

Korea

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As the prevalence of international product liability litigation is likely to expand, practitioners should be aware of the substantive and procedural differences in the laws of the U.S. and the foreign venue.

International Litigation of Product Liability Claims

With the ever-increasing global economy and the development of more vigorous tort systems (and plaintiffs' bars) in foreign jurisdictions, the opportunity for American companies to be litigating product liability claims in

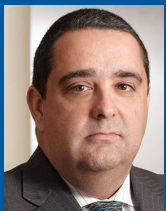
those jurisdictions seems apt to increase, as well as for foreign manufacturers to litigate in the United States courts. These scenarios might also become more prevalent as a result of recent case law restricting the U.S. courts' exercise of personal jurisdiction, such that foreign plaintiffs might only have recourse in their home venue. Such litigations raise a number of issues for the defense of such claims, including substantive differences in product liability law, divergent approaches to discovery, motion practice, the acceptance and reliance on expert testimony, and contrasts in the trial conducted in a civil law jurisdiction from a jury trial. A U.S. litigator and client should be wary of the distinctions and procedural limitations in the foreign proceedings, and vice versa—that a foreign entity being represented in U.S. proceedings might be unfamiliar with the breadth of proceedings, particularly in terms of discovery and motion practice. Finally, in litigating in a foreign venue, strategic consideration will need to be given to balancing adherence to

local practice and nevertheless making an appropriate record for the possible recognition and enforcement of a foreign judgment in the party's home jurisdiction in the event of a result in favor of the plaintiff.

In this article, we use the legal system of South Korea as an exemplar for examining these comparative product liability litigation issues. First, we provide background on the South Korean economy and circumstances conducive to an expansion of such cross-border product liability litigation, and on the South Korean legal system. Second, we explore some of the basics of substantive product liability law in South Korea. Third, we examine some of the key procedural differences to be encountered in a product liability litigation. Fourth, we comment on the potential recognition scenarios and strategy that arise out of litigation in a foreign venue.

South Korea Economy and Trade with the United States

South Korea is now one of the world's leading economies and a significant trading



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partner of the United States. While South Korea had a GDP similar to poorer countries of Africa and Asia at the aftermath of the Korean War, by 2004, South Korea joined the trillion-dollar club of world economies, and today, it is the world's 12th largest economy. <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html>. South Korea's largest product sectors include: semiconductors, telecommunication equipment, motor vehicles and auto parts, computers, displays, home appliances, steel, ships, and petrochemicals.

In March of 2012, the long-negotiated Free Trade Agreement between the United States and South Korea (KORUS FTA) became effective. The KORUS FTA eliminated tariffs on 95 percent of goods between the countries within five years, and became the largest U.S. trade pact since the North American Free Trade Agreement with Canada and Mexico in 1994. http://seoul.usembassy.gov/p_rok_fta_100311a.html. In the past two years, South Korea became the sixth largest trading partner of the United States with \$104 billion in total (two ways) goods traded. http://seoul.usembassy.gov/p_rok_fta_031514.html. According to the U.S. Census Bureau, in 2013, U.S. exports to Korea totaled \$42 billion, while U.S. imports from Korea totaled \$62 billion. <https://www.census.gov/foreign-trade/balance/c5800.html>.

With further eliminations of tariffs, the two countries' economic synergy will only become stronger. As U.S. businesses sell goods and services to South Korea and vice versa, both American and Korean businesses will expand into each other's countries. Inevitably, with this integration of economies, both countries' businesses will be subject to the laws of the respective host country, and thus, businesses and their lawyers should be familiar with the different legal restrictions and liabilities.

Korean Judicial History and Court System

In contrast to the United States, South Korea follows a civil law system. Following 35 years of Japanese occupation, during which Japanese law governed, and the ensuing Korean War, South Korea needed to establish and bolster its own judicial system. In developing its legal system, South Korea drew from the experiences of other nations and reformed such les-

sons in its own context. In July 1, 1960, the Korean Civil Procedure Act (KCPA) was enacted, and since its enactment, it has been amended 14 times. The KCPA primarily governs civil procedure in Korean judicial cases. However, as supplemental rules to the KCPA, the Supreme Court of Korea also promulgated the Rules of Civil Procedure (RCP).

