

# The International Comparative Legal Guide to: Product Liability 2005

A practical insight to cross-border Product Liability work



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# Foreign Litigants in American Courts: How Foreign Parties can Sue, and be Sued, in the United States

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## I. Introduction

Jurists have characterised foreign litigants as behaving as if they were moths “drawn to light” when describing the litigants’ attraction to American courts. *Smith Kline & French Labs v. Bloch*, 2 All ER 72, 74 (Eng. 1983). Foreign litigants often believe that if they are able to litigate in the U.S., then they stand to “win a fortune” with almost no cost or risk to themselves because of laws concerning contingency fees, liberal discovery rules, and high damage awards. *Id.* While this view is perhaps an over-exaggeration, plaintiffs in the United States do enjoy a panoply of substantive and procedural advantages that they do not possess in civil systems, such as most in Europe and the Far East or, for that matter, in many Common Law systems. In recent decades, American plaintiffs have increasingly learned to profit from these advantages. With these well-publicised successes, both foreign and domestic plaintiffs naturally began seeking access to American federal and state courts.

## II. Lure of the American Forum

It is not one factor that leads foreign plaintiffs gladly to accept the inconvenience of bringing suit across oceans, but rather a broad range of factors. These include the possibility of large damage awards, including punitive damages, the availability of jury trials, liberal pleading rules, broad discovery tools and the option to bring claims on a contingency fee basis.

Any discussion of product liability litigation in American courts cannot fail to notice the increasingly fabulous damage awards granted by juries in recent years. Damages in America are calculated on two principle bases: compensatory and punitive. Compensatory damages are meant to have a basis in the actual harm suffered. However, the addition and expansion of the concept of “pain and suffering” has muddied the waters somewhat. Compensation for lost wages and similar traditional categories of compensatory damages are clearly tethered to concrete figures. A determination of what is fair compensation for “pain and suffering” lacks a similar anchor.

Departing further from the realm of the quantifiable, the concept of punitive damages allows a jury to impose further damages on top of compensatory damages. In order to qualify for punitive damages, plaintiffs must make a

threshold showing of certain egregious behaviour on the part of the defendant. This requirement has not always proven to be daunting in the product liability setting.

Further assisting plaintiffs in United States courts, judgments of whether to impose liability, and how much to award in damages, generally fall to a jury of laymen. In most contexts, plaintiffs in product liability actions do not even need to clear any meaningful substantive hurdles in order to receive a jury trial. Rather, plaintiffs generally have a “right” to a jury, under the federal and many state constitutions, unless they choose to waive that right. It virtually goes without saying that an injured person or group of people might prefer to place their claims before a panel of their peers, rather than an impartial (and arguably conservative) judge, particularly when (as in a product liability action) their opponent is a large international corporation.

Well before a trial even reaches a jury, however, plaintiffs enjoy significant advantages through the use of what are, generally speaking, liberal pleading rules. A plaintiff often may not need to spell out a well-articulated theory of the case to be able to move forward with the litigation. In most American courts, a plaintiff need only make the barest allegations to survive a motion to dismiss. This practice, called “notice pleading,” requires only a “short and plain statement of the grounds” for why the court has jurisdiction and the reasons the plaintiff should recover. *See* FED. R. CIV. P. 8(a) (West 2005). Even the model complaint offered by the Federal Rules of Civil Procedure contains only three paragraphs, which assert merely the basis for jurisdiction, the nature of the injury, and a demand for damages. Plaintiffs need not provide any other information in order to commence their suit and start the wheels of a civil action turning.

Once a plaintiff files a complaint and survives any motions to dismiss, he finds himself armed with the considerable powers of American discovery tools. He may now develop his case by demanding that a defendant produce huge volumes of documents, answer written questions and produce witnesses for examination. *See* FED. R. CIV. P. 26-37 (West 2005). Bearing the costs of meeting discovery obligations in a U.S. court can prove extraordinarily expensive for defendants who, in product liability actions, tend to have the bulk of relevant documents and witnesses in their possession or their employ. This expensive burden provides a strategic advantage to plaintiffs; as soon as litigation begins, costs borne by defendants rise no matter

how weak a plaintiff's case.

