

A Legal Guide for Overseas Companies on Doing Business in the UK

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ABOUT UK BUSINESS – A LEGAL GUIDE

INTRODUCTION

This guide summarises the main legal requirements for overseas companies on doing business in the UK, It also considers the different ways in which those requirements can be met, and explores some of the more significant legal issues which the UK business will have to deal with.

This guide is very much an introduction to the subject, and is not intended to be a comprehensive guide to all legal issues which may be relevant.

There may well be special aspects of any given case, which would benefit from individual consideration, at an early stage.

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1. **INTRODUCTION TO THE UK LEGAL SYSTEMS**

1.1 **THE UNITED KINGDOM**

There are three separate legal systems in the UK. English law applies in England and Wales, while Scotland and Northern Ireland (although part of the UK) are separate legal jurisdictions. Great Britain comprises England, Wales and Scotland only, and does not include Northern Ireland.

While certain areas of statutory law apply to all three jurisdictions and, in general terms, there is a similarity between the commercial laws of each system, there are important differences, particularly in the field of real property law in Scotland, and in other respects in Northern Ireland. Also, Scotland has a mixed common law and civil law system whereas England and Wales and Northern Ireland have a common law system.

Common law is made by judges, and has evolved over centuries from the judgment of cases appearing before the courts. These judgments set precedents against which future cases are judged. The legal systems of Scotland (in part) and most other European countries are based on Civil Codes.

In addition to common law, English law has evolved from two other sources:

- Legislation – which includes statutes/Acts of Parliament. Legislation is approved by the Queen before it becomes law.
- European Union law which is binding in all UK legal systems (see below).

This guide deals with the position under English law, and therefore assumes that any business is proposed to be carried on in England and/or Wales. However, as noted above, many of the same or similar laws may apply where the business is carried on elsewhere in the UK, although specific advice should always be sought on individual circumstances.

1.2 **EUROPEAN UNION**

The UK is one of the 28 member states of the European Union (EU). Since May 2004, 12 new member states have joined the EU, with the latest member state being Croatia, which joined in July 2013.

The EU, through the European Council, has the power to legislate for the member states. The European Court of Justice is the superior court on issues of EU law.

Some EU laws are implemented through national legislation (in the UK, Acts of Parliament, Statutory Instruments or Orders), but other provisions of EU law apply directly and do not require implementation at national level.

1.3 **UK TAX AUTHORITIES**

In the UK there is now a single tax authority, HM Revenue and Customs, which deals with personal income tax, corporation tax, capital gains tax, stamp duty and Stamp Duty Land Tax and social security tax (National Insurance contributions) and all indirect taxes such as Value Added Tax (VAT), custom duties, insurance premium tax and a variety of other minor taxes. Further details about the UK tax regime are set out in section 7.

2. **CHOOSING A BUSINESS ENTITY**

2.1 **STARTING TO TRADE WITHIN THE UK**

Business enterprises from abroad can trade within the UK with relative ease, subject to compliance with customs and excise procedures and other regulations which apply to the particular goods or services concerned.

2.2 **ENTERING THE UK MARKET**

A variety of circumstances may, nevertheless, make it desirable for a business to bring its activities and the management and servicing of its products closer to a given market, such as the UK. A business enterprise from abroad will, in these circumstances, need to consider whether to:

- appoint a UK agent or distributor;
- acquire an existing UK business;
- form a joint venture with a UK enterprise; or
- start its own operations in the UK.

2.3 **THE UK REGISTRATION SYSTEM**

Businesses can be carried on in the UK by individuals, partnerships (or other unincorporated associations) or companies (whether incorporated in the UK or abroad). There is no requirement to register unincorporated businesses or business names as such, but all companies and other incorporated bodies carrying on business in the UK are subject to a statutory system of registration, and the use of corporate and business names is regulated.

For reasons of liability and commercial convenience, the most common vehicle for carrying on business in the UK is the limited company. A business based abroad will therefore generally have to decide whether to set up a UK subsidiary, to start up business itself in the UK through a 'branch', or merely to establish a place of business which does not amount to a branch.

2.4 **TYPES OF BUSINESS VEHICLES**

2.4.1 **Partnership**

Partnerships have no separate legal personality, and therefore it is individual partners who enter into contracts jointly. This means that if a partnership becomes insolvent, the creditors are entitled to satisfy debts owed to them by enforcement

against the personal assets of each of the partners themselves. Partners in a traditional partnership will have unlimited personal liability.

2.4.2 **Limited liability partnership (LLP)**

An LLP has the flexibility of a partnership with the added advantage of limited liability for its members. Legally, an LLP is a separate legal entity from its members and can contract in its own name. For tax purposes, it is treated as a partnership. It has to comply with company, rather than partnership, law.

2.4.3 **Company**

A company is an artificial legal person with a separate legal identity from that of its shareholders, which means that a company may, therefore, enter into contracts in its own right. If the company becomes insolvent it will be wound up and any assets divided amongst the creditors. Creditors are not, however, able to access the assets of the shareholders. A company can have another company (or companies) as its shareholder(s). There are different types of company, as described further in section 3. The most common form of corporate vehicle established by foreign companies in the UK is a private limited company.

2.4.4 **Joint venture**

A joint venture is a collaborative commercial arrangement between two or more parties to work towards a common business goal. It is not strictly a business vehicle as it can be structured in different ways – as a company, partnership or through a simple contractual arrangement.

2.4.5 **Branch**

A branch is not a company but is an operation of an overseas company in the UK. It cannot contract in its own name but rather acts as agent for its overseas company. A branch must file certain details with the Registrar of Companies in England and Wales.

2.5 **UK SUBSIDIARY OR UK BRANCH?**

Whether a subsidiary or branch is the right choice will depend upon a combination of commercial, legal and tax considerations. From a commercial point of view, a UK subsidiary might have advantages over a UK branch. For example, bankers and landlords (as well as customers) may well find it more convenient to deal with a locally incorporated company. However, in either event, the promoter of the business may be required to accept liability as a guarantor (e.g. by entering into a personal bank guarantee) if the business is to be carried on by a subsidiary company, or as primary obligor (e.g. by entering into contracts directly or in a personal capacity) if it is to be carried on by the promoter through a UK branch. The

principal distinctions between a UK subsidiary and a UK branch are set out in the table below:

	UK SUBSIDIARY	UK BRANCH
Legal Status	A separate legal entity from its parent	Not a separate legal entity from its parent
Commercial Factors	Bankers, landlords and customers may prefer a local company.	A branch may be perceived as less permanent.
Tax on Profits	Corporation tax is payable on taxable profits (including gains).	Corporation tax is payable on a branch's UK taxable profits (including gains).
Tax Credit	UK tax paid on profits may not generally be credited against the parent's tax liability in its country of residence.	UK tax paid on profits may be credited against the parent's tax liability in its country of residence.
Deduction of Interest	Interest charged on a 'parent' loan may be deductible (if there is an appropriate double tax treaty).	Interest on 'parent' loans may not be deductible.
Deduction of Expenses	Excessive expenses charged by the parent will be disallowed.	Expenses incurred by the parent (including interest expenses) may be allocated to the UK branch and deducted for UK tax purposes.
Distribution of Profits	There is no withholding tax on payment of dividends by a UK subsidiary to a parent.	Profits are remitted directly without any immediate tax consequences.
Losses	It is unlikely to be possible to set a subsidiary's losses off against its foreign parent's trading profits.	Domestic law of parent may allow branch losses to be set off against parent's profits.

2.6 REGISTERING A UK BRANCH

An overseas company can readily establish a branch in the UK, subject to certain registration and reporting requirements, including the following:

2.6.1 Registration

If the overseas company is a limited company and the branch is organised so as to carry on business (i.e. the branch's activities are more than merely ancillary or incidental to the company's business as a whole), it must, within one month of opening the branch, file certain details with the Registrar of Companies.