The Korean judiciary is structured into three tiers: (1) the district courts, which are the courts with general jurisdiction; (2) the intermediate appellate high courts; and (3) the Supreme Court, which is the highest court in the country with final appellate jurisdiction.

The district courts are courts of the first instance that retain general original jurisdiction over most matters. There are 13 district courts throughout the country, each of which adjudicates their respective geographical area. While in principle, a single judge is supposed to preside over a case, cases where claims exceed 100 million Won (approximately \$100,000 USD) requires that a panel of three judges adjudicate the matter.

There are five high courts nationwide, located in major cities of Korea—Seoul, Busan, Daegu, Gwangju, and Daejeon. The high courts only adjudicate appeals from judgments rendered by a panel of three judges, and the appeals from judgments rendered by a single judge if the disputed amount is over 50 million Won (approximately \$50,000 USD). In appeals from judgments rendered by a single judge below the 50 million Won/\$50,000 threshold, such appeals are heard by the district court with an appellate panel.

The Supreme Court of Korea is the court of last resort. It is composed of 13 justices, led by a Chief Justice. Unlike U.S. Supreme Court procedure with respect to certiorari, appeals to the Korean Supreme Court are as of right, although the Korean Supreme Court will generally rule only on legal issues and may provide a summary disposition of an appeal. Under the Court Organization Act, cases are generally adjudicated by a panel of four Supreme Court Justices except for cases involving the following situations, which are heard before the *en banc* court: (i) the order appealed from violates the Constitution; (ii) the new decision would modify a prior Supreme

Court's ruling, order, or interpretation; or (iii) the matter of substantial importance to warrant *en banc* determination. *Court Organization Act*, Act No. 9940.

While the Korean judiciary system does not follow the common law theory of *stare decisis*, Supreme Court decisions do tend to strongly influence decisions by lower courts facing similar cases.

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Korean Product Liability Act

Product liability law in Korea is generally governed by the Product Liability Act (PLA), which by its terms applies to products manufactured after the effective date of July 1, 2002. The translated text of the PLA is provided in the sidebar. Claims for latent injuries arising out of allegedly defective products manufactured prior to the PLA's effective date generally would fall under a tort action under Article 750 of the Korean Civil Act (KCA), which provides that any person who causes damage or injury on another by an unlawful act, intentionally or negligently, would be liable for the damages caused onto such person. The KCA typically imposes the burden of proof on the plaintiff as to the existence of a product defective and causation, although certain Korean court precedents have suggested or provided for the shifting of the burden of proof to the product manufacturer. Legislation to amend the PLA to shift the burden of proof to the manufacturer has been introduced in the Korean National Assembly, but such amendment has not yet been passed.

Burden of Proof and Causation

Although the KCA generally places the burden of proof on the plaintiff asserting a tort claim, that burden has been relaxed or shifted to the manufacturer in cases involving products in some court decisions. The rationale for this relaxation of the burden of proof is that such burdens are inherently difficult to prove based on the technical na-

Korean Product Liability Act

Article 1 (Purpose)

The purpose of this Act is to prescribe the responsibility of manufacturers of products for compensation for injury caused by defects in their products in order to protect the interests of the injured, thereby contributing to the enhancement of the quality of people's lives and sound development of the national economy.

Article 2 (Definitions)

The definitions of terms used in this Act shall be as follows.

