KILPATRICK TOWNSEND

3 TAKEAWAYS

Practice Pointers for German Companies Doing Business in the U.S.

German companies are often surprised when they get sued in the U.S. (a) that U.S. courts even have jurisdiction; (b) about the exorbitant amount of damages that are claimed; and (c) about the power U.S. courts have to compel witnesses and documents as evidence. John Jett and Siegmar Pohl give practical tips on what companies should do to protect themselves ***before*** they are being sued:

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Proper Protections in Contracts: Contracts that include properly drafted, broadly applicable exclusive jurisdiction clauses and choice of law clauses help protect German companies from unwanted and expensive surprises. It may be a great advantage to include a waiver of jury trial in contract and exclusive mediation and arbitration clauses. Depending on which side of the contract you are on, a limitation of liability and exclusion of certain types of damages (e.g., punitive, consequential, indirect damages). Consider a liquidated damages clause if you are the party that might incur damages that are difficult to prove or quantify. German companies often forget to add a clause that the losing party will pay the prevailing party's attorney's fees. Again, that may only make sense if you are the party that more likely comes into a situation where it will have to sue to get to its right.

Proper Protections in Corporate Governance: Sometimes plaintiffs add the German patent company as a defendant when suing its U.S. subsidiary because they assume that the parent has "pockets." You can increase the chances to get a lawsuit against the German parent dismissed, and decrease the risk of piercing the corporate veil liability of the German parent if you (a) don't unintentionally waive proper service of the lawsuit in Germany via the Hague Convention and (b) you set up the U.S. subsidiary as a separate entity with independent governance, ***and live*** this "Corporate Separateness" in the day-to-day operation of the subsidiary. The German parent is less likely to be subject to claims in the U.S. if (i) it has no employees or assets in the U.S.; (ii) it conducts all negotiations and all business through its subsidiary, for example, acting as the parent's independent nationwide distributor; and (iii) the parent does not exercise excessive control over the day-to-day decisions of the subsidiary.

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Proper Preparation for Discovery: U.S. courts can compel extensive documents and witnesses when plaintiffs are looking for evidence for their claims. German privacy laws are not a talisman against such requests. Companies can sometimes protect themselves by stipulating the scope of discovery in arbitration clauses (see above). Having a general document retention (and destruction) policy in place prior to any complaints helps minimize the amounts of older documents that can be produced. In all company documents, don't write anything that you would not want to be republished in the New York Times (the "New York Times Rule"). This applies to board minutes, shareholder minutes, inter-company agreements, and most importantly emails (including internal emails). And: Be careful with humor and sarcasm!

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For more information, please contact:
John Jett jjett@kilpatricktownsend.com
Siegmar Pohl spohl@kilpatricktownsend.com

www.kilpatricktownsend.com

Related People



Dr. Siegmar Pohl
t 415.273.4357
spohl@ktslaw.com



John Jett
t 404.815.6020
jjett@ktslaw.com