

SELLING TO THE USA: 12 CRUCIAL DECISIONS

FOR UK EXPORTERS

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SUMMARY

This eBook provides United Kingdom companies and entrepreneurs with an explanation of 12 crucial legal issues for selling to American customers.

Whether your company wants to sell directly to American consumers, structure a business relationship with an American partner, or establish an American branch, the decisions you make concerning these 12 issues will definitely influence the success of your business venture in the United States.

The eBook opens with specific insights from U.K. exporters about their “real world” experiences and practical advice about selling to the American market in response to these questions:

- *Why the American market represented an opportunity?*
- *What were your primary legal issues/concerns/problems about selling to the American market? Why?*
- *What issue/concern/problem kept you up at night? Why?*
- *What’s the best advice you would give another U.K. company wanting to sell to/enter the American market?*

Throughout this eBook, I’ve included numerous Case Studies involving U.K. companies and explained (in generic terms and with their permission) the situations we’ve worked through for three very specific reasons:

- First, I want to provide actual examples of how my clients and I have approached problems related to the issues covered in this eBook.
- Second, to illustrate that these legal issues apply to companies engaged in a wide range of industries – from industrial equipment to high technology to professional services.
- Third, I think it’s important that you get an understanding of the crucial decisions that must be made to successfully launch an American strategy.

The eBook concludes with what I consider to be invaluable inside advice from English executives about what they would do differently if they could go back in time and re-launch their American strategy.

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What would you do differently if you could start all over again?

Is your company ready to sell across the pond?

INSIGHT FROM CURRENT U.K. EXPORTERS

I recently asked several of my U.K. clients and Richard Northcote (North American Market Advisor, UKTI North West England) a series of questions about their efforts to break into the American market. Their replies were very insightful into the strategic decisions that were necessary for their successful entry into the American market. Plus, they provide an excellent starting point for a discussion of the legal issues and strategic decisions that you should consider.

Industrial Equipment Supplier

This U.K. supplier has been in business for 22 years and began selling in America three years ago. The company has an annual turnover of GBP 26 Million to GBP 28 Million.

1. What led to your decision to sell to the American market?

Response: “A) Our product is relatively new to USA but is being used more and more. We have since found that the potential is much more than we first thought. B) In our opinion, USA companies are quite poor regarding service, quality, documentation and being competitive.”

2. What key factors were considered in making this decision?

Response: “Finding the right guy to run the business. Obviously you need a product or niche, and can the profit cover the annual outlay.

3. Briefly describe why the American market represents an opportunity for your company?

Response: “Our main industry is oil and gas and now desalination. Our product is now being used in the USA market.”

4. What one issue/concern/problem kept you up at night? Why?

Response: “Ability of local guy to do the job. Have since sent him on courses to understand the financial issues better. Should have done this earlier.”

Professional Training Services Company

This rapidly growing company provides innovative business coaching services, programs and training. They’ve been in business in the U.K. for over eight years and first entered the American market in late 2010.

1. What led to your decision to sell to the American market?

Response: “Large market, existing acceptance of our product/service.”

2. What key factors were considered in making this decision?

Response: “English speaking (minimal program adaptation) - this is a major prime strategy for our global expansion – plus size.”

3. Briefly describe why the American market represents an opportunity for your company?

Response: “Coaching is already established and understood, our model assumes a coach density of 1 per 300,000 of population, so the US market is a major opportunity. In addition, the programs require minimal adaptation for the market, leading to a low cost of entry.”

4. What were your primary legal issues/concerns/problems about selling to the American market? Why?

Response: “Franchise rule issues. Our offering was originally a franchise in the U.K., but has been changed. Nevertheless there were concerns about the model which required some structural changes to the way it will be offered in the U.S. market. Had we been forced to enter the market as a franchise we would have withdrawn as it would have made our proposition uneconomic.”

5. What one issue/concern/problem kept you up at night? Why?

Response: “The difficulty of positioning our business as a seller of product and not as a franchise. The cost of being classified as a franchise would have stopped us entering the market.”

6. What's the best advice you would give another U.K. company wanting to sell to/enter the American market?

Response: “Find a trusted attorney – educate them in your business model and objectives and manage the process closely. As an example, using a specialist franchise lawyer to prevent you being categorised as a franchise is a necessary step (the franchise rule is complex) – but they can be blinkered in their view of what possible alternatives there could be. If you can find someone specialising in your need (i.e. in our case AVOIDING being seen as a franchise) then even if the costs are higher, the time taken could be significantly shortened. A lawyer with real commercial acumen is a valuable partner indeed - we know this from experience as our U.K. lawyer is just such an animal!!”

Pharmaceutical Equipment Supplier

This U.K. company has been in business since 1989 and has done business in America since 1995. The company has an annual turnover of GBP 7 Million, including GBP 3 Million to North American customers.

1. What led to your decision to sell to the American market?

Response: “We sell mainly to Research & Development Pharmaceutical Industry – U.S. at time building many new plants.”

2. Briefly describe why the American market represents an opportunity for your company?

Response: “All main pharmaceutical companies based in U.S.”

3. What were your primary legal issues/concerns/problems about selling to the American market? Why?

Response: “Advised at start to set up a U.S. Office ONLY to avoid taxation issues.”

4. What's the best advice you would give another U.K. company wanting to sell to/enter the American market?

Response: “Gain as much information from as many sources as possible and make your own decisions.”

Fuel Service and Safety Specialist

This industry award winning U.K. company was founded in 2001 and has become a global leader in the haulage industry in less than ten years. Their innovative products have become very popular with blue-chip multinationals and other leading logistics companies.

1. What led to your decision to sell to the American market?

Response: “The timing of the decision to sell in the U.S. was in fact a reactive decision based on an enquiry we received from a company in Florida wishing to be our National Reseller.”

2. What key factors were considered in making this decision?

Response: “The company above (Florida company) first undertook nine months of research to establish demand in the market place. This (process) involved meeting with Truck Fleets, demonstrating the product, and discussing their fuel security issues plus visiting CV (Commercial Vehicle) shows to do the same.

We requested and evaluated their Sales and Marketing plan and we agreed market share targets for years 1-3.”

3. Briefly describe why the American market represents an opportunity for your company?

Response: “The market size, the current fuel price trend and the early adopting culture for new/unique products.”

4. What one issue/concern/problem kept you up at night? Why?

Response: “Whether one National Distributor could achieve our market share objectives due to the economic and geographic size, or, whether we should appoint a series of regional distributors which in turn would create much more support work from the U.K.”

Richard Northcote, North American Market Advisor UKTI North West England

Richard is a contractor for United Kingdom Trade & Investment, North West England, the government agency for international trade liaison which advises U.K. companies on their strategic plans for entering the North American market. He has 20 years of experience in this position and has advised more than 150 U.K. companies during his tenure. During this period, Richard has also assisted over 80 U.S. companies with their business development in the United Kingdom. The website for United Kingdom Trade & Investment is located at www.ukti.gov.uk.

1. What leads U.K. companies to their decision to sell to the American market?

Response: “I would suggest that the majority of the clients that I meet tend to believe that the U.S. represents a fairly logical extension to the U.K. market. Much of this is I believe based upon both a sense of tradition and a belief that with at least a relatively "common" language. There is I believe, an all too common misconception that the US is a relatively easy market. Something that far too many eventually find to their cost, is not actually the case. When compared to some other countries, the US does actually look to be a relatively easy market to enter. At least the language while it does nevertheless have some slight differences, it is at least a lot easier to understand than most others!”

2. What key factors were considered in making this decision?

Response:

“a. In looking at entering the U.S. market, many companies cite the general downturn in both the U.K. home market the European market in general.

b. For those companies with either an IP or a particular technology, they often feel that it is essential for them to be involved in the U.S. market

c. A “fascination” with the U.S. market in general. This is of course not the most solid of reasons to try entering one of the most demanding markets of all though definitely one that exists

d. Their key customers could quite easily be based in the U.S. anyway.”

