

REDUCING LIABILITY RISK IN THE UNITED STATES

Legal liability in the United States cannot be eliminated but it can be reduced by following some relatively easy steps. This is a short overview. Even my 17-page German-language version (available on request) is an oversimplification.

Legal risk comes from four sources – contracts, torts (negligence or willful misconduct), civil statutes and regulations, and criminal law. Criminal law risks are mainly antitrust and fraud and will not be covered.

How reduce liability?

1. Pick the right legal form, usually a corporation but more and more often limited liability companies. Corporations offer more structure and certainty.
2. Pay attention to the formalities required by the form you pick. Do not treat it as if it were a GmbH or AG. There is no simple 1-1 relationship.
 - a. Treat it as if it were a fully separate company, owned by someone else.
 - b. Capitalize it properly and keep its accounts and funds separate.
 - c. A Geschaefstfuehrer of the European mother company has no authority to sign a contract for the US subsidiary. Likewise, a director of the subsidiary cannot sign on behalf of the subsidiary.
 - d. Use the company's full name, including Inc. or Corp. or LLC - on stationery, in ads, on business cards.
 - e. Give officers proper, US titles. "General Manager" and "CEO" are seldom the titles of US officers. Only titles described in the bylaws are proper.
 - f. Officers report to the Board. The Board reports to shareholders – in most cases, the European parent. Any reporting to management at the parent is informal. No decision by the US subsidiary is subject to the approval of the parent, but instead to the board of the subsidiary acting AS a board, i.e. not one director. Making a US company decision subject to approval of the foreign home office tends to make the parent liable.
 - g. Consider forming multiple companies, to limit liability to each one's assets. Keep them separate.
 - h. Remember that internal, "confidential" documents can be part of American litigation, required by the plaintiff to be disclosed. When disclosed in court, they may show that the US company was treated as if it were part of the foreign parent.
3. Contracts between two businesses can be used to allocate risks. Contractual limits do not work so well with normal consumers. Public policy gives the consumer substantial rights, regardless of the contract.
 - a. Develop American terms and conditions of sale – not translations of the parent's Rahmenbedingungen. Some concepts do not apply in the US, even if foreign law controls the contract.
 - b. In contracts with other businesses, limit warranties, require product inspection, require indemnification.
 - c. Limit amounts and types of damages.
 - d. Provide for dispute settlement somewhere good for the seller or equally inconvenient for both parties, possibly by one or more arbitrators. Exclude jury trials. Agree to

exclusive jurisdiction. Possibly the loser should pay the winner's legal fees, however if the American party is financially weak, this requirement may be worthless.

4. Make product warranties part of the contract.
 - a. If the buyer and seller do not sign the same contract, limiting seller's warranties is difficult, regardless of what the seller's forms say.
 - b. If the limited warranty is not signed by the buyer, seller should print it in all its ads and packaging and on-line.
 - c. US law requires certain "magic language" for warranty and damage limitations to be effective.
5. Get insurance and take the advice of the insurance advisor.
6. Remember that insolvency is more acceptable in the United States than in Europe.
 - a. It can be used to limit liability.
 - b. A US bankruptcy judge can rewrite contracts and undo payments. Parent company loans will be treated as capital.
 - c. US law does not recognize the concept Eigentumsvorbehalt. The seller can take a security interest, but it is not the same thing. If you sell a product on credit, the buyer's bank may well have a stronger claim to the proceeds of the sale of the product than the seller.
 - d. Cash pooling is risky – mixing the assets of several companies.
7. Pay attention to your competition.
 - a. Read its terms of sale, its user's manual and its product warnings. Stihl is an excellent example.
 - b. Join an industry group and send people to its meetings.
8. Establish local credentials and generate good will.
 - a. Sponsor local teams.
 - b. Welcome visitors.
 - c. Hire locals, including in leading positions.
 - d. Meet local politicians BEFORE you need their help.
9. Everyone in a product distribution chain is likely to be sued.
 - a. Costs of litigation are not tied to the amount demanded and the loser does not pay the winner's fees. So, a plaintiff is likely to sue everyone who played a role in the product's distribution.
 - b. Even if the manufacturer requires the distributor to inspect the product, the manufacturer may be liable for visible defects and the distributor may not have enough assets to pay any award.
10. US litigation is not like litigation in Continental Europe. There are too many differences to list. Some are covered above.
 - a. Contingent fees are permitted in the US and class action law suits are common.
 - b. In suits with a large American company, its law department may already be a fixed cost, and so be willing to sue and not bear substantial additional costs.
 - c. An outside law firm may take a small matter in hopes of creating a good impression on the corporate client.
 - d. If a product is sold in a particular state or causes an injury there, the company will have to appear there in court. That state's laws will apply to some aspects of the litigation.

11. Jury awards in America are higher.
 - a. If an individual is harmed by a product – even through his own stupidity – a jury is more likely to give an award because the state does not provide an adequate safety net.
 - b. Juries are always more likely to be generous with a foreigner’s money. This rule applies even to a company from a distant *state*.
12. Punitive damages should not be awarded in contractual disputes. However, if an individual is harmed, the jury may conclude that the manufacturer decided to knowingly take the risk, hoping for a low award. That attitude – even though rational - will be punished.
13. The United States has 50 States, plus Washington, D.C., Puerto Rico and territories. Each has its own laws. The federal government has its own laws. Cities and local authorities may, too. Even if the law or regulation does not apply to the defendant, it may set a standard of acceptable conduct or safety. Falling below that standard may be viewed as negligence. It is practically impossible to keep a product from causing an injury in any particular state.
14. When in America, do as Americans do.
 - a. To do things “the way we do it back home” shows disrespect for local customs.
 - b. It may also be misinterpreted. This rule applies, for example, to corporate board resolutions. The plaintiff will look at the minute book and use anything not normal in the US to his advantage, ignoring the defendant’s intent.
15. America is not Europe
 - a. American consumers – especially factory workers – are probably not as well trained as their European counterparts. Do not assume they know how to use your product safely.
 - b. Some products MAY be too dangerous to be sold in the United States. If so, start out in Canada.

Despite these complications and risks, hundreds of European companies have enjoyed great success in the United States. More and more, Americans value the greater quality and prestige of European products, whether cars, machine tools, beer or other products.