ESTABLISHING A BUSINESS

IN THE US

Presented by Goldman Collins Associates, LLC

Goldman Collins Associates, LLC can be found at www.GoldmanCollins.com

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About Goldman Collins Associates, LLC

Ronald W. Collins, Principal, founded Goldman Collins Associates in 2000. Prior to forming Goldman Collins Associates, he was President and CEO of Transtec Manufacturing Systems. Before that Ron was a Vice President of the Polaroid Corporation. He established, in 1994, a European Division for a Fortune 500 company. In 1997 he formed a new high tech division of a Fortune 500 company. In 1998, he bought and merged a European High Tech company into an American company, and sold two American companies to European investors. He formed, ran and sold two software companies. Ron has provided international project management, and C-Level Interim Management. Email Ron at RCollins@GoldmanCollins.com

Goldman Collins Associates specializes in Interim Management, Start-ups, Turn-arounds, M&A's and Business Planning and Analysis. Since 2000, Goldman Collins Associates has been responsible for creating American subsidiaries for two European companies and one European subsidiary for an American company, and has obtained major funding and managed a major project for expansion for one of the world's leading biotechnology company specializing in ophthalmics, and provided Interim Management for a pharmaceutical manufacturing company, and for an audiologist management and sales company, and successfully completed the sale of a biopharmaceutical company. We also offer small business networking and IT support.

Our associates have a broad range of expertise including senior management, business planning, strategic analysis, business development, technical management, operational analysis, operational management, corporate management training, marketing, market analysis, sales, IT, and networks.

Our Mission

Leadership: At Goldman Collins Associates, LLC, the Clients receive the kind of quality and service expected from a leader. Our company is always evolving as the needs of our Clients change and as new opportunities are created in the market. Our Clients can rest assured that working with Goldman Collins Associates, they will have the latest services, technology and developments in the industry.

Customer Relations: At Goldman Collins Associates, LLC, our highest priority are satisfied Clients. All Clients are important to us and they can expect us to go the extra mile for their business. Superior customer service is the hallmark of Goldman Collins Associates, LLC. We are proud to serve our Clients and work hard to earn their business.

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Introduction

DISCLAIMER: This a guide for establishing a business in the United States based upon the rules and laws as they are in 2013. Both the rules and laws change periodically and the reader and user of this guide is responsible for knowing the latest version of the rules and laws as they pertain to doing business in the United States. Goldman Collins Associates makes no claim to being legal or tax experts and offers this guide only as their understanding of the business issues pertaining to starting a business in the USA. Goldman Collins Associates cannot know the particulars of any business therefore the reader and user of this guide is responsible for the application of the principles container herein. This is a guide only and does not claim to be complete or applicable to all businesses.

Regardless how small or large your company is, it is a daunting task to establish a business presence in the US. To do so without expert help can lead to disaster. Goldman Collins specializes in helping non-American companies that range in size from start-ups to medium size (under 1000 employees) establish themselves in the US. This guide will cover some of the things you should consider before deciding to build an American business.

This guide will cover

A. Should you build a US business?

B. Marketing and Market Analysis

C. Location of Business

D. Legal Form of the Business

E. Sales and Distribution

F. Construction and Infrastructure

G. IT and Networking

H. Human Resources and Employees

I. Some Legal Issues

First we will summarize here some important consideration when you contemplate building a business in the US.

Ten Success Criteria for Establishing a Thriving US Subsidiary

The United States is the largest economy, and the most important market for many products and services. Growing small and mid-sized international companies recognize that a presence in the United States is necessary to be recognized as a global competitor. Although many of the success criteria described below apply to global market entries, this paper focuses on the specific

opportunities and challenges in establishing a presence in the US. Typical drivers for a US market entry include:

A. The need to service US customers including distribution and service partners

B. Increasing sales which leads to increasing production volumes needed to achieve a competitive cost structure and amortize R&D investments

C. Limited growth opportunities in home markets

D. The cost of export versus production in the US

E. The availability of investment capital

Many companies enter into the US market without a clear plan and entry strategy. Market entry strategies must be based on the goals of the company. There are no "right" or "wrong" strategies, but a series of trade-offs based on short and long-term objectives. More control, brand name recognition, and higher margins require more investment and a longer term commitment. Market entry strategies with lower investment reduce the potential for long-term market control and margins.

Below are the ten most important considerations for establishing a profitable US operation.

A Business Plan with Realistic Expectations

Although this may seem obvious, many companies enter the US market recognizing the potential and "need to be there", but without clear objectives, a business plan, and funding. As a result, money is wasted on half-hearted attempts to slow-roll a market entry. A business plan must answer a few fundamental questions:

A. What are your objectives for revenue, market share, margins, cash flow and EBITDA?

B. How much capital do you have available to invest?

C. How long can you wait for the US operation to be profitable?

It is essential that the business plan is in line with the long-term objectives and includes the appropriate funding to support the market entry strategy.

Adapt to US Culture and Business Customs

In general, most failed market entries - worldwide - are due to a lack of cultural adaptation of the product, business model, or the company culture. An ethnocentric approach assumes that the home culture, products, and business customs are superior, and can be imposed on foreign markets. This is a known barrier for European companies where home office executives may feel that European designs, traditions, and ways of doing business are superior to the US. European companies often have a high level of government social program support that is not available in

the US. In the US there is a culture of company-provided benefits for healthcare, disability, and retirement savings.

Be Prepared to Live up to High Expectations and Tough Competition

US markets are often the most competitive in the world, in terms of delivery expectations, service, quality, and price. International suppliers may be forced to sell products in the US at lower prices and margins than in their home markets. This is especially the case when suppliers cannot pass on the effects of dollar devaluation when they compete with US and other global suppliers.

Define your Value Proposition and Differentiation

Market entrants tend to over-estimate the uniqueness of their product or service. International companies often think that their product is unique or superior. If there is a consumer desire or a business need, there is almost always an offering or solution already in the market. There is not likely room for one more "me-too" competitor.

Define one area where your offering will be clearly superior to the competition:

A. Customer Centric Service and Relationships

B. Product Design and Innovation

C. Operational Excellence and Low Cost

Setting a goal to beat the competition in all areas would be unrealistic and usually leads to failure. A new market entrant will find it difficult to surpass competitors in the area of customer service and relationships. Any vendor selection based on proven history, relationships, and risk avoidance favors long-term and local competitors.

A more realistic differentiation strategy may be based on product innovation, offering unique features, superior design, high-end quality, or a more elegant design. But the value of the differentiation to the potential buyer has to be clear. European companies tend to overestimate the value of an elegant design, especially for B2B products. Consumers may base a purchase decision on emotion, but industrial and commercial users are looking primarily for functionality, reliability, and cost of ownership.

Alternatively, a foreign competitor may leverage low-cost development and production to offer a better price-to-value ratio. A key to success is to be clearly superior in the differentiating discipline, but adequate in the other areas. For example, in the long run, technology differentiation or a price advantage cannot overcome poor logistics or customer service.

Select your Channel Strategy Carefully

The channel strategy is one of the most critical market entry decisions. Selecting the channel can make or break a market entry. The channel strategy is often very difficult to change later on. This is especially the case with lower investment market entry strategies such as sales through Original Equipment Manufacturers (OEM) or private label retailers that do not create brand equity. A low-

cost strategy that relies heavily on sales agents, distributors, dealers and/or systems integrators creates customer loyalty to the sales channel who can often switch customers to a different product.

Below is a summary of common channel strategies, and the trade-off between investment and long-term objectives. We will go into details in later sections of this work.

Franchising

Capital requirement: Low

A. Pros: Franchisees raise funds

B. Cons: Typically requires a lot more legal work and laws vary by state

Licensing

Capital requirement: Low

A. Pros: Royalty revenue with very little investment in sales channels

B. Cons: Licensee service or production quality may impact brand reputation. Risk of theft of Intellectual Property

OEM and Private Label Sales

Capital requirement: Low

A. Pros: Low investment to build a sales channel and infrastructure. May generate sales volume quickly.

B. Cons: Does not build brand recognition nor loyalty. Buyer can often switch suppliers easily. Brand owner earns a larger share of the margin.

Joint Ventures

Capital requirement: Medium

A. Pros: Local JV partner contributes capital, resources, local market knowledge, and relationships

B. Cons: Long-term viability of JVs is problematic. Sharing of profit with JV partner. Potential for future conflict.

Dealers, Distributors, Sales Agents, Integrators

Capital requirement: Medium

A. Pros: Quickly build market penetration. Local advice, relationships, sales and support infrastructure.

B. Cons: Requires sharing margins with the channel partner. Long-term dependence on partner who owns client relationships and may be able to switch suppliers. In some markets, integrators want to be supplier neutral.

Direct Sales

Capital requirement: High

A. Pros: Market control, higher margins, direct control over customer relationships.

B. Cons: Requires own sales force, recruiting, training. Much lengthier process that requires investment and patience.

The trade-offs associated with each channel model often result in a hybrid approach that focuses direct sales on certain strategically important target markets, combined with a distribution model for secondary target markets or markets where existing channels exercise a high degree of market control. We go into more detail on sales distribution later in this guide.

Recruit Local Talent

International companies may be tempted to staff their US operations with successful foreign nationals. Expatriates may be needed initially to establish the operation, train local staff, and to support more complex products. But success in the US requires knowledge of the markets, business culture, and most importantly an extensive list of business contacts and established relationships in the target industry. International companies often underestimate the difficulty recruiting local talent with knowledge and industry connections. Candidates from larger companies often lack the entrepreneurial spirit needed to manage a startup, and may be restricted by stifling non-compete agreement with their current employer.

Empower Your Local Management

A very frequent problem - especially in small to midsize closely held enterprises - is that they establish a subsidiary but manage it as an overseas sales branch. After hiring competent and trustworthy local talent, and potentially a training and transition period managed by home office expatriates, it becomes essential to establish clear rules and approval authorities for the local management team, including

A. Authority to hire, manage performance and terminate local employees

B. Pricing, discounts, and terms

C. Develop and manage compensation plans

D. Purchasing, spending, and travel approval

E. Day-to-day management of cash flow, P&L, and commissions and bonus payments

F. Goals for EBITDA and other measurables.

Clear rules prevent the micro-management of a subsidiary that invariable hinders nimble local decision-making that is essential for the successful execution of a market entry strategy. This does not mean that local management is given a carte blanche, but that authority levels are clearly defined and documented. Home office approval should be required for any transactions that create a risk to the existence of the subsidiary or even the corporation, for example long-term price guarantees, warranties, or purchase/lease commitments, special contract terms and conditions, large expenditures, or transactions that are more likely to result in a legal liability, such as employee terminations.

Proper Controls and Monitoring are Needed:

Local management should not be permitted to hire US company's legal counsel, accountants and other experts. The foreign parent should select them, and they should be totally independent and loyal to the foreign parent, not to the US company or any of its employees. Those experts should be eyes and ears of majority owner.

Develop Competitive Compensation Plans

A very common aspect of insufficient cultural adaptation is in compensation plans. European and Asian company plans typically contain a higher element of base salary and benefits, and often fail to adapt compensation - and especially sales commission plans - to the US culture. The US cultural focus on individual achievement and short-term gratification must be reflected in the compensation plans of the subsidiary leadership and sales force. To attract competent sales people to a new market entrant may require some bridge plans (e.g. a draw on future commissions), signing bonuses, or a higher base salary. Another alternative is the creation of intermediate strategic objectives that tie performance to achievements and avoid paying poor performance.

Build a Low Overhead Infrastructure

To be a serious contender in the US marketplace requires a local infrastructure. This includes in all cases a local office, a web site, and a legal, marketing, personnel, and finance operation. Depending on the type of business, product and channel strategy, a local service department, stock and the associated warehousing and logistics operation may be needed.

Fortunately, the US offers excellent services to support small businesses and startups. Compared to most countries, it is much easier to obtain regulatory approvals and establish an organization in the US that looks substantial, but with low fixed cost. Successful market entrants take advantage of:

A. Federal, State, and local support organizations for small business

B. Support and funding provided by US state, local and chamber of commerce organizations, and home country organizations chartered with export promotions.

C. Low cost web hosting, e-mail, VoIP phone services, and virtual switchboards

D. Marketing services firms and free-lance marketing consultants for event management, lead generation, and the adaptation of marketing collateral and websites

E. Executive business centers

F. Outsourced Human Resource and benefits administration

G. Accounting and legal services by companies specializing in the support of international companies

H. Fulfillment and logistics services, such as warehousing, packing, shipping and tracking

I. Service providers with an established infrastructure to manage parts, warranty and repair

Executive business centers make it easy to establish a professional presence quickly, if necessary in multiple locations, and with the necessary administrative and conference room facilities. Most companies will switch to leased facilities when multiple offices or warehousing space are needed more long-term.

Outsource Human Resources, Recruiting, and Benefits

US startup subsidiaries and most small to mid-sized companies require professionally managed payroll, benefits, and government reporting, but should avoid the cost of an in-house HR organization at least during the startup phase. One of the challenges for the subsidiary management is to familiarize the foreign owners with US laws and business customs relating to employees. US employees often rely on company benefits that foreign owners would expect to be government provided, such as health care and disability insurance.

Because of the challenge to provide competitive benefits for a small startup, consider using a co-employment agreement (also called Professional Employer Organization or Employee Leasing). PEOs combine a number of small and mid-sized companies in an employer agreement for the administration of payroll, legal reporting, recruiting, and training. PEOs ensure that local management follows US laws and minimized the risk of lawsuits. PEOs develop an employee handbook, adapted to the company culture and policies, but in line with US laws and regulations, an effort that would otherwise take management time and involve legal expenses. Having an employee handbook sets clear expectations on code of conduct and ethics to reduce legal exposure. Most importantly, PEOs make it easier to establish a benefits package that will be needed to attract the needed talent.

Summary

A successful market entry in any new market, but especially the very competitive US market, requires careful planning, realistic expectations, a strong and well-defined value proposition, and - above all - patience. A clear plan with a budget will determine the channel model and the "presence" and visibility of the company.

Should you build a US business?

Entering into the U.S. market can be a rewarding venture for many foreign businesses. Because U.S. citizenship and residency are not required, foreign nationals are able to start or expand on U.S. soil without experiencing much more red-tape than an American-born business owner would.

There are many reasons to set up a wholly-owned US company. You may want to have a presence in the market; to satisfy existing customers and prospects; to manufacture, process or assemble products in the States; to protect against liability claims; and to minimize certain tax or customs duty-related costs.

The United States is still the largest economy, and even with the fast growth of China it is the most important market for many products and services. Growing small to mid-sized international companies recognize that a presence in the United States is necessary to be recognized as a global competitor. Typical drivers for a US market entry include:

A. The need to service US customers including distribution and service partners

B. Increasing sales which leads to increasing production volumes needed to achieve a competitive cost structure and amortize R&D investments

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Some Reasons for Building a Business in the US

Access to American consumers.

Is it necessary to have a US presence business to gain access to American consumers? Technically, no . . . but it helps. International companies that export products to the U.S. face some significant hurdles. In addition to coping with trade barriers and regulations, you would need to find someone to receive your product once it arrives in the U.S., and then someone else who would be willing to distribute it to stores. By building a US presence, you can potentially eliminate several steps in the chain – and keep their cut of the profits for yourself.

Global status.

In global trade circles, there is a certain prestige that comes with having an American company as part of an international business portfolio. The status of an American business holding isn't based on cultural or nationalistic elitism, but on the fact that the U.S. continues to be an economic powerhouse that serves as a center of commerce for many sectors of the global economy. In some industries, an American subsidiary isn't just a good idea – it's a necessity.

Access to technology & talent.

America is known for its ability to supply the global economy with talented leaders and cutting edge technologies. As an international business owner, you can have a hard time attracting talent and transplanting technologies overseas. When you build an American business, you bring your company to the talent and technology rather than waiting for them to come to you.

Global growth potential.

The U.S. is an incubator for emerging global consumer trends. If it's flying off the shelves in the U.S., it's only a matter of time before a version of it reaches store shelves in London, Tokyo, and Johannesburg. With a little luck and a lot of hard work, you can focus your acquisition search on U.S. companies that are poised to explode in the global marketplace.

Marketing and Market Analysis

This section will concern

A. market analysis

B. marketing, i.e. market penetration strategies

C. pricing and margin analysis

This is not intended to be a textbook on marketing, thousands of those exist. Rather we will focus on some of the critical things needed to penetrate the US market.

Target Marketing

Target marketing centers around the recognition that a mass market is comprised of many separate groups with different demographic and psychographic profiles. A program to market to those segments should understand and capitalize on the group's differences and use them strategically in marketing.

Social Networking and Data Collection

Internet companies like Google, Amazon, Facebook have market segment analysis as a result of capturing millions, if not billions of on-line transaction and data mining for reoccurring trends of groups and individuals. There are many commercial sources for this data and it is often easier and cheaper, not to mention quicker, to buy the analysis you need.

Demographic Market Analysis

Gender, age, ethnicity, geography and income are all market-segmenting criteria based on demographics. The first resource to consult when doing an analysis on a target group is the U.S. Census. The government does a thorough of detailing information about all the groups that make up the U.S. population. The government collects this information every 10 years, then slices and dices the basic data to generate all sorts of reports related to nearly every aspect of consumer life from births and deaths to geography to the size and projected growth of groups, such as African-Americans, Latinos and Asians.

Depending on the nature of the specific business and the goals of the business for growth, defining one or more target consumer segments is an effective and efficient means of marketing.

Psychographic Market Analysis

Equally important is the psychographic profile of your expected US customer. What makes customer decide which vendor to go to? This information is usually found by doing primary research to understand the motivations and behaviors of the target market. Both focus-group research and quantitative studies are available as vehicles to gain insight into target audiences.

Know Your Segmentation

Make sure you can define the different US segments, particularly since they are the basis of your marketing strategy. What distinguishes your business from other businesses, if this is part of your segmentation? Do you classify them by sales, number of employees, or some other factor? Do you define customers by the channels they buy in, as in the retail customer compared to the wholesale or direct customer, also compared to the Internet download customer? Have you defined which segment is which, and why?