3. What one issue/concern/problem keeps people up at night? Why?

Response:

“a. U.S. immigration and the apparent growing difficulties/obstacles presented to business people trying to enter the U.S. genuinely just to do business.

b. Re the above, a missing link in the Visas that are available. A visa that could enable people to enter the U.S. to conduct their business without the constant fear that every time they stand in front of an immigration officer, they are simply at the whim of an individual's subjective opinion.

c. Many view the state tax system as unclear and are therefore confused as to when and where individual state taxes may or may not be due

d. Finding out the correct U.S. import taxes/duties where applicable. Many companies seem to find this to be both difficult and complicated too.

e. Incorporation in the U.S. – whether to incorporate or not and if so, which jurisdiction should they incorporate within and what type of company is most suited to their purpose

f. U.S. banking and banking arrangements – even what should be the relatively simple task of opening a U.S. bank account.

g. Many fear the litigiousness of the U.S. system and for some, this fear is more than enough to put them off entering the U.S. market altogether.

h. Many overlook the need (essential) for the correct and quite different insurance requirements. Insurance for both product liability and PI liability cover can at times be at the best expensive and in many cases, difficult to obtain. In many cases, their usual U.K. based insurance brokers are unable to obtain correct or adequate cover for the U.S.

i. Fear of involvement with a U.S. lawyer and being totally ripped off (over this side of the Atlantic, U.S. lawyers do have this kind of reputation!)

j. Fear of employing U.S. citizens, the potential “liabilities” that this could bring and in particular, fear of involvement with the IRS. Fear of the U.S. tax system which to an outsider can at least look to be particularly daunting.”

ISSUE ONE - MONETIZING YOUR U.S. STRATEGY

Every U.K. company wants to gain immediate traction in the American market, generate revenue, and turn a profit sooner rather than later. The United States represents a rich market with endless opportunities. Like any foreign market, it can also quickly become a maze.

Determining Your End-Game In Advance

Before charging into an effort to enter the American market, I highly recommend that you determine your end-game in advance – how can you best monetize your entry into the American market?

Your ultimate objective may be to:

- generate some sales in a new market and test the waters
- establish a relationship with an American agent or distributor
- establish your own physical distribution facility in the United States
- establish your own physical presence or manufacturing operation in the United States
- some variation of the above.

This decision is crucial because it will shape all tasks that follow. For example, let me briefly contrast two strategies from the above list:

1. Generate some sales in a new market and test the waters. This option is the least complicated and can be implemented quickly. Many U.K. companies can simply start generating U.S. leads by targeted Internet marketing and search engine optimization. At the outset, you’re trying to determine how much of a market exists in the U.S. for your product/service and how you can best reach your target market. As you gather more experience with the American market, your focus may rapidly shift to one of the other options.

2. Establish your own physical presence or manufacturing facility in the United States. This option is far more involved than testing the waters. You’ll need to determine the best physical location within the U.S., lease or buy a site, establish a U.S. entity, hire staff, comply with employment law and other legal requirements, and address local, state, and federal taxation issues.

The expense of implementing either strategy can be substantial and it certainly pays to get it right from the outset.

Identifying Your Target Market

What is your target market? Do you plan to sell: (i) directly to customers/clients, (ii) via an agent, (iii) through a distributor, (iv) in conjunction with a joint venture partner, or (v) through some other channel?

This decision also has far-reaching consequences. What works in the United Kingdom and the European Union may not necessarily work in the United States. Failure to identify your target market at the outset of your entry strategy can result in a substantial waste of time, effort, and money. Plus, if your effort gets off on the wrong foot and results are slow, enthusiasm for the American market will decline as frustration inevitably builds. There must be an analysis of how to reach your customer/client in the most effective, most efficient, and most profitable manner.

Protecting Your Brand and Intellectual Property Rights

Every U.K. company who enters the American market should take tangible steps to protect their brand and intellectual property rights. Often, this step is simply overlooked and can lead to some very negative outcomes. For example, failure to clarify how an American agent or distributor uses your brand or failure to clarify ownership of intellectual property rights (trademarks, trade names, domain names, etc.) can lead to nasty disputes. You can't effectively monetize your brand and intellectual property rights if these rights have been compromised or lost.

Contact me if you'd like to discuss how to monetize your American strategy.

Case Study

I've recently worked with a British consumer goods company who wanted to begin selling its products in the United States. Since a substantial portion of their goods were either manufactured or assembled in the Far East, they were interested in considering ports located on both the Pacific coast and the Northeastern coast for their initial distribution facility.

The company's primary focus was on ensuring efficient logistical systems and finding a pool of experienced customs house brokers who had substantial experience with consumer products and shipments. In addition, proximity to their target market was a significant factor.

We were able to immediately rule out several locations. For example, since the company had no immediate interest in accessing the South American countries, there was no reason to consider a distribution facility in Miami.

We also considered a range of business relationships (appointment of an agent or distributor, joint venture, establishing a distribution facility) for their initial entry. Ultimately, the company's principals decided to enter the U.S. on a very conservative basis and test the market for their consumer products on an incremental region-by-region basis.

Finally, we discussed the steps that would be necessary to register and protect their distinctive brands in the United States.

ISSUE TWO - WHERE TO ENTER THE AMERICAN MARKET?

To determine the best location for a U.S. branch or distribution point for your products, I highly recommend that you conduct due diligence on a number of issues:

1. Demographic research.

If you have not done so, I highly recommend that you conduct demographic research on the best U.S. markets for your products or services. I think it is crucial that your demographic research provide analysis of what prospective locations will minimize transportation costs and select the appropriate location of your logistic hub(s).

a. Once you choose an initial location for the U.S. business center, there will be inconvenience and expense in relocating it.

b. The U.S. market is vast and at this point you may not know what location represents the most advantageous place to base operations. For example, New York City, Chicago, Dallas, Atlanta, Denver, Los Angeles, Miami, and Seattle are the primary regional trade centers in the United States. For example, if you were interested in pursuing sales in the Southeast U.S., Caribbean, and South America, Miami would likely be the best choice and Seattle would be the last choice. For another example, if you were interested in pursuing sales in the Pacific Northwest, then Seattle or Denver would be the best choice and Miami would be the last choice.

c. It may be far more efficient for you to operate as an importer while conducting your due diligence of the U.S. market and refining your market entry strategy.

2. Get a decision-maker on the ground.

I highly recommend that your company appoint an experienced decision-maker to serve as the point person in the United States and serve as the principal individual to conduct the due diligence process. Many U.K. companies attempt to "outsource" too many of the crucial decisions about entering the U.S. market to attorneys, accountants, agents, or other American service providers.

An internal decision-maker will know and understand your company's business strategy, product lines, corporate culture, corporate objectives, competitive advantages and disadvantages, competitors, and other factors that are relevant/crucial to formulating your market entry strategy. Too often, "outsourcing" these tasks proves to be both ineffective and costly.

ISSUE THREE - AN INTERIM STEP: APPOINTING AN AGENT OR REPRESENTATIVE

For their initial entry into the U.S. market, many U.K. companies contract with an American agent or representative. For a company that is not yet ready to fully commit to the American market, appointing an agent is a low-risk market entry method.

By selling through an American agent or representative, U.S. employment law issues can be minimized since no employer-employee relationship has been created. Prior to commencing negotiations with a prospective agent, it is advisable to review your existing Agency Agreement.