2.6.2 Reporting requirements

An overseas company which opens a branch in the UK will have to make broadly similar returns to the Registrar of Companies to those which would be required if it were incorporated in England and Wales.

2.7 ESTABLISHING A PLACE OF BUSINESS

If an overseas company establishes a place of business in the UK which does not amount to a branch because the business carried on there is only ancillary to, or incidental to the company's business as a whole (e.g. warehouse facilities, administrative offices and data processing facilities), or if it does amount to a branch but the overseas company is not a limited company, it must also file certain particulars and documents. However, these are less detailed than those required for branch registration. Modified accounts (which need not be audited) and other documents must also be filed.

3. THE ENGLISH LIMITED COMPANY

3.1 THE NATURE OF A COMPANY

A company is a distinct legal entity, separate from its shareholders (or members), directors and employees, which can own property, enter into contracts, sue and be sued in its own name. It must operate through others, principally the shareholders as a body and the board of directors. The liability of its members on a winding-up is in general limited to the amount (if any) unpaid on the shares respectively held by them.

3.2 DEFINITION OF SUBSIDIARY

A subsidiary is, in general terms, a company which is controlled by another company (wherever incorporated) by way of the latter holding or controlling a majority of the voting rights attaching to its shares or being able to appoint a majority of the board directors. The definition 'subsidiary undertaking', which applies for accounting purposes, differs slightly.

3.3 TYPES OF COMPANIES

Five types of companies can be formed and registered in England and Wales:

3.3.1 Private companies limited by shares

This is the most common type of company. The phrase limited by shares means that the liability of the shareholders of the company, in the event of the company going into liquidation and being unable to pay its debts, is limited to the extent of payment of the nominal value of the shares issued to those members.

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3.3.2 Public companies limited by shares

See section 3.4 below for the main differences between public and private companies.

3.3.3 Private companies limited by guarantee

These companies do not have a share capital, and are often used by charities or other non-profit making organisations.

3.3.4 Private unlimited companies

These companies do not have any limit on the members' liability to contribute to the company's assets in the event of the company going into liquidation and being unable to pay its debts.

3.3.5 Societas Europaea / European Company

Since 2004, it has been possible to form this new type of public limited liability company in England and Wales. They can be used by companies or groups with operations in more than one member state of the EU and are registered in one of these member states.

3.4 PUBLIC AND PRIVATE COMPANIES

Companies limited by shares can be either public or private. A public company (whose name will end with the words 'public limited company' or 'plc') is subject to a number of stringent statutory requirements, while a private company limited by shares (whose name will generally end with the word 'Limited' or 'Ltd.'), benefits from relaxation of a number of the requirements which apply to public companies. While this guide focuses mainly on private limited companies incorporated in England and Wales, some of the key differences between a public company and a private company are as follows:-

3.4.1 Shares and share capital

- Only a public company may make an offering of its shares to the public.
- A public company may not allot shares unless at least 25% of the nominal value of the share and the whole of any premium has been paid up.
- The nominal value of a public company's allotted share capital must be not less than the authorised minimum, which is currently £50,000 or the prescribed euro equivalent.

- A public company cannot give financial assistance (including the giving of a guarantee or indemnity or the grant of any security over its assets) for the purchase of its own shares or the shares of its holding company or discharging a liability so incurred. Since October 2008 there has been no prohibition on private companies providing such financial assistance.

3.4.2 Other issues

- Public companies cannot take advantage of the provisions contained in the Companies Acts permitting small and medium sized companies to file short-form accounts with the Registrar of Companies.
- Public companies must have a minimum of two directors and they must also have a company secretary.
- Public companies are obliged to pass shareholder resolutions at general meetings and cannot take advantage of the written resolution procedure which is available to private companies.

3.5 FORMATION

Formation of a private company limited by shares can be achieved relatively easily and inexpensively by delivering certain formal documents to the Registrar of Companies together with a modest registration fee. Blandy & Blandy LLP maintains a number of ready to operate 'shelf companies' which can be supplied to clients on short notice. These are companies which have already been formed by Blandy & Blandy LLP, but which have never traded and are dormant. Whether a company is specially formed or whether a shelf company is used, there are a number of matters on which a preliminary decision is required.

3.5.1 The Company's Name

This must not be the same as, or too similar to, that of an existing company. Certain names must be cleared in advance, such as those which include the words 'Holdings', 'Group', 'Trust', 'Insurance', 'International', 'United Kingdom', and a number of other words implying special importance or status. As a separate exercise, searches should be carried out so far as practicable to ensure that the proposed name does not infringe the business name or intellectual property rights of third parties.

3.5.2 Share Capital

The issued share capital of a private company can be of any amount, and a 'single member' company may be formed with only one shareholder and one issued share. No taxes or duties are payable on the issued share capital, although subsequent

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transfers of shares attract stamp duty unless a relief or exemption applies. The decision as to the amount of the share capital to be issued and paid up is likely to be influenced by the company's anticipated working capital requirements. It was previously necessary for a company limited by shares to also have an authorised share capital, but this concept has been abolished for companies which are incorporated on or after 1 October 2009.

3.5.3 Shareholders

As mentioned above, a private limited company need have only one shareholder. Consequently, wholly-owned subsidiaries are generally formed with their parent company as the sole shareholder. A shareholder does not need to be resident in the UK. There is no maximum limit on the number of shareholders of a private company.

On a transfer of shares the transferee does not become a shareholder until his name is registered as a member in the register of members. Before his name can be entered in the register the transfer must be properly stamped (for stamp duty purposes). Stamp duty is not payable on an issue of new shares by the company.

3.5.4 The Company's Constitution

The constitution consists of the memorandum of association and the articles of association. For all companies incorporated since 1 October 2009, the memorandum simply states that the subscribers wish to form a company under the Companies Act 2006 and have agreed to become members and to take at least one share each.

The articles contain the regulations governing the company's internal management, and they also regulate (subject to the requirements of the Companies Acts and general principles of common law) a great range of matters. These include the rights attached to the company's shares (including voting rights), the powers of the directors, the regulation of shareholders' and directors' meetings, the alteration of capital and the transfer of shares. For a wholly-owned subsidiary, the articles are typically in a relatively standard form, although special provisions may be desirable where the parent company is a foreign corporation and/or directors reside overseas. Where there are to be two or more shareholders, such as in a joint venture scenario, then specific provisions need to be included in the articles of association to regulate the relationship of the shareholders.

3.5.5 Directors and Company Secretary

A private company formed in the UK must have at least one director (although there are no restrictions on foreign directors), and it was previously also a legal

requirement for them to have a company secretary who carried out the formal administrative functions of the company. Under the Companies Act 2006, private companies are no longer legally required to have a company secretary (although they may still choose to have one).

Particulars of the proposed directors and secretary (if any), bearing an original signature consenting to the appointment, must be provided to the Registrar of Companies in the prescribed form. There is no requirement that the directors or the secretary should be citizens of, or resident in, any part of the UK or the EU, but in practice it may be convenient to have a local director.

Director's details can be filed at Companies House either online via the Companies House website, known as 'webfiling', or by paper form. Webfiling offers a secure system to submit information to Companies House; first-time users must apply for a security code when accessing the service, and must also apply for a company authentication code in order to register documents. The Companies House webfiling service is cheaper and faster than paper filing as there is no need to print the forms or incur postal charges.

Blandy & Blandy LLP can provide the company secretarial services necessary in order to comply with the legal requirements referred to below.

3.5.6 Registered Office

This is the location where legal proceedings may be served on the company and where certain registers and company documents must usually be kept. The registered office can be changed to anywhere within England and Wales, but not to another country.

In accordance with The Companies (Trading Disclosures) Regulations 2008, a company's registered name should appear at:

- The registered office
- Any location at which a company keeps company records available for inspection
- Any location at which it carries on business (except where that location is primarily living accommodation).

A company's registered name must be positioned at the relevant premises so that it can be seen easily by any visitor.

Failure to comply with a requirement of the Regulations constitutes a criminal offence and renders the company and every officer who is in default liable to a fine.