As you deal with segmentation, you should also know the marketing strategy behind it and your choice of target markets. What makes these groups more interesting than the other groups that you've ruled out? Why are the characteristics you specify important?

Know Your Market Needs, Growth, and Trends

All marketing should be based on underlying needs. For each market segment included in your strategy, explain the market needs that lead to this group's wanting to buy your service. Did the need exist before the business was there? Are there other products or services or stores that offer different ways to satisfy this same need? Do you have market research related to this market need? It is always a good idea to try to define your retail offering in terms of target market needs, so you focus not on what you have to sell, but rather on the buyer needs you satisfy. As a shoe store, for example, are you selling shoes or are you satisfying the customer needs for covered feet? Are there really underlying needs, such as style and prestige for fashion footwear, or padding for runners, or jumping for basketball players, that relate to selling shoes? Are kids buying status with their basketball shoes?

Understand your market trends. What factors seem to be changing the market or changing the business? What developing trends can make a difference? Market trends could be changes in demographics, changes in customer needs, a new sense of style or fashion, or something else. It depends on what business you are in.

Sales and Distribution

Distribution Basics

What Are They and What Do I Want. Be sure you understand the differences between a "distributor" or "dealer", and a "sales agent" or "sales rep". Decide carefully which you want for the US market.

A **Distributor** buys from you, the supplier, and resells through multiple outlets, usually over a wide area. A distributor can sell wholesale to local Dealers or large customers or sell retail to end users.

A **Dealer** buys from you and resells at the retail level directly to the end user of your product.

Unlike distributors and dealers that buy and resell goods, **Sales Agents** and **Sales Reps** do not buy and resell, but rather obtain customer orders for the supplier's goods (the sales being between the supplier and the customer). Sales Agents can be independent contractors. Sales Reps usually work for you the supplier.

Distributors and Dealers

How Many Do You Need? Think through carefully whether you want to have one exclusive distributor, dealer, sales agent or rep for the US market, or several of them. If several should be the answer, should each have exclusivity for a particular part of the US or should they all be non-exclusive for the entire US? There is no one pattern that will suit each and every company. A good market study may be a worthwhile expense.

"Due Diligence". Check out your prospective US distributor(s), dealer(s), sales agent(s) and sales rep(s) in advance, before engaging them. There are several areas you should check. These include their legal status, financial situation and banking information/references. Too many non-US companies rush into deals with US parties without doing a proper "due diligence", and the result is often a messy affair.

Some Important Points for Distributorship and Dealership Contract:

A. **Contract Products**: These should be clearly defined. If, during the course of the agreement, you develop other products, should they automatically fall under the contract?

B. **Sales Territory; Exclusive or Non-Exclusive Rights**: These points must be clearly articulated in the contract. The contract should clearly define what is meant by a sale by the distributor or dealer within its specified territory. Where the territory is large (e.g., all of US, Canada and Mexico, or even all of the Western Hemisphere), you may wish to grant exclusive rights for part of it and non-exclusive rights for other parts. You may wish to reserve certain customers in the agreed territory for direct sales by you, the foreign supplier.

C. **Sales to Only Specified Type of Customers:** You might wish to confine the distributor's or dealer's sale of your products to a particular type of customer (industry segment) or to customers who will use your products only in a particular way.

D. **Can the Distributor or Dealer Appoint "Subs" and Sales Agents?** Should the distributor or dealer have the right to appoint sub-distributors or sub-dealers, and/or sales agents or sales reps? If yes, can that be done only with your (supplier's) prior written consent? Should you attach to the distributorship contract a model of such agreements that the distributor or dealer must use?

E. **Sales Outside of Territory or Outside of Permitted Scope:** Those points should normally be dealt with in the contract. There is, for example, American case law holding that if the contract does not clearly prohibit it, a distributor or dealer can lawfully sell outside of its assigned territory.

F. **Duration:** Will the contract be for a fixed term (with or without an option to renew) or of indefinite duration? Either way, there should be termination clauses. See point 19 below regarding "termination".

G. **Delivery Terms:** These should be clearly set forth, and you should know exactly what the delivery terms mean and what rights/obligations flow from them. Specific delivery terms (e.g., Freight On Board (FOB), Cost Insurance and Freight (CIF), Cost and Freight (C&F), etc.) carry with them certain consequences, unless the parties agree by contract to vary them. If there will be variations (e.g., when title or risk of loss passes to the buyer), they should be set forth in the contract.

H. **Payment Terms:** The method and time for payment, including provisions for interest on late payments, should be set forth. If payment (in whole or in part) will be by letter of credit, the l/c terms must be carefully drafted.

I. **Security for Payment:** If you will be selling on credit terms, what security for payment will you receive? One very frequently used US mechanism is the **"security interest"** which operates basically the way a real estate mortgage does and can give you a "secured creditor" position in the agreed "collateral" of the distributor or dealer. The "collateral" under a "security interest" can be any non-real property assets of your buyer.

J. **Minimums Quotas:** If you are granting the US side exclusive or quasi-exclusive rights for all or part of the US (or North America), you will normally want the US distributor or dealer to agree to "minimum quotas" which, if not met, will entitle you to terminate the agreement. From your standpoint, minimum purchase quotas (the distributor's or dealer's purchases from you) are better than minimum sales quotas (the distributor's or dealer's sales to its customers). Sometimes, even when the distributor or dealer has only non-exclusive rights for its territory, minimums may be desired.

K. **Promotional Moneys:** Will there be an agreed minimum budget for promoting your products in the distributor's territory? As between the distributor or dealer and you, the supplier, which will contribute what portion? Of course, the permitted types of promotion should usually also be specified in the contract.

L. **Sales/Promotion Under What Mark or Name?** As a **general rule**, the supplier's trademark, brand and/or other distinguishing characteristics (for short, "trademark"), rather than the distributor's or none, should appear prominently on the products and/or their packaging and be used to promote them in the contract territory. Otherwise, the supplier will not build up brand recognition in the marketplace and may lose the customers once the distributorship contract ends. When the supplier's trademark(s) will be so used, the contract should so state and should contain special clauses designed to protect them.

M. **Adequate Stock:** Will the distributor or dealer be required to maintain a stock of the supplier's goods, and if so, at what level?

N. **Sales on Consignment:** Yes, under US law, you can sell on consignment, but experience has shown that it is a risky practice in terms of getting paid, recovering your goods and for tax reasons. You should consult competent US counsel in advance if you are thinking about consignment sales.

O. **"Acceptance":** Sometimes, distributorship arrangements involve machinery or equipment that the US distributor will resell to customers, who will use them in their plants or factories. In arrangements of this type, the distributor's customer will normally want to have a start up and initial trial test and then condition final acceptance of the goods on a final acceptance test. Provisions dealing with those points, including defining parameters for acceptance, should normally be built into the contract.

P. **Clauses Designed to Reduce the Foreign Supplier's Product Liability and Late Delivery Risks:** These types of clauses, including limitations on the supplier's express warranty on the contract goods, require careful thought, negotiation and drafting.

Q. **Competitive Restrictions on Distributor or Dealer:** Certain types of contractual restrictions on distributors or dealers may violate US "antitrust" law. These can include price fixing, minimum price levels, territorial restrictions, non-compete clauses, "tying", and other restraints. Avoiding antitrust violations or even allegations thereof is essential, because a party allegedly injured by competitive restrictions can sue for and, if successful, recover 3 times the damages sustained, plus attorneys' fees and costs. With careful drafting, the foreign supplier may be able to achieve its business goals while minimizing these risks.

R. **Avoid Having a "Franchise":** Unless what you really want is a franchisor-franchisee relationship (or to grant a "master franchise"), avoid falling into the trap that your distribution, sales agency, license or other agreements can be characterized as "franchise" arrangements under US law. Franchises are often subject to an entire level of regulation that you might wish to avoid. Competent US counsel will provide guidance in this area.

S. **Termination Provisions; Improper Termination Claims: Related Points:** There should normally be a number of provisions allowing the supplier, or either party, to terminate the contract on several different grounds, including, in many instances, without cause. These must be carefully negotiated and drafted. Not infrequently, terminated distributors, dealers, sales agents and reps attempt to claim damages for improper termination. With

skillful drafting, that risk can usually be reduced, if not eliminated. Similarly, the contract will usually state what happens upon or shortly after the contract's termination or expiration. Among them, the supplier will often want either the obligation or the right to repurchase the distributor's or dealer's remaining stock of goods. The supplier might also want the right to take over some or all of the sub-distributorships and sales agency/sales rep contracts that the distributor has entered into for the supplier's products.

T. **What Tribunal Decides Disputes/Claims and What Law Applies?** How you deal with these questions in your contract are important points, not just legal ones for the lawyers to work out. Consider the general rule: you, the supplier, should be able to bring your claims against the US side in the United States via arbitration under particular American Arbitration Association ("AAA") rules in a US city not too close to the US party's place of business but reasonably convenient for you; and to defend claims against you via AAA arbitration in the same location as just mentioned or, alternatively, in a city in your home country or possibly some third country under acceptable, specified arbitration rules. How these points are resolved will vary from case to case, according to the facts and circumstances and what can be negotiated.

U. **Tax Aspects:** When arranging your US export sales and contracts, be careful to avoid having, for US income tax purposes, a "permanent establishment" in the US or a "fixed base" in the US from which you render services, if there is an income tax treaty between your country and the US that utilizes these terms. Absent such a treaty, avoid acts and actions that may cause you to be "doing business" in the States for US federal, state or local income tax purposes.

Sales Agents and Sales Reps

Here are a few other points applicable to sales agents and sales reps:

A. **Commission, Rate and Basis:** These terms must be carefully negotiated and drafted. On which sales does the agent or rep earn its commission and at what point in time? If you have more than one sales agent or rep for the US, there is the potential for territorial customer overlaps. Who earns what commissions on which sales are questions that should be resolved in advance by contract.

B. **Agent or Rep Accepting Orders:** Avoid allowing your agents or reps having or exercising the power to accept orders for your goods, and deal with that point specifically by contract. Allowing any of your agents to accept orders can result in tax and legal problems for you. You, the supplier, should be the only one to accept (or decline) orders.

C. **Advances :** If you plan to allow your agent or rep to receive advances against future commissions, the contract should be very clear that these are advances to be repaid within a specified time--even if earned commissions do not equal the advances.

D. **Rep or Sales Agent as Your Employee:** If sales reps or agents are, in fact, to be your employees, and then you must forming a US subsidiary and have those individuals be employees of the sub.

Location of Business

If your targeted market is located in one concentrated area then the choice of location is obvious. If, on the other hand you need to penetrate a widely distributed market then other factors need to be considered.

Tips for Choosing Your Business Location

Choosing a business location is perhaps the most important decision a small business owner or startup will make, so it requires precise planning and research. It involves looking at demographics, assessing your supply chain, scoping the competition, staying on budget, understanding state laws and taxes, and much more. Here are some tips to help you choose the right business location.

Determine Your Needs

Most businesses choose a location that provides exposure to customers. Additionally, there are less obvious factors and needs to consider, for example:

A. Brand Image – Is the location consistent with the image you want to maintain?

B. Competition – Are the businesses around you complementary or competing?

C. Local Labor Market – Does the area have potential employees?

D. Plan for Future Growth – If you anticipate further growth, look for a building that has extra space should you need it.

E. Proximity to Suppliers – They need to be able to find you easily as well.

F. Zoning Regulations – These determine whether you can conduct your type of business in certain properties or locations. You can find out how property is zoned by contacting your local planning agency.

Where Can You Afford to Be

Besides determining what you can afford, you will need to be aware of other financial considerations:

A. Hidden Costs – Very few spaces are business ready. Include costs like renovation, decorating, IT system upgrades, and so on.

B. Minimum Wage – While the federal government sets a minimum wage, many states have a higher minimum. View the Department of Labor’s list of minimum wage rates by state.

Understanding laws and regulations imposed on businesses in a particular location is essential. Check what programs and support a state government and local community offer to businesses. Many states offer online tools to help business owners start up and succeed.

Choosing a Location in the US.

Things to consider:

A. You can negotiate with the state and local authorities for incentives and benefits (e.g., tax breaks, reduced power costs, etc.)?

B. Cash flow and capital availability may force you to decide whether to build a new or lease an existing building for the facility.

C. In hiring, and training employees being near a city with a university is important if you are building a high tech or web based business.

D. Some states have no income or sales tax. Is that an advantage for your company? What about property taxes? Could you pay less in taxes by locating your business in a different state?

E. Are you importing? Do you need to be near a major port and distribution center.

F. Will you be servicing customers over a wide area and need many service locations?

Legal and Tax Incentives

Legal and tax factors or incentives are offered by many US states and can be a primary reasons for deciding where to locate your production facility.

Government Investment Incentives.

US states and cities offer various investment incentives. For the most part, no significant investment incentives are available unless the investment will produce a fairly large number of jobs for American citizens or residents, or involve setting up in a particular area targeted for development. However, even if no significant incentives are available for your particular investment, the state and local economic development authorities will typically provide considerable useful information, contacts, facilities, and the like. A number of US states have economic development offices outside of the US, and contact with them can be beneficial, at least as a starting point.

The Bottom Line

Do your research. Talk to other business owners and potential co-tenants. Consult the business community and utilize available resources.

Legal Form of the Business

Creating A US Subsidiary

Here, we are dealing with setting up a wholly-owned US company, not a US entity with two or more shareholders which, broadly viewed, is a joint venture. We will discuss joint ventures later. There are many reasons to set up a wholly-owned US company. You may want to have a presence in the market; to satisfy existing customers and prospects; to manufacture, process or assemble products in the States; to protect against liability claims; and to minimize certain tax or customs duty-related costs.

The Advantages and Disadvantages of a Wholly Owned Subsidiary

A parent company owns 100 percent of a wholly owned subsidiary, which usually operates independently with its own senior management structure, products and clients. However, the parent company has significant control over the strategic direction of the subsidiary. The advantages and disadvantages of this business model fall into financial, operational and strategic categories.

Financial

The financial advantages of a wholly owned subsidiary include simpler reporting and more financial resources. The parent company can consolidate the results of its wholly owned subsidiaries into one financial statement. It can also use the subsidiary's earnings to grow the business or invest in other assets and businesses to generate a higher rate of return. Additionally, the two companies can integrate their financial and other information technology systems to streamline business processes and reduce costs. The financial disadvantage is that an execution error or malfeasance at a subsidiary can seriously affect the financial performance of the parent company.

Operational

The parent company usually maintains direct or indirect operational control over its wholly owned subsidiaries. The degree of control varies, but it is implicit in the relationship. For example, the parent company often initiates management changes at its wholly owned subsidiaries. The parent and the subsidiary can also use their combined size to negotiate better terms with suppliers. Additionally, they can take advantage of one another's management and technical expertise, reduce administrative overlap and better integrate new product development and launch initiatives.

The disadvantages to this type of structure include a concentration of risk and a loss of operational flexibility. For example, if a company enters a foreign market through a wholly owned subsidiary, it has to rely on the subsidiary to develop a distribution channel, recruit a sales force and establish a customer base. In other words, success depends entirely on the subsidiary's execution. The operational risk is concentrated in one company rather than spread across multiple entities.

Strategic

The speedy execution of strategic priorities is another advantage of a wholly owned subsidiary. For example, a parent company could ask one of its foreign wholly owned subsidiaries to dedicate all of its resources toward a new product launch. Faster execution means faster market penetration. Synergies in marketing, research and development and information technology mean cost efficiencies and long-term strategic positioning. The strategic disadvantage is that cultural differences often lead to problems integrating a subsidiary's people and processes into the parent company's system.

Joint Ventures

Joint ventures are one of the alternatives to a subsidiary structure. In this business agreement two or more companies invest in a joint venture to develop a new product, explore new business opportunities or work on costly projects. The companies share the costs and participate in the profits. However, decision-making could be slow because of multiple management levels.

Legal Form.

What legal form should most foreign business people select for their American business? The answer for most foreign parties is a **"corporation".** There is no such thing as a US corporation per se. Each of the fifty states has its own laws governing the creation of legal entities, corporations included. So, in the case of corporations, there are Delaware, New York, Florida, California, Illinois, etc. corporations. When we refer to "US Corporation", we mean one formed under the laws of a US state. A US corporation offers the feature of limited liability to its shareholders (limited to their respective capital contribution). The limited liability company ("LLC"), while offering the limited liability feature, is, for legal, tax and cost reasons, usually **not** the appropriate vehicle for foreign parties; and there typically is no other form of legal entity that is appropriate, except the **"corporation".**

A few more words are in order about the limited liability company ("LLC") and why it may not be the vehicle foreign parties should use. Tax-wise, the LLC is a pass-through. While the LLC itself must file a US federal income tax return (and possibly one or more state or even city returns), its owner(s) must obtain a tax number, have prepared and file these same tax returns and pay the resulting taxes due. A foreign (non-US) legal entity or individual should normally not have to do that---it should stay as far away from the US tax authorities and their worldwide auditing capabilities as possible. The use of a US corporation will accomplish that.

Also, it is typically more expensive to form and organize properly an LLC than a corporation. The corporation has well recognized internal structures, whereas the LLC does not. Preparing the LLC operating agreement properly along with related documents and features can often involve considerably more costs than the formation of a US corporation. Third, while both a US LLC and a US corporation offer limited liability to its owner(s), there are situations where the LLC may potentially offer less limited liability than the corporation.

