

DOING BUSINESS IN NEW YORK STATE

A Legal Guide for Foreign Companies

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This pamphlet is intended to assist foreign companies and individuals considering doing business in New York State. The topics are illustrative, not exhaustive. These discussions are intended as broad introductions to their subject matter, and should not be viewed as legal advice. Readers are urged not to act on the information contained in this pamphlet but to consult with legal counsel and other professionals.

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CHOICE OF BUSINESS STRUCTURE

by
Louise Martin-Valiquette

The various legal structures available for the conduct of business in the United States include the following:

- Sole Proprietorship
- Partnership
- Corporation
- Limited Liability Company

Each of these structures will be described below, along with its respective advantages and disadvantages.

The choice of one structure over another will be dictated by considerations such as liability of the principals or investors, transferability of interests, ease and expense of operation, management, capitalization, taxation, continuity of existence, profit allocation.

We will compare these entities based on these factors.

Sole proprietorship

The sole proprietorship is the simplest form of organization to set up. A person doing business as an individual without forming a separate legal entity is referred to as a sole proprietor. A foreign individual can do business in his or her own name as a sole proprietor without incurring any expenses or complying with any formalities relating to its formation. However, if the organization wants to use a trade name, as opposed to the principal's own name, a certificate must then be filed in each county in which business is to be transacted.

This form of business presents significant drawbacks. The owner is exposed to unlimited personal liability for the debts and obligations of the business. Therefore this type of organization should be reserved to activities with a very low risk.

A sole proprietorship terminates upon the death of the owner. There is no continuity of the business entity after the owner's death.

Because there is no separate entity, there is no equity capital. There are no stockholders and the sole proprietor must rely on his or her own financial resources.

All business profits are taxable as personal income of the sole proprietor.

Partnerships

A partnership is an association of at least two persons. Each such person can be any U.S. or foreign entity or individual. A partnership can be general or limited.

General Partnerships

Like the sole proprietorship, the general partnership can be organized in an informal and inexpensive manner. An oral agreement is sufficient to create it, but it is strongly recommended to enter into a written partnership agreement. The only formality required under New York law is that the general partnership file a certificate with the County Clerk in each county in which business is to be conducted.

Each partner has unlimited liability for the debts and obligations of the general partnership, a liability which goes beyond his/her investment in the entity and extends to that partner's personal assets. On the other hand, in a corporation, which is discussed below, the stockholder's liability exposure is limited to his/her stockholdings. Furthermore, since each general partner participates in management and can bind the partnership and thus the other partners without their consent, the extent of potential personal liability can be quite significant.

The lack of centralized management makes the general partnership a fairly inefficient form of business organization, unless appropriate measures are taken in the partnership agreement.

Unlike shares of stock in a corporation, partnership interests cannot be freely transferred. There is no continuity of existence of the partnership which usually dissolves upon the death, bankruptcy or withdrawal of a partner.

For all these reasons, the general partnership is not the business organization of choice unless there is sufficient liability insurance as well as life insurance to enable the remaining partners to buy out the partnership interest of a deceased partner.

Limited Partnerships

A limited partnership must have at least one general partner with unlimited liability for the debts of the partnership and general management power, and at least one limited partner with liability limited to the amount of his/her agreed-upon capital contribution and no management power.

Limited partnerships are more regulated and may be formed under the New York Partnership Act only by a written partnership agreement and upon filing of a Certificate of Limited Partnership, failing which the partnership will be treated as a general partnership.

The most important advantage of limited partnerships lies in limited liability for its limited partners. However, any active involvement by the limited partners in the partnership's business will make them liable as general partners.

If we compare limited partnerships with corporations, both limited partners and stockholders benefit from limited liability; however, limited partners may not always so easily transfer their ownership interests. Furthermore, despite provisions which can be inserted in the partnership agreement to obviate the automatic dissolution of the partnership in case of the death or withdrawal of a general partner, the limited partnership has no perpetual existence.

From a tax standpoint, partnerships - whether general or limited - differ considerably from corporations. The partnership's income or losses are ratably passed through to its partners who then report them on their individual tax returns. In contrast, corporate profits are ordinarily subject to double taxation, once at the level of the corporation itself, which is a separate taxpayer, and a second time when profits are distributed to stockholders by dividends.

Another form of partnership, the limited liability partnership, introduced in New York State in 1994, is available only to professional firms. By professions, we mean the professions subject to a license under the New York Education Law (including physicians, attorneys and architects.) This entity is very similar to the general partnership, except that its partners are protected from liability for the acts and omissions of their partners while remaining responsible for their own malpractice.

Corporations

Corporations have long been the business organization of choice and the preferred entity of financial institutions. The corporation is a separate entity with a legal personality, which means that it can sue and be sued, and own property.

There are no federal charters in the United States. Each state has its own corporate laws. Once a corporation is formed under the laws of one state, it becomes a domestic corporation of that state and, as a "foreign" corporation, must obtain proper authorizations from other states prior to conducting business in such states. For example, a corporation that has offices only in New York State may be formed in Delaware and then file in New York State in order to qualify to do business in the state.

In many cases, there is no advantage to incorporating outside of the state in which the corporation intends to have its principal office. In New York, the incorporation process is relatively inexpensive and can be accomplished in as little as a few days. It is achieved by the filing of a certificate of incorporation with the Office of the Secretary of State in Albany, New York.

The certificate of incorporation includes, among other things:

- The name of the corporation (which must contain the word "corporation", "incorporated" or "limited" or an abbreviation of one of these words and may not contain any of the reserved words or phrases such as "board of trade", "bank", "insurance", "trust", "finance", or the like, which are companies organized under different laws).
- The purpose or purposes for which it is formed. It is advisable to use a general all-encompassing language so that the certificate will not have to be amended to reflect a change in activities.
- The city and county in New York State where the registered office will be located.
- The aggregate number of shares which the corporation will be authorized to issue. There is no minimum capitalization in New York. The certificate must describe the shares, whether they are common or preferred, the number of classes, and whether they have a par value.

Normally, the certificate of incorporation is prepared and filed by an attorney who will also act as incorporator, draft the by-laws (an internal governance document not filed with the Secretary of State), prepare the necessary organizational meetings, procure the corporate books and records, and obtain a federal employer identification number.

We strongly recommend to foreign companies to organize a separate US corporation which becomes their subsidiary, as opposed to establishing and qualifying a branch in New York. A branch office of a foreign company may qualify to do business in New York, whether the foreign company is formed in another state or another country. However, by establishing a subsidiary, the foreign company will erect a wall between the foreign company and its US subsidiary, protecting the parent from liability and claims in a litigation-prone environment, and limiting disclosure and reporting requirements to U.S. assets and operations.

