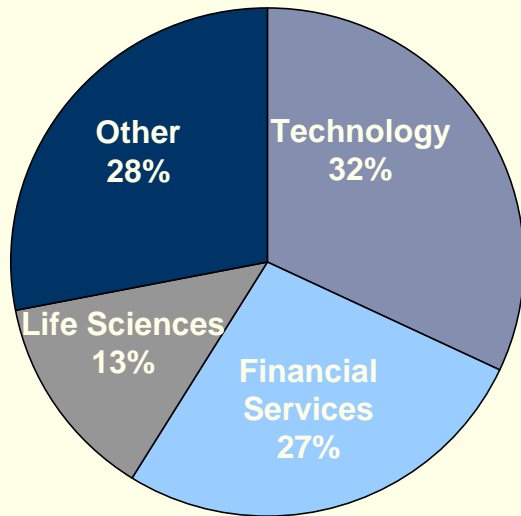
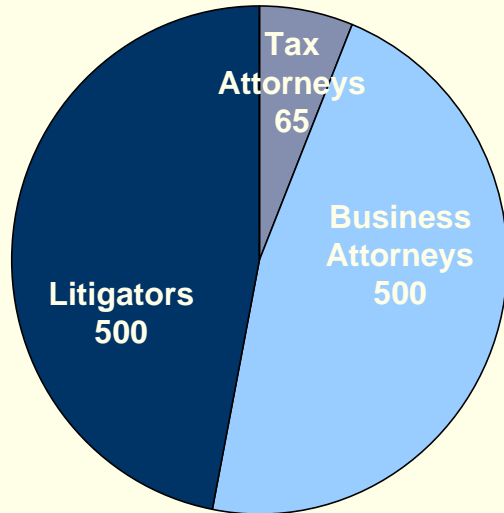


# Focus on the Future – Prospects for UK/US Business

Tuesday, July 7, 2009

The Fairfax County Economic Development Authority  
Institute Of Directors, London

# Firm Overview



- Morrison & Foerster is one of the world's leading law firms with more than 1,000 lawyers across 3 continents
- Particular expertise in finance, healthcare and technology
- Unrivalled depth in Asia and the Pacific Rim
- Clients rely on us for innovative and business-minded solutions
- We have enduring relationships with our clients

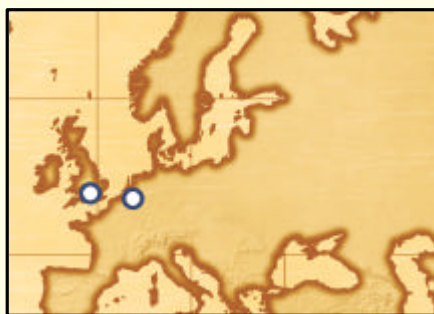
# London and Northern Virginia

## Northern Virginia



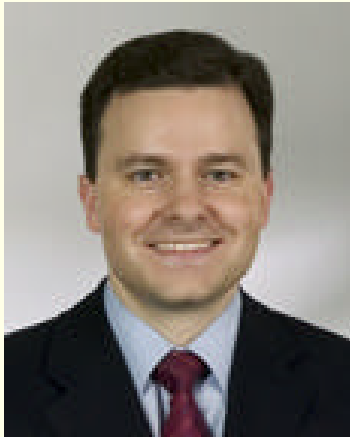
- One of the largest and most established corporate practices in the Northern Virginia area with over 20 corporate attorneys.
- Labour and Employment expertise frequently recognised and cited, especially in niche areas such as Whistleblower issues.
- Internationally renowned patent attorneys. One of the firm's top offices for volume of patent matters handled annually.
- Government Contracts expertise: In the last five years, litigated claims against the government valued at over \$350 million and litigated 20 bid protests related to over \$5 billion in contract awards.

## London



- 60 English and US qualified lawyers in London offering expertise in the major disciplines.
- Established presence in the UK for 30 years.
- Particular expertise in technology, healthcare and finance sectors.
- Our lawyers and practices are recognised for excellence by Chambers UK and Legal 500 UK. 70% of our London partners are mentioned in the current Legal 500 UK, with three singled out as “Leading” lawyers.