Setting Up a Branch Office may be Wrong

For the overwhelming majority of foreign companies, a "branch" in the US of your home country company is not the way to go. A branch of a foreign company is just an extension of that company within the US. It subjects the company to

A. being a more visible target for lawsuits and claims in the States; and

B. being liable for US federal, state and possible local income taxes, and possibly other taxes.

That applies for an "unregistered" as well as a "registered branch". An unregistered branch means any US place of business or the like of the foreign company which is not registered to do business in the US state in which it is conducted its business. A "registered branch" is one that is formally registered to do business in that US state. If, under the laws of a particular US state, the foreign company's business activities through its operations in that state is sufficient to require it to register there, it must do so or run the risk of penalties and other negative consequences. That does not mean just establishing a sales office in that state, rather, it can include as well having an employee there, having a stock of goods there, including on consignment, and other "links" with that state. Essentially, one could loosely say that any type of business activities within the US involving some sort of presence of the foreign company, can be viewed as a possible "branch".

The same is true if one or more individuals establish an unincorporated business operation. In many foreign countries, it is quite common, without inordinate risk, for a foreign company to establish a branch. Not in the US. There are a few exceptions, but very few. For example, some banks in the US operate as branches or representative offices. But to repeat, for the great majority of companies, the best advice will be to form a US legal entity offering limited liability to its owner(s). The entity of choice will typically be the "corporation".

Which US State?

Under which US state's laws shall I form my corporation? The answer will vary depending on the particular company's needs. In most cases, though, the choice, in this writer's view, will come down to:

A. a Delaware corporation; or

B. a corporation formed under the laws of the US state in which the corporation will have its center of operations (e.g., main office).

The Need for Registering in another State

It is generally the case that if you form a corporation in one US state, then operate a business in one or more other US states by accepting orders for goods and services within that or those other states, then you need to register to do business in that or those other states. However, the mere fact your corporation sells its goods from one American state to a customer in another American state does not normally require the corporation to register to do business in the customer's state.

Corporate Name and Trademark

The name of a corporation formed in one state is not protected in all of the other US states. A company name is not the same thing as a trademark. A registered US federal trademark will provide protection throughout the entire US for the particular goods or services for which it is registered. The name of your US corporation will give you (weak) protection within the state in which the corporation is formed, and in those other states in which the corporation is registered to do business. But the protection offered by a corporate name is far weaker than, the protection accorded by a US federal trademark. Thus, a foreign enterprise will normally want to obtain US federal trademark protection for the name, brand, logo, or other designation used in connection with the products or services it will be marketing in the States.

The Use of a Corporate or Company Name can Infringe a Third Party's Trademark Rights

That is one important reason why, before definitely selecting a corporate or company name and forming the US entity, you should have research done for you as to whether the key word(s) in it are protected in the US by third party trademark rights, particularly if the third party's business is somewhat similar to what yours will be. If the research turns up some serious potential problem, then you should select a corporate or company name not involving that risk.

Minimum Capital

Is there any "minimum amount" of capital I have to put into a US corporation? In most states, there is none; and the minimum is very low in those states that specify one. That means that you are essentially free to decide on the amount of capital you want to contribute. In some situations, it may make tax sense to split the total invested dollar amount into an equity piece and a debt piece. Property or services can usually be contributed as capital (but, under some states' laws, only past services rendered, not future services, can be contributed). However, if the foreign party should wish and qualifies to obtain an "E" type US visa for one or more key nationals who will work for the US corporation (particularly an E-2 Treaty Investor visa), the total amount of the corporation's paid-in capital must be of a sufficiently high level for the type of business operation concerned.

Nationality or Residence Requirements.

Non-US nationals can own all of the shares of a US corporation. There is no requirement that a US citizen or permanent resident own shares. Nor must a member of the corporation's Board of Directors or corporate officers own any shares (like "directors' qualifying shares"). Similarly, all of the members of the US corporation's Board of Directors and all of its officers can, if so desired, be non-US nationals and US non-residents.

One Shareholder.

There is no problem with a US corporation being owned by just one shareholder.

Par Value and No Par Value Shares.

It is common to issue "no par value" shares, rather than shares having a par value.

Board Members' Powers and Related Points.

Members of the Board of Directors (called "directors") are not directors in the sense of the term that term is used in many other countries. In the US meaning, directors are simply members of the Board. The Board acts and decides as a body; individual directors have no power to act or to bind the corporation individually (unless, exceptionally, by resolution or power of attorney, the corporation grants a particular director certain powers). Under the laws of many US states, a one person Board is possible. Some states have a different rule when a corporation has two or more shareholders. Directors can be officers and officers can be directors.

Required and Optional Officers.

Many, if not most, US state laws require a corporation to have a President, a Treasurer and a Secretary. Other officer posts are optional (examples: one or more Vice Presidents or an Assistant Treasurer). The officers' respective powers (and limitations thereon) will typically be contained in the corporation's bylaws and/or in a Board resolution.

Restricting Powers of Corporate Officers.

The powers of corporate officers can be restricted or expanded in the corporation's bylaws, by contract or special Board (or shareholder) resolution. However, a third party without knowledge of restrictions on the officer's powers may not be bound by them.

A Corporate Officer or Director of a US Corporation is Not an Employee?

Except when it is clearly agreed that the officer or director is an employee of the corporation and he/she is on the corporation's payroll. But, for example, it is not at all unusual to have a President, Vice President, Treasurer, Secretary or other corporate officer who is not an employee of your corporation.

Tax Returns If Corporation Inactive.

The corporation must file tax returns even if it generates no income or is inactive.

Corporate Bank Account(s).

You will to establish a bank account in the US. That can often be a surprisingly lengthy, complicated procedure. You usually need to have formed the company and obtained an Employer Identification Number (EIN) from the US Internal Revenue Service.

Employer Identification Number (EIN)

An EIN are issue free by the US Internal Revenue Service and need to be obtained as soon as the corporate name has been established. The company will be asked by many agencies for their EIN number in order to do business.

Construction and Infrastructure

First question: should you own or lease space for your business. It depends upon many factors including your access to capital and expected business cash flows.

Owning

When you lease your lease amount is 100% deductible from your American taxes, whereas, if you own you must depreciate your real estate, buildings and equipment over a very long time. Another thing to consider is that it takes a large amount of capital to buy real estate and build a facility and you might need that capital for working capital as you start your American business. In general you need to take tax considerations and cash flow considerations into account when making the decision to buy real estate and buildings.

Leases

Office Leases.

You can lease office space in many different ways: a lease of real office space in a building; leasing space from a business incubator or "baby-sitting" firm; leasing via an office-sharing arrangement; leasing a "virtual office", etc. It is true that there are various types of pre-printed office leases, and most of those are pro-landlord. Moreover, landlords often either modify a pre-printed office lease to make it even more landlord friendly, or create their own. Moreover, if US work visas (like, for example, an L-1 intercompany transferee or E-2 or E-1, or H category visa) are needed for key employees of your US entity, the type of office space lease you conclude will be important. US immigration will want to see a genuine lease of office space (typically not a virtual one or home office of an employee) sufficient to house the number of employees you anticipate having, and for a term sufficient to match the number of years requested in the visa application(s).

Other Premises Leases.

Certain businesses will require particular types of premises. These might include set up of a restaurant, school, academy, museum, hair salon, or other service business requiring a particular type of premises in terms of location, size, configuration etc. The corresponding leases will often be more complicated and difficult to negotiate to suit the investor's needs. The comments under "Office Leases" apply as well.

Warehouse Leases.

You may need a warehouse for your goods. Many warehouses offer a variety of services to choose from, ranging from mere warehousing, to that plus invoicing customers, shipping, etc. Most of the points under "Office Leases" will apply to these.

Do your Research

Research what the cost per square foot is in comparable facilities near where you intent to build or lease. The results will guide you in determining if you are paying too much for what you are receiving.

IT and Networking

Building IT Infrastructure for Strategic Agility

The MIT Sloan School of Management's Center for Information Systems Research conducted research on building IT infrastructure in successful companies. This section is based on that study

Senior executives make few choices more critical than deciding which IT investments will be needed for future strategic agility. As it has become increasingly clear that those choices can significantly enable or impede business initiatives, managers must anticipate future strategic moves and make often-complex assessments about how the IT infrastructure must adapt to support the enterprise. Although the goal is to create a unified IT infrastructure that supports long-term, business strategies while being responsive to the demands of business-unit strategies, investments by different business units are often made independently. These independent investments are often of a short-term, catch-up or bleeding-edge in nature, and the resulting technologies are often incompatible. Overinvesting in infrastructure leads to wasted resources that weigh heavily on the bottom line. Underinvesting (or worse, implementing the wrong infrastructure) translates into delays, rushed implementations, islands of automation and limited sharing of resources, information and expertise by business units.

Infrastructure investments (say, a business customer database or communications network) are often shared across many applications, business initiatives and business units. But sharing requires negotiation about how much infrastructure is needed, who pays for it and who should be responsible for it. To what extent should the IT infrastructure be standard, shared and available business? To what extent should infrastructure be customized for individual business units? In what areas should infrastructure capabilities be industry leading? New research indicates that getting the IT-infrastructure balance right requires collaboration by the heads of business lines and IT professionals. And the payoffs can be considerable — despite lower short-term profitability, enterprises building appropriate infrastructures have faster times to market, higher growth rates and more sales from new products.1

Executives need a framework for making informed decisions about IT infrastructure. To that end, we examined 180 electronically based business initiatives in enterprises that were among the top three in their industries and studied their IT-infrastructure choices. We were able to identify, first, the specific infrastructure capabilities needed for different types of strategy-related business initiatives and, second, whether they were within individual business units or within a central group and made available across the enterprise. (See "About the Research.") The key finding: In leading enterprises, each type of strategic agility requires distinct patterns of IT-infrastructure capability. And any company that can determine the type of agility it will need for specific business initiatives is more likely to make sensible infrastructure investments.

According to the MIT study, the average enterprise spends more than 4.2% of revenues annually on information technology. Overall, those investments account for more than 50% of the total capital budget. Although the components of infrastructure are commonly available, the

management processes needed to implement them flexibly are less evident. About 55% of the IT budget goes toward the complex fusion of technology, processes and human assets that comprises infrastructure.

Once a company's infrastructure is in place, there is a potential payoff: Competitors need long lead times to emulate the new business initiatives that the infrastructure enables. But there is also a cost: As with infrastructure investments in people or real estate, IT-infrastructure investments involve a trade-off between profit levels today and tomorrow, especially if the resulting infrastructure is not flexible or not exploited. On the other hand, tailored, strategy-enabling infrastructure can be reused for many business initiatives while also reducing time to market.

Many enterprises comprise more than one business and need infrastructure investments at multiple levels — corporate, individual business-unit and public infrastructure. Whether to place the IT infrastructure capability in individual business units or make it business is a strategic decision. For example, a company may want one contact point for customers across multiple business units. By integrating information from separate units, the enterprise can take full advantage of a customer's transaction with one part of the business and cross-sell related products and services. Centralizing activities enabled the company to take advantage of economies of scale as well as shared development capability and faster time to market.

An integrated IT infrastructure combines the businesses' shared IT capabilities into a platform for all business processes. The extent of the infrastructure capability depends on the business needs. The real power behind any IT system is having the ability to push the technology out into ways that would make it easier for customers who do business with you.

IT Infrastructure as Services

Leading companies we studied tended not to establish their infrastructure through a few large one-time IT investments, but gradually, through incremental modular investments. It is useful to think of those modules as service bundles. IT infrastructure is, of course, not simply a comprehensive billing program, but a collection of reliable, centrally coordinated services budgeted by senior managers and comprising both technical and human capability. Indeed, business managers, who often have trouble determining the value of the technological and human components of IT infrastructure, can readily recognize and value a service that integrates the two — for example, the provision of a fully maintained laptop computer with access to all company systems and the Internet. A service can be specified, measured and controlled in service-level agreements and can be comparison-priced in the marketplace.

The services concept has advantages for the IT group, too, because infrastructure services remain relatively stable even when technical components change. A local-area-network (LAN) service that was needed five years ago will likely be needed five years from now. Although the technology components — the personal computer, the server and the network — may change, the service and the service-level agreement are stable.

The Ten Clusters

The first six clusters comprise the physical layer of IT-infrastructure capability.

Cluster 1: channel-management services.

Businesses increasingly link to customers and business partners through electronic channels. Usually the channels include a combination of physical outlets (say, point-of-service devices in bank branches), Web sites, e-mail, physical mail (scanned in), interactive voice response, wireless devices and ATMs. Integrating all the channels to deliver a single picture of the customer's relationship with the enterprise is a challenge.

To integrate different channels and thereby to offer a level of service that is a differentiator, some businesses are investing heavily in data-warehouse systems, Web services, middleware and translation tables. But when that level becomes the norm, companies will have to do more to differentiate themselves.

Cluster 2: security and risk-management services.

Security and risk-management services provide protection for the enterprise's brand, reputation, data, equipment and revenue stream. Security becomes critical for interactions with customers and partners via integrated electronic channels. Digital security boils down to a management decision about the level of acceptable risk balanced against the cost to achieve the level of protection. Security-and-risk services include firewalls, policies for remote access, encryption and use of passwords — as well as disaster planning and recovery. Ensuring business continuity following such disruptions as a natural disaster, terrorist attack or power outage is part of the capabilities.

Cluster 3: communication services.

Electronic interactions with customers and partners occur through communications services, which typically include a network linking all points within an enterprise and providing the gateway to electronic channels. Communications services may include video, voice and voice-over intellectual property. And connected to the backbone network are local-area networks for particular regions or business units.

Cluster 4: data-management services.

A key asset in an electronically connected business world is data on customers, products, processes, performance and capabilities. Enterprises strive to manage data assets independently of applications, making them available business to promote initiatives such as new-product development and cross-selling. Large storage facilities or storage-area networks are required to ensure access, and many enterprises have adopted data warehouses and Web services to summarize key information from decentralized databases. Data assets that aid decision making can be accessed through intranets or electronic-reporting techniques such as executive-information systems and e-mail distribution lists. Knowledge-management services that identify and codify knowledge or point to individuals possessing key knowledge are also part of this cluster.

Cluster 5: application-infrastructure services.

On top of the data sits a cluster of infrastructure applications that are standard across the enterprise and support such areas as accounting, human-resource management and budgeting.

Some enterprises choose one enterprise-resource-planning (ERP) package, and that becomes part of the application's infrastructure. Others standardize and consolidate business units' applications into a shared-services group or a common application run independently. The aim is to reduce costs, increase reliability, enable standardization and encourage the integrated operation of multiple business units.

Cluster 6: IT-facilities-management services.

IT-facilities management coordinates and spans the physical-infrastructure layers, providing services such as servers, large-scale processing, and creation of an environment for developing new systems. IT-facilities management adds value by integrating the five other physical-infrastructure layers.

In addition to the six service clusters that constitute an enterprise's physical IT-infrastructure capabilities, there are four clusters that represent management-oriented IT capabilities.

Cluster 7: IT-management services.

IT-management services coordinate the integrated infrastructure and manage its relationships with the business units. Typically management services include information-systems planning, project management, service-level agreements and negotiations with vendors. The cluster has strong links to the architecture-and-standards cluster.

Cluster 8: IT-architecture-and-standards services.

This cluster comprises the core policies that govern the use of information technology and that determine how future business will be done. Spanning the physical layers of infrastructure services, the IT architecture needs constant review to meet strategic needs. For example, UPS publishes application-program interfaces for tracking packages, and ERP producers incorporate the code into their logistics modules. Then users of ERPs who are potential UPS customers can link to UPS services seamlessly.

The increasing use of electronic means to integrate different players in the value chain raises the stakes for setting and implementing architectures and standards. Determining the IT architecture calls for senior-management involvement because of the complexity of simultaneously addressing issues created by business uncertainty and technological change. Evolving over time, a good architecture documents detailed definitions of the recommended standards and identifies acceptable options. Each architectural decision that enforces specific technical choices must incorporate the underlying business logic so that the standards can evolve as business conditions change. For many enterprises we studied, it was sufficient to specify architecture and standards. For others, enforcement of architecture and standards was critical.

Both the management-services cluster and the and-standards cluster must interact with the IT-research-and-development cluster (discussed below) to leverage new technologies that have high potential value.

Cluster 9: IT-education services.

IT education and training are IT-infrastructure capabilities too often neglected. This cluster includes training in the use of the enterprise-specific technologies and systems plus education for managers about how to envision, invest in and use IT to create business value. We found that those enterprises that spent a higher percentage of their budgets than industry average on training had lower total costs per workstation and superior business-process performance.

Cluster 10: IT R&D services.

The IT-research-and-development cluster includes the enterprise's search for new ways to use IT to create business value. R&D services are typically industry- or enterprise-specific and build on the more generic work of the research companies that track technology trends.

Matching Capabilities to Strategic Direction

Strategic agility is defined by the set of business initiatives an enterprise can readily implement. Many elements contribute to agility, including customer base, brand, core competence, infrastructure and employees' ability to change. Organizing and coordinating those elements into an integrated group of resources results in an enterprise capability, which, if superior to that of competitors, becomes a distinctive competence.

Our research demonstrates a significant correlation between strategic agility and IT-infrastructure capability. This suggests that if managers can describe their desired strategic agility, they then can identify the IT-infrastructure service clusters that need to be above the industry average — and thus can create a distinctive competence. Although none of the enterprises we evaluated had all 70 services we've identified, those with the highest degree of strategic agility had more services in each of the 10 clusters, broader implementations of each service and more demanding service-level agreements.

Classifying Initiatives

To understand the impact of IT infrastructure on strategic agility, we classified each initiative by its position on the value net, type of exchange and type of innovation:

Position on the value net.

The view of a value chain as a process that moves goods from suppliers to customers — with the enterprise adding value at various stages — needs rethinking. Information technology, having dropped coordination and transaction costs as well as the cost of searching for goods and services, has created a richly interconnected system better described as a value net. Through technology, each participant can communicate more easily with other participants; the reality is less like a chain than three intersecting circles representing demand-side, internally focused and supply-side initiatives. (See "Distribution of Initiatives Throughout the Value Net.")

The type of exchange: B2B or B2C.

