How To Reduce the Risks of U.S. Litigation: A Guide for Foreign Businesses

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FOR BUSINESSES HEADQUARTERED outside the United States, but with some involvement in U.S.-related commerce, the risks of becoming involved in civil litigation in U.S. courts require careful attention. This article reviews steps that foreign businesses may consider to help reduce those risks. The steps outlined are neither mandatory nor exhaustive. Each business must adopt its own structures and processes to meet its particular needs and circumstances.

UNIQUE RISKS IN U.S. LITIGATION • Foreign businesses are particularly good targets for U.S. lawsuits and threats of litigation. They may not fully understand the U.S. business and legal milieu, and underestimate the dangers of a lawsuit.1 They also may not appreciate the

1 As one English judge famously put it: “As a moth is drawn to the light, so is a litigant drawn to the United States.” See Smith Kline & French Lab. Ltd. v. Bloch, [1983] 1 W.L.R. 730, quoted in Paul D. Carrington, Moths To The Light: The Dubious Attractions Of American Law, 46 Kansas L. Rev. 673, 686 (1998) (“[A]s a moth is drawn to the light, aggrieved plaintiffs afforded a choice will often be wise to elect an American forum as the place in which their grievances are heard.”); see also In re Air Crash Near Peixoto De Azveda, 574 F. Supp.2d
value in the U.S. climate of carefully drafted, American-style contract protections. They often do not bring an American lawyer into their planning early enough to help reduce the risk of lawsuits and claims against the foreign party.

The U.S. litigation system includes features unknown, or rare, in other nations. Many of these features can affect the risks presented to businesses confronting U.S. litigation.2

**Jury Trial**

Under the United States Constitution and state constitutions, either party to a civil lawsuit may demand a trial by jury in most types of litigation.3 The parties may also agree to have a judge try the case without a jury. Parties sometimes waive their right to jury trial to permit an early trial, or where they are concerned that a lay jury may not fully understand the evidence and arguments.

The fact that average citizens decide issues of liability and damages in complex commercial cases, often involving potentially high monetary awards, gives the process a certain amount of unpredictability. This unpredictability can promote settlements because companies often prefer a settled, known result to the potential for a seemingly random jury verdict.

272, 278-79 (E.D.N.Y. 2008) (“it is a fact that plaintiffs will almost always select a forum in which they believe they will maximize their recovery, as long as they have a reasonable chance of remaining in the forum, and that forum is often within the U.S.”).


3 See U.S. Constitution, Seventh Amendment (civil cases), Sixth Amendment (criminal cases); see also Taylor v. Louisiana, 419 U.S. 522 (1975) (jury trial is safeguard against arbitrary use of power); Strader v. West Virginia, 100 U.S. 303 (1880) (jury trial embodies judgment by peers).

**Discovery**

Another key factor is the significant amount of discovery available in U.S. litigation.4 Discovery is the process by which each side investigates (discovers) what evidence (information) the other side and non-party witnesses may possess concerning issues in the lawsuit. The standard of relevance is quite broad and limits on discovery typically depend on a showing of “undue” burden. A court may order that confidential documents be produced for the litigation, but not made publicly available.

The discovery process also allows lawyers to take wide-ranging depositions of an opponent’s employees, and non-party witnesses. In a deposition, a lawyer for a party asks questions of the witness, typically in a conference room at the lawyer’s offices, with no judicial officer present. The testimony is given under oath and a stenographer records everything the witness says.

Whether an officer or employee of a foreign company can be required to travel to attend a deposition in the U.S. depends on a number of factors.5 Even where personal jurisdiction over the foreign defendant clearly exists, counsel often successfully argue that the plaintiff’s attorney should be required to travel to the defendant’s home country to take the deposition, to reduce litigation burden. Parties may also stipulate to such limitations.

**Class Actions**

In federal court, and in most state courts, a plaintiff may seek to sue as a representative of a large class of people, all injured or damaged in sim-
ilar ways by the actions of a defendant. If certain procedural conditions appear, the law will allow one or more representatives to sue on behalf of the whole class, without all other members of the class formally becoming parties to the lawsuit.

**Punitive Damages**

In certain kinds of cases, juries may award punitive damages, intended to punish (and deter) the defendant for certain types of improper conduct. Such damages must comport with constitutional requirements of due process. Some states, moreover, place limits on a jury’s ability to award punitive damages, while in other states punitive damage awards are more common. Certain statutes, such as the federal Racketeer Influenced and Corrupt Organizations (“RICO”) law, and parallel state laws, permit recovery of “treble” damages in certain cases.

