



Why Incorporate in Delaware?

One of the most common questions I've heard from people thinking about incorporating their business is, "Should I incorporate in Delaware? I've heard it's better." Typically, the individual doesn't have any information beyond that, "I've heard it's better," but everyone seems to have heard that. So the question is, what's the advantage of incorporating in Delaware, and is that a reason for you to do it?



While there are myriad potential advantages to incorporating in Delaware, the big one is probably not what you'd think: The Delaware Court of Chancery.

The Delaware Court of Chancery is not just a regular court with a killer name, over time it's become a court whose primary purpose is to handle corporate disputes. More specifically, they're there to interpret the statutes governing the structure and governance of Delaware corporations, LLC's, LLP's, and other business entities. From their website:

The Delaware Court of Chancery is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted. Its unique competence in and exposure to issues of business law are unmatched.

Not modest, but also not just lip service. The effect of having such a specialized court is that they get through a lot of cases, and therefore issue a lot of opinions. In 2013 alone, they've already issued 42 written opinions of one kind or another. That's practically unheard of anywhere else in the country.

And that's the advantage that the Delaware Court of Chancery provides to businesses looking to incorporate in Delaware: a huge catalog of case law that tells you exactly how the Court will interpret that clause you're looking to put into your bylaws. When there's a lot of money on the line, a business wants as much certainty as it can get, and a statute that's been interpreted by hundreds of cases is going to provide a lot more certainty than one that's only been interpreted by a handful of cases (as is the case here in Massachusetts). With all that certainty (and the fact that judges decide cases, not juries), a lot of cases are stopped before they've even begun, which is a good thing.

There are, of course, other advantages - a statute and government more favorable to business, a structure investors are used to seeing, lower incorporation fees, more privacy - but the Delaware Court of Chancery has to sit at the top of that list.

Does all this mean that you should incorporate your new company in Delaware? Well, maybe. Many states, Massachusetts included, have since modeled their corporate statutes after those pioneered by Delaware, and as such it's largely assumed (though this hasn't been extensively tested), that those state courts will follow the Delaware case law. Moreover, the incorporation fees are lower, but you'll still have to register as a foreign corporation wherever you're actually located, so you end up adding a cost instead of reducing one. Finally, a small business that will ultimately be bootstrapping or looking for bank financing doesn't need to worry about appealing to venture capitalists or angel investors with their incorporation documents.

So in the end, a Delaware incorporation isn't right for every business, but if you decide to go that route, the Delaware Court of Chancery should be a big reason why.