You should pay special attention to several specific provisions in the Agency Agreement. When appointing an agent, clearly specify the applicable territory (i.e., State of Florida, Southeastern Region of the United States consisting of the following states: Florida, Georgia, Louisiana, South Carolina,, etc.). When defining sales territories, be careful - you may want to appoint several agents in the future and don't want to have overlapping and conflicting territories. Also, guard against giving a sales agent in more territory than they can reasonably cover. Start an agent in one territory and incrementally add markets as the agent proves that they are able to commit the necessary time, effort, and resources to be successful in additional territories.

The choice of law and choice of forum provisions should make it clear that the agency relationship shall be governed by U.K. law. In addition, the Agency Agreement should expressly state that no employer-employee, partnership, or joint venture relationship has been created by the Agency Agreement. Also, the Agreement should explicitly state that the agent is an independent contractor and thus the agent will be responsible for paying all applicable employment-related taxes. Finally, it's also important to address how the Agency Agreement can be terminated.

When the U.K. company selects a business location in a given state and hires employees of that U.S.-based entity, the U.S. entity will then be required to comply with state and federal employment laws and pay applicable employee-related taxes. At that time, I would encourage you to prepare employment agreements for management and key employees that comply with the employment laws of the specific state where the employee will be based.

Case Study

I've recently advised a professional services company based in the United Kingdom about establishing a series of U.S. representatives. The company's primary concerns were identifying the best representatives who could implement and fulfill their training programs, complying with applicable state laws that governed business relationships, creating a comprehensive U.S. strategy that could be extended from state-to-state, and establishing several "beachheads" within the American market that would facilitate orderly growth.

The company had done their homework, implemented several strategic recommendations, and was spot-on in their execution – setting the stage for a successful American launch of their services.

ISSUE FOUR - SELECTING A BUSINESS STRUCTURE - CORPORATION OR LLC?

If you plan to establish a new legal entity in the United States, it's most likely that you'll ultimately choose either a corporation or a limited liability company. In selecting the appropriate legal entity for your U.S. venture, I feel that it's vital to consider three basic issues:

1. What is the best ownership structure for the new legal entity in the United States?
2. What level of protection does the new legal entity provide?
3. How will federal income taxation impact the new legal entity?

These three basic issues are applicable regardless of the American state in which you form the new legal entity.

Which State?

I strongly recommend that the choice of state be driven by both practical and strategic considerations. I often discuss this issue with U.K. entrepreneurs who initially want to form a legal entity in Delaware and plan to locate their entity in another state (such as New York).

If you formed a corporation or limited liability company in Delaware, but located the entity's principal corporate office in New York City, you'll be required to comply with applicable filing requirements in Delaware and comparable New York filing requirements for doing business as a foreign company in New York. And you'll pay annual fees in both Delaware and New York. For most U.K. companies, I think this strategy results in unnecessary duplication without a compelling business reason.

In my opinion, the best course of action is usually to form the legal entity in the state where you intend to locate your principal corporate office and simplify your regulatory compliance obligations.

Corporation

A corporation is an independent legal entity that has four core characteristics:

1. Legal personality.
2. Limited liability.
3. Transferrable shares.
4. Centralized management under a board structure.

Delaware is generally considered as one of the most pro-business states in America. More than 50% of all U.S. publicly traded companies and 63% of the Fortune 500 are based in Delaware. The principal reasons for choosing Delaware as the state of incorporation are:

1. Delaware offers favorable tax treatment in the form of nominal franchise taxes and no state corporate income tax for companies that operate outside of Delaware.
2. Delaware's incorporation fees are nominal.
3. Delaware courts have been very pro-business and judicial decisions have a reputation for supporting companies incorporated in the Delaware.
4. There is no minimum capital requirement for a corporation incorporating in Delaware.
5. There is no sales tax, personal property tax, or intangible property tax on corporations incorporated in Delaware.
6. Delaware law enables a corporation to maintain its books and records outside of the state.

If you ultimately intend to take your new entity public, I highly recommend that you choose Delaware. If not, I think you should form a business entity in the state where your principal office or branch will be located.

Although you should certainly consider the formation of a corporation, there are numerous reasons to ultimately decide to form a limited liability company.

Limited Liability Company

Since I am more familiar with Florida limited liability company law, I will explain limited liability company issues in relation to Florida law. Please note that the limited liability company law for another state (i.e., Delaware or California) will have many similarities and some nuances depending upon the specific state. The application of federal law (such as income taxation issues) is uniform regardless of the state of the LLC formation.

1. Preferred Investment Vehicle for Foreign Nationals

A LLC is a hybrid business entity having characteristics of both a traditional corporation and partnership. The primary corporate characteristic is limited liability. The primary partnership characteristic is the availability of pass-through taxation (i.e., no double-taxation). This entity offers an attractive combination to savvy investors - some protection from creditors and lawsuits and freedom from federal and state taxation.

The limited liability company is the preferred investment vehicle for foreign nationals who want to invest in Florida real estate or establish a business presence in Florida. It's also the preferred

investment vehicle for passive investors who want the benefits of limited liability along with the tax advantages of partnership taxation.

2. Formation.

One or more persons may form a limited liability company in Florida. "Person" means either an individual or an entity. There are no restrictions or prohibitions in relation to the nationality of an individual. Therefore, a foreign individual or entity can be the sole member of a Florida LLC. As will be explained later, a foreign national can obtain an Individual Taxpayer Identification Number from the Internal Revenue Service for the purpose of paying United States Federal income tax.

The company's business activities can be extremely broad. Florida law defines a limited liability company's business as every trade, occupation, or profession and other lawful business, purpose, or activity, whether or not carried on for profit.

Unless its articles of organization or operating agreement provide otherwise, each Florida LLC has the same powers as an individual to do all things necessary to carry out its business and affairs. These powers include the power to acquire, own, hold, improve, use and otherwise deal with real or personal property wherever located, enter into contracts, borrow money, invest or reinvest its funds, and otherwise conduct its business.

3. Key Advantages.

The key advantages of a Florida limited liability company are the following:

a. **Taxation.** For United States Federal income tax purposes, an LLC is treated as a partnership unless the members elect to have the limited liability company taxed as a sole proprietor, corporation, or C corporation. Taxation as a partnership results in the pass-through of income and deductions attributed to each member which are then reported to the Internal Revenue Service on that owner's tax return.

Thus, the LLC itself is not taxed. Unlike a corporation, there is no double taxation (taxation on the entity's income prior to any dividends or distributions to the shareholders and then taxation of the dividends or distributions once received as income by the shareholders).

b. **Limited liability.** A Florida limited liability company's members are protected from some liability for the acts and debts of the company in the same manner than a corporation's shareholders are shielded from personal liability for the corporation's acts and debts.

c. **The LLC has far fewer formalities than a corporation.** There is much less administrative paperwork and record maintenance requirements than a traditional corporation.

d. **The entity is an ideal investment for passive investment owners who want to maintain flexibility and convenience, shield themselves from personal liability, and avoid double taxation.**

e. Attractive investment vehicle for foreign investors. A LLC has a distinct advantage over an S-corporation since an S-corporation can only have 100 shareholders and those shareholders must be United States citizens and not corporations.

4. Key Disadvantages.

You should be aware of the following potential disadvantages of forming a Florida limited liability company:

a. The structure of the entity and the roles of its principals may be unfamiliar. For example, a limited liability company is owned by its members and managed by a manager or managing member. A corporation is owned by its shareholders and is governed by a board of directors and officers.

b. Since Florida law allows a LLC to operate with either a written or oral operating agreement, members who conduct business without a written operating agreement will likely encounter many problems.

c. It may be more challenging to raise investment capital for a new company since some investors may be more comfortable with more traditional corporate structures.

d. Creditors will often require members of new entities to personally guarantee the limited liability company's loans. Thus, the members will be personally liable for the loan obligations of the limited liability company.

e. The principals of a Florida LLC use many different titles - member, manager, or managing member. For this reason, it may be difficult to determine who actually has the requisite legal authority to contractually bind the limited liability company.