1. "Product" means a manufactured or processed movable property, including cases in which it is part of another movable or immovable property.
2. "Defect" means a flaw or a lack of reasonably expected safety in the manufacture, design, or labeling of a product as specified in the following subparagraphs
 - a. "Defect in Manufacture" means a flaw in the manufacture of a Product, which makes the Product different from the way it is designed, thereby making it unsafe, regardless of the care the manufacturer has taken in the process of manufacture.
 - b. "Defect in Design" means a flaw in the design of a Product, which the manufacturer could have avoided by adopting a safer design, thereby preventing or reducing harm or injury the Product has caused.
 - c. "Defect in Labeling" means a failure on the manufacturer's part to provide adequate descriptions, directions, or warnings that could have prevented or reduced the harm or injury the Product has caused.
3. "Manufacturer" means either of the following.
 - a. a person who receives income from manufacturing, processing, or importing Products
 - b. a person who has listed himself/herself on the Product by way of a name, business title, or trademark as a person defined by item (a) or who has used such indications to misrepresent himself/herself as a person defined by item (a)

Article 3 (Product Liability)

- (1) A Manufacturer shall be liable to compensate for any injury that his/her Product has caused to the lives, bodies, or property of its users.
- (2) In case the manufacturer of a Product is unable to be located, the person who has supplied the Product to a person injured by the Product either by selling or renting it shall be liable for compensation for injury under paragraph (1) if the supplier has failed to provide the injured party or his/her legal representative with information that he/she has about the manufacturer of the Product or a person who supplied the Product to him/her for a considerable period of time.

Article 4 (Liability Exemption)

- (1) A Manufacturer who is liable for compensation for injury under Article 3 shall be exempted from the liability if he/she proves one of the following facts.

1. that the Manufacturer has not supplied the Product in question
 2. that the Manufacturer could not have discovered the Defect in question with the scientific and technological knowledge available at the time of the supply of the Product
 3. that the Defect in question is attributable to the statutory criteria the Manufacturer complied with at the time of the supply of the Product
 4. that, in case the Product in question is a raw material or a part, the Defect in the Product is attributable to a flaw in the manufacture or design of another Product that has used the raw material or part
- (2) A Manufacturer liable for compensation for injury under Article 3 shall not be able to claim exemption from the liability under paragraph (1)-2 or -4, if the Manufacturer has discovered the Defect in the Product after supply but has failed to take appropriate measures that could have prevented injuries caused by the Defect.

Article 5 (Collective Liability)

If 2 or more parties are liable for compensation for the same injury caused by a Product, all parties shall be collectively liable for the compensation.

Article 6 (Limitations on Escape Clauses)

Any contract that excludes or limits a Manufacturer's liability for compensation for injury prescribed by this Act shall be null and void; provided that this provision shall not apply when such a contract concerns a Product that is supplied to a person who intends to use the Product for commercial purposes.

Article 7 (Statute of Limitations, etc.)

- (1) The statute of limitations for an injury claim under this Act shall end 3 years after the day on which the injured party or his/her legal representative discovered the person liable for compensation for the injury.
- (2) The statute of limitations for an injury claim under this Act shall end 10 years after the day on which the Product responsible for the injury was supplied; provided that, in the case of an injury which results from an accumulation of a harmful substance in the human body or symptoms appearing after a certain dormant period, the statute of limitations time period shall begin on the day the injury is discovered.

Article 8 (Application of Civil Act)

The Civil Act shall apply to matters concerning liability for compensation for injury caused by Defects in Products other than those prescribed in this Act.

Act No. 6109.

ture and, given the respective posture of the parties, *i.e.*, a single consumer on one side and a large manufacturer on the other, the playing field should be leveled in favor of the plaintiff consumer so that they might have their day in court. A factor likely playing into this rationale is that, in contrast with the extensive use of party experts in U.S. tort litigation, the Korean system traditionally has not focused on party experts, and, thus, a plaintiff would be presumed not to be so equipped to make complex, technical proofs. As the Korean bar and courts gain greater experience with complex product defect and toxic torts, we might see the development of greater emphasis or allowance of party experts (as opposed to court-appointed experts, as discussed below).

Korean Litigation Practice and Devices

In this section, we try to highlight some of the practical issues associated with Korean litigation and the significant distinctions with U.S. practice.