# Contacts



Kristian Wiggert

Partner

London Office

+44 20 7920 4009

[kwiggert@mofocom](mailto:kwiggert@mofocom)

Engages in a general corporate finance practice.

Prior to joining the London Office in 2000, he practiced for five years in our San Francisco office.

Has considerable experience of advising UK companies on all aspects of doing business in the US.

Has deep understanding of how the US and UK legal regimes mesh (or differ) and how to make cross-border transactions work.

# Setting Up a Business in the United States

- When conducting business in the US, most non-US businesses choose to set up a US-based subsidiary entity as a vehicle for US operations.
- Allows non-US business to ring-fence its US liabilities from the rest of the operations.
- Overview of Presentation
  - US legal system and choice of where to incorporate US-based business
  - Forms of Business Entities in the US
    - Corporations
    - LLCs
  - Overview of US Tax Law relating to Corporations and LLCs
  - Overview of Employment Law in the US
  - Overview of Intellectual Property Law in the US

# US Legal System and Choice of Where to Incorporate US-Based Business

- US Legal System (Common Law Legal System)
    - Federal Laws
    - State Laws: each of the 50 US states has its own laws
  - Note: In the US, the laws of the state in which an entity is formed generally regulate its governance and internal affairs.
  - Delaware\*\* is usually preferred because:
    - *Straightforward Statute.* Delaware law generally reflects a practical approach.
    - *Highly Developed Case Law.* Extensive body of corporate case law and precedent, providing greater certainty and predictability for Delaware companies.
    - *Specialised Court System.* Unique expertise in corporate matters.
    - *“User-Friendly” State Agency.* Allows for expedited document filing and processing, advanced document imaging and online access to corporate files.
- \*\* Note: A Delaware corporation can conduct business in any location, inside or outside the US, and does not need to keep a corporate office in Delaware.

# Forms of Business Entities in the US

- Sole Proprietorship
- General Partnership
- Limited Partnership
- Corporation (Note: no distinction between public and private companies)
- Limited Liability Company (“LLC”)
- Limited Liability Partnership

*Please note that this presentation shall focus on Corporations and LLCs as these are most common forms for business vehicles established by non-US companies in the US.*

# Corporation – General Information

- Basic Structure
  - Business owned by one or more stockholders
  - Management through the Board of Directors
  - Day to day operations carried out by officers and employees
- Highly flexible - corporate structure can be tailored to accommodate business needs
- Limited liability for stockholders
- Taxable as separate entity
- Shares of capital stock are considered securities under US securities laws which must be qualified or registered under applicable state and federal securities laws unless an exemption is available
- Allows for discretion (minimum requirements on private corporations for public disclosure of information – no Companies House in the US!)

# Corporation – Formation

- Certificate of Incorporation
  - Basic governing document of the new corporation (minimum information required to be included in the Certificate of Incorporation)
  - Publicly filed with the Secretary of State
  - Legal existence of the corporation commences when the Certificate of Incorporation has been filed
- Bylaws
  - Bylaws contain the rules for conducting the corporation's business and affairs (i.e., timing of notices, quorum requirements and indemnification of directors and officers)
  - Not publicly filed
- Appoint directors for Corporation's Board of Directors and hold first meeting
- Issuance of Shares
  - Shares can be issued for cash or for property, goods and services provided to the corporation
  - There may be tax implications where shares are issued for non-cash consideration
- Possible Additional Steps
  - File Form SS-4 (Application for an Employer Identification Number) with the IRS;
  - File Form BE-13 (or related Exemption Claim Form) with the US Commerce Department (Declares foreign ownership of US-based corporation); and/or
  - File Application for Certificate of Authorization to conduct business in other US States (the Corporation must be approved/qualified to conduct business in each individual US State where it intends to conduct business) and localities

