LEXOLOGY

PANORAMIC NEXT

Crisis Management

Mónica Pérez
Carey
Published February 2024

Saved | Forward | Print | Share | Ask Lexy

You have been granted complimentary access to this guide courtesy of Carey

Chile

Mónica Pérez is a partner at Carey and co-head of the firm's litigation group. Her practice focuses on civil and commercial litigation, domestic and international commercial arbitration, consumer protection law, advertising, product liability and mass torts, on matters including contracts, torts, corporations, unfair competition, distribution agreements, international commerce, secured transactions and environmental law, among others. Her practice also

includes pre-litigious advice to national and international clients in the fields of mining, insurance, energy, automotive and retail, among others. Additionally, she represents creditors and debtors in several insolvency and bankruptcy proceedings.

Mónica graduated from the Pontifical Catholic University of Chile's Law School and holds an LLM from the University of California. She is admitted in Chile and in Alabama in the United States.

She has been recognised in litigation and arbitration by international publications such as *The Legal 500* and *Benchmark Litigation Latin America* and is a member of the list of young arbitrators at the Mediation and Arbitration Center (CAM), Santiago Chamber of Commerce.

She has a permanent position as professor of civil law and lecturer in the postgraduate degree in consumer law at Universidad de Chile. She is a former member of the list of arbitrators of the Santiago Court of Appeals, and in 2017 she worked as an international visiting attorney at Pérez-Llorca in Madrid. She became a young arbitrator at the Mediation and Arbitration Center (CAM), Santiago Chamber of Commerce in 2023. She is also a member of the Chilean Chapter of the Spanish Arbitration club (cea). additionally, Mónica has been a professor of the postgraduate degree course in consumer law at the University of Chile since 2022.

---

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?

While a crisis typically comes with unexpected events, having a clear understanding of a company's business can help to limit negative outcomes, control chaos, and reduce the risk of a large-scale disaster.

As an experienced legal team, we always advise our clients that the key element is to prepare mechanisms and protocols in advance that can be quickly implemented to properly manage a crisis. To this end, it is necessary for each client to clearly identify and recognise its business, risks and possible crisis vectors.

Part of this business recognition is to identify other agents that have an active participation in that market, such as intermediary distributors, regulatory agencies, supervisory entities, among others.

Once these factors have been identified, we advise clients to create, in advance and within the company itself, a crisis team that should be ready and prepared to react whenever necessary. While every business has its unique relevant areas, generally, a crisis team should include senior managers from key areas involved in the matter and representatives of essential areas such as human resources, communications, marketing and sales or technology. It is also essential to include leadership from the chief executive officer, chief financial officer, general counsel, and public relations. Additionally, in case of a major crisis, where reputation and litigation are at stake, it is essential that the company has a fast and direct support from an external attorney and communications specialists.

There are certain activities in which the risks of a crisis can be reviewed and foreseen before they occur. This is the case with all companies that produce and manufacture products, such as medicines, makeup, or food, that are subject to very strict regulation, and, consequently, they are more exposed to product liability cases. In this regard, it is essential for the companies to have an internal quality control for their manufacturing processes, which would allow them to detect irregularities and to adopt any necessary mitigation measures. In this regard, it is also important that the information gathered from these internal audits is analysed so as to constantly review and update their manufacturing processes.

On the other hand, there are companies that operate in highly regulated markets and have an active and continuous relationship with the authorities, such as health, agricultural, electrical authorities, among others. In these cases, it is necessary to identify the company's employees who manage the relations with this authority and train them, so that they are completely up to date on the latest topics related to their business.

Additionally, it is a must for companies that operate in these regulated markets to identify the specific activities in which a breach of the compliance law may occur, in order to develop an effective internal programme to reduce this risk and promote an ethical work culture among its employees at all levels of the organisation.

Finally, in the case of large companies, whether at a national or international level, it is very important that all employees, at all levels, are aligned with the principles and values of the company, and its mission and vision, so that, when facing any crises, the interests are aligned, thus reducing the risk of internal breakdowns.

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?

Self-knowledge on the part of companies, although a powerful tool to avoid crises, is clearly not infallible or sufficient for this purpose. Crises can arise at any moment and time and can, certainly, affect business in many ways.

Due to rapid technological evolution, the impact and risk of crises is much higher than in the past and will continue to grow. In this regard, the effects of a crisis in a company can impact not only its internal structure and operations, but also external stakeholders, such as clients, authorities, shareholders and markets. Additionally, the evolution of society sets the path for the evolution of a company's risks, especially considering that many companies play an influential social role in their communities.

It is interesting to see how crises have gone beyond just affecting the business itself, to also affect society and even change the normal course of legislative agendas, depending on their scale, as can be appreciated especially in areas such as consumer law and antitrust.

In this context, as the effects of a crisis can also reach individuals, we have seen how people's perception of companies has evolved in the sense of holding them responsible for their actions. This phenomenon is enhanced by the greater exposure of companies due to social networks, the empowerment of people and their role as consumers.