Blandy & Blandy LLP can provide registered office facilities.

3.5.7 Auditors

Every company which is not dormant must appoint auditors, who must be members of a recognised supervisory body and eligible for appointment. The auditors are usually a firm of chartered accountants. However, small companies which satisfy specified conditions are exempted from the obligations to have their annual accounts audited (but this does not apply to a subsidiary undertaking).

3.6 CONTINUING OBLIGATIONS

After incorporation, a company formed in England and Wales will have the following continuing obligations which should be considered.

3.6.1 Accounting Reference Date

This is a date by reference to which annual accounts or financial statements must be made up. Subject to certain restrictions, an accounting reference date may be changed. The first financial period must not be shorter than six months, but may be as long as 18 months from the date of incorporation.

3.6.2 Annual Accounts and Annual Returns

Annual accounts must be prepared and reported on by the auditors (unless the company is exempted in accordance with the statutory provisions), and laid before the company in general meeting each year and filed with the Registrar of Companies. The accounts must give a 'true and fair view' of the state of the company's affairs as at the end of its financial year and of its profit or loss for the financial year then ended, and comply with the other requirements of the legislation.

In addition, every company must file an annual return stating its current registered office address, up to date details of all directors and the secretary, and changes to the issued share capital and members.

All annual returns must be delivered to the Registrar of Companies within 28 days of the made up date given on the relevant form and there are also time limits for the filing of annual accounts. It is a criminal offence not to deliver the company's annual return on time, and there is an automatic fine for late filing of accounts.

3.6.3 Board of Directors

The management of the business of a company is conducted by its board of directors, although they may delegate some or all of their powers to a managing director. The board will need not only to take decisions regarding the company's business, but also to deal with formal company law matters such as the

appointment of auditors and bankers, the approval of share transfers and the issue of shares. Board decisions can generally be taken either by written resolution or at a formal meeting, or if the articles of association permit, by telephone or audio-visual participation.

Since October 2008, directors have owed various statutory duties (as set out in the Companies Act 2006) to the company. These duties are:

- a duty to act within the powers conferred by the company's constitution;
- duty to promote the success of the company for the benefit of the members as a whole;
- a duty to exercise independent judgment;
- a duty to exercise reasonable care, skill and diligence;
- a duty to avoid conflicts of interest;
- a duty not to accept benefits from third parties; and
- a duty to disclose an interest in a proposed transaction with the company.

Directors can be personally liable for, among other things:

- breach of their statutory duties (Companies Act 2006, as noted above);
- fraudulent or wrongful trading if the company becomes insolvent (Insolvency Act 1986).

3.6.4 **General Meetings**

There was previously a legal requirement for a private company to hold an annual general meeting of its shareholders in each calendar year, the normal purpose of which was to receive the annual report and accounts, to declare a dividend (if appropriate), to re-appoint directors if required by the articles of association and to appoint auditors for the next year, although it was possible for the company to elect to dispense with these formalities. Under the Companies Act 2006, private companies are no longer obliged to hold an annual general meeting.

3.6.5 **Statutory Records**

Certain statutory books and records must be kept (normally at the registered office of the company) relating to the members (i.e. the shareholders), directors and secretary, directors' interests and service contracts, charges created by the

company, debenture holders, minutes of meetings of directors and of shareholders, and accounting records.

3.6.6 Filings

Certain information relating to the company must be filed with, and will be publicly recorded by, the Registrar of Companies.

This includes particulars of almost all charges (including any floating charge) granted by the company, which must be registered with the Registrar of Companies within 21 days of creation. If a charge is a fixed charge over the company's land, the charge must also be registered at the Land Registry or Land Charges Registry. As mentioned above, filing documentation at Companies House can either be done online via the Companies House webfiling service, or by paper form.

3.7 OTHER REGULATIONS

In addition to the general requirements of company legislation, it will be necessary to consider the provisions of any special legislation relevant to the particular business to be started up, and to take steps to obtain any regulatory consents or clearances which are required. This would apply (by way of example only) in the cases of banking, insurance, investment and other financial services, telecommunications, healthcare and pharmaceuticals.

4. **ACQUISITIONS OF COMPANIES AND BUSINESSES**

One likely route to investment in the UK will be through direct acquisition of an existing company. The way in which a company is acquired in the UK depends upon whether the company is a public or private company. The acquisition of listed public companies in the UK is governed by the City Code on Takeovers and Mergers (also known as the Takeover Code) and the Takeover Panel. This section focuses on the usual process for acquiring a UK private company.

4.1 **SHOULD THE BUSINESS OR ASSETS OF THE COMPANY OR ITS SHARES BE ACQUIRED?**

This is a key question which should be asked by a prospective buyer at an early stage of the acquisition process. The difference is that, in the case of a share purchase, the ownership of the company as a separate legal entity is acquired, comprising all of its assets and liabilities. However, in the case of a business acquisition, or “asset purchase”, the buyer selects which individual categories of assets and liabilities of the company it is interested in acquiring.

The main commercial advantage of an asset purchase is the ability to avoid inheriting the liabilities of the target business. On a share acquisition, the buyer can seek to protect itself by carrying out due diligence and obtaining warranties (see below), but the difficulties of successfully recovering for loss or damage should never be underestimated.

The main commercial advantage to structuring an acquisition as a share purchase is that continuity of the business is preserved, as the business will still be carried on by the same company. In contrast, on an asset purchase, the buyer must ensure that the ownership of each asset has been correctly transferred to it.

There may be other specific advantages and disadvantages to a business or share acquisition, including tax structuring, which should also be considered in each case.

4.2 **THE ACQUISITION PROCESS AND DOCUMENTATION**

4.2.1 **Expressions of interest**

In the early stages, when the prospective buyer and seller have agreed the key terms of the transaction, such as the price, they commonly enter into heads of agreement. The main provisions of the heads of agreement are typically not legally binding but provide a checklist for the content of the final documentation. Sometimes the heads also contain an exclusivity agreement, whereby the seller agrees that it will not negotiate and/or approach any other interested party for a specified period of time to give the buyer time to complete the acquisition. A confidentiality agreement is also either contained in the heads of agreement or entered into separately as a precursor to the buyer being given access to the target company’s financial and commercial information for the purposes of due diligence.

4.2.2 Due diligence

Due diligence is the term used to describe the process of a buyer investigating the affairs of the target company or business. Commonly, the buyer will employ its lawyers and accountants to review, respectively, the legal documentation and information and the financial and taxation information. Also, the buyer may wish to review the documentation from a commercial perspective.

4.2.3 Documenting the acquisition

The main documentation for the acquisition of a business or company comprises of a sale and purchase agreement which contains the key terms of the acquisition, including risk protection for the buyer in the form of warranties (see below) and restrictive covenants on the seller setting up competing businesses or poaching staff or suppliers and customers.

There will usually be a disclosure letter from the seller to the buyer (see below) and, (in the case of a share acquisition) a tax deed covering the allocation of liability for taxation of the target between the buyer and seller.

4.2.4 Warranties and disclosure

Warranties are likely to comprise a large section of the sale and purchase agreement. Warranties are contractual statements of fact by the seller on the condition of the company or business, covering all aspects of its affairs, including employees, relationships with customers and suppliers, property, intellectual property rights and litigation. The warranties:

- provide the buyer with contractual protection so that where a statement about the company is untrue, it can sue for breach of warranty and recover damages (subject to certain limitations); and
- help to flush out information about potential problems, as the seller will not usually be liable to the buyer for damages for any matter which it fairly disclosed in the disclosure letter.

The role of the disclosure letter and the supporting disclosure bundle of copy documents for the seller is therefore key in avoiding liability to the buyer.

Blandy & Blandy LLP's corporate team would be happy to advise further on the procedure for acquiring either a English or Welsh registered private company or its business and assets, if required.

