Risk Factors

for the Away Team

In an increasingly global marketplace, European companies find that they face the risk of litigation in the United States with ever-growing frequency. They may face US litigation as an expected consequence of contracting with US entities or as an unexpected consequence of unforeseen events affecting US parties. The flurry of lawsuits brought against BP in the wake of the devastating oil spill reaching US soil is one such example, in an ever-increasing number of cases being filed in the federal and state courts across the United States.

When any lawsuit is received, corporate counsel must promptly assess both the substance and procedural status of the case. While dispute resolution systems around the world will present some common challenges and areas of uncertainty, a number of unique aspects of US litigation may dramatically affect the related risk assessment. The good news is that some risks may be reduced by the choices a party makes. The bad news is that the options are not necessarily obvious or available indefinitely, increasing the need for timely legal advice.

We address 10 factors European companies should consider when assessing potential risk related to the US litigation process. These factors encompass issues related to the selected court, judge and jury; the treacherous areas of discovery and disclosure, including document preservation and ediscovery; compensation of counsel and insurance coverage; unique risks of class actions and punitive damages; and the path from ruling to post-trial relief and judgment enforcement. The article focuses on the questions to ask US counsel about the litigation process and highlights areas where options exist. No amount of planning will remove all of the uncertainty surrounding US litigation, but a clear understanding of issues and options may at least render the associated risk more manageable.

in US Litigation

BY DR. MARTIN WAGENER AND BARB DAWSON

The starting point: Consider the court selected by the plaintiff

The United States is founded upon a system of dual sovereignty, where both the national (federal) government and its constituent states are sovereign entities. One government exists at the federal level, and that government includes a federal court system. Meanwhile, each of the 50 states maintains its own, independently functioning government and court system. For a litigant, this means that a lawsuit could arise in any number of different courts, in any part of the United States.

In this system, plaintiffs make the first choice as to where to file their lawsuits. One court may be more advantageous to a plaintiff or defendant in a given case. Another could be the opposite. While it is often difficult or impossible to predict which court a plaintiff will choose, complicated questions sometimes arise as to which court should properly hear the case once it is filed. In evaluating the risk confronted in a given American court, a non-US corporate defendant should keep the following issues in mind.

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The courts of the 50 states

With a non-US corporate defendant, it is quite likely that any lawsuit will be filed in the state court system. Plaintiffs' counsel often perceive an advantage to suing in state court, where judges and juries are seen as more inclined to protect local parties and local interests. Also, state courts sometimes employ more lenient standards of pleading and proof than the federal courts, making it easier for plaintiffs to impose expense and potentially succeed in their litigation. If faced with a state-court lawsuit, a non-US corporate defendant should ask the following questions:

- *What is known about the judge?* Each state court will have its own process by which people become judges. In some states, judges are selected in a merit-based system. In other states, judges are elected. Some judges must periodically stand for re-election, while others have long-term appointments. Also, the fact that the judge may not have any special training to serve as a judge may come as a surprise to European clients. Local counsel may be able to provide additional background about a particular judge, including that judge's educational background, professional experience and political tendencies. Some state-court judges may have published decisions, but these are less prevalent at the trial-court level. The internet may provide some information about the judge, but its accuracy and completeness cannot be guaranteed.
- *Is there an option to change judges?* The system may allow a party to "strike" or veto the assigned judge, with or without stated cause, so that a new judge takes over the case. There should be careful consideration of the available options and consequences relating to this tactic.
- *What is known about a potential jury?* A corporate defendant should determine whether the plaintiff has requested a jury; the law entitles the plaintiff to a jury in the particular case and if a jury is desirable. Assuming a jury has been requested by a plaintiff (which is likely), some general information about a possible jury may be known. For example, a corporate defendant would want to consider the population from which the jury would be drawn: Is it rural or urban? Are there relevant commonalities in values, experiences or exposure to issues? What is the size of the jury under that court's specific rules? Under what circumstances may a potential juror be stricken — with or without cause?
- *What are the rules for jurors?* For example, the state of Arizona has a system, now followed by others,[1] allowing jurors to discuss the case from its inception, take notes during the case, and submit questions for the court to ask witnesses or counsel in real time, if the questions are appropriate. How these practices may impact a particular case has been the source of much study and some interesting findings. These considerations are worthy of discussion with counsel in assessing risk.

The federal court system

A non-US corporate defendant sued in the US federal court system may take some comfort. For one thing, the standards of pleading and proof in federal court are generally more stringent than in state court, making it more difficult for plaintiffs to impose expense and succeed on the merits. Federal court offers an additional measure of predictability because the body of law surrounding the federal court rules is generally more developed than state court procedural law. Federal judges are appointed for life, so they are free from the political pressures that attend a regular election process. Moreover, the public vetting and ap-

pointment process generally makes information about their backgrounds and judicial temperament readily available. Federal trial judges often publish their decisions, which may be consulted for an idea of the judge's philosophy.

A number of questions should still be asked of US counsel. Federal judges may have local rules and practices unique to their districts, or specific to them as individuals, that can materially affect a matter. For example, some judges might be known for processing cases slowly, while others go to the opposite extreme, forcing parties to litigate the case on a compressed timetable. Also, while there is a good deal of public information about federal judges, local counsel still will likely have "off the record" insight into their less commonly known preferences and expectations, like their tendency to invite oral argument or their aggressiveness at rule enforcement. It is fair to ask counsel for such information.

