

Counsel share tales of products gone wrong

Photographs of handcuffed executives being led into court, company presidents apologizing on television and crowds jostling corporate spokesmen were among alarming images used at a session yesterday to illustrate the difficulties surrounding product recalls.

Panellists including John Packman, food law counsel at The Coca-Cola Company and Don Lofty, in-house counsel at SC Johnson & Son, shared stories about the problems companies face when products are blamed for accidents.

Coca-Cola's Packman opened his presentation with video footage of news coverage from yesterday morning about E-coli found in US spinach, a story that also featured on the front page of USA Today. Several producers have already recalled packaged spinach while regulators have advised consumers to stop buying spinach altogether.

"Undertaking a recall will draw the attention of both regulators and potential plaintiffs," said Packman. "But failing to recall will increase your company's potential liability, not decrease it."

Ingo Kruse, a lawyer with Lingershausen & Smith based in Germany, recounted the stories of

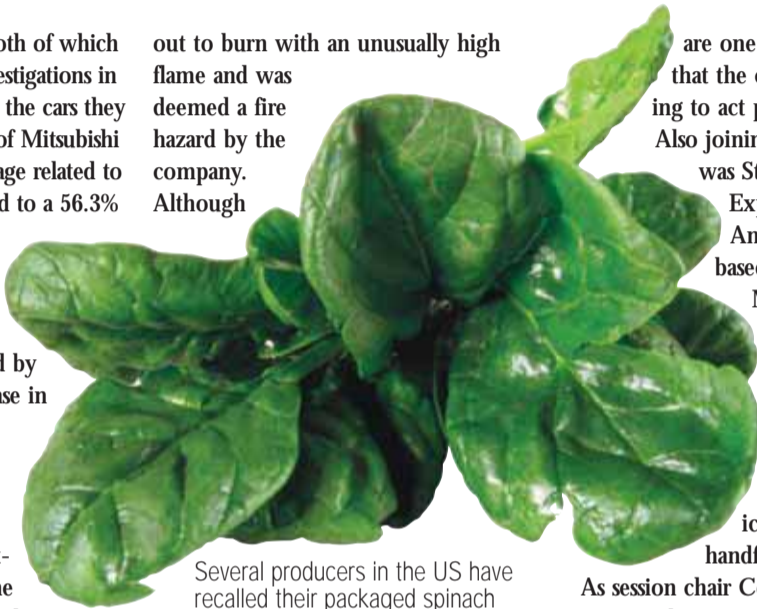
Toyota and Mitsubishi, both of which have faced regulatory investigations in Japan related to defects in the cars they manufacture. In the case of Mitsubishi the negative media coverage related to product recalls contributed to a 56.3% drop in new sales of passenger vehicles in 2004, he explained.

Kruse went on to highlight difficulties faced by Mercedes in Turkey, a case in which the company was fully absolved. The German car maker became the subject of a sustained media and political campaign accusing the company of producing faulty vehicles after a bus crash in the village of Konya in which 49 children died.

Despite the driver of the bus driving without a licence, being blind in one eye and speeding at the time of the crash, the judge ruled that 17 company executives were guilty of murder, a charge that had not even been made against them. The judgment was subsequently overturned on appeal.

SC Johnson's Don Lofty shared his experience with the audience concerning a gel candle that turned

out to burn with an unusually high flame and was deemed a fire hazard by the company. Although



Several producers in the US have recalled their packaged spinach

1.7 million candles were sold without a single fire being reported, SC Johnson recalled the product three months after launch. In the US, products need not cause actual harm to consumers to fall under the regulatory regime requiring a recall, explained Lofty.

"With the media you are often called upon to prove the negative," he said. In other words, a company can find itself having to prove that it is beyond reproach when products go wrong. Early recalls in that situation

are one way to show that the company is seeking to act properly.

Also joining the session was Steven Murray of Exponent Failure Analysis Associates based in California.

Murray specializes in testing products to establish whether their failure is systemic, or specific to just one or a handful of cases.

As session chair Colin Loveday, a partner at Clayton Utz in Australia, told IBA Daily News ahead of the conference, quantifying the risk posed by a defect is a central element of deciding whether a recall is the best course of action. Most companies that he deals with want to act properly, said Loveday. But sometimes initiating a recall too early or too broadly can cause unnecessary anxiety and even distress to consumers.

Lofty echoed this view. "Your MVP (most valuable person) on recalls is very often the statistician," he said.

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HUMAN TRAFFICKING

NGOs secret weapon against traffickers

Panellists at Monday's session on procedures for the prosecution of traffickers in humans for sexual and labour exploitation agreed that the role of Non-Governmental Organizations (NGOs) is crucial.

One of the key issues addressed was the need to train law enforcement officials to approach victims of human trafficking with sensitivity. "The first impression is the one that counts," said Anna Rodriguez of the NGO, Florida Coalition Against Human Trafficking (FCAHT). Rodriguez said that, since

many victims of human trafficking have been transported from countries where law enforcement is corrupt, they are often distrustful of authorities and unwilling to relate their stories to officials, which can undermine efforts to prosecute human traffickers.