Identifying the type of exchange involved in a business initiative helps determine the different IT infrastructures required. Business-to-business initiatives generally involve a small, focused

customer set with large transaction volumes per customer, periodic consolidated payments and significant customization of products and services — such as the business-to-business steel-trading portal in our study. In contrast, business-to-consumer initiatives typically involve large numbers of individual customers with intermittent transactions, lower dollar values per transaction and online electronic payments linked to each transaction — such as the U.S. Postal Service's invoicing and bill payment initiative included in our study. Both B2B and B2C initiatives are likely to involve significant use of customer, product and financial data.

Type of innovation: for products or markets.

An initiative can be innovative either in terms of the product or the market or both. Nearly half the initiatives we studied by MIT involved electronically based implementations of existing products in existing markets — for example, the online catalog for hospital orders set up by an implantable-medical-device manufacturer. In contrast, 32% of initiatives were new products in new markets — such as a U.S. hospitality company's reverse-auction site for U.K. hotel-room bookings.

The three dimensions of classification, when applied together, provide a good deal of insight into the IT capabilities required for a given initiative. Consider two in the MIT study: a Web site for pubs to purchase products from a brewer, showing stock levels, pricing, order tracking, cost comparisons and customized promotion deals; and an online reservation system to streamline bookings at franchisee and co-owned hotel properties. Both would be classified as B2B, existing-product-and-market, demand-side initiatives. However, the brewer's site did not integrate directly with its internal systems for production and scheduling, whereas the hotel parent company coordinated all booking and room availability centrally, providing a single view of availability and pricing to the customer, and a single view of cost control and asset utilization to management. Therefore, the latter is both a demand-side and internal initiative, requiring firm-wide infrastructure and much more standardization.

Capabilities Critical to Each Position on the Value Net

After classifying the business initiatives, we examined the extent of IT-infrastructure capabilities in terms of cluster and location in the enterprise. Then, by identifying statistically significant correlations18 we determined the relationship between the enterprise's infrastructure capabilities and its ability to implement its business initiatives.

Supply-side capabilities.

In the supply-side initiatives MIT studied, the critical business cluster was IT-architecture-and-standards. Having business architecture and standards allowed linking of independently developed systems, reducing disparities and creating purchasing economies. Interestingly, all other important clusters were at the business-unit level, suggesting that supply-side initiatives were typically business-unit specific. The applications-infrastructure and data-management clusters were critical in enabling supply-side initiatives in business units. Despite the potential for business services for IT management and communications, they, too, were provided at the business-unit level. That pattern at top-performing companies suggests that typically supply-side initiatives are sufficiently different among business units that the extra effort of sharing services across units cannot be justified. For many enterprises, supply-side initiatives are just quicker and easier at the local level.

Business implementation requires either a top-down directive or a chief information officer demonstrating that business work will cost the units less.

Internally focused capabilities.

For internally focused initiatives, IT architecture and broadly enforced standards are again key. Initiatives for streamlining internal processes must coordinate, link and standardize systems business. However, other critical infrastructure clusters that support initiatives to streamline internal processes — applications infrastructure, data management, channel management and communications — are provided at the business-unit level. That is true for IT-management capability, too, which suggests that services in that cluster are also business specific.

Demand-side capabilities.

On the demand side, new initiatives again rely heavily on business IT architecture and standards — the only business cluster important for all three parts of the value net and one of the hardest competencies to develop and implement. Also important for demand-side activities is business security-and-risk capability — which is critical when the enterprise gives external users access to its systems and data — and IT-facilities-management capability. Given that customer response is difficult to predict and traffic volumes vary wildly, facilities-management capability helps manage the risk that one unit's underperformance on a demand-side initiative will affect the corporate image or the brand franchise. Also, the centralization of activities enables oversight of the often unstable startups that companies rely on to provide new technology. Finally, it permits capturing lessons learned across multiple business units.

For demand-side initiatives, we also found the channel-management and IT R&D clusters important at the business-unit level. Establishing effective channel linkages means addressing complex interfaces with different customer segments and is tackled most effectively by the unit that is in direct contact with a particular segment. Similarly, given the variety of contexts of successful customer initiatives, IT R&D needs tailoring by individual business units to resolve the complexities of integrating the electronic channels.

The MIT research shows that industry leadership in implementing IT initiatives requires high-capability IT infrastructure in all three realms of the value net and that high levels of competence are essential in every cluster but IT education. However, the integrated infrastructure needed for strategic agility does not have to be business. Only the IT-architecture-and-standards, security-and-risk and IT-facilities-management clusters were found to be business. IT management, applications infrastructure, communications, IT R&D and channel

Notably, there is a conflict inherent in data management. For internal and supply-side initiatives, data management is best provided locally, but for demand-side initiatives, data management is needed business. Those companies that are able to resolve the conflict often create a federal structure for data by identifying which elements (say, product, financial, customer or process data) are best managed at which level. Then for each element, they name data custodians to define, clean, manage and share their information.

Capabilities Critical to Each Type of Exchange

B2B and B2C initiatives require different patterns of high-capability infrastructure both in terms of which clusters are key and whether they are business or local. Nearly 75% of initiatives we MIT studied had a B2B component; only 35% had a B2C component. B2B initiatives tend to focus on converting conventional interactions to IT-enabled transactions. B2C initiatives, however, are often associated with enterprises breaking new ground — providing new products or entering new markets.

Given the differing market orientations for the initiatives, the infrastructure services supporting them are also different. For example, reflecting the considerable variation of operating contexts underlying B2B interactions, all high-capability-infrastructure clusters tend to be managed at the business-unit level. For B2C, such capabilities are centrally coordinated, with the emphasis on uniformity across business units to provide a consistent electronic front to customers.

Capabilities Critical to Each Type of Innovation

MIT found differences in infrastructure capabilities depending on whether a company was pursuing initiatives in new products or new markets. In new-product initiatives, R&D and channel-management clusters were mostly local, with only one high-capability infrastructure cluster being business. In contrast, new-market initiatives required business service clusters for security and risk and also for IT-facilities management.

Investing in IT Infrastructure for Strategic Agility

The evidence from leading enterprises indicates that implementing different types of electronically based business initiatives requires different high-capability IT infrastructures. Strategic agility requires time, money, leadership and focus — and an understanding of which distinct patterns of high-capability infrastructures are needed where. Getting the right balance is difficult. Underinvesting reduces strategic agility and slows time to market. Also, infrastructure investments usually must be made before investments in business applications because doing both at the same time results in infrastructure fragmentation. But if the infrastructure is not used or is the wrong kind, a company is overinvesting and wasting resources.

Investing in IT infrastructure is like buying an option. If used successfully, infrastructure enables faster time to market; if not, it will prove an unnecessary cost. Successful enterprises get the infrastructure balance right because they make regular, systematic, modular and targeted investments in IT infrastructure on the basis of an overall strategic direction. The successful companies we studied had a clear picture of their overall infrastructure capability and how each incremental investment contributed to it.

To ensure that investments in IT infrastructure support the organization's strategic goals and business initiatives, we consider it critical for the enterprise's most senior executives to understand which specific IT-infrastructure capabilities are needed for which kinds of initiatives. That way, they can have some assurance that the investments they make today will serve the strategies of tomorrow.

Human Resources and Employees

Employment law is, in part, state law and thus will in some respects vary considerably from state to state. In this section we focus on a few key aspects of US employment law and practice.

Employment Contracts:

It is normally advisable to conclude written employment contracts, American style, with key employees of your US subsidiary or JV company, such as its executives, officers and key technical managers. One reason is obvious: to define the terms and conditions applicable to their employment; and often, to limit their capacity to act and bind the employer, e.g., without the prior written approval of the employer's board of directors or owners. Another important reason is to protect the US company and its foreign parent company against claims by the employee, for example, claims of improper termination when the employment relationship ceases. Claims and lawsuits concerning "improper termination" of employees, based on one legal theory or another, are relatively common in the US. With a good employment contract prepared by experienced US counsel and proper conduct by the employer, it will usually be possible to avoid or at least substantially reduce the risks of such claims. From the company-employer's standpoint, it is normally preferable that only the US subsidiary or JV company (the employer) sign and be legally bound by thereby---not the parent company or JV company's owners; and that the employment contract so state. Sometimes, however, the employee will insist on the written guaranty of the parent company or JV owners of the US subsidiary's or JV company's obligations under the employment agreement. And sometimes the parent or JV owners will not mind at all guaranteeing said obligations. In the employment contract, the law of the particular US state where the employee will primarily perform his/her services should usually be specified as applicable, unless that law is particularly unfavorable to the employer, in which case, to the extent legally possible (and in many instances, it may not be possible for purposes of the desired effect), the law of another, more favorable US state should be specified.

The employment contract should contain either an arbitration clause providing for arbitration in the US (typically, under the American Arbitration Association's pertinent rules) or a clause specifying a particular US court to resolve disputes and claims. Some US states' laws will not permit arbitration of certain employment disputes, and a point to be checked before preparing the agreement.

Termination without Cause; Termination for Cause.

Some US states, perhaps the majority, follow the common law "at will" rule that absent an agreement to the contrary, an employee can be terminated at will by the employer without cause without liability for improper termination. However, even US states in the "at will" category have fairly recently developed exceptions to that norm. For example, if there is some company handbook stating or policy or practice to the effect, that employees will not be terminated without cause or only upon a certain minimum notice period, a court may apply that even if a written employment contract stating otherwise exists. Some US states go to the extent of virtually

prohibiting an employee from terminating an employee without cause except where parties reaching written agreement at the time of termination or thereafter on additional compensation to the employee.

The employment agreement should state the grounds for termination for cause, which can also include events like the closing of the US company, its sale etc.

The main point is that prior to concluding any employment contract with a key employee, the employment law of the particular US state(s) concerned must be taken into account for purposes of how the agreement should be drafted. Moreover, prior to the employer's termination contemplated termination of any employee, with or without cause, US counsel should be consulted. The same applies where the employee quits of his/her volition or terminates.

Employee Confidentiality and Employee Invention Agreements.

The US employer company should seriously consider having essentially all of its officers and employees, not only key ones, sign secrecy agreements. They would typically contain non-disclosure and non-use obligations on the employee with respect to the secret and otherwise proprietary data (technical, commercial, client lists etc.) of the US company and its parent or JV owner(s), return or destruction of all company files and materials, etc. It might also contain provisions dealing with inventions, discoveries, improvements and the like developed by the employee while employed and possibly even a certain period thereafter (ownership thereof, patent and other rights, whether the employee is entitled to any additional compensation). If written employment contracts are concluded with particular employees can be built into them. If no employment contract will be concluded, then a secrecy/invention type agreement might well be in order.

Post-Employment Non-Compete Clauses.

Most employment contracts with employees will prohibit the employee from working for any other person or firm while in the employer's employ (sometimes, there are exceptions made, e.g., where the employee is not full time in which case normally, the employee will be prohibited from working for a competitor of the employer). Normally, such clauses will pose no significant legal problem. Much more tricky, and problematic, are "post-employment non-compete clauses"----that is, a prohibition upon the employee, once his/her employment ends, from working in a particular field whether for a third party or for his/her own account. The enforceability of post-employment non-compete clauses will vary from US state to state. In some US states, it will be very difficult if not impossible to enforce them. In other states, they will have to be very carefully, precisely and narrowly drafted to stand a reasonable chance of being enforceable (e.g., by way of injunction, damages for breach): they will have to be reasonable in time, scope, geography and not unduly restrict the ex-employee's ability to earn a living in his field.

Discrimination and other Unlawful Acts by Employer.

US state and federal law prohibit essentially any form of discrimination by the employer against the employee. That includes discrimination based on race, color, national origin, religion, age, gender, disability, marital and veteran status. Also prohibited more or less throughout the US are

sexual harassment in the workplace; and retaliatory firing or demotion by the employer where, for example, the employee blows the whistle or threatens to do so regarding some illegal action by the employer. There is American legislation requiring the employer to retain a woman's job while she is on maternity leave, and while a person is serving in the military. There are many different types of employer acts which US law will regard as unlawful or which an employer must comply with which cannot be mentioned in this Guide.

Employer Retaliation against Employee(s) Wishing to Unionize.

Not only can employer retaliation of this sort violate state law, but it may well constitute an "unfair labor practice" under US federal labor law.

Employee Claims and Lawsuits Among the Top Types.

Claims made and lawsuits (or arbitrations) brought by employees against their employers or former employers are among the the most prevalent types in the US----maybe number one. Your US lawyers should counsel you from the beginning and regularly as to the "dos" and "don'ts" and "cans" and "cannots" with regard to interviewing prospective employees, hiring practices, dealing with them while employed by your company, and upon their dismissal or departure, and sometimes, thereafter.

Employer Handbook or Similar Document.

It is generally a good procedure for the US subsidiary or JV corporation to have an employee handbook or similar document stating its policies and procedures applicable to employees and employment; and to update it regularly. Goldman Collins can provide examples of Employee Handbooks.

Proper Payment of US Taxes and Workers Compensation

The employer should be sure that all amounts required to be paid to the US tax authorities by the employer (e.g., by way of withholding) are paid in on time. In a small US operation one should not leave it to the employee to see that that is done; rather, a bookkeeper for the U.S, company or a commercial payroll company should take care of that. Often, the best choice is a payroll company.

Workers compensation insurance is mandatory. It insures the employer from its employee's claims for job related injury and illness. You can use your lawyer, accountant or insurance broker to contract it, or have your payroll company do it.

Employee Pensions and Profit Sharing Plans

US law does not require enterprises to offer pension plans, profit sharing plans, medical, disability or life insurance coverage to employees. Often, the employer will want to obtain and establish various one or more of such benefits, and/or others, for its employees. For newcomers to the US market, particularly smaller companies, this can be a difficult and time-consuming exercise. See the bullet point below.

On occasion, the employer offers a particular employee the opportunity to acquire or purchase shares of stock or ownership interest in the US company. In such case, written agreements are necessary regarding such acquisition or purchase, including provisions on restriction on the employee's transfer of shares, cash-out or buyout provisions and a plethora of others.

Getting Into Place the Employee Benefits Package and Commercial Insurance:

Quite often, getting the employee benefits package like various insurances, pension or profit sharing plan, and other benefits, as well as contracting a payroll company and coordinating the payroll with the company's bank account, plus deciding on and obtaining the desired commercial insurance are not easy tasks and require time. Your author has found that working and coordinating with a good, efficient insurance brokerage firm is frequently the best solution. This process should normally start before a new US enterprise is set up, as it takes times to decide on what the benefits package and commercial insurance should be (type, scope of coverage, etc.), to obtain quotations, evaluate the coverage and cost, and set them up.

Agent, Consultant or Independent Contractor: Is He or She Really an Employee?

It frequently occurs that a particular enterprise will engage an individual as its sales (or other agent, a consultant or as an independent service-rendering contractor. At least that is the intention. However, it can easily occur that such person, from a tax and/or legal perspective, really meets the requirements of an "employee" and will be so treated. Most commonly, that occurs once the relationship is cut with that person. He/she will claim to be an employee for federal and/or state unemployment compensation, social security, workers compensation or other purposes, and claim that the employer, e.g., did not make the required payments and owes the employee money. Or, the federal or state authority will make such claim. Prior to engaging such person, competent advice should be sought.

Employees of the Foreign Parent or Foreign JV Owner(s) Working in the US:

For legal and tax reasons, foreigners, that is, foreign companies and individuals, should, as a rule, not have employees of their own working in the United States. There may be some valid exceptions to this general rule, where such employees function in the US for a short time on a project basis, or perform limited services.

Some Legal Issues

Your Products and Services

Make sure that your products and goods can be lawfully imported into the US, that all legal requirements of US customs and import laws are met, that you have all required licenses and permits to import and sell the products, and that your export and import documentation complies with US law. Also, stated very generally, there is US legislation relating to particular types of products, what they can and cannot contain, their labeling etc. Failure to comply can, in some instances, subject the manufacturer, seller and possibly others to fines and penalties. It can also be ammunition for product liability lawsuits for persons harmed by such infringing products.

The Consumer Product Safety Improvement Act

A federal law passed in the summer of 2009, makes it illegal for anyone to sell children's toys, books, clothes or jewelry and certain other goods if the items contain more than trace levels of lead or phthalates. Penalties are stiff, with violators facing potential prison terms and fines of up to US$100,000 per violation. The Act applies not only to new items but existing stock as well.

Recent federal legislation often called for short, the "Bioterrorism Act" applies to exporters of food and beverage products intended for humans and animals. It requires registration with the US Food and Drug Administration, the appointment of a US representative, certain document filing with regard to each shipment, and certain record retention by the exporter. The consequences for violations can be severe.

Certain products destined for the US market can be tested and certified by a private industry organization (e.g., Underwriters Laboratories being one for particular types of products---there are others). Companies will typically want to obtain certification for their relevant products for several reasons, two being: difficulty in marketing them in the US without it; and, to reduce to some degree the company's product liability exposure.

Certain services may require special licenses or permits, or may be subject to particular legal requirements.

Trademarks; Other Intellectual Property

If you intend to sell goods or services to the US under a particular trademark, brand name, promotional slogan etc., have search done, before you start business, whether the use of the mark, name, slogan, etc. might infringe any existing, third party trademark. If it does not, consider applying for US trademark protection covering that mark, name, slogan, etc. That applies for the US and any other Western Hemisphere countries in which you may wish to market your products or services. Essentially the same points apply to other types of intellectual property you may have and should protect (e.g., patents, copyrights and designs), though the search and application procedures for each type and the nature of the rights conferred are different.

Filing Your Copyrighted Works with the US Copyright Office

If you own items that are or may be protected by copyright, you need to protect them in the US. That is done principally by filing an application for registration with the US Copyright Office. Doing that in a proper and timely way is really a must; failure to do that can result in serious problems for the copyright owner.