Legal changes, the increase of regulation on different markets, the new tendency to establish higher and more strict requirements for many economic activities, such as consumer protection, environmental law or fintech, have created the perfect storm for crises to escalate and generate more harmful effects than they would have in the past. In fact, there has been an expansion of liability litigation for corporations and, as a result, a continuing concern by companies to preserve their image as a caring member of the community, since it is people's trust in companies, their activities and their products that keeps them alive.

The role of social accountability is increasing, with the public, through organisations such as foundations or consumer associations, often taking an active role in protecting the multiple interests of different members of the community. Hence, the public relations strategy with its

consumers and the company's commitment to deliver high-quality services and products is a fundamental matter to consider.

In this regard, the authorities' powers must also be taken into consideration, insofar as some of them, such as the National Consumer Service, which has been empowered by recent legislation that provides it with new faculties including the right to propose legislation, to interpret the law and regulations and, most importantly, to monitor the activities of suppliers in the market to certify compliance with the consumers' rights. Through the exercise of these powers and attending to more consumer and social oriented objectives, governmental entities like this have been very responsive to the needs of the people, pursuing compliance with the law and the responsibility of the companies.

This has also been replicated by social civil organisations, which, by exercising the tools and legal actions set forth by the law, have increased their activities regarding the protection of citizens and consumers and have been actively monitoring the international legal scene to bring before national courts certain cases that represent a potential breach of the law and affect the interests of certain groups.

In a context like this, a crisis can have far-reaching effects evolving from an economic level to a problem that should be analysed from many perspectives. Thus, in most cases, a crisis would not only have monetary consequences for the business, but also have legal, commercial and reputational effects. These last two elements in some cases could become crucial for the company insofar as it may mean losing the public's trust.

On the other hand, crises can take various forms and can even be silent for the market in many cases. For example, there are situations in which a crisis manifests through the repeated exercise of lawsuits, filed by a company against its competitor, to the point of becoming abusive, all with an exclusionary purpose. This has happened, especially in small or monopolistic markets in which a new company tries to enter.

In this regard, lawyers who advise companies in this position – especially as defendants – should have an overview of the conflict as one conflict, and not see each lawsuit separately, taking care not to fall into contradictions and striving for a unified and coherent strategy.

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?

In cases of crisis, communication is key. First and foremost, the company must have a clear understanding of its communication protocols, its editorial line and of the nature of the crisis it is facing to prepare a narrative of the facts and possible measures to solve it. A company must evaluate and identify in advance the different risks that may be generated by the measures that the company may eventually adopt.

It is important that the narrative adopted by the company conforms to the values and principles that the company will use in the eventual legal defence. Although this task is complex due to the multiplicity of interests, it could be developed through collaboration and constant support work that could reflect the positive aspects and solution measures. In this sense, we have seen that from an internal point of view, narratives that focus on the opportunities for growth and work that inspire the company are always more effective than the ones that make visible the cause of the problems, the negative aspects and weaknesses.

In this sense, the company should identify stakeholders, such as employees, customers, commercial partners, and regulatory agencies, and maintain constant communication with them at all stages of the crisis, even after it has been resolved. From a legal standpoint, it is important that only the designated spokesperson from the crisis team share information publicly, and executives should be advised that, when facing a crisis, any document or information could be used in potential litigation.

Regarding expectations that the public be kept informed, it is important to avoid negative statements and define a course of action that reflects what will be done in the future. These decisions are the ones that must be clear to all the people outside and within the company to avoid the risk of one member of the company acting severally and in prejudice of the best interests of the company. Any public communication before the authorities or media, even before an individual consumer, must be previously discussed and approved.

In our experience, it is common that once litigation begins, plaintiffs often use statements or public communications taken out of context, which could be considered by the courts at the time of ruling. Any response or solution that is provided to an individual client can be requested or criticised by the rest, so it is important to maintain uniformity and consistency in what is said and how the company performs when facing the crisis. For this reason, it is

extremely important to be cautious with the information that is conveyed to the public to prevent it from having a negative impact in the event of a possible litigation or potential sanctions proceeding.

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?

In any type of lawsuit, especially those involving multiple parties and exponential risks such as the payment of high amounts of fines and damages, the key to a good strategy and outcome is mainly communication between companies and their legal advisers. To the extent that companies develop a solid source of information that allows them to accurately identify the risk involved and those potentially affected, legal teams will be able to properly access the information and develop a strategy appropriate to the crisis scenario.

To this end, one of the main keys is for companies to designate a specific person or team to oversee transmitting accurate and relevant information. The complexity and sensitivity of these issues involves a large amount of evidence that must be collected and cannot be lost, so it is necessary to act quickly, create reliable records and certify the adequacy of the company's procedures. In this sense, the relationship and the fluid communication between the client and the legal advisers are crucial.

Given the interests that are at stake in multi-party actions, there is a high level of exposure of the companies, which is enhanced by social media. In this regard, the company must present itself as a collaborating entity, both to the users and with competent authorities. In Chile, the authorities that may be involved in multi-party claims, may require information, supervise or even in some cases, like in consumer law, initiate an extrajudicial mediation in order to seek immediate and effective solutions.