As litigation continues and costs mount for defendants, the typical product liability plaintiff has had to pay not the slightest sum of money. The United States legal system permits plaintiffs' lawyers to take cases on "contingent fee" arrangements, and they frequently do so. Under such arrangement, the plaintiff pays no costs to his attorneys unless the plaintiff prevails at trial, in which case the lawyers take a substantial share of the judgment - generally thirty-three percent, and sometimes as much as fifty percent. Not only are such arrangements uncommon in other legal systems, in many countries they are illegal.

Finally, in contrast to other Common Law systems, a failing plaintiff bears no responsibility for a defendant's legal bills. With no costs up front, no downside risks at the conclusion and a range of advantages throughout the process, it is no surprise that a product liability (or any other) plaintiff would seek access to United States courts.

#### A. Jurisdiction Over Foreign Plaintiffs

It is clear that plaintiffs may wish to pursue their claims in American courts, but can foreign plaintiffs actually do so? If they can, in which courts may they bring their actions? Initially, the answers to these questions would be yes, they can, and plaintiffs will likely have access to a variety of state and federal venues.

The question of whether a court may hear a plaintiff's case is governed by an inquiry into "jurisdiction," the Common Law equivalent of the Civil Law's concept of "competence." In order to hear a given case, a U.S. court must have both subject matter and personal jurisdiction. Unless a plaintiff can show that a court has each, the court is unable to hear the case.

Subject matter jurisdiction concerns whether the claim presented is within a category of issues that a particular court has the power to hear. For current purposes, it is sufficient to say that American state courts are courts of general subject matter jurisdiction. With some exceptions not relevant here, a state court can hear claims on any issue, which includes product liability claims. The federal courts, on the other hand, are courts of limited subject matter jurisdiction. Federal courts only have subject matter jurisdiction in certain classes of cases. One basis for federal subject-matter jurisdiction is "diversity" of the parties, where the amount in dispute is in excess of US \$75,000. 28 U.S.C. § 1332 (2005). Put simply, the parties are diverse when the plaintiff and defendant are not citizens of the same state. Thus, in any action against a U.S. company by a foreign plaintiff, diversity of the parties will exist. Assuming the "amount in controversy" is in excess of US \$75,000 (a safe assumption in the product liability context), a federal court will have subject matter jurisdiction over a product liability claim by a foreign national against a domestic corporation.

In addition to establishing subject matter jurisdiction, plaintiffs also must show that a court has personal or territorial jurisdiction. Traditionally, a court had personal jurisdiction over its citizens and those who could be found in, or who possessed property within, the boundaries its authority. *Pennoyer v. Neff*, 96 U.S. 714, 733 (1877). As this concept evolved with industrialisation, courts increasingly found that corporations were subject to

jurisdiction in any state when they had "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945). Manufacturers of widely-distributed products typically find themselves subject to personal jurisdiction in numerous fora.

The practical effect of the foregoing is that foreign product liability plaintiffs suing American corporations will usually have the ability to select from a wide array of American courts, including state or federal district courts. This should only make litigating in the United States more attractive to foreign plaintiffs - not only do they benefit from all the procedural and substantive rules discussed above, they also have the power to select the court and jurisdiction where all of those factors run most strongly in a plaintiff's favour, and where the most favourable substantive law and sympathetic jury may be found. Rather than offend basic notions of American jurisprudence, this fact finds itself buttressed by the axiomatic principle that a plaintiff's choice of forum is entitled to great deference. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981); *Dowling v. Hyland Therapeutics Div.*, 767 F. Supp. 57, 58 (S.D.N.Y. 1991).

