Hinckley, Allen & Snyder LLP is a 100-year old regional law firm with offices in Boston, Massachusetts, Providence, Rhode Island and Concord, New Hampshire.

OUR INTERNATIONAL GROUP serves U. S. clients in foreign transactions and as they enter foreign markets, either through the sale of goods and services or the physical location of facilities or joint venture activities. The Group also serves foreign clients seeking quality legal representation, particularly in the New England region, for matters such as mergers and acquisitions, general corporate, litigation, facilities location investments, labor and tax matters. The professionals in the Group are experienced in dealing with both aspects of the international practice, and take pride in providing attentive service. To support the needs of clients in foreign jurisdictions, we rely on multiple networks for quality referrals, such as TerraLex, a network of more than 155 independent law firms and 15,000 attorneys in nearly 100 countries and 40 states in the United States, and The Toledo Group, an association of 10 law firms in the United States.

AIM AS A PUBLIC MARKET FOR SMALLER COMPANY SHARES
Kathleen A. Carroll, Esq.

Launched in 1995, the alternative investment market of the London Stock Exchange (“AIM”), imposes less regulation and no requirements for capitalization or number of shares issued. For emerging companies to whom access to the U.S. public markets may currently be out of reach or viewed as overly burdensome, the listing requirements of AIM have made it an increasingly attractive vehicle to take a company public. The London Stock Exchange reports that over 2,700 companies chose to join AIM since 1995. The total value of shares traded on AIM in 2006 was 58,000,000,000 GBP, and included 278 IPOs.

Unlike NASDAQ, which has minimum financial, operating, public float, market value, bid price, shareholder base, number of market makers and established corporate governance requirements that must be met for an initial listing, AIM has no

WHY CISG MAY APPLY TO YOUR CONTRACT; AND WHY YOU MAY WANT IT NOT TO!
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When a dispute arises under a contract for the purchase or sale of goods with a foreign party, you may be surprised to learn that the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) applies and, as a result, the Agreement will not be interpreted or enforced as anticipated, even if a domestic choice of law clause has been agreed to by the parties.

CISG was adopted by the United States in 1988, and as of 2006, has been adopted by 70 countries. It applies to all contracts for the international sale of goods between parties with their relevant places of business in different countries, or “Contracting States”. Unless the contract expressly provides that CISG will not apply, it will apply automatically.

Accordingly, a Contracting State will have two sales laws: a domestic and CISG. In the United States, under the Supremacy

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formal listing requirements other than the appointment of a nominated adviser, called a NOMAD, that will determine the suitability of the company to offer its securities on AIM and guide it through the offering process. In addition, semi-annual reporting in the UK versus quarterly reporting in the US, as well as the absence of Sarbanes-Oxley Section 404 that requires management to make a formal assessment of the company’s internal controls and an independent auditor to issue a report on management’s assessment, make an AIM listing particularly appealing.

There are, however, certain requirements that the NOMAD will insist on. For example, most NOMADs will expect the issuer to comply with a substantial number of the governance provisions of The Combined Code on Corporate Governance, the governing principles of the London Stock Exchange (Main Board) companies, including providing preemption rights to existing shareholders. In addition, the grant of stock options to executives and other employees, typical for many growth companies in the US, is looked upon unfavorably in the UK, and compensating directors with stock options, a common practice in the US in order to align the directors’ objectives with those of shareholders, is frowned upon in the UK because of the perception that it impairs director independence.

Clause of the Constitution, CISG is U.S. law and preempts state common law and the Uniform Commercial Code (“UCC”) on any issues to which is applies.

The purpose of CISG is to provide rules governing the making and interpretation of international contracts for the sale of goods and to provide obligations and remedies for the parties. Basically, CISG governs the same issues as Article 2 of the UCC and it fills in where the parties have failed to provide an express provision governing a situation to which CISG is applicable or a provision in the contract is unclear. CISG does not apply to contracts to provide services alone, contracts for the sale of securities or negotiable instruments, auctions, consumer sales or sales of aircraft or vessels.

