

RISK ASSESSMENT & MITIGATION CHECKLIST

Set forth below is a summary of the approach that a foreign retailer contemplating a roll out of a retail concept into the USA should consider to identify and plan for the major legal risks it may encounter. By undertaking such an analysis and implementing appropriate risk mitigation measures, the retailer can, in most cases, achieve a risk profile it determines to be acceptable and limit exposure to potentially costly and distracting litigation. The review and mitigation steps described are best undertaken by a team involving management, legal counsel and appropriate other business, IT and insurance experts.

 Decide Whether to Form A New Business Entity	Operating through an entity provides the opportunity for insulation from liability for owners, investors and management. However, it is important to take into account the statutory and judicial exceptions in the USA that can still impose liability on owners and others involved with the new business. Creating a new, separate entity, rather than using an existing domestic or foreign entity, can help to limit exposure of existing operations and assets to the new business.
 Structure the New Entity or Amend Existing Structure To Maximize The Parties Goals	The goals of the business' owners, investors and management should be identified, and the entity to be formed structured so as to promote these goals, provide maximum alignment of interests and realize maximum tax efficiencies. The entity's charter documents should reflect these goals, and the parties should consider inclusion of best practices provisions for director and officer indemnification and exculpation.
 Undertake Tax Planning for Foreign Parties	In the case of a roll out to the USA by foreign owners, investors and/or management, an analysis should be made to most effectively integrate the USA ownership structure, with its relative tax attributes and impact, within the business' overall global tax planning and structure.
 Identify Inherent Risks of Operating the Specific Business	The inherent risks to customers, employees and the public of the operation of the specific business contemplated should be reviewed together with a list of applicable regulatory schemes, including relevant USA export control laws. Policies, procedures and controls to address these risks and regulations should then be developed to guide operations and mitigate exposure.
 Develop Standard Contractual Terms and Conditions (T&Cs)	Establish standard T&Cs within the business' USA trading contracts in order to reflect best retail industry contracting practices and to allocate legal risk appropriately between contracting parties (to the extent practical, taking into account market strength and significance of contracting parties).
 Address Employment and Immigration Issues	Federal, state and local employment laws and regulations should be catalogued, including those pertaining to "wages and hours," overtime pay, work breaks, payment of benefits, vacation and sick pay, disability, family leave, determination of employee vs. independent contractor status, compliance with immigration laws, standard form NDAs, employee IP assignments, and non-compete covenants. Human resource materials, including policies, forms, procedures and handbooks should then be prepared to address these issues and other potential work place problems such as sexual harassment and discrimination.
 Establish Means to Maintain Privacy of Personal Data	Customer lists and data to be maintained by the business should be reviewed and policies and procedures established with respect to data collection, storage, use by the business (including emails, twitter, etc.) and any proposed use of, or access to, this data by third-parties.
 Review IT, Internet and Payment Security	Appropriate experts should review the business' proposed IT network and security. Credit card, electronic payment, data collection, privacy, POS and other IT policies and procedures should be reviewed for industry and legal compliance.
 Review Accounting Procedures	Financial procedures and documentation should be reviewed, including any potential vulnerability to fraud or other malfeasance in the handling of records, customer deposits, cash and inventory.
 Establish IP Protection and Management	An inventory of applicable trademarks, copyrights, patents and other intellectual property should be made, including the status of filings and other protections in place, and the jurisdictions in which they are currently effective. Procedures should then be established for ongoing protection of IP, including detection and response to infringing activities and possible filings in other jurisdictions.
 Review Leases	Leases should be reviewed carefully and negotiated to achieve the retailer's business objectives, with special attention to provisions that could restrict the ability of the retailers to operate its business, sell its business, or transfer the lease to a third party, and expose the retailer to unexpected liabilities. Tenants operating in the USA do not benefit from various protections accorded tenants by statute or common law in Europe.
 Consider Litigation Alternatives	Alternative dispute resolution ("ADR") is a common procedure to deal with the increased costs and time inherent in USA litigation. The two most common ADR procedures are mediation (a negotiation of disputed issues facilitated by a third party) and arbitration (a binding process with a third-party decision maker).
 Establish Appropriate and Effective Insurance Coverage	Appropriate insurance, including coverage for worker's compensation, property damage, third party claims, environmental exposure, business interruption, cyber and data security breaches, liability for professional activities and directors and officers' coverage should be put in place. So-called "boiler-plate" should be adjusted wherever possible to tailor coverage to identified actual risks anticipated to be encountered by the business.