# Corporation - Governance

- **Stockholders**
  - May have different classes of stockholders
  - Do not need to be US citizen/resident
  - Generally, not personally liable for the payment of the corporation's debts
  - Names and addresses of stockholders do not need to be publicly disclosed
  - Unless included in Certificate of Incorporation, no super majority vote requirement for approvals of corporate actions
- **Directors and Officers**
  - Single person can serve as director and also fill all officer positions of the Corporation
  - Do not need to be US citizen/resident
  - Directors and officers may be indemnified under Delaware law
  - Officers run the day-to-day operations of the Corporation; unlike usual practice in the UK, officers are often not directors

# Corporations – Housekeeping & Corporate Records

- Corporations should maintain accurate and thorough records of their actions, including:
  - contracts and other documents memorializing the day-to-day operations of the company,
  - stock ledgers,
  - books of account, and
  - minute books for meetings of the Board and Stockholders.
- Minutes/Written Resolutions
  - Delaware law states that one officer (usually the secretary) “shall have the duty to record the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose.” This requirement is generally satisfied by keeping minutes of meetings.
  - Minutes should accurately reflect what actually occurred at the meeting, but are usually less detailed than those for UK companies.
  - Minutes, together with copies of the notice of the meetings or waivers thereof, should be placed in the Corporation’s minute book.
  - If a Corporation should for any reason become involved in litigation, proper minutes and other records can be indispensable evidence for the Corporation to demonstrate that action taken was properly considered and approved (however, they can also be used as evidence against the Corporation).

# Corporation – Director’s Duties under Delaware Law

- *Duty of care*: Requires directors to become informed of all reasonably available material in making decisions and overseeing the management of the Corporation.
- *Duty of loyalty*: Requires directors to put the best interest of the Corporation and its stockholders over any interest possessed by that director and not shared by the stockholders generally. Requires directors to, among other things:
  - act in good faith
  - avoid conflicts of interest
  - ensure that transactions are fair
  - obtain independent advice
  - avoid corporate opportunity
- *Business Judgment Rule*: A decision made by a director will be protected by the business judgment rule, which provides (subject to limited exceptions) that absent bad faith, fraud or self-dealing, courts will not second guess an informed decision made by a director. In order to invoke the protections of the business judgment rule, a director must have satisfied the duties of care and loyalty.

*Please Note: A parent company generally is not liable for its subsidiaries' obligations. A court can, as an equitable remedy, revoke the limited liability status of the stockholders.*

# Limited Liability Company (“LLC”) – General Information

- An LLC combines certain of the characteristics of a partnership and a corporation
- Basic Structure
  - Business owned by one or more Members
  - Managed by either its Members or by one or more managers (who may or may not be Members)
  - Day to day operations carried out by either by its Members, or managers, or by officers and employees
- Limited liability for Members
- Taxed either as a partnership or corporation (election)
- LLC membership interests may be considered securities under US securities laws which must be qualified or registered under applicable state and federal securities laws unless an exemption is available.
- Although there is a Uniform Limited Liability Company law, most US states (including Delaware) have adopted their own statutes

# LLC - Formation

- Certificate of Formation
  - Basic governing document of the new LLC
  - Publicly filed with the Secretary of State
  - Legal existence of the LLC commences when the Certificate of Formation has been filed
- Operating Agreement or LLC Agreement
  - Sets forth how the LLC is to be operated
  - Not publicly filed; Private agreement between Members

# LLC - Governance

- **Members**
  - Party with ownership interest in the LLC
  - An LLC needs to have only one Member
  - Do not need to be US citizen/resident
  - Generally, not personally liable for the payment of the LLC's debts
  - No minimum capital investment is required
- **Managers or Other Management Arrangement**
  - LLC Members can select the management arrangement that works best for them.
  - Do not need to be US citizen/resident
  - Members can be Managers

# Overview of US Tax law relating to Corporations and LLCs

- Corporations
  - A US Corporation is a taxpayer and pays US taxes on its taxable income (gross income less deductible expenses)
  - Corporate profits are generally taxed a second time, this time at the shareholder level, when they are distributed as dividends
  - However, a Corporation can accumulate profits (subject to certain limitations and other potential taxes) for later use in the business by not declaring dividends; the shareholder will not be taxed on the accumulated profits until a dividend is paid
  - Dividends paid to non-US stockholders - A 30% withholding tax is payable on dividends paid to non-US stockholders, subject to the provisions of any applicable double tax treaty.
- LLCs
  - An LLC can elect to be treated as a partnership (so it will not be subject to tax at the business organisation level) or a corporation
  - The LLC/Operating Agreement will set forth the tax treatment agreed to by the LLC Members
- In both cases the entity, as an employer, will have responsibility for withholding certain taxes from employees' pay (including income, Social Security and Medicare)