Once organized, the corporation possesses the following attributes:

- Perpetual existence, unless otherwise provided for in the certificate of incorporation, which means that the death of a shareholder does not put an end to the corporation;
- Easy transfer of ownership interests;
- Easy access to equity capital by issuance and sale of additional shares;
- Centralized management, vested in a board of directors elected by the stockholders. That being said, in New York there is no minimum requirement as to the number of directors and shareholders, and a corporation may have one owner and one director. Similarly, there is no requirement as to the citizenship or residence status of directors and stockholders. Under the New York Business Corporation Law, directors' meetings need not be held in the United States.

- Limited liability of shareholders, one of the chief advantages from the standpoint of investors who do not put at stake more than the amount of their agreed-upon capital contribution. However, the corporation must observe corporate formalities in order to protect the limited liability of the shareholders and avoid the piercing of the corporate veil. Shareholders will become liable on their personal assets if corporate funds are mingled with those of the stockholders, if the corporation is insufficiently capitalized or is systematically drained of its profits so as to leave it with an inadequate working capital, or if the corporate formalities are not observed.

From a tax point of view, the Internal Revenue Service may view a corporation either as a “C” or an “S” corporation. These designations refer to subchapters of the Internal Revenue Code. From a corporate law point of view, the entities are the same. However, they are taxed very differently by the federal government. In the case of a C corporation, income is taxed twice, once at the level of the corporation as a separate entity, and a second time at the shareholder's level when profits are distributed to them by means of dividends.

On the other hand, a corporation which has made an election under subchapter S receives the pass-through treatment which is typical of partnerships, and income is taxed only once at the shareholders' level. However, requirements for qualification under subchapter S, such as allowance of only one class of stock, restrictions on the number ((35 for tax years beginning before 1997; 75 thereafter) and type of shareholders and on the ownership of subsidiaries often prevent its use.

Limited Liability Companies

The limited liability company was introduced in New York State in 1994.

European business people have long been familiar with this unincorporated form of business organization and its terminology. We are no longer talking of shareholders and shares of stock, but of members and interests.

The limited liability company is a flexible entity which can have a centralized management as in a corporation. On the other hand, it can have a decentralized, member-managed governance, similar in this respect to a partnership. In fact, the limited liability company is an extremely flexible entity that can be customized to suit specific requirements.

The limited liability company is a hybrid form of organization between a corporation and a partnership. It offers the limited liability of the former regardless of members' involvement in the management, together with the pass-through tax treatment typical of the partnership.

The LLC is formed by the filing of Articles of Organization with the New York State Department of State and the advertising of this filing in local newspapers. Therefore, the formalities and costs of organization are similar to those of a corporation, although the costs may be

somewhat more, because of the advertising requirement. The name of the newly formed entity must include "Limited Liability Company" or its abbreviation, LLC.

The New York LLC law also requires a written Operating Agreement which normally governs who will manage the LLC, how contributions to capital will be made, how profits and losses will be allocated, what happens upon the withdrawal of a member, and whether members can transfer interests.

Non-US residents may be members of an LLC.

There are no restrictions either on the number of members. No ceiling applies to the LLC. There can also be one-member LLCs as there are one-shareholder corporations, which, taxwise, can elect to be classified as a corporation or to be disregarded as an entity.

From a tax standpoint, the LLC can be taxed as a partnership or a corporation under the Check-the-Box regulations.

TAXATION

by
Louise Martin-Valiquette

Taxation considerations were partly addressed in the preceding chapter on the choice of business structure. That chapter discussed some of these organizations, such as partnerships and some limited liability companies, which are treated as "conduits" for tax purposes. In other words, income, profits, and losses are passed through to the principals and taxed only individually.

From a tax standpoint, each partner is treated as if he owns a fractional share of the partnership and he must pay taxes on his share of the partnership's income, whether or not it was actually distributed to him. There is, thus, only one layer of taxation, at the individual level. Since it would not be possible to treat major businesses operated under the partnership form as though they were separate businesses conducted by the individual members themselves, the Internal Revenue Code uses an entity concept in order to compute the taxable income of the partnership and make various tax determinations.

The partnership will thus file an information return to the U.S. tax authorities, and each partner will report his distributive share - as defined by the partnership agreement - of income, deductions, and credits in his individual return.

The partnership's taxable income is calculated essentially in the same fashion as that of an individual, and the partnership is taxed on its worldwide income.

As we have seen in the section on business structures, a limited liability company can elect to be taxed as a partnership or as a corporation under the federal check-the-box regulations. The default classification for domestic limited liability companies with at least two members is a partnership.

On the other hand, other forms of business organizations such as the corporation are treated as an "association" which is taxed separately from its owners. Corporate earnings are thus taxed twice, once at the level of the corporation, and a second time upon distribution to owners.

Several measures have been enacted to prevent undue accumulation of corporate earnings for the purpose of avoiding a tax at the shareholder level. One of these is the accumulated earnings tax on the undistributed earnings of the corporation if they exceed the reasonable needs of the corporation.

Another is the personal holding company tax computed on the undistributed income of closely held corporations. This is often used for collection of passive income.

The U.S. subsidiary of a foreign corporation - and we have discussed the importance of choosing this vehicle for the purpose of limiting reporting and disclosure requirements and for protection from liability and claims - is treated as a domestic U.S. corporation and is taxable on its income from worldwide sources.

The federal corporate tax rates range from 15% to 35%. A corporation may also be subject to the alternative minimum tax (AMT) which modifies the taxable income for tax preferences and adjustments.

When the US subsidiary distributes its after-tax profits as a dividend to its foreign parent corporation, this dividend is subject to a withholding tax at the 30% Code rate or at the lower rate provided for by treaty.

Foreign-controlled U.S. corporations must pay particular attention to the Internal Revenue Service intercompany pricing regulations which give the federal tax agency the discretionary authority to monitor transactions between related corporations and reallocate income between them if such transactions were not conducted at arm's length and resulted in an underreporting of income for the US foreign-owned corporation. The IRS regulations impose significant penalties for underreporting of income, as well as further reporting requirements for U.S. corporations that have at least one 25% foreign shareholder. It is extremely important for any foreign company to consult with U.S. attorneys and accountants in order to be sure that the intercompany pricing is properly handled and to minimize the possibility of an IRS review.

US Taxation of Branches

As mentioned previously, some foreign corporations elect to do business in the United States without organizing a U.S. subsidiary. They establish a branch in the United States and seek authorization from the New York State Department of State to do business as a foreign corporation.

Once the foreign enterprise is found to be engaged in trade or business in the United States during the taxable year, it is then fully taxed on the income which is effectively connected with its trade or business. Both the Internal Revenue Code and the regulations adopted by the Treasury Department set forth intricate rules on what items of income are "effectively connected."

As a general rule, income which has some functional relation to that foreign enterprise's business in the United States is separated from non-business income which has its source in the United States but is not so functionally related, and these two types of income are taxed separately.

After identification of the "effectively connected" income, the foreign enterprise operating in the US as a branch will pay taxes, at regular corporate tax rates, on that income in essentially the same fashion as a US corporation receiving the same income.