Product Liability in the US

Do you have a realistic, informed view of the product liability risk in the US as it applies to your particular goods? Or do you have an unrealistic, exaggerated, media-influenced viewpoint? While there is a product liability risk for many foreign firms, it will normally be manageable if you adopt certain measures. In short, if you are concerned about product liability, educate yourself about the risk and what you can do to reduce and manage it. An unwarranted "knee-jerk" reaction shouldn't frighten you away from the US market.

Who Can Be Sued? Who Can Be Liable?

Stated in a general way, anyone who designs, manufactures, sells, distributes, or renders services in connection with a product, or component or part thereof, can incur product liability in the US. That may include a licensor of technology used to produce the item or of a trademark or brand name (if the product is marketed with that mark or name). A plaintiff often tries to sue all parties in the distribution chain. That does not mean, however, that the plaintiff will succeed against all of them, or succeed at all.

Important Jurisdictional Point:

Your Company May Not Be Subject to the Jurisdictional Reach of the Particular US Court in Which a Product Liability Suit Is, or May Be, Brought. You may at least have a good legal argument supporting that point and that in itself may deter the plaintiff from suing or continuing suit. That may apply even if you have a US subsidiary or affiliate engaged in the sales or distribution process. We use the word "may" intentionally--the preceding three sentences will not necessary apply to all foreign parties in each and every instance. But they probably will apply to a considerable number.

Passing and Reducing Risk by Contract

A significant part of your product liability risk can, by contract, be passed on to your US customer, distributor, dealer, licensee or joint venture partner, and be reduced in other ways by contract. Even properly drafted and implemented "General Terms of Sale" tailored to the US market can reduce your risk.

Another Liability Area

Liability can arise when your buyer, typically a legal entity, allegedly sustains losses and damages as a result of defects in or deficiencies of your products, equipment, etc. Damages due to your unexcused late delivery might also come into play. The alleged damages might include your customer's plant down time, lost profits, other economic damages, penalties your buyer might

incur to third parties, and other possible direct and consequential damages. The plaintiff might also attempt to claim punitive damages. The risks associated with this type of liability can be very substantially reduced by including or not including certain provisions in the contract with your buyer. The term “contract” should also include “General Terms of Sale” designed to reduce your liability.

Non-US Contract Documents Probably Won’t Do The Trick

You should not assume that contract documents prepared according to foreign (non-US) law or in any manner other than by competent US counsel will accomplish the goal of reducing and helping manage the US product liability risk. The likelihood is that they will not.

Product Liability Insurance

You should seriously explore the possibility of purchasing product liability insurance and commercial risk insurance for the US (and possibly Canadian) market in appropriate amounts. You should normally require your US contract partner (e.g., distributor, licensee) to carry and maintain an acceptable level of product liability insurance covering the goods you sell to that partner. Sometimes, it makes sense to try to convince your US contract partner (e.g., distributor, licensee, joint venture partner) to include you as a co-insured under its policy or policies, with you reimbursing the US side for the additional premiums. Even with reasonably good insurance coverage, it will normally be prudent to consider implementing various other measures designed to reduce the risk.

If You Are Sued

If you are contacted by a plaintiff (actual or potential) or the plaintiff’s lawyer regarding an actual or potential product liability suit against you, do not reply, orally or in writing. Rather, you should contact your US lawyer, who will advise you what to do. Sometimes, your lawyer will prepare a reply for you to make. Not infrequently, the lawyer for the potential plaintiff will send you and request that you sign and return a document by which you waive service of process or allow service of process to be made upon you by a simplified route (e.g., mail). You should not comply, for normally, the plaintiff, in order to effect valid service of process against a foreign company, will have to go through a tedious, formal procedure that can take several months. The fact that the plaintiff may have filed a Complaint with a particular American court does not mean the court has obtained jurisdiction over you---as one element, the plaintiff must effect a legally valid service of process against you and file proof of that with the court.

Insurance

You will need certain types of insurance for the US operations, and may wish to consider other types. Examples in the commercial insurance area are: general liability insurance; product liability insurance (which may or may not be part of the general liability insurance); business property insurance, covering your own goods and physical property; directors and officers liability; employer’s practices liability; intellectual property infringement; professional liability (errors and omissions); and workers compensation insurance. In the personal insurance area, medical,

disability and life insurance are examples. You will probably want to (and have to) contract all or most of these from an insurance broker located in the States.

Payroll Company

The same applies for engaging a payroll company to handle the US entity payroll and possibly other functions, if you decide to go that route. These, particularly insurance policies, take time to put into place, thus, an early start is generally needed.

Accountant

You will need one. The accountant can perform a variety of services, like advice in tax planning, doing the bookkeeping, preparing financial statements, and preparing tax returns. The majority owner(s) of the US entity should select the accountant and other outside experts, not, for example, an employee of the US entity that is not a majority owner. The majority owner(s) will want the accountant's/outside experts' loyalties run to them and not anyone else.

JOINT VENTURES IN THE US

The Right Partner. JV's for the US market will work only if you have the right partner(s). Check out each JV candidate carefully in advance of any deal.

Most US JVs Are Not Permanent.

Nor should you view them as permanent -- or even, in many instances, as long term arrangements. Circumstances, people and mentalities change. Try to arrange your US JV and your planning so that if the JV breaks up at some point, you can continue the US operation.

US Corporation as JV Vehicle.

Rarely should a foreign party participate directly in a US JV or "cooperation agreement". Direct participation in an "unincorporated JV" or "cooperation arrangement" will expose the foreign party to potential liability for the venture's debts and liabilities, to lawsuits in the States, and to negative tax consequences. As a rule, from the foreign partner's standpoint, a new US "corporation" should be the JV vehicle. There may, of course, be instances in which another form of US legal entity, like the limited liability company ("LLC") would suit the purpose.

Three Typical Types of US JV:

Distribution JV:

Foreign and US parties form a corporation under the laws of a US state (very often, Delaware), each owning an agreed percentage (the "JV Corp"). Typically, it will be the foreign party's products that the JV will sell, and a distributorship contract will be among the JV documents to negotiate/sign. If the US side will also be selling goods or products to the JV Corp, the terms will normally be embodied in a separate agreement. Typically, the US side will contribute US marketing knowledge, a sales force (its own or independent agents/reps), technical knowledge about the JV products, and possibly things like administrative assistance and the use of its physical facilities. The JV Corp will sell the products to customers in its agreed territory (e.g., the entire US, and possibly elsewhere in the Western Hemisphere).

Production JV:

It is similar to the distribution JV except that the JV Corp will manufacture (in whole or part) and/or assemble the products emanating from the foreign party's side (and, where applicable, those coming from the US side), and resell them. The US side may have a production facility which will be used to make the JV Corp's products, or the JV Corp may buy or lease an existing one or build a new one. Manufacture may take place in the US, or even in Canada, Mexico or elsewhere in the Western Hemisphere. Among the contract documents to conclude is a "license agreement" from the appropriate JV partner to the JV Corp allowing it to manufacture its products with the partner's technology or other intellectual property.

R&D JV:

A foreign and a US party form a US entity to engage in research and development or similar activities.

Importance of First Class JV Contract Documents. This is a must, especially for the foreign side. To the extent possible, all the transaction documents should be signed at essentially the same time.

"NB-SOT".

Rather than proceeding directly to contract drafts, it is usually advantageous to commence negotiations by submitting to the US side, and working to the signature of, "a non-binding summary of key terms" ("NB-SOT") of the deal. That technique has many benefits for both sides, and will guide in the creation of the final contract.

Tax Planning.

Proper tax planning for a US JV, with the assistance of experts, is important. It may affect the JV structure negotiated and implemented.

Some Key JV Points to be Negotiated

A. Under which US state's laws will the US JV corporation be formed?

B. What type(s) of shares the JV vehicle will issue and what percentages will each side have therein?

C. Capital contributions to JV vehicle of each partner; capitalization of the JV corporation generally. How will future capital increases or loans be handled if the corporation needs additional funding?

D. How will members of JV vehicle's governing management body ("Board of Directors") and its officers be selected and who will they be?

E. What are the functions and powers (and restrictions thereon) of each of the JV corporation's officers?

F. What acts, binding documents, etc. of the JV corporation require the prior approval of the JV's shareholders and/or Board of Directors? Will there be a special majority or unanimity required for certain acts and activities of the JV corporation?

G. Deadlock situations and how to deal with them contractually.

H. What will be the restrictions on transferring shares of the US JV corporation? Buyout obligations? Options to purchase or sell? First refusal provisions?

I. Provisions for terminating the JV and dissolving the JV corporation.

All of the key provisions in any distributorship, license, employment, loan, service, employment, or other agreements between or among the JV partners and the JV.

Provisions dealing with how and where disputes and claims will be resolved, and what laws will apply to the JV contracts.

Input of Foreign Client. The foreign partner will have to work closely with its US lawyers to put together and close a US JV. That input and cooperation is vital.

US Corporation with More Than 1 Shareholder.

Whether or not called a JV, if there will be more than 1 shareholder in a US corporation, what will be needed (at a minimum) is (i) a shareholders' agreement between the parties; and (ii) special Bylaws of the US corporation tailored to the shareholders' agreement's provisions. As one example: a foreign company forms a US corporation. Either at the time of formation or later, it decides that a particular employee or group of employees of the US corporation can buy or otherwise obtain shares in it. When that happens, it will be necessary to prepare, negotiate and sign, at the very least, a shareholders' agreement, plus special bylaws.

Costs.

It will normally cost considerably more in legal fees to create a JV than to form a wholly owned US subsidiary.

Intellectual Property, Licensing, Technology

Introduction

In this section, we cover three separate areas: intellectual property in the US; licensing and technology transfer to the US; and franchising in the US market. By licensing, we mean the licensing of patents, trademarks, copyrights, know-how, and even computer software licenses. We will not attempt to define "franchising" or what constitutes a "franchise". The US federal and state legislation on franchising and franchises contain definitions, and for our purposes, how they define "franchise" is what really counts.

Intellectual Property in the US

Patents:

A US patent confers an exclusive right upon its owner to use the patented invention and prevent anyone else from using it for the patent's duration. The invention must be a new, novel and non-obvious product (manufactured article), process, machine, chemical composition or a distinct, new variety of plant. The patent's term is generally 20 years from the US application filing date or, in special cases, from the filing date of an earlier related US application. A design patent, valid for 14 years, applies to a new, non-obvious ornamental design of a manufactured article, not its structural or functional features. A foreign (non-US) patent does not protect the patented invention in the US or in any country other than the one that granted it. Under US law, a patentee that makes or sells patented articles, or its licensee, must mark the articles with the word "Patent" and the patent number. Not doing that precludes the patentee or its licensee from recovering damages from an infringer unless the infringer was duly notified of the infringement and continued to infringe after the notice.

Some types of computer software can qualify for US patent protection, and where that applies, the protection will usually be stronger than by copyright. You may wish to explore that potential option.

Trademarks:

A US federal trademark registration is an exclusive right of the owner to use a specific word or words, name, design or logo, or other designation of source of origin, or combination thereof, in connection with specified goods and/or services. It is valid for 10 years, and is renewable if certain requirements are met. Trademark rights can be used to prevent others from using a confusingly similar mark. Certain trademark rights may accrue to the holder of an "unregistered mark" used commercially in the US (a "common law trademark") but they are normally less extensive and more tenuous than those conferred by a US federal trademark registration. A federal trademark applies throughout the US. US states have their own separate trademark system, thus, a trademark can, upon meeting the requirements, be registered in one or more particular states. It is possible for the owner to obtain both a US federal and one or more state registrations for the same mark. A foreign registered trademark does not confer trademark protection upon its owner in the US or in any other country than the one in which it is registered.

Domain names:

A registered domain name confers upon the registrant the exclusive right to use it for its website and on the Internet. It is not to be confused with a registered US federal or state trademark. In fact, it is possible that use of your domain name may infringe the trademark rights of a third party; or, that a third party's domain name use can infringe your trademark rights. Also, often there are a number of domain names that are very similar or even identical, except for, e.g., its TLD (.com, .org, .biz, .edu, etc.), so that the scope of domain name exclusivity is narrowly circumscribed. There are great number of domain name registrars, which are accredited by The Internet Corporation for Assigned Names and Numbers. It is possible to lose one's domain name to another holding a federally registered trademark or superior rights to the mark. Holding a federally registered US trademark for the same name as your domain name is typically the best solution for you (the foreign company or business person).

Copyrights

Under the laws of more than 160 countries, copyright is granted automatically to the author upon the event of recording a creative work of expression in a tangible form, be it paint on canvas, pixels in a digital camera, or pencil on paper.

Under US law, since 1989 there have been no "formalities" required to obtain copyright -- prior to that the publication may have been required to be registered or marked with a copyright notice (Copyright, date, name of author). Copyright notice is optional today, but may be useful as evidence that an infringement was "willful", which is an element of a criminal copyright indictment.

Copyright ownership and priority may be easier to prove if it is registered with the US Copyright Office. The drawback is that you must pay a fee and submit a copy to have any work registered. Forms can be obtained online through the Library of Congress. A registration may also make it simpler for potential licensees to locate the proper owners of copyrights.

As a bonus, the US Copyright Office registration allows the registered copyright owner to sue for "statutory damages" in lieu of having to prove "actual" damages.

"Trade secrets"

Trade secrets are well protected in the US. A "trade secret" can be, broadly speaking, any type of information of an industrial, technical or commercial nature known to one or a limited number of enterprises or interested persons, which has some value to the holder and which the holder treats as being secret or proprietary. Examples of trade secrets include: a secret process, method, formula, device, manufacturing procedure, method of construction, or a customer list. If "know-how" (which has no precise, legal definition) is secret, it can be protected in the US as a trade secret.

"Right of Publicity" and "Right of Privacy"

There are certain other "rights" that might be considered to fall with the general scope of intellectual property, for example, "rights of publicity" and "rights of privacy". Generally and loosely speaking, the former protects an individual's right against unauthorized use of his persona,

personal image, personal characteristics etc.; and the latter, against unauthorized invasions of his or her right of privacy. These are matters of US state law, and the extent to which one or the other or both are recognized, and the scope of protection, varies from state to state. Some states have specific statutes dealing with one or the other (e.g., New York State and California). In some states, a common law right, particularly of privacy, may also apply.

The Trademark Application Process in the US.

First, you have to have done a “trademark search” to determine whether there are existing, third party registrations, pending applications, common law marks etc. that might present a problem. That can be done in two ways: ordering from a search company and analyzing a formal search report; or by searching the US Patent & Trademark Office (“USPTO”) website. The former is the more comprehensive, safest way. Assume that the search reveals no significant problems, and that the decision is made to apply for trademark protection---to prepare and file an application.

The US and many foreign countries are parties to an international trademark Protocol (Madrid Protocol). If the foreign party’s country is a party to it and has a home country trademark registration for the mark it wishes to protect in the US covering the same general types of goods and services it wishes to protect there, it can use that registration to generate an “international application” and file that in the US. The typical foreign country registration will set forth the goods and services in a very broad way, and the USPTO examiner will not accept that. The USPTO requires that the goods and services be very specifically described. Also, sometimes, goods and services that appear in a foreign registration under one or the other Class, will not correspond to the same Class in the US. Additionally, it typically takes a longer time for an “international application” to reach the USPTO and an examiner than a traditional US application. The point is: either prepare the US trademark application (not using an “international application” at all); or, if the decision is to proceed with an “international application”, then adapt it before it is filed with the USPTO to one that the assigned USPTO examiner is more likely to find acceptable.

The reader should bear in mind that the US is a “use country”: a US trademark registration will not be granted unless and until the applicant states and presents evidence to the USPTO that it has used the mark commercially in US interstate or international commerce, for at least one item shown in the particular trademark class concerned. The US application will either be based on such “actual use” having been made, for the particular class or class concerned; or, for the classes in the application in which that use has not yet been made, based on “future intent to use”, and at a later point in the process, the applicant will have to file a declaration and evidence of the “actual use” to obtain a registration for that class. The “international application” mentioned above offers the advantage that one does not have to claim and demonstrate “actual use” at any point in order to obtain a US registration. However, that “advantage” should not fool you into thinking that the “international application” is the way to proceed.

Licensing and Technology Transfer to and Within the US

The Meaning/Pros and Cons of Licensing. In practical, non-legal terms, licensing means granting to someone the right to use, normally for commercial purposes, certain intellectual property. A non-exhaustive list of the types of intellectual property that can be licensed are: patents and patent applications, trademarks (whether or not registered) and trademark applications, internet domain

names, copyrights (including to computer software), trade secrets and know-how. Except for computer software, the license will normally permit the licensee to produce or manufacture or have produced or manufactured, in whole or in part, particular products or components, to assemble them (where applicable), and to sell them in an agreed territory. In most instances, the licensee is granted the agreed rights for a specified time period; or, alternatively, the agreement will have no fixed term but can be terminated by the licensor (or both parties) for specified causes or without cause. Typically, the licensee will agree to make certain payments for the rights granted (and possibly for services the licensor will render). The term "technology transfer", in the American context, has no specific meaning. It is mentioned only because in some circles the term is loosely used. There are positive and negative features of selecting licensing as a way of doing business in the US. You should be well aware of them before deciding to embark on the licensing path.

Protecting Your Intellectual Property.

The foreign party's intellectual property to be licensed should, to the extent possible, be registered (or filed, as appropriate) or at least applied for, in the US (and where applicable, in other Western Hemisphere countries). That should, whenever possible, be done prior to negotiating the license agreement. You, the licensor, are likely to negotiate a better deal in that posture. Trade secrets and know-how are not filed or registered with any governmental agency.

"Due Diligence"

You should do a careful due diligence review of each licensee candidate. That will include reviewing the prospect's financial and legal condition, its capability to produce the licensed products, and its ability to market them expeditiously in the contractual territory.

License Agreements for the US Market.

For the licensor's protection and benefit, there is no substitute for a carefully drafted license agreement prepared by a American lawyer experienced in that field. Without that, the results can be a failed deal; placing your intellectual property rights at risk; a legal dispute or an actual lawsuit; and unnecessary expense. Most properly prepared license agreements for the US market will be rather detailed, complicated and fairly lengthy, and not easy to negotiate. The reason is that there are a considerable number of points to be covered, negotiated and drafted.

