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CRISIS MANAGEMENT 2023

Global interview panel led by Linklaters LLP

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About the editor

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Christa Band is a partner in the litigation department at Linklaters LLP in London. She has over 25 years' experience as a litigation partner, advising banks, financial services institutions and corporates on all aspects of contentious work, much of which is multi-jurisdictional. She manages parallel proceedings for clients in regulatory, civil and criminal contexts. She has helped clients navigate a number of crises in different sectors and contexts.

Contents

While reading, click this icon to return to the Contents at any time

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Introduction

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Crisis management is a term that is in vogue, often being applied to situations that are not, or certainly should not be, crises. However, it is undoubtedly the case that companies are increasingly exposed to risks that, if they eventuate, result in a genuine crisis necessitating expert and bespoke advice.

Every crisis is different, but there are some hallmarks that many share.

- The event often happens suddenly and without warning – even though it may involve the revelation of a long history of gathering causes or require the review of past working practices.
- Typically, the response will play out in a number of different contexts: civil claims, regulatory issues and, in some cases, interest from prosecuting authorities. Reporting obligations may be triggered.
- Employees are likely to be concerned about the potential impact on them and the business. A company will have to review the conduct of relevant employees and where necessary start disciplinary proceedings.
- Media interest is common. Corporate, and sometimes individual, reputations require management.
- For global businesses, the repercussions are generally not limited to one jurisdiction.
- Increasingly, the challenges include a political dimension: scrutiny from central or local government, including through, in the UK, select committees or public inquiries.
- In a crisis, the standards to which a business is held may not be limited to those found in contracts or statute books. There is a growing focus on 'soft law' – expectations of businesses to respond to social and political agendas rather than to fixed and identifiable obligations.

Christa Band

- The range of stakeholders who have an interest in the nature, causes, impact and resolution of a crisis is wide, and their interests are often not aligned.
- Almost inevitably, the company will be expected to respond quickly and publicly with a statement both as to the past and the future. However unrealistic it is to expect an informed view at the earliest stage, maintaining an open dialogue with stakeholders is a key aspect of crisis management.

In terms of the legal and other risks that have the propensity to generate crises, some key themes emerge from recent events.

- Product liability: this is not only to do with products that do not work as they should, or injure customers; it is also increasingly about a focus on what a company has told its market about the features of the product to encourage buyers to buy.

QUESTIONS

- Natural disasters and events: while the underlying event may not be attributable to the company, its response to it or the way in which its products withstood the event can certainly give rise to a crisis for a wide variety of companies.
- Data use and misuse: claims featuring data, and a company's ability to manage it in accordance with contractual commitments and society's expectations, are a source of many crises. Data loss and technology failures, in particular, are real causes for concern.
- Global situation: the unpredictable and uncertain economic climate, in the wake of the covid-19 pandemic, the war in Ukraine, the energy crisis and inflation rates, has put all businesses under real stress. Crises that emerge from these conditions often threaten solvency, giving rise to additional challenges.
- Working practices: these can be a feature for multinational businesses where working conditions in international locations are not thought to match those that would apply in the corporate's main jurisdiction.
- Whistleblowers: there is an understandable focus from regulators and others on ensuring that employees have the ability and channels to raise concerns should they have them. The corollary is that some crises emerge through a whistleblower highlighting corporate practices that they allege do not comply with appropriate standards.
- The growth in collective litigation procedures – seen in many jurisdictions – means that a crisis can result from the fact that claims that would previously not result in litigation are now economically viable.

Practitioners who specialise in crisis management aim to guide their clients through the maze of interrelated, and sometimes conflicting, priorities, interests, rights and obligations that are outlined above.

Their experience enables them to advise a company how to be 'crisis ready' on the basis that good preparation is the most effective remedy. They recognise that the first 24 hours are crucial and that the actions taken by the company at that time can have a significant effect on the impact of the crisis. While the company navigates its way through the crisis, there will be considerable work needed to support 'business as usual'.

If it is implicit in the nature of the crisis that 'something has gone wrong' in the past, then a review of the relevant business is a key element of the response. Such an investigation is not simply about establishing what went wrong; it can be an important feature of mitigation and rehabilitation as well as a foundation for ensuring that the problem does not repeat.

While no company attempts to manage a crisis without external help, equally structuring the internal team and its reporting lines requires careful thought. So does managing broader expectations of what the company is likely to be able to, or wish to, share by way of conclusions.

In particular, it is the careful balancing of interests and the recognition that what might be ideal in one context can have undesired consequences in another that is the skill that crisis management lawyers offer.

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Canada

Mark Dunn is a partner in the Dispute Resolution Group at Goodmans. He has acted as lead counsel to parties involved in complex disputes before all levels of court in Ontario, the Supreme Court of Canada and arbitral tribunals. Mark has significant expertise in corporate and securities litigation, including litigation arising from disputed proxy contests, class proceedings relating to alleged misrepresentations and class proceedings commenced under the Competition Act. Mark has also acted on a variety of shareholder disputes, including oppression claims, shareholder class actions and proxy contest litigation. He provides strategic advice to, and litigates on behalf of, companies, shareholders and directors. Mark also has experience with the quantification of large and complex damages claims. Mark has been recognised as a leading litigation lawyer by *Best Lawyers in Canada* and *The Canadian Legal Lexpert Directory*.

Sarah Stothart is an associate in the Dispute Resolution Group at Goodmans. She is developing her practice in corporate commercial and intellectual property litigation, with a focus on securities and technology issues. She acts for and advises clients on a variety of litigation matters, including complex contractual disputes, patent disputes, securities and shareholder disputes, and issues relating to fiduciary, statutory and regulatory obligations. Sarah is licensed in Ontario and California and has appeared before all levels of Ontario and federal courts, the Competition Tribunal, and the Supreme Court of Canada, as well as in the US before the Delaware Court of Chancery.

QUESTIONS

1 The word 'crisis' carries with it the notion of the sudden and unexpected. What can a business do in advance of a crisis striking to ensure that it is best prepared to navigate it?


Mark Dunn


Sarah Stothart

Crisis is a broad term that can capture virtually any circumstance that threatens to cause substantial harm to a company's business or reputation, or both. Avoiding crises entirely is not a realistic or possible goal. Instead, when crises arise, a business should aim to identify them early, move through them and recover as quickly as possible, and then use the experience as a learning opportunity for the next crisis. From a legal perspective, another primary goal is to minimise liability to third parties to the extent possible.

A business can implement the following legal and business strategies to prepare itself for a crisis:

Allocating risk through contract

A crisis is, in some sense, a significant risk that has materialised. From a legal perspective, companies can prepare for crisis by carefully considering how they are managing and allocating risk appropriately.

One important way to allocate risk is by having appropriate contracts in place. Contracts are a tool that virtually every business uses to anticipate and allocate risks between the contracting parties. When parties enter into contracts, they agree who will bear the risk of various outcomes. Thinking carefully about what contractual protections your business needs, or might need, can be a really important way to arm yourself with the tools that you need to address a crisis.

The recent pandemic illustrated the importance of contracts when a crisis hits. Almost no one anticipated the potential disruption that the pandemic would cause. But some businesses incorporated strong force majeure clauses, or other similar terms, in contracts that significantly helped to mitigate the harm caused by the pandemic. These clauses, in general terms, excused one party from its obligations if those obligations became impossible to perform because of some outside force. A number of parties were excused from paying money (especially rent) while their businesses were closed by the pandemic.

Companies without contractual protections were frequently not able to use general legal principles to help them avoid the impacts of the pandemic. A number of parties argued that the pandemic made it impossible to perform contracts and tried to invoke the doctrine of frustration (a legal principle that allows a party to avoid performing a contract if exterior factors make performance impossible). These cases were largely unsuccessful.

> "There are usually few useful legal remedies available to the victims of cybercrime in Canada. That is not because the remedies do not exist."

One crisis management lesson to take away from the pandemic is that a little planning can go a long way. A lot of contractual terms that received little (and sometime no) attention when contracts were executed suddenly became critically important.

This lesson does not, of course, apply only to huge risks such as the pandemic. Properly allocating risk before a crisis strikes should be done with respect to identifiable risks unique to a business' particular operations or market conditions. Where risks are not identifiable, establishing contractually agreed processes for responding to those risks is an alternative option – for example, agreeing to dispute resolution processes or notice and termination provisions.

Trust, but verify

A surprising number of crises arise, or grow, because parties do not enforce legal rights that they have. Many businesses, for example, negotiate for the right to receive detailed information from key counterparties, but then they do not enforce those rights. Failing to enforce rights promptly can, in some instances, lead to arguments that those rights have been waived or that a party is estopped from asserting them. In some cases, it can even lead to arguments that the failures to enforce are themselves actionable by third parties.

In a crisis situation, therefore, parties should be in constant review of changing scenarios that might trigger certain rights and should be prepared to evaluate the merits of exercising those rights. Engaging internal or external legal counsel at an early stage can help with this decision-making process. Also helpful are key metrics to identify that a business is even in a crisis situation and should be taking resources away from day-to-day operations to evaluate its options.

Putting the right policies and teams in place

From a business standpoint, the business should make sure that it has a crisis response plan that categorises types and levels of potential crises and the specific response channels for addressing them as they arise. Similarly, it should have a ready crisis response team comprised of internal and external representatives and a list of approved and conflict-free external advisers that can be activated quickly upon request. Advisers should include, depending on the type of business and type of potential crisis, lawyers, consultants, government relations, PR firms, cybersecurity and ransomware consultants, crisis communication personnel, etc.

2 Some crises affect a business in unpredictable ways; others arise from well-recognised, though unwelcome, risks. What key themes underlie the risk management analysis in your jurisdiction? How might this analysis evolve over time, in light of any emerging or potential future risks?

The following current and emerging areas of risk are particularly noteworthy in Canada.

Data security and privacy concerns are an important consideration for virtually every business. The specific nature of the concern will vary from business to business. Some businesses will be particularly sensitive to the unauthorised disclosure of sensitive business information, or they may hold consumer information and risk financial or reputational harm if it is accessed illegally. Other businesses may rely heavily on specific systems that are vulnerable to a ransomware attack where hackers take control of the system and will only return it in exchange for payment.

There are usually few useful legal remedies available to the victims of cybercrime in Canada. That is not because the remedies do not exist. Court orders requiring the disclosure of information, prohibiting conduct, or ordering the wrongdoer to pay damages are all available in Canada if there is evidence to support them. But these remedies usually have limited impact because the wrongdoers either cannot be identified or are outside of Canada.

One recent exception to this rule is a case involving the illegal sale of trademarked goods. The seller was outside Canada, and ignored a court order requiring that it stop selling. But the plaintiff was able to get an order requiring that Google remove the illegal seller from search results, in order to prevent Canadians from accessing the website of the illegal seller. The case was upheld by the Supreme Court of Canada, and is therefore a precedent binding across Canada.

Online reputation risk

Another trend that we are eyeing in Canada is the reputational risk posed by social media and online review sites. Negative online reviews, or critical social media posts, can cause significant reputational harm to a business and we have seen a number of cases where businesses have sued those posting negative reviews about them. These are usually framed as actions for defamation, which

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allow a plaintiff to recover damages caused by a defendant who disseminated harmful and untrue information.

Canadian courts will typically order the disclosure of IP addresses and other information required to identify individuals posting the allegedly defamatory reviews or making the allegedly defamatory social media posts. If the alleged defamer is located in Canada, they can be sued.

Defamation actions in Canada take time to prosecute, and that time can vary depending on where you are because some Canadian courts are still dealing with covid-era backlogs that make the process even slower.

The time that it takes to prosecute defamation actions can be exacerbated by legislation aimed at preventing suits known as Strategic Lawsuits against Public Participation (SLAPP). Anti-SLAPP legislation allows a plaintiff to bring an early motion to dismiss an action, in order to allow baseless suits to be dismissed quickly. In practice, anti-SLAPP legislation has had the opposite effect. Anti-SLAPP motions are long and complicated. A successful anti-SLAPP

> "Ultimately, businesses should do their best to be honest and build trust with employees, customers, shareholders and other potentially affected stakeholders, but they must take particular care to prepare messaging that is defensible."

motion will end the lawsuit more quickly than a trial, but many unsuccessful anti-SLAPP motions wind up making the case even longer and more expensive than it would otherwise be.

Shareholder class actions

Another important risk applicable to public companies is shareholder litigation. The applicable provincial Securities Acts in Canadian provinces impose liability on public companies and, in some cases, the officers and directors of those companies for misrepresentations that cause a decrease in value of a company. The plaintiff shareholders are able to sue as a class without proving that each of them read or relied on the misrepresentation. The result has been that any company that discloses a significant error in its financial reporting risks a shareholder class action. Officers and directors are routinely named in these actions, and so it is important to have appropriate risk D&O insurance.