Income not so effectively connected, such as interests, dividends, royalties, rents, etc. will be subject to a withholding tax at the Code rate of 30%, or such lower rate provided for by treaty.

Treaties between the United States and foreign jurisdictions generally provide for reductions of the withholding tax on specific types of income, such as interests, dividends, and royalties.

They also provide that the United States cannot tax the business earnings of a foreign enterprise unless that foreign enterprise is not only carrying a business or trade in the United States but does so through a permanent establishment in this country.

In addition to the corporate tax on its effectively connected income, the US branch of a foreign corporation may also be subject to the branch office profits tax. The purpose of this tax is to restore a balance between the tax treatment of subsidiaries and that of branches through a constructive distribution of the branch earnings to the foreign corporation which would have triggered a withholding tax at the Code rate of 30%. The branch office tax mirrors the withholding tax on dividends, and, generally, it also is reduced by treaty.

New York State Taxation

The New York State Corporate Franchise Tax is imposed on New York State corporations and foreign corporations doing business, employing capital, or owning or leasing property in New York. "S" corporations are exempted from the corporate franchise tax if all shareholders agree to pay New York State personal income taxes.

New York uses a formula to apportion the income or capital of the corporation - be it a foreign or a New York corporation - related to New York State.

The corporate franchise tax is approximately 8%.

New York State Sales Tax

Should out-of-state vendors which do not have a permanent establishment in New York State but sell their products into that state register with the New York State sales tax authorities in Albany and collect sales taxes? If they meet contact or "nexus" requirements in New York State, they have to register and collect.

Before 1995, "nexus" or contact was found to exist when employees, agents, brokers or independent representatives located in New York State promoted sales or solicited business in

New York State for the out-of-state vendor. Presence in the New York State market through a sales agent was sufficient contact for tax purposes, making the vendor liable to register and collect, while the entering the New York market by selling to a distributor for resale would not be sufficient contact because the vendor parted with ownership of the goods. An out-of-state vendor also meets nexus requirements if the vendor:

- maintains a place of business (warehouse, office, point of sale, etc.) in New York State;
- regularly or systematically delivers goods in New York State by means other than the United States mail or a common carrier (there is a presumption if there are more than 12 such deliveries per year);
- regularly or systematically solicits business in New York State by the distribution of catalogs, advertising flyers or letters (there is a presumption if the gross receipts exceed a certain threshold); or
- installs or services its products within the state.

In 1995, the New York State Court of Appeals issued two important decisions on this subject: *Orvis Co. v. Tax Appeals Tribunal* and *Vermont Information Processing Inc. v. Tax Appeals Tribunal*. The effect of these two decisions was to extend considerably the criteria for inclusion as an out-of-state vendor who must register and collect. The Court of Appeals of New York ruled that the “nexus” standard was not synonymous with a substantial physical presence in New York State but that any measurable presence would suffice. The Court thus upheld New York State’s power to impose sales tax collection obligations on two Vermont-based companies whose employees occasionally visited New York State customers to find out whether anything could be done to improve their commercial relationship or enhance their satisfaction with their products.

What are the repercussions of these decisions for out-of-state companies? Before 1995 an out-of-state vendor could sell without sales tax liability if the vendor had no physical presence in New York either directly or through an agent, employee or representative, its sales contracts were concluded out of state, its products were delivered using the mail or a common carrier, and it did not install or service its products in New York. Since the decisions in the *Orvis* and *Vermont Information Processing* cases, if a foreign company representative makes occasional visits (and, in the above cases, the visits amounted to 10-12 per year) to New York accounts, the company may have sales tax obligations.

The universe of potential registrants has clearly been extended since 1995. Out-of-state vendors should thus review their sales practices in the light of the above decisions. Furthermore, once an out-of-state vendor meets the nexus requirements, the vendor still must register even if the vendor sells to persons or entities who will resell the products and who are exempted, and even if the vendor sells to manufacturers who will use the products for production in New York State and will avail themselves of the limited production exemption. Obviously sales tax remittances will practically be null, but that out-of-state vendor is still required to register and file tax returns.

If an out-of-state vendor comes to New York for one or a few trade shows per year during which the vendor exhibits its products but does not sell them, this mere presence does not require the out-of-state vendor to register and collect sales tax. An opinion to that effect was issued in 1996 by the New York State Commissioner of Taxation and Finance in *Electron Fusion Devices, Inc.*

However, if the vendor registers to sell its products on the occasion of the trade show, *all the vendor's sales* made during the period of the show, including those the vendor normally makes to its regular customers from outside New York State, will become subject to sales tax. However, the vendor can file a *final* sales tax return after the trade show.

CONTRACTS AND COMMERCIAL LAW

by
Thomas M. Pitegoff

Contracts for the Sale of Goods

Contracts in the U.S. are generally governed by state law, and that law is very similar from state to state. Contract law is mostly a product of the common law, meaning the cumulative result of the decisions of judges based on specific facts in the cases before them. Courts in the U.S. will allow the parties to a contract a great deal of discretion in their contracts. Notwithstanding the general principle of freedom of contract in the U.S., however, there are limits on what the parties may agree. Not all contracts are enforceable. For example, some contractual provisions may violate antitrust laws. Specific laws may limit the effect of covenants against competition or may override the parties' agreement regarding the ability of a supplier or licensor to terminate the agreement.

If your company is entering into a contract with a U.S. company for the sale of your company's goods into the U.S., the likelihood is that you will be selling the goods to that company for resale. In the U.S., this is generally called a distributorship arrangement. On the other hand, if you are looking for a U.S. person or company to find customers and place orders for your company's products, the U.S. company might be acting as your company's agent who will be paid on a commission basis. In the U.S., it is common to make this type of appointment that of a "sales representative" rather than an "agent". In a principal/agent relationship, the principal can be held liable for the acts of its agent under the common law in New York and other states. A sales representative, on the other hand, is an independent contractor, who is responsible for his or her or its own acts. In a sales representative arrangement, your company, as the supplier, reserves the right to accept or reject the orders. If your sales representative has the authority to enter into contracts on behalf of your company, you risk the possibility that a court could deem the representative to be an agent, making your company responsible for the acts of the agent.

Contracts between U.S. companies for the sale of goods are generally governed by the Uniform Commercial Code (the "UCC"). The UCC is state law, although it varies little from state to state. The UCC governs such questions as whether a binding contract has been formed, what warranties may be implied, what remedies the parties may have for breach, and so forth. To a large extent, the UCC comes into play with respect to issues on which the contract may be silent or ambiguous.

When the sale of goods is between parties in different countries, another set of rules sometimes applies, namely the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). The CISG applies to contracts between parties whose places of business are in different countries that have adopted the convention. At least thirty countries have ratified the convention. These countries include, among others, the U.S., Canada, Italy, Ger-

many, France, Mexico, Australia, Chile and Argentina. The United Kingdom is not a signatory to the CISG.