The "NB-SOT".

As with any other contract, it is often useful not to start with a draft license agreement, but rather, with a non-binding summary of key terms ("NB-SOT") as the first negotiation document. Your US lawyer, with your input, will bring an NB-SOT to the point where both of you are satisfied with it and are ready to submit it to the licensee.

The Drafting Initiative

You should do your utmost to seize and retain the drafting initiative both for NB-SOTs and contract drafts. To the extent avoidable, you should insist on the US side only commenting on yours. Losing the drafting initiative can make it difficult to conclude a binding license agreement on terms that

are advantageous to you. Also, once the potential licensee has submitted its draft, it is difficult, and often more expensive, to reformulate it to satisfy your concerns.

Competitive Restrictions on Licensee: Potential Illegal or Dangerous Terms.

Certain competitive restrictions imposed on a licensee and certain other contractual terms may

A. violate the US federal or state antitrust or analogous laws; and/or

B. if you are licensing US Patent rights, be a patent misuse and put your patent at risk.

Moreover, whether or not there is an actual violation or misuse, a poorly drafted or inappropriate restriction can lead a licensee to bring or threaten to bring a legal claim or counterclaim against you, typically to retaliate when you sue or try to terminate the license. A party who successfully pursues an antitrust claim can collect treble damages, actual damages times three. Also, the court can award the winner its legal fees and costs. Experienced US counsel will know how to draft the agreement to minimize this type of risk.

Exclusive Licenses; Non-Exclusive Licenses.

As a general rule, nothing prohibits an exclusive license covering all of the US. Like all general statements, there are a few exceptions. But the general rule will apply to most foreign companies. Sales by a licensee outside of its territory can lead to problems that – while thorny – can be solved. The granting of one or more non-exclusive licenses will not normally pose any problem under US law.

Clauses Protecting Licensed Trademarks.

Under US law, an agreement licensing or permitting a third party to use a trademark should contain certain clauses designed (among other things) to protect the licensor's rights in the mark. Without such clauses, the licensor's trademark may be jeopardized.

Royalties; Up-Front Payments, etc.

With few exceptions, the licensor and licensee can freely agree on the royalties, including, where applicable, an up-front payment (payment upon the license agreement being signed or very shortly thereafter). The same applies for minimum royalties, which the licensor will often want.

Trade Secret and Know-how Licensing and Protection.

These can be licensed, and in general, clauses prohibiting the licensee's unauthorized use and disclosure during the contract's term and after the contract ends are enforceable, at least if the technology is not in the public domain. With a clear contract, even technology or knowledge that is not secret at the time of contracting, or ceases to be, can be the subject to royalty or similar payments. That is, with concise drafting, the licensee will not usually be able to convince a court that it can stop paying because the licensed technology or data is in the public domain or is known to all competitors. US courts grant strong protection to trade secrets and proprietary data. In appropriate circumstances,

US courts will issue injunctions to protect trade secrets and other proprietary information. Under the arbitration rules of the American Arbitration Association, arbitrators too can issue preliminary and final injunctive-type orders.

Sale of Intellectual Property.

Instead of licensing the right to use for a limited time period, it is possible to sell outright intellectual property. In the case of trade secrets and know- how, the sale can be confined to the rights for a particular country or territory (e.g., the entire US, or the US and Canada). The tax aspects of intellectual property sales should be examined carefully.

Choice of Tribunal and Choice of Law.

These points are not just “legal points for the lawyers and of secondary importance to the economics of the license deal. They are very often critical business-legal points. What the agreement states on these points can be crucial for the licensor if it wishes to consider attacking, for example, if the licensee does not pay the agreed royalties, abuses or steals the licensor’s intellectual property or engages in some other wrongdoing. When the licensor may be defending a claim by the licensee (for example, for the licensor’s alleged breach of contract or a product liability or similar claim), what tribunal located where will decide the claim under which law is of paramount importance.

Tax Aspects

The foreign licensor should, with the aid of experts, examine in advance the tax ramifications of the particular license or other intellectual property deal. Among other sources, the relevant income tax treaty should be consulted (if any). As a general rule, a foreign party should do everything possible to avoid having what US tax treaties defines as a “permanent establishment” in the US or a “fixed base” used for the rendering of services in the US. Absent a relevant tax treaty, the foreign licensor should avoid acts that would cause it to be “doing business” in the US (or a particular US state or city), for income tax purposes. Other US state and local taxes, such as sales and use taxes, may also be relevant.

Some Clauses are Difficult to Negotiate and/or Draft in License Agreements.

Exclusivity

When exclusivity will be granted for only a part of the US and that will be the licensee’s entire contractual territory, the issue of under what conditions the licensee can sell the licensed products in other parts of the US.

Royalty clauses,

Particularly:

A. Up-front payment;

B. minimum royalties;

C. running royalties: the percentage, the base on which they are calculated, when they accrue and when they are payable.

Improvements or modifications of the licensed technology or licensed products made:

A. by the licensee: To whom do they belong? What rights therein should the each party receive?

B. by the licensor: Are they part of the licensee's rights? What if the licensor's improvement is a "major development"?

Infringements of the licensed intellectual property rights by third parties:

A. which party has which obligations, if any, to prosecute infringers and under what terms and conditions?

B. If the licensed products infringe the intellectual property rights of a third party, how will the license agreement deal with that?

The duration of the license agreement

In particular, the termination clauses. One especially tricky issue relates to the licensor's right to terminate should the licensee enter into bankruptcy proceedings.

Computer Software Licenses and Authorized Reseller Agreements.

A great many of the points made here apply, either directly or with some adaptation, to computer software licenses and authorized software reseller agreements.

Here are a few points pertinent to such agreements for the US:

US Franchise Laws:

There are federal regulations applicable to "franchises; and state legislation governing "franchises." Frequently, a software license even more so, a software reseller's agreement can constitute a "franchise" for purposes under the federal and certain state franchise legislation. The consequences thereof can be negative, even grave, for the licensor. Many of the franchise statutes define quite broadly what is a "franchise". It is not possible in this short guide to discuss this subject in detail. Citing one example, New Jersey's franchise act captures, as a "franchise", many software licenses and especially authorized reseller agreements. That act prohibits the licensor (franchisor) from terminating or modifying the "franchise" agreement without good cause, defined in the act, and lists a number of other possible violations. That act accords the injured or potentially injured franchisee a number of remedies, from injunctive relief, to damages, including possible punitive damages, recovery of its legal fees, to even possible reinstatement.

Improper Termination by Licensor:

Even if the software license or reseller's Agreement does not constitute a "franchise" under state franchise legislation, some US states will require "good cause" for franchisor termination; and/or

will require a sufficient notice period to the licensee especially where the termination is without cause.

Poorly Drafted Software Licenses and Reseller Agreements:

It occurs rather frequently that software licenses and authorized reseller agreements prepared by foreign (non-US) companies and their local advisors are just not well drafted or are not suitable for the US or risk violating US law. Frequently, they also do not offer sufficient protection to the licensor. Preparing the agreements properly for the US market may involve some costs to the licensor (including legal research by US counsel), but its risks outweigh those costs.

Non-US Style License, Reseller and Other Computer Software Agreements:

Foreign software agreements should not be used in the US ----at least without adaptation. Many legal and some practical business points of substance contained in agreements of this type that are not prepared by US counsel will not be suitable for the US market. That is the main point. Plus, when marketing software to US resellers or customers, the agreements should be in proper, US style English.

Policing the Agreement:

Not infrequently, the licensor does not require the licensee or reseller to comply with certain of its contractual obligations, or the licensor itself does not comply with certain of its own obligations. When the time comes that the licensor wants to terminate the agreement, such non-compliance can pose a potential problem or obstacle.

Trademark Protection:

Sometimes, the licensor does not bother to register its trademark(s) in the US, Canada and other important markets (e.g., Mexico or South American countries, maybe not even in its home country). The licensee becomes aware of that and decides to register the one or more of those marks in its own name, without informing the licensor. The licensee then has an important bargaining chip to ward off a potential licensor termination, or to obtain better contract terms, or a payout on licensor’s termination, for the licensor to get back its trademark rights. The licensor might well be able to challenge at the trademark office level or in court, the licensee’s application or registration, but may be reluctant due to the costs.

Copyright Protection for Computer Software and Manuals.

Filing timely copyright applications in the US very important for software owners and licensees.

Franchising to and Within the US

Franchising Heavily Regulated in the US at the Federal and State Levels:

First, there are federal regulations on franchising and "franchises" to comply with (the so-called "FTC Rule" and interpretative guidelines). There are also federal statutes applicable to certain specific, narrowly defined franchises business types. At the state level, many of them have a general statute regulating franchising and "franchises". Some also have laws concerning specific types of franchise businesses.

The franchisor will have to prepare, file in the appropriate offices and obtain approval of, and give to prospective franchisees in advance (within the time period established by law) a complex, detailed offering statement (a franchise offering circular or offering document) roughly similar in its overall general nature to an offering statement that a company going public in the US would prepare, file and disseminate. The offering document must be amended and updated each year, and more frequently if there are any material changes, as long as the franchisor is continuing to offer franchises for sale. For purposes of the FTC Rule and many if not most state franchise statutes, one offering statement can be used (the Uniform Franchise Offering Circular). Frequently, it will be necessary to amend and supplement it to comply with the requirements of applicable US state statutes. Copies of the franchisor's standard franchise agreement and any related agreements (e.g., leases, supply agreements, specifications, purchase orders) form part of the offering circular and must be given to prospective franchisees at the same time as the basic disclosure document. All of these must comply with the FTC Rule and the pertinent state statute(s), as well as other American federal and state laws. Several of the state franchise laws contain stringent rules (for the franchisor) regarding what a franchise agreement cannot and/or must contain, franchise termination, renewal and non-renewal, modification of franchises and franchise agreements, and many other points; and provide franchisee-friendly legal remedies for violations committed by the franchisor.

Many other laws, federal and state, apply to and may affect franchise agreements and relationships. One such type are federal and state antitrust laws, affecting, for example, certain competitive restrictions that a franchisor might seek to impose on a franchisee.

Another issue among the many is whether an arbitration clause placed in a franchise agreement to resolve disputes and claims will be legally enforceable, as a whole or as to particular issues that may arise.

Ways of Structuring a US Franchise Operation:

Among the most common structures for a foreign party to approach the US market by way of franchising are:

A. Establish a wholly-owned US subsidiary (e.g., a US corporation) , grant it the necessary rights for the US, and regarding the franchise trademark(s) for the US market, either grant it a license (e.g., an exclusive one) or have it be the owner of the US mark(s). The US subsidiary would grant the franchises as franchisor and contracting party, and possibly own and operate one or more company-owned franchise operation units.

B. Set up a US joint venture with one or more JV partners; grant it the necessary rights and licenses (or allow it to own, e.g., the US trademark(s) concerned), and have the US JV sell franchises----and possibly, own and operate one or more company-owned franchise units or outlets. While the FTC Rule does provide an exception to its application for certain kinds of "partnerships" functioning as franchisees, most foreign companies will be unable (and even unwilling, considering what may be required) to structure the JV to avoid the JV itself being treated as a "franchisee" and the arrangement being treated as an offer by it to the JV to sell or distribute "franchises". Thus, that JV arrangement itself is likely to require the foreign party, as franchisor, to comply with the federal and pertinent state legislation.

C. Grant one sole exclusive license of the US trademark(s) for the entire US applicable to the franchise operations to an independent US company, to use them and other intellectual property and rights of the foreign party (e.g., trade secrets and know-how, copyrights) to sell franchises in the US market, pursuant to the foreign company's franchise plan, format etc. or pursuant to specifications and other obligations that it establishes. That would be, in essence, a "master franchise agreement", although that term might be avoided in the license agreement. Such an agreement, in a given case and if structured properly, might fall within a certain exception under the FTC Rule and possibly certain state franchise statutes, i.e. the exclusive license itself might not be an offering or a grant of a "franchise" thus exempting the foreign party from compliance with that legislation. A key aspect will be the extent of control the foreign party has over the US licensee's entire method of operating the business in question, and how significant those controls are. In any case, the exclusive licensee would have to comply in order for it to offer franchises to others, and quite probably, the franchise offering circular it prepares will have to contain certain information about the foreign party. If the abovementioned "one exclusive license" were not for the entire US but only a part thereof, the chances of successfully falling under that FTC Rule exception are less.

Internet Business: An Overview of US Cyberlaw

A short section covering all or nearly all of the vast subject matter is not possible in this Guide and has not been attempted. A relatively few points have been selected and dealt with only in summary fashion.

Protecting Your Own Intellectual Property Used in Cyberspace.

Those will typically be your domain name(s), trademark(s), copyrighted items, and computer software. That point is closely related to the next bullet. On your website, you should insert the proper legends and the like to indicate that you are the owner of the particular intellectual property items (e.g. patents, trademarks and copyrights). If a third party infringes on your copyright, you should notify the site owner in writing, demanding removal of the infringing items pursuant to the 1998 US Digital Millenium Copyright Act ("DMCA").

Not Infringing Third Party Intellectual Property Rights.

You should take care not to infringe anyone else's intellectual property or similar rights, by use in cyberspace. For example, using without permission another's trademark or copyrighted item on the internet is usually not a good idea---it can, depending on the circumstances, result in an infringement under US law. The use of a person's name or likeness without permission (whether or not that person is a celebrity) can infringe his/her "right of publicity" and/or "right of privacy" under US law.

A few additional words about copyright.

Copying a third's party's copyrighted material (text, images, scripting, programming), without permission can result in infringement, even without knowledge that it is copyrighted. Contributing to or inducing another to infringe can also result in copyright infringement. So can the acts of your employees or agents or other others subject to your control. An internet site operator or service provider can reduce its risks of copyright infringement damages by undertaking certain measures specified in the DMCA. Copyright infringement can have severe consequences, including criminal penalties and potentially substantial civil damages for each infringement, plus bearing the legal fees of the copyright owner, if he prevails in court.

Regarding both copyright and trademarks under US law, there is a defensive "fair use doctrine" that permits someone to use another's copyright or trademark without infringement. The doctrine is too difficult to define precisely here and we will not try, but only offer some general benchmarks. Unauthorized uses of another's copyrighted work that promote the public interest, such as education, scholarship, criticism, parody, and others, and that involve copying or otherwise using a relative small amount of the total copyrighted work, might fall within the doctrine. That is particularly so if credit in the copy or reproduction is given to the copyright holder. Whereas, commercial uses of another's copyrighted work are less likely to benefit, by way of defense, from the "fair use" doctrine, though there are clearly exceptions to that statement. A fair use defense also exists to certain uses of another's trademark rights, somewhat similar in general nature to the copyright law's doctrine.

Certain Other Cyberspace Illegalities.

Many actions on the Internet are subject to conventional American legislation and legal principals, both with respect to transactions conducted on the Internet and images and text posted there. A few examples are laws on: defamation; fraud gambling, and child pornography, which are regulated in very similar ways on-line as off-line.

Privacy Policy and Terms of Use on One's Own Website

Care should be taken to see to it that

A. your website Privacy Policy and Terms of Use comply with applicable American law;

B. both accomplish the particular purposes and goals of the website owner;

C. the rest of the site otherwise is legally in order; and

D. the language used in the site is capable of being displayed in American English.

Terms of Use

Terms of Use are similar to pre-printed "General Terms of Sale" used off-line. If you are selling goods or services via your website, your Terms of Use will be a contract documenting the transaction. You will normally want them to contain certain provisions that properly protect you, the website holder.

Can A Foreign Company's or Individual's Internet Activities Subject It to Being Sued in the US Courts ?

That is a complicated question, not capable of a simple "yes" or no" answer. Perhaps the best answer is "yes", under certain circumstances.

Here are some concepts that bear on that issue

Assume a foreign company or its US subsidiary that is not formed in the US State in which a lawsuit is brought (the "Forum State") and is not registered to do business in that same State. If the sub is formed or registered in that State, or if the foreign company has a registered branch in that State, it becomes a "resident" for jurisdictional purposes and can quite probably be sued there no matter the nature of the particular dispute, whether or not related to its internet activities. We will assume that the foreign company and its sub are not residents of the Forum State but rather "non-residents".

The critical issue will usually be whether the non-resident foreign company or its US sub (each, the "defendant") "purposefully availed" itself of the privilege of conducting business in the Forum State by one or more of its own material acts so as to invoke the benefits and protections of its laws.

If the defendant has material "continuous and systematic" contacts with the Forum State then that State will have "general jurisdiction" over the defendant for essentially any type of dispute, whether or not involving internet activities.

Where that is not the case, then one looks to whether the Forum State has "specific jurisdiction" over the non-resident defendant. For that, there must be a substantial connection between the defendant's "purposefully directed" contacts with the Forum State and the operative facts of the particular litigation.

Assuming a "specific jurisdiction" type situation, some American courts apply a sliding scale to determine whether cyberspace contacts with the Forum State will justify that State exercising personal jurisdiction over the non-resident defendant. At one end of the sliding scale is a "passive website" that merely advertises on the Internet. Such ads, accessible to anyone in the world connected to the Internet, probably do not rise to the level of "purposefully directed" contacts with the Forum State, and probably are not sufficient minimum contacts to justify its exercise of personal jurisdiction over the defendant, even if the litigation is directly connected to that website. At the other end of the scale is a website through which the owner does Internet business by entering into contracts with Forum State residents by knowingly transmitting computer files over the Internet. If the claim or dispute arises out of that or those contacts, the chances are fairly substantial that the Forum State will find there to be "specific jurisdiction" over the non-resident defendant. In between are those websites with some interactive elements enabling a visitor to exchange information with the host computer. It is difficult to predict whether use of an "in-between" site that involves some contact with persons in the Forum State (and a dispute with one of them arising out of such contact(s)) would be sufficient to permit that State to exercise personal jurisdiction over the nonresident defendant.

