



Threshold Issues in Setting up a Business in the U.S.

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Agenda

- I. Initial Issues**
- II. Liability Concerns of Foreign Parent Company**
- III. Visa & Immigration**
- IV. Q&A**

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Section I: Initial Issues

Threshold Issues in Setting up a Business in the U.S.

Section I: Initial Issues

Typical Goals for Establishing U.S. Operations

- Maximization of return on investment
- Minimization of exposure to U.S. liabilities
- Minimization of overall tax liability
- Repatriation of profits from U.S. to home country

Section I: Initial Issues

Operating Without Forming a New Entity

- No limited liability for foreign parent
- Foreign parent will need to qualify to do business
- Tax Considerations
 - Foreign corporation subject to U.S. taxation on U.S. business profits of U.S branch.
 - Profit repatriation – US Branch Profits Tax
 - Consider potential double taxation issue

Section I: Initial Issues

Forming a New Entity—Types to Choose From

- Corporation
- Limited Partnership
- Limited Liability Company

Section I: Initial Issues

Corporations

- Easy to form
- Limited liability protection for stockholders
- Will need to elect board of directors and officers annually
- Tax considerations
 - Subject to U.S. taxation as a corporate entity
 - Consider appropriate equity structure
 - Profit repatriation – withholding tax considerations
 - Consider whether foreign country will tax U.S. activities based on foreign anti-deferral regime

Section I: Initial Issues

Limited Partnership

- Easy to form
- Limited liability protection for limited partners
- Need for additional entity to act as general partner
- Tax considerations
 - Tax flexibility regarding whether to be treated as a corporation or flow-through entity (branch or partnership)
 - Profit repatriation: branch profits tax versus withholding tax
 - Consider foreign country tax implications

Section I: Initial Issues

Limited Liability Companies (LLCs)

- Easy to form
- Limited liability protection for owners (called “members”)
- Tremendous flexibility in governance
- Tax considerations
 - Tax flexibility regarding whether to be taxed as a corporation or flow-through entity (branch or partnership)
 - Profit repatriation: branch profits tax versus withholding tax
 - Consider foreign country tax implications – might be considered a corporation for a foreign perspective even if a flow-through for US tax purposes
 - Consider implications to utilization of U.S. tax treaty network

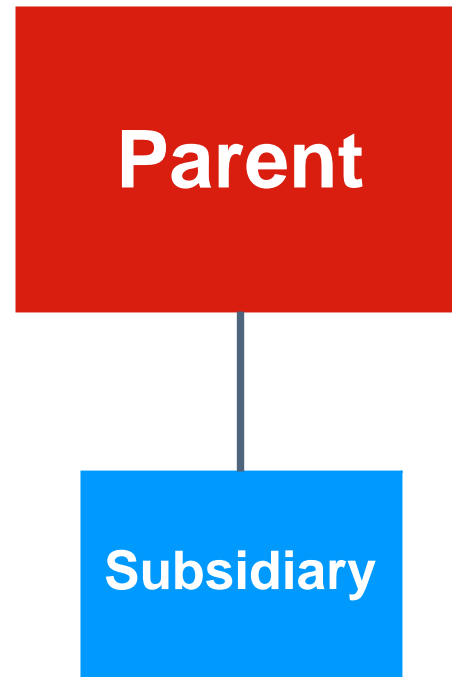
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Section II: Liability Concerns of Foreign Parent Company

Threshold Issues in Setting up a Business in the U.S.

Section II: Liability Concerns of Foreign Parent Company

Piercing the Veil of Limited Liability



Section II: Liability Concerns of Foreign Parent Company

Piercing the Veil (cont.)

Courts look at the following factors:

- Alter ego (sub and parent act as single entity)
- Fraud on creditors
- Unduly thin capitalization

Section II: Liability Concerns of Foreign Parent Company

Liabilities of Directors and Officers (or managers of LLCs, or of general partners)

- Directors and officers owe the corporation and stockholders duties of care and loyalty
 - Duty of care – reasonableness in decision-making
 - Duty of loyalty – directors should be free of conflicts of interest
- Minority investors might bring claims if they believe a breach has occurred

Section II: Liability Concerns of Foreign Parent Company

U.S. Litigation Liability Issues

1. Should non-U.S. based companies be concerned about liability in the U.S.?
2. If U.S. liability is a significant concern, how can U.S. courts obtain jurisdiction over foreign companies?
3. For purposes of trying to insulate itself from U.S. court jurisdiction, does it matter how the foreign company sets up U.S. operations?
 - Five situations considered

Section II: Liability Concerns of Foreign Parent Company

Should a foreign company be concerned about its potential liability in the U.S. from U.S. activities?

YES – Significant verdicts have been rendered in U.S. courts against foreign companies in products liability and other cases.