#### B. Forum Non Conveniens

At this point, it might appear that the prospect of litigating in the United States constitutes a foreign plaintiff's dream come true. Save the last two words, that phrase might be accurate. American courts have developed doctrines that make it quite challenging for foreign plaintiffs to convert the ethereal into the actual.

While legal and political movements to dampen litigation have yet to achieve any global reform, product liability cases brought by foreign plaintiffs compose one of the categories of cases in which pro-reform forces have met with the most success. The impetus for turning away foreign plaintiffs has come not from the political branches, but from the judiciary itself. Relying on the traditional notion of *forum non conveniens*, the courts in recent decades routinely have dismissed foreign claims.

Just because an American court has jurisdiction to hear a claim does not mean that it must do so. Several grounds exist upon which it can decline to adjudicate a dispute, one of these grounds being known as the doctrine of *forum non conveniens*. It holds, that a court may decline to exercise jurisdiction when litigation makes more sense - is more convenient - elsewhere.

##### 1. The Federal Test

The United States Supreme Court has developed a flexible approach to *forum non-conveniens*, which federal courts employ to evaluate whether a case ought to be dismissed on those grounds. The general framework was first announced in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). As an initial matter, a court must find that there is an adequate available forum elsewhere. This condition is easily satisfied in most cases. If all parties may be brought before a particular court, it is generally considered adequate. That the alternate forum provides different substantive law, a lower likelihood of success or less significant available remedies does not render an alternative forum inadequate.

Once a court satisfies itself that an acceptable alternative forum exists, it must weigh a variety of private and public considerations before reaching the decision of whether to

hear the case or send it back from whence it came. The private considerations include: access to evidence, availability and cost of compelling the presence of unwilling witnesses, the ability to view locations relevant to the action, and general considerations of ease, cost and timeliness. *Id.* at 508. While the *Gulf Oil* Court held that a plaintiff's choice of forum ought to be disturbed only when a weighing of the factors strongly favors the defendant's position, it also made clear that courts should not permit plaintiffs to choose a forum to harass a defendant. *Id.* at 507.

A court must also consider a multitude of public factors. These factors include, among others: administrative difficulties related to court congestion; the imposition of jury duty upon a community that bears no relation to the controversy; the interest in having "localized controversies" decided by local courts; and the appropriateness of having a local court make determinations with regard to its own local law. *Id.* at 508-09. If the public factors weigh in favour of the defendant, then a foreign plaintiff is unlikely to succeed in keeping the action in the United States.

The Supreme Court addressed the question of *forum non conveniens* in the products liability context for the first time in *Piper*, 454 U.S. at 235. In that case, an action was brought by the representative of the estates of British subjects who perished in an airplane crash in Scotland. The only connection the suit had to the United States was the fact that the manufacturers of the plane and its propellers were American companies. The plaintiffs admitted that the action was filed in the United States solely because its laws regarding liability, capacity to sue, and damages were more favourable than those of foreign courts. *Id.* at 240. Thus, it was the plaintiffs' position that the case should not be dismissed on *forum non conveniens* grounds because it would result in an unfavourable change in substantive law.

The Supreme Court rejected the assertion and held that even the "possibility of a change in substantive law should ordinarily not be given conclusive, or even substantial, weight in the *forum non conveniens* inquiry." *Id.* at 247. In its decision, the court made it clear that it was consciously limiting the access foreign plaintiffs have to United States courts. It explained that if it had reached a contrary result, "American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest crowded courts." *Id.* Accordingly, a change in substantive law would only be given substantial weight when "the alternative forum is so inadequate or unsatisfactory that it is no remedy at all." *Id.* at 254.

The court also re-balanced the scales of the *forum non conveniens* analysis in terms of according deference to a plaintiff's choice of forum. Whereas the traditional rule was to give plaintiffs' choice of forum great deference, the *Piper* Court held that foreign plaintiffs were not entitled to any such deference. This conclusion significantly impaired the ability of foreign plaintiffs to maintain their actions in U.S. courts.