Multiple Claimants

With respect to multiple claimants alleging injuries from the same product, note that Korean procedure does not allow for class actions. Class actions are available for certain claims related to securities and other consumer protection matters, but not for product liability or any other tort claims. Thus, a multiple claimant product liability case would simply be a consolidation of plaintiffs. Although the district courts have broad discretion as to the management of litigation, the use of devices such as case management orders, bellwether plaintiffs, Lone Pine orders, and the like, have not been developed and utilized by the Korean courts. As discussed below, a U.S. manufacturer defending a claim in Korea might seek to introduce and implement such devices (as well as, for example, seeking broad discovery), and essentially turn the litigation into a U.S.-style litigation, both to present its case most effectively and to make a due process record for a later recognition scenario. How and how much a U.S.-based defendant might press is a matter of strategic balance, with the foregoing notions weighing against possibly offending the court by the suggestion that its procedures are inadequate.

Trial

The “trial” in Korea is quite dissimilar to a U.S. trial. There are no juries in civil matters, and the Korean trial does not involve the presentation of live witnesses and evidence over the course of consecutive days or weeks. Rather, in the typical proceedings, the parties will make a number of exchanges of briefs, after which the presiding judge will schedule a preparatory hearing. This process of briefing and preparatory hearings, during which the court will determine the issues in dispute and perhaps explore settlement, will continue until the presiding judge sets a date for a main hearing.

The main hearing will ordinarily consist of a series of short hearings during which the court receives further written submissions, arguments, and potentially some live testimony. The trial court will close the hearing once it determines that it has received and reviewed sufficient information to render its judgment.

While the Korean court system and procedures are designed to be more inquisitorial in nature than adversarial, judges are encouraged to play a passive role. However, as there are no jury trials in civil actions, the judges’ act as triers of facts and law. Judges are also provided with discretionary authority to order a case be settled in a conciliation proceeding before a committee. In the event that the case cannot be conciliated, the judge may render a ruling that he or she deems reasonable after considering the merits of both sides. The role of lawyers is to represent the parties in the judicial proceedings of a case. The lawyers play a primary role, determining the beginning, subject-matter, and the termination of proceedings, as well as presenting facts and evidences to the court.

Discovery

In contrast to U.S. procedure, Korean procedure does not provide for extensive, pre-trial discovery. Discovery is conducted on a limited basis, and requires a court order. The parties do not have a general obligation to submit documents adverse to their interests. Rather, a party needs to apply to the court to compel the person or entity possessing documentary evidence to produce the document or record to the court. Such application for the document may be made

when (i) the opposing party referenced the document during trial and is in possession, (ii) the applicant has a legal right to inspect the document, or (iii) when the requested document was prepared for the benefit of the applicant. If the holder of the document refuses to comply with the court’s document production order, the court may admit the claims of the other party in the

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document to be true under Article 349. The holder may also be subject to fines (Article 351, 318, 311(1)).

Discovery is an area of concern when representing a Korean entity in a U.S. proceeding because, based on the lack of discovery under the Korean law, the entity might be reticent in providing documents, or having effectively retained documents or evidence in the first instance. Spoliation issues might arise in this context.

Motion Practice

While there is interaction with the Korean courts via the preparatory hearings described above, there is not U.S.-style motion practice in Korea to receive interim rulings and relief, *e.g.*, motions to dismiss certain causes of action, motions for summary judgment, etc. Instead, the court will ordinarily address all of the issues in its judgment at the conclusion of the case.

Experts

The use and reliance on party experts is permitted in Korean proceedings, although the practice is not as evolved as in the U.S. system and party experts might tend to be viewed with greater skepticism. Highly cre-

dentialed academic experts are likely preferred. Somewhat more traditional would be the court's appointment of its own expert to consider technical issues, which might be done *sua sponte* or at the parties' request. A party expert might be subject to examination by the court. The court has the discretion to decide on the admissibility of expert evidence as part of its adjudi-

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cation of the claims, however, there is no formal *Daubert* or *Frye* procedure for challenging or excluding an expert.

