

The changing face of business

New 'blame culture' places companies at greater risk

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The global trade in goods, services and capital, increased by the exchange of technology and know-how, have made the world a smaller place. This development has been further benefited by modern communications tools as well as faster and cheaper travel options.

However, the globalisation of the economic process and the liberalisation of trade have meant that companies now face increased competition from all parts of the globe and they need to adapt to near constant change. Firms aim to improve their existing products or develop new ones, which are better and safer, and cheaper to produce. Innovation of products and services offers new opportunities in the form of market share and positioning. But the success or failure of a new design is not only governed by consumer demand, and factors outside the company's direct control do come into play.

While the technical exposures can be jointly assessed and managed by in-house risk managers and the insurance industry, it is the public opinion of a product that frequently gets underestimated, especially as such risks are hard to quantify.

These so called "social risks" have increased over the last few years and have, if anything, become even less predictable. In the past, when products have fallen foul of new liability laws and regulation,

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it has normally been the result of changes in public opinion. What is acceptable and what is not does tend to change over time, and politicians pass laws based on the current prevailing public opinion.

The perception used to be that "accidents can just happen", but now the view is more likely to be that somebody is to blame for a mishap. It sometimes appears that we are moving into a culture where people's first concern after a fall is to look for somebody to blame. The US lawsuits against fast food manufacturers for causing obesity certainly seem based on that line of thinking.

The larger the possible liability and the greater the public interest, the more attractive the case will be to lawyers who are willing to represent the plaintiff. A high media profile will usually further increase the pressure on companies to settle out of court. Next to the legal fees, firms now have to take into account the disruption to their operations when considering their response to the threat of legal action.

We are familiar with seeing these sorts of cases in American courts, but over the last few years similar trends have also been affecting European corporations. In cases such as the cable car accident in Kaprun, Austria, or the train accident in Eschede, Germany, European legal teams

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tried to sue in the US in order to benefit from US liability laws which have the option of very high punitive damage awards. Another perceived advantage of the US system is the class action lawsuit, a trial by jury, and the chance to calculate legal fees based on the risk. As a result, the US is frequently chosen as the preferred court of jurisdiction for international cases even if many other countries could be possible.

Under the US common law doctrine of *forum non conveniens*, a US court can decline to exercise its jurisdiction if another court would be more appropriate or “convenient” to hear the case, or the defence in the US would cause “undue hardship”

to the defendant. Usually a US court will accept cases with an American connection — for instance, if a US citizen has been affected or the defendant has a business relationship with the US — but it does not automatically mean that US law will be applied. In connection with the cable car accident mentioned above, the Southern District Court of New York accepted that the Austrian court’s decision would apply. This means that European plaintiffs cannot assume any higher compensation in the US, but both sides will be affected by the high US legal expenses.

Risk managers and the industry are well aware of the increasing impact these

trends can have on companies' global liability exposures (see sidebar below). Now, it is up to the insurers to take into consideration this shifting landscape in the development of customised liability insurance solutions. 

What keeps risk managers awake at night?

Risk managers are used to dealing with a wide range of exposures and potential threats, but they do have some recurring worries...

Maybe not surprisingly, next to crime and corruption, liability regimes came out tops in a recent FERMA (Federation of European Risk Management Associations) survey. Being sued as part of the day-to-day operation or falling foul of increasingly onerous regulations is also a major concern, as is the prospect of a breakdown of the critical information structure.

When AIRMIC (Association of Insurance and Risk Managers) in the UK asked its members which exposures they see most likely to rise over the next year, they highlighted business continuity, followed by environmental and reputational damage.

Damage to a company’s reputation was also number one on Aon’s Global Risk Management Survey, reflecting the growing importance of brand value. This was followed by business interruption and again, maybe not surprisingly, third party liability.

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