## 2. State Approaches

While a *forum non conveniens* analysis in state court would have to proceed under the relevant state's particular laws and precedents, in reality, the analysis tends to be very similar to the federal approach. For example, the California Supreme Court explicitly adopted the framework of *Gulf Oil* in 1954. *Price v. Atchinson, Topeka & Santa Fe Ry. Co.*, 268 P.2d 457

(Cal. 1954). This approach seems to be the most common, but the doctrine may have slight variations and, in a handful of states, the doctrine may not exist at all. Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations for Forum Shopping Plaintiffs* 19 U. PA. J. INT'L ECON. L. 141, 164-65 (1998); David W. Robertson and Paula Speck, *Access to State Courts in Transnational Personal Injury Cases* 68 TEX. L. REV. 937, 950-51 (1990). Thus, the practitioner is urged to investigate the statutes and case law of the individual state.

## C. Dismissals

Courts in the United States increasingly have relied on *forum non conveniens* to keep foreign product liability actions out of United States courts, so much so, that this has become the expected result. Following *Piper*, courts have found that a foreign court provides an adequate forum, even when the substantive foreign law offers plaintiffs significantly diminished prospects of recovery. *Proyectos Orchimaex de Costa Rica v. E.I. DuPont de Nemors & Co.*, 896 F. Supp. 1197, 1201 (M.D. Fla. 1995). For example, a state court found that a US \$10,000 recovery limit does not render a foreign forum inadequate; nor does a requirement of massive filing fees, the presence of a heavily congested and backlogged judicial system, and far-less favorable tort remedies. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 847-52 (S.D.N.Y. 1986); *Wolf v. Boeing Co.*, 810 P.2d 943, 948-49 (Wash. Ct. App. 1991). Some courts have allowed dismissal on the ground of *forum non conveniens* even when the suit might be time-barred by the foreign country's statute of limitations. Lonny S. Hoffman, *Forum Non Conveniens- State and Federal Movements* SF13 Ali-Aba 135, 144 (Nov. 2000). Perhaps most remarkable is that a court even upheld a dismissal on the ground of *forum non conveniens* when, due to political conflicts, no alternative forum was actually available at the time. *Islamic Rep. of Iran v. Pahlavi*, 467 N.E.2d 245 (N.Y. 1984).

Despite the trend indicating that United States courts will dismiss product liability claims brought by foreign plaintiffs, domestic defendants cannot count on such a result. Because the *forum non conveniens* analysis invokes a multi-factored balancing test, under no situation can the expected result be the anticipated result. Courts have broad discretion when making such determinations and the results of a motion to dismiss on these grounds will vary depending on the judge entertaining it and the specific facts making up the case at issue.

Examples of courts that have rejected a *forum non conveniens* argument include several that cannot easily be reconciled with the broader trend discussed above. For example, some courts have concluded that Bolivia and India could not provide an adequate alternative forum due to issues of corruption and congestion in their judicial systems. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085 (S.D. Fla. 1997); *Bhatnagar v. Surrendra Overseas LTD*, 52 F.3d 1220, 1225-30 (3d. Cir. 1995). Moreover, contrary to their other judicial brethren, some courts have found that if an action would be time-barred in the foreign jurisdiction, then dismissal on *forum non conveniens* grounds is inappropriate. *Silicone Gel Breast Implants*, 887 F. Supp. 1469, 1475. Thus, while *forum non conveniens* can be an effective

method for dismissing foreign plaintiffs' lawsuits, the results are not guaranteed.

Even if defendants could count on a dismissal on the ground of *forum non conveniens*, they should still take pause. Recent trends indicate that a favourable result on a motion to dismiss on the ground of *forum non conveniens* may come with strings attached. Prior to entering an order dismissing a case on the ground of *forum non conveniens*, courts have required defendants to make various concessions including agreeing to submit to process in foreign courts, agreeing to accept any judgment reached by that court and waiving statute of limitations defences. See, e.g., *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 887 F. Supp. at 1479; *Kilvert v. Tambrands, Inc.*, 906 F. Supp. 790, 798 (S.D.N.Y. 1995); *Ministry of Health v. Shiley*, 858 F. Supp. 1426, 1442 (C.D. Cal. 1994).