The federal court system also employs officials known as "magistrate judges" who are not appointed for life. While magistrate judges may not adjudicate cases without the parties' consent, they may still perform ancillary duties in a case such as resolving evidentiary disputes. Some federal courts with a heavy caseload make extensive use of magistrates in processing cases. Others do not. As a result, a party cannot assess risk based upon the assignment to a federal judge in the US system without considering the impact of magistrates. Depending on a court's practice, it could be that a magistrate decides many critical issues in a case, and that magistrate may have very different characteristics from the federal judge in charge.

Assessing the options to the court of the plaintiff's choice

Is service of process proper, and must this dispute be resolved in the United States?

Before a US court may exercise jurisdiction over a defendant, the Due Process Clause of the US Constitution requires that the defendant receive a notice reasonably calculated to apprise it of the pendency of the action, and provide an opportunity to present objections. Rule 4 governs service of process in the US district courts; analogous state rules prescribe the procedure in state courts. US courts will dismiss the case if the plaintiff fails properly to serve the defendant.

To serve a party abroad, you must follow the provisions of the Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Com-

mercial Matters (the Hague Convention, or the Convention). This Convention creates a mechanism for service of process within the signatory nations. It sets out the circumstances when default judgment may be entered against a defendant who was served abroad and failed to appear, and provides for relief from such a judgment. The US Supreme Court interpreted the Hague Convention as "mandatory in all cases to which it applies" and "pre-empt[ing] inconsistent methods of service prescribed by state law."[2] Service of process that does not comply with the Convention is invalid, even if it otherwise comports with the federal and state law, and even if the defendant had actual knowledge of the lawsuit.

In the United States, the Convention is triggered whenever the internal law of a forum US state requires a party to serve process by transmitting the documents (i.e., complaint and summons) abroad. Conversely, the Convention does not apply "where the forum state's law does not define the applicable method of serving process on a foreign corporation as requiring the transmittal of documents abroad..." It also does not apply when plaintiff serves defendant, or defendant's agent, in the United States. The presence of a subsidiary is "not necessarily enough to render a parent subject to a court's jurisdiction, for service of process or otherwise." Finally, the Convention does not apply when defendant's location is unknown.[3]

The Convention sets out comprehensive requirements for service. Plaintiff must send the documents and the Request for Service Abroad of Judicial or Extrajudicial Documents to the "Central Authority" of the country where the defendant is domiciled. Once it receives the documents and the request, the central authority will serve the foreign defendant with the process.

For a non-US defendant, early issues in litigation include:

- Is service under the Convention required?
- Is there any reason to waive the service requirements?
- Is there reason to fight service as improper?
- Is there a basis for pursuing dispute resolution in another country instead of the United States?
- And if so, what are the chances of obtaining the right to proceed exclusively (or at least first) in a non-US court?

These early questions are critical, given the differences in court process and procedure as discussed below. In some circumstances, a corporation may reasonably conclude that it is worth fighting for a familiar jurisdiction

with the language and practices of one's own forum. In other circumstances, the prudent course may be to aggressively litigate in the United States with the goal of creating a track record that will preclude additional frivolous claims in the future.

Moreover, the rules in this area are potentially in flux as US legislation focuses on ways to bring non-US parties with US business ties into the jurisdiction of US courts. For example, proposed amendments to the Foreign Manufacturer Legal Accountability Act introduced in 2010 would require foreign manufacturers and producers importing products into the United States to designate an agent in the United States for acceptance of service of process. Such legislation could change the rules in this area and/or test the limits under the Convention.

> While US courtrooms are **typically open to all observers,** rules vary as to **the exclusion of potential witnesses** and the **inclusion of the press,** both of which are factors that may **dramatically affect a party's view** of the process.

Is a move from one US court to another possible?

Another reasonable area of inquiry is whether a case may be moved from state to federal court, from federal to state court, or from a court in one part of the country to another. There is obvious complexity to administering a dual federal-state court system in a country spanning almost 10 million square kilometers, and complex rules determine which courts may hear which cases, under which circumstances. These rules may enable a non-US litigant to move a case from a less favorable court to a more favorable one, and should be explored with US counsel.

For example, if suit is filed in state court, the defendant may have a right to "remove" that case from state court to federal court. Removal may be warranted where none of the plaintiffs are citizens of the same state as any defendants, or where the case involves a claim that is predicated on federal law. Conversely, a case that was originally filed in federal court may be dismissed from the federal court if it does not involve either of these elements. The plaintiff would then have to choose whether to abandon the litigation or re-file the case in state court.

It is also possible to dismiss or transfer a case for geographic reasons. In general, a state or federal court sitting in one state cannot hear a case if the defendant has absolutely no connection to that state or its residents. A case also may be transferred from the federal court in one state to the federal court in another, where a party shows that the party's private interests warrant a transfer. Courts balance the interests of the court and parties when such a request is made.[4]

The possibility of moving a case from one court to another is typically worthy of discussion, and that discussion should occur on a prompt basis. Once suit is filed, the window of opportunity to make these moves usually closes quickly. A non-US corporation does best to discuss these issues with US counsel at the earliest opportunity.

Is a move out of the US court system to alternative dispute resolution preferred?