QUESTIONS

3 In a crisis, stakeholder expectations of a continuing narrative and explanation are high and the interests of various groups are not necessarily aligned. How does a business meet varying expectations of what to say and when to say it? How does a business maintain an open narrative while best minimising legal risk?

Communication with key stakeholders is critical to navigating a crisis and emerging intact. There is sometimes a tension between the need to communicate and the risk that the communication could undermine the business' position in future litigation or undermine efforts to manage regulatory relationships.

Depending on the nature of the crisis and the nature of the business, an effective crisis response can require creating a special committee or crisis response team, with regular meetings, to engage with external legal and other advisers and be the central portal for decisions on communications. Regardless of whether there is a specific team or designated individuals, it is important that all key team members, both internally and externally, work effectively together with a clear hierarchy for decision-making. Perhaps most importantly, the team needs to have key priorities as their common goal, without competing agendas.

When assessing what to communicate and how to frame a narrative, from a strictly legal perspective, the best decision is typically to stay silent early in a matter because new facts almost always emerge over time. But it is usually wrong for a business to look at a crisis from a strictly legal perspective. It is also usually wrong for a business to look at a crisis without any regard for the legal perspective. Thus, having advisors representing both perspectives is key.

Lawyers are experts in a specific kind of communication, but businesses can also benefit from diverse perspectives, experience

and expertise. Public relations professionals, shareholder advisory firms and many others can have an important role to play. The key is to balance the need to communicate with the need to ensure that the communication does not undermine legal efforts. It is important to identify the biggest risks posed by a crisis, and assemble a team capable of addressing those risks. It is also important to have a complete picture of all stakeholders that need to be engaged and what is likely to concern them about the potential crisis.

Ultimately, businesses should do their best to be honest and build trust with employees, customers, shareholders and other potentially affected stakeholders, but they must take particular care to prepare messaging that is defensible and will not emerge as incorrect with the passage of time. Including caveats in communications, such as limiting statements to knowledge at a particular time and indicating that future information may necessitate updates, can go a long way to achieving this balance.

Finally, businesses should make sure to preserve relevant documents and to document the steps taken and factors considered in response to a crisis. Crises evolve quickly and if it ever becomes necessary to justify a particular approach or decision, having the records to establish why that decision was made can be very helpful.

4 Many crises are critical because they involve the potential for widespread civil liability and many claimants. What challenges arise in the resolution of multi-party claims and how does a defendant determine its strategy to meet them?

The potential for litigation should always be on a business' mind when responding to a crisis. This is particularly true in circumstances where a business is potentially liable to large and unidentifiable groups of people, such as data security breaches, misrepresentations in

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securities filings, product liability issues, and other issues otherwise subject to considerable public scrutiny. Class actions are a significant risk to businesses in Canada. Every Canadian province has class action litigation that allows multiple plaintiffs to sue as a class to recover losses suffered as a result of the same wrong, and Canada's federal court also has procedures to address class actions in certain specialised areas within its areas of expertise.

The Canadian class action landscape is, in some important respects, friendly to plaintiffs. Most class proceedings are 'opt-out' proceedings, which means that everyone injured by a particular wrong (and who fits within the class definition) is a member of the class unless they opt out. Third-party litigation funding is legal and litigation funders are active in the Canadian market. Court approval for funding is required, but it is commonly granted.

Canadian class actions have two important stages. First, a class action has to be certified by the court. Second, the case proceeds to trial. Very few class actions proceed to trial and so certification

is a critical step. Defendants often contest a variety of issues at the certification stage, including: whether the plaintiffs' allegations would (if proven) entitle it to relief; whether the facts support the existence of common issues that can appropriately be determined in a class proceeding; and, whether a class action is the preferable procedure to determine the matter.

Class actions in Canada tend to proceed slowly and trials are rare. Most class actions settle, whether before or after certification. Settlement of class actions requires court approval, and the settling plaintiff must show that the proposed settlement is fair, reasonable and in the best interests of the class. If the case settles before certification, then the plaintiff must both certify the class (on consent, since the certification is for settlement purposes) and obtain settlement approval.

More generally in terms of determining strategy when a business does not yet know what liability it might face and where it might come from, key goals are to maintain optionality, preserve rights and have sufficient time to ensure full information has been gathered. A business should immediately take steps to preserve all relevant records, identify individuals with knowledge of events at issue and document key events. It is important that a business develop as clear an understanding of the merits of potential claims as possible, so that it can effectively determine its risk tolerance and strategy to respond to them. These steps would typically be undertaken with the assistance of internal or external counsel, both for the benefit of their legal advice, but also to ensure any work product or strategic discussion is covered by privilege.

One major challenge in a crisis situation is the uncertainty of knowing the number of potential claimants and when they might arise. Most litigation in Canada is subject to a two-year limitation period, so businesses can be relatively confident once that period has elapsed that they will not become subject to new claims. Within that two-year period, however, some plaintiffs may emerge earlier and others may wait. It is difficult to develop a strategy when the opponents keep changing.

> "It can be difficult to arbitrate multi-party claims given the procedure's reliance on consent, often making public court proceedings the default, but private dispute-resolution is an option that can be pursued in certain situations."

To the greatest extent possible, therefore, a company should take steps to identify the scope or nature of possible claims or set in place a strategy for responding to unanticipated ones at an early stage. For example, in a data breach crisis, a business might be liable to all of its customers for breach of a common confidentiality clause and to members of the public for statutory or common law breaches. A business can take steps to ascertain potential claims arising from the former (by engaging with its customers on a business-to-business level) and can at least be aware of and develop a consistent approach for addressing substantially similar individual claims or a class action from the latter.

At an early stage, tolling agreements (in which the parties essentially agree to 'pause' their rights and applicable limitation periods for a

certain period of time) may also be leveraged by a business to buy time to allow other claims to come forward.

A business may find itself constrained in its choice of forum due to a multiplicity of claims. It can be difficult to arbitrate multi-party claims given the procedure's reliance on consent, often making public court proceedings the default, but private dispute-resolution is an option that can be pursued in certain situations.

Once disputes are known, a business must also contend with the prospect of conflicting or inconsistent decisions or resolving claims in a way that creates precedent for others. For this reason, it often makes sense to seek common resolution of disputes involving similar facts and issues, or to have them heard by the same decision-maker or with a joint or consecutive trial. Joint mediations can also be facilitated to seek creative resolutions on multiple fronts.

Settlement considerations vary across different claimants and a business may find it is within its interests to settle certain claims and not others. Settlement terms are generally subject to privilege, so the quantum of a payment and other substantive terms should not be disclosed to other claimants, though of course there are always risks of breach, especially in a case involving public scrutiny. A business should therefore be cautious not to set any 'base level' of recovery that it would struggle to justify to other plaintiffs if it became known.

5 Alongside managing the crisis is the imperative to maintain 'business as usual'. How can lawyers help to establish what went wrong and minimise the impact of those issues on the underlying business?

Establishing separate committees or crisis response teams that are specifically delegated responsibility for the crisis can help in allowing other business units to maintain 'business as usual'.

Lawyers can assist a committee with determining an appropriate response to the crisis and path forward, and also with documenting what went wrong and how to avoid repeating similar issues in the future. To that end, collection and review of relevant documents is an important function of the legal team, as is conducting interviews with key individuals. Lawyers can also document the steps being taken in response to the crisis to ensure the defensibility of the crisis response down the line.

While lawyers can assist in many of the steps, it is important that there be 'buy-in' from business leaders and that they either are involved with or regularly apprised of the committee's actions. Business leaders should be part of the solutions implemented and the historical review to ensure that the impression of how the crisis developed and how it can be avoided or mitigated in the future can be retained in the corporate memory.

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QUESTIONS

The Inside Track

What traits, skills and experience do you think are critical for a lawyer advising on crisis management?

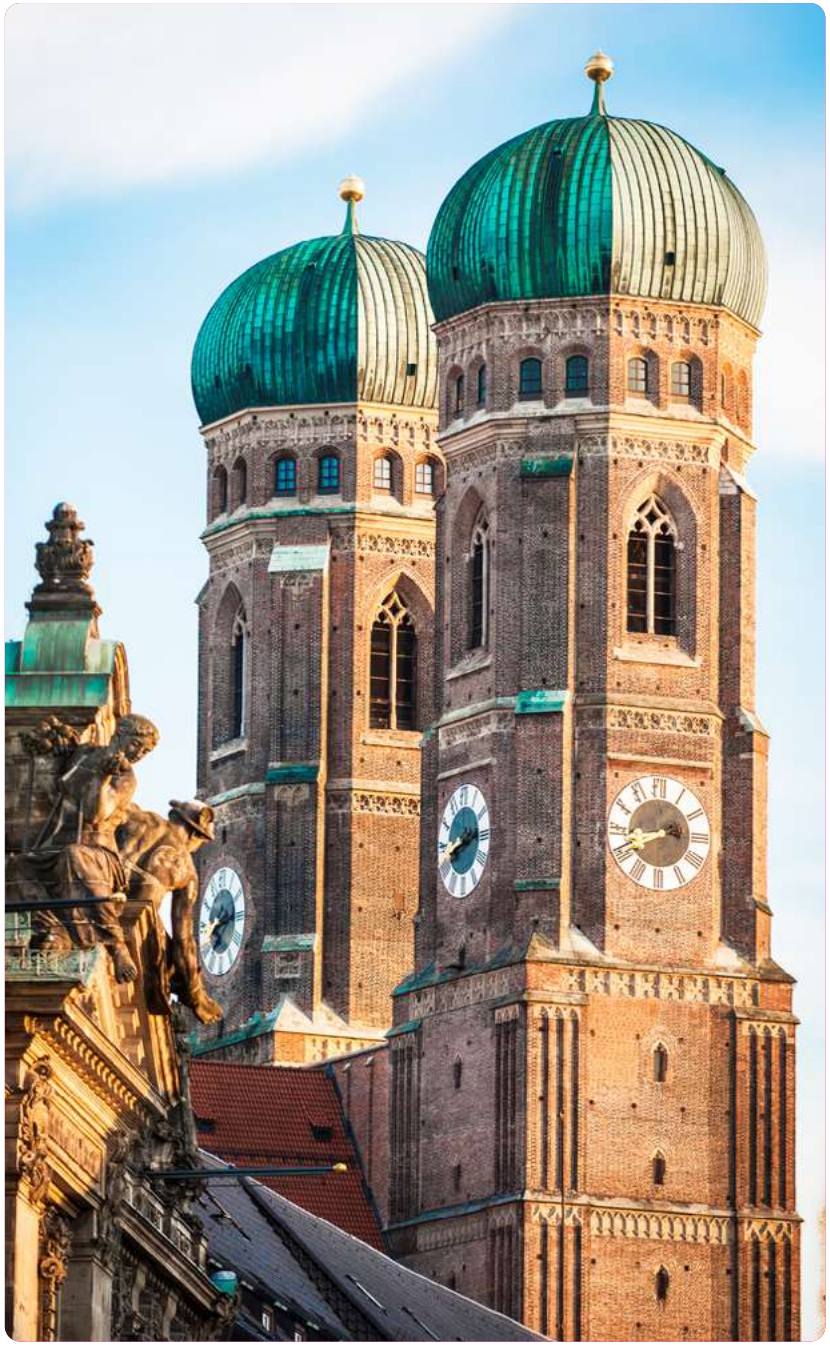
Among the personal and professional traits a lawyer advising on crisis management must have are the abilities to remain calm and composed in high-pressure situations. They should not simply be a 'reactive' and dispute-oriented practitioner, but also be able to maintain a holistic and pragmatic approach to their client's business. They must be able to triage highest urgency issues as compared to lower priority tasks, and delegate and manage effectively to ensure more long-term tasks such as document review and collection are being undertaken contemporaneously with addressing larger 'fires'. Finally, a lawyer at a full-service law firm will have more direct and timely access to the wide variety of types of expertise that are necessary to advise on an evolving crisis, though a lawyer with close relationships with external lawyers offering these types of expertise can offer this as well.

In your opinion, what expertise, attitudes, behaviours and practices characterise an effective legal team charged with crisis management?

As above, the ability of the team to collectively undertake a holistic approach to the unique circumstances of a particular business, its ongoing operations and its legal risks, is crucial. The team should reflect a diversity of expertise and practice areas, from both the advisory and dispute resolution perspectives. They should also reflect a diversity of levels of experience, such that there are more junior members available to assist with larger projects and more senior members available to manage and delegate. The team should be able to work together effectively with a clear and established hierarchy for decision-making and reporting to the business.

What do you personally find most rewarding and most challenging about advising in this area?