When determining whether CISG applies, the nationality of the buyer and the seller, place where the buyer takes delivery and whether the goods are to move from one country to the other is irrelevant. The determining factor is whether the relevant business of the parties is in different contracting states. While CISG does not define place of relevant business, U. S. case law has used a facts and circumstances test and looked at which place of business is the closest to the contract. The issues become difficult when Non-Contracting State parties enter the equation, and a private rule of law analysis is required to determine which jurisdiction governs.

Here are but a few examples of when CISG may produce unintended results:

• Under the UCC, an offer to purchase goods is accepted by the mailing of the acceptance. Under CISG, an acceptance must be received to be effective, and it must be received within the time stated in the offer. This rule can create problems where an offer states that a party has a certain time in which to accept, e. g., 10 days. Under the UCC, the ten days would not begin to run until the offer is received. Under CISG, however, the ten days begins to run as of the date on the offer. By the time the offer is received, a certain number of the ten days would have elapsed and the acceptance must be received by the offeror within the remainder of the ten days.

• The UCC requires any contract for the sale of goods priced at $500 or more to be evidenced by a "writing" or electronic record. There is no such requirement under CISG.

The London Stock Exchange reports that over 2,700 companies have chosen to join AIM since 1995. The total value of shares traded on AIM in 2006 amounted to 58,000,000,000 GBP, and included 278 IPOs.
Under the UCC, merely placing a time limit on the duration of an offer does not prevent the offeror from revoking it. If, for example, a seller or buyer makes an offer stating that it must be accepted within 10 days, the offer may be revoked (withdrawn) at any time before the ten days elapse unless the offer provides written assurance that it will not be revoked. Under CISG, however, an offer that merely states that it will only last for ten days prevents the party making the offer from withdrawing it during the ten-day period.

Under the UCC, if a buyer sends a purchase order and the seller responds with an acknowledgment stating the same price and quantity terms but adding other terms not found in the offer, the acknowledgment may still be an acceptance of the offer forming a contract. Typically, the buyer who makes an offer will prevail in this "battle of the forms." Under CISG, virtually any additional term in the acknowledgment will convert the seller's acceptance into a counter offer. The seller will then ship the goods and buyer will accept the goods (ignoring boilerplate additional terms) and seller's terms will prevail.

Under the UCC, where terms of the contract are reduced to a writing that manifests the parties' intention to be bound only by written terms, evidence of terms discussed in negotiation before the writing was executed will not be admitted into evidence. Under CISG, such evidence is admissible.

Interpretation of contract language under the UCC is based on the reasonable person standard. Under CISG, however, evidence of the subjective intention of the individual parties may even trump a document signed by both parties.

Article 6 of CISG allows the parties to agree that CISG will not apply, i.e., they may "opt out" of CISG. The parties may also decide that they wish to opt out of only one or more provisions of CISG. Whether they decide to opt out of CISG entirely or only certain parts, their contract should clearly indicate this intention.

In order to opt out of CISG entirely, the parties should expressly include in their contracts clear exclusive language, such as "This contract shall not be governed by the United Nations Convention on the International Sales of Goods." Simply stating that the law of a certain state applies is not sufficient.
US TAX CLASSIFICATION OF FOREIGN ENTITIES
Roy W. Gillig, Esq.

U.S. tax law is unusual in the flexibility it allows for classifying entities. For example, a U.S. limited liability company may be treated for tax purposes as a corporation, as a partnership (if it has two or more owners), or as a mere extension of its owner (e.g., a branch or division, if it has one owner). The same choice is available for many types of non-U.S. legal entities. Where the choice is available, U.S. tax law permits the entity or its owners to select the U.S. tax classification of the entity by filing an election form, and in the absence of an election provides for a default classification. The default classification rules for foreign entities are not the same as the rules for domestic entities. The classification election, the so-called "check-the-box" form, must be filed within 75 days of the desired effective date. The optimal classification depends on a number of factors, including the specifics of the taxpayer’s business, the non-U.S. tax rules applicable to the business, and the owner’s U.S. tax position, among other factors. To avoid unexpected tax results, taxpayers should assess entity classification issues upon entity formation or acquisition.