Like the UCC, the CISG governs such questions as whether a binding contract has been formed, what warranties may be implied and what remedies the parties may have for breach. In fact, the CISG is generally similar to the UCC.

Delivery Terms

Delivery terms are the contractual provisions that indicate, among other things, who pays for shipping and insurance, and when the risk of loss passes to the buyer. These are described in commercial shorthand with the abbreviations F.O.B., C.I.F. and C.& F. and others.

The meaning of the delivery terms is determined by the commercial law that governs the sale. In U.S. domestic sale agreements, the UCC applies in almost all cases, since it is the law governing the sale of goods in all U.S. states except Louisiana. In international transactions, it is not uncommon to use internationally accepted definitions of delivery terms. The most common are the INCOTERMS, published by the International Chamber of Commerce.

Unlike the UCC, the CISG does not define delivery terms, such as F.O.B., C.I.F. and others. Therefore, an international agreement for the sale of goods can be governed by the CISG and still use the INCOTERMS or the UCC of a particular state to define the meaning of the delivery terms.

Antitrust and Trade Regulation; Unfair Competition

Antitrust laws in the U.S. place limits on what the parties may agree to do in their commercial relationships. The federal Sherman Act prohibits monopolization as well as conspiracies in restraint of trade. The antitrust laws also place limits on exclusive dealing and price discrimination.

In the distribution of goods, it is unlawful for a supplier to fix the prices at which its customers resell products. Such restrictions placed down the distribution chain are called “vertical” restraints. It is also unlawful for a supplier to make any agreement with its competitors regarding the prices of their competing products. Agreements among competitors are called “horizontal” restraints, and they are generally the most serious of antitrust offenses. On the other hand, most restrictions, other than price restrictions, which would normally appear in a distribution or license agreement (i.e. vertical restraints) will be lawful if they are reasonable. Territorial, customer and product restrictions, for example, will generally be lawful if they promote interbrand competition.

Advertising

U.S. federal and state laws prohibit false and misleading advertising. Agencies that have the power to enforce these laws include the U.S. Federal Trade Commission and the New York State Attorney General's Office. Also, companies can bring lawsuits in federal or state court to seek an injunction to stop competitors from running false or misleading advertisements and to recover monetary damages.

Mere "puffing" is not unlawful. It is lawful to say that your product or service is "great". A specific claim, however, must be truthful.

Advertising may refer to the product of a competitor, as long as it is not false or misleading in any way. This is called "comparative advertising." Of course, companies are likely to be on the lookout for misleading advertising by competitors. Accordingly, a company that runs a comparative ad must exercise special care.

The manner in which testimonials and endorsements are used in advertising is also regulated by law. Because individuals have a right of privacy, the advertiser must have the express, written consent of the person who gave the testimonial in order to use it and in order to use that person's name or picture. Publications whose reviews are quoted will also want to receive proper credit, and they may charge a fee for the use of their endorsement.

Products Liability; Insurance

Manufacturers, distributors, retailers and others who sell goods in the U.S. are liable for injuries and damages caused by defects in those goods. The fact that products liability law in the U.S. can lead to onerous damage awards is well-known. A foreign manufacturer might in some cases be liable for injuries caused in the U.S. by its defective products even if the manufacturer is not present in the U.S.

Any company entering the U.S. market should be sure that it has adequate insurance protection against business risks in the U.S., including products liability. Comprehensive General Liability insurance policies often include coverage for "advertising injury", which includes defamation, violation of the right of privacy, piracy, unfair competition, idea misappropriation, or infringement. Timely notice to the insurance company may save your company the defense costs and the amount of any damage award.

INTELLECTUAL PROPERTY LAW

by
Thomas M. Pitegoff

Intellectual property law covers four distinct but overlapping subjects: trademarks, patents, copyrights and trade secrets. A trademark is a brand name or logo that identifies the source of goods or services. A patent provides a legally-protected monopoly in an invention. Copyrights are legal rights in creative works. A trade secret is confidential information that has business value.

Before selling a product or service in the U.S., it is important to consider whether your invention or brand name will infringe the intellectual property rights of another person in the U.S. and whether you can or should seek to protect your invention or brand name in the U.S. The fact that your intellectual property is protected in your home country does not necessarily mean it will be protected in the U.S.

Trademarks

Trademarks come into play in connection with marketing issues. What do you call your product or service? Will customers readily recognize the brand and distinguish it from competing products? In this sense, a trademark identifies the source of goods or services. Trademark rights can exist not only in a word or logo, but also a slogan, a package design or even the overall impression of a store design, as in a franchise system.

In the U.S., trademark protection arises simply from the commercial use of a trademark, provided that the mark does not infringe on the preexisting trademark rights of another person and provided that it meets certain other criteria, such as not being merely descriptive. Registration of a trademark at the federal Patent and Trademark Office gives the trademark owner certain advantages, including the fact that registration puts the world on notice of the owner's rights. A person who is using a trademark that is not registered may notify the public that such person claims rights in the mark by placing the designation "TM" alongside the mark. A mark that is used in conjunction with services rather than goods is called a "service mark". The designation "sm" denotes a service mark, although "TM" can also be used for a service mark. Once the mark is registered, the owner may place the designation © beside the mark.

The Paris Convention is a multilateral treaty that covers patents and trademarks. The U.S. and virtually all other industrialized countries are signatories to this treaty. Under the Paris Convention, an application for trademark registration made in a treaty country within six months after the filing in the first treaty country receives the benefit of the earlier filing date in the first country. A trademark owner who misses the six-month deadline can always apply later without the benefit of the priority date if the mark is available.

Federal trademark registration lasts for ten years as long as the proper interim filings are made. Registration may be renewed indefinitely, as long as the owner can prove continued use of the trademark in interstate or international commerce.

Patents

Patents protect rights in inventions. The government grants the inventor a monopoly on the rights to the invention for a specified number of years. This period was once seventeen years in the U.S., but is now twenty years. Patent law encourages inventors to file for patent protection by granting inventors a limited-term monopoly. Patents are published once they are issued, thereby disseminating new inventions. The fact that patents are published distinguishes them from trade secrets, which also protect the underlying invention.

Proof of patent infringement does not require that the infringer had access to and actually copied the original invention. In this sense, patent law affords stronger protection than copyright law.

In order to be patentable, an invention must be non-obvious and it must have a useful purpose. Laws of nature, such as mathematical formulae, are not patentable. For this reason, it was once not clear whether computer source code could be patented. Today, it is settled that source code is patentable.

In recent years, business methods have increasingly become the subject of patent filings, particularly in light of the new business models inspired by the Internet. Amazon.com's one-click buying and Priceline.com's reverse auctions are well-known examples of Web-based business-method patents. The granting of patents for Internet business methods has been criticized as being an impediment to competition, and the extent to which it will be available in the future is not yet clear. Indeed, both the Amazon and Priceline patents have been challenged.