5. **FINANCE AND SECURITY**

5.1 **LOAN FACILITIES**

A loan facility can provide a corporate borrower with financing which is both reliable and tailored to the particular purpose of the loan. For example, a company looking to ease its cash flow could obtain an overdraft facility which would provide it with instant access to variable sums of money, whilst a company aiming to fund a specific investment could enter into a term loan (the loan of a lump sum for a specific period of time). See below.

5.1.1 **Types of loan facility**

- **Term loans**

A term loan provides a corporate borrower with a specified sum of capital over a specified period known as the term. The term of a loan for general corporate purposes is not normally more than five years. Term loans are usually committed facilities, which means that the loan agreement contains an obligation by the lender to advance monies to the borrower at the borrower's request (provided that the borrower has satisfied certain pre-agreed conditions known as conditions precedent). Under a standard term loan facility, there will be a short period at the beginning of the term during which the borrower can draw a lump sum up to a specified maximum amount. Alternatively, a term loan can allow drawings to be made in a series of advances when the borrower needs the finance, which means that it borrows according to its specific requirements.

The loan agreement will either require repayment of the loan by instalments at specified intervals or in one sum at the end of the term. The borrower will be required to pay interest on the loan. See below.

- **Revolving credit facility**

Under a revolving credit facility, the borrower is still provided with a capital sum which is made available over a specified period. However, the main difference between a term loan and a revolving credit facility is that under the latter the borrower can draw down and repay advances of the available capital throughout the life of the loan. Each advance is usually borrowed for a short period of one, three or six months, at the end of which it is repayable. But if the borrower is not in default an advance can be immediately re-drawn (a rollover). A commitment fee will be payable in respect of the revolving credit facility, which is usually a percentage of the undrawn facility from time to time.

- Secured and unsecured facilities

Lenders will normally take security over the assets of a borrower in order to increase the likelihood of recovery without unnecessary delay. The taking of security is also designed to avoid the need for litigation and in addition may ensure priority over other creditors of the borrower.

5.1.2 **Loan agreement**

Loan agreements are likely to contain a number of clauses which are potentially onerous for the borrower. These may include the following:-

- Representations and warranties (i.e. Statements of fact made by the borrower)
- Covenants (including financial covenants)
- Events of default
- Interest (usually at a floating rate, rather than a fixed rate)
- Fees (e.g. Front end fees and early repayment fees)

5.2 **SECURITY**

A lender may seek to take a variety of security under English law. This may include one or more of the following:

5.2.1 **Fixed charge**

A fixed charge gives a lender rights over the charged assets which prohibit the borrower from disposing of them without permission and allow the lender recourse to the assets should the borrower default under the loan. On a default, the lender may sell the asset or appoint a receiver to organise the sale.

5.2.2 **Floating charge**

Floating charges are used where the relevant group of assets may fluctuate from time to time. A key difference between a fixed and a floating charge is that a floating charge allows a borrower to deal with the charged assets in the ordinary course of business. However, on the occurrence of specified events, the floating charge will effectively become a fixed charge – it crystallises. Upon crystallisation the borrower is then unable to dispose of the assets subject to the charge unless it obtains the lender's prior consent.

5.2.3 **Mortgage**

A mortgage transfers ownership of an asset to the lender. The lender has a right to sell the asset on default and an obligation to re-transfer title on repayment of the debt.

5.2.4 **Guarantee**

A guarantee is an undertaking by one party (the guarantor) to answer for the obligations of another party, normally upon default by that other party. Guarantees are often given by the borrower's parent company or by another company in the same group. The guarantor may also be required to give security over its own assets to support its potential liability under the guarantee.

Blandy & Blandy LLP's corporate team would be happy to advise you on the legal implications of entering into a particular loan agreement or granting security, if required.

6. **EMPLOYEES AND PENSIONS**

On acquiring or setting up a business or company in the UK, there will inevitably be employees and it is important to understand some of the key UK employment law issues that apply in England and Wales.

6.1 **SOURCES OF EMPLOYEES' RIGHTS AND DUTIES**

An employee's rights and duties are derived from three principal sources:

- the express terms and conditions of their contract of employment or statement of terms;
- the terms implied by common law; and
- domestic and EU legislation.

An outline of the more important common law rights and statutory provisions is given below.

6.2 **CONTRACTS OF EMPLOYMENT**

Although English law does not require contracts of employment to be in writing, every employer must give each employee written particulars of certain terms of his or her contract of employment within two months of the start of employment. If they fail to do so, the employee may apply to an Employment Tribunal for a declaration of terms (or, if they have an additional claim, for compensation currently of up to £1,900). The written particulars must identify the employer and the employee, the date on which employment began and when the employee's period of continuous employment began, and certain other details. In practice most employees will be given a fuller employment contract, setting out a whole range of terms covering remuneration, duties, termination provisions, etc. Contracts will often contain express prohibitions on what an employee can do after leaving. Without such provisions, employees are not prevented from competing or soliciting customers or employees.

6.3 **TERMINATION AND REDUNDANCY**

UK employees have various statutory and contractual rights on termination, including the following:-

6.3.1 **Notice rights and wrongful dismissal**

Under statute, employees are entitled to a minimum period of notice prior to dismissal once they have worked at least a month, unless dismissed for gross misconduct. Minimum notice by the employer is one week (where the employee has worked less than two years), then one week per year of service up to a maximum of

12 weeks. However, employers and employees often agree longer notice periods and/or provide that the employer can pay an amount in lieu of notice.

Failure to give notice (or exercise a contractual payment in lieu provision) entitles employees to claim damages for wrongful dismissal representing lost salary and benefits during what would have been the notice period, subject to the employee's duty to mitigate his loss by seeking new employment.

6.3.2 **Unfair dismissal**

After two years of service, an employee has the statutory right not to be unfairly dismissed.

An employee can also resign and claim that he has been constructively dismissed where the employer has fundamentally breached the contract.

A dismissal will be fair if the principal reason for the dismissal and the procedure adopted in dismissing are both fair. There are five potentially fair reasons:

- lack of capability or qualifications;
- misconduct;
- redundancy;
- that the employment could not lawfully be continued;
- some other substantial reason.

Dismissals for certain inadmissible reasons (e.g. reasons relating to pregnancy, whistleblowing, raising health and safety concerns) are also automatically unfair and do not require two years' service.

The most common award by a tribunal in cases of unfair dismissal is compensation, which includes a basic award of up to £14,250 (depending on age and length of service) and a compensatory award to reflect loss, currently capped at the greater of £78,335 or a year's salary.

6.3.3 **Redundancy**

An employee dismissed for redundancy will be entitled to a statutory redundancy payment if he has two years' service. Larger employers often provide enhanced redundancy packages over and above the statutory amount. A fair redundancy procedure will involve using fair selection criteria and applying them fairly, looking for alternative jobs, and consulting with the employee. Where 20 or more redundancies are proposed, there are also obligations to consult collectively, with severe penalties if the employer fails to do so.

6.4 **DISCRIMINATION**

Discrimination on various grounds (including sex, pregnancy, race, disability, religion or belief, sexual orientation and age) is unlawful in relation to recruitment, employment and certain post-employment conduct. The law prohibits direct discrimination, indirect discrimination, harassment and victimisation on these grounds.

There is no statutory limit to the size of compensation awards for discrimination claims. In addition to economic loss, tribunals will usually make an award for injury to feelings and can also award compensation for any personal injury caused. Aggravated damages can also be awarded to reflect unacceptable behaviour by the employer.

6.5 **EMPLOYEE PROTECTION ON BUSINESS TRANSFERS**

Asset purchases may be regulated by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Broadly, if there is a business transfer or a service provision change, employees engaged in the business will be transferred to the buyer on their current terms of employment. There must be a process of informing and consultation with appropriate representatives of any affected employees. Mergers, outsourcings or insourcings of services, changes of contractor providing services, and intra-group transfers can all be covered, depending on the circumstances. Though liabilities may be shared by the transferor and the transferee giving each other indemnities, it is not possible to contract out of TUPE.

