



Product liability: A rising challenge

The ongoing push to expand into new markets is bringing robust challenges for British companies. International trade is easier than ever via the Internet, allowing businesses to build new paths into markets on the other side of the world within minutes of placing an advertisement. But the opportunities come with potential pitfalls attached, not the least of these being product liability, according to Nigel Hooker, Deputy Head of Casualty Risk Consulting, EMEA, at AIG Europe Limited.



“More markets will be opening in the short- to medium-term, following the example set by China in importing luxury Western goods. Africa has some significant pockets of wealth, and Latin American countries will grow in importance. Suppliers need to take note that some of the markets can be quite demanding in their standards,” Hooker emphasises.

The unfolding pattern of trade with unfamiliar markets therefore brings a raft of questions. “A British company will have to make a real effort to understand the local business culture, to look at the level of compliance with the jurisdictional regulations, and to work out whether the

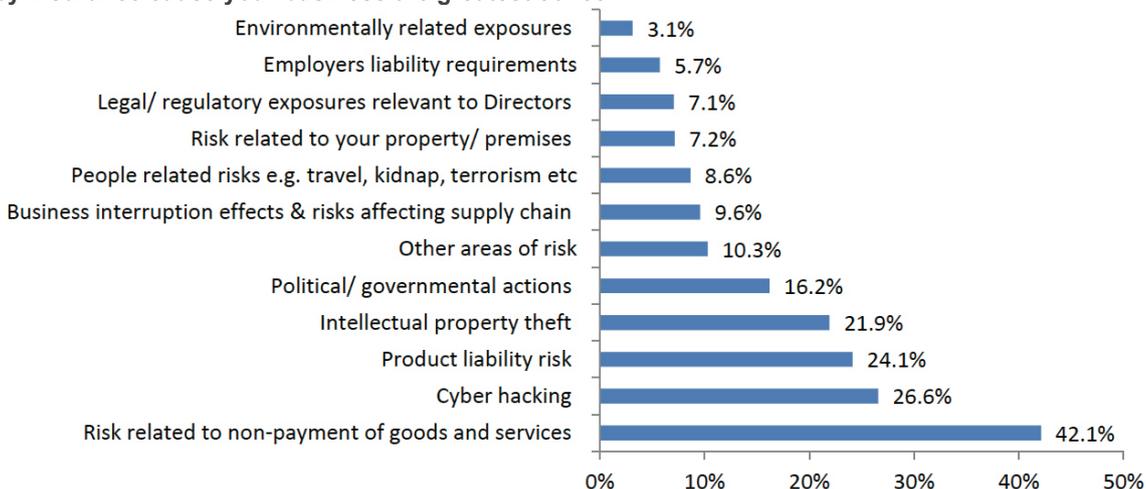
contractual terms will be recognised legally, especially if language translation is involved,” says Hooker.

“A notable question when working with overseas suppliers is whether accountability for defects in their goods can be pushed back to them? If your chain involves purchasing goods made in Turkey, or China, and you import these to Britain, before re-exporting, do you understand all of the potential risks and who will be held liable?”

The litigation model within the United States is increasingly influential elsewhere, as past models of cooperation and informal contracts, say based on a handshake, are losing traction, notes Hooker. “At the consumer level, there is more awareness of rights, and more willingness to seek out a lawyer to pursue a claim. In the UK as the personal injury market changes in the wake of reforms, we could see other new areas of litigation increasing, especially product liability. The ramifications of that trend could begin to cascade directly back to manufacturers.”

An indication that some awareness of these issues exists can be found in the International Trade Survey 2014, sponsored by AIG. When some 3,000 UK-based companies were asked to name the three most worrying risk areas relevant for exporters covered by insurance, 24% cited product liability risk. [Figure 1]

Figure 1. Which 3 of the following areas of risk relevant for exporters covered by insurance cause your business the greatest concern?



International Trade Survey 2014

Obtaining recompense for below-standard goods inevitably requires a satisfactory legal procedure in the country of origin. China has proved a concern in this respect, for UK importers, in that it has been almost impossible for external parties to successfully prosecute a case against a Chinese supplier. One way to obviate this, say lawyers, is to draft contract terms prior to the point of sale, specifying the jurisdiction for any arbitration.

“Most commercial contracts will include governing law and jurisdiction / dispute resolution clauses, the terms of which are subject to negotiation between the parties,” says Jennifer Boldon, Partner, at law firm Kennedys LLP. “The former sets out the express choice of law which will govern the contract. The latter specifies how any disputes will be dealt with. The purpose of these provisions is to give the parties certainty as to how the contract operates and to agree where and how disputes will be resolved.”

Boldon stresses that if it is not clearly stated in a contract which set of laws will govern it, parties to a dispute risk a costly, time-consuming preliminary battle to establish which law should be applied. “This is particularly the case in international supply contracts with several legal systems of potential relevance to the contract. It is absolutely key to ensure businesses understand what their rights and obligations are in the transactions they are entering into. The law in different countries can produce very different results when applied to contract terms that businesses in the UK may regard as standard, such as exclusions or limitations of liability. It is vital to have informed advice and ensure the applicable law is effective.”

Even if the law to be applied is favourable, if it is to be applied in the courts of an unfavourable jurisdiction, resulting litigation may be surprising and disappointing, Boldon underlines. “Courts in jurisdictions outside the UK have very different rules on disclosure, expert evidence, trial procedure

and costs. If a business wants disputes dealt with in a particular court, it should ensure that such court has ‘exclusive jurisdiction’, as opposed to non-exclusive jurisdiction where other courts can hear the dispute as well.”

Arbitration may be favoured as a means of dispute resolution, particularly for cross-border contracts, with clauses often stipulating a neutral venue for resolving any dispute. Boldon comments that “an arbitral award can be more widely enforced than a court judgment and arbitration has the benefit of being confidential and generally providing finality to the parties more quickly than the court process”.

For an exporter selling into the vast US market, “defence mechanisms have to be in place”, says Hooker. “The market has its peculiarities, which are expensive to fall foul of, so people need to look with caution at wordings, contracts, local laws, standards, and so on. The EU, by contrast, has fewer complications with over-arching EU Directives, albeit with the issues of language and some variations in national legal codes.”

As products are developed, new risks emerge. For example the increasing use of IT embedded in products creates new exposures. The micro-processor within or through its need to communicate with the wider IT world creates potential routes for unintended consequences. The arenas of product and cyber liability are increasingly overlapping. Businesses need to identify the full range of consequences that come with new technology and stay abreast of developing knowledge so that they can manage their risks.

For SMEs that lack the risk management skills of bigger companies, product liability insurance can ensure that a robust form of risk transfer is in place. AIG offers a suite of online training tools – via its [Product Liability Service](#) – able to take its insured clients through the pitfalls, and provide advice.

The International Trade Survey 2014 was sponsored by AIG, supported by The Institute of Export and undertaken by Trade & Export Finance Limited. Just under 3,000 UK-based companies, with turnover from less than a million to more than £100m, were canvassed, to investigate the current issues that have an impact on the ability of exporters and importers to trade in global markets.



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