As lawyers and litigators, the most rewarding and most challenging aspects of this type of work are similar: the situations are always evolving quickly, there is no clear 'answer' to the crisis, and there are a variety of directions a crisis can go depending on the paths chosen by the business. Lawyers have a wider variety of tools and options available to us in a crisis situation where the path forward is not prescribed. Crisis situations are also unique from litigation specifically, because we have the opportunity to learn the business more intimately and shape the context of the situation from which we may eventually operate if and when litigation arises. The advice we give must simultaneously be proactive to future problems and reactive to those that have already manifested.



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Germany

Kerstin Wilhelm is co-head of Linklaters' German crisis management and compliance group. She has specialised experience in internal and government investigations, both domestic and cross-border, in the field of white-collar crime as well as in compliance matters, including advice on mitigating sanctions risks and corporate criminal liability. During a secondment to the investigations in-house team of a large international US-based technology company, she gained additional experience in conducting internal investigations into sensitive matters in various jurisdictions. Kerstin also has extensive experience in advising on dawn raids. In addition, Kerstin has many years of experience in complex civil litigation proceedings with a focus on banking and capital markets litigation, in particular mass litigation.

Kerstin is a regular speaker at compliance-focused conferences both in Germany and abroad. She was recently awarded 'Name of the next Generation' by *The Legal 500* (Legal 500 Germany 2022, Internal Investigations). Moreover, Kerstin is a member of the working committee for criminal law at the German Institute for Compliance – DICO e.V.

1 The word 'crisis' carries with it the notion of the sudden and unexpected. What can a business do in advance of a crisis striking to ensure that it is best prepared to navigate it?

When talking about a 'crisis', everyone will have different ideas of what a crisis actually is. Generally speaking, a crisis can be any external or internal circumstance that poses an acute and significant risk to a company's reputation, its assets or its operations, thereby triggering the need for immediate action.

Some risks that have the potential to turn into an actual crisis can, if recognised in time, be mitigated or even avoided. Other crisis situations are hard, if not impossible, to predict and will hit the company out of the blue without any warning. However, even if some crises cannot be avoided, at least their consequences can be mitigated. Hence, preparedness is key for any company. Crisis preparedness will involve an organisational risk assessment to evaluate, assess and quantify the operational, financial and reputational risks the company might face and thus enable the company to scan the horizon for any signals of an impending crisis.

In addition, to address the potential for disruptive and unexpected events, any company should have a crisis response plan that it can roll out once the crisis hits. Having a plan ready and merely needing to execute it will allow the company to focus on the multitude of issues that usually require immediate attention in a crisis situation. Time that would otherwise be spent on setting up organisational structures can be better used for the important strategic decisions that may need to be taken at the outset of a crisis.

The triggers for a crisis can be manifold. As different as the business activities of each company are, so too are the possible risks that a company might be exposed to. This is why it is impossible to provide an exhaustive list of every potential crisis. However, while there are

Kerstin Wilhelm

some unique risks for companies emanating from their own specific operations, general areas of risk include accidents and natural catastrophes such as fires, earthquakes or floods, power outages, cyberattacks, financial distress, political disruption, data breaches, compliance incidents and regulatory or criminal investigations.

A company should be clear about the potential sources of a crisis that might affect its business. It should also have a view on the potential impacts of such risks, which may again be manifold, ranging from financial implications and reputational damage to disruption of the company's supply chain and the risk of litigation proceedings.

Once such a risk assessment has been finalised, the company should set up the crisis management or crisis response plan as a framework for its internal decision-making, should an actual crisis occur. This will include setting up effective team structures. Besides the actual

"Having a plan is one thing, being able to execute it is another. Companies should therefore run training to ensure that people are familiar with the crisis response plan and know the role they have to play."

crisis management team, which will be in charge of managing the company's response to the crisis, the company will need clear escalation guidelines to allow for further management levels to be involved as needed. Although responsibilities should be clearly allocated, each key team member should also have an identified substitute to provide coverage in situations of unforeseen absence or the like.

Having a plan is one thing, being able to execute it is another. Companies should therefore run training to ensure that people are familiar with the crisis response plan and know the role they have to play. This training could also involve simulations of crisis scenarios to test people's actual response. In criminal investigations, the public prosecutor's offices regularly conduct dawn raids at a company's premises if the allegations raised concern individuals associated with the business, such as employees or members of management. In order to be prepared for this, it has proved useful to set up dedicated training sessions on the "dos and don'ts" should such a dawn raid occur, so that the staff know what to expect if the prosecutor knocks at their door.

Any crisis management plan should be flexible enough to suit the needs of any particular crisis since it is impossible to predict the exact disruptive event. It almost goes without saying that any plans should also be revisited at regular intervals to make sure that they are still up-to-date and fit for purpose.

Neither does it come as a surprise that there is no one-size-fits-all crisis response plan that applies equally to all companies. Only if the plan is tailored to the individual needs and organisational structures of the respective company can it fulfil its purpose. Reporting obligations vis-à-vis regulators fall into this category. Each company should know its statutory reporting obligations since, depending on the problem at hand, the company may be legally required to disclose the issue and make a report to the authorities. Knowing the legal framework under which the company is operating, including any mandatory timings for making a report, will be key for the members of the crisis response team and should therefore be built into the crisis response plan.

In addition to the crisis response plan, companies may also consider creating a suite of off-the-shelf communications material focusing on specific scenarios. Having pre-agreed language in place will help ensure the company's timely and sure-footed response to the media and staff alike. The latter should not be underestimated since only if it is clear from the beginning of a crisis situation who may communicate what to which employees will it be possible to prevent contradictory statements, ambiguities and rumours.

2 Some crises affect a business in unpredictable ways; others arise from well-recognised, though unwelcome, risks. What key themes underlie the risk management analysis in your jurisdiction? How might this analysis evolve over time, in light of any emerging or potential future risks?

Each company's risk profile is different, which is why each company needs to understand its individual risk profile to assess the key risks it is exposed to. Only if the company knows its actual and potential risks can these risks be mitigated through appropriate measures.

Conducting a risk analysis is, however, not simply a 'nice-to-have' for commercial organisations. In Germany, the owner of a company may be held liable under section 130 of the Act on Regulatory Offences for failing to take appropriate supervisory measures that would, had they been taken, have prevented or materially impeded a breach of duties incumbent on the owner. Obviously, appropriate supervisory measures can only be taken if there is clarity on where the risks lie.

The legal necessity to perform a risk assessment also follows from the executive board members' *Legalitätspflicht* – the duty to act legally – under section 93 paragraph 2 sentence 1 German Stock Corporation Act (AktG). In this context, the German Federal Supreme Court has held that within the scope of this legal duty, a board member has to ensure that the company is organised and supervised in such a way that no violations of law take place. This duty of supervision is further cemented by section 91 paragraph 2 AktG, which provides for the establishment of a monitoring system suitable to recognise developments that could jeopardise the existence of the company at an early stage. According to the German Federal Supreme Court, a management board member only fulfils this organisational duty if they establish a compliance programme that is based on damage prevention and risk control.

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Furthermore, there are some specific legal provisions that expressly contain an obligation to conduct a risk analysis. One example is section 5 paragraph 5 sentence 1 German Money Laundering Act, pursuant to which obligated entities have to determine and evaluate the risks of money laundering and terrorist financing associated with the business activities they are engaged in. Money laundering is one of the key areas of scrutiny in Germany at the moment, in particular since the Financial Action Task Force (FATF) published its evaluation report on Germany in June 2022. In this report, the FATF held that despite Germany having implemented significant reforms over the past five years to strengthen its system and more effectively combat money laundering and terrorist financing, and having also introduced non-conviction-based asset confiscation, (which has already resulted in the confiscation of significant amounts of criminal proceeds), there is still room for improvement in some areas. The German government has already reacted to this criticism, with the German Finance Ministry publishing a proposal to improve the effectiveness of the fight against money laundering and financial crime. One of the proposals

> "German law does not generally set out any specific requirements with respect to the content of the risk analysis."

put forward is the establishment of a new German federal financial crime agency that shall have combined powers to investigate and supervise in the field of anti-money laundering and financial crime. Companies therefore need to watch out for legislative developments in this area and should expect a greater focus on money-laundering. This obviously triggers the need to ensure that their individual anti-money laundering risks, if any, are identified and properly addressed.

Another specific statutory obligation to conduct a risk analysis is section 5 of the German Supply Chain Due Diligence Act (LkSG), a fairly new provision that was only introduced with effect from 1 January 2023. Under this new Act, companies are required to establish an appropriate and effective risk management system (section 4 LkSG). The required risk analysis under the LkSG needs to be appropriate to identify the human rights and environment-related risks in the company's own business area, as well as its direct suppliers. This regular risk analysis needs to be conducted once per year, but the law also provides for a risk analysis to be conducted on an ad hoc basis if there are certain changes to the business operations leading to a change in the risk profile (section 5 paragraph 4 LkSG), as well as where the company becomes aware of a possible violation of a human rights or environmental-related duty at the indirect supplier level (section 9 paragraph 3 LkSG).

Currently, the implementation of the LkSG is a hot topic for many companies and this is expected to continue for some time, in particular in light of the risk of enforcement should the duties be breached. For example, if a company violates the duty to conduct an appropriate risk analysis under the LkSG, it commits an administrative offence that can be punished with a monetary fine up to €500,000.

In contrast to the obligation to perform a risk analysis, German law does not generally set out any specific requirements with respect to the content of the risk analysis. Rather, the question of how a company will conduct such an analysis will depend on the type and scope of its business activities.

Typical areas of focus for any company concern the fields of anti-bribery and corruption; competition and anti-trust law; environment; health and safety; human rights and supply chain risks; employment risks; data protection and data privacy; and IT security. In the light of increased and accelerated digitisation as well as an increased use of personal devices, and the fact that more and more employees work remotely from home, cyber risks have gained importance, in particular following an increased number of attacks from hackers. Not surprisingly, cyber is therefore often said to be one the most important issues that a board has to deal with these days. Hence, IT security is likely to play a major role in each company's risk assessment.

In addition, sanctions and export controls have gained significant importance in light of the restrictions being imposed following Russia's invasion of Ukraine in February 2022. Companies with

existing Russian business, be it through their own subsidiaries in Russia or through the import or export of goods to and from Russia, have had to and still must pay close attention to the constantly changing sanctions environment, in particular since most violations of EU sanctions regulations are criminal offences in Germany. The German legislator has also taken measures that aim to enhance sanctions enforcement. In this context, Germany has introduced two new laws: the Sanctions Enforcement Acts I and II (SDG I and SDG II) in May and December 2022 respectively. Both acts show the German legislator's intention to create structural improvements for enforcement of sanctions violations. While the SDG I introduced sanctions-specific asset investigation and seizure powers, the SDG II provides for the establishment of a central office for the enforcement of sanctions to coordinate enforcement throughout Germany. The SDG II also aims to improve enforcement of anti-money laundering law by prohibiting the use of cash payments in real estate transactions to minimise money laundering risks in the real estate sector. Again, this demonstrates that anti-money laundering is one of the key themes for companies to have on their radar.

3 In a crisis, stakeholder expectations of a continuing narrative and explanation are high and the interests of various groups are not necessarily aligned. How does a business meet varying expectations of what to say and when to say it? How does a business maintain an open narrative while best minimising legal risk?

When a crisis erupts and becomes public, companies can be sure of one thing: constant media attention. Companies are then faced with a dilemma. In most crisis situations, companies will not initially have all the facts about what actually happened, who is affected and what the impacts are. Putting out a statement at a very early stage may risk having to make corrections to that statement afterwards. Companies

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will have to consider when the right time to actually put out a statement may be and whether they have enough facts at this early stage or whether it would be better to wait until more information can be obtained or initial allegations have been verified.

Again, there is no one-size-fits-all approach to each and every crisis situation, which is why companies need to assess their communications strategy with respect to the individual case. Nonetheless, it is important that the company makes a statement due to the expectations that will come from the press, the general public and internal stakeholders. Remaining silent for too long carries the risk of rumours being spread or the suspicion being raised that the company is not in a position (or is perceived not to be in a position) to be able to handle the situation, or that the crisis is even worse than it seems. However, the company will have to consider its initial statement carefully because this first statement will set the tone for any further communications. A company that overcommits at the outset and promises actions or measures to be taken should be aware

that it will be measured against its initial commitments. Failure to take the action announced at the outset may have a negative impact on the company's overall public perception.

Therefore, companies are usually well advised to put out a 'human' statement showing concern about what happened and demonstrating that the company is in control of the situation. In particular, if not all the facts are known, it might be best to put out a short and simple statement only and not elaborate on issues that have not yet been established by the company.