Where TUPE applies, the protection includes:

- trade union or employee representatives must be informed and consulted in advance about the proposed transfer;
- the penalty for failure to inform and consult is up to 13 weeks' pay per employee;
- the employment contracts of employees in the transferring business automatically pass to the transferee, save for certain pension rights;
- the transferee inherits accrued rights and liabilities in relation to the transferring employees;
- any dismissal connected with the transfer will be automatically unfair, unless the employer can justify the dismissal on economic, technical or organisational grounds.

6.6 **OTHER STATUTORY RIGHTS**

UK employees enjoy a wide range of other statutory rights, including:

- 48 hour maximum working week (unless they expressly agree to opt out of this);

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- statutory minimum paid holiday of 5.6 weeks per year (including statutory holidays);
- maternity leave, paternity leave and other family-friendly leave;
- statutory sick pay (currently £88.45 per week) for a limited period;
- national minimum wage (currently £6.50 per hour (increasing to £6.70 per hour from 1 October 2015) for those aged over 21;
- health and safety rights
- rights to privacy and data protection.

6.7 WORK PERMITS AND RESIDENCY PERMITS

British citizens, Swiss nationals, Norwegian nationals, Liechtenstein nationals and nationals of most EU member states do not require a work permit to work in the UK. Under the work permit scheme, it is easier for permits to be obtained in respect of senior employees, employees transferring within companies, and employees whose skills are in short supply.

Workers from Croatia (the most recent EU member) must register with the Home Office Worker Registration Scheme as soon as they find work. Once they have been working legally in the UK for 12 months without a break they obtain full rights of free movement and will no longer need to register.

Other nationals usually require work permits, and a points-based immigration system is in place. There is also a new system of fines, under which employers who negligently hire illegal workers face a fine of up to £20,000 for each offence and those who knowingly hire illegal workers risk an unlimited fine and a prison sentence.

6.8 TYPES OF PENSION SCHEME

There are various types of pension schemes and arrangements in the UK. The state pension scheme is funded by National Insurance contributions (see section 7) and administered by the Government and consists of a Basic Pension and the State Second Pension (S2P), the latter being linked to an employee's earnings.

Other schemes include an occupational pension scheme that may be provided by an employer, and personal pensions. A group personal pension scheme may also be offered by an employer.

The employer pension reforms that came into force on 30 June 2012 will eventually require all UK employers to auto-enrol eligible workers in a pension scheme and make mandatory minimum contributions. Implementation of the reforms is being staged over several years. The new employer duties are being implemented month by month over a five-and-a-half-

year staging period that started on 1 October 2012, with larger employers passing their staging dates first. An employer can choose to bring forward its staging date if it wishes.

Blandy & Blandy LLP has a dedicated employment team which is well placed to advise on all aspects of employment law, including health & safety, parental leave, working time, discrimination, unfair dismissal, redundancy and TUPE related issues.

7. **TAXATION**

7.1 **COMPANY TAXATION**

7.1.1 **Corporation tax**

UK corporation tax is payable on a company's taxable profits (i.e. trading income less allowable deductions and other reliefs, and chargeable capital gains) in accordance with the following basic principles:

- If the company is resident in the UK (and every company formed in the UK will be), corporation tax is payable on the whole of its taxable profits, whether they arise in the UK or elsewhere.
- The rates of corporation tax are currently as follows, depending on the level of the company's profits:

Profit band (£)	Corporation tax rate
0 – 300,000	20%
300,001 – 1,500,000	21.25% (reducing to 20% with effect from 31 March 2016)
1,500,001 and over	21% (reducing to 20% with effect from 31 March 2016)

- If the company is not UK resident but carried on a trade in the UK through a branch or agency (as opposed to merely making investments), corporation tax is payable on that part of its taxable profits arising directly or indirectly through or from that UK branch or agency.
- Non-resident companies may be liable to UK taxation on certain types of UK source income which is not related to the trading branch or agency (for example, on rental income from UK property). However, they are not liable to UK tax on any gains arising to them which are not connected with the UK trade, branch or agency. There are different tax treatments of profits depending on whether the corporation concerned is resident or non-resident in the UK, a subsidiary or a branch and therefore specific tax advice should be sought.

7.1.2 Value added tax

VAT is chargeable (currently at a standard rate of 20%) on:

- supplies of goods and services made in the UK;
- transactions treated as supplies of goods or services made in the UK ('deemed supplies');
- goods imported into the UK; and
- goods acquired by a UK business from another member state of the EU.

Supplies and deemed supplies may be divided into 'exempt supplies' (which are not charged to tax) and 'taxable supplies' (which are charged to tax). Taxable supplies are taxed at either the standard rate, a lower rate or a zero rate (a tax rate of nil). The tax charge is referred to as 'output tax'.

'Taxable persons' are allowed to recover VAT paid to other taxable persons on goods and services purchased by them, including VAT paid on imported or acquired goods which is used to make taxable supplies (including those taxed at zero rate) but excluding exempt supplies. This VAT is known as 'input tax'.

The above is a brief commentary only on some of the taxation issues that will arise when considering the establishment of a UK business. There are certain UK tax areas, for example value added tax, where the administrative burden and the complications of the tax itself, as well as the cost of compliance, will need to be explored in some detail to avoid penalties arising from non-compliance and to ensure that the UK business is organised so as to achieve the most beneficial treatment.

7.2 PAYROLL TAXATION

As soon as an employer takes on its first employee in the UK, it must operate the combined systems for Income Tax and State Social Security. These two systems are known as the Pay-As-You-Earn (PAYE) system and the National Insurance (NI) scheme.

7.2.1 PAYE

The PAYE system is a method of collecting tax from employees' salaries. All payments of emoluments which are assessable on an employee as earnings are subject to deduction of tax under the PAYE system. The tax is deducted by the employer who pays it direct to the Inland Revenue, effectively acting as an agent for the Inland Revenue.

7.2.2 **National Insurance**

NI contributions are paid by both the employee and the employer. An employee's NI contributions are currently a specified percentage of income above a certain threshold. The contributions are deducted from earnings by the employer, who then passes them on to the Government. The employer itself must also pay NI contributions of a certain percentage of the employee's earnings, and these are likewise paid direct to the Government.

7.2.3 **Sickness**

An employee who is unable to work due to sickness is entitled (if he or she satisfies conditions of eligibility) to receive financial assistance from the State by way of Statutory Sickness Pay. To facilitate the administration of such payments, an employer will usually pay the employee the appropriate benefit and then set this off (partially or wholly) against its own NI contributions.

7.2.4 **Contributions for foreign employees**

Generally, NI contributions are payable for an employee from abroad starting from the commencement of his or her employment in the UK. However, there are certain exceptions, and special rules apply for employees from other EU Member States and from countries with which the UK has some form of reciprocal agreement on social security matters.

8. **BUSINESS PREMISES**

8.1 **REAL ESTATE LAW**

Establishing a business in the UK often involves acquiring premises from which the business is to be conducted. As stated previously, the law relating to real estate in England and Wales differs from the rest of the UK.

8.2 **BUYING OR RENTING PREMISES**

Under English law there are two principal ways of acquiring commercial real estate:

- **Buying:** this involves owning the property outright. The expression used is owning the 'freehold' interest in the property in question. An investor may prefer to own a freehold as this gives total control over the property and enables the grant of leases of the property to secure an income stream.
- **Renting:** here the user of the property will take a lease from the owner and, usually, pay a rent and take on other obligations relating to the property which are detailed in the lease.
- **Commonhold:** The Commonhold and Leasehold Reform Act 2002 introduced a new form of freehold tenure known as commonhold. Under commonhold, each separate piece of real estate within a commonhold building is a unit and each owner a unit holder. The unit holders together form a commonhold association (a private company limited by a guarantee which owns the registered freehold estate and the commonhold land and manages the common parts). Commonhold is still relatively rare.