Evidence

All evidence needs to be submitted by the parties as the court is not permitted to consider evidence that has not been presented by either party. The court might become aware of certain evidence based on its own knowledge and research, although if such evidence has not been offered by the parties, the court should not consider it when rendering its decision. Notwithstanding these limitations, the court might suggest during the course of hearings that the parties adduce such evidence in which the court is interested.

Evidence that is submitted or presented in court can be in the form of witness testimony, written legal briefs, documentary evidence (including written reports, statements, drawings, photographs, recording tapes, video tapes, etc.), expert testimony, inspection, and oral arguments made at trial. Generally, the court has discretion in allowing or denying the submitted evidence into the record. In doing so, the judge will assess the relevance and materiality of the evidence at her discretion, but because there is no clear-cut rule weighing the probative value of a piece of evidence as well as the wide-range of discretionary authority, in practice, the judges typically are flexible in the admission of various evidence, including hearsay evidence. Additionally, the court might treat materials not

as evidence but as "reference material" in its deliberations.

Tobacco Litigation

The Korean courts' experience with tobacco litigation provides a helpful example of how a product liability lawsuit has proceeded in the Korean system. On April 10, 2014, the Supreme Court rendered its decisions on two lawsuits brought by six plaintiffs against the Korean government and the Korean tobacco manufacturer, KT&G, finding that the plaintiffs failed to establish that the tobacco products were defective.

The plaintiffs claimed that under the Consumer Protection Act, defendants were obligated to protect the life and bodily safety of its consumers. More specifically, defendants, among other things, disregarded such obligations by failing to: (i) "make efforts to reduce or eliminate the harmfulness and addictiveness of cigarettes, and design, manufacture and sell cigarettes that are reasonably safe for consumers"; (ii) properly explain, instruct, warn, or indicate the damage or the health risks of smoking tobacco; and (iii) implement safety measures that are commonly expected by consumers to reduce or eliminate the risk of harm. *2007 NA 18883; 2011 DA 22092*.

The Seoul High Court had previously dismissed plaintiffs' claims in its entirety, and the Supreme Court affirmed the Seoul High Court's decision, finding that there was no defect in the tobacco products or that the defendants acted in a tortious manner. In its decision, the Supreme Court emphasized that when determining the existence of a product defect, one must consider various factors such as: the characteristics and uses of the product; a consumer's expectation for the product; the contents of the expected risk; a consumer's awareness of the risks of using the product; possibility for consumers to avoid such risks of harm; and possibility and economic feasibility of implementing an alternative design. Taking into account such factors and the social norm, the Supreme Court found that there was no proof that any design defect, marketing defect, or defect due to lack of safety that is generally expected in tobacco products manufactured by defendants.

The tobacco litigation also addressed the issue of causation for a toxic injury. The

Seoul High Court and Korean Supreme Court essentially embraced the general causation/specific causation paradigm employed in U.S. courts, although the precise contours of general causation, described by the Korean Supreme Court as "epidemiologic causation," will likely be refined as the Korean case law evolves. Recognizing that lung cancer is not solely caused by tobacco use, the court explained that "unlike 'specific diseases,' which are caused by specific etiological causes and there is a clear correspondence between cause and result, the so-called 'non-specific diseases,' whose causes and mechanisms are various and complex, are diseases that occur through congenital factors..." Thus, for non-specific diseases, one must prove that

based on epidemiological study comparing a population that was exposed to the risk factor with another general population that was not exposed, the rate of incidence of the non-specific disease among the population that was exposed to the risk factor significantly exceeds the rate of incidence of the non-specific disease among the population that was not exposed to the risk factor, and additionally establish the period during which individuals belonging to the population were exposed to the risk factor, the degree of exposure, when onset occurred, as well as the health status and lifestyle before being exposed to the risk factor, change in disease status, and family history.