Often, there is tension between the legal team and the public relations team as to what the right strategy is. This is particularly important with respect to any litigation that the company might face following the crisis. Although any admissions on culpability may lead to a more positive perception of the company in public, admitting responsibility in a legally binding way could be detrimental to the company in any later litigation proceedings. This is even more true if those statements are made at a time when not all facts have been established and where the initial admission of guilt may later turn out to be incorrect.

Furthermore, putting out a written press release is one thing, responding orally to requests from reporters is another. This is why companies also have to carefully consider who the right person is to speak to the press. It is usually preferable to have someone who is used to dealing with the media appointed to communicate with the press. Companies may therefore consider offering media training to key individuals at the company, ideally as part of their crisis response plan, so that people are already trained when the crisis hits.

Clearly, the company needs to monitor the situation constantly. If an internal investigation that has been triggered by the initial crisis reveals further facts, the company may consider putting out additional statements. Often, it might be good to be proactive rather than

> "Remaining silent for too long carries the risk of rumours being spread or the suspicion being raised that the company is not in a position to be able to handle the situation, or that the crisis is even worse than it seems."

reactive, but, again, the appropriate strategy needs to be assessed depending on the individual case.

While it is certainly important to get communications with the media right, companies should not forget about internal communications, which are equally important. Not only will the crisis management team have to regularly update the company's board and shareholders, employees will also expect to hear from the leaders of the company about what is going on and whether or not there are any negative consequences of the crisis which will impact their employment. In this context, it is advisable to name a point of contact for employees to whom they can turn with requests in relation to the crisis, and to ask employees not to engage in any discussions and speculation with the media themselves.

4 Many crises are critical because they involve the potential for widespread civil liability and many claimants. What challenges arise in the resolution of multi-party claims and how does a defendant determine its strategy to meet them?

Under German civil procedure law, the standard mechanism for bringing claims is based on individual litigation proceedings. A class action procedure as known under US law does not exist in Germany. However, over the past years, various collective redress procedures have been developed. These are mainly model case proceedings in specific areas of law (such as the procedure under the Capital Markets Model Case Act) or collective proceedings initiated by certain authorised organisations that aim to protect the interests of others.

In particular, in the context of the multitude of claims that German courts have been faced with in the diesel scandal, the German legislator introduced the Model Declaratory Act in 2018, which applies to all consumer-related disputes and entered into force just before the statutory limitation period for many consumer claims relating to the diesel scandal ended. It should be noted, however, that any decisions under this new proceeding are only of a declaratory nature. No damages can be awarded and consumers still have to initiate their own individual damages proceedings. However, following the declarations obtained in the model case proceedings, it is possible to enter into a settlement, provided that certain conditions are met and that the settlement is approved by the court as being appropriate for the substantive claims. Provided that fewer than 30 per cent of all registered consumers withdraw from the settlement it will become effective.

Even if a settlement is concluded in a model case proceeding, it should be noted that this will only take effect for and against the registered consumers. Registered consumers will be bound by the settlement and will not be allowed to bring individual claims against the company concerning the same subject matter. However, injured parties who have not registered on the register of claims in the model case proceedings may still bring individual claims, provided that the statute of limitation has not expired. This means that German law does not provide for the option to enter into a settlement that will be binding upon each and every affected party, regardless of whether this individual has filed a claim or not (as would be the case under the US 'opt out' style of class action).

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Leaving aside these procedural specifics of German law, any strategy for settling a case will depend on the prospects of success of the claim, as well as the financial situation of the company. It is possible to reach out-of-court settlements before the claimants initiate litigation proceedings, but companies will have to carefully weigh the pros and cons of agreeing to a settlement at this stage.

Whether or not a claim has good prospects of success is often not clear when the crisis begins. Typically, only in the course of the

> "German law does not provide for the option to enter into a settlement that will be binding upon each and every affected party, regardless of whether this individual has filed a claim or not."

internal investigation, which will usually involve extensive fact-finding, will the company get further clarity about how strong its position is. Therefore, both workstreams (the internal investigation and the defence against claims from injured parties) must be closely aligned, since developments in either workstream will affect the other. The situation can also become more complicated if external investigations, such as regulatory or criminal investigations, are also taking place in which enforcement authorities are conducting their own fact-finding exercise. The company will then often also have to consider if and to what extent any information obtained in the context of the authorities' investigation can be used for defending the litigation claims. If criminal investigations proceed to trial, it may be appropriate for the company to consider whether it is worthwhile actively applying for a stay of the civil litigation proceedings in light of the ongoing criminal investigations, if the outcome of these criminal trials will affect the merits of the civil case.

When assessing the merits of the case and collecting all evidence, it is also important to bear in mind that German civil procedure law does not provide for pre-trial disclosure of documents. There is only a limited possibility to request the production of certain specific documents or narrowly defined categories of documents, but fishing expeditions (for unspecified documents) are not allowed under German law. Compared to other legal systems, the substantive right of disclosure is generally limited and only stems from each party's civil law duty to perform its obligations in good faith. This will impact any fact-finding exercise in Germany and should be considered when forming a view on how strong the case is and whether and when it could make sense to engage in settlement discussions.

5 Alongside managing the crisis is the imperative to maintain 'business as usual'. How can lawyers help to establish what went wrong and minimise the impact of those issues on the underlying business?

A crisis situation always involves individuals being under severe stress with the potential for such pressure to affect their decision-making. It is of significant importance to get the focus right at the outset, and this is where lawyers can play a crucial role in helping the in-house team steer through the crisis.

Although it is perfectly understandable that a company wants to have clarity as soon as possible about how the crisis could have happened, how things could have gone wrong and who is responsible, there are two important aspects which need to be considered. First of all, before jumping into an analysis of the root cause, the immediate issue needs to be remedied. For example, if there is an issue with the company's IT security leading to a cyberattack, then the vulnerability of the IT system must be addressed first to avoid further data loss, before the analysis of how this could have happened in the first place commences. In this phase, it is particularly important to comply with any reporting obligations vis-à-vis regulators that the company is

subject to, given that failure to comply with such obligations might lead to additional issues with severe consequences. Additional scrutiny from regulators might also be expected if the company fails to make any required notifications to the market. To the extent there are, for example, ad hoc notification obligations, being prepared for this reporting should already be part of the crisis response plan, but will have to be assessed from a legal point of view individually in each case.

Second, while it is certainly important to investigate the reasons for the crisis, such an investigation must be planned sensibly. Again, here is where lawyers will add value by helping the company decide about the purpose of the investigation and its objectives and setting out a plan to structure the subsequent investigative steps. It goes without saying that the lawyers need to work closely not only with the in-house legal team, but also with the business to fully understand the organisation's operations and structures. This will enable lawyers to not only be in a position to assess the reason for the crisis, but also to advise on how any impact on the ongoing business can be mitigated.

Helping companies focus on the priorities – which is not only the company's reputation but also its people and ongoing operations – is where lawyers can add value. This also involves assessing the governance of the company, in particular making sure that there is good corporate governance during the crisis situation. This requires proper information management and independence, both with respect to the investigation and with respect to decision-making generally. No individual who might be involved in the incident or who might have an interest in its outcome and thus have a conflict of interest should play a part here.

Last but not least, lawyers can play a crucial part in helping companies assess the lessons learned from the crisis and consequent investigation. This will involve setting up a process of how to deal with the findings, including the assessment of any reporting requirements and the need for any public statements. It also includes an analysis as to what changes might be required to the organisation's operations in light of the investigative outcome. In addition, the lessons learned will also involve a review of the company's governance, not only with respect to the underlying issues but also with respect to how the crisis has been managed. There will be lessons to be learnt from each crisis for each company, and helping the company implement any recommendations is where lawyers can play a key role.

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QUESTIONS

The Inside Track

What traits, skills and experience do you think are critical for a lawyer advising on crisis management?

When the storm hits, the external legal adviser needs to be the anchor for the company. Remaining calm under stress, and helping the internal stakeholders do the same, is crucial. Having a good sense for the right strategic decisions, while at the same time being confident in decision-making under time pressure, is what makes a good crisis management lawyer. Excellent organisational skills and being able to keep the necessary oversight of all workstreams is equally important to functioning as the lighthouse helping the company to navigate the storm.

In your opinion, what expertise, attitudes, behaviours and practices characterise an effective legal team charged with crisis management?

The various stakeholders within the organisation will typically look to the legal team for leadership when a crisis hits. The legal team should therefore be an integral part of any crisis management team and have a good oversight of the corporate structure and all the internal stakeholders with whom they need to engage. A good understanding of the business is also indispensable since the legal team will have to find the right balance between providing legal advice and protecting the operational needs of the company, as well as managing communications, both externally and internally.

What do you personally find most rewarding and most challenging about advising in this area?

Being the trusted adviser to clients during crises, some of which may threaten the very existence of the company, is a true privilege. Helping a client prepare for the unexpected and then seeing this client execute on the crisis management plan feels really rewarding. The same is true for helping clients to identify the key lessons learned from a past crisis and implement that learning into the client's risk management system, making the company more resilient in the future.

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Japan

Yoshihiko Matake focuses on corporate crisis management, international dispute resolution, consultation on corporate governance and compliance framework and export control. He has advised domestic and foreign clients in various corporate crisis cases, including a high profile criminal trial regarding fraud in clinical research, large-scale data manipulation of product quality by manufacturers and international cartel and foreign bribery and corruptions. He has a great deal of experience of US class actions and mass actions and other international dispute resolution. His practice covers a large variety of corporate matters including export control, international trading regulations, data privacy regulations and other cross border legal matters, in particular involving North America. He worked at Nagashima Ohno & Tsunematsu NY LLP as a senior associate from 2010 to 2013. He graduated with an LLM from Columbia Law School in 2010 and with an LLB from the University of Tokyo in 2003. He was admitted to the Japan Bar in 2004.

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1 The word 'crisis' carries with it the notion of the sudden and unexpected. What can a business do in advance of a crisis striking to ensure that it is best prepared to navigate it?

Advance preparation is essential for a company to navigate a crisis

Generally, when a large-scale corporate crisis, such as product quality fraud (eg, manipulation of test data) or a data breach is identified, the company's actions to manage the crisis are typically phased as follows: (1) initial response, including preservation of evidence; (2) investigation of underlying facts; (3) root cause analysis; and (4) implementation of remedial measures. Companies often announce incidents publicly and communicate with customers, investors and other stakeholders who may be affected by the crisis in the course of implementing the action phases above. The latter three action phases above should be tailored on a case-by-case basis to address specific issues. Conversely, as the initial response often requires important decisions to be made within a short time frame in high-pressure situations, companies should prepare it in advance to address typical issues. Establishing such a framework should enable companies to provide an initial response smoothly.

Codification of decision-making process

Under the Japanese legal system, to ensure effective initial responses to crises, the following should be codified: the procedures and criteria for deciding whether an incident should be publicly disclosed, the structure of the investigative body for fact-finding and any other important issues to be addressed in the early stages of crisis management. In Japan, the failure of a listed company to disclose a corporate scandal or possibility of a scandal in a timely manner could constitute a violation of disclosure obligations under the Financial Instruments and Exchange Act, a Japanese securities law. In recent years, securities lawsuits have been filed claiming


Yoshihiko Matake


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Hayato Maruta

"Companies often announce incidents publicly and communicate with customers."

QUESTIONS

> "In practice, competent regulators and major business partners often expect prompt notice of a serious scandal before a public announcement is made."

such violations after high-profile corporate scandals occurred, and there have been law firms that have actively solicited potential plaintiffs to initiate such securities lawsuits. Although this practice of plaintiff lawyers is still rare and underdeveloped in Japan, more law firms might be interested in pursuing it in the future.

In the case of corporate scandals that could harm the health, safety, or wellbeing of consumers, a delayed announcement of the relevant issues could trigger civil damage lawsuits not only against the company but also against its senior executives that were involved in the decision-making process and that are alleged to have failed to perform their duties. Further, in some precedents involving product safety issues where physical damage was sustained, senior executives were charged for criminal offences. In contrast, in practice, competent regulators and major business partners often expect prompt notice of a serious scandal before a public announcement is made. Late notification to such parties could jeopardise relations with them, making subsequent crisis management more challenging. Therefore, for listed companies in Japan, the decision on the timing and information to be disclosed in public announcements of corporate crises is crucial and difficult even if the company successfully identifies the issues and maintains confidentiality in the initial stages. To tackle such challenges at the beginning of crisis management, internal rules organising a crisis response task force and information management policy will be useful, and provisions on procedures and the decision-making authority for public disclosure of crises will be important among such internal rules.