In short, a defendant should not expect to receive a *forum non conveniens* dismissal, and will need to muster the very best argument to succeed - and even then, there may be a price to be paid.

### III. Fear of the American Forum

The same factors that lead foreign plaintiffs to bring suit across oceans, strike fear in the minds of foreign defendants who wish to avoid the inconvenience and arguably hostile and unfamiliar environment of American jurisdiction. These defendants shudder at the possibility of large damage awards, including punitive damages, the availability of jury trials, liberal pleading rules, broad discovery tools, and plaintiffs' attorneys who will work on a contingent fee basis.

Though foreign defendants may wish to avoid American jurisdiction, can they actually do so? The answer to this question is yes; however, they should engage in strategic planning if they desire to insure an appropriate result.

#### A. Jurisdiction Over Foreign Defendants

As discussed above, plaintiffs must establish both subject matter and personal jurisdiction over a foreign defendant. Further, the existence of subject matter jurisdiction is rarely an issue in a products liability matter involving a foreign party. Therefore, the remainder of this article will focus on the limits of personal jurisdiction over foreign defendants.

#### B. Personal Jurisdiction

When a plaintiff institutes suit against a foreign defendant, an American court will engage in a two-step inquiry to determine if the court can assert personal jurisdiction. First, it will determine if the state legislature has granted statutory authority for the exercise of jurisdiction. Provided such statutory authority exists, the court will then consider whether an exercise of such jurisdiction is consistent with traditional notions of "fair play" inherent in the U.S. Constitution.

##### 1. Statutory Authority

In the majority of cases, a state's "long arm" provision will serve as statutory authority for jurisdiction. Some state long arm statutes grant jurisdiction to the state's courts to the extent permissible under the United States Constitution. In other jurisdictions, however, the state long arm statute

provides either a specific list of enumerated relationships or a stated nexus between the defendant and the forum that allow for jurisdiction. No bright line rule exists with regard to these states. Instead, the courts engage in fact specific inquiries. This article will not focus on state long arm statutes, as even the most restrictive state long arm statute will likely provide for jurisdiction in a products liability matter.

##### 2. Minimum Contacts

Once a court determines that it can exercise jurisdiction under a state long arm statute, the court will consider if doing so will violate the due process clauses of Fifth and the Fourteenth Amendments of the United States Constitution. In the last half of the twentieth century, the Supreme Court set forth the basic analysis that should be conducted to determine whether jurisdiction over a defendant is proper. First, the defendant must have minimum contacts with the jurisdiction such that the exercise of personal jurisdiction would not "offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. Second, the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities in the forum state" such that the defendant should have reasonably foreseen that a plaintiff would pursue litigation in that jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citation omitted). Under this purposeful availment standard, the mere fact that a defendant's product enters a state does not subject that manufacturer to personal jurisdiction in that forum.

The question of how a defendant "purposefully avails" itself to the privileges provided by a forum and makes itself amenable to litigation in that forum became more complicated in 1987 when the Supreme Court decided the products liability case of *Asahi Metal Industries Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987). In *Asahi*, the Court found that the state of California could not exercise personal jurisdiction over a Japanese manufacturer of component parts. Due to the divisiveness of the *Asahi* opinion, however, the court failed to set clear guidelines for litigants and judges in future cases.

The plaintiff, in *Asahi*, was injured in a motorcycle accident in California. He filed suit in California against various parties including Cheng Shin, a Taiwanese manufacturer, alleging a defect in the motorcycle's rear tire and tube. Cheng Shin filed a cross-complaint for indemnification against Asahi Metal Industry Co., the Japanese manufacturer of the tube's valve. The plaintiff eventually settled his claim against all defendants except Asahi. Asahi challenged the court's assertion of personal jurisdiction. While the United States Supreme Court unanimously agreed that assertion of jurisdiction over the company would violate due process, the court's members did not present a uniform rationale for their decision.