Judicial fora are not the only (or even the chief) mode of dispute resolution in the United States. Private procedures such as mediation and arbitration are widespread. Sometimes as a matter of standard procedure, a court will require, or at least encourage, the parties to submit to some form of non-binding alternative dispute resolution (ADR) to see if the dispute may be resolved without the aid of the court. Alternatively, parties may agree in their contract that a dispute will be subject to mediation and/or arbitration. Both the US legislature and the US Supreme Court have expressed strong support for private arbitration agreements as a means of resolving business disputes.[5] A well-crafted ADR clause in the parties' contract may allow the parties to avoid US litigation, and instead resolve disputes in the manner and location of their choosing.[6]

Thus, it is not uncommon for a non-US corporation to enforce an arbitration clause against its litigation adversary, thereby removing the dispute from the US court system to a private arbitrator or panel. The body of law surrounding the enforcement of arbitration clauses is relatively well developed but varies based upon the court's jurisdiction. The decision to exercise the right to arbitration carries obvious importance, as the streamlined procedures of arbitration can save litigants vast amounts of time and expense. This option may be waived if not promptly exercised, however, so it should be raised with US counsel at the earliest opportunity.

Even if a dispute does not involve a written arbitration agreement, arbitration may be a viable option if both parties are willing to consent to it. And as already noted, some

courts require parties to at least attempt to utilize ADR to resolve their dispute. A range of ADR options are available, subject only to the creativity of counsel and the willingness of the parties to participate. "Baseball arbitration," for example, is where each party argues its side of the case and submits a proposed monetary award. The arbitrator listens to the case and chooses the most reasonable award of the two. Each party arrives at the arbitration with an incentive to submit a reasonable proposal that the arbitrator is likely to accept.

The pros and cons of the US options for ADR, and the benefit to using these options strategically at particular stages of the litigation, should be discussed with US counsel early and often as the case unfolds.

Discovery and disclosure rules if the case proceeds in a US court

For all parties, the American process of disclosure and discovery may cause discomfort, and for non-US parties, it likely presents the most unfamiliar part of the litigation process. At the outset of the case, many courts impose automatic disclosure requirements on the parties. For example, Federal Rule 26 requires that parties voluntarily participate in "initial disclosure," "disclosure of expert testimony," and "pretrial disclosures." While state court systems vary, extremes exist under which relevant information that is helpful — and unhelpful — must be voluntarily produced to the opposing party early in the case.[7] Also, parties are able to ask for the production of information from the other side that is sometimes viewed as a "fishing expedition." Accordingly, the topic of court-required disclosure is an essential item on the agenda for discussion with US counsel.

Once a case is underway, discovery may begin. The formal discovery process encompasses written requests for information (e.g., interrogatories and requests for production of documents, electronically stored and other information), and deposition of witnesses, including party representatives, non-parties and designated experts. The scope of discovery may largely drive the pre-trial cost related to a matter. A corporate defendant facing an individual plaintiff is apt to find discovery demands to have an adverse, lopsided impact. The mass of information and related intrusion of discovery at a corporation is often much greater than the impact on the individual party, who may have no documents or hesitancy to testify, and may have plenty of time and desire to focus on the case. Specific inquiries about the permitted and expected scope of discovery are likely to assist the risk management analysis.

The events of discovery are also likely to surprise non-US corporate executives, who may find that a plaintiff's attorney is seeking — and entitled to pursue — production of his hard copy records, electronic files, in-person deposition testimony and sworn responses to some very pointed, written interrogatory questions. No one enjoys such surprises, and a non-US litigant should work with US counsel to anticipate them. Collateral issues must also be considered, particularly if potential criminal claims may follow. There may be serious ramifications of public disclosure with respect to sensitive information, going well beyond the scope of the specific litigation. While a corporation's own designation of information as "private" will not automatically prevent its production, US courts may allow the parties to make a confidential, non-public disclosure of information in well-justified cases.

On the flipside, the potential of using discovery against one's opponent — particularly a corporate opponent — may yield some value not typically in play in non-US dispute resolution. This possibility should be explored as well.

As the volume, scope, rules of engagement and local practices related to each of these areas vary drastically based upon the particular state or federal court, these topics may drive decisions to attempt to move a matter from one court to another.

The must-know area of document preservation and ediscovery: What must be saved and why?

A discussion of US litigation requirements related to discovery and disclosure would be woefully incomplete in current times without comprehensive coverage of the hazards surrounding document preservation obligations and ediscovery. With the seminal case of *Zubulake vs. UBS Warburg L.L.C.*, 229 F.R.D. 422 (S.D.N.Y. 2004), which sent shockwaves through corporations everywhere, the US expectations relating to this area changed forever. While the full scope of issues related to this area cannot be addressed in a single article, key questions to ask US counsel include the following:

- *What are the applicable court rules related to document preservation and ediscovery?* The rules tend to be more defined in federal than state courts, and yet variations in both systems exist.[8]
- *What are the actual practices to be expected under these rules?* This question is just as important as the form of the rules themselves. Even in federal court, where the rules are more specific, local practice varies as to the ability of the parties to stipulate to and agree upon different procedures in the case. Practices continue to evolve as counsel becomes more experienced in this area.

Every litigant in the US court system should be aware of the serious consequences that can attend the mismanagement of electronic evidence. Rules applicable to spoliation of evidence — the willing or negligent destruction of evidence necessary in the case — have led courts to sanction

parties for losing electronic data.[9] Consequences range from the exclusion of related evidence to entry of judgment against the party responsible for the spoliation. The significant hazards and traps for the unwary arising in this area lead to the following essential questions:

- What must we preserve?
- What notice should we provide to ensure that preservation occurs?
- Who should receive the notice?
- What should be done to confirm that documents — electronic and hard copy — have been properly preserved?
- How and when must we collect the documents?
- Who should handle these tasks?
- What are the proper roles of counsel — inside and outside — and others in this process?
- To what extent is our work protected from discovery or disclosure under a privilege or otherwise?
- What do we do if the expectations under these US rules conflict with the laws of other countries by which we are bound?