Under the Japanese practice of investigating large corporate scandals, companies sometimes set up an investigation committee that is independent of the company to some extent and will publicly release the committee's investigation report to restore its reputation and trust among its stakeholders affected by the scandal. Although the Japanese Bar Association has non-binding guidelines for such an investigation committee, there are no other statutory requirements or guidelines to follow. Therefore, decisions on whether to set up an investigation committee, the extent to which it should be independent of the company and the composition of its members and supporting personnel are left to the discretion of each company facing a crisis. In light of this, it would also be advisable for companies to prepare in advance the criteria and procedures for decision-making on matters related to the investigation committee.

Framework for preserving evidence

In preparation for a possible extensive investigation after the initial stage of crisis management, companies should consider efficient methods of preserving the relevant evidence before dealing with the major crisis. The Japanese litigation system does not have expansive discovery requiring parties to produce a large amount of evidence or preserve documents. Therefore, the main purpose of preservation in corporate scandals is to assist internal fact-finding investigations, as long as the subject matter has no effect outside Japan and is unlikely to be subject to the jurisdiction of foreign courts. For

example, in recent times, product quality fraud has been a frequent occurrence among Japanese manufacturers. In these cases, the data related to product quality or performance is often managed solely by a certain business division. As a result, the company may often not promptly identify quality tests that do not meet test conditions agreed upon with its customers. This is often due to engineers making unilateral decisions and manipulating data to conceal quality standards breaches.

To effectively manage crises caused by such misconduct, a key step is to put in place a process for preserving the relevant documents and data, such as product quality test conditions and test results that cannot be compromised by possible misconduct. Since the Japanese legal system does not provide for extensive discovery, many traditional Japanese companies prefer to retain written records, even if the relevant information they contain could be damaging in the event of civil litigation. It is not unusual for some companies to retain old documents after the applicable document retention period has expired. For better risk management, companies should periodically check which documents need to be retained and which can be discarded and review internal rules for document retention and deletion.

2 Some crises affect a business in unpredictable ways; others arise from well-recognised, though unwelcome, risks. What key themes underlie the risk management analysis in your jurisdiction? How might this analysis evolve over time, in light of any emerging or potential future risks?

Risk of criminal and civil liabilities under Japanese law

Under Japanese criminal law, companies are only subject to criminal liability if employees or other relevant personnel are criminally liable and dual liability provisions are applicable. The

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Criminal Code of Japan does not contain provisions on dual liability. However, other laws that specifically criminalise certain types of misconduct (eg, bribery of a foreign official) contain dual liability provisions. Furthermore, in practice, corporate scandals do not frequently lead to criminal prosecution of the company or its executives, and the amount of monetary penalties is generally much lower than in Western countries. However, the amount of such penalties has been on the rise in recent years. For instance, in a cartel case involving utilities companies in 2022, the companies involved face a potential monetary penalty of approximately US$1 billion.

Under Japanese civil litigation procedure, broad discovery of evidence, punitive damages and US-style class actions favourable to plaintiffs are not available. As a result, plaintiffs do not have much strategic leverage, and the risk of civil litigation arising from corporate scandals is low in Japan compared to the US and the UK. However, there is a recent trend under which plaintiff firms have been soliciting investors to initiate securities lawsuits, claiming that the listed

"To maintain their businesses, Japanese manufacturers were sometimes forced to commit to extremely high standards of product quality or conditions, which put unreasonable pressure on the manufacturing division. This pressure often led to misconduct in product development, manufacturing and testing."

companies have not disclosed non-compliance or associated risks in their disclosure documents under the securities regulation. This trend could become a significant risk in corporate crisis management in the near future. There are limited court precedents relating to corporate scandals in Japan and few reliable guidelines for crisis management. However, if not properly handled, a crisis can lead to various negative consequences other than criminal or civil liabilities, for example, the loss of trust with stakeholders, such as regulators, business partners, shareholders and consumers.

Backgrounds of product quality fraud in Japan

In many of the major fraud cases involving Japanese manufacturers regarding product quality, the relevant inappropriate business practices began long before they were discovered. This suggests that Japanese companies may find it difficult to detect and eliminate long-standing inappropriate practices at manufacturing sites involving many employees. In addition, their internal reporting and monitoring systems may not be functioning effectively to escalate the issues relating to such practices. This issue can be partially attributed to the unique lifetime employment system in Japan. This system, which was introduced in the later half of the 20th century, involves workers staying with one company for their entire career and was a common practice in Japan. As a result, the allocation of human capital was generally less flexible, with many workers remaining in a business division for a long time, and some divisions becoming 'untouched sanctuaries' where once an inappropriate practice begins, it can easily be concealed from monitoring or auditing by personnel outside the division. This organisational characteristic appears to be one of the causes of long-standing misconduct in Japanese companies.

In addition, in recent decades, the growth of the manufacturing industries in China and other emerging countries has led to increased competition for Japanese manufacturers, which

had previously leveraged their high-quality products to gain significant market share. To maintain their businesses, Japanese manufacturers were sometimes forced to commit to extremely high standards of product quality or conditions, which put unreasonable pressure on the manufacturing division. This pressure often led to misconduct in product development, manufacturing and testing.

That said, the recent increase in the discovery of inappropriate business practices in Japanese companies may be linked to a more liquid Japanese labour market as well as increased compliance awareness. The commentary No. 1-2 of the Japan Exchange Group's principle of preventing corporate scandals states that the concept of 'compliance' should encompass not only compliance with explicit laws and regulations but also a commitment to business partners, customers, employees and other stakeholders. This is also evident in the growing awareness of compliance in Japanese society and the broadening view of corporate social responsibility.

As the baby-boom generation retires and the practice of lifetime employment becomes obsolete, the liquidity in the labour market should also improve the flexibility of Japanese companies' business organisation, which may highlight existing inappropriate practices. In addition, whistle-blower reporting systems tend to be more effective in identifying compliance risks after the amendment to applicable laws and the improvement of compliance awareness.

Although the Japanese economy continues to play a significant role in the global supply chain, there may still be some Japanese companies engaged in ongoing, yet undiscovered, inappropriate business practices. Although statutory sanctions against corporate scandal in Japan are currently not as severe as in some other jurisdictions, improved compliance awareness may lead to more rigid enforcement or enactment of penalties, and civil claims, including securities lawsuits, related to corporate scandals. The

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risks associated with serious and long-standing misconduct should never be underestimated.

3 In a crisis, stakeholder expectations of a continuing narrative and explanation are high and the interests of various groups are not necessarily aligned. How does a business meet varying expectations of what to say and when to say it? How does a business maintain an open narrative while best minimising legal risk?

The content and timing of publication differ between cases where disclosure and publication are mandatory and those where disclosure is not required by applicable laws and regulations. These two cases are discussed below (see under the following header for initial disclosure).

QUESTIONS

"Even though laws and regulations may require disclosure and publication, if they are made without thoroughly verifying the facts, inaccuracies in the disclosure would further affect the credibility of the company."

Cases where disclosure and publication are required by applicable laws and regulations

In this case, the timing and content of the disclosure will need to comply with the disclosure timing and publication requirements of the applicable laws and regulations. For example, according to article 402 of the Securities Listing Regulations of the Japan Exchange Group, if there is any event that requires timely disclosure, the details of this event will need to be disclosed immediately. In many instances, a listed company's crisis requires timely disclosure as it involves 'important facts relating to the operation, business, or property of the listed company or the listed share certificates, etc. concerned, which significantly affect the investment decisions of investors', as stated in provision x of article 402 of the Regulations. In addition, according to article 402-2 of the Enforcement Rules for Securities Listing Regulations, when an event that requires timely disclosure occurs, the details, overview and future outlook of the event will need to be disclosed.

In addition, under the Act Against Unjustifiable Premiums and Misleading Representations Act (the Premiums Act) (see article 5, paragraph 1of the Premiums Act), in the event of a violation of the prohibition against misleading representations, the Commissioner of the Consumer Affairs Agency generally issues an order. This order requires that measures be taken to ensure that the general public is made aware that the company's representation was in violation of the Premiums Act (see article 7 of the Premiums Act: Order for Measures). Furthermore, the Consumer Product Safety Act requires manufacturers and importers to promptly and accurately report the name, type and details of any serious accident involving their manufactured products, among others, to the Consumer Affairs Agency within 10 days of becoming aware of the accident (including the date they became aware) (see article 35 of the Consumer Product Safety Act).

There are also cases where failure to disclose a crisis is considered a breach of the duty of due care of a prudent manager owed to the management of the board of directors, among others, even though this is not clearly required by laws and regulations (see the 9 June 2006 Decision of the Osaka High Court).

However, even though laws and regulations may require disclosure and publication, if they are made without thoroughly verifying the facts, inaccuracies in the disclosure would further affect the credibility of the company. Therefore, companies should adopt a policy of delaying disclosure and publication to the extent possible to investigate and verify facts while assessing the risk of breach of disclosure obligations.

Cases where disclosure and publication are not required by applicable laws and regulations

In this case, it should be determined whether publication is necessary in the first place. Generally, if a warning is required to prevent or limit potential harm of customers or other parties outside of the company, such as in the case of a product safety issue, disclosure should be made immediately. Disclosure should also be considered where it is difficult to respond individually or where reputational damage would be significant if the scandal were to be discovered in an uncontrolled manner.

Regarding the timing of publication and disclosure, efforts should be made to disclose the discovered facts and the investigation results as early and as quickly possible, especially where it is highly necessary to prevent or limit potential harm to third parties. However, as mentioned above, the relevant facts should be thoroughly verified, and accurate information should be published.

For voluntary publication, there are no common standards for the information to be included, and the appropriate content should be determined in light of the timing and purpose of the publication.

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To limit or prevent potential harm to third parties, the minimum information necessary for the intended purpose should be disclosed, but it is usually acceptable to indicate that information that is not known at the time of publication is being actively 'investigated' and will be disclosed later if necessary.

4 Many crises are critical because they involve the potential for widespread civil liability and many claimants. What challenges arise in the resolution of multi-party claims and how does a defendant determine its strategy to meet them?

Litigation for pursuing liability in Japan

The main stakeholders who can seek to hold companies liable for the crisis are shareholders, business partners, consumers, other affected parties and local community members. The typical methods of seeking liability include filing a claim for damages based on general

"There is no class action system in Japan. However, there is a consumer group litigation system. This is a system under which a consumer organisation authorised by the Prime Minister may file a lawsuit, or take other legal action, against an entity on behalf of a group of consumers."

tort or breach of contract. In this answer, we will briefly explain some of the particular methods each stakeholder may adopt in Japan.

Shareholders

In Japan, shareholders' derivative actions are permissible under article 847, paragraph 3 of the Companies Act. If the decision-making or action of a company's directors or officers results in the company incurring losses and the company fails to hold them accountable, shareholders may bring a lawsuit against them on behalf of the company based on prescribed procedures. Even if shareholders were to lose such a lawsuit, in principle, they would not be required to compensate the company for any damage arising from the lawsuit unless the shareholder had malicious intent (see article 852, paragraph 2 of the Companies Act).

In addition, the Financial Instruments and Exchange Act (FIEA) allows investors to seek compensation for damage caused by misrepresentations or omissions of material items in disclosure documents such as annual securities reports of a listed company. In relation to claims for damages under the FIEA, all or a part of the burden of proof is shifted to the company or its directors, or proof of certain elements may not be required at all. Thus, the FIEA provides actions that are highly effective in protecting shareholders (see articles 18, 21, 21-2, 22, among others, of the FIEA). For example, if an individual who has acquired shares in an issuing market claims damages against a listed company (article 18 of the FIEA), the company may still be held liable for damages even if it was not negligent in making the misrepresentation. In addition, under the law, the difference between the market price at the time of the claim for damages and the acquisition price of the shares (or if the shareholder has disposed of the shares, the difference between the disposal price and the acquisition price) is deemed to be the amount of damages (see article 19, paragraph1 of FIEA), unless the company can prove the lack of causation. Therefore, shareholders

are not required to prove a causal relationship between the misrepresentation and the damage, or the amount of damages.

Consumers

There is no class action system in Japan. However, there is a consumer group litigation system. This is a system under which a consumer organisation authorised by the Prime Minister may file a lawsuit, or take other legal action, against an entity on behalf of a group of consumers. Under Japanese law, a qualified consumer organisation can protect the interests of many unspecified consumers using two methods. The first is by seeking an injunction against an unjust act committed by an entity. The second is through a system under which a specified, qualified consumer organisation that has been newly authorised by the Prime Minister can seek collective recovery of damage on behalf of a consumer against entities that engaged in unjust practices. However, the actual use of these methods is rare (only four cases as at February 2023).

Other stakeholders

Business partners and other stakeholders of the company can claim damages by bilateral civil lawsuits. However, business partners often settle the matter through ongoing businesses (eg, certain business terms favourable for them in their ongoing transactions) rather than filing a lawsuit.