An invention is not protected by patent law in the U.S. unless the U.S. Patent and Trademark Office issues a patent. The application process is lengthy and expensive. Enforcement of patent rights is also expensive. In addition, once the twenty-year patent term expires, patent protection is ended and the invention is available for all to use. For these reasons, patents make sense for inventions with broad appeal that will be commercially viable for years. Patent protection is not appropriate for all inventions. Computer software may already be obsolete by the time a patent issues. A soft drink company may want to preserve its concentrate formula as a trade secret forever.

Inventors and companies that use patentable inventions are under some time pressure to consider their international plans. While trademark applications may be filed at any time, once a patent application is filed in one country, there is a limited amount of time in which to file for protection of that invention in other countries. A common approach is to make a filing under the Patent Cooperation Treaty (the "PCT"). A PCT filing within one year of U.S. patent filing gives you up to thirty months to decide whether and in which countries to apply for patents. Most de-

veloped countries belong to the PCT, and the patent protection available in non-PCT countries is generally weak. There is no similar treaty for trademark or copyright protection.

Copyrights

Copyright law protects original, creative expression in the form of books, films, music and other works of art. In the commercial area, copyrights can protect advertising materials, trade publications, label designs, operations manuals and photographs. Copyrights can also protect computer software, databases, directories and Internet page layouts.

Copyright law does not protect slogans, titles and short phrases. While these lack a requisite amount of objective originality for copyright protection, they might be the subject of trademark protection. The doctrine of “fair use” also limits the extent of copyright protection. Copyrighted works can be copied under the fair use doctrine without infringement for purposes of criticism, comment, news reporting, teaching, scholarship or research.

Copyright law protects against unauthorized copying. The law protects the expression, not the idea. In this sense, copyright law differs from patent and trade secret law. Copyright protection in the U.S. begins when the work is created. Federal copyright registration is not a prerequisite to copyright protection in the U.S. However, registration is necessary before the copyright owner can bring a lawsuit for infringement.

It is always a good idea to place a copyright notice on a creative work in order to put the world on notice that the owner is claiming copyrights in the work. The usual notice would appear as follows: “Copyright © 2000 Pitegoff Law Office. All rights reserved.”

Copyrights in the U.S. generally last for the life of the author plus fifty years. When a work is created by an employee in the course of his or her employment, it is generally considered to be a work made “for hire”. Copyright protection for a work made for hire lasts seventy-five years from publication or one hundred years from creation, whichever is shorter.

Trade Secrets

Trade secrecy law protects confidential information that has commercial value. Such information may include inventions, whether patentable or not. It may also include sensitive competitive information, such as customer lists, methods of doing business, financial information and the like.

One important advantage of maintaining information as a trade secret is that a trade secret can last as long as the information remains a secret. The formula for Coca Cola, for example, has remained a secret for more than a century.

Trade secrets are protected under state laws in the U.S. as long as the owner of the secret takes the appropriate steps to protect their secrecy. This means, for example, prominently mark-

ing all secret information as trade secrets. Trade secrets can also be protected by contract. Unlike copyright law, trade secrecy law protects the ideas themselves.

Trade secrecy protection in the U.S. lasts as long as the confidentiality is maintained. Once the information goes into the public domain, trade secrecy protection is lost forever.

Companies that have confidential information they wish to protect must take steps to safeguard that information. This is an ongoing effort. The owner of the information should prominently mark it as secret or confidential, disclose it only to the extent necessary, and obtain confidentiality agreements where appropriate.

COMPUTER SOFTWARE

by
Thomas M. Pitegoff

Computer software can be protected in the U.S. by trade secrecy, copyright and patent law. Each type of protection involves different considerations. Generally speaking, source code is protected by trade secrecy, while object code is protected by copyright law. However, patents are becoming a more common form of protecting the source code.

Appropriate contracts are also crucial to a successful program of developing, exploiting and protecting rights in computer software. This is true both in the development of the software or creative work and in its licensing or sale. Copyright law takes on particular importance in light of the Internet, where copying is *very* easy. Companies must take care to stop employees from illegally copying and distributing both company-owned property and property owned by others. On-line service providers are concerned about their potential level of responsibility for contributory infringement of postings by users of their services.

Copyright law is of limited use for computer source code. While the code is protectable by copyright law, that law does not stop another from independently creating new code that functions in the same way. Copyright law does not protect the functional elements of software. In addition, companies usually want to maintain their source code as a trade secret. Although copyright protection is inexpensive and easy to obtain, copyright protection is far weaker than patent protection. Independent creation is a complete defense to copyright infringement.

Creators of software and other multimedia works must be especially careful when they hire independent contractors to assist them in their work. Under copyright law, the creator of the work is the owner, even if the work was created under contract for another. It must be clear in the contract with the independent contractor that ownership is being assigned to the party that is contracting to have the work done. It may be necessary for the creator of the work to sign a written assignment of the copyright after the work is created. This differs from work created by an employee within the scope of his or her employment. Such a work would be owned by the employer and would be considered to be a work "for hire."

Trade secrecy is the most common method of protecting computer source code. However, it is easier to protect secrecy in soft drinks than in software. When many programmers work on the same code, the programmers must each be bound by the obligation of confidentiality. Even if they are legally bound to maintain the code as a secret, it is not possible through the law to achieve absolute protection. Therefore, confidentiality may require a high degree of policing.

FRANCHISING

by
Thomas M. Pitegoff

Franchising is a type of licensing in which a company licenses a trademark representing a business format and exercises significant control or provides significant assistance in the marketing of the product or service in exchange for a fee.

There are two types of franchise laws in the U.S., both of which are intended to protect franchisees. One type of law requires disclosure and, in some states, registration with a state agency. The second type of law regulates the relationship between franchisors and franchisees, typically prohibiting termination or nonrenewal by the franchisor except for good cause, and often requiring good cause to refuse consent to the franchisee's transfer of the franchise.

The sale of franchises in the U.S. is regulated by both state and federal law. The U.S. Federal Trade Commission's trade regulation rule on franchising (the "FTC Rule") is a disclosure rule and does not require registration or filing. Under the FTC Rule, anyone who offers or sells a franchise must deliver an offering circular to each prospective franchisee at least ten business days before any agreement is signed or any money is paid.

New York State is one of several states that requires franchisors to make disclosures similar to those required by the Federal Trade Commission. New York State also requires that the franchise offering be filed with and approved by the state Department of Law, also referred to as the state Attorney General's office.

Unlike some other states, such as New Jersey and Connecticut, New York has no law that can override the parties' franchise contract on the subject of termination, transfer or nonrenewal of the contract. In these respects, New York law favors freedom of contract.