The bad news is that this area of law is not sufficiently settled for a strong body of guiding authority to exist. The good news is that, so far, the courts have largely employed standards based on a principle of reasonableness.[10] Corporations with good document maintenance systems in place — before issues arise — are in the best position to comply with the applicable requirements. Yet, whether compliance with US requirements creates separate issues under the laws of the country in which the documents reside, may be a driving factor with no easy solution.

The path to a decision: Rules for dispositive motion and trial practice

Naturally, every defendant in US litigation wants to understand the best paths to a rapid resolution of the case. Counsel should help the non-US corporate defendants understand and assess these options, which typically include motions to dismiss, motions for judgment on the pleadings, and/or motions for summary judgment.

Typically, such dispositive motions are only appropriate where resolution of an issue of law could partially or fully dispose of the case. In turn, the central question is generally whether the case turns upon an issue of law, or an issue of fact, which requires a good understanding of both. As this distinction is often not as clear-cut as one would expect, case-specific analysis is valuable in this context. Needless to say, the faster and less expensive approach is generally to dispose of a case by motion rather than by trial.

If the case presents issues of fact, a motion probably will not succeed in disposing the entire case. In this situation, a trial is likely required. If so, the rules for trial, and possible options available to stipulating parties, are key. Depending upon the court and the nature of the case, trial could occur before the judge or before a local jury. The witnesses who might testify at the trial could vary based upon the court's subpoena power.[11] Also, the evidence most likely to be admitted depends upon local rules and often the particular judge's discretion. More broadly, who may observe trial could vary. While US courtrooms are typically open to all observers, rules vary as to the exclusion of potential witnesses and the inclusion of the press, both of which are factors that may dramatically affect a party's view of the process.[12] While a party may not be able to avoid some undesired rules of engagement in the US trial process, knowledge of common practices at least strengthens the ability to properly assess the risks, hopefully at a point in time when more attractive options still exist.

Increasingly, US courts are experimenting with alternatives to the standard track trials. An understanding of non-standard options available in the jurisdiction, if any, may make a significant difference in how a case is approached. For example, some courts allow the parties to stipulate to "short trials," saving on time and costs but requiring some strategic and sometimes difficult decisions about what will be presented in very limited time. Also, some courts encourage parties to engage a private judge — the upside being the potential of more confidentiality and control surrounding the trial process, and the downside being that the judge must be privately paid and agreed upon by adverse parties, with the potential of appeal likely being removed as an option.[13]

As US courts confront an ever-increasing caseload, coupled with financial pressures that tend to reduce the available staff and resources, trial options that partly or completely remove matters from courts' dockets are gaining popularity. There may be times when a private resolution is the best answer. There also, however, may be times when publicly fighting to deter future copycat frivolous claims is the wiser course. Enlisting US counsel to explore and advise on the pros and cons of alternatives is a logical measure.

Money matters: Compensation of counsel and insurance coverage

Under any legal system, the human factor of compensation to counsel exerts a marked effect on behavior. In the US system, where the plaintiff's counsel may be paid on contingency instead of on an hourly basis, the impact of this factor is magnified. The impact of contingency arrangements has added such drama to the system that it has been the subject of such US movies as "A Civil Action," "The Sweet Hereafter" and "The King of Torts." It is important to understand the likely plaintiff payment scenario and the ethical rules related to attorney compensation, as

these factors will drive the conduct of plaintiff's counsel to some degree.

Understanding the payment options for one's own defense counsel is also fundamentally important. Here, again, not only will a solid appreciation for the customary arrangement help with assessment of options, but also with an understanding of the ethical limits. While a full discussion about alternative fee arrangements is beyond the scope of this article, this issue must be studied on an ongoing basis, as commonplace practice in the United States is changing.[14]

One should also question the availability to either side of fee — or cost — recovery. Unlike some other countries in the Common Law tradition, the United States rejects a general rule that the loser in the litigation must pay the winner's legal fees. However, specific state laws often provide for an award of fees against the loser in some commercial cases, whether the cases arise in state or federal court. The rules here will vary potentially with the source of the dispute, the specific claims and the applicable law, among other things.[15] And in some circumstances, the value of such fee and cost recovery may drive the decision to settle or proceed with litigation.

Finally, the availability of insurance coverage for all, or any, of the litigation expenses and exposure should be investigated promptly upon notice of a claim. Early notice to a carrier may significantly reduce the potential that a company will need to fight an additional battle with an insurer over timely notice of an otherwise covered matter.

> While much of the US system is **in sync with other systems** when it comes to damages, its **punitive damages** principles pose a **relatively unique threat.**

Assessing unique risks of class claims

As class action claims have recently become available in some European countries, the nature and scope of this US mass litigation tool has gained a fair amount of attention.[16] Because US class actions may result in windfall attorneys' fees awards, not tied to the hours worked, the risk associated with US class action claims will likely be elevated.

Federal and state rules govern the creation of class actions. For example, Rule 23(a) of the Federal Rules of Civil Procedure spells out four prerequisites to the maintenance of a class action: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

> Class actions are **particularly perilous** because the **federal rules do not require** affirmative certification: A plaintiff who **fails to opt out** may automatically **become a member of the class.**

Class actions amplify an individual plaintiff's power vis-à-vis a corporate defendant, and expose companies to an augmented judgment liability. Attorneys focusing on their potential personal profit may initiate class actions. In such cases, deep-pocketed defendants are typically the targets. Class actions are particularly perilous because the federal rules do not require affirmative certification: A plaintiff who fails to opt out may automatically become a member of the class. The high stakes related to class actions often drive consideration of ADR or other tools to confine, resolve or at least aggressively address claims at a very early stage in the litigation.