Issues in dealing with lawsuits in Japan

In Japan, it is generally expensive for plaintiffs to bring lawsuits given the court fees, which are based on the amount claimed. For example, to file a lawsuit claiming an amount of ¥1 billion, plaintiffs will need to pay a fee of ¥3 million or more to the court. More importantly, there is no discovery system in Japan, making it challenging for plaintiffs to obtain relevant information and evidence to establish their case. Moreover, since there are no class actions and punitive damages

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cannot be sought, there are relatively few cases in which a substantial amount of damages are claimed and awarded for fraudulent acts in lawsuits. Against this background, it is not common for the plaintiff lawyer to proactively file civil suits in Japan. However, as mentioned under the header above, companies in Japan may establish investigation committees, which often investigate the detailed facts somewhat independently of the company, and publish an investigation report detailing its results. Generally, these investigation reports are considered highly reliable, and it is practically difficult for a company that handles a crisis based on such reports to deny or dispute the facts in them in the event of litigation. Therefore, it may be challenging to defend a company in a lawsuit if there is an investigation report containing specific facts that constitute causes of action against the company. In recent years, lawyers have been actively soliciting victims in securities lawsuits, claiming that the disclosure of such fraud was inadequate. However, these types of lawsuits do not provide compensation for damage caused by fraudulent acts described in an investigation report.

QUESTIONS

"It is advantageous not to provide anything beyond the minimum explanations necessary in view of the risks of potential litigation and other factors when making public disclosures."

Litigation response strategy

Large-scale consumer lawsuits are rare in Japan. Instead of taking legal action immediately, even for individual customers, it is more common to attempt to resolve disputes through non-contentious negotiations. To ensure successful negotiations and avoid litigation with stakeholders in Japan, it is also common for companies to address customer concerns individually to assure them of product performance or safety. In relation to product defects, companies may voluntarily recall products and compensate consumers to gain or regain their trust and satisfaction.

Although there are many precedents for derivative lawsuits against directors and officers responsible for fraud, the extent to which companies will defend the directors and officers in this type of litigation will depend on how the directors or officers are allegedly involved in the fraud and whether the liability of the directors and officers is covered by D/O (directors and officers) insurance policies or by indemnification agreements between companies and directors and officers.

In Japan, it appears that there have been no cases of securities lawsuits arising from corporate crises other than accounting fraud that led to a court decision. According to the FIEA, companies are exempt from liability if they can prove that shareholders were aware of misstatements in the disclosure documents at the time of the acquisition of shares. Therefore, in the event of a scandal at a listed company, prompt disclosure of the relevant facts can minimise potential risk. However, as mentioned under the header 'Shareholders', it is challenging to strike a balance between the time required to verify facts and that required for disclosure.

5 Alongside managing the crisis is the imperative to maintain 'business as usual'. How can lawyers help to establish what went wrong and minimise the impact of those issues on the underlying business?

Early stage of crisis management

To minimise the impact of a crisis, such as quality improprieties that affect business partners and other stakeholders, it is crucial to prevent or limit potential harm by making announcements to stop using the relevant products and suspending shipments as the first step. Companies should provide customers with explanations that are sincere, accurate, and easy to understand, and make public disclosures. At the same time, it is advantageous not to provide anything beyond the minimum explanations necessary in view of the risks of potential litigation and other factors when providing explanations to customers and making public disclosures. Involving lawyers with experience in crisis management and legal knowledge can provide an appropriate response that balances legal risk with honest explanations. In addition, companies should detect the spread of fraudulent activities promptly and accurately, and to consider countermeasures. For this purpose, it is useful to involve lawyers with appropriate expertise and knowledge in collecting evidence and conducting fact-finding.

Investigation committee

In Japanese practice, lawyers sometimes conduct investigations as members or assistants of highly independent third-party committees, instead of as typical advisers, to ensure that the investigations are highly reliable. The investigation committee operates completely independently from the company and may not share the progress of its investigation with the company until the investigation is completed and the investigation report is published. In some cases, it may share the progress of its investigation with the company in a manner that ensures a certain degree of independence, with the company responding to the crisis based on it. In the latter cases, the company may make external responses (eg, public announcements) based on the reliable fact-finding shared by the investigation committee. In the former cases, however, it may be necessary to retain separate counsel responsible for crisis management to gather evidence and conduct fact-finding to handle external responses.

Attorney–client privilege

In addition, it is common for the legal department of a Japanese company not to have a qualified lawyer, so it may be necessary to retain an outside lawyer to establish a confidential attorney–client relationship in cases involving foreign countries. In recent years, the Japanese Antimonopoly Act has introduced the specified communications protection system (ie, the Japanese equivalent of attorney–client privilege to protect communications between lawyers and clients in certain circumstances), under which it may be possible to exclude certain documents from the scope of administrative investigations (see article 23-2, paragraph1 of the Rules on Examination by the Fair Trade Commission). However, since this protection is limited to cases where an in-house lawyer is working independently, not under the supervision of the company, it is more advantageous to retain outside counsel.

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QUESTIONS

The Inside Track

What traits, skills and experience do you think are critical for a lawyer advising on crisis management?

Crisis management practitioners should provide their clients with effective legal advice that alleviates their concerns, enables them to grasp the crucial elements of their crisis, and allows them to make informed decisions on complex issues in the midst of an emergency. In order to provide such advice promptly and within a tight time frame, a lawyer in this field should have broad experience in various practice areas, not just in disputes and investigations, but also in regulatory and corporate laws. The skills to appropriately identify and prioritise critical issues and to build strong relationships of trust with clients are essential for this practice.

In your opinion, what expertise, attitudes, behaviours and practices characterise an effective legal team charged with crisis management?

A law firm's crisis management team should collaborate as 'one team', working as a cohesive unit, sharing a common purpose and adopting a uniform approach to addressing the various issues that may arise in a major crisis. The crisis management team should ideally comprise lawyers with diverse backgrounds and experience, including the main subject matter of the crisis, as crisis management matters often require leveraging knowledge from various areas of the law. The legal team needs strong leadership to effectively assess the scope of, and prioritise, the issues, and utilise team members who can act independently and promptly to address them.

What do you personally find most rewarding and most challenging about advising in this area?

Companies in need of advice on crisis management are often in a state of great panic and find it difficult to make appropriate decisions. Furthermore, the corporate governance of such companies has serious problems in many cases of major corporate crisis. As a result, it is sometimes difficult for outside counsel to maintain a good relationship with the client or help the client make the appropriate decision. On the other hand, it can be rewarding to provide effective crisis management advice to help companies facing a serious threat to their survival, as a successful outcome is highly regarded by such companies, builds trust and enhances reputation as a lawyer.

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Switzerland

Adeline Burrus-Robin of Faerus Ltd specialises in business and financial crime matters and commercial dispute resolution. She regularly advises and represents accused individuals and entities in criminal proceedings and, in particular, assists them in obtaining the lifting of related freezing orders targeting their assets. She is also experienced in assisting clients in the context of court claims.

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Fuad Ahmed of Faerus Ltd specialises in business and financial crime matters and commercial dispute resolution. He regularly advises and represents private and corporate clients in criminal matters involving misappropriated funds, bribery, fraud schemes, money laundering, criminal mismanagement, etc. He also assists our clients in commercial disputes and provides advice and representation in enforcement proceedings, asset tracing and recovery.

QUESTIONS

1 The word 'crisis' carries with it the notion of the sudden and unexpected. What can a business do in advance of a crisis striking to ensure that it is best prepared to navigate it?

No organisation can anticipate every threat. Establishing a crisis management plan is, however, essential for reducing chaos when crisis strikes and mitigating reputational, financial and legal consequences. In a perfect world, companies would have a plan in place for each variety of potential crisis, or at least for the crisis most likely to happen: operational (eg, compromised major equipment, bankruptcy of key supplier, energy shortage), economic (eg, market crashes), human resources (eg, loss of key executive or team member), reputational (eg, rumours about the organisation), legal (eg, investigation for alleged misconduct), natural disasters (eg, flash floods, fire, disease outbreaks) and crimes (eg, tampering, terrorism, kidnapping). However, in reality, organisations generally do not prepare in advance management crisis plans for each variety of potential crisis. Obviously, the crisis management plans are most frequently linked with the size of the company and the level of risk in its business.

Concretely, in our opinion, any crisis management plan should first name the key players to be informed once the company is aware of the crisis. The list should include the team or department those people are members of, and how to best communicate with each member individually. If there is an internal chat system or group email for the whole team, this should be listed here as well. The crisis management plan should also include a dedicated section on roles and responsibilities of the crisis management team members. The crisis management plan should then list questions that the person reporting an incident must be able to answer as soon as possible to help the crisis management team in assessing and navigating the issue (eg, What happened? Where and when? Who was affected?


Adeline Burrus-Robin


Edouard Faillot


Fuad Ahmed

"Establishing a crisis management plan is essential for reducing chaos when crisis strikes."

> "The crisis management plan should also include a list of external professionals that should be contacted, depending on the type and the level of crisis."

Who is involved? When did we learn about the incident? What is the impact or likely impact? Is there any immediate danger? Do we understand the entire issue?). The crisis management plan may also identify different levels of crisis, with a description for each level to help to identify the level of escalation, and the required actions for each level. Finally, the crisis management plan should also include a list of external professionals that should be contacted, depending on the type and the level of crisis (eg, attorney and PR agency). Ideally, the crisis management plan should be reviewed every six months to ensure the roles, contact details and reporting lines of everyone involved are accurate, as well as to cover newly identified risks. The company should also hold practice simulations to train staff and expose weaknesses in the plan. Reviewing the response procedures and organising training regularly will help the staff to click into action if a crisis strikes.

In parallel to the crisis management plan, it is important to have a clear crisis communication plan in place to address the expectations of various stakeholders. The communication plan should identify the communication team members, and include a list of key media contacts, company background information and a set of pre-approved messages for use during any variety of crisis. The benefit of having a bank of communication is to ensure a quick response and consistency, including social media use.

In conclusion, although crises are most of the time sudden and unexpected, we believe that preparing plans in advance and having training bring significant help to navigating though any kind of crisis.

2 Some crises affect a business in unpredictable ways; others arise from well-recognised, though unwelcome, risks. What key themes underlie the risk management analysis in your jurisdiction? How might this analysis evolve over time, in light of any emerging or potential future risks?

All types of organisations have experienced a variety of crisis during recent years in Switzerland: data theft (HSBC), rumours about the organisation (Credit Suisse), regulatory investigations (Raiffeisen, UBS), bankruptcy of key supplier (Tamoil), market crashes (Swissair) and loss of a key executive or team member (Swiss National Bank). However, crime crises (eg, tampering, terrorism and kidnapping) and natural disaster crises (eg, flash floods, fire and disease outbreaks) remain rare.

Based on experience, the key themes are information security (data protection) and financial regulation, mostly compliance with anti-money laundering (financial institutions), anti-corruption laws (organisations operating in sensible jurisdictions) and sanctions laws (all types of organisations). With Switzerland being a hub for commodity trading (approximately 25 per cent of transactions worldwide), the violation of human rights and events triggering pollution are also under scrutiny.

Lately, reputational risk has become more and more significant, in particular in relation to cases of bullying and sexual harassment of employees. To mitigate this risk, employees shall be given clear guidelines on how to behave at work and in particular towards subordinates. Regular training is also key in this context. Finally, an effective reporting system should be put in place, to allow the employee that feels like a victim of misconduct to escalate the case quickly and effectively.

Speaking about internal reporting systems of misconduct, it is general knowledge that whistle-blowing is often the starting point of a crisis. In Switzerland, there is no explicit law on whistle-blowing. Consequently, the measures that whistle-blowers may take to report misconduct, and the circumstances in which they may report directly to the authorities or the public, have primarily been established by case law, which we expect to continue to evolve. To avoid the escalation of internal issues to possibly public reports with potential serious adverse reputational, financial and legal consequences, it is crucial for any organisation to put in place effective internal reporting systems.

To mitigate the effects of undesired events that may lead to a crisis, companies are more and more conducting internal investigations, with or without the assistance of outside counsel, to identify what went wrong and to minimise the impact of these events. There is, however, no explicit law on internal investigations in Switzerland. It is also mostly case law that developed the practice, which we also expect to continue to evolve. Important questions concern confidentiality and employee rights. Outside counsel generally have knowledge and experience of the pitfalls to be avoided that could make an internal investigation counterproductive.

All past events should allow organisations and external advisers to gain experience to mitigate several risks and to improve procedure to navigate through potential new crises.