8.3 **CONTROLS ON USING REAL ESTATE**

Whether a property is owned or rented, it is important to establish that it can be used for the purpose of the business. There are three main types of control (the first two of which apply to all properties), which are as follows:

- **Planning regulations:** administered principally by the local council for the area in which the property is located, legislation relating to Town and Country Planning affects all land in the UK to varying degrees depending on the type of property and its location. In many cases specific planning permission is needed for certain uses of property or for constructing or altering buildings.

- **Restrictive covenants:** these are obligations that can affect a particular piece of land. Examples include obligations not to use land for stated purposes or not to build on the land.
- **Obligations in leases:** lease obligations, or covenants, are specifically negotiated when the terms of the lease are drawn up. Again, these often impose restrictions on the uses to which premises can be put.

It is important to ensure that land or buildings for the proposed business can be used for all relevant activities, whether the premises are, for example, conventional offices or specialised for a particular type of business.

There are many matters that can affect owners and occupiers of property. Local authorities have many powers that can apply generally to properties in its area, or which they may exercise in relation to specific properties, for example compulsory purchase if the land is needed for certain other purposes, or to impose special categories of 'listing' if a property is of important architectural or historic merit. This can result in restricting use or imposing greater obligations in relation to maintenance. There will also be many other factors to consider, particularly if property is to be specially developed for the business in question.

8.4 SECURITY OF TENURE

The Landlord & Tenant Act 1954 gives a business tenant the right to renew his lease at the end of the term, and rights to compensation in the event that the landlord is able (under certain circumstances) to deny the tenant a new lease. At the expiry of the lease (subject to serving an appropriate notice in time), the tenant has an automatic right to renew the lease on substantially the same terms as the original lease, subject to a review of the rent and the length of the term. The landlord can only object to the request for a new lease in limited circumstances. It is often the case that the parties agree at the outset to exclude the tenant's right to a new lease, by 'contracting out'. If the lease is contracted out, then the tenant must vacate the premises when the lease expires.

8.5 TAX IMPLICATIONS OF ACQUIRING AN INTEREST IN PROPERTY

8.5.1 Value Added Tax (VAT)

Most commercial property transactions are subject to VAT.

8.5.2 Stamp Duty Land Tax (SDLT)

This is a mandatory tax which is usually payable by the buyer on the property purchase price or by a tenant on the grant of a lease. Rates are currently:

- 1% of the net present value of the rental element of lease transactions; or

- up to 5% of consideration paid for the acquisition of land.

Blandy & Blandy LLP's commercial property team can help locate suitable commercial premises and can advise in relation to all aspects of planning and property work.

9. **COMPETITION LAW**

9.1 **OVERVIEW**

Any business starting up in the UK needs to consider the impact of UK and EU competition laws on its commercial operations, and in particular on:

- its entry strategy: for example, whether it is to merge with or acquire an existing UK business, form of joint venture, or appoint distributors or agents to carry on its business in the UK; and
- its day to day commercial activities in the UK: for example, the content of distribution and purchasing agreements, selective distribution agreements, franchising arrangements, and licences of intellectual property.

In addition, competition law prohibits certain kinds of agreements and practices by market dominating companies. These include discriminatory or predatory pricing, unjustified tie-ins and other abusive behaviour.

Competition law can also be used as a means to attack the anti-competitive behaviour of other companies (including competitors), especially those who unlawfully try to prevent others competing in their markets.

9.2 **ANTI-COMPETITIVE AGREEMENTS AND PRACTICES**

The key competition rules are set out in the Competition Act 1998 and the Enterprise Act 2002. The Chapter I prohibition is concerned with anti-competitive agreements and prohibits agreements between undertakings, decisions by associations or concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. Anti-competitive agreements which are prohibited under the Competition Act 1998 may include agreements:

- fixing purchase or selling prices or other trading conditions;
- limiting or controlling production, markets, technical development or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage; and

- making contracts conditional on additional obligations that are not connected with the subject matter of the contract.

The Chapter II prohibition prohibits the abuse of a dominant market position which has or is capable of having an effect on trade within the UK. A dominant position in itself is not unlawful, it is the abuse of the dominant position that results in an infringement. The Chapter II prohibition sets out a non-exclusive list of conduct that may constitute abuse, which include:

- Pricing abuses;
- Refusal to supply; and
- Tying of one product to other unrelated products or services.

Both the Chapter I and Chapter II prohibitions are modelled on similar provisions of EU law (Articles 101 and 102), which apply where there is an effect on trade between member states.

9.3 **ENFORCEMENT**

The Chapter I and II prohibitions are enforced by the Competition and Markets Authority (CMA) and by the relevant sector regulators. An agreement or practice in breach of the Competition Act is void and unenforceable, and the CMA can impose fines of up to 10% of a company's worldwide turnover for the previous business year, where the prohibitions are infringed either intentionally or negligently.

Third parties who have suffered a loss as a result of a breach of these provisions can also bring civil damages claims, before the Competition Appeal Tribunal or before the High Court.

UK and EU competition law is a very technical area of law. Our corporate and commercial team can advise on the competition law implications of a particular matter.

10. **COMMERCIAL CONTRACTS**

Commercial contracts include distribution, agency and franchising agreements, the first two of which are briefly considered below:

10.1 **DISTRIBUTION**

There are no specific regulations relating to distribution agreements in the UK, and so these arrangements are regulated by generally applicable law. However, suppliers entering into a distribution agreement should be aware of various legal issues, including the following:

- That they may be liable to the ultimate consumer under product liability legislation.

- That the inclusion of certain restrictions in a distribution agreement will bring it within the scope of the Chapter I prohibition of the Competition Act 1998.

10.2 **AGENCY**

The Commercial Agents (Council Directive) Regulations 1993 may apply to arrangements involving a self-employed Agent with continuing authority to negotiate the sale or purchase of goods on behalf of and in the name of a principal. These regulations prescribe minimum terms which will apply to all agency agreements (e.g. in relation to notice periods) and they may also give an agent the right to seek compensation from the principal on expiry or termination of the agreement.

Commercial contracts can be a very technical area of law, particularly where the relevant contract gives rise to UK and/or EU competition law issues. Our corporate and commercial department can advise on the contract itself and any competition law implications.

11. **INTELLECTUAL PROPERTY**

11.1 **INTRODUCTION**

Intellectual property is an increasingly vital part of commercial life as awareness of its value to business grows. The quickening of innovation in industry has created and refined these rights. An enterprise proposing to establish a business in the UK should consider carefully how it will protect its less tangible assets, such as inventions, brands, confidential information and designs.

The key areas of legal protection in the UK arise in respect of patents (for inventions), trade marks (for brands), unregistered and registered designs (for shape and configuration and 'individual character'), and copyright (for artistic, literary, musical and certain other materials, including software).

11.2 **PATENTS**

A patent gives to its owner a monopoly for a term of years (maximum 20, subject to the payment of renewal fees) to exploit an invention in the country where the patent is registered. Such patents may have valuable licensing rights. For a patent to be granted in the UK the invention has to be novel, involve an inventive step and be capable of industrial application.

The patent owner can:

- enjoy exclusive use of the invention within the UK;
- prevent the unlicensed manufacture, use, importation or sale of the patented invention;
- develop a business based on the invention; and
- license the patent to another party.

Applications for registration can be made via the UK Intellectual Property Office or via the European Patent Office. Both UK and European patents will usually be enforced by the UK courts.

11.3 **TRADE MARKS**

Establishing brand awareness is likely to be a key objective of any business establishing a UK trading presence. As such, the protection of such brands from imitation by competitors may be a major concern.

It is preferable to register brands as trade marks wherever possible, since a trade mark registration gives its owner the exclusive right to apply a trade mark to particular classes of products or services. Such registrations can have commercial value in their own right, and

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can be dealt with by way of licences to provide an income stream. Most trade mark registrations are for words or logos, but it is now possible to register colours and sounds, so long as they can be represented graphically. Any trade mark must distinguish the goods or services of one undertaking from another.