Additionally, immediate implementation of mitigating measures, such as the voluntary recall of potentially defective products, the proposition to the authority of compliance plans, self-reporting, the establishment of predetermined channels for the consumers to report any irregularity, either through telephone numbers or the company's website, among other means is highly recommended, and even necessary in some cases.

However, the above mentioned requires a large outlay of funds, which not all companies have available to act with the necessary speed. Hence, the ability of the crisis management team and external advisers to devise effective measures, with the widest possible scope, is crucial for dealing with crises, especially when litigation is involved.

One should also take into consideration the possibility that the company has a deficient systematisation of their data on its clients, procedures or organisation. As a result, the legal team could face difficulties in effectively tracing the alleged existence of any defects on products, any alteration in their production process, whether the services were provided in a deficient manner or any possibility of non-compliance with the regulation.

Second, a lack of systematic data makes it difficult to calculate the number of potential affected individuals, and, therefore, the eventual risks that the company could face if the action is successful.

Once the trial begins, the amount of documentary, testimonial and technical evidence involved requires a very detailed level of work from the legal advisers, both to analyse the evidence of the opposing party, as well as to exercise, at the appropriate opportunity, the mechanisms provided by law to challenge them. Witness hearings are also a great challenge, since given the nature of these cases, the witnesses are highly involved in the conflict and claim to have directly suffered some type of harm.

At a company level, for as long as a multi-party lawsuit lasts, it will be in the public eye. Here, what was discussed earlier about the social role of the company and its role as a partner in the market becomes relevant. The attitude of the company, manifested mainly through its management, must always be collaborative, in the sense of trying to seek the truth, reasonable solutions, and, above all, to prevent the crisis from escalating.

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?

It is essential that, despite the crisis, the business’s usual activities and duties are performed correctly and on schedule to avoid any further negative circumstances that may affect or escalate the crisis or hinder the implementation of solutions.

The role of attorneys becomes very important, since usually crises have common components and patterns that an experienced lawyer could easily identify. Thus, this knowledge could help the business to identify the elements that allowed the crisis to happen in the first place. Additionally, the company's top management, as well as the work teams, should be able to trace and review their work, activities and the decisions taken, to determine the reasons that led to the crisis, to be able to correct them within a limited period of time and thus mitigate them or avoid them completely in the future.

For that purpose, tools such as compliance programmes are effective mechanisms that allow the company to prevent future crises and to better know and understand its business, its specific characteristics, its main duties and obligations when developing its activities and the foreseeable risks, so the tools not only may, hopefully, prevent the crisis, but also may help in its management, ensuring that quick reactive measures could be taken.

As an example, Chilean regulation has promoted legal amendments to strengthen the compliance culture in the country in areas where it is necessary to prevent breaches insofar as they can result in harm and damage to individuals. In the case of the Chilean consumer protection law, which since 2019, recognises the implementation of preventive and corrective compliance plans, establishing that their effective implementation can represent a mitigating circumstance of liability in the event of future infringements of the law.

There are many companies that, once they reach an agreement with the consumer rights protection entity to compensate customers, decide to voluntarily establish an obligation to implement a corrective compliance plan to prevent them from experiencing the same situation again in the future. These types of measures are deeply valued by both authorities and clients, reflecting the collaborative and transformative spirit that inspires the culture of compliance. In this context, attorneys play a very relevant role in the decision to adopt and implement these measures before the authority.

In this global culture of compliance, the work carried out by attorneys is extremely relevant since, together with detecting potential risks and correcting them, an environment must be created that prevents the generation of new risks in the future. In our practical experience, in those cases in which critical situations have been generated, subsequent corrective measures always generate important lessons for the company. Errors generate an opportunity to learn and grow as a company, which ultimately ends up being valued by loyal clients.

Finally, and by way of reflection, it should be noted that this culture of compliance is constantly evolving and growing, with the aim of making companies capable of self-criticising, self-regulating and self-improving in the event of any non-compliance they may incur.

The Inside Track

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

Time is of the essence in crisis management. In this regard, the key is to react with decisiveness and confidence to provide the client with legal advice that conveys reassurance and confidence to the client.

Attorneys must keep an open mind to creativity that allows them to develop new strategies and alternatives, to adapt solutions to the unique case and circumstances. Finally, a 'hope for the best, but be prepared for the worst' mentality is crucial, as new obstacles may appear over time. Paying attention to details is also very important in complex matters such as crisis management.

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

Attorneys advising on crisis management must develop strong teamwork, both with the client and with their co-workers, given the complexity and the number of people working on these cases.

An effective legal team in this area would perform its tasks with the highest standards, which would imply effective communication between all areas involved, and the commitment of its members to stay at the forefront of the topics, both in legal and non-legal issues and, above all, understanding the characteristics of the clients and the markets in which they act.

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

One of the most rewarding aspects of all cases is looking back and seeing how, as a team, we were able to understand our client's business and needs and create new and innovative strategies and solutions for each case, providing strong legal support and factual background, by achieving a comprehensive view of the conflict.

One of the most challenging aspects of our work is to anticipate and face the effects of the crisis coming from the media. In order to safeguard the reputation of our clients, one of their most important assets, the legal team must develop a tailored strategy where every word must be consciously selected and approved.