**Contingency Fees**

Unlike lawyers in most of the world, U.S. lawyers may represent a client on a contingency fee basis. Instead of billing for professional time spent as the case progresses, or a flat fee, the lawyer’s fee is “contingent” on recovery after trial or by settlement. The lawyer receives a percentage of the recovery (typically one-third). If the case is lost, the lawyer gets nothing.

**No “Loser Pays” Rule**

With certain statutory exceptions, the U.S. rule is that each party to a lawsuit pays its own attorneys’ fees. Generally, there is no “loser pays” rule as in many countries. This rule may be varied by agreement of the parties.

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8 Caps on punitive damages, special standards (such as a requirement of “clear and convincing evidence” to support punitive damage awards) and other procedural devices to limit awards of punitive damages are all part of a larger movement in the U.S. toward “tort reform.” See generally Myungho Paik, Bernard S. Black, David A. Hyman & Charles Silver, *Will Tort Reform Bend the Cost Curve?*, 9 J. of Empirical Leg. Studies, 173 (2012); Thomas A. Eaton, David B. Mustard & Susette M. Talarico, *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. of Legal Studies 202 (2005).


11 Critics of the contingency fee system abound. See generally Deborah L. Rhode, *Frivolous Litigation And Civil Justice Reform: Miscasting The Problem, Recasting The Solution*, 54 Duke L.J. 448, 467 (2004) (claiming that contingency fees, among other factors, cause the American justice system to be “excessively expensive, . . . inaccurate and inconsistent”).

Federalism

As a federal republic, the U.S. does not embody a unitary legal system. Instead, two distinct, yet often overlapping, sets of laws may apply: (1) federal law, promulgated by the national government; and (2) state law enacted by one or more of the fifty states. Businesses operating in the U.S. may find themselves confused as to whether state or federal law controls their activities. Generally, businesses must be prepared to comply with both state and federal law, where the laws do not conflict. If they do conflict, then federal law generally controls because the U.S. Constitution makes federal law “the supreme law of the land.”

Similarly, two court systems operate in the U.S.—the federal judiciary and the court system of each of the fifty states. The federal constitution limits the subject matter jurisdiction of federal courts, generally, to cases “arising under” federal law (known as “federal question” jurisdiction) or cases involving state law where the parties are citizens of different states (known as “diversity of citizenship” or simply “diversity” jurisdiction), reserving all other cases to the state courts. If both sides of a lawsuit include foreign parties, no “diversity” appears, and the matter may be heard in state court. If a defendant has been sued in state court, but the case arises under federal law or involves parties of diverse citizenship, the defendant may “remove” the case from state to federal court. This “removal” procedure can be a powerful tool for businesses because federal civil procedure rules can often be more favorable to defendants.

Extra-Territorial Application of U.S. Law

The American legal system operates under the general presumption that U.S. laws will not apply beyond U.S. territorial jurisdiction unless Congress clearly intends such extraterritorial reach. Thus, for example, where the plaintiff, the defendant, and some allegedly tortious conduct lack any connection to the U.S., the Supreme Court has resisted application of U.S. law. Yet, where either “the wrongful conduct had a substantial effect in the United States or upon United States citizens,” or some portion of the wrongful conduct “occurred in the United States,” a U.S. court may apply U.S. law to a foreign defendant.

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13 See U.S. Constitution, Art. VI, Cl. 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”). The process of determining whether state law has been “preempted” by federal law sometimes requires careful parsing of the provisions of federal law. Compare Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068 (2011) (text and structure of national vaccination statute preempted state design defect claims) with Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131 (2011) (no preemption where no indication that preemption was a “significant objective of federal regulation”).

14 See U.S. Constitution, Art. III, Sec. 2 (“the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies between two or more States; . . . between a State and Citizens of another State; . . . between Citizens of different States; . . . between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”)

15 See Universal Licensing Corp. v. Paola del Lungo S.p.A., 293 F.3d 579, 581 (2d Cir. 2002) (no diversity jurisdiction “where on one side there are citizens [of a State] and aliens and on the opposite side there are only aliens”).

16 The right of removal of cases does not appear in the U.S. Constitution. It is, however, a right extended by Congress since the early days of the Republic. The right to remove a case from state to federal court is vested exclusively in the defendant. 28 U.S.C. § 1441(A); 28 U.S.C. § 1446(a). See also Shamrock Oil and Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868 (1941).