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3 In a crisis, stakeholder expectations of a continuing narrative and explanation are high and the interests of various groups are not necessarily aligned. How does a business meet varying expectations of what to say and when to say it? How does a business maintain an open narrative while best minimising legal risk?

The main stakeholders will vary depending on the nature of the organisation. However, they are likely to include most, if not all, of the following groups: top management (one member at least is likely to be part of the crisis management team, the others have to continue to run the business), legal and compliance (who are not always the best people to make decisions as their usual desire to eliminate risk makes them slow to react), outsource providers (what if IT fails?), supply chain (who can be either the cause of the crisis, or worried about a crisis encountered by the organisation), clients (who may wish to terminate or suspend their relationships with the organisation during the crisis, or the organisation may want to let down a client if

"The crisis communication plan should identify who the stakeholders are and their specific concerns, priorities, and expectations. This will help to determine what information should be communicated and to whom."

the client is the cause of the crisis), shareholders (most likely if the board is involved in the cause of the crisis, or if the approval of the board is required to activate a crisis management plan) and the media (in the event of press coverage).

The crisis communication plan should identify who the stakeholders are and their specific concerns, priorities, and expectations. This will help to determine what information should be communicated and to whom. The continuous monitoring of feedback from stakeholders to determine their concerns and priorities (which may evolve during the different steps of the crisis) is key to the appropriate time and manner of communication. The downside of open and proactive narration is the risk of pitfalls. As a general principle, speculation and statements that are not supported by facts must be avoided. Keeping records of all communications (who was informed, when and through which channels) is a helpful tool. The next actions and communications can then be decided based on a comprehensive understanding of the information already disclosed. In this context, the assistance of a professional specialising in public relations and communications might be recommended, depending on the level of crisis and the sensitivity of the issue at hand.

With respect to the specific case of criminal investigation, the timing of communications with stakeholders generally depends on the degree of the measures taken by authorities. The receipt of a simple list of questions from the office of the attorney general in relation to a business partner or a transaction is obviously different to a dawn raid, which employees at all levels are likely to notice. The other criterion is also whether the press speaks about it. On the one hand, if the matter is likely to be reported by the media (questions asked by journalists, etc), stakeholders must be informed beforehand to maintain trust and to control the communication around the investigation. On the other hand, if the investigation is not under the radar of the media, the crisis management team may be limited to a small number of members and may want to limit the spreading of information, including among stakeholders.

4 Many crises are critical because they involve the potential for widespread civil liability and many claimants. What challenges arise in the resolution of multi-party claims and how does a defendant determine its strategy to meet them?

The resolution of multi-party claims can be challenging for a number of reasons. Some challenges are identical to those in defending any other case, and some others are specific to 'class actions' (note that as mentioned below, Swiss law is not familiar with class-actions). However, given their size and exposure, Swiss companies have international reach and may be exposed abroad to class actions. The general challenges are to gather all relevant facts (including the number of potential claimants), to understand the legal issues involved and to commit time and resources to educate the outside counsel on the product or service in dispute. The specific challenges

are to hire lawyers who specialise in class action lawsuits and have expertise in the specific type of case being handled, and to find technical experts that can see nuanced issues among claimants to help defeat a unified strategy. There is a cost, but the value they bring to a case may be priceless.

In defending class actions, it is even more important to get on top of it very quickly and to develop a game plan aiming to dictate the course of litigation, instead of undergoing it. The definition of victory may differ from one case to another. A win may be defined by reducing the number of claimants or by delaying the process, which can be important for how the case is then viewed by claimants themselves and the authorities. The number of relevant documents is generally exponential in multi-party claims. A specific plan is necessary to gather, sort, review and organise all these documents in the most effective and cost-efficient manner. Finally, the defendant should be prepared to fight the battle on multiple fronts, as similar cases may be filed in other jurisdictions, which means that an overall strategy must be defined to ensure consistency.

Under Swiss law, however, there is currently no equivalent to the class action well-known in US law. One notable exception is found in the Swiss Merger Act in relation to minority shareholders' claims. The civil procedure also allows persons whose rights and duties result from similar circumstances or legal grounds to appear jointly as claimants or to be sued as joint defendants (ie, 'simple joinder of parties'). The joint claims shall, however, remain legally independent, even if they will be settled by a single judgement. Each claimant may proceed independently from the others. Moreover, associations and other similar organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals may bring an action in their own name for a violation of the personality rights of the members of the group. The most common example is a claim filed by a consumer association.

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The association is in this context is only authorised to request: (1) the prohibition of an imminent violation; (2) the stopping of an ongoing violation; and (3) the establishment of the unlawful character of a violation if it continues to have a disturbing effect, but cannot file a claim for damages. The Swiss government published a draft law in December 2021, intended to amend this mechanism. The government proposes to expand the scope of this group action by: (1) broadening its scope to all violation of the law (and not only the violation of personality rights as is currently the case); (2) adding the possibility for notification of the decision to third parties; and (3) adding the possibility to file a declaratory claim. This draft law also provides for the possibility to bring claims for damages. It has, however, not yet been approved by the Swiss parliament.

Finally, in those multi-party claims cases, communication is key, and it is important that communication is monitored from the beginning of the case by a PR expert that has the same culture of the country where the crisis occurred and will impact the company. For instance, one should not communicate the same way in Japan the way one

would in the US. A wrong communication may kill the business of the company even if ultimately the company succeeds in its litigation.

5 Alongside managing the crisis is the imperative to maintain 'business as usual'. How can lawyers help to establish what went wrong and minimise the impact of those issues on the underlying business?

Lawyers can play a significant role in helping to establish what went wrong, as they are generally very able to undertake investigations. Their day-to-day business is to gather facts and to identify factual and legal issues. This also includes identifying any weaknesses in the company's internal controls and governance structures. Outside counsel have the benefit of being independent when collecting and analysing data, interviewing key employees, and reviewing internal documents. The investigation's result is less likely to be biased by subjective understanding or by employees conducting the investigation who are potentially themselves involved in what went wrong.

In addition to identifying legal and regulatory issues, lawyers can help in minimising the impact of the crisis on the underlying business. Experienced lawyers have a sense of urgency and priorities, with the ability to reassure their clients in difficult situations, which is crucial when it comes to taking strategic decisions that should never be dictated by emotional distress. In difficult situations, lawyers can direct and help the client focus on the day-to-day business by organising priorities (including non-legal priorities) and showing that the crisis is well managed if not under control yet.

Experience shows that lawyers can play a key role and bring value in developing and implementing a crisis management plan that addresses the immediate and long-term effects of the crisis. The management of a crisis is time-consuming and requires quick reaction. The management of a company has generally no time to handle both 'business as usual' and the crisis. It is therefore important to have an additional external task force to allow the management to continue delivering on 'business as usual'. The outside counsel has resources to take immediate action to protect the company and its reputation, do project management of the crisis efficiently, support with internal and external communications and respond to requests from the authorities. The lawyers' network will also be very helpful in this context, as it may help identify the professional that should be contacted in order to mitigate the effects of the crisis, such as public relations professionals, IT specialists and financial analysts. The intervention of outside experts should not be underestimated at a time of crisis where the management and the employees of a company will be put under high pressure and can themselves even be involved in the cause of the crisis.

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QUESTIONS

The Inside Track

What traits, skills and experience do you think are critical for a lawyer advising on crisis management?

A lawyer advising on crisis management should have a deep understanding of the relevant laws and regulations at stake, as well as knowledge on the specific industry where the business operates and understanding of how crisis management may differ in that industry and in the country at stake. The ability to adapt to changing circumstances and provide guidance in real time is critical. The lawyer should also have the ability to clearly and effectively communicate complex legal issues to non-legal stakeholders, such as executives, employees and the public, as well as to work effectively as part of a cross-functional team made of communication and operational stakeholders.

In your opinion, what expertise, attitudes, behaviours and practices characterise an effective legal team charged with crisis management?

An effective legal team charged with crisis management should possess a combination of expertise, attitudes, behaviours and practices that allow them to anticipate, assess, and respond to a crisis in a timely, efficient and strategic manner. This includes knowledge of relevant laws and regulations, a deep understanding of the underlying business and industry, a sense of urgency and accountability, strong communication and negotiation skills, a well-established crisis management plan and access to necessary resources and tools, including technology. Finally, being able to absorb the pressure that is on the client's shoulders is key.

What do you personally find most rewarding and most challenging about advising in this area?

It is extremely rewarding to be able to help executives and companies in a time of great need and to see the positive impact of our advice. This is, however, not exempt from serious challenges: we often face difficult decisions and ethical dilemmas. Additionally, communicating effectively with people who are in distress and may be resistant to accepting advice is part of the challenge.

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United Kingdom

Christa Band is a partner in the litigation department at Linklaters LLP in London. She has over 25 years' experience as a litigation partner, advising banks, financial services institutions and corporates on all aspects of contentious work, much of which is multi-jurisdictional. She manages parallel proceedings for clients in regulatory, civil and criminal contexts. She has helped clients navigate a number of crises in different sectors and contexts.

Read this article on Lexology

1 The word 'crisis' carries with it the notion of the sudden and unexpected. What can a business do in advance of a crisis striking to ensure that it is best prepared to navigate it?

Well-managed businesses are continually reviewing their governance, systems, procedures, training and culture to minimise the risk of a crisis happening in the first place. However, even the best run companies are subject to crises and need to prepare for that eventuality.

The precise way in which a crisis unfolds, and its timing, may be hard to predict but careful preparation enables a company to translate 'crisis' into 'situation being dealt with'.

That preparation should start with legal risk mapping. This is an exercise in identifying the sort of risks to which the business is exposed and assessing the impact and seriousness of the potential consequences were they to do so. It is a topic that a company should keep under regular review as risk profiles change and develop over time.

There is no substitute for discussion and sharing ideas. Colleagues within the business should be used as a sounding board, and companies should regularly pick the brains of their external advisers. The chief technology officer's view of the risk environment will differ from that of the head of HR and from that of the chief financial officer. Here, perhaps more than anywhere else, diversity of experience and approach is vital if the company is to form a rounded view of the risks it faces. This offers the company choices in terms of risk mitigation. However, it is also essential preparation: when a crisis happens, the business will cope much better with it if the element of surprise is reduced. Having thought through consequences in advance will enable greater clarity of decision-making and a more efficient and confident response.

Christa Band

Things that a board would be well advised to have thought through in advance include:

- The identification of an internal team that is well-placed to guide the company through the unfolding events. Setting the right 'tone from the top' will be a key part of the company's mitigation strategy and senior level engagement is vital. The internal team is likely to include the general counsel, the chief risk officer and others who may be important because of their particular role or expertise, for example the head of HR or the chief technology officer. Depending on how the relevant events have arisen, it may be important to have alternates for some roles so that no one is put in a position of having to review their own work.
- Similarly, a list of potential external advisers needs to be readily to hand. The company will usually need a multidisciplinary team of external advisers including lawyers, accountants, data specialists

"Employees who need to be familiar with these issues will vary. Receptionists and security guards need to know whom to call and what to do if there is a dawn raid or protesters turn up at company premises."

and PR advisers, and that team has to be pulled together in a hurry. General counsel know how to contact relevant advisers at any time; but those details need to be available to others if the general counsel is not around when the crisis first presents itself.

- With a number of moving parts and often many people involved, having clear lines of communication is really important but not always easily achieved. Clarity is needed as to who can make decisions as to what issues, recognising that decisions often have to be made quickly. While it is not realistic to have all this determined in advance, as it may need to reflect the particular facts, the company can identify who would undertake the chief of staff role, and top of that person's to-do list should be a plan for communication and reporting.
- Potential stakeholders should be identified as part of the planning process. They will include employees, customers, investors, lenders, regulators, insurers and others depending on the crisis. Their interests will vary depending on the facts that have given rise to the particular problem. To state the obvious: joined-up thinking between those liaising with the various stakeholders will be vital.
- Some companies have first-hand experience of dealing with a crisis. Where they have, it should prompt a 'lessons learned' analysis, and those lessons should be built into the crisis planning for the future.
- For all companies, there is learning and experience that can be gathered, kept up to date and shared and on which training (including dry runs) should be given as appropriate. Particular topics include:
    - dawn raids (as per the relevant regulatory regimes);
    - cyberattacks;
    - protestors and picketing;
    - natural disasters and security threats affecting the business premises and staff;

- media: media training for senior management is good preparation for a crisis. The company's approach to social media needs to be kept up to date, including through guidance to employees;
- the company's policies, and the general law, in relation to access to employees' emails and other electronically held data; and
- business resilience plans should be in place and up to date.

Note that employees who need to be familiar with these issues will vary. Receptionists and security guards need to know whom to call and what to do if there is a dawn raid or protesters turn up at company premises.