There is no guaranty that courts in all US states will apply the above sliding scale concept regarding website or cyber contact. American law in this area continues to evolve.

Even if the court finds there to be "general jurisdiction" or "specific jurisdiction", that is not the end. Other criteria that must be met for the court to proceed with the case, which are beyond the scope of this Guide to explain.

US Tax Aspects of Internet Sales: An Overview

US Income Tax:

If the internet seller is a US corporation (one formed in the US), it is subject to US federal income tax on its worldwide income, including from internet sales. The same is true for a US limited liability company, except that the LLC owners are responsible to file tax returns and pay the taxes due (the LLC being a tax pass through entity).

If the internet seller is a foreign entity or person, and there is a income tax treaty between his/its country and the US, normally the seller will not be liable for US federal income tax its internet sales unless it has a "permanent establishment" in the US ("PE") with which the internet sales income is effectively connected. If there is no such tax treaty, then rather than "PE", the issue becomes whether the seller has a US trade or business with which that income is effectively

connected, in which case it is taxable. It is not clear whether a website itself can constitute a PE or trade or business in the US. If the server is based in the US, that might be a factor. If the server's host is located in the US that might possibly be enough, depending on overall scope of the host's functions for the internet seller.

State Income Tax If the internet seller is a US corporation or LLC, and has a place of business or a sufficient physical presence in a particular US state from which it makes internet sales to persons in that same state, it will normally be liable for that state's income tax on those sales. In general, the same is true for a foreign entity or physical person.

Sales and Use Tax:

Sales tax applies, in general, to sales of non-exempted tangible personal property and possibly certain services, depending on the particular state or municipal law.

As a general rule, if your business is physically located in US State 1 and it sells over the internet to a consumer (retail buyer) in that same State, you are probably responsible for collecting and remitting to the State 1 its sales tax on the transaction; if it sells to a retail buyer in US State 2, probably you are not responsible for collecting sales tax. However, if your business has a "nexus" (which in layman's terms roughly corresponds to "physical presence" of some significant sort) within State 2, then you may be required to collect the sales tax due in State 2. Maintaining an office, or good inventory, or extensive marketing or promotion, or having employees or even possible sales agents, in State 2, could be enough of a nexus.

If your business is physically located in State 1 and you sell via your internet site, you will normally be considered to be located in that State for sales (and use) tax purposes, even if your internet server and place of shipment of the goods are outside of State 1. With few exceptions, that means you are subject to the sales and use tax laws of the taxing authorities in State 1.

Sales of computer software, whether via the internet or not, may or may not be subject to sales (and use) taxes. That will depend on the particular legislation. Some jurisdictions make a distinction between pre-packaged software and custom made software.

Use tax can result from out-of state purchases of non-exempt tangible personal property and certain other items from sources such as internet sites not intended for the buyer's resale but its use, storage or consumption. "Out-of-state" generally means outside of the US state in which the purchaser has its place of business (physical presence of some sort, as above).

Sales and use tax, including on internet sales, are complicated areas and can, if you, in fact, are determined to have an obligation to collect and remit and do not, result in significant liability. The laws on collecting and remitting these taxes vary from state to state.

A few disclaimers are in order. First, the sales and use tax area, particularly regarding internet sales, are fact specific—they depend on the particular situation. Second, the sales and use tax laws vary from state to state and are subject to change possibly more than fields. Third, if you think you might possibly be subject to sales tax and use tax, consult an expert.

Buying an Existing US Company or a Part Ownership Thereof

"Due diligence" is a must

For any acquisition of a US company, a considerable amount of preliminary homework will be required. All aspects of the acquisition target company will have to be carefully examined and evaluated, from top to bottom. This process is called "due diligence". A due diligence review should include a thorough review of the financial, legal, tax and other aspects of the target company. Other types of experts will often be involved in the due diligence process, such as an accounting firm, an environmental study firm, or a construction engineer. Consummating an acquisition without proper "due diligence" is like "buying a pig in a poke". If your experts' due diligence reports reflect a company that is not to your liking, you might decide not to consummate the deal, or might bargain for better terms.

Stock Purchase; Assets Purchase.

Most acquisitions of privately owned companies will be by way of either a stock purchase or an assets purchase. Potentially, each has its particular upside and downside features for the buyer and the seller. You should be aware of them.

Drafting Initiative.

Through your US counsel, you should do your best to prepare the first draft of the acquisition agreement (and any non-binding summary of terms or letter of intent that might precede it), and thereafter, to maintain the "drafting initiative".

Do Your Own Homework and Be Patient. Do not underestimate how long it will take to finalize an acquisition. Although the parties may have reached agreement in principle, it takes time to complete the "due diligence", obtain the financing (where applicable), negotiate, prepare and revise the necessary contractual and other documents and get them signed, and do all of the other legal and non-legal tasks. You should not become exasperated because the acquisition agreement and other contractual documents are long and complicated. To get the best possible results, you should work very closely with your US counsel, review and comment on contract drafts and other documents, and generally, be part of a team.

The "Antitrust" Law Aspects.

Where the acquisition is fairly sizeable, the US antitrust aspects should be evaluated before proceeding too far with the negotiations. Also, for fairly sizeable acquisitions, a pre-notification filing with a US government antitrust watchdog agency will be required.

The Tax Aspects.

Before proceeding too far with negotiations, the buyer's experts should study the tax aspects of the proposed target company. They may affect the manner and structure of the deal the buyer wishes to negotiate.

Valuing a Company for Purchase

Before an offer can be made to purchase a company the buyer need to calculate the value of the business. We suggest that using a discounted cash flow calculation is the most accurate method to establishing a businesses' value. Goldman Collins can perform this valuation. The process in detail is too complicated to include here but in broad terms it is:

(EBITDA times a multiple + Assets – Liabilities) discounted for risk.

The complication comes in calculating the risk, as well how aged receivables and aged payables are handled by buyer and seller.

An Overview of US Taxation

Introduction.

The United States is a federal republic; that is to say, the national government, each state, and the local government within each state makes its own laws and has its own courts. Therefore, each government has its own tax administration, its own tax laws, and its own tax forms. At the federal level, there is income tax, including corporate and personal income tax, capital gains tax, income tax on dividends, interest and royalties, and on partnership profits; and employee payroll taxes. At the state level, there are, in most states, similar taxes as the above federal ones; and sales and use taxes. Some counties and cities have their own tax regimes, e.g., income and business taxes and property taxes.

The US enters into separate international agreements with many countries for the purpose of avoiding double taxation and preventing fiscal evasion with respect to taxes on income (they are often called “income tax treaties”). Some of these treaties are rather complicated, one example being the rather intricate provisions on activities which can cause a foreign resident company or individual to have a "permanent establishment" in the US and those which will not cause such a result. Those income tax treaties apply to US federal income tax (and the income taxes of the other treaty country). The provisions of the relevant treaty or treaties are often important tax planning tools and for determining what taxes will be due.

Also, before entering into a venture in the US, a foreign exporter or investor should determine which taxes may be due to states and municipalities. These are not covered by income tax treaties. Because of the US’s size and the diversity of local laws, the total amount of taxes may differ significantly from one location to another.

Permanent Establishment in the US. As a general principle, the US tax laws seek to impose a tax on every company that is considered to be doing business in the US. Most US income tax treaties exempt resident companies and individuals of the other treaty country from US federal income taxes on business profits if they do not have a Permanent Establishment (PE) in the United States. A PE is defined therein. A PE in the US under many of the US tax treaties typically includes a fixed place of business such as a seat of management, branch, an office, a factory, a workshop or a warehouse, used to conduct business in the US. It also frequently includes a mine, quarry or other place of natural resource extraction in the US maintained by the foreign resident party; and a building site or construction or installation project of the foreign resident existing in the US for more than a certain number of months.

If a foreign exporter appoints an American company as its exclusive distributor and delivers all goods f.o.b. non-US port, normally no US income tax liability arises for the foreign exporter on the profits from its sales to the distributor.

If, however, a foreign company believes that it can sell its products better by having its own marketing group in the US or at least having its trained personnel in the US to assist in the marketing, the company may be considered to have a PE in the US and be subject to American

income tax on the income resulting from the PE and any other US source income effectively connected to the PE.

Some other acts and actions that might give rise to a PE in the US under many US income tax treaties are:

A. You set up a branch marketing sales or marketing office of your company in the US (whether or not the branch is formally registered).

B. You give your US agent the authority to accept purchase orders from your customers or otherwise allow him to do so.

C. Your agent uses business cards which list him as a manager for your company. (He holds himself out to the public as an employee of your company.)

D. You send your employee to live in the US to help your agent or distributor with technical or marketing problems, or to operate out of your (unincorporated) US sales or marketing office.

E. You agree to pay part of the rent of your US agent's or distributor's office or telephone expenses and have your company name listed in the local telephone directory. The foregoing are examples only---many others could be cited.

Income tax treaties typically list certain activities which will not result in the foreign resident company having a PE in the US. These may include (depending, of course, on the terms of the particular treaty):

A. exporting to the US without any fixed placed of business in the US or without a US agent that regularly accepts orders for goods to be sold;

B. utilizing a corporation, that is, one incorporated under the laws of a US state, to conduct the US business (e.g. manufacture or purchase of goods from the foreign parent and sale or resale thereof to US distributors, dealers and customers; or sale of services);

C. use of US facilities for, or the maintenance in the US. of, a stock of goods belonging to the foreign enterprise for storage, display or delivery of such goods for their processing by a third party;

D. maintaining a fixed place of business in the US for purchasing goods, collecting information for the foreign enterprise, or for activities of a preparatory or auxiliary character (e.g., advertising or scientific research); and

E. the maintenance by the foreign enterprise or individual of a building site or construction, assembly or installation project in the US which does not exist for more than the number of months specified in the relevant tax treaty.

The foregoing rules are stated in a general way. Income tax treaty provisions are rather detailed and contain many subtleties. The foreign company's proposed activity in the US should be carefully reviewed in advance to determine whether a "PE" in the US is a material risk for you, and the likely consequences of having one. In general, most foreign companies and individuals will want to avoid having one.

Claiming Tax Treaty Benefits.

Foreign companies and individuals that claim the

benefits of particular provisions of a tax treaty to override provisions in domestic US federal income tax law, must disclose the treaty-based provision in a federal income tax return. This applies whether or not the foreign party was otherwise required to file a US federal income tax return. Non-compliance can involve potentially very large penalties.

No Applicable Income Tax Treaty.

There will be situations where no applicable income tax treaty exists between the foreign party's home country and the US. In that situation

A. the foreign party should avoid acts and activities that will cause it to be doing business in the US for US federal income tax purposes; and doing business in any particular US state for purposes of its income tax; and

B. creative, advance tax planning will often be required.

Branch, LLC or Corporation.

When the foreign company decides to have its own US operation, it must also decide whether it should function as a US branch of the foreign company or as a separate US legal entity (like a corporation or LLC) organized in one of the states in the US. If you expect the early years of the US operation to show losses, you might give consideration to operating a branch. This may be advantageous from a foreign income tax standpoint. However, the US imposes a branch profits tax on the deemed repatriated earnings of the branch. This, in effect, equalizes the tax treatment of a US branch and a US subsidiary corporation or LLC. Based on this author's experience, if you intend to market your products or services in the United States, the formation of an American corporation is in many if not most cases the route to select. Operating through a "branch" is too risky from several standpoints, including liability. And, the LLC (limited liability company) has several important drawbacks, particularly for a foreign-owned one.

Taxation of "Corporations":

US Federal Income Tax.

A corporation formed under the laws of a US state is subject to US federal income tax on its worldwide income. The tax is levied on its net taxable income, which is essentially its gross income minus allowable deductions. A corporation's taxable income and federal income tax are computed essentially as follows: book gross income +/- adjustments and deductions ' taxable income x

applicable corporate tax rate ‘ amount of tax -applicable credits ‘ final tax liability. The annual accounting period selected by a US corporation is its taxable year generally, and is normally the same as its financial year.

Alternative Minimum Tax.

To the extent that its application results in a higher tax than the regular corporate tax, an alternative minimum tax ("AMT") is imposed in lieu of the regular corporate tax. Certain so-called “tax preference” items are added back to the corporation's taxable income to arrive at the corporation's alternative minimum taxable income. The AMT is intended to assure that all US corporations with substantial economic income pay federal income tax notwithstanding exclusions, deductions and credits otherwise available by law. The AMT makes for additional complexity and more record keeping. Corporations with relatively low gross receipts may be exempt from AMT for its initial year or possibly initial years of operation.

Consolidated Tax Returns.

A group of US companies consisting of a US parent company and its at least 80% owned US corporations may be taxed on their consolidated income, by filing a consolidated federal income tax return. In such cases, dividends paid by the

US affiliated companies to their US parent company are exempt from US federal income tax.

Transfer Pricing.

The American tax authorities are concerned that profits between the foreign parent company and its US subsidiary or affiliate may be shifted from the US to the foreign country. This would be the case whenever the parent company invoices the subsidiary at a higher price than would be charged a third party. Under Internal Revenue Code (" IRC") Section 482, the government has the right to change the prices charged by the foreign parent company to the US affiliate, if it believes that they do not reflect the proper amount. That is the amount which would be charged in an "arms length" transaction between unrelated parties. As an exporter this normally means that you must be able to prove to the tax authorities that the price you charge to your branch, subsidiary or affiliate in the United States is the same as you charge an unrelated third party. Other charges such as interest on loans, license fees, royalties and management and other service fees between related parties are also included in IRC Section 482 must be carefully conceived to avoid tax problems. Provisions more or less paralleling IRC Section 482 are found in many US income tax treaties. A foreign company can also encounter US customs problems when it invoices a related party at too low a price.

Interest, Royalties and Service Fees between Related Companies.

Royalty and interest payments from a US resident payor to a foreign payee will, as a rule, be subject to a flat 30% US withholding tax.

Tax treaties to which the US is a party either reduce the rate or eliminate the withholding tax. Normally a US corporation can deduct these from its income as business expenses. Under US

federal income tax rules, a corporation's ability to deduct interest paid to a related party can, under certain circumstances, be substantially curtailed if the related corporation is not subject to US income tax on the interest income. As remarked above, similar potential problems exist for royalty and service fee payments between related parties.

Debt/Equity Ratio.

Care must be taken to assure that a proper and acceptable relationship between debt and equity for foreign-owned US corporations is maintained. If the tax authorities can establish that the debt is too high in relation to the stockholders' equity, they can treat the interest payments as dividends and can as well consider the principal repayments as dividends. The result of this determination has the effect of increasing the taxable income of the US corporation by the disallowance of the interest expense and application of income and/or withholding tax on both the interest and principal repayments.

Real Estate (Immovable Property).

Many years ago, it was possible for a foreign individual or company to escape all US taxes when real property was sold in the United States at a profit. One reason for this was that some tax treaties exempted such transactions. Several years back, that was changed. If a foreign company or individual sells real property located in the United States, a US withholding of 10% of the sales price applies. The seller has to effect the withholding and pay the money to the IRS. The purpose is to assure that the income tax due on the gain from the sale will be collected.

Accumulated Earnings Tax (“AET”).

This is a penalty tax applicable if the authorities believe that the US corporation is not sufficiently distributing its earnings to its shareholders (thus avoiding their being taxed on dividends), but rather keeping the funds in the business beyond its reasonable needs. At this writing, the AET is 15% of the corporation’s accumulated taxable income.

Dividends.

Shareholders are normally subject to US income tax on dividends. Non-US shareholders are subject to US withholding tax on dividends received from a US company (normal rate 30%) which may be reduced by the applicable income tax treaty (if any).

Net Operating Loss Carryback/Carryforward.

If the US branch or corporation has an operating loss in any year, this loss can be offset against prior income as well as any future income. Generally, it can be carried back first to the two years preceding the loss year, then forward to the twenty years following the loss year. The taxpayer can, by filing an election, waive the entire carryback period whereupon the NOL can only be carried forward.

Financial Statements.

There are differences between a financial statement prepared on the basis of generally accepted accounting principles and tax returns prepared in accordance with the US Internal Revenue Code. Some items that may cause these differences are depreciation, foreign exchange gain or loss, and intangible drilling costs. Reserves for future expenses and other contingencies are not allowed for income tax purposes, nor are valuation reserves. A reserve fund for bad debts, however, is permitted, both in the financial statements and the income tax returns. The affairs of a company are considered private and, therefore, there is normally no requirement to publish its financial statements, unless the shares of the company are publicly held and are thereby subject to the rules and regulations of the US Securities and Exchange Commission.

State Corporate Income Tax

Nearly all US states have an income tax on corporations, normally applicable to income attributable to that particular state. The rates range per state from around 1% to around 10%. For corporations conducting business in New York City, there is a corporate tax calculated by one of several methods, the top rate being at this writing 8.85%. The paid taxes can be deducted on the corporation's US federal income tax return.

Payroll Taxes; Voluntary Expenses.

Most companies pay certain payroll-type taxes, which, as a rough rule of thumb, will total around 10% of their employees' salaries and wages. In addition, they may incur voluntary expenses for medical care, disability insurance, life insurance and retirement plans of their employees. In total these costs will probably range roughly from around 15% to 25% of salary and wage payments.

State Sales and Use Taxes.

Many states and municipalities collect "sales taxes" on retail sales and "use taxes", with different rates in effect from one location to the next. Each tax authority establishes which goods and services are subject to sales tax and use tax, and establishes the procedures to be used for registration, collection and payment of the taxes due.

If the company is not doing business in a particular US state, it is usually not obligated to collect sales tax on sales within that state. On the other hand, if the state laws consider your activity as doing business in the state and your company sells and delivers a product to the final user within the state, you must collect the sales tax from your buyer, file the required tax returns and pay the tax to the state or municipal tax authority. This can be quite cumbersome if the company is doing business in many states.