According to panellist Douglas Molloy, chief assistant attorney at the US Attorney's Office for the Middle District of Florida, NGOs are most qualified to deal with such victims, and thereby form an integral part of the solution to human trafficking.

To illustrate possible reasons behind victims' fear of authorities, Rodriguez recalled the story of a girl who was rescued from a brothel in Guatemala, only to be raped by police in transit to a shelter. Such stories account for the reluctance on the part of most victims to come forward and report their captors.

In addition, Rodriguez pointed out that victims



Anna Rodriguez, FCAHT

very often don't know the language, how to call for help, or even where they are.

"It's very difficult to prosecute a crime in which the illegal commodity is people," added session chair Luz Nagle, who is secretary of the IBA Criminal Law Committee and professor of law at Stetson University College of Law. "People are easy to conceal because we think that in modern times people act freely," she said.

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Lawrence Graham

No evidence rule of law schemes are working

Delegates at a showcase session on economic development and the rule of law heard that there has been a “massive shift” toward judicial development assistance, but no evidence that the schemes are yielding positive results.

More investigation into the efficacy of the many rule of law-enhancing projects is needed, said Livingston Armytage, senior counsel, legal and judicial reform, at the United Nations. At present, delegates were told, the international community is spending around \$1.5 billion every year on judicial reform internationally without qualitative evidence that the reforms actually work.

Speaking at the session presented by the Public and Professional Interest Division, Armytage said that there has been a “rule of

law revival” in that it is now universally accepted among donor organizations that the rule of law is vital for building a framework to secure investment and provide security. But more effort was needed on the part of the international community to accurately measure the results of this revival.

Earlier delegates had heard from Glenn Yago, director of capital studies at the Milken Institute. Yago pointed to his organization’s work on opacity (the degree to which countries lack clear, accurate, easily discernible and widely accepted practices governing the relationships among businesses, investors and governments) to demonstrate the link between legal transparency and investment. Business faces two types of risk, said Yago. The first is headline-grabbing, large-scale but

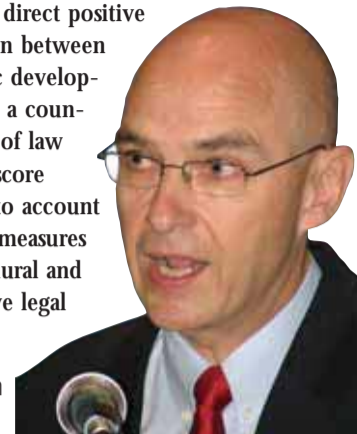
low frequency risks that include wars, natural disasters and acts of terrorism. The second type is smaller in scale but high in frequency, and includes unenforceable contracts, fraudulent transactions and legal complexity. It is these smaller-scale risks that interfere with commerce, add to costs and slow growth.

Yago used the growing trend in cross-border M&A to show delegates that legal risk deters investment. Lack of legal and regulatory transparency should be seen as a tax on business, said Yago, but also an opportunity for lawyers.

Delegates were presented with an opportunity map that, by plotting economic growth against legal complexity, shows where justice system reform is especially important. The results demonstrated that reform is particularly pressing in the European Union, China and India.

“Lawyers have a big role to play in reducing transactional costs,” said David Freestone, deputy general counsel at the World Bank. Freestone demonstrated that there is a direct positive correlation between economic development and a country’s rule of law index (a score taking into account different measures of procedural and substantive legal clarity).

Livingston Armytage



HEDGE FUNDS

Hedge funds are at a turning point

Lawyers at a session on the role of hedge funds yesterday were split over the direction the industry will take in the future.

Some saw the recent reversal of US registration as the peak of disclosure, with the investigation and attention paid to funds in US Congress inevitably lessening. Others pointed to the fact that only a handful of funds have deregistered since the Court of Appeals decision in June, and that an increasing number

are taking on other forms of disclosure, such as appointing independent directors.

Panellist Scott J Lederman, of Grosvenor Capital Management, said that although only a few hedge funds had deregistered since the Court of Appeals for the District of Columbia Circuit invalidated a rule forcing hedge fund advisers to register with the SEC, this wasn’t necessarily a sign of acceptance of disclosure.

“Many of the funds are adopting a wait-

and-see approach because the registration process was a headache, so it makes sense to be absolutely sure before unwinding it, and because there are still rumblings in Washington about a challenge to the ruling,” he said.

Lederman did also point out, however, that some funds have found that they are more popular with institutional investors as a result of the transparency brought about by registration.

Jon Fowler, of Maples and Calder, said

that the change in boards of directors at many funds was a sign of greater disclosure: “The drive towards greater corporate governance can be seen in the number of independent directors at many funds. Often the majority, say two out of three, are independent.”

However, Philip Harris of Skadden Arps Slate Meagher & Flom argued that the importance of directors varies. “For some, corporate governance is just another form of marketing. Others genuinely support the idea of independent directors, often because it takes some of the pressure off them as managers,” he said.

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