The franchise offering circular required under both the FTC Rule and New York State law must contain, among other things, a detailed explanation of the prospective franchisee's rights and obligations under the franchise agreement; information regarding the directors and principal officers of the franchisor; and the litigation and bankruptcy history of the franchisor. The circular must also contain audited financial statements of the franchisor and copies of all agreements the franchisee may be asked to sign.

Ongoing franchise compliance requirements extend beyond the annual preparation of audited financial statements. The franchisor must monitor, among other things, the timing of the delivery of the offering circular and agreements to prospective franchisees and the obtaining of signed and notarized acknowledgments of receipt from prospective franchisees.

IMPORTING PRODUCTS INTO THE UNITED STATES

by
Marilyn-Joy Cerny

It is critical for any company that exports to the United States to know and understand the many laws and regulations governing imports. Despite the harmonization of the tariff schedules among most nations of the world, exporters often find that U.S. laws, regulations and tariffs are unique, complex and quite unlike those in their own country. To succeed in the U.S. market, an exporter must ensure that its products will enter the United States with as little interference as possible and at the lowest allowable duty rate. In order to do this, an exporter to the United States must consider three essential areas. First, you must confirm the classification of your product and the amount of duty that will be required to “enter” your products into the United States. Second, companies must be aware of special invoicing requirements, country of origin marking regulations, quota and visa requirements for textiles and apparel as well as a host of other requirements imposed by other U.S. agencies. Finally, to maximize profitability, companies that intend to export to the United States should also seriously consider using sophisticated, cost-cutting, international trade mechanisms such as duty drawback, foreign trade zones, and bonded warehouses.

Failure to comply with any number of these regulations can devastate an entire program. While companies devote significant time and resources to product development, production, and marketing, often they do not make the same effort to thoroughly research U.S. import issues. The following is a brief discussion of several issues that all companies exporting to the United States must consider.

Importers Face Tough New Standards

On December 8, 1993, President Clinton signed the Customs Modernization Act into law. The □Mod Act□ imposes heightened new standards on importers. If importers fail to comply with these heightened standards, they face serious penalties.

The Mod Act introduced the concept of “informed compliance” in which U.S. Customs and the importing community now *share* the responsibility of administering customs laws. This means that importers have a *greater* responsibility in entering their imported merchandise. Importers must determine the proper classification and valuation of their products and must exercise “reasonable care” in making such determinations. “Reasonable care” requires that an importer act reasonably with knowledge of all relevant facts and legal obligations. **Failure to exercise reasonable care will subject your company to severe civil penalties.**

Individuals who make import decisions must have knowledge of U.S. Customs import laws and regulations. In passing the Mod Act, the U.S. Congress stated that unless importers

have knowledge of the customs laws and regulations, they should consult with customs brokers, consultants and attorneys when faced with customs decisions.

Classification and Valuation

Classification and valuation are two of the most important factors that determine the amount of customs duties that must be paid for imports into the United States. Classification entails finding the proper category in the Harmonized Tariff Schedule of the United States (“HTSUS”) for your imported products. The HTSUS is divided into twenty-two sections and ninety-nine chapters. Many different rules, at both the international and U.S. level, govern the classification of imported goods, making this process very complicated. Most importantly, companies must realize that what may be considered the correct classification of their products in their home country, or other countries, is often considered incorrect by the U.S. Customs Service.

To illustrate the importance of proper classification, consider the following true story. Several years ago, a company, wishing to capitalize on the growing U.S. wine cooler market, developed a product specifically for the U.S. market. A significant amount of money was spent on product development and marketing. Unfortunately, while this company did have an export manager review the classification of this product, it did not have that opinion confirmed by U.S. Customs or a customs broker or attorney in the United States. The rate of duty that they anticipated paying was approximately 6.8% *ad valorem*.

When the first shipment of wine coolers reached the United States, the customs broker classified them as advised by the exporter. U.S. Customs rejected the claimed classification provision and reclassified the product under a tariff provision carrying a 5.6% rate of duty. However, due to the country of origin of that product, it was also subjected at that time to punitive tariffs in the amount of 100% *ad valorem*. It was at this point that the company sought the advice of customs specialists in the United States, but they confirmed that U.S. Customs was correct. The company had no choice but to end the program, at a significant loss.

In addition to classification, companies must be aware of the proper way to value their merchandise. In most cases, the proper basis for valuing a product is the “transaction value” or the price paid by the buyer to the seller. Certain costs (*e.g.*, commissions paid to selling agents, assists, packing costs, royalties and certain proceeds of resale in the United States) must be added to that price if not already included.

If the foreign seller and the U.S. buyer are related, transaction value can only be used if the relationship between the buyer and the seller does not “influence” the price paid or payable. The valuation law provides several tests that can be applied to see if the price is acceptable. If it is not, the law provides for several other alternative bases of appraisal.

Failure to properly classify and value imported merchandise will lead to one of two problems. First, underpayment of duties, even if inadvertent, can subject importers to steep penalties.

On the other hand, needlessly overpaying customs duties will severely hamper your competitive position.

Country of Origin Marking

The U.S. customs laws require that each imported article manufactured abroad be marked with the English name of the country of origin. It must be marked in a *conspicuous* place as legibly, indelibly and permanently as the nature of the article permits. The intent of these laws is to indicate to the *ultimate purchaser in the United States* the name of the country of origin in which the article was manufactured or produced. In certain specified instances, an importer may mark a container in lieu of the individual marking of the items contained inside. However, it is essential that you receive prior written approval from U.S. Customs before attempting this container marking exception.

Failure to properly mark imported articles can result in steep penalties and significant interference with your product entering the United States. If the article (or the container when the container is marked in lieu of the articles) is not properly marked, U.S. Customs may assess penalties and a 10% marking duty unless the article is exported, destroyed, or properly marked under U.S. Customs supervision within a specified time period.

Broadly speaking, the “ultimate purchaser” in the United States is the last person who will receive the article in its imported form. Generally, if you sell imported components to a U.S. manufacturer and the manufacturer uses those components to make a finished product having a name, character or use that is different from that of the imported components, the U.S. manufacturer will be considered the “ultimate purchaser.” On the other hand, if the processing in the United States is only minor, the U.S. manufacturer will not be considered the ultimate purchaser.

If your company sells articles that are intended for retail sale in their condition as imported, the purchaser at the retail level is the ultimate purchaser. Therefore, if you sell rolls of adhesive tape to wholesalers in the United States who in turn sell them to office and home supply stores, the retail store customers would be the “ultimate purchasers.” Accordingly, the product purchased by the retail purchaser must be properly marked with the country of origin.

Another requirement is that the marking be sufficiently “permanent.” This requires that it remain on the article (or its container) until it reaches the ultimate purchaser. The U.S. Customs Regulations (19 C.F.R. §146) set forth special marking requirements for certain products (*e.g.*, engraving on metal knives) as well as exceptions to marking (*e.g.*, chemicals and drugs when imported in capsules, pills, tablets, lozenges or troches).