Strategic Considerations for Preserving the Recognition Record

Lastly, a significant consideration in litigating in a foreign jurisdiction is the possibility of confronting an action for recognition and enforcement of a foreign judgment if the defendant does not prevail. So, while litigating within the parameters of the foreign procedure and practice, a party will also want to ensure that its record is protected for the recognition context and potential challenges to recognition. The most likely, pertinent challenge in the product liability context would be a lack of due process, on grounds, for example, of inadequate discovery, improper evidentiary safeguards relating to expert testimony, etc. (We do not discuss challenges

to recognition based on lack of jurisdiction here.)

As some background on the recognition and enforcement of foreign country judgments, the matter is currently governed by state law in one of three forms: (i) a version of the Uniform Foreign Money-Judgments Recognition Act, which was adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1962 (the “1962 Act”); (ii) a version of the NCCUSL’s 2005 revision of the 1962 Act, the Uniform Foreign-Country Money Judgments Recognition Act (the “Revised Act”); or (iii) common law in jurisdictions that have not adopted one of the statutes. So, the standards for recognition are variable, depending on where the judgment-creditor proceeds. (The American Law Institute has a proposal for a federal recognition statute, but that has not been adopted as of yet.)

As noted, due process infirmities might be seen in the product liability or toxic tort context based on, for example, the foreign court’s treatment of scientific and medical evidence on causation; the court’s procedures, or lack of procedure, for addressing multiple-plaintiff, consolidated cases; or deficient discovery procedures. A due process challenge might turn on the venue in which the plaintiff seeks recognition, because while the 1962 Act requires a showing that “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law” to defeat recognition, the Revised Act, in addition to the foregoing ground, also permits a broader challenge based on a lack of due process in “the specific proceeding in the foreign court leading to the judgment.” Compare 1962 Act, §4(a)(1) with Revised Act, §4(c)(8). As reflected in the NCCUSL comments to the Revised Act, the linchpin of a due process challenge remains the deprivation of “fundamental fairness,” see Revised Act, §4(c)(8), cmt. 12. So, while *Daubert* safeguards and advanced mass tort litigation procedures might be lacking in foreign proceedings, their mere absence would not seem likely to satisfy a due process challenge. As one court has observed, “The term ‘due process’ in this context does not refer to the ‘latest twist and turn of our courts’ regarding procedural due process norms, because it is not ‘intended to

reflect the idiosyncratic jurisprudence of a particular state’... Rather, it is meant to embody an ‘international concept of due process,’ defined as ‘a concept of fair procedures simple and basic enough to describe the judicial processes of civilized nations, our peers.’” *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1327 (S.D. Fla. 2009) (quoting *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 476-77 (7th Cir. 2000)), *aff’d*, 635 F.3d 1277 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1045 (2012). In *Osorio*, in which the court rejected a Nicaraguan judgment for alleged injuries arising from a toxic exposure, the district court framed the due process issue as requiring an examination of “the scientific basis for the irrefutable presumption of causation afforded to plaintiffs who establish DBCP exposure and sperm damage and... whether the presumption constitutes a procedure consistent with due process in light of the medical testimony in [the] case.” *Id.* The court reasoned that the due process consideration “necessarily requires the [recognition court] to examine the procedures, including any applicable legal presumptions, which were in place or were applied by the rendering court.” *Id.* at 1327–28.

But, to establish a due process challenge (which might effectively comprise a JNOV motion), the defendant will likely need to be able to demonstrate precisely how it was denied due process, *i.e.*, showing that it requested discovery, case management, etc. and was denied by the foreign court. This raises the balance of adhering to the local practice, while stretching or skirting its boundaries to protect the recognition record. Such strategy should be carefully considered by U.S. and foreign counsel representing the defendant.

Conclusion

The prevalence of international product liability litigation is likely to expand. As the Korean example shows, the practitioner should be aware of the substantive and procedural differences in the laws of the U.S. and the foreign venue; and while needing to adhere to local practice and judicial culture to achieve success in the first instance, if possible, must also protect the record for a recognition scenario if the claims are not defeated. 