Assessing unique risks of punitive damages

Any conversation regarding the risks involved in litigation, both in and outside of the United States, would be incomplete without a discussion of damages. While much of the US system is in sync with other systems when it comes to damages, its punitive damages principles pose a relatively unique threat. Punitive damages are awarded in circumstances where the findings are deemed to warrant punishment of a party.[17] Therefore, punitive damages do not directly relate to the loss incurred by the plaintiff. Rather, they depend on the status of the party being punished, and the amount of damages that is determined necessary and appropriate to catch the wrongdoer's attention and correct its future behavior. "Smoking gun documents," such as email exchanges that executives never expected to be disclosed, may trigger punitive damage consideration.

ACC Extras on… US Litigation

ACC Docket

- *Protecting Privilege in a Global Business Environment (June 2009).* In the face of litigation, internal documents could be called into evidence, and upholding the international sanctity of attorney-client privilege can become knotty. Explore ways to make the law work for you anywhere in the world. *www.acc.com/docket/prvlg-gbe_jun09*
- *Ethics & Privilege: Litigation Challenges Facing Multinational Financial Institutions (Dec. 2006).* When it comes to litigation challenges facing the multinational financial institution, the most appropriate metaphor is playing tennis without knowing where the chalk lines are on the court. *www.acc.com/docket/e&p_dec06*
- *Representing European Companies in US Litigation (Feb. 2001).* Representing European companies in US litigation is not at all the same as representing your American client in US litigation. Learn what you need to take into account, such as billing procedure differences, confidentiality requirements differences, translation requirements and differences in expectations on the part of your clients. *www.acc.com/docket/euro-uslit_feb01*

Articles

- *E-Discovery Compliance as Domestic and Foreign Litigation Grows (Oct. 2009).* The editor interviews Mary Mack, corporate technology counsel, Fios, Inc., who discusses the financial crisis and impact of that litigation on businesses outside the financial sector, focusing on investigation and electronic discovery. *www.acc.com/e-dis_comp_oct09*
- *How to Effectively Manage the US Litigation Risks — Ediscovery (Nov. 2008).* By generating, transmitting and storing enormous amounts of electronic information, companies expose themselves to significant risks and costs in the important discovery phase of US litigation. This article discusses how to deal with discovery of these documents. *www.acc.com/uslitrisk_nov08*
- *The Shrinking World Research Report: How European In-house Counsel are Managing Multinational Disputes (May 2008).* This research report covers the growth in legal disputes around the world. *www.acc.com/srnk-wrld_may08*

Quick Reference

- *First 90 Days Handling Litigation Checklist (Dec. 2007).* This reference lists important points to remember during the first 90 days of litigation. *www.acc.com/quickref/90dayslit_dec07*

InfoPAK℠

- *Crisis Management in Litigation and Investigations: Parallel Proceedings, Competing Stakeholders and Multiple Venues (Aug. 2008).* This InfoPAK provides a general overview of the legal issues, concerns, and considerations that in-house counsel should be aware of when its company is faced with a crisis. It addresses a wide-range of issues and areas commonly affected by a company crisis, including the media, regulatory concerns and litigation issues. *www.acc.com/infopaks/cm-lit&inv_apr08*

ACC has more material on this subject on our website. Visit *www.acc.com*, where you can browse our resources by practice area or search by keyword.

Likewise, the destruction of documents, such as the erasing of electronic data, is a high-risk area that could trigger corporate punishment. As this concept of damages is not shared everywhere, its underpinnings and the circumstances on which it may be invoked should be understood by US litigation defendants. Otherwise, such defendants run the risk of suffering a catastrophic and unexpected loss well beyond the financial scope of the dispute.

As the US Supreme Court observed, "punitive damages overall are higher and more frequent in the United States than they are anywhere else."[18] A 2001 study that examined punitive damages in the 75 largest US counties found that punitive awards equaled or exceeded one million dollars in 12 percent of the 365 civil trials.[19] In nine of these trials, punitive damages amounted to $10 million or more. Examples of massive punitive awards are easy to find. In a VIOXX trial, the jury awarded $229 million in punitive damages to a single plaintiff.[20] In an anti-discrimination suit against Novartis, one of the world's largest pharmaceutical companies, a New York jury awarded plaintiffs $250 million in punitive damages.[21]

The US Supreme Court has taken a recent interest in punitive damages awards, expressing discomfort with the idea of crippling punishment in the context of a civil (as opposed to criminal) dispute. The Supreme Court has held that punitive awards exceeding compensatory damages by more than a single-digit multiplier are unlikely to satisfy constitutional limits.[22] Even with these limits, the potential for punitive damages, and damages in general, should be included in any discussion of potential US litigation risks.

Post-trial relief: What is the path to a final result?

Another area warranting consideration is the path to a final resolution after the trial court outcome. Particular attention should be paid to the US appellate process as state and federal procedures vary greatly. Questions to ask in this area include:

- What are the levels of appeal?
- What is known about the judges at each level?
- May an appeal be taken as of right, or does it depend upon the court's discretion?
- What is the financial obligation of a party to bond an appeal?[23]
- How long is each level of appeal likely to take?
- What enforcement of a lower court judgment, if any, may occur while a matter is on appeal?
- What may be done to stop such judgment enforcement pending the outcome of an appeal?
- To what extent are the attorneys' fees and other costs related to an appeal that could be recovered by the prevailing party?
- Is this a good time to explore settlement? The answer is often yes.