Duty Drawback

If imported components or products are subsequently exported from the United States, the exporter may be eligible for thousands, or hundreds of thousands, of dollars in customs duty refunds under a U.S. Customs Service refund program known as “duty drawback.” Under the duty drawback law, exporters are entitled to a refund of 99% of customs duties that have been paid on imported goods that are subsequently exported. Duty drawback is intended to encourage exports from the United States and thereby stimulate industry and labor in the United States. For any exporter to the United States considering distribution to other countries from the United States, duty drawback is essential.

Duty drawback is available for products that are manufactured in the United States using imported raw materials or components and then subsequently exported. For example, if your company exports printed circuit boards to a U.S. subsidiary for manufacture into specialized lighting products and that subsidiary subsequently exports the lighting products to Brazil, the subsidiary is entitled to a refund of 99% of the duties paid on the imported circuit boards.

In addition to “manufacturing” drawback, duty refunds are also available for “unused” merchandise. Under this program, if your company imports goods into the United States and exports them *without* subjecting them to any manufacturing or assembly processes in the United States, your company is entitled to a refund of 99% of the import duties paid on those exported goods. For example, if you export tools to the United States for repackaging and distribution to South American countries, your company would be entitled to a refund of 99% of the customs duties attributable to those tool exports.

Duty drawback can also be obtained for imported merchandise that is subsequently destroyed in the United States. While it is routine at most companies to periodically dump or destroy obsolete or unwanted merchandise that was previously imported, companies often overlook the possibility of obtaining duty drawback refunds for that merchandise. One of the most critical factors in applying for destroyed merchandise drawback is the requirement that you give U.S. Customs prior notice of the scheduled reduction and the opportunity to witness it. Under the new drawback regulations (published on April 6, 1998), claimants must provide notice at least seven working days prior to the scheduled destruction. While the regulations are rather complicated, duty drawback provides companies with the ability to save significant money on “trash” that is about to be discarded.

As you can see, there are many opportunities for even the smallest exporters to the United States to obtain duty drawback refunds. For most businesses, however, the process can be time-consuming. Although some large companies have implemented in-house drawback programs, the complex requirements and paperwork allow only the largest companies to perform the work with their own personnel. For this reason, many companies choose to employ a duty drawback specialist to pursue refunds. The U.S. Customs Service authorizes licensed U.S. customs brokers to implement and maintain duty drawback programs on behalf of exporters. Fur-

thermore, since duty drawback brokers almost always work on a contingency fee basis, an exporter is able to avoid up-front fees.

Duty drawback can result in significant savings particularly because you can make retroactive claims as well. Under most duty drawback programs, refund claims can be made on exports shipped up to *three* years before the claim is filed. Therefore, if your company filed a drawback claim on December 1, 1998, that claim could cover exports made since December 1, 1995. If your company is looking to lower costs and, in turn, better compete in the global marketplace, duty drawback is one program that your company *cannot* afford to overlook.

The North American Free Trade Agreement

An exporter of raw materials and components can gain a vastly competitive advantage in North America by qualifying for benefits under the North American Free Trade Agreement (“NAFTA”). NAFTA has freed up trade among the United States, Canada and Mexico by eliminating or lowering customs duties on North American products. Moreover, the NAFTA parties are also negotiating with countries in South America to extend NAFTA to those countries. Therefore, foreign companies should prepare for an eventual Free Trade Agreement of the Americas.

Determining what is a “North American” product under the NAFTA origin rules can be quite complicated, particularly when non-North American components and raw materials are used.

For most products, NAFTA eligibility is based upon a specified shift in tariff classification of the imported components. This is a highly technical analysis that requires some understanding of tariff classification rules. However, by failing to take the time and effort to conduct a careful and accurate analysis of NAFTA eligibility, many companies are denying themselves the opportunity to significantly lower the cost of their products and obtain a competitive advantage in North America.

Furthermore, few companies realize that NAFTA benefits are also *retroactive*. That is, if exporters or importers have traded qualifying NAFTA products in North America but did not apply for lower NAFTA tariff rates at the time of shipment, they can apply for duty refunds. However, refund applications must be filed within twelve months of shipment. Companies must act quickly if they expect to recover any overpaid customs duties.

Foreign Trade Zones and Bonded Warehouses

Foreign trade zones (or “free” trade zones) are secured areas outside of a nation’s customs territory. They were specifically designed to attract and promote international trade. FTZ’s are a very useful tool in the United States. Exporters planning to expand or open up new U.S. outlets can transport their goods to an FTZ and store them there for an unlimited period of time while awaiting a favorable market in either the United States or in nearby countries *without*

being required to pay customs duties or local and federal taxes. FTZ users do not have to pay customs duties or federal and local taxes unless and until the imported merchandise is entered into U.S. commerce. If the FTZ merchandise is exported from the United States, no duties are owing. U.S. companies can designate existing manufacturing facilities as foreign trade sub-zones. These eliminate the need to relocate current operations in order to receive FTZ benefits.

In addition, if you ship raw materials or components into the United States, admit them into an FTZ, and manufacture them into finished articles, you may take advantage of “tariff inversion” benefits. Under this program, when finished goods are withdrawn from the FTZ for sale in the United States, the FTZ user may apply duties at *either* the rate applicable to the raw materials or components (in their imported condition) or the rate applicable to the finished product that they manufactured in the FTZ. For example, automobile manufacturers that import components into FTZ’s for manufacture into finished cars routinely apply the 2.5% tariff rate that applies to finished cars instead of the rates that apply to components, which can range anywhere between 3% and 25%. Of course, if you export the finished products, you pay no customs duties.

Bonded warehouses offer some of the same benefits as FTZ’s (*e.g.*, deferring duties and avoiding duties for exports). However, they are not as flexible. For example, there is a five year time limitation for the storage of goods in a bonded warehouse. Also, you cannot commingle both foreign (imported) and domestic (U.S.-origin) merchandise in a bonded warehouse.

Conclusion

While exporting to the United States represents a significant opportunity to penetrate the North, Central and South American markets, a U.S. importer must carefully plan and analyze U.S. import requirements as well as sophisticated tools to lower its international customs duty burden. Careful planning will ensure that your products enter the United States unhindered and that you are paying the lowest amount of duty allowed under U.S. law.

RESOLVING DISPUTES

by
Thomas M. Pitegoff

Selecting a Forum for Litigation

Two court systems coexist in the U.S., the federal courts and the state and local courts. Each court has jurisdiction over different types of cases. Both the federal and state courts in New York pride themselves on their experience in handling international disputes. The fact that many international business disputes are brought before the courts in New York means that these courts have a well-developed case law, which makes outcomes more predictable than in some states. New York courts will also generally accept international cases when the parties have agreed to litigation in New York, even if the parties have no connection with the state. If New York law is also to be applied, the selection of New York as the forum for litigation promotes a uniform interpretation of the contract.

