



## **US-Justice**

### **THE LONG ARM**

German companies with business contacts in the United States of America (US) are subjected to tremendous liability risks. How can they prepare and protect themselves?

In the US the question for any a company is not if it will be sued but rather when. German companies should take this saying very seriously and adjust to a very different litigation culture. This does not just apply to German companies that have an affiliate in the US but also to companies that offer their products or services through third parties in the US.

A common misperception is that a German company can keep itself legally and financially “invulnerable” from US law enforcement by founding a small shell company or by utilizing a US distributor. There are many cases refuting this fallacy when the German parent company had to face litigation in the US.

There are several options at the disposal of a plaintiff in The US to sue a foreign company. First, a lawsuit can be filed via the so called “Hague Convention on the taking of evidence aboard” of 1970 that was signed by the United States and the Federal Republic of Germany. Second, lawsuits can also be filed via so called “long arm statutes”. This “long arm” authorizes usually the secretary of state to act as an authorized recipient for the defendant abroad. Hence, a complaint can be filed effectively in the US with all legal consequences resulting therefrom. And a third possibility is a request for judicial assistance filed by the US plaintiff in Germany.

Procedure after the complaint is served:

After the complaint is served on the German company, an answer needs to be filed within 30 days by the defendant to avoid a default judgement. This is followed by an initial status conference held at the US Court. At this conference the Judge usually meets the parties involved to discuss case details, as well as the main legal and practical questions. This is usually followed by the discovery procedure that can be requested by each party. The pretrial discovery can consist of so called interrogatories (submission of case relevant questions that have to be answered in writing) of inspection requests or the formal request to produce documents relevant to the lawsuit. These procedures that are not known in the German legal system are supposed to enable the parties of a lawsuit to exchange all relevant information before the actual trial. The chances of success or at least the value of a possible settlement can be determined at an earlier stage of the proceedings.

Discovery:

The formal request to produce documents is of central importance during lawsuits in the US . And the often times lengthy process of pretrial discovery can produce considerable cost before the case is actual tried in a courtroom.

The defendant usually submits the requested evidence, mostly in form of documents electronically (“e-discovery”). In practice the parties hire litigation support companies that are specialized in the so called electronic discovery. They transmit the electronically stored information to special servers and computing platforms that can eventually be accessed by the opposing party.

The e-discovery request can be extensive: It can affect and reach each and every archive and all business processes that generate data, as well as individual e-mails that could be relevant to the lawsuit. As soon as a lawsuit is foreseeable or pending a so called legal hold can be ordered –a procedure to protect all relevant data that aims to prevent data spoliation by the opposing party. Attorneys on each side normally filter all available data with broad key words and search parameters relevant to the lawsuit. The populated data then has to be submitted to the opposing party.

This means that already during the preliminary data selection process many eyes get to review private data and e-mails. Another noteworthy aspect is that discovery pursuant to US law normally does not distinguish between data that is necessary and data that is irrelevant to the case. This means that in the US - in contrast to German legal practice- usually more data than necessary is requested. While privacy and private data are strongly protected in the European Union (EU) by law, emails belong to the evidence most sought after in US lawsuits.

#### Data protection dilemma

In Germany all of this is very questionable from a legal data protection perspective. In the US the protection of the corporation take priority over the privacy rights of the individual. However, the German Federal Data Protection Act remains applicable when personal data is transmitted from Germany to the US. The EU directive on data security from 1995 and the German Federal Data Protection Act prohibit the submission of personal data to non-EU countries that do not meet the European standards of privacy protection. Due to the fact that it would not be feasible to prohibit any transfer of personal data to the US, the EU and the US tried to close the gap through the “privacy shield”-concept (former Safe Harbor) for international data transmission. The conflicts that arise from the current legal situation regarding data transfer between Germany and the US are in part navigated by the utilization of third party vendors that collect and submit the data in compliance with privacy shield principles.

Many German companies are not aware of the consequences a carefree email conversation might have. When it comes to a legal dispute in the US, sensitive subjects and confidential business information can be revealed. It has shown, that usually this kind of information determines the outcome of the entire lawsuit. Foreign companies with business contacts in the US are generally overtaxed by dealing with US litigation culture, questions regarding proceedings and data protection. In order to avoid having to pay dearly not just for costly attorney fees, German companies should take preventive measures and deal with these subject matters to take precautions regarding employee communications, data- collection. -capture and -transfer.