5. LLC Formation Process.

In order to form a Florida limited liability company, articles of organization must be filed with the Department of State by one or more members or authorized representatives of the limited liability company. The articles of organization are the initial, amended, and restated articles of organization of a LLC.

The articles of organization are filed with the Florida Secretary of State Division of Corporations and must specify the name of the limited liability company, principal and mailing addresses, Registered Agent information, Manager(s) or Managing Member(s) and a statement concerning the effective date of the limited liability company.

The Department of State's filing of the articles of organization is conclusive proof that all conditions precedent to organization have been satisfied except in a proceeding by the state to cancel or revoke the organization or to administratively dissolve the organization.

6. Operating Agreement.

The operating agreement of a limited liability company is critically important to its success since it determines, defines and allocates the rights and obligations of the members. Although Florida law allows much flexibility in drafting an operating agreement, the document must be carefully drafted to ensure that the expectations of the prospective members are met. The operating agreement is not filed with the State of Florida Division of Corporations and is typically maintained as a private document governing the relationship between the members, managers, and managing members.

The operating agreement is comprised of written or oral provisions that are adopted for the management and regulation of the affairs of the company and that set forth the relationships of the members, managers, or managing members and the LLC. The members of a company may enter into an operating agreement before, after, or at the time the articles of organization are filed, and the operating agreement takes effect on the date of the formation of the LLC or on any other date provided in the operating agreement.

7. Avoiding Liability

Most people work very hard to acquire and build assets such as real estate and businesses. Due to the litigious nature of our society, it is important to pro-actively protect these assets. Except as provided in Chapter 608, Florida Statutes, the members, managers and managing members of a Florida limited liability company are not liable, solely by reason of being a member or serving as a manager or managing member, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company. The member's, managing member's, manager's , or other person's duties and liabilities may be expanded or restricted by provisions in the company's articles of organization or operating agreement.

Asset protection is an important objective when forming a LLC.

It is crucial that you take specific actions to safeguard your assets and business such as:

- a. Purchase as much insurance as you can afford to protect all your real estate and business assets. Maintain written proof of insurance showing that your company is a named insured. If you transfer real property to your company, but fail to obtain insurance naming the LLC as an insured, you can expect the insurance company to deny coverage.
- b. Hold title to your real estate assets in the name of your limited liability company. If a lawsuit occurs which involves a real estate asset titled in the company's name, the LLC will be the defendant rather than you as an individual. This concept is crucial to real estate asset protection. If real estate is titled in your individual name, all of your personal assets are at risk. To gain the protection provided by your limited liability company, you must actually transfer title to the real

estate to the company by conveying the real estate and recording the deed in the county where the real estate is located.

It is a complete waste of time, effort and money to form a Florida LLC and then fail to transfer the real estate into the limited liability company's name. Although this problem is quite common, it can easily be corrected.

c. Manage your assets in a professional and reasonable manner. Although a LLC can reduce your exposure to risk, it cannot eliminate it entirely.

For example, assume that you properly form a Florida limited liability company and hold a real estate asset in the name of your limited liability company. If you negligently install a gas barbecue grill and the grill explodes injuring or killing one of your tenants, you will likely be a defendant in a lawsuit. To minimize your exposure to these types of lawsuits, manage your assets in a professional and reasonable manner by reducing or eliminating those situations that place you at risk. For example, instead of personally building a multi-level deck and stairs, hire a licensed contractor to perform this task on your behalf.

8. Costs of Forming a Florida LLC.

Compared to other states, the filing and maintenance fees for Florida LLCs are relatively inexpensive. The filing fee for a new Florida LLC is \$100.00 and the Registered Agent fee is \$25.00. Maintenance of the limited liability company requires filing an Annual Report (& Supplemental Fee) of \$138.75 each year. By contrast, the initial filing fees for a limited liability company in Illinois and Massachusetts are \$675 and \$512 respectively.

Case Study

I recently advised an English equipment supply company that wanted to expand into the U.S. market and purchase a distribution facility in Florida. They considered both a corporation and a limited liability company. After obtaining tax advice from both their U.K. accountant and an American accountant, they decided to form a Florida limited liability company and take title to the real property in the name of the LLC.

Due to time constraints related to the closing date, we expedited formation of the LLC, finalized the LLC's Operating Agreement, and worked with the Closing Agent to ensure a smooth closing on the real property – all within a two week period.

ISSUE FIVE - CONFRONTING THE TAX MEN

Although Warren Buffett and several other high-profile American billionaires have recently proclaimed their staunch desire to pay higher taxes to the Internal Revenue Service, I've yet to work with a single U.K. company who wanted to join their crusade. Since all of my previous

clients have expressed their distinct desire to minimize their tax obligations, let me touch on several relevant points.

Federal Taxation

The United States has one of the highest corporate tax rates in the world, but also has a wide range of subsidies, shelters, and tax breaks. The federal tax code is extremely long and extremely complicated. If you're concerned about your bottom line, the best recommendation I can make is to get professional advice. Here are a few basic facts that you'll need to know:

The federal tax rates on corporate taxable income vary from 15% to 35%.

“Short-term capital gains” are defined as investments held for a year or less before being sold. Short-term capital gains are taxed at the investor's ordinary income tax rate (10% to 35%).

“Long-term capital gains” are defined as those investments held for more than a year before being sold. Long-term capital gains are taxed at a lower rate (0% to 15%) than short-term capital gain rates.

Business Tax Index 2011

What U.S. states have the best and worst taxation systems?

The Small Business & Entrepreneurship Council's “Business Tax Index 2011” pulls together 18 different tax measures, and combines those into one tax score that allows the 50 states and District of Columbia to be compared. Among the taxes included are income, capital gains, property, death/inheritance, unemployment, and various consumption-based taxes, including state gas and diesel levies.

Raymond J. Keating, chief economist of the SBE Council and author of the Index said: “State and local taxes affect the decisions made by entrepreneurs, investors, businesses and individuals. Several states in recent years have hiked taxes in response to excessive government spending, and declining revenues in a down economy. In high-tax states, elected officials have refused to cut spending or slow its growth. The implications for entrepreneurship, small businesses, competitiveness, investment and employment are significant.”

According to the “Business Tax Index 2011,” the 15 best tax systems are: 1) South Dakota, 2) Texas, 3) Nevada, 4) Wyoming, 5) Washington, 6) Florida, 7) Alabama, 8) Alaska, 9) Ohio, 10) Colorado, 11) South Carolina, 12) Mississippi, 13) Oklahoma, 14) Virginia, and 15) Missouri.

The 15 worst state tax systems are: 37) Illinois, 38) North Carolina, 39) Nebraska, 40) Connecticut, 41) Oregon, 42) Rhode Island, 43) Hawaii, 44) Vermont, 45) California, 46) Maine, 47) Iowa, 48) New York, 49) New Jersey, 50) Minnesota, and 51) District of Columbia.

The Business Tax Index 2011 can be found at <http://www.sbecouncil.org/businessindex2011/>

Get Professional Advice

I strongly encourage that you retain a certified public accountant to set-up your accounting program and taxation issues. Federal income tax laws and regulations are constantly changing. You'll need someone who handles both of these issues on a daily basis and has contacts within the federal, state, and local government offices.

Rather than explain complex accounting principles and tax issues, let me suggest that you ask the following questions during your initial conference with an accountant:

1. What is the best tax structure for the type of business you are forming in the U.S.?
2. What tax benefits or breaks are available at the state level?
3. What are the important filing requirements and dates?
4. What steps can be taken to minimize the entity's federal income tax obligations?
5. What are the rules for depreciation of equipment and capital assets?
6. What costs or expenses are deductible?
7. What are the tax consequences to foreign owners of the U.S. entity?