Section II: Liability Concerns of Foreign Parent Company

Examples of U.S. Verdicts Against Foreign Companies:

- **The Lychee Candy cases (2003)**
 - 3 children died after choking on candy that did not dissolve easily
 - 3 California lawsuits against the Taiwanese candy manufacturer and two of its officers
 - \$117,000,000 in total verdicts
- **The Life Flight Helicopter cases (1993-1995)**
 - Crash of an air ambulance caused by engine drive gear failure
 - 3 lawsuits brought in Texas and Missouri against French helicopter and engine manufacturers
 - \$422,000,000 in total damages

Section II: Liability Concerns of Foreign Parent Company

Examples of U.S. Verdicts Against Foreign Companies:

- **The Nissan Maxima case (2002)**
 - Passenger compartment of a 1995 Maxima GXE collapsed during an accident
 - New Jersey lawsuit against a Japanese automaker and its North American affiliate
 - Jury awarded victim \$14,400,000
- **The Nail Gun case (1985)**
 - Special gun over-penetrated a wood frame on a construction project and a nail ricocheted into plaintiff's neck
 - German nail gun manufacturer held liable in Maine
 - \$9,700,000 in damages

Section II: Liability Concerns of Foreign Parent Company

How does a U.S. court obtain jurisdiction over a foreign company?

- “Doing Business” in the state
 - Does foreign entity maintain an office, mailing address, or telephone in the state?
 - Does foreign entity have agents, employees, or real property in the state?
- Long-Arm Statutes
 - Exist in all U.S. states and vary by state.
 - Convey jurisdiction as long as the conduct in the state is the source of the claim at issue.
 - A single act done or transaction engaged in by the foreign entity can be sufficient to establish jurisdiction.
 - Merely forming and operating a subsidiary within the state may constitute the “single act or transaction” required by the long-arm statute.

Section II: Liability Concerns of Foreign Parent Company

How does a U.S. court obtain jurisdiction over a foreign company (cont)?

- State Long-Arm Statutes Are Measured by U.S. Constitutional Standards of “Due Process.”
 - Foreign entity must have certain “minimum contacts” with the state.
 - “Purposeful availment” – Foreign entity’s deliberate actions must be directed at the state.
 - Foreseeability – Foreign entity’s conduct must be such that there should be reasonable anticipation of being haled into court.

Section II: Liability Concerns of Foreign Parent Company

When does a U.S. court have jurisdiction over a foreign company? Five Situations Considered...

Situation A - Foreign company sells products directly into the U.S. with no U.S. “footprint.”

U.S. Court Jurisdiction? YES – Easy to show sales directed at the forum state and U.S. courts will typically have jurisdiction over claims related to the product sold:

- *Haedike v. Kodiak Research, Ltd.* (Illinois) – U.S. court had jurisdiction over German manufacturer of carburetors which had extensive sales relationships with U.S. wholesalers and retailers.
- *McKenney v. Kenyon Piece Dye Works* (Rhode Island) – U.S. court had jurisdiction over German manufacturer of industrial machine, despite passage of 20 years and resale of the machine.
- The Lychee Candy cases (California) – Manufacturer in Taiwan sold to several U.S. distributors for sale into the U.S.

Section II: Liability Concerns of Foreign Parent Company

When does a U.S. court have jurisdiction over a foreign company?

Situation B – Foreign company opens an unincorporated U.S. branch office and operates through that office.

U.S. Court Jurisdiction? YES – U.S. courts typically have jurisdiction in this situation. *Frummer v. Hilton Hotels Int'l, Inc., et al.* (New York)

Court will look for presence of:

- “Continuous and systematic” activities
- Foreign company office in the state
- Employees stationed in the state
- Bank account in the state
- Registration to do business or registered agent in the state (majority of states)
- Supervisory meetings (board of directors, executive committee) held in the state

Section II: Liability Concerns of Foreign Parent Company

When does a U.S. court have jurisdiction over a foreign company?

Situation C –Foreign company establishes a U.S. subsidiary which is an “alter ego” or “mere department”

U.S. Court Jurisdiction? YES – U.S. courts will typically have jurisdiction over claims against the foreign parent. *Taca Int’l Airlines, S.A. v. Rolls Royce of England, Ltd.* (New York)

Courts will consider:

- Form and appearance of independence (or lack thereof)
- Wholly owned subsidiary
- Commonality of key personnel (management, directors)
- Combined financial and operating statements
- Common direction of marketing efforts
- Key question – Was the subsidiary actually an independent entity or a mere department of the parent?

Section II: Liability Concerns of Foreign Parent Company

When does a U.S. court have jurisdiction over a foreign company?

Situation D – Foreign company establishes a purportedly independent U.S. subsidiary.

U.S. Court Jurisdiction? MAYBE – U.S. courts will have jurisdiction over claims that “arise out of” foreign parent’s activities in the relevant state.