> In general terms, **the advantage** of having a separate US entity **is the potential to limit risk of exposure,** arising from US business and related litigation, **to just that entity.**

The ability and willingness of each party to appeal an adverse trial outcome plays a significant role in any strategic litigation calculus.

Win or lose: The critical rules of judgment enforcement and the role of the US affiliate

Just as a win or loss on paper is never the end of the matter, the risk assessment is not complete without consideration of judgment enforcement. In general, US judgments tend to be enforced in Europe if the European state determines that: (1) the US court had jurisdiction; (2) defendant was served properly; (3) proceedings were not marked by fraud; and (4) the US judgment is not against the foreign state's public policy.[24] Given the potential for such enforcement of a judgment from a court in the United States on European soil, the question is frequently asked as to whether a separate US affiliate is advisable.

In general terms, the advantage of having a separate US entity is the potential to limit risk of exposure, arising from US business and related litigation, to just that entity. However, in certain instances, plaintiffs may ask courts to pierce the corporate veil and assert jurisdiction against the foreign parent. Courts employ three different approaches to evaluate the relationship between the foreign parent and the US entity.[25] Under the "corporate formalities approach," courts ask whether the parent and the subsidiary maintained formal corporate separation. Under the "control" approach, courts examine the degree of the parent's control over the subsidiary. Under the "hybrid approach," courts examine formality of the separation and the degree of the parent's control over the subsidiary. At bottom, courts inquire whether "sufficient grounds" exist to treat the subsidiary as the parent's alter ego.

Advanced planning warrants consideration of the proper corporate structure when an entity is global in its reach. If the entity is doing business in the United States, or even with US entities or residents, it arguably has exposure to US litigation. If so, the establishment of an appropriate US entity, separate from the European parent, may be wise.

All litigation involves risk

Risk is best managed if it is broken down and well understood. When it comes to the risks inherent in US litigation, risk management is not intuitive and cannot be understood unless the right questions are answered. The checklist above is not all-inclusive, nor is it case specific. It is, however, a broad overview of some common risk areas in the US court system, which is a good starting point for a collaborative risk assessment by US counsel and a European corporate client. Rephrasing a venerable Greek philosopher: to maximize your success, you must know what you can control and what you cannot.

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Editor's note: *For detailed endnotes, please see the Digital Docket edition available at* www.acc.com/docket.

Notes

1 See, e.g., Gregory E. Mize & Christopher J. Connelly, "Jury Trial Innovations: Charting a Rising Tide," 41 Ct. Rev. 4 (2004) (stating that the "movement [for innovative jury rules that] started in Arizona has taken hold in a growing number of states); Shari Seidman Diamond et al., "Juror Discussions During Civil Trials: Studying an Arizona Innovation," 45 Ariz. L. Rev. 1, 81 n.7 (2003) (noting that Colorado, Maryland, and Florida have considered "pilot studies on rule changes to allow pre-deliberation discussions similar to those in Arizona"). See generally G. Thomas Munsterman, Nat'l Ctr. for State Cts., "Implementing Jury Trial Innovations" (Apr. 2002) (describing pilot programs to adopt innovative rules for jurors in Hawaii and Massachusetts).

2 *Volkswagenwerk Aktiengesellschaft v. Schunk*, 486 US 694, 705 (1988); *Balcom v. Hiller,* 54 Cal. Rptr. 2d 536 (Cal. Dist. Ct. App. 1996).

3 "Comm. on Fed. Cts. of the N.Y. State Bar Ass'n, Service of Process Abroad: A Nuts and Bolts Guide," 122 F.R.D. 63, 71 (1989); see e.g., *Vega Glen v. Club Mediterranee S.A., 359 F. Supp. 2d 1352 (S.D. Fla. 2005); Schlunk,* 486 US at 694-95; "Comm. on Fed. Cts. of the N.Y. State Bar Ass'n, Service of Process Abroad: A Nuts and Bolts Guide," 122 F.R.D. 63, 73 (1989). Therefore, attorneys drafting contracts with the foreign companies should include an appointment of a foreign party's agent for service of process in the United States. Id. At 74; Schlunk, 486 US at 705 n.* (ci*ting Cannon Mfg. Co. v. Cudahy Packing Co.,* 267 US 333, 336-37 (1925)); American Law Reports Federal § 2 (2d 2010) ("[W]here the whereabouts of a foreign defendant are unknown . . . service by publication is permissible.").

4 *Piper Aircraft v. Reyno*, 454 US 235, 242 n.6 (1982) (quoting *Gulf Oil Corp. v. Gilbert*, 330 US 501, 508-09 (1947)).

5 *Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 440, 443 (2006) ("To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act...Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts...") (quoting Federal Arbitration Act, 9 USC. §§ 1-16); see also Aaron-Andrew P. Bruhl, "The Unconscionability Game: Strategic Judging and The Evolution Of Federal Arbitration Law," 83 N.Y.U. L. Rev. 1420, 1421-22 (2008) ("The United States Supreme Court strongly favors arbitration as a method of dispute resolution.").

6 Mark Rogers & Barb Dawson, "Unchartered Waters: Ten Considerations to Crafting the International Mediation Clause," *ACC Docket,* Oct. 2008, at 78, 80-84.

7 Compare Ariz. R. Civ. P. 26.1(a) & (b) (2010) (automatic disclosure) with Alaska R. Civ. P. 26 (same) *with* Cal. Code Civ. Proc. § 2017.010 (2009) (disclosure upon request) *and* N.Y. C.P.L.R. § 3101 (McKinney 2010) (same).