WHY IS TRANSFER PRICING RELEVANT?
Transfer pricing refers to the pricing of property or services transferred from one unit of a group of related business to another unit. Most transfer pricing issues arise in international transactions. The value placed on items transferred can affect income and other taxes. For example, import duty imposed on transferred goods will be misstated if the goods are not priced properly. Similarly, the income of a business unit will be understated if it pays too much for goods purchased from affiliates, or receives too little for goods sold to affiliates. Rate arbitrage may occur if business units are located in jurisdictions with different tax rates. Because of the potential for considerable erosion of the U.S. tax base, the I.R.S. devotes a significant proportion of its audit effort to transfer pricing. Even if tax is understated because a taxpayer’s transfer prices are found to be incorrect by the I.R.S., regulations provide that a penalty will not be imposed if the taxpayer followed certain procedures when establishing the transfer prices.

TRANSFER PRICING FOR SERVICES RENDERED TO A RELATED PERSON
The I.R.S. recently issued revised regulations for determining what constitutes an arm’s length charge for services provided to a related person. With the increasing importance of services to the U.S. economy, the I.R.S. was concerned the old regulations permitted taxpayers to inadequately compensate related service providers for high value services. The new regulations provide more elaborate rules for pricing high value intercompany services.

The prior regulations included a rule that permitted many back-office services to be charged at cost. As the new regulations took shape, U.S. multinationals were concerned the rules would not adequately provide an easily administered method of demonstrating which services are low value, or back-office, for which a charge based on cost should still be acceptable. As issued, the Temporary Regulations include a "safe harbor" allowing a cost-based charge for certain intercompany services described on a list issued by the IRS, if the taxpayer reasonably concludes, in its business judgment, the service does not, in essence, make an important economic contribution to the taxpayer’s business. The Temporary Regulations are generally effective for taxable years beginning after December 31, 2006, except a one-year delay applies to the new method applicable to low-margin and back-office services.

TOTALIZATION AGREEMENTS
The U.S. maintains agreements with numerous countries relating to the imposition of Social Security and the coordination of benefits from such programs. These are referred to as “totalization agreements.” Employees transferring to other countries and their employers should review any applicable Totalization agreement to assess whether double social security taxation can be mitigated.

FOREIGN BANK ACCOUNT REPORT
Under the Foreign Bank Secrecy Act the U.S. Treasury Department requires U.S. persons who hold a financial
DO YOU CONDUCT BUSINESS ABROAD? WHAT EVERY BUSINESS OWNER SHOULD KNOW ABOUT FOREIGN TRADEMARK REGISTRATION

Deborah L. Benson, Esq. & Amy B. Spagnole, Esq.

In today’s world of fax machines, e-mail and teleconferencing, even small, local business have the opportunity to market and sell their products in foreign countries. Although U.S. business owners generally understand the importance of registering their trademarks on their own turf, even the most savvy business owners frequently overlook the importance of obtaining trademark protection in the foreign countries where they do business. This seemingly innocent oversight can be detrimental to a business’ ability to conduct business abroad.

Trademark laws outside the United States differ greatly. In the United States, trademark rights are based on use of a trademark in connection with the sale of goods or services. The first to use a trademark generally has superior rights and can stop the use of the same or similar mark by another. This is true even if the trademark owner did not register its mark with the United States Patent and Trademark Office. However, in most foreign countries the “first to file” for trademark registration rather than the “first to use” will own the trademark.

Furthermore, trademarks outside the United States need not be in use in order to obtain a registration. In fact, in most countries there need be no actual use of a mark for three (3) or more years after the issuance of registration. Because use is not required to obtain a registration a business can perfect its right to use a mark in a country before the business actually enters that market.