The owner of a trade mark will enjoy the exclusive right to use the trade mark in the UK. He will also be able to prevent others from using a mark which is the same as (or similar to) his mark, and he can assign or license the use of the mark to other parties. Applications for UK registration must be made to the UK Intellectual Property Office, and marks can also be registered through the Office for Harmonisation in the Internal Market (OHIM) to register Community trade marks in the European Union. Trade mark protection lasts indefinitely, subject to renewal every 10 years.

In the absence of a registered trade mark, the proprietor of a brand name could seek to rely instead on the common law area of passing off if infringement of those brand name rights has occurred. However, this does not give the same degree of certainty, and in order to found a valid claim it is necessary to prove some degree of financial loss, which may be difficult to quantify.

11.4 DESIGN RIGHTS

A design may be protected:

- by artistic copyright;
- as a design right (unregistered); or
- as a registered design.

The first two rights arise automatically if the design satisfies certain criteria, but it is usually preferable to obtain registration wherever possible.

Copyright and design rights only protect the owner of a design against someone else knowingly copying their design. Registration, on the other hand, gives protection not only against copying but also against the wholly independent and original creation by someone else of a similar design. Registration therefore gives a design owner a monopoly over the use of a design that is not granted by copyright or design right. In addition, registration gives 25 years' protection (as does artistic copyright), a far longer period of protection than that given to unregistered design rights.

11.5 COPYRIGHT

This is the right of the originator of a literary, dramatic, artistic or musical work to control certain uses of the work. It arises automatically on creation of the work, without the need for registration. Films, sound recordings and broadcasts are also protected by copyright, in

some cases for shorter periods. Copyright is essentially a negative right, giving the copyright owner the ability to prevent others from using or copying the work without permission.

The owner of the copyright in a work has the exclusive right to do various acts in the UK, including the following:

- copy the work;
- issue copies of the work to the public;
- rent or lend the work to the public;
- perform, show or play the work in public;
- be identified as the author or director of the work;
- prevent others from infringing any of his rights; and
- assign or license the rights to other parties.

Copyright infringers face a range of civil and criminal penalties, but it should be stressed that copyright only prevents copying and does not prevent third parties from arriving independently at a similar result using the same idea.

Copyright also protects computer programs and databases. Where a database lacks sufficient creative input to warrant full copyright protection, there is nonetheless a right to prevent extraction or re-utilisation of all or a substantial part of the contents of the database without the consent of the owner.

The length of protection depends on the work:

- literary, dramatic, musical and artistic works: 70 years after the author's death;
- films: 70 years after the death of the last surviving director, author of the screenplay, or composer of any music specifically created for the film;
- sound recordings: 50 years from the year of publication;
- broadcasts: 50 years from the first broadcast; and
- published editions: 25 years from the first publication.

11.6 CONFIDENTIAL INFORMATION

This right is based on common law principles. The information must be confidential in nature, and it must also be communicated in circumstances importing an obligation of

confidence. The right holder can take legal action against any party who is under a duty of confidence to the right holder with regards to the confidential information.

11.7 DATA PROTECTION

The Data Protection Act 1998 (DPA) regulates the collection and processing of personal data. It is of particular interest to businesses looking to expand into the UK for the first time, as in many countries (including most of the United States), there is no comparable legislation.

Businesses should take legal advice on drafting policies and procedures for data protection and IT security that set out what needs to be done and what has been done in order to achieve compliance, both in relation to employees and to customers and suppliers.

Most businesses will need to notify their data processing activities to the Information Commissioner. Notification is a fairly straightforward and inexpensive process.

Among other rights, the DPA provides for a right of access to personal information by the data subject. IT systems and manual filing systems need to be designed with data subject access rights in mind. There is provision for substantial fines in the event of a failure to comply with certain provisions of the DPA. However, a potentially more significant sanction is the ability of the Information Commissioner to order a company to cease the non-compliant processing of personal data. Also, enforcement action could undermine consumer confidence in a company's ability to protect personal data, particularly in the area of e-commerce where consumers might be wary about supplying personal data over the Internet.

Of particular importance to a company establishing a subsidiary in the UK is the ban on the export of personal data out of the EEA to countries whose data protection laws do not comply with EU standards. Businesses should obtain advice on trans-border data flow agreements and, in the case of US personal data recipients, on the 'Safe Harbour' programme.

11.8 LICENSING

The rules governing the ability of a foreign enterprise to protect its intellectual property rights in the UK, and the length of protection that may be obtained, are often complex. In particular, there are special rules under EU competition law concerning the terms of licence agreements. The provisions relating to the regulation of important areas of new technology are also complex. Frequently, the licensing of intellectual property will form an important part of the arrangements involved in starting up a business in the UK. Consideration should therefore be given to these aspects at an early stage. For example, provisions in US agreements relating to such matters as the reverse engineering of software or limits of liability may be unenforceable if the contracts are to be governed by English law.

12. **MONEY LAUNDERING**

Over the past 15 years, the UK anti-money laundering regime has expanded to regulate systems and controls in various sectors with a view to deterring criminal activity. Its impact is wide and needs to be considered carefully.

12.1 **THE ANTI-MONEY LAUNDERING REGIME**

The UK's anti-money laundering regime is designed to assist the UK authorities to detect, disrupt and deter money laundering and the underlying criminal activity by requiring higher standards of due diligence across the regulated sector. It can be divided into three elements, the substantive law criminalising involvement in money laundering and imposing obligations to report, the administrative requirements which require firms to have procedures to forestall money laundering (the Regulations) and the regulatory requirements which impose additional obligations to have systems and controls to prevent money laundering.

12.2 **MONEY LAUNDERING REGULATIONS**

These require relevant persons to establish and maintain appropriate and risk sensitive anti-money laundering policies and procedures. Contravention of the Regulations is an offence punishable on conviction up to a maximum of two years' imprisonment and/or a fine.

13. **PRODUCT LIABILITY**

On acquiring any manufacturing business the law relating to product liability is key. There are three categories of liability in English law to which the manufacturer or seller of a product may be exposed. These are liability for breach of contract where liability is based upon the terms of any relevant contract of sale or supply; liability for breach of a general duty of care where liability is based upon fault; and liability pursuant to the Consumer Protection Act 1987 (the 1987 Act) which imposes a strict liability regime upon parties in the production and distribution chain.

13.1 **CONTRACT**

A contract for sale or supply of a product may give rise to liability in a number of ways:

- Express terms (whether orally or in writing)
- Terms implied by statute such as The Sale of Goods Act 1979 (as amended) or The Supply of Goods and Services Act 1982 (as amended) (e.g. An implied term that products will correspond with their description)
- Pre-contractual statements

13.2 **TORT OF NEGLIGENCE**

The liability of a product manufacturer under the English law of tort is fault-based. As liability in negligence is based on fault, the injured party has the burden of proving:

- that the manufacturer owed him a duty of care;
- that the duty was breached (i.e. that the manufacturer was at fault because his conduct fell below the required standard of care); and
- that the breach caused the damage suffered and that the damage was, or ought to have been, foreseeable at the time of the breach.

Manufacturers of defective products who have been held to owe a duty of care to consumers could include anyone directly involved in the manufacture of the product (i.e. assemblers, repairers and inspectors). The standard of care expected of a manufacturer is tested objectively. A manufacturer will be negligent if he has failed to act as a reasonable person (possessing the same skills) would have acted.

For any breach of duty of care in tort, the buyer will be able to claim damages (intended to put the buyer back in the position in which he would have been in before the tort was committed (i.e. as if there has been no breach of the duty of care).

13.3 **STRICT LIABILITY REGIME**

Since 1987 the UK, in common with all EC Member States, has imposed a strict liability regime on certain parties in the manufacture and supply chain in respect of claims by consumers who have suffered damage caused by a defective product. The relevant European Council Directive was implemented in the UK under The Defective Products Act 1987.

This Act imposes liability where any damage is caused wholly or partly by a defect in a product. This is strict liability in that the defect need not have resulted from another party's negligence. However, there is still the requirement for the party suffering damage to prove a causal connection between the defect and the damage.