- The first 24 hours of a crisis are crucial. Navigating this early period carefully and with good preparation will instil confidence in staff, regulators and other key stakeholders. Not everything can be scripted in advance, but what a company can do is to have a written plan for those initial hours – extending into the first couple of days. The exercise of committing this 'First 24 hours' plan to paper should ensure that no important aspect is overlooked in the inevitable disruption as events unfold in real time. Documents it is sensible to hold alongside the 'First 24 hours' plan include a corporate structure chart, details of internal reporting lines, the company's 'values statement' or equivalent, the employee handbook and IT policies and the insurance policies.
- Although some crises hit businesses without warning, the genesis of others can be spotted. A careful eye should be kept on issues that are minor at present but that, were they to escalate, could cause a serious problem, whether economically or reputationally. This includes complaints or disputes that seem minor on their face but which, if successful, would be available to a larger group.
- If it seems to senior management that a crisis is brewing, either for the particular company or the relevant sector, it can be very helpful to have the communications team collate recent media coverage so that it is readily to hand.

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Careful, thorough, up-to-date preparation will pay dividends if – when – a crisis strikes. Having done a good deal of thinking in advance will enable the company to develop the most effective strategy for dealing with the crisis.

2 Some crises affect a business in unpredictable ways; others arise from well-recognised, though unwelcome, risks. What key themes underlie the risk management analysis in your jurisdiction? How might this analysis evolve over time, in light of any emerging or potential future risks?

How and where a company operates shapes the legal risks it faces. However, some key themes are common across all businesses. It is, in a sense, artificial to divide these up since they are interlinked and can arise in combination. With that caveat, current themes include:

"The huge and rapid growth of litigation funding in the UK means that the scale and scope of a crisis and its potential to cause economic harm to a company has been dramatically increased."

- Data: since the acquisition, holding and management of data is something that pretty much every company does, and since technology is susceptible to glitches – from malfunctions to cyberattacks – and human beings are never immune from leaving documents on a train, data forms the basis of many crises. Those whose data are affected are increasingly able not just to complain to the regulators but also to bring claims for compensation. The English courts have recently made the process for bringing those claims somewhat more challenging, but the risk remains. The reputational consequences of a failure to protect data are potentially very damaging, and regulatory fines can be seriously high.
- ESG: the 'environmental, social and governance' agenda is in focus for a whole range of stakeholders, and their scrutiny can be intense. Companies are increasingly held to account for what they may have done in the past, their perceived current contribution to climate change and whether their plans for the future do enough to move the company forward to the net zero goal and match what they have told investors and customers. Stakeholders can and do use legal challenges to pursue the change agenda. These rely on the existing law, but there is also pressure on companies to meet 'soft law' standards not found in a statute, rulebook or precedent.
- Product liability: the faulty or defective product that either malfunctions or that, worse still, harms the consumer, is a well-recognised source of a crisis. However, increasingly, product liability includes not simply a product's physical attributes but what a company has told the market about the product and its qualities. This can be closely tied to ESG issues.
- Corporate culture, compliance and whistle-blowing: a crisis that emerges through a whistle-blower's report entails particular challenges. These crises are real and difficult to navigate but often not so much concerned with legal liability as they are with reputation management and identification and implementation of cultural changes.
- Geopolitical changes: the seismic changes that the world has experienced over the past two years will underpin legal risk for the near future. Supply chains are disrupted and market dislocation results in failure to perform contracts and increased costs of borrowing. Close monitoring of sanctions and other fast paced legal developments is essential.
- Natural disasters: these come in many shapes and forms. Almost every business will have had its planning for such an event tested through the covid-19 pandemic.
- Litigation funding and a focus on claimants: the huge and rapid growth of litigation funding in the UK means that the scale and scope of a crisis and its potential to cause economic harm to a company has been dramatically increased. Here, legal merit does not automatically dictate legal risk. Claimants know that even claims of uncertain legal merit may have a commercial settlement value. Not every crisis will result in group litigation, but claimant

law firms advertise extensively for potential claimants to join a group in what is promoted as risk-free, cost-free litigation.

3 In a crisis, stakeholder expectations of a continuing narrative and explanation are high and the interests of various groups are not necessarily aligned. How does a business meet varying expectations of what to say and when to say it? How does a business maintain an open narrative while best minimising legal risk?

When a crisis strikes, remaining silent is rarely an option. A company will be expected to tell stakeholders as soon as it possibly can what has happened and what its plans are for tackling it. That expectation does not take into account the fact that what has actually happened may not yet be clear. As much time can be spent on the communications strategy as on other aspects of managing the crisis, and it can present some genuine and difficult questions.

Defining the crisis so as to be able to describe it and state what the company is dealing with is a key first step. This sounds obvious, but the exercise can be challenging. Part of this exercise entails the discipline of noting 'what do we know, what do we not yet know?' Even though the parameters will not necessarily be clear at the outset, and it may not be appropriate to share all details, clarity of thought about what is going on is a necessary precondition to accurate and effective communication.

Thereafter, it is important to recognise what the company's communications strategy can achieve, and what the inherent limitations are:

- The business has to engage with stakeholders and very often the media too. An effective communications strategy can go a long way towards protecting the company's reputation and instilling confidence in stakeholders.
- The business will never be able to go as far as any single set of stakeholders would wish. Reconciling everyone's appetite for information is rarely possible.
- There may be irreconcilable conflicts between the needs of some stakeholders. What is reassuring to investors may be interpreted negatively by employees.
- Anything said by the company in relation to the crisis has an impact on its legal risk profile. The two key points in that respect are that the company should avoid making statements that would in a legal context be seen as an admission and that privilege should be preserved wherever it can be.

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Bearing those principles in mind, points that are universal in terms of the communications strategy include:

- Accuracy: it goes without saying that anything that a business does say should be accurate. The challenges in this context are

that facts may be uncertain and unfolding fast, and the facts such as they are known may be unpalatable. External lawyers can be helpful in kicking the tyres of intended statements and testing whether there is a solid foundation for statements.

- The audience: the sort of caveats that make perfect sense to lawyers are likely not to be understood in the way that they are intended by a non-legal audience. The language chosen needs to work in multiple contexts.
- Publicity: any statement made should be assumed to be publicly available immediately.
- The identity of the spokesperson: there is often understandable pressure for a senior member of management to answer questions. Where this is done it calls for very thorough preparation.
- Communications strategy: there is often considerable pressure to give assurances in the early stages: 'no jobs will be affected'; 'no one has done anything wrong'; etc. The communications strategy has to navigate giving comfort where it can but avoid making promises that may not be capable of being kept.
- Apologies: the topic of apologies comes up often. An apology can be a key part of the company's mitigation. An apology also risks making the problem worse if it is seen as caveated or insincere. Timing is important here: an apology should not be made until it is clear what the company is apologising for; but the impression that the apology has had to be dragged out of the company lessens its impact.
- Liability profile: it is absolutely right that the company should seek not to make a difficult problem worse through its communications strategy. Legal risk can be exacerbated through ill-advised admissions or loss of privilege. But the approach here has to recognise the realities of the particular situation. Mitigation of the consequences for the future needs to take into account the liability profile of what has happened. It is not possible to lay down hard and fast rules in advance of particular facts (other than that the benefit of insurance cover must be preserved wherever available).

"An apology also risks making the problem worse if it is seen as caveated or insincere."

QUESTIONS

4 Many crises are critical because they involve the potential for widespread civil liability and many claimants. What challenges arise in the resolution of multi-party claims and how does a defendant determine its strategy to meet them?

It is not an attempt to duck this question to say that every multi-party claim requires a bespoke approach. It is often helpful to think about that tailor-made defence strategy in three phases which we refer to as 'define, refine, resolve'.

The first stage focuses on defining the issues. What are the claims really about? How many people are affected and are they identifiable? Are other parties potentially liable? How confident is the company of the factual narrative? What further work needs to be done to complete the picture?

The second stage aims to refine the litigation. Claimant law firms try to build the largest book of claims possible. There may be scope to refine, reduce or subdivide the class through careful analysis of the criteria used to build it. All too often, claims are marketed by claimant law firms before the legal basis for the claims has been properly interrogated. Issues can be refined by early applications to the court. It may be possible to challenge the form of proceedings chosen by the claimants, which can reduce or limit the claim at an early stage and limit its attractiveness to funders. Jurisdictional challenges should also be considered where they are available and tactically sound. An important aspect of refining the claim focuses on value. Claimants, and litigation funders, are often given an optimistic view on potential recoveries, and that narrative needs regrounding.

The whole defence strategy leads to the third phase: resolving the claims. There are many techniques that a defendant can use to promote settlement, and these depend on an appreciation of the funding model and the structural dynamics of the funded litigation. The claimants' motivations for pursuing the claims are important: the nature of the rights affected and the impact on claimants' lives, the claimants' connection to the defendant, the claimants' emotional and financial investment in the claims and their likely desire for measures other than the purely financial, for example, an apology.

In devising the right strategy, defence lawyers need to keep an open mind. Litigation is not the only, or sometimes best, way to resolve collective claims. Alternative dispute resolution mechanisms and redress and compensation schemes can work well as part of the bespoke approach and suit the interests of all parties.

Resolving good claims fairly and efficiently is a key in corporate rehabilitation. Once established, the defence strategy needs to be communicated to key stakeholders (including insurers) to secure their buy-in. The strategy always remains under review.

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5 Alongside managing the crisis is the imperative to maintain 'business as usual'. How can lawyers help to establish what went wrong and minimise the impact of those issues on the underlying business?

Maintaining business as usual through what are likely to be highly unusual circumstances is obviously critical for the business's own ongoing health. The first way in which lawyers can help with what is in large part a commercial challenge is by ensuring that members of the management team have the time that they need to commit to the ongoing business. Lawyers can, through structuring their work and interaction with the company, ease the time burden that a crisis inevitably imposes on management. It is tempting to think, in the immediate aftermath of a crisis, that everyone needs to be involved in everything. This is rarely true and comes at a price in terms of diverting resources from the actual operations of the company.

"Lawyers need to work with the commercial side of the business to design an investigation that will be thorough, proportionate and focus on the right issues. Thereafter, lawyers should be able to take the burden of implementing that investigation away from the business."

Lawyers will also be focused on establishing, as quickly as possible, what has gone wrong and advising on the legal impact. Every crisis necessitates a carefully scoped and implemented investigation. Lawyers need to work with the commercial side of the business to design an investigation that will be thorough, proportionate and focus on the right issues. Thereafter, lawyers should be able to take the burden of implementing that investigation away from the business. Regular updates from the investigation team to the internal crisis response team should enable the team to determine what needs to be passed on to commercial colleagues so that they can consider its impact on operations.

Minimising the impact on the business calls for an understanding of how business practices contributed – if at all – to the problem in the first place. Lawyers help support the business in this context by identifying what changes may be needed so that the business can comply with the general law and any applicable regulatory regime. Implementing change for the future enables the business to lower its risk of similar problems recurring. Advising on the speed of change necessary is part of the role of the legal team – from the instant product recall to longer-term changes recommended to keep up with best practice.

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QUESTIONS

QUESTIONS

The Inside Track

What traits, skills and experience do you think are critical for a lawyer advising on crisis management?

A crisis management lawyer needs to be able to:

- Inspire confidence. When people are understandably uncertain about the implications of events, lawyers need to show that there is a clear strategy and things are under control.
- Prioritise. This means resisting the temptation to think that everything must be done all at once and super-fast. Triaging issues needs careful judgment.
- Think laterally. Issues in a crisis are multidimensional. Lawyers need to assess how a decision in one context may play out in another.

These skills are built from experience: from having seen different problems, with different facts and different clients.

In your opinion, what expertise, attitudes, behaviours and practices characterise an effective legal team charged with crisis management?

Managing a crisis usually entails a large, often multidisciplinary team, possibly in more than one jurisdiction. Every team member has to get on with colleagues and work collaboratively and cooperatively. The foundation for that is good communication.

Determining the right level of information to enable team members to work effectively is a skill in itself. Everyone needs to have sufficient detail so that they understand their contribution and how it fits the broader strategy. But not everyone can do everything, and an efficient team has demarcations. Bringing individual contributions together to further the strategy is the role of those leading crisis management teams.

What do you personally find most rewarding and most challenging about advising in this area?

Helping a company navigate its way through a crisis is like no other sort of legal work. These situations can be hugely stressful for the business – on a corporate and often also a personal level. I work with management to shape and implement a strategy to allow it to mitigate the effects of the crisis, look after its people and get back to normal as quickly as possible. The personal dimension is a much greater factor than in most commercial litigation. It is the multi-faceted nature of the issues which I find makes supporting a company through them challenging and rewarding in equal measure.

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