# Overview of Employment Law in the US

- *US Terminology:* “Labor law” addresses union-employer relations. “Employment law” covers individual employment rights and obligations.
- *Applicable Employment Laws*
  - Federal, state and local laws regulate employment matters.
  - Employment contract matters are regulated at the state level.
  - At the federal, state and local level, employment statutes generally fall into one of the following categories:
    - Labor standards laws – Cover minimum wages, maximum hours, child labor, occupational safety and health, etc. (e.g., Fair Labor Standards Act and the Occupational Safety and Health Act and also State laws covering matters)
    - Non-discrimination laws - Prohibit discrimination on the basis of stated criteria, such as, race, religion, sex, age, etc. (e.g., Title VII of the Civil Rights Act of 1964, The Americans with Disabilities Act of 1990, etc.)
    - Employee benefit laws – Regulate employee benefits, such as, health benefits, unpaid leave, etc. (e.g., Employee Retirement Income Security Act, Consolidated Omnibus Budget Reform Act, Family and Medical Leave Act and various State laws)
- *Scope of Laws:* US employment laws are generally viewed as more employer-friendly than UK employment law.
  - US employment law generally regulates only certain aspects of the employment relationship (e.g., occupational health and safety, equal employment opportunity, workers’ compensation, etc.).
  - Most other countries’ laws (including UK law) address many other areas of the employment relationship such as holidays, vacation time, bonus payments, and mandatory sick leave.

# Overview of Employment Law in the US (continued)

- *At-will employment.*
  - Conventional relationship between an employer and an employee in the US is “employment at will.”
  - Employee is hired for an indefinite period of time and either the employer or the employee may terminate the employment relationship at any time, with or without cause, and with or without advance notice.
- \*\* Note that a written contract is not required, but is good practice.
- *Termination of Employees:*
  - Generally, in the absence of an agreement to the contrary, employers can terminate employees at any time with or without cause
  - Labor relations and non-discrimination laws prohibit the dismissal of employees for certain reasons (e.g., disability/age/etc., complaining about discrimination, interfering with their benefits entitlements, etc.)
  - The remedies for dismissals that violate federal or state law may include reinstatement, back pay, future payments and lawyers' fees.

# Overview of Intellectual Property Law in the US

- Patents
  - Patent owner can exclude others from making, using, selling and importing in the US an invention that is new, useful and not obvious.
  - *How protected* - A patent application must be filed with the US Patent and Trademark Office (“USPTO”)
  - *How enforced* - A patent owner can (i) bring a civil action to prevent infringement, (ii) seek damages for the infringement and an injunction against future use of the patented invention and (iii) ask the US International Trade Commission to block the importation of infringing articles into the US.
  - *Length of protection* - 20 years from the date of filing
- Trademarks
  - Any name, word, device, logo, slogan or combination of these which, when used in commerce, indicates the source or origin of goods or services, qualifies as a trade mark unless the mark falls within a statutorily excluded category. The mark must be distinctive and not merely descriptive.
  - *How protected* - A trade mark must be either registered with the USPTO or, if not registered, used continuously in commerce. States have parallel registration systems. Registration is not required for trade mark protection and does not grant a registrant any right to use a trade mark.
  - *How enforced* – Same as those for Patents (see above)
  - *Length of protection* - If registered, protection lasts for ten years from the date of filing. If unregistered, protection is indefinite provided that there is continuous use in commerce.
- Copyrights
  - Original works of authorship are protected as expressions fixed in a tangible medium.
  - *How protected* - Protection subsists automatically without formalities. Registration with the US Copyright Office is required for judicial enforcement.
  - *How enforced* – Same as those for Patents (see above)
  - *Length of protection*- Protection lasts for the life of the author plus 70 years.