Five of the nine justices found that Asahi had minimum contacts with the state of California by its mere act of placing a product in the stream of commerce; however, all of the justices except for one held that despite these minimum contacts it would be "unreasonable and unfair" for California to hear this case because of the burden placed on Asahi in defending itself in a foreign legal system. Moreover, they found California had very little interest in deciding an indemnification issue between two foreign defendants. *Id.* at 116.

In a plurality opinion three justices joined Justice O'Connor, who wrote that Asahi did not maintain the requisite minimum contacts for California to assert jurisdiction as such contacts could only occur "by an action of the defendant purposefully directed toward the forum State." *Id.* at 112. Referred to as the "purposeful availment" standard, O'Connor wrote that factors such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" would have demonstrated "contacts," however, Asahi did not engage in such actions. *Id.* In contrast to the purposeful availment standard, three justices joined Justice Brennan in his "stream of commerce" opinion that Asahi had minimum contacts with California stating that as long as a manufacturer "is aware that [its] final product is being marketed in [a] forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117. Justice Stevens, in a separate concurrence, joined the majority of justices in his opinion that it would violate due process for California to exercise jurisdiction over Asahi, however, he refused to decide the minimum contacts issue, instead discussing the purposeful availment standard in the abstract. *Id.* at 121.

The ever-changing alliances and varied opinions that emerged from the *Asahi* opinion left litigants wondering how either the minimum contacts or the purposeful availment analysis would ultimately be decided in later litigation. Lower courts, therefore, often struggle with this analysis and decisions vary widely.

### C. Dismissals - Recommendations

To avoid being subject to the risks and burdens of litigation in the United States, foreign parties should engage in certain strategic planning mechanisms. While no strategy offers a full-proof solution, the following proposals can strengthen a foreign party's ability to stay out of U.S. courts.

#### 1. Refrain From Direct Sales, Shipping and Marketing

Foreign parties who wish to avoid the reach of American courts should avoid direct sales and shipping to American jurisdictions. For example, courts in Texas and California refused to grant motions to dismiss because foreign defendants directly sold their products in those jurisdictions in "mass quantities" for a number of years. *S.P.A. Giacomini v. Lamping*, 42 S.W.3d 265, 273 (Tex. App. 2001); *In Cassier Mining Corp. v. Superior Court of Orange County*, 78 Cal. Rptr. 2d 167 (Cal. App. 1998).

Foreign parties seeking to avoid American jurisdiction also should avoid targeting their advertisements to residents of a forum state. Such direct-to-consumer advertising will weigh against a defendant in jurisdictions using the minimum contacts test. For instance, in *Turpin v. Mori Seiki Co., Ltd.*, a federal district court held that the defendant had "purposefully availed" itself of the protection of the forum state by providing brochures to help distributors market its products in the U.S. and publishing promotional literature advertising that the company had a Boston office (which was actually the office of a dealer or a subsidiary). 56 F. Supp. 2d 121, 127-28 (D. Mass. 1999).

#### 2. Monitor Internet Infrastructure and Contacts

The internet creates a new realm of exposure to American jurisdiction for foreign entities. Therefore, it remains important for foreign parties that wish to avoid American courts to monitor their internet dealings with residents of American jurisdictions. American courts have adopted a sliding scale approach with regard to jurisdiction created by internet exposure. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, F. Supp. 1119, 1124 (W.D. Pa. 1997). The more embracing the interaction between the entity's website and residents of the forum state, the more likely a court will assert personal jurisdiction.