Choice of Law

The uncertainties of international contracting often make it advisable to choose a governing law. Courts in the U.S. differ in the rules they apply to the choice of law in contractual settings, and they are unpredictable in their results. In an international context, the unpredictability is exacerbated. A choice of law clause in an international contract provides some degree of certainty in the interpretation of the agreement. When a foreign company does business in New York, its contracts frequently provide that New York law will govern.

In New York, the general rule is that parties may freely choose what law will govern an international agreement. The rationale of the courts is their desire to protect the autonomy and justified expectations of the parties. This promotes certainty and predictability, which are basic objectives of contract law.

A contract for the sale or distribution of goods may provide for the application of the CISG, INCOTERMS or the UCC, as discussed above in the chapter entitled “Contracts and Commercial Law”. Generally speaking, however, the CISG, INCOTERMS and the UCC do not cover the sale of services or the licensing of intellectual property. Therefore, it is usually advisable to specify the application of the laws of a particular jurisdiction, even when the CISG is to be used.

Arbitration

Arbitration is a common method of resolving international disputes. U.S. and New York laws favor the enforcement of arbitration provisions, and the U.S. is party to several international treaties. Under both federal and state law, the parties have a great deal of freedom to determine the procedural rules for the arbitration, the method by which the arbitrators will be selected and the substantive law that will govern the arbitration.

Arbitration is less formal than litigation and may end up costing less than litigation. It need not follow the procedural rules that call for extensive pre-trial discovery. This means that there will be no depositions, and there will be a limit to the extent to which each party will be required to produce copies of relevant documents. The decision of the arbitrator or arbitrators also generally may not be appealed. This can be an advantage or a disadvantage, depending on the result.

The American Arbitration Association, which is based in New York, is frequently the body that administers international arbitrations in the U.S. The American Arbitration Association maintains panels of qualified arbitrators in all fields, appoints arbitrators and administers arbitrations under its own rules of commercial arbitration and under various other sets of rules. Another organization based in New York, the CPR Institute for Dispute Resolution, also maintains panels of arbitrators.

Mediation

Mediation is an alternative to arbitration and litigation. In mediation, the parties seek to resolve their dispute with the assistance of a trained and impartial person. Mediation is not binding. Because it may serve to minimize the level of rancor between the parties, mediation is often used when the parties desire to continue their business relationship rather than end it. Most organizations that provide arbitration expertise also assist in mediation.

BIOGRAPHIES OF THE AUTHORS

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Louise Valiquette is an attorney with international education and experience who handles a broad range of corporate and commercial matters, including work in the areas of international distribution and trade, formation of corporations, licensing and intellectual property. Ms. Valiquette is admitted to the New York and Quebec bars.

Ms. Valiquette was born in Montreal, Canada, where she obtained her first law degree. She started her law career in 1972 with the Montreal law firm of Stikeman & Elliott. She subsequently worked for the Quebec Department of Justice until 1976 when she moved to Milan, Italy.

In Milan, Ms. Valiquette was an associate of the law firm Studio dell'Avvocato Francesco Nicoletti & Associati specialized in commercial and banking law. Upon her arrival in New York in the early 80's, she obtained a master's degree in corporate law from New York University and requalified to practice law in New York. She is now in private practice, advising a number of corporations in the US, in Canada, and in Europe. She also is Adjunct Professor of international trade law at Pace University Law School, in New York.

She is actively involved in US-Canada trade and has organized a number of conferences on this subject. She is the Secretary of the Canadian Society of New York, and sits on the Subcommittee on Relations between the Quebec and U.S. Bar Associations of the Quebec Bar Association. She also is a member of the Board of Governors of the World Trade Council of Westchester.

Her professional associations include the American Bar Association, the New York State Bar Association, the World Trade Council of Westchester, and the International Center for Law, Trade, and Diplomacy.

She speaks regularly on legal issues of international trade. She is fluent in English, French, and Italian, and has a working knowledge of Spanish.

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Thomas M. Pitegoff, a member of the New York bar, is the founder of PITEGOFF LAW OFFICE in White Plains, New York. Mr. Pitegoff's practice covers corporate and commercial law, including franchising, licensing, distribution, international business and computer and cyberspace law.

International - Mr. Pitegoff represents U.S. suppliers in their international activities and foreign companies in their U.S. ventures. He is the Westchester regional coordinator of the Export Legal Assistance Network and a member of the governing board of the World Trade Council of Westchester.

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Franchising - Mr. Pitegoff is rated in AN INTERNATIONAL WHO'S WHO OF FRANCHISE LAWYERS (Law Business Research, London, 2000) as one of 174 preeminent franchise lawyers worldwide. Mr. Pitegoff represents franchisors, franchisees and area developers, and advises others on the applicability of franchise laws to license and distributorship arrangements. Mr. Pitegoff is a former member of the Governing Committee of the American Bar Association's Forum on Franchising (1993-1996), its former Technology Officer (1995-1997) and a former Associate Editor of the ABA FRANCHISE LAW JOURNAL (1990-1993). He is the Technology Officer of the Franchise Law Committee of the New York State Bar Association's Business Law Section and a member of the Franchise Law Committee of the International Bar Association.

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Marilyn-Joy Cerny is a licensed U.S. Customs Broker and President of GLOBAL CUSTOMS & TRADE SPECIALISTS, INC. located in Brewster, New York. In addition to being a licensed customs broker, Ms. Cerny is a customs attorney, having practiced with one of the premier customs law firms in the United States and as in-house counsel for a customs broker. Ms. Cerny is a member of the Customs and International Trade Bar Association and the Windows on Wuhan China Trade Mission. In addition, she is member of the Board of Directors of the New York City Chapter of Women in International Trade as well as The Coalition for Customs Modernization. Ms. Cerny is also a member of the Editorial Advisory Board of IOMA's *Managing Exports* and is a regular contributor to that publication. Ms. Cerny has conducted lectures and participated in seminars throughout the United States.

GLOBAL CUSTOMS & TRADE SPECIALISTS, INC. is a unique customs brokerage specializing in complex customs analysis, customs duty refund, duty drawback and other programs, all designed to minimize the amount of customs duties paid by your company and to optimize your company's compliance with complicated U.S. Customs Regulations. Global's services supplement those of your entry broker and allow your company to take advantage of duty savings opportunities offered by U.S. Customs. Global prides itself in providing cost-effective services to its clients, recognizing that complicated customs issues must still be resolved within budgetary constraints. Global is a member of the National Customs Brokers & Forwarders Association of America, Inc. ("NCBFAA") and the American Association of Exporters and Importers ("AAEI").

Global's clients include both large and medium-sized corporations worldwide. These companies have taken advantage of Global's expertise and professional experience in providing reliable and accurate customs advice including duty drawback services, customs refund and classification services, NAFTA compliance services and customs compliance audits. Global is equipped to handle the most complex duty drawback programs and customs issues.

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