Generally, non-exempted tangible person property purchased outside of the buyer's home US state (e.g., the one in which it is doing business) and brought back into it, on which the out-of-state seller has not collected sales tax at least equal to the home state's use tax, is subject to the home state use tax. Typically, out-of-state purchases of tangible personal property intended for resale by the buyer are exempt from home state use tax, whereas if it is for use or consumption by the buyer, it will apply (but subject to the preceding sentence and absent some other exemption).

Individual Income Taxes.

The rates vary, depending on whether the person is married, single or unmarried head of household. The amount of income tax can vary depending on which state of the US. one works in and where on lives. A small handful of the fifty states have no personal income tax for individuals.

For US tax purposes, the rule is that a foreign individual who is considered to be a US tax resident is subject to US income tax on his or her worldwide income. An individual is deemed to be a resident of the US. for purposes of US federal income tax if

A. he or she holds a US permanent resident visa ("green card"), or

B. he or she was present in the US. for at least 183 days during the latest tax year.

Even if the above tests are not met, if the individual was present in the US in the latest tax year for at least 31 days, then the following formula is applied: number of days present in the US. in the latest tax year, plus 1/3 of the total days present in the US during the immediately preceding tax year; plus 1/6 of the total days present in the US in the tax year immediately preceding that one. If the total is at least 183 days, the person is considered to be a resident for US federal income tax purposes for the latest tax year. This is hereafter referred to as the "cumulative days test". Thus, if Mr. X, a citizen of a country other than the US, was present in the US for 160 days in the latest tax year, 54 days in the immediately preceding year and 30 days in year before that, the calculation would be 160 plus 18 (1/3 of 54) plus (1/6 of 30), totaling 183 days. Mr. X would be considered a resident for US federal income tax purposes for the latest tax year, unless it is established that he has a closer tax connection to another country (e.g., the country of which he is a citizen). The cumulative test is avoided if the foreign national is not present in the US for more than 121 days during any calendar year; or, as stated above, if he establishes that he has a closer tax connection to his home country than the US, based on the relevant facts and circumstances. The length of the alien's permitted US stay under his non-immigrant visa may be influential in connection with the closer tax connection test.

If the employee not treated as a US tax resident earns compensation for his services from his employer, that income, because it derives from a US source (and certain other types of source income), will normally be subject to U.S income tax at the same rates as a US citizen or permanent resident would pay but is permitted only limited deductions. As a tax nonresident, he is not subject to US income tax on his non-US source income.

US Business-Related Visas for Foreign Nationals

Your US Visa Requirements Should be Part of the Planning Process in Structuring Your US Operation. US visas needed by your key employees to be paid by your US operation can affect the structure of the US operation you are planning or already have in place (e.g., its ownership structure and capital). A non-US national cannot be paid from a US source for services rendered unless he/she has a US visa so permitting.

Temporary US Visas; Permanent Residence Visa ("Green Card):

There are several different types of "temporary" visas available to certain foreign nationals meeting the corresponding requirements, among them (examples only):

O-1 and O-1(a) Visas

Are for athletes and entertainers;

"A" Visa

Is for diplomats.

The Green Card

The permanent residence visa or "green card" is a permanent or "immigrant" visa, whereas the above listed ones are temporary.

Below is a brief summary of most of the above visa types. In any particular situation, the details and specifics of both that situation and the visa type(s) being considered must be closely examined to determine which is appropriate.

The B-1 visa.

With a B-1, a non-US national cannot work for and be paid by any US source. However, he/she can negotiate contracts, consult with business associates, litigate or arbitrate, participate in conventions and seminars, do research, and engage in certain other permitted activities in the States. With a B-1, each US stay will be limited to a short period (6 months is the maximum but may not necessarily be granted for a particular stay). There is a "visa waive program" applicable to nationals of particular countries permitting them to stay in the States for up to 90 days without a B-1 (or B-2 visitors for pleasure) visa. However, holding a B-1 visa can be advantageous in certain circumstances.

The L-1 visa.

This visa is for a foreign national "executive", "manager" or "person of specialized knowledge" (all defined terms in the US immigration law) who has worked for an enterprise outside the US. for at least 1 year within the past 3 years in one of those capacities and is being transferred to that enterprise's US subsidiary, branch office or affiliate temporarily in a comparable capacity. With an L-1, the holder can be paid for his/her services by the US sub, branch or affiliate. Extensive documentation is usually required for L-1 applications. The person seeking an L-1 does not have to

be a national of the same country as the country in which the foreign enterprise is formed. Thus, the person can be a U.K, French, Brazilian, Swedish, Japanese, Indian, Chinese etc. national and the foreign enterprise, one formed in the another country. The L-1 is tied to the particular US employer (subsidiary, branch or affiliate of the foreign company), meaning that the holder cannot work for another US employer. By filing a special application, the spouse of L-1 visa holder can receive a visa permitting the spouse to work in the US.

The "H" Category Visas. 1. The H-1B:

Among the requirements, the applicant must have professional level qualifications for a professional level position in the US. Usually, this means that the position typically requires a baccalaureate (university) degree or an equivalent combination of education and experience. State licensure, if required to practice in that field, is also necessary. Applying for and receiving labor certification from the US Department of Labor is also required for the H-1B. In the application, the employer must attest that wages offered are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or alternatively, pay the prevailing wage for the occupation in the area of intended employment, whichever is greater. Employers are not required to seek and advertise for local talent before—foreign H-1B workers can be hired even when a qualified U.S worker wants the job, and a US worker can be displaced from the job concerned in favor of a foreign worker. The H-1B visa is tied to the particular employer seeking the visa for the individual, meaning that the visa holder cannot work for another employer. Members of the immediate familiar of the visa holder (spouse and children under 21 years of age) receive H-4 visas but cannot work in the US. There are annual numerical caps for H-1B visas. The normal duration of H-1B stay is 3 years, extendable to 6 (and possibly beyond under particular circumstances). The H-2: Generally, the H-2 is for non-US national workers or technicians needed to perform specific tasks in the States. One example might be to install and teach other workers of a company how to operate certain machinery. That US company may pay the H-2 holder for his/her services. As with the H-1B, labor certification is required. The H-3: The H-3 is for an alien coming to the US to receiving training from a US employer. Stringent requirements must be met.

E-1 ("Treaty Trader").

The E-1 is only available for nationals of countries that have concluded a particular type of treaty with the US granting access to it. Thus, one must first determine if the E-1 is available to the particular foreign national. The E-1 is predicated on a company from such a treaty country having a US subsidiary, affiliate or branch ("US Operation"). The individual seeking an E-1 must show that he/she will hold an executive or supervisory position in the US Operation and has the requisite skill for the post. At least 50% of the US Operation's total volume of trade, which must be "substantial", must be with the foreign treaty country. Nationals of the treaty country must own at least a 50% of the foreign company (and, if the 50% or more ownership is through one or more legal entities, one looks to the nationality of its or their owners). The individual seeking the visa must be coming to the US to carry on that business. Generally, the US Operation will have to have been in operation for about a year. The E-1 holder can be paid for his/her services from the US Operation's payroll. Spouses of E-1 holders are eligible, by obtaining prior authorization, to work in the US. There are no quotas for E-1s.

E-2 ("Treaty Investor").

The E-2 is available only to nationals of a country that has a particular type of treaty with the US according access to it. As with the E-1, one must first determine if, in the particular situation, the E-2 is available at all. The key for the E-2 is the amount of "capital" the foreign company or individual has invested its US Operation. It must be sufficient for the type of business concerned (no precise amount is specified in the regulations). The applicant can be, but need not be, an owner of the foreign treaty company, but he/she must be employed by it. He/she must be a manager or highly trained or specially qualified employee who is needed to develop and manage the US Operation. As with the E-1 (Treaty Trader) visa, nationals of the foreign treaty country must own at least 50% of the treaty country company. The E-2 holder can be paid for his/her services by the US Operation. Spouses of E-1 holders are eligible, by prior authorization, to work in the US. No quotas exist for E-2s. E-2s are typically granted for an initial 2 year period; extensions can normally be obtained fairly easily.

Permanent Resident Visa ("Green Card").

The requirements for a "green card" will not be discussed here for lack of sufficient space. The following points are noteworthy: 1. A foreign national may not be able to obtain a green card straight away. He/she may have to apply for and obtain, as a first step, one of the types of temporary visas described above. Later (but before the temporary visa expires), it may be possible to apply for and obtain a green card. 2. Once a person has a green card, that is not the end of the story: the holder must meet certain criteria (e.g., presence in the US for minimum periods), failing which it can be revoked. 3. A green card holder becomes a permanent US resident for American income tax purposes. That causes the holder to be taxable in the US on his/her worldwide income.

Permanent Resident Visa Based on a Substantial US Investment (Visa EB-5):

This is a special type of permanent resident visa. It is for a foreign national that make a major investment in a "new US enterprise". The new US enterprise can be a newly created one, or the expansion of an existing one, or one resulting from the purchase of an existing US business and its restructuring or reorganization. The applicant must invest at least US$ 1 million in the new US enterprise (US$500,000 in certain exceptional cases). He/she must show a benefit to the US economy and satisfy certain other requirements and criteria regarding employment, new job creation and certain others.

Litigation and Arbitration in the US

General Comments and Principles

Americans' proclivity to start lawsuits or threaten to do so.

Americans are, in general, inclined to start litigation or to threaten it - probably more so than just about anyone else. It is not just American lawyers that exhibit this tendency, but also (and particularly) American business people.

Americans often sue or threaten suit as a strategic device to obtain some sort of amicable settlement: a money payment, a new contract, an agreement by the other side to abandon its claims, or the like. The great majority of commercial litigations started are never decided by the court or arbitration panel. They are settled by the parties after the legal proceeding has begun. Sometimes, the threat of legal action is sufficient to bring about a settlement.

An example: a foreign firm sells goods to a US buyer or grants a technology license to a US party. The US side does not pay for the goods or the royalties. The foreign firm sues the US party in an American court. In such a case, the US side's lawyer will often respond by making strong counterclaims, possibly claiming high damages. Often such counterclaims are quite exaggerated and not at all justified. That is a strategy to frighten the foreign party into abandoning the lawsuit or concluding a settlement favorable to the US side but not the foreign side. We would emphasize that in a US litigation, the plaintiff or counterclaimant does not have to deposit any money with the court (e.g., in proportion to the damage amount claimed). Rather, in the US, claims for very high amounts are commonly made in lawsuits, often for psychological reasons even though the party making them knows its chances of recovering them are small.

Foreigners are particularly good targets for lawsuits and serious threats of litigation. They frequently do not understand the US milieu, mentality and underestimate the chances and danger of a lawsuit. They often do not really fully appreciate the value in the US climate of carefully drafted, American style contracts aimed at protecting them. They typically do not bring an American lawyer into the picture early enough to reduce significantly the risk of lawsuits and claims against the foreign party.

Litigation in US Courts:

As a rule expensive and time consuming. Commercial lawsuits in the US courts are typically expensive and time consuming. In most cases, it is not a swift method for resolving disputes.

Unless there is a contract between the disputing parties stating that you, the foreign party, are entitled to recover in litigation your legal fees connected with the litigation, US law generally does not permit that. There are only a few exceptions to that rule.

The lawyers for both sides can use various procedures to delay the day of final decision of the case by the US court. A good example is pre-trial discovery mechanisms. In a great many countries, it is primarily the judge who controls and directs the production of evidence. The lawyer presents his proof to the judge and from there, finds out what counterarguments his opponent has. In US civil

law suits, it is the lawyers for each party that obtain from the other, normally without court intervention and well in advance of the actual trial, all of the evidence the other side. This is done via pre-trial discovery mechanisms such as:

A. depositions (oral testimony under oath given by a witnesses, often in the office of the document inspection requests (the party receiving this request must provide opposing counsel with copies of all requested documents having some relevancy to the case. Locating, reviewing and assembling the documents can often be time consuming;

B. interrogatories (written questions, which are often quite voluminous, complicated and take time to answer properly;

C. notices to admit or deny (statements are made which the other party is asked to admit or deny).

Discovery can produce high legal fees for both sides, and, as mentioned, can be used as a delaying tactic. Of course, that does not always occur. Sometimes the lawyers will use no or relatively little pre-trial discovery. However, one should normally presume that in most cases there will be a fair amount of pre-trial discovery.

It is often not feasible to prosecute commercial lawsuits in the US where the plaintiff is claiming less than around $100,000 in damages. The reason is that the costs, particularly legal fees, will normally be too high in comparison with the relatively small amount of damages. If, however, the parties have agreed to arbitrate their disputes and claims and the arbitration clause is properly drafted, then it might be cost effective to sue in arbitration for the small (or larger) claims.

General Suggestions.

At the time of contracting with a US party, you, the foreign party, should keep the following in mind:

A. to the extent possible, stay out of the US courts;

B. provide for arbitration of all claims and disputes in its contracts with US parties (including in your General Terms of Sale), typically in the US;

C. be sure that contracts with US parties are drafted, or at the least carefully reviewed, by US legal counsel with experience in the area.

Exceptions.

There are situation in which serious consideration should be given to providing in a contract that a particular US court will have jurisdiction for disputes and claims, or certain of them. One such situation might, for example be where the foreign party has licensed the US side to use its trade secrets or confidential information. That might occur within the framework of a license agreement, a joint venture or a cooperation agreement. One of the main concerns of a licensor or JV partner is to be able to prevent the US side from making authorized use or disclosure of the secret or confidential information. In such a situation, a US court can react quickly by issuing first,

a temporary restraining order and then, a preliminary injunction ordering the US side not to take such action. While arbitrators might have the power to issue similar orders, often they will not be in the position to react quickly enough.

It is usually possible to state in the parties' contract that disputes and claims will be resolved by arbitration, but that one or both parties reserves the right to seek interlocutory relief (of the type mentioned above) from a court.

The Arbitration Clause; Applicable Law

General Considerations.

Although arbitration has its pros and cons, it is usually the best solution for transactions with the US and with US parties. In the US, the most well-known and used arbitral institution is the American Arbitration Association (AAA) with its headquarters in New York City. It is capable of handling an arbitration anywhere within the US and, additionally, anywhere in the world. The AAA's International Arbitration Rules and its Commercial Arbitration Rules are frequently used in commercial and international commercial disputes.

To repeat, a properly drafted arbitration clause will usually be the best solution for a foreign party. From the offensive viewpoint (claims of the foreign side against the US party) a

US arbitration will normally be quicker and less costly than a lawsuit in a US court. That also applies for smaller claim amounts. In a US arbitration, the permissible scope of discovery (compared with pre-trial discovery in a US court) is reduced. From a defensive standpoint (the US side has claims/counterclaims against the foreign party), arbitrators are often inclined to award lesser amounts of monetary damages than a US court, particularly if a jury is deciding.

Most US parties will not agree to arbitrate disputes and claims in a foreign country or anywhere other than the US; and will not agree to some "foreign" law or any law other than the law of some US state being applicable to disputes and claims. They will as a rule agree to arbitrate disputes in some US city according to the AAA's International or Commercial Arbitration Rules. Moreover, clauses stipulating arbitration in a foreign country (not the US) but stating that the law of some US state will apply to the parties' relationship will usually not be good for the foreign party. It will usually be expensive, difficult and problematic to plead and prove American law before arbitrator(s) outside of the US. A commercial arbitral award rendered outside the US can normally be enforced in the US if the foreign party is from a country that adheres to an international arbitration convention to which the US also is bound. Nevertheless, experience has shown that the enforcement procedure is rather complicated and costly as compared to the enforcement in the US of an arbitral award rendered within the US.

The US city in which the arbitration proceedings will occur does not have to be the city where the US side has its headquarters or a place of business. In fact, from the foreign party's standpoint, that should be avoided. Where possible, the arbitration clause should provide for arbitration in a US city not too close to the American side's location (e.g., not where it has a place of business), and but one that is reasonable convenient for the foreign party. Quite often, the parties in their contract stipulate New York City as the place of arbitration and provide for the application of New

York State law to their contract (even though New York State may not have a material connection with the transactions).

Variations and special points regarding arbitration.

The parties may provide in their contract:

A. that if the foreign side (as supplier, licensor etc.) is the one initiating arbitration, it will be under the AAA's International Arbitration Rules in a particular, named US city reasonably distant from the US party's place of business; but if the US side initiates arbitration, it must be take place in a named city in the foreign party's country under the same AAA International Arbitration Rules or some other agreed arbitration rules. This variation permits the foreign party to attack in the US where the American party is located---a distinct advantage; but allows it to defend in its home country---another important advantage. The US party, of course, more often than not will not accept this formula, but it might well be worth a try.

B. that only the foreign party has the right, at its sole election, either to arbitrate disputes and claims pursuant to the arbitration provisions in the contract, or to sue the US side in a US court. Under the laws of many US states, such a provision is legally enforceable. It provides flexibility to the foreign party.

Obviously, there are many other possible variations too numerous to mention here.

Typically, US parties will, in contract negotiations, initially refuse to have any court or arbitral tribunal other than one located very close to the US side's place of business decide disputes and claims, and will insist that the laws of that jurisdiction (US State) apply to the contract and all disputes/claims. If, however, the foreign party is firm in negotiations, insisting on arbitration and applicable law clauses of the types noted above, it might end up with them.

Other important considerations regarding arbitration clauses

A. How many arbitrators should decide the disputes/claims, one or three?

B. How should the arbitrators' fees and other costs of arbitration be divided by the parties?

C. Who should the arbitrator(s) be and how should they be chosen?

The advantages of having only one arbitrator include: lower costs (one pays the arbitrators); and it is normally easier to get things done, as compared with three arbitrators who may not be readily available for hearings, decision making and other procedures. The American Arbitration Association ("AAA") employs a "list procedure" to select the arbitrator(s) if the parties have not agreed on the arbitrator(s) or another method of selecting them. The AAA arbitrator list normally contains qualified persons, and the list procedure itself works reasonably well in most cases. As stated above, the AAA has arbitrators available in a considerable number of countries.