14. **DISPUTE RESOLUTION**

During the course of running a business, disputes may occur from time to time, and these may prove to be costly and time-consuming.

14.1 **COURT SYSTEM**

14.1.1 **Background**

Civil proceedings in England and Wales are conducted in the county courts or in the High Court. There are over 200 county courts in England and Wales, each exercising its powers for a limited geographical area. If the value of a claim is below £100,000, the claim must be started in the county court. If the value of the claim exceeds £100,000 it can be started in the county court or in the High Court. However, usually the High Court hears high value claims. There are also a number of specialist courts, including the Commercial Court. The Court of Appeal hears appeals from the county courts and the High Court. The Supreme Court for the United Kingdom hears appeals from the Court of Appeal (and sometimes directly from the High Court). This responsibility rested with The House of Lords prior to October 2009.

14.1.2 **Limitation or time limits for bringing claims**

Most limitation periods are laid down by the Limitation Act 1980. The basic rule for actions based on contract or tort is that the claimant has six years from the date of the cause of action to commence proceedings. In contract, time runs from the breach of contract. In tort, unless the tort is actionable without proof of damage, the cause of action accrues when damage occurs. The limitation period for a claim in respect of a document entered into as a deed is 12 years from breach.

14.1.3 **Claim procedure**

(a) Pre-action

Pre-action protocols outline the steps that parties should take to seek information from and to provide information to each other about a prospective legal claim. Their purpose is to encourage the exchange of early and full information about the prospective legal claim, to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings and to support the efficient management of proceedings where litigation cannot be avoided. In addition, under the Civil Procedure Rules, a party may apply to the court for disclosure of documents before proceedings have started from a party who is likely to be a party to proceedings.

(b) Starting and defending proceedings

Proceedings are commenced by the issue of a claim form which is lodged with the court and served on the other parties. The claim form provides details of the amount that the claimant expects to recover, full details of the parties and details of the claim (which may be set out either in the claim form itself or in a separate document called the particulars of claim). A claim form must be verified by a statement of truth which is a statement that the party presenting the document believes that the facts stated in it are true. A fee is payable, based on the value of the claim.

If the defendant wishes to dispute the claim, he must serve a defence. The timetable for service of a defence is capable of being extended by agreement between the parties (for up to 28 days) or by application to the court. In most cases, the defendant has at least 28 days from service of the particulars of claim to serve his defence. Cases can come to trial as quickly as six months from issue. Often, however, they will take between one and two years, and sometimes longer.

14.1.4 Interim remedies

The court has wide powers to grant parties to an action various interim remedies (remedies available during the course of proceedings before the trial or final outcome) including interim injunctions, freezing injunctions, search orders, specific disclosure and payments into court.

14.1.5 Remedies

Common remedies awarded by the courts are damages (although the object is to compensate the claimant rather than punish the defendant), declarations, injunctions (mandatory or prohibitory), specific performance (a form of mandatory injunction) or orders for the sale, mortgaging, exchange or partition of land. Interest may be payable on money judgments.

14.1.6 Costs

The court has discretion whether or not to order that costs are payable by one party to the other, the amount of the costs, and when they are to be paid. However, usually in litigation, the winning party will recover some or most of its costs from the losing party.

14.1.7 Appeals

An unsuccessful party may appeal from the county court or the High Court to the Court of Appeal, and from the Court of Appeal to the Supreme Court. Permission to appeal is generally required. For permission to be given, the appeal must have a real

prospect of success or there must be some other compelling reason for the appeal to be heard. The appeal court will not allow an appeal unless it considers that the decision of the lower court was wrong or it was unjust because of a serious procedural or other irregularity in the proceedings.

14.2 **ARBITRATION**

14.2.1 **Background**

The Arbitration Act 1996 reflects in many respects the provisions of the UNCITRAL Model Law, and there is no longer any major distinction between domestic and international arbitrations. Under the Arbitration Act 1996, and consistent with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”), there must be an agreement in writing to submit present or future disputes (whether contractual or not) to arbitration. Oral arbitration agreements are recognised by English law but fall outside the scope of the Arbitration Act 1996 and the New York Convention.

14.2.2 **Choice of arbitrator**

If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. In the absence of agreement, one party may serve a written request on the other to make a joint appointment.

A party may challenge an arbitrator if there are justifiable grounds as to his/her impartiality. If he/she does not have the necessary qualifications, is physically or mentally incapable or has failed to properly conduct the proceedings, a challenge can be made to court to have him/her removed. Pending the outcome of such an application, the tribunal can proceed with the arbitration and make an award.

14.2.3 **Procedure**

It is up to the parties to select the rules of procedure that will govern the arbitration. However, if no express provision is made in the arbitration agreement, it is for the arbitrator to decide procedural and evidential matters. The tribunal is at all times bound by the mandatory provisions of due process and to act fairly and impartially between the parties.

The court’s role is strictly supportive and there is minimal intervention by domestic courts in the arbitral process. However, the court may provide assistance in certain procedural matters and has powers to order interim measures in certain circumstances. The majority of the court’s powers can be excluded by the parties by agreement.

14.2.4 Reliefs and awards

The parties may agree the powers the tribunal should have to grant interim orders. However, unless the parties have agreed otherwise, the tribunal has powers relating to security for costs and preservation of property and evidence. If the parties have expressly agreed in writing, the tribunal has power to order provisional relief, e.g. payment of money or disposal of property. Provisional relief is subject to the final decision of the tribunal on the case.

Generally the tribunal may make its award at any time, unless otherwise agreed by the parties in writing. If the award is not agreed between the parties, it should be in writing, signed by all the arbitrators, generally it should contain (among other things) the reasons for the award (unless the parties agree otherwise).

14.2.5 Appeals

There are limited grounds for an appeal of an award to the court. A party may challenge an award on the grounds of the tribunal's lack of jurisdiction or because of a serious irregularity in the proceedings that has caused substantial injustice to the aggrieved party. This test is quite onerous and an award will only be set aside in rare cases. Neither of these provisions may be excluded by agreement between the parties. These mandatory provisions are listed in Schedule 1 of the Arbitration Act 1996. In limited circumstances, a party may also challenge an award on a point of English law. There is no right to appeal to the court on a question of fact.

14.2.6 Costs

Unless agreed to the contrary, the arbitrator can order one party to pay the costs of the arbitration. The general principle is that the loser pays the costs, which include the arbitrator's fee. However, this is at the discretion of the arbitrator who will take into account all the circumstances of the case, including the conduct of the parties during the arbitration.

14.3 ALTERNATIVE DISPUTE RESOLUTION

14.3.1 Background

Alternative dispute resolution is a term used to describe a range of processes outside of traditional litigation or arbitration which can be used to resolve disputes quickly, confidentially and economically. In recent years the courts have strongly encouraged the parties to litigation to attempt to resolve their disputes before reverting to the courts themselves.

English courts will not force a party to engage in ADR if it is unwilling to do so. However, under the Civil Procedure Rules the pre-action protocols which prescribe steps to be taken prior to the commencement of proceedings oblige prospective

litigants to consider the use of ADR. Once proceedings are commenced, the court's duty of active case management includes encouraging the parties to use ADR if considered appropriate, and facilitating the use of ADR. The courts may also penalise a party in costs if it has unreasonably refused to attempt ADR.

14.3.2 Types of ADR process include:

(a) Mediation

This is a consensual and confidential process in which a neutral third party, who has no decision-making power, helps the parties to reach a negotiated agreement, usually through a process of shuttle diplomacy. One of the principal advantages of mediation over direct negotiations is that parties are able to assess with the mediator privately and in confidence the strengths and weaknesses of their respective positions in a way that would be difficult or impossible in a face to face negotiation.

(b) Expert determination

This is where a neutral third party, acting as an expert (rather than judge or arbitrator), is appointed to decide the dispute with no right of appeal.

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