- French company created subsidiary to effect a merger with a U.S. company – court held that there was jurisdiction over the French entity for claims arising from the merger (*Friedman v. Alcatel Alsthom* (Delaware))
- Bahrain bank created U.S. subsidiary to advise and represent foreign parent on U.S. investments – court held that there was jurisdiction over the parent regarding claims arising from the U.S. investment activities (*Aeroglobal Capital Management, LLC v. Cirrus Industries, Inc., et al.* (Delaware))

Section II: Liability Concerns of Foreign Parent Company

When does a U.S. court have jurisdiction over a foreign company?

Situation D (cont)

- Key factors from these cases:
 - Foreign companies acted through their U.S. subsidiaries in the U.S. and therefore established “minimum contacts” with the state.
 - “Purposeful availment” found; foreign entities used the benefits and protection of state law to create and maintain their U.S. subsidiaries.
 - Foreign entities could “reasonably anticipate” being required to defend themselves in state’s courts.

Section II: Liability Concerns of Foreign Parent Company

When does a U.S. court have jurisdiction over a foreign company?

Situation E – Foreign company establishes a truly independent U.S. subsidiary.

U.S. Court Jurisdiction? PROBABLY NOT

- Mere ownership of a U.S. subsidiary not enough to convey jurisdiction over parent.
- *Vaughan Motors v. Societe Anonyme Des Automobiles Peugeot* (New York)
 - French auto manufacturer sold cars f.o.b. in France to its New York-based (independent) U.S. subsidiary.
 - Parent did not advertise or directly sell any products in the U.S.
 - Parent maintained no office, employees, bank accounts, telephone listing, etc. in the U.S.
 - U.S. court held that it did not have jurisdiction over foreign company.

Section II: Liability Concerns of Foreign Parent Company

When does a U.S. court have jurisdiction over a foreign company?

Situation E (cont)

- *Miller v. Honda Motor Co. Ltd.* (Massachusetts)
 - U.S. subsidiary had forum state contacts, but foreign parent manufacturer in Japan did not.
 - Some common executives, but independent day-to-day management, finances, personnel.
 - Sales of allegedly defective product not directed at forum state.
 - No jurisdiction over foreign parent; “[T]here is nothing fraudulent or against public policy in limiting one’s liability by the appropriate use of corporate insulation.”

Section II: Liability Concerns of Foreign Parent Company

Conclusions:

- Foreign entities can have major liability concerns as a result of U.S.-related activities.
- U.S. courts will typically have jurisdiction over foreign companies which:
 - act independently in the U.S.
 - act in the U.S. through unincorporated affiliates.
 - act in the U.S. through subsidiaries which are nothing more than “alter egos” or mere departments of the parent.
- U.S. subsidiaries which are **truly independent** can insulate foreign parents from U.S. court jurisdiction and liability.

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Section III: Visa & Immigration

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Nonimmigrant Visa Options

- B-1 Business Visitor Visa or Visa Waiver Program
- L-1 Intra-company Transferee Visa
- E Treaty Visa
- H-1B Temporary Worker Visa
- Other Visa Categories

Section III: Visa & Immigration

B-1 Business Visitor Visa or Visa Waiver Program

- Temporary business visit
- Participate in conferences, attend meetings, negotiate contracts, etc.
- No local employment

Section III: Visa & Immigration

L-1 Intra-company Transferee Visa

- Executives, managers or specialized knowledge employees
- Must have worked for at least 1 year with a foreign parent, branch, affiliate or subsidiary of U.S. company within the past 3 years

Section III: Visa & Immigration

E Treaty Visa

- Treaty investor or treaty trader
- Based on a bilateral investment treaty or other treaties between U.S. and country of which one is a national
- Nationality of company must be the same as the visa applicant

Section III: Visa & Immigration

H-1B Temporary Worker Visa

- Professionals such as engineers, computer programmers, economists, lawyers and others
- Must have a bachelor's degree in a related field of study or equivalent experience
- Subject to an annual numerical quota of 65,000 visas

Section III: Visa & Immigration

Other Visas Categories

- O-1 visa for persons who have demonstrated extraordinary ability in the sciences, arts, education, business or athletics
- TN visa for Canadian and Mexican professionals engaged in occupations listed under the NAFTA regulations
- E-3 visa for Australian professionals

Section III: Visa & Immigration

Visa Challenges of the Newly Formed or Small Company:

- Close scrutiny by U.S. Citizenship & Immigration Services and U.S. Consulates
- Documentary requirements
- Application timing and delays

Section III: Visa & Immigration

Employment-based Immigration or Permanent Resident Status Application:

- Priority Workers Petition
 - Multinational executives or managers
 - “Fast-track” process
- Labor Certification Application
 - Professionals
 - Labor market test
- Immigrant Investors
 - \$1 million investment to a U.S. commercial enterprise
 - Must create 10 full-time jobs within 2 years
 - Conditional resident status for 2 years



Section IV: Q & A

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Thank you for joining us!

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