Get Organized

It goes without saying, but I'll say it nonetheless – get organized on Day One. Upon the recommendation of my accountant, I use Quickbooks (by Intuit) to keep track of business receipts, disbursements, and accounts. Although I'm an attorney and understand legal principles better than most, I simply cannot remain current on the day-to-day changes in accounting and taxation.

Case Study

One of my principal recommendations to U.K. clients interested in establishing an entity in the United States is that they first have a discussion with a certified public accountant who can advise them on specific taxation issues. I routinely refer these clients to an American accountant who works with start-up entities on a daily basis. Then, either the client or their U.K.-based accountant can initiate contact. The vast majority of accounting issues can be addressed via email, telephone, and Skype communications.

Periodically, I refer clients to American certified public accountants who have experience working with English business clients.

ISSUE SIX - OPENING A U.S. BANK ACCOUNT

The easiest way to open a new account in the United States is to personally visit a bank in the city where the corporation will have a presence.

A foreign individual cannot open an account online due to the Homeland Security requirements.

In order to open a new account over the telephone, you will need to (i) have the Employer Identification Number (“EIN”) issued for the corporation/LLC by the Internal Revenue Service, and (ii) have a Social Security Number/Individual Taxpayer Identification Number (“SSN/ITIN”) for one of the officers/directors of the corporation/LLC who will open the account. The EIN and SSN/ITIN numbers are required for compliance with the Homeland Security laws.

If one of your officers/directors has a SSN/ITIN, then you can proceed as soon as you have the EIN. If not, an officer/director will either need to obtain a SSN/ITIN or make a personal visit to a U.S. bank.

Obtaining a Federal Employer Identification Number

The following information is from the Internal Revenue Service website on how to obtain an Employer Identification Number.

If you've either established a new corporation in the U.S. (either Delaware or New York) or registered as a "foreign entity" doing business in New York, the address of your Registered Agent can be used in completing the SS-4 Form.

An Employer Identification Number (EIN), also known as a federal tax identification number, identifies a business entity. Generally, all businesses need a federal tax identification number. An EIN is a nine-digit number that the Internal Revenue Service assigns to a business. The IRS uses the number to identify taxpayers that are required to file various business tax returns. Employers, sole proprietors, corporations, partnerships, nonprofit organizations, trusts, estates of decedents, government agencies, certain individuals and other business entities use EINs. It is against the law to use an EIN for anything other than business use or to use it as a Social Security Number. You may not transfer your EIN if you sell or otherwise transfer your business. The new business owner and operator will need to apply for a new EIN.

Obtaining an Individual Taxpayer Identification Number

A foreign individual who is not authorized to work in the United States is ineligible to obtain a Social Security Number. Instead, the foreign individual can apply for an Individual Taxpayer Identification Number (“ITIN”).

What is an ITIN?

An ITIN is a tax processing number issued by the Internal Revenue Service. It is a nine-digit number that always begins with the number 9 and has a 7 or 8 in the fourth digit, example 9XX-7X-XXXX. IRS issues ITINs to individuals who are required to have a U.S. taxpayer identification number but who do not have, and are not eligible to obtain a Social Security Number (SSN) from the Social Security Administration (SSA).

ITINs are issued regardless of immigration status because both resident and nonresident aliens may have U.S. tax return and payment responsibilities under the Internal Revenue Code. Individuals must have a filing requirement and file a valid federal income tax return to receive an ITIN, unless they meet an exception.

What is an ITIN used for?

ITINs are for federal tax reporting only, and are not intended to serve any other purpose. An ITIN does not authorize work in the U.S. or provide eligibility for Social Security benefits or the Earned Income Tax Credit. ITINs are not valid identification outside the tax system.

IRS issues ITINs to help individuals comply with the U.S. tax laws, and to provide a means to efficiently process and account for tax returns and payments for those not eligible for Social Security Numbers.

Who needs an ITIN?

IRS issues ITINs to foreign nationals and others who have federal tax reporting or filing requirements and do not qualify for SSNs. A non-resident alien individual not eligible for a SSN, who is required to file a U.S. tax return only to claim a refund of tax under the provisions of a U.S. tax treaty, needs an ITIN.

Examples of individuals who need ITINs include:

1. Non-resident alien filing a U.S. tax return and not eligible for a SSN
2. U.S. resident alien (based on days present in the United States) filing a U.S. tax return and not eligible for a SSN
3. Dependent or spouse of a U.S. citizen/resident alien
4. Dependent or spouse of a non-resident alien visa holder

How do I know if I need an ITIN?

If you do not have a SSN and are not eligible to obtain a SSN, but you have a requirement to furnish a federal tax identification number or file a federal income tax return, you must apply for an ITIN.

ISSUE SEVEN - DEALING WITH GOVERNMENT RED TAPE

At some point, it's inevitable that you'll be forced to cut through government red tape. One of the most epic challenges about doing business in the United States is the confusing layers of regulation and bureaucracy that must be navigated. Here are several useful pointers.

Get All the Facts

Most bureaucratic legal problems are multifaceted. The appropriate solution will depend on analysis of all relevant facts. Often, it's difficult for both the attorney and the client to separate the relevant from the irrelevant – that's why a frank and open discussion is important.

It may be cliché, but the first step to solving the problem is recognizing that you've got a problem. The second step is assembling all of the relevant facts so that there will be a sound basis for your legal analysis. Let's face facts, your failure to identify a crucial fact can cripple your case. To uncover the relevant facts, ask informed questions and dig to get reliable answers.

Determine What Legal Standard Applies

When a legal problem strikes, it triggers an emotional response in most people. Rather than attempting to identify the applicable legal standard, they immediately focus on the injustice of their situation. Although the injustice of any given situation may be important, you cannot properly analyze the problem without first identifying the applicable legal standard.

The legal standard may be a federal law, state statute, local code, administrative rule, case law, or (more likely) a combination thereof. I highly recommend that you read and re-read the legal standard several times – you'll be amazed how people gloss over the most critical aspects of the legal standard and base their argument on everything but the most critical aspects. You cannot afford to make that mistake.

Here's a simple example of this principle at work. If you've been cited by your local Code Enforcement official for an overgrown lawn, your first move should be to read the specific Code provision that defines "overgrown grass." Does "overgrown" mean grass that is eight inches tall, 12 inches tall, or 24 inches tall? If the Code provision prohibits grass that is 12 inches or taller and your lawn is only 10 inches tall, then you can present a great defense that you have not violated the Code section.

Consider the Range Of Options Available

I've found that people often want to select a course of action without ever thinking through the range of options available to resolve the problem. Your ability to select the best option and achieve an advantageous outcome will be dramatically increased when there's a range of options on the table. While there are many ways to solve a legal problem, recognize that some may be effective and others may not.

Each potential option should be evaluated on whether there's a sound legal basis for the strategy, who will likely oppose your strategy and why, the likelihood that the strategy will actually resolve the problem, whether the strategy could cause unintended consequences, and the expenses associated with the strategy.

Select a Strategy and Take Action

If you've assembled all of the relevant facts, determined what legal standard applies, and considered the range of options, then you're in a good position to select a strategy and take action.

If you either fail to form a strategy or fail to implement it, your outcome will remain in jeopardy. It's been my experience that very few legal problems resolve themselves and inaction frequently makes matters worse.

During the course of implementing your strategy, monitor how the strategy is working and whether a course change is necessary. It's a mistake to just charge ahead with blinders. Taking a "Damn the torpedoes" attitude will get you sunk. Remain nimble and flexible – you never know when an opportunity to achieve a more advantageous result may materialize.

Does your company need advice on how to navigate government red tape in the United States? I'd be happy to help.

ISSUE EIGHT - THE DANGER OF THE "DOING BUSINESS IN" STANDARD

Case Study

I recently worked with a UK-based company that designs and manufactures medical equipment. The company has a U.S. Sales Office located in a Midwestern state and employs a Sales Administrator and Sales Agents in the United States.