One end of the sliding scale consists of websites established for the primary purpose of conducting business activities with residents of other jurisdictions, which will subject parties to jurisdiction. *Compuserve Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). The other extreme of the scale includes passive websites where companies merely post information, rather than conduct business activities. These websites will not subject companies to U.S. jurisdiction. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), aff'd 126 F.3d 25 (2d Cir. 1997). The middle of the scale contains the difficult cases. These types of websites provide some interaction between forum state consumers and the corporation; however, the interaction does not result in consistent business activity or communication. Courts hearing the cases in the middle scale will address personal jurisdiction on a case-by-case basis focusing on whether the defendant targeted residents of the forum state. *Millennium Enter. Inc. v. Millennium Music*, L.P. 33 F. Supp. 907 (Ore. 1999).

#### 3. Maintain Corporate Formalities

Plaintiffs can attempt to bring actions against foreign defendants in American courts by citing the activities of related American entities (typically subsidiary or parent corporations of the foreign defendant). If the plaintiff can demonstrate that the subsidiary constitutes a mere extension of the parent or vice versa, the foreign entity can find itself subject to American jurisdiction. *See, e.g., Hawes v. Honda Motor Co., Ltd.*, 738 F. Supp. 1247 (E.D. Ark. 1990). Furthermore, a foreign corporation that itself maintains operations in the United States will be hard-pressed to avoid personal jurisdiction in a forum in which those operations are based.

#### 4. Avoid Territorial or Exclusive Agreements with American Distributors

Foreign parties who wish to avoid the reach of American courts should avoid territorial and exclusive agreements with American distributors. Treatment of supplier to distributor relationships varies from state to state; however, the mere fact that a product is sold to a distributor rather than directly to customers in a particular state is not an effective method for avoiding liability. *See, e.g., S.P.A. Giacomini*, 42 S.W.3d at 273.

When considering personal jurisdiction, courts view certain supplier to distributor relationships in a more skeptical manner than others. Courts typically find that defendants who maintain exclusive relationships with American distributors, or that impose territorial restrictions on American distributors, possess minimum contacts with states in which those distributors are located or in which those distributors regularly conduct business. *See Lister v. Marangoni Meccanica, S.P.A.*, 728 F. Supp. 1524, 1528 (D.

Utah 1990).

By contrast, suppliers who employ distributors without exclusivity or territorial restrictions may be able to avoid personal jurisdiction in certain states. For example, in *Mullins v. Harley-Davidson Yamaha BMW of Memphis, Inc.*, a Tennessee state court dismissed a complaint against a foreign corporation for lack of personal jurisdiction even though the corporation's products were distributed in the forum state. 924 S.W.2d 907 (Tenn. App. 1996). The court reasoned that the defendant had no control over the products' distribution and the agreement noted that the defendant's distributors were "free to sell to any dealer of their choosing anywhere in the United States." *Id.* at 909. Thus, this type of arrangement might provide foreign defendants with some protection against U.S. jurisdiction, depending upon their other U.S. contacts.

### 5. Assert a Due Process Defence

As *Asahi* demonstrates, there are a number of individualised factors that determine whether foreign defendants can be subjected to U.S. jurisdiction. Courts are directed to consider "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It also must weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of

controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Asahi*, 480 U.S. at 113 (citation omitted). A defendant must be prepared with evidence supporting an argument for each of these factors to convince the forum court that an assertion of jurisdiction would violate traditional notions of fair play and substantial justice.

### 6. Contact Local Counsel

American law clearly provides that American plaintiffs can bring product liability actions against foreign defendants in American courts, provided such defendants exhibit minimum contacts with the forum jurisdiction and adjudication of the matter will not interfere with fair play and substantial justice. Foreign parties can follow the guidelines set forth in an attempt to avoid such an assertion of jurisdiction; however, a foreign party that wishes to minimise its potential of facing litigation in American courts should contact local American counsel to provide advice on the structure of their business operations. Similarly, a foreign party that finds itself named in a lawsuit in an American court should contact American counsel immediately in order to preserve and articulate its very best challenge to the court's assertion of personal jurisdiction.



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