The ability to file for trademark registration outside the U.S. prior to use is a double edge sword as it also permits third parties to register a business’ important trademarks without ever using or intending to use such marks. It is not uncommon for a U.S. trademark owner who sells its products in another country but fails to register its mark in that country to find out that its mark has been registered in that country by a third party. In many instances, that third party turns out to be the trademark owner’s own foreign distributor or, even worse, its competitor. If another company registers a business’ mark, it can block that business’ ability to register and thereby block its ability to both import goods or enforce its rights.

Without a trademark registration, a trademark owner faced with a third party foreign registration for its mark has little recourse other than choosing a new mark and starting over, or buying the mark back from the registrant, usually at a steep price. This situation can be easily avoided however, if the business owner has the foresight to register its mark prior to conducting business abroad.

Foreign trademark registrations can be viewed both as a means to prevent competitors from using the same or a similar mark to ride the coattails of a product success and as “insurance” that a company can expand into and use its trademarks in foreign countries where it does or contemplates doing business. If the business owner decides not to seek protection of its marks in foreign markets, the business owner risks possible exposure for liability for infringement – including fines, seizure of goods, business interruption and costs for indemnifying distributors for any breach of warranty or for any other basis pursuant to which the distributor can withhold payment to the trademark owner. This is probably the single most important reason to seek trademark protection abroad.

With few exceptions trademarks are registered on a country by country basis. In general, a business owner must register its trademark with the national trademark office of each country in which it is or contemplating doing business.

There are, however, two filing systems which permit trademark owners to seek protection in multiple countries by filing one application. On November 2, 2002, President Bush signed a long awaited bill ratifying the United States’ adherence to the Madrid Protocol. In a nutshell, the Protocol permits a United States business or citizen to file an application for trademark protection in any number of the 60 member countries by filing one trademark application, with one trademark office, in one language and by paying one fee.

The Community Trademark Application is another type of foreign trademark application commonly used to cover multiple countries. A single Community Trademark (“CTM”) Application covers all member countries in the

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Continued - US Tax Classification of Foreign Entities

interest in, signature authority, or other authority over a foreign bank, securities, or other financial account to annually disclose such interest or authority by filing Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, by June 30, for the prior calendar year. No filing is required if the aggregate value of such accounts does not exceed $10,000 at any time during the calendar year. The filing requirement also applies to employees and officers of U.S. corporations and their subsidiaries, unless (a) the corporation’s equity securities are listed on a national securities exchange, or (b) the corporation has more than 500 shareholders, assets of more than $10,000,000, and the individual does not have a financial interest in the account, or own more than 50% of the shares of the corporation (measured by value).

**RECENT NEWS**

China has one of the relatively few brakes on non-domestic legal expansion in China has been the PRC’s regulatory framework. However, certain barriers to foreign business activity in the Chinese market are coming down, not least because of the Government’s obligations under World Trade Organization rules. Over the last few years, this has led to foreign law firms setting up and growing rapidly on the Mainland. The recent announcement that the first foreign banks have been given final regulatory approval to incorporate in Shanghai is another very important step.

The four banks will be able to operate in the retail banking sector, meaning they will be able to offer services such as wealth management and credit cards.

Continued - ...What Every Business Owner Should Know About Foreign Trademark...

European Union. The European Union includes twenty-seven countries, namely, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

Both the Madrid and CTM systems leave the national trademark filing systems of the individual countries intact. A trademark owner can file a Madrid application, a CTM application, a national application or any combination of the three. As with any trademark registration system there are many pros and cons to utilizing the Madrid, CTM and national filing systems. Choosing the appropriate filing system depends on a specific business’ needs, future plans and financial situation. Regardless of which system is right for your particular business, one thing is clear – if you are doing or contemplating doing business abroad, you must register your trademarks!