

Overseas Product Liability Claims

By George W. Soule

Many American companies sell products overseas. While most countries are not as litigious as the United States, manufacturers are seeing more product liability claims abroad. Manufacturers may have little experience in litigating such claims, and will look to their U.S.-based liability counsel for assistance. There are several ways in which counsel may help manufacturers manage overseas litigation. Here are some of them.

Select Experienced Counsel in the Jurisdiction

The first priority is to secure effective counsel where the claim is pending. Many manufacturers have extensive networks of counsel in the United States, but lack connections overseas. You may reach out to your defense counsel and in-house lawyer for suggestions. Overseas counsel often participate in U.S.-based legal activities, so you can identify prospects in organizations to which you belong. Firms with an international practice often have offices in many countries; a lawyer you know in one location may be able to refer you to a colleague elsewhere.

When you do identify a prospect, check the lawyer's credentials on the law firm website. You will want counsel with significant litigation experience in the venue, who has handled product liability cases and who has worked with American clients. Once you have identified a good prospect, interview the lawyer and obtain and check references.

Establish All Parties' Roles

Some foreign counsel may be accustomed to dealing directly with the client and may not be familiar with the role of coordinating counsel. You may need to explain your role in defending the claim.

Learn the Law

In most countries, the plaintiff must prove the manufacturer's negligence or strict liability product defect. Most nations, however, employ procedures much different from U.S. practices for deciding civil claims such as those for product liability. For example, most countries limit discovery. They may require exchange of some documents, but will not facilitate an extensive exchange of documents. Most do not provide for depositions.

Expert and lay witness testimony is often presented at trial by written statement, affidavit or report. Sometimes, the witness whose "direct testimony" is presented in writing may be subject to cross-examination and redirect in person. In some countries, judges decide cases based principally on written submissions. Juries are rarely employed; outside the U.S., most civil claims are decided by a judge.

In some countries, the judge may appoint an expert to provide advice to the court on substantive issues. The parties may be able to call their own experts to testify, or their experts may provide information to the court-appointed expert to influence his or her opinion.

The best source of information about your venue's laws and procedures is your local counsel. Many overseas lawyers have prepared summaries of their nation's laws just for this purpose; sometimes these sources may be found on their websites. In addition, you may obtain insights through other published sources summarizing laws of international jurisdictions, including International Comparative Legal Guides (<https://bit.ly/2aJxMYR>), Getting the Deal Through — Product Liability (Law Business Research Ltd. 2014), and International Product Liability, Second Edition (Juris Publishing 2016).

Appreciate the Other Country's Legal Culture

Your local counsel should explain the court's processes and the cultural considerations impacting your case. You may need to set aside preconceived ideas on how a case should proceed based on your experience in the United States.

Understand Attorney-Client Privilege

Most countries recognize confidentiality of communications between outside counsel and client. Some, however, do not extend the privilege to communications by or to in-house counsel. This aspect may not be significant if the jurisdiction does not permit requests for company documents. You should check with your local counsel on whether the privilege extends to in-house counsel, and, if not, seek guidance on how to adjust your communication and litigation strategy.

Manage the Language Barrier

Unless you and your client are fluent in the venue's language, you will need to have court documents and evidence translated into English. Your client may have in-house or contract services available to do that, but you also may rely on local counsel to provide translated versions.

Organize the Client's Defense

Just as you would in a case pending in the United States, you should help your client organize its defense, including by identifying important witnesses and pertinent documents. There may be factors unique to the jurisdiction that influence your selection of witnesses and physical evidence. Your client's international staff, for example, may be especially helpful in dealing with issues in the overseas jurisdiction. You will want a knowledgeable and persuasive technical witness on board even if that person never gives testimony. Your technical representative's acumen may help win the day with court-appointed experts.

Communicate Frequently with Local Counsel

Language barriers and time differences may pose challenges in communications. You and your local counsel should remain flexible to confer by telephone after or before work hours. You might set a regular monthly call, or, at the end of a call, set the time and date for the next call.

Make sure that you and local counsel have the same expectations in managing the litigation. Clearly communicate your client's goals in resolving the litigation and agree on what steps are appropriate to achieve those goals.

Visit the Venue

While travel is costly and time consuming, face-to-face meetings will be far more effective than telephone conferences. Because such activities will likely be conducted in the country's language, make arrangements for an interpreter to assist you in understanding the proceedings. An interpreter may provide you with a real time account of the discussions, or your local counsel can update you during breaks.

Speak for the Client

Sometimes, your client may ask you to speak on its behalf in case proceedings. You should confer with your client and local counsel to determine when such statements are needed, as well as the length and style of the communication.

Encourage Resolution

Sometimes we think that cases in states like New York and California drag on forever. Even experience in these venues, however, cannot prepare you for delays in some nations' courts. Some cases will proceed at glacial pace and extend over several years. Companies understand that such delays significantly increase the costs of litigation and may not promote the quality of justice. Sometimes, your local counsel will be quite comfortable with the slow pace at which a case proceeds, so you might inquire as to what steps may be helpful to move the case along faster.

You may also ask whether there are alternatives to resolving the case on the usual timeline. For example, should the parties attempt to resolve the case with in-person settlement negotiations or a mediation? Local counsel can advise whether such proceedings are feasible or customary, or whether a settlement initiative will be seen as a weakness in the local legal culture.

Conclusion

As we have seen, the procedures for litigating product liability claims overseas are likely to be much different than those to which you are accustomed, but outside or in-house product liability counsel can still play an important role in assisting the client to manage and resolve overseas claims. It will take some extra effort, but the challenges posed by overseas litigation can probably be tamed with the right approach.

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