In early 2011, a representative of the State of California State Board of Equalization ("BOE") advised the U.K. company that it was required to comply with Sales and Use Tax registration requirements since its installers traveled into California to install equipment. Further, the U.K. company's quotations included a specific statement that the payment of all taxes was the responsibility of the end user.

The U.K. company requested advice on several issues to ensure compliance with California law and avoid getting bogged down in government red tape.

Issue One: What is the difference between Sales Tax and Use Tax under California law?

Answer: The California Sales Tax is imposed on all California retailers. It applies to all retail sales of tangible personal property in the state. Retailers making sales in the State of California are required to remit the Sales Tax to the Board of Equalization.

Retailers are required to pay and report Sales Taxes to the Board of Equalization and they have the option of collecting Sales Tax reimbursement from their customers. Almost all retailers utilize this option. Whether or not a retailer collects the Sales Tax, the retailer is liable to remit the tax due.

The California Use Tax is imposed on consumers of tangible personal property that is used, consumed, or stored in this state. Use Tax applies to purchases from out-of-state vendors that are not required to collect tax on their sales. Use Tax also applies to most leases of tangible personal property.

The state Sales Tax and Use Tax are "mutually exclusive," which means either Sales Tax or Use Tax applies to a single transaction, but not both.

Issue Two: Was the U.K. company required to collect Sales Tax on the sale of its equipment to customers located in California?

Answer: Yes. Pursuant to Section 6203(c)(1)(2), the U.K. company is a "retailer engaged in business" in California and is therefore required to collect Sales Tax on sales of its equipment to customers located in California.

Section 6203(c)(1), California Code states as follows:

(c) "Retailer engaged in business in this state" as used in this section and Section 6202 means and includes any of the following:

(2) Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.

Analysis:

1. Imposition of the Sales Tax is addressed in Section 6203, California Code, which is included in its entirety in the References section of this Memo. None of the exemptions referenced in Section 6203 (i.e., Section 6292, 6293, 6271 and 6351) are applicable to the U.K. company.
2. The primary liability for the tax is upon the purchaser. Consequently, when a retailer pays an amount of tax to the state in satisfaction of the liability imposed on him by Section 6203, the law implies an obligation on the part of the purchaser to reimburse the retailer for the amount so paid.
3. According to the BOE's Frequently Asked Questions, some out-of-state companies with no physical presence voluntarily register with the Board of Equalization as a courtesy to their California customers. They collect the California Use Tax from their California customers. This relieves California customers of their Use Tax liability, if they retain proof of their payment of

Use Tax to the vendor. Once registered with the Board of Equalization the out-of-state company is legally obligated to collect the Use Tax.

4. I recommended that the U.K. company invoice all California customers for Sales Tax as a matter of course in all future transactions. Although I do not personally agree with the expansive view of “doing business in California” that is embodied in the statutory provision, I recognize it is the current law and that the State of California is desperately attempting to maximize collection of all applicable taxes due to the state’s fiscally irresponsible policies.

5. Finally, although I think that the U.K. company could eliminate its “doing business in California” status by terminating those actions specified in Section 6203(c)(2) (i.e., installing equipment for California customers), I recognize that doing so would probably put the U.K. company at a competitive disadvantage with its California customers. Collecting the Sales Tax appears to me to be the most immediate, efficient, and viable solution under current law.

ISSUE NINE - INTERNET SALES TAX

Internet sales tax is a rapidly evolving issue that could have far-reaching ramifications to your business.

Issue: Is a United Kingdom internet retailer required to charge and collect retail sales tax on internet sales to American consumers?

Answer: Under current U.S. law, it depends on whether the United Kingdom internet retailer has a “physical presence” in the American state where the consumer lives.

For example, if a U.K. internet retailer maintains stores in Florida and Texas (both states with state sales taxes), the retailer would be obligated to charge and collect state sales tax on internet purchases by both Florida and Texas consumers. If the U.K. internet retailer had no “physical presence” in either state, they would not be obligated to charge and collect state sales tax on internet purchases by either Florida or Texas consumers.

There are several legislative initiatives underway to close this “loophole” and it is likely that cash-hungry governments could dramatically change existing law in the very near future.

In addition, several states have recently passed creative laws to force internet retailers to charge and collect sales tax. Understandably, these laws are currently being challenged in the court systems.

Legal Analysis

In a 1992 U.S. Supreme Court decision (*Quill v. North Dakota*), the court ruled that a mail order merchant could not be forced to charge and collect sales taxes if the merchant did not have a “physical presence” in the state where the consumer lived. Absent a physical presence or nexus with the state, the merchant had no obligation to collect that state’s sales tax. The rationale of

this decision is also applicable to internet sales. Thus, a United Kingdom internet retailer is not obligated to charge or collect sales tax on purchases made by American consumers unless the U.K. internet retailer has established a physical presence in one or more American states.

A “physical presence” generally means a bricks and mortar store, office, warehouse, or distribution facility.

Although a U.K. internet retailer may not be obligated by current law to charge and collect a state sales tax, it does not mean that a consumer is not obligated to pay the sales tax. Technically, a consumer who resides in a state that collects sales tax is obligated to pay the tax on internet purchases even when the merchant does not collect the sales tax. When the consumer is obligated to pay the tax directly to the state, it is characterized as a “use” tax rather than a sales tax. Recently, many tax-strapped states have significantly increased their efforts to collect use tax on internet purchases.

Policy Considerations

Both federal and state governments in the United States are exploring creative ways to generate more tax revenues. Tax advocates argue that new laws won’t impose a new tax or raise rates, but would simply make it more efficient to collect tax under existing law.

New York passed a law in 2008 (called the “Amazon law” after the internet retail giant) which redefined what it meant to have a “physical presence” in the state. Under the New York law, a company that has an affiliate relationship with another business in New York would be obligated to charge and collect sales tax on internet purchases. Thus, a U.K. company’s affiliate relationship with a website owner based in New York would require the U.K. company to charge and collect New York sales tax under this law. Not surprisingly, Amazon has challenged the law and the case is currently in the court system.

Colorado recently passed legislation requiring out-of-state retailers that don’t collect sales tax to provide the state government with a list of its purchasers and purchase details so that tax collectors could seek payment directly from the purchasers. This law is also being challenged in court and a decision is expected soon.

Advocates for the imposition of internet sales tax also argue that the internet sales tax “loophole” is unfair to bricks and mortar retailers who face a competitive disadvantage with internet retailers who do not charge and collect sales tax.

On the federal level, a bill was recently introduced in Congress called the Mainstreet Fairness Act to put online retailers on equal footing with bricks and mortar retailers. Soon after introduction of this Act, a resolution was introduced to maintain the status quo and included the language: “Congress should not impose any new burdensome or unfair tax collecting

requirements on small online businesses, which would ultimately hurt the economy and consumers.”

What to Anticipate in the Future

In my opinion, the Obama administration and their Democratic allies in Congress may push legislation which mandates the collection of state sales taxes on internet purchases. There’s also reason to worry that the Obama administration may recommend a national internet sales tax in addition to instituting a system for collecting state internet sales tax.

On the state level, the current New York and Colorado cases mentioned above are significant. If either law is upheld, you can expect other states to immediately implement similar laws. If both laws are rejected by the courts, then you can expect the states to enact other creative laws requiring internet retailers to charge and collect sales tax.

As an attorney who advises clients on technology issues, the best advice that I can offer to United Kingdom companies that sell online to American consumers is to:

1. Understand the application of current laws to your internet business;
2. Be wary of the state laws that seek to expand the physical presence definition and circumvent the 1992 U.S. Supreme Court decision; and
3. Closely monitor future developments, especially state court decisions interpreting statutes that rely on the existence of an affiliate relationship.

