliest manner possible. This may include a combination of in-store signage, digital notifications, and media outreach, depending on the scale and urgency of the recall. This includes, but is not limited to:
  - 4.4.1. In-Store Notifications: The Retailer shall prominently display recall notices at all store entrances, checkout counters, and in the sections where the recalled products were previously sold. Notices shall be clear, visible, and written in a language understood by the majority of customers.
  - 4.4.2. Online Notifications: If the recalled products were sold through the Retailer's e-commerce platform, the Retailer shall immediately post a recall notice on its website homepage, product pages, and any relevant mobile applications. The notice shall include a direct link to the Manufacturer's official recall announcement and instructions for returning or disposing of the product.
  - 4.4.3. Email and SMS Alerts: If the Retailer maintains a customer database with contact information (e.g., email addresses or phone numbers), the Retailer shall send targeted notifications to customers who purchased the recalled product, providing details of the recall and instructions for returning or disposing of the product.
  - 4.4.4. Social Media: The Retailer shall use its social media channels to disseminate recall information, ensuring that the message reaches a broad audience. Posts shall include clear instructions and links to additional resources.
- 4.5. If the recall involves a product that poses a serious health or safety risk, the Retailer shall prioritize immediate and widespread notification, including the use of emergency communication channels if necessary.



- 4.6. Compliant Retailers shall receive a [5%–10%] discount on next [6] orders of the recalled product category.
- 4.7. The Retailer shall maintain records of all customer notifications issued during the recall, including copies of in-store notices, digital communications, and social media posts. These records shall be made available to the Manufacturer upon request and retained for a minimum of two years following the recall.
- 4.8. If the Retailer fails to notify customers in accordance with this clause, and such failure results in harm to customers, regulatory penalties, or reputational damage, the Retailer shall bear full responsibility for any resulting liabilities.
- 4.9. If the Manufacturer fails to provide timely or accurate information necessary for customer notification, the Manufacturer shall indemnify the Retailer for any costs, damages, or penalties incurred as a result of such failure.

## **5. Consequences of Non-Cooperation**

- 5.1. If either party fails to cooperate fully in the recall process, the non-cooperating party shall be liable for any additional costs, damages, or regulatory penalties incurred as a result of such failure.
- 5.2. If the Manufacturer fails to provide replacement products within the agreed timeframe or fails to reimburse the Retailer for verifiable recall-related costs, the Retailer may, at its discretion, terminate this agreement and seek indemnification for any resulting losses, including but not limited to loss of business, reputational damage, and customer compensation claims.
- 5.3. If the Retailer is left without replacement products for an extended period (exceeding 14 calendar days), the Manufacturer shall indemnify the Retailer for any demonstrable loss of business directly attributable to the unavailability of the product. This indemnification shall include, but not be limited to, lost profits, reduced foot traffic, and any additional costs incurred by the Retailer to mitigate the impact of the product shortage.
- 5.4. The Manufacturer shall also reimburse the Retailer for any costs associated with sourcing alternative products from third-party suppliers, provided that the Retailer has made reasonable efforts to notify the Manufacturer of such actions and has obtained the Manufacturer's prior approval (which shall not be unreasonably withheld).
- 5.5. The above indemnity for loss of profit and/or reimbursement for costs incurred shall not operate where recall results solely from: (i) changes in health/safety laws; or (ii) regulatory actions unrelated to Manufacturer's breach that become enforceable after products have been delivered to Retailer.

## COOPERATION CLAUSE

*If either Party becomes aware of an investigation by a competent authority that the PRODUCT, including packaging or any of its ingredients, is defective or unsafe, it shall notify the other Party in writing within 5 days of becoming aware of the same.*

*The Parties agree to cooperate promptly and in good faith to comply with any order of a competent authority. They will jointly decide on all actions, including but not limited to complaints, objections, appeals, whether administrative or judicial, and any settlements related to such actions. If the Parties fail to agree on any action described above, each Party shall be free to act individually and bear the costs thereof.*

*All costs associated with complying with an order of a competent authority resulting in the withdrawal or recall of the PRODUCT shall be borne by the Party whose activities gave rise to such order. If such costs are borne by the other Party, they will be reimbursed within 30 days.*

*Any claim by either Party against the other under this clause shall be time-barred after 2 years from the date on which the decision of the competent authority becomes final.*

## **SPEAKERS**

**Pedro da Costa Mendes (Chair)**

**Irene Grassi**

**Maja Šubic**

**Walter van Overbeek**