8 Compare Fed. R. Civ. P. 26(a)(1) (2010) (requiring automatic disclosure of "electronically stored information); Fed. R. Civ. P. 26(b)(1) (2010) (defining the scope of discovery as encompassing "the existence, description, nature, custody, condition, and location of any documents"); Fed. R. Civ. P. 26(b)(2)(B) (2010) (limiting discovery of electronically stored information) with Cal. Code Civ. P. § 2017.010 (2009) (defining the scope of discovery); Cal. Code Civ. P. § 2017.730 (2009) (authorizing courts to enter orders allowing use of technology); Cal. Code Civ. P. § 2017.710 (2009) (providing a broad and non-exhaustive definition of "technology"); and Ariz. R. Civ. P. 26.1(a)(8) (2010) (requiring automatic disclosure of electronically stored information); Ariz. R. Civ. P. 26(b)(1)(B) (2010) (limiting discovery of electronically stored information); Ariz. R. Civ. P.16(1)(B) (2010) (authorizing courts to enter orders setting requirements or limitations on discovery of electronically stored information and orders setting measures for preservation of such information); and N.Y. C.P.L.R. § 3101 (a) (McKinney 2010) (defining the scope of discovery); N.Y. Comp. Codes R. & Regs., Tit. 22, § 202.70, R. 8(b) (2010) (requiring counsel to "confer with regard to anticipated electronic discovery issues" before the preliminary pretrial conference).

9 See, e.g., *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 24 (D.D.C. 2004); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 224 F.R.D. 595, 599 (D.N.J. 2004); Zubulake v. UBS Warburg L.L.C., 220 F.R.D. 212, 217 (S.D.N.Y. 2003); *Thompson v. US Dep't of Housing & Urban Dev.,* 219 F.R.D. 93, 100 (D. Md. 2003); *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1095 (Fla. Dist. Ct. App. 2001); C*oleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.,* 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005); *Convolve, Inc. v. Company Computer Corp.* 223 F.R.D. 162, 176 (S.D.N.Y. 2004) (stating that a court can impose the sanction of adverse inference for the destruction of electronic evidence); *Phillip Morris USA, Inc.*, 327 F. Supp. 2d at 25-26 (sanctioning defendant for its employees' destruction of electronic evidence by excluding its witness and by imposing monetary penalty); *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1095 (Fla. Dist. Ct. App. 2001) (affirming trial judge's instruction to the jury to find for plaintiff, because defendant discarded a computer that contained pertinent electronic evidence); *Computer Assoc. Int'l, Inc. v. Am Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990) (holding that developer's destruction of source code after receipt of complaint warranted entry of default judgment).

10 See, e.g., *Zubulake*, 220 F.R.D. at 217 ("[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. 'While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.'") (*quoting Turner v. Hudson Transit Lines, Inc.,* 142 F.R.D. 68, 72 (S.D.N.Y. 1991)); *Kronisch v. United States,* 150 F.3d 112, 126 (2d Cir. 1998) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."). See, e.g., *Martin v. Northwestern Mut. Life Ins. Co.*, 2006 WL 148991, at *1 (M.D. Fla. Jan. 19, 2006) (The court sanctioned plaintiff for failing to produce requested documents where plaintiff's accountant "failed to understand the scope of the [plaintiff's] demand [to retrieve all the documents] or the obligations it imposed"); *Philip Morris USA, Inc.,* 327 F. Supp. 2d at 24-25 (The court found it "astounding" that Philip Morris employees deleted emails, contravening the company's internal policy for document preservation and the court's order. The court sanctioned Philip Morris for the destruction of emails.).

11 Fed. R. Civ. P. 45(c)(3)(A) (2010). See also 9A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2454 (3d ed. 2010) ("Attorneys issuing subpoenas should note that a district court does not have the power to enforce a subpoena if it lacks subject matter jurisdiction over the underlying action. In addition, witnesses and parties attending a judicial proceeding outside the territorial jurisdiction of their residence are immune or exempt from service of civil process in another suit while in attendance at court in the jurisdiction to which they have been summoned.").

12 Compare Fed. R. Evid. 615 (2010) and Cal. Evid. Code 777 (2010) *with* Ariz. R. Evid. 615 (2010). See e.g., Carolyn Stewart Dyer & Nancy R. Hauserman, "Electronic Coverage of the Courts: Exceptions of Exposure," 75 Geo. L.J. 1633, 1700 (1987) ("Conditions of [media] coverage vary in [different] states."); Nancy T. Gardner, "Cameras in the Courtroom: Guidelines for State Criminal Trials," 84 Mich. L. Rev. 475, 505-06 (1985) ("States have devised a variety of rules aimed at limiting the physical distractions caused by cameras in the courtroom. Although specific requirements vary from state to state, these technical rules are rarely in controversy in debates over media access.").

13 See, e.g., Jean R. Sternlight, "Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia," 80 Notre Dame L. Rev. 681, 722 (2005); G. Thomas Munsterman, "A Cost Free Civil Jury Trial?," 18 Ct. Manager 35, 35-36 (2003); see, e.g., Amy L. Litkovitz, "The Advantages of Using A 'Rent-A-Judge' System in Ohio," 10 Ohio St. J. Disp. Resol. 491, 491 (1995); Lawrence B. Solum, "Alternative Court Structures in the Future of the California Judiciary: 2020 Vision," 66 S. Cal. L. Rev. 2121, 2141 (1993) (analyzing the differences between the private-judging proceedings and the public trials and noting that parties may appeal a private judge's decision only if they have reserved appeal as an option).