Case Study

Internet sales tax is a hot button issue. As you can imagine, every company entering the U.S. market from abroad wants to comply with state sales tax requirements. Unfortunately, the regulatory scheme is changing rapidly as more state governments look for creative ways to force all internet companies to collect state sales taxes.

I’ve recently had an in-depth consultation with an Asian technology entrepreneur whose company streamed television programming to U.S. customers. Since the entrepreneur’s company operated entirely from their home country and had no physical presence in the United States (no workers, warehouses or offices), there was a minimal likelihood that they would run afoul of a state’s statutory nexus requirement.

However, I alerted the entrepreneur of an important emerging trend in state law. Recently enacted New York and California laws have significantly expanded the definition of what actions require an out-of-state internet retailer to collect state sales taxes. These laws are being challenged in the court. These newly-enacted laws target large internet retailers (like Amazon) who market through a series of affiliates that receive advertising commissions. If the laws are

upheld, internet retailers both large and small will be forced to evaluate whether their business model and marketing practices require compliance with state sales tax obligations.

ISSUE TEN - “AMERICANIZING” CONTRACTUAL TERMS AND CONDITIONS

I often review contracts (including website Terms and Conditions) on behalf of U.K. companies that want to enter the American market and ensure that their contracts provide appropriate protection. It’s been my experience that my U.K. client’s existing contracts are typically sound and usually only require minimal tweaking. A comprehensive redrafting of the contract has seldom been necessary.

The most commonly added/revised contract provisions are:

1. Pre-trial mediation.

I highly recommend inclusion of this practical provision in all contracts to require the parties to mediate a dispute before a lawsuit can ever be filed. Since many disputes can be resolved during a mediation conference, it makes tremendous sense to attempt this process before people dig in their heels and incur substantial litigation expenses.

2. Choice of law.

Does your contract specify what law governs the agreement? If not, your adversary in a dispute may argue that the contract is governed by the law of an unfriendly jurisdiction.

3. Interest to accrue on past due accounts.

Without an appropriate contractual provision, you won’t be able to collect interest on a past due account.

4. Termination of the agreement.

Does the contract include a provision that terminates the business relationship in a manner that won’t damage your company?

5. Collection costs (including attorney’s fees) in the event of a dispute.

Without an appropriate contractual provision, you won’t have a sound basis for demanding collection costs, including attorney’s fees. In addition, an attorney’s fees provision often serves as a deterrent to reckless would-be litigants.

6. Confidentiality and non-compete provisions.

Does your contract contain appropriate protections for sensitive confidential information? Have you structured a contract provisions that prevents a current business partner from competing against you in the future?

7. Intellectual property rights.

What provisions are in place to protect your intellectual property rights?

8. Branding issues.

It's easy to overlook this one. Does your contract specify who owns your brands and who is authorized to use your brands in the United States?

For U.K. companies that are considering the appointment of an American agent or distributor, it's also important to clarify the nature of the relationship to (i) define the scope of the relationship and (ii) ensure that an employer-employee relationship is not created.

Have your company's contract Terms and Conditions been "Americanized?"

Case Study

I recently revised a U.K. company's standard Terms and Conditions. The company's American sales were steadily rising and now represented an important source of revenue. The company had not yet established a presence in the United States, but was contemplating the appointment of an American distributor and had already held some serious discussions with several prospects. Before formalizing the business relationship with the prospective distributor, the U.K. company requested a review of their standard Terms and Conditions and recommended revisions.

The company's existing Terms and Conditions had been primarily drafted for the U.K. and EU markets. After review the Terms and Conditions, I made several observations. First, the original drafter of the Terms and Conditions had done a solid job and minimal revisions were necessary. Second, the existing Terms and Conditions made the company vulnerable in two basic ways which were easily addressed. One, the contractual provisions did not expedite payment and collections of past due accounts. Two, the contractual provisions did not minimize the U.K. company's exposure to U.S. lawsuits.

After reviewing the document and discussing options with the client, we added revisions that substantially reduced the company's exposure. The entire review and revision process required less than five hours of attorney time.

ISSUING ELEVEN - MINIMIZING EXPOSURE TO U.S. LAWSUITS

For almost every U.K. client that I counsel, this is a biggie. America has a reputation for being a litigious society – unfortunately this reputation is well-earned. Although you can never completely pre-empt a potential American plaintiff from filing a lawsuit against you, there are several distinct decisions that you can take to minimize their opportunities to do so.

First, include a pre-suit mediation provision in your contracts and Terms and Conditions that requires you and the potential plaintiff to mediate the dispute as a contractual precondition to

them ever filing a lawsuit. Most disputes can be solved at pre-trial mediation without the expense and anguish that goes with defending a lawsuit.

Second, include an appropriate choice of law and choice of forum provision in your contracts and Terms and Conditions that will require a lawsuit to be litigated in the United Kingdom courts, not an American court.

Third, inclusion of an appropriate attorney's fees provision in your contract will serve as a substantial deterrent to frivolous lawsuits.

Fourth, when a dispute arises or a relationship begins to deteriorate, take charge and get proactive. These situations never solve themselves; they only get worse due to inattention. Obtain legal advice and take the action necessary to minimize your potential exposure.

Have you taken the necessary steps to limit your exposure to American lawsuits?

Case Study I

It's inevitable that your U.K. company will have a collection case against an American customer who fails to pay for goods or services. When this situation arises, I recommend that the client do the following:

First, I ask that the client assemble the relevant documents, including the contract, invoices, correspondence between the client and their customer, payment records, and other documentation that may affect the case.

Second, the client and I discuss the case, the available options, and the appropriate strategy for getting a resolution. In collection cases, the client's decisions will largely depend upon the likelihood of a recovery and the anticipated cost of proceeding. Since it makes little sense to throw good money after bad, the best decision may be to take no action. If the best decision is to take action, I explain the steps that will be necessary to initiate a lawsuit, the applicable procedure, and the complications that will likely be encountered along the way.

Regardless of the outcome of the collection case, I recommend several specific actions that the client can take to reduce their vulnerability to future problem customers. Typically, these include revisions to the client's contracts (i.e., provisions concerning pre-suit mediation, interest, collection costs, choice of law, etc.) and future proactive steps in the event that a business relationship begins to deteriorate.

Case Study II

I advised a British software developer who had entered into a License Agreement with a major American hardware company. The License Agreement contained a prohibition against the U.K. developer selling its products to specifically identified competitors of the American hardware company.

Now, several years later, the prohibition represented a monumental problem - it threatened to block the U.K. developer's prospective sale of its entire company to one of the American hardware company's named competitors.

After analyzing the documents, I advised my client that although the License Agreement did prohibit the sale of products to certain competitors, the License Agreement did not prohibit the U.K. developer from the *sale or merger* of its business to another company (including the American hardware company's competitors) with one caveat. The specific caveat was that the U.K. developer must first provide the U.S. hardware company with a written notice and written summary of the proposed sale, and then provide twenty (20) days for the American hardware company to make an offer to purchase the U.K. developer.

My client provided the American hardware company with the written notice and written summary in accordance with their contractual obligations and then proceeded to consider the proposed sale to the competitor.

ISSUE TWELVE - IMMIGRATION AND VISA ISSUES

If you plan to send employees to the United States, you'll need to ensure that immigration and visa issues are properly addressed. Here are the basics.

What is a Visa?

A visa is issued by a U.S. Embassy or Consulate. A visa entitles the holder to travel to the United States and apply for admission; it does not guarantee entry. An immigration inspector at the port of entry determines the visa holder's eligibility for admission into the United States.

What types of Visas are Available?

- **Non-immigrant:** A Non-immigrant visa is required by anyone seeking temporary admission into the United States who is not eligible to travel visa free under the Visa Waiver Program, or is exempt from the visa requirement. Non-immigrant visas cover visits for tourism, business, work or study.
- **Immigrant:** An immigrant visa is required by anyone seeking to take up indefinite or permanent residence in the United States. Upon entry into the United States, an immigrant visa holder is processed for a Permanent Resident Card (PRC) commonly known as a green card.

Non-Immigrant Visas

What is the Visa Waiver Program?

Citizens of certain countries (including the United Kingdom) may be eligible to travel to the United States visa free under the Visa Waiver Program if they are traveling for business, pleasure or are in transit, and they meet all of the following requirements:

1. The U.K. citizen is traveling on a valid, full validity, machine readable or e-passport with an electronic chip. The date on which your passport was issued is an important factor in determining whether your passport will be acceptable for visa-free travel. United Kingdom Passport holders please note: A passport indicating that the bearer is a British Subject, British Dependent Territories Citizen, British Overseas Citizen, British National (Overseas) Citizen, or British Protected Person does not qualify for travel without a visa. A passport which states holder has Right of Abode or indefinite leave to remain in the United Kingdom does not qualify for visa free travel;

2. The U.K. citizen is traveling for business, pleasure or transit for less than 90 days. Visa-free travel does not include those who plan to study, work or remain in the United States for more than 90 days.

3. The U.K. citizen is not ineligible to receive a visa under U.S. visa law. Travelers who have been arrested, even if the arrest did not result in a criminal conviction, those with criminal records, (the Rehabilitation of Offenders Act does not apply to U.S. visa law), certain serious communicable illnesses, those who have been refused admission into, or have been deported from, the United States, or have previously overstayed on the Visa Waiver Program are not eligible to travel visa free under the Visa Waiver Program.

Plus, there are additional administrative requirements depending upon whether the U.K. citizen is entering the United States by air, sea, or land.

Business Visitor (B-1) Visa

In general, travelers seeking admission into the United States to conduct business require valid B-1 visas. That is unless they are eligible to travel visa free under the Visa Waiver Program, or they are a national of a country which has an agreement with the United States allowing their citizens to travel to the United States without B-1 visas.

The definition of "business" in this instance is limited, and does not generally allow for gainful employment or productive activity such as operating a business or consultancy work. Specifically, in the applicable U.S. law the term "business" is limited to the negotiation of contracts, consultation with business associates, litigation, and participation in scientific, educational, professional or business conventions, conferences or seminars and other legitimate activities of a commercial or professional nature. It does not include local employment or labor for hire.

If you are not eligible to travel visa free, or are not a national of a country where B-1 visa requirements are waived, you are required to apply for a visa before traveling.

Immigrant Visas

An immigrant visa is required of anyone who wishes to enter the United States to reside there permanently, whether or not that person plans to seek employment in the United States. U.S. immigration law provides for the issuance of immigrant visas in four general categories: immediate relative, family based, employment based, and the Diversity Immigrant Visa Program, known as the "green card" lottery.

There are three steps involved in applying for an immigrant visa:

Step 1: Filing an immigrant visa petition with the U.S. Citizenship and Immigration Services.

Step 2: The processing of the immigrant visa either by the National Visa Center in New Hampshire or the Immigrant Visa Unit at the Embassy in London.

Step 3: The immigrant visa interview and medical examination.

Are Investor Visas available?

Investors may qualify for employment creation immigrant visas if they seek to enter the United States for the purpose of establishing a new commercial enterprise. The investment must provide at least 10 full-time positions for U.S. citizens, legal permanent residents of the United States, or other immigrants with employment authorization. The minimum capital required in most cases is one million dollars; the requirement is less in certain poverty areas.

WHAT WOULD YOU DO DIFFERENTLY IF YOU COULD START ALL OVER AGAIN?

At the beginning of this eBook, I included insights from several of my U.K. clients who had real world experience in entering the U.K. market. It's appropriate to close with one of the most important questions I asked the managers of these companies:

Question: Based on your experience, what would you do differently if you could start all over again?

Industrial Equipment Supplier

Response: "I think we did it right. We started with a small office unit to check if it was possible to market our product and make money. After about a year, we decided to open an office/warehouse and put in some stock. All of that is now working well and we are making profits. So don't go in feet first, do some groundwork before investing seriously."

Professional Training Services Company

Response: "Spend more time up front on market research to look for similar business offerings which could have provided an example/template to meet our objectives – that could have significantly reduced our final legal bill."

Pharmaceutical Equipment Supplier

Response: “More research and planning prior to decision-making.”

Fuel Service and Safety Specialist

Response: “A proactive strategy whereby we research the marketplace in more depth and identify a list of potential distributors that we meet with before making our decision.”

Richard Northcote, North American Market Advisor UKTI North West England

Response:

“a. In making their arrangements to enter the U.S. market, some are extremely thorough though more often than not, the majority tend to either totally ignore and or overlook the legal “differences” in operating in the U.S.

b. Better advice and choice in choosing the correct type of corporation. Incorporating the wrong type of corporation and at times in the wrong jurisdiction too, has come back to haunt quite a number of U.K. companies.

c. From the outset, seek advice from a U.S. lawyer. It is amazing just how many do not do this. Essentially down to the fear of the cost of U.S. lawyers.”

IS YOUR COMPANY READY TO SELL ACROSS THE POND?

The client experiences and Case Studies contained in this eBook clearly demonstrate that the American market is accessible to a wide range of companies and entrepreneurs from the United Kingdom.

It’s inevitable that you’ll have questions about the legal issues and strategic decisions that must be made in order to successfully enter the American market. Although these issues and decisions have varying degrees of complexity, many can be resolved quickly in a simple, straight forward manner before expensive complications arise.

Would you like to discuss your company’s American strategy with me?

MY WORK ETHIC

As a practicing attorney since 1986, I recognize that most prospective clients are busy, skeptical, and cautious about hiring an attorney. I also recognize that there are negative perceptions about attorneys (always busy, overpriced, only interested in making money, slow to respond, etc.).

The bottom line is this - I understand that prospective clients want information before making a decision to hire an attorney so they can make the best choice possible.

With these points in mind, I can appreciate that a client wants certain things from their attorney.

Although I cannot ethically guarantee results, my commitment is to:

- Be accessible via personal appointments, telephone calls, Skype video calls, and email.
- Provide quick responses. I am not slow to return calls or emails.
- Provide aggressive, strategic, and proactive advice.
- Be willing to listen carefully to a client's problem so that I can fully understand what is important to the client.
- Consider and present a range of options for the client's consideration.
- Recommend a specific solution to the client's problem and explain how the client will benefit from the solution.
- Answer the client's questions.
- Provide information and advice in plain English.
- Work hard to add value and make every client experience outstanding.
- Strive to minimize and eliminate "surprises."
- Provide legal services in an efficient, cost-effective manner.

MY QUALIFICATIONS

- Licensed to practice law in California, Florida, and as an English Solicitor.
- Admitted to practice before the United States Supreme Court and the United States Court of International Trade.
- Awarded Master's degree (LL.M.) in International Business Law by The London School of Economics and Political Science.
- Awarded Juris Doctorate by The Cumberland School of Law, Samford University. Associate Editor of The Cumberland Law Review.
- Awarded B.S. (Management) by The Krannert School of Management, Purdue University.
- Adjunct Professor at Polk State College (Winter Haven, Florida).
- Fred Reilly is the author of *Slash Your Attorney Fees* and *12 Website Legal Issues for Small Businesses and Entrepreneurs* available through the Amazon Kindle Book Store.

- Fred Reilly is available to conduct live seminars or online webinars on *Website Legal Issues* and *Legal Issues for Selling to the American Market*.

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IMPORTANT NOTICE

The purpose of this eBook is to inform and not to advise. The statements are general in nature and individual facts in any given situation may alter their application or involve other laws not referred herein. You should always seek advice from a competent professional if any questions arise.

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