14 See, e.g., "Flat-Fee or Hourly Billing, It Doesn't Matter: Lawyers Will Work Hard," *Wall Street Journal*, Jan. 26, 2010, available at *http://blogs.wsj.com/law/2010/01/26/flat-fee-or-hourly-billing-it-doesnt-matter-lawyers-will-work-hard* (last visited June 23, 2010) (reporting about a flat-fee deal between a client corporation and a lawyer); Edward Poll, "Flat Fees and Contingency Fees - Do They "Fix" Hourly Rates?," *Law Practice Today*, June 2007, available at http://www.abanet.org/lpm/lpt/articles/fin06071.shtml (last visited June 28, 2010) (describing alternatives to hourly rates); Poonam Puri, "Lawyers as Gatekeepers, Investors and Advisors: An Analysis of Innovation in Legal Fee Arrangements" (and "Implications for the Lawyer-Client Relationship and the Public Interest") (W.G. Hart 2001 Legal Workshop, July 17, 2001) available at *http://ssrn.com/abstract=271749* (last visited July 4, 2010) (reporting that some law firms accept equity in their clients as compensation for legal services) .

15 A number of factors will determine whether the winning party can recover fees from the losing party. For example, the parties' contract may provide for recovery of litigation costs, the lawsuit may involve a breach of contract, or claims may arise under other theories where applicable law provides for recovery. For discussion about the loser-pays reforms in the United States, see Walter Olson & David Bernstein, "Loser-Pays: Where Next?," 55 Md. L. Rev. 1161 (1996).

16 Tiana Leia Russell, "Exporting Class Actions to the European Union," 28 B.U. Int'l L.J. 141 (2010) ("The reformulation of US class actions for the European market has increasingly attracted attention.); Samuel Issacharoff & Geoffrey P. Miller, "Will Aggregate Litigation Come to Europe?" 62 Vand. L. Rev. 179, 179-80 (2009); Laurel J. Harbour & Marc E. Shelley, ABA Annual Meeting, "The Emerging European Class Action," 11 (2006).

17 *BMW of North America, Inc. v. Gore*, 517 US 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 US 424, 432 (2001) (Punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing"); see also 7 Bus. & Com. Litig. Fed. Cts. § 81:78 (2d ed. 2009) ("In imposing punitive damages, most jurisdictions require the defendant to have acted with reckless disregard or with wanton or malicious behavior."); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 US 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

18 *Exxon Shipping Co.*, 128 S. Ct. at 2623 (citations omitted).

19 Thomas H. Cohen, US Dep't of Just., "Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties," 2001 (March 2005), available at *http://bjs.ojp.usdoj.gov/content/pub/pdf/pdalc01.pdf* (last visited July 3, 2010).

20 Alex Berenson, "The Vioxx Decision: The Overview; Jury Calls Merck Liable in Death of Man on Vioxx," *New York Times*, Aug. 20, 2005, available at *http://query.nytimes.com/gst/fullpage.html?res=9A03E6D8103EF933A1575BC0A9639C8B63&sec=health&spon=&pagewanted*=1 (last visited July 3, 2010).

21 Emily Friedman, "Jury Finds Novartis Liable for $250M in Female Discrimination Complaints," *ABC News,* May 19, 2010, available at *http://abcnews.go.com/Business/novartis-pharmaceuticals-corp-found-guilty-gender-discrimination/story?id=10689070* (last visited July 4, 2010).

22 *Exxon Shipping Co.*, 128 S. Ct. at 2626 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.") (citation omitted).

23 See, e.g., Doug Rendleman, "A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform," 39 Akron L. Rev. 1089, 1096-97 (2006) (An appeal bond is a mechanism that allows "the defendant-appellant to post . . . [a] bond to stay or suspend plaintiff's collection during the protracted appellate review..." Thus, appeal bond serves "competing goals": It will stay the plaintiff's immediate collection, but it will also guarantee the plaintiff's ability to collect her judgment if her damages verdict emerges from appellate review as a judgment that she can collect... The judgment debtor loses the bond premium, but it gains a breathing space during appellate review.").

24 Bernd Honsel, Gerald G. Paul & Wolfgang A. Dase, Successful Partnering Between Inside and Outside Counsel § 23:51 (2010). The authors also note that "[w]hile . . . requirements vary widely from country to country, judgments which do not involve multiple damages or punitive damages generally may be enforced, in whole or in part, upon recognition as authoritative and final . . . ." *Id.* (citation omitted). Foreign jurisdictions may also consider whether "proper legal procedures [were] observed," "the judgment conflicts with a proceeding or judgment in the foreign country," and "the procedure in the US court conflicts with fundamental principles of fairness and due process in such foreign country." J. Andrew Murphy & Ferdinand Calice, Practicing Law Institute, Equipment Leasing – Leveraged Leasing § 24:5 Enforcement of Judgments of US Courts in Foreign Jurisdictions (2010).

25 See, e.g., Jennifer A. Schwartz, "Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for A Standard that Comports with Due Process," 96 Cal. L. Rev. 731, 733, 744-45 (2008); David Aronofsky, "Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis," 10 N.C.J. Int'l L. & Com. Reg. 27, 57 (1985). But see Detlev F. Vagts, "The Multinational Enterprise: A New Challenge For Transnational Law," 83 Harv. L. Rev. 739, 739 (1970) (noting that "[t]he home country (in particular the United States) finds it hard to resist the temptation to extend its authority over the foreign subsidiaries and to treat